190 Ariz. 129
Supreme Court of Arizona,
En Banc.

STATE of Arizona, Appellee,
v.
Christopher John SPREITZ, Appellant.

No. CR–94–0454–AP.
|
Sept. 11, 1997.

Synopsis

Defendant was convicted in the Superior Court, Pima County, No. CR–27745, William N. Sherrill, J., of first-degree murder, sexual assault, and kidnapping, and was sentenced to death. He appealed. The Supreme Court, Jones, V.C.J., held that: (1) defendant's speedy trial rights were not violated; (2) erroneous admission of gruesome photographs of victim's body was harmless; (3) defendant was not entitled to *Miranda* warnings after officers stopped defendant's vehicle; (4) probable cause existed for issuance of warrant to search defendant's home; (5) evidence regarding victim's "habit" of never accepting rides from strangers was admissible; (6) defendant was not denied effective assistance of counsel; and (7) evidence supported imposition of death penalty.

Affirmed.

Attorneys and Law Firms

****1264** ***133** Grant Woods, Attorney General by Paul J. McMurdie, Chief Counsel, Criminal Appeals Division, Jon G. Anderson, Assistant Attorney General, Phoenix, for Appellee.

Law Office of David Alan Darby by David Alan Darby, Julie L.C. Duvall, Tucson, for Appellant.

OPINION

JONES, Vice Chief Justice.

Christopher John Spreitz (defendant) was convicted of first degree murder, sexual assault, and kidnapping. His victim was Ruby Reid. The trial court sentenced Spreitz to death for the murder and to fourteen-year consecutive prison terms for each of the non-capital convictions. Appeal to this court for the death sentence is mandatory. Ariz. R.Crim. P. 26.15 and 31.2(b). This court has jurisdiction under Arizona Constitution article VI, section 5(3), and Arizona Revised Statutes sections 13–4031 and –4033(A). We affirm.

I. Facts

On May 18, 1989, Ruby Reid spent the evening at the Red Dog Saloon in Tucson. She had been a regular patron for a number of years. On the night in question, a bartender friend saw Ms. Reid leave the bar at approximately 11:30 p.m. Because she did not own a car and the bar was near her home, she was on foot as usual.

Meanwhile, defendant spent several hours drinking with his roommate at another bar in the vicinity. At about midnight, defendant and his roommate returned home. The roommate's girlfriend testified that shortly after they arrived, defendant remarked that he was going out to see if he could "pick up a date."

Between 12:35 and 12:45 a.m., Tucson Police Officer Ramon Batista noticed a man he later identified as defendant drive into a convenience store parking lot across the road from where Batista was parked. Officer Batista noted the make and color of defendant's car. After watching defendant talk to another man for a few minutes, Officer Batista drove through the convenience store parking lot, observing that defendant was wearing torn jeans over spandex shorts and a white T-shirt.

At approximately 1:45 a.m., Officer Batista again noticed defendant's car in downtown Tucson. Contrary to the earlier convenience store sighting where the officer recalled the car was running cleanly, the car was now smoking heavily and leaving a trail of oil. Officer Batista pulled defendant over, and with defendant out of his car, observed that his hands, arms, legs, shoes, and shirt appeared to be smeared with blood and fecal matter, his shirt was torn, and he smelled of feces. The officer noted that defendant had removed his jeans and was now wearing spandex shorts with the same T-shirt. Explaining his condition, defendant said he had fought with the man seen with him by the officer earlier that evening.

Another police officer, Sergeant Victor Chacon, drove by and stopped when he observed defendant's appearance. Sgt. Chacon expressed concern about the condition of the man with whom defendant had allegedly fought and asked defendant to take the officers to the scene of the fight. Defendant rode unrestrained in the back seat of Officer

Batista's patrol vehicle. Upon arrival at the purported scene, however, the officers were unable to find any signs of an altercation, injuries to the other man, or the cause of the oil leak in defendant's car. Sgt. Chacon called another police officer to take photographs of defendant, who consented to being **1265 *134 photographed. Officer Batista noticed that defendant was flushed and his breath smelled of beer and concluded that he had been drinking. However, Officer Batista also testified that defendant's actions evidenced no physical or mental impairment. Officer Batista issued defendant a repair order for his car and released him no later than 2:30 a.m. Friday, May 19. After defendant arrived home a short time later, he told his roommate's girlfriend that he had had a fight with a man and he was not certain if the man were alive or dead.

On Monday morning, May 22, a horseback rider discovered Ruby Reid's naked and decomposing body in the desert on the outskirts of Tucson. At the scene, police detectives observed tire tracks leading back to the pavement, oil stains in the dirt, footprints, and drag marks in the dirt leading away from the body. They also found feces-stained pants, tennis shoes, socks, a used tampon, and a torn brassiere. Two blood-stained rocks lay next to the body.

The medical examiner testified that, due to the advanced state of decomposition, he could not determine the full extent and nature of the victim's injuries. For the same reason, the examiner was unable to confirm or reject the presence of semen. The injuries he was able to catalog included: bruising on the legs, arms, and back; bruising and abrasions on the buttocks; several broken ribs; internal bleeding; a broken jaw; several head lacerations; and a skull fracture where the skull had been "shoved in." The examiner concluded that the cause of death was blunt-force trauma to the head.

The police were initially unable to develop leads in the case. However, on Wednesday, May 24, at the police station, the officer who had photographed defendant the previous Friday morning encountered the investigating detective in the Reid murder. The events of Friday morning, May 19, were mentioned during their conversation, causing the detective to sense that the blood- and feces-covered driver might be connected to the murder. Accordingly, the detective obtained a search warrant for defendant's apartment and car. In addition, the detective ran a computer check and discovered that defendant was subject to several outstanding warrants for unsatisfied traffic citations. The defendant was at home when the detective and other officers executed the warrant at 1:30 a.m. on May 25 and arrested him based on the outstanding warrants.

At the police station, defendant was advised of his *Miranda* rights and, upon questioning, confessed to the murder of Ruby Reid. He claimed that he "picked up" Ms. Reid at a convenience store and that she voluntarily went with him, intending to "party." After they arrived in the desert, defendant said that Ms. Reid reneged on her promise to have sex with him and that they fought. He stated that Ms. Reid slapped him and that he punched her in the mouth. He admitted further that he removed her clothing and had vaginal intercourse with her. Finally, defendant confessed that he hit Ms. Reid in the head with a rock more than once to make her stop yelling. He then left, not knowing if she were alive or dead. Shortly thereafter he was stopped in downtown Tucson by Officer Batista.

When the detectives searched defendant's car, they found blood spatter in various locations inside the trunk. The investigating criminologist was able to determine that some of the blood was not consistent with defendant's blood characteristics.

II. Procedural History

A. The Arrest, Indictment, Pretrial Proceedings, and Trial

Defendant's arrest occurred May 25, 1989. On June 2, 1989, he was indicted by a grand jury on counts of first degree murder, sexual assault, and kidnapping. The trial court fixed a pretrial conference date for August 8, 1989, but continued it at defendant's request until August 30. At the pretrial conference on August 30, defendant waived his Rule 8 speedy trial rights, and the court set trial for February 14, 1990. Defendant thereafter waived Rule 8 speedy trial rights in writing numerous times, obtaining several new trial dates between August 8, 1989, and April 23, 1991. The reasons for continuing the trial included claims that analysis of DNA evidence was not yet complete, that defendant **1266 *135 was attempting unsuccessfully to engage another attorney, that defense counsel was ill, and that defense counsel had not received materials necessary to interview an FBI laboratory supervisor.

In April 1991, defendant requested that the court continue the trial date pending a *Frye* hearing to determine admissibility of the state's DNA evidence. On April 23, 1991, defense counsel waived the Rule 8 speedy trial requirements to accommodate

the *Frye* hearing. The court consolidated defendant's action with another case for purposes of the *Frye* hearing and did not at that time set a new trial date.

In April 1992, defense counsel requested a stay in the *Frye* hearing while she filed a petition for special action with the court of appeals regarding the scope of the hearing. The court of appeals declined to accept jurisdiction in June 1992. Defendant immediately filed a petition for special action with this court, again requesting a stay and a determination of scope. The trial court continued the proceedings several more times while awaiting disposition of the special action in this court. In a letter dated August 19, 1992, the trial judge wrote this court asking for an early ruling on the petition for review. This court denied review of the special action in October 1992.

In August 1993, the trial court required the parties to brief and argue the effect of this court's decision in *State v. Bible,* 175 Ariz. 549, 858 P.2d 1152 (1993), on the DNA hearing. After oral argument on October 4, 1993, the trial court took the matter under advisement. In December 1993, the trial court ruled that DNA evidence would be admissible if certain foundational requirements were met. In February 1994, the court set a hearing on pending motions for the following April and reset the trial for June 28, 1994.

In May 1994, defendant filed motions to suppress evidence gathered during his arrest, search, and detention, all of which defendant alleges were illegally conducted. The court heard oral argument on July 6 and denied all motions by order dated July 19, 1994. Meanwhile, the trial court had continued the trial from June 28 to August 9, 1994 at the request of defense counsel.

Against all expectations, the admissibility hearings did not conclude until June 3, 1994 when the court precluded the use of DNA evidence as a sanction because of the state's failure to disclose a witness. During the three-year period between April 1991 and June 1994, the trial court continued the hearing repeatedly at the request of both the defendant and the state and granted the parties time to analyze complex DNA evidence and to arrange for the appearance of numerous expert witnesses. The court also allowed defense counsel to withdraw and appointed substitute counsel.

On June 16, 1994, defendant filed a motion to dismiss for speedy trial violations under Rule 8, Arizona Rules of Criminal Procedure. The court heard arguments on June 28, 1994, and denied the motion on July 25, 1994.

The trial finally began on August 9, 1994, and lasted seven days. On August 18, 1994, the jury returned the following guilty verdicts: first degree murder (both premeditated and felony murder), sexual assault, and kidnapping.

B. The Sentencing

The court conducted defendant's aggravation-mitigation hearing on November 28, 1994, and found aggravation under A.R.S. § 13–703(F)(6), concluding that Ms. Reid's murder was committed in an especially cruel manner. As nonstatutory mitigating factors, the court determined that defendant was raised in a "sub-normal" home environment, that he had been emotionally immature at age twenty-two when the crime was committed but had shown emotional growth while in confinement, that he had no prior felonies, and that he was capable of rehabilitation. After considering the aggravating and mitigating factors, the court imposed the death penalty. The judge concluded that the especially cruel manner in which the victim died substantially outweighed all mitigating factors, whether considered separately or together.

****1267 *136 III. Issues**

A. Trial Issues

1. Speedy trial

Defendant argues that the trial court erred in not granting his motion to dismiss for violation of his right to a speedy trial pursuant to Rule 8 of the Arizona Rules of Criminal Procedure. In addition, defendant asserts that he was denied speedy trial rights under the Due Process Clauses of the United States and Arizona Constitutions. [1]

a. Rule 8 speedy trial

Rule 8 grants even "stricter speedy trial rights than those provided by the United States Constitution." *State v. Tucker,* 133 Ariz. 304, 308, 651 P.2d 359, 363 (1982) (citing *State ex rel. Berger v. Superior Court,* 111 Ariz. 335, 529 P.2d 686 (1974)). Here, defendant complains that his case was not given priority as required under Rule 8.1, that nonexcluded time over the five-year period between his arraignment on June 12, 1989, and the beginning of his trial on August 9, 1994, exceeded the Rule 8.2 time limits, and that several

continuances granted by the court extended beyond the Rule 8.5 thirty-day limit. We have determined, on the entire record, that defendant has waived his rights under Rule 8.

Rule 8.2(b) provides that a defendant who is in custody for criminal charges "shall be tried ... within 120 days from the date of the person's initial appearance before a magistrate ... or within 90 days from the date of the person's arraignment ..., whichever is the lesser." Defendant was arrested on May 25, 1989, indicted on June 2, 1989, and arraigned on June 12, 1989. In the absence of intervening events, defendant's trial was required to commence by September 10, 1989 to avoid violating Rule 8. His trial finally began on August 9, 1994, more than five years after the indictment.

The trial court ruled that defendant's Rule 8 rights had not been violated because: (1) there was a presumption that all continuances granted by the trial court were indispensable to the interests of justice, even though it was likely that the Rule 8.2 limits had been exceeded; (2) defendant had expressly waived his rights on numerous occasions; (3) defendant impliedly waived speedy trial rights by failing to assert the same before the applicable deadlines; and (4) defendant violated his obligations under Rule 8 by failing to advise the court of the imminence of Rule 8.2 deadlines. [2]

A trial court's ruling will be upheld unless an appellant demonstrates that the court abused its discretion and that prejudice resulted. *See State v. Lukezic,* 143 Ariz. 60, 68, 691 P.2d 1088, 1096 (1984). Moreover, the determination of abuse of discretion depends on the facts of each case. *See State v. Mendoza,* 170 Ariz. 184, 194, 823 P.2d 51, 61 (1992). On the facts of this case, we find the trial court did not abuse its discretion, and defendant's Rule 8 speedy trial rights were not violated.

(i) *Undisputed time waived by defendant*

Defendant concedes that he waived Rule 8 time from August 8, 1989, the date set for the first pretrial conference, through April 23, 1991, a period of roughly twenty months. Our review of the record confirms the following sequence of events. Defendant continued the pretrial conference three times between August 8 and August 30, 1989. On August 30, the trial court counseled defendant about his right to insist on a trial within the Rule 8 limits. Defendant knowingly and intentionally waived his right, agreeing to a trial date of February 14, 1990. On January 25, 1990, defendant again agreed to waive his Rule 8.1 speedy trial rights, and the court continued trial to April 3, 1990. Defendant ****1268** ***137** filed a signed waiver of his Rule 8.2(b) rights, expressly acknowledging that the trial date would fall outside the 8.2 time limits.

On April 2, 1990, defendant informed the court that his mother was attempting, on his behalf, to engage new counsel. After defendant freely waived his Rule 8 rights, the court set a tentative trial date of May 4, 1990. On May 4, 1990, defendant again requested a continuance of the trial because his mother had not yet engaged another attorney. With defendant's express waiver under Rule 8, the court set a trial date of September 11, 1990. On September 11, 1990, however, defendant again filed a motion to continue, citing as reasons for delay that interviews of witnesses were not complete, defense counsel had not been able to hire all of the experts needed to testify regarding the admissibility of DNA evidence, and defense counsel had been ill for several weeks. As was customary, the trial court again advised defendant of his right to an immediate trial or a continuance of no more than thirty days. Defendant once more waived this right and agreed to a trial date of January 24, 1991.

On January 14, 1991, defendant moved to continue because the parties needed more trial preparation, due particularly to the complexity of the DNA evidence and because the court would need to conduct a *Frye* hearing prior to admitting any such evidence at trial. Again, defendant filed a signed acknowledgment and waiver under Rule 8.2. Finally, on April 23, 1991, defendant requested a continuance of the trial date in order to conduct a *Frye* hearing. The court approved the continuance without setting a new trial date, although it was apparently the court's understanding that the hearing would take at least two months. Defense counsel avowed that his client again would waive Rule 8 time limits to permit the continuance. Although defense counsel assured the court that defendant would provide yet another written acknowledgment and waiver of Rule 8, this waiver does not appear in the record.

On this record, we find that defendant did waive his Rule 8 speedy trial rights between August 8, 1989 and April 23, 1991. Rule 8.4(a) allows the exclusion from Rule 8.2 time limits for delays "occasioned by or on behalf of the defendant." All trial delays during this period were clearly brought about by defendant and were thus properly excluded within the province of Rule 8.4(a). Significant to this opinion, we find that defendant repeatedly and knowingly waived his

Rule 8 speedy trial rights during this period, usually by filing with the court a signed acknowledgment recognizing that the continuances requested would move his trial outside the Rule 8.2 limits.

(ii) *Disputed waived time*

From April 23, 1991 through the conclusion of pretrial evidentiary hearings on June 3, 1994, defendant did not expressly waive his Rule 8 time. However, the record does not demonstrate that defendant ever made an affirmative assertion of speedy trial rights until his motion to dismiss on June 16, 1994, twelve days before his scheduled trial date of June 28. We turn attention, therefore, to the question whether defendant waived Rule 8 time during this period, and if so, whether the time waived brings his trial within Rule 8.2 limits.

Our review of the record indicates that the protracted *Frye* hearings were frequently stalled by disputes over discovery, motions to reconsider the court's rulings, and requests by the court for memoranda on points of law. In addition, between April 6 and November 9, 1992, the court continued the hearings while defendant filed special actions relating to the scope of *Frye,* first with the court of appeals, and then with this court. On August 17, 1993, the trial court asked the parties to brief and argue the effect of *State v. Bible,* 175 Ariz. 549, 858 P.2d 1152 (1993), on the hearings and then on December 3, 1993, issued findings of fact and conclusions of law regarding various DNA evidentiary issues. After the court ruled the DNA evidence admissible on December 3, 1993 and denied defendant's motion to reconsider on January 12, 1994, it held hearings in which the state was required to establish foundation for the admission of specific DNA evidence. Previously, on February 18, 1994, the court had set a hearing on pending pretrial motions for April 27, 1994, and trial for June 28, 1994.

****1269** ***138** During a foundation hearing on June 3, 1994, because the state failed to disclose a material witness, the court determined to preclude the state's use of all DNA evidence. On June 16, 1994, twelve days before his trial was scheduled to start, defendant filed a motion to dismiss for speedy trial violations. The next day, defendant moved to continue the pretrial hearing and trial due to conflicts with defense counsel's schedule, and the court reset the hearing and trial for June 28 and August 9, 1994, respectively. On August 4, 1994, defendant moved for a stay of the trial pending a special action to the court of appeals. The court denied the stay and commenced the trial on August 9.

Continuances granted defendant for filing special actions and those resulting from defense counsel's scheduling conflicts are excluded from Rule 8 limits as delays occasioned by or on behalf of defendant under Rule 8.4(a). *See, e.g., State v. Rodriguez,* 186 Ariz. 240, 245, 921 P.2d 643, 648 (1996). This leaves the periods of time during which the state sought to admit and defendant argued to exclude DNA evidence, during which the court had not set a trial date. A delay of over five years between arraignment and trial warrants intensely close scrutiny. The state concedes that such a delay is presumptively prejudicial, citing *Doggett v. United States,* 505 U.S. 647, 652 n. 1, 112 S.Ct. 2686, 2691 n. 1, 120 L.Ed.2d 520 (1992), where the Supreme Court deemed a delay approaching one year "unreasonable enough" to trigger judicial review.

We are troubled that the eventual disposition of the admissibility of DNA evidence came, not two or three months after the hearing process began, but three years later. While a significant portion of that three-year period was attributable to defendant's petitions for special action and other motions, this pretrial process is extremely lengthy. Defendant's claim that his attorney's waiver on April 23, 1991 cannot reasonably be construed to encompass the protracted hearings that actually followed may be facially compelling, but more compelling is defendant's compromise of this argument by never once objecting to the delay until the DNA admissibility hearings were concluded.

Rule 8.1(d) requires defense counsel to "advise the court of the impending expiration of time limits in the defendant's case. Failure to do so may result in sanctions...."[3] Thus, a defendant may waive speedy trial rights by not objecting to the denial of speedy trial in a timely manner. *See State v. Guerrero,* 159 Ariz. 568, 570, 769 P.2d 1014, 1016 (1989) (citing *State v. Adair,* 106 Ariz. 58, 60, 470 P.2d 671, 673 (1970)). We have held that once a defendant has let a Rule 8 speedy trial time limit pass without objection, he cannot later claim a violation that requires reversal. *Id.* at 570–71, 769 P.2d at 1016–17. Our decisions regarding a defendant's duty to assert speedy trial rights are predicated in substantial part on the concern that defendants may "wait until after the [Rule 8.2 time limit] has expired and then claim a Rule 8 violation after it is too late for the trial court to prevent the violation." *State v. Swensrud,* 168 Ariz. 21, 23, 810 P.2d 1028, 1030 (1991). Moreover, we observe that although Rule 8.2(e) warns that Rule 8 speedy trial time limits "may not be extended by

stipulation or waiver," in *Guerrero* we explained that Rule 8.2(e) was intended solely to prevent voluntary waivers of speedy trial time limits in DUI prosecutions. 159 Ariz. at 570, 769 P.2d at 1016. It is therefore not applicable here.

Defendant did not file a motion to dismiss for violation of his speedy trial rights until June 16, 1994, after the evidentiary hearings were terminated on June 3, 1994, after the court had excluded all DNA evidence, and after trial had been set for June 28, 1994. Fifty-seven days elapsed between defendant's arraignment on June 12, 1989 and his scheduled pretrial conference on August 8, **1270 *139 1989, leaving thirty-three days before the running of the Rule 8.2(b) time limit. As noted, however, defendant expressly waived his speedy trial rights between August 8, 1989 and April 23, 1991. Defendant could have asserted his rights and filed a motion to dismiss any time after thirty-three days past April 23, 1991; he elected not to do so. Instead, through his attorney, he waived his rights for the purpose of the *Frye* hearings and moved to dismiss thirteen days after the *Frye* hearings concluded and twelve days before his scheduled trial date. Defendant's trial was thus scheduled to commence twenty-five days after the conclusion of the *Frye* hearings, well within the thirty-three days remaining of defendant's ninety-day Rule 8.2 limitation.

Defendant's was the test case in Pima County for the admissibility of RLFP DNA evidence. The record demonstrates that defendant was represented zealously during the *Frye* hearings in a spirited effort to preclude admission of this evidence. Defendant now requests dismissal alleging that the inordinate length of process resulted in a compromise of his rights.

In *Commonwealth v. Lanigan,* 419 Mass. 15, 641 N.E.2d 1342, 1345 (1994), the Massachusetts Supreme Judicial Court exempted delays caused by DNA admissibility hearings from the statutory speedy trial time limits because of "special circumstances" presented by the hearings, the "public interest reasons justifying the delay," and because the defendant's pursuit of his speedy trial right was not "zealous." We agree that there may be adequate public policy reasons for allowing extra time for pretrial hearings involving complex scientific evidence such as DNA.

We have earlier decided that the Rule 8 right to a speedy trial is not fundamental, but "a procedural right, 'not a shield by which the accused may avoid trial and possible punishment by taking advantage of loopholes in the law or arithmetic errors.' " *State v. Henry,* 176 Ariz. 569, 578, 863 P.2d 861, 870 (1993) (quoting *Guerrero,* 159 Ariz. at 570, 769 P.2d at 1016). Here, we find that although the period between defendant's arraignment and trial was unprecedented, defendant waived his right to object by not objecting when the violation was occurring. We further conclude that defendant and his counsel knew or should have known of defendant's right to demand a trial within Rule 8 time limits. During the undisputed waived time, the trial judge explained this right to defendant each time the court continued the trial date.

Defendant complains that his attorney was not authorized to waive the speedy trial time eventually required for the DNA evidentiary hearing because he had expressed to the court his dissatisfaction with counsel. Also, defendant asserts that he himself invoked his speedy trial rights in court on February 17, 1993, when defendant remarked to the court that "after four years, something should be done." We have held that delays agreed to by defense counsel are binding on a defendant, even if made without the defendant's consent. *See Rodriguez,* 186 Ariz. at 244, 921 P.2d at 647 (citing *State v. Zuck,* 134 Ariz. 509, 515, 658 P.2d 162, 168 (1982)); *State v. Killian,* 118 Ariz. 408, 411, 577 P.2d 259, 262 (App.1978) ("Rule 8.2 does not grant the appellant any 'fundamental right' which cannot be waived by his counsel.").

b. *Constitutional speedy trial rights*

Neither the United States nor the Arizona Constitution requires that a trial be held within a specified time period. U.S. Const. amend. VI; Ariz. Const. art. II, § 24; *see Henry,* 176 Ariz. at 578, 863 P.2d at 870. In *Barker v. Wingo,* the Supreme Court established a test by which courts decide whether trial delay warrants reversal. 407 U.S. 514, 530–32, 92 S.Ct. 2182, 2191–93, 33 L.Ed.2d 101 (1972). The four-factor *Barker* analysis examines "(1) the length of the delay; (2) the reason for the delay; (3) whether the defendant has demanded a speedy trial; and (4) the prejudice to the defendant." *Lukezic,* 143 Ariz. at 69, 691 P.2d at 1097 (citing *Barker,* 407 U.S. at 530, 92 S.Ct. at 2192). In weighing these factors, the length of the delay is the least important, while the prejudice **1271 *140 to defendant is the most significant. *See Henry,* 176 Ariz. at 579, 863 P.2d at 871. We apply each of the *Barker* factors to the facts presented here.

A pretrial period after arraignment of over five years is presumptively prejudicial. *See Doggett,* 505 U.S. at 652 n. 1, 112 S.Ct. at 2691 n. 1. This factor, however, must be considered in concert with the remaining three *Barker* factors.

Not surprisingly, defendant attributes the reason for the delay primarily to the state's desire to present DNA evidence. In fact, the evidentiary hearings were required when defendant moved to exclude this evidence. We agree with the state that it would be unjust to allow defendant to force exclusion of potentially probative evidence where its admission provides a court with an issue of first impression and requires a lengthy evidentiary hearing. Where, as here, a defendant fights to exclude DNA evidence, the delay resulting from hearings necessary to determine admissibility is necessarily attributable to the defense. *See State v. Weeks,* 270 Mont. 63, 891 P.2d 477, 483 (1995). Obviously, we conclude that a defendant may contest the admissibility of scientific evidence but not that he may do so and then later contend violation of speedy trial rights due to delays occasioned by the contest. In so stating, we do not seek to penalize the defendant but merely to accommodate his wishes without jeopardizing the state's interest in bringing the matter to trial.

Here, defendant waived his speedy trial rights in advance of the hearings and, for reasons the record does not reveal, never objected to the court that his rights had been compromised by the long delay. Thus, we find that the reason for the delay weighs against defendant's position. Defendant did not move to dismiss for violation of speedy trial rights until after the DNA evidentiary hearing process had run its three-year course. His assertion of rights was thus untimely and bears little weight in our *Barker* analysis. Furthermore, defendant did not complain of any violation of speedy trial rights until twelve days before trial, and the next day he moved to continue the trial because of defense counsel's scheduling conflict.

Finally, defendant claims no prejudice from the trial delay other than that arising out of his long period of custody. While five years in custody may have increased defendant's anxiety quotient, we find, on the entire record, that the delay did not prejudice his ability to defend against the state's claims. After weighing each of the *Barker* factors, we conclude that defendant's constitutional right to an expeditious trial has not been unduly disturbed.

Although we reject defendant's claim of speedy trial violations, any pretrial delay stretching into a period of years greatly concerns us. Thus, we issue the following word of caution. The duty to move criminal cases through the courts is a responsibility shared by the prosecution, the defense, and the courts. *See* Rule 8.1(a) and cmt. to Rule 8.1(d), Ariz. R.Crim. P; *United States v. Perez–Reveles,* 715 F.2d 1348, 1353 (9th Cir.1983). Our holding in this case is limited to the facts peculiar to this record. We find no abuse of discretion by the trial court in granting continuances and in allowing delays in pretrial hearings because of the novelty of DNA evidence and the absence of prejudice. We also recognize that defendants make intelligent decisions to waive speedy trial time limits and that in certain circumstances there are sound tactical reasons to do so.

2. Gruesome Photographs

Defendant argues that the trial court erred in admitting several autopsy photographs of the victim. The photographs depict the corpse as it appeared after decomposing in the desert for over three days in temperatures exceeding 100°F. The corpse is severely discolored, and in all of the photographs insects are shown partly covering the body. This insect activity is vividly apparent in the close-ups. Perhaps the most disturbing photograph, marked Exhibit 156, depicts the victim's face staring at the camera in a mummy-like mask of death.

**1272 *141 Defendant asserts that under Rule 403 of the Arizona Rules of Evidence, these photographs were improperly admitted because their probative value was outweighed by the danger that they would prejudice the jury against him.[4] This court has frequently confronted claims that photographs admitted at trial were so graphic that their probative value was outweighed by the prejudice they create. Recently, this court declared that admissibility of photographs at trial will be determined under a three-part inquiry in which a court examines the relevance of the photograph, the " tendency [of the photograph] to incite or inflame the jury," and the "probative value versus potential to cause unfair prejudice." *State v. Murray,* 184 Ariz. 9, 28, 906 P.2d 542, 561 (1995) (citing *State v. Stokley,* 182 Ariz. 505, 515, 898 P.2d 454, 464 (1995), *cert. denied,* 516 U.S. 1078, 116 S.Ct. 787, 133 L.Ed.2d 737 (1996), and Ariz. R. Evid. 401 to 403), *cert. denied,* 518 U.S. 1010, 116 S.Ct. 2535, 135 L.Ed.2d 1057, and 519 U.S. 874, 117 S.Ct. 193, 136 L.Ed.2d 130 (1996). The relevance of questionable photographs depends on whether they assist a jury to understand an issue. *See State v. Roscoe,* 184 Ariz. 484, 494, 910 P.2d 635, 645 (citing *Murray,* 184 Ariz. at 28, 906 P.2d at 561), *cert. denied,* 519 U.S. 854, 117 S.Ct. 150, 136 L.Ed.2d 96 (1996).

To find that the autopsy photographs of Ms. Reid were improperly admitted, this court must find a clear abuse of discretion by the trial court. *See State v. Gulbrandson,* 184 Ariz. 46, 60, 906 P.2d 579, 593 (1995) (citing *State v. Amaya–*

Ruiz, 166 Ariz. 152, 170, 800 P.2d 1260, 1278 (1990)). Trial courts are permitted broad discretion in admitting photographs. For example, in *State v. Bracy,* the court upheld the admission of graphic and inflammatory photographs of victims at the murder scene. The court reasoned that "we cannot compel the state 'to try its case in a sterile setting.' " 145 Ariz. 520, 534, 703 P.2d 464, 478 (1985) (quoting *State v. Chapple,* 135 Ariz. 281, 289–90, 660 P.2d 1208, 1216–17 (1983)); *see also Amaya–Ruiz,* 166 Ariz. at 171, 800 P.2d at 1279 ("In prosecuting [a murder], the state must be allowed some latitude to show what actually occurred."). Photographs of a corpse in a murder trial may properly be admitted in evidence for many reasons, including

> to prove the corpus delecti, to identify the victim, to show the nature and location of the fatal injury, to help determine the degree or atrociousness of the crime, to corroborate state witnesses, to illustrate or explain testimony, and to corroborate the state's theory of how and why the homicide was committed.

