

No. 18-1109

IN THE
Supreme Court of the United States

JAMES ERIN MCKINNEY,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

**On Writ of Certiorari to the
Arizona Supreme Court**

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: FEBRUARY 21, 2019
CERTIORARI GRANTED: JUNE 10, 2019

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ARIZONA SUPREME COURT

Criminal Death Penalty Appeal
Docket No. CR-93-0362-AP

STATE OF ARIZONA,

Appellee,

v.

JAMES ERIN MCKINNEY,

Appellant.

APPELLATE CASE INFORMATION:

Case Filed: August 3, 1993
Case Closed: July 2, 1996
Reinstated x1: October 7, 2016
Re-Closed: October 23, 2018

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
09/09/1993	<u>1</u>	Record on Appeal - MCSC: Instruments (2 Parts); MEs; Presentence Report; 3 Orig RTs (3/19/93; 3/30/93; 4/2/93); Exhibits (List; 4 Man Envs - Env No 1 [Pltf Exh

DATE	DOCKET NUMBER	PROCEEDINGS
		No B]; Env No 2 [Def Exh Nos 1-5]; Env No 3 [Pltf Exh Nos 1-2] [Def Exh Nos 3-8]; Env No 4 [Pltf Exh Nos 7, 16, 22-24, 27- 28, 29-115, 120, 73B] [sb]
		* * *
08/03/1993	<u>12</u>	Notice of Appeal [Appel- lant McKinney] [Judg- ment filed in MCSC] [sb]
		* * *
12/06/1994	<u>34</u>	APPELLANT'S OPEN- ING BRIEF [McKinney] [sb]
02/06/1995	<u>35</u>	APPELLEE'S ANSWER- ING BRIEF [State] [ct]
		* * *
04/10/1995	<u>40</u>	APPELLANT'S REPLY BRIEF [McKinney] AT ISSUE [sb]
		* * *
05/16/1996	<u>45</u>	OPINION - Convictions and Sentences Affirmed in all Respects [Feldman]; Dissenting in Part [Mar- tone] Opinion Distribu- tion List [T 5-Jun-1996]

DATE	DOCKET NUMBER	PROCEEDINGS
		[rs]
05/28/1996	<u>46</u>	Motion for Reconsideration [Appellant McKinney] [ct]
07/02/1996	<u>47</u>	ORDERED: Motion for Reconsideration = DENIED. FURTHER ORDERED: The mandate is stayed pursuant to Rule 31.23(b)(1), Arizona Rules of Criminal Procedure. Justice Jones and Justice Corcoran (retired) did not participate in the determination of this matter. [ct]
02/02/1999	<u>48</u>	MANDATE (Affirming the Judgment of Convictions and Sentences, including the Sentences of death) Issued Mandate and copy of Opinion, together with record, to trial court [rs]
02/02/1999	<u>49</u>	Upon the Court's own motion, ORDERED: that Jamie McAlister is ap-

DATE	DOCKET NUMBER	PROCEEDINGS
		<p>pointed to represent James Erin McKinney in post-conviction proceedings pursuant to A.R.S. Sec. 13-4041 and Rule 6.8(d), Ariz. R. Crim. P. FURTHER ORDERED: that Jess Lorona is Appointed as associate counsel pursuant to Rule 6.8(d). The superior court and the state shall send copies of orders and pleadings in the post-conviction proceedings to associate counsel as well as lead counsel. FURTHER ORDERED that lead counsel and associate counsel each shall be compensated at the rate of \$100.00 per hour plus reasonable costs incurred in the representation. If the attorneys' work hours, combined, are over two hundred hours, the superior court shall review and approve additional reasonable fees and costs pursuant to A.R.S. Sec. 13-4041(H). Counsel shall</p>

DATE	DOCKET NUMBER	PROCEEDINGS
		direct request for the appointment of investigators and experts to the superior court pursuant to A.R.S. Sec. 13-4013(B) and Sec. 13-4041(J). [Jones] [rs]
02/02/1999	<u>50</u>	Notice for Post-Conviction Relief sent to Michael K. Jeanes, Clerk, MCSC [rs] * * *
04/23/2003	<u>54</u>	WARRANT OF EXECUTION - Execution set for Wednesday, June 11, 2003 [kab]
04/28/2003	<u>55</u>	TELEPHONIC NOTIFICATION by USDC: Stay of Execution pending HC [CV-03-0774-PHX-SMM] Faxed copy of Stay of Execution received 4/28/03 [McNamee, USDC] [Certified copy of Order for Stay of Execution received 4/30/03] [kab] * * *
01/26/2005	<u>58</u>	CERTIFICATION of record to USDC

DATE	DOCKET NUMBER	PROCEEDINGS
10/07/2016	<u>59</u>	FILED: Motion to Conduct New Independent Review of Death Sentence; Certificate of Service (Appellee State) CASE REINSTATED
10/11/2016	<u>60</u>	FILED: (Copy of) USDC Order Granting Writ of Habeas Corpus (Hon. David G Campbell) * * *
01/27/2017	<u>72</u>	FILED: Response to State's Motion for New Independent Review (Oral Argument Requested) (Capital Case); Certificate of Service (Appellant McKinney) * * *
02/13/2017	<u>76</u>	FILED: Reply to Response to State's Motion for New Independent Review; Certificate of Service (Appellee State) * * *
04/19/2017	<u>79</u>	Upon considering the Motion to Conduct New In-

DATE	DOCKET NUMBER	PROCEEDINGS
		<p data-bbox="802 531 1195 640">dependent Review of Death Sentence, Re- sponse, and Reply,</p> <p data-bbox="802 667 1195 850">IT IS ORDERED that the Motion is granted. The Request for Oral Argu- ment on the Motion is de- nied.</p> <p data-bbox="802 877 1195 1255">IT IS FURTHER OR- DERED that the parties shall brief the following issue regarding the death sentences: Whether the proffered mitigation is sufficiently substantial to warrant leniency in light of the existing aggrava- tion.</p> <p data-bbox="802 1283 1195 1743">IT IS FURTHER OR- DERED that James McKinney's opening brief shall be filed no later than July 18, 2017. The State's answering brief shall be filed no later than sixty days after service of the opening brief. The reply brief shall be filed no later than thirty days after service of the answering</p>

DATE	DOCKET NUMBER	PROCEEDINGS
		<p>brief.</p> <p>IT IS FURTHER ORDERED that the form and content of the briefs shall comply with Rule 31.13(b) and (c), Ariz. R. Crim. P. The length of the principle briefs shall not exceed 14,000 words and the length of the reply brief shall not exceed 7,000 words.</p> <p>Justice Lopez did not participate in the determination of this matter. (Hon. Scott Bales)</p> <p>* * *</p>
08/20/2107	<u>86</u>	<p>FILED: Appellant's Opening "Independent Review" Brief; Certificate of Service 8-20-17; Certificate of Compliance (Appellant McKinney)</p> <p>* * *</p>
11/17/2017	<u>91</u>	<p>FILED: Appellee's Answering Brief; Certificate of Service; Certificate of Compliance (Appellee</p>

DATE	DOCKET NUMBER	PROCEEDINGS
		State)
		* * *
01/09/2018	<u>98</u>	FILED: Appellant's Reply Brief; Certificate of Service; Certificate of Compliance (Appellant McKinney) AT ISSUE
		* * *
09/06/2018	<u>108</u>	ORAL ARGUMENT - Submitted for decision en banc (Attorneys who argued: Jeffrey L. Sparks; Sharmila Roy)
09/27/2018	<u>109</u>	OPINION - For the reasons discussed above, we affirm McKinney's death sentences. (Hon. Andrew W. Gould - Author; Hon. Scott Bales - Concur; Hon. Robert M. Brutinel - Concur; Hon. John Pelander - Concur; Hon. Ann A. Scott Timmer - Concur; Hon. Clint Bolick - Concur; Hon. Garye L. Vasquez - Concur)
10/12/2018	<u>110</u>	FILED: Motion for Reconsideration; Certificate of

DATE	DOCKET NUMBER	PROCEEDINGS
		Service; Certificate of Compliance (Appellant McKinney)
10/23/2018	<u>111</u>	<p>The Court having reviewed Appellee's Motion for Reconsideration filed October 12, 2018,</p> <p>IT IS ORDERED denying the motion. (Hon. Andrew W. Gould)</p> <p>CASE STATISTICALLY TERMINATED</p> <p>**Mandate Automatically Stayed Ninety (90) days pursuant to Rule 31.22(c)**</p>
12/14/2018	<u>112</u>	FILED: Motion to Stay Mandate; Certificate of Service (Appellant McKinney)
12/17/2018	<u>113</u>	<p>On December 14, 2018, Appellant McKinney filed a "Motion to Stay Mandate." After consideration,</p> <p>IT IS ORDERED granting the motion. The Issuance of the mandate shall be stayed until February 21,</p>

DATE	DOCKET NUMBER	PROCEEDINGS
		2019. (Hon. Andrew W. Gould)
02/26/2019	<u>114</u>	FILED: Notice from USSC - Petition for Writ of Certiorari filed on 2/26/2019 (No. 18-1109) (Harris, Clerk) (Rec'd from USSC on 3/1/2019)
06/10/2019	<u>115</u>	FILED: Notice from USSC - Petition for Writ of Certiorari is Granted. (No. 18-1109) (Harris, Clerk) (Rec'd from USSC on 06/13/2019)

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

SC No. CR 93-0362-AP

No. CR 91-90926 (B)

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ERIN MCKINNEY,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Presentence Hearing)

BEFORE: THE HONORABLE STEVEN D.
SHELDON, Judge

APPEARANCES: Mr. Louis F. Stalzer
Deputy County Attorney
Representing the State

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Mr. Scott F. Allen
Deputy Public Defender
Representing the Defendant

Mr. Alex D. Gonzalez
Deputy Public Defender
Representing the Defendant

Mesa, Arizona
July 16, 1993
1:30 o'clock p.m.

SUSAN D. WENTLEJEWSKI, RPR
Certified Court Reporter

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<u>WITNESSES:</u>	<u>DX</u>	<u>CX</u>	<u>RDX</u>	<u>RCX</u>
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Mesa, Arizona
July 16, 1993
1:30 o'clock p.m.

P R O C E E D I N G S

[Transcript in full, pp. 3-150]

THE COURT: We're on the record in State of Arizona versus James Erin McKinney, CR 91-90926 B, time set for sentencing in this matter pursuant to 13-703.

Counsel, are you ready to proceed?

MR. STALZER: Good afternoon, your Honor. State's ready.

MR. ALLEN: Scott Allen appearing on behalf of James McKinney.

MR. GONZALEZ: Alex Gonzalez as well, your Honor. We're ready.

THE COURT: Counsel, I've reviewed your sentencing memorandums with the exception of Mr. Stalzer's, which was received today. I have not had an opportunity to read that yet. I've read the defendant's mitigation memorandum, as well as the defendant's memorandum regarding the State's allegation of aggravating circumstances. What I would propose that we do at this point -- I've also not reviewed the presentence reports, as you may recall. The minute entry indicated that I would waive review until after counsel had had an opportunity to review them. It is my intention, following the conclusion of the receipt of evidence in this hearing, to review Mr. McKinney's presentence report. So it is

important if you have any objection or we need to have any hearing with respect to any matter in the presentence report to let me know.

MR. GONZALEZ: Judge, the only thing -- we can resolve that right now, if you like. The objections that we made to the presentence report, there's been a record made of them. Primarily, if I recall correctly, what we're concerned about is the victim impact information contained in that presentence report given what we're doing here today, and what is the potential sentence that our client can receive. Obviously, that record has been made. We still stand by it, despite the Court's recent ruling in that regard in testimony, of us having to provide information, statements made by our client to the State, and which was conveyed to their expert. Our record has been made. We maintain our position as before with respect to the presentence report.

THE COURT: Mr. Stalzer, in view of the State's filing of the request in this matter pursuant to A.R.S. 13-703, you're aware you have the aggravating circumstances. I would propose that the State proceed with the evidence regarding the aggravating circumstances. I will then give the defense the opportunity to rebut both those aggravating circumstances evidence with respect to it and give Mr. Gonzalez and Mr. Allen the opportunity at that time to present any mitigating evidence, then to allow, finally, the opportunity to rebut any of the mitigating evidence that is presented by the defense. Is that agreeable to both counsel?

MR. ALLEN: That's fine, your Honor.

THE COURT: Mr. Gonzalez?

MR. GONZALEZ: I think I missed the last part of what you said. I was just explaining something to Dr. McMahon. At least in my view, we'd have an opportunity to have the last words, so to speak, with respect to our burden of proof on mitigation?

THE COURT: Yes.

MR. GONZALEZ: Okay. There is one other preliminary matter which I think will take a couple of minutes. Our client, as you can see, is seated in the area where the jury sits. We would like him sitting with us at counsels' table. He is obviously an integral part of this part of the case. We will need to confer with him during testimony. I think it's important that we have access to him and not have to run across the courtroom to talk to him and potentially miss things that could be presented.

THE COURT: Counsel, would you approach?

(An off-the-record discussion was held at the Bench between Court and counsel, out of the hearing of the court reporter and jury.)

THE COURT: Ladies and gentlemen, those of you who are seated in the first row behind defense counsels' table, I'd like to ask all of you to move if you would into the second row or somewhere else in the courtroom.

Mr. Stalzer, are you ready to proceed?

MR. STALZER: State's ready, your Honor.

THE COURT: You may proceed.

MR. STALZER: I'm calling Detective Franzen.

MARK FRANZEN,

called as a witness herein, after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STALZER:

Q. Please State your name, sir.

A. Mark Franzen.

Q. Sir, you're a detective with the Chandler Police Department?

A. That is correct.

Q. What particular assignment do you have at the present time?

A. I'm assigned to the criminal investigation of second-person crimes.

Q. Does that assignment involve investigating homicides?

A. Yes, it does.

Q. Does it involve other assaultive-type crimes?

A. Yes, it does.

Q. Detective, let me show you what has been initially marked as State's Exhibit 1 for identification purposes. I indicated to you non-verbally, off of the record, a particular page of the document that I handed to you. Do you see the photograph contained on that page?

A. Yes, I do.

Q. Do you recognize the person in the Photograph?

A. Yes, I do.

Q. Who is the individual?

A. James McKinney.

Q. Is James McKinney in the courtroom today?

A. Yes, he is.

Q. Is that the person that was on trial last November in this courtroom?

A. That's correct.

MR. STALZER: Your Honor, I'd move to introduce Exhibit 1 into evidence being a certified document pursuant to Rule 803 as well as 901, 902. A copy of this document has been provided to defense counsel a number of months in the past.

MR. GONZALEZ: Judge, we object to the admissibility of the document. It is simply a letter attesting to verification. The problem here is that there are a number of documents which are not documents produced by the DOC. They are documents or copies of documents sent to the DOC. In order for any of these documents to be admissible, there has to be basically a double seal on these documents, which we don't have. They simply don't comply with the Rule, and they're not admissible.

THE COURT: Mr. Stalzer?

MR. STALZER: I don't think that's a law, your Honor, that there need to be duplicate verification as to the authenticity of the document, even though they may not have been originally prepared by the DOC or Department of Corrections.

THE COURT: May I see the exhibit once defense counsel finished reviewing?

You can proceed. I'll take it under advisement.

Q. BY MR. STALZER: Detective Franzen, how long have you been involved in the investigation of people-type crimes with either the Chandler Police Department or any other type of law enforcement agency?

A. For 13 years.

Q. In the course of those 14 (sic) years, have you ever had training in the investigation of homicide crimes or other assaultive-type crimes?

A. Yes, I have.

Q. During your experience and any training programs that you may have had over the years, have you ever had any type of particularized training with respect to defensive wounds?

A. Some training, yes.

Q. Can you describe the best you can recall the type of formalized training you've had regarding these type of defensive wounds.

A. At a seminar conducted by Hocking College, there was a segment on defensive wounds where photographs were shown of defensive, wound-type injuries.

Q. Can you briefly explain what is meant by "defensive wounds."

A. Generally, a wound to a person that could be of any type or variety, normally on the hands, arms -- and the arms.

Q. Were you present during the crime scene investigation at the Mertens residence?

A. Yes, I was.

Q. And did that occur sometime on -- well, precisely on the 10th of March, 1991?

A. Yes.

Q. Who was the primary person involved in the scene investigation itself?

A. Detective Dave Neuman.

Q. Were you present when Detective Neuman was performing his scene investigation?

A. During portions of it, yes.

Q. Did you at any time observe Ms. Mertens -- well, before she was removed from her residence?

A. Yes, I did.

Q. Were you able to observe various portions of her body?

A. Various portions yes.

Q. What portions would you readily observe that were not hindered by clothing or any other type of debris or material?

A. Her legs, her body, and her arms and hands.

Q. Were you -- strike that. Were you present at the autopsy of Ms. Mertens?

A. Yes, I was.

Q. And did you observe her body during the course of the autopsy?

A. Yes, I did.

Q. Do you recall who performed the autopsy?

A. I believe it was Dr. Shaw -- excuse me. I don't recall.

Q. Does the name Dr. Walker sound familiar?

A. Yes, it does.

Q. Have you had any, what I'd call, street experience in learning about defensive wounds?

A. Yes, I have.

Q. Can you explain that to Judge Sheldon.

A. During the course of my police experience, been on obviously numerous calls, calls against persons, assaults, where there were wounds and injuries to these people, and I have seen wounds on the hands and the arms of people where they have been trying to deflect or ward off any object -- a knife, hands, anything. Generally, these wounds can be found on the arms and the hands of people.

MR. GONZALEZ: Object to the last opinion, your Honor, as not based on his expertise and beyond the scope of any expert testimony that may be required.

THE COURT: The objection's overruled. The answer will stand with respect to the witness's observations relating to his own personal experience.

Q. BY MR. STALZER: Detective Franzen, when you observed Ms. Mertens, either at the medical examiner's office or in her residence before she was removed, did you observe what you would characterize as defense wounds on her?

A. Yes, I did.

Q. Where do you recall seeing any wounds of that nature?

A. She had a cut on one of the her fingers, and another finger was broken.

Q. What leads you to conclude that those injuries were defensive wounds as opposed to some other type of injury inflicted upon her --

MR. GONZALEZ: Objection. Foundation.

THE COURT: The objection's overruled. Sufficient foundation has been laid.

Q. BY MR. STALZER: Let me restate my question. What led you to conclude that they could have been defensive wounds as opposed to, say, someone just falling down and scraping a knee on the sidewalk or scraping a hand on the sidewalk?

A. It was consistent with evidence that was found at the scene.

Q. And what evidence did you consider while at the crime scene to form that conclusion of the defensive wounds?

A. There were knives laying on the carpeting and broken knives.

MR. STALZER: I don't have any further questions of this witness, your Honor.

THE COURT: Counsel, any questions?

MR. GONZALEZ: Couple, your Honor.

(Next page, please.)

CROSS-EXAMINATION

BY MR. GONZALEZ:

Q. Basically, you're testifying to wounds you saw on the victim?

A. That's correct.

Q. And you are surmising that those, for whatever reason, were defensive wounds?

A. Consistent with defensive wounds, yes.

Q. Let me ask you a question. If you and I were in a struggle, in a fight, and you had a knife and I had a knife, and you lunged at me but missed, and I lunged at you and you put your arm up and I cut your arm, is that a defensive wound?

A. To myself?

Q. Is that a defensive wound, yes.

A. Yes.

Q. All right. So even though you may have been the aggressor, it was the -- in your opinion, a defensive wound?

A. That's correct.

Q. There was obviously a struggle, at least from the evidence at trial. Correct?

A. That's correct.

Q. Things were thrown all over the place. Right? Or out of place?

A. That's correct.

Q. You don't know how that struggle ensued?

A. No, I don't.

Q. You don't know whether it was one or two people or three people in the fight?

A. Evidence of fighting, I don't know.

Q. You don't know if anybody was wielding a knife or if only one or more than one person was wielding a knife?

A. A knife was wielded.

Q. You know that much. Right?

A. That's correct.

Q. You surmised that by the cut or cuts?

A. Right.

Q. But you don't know how many people actually had a knife?

A. No, I do not.

MR. GONZALEZ: I have no other questions of this witness.

THE COURT: Mr. Stalzer?

MR. STALZER: I have nothing further, your Honor. Thank you.

THE COURT: Detective, thank you. You may step down.

MR. STALZER: Your Honor, at this time, I would move to introduce what has been marked as State's Exhibit 2 for identification purposes, a copy of which has been given to Mr. Allen well over a month ago, and we have discussed it. And as soon as counselor's finished reviewing it, I'll submit it to the Court. Again, I submit it under rule 803, 901, and 902 here from the Clerk's office here in Maricopa County.

MR. GONZALEZ: Judge, we object, and the primary basis for the objection is that that isn't a certified document of any documents kept during the regular course of business. This is simply something saying that there is a lack of documents. Somehow, I don't think that there would be a lack of documents. Certainly they have, if this information is correct, records of payments or nonpayments that could have been presented which would be properly certified. This is simply a statement without any supportive documentation. We object.

THE COURT: Mr. Stalzer, may I see Exhibit 2?

MR. STALZER: Yes, your Honor. And your Honor, I use that in conjunction with State's Exhibit 1 solely for those areas in the document that are tabbed by the two markings. Again, those do reflect court documents appended to the certified Department of Corrections overall form that has been presented with the blue-back.

THE COURT: The objection raised by defense counsel is overruled, and Exhibit 2 is admitted.

MR. STALZER: Your Honor, just pending the Court's decision on Exhibit 1, State rests its case. It relies on the evidence that has been provided at trial to support the aggravating factors which the State will be arguing at the conclusion of the testimony, and evidence that has been presented by the defense and prosecution.

MR. GONZALEZ: Your Honor, we'd call Diana McKinney.

THE COURT: Ms. McKinney, would you come forward and be sworn in, please. If you'd step forward and be sworn, please, Ms. McKinney.

DIANA MCKINNEY,
called as a witness herein, after having been duly sworn, was examined and testified as follows:

THE COURT: Ms. McKinney, you can adjust that microphone. In fact, the whole thing can come forward, if you can sit back in that chair. And there's water if you'd like to have a drink.

Mr. Gonzalez?

MR. GONZALEZ: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. GONZALEZ:

Q. State your name, please.

A. Diana McKinney.

Q. Diana, how old are you?

A. Twenty-three.

Q. What's your father's name?

A. James Erin McKinney.

Q. And your natural mother's name?

A. Bobbie Morris.

Q. You have a number of brothers and sisters; some full brothers; some half; et cetera. Could you please tell us who they are and how old they are, starting with the oldest.

A. I have a step-sister, Sandy. She's about 30 years old. And there's Charles Michael Hedlund. He's around 28.

Q. Who is Charles' father?

A. I've never met the man.

Q. His mother is your natural mother?

A. Yes.

Q. And her name is?

A. Bobbie Morris.

Q. Okay. Now, who else?

A. Then there's James. He's 26. Donna --

Q. "James" you're referring to as James McKinney who's seated here?

A. Yes. Yes. And Donna Kemp. She's 25. Myself, and then there's Chris Morris. He's 18.

Q. Your mother, Donna, and your father were divorced at some point. Were they?

A. My mother is Bobbie.

Q. Right. When was it and how old were you when your mother and your father were divorced?

A. I do believe I was two years old.

Q. Who did your father marry after he divorced Bobbie, your natural mother?

A. Shirley Crow.

Q. Where did you live most of the time during your childhood?

A. In Chandler, Arizona on Cooper Road.

Q. With whom?

A. My father and my stepmother, Shirley.

Q. Shirley had a daughter of her own?

A. Yes.

Q. And that is who?

A. The oldest, Sandy.

Q. When your parents were divorced, was there a time when you lived with your mother, Bobbie? All of you?

A. Eventually, we all ran away from home. Most of us were around the age of 13 when we went to live with our mother.

Q. Let's go back a bit to when you were four or five years old. Okay? You were living in Gilbert. Right?

A. Chandler.

Q. Chandler. With your father, James, and Shirley?

A. Yes.

Q. Who else was living there?

A. There was Sandy.

Q. Shirley's daughter?

A. Yes. And there was Charles Michael Hedlund, the oldest son, and James, Donna, and myself.

Q. Did your mother work, your stepmother, Shirley?

A. I remember her working one time. She was working at a bar.

Q. Do you have any recollection as to how long that was?

A. No, I do not.

Q. All right. Tell us about the home that you lived in.

A. It was dirty.

Q. What do you mean "dirty?"

A. Animals urinating, going to the bathroom in the house. There were dirty clothes on the floor. That was mainly in our bedroom, in the kids' bedroom.

Q. Tell us who slept where in the house.

A. There was James, Mike, my sister, and myself in one room, and my stepmother's daughter in another room.

Q. She had her own room?

A. Yes.

Q. You mentioned about the house being dirty; urine. Were there animals in the house?

A. Dogs.

Q. Who cleaned up after them?

A. The kids did.

Q. Yourself?

A. Yes.

Q. James?

A. Yes.

Q. Michael?

A. Yes.

Q. Donna?

A. Yes.

Q. What about Shirley's daughter?

A. Shirley's daughter didn't do any of it.

Q. Could you tell us in terms of the bedroom that you slept in with your brothers and sister what that was like?

A. It was crowded, and it was dirty.

Q. Would there be any animal feces in that room?

A. Yes.

Q. Would any of the animals urinate in that room?

A. Yes.

Q. Were there any other types of animals inside the home?

A. Not that I can remember.

Q. No cats, no chickens, no nothing like that?

A. Not that I can remember.

Q. How many dogs?

A. Two.

Q. Where were all the clothes in your room that y'all had?

A. Everywhere; floor, bed.

Q. Was there a closet?

A. Yes.

Q. Why weren't the clothes in the closet?

A. None of them were clean.

Q. Who would clean your clothes?

A. We did. The kids did.

Q. Your mother wouldn't?

A. No.

Q. Why not?

A. I really don't know.

Q. How old were you when you started doing that? Do you recall?

A. Around five.

Q. And at that point, was everybody doing the same thing? Washing their own clothes?

A. Yes.

Q. Who cleaned your stepmother's clothes?

A. At times, we did.

Q. Why?

A. I do not know.

Q. Who cleaned your stepmother's daughter's clothes?

A. I believe that she had cleaned her own clothes.

Q. Whose responsibility was it to take the dog feces out of the house and clean up?

A. It was ours.

Q. What happened when you folks didn't do it?

A. Most of the time, we got beatings if it wasn't cleaned up.

Q. Would Shirley clean it up if you didn't do it?

A. No.

Q. What did your father do about that?

A. He wouldn't do anything. He was hardly ever home.

Q. Did he drink?

A. Yes, he did.

Q. You mentioned that if you didn't clean that you would get beatings. What are you talking about?

A. With a belt or a switch. We -- at -- a couple of times, it was a cord from a lamp.

Q. How often would this occur?

A. Often. Everyday.

Q. During the time that you were living there, were you in fear of anybody?

A. Yes.

Q. Who?

A. My stepmother.

Q. Why?

A. Because she was always beating the kids.

Q. Did she beat you?

A. Yes.

Q. What, if anything, did she do to her own daughter?

A. None. Nothing.

Q. Did you ever see her hit her own daughter?

A. No.

Q. What types of things would you kids be beaten for?

A. Not cleaning the house; not cooking; if the animals weren't fed.

Q. When did you start cooking your own food?

A. When we were around six or seven, we were cooking full dinners.

Q. Was there plenty of food in the house?

A. Seventy percent of the time, yes.

Q. Did you have access to it?

A. No.

Q. What do you mean, "no?"

A. We were not allowed to go in there to get snacks if we were hungry and things like that.

Q. What would happen if you did?

A. We would get a beating.

Q. Did you ever feel hungry?

A. Yes.

Q. Do you recall any event where anybody may have gone to get food without permission?

A. Yes.

Q. Who?

A. Mike, my oldest brother.

Q. What happened?

A. He --

MR. STALZER: Objection as to relevance as to this line of questioning, your Honor; as to Mike.

THE COURT: The objection's sustained.

Q. BY MR. GONZALEZ: Was James present or in the house when this happened?

A. I do not remember.

Q. Was -- or were the beatings witnessed by many of the children?

A. Yes.

Q. What would happen when -- well, let me go to another line, okay?

Do you remember James ever being beaten by your stepmother?

A. Yes.

Q. What types of things would he get beaten for?

A. Mainly, anything that triggered her; if something wasn't done.

Q. Describe your stepmother. Was she irritable?

A. Yes, she was -- seemed depressed and stressed all the time.

Q. Was she unpredictable?

A. Yes.

Q. What gives you that opinion in terms of her unpredictability?

MR. STALZER: Objection as to the relevance, your Honor.

THE COURT: Objection's overruled.

You can answer.

THE WITNESS: As soon as anything would happen, if it was her daughter -- I mean, she would just jump at us, my father's kids. It was always us that did anything.

Q. BY MR. GONZALEZ: And what would happen?

A. The beatings would start.

Q. You mentioned, I think, that this was basically a daily occurrence?

A. Yes.

Q. Before you could go to school, when you started to go to school, were there any things that the kids -- you and James, Michael, any of the others -- had to do before you could go?

A. Yes. We lived on a farm. We had a lot of animals. They all had to be fed. The house had to be clean, and if it wasn't done, we wouldn't go to school that day.

Q. Did this happen in the sense of not going to school often or just every now and then?

A. Now and then.

Q. You were responsible for cleaning your own clothes? The kids?

A. Yes.

Q. Were you able -- were the kids able to do this all the time and keep the clothes clean?

A. No.

Q. When you started going to school and James started going to school, what types of clothes would you wear to school?

A. They would either be dirty; some of them too big; some of them too small.

Q. Did the clothes ever reek of urine?

A. Yes, at times.

Q. What types of things would happen on the bus on the way to school, if anything?

A. Because of that, kids would laugh and make fun of us.

Q. Did you ever see James fight because of that?

A. No.

Q. Okay. Did you, yourself, ever fight anybody because of it?

A. No.

Q. Did, to your knowledge, anybody ever send a letter to your mother about your hygiene or anything like that --

A. I do not remember.

Q. -- at school? What would happen, for example, if the dishes weren't done by any one of the kids?

A. There would be beatings.

Q. By whom?

A. Shirley.

Q. Do you recall any other type of physical injury imposed by Shirley on one of the kids?

A. I didn't see it happen, but my sister spoke of being burnt with a cigarette.

Q. Was this something that you, as kids, talked about when -- after it happened?

A. Yes --

MR. STALZER: Your Honor, I have to object for more specific foundation, to it's relevance, to Mr. McKinney as "just kids," because we have a number of kids, a number of situations, and it's hard to determine if Mr. McKinney was part and parcel of these events or conversations.

MR. GONZALEZ: Judge, it escapes me how James, being a member of that household, could not know what was going on unless he was blind about not being touched or anything else. All I'm doing was laying the foundation for what the house was like.

THE COURT: Point is well taken to the extent the defendant is not specifically included. Hence, I think it would go to weight of the evidence.

Mr. Gonzalez, you may proceed

MR. GONZALEZ: Thank you.

Q. BY MR. GONZALEZ: Do you know whether or not James was aware of that?

A. No, I do not.

Q. You certainly were?

A. Yes.

Q. When -- getting back to school, when you were leaving to go to school, did you want to go?

A. No.

Q. When you were leaving school, did you want to come back home?

A. No.

Q. Did any of the kids start running away?

A. All of us did, eventually.

Q. Do you recall who the first was?

A. I would have to say the first one was James, because my father let Mike go to live with my mother.

Q. Do you recall where James went?

A. To live with my mom.

Q. Do you know how long he stayed there or if he came back?

A. I do not. He did come back.

Q. Do you know why that occurred?

A. No, I do not.

Q. When he came back, were the conditions still the same at home?

A. Yes.

Q. Did you personally ever see your mother beating on James?

A. Yes, I have.

Q. Could you give us a guess as to how many times you could even recall?

A. No.

Q. Did it ever stop?

A. No.

Q. Until you left?

A. Yes.

Q. Were you ever, while you were living here in Arizona -- you, James and the other kids --locked out of the house?

A. Yes.

Q. What types of reasons would you be locked out of the house for? And by "you," I mean you and James and all the other kids.

A. We would -- Shirley would tell us we were too loud, we were getting on her nerves, and we would get locked out.

Q. When would these things occur? In the summertime? In the wintertime?

A. Both.

Q. When you were locked out, for example, in the summertime with James and the other kids, was Shirley's daughter also locked out?

A. No.

Q. What types of clothes would you be wearing when you were locked out of the house in the summertime, for example?

A. I do not remember.

Q. Do you remember any time in the wintertime when you were locked out?

A. Yes.

Q. Do you remember what types of clothing you folks, kids, were wearing when you were locked out of the house.'

A. It was mainly jeans and a T-shirt.

Q. Was it cold outside?

A. Yes.

Q. What would happen if you managed to get back in the house?

A. We never did manage to get back in; not until the door was opened.

Q. Did you try?

A. No.

Q. How long would you be left outside, for example, in the summertime?

A. Couple hours at a time.

Q. Do you remember every incident?

A. No.

Q. Were you given water?

A. We had the water hose outside from the faucet.

Q. Were you given any food if you were hungry out there?

A. No.

Q. Basically, was this some type of disciplinary measure?

A. Yes, it felt like it.

Q. As you were growing up, did you ever notice whether James withdrew from you and your brothers and sisters and everybody else?

A. He seemed distant most of the time.

Q. Do you remember about when that started happening?

A. When he was around nine or 10.

Q. Would it be fair to characterize him as basically a loner at that point?

A. Yes.

Q. Were you much the same way?

A. Yes, I was.

Q. What happened to you? What would you do?

A. Excuse me?

Q. What caused you, if you know -- or what types of things would you do alone?

A. Just play dolls by myself or go down to a friend's house and play. We all wanted to be alone when we were together with Shirley. It seemed like there was beatings all the time or some chores to do. We looked forward to being by ourselves.

Q. Did you like it when you managed to go to some other house?

A. Yes.

Q. Why is that?

A. We had our friends to talk to. At home, there was no one to talk to.

Q. What was it like when you had to come back home?

A. Scary.

Q. At some point in time, Donna left, your older sister?

A. Yes.

Q. Do you remember that?

A. Yes.

Q. How old was she about?

A. Thirteen.

Q. How old were you?

A. Twelve.

Q. Who was left in the house at that point?

A. Myself; Shirley, my stepmom; and my dad.

Q. Donna left. Was she allowed to leave or what?

A. She was allowed to.

Q. Did you talk to your father at that point?

A. Yes.

Q. What about?

A. I wanted to go with her.

Q. Why?

A. Because I did not like my stepmother.

Q. What did he tell you?

A. No --

MR. STALZER: Objection, your Honor, as to the relevance as to this line of questioning.

THE COURT: Overruled. Answer will stand.

Q. BY MR. GONZALEZ: And he said no?

A. Yes.

Q. How were you feeling at that point?

A. Like crying.

Q. Do you recall how many times approximately or your best guess that James ran away?

A. Around four or five times back and forth.

Q. When you mentioned about James withdrawing, what exactly do you mean by that?

A. He would just be by himself most of the time. He didn't want to play with the other kids. He didn't have very many friends.

Q. Did you notice any loss of interest on his part in -- I call them -- social functions? Like functions

that kids engage in with other kids? Certain games?
Things like that?

A. No.

Q. Would he still do those things alone?

A. Yes.

Q. Like what?

A. He would go riding the horses or just go up and down the canal that we lived on. Or he'd go off riding his bike alone.

Q. Do you recall James getting in trouble at school?

A. No.

Q. Do you recall yourself getting in trouble at school at any point?

A. No, I do not.

Q. Did anybody stop going to school pretty much completely?

A. Yes.

Q. Who?

A. James, Mike, and myself.

Q. Are you working right now?

A. No; I'm attending school.

Q. And where is that at?

A. It's a J.T.P.Q. program.

Q. Are you seeing any counselor?

A. Yes.

Q. Because of past and present experiences?

A. Yes.

Q. When you were living at home -- and you may have described this, but I want to make sure -- you mentioned being hit by a belt, a switch, any other -- a cord?

A. Yes.

Q. Would these be things that Shirley kept handy?

A. Yes.

Q. Around the house?

A. Yes.

Q. Always present?

A. Yes.

Q. Was there ever any statements, comments, or whatever, made by Shirley to James, yourself, and others about being bright, dumb, whatever?

A. Yes.

Q. What types of things would she say to you?

A. Stupid, ugly, not worth anything.

Q. Was this common?

A. Yes.

Q. Would she be screaming?

A. Yelling, yes.

Q. Would any of these things occur to James or you or any other kid while you were being beaten?

A. All of us.

Q. So not only did she beat you with whatever she could find, she would also make disparaging remarks?

A. Yes.

Q. You mentioned that you all cleaned the house as best as you could. Right?

A. Yes.

Q. Would the house still smell, however?

A. Yes.

Q. Daily?

A. Yes.

Q. Would the dog feces be in the house daily?

A. Most everyday, yes.

Q. You mentioned about the room that you slept in; there would be dog feces in there, urine, and that there were clothes thrown all over the place?

A. Yes.

Q. Could you describe that to me in more detail in terms of how many clothes are you talking about? One pair of pants sitting on the floor? Things like that.

A. Like five to six loads of clothes scattered throughout the room. It smelled. It was dirty. The beds weren't made

Q. Did you ever sleep -- you and James and the other kids in that room -- on a bed that didn't have any sheets or anything like that?

A. Yes.

Q. Was that common?

A. Yes.

Q. Why would there be no sheets on the bed? Do you know?

A. No, I do not.

Q. Were you given any?

A. No; not that I can remember.

Q. What about blankets?

A. I do not remember.

Q. Do you remember whether it was cold in there in the wintertime?

A. Yes, it was.

Q. How was it in the summer? Was this a house that had an air conditioner or swamp cooler or did it have any type of cooler?

A. I do believe it had a swamp cooler.

MR. GONZALEZ: Can I have a minute, your Honor?

THE COURT: You may.

Q. BY MR. GONZALEZ: Let's talk about what you've referred to as "beatings." Do you have any kids?

A. I have two.

Q. Do you spank them?

A. Yes, I do.

Q. Could you tell me -- explain to me so that we're clear here, what is -- what does "spanking" mean to you?

A. It means to spank the kid on the butt with your hand a couple times and send them to a room or put them in the corner. That's a punishment to me.

Q. Versus a beating?

A. Yes.

Q. How would you describe these beatings in terms of what occurred to you, James, and the other kids?

A. Getting beat with a plastic switch or even a cord for like five minutes at a time. We'd have welts on us; bruises for weeks at a time.

Q. Did -- when you're talking about "welts" and the "bruises for weeks at a time," do you recall seeing these types of injuries on James?

A. Yes.

Q. On yourself?

A. Yes.

Q. Was there ever a time that you can recall where none of the kids -- you, James, Donna, Mike, et cetera -- had a welt or a bruise caused by her?

A. Could you repeat the question?

Q. It was a bad question. Let me rephrase it.

Do you recall there ever being a time when none of you had a welt or a bruise caused from a beating?

A. No.

Q. When you were sent to school in your clothes that you've described to us, would that also be true the same type of condition that James went to school in? Dirty clothes?

A. Yes.

Q. Smelly?

A. Yes.

Q. Michael?

A. Yes.

Q. Everybody?

A. Yes.

Q. Were you given a lunch?

A. No.

Q. Were you given money to buy lunch at school?

A. We ate in the cafeteria through a program that they had.

Q. At some point?

A. Yes.

Q. Were there times when you didn't have any money and didn't have any lunch?

A. Yes.

Q. Was that often?

A. No.

Q. It occurred?

A. No.

Q. Did it ever occur?

A. A few times, yes.

Q. What did you do then?

A. Went without.

Q. Diane, describe as best as you can what it was like for you and James and all the other kids to live with or in that house with Shirley.

A. It was horrible. It was scary. It seems like we were all stressed out wondering when the next time we were getting beat; wondering when we were going to eat next. She reminds me of the Cinderella story.

Q. What do you mean?

A. Shirley, my stepmother, she has her good daughter and then there's four bad kids over here.

MR. GONZALEZ: I got no other questions, your Honor.

THE COURT: Mr. Stalzer?

CROSS-EXAMINATION

BY MR. STALZER:

Q. Ms. McKinney, couple of questions back, Mr. Gonzalez was asking about not having food for lunch. I got the impression that happened very rarely; is that correct?

A. On occasions, yes.

Q. How many occasions can you recall, if that's possible?

A. Four.

Q. And those four occasions involved – how many years of schooling have you attended in your lifetime?

A. I attended 10 years.

Q. You dropped out sometime during your sophomore year in high school?

A. In the 9th grade

Q. Ninth grade? In a length of time of nine years of school, you missed lunch four times?

A. Yes.

Q. Do you recall how many times, if at all, James McKinney, your brother, missed lunch, if you know?

A. A couple of times. Yes.

Q. Two?

A. Yes.

Q. Do you know what year in school he dropped out?

A. No, I don't.

Q. Do you know if he ever attended high school?

A. No, he did not.

Q. When he wasn't attending high school, do you know if he was working either for some small job or with his father?

A. He was working for a painting company, I do believe.

Q. Is your aunt in the courtroom today?

A. Yes.

Q. What's her name?

A. Susan.

Q. And her last name?

A. I'm not sure. She's married now.

Q. Do you know how long she's been married?

A. No, I don't.

Q. Where approximately did you live in the country when you spoke of all these incidents that occurred focusing on your stepmother, Shirley?

A. Well, three to four miles out of the town of Chandler.

Q. Is that anywhere near where your aunt lives at the present time or did back in 1991?

A. It's a couple miles from there. Yes.

Q. You stated earlier in your testimony that as a result of the home environment, you didn't go to school periodically. You said, "It happened now and

then," I think, to use your words. How frequently are you talking about that you didn't go to school in those nine years?

A. Myself?

Q. Yes.

A. At least once to twice a week.

Q. Do you have any idea -- I know it's a difficult question -- as to the frequency or the amount of time that your half-brother, James -- I'm sorry -- your brother, James, didn't go to school?

A. He went to school almost every day.

Q. When -- when you were in school, did -- you know, children sometimes say they like school or they don't mind it or they dislike it. What was your general feeling towards school?

A. I liked it. I just was uncomfortable being around the kids.

Q. Did your brother, James, ever verbalize to you if he felt comfortable with school, you know, the things you do in school?

A. No.

Q. You never talked about it?

A. No.

Q. You mentioned earlier that you apparently took the same bus to school that James took. Is that an accurate statement?

A. Yes.

Q. Sometimes they have these, what they call, grade schools and middle schools and, you know,

they separate the different buildings. Was there a time when you never rode in the same bus as James?

A. I do not remember.

Q. Okay. In fact, to phrase it this way, do you remember always -- always taking the same bus to school with James?

A. Yes.

Q. You can't remember for what grades you took the bus?

A. We took -- we took the bus -- I went from first grade to the sixth grade on the bus, and then from there, we moved to Oklahoma.

Q. When you say "we," do you include James?

A. I don't remember if he went with us. I don't believe that he did.

Q. Do you recall how old James was when he first left the house to live with Bobbie Morris?

A. I think he was around 13.

Q. Do you know why he returned? Why things didn't work out when he stayed with Bobbie Morris?

A. No, I do not.

Q. You stated that you saw your stepmother beat your brother, James. Do you recall how frequently that would occur? What you would characterize as a beating?

A. Two to three times a week.

Q. How would the beatings -- what do you remember happening?

A. Getting beaten with the belt or a switch; anything she could get in her hands.

Q. For not doing some task or chore?

A. Yes.

Q. I'm sorry. I think we spoke at the same time. That was a "yes?"

A. Yes.

Q. In talking about being locked out of the house -- again, the best you can remember: I know you're going back a number of years -- how often did that happen? Was it frequently or infrequently?

A. Once, twice a month.

Q. And you stated that you would be outside with your other bothers and sisters for, at most, a couple of hours?

A. Yes.

Q. What time of day do you remember being outside usually when you were locked out?

A. Around noon; in the afternoon.

Q. You indicated that there was times that James became or acted like a loaner. And again, for me and the Court, could you describe what you mean by a "loaner?" Because it means different things to, different people.

A. He played by hisself. He didn't have very many friends

Q. Did he have friends within the family? Did he get along with your bothers and sisters?

A. Yes, he did.

Q. Did you get along with all your bothers and sisters as well?

A. Yes, I did.

Q. Did James play with his bothers and sisters periodically?

A. Not very often.

Q. And you stated you were a loaner as well?

A. Yes.

Q. And I think you indicated you'd like to go to a friend's house?

A. Yes.

Q. Did you siblings talk much between yourselves?

A. Not very often.

Q. You indicated that James ran away about four or five times. Do you remember that -- I mean, saying that?

A. Yes.

Q. You said he went back and forth. What did you mean by going back and forth?" Like, where did he go or where did he come from?

A. He would go to my mother's house and back to my father's. He did that four to five times that I remember.

Q. When he went to live with Bobbie Morris, was that kind of something -- I guess we could say run away, but he planned to go to Bobbie's house?

A. Yes.

Q. And if things didn't work out, would he normally return to your household?

A. Yes.

Q. You indicated earlier -- I don't mean to get super personal, but -- that you're seeing a counselor now?

A. Yes.

Q. When did that start?

A. November.

Q. Of 19 --

A. Last year.

Q. 'Ninety-two?

A. Yes.

Q. What was the motivating force? Who got you going to a counselor?

A. This trial.

Q. Your childhood?

A. No; this situation right now.

Q. Oh. The trial? I'm sorry.

A. Yes.

Q. How often do you see the counselor?

A. Twice a week.

Q. And how long have you been going?

A. Excuse me?

Q. How long have you been going? Was that twice a week since last November?

A. Since November. Yes.

Q. And again, you're on probation right now, correct, for a felony?

A. Yes.

Q. Was any counseling ordered as a result of that probation?

A. No.

Q. You stated that the house at times would maybe be too cool or cold, and maybe in the summer-time, a little bit too hot. Would that be a fair statement?

A. Yes.

Q. And would the physical conditions be the same for James McKinney -- we refer to him as James Sr. -- and Shirley?

A. Yes.

Q. Was this house somewhat of an older house or newer house? Or how old? You describe its age.

A. Probably around 10 years old when we lived there.

Q. Do you remember if your father was always working full time when you were a young child growing up with James McKinney?

A. My father?

Q. Yes.

A. Yes.

Q. What did he do that you remember as a trade or occupation?

A. He was a welder.

Q. Did Shirley work outside of the home?

A. Once, that I remember.

Q. Was it for a very long time?

A. No.

Q. Did you ever -- going back to your Aunt Susan, did you ever contact her back when you were living in Utah? And I believe you were in Utah during March of 1991.

A. Yes, I was.

Q. Did you ever call her after your bothers were arrested?

A. Yes, I did.

Q. And do you remember having a conversation with her about a purple pillowcase?

A. Yes.

Q. And did you ask her if they found the purple pillowcase in the canal?

A. I do not remember.

Q. Did you ever talk to your brother, James, regarding these offenses?

A. No.

Q. Did you ever visit your brother while he has been incarcerated in Jail since his arrest of April 1st, 1991?

A. I seen him one week ago.

Q. What about before that?

A. No.

MR. STALZER: If I may have just one second, your Honor.

I don't have anything else, your Honor.

THE COURT: Mr. Gonzalez?

MR. GONZALEZ: One minute, your Honor.

REDIRECT EXAMINATION

BY MR. GONZALEZ:

Q. Diana, do you recall everything that occurred since you were four, five years old?

A. No.

Q. What you've been talking about are some of the instances that you can recall?

A. Yes.

MR. GONZALEZ: No other questions, your Honor.

THE COURT: Ms. McKinney, thank you. You may step down.

MR. STALZER: Your Honor, may Mr. Allen and I approach? Mr. Gonzalez, if he wants.

THE COURT: Yes.

(An off-the-record discussion was held at the Bench between Court and counsel, out of the hearing of the court reporter and Jury.)

MR. ALLEN: Your Honor, defense would call Susan Sesate.

SUSAN SESATE,

called as a witness herein, after having been duly sworn, was examined and testified as follows:

THE COURT: Ms. Sesate, if you'll just have a seat in this chair.

DIRECT EXAMINATION

BY MR. ALLEN:

Q. Could you state your name for the record, please

A. Susan Sesate.

Q. And Susan, how are you related to James McKinney, my client who is sitting next to me?

A. He's my nephew.

Q. All right. And he's your nephew in what relation? Explain to the Court.

A. My brother is his father.

Q. All right. And have you known James all his life?

A. Yes, sir.

Q. All right. And -- and how well do you know James?

A. He's my nephew. I know him pretty good. I babysat him, changed his diapers, cleaned his nose.

Q. You've known him since he was born?

A. Yeah.

Q. When James was born -- he's now 26 -- how old were you at that time?

A. Ten years older than James. I'm 36.

Q. All right. So you were about 16 then; is that right? Did I get that right? Or 10?

A. When he was born?

Q. You're 10 years older?

A. Yeah.

Q. All right. And as James was growing up, where were you living in relation to where he was?

A. There was about a hundred yards difference between the houses when my brother got custody of all four kids, which that includes Michael Hedlund, James, Diana, and Donna. They were all -- the houses were like a hundred yards apart, and they

lived right there for -- until I was 19 and married and moved out of the house. And after that, they moved, but I don't know approximately when it was that they moved. I mean, they stayed there for a while, even after I moved out of the house.

