

VOLUME XXI -- SENTENCING HEARING
Pages 3911 through 3960

1 IN THE DISTRICT COURT OF RICHARDSON COUNTY, NEBRASKA

THE STATE OF NEBRASKA,) CASE NOS. 2682,
Plaintiff,) 2683, 2684, 2685
v.) SENTENCING HEARING
JOHN L. LOTTER,)
Defendant.)

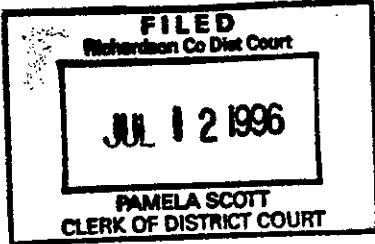
Proceedings had before THE HONORABLE ROBERT T. FINN; THE HONORABLE MICHAEL W. AMDOR; and THE HONORABLE GERALD D. MORAN, at Falls City, Richardson County, Nebraska, on February 21, 1996.

APPEARANCES

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1 doubt that this evidence supports a finding that this sub-
2 section applies to this defendant.

3 Finally, no evidence was presented as to the facts
4 underlying the 1990 burglary and escape conviction relied
5 upon by the state. After considering all the testimony and
6 exhibits offered by the state in support of their contention
7 that this sub-section should be applied to this defendant,
8 the panel concludes that regardless of whether the events
9 that have been testified to are considered alone or in
10 combination, there is insufficient evidence on which to base
11 a finding beyond a reasonable doubt that the second prong of
12 aggravating circumstance 1A is applicable.

13 B. The murder was committed in an apparent effort
14 to conceal the commission of a crime, or to conceal the
15 identity of the perpetrator. We find that the evidence
16 fails to show beyond a reasonable doubt that the first prong
17 of this sub-section, the murder was committed in an apparent
18 effort to conceal the commission of a crime, is applicable.
19 We base this finding upon the rationale set forth in *State*
20 *versus Rust*, 197 Neb. 528.

21 Considering the second prong of this sub-section,
22 the murder was committed in an apparent effort to conceal
23 the identity of the perpetrator of a crime, the evidence
24 reflects that the defendant, on the night these homicides
25 were committed, and after arming themselves with a gun and

1 knife procured by defendant Lotter, drove to Humboldt,
2 Nebraska to the farmhouse of Lisa Lambert. They drove there
3 for the express purpose of murdering Tina Brandon so that
4 she would not be alive to act as a witness for the state in
5 any potential prosecution against them for sexually
6 assaulting and kidnapping her. According to Nissen, on the
7 way to Lambert's home, both defendants agreed that anyone
8 else present when Brandon was killed would also have to be
9 killed. Nissen testified at Lotter's trial that he and
10 Lotter, with Lotter being the actual trigger-man, carried
11 out their intent by first murdering Tina Brandon and then
12 murdering Lisa Lambert and finally murdering Phillip DeVine.

13 The motive for the killing of Tina Brandon, to
14 protect Nissen and Lotter from possible prosecution, was
15 established not only by Marvin Nissen, but also by
16 corroborating evidence provided by Linda Gutierrez,
17 Investigator Hayes, the defendant's trip to Lincoln
18 searching for Brandon on December 26th and 27th, 1993,
19 Lincoln pawn shop slip, as well as the testimony of Rhonda
20 McKenzie and Candy Nissen. A thorough discussion of the
21 facts established in this case is found under Section 7
22 hereafter.

23 The motive for murdering Tina Brandon, twisted
24 though it is, can be readily discerned from the facts
25 adduced at trial concerning the feverish plotting and

1 attempts to locate Brandon in the week prior to the murders.
2 Lisa Lambert and Phillip Devine, as even Nissen
3 acknowledged, had caused them absolutely no harm or
4 distress. From the facts developed at trial, there is quite
5 simply no other motivation for this defendant murdering Lisa
6 Lambert and Phillip DeVine, other than to conceal his
7 identity as perpetrator of the crime of murdering Tina
8 Brandon.

9 We therefore conclude that the second prong of
10 this aggravating circumstance, the murder was committed in
11 an apparent effort to conceal the identity of the
12 perpetrator of a crime, is clearly applicable beyond a
13 reasonable doubt to the murder of Lisa Lambert and the
14 murder of Phillip DeVine. Therefore, the panel determines
15 that the second prong of aggravating circumstances, 1B, is
16 applicable to the defendant beyond a reasonable doubt in the
17 murders of Lisa Lambert and Phillip DeVine.

18 C. The murder was committed for hire or for
19 pecuniary gain or the defendant hired another to commit the
20 murder for the defendant. The state adduced no evidence to
21 support the existence of aggravating circumstances 1C and
22 the sentencing panel concludes that it is not applicable in
23 this case.