State v. Chapple, 135 Ariz. at 288, 660 P.2d at 1215 (citing *State v. Thomas,* 110 Ariz. 120, 130, 515 P.2d 865, 875 (1973)). In a case involving a challenge to the admission of an inflammatory photograph of a close-up of the victim's torso and decomposed head, the court declared the evidence admissible "provided it has probative value apart from merely illustrating the atrociousness of the crime."[5] *State v. Poland,* 144 Ariz. 388, 401, 698 P.2d 183, 196 (1985) (citing *State v. Perea,* 142 Ariz. 352, 690 P.2d 71, 76 (1984), *aff'd,* 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986)). However, this court has declared that it will reverse on appeal if "gruesome evidence is admitted for the ***sole purpose*** of inflaming the jury." *State v. Gerlaugh,* 134 Ariz. 164, 169, 654 P.2d 800, 805 (1982) (citing *State v. Steele,* 120 Ariz. 462, 586 P.2d 1274 (1978)) (emphasis added).

Applying the three-part test for admissibility of the photographs, we first decide ****1273** ***142** that these photographs were relevant. As stated in *Chapple,* "any photograph of the deceased in any murder case [is relevant to assist a jury to understand an issue] because the fact and cause of death are always relevant in a murder prosecution." 135 Ariz. at 288, 660 P.2d at 1215. Conversely, we have no difficulty deciding that the photographs are prejudicial. They were unduly disturbing because of their gruesome character and tended to incite or inflame the jury because of the severe state of the victim's decomposition and the accompanying insect activity.

The medical examiner testified clearly about wounds to the victim's body, and we conclude that the photographs provide little or no additional aid in that regard. Further, the examiner did not testify specifically regarding two of the most unsettling of the autopsy photographs, Exhibits 150 and 156. Accordingly, we conclude that the trial court abused its discretion, erring on the side of relevance, by not excluding the autopsy photographs because the resultant danger of unfair prejudicial effect on the jury substantially outweighed the photographs' probative value.

Defendant argues, of course, that because the trial court erred in admitting the photographs, he did not receive a fair trial under the federal and state constitutions and that this court must remand for a new trial. We disagree because even if the trial court abused its discretion in admitting the photographs, we need not reverse or remand if this error was harmless. *See State v. Moorman,* 154 Ariz. 578, 586, 744 P.2d 679, 687 (1987). In *State v. Atwood,* we reiterated that the test for harmless error depends on whether there is a "reasonable probability" that had the error not been made, the verdict would have been different. 171 Ariz. 576, 639, 832 P.2d 593, 656 (1992) (quoting *State v. Williams,* 133 Ariz. 220, 225, 650 P.2d 1202, 1207 (1982)) (quoting *State v. McVay,* 127 Ariz. 450, 453, 622 P.2d 9, 12 (1980)). "Error ... is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Bible,* 175 Ariz. at 588, 858 P.2d at 1191 (citing *State v. Lundstrom,* 161 Ariz. 141, 150 & n. 11, 776 P.2d 1067, 1076 & n. 11 (1989)). While it is impossible to assess the precise effect viewing the most gruesome autopsy photographs might have had on the jury, we have no difficulty concluding beyond a reasonable doubt by reason of the overwhelming evidence against the defendant, including, most importantly, his own uncoerced confession, that the jury would have found him guilty without the photographs. We thus find the trial court's discretionary error in admitting the autopsy photographs harmless.

3. Illegal detention

The Tucson Police stopped defendant at approximately 1:45 a.m. in downtown Tucson because his car was losing oil and emitting smoke. After officers noticed that parts of defendant's body were smeared with blood and feces,

they questioned him about his appearance and eventually asked him to take them to the scene of the alleged fight. Defendant voluntarily complied. Eventually, the police photographed defendant with his permission. The detention lasted approximately forty-five minutes, after which the police issued defendant a motor vehicle repair order and released him. Defendant's statements and the photographs were used against him at trial.

Defendant argues that his questioning by police officers in the early morning hours of May 19, 1989, constituted an illegal detention and that the trial court erred in denying his motion to suppress evidence gathered during the detention. Under these circumstances, defendant argues, he should have been given *Miranda* warnings. Because he received no warning, he alleges that use at trial of statements made during the detention violated his rights under the Fifth and Fourteenth Amendments of the United States Constitution and Article II, section 24 of the Arizona Constitution.

When police officers conduct an investigation, they may detain persons "under circumstances which would not justify an **1274 *143 arrest." *State v. Aguirre,* 130 Ariz. 54, 56, 633 P.2d 1047, 1049 (App.1981). In *State v. Wiley,* this court instructed that a police officer may detain a person for investigative purposes if the officer has a "reasonable, articulable suspicion that a particular person had committed, was committing, or was about to commit a crime." 144 Ariz. 525, 530, 698 P.2d 1244, 1249 (1985),*overruled on other grounds,* 157 Ariz. 541, 760 P.2d 541 (1988). Here, Officer Batista was justified in initially stopping defendant on the basis of the leaking oil and excessive smoke from his car. When the officer also discovered that defendant's arms and legs were smeared with blood, it was reasonable for him to investigate the cause. *See State v. Brierly,* 109 Ariz. 310, 316, 509 P.2d 203, 209 (1973) (finding police search of truck reasonable when, after stopping truck for malfunctioning headlight, police noticed driver had blood on his chest, arms, hands, and face); *Patton v. United States,* 633 A.2d 800, 814–15 (D.C.App.1993) (defendant, bleeding from a cut, flagged down police, who transported him to crime scene, then to hospital, and later to police station where they interrogated him with his consent; court held that police actions would "not exceed the bounds of a permissible *Terry* stop.").

A detention of nearly forty-five minutes merits scrutiny. During this period, defendant was questioned about his appearance and condition, accompanied Officer Batista to the supposed fight scene to search for the alleged co-participant, and finding nothing, returned to his car where police photographed him with his consent. Finding no probable cause to arrest defendant, the police issued a repair order, and defendant left. At no time did the officers handcuff defendant or advise him that he was under suspicion or arrest. Defendant voluntarily cooperated in all of the activities. The police had reasonable suspicion to investigate defendant's appearance and the story he told to explain it, and did not exceed the scope of that investigation. The forty-five minute duration was fully justified, given the time to travel in search of the "fight scene," to return, and to photograph defendant.

If defendant's detention by the police amounted to custody, the police would have been required to inform him of his *Miranda* rights before commencing an interrogation. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The test used to determine if a person is in custody under a Fifth Amendment analysis is whether the person's freedom of movement is restricted to the extent it would be tantamount to formal arrest. *See Berkemer v. McCarty,* 468 U.S. 420, 440, 104 S.Ct. 3138, 3150, 82 L.Ed.2d 317 (1984) (holding that "comparatively nonthreatening character of detentions [associated with ordinary traffic stops] explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda* "); *California v. Beheler,* 463 U.S. 1121, 1123, 1125, 103 S.Ct. 3517, 3519, 3520, 77 L.Ed.2d 1275 (1983) (per curiam) (defendant was "neither taken into custody nor significantly deprived of his freedom of action" even though he accompanied police to station where he was questioned); *State v. Castellano,* 162 Ariz. 461, 462–63, 784 P.2d 287, 288–89 (1989) (under totality of circumstances, including fact that noncoercive interrogation took place on public highway, questioning of defendant after traffic stop was not custodial); *State v. Stabler,* 162 Ariz. 370, 375, 783 P.2d 816, 821 (App.1989) (defendant was subject of traffic stop, police advised him that he was not free to go and questioned him; nevertheless, court found that defendant was not in custody and thus *Miranda* rights did not apply).

Defendant argues that he was not free to leave after the initial traffic stop and states that he was, in fact, in custody. In support of his claim, defendant emphasizes that he was interrogated at length, transported to and from the alleged fight scene in a police car and photographed, and that the detention lasted forty-five minutes. In *Berkemer,* the Supreme Court warned that "[i]f a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will

be entitled to the full panoply of protections prescribed by *Miranda.*" 468 U.S. at 440, 104 S.Ct. at 3150.

**1275 *144 In this case, the interrogation and detention were noncoercive and driven in part by concern both for defendant and the unidentified participant of the alleged fight. Moreover, on this record, defendant's interaction with the police was entirely cooperative. The length of the detention seems unusual but appears to have been no more than that necessary to accomplish a reasonable investigation of the unusual circumstances the officers encountered. To overturn the trial court's denial of defendant's motion to suppress requires that defendant prove clear and manifest error. *See State v. Stanley,* 167 Ariz. 519, 523, 809 P.2d 944, 948 (1991); *State v. Harris,* 131 Ariz. 488, 490, 642 P.2d 485, 487 (App.1982). We find that the facts presented here do not support a finding of clear and manifest error.

Additionally, defendant's argument to suppress evidence gathered during the detention seems pointless because the most damaging evidence resulting from the stop and detention was defendant's soiled condition and general appearance. This is nontestimonial evidence the officers observed in plain view. Such evidence would have been admissible even if defendant had been in custody and had not been given his *Miranda* warning. *See State v. Lee,* 184 Ariz. 230, 233, 908 P.2d 44, 47 (App.1995).

4. Illegal arrest

Defendant, claiming his arrest was illegal, asks the court to find that the trial judge erred in denying the motion to suppress evidence thus obtained. The basis for the alleged illegality is that the officers initially told defendant he was being arrested on outstanding warrants for traffic citations when in reality they sought custody to interrogate defendant on the homicide. Thus, defendant argues, the arrest was illegal because it was merely a pretext.

The argument and accompanying analysis are without merit. The case on which defendant primarily relies, *Taglavore v. United States,* 291 F.2d 262 (9th Cir.1961), is not dispositive of the facts here. The warrant at issue in *Taglavore* was not preexisting, but rather stemmed from a traffic citation issued by a drug inspector on the basis of violations observed by the inspector the day before he made the defendant's arrest for a suspected drug offense. *Id.* Both federal and Arizona case law clearly allow police to use valid, preexisting traffic warrants to effect an arrest, even if the arrest is made to investigate other suspected crimes. In *State v. Jeney,* the court of appeals pointed out that the United States Supreme Court's Fourth Amendment analysis focuses on " 'an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time.' " 163 Ariz. 293, 295, 787 P.2d 1089, 1091 (App.1989) (quoting *Maryland v. Macon,* 472 U.S. 463, 471, 105 S.Ct. 2778, 2783, 86 L.Ed.2d 370 (1985)); *see also Whren v. United States,* 517 U.S. 806, ——, 116 S.Ct. 1769, 1774, 135 L.Ed.2d 89 (1996) (eliminating pretext defense and holding that "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

Citing various state court decisions, the *Jeney* court reasoned that "[m]ost state courts have now adopted the view that so long as the police do no more than they are objectively authorized and legally permitted to do, their motives in making an arrest are irrelevant and not subject to inquiry." 163 Ariz. at 296, 787 P.2d at 1092. The *Jeney* court expressly endorsed the objective test for determining the reasonableness of an officer's search. *Id.*

Under the facts presented here, the traffic warrants relied on by the arresting officers were valid, and, as was the case in *Jeney,* "[r]egardless of the officer's subjective intent, they had an objectively valid reason to make the arrest. There is no suggestion that the traffic warrants were held or issued for any purpose other than their execution for a traffic offense." *Id.* That police could have arrested defendant on the basis of the search warrant expressly permitting them to seize defendant for the purpose of taking hair and blood samples provides further support for the state's position.

1276 *145 **5. Illegal search warrant

Defendant contends that the police provided false or misleading statements to the judge as the basis for issuance of the search warrant for defendant's house just after midnight on May 25, 1989. He asserts that the trial court erred when it found only one of the affiant's statements to be false and concluding that the affidavit provided sufficient probable cause to support the search warrant.

For evidence thus seized to be ruled inadmissible, a defendant must prove by a preponderance of the evidence that the affiant's statement to the judge was knowingly or intentionally false or was made in reckless disregard for the truth, and that the false statement was necessary to a finding of probable cause. *See Franks v. Delaware,* 438 U.S. 154, 171–72, 98 S.Ct. 2674, 2684–85, 57 L.Ed.2d 667 (1978); *State v. Buccini,* 167 Ariz. 550, 554, 810 P.2d 178, 182 (1991). To overturn a trial court's ruling on a defendant's motion to suppress, this

court must find the trial court committed clear and manifest error. *See State v. Gulbrandson,* 184 Ariz. 46, 57, 906 P.2d 579, 590 (1995) (citing *State v. Stanley,* 167 Ariz. 519, 523, 809 P.2d 944, 948 (1991), *cert. denied,* 518 U.S. 1022, 116 S.Ct. 2558, 135 L.Ed.2d 1076 (1996)).

Even if we consider nothing but defendant's version of how he came to be soiled, along with undisputed statements by the affiant, we are left with the following information. Defendant, covered with blood and feces, was stopped during the early morning hours not long after, and not far from, the place where the victim was last seen. Defendant's explanation for his condition—that he had been in a fight nearby, where he had also damaged his car—was immediately investigated by police, who found no corroborating evidence. The victim's pants, found near her body, were smeared inside and out with feces. Two bloodied rocks were found near the victim. The victim's body appeared to have been dragged from where she was stripped and assaulted to where her body was found. The officer who stopped defendant for the traffic violation had seen defendant less than two hours earlier, wearing the clothing he wore when he was stopped, except that when first observed, neither defendant nor his clothing had been soiled, and he had worn a pair of jeans. When Officer Batista later stopped defendant for the traffic violation, defendant wore only the spandex shorts, but no jeans. When the officer earlier observed defendant, his car had not been smoking, but less than two hours later it was smoking heavily.

On these facts, we conclude that defendant has failed to show that the trial court committed clear and manifest error in denying his motion to suppress evidence obtained pursuant to the search warrant.

6. Habit Evidence

We also reject defendant's argument that the trial court erred in admitting testimony regarding the victim's "habit" of never accepting rides from strangers and seldom accepting rides from friends. Defendant complains that by admitting this evidence he was denied a fair trial under the Fourteenth Amendment of the United States Constitution and article II, section 24 of the Arizona Constitution.

This court "will not consider an evidentiary theory when it is advanced for the first time on appeal." *State v. Bolton,* 182 Ariz. 290, 304, 896 P.2d 830, 844 (1995) (citing *State v. Schaaf,* 169 Ariz. 323, 332, 819 P.2d 909, 918 (1991)). At trial, defendant failed to raise objections on constitutional grounds. This court may therefore properly decline to consider defendant's constitutional claims. We observe simply that Rule 406 of the Arizona Rules of Evidence states:

> [e]vidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or the organization on a particular occasion was in conformity with the habit or routine practice.

****1277** ***146** Arizona courts have held that habit evidence is of a "semi-automatic and regular character." *State v. Munguia,* 137 Ariz. 69, 72, 668 P.2d 912, 915 (App.1983); *see also State v. Serna,* 163 Ariz. 260, 266, 787 P.2d 1056, 1062 (1990). Courts have taken pains to distinguish between habit evidence indicating a person's "regular response to a repeated specific situation" and evidence introduced to show character, generally describing one's predisposition. *Boswell v. Phoenix Newspapers, Inc.,* 152 Ariz. 1, 4, 730 P.2d 178, 181 (App.1985) (citing McCormick, *Law of Evidence* § 162 (1954) and 2 Wigmore, *Evidence* § 375 (1979)), *approved as supplemented,* 152 Ariz. 9, 730 P.2d 186 (1986). This court has held that evidence that an employer warned an employee against speeding suggested that the employee habitually drove rapidly between jobs. *State v. Walden,* 183 Ariz. 595, 613, 905 P.2d 974, 992 (1995), *cert. denied,* 517 U.S. 1146, 116 S.Ct. 1444, 134 L.Ed.2d 564 (1996). In *Boswell,* we ruled that evidence a reporter always obtained the correct spelling of names at the start of an interview was admissible to show that she had obtained the correct spelling of names of interviewees in a specific instance. 152 Ariz. at 4, 730 P.2d at 181.

Habit evidence is admissible, while character evidence is usually not. *See Boswell,* 152 Ariz. at 4, 730 P.2d at 181; Rule 404, Ariz. R. Evid. Our standard of review is that "[a]bsent a clear abuse of discretion" this court will not "second-guess a trial court's ruling on the admissibility or relevance of evidence." *State v. Rodriguez,* 186 Ariz. 240, 250, 921 P.2d 643, 653 (1996) (citing *Amaya–Ruiz,* 166 Ariz. at 167, 800 P.2d at 1275).

The state argues that the trial court's admission of evidence of the victim's habit of rarely accepting rides was probative to show that on the night of her murder she would not have willingly accompanied defendant in his car, as he claimed, and that instead she was kidnapped. Witnesses testified variously that the victim never took rides, that of twenty-five to thirty offers of rides from acquaintances, the victim accepted ten to fifteen percent, that of "very frequent" offers, she would "most often" decline, and that of twenty to forty offers, she accepted none.

The trial court did not abuse its discretion in determining that this was habit evidence. The cases cited by defendant to support exclusion of the disputed evidence did not involve parties acting ***in response*** to a specific, repeated situation. *See Munguia,* 137 Ariz. at 72, 668 P.2d at 915 (where evidence that victim frequently "bummed" drinks was inadmissible as habit); *State v. Williams,* 141 Ariz. 127, 130, 685 P.2d 764, 767 (App.1984) (testimony that victim normally carried gun when intoxicated was held inadmissible). In this case, the state introduced ample evidence to show that the victim's "semi-automatic" and "regular" response to specific, repeated offers of a ride was to refuse. We find no error.

7. Ineffective Assistance of Counsel

Defendant claims that he was denied effective assistance of counsel in violation of the Sixth Amendment when trial counsel admitted guilt in front of the jury in the opening statement. By so doing, defendant asserts that his counsel in effect abandoned all defenses. Defendant asks this court to remand for a new trial.

This court will not "resolve an ineffective assistance of counsel claim on direct appeal unless the record clearly indicates that the claim is meritless." *State v. Maturana,* 180 Ariz. 126, 133, 882 P.2d 933, 940 (1994) (citing *State v. Atwood,* 171 Ariz. at 599, 832 P.2d at 616). We find this claim entirely without merit and decide the issue against defendant.

Defendant's argument incorrectly states that by admitting defendant's responsibility for the victim's death, his trial counsel abandoned all defenses. Counsel had no choice but to face facts established by defendant's own conduct and statements. Defendant had confessed causing the victim's ****1278** ***147** death. The state possessed contemporaneous photographs of defendant covered in blood and feces. While defendant suggests that "effective representation requires that counsel pursue all available defenses," citing *State v. Schultz,* 140 Ariz. 222, 681 P.2d 374 (1984), this court has determined that "defense counsel is not required to argue the absurd or impossible." *State v. Roscoe,* 145 Ariz. 212, 225, 700 P.2d 1312, 1325 (1984). It was strategically sound for defense counsel to admit defendant's "responsibility" for the victim's death, but to argue that under the law defendant was guilty of only manslaughter or second degree murder. Rather than abandoning all defenses, defense counsel argued against a finding of kidnapping and sexual assault in an effort to forestall a verdict of felony murder. Although defense counsel was unsuccessful in this attempt, his representation of defendant during the opening statement satisfied the essential prerequisites of effective assistance. *See Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *State v. Walton,* 159 Ariz. 571, 591–92, 769 P.2d 1017, 1037–38 (1989), *aff'd,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990).

B. Sentencing Issues

1. Independent review

We have performed a detailed independent review of defendant's death sentence, as required by law. A.R.S. § 13–703.01. In conducting this review, we have examined the entire record to weigh and consider the aggravating and mitigating circumstances as set forth in A.R.S. sections 13–703(F) and (G). Our review confirms the trial court's finding beyond a reasonable doubt that the aggravating factor of commission of the murder in an especially cruel manner under section 13–703(F)(6) was present and that the mitigating factor of immaturity under section 13–703(G)(5) was also present. In addition, several nonstatutory mitigating factors were found to exist.

2. Aggravating factor of especially cruel circumstances

A court will not impose the death penalty unless it finds at least one aggravating circumstance under A.R.S. section 13–703(F) beyond a reasonable doubt. *See State v. Brewer,* 170 Ariz. 486, 500, 826 P.2d 783, 797 (1992). Here, the state argued and the court found as one aggravating circumstance that defendant murdered Ms. Reid in an especially cruel manner. A.R.S. § 13–703(F)(6). Defendant challenges the court's finding.

A finding of cruelty is warranted when the defendant inflicts on the victim mental anguish or physical abuse before the victim's death. *State v. Murray,* 184 Ariz. 9, 37, 906 P.2d 542, 570 (1995) (quoting *State v. Walton,* 159 Ariz. 571, 586, 769 P.2d 1017, 1032 (1989)), *aff'd,* 497 U.S. 639, 110 S.Ct.

3047, 111 L.Ed.2d 511 (1990). Such a finding depends on the sensations and anxieties experienced by the victim. *Id.* A finding of mental anguish depends on whether a victim "experiences significant uncertainty as to [her] ultimate fate." *Id.* (citing *Brewer,* 170 Ariz. at 501, 826 P.2d at 798). Cruelty is found when the "victim [is] conscious at the time of the offense in order to suffer pain and distress. When evidence of consciousness is inconclusive, a finding of cruelty is unsupported." *Amaya–Ruiz,* 166 Ariz. at 177, 800 P.2d at 1285 (citations omitted).

In its special verdict, the sentencing court found that the victim suffered tremendous mental and physical pain when she was forced into defendant's car trunk and transported to the desert where she was beaten, sexually assaulted, and eventually murdered. Defendant did not confess to kidnapping the victim, but did admit to beating her as she fought back, removing her clothes, having intercourse with her, and smashing her in the head with a rock when she would not stop yelling. The court's finding of the victim's abduction depended primarily on evidence of blood compatible with the victim (and not defendant) in the trunk of defendant's car. Physical evidence at the scene corroborated defendant's confession. The victim's clothing, including her torn brassiere, was strewn in one area of the murder scene. Photographs of the area vividly depict **1279 *148 drag marks running from this area to the spot where the victim and the bloody rocks were found. The court also considered significant to its finding of mental anguish that the victim defecated in and on her clothing.

Because the medical examiner testifying at trial did not state definitively that the lethal blow to the victim's head occurred after her other injuries, defendant argues that there is no evidence that the victim suffered prior to death. Defendant urges this court to find that, under the evidence admitted at trial, the possibility that the victim was rendered unconscious before suffering any other injuries is as plausible as the scenario argued by the state. Defendant suggests that without proof of the victim's conscious suffering, the court erred in finding the aggravating factor of cruelty.

To avoid a finding of physical pain and mental anguish, defendant suggests a scenario under which the victim was rendered unconscious before suffering any of her other injuries, including broken ribs, a broken jaw, and internal injuries. Further, defendant asserts that this scenario is equally plausible to the sequence of events promoted by the state. Defendant's confession and physical evidence at the scene fully discredit his version of the events. We agree with the state that it strains reason to suppose that defendant, using two rocks, first knocked the victim senseless with fatal blows to the head, after which her unconscious body was stripped naked, beaten thoroughly, raped, and dragged to its final resting place. Under this scenario, defendant must have carried the bloody rocks along and placed them next to the victim's body. Ironically, if this court were to accept defendant's "equally plausible" hypothesis, it would most certainly then find the (F)(6) aggravating factor of depravity. Moreover, defendant ignores his own admission that he beat her ***as she fought back*** and hit her with the rock ***when she would not stop yelling***. This is clear evidence of conscious suffering.

We find defendant's version of events is not "equally [as] plausible" as the version accepted by the sentencing court. The reasonable version is that provided by defendant's confession and physical evidence at the scene: defendant beat and raped the victim in a brutal assault that lasted many minutes before he crushed her skull. The court did not err in finding the murder to be especially cruel beyond a reasonable doubt.

3. Mitigating circumstances

Defendant does not appeal the findings of the sentencing judge concerning mitigating circumstances. We have independently reviewed the record for all mitigating circumstances in order to determine whether the trial judge properly sentenced defendant to death. *See State v. Jones,* 185 Ariz. 471, 492, 917 P.2d 200, 221 (1996) (citing A.R.S. § 13–703.01; *Gulbrandson,* 184 Ariz. at 67, 906 P.2d at 600). In our review, we have been mindful that the sentencing judge must consider "any aspect of the defendant's character or record and any circumstance of the offense relevant to determining whether the death penalty should be imposed." *State v. Kiles,* 175 Ariz. 358, 373, 857 P.2d 1212, 1227 (1993) (internal quotations omitted). We further note that the weight accorded such evidence is within the sentencing judge's discretion, *State v. Ramirez,* 178 Ariz. 116, 131, 871 P.2d 237, 252 (1994), and that a defendant must prove the existence of any mitigating circumstance by a preponderance of the evidence. *See State v. West,* 176 Ariz. 432, 449, 862 P.2d 192, 209 (1993).

At sentencing, defendant argued as statutory and nonstatutory mitigating factors: (1) his dysfunctional family life and lack of socialization; (2) a history of alcohol and drug abuse; (3) his expressions of remorse; (4) his impaired capacity

to appreciate the wrongfulness of his conduct, A.R.S. § 13–703(G)(1); (5) his good behavior while incarcerated; (6) his lack of adult convictions; (7) no prior record of violent tendencies; and (8) his age at the time of the murder, A.R.S. § 13–703(G)(5). The sentencing judge found as a mitigating circumstance that defendant was raised in a sub-normal home and had endured a disruptive middle childhood. The **1280 *149 judge concluded, however, that defendant's longstanding history of substance abuse was not a mitigating circumstance that significantly impaired his ability to recognize the wrongfulness of his actions when he took Ms. Reid's life.

Similarly, the judge was not persuaded that defendant had shown by a preponderance of the evidence that defendant suffered from any emotional disorder impairing his ability to recognize the wrongfulness of his actions. The judge acknowledged defendant's emotional growth and personal improvement during incarceration. The judge did not find defendant's age of twenty-two to be mitigating but decided that defendant's emotional immaturity was inconsequential in the circumstances of this case. Although the judge found that defendant had no history of felonies and no history of propensity for acts of violence, he refused, in light of the murder, to conclude that defendant posed no risk of future danger.

After weighing the mitigating circumstances both individually and cumulatively against the aggravating circumstance, the trial judge concluded the aggravator of especial cruelty outweighed all other circumstances and sentenced defendant to death.

In our independent reweighing of the aggravating and mitigating circumstances, we find the record provides no basis on which to alter the sentencing judge's decision. We note that defendant argues that because the sentencing judge did not specifically discuss the issue of remorse in his special verdict, the judge did not consider remorse in weighing the aggravating and mitigating circumstances, thus violating defendant's rights under the Eighth and Fourteenth Amendments of the U.S. Constitution and under article II, sections 1, 4, 15, and 24 of the Arizona Constitution. Defendant's argument lacks merit. We have held that a special verdict is not defective because it "does not discuss all the circumstances argued by the defense to be mitigating." *State v. Apelt (Michael),* 176 Ariz. 349, 368, 861 P.2d 634, 653 (1993) (citing *State v. McCall,* 160 Ariz. 119, 125, 770 P.2d 1165, 1171 (1989)). The record clearly indicates that (1) defendant provided evidence of remorse in his sentencing memorandum, (2) the state rebutted such evidence, and (3) defendant told the judge at his sentencing hearing he was sorry for killing the victim. The judge issued the sentence a brief time later that day. We have no reason to doubt that the sentencing judge weighed defendant's remorse in his balancing of mitigating and aggravating circumstances.

Additionally, we have expressly considered evidence of defendant's remorse in our review and reweighing of the aggravating and mitigating factors. We have no need to remand to the trial court for resentencing because we find no error in the trial court's exclusion of mitigating evidence or in not reflecting adequately the evidence presented. *See* A.R.S. § 13–703.01(C).

We agree with the sentencing judge that defendant's upbringing was subnormal. The record supports the judge's conclusion that defendant's home life was sadly lacking and that his mother's erratic behavior toward defendant inhibited his emotional development and social skills. We also find significant the conclusions of the psychologist testifying on defendant's behalf at the sentencing hearing, who stated that defendant "did not suffer acute, dramatic abuse." Although we recognize defendant's upbringing as a mitigating circumstance, we accord it little weight. While defendant's inadequate upbringing may have contributed to his emotional immaturity and undeveloped humanitarian skills, we concur with defendant's statement at his sentencing hearing that "people that have had as bad a background or worse haven't killed. And I don't want what everyone has said about my background to be an excuse for what's happened."

The record demonstrates defendant's longtime substance abuse problems. We note, however, that defendant's general problems with substance abuse are not essential to our decision here. We therefore decline to conclude that defendant was impaired by alcohol **1281 *150 consumption to an extent that it interfered with his "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." A.R.S. § 13–703(G)(1); *see also State v. Medrano,* 185 Ariz. 192, 194, 914 P.2d 225, 227 (1996) (citing *Stokley,* 182 Ariz. at 520, 898 P.2d at 469).

As discussed earlier, we find that defendant expressed remorse for the victim's death on more than one occasion. At his sentencing hearing, defendant said, "I'm sorry for putting everyone in this situation, I am sorry to the family for causing this death of Ms. Reid." To a presentence investigator,

defendant remarked, "A lady died, that really sucks. It was senseless that she died." In his November 17, 1994 typed letter to the sentencing judge, defendant declared,

> I should be held accountable.... Knowing I was the cause of Ms. Reid's death is something I will have to live with. Believe me, it's not an easy thing that I can just forget about. It does not matter that I am locked up. Even if I was free I would still think about her and know if it wasn't for me, she would be alive today.

At the bottom of this letter, defendant added in his own hand, "I am truly sorry I have caused Ms. Reid's death, Your Honor."