Q. There was about a six-year period you lived next door?

A. Approximately.

Q. And you were about 13 years old at that time?

A. When I was 13, the marriage broke up between Bobbie Jean and my brother.

Q. All right. Can you tell the Court a little bit about that; what you observed in that regard?

A. My brother used to come and pick me up at 4:30 in the morning to -- to go down, because he told me Bobbie got a job and she was working days. He was working days, too, but he had two welding shops. He had one he owned, and one he worked out of, where he stocked cores and things like that --

Q. Not in so much detail, if I could interrupt.

A. Well, during that time while this was all going on, he was gone so much. He would pick me up -- incredibly, I recall -- in the morning and drop me off at his house. I'd be there 4:30 in the morning till 8:00, 9:00.

Q. Before you lived next door?

A. Right. This is during the marriage.

Q. And you were brought over to babysit with all the children born at that time?

A. Yes. Diana was just -- she wasn't even a year old. She was tiny.

Q. How old was James at that time?

A. Oh, gosh, let's see. He got custody of them when he was like five, so I'd say he was two or three. They were all right in line; James, Diana, and Donna. They were just like months apart in their ages.

Q. And Michael was there, also?

A. Right.

Q. Okay. And when they were still living with the natural mother, all these four children, what was the condition of the house that Bobbie Morris kept that you can remember?

A. Well, she wasn't a clean person. I mean, when you walked through the door, it wasn't nothing to see, you know, diapers full of -- all around -- they were all around. Everything stunk; the furniture in the house. And you know, Bobbie wasn't mean. I never saw her spank or strike the kids, but she wasn't clean. No.

Q. She was affectionate with them?

A. Yes, she was.

Q. But it wasn't a clean house?

A. No, it wasn't hygienic at all.

Q. All right. Now, at some point in time, your brother and Bobbie Morris got divorced. Correct?

A. Yes, they did.

Q. What happened as a result of that? What did Bobbie do with the children?

Q. She ran with them.

Q. And ran where?

A. The first time, I believe, it was California. She ran to a lot of different states. I know she went to California first and Kansas twice, California again. I know she went through Texas, New Mexico. I can't imagine all the other states, but I know she went through those states.

Q. She took the kids?

A. Yes, she did.

Q. Your brother was trying to get custody of the children?

A. Yes. He had a court date. She didn't tell him; they told him after they postponed the first date. Then they had to try again to bring her into the court. And during that time, he went looking for her to find out where she went. He found out she was out of the state. That's when he went to get them and brought her and the kids back to California (sic).

Q. And by "he," you're talking about James, the father?

A. Right; my brother.

Q. He brought them all back, even her, and as soon as he did, she would run again. As soon as he brought her back, within a week she'd be gone again to Kansas. She had the kids there. My brother went there twice on two different occasions. It all occurred in one year. And during that time, the second court date had come up between the run from California to Kansas. The second court date had come up; she didn't show again. They told my brother they were going to get another court date. She set a third date for her to come in and state what was happening and why she was running with the kids, and the last time

that he went and got her and brought her back, she wouldn't tell her own lawyers why she didn't show up. She was in Arizona, but they don't know why she didn't show up to the Arizona court date. So they gave my brother custody.

Q. So at some point, he gets legal custody. Is there a point in time --

A. She was in Arizona with the kids, and one day -- something -- it was the day before. We didn't know, of course, when we went to court the day after that that she'd already taken off again and went back to California again with them.

Q. Okay. At some point in time, your brother goes over to California?

A. Yes.

Q. And gets the kids?

A. And goes to court there. He set up a court date there to get custody of the kids because he took his papers from Arizona to California and said, "Look, I've got my custody of my kids, you know, but they won't give them to me, you know," He went to the police and they wouldn't enforce the -- because it was an Arizona court order. So he took it to the courts, and they told him he'd have to get a lawyer and fight it right there in California. She was pretending to establish residence there, but she wasn't --

MR. STALZER: I'm going to object.

Excuse me, ma'am.

I have to object to the long narrative and relevance to some of the statements that Ms. Sesate's making.

THE COURT: Objection sustained.

If you can narrow it down?

MR. ALLEN: That's fine, Judge.

Q. BY MR. ALLEN: When we're talking about Bobbie Morris, the mother, taking the kids and going to these different states, were the kids going from household to household?

A. Constantly.

Q. So she just didn't have the kids all the time; it just was moving?

A. Right.

Q. They would spend time with the father, and she would take them and go somewhere?

A. Yes.

Q. And now, eventually, your brother gets them for good?

A. Yes.

Q. And he brings them to Arizona?

A. Yes.

Q. And that's when -- to go back on your testimony earlier, that's when he moved next door to where you grew up?

A. I believe that he rented that house before, after he had got the court date and got the kids here in Arizona. He'd already rented the house next door to us, and he'd already married Shirley Crow, his second wife, during that same period of time.

Q. Okay. So during the fight over the custody, he meets and marries Shirley Crow?

A. Yes, he does.

Q. Who is Shirley McKinney?

A. Yes.

Q. And so when the kids are brought back for the last time and for a steady period of time, that's when you were living next door to him? To your brother?

A. Yes.

Q. And the house that you're talking about is the house you grew up in?

A. Yes.

Q. During that period of time now, were they staying with their father?

A. Uh-huh.

Q. Can you describe to the Court the household that you observed.

A. It was gross. It was gross. I mean, the house was filthy, the kids were filthy, they never had clean clothes that I ever saw them in. If they had clothes, they were ill-fitting clothes. I mean, it was disgusting.

Q. Did you have to babysit them at any time at this point?

A. He rarely -- he rarely would let me, you know, go over and babysit, because my mother had a real problem with the way the house looked and the way they were treated, and him and my mom and his wife clashed a lot. So -- but see, I could get away with it, because I was still a kid. I was always there making sure they were all right. My mother sent me over there consistently to do that.

Q. Was Shirley there the whole time? Did she work, to your knowledge?

A. I understood -- well, she was working in a bar when my brother met her. She was a bartendress of some kind when my brother met her. She left him for a whole week once, and that was shortly after he had gotten the kids. It was not even a year later she left him and went back to work at the bar. And I think that lasted two weeks.

Q. So mainly she was around the home?

A. Yes; all the time.

Q. Was your brother around very much that you saw?

A. No. No, he was still working all the time. The only thing that he had when he came back after his divorce was his job. That was it. And he drank heavily. He was a heavy drinker.

Q. When he was around the home, was he drinking heavily then?

A. Oh, yeah. Absolutely.

Q. Do you remember him drinking?

A. He -- he was a beer drinker. He likes beer, but he also had to have his stuff, too; hard liquor.

Q. Okay. Did you ever see the -- I assume you saw the inside of the home, also?

A. Oh, yeah.

Q. Okay. Describe the bedroom that the four children of your brother's stayed in.

A. It was -- they had -- it was a small room. I would say that you could have put the desk you're sitting at in the room. As far as lengthwise, it was a set of bunk beds about the length of that desk (indicating) in one corner of the room. There's no chest of

drawers. There was a closet with nothing in it but dirty clothes; things like that. There were no hangers; nothing to hang anything on. There were no sheets on their beds. None that I ever saw.

Q. Were there animal feces?

A. Absolutely. All over. All over.

Q. Were there animals in the house besides dogs?

A. Yes, sir. Oh, yes.

Q. What do you remember being -- what animals? What type of animals were there?

A. I saw a goat. I saw a monkey. I saw chickens. I saw dogs. I saw cats. I saw a snake, a boa constrictor. I mean, you name it and those animals lived in those kids' room, and one little room.

Q. Whose animals were they?

A. It was Shirley's. She brought home everything that she saw.

Q. They were not the kids' pets?

A. No.

Q. Were they responsible for them, though?

A. Yes, they were; the feeding and the cleaning and everything.

Q. Did she have other animals outside that they took care of?

A. Oh, yes. There was a cow. There were horses in the pasture. They didn't belong to my brother, but in order to pasture the cows, they kept it in the same area, and they had to feed those, too; the cows, the pigs, the goat. My brother had hunting dogs they had to feed and take care of.

Q. These were all chores that these small children had to take care of?

A. Yes, sir. And Diana was at that time 18 months old when my brother got them. Donna was three, James was between four and five, and Michael was seven. So I mean, they were little. They were little guys.

Q. Okay. And what age were they when they had to start doing all of these chores, if you can remember?

A. It started right from the very beginning when they first moved there. Shirley had already collected all the animals, so those chores were from day one.

Q. And Diana, who testified earlier, she was very young at that time?

A. Oh, yes. She was very young when James was constantly being in trouble at school, because kids were making fun of his clothes and the way he looked. Oh, yeah. Diana was just a baby. She was still toddling around.

Q. Do you remember a specific incident with James and his clothes and the school?

A. Oh, yes.

Q. Tell us about that.

A. He had gotten suspended from the school bus - for fighting on the school bus. A little boy was making fun of him because he said he smelled and his clothes were dirty, and you know how kids are. And he got suspended off the school bus for fighting this kid.

Q. So what did you observe as a result of that?

A. He got a beating with a water hose.

Q. Do you see him get hit?

A. Yes, I did.

Q. Were you present for it?

A. Yes, I was.

Q. Who did the beating?

A. Shirley.

Q. And she used what?

A. A water hose. It was about a yard long like that (indicating), and she had like a pocket knife, and she snipped the hose and she went after him. She beat him on the back of his head, down his back, all over his legs, his arms; anything that moved, she hit him.

Q. Did they cause any injuries that you saw?

A. He had bruises for weeks after that all over him.

Q. During that beating, did anybody else get involved?

A. Michael. He tried to -- Michael Hedlund tried to stop her. He grabbed her arm, and so she swung back and hit him across the side of the face and bruised his face.

Q. What did you do as a result of this?

A. I was about 14 years old, and I ran and got my mom, and my mom waited for my brother to come in from work. And she went over and confronted him and told him, and my brother told her to keep her nose out of his business.

Q. Did the chores that the kids have to do -- and when I'm talking "kids," I'm including James in all of this -- did that include cooking and cleaning?

A. Yes, it did.

Q. Did you ever observe them doing this?

A. All the time. Like I said, my mother would send me over there, because she knew Jim wasn't going to say anything or Shirley wasn't going to say anything to me because I was a kid. But they would tell me to keep her nose out of their business. I went over on a regular basis every day after school if I got the chance, you know, just to go over and talk to them. It was nothing to see James and Michael standing on chairs at the stove cooking or having to stand on chairs to do the dishes.

Q. Because they were too short?

A. Oh, yeah.

Q. Did you know Sandy, Shirley's daughter?

A. Yes, I did.

Q. Did she have to do any chores?

A. I never saw her doing anything.

Q. Did she have her own room?

A. Yes, she did.

Q. Did you ever see the four children -- James, Michael, Diana, and Donna locked out of the home?

A. Oh, yes.

Q. Did this -- how often did this occur? Do you recall?

A. When they were -- when she first had them the first two or three years, that was like a constant

thing. And in the summertime, they stayed outside. And if she was really angry at them, they couldn't turn the water faucet on outside and even get a drink of water, and it would be 110 degrees outside. Just miserable.

Q. Were they out there longer than two hours?

A. Oh, definitely. Definitely.

Q. Do you remember one experience especially?

A. The one that I remember the most is I had just turned 16 and I got my driver's license, and my mom and I had went somewhere that morning. And the kids were outside at the side of the house, the four kids -- Michael, James, Diana, and Donna -- and they were just -- they were like under an eave hanging over the house, just a little ways. They were staying in that shaded area there because none of them had shoes on. And Diana and Donna wore just little panties. And James and Michael were in shorts, little cutoff shorts and no shirts, no shoes. And I hadn't spoken to him that morning. We just saw them sitting there. When we came back four hours later, they were still sitting there. It's 1:00 or 2:00 in the afternoon, and I mean, their faces are beet red, they're not moving from that spot. So my mom sends me over, naturally, to find out why those kids are sitting there still. So I go over there and asked them. She locked them out. She wouldn't let them in and she wasn't going to waste water. They couldn't come back in until their dad came home, because their dad was going to punish them.

Q. How old was Diana?

A. Oh, Diana was potty training -- two or three years old -- first few years, when they first moved in next door.

Q. And this was a common experience that you saw?

A. Yeah. It happened quite a lot in the beginning. But later on, just once in a while.

Q. This happened all year long?

A. As far as I know, I noticed it more in the summer, because I was in school during the winter months. So in the summertime is when I noticed it happening.

Q. Did you ever see it happen in the wintertime when it was cold?

A. I saw Shirley pick James up by the scruff of the neck, set him out on the porch with no shoes on, no coat. I mean, the grass would crunch under your feet, it was so cold.

Q. What were the conditions of the children? Did you see anything on them during these years of being there?

A. They had bruises all the time. It was hard to tell what were new bruises and what weren't. I mean, they always had bruises on them.

Q. What was James doing during this period of time? What was James doing during this period of time as a child?

A. James began to, like, draw away and become real quiet and reserved and didn't -- I mean, he -- he was the most verbal one of all of them when they first moved in next door. He'd say, "She did this to me." After while, he stopped saying that. The older

he got, the less he said. I mean -- but he was consistently being suspended from school or being suspended from the school bus for fighting because kids were making fun of their clothes and that kind of stuff. I know that they didn't have lunch money on a consistent basis.

Q. How do you know that?

A. When they first moved in next door, Michael and James were the only ones in school. Diane and Donna were too young. The next year, she would have been old enough to go. James missed kindergarten because of the running, you know, between the marriage. He would have been going to kindergarten, but he didn't make it. He didn't make it because he'd already missed it. And they started him in kindergarten a year behind all the other kids after my brother got custody.

Q. And were you going to school at that time?

A. Yes, I was. Yes. And we rode the school bus together up until I went to junior high school or high school. When I hit high school, I went on a different bus, but up until then, these guys rode the same bus I did.

Q. And you heard the harassment?

A. Oh, absolutely. There was no way you could miss it.

Q. We were talking about lunch money, and what was your understanding --

A. I understood Michael and James -- my mom had told her, "You need to go down and sign them up for the lunch program." She never would do it. Now later on, I guess, when Diana and Donna got in

school she did, but she didn't when Michael and James -- she just didn't give them any lunch money. I know that her daughter, Sandra -- 'cause she would -- Sandra and my sister, my younger sister, are exactly the same age, and they told each other everything.

Q. Is there one incident regarding lunch with James that you can recall specifically?

A. Oh, yes.

Q. And what's that?

A. Jamie was -- I think it was first grade, second grade, and he didn't have lunch money, and he had stolen a lunch at school and they caught him eating it. And they suspended him from school for, like, three days. And when he came home, he told Shirley, "I'm going to be suspended," all this. She said, "When your Dad comes in, he's going to punish you." Well, when my brother came in, he pulled James on his lap --

Q. Let me stop you. Were you present at that time?

A. Yes, I was. I had gone over after school, and I was afraid they were going to beat him up. I went over and stuck my nose in and was sitting there when my brother came in from work. I went over earlier just to make sure that Shirley didn't beat him up.

Q. What did your brother do to James?

A. He asked James what he did, and James told him, "I stole a lunch because I was hungry, and I didn't have any money." And my brother told him he

wasn't going to punish him for stealing lunch; he was going to punish him for getting caught.

Q. That appalls you? Still appalls you? That appalls you?

A. Yes.

Q. You need a few minutes?

A. I'm fine.

THE COURT: Counsel, why don't we take a recess? About 15 minutes.

(A recess was taken at 2:45 p.m.)

(Court reconvened at 3:05 p.m.)

THE COURT: Mr. Allen?

MR. ALLEN: Thank you, Judge.

FURTHER DIRECT EXAMINATION

BY MR. ALLEN:

Q. Okay, Susan, we were discussing what happened to James with his father. In regard to the lunch incident, at some point in time, do you remember the kids leaving home one at a time?

A. Yes; they all ran away.

Q. Leaving the household for good?

A. Yes. They all ran away at one time or other.

Q. Okay. Do you remember what happened to James in any regard to runaways?

A. Yes. After they moved, I had already gotten married. I was about 20 -- I was, I think, 21 and I had gotten married and had moved out of the house and was renting a house in Gilbert. And James just showed up one night about 8:00 o'clock -- it was between 8:00, 8:30 at night. He was dirty, he was

tired, he had -- he told me he had a bus ticket from Oklahoma where they were at to Flagstaff and he ran out of money. So he couldn't get another ticket to come on down. He went from Flagstaff then and hitchhiked to my house, because I was the only one where he knew I was at.

Q. He was living with his father at that time and Shirley, but this was up in Oklahoma?

A. Right. This happened after I had married and moved out of the house.

Q. Do you know how old James was at that time?

A. Eleven.

Q. Could you describe his condition when you saw him.

A. He was dirty, he was bruised, his arm and shoulder and face and stuff had been bruised. He told me he had had a fight with Shirley, and he told me the bruising was from her twisting his arm but, you know, like I said, I wasn't there and I didn't see it. I just know what he told me; that he hitchhiked from Flagstaff and came to my house.

Q. That was the reason he ran away, though?

A. That was what he told me.

Q. Okay. And do you know any other incidents of James running away from Shirley and those living conditions?

A. Just a couple years after they moved in right next door to us. I mean, they ran away constantly. I mean, they didn't stay gone very long, but somebody would catch them and bring them back, you know.

Q. Do you know what happened to James after he ran away to you at that time period from Oklahoma?

A. His real mom, Bobbie, called the authorities, I guess. James had some kind of warrants out for him. I had called her and told her James had got here to my house. He's real dirty, he's real tired, he hasn't eaten in a couple of days. I know it took him two days to get here from Flagstaff. He didn't know which connection to take or something like that. From there, it took him two days hitchhiking from Flagstaff to my house in Gilbert, and then I called her as soon as I fed him and got him cleaned up and everything. And I put him to bed in a spare room that I had, and I called her and told her he's here and he didn't want to call anybody and tell them he was here. She had the sheriff at my house within two hours after I had called her. The sheriff got there and picked him up and took him from there. I believe he went to Durango; either Adobe Mountain or Durango.

Q. Juvenile detention?

A. Yes.

Q. Can -- can you describe in your own words to sum up the condition of the household and what these kids, including James, their living conditions were during that period of time, six years you living next door to them?

A. To the time they lived there, right off the bat, James would call and tell me, "She's mean," and she does this and she does that. He was the more verbal of them. As the six years went on, while I was in the house with my mom, he began to be quiet; not, you know -- you know -- I mean, they were dirty all the

time. Their clothing was dirty, the house was always dirty, it was filthy. I mean, my pig lives in a cleaner pen than that house was. It's -- it was pretty gross.

Q. Was there ever any improvement? That it got better after somebody had done anything?

A. No, sir, I never saw it get better.

Q. Always remained the same?

A. Or worse.

Q. Or worse?

A. When you think that they couldn't do something else, they would bring something in that was much more gross and you think, how could they live in that?

MR. ALLEN: I have no further questions.

THE COURT: Mr. Stalzer?

MR. STALZER: Thank you, Judge.

CROSS-EXAMINATION

BY MR. STALZER:

Q. With the last item. Ms. Sesate --

A. Yes.

Q. -- you mentioned the kids were always dirty. It's kind of a vast description. Can you explain again what you are meaning by that, at least in James being part of that group?

A. Yes.

Q. How was he dirty?

A. Their -- they just -- I don't know. They had no regular baths. At least I never saw them take regular baths.

Q. Well --

A. And their hair was dirty.--

Q. Excuse me. Let me ask you this, if I could.
You never saw them take a regular bath?

A. No.

Q. What is a "regular bath" to you?

A. A bath once a day, once a week. I never saw that happen. Their clothes were never clean.

Q. Had -- well, let me stay on that issue. Do you know if they bathed maybe once or twice a week?

A. No, I don't.

Q. Did you ever ask them?

A. Yes. I did.

Q. Once or twice a week, did they tell you?

A. Yes, most of the time they would tell me when I asked them, because they smelled like urine. It was obvious.

Q. Every time --

A. Most of the time.

Q. Let me ask the question before you answer, 'cause she's got to take down what you're saying, so slow down a little bit.

Every time you came in contact with James or the other children, they smelled like urine every time for the six years you lived nearby?

A. I won't say every time.

Q. How often did they say they bathed when you asked them if they did?

A. Saturday. Saturday was bath day.

Q. Do you know from your experiences with other friends, relatives, acquaintances if that is something highly unusual? To take a full bath only one day a week?

A. Nobody I know does.

Q. When you say, "They were dirty," you spoke about their clothes. Were their clothes always dirty every day they went to school?

A. I saw it that way. Yes.

Q. What was it or how would you describe the dirtiness of the clothes?

A. They were stained, torn, ill-fitting, buttons missing, you know. Yeah.

Q. Anything else dealing with dirtiness as far as your description of James or the other children?

A. No; that pretty much sums it up.

Q. And you lived nearby from the time you were about 10 to the time you were 18?

A. Till -- no, till I moved out of the house. So I was like 13; so 19 when I left.

Q. So for that six-year period of time?

A. Yes.

Q. And when you were 19, that was about the time you started dating and --

A. I got married.

Q. You got married?

A. Uh-huh.

Q. And did you consider yourself a fairly responsible person for that age?

A. I was kind of kid-ish. I was sort of a late bloomer and not real -- not real smart about a lot of things. My mother was very -- brought up in the old school, and so she was -- I was a late bloomer. As far as dating, I didn't date until I was 18 years old.

Q. I'm sorry. I forgot her first name. Is it May?

A. My mother?

Q. Yes.

A. Roxie.

Q. Roxie. You've testified at length -- I don't know, maybe an hour or so -- about the deplorable conditions in the home, deplorable way in which the children were kept physically. Did you ever call the police?

A. My mother did once.

Q. Did you ever call the police?

A. No, I didn't.

Q. You spoke about going over to Shirley's house to make sure James wouldn't get beat. Remember that?

A. Yes.

Q. If you were so concerned, why didn't you call the police?

A. I was scared of my brother, and I believe my mother was, too. I mean, he made that clear he didn't want any interference.

Q. Then, I guess my question is, how did you stop Shirley from beating James?

A. Well, she never did anything. The only time she ever beat them that I saw or any of them was the

one time with the water hose, and she didn't know I was witnessing anything because I was in my yard. Our house faced theirs.

Q. So that was the only time --

A. Yes.

Q. -- you saw with your own eyes --

A. Yes.

Q. -- Shirley beating James, and the rest was what was told to you?

A. Yes. The children told me.

Q. How often -- and this is a tough question, 'cause I know you're 36 now, and we're going back a number of years and we're not counting. How often would they be telling you -- I mean, realistically you're living next door. How often was Shirley beating the snot out of them?

A. Right. The first couple of years, it was frequent. It was like every two to three days James or one of the other children would tell me that they had gotten beat.

Q. And that someone would be getting beaten?

A. Yes; that one or all of them were getting beaten. And then they tapered off when my brother realized I was telling my mom what was happening. The kids were telling me, I was telling my mom, she was going down and confronting him.

Q. So after a couple years, it starts to taper off?

A. It tapers off and they stop telling us, but they can't come over the house. They weren't allowed.

Q. As you get into the 5th and 6th years, does it seem to taper off more and more?

A. Yes.

Q. Or is it you have no conversation?

A. Yes. About the last year before I was married and moved out of my house, yes, it tapered off to nothing.

Q. You mentioned you were on the same bus with James and maybe Michael and maybe some of the other girls for a few years. Did you go to the same school?

A. No.

Q. What about the school personnel? They --

A. I know --

Q. You have to answer -- you have to give me a chance to ask a question.

Did the school personnel get notified of this condition? It should have been obvious to them, wouldn't it?

A. I would think so.

Q. Did any of the children tell teachers, Deans, or Principals by saying, "Hey, look what Mom's doing to me?"

A. I don't believe so. I don't believe they went to anybody and told them.

Q. You mentioned, like this most recent time, that James had a bruise where he was hit by Shirley and it was there for some time.

A. Uh-huh.

Q. Like the one with the hose?

A. Yes.

Q. You saw the bruises?

A. Yes.

Q. They never mentioned, any of the children, about school personnel seeing bruises on their body, did they?

A. Huh-uh.

Q. That's a no?

A. No.

Q. Do you know if at any time anyone notified, like, what might be called Children and Family Services or Child Protective Services, like a welfare agency to help these kids?

A. I don't know if anything like that was contacted or if any -- any association was ever contacted on them. I know my mom confronted my brother and continually tried to get him to do something about the situation. But I know that letters were sent home from the school about the clothing and the appearance and the children's appearances and their odor; their body odor. Now what Shirley or Jim did, I don't know.

Q. You mentioned this vast array of animals that were kept in a rather small room with a few kids in there?

A. Yes.

Q. From your own personal observations, if any, how long did all of these animals stay in one room?

A. That's a good question. I really don't know how long. I know that the goat was there a couple of years, and he -- and it stayed there until it was big enough to go outside.

Q. Was this goat tied to the bedpost or I mean --

A. No, just closed the bedroom door and he was in there. It was a little goat, baby goat.

Q. You mentioned, I think, that the kids always had to do the cleaning in the house.

A. I always saw them doing it.

Q. Was that on a daily basis?

A. Usually. I went over there every day after school.

Q. And I think were they also responsible for like washing the clothes and --

A. Yes.

Q. -- they were responsible for preparing food?

A. Yes.

Q. Do you know, did they have to prepare, was it, food only for themselves or food for James, and -- I'll call him James Sr. -- your brother, and Shirley as well?

A. The whole family.

Q. So they basically ran the house as far as the basic needs day in and day out?

A. Yes.

Q. I have one question. With that thought in mind that they were basically employed on a daily basis in the house, then why was the house dirty every day and their clothes dirty every day?

A. I have no idea, but they were little. We're talking little when I started. Nobody ever taught them to clean or to, you know, pick up or they didn't know how to do it. I mean, Diana was 18 months old when it started.

Q. Well, let me stop you there. Obviously, Diana was not doing the work. I mean, an 18-year-old or 18 months?

A. Eighteen months.

Q. Okay. That's an infant?

A. Yes.

Q. So that infant wasn't working in the house. Right?

A. She was still was required to pick up and do things, too, at 18 months old. And when she didn't, she got spanked.

Q. Would she talk at 18 months?

Q. She could a little. She could understand "yes" and "no," and that kind of stuff.

Q. So then what you're saying is that the children weren't really cleaning the house?

A. They did. By the time they were old enough, they did.

Q. But now we're talking about a different type of cleaning six years later. From what you observed --

A. Right. It was different. It still wasn't clean and it was still, you know -- there were just too many animals in that little house, plus the family.

Q. When -- when did you move to the -- strike that.

Where do you live right now?

A. I live in Gilbert presently.

Q. Basic intersection?

A. Gilbert and Warner.

Q. And how long have you lived there?

A. Five years,

Q. And so you were living at the same location back January, February, March of 1991?

A. Yeah.

Q. Anyone live with you at that location?

A. Anyone live with -- oh. James and my brother and his wife, Shirley, moved in with me in December, I think it was, like the end of December, beginning of January and they were there about two-and-a-half months. They moved out at the first of March, but actually moved out the end of February, but they came back and, got their stuff in March.

Q. Okay. Simple question. How long did they live there all together?

A. It was two -- two-and-a-half months.

Q. Knowing their background?

A. Uh-huh.

Q. And knowing that they keep house worse than a cesspool, why did you let them in?

A. Well, my brother -- I love my brother.

Q. I realize that.

A. And he came and gave me this story of how he had lost the place he was living in.

Q. So you gave him a break?

A. Yes, I did.

Q. Much like any person would or could for probably any blood relative?

A. Yes.

Q. Anyone ever come and live near you in addition to your brother and his wife?

A. No.

Q. Did you have another piece of property suitable for habitation near the house?

A. Oh, yes. There was a trailer in the back.

Q. Who lived in the trailer?

A. That was a friend of my brother's which is another one of my brothers -- let him live there.

Q. His name?

A. Kenny.

Q. Kenny?

A. Kenny Foster.

Q. Did anyone ever live with Kenny?

A. Not that I know of.

Q. Did James McKinney ever live with Kenny?

A. Not that I know.

Q. He never did?

A. He didn't. When he lived in that trailer, Kenny lived there by himself.

Q. Did James ever live in your house when his father and stepmother lived with you?

A. Yes.

Q. And how many months did James live with you?

A. After about a month-and-a-half, James -- there was a camper right beside the trailer where Kenny Foster lived. This camper was set up on air (sic), and he lived there. He moved out in about a month-and-a-half. I guess he couldn't take it anymore, and he moved out.

Q. So I have it correct, and so the Judge could hopefully understand, James lived there for about a month-and-a-half or more than that?

A. He lived inside my home for a month-and-a-half. He still ate at my table. He was there for two-and-a-half months.

Q. Total?

A. Yes.

Q. Either in your house or in the camper?

A. Yes.

Q. Or --

A. Yes.

Q. And somewhere around two-and-a-half months?

A. About that.

Q. Did he come directly from prison to your house?

A. After he got out, it was like a week or more before my brother came and gave me a story about how he needed a place. So yes, he had just gotten out.

Q. Did he move out away from your property about the same time when James and Shirley moved away?

A. He moved out actually a week before Jim and Shirley did.

Q. Do you know if he got -- James, your nephew, got into a dispute with Kenny?

A. Kenny told me he did. I didn't see the dispute.

Q. Was that a dispute over a possible theft?

A. Yes. Kenny came and asked me about it and I said, "Well, I don't even know where he's at 'cause he already left my house."

Q. Was Kenny looking for property?

A. Yes. He said he took a tool.

MR. ALLEN: Judge, I'm going to object. I think we're getting away, far away from the direction and the purpose of this witness with this line of questioning.

THE COURT: Mr. Stalzer? Are you going to go into this any further?

MR. STALZER: No, Judge. I was done. I was going into another area.

THE COURT: Overruled. The answer will stand.

MR. STALZER: I'm sorry, Judge.

Q. BY MR. STALZER: With respect to you getting married at approximately -- I think you said you were 19 or 20?

A. Yes.

Q. You moved away from the house?

A. Yes.

Q. Did you ever see James McKinney from -- from that period of time up until the time he came to live near you or with you back in February -- January, February, March of '91?

A. When I moved out at 19, I was married, moved to Gilbert, then James ran away and came to me when he was 11. I was 21 and still married.

Q. Did you tell the police that he had these bruises on him when they came to arrest him?

A. They knew. The sheriff knew that, 'cause he was in bed and they went in and got him.

Q. No, did you tell the police?

A. Yes, I did. I told him not to pull his arms behind his back, 'cause his arms was bruised.

Q. Did you tell him --

A. James had told me.

Q. Okay. How frequently would you see James from that point in time up to the time of his arrest?

A. I did not see James again until James was almost 17 years old -- 16, just before he was he went to prison.

Q. Where did you see him?

A. He came to my house. I was then living in Chandler and he came to my house and I saw him for like 20 minutes. Him and Michael, his brother, came and visited me. They were just there for like 20 minutes.

Q. Was that just like a social visit?

A. I asked him where he was working, and I can't remember what he told me, but he was working -- Michael was working construction and that was about the extent of it. And the next thing I knew, he was in prison, and I heard that through the family. I didn't know that he had been arrested.

Q. Was James social to you when he came over?

A. Yeah. Yes, he was.

Q. Were you married to Louis at that time?

A. No.

Q. Okay Was James social to your husband at that time?

A. The husband I was married to?

Q. Yes; when he was 16.

A. My husband wasn't there when he came, so my husband never saw him.

Q. Did you ever have any problem socializing, getting along with James McKinney?

A. No.

Q. Did you ever see him having any problem getting along with any other individuals other than Shirley or James, your brother?

A. The only time that I ever saw James be upset or angry was around the 10th -- no, it was like the 9th -- 7th, 8th, 9th, something like that, of February. And he --

Q. February of when?

A. Of 1992 -- '91.

Q. 'Ninety-one?

A. 'Ninety-one. I got my dates wrong. And he was real agitated. Michael's car broke down, and he had tried to fix it that day. And he was trying to fix it in my back yard, and he was just real upset because he couldn't get it running. That was the only day he and I had words, because he kept coming --

Q. But generally speaking, did you always see him getting along with people okay?

A. He just was quiet. I never saw him interact with anybody that much.

Q. When he was at your house, how would you get along with him during the months of January through March?

A. James was really reserved, real quiet. We didn't argue or anything like that.

Q. Did you get along?

A. Yes, we did.

Q. Did you -- did he get along with your husband, Louis?

A. Yes, he did.

Q. Did James drink casually on a friendly basis with your husband, Louis?

A. I only saw him drink once when he was there.

Q. How many beers -- or whatever he was drinking -- did you see him drink?

A. I never saw him drink more than the one beer. My husband told me he had two, but I never saw him. I never saw him. I saw one.

Q. Was he intoxicated from what you could tell?

A. Not that I could tell.

Q. Did you ever see James intoxicated around your house?

A. Once.

Q. Was that at your husband's birthday?

A. Yes.

Q. And that was a party that was at your home?

A. Yes.

Q. Was your husband intoxicated as well? A little bit?

A. No. Well, he'd had a few drinks, but he wasn't intoxicated where he couldn't walk on his own or anything.

Q. Was James walking on his own that same day?

A. I don't know. He was -- I don't know. I don't remember.

Q. Were you intoxicated?

A. No, I hadn't had anything. I did all the cooking, so no.

Q. Except for Kenny's one gripe about the item that was missing --

A. Uh-huh.

Q. -- did it appear to you that Kenny got along with James?

A. As far as I know, yeah.

Q. Despite the background that you've discussed concerning the children as they grew up -- that they had to clean house, they had to put up with dirty clothes, and the smells -- did they appear to you when you observed them to have what you might call normal social skills with other people, except for Shirley and maybe James, your brother?

A. Not really. No.

Q. Explain, please.

A. Like I said, they changed. Their whole personality changed, and especially James. Michael was like the protective one. James, who started out saying that "they hurt me these times," no longer says that anymore. He's not -- he's very quiet, very

inward, very, you know, keeps everything to himself, stopped saying what was happening to him.

Q. Listen to my question, please. When you saw them, if you did, with other --

MR. ALLEN: Objection. Mr. Stalzer asked a question and I believe the witness answered, and now he's re-asking the same question, trying to get a different answer.

THE COURT: Overruled. I'll let you go over it in Redirect if you wish to.

Mr. Stalzer, you may proceed.

Q. BY MR, STALZER: When James was older --

A. Right.

Q. -- and maybe this would be only at the time he got out of prison at that time or the month-and-a-half period, whatever it was, he lived near your house --

A. Right.

Q. -- did you get to see him with other people?

A. Yes.

Q. Did he do anything abnormal with respect to those other people?

A. I don't know what you mean by "abnormal."

Q. Did he appear to you to get along with the people you saw him with?

A. I know he scared some people he came in contact with. They thought he was very quiet, very reserved, so they were frightened of him.

Q. James talked to you. Right?

A. Yes, he did.

Q. Talked to your husband?

A. Yes, he did.

Q. You had no problems?

A. He's polite, and courteous, but he's not -- it's not an emotional, outward, friendliness like "Hi, how you doing" kind of person. His personality is not like that.

Q. Was he ignorant to other people that you could see?

A. No. No.

Q. Was he disrespectful?

A. No, he could never be disrespectful.

Q. You had the party for your husband, Louis --

A. Yes.

Q. -- on his birthday. And is it correct James participated in the festivities that day?

A. Yes, he did.

Q. Did James talk to you or your husband or to anyone else that was present?

A. He mainly was with Michael and two, young, teenage girls that live right next door.

Q. Did it appear he was socializing with two, young, teenage girls?

A. They seemed to get along just fine. Yes.

Q. Did he get along with James Sr., your brother?

A. Yes.

Q. Even though he may not technically be a "Senior," did he love his children?

A. I believe so.

Q. How did he generally, in your opinion, treat James, his son?

A. He loved his son very much.

Q. In a general sense, did he -- did he treat the kids right?

A. He just wasn't there, you know. I mean, when he was there, I believe he did. I mean --

Q. Did he work in the morning?

A. Yeah, he was always gone early in the mornings.

Q. When would he come home at night?

A. At 7:00, 8:00, 9:00, you know. He came home all hours.

Q. And how do you know that? From what somebody has told you?

A. No, when he was living next door to me. I mean, that's when he came in. Now that he's older, he doesn't do that, but I mean, that's what he did when they were young.

Q. How did he keep his residence? I think you mentioned he lived in a trailer next door to your house in January of '91.

A. Uh-huh.

Q. How was it kept?

A. Who? What are you talking about?

Q. The trailer, where James, your nephew --

A. It was a camper.

Q. How was it kept?

A. As far as I know, it was clean. He kept it neat. He was very neat. He, himself, was.

Q. You stated, and I made the comment on my notes, that "they ran away constantly." Were you referring to all of the children or some of the children?

A. All of them at one time or another did.

Q. Where would they run to?

A. Well, we lived on a canal and they would mainly take off down the canal and hide down – they had big Cottonwood trees that ran along the sides of the canal where the gates were and the overpass. They'd go down and hide in those trees.

Q. How long would they be gone? Would you characterize this as a runaway? Did they go to New York City, Houston, Tucson or down the canal?

A. Michael was gone a week. James – as soon as it got dark, you know, you could find James.

Q. He'd come home?

A. Yes. And Michael ran once.

Q. Where did Michael run to?

A. California. They picked him up walking down the side of the freeway.

Q. Because Bobbie lived in California at the time?

A. Yes, and he was trying to get to her.

MR. STALZER: One second, your Honor, please.

I don't have anything else, your Honor. Thank you.

THE COURT: Mr. Allen?

MR. ALLEN: Thank you, Judge

REDIRECT EXAMINATION

BY MR. ALLEN:

Q. You testified you only witnessed one beating of James, but James and the other three children told you about the beatings. Right?

A. Yes.

Q. And you could observe the results of the beatings?

A. Yes.

Q. There is no doubt in your mind?

A. None.

Q. We talked about the cleaning. Cleaning of the house wasn't the only duty they had. Correct?

A. Correct.

Q. They had chores to do?

A. Yes, they did.

Q. There was farm animals there?

A. Yes, there were.

Q. And --

A. A garden.

Q. Did the boys have to do one thing and the girls have to do another?

A. Sometimes. Sometimes you'd see them all doing the same thing. Like the laundry, they were too short to reach the clothesline, so I used to see them reaching up and throwing the clothes over the line, They were all doing that. They had to get these chores finished outside the home before they were allowed to go to school.

Q. And when we're talking about them washing clothes, and you mentioned they were throwing things over the clothesline, we're talking about five

years old, six years old, seven-year-old children doing the wash; is that correct?

A. Right.

Q. That's the type of job they were doing as five, six, and seven-year-olds?

A. Exactly.

Q. And preparing food. When you talked about that, that wasn't really for the father; that was for themselves. Correct?

A. The whole family.

Q. Okay.

A. They were required to set the table, fix the meals, do the dishes afterwards, and they had to clean up any cooking that was done --

MR. STALZER: I'm going to object to the nature. If it's some Redirect on my Cross, fine, but I hear just repetition of the counsel's Direct Examination.

THE COURT: Objection overruled.

Q. BY MR. ALLEN: The question I was getting at, you testified the father didn't come home till 8:00, 9:00, 10:00 o'clock at night?

A. Right. Right. Right.

Q. Mr. Stalzer's asking about your testimony in regard to them running away.

A. Right.

Q. They were running away to their mother, mainly?

A. They were trying to get to Bobbie. Yes.

Q. So they just weren't going away from the home to hide; they were actually --

A. Bobbie moved around a lot during those years, too, herself; California, back to Arizona, different places in Arizona. So when they ran, they would try to go in the direction they last knew she would be in. So I mean, yeah, they did. Like I said, they were little, so I don't know how much they knew about directions or anything at that time.

Q. And eventually, all of the children did go back to live with their natural mother?

A. Yes, they did.

Q. Mr. Stalzer was talking about James at this party recently. Would you describe James as being a loaner type of a person?

A. He's not real forward and not real outgoing. I don't know if you call that a loaner, but he's not a big talker. And he's kind of quiet, and he listens intently, but I don't think, you know, he's like boisterous or anything. No, I don't know if I'd call that a loaner.

MR. ALLEN: Your Honor, may I have a second?

Your Honor, could I approach for a second?

THE COURT: You may.

(An off-the-record discussion was held at the Bench between Court and counsel, out of the hearing of the court reporter and jury.)

Q. BY MR. ALLEN: Susan, there's one thing I forgot to ask you in my Direct testimony. It was an incident -- do you remember an incident that you observed James not going to school while the rest of the children were going to school during --

A. They were all in school at the time, and my mom had noticed that for three days in a row, James was sitting on the porch in front of the house. And

like I said, our house faced theirs. Theirs faced the street, but our house faced theirs. So when my mom would do dishes or anything, she could see what was going on at that house. And James was sitting out on the porch, and the other kids were getting on the school bus every morning and going to school. So on the third morning, my mother wanted that I go over and ask him why he was staying home and why he wasn't going to school. He said it was because he didn't have tennis shoes, and Shirley told him he couldn't go to school until Bobbie bought him a pair.

Q. Bobbie is his mother?

A. Right; until Bobbie bought him a pair of shoes. That was because she didn't pay any child support. And so my mother got kind of upset about it and made me take her to the bank and get money out and go down and buy him a pair of shoes. And so Friday of that week, he got to go to school because we bought him a new pair of shoes.

MR. ALLEN: I have nothing further, your Honor. Thank you.

THE COURT: Mr. Stalzer?

MR. STALZER: Thank you.

RECROSS-EXAMINATION

BY MR. STALZER:

Q. On the last question, Ms. Sesate, why did Shirley make him wear tennis shoes, if you know?

A. I have no idea.

Q. Do you know if it was --

A. He had a pair, but the bottoms were worn on them and she didn't like it.

Q. Do you know if James verbalized that he, himself, wanted a new pair of tennis shoes?

A. No, that's not what he said to me.

MR. STALZER: Thank you, Judge. I don't have anything else.

THE COURT: Mr. Allen?

MR. ALLEN: Thank you, your Honor. I don't have anything.

THE COURT: Ms. Sesate, thank you. You may step down.

MR. ALLEN: Your Honor, defense would call Dr. Mickey McMahon to the stand.

MICKEY MCMAHON, PhD,

called as a witness herein, after having been duly sworn, was examined and testified as follows:

THE COURT: Doctor, if you'll just have a seat. Good afternoon.

MR. GONZALEZ: Excuse me, your Honor, before we start, could I be excused for a minute?

THE COURT: Sure. Mr. Gonzalez, would you like the examination to wait for a moment?

MR. GONZALEZ: No.

DIRECT EXAMINATION

BY MR. ALLEN:

Q. Could you please state your name for the record, please.

A. Mickey McMahon.

Q. And you're a PhD. Correct?

A. Yes, PhD; Clinical psychologist.

Q. All right. And can you go over for the Court your credentials and where you went to school.

A. I have a Doctorate in Clinical Psychology from Arizona State University. Also, a Masters in Clinical Psychology from Arizona State University; a Bachelor's schooling in Sacramento University in California; obtained my Doctorate in January of 1973; and have been in practice for approximately 20 years.

Q. Do you belong to any professional associations in regard to your practice?

A. Yes. I'm a member of the American Psychological Association, a member of the International Society for the Study of Traumatic Stress, and State Arizona Psychological Association --

MR. STALZER: Judge, I'll stipulate to the Doctor's credentials. I believe he's probably testified in court a number of times.

THE COURT: Mr. Allen, would you prefer to go over them?

MR. ALLEN: Yes, I would, your Honor, just for the record purposes.

Q. BY MR. ALLEN: I don't know if you would like to continue from what you were discussing. Associations?

A. I'm done with that. Yes.

Q. All right. Did you do any teaching in regard to any of what you just referred to? Your associations or lectures?

A. In the past, I have supervised interns in the Doctoral program in Psychology at Good Samaritan Hospital. Also a child guidance center, and also Adobe Mountain School for juveniles.

Q. And in your practice, are you -- do you attend seminars and continuing education in this regard?

A. Yes, I do.

Q. All right. You were asked to see James McKinney by me and Alex Gonzalez in this case: is that correct?

A. That's correct.

Q. Okay. And could you tell me -- I provided you with some documentation to review for this case?

A. That's correct.

Q. Could you tell me what you did as far as documents reviewed to assess Mr. McKinney?

A. I reviewed the presentence investigation by Sandra Lewis-George dated 1/7/92, including the juvenile and adult arrest history. I reviewed educational records from May 17, 1973 to May 29th, 1980, which was the first grade throughout the 12th grade. I also reviewed the police homicide investigation synopsis by Detective Neuman.

Q. Okay. And that synopsis basically discussed the -- both homicides that Mr. McKinney was convicted of. Correct?

A. That's correct.

Q. Okay. And then, you discussed these matters with myself and Mr. Gonzalez: is that correct?

A. That's correct.

Q. And then you saw Mr. McKinney, I take it, at some point in time?

A. Yes, I did.

Q. All right. And before you saw Mr. McKinney, did you talk to and discuss this case with any -- anyone else?

A. Besides yourself and Mr. Gonzalez, no.

Q. Okay. Did you -- after you saw Mr. McKinney, did you speak with any persons involved in this case, specifically referring to Susan Sesate and Diana McKinney?

A. Yes, I had telephone interviews with Susan Sesate and Diane McKinney. I had an hour telephone consultation with Susan Sesate, and half-hour consultation with Diana McKinney.

Q. All right. And when you saw James McKinney at the jail, did you give him any testing?

A. Yes, I did.

Q. Okay. Can you go over those tests.

A. I gave him a 16-Personality Factor test, a Clinical Analysis Questionnaire -- both of those are part of a battery that I was familiar with in Department of Corrections when I worked at Alhambra for seven years. I gave him the Woodcock-Johnson, W-o-o-d-k-o-c-k-Johnson, which is part of a battery that Dr. Lewis has used in her research on death row inmates that have been sentenced to death. Also administered the Williamson's Sense Completion Test. I administered the Wechsler Adult Intelligence Scale Revised. I administered the full wide-range achievement test, and I also spent three hours administering the Luria-Nebraska Neuropsychological Battery, which is a very, very long comprehensive battery.

Q. All right. Can you discuss with the Court what those tests showed you in regard to this case?

A. Mr. McKinney obtained a verbal IQ of 85, a performance -- a performance in our full scale IQ, 35, lower average range, which is on the wide-range achievement test. He scored 11th grade reading level in pronouncing words, which is a screening test for reading. When we go into comprehension -- what he understands of what he reads -- we get a dramatic drop; 11th grade down to the third month of 8th grade. So he doesn't process information as well as he can read it probably. His spelling is at the beginning of the 6th grade; and the arithmetic, at the end of the 7th grade. Spelling is at the 7th percentile, so 93 percent of the people are better spellers than he is. Arithmetic is at the 12th percentile, so what's that? Eighty-eight percent of the people.

Q. Eighty-eight percent?

A. Right; better in math than he is -- also on the reading comprehension, the 8th-grade level's equivalent to a person that's 13 years old and eight months.

The results from the Luria-Nebraska were not indicative of a significant neuropsychological dysfunction; however, they are indicative of learning disabilities. The writing and arithmetic sections of that particular test were below the cut-off point for showing some kind of impairment.

The results from the 16-Personality Factor test, which is basically a test to look at normal personality as opposed to psychopathology that you might get in an MMPI or in this case, the Clinical Analysis Questionnaire, revealed a moderately introverted person with a pessimistic outlook, takes his responsibilities

seriously, may have some conflict with less dedicated people.

He's basically passive and makes less effort to change things than most people. He focuses on details in a situation rather than the big picture. Also, it shows him to be sober, serious, and even have a grim outlook on life, which is -- which the research shows is quite consistent with the kind of background history you've heard earlier today in this court. He generally will take few risks. He is quite submissive and will behave differentially towards others, even if he is put in charge. Tends to be shy and timid in relationships with others and acts to minimize any anxiety and stress. He can be emotionally overwhelmed by environmental stress and act in poorly-judged ways just to produce the internal emotional turmoil. Probably goes back to the trauma you've heard testified to earlier this morning.

He has very low ego strength, which means that he is vulnerable again to be overwhelmed by environmental stress. There's some research that shows that the low ego strength has a hereditary component to it. Generally, people with this kind of low ego strength have very little relationship with their fathers. With this, we had testimony the father was pretty much absent, gone while working. The early discipline of children that have low ego strength is typically characterized by attempts to control the child, by evoking excessive levels of fear, excessive punishment for mistakes, and habitual discounting of personal ideas and feelings. It shows disinterest in the child's welfare and their achievements.