24 D. The murder was especially heinous, atrocious,
25 cruel or manifested exceptional depravity by ordinary

1 standards of morality and intelligence. The state adduced
2 no evidence to support the existence of aggravating
3 circumstance 1D and the sentencing panel concludes that it
4 is not applicable in this case.

5 E. At the time the murder was committed, the
6 offender also committed another murder. The testimony of
7 Marvin Nissen at defendant's trial, and corroborated by
8 other evidence in the case reveals that all three victims
9 were murdered within minutes of each other in Lambert's
10 home. The evidence adduced at defendant's trial, and the
11 jury's verdict, clearly established that this aggravating
12 circumstance, 1E, is applicable beyond a reasonable doubt to
13 this defendant in each of the three murders of this case.
14 The panel, therefore, determines that aggravating
15 circumstances 1E is applicable to the defendant beyond a
16 reasonable doubt in the murder of Tina Brandon, in the
17 murder of Lisa Lambert and in the murder of Phillip DeVine.

18 F. The offender knowingly created a great risk of
19 death to at least several persons. The state adduced no
20 evidence to support the existence of aggravating
21 circumstance 1F and the sentencing panel concludes that it
22 is not applicable in this case.

23 G. The victim was a law enforcement officer or a
24 public servant having custody of the offender or another.
25 The state has adduced no evidence to support the existence

1 of aggravating circumstance 1G and the sentencing panel
2 concludes that it is not applicable in this case.

3 H. The crime was committed to disrupt or hinder
4 the lawful exercise of any governmental function or the
5 enforcement of the law. As to the first prong of this sub-
6 section, the crime was committed to disrupt or hinder the
7 lawful exercise of any governmental function. The panel
8 does not find sufficient statutory case law or evidence in
9 the record to establish and support a finding beyond a
10 reasonable doubt that this prong of 1H is applicable to this
11 defendant. The panel therefore determines that this first
12 prong of aggravating circumstance 1H is not applicable to
13 the defendant in this case.

14 Considering the second prong of this sub-section,
15 the crime was committed to disrupt or hinder the enforcement
16 of the laws after the alleged kidnapping and sexual assault
17 of Tina Brandon on December 24th, 1993. Both defendants
18 were made aware on December 25, 1993 by Linda Gutierrezes that
19 the police had been called in to investigate the case. On
20 December 28th, 1993 Investigator Hayes informed both
21 defendants of the allegations against them during
22 questioning at police headquarters. As discussed under
23 Section 1B above, Nissen's account of his and defendant's
24 motivation for the murders is corroborated by other credible
25 witnesses and exhibits in this case. As a result of not

1 only the testimony supplied by Marvin Nissen, but by all of
2 the corroborated evidence in this case, the panel finds the
3 motive for the murder of Tina Brandon was to prevent her
4 from being a witness for the state in any potential
5 prosecution against each defendant for kidnapping and
6 sexually assaulting her. Clearly, the murder of Tina
7 Brandon was committed to disrupt or hinder the enforcement
8 of the law. The panel concludes that the second prong of
9 this aggravating circumstance, the crime was committed to
10 disrupt or hinder the enforcement of the laws, is applicable
11 beyond a reasonable doubt to the murder of Tina Brandon.
12 The panel therefore determines that this portion of
13 aggravating circumstances, 1H, is applicable to the
14 defendant beyond a reasonable doubt.

15 And Judge Amdor will --

16 JUDGE AMDOR: The record should note that we
17 continue to read from the original signed order in the case.

18 Part 4. Statutory and mitigating circumstances.
19 As to the mitigating circumstances, the statutory
20 definitions of which are hereafter set forth, the sentencing
21 panel unanimously finds as follows for each such
22 circumstance.

23 A. The offender has no significant history of
24 prior criminal activity. The defendant adduced no evidence
25 to support the existence of this mitigating circumstance,

1 various theories, including premeditated murder, felony
2 murder and aiding and abetting first degree murder. In
3 finding the defendant guilty of three counts of first degree
4 murder, the jury was not required to indicate which theory
5 their verdicts were based upon in each of the cases.
6 Further, defendant contends that it is only the testimony of
7 Marvin Nissen which places defendant at the scene of the
8 crimes. As discussed under sub-sections 2B and C, the panel
9 is convinced that there is a great deal of credible evidence
10 in the record that the defendant fired the shots that killed
11 the three victims. Furthermore, the trial record reveals
12 that it is barren of any evidence whatsoever that the
13 defendant was merely an accomplice in these crimes or that
14 his participation was relatively minor. The sentencing
15 panel concludes that mitigating circumstance 2E is not
16 applicable in this case.