We recognize remorse as a nonstatutory mitigating factor. *See Brewer,* 170 Ariz. at 507, 826 P.2d at 804; *see also State v. Gallegos,* 185 Ariz. 340, 345–46, 916 P.2d 1056, 1061–62 (1996); *State v. Gallegos,* 178 Ariz. 1, 19, 870 P.2d 1097, 1115 (1994); *State v. Wallace,* 151 Ariz. 362, 364–65, 728 P.2d 232, 234–35 (1986). We find that since his arrest, defendant has demonstrated remorse and accepted responsibility for Ms. Reid's murder. However, defendant's remorse for his actions does little to counterbalance especial cruelty as a serious aggravating circumstance in Ms. Reid's murder. According to defendant's confession, when he left Ms. Reid in the desert early the morning of May 19, 1989, he did not know whether she was alive or dead. He confessed that he rode his bicycle out to the murder site several days later to see if her body was still there, hoping that it would not be, that she was still alive. We would find defendant's remorse a more compelling mitigating factor if, for example, it had prompted him to report his actions toward Ms. Reid to the authorities.

The sentencing judge found that defendant's ability to appreciate the wrongfulness of his conduct was not impaired on the night of the murder to any significant extent by substance abuse, emotional disorders, situational stress, or by a combination of these. Our review of the record convinces us that the trial court's finding was proper. In fact, Dr. Flynn, the forensic psychologist who testified for defendant at the sentencing hearing, advised the court that defendant did not suffer from an emotional disorder or any cognitive disorder affecting his ability to distinguish right from wrong or to conform his behavior to the law.

The sentencing judge also acknowledged that defendant had experienced personal growth in prison and had caused no problems, without specifically finding this to be a mitigating factor. This court has previously rejected pretrial and presentence good behavior during incarceration as a mitigating circumstance. *See Stokley,* 182 Ariz. at 524, 898 P.2d at 473 (citing *State v. Lopez,* 175 Ariz. 407, 416, 857 P.2d 1261, 1270 (1993)). As we indicated in *Lopez,* a "defendant would be expected to behave himself in county jail while awaiting [sentencing]." 175 Ariz. at 416, 857 P.2d at 1270. Thus, we decline to find defendant's good behavior while in the Pima County Jail a mitigating factor.

We agree that the record supports the sentencing judge's findings that defendant had no previous adult felony convictions, no prior record of acts of violence, and that defendant is capable of rehabilitation. We also find that the sentencing judge correctly rejected defendant's age of twenty-two as a mitigating circumstance and properly found that his emotional immaturity was not a significant mitigating factor.

After examining the entire record and reweighing the applicable aggravating and mitigating ****1282 *151** factors, we find that the aggravating circumstance of especial cruelty in defendant's murder of Ruby Reid outweighs all factors mitigating in favor of leniency.

C. Other Issues

Defendant makes a number of additional arguments to preserve them for future appeal, although each has previously been considered and rejected by this court.

The death penalty is per se cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *See Gulbrandson,* 184 Ariz. at 72–73, 906 P.2d at 605–06.

Execution by lethal injection is cruel and unusual punishment. *See State v. Spears,* 184 Ariz. 277, 291, 908 P.2d 1062, 1076 (1996).

Arizona's death penalty statute is unconstitutional because it requires the death penalty whenever an aggravating circumstance and no mitigating circumstances are found. *See State v. Bolton,* 182 Ariz. 290, 310, 896 P.2d 830, 850 (1995).

Arizona's death penalty statute is unconstitutional because the defendant does not have the right to death-qualify the

sentencing judge. *See Gulbrandson,* 184 Ariz. at 72, 906 P.2d at 605.

Arizona's death penalty statute fails to provide guidance to the sentencing court. *See Spears,* 184 Ariz. at 291, 908 P.2d at 1076.

Arizona's death penalty statute violates the Eighth Amendment by requiring defendants to prove that their lives should be spared. *See Gulbrandson,* 184 Ariz. at 72, 906 P.2d at 605.

Arizona's death penalty statute violates the Eighth and Fourteenth Amendments and article II, sections 4 and 15 of the Arizona Constitution because it does not require multiple mitigating factors to be considered cumulatively or require the trial court to make specific findings as to each mitigating factor. *See Apelt,* 176 Ariz. at 368, 861 P.2d at 653.

Arizona's death penalty statute violates the Eighth Amendment because it does not sufficiently channel the sentencer's discretion. *See State v. Roscoe,* 184 Ariz. 484, 501, 910 P.2d 635, 652 (1996).

Arizona's death penalty statute is constitutionally defective because it fails to require the state to prove that death is appropriate. *See Spears,* 184 Ariz. at 291, 908 P.2d at 1076.

The Arizona death penalty statute is unconstitutional because the aggravating factor of cruel, heinous or depraved is vague and fails to perform its necessary narrowing function under the Eighth and Fourteenth Amendments. *See Gulbrandson,* 184 Ariz. at 72, 906 P.2d at 605.

The Arizona statutory scheme for consideration of mitigating evidence is unconstitutional because it limits full consideration of that evidence. *See Spears,* 184 Ariz. at 291, 908 P.2d at 1076.

The prosecutor's discretion to seek the death penalty is unconstitutional because it lacks standards. *See id.*

The death sentence has been applied discriminatorily in Arizona against poor males whose victims have been Caucasian, in violation of the Eighth and Fourteenth Amendments of the United States Constitution and article II, sections 13 and 15 of the Arizona Constitution. *See State v. Stokley,* 182 Ariz. at 516, 898 P.2d at 465.

The trial court improperly considered a presentence report that contained statements from the victim's sister regarding her opinion as to the proper sentence. *See Spears,* 184 Ariz. at 292, 908 P.2d at 1077.

The presentence report contained inaccurate and unreliable hearsay information. *See Gulbrandson,* 184 Ariz. at 66–67, 906 P.2d at 599–600.

Defendant's rights to due process and a fair and reliable capital sentencing proceeding were violated by the joint sentencing hearing on both the capital and noncapital offenses. *See id.*

A proportionality review of defendant's death sentence is constitutionally required. *See id.* at 73, 906 P.2d at 606.

We continue to reject these arguments in this case.

****1283 *152 DISPOSITION**

We have conducted an independent review of defendant's aggravating and mitigating circumstances as required by A.R.S. section 13–703.01 and find that the mitigating circumstances cumulatively are not sufficiently substantial to warrant leniency in relation to the aggravating circumstance of cruelty. A.R.S. § 13–703(F)(6). We affirm defendant's convictions and sentences.

ZLAKET, C.J., and MOELLER and MARTONE, JJ., concur.

NOTE: Justice STANLEY G. FELDMAN recused and did not participate in the determination of this matter.

All Citations

190 Ariz. 129, 945 P.2d 1260, 252 Ariz. Adv. Rep. 3

Footnotes

1 The Sixth Amendment of the United States Constitution reads: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...." Arizona Constitution article 2, section 24 requires: "In criminal prosecutions, the accused shall have the right ... to have a speedy public trial...."

2 The court concluded, "by failing to notify the court of the impending passage of 150 days prior to such passage, [defendant] has violated his obligations under Rule 8 of the Arizona Rules of Criminal Procedure." Because the defendant was in custody, the correct time limit applicable under Rule 8.2(b) was 90 days, not 150 days.

3 In *State v. Tucker,* this court suggested that Rule 8.1(d) applies only to cases where, as here, "a pretrial motion or hearing causes a trial to occur later than the expiration of the original Rule 8.2 time limit." 133 Ariz. at 308 n. 5, 651 P.2d at 363 n. 5.

4 Rule 403 requires that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

5 In *Poland,* the probative value of the photograph was in the fact that the victim could be identified partly by the uniform he had been wearing in the photograph, that the photograph helped to establish that the medical examiner had difficulty in determining a cause of death, and that the victim's stopped watch was visible, aiding the investigation to deduce the time of the murder. *State v. Poland,* 144 Ariz. 388, 401, 698 P.2d 183, 196 (1985).

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PRESENTENCE REPORT
THE ADULT PROBATION DEPARTMENT OF
THE SUPERIOR COURT IN PIMA COUNTY

Probation Officer: Paula R. Schlecht
Case No: CR-27745

Sentencing Judge: William N. Sherrill
Sentencing Date: 12/21/94 Div: XVIII

PERSONAL DATA

Name	SPREITZ, Christopher John	Ethnic	W	Ht	6'0"
Address	Pima County Jail Tucson, Arizona 85713	Gender	M	Wt	200
		Eyes	Brown	Hair	Brown
Phone	None Msg. None	DOB	6/10/66; 6/10/65	Age	28
AKA	Christopher John Jackson (True Name); C. J. Curtis; C. J. Spreitz; Chris Curtis; Chris Sprites; C. J. Sprites; Chris Jackson; C. J. Jackson; Chris J. Jackson; Chris John Jackson	Citizen of	USA		
		Birthplace	Santa Barbara, CA		
		SSN	660-71-6314; 560-71-6314		
		FBI NO	641 054 KA6		
		Driver's Lic#	None		
ID Marks	Scars on right arm, right leg, and left arm				
		Military History	None		
Employer	None	Branch			
		Entry Date			
Occupation	None	Discharge Date/Type			
Marital	Single				
Children	1				
Education	11 + GED				

ARREST DATA

Arrest Date	5/24/89	Indictment Date	6/2/89
Incar. Date	5/25/89	Rel. Date/Status	In Custody Without Bond
Arrest Agency	TPD	Days Jail This Arrest	2,036 (5 yrs 7 mos 1 day)
Agency #	89-05-22-0230	Guilty By/Date	Jury 8/18/94
		Defense Atty	Marshall Tandy, Apptd, No Fee
Codefendants/Dispositions - None		Prosecutor	Kathleen Mayer

FAMILY DATA

Spouse/Relatives/Children

Name	Relation	Age	Address	Phone
Raymond Jackson	Father	48	1548 McCoy Ave., San Jose, CA	(408) 370-1537
Linda Jackson	S/Mother	40+	"	"
Susan Mendenhall	Mother	46	840 Via Covello, Santa Barbara, CA	(805) 964-9123
Kathryn Spreitz	H/Sister	12	"	"
Gretchen Jaeger	Sister	24	8245 Auberry Dr., Elk Grove, CA	(916) 682-5168
Melissa Blanton	Daughter	6	St. Joseph, MI	Unknown
Tammy Blanton	Ex-G/Friend	Unk	"	"

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Defendant: SPREITZ, Christopher John
Case No: CR-27745

Sentencing Judge: William N. Sherrill
Sentencing Date: 12/21/94

CASE NO.	DATE	OFFENSE/ARS CODE	CLASS	NCIC
CR-27745	5/18/89 through 5/19/89	Count One, First Degree Murder. ARS 13-1105; 13-703.	F1	0999
PENALTY:		• Death or life imprisonment without the possibility of release until 25 calendar years have been served • Up to $150,000 fine available (plus 37% surcharge) • $100 Victim Compensation Fund • $12 fee per ARS 12-116 for time payments		
CR-27745	5/18/89 through 5/19/89	Count Two, Sexual Assault. Nondangerous; Nonrepetitive. ARS 13-1406(A) and (B).	F2	1199
PENALTY:		• 7 years imprisonment (min. 5.25 yrs; max. 14 yrs) • Up to $150,000 fine available (plus 37% surcharge) • $100 Victim Compensation Fund • $12 fee per ARS 12-116 for time payments • The defendant must serve sentence imposed • Probation is not available		
CR-27745	5/18/89 through 5/19/89	Count Three, Kidnapping. Nondangerous; Nonrepetitive. ARS 13-1304(A)(3) and (B).	F2	1099
PENALTY:		• 7 years imprisonment (min. 5.25 yrs; max. 14 yrs) • Up to 7 years probation available • Up to $150,000 fine available (plus 37% surcharge) • $100 Victim Compensation Fund • $12 fee per ARS 12-116 for time payments • The defendant must serve 1/2 of sentence before release		M-E

Defendant: SPREITZ, Christopher John
Case No: CR-27745

Sentencing Judge: William N. Sherrill
Sentencing Date: 12/21/94

CASE NO.	DATE	OFFENSE/ARS CODE	CLASS	NCIC

PLEA AGREEMENT:

None. The defendant was found guilty by a jury.

Pursuant to ARS 13-3821, the defendant shall register in the county of his residence.

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PRESENTENCE REPORT - PART ONE

GENERAL STATEMENT:

As the Court is the trial Court of record and is fully conversant with the facts surrounding this case, only a brief synopsis of the offense will be provided.

STATEMENT OF OFFENSE:

Offense: During the late evening hours of May 18, 1989 through the early morning hours of May 19, 1989, the defendant came in contact with the female victim. The defendant drove the victim to a desert area near Silverbell and Camino Del Cerro, Tucson, Arizona, and engaged in sexual intercourse with the victim, who did not consent to this activity and began to scream. The defendant beat the victim over the head with a rock. He dragged the victim a short distance and left the body there. According to available documentation, the victim died of blunt force trauma to the head.

On May 19, 1989, at approximately 12:30 a.m., a Tucson Police Department (TPD) officer heard the defendant's vehicle's squealing tires at a convenience market in the area of 1st Avenue and Broadway Boulevard. He was observed talking to a black male on a bicycle at that location. The officer documented his observations and left.

At approximately 1:45 a.m., the same officer observed the defendant's vehicle in the area of Church Avenue and Broadway Boulevard. The vehicle was emanating fumes from the exhaust and made a traffic stop. Upon making contact with the defendant, he observed he had blood and fecal matter on his hands, arms and the front of his clothing, along with concentrated amounts on his legs and shoes. The officer questioned the defendant as to how the blood and fecal matter got on his person. The defendant reported he made an ethnic remark to the black male, whom the officer had observed him with earlier, and they fought, which caused the blood to be on his person. The officer noted the defendant had not been beaten up nor did he have cuts, scratches, or anything else which would collaborate his story.

Other police officers responded to the area and questioned the defendant as to the blood and fecal matter. The defendant drove the officers to the area of Broadway and I-10, where he indicated the fight had taken place. He also stated it was the location he "busted out" his oil pan; however, there was no evidence at the scene. At this time, officers knew a crime had been committed; however, they did not know the location or where a victim may be. Officers documented their observations, the state the defendant was in, and took photographs of the defendant and his vehicle. The defendant was issued a citation for Excessive Smoke and Released.

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During the morning hours of May 22, 1989, a woman riding horseback discovered the victim's body lying in the desert location where she had been left. The woman rode to a nearby house where she reported the finding to authorities. Homicide detectives arrived at the scene and began their investigation. On May 24, 1989, the detectives made contact with the uniformed officers who initially stopped the defendant on May 18. Officers secured a search warrant for the defendant's residence and ran a records check on his name. Several outstanding traffic warrants for misdemeanor offenses were located, and the defendant was initially placed under arrest for those offenses.

When detectives questioned the defendant about being stopped on May 19, 1989, he admitted his involvement in the instant offense. He told the detective the victim was not known to him prior to May 19, 1989. He had picked her up at a local convenience market in the area of Grant Road and Miracle Mile. He drove her to the area where the body was found and pulled into the desert area. He indicated the victim wanted to drink and party. They exited the vehicle and, when she discovered he had nothing in the car to drink, she began to yell at him. At that time, he struck her several times with his fist to make her be quiet. She fell to the ground where he engaged in sexual intercourse with her. Because the victim would not stop screaming, he picked up a rock and beat her to death.

Following questioning, the defendant was transported to the Pima County Jail where he was booked. He has remained in custody in the Pima County Jail since May 25, 1989. He was held in lieu of $1,000,000 bond until the jury verdict was returned and he was held without bond.

Defendant's Statement: The defendant reported he and his roornmate had been drinking the night prior to the instant offense. There was a bar which was selling beer for five cents each. He lost count and does not know how many he consumed. His roommate, on the other hand, was getting sick and they returned to their apartment. The defendant stated he made a few telephone calls to a female friend because he wanted to see her. On his way to her residence, he stopped for more beer, and he was "feeling no pain." It was then that he encountered the black male who was observed by the officer. The defendant gave the black male a ride, and they used cocaine together. Reportedly, they did a "couple quick lines," then the defendant left for his friend's residence. When he got to her residence, she would not answer the door. The defendant stated he was drunk and obnoxious, and remembered sitting there for a minute or two. He got back in his vehicle and drove down the road, which was when he saw the victim sitting on a curb.

The defendant stated he does not know if he stopped at the convenience market for gas or beer but he ended up talking with the victim. He recalled she seemed like she wanted something to drink. He opened the car door for her, as it was hard to open, and they left. They ended up in the desert, where they engaged

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in "heavy petting." He stated he has a difficult time remembering the exact sequence of events but that she exited the car. He recalled his pants and her top were left in the car. The victim began to yell and he began hitting her. She was pulling his hair and, "I just wanted her to stop. I hit her. I don't know if a rock was used or not at this time." He recalled the yelling stopped and she died. "I knew I had to get out of there because something went wrong. A lot of things happened real quick. A lot to remember or even hard to remember." He recalled he left the area, and the next thing he knew he was getting pulled over by law enforcement officers.

The defendant recalled the state he was in was "real weird." He was "up and down . . . my brain down and my body up. In a fog . . . but not. The adrenalin was flowing and I was all pumped up but my brain wasn't working. I was not sure what I perceived happening happened."

The defendant stated when officers first questioned him about the occurrences, he was scared and not thinking clearly. "I was not sure what transpired . . . I said I had a fight with the black guy. Things were foggy." He recalled taking officers to an area west of some train tracks and stated they let him go after they took pictures of him. He recalled thinking he just needed to "crash, because this couldn't be real. I just wanted it to go away. It could not have happened. I was a private duty nurse, I increase life not take a life."

The defendant now realizes "a lady died, that really sucks. It was senseless that she died."

Victim's Impact Statement: The victim's younger sister has written a lengthy letter to the Court. During telephone conversations with her, she revealed she has suffered psychological, emotional, and physical traumas from the loss of her sister. She is currently unable to hold a job, which has hurt her career. She recalls the instant offense has also "cost me the most precious thing I ever had; my marriage of twelve years to a wonderful man, of which I am devastated over. I believe he could no longer handle my depression; crying and terrible nightmares. Sometimes I find myself sitting in a corner and crying and don't know why. I've had terrible, terrible nightmares, ones which I've had to express to my therapist to make sure I am sane."

The victim's sister stated she has to sell her home and, at the age of 42, start her life over again. "I really don't wish to go through all of that again, I've raised my two children, and now I'm all alone, completely, as you see this 'monster' didn't just take a gun to my sister's head; no, he tortured my one and only sister, only family I had, and the best friend I ever had. We were extremely close as our mother ran off and left us with our father, who at the age of twelve (me) my father died of cancer. We had five of the worst stepmothers Cinderella

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could only imagine. The last of whom remains in my memory most and was very emotionally disturbing to both of us girls. Which only made us closer."

In closing the victim stated her sister "never made it to forty years old, and my wish is that Mr. Spreitz does not either. He took all of this lovely person away from me - I'm totally without family and this hurts very deeply. He also took a vibrant, wonderful, intelligent, lively human being away from not only me but the world as well, he had no right to do so. This senseless, inhumane act is what he has done."

The victim's sister is currently in financial upheaval and requests reimbursement for all funeral expenses, including the headstone and grave site. She requests $3,928.21, documents were presented to the County Attorney's Office shortly after her sister's burial.

SOCIAL HISTORY:

The defendant was born in Santa Barbara, California. His father works as middle management for a company which manufactures computer hard drives. His mother has worked in the printing field and has also earned a master's degree. Currently, she is unemployed and looking for work. The defendant has one younger sister.

The defendant's parents divorced when he was approximately three years old. It appears he did not have contact with his father until the defendant was 18 years old. Soon after the divorce an individual, who later became the defendant's stepfather, moved in with them. His mother and stepfather were married when the defendant was approximately eight years old. His stepfather was a mechanic for a major commercial airline company.

The defendant reported a hectic lifestyle. The defendant and his sister had to fend for themselves due to his mother and stepfather's work schedules and his mother's college attendance. As he grew up, there was less communication between family members. He stated most of the com-munication within the family was by "yelling." Discipline was usually administered by spankings by his stepfather or hitting by his mother. By the time he was approximately 12 years old, the corporal punishment ceased, and he was disciplined by "groundings."

The defendant's half-sister was born in 1982. By this time, he was at home as little as possible. Also during this period of time, his sister left home to reside with their father.

When the defendant became 17 years old, he was "kicked out" of the family home. The formal reason for this action was his mother's automobile insurance would be cancelled if he was still living in the house. This action was

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going to be taken by the insurance company because of the numerous traffic citations the defendant had received. In reflection, the defendant stated he should have gone to military school, as his mother had always threatened him, or he should have gone to live with his father.

The defendant reported he had a "pretty good relationship" with his mother. She is a "hot and cold" type of mother. For a period of time, they had contact approximately once per week, but there were also times when they would not have any contact for six months. He has maintained contact on a weekly basis with his stepfather. The stepfather considers the defendant as his son.

Reportedly, the defendant has gotten to know his father over the past five years. He stated his father is not the "jerk" his mother portrayed him as being. The father afforded the defendant "great support" for the past five years.

The defendant reported he got along with classmates at school. In high school, he had two main groups of friends: one was the "guys" that were on the football team with him, which kept him out of trouble, and the other were the individuals he lived near, which got him into drinking and abusing drugs. These two factions placed him on a constant "see-saw." During his formative years, he reported he had a bad self-image. Drinking alcohol and "doing drugs" made him feel better about himself. He reported the more he "drank and drugged," the "cooler" he thought he was. After completion of the football season, during his senior year, reportedly things started going downhill, which was due to not having the football team as a "stabilizing" influence. Since his incarceration, most of his friends from the team have shown support and how much he means to them. The defendant reported "partying" was his greatest interest while growing up. He always tried to stay away from home an entire weekend, if he could manage it.

The defendant reported "getting through school was terrible." He started his education by going to a strict, private Christian school. He transferred to public school for the sixth grade. At that time, he was so far ahead, he coasted through the sixth grade and part of the seventh. By the time he was finally tested and placed in the correct class, he had forgotten how to study. He also stated, since he was responsible for himself from the seventh grade, he seldom ate breakfast or lunch; consequently, he constantly fell sleep in class. Therefore, not trying to succeed became very easy. He completed the 11th grade but dropped out of school entirely when he was kicked out of the family home at age seventeen. During his incarceration, he has obtained his GED and has become interested in learning again.

When he was kicked out of his family residence and upon dropping out of high school, the defendant obtained employment and slept in his truck for about five months. During that period of time, he saved enough money to get an apartment with a friend.

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The defendant has never been married but does have a daughter, who is approximately six years old. Her mother and the defendant started fighting long before she was born, and mother and daughter relocated to Missouri. Prior to the defendant's arrest for the instant offense, he and his daughter's mother were working at attempting a friendship; however, since his incarceration, he has lost all contact with his daughter and her mother.

During the defendant's incarceration for the instant offense, he has come to realize he had an alcohol and drug problem. This revelation came to him after a dream from which he woke up in a cold sweat and his fingernails were deeply pressed into the palms of his hands. The dream was of him holding a beer mug and friends trying to take it away from him since he would not give up the mug.

The defendant has been writing to an uncle, who is a psychiatrist, and the letters have helped. Reportedly, prior to these communications, he was impulsive; however, now he believes he is able to thoroughly think out situations.

The defendant would like to seek further education in nutrition and sports science. "If I was ever released, I would like to be a health and fitness consultant." He wants to contact the University of California at Irvine or California State University at Haywood to obtain textbooks. He is not worried about obtaining a degree at this time but would like to just work toward this end.

Current Life Situation: The defendant has resided in the Pima County Jail since May 25, 1989. Reportedly, when he was first incarcerated, he was real despondent and his feeling was, "Let's just get it over with." Since then, he has been reading and reported the librarian at the jail finds him many books to read. He has been studying health and nutrition and he has redirected his goals. His plans for the future, although limited, are to study health and fitness. He would like to be certified as a fitness trainer. In 1990, he obtained his GED through the Pima County Jail. He has been working in the PALS lab, helping the teacher as often as possible, and attending as often as possible. Once per week he is able to work with the computer.

During the last five years, the defendant has attended church off and on. He has his own sense of spirituality and does not feel he needs an organized church service. He goes out to the yard when able and has spent time working on his penmanship.

Reportedly, the defendant "now have my head straight" and wants to keep it straight. He stated prior to going to jail, the only thing that concerned him was "partying," consuming alcohol and drugs. During his incarceration, he has learned about alcoholism and the effects of drugs. He can only better himself now. He is helping make something better of this situation. He does not know why, but there is a reason this situation occurred. He would like to do the rest of

his time "straight." He does not want to take even prescribed medication because, in his opinion, alcohol and drugs are "what got me in here."

During the five years of his incarceration, he has spent a total of seven days in lockdown. He recalled receiving one write-up when he threw cold water at an inmate while in the shower. His second write-up was that his cellmate was a "slob," who left things on the defendant's bed. Then, when the defendant asked him to clean it up, the cellmate began to yell. The defendant yelled back, and the correctional officer believed there might be a fight, so they were both taken to lockdown.

The defendant has contact with his family a minimum of once per week. They visit as often as possible; however, since they live in California, it is difficult for them to make the trip often.

The defendant stated his plans for prison include obtaining an education. "Do whatever I can to get skills. Continue to improve myself." He expressed a desire to stay fit physically and mentally, and he expressed a desire to write a book or article, in addition to speaking to children from closed circuit television. He would like to explain to children the effects of alcohol and drugs. He would like to explain this is not the kind of life to lead and not to waste opportunities. "I wasted them all."

The defendant would like the Judge to know he is not afraid to die, "If that's what it's going to take to keep people out of this . . . but I don't know. If I can keep one person out, then that would be good. Maybe 25 years would be best so that I could do something. To have more impact on someone . . . to help, the best thing possible."

A psychological evaluation was prepared to assist the Court in a sentencing disposition at the request of the defense. It was the sole purpose of the evaluator to assess the defendant for mitigating circumstances. The appended 12-page report included statements from many of the defendant's family members, who consistently describe the defendant as a person who virtually never had successes in developing an emotionally close relationship with a woman. The doctor also noted due to available information, the defendant had a long-standing problem with alcohol, which probably reached a level of physical dependence. What is unclear is the defendant's state of mind on or about the time of the offense. It was determined from the defendant's Minnesota Multiphasic Personality Inventory (MMPI) that his code type tends to have angry, resentful qualities and trouble modulating and expressing those tendencies. They view the world as hostile and other people as rejecting and unreliable. In the defendant's case, "this is aggravated by an elevation on the scale of ruminative anxiety. People with an elevation on this scale tend to be unable to get insults and ego injuries out of their heads. The disturbing thoughts roll over and over in their

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minds. Mr. Spreitz probably used drugs, alcohol, and distracting activities as means of shutting off these disturbing thoughts."

It was the clinical psychologist's opinion that possible mitigating factors include the defendant's alcohol abuse and the pathogenic, emotionally neglectful home environment in which he was raised. Apparently, the psychologist will testify at the defendant's mitigation hearing set forth on November 28, 1994, where he will, in all likelihood, discuss additional aspects of his report.

CRIMINAL HISTORY:

Information under this heading is contained in PART TWO of this report and is for disclosure only to the Court, the prosecutor, the defense attorney, and other authorized criminal justice agencies, per ARS 13-4425.

EVALUATION:

Evaluative Summary: It appears the defendant became involved in the senseless commission of the instant offense due to his alcohol and drug abuse. After five years in custody, he now admits his substance abuse problem; however, this does not condone his involvement in the offense. It is unfortunate the victim died before the defendant had his revelation. Unfortunately, a sentence of natural life is not available to the Court, who must now decide whether to sentence the defendant to death or a minimum of 25 years.

Third Party Risk Assessment: In consideration of the defendant's involvement in the commission of the instant offense, he poses a reasonably foreseeable risk to the community and to recidivate.

Aggravation and Mitigation: In aggravation, regarding Count One, First Degree Murder, pursuant to ARS 13-703(F), the Court may wish to consider the defendant committed the offense in an especially heinous, cruel or depraved manner. Regarding Counts Two and Three, the Court may wish to consider the alcohol and drug consumption, the defendant's prior arrest record, and the trauma to the victim's family.

In mitigation, regarding Count One, the Court may wish to consider the defendant's age. Regarding Counts Two and Three, the Court may wish to consider additional mitigating factors as the defendant's dysfunctional childhood, his stated remorse, his realization of alcoholism and drug abuse, his good performance while in the Pima County Jail, and his educational endeavors.

ASSESSMENTS

VICTIM COMPENSATION FUND $100 per Felony and F6/M1 Count	$ 300
VICTIM COMPENSATION FUND $25 per Misdemeanor Count	$
ARS 12-116 $12 for time payment	$ 12
PROBATION FEE $ 40 per month	$
FINE (including surcharge)	$
INITIAL ATTORNEY FEE	$
ADDITIONAL ATTORNEY FEE	$
INTERSTATE TRANSFER FEE $200	$
$500 DNA TESTING FEE	$
____$10 LAB FEE; ____$35 SURCHARGE; ____$40 SURCHARGE	$
OTHER:	$
COMMUNITY SERVICE HOURS	_____ HOURS

* * * * *

RESTITUTION

	LOSS CLAIMED	TOTAL ORDERED	MONTHLY PAYMENT
VICTIM 1 of 1	$ 3,928.21	$	$

Respectfully submitted,

Paula R. Schlecht

Paula R. Schlecht, Senior Deputy
Investigation Services Division

APPROVED BY:

Linda A. Montoya - for

William G. Johnson, Division Director
Investigation Services Division

November 28, 1994
el
Sentencing Date: 12/21/94

Defendant: SPREITZ, Christopher John
Case No: CR-27745

Sentencing Judge: William N. Sherrill
Sentencing Date: 12/21/94

CONFIDENTIAL

CRIMINAL HISTORY

PART TWO

PER ARS 13-4425
FOR DISCLOSURE ONLY TO THE COURT, PROSECUTOR, DEFENSE ATTORNEY, AND OTHER AUTHORIZED CRIMINAL JUSTICE AGENCIES

CRIMINAL HISTORY						
CONVICTIONS	FELONY	0	MISD	0	JUV	0
INCARCERATIONS	PRISON	0	JAIL	0		
	ESCAPE	0	OTHER	0		
SUPERVISIONS	PROB	0	PAROLE	0	OTHER	0

CRIMINAL HISTORY:

The defendant and local, state, and national law enforcement agencies document the following police contacts:

DATE/PLACE	OFFENSE	DISPOSITION
JUVENILE:		
3/8/84 Santa Barbara, CA	Grand Theft Auto. SBPD 84012496. The defendant was charged with Possession of Stolen Property.	Released to parents.
ADULT:		
8/19/84 Santa Barbara, CA	Grand Theft. SBPD 8444662.	Unavailable.
8/16/87 Tucson, AZ	Injury With Auto. PCSD 87-08-16-154.	Unavailable.