The 16 P.F. also showed that there are long-term feelings of guilt. We know that it's one thing to feel guilty about a particular incident; it's another thing to have a pervasive feeling of guilt, and pretty much your expectation whatever happens, you're going to be guilty for in some kind of way. This brings about a vulnerability of feelings of worthlessness. That can make a person susceptible to manipulation, exploitation. If someone knows about this, they can play on that and use that.

The results from the Clinical Analysis Questionnaire are consistent with the 16 P.F. in showing a great deal of guilt, self-blame, self-doubt, and confusion, with some significant depression and withdrawal from people. In addition, it shows there may be some periodic thought confusion and irrational, unrealistic thinking that tends to result in some poorly-judged behaviors that are more out of reflex than they are out of appropriately reflecting and ceasing the situation in deciding what's the best thing to do.

He does not present on the testing who is someone manipulative, sensation- or thrill-seeking, and we know often that people that get involved with violent kinds of crime are thrill-seeking sociopaths. These results do not look like that. It looks the opposite of that, since these tests are pretty much consistent. He is a loner; depressed.

On Williamson's, he likes solitary activities best. When you ask him, "What's the nicest thing that ever happened to you?" he blocks, can't come up with an answer. I think that's the result of the testing.

Q. Okay. I asked earlier, and you said you spoke --

A. Oh, I'm sorry. I forgot one other thing.

Q. Okay. Go ahead.

A. The 16 C.A.Q. from the Department of Corrections has been utilized to date with 400,000 inmates in Arizona, Colorado, and Georgia. I had taken these test results and sent them back to Georgia to Dr. Herb Eaber -- who is the person who is the creator of the system -- and had it scored through their norms back there. And on the logic and the testing, it turns out that he is not considered to be an escape risk if he is in prison, and he's also not considered to be a risk for violence within a prison setting.

Q. Okay. Now, I asked you earlier and you testified that you spoke with Diana McKinney -- that's his sister -- and his aunt, Susan Sesate. And you also were present for their testimony today. Can you tell the Court from what you learned from them, how can you relate this to James McKinney, basically discussing his background, his childhood, upbringing?

A. I think I can try to connect the examples that were given in the court earlier with the research, literature, and my particular opinion about his diagnosis.

We now know that prolonged kind of emotional, physical neglect and/or sexual abuse has the kind of effect upon young children that concentration camp survivors and political prisoners and hostages undergo. The research comes from Amnesty International, and our particular data on prisoner-of-war people, you know, prisoner-of-war soldiers from the United States, children are captive in the same sort

of way that prisoner-of-wars are captive. To have multiple traumas occur over a long period of time, a person has to be held in a situation. They have to be captive. We know that the isolated example of Post-traumatic Stress, such as in Viet Nam or happens in a crime when you're mugged or assaulted is a one-time kind of incident. A person often has a memory of that. Abuse happens over a prolonged period of time to a vulnerable child, is often not remembered in great detail, but we have flashbacks of emotion, such as a person overwhelmed with stress if they get in a situation that is similar to the kind of situation they were in when the trauma was first instilled.

So consequently, from my testing and from my interviews with Susan Sesate and Diana McKinney, I diagnosed Mr. McKinney suffered from Post-traumatic Stress Disorder. The personality data that I gave you from the testing essentially says that he adapts to that trauma, tries to respond to it by withdrawing, which is consistent with two of the primary ingredients of Post-traumatic Stress. One is flashbacks, but two is some sort of voidness, numbing, withdrawing. Substance abuse is classically associated with Post-traumatic Stress. He has a history of multiple substance abuse; generally downers, opiates in prison, alcohol, marijuana. We don't have a history of amphetamine/psychostimulant kind of abuse.

Q. What's the significance of using -- a person using depressants as a result of having this stress or observing events like Mr. McKinney did in his childhood?

A. I'm not sure I understand. You mean why do they use it or if you'd use it over a long period of time?

Q. Why would somebody use depressants, first of all?

A. When you have this particular kind of affliction, you're susceptible to -- at any moment to have the trauma re-triggered. For example, any kind of emotional loss, you know, will trigger Post-traumatic Stress episodes, because when you go through the trauma, you lose things; you lose your security; you lose your hope for love from parents. It's emotional loss. So it doesn't have to be the exact thing that happened at the time of the trauma to re-elicite this. So you're vulnerable and you need to -- if you take downers, then you're not as alert to things that are going on around you in your environment. It's like taking pain killers. The pain is not -- it may be there, but it's not as intense.

Q. From your interview of Mr. McKinney, did -- did he tell you about the substance abuse -- his substance abuse history in relation to the presence around other type of drugs?

A. Yes, he did. I think he started drinking around 13 years of age. He'd actually had some beer at 10, but around 13, he really started drinking along with mixing marijuana with that. That pattern continued from about 13 to 22; drinking one or two cans of beer a day, three or four beers; once every two weeks. The pot was daily; like two joints a day. Marijuana is a relaxant. You tend to focus on internal sensation rather than things in your environment. He had tried PCP sprinkled on the marijuana for

about three months; one or two times a week. He felt like it almost killed him, so he stopped doing that after three months. He'd also got into some hallucinogens; LSD abuse. Again, that's having you focus on things away from your environment. Usually people see visual illusions, colors, and things that move on them, and that's a distraction from the external environment. When he was in prison, he did a lot of heroine in order to withdraw and kind of do his time. My information is that he has only minor infractions in a prison setting. He never lost any time, never had any major infractions that would have cost that time. That all is consistent with withdrawing.

Q. And is that consistent with a person having Post-traumatic Stress Disorder?

A. Yes. I could give an example.

Q. Sure.

A. The V.A. Hospital originally came up with the Post-traumatic Stress from our Viet Nam veterans. They weren't getting much better, so somebody decided to go inside and re-evaluate the Post-traumatic Stress Disorder, and well over 50 percent of the veterans in the drug abuse program had been undiagnosed.

Q. Can you tell the Court everything as we talked about it associated with Post-traumatic Stress Disorder just with Viet-Nam veterans or war veterans? Can you tell the Court why this is now becoming something that's found in -- in children more and more of abuse, and you know why that -- to make a simple question -- what's the difference between a person who was a war veteran and somebody like James McKinney?

A. Well, I think the war sensitizes us to the reality of Post-traumatic Stress. Also the Israelis have studied Post-traumatic Stress quite a bit, 'cause they're generally on state-of-war over there. So then we started looking at children, and they were children who misbehaved in class; who got into trouble; children started to use more drugs in the United States. So having this awareness of trauma, some people decided to look at this as a possibility. Like, they went into the drug abuse programs in the V.A., and looked to see if any drug abusers had Post-traumatic Stress. And so they started to discover these kinds of things that were happening to children.

Our country has also become more aware of abuse in general. The DSM III-R, our diagnostic and statistical manual, lists substance abuse as an associated kind of symptom for Post-traumatic Stress. Also, we've had the latest research and attempts to rewrite the DSM III-R, which is what we call DSM III-IV; Complex Post-traumatic Stress Disorder. This includes prolonged and multiple traumatic kind of episodes.

Q. Has there been any articles that you have looked at that have described the symptoms of Mr. McKinney and Post-traumatic Stress Disorder?

A. Yes.

Q. And could you tell the Court about those articles.

A. One particular article that I think brings it home to this particular situation was a study that was done in Oklahoma's prison system in the Journal of Traumatic Stress where they look at 1100 in-

mates, and they looked at those who had the most violent kind of crimes -- not just murder, but aggravated assault, and armed robbery, and those kinds of things -- then they looked at the people that had symptoms and histories of Post-traumatic Stress Disorder. What they found was that even if you do not have enough symptoms to achieve the formal diagnosis of Post-traumatic Stress Disorder that the more symptoms and history of trauma you had, the more violent your crimes were. That would be one particular kind of study.

The studies from Dr. Lewis, who has studied death row inmates, has found that these particular kinds of things go together in these people's lives. The first is that they have some kind of vulnerability. That generally means some kind of learning disability or some great -- like some kind of organic dysfunction, head injuries, things like that. Second thing that they typically have is some history of abuse, some history of neglect. The abuse could be emotional, physical, sexual. And they also, thirdly, have witnessed violence in their families. They have witnessed things being resolved by violence or other kinds of means. That seems to fit my test for Mr. McKinney and the testimony I heard in here today.

Q. Let me show you what I have as Exhibit 3 for identification; the study you just spoke about. Is this the article?

A. Yes; from Dr. Lewis.

Q. Would that assist in your pending -- assist the Court in understanding what you're speaking of today?

A. Yes, it's summarizing what I had said there; and that three aspects there come out of other research that she's done, but that essentially describes it there. So rather than reading all this research, you might simply make time to read that.

MR. ALLEN: Your Honor, I'd move to admit Exhibit No. 3 for identification, defense.

MR. STALZER: I don't have any objection, Judge.

THE COURT: All right. Exhibit 3 is admitted.

Q. BY MR. ALLEN: Doctor, did you also look at an article that was written by an attorney and a psychologist, Deana Dorman-Logan?

A. Yes; from 1992.

Q. Right. And that -- could you tell us what that article was basically about.

A. The article basically discusses going from being an abused child to having killed somebody. It talks about what is child maltreatment. It talks about physical abuse. It talks about physical neglect. Talks about sexual abuse. Talks about witnessing family violence. It talks about psychological maltreatment. Example: We heard today, it was like calling somebody stupid and saying they don't know what they're doing and ridiculing them. Also, isolating a child, exposing them to violence, leaving a child unattended, which is called "spurning" in the article, is another example of child maltreatment.

Q. In this case, in the evidence you heard today and speaking with Mr. McKinney, of all the maltreatment that's described in that article, was every one present except for the sexual abuse?

A. Yes.

Q. So that's physical abuse, physical neglect, the psychological abuse, and the witnessing of family violence?

A. Yes.

Q. Let me show you what I have marked as Exhibit 4 for identification.

A. Yes.

Q. Is that a copy of the article that I was just referring to -- or you were referring to?

A. Yes, it is.

Q. Would that assist the Judge in this matter to understand what we're talking about today?

A. Yes, I think so. It's also a brief article, and it goes through a number of these issues and has a good reference section.

MR. ALLEN: Your Honor, I move to admit Defense Exhibit No. 4.

MR. STALZER: No objection, your Honor.

THE COURT: Exhibit 4 is admitted.

Q. BY MR. ALLEN: Witnessing family violence or violence of a human nature, is that important in this diagnosis for Post-traumatic Stress Syndrome?

A. The child had Post-traumatic Stress that goes with the abuse and such. You can have Post-traumatic Stress from combat in Viet Nam, and from what we're talking about today, in witnessing the violence. We know in research that witnessing can be even more damaging than actually being the recipient of abuse. And although that doesn't seem, from common everyday kind of logic, like that would be the case, but it is.

And I would just mention by way of explanation that there is a helplessness that is involved when you're witnessing violent and violence and you're too small to do anything about it. We also know that it's a form of coercion that's used in concentration camps where you have to observe your colleagues, comrades, being abused and can't do anything about it. So it fits the pattern.

Q. So in this particular case, from what you heard from the witnesses and your discussion with them of the four young children and James being a participant in that, the violence upon his sisters and brother would be -- is more traumatic to him possibly than himself?

A. Yes.

Q. You testified earlier that the results of some of your testing show that James would not be a thrill-seeking type individual.

A. That's correct.

Q. Doctor, if -- if -- going along with that, would your diagnosis be that he be more of a person that would be a follower than a leader? I think you testified to something similar to that.

A. Yes. The test results show that.

Q. And that you heard testimony -- I believe you said that his personality testing was, quote, a loner type of a person?

A. Yes; in a sense that he's withdrawing and trying to numb out.

Q. He would be more -- a person more to likely avoid stressful situations than be part of them?

A. Yes.

Q. There was testimony at trial about a prior burglary before the homicides where James -- there was testimony by Chris Morris that James and him went into a house to burglarize, and there was an older woman sleeping in a bedroom; and someone came home and both James and this witness fled the house, not harming anybody.

Is that consistent with your testing of James?

A. Yes.

Q. Why is that?

A. Well, because you have a situation here where there's a big confrontation that can occur. If the person comes home in the midst of a burglary and you're going to stay there and persist in burglarizing this house because you've got the potential for aggravated assault or injury, who knows what's going to happen if a person has the -- has a gun? So by getting out of there and running away, he is essentially withdrawing from potential kind of conflict. That was like what he saw in his home when he was growing up. I've been involved in opposite cases of murder where a person has persistently stayed there, regardless and not even considered the possibility of violence.

Q. Let me throw into the mix of that a fact situation; that if there was testimony that James even had a gun, a weapon at that time period, and even had made statements about using that weapon if anyone was in the house or came upon him, is it still consistent with what your findings were; that he still left that home?

A. Well, I would say that saying something is one thing, and doing it is another. Let's take that example and see if we make some sense with the test data

that I have. One of the ways to avoid conflict is to -- in a prison setting is to do your own time and not violate the inmate code. So you basically -- if your other colleagues run out on you, then you need to run, too.

I think it all goes back into finding some psychological way to withdraw that might very well include physical withdrawal, but we have to look at the situation and see what the alternatives are that the man is faced with, because they may choose something that looks like it's in the behavioral withdrawal, but it's the best withdrawal response they could make at the time.

Q. So given certain options that James would have had in a situation, his testing shows his preference to be withdrawal from a stressful situation?

A. That's correct.

Q. Not going the other -- the opposite way?

A. That's correct.

Q. So given an option, if he can leave and not have a confrontation, the testing shows that would be the case?

A. Yes. If he's going to act in an aggressive way, I would want to look at the situation, see if there was some entrapment in that situation, where he was trapped or felt he was trapped, and if he actually tried to break out of the situation; to get away from it in some kind of way.

Q. What about your testing showing James' personality and this Post-traumatic Stress Disorder in regard to statements being made about using a gun or bragging about doing things? Is that consistent?

A. Well, one of the ways that you can avoid conflict is to appear to be a bad character. You can appear that, like, no one wants to mess with you. And I know that Mr. McKinney has spent some years in juvenile and adult prisons. And I have also spent some time there myself -- not as an inmate, but as a staff person -- and that's a very big -- that's a very real thing there.

Q. Are there doctors -- you've mentioned these articles before the Court today. Are there any other doctors in your field that have come up with similar diagnoses of Post-traumatic Stress Disorder in children and relating to violent crimes?

A. Well, let's see. Let me review what I've given you. The Oklahoma study, the study by Dr. Herman on the Complex Post-traumatic Stress, and of course, we have four pages of references there. There have been a number of professionals in the field have come up with the same diagnoses. They've put on workshops, seminars, they publish articles.

Q. So you're not alone in this field?

A. No, not by any means.

Q. Does a person who suffers from Post-traumatic Stress Disorder, do they suffer from this constantly or is this something that may rear its head under certain situations? Do you understand the question I'm asking?

A. I understand the question. It's a little more complicated. Let me amplify it as much as I can. First of all, we could think of it as there is the potential for the trauma to be re-triggered, if things happen that are similar to what happened when you're originally traumatized. That's the first part. The

second part is that some people have lived under such a state of trauma for so long that their level of arousal is just much higher on a normal basis than other people, even if they have gone through some isolated kind of periods of trauma.

The third part is that you have to adapt to this. It's not "you need to adapt to"; it's "cause you'll get along better in life." Your body has to do something to reduce this stress, and when the stress gets re-triggered and it's high enough, then a lot of poorly-judged things happen in order to reduce the stress. Because that's the primary kind of thing that must be done, because the body has got to maintain some kind of homeostatic balance. We may look at it objectively from the outside and say that was not a very effective way to handle that situation, but we're overlooking that this person had to reduce that stress in some way and that they're in a state where they're not thinking very well. So oftentimes, the first thing that comes into their mind is what they do.

Q. Will a similar event to the original abuse, or whatever that caused the stress to begin with, will that trigger this in a person?

A. Yes.

Q. So if a person's exposed to a similar-type situation, they can go into this; where you said they can make poor decisions just to get out of the situation?

A. Yes, which I might elaborate on little bit. The situation is if you received abuse at the hand of a female, then a female has a potential to re-trigger the trauma in the future. Okay. Now, that's balanced off by how well you're able to cope with it. So you

may start to get triggered, but you have some effective coping mechanisms so the trauma doesn't get out of hand. So it's not like every woman you see, all of a sudden you're going to be traumatized. Often-times -- give you an example from Viet Nam.

I was in a group years ago, and they had some artificial plants, and they moved them all over to one side of the room to make more room for everybody, and half of the veteran's were freaking-out that evening and half weren't. And as we discussed it, it turned out that the people that were freaking-out had served in the Mekong Delta where there was a lot of foliage. The ones that were not freaking-out had served up north where there were a lot of boulders and rocks. Sometimes vegetation, humidity in the air, a particular time of day, a season, a Christmas, you're traumatized at Christmas. So you have the Christmas situation and all those things. Any of those stipulated could be conditioned to re-trigger the trauma.

Q. Now, in this particular case with James McKinney, the -- would it be fair to say that his stepmother was a primary abuser to cause stress in James?

A. Yes, she's the obvious abuser, although absent fathers are also very damaging. But she's the -- she would be the most likely candidate.

Q. And you haven't thrown in the absent father, though, in this case?

A. We know that young boys have difficulty growing up when they have absent fathers. It doesn't always hold true for everybody, but there's a real vulnerability there.

Q. Now, I asked earlier and you read the information about the homicide from Detective Neuman's report. Correct?

A. Yes.

Q. All right. And let me give you a hypothetical, and just in relation to Mrs. Mertens' death. That was the woman that was found dead in this matter. Do you remember reading about that in your reports?

A. Yes.

Q. Just so you're with me, okay, assume James is inside that home and that Mrs. Mertens, the victim, is startled by James being in there, possibly one or two other people and a fight ensues between them or a fight ensues between the victim, Mrs. Mertens, and another person. And knowing that the stepmother, Shirley McKinney, was the abuser, the main abuser in James' life, could you say that would or could have such an event occurred, it would trigger this response in James McKinney?

A. I think most certainly it triggered something. We just have to try to look at what his coping mechanisms were at the time and whether they could override that. There may have been some other things going on. What kind of condition is he in personally when he gets into the situation? Has he slept? Has he been under stress? Those kinds of things, But I would expect that situation to trigger something.

Q. Could such a situation as I described cause a person in, like, James' -- in this situation, to have diminished capacity?

A. Oh, yes. That's very possible. It would be nice to have a videotape of the situation and then, you know, I could tell you for sure beyond a reasonable psychological certainty, but I think we have a high likelihood of that occurring here.

Q. And from your diagnosis and what we talked about before is that James is more likely to avoid stress, avoid situations, than getting involved?

A. Yes. That's correct.

Q. When I -- when I asked you about the diminished capacity and someone in a situation such as that, what do you base that on? Could you expand on that for us a little bit -- a little bit for us?

A. From a psychological or from the legal --

Q. I guess if you could tie it together.

A. All at once. Well, from a simple -- my point of view, we've heard about people having flashbacks, okay, and when they flashback, the perception is they're re-living something that occurred at some other time, and so they're not in touch with reality.

Here now it gets a little bit more complicated than that, because you have to balance off what their normal way of coping is; how they have adjusted to this potential to have this re-triggered. Witnessing violence as a child, being a recipient of violence, is a life-threatening kind of situation for a child, because life to them and security to them is the secure home life. It insulates them, and the parents insulate them from the big bad world out there.

When you get involved in a burglary kind of situation and there's violence going on there, this is a potentially very, very dangerous kind of situation

which is different than the one you gave me earlier when they got out of the burglary situation. I would expect some kind of reflexive kind of thinking, some emotional kind of thinking rather than logical, reflective assessment of the alternatives and an intelligent discussion about what's the best way to get out of that. In that sense, that's psychologically diminished capacity.

Q. Now, taking that, the part that you discussed a while ago that you found in James McKinney -- that he has a disability related to processing language information, both in auditory and verbal nature --

A. That's correct.

Q. -- throwing that into the mix -- could you expand on that?

A. Well, again, we have -- we're going back to Lewis's Triad. We have a vulnerability here and processing information -- I think I looked back at his educational records. His language-kind of skills were always deficient, so that was present from a long time back before any kind of drug abuse or any kind of criminal activity. Then we have this situation that is psychologically pretty much identical to the life-threatening situations he was in as a child. I could not believe that he was processing information in an effective way at that time, and I would expect that whatever popped into his head or whatever kind of adapting -- adaptive behavior he'd used in the past would be automatically utilized at that time, without much reflection at all.

Q. From what you heard of Diana -- from Diana McKinney of her own experiences, is it -- is it unusu-

al for someone who went through that experience like her brother James to repress things and forget about details?

A. No, that's very common. It's a defensive mechanism that, again, the body needs to survive.

Q. So her not remembering all the details of what happened wouldn't surprise you of her early childhood years?

A. No. Those are very, very painful and disruptive to her thinking kind of processes, and I think people -- most people have heard about it by now. There's so much publicity about it of people having recovered memories of things that happened a long time ago. Some things are not remembered at all, but it's also a reality that some people don't remember things for periods of time.

Q. And that will be true of James McKinney in discussing this time period in his life?

A. Yes.

Q. He's been repressing things or wouldn't remember or tell you everything about it, even if they remembered?

A. The strategy is to focus on something else and simplify things and get away from the subject.

Q. So they may not even tell you everything they really know about what happened? Is that common?

A. We have to look at that from the point of view of whether a person at a moment in time has access to that memory. We can't think of it as, "Well, they have access to it, but they're deliberately-not telling us." It's an automatic kind of process that takes place beyond conscious awareness.

Q. And it -- abuse of -- physical type of abuse, I think, would be something that everybody would relate to as a traumatic experience. But what about neglect and things of this nature? Of living in conditions and going to school in conditions that these children were going through? Is that traumatic as a physical abuse?

A. Yes, because if we go back to the -- it's not really an analogy where I discussed earlier about life-threatening events for a child. A child can feel as if they're -- they could lose their life quickly if there's not safety, if there's not food, if someone isn't there to kiss the ow-ie and make it go away. Those seem kind of simple things to us as adults, but they're very, very big for children. Children's brain, their cognitive analytical brain, does not develop as fast as their emotional brain, so when these things happen as children, they think about these from the emotional point of view; not from an objective point of view as we do. Now -- and from that emotional point of view, you could be losing your life real quick and that's what creates all the trauma.

Q. And would the same thing be true for psychological maltreatment or the verbal abuse that was testified to along with the physical and the neglect? Again, is that -- none of these are stronger than the others. Is that a fair statement?

A. Yes. The emotional abuse is best explained by, you don't know who you are when you start out in this life, and people start telling you who you are. If people are saying that you are stupid, that you're nothing, that you don't count, that's like taking your life away.

MR. GONZALEZ: Could we have a minute, your Honor?

THE COURT: All right.

Q. BY MR. ALLEN: Doctor, again, you went through the police reports, and I'm going to give you another hypothetical, that it goes with the evidence in regard to Mr. McClain; the fact of him being asleep; and shot, basically, while sleeping; and then a burglary taking place.

In your assessment of James McKinney and what we've talked about this afternoon, and someone avoiding stress and taking the option of running away or something like that, does that type of conduct show that's something that James McKinney would do in a situation like that?

A. Are you referring to going back into the bedroom and shooting someone who's asleep?

Q. Right. And then burglarizing a home or doing that first off in regard to thrill-seeking and what you testified to earlier.

A. That would be the exact opposite of what I would expect from Mr. McKinney.

Q. Could you expand on why in relation to what we talked about earlier?

A. Well, going in and just cold-bloodedly shooting somebody can be a rush, a high for thrill-seeking, sensation-seeking sociopaths, just as a serial killer can get almost like an addiction to killing. There is a high that's associated with that. We also know that among sex offenders, there's a difference between the ones that are a power thrust, kind of take control of things, and getting enjoyment out of intimidating

and dominating people. Mr. McKinney's tests results, in the more than eight hours I spent with him, did not indicate that he was that thrill-seeking kind of, execution-kind of person. He'd rather withdraw from the situation.

Q. And you just said you spent eight hours with him doing not only these tests, which were -- I don't know even how many -- five or six tests that you did, and you also spoke with James for a period of time?

A. Yes. I did.

Q. Okay. So it wasn't just a matter of filling out these test forms that you concluded your opinion on. Correct?

A. Oh, no. I gathered a history from him of this abuse and I corroborated that with two other people; with Susan Sesate and Diane McKinney. And I didn't really find any areas there where there were inconsistencies.

Q. You spoke with Susan and Diana after speaking with James. Correct?

A. Yes, I did. Right. That's correct.

Q. Right: So you first got that information from James, and they basically backed that up and went into greater detail?

A. Particularly Susan Sesate. This was very difficult for Diana McKinney, I think, to go through at such a young age. And again. I would not expect her to remember all that detail.

Q. Dr. McMahan, after doing all this testing and observing James and actually observing the testimony today, do you have any doubts about your diagno-

sis of James McKinney having Post-traumatic Stress Disorder?

A. No. None.

MR. ALLEN: I have nothing further, Judge.

THE COURT: Dr. McMahon, can you be back here on Monday?

THE WITNESS: What time? The afternoon?

THE COURT: One o'clock.

THE WITNESS: Yes.

THE COURT: Counsel, until 1:00 o'clock on Monday then, we'll stand in recess.

(Court adjourns at 5:01 p.m.)

* * * * *

C E R T I F I C A T E

I, SUSAN D. WENTLEJEWSKI, do hereby certify that the proceedings had upon the hearing of the foregoing cause are contained fully and accurately in the shorthand record made by me thereof, and that such shorthand was reduced to writing under my direction and the foregoing 149 typewritten pages of said transcript contain a full, true and correct transcript of my shorthand notes taken by me as aforesaid, all to the best of my skill and ability.

DATED, this 10th day of September, 1993, at Tempe, Arizona.

My Commission Expires December 30, 1995

/s/ Susan D. Wentlejewski
Susan D. Wentlejewski, RPR
Certified Court Reporter

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ERIN MCKINNEY,

Defendant.

SC No. CR-93-0362-AP

No. CR 91-90926 (B)

July 19, 1993

Mesa, Arizona

BEFORE: The Honorable STEVEN D. SHELDON, Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS
SENTENCING HEARING

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FOR THE DEFENDANT McKINNEY:

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Alex Gonzalez, Court-Appointed Counsel

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Superior Court Reporter

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P R O C E E D I N G S

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(The following proceedings are held in open court.)

THE COURT: We're back on the record in the sentencing in State of Arizona versus James McKinney.

And Dr. McMahon is on the stand still under oath.

Mr. Allen, did you have any additional questions at this time?

MR. ALLEN: Just a couple, your Honor, that I forgot to discuss with Dr. McMahon.

MICKY McMAHON, Ph.D.,

re-called as a witness herein, having been previously duly sworn, is examined and testifies further as follows:

EXAMINATION

BY MR. ALLEN:

Q Doctor, did you prepare a resume for the Court to put down your credentials?

A Yes, I did.

Q I'm going to show you what's marked Defense Exhibit for identification Number 5. Do you recognize that?

A Yes.

Q Is that the resume?

A Yes, it is.

Q Do you think it would help assist the Court in going over your accomplishments and your work in the area that we discussed on Friday?

A Yes.

MR. ALLEN: Your Honor, I move into evidence Defense Exhibit Number 5.

MR. STALZER: No objection, Judge.

THE COURT: All right. Exhibit 5 is admitted.

Q BY MR. ALLEN: Doctor, also you prepared a report on your findings in this matter, correct?

A That's correct.

Q And I think we talked briefly about this on Friday. In your report you -- it was your opinion that if the defendant was placed in a prison setting for a long period of time, that it was your opinion of the scores and your analysis of the defendant that he would not be a risk; is that correct?

A A risk for violence or escape?

Q Yes. Both.

A Yes.

Q And could you elaborate your findings in making this assessment?

A The previous testimony I gave about his tendency to withdraw under stress, his -- the option of which you would expect in someone who was going to be chronically violent; the data that I had previously discussed about the testing, where we utilized the norms from 400,000 inmates across the country, without any input on my part, kicked out that he scored like someone who would not be an escape risk or a risk for violence.

Q Previously you've worked a long period of time with the Department of Corrections?

A Yes.

Q And could you tell the Court what you were doing there and how long?

A I worked at the Alhambra Inception and Treatment Center. Primarily that had two parts to it. One was a psychiatric treatment unit licensed by Department of Behavioral Health Services and also a classification center that made initial classifications in the department as to where the person would stay, what institution around the state, and what security level they would stay in that institution.

Q In your overall analysis of Mr. McKinney, what would you assess his chances for rehabilitation if he was placed in the prison setting?

A Assuming that he has a long term in the Department of Corrections, that would be advantageous as far as addressing the long term trauma he's had and some of the maladaptive habits that he's devel-

oped as a way of coping with that, the burglaries and so forth, the drug abuse, those kinds of things. Department of Corrections would be the treatment of choice for him as opposed to an outpatient kind of setting when he comes in and sees someone once a week.

In the Department of Corrections you can manipulate the environment, the living setting, the rules in which they live under. And it's just much, much more structured and regimented than life in the community. And to successfully deal with some of his problems, that would be an essential ingredient.

MR. ALLEN: I have nothing further, Judge.

THE COURT: Mr. Stalzer?

MR. STALZER: Thank you, Judge.

EXAMINATION

BY MR. STALZER:

Q Good afternoon, Doctor.

A Good afternoon.

Q Dr. McMahon, you stated, I think, to some degree at length last Friday that you performed a number of what I'll call tests. Now, I say that in the generic sense to encompass any kind of standardized procedure for assessing or evaluating a person from a different number of avenues. Did -- strike that. In this case I think you said you gave Mr. McKinney an intelligence test?

A That's correct.

Q Could you briefly describe for the Court what is meant by an intelligence test? The function?

A Depending upon the intelligence test that you give, it has different functions. The one I gave is the most comprehensive and respected intelligence test that we give. It not only gives you three different IQ's, one in the verbal area, one in the performance or nonverbal area, and then an overall IQ, it also goes through eleven cognitive tasks, each one of which requires different cognitive skills to complete successfully. So that allows you to look at specific cognitive deficits a person might have even though their overall IQ appears to be average or slightly below average.

Q As well as it would give you an indication of cognitive assets?

A Yes, it would.

Q Did you administer an aptitude test in this case with Mr. McKinney?

A No, I didn't.

Q I may have misspoken in the materials that I received from defense counsel, and if I could make specific reference to the Wide Range Achievement Test, what is the function of the achievement test as compared to the intelligence test?

A The achievement test and the one you mention in particular is a well-known screening test to look at three levels of academic kind of achievement.

Q Is that -- is it fair to say it's kind of looking at what a person has learned?

A Yes.

Q In, in this case, also, I think you spoke of the Luria, L-u-r-i-a, Nebraska test?

A Yes.

Q What is the general function of that test?

A That's our most comprehensive, well-researched battery, which have 12 clinical tests and multiple other factors that are involved. That was designed to essentially test for neuropsychological dysfunction. Neuropsychological is a form of behavior that is often indicative of brain dysfunction.

Q Also, I believe you stated you administered the Woodcock-Johnson Reading Test.

A I administered the reading comprehension subtest from the Woodcock-Johnson to supplement the reading pronunciation test that I had given from the Wide Range Achievement Test since they tap two separate skills.

Q With the Woodcock-Johnson that you administered on the subtest, is it basically to determine Mr. McKinney's reading level?

A I gave it for two reasons. The first was to determine how well he comprehended what he read.

Q And that is something the test can tell the person who administers the test?

A Yes. It's scored objectively, and there are norms that will tell you what grade level the person obtained and also the age equivalent of a person who scored at that level.

Q Did you cover your second function or purpose for giving this?

A No. The second function has to do with a higher order mental processing function that people have which is different from the basic kind of input, simple input kind of functions. For example, if you're reading it's one thing to know how to pro-

nounce the words, it's another thing to know what the word means, it's another thing to know what a phrase means. And in that sentence you typically may have two or three phrases, some of which will qualify.

You can see that it gradually starts to get more complicated. And a person that has a deficiency in that area could have a number of impairments. He may not be able to remember all of the phrases that are in the sentence. If he does, he may not be able to combine them. And even if he's able to do that, he may not then be able to sort through possible alternative meanings that the sentence has.

Q Now, that's something that is specifically designed by this test to accomplish, to sort out what you've just described?

A The test -- it does not have a norm for that. The norm is included within the reading comprehension score. So what psychologists typically do is see if they get the same score when someone is doing a simple pronunciation of a word, with the comprehension score, which is more complicated. If you get a discrepancy, then you need to consider why you got a discrepancy. And that's, that's at the point where you get involved in the second reason that I gave him that test.

Q But I guess if you could give a yes or no answer, because I'm a little bit confused. As to your second purpose, to address that purpose, is that Woodcock-Johnson designed to specifically confront that particular little issue that you want to investigate?

A Yes, it's one of a number of tests that will do that. It's not the only one. It's not the most sophisticated. But it does tap that, yes.

Q What type of test is the 16PF?

A The Sixteen Personality Factor Test, as I testified to earlier, is a test that attempts to look at basic normal kind of personality as opposed to mental illness, psychopathology, those kinds of issues.

Q Is it a fair statement to say that it kind of develops some general personality or character traits of an individual?

A It looks at various dimensions of a person's personality. I'm using dimension rather than characteristics because I want to make sure it's clear that this test was researched statistically so that these particular 16 dimensions were not something that psychologists just dreamed up. They gave a great number of people this test. And they statistically then analyzed the test. And they found out that people in general will come up with 16 separate kinds of personality characteristics. And each one of those can be on one side or the other.

For example, there is the sober/serious aspect of the dimension, which I testified to earlier that Mr. McKinney has, the opposite of that is a happy-go-lucky, excited kind of personality characteristic. So each dimension has two extremes.

Q Much like if we said someone was introverted and another person might be extroverted?

A Yes.

Q What is the CAQ?

A The Clinical Analysis Questionnaire is a test designed to look at psychopathology. Again, it is factor analyzed.

Q What do you mean by that?

A Well, that was what I explained earlier, that you give a lot of people the test, and then I statistically look and see in reality how many separate kinds of characteristics do people have on this test, as opposed to someone saying well, I think they ought to have this and they ought to have that.

Q Is it related somewhat then to the 16PF?

A The questions are different. One deals with more normal personality; the other deals with the psychopathology. The statistical process of constructing those tests is identical.

And I had one other thing to mention about the CAQ, if I might.

Q Go ahead.

A It is sometimes used as a substitute for the MMPI, the Minnesota Multiphasic Personality Inventory, which is well known in court settings. The 16PF has many, many more questions that -- the construction of the test was not factor analyzed initially. It was more constructed upon the lines of clinicians saying that we think there is such a thing of sociopathic schizophrenia. There is deviancy depression and so forth and so on.

The items, the test questions on the MMPI are much more blatantly bizarre than the ones on the CAQ, which is important because a CAQ will get at -- will avoid people that are trying to make themselves look bad being able to easily do so because the items

are more subtle on the CAQ. It's not as easy to figure out how to answer it.

Q Well, while you're on -- you brought up the topic of the MMPI. Do you prefer one over the other?

A It depends upon the situation. When I'm involved in a situation where there is a history of major mental illness such as schizophrenia, such as manic depression, bipolar, those kinds of things, then I'm more apt to do that. I'm also more apt to use it in a situation where I'm not looking at how a person may adjust to a prison setting, because the research is better on the CAQ than it is on the MMPI as far as adjusting to a prison situation.

Q With respect to an intelligence test score by itself, is there any correlation between one's score and the mental illness of PTSD?

A The -- if you have a lower score and you have particular cognitive deficits, it makes you more vulnerable to the same amount of trauma that, of course, creates the PTSD.

Q In general, is there any correlation between one's aptitude -- achievement test score, rather, excuse me, and a correlation with PTSD?

A Again, if someone has a poor academic achievement level, school is not a relaxing experience for them. It's not one that is increasing their self esteem. It's something that they would like to avoid. But mandatory attendance requires that they stay there in that setting.

Q So you're saying then if the -- the lower the achievement score, the more likelihood someone could suffer from PTSD?

A No. I'm saying the lower the achievement score, the more vulnerable a person is to trauma conditions that could by -- in and of themselves create post-traumatic stress.

Q There is location on the Luria Nebraska and a diagnosis of PTSD?

A Again, the Luria Nebraska is looking at cognitive kind of impairments that would make someone more vulnerable to the same kind of traumatic conditions.

Q Are we talking about organic impairment?

A There are studies that show correlation between neuropsychological dysfunctions on the Luria Nebraska and organic brain dysfunction. However, it is sometimes risky to try and identify the exact location of the brain dysfunction from the neuropsychological testing.

Q You didn't find any dysfunction with respect to Mr. McKinney and the Luria Nebraska; is that correct?

A I found the learning disabilities that I discussed previously, arithmetic and writing, which was consistent with the language deficiency from his school records. I did not find a neuropsychological dysfunction on the Luria Nebraska.

Q What is the function of the Williams -- Williamson Sentence Completion?

A It is a personality psychopathology kind of test that is not objective like the 16PF or the CAQ. The way I was trained to use it was rather than give it to someone and have them write out their answers when they complete a sentence, I would read them

the first part of the sentence and then have them spontaneously complete the sentence, which allows me to notice nonverbal kind of responses such as their voice cracking, such as anger, such as excessive movement, agitation, such as spacing out.

Q Well, with those factors considered by you, what does that help you to determine in the end?

A Well, since some of the sentences are about particular topic areas, for example, "when I'm all alone," okay, that puts a person in the situation where they're all alone. And if they're saying they're sad or if they don't say anything at all, then you're getting indications that being alone is a potentially difficult situation for them.

You ask them some questions about what do they do when they feel badly, so you get some indications of how they deal with bad situations when they are feeling badly. So you're able to tie some of these emotional kind of responses to specific situations, which you can then pursue later in your questioning.

Q Did you notice any correlation between responses on the Williamson and your diagnosis of PTSD with respect to Mr. McKinney?

A Could I have a moment to refer to my notes?

Q Sure. Are you referring to the Williamson form that you wrote out?

A Yes. The responses that I saw on the Williamson were consistent with him being sad when he's alone, somewhat depressed and a loner.

Q What number are you referring to?

A I don't have it right in front of me. I'm just reading from my summary notes of that.

Q Did Mr. McKinney have read to him all 39 phrases that are listed on the form that was given to me, the copy of the Williamson?

A No, he didn't.

Q And any reason why he didn't?

A I was using that to get an indication of his nonverbal kind of behavior, emotional reactions in certain areas. I didn't really need to go into all of it because I was already giving him a 16PG and a CAQ and was getting a lot of data there that was more objective than the Williamson. I used that to -- as a clue to search other places for follow-up questioning, not as a definitive kind of result.

Q So then it would be accurate to say you didn't think it would be very helpful to read to him Number 31, which states, "Brothers and sisters," and to give a response to that phrase?

A I had previously talked with him about brothers and sisters in the clinical interview. And we had gone into great depth about him witnessing Dianna being abused and beaten by her stepmother. And so from -- for my purposes, I had a good feel for the situation that he had with brothers and sisters. And I, I just didn't need to go any further into that.

Q Do you have your copy of the Williamson with you?

A It may take me a while to find it here. Do you have an extra copy I could look at?

Q Well, I have my copy. I'll be more than glad to give you mine.

Is it fair to say the Williamson is a projective type of device?

A It's much more projective than the CAQ and -- Clinical Analysis Questionnaire. It's not as projective as, say, the Rorschach.

Q You asked Mr. McKinney Question 29, didn't you?

A Yes.

Q What -- how did you present the question to him, the best you can remember, and what did he say, if anything?

A Prior to giving the test I give the instructions. The instructions are: I'm going to read you some sentences and I'm going to stop in the middle of the sentence. And I would like you to say the first thing that pops into your head. No one thing means much of anything. I'll look at the entire pattern of scores to the test and compare it to people that I have known in the past for a long period of time. We find that people that have the same overall pattern have a lot of things in common.

Q Now, just regarding 29, what did you read to him and what did he say?

A I said, "The nicest thing that has happened to me was." He paused. "I don't know." I'm sorry -- that's not 29. That's 28.

Twenty-nine: "I sometimes wish I were very good at." Pauses for about six seconds. "Stealing." And then I say, "Well, did that just pop into your head or is that true?"

A He said, "That's true. If I'd been any better I might not got caught."

Q If you could answer yes or no, did you consider that statement in your final assessment of Mr. McKinney?

A Yes.

Q When administering the Williamson, were you taught to ask all of the questions that are on the form -- and those according to what I have been given, number 39 in total?

A Item Number 39 or 39 questions total?

Q Thirty-nine questions.

A I was taught to utilize those items that in my judgment appeared to be most applicable to the person that I was evaluating. If it was the only test that I gave, I might consider giving all of them in order to get the maximum amount of data from that semiprojective test that I could.

Q So, in essence, not only is the test itself somewhat subjective, it's subjective on your part as to which questions of the 39 you or someone else might ask the person to whom it's being administered?

A That's correct.

Q Does Mr. McKinney have a learning disability?

A Um, he was not diagnosed as having a learning disability in the school system, that I was able to find out from records available to me. His performance on the testing that I gave, plus the language impairment on the educational records that are given to all of the students indicated to me that he had a learning disability.

Q Is it possible what you consider to be a learning disability is a result of basically lack of attendance in school?

A The processing of information is something that is different from the actual content of what you are taught in school. You can have a processing difficulty whether you are processing information outside of school, in your home, in your work, with friends, or whether you're processing information in school.

Q Could you answer yes or no, I guess?

A I found a learning disability, yes.

Q But can it be the result of his lack of attendance?

A In my opinion, no.

Q Are there learning disability tests that could be administered which would accurately assess whether or not, in fact, Mr. McKinney has a learning disability?

A There is --

Q If you can answer yes or no.

A There are more comprehensive tests, yes.

Q You didn't administer any of those comprehensive tests, did you?

A No.

Q Are you aware that Mr. McKinney denied being in special education while in school?

A Yes.

Q You stated you reviewed the educational records of Mr. McKinney. Did any of them reflect he was learning disabled?

A There was no specification for learning disability on the records.

Q Was there any type of certification or statement as to whether or not he was in any type of special education programs while in school?

A There was no such statement.

Q Yesterday -- I'm sorry. Last Friday, rather, you were talking in part about some crimes being committed for the thrill of it. Do you recall that?

A Yes.

Q Do you believe people who commit violent crimes do it for the thrill of it?

A You have to look at the individual case. There are certainly people who do commit crimes for the thrill of it.

Q And there are people who do not commit violent crimes solely for the thrill of it. Would that not be correct?

A That is also correct.

Q You indicated Friday and today it's your belief Mr. McKinney is not an escape risk. Is that accurate?

A That's correct.

Q Were you aware of a report generated by the Sheriff's Department concerning a potential escape risk?

A I was just shown a report by the defense before -- a few minutes before I started testifying, that

I understand that you supplied them. And I read that report. Is that the one you're talking about?

Q Yes, sir.

A Yes, I read that.

Q Having read that report, does that change your opinion as to the issue of escape risk?

A No.

Q You indicated at length Friday about the neglect or abuse that occurred in the McKinney household, namely at the hands of maybe Mr. McKinney or Ms. Shirley McKinney when James was growing up. Did -- is it correct you saw no signs of sexual abuse in the home with respect to Mr. McKinney?

A He denied any sexual abuse.

Q Are you assuming or under the belief there may be or there may have been sexual abuse? Mr. McKinney also denied any learning disability or being in Special Ed.

A He denied being in Special Ed. That's the information I have. It can take a very long, protracted period of time to uncover potential sexual abuse. Sometimes you can have people in therapy for months or even years. So when that is revealed, one should also be quite cautious in just assuming that it occurred. There are false memories of sexual abuse that occur. So I did not have him in treatment. I did not have six months or a year to explore that there might have been sexual abuse, even though he said it did not occur with him.

Q Is it correct -- and I may have misunderstood as I was processing information last Friday, but the primary, if I could call it, motivation or impetus for

you to come to this conclusion of PTSD, is it based primarily on the interviews of Susan Sesate and Dianna McKinney, as well as the statements by James McKinney?

A All of those, plus the testing. And also the medical treatment in the jail.

Q Now, is it correct of all the tests you administered with Mr. McKinney, standing alone those tests cannot tell you if a person, and even specifically Mr. McKinney, would suffer from PTSD?

A Could you explain what you mean by "standing alone"?

If you just give a test, namely an intelligence test to Mr. McKinney, that test by itself with the scores that you receive back after it's scored, can that tell you someone suffers from PTSD?

A Are you saying that if you were given the test, if you were given the results of Mr. McKinney's tests, that you could read that test, and you, yourself, it would tell you that he had PTSD or didn't; is that your question?

Q Yes, sir.

A No. It will not do that.

Q Any of the other tests do that?

A There is no test -- the MMPI has two PTSD scales, but they're only effective with the Vietnam veteran kind of situation. You must --

Q That's an example?

A All tests require that an expert be part of the decision-making process, and they review the tests and interpret them. And our ethics require that we

also look at background history and other kinds of information before we come to a decision like that. You never want to come to a decision just based on the test itself.

Q How frequently do you give estimated MMPI scores when the test is not administered?

A I, myself, don't give estimated MMPI scores.

Q Did you administer an MMPI to Mr. McKinney in this case?

A No, I didn't.

Q Did you ever submit any reports with estimated MMPI scaled scores for the various scales on that test?

A The normal printout from Dr. Eber's battery, when I sent it back to him to score, will include an estimated MMPI, which I never looked at.

Q But you saw it was there?

A I know it's there because I've looked at other kinds of packages that I've obtained from Dr. Eber. I did not look at it on Mr. McKinney. I -- if I was going to use an MMPI -- I would personally want to give an MMPI before I started interpreting that type of a profile.

Q Last Friday you indicated that Mr. McKinney had no major infractions while in prison. Do you recall stating words to that effect?

A That was the information that I got from the defense. There were some minors, but he had never lost any time through any disciplinary kind of actions in the Department of Corrections.

Q That, that particular information you said by the defense, how was it submitted to you? Was that oral information or written information?

A That was oral information. I asked if they had Department of Correction's records, I would like to see those. They did not have that. They gave me the oral information that I just gave you.

Q Did you inquire where that oral information came from, assuming that neither of the defense, whoever they may be, work for the Department of Corrections and was familiar with Mr. McKinney's file that may be down in their records section?

A My recollection was that they had gotten the information from Mr. McKinney. I do not remember them telling me about getting information from any other kind of source.

Q Mr. McKinney told you that he would drink beer and smoke marijuana on a particular basis of set frequency?

A Yes.

Q Did he specify to you how frequently he would drink beer and smoke marijuana?

A Yes. I think I previously testified to that.

Q That fact of drinking beer and smoking marijuana, is all that different from many other individuals who are sitting in the Maricopa County Jail today?

A The ones that I have seen at the jail would typically drink more beer, not smoke as much marijuana.

Q I guess what you're saying is the two have been found to be kind of side by side, but the fre-

quency may change as to consumption of either beer or marijuana?

A Most people who use marijuana also drink beer. They typically go together, particularly in younger people. I can just tell you my professional experience with dealing with people in the jails and prisons. But I don't have right off the top of my head any scientific studies that have surveyed that, although I am familiar with studies that typically show multiple drug abuse among most abusers.

Q In speaking with Mr. McKinney on drug abuse or drug use, I think you indicated he used PCP?

A Yes. For a period of about three months he told me.

Q Did he say how frequently during that three-month period he used PCP?

A Yes.

Q What did he say as far as the frequency of its use?

A Let me refer to my notes.

Q Sure.

A He used the PCP sprinkled on marijuana, colloquially known as sherm, for three months, one to two times per week. I think I testified that he discontinued that because he felt like he almost killed himself.

Q Did this -- strike that. Are you aware that he told the probation officer that he used it three times?

A No.

Q Did you read the presentence report?

A I'm not -- let me check my notes.

Q Sure, go ahead.

A Yes, I did.

Q You didn't note the discrepancy then between his frequency and what he was telling the probation officer then, correct?

A I noted a discrepancy. You asked me what my information was, and I told you that.

Q Right. I asked if you were aware that he told the probation officer --

MR. ALLEN: Your Honor, I'm going to object to foundation, the exact part of the presentence report Mr. Stalzer is speaking of.

Q BY MR. STALZER: What's the date of the presentence report that you have? Is that the 7th?

THE COURT: Mr. Stalzer, how many presentence reports are there that you might be referring to, if there is some confusion?

MR. STALZER: There were two prepared, your Honor.

THE COURT: All right. Then could you refer for the record then, when you ask Dr. McMahon about something in the presentence report, which report you are speaking about, so that Mr. Allen will have an opportunity to review that with you?

MR. STALZER: Yes, Judge.