17 F. The victim was a participant in the
18 defendant's conduct or consented to the act. There is no
19 evidence to support the existence of this mitigating
20 circumstance and the panel concludes that it is not
21 applicable in this case.

22 G. At the time of the crime, the capacity of
23 the defendant to appreciate the wrongfulness of his conduct
24 or to conform his conduct to the requirements of the law was
25 impaired as a result of mental illness, mental defect, or

1 intoxication. Previously, under sub-sections 2B, C and D
2 above, the undeniably tragic circumstances of defendant's
3 childhood, adolescence and young adulthood prior to these
4 crimes were discussed. We have examined Dr. Jeffrey's and
5 Dr. Fine's testimony concerning defendant's mental state in
6 general, as opposed to whether defendant was under extreme
7 mental or emotional disturbance at the precise time the
8 crimes were committed as under 2C above. Their testimony is
9 persuasive that the defendant has an extensive psychiatric
10 and psychological history. Throughout the years, the
11 defendant has been diagnosed with a number of psychiatric
12 and psychological disorders. In Dr. Jeffrey's psychological
13 evaluation of the defendant, he concluded that he had a
14 diagnosis of antisocial personality disorder. Dr. Fine,
15 after having reviewed the defendant's psychiatric history,
16 stated that Lotter has suffered from severe debilitating-
17 type disorders since birth. Dr. Fine characterized Lotter
18 as being severely dysfunctional. Even if Lotter's testimony
19 is taken as truthful, both doctors agree -- I stand
20 corrected. Even if Nissen's testimony is taken as truthful,
21 both doctors agree that in their opinion the elements of
22 mitigating circumstance, 2G, described the defendant at the
23 time of the crimes. As previously discussed under sub-
24 section 2C above, the panel concludes that the defendant was
25 not intoxicated at the time the homicides were committed.

We do recognize that there is evidence from both the state and the defendant that he was consuming alcohol during the evening prior to the murders. While the alcohol may have affected the defendant to some degree, there is not evidence to conclude that the effects of the alcohol rose to the level of intoxication. Based upon the evidence of defendant's abnormal childhood experiences, his long-standing history of various mental disorders, Drs. Jeffrey's and Fine's opinions of defendant's emotional maturity level, as discussed under sub-section 2D above, defendant's alcohol consumption prior to committing the homicides and Drs. Jeffrey's and Fine's opinion that the elements of 2G described defendant's mental state in general, and therefore, at the time of the crime, the sentencing panel concludes that mitigating circumstance 2G is applicable to each of the murders in this case.

Part 5. Non-statutory mitigating circumstances.

In addition to the statutory mitigating circumstances specified in Section 29-2923, Part 2, this sentencing panel is required, both by statute, see Nebraska Revised Statutes, Section 29-2521, Reissue of 1989, and by case law, Lockett versus Ohio, 438 U.S. 586, 98 Supreme Court 2954, 57 L. Ed. 2d 973, 1978; State versus Holtan, 205 Neb. 314, on pages 318 and 319, 287 N.W.2d 671 at page 674, cert. denied, 449 U.S. 891, 101 Supreme Court 250, 66 L. Ed. 2d 117, 1980, to

1 factors which the defendant argues are applicable. The
2 Court has given that evidence such weight, if any, to which
3 it is entitled.

4 Part 6. Non-prejudicial effect of violation of
5 court orders. As evidenced by exchanges in the record
6 between the panel and the state and the insolent tone taken
7 in many of the state's legal briefs, it is apparent that the
8 state has had great difficulty in accepting and complying
9 with court rulings and orders in these proceedings. The
10 conduct of the special deputy Richardson County Attorney in
11 this regard has been, in a word, contentious. Predictably,
12 this posture led to the defense filing a motion to
13 disqualify plaintiff's counsel for intentionally violating a
14 court order, specifically this panel's order denying the
15 state access to the records of the defendant we deemed to be
16 confidential or privileged. Further, it was called to our
17 attention that the state had failed to comply with a
18 discovery order which had been entered on August 16th, 1995.
19 This panel dealt with both issues immediately prior to
20 commencing presentation of evidence in these proceedings.
21 The findings of the panel on those issues will be outlined
22 at this time, so as to be of assistance to the Nebraska
23 Supreme Court in its review.