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Other Legal Status or Detainers: The defendant currently has an active warrant issued June 6, 1989, for Failure to Appear out of Casa Grande Justice Court for the original charge of Speeding. The bond amount is $141.

Respectfully submitted,

Paula R. Schlecht

Paula R. Schlecht, Senior Deputy
Investigation Services Division

APPROVED BY:

Linda A. Ortega for

William G. Johnson, Division Director
Investigation Services Division

November 28, 1994
el

Todd C. Flynn, Ph.D.
Clinical and Forensic Psychologist

2200 East River Road, Suite 121
Tucson, Arizona 85718
(602) 577-3652
FAX 577-3516

November 21, 1994

Marshall D. Tandy, Esq.
Law Offices
453 South Main
Tucson, Arizona 85701

RE: Christopher Spreitz

Dear Mr. Tandy:

At your request, I conducted a forensic evaluation of Christopher Spreitz in order to address the presence or absence of mitigating circumstances. In accordance with the Arizona Revised Statues Criminal Code, paragraph 13-703 (G), I understand the statutory factors to include, "any aspect of the defendant's character, propensities, or record, and any of the circumstances of the offense including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

5. The defendant's age "(ARS 13-704 [G])

By my understanding, non-statutory mitigating factors may also be considered by the Court and relevant to the expertise of a forensic psychologist.

The evaluation of Mr. Spreitz consisted of the following:

1. A two-hour clinical interview on October 5, 1994, as well as a one-hour interview on October 11, 1994;

2. A telephone interview with John and Rafaela Graciela Spreitz on October 10, 1994; Mr. and Mrs. Spreitz are Chris' aunt and uncle by virtue of their relationship with his ex-stepfather, Stephen Spreitz;

3. A telephone interview with Gretchen Jaeger, Chris' sister; 1/2 hour on 10/24/94.

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4. The Minnesota Multiphasic Personality Inventory and the Substance Abuse Subtle Screening Inventory were administered on October 4, 1994, at the Pima County Jail;

5. Review of the following collateral information:

a. the interview between Detective Millstone and Mr. Spreitz, apparently conducted on May 25, 1989;

b. an 8/15/94 letter from John and Rafaela Spreitz;

c. a letter from Richard W. Bozich of Western Investigative Services concerning interviews made at Santa Barbara High School concerning Mr. Spreitz;

d. a letter from Richard W. Bozich of Western Investigative Services concerning interviews with John and Barbara Jewitt and Scott Jewitt;

e. a variety of other interviews conducted by Mr. Bozich of Western Investigative Services, to include:

1.) a 10/8/90 interview with Susan Mendenhall, the mother of Mr. Spreitz;

2.) a 10/9/90 transcribed interview with Stephen Spreitz, Christopher Spreitz' ex-stepfather;

3.) a transcribed interview with Gretchen Jaeger, dated 10/9/90;

4.) a 10/8/90 interview with Mr. and Mrs. Gaylord Spreitz;

5.) a 10/10/90 transcribed interview between Raymond and Linda Jackson, the natural father and stepmother of Christopher Spreitz;

6.) a 5/31/89 transcribed interview with Lucy Eramik, an ex-girlfriend of Mr. Spreitz;

7.) a transcribed interview between Detective K. Wright (#3519) and Lucy Eramik on 5/31/89;

8.) a transcribed interview between Detective J.E. Salgado and Elana Owens (beginning with page four; date unknown);

9.) a transcribed interview between Don Jorgenson, an investigator with Pima County Attorney's Office, and Christie Thrash on 2/15/91;

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10.) information in your files concerning Christopher Spreitz' police record in his hometown of Santa Barbara, California.

BACKGROUND INFORMATION:

The available information on Christopher Spreitz shows a disrupted middle childhood, characterized by a punitive, controlling, emotionally cold mother, poor social adjustment with peers, and the absence of a healthy male role model. Drug and alcohol abuse dominated his teenage years.

From the information from his ex-stepfather, his sister and his uncle and aunt (by marriage), I infer that the mother was controlling and punitive in spite of Mr. Spreitz's efforts to please her. His sister, Gretchen Jaeger, recalls physical punishments of Chris by his mother, including an incident in which she broke a paddle over his back. By Gretchen's description, she protested the mother's attempts of control more so did Chris or the stepfather. She describes him as follows, "he would do basically what she [his mother] wanted and she... he looked so much up to her and wanted love from her so much... he tried so hard to please her... so she has the control over him basically."

John and Graciela Spreitz, Chris' uncle and aunt by marriage, also observed his mother to be overcontrolling to the point at which she could force him to, "break down and agree to whatever she had in mind." In their view, he was afraid to disagree with her. She used her tight control over him to be arbitrary. They described an episode in which she broke a promise for no reason and then dismissed his tears as, "unimportant and with the attitude of he'll get over it." John Spreitz describes the parents and the family as dysfunctional in a manner that was especially detrimental to both children.

By age twelve or thirteen, Chris Spreitz began drinking alcohol and smoking marijuana. By age 15, he drank steadily on weekends and would have a shot of vodka before school. He says that the effect of alcohol was to relax him and give him confidence. He recalls stealing alcohol from the family liquor cabinet and taking bottles of vodka from local stores. In the early years, no one noticed that he was drinking at abusive levels. In her interview with Western Investigative Services, Gretchen recalls a time when, at about age 16 or 17, his mother would not let him in the house, (apparently because he had been drinking), and he spent the night in the dog house. Neither parent acknowledged the substance abuse problem. He never received treatment.

The collateral information shows that the alcohol abuse continued to intensify after he left home. A variety of persons interviewed by Western Investigative Services described him as a

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heavy drinker. This includes a second cousin, Scott Jewitt, who saw him to be intoxicated, "a majority of the time," when he was visiting Santa Barbara a week before the current offense. To the interviewing investigator, Mr. Jewitt also described, "several different occasions when Chris has blackouts," while drinking alcohol.

The records shows that Mr. Spreitz was involved in a variety of property offenses as a teenager. There is no evidence of violence in his history. Rather, his sister describes him as being perceived as something of a wimp by his age-mates, partially because he was a scrawny teenager. Santa Barbara Police Department records describe him as between 5'11" and 6' tall and between 145 and 150 pounds when he was 17. Presumably, he was still smaller in earlier years. An aunt described his mother and stepfather as encouraging him to play football. He was small, notably unsuccessful at that sport, and mostly sat on the bench. The teachers reported to Western Investigative Services that he was under-developed athletically and treated as a social outsider at the school.

Apparently because of a long series of traffic violations and problems with the mother's insurance company, she ultimately kicked him out of the house at age 17, shortly before the end of his senior year in high school. Homeless and working to support himself, he did not graduate. For a while, he continued to live and work in Santa Barbara. Ultimately, he moved to Tucson to live with his natural father and stepmother.

The available information suggests that this problem with acceptance with peers in high school extended to teenage girls. On interview, he appeared embarrassed at admitting that he did not date in high school except for a couple of quasi-dates in which he would stay by a girl when the two of them were in a larger group of people. He then recalls a steady girlfriend older than he by a few years, when he was 18. She was a nice, mellow person with whom he had few arguments. Apparently, she shared his problem with alcohol and they, "drank a lot," together. Ultimately, she joined the Navy in the hope of straightening her own life. He perceived that as an abandonment and was angry at her.

After he moved to Tucson, he claimed to have had an easy time meeting and dating a large number of women. He says, "there are a lot of women everywhere. Women are so easy to meet - bars, banks, restaurants, work and friends." His sister describes him as, "more party animal," after moving to Tucson. It was her impression that he slept around more in Tucson. Interviews conducted by Western Investigative Services of women who knew him do not suggest any particular social skill or success with women. In the interviews with Western Investigative Services, Lucy Eramik and Christie Thrash expressed no special attraction to him. A couple of people describe him as talking about his sexual exploits in a manner that was not completely believable. When I asked him about his contact

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with prostitutes, he responded, "I don't know why. Sometimes I got lonely and it didn't matter who I was with as long as they are with you." He went on to say that he would seek the company of prostitutes to, "at least be with somebody for a while. My sister and I both use sex as our means of love - we equated sex to self-esteem and love." He acknowledges an incident in which he picked up a prostitute when he didn't have any money, yelled at her when she refused sex, and essentially intimidated her into having sex with him, "a little while" before the current offense.

Overall, the available information on Chris Spreitz most consistently describes a person who virtually never had success at developing an emotionally close relationship with a woman. His mother is consistently described as cold, punitive, and overcontrolling. None of the collateral sources describe him as being able to please her or to elicit any sign of love from her. The information from the interviews suggested that, in spite of the fact that he came to be a sturdily built, good-looking young man, that he did not have the social skill, the social insight, or the smooth talk required for him to be a ladies' man. It is my impression that he substituted bragging for actual accomplishments, although he was obviously not totally unsuccessful with women. It also appears that he oriented toward women older than he. The woman that he dated in early May, 1989, was thirteen years his senior. The victim was almost 17 years older than he.

It appears completely clear from the available information that Chris Spreitz had a long-standing problem with alcohol which probably reached the level of physical dependence. He described himself as drinking in the morning as early as age 15. Virtually everyone else who spent much time with him described him as a heavy drinker. His cousin remembers episodes in which he would black out from alcohol. The possible significance of physiological dependence includes the increased likelihood of a significant tolerance to alcohol. The term "tolerance" means, "the need for greatly increased amounts of the substance to achieve intoxication... or a markedly diminished effect with the continued use of the same amount of the substance (DSM-IV)." People who develop a tolerance to alcohol as part of their alcohol dependence may not appear as intoxicated as the blood level of alcohol would indicate. The alcohol dependent person is more likely to be able to drink large amounts until a threshold is reached after which there is an increased probability of an alcoholic blackout. This suggests the possibility that Mr. Spreitz may not have appeared to be intensely intoxicated to the officers who stopped him the night of the offense more because of tolerance effects than because of blood alcohol level.

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CLINICAL PRESENTATION:

Mr. Spreitz's current clinical presentation is generally unremarkable. He does not show any current sign or symptom of any acute emotional disorder. He presents as a 28 year old Caucasian male of approximately average height, with a sturdy build, good looks, and a pleasant social manner. He has good communication skills although he lacks the smooth talk of good verbal manipulators. He shows good vocabulary and intact cognitive processing abilities. Although he makes some references to thoughts, feelings and values, he does not present as especially introspective nor particularly sensitive to subtle emotions in himself or others.

Interestingly, Mr. Spreitz describes his mother in less negative terms than does his sister or others. He manages even to describe her overcontrolling nature in positive terms. In his words, "my mother is a really strong person. What she says goes. My stepfather couldn't override her boundaries... she's the boss, pretty much rules things. She likes to control whatever is going on. Not to say that she is not a nice person, she always wants to remain the person who has to control the situation. I never thought of her as super demanding. It is hard to explain." He did not question her failure to acknowledge his drinking or drug use even though, by his description, her father, her sister, and two of her uncles were obvious alcoholics. Nor did it seem unreasonable to him that she kicked him out of the house in May of his senior year in high school because he had too many speeding tickets. He even commented on her unwillingness to provide him with any level of monetary support - even food money - after he left the home as though that were a reasonable action for a caring mother. In fact, Mr. Spreitz did not complain about any woman in his life. He remembers being angry at and abandoned by the girlfriend who left him to join to the Navy when he was 18. He remembers being unhappy with other girls but denies ever confronting them. He agrees he was angry at the prostitute who refused to have sex but acknowledges only yelling at her. He voices virtually no insight into the sense of intimidation that he feels from women or the intense anger that he feels at the women who criticize and reject him.

The available information suggests that his control of angry impulses had been slipping in the weeks or months leading up to the offense. Although there is virtually nothing in the record to suggest that he had been an aggressive or violent person during his teenage years even when he was drinking intensely, there are two references to aggressive impulses in the weeks leading up to the offense: the first occurred apparently when he became angry at a McDonald's and put his fist through a window. The next would be the incident in which he intimidated the prostitute into permitting him to have sex with her.

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It does not surprise me that the offense occurred shortly after his most recent girlfriend refused him entrance to her home when he arrived there late at night and drunk. The research on violent behavior shows a strong correlation with alcohol intoxication. Given his history, I can see a perceived rejection by two women in the same evening as especially disturbing to him, particularly when intoxicated, to the point at which he lost aggressive control, disinhibited by the alcohol intoxication.

Obviously, I cannot know the sequence of events that led up to the homicide on that night in March, 1989. Mr. Spreitz's description of the evening includes the sketchy memory consistent with the impaired memory characteristic of alcohol intoxication. His description of hitting the victim during an argument in which she was yelling at him is also consistent. First, the available information on the victim suggests that she could be irritable when intoxicated. Next, Mr. Spreitz's history is consistent with his striking out at an older woman yelling at him angrily and critically. I infer this not from the early history which suggests that he would normally remove himself from such a confrontation. Rather, it is the more recent history that suggests the loosening of his physically aggressive tendencies. Given the harsh descriptions of his mother by others combined with his benevolent view of her, it is more probable than not that he harbored years of pent-up, repressed anger at her, that was seeping out in the months leading up to the offense and exploded forth during it.

Psychological testing does not provide much information on Mr. Spreitz and it is unclear to what extent current psychological testing could reveal anything about his state of mind on or about the time of the offense. The Minnesota Multiphasic Personality Inventory-2 (MMPI-2) validity scales show that he read the items carefully and responded in a mildly self-critical manner which should result in a valid clinical profile. There is no evidence of an attempt to appear unrealistically healthy or unrealistically unhealthy. The clinical profile shows extreme elevations (more than four standard deviations above average using the original MMPI norms) on the scales associated with behavioral acting out and the kind of personal fragmentation and identity diffusion that leaves people disorganized and ill-able to develop emotionally close, mutually satisfying relationships. People with this MMPI code type tend to have angry, resentful qualities and to have trouble modulating and expressing these tendencies. They view the world as hostile and other people as rejecting and unreliable. When there is a history of criminal activity, there criminal behavior is likely to be disorganized and somewhat bizarre. In Mr. Spreitz, this is aggravated by an elevation on the scale of ruminative anxiety. People with an elevation on this scale tend to be unable to get insults and ego injuries out of their heads. The disturbing thoughts roll over and over in their minds. Mr. Spreitz probably used drugs, alcohol, and distracting activities as a means of shutting off these disturbing thoughts.

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CONCLUSIONS:

In identifying the psychological factors contributing to the offense, it appears appropriate to consider the family problems, harsh physical punishment, maternal rejection and other disruptive factors which characterized his life at home and life with peers from the age of 6 or 7. In his early years, he appears to have been anxious to please and somewhat sensitive. Later, he acted out behaviorally, primarily by turning to alcohol intoxication. Given the extent of the reported alcoholism in the mother's family, it is likely that he not only turned to alcohol on a psychological defense but developed a physiological addiction. This addictive tendency then aggravated the earlier social and emotional disruption of development to turn it into a fully dysfunctional young adult lacking coping or social skills. From the available information, it appears that all of these problems intensified and, for some reason, accelerated in the months leading up to the offense.

Chris Spreitz did not suffer acute, dramatic abuse in his family home. He did suffer pervasive subabusive emotional battering and neglect, along with inattention to his developmental needs. None of the available information suggests that the home environment was a minimally healthy one for developing children. Chris' sister fought more strongly. Her battle took her out of the home at a younger age. Reports by relatives suggest that she, also, suffered intense emotional and behavioral turmoil, including serious, self-harmful sexual acting out. She describes herself as being saved from the pathogenic home environment by moving out at about age 12 and seeking help.

Chris fought a quieter, personal battle. In the early years, he tried to please. For his efforts, he walked away with a sense of failure to live up to his mother's standards or earn her love. He then slipped quietly into alcoholic numbness. Next came the more self-destructive alcoholic acting-out involving nonviolent crimes, traffic tickets, accidents, and his ejection from the home.

For Chris Spreitz, as for other chronically neglected, rejected, devalued children, there was no escaping the deep-seated anger and resentment. His developmental failure included the non-development of personal insight and conflict resolution skills. He could not and did not deal with the anger. He numbed it with alcohol and acted it out indirectly by orienting to older women, attempting sexual conquests with them (probably as a symbol of his current desirability to older women as mother substitutes), and then bragged about real and imagined sexual adventures as a means of convincing himself that he was now in a dominant position over the women who intimidated him.

It was, however, a poorly built, fragile facade which age-mates readily identified. It was also personally unsatisfying because it

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was largely a sham. Each failure with a woman made the attempts at self-deception more apparent to himself. The early anger never resolved and continues to fester. New failures added still more anger and more resentment of the women whom he could neither please nor control. He turned to prostitutes for company, or, more likely, control via money. The control of his aggressive impulses eroded. My best guess is that he was drunk, hurt and angry at the unwillingness of his girlfriend to let him into her apartment, startled into an alcoholic rage at the angry confrontation by the victim, and ended up venting the years of stored up rage at her.

There is no evidence of the pattern of violent behavior from an early age that is most predictive of a pervasive pattern of violence as an adult. There is no evidence of the pattern of behavior indicative of an Antisocial Personality Disorder or more violently destructive psychopathic disorder. There is no major emotional disorder to drive future violent behavior uncontrollably. There is alcoholism - one of the strongest correlates of violent behavior. And, there is the emotional, sexual maladjustment that comes from his lifetime of misdirected development in a dysfunctional family, combined with arrested and/or distorted adult development because of the alcoholism.

POSSIBLE MITIGATING FACTORS:

The first statutory mitigating factor addresses impaired capacity to appreciate wrongfulness or conform his conduct to the law.

If the Court finds that the facts of the case support a scenario in which he and the victim were voluntarily together in the desert, when the homicide took place, the following factors are likely to fit this aspect of mitigation.

1. Given the history of alcoholism corroborated by a variety of collateral sources and the sketchy memory that is credible in the sense of fitting the common pattern of alcohol-induced memory impairment (and not with attempts at malingered amnesia), a significant but unknown degree of alcohol intoxication is likely. Alcohol intoxication has a well-documented disinhibiting effect which frequently includes losses of control of angry emotions and aggressive behavior.

2. The history strongly suggests years of early experiences likely to have caused a build-up of pent-up angry, aggressive feelings toward women generally (and older women especially) which may have burst forth with uncontrollable intensity with or without alcohol intoxication. Only trivial provocation is required for this type of aggression explosion, termed an Intermittent Explosive Disorder by DSM-IV.

3. Still more likely is that a combination of 1. and 2. above contributed to an uncontrollable outburst of aggression.

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The fifth statutory factor is age. Mr. Spreitz was in his early 20's at the time of the offense. He is very likely to have been socially and emotionally immature for the following reasons:

1.) Years of alcoholism intoxication wipe out many of the healthy experiences and healthy developmental processes requisite to age-appropriate social and emotional maturity.

2.) The pathogenic, emotionally neglectful home environment, including the absence of a healthy nurturing mother figure or positive male role model are expected to impair healthy social and emotional development.

3.) The combination of 1.) and 2.) above can be expected to cause major deficits in social and emotional development and maturity.

I do not claim to know all of the non-statutory factors which the Court might consider. Therefore, I will include all aspects of my evaluation which from the case law and the forensic literature might be relevant.

1. Future potential for violent behavior:

The two best predictors of violent behavior are:

a.) a long history of past violent behavior which extends into the early teenage years, and
b.) a person who fits the designation as a psychopath by the criteria established by Robert Hare, Ph.D. The psychopath takes the characteristics of the Antisocial Personality Disorder to a destructive extreme.

I am aware of only the three incidents of violent behavior noted above. The collateral information documents none in his teenage years. One of the latest three was toward property. One was verbal. One was the current offense. The latter two, no matter how severe, do not constitute a pattern. Mr. Spreitz clearly does not meet the risk factor described under a.) above.

Nor does he meet the Hare criteria for designation as a psychopath. Nor does he even meet the DSM-IV criteria for Antisocial Personality Disorder.

A somewhat weaker set of risk factors from the research on violent behavior includes substance abuse (alcohol included) and the presence of a major mood or thought disorder, especially in young males. He has neither of the emotional disorders and would not fit the "young" category even after a mitigated sentence. He has the intelligence, verbal skills, and emotional neediness

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required to benefit from substance abuse rehabilitation. Except for the psychopath, the risk of violent behavior drops dramatically after age 45-50 for all groups. By my understanding, it is not possible for him to get out of prison before age 45 (or older).

2. The failure of the parents to provide treatment for alcohol abuse in Mr. Spreitz's teenage years:

Mr. Spreitz reports, and his sister confirms, years of alcohol abuse and associated problems while he lived in his mother's home. Given the intensity and duration described, the mother (and step-father) were either so uninvolved with him to have failed to notice the problem, or they were aware of it and failed to arrange (or attempt to arrange) for an appropriate rehabilitation program.

This failure links to the offense both because it contributed to the years of intoxication and associated immaturity and lack of coping skills and social skills which (as described above) contributed individually or in combination to the offense.

3. The emotionally deprived, physically punitive home environment described by the sister and others, and the abuse of hereditary parent-child relationships are likely to have contributed to the offense and may be considered a nonstatutory mitigating factor.

It is the responsibility of the parent to provide a nourishing of home environment conducive to healthy social, emotional and cognitive development, healthy habits and activities, the absence of destructive habits and productive coping skills and emotional/behavioral controls. It is also the parental responsibility to create a healthy parent-child relationship. Collateral information suggests the absence of all of the above.

The collateral information also strongly suggests a pathological mother-son relationship which contributed to Mr. Spreitz's poor, emotionally unsatisfying relationships with women generally, as well as the hypothesized pent-up, repressed anger at women, which I described above as likely to have produced the explosion of aggression toward the victim.

A healthy father-son relationship or a healthy stepfather-son relationship might have compensated for or taken Mr. Spreitz out of the pathological home environment in Santa Barbara.

If the natural father had kept in close enough touch with his son and daughter to recognize the harm done to them, he might have successfully sought custody and put Mr. Spreitz in an alcohol rehabilitation program.

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Alternatively, the stepfather might have provided a compensatory, supportive, nourishing relationship and encouraged relationships with and attachments to surrogate mother figures (such as his aunt in the Northern California Bay Area).

The sister forced these kinds of changes in living arrangements and adult relationships, and sees herself as saved by her own assertive acting out. By her report, Mr. Spreitz was more passive and anxious to please as a child and, as a consequence, suffered more from the action or inaction of the parents.

4. Other:

I realize that statutory mitigating factors may also, failing the statutory threshold, be appropriately considered and weighed by the trial judge as nonstatutory mitigation. By my non-lawyer's understanding, that prerogative is the province of the trial judge and not a forensic psychologist.

I also realize that the absence of a prior felony record and/or good behavior while incarcerated or the recommendation of a police officer knowledgeable about the case, can be considered as nonstatutory mitigation. Again, I do not see how my expertise as a forensic psychologist might aid the Court better than can witnesses or evidence directly.

In no way do I intend these observations or opinions to excuse Chris Spreitz for a senseless homicide. I intend only to distinguish him from the habitually violent, conscienceless victimizer of others, and to help the court understand the psychological process that brought him to this crime. It's my understanding that these are the issues relevant to mitigation.

Yours,

Todd C. Flynn, Ph.D.
Clinical Psychologist

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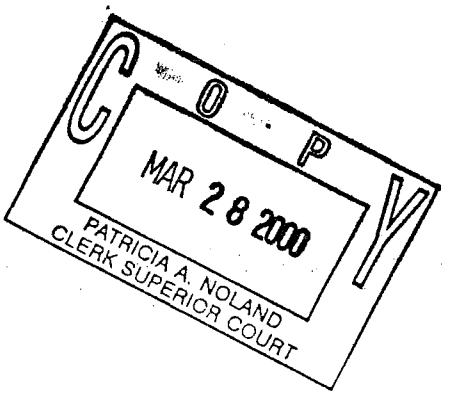

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520-624-8000
By Sean Bruner, PCC #6984
Attorneys for Defendant/Petitioner

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Plaintiff, v. CHRISTOPHER J. SPREITZ, Defendant.	NO. CR-27745 PETITION FOR POST-CONVICTION RELIEF PURSUANT TO RULE 32

1. Defendant/Petitioner's name is Christopher John Spreitz. His prison number is 110042.

2. He is now confined on death row of the Arizona State Prison, SMU II, Eyman Unit, PO Box 3400, Florence, Arizona, 85232.

3. (A) Defendant was arrested on May 25, 1989. On June 2, 1989 he was indicted for, count one, first degree murder, count two, sexual assault, and count three, kidnapping. (ROA 1)[1]. He was arraigned on June 12, 1989. (ROA 14). Petitioner was convicted by jury verdict on August 18, 1994 of first degree murder, in violation of A.R.S. § 13-1105; sexual assault, in violation of A.R.S. § 13-1406, and kidnapping, in violation of A.R.S. § 13-1304(A)(3) and (B). (ROA 285).

(B) Defendant was sentenced by the Honorable William N. Sherrill of the Pima County Superior Court on December 21, 1994, after spending five years, seven months and one day in jail. Judge Sherrill sentenced defendant to death, count one, fourteen years (aggravated) as to

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[1] ROA refers to the clerk's record on appeal. The number refers to the number in the index to said record.

count two and fourteen years (aggravated) as to count three. (ROA 301, 302). The sentence as to count two was consecutive to count three. Id.

(C) Defendant's judgments of guilt and sentences were affirmed on appeal. State v. Spreitz, 190 Ariz. 129, 945 P.2d 1260 (1997) (en banc).

The file number of the case is the same as that listed above in the caption of this document.

4. Defendant/Petitioner is eligible for relief for the following reasons:

4.1 He received ineffective assistance of counsel at the guilt/innocense phase of his trial, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Art. 2 §§ 4, 13, 15, and 24 of the Arizona Constitution and other rights discussed in Attachment A.

4.2 He received ineffective assistance of counsel at the sentencing phase of his trial, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Art. 2 §§ 4, 13, 15, and 24 of the Arizona Constitution and other rights discussed in Attachment A.

4.3 He received ineffective assistance of counsel on appeal, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Art. 2 §§ 4, 13, 15, and 24 of the Arizona Constitution and other rights discussed in Attachment A.

4.4 Various jury instructions given by the court violated the United States and Arizona State Constitutions, and constituted fundamental and structural error, as more fully set forth in arguments V-VII contained in Attachment A.

4.5 The court found non-statutory aggravation in sentencing defendant to death, in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Art. 2, §§ 4, 13, and 15 of the Arizona Constitution and other rights discussed in argument VIII contained in Attachment A.

4.6 The court wrongfully failed to consider mitigation and applied wrong legal principles

in weighing mitigation in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Art. 2, §§ 4, 13, and 15 of the Arizona Constitution and other rights discussed in arguments IX-X contained in Attachment A.

5. The facts and legal authorities in support of the alleged errors upon which this petition is based are contained in Attachment A.

6. The following exhibits are attached in support of the petition: See appendix.

7. Defendant/Petitioner has taken the following actions to secure relief from his convictions or sentences: He filed his automatic direct appeal to the Arizona Supreme Court, which was denied on May 3, 1996. See State v. Spreitz, 190 Ariz. 129, 945 P.2d 1260 (1997) (en banc).

No other post-conviction pleadings, including habeas corpus proceedings, have been filed, nor any special actions taken.

8. Defendant/Petitioner was represented by the following lawyers:

First by William G. Lane, no longer an active member of the Arizona bar. During pre-trial proceedings by M. Josephine Sotelo, 160 South Third Avenue, Suite A, Yuma, Arizona, 85364-2223, 520-329-8707.

During the guilt/innocense phase and sentencing phase of trial by the Marshall D. Tandy, a convicted felon whose license to practice law was suspended and who will be disbarred, 453 South Main Avenue, Tucson, Arizona, 85701, 520-624-9119.

On direct appeal to the Arizona Supreme Court by David Alan Darby and Julie L.C. Duvall, 530 South Main Avenue, Suite B, Tucson, Arizona, 85701, 520-620-0000.

9. The issues which are raised in this petition have not been finally decided nor raised (except for the reasons therein indicated) before because: of the ineffective assistance of counsel, because they were in violation of the Constitution of the United States and/or the State of Arizona, because the sentence imposed was not in accordance with the sentence authorized by law, because newly discovered material facts probably exist and such facts probably would have changed their

verdict or sentence, because there have been significant changes in the law that if determined to apply to defendant's case would probably overturn his convictions and/or sentences, because the verdict and sentence resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States, because the verdict and sentence resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding, because the claims herein rely on new rules of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that were previously unavailable, and because a factual predicate that could not have been previously discovered through the exercise of due diligence and the facts underlying the claims would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found defendant guilty of the underlying offenses.

10. Because of the foregoing reasons, the relief which the defendant desires is release from custody and discharge, or a new trial, and/or a correction of the sentences.

11. Defendant/Petitioner is presently represented by Sean Bruner, Bruner & Upham, P.C., P.O. Box 591, Tucson, Arizona, 85702, 520-624-8000 (phone), 520-622-1094 (fax).

Respectfully submitted March 28, 2000.

Sean Bruner
Attorney for Defendant

I understand that no further petitions concerning this conviction may be filed on any ground of which I am aware but do not raise at this time, and that the information contained in this form and in any attachments is true to the best of my knowledge or belief.