MR. ALLEN: I'm also going to object to foundation in regard to the accuracy of the person who wrote the report. She's not present here today. We don't know for sure if that's an accurate statement or if that's a typographical error along this line. I think we've got a problem here.

THE COURT: That objection is overruled.

Mr. Stalzer, you may proceed.

Q BY MR. STALZER: Do you have the presentence report, Dr. McMahon?

A That's one dated January the 7th, 1992.

Q And from that date -- where are you reading for the date of the 7th? Where are you finding that date?

A I am on the -- actually page 3 of the arrest history. Let me go back. Okay. Page 16 also says the 7th. I'm reading from page 16.

Q Okay. Lower right corner?

A That's correct.

Q Okay. We have the same report.

A By Sandra Lewis George?

Q Correct. If you could refer to page 14, first full paragraph.

A Yes.

Q If you want to review that.

A Yes. I've reviewed that paragraph.

Q Were you aware of that fact -- I believe you said you reviewed this presentence report?

A Yes.

Q Did you overlook the fact that -- stated in that paragraph, first full paragraph on page 14 of the January 7 report?

A No. Since he told me he had used PCP more frequently than the report, I assumed the higher rate of PCP use in my review of the case.

Q You indicated that the defendant was more of a follower than a leader; is that accurate?

A Yes.

Q I may be mistaken, and I'm sure you'll correct me, but did you also indicate the defendant generally tries to avoid stress or stressful situations?

A That's not quite accurate. He tries to avoid those situations that are similar to the ones where he experienced initial trauma, the particular stimuli that are in those situations he tries to avoid. There may be other stressful situations that he would not try to avoid.

In addition, a person who has gone through this will try to become better at dealing with stress, and sometimes they will get themselves in some stressful situations in order to practice and to get better at handling this.

Q Were you aware that the defendant possessed a weapon at least during one burglary committed prior to the first killing, which was that of Ms. Mertens?

A Yes. I think that's the one where -- correct me if I'm wrong -- that they went into the house and then someone came and they left before the person got there. Is that the one you're talking about?

Q Yes, sir.

A I'm familiar -- well, I'm aware of that particular incident, yeah.

Q Were you aware that the defendant and his sixteen or sixteen-and-a-half-year-old half-brother entered three residences approximately a week before the killing of Ms. Mertens?

A I'm aware that they were involved in burglaries. The particular burglaries, the details, the dates, the frequency, I'm not aware of.

Q Were you aware that the defendant initiated or asked of his younger brother, the sixteen-year-old, about who had money so they could burglarize that particular residence?

A I was unaware of that information.

Q Were you aware that the defendant told the younger brother what should be taken from the residences, that being like smaller items, gold, cash, small handguns instead of large shotguns?

A I never saw any information about that.

Q Were you aware that the defendant tried to sell a victim's guns on the same day the victim was found dead in his home?

MR. ALLEN: Your Honor, I'm going to object. I think some of the facts that the prosecutor is discussing here were disputed as far as the -- I know we had the trial on this, but at least it was the defense position at trial that there was a question about the day from the two different witnesses, James and Julie Crow. We're getting into areas -- and I believe also to --

THE COURT: The objection is overruled.

But, Mr. Stalzer, it might be more appropriate to rephrase the question.

Q BY MR. STALZER: Doctor, were you aware that sometime after the second victim's house was burglarized, guns belonging to that victim were sold by Mr. McKinney and his other half-brother, Mike Hedlund?

A I'm recalling vaguely, and I'm not sure whether this is in talking with the defense orally or I read it in the synopsis that -- correct me if I'm wrong -- but one of the ways that the police identified Mr. McKinney and the others were through a process of attempting to sell guns and some of those people calling the police, if I'm not getting it mixed up with another case. That's a very vague recollection. Is that correct? Is that correct?

Q Generally correct, sure. These facts of selling a gun or guns, asking who has a lot of money, what should be taken from residences being burglarized, does that sound more like a follower or a leader?

A A person may be put in the role of a leader and that is not their typical style, if they have more experience in the -- than the other people in doing that. And they may very well give instructions. The data that I have basically says that that would not be a typical kind of situation that they would be involved in, like someone who really was an active leader who sought out those particular kind of roles and who would dominate other people.

Q Well, in light of all that, were you saying -- I'm not quite sure if you were saying those facts demonstrate more of a leader than a follower. If you can answer yes or no?

A I wouldn't be able to answer yes or no without knowing more information about it. On the surface it looks like they're a leader. But I would have to know more about that situation because it's out of character from the data D that I have.

Q The fact that Mr. McKinney was involved in burglaries, is that fact out of character from the data you have accumulated?

A No.

Q I think you were presented with a hypothetical about the defendant running or leaving the scene of one of the burglaries that occurred prior to the first homicide victim. And I think you said you had an awareness of Mr. McKinney going into a house with a gun. Do you recall that?

A Yes.

Q And someone -- were you aware of a fact that someone came home at some point in time during the course of that burglary that lived in the residence, or at least was coming to the residence?

A I'm not sure if it was the person who lived in the residence, but someone came and the -- there was an option of staying and continuing with the burglary or leaving, and that Mr. McKinney and others left as opposed to staying. That's all I'm aware of.

Q That leaving behavior, is that logical behavior if they didn't want to get caught?

A Yes.

Q Would you agree that such withdrawal type of behavior is not atypical behavior for many criminals?

A I would agree.

Q Let me present this hypothetical question to you. If a person says, "I'll shoot anyone," inside a residence that he or she anticipated on burglarizing to eliminate any witnesses who could later identify the burglar, would you consider that person to be a dangerous person?

A Is that a direct quote that I am -- "let's shoot anybody in order to eliminate them as being witnesses"?

Q That's my quote.

A Yeah, but that's -- the hypothetical includes that in it?

Q When a person says, "I'll shoot anyone who sees me during a burglary," do you consider that person a dangerous person?

A There's a difference between saying and doing. I would want to look at more information before coming to a conclusion on that hypothetical.

Q What about if I added the fact the statement may have been said in preparation to burglarize the Mertens residence and then a week later Ms. Mertens is found dead shot in the back of a head with a pillow over her head?

A Okay. So you're saying the hypothetical includes one moment in time where the person talks about killing somebody to eliminate witnesses, and then we go to a second moment in time, seven days later, where in fact a person is killed in a burglary kind of situation?

Q Yes, sir.

A And so the question is would I consider them a danger?

Q A dangerous person.

A Yes.

Q What about if the hypothetical changed and now we insert the defendant made that statement?

A Yes.

Q You'd still consider him a dangerous person then?

A Yes.

Q Are you aware that the defendant has denied having been diagnosed with any mental condition?

A Yes.

Q Now, you have said the defendant suffers or has a mental illness of PTSD. Can a person have PTSD and commit murders with full awareness of his or her acts?

A Yes.

Q Now, last Friday Mr. Allen presented you with a hypothetical regarding the Mertens homicide. And I think you spoke briefly about the McClain homicide which occurred approximately two weeks later.

Not -- strike that. Is it correct, you do not really know what happened for a fact inside the Mertens residence? Would that be accurate?

A Yes.

Q And I believe with the hypothetical drawn by Mr. Allen last Friday, he presented a scene where two or more people enter the Mertens residence, and I believe he said Ms. Mertens obviously is home. There is some kind of confrontation, possibly between a second party and Ms. Mertens which starts into a fight. Do you recall that portion?

A Yes.

Q And I believe Mr. Allen's hypothetical was Mr. McKinney is somewhere observing this confrontation between a co-defendant and the victim. Correct?

A Yes.

Q Not knowing what really happened in the Mertens residence, is it possible that the defendant committed this murder and was involved with a full awareness of all the acts that took place inside?

A Possible, yes.

Q In other words, there could be no diminished capacity?

A That's possible, yes.

Q Just as possible as your claim that he suffered from diminished capacity under the hypothetical?

A No. I have an opinion about which is more likely.

Q I didn't ask that question.

One thing that was somewhat sketchy in the hypothetical, still dealing with Mertens, does your ultimate conclusion under Mr. Allen's hypothetical about diminished capacity, because of what the defendant sees someone else doing with the victim, does, that change if we change the hypothetical to reveal the defendant provokes Mrs. Mertens first without her provoking him in any way of a physical or verbally abusive nature?

A I would have to know more detail about the nature of the provocation and what went on just before that.

Q Let's assume that the defendant goes into the house. Let's assume the defendant goes into a room where Mrs. Mertens sees him. And let's assume she screams because of the alarm it would cause a female in her own home alone.

A Yes.

Q Would those facts -- does your ultimate conclusion change?

A I cannot answer your question because you're not giving me information about potential triggers that are similar to the trauma situations he went through. You're looking at it from an objective point of view, which makes some logical sense, but that doesn't let us know anything at all about the condition connections that were present in the defendant.

Q So you're saying I didn't give you the trigger mechanism for PTSD?

A You're not even discussing potential triggers. You're discussing objective kinds of situations that don't -- I testified earlier that if we had some kind of videotape or something it would be able to identify potential kinds of triggers there. But these are just objective kind of situations that we then have to make a leap and to decide that anyone would, that was in a situation like this, would be aware of what they were doing and that they were provoked and that they provoked someone else and that they killed them.

Q Now, that's bringing us to the McClain homicide. You are aware a jury convicted Mr. McKinney of First Degree Murder in that case, correct?

A That's correct.

Q Based on what you know about that case, is it not correct Mr. McKinney wasn't suffering from any mental -- excuse me, diminished capacity during the commission of that crime, the homicide?

A From what I know, which I testified to earlier, I think with reasonable psychological certainty, I'm

willing to believe that the situation triggered a response. What I am unsure of is what kind of coping mechanisms were used to handle that and how effective they were.

Q Now, are you saying he did suffer from a diminished capacity during the McClain homicide?

A I'm saying that, which I testified to earlier, that the situation was so similar to past traumas that I'm sure that the PTSD was triggered to some degree. We have to balance --

Q Let me interrupt you. Well, a yes or no. Is he suffering from diminished capacity or experienced diminished capacity at the time of the McClain homicide?

MR. ALLEN: Your Honor, I object. It's just that I think the doctor is confused about which homicide that the county attorney is talking about. I believe he's -- when Mr. Stalzer is saying McClain.

MR. STALZER: McClain.

MR. ALLEN: I think the doctor is thinking of Mrs. Mertens.

THE WITNESS: Oh, that's right. I am. I apologize.

MR. STALZER: Do you two have telepathy?

THE WITNESS: Well --

THE COURT: Mr. Stalzer, would you rephrase your question?

MR. STALZER: I will. And I'm sorry if I confused you.

THE WITNESS: I think the error was mine. You said Mertens and I -- I mean, you said McClain and I thought Mertens.

Q BY MR. STALZER: It's been long days, I know. You're familiar with the McClain homicide, that was the man that was shot in his bedroom?

A Yes, asleep.

Q In that case, based on facts you have available to you, past, present, testimony last Friday, everything that has come into your mind in reviewing the case, was Mr. McKinney experiencing diminished capacity during the commission of that homicide?

A I don't have enough facts to say that he was suffering from diminished capacity at that particular time. I think it's in doubt as to whether or not he was the person who actually did the shooting in that murder; or am I incorrect?

Q Well, I don't know. The jury said guilty of First Degree Murder and that's what I have to go on. So, you know, as to whether he's not the person or if he's -- well --

MR. ALLEN: Your Honor, I'm going to object. The verdict by the jury that Mr. Stalzer is trying to get the witness to answer was a general verdict as to First Degree Murder. It was not a specific finding that Mr. McKinney committed the murder premeditated, that he was the one. The jury never specifically determined that issue.

THE COURT: What is your objection?

MR. ALLEN: That this is a misleading question.

THE COURT: Objection is sustained.

Q BY MR. STALZER: Doctor, with the hypotheticals that Mr. Allen submitted last Friday and the ones that I've created today, is it accurate, the bottom line, there's a certain amount of guesswork that we're asking you to go through in coming up with an assessment or diagnosis with respect to one's mental condition at the time of a crime?

A My profession deals with probabilities. It does not deal with certainties. And so that's not an unusual situation to me, for me to be placed in. All I can do is say that I have a -- my opinion with reasonable certainty is such and such, or it can be that I cannot make a decision because I don't have enough information.

Q I think earlier you indicated, as well as on Friday, for sure that there was a low likelihood of recidivism by Mr. McKinney?

A I don't think I referred to recidivism. We referred to violence and escape risk. Correct me if I'm wrong.

Q Did you ever refer to recidivism in any of your reports, specifically a psychometric report dated April 30th, 1993?

A This must be Dr. Eber's printout?

Q Correct. It has your name in the upper right-hand corner of the first page.

A Right. I was the one that requested this. And so the computer just prints that out.

Q Well, then what is printed out, what, on page 2, second to the last paragraph, where it states, "no particular likelihood of recidivism for this client," do you agree or disagree with that statement?

A Okay. I'm on page 2. And there are multiple page twos here. Which page 2?

Q Well, it talks about factors relating to recidivism.

A Oh, okay. The next to the last paragraph?

Q Yes, sir. Do you agree or disagree with that statement, "No particular likelihood of recidivism for this client"?

A I would disagree with that. I think at the present time -- and we have to look at recidivism for what particular kind of crime or what particular kind of activity. I think there's a high likelihood of continued burglaries if he is, you know, outside the prison system. So I have no difficulty with him being incarcerated to prevent that. As far as homicides, I really have not thought about that. My assumption is that he will be in prison for a very long period of time or he will be executed. So that was not a question that I really looked at.

Q Just a few more questions, Doctor, and I'll be through. You say that Mr. McKinney is an individual who's more passive; would that be accurate? A passive type of individual?

A That's, you know, one of the things. Passive, withdrawn, as opposed to being active, happy-go-lucky, extroverted.

Q You spoke of, I guess, if I could say or characterize it as thrill-seeking by some people?

A Yes.

Q And I think you labeled the sociopathic individual as kind of like a typical thrill-seeking individual?

A Yes. There's a kind of sociopath like that.

Q In 30 seconds or less, how would you describe this factor of like thrill-seeking? What do you mean by that?

A Well, it has a quality of abhorring quiet, solitude, which they generally perceive as boring, which is very stressful to them. They become agitated. Like if you're really hungry and you get agitated looking for something to eat, then you've got to do something. They typically will search for excitement, risky, dangerous type of situations. They typically don't do well in the traditional vocational programs in prison. They need to have something that's more exciting, more action. They will do things just for the sensations that they feel, the rushes that they feel in doing things. They typically would gravitate towards psychostimulants rather than the downer kind of drugs.

Q If I could ask you, are you familiar with what is meant by the word or term "donuts" with a car, the spinning around, kind of in circles?

A I'm not familiar with that. Maybe if you tell me more I'll --

Q Have you ever heard of, say, young adults, teenagers getting in the family car, say in a snowy region of the United States, and just spin the tires on the car because of the snow and just kind of have fun doing that with the car spinning around in a circle?

A I had not. I've always lived in the Sunbelt, but I understand your analysis. I can picture the young people doing that.

Q Can you picture the young people doing the same activities, say, out in the desert where it's basically loose dirt and the wheels will spin?

A Yes, yes.

Q Would you consider that thrill-seeking type of activity?

A Well, teenagers in general are going to be more thrill-seeking than older people. So it doesn't necessarily indicate that there's anything abnormal about that. I wouldn't necessarily think of that as thrill-seeking with a teenager.

Q The experience with PCP, is that a downer or upper type drug?

A Well, it's a hallucinogen. It can cause quite bizarre behavior. It can result in great tolerance for pain, almost not even knowing that you've been hurt. It can cause extremely aggressive kind of behavior.

Q A person committing burglaries having a good awareness of the occupant or victim could be in the residence during the course of the burglary, would that be a risk-taking or dangerous type of adventure, thrill-seeking adventure?

A It could be. But, again, you have to look and see if there were other people around they're doing it with and what's the social relationships that are going on.

Q I think, finally, Mr. Allen was asking about rehabilitation in the -- well, you were speaking about rehabilitation in the prison setting and you mention long term incarceration and to handle I think the aspect of drug abuse; do you recall that? That Mr.

McKinney could get a grip on the drug abuse while incarcerated in prison?

A I don't specifically remember the connection to drug abuse. Maybe that was asked, but I just don't remember it at this time.

Q Are you -- do you remember the aspect of treatment choices in the Department of Corrections in dealing with the topic of rehabilitation?

A I know of possibilities there. I don't recall discussing that in any detail.

Q Are you aware that Mr. McKinney never participated in programs in the past while in the Department of Corrections according to his statements?

A I'm not aware of that. It would not surprise me if that was the case.

MR. STALZER: I don't have anything else, your Honor.

Thank you, Doctor.

THE COURT: Mr. Allen?

MR. ALLEN: Thank you, Judge.

RE-EXAMINATION

BY MR. ALLEN:

Q Doctor, all the tests that you gave Mr. McKinney, when you gave those tests, that was to look at all of the results, correct?

A That's correct.

Q So not one particular test was going to point you in any certain direction, correct?

A That's correct.

Q You used your analysis of the statements of the witnesses, from Mr. McKinney and other documents you were provided, right?

A That's correct.

Q And taking all of that into consideration, that's when you came up with Mr. McKinney's diagnosis, right?

A That's correct.

Q And that was Post-traumatic Stress Disorder, correct?

A That's right.

Q Some of these tests you testified that you sent out, right?

A Yes.

Q And that was to a Dr. Eber?

A Eber, E-b-e-r.

Q And what was the purpose for that?

A I don't have the scoring logic to get the decisions about risks for violence and escape. That's a proprietary kind of thing that he has. It's based upon the 400,000 inmates that he has tested.

Q So some -- and some of the results that he gave you, you didn't ask for?

A That's correct.

Q So those were some of the items that Mr. Stalzer was going over that you weren't aware of?

A That I didn't look at.

Q Specifically that estimate of the MMPI?

A Yes.

Q The school records that I provided for you were very minimal, correct?

A That's correct.

Q So when there was nothing on those records about learning disability classes and things of that nature, that was because of the -- at least what I provided really was very minimal; is that fair to say?

A That's, that's correct.

Q We're talking records of 15, 20 years ago?

A Yes.

Q When you speak of Mr. McKinney now having learning disability, that was from your test results that you came up with that diagnosis?

A Yes. And also the impairments that I testified to earlier that were in the educational records.

Q So it didn't matter to you, or did it, that there was nothing in the school records that had shown that he had a learning disability?

A I did not place a great deal of weight to that because of the period of time that it occurred and the state of the art for identifying learning disabilities was not there at that time. And also if you tend to be in smaller schools and rural areas, you don't have a special education program. You don't have identification process as sophisticated as they are in the larger cities.

Q I showed you that police report that was one page that Mr. Stalzer talked about?

A Yes.

Q About him being, Mr. McKinney being an escape risk?

A Yes.

Q You said it didn't change your mind. Why is that?

A Well, like I testified to earlier, to say one thing and -- to say something and to do it are two separate things. I testified earlier that within the people he associates with, inmates, one has to maintain a facade of a person who is strong.

Q One of the tests that Mr. Stalzer was going over with you is the Williamson Sentence Completion Test?

A Yes.

Q And he specifically asked about Question Number 29 regarding, "I sometimes" -- I'm sorry, let me start over. "I sometimes wish I were very good at," and his answer was stealing. Does --

A Yes.

Q Does his answer surprise you in light of the testimony that we heard Friday in regard to being chastised for being caught stealing?

A No.

Q Those prior burglaries that Mr. Stalzer spoke about today that I didn't specifically go over with you last Friday, besides the one where Mr. McKinney went in with a gun and fled, does that change your decision at all hearing about that today?

A No.

Q Last Friday when I talked to you about that specific hypothetical or going over the testimony about Mr. McKinney being in a residence with a gun and a person coming home, I also told you that there

was a person already in the home. Do you remember that?

A No, I don't remember that.

Q If I -- let's put that person in the home. I'm pretty sure I asked you that. That was last Friday.

A Okay.

Q Under the facts that Mr. Stalzer said today and that a person was already discovered in the home and Mr. McKinney, according to testimony, fled, does that surprise you? Does that change your diagnosis?

A No. That's consistent with the way that he handles situations.

Q And that was even after the threat of shooting someone in the house, before going in, if someone was there?

A That's the hypothetical?

Q Yeah.

A Yes, that's consistent.

Q What about -- Mr. Stalzer asked you today about your diagnosis in regard to Mr. McKinney actually discussing going into the Mertens house with a gun. Remember Mr. Stalzer talking about that? That that was discussed a little a previous time?

A Yes.

Q Okay. And what about adding in the fact that there was a decision not to be -- not to go in that evening because someone was at home. Does that surprise you?

A That would be consistent with the data I have.

Q What about --

MR. STALZER: As to the last question, I want clarification, your Honor, if I may, as to who's making that decision or who's giving that information for the hypothetical, because it's unclear. Is that coming from the defendant or somebody else? There are three other individuals.

THE COURT: Mr. Allen, could you be more specific?

MR. ALLEN: Okay.

Q MR. ALLEN: Doctor, what if my client, Mr. McKinney, was asking when someone would be home and whether or not someone would be home, in that situation.

A Yes.

Q Is that consistent with your diagnosis?

A Yes.

Q And the fact that a decision was made by someone, maybe Mr. McKinney, maybe not, not to go in that home that night?

A Yes.

Q Mr. Stalzer was asking you under the hypotheticals that I gave you Friday about tracking the Mertens incident, and he was saying some things today that was changing, and you said that it was possible that if that happened Mr. McKinney would not have diminished capacity. Is it also possible that he could have?

A Yes.

Q The drugs history that you got from Mr. McKinney was mostly downers, depressants, correct?

A Yes. And some hallucinogens.

Q So you based your opinion on the majority of his drugs of choice, for lack of a better term?

A Yes, it's important to determine what the basic drug or drugs of choice are.

Q Is it that important that there is mixed in something like PCP or LSD or something of that nature, though that's not a main component of the drug use?

A In trying to assess the person's personality and their basic ways of coping with stress and trauma, it's important to look at the primary drugs of choice.

Q That's including heroin also?

A Yes. Yes. There may be some specific situations in which they had taken something other than drug of choice that might have interacted with that particular situation to cause them to behave in a different sort of way. But that doesn't help us as far as the overall personality pattern, the overall tendencies, the overall drugs of choice.

Q So the fact that he used a stimulant and then on PCP drug that period of time, that doesn't change your diagnosis of his drug history, what it shows you, does it?

A No, it doesn't.

Q What opinion with regard to, to a person who you describe Mr. McKinney as not being, a thrill-seeking individual, the fact that he does something like doing donuts in the desert, something now and then of a thrill-seeking nature? Does that make them a thrill-seeking individual?

A No. You have to look at totality of the data, not just one particular kind of incident, before you can come to some conclusion. Everybody does a little bit of everything, but there are certain things they emphasize, and that's what it's important to pay attention to.

Q So a non-thrill-seeking individual can go to an amusement park to get thrills?

A Yes. Rollercoaster, scream, all kind of things like that.

Q That does not make him a thrill-seeking individual, correct?

A Correct.

Q Your description of Mr. McKinney as withdrawn, a loner, do you still stay with that description?

A Yes.

Q The fact that these hypotheticals are with another person and the fact that Mr. McKinney is the one that is allegedly always saying -- threatening with using the gun and this sort of thing, does that type of behavior automatically make him a leader?

A No. You have to look at the other kind of people that are involved and whether or not, as I testified to before, he happened to have more experience, be older or whatever in that specific sort of situation such that he is thrown into the role of leader, as opposed to forcefully exerting his will over the other people and being a leader.

Q What about being thrown into that with a person who is older, a brother, and is a happy-go-lucky individual that is well liked?

A Okay. I've got that.

Q Regarding to being a follower or a leader.

A Well, that, the situation you've described, is generally a situation where he's vulnerable to being manipulated by a more dominant kind of person that is more happy-go-lucky. I think I testified earlier that he has some pervasive feelings of guilt which don't necessarily relate to particular guilt, but just guilt that his life is screwed up. A more happy-go-lucky person can play on that and manipulate that opinion into being more of a follower and going along with what the more dominant person wants them to do.

MR. ALLEN: I have nothing further.

EXAMINATION

BY THE COURT:

Q Dr. McMahon, the attorneys I think this afternoon asked you or made a point about the reported incidents or usage of PCP. The reported usage to you, I think you testified was once or twice a week over a three-month period?

A Yes.

Q And apparently, from what Mr. Stalzer asked you about, it was reported as being two or three times. Does that make any difference at all now in the conclusions or the evaluations that you've made?

A No.

Q How much relevance did you place on the assumed accuracy or truthfulness of information that was self-reported to you by the defendant in making your conclusions or evaluations in this case?

A All of the self-reporting information I got from Mr. McKinney I, I sought to corroborate with other sources. So I testified previously that at least in the area of abuse, I couldn't find any inconsistencies between what Mr. McKinney had told me and what Susan Sesate and Dianna McKinney had told me. And not just in relationship to the overall, "I was abused" or "I was beaten," but actual situations and details. And so that led me to believe more in the credibility of his self-reporting statements. But I would never just take that as a basis of my opinion.

Q Would you -- how would you describe the quantity of the self-reported information by the defendant to you that was uncorroborated by outside witnesses or reports other than self-testing in factoring into your conclusions or evaluations or opinions that you've expressed here today?

A I think the amount of self-reported information there was minimal. I knew that he had been abused. I got, I got detailed kind of examples of school kind of episodes, episodes in the home. I corroborated that as much as I could with the other sources. And the Court's had the same kind of testimony that I heard. So his self-reports are a minimal part of my opinion.

Q Okay. And I suppose my final question, in referring to exhibit -- I think it was 3, Lewis' report, Dr. Lewis' report that Mr. Allen referred to last week -- am I remembering correctly?

A The presentence investigation, yes.

Q To the extent that you may have relied on any of those types of articles or the doctor's opinion in looking at the intrinsic vulnerabilities that I think

you talked about in relationship to that article, it was cognitive?

A Oh, excuse me. I'm, I'm confused here. I was -- my mind was thinking about the presentence investigation. You're talking about -- oh, Dr. Lewis' articles, okay.

Q Was the only intrinsic vulnerability that you've identified in this case the cognitive impairment of the triad that you identified previously in your testimony? You didn't find any evidence of episodic psychotic system or neurological or limbic dysfunction in any of the testing you did?

A No. The vulnerabilities that Dr. Lewis talks about neuropsychologically are basically cognitive kinds of deficits along with the learning disability, psychoeducational deficits and emotional psychiatric kind of vulnerabilities. Sometimes Dr. Lewis will have -- well, sometimes there are available MRI's and CAT scans and EKG and things like that. In her research that typically had not been done with people that had been sentenced to death. Now not only was that not done, but the neuropsychological was not done and the educational information was not available to the court at the time that those inmates had been sentenced to death.

THE COURT: Counsel, are there any questions of the doctor as a result of the Court's questions?

MR. ALLEN: I don't think so, your Honor.

MR. STALZER: No, your Honor. Thank you.

THE COURT: Dr. McMahon, thank you.

Counsel, we'll take about a 15-minute recess.

(The court stood in recess, after which time the following proceedings are held in open court.)

THE COURT: Mr. Gonzalez or Mr. Allen, any additional witnesses?

MR. GONZALEZ: No, your Honor.

THE COURT: Mr. Stalzer?

MR. STALZER: Yes, Judge. Dr. Gray.

STEVEN GRAY, Ed.D.,

called as a witness herein, having been first duly sworn, is examined and testifies as follows:

THE COURT: Dr. Gray, good afternoon. If you'll just have a seat on the witness stand.

EXAMINATION

BY MR. STALZER:

Q Sir, would you please tell us your name for the court reporter, please?

A My name is Steven Gray.

Q What is your occupation?

A I'm a licensed psychologist, State of Arizona.

Q What is your current specialty or area of practice at the present time?

A My specialty is assessment and treatment of sex offenders and victims of sexual assault. And I also testify in other court-related matters.

Q Are you self-employed?

A Yes.

Q Could you tell us a little bit about your educational background?

A Yes. I have a Bachelors Degree in Education and Business Administration from Arizona State University. I have a Master's Degree in Education with a specialty in counseling from Arizona State University. And I have a Doctoral in Psychology from the University of Arizona.

Q In the past or present do you have any teaching responsibilities or had you had any teaching responsibilities?

A Yes. I've taught at the University of Arizona in the Department of Educational Psychology. And I taught in the Department of Criminal Justice. I taught for a community college in Pima County.

Q Could you describe a little bit your employment background prior to being in private practice as it relates to psychology?

A Yes. I was a psychology associate for a joint commission accredited program for emotionally disturbed adolescents for about two years. From there I went to juvenile corrections which is now called DUITR.

Q Is there --

A I was psychologist, practicing psychologist and also eventually became supervising psychologist. From there I moved to the Department of Corrections Adult Services and supervised programs associated with a novel program that had 18 to 25-year-old first offenders.

From there I went into private practice and basically did general practice, except that much of it was related to forensic work including assessment and treatment of everybody on parole. Had a contract

with DES, which is Department of Economic Security.

I then returned to the Department of Corrections and supervised all the treatment programs associated with a facility entitled Arizona Correctional Training Facility at Tucson which is now called the Arizona Prison Complex of Tucson. My duties included virtually everything. I saw inmates. I did assessments; for example, for parole routinely. I supervised programs. I participated in delivering programs. Virtually everything you can think of.

I then went to -- into private practice. Private practice. And then have had a number of contracts including juvenile corrections, adult corrections, Maricopa County probation. I also had staff privileges at St. Mary's Hospital in Tucson. And we had treated and assessed families who were victims of burns.

Q How long have you been practicing in psychology with your Ph.D. degree?

A Since 1976, Ed.D.

Q What professional organizations, if any, do you belong to?

A I belong to the American Psychological Association; I belong to the Association For the Treatment of Sexual Abusers; I belong to the Arizona State Psychological Association.

Q Are you familiar with an individual by the name of James Erin McKinney?

A I am.

Q Do you see that individual in the courtroom?

A I do.

Q Is that the individual seated between Mr. Gonzalez and Mr. Allen?

A It is.

Q Did you perform a mental status exam with regard to Mr. McKinney?

A I did.

Q Could you tell us what types of materials you did review in the course of your examination or assessment of Mr. McKinney?

A I reviewed a presentence report, two of them actually. One is -- has "Revised copy" on the front of it and it's date is on page 16, it's dated January 7, 1993. I reviewed a psychometric report that has the name James McKinney to the left of it, date of testing 5-1-93. Date of report is listed as 4-30-93.

Q Is that from Dr. McMahon's office?

A Yes. It has Mickey McMahon, Ph.D. in the upper right-hand corner, a psychological report apparently authored by Dr. McMahon. And it's dated 7-8-93 in the upper left-hand corner.

Q I'm sorry. That may be a date from a possible fax transmittal. Is there a date below his name on that same report, the psychological report?

A Yes, I'm sorry. 7-6-93.

Q Did you review any police reports?

A No, sir, I did not, to my knowledge.

Q Did you review any synopsis of any type of reports prepared by the Chandler Police Department regarding the crimes in this case?

A I don't believe so. I have also reviewed another presentence report which is dated October 24,

1985. I also reviewed a raw data material from Dr. McMahon. One of them is entitled WAIS-R record form. Do you want me to list all these materials?

Q Yes. Did you review the data form for the intelligence test that was administered to Mr. McKinney?

A Yes, I did.

Q That would be the Wechsler?

A Yes, that's it, the one I just mentioned.

Q And you had the achievement test data form?

A Yes, the achievement test. I also reviewed a WPS test report dated May 16, 1993. And it's entitled the Luria Nebraska Neuropsychological Battery.

Q Did you have the Williamson Sentence Completion Test available to you prepared or utilized by Dr. McMahon?

A Yes, I did. I also had the Luria Nebraska Patient Response Booklet. I had the Wide Range Achievement Test Protocol Response Booklet. I had a Maricopa County Juvenile Court Center Juvenile Profile Report. I had a summary of Passage Comprehension -- I believe it really has no title. It's entitled Passage Comprehension dated 5-1-93. And the Neuropsych Battery Clinician's Form.

Q Did you also have available some school records pertaining to Mr. McKinney?

A Yes, I did. I'm not locating them now.

Q But do you recall seeing those?

A Yes, I do.

Q Did you read anything about this case that described the crimes for which Mr. McKinney was found guilty?

A Other than the presentence report and what I heard from your office, and in testimony, no.

Q Can you describe for Judge Sheldon what you did in conducting your status exam, your mental health status exam?

A I simply reviewed the materials, and I conducted a mental health status exam, which involved inquiry, questions related to specific issues that might relate to psychological functioning.

Q Are you referring to your meeting with Mr. McKinney in the jail?

A Yes, I am.

Q How long did you meet with Mr. McKinney?

A An hour, hour-and-a-half.

Q Who was present during that examination process or the interview process?

A His attorney, Mr. Gonzalez, was also present.

Q Anyone else other than the three of you?

A Not really. It was very crowded in the jail.

Q With respect to the testimony that you've heard over the last couple of afternoons, have you arrived at an opinion regarding the potential for whether or not the defendant suffers from a mental illness or diagnosis of Post-traumatic Stress Disorder?

A No.

Q Why is it you do not come to any opinion regarding that mental illness?

A I don't think there's enough evidence or diagnostic materials or work that's been done to conclusively diagnose him as having Post-traumatic Stress Disorder.

Q Did you prepare what is known as an MMPI in this case?

A No, I did not.

Q Are you familiar with the Minnesota Multiphasic Personality Inventory?

A Very.

Q Have you administered that test or examination to other individuals in the past?

A Hundreds of times.

Q Would that exam have been useful in this case?

A I believe it would have been, yes.

Q Did you conduct or administer that examination with Mr. McKinney?

A I did not.

Q Could you explain why you did not?

A Well, one, I was told by him that he had already taken the examination. I showed him an example of it and he said he had already taken it. And a cursory review of Dr. McMahon's material, I saw an MMPI profile in the materials and assumed that it was an MMPI.

Q You heard Dr. McMahon speak of this 16PF over the last couple court dates, correct?

A Yes.

Q And did you hear him speak also of the CAQ, as I'll call it, over the last couple of court dates?

A I have.

Q Do you know of any preference for either of these exams over another compared to the MMPI for the situation which we are addressing concerning Mr. McKinney and in getting a proper assessment of him?

A I personally prefer the MMPI.

Q Why is that?

A First of all, I believe it's a more valid instrument. Like Dr. McMahon said, it focuses on issues of pathology. Plus the new MMPI II has extended scales which, for example, include two scales of Post-traumatic Stress Disorder, which Dr. McMahon's correct in talking most of those cutoff scores were acquired through Vietnam veterans. But there, but there are other subscales, yes.

Q How long has the new or revised MMPI been around? How many years or months, if you know?

A I believe it was 1989 because I know I went to additional training on the MMPI II.

Q Do you know how long the MMPI has been utilized over the years?

A Since the forties, fifties. I believe it to be the most widely researched pencil-paper psychological examination in existence.

Q Do you know at what reading level the test is geared for?

A Approximately the 8th grade.

Q By reviewing the information, do you know what grade level Mr. McKinney can read at?

A Apparently he can comprehend passages at 8.3 and he can recognize words at almost a 12th grade level.

Q Have you considered or come to any opinions regarding risk assessment with respect to Mr. McKinney?

A I have.

Q Could you explain to Judge Sheldon, first of all, what you mean by the terminology of "risk assessment"?

A Risk assessment for this purpose means two factors; one, overall risk for recidivism, and overall risk or specific risk for violence.

Q What conclusions, if any, have you come to regarding these aspects?

A That he is very high risk for recidivism and a very high risk for acts of violence.

Q Dealing with recidivism, what draws you to that conclusion?

A One -- well, historically there's some historical data. He was in juvenile corrections and acted out following release from juvenile, that secure environment. He was incarcerated as an adult and acted out while on parole. Also, I submitted the presentence reports to Dr. Daryl Fischer who is an expert in the assessment of risk and recidivism.

MR. GONZALEZ: Objection, hearsay as to the opinion of any other doctor.

THE COURT: Without further foundation the objection is sustained.

Q BY MR. STALZER: With respect to the information -- you said you sent presentence reports to a Dr. Fischer?

A I did.

Q Where did you send those reports to? Where is he located?

A He located at 1645 West Jefferson, Department of Corrections.

Q And what type of work does Dr. Fischer do?

A Dr. Fischer, a Ph.D. mathematician, who's Director of Planning for the Department of Corrections and has developed risk assessment models for use in the State of Iowa and in the State of Arizona for use with parole relative to incarcerated offenders.

Q Have you dealt with him before in dealing with the topic of risk assessments?

A Yes, I did when I was the Assistant Deputy Warden at the Arizona Correctional Training Facility. It was my responsibility to sign off on inmates who were being released for 72-hour furloughs.

And since my name was on the documents and the practice had been to use clinical judgments for releases, like MMPI's and clinical questionnaires and that sort of thing, which literature suggest are basically not useful in that regard, I did a review of the literature and located Dr. Fisher in the State of Iowa, traveled to Iowa and began using his risk assessment model for release of furloughed inmates for 72-hour furlough.

Q Does Dr. Fischer, if you know, conduct a full-time practice to risk assessment or some -- one sub-area of his general practice?

A Well, it has been a major area of his professional life since at least 1980-81. And now he works for the planning bureau, and I'm sure he has other duties, but which is a major area of his expertise.

Q Did Dr. Fischer prepare any report on the information you submitted to him on this case?

A He did not.

Q Did you receive information back from Dr. Fischer?

A Yes, I did.

Q And how was that information obtained by you from him?

A He sent me materials about the risk assessment model which has been revised since I've worked with it, and he also conveyed to me over the phone information relative to Mr. McKinney's risk.

Q Based on what was sent to you and what was told to you by Dr. Fischer, did you take that information in drawing any conclusions in your overall assessment of his risk potential in the areas of recidivism or the commission of other violent acts?

A I did.

Q Other than those areas you mentioned in Mr. McKinney's past juvenile history, and also I think you mentioned his adult history, was there any other information which you considered in determining he was, he, Mr. McKinney, is a bad recidivism risk?

A No.

Q With respect to the secondary dealing with violent acts, what again have you been able to draw from the information that you considered on this particular topic?

MR. GONZALEZ: Again, Judge, I still have to object. There has been no testimony as to the validity of the model used by this other doctor. He hasn't testified to any degree about that model, it's accuracy, any tests that have been conducted on it to determine whether or not it's even reliable.

Secondly, I don't see the point in terms of furloughed inmates. Certainly if James McKinney is sentenced to prison he is not going to be out on furlough. So it's simply inapplicable to this case. I object.

THE COURT: The objection is overruled.

You can answer the question, if you remember it.

THE WITNESS: Would you rephrase the question, please, or restate the question?

Q BY MR. STALZER: I think I was asking you how you can come to any conclusion regarding the potential for violent acts. I assume that from your initial statement we're dealing with an assessment of risk of potential for further violent acts?

A That's true.

Q And I asked if you came to an opinion regarding some risk assessment regarding potential for violent acts by Mr. McKinney, and how you were able to come to any conclusion, if you have one.

A And my response was yes. And I used the material that Dr. Fischer provided me.

Q What is it about that material that leads you to draw some conclusions regarding violent acts?

A Um, well, the way the material is handled is various aspects of the person's criminal history are plugged into a matrix action mathematical model. And that model produces levels of risk. And it has been validated in the State of Arizona on approximately 200 inmates. Mr. McKinney was actually in the original 200.

And then what they did is they followed these -- the inmates after release and found that those that were in the high risk category, their recidivism rates were around 50 percent. And those who were in the low risk, their recidivism rates were approximately 10 percent. Let me make sure on that. It was statistically significant anyway, in terms of the differences.

Q With respect to Mr. McKinney then, are you categorizing him as a high risk or, or a low risk for future violent acts?

A Categorizing him for high risk of future acts of violence and for recidivism.

Q Based on the data available to you from the work by Dr. Fischer or others, are you saying then that Mr. McKinney falls into a -- has 50 percent chance of committing another violent act in the future?

A No.

Q What exactly are we saying?

A I'm saying the population from which was sampled, the rates were 50 percent. I think it would be a reasonable statement to conclude that given

that all factors remain equal, that the statistics would stay pretty close to the same.

Q Have you considered Mr. McKinney's potential for rehabilitation?

A Yes, I have.

Q And is this, again, based on all of the information you previously described for the Court earlier?

A Yes.

Q Is there any additional information that maybe you didn't mention that you recall?

A I don't think so.

Q What conclusions, if any, can you draw on this topic of rehabilitation? And, first of all, to preface, what do you mean when you talk about rehabilitation?

A When I talk about rehabilitation, I mean amenability. First of all, does he have the emotional and cognitive and psychological resources to successfully engage in any rehabilitation program. The other part is whether or not the rehabilitation program in any way matches any of his psychological or emotional issues, and whether or not the client, in this case Mr. McKinney, has an interest in engaging actively in any rehabilitation efforts. And also the security associated and the contingencies used to successfully manage him involving himself in treatment.

Q Dealing with, I think you said first, it was potential?

A Uh-huh.

Q What could you say about potential?

A It's my belief Mr. McKinney has the potential to engage in successful treatment.

Q What about rehab programs? And I think you dealt with a topic on a statement of psychiatric issues?

A Yes.

Q Could you expand or explain what you mean by that for Mr. McKinney's purposes?

A In a prison setting there are some perhaps available, but they are very minimal. And a person has to, has to be very assertive about getting involved in any programming.

Q Can you see anything further with respect to this aspect as it relates to Mr. McKinney?

A I'm saying that if he is incarcerated in prison, and that appears to be at least one possibility, that in order for him to get involved in treatment he's going to have to be very assertive about getting it. He's going to have to push people in order to get involved. And once he gets involved he's going to have to stay involved and not act out so he can continue.

Q Does that tie into the third aspect, that being the interest of the defendant?

A Yes.

Q Have you been able to make any determination as to his interest to participate in rehabilitative-type programs that may assist him?

A It appears, based on his history, that he has absolutely no interest in rehabilitation.

Q How do you draw that conclusion?

A Well, by his own report, he was in the correctional system for five years, and indicated that he had involved himself in absolutely no programming whatsoever with the exception, I think, he said he started GED.

Q Did he complete GED, to your knowledge?

A He said he did not.

Q And I think there was a fourth component under this topic of rehabilitation, and you mentioned the word "security." Go ahead.

A Yes. Security means is the system able to maintain a person's behavior so that they can successfully engage in the rehabilitation effort. For example, some programs are best delivered in a minimum custody environment and some are best delivered in a higher security environment.

Q Do you have any comment with respect to Mr. McKinney on this particular subissue?

A It's my belief that based on what he told me and what, what I've read is I think he could successfully work in treatment at medium custody or minimum custody level.

Q With respect to these issues of medium custody, is that the type of security at the prison setting itself?

A Yes.

Q Do you view, if you can say, Mr. McKinney as a potential escape risk?

A I would.

Q And why is that?

A Primarily because of the nature of his offense, the time that he would be looking at while he was in prison. I would see him -- he would have to be treated as a high risk for escape certainly.

Q You may have answered this already. I'm not quite sure. To conclude on the topic of rehabilitation, do you have any prognosis for his ability to partake in the programs? I know you mentioned that he didn't in the past. Anything to indicate he would be using programs to his benefit in the future that you could tell from your experiences?

A Prognosis would be very guarded at best.

Q Did you review the articles that were submitted for Judge Sheldon's review that were marked as defense exhibits? And I believe they are 3 and 4. At least one is the Dr. Lewis report.

A I did.

Q Did you review Dr. Lewis' report?

A I did.

Q Do you have any comments that are noteworthy for Judge Sheldon regarding this particular article as it relates to the defendant's case?

A I do.

Q What are those comments that you wish to make?

A I reviewed the article and reviewed in particular the issues associated with categorizations of intrinsic vulnerabilities, namely what she refers to as episodic psychotic symptoms, neurological/limbic dysfunction and cognitive impairment. And what I did is that I systematically took Dr. McMahon's data and compared it to the paragraph definitions relative

to intrinsic vulnerabilities. And what I discovered is that he has no intrinsic vulnerabilities based on Mickey McMahon's data.

Q Did you review the report by Deana Dorman Logan?

A Yes, I did.

Q Excuse me, Doctor. Do you have anything else you want to say about the Lewis report?

A Yes, I would. If I could refer to my notes?

Q Sure.

A I think it's interesting to note that in Dr. Davis' (sic) report she notes that the data -- and this I'm quoting her now. "The data clearly shows that all aggressive juveniles do not become violent adults." I think that's certainly worthy of note. She said she was surprised to find that juveniles --

MR. GONZALEZ: Your Honor, can I object? There is no question before the witness. I object to the narrative.

THE COURT: The objection is overruled.

Finish your answer, Dr. Gray.

THE WITNESS: She found that there was virtually no statistical difference between people who had one vulnerability plus having been abused to people who were either only abused or only had vulnerabilities. Because she expected to find something very different. And what she concluded from that is that people who had two or three very severe intrinsic vulnerabilities, were severely abused, were the highest risk for violence.

Q BY MR. STALZER: Do you have any other significant comments you wish to make regarding Dr. Lewis' report?

A I do not.

Q As to the report by Deana Dorman Logan, have you reviewed it over the weekend?

A Yes, I have.

Q Do you wish to make any comments regarding that report and its applicability to the case here today involving Mr. McKinney?

A I think it's interesting to note that Dr. Logan write -- states that there's no one-to-one relationship between being abused as a child and, according to her, becoming a killer.

Q So, in essence, just because you're abused doesn't mean you're a killer?

A Exactly.

Q And I guess would that converse be true; you could be a killer and not be abused?

A True.

Q Did you find anything else noteworthy or significant to you by reviewing the Logan report?

A I think I'll pass on the Logan report at this point.

Q Dr. McMahon spoke today as well as Friday concerning his belief that Mr. McKinney had a learning disability or there was evidence of a learning disability.

A Yes.

Q Do you agree with that conclusion?

A I do not.

Q Why not?

A I don't think there's enough evidence to warrant a statement that he has a learning disability.

Q Are you familiar with any tests to detect learning disabilities of various sorts?

A I am.

Q What tests are available?

A Well, one of the few that is normed or related to adults is called a Detroit Test of Learning Disabilities.

Q Did you check Mr. McKinney for learning disabilities?

A I did not.

Q Any reason why not?

A Based on the material that I reviewed, I didn't see any evidence to suggest that he had a learning disability.

Q Mr. McMahon made reference to at least the defendant growing up in a rural area and maybe not having maybe a good school system to check into the possibility of learning -- a learning disability. Do you recall hearing such statements?

A I do.

Q Do you agree generally with the comments he made about the background of the educational system back in the, say, '73 to '80 when Mr. McKinney was in school?

A I do not.

Q What is it that you disagree with concerning that position?

A Well, Chandler certainly wasn't an isolated area. I believe he went to Chandler schools, or at least he went to schools in the metropolitan schools possibly. Even if you are in a public school, Public Law 192 required that every child be screened for a learning disability. It was a gross screening but it was a screening nonetheless. And each, each school is required to -- if that gross screening demonstrates any problems, then they're supposed to go in and do a comprehensive special education assessment.

Q Do you recall when that law was enacted?

A No. But I was involved in assessments at that time.

Q What time are you talking about?

A In the seventies. And special education programs and Vouchers and assessments were being administered. As a matter of fact, we had a rural school project which was at exactly the time that Mr. McKinley was in school.

Q Do you have any other comments you wish to make regarding the learning disability aspect or topic?

A No. That will suffice.

Q The Wechsler Intelligence Scale was reviewed by you?

A Yes, it was.

Q What does the raw data indicate regarding Mr. McKinney's intelligence?

A Overall it's basically within normal limits. The performance, the difference between -- pardon me?

MR. STALZER: I didn't say anything.

THE WITNESS: -- difference between performance and verbal is bordering on significance, although it's not considered to be that. The full scale is 85, which is low end of average. That's hovering at one standard deviation below the mean. The performance is, the performance is 94, which is within normal limits. The verbal is 82. That's, that's low but it's workable.

His profile is typical of people with criminal behavior. They typically have higher performance scores than verbal scores because most of the time they are not involved in school in any kind of active or successful way. What you get is you get some performance is assumed to be -- you're thought to be more of a native intelligence whereas verbal requires more systematic sustained mental knowledge over a period of time. So if you're not involved in school or you're acting out, what will happen is you will -- typically your verbal scores will drop and your performance scores will remain relatively stable.

Q Did you review the 16PF, or I think you refer to it as a Eber test?

A The 16PF is a test that Dr. Eber is the co-author of.

Q Is that E-b-e-r?

A Yes, it is. And when I referred to the Eber report it's his constellation of tests that he uses, and usually sells them to prisons.

Q Have you ever --

MR. GONZALEZ: Excuse me. I didn't hear the last.

THE WITNESS: He sells them to prisons, correctional systems.

Q BY MR. STALZER: Have you ever utilized this test in the prison setting?

A Rarely.