24 The first issue concerns a motion for release of
25 records, filed by the state on August 24th of 1995. In that

Section 8. Determination of sentence. In determining the sentence to be imposed on the defendant, the sentencing panel is required by Nebraska Revised Statutes, Section 29-2522, Reissue 1989, to consider one, whether sufficient aggravating circumstances exist to justify imposition of a sentence of death; two, whether sufficient mitigating circumstance exist which approach or exceed the weight given to the aggravating circumstances; or three, whether a sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. The Nebraska Supreme Court has repeatedly emphasized that the determination of sentence is to be based not on a mere numerical counting of aggravating and mitigating circumstances, but rather requires a careful weighing and examination of the various factors. The sentencing panel has undertaken that careful weighing and examination.

The sentencing panel specifically finds that with regard to the murders of both Lisa Lambert and Phillip DeVine, the second prong of aggravating circumstance 1B, the murder was committed in an apparent effort to conceal the identity of the perpetrator of a crime, and aggravating circumstance 1E, at the time the murder was committed, the offender also committed another murder, are applicable in these cases beyond a reasonable doubt. We further find

1 beyond a reasonable doubt that in the case wherein Lisa
2 Lambert is the victim, that aggravating circumstance 1E
3 applies to the murders of Tina Brandon and Phillip DeVine.
4 We further find beyond a reasonable doubt that in the case
5 wherein Phillip DeVine is the victim, that aggravating
6 circumstance 1E applies to the murders of Tina Brandon and
7 Lisa Lambert. The sentencing panel specifically finds that
8 with regard to the murder of Tina Brandon, the second prong
9 of aggravating circumstance 1H, the crime was committed to
10 disrupt or hinder the enforcement of the laws, and
11 aggravating circumstance 1E, at the time the murder was
12 committed, defender also committed another murder, are
13 applicable in this case beyond a reasonable doubt. The
14 sentencing panel further finds beyond a reasonable doubt
15 that in the case wherein Tina Brandon is the victim, that
16 aggravating circumstance 1E applies to the murders of Lisa
17 Lambert and Phillip DeVine. It is the sentencing panel's
18 conclusion that the presence of these aggravating
19 circumstances is sufficient to justify imposition of a
20 sentence of death for each of the murders of which the
21 defendant has been convicted. The sentencing panel further
22 finds that mitigating circumstance 2G, at the time of the
23 crime, the capacity of the defendant to conform his conduct
24 to the requirements of law was impaired as a result of
25 mental illness, is applicable to the murders of Tina

1 Brandon, Lisa Lambert and Phillip DeVine. The sentencing
2 panel further finds that this mitigating circumstance is
3 entitled to some weight and consideration in each case. We
4 likewise find that the non-statutory mitigating
5 circumstances, with respect to the defendant's childhood,
6 family history, and history of mental disorder exists as to
7 all three murders. In weighing such mitigating
8 circumstances against the aggravating circumstances, which
9 we have heretofore found, we conclude that the mitigating
10 circumstances above set forth are not of sufficient weight
11 to approach or exceed the weight which we give to the
12 aggravating circumstances applicable to each murder. And,
13 we restate again our conclusion that the sentence of death
14 should be imposed on the defendant for all three murders.

15 As required by Nebraska Revised Statutes, Section
16 29-2522, the panel has considered whether a sentence of
17 death imposed in this case is excessive or disproportionate
18 to the penalty imposed in similar cases, considering both
19 the crime and the defendant. In this regard, the panel has
20 reviewed all relevant opinions of the Nebraska Supreme
21 Court. In light of that review, and having considered all
22 of the evidence offered by defendant during the sentencing
23 hearing, the panel finds beyond a reasonable doubt that the
24 imposition of a sentence of death in each of these cases for
25 these three murders is not and would not be excessive or

1 disproportionate to the penalty imposed in similar cases,
2 considering both the crime and the defendant.

3 Finally, under Section 7 of this order, the
4 sentencing panel has considered in detail whether the
5 sentence of death imposed in this case is excessive or
6 disproportionate to the penalty imposed on the co-defendant,
7 Marvin Nissen, considering both the crime and the defendant.
8 As we concluded under Section 7 of this order, the panel
9 finds that the sentence of death imposed in this case for
10 all three murders is not excessive or disproportionate to
11 the penalty imposed upon the co-defendant, Marvin Nissen,
12 considering both the crimes and the defendant.

13 JUDGE FINN: It is therefore ordered and adjudged
14 that, as to Count One of the information, the murder of Tina
15 Brandon, it is the judgment and sentence of this Court that
16 the defendant, John L. Lotter, is hereby sentenced to the
17 penalty of death for the murder and the first degree murder
18 of Tina Brandon.

19 It is further ordered and adjudged as to Count Two
20 of the information and the murder of Lisa Lambert, that the
21 defendant, John L. Lotter, is hereby sentenced to the
22 penalty of death for the murder in the first degree of Lisa
23 Lambert.

24 It is further ordered and adjudged as to Count
25 Three of the information to the murder of Phillip DeVine