Christopher J. Spreitz
Defendant/Petitioner

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P.O. Box 591
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520-624-8000
By Sean Bruner, PCC #6984
Attorneys for Defendant/Petitioner

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Plaintiff, v. CHRISTOPHER J. SPREITZ, Defendant.	NO. CR-27745 ATTACHMENT A TO DEFENDANT'S RULE 32 PETITION

Defendant's Personal History

Chris Spreitz's Parents:

Ray Jackson and Susan Mendenhall grew up in families of alcoholics. Violence and corporal punishment were the norm. Susan stated that when she learned she was pregnant in the fall of 1965 she wanted the baby. She hinted she was already engaged by saying, "There was a ring". Ray felt it was a way for her to get out of the house. In his mind, the pregnancy was not planned. Reverend Trouche was called in to discuss the situation, with both families. He performed the wedding ceremony. Susan was 17 and in her senior year in high school.

Susan's grandparents were very strict, as was her mother. Susan had problems at home before the pregnancy. She dealt with the problems, by running away several times. The family minister recalled, "The Mendenhall household was always in an uproar." Rev. Trouche went on to say that Susan was very independent which helped her survive through life. Both her brother and younger sister had behavior problems. Reverend Trouche recalled having to counsel Susan's brother, Butch, on several occasions. Susan't sister, Marcia, admitted her problems with alcohol.

Susan's attitudes and way of dealing with life carried over into her own family and how

she raised her children. Her sister stated, "I have never met anyone as cold and mean an individual, as Susan." As Susan got older, Marcy stated, she and her mother, Alice, were afraid of her. Susan was a manipulative liar, who frequently denied something she had said, after she got what she wanted. Both Ray and her second husband, Stephen Spreitz, described similar incidents with regards to how she dealt with life.

Ray Jackson freely admitted to physical abuse of Susan and breaking up their residence in fits of rage. Stephen Spreitz, Susan's second husband, went through several years of therapy after their divorce. He admitted to spanking the kids with a belt. Neighbors and friends described Steve as abusing Chris verbally. Chris' reaction to disturbing events was to ignore, or just shrug things off, so they couldn't affect him.

Birth through Four Years of Age 1966 to 1970:

Susan and Ray lived in Ventura at some point after Chris's birth, for a about a year.

By their own admission, Chris's parents had a violent marriage. The reasons for their problems depend on who you talk to. According to Ray, Susan cheated on him frequently. Susan stated, "Ray wanted me to pick up strange men, have sex with them and then tell him about it, when I got home." Ray described Susan as a very needy person during their marriage. She found the attention she seemed to crave from various men, including her second husband, Stephen Spreitz.

Susan's notations in Chris' baby book are revealing in the way Susan sees herself. She recognizes her own short temper, though she minimizes what was described by various family members as fits of rage.

Susan noted in his baby book that Chris was surprisingly quiet the first couple of weeks after birth. By the time he was two months old, she attributed his crying to being ignored and not wanting to play alone. At three months, he was screaming whether he was happy or sad. She had him drinking from a cup at four months old.

By the time Chris was seven months old, Susan wrote, Chris was developing a mind of his own. "He trys (sic) to scream and yell to get his own way."

At 16 months, he was trying to put his things away. He'd been quite crabby, probably due to his teething. He had a second degree burn on his thumb. She wasn't sure if he had burned it on the stove, but was keeping the dressing clean.

She appears to have found a sitter for Chris, just before he turned two. She was happy with Mary Rosales. At the Rosales home Chris seemed to receive the attention he needed, something Susan feared she couldn't give him. Because of working and the house, Susan admitted she got nervous and impatient. She questioned whether she was showing Chris a sufficient amount of love.

Chris spent much of his time with sitters. Susan denied he spent a great deal of time with her mother, claiming Alice only took him when it was convenient for Alice. She was a good grandmother, but she refused to be a baby sitter. Marcia stated, Susan was always dropping the kids off. Both Ray and Susan worked and after her divorce from Ray and subsequent relationship and marriage with Steve Spreitz, she continued to work and go to school part time. Susan received her bachelors degree in 1992 and her masters in 1994 in business administration.

The baby book indicates Chris was cleaning his own dishes by the time he was two. He even tried to clean up his dirty pants when he had accidents. She had him potty trained when he was 16 1/2 months old, except for accidents and at night. He continued to have a bed wetting problem into his teens. Susan commented, in a baby book entry, she frequently got impatient that he was not completely trained.

Chris' sister Gretchen was born several months before Chris turned 4. Susan and Ray's problems continued. The physical abuse was off and on. Susan didn't think Chris was affected by the fights. They usually occurred after he was put down for the night, but admitted they were loud enough that a neighbor commented after the divorce that he had heard the fights.

During their marriage she admitted to having left Ray at least once. According to Ray,

Susan was constantly running to her mother's or to Reverend Trouche. She didn't always take Chris with her when she left. After Gretchen was born, Susan headed to Los Angeles and stayed with Reverend Trouche, but she didn't have Chris with her. Ray remembered going down there and seeing Gretchen. He thought Chris was probably with Alice. Reverend Trouche did not recall the children being with Susan when she was there.

When Chris was 4 ½ he fell down the steps leading to their apartment. Susan was vague about how the injury occurred. She said her mother took Chris to the hospital for stitches. She had been sick, in bed. She couldn't remember where he'd cut his head or where the stitches were. The medical records department at Cottage Hospital has been unable to locate the older records. The only record we have to date, of when this fall occurred, is a copy of the order for a skull series obtained from Dr. Delgado's practice (Chris' family physician). The first photo after this fall shows Chris' left eye is turned in.

Sometime during the divorce, Alice, Susan's mother, approached Ray and wanted him to have custody of the children. He couldn't remember if she ever told him why. He felt Alice wanted the kids and figured if he had custody, she would be able to care for them.

Marcia, Susan's sister, stated, Alice was terrified of Susan. This is a fear she instilled in Marcia, who described her sister as an emotional iceberg, with no nurturing skills. Susan also has half siblings, but she is not in contact with them as she stated they are alcoholics.

Susan started seeing Stephen Spreitz before the divorce was final and he was still in the military. They started living together in 1971 and married in 1973. Steve admitted punishing Steve and Gretchen by beating them on their bare butts with a belt. Susan denied hitting the children with anything but her open hand, but Steve and Gretchen both remember that Susan was extremely violent, hitting the children with anything that was available, including a favorite board which she eventually broke over Chris' back. She threw whatever was at hand, including, once, an iron, when she was angry.

Early Letters From Chris To His Mom And Stepfather and Family Dynamics:

The dates of the letters are not legible. The contents are relevant, as it coincides with witness statements regarding family life. In one letter, Chris indicates he acts like a brat and makes his parents mad and late lots of times. His list of things he will do in order to get a motorcycle fills his day with no time for goofing off, if he performed all the tasks. He appears to feel he is highly responsible for making his parents happy. The handwriting is childish, and very poorly written.

According to witness' statements, at best, Chris's parents were harried working adults who had no time to listen or do things with their children. At worst, they were punitive, demoralizing, self centered, autocratic individuals. Their only interest was in only themselves.

School Years:

Christian School of Santa Barbara:

Chris entered Kindergarten in the fall of 1971. He appears to have had problems with concentration, even in kindergarten. His teacher, Dianne Hall, noted he was too active at times. His work needed to be neater. He needed to practice counting and had little self control. She also noted, Chris did not look people in the eye when they talked to him. He seemed fearful of trying something new. His stepfather, Steve, also observed that Chris never looked a person in the eye when you talked to him. His eyes would dart left or right. He never looked directly at you.

His first grade teacher commented, he was reading at the second grade level. She wrote a letter to Susan in February 1973, telling her he talked constantly, had no concern for others and frequently put others down to make himself look and feel more important. She noted he felt very insecure. He had ability, but often sat and daydreamed and frequently had to stay after school to finish his work. She had been trying to spend more time with him and suggested that Susan give

him more attention at home; let him know he was expected to do his best at school. She noted that Chris had settled down considerably by the end of the school year. He still needed improvement in his work and study habits, though.

During the summer of 1974, between second and third grade, Chris rode his bike off a large boulder or rock and spent two days in St. Francis Hospital with a concussion.

Alice Mendenhall, Chris's grandmother died that year after she was thrown from a horse. A bitter battle ensued between Marcia and Susan over the will. Susan took Marcia to court to contest it. Alice had cut Susan out of the will.

Chris continued to have problems throughout his years in Christian school. Memorizing verses in bible study was always his worst subject. His grades started to drop. Most of his report cards contain checks were he needed improvement, both scholastically and emotionally.

The teachers usually commented they enjoyed having him in their class. They felt he was definitely capable of doing better. He was a bright and cheerful child.

By fourth grade he was paper chewing. His grades improved, but he still did not have acceptable study and work habits. In fifth grade his grades took another dive. He received at least one D, in one out of two semesters, in the following classes: bible, language, spelling, handwriting, mathematics, social studies, music, work and study habits.

Jon Whipple was his best friend from 1970 until 1975 when the Whipple family moved to Vancouver, B.C. Jon confirmed Chris was frequently in trouble at school, for talking and not paying attention. He confirmed that Chris had problems academically. Chris was small for his age, but athletically he was quick and agile. Jon could not recall Chris ever throwing a ball. He was picked on by other kids, but not severely. The two boys had banded together and decided they would always defend each other. Chris was not as vulnerable as he appears to have been later on. Jon was small for his age also.

Peabody Elementary:

Chris attended Peabody Elementary for sixth grade, starting in the fall of 1977. According to Susan, he was transferred to keep the kids together as Gretchen had to be transfered for her dyslexia. Peabody had an excellent program for this problem. Steve Spreitz thought the transfer occurred for monetary reasons.

Chris' sixth grade teacher indicated he was still easily distracted, but his grades improved somewhat. He still received checks in all areas of work and study habits and social development.

During the sixth grade, medical records indicate Chris either became more accident prone and/or the teasing from classmates and neighborhood kids became more physical. He fell in the street playing football. He sprained his left wrist in a game at school. He was hit on the back of the head with a fist, in a fight. He fell in the bathroom and hit his forehead and the bridge of his nose. He had to have a small surgical procedure performed to remove blood from under a fingernail, which he had hit on a door jamb.

In August 1978, he attended YMCA camp and was pushed and hit the back of his head on a piece of furniture and needed stitches.

La Colina Junior High:

Susan filled out an application for an Intra-District Transfer to enable Chris to attend La Colina. In her application she stated that this would ease her burden of dropping him off and picking him up from school. According to people interviewed, Chris rode his bike the four miles to school and was not picked up or dropped off on a regular basis. Susan also thought the academic atmosphere was better and more attuned to their expectations for Chris.

Chris started seventh grade in the fall of 1978. The only A he received was in Physical Education and his parents received a letter of commendation about his efforts in PE. The first semester he maintained an overall 1.50 G.P.A. The second semester his G.P.A. was 2.33. His competency exam scores that spring of 1979 were, Mathematics 100%, Reading 92% and

Writing, pass.

He had two bicycle accidents that October. On one occasion he slid off the bike to avoid a parked car. The second time he was hit by a car. He missed 2 days of school the entire year.

In eighth grade he maintained a 2.00 average. He took the competency exams in the spring of 1979 and obtained the following scores: Mathematics 92%, Reading 98%, Writing 6 out of 10; a passing score being 6.

In the fall of 1979 he broke a finger on his right hand playing football. He fell and hit his head on a piece of furniture. That winter and spring he sprained his left hand running into a wall and sustained a puncture wound to his left foot. He also had bronchitis that winter, but does not appear to have missed more than 6 days if school the whole year.

In ninth grade, 1980-81, his G.P.A. was 2.00 the first semester and 1.50 the second. In April 1981 he took the minimum competency exam on which he scored a 92% in Mathematics, 98% in Reading and a 4 out of 10 in writing. A six is required for a passing result.

He missed 4 days of school for the year. His physical exam in May 1981 shows he was 5'2" tall and weighed 112 lbs.

He attended summer school at Bishop High for Algebra and ended up with a B+, after receiving an F during the school year. A memo from his teacher, that semester, M. Jurgensen, indicated he turned in one test with nothing on it, not even his name.

Laurie Poe was in many of the same classes he was. She noticed in eighth grade Chris was goofing off in class and always clowning around. She could never understand why. His personality became more outgoing in many ways. He was always smiling and trying to get people to laugh. Unfortunately this frequently occurred at inappropriate times. He was always sweet and extremely kind to her. This niceness seemed to attract the bullies, who would pick on him just because they could.

Chris's only close friend during these years was Devon Poe, who he met in the fall of 1977. Devon played football in the YFL League and the two boys were described as being

inseparable. Devon was two years younger than Chris.

High School Years:

Chris entered Santa Barbara High School in the fall of 1981, as a sophomore. The school was just changing over from a three to four year school . During the three years he attended, his G.P.A. never went above a 2.0. He was placed on probation in February 1982 for his poor grades, which were attributed to poor attendance.

He was tested by the school psychologist, Frank Puchi, that February. His test scores indicated problems in visual perception, visual figure ground, visual closure and visual memory. Susan was vague as to what transpired during the meeting between Dr. Puchi and herself. She couldn't recall if Chris was there. It is not known at present if Chris was aware of the results of the tests, or what he was told. The paperwork which Susan supplied indicates an appointment was to be arranged, but there is no way to verify if it ever took place.

Dr. Puchi made several recommendations, among them a visual screening. It does not appear this was ever done. No one in the family was aware of the testing, or the results, including Chris' stepfather. The tests do not indicate if a full emotional testing was conducted. John Spreitz, Chris' uncle, is a psychologist and worked with juveniles in the criminal system for many years. He stated, if one of his patients tested similar to Chris, at the very least he would order a full battery of tests. The tests are also indicative of someone with ADD.

In spite of Chris' poor grades, he was allowed to have a dirt bike motorcycle. Chris' sister, Katie, was born in May 1982, just before Chris turned 16. Susan stated he was somewhat embarrassed to have his mother pregnant. After Katie was a couple of months old, he was always proud to show Katie off to his friends.

Chris attended summer school in 1982 for his Spanish class which he flunked the second semester. In summer school he obtained a C+.

His uncle Butch died in 1982 of cancer. He had been confined to a wheelchair before he

died. Butch used to take Chris to the races with him and they had a fairly close relationship. No one was able to comment as to how Chris felt about his uncle's illness and death, as no one apparently talked to him about his feelings. Feelings were not encouraged in Chris' family.

Chris' sister, Gretchen, started vandalizing homes in the neighborhood in the fall of 1982 and was subsequently arrested. The family attended counseling for a month or two and Gretchen was placed in the custody of her father in 1983, who was then living in San Jose. There is nothing regarding the counseling session in the juvenile records. The counselor, Mary Jane Hungerford, passed away in 1999. It is unknown whether records exist, or if her practice was taken over by someone else.

After the arrest and during the court proceedings, Gretchen made allegations of sexual molestation by her step-father, Steve. She still maintains she was molested and she supplied details when she was interviewed. It seems Chris was probably aware of what was occurring at the time.

Two classmates of Chris' died in 1982 - a teammate died of cancer in the fall, and a guy by the name of Wally either jumped or fell off a bridge.

That year Susan became aware that everything that went on in the downstairs portion of their house could be clearly heard in Chris' room, due to the venting system. According to Steve, many of the arguments which took place after the kids were in bed occurred downstairs, so the kids wouldn't hear.

Chris was involved in a fight in school, in June 1983, and sustained a cut to the left side of his head near his eye and received stitches.

In January 1983, Chris' best friend, Devon, committed suicide by shooting himself. Chris, Dennis Patterson and Devon had worked out in the gym just hours before. Chris was deeply shocked, he called several people, but does not appear to have found anyone to talk with, about it. Gretchen stated her mother told her, "Devon shot himself." Susan turned around and went about her business. Gretchen just stood there and then went to see Chris. He was in his

room crying.

Members of the family described Chris' room as a filthy pig sty. Gretchen recalled that Chris' room was always kept very dark and he would spend days in it, only coming out to get food, which he took back into the room to eat.

Chris' grades continued to spiral downward. He attended the Dubin Learning Center, a private tutoring center in Santa Barbara, in the spring of 1983. Mr. Dubin's letter indicates Chris needed individual assistance in order to deal with his outstanding academic deficits as well as his poor self image and low self-confidence. He was not re-enrolled at the Dubin Center, but he did attend summer school. Chris' mother stated she didn't keep him at the Dubin Center, probably because of his rebellion. It is highly likely the real reason was the cost of this private tutoring, as most of the family interviewed stated that Susan's driving force was money. Steve was a home dad about that time. Katie was a year old and Steve had been laid off by Burroughs.

Even though Chris' grades remained dismal, his stepfather and grandfather, Gaylord Spreitz, cosigned so Chris could purchase another motorcycle. He rode this bike to and from school and work. He did not follow through and Susan stated she ended up paying off the loan.

His senior year in school shows a change in the type of classes he took, but his grades did not improve much.

Despite his poor grades, Chris played football all three years. He didn't letter until his senior year. Friends of his from the team stated that Chris gave the game all he had, but he wasn't very coordinated and only played when the team was so far ahead they couldn't lose. Chris was good natured about the razzing his teammates gave him and never got angry that he didn't play. He lettered because he was on the scrub team that practiced against the first string.

Tony Becerra's description of Chris indicates his clumsiness was possibly due to his feet and joints getting ready for a growth spurt, that didn't occur until he was about 19 or 20 years old.

Chris hung out with the Hispanic portion of the football team. As teens, Richard Becerra and Dennis Patterson said it was kind of funny, here were all these dark skinned, black haired

boys and Chris. They accepted him into their group because he gave the game his all, even though he was so clumsy.

Chris didn't date in high school. The group he hung out with consisted of several girls, but they were friends only. They partied pretty hard and Chris drank with the best of them. His personality and attitude did not change when he drank, except that he would talk non stop. He did suffer from frequent blackouts, however. Chris would act fine but the next day wouldn't remember a thing. It was then that his friends realized he had been operating in a blackout.

In March 1984, Susan and Steve received a notice from the insurance company that their policy would be canceled due to the numerous speeding tickets Chris had received. Chris was told to move out of the house. Susan claims this was Steve's idea. She did not want Chris to leave, but she felt she had to show a united front with her husband. Steve admitted he threw Chris out once, but it was Susan's idea the second time.

Chris traded his bike for a truck and slept in the truck and at work. He appears to have tried to continue school, but he didn't graduate. Records indicated he dropped out in April. He did attend the senior prom that spring.

<u>1984 to 1989:</u>

Juvenile records indicate Chris was arrested in March 1984, for receiving stolen property. According to Vince Owens, his roommate, Chris bought a motorcycle from two co-workers which was stolen. Chris claimed not to have known it was stolen.

He had no previous juvenile record. He was made a ward of the court, even though he had turned 18 during the court proceedings. He was ordered to pay restitution in the amount of $1,530.00. His mother claimed she and Steve did not know about this incident prior to his moving out.

The November 6, 1984 interviews conducted by the probation officer indicate Chris was working at La Cumbre Chevron, where he slept in his truck. His mother was reportedly in China

and unavailable for comment. His stepfather thought Chris was generally a good kid, who had gotten involved with the wrong people. One portion of the file indicates his biological father's whereabouts were unknown. Considering Gretchen was living with him in San Jose at the time, one wonders why the interviewer was given this information and by whom.

When Chris finally got an apartment in 1984, he roomed with Vincent Owens. After Vince moved to Golet, Chris roomed with another fellow who's identity is unknown. This unknown individual is reported to have been heavily involved in drugs.

Gretchen returned to Santa Barbara after running away from a group home she'd been placed in, at the recommendation of her counselor and psychologist, in San Jose. After she ran, her mother sent her a bus ticket, to bring her back to Santa Barbara. She stayed with her mother for several months until she was also thrown out of the house. After bouncing around for several months she ended up living with Chris at his apartment and he attempted to keep an eye on her. By her own account, she was uncontrollable. There is nothing in Gretchen's juvenile record in Santa Barbara to suggest she was a runaway.

Information varies as to how involved Chris' mom and stepfather were with regards to helping out financially. Susan stated she paid for groceries and utility bills; Gretchen was not aware of any financial assistance. Ray Jackson continued to pay child support for Chris until he turned 18 and for Gretchen after her return to Santa Barbara. He was not aware Chris or Gretchen had been thrown out of the house until much later.

Chris enrolled at Santa Barbara City College in the fall of 1985, but dropped out.

In the late spring of 1986, Chris contacted his father, Ray Jackson, who had moved to Tucson. Chris moved to Tucson in June and enrolled in Canyon Del Oro High school in the fall of 1986. He took three classes. It appears he was attempting to make up credits for his high school diploma. The records indicate he fudged about his age, making himself a year younger. He did not finish the semester and withdrew from school.

Ray and Linda Jackson stated Chris was in typical teen mode. Chris always worked at

some type of job, and never talked about school or whether he was having problems. His room was always a swamp. You could smell it through closed doors. He drank beer and they had to hide a couple, or he'd drink it all.

After about a year, it was obvious it was time he got out on his own. He was keeping unusual hours, sleeping all day and staying up all night, even if it was just to watch TV. They found him an apartment, paid first and last months' rent and bought a month's worth of groceries.

Shortly after that, Jon Whipple came to Tucson and lived with Chris for 6 to 8 months before going back to Canada. Chris moved back to Santa Barbara after that.

In 1986 and 1987, he dated many women or girls, both younger and older than he was. Tammy, the mother of Chris' daughter, and Rachel Koester, his serious girlfriend who broke his heart, saw nothing in his demeanor that indicated he had any violent tendencies. Both women admitted to having been more aggressive than he was with regards to their sexual relationship.

Chris frequently returned to Santa Barbara throughout the time he lived in Tucson. Ray and Linda Jackson both noted that his mood changed whenever he talked to his mother. They got the impression from Chris that she was always making promises and plans, which always seemed to fall through. Some of these plans included Chris' coming back to Santa Barbara.

In 1987, when Chris returned to Santa Barbara, he worked as manager in a Pizza Hut Restaurant. His friends were under the impression that everything was fine. He and Rachel Koester continued their relationship after he moved, until she broke it off several months after he was in Santa Barbara. According to his mother, and Rachel, Chris was very upset when he received the Dear John letter.

Chris returned to Tucson in 1988. According to the statement given by Don Alden in May of 1989, Chris answered an ad in the paper in or around May 1988 and came to work for him, as his personal aide and nurse. Don Alden was a paraplegic. He died January 1, 1992, according to the probate records.

Mr. Alden stated, in his original statement that Chris was an excellent employee. According to people who knew what he was doing, Chris enjoyed the work. He enrolled in classes at Pima Community College, with a nursing major. The classes included Health Careers Math, Introduction to Psychology and a Writing Class. He dropped out.

When John Whipple returned to Tucson in 1988, he noticed the parties had definitely gotten wilder. Chris was more short tempered at times. John noted his mood swings were way up, or way down. When he was down, he had nothing good to say about himself, or anyone else. Chris tried to keep a good attitude about life, but did not seem to handle disappointments or problems well during this period of his life.

His sister Gretchen married in October 1998, in Tucson. She moved here in 1987, when she was 17. It was not until she came to Tucson that her mother filed a report with the police, putting her on runaway status. Gretchen didn't find this out until she applied for a job at the Tucson airport and was arrested.

In reviewing the photos of Chris over the years, a great change can be noted from 1987 to 1988. Chris had gained weight and dyed his hair blonde, as seen in the latter photo.

Ray and Linda Jackson moved back to Santa Clara, California in 1988. Ray's work periodically brought him back to Arizona. He and Chris saw each other on occasion. Ray thought Chris was doing fine. His visit to Chris' apartment showed it was neat and clean. Gretchen and her husband Craig moved back to California, in January 1989. Jon Whipple, who was unable to locate any work other than Burger King, returned to Canada in late 1988 or early 1989.

<u>The End of 1988 into 1989:</u>

Chris lived with Gretchen for a couple of months between living with Jon Whipple and moving in with Craig Clark. He may have also stayed with Don Alden, his employer, before he and Craig got their apartment. Mr. Alden noted Chris appeared unhappy in his work. Chris left

his employ, by mutual agreements. They remained friends and Chris called him from California. When Mr. Alden visited Chris in jail after the incident, he told Sharon Kubiac, who was also there visiting Chris, "I love Chris. He is the most pleasant boy I have ever known."

May 1989:

What transpired when he returned to Santa Barbara in May 1989 is not entirely clear. He spent time with his mother, the Becerra brothers, Dennis Patterson and his cousin, Scott Jouett.

Susan stated that Chris told her he wanted to come back home. She did not tell him he couldn't. She told him he had to go back to Tucson to square things with his employer and roommate. From Chris' letters to his uncle John and from what Chris told Ray, Susan had offered him a job, taking care of the apartments. In return he was to receive an apartment for $125.00 a month. When he got to Santa Barbara, his mom had hired a college student instead.

In Susan's original statement to Richard Bozich, she alludes to the apartment and the amount of the rent. She also alludes that it was Chris' idea, not hers, for him to move into the apartment at a discounted rate, in return for taking care of the complex. She claimed at that time that she had no power to make that kind of decision, because of Steve and the divorce.

Richard and Tony Becerra and Dennis Patterson stated that Chris didn't mention that he might be moving back to Santa Barbara when they saw him. They had suggested this themselves. Chris told them no, he had a new job in Tucson and he was going back to school. In retrospect, he seemed more hyper and tense at the time.

Chris returned to Tucson approximately one week prior to May 18, 1989.

Witnesses talked about the fund raising effort, after Chris was arrested. Susan and Steve both stated they had wanted to raise money for Chris' defense. Susan alleged she could not afford to do so on her own. According to the divorce records filed in December, 1989, Susan and Steve owned a million dollars worth of property in Santa Barbara. There were encumbrances on some of it, but Susan was not as poor as she alleged at the time, and still maintains. Susan

complained bitterly about Marshall Tandy's performance, yet she was able to attend only a half a day of the trial and didn't show up for the sentencing. She washes her hands of any responsibility for not hiring a private lawyer, blaming other family members for not contributing, even though Ray paid for the psychiatrist, Dr. Blinder, and psychologist, Dr. Flynn.

Witness Reactions to Learning about Chris's Situation:

Many of the witnesses contacted did not know Chris was in jail, much less that he was on death row. They all stated, it was impossible to conceive that Chris had murdered someone. In the years they knew him, he displayed no temper or any propensity for violence. He rarely displayed anger. He was a kind and gentle person.

Claims for Relief:

I. Ineffective Assistance of Counsel at the Guilt/Innocense Phase of Trial.

Trial counsel for petitioner committed ineffective assistance of counsel at the guilt/innocence phase of trial, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Art. 2. §§ 4 and 24 of the Arizona Constitution, in the following respects:

A. Counsel Failed to Properly Contest the Speedy Trial Violation in Defendant's Case.

In it opinion in this case, the Arizona Supreme Court recognized the gross violation of Rule of Criminal Procedure 8, but laid the blame for the failure to legally vindicate defendant's rights on his attorneys'[1] failure to timely file his motion to dismiss or to notify the trial court and prosecutor of the impending violation. *See* State v Spreitz, 190 Ariz. 129, at 138-39, 945 P.2d 1260, at 1269-70 (1997).

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[1] Defendant alleges ineffective assistance of counsel on this issue as to both his trial attorneys, William Lane and Marshall Tandy.

The time line regarding this issue needs to be set forth. Defendant was arrested on May 25, 1989. Defendant was arraigned on June 12, 1989. (ROA 14). After several continuances, his pre-trial conference was held on August 30, 1989, and the trial was ordered to be set for February 14, 1990. (ROA 23). That date was 264 days after defendant's arrest, and 246 days after his arraignment. Since both dates were well beyond the Rule 8 limits, see Rule of Criminal Procedure 8.2(a) and (b), the judge advised defendant that he had a right to have the trial sooner, but the defendant agreed on the February trial date. (RT 8/30/89 at 4-5).

On January 25, 1990, after the state notified the court that her DNA expert from the FBI would not be ready until March, counsel for the defendant inexplicably moved to continue the trial date. (ROA 32; RT 1/25/90 at 2-6). The trial was reset to April 3, 1990. Id. Counsel was directed to file a written motion to continue and waiver by defendant. In the motion, Mr. Lane referenced the fact that the interviewing of state's witnesses had not been completed, in addition to the delay in processing the DNA evidence by the FBI. (ROA 33).

At the continued status conference on March 27, 1990, counsel for defendant, Mr. Lane, informed the court that defendant wished to change attorneys and that the family was attempting to hire a private attorney, Jeffrey Bartolino. (ROA 38; RT 3/27/90 at 2-6). On April 2, 1990, the court was informed that Mr. Bartolino would know within two weeks whether he was to be retained based on the defendant's mother trying to obtain a loan. The court found the case could not be tried on April 3 for that reason and for the reason that even though the state had received the DNA results from the FBI, they had inexplicably not been disclosed to the defense. (ROA 39; RT 4/2/90 at 2-7). Defendant waived Rule 8 again. Id.

On May 4, 1990, Mr. Bartolino informed the court that he had still not been hired. Defendant again waived Rule 8 and the trial was reset to September 11, 1990. (ROA 41; RT 5/4/90 at 2-9). On May 24, 1990, Mr. Bartolino informed the court that he would not be retained; the September 11, 1990 trial date was affirmed. (ROA 42).

On August 29, 1990 the state filed a motion to compel counsel for defendant to submit

dates for witness interviews, expressing frustration that counsel was not diligently pursuing the interviews. (ROA 50). On September 6, 1990, the court gave counsel until September 12 to establish dates for interviews. (ROA 51; RT 9/6/90). On September 11, 1990 counsel filed another motion to continue the trial, citing the fact that interviews had not been completed, that he "wasn't able to arrange to hire the experts necessary to deal with the admissibility of the DNA evidence" and the fact that he had the flu for two weeks. (ROA 54). The court then continued the trial until January 24, 1991, 20 months after defendant's arrest. (ROA 55; RT 9/11/90).

Notwithstanding his representation to the court in his motion for continuance, coupled with the fact that he had been aware that DNA was an issue at least nine months earlier, counsel did not file a motion with the court requesting the appointment of a DNA expert until September 12, 1990. (ROA 59). On September 17, 1990, the court "reluctantly" granted his request. (ROA 61; RT 9/17/90 at 7-10).