Q Do you know why it was utilized by prison settings?

MR. GONZALEZ: Objection, foundation as to whether it was utilized or not. I thought he answered no and now he wants him to say yes. I'm unclear.

MR. STALZER: I asked him if he utilized it.

MR. GONZALEZ: Okay.

THE COURT: You can answer that question, Dr. Gray.

THE WITNESS: What was the question? I'm sorry.

Q BY MR. STALZER: Let me ask you, have you utilized the 16PF in the prison setting?

A No.

Q Have you ever utilized the 16PF?

A No.

Q Any particular reason for you not ever employing the use of this test?

A I think there are other tests that are much better, most notably the MMPI.

Q In the course of your experience with the Department of Corrections, do you know if it was utilized here in Arizona?

A Yes. Yes, it is and was, was and is.

Q Do you know -- strike that. For what basis is it utilized; do you know?

A Screening for inmates just coming into the system.

Q To do a diagnostic assessment?

A Not in the directest sense, no. And it is used for some diagnostic purposes, yes.

Q They employ the use of this test periodically. What is it they want to get out of it by administering such a test?

A Um --

Q What will it tell them?

A Unfortunately, very little. The -- it's designed primarily to meet the criteria for assessment for inmates because of Federal District Court requirements. The test is supposed to produce information like you see here, data relative to recidivism, risk factors, psychological/emotional functioning, and that sort of thing. Also it has a vocational section, an educational section, a psychological section and there's some other stuff. They also give the inmate a copy and then there's a copy that's supposed to be read by staff only.

Q You stated earlier that part of your assessment dealt with an interview of Mr. McKinney; is that correct?

A That's true.

Q Did you inquire of Mr. McKinney about his drinking habits when he was not in custody?

A Yes, I did.

Q Did he say what, if any, type of alcoholic beverage he would drink periodically?

A I need to refer to my report and my notes, please.

Q Sure.

A My report contains a summary or the data that I wrote down that's on my protocol form and suggests that he indicated that he began drinking alcohol at a very early age, had used -- mixed alcohol with other substances, and notably marijuana and derivatives, nicotine. He said he had experimented with LSD, PCP, alcohol, amphetamines, cocaine, rock cocaine, and heroin.

Q Did you get into the frequency in which he used all these various drugs or chemicals?

A Alcohol, I asked him when he began and how much he had been abusing alcohol prior to his offense behavior. The other drugs I did not focus on with regard to his instance of abuse or use.

Q Did you ever ask him how he would get when he drank?

A I don't believe I did. I believe I asked him about his father and drinking behavior, but not him.

Q When you review all of the material and the data that's been supplied to you, do you agree with Dr. McMahon's conclusion that the defendant suffers from Post-traumatic Stress Disorder?

A I don't think so. I don't think there's enough evidence to warrant a diagnosis of Post-traumatic Stress Disorder.

Q Why do you say that?

A Well, one is that I looked at the -- some of the data. I reviewed the reports. I compared that, contrasted that with some of the material available in the DSM III-R. And I'm clearly aware there's a new one coming out. And so there might be some -- there's going to be some differences in DMS III.

Q In your opinion, did James McKinney fit the requirements that are listed in the Diagnostic Statistical Manual III-Revised for the mental illness of Post-traumatic Stress Disorder?

A I think there's a major question as to whether he does or does not.

Q With the limited information you had available, do you come to any conclusion as to any mental illness being experienced by Mr. McKinney?

A I have a tentative or provisional diagnosis for him.

Q And what is that provisional diagnosis?

A Anti, Antisocial Personality Disorder.

Q What are the traits of that disorder?

A Major problems with regard to character or personality. Most antisocial people have major disturbance in thinking, not to be confused with schizophrenia or psychosis. They tend to, for example, blame others for their situation. They have little -- they also have disturbances in affect which is consistent with their thinking.

They have what we call a victim posturing sort of status which has to do with they see others as people who are out to use them, abuse them. And it's an attitude, if I'm not the -- there's two kinds of people in the world basically for antisocial people. There's victims and then there's offenders. And rather than be a victim they want to be an offender, be in control, be in charge, be powerful even though the manner in which they do that is self-defeating, unhealthy and is abusive, harmful to others.

Usually people with antisocial personality have a long history of conflict with the law. Most of them fail in school; they don't participate in schooling activities. They see rules and society's norms as they are for somebody else, "not for me." "They don't fit for me." Typically they're in and out of institutional settings, either briefly or for long periods of time. Major personality issues.

MR. STALZER: Thank you, Doctor.

I have nothing else at this time, your Honor.

THE COURT: Counsel?

EXAMINATION

BY MR. GONZALEZ:

Q Doctor, to your estimate in terms of the amount of time you spent with James McKinney of an hour to an hour-and-a-half was a little exaggerated; wouldn't you say?

A I don't think so. I would say we were there at least an hour.

Q I'm curious because I billed .8 for it.

A Did you? That's very kind of you.

Q Doctor, you waited at least 15 or 20 minutes in there with me before James McKinney even came, correct?

A That's possible, yes.

Q Do you recall?

A I recall waiting, yes.

Q All right. I want to start backwards and kind of work our way up because it seems to me that basically you disagree with most everything that Dr. McMahon testified to. Correct?

A I don't think I disagree with everything.

Q Is most everything a good characterization?

A A lot.

Q You have reached a tentative diagnosis of Antisocial Personality Disorder?

A Yes.

Q Yet, you have not or cannot, based on your testimony, say whether or not based on the information James McKinney suffers from Post-traumatic Stress Disorder, right?

A Yes.

Q Isn't it true that before you can reach a diagnosis or even a possible diagnosis of Antisocial Personality Disorder, you should engage in an effort to exclude all other potential causes of the conduct? That's a given, isn't it?

A I don't know about the given part, but that's a typical practice, yes.

Q And your practice was not to exclude but simply to reach a tentative diagnosis in this case?

A That's why it's tentative.

Q Yeah. So you have done nothing to attribute any problems with James McKinney to any other potential mental disorder, right?

A Other than what I've read, no.

Q So you cannot even reach a tentative diagnosis without even doing that, correct?

A I think you can offer a tentative diagnosis, yes.

Q Well, since we have already established that you must engage in an effort to exclude any other potential mental illness explanation for set conduct before you reach a diagnosis of Antisocial Personality Disorder, then your tentative conclusion shouldn't really carry much weight before this Court today?

A It should be tentative, which, which is what I said.

Q Very weak at this point?

A I don't know about weak. I'll say tentative.

Q What do you mean by "tentative"?

A By tentative I mean --

Q Possible?

A Possible. Continue to consider. Based on history.

Q Okay. So what you're saying then is that if you had five possible explanations in terms of mental disorders described and defined in SSW III-R, you could say it's possible that any one of those could be the problem?

A I could say that without some possibly, yes.

Q The degree to which you say Antisocial Personality Disorder is possible is no different than the degree based on what you've testified to, would you say, post-traumatic Stress Disorder is also possible?

A I would rate my degree of possibility on antisocial just a little bit higher than Post-traumatic Stress Disorder.

Q We're certainly not in a category of beyond a reasonable doubt in your mind?

A Oh, no.

Q Not even close, right?

A I'll go with the first thing you said.

Q All right. Fair enough.

You mentioned a report that you'd rather not comment on at this time, I believe your words were?

A Oh, it's not that I didn't want to comment on it. It's -- I'm sitting up here thinking about it and I'm not sure how much relevance it would have for the Court.

Q We know in this case, based on the testimony -- and for the time being I would like you to assume that the information you heard is correct, okay?

A Okay.

Q We have a history of abuse, right?

A True.

Q From a very young age, beginning at a very young age?

A I believe so, yes.

Q Would you characterize that abuse, as being severe? And when I use the word "abuse," so that we're clear -- okay?

A Okay.

Q -- we're not only talking about physical abuse. I mean, we are talking about physical abuse and we are talking about mental abuse.

A Emotional abuse, psychological maltreatment.

Q Right. Would you say that was severe abuse?

A I would say certainly moderate to severe, yes.

Q Moderate?

A I said moderate to severe.

Q Huh. What is it that holds you back from saying it was severe?

A Nothing. I actually said it. I said moderate to severe. So severe is in there.

Q But in reality you're starting with moderate and you're giving me an equivocal answer to severe. What is holding you back from saying it's definitely severe versus it's definitely moderate versus, versus it's not even abuse at all?

A Primarily because the information that I have or I've heard about is, has not been -- I heard Dr. McMahon say that he's corroborated the evidence. I think more needs to be done with that. Also, I think you need to compare and contrast that with other issues of Post-traumatic Stress Disorder as well.

Q We'll get to that in a minute or a few seconds, okay? We're just talking about abuse right now. That's the topic. All right. What is it that's holding

you back from saying this is definitely severe versus definitely moderate or something along those lines?

MR. STALZER: Asked and answered, Judge.

THE COURT: Objection is overruled.

THE WITNESS: I think it has to do with consideration of other abusive situations in which people's lives were lost, people were shot and near death, people were burned, people were sustained -- in sustained conflict in which people's lives were lost, in which people had the threat of losing their lives over a systematic period of time. And when you put that together you have severe; and then you have moderate.

Q When you're four years old, Doctor, and you are being abused, as the testimony has been here, do you think that you're thinking about losing your life maybe?

A That's a possibility, yes.

Q Do you think you're thinking about when the next time you will be again abused?

A That's typical thinking, yes.

Q In a child, right?

A Yes.

Q And what a child is looking for is reassurance and safety?

A That's true.

Q And what we had, he was the opposite of that?

A True.

Q To that child, do you think he has -- he or she has to see somebody killed before they suffer severe abuse?

A No.

Q Do you think he or she has to see somebody almost killed?

A To?

Q To suffer severe abuse.

A No.

Q Do you think he or she has to suffer a beating that would put him or her in the hospital to suffer severe abuse?

A No.

Q Abuse that could have psychological ramifications into adulthood?

A No.

Q You've read the articles that were submitted to you regarding the development of or the diagnosis of Post-traumatic Stress Disorder based upon a severe history of abuse.

A Yes.

Q You've heard Dr. McMahon testify in terms of some studies with people that were in prisons -- or prisoners of war, I should say, and the abuse that they suffered watching beatings never knowing whether it was going to happen to them next, et cetera. That ultimately results in Post-traumatic Stress Disorder?

A Can.

Q Can. Not always, of course?

A Not always.

Q Is there realistically any difference in a child who's three, four and growing up in a home with severe abuse, that they really can't leave, because in a sense they are kind of a prisoner of that home, right?

A They're dependent on that home, yes.

Q They can't go out and make a living and get a job or anything like that, right?

A True.

Q So they got to stay there, right, unless Child Protective Services takes them out or something like that, right?

A True.

Q Versus a person who was incarcerated as an adult, a POW, there really isn't much difference, is there, in terms of psychological effect to a child and the psychological effect to a POW?

A I would think there would be differences in the degree. I wouldn't know, to be honest with you.

Q Wouldn't you admit that the severity of the psychological trauma could very well be worse to a child who's just developing versus an adult who's already developed coping mechanisms?

A Could be.

Q And not unlikely, right?

A I'll stay with could be.

Q Let's talk about then what you think is missing here to be able to make this diagnosis.

A Is that a question?

Q You bet.

A Okay. Would you form it in a question, please?

Q You told us that you don't have enough information, right?

A That's true.

Q You have information of, using your words, moderate to severe abuse over a prolonged period of time?

A Yes.

Q Something that today we know can cause Post-traumatic Stress Disorder?

A It can, yes.

Q Your problem is you don't disagree or agree that he has potentially some other problem, learning disabilities of some sort; is that your problem?

A No.

Q Or do you want more information of abuse?

A No, I don't think we need more information of abuse. I think it's, pretty clearly demonstrated historically in the testimony that there was at least moderate to severe abuse suffered over a period of time.

Q Years.

A Years, yes.

Q So what is it that you want? What is it you need?

A Is that -- are you --

Q That's a yes.

A Oh, okay. I think what I need is corroborated evidence consistent with Post-traumatic Stress Disorder.

Q MMPI?

A As mentioned in the DSM III-R.

Q What are you talking about?

A I'm talking about startled response. I'm talking about avoidance of activities. I'm talking about re-experiencing, and I'm --

Q Let's stop here a minute and we'll take them one at a time. Avoidance of activities. What do you mean by that?

A People who experience Post-traumatic Stress Disorder tend to avoid, if they can, if they can mentally codify it, will avoid symbolization that is consistent with their interpretation of the abuse.

Q Why didn't you ask him? "Him" being your client.

A "Him being your client." To be frank with you, at the time I was focusing on general issues and not, not focusing on Post-traumatic Stress Disorder.

Q You've never really focused on Post-traumatic Stress Disorder, have you?

A That's not true. I have.

Q When did you start focusing on Post-traumatic Stress Disorder?

A Many of the people and perpetrators of sexual abuse also present with people that are consistent with Post-traumatic Stress Disorder.

Q I'm talking reference James McKinney because we have no evidence of sexual abuse here.

A That's true.

Q So when did you start focusing on Post-traumatic Stress Disorder with respect to James McKinney?

A With respect to James McKinney?

Q Yeah.

A When I was asked to do an assessment on James McKinney.

Q So that was prior to your visit with James McKinney?

A No. Let me correct that. At the time I was not aware the issue was focused around Post-traumatic Stress Disorder.

Q You mentioned to me before we left that you might want to go back and talk to him again?

A Yes.

Q I said okay?

A Yes.

Q You haven't asked for that opportunity?

A That's true.

Q Let's talk about your diagnosis for a second.

A Sure.

Q Do you have any real doubt as to whether Dr. McMahon's description of James McKinney as being withdrawn is accurate?

A I have some doubts about how he characterized it, yes.

Q What do you mean?

A Well, Mr. McKinney gets variously described as withdrawn, isolated, at one time and then another time we have evidence that he's aggressive, abusive, acting out, a leader with regard to other behaviors. So it's really --

Q That's not really by definition or otherwise contrary to the illness of Post-traumatic Stress Disorder. You do have the dichotomy at times and the differences in emotions and things like that, correct?

A Yes.

Q Your diagnosis also depends at least in part well, I shouldn't call it a diagnosis. Your -- what shall we call it -- your tentative diagnosis has to be based at least in part on some of the factors that Dr. McMahon relied on. Withdrawn. Would you like to see DSM III?

A Yeah, I've got it right here. I'm looking for it right now.

Q You want to look at it?

A Are we focusing on --

Q On both, factors that are common.

A Okay.

Q I don't think you have to go past the first paragraph when you get to the section on Antisocial Personality Disorders in DSM III.

A Uh-huh.

Q Would you like me to point it out to you, or have you seen it?

A I'm looking at it now. And I'm not clear on what you're focusing on.

Q Second paragraph under Antisocial Personality Disorder, Cluster B, we have some of the things that are characteristics that you've found. That's why you made your tentative diagnosis: stealing, truancy, running away from home, things of this nature. Okay?

A Yes.

Q Before we get to what I was talking about earlier, let's talk about that. Certainly truancy was something that factored into your tentative diagnosis?

A Yes.

Q Certainly running away was something that factored into your tentative diagnosis?

A Yes.

Q Certainly initiating fights -- you don't know about that. Did that factor in?

A There was evidence or testimony to say that he had been involved in fights, yes.

Q But the word is "initiating" fights. Did you consider that as being like an initiation to?

A I don't think so.

Q Let me stop you there because I don't mean to belabor the point.

A Okay.

Q When you look at truancy, for example, how was that defined in your mind?

A Truancy is prolonged avoidance of school.

Q What if there's a reason for it? Let me explain. What if you have chosen not to go to school

because going to school is just as stressful as staying home in the sense that if you go, you're going to be ridiculed not only because of your smell but because of your clothing. If you go you may get into a fight because somebody may pick on you, which may require retaliatory conduct. Did you consider that problem in saying, well, truancy fits or doesn't fit?

A I considered the totality of it in the sense of I didn't take -- isolate out truancy, and isolate out.

Q I understand, but we're going to take --

MR. STALZER: Objection, your Honor, I think the witness was trying to explain.

THE COURT: The objection is sustained. Dr. Gray, you can finish your answer.

THE WITNESS: Essentially what I did is I considered each item and then in totality.

Q BY MR. GONZALEZ: Did you ever consider what I just mentioned?

A Yes, I did.

Q What about in terms of running away? Did you consider the why he ran away?

A Yes.

Q Are you sure?

A I considered it.

Q Yet, even after considering it, you included that as part of your tentative diagnosis?

A Yes.

Q In this case the running away, at least the evidence would support, the conclusion was to get away from a home life that was completely unacceptable.

A It could be, yes.

Q All right. Did that lead you to say, well, this factor really shouldn't be considered?

A No.

Q Not at all?

A I still considered it.

Q Did it lead you to give it less weight?

A That's why I used the word tentative.

Q Just because of that?

A No. Because I wasn't totally sure about the total diagnosis.

Q Some of the symptoms early on of -- let me start over. Before you can make a diagnosis, forget tentative for a second, of Antisocial Personality Disorders, there has to be certain criteria met, right?

A That's true.

Q One of the first criteria has to be some sort of conduct disorder?

A That's typical, yes.

Q Prior to the age of 15?

A That's typical.

Q And after that simply the commission of crime, basically deviant conduct, right?

A For, for the most part, yes. But there's other issues.

Q But that's basically, in a nutshell, what we are all talking about here, right?

A Well, I don't think traveling place to place without a prearranged job is illegal.

Q I'm sorry?

A Impulsive behavior is not necessarily or always illegal and that's one of the -- part of the diagnosis.

Q Doctor, when you considered the aspect of running away and factored that into your diagnosis, tentative diagnosis, did you consider the running away from Oklahoma to Arizona in the sense of why and what would motivate somebody to do that at the age testified to, which was around 11?

A I did not.

Q Why not?

A I simply used diagnostic categories and included them to see what would occur, what would present. And that's what presented.

Q The diagnostic categories in DSM III-R?

A Yes.

Q Well, DSM III-R, Doctor, is not the definitive voice on whether or not somebody suffers a particular disorder. Other factors must be considered?

A That's true.

Q Wouldn't it be fair to say that you should have considered this factor?

A I don't think so in arriving at a tentative or provisional diagnosis, I don't have a problem with that.

Q Do you have any problem with, with the idea that -- let's assume for a second that you're correct, not tentatively but absolutely. Okay?

A Okay.

Q Do you have any problem with the idea that a person does not have to be born with an Antisocial Personality Disorder, that it wasn't inherited from their parent or parents? Do you have any problem with that concept?

A Concept that it's not inherited?

Q Yes.

A No.

Q Fact, so we think anyway, right?

A There's been some studies, but they are not very good.

Q This whole area is troublesome, right, Antisocial Personality Disorders, other personality disorders?

A Did you use the word confusing?

Q Troublesome.

A Troublesome?

Q Troublesome in terms of trying to make the right diagnosis because of overlapping elements because, for example, Antisocial Personality Disorders?

A Histrionic, narcissistic?

Q Right.

A There's a problem there. It's difficult, sometimes, yes.

Q Especially when we get into the -- I think it's Borderline Personality Disorder versus Antisocial Personality Disorder?

A Yes.

Q We're kind of like splitting hairs right there, right?

A Borderline has unique features, right.

Q You can have both, right? Features of one going over into the other?

A You can have a diagnosis of mixed features.

Q So the point where you can say it's definitely one and you have these, but you have these features and it's definitely that, but it has these features, it causes a problem, doesn't it?

A Yes.

Q Now, going back to the question that you didn't have a problem with, that Antisocial Personality Disorder isn't necessarily inherited, genetic, for example, then there's got to be another cause for it, right?

A I don't know about the cause part but there are certainly associated factors.

Q Abuse?

A That's one of the factors, yes.

Q Big one, right?

A It's one, yes.

Q Severe abuse?

A Abuse, yes.

Q Let me ask you this. You heard testimony about an incident where James was caught stealing, wasn't punished for being caught -- I mean, for stealing but for being caught, at a young age, remember that?

A Yes, I do.

Q How does that factor into the shaping of a young child's mind?

A It would have a very negative impact. It's what's referred to as negative modeling.

Q The problem that most psychologists and psychiatrists have with Antisocial Personality Disorder is that you're trying to make in a sense a psychological diagnosis or psychiatric diagnosis, whatever, based on nothing more than a person committing certain crimes really; on a history of crimes?

A A history of antisocial behavior.

Q Crimes?

A Could include crimes, yeah.

Q That's what you're basing it on here, at least your tentative thinking, right?

A That's included, yes.

Q The problem with that is that it doesn't get you into why that started happening, right?

A There's no, you know, no definitive --

Q You're making a judgment call?

MR. STALZER: Objection. Could the witness answer the question?

THE COURT: Objection is sustained.

You may answer the question.

THE WITNESS: There is no definite connection between any defined etiology and Antisocial Personality Disorder. For example, there are people who come from very fortunate homes who are also antisocial.

Q Would you agree, however, that that is less common?

A I would, yes.

Q That the vast majority of so-called antisocial personality individuals come from, at least the studies have shown, abuse, whether it be sexual, whether it be physical, whether it be mental abuse that occurred at a young age, right?

A Yes.

Q So in that sense it would be fair to say, wouldn't it, that even if we assume your diagnosis is correct, and that this was cause of the illness, that it wasn't through efforts in that scenario of the defendant, like our client in this case, but through what that person was put through at a young age?

A I would say that it's an interaction between himself and his environment, which is true for virtually everybody.

Q And when you say an interaction between himself, I assume that you are speaking of certain defense mechanisms-and other responses that an individual would have to certain abuse or conflict, how they deal with it. Right?

A How they deal with it in the emotional and psychological and other resources that they bring to bear on the situation.

Q Right. You would agree, wouldn't you, that some people -- let me rephrase that -- that a person could go through the same scenario, upbringing, et cetera, that James McKinney did, and not turn out to have an antisocial personality because at least the criminal conduct stopped, let's say, for instance, at 16? That's possible, right?

A That's possible.

Q And that's possible because certain people, based on genetic makeup or whatever, are able to deal with problems better than others?

A Or at least differently, yes.

Q Or differently, yes.

A True.

Q Now, I want to get on to this idea of recidivism and dangerousness and things like this. If James McKinney isn't sentenced to death, the fact of the matter is he's not going to get out of prison realistically. Okay?

MR. STALZER: Objection. If Counsel's testifying, then the relevance of that.

MR. GONZALEZ: I'm setting the foundation for the question, your Honor.

THE COURT: The objection is overruled.

And, Mr. Gonzalez, you can come back to that question when we come back from the break. We're going to take a break for about ten minutes.

(The court stood in recess, after which time the following proceedings are held in open court.)

THE COURT: We're back on the record.

Dr. Gray is still on the witness stand under oath.

Mr. Gonzalez?

EXAMINATION CONTINUES

BY MR. GONZALEZ:

Q Doctor, I believe when we took a break I was just going to get to your comments or your testimony regarding recidivism and the likelihood of rehabilitation, so to speak. And you testified that in your opin-

ion there was a high likelihood of recidivism with respect to how you view your diagnosis of James McKinney. Right?

A Yes.

Q And that was based on the fact that he has a history from early on in terms of crimes, criminal conduct; that he was committed to Adobe Mountain as a juvenile, released, committed crimes, committed to the Arizona Department of Corrections and released and, et cetera, down the line.

Okay. In this case the Court has the option, assuming that the Court doesn't sentence James McKinney to death, of imposing, for example, consecutive life terms and stacking other offenses on top of those. We're talking many, many years, 50, 60, 70, 80 years. And James McKinney is 26. So realistically he could be incarcerated for the rest of his natural life.

How does recidivism then factor into this if that's an option for the Court? Are you saying that if he's not sentenced to death, that he ought to be locked up for the rest of his natural life?

A I don't think I'm saying that. I was asked a question relative to recidivism relative to potential for violence, and I responded to the question.

Q But given the Court does have that available --

A Yes.

Q -- it really doesn't matter, therefore, does it, in terms of recidivism and his likelihood of committing another offense, given that he's going to be in prison?

A In those two contexts that you described, I would assume not.

Q And you mention that he is treatable, correct?

A I said he has --

Q Under certain conditions?

A Yes.

Q I think one of those conditions was that he would have to seek this out and be aggressive in that regard?

A Or contingencies would have to be arranged so that he would have access to them.

Q And I think you also alluded to a problem in terms of security or his classification within the prison system. Let me ask you this. Is there any doubt in your mind that if he is sentenced to whatever amount, to the rest of his natural life, that he would be classified maximum when he went in?

A Oh, absolutely.

Q No question about that?

A No question.

Q That then creates problems in terms of treatment programs and things like that; is that what you're saying?

A It's more difficult to deliver programming in a very, very secure setting.

Q Now, it is true, isn't it, that people that have been sentenced to terms of imprisonment that call for their serving a prison sentence for the rest of their natural lives have initially gone in and been placed in maximum security, right?

A Yes.

Q And then subsequently placed in minimum security?

A Some have actually been on release status.

Q Right. And furloughs and things like that, right?

A That's true. It's been reported to me that practice has been discontinued.

Q But, in any event, certainly minimum security wouldn't be out of the question in a set period of time?

A Would not.

Q So in that context, you weren't suggesting that he would never be able to be treated because he would be maximum security?

A No.

Q All right. One of the problems, assuming that your diagnosis, your tentative diagnosis, is correct, is that in treating an Antisocial Personality Disorder on an individual who has that disorder has been the structure or the lack of structure, right?

A Structure where?

Q In the sense that if you have an individual who is out in the community with this disorder, it creates a real problem, right?

A Yes, it does.

Q A number of problems, right? Could commit another offense?

A Yes.

Q And you don't necessarily, unless they're on probation or something like that, have the tie to

bring them in for treatment; the strings so to speak that you can just kind of reel them back in with, right?

A That's true.

Q And that really has, has been the primary, or at least one of the causes of the failures in treating this type of individual?

A Yes. One of them, yes.

Q One of them. Certainly there are others?

A Of course.

Q But that wouldn't be a problem necessarily in McKinney's case if he was sentenced to prison for the rest of his natural life, because he's there?

A Okay. Yes. The structure is tentatively available certainly.

Q You testified about the tests and your review of the results of those tests that were conducted by Dr. McMahon, right?

A Yes.

Q Some of those tests were designed to detect learning disabilities?

A I don't think they were specifically designed for LD; however, there are some of the tests that he used that are consistent with some of the sub-process skills associated with learning disabilities.

Q You would admit, wouldn't you, that these tests are useful in detecting a learning disability?

A Yes.

Q You mention that you perhaps would have run different tests, right?

A Yes.

Q For example, one of them was the MMPI?

A Not for LD, no.

Q But for the diagnosis potentially of Post-traumatic Stress Disorder?

A Potentially, yes, that would have helped.

Q It's not unusual in the community that you are in, the psychiatric community, for psychologists and psychiatrists to use different tests, some that are preferred by a group, or others that are preferred by another group?

A That's true.

Q So you were not saying while you're testifying here today that what Dr. McMahon did was incorrect?

A No.

Q You're saying that you would have preferred to have done some other things, perhaps other tests?

A True.

Q And with respect to the MMPI, again, I believe Dr. McMahon testified that it does have -- a portion of the test does deal with Post-traumatic Stress Disorder, and has in criteria there that you can look at --

A There are two scales.

Q -- interpret the results, and it could be helpful in making that diagnosis or in not making that diagnosis, right?

A Well, some experts --

Q Correct me if I'm incorrect, okay?

A That's what I'm doing. Green and others don't feel that they put -- PTSD scales are very useful because what he says basically is that they're simply a restatement of other issues, other associated disorders and that are just lumped together; and he doesn't think it's very useful.

Q And the realistic problem with the MMPI, if you assume that those two scales you're referring to does address the problem of Post-traumatic Stress Disorder, is that it was designed for war veterans, Vietnam veterans, people of that nature?

A The items are consistent, more consistent with that, yes.

Q So in that respect, since we don't have in our case here today a person who, who has been to Vietnam, or no Korean War or whatever, that's a different story altogether. Right?

A Yes. But not an entirely different story. There are some consistencies.

Q Let me ask you this question, Doctor, and I'll leave it at that. If that test was administered to James McKinney for the -- for one purpose, with one purpose being to address this Post-traumatic Stress Disorder issue and to see if it even exists, isn't it true, given his background, he's not a veteran, he wasn't in combat, that another doctor, perhaps one much like you, would come in and say, well, based on that test he was diagnosed as having Post-traumatic Stress Disorder, but really those two scales don't apply to this man so I really have a question as to whether that diagnosis was correct, right?

A They could.

Q They could legitimately argue that, right?

A Yes.

Q And make a diagnosis along those lines, correct?

A They do.

Q I'm sorry, I have one other question. I'm sorry.

Q I was reading something the other day. I'd like you to either agree with it or disagree with it, if you can. If you need, need to explain it, that's fine also. Okay.

And I don't remember where I took it from, but I'll read to you as I wrote it, okay? The controversy surrounding Antisocial Personality Disorder diagnosis is that it is an unspecified mental abnormality inferred from social deviance. Do you agree with that?

A No.

Q The article went on to say it is a moral judgment masquerading as clinical diagnosis.

A I don't think so.

Q You don't agree with that?

A No.

MR. GONZALEZ: I have no other questions.

THE COURT: Mr. Stalzer?

RE-EXAMINATION

BY MR. STALZER:

Q Dr. Gray, short of any materials presented from the defense via Dr. McMahon, have you ever seen any documented proof of abuse concerning the defendant, James McKinney?

A I have not.

Q Are you aware of anyone from the defense ever speaking or interviewing Shirley or James McKinney, the stepmother and father of Mr. McKinney, concerning possible abuse during the defendant's early years?

A I'm not aware of that.

Q Mr. Gonzalez asked you some questions about your perceptions going into the interview face-to-face with Mr. McKinney. What I'd like to ask you is at that point in time, when you went to speak with him about his general background, were you aware of any reports or any testing materials generated by Dr. McMahon?

A No.

Q Were you aware at the time you went in to speak with Mr. McKinney that Dr. McMahon was to -- was going on to prepare a report saying the defendant suffered from Post-traumatic Stress Disorder?

A I was not aware of that.

Q When you went into the interview process with the defendant in the jail in the presence of Mr. Gonzalez, do you have preconceived ideas -- or did you have any preconceived ideas as to mental illnesses that Mr. McKinney may have?

A I did not.

Q Did you keep an open mind when you went in to interview him concerning potential, or the lack of, mental illnesses?

A I did.

Q The materials supplied to you via the defense, that were generated by Dr. McMahon, and I believe it's called psychometric report, do you recall in the psychometric report, that is, where it mentions the lack of any likelihood for recidivism?

A On page 2 it says, "Our data show no particular likelihood of recidivism for this client."

Q Do you know what is meant by that phrase, "by our data"?

A I assume it's the responses that Mr. McKinney made to the pencil-paper tests which were subsequently fed into a computer, then compared to a data base of quite a few inmates.

Q You disagree with that conclusion drawn by a computer with thousands of bits of information?

A I do.

Q Did you hear if Dr. McMahon agrees with that conclusion drawn by thousands of pieces of information as a result of Mr. McKinney's answers on a scoring sheet?

A I believe I heard Dr. McMahon say he disagrees with that as well.

Q In essence, is Dr. McMahon relying on the same answer sheets to draw his conclusion, at least in part, of PTSD?

A I don't know. It appears as if he's using some of the material, yes.

Q Is it accurate to say the computer is not always correct then?

A It's accurate to say that, yes.

Q You were talking about potential for carryover consistencies. Now I'm addressing this MMPI issue, that it's geared for Vietnam stress. Do you recall that area of questioning?

A The PTSD scales were normed, I think, emphasis on, I think, on people who had experience in Vietnam. That was the subjects.

Q And I think you mentioned the words "carryover consistencies" with those not experiencing any Vietnam stress. Correct?

A Yes.

Q What do you mean by carryover consistencies?

A Well, there are some general PTSD characteristics that are consistent from population to population. Of late there have been research on two defined populations specific to various types of PTSD; the most know, rape trauma syndrome, child psychological maltreatment. So there's a number of efforts to focus on various populations. Again, there's some commonalities among those populations.

Q When you say there's commonalities, are you referring that some of the questions on the MMPI as they focus in on the issue of PTSD can pertain to people who have experienced Vietnam Stress Syndrome as well as those much like in the case of Mr. McKinney are classified just PTSD for, say, an abusive background?

A You could. And additionally there is other items on the MMPI that -- and other scales that would help you get out some of that information.

Q Based on the information given to you regarding Mr. McKinney, the totality of that information,

does he fit the requirements for a diagnosis of PTSD pursuant to the Diagnostic Statistical Manual III-Revised?

A I believe there's grave questions as to whether he meets the diagnosis.

MR. STALZER: I don't have anything else, your Honor.

THE COURT: Dr. Gray, thank you. You can step down.

MR. STALZER: Your Honor, I have no additional witnesses at this time.

MR. GONZALEZ: Judge, could we approach for a minute?

THE COURT: You may.

(A discussion was had at the bench between Court and counsel, out of the hearing of the court reporter.)

MR. GONZALEZ: We recall Dr. McMahon.

THE COURT: Dr. McMahon, you're still under oath. I know it's late, but I think rather than re-call you tomorrow, I think we'll just go ahead tonight.

THE WITNESS: I understand that.

THE COURT: Is there water in there?

THE WITNESS: No.

THE COURT: Patty, would you get some water, please?

MICKEY McMAHON, Ph.D.,

re-called as a witness herein, having been previously duly sworn, is examined and testifies further as follows:

MR. GONZALEZ: If I may approach, your Honor?

THE COURT: You may.

FURTHER EXAMINATION

BY MR. GONZALEZ:

Q Dr. McMahon, you've been sitting through Dr. Gray's testimony?

A Yes, I have.

Q And you heard Dr. Gray testify that in his opinion there was not information or there is not enough information available for him to reach the diagnosis of Post-traumatic Stress Disorder?

A Yes.

Q I assume you disagree with that?

A Yes.

Q Why?

A First, it's very difficult for me to have heard all of the testimony in court plus the three hours that I spent talking with the family and also with Mr. McKinney, and conceive of their not having been trauma in Mr. McKinney's background.

The second thing I would say is that in the DSM III are what are called positive symptoms and they have what are called negative symptoms. A positive symptom means that you have something present that somebody complains about. Negative symptom is generally something that will mask the positive kind of symptoms.

For example, in Post-traumatic Stress Disorder, a positive symptom would be a flashback, an intrusive kind of memory. A person would be reliving a particular moment in time when they were traumatized and they would tell you about that. And they would

essentially experience that very same kind of scene, which could be a visual scene. It could have sounds to it, conversation. It could have the emotional kind of trauma that's retriggered that the person relives.

The avoidance of situations where that trauma is retriggered is an example of the negative symptoms. Those take place in -- excuse me, those occur in different ways. One way would be the simple-minded way. You're in a situation that is similar to a previous trauma, you turn around and run the other way. You avoid it. Okay.

You can also avoid it by spacing out and not paying attention to what is going on around you and really not be aware of reality as other people are observing it. You can avoid it by numbing yourself with drugs.

Q What do you mean by numbing?

A Well, if someone has pain and the doctor thinks it's a legitimate kind of case, like surgery, they'll give you a painkiller which numbs the pain. So you are not as aware of the pain that's going on in your body. Maybe there's pain there but it's dull pain, the medication has masked it.

Q So are you saying that there were negative symptoms as well in this case?

A Yes. We have the associated substance abuse as part of the numbing process. We have the loner withdrawal kind of pattern where you cut down your risk for being retriggered by not getting into situations where that can occur.

Q You heard testimony concerning the tests, the battery of tests that you administered. And there

was some testimony about how those tests were inadequate or that there were better tests?

A Yes.

Q How do you respond to that?

A One always selects the tests that appear to most effectively and efficiently address the issues that are before you with the referral kind of question. In this particular kind of case we know that vulnerabilities is one of the ingredients that Dr. Lewis had found. And part of the vulnerabilities can be emotional, psychiatric kind of illnesses, like psychotic kind of disorders. They can be brain damage. They can also be learning disabilities.

And I think one of the things that maybe we failed to do is we didn't give the Court the original article on Dr. Lewis' research that listed the learning disability kind of functions that were assessed. We simply gave the Court a summary article that reviewed the various factors that were involved there. It might be very helpful for the Court to have the other copy of that.

I would just mention that they, as part of that evaluation, would assess spelling, which we did in the Wide Range Achievement Test, was somewhere around the sixth grade level, which was quite deficient. Calculation, the math was deficient.

I would also mention that the electrical processes scale of Luria Nebraska asks a person to go into word problems and solve the word problems in their mind so they have to remember what is said. They have to understand the overall question and what it's asking for. Again, a higher order processing kind of skill. He was particularly deficient there.

We gave him the word -- a reading thing, which is called -- I call the reading-pronunciation. We gave the reading comprehension test, which was talked about.

The quantitative concepts. We did that as part of the electrical processes scale of Luria Nebraska.

I would also mention that my background, I first got into neuropsychology in the VA Hospital in the early seventies before learning disabilities had become an issue, and then when I went to intern at Child Center I found about learning disabilities. I found they had taken the same concepts of neuropsychology and had put them into another testing the same kind of functions, and they called them learning disabilities. And they normed it on children.

So a lot of these tests -- I think even Dr. Gray mentioned this -- there are tests in my battery that could be assessing some of the functions that learning disability tests test. So we're getting the same thing. It's just a matter of doing that in a effective manner, which I think we did.

Q Doctor, I want to show you what's been marked as Exhibit 7. I'm not sure if it's defendant's or if they are all marked one right after the other. As soon as counsel takes a glance at it.

MR. STALZER: Judge, to expedite matters I'll give it to Mr. Gonzalez. I've barely been able to get through the title on the document. I didn't know of its existence until right now.

THE COURT: Which exhibit?

MR. GONZALEZ: It's Exhibit Number 7, entitled Psychiatric, Neurological, and Psychoeducational

Characteristics of 15 Death Row Inmates in the United States.

THE WITNESS: Yes. This is the article I just referred to about the disabilities that maybe we should have provided the court earlier.

Q BY MR. GONZALEZ: Just so we're clear, since your testimony may have been missed somewhat, what does that article say with respect to some of the tests that you ran and how it was related to Post-traumatic Stress Disorder, if at all?

MR. STALZER: Objection as to foundation, your Honor.

THE COURT: The objection is overruled.

Dr. McMahon, you can answer.

THE WITNESS: This particular article is related more to the vulnerability that a person would have to traumatic kinds of situations. And, of course, Dr. Lewis' research relates child abuse, vulnerabilities, observing balance as being the three primary factors that they found that were present in death row inmates that had been sentenced to death that had not been evaluated appropriately during sentencing.

Q Doctor, I think you mentioned at one time about the revision or the revisions that have occurred with DSM III -- IV, which is now coming out. What has occurred, if you know, with respect to the revisions in DSM IV as compared to DSM III with respect to the diagnosis of Post-traumatic Stress Disorder?

A I believe we gave -- did we give the Court the exhibit of the Complex Post-traumatic Stress Disorder article?

MR. GONZALEZ: Let me check. I'm not sure if this is it, but this has been marked as Exhibit 6. Let me show it to you. Is that the one?

A No. I have a copy here if you'd like it.

Q Okay. Let me see it. I don't think we have had this marked.

A I need to have -- that's my only --

Q I'll get it back to you.

A Okay.

Q Go ahead. What are you referring to in that article?

A The article --

THE COURT: Before you start, are you saying this is your only copy of the article and you'd like to have this back?

THE WITNESS: Yes.

THE COURT: Let's just make a copy of it then.

Patty, we'll make a copy and give the doctor his article back.

Mr. Gonzalez, go ahead.

THE WITNESS: The article is published in the Journal of Traumatic Stress, of which I am a member of that international society, which includes experts around the world that have been studying post-traumatic stress in its various manifestations. Dr. Gray mentioned the rape kind of trauma, abuse kind of trauma. We're finding this occurs in a lot of different kinds of situations.

The importance of the article and what I'm saying in regard to negative symptoms is that typically

when someone has had abuse that has taken place over years and taken place hundreds of times, when you ask them to give you an example of the trauma, they say, well, I can't think of anything in particular right now. It's like when Dianna McKinney was in here and she would not have memories of some of the particular kinds of abuse that Susan Sesate had witnessed, so consequently you don't tend to get the, the flashback and in its classic sense of a person can tell you about.

What you do get is you get emotional flashback without the mental picture of where you were when some of these things happened or what was said. And that's why it has nonspecificity to it. And that's why the article talks about an inclusion within Post-traumatic Stress Disorder of a disorder of stress, a disorder of complex post-traumatic stress not otherwise specified because you can't pin it down to one isolated kind of trauma.

And it may be that's where Dr. Gray has a difficulty with the criteria in DSM III. He certainly has other criteria for the avoidance aspect of it. But he doesn't complain, "I had a flashback last night of" -- or walking along, and he doesn't complain of nightmares where he's reliving the particular trauma. But he has emotional component to that.

Q BY MR. GONZALEZ: Okay. Let me show you what's been marked as Exhibit 8.

A Yes.

Q Is that the, the article that you've been referring to that discusses Complex Post-traumatic Stress Disorder?

A Yes.

Q Would the articles I've shown you right now, Exhibit 8 and Exhibit 7, assist the Court in understanding your testimony in reviewing?

A I think so, yes.

MR. GONZALEZ: I move to admit both, your Honor.

MR. STALZER: No objection, Judge.

THE COURT: Exhibits 7 and 8 are admitted.

Q BY MR. GONZALEZ: Doctor, do you feel at this point that you should have administered additional tests to reach your diagnosis?

A It was not necessary in my opinion to administer more tests. I had already spent eight-and-a-half hours with Mr. McKinney administering a tremendous number of tests.

Q I believe you were asked this before, but I'll ask it one more time. Do you have any doubt concerning your diagnosis of James McKinney suffering from Post-traumatic Stress Disorder?

A No, I don't.

MR. GONZALEZ: I have no other questions, your Honor.

THE COURT: Mr. Stalzer?

MR. STALZER: Thank you, Judge.

EXAMINATION

BY MR. STALZER:

Q Doctor, you just said you spent eight-and-a-half hours with Mr. McKinney. Out of that eight-and-a-half hours, in fact, a lot of that time was spent in giving the actual tests, correct?

A Yes.

Q So you're giving him the Wechsler, correct?

A Yes.

Q You're giving him the achievement tests, correct?

A Yes.

Q You're conducting the Williamson, correct?

A Yes.

Q There is the 16PF where you're asking questions or having him do some kind of scoring on set questions?

A I sat with him while he filled out the answers, and I read something. I think I reviewed some other documents.

Q You have stated that there are signs of avoidance of trauma in this case?

A Yes.

Q I might be going deaf or it's late. What is the avoidance of trauma?

A I talked about numbing as being part of the avoidance of trauma.

Q Let me stop you there. What concrete facts show the avoidance of trauma?

A The multiple drug abuse that has taken place since a very young age over a long period of time. The withdrawal kind of -- and we're using withdrawal very -- there are lots of parts to it. But there's been so much testimony about the different kinds of withdrawal here and the kind of withdrawal, that

the withdrawal would be another form of the avoidance mechanism.

Q Withdrawal. Give one example or two, if you can recall.

A I don't know whether it was Dianna McKinney or Susan Sesate had testified that one time he just became quiet, didn't have many friends as a child, pretty much stayed off to himself. I think it was Dianna McKinney because she was also saying that, "I, myself, and the other children in the family just -- we had so much conflict" -- I forgot the word she used. I would use trauma -- "that we just wanted to have time to ourselves. Like myself, I went in and read." Things like that. Just wanted to be alone.

Q Anything else?

A I can't think of anything this late in the afternoon right now.

Q As to drugs, many people use many different illegal substances, correct?

A That's correct.

Q And many people are not suffering from Post-traumatic Stress Disorder just because they use different drugs, correct?

A That's correct.

Q As to the avoidance of contact, are you aware of any current day avoidance of contact by Mr. McKinney over the last couple of years, specifically around the time of the offenses that you can articulate?

A I can't think of anything right now.

Q Doctor, you stated that, I think, in the words of Mr. Gonzalez, "without any doubt" you believe the defendant suffers from the mental illness of PTSD; is that accurate?

A That's my opinion.

Q Then the one concern I have, is that opinion based in part on the 16PF results?

A The diagnosis itself is not based in part upon the 16PF.

Q Are you saying that 16PF has nothing to do with this diagnosis that you have reached?

A It has something to do with the way he copes with that.

Q In the 16PF results that have been returned to you from whatever agency, does the scoring -- now correct me, on page 2 there's a statement, and this is in the psychometric report. And, again, I think you may have two of them, Doctor. And we'll just have to kind of glance to the second page of the one that has the scaled scores for those various traits that you spoke about earlier this afternoon. But page 2 of that document.

A Can you tell me something that's on the page? It might help me decide which page.

Q Yes. It says Axis 1295.1 Schizophrenia, disorder type.

A Okay, I've got the page.

Q That statement that I just read to you "schizophrenia, disorder type," based on the results of his test score, is that agency indicating to you that they believe he may suffer from schizophrenia, disorder type?

A No.

Q Why is that on that sheet?

A The decision-making process among mental health professionals is one in which you consider all alternatives or the most likely alternatives and you rule out everything until you wind up with one. And that's supposed to be the best way to make decisions. If you go out and look for a diagnosis and come up with one diagnosis and don't go through the ruling out process, it's the logical error of affirming the consequence.

Q Is it not correct that under sections 2, 3, 4 and 5, same page, it states "rule out"? Does that mean the various mental illnesses that follow the statement "rule out" need to be ruled out?

A Yes.

Q Why is schizophrenia there without the words quote, "rule out" end of quote?

A I don't know why it's there that way. I would call your attention to the paragraph right above that. Says, "Final diagnosis will be made by qualified practitioner who gives appropriate consideration and other conditions to these test data."

Q I agree with you, Doctor.

Is this kind of a ballpark estimate by the testing agency to give you some guidance into what avenue you may want to look into?

A Yes.

Q As a potential illness?

A Yes.

MR. STALZER: Nothing else, Judge.

THE COURT: Mr. Gonzalez?

MR. GONZALEZ: Judge, I don't have any further questions.

EXAMINATION

BY THE COURT:

Q Dr. McMahon, I have just a couple of questions that I would like to ask. Going back to the Lewis report, Exhibit Number 3, and I guess I just want to get a couple of things straight. And rather than trying to phrase the question, I'll rely on the language in that report to at least frame the question that I'm making.

A Now, Exhibit 3 that you have there, is that the first one we gave? Or is this the one that's called -- does it say "Juvenile" in the title or "Death Row Inmates" in the title?

Q It's authored A Theory of the Genesis of Violence: The Follow-up Study of Delinquents.

A Yes. Okay.

Q You've been speaking about the importance of the interaction of the intrinsic vulnerabilities with the family violence and the stress and the abuse that goes on in the family environment?

A Yes.

Q Do you agree in the article where it states that family violence and abusiveness function as a model of aggressive behavior for children?

A Yes.

Q From what I have gathered, that's important because children who then have learning disabilities or cognitive impairments -- and to sort of paraphrase

the language of the article, in turning it around, those children who do have those are not as well equipped as children who do not have them, because then, what I have gathered, they're not intellectually capable then of resisting those learned models of behavior and to choose among alternate styles and make independent, more rational judgments regarding appropriate behavior?

A Yes, that's one of the things that can occur. But you've got three-way interaction going on with also the learning of using the learned violence as a means of coping, the vulnerability and then the trauma that gets retriggered. When that's retriggered you can't think as well, so it interferes with your thinking just as much as a vulnerability would interfere with the thinking.

Q So when they get into a stressful situation like that, those people then, the intrinsically vulnerable child is more likely to then act impulsively and unthinkingly later on when they're stressed? That may be more of a learned response to the trauma?

A Yes.

Q Is that what you've suggested may have happened at least in Mrs. Mertens death? I believe either as Mr. Allen or as Mr. Gonzalez phrased the question, assuming for a second that something did happen inside the home, that could have triggered the PTSD at that point?

A Yes.

Q Again, you're saying it's not unlikely that the behavior then became impulsive and unthinking and was simply a response to the Post-traumatic Stress

Syndrome resulting from the childhood factors that you've discussed?

A Yes. I think it's particularly helpful to note that the information processing problem would be potentially occurring there too. So he's seen a lot of things going on, there's a lot of chaos going on, so he has the vulnerability, plus the situation itself is so similar to his childhood trauma that there's at least double, triple trouble there.

Q So the possible fighting commotion triggered then the impulsive or unthinking response to the, the acts or the actions that were going on?

A Yes.

Q Would that tend -- being involved in something like that, not only with those types of stressors then being retriggered from childhood, but possibly the viewing of the dead body and all of the fear and trauma that goes on with having committed a crime, and the person's been the victim, would that tend, in your experience, to raise a very high level of stress and trauma to someone right after that event when they're thinking back on it over the days or a week or so after it's occurred?