On January 14, 1991, counsel again filed a motion for a continuance of the January 24 trial date. (ROA 81). The motion cited the fact that witnesses had still not been interviewed and that a hearing still had to be conducted and prepared for regarding the admissibility of DNA evidence. That same date a hearing was held, although the defendant was not present, and the trial was continued again, this time to April 23, 1991. (ROA 82). Defendant thereafter filed a written waiver and an acknowledgment of the April 23 trial date. (ROA 83; RT 1/14/91 at 7).

Six days before trial, on April 17, 1991, Mr. Lane filed a motion for appointment of a second attorney skilled in DNA. (ROA 92). For the first time, counsel acknowledged that DNA "requires skills that the undersigned does not possess." Id. On April 23, 1991, the trial date was vacated and continued, although defendant was not present. (ROA 97). No new trial date was set, only a status conference date. Id. Defendant never submitted a Rule 8 waiver.

The rest of the year was consumed with new counsel's (Ms. Sotelo) handling of the DNA issues. On November 7, 1991 the court, in a comprehensive minute entry, set dates for the hearing on the admissibility of the DNA evidence, through December 20, 1991. (ROA 122).

On November 26, 1991, Mr. Lane moved to withdraw from the case based on the fact that his father had been diagnosed as terminally ill. (ROA 130). On December 3, 1991, new counsel, Marshall Tandy, was appointed for defendant. (ROA 131).

On April 6, 1992 the court granted Ms. Sotelo's motion for a stay to file an application for special action to the court of appeals. (ROA 151). The stay was to last until April 27, 1992. Id. On April 22, 1992, the court extended the stay to May 11, 1992. (ROA page 1576)[2]. No further stay was entered, but a minute entry from June 15, 1992 notes that the court of appeals declined jurisdiction of the special action, and a status conference was set for June 22, 1992. (ROA 158). On June 22, 1992, the status conference was reset to July 13, 1992, and the court specifically found that the time was attributable to the defense because a petition for review to the Arizona Supreme Court was being sought. (ROA 159; RT 6/22/92). That status conference was continued to August 14, 1992 (ROA 161) and that status conference was continued, in turn, to September 14, 1992, while awaiting word from the Supreme Court. (ROA 162; RT 8/14/92).

On August 19, 1992, the judge sua sponte wrote the Chief Justice of the Supreme Court asking for an expedited ruling on the petition for review and noting that the case was now over two years old. (ROA 163). On September 14, 1992 defendant wrote the judge, expressing concern that in the past year he had only seen his attorney, Mr. Tandy, one time for 15 minutes. (ROA 164). The defendant concluded by asking for a new attorney, "who will take an interest in my court case and not just spend the court's money." Id. At the hearing that date, Mr. Tandy assured the court that "I have been discussing this, with Mr. Spreitz, and I don't think we have any kind of problem, between one and (sic) another at this point." (RT 9/14/92 at 4). The defendant still expressed concern, however, telling the court, "I wonder whether he understands what's going on, and, he could come out and talk to me a little more often." Id.

On November 9, 1992, the record notes that the Supreme Court had denied review.

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[2] For some reason, this entry is not contained in the index, so it is referenced herein by page number.

(ROA 169). On November 19, 1992 the court set the remainder of the hearings on the DNA to be conducted in the latter part of January, 1993, more than a year after the original DNA evidentiary hearing was due to be conducted. (ROA 172). The hearings dragged on, however, and on February 1, 1993 the court set resumed hearings through April 23, 1993. (ROA 178). Those hearings were then reset to April 28 and 29, 1993. (ROA 180). At that time, the defendant also asked for a hearing regarding Mr. Tandy's representation of him. Id.

At the hearing on March 3, 1993, Mr. Tandy advised the court that the DNA issues were taking all the time and so his presence in the case was not visible. (RT 3/3/93 at 2-4). Defendant addressed the court and stated that he had visitation slips showing that in a year and one-half, Mr. Tandy and his investigator had only visited him a total of 32 minutes! (RT 3/3/93 at 5). "I'm not exactly sure – but, something doesn't seem right." Id. At the hearing on March 19, 1993, after apparently receiving assurances from Mr. Tandy, the defendant withdrew his motion for new counsel. (RT 3/19/93 at 7). The defendant and the prosecutor noted, however, that defendant had been in custody for almost four years. Id.

On May 5, 1993, the judge ordered counsel to submit proposed findings of fact and conclusions of law regarding the DNA issue by June 4, 1993. (ROA 194). The DNA hearings continued into June, however. No hearings took place after June 3, however, and on August 17, 1993, the court set a status conference for August 23, 1993. (ROA 209). On August 23, argument was set for October 4, 1993. (ROA 210). On October 4, 1993 the court set a hearing on pending motions for April 27, 1994 and the trial for June 28, 1994. (ROA 213). Unfortunately, whatever conversations may have occurred wherein it was decided to set the trial so far off were not transcribed, so no record exists on why the court chose to postpone the trial so long.

Finally, on January 12, 1994, the court made an in-chambers ruling regarding the DNA issues and signed the findings and conclusions which had been submitted by the state. (ROA 230). Notwithstanding the October 4, 1993 order setting the trial for June 28, 1994, the court

issued a minute entry on February 11, 1994 setting a status conference for the reason that no trial date was set. (ROA 232). The status conference was then reset for February 18, 1994, but there is no record of its having taken place. (ROA 233). The next entry in the record is April 27, 1994 when another evidentiary hearing regarding DNA took place. (ROA 234). There is absolutely nothing in the record to indicate why this delay occurred or that it was excluded time.

On May 27, 1994, almost two and one-half years after being appointed to the case, Mr. Tandy filed his first substantive motions, to suppress evidence under two similar theories.. (ROA 235, 237). On June 2, 1994 counsel filed another motion to suppress. (ROA 239). On June 3, 1994, during another hearing on DNA the court ruled that DNA would not be admissible at trial for failure of the FBI to comply with disclosure orders of the court. (ROA 241, RT 6/3/94 at 54). At the hearing on the suppression motion on June 15, 1994 counsel for the first time advised the court that he was filing a motion to dismiss for violation of speedy trial rights. (ROA at page 2090; RT 6/15/94).[3] On June 16, 1994 counsel filed a motion to dismiss and motion for release, citing constitutional and statutory violations. (ROA 247.)

On June 17, 1994 Mr. Tandy, in absence of the defendant, and waiving a court reporter, asked that the motions hearing be continued and reset to June 28, 1994, the present trial date. (ROA 252). On that date, testimony was taken and argument was set for July 6, 1994. (ROA 254). On July 25, 1994 the court denied defendant's speedy trial motion. (ROA 256).[4] In so ruling, the court found that the delay was attributable to both the defense and the prosecution, but that the defense had failed to properly assert defendant's speedy trial rights. The court further found that defendant was not prejudiced due to the delay.

This latter point is incorrect, however. Significant evidence which was essential to the

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[3] For some reason this minute entry does not appear in the index.

[4] Although the record on appeal states that the July 19, 1994 minute (ROA 255) appears on page 2157, it actually appears on page 2161, following the July 25, 1994 minute entry.

defense, especially for mitigation purposes, was lost as a result of the delay. For example, Don Alden, an essential mitigation witnesses (as discussed *infra*) died in 1992 and was, therefore, unavailable to testify at the mitigation hearing. Also, had counsel raised the speedy trial issue in the first instance, on January 25, 1990, after the state notified the court that her DNA expert from the FBI would not be ready until March, instead of inexplicably moving to continue the trial date, (ROA 32; RT 1/25/90 at 2-6), the state would in all likelihood have offered a plea bargain, at least alleviating defendant of having to face the possibility of the death penalty at sentencing. It wasn't until August 29, 1990 that the state even noticed its intent to seek the death penalty. (ROA 49).

In its ruling in defendant's case, the Arizona Supreme Court found that defendant explicitly waived his Rule 8 rights through April 23, 1991. In so finding, however, the court noted that on April 2, 1990 and again on May 4, 1990 defendant requested the continuance because his mother was attempting to hire private counsel. As has been pointed out, during this time, counsel was continually admonished by the court for having failed to conduct defense interviews or notice expert witnesses.

It wasn't until April 17, 1991, eight days before trial was supposed to commence that counsel acknowledged that DNA "requires skills that the undersigned does not possess." (ROA 92). By that time, defendant had been incarcerated for almost two years and counsel had been on notice that DNA was an issue since before January, 1990. In fact, on January 25, 1990, after the state notified the court that her DNA expert from the FBI would not be ready until March, counsel for the defendant inexplicably moved to continue the trial date. (ROA 32; RT 1/25/90 at 2-6). That counsel for the defense would request a continuance to allow the prosecution to prepare for its DNA evidence against defendant is egregious. Defendant had confessed; counsel had no reason to believe the DNA evidence would help the defendant.

That attorney, William Lane, then withdrew from the case on November 26, 1991 citing the fact that his father had been diagnosed as terminally ill. (ROA 130). Although that fact is

certainly regrettable, it is not a credible reason to withdraw from a case. More likely, counsel felt overwhelmed by the case and did not want to be responsible for the result. Counsel's entire performance to that time, two and one-half years after defendant's arrest, can only be described as dismal. He had not timely interviewed witnesses, he had not followed up on the information received from his mental health experts or sought to correct their misimpressions as to the facts of defendant's life through more thorough investigation, he had hired an investigator who submitted interview tapes with so many gaps that they were worthless and who never submitted reports, counsel had failed to file motions and had raised defenses which he was not attempting to prepare. By the time he withdrew, the defense was in shambles.

When Marshall Tandy[5] took over as attorney for the defense, he did no better. A review of the defense file shows that he did not conduct a single witness interview. The file contains zero work product of Mr. Tandy from December, 1991 until he finally filed the motions to suppress evidence, in May, 1994.

On September 14, 1992 defendant wrote the judge, expressing concern that in the past year he had seen Mr. Tandy only once, for 15 minutes. (ROA 164). While the Supreme Court faulted the defendant for failing to bring to the trial court's attention the fact that the three year delay to litigate DNA issues was a violation of his rights, *see* State v Spreitz, 190 Ariz. at 138, 945 P.2d at 1269, the defendant cannot be faulted when his counsel spent no more than 15 minutes a year consulting with him. A defendant cannot be expected to argue his own motions to the court. The Supreme Court seemingly recognized this when it held that Rule 81.(d), Ariz.R.Crim.Pro. "requires defense *counsel* to 'advise the court of the impending expiration of time limits in the defendant's case.'" Id. (Emphasis supplied). "Defendant could have asserted his rights and filed a motion to dismiss any time after thirty-three days past April 23, 1991; he elected not to do so." Id. at 139, 945 P.2d at 1270. Although the first part of that statement is undoubtedly true, the second part is not. If defendant's attorneys never asserted his rights for

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[5] Mr. Tandy was recently convicted of a federal felony.

him, defendant was not in a position to do so.

In conclusion, both of defendant's trial attorneys, Lane and Tandy, were ineffective in failing to timely assert defendant's speedy trial rights. Defendant's judgments of conviction and sentences must be reversed.

B. Counsel Failed to Present the Insanity Defense.

In his statement to police, defendant cried, "I need help." On January 3, 1990, defendant's first counsel, William Lane, filed his Rule 15 disclosure listing insanity and "impulsivity" as defenses. (ROA 29). On August 29, 1990, over eight months later, the state filed a demand for disclosure. (ROA 48). The motion noted that although the defense had disclosed two defenses of a psychiatric nature, no expert had been disclosed. The same day, new counsel for the state filed a notice of intent to seek the death penalty. (ROA 49).

On November 26, 1990, counsel filed a motion requesting that James R. Allender, Ph.D. be allowed a "face-to-face" interview with defendant at the jail. (ROA 71). This is the first indication in the record that counsel had actually made any effort to have defendant evaluated, more than a year after his arrest.

In fact, an evaluation of defendant had been done almost immediately after his arrest. Martin Blinder, M.D., a psychiatrist, had seen Chris on May 31, 1989 within a week of his arrest. According to Chris' mother, Susan Mendenhall, Dr. Blinder recommended neurological testing and Mr. Lane requested $1,000 for same from the family. Ms. Mendenhall claims she sent Mr. Lane a check for that amount, but then stopped payment on the check when he did not return her phone calls. Counsel never sought funds from the court to pay for the testing, which was never done. In fact, Dr. Blinder's report is not even contained in the materials received by undersinged counsel and only came to light through the efforts of the present investigator, Cheryl R. Fischer. It is unknown whether Mr. Tandy had access to Dr. Blinder's report or had any contact with Dr. Allender, due to the fact that nothing appeared in the files given to undersigned related to either the psychiatrist or the psychologist.

On January 2, 1991, the state filed another demand for disclosure requesting any witnesses who would be called in either the defense-in-chief or in mitigation at sentencing. (ROA 206). The motion also asked for a statement to the effect that no mitigation would be presented, if that was the case. Id. The state also let it be known that it would be contesting any claim that defendant was intoxicated at the time of the crime.

The fact that counsel filed an insanity defense after Dr. Blinder evaluated defendant can only lead to the conclusion that counsel believed that there was enough evidence of temporary insanity to warrant the use of that defense. Dr. Joseph Geffen, who recently tested and evaluated defendant at the behest of undersigned counsel, came to the conclusion that defendant was temporarily insane at the time of the commission of the offense and that this defense would have been viable under the law in effect at that time, A.R.S. § 13-502.

Despite overwhelming evidence that defendant was operating in an alcoholic blackout at the time of the crime (see defendant's statement to police) counsel did nothing to seek an expert with knowledge of that area. Nor did counsel investigate defendant's head injuries as a child, or follow up on Dr. Blinder's suggestion that neurological testing be conducted.

At the time of the crime, the old insanity law was in effect and could have been utilized by defendant. That law, A.R.S. § 13-502 stated that, "A person is not responsible for criminal conduct by reason of insanity if at the time of such conduct the person was suffering from such a mental disease or defect as not to know the nature and quality of the act or, if such person did know, that such person did not know that what he was doing was wrong."

Notwithstanding the fact that counsel noticed the defense of temporary insanity, he failed to pursue it by investigating defendant's past head injuries, his blackout on the night of the murder, and his overwrought mental state at the time of the commission of the offense. Counsel's conduct was ineffective. But for his ineffectiveness, defendant would probably have been acquitted of the crime based on temporary insanity. The judgments of conviction and sentences must be reversed.

C. Counsel Never Objected to Irrelevant and Highly Prejudicial Testimony Regarding Homosexuals.

At trial Sgt. Victor Chacon of the Tucson Police Department testified that he interrogated defendant by the side of the road on the night he was stopped shortly after the victim was killed (unknown to the police at that time). Chacon testified:

> Well, I asked him if he was gay, and his response was, well, a little bit.
>
> ...
>
> Well, there is a sex act that, I guess, homosexuals involve in where they insert their hand or an arm into the (sic) their partner's rectum and there is some transference of fecal matter sometimes or most of the time.

RT 8/10/94 at 251.

Counsel never objected to this unbelievably prejudicial and totally irrelevant evidence. Supposedly, Chacon asked the question because he thought that might be an explanation as to why defendant had blood and fecal matter on his clothes, but why he asked the question was totally irrelevant, as was the question regarding whether defendant was a homosexual. All it did was to disgust the jurors and prejudice defendant in their eyes, especially those who harbored bias against homosexuals in general.

Counsel should have anticipated the question and response, first, because it was contained in Chacon's police report, but even if counsel never read Chacon's police report, he testified exactly the same during the hearing on the motion to suppress prior to trial. RT 6/28/94 at 64. Not only did not counsel not object or file a motion in limine to prevent the state from inquiring into this highly offensive and prejudicial area, counsel never requested the court to inquire of the prospective jurors their bias towards homosexuals. RT 8/9/94 at 155. (Counsel declined the opportunity to personally voir dire the jurors).[6]

Counsel's ineffective response to this highly prejudicial line of testimony cannot be said

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[6] In fact, not only did counsel not voir dire the jurors himself, he never submitted any questions for the court to ask.

to have been harmless. Defendant's judgments of conviction and sentences must be reversed.

D. Counsel Never Had a Theory of the Defense and Failed to Present Any Witnesses or Give Defendant the Opportunity to Participate in that Decision.

After the state rested its case at trial, counsel for the defense rested, as well. RT 8/16/94 at 651-652. Counsel informed the court at bench that he had no witnesses. Id. at 651. This is after having informed the jury during his opening that he hadn't decided whether the defendant would testify or not. RT 8/10/94 at 218. ("I will tell you right now that we haven't decided yet whether Mr. Spreitz is going to testify. ... So if you are sitting there thinking, we may or may not hear from Mr. Spreitz, that is the right frame of mind. We may or may not hear from him. This decision is not made at this particular point in time.")

Counsel effectively conceded the case to the state in his opening. "I think it is going to be certifiable that in this case I'm not going to be here saying to you during the course of the next few days they have the wrong guy." RT 8/10/94 at 211. "[W]e are not denying his responsibility in the death of Ruby Reid." Id. at 212. "That sounds pretty bad. Not much doubt left here as to probably what happened ..." Id. at 212-13.

Counsel never had a theory of the defense, although he did, lamely, suggest to the jury at the conclusion of his rambling opening that the defendant was guilty of a lesser degree of homicide than first degree murder. RT 8/10/94 at 218. Given that counsel never had a theory of the defense, despite there being the obvious defense of temporary insanity (see argument IB, *supra*), it is not surprising that he never presented a defense or called witnesses.

Not only was failing to present a theory of the defense a fatal mistake, additionally counsel never discussed the matter with the defendant. In fact, counsel told the defendant that he had lined up several witnesses to testify and that the defendant also may testify, and defendant was surprised when counsel suddenly rested.

Again, during his closing, counsel rambled and appeared confused. "I don't remember exactly when it was that we started. I think it was last Tuesday." RT 8/17/94 at 693-94. "You

know, it is difficult, I think, to know exactly where to start." Id. at 695. At the end of his jumbled discourse, counsel finally asked the jury to find that there was no kidnapping, no sexual assault and no premeditation. Id. at 732. ("Christopher Spreitz is not denying, does not deny that he was responsible for the death of Ruby Reid. What he does deny is that he kidnapped her, that he raped her, and that he did it with premeditation.") He never suggested to the jury what verdict they should respond with, however, even though they were instructed on both second degree murder and manslaughter. RT 8/17/94 at 671-72.

In Hart v. Gomez, 174 F.3d 1067 (9th Cir. 1999), the court found trial counsel's performance deficient where he failed to adequately investigate and introduce into evidence facts that would demonstrate his client's innocence or raise sufficient doubt as to that question to undermine confidence in the verdict. Id. at 1070. Referring to its holding in Sanders v. Ratelle, 21 F.3d 1446 (9th Cir. 1994), the court stated:

> As in *Sanders*, Hart's defense counsel was presented with important exculpatory evidence, and like Sanders' attorney, Hart's counsel failed to conduct any investigation regarding that evidence. In short, Hart's counsel "failed to fulfill his duty to investigate [Hart's] most important defense," *Sanders*, 21 F.3d at 1457, and was therefore, deficient.
> ...Our conclusion was based on two factors: 1) the evidence would constitute a strong defense to the murder charges against Sanders, and (2) "there was no conceivable strategic or tactical reason not to use this evidence at the... trial" *Id.* Both factors are present in the case at bench.

Id. at 1071.

Those two factors are present in the instant case, as well. Potential witnesses were not located and interviewed. "Where defense counsel is so ill prepared that he fails to understand his client's factual claims or the legal significance of those claims or that he fails to understand the basic procedural requirements applicable in court, we have held that counsel fails to provide service within the range of competency expected of members of the criminal defense bar." Young v. Zant, 677 F.2d 792, 798 (11th Cir. 1982). *See also*, United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Since counsel had no theory of the defense, the

trial became a "meaningless ritual." Douglas v. California, 372 U.S. 353, 358, 83 S.Ct. 814, 817, 9 L.Ed.2d 811 (1963).

Furthermore, defendant never waived his right to testify:

> The right to testify is a constitutional right of fundamental dimensions.
>
> ...
>
> As the right is fundamental and personal it can only be relinquished by the person to whom it belongs, the defendant in a criminal trial. The general rule is clear that the relinquishment of such a right must be intentional and to be intentional must be known to the one who gives it up.

United States v. Martinez, 883 F.2d 750, 756 (9th Cir. 1989), opinion vacated and conviction reversed, 928 F.2d 1470 (9th Cir. 1991), citing Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1089 (1938).

Counsel's failure to present a defense, or to allow defendant to participate in deciding whether to present witnesses or to testify violated his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Art. 2 §§ 4 and 24 of the Arizona Constitution. His judgments of conviction and sentences must be reversed.

E. Counsel Never Presented Available Evidence that Defendant Was Intoxicated at the Time of the Commission of the Offense.

Intoxication could have been used as a defense in this case. Defendant was charged with kidnapping, which requires intent. *See*, A.R.S. § 13-1304(A). Also, premeditated murder and sexual assault may require intent. *See* A.R.S. §§ 13-1101(1); 13-1406(A). At the time of the commission of the crime in the instant case, the legislature allowed the jury to conder the fact that a defendant was intoxicated at the time of the criminal act when determining the defendant's culpable mental state, i.e. intent. A.R.S. § 13-503; *see also* State v. Rankovich, 159 Ariz. 116, 765 P.2d 518 (1988).

Although Rankovich and other cases attempted to distinguish crimes that can be committed either intentionally or knowingly as far whether an intoxication instruction had to be given, those cases are wrongfully decided, since there is no logical or meaningful distinction

between the two mental states. *See* A.R.S. §§ 13-105(9)(a) and (b). It is impossible to give an example of something which is done intentionally but not knowingly, or knowingly but not intentionally. This argument need not be resolved for purposes of this issue, however, since the court did give the jury the intoxication instruction. RT 8/17/94 at 673-74; ROA at p. 2276.

Given the fact that the instruction was given, it was incumbent upon counsel to make the most of the evidence, especially given the fact that the state was trying very hard to convince the jury that defendant was *not* intoxicated, through the testimony of the officers who stopped and interrogated him by the side of the road shortly after the commission of the crime.[7]

Yet counsel never called Lucy Eremic as a witness for the defense. Lucy Eremic was the woman defendant was dating at the time. She told police and the defense investigator that defendant called her from the bar that night and sounded intoxicated; he told her he was "really trashed." He then came uninvited to her apartment at 12:40 a.m. and banged on her apartment door and forcefully tried the doorknob, attempting to get in. This is clear and compelling evidence that defendant was intoxicated shortly before he killed the victim.

Counsel could also have presented the testimony of defendant's cousin, Scott Jouett, as to his behavior when stopped by the police. Scott was familiar with defendant's drinking habits and would have testified that defendant often operated in a blackout when he had been drinking, but that his friends could not tell. "No one ever knew when he was in a blackout until later; his attitude never changed and he could drive a car or bike straight down the road. It wasn't until later when they'd rehash what had occurred the night before that anyone was aware that defendant had been operating in a blackout." Investigator's interview with Scott Jouett at 3. Defendant's high school friends Richard Becerra, Tony Becerra and Dennis Patterson also verified that defendant operated in a blackout when drunk.

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[7] Counsel was on notice as early as January 2, 1991 that the state was contesting any claim that defendant was intoxicated. (ROA 206).

Counsel was clearly ineffective in failing to present this evidence. Defendant's judgments of conviction and sentences must be reversed.

F. Counsel Failed to Aggressively Pursue a Plea Bargain for Defendant.

Despite the incredible delay in bringing defendant's case to trial, counsel never pursued a plea bargain. Had counsel not continued the trial in order to allow the state to complete its DNA testing, the state would have probably offered the defendant a plea bargain. Furthermore, had counsel attempted to portray defendant in a human light to the prosecutor and shown his many good qualities, he would have been a given a plea bargain to life in prison, sparing the state the expenditure of resources and the victim's family the anguish of a trial, especially given defendant's cooperation with police. *See* State v. Miller, 186 Ariz. 314, 326, 921 P.2d 1151, 1163 (1996), *cert. denied*, 117 S.Ct. 1088 (1997) (admission of guilt and cooperation with police can be a mitigating circumstance).

Instead, counsel did nothing. Plea bargaining is a critical stage of trial. *See, e.g.* Hill v. Lockart, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985) (a defendant establishes ineffective assistance of counsel where he shows that counsel's performance "affected the outcome of the plea process ... [such] that absent the erroneous advice, he would have insisted on going to trial."); United States v. De la Fuente, 8 F.3d 1333 (9th Cir. 1993) (counsel's failure to bring plea-breach claim to the sentencing judge's attention constituted ineffective assistance of counsel); United States v. Blaylock, 20 F.3d 1458 (9th Cir. 1994) (failure to communicate plea bargain to defendant constituted ineffective assistance of counsel). Counsel's failure to attempt to obtain a plea bargain for defendant deprived him of his right to effective assistance of counsel in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Art. 2, §§ 4 and 24 of the Arizona Constitution. His judgments of conviction and sentences must be reversed.

G. Counsel Was Ineffective in Failing to Request Certain Jury Instructions or to Object to Certain Others.

Under arguments V, VI and VII, *infra*, defendant raises arguments related to certain jury instructions. Those arguments will not be repeated herein for the sake of efficiency, but they are hereby incorporated herein as if fully set forth. Defendant wants to make clear that he is also claiming that counsel was ineffective for failing to request the instruction which should have been given and were not (argument VII) and for failing to object to those wrongful and unconstitutional instructions which were given (arguments V and VI). In fact, the only objection which counsel made regarding the jury instructions was based on the court's failure to give a negligent homicide instruction. RT 8/16/94 at 656. Where counsel fails to offer an instruction or fails to object to misleading instructions, it may deprive a defendant of a fair trial. United States v. Span, 75 F. 3d 1383 (9th Cir. 1996). Counsel was clearly ineffective. Defendant's judgments of conviction and sentences must be reversed.

II. Ineffective Assistance of Counsel at the Sentencing Phase of Trial.

Trial counsel for petitioner committed ineffective assistance of counsel at the sentencing phase of trial, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Art. 2. §§ 4 and 24 of the Arizona Constitution. *See*, Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale Law Journal 1835 (May, 1994); Ivan K. Fong, Ineffective Assistance of Counsel at Capital Sentencing, 39 Stan.L.Rev. 461 (1984); Gary Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299 (1983); *see also*, Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

A. Counsel Never Understood or Researched the State's Theory of Aggravation.

The state presented no testimony at the aggravation hearing and relied on the cruelty of the murder as its sole aggravating circumstance. A.R.S. § 13-703(F)(6). Although counsel did make an argument that said aggravation did not exist, (ROA 296 at 13; p. 2341) it was terse and never even discussed the cruelty aspect in detail. ("It is the Defendant's position that cruelty, as defined by case law, does not exist in the instant case. The instances of pain and distress noted in

the cases, namely, Correll and Gillies are clearly distinguishable from the facts in this case.")

At sentencing, moreover, counsel demonstrated that he did not understand the legal distinction between cruelty and heinous and depraved, the other F6 factor. Counsel claimed in his rambling discourse to the judge that the leading case on cruelty was State v. Gretzler, 135 Ariz. 42, 659 P.2d 1, *cert. denied*, 461 U.S. 971 (1983), when, in fact, that case is only cited for the issue of whether a murder is heinous and depraved. *See* id. at 52-53, 659 P.2d at 11-12. (RT 12/21/94 at 4-7). The state, however, never alleged that the murder was heinous and depraved, only cruel.

What most concerned the court was whether defendant had kidnapped the victim in the classic sense. The state alleged that the defendant transported the victim to the scene of the murder in the trunk of his car, not voluntarily, as alleged by the defendant in his post-arrest statement to police. (RT 12/21/94 at 20, 25-27). When given the chance to respond, it is obvious that counsel never grasped the importance of this factor in deciding the cruelty aspect. (*See* RT 12/21/94 at 27-28: "MR. TANDY: [W]hen I look at the five (Gretzler) factors, being one of those apparent relishing of the murder by the killer, and infliction of gratuitous violence and that sort of thing, and I think that perhaps those are –"....THE COURT: I don't think (the prosecutor) is saying that he relished the murder.")

Counsel was totally unprepared to make a plausible argument, leading the court to make a sarcastic comment as to counsel's response. (RT 12/21/94 at 27-29). "THE COURT: You are considering that the blood got in the trunk while everybody is looking for beer, is this before or after he had broken her ribs?" (RT 12/21/94 at 29). Counsel never even pointed out the fact that the criminalist, Steven Clemmons, only found blood in the trunk of defendant's car, but was unable to type it or say with any certainty whose it may have been. RT 8/12/94 at 560 ("The only thing I did on [the sample from the trunk] was, again, collected it, and gave a positive result indicating the presence of blood. ...The problem had to do more with the actual size of the

samples.")[8] Based on this evidence, there was no way the court could find beyond a reasonable doubt that the blood on the trunk indicated that the victim had been placed in the trunk and transported to the scene of the murder. It could have been anybody's blood, or not blood at all. There was surely a reasonable doubt as to whether the victim's blood was in the trunk and, therefore, whether she had been transported in the trunk of defendant's car to the murder sight. Counsel never argued this, however, and that failure was crucial.

Notwithstanding the state of the evidence, after taking a recess, the judge did find that defendant had transported the victim in the trunk and that this constituted an aggravating circumstance (or established the aggravating circumstance of cruelty). RT 12/21/94 at 31-32.

Counsel's total failure to understand the state's basis for claiming that the killing was cruel and to properly research that issue and prepare it for sentencing was devastating. The court had not been predisposed to give the death penalty prior to the sentencing hearing. *See* RT 12/21/94 at 31 ("[W]hen I came on the bench my mind was open and I had not made up my mind as to what the sentence ought to be in this case.")

Had counsel properly prepared and addressed the issue of cruelty defendant probably would not have been given the death penalty. That is because, compared to other cases in which the cruelty factor was rejected, defendant's case was not comparably worse. Had counsel properly prepared and researched this issue, he could have shown the sentencing court that defendant had not acted in an *especially* cruel manner.

When a defendant purposefully inflicts mental anguish or physical abuse on a conscious victim, a murder is especially cruel. State v. Medina, 193 Ariz. 504, 975 P.2d 92 (1999); State v. Schackart, 190 Ariz. 238, 248, 947 P.2d 315, 325 (1997), cert. denied, 119 S.Ct. 149 (1998).

In State v. Hinchey, 165 Ariz. 432, 799 P.2d 352 (1990), cert. denied, 499 U.S. 963

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[8] On cross-examination, Mr. Clemmons backed up even further, claiming only that "it could be blood." RT 8/12/94 at 576. "Based on my test it was highly probable it was blood, but I cannot say for sure that it was." Id. at 577.

(1991) the Supreme Court reversed the trial court's finding of especial cruelty. The defendant therein argued with the woman he had lived with for 12 years about her two daughters from a prior marriage. He shot her four times. He then kicked open the bedroom door where the woman's 17-year-old daughter slept and when she awoke shot her twice in the face. Her infant daughter was also in the room, asleep.

Meanwhile, the mother had managed to run outside. The defendant ran after her, caught her, then beat her with the pistol until the trigger guard broke, at which point he beat her head against some rocks. He then returned to the daughter's bedroom. Hearing her moan, he beat her with a bottle of tonic water until the bottle shattered. She continued to moan, so the defendant went to the kitchen, got a knife and stabbed her numerous times, leaving the knife in her abdomen. The mother survived, but the daughter died.

The Supreme Court concluded, "As reprehensible as defendant's actions appear, we cannot agree that the evidence supports a finding that the crime was committed in an 'especially cruel' manner, as the term has been defined. This factor depends on the State presenting evidence establishing beyond a reasonable doubt that the victim actually suffered physical or mental pain prior to death." Id. at 438, 799 P.2d at 358.

In State v. Wallace, 151 Ariz. 362, 728 P.2d 232 (1986), appeal after remand, 160 Ariz. 424, 773 P.2d 983 (1989), cert. denied, 494 U.S. 1047 (1990) the Supreme Court reversed the trial court's finding that the murder was especially cruel. Defendant's girlfriend of two and one-half years asked him to move out of her mobile home because of his drug and alcohol use, and because she was seeing another man. The next day, the defendant, who had been drinking, waited for the woman and her two children, 16 and 12, to return home. When she walked in the door, he attacked her from behind with a baseball bat, striking her numerous times about the head, eventually breaking the bat. The victim moaned and defendant forced a portion of the broken bat through her throat until it hit the floor.

Defendant then retrieved a pipe wrench and waited for the children to return. When the

12-year-old entered the mobile home the defendant struck him repeatedly over the head with the pipe wrench with such force that the skull was fractured in several places and brain matter was clearly visible on the floor. When the 17-year-old came home from work, defendant talked to her. "As she turned to face defendant, he struck her on the side of her head with the same wrench he had used on [the 12-year-old]."

The Supreme Court concluded, however, that the State had failed to prove that the murder was especially cruel. It noted that the defendant attacked each of his victims quickly and by surprise. Id. at 367, 728 P.2d at 237. "The state offered no evidence to establish pain or suffering by the victims." Ibid.

In State v. Poland, 144 Ariz. 388, 698 P.2d 183 (1985), aff'd, 476 U.S. 147 (1986) the Supreme Court reversed the trial court's finding that the murder was especially cruel. Two Purolator security guards were found in Lake Mead. Autopsies revealed that the most probable cause of death was drowning, although in the case of one of the guards a heart attack may have been a possible cause of death. There was no evidence that the guards were wounded or tied before being placed in the water, although it was impossible to determine whether they had been drugged. There was no evidence of a struggle.

The court noted that "[w]e have interpreted 'cruel' as 'disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic.'" Id. at 405, 698 P.2d at 200, quoting State v. Lujan, 124 Ariz. 365, 372, 604 P.2d 629, 636 (1979), quoting Webster's Third New International Dictionary. Finding that there was no evidence of suffering by the guards, the court held that the state did not show cruelty beyond a reasonable doubt.

Focusing on the mind of the killer, the court also found that the murders were not especially heinous or depraved.

In State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1981), cert. denied, 456 U.S. 984 (1982) the Supreme Court reversed the trial court's finding that the murder was especially cruel. Therein the sentencing court found that the victim was "a defenseless woman," that the defendant

inflicted "multiple stab wounds in the neck and chest areas," that he then stabbed two of the victim's children and "poured gasoline on or upon the body of the mother and in other areas of the home so as to prevent the children from leaving when the fire ignited," and then ignited the fire and "left the home blazing, with the victim and the three young children still in the home." Id. at 210, 639 P.2d at 1035. Finding that the state had failed to prove beyond a reasonable doubt "that the victim suffered during the commission of the murder," Ibid., the Supreme Court reversed the cruelty finding.

In State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980), the Supreme Court reversed the trial court's finding that the murder was especially cruel. In that case, the defendant went to the victims' house to steal marijuana. He found the wife at home and she resisted his attempt to steal the marijuana. He shot her twice then dragged her into the bedroom where he shot her again several times, emptying his gun to "finish her off." State v. Ceja, 115 Ariz. 413, 416, 565 P.2d 1274, 1277, cert. denied, 434 U.S. 975 (1977). Two shots were to the chest, four to the front of her ear in the temple area, and the seventh shot grazed her back. Ibid.

Defendant then loaded the victim's gun, which he found in a drawer. When the husband came home, the defendant ordered him at gunpoint into the bedroom. Defendant then shot the husband twice in the front and twice in the back. His body was found lying in the hall leading to the bedroom.

In Ceja I the Supreme Court found that the murder was cruel. Following its opinion in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979), the Supreme Court remanded all death penalty cases to the trial courts for resentencing. Ceja was again sentenced to death and his crime was again found to be cruel, heinous or depraved by the trial court. In Ceja II, however, the Supreme Court reversed its earlier opinion as to the cruelty holding. "[T]he evidence is inconclusive as to whether the victims suffered in such a way as to support a finding that the crime was committed in a cruel manner." at 39, 612 P.2d at 495. *See also*, State v. Clark, 126 Ariz. 428, 436-37, 616 P.2d 888, 986-97, cert. denied 446 U.S. 1067

(1980) (defendant killed four victims, but "[t]here is no evidence that any of the victims suffered any pain. The fatal wounds appear to have been delivered at vital parts of the bodies of the victims, and death ensued swiftly."); State v. Bishop, 127 Ariz. 531, 534, 622 P.2d 478, 481 (1980) (defendant struck victim in the back of the head several times with a claw hammer; no evidence of cruelty).

The instant case presents a scenario which is no more cruel than that presented in the cases above where cruelty was not found. Counsel failed to present these cases or argue them to the court, instead focusing on the five factors in Gretzler, which relate to heinousness and depravity, not cruelty. He misunderstood the state's theory of the case and failed to prepare for sentencing. His incompetence was the direct cause of defendant herein receiving the death penalty. This was a close case with only one-half of an aggravating factor alleged by the state and accepted by the court. There was an abundance of mitigation. Had counsel properly prepared for the aggravation/mitigation hearing, defendant would not be on death row today. His sentence of death must be reversed.

B. Counsel Never Presented Available Witnesses at the Time of the Mitigation Hearing Who Could Humanize Defendant.

In addition to failing to properly prepare to rebut the state's theory of aggravation, counsel totally failed to present mitigation evidence which would have spared defendant the death sentence even if the court found the aggravating circumstance of cruelty.

Counsel presented as mitigation only Chris' alcohol abuse, his dysfunctional upbringing and his good behavior in jail. (ROA 296). Although these factors were all present and important, counsel never presented Chris as a good and kind person, which, in fact, he was. Counsel did passingly mention that "Chris was generally a person of good character," and Chris "lacks any anti-social personality traits." Id. These, however, were lumped together with other such non-statutory mitigating factors as, "Chris did not even graduate from high school," and "The theme and destructive effects of continued rejection and ostracism."

At the mitigation hearing, counsel presented the testimony of Todd Flynn, Ph.D., a psychologist who had interviewed and tested Chris, and two corrections officers, who had very little to say other than that Chris was not a problem at the jail. The judge must have been left to wonder if these were the only persons willing to testify regarding Chris' character, leaving his past one big blank.

In fact, there were numerous witnesses who could have testified as to Chris' personality, his behavior towards women, his helpfulness towards others, his concern for the disadvantaged and generally, the fact that the incident in question was totally out of character for Chris. If the court had been aware of Chris' complete background, it would have been more inclined to look upon the instant incident as one in which Chris did truly "snap" while under the influence of alcohol. Chris was not the type of person to do such a thing. Even though the extent of the beating administered to the victim suggested cruelty, Chris was not and is not a cruel person. Even though the kidnapping aspect of the crime suggested cold-blooded planning and execution, Chris is not cold-blooded nor is he an executioner.

During undersigned's investigation, numerous persons were willing to come forward to supply information about Chris' past. These included his mother and former step-father, his father and step-mother, his sister, his aunt, his uncle, former teachers and classmates and childhood friends. Furthermore, women who were girlfriends of Chris' have been contacted, including Tammy Blanton Brunner, the mother of Chris' daughter, and have given the picture of Chris as a normal, polite and sexually timid person. All these persons were available and willing to testify, and some of them had even been interviewed briefly by attorney Lane's investigator at the beginning of the case and the notes of their interviews were in attorney Tandy's files. He never contacted them or requested that they be witnesses for Chris at the mitigation hearing.

Another important witness would have been Donald Alden, a person who was well known to Chris but was never even interviewed by counsel. He died on January 1, 1992, almost three years prior to sentencing. Had counsel brought the case to trial more timely, Mr. Alden

would have been available to testify. Mr. Alden was a quadriplegic whom Chris cared for exclusively for approximately one year. Even after Chris left his job by mutual consent, Mr. Alden had nothing but good things to say about Chris. He would have made an extremely compelling witness, given his status as completely helpless and totally dependent upon Chris.

All that exists regarding contact with Mr. Alden is a half-page report by the prior attorney's investigator of an interview he conducted with Mr. Alden at his home on May 29, 1989. "Alden stated that even after he had terminated Spreitz they remained friends. They spoke on the phone frequently and Spreitz had called him from California." This brief interview was apparently not tape-recorded.

Lucy Eremic would also have made a good witness for Chris. In addition to testifying that Chris was very intoxicated on the night of the murder, she could have testifed that Chris was kind, considerate, and gentle with women. Rachel Koester Bach would have made a wonderful witness. Chris was devastated when she broke up with him. Still, to this day, she is willing to help in whatever way she can, and had she been contacted, would have willingly appeared to testify for Chris. Diane Thrash would also have made an excellent witness and counsel was in possession of a one page report from the investigator regarding his contact with Ms. Thrash. Caroline Duck[9] and Sharon Kubiak were also contacted by the former investigator and would have made good witnesses. All these women would have shown that Chris was not a predator with women, that he was normal sexually, that he was warm and caring and not violent or aggressive.

Counsel's failure to present witnesses who could humanize defendant and put his life in context was inexcusable and certainly constituted ineffective assistance of counsel. But for counsel's unconstitutional performance, defendant never would have been sentenced to death. His sentence of death must be reversed.

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[9] Unfortunately, Ms. Duck died after the mitigation hearing but before the work began on preparing this petition.

C. Counsel Failed to Investigate and Document Defendant's Childhood Head Injuries.

The significance of childhood head injuries in murderers has been documented in several studies. Sarapata, Herrmann, Johnson & Aycock, The role of head injury in cognitive functioning, emotional adjustment and criminal behaviour, Brain Injury, Brain Injury at 821-842 (1998); Crocker, Childhood Abuse and Adult Murder: Implications for the Death Penalty, North Carolina Law Review at 1143-1222 (1999); Crocker, Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Cases, Fordham Law Review at 21-85 (1997). Head injuries that lead to behavioral disorders may be considered a mitigating circumstance. *See* State v. Rockwell, 161 Ariz. 5, 15, 775 P.2d 1069, 1079 (1989). In the instant case, Chris suffered from childhood head injuries. The first occurred at age 4 ½ when Chris fell down the stairs. A series of head X-rays was ordered by Dr. Delgado. The records from Cottage Hospital, however, have been destroyed in the past 10 years.

During the summer of 1974, between second and third grade, Chris had a bicycle accident resulting in a head injury. He spent two days in St. Francis Hospital. Through perseverance, the records were finally located and show that defendant suffered a concussion which affected the clarity of his thinking at the time. None of the psychiatrists or psychologists who evaluated Chris for the trial and sentencing were aware of these records.

In February, 1978 Chris hit his forehead on the floor at school. In August, 1978 Chris was pushed at YMCA camp, causing him to hit his head on some furniture, requiring stitches, supposedly from Cottage Hospital.[10] In October of that same year, he was hit by a car while riding his bike. Around that time, (Dr. Delgado's report states he was 11 ½) Chris fell in the boys' bathroom at school and hit his forehead, but was not knocked unconscious. In the fall of 1979 he fell and hit his head on a piece of furniture.

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[10] Chris' mother claimed she only learned about this from Richard Bozich, the former attorney's investigator.

The entire medical file obtained by defendant's prior attorneys consisted of some old doctor bills. There is not a single medical report or record contained in counsel's file. Obviously, counsel would have had a better opportunity 10 years ago to obtain the medical records substantiating these events. Even 10 years later, undersigned has been able to obtain a significant number of these records; unfortunately, not all.

Had counsel obtained these records and shown them to the psychiatrist and psychologists who evaluated defendant, they would have concluded that there was a correlation between defendant's head injuries as a child and his behavior in the instant case. But for counsel's unconstitutional performance, defendant would not have received the death penalty. His sentence of death must be reversed.

D. Counsel Failed to Present Evidence of the Extent of Abuse Which Defendant Suffered During Childhood and the Striking Physical Resemblance Between the Victim and Defendant's Mother.

Counsel did present, through the report and testimony of Todd Flynn, Ph.D., the fact that defendant had been abused and lived in a dysfunctional home environment, but the extent of that abuse was never presented to the court. In fact, the court did find as mitigation that defendant lived in a "subnormal home. And obviously Mr. Spreitz suffered a disruptive childhood with a punitive cold mother ..." RT 12/21/94 at 33; ROA at 302, p. 2366. Yet the court, quoting from Dr. Flynn's report, observed that "Christopher Spreitz did not suffer acute dramatic abuse in his family home." Id. The Arizona Supreme Court also emphasized that quotation in according this mitigation "little weight" in its independent reweighing. Spreitz, at 149, 945 P.2d at 1280. ("We also find significant the conclusions of the psychologist testifying on defendant's behalf at the sentencing hearing, who stated that defendant 'did not suffer acute, dramatic abuse.'") This conclusion is flat out wrong.

Had counsel conducted a proper investigation and had he provided to Dr. Flynn the overwhelming evidence of pervasive and violent physical abuse which defendant suffered,

neither Dr. Flynn or the court would have come to the conclusion that defendant "did not suffer acute dramatic abuse in his family home." The prejudice of such failure is obvious: the court concluded that "I don't find that that history is a mitigating factor that impaired his ability to make a judgment as to whether he was acting rightly or wrongly in the death of the victim in this case." Id. at 33-34.

The years of physical abuse, especially by defendant's mother, coupled with her sadistic emotional treatment of defendant, certainly impaired his ability to make a judgment regarding the instant homicide. The other factor which makes this argument compelling is the fact that the victim bore a striking physical resemblance to the defendant's mother at the age she was when she was actively abusing the defendant. Had this been brought to the court's attention, the court undoubtedly would have considered the matter in a different light. Instead, the only thing that was brought forth was that Chris "liked older women." This was totally inadequate.

According to the defendant's mother, her punishment for her children was "time out," or putting them in a corner. She denied ever spanking them with anything other than her hand; that way she would never hit them too hard. *See* investigator's report of interview with Susan Mendenhall, at 3. Needless to say, this charitable view of herself is not shared by any of the other witnesses. According to Chris' step-father, Stephen Spreitz, (whose name Chris took, or was given), Chris' mother was a hitter. She spanked and hit the kids with whatever object was at hand, and she was known to shake the kids. She also threw things, whatever was at hand, and he recalled her throwning an iron at him. Investigator's interview with Stephen Spreitz, at 2-3.

Mr. Spreitz was also a disciplinarian, hitting the children on their bare butts with a belt. Id.; interview with Gretchen Jaeger, at 1. Going back to the mother, however, she used whatever was handy, according to Chris' sister, including a wooden spoon and a favorite paddle, which she broke over defendant's back once in her zeal. Interview with Gretchen Jaeger, at 1. Ms. Mendenhall herself had been abused as a child, her mother using a strap liberally on her and her siblings. Interview of Marcia Mendenhall Trask, at 1.

In addition to the physical abuse which defendant suffered at the hands of his parents, his mother tormented him psychologically and emotionally. Defendant was also exposed to an incredible level of violence between his parents, both when his natural father was in the home and later, with his step-father.

The facts in this case are similar to others in which counsel has been found ineffective at the penalty stage for failure to investigate and present evidence of psychological problems. Wallace v. Stewart, 184 F.3d 1112 (9th Cir. 1999); Caro v. Claderon, 165 F.3d 1223 (9th Cir. 1999); Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995); Clabourne v. Lewis, 64 F.3d 1373 (9th Cir. 1995).

In the instant case, had counsel performed his duties in a constitutional manner, he would have supplied the appropriate information to Dr. Flynn, or insisted that Dr. Flynn conduct his own interviews, and Dr. Flynn's opinion would have been that defendant did suffer acute and dramatic abuse in his home life. The court would have certainly found such evidence persuasive that defendant was unable to properly control his behavior, especially given the strong physical resemblance between the mother at the time she was abusing Chris and the victim, and he would have imposed a life sentence. *See* State v. Ramirez, 178 Ariz. 116, 131, 871 P.2d 237, 252, *cert. denied*, 513 U.S. 968 (1994) (defendant's psychological makeup combined with intoxication deemed mitigating). Defendant's sentence of death must be reversed.

E. Counsel Never Presented the Available Evidence that Defendant Was Intoxicated at the Time the Offense Was Committed.

This is similar to the argument presented in I E, *supra*. Defendant incorporates the facts and arguments stated therein as is fully set forth herein. Counsel was ineffective in failing to present evidence to the court that defendant was intoxicated at the time of the murder and that his intoxication affected his ability to control his impulses. Intoxication may constitute statutory mitigation. State v. Robinson and Washington, 165 Ariz. 51, 61, 796 P.2d 853, 863 (1990), *cert. denied*, 498 U.S. 1110 (1991); State v. Murray, 184 Ariz. 9, 42, 906 P. 2d 542, 575 (1995), *cert.*

denied, 116 S.Ct. 2535 (1996).

Had this evidence been presented, the court would have found mitigating circumstance 13-703(G)(1) as well as non-statutory mitigation. State v. Gallegos, 178 Ariz. 1, 17, 870 P.2d 1096, 1113 (1994); State v. Aryon Williams, 183 Ariz. 368, 384, 904 P.2d 437, 453 (1995); Murray, *supra*, at 39, 906 P.2d at 572; State v. Danny Lee Jones, 185 Ariz. 471, 491, 917 P.2d 200, 220 (1996). See argument IX, *infra*. Counsel's unconstitutional representation of defendant caused defendant to be sentenced to death. His sentence of death must be reversed.

F. Counsel Was Ineffective in Failing to Object to the Preparation of a Pre-Sentence Report or to Be Present at the Interview of Petitioner in Connection with that Report.

A presentence report was submitted to the sentencing judge, who used information presented therein to render its special verdict of death. (RT 12/21/94 at 3). The use of the presentence report violated petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 2, §§ 4, 15 and 24 of the Arizona Constitution. Additionally, counsel's failure to attend the presentence interview constituted ineffective assistance of counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Art. 2, §§ 4 and 24 of the Arizona Constitution.

Once a defendant is found guilty of first degree murder as defined in A.R.S. § 13-1105, the law requires the judge to hold a separate sentencing hearing in which the jury does not participate. A.R.S. § 13-703(B). During this hearing, the state may offer evidence concerning any statutorily defined aggravating circumstances, which the defendant may rebut, and the defendant may offer evidence and information concerning any mitigating circumstances, which the state may rebut. Both sides may then argue what the appropriate penalties should be. A.R.S. § 13-703(C).

Aggravating evidence may come from either the trial testimony, or from new evidence which must be admissible under the Rules of Evidence; whereas any information concerning any mitigating circumstances may be offered without regard to its admissibility under the Rules of

Evidence. A.R.S. § 13-703(C).

At the conclusion of the sentencing hearing, A.R.S. § 13-703(D) requires that the court return a special verdict setting forth its findings as to the existence or non-existence of the aggravating and mitigating circumstances contained in A.R.S. §§ 13-703(F) and (G).

In reaching its special verdict, the court must take into account the aggravating and mitigating circumstances included in subsections F and G of A.R.S. § 13-703 and shall impose a sentence of death if it finds one or more of the aggravating circumstances enumerated in subsection F, and finds that there are no mitigating circumstances sufficiently substantial to call for leniency. A.R.S.§ 13-703(E).

The statutory scheme set out in A.R.S. § 13-703, then, allows the court to sentence a defendant to death only upon finding one of the aggravating factors listed in the statute through legally admissible evidence submitted at the sentencing hearing or at trial. Since the hearing is the only means permitted by statute for receiving evidence on the issue of the existence of aggravating factors, any submission of information to the court outside of the hearings is illegal under the statutory scheme, and unconstitutional as violative of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Art. 2, §§ 4, 15 and 24 of the Arizona Constitution.

The ordinary procedures for sentencing a defendant in a felony case in Arizona do not apply in a capital case because of the specific scheme set forth in A.R.S. § 13-703 and various cases of the Arizona and United States Supreme Courts holding that a capital sentencing hearing is more akin to a trial than a non-capital sentencing hearing. Strickland v. Washington, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 2064, 80 L.Ed. 2d 674 (1984) ("A capital sentencing proceeding ... is sufficiently like a trial in its adversarial format and in the existence of standards for a decision ..." to bring into play Sixth Amendment guarantees); Bullington v. Missouri, 451 U.S. 430, 446, 101 S.Ct. 1852, 1862, 68 L.Ed.2d 270 (1981) (Double Jeopardy Clause applied to sentencing phase of capital case, which resembles a trial); Arizona v. Rumsey, 467 U.S. 203, 210, 104 S.Ct.

2305, 2309, 81 L.Ed.2d 164 (1984) (the sentencing proceeding in Arizona shares the characteristics of the Missouri proceeding that make it resemble a trial for purposes of the Double Jeopardy Clause).

The preparation of a presentence report and its submission to the court prior to the sentencing hearing conflicts with the statutory requirement that the court rely only upon relevant evidence presented at the sentencing hearing. Furthermore, any extrajudicial conversations which the sentencing judge might have with members of the probation department or other court personnel, while appropriate in a non-capital sentencing, are improper given the mandates of A.R.S.§ 13-703 and violate the confrontation clauses of the United States and Arizona Constitutions.

Unlike some states, Arizona does not require that the state formally plead in the indictment which statutory aggravating circumstances it will seek to prove in the event of a first degree murder conviction. State v. Blazak, 114 Ariz. 199, 206, 560 P.2d 54, 61 (1977). A capital defendant, however, is constitutionally entitled to procedural due process with respect to the sentencing proceeding. State v. Ortiz, 131 Ariz. 195, 207, 639 P.2d 1020, 1032 (1981). In the context of an A.R.S. § 13-703 sentencing proceeding, Ortiz holds that the defendant has the following constitutional rights:

First, he is entitled to notice of the statutory aggravating circumstances the state will seek to prove;

Second, he is entitled to notice of the evidence on which the prosecution will rely to establish the statutory aggravating circumstances;

Third, the defendant in a sentencing proceeding is to receive disclosure of the notice sufficiently in advance of the hearing to give him a reasonable opportunity to prepare a defense.

These due process requirements have since been codified in Rule 15.1(g)(2), Ariz. R. Crim. P. Ortiz, therefore, establishes that the sentencing hearing required by A.R.S. § 13-703(B) must comply with the due process clauses of the state and federal constitutions. Since both the

statute and the due process clauses of the state and federal constitutions require that the defendant be able to confront all of the legally admissible evidence on which the state seeks to rely in having him sentenced, it necessarily follows that to permit the sentencing judge access to information outside the hearing process offends due process.

In the instant case, the presentence report contained a lot of information that was damaging to the petitioner and was information not received in the trial or aggravation hearing. [11] For example, the presentence report, on pages 4-5, contains a victim impact statement wherein the victim's younger sister blames numerous problems in her own life on the defendant. Not only was this information prejudicial to defendant, and would not have come to light but for counsel's ineffective assistance, the information was also unfounded. Had counsel investigated the situation he would have found that there was virtually no contact between the victim and her sister, that, in fact, the victim even changed her name in order to not have contact with her family, and that the sister cared little about the victim's alcoholism and poverty during her life. None of that came out, however, and the court was given the impression that the sister's loss of the victim resulted in her own life falling apart.

Furthermore, the trauma suffered by the defendant growing up was minimized in the Social History section of the presentence report, pages 5-9. In the Defendant's Statement portion of the report, page 3, and the Current Life Situation portion of the report, pages 7-9, defendant is portrayed as someone with very little insight into his situation who is minimizing the seriousness of the offense. According to the report, defendant's comment about the crime was, "a lady died, that really sucks." There is little doubt that comments such as this and others contained in the report had a highly negative effect on the judge.

Regardless of whether the judge considered the recommendations of the victim's sister, however, the consideration of the presentence report itself was error and deprived the defendant

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[11] In fact, the state presented no extra evidence in mitigation and relied exclusively on the trial testimony.

of his constitutional right to due process and to confrontation. Not only was the prejudicial effect of the evidence contained in the report and discussed above extremely damaging to defendant's plea for a sentence less than death, it was emotionally laden and constituted an illegal and unacceptable influence on the sentencing judge. The use of the presentence report violated petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 2, §§ 4, 15 and 24 of the Arizona Constitution. Counsel's failure to object to the preparation of a presentence report denied petitioner the effective assistance of counsel.

Additionally, counsel's failure to attend the presentence interview constituted ineffective assistance of counsel. *See, e.g.,* State v. (Roger) Smith (I), 136 Ariz. 273, 279, 665 P.2d 995, 1001 (1983) (counsel ineffective for advising defendant not to talk to the presentence officer because his statement could be used against him at retrial, and where no mitigation was presented). Finally, counsel's failure to assist defendant in preparing for the interview and submitting a coherent, intelligible statement to the probation officer or letter to the sentencing judge was inexcusable, given what was at stake.

Defendant's letter to the court is rambling and extremely self-centered, communicating in a tone as if talking to a friend. He almost discusses the victim as an afterthought, "Maybe you are thinking, this is all fine and dandy, but what about Ms. Reid? Like I said before, her death was senseless and I should accept responsibility and be held accountable. All I can do is work hard toward a positive goal. If I don't do that Ms. Reid's death will never make sense." He then goes on to add a handwritten p.s. "I am truly sorry I have caused Ms. Reid's death, Your Honor." Although this may have been sincere, it gave the impression that Chris is self-centered and has still not come to grips with the magnitude of what he did. The letter worked a disservice on defendant's chances for a life sentence.

Although counsel cannot write the letter for a defendant, he can advise the defendant, make suggestions, and suggest revisions after seeing what the first draft of the letter is like.

Counsel did none of this and defendant was deprived of the services of his counsel at a critical stage of the proceedings. His sentence of death must be reversed.

III. Ineffective Assistance of Counsel On Appeal.

Appellate counsel for petitioner committed ineffective assistance of counsel at the appeal phase, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Art. 2. §§ 4 and 24 of the Arizona Constitution, in the following respects:

A. Counsel Was Ineffective for Challenging Trial Counsel's Effectiveness on Direct Appeal.

Counsel on appeal claimed that trial counsel was ineffective for admitting guilt in his opening statement. *See* State v. Spreitz, supra, 190 Ariz. At 146-47, 945 P.2d at 1277-78. It is elementary that a post-conviction proceeding is the first instance that ineffective assistance of counsel can be raised. State v. Santana, 153 Ariz. 147, 150, 735 P.2d 757, 760 (1987) (The "unsupplemented record [] will seldom show why the trial attorney did or failed to do something.") *Accord* State v. Jones, 185 Ariz. 471, 482, 917 P.2d 200, 211 (1996); State v. Maturana, 180 Ariz. 126, 133, 882 P.2d 933, 940 (1994); State v. Apelt, 176 Ariz. 369, 374, 861 P.2d 654, 659 (1993); State v. Atwood, 171 Ariz. 576, 599, 832 P.2d 593, 616 (1992); State v. Valdez, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989); State v. Schrock, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). *See also*, State v. Watson, 114 Ariz. 1, 15, 559 P.2d 121, 135 ("Even though we have held herein that based upon the record on appeal that the defendant has not shown a denial of adequate counsel, this does not mean that at a hearing on the Rule 32 motion he may not be able to show ineffective assistance of counsel such as would bring him under the cases on this subject.")

Because of counsel's ineffectiveness on appeal, defendant's judgments of conviction and sentences must be reversed.

B. Counsel Was Ineffective in Failing to Request Certain Jury Instructions or to Object to Certain Others.

Under sections V and VI of this petition, *infra*, defendant raises arguments related to certain jury instructions. Those arguments will not be repeated herein for the sake of efficiency, but defendant wants to make clear that he is also claiming that counsel was ineffective for failing to challenge those wrongful and unconstitutional instructions which were given, even though trial counsel never challenged them. (*See* Argument I F, *supra*).

C. Counsel Was Ineffective in Failing to Challenge the Sentence of the Court for the Reasons Stated in Arguments VIII-X.

Under sections VIII, IX and X of this petition, *infra*, defendant raises arguments related to his sentence. Those arguments will not be repeated herein for the sake of efficiency, but defendant wants to make clear that he is also claiming that counsel was ineffective for failing to challenge that wrongful and unconstitutional analysis by the court of the reasons warranting the death penalty. Although appellate counsel did challenge the finding by the sentencing court that the murder was cruel, he did not challenge the kidnapping issue raised in section VIII. Spreitz at 147, 945 P.2d at 1278. Furthermore, counsel never raised any argument regarding mitigation. Id. at 148, 945 P.2d at 1279.