A Yes. It would, you would expect.

Q I mean, in layman's parlance, scare the day-lights out of you once you get out of there and all the type of laymen trauma that one would associate?

A Even a normal person, if they had never been present when someone's lost their life, or if they have never done something that cost somebody a life, it's a -- it turns your world around. It's extremely traumatic. And then if you add the vulnerabilities, the

past traumas to that, we know that people with past traumas don't get immunized in dealing with them. They are at greater risk for future trauma.

Q And one of the things that was his lack of ability, one of them, is lack of ability to choose appropriate alternatives, resist those models or make more rational judgments. You've talked now in going, leading that into you've talked about avoidance.

A Yes.

Q If the individual had made a conscious voluntary choice to continue burglarizing homes, would one possible -- and I'm just asking is it possible -- is one manifestation of avoidance simply to have then killed the individual while they were sleeping rather than risk a physical confrontation later on?

A No. Now correct me if I'm wrong. That particular homicide was -- took place after the original one with the lady?

Q Two weeks later.

A Okay.

(Pause.)

It is possible. It is highly unlikely. And I'm thinking the only way that might occur is if, you know, in our gangs and those kind of situations you want to prove your entry into the gang or you want to try to prove something about that. That would be the only outside way that I would think that there was -- that that could have occurred with Mr. McKinney. I think it's highly likely that he went the other way and did the opposite and would not have shot that person.

Q Is it at least possible that that would be a manifestation of an avoidance technique to avoid the triggering of the memories of the trauma?

A Well, if he's going in and pointing the gun and firing the gun and hearing the sound of the gun after he has just killed his first person a few weeks earlier, that would create even more trauma again. The avoidance mechanism would say that you would not do that.

THE COURT: Okay. Counsel, any questions of Dr. McMahon? Mr. Gonzales or Mr. Allen?

MR. GONZALEZ: I was thinking of one, but I think I lost it, if I could have a couple of seconds?

THE COURT: Mr. Stalzer?

MR. STALZER: I don't have any, Judge.

MR. GONZALEZ: I don't have anything, your Honor.

THE COURT: Dr. McMahon, thank you.

Mr. Gonzalez or Mr. McMahon (sic), do you have any other witnesses that you were going to be presenting at the hearing?

MR. GONZALEZ: No, your Honor.

MR. ALLEN: No, your Honor.

THE COURT: Mr. Stalzer, do you have any additional witnesses that you are going to be presenting?

MR. STALZER: No, your Honor. My only question is if all of the exhibits, of which I believe total eight in 144 L number, if they've all been admitted at this juncture?

THE COURT: One was under advisement. One is 3 admitted.

Mr. Stalzer, is the only information then that 5 the State wishes to present -- and the defense statements -- from either witnesses on behalf of the victims or witnesses on 7 behalf of the defendant, laypersons and not expert witnesses 3 or other witnesses who will be offering testimony on) mitigation or aggravation?

MR. STALZER: I believe my correct answer is yes, Judge. It would be -- the family would be making statements at the proper time.

THE COURT: All right. I know it is very late this afternoon. I believe that the next phase of the hearing that I would like to proceed into would be the Enmund-Tison phase of the hearing, since the evidence has now been presented. What I would like to propose that we do is conduct I that tomorrow afternoon. How long do you estimate that that will last?

MR. STALZER: Judge, I have nothing to present other than what was introduced during the course of the trial for that particular consideration by the Court.

THE COURT: And we'll continue this until 4:00 tomorrow afternoon, if all counsel are available. That will give you time to be thinking about that aspect of it. I will just advise you that once the hearing concludes tomorrow with respect to your respective positions on the applicability of those cases and the facts of this case to it, I intend to take the matter under advisement, review the exhibits that have been admitted, and it would not be my intention to render a verdict in this case until probably Thursday afternoon at 1:00.

MR. ALLEN: Your Honor, just so the Court's aware, I will be out of state all of next week.

MR. STALZER: I don't know what the Court wanted to do in regard, once it reaches a decision and the next court appearances in relation to that.

THE COURT: Well, if it's possible -- and if it's not I will certainly notify the parties before then. But I may be taking the matter -- I know I previously advised I would be taking it under advisement for approximately a week. However, I'm going to give this some thought, but I may be rendering the verdict Thursday afternoon at 1:00.

I've given some thought to any possible procedural conflict or problems that might arise if I started taking evidence in the co-defendant's case in the matter before I render a verdict in this matter. At the very least I would intend to return a sealed verdict at that time on Thursday afternoon.

I know it wouldn't do the victims or families in this case any good, but it would probably be my intention at least to do that.

MR. STALZER: I don't have anything else. You answered what I was going to say next, Judge, regarding the victims.

THE COURT: All right. We'll see you tomorrow at 4:00.

(The court stood in recess.)

* * * * *

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

SC No. CR-93-0362-AP
No. CR 91-90926 (B)

July 20, 1993
Mesa, Arizona

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ERIN MCKINNEY,

Defendant.

BEFORE: The Honorable STEVEN D. SHELDON, Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS
SENTENCING HEARING CONTINUES

APPEARANCES:

FOR THE PLAINTIFF:

Louis Stalzer, Deputy County Attorney

FOR THE DEFENDANT McKINNEY:

Scott F. Allen, Court-Appointed Counsel
Alex Gonzalez, Court-Appointed Counsel

Penny Heins, RPR-CM
Superior Court Reporter

P R O C E E D I N G S

[Transcript in full, pp. 2-35]

(The following proceedings are held in open court.)

THE COURT: We're on the record in State of Arizona versus James McKinney, a continuation of the sentencing hearing.

Counsel, at this time we are going to proceed with the Enmund-Tison portion of the hearing.

Mr. Stalzer, are you ready to proceed?

MR. STALZER: Yes, Judge, I'm ready.

THE COURT: All right.

MR. STALZER: Basically, regarding this issue, I would be again indicating as yesterday at the conclusion, relying on the testimony that has been presented at trial to satisfy the requirements that you have to make in light of the general verdict that was returned by the jury on each count of First Degree Murder. And obviously we did present two alternative theories, being premeditated murder and felony murder to the jury for their consideration.

And basically we would be relying on the arguments presented in our sentencing memorandum regarding how you can make that determination that Mr. McKinney was basically a major participant and also that he had an awareness of extreme indifference to human life, to reckless indifference to human life, especially in light of the homicide that occurred involving Mr. Jim McClain. As far as any additional evidence, the State would have none at this time.

THE COURT: Mr. Allen or Mr. Gonzalez?

MR. GONZALEZ: Judge, we have no additional evidence to present at this time, although we would like to argue our position in that respect.

THE COURT: All right.

MR. GONZALEZ: I'm not sure, your Honor, as a starting point, what Mr. Stalzer means "in light of the McClain homicide" and how that applies to Mertens or what that means at all. I've read his memo in regard to the Enmund-Tison issue. Clearly that analysis has to be engaged in in both cases, in my view, before the Court can even get to, get to the aggravating and perhaps the mitigating circumstances as well.

Taking them one step at a time. Again, at this point zeroing in on the Mertens homicide, as I noted in my memo, in our memo that we filed with the Court, there was clearly evidence of a plan to commit a burglary at the Mertens residence. The evidence for the most part, I believe, was presented through the testimony of Chris Morris. There was also uncontradicted evidence that the burglary was to take place at a time when nobody was home.

If I recall the testimony correct, and I'm obviously paraphrasing -- it's been a long time -- it was either James McKinney or Hedlund. My belief is McKinney, but I could be mistaken, or both, were inquiring as to what times people were gone. Basically the focus of the inquiry was on the question of when nobody would be at the home. It was clear from the trial testimony that that was the intent of all involved, to burglarize the residence at a time when nobody was home.

What we have in terms of the State's evidence that they presented, at least in what I think it is, is a struggle leading to the homicide. What we don't have in that case is evidence of who did what. I think there was some conflicting evidence from the testimony of James McKinney's father. I'm not sure he ever said, "James. McKinney told me he killed Christine Mertens." There were things that would suggest maybe that's what he said. There was other testimony that clearly suggested that was not what he said. That testimony obviously is something the Court has to consider in terms of whether or not James McKinney killed Christine Mertens.

Obviously, before we could get past the Enmund-Tison, this Court has to find that James McKinney killed, attempted to kill, or intended to kill Christine Mertens. Starting with the latter, intended to kill, I think the evidence is completely to the contrary, that there was no intent to kill anyone. In fact, that's what the evidence established. Attempted to kill. I don't believe the State's shown that; or killed, for that matter. That James McKinney was the actual shooter in that particular homicide. There was no evidence from any ballistics that a gun or any gun attributed to James McKinney was involved in that homicide.

There may have been some evidence along those lines in the testimony of the -- that was elicited during the Hedlund trial. But, again, we have to be very careful when we are analyzing the issue not to confuse the evidence presented in the Hedlund case that was not presented in the McKinney case; That evidence simply does not apply, and I don't think this Court can consider it in terms of whether or not the

State has proven beyond a reasonable doubt that James McKinney was the shooter in that case.

Under the Tison standard I don't think that you can say, or say per se, so to speak, that if an individual goes into a burglary armed, that that automatically establishes reckless indifference. I don't think that's true. I'm not sure that's any different from a person entering a house and immediately -- assuming they went in through kitchen, grabbing a knife, that that automatically establishes reckless indifference. You have to know what the person's state of mind was, what they intended to do and what they did not intend to do.

One can, I think, arrive at the conclusion inappropriately that since someone, whether it be James McKinney or Michael Hedlund, went into the house armed, that that establishes reckless indifference to human life. Again, along the lines of the Tison analysis, I don't think that's true. And I think in analyzing this issue we also have to consider other conduct that was presented in the sentencing memo that the State filed with this Court.

They relied, I think, heavily on -- I think it may have been statements made by James McKinney that if he went into a house, whether it be the Mertens or something -- I don't think he said, "If I go into that house and somebody is there I'm going to use my gun." I don't think that was the testimony. I think it was general testimony that, "If somebody's in there I'm going to use a gun." It was not a verbal statement on the part of James McKinney.

If I recall the testimony, it was a nonverbal statement interpreted by Chris Morris to mean that,

which causes us a problem also. Did it really mean that? But I think the real thing that I think this Court has to focus on or one of the things is shortly after that. In fact, I believe it was the same night. James McKinney, according to the testimony of Chris Morris, and Chris Morris, went into a home for the purpose of burglarizing that home. I believe it was Chris Morris' testimony that just prior to that burglary James McKinney said something, "If there's somebody inside the house I'm going to use my gun." And he was armed at that time.

They go inside the house. They started stealing items. And, again, I'm speaking with respect to the testimony of Chris Morris. And at some point they realize, either James McKinney or Chris Morris or both, that there is someone inside the house. And almost at that same point somebody drives up to the house. So we've got somebody inside the house and somebody driving up to the house. And the point to be made here is that contrary to the testimony that James McKinney had said he was going to use his gun, he didn't. What did he do? He ran. They both ran to get away from the situation. I think that's important, to analyze the incident in the Mertens homicide.

There were other arguments that I may have or did actually set forth in the memorandum that I really don't need to go over. I'm sure this Court has read them and will consider them.

At this point I would like to get to the McClain homicide. There we have, unlike the Mertens homicide, an individual, at least from my view of the evidence, that was killed while he was sleeping.

There was no evidence that James McKinney was the killer, was the person who shot James Mc -- shot Jim McClain. There was no evidence that James McKinney participated in that killing. There was no evidence that James McKinney knew somebody was going to be killed or that he planned to kill anybody inside that residence. Nor is there any evidence presented by the State that James McKinney was present in the bedroom of Jim McClain when he was killed. There simply is not even evidence that James McKinney knew someone was in the house, that he went in armed. There is no evidence along those lines.

The point is that the State simply has failed to establish any participation on the part of James McKinney in that homicide other than perhaps the burglary. And even that's far-fetched. I understand that this Court has denied a prior motion for acquittal based on the evidence in that case. But the point I'm making is that the evidence in that case is simply lacking, cannot show any participation on the part of James McKinney, cannot show any reckless conduct on the part of James McKinney, or anything else that satisfies Enmund-Tison.

Based on that, it's our position as it was set forth in my memorandum that you simply cannot even go to the aggravating circumstances in that case because you can't get past the Enmund-Tison. Other than that, I'd also point out, as I noted in my memo, if there is evidence to establish that either James McKinney or Michael Hedlund, if either of those committed the homicide, the evidence clearly points to Michael Hedlund.

The reasons I set forth in my memo. Number one, I believe it was a fingerprint of Michael Hedlund's found inside the house. Number two, the caliber of bullet that was found during the autopsy was of the type that was used or that would be used in a gun that was possessed by Michael Hedlund; a gun that was found in Michael Hedlund's residence, it was during the execution of a search warrant. And the other thing was, although it couldn't be stated conclusively one way or the other whether it was even human blood, animal blood or even this individual's blood, Jim McClain, there was blood on that weapon which is consistent with that weapon being used in that homicide by Michael Hedlund.

What's missing is the connection in terms of our client's conduct in that offense, whether he was a major participant in that offense, whether he was inside the house versus outside the house or any of that. It's just not there. I don't think this Court can assume or conclude major participation in that offense without having any facts to support it. And I would suggest that our position is quite clear that you just don't have those facts, that you can't get past Enmund-Tison, that the State didn't prove any of the elements that are necessary under Enmund-Tison to make James McKinney death eligible for that offense.

THE COURT: Mr. Gonzalez, just as a matter of interest, you kept referring to your memorandum. I wonder, in reading your memorandum, mitigation memorandum and the other that was prepared and submitted, I note both you and Mr. Allen signed those.

MR. GONZALEZ: Yes.

THE COURT: Which of you prepared or was the author of the motion?

MR. GONZALEZ: The Enmund-Tison motion and the aggravation-mitigation, I prepared that with help from Scott Allen.

THE COURT: All right. Mr. Stalzer?

MR. STALZER: May I respond?

THE COURT: Yes.

MR. STALZER: Regarding Ms. Mertens first, we're dealing with a person who, acting where two people are acting as one, which is basically the State's theory from the start. Much of what occurs inside the homes is not disputed. You know, we're not saying it's a clear-cut answer as to who is the shooter of Ms. Mertens, who is the shooter of Mr. McClain.

My recollection -- and I'm sure you have your notes and your own recollection -- is that there is a clear delineation as to whether these two defendants would participate in the burglary/homicide of Ms. Mertens or the burglary/homicide of Mr. McClain's residence. There were discussions, as you recall, about a week preceding the homicide of Ms. Mertens and a number of questions were asked about the activities of the occupants.

One thing that you may recall is the statements regarding what would happen should someone be in the residence and what Mr. McKinney would do, and the statements or the actions or the combination of the two indicating he would shoot someone if they could identify him. You may also recall the statements during trial by Mr. Hedlund that were testi-

fied to by, I believe it was Christopher Morris, about conking someone over the head, if someone was in a house and that someone could identify any of the intruders.

On this issue of reckless indifference, you have those statements preceding the Mertens homicide. You have Mr. McKinney in possession of a .22 caliber revolver, one carried with him. You heard about that during the bad act testimony which Mr. Gonzalez referred to.

One thing that is different in that bad act and trying to say, well, because he didn't shoot someone in that situation means he didn't shoot in the latter two occurrences, there was no testimony that there was an identification with it, only that someone was in a room possibly asleep and that someone came and they were aware of the -- I think it was the elderly lady's relative, whether it be son, cousin, what have you, coming to the residence, and they were fleeing by whatever means, out the back way, side way.

But there was no testimony of any confrontation where either the person coming to the residence could identify Chris Morris or James McKinney, or the person in the residence in a bedroom could identify James McKinney or Chris Morris that evening, whether they tried to commit or did, in fact, commit that burglary.

I have a hard time accepting some of the arguments presented by Mr. Gonzalez in his explanation for no reckless indifference to what may occur during the course of the McClain homicide. One fact that is not in dispute is the jury's verdict. The defendant was found guilty. The defendant had the awareness

of the Mertens homicide. Assuming, for sake of argument, that he was involved but did not shoot, then he had the awareness, as to the killing of Mr. McClain, that a homicide could occur during the commission of that offense, whether it be at the hands of Mr. Hedlund or his own hand behind the trigger.

The argument that it is all by Mr. Hedlund may seem somewhat appealing because of the fingerprint or palm print on the briefcase. But what is not mentioned is the possession of the guns by both, two acting as one, 12 hours or so, maybe a few -- well, a little bit more than 12 hours or so, maybe 18. Because it was almost 24 hours later when Mr. McClain was found by his -- the relatives.

As to the last contact that the relatives had with him while he was alive, you may recall it was around 10:00 Friday night. He was found around 10:00, 9:00 Saturday night. But at 5:00, or for sure we know around 7:00, 7:30, both defendants are at the home of James Crow trying to pawn off and sell three of the victim's weapons.

As indicated in the memorandum, that car is taken. Also an indication of multiple perpetrators, where it's taken back into the desert.

But getting back to the Enmund-Tison issue specifically, we have the mind set that has to be present that someone could get killed. Someone was killed two weeks earlier in the Mertens home. And now to disregard that fact -- and the State submits that's closely akin to what happened in the Tison case itself. The younger Tisons were arguing that they had no awareness that the father or Greenwald would

kill the family; the husband, wife, and I think there was a child. And I believe their name may have been Tyson also with a different spelling on the last name.

But the Court said, "No, you had -- you bring guns to the prison. You help a father, a Greenwald, break out of prison. There is a reckless indifference to human life and there is that major participation in the crime." Even though the Tisons could argue they didn't intend to kill, they did not kill, or they did not attempt to kill that innocent family that they came upon while traveling about the desert and trying to flee from the authorities.

Also the State submitted the case from, I believe it was the jurisdiction of Nevada, the Guy case G-u-y. And there that case is somewhat akin to the State's argument made today where the defendant Guy is in a car with the actual shooter. They pick up a third person to make a drug transaction. They obtain drugs. That third person gets out of the car and Guy, with his accomplice, attempts to drive off. And in the process Guy's accomplice just shoots that third person. Guy had no awareness. He did not intend to kill the person, attempt, or actually kill.

But the Court went on, using almost the Tison analogy that was the week or so earlier where that same co-defendant utilized a gun in the course of a felony. And that, again, that awareness is there that when something is going down that serious harm could result, and that serious harm being a homicide, a murder. And that's precisely as to Mr. McClain. That's precisely what occurred. Even assuming for sake of argument it's weak on Mrs. Mertens, sure, it's present in a solid form two weeks later when eve-

ryone knows, everyone knows Mrs. Mertens is found dead in her home.

And on that basis the Enmund-Tison analysis can be made by this Court to determine the degree of culpability and whether Mr. McKinney had that reckless indifference, and then his degree of participation based on all of the circumstances surrounding the burglary, theft, and the homicide of Mr. McClain, as well as his participation two weeks earlier in the preparation for Ms. Mertens' burglary. What happens a week later in the desert, involving burying a gun, and circumstantial evidence the Court may give to that, notwithstanding, disregarding statements that were attributable to the co-defendant, Mr. Hedlund.

With those facts in mind, Judge, and basically the ruling in Tison and Guy, the State believes that should you feel that there are sufficient aggravating factors that outweigh the -- any mitigation presented by the defense, the Court can consider the possibility of imposing a death penalty in this case, at least as to Mr. McClain; if not also in the Mertens case.

THE COURT: Mr. Gonzalez or Mr. Allen, anything further?

MR. GONZALEZ: In terms of the Guy case, I did read that. I believe he attached it to his memo. And I think Scott read it as well. There is a big distinction, I think, to be drawn between what happened in Guy and what we're talking about here. In the Guy case you have people entering into a drug transaction. It doesn't take a lot of thought to realize that a -- that drug transactions lead to killing. It happens all the time. There is a different state of mind when

you enter into that type of situation and how it feeds into the Tison analysis of recklessness.

Then you have in a situation, for example, as in the Mertens homicide, where the purpose is to go in when somebody's not there, not to confront somebody directly as you do in a drug deal, to take something and get out before somebody comes home. There is a big distinction there in how it applies to recklessness. And Enmund-Tison is an entirely different story. I don't think you could say that Guy, in terms of how people are going into that type of situation, is applicable to a person going into a burglary with the intent to steal something and not to kill anybody, because certainly there was no testimony or any evidence from any source that either Jim McClain -- I'm sorry, our client or the co-defendant went in there with the express intent to kill somebody or to kill somebody if they were seen.

And I have a real problem with how the State characterizes the evidence of somehow all of a sudden has turned from the waving of a gun, to an opinion from another witness as to what that meant, to now we're here today and a statement attributed to our client that he was going to eliminate a witness if somebody was there. I don't recall any evidence along those lines. I don't believe it's there. And I just want to be real clear about that. It's simply not there.

THE COURT: Mr. Allen, you're going to be out of town next week; is that correct?

MR. ALLEN: Yes, Judge, all week.

THE COURT: I believe we have the hearing set in Mr. Hedlund's case starting this Friday at 1:00.

What I'm going to do is set this matter for the entry of judgment of guilt, sentencing and finding of fact on Friday, this Friday, the 23rd at 4:00. I'll just shorten the hearing in Mr. Hedlund's case. We'll recess early, and proceed with sentencing in this matter at 4:00 on Friday.

MR. ALLEN: Judge, did you want to hear any argument in regard to the mitigation that we presented the last few days?

THE COURT: I had anticipated that you would probably do that on Friday. But would you like to do it today? Are you ready to do it today?

MR. ALLEN: I can do it today since I assume that by Friday your decision will be made. So it would probably be more appropriate. I can just briefly address it. That's what I was planning to do today.

Basically, your Honor, I'm not going to go through everything. We spent two days listening to testimony from different witnesses, especially from Dr. McMahan. I did file the mitigation memorandum which covers quite a few areas in mitigation. But I would like to just basically speak about what we presented the Court the last couple of days. Basically the evidence that the defendant having a difficult or traumatic childhood, I think, was established through testimony of Dianna McKinney and Susan Sesate. You heard Dianna McKinney's firsthand remembrance of what happened and how she was raised and how not only herself but her brother, James McKinney --

THE COURT: Mr. Allen, I don't mean to interrupt you and I do want to hear your argument on this. However, I am impaneling a jury right now. I would

like to get that jury empaneled right now. I will just tell you that after hearing the evidence and looking at the CVs of the respective experts that were presented, that for purposes of this hearing and for purposes of your argument I will simply advise you at this point of some matters that I am willing to make assumptions on at this point.

MR. ALLEN: Okay.

THE COURT: That is that your client was abused, that the abuse was severe, that Dr. Lewis' profile of death row inmates is one that your client may very well fit, that I found Dr. McMahon's expertise in the area probably more persuasive than Dr. Gray's. But I do believe that for purposes of this hearing that some evidence of your client's possible manifestations of Post-traumatic Stress Syndrome were demonstrated by the testimony of Dr. McMahon. And I'll just -- I don't know that I find it an overwhelmingly persuasive mitigating factor, but I will tell you that I'm, more inclined to believe that than Dr. Gray's determination that there is not enough evidence to assume that there is Post-traumatic Stress Syndrome. I will simply advise you of that.

We're going to take about a 10-minute recess while I empanel the other jury.

(The court stood in recess, after which time the following proceedings are held in open court.)

THE COURT: Please be seated. We're back on the record.

Mr. Allen?

MR. ALLEN: Thank you, Judge. Judge, in light of what you said before the break, that was a lot of my

argument in regard to the -- that we did show, the defense did show that -- through Dr. McMahon that we believe that the defendant, James McKinney, does suffer from Post-traumatic Stress Disorder. There was a lot of information provided to the Court in that regard. I would also point out for the Court that, as you stated, that Dr. Gray -- I don't believe the State presented any rebuttal evidence in regard to Dr. McMahon's diagnosis.

Dr. Gray basically told the Court that he had a tentative diagnosis, that he -- it's even possible in his opinion that he can be -- James can have Post-traumatic Stress Disorder. He was just unsure, that there wasn't enough testing. And I think that Dr. McMahon, as the Court stated, did many hours of testing and work on this case.

THE COURT: Mr. Allen, I'll just suggest to you that I think Dr. Gray's testimony, his experience and background and his opinion and the time that he spent, I will consider as going probably to the weight that I will place in his testimony. I concluded that it was in rebuttal of Dr. McMahon's testimony to the extent that Dr. Gray concluded that in his professional opinion -- and I do believe he has certainly some background and experience in dealing with PTSD based on the type of cases that he deals with on a regular basis.

Although they're not the type of trauma, violent crime victims, in the sense of being physically assaulted or killed as in this case, that I do consider his testimony to have been rebuttal in nature because he stated that in his professional opinion there was not

enough clinical or diagnostic evidence available for him to draw the conclusion.

I concluded from his testimony that he believed, in his opinion, that Dr. McMahon's opinion was premature, that it simply was not supported by the available data that he based his opinion on. That's how I am going to evaluate Dr. Gray's testimony.

MR. ALLEN: The only response I would have, your Honor, is that again that Dr. McMahon I believe gave a battery of different tests. I think Dr. Gray was concerned about the MMPI not being done; and Dr. McMahon, I think, had a reasonable explanation that he felt that the test, even though in some areas for Post-traumatic Stress Disorder it's more appropriate for war veterans and that type of thing, and I think that's what the -- the reason that Dr. McMahon did not use that.

I would just basically, to conclude this part of the argument, is that Dr. McMahon -- I think we presented that he did do enough testing, that his opinion was based on many hours of work and not just testing but talking with the victims -- I'm sorry, the defendant's family members to draw from that experience, and in speaking with Mr. McKinney, not only during the testing but his clinical interview of James McKinney.

Your Honor, I would just briefly also talk about -- and I don't know if the Court is going to be considering this -- Dr. Gray's testimony in regard to recidivism. I think, as Mr. Gonzales was arguing and during one of his objections to this, but -- and in his cross-examination, that the testing, that Dr. Gray was going along with that, was basically from people

that were, that were furloughed from prison or released from prison on a parole or other sort of thing.

And the choices that the Court has in this case is either the death penalty or life in prison. And I'm not even including the other counts that we haven't even dealt with that Mr. McKinney, if the Court did not find that the death penalty was appropriate, is going to be spending the rest of his natural life in prison. I think Dr. McMahon's testimony was going towards that type of environment, a prison structured environment, where Dr. Gray was basically giving his opinion on studies of people that were released or soon to be released, this type of thing. And I think that's really misplaced.

THE COURT: Mr. Allen, before you proceed to another thought, I'll just comment on that. And I may give a broader application to Dr. Gray's testimony when I think about it over the next few days. But at least insofar as the testimony was different the other day, I am applying it essentially as testimony in contradiction to what I perceived Dr. McMahon's testimony to be about the low escape risk and low risk of violence in a prison setting by your client, which I assume was evidence, or I am considering it as evidence offered under the catchall, under the catchall mitigation evidence. So to the extent that I might have given that weight as a mitigating circumstance to be considered, I think that Dr. Gray's testimony, in fairness, has to be considered in opposition to that.

MR. ALLEN: That's fine, your Honor. I'm basically pointing out where I feel that our evidence is stronger or the Court should possibly give more weight. I think that the Court will and should take

every evidence -- every bit of evidence that was referred to over the last two days into account. And I'm just trying to give weight and argue to what we presented here. And I understand that's the purpose. What I'm --

THE COURT: Well, I just want to let you know where I'm kind of going in case you wanted to argue why that's a mistaken belief on my part or you want to persuade me to some other extent.

MR. ALLEN: You're correct that is the catchall in my mitigation memorandum. I've got specific areas, and there is a catchall basic mitigation that we're showing here. And one of the areas that I did cite in there, I believe, was the defendant's being in prison instead of -- and that's where -- that he can, according to Dr. McMahon, be a, a person that's not going to be violent in the prison system. And that's where I'm leading it to. But it also goes in regard to the psychological areas that we were talking about with both doctors.

Also, Judge, and I know you were asking at the end of the day yesterday in regard to the diminished capacity with Dr. McMahon. I understand it was -- it's difficult that the type of evidence that was presented basically by Dr. McMahon, through myself and actually through cross-examination of Mr. Stalzer of these hypotheticals that we're grasping to show that we really don't know the facts. We don't have the luxury, as Dr. McMahon, on the video camera showing what happened and why somebody might have diminished capacity.

But what we are establishing is that under certain circumstances a person that is suffering from Post-

traumatic Stress Disorder can have diminished capacity. And that's why Dr. McMahon was asked those questions for the Court to hear. I would point out to the Court that in Dr. McMahon's diagnosis, there's no doubt that the defendant has had a significant history of alcohol and drug abuse. And that is -- was shown for both the mitigation of that and the going to the psychological illness.

What we've got here, Judge, and the evidence that was presented in the last couple of days was mainly psychological evidence. But it can be applied in many of these categories that I have written up in my motion. I would hope the Court would consider applying those different factors to what Dr. McMahon has stated. But --

THE COURT: Mr. Allen, from what I recall of the evidence, there was no significant psychiatric or mental health history of your client essentially, unless it went undetected, until Dr. McMahon completed his evaluation; is that correct?

MR. ALLEN: That's correct, from what I understand. I know -- and I think Dr. McMahon referred in his report that my, client at the County Jail had seen some of the psychologists or psychiatrists at the County Jail, and may have sought counseling and that type of help in the prison system when he was at the Department of Corrections. But I don't believe there was an actual mental illness diagnosed up until now. But I don't know if there was -- if it was ever done before this case, you know, came to be, if there was ever an exam looking for a specific mental illness throughout the, you know, juvenile court system

or the early adult criminal justice system for my client.

THE COURT: Did either of the doctors, in your recollection of the testimony, offer an opinion at the age of onset of the manifestation of this PTSD or the manner in which they would have expected it to be exhibited by your client in particular?

MR. ALLEN: Your Honor, I don't know if there was. I don't believe there was an exact age ever given by Dr. McMahon other than it occurred starting in childhood. And I believe it was his testimony -- and reading the literature myself -- that this is something that as a result of the abuse at childhood starts and actually begins then. And I think -- and the way I would back that up is the way that Dr. McMahon talked about the other relatives, Dianna McKinney and Susan Sesate saying that James McKinney was becoming withdrawn as a child, would play by himself, was described as a loner, was not a person who was a vocal type child, becoming more and more of a person who would not talk unless asked questions to and this sort of thing. And I think that's where I would say that Dr. McMahon was trying to say the onset of this disorder was at least showing itself, though I don't know if he gave any specific ages.

MR. GONZALEZ: Judge, may I add something to that?

THE COURT: Sure.

MR. GONZALEZ: I think what he testified to was exactly what Mr. Allen said. And I think the other -- at least one of the other factors that he considered is that when that conduct manifested itself in James McKinney, he then started turning, as many do with

that disorder, to drugs. And he said that the rationale or the reason for that drug usage at that point -- as well as which started early on in life. I believe the testimony was that James McKinney started drinking when he was eight. He had his first drink and then progressed from there to continue with alcohol and other drugs.

But the purpose of it was to suppress the thoughts of the -- that manifested in his mind with respect to the illness. And I believe how he tied it together was -- had to do with what Dr. Gray had a problem with in the sense that there wasn't, at least as Dr. Gray saw it, a record of, for example, flashbacks. And the point that Dr. McMahon made was that you don't necessarily have to see those. And that's correct.

Even to make a diagnosis of Post-traumatic Stress Disorder you don't necessarily have to have flashbacks. What you're looking for in that scenario, if you don't have evidence of that, of that type of conduct, is evidence of suppressing that type of conduct. And that's what he was talking about with respect to the drug usage and how that suppressed the type of conduct in terms of the conduct that would involve flashbacks. That's what he was talking about and that's how he arrived at his conclusion in that regard.

That's also what he was talking about in terms of negative -- basically he was saying that in DSM III there are positive factors and negative factors. And a positive factor, for example, would have been a person having an actual flashback. The negative factor involves conduct that suppresses the positive factor.

That's what he was talking about on rebuttal. And that's what he zeroed in on.

MR. ALLEN: The only thing I would add to that, and I think Dr. McMahon, with these barrage of tests, that he concluded that the personality, that type that James McKinney, that he would say he is, goes along with the Post-traumatic Stress Disorder, that it's a person who at least in his opinion would not be a leader but more of a follower, would not try to go into stressful situations whenever -- and that's not to say that they're going to avoid every stressful situation or not to do thrill seeking now and then.

I think that we were trying to get nit-picky there. But the doctor says that all human beings are going to do these sorts of things but that at least in his opinion with the expectation that these things go hand-in-hand in tying it all back with the abuse.

And just to finish, your Honor, I think that we have shown as a matter of burden that this is a mitigating factor, the abuse, the mental disorder, and the items that flow from that disorder, which include the substance abuse, all be taken into mitigating factors. And I would rely on my written motion for other side and minor issues.

THE COURT: Thank you.

Mr. Stalzer?

MR. STALZER: Judge, regarding the diminished capacity and it's relationship with the diagnosis of PTSD, I think Dr. McMahon -- I think a critical point here is talking about a time when you have two homicides committed. And I think one thing that kind of flushed out in testimony on direct, cross, redirect, is that he can't really say. I mean, maybe it's not really

disputed that a person can have diminished capacity with the existence of a certain mental illness. But what's important, did Mr. McKinney suffer from diminished capacity or did he experience diminished capacity at the time of the Mertens or the McClain homicide. That's what's important in this case today.

I mean, the literature is there. And probably a lot of experts could come in and say that there is that potential. But did a particular defendant and in this case did Mr. McKinney experience diminished capacity at the time of the Mertens homicide, at the time of the McClain homicide? And that -- at that point, each one point in time, that's where neither doctor -- well, Dr. McMahon could not say he did or did not because the facts were just not known. Hypothetically he could give his opinion. But hypothetically those are not concrete facts before this Court.

The other aspect is if you accept as true that the defendant has the mental illness of PTSD, what is that, what is that affect then upon him during the commission of these two crimes? And that's something again relating to the diminished capacity that Dr. McMahon did not address. Much like a person could be addicted to chocolate. What would that do to the person who commits two violent crimes? On a person who is depressed? How does that affect him in the commission of two violent crimes? And that key question, if assuming for sake of argument the defendant has PTSD, how does that affect him at the time of these two murders? That is the key question.

Talking of recidivism, Mr. Allen brought it up early in his argument. Recidivism is important because you have Dr. McMahon relying in a large part on this

16PF examination, this personality inventory or projective test. Whatever. It's scored by an independent agency. And, again, this independent agency upon which Dr. McMahon relies for information to come to this conclusion of PTSD is saying, this: "He's a good, he's a good individual not to recidivate." And Dr. McMahon says, "I don't agree with that," as well as Dr. Gray, obviously saying they don't agree with that conclusion. But that's a conclusion drawn by the testing agency with respect to Mr. McKinney's answers on the test form.

Also, you heard about how the agency submits a projected MMPI, and Dr. McMahon avoiding that almost as if it's totally taboo. And I think it's a good thing because it almost gets guessing on top of guessing instead of just administering the test to find out what, what his MMPI profile would be.

The other interesting aspect on the 16PF, being one of the projective tests along I think with the Williamson which was not completed in a total form -- and Dr. McMahon, I recognize what he said. He said, "Well, I'm investigating areas where I think it's most important out of 39 questions." But then you can't evaluate as far as the weight of the evidence. Why not ask all 39? What have you to lose by getting responses from those questions that he didn't ask him about? Because maybe it might change an ultimate diagnosis or there might be something that would come up which would cause additional concern. Much like the aggressive cross-examination on Dr. Gray.

You know, wouldn't you like to know as much as you could possibly know about an individual? Well,

why stop short when you have this tool available? You're doing more than half of it, why not do the full -- or doing two-thirds of the questions, why not do the remainder? Ten or fifteen or whatever that wasn't asked? And on this 16PF, get back to it, you have a diagnosis of schizophrenia, differentiated type, I think was the form of schizophrenia, a differentiated type. Yet that is totally contradictory to what Dr. McMahon found, contradictory to the tentative diagnosis of Dr. Gray.

But yet this is a tool relied upon by Dr. McMahon in assessing the defendant with the illness of PTSD. That's the reason for getting into recidivism. That's a reason for the questions about the bottom line on the report from the 16PF by the independent testing agency. Judge, I realize there are a number of other mitigating factors that have been in some way, I guess I'll call it, presented. Although there in my opinion have been -- there has been no evidence to support those factors.

One, there's mention of remorse; two, I ask you to look closely at the degree of intoxication at the time of the offenses, at the time of the offenses; three, the degree of drug usage on the days of the offenses. And again these individuals, specifically Mr. McKinney, driving a vehicle. Knowing when to leave a house, when to enter a house, not to get caught. It doesn't sound like impaired judgment. Hiding a bag of property items. Was it a trash bin or in an alley to later pick it up? Sounds like rational thought processes if you want to carry out a crime and not get caught.

There's been no evidence of any type of remorse. That was mentioned I believe in the defendant's memorandum. And I think, Judge, in my recollection, it just about covers those areas that have been presented. And obviously your consideration, what you have to determine, is if there's sufficient showing that -- there has been a showing that there was abuse during early formative years, and the impact of that type of behavior by the stepmother and father into his adult life. How has he been functioning?

You heard some testimony of the relationship with Joe Lemon, Chris Morris. There was testimony of the girls. The socializing out in the desert. The driving around. And there is testimony about also driving around and drinking in the car. But how does that impact on one's ability to recognize right from wrong and that you can't burglarize people, you can't steal from people, and most of all you can't kill people.

Is this an individual before you that can't see the forest for the, the trees? Is this an individual who would have not gone into any of these homes of the two victims if a police officer was standing across the street? Would he still go in and commit the crime? Obviously not. Because he has the awareness. He has the capabilities to be rational and know that if somebody's around they could get caught; much like you heard argued either by me or by Mr. Gonzalez regarding that prior bad act burglary. The person comes home, logical, you get out of the house. You don't know what you are going to confront. And you got a person in the bedroom. Now that's, you know, two on two.

Judge, basically we have whatever decision you come down to. The victims will make statements regarding those 702 factors on the other underlying crimes, and deciding whether the aggravation is there beyond a reasonable doubt, whether there's sufficient mitigation to call for leniency, if it's been demonstrated by a preponderance of the evidence. And with that, Judge, we can't ask for anything more. And we recognize that it's not an easy chore, but it's a tough one. And whatever decision the Court comes down with we accept.

THE COURT: Mr. Allen, Mr. Gonzalez, anything further?

MR. ALLEN: Judge, I would -- I was just going to respond very briefly in regard to the remorse. What I put in the motion is regard to a case that I was citing to the fact that I believe that in that case they were -- the fact that the defendant was denying that he did these acts. I think the prosecution in that case was trying to show that, that he had no remorse then, and that's why that case is cited in there for.

I would point out to the Court that I think Dr. McMahon answered the questions that now Mr. Stalzer is bringing up in regards to certain tests, why they were sent away, that the service scores on things that he didn't really care about, that he gave the reasons why he asked certain questions. He answered that not one test was specific, it was a combination, in looking at all the data from all these tests.

So in regard to Dr. McMahon, I think that the Court heard his explanations and they make sense. And I would just ask the Court to consider all the evidence that we have presented in the mitigation

hearing with the written motions, and ask the Court to make the correct decision.

THE COURT: Mr. Allen, in evaluating Dr. Gray's testimony, I assume based on what he indicated he had reviewed when Mr. Stalzer laid the foundation for it that he had at least reviewed the raw data upon which Dr. McMahon based his opinions. So I assume that they were basing their opinions based on the same data with the exception of the opportunity to have a more lengthy personal interview with your client. Under the circumstances, considering that Dr. Gray does in fact have a Ph.D. in psychology, I certainly will give some weight to his opinion.

It's simply a -- in evaluating the two individuals, it appears to me that Dr. McMahon has more experience in this particular area, in this type of application, than does Dr. Gray. So it is his actual personal experience that I think entitles his opinion to more weight under the circumstances of this case.

Counsel, anything further?

MR. STALZER: Nothing by the State, your Honor.

MR. ALLEN: No, Judge.

THE COURT: I'll see you Friday at 4:00.

(The court stood in recess.)

* * * * *

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

July 23, 1993

No. CR 91-90926

STATE OF ARIZONA,

vs.

JAMES ERIN MCKINNEY,

BEFORE: The Honorable STEVEN D. SHELDON, Judge

FOR THE STATE:

County Attorney
By: Louis Stalzer

FOR THE DEFENDANT MCKINNEY:

Scott F. Allen
Alex Gonzalez
Victim Witness Division

SENTENCE OF IMPRISONMENT

4:30 p.m. State is represented by above-named counsel. Defendant is present with above-named counsel.

Court Reporter, Susan Wentlejewski, is present.

Barbara Phillips and Sharon McClain address the Court regarding sentencing.

The Defendant is advised of the charge, the determination of guilt and is given the opportunity to speak.

The victim is given the opportunity to address the Court.

Pursuant to A.R.S. § 13-607,

THE COURT FINDS AS FOLLOWS:

JURY VERDICT The determination of guilt was based upon a verdict of guilty after a jury trial.

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the Court enters the following judgment and sentence:

IT IS THE JUDGMENT of the Court that the Defendant is guilty of the following crime(s) as set forth on the following page(s), that upon due consideration of all the facts, law and circumstances relevant herein, the Court finds that suspension of sentence and a term of probation are not appropriate and that a sentence of imprisonment with the Department of Corrections is appropriate.

THE COURT FURTHER FINDS that there are circumstances sufficiently substantial to call for the term as indicated. These circumstances are stated by the Court on the record.

THE COURT READS THE SPECIAL VERDICT.

AS PUNISHMENT, IT IS ORDERED that the Defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Correc-

tions as follows:

OFFENSE: COUNT I: MURDER IN THE FIRST DEGREE

FELONY CLASS: 1

IN VIOLATION OF A.R.S. § 13-1105, 1101, 301, 302, 303, 304, 703, 801, 812, 604(K)

DATE OF OFFENSE: Between 03-09-91 and 03-10-91

SENTENCE: Death by administration of lethal gas or lethal injection

DANGEROUS pursuant to A.R.S. § 13-604

NONREPETITIVE

This sentence is to date from 07-23-93.

OFFENSE: COUNT II: BURGLARY IN THE FIRST DEGREE

FELONY CLASS: 2

IN VIOLATION OF A.R.S. SECTIONS: 13-1508, 1507, 1501, 301, 302, 303, 304, 701, 702, 801, 812, 604(K)

DATE OF OFFENSE: Between 03-09-91 and 03-10-91

SENTENCE: 21 Years

AGGRAVATED

DANGEROUS pursuant to A.R.S. § 13-604

NONREPETITIVE

This sentence is consecutive to term imposed in Count IV.

This sentence is to be consecutive to Counts IV and VI.

OFFENSE: COUNT III: MURDER IN THE FIRST DEGREE

FELONY CLASS: 1

IN VIOLATION OF A.R.S. SECTIONS: 13-1105, 1101, 301, 302, 303, 304, 702, 801, 812, 604(K)

DATE OF OFFENSE: Between 03-22-91 and 03-23-91

SENTENCE: Death by administration of lethal gas or lethal injection

DANGEROUS pursuant to A.R.S. § 13-604

NONREPETITIVE

This sentence is to date from 07-23-93.

OFFENSE: COUNT IV: BURGLARY IN THE FIRST DEGREE

FELONY CLASS: 2

IN VIOLATION OF A.R.S. SECTIONS: 13-1508, 1507, 1501, 301, 302, 303, 304, 701, 702, 801, 812, 604(K)

DATE OF OFFENSE: Between 03-22-91 and 03-23-91

SENTENCE: 21 Years

AGGRAVATED

DANGEROUS pursuant to A.R.S. § 13-604

NONREPETITIVE

This sentence is to date July 23, 1993.

The defendant is given 654 days of presentence credit.

This sentence is to be concurrent with Count VI.

OFFENSE: COUNT VI: THEFT

FELONY CLASS: 3

IN VIOLATION OF A.R.S. SECTIONS: 13-1802,
1801, 301, 302, 303, 304, 701, 702, 801, 812

DATE OF OFFENSE: Between 03-22-91 and
04-02-91

SENTENCE: Ten Years

AGGRAVATED

NONDANGEROUS

NONREPETITIVE

This sentence is to date from 07-23-93.

This sentence is to be concurrent with Count IV.

The defendant is given credit for 654 days of
presentence incarceration. .

IT IS ORDERED that the Defendant pay an as-
sessment in the amount of \$508.00 to the Clerk of
the Superior Court of Maricopa County:

Pursuant to A.R.S. § 13-812, Defendant shall pay a
\$500.00 (\$100.00 for each count) felony assessment.

Pursuant to A.R.S. §12-116, Defendant shall pay a
fee of \$8.00 to the Clerk of the Superior Court of
Maricopa County. Should Defendant pay all penal-
ties, fines and/or sanctions in full this date, said fee
is not applicable.

Payment shall commence on the first day of the
fourth month upon release from custody of the De-
partment of Corrections. Said payment shall not be
less than \$25.00 per month.

Any order entered by the Board of Pardons and Pa-
roles Pursuant to A.R.S. § 31-412 shall be transmit-

ted to the Clerk of the Superior Court of Maricopa County.

The Defendant is advised concerning rights of review after conviction and written notice of those rights is provided.

IT IS FURTHER ORDERED exonerating the bond.

IT IS ORDERED authorizing the Sheriff of Maricopa County to deliver the Defendant to the custody of the Arizona Department of Corrections and authorizing the Department of Corrections to carry out the term of imprisonment set forth herein. Issued: Order of Confinement.

IT IS FURTHER ORDERED that the Clerk of the Court shall remit to the Department of Corrections a copy of this order together with all presentence reports, probation violation reports, medical and psychological reports relating to the Defendant and involving this cause.

FILED: Notice of Rights of Review After Conviction.

cc: Criminal Judgments Desk

Deputy

STATE V. MCKINNEY (B) (Continued)

5:20 p.m. Hearing concludes

/s/Hon. Steven D. Sheldon
JUDGE OF THE SUPERIOR COURT

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

No. CR 91-90926

STATE OF ARIZONA,

Plaintiff,

v.

JAMES ERIN MCKINNEY,

Defendant.

DEFENDANT'S MITIGATION MEMORANDUM

(Oral Argument Requested)

(Assigned to the Honorable Steven D. Sheldon)

In the capital cases, fundamental respect for humanity underlying the Eighth Amendment requires consideration of this defendant as an individual offender as well as the circumstances of this particular offense when deciding whether or not to inflict the penalty of death. Any sentencing decision must focus on this individual defendant and his culpability. This conclusion rests squarely on the premise that the penalty of death is qualitatively different from a sentence of imprisonment. In Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed. 2d 944 (1976) the Supreme court stated:

Death, in its finality, differs more from life imprisonment than a 100-year prison term differ 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.” *Id.*, at 304-305, 96 S.Ct., at 2991-2992.

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978), the Supreme Court in reaffirming this principle stated:

“Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. . . . The non availability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence”. (98 S.Ct. at 2965)

A long time ago the Supreme Court recognized that “[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.” Pennsylvania ex rel. Sullivan v.

Ash, 302 U.S. 51, 551, 58 S.Ct. 59; 61, 82 L.Ed. 43 (1937).

Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. The prevailing practice of individualizing sentencing determinations generally reflects not only an enlightened policy, but also the constitutionally indispensable part of the process of inflicting the ultimate penalty. Woodson v. North Carolina, supra, 96 S.Ct. at 2991.

The Supreme Court set forth the premise when it stated:

“A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death”, Woodson v. North Carolina, 428 U.S. 280, 340, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976).

These principles were reaffirmed by the Supreme Court in California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987).

We direct the Court’s attention to two non-capital federal cases, which discusses the concept of individualization.

First, United States v. Wardlaw, 576 F.2d 932 (1978) where the Court stated:

“Sentences dictated by a ‘mechanistic’ concept of what a particular type of crime invariably deserves have been held to fall within this exception: a judge holding such fixed ideas is presumably closed to individual mitigating facts.” 576 F.2d 538.

* * *

“The court’s duty to ‘individualize’ the sentence simply means that, whatever the judge’s thoughts as to the deterrent value of a jail sentence, he must in every case reexamine and measure that view against the relevant facts and other important goals such as the offender’s rehabilitation. Having done so, the district judge must finally decide what factors, or mix of factors, carry the day. While the judge’s conclusions as to the deterrence may never be so unbending as to forbid relaxation in an appropriate case, they may nonetheless on occasion justify confinement although other factors point in another direction.” 576 F.2d at 538.

In United States v. Barker, 771 F.2d 1362 (9th Cir. 1985), the Ninth Circuit Court of Appeals again reaffirmed that a criminal sentence must reflect an individualized assessment of an individual defendant’s culpability rather than a mechanistic application of a given sentence to a given category of crime. The Court stated in this regard:

“[P]unishment should fit the offender and not merely the crime. The belief no longer pre-

vails that every offense in like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. The sentencing judge is required to consider all mitigating and aggravating circumstances involved. There is a strong public interest in the imposition of a sentence based upon an accurate evaluation of the particular offender and designed to aid in his personal rehabilitation. Thus, appellate courts have vacated sentences reflecting a preconceived policy always to impose the maximum penalty for a certain crime.” 771 F.2d at 1365.

Beginning with Lockett v. Ohio, supra, the Supreme Court recognized that in order to give meaning to the individualized-sentencing requirement in capital cases, the sentencing authority must be permitted to consider “as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense.” 98 S.Ct., at 2965 (emphasis in original). In Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the Court accepted the Lockett approach. Not only did the Eighth Amendment require that capital-sentencing schemes permit the defendant to present any relevant mitigating evidence, but “Lockett requires the sentencer to listen” to that evidence. 102 S.Ct., at 877, n. 10;

In Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), the Supreme Court reinforced the constitutional significance of the capital-sentencing authority’s consideration of evidence that “would be ‘mitigating’ in the sense that [it] might serve ‘as a basis for a sentence less than death.’” 106

S.Ct., at 1671, quoting Lockett v. Ohio, 438 U.S., at 604 98 S.Ct., at 2965. In Hichcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), the Court, by a unanimous vote, invalidated a death sentence because “the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of non statutory mitigating circumstances.” *Id.*, 107 S.Ct., at 1824. The Supreme Court unequivocally relied on the rulings in Lockett v. Ohio, and Eddings v. Oklahoma, that the Eighth and Fourteenth Amendments require that the sentencing authority be permitted to consider any relevant mitigating evidence before imposing a death sentence. 107 S.Ct., at 1822 and 1824.

In still another decision the Court again acknowledges the constitutional significance of this principle. In California v. Brown, *supra*, the central principles establishes by the Court’s Eighth Amendment jurisprudence is that consideration of a defendant’s character or record, and the circumstances of the offense are a “constitutionally indispensable part of the process of inflicting the penalty of death,” quoting Woodson v. North Carolina, 96 S.Ct. 2978, 2991; 107 S.Ct., at 839. The Court stated:

“Lockett and Eddings reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant’s background, character, and crime”.

107 S.Ct. at 841.

These principles are recognized in Arizona.

A.R.S. § 13-703(G) reads in part:

“G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant’s character, propensities or record and any of the circumstances of the offense...”

The statute then lists some factors. Such list was not intended to limit the court. The statute reads “including but not limited to.” Under A.R.S. § 13-703, at trial court is not free to disregard any mitigating factor. This includes any aspect of a defendant’s character or record that is offered and/or could form as a basis for a sentence less than death. If a court does, it violates a defendant’s rights under the Eighth & Fourteenth Amendment of the United States Constitution. State v. Smith, 136 Ariz. 273, 655 P.2d 995 (1983). This ensures that the death penalty is not imposed despite factors that may call for a less severe penalty. State v. McMurtrey, 136 Ariz. 93, 664 P.2d 637 cert. den., 464 U.S. 858, 104 S.Ct. 180, 78 L.Ed.2d 161 appeal after remand 143 Ariz. 711, 691 P.2d 1099 (1983) cert. den., 107 S.Ct. 1359 (1984). See also, State v. McCall, 139 Ariz. 147, 677 P.2d 920 cert. den., 467 U.S. 1220, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1983).

In a law review article concerning the death penalty statute the authors stated:

“In this respect, the Arizona Statute goes beyond Lockett. It does not simply permit the sentencing judge to consider mitigating cir-

cumstances; it requires such consideration as a matter of state law.”

Capital Sentencing in Arizona 1984, Ariz. St. L.J. 1 (1984)

The article went on to discuss the change in the statute:

As reconstructed by the Watson decision, the Arizona statute appeared to satisfy the requirements of Lockett. In 1979, however, the legislature further amended the statute, not only ratifying Watson, but also adopting a new definition of mitigating circumstances that appears to be even broader than Lockett contemplated. As amended, section 13-703(G) defines mitigating circumstances as follows:

Mitigating circumstances shall be any factors . . . which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant’s character, propensities or record, and any of the circumstances of the offense. . . .

If the word “including” in the statute is read in a non-exclusive sense--i.e., including, but not limited to--the language of section 13-703(G) seems to contemplate a range of mitigating factors that is even broader than the constitutional notion. Conceivably, the revised definition includes any factor relevant to the sentencing decision even if it has no direct connection with the defendant’s character or record or the circumstances of the crime. Furthermore, section 13-703(E) requires the sen-

tencing judge to take all such factors into account if established by satisfactory proof.

Generally, the Arizona Supreme Court has applied the statutory provisions concerning mitigating circumstances in a relatively permissive manner. In State v. Gretzler, for example, the court described mitigating circumstances as “all the ‘compassionate or mitigating factors stemming from the diverse frailties of mankind.’” This description, adopted from Woodson v. North Carolina, certainly conforms to the constitutional notion of mitigating circumstances established in Lockett. On the other hand, a few Arizona cases suggest a sort of causal relationship must exist between an asserted mitigating circumstance and the defendant’s behavior at the time of the crime. Perhaps such a requirement is applicable to the statutory mitigating circumstances listed in section 13-703(G). The constitutionally prescribed notion of mitigating circumstances, however, is much broader, as the Arizona Supreme Court recently acknowledged in State v. McMurtrey. Furthermore, a “causal connection” requirement would be inconsistent with several other Arizona cases that identify as mitigating circumstances various factors that did not influence the defendant’s criminal act, such as the absence of prior convictions; the defendant’s model behavior while in prison awaiting his execution; the defendant’s youth; and even, in certain situations, a lesser sentence imposed on the defendant’s accomplice. In other words, even if a claimed mitigating

circumstance bears no causal connection to the defendant's criminal act, "[t]he court must consider the offered evidence further to determine whether it in some other way suggests that the defendant should be treated with leniency."

We caution the court that when it is weighing the mitigating circumstances, the Arizona death penalty process may be defective by precluding the sentencer from considering circumstances that may be mitigating yet fail to meet the burden of proof imposed on a defendant. This precludes the sentencing court from weighing evidence of mitigation that, while not satisfying the evidentiary standard, nonetheless may give the sentencer reservations about the appropriateness of imposing a sentence of death. (See Adamson v. Ricketts, 865 F.2d 1011, 1041 (9th Cir. 1988) This exclusion of relevant evidence at the weighing stage violates the principle established by Woodson, Lockett, Eddings and Skipper that a sentencing court must weigh all relevant mitigating evidence against the aggravating circumstances. Any modifiers which restrict the trier of fact from consideration of any mitigation are unconstitutional. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 111 L.Ed.2d 511 (1990). We can only urge the court to carefully consider all evidence presented in mitigation, applying the weight it deserves.

In Spivey v. Zant, 661 F.2d 464, 471 (5th Cir. 1981), the Federal Court of Appeals announces a definition of mitigation that counsel wants the court to consider:

“circumstances which do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability and punishment.”

Id. at n.8 (citing Coker v. Georgia, 433 U.S. 584, 590-91 (1977)).

We point the court, again, to the Barker case of the doctrine of “General Deterrence”.

“Nevertheless, deterrence as a sentencing rationale is subject to limitation. Tailoring punishment to the individual criminal may reduce the efficacy of deterrence, but that reduction is an inevitable cost of a system that eschews mechanistic punishment. General deterrence is a legitimate aim, but it has never been the sole aim in imposing sentence.” 771 F.2d at 1368.

Deterrence is neither an aggravating nor a mitigating factor, therefore, deterrence is not a factor which you may consider when making your decision about the appropriate punishment in this case. You may not render the death sentence based on your belief that a death sentence is necessary to deter this defendant from future misconduct or to deter other members of the general public from future misconduct. Deterrence of this defendant or others must not be used by you during deliberation concerning the appropriate sentence in this case. We urge the court to review the deterrence discussion in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), which discusses the concept in this fact situation - accomplice liability.

The failure to find mitigation by the state results because the state fails to understand the concept of mitigation. In order to begin the process, we suggest the following definition of mitigation for the trier of fact:

Mitigating circumstances are not intended as a justification or excuse for a killing or to reduce it to a lesser degree of crime than first degree murder. Instead, a mitigating circumstance is a fact or group of facts which has one of two purposes: (1) a mitigating circumstance may extenuate or reduce the culpability of this defendant for this crime, or (2) a mitigating circumstance may make the defendant less deserving of the extreme punishment of death.

Our law requires consideration of more than just the bare facts of the crime. A mitigating circumstance may stem from any of the diverse frailties of humankind.

In considering mitigating circumstances, it is your duty to consider as a mitigating circumstance any aspect of the defendant's background, character, age, education, environment, behavior and habits which make him less deserving of the extreme punishment of death.

You may consider as a mitigating circumstance any circumstance which tends to justify the penalty of life imprisonment or that the defendant contends as a basis for a sentence less than death. [This definition is used to instruct juries in North Carolina, Mississippi and California]

The defendant submits the following aspects of his character, propensities, and record, and the following

circumstances of the offense, as mitigating evidence sufficiently substantial to call for leniency:

I. EVIDENCE OF A DIFFICULT FAMILY HISTORY: EDDINGS V. OKLAHOMA, *supra*.

The evidence from Dr. McMahon, Ph.D., Susan Sesate, the defendant's aunt, and Diana McKinney, the defendant's sister, present a history of a very difficult, troubled, and dysfunctional childhood. During his tender years, James McKinney, was raised in a very turbulent family setting. James' parents were divorced when James was approximately three (3) years old. The mother got custody of the children and James lived with his mother in California. At some point very soon after the divorce James McKinney, Sr. took the kids away from their mother and brought them back to Arizona. James saw his mother approximately every other weekend. In his early teens he went back and forth living with his mother and his father. During the time period that James would live with his father, James was physically and mentally abused by his stepmother, Shirley McKinney. At some point in time all of the children eventually left the McKinney household except for James. James basically was •the only child to remain with his father and Shirley McKinney. When living with the McKinney's James was subjected to his father's heavy drinking, physical abuse and also mental abuse.

All of these events, and other events that will be testified to, combined to create James' personality, and a major mental illness, post-traumatic stress disorder, which Dr. McMahon found.

II. ALCOHOL ABUSE

Alcohol and substance abuse is a mitigating circumstance. State statutes which did not permit consideration of the defendant's alcohol problem were held unconstitutional. Bell v. Ohio, 438 U.S. 637, 641-642 (1978); Roberts v. Louisiana, 431 U.S. 633, 637 (1971); see also People v. Lanphear II, 36 Cal.3d 163, 168-169 (1984).

In this case, the mental health professional found significant alcohol and substance abuse.

III. The Defendant's Conduct While Incarcerated and His Conduct During Trial.

The Maricopa County Sheriff's Department has had no difficulties of any kind with the defendant during his time in custody since the defendant's arrest. During trial, the defendant's demeanor was respectful, proper and controlled. He conducted himself, while under extreme stress, in a composed and dignified manner.

A person's behavior is relevant evidence in mitigation of punishment. State v. Watson, 129 Ariz. 60, 629 P.2d 943 (1981) Skipper v. South Carolina, supra.

IV. Age of Defendant

Under the statute, age is a mitigating circumstance. The defendant concedes that the Arizona cases involving age deal with youth as a mitigating factor. See, State v. Valencia, 132 Ariz. 2481, 648 P.2d 239 (1982). However, the statute does not so limit the consideration. The defendant is 26 years old. At the time of the homicides the defendant was 23.

The court should consider his age and the impact of a sentence of life imprisonment. A life sentence from the court for each conviction of First Degree Murder carries a mandatory minimum sentence of 25 years. With consecutive sentences on each first degree murder conviction, the earliest the defendant would be released would be 2043 at age 86. This does not include the sentences he can receive on the other counts. Realistically, a life sentence here is a sentence for the rest of the defendant's natural life.

V. Risk of Future Criminal Conduct

There is ample evidence that given the defendant's background, his behavior in jail, and his personality, the defendant does not pose a risk while incarcerated. State v. Watson, supra; Miller v. Wainwright, 798 F.2d 426 (11th cir. 1986). Dr. McMahon will testify that he poses no danger to himself and others in jail.

VI. RESIDUAL DOUBT

The court may also consider as a mitigating circumstance any residual or lingering doubt you may have about James McKinneys's guilt, if in fact you have such a doubt.

Lingering or residual doubt differs from reasonable doubt. The jury has already found beyond a reasonable doubt that James McKinney is guilty. Yet, some genuine doubt may still exist. It may reflect a mere possibility. It may be the thought of one juror or several. It is that type of doubt that is called residual doubt. This lingering doubt -- the absence of absolute certainty about guilt -- can be a valid reason for not imposing the ultimate and irrevocable penalty of death.

Unless you can say with certainty that you do not possess a residual or lingering doubt, then you may consider the existence of such a residual doubt as a mitigating circumstance that warrants a sentence of life in prison rather than the death penalty. Certainly there is a lingering doubt as to whether James McKinney was the shooter in either the Mertens and McClain homicides. Michael Hedlund's jury found specifically that he was guilty of premeditated first degree murder in regard to Mr. McClain. This was not found in either case for James McKinney.

United States Constitution: Amendments VI, VIII, and XIV

Franklin v. Lynaugh, 487 U.S. 164, 108 S.Ct. 2320, 110 L.Ed.2d 80 (1988)

Lockett v. Ohio, *supra*

Eddings v. Oklahoma, *supra*

Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1983) rehearing denied, 747 F.2d 1468 (1984)

Smith v. Balkom, 660 F.2d 573 (5th Cir. Unit B 1981), modified, 677 F.2d 20 (1981)

VII. PSYCHOLOGICAL HISTORY

In this matter Dr. Mickey McMahon, Ph.D., examined the defendant and found:

The client is an individual who underwent a massive amount of neglect and abuse during his developmental years which in my opinion was sufficient to create a case of post-traumatic stress disorder (PTSD). In addition it appears that he had some learning disabilities processing visional and auditory infor-

mation that would have made him even more vulnerable to such abuse.

Substance abuse is frequently associated with PTSD, and it is not surprising that he began as early as thirteen (13) to drink beer and smoke marijuana--substances that he maintained an interest in to the neglect of stimulants. While in prison he withdrew into a heroin addiction, which again is consistent with self medication anxiety and distress, not the kind of pattern one would expect to see in a thrill-seeking or sensation-seeking individual.

Dr. McMahon concluded:

In summary, the client's background history and comprehensive test results reveal a multitude of abusive and traumatic experiences since early childhood and continuing of into adolescence. His criminal history and test results are out of character with the current offenses under question. The data also indicate that he will do his time without major incident and not be a significant management problem nor a risk for violence in the Department of Corrections.

Defendant submits that his psychological background is mitigating. Defendant basis this on Dr. McMahon's report (attached Exhibit A) and anticipated testimony at the sentencing hearing.

Post-traumatic stress disorder in childhood has been found by other psychiatrists and psychologists. This was found in the case of *State of Arizona v. John Angel Serna*, CR 150464, a post-conviction re-

lief action currently pending before Judge Ronald Reinstein in the Maricopa County Superior Court. Dr. Don a psychiatrist, and Dr. Becker a psychologist found post-traumatic stress disorder in that case. Defendant has attached part of a memorandum filed in that case that relates to post-traumatic stress disorder. (See attached Exhibit B).

VIII. The Defendant's Ability to Appreciate the Wrongfulness of His Conduct Was Substantially Impaired, A.R.S. § 13- 7031G)(1).

In this matter Dr. Mickey McMahon, Ph.D., examined the defendant and found there is evidence of post-traumatic stress disorder. Dr. McMahon will testify that this seriously impacts greatly upon a persons ability to appreciate the wrongfulness of his acts.

In terms of mitigation there is no question James McKinney's capacity was significantly impaired. In this regard, the defendant offers five cases where the court found substantial impairment.

First, State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977). The court found the mental condition of the defendant which was induced by voluntary consumption of alcohol significantly impaired his capacity and, therefore, was a mitigating circumstance sufficiently substantial to call for leniency

In State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979), the court found that the defendant suffered from substantial mental impairment due to brain lesions and reduced a death sentence to life imprisonment.

In State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983), the court found substantial mental impair-

ment due to drug addiction, neurological problems, vulnerability to influence and a lack of a prior record of violence to be factors which called for leniency.

In State v. Stevens, 764 P.2d 724 (1988), the court found the defendant, due to drugs and alcohol use, was substantially impaired and reduced a death sentence to life imprisonment. In so finding, the court noted:

“Dr. Tatro concluded that ‘the weight of the present findings suggest that Mr. Stevens’ actions were the result of his heavy use of alcohol and drugs preceding his meeting with the victims and a well-developed habit of acting out on socially unacceptable impulses while under the influence of such intoxicants.’ Dr. Tatro diagnosed Stevens as being alcohol and amphetamine dependent and as having a passive-aggressive personality disorder.” p.728.

The court further noted:

“Dr. Tatro describes Stevens as ‘soft spoken, pleasant, courteous and cooperative. There was little about his manner or appearance to suggest that he would be capable of the kind of violence with which he is charged.’ Dr. Tatro describes Stevens as too passive to intentionally hurt anyone that he cares about. ‘When he acts out against others, it is almost always when he is under the influence of some ‘irresistible’ external influence such as alcohol, drugs or persuasion of friends.’” p.728.

Finally, the Supreme Court vacated a death sentence in State v. Jesus Jimenez, 67 Ariz. Adv. Rep. 3 (1990). After weighing the aggravating and mitigat-

ing circumstances. The Court found that the defendant's impaired mental condition was "sufficiently substantial" to outweigh the aggravating factors. In doing so the Court commented:

"Given the strong evidence in this case of the severity of defendant's mental illness, combined with the substantial and relevant factor of defendant's young age and borderline intelligence level affecting his intellectual maturity, we believe that leniency is required. We therefore reduce the sentence from death to life imprisonment."

We suggest that the picture presented by Dr. Tatro mirrors the picture painted by the Supreme Court in State v. Rockwell, 161 Ariz. 5, 775 P.2d 1069 (1989).

In that case the court stated:

"This defendant's character and background, together with his age at the time of the murder and the unique circumstances of his conviction, cause us to conclude that a sentence of death is inappropriate in this case. At age seventeen defendant was involved in a serious motorcycle accident, defendant lost his right leg and sustained serious head injuries. Family members attest that his violent and unpredictable behavior began after this tragic accident, as did his alcoholism and his need to appear macho.

From the record, it is apparent that the trauma of losing his leg has caused defendant to become destructive and unpredictable. He turned to alcohol and modeled himself after his brother Lewis. The defendant and Lewis

had what one examining psychiatrist termed a “destructive abnormally symbiotic relationship.”

Based upon those findings the Supreme Court reduced the death sentence to life imprisonment.

We suggest to the court that here, as in Rockwell, the defendant was suffering from the same combination of factors and, therefore, considering all of these factors, the court should find this condition of the defendant to be sufficiently substantial to call for leniency as did the Supreme Court in Rockwell and in Stevens.

IX. Cumulative Effect of All of the Above Mitigating Circumstances

In State v. Correll, 146 Ariz. 468, 715 P.2d 721 (1985), the Supreme Court stated that mitigating circumstances will be considered individually and “in combination”. Here, the weight of all of the factors in combination clearly bring the mitigating evidence above the “Plimsol Line” where it is sufficiently substantial to call for leniency. The finding of no mitigating factors would be an abuse of the trial court’s discretion. That abuse would violate the defendant’s Eighth & Fourteenth Amendment rights to the United States Constitution and Article 2, Sections 1, 4 and 15 of the Arizona Constitution. Recently, the Ninth Circuit found the Montana Death Penalty Statute unconstitutional, because it failed to consider the cumulative effect. In Smith v. McCormick, 914 F.2d 1153 (9th Cir 1990) the court stated:

As Justice O’Connor wrote in Penry v. Lynaugh, U.S. ____, 109 S. Ct. 2934, 2951, 106 L.Ed.2d 256 (1989), “[r]ather than creat-

ing risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is, essential if the jury is to give a ‘reasoned moral response to the defendant’s background, character, and crime.’” (citations omitted; emphasis in original). Justice O’Connor’s use of the conjunctive--that the moral analysis in death sentencing must respond to “the defendant’s background, character, and crime”, follows Woodson’s position that all mitigating evidence must be weighed “together”.

The sentencer must not only consider, but “give effect” to all the mitigating evidence. Penry, 109 S.Ct. at 2947. But the Montana Supreme Court “rejected” as mitigating that evidence not sufficiently substantial to warrant leniency, and deprived such evidence of any effect by failing to weigh it together with other circumstances.

Simply to run down a list of possible mitigating factors seriatim, deciding whether each one meets a threshold weight, fails to focus sentencing on the appropriateness of death for a specific individual. Failure to assess defendants as “uniquely individual human beings”, Woodson, 428 U.S. at 304, 96 S.Ct. at 2991, in light of the combined moral weight of all the mitigating evidence, is to unconstitutionally “narrow a sentencer’s discretion to consider relevant evidence that might cause it to decline to impose the death sentence.” McCleskey v. Kemp, 481 U.S. 279, 304, 107 S.Ct. 1756, 1773, 95 L.Ed.2d 262 (1987) (emphasis

in original). Compare United States v. Sokolew, 490 U.S. 1 (1989) (applying totality of circumstances analysis to drug profile searches).

Although the Supreme Court has recently held that Lockett and Eddings speak mainly to “what” mitigating evidence a sentencer must consider rather than “how” that evidence must be considered, Saffle v. Parks, ____ U.S. ____, 110 S.Ct. 1257, 1261, 108 L.Ed.2d 415 (1990), it is clear from Pennsylvania v. Ashe, Woodson, and their progeny, that a sentencer, in addition to not excluding from consideration any relevant mitigating evidence, must also weigh all of the mitigating circumstances “together”. The Montana courts failed to do this in Smith’s case. (914 F.2d at 1168-1169).

In this case the Ninth Circuit reaffirmed the requirement that the court make specific findings of fact:

. . . Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factor actually considered by the trial court.” 455 U.S. at 119, 102 S.Ct. at 879 (O’Connor, J., concurring). The sentencing court must, therefore, explicitly discuss in its written findings all relevant mitigating circumstances, “including those it finds insufficient to warrant leniency.” See Coleman v. Risley, 839 F.2d 434, 502 (9th Cir. 1988)1 (Reinhardt, J., dissenting), rev’d sub nom. Coleman v. McCormick, 874 F.2d 1280 (en banc) (9th Cir. 1989), cert. denied, ____ U.S.,

11.0 S.Ct. 349, 107 L.Ed.2d 337 (1989), (914 F.2d at 1166).

See also, Mills v. Maryland, 486 U.S. 367, 1089 S.Ct. 1860. Also, State v. Rockwell, 161 Ariz. 5, 775 P.2d 1069 (1989).

In closing, in State v. McCall, 29 Ariz.Adv.Rep. 4,7 (1989), the Supreme Court noted it was a better practice for the sentencing judge to list all factors considered in mitigation.

The defendant requests that the court make specific findings on each of the factors advanced by the defendant. We ask that the court find whether each factor is mitigating and then whether it is sufficiently substantial to call for leniency. State v. Beaty, 158 Ariz. 232, 762 P.2d 519 (1988). (See also Smith v. McCormick, *supra*).

X. REMORSE

Counsel points to State v. Carriger, 692 P.2d at 1011, where the court states:

“The trial court found that Carriger’s refusal to acknowledge his guilt was to be held against him. We think it is neither mitigating nor a fact that should be held against Carriger. A defendant is guilty when convicted and if he chooses not to publicly admit his guilt, when convicted and if he chooses not to publicly admit his guilt, that is irrelevant to a sentencing determination. If a defendant admits guilt, this can be used as additional mitigating evidence, provided the defendant is truly remorseful for his crime.” (Emphasis added)

XI. MERCY

The court has absolute discretion to grant mercy regardless of the existence of the aggravating circumstances. California v. Brown, 107 S.Ct. 837 (1987); Peek v. Kemp, 784 F.2d 1479, 1488 (11th Cir) cert. den., 107 S.Ct. 421 (1986) (Georgia); Gray v. Lucas, 677 F.2d 1086, 1106 (5th Cir. 1982) cert. den., 461 U.S. 910 (1983) (Mississippi).

PROPORTIONALITY REVIEW

In deciding whether to impose the death penalty, the court in addition to finding aggravation-mitigation, must also decide “whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases considering both crime and the defendant.” State v. Richmond, 560 P.2d 41, 51 (1976) cert. den., 433 U.S. 915 (1977).

Proportionality review is distinct from the review of aggravating and mitigating review which assesses whether the death sentence is proportional in comparison to the offense. In contrast, proportionality review occurs in cases where the sentence is not disproportionate to the crime but may be disproportionate to the sentence given other defendants.

It may be argued by the state that such a review is not required by the statute or an appropriate function of the court. In this regard we would direct the court to the case of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (128 Ariz.Adv.Rep. at 22.)

In this case we ask the court to compare the following cases with the defendant’s case. First, compare a

case where the Supreme Court vacated a sentence death penalty. This case arose out of Maricopa County.

State v. Stevens, supra.

The court vacated a sentence with an aggravating factor of pecuniary gain and mitigating factors of the defendant's character and background, his age and the unique circumstances of his conviction. See also State v. Rockwell, supra.

Next, we ask the court to look at several cases in Maricopa County where the trial court, despite a finding of aggravating circumstances, sentenced the defendant to life imprisonment because the court found the mitigating circumstances were substantially sufficient to call for leniency.

State v. Corey Tilden, CR-87-11508 before Judge Gloria Ybarra.

This case was a double homicide of two elderly people in North Phoenix. It was for pecuniary gain. However, the court found that mental impairment of Corey Tilden and his turbulent childhood were sufficiently substantial to call for leniency. Defendant was sentenced to life imprisonment.

State v. James Lee White, CR-1448926, (1986), before Judge Stanley Goodfarb.

There, the defendant was convicted of two counts of First Degree Murder of two dancers. There, the court found the aggravating factors were substantially outweighed by the mitigating circumstances of the defendant's background and the trial court sentenced the defendant to two concurrent life sentence.

In **State v. Walter Spear**, CR-88-08980, where the State extended Mr. Spear a plea to something less than death. He was convicted of three counts of First Degree Murder of his wife and two children.

In **State v. Frank Edward Lewis**, CR-89-06065, Judge Gregory Martin imposed a sentence of two life sentences to be served consecutively for a double homicide, where both decedents had been repeatedly stabbed and physically injured.

Finally, in **State v. Michael Anthony Sanders**, CR-89-00826, Judge William Schafer accepted an Alford plea for the murders of Margaret and Clarence Bluhm, ages 69 and 74, respectively, and their blind daughter, Barbara Bluhm, age 37. The defendant, who had an extensive criminal record, was sentenced to serve three life sentences with only one sentence to be served consecutively to the other two concurrent sentences. All three decedents had been badly beaten about the head with an unknown object. Further, investigation revealed that the defendant stole from the house to buy cocaine. (See Sanders Presentence Report to be submitted)

In terms of proportionality again we ask the court to look at the Enmund case which discusses the number of persons sentenced to death.

The fact remains that we are not aware of a single person convicted of felony murder over the past quarter century who did not kill or attempt to kill, and did not intend the death of the victim, who has been executed, and that only three persons in that category are presently sentenced to die. 102 S.Ct. at 3376

Proportionally, the defendant's conduct does not merit a sentence of death.

In conducting this proportionality review, we again, suggest to the court it has absolute discretion to grant mercy regardless of the existence of the aggravating circumstances. Peek v. Kemp, 784 Fold 1479, 1488 (11th Cir) cert. den., 107 S.Ct. 421 (1986) (Georgia); and Gray v. Lucas, 677 Fold 1086, 1106 (5th Cir. 1982) cert. den., 461 U.S. 910 (1983) (Mississippi).

CONCLUSION

What we are asking this Court to do is keep in mind that this is an individual, James McKinney, who is being sentenced; James McKinney, an individual who has an individual background; James McKinney, an individual convicted of individual offenses. The Court must step away from generalizations which may have some validity in some cases. The key is the defendant is capable of responding to rehabilitation. Dr. McMahon concludes in his report that James McKinney will "do his time without major incident and not be a significant management problem nor a risk for violence in the Department of Corrections". Justice requires that the sentence imposed must also be capable of achieving personal rehabilitation.

RESPECTFULLY SUBMITTED this 15th day of July, 1993.

By: /s/ Scott F. Allen
SCOTT F. ALLEN
Attorney at Law

By: /s/ Alex D. Gonzalez
ALEX D. GONZALEZ
Attorney at Law

Copy of the foregoing memorandum
mailed/delivered this 15th
day of July, 1993, to:

HONORABLE STEVEN D. SHELDON
Judge of the Superior Court
Southeast Facility
222 E. Javelina
Mesa, AZ 85210

LOUIS STALZER
Deputy County Attorney
301 W. Jefferson, 5th Floor
Phoenix, AZ 85003

By: /s/ Scott F. Allen
SCOTT F. ALLEN
Attorney at Law

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EXHIBIT “A”

MICKY MCMAHON, PH.D.
Clinical & Consulting Psychologist
5150 N. 16th St., Suite A-122
Phoenix, AZ 05016
(602) 997-6315

PSYCHOLOGICAL REPORT

Name: McKinney, James

Date: 07/8/93

Referral: The client was referred by his attorneys, Scott Allen and Alex Gonzales, for a psychological study relating to a potential death penalty for their client.

Documents Reviewed: The following documents were sent to me by defense counsel and reviewed as part of the evaluation:

Presentence Investigation by Sandra Lewis-George, dated 1/7/92, including. Juvenile and Adult Arrest History.

Educational Records from 5/17/73 to 5/29/80,
1st Grade - 12th Police Homicide Investigation
Synopsis by Detective Neuman #186

Procedures Administered:

4/29/93	Clinical Interview	1.5 hours
4/30/93	Family Telephone Interview (Susan Sesate)	1.0 hours
5/01/93	Psychological Testing (16PF, CAQ, Woodcock-Johnson Reading Comprehension, Williamson Sentence	2.0 hours

Completion Test

5/13/93	Psychological Testing (WAIS-R, WRAT-R)	2.0 hours
5/16/93	Psychological Testing (Luria-Nebraska Neuropsychological Battery)	3.0 hours
5/23/93	Family Telephone In- terview (Diana McKinney)	0.5 hours

Background History: The client, as well as family members, were consistent in their descriptions of severe neglect as well as severe emotional and physical abuse from at least as early as three years of age.

Not only was the client beaten frequently but he was disciplined by being kept home and not allowed to attend school nor was he given money for lunch and either went hungry or had to eat leftovers or steal food. In addition, he was taunted by peers for the ragged clothes he and his siblings wore to school.

Educationally, he denied ever being in special education although language skills were significantly deficient throughout a number of grading periods or, his report cards up to the 7th grade.

The client volunteered that he only obtained an 8th grade education. He began running with a delinquent crowd and had a referral to the juvenile court as early as eleven years of age.

The client's drug and alcohol history began as early as 13 years of age when he drank beer and smoked marijuana with friends. He stated

The results from the Williamson' Sentence Completion were consistent with the above descriptions as well.

Summary: The client is an individual who underwent a massive amount of neglect and abuse during his developmental years which in my opinion was sufficient to create a case of Post-Traumatic Stress Disorder (PTSD). In addition, it appears that he had some learning disabilities processing visual and auditory information that would have made him even more vulnerable to such abuse.

Substance abuse is frequently associated with PTSD, and it is not surprising that he began as early as age 13 to drink beer and smoke marijuana--substances that he maintained an interest in to the neglect of stimulants. While in prison he withdrew into a heroin addiction, which again is consistent with self-medicating anxiety and distress, not the kind of pattern one would expect to see in a thrill-seeking or sensation-seeking individual.

The client gives no history of head injury or illness that would cause brain dysfunction over and above any hereditary learning disabilities. In addition, there were also no further indicators of an organic brain syndrome on the Luria Nebraska Neuropsychological Battery. I am unaware of any CAT, MRI, EEG or PET studies (which might add more information), although they are not typically administered without a history of injury and/or symptoms consistent with significant brain dysfunction which appear not to have occurred.

In summary, the client's background history and comprehensive test results reveal a multitude of

abusive and traumatic experiences since early childhood and continuing of into adolescence. His criminal history and test results are out-of-character with the current offenses under question. The data also indicate that he will do his time without major incident and not be a significant management problem nor a risk for violence in the Department of Corrections.

/s/ Mickey McMahon

Mickey McMahon, Ph.D.

Clinical Psychologist

and the enduring love that his family has for him. As Peggy Serna told this court, “I love [Johnny] dearly. . . . My brother is a very nice person. . .”. R.T., 2/3/93, at 100. Yolanda Cruz wanted this court to know that she too loved her brother, the Petitioner, “Johnny is my baby brother. He is like one of my own. I love him very much. Johnny is a very good person at heart.” *Id.*, at 25.

2. At the time of the offense and thereafter, Petitioner has suffered from major mental illness.

Both Dr. Don, a board certified psychiatrist, and Dr. Becker, a clinical psychologist, testified that Petitioner has suffered from Post-traumatic Stress Disorder since early, childhood. Additionally, both doctors testified he has also suffered from a Depressive Disorder (not otherwise specified) since early childhood.*

a. Post-traumatic Stress Disorder (PTSD) is a major mental disorder.

According to the American Psychiatric Association’s *Diagnostic and Statistics Manual of Mental Disorders* (3rd Edition-Revised)[hereinafter DSM-III-R], Post-traumatic Stress Disorder is a mental ill-

February 2, 1993 testimony of Peggy Serna at 77.

Johnny draws beautiful. Fantastic artist.

February 3, 1993 testimony of Yolanda Cruz at 22. See also February 3 testimony of Yolanda Cruz at 23-24; February 3 testimony of Joanne Serna at 67-71; Petitioner’s Exhibit 17.

ness.⁷ Children are extremely vulnerable to this mental disease. See, e.g., *Post-traumatic Stress Disorder in Children* (American Psychiatric Press, 1985); and *Rediscovering Childhood Trauma* (American Psychiatric Press, 1993). When this mental illness begins in childhood, it continues throughout a person's life. Indeed, in his chapter on Post-traumatic Stress Disorder, Dr. J. David Kinzie⁸ reports both that "trauma in early life may increase the symptoms in response to later trauma," and that "PTSD can occur at any age. . . . Several studies now indicate that the syndrome exists in very young children, even those who are preverbal." *Comprehensive Textbook of Psychiatry* (5th Ed. 1989), at 1002-03.⁹ In his chapter on children's mental illnesses, Dr. Paul L. Adams¹⁰ summarizes the causes of this mental illness and the persistent course of the disease,

⁷ The terms "mental illness", "mental disease" and "mental disorder" are synonymous according to the American Psychiatric Association's A Psychiatric Glossary (5th ed. 1980) at 89-90. Mental disorders are defined according to the American Psychiatric Association's Diagnostic and Statistics Manual of Mental Disorders (3rd ed.-Revised, 1987).

⁸ J. David Kinzie, M.D., is Professor of Psychiatry and Director of Psychiatric Clinical Services at the University of Oregon School of Medicine.

⁹ *The Comprehensive Textbook of Psychiatry* is an encyclopedic multi-volume medical and psychiatric reference publication that is widely accepted by all the allied mental health professions. [Hereinafter *Comprehensive Textbook*].

¹⁰ Paul L. Adams, M.D., is the Kempner Professor of Child Psychiatry at the University of Texas Medical School, Galveston Branch.

when a child is traumatized, from childhood on through an adult's life.:

DSM-III-R acknowledges that psychological traumata occur at all ages, including childhood. Certainly, children are subjected to highly stressful experiences . . . [by] the crimes of passion and intrafamilial violence that seem to have become integral to the postindustrial U.S. setting Children are particularly vulnerable to numerous horrible adversities, deliberate and unanticipated, natural and human-engineered, if and whenever parental love and care are not sufficient buffers or protectors against the stresses that devastate children.

The remote sequelae of trauma culminating in a PTSD during childhood have not been surveyed fully, but [clinical] work . . . [with its victims] . . . has found that the now adult victims: (1) persist in having symptoms of PTSD; [or] (2) lose most of the PTSD symptoms but develop grave depressions, phobias, dissociative disorders, and other mental illnesses; (3) have impaired . . . sexual role functioning; and (4) encounter . . . numerous barriers to their empathy and confront on every hand distortions, such as projective identification, identification with the aggressor, narcissistic identification, role reversal, and splitting.

Comprehensive Textbook, at 1852-53.

- b. PTSD is an obdurate, pervasive and debilitating mental illness.

The pervasiveness of the disorder is illustrated by this description of the effect of a traumatizing event:

This stressor event will usually set in motion a cascading series of other life events, as when a flood wrecks a house and then leads to years of economic difficulty and separations from important neighbors.

While this describes the life-encompassing effect of PTSD on an individual person, the effect of PTSD also permeates and invades the most fundamental biological component of human life: the neurochemistry of the brain. According to a Task Force Report of the American Psychiatric Association:

A traumatic experience . . . is recognized as highly relevant to the self and does not fit well with the self's usual view of the world and personal response capabilities. The result is an association of the event with alarm emotions, ideas of harm, altered states of mind, and special memory encoding. These psychological stress responses have biologic implications as well; catecholamine, corticosteroids, and other neurotransmitters and hormonal systems are aroused.

Treatments of Psychiatric Disorders (1989), at 2064-65. See also, *Biological Assessment and Treatment of Posttraumatic Stress Disorder* (Earl L. Giller, Jr., M.D., Ph.D., ed. 1990).

In addition to this physiological alteration in the actual neurochemical processes controlling the

brain's function, PTSD also causes a change in the structure of thought and memory. For example:

A traumatic life event is by definition enormously serious, in terms of its implications to self-organization, attachments, and meaning structures. Such events must eventually change the victim's inner schematic models of how the self articulates with the world. The processing of information that leads to such change in meaning structures of the mind is slow . . . in stressful life events [The] special memory endurance for traumatic perceptions . . . may be why they tend to return as intrusive images.[citation omitted].

To repeat, a traumatic event is coded as memories. These can be gradually integrated with mental schematizations. The memories and their gradual permutations are stored in what . . . is called "active memory," because they tend toward repeated mental representation or behavioral expression.

Each repeated representation once again sets in motion information processing of the kind that may eventually revise inner schematizations of meanings about self and the self-surrounding world.

Treatments of Psychiatric Disorders, at 2071. As a result of the physiological changes in the brain's neurochemistry and as a result of the alterations that PTSD has upon thought and memory:

A latency period of months or even years may follow the event, and the earlier state-

ment in DSM-III about “onset within six months of the stress event” is no longer justified, nor is it contained in DSM-111-R. Furthermore, persons trying to avoid reexperience of stress-related ideas and feelings may. . . lead to syndromes that require a variety of other diagnoses. These should be made in addition to, rather than instead of, the PTSD diagnosis.

Treatments of Psychiatric Disorders, at 2069.

In sum, there is no dispute that PTSD is a pervasive, debilitating and obdurate mental illness.

c. Petitioner suffers from PTSD.

Mr. Serna is diagnosed as suffering from Post-traumatic Stress Disorder. Dr. Don concluded:

[I]n terms of the duration of the exposure that John Serna experienced and the intensity of the experiences that he underwent, it probably is somewhat analogous to the holocaust experience because of the very lengthy period of time that he was brutalized and also the very real risk of, danger of death even to loved ones, close family members.

The Axis 1 diagnosis . . . was atypical depression or depression not otherwise specified . . . he had feelings of major depression as well as dysthymia with a neurotic depression, an Axis 1B diagnosis of post-traumatic stress disorder, and Axis 1C diagnosis of poly-substance abuse.

R.T., 3/24/93 at p. 40, line 18-24; p. 41, line 4-11.

Dr. Becker agreed. R.T., 3\24\93 at p. 94, lines 17-21; p. 105, line 1- p. 106, line 11.

Of critical importance is the fact that this diagnosis relates back to the time of the commission of the instant offenses. This diagnosis is based upon the DSM-III-R diagnostic criteria, historical records, social history information about Mr. Serna, corroborating-third-party interviews, the extensive body of medical, scientific, and psychological research data on the effects of PTSD on children and its consequences for the mental health of those children over time into adulthood¹¹, and two independent clinical evaluations. The diagnosis was independently reached both by Alexander M. Don, M.D., a licensed physician board-certified in psychiatry and in forensic psychiatry, and Judith V. Becker, Ph.D., a licensed clinical psychologist who has a national reputation in the diagnosis and treatment of trauma-caused mental illnesses, and Professor of Psychiatry at the University of Arizona College of Medicine. The diagnosis was reached with reasonable medical, scientific, and psychological certainty. R.T. 3/24/93 at p. 56, lines 4-6; 110, lines 16-18. Both doctors concluded that this mental illness and the other Axis I mental illness, depressive disorder not otherwise specified, have existed from Petitioner's childhood through the time of the commission of the offense to

¹¹ This scientific and medical data which has been gathered since the inclusion of PTSD in the DSM-III and then the DSM-III-R has been incorporated into the DSM-IV (*Diagnostic and Statistical Manual of Mental Disorders (4th Edition)*). *Posttraumatic Stress Disorder: DSM-IV and Beyond* (American Psychiatric Press, 1992). The DSM-IV will be published and take effect in the Fall, 1993.

the present. R.T. 3/24/93 at p. 43, line 4-6; p. 44, lines 21-25; p. 95, lines 13-p. 96, line 14.

**Toward a Theory of the Genesis of Violence:
A Follow-up Study of Delinquents***

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28 J. Am. Academy of Child &
Adolescent Psychiatry 431 (1989)

Abstract. The results of a follow-up study of 95 formerly incarcerated delinquents are reported. Adult F.B.I. and state police records were used. All but six of the subjects had adult criminal records. The average number of adult offenses was 11.58. Juvenile violence alone did not distinguish well between those who would and would not go on to adult vio-

Accepted August 12, 1988.

Dr. Lewis is Professor of Psychiatry. Ms. Yeager is Senior Research Assistant, and Ms. Della Femina is Research Assistant in the Department of Psychiatry, New York University School of Medicine. Dr. Lovely is Assistant Professor in the Department of Sociology, John Jay College of Criminal Justice.

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lent crime. Seventy-seven percent of the more violent juveniles and 61% of the less violent juveniles committed adult aggressive offenses. The interaction of intrinsic vulnerabilities (cognitive, psychiatric, and neurological) and a history of abuse and/or family violence was a better predictor of adult violent crime. *J. Am. Acad. Child Adolesc. Psychiatry*, 1989, 28, 3:431-436. Key Words: delinquents, follow-up study, abuse, family violence, neurological impairment.

The causes of violence are poorly understood. It is well established that violence in childhood is associated with later violence. (Monahan, 1981). As a variable, however, early aggression can only predict adult violence; it has no implications for understanding its causes, treatment, or prevention. While nearly all very violent adults appear to have been violent as juveniles, many violent juveniles do not become violent adults. How can one explain why some do and some do not? Are there more useful variables than early aggression that have implications for treatment and prevention? Are there combinations of intrinsic and environmental factors that distinguish between those aggressive children who are likely to continue their violent careers, and those who will not?

The purpose of this paper is twofold: (1) to report the results of a 7-year follow-up study of Incarcerated juveniles; and (2) to test the hypothesis that a constellation of certain kinds of neuropsychiatric vulnerabilities, interacting with violent abusive family environments, predicts adult violence better than does early violence alone.

The Literature

Considering the magnitude of violent crime in the United States, there have been remarkably few follow-up studies of aggressive children and adolescents and even fewer studies that consider issues other than previous antisocial behaviors, for purposes of prediction. Lefkowitz *et al.* (1977) reported that aggression at 8 years of age was predictive of future aggression; Wolfgang *et al.* (1972, 1984) reported that the degree of early antisocial behavior and being black were predictive of ongoing criminality, and Robins (1966), in study using records from a child guidance clinic, found that early antisocial behavior was associated with the adult diagnosis of sociopathic personality. Faretra's (1981) follow-up study of violent and suicidal adolescent psychiatric inpatients also reported a high prevalence of adult violent crime in former adolescent psychiatric inpatients. Finally, Loeber and Dishion (1983), after an extensive literature review, concluded that early conduct and academic problems and poor family discipline and supervision were the best predictor, of delinquency.

Most of the studies cited above used data from police files, school records, and clinic or hospital records. These resources allow the study of large numbers of subjects but limit the kinds of variables to those that are readily available. Clinical data that are now recognized as essential for the evaluation of violent individuals (e.g., histories of CNS trauma, EEG results and psychomotor epileptic symptoms, evidence of cognitive impairment, histories of physical abuse, etc.) are not uniformly available in clinic or hospital records.

Studies of delinquent adolescents and criminal adults by the present authors and their colleagues (Lewis et al., 1976a, b, 1979, 1985, 1986, 1987, 1988) have consistently demonstrated associations among signs and symptoms of neuropsychiatric and cognitive impairment, upbringing in abusive, violent families, and aggressive behaviors in childhood and adolescence. Of special note was the finding that a constellation of neuropsychiatric vulnerabilities and abusive, violent families distinguished more aggressive nondelinquent subjects from their nonaggressive nondelinquent peers (Lewis et al. 1987). Thus, it would seem that a constellation of particular intrinsic vulnerabilities and specific kinds of family stressors is associated with aggressiveness in general and not simply with having been designated delinquent or criminal. The authors of this study wondered whether the same kinds of intrinsic and environmental disturbances associated with juvenile aggression were predictive of adult violence.

The current study, in addition to exploring the association between juvenile violence and adult criminality, examines data gathered from psychiatric, neurological, and psychological evaluations performed expressly for research purposes. It differs from the Robins (1966) and Faretra (1981) studies in two important ways: (1) it was based on clinical evaluations rather than record reviews, and (2) the study sample was composed entirely of incarcerated delinquents rather than hospitalized or child guidance center referred patients.

When this follow-up study was begun, the authors hypothesized that intrinsic vulnerabilities—psychiatric, neurological, or cognitive—when coupled

with an upbringing in an abusive and/or violent household, would be associated with adult criminal violence. They further hypothesized that the effect of this combination of variables on violence would not simply be additive but would gain power by virtue of an interaction between the intrinsic and environmental components.

Method

Sample

This follow-up study is one of a series of reports on a group of incarcerated juveniles who were originally studied in the late 1970's (Lewis et al., 1979). The original sample consisted of 97 boys incarcerated at the only correctional school in Connecticut during an 18-month period in the late 1970s. The selection of subjects has been described (Lewis et al., 1979). Unfortunately, at the time, there was considerable local and national concern regarding studies of neuropsychiatric and intellectual factors, and it was impossible to recruit a comparison sample of demographically comparable nondelinquents. Thus, Lewis et al. were limited to studying incarcerated delinquents only. So that violent and relatively nonviolent juveniles could be compared, the sample was divided into 79 more-violent subjects, and 18 less-violent subjects, based on reliable ratings of violent behaviors (Lewis et al., 1979). Given the sample limitations, findings from this follow-up study may not be able to be extrapolated to other juvenile populations.

Within the sample, 37% of the subjects were white, 41% were black, 21% were Hispanic, and 1% Oriental. The subjects' ages at the time of evaluation ranged from 12.4 years to 17.4 years (mean 15 years

3 months, median 15 years, 3 months). Ages at the time of follow-up ranged from 19.9 years to 25.2 years (mean 22.5 years, median 22.7 years). The overwhelming majority of the subjects were from classes IV and V according to the Hollingshead and Redlich criteria (Hollingshead and Redlich, 1958).

By the time of follow-up, six subjects had died. Of these, two died shortly after release from the correctional school. Since they had insufficient time to commit offenses as adults, their data were dropped from the follow-up study. Thus, the final number of subjects was 95, 77 very violent, and 18 less violent.

Psychiatric and Neurological Evaluation

The original psychiatric evaluation has been described (Lewis et al., 1979, 1987). To summarize briefly, it consisted of a lengthy semistructured interview that was devised because there was no existing diagnostic protocol for children, or adolescents that dealt adequately with topics such as medical history, history of neuropsychiatric symptoms (e.g., lapses, memory impairment, metamorphopsias), qualities of temper, or histories of physical abuse and family violence, all topics essential to the workup of antisocial individuals. The instrument has since been tested on adolescent inpatients, and the data obtained from it in the areas mentioned above were found to be more comprehensive than those obtained after a 2-week period of routine psychiatric assessment on an adolescent inpatient teaching service.

In addition to obtaining historical information, a systematic mental status examination was conducted by both the neurologist and the psychiatrist. The criteria for determining the presence or absence of

psychotic symptoms were clearly defined and have been described (Lewis et al., 1979, 1987).

Standard neurological examinations, which have been described (Lewis et al., 1979, 1987), were carried out by a senior neurologist. A brief test of reading grade level, including word recognition and paragraph comprehension, was also performed by the neurologist.

Neurological history, including a detailed history of CNS injury and psychomotor symptoms, was obtained by the neurologist as well as the psychiatrist.

In addition to the neurological examination, sleep deprived electroencephalograms were performed and were read by a senior neurologist at a local medical school.