IV. General Legal Principles of Ineffective Assistance of Counsel.

Defendant is guaranteed the right to counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Art. 2, §§ 4 and 24 of the Arizona Constitution. In order to show ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was deficient, as defined by the prevailing professional norms; and (2) the deficient performance resulted in prejudice to the defense. State v. Vickers, 180 Ariz. 521, 525, 885 P.2d 1086, 1090 (1994); State v. Nash, 143 Ariz. 392, 397, 694 P.2d 222, 227, cert. denied, 471 U.S. 1143 (1985); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

Stated slightly differently, the federal constitutional test requires that in order to prevail on a claim of ineffective assistance of trial counsel, a defendant must show that but for the

ineffective assistance there is a reasonable probability that the outcome would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The analysis cannot be merely outcome determinative, however; attention must focus on whether the result of the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 369, 113 S.Ct. 838, 842-43, 122 L.Ed.2d 180 (1993).

In Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed. 2d 490 (1995) the Supreme Court further defined the second prong of the Strickland standard, (in the context of the government withholding Brady material) holding that the test does not "require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. ... The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id.

A "reasonable probability" of a different result is accordingly shown when the procedure "undermines confidence in the outcome of the trial." Id. citing United States v. Bagley, 473 U.S. 667, 678, 105 S.Ct. 3375, 3381, 87 L.Ed.2d 481 (1985).

Since petitioner in the instant case was indigent, he was represented by an appointed counsel at trial. "A necessary corollary of these principles is that the attorney appointed must render competent, effective assistance at trial and on appeal." Zambia v. Bradshaw, 185 Ariz. 1, 3, 912 P.2d 5, 7 (1996).

With these principals in mind, it is clear from the arguments and authorities presented above, that due to the ineffective assistance of trial counsel, the outcome of the trial does not command confidence.

Since the right to counsel is so fundamental to a fair trial, the constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits. Evitts v. Lucey, 469 U.S. 387, 395, 105 S.Ct. 830, 835, 83 L.Ed.2d 821

(1985). When the state obtains a criminal conviction through such a defective trial, the state unconstitutionally deprives the defendant of his liberty. Cuyler v. Sullivan, 446 U.S. 335, 342-45, 100 S.Ct. 1708, 1715-16, 64 L.Ed.2d 333 (1980). In this case, the cumulative errors of counsel violated defendant's constitutional rights. The errors can be considered cumulatively, not just singularly. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1995). Given the numerous errors and deficiencies of counsel, taken both separately and considered in totality, there is a reasonable probability to undermine confidence in the outcomes of the trial, sentencing and appeal. Defendant's judgments of conviction and sentences must be reversed.

Substantive Issues.

The following issues constitute fundamental and structural errors and are grounds for reversal of defendant's judgments of conviction and sentences, notwithstanding trial and appellate counsels' failure to raise them previously. These errors should be considered by this court as examples first of ineffective assistance of trial and appellate counsel but also, secondly, as substantive fundamental and structural errors attributable to the court. Since these are fundamental and structural errors, they cannot be waived for purposes of Rule 32.2(a)(3), Ariz.R.Crim.P. This court has jurisdiction to entertain these arguments, and they are not precluded, since they are based on newly discovered evidence, counsel error for which defendant is not responsible, see Rule 32.1(f), or for which there has been a significant change in the law that if determined to apply to defendant's case would probably overturn his convictions and sentences.

V. The Court's Instruction on Premeditation Violated Defendant's Constitutional Rights.

The trial court told the jury, "'Premeditation' means that the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by a length of time to permit reflection. An act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion." (RT 8/17/94 at

670-71; ROA at p. 2270).

Defendant concedes that this is the statutory definition of premeditation under A.R.S. § 13-1101(1); however this definition violates the Fifth and Fourteenth Amendments to the United States Constitution and Art. 2, Sec. 4 of the Arizona Constitution. First degree murder can be committed either intentionally or knowingly, as can second degree murder; the only difference is the requirement that there be premeditation for it to be first degree murder. When actual reflection is not required, however, only that there be "a length of time to permit reflection," it is a difference without substance. Therefore, the jury has no guidance and can convict a defendant of either first or second degree murder based on a whim. That violates due process.

Since the court in the instant case did not instruct the jury that premeditation requires actual reflection, defendant's constitutional right to due process was violated.

VI. The Court's Instructions on Felony Murder Violated Defendant's Constitutional Rights.

The court instructed the jury as follows:

> With respect to the felony murder rule, insofar as it provides the basis for a charge of first degree murder, it is the law that there is no requirement that the killing occur "while committing" or "engaged in" the felony, or that the killing be part of the felony. The homicide need not have been committed to perpetrate the felony. It is enough if the felony and the killing were part of the same series of events.

(RT 8/17/94 at 673; ROA at 2274). Counsel failed to object to this instruction. (RT 8/16/94 at 656).

To prove felony murder under A.R.S. § 13-1105(A)(2), the State must prove beyond a reasonable doubt the following four elements:

1. The defendant committed one of the offenses enumerated in the statute, and
2. the defendant or another person caused the death of any person,
3. in the course of the offense, and
4. in furtherance of the offense or immediate flight from the offense.

It is with respect to elements (3) and (4) that the trial court misinstructed the jury. The instruction told the jury that in order for the state to prove felony murder, the state need only prove that the death was "part of the same series of events." The instruction also indicated that the killing need not occur while "engaged in the felony" which clearly contradicts the requirement that it occur "in the course of the offense."

The given instructions were based on the former felony murder rule in effect prior to October 1, 1978, which stated in relevant part:

> A murder which is perpetrated by means of poison or lying in wait, torture or any other kind of willful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate arson, rape in the first degree, robbery, burglary, kidnapping or mayhem or sexual molestation of a child under the age of thirteen years, is murder in the first degree.

Former A.R.S. § 13-452. Case law interpreting the above statute held that the state, in order to prove felony murder, only had to prove that the death and the underlying felony be "part of the same series of events." State v. Richmond, 112 Ariz. 228, 540 P.2d 700 (1975).

The present Arizona felony murder rule set forth in A.R.S. § 13-1105(A)(2), which first became effective on October 1, 1978, specifically requires that the State prove that the death was "in the course of" the underlying felony and also that it results from action taken to facilitate the accomplishment of the predicate felony. State v. Arias, 131 Ariz. 441, 443, 641 P.2d 1285, 1287 (1982); State v. Hallman, 137 Ariz. 31, 38, 668 P.2d 874, 881 (1983).

The felony murder instruction was, therefore, a misstatement of the felony murder rule in existence at the time of the instant offense. While the court correctly instructed the jury that the state was required to prove that the death was "in the course of" and "in furtherance of" the crimes of robbery or kidnapping (RT 4/30/93 at 82; ROA at 359), the complained of instruction relieved the State of proving both elements of felony murder by stating that there is no requirement that the killing occurred "while engaged in the felony" (eliminating the "in the course of" requirement) and by stating that "it is enough if the felony and the killing were part of

the same series of events." (eliminating the requirments that the killing occur "in the course of" a sexual assault or kidnapping and be "in furtherance of" such crime(s) or immediate flight therefrom).

By relieving the state of its burden to prove the "in furtherance of" element of felony murder beyond a reasonable doubt, the instruction violated the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution and Art. 2 § 4 of the Arizona Constitution. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986).

In State v. Miles, 186 Ariz. 10, 15, 918 P.2d 1028, 1033 (1996) the Arizona Supreme Court found the complained of instruction not to be error, although it discouraged the use of such instructions. The Supreme Court never addressed the constitutional arguments being made herein, however. Moreover, this portion of the Miles decision is clearly wrong and should be reconsidered.

The "in furtherance of" element, not present in the pre-1978 version of the statute, narrowed the definition of felony murder in the version of the law in effect at the time of the crime in question. The decision Miles cited State v. Arias, 131 Ariz. 441, 443, 641 P.2d 1285, 1287 (1982) for the proposition that the "in furtherance of" language did *not* narrow felony murder in Arizona. That was not the holding of Arias at all. Arias held that it was sufficient if the actions resulting in death (the binding and gagging of the robbery victim therein), rather than the death itself, further the felony. "In furtherance of" is still a necessary element of felony murder both before and after the judicial gloss added in Arias. Furthermore, the decision in Miles' case completely fails to explain how the language "no requirement that the killing occur while committing or engaged in the felony" squares with the "in the course of" element.

The court's instruction on felony murder violated the defendant's rights to due process, equal protection and to be free from cruel and unusual punishment, in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Art. 2 §§ 4, 13 and 15 of the Arizona Constitution. Furthermore, since the court used the old concept of felony murder which had been subsequently narrowed by the "in furtherance of" language, defendant's conviction violated the ex post facto clauses of the United States and Arizona Constitutions. Art. 1 § 10, cl. 1, United States Constitution; Art. 2, § 25, Arizona Constitution. The constitutional ex post facto clauses prohibit judicial enlargement of a statutory offense by judicial interpretation which negates an element of the offense. Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). The court committed structural error. Defendant's murder conviction must be reversed.

VII. The Court Failed to Instruct the Jury that It Did Not Have to Return a Verdict if It Was Unable to Do So.

It is the law of this state that jurors should be instructed that they are not required to return a verdict if they are unable to do so without violating their beliefs. State v. Atwood, 171 Ariz. 576, 625-26, 832 P.2d 593, 642-43 (1992), cert. denied, 506 U.S. 1084 (1993); State v. McCutcheon, 162 Ariz. 54, 60, 781 P.2d 31, 37 (1989).

In the instant case, not only were the jurors *not* instructed that they were not required to return a verdict, they were instructed that they *had to* return a verdict: "All twelve of you must agree on a verdict." (RT 8/17/94 at 750; ROA at p. 2287).

The court's failure to instruct the jury that it did not have to return a verdict if jurors were unable to do so violated the defendant's right to due process, in violation of the Fifth and Fourteenth Amendment to the United States Constitution and Art. 2 § 4 of the Arizona Constitution.

VIII. The Court Found Non-Statutory Aggravation; Namely that Kidnapping Was an Aggravating Factor Justifying the Death Penalty.

In its special verdict, the sentencing judge held, "in this case I do find that there are aggravating circumstances, I find that the offense was committed in an especially cruel manner and I find that there was what I called earlier the classical or common law kidnapping..." RT 12/21/94 at 31; ROA at 302, p. 2365.

This was error since in capital cases the trial court may give aggravating weight only to evidence that tends to establish a statutory aggravating circumstance. State v. Gulbrandson, 184 Ariz. 46, 67, 906 P.2d 579, 600 (1995). The Arizona Supreme Court never addressed this issue in upholding the cruelty aspect as found by the trial court. Even though appellate counsel did not raise this precise issue, *see* Spreitz at 147, 945 P.2d at 1278, the Supreme Court claimed to have reweighed the evidence in aggravation and mitigation in upholding the sentence of death. Id. at 150-51, 945 P.2d at 1281-82.

As pointed out in argument IIA, *supra*, the court erred in finding beyond a reasonable doubt that defendant kidnapped the victim by putting her in the trunk of his car and driving her to the desert. The only evidence of this was a stain on the trunk of defendant's car which was probably blood, but even if it was, could not be identified as anyone particular person's blood. The only other evidence pointing to the victim being put in the trunk was the testimony of some of the victim's friends that she rarely accepted rides, and never from strangers. This testimony, however, was based on nothing more substantial than the fact that the victim usually walked home from the bar which she frequented, the Red Dog Saloon, which was only a few blocks from her house. Neither one of these two opinions regarding the presence of blood on the trunk or the victim's refusing rides, proves beyond a reasonable doubt that she was taken to the desert in the victim's trunk.

But even if the evidence did prove such a kidnapping, that is not an aggravating circumstance recognized by statute. The court, however, clearly found that it was. First, the

court clearly stated that it found aggravating "circumstances," plural, not "circumstance," singular. Secondly, the court clearly stated that it found the offense to be especially cruel "*and* I find that there was what I called earlier the classical or common law kidnapping..." RT 12/21/94 at 31.

The court's findings on aggravation violated defendant's rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Art. 2 §§ 4, 13 and 15 of the Arizona Constitution. His sentence of death must be reversed.

IX. The Court Wrongfully Believed that Defendant Had to Prove He Was Intoxicated at the Time of the Murder for His Longstanding Alcoholism and Drug Addiction to Be Considered a Mitigating Circumstance.

In its special verdict, the court confused the two distinct issues of whether defendant was intoxicated at the time of the offense and whether his longstanding alcoholism and substance abuse could constitute a mitigating factor. The court ruled:

> On the intoxication, the defendant's history of intoxication is long, longstanding. There was substance abuse for certainly close to ten years of his life at the time that he committed this offense. He was age 22 at the time that this offense was committed.
>
> But again I don't believe that the intoxication or the substance abuse impaired his ability and capacity to appreciate the wrongfulness of his conduct to any significant degree. And in that I take into consideration that when he was stopped within probably 30 minutes from the time the crime was committed by the police and photographs were taken at the corner of Broadway and Church here in Tucson, Arizona, and the officers were repeatedly asked whether there was any evidence of intoxication, and they repeatedly said nothing of any significance.

RT 12/21/94 at 34; *see also*, ROA at 302, p. 2366.

There are several problems with the court's analysis. First, there was substantial evidence that defendant was intoxicated at the time he committed the crime. He had been with his roommate, and others, at the Tucson Gardens bar from about 9 p.m. to 12 midnight, drinking non-stop. From there, they went home, where the roommate was sick from drinking too much (although he had been drinking less than Chris). Chris quickly left again, apparently on his way

to Lucy Eremic's apartment.

Lucy Eremic was the woman Chris was dating at the time. She told police and the defense investigator that Chris called her from the bar that night and sounded intoxicated; he told her he was "really trashed." He then came uninvited to her apartment at 12:40 a.m. and banged on her apartment door and forcefully tried the doorknob, attempting to get in. Finally, when he came back to his house at about 3 a.m. his roommate's girlfriend, who was still awake and watching television, testified that Chris passed out in a chair in the living room after a short conversation.

All this evidence, including the crime itself, points to substantial intoxication. Whether the police, with their motive to show that Chris was not intoxicated, noticed how intoxicated Chris was, is only a small factor to consider. How could the court find that after drinking for at least three straight hours, alcohol was not a factor? The fact that Chris was drunkenly banging on his girlfriend's door shortly before the murder is more indicative of how intoxicated he was.

The second problem with the court's analysis is that there are two different mitigating factors, not one. There is Chris' intoxication at the time he committed the murder, but there is also Chris' long-standing alcoholism. Even if the court was not persuaded that Chris was so intoxicated that he did not appreciate the wrongfulness of his actions at the time of the killing, Chris was still entitled to have the court consider his alcoholism as a mitigating factor. State v. Detrich, 188 Ariz. 57, 67, 932 P.2d 1328, 1338, *cert. denied*, 118 S.Ct. 202 (1997); State v. Rossi, 154 Ariz. 245, 250-51, 741 P.2d 1223, 1228-29 (1987); State v. Gretzler, 135 Ariz. 42, 57-58, 659 P.2d 1, 16-17, *cert. denied*, 461 U.S. 971 (1983). The Arizona Supreme Court also confused this issue. Spreitz at 149, 945 P.2d at 1280.

The third problem is that substance abuse and alcoholism must be considered as a non-statutory mitigating factor even if it does not rise to the level of statutory mitigation under 13-703(G)(1). Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978); State v. Samuel Lopez, 175 Ariz. 407, 414-416, 857 P.2d 1261, 1268-70 (1993), *cert. denied*, 511 U.S.

1046 (1994); State v. Gallegos, 178 Ariz. 1, 17, 870 P.2d 1096, 1113 (1994); State v. Aryon Williams, 183 Ariz. 368, 384, 904 P.2d 437, 453 (1995); Murray, 184 Ariz. 9, 39, 906 P. 2d 542, 572 (1995), *cert. denied*, 518 U.S. 1010 (1996); State v. Danny Lee Jones, 185 Ariz. 471, 491, 917 P.2d 200, 220 (1996). Yet the court never considered defendant's substance abuse as non-statutory mitigation.

In conclusion, the court's confused findings regarding defendant's intoxication on the night ofithe murder and his long-standing alcoholism and substance abuse violated his constitutional rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Art. 2 §§ 4, 13 and 15 of the Arizona Constitution. His sentence of death must be reversed.

X. The Court Failed to Weigh A.R.S. § 13-703(G)(1) in the Disjunctive or to Give Non-Statutory Mitigating Weight to Defendant's Abusive Upbringing.

The court found that defendant was brought up in a "subnormal home. And obviously Mr. Spreitz suffered a disruptive childhood with a punitive cold mother ..." RT 12/21/94 at 33; ROA at 302, p. 2366. Yet it appears that the court believed that that evidence could only be considered in the context of the first prong of statutory mitigation under A.R.S. § 13-703(G)(1): "I don't find that that history is a mitigating factor that impaired his ability to make a judgment as to whether he was acting rightly or wrongly in the death of the victim in this case." Id. at 33-34.

A.R.S. § 13-703(G)(1) provides that it shall be a mitigating circumstance that "[t]he defendant's capacity to appreciate the wrongfulness ofihis conduct or to conform his conduct to the requirements of law was significantly impaired, but no so impaired as to constitute a defense to prosecution." The court's special verdict makes clear that it only considered the first prong of the statute, that defendant was able to appreciate the wrongfulness of his conduct. The court never considered the second prong, that the defendant's ability to conform his conduct to the requirements of law was significantly impaired. The factor is phrased disjunctively so that proof of incapacity as to either ability to appreciate or ability to conform establishes the mitigating

circumstance. State v. Wood, 180 Ariz. 53, 70, 881 P.2d 1158, 1175 (1994) *cert. denied*, 515 U.S. 1147 (1995); State v. Stokley, 182 Ariz. 505, 520, 898 P.2d 454, 469 (1995), *cert. denied*, 516 U.S. 1078 (1996); State v. Murray, 184 Ariz. 9, 40-41, 906 P.2d 542, 573 (1995), *cert. denied*, 519 U.S. 874 (1996). The Arizona Supreme Court also failed to note the distinction. Spreitz, at 149, 945 P.2d at 1280 ("Similarly, the judge was not persuaded that defendant had shown by a preponderance of the evidence that defendant suffered from any emotional disorder impairing his ability to recognize the wrongfulnessof his actions.")

Furthermore, as in argument IX *supra*, the court was incorrect that it was only able to consider the defendant's emotional problems resulting from his upbringing as statutory mitigation. It also should have been considered as non-statutory mitigation. Eddings v. Oklahoma, 455 U.S. 104, 117, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982); Penry v. Lynaugh, 492 U.S. 302, 321, 109 S.Ct. 2934, 2947, 106 L.Ed.2d 256 (1989); Boyde v. California, 494 U.S. 370, 383, 110 S.Ct. 1190, 1199, 108 L.Ed.2d 316 (1990); State v. Brewer, 170 Ariz. 486, 505, 826 P.2d 783, 802, *cert. denied*, 506 U.S. 872 (1992); State v. McMurtrey, 136 Ariz. 93, 102, 664 P.2d 637, 646 (1983).

The court's failure to give non-statutory mitigating weight to defendant's upbringing violated his constitutional rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Art. 2 §§ 4, 13 and 15 of the Arizona Constitution. His sentence of death must be reversed.

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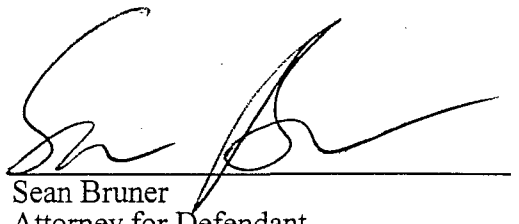
Conclusion.

In conclusion, defendant received ineffective assistance of counsel at the trial, penalty and appeal stages of his proceedings. Furthermore, the court committed fundamental and structural error in instructing the jury and in rendering its special verdict. Defendant's judgments of conviction and sentences must be reversed.

Respectfully submitted March 28, 2000.



Sean Bruner
Attorney for Defendant

Copy mailed this date to:

Jon G. Anderson
Assistant Attorney General
Criminal Appeals Section
1275 W. Washington
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BY: J. STEWART, DEPUTY

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IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Plaintiff, v. CHRISTOPHER J. SPREITZ, Defendant.	NO. CR-27745 APPENDIX TO DEFENDANT'S RULE 32 PETITION FOR POST-CONVICTION RELIEF (Hon. Paul S. Banales)

Defendant hereby submits this appendix in support of his Rule 32 petition. The contents are as follows:

1. Report of Joseph Geffen, Ph.D.

2. Affidavit of Susan Mendenhall, notes of current investigator's interview, and transcript of prior investigator's interview.

3. Affidavit of Stephen Spreitz, notes of current investigator's interview, and transcript of prior investigator's interview.

4. Affidavits of Raymond and Linda Jackson notes of current investigator's interview, and transcript of prior investigator's interview.

5. Affidavit of Gretchen Jaeger, notes of current investigator's interview, and transcript of prior investigator's interview.

6. Affidavit of John Spreitz and notes of current investigator's interview.

7. Affidavits of Richard Becerra and Dennis Patterson and notes of current investigator's interview.

8. Affidavit of Tony Becerra and notes of current investigator's interview.

CC: County Attorney - By Court Runner
Court Mail
Judge - Div E2
Defendant - Reg Mail
Defense Attorney - Reg Mail
Appeals

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9. Affidavit of Tammy Blanton Brunner and notes of current investigator's interview.

10. Affidavit of Lucy Eremic, notes of current investigator's interview, and transcript of prior investigator's interview.

11. Affidavit of Rachel E. Bach and notes of current investigator's interview.

12. Affidavit of Vincent Owens and notes of current investigator's interview.

13. Declaration of Jon Whipple and notes of current investigator's interview.

14. Affidavit of Laurie Poe and notes of current investigator's interview.

15. Affidavit of Sharon Kubiac, notes of current investigator's interview, and notes of prior investigator's interview with her and Carolyn Duck.

16. Declaration of Doreen Alexander and notes of current investigator's interview.

17. Copy of probate of Donald C. Alden and notes of prior investigator's interview.

Respectfully submitted March 29, 2000.

Sean Bruner
Attorney for Defendant

Copy mailed this date to:

Jon G. Anderson
Asst. Attorney General
1275 W. Washington
Phoenix, AZ 85007-2997

M-B

Joseph Geffen, Ph.D., P.C.
Licensed Psychologist

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Tucson, Arizona 85712-4410
Telephone 520-885-9950
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03/28/00

Sean Bruner
Attorney at Law
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Tucson AZ 85702

Re: **CHRISTOPHER J. SPREITZ**
DOB: 06/10/66
Case No.: CR-27745

Dear Mr. Bruner:

Referral

The following is my report of the psychological evaluation of your client, Mr. Spreitz, whom you kindly referred to me. I understood the purpose of this examination was to determine psychological factors that may be relevant in court, in determining post-conviction relief. From your referral information, and a review of records you provided, I understand that Mr. Spreitz has been convicted of first degree murder and was sentenced to death.

Method

I obtained data, upon which to base my conclusions and opinions, from the following sources of information:

1. Review of collateral records provided by your office and by others through your assistance, consisting of copies of:

- School records of the defendant from Santa Barbara, California (1971 - 1983)
- Letters written by the defendant, Chris Spreitz, to his uncle John Spreitz (stepfather's brother (08/29/89 - 11/22/98)
- Notes written by Chris' mother in his baby book (dates are hard to read because of the poor quality of the copies)

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- Notes and letters written by Chris, as a child (in the 70's)

- Transcripts of interviews with several persons who knew or had contact with the defendant:

  Craig A. Clark (05/25/89) by Detectives Salgado and Godoy
  Gretchen Jaeger, the defendant's sister, by an unidentified person, (10/09/90)
  Susan Mendenhall, the defenedant's mother, by an unidentified person (10/08/90)
  Lucy Eremik, by Richard Bozich, private investigator (05/31/89)
  Steven Spreitz, the defendant's stepfather, by an unidentified person (10/09/90)
  Raymond Jackson, the defendant's natural father and his wife Linda Jackson, by an unidentified person (10/10/90)
  Christopher Spreitz, the defendant, by Detectives Millstone and Wright TPD (05/22/89)

- Court Document: Minute Court Entry: aggravation/Mitigation Hearing, Judge William Sherrill, Div.XVIII, 11/28/94

- Notes and Test results from a psychological examination of the defendant by Psychologist James Allender, Ph.D.

- Psychological report of Mr. Spreitz by psychologist Todd Flynn, Ph.D., 11/21/94

- Psychiatric report concerning the defendant by Martin Blinder, M.D., 06/01/89

- Social history and background report by Cheryl R. Fischer, 03/07/00, obtained from interviews with Chris' mother, sister and other relatives and persons who were acquainted with the family.

2. Clinical interviews with the defendant, Chris Spreitz, conducted at the AzDOC SMU-2 facility in Florence, AZ (02/15/00 and 03/09/00), during which I obtained his statement of personal history

3. Psychological tests and procedures administered during this examination:

- **Wechsler Adult Intelligence Scale - Revised** (WAIS-R), to assess the client's intellectual functioning

- **Benton Visual Retention Test** (BVRT), designed to screen for possible acquired organic impairment of brain functioning

- **Millon Clinical Multiaxial Inventory-III** (MCMI-III), A personality test designed to assess the client's emotional and social adjustment and to determine the presence, type and severity of any psychopathology.

Findings of this Evaluation

General Background and History:

According to his own report and the reviewed social history, Christopher Spreitz is a 33-year old single Caucasian male who was born to Ray Jackson and Susan Mendenhall, and grew up in Santa Barbara California. He was raised mainly by his mother, since the parents were divorced when Chris was only about three years old. According to the obtained history, both parents grew up in alcoholic families who were reported to be very strict and who handled their children with violence and physical punishment. The mother's home was described as being always in an uproar and she and her brother and younger sister were said to have significant behavioral problems. Susan's sister reportedly admitted that she had problems with alcohol.

According to the history, Chris' mother, herself, raised her children in a similar atmosphere. Her own sister was reported to have said: "I have never met anyone as cold and mean an individual as Susan" and described her as "an emotional iceberg with no nurturing skills." She was also described as a manipulative liar who often denied things that she had said. The defendant's father, Ray Jackson, reportedly admitted to abusing his wife physically, and destroying their property in fits of rage. Susan's second husband, Chris' stepfather, was reported to have been physically punitive of the boy and to have abused him emotionally, as well. Both of Chris' parents admitted they had a violent marriage, each accusing the other of sexual misconduct.

Significant facts regarding Chris during his early childhood were obtained, partly from his mother's entries which she made in his baby book and diary. This included a description of him as crying all the time in his infancy. She apparently also worked to develop in him a strong sense of independence, which was interesting since she herself was described as being very independent in her childhood and adolescent history. For example, Chris was taught to drink from a cup at four months and he was washing his own dishes by the age of two. He was toilet trained by the time he was 16 months and even tried to clean his own dirty pants when he had accidents. Still, he had bedwetting problems into his teens.

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Reportedly, Susan was concerned that she was not giving her baby enough love and attention. She hired sitters for him at about two years. She worked and went to school part-time continuously during the first three years, and after her divorce when she became married a second time, to Steven Spreitz. During the marriage to Ray Jackson, Susan reportedly left home at least once, and she went to stay with Reverend Trouche who had ministered to her family of origin. It was unclear what she did with Chris, and with his newborn sister Gretchen. According to one report, the baby stayed with her at the reverend's home and Chris stayed with the grandmother, Alice. According to the reverend's report, he did not recall any children being at his home during Susan's stay.

Chris was injured, at the age of four, after falling down some steps. Ms. Fischer's report stated that the mother was vague about the circumstances, saying she had been sick in bed at the time. The grandmother took Chris to Cottage Hospital and there is a record of skull series X-Rays ordered by a Dr. Delgado. Ms. Fischer noted that she saw a photograph of Chris, taken after the fall, which showed that his left eye was turned in.

Chris' history during his school years,described in Ms. Fischer's report, revealed that he reportedly had problems with concentration even in kindergarten, and he was described by his teacher as being "too active" and showing little self control. He was perceived as being fearful, and not looking at people when they talked to him. Chris' stepfather also reportedly stated that the boy never looked people in the eye when he talked to him.

On the positive side, Chris was reported to be reading at the second grade level, when he was in the first grade. The first grade teacher wrote a report to Chris' mother, stating that he "talked constantly, had no concern for others and frequently put others down to make himself look and feel more important." Although he had ability, he daydreamed a lot and, as a result, had to stay after school frequently to finish his scholl work. The teacher suggested to Susan that she spend more time with the boy and give him more attention. The same teacher reported that Chris had improved considerably by the end of the school year, but still needed more improvement in his study habits.

Chris suffered another injury during the summer of 1994 when he reportedly rode his bike off a large boulder or rock. He spent two to three days at the St. Francis Hospital with a concussion. His maternal grandmother died that same year after being thrown from a horse. Chris later attended Christian School in Santa Barbara, where he continued to have problems scholastically and emotionally. However, the teachers like him and thought he was bright and cheerful and capable of doing better. His progress was up and down through the fifth grade. He later transferred to

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Peabody Elementary School because the mother wanted to keep him and his sister together and the sister needed special help for dyslexia, which she could best get at that school. When interviewed, the stepfather stated he thought the transfer was for financial reasons.

In the sixth grade, Chris was described as easily distracted but his grades improved somewhat. Medical records indicated that Chris became progressively accident prone and he also had physical altercations with other students and with neighborhood children who were teasing him. In YMCA camp, in 1978, he was pushed and hit the back of his head on a piece of furniture, requiring stitches. Chris' mother transferred him to La Colina High school, apparently because it made it would reduce her burden of dropping him off and picking him up. He rode his bike four miles to school and back. His GPA went from 1.50 during the first semester, to 2.33 and his competency scores in 1979 were 100% in mathematics, 92 in Reading and passing in writing. He continued to have accidents, including being hit in a bicycle-car accident. Nevertheless, he only missed two days of school the entire year. During the eighth and ninth grades his GPA went down to 2.00 and 1.50, and his performance on the competency exams yielded scores of 92% in Mathematics, 98% in Reading, and below passing in writing.

Chris attended summer school in Bishop High School, where he obtained a grade of B+, after having