Psychoeducational Testing

Psychological testing, consisting of the Weschlar Intelligence Scale for Children (revised) (Weschler, 1974), the Bender-Gestalt Test (Bender, 1946), and the Rorschach Test (Rorschach, 1945) was performed.

Reading grade level was assessed as part of the correctional school's routine educational evaluation and has been described (Lewis et al., 1979). Reading level discrepancy was calculated by subtracting the subject's reading grade level score from his expected grade level for age and IQ.

Abuse and Family Violence

Certain other issues were covered both by the neurologist and the psychiatrist. For example, both tried to ascertain whether or not the child had been a victim of abuse or had witnessed extreme violence.

Because issues of abuse are so important to this follow-up study, criteria for positive coding will be repeated here. A child was considered to have been a victim of abuse by his parents, guardian, or other if he had been punched, beaten with a stick, board, pipe, or belt buckle, or beaten with a belt or switch other than on the buttocks. He was also considered to have been abused if he had been deliberately cut, burned, or thrown down stairs or across a room. A child was considered not to have been abused if he was only struck with an open hand or beaten with the leather part of a belt or with a switch on the buttocks only. For purposes of this follow-up study, subjects were also categorized as abused if their parents had been referred to Protective Services for abuse or neglect. Family violence was considered to have occurred if parents or other close family members had assaulted each other physically or threatened each other with weapons.

Issues of Veracity

When dealing with information obtained from delinquents or criminals the issue of veracity is paramount. Because the majority of this sample of juveniles was born before the Battered Child Syndrome was reported (Kempe et al., 1962), and before mechanisms were standardized for reporting abuse, it was not always possible to verify juveniles' reports with official records of abuse. However, in addition to the clinicians' interviews with subjects, there was a wealth of data from other social service agencies, parent interviews, and hospital records, as well as from scars over subjects' faces and bodies, that tended to substantiate what children said. In fact, subsequent reviews of hospital records, and interviews

years later with subjects themselves, indicated that in adolescence they tended to underreport their experience of having been abused and of having witnessed family violence.

Categorization of Intrinsic Vulnerabilities

Intrinsic vulnerabilities are defined here as impairments or dysfunctions that interfere with or limit the normal socialization of a child. From the authors' previous studies of the association of clinical signs and symptoms and juvenile violence, three general categories of such intrinsic vulnerabilities were identified: (1) episodic psychotic symptoms, (2) neurological/limbic dysfunction, (3) cognitive impairment.

Episodic psychotic symptoms. Subjects in this study were considered to have episodic psychotic symptoms if, at any time, they experienced paranoid ideation, or visual or auditory hallucinations as previously defined (Lewis et al., 1979), or if during psychiatric interviews, they were loose rambling, or illogical.

Neurological/limbic dysfunction. A subject was classified as having neurological or limbic dysfunction if he had three or more psychomotor symptoms, as previously defined (Lewis et al. 1987), or if he had a history of seizures or an abnormal EEC.

Cognitive impairment. The following measures of cognitive impairment were used: (1) a reading ability of 3 or more years below that expected for age and intelligence and (2) either an inability to subtract serial 7s or an inability to recall four digits backward. IQ alone was not used, because in the original study, it did not distinguish between more- and less-violent

groups significantly. Furthermore, it was found that brain dysfunction rather than simply low intelligence is more closely associated with problems in judgment and impulse control. Although it would have been desirable to have had a more robust measure of cognitive impairment based on a standardized battery of neuropsychological tests such as the Halstead-Reitan Battery (Halstead and Reitan, 1979), funding limitations precluded obtaining such measures.

Thus, a continuous variable was created, intrinsic Vulnerabilities, encompassing episodic psychotic symptoms, neurological/limbic dysfunction, and cognitive impairment (min. value = 0, max. value = 3).

Categorization of Environmental Stressors

For purposes of this study, environmental stressors were defined as having been physically abused, and/or having witnessed extreme violent between family members, both as defined above. Of the 95 subject 60% ($N = 57$) had both been abused and had witnessed extraordinary family violence. In addition 16 had indisputable evidence of abuse only and seven had similarly clear evidence of extreme family violence only. However, in these 23 cases, there was also material available suggesting the likelihood that both had occurred. Since, in this sample, the two experiences usually went together, it was decided to not distinguish between those who had been abused and those who had been exposed to violence. For this reason, the environmental variable, *Abusive, Violent Family* was created to reflect either experience.

Measures of Adult Violence and Criminality

With proper respect for and assurances of confidentiality, the authors were able to obtain the following

data regarding adult offenses; (1) number, nature, and timing of arrests according to state police records; (2) number, nature, and timing of arrests according to F.B.I. records; and (3) duration and timing of incarcerations. Thus, adult arrest data was exceptionally complete.

After the arrest data were obtained, the nature of the offenses were coded in two different ways. First, each offense was coded to reflect its severity according to the Connecticut State Penal Code. The penal code divides offenses into felonies and misdemeanors. Within each of these categories, the severity of the offense is classified as A, B, C, or D, in descending order of seriousness. For purposes of assessing adult violence, one of our OCCOMC measures was numbers of A felonies plus numbers of B felonies. These felonies included murder, sexual assault, kidnapping, and robbery.

The alphabetical classification of offenses used by the police did not always reflect the aggressive nature of criminal acts, since lower degrees of felonies and some misdemeanors are violent. Therefore, offenses were also coded in terms of the descriptive nature of the acts. Thus the following acts were grouped together as Aggressive Offenses: murder or attempted murder, kidnapping or unlawful restraint: sexual assault of any kind: nonsexual assault of any kind: robbery of any kind: and burglary with weapons or explosives or in which physical injury occurred (i.e., Burglary 1). The category of Nonaggressive Offenses encompassed all other offenses such as stealing of any kind, including certain forms of burglary in which no physical harm occurred, and other lesser offense; such as breach of the peace in which no indi-

vidual was injured.

Coding offenses in these two different ways allowed the data to be analyzed in more meaningful ways than would have been possible had simply felony and misdemeanor alphabetical classifications been used. Also, a subject's total number of offenses, regardless of their nature was recorded.

In addition, the numbers of prison days a subject was incarcerated was tabulated. By subtracting the numbers of days incarcerated from the numbers of days between discharge from juvenile corrections and follow-up, the number of offenses committed per year at liberty could be calculated.

A word should be said about the limitations of using recorded offenses only. Many violent acts never come to the attention of the police. Furthermore, the classification of an offense sometimes reflects plea bargaining. Thus, official records underestimate actual violence. On the other hand, they are objective.

Findings

The follow-up data revealed a distressing picture. Of the 95 subjects, all but six had an adult criminal record. The average total number of adult offenses was 11.58 (median 9, range 0 to 64). Moreover, 48 of the 95 had committed at least one A or B felony (mean 1.46, range 0 to 11). Nine had been arrested for murder or attempted murder, 12 for sexual assault, nine for kidnapping or unlawful restraint, 58 for nonsexual assault, and 44 for robbery or Burglary I. In fact, 69 of the 95 subjects had committed one or more aggressive offenses, as categorized above. The average number of aggressive offenses was 3.52 (median 2, range 0 to 16). Over 80% of subjects had

spent time in jail or prison. Time imprisoned ranged from 0 to 2,604 days ($\chi = 745$ days, median = 537 days).

Juvenile Violence vs. Adult Violence

To what extent did those who were aggressive as juveniles turn out to be violent adults? Of those who had been classified seriously violent as juveniles, 77% had an adult arrest record for aggressive offenses, but so did 61% of the subjects who were not classified seriously violent as juveniles. Thus, early violence per se did not distinguish well those who would become violent adults from those who would not. In fact, early violence alone misclassified 23% of the more violent juveniles and 61% of the less violent juveniles in terms of future adult violence.

Intrinsic Vulnerabilities, Family Stressors, and Violence

If intrinsic vulnerabilities and abusive, violent families contribute to the production of violence, then these variables might be expected to perform as better indicators of future violence than simply early violent behavior. The authors' concern, however, was not simply to predict adult violence, but also to take a step toward understanding the dynamics of the causes of violence.

Because of the relatively small number of subjects in relation to the number of variables and combinations thereof, it was not possible to study the relationship of isolated specific vulnerabilities to outcome. For example, almost all of the subjects who had only one intrinsic vulnerability (i.e., either episodic psychotic symptoms, or neurological/limbic dysfunction, or cognitive impairment), had also been

abused or raised in violent homes. Similarly, only seven subjects had histories of abuse and/or family violence and no intrinsic vulnerabilities at all. However, the sample size did permit us to determine whether the numbers of intrinsic vulnerabilities and their interaction with violent abusive home environments were associated with increasing levels of adult violence. Therefore the data were analyzed in terms of the relationship to criminal outcome of numbers of intrinsic vulnerabilities with and without a history of abuse and/or family violence.

Subjects were divided into the following groups:

I--Those with neither Intrinsic Vulnerabilities nor Abusive, Violent Families ($N = 6$)

II--Those with Intrinsic Vulnerabilities only ($N = 9$)

III--Those with Abusive, Violent Families only ($N = 7$)

IV--Those with one Intrinsic Vulnerability *and* Abusive, Violent Families ($N = 17$)

V--Those with two Intrinsic Vulnerabilities *and* Abusive, Violent Families ($N = 34$)

VI--Those with all three Intrinsic Vulnerabilities *and* Abusive, Violent Families ($N = 22$).

Tables 1 and 2 Illustrate the relationship of adult criminal violence to Intrinsic Vulnerabilities and Abusive, Violent Families. As can be seen, subjects seem to fall into three different levels of criminality. Those few subjects with neither Intrinsic Vulnerabilities nor Abusive, Violent Families have extremely low rates of serious criminality, whatever the measure used, be it A plus B felonies, Aggressive Offenses, or Total Numbers of Offenses.

Of some surprise was the finding that subjects in group IV, with one Intrinsic Vulnerability and a history of Abusive, Violent Families, had no more serious criminal records than did those in groups II and III with either Intrinsic Vulnerabilities or Abusive, Violent Families. The authors had thought originally that any vulnerability, coupled with abuse and/or family violence would be more detrimental than vulnerabilities alone or abuse alone. Of note, of the nine subjects in group II, with Intrinsic Vulnerabilities only, just one had a single vulnerability; the rest had two or three, suggesting fairly extensive impairment. These subjects with one to three Intrinsic Vulnerabilities were collapsed into one category because of their extremely small numbers. Thus, groups II, III, and IV fell into a middle level of criminality, with more

TABLE 1. *Numbers of A plus B Felonies, Aggressive Offenses, Total Offenses, and Days Incarcerated for Subjects in Categories I-VI*

	Category*	Mean	Median
A plus B felonies	I	0.2	0.0
	II	0.7	0.0
	III	0.6	0.0
	IV	0.5	0.0
	V	1.8	1.0
	VI	2.9	1.5
Aggressive offenses	I	0.0	0.0
	II	2.1	2.0
	III	1.9	1.0
	IV	2.2	1.0
	V	4.4	3.5

	Category*	Mean	Median
	VI	5.4	4.0
Total numbers of offenses	I	2.2	2.5
	II	9.8	6.0
	III	11.9	10.0
	IV	10.2	3.0
	V	11.0	10.0
	VI	16.8	13.5
Numbers of days incarcerated	I	1.0	0.0
	II	337.7	13.0
	III	562.1	20.0
	IV	563.3	376.0
	V	750.8	604.0
	VI	1214.4	1123.0

* I—Neither Vulnerabilities nor Abusive, Violent Families; II—Intrinsic Vulnerabilities only; III—Abusive, Violent Families only; IV—One Vulnerability and Abusive, Violent Families; V—Two Vulnerabilities and Abusive, Violent Families; VI—Three Vulnerabilities and Abusive, Violent Families.

TABLE 2. *Rates of A plus B Felonies, Aggressive Offenses, and Total Offenses per Year at Liberty for Subjects in Categories I-VI*

	Category*	Mean	Median
A plus B felonies	I	0.0	0.0
	II	0.2	0.0
	III	0.2	0.0
	IV	0.2	0.0
	V	0.7	0.2

	Category*	Mean	Median
	VI	2.5	0.5
Aggressive of-			
fenses	I	0.0	0.0
	II	0.5	0.3
	III	0.6	0.2
	IV	0.8	0.3
	V	2.6	0.8
	VI	4.6	1.2
Total offenses	I	0.4	0.5
	II	2.2	1.2
	III	3.5	1.7
	IV	3.0	0.9
	V	5.6	2.1
	VI	15.4	3.8

* See Table I for explanation of categories.

serious criminality than subjects in category I but several times less serious criminality than subjects in categories V and VI.

Most striking, and consistent with the hypothesis, were the high rates of criminality in subjects in groups V and VI. Severe neuropsychiatric and/or cognitive handicaps (2 or more kinds of intrinsic vulnerabilities) coupled with an up-bringing in an abusive, violent household were associated with serious adult violent criminality.

Patterns of Vulnerabilities and Environmental Stressors in Murderers

Murder is the most serious of crimes. For this reason the authors looked specifically at the patterns of vulnerabilities and stressors in the nine subjects who

as adults, committed murder. Six of the nine had three vulnerabilities and a history of abuse and/or family violence. The remaining three had two vulnerabilities and a history of abuse and/or family violence. Thus all fell into the seriously impaired as well as abused categories.

Log-Linear Analysis

Central to the theoretical thrust of this study was to test whether intrinsic vulnerabilities and abuse had independent effects on criminal outcomes or whether they interacted to heighten the level of violence. Tables 1 and 2 reveal a pattern of sharp increases in the site of the outcome variable when the number of intrinsic vulnerabilities in conjunction with a history of abuse and/or family violence jumps from one to two and then from two to three. This is consistent with the hypothesis that there is an interactive effect between Intrinsic Vulnerabilities and Abusive, Violent Families. As a way to test this hypothesis, a log-linear analysis was conducted, using as an outcome variable ever having committed an aggressive offense as an adult (Variable name - AGOOFF). An index of vulnerabilities from 0 to 3 was used as an independent variable indicating the extent of intrinsic impairment (Variable name - VULS). Abusive, violent families were used as the independent variable indicating extreme environmental stress (Variable name - ABVIOL).

The goal of the log-linear analysis is to reproduce the actual profile of the sample by specifying a model comprised of the hypothesized interactions among the independent variables. As can be seen in Table 3, the distribution of subjects across the three varia-

bles in the analysis could not be reproduced with a log-linear model which included only the main effects of the independent variables. Nor did the two log-linear models which allowed for 2-way interactions between intrinsic vulnerabilities and aggressive offenses only, and abusive, violent families and aggressive offenses only, fit the model. The log-linear model fit, however, when the three possible 2-way interactions, short of the saturated model (i.e., Intrinsic Vulnerabilities x Aggressive Offenses; Abusive, Violent Families x Aggressive Offenses; and Intrinsic Vulnerabilities x Abusive, Violent Families), were included. This finding suggests that there is, as supposed, not simply an additive effect, but also an interactive effect among intrinsic vulnerabilities, having been raised in an abusive, violent household; and adult aggression.

Toward a Theory of the Genesis of Violence

Nearly all violent adult criminals have histories of juvenile violence. On the other hand, as the data clearly show, all aggressive juveniles do not become violent adults. The question remains, therefore, are there ways of knowing which aggressive juveniles are most likely to make adequate nonviolent adaptations to society and which are most likely to go on to make violent criminality a career?

The data suggest that there are combinations of intrinsic vulnerabilities and environmental stressors identifiable in adolescence, and probably before then, that help to explain which delinquents will go on to commit crimes of violence as adults. It would seem that delinquent children with combinations of psychiatric, neurological, and cognitive vulnerabilities

are at somewhat greater risk of continuing violence than are their more intact counterparts. Similarly, delinquent children who have been brutally abused and/or have been raised in extraordinarily violent households are at somewhat greater risk for ongoing violent adult crime than are those who have not been raised in such environments.

TABLE 3. *Log-Linear Models for 3-Way Cross Tabulation of Intrinsic Vulnerabilities (VULS), Abuse. Violent Families (ABVIOL), and Aggressive Offenses (AGGOFF)*

Fitted Marginals/Log Linear Models (Outcome Variable – AGGOFF)	Likelihood Ratio	df	ρ Value
VULS ABVIOL	14.42	6	0.03
VULS ABVIOL VULS AGGOFF	10.81	5	0.06
VULS ABVIOL ABVIOL AGGOFF	12.31	5	0.03
VULS ABVIOL ABVIOL AGGOFF VULS AGGOFF	6.11	4	0.19*

*This interactive combination of variables did not differ significantly from the actual clinical data and, thus, supported the interactive hypothesis. This interaction is one step below the full, or saturated, model with all effects included.

However, seriously intrinsically handicapped delinquents who also have grown up in violent, abusive environments are much more likely to go on to commit numerous, violent offenses as adults.

The authors found, to their surprise, that the combination of one kind of intrinsic vulnerability (a reflection of relatively minor impairment) and having been exposed to abuse and/ or violence (Group IV)

was not any more closely related to adult violence than having vulnerabilities only (Group II) or having been raised in an abusive, violent household only (Group III). Rather, it appeared that it was the combinations of severe impairment, as reflected in having two or three kinds of vulnerabilities, and abuse and/or family violence that were most closely associated with extreme adult aggression.

The log-linear analysis supported the initial hypothesis—that the combination of intrinsic vulnerabilities and family violence and/or abusiveness was not merely additive; rather, intrinsic vulnerabilities interacted with environmental stressors to increase the risk and severity of adult violent criminality.

How might we begin to understand this interactive effect from a clinical perspective? First and foremost, family violence and abusiveness function as a model of aggressive behavior. Children who are neuropsychiatrically and cognitively intact are better equipped than are multiply handicapped children to resist then models, choose among alternative styles, and make independent, more rational judgments, regarding appropriate behavior. The intrinsically vulnerable child is more likely to react impulsively and unthinkingly when stressed.

Second, abuse engenders rage, the kind of rage that neuropsychiatrically and cognitively impaired individuals, particularly episodically paranoid individuals, find far more difficult to control than do normal, nonimpaired; healthy individuals.

Third, in many instances, when abuse involves shaking, battering, or other injury to the central nervous system, it creates the very psychiatric, neu-

rological, and cognitive vulnerabilities that we have described.

Finally, and ironically, neuropsychiatrically impaired children, by virtue of their hyperactivity and impulsivity, often invite abuse.

Violence is possibly the most serious mental health problem confronting our society. To say that early aggression predicts later aggression leads nowhere except, perhaps, to incarceration. Furthermore, the data suggest that early aggression overpredicts adult aggression in violent delinquents about 23% of the time and underpredicts adult aggression in less violent delinquents over 60% of the time. On the other hand, within the sample of delinquents studied, a constellation of interacting clinical and environmental variables is a far better predictor of future violent behavior than is early aggression alone. More importantly, each characteristic of that constellation, unlike early aggression, carries with it very specific implications for prevention and treatment.

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**From Abused Child to Killer:
Positing Links in the Chain**

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Child abuse is often a central focus in death penalty cases. It arises because most capital clients have been abused as children by parents and other adults. This victimization of the defendant is frequently a primary theme presented in mitigation at a penalty phase. Yet far too often jurors and judges, although they may have some emotional reaction to evidence, fail to treat child abuse as a meaningful component in their decision. They report that they feel sad and are touched by accounts of the client's childhood but fail to see any connection between that evidence and his later "choices" to commit such "heinous crimes."

There is no one to one relationship between being abused as a child and becoming a killer. One does not inevitably lead to the other. Just as each abused child's life is different so is the path leading up to every homicide. However, the striking prevalence of child abuse in the backgrounds of our clients re-

quires that we struggle to understand the connections. In fact, the debilitating effects of child abuse may range far beyond mitigation in a capital case to issues of *mens rea* as well as many relevant mental competency issues (waivers, statements, cooperation and assistance in own defense, etc.)

This article is an attempt to explore the diverse and complex nature of those relationships between victimization of abuse as a child and later commission of homicide. It is not intended as an outline for a penalty phase but rather as a guide for capital attorneys. The article begins with a description of the wide spectrum of types of child abuse. Next there is an exploration of the variety of negative consequences of child abuse, which include neurological damage, psychiatric illnesses and behavioral disabilities. Finally, there is an examination of the research on killers which identifies several psychological risk factors linked to homicide. These include high levels of paranoia, increased aggression and inability to problem-solve. The links from abused child to killer seem to be forged between the devastating consequences of child abuse (neurological damage, psychiatric illnesses and developmental disabilities) and the identified homicide risks (paranoia, aggressiveness and problem-solving inability).

What Is Child Maltreatment?

Child maltreatment is a generic term encompassing a wide variety of destructive behaviors toward children, including physical abuse, physical neglect, sexual abuse, witnessing family violence and psychological maltreatment. To acknowledge the extensive range of damaging behaviors psychologists have sug-

gested the term “child maltreatment” to replace the term “child abuse.”¹ It is important to note that the first, step in analyzing the background of a capital client is to broaden the scope of inquiry to include all the harmful behaviors psychologists call child maltreatment.

State laws also give some guidance to understanding the areas of child maltreatment. Unfortunately, rather than a uniform codification of terminology and illegal acts, the statutes vary widely in their specificity. They range from the very general outlines of Alaska, Georgia and Kansas to the elaborately specific lists found in Colorado and Hawaii,² California was selected as illustrative here because its laws represent a middle ground of definitional specificity.

Physical abuse is the first and most obvious type of child maltreatment. Under California law this includes non-accidental physical injury (Penal Code § 11165.6), “willful cruelty or unjustifiable punishment” (Penal Code § 11165.3), and “unlawful corporal punishment” (Penal Code § 11165.4). In the life of a victimized child, physical abuse can encompass a staggering array of brutal acts.

Physical neglect is the second major type of child maltreatment. Neglect includes both intentional and negligent “failure to provide adequate food, clothing, shelter or medical care.”³ Signals of possible neglect can be identified in the appearance and behavior of children.⁴ These include signs of malnutrition, chronic hunger or listlessness; untreated medical or dental needs; and unkempt or inadequate clothing.

Sexual abuse is the third major type of child maltreatment. The California Penal Code divides child sexual abuse into two parts - sexual assault and sexual exploitation (Penal Code § 11165.1). Included in this legal definition are various sex crimes as well as sexual conduct and use of children in prostitution or portrayals of obscene sex.⁵ Psychologists studying child sexual abuse restrict the definition in three ways. They require: (1) an age discrepancy of at least five years between abuser and abused; (2) use of some form of force or coercion by the abuser (including gifts, money and personal power); and (3) a care-giver role by the abuser (parent, teacher, relative, baby-sitter, etc.).⁶

The fourth major type of child maltreatment is witnessing of family violence. Children who witness their parents, siblings or other family members being physically or sexually abused are themselves traumatized by what they view.⁷ Not only do the witnesses suffer from the horror of the brutality but they are terrorized by fear and helplessness for themselves as well. In addition, these child witnesses to violence are often physically endangered, particularly if they step in to try to protect the battered parent or sibling.⁸

Psychological maltreatment, the fifth type of child maltreatment, encompasses destructive behavior toward children that lacks a physical component. Earlier discussions of this type of harm used such terms as mental cruelty, emotional abuse and neglect, and emotional maltreatment.⁹ Even in the absence of physical danger, psychological maltreatment can have pervasive negative effects on the well-being of a child. Psychological maltreatment includes a wide

variety of harmful behaviors, which are termed spurning, terrorizing, Isolating, exploiting/corrupting, and denying emotional responsiveness.¹⁰

Spurning refers to verbal battering including rejection, humiliation and degradation. Terrorizing entails threats of violence, exposure to violence and leaving a child unattended. Isolating is used to designate behavior that severely confines the child physically or socially. Exploiting/corrupting behavior exposes a child to, or involves him in, antisocial acts, deviant standards and criminal behavior. Denying emotional responsiveness entails ignoring a child's attempts at interaction, withholding warmth and affection, and responding in a mechanistic way.

Consequences of Child Maltreatment

The devastating effects of child maltreatment can range from (a) central nervous system or brain damage through (b) mental disorders or psychiatric illnesses to (c) behavioral disabilities. The variety in outcomes derives from several sources. First, there are differences in the extent of abuse, the numbers and types of abuse, the severity of abuse, and the duration of abuse. Secondly, there are differences in the personal characteristics of those being abused including age, mental abilities, physical limitations and social supports. Some psychologists have used a fever analogy to help explain the range of danger in abuse or neglect.¹¹ That is, the higher the fever, the more danger the child is in, and the more extreme the abuse or neglect, the more dire the consequences for the child. This analogy can be expanded to illustrate the impact of the personal characteristics as

well. The younger the child, the more worrisome is the fever or the abuse. Also, a child who is already sickly is in more jeopardy of both a fever and abuse. Finally, the presence of a loving and capable caretaker can help while a hostile or impaired caretaker will likely exacerbate the problem.

Central Nervous System Damage

Central nervous system damage from child maltreatment includes brain damage which is identifiable in a particular site on a brain scan. It also includes neurological dysfunction which may be less anatomically dramatic yet can be persuasively documented through neuropsychological testing. The brain damage caused by child maltreatment can come from direct trauma, such as blows to the head, or from indirect trauma, such as severe shaking.¹² Shaking, which may appear to be a minor form of punishment, can cause the brain to bounce wildly against the sides of the skull resulting in serious damage. The inside of the skull is irregular, not smooth. Thus, when the brain is jolted back and forth as a result of severe shaking, it not only hits the skull bone but suffers from scraping as well.

Psychiatric Illnesses Associated with Child Maltreatment

Several psychiatric illnesses defined in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM III-R)¹³ can develop from childhood maltreatment and neglect. Although it is impossible to review all of the DSM III-R diagnoses that have been linked to child maltreatment, it may be helpful to explore a few illustrations.

Two of the most common psychiatric illnesses associated with child maltreatment are Psychoactive Substance Dependence and Psychoactive Substance Abuse.¹⁴ Abused children often reach toward alcohol or drugs to dull the pain of their lives. Some of them even begin their drinking or drug-taking with their corrupting parents or caretakers. Early use of drugs and alcohol can lead to the impaired control and negative consequences of these psychiatrically-defined disorders.

Two other psychiatric illnesses associated with child maltreatment are Organic Personality Syndrome and Organic Mental Disorder.^{15 5} Head trauma which results from child abuse as well as drugs and alcohol used by abused children as a means of coping can be precipitants to these types of organic mental impairments.

Depression problems are also a common psychiatric sequelae in victims of abuse and neglect. When the abuse is long-term and the depressive reaction becomes chronic, the problem may advance into what is labeled Dysthymia. In some cases the mood disorder may be so severe as to qualify as a Major Depression.¹⁶

Post-Traumatic Stress Disorder (PTSD), originally associated with the Vietnam veterans, is now linked to child maltreatment as well. The first requirement of the diagnosis is exposure to a trauma outside the normal range of experience that would cause stress in almost everyone.¹⁷ Severe physical abuse as well sexual abuse can qualify as the requisite stressor.¹⁸ Major symptoms include feeling detached or es-

tranged; irritability or outbursts of anger; trouble concentrating; and hypervigilance.

Multiple Personality Disorder is another psychiatric problem associated with severe and torturous forms of child physical and sexual abuse. The diagnosis is made when two or more distinct personalities can be identified in one individual.¹⁹ It is believed that the splitting of the personality occurs as endangered children try to psychologically remove themselves from the abuse and the abuser.

Borderline Personality Disorder is also associated with child maltreatment, particularly sexual abuse²⁰ and psychological maltreatment.²¹ The major feature of Borderline Disorder is instability in mood, personal relationships and self-image.²² Major symptoms of Borderline Personality Disorder include self-damaging impulsiveness; emotional instability; intense and inappropriate anger; and recurrent suicidal behavior and self-mutilation.

Behavioral Disabilities In Abused Children

In addition to possible central nervous system damage and certain psychiatric illnesses, abused children generally suffer from a wide range of developmental hindrances,²³ including emotional crippling, intellectual impairment, social skills deficits, and behavior disruptions. These impairments, including those in intellectual abilities, result even when there is no neurological damage.²⁴ Such problems are likely the outcome of the rejection inherent in all types of child maltreatment. Except in extreme cases, it is not the physical wound that causes the lasting trauma. A child can heal easily from a scar if received in a ball game. It is often the child's

perception of the meaning behind the blow that causes the major trauma of abuse.²⁵

Much of the research on consequences has been done by studying children who suffered from more than one type of child maltreatment. A small number of studies, however, have tried to use “pure” groups of abuse. One study comparing physically abused children with physically neglected children found that the abused children were more defiant, more noncompliant, and more aggressive. The neglected children were, more withdrawn, had greater cognitive delays, and performed worse in school.²⁶

Males who were sexually abused as children also show some damaging sequelae which are distinct from those who were neglected or abused in other ways. These problems include: sexual compulsiveness, masculine identity confusion, sexual dysfunction, guilt and shame.²⁷

Links to Homicidal Behavior

Infliction of harm to a child is only the starting point in a complex series of relationships between child maltreatment and homicide. Obviously, not all children who are abused become murderers. In fact, a great majority of abused children grow up to lead law abiding, though psychologically scarred, lives. Obviously then, there is something distinct about our capital clients, almost all of them were abused as children. Researchers and clinicians studying the links between child maltreatment and murder have pointed to several connections

Psychiatrist Dorothy O. Lewis and her colleagues have identified high levels of paranoid ideation in murderers.²⁸ Paranoid ideation is a psychiatric term

used to refer to unfounded beliefs that others mean to harm you. Obviously, if one walks around with the tendency to see others as threatening, one will be more likely to respond in a hostile manner. Homicides of a spontaneous nature may well spring from this handicap.

Paranoid Ideation can be the result of several psychiatric problems, including some that flow from the consequences of child maltreatment. Neurological impairment to certain areas of the brain can cause paranoid ideation. Paranoid features can also arise in Organic Mental Disorder and Organic Personality Syndrome. Head trauma and psychoactive substance abuse are not only common consequences of child maltreatment but also are causal factors in each of these syndromes.

The hypervigilance of Post-Traumatic Stress Disorder is another source of paranoid thinking. In addition to these identified psychiatric disturbances, there is continued speculation among some researchers that the trauma of child maltreatment may alter the biochemical makeup of the child so that throughout life the afflicted person will overreact to aggression or perceived threat.²⁹ Finally, certain psychoactive drugs cause paranoid reactions. Since many who were abused as children turn to drugs as an escape, it is reasonable to assume they will acquire the paranoid side effects of the illicit substances they ingest.

Overall high levels of physical aggression is another feature identified in murderers.³⁰ This heightened aggression is also prominent in several psychiatric conditions commonly found in those who were

abused as children. These include types of neurological impairment, such as temporal lobe epilepsy. Other mental disorders associated with uncontrolled aggression include Organic Personality Syndrome, Organic Mental Disorder, and Post-Traumatic Stress Disorder. In multiple personalities as well, it is not uncommon to find at least one personality who is hostile and aggressive. Finally, certain psychoactive substances, often abused by battered children, are known to cause increased aggression.

A final link often postulated between child maltreatment and murder is the devastating inability to solve problems that flow from several of the consequences of child maltreatment. Certainly many kinds of brain damage, including retardation, seizures, chronic severe headaches and neurological impairment, are likely to affect some aspect of cognitive functioning. Each of the psychiatric illnesses already discussed has obvious features that also impede problem solving. In addition, the mood disorders such as Major Depression and Dysthymia will interfere with thinking capacity, blocking attempts to appropriately assess a problem and seek a successful solution to it.

Many psychoactive substances ingested by those abused as children will cause difficulties such as mental confusion, delayed reaction time and impaired judgment. This will adversely impact critical problem-solving as well. The aspects of behavioral disabilities such as the emotional crippling, intellectual impairment, and social skill deficits, will hinder problem-solving also.

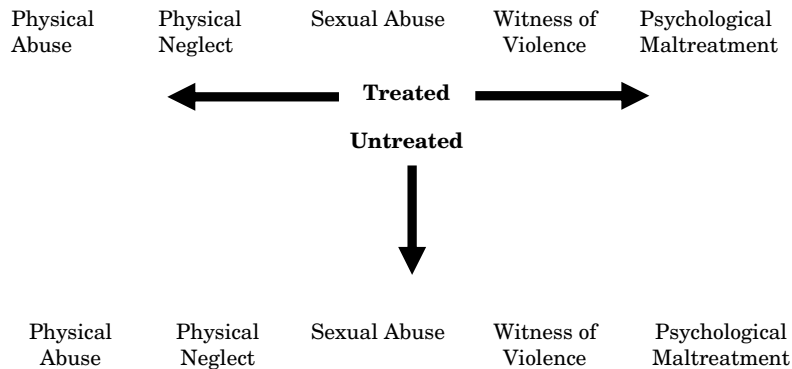
A final element in the destruction of problem-solving abilities is the response pattern abused children learn from their violent parents. Just as children of healthy parents learn how to be patient, how to share how to avoid their earlier mistakes, children of violent parents learn to react to stress with hostility and physical brutality. Psychologists call this type of ingrained lesson “modeling.” The destructive effects of modeling are twofold. Not only do children acquire the knowledge that violence is the appropriate and expected reaction to stress, but they also fail to learn a necessary repertoire of positive alternative behaviors to try when faced with serious problems.

**Links in the Chain from
Child Molestation to Homicidal Behavior³¹**

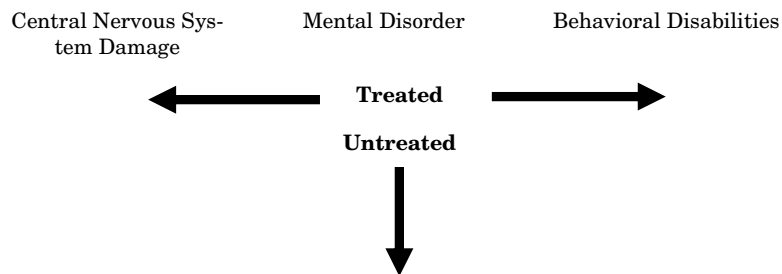
1. Vulnerabilities of Child

Age of Child	Mental Abilities	Physical Lim- itations	Health of Caretaker	Other Social Supports
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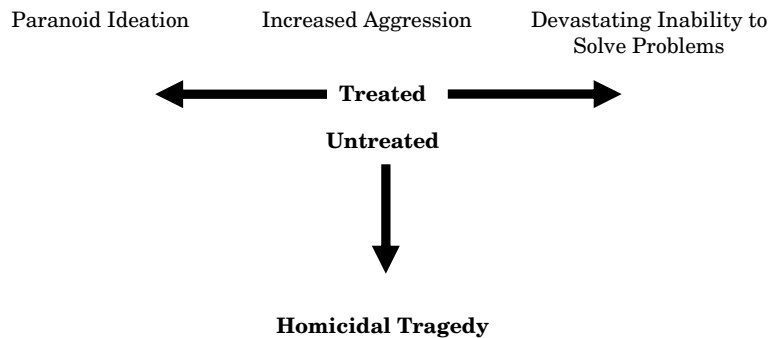
2. Child Maltreatment



3. Consequences of Child Maltreatment



4. Homicidal Behavior Risk Factors



Conclusion

Although most abused children never become murderers, most murderers were abused children. It is likely that one difference between our clients and the noncriminal abused children is the number of and strength of these posited links in the chain, (see accompanying chart). Looking at the chart, we can follow the chain and conclude that the more vulnerable the child, the more severe the abuse, the greater the consequences of abuse, the more numerous the risk factors, the more likely the chain will end in homicidal tragedy. A key element in the posited chain is the presence or absence of effective treatment at crit-

ical points. Another logical difference between our capital clients and noncriminal abused children is effective intervention along the way.

Hopefully, this model can serve several purposes. It may help us understand and then portray our clients' development from abused child to killer. It may also guide us to necessary areas of investigation. Finally, it may help us answer the thorny question of why our clients' siblings never killed anyone. The answer to this question, often posed by prosecutors and jurors, is probably buried within the myriad of variabilities along the links in the chain. The siblings, though they no doubt suffered from the abuse, were likely less vulnerable, less severely abused, suffered fewer consequences, developed fewer homicidal risk factors or received effective treatment somewhere along the line.

Author's note: This discussion of the development from abused child to killer should not be seen as an outline or template for a mitigation presentation in a penalty phase. It is intended as a theoretical orientation for the legal team, a guide to clues for investigation and strategic analysis. Obviously, choices about penalty phase presentations must be made in a much wider context. This should include analysis of the unique nature of the client, the particular facts of the case, the specific jurors who are seated and the availability of the many other types of mitigation.³²

Notes

¹ Garbarino and Gilliam, *Understanding Abusive Families*, Lexington Books, p. 5, (1980).

² Clark, Homer H. Jr., *The Law of Domestic relations in the United States*. St. Paul, Minn: West Publishing Co., 1987, p. 602.

³ California Penal Code §§11165.2.

⁴ Besharov, *Recognizing Child Abuse: A Guide for the Concerned*, The Free Press, p. 102, (1990).

⁵ California Penal Code §11165.1.

⁶ Risin and Koss, *The Sexual Abuse of Boys*, Journal of Interpersonal Violence, 2:3, p. 311. (1987).

⁷ Hurley and Jaffe, *Children's Observations of Violence: II. Clinical Implications of Children's Mental Health Professionals*, Canadian Journal of Psychiatry, 35,471-476 (1990).

⁸ Rosenberg, *Children of Battered Women: The Effects of Witnessing Violence on Their Social Problem-Solving Abilities*, Behavior Therapist, 4. p. 86, (1987).

⁹ Hart and Brassard, *A Major Threat to Children's Mental Health: Psychological Maltreatment*, American Psychologist. 42:2. p. 160 (1987).

¹⁰ Hart, *Psychological Maltreatment Forms*, Office for the Study of the Psychological Rights of the Child, 902 West New York Street, Indianapolis, IN 46202-5155.

¹¹ Garbarino and Gilliam, *supra*, at p. 8-9.

¹² Green. *Children Traumatized by Physical Abuse*, in Eth and Pynoos (Eds.), *Post-Traumatic Stress Disorder in Children*, American Psychiatric Press (1985).

¹³ See generally, American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, Third Edition (DSM III-R).

¹⁴ Psychoactive Substance Dependence and Psychoactive Substance Abuse are DSM III-R classifications related to impaired control over psychoactive substances and continued use despite negative consequences. The dependence diagno-

sis is the more severe one. Nine classes of psychoactive substances are included in the DSM III-R diagnoses of dependence and abuse, including alcohol, amphetamines, cannabis, cocaine, hallucinogens, inhalants, opioids, PCP, as well as sedatives and hypnotics. Amchin, *Psychiatric Diagnosis; A Biopsychosocial Approach Using DSM III-R*, American Psychiatric Press, p. 91-92 (1991).

¹⁵ Organic Personality Syndrome (OPS) is marked by a persistent personality disturbance which is accompanied by some evidence of a specific organic etiology. The personality disturbance must include at least one of the following:

- Affective (emotional) instability
- Recurrent outbursts of aggression
- Markedly impaired social judgment
- Marked apathy and indifference
- Suspicious or paranoid ideation.

Amchin, *supra*, at p. 82-83.

Organic Mental Disorder, less specific in criteria than OPS. Is a broad category of mental impairment which can be linked to some organic origin. Obvious organic sources in abused children are head trauma and substance abuse.

¹⁶ Dysthymia is a depressed mood that is manifest more days than not over a period of at least two years. It is more chronic and less severe than the diagnosis of Major Depression. Amchin, *supra*, at p. 108.

¹⁷ In addition to the recognized stressor, a diagnosis of PTSD requires:

Re-experiencing the event, such as:

- intrusive recollections
- dreams
- sudden feelings;

Avoidance or numbing, such as:

- diminished interest in activities
- feeling detached or estranged

- restricted range of emotions; and

Persistent increased arousal, such as:

- difficulty sleeping
- irritability or outbursts of anger
- trouble concentrating
- hypervigilance

Amchin, *supra*, at p. 116.

¹⁸ Finkelhor, *Trauma of Child Sexual Abuse*, Journal of Interpersonal Violence, 2:4, p. 48, 1988. Green, *supra*, at p. 148.

¹⁹ Amchin, *supra*, at p. 126.

²⁰ Lines and Blum, *Family Environment and Borderline Personality Disorder: Development of Etiologic Models*, in Links (Ed.) *Family Environment and Borderline Personality Disorder*, American Psychiatric Press, p. 13 (1990).

²¹ Ogata, Silk and Goodrich, *The Childhood Experience of the Borderline Patient*, in Links, *supra*, at p. 98-100.

²² To qualify for a diagnosis of Borderline Personality Disorder, one must exhibit at least five of the following symptoms:

- A pattern of unstable and intense personal relationships (alternating over idealization and devaluation)
- Impulsiveness in at least two self-damaging ways (excluding suicidal acts)
- Emotional instability, shifting to depression, irritability or anxiety
- Intense and inappropriate anger (or inability to control anger)
- Recurrent suicidal behavior (threats, gestures, acts) or self-mutilating
- Identity disturbance
- Chronic feelings of emptiness and boredom
- Frantic efforts to avoid real or imagined abandonment

Amchin, *supra*, at p. 154.

²³ Emery, Family Violence, *American Psychologist*, 44:2, p. 324 (1989). Green, *supra*.

²⁴ Augustinos, Developmental Effects of Child Abuse: Recent Findings. *Child Abuse and Neglect*, 11, p. 17 (1987).

²⁵ Garbarino and Gilliam, *supra*.

²⁶ Lamphear, *The Psychosocial Adjustment of Maltreated Children*, *Child Abuse and Neglect*, 10 p. 64 (1986).

²⁷ Dimock, *Male Sexual Abuse: An Underreported Problem*, *Journal of Interpersonal Violence*, 3:2, p. 207 (1988). Finkelhor, *supra*, at p. 359.

²⁸ Lewis, Mallouk and Webb, *Child Abuse. Delinquency and Violent Criminality in Cicchetti and Carlson* (Eds.). *Child Maltreatment*, Cambridge Press (1989).

²⁹ Van der Kolk and Greenberg, *The Psychobiology of the Trauma Response; Hyperarousal, Constriction, and Addiction to Traumatic Reexposure*, in Van Der Kolk (Ed.), *Psychological Trauma*. American Psychiatric Press, p. 64 (1987).

³⁰ Lewis, *et al.*, *supra*, p. 1164.

³¹ Amchin, *supra*, p. 83.

³² Logan, *Is It Mitigation or Aggravation?*, CACJ Forum. 16:5 (1989). *See also*. Thomson & Laurence, *Penalty Phase Mitigation* in California Death Penalty Defense Manual, CACJ (1991).

ARIZONA SUPREME COURT

Case No. CR-93-0362-AP
Maricopa County Superior Court
No. CR-1991-90926

STATE OF ARIZONA,

Appellee,

v.

JAMES MCKINNEY,

Appellant.

**MOTION TO CONDUCT NEW INDEPENDENT
REVIEW OF DEATH SENTENCE**

The State of Arizona respectfully requests that this Court conduct a new independent review of James McKinney's death sentence and reweigh the aggravating and mitigating factors pursuant to *Clemons v. Mississippi*, 494 U.S. 738 (1990) and *State v. Styers*, 227 Ariz. 186, 254 P.3d 1132 (2011). The United States Court of Appeals for the Ninth Circuit found that this Court erred in its independent review of McKinney's death sentence by failing to treat his proffered post-traumatic stress disorder (PTSD) as a non-statutory mitigating circumstance. *McKinney v. Ryan (McKinney III)*, 813 F.3d 798, 819-21 (9th Cir. 2015). For the reasons stated in the following Memorandum of Points and Authorities, the State asks

this Court to conduct a new independent review of McKinney's death sentence to correct any perceived constitutional error, and set a briefing schedule and oral argument.

MEMORANDUM OF POINTS AND AUTHORITIES

A. *Procedural History.*

In 1991, McKinney committed two first-degree murders two weeks apart during night-time residential burglaries. *State v. McKinney (McKinney I)*, 185 Ariz. 567, 571, 917 P.2d 1214, 1218 (1996). During the first burglary, McKinney and his brother, Charles Hedlund, beat and savagely stabbed the victim, Christene Mertens, as she struggle to save her life. *Id.* at 572, 917 P.2d at 1219. McKinney ultimately held her face down on the floor and shot her in the back of the head, using a pillow to muffle the sound of the shot. *Id.* In the second burglary, the brothers broke into the home of 65-year-old Jim McClain, who was shot in the back of the head with a rifle. *Id.* The trial court sentenced McKinney to death for both murders. *Id.* at 571, 917 P.2d at 1218.

On direct appeal, this Court addressed McKinney's argument that the sentencing judge had not properly considered the mitigating value of his abusive childhood and resulting PTSD. *Id.* at 587, 917 P.2d at 1234. It noted that the sentencing judge had found as a fact that McKinney had an abusive childhood. *Id.* This Court examined the record and stated, "the record shows that the judge gave full consideration to McKinney's childhood and the expert testimony regarding the effects of that childhood, specifically the diagnosis of post-traumatic stress disorder

(PTSD).” *Id.* The Court also noted the sentencing judge had found the PTSD did not impact the crimes. *Id.*

In assessing the sentencing judge’s findings, this Court stated:

As we noted in discussing Hedlund’s claim on this same issue, a difficult family background, including childhood abuse, *does not necessarily have substantial mitigating weight* absent a showing that it significantly affected or impacted the defendant’s ability to perceive, comprehend, or control his actions.

. . .

The record clearly shows that the judge considered McKinney’s abusive childhood and its impact on his behavior and ability to conform his conduct and found it insufficiently mitigating to call for leniency. On this record there was no error.

Id. (emphasis added). Ultimately, the Court concluded that all claims McKinney raised were meritless, and “having independently reviewed the record in both cases for fundamental error and finding none,”¹ affirmed his convictions and sentences.

After exhausting his state direct appeal and collateral review remedies, McKinney filed a petition for a writ of habeas corpus in federal district court. After the district court denied his habeas petition, McKin-

¹ Because McKinney and Hedlund were tried together, this Court reviewed their convictions and sentences in a consolidated opinion. *McKinney I*, 185 Ariz. at 571, 917 P.2d at 1218.

ney appealed to the Ninth Circuit. A three-judge panel of the Ninth Circuit affirmed the district court's denial of habeas relief. *McKinney v. Ryan* (*McKinney II*), 750 F.3d 903 (9th Cir. 2013). The panel concluded that the trial court considered all potential mitigation evidence, including McKinney's PTSD evidence, and that this Court did not apply an unconstitutional nexus test to McKinney's mitigating evidence. *Id.* at 917-21. It held: "Nothing in the record suggests that the Arizona Supreme Court outrightly rejected, or otherwise did not fully consider, those [mitigating] factors due to a lack of nexus to the crime." *Id.* at 920.

The Ninth Circuit granted rehearing *en banc* and, in a 6–5 opinion, the majority found that this Court erred under *Eddings v. Oklahoma*, 455 U.S. 104 (1982),² and granted McKinney habeas relief on both death sentences. *McKinney III*, 813 F.3d 798. The majority then concluded, after examining 16 years of this Court's opinions (from 1989 to 2005), that this Court had created and systematically applied an unconstitutional causal nexus rule, contrary to *Eddings*, that precluded consideration of mitigating evidence as a matter of law for that entire 16-year period, no matter what this Court said about the mitigation in a particular case. *Id.* at 813-18. The majority further concluded that this Court held, as a matter of law, "that McKinney's PTSD was not a nonstatutory mitigating circumstance, and that it

² In *Eddings*, the Supreme Court held that a sentencer in a capital case may not "refuse to consider, as a matter of law, any relevant mitigating evidence" offered by a defendant. 455 U.S. at 114.

was therefore entitled to no weight,” and had applied a rule contrary to *Eddings*. *Id.* at 819-21. Finally, the majority also dismissed the dissent’s contention that it failed to defer to this Court’s factual determination that the sentencing judge had fully considered the PTSD evidence. *Id.* at 826-27.

The State filed its petition for certiorari review in the United States Supreme Court on March 28, 2016. The petition was denied on October 3, 2016. On October 6, 2016, the district court issued an order granting McKinney’s writ of habeas corpus “unless the State of Arizona, within 120 days from the entry of this Judgment, initiates proceedings either to correct the constitutional error in McKinney’s death sentence or to vacate the sentence and impose a lesser sentence consistent with the law.”

B. Request for briefing schedule and oral argument.

The only remedy to cure any error in this Court’s independent review is to have this Court conduct a new independent review of McKinney’s death sentences and reconsider the proffered PTSD and other mitigation he presented in the sentencing calculus. It is clear from the Ninth Circuit’s opinion that it perceived that this Court erred by failing to follow its obligation under *Eddings* in considering the mitigation evidence McKinney presented. Therefore, this Court should conduct an independent review of McKinney’s death sentence pursuant to *Clemons* and *Styers*. The State requests that this Court set a briefing schedule.

. . . .
DATED this 7th day of October, 2016.

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Respectfully submitted,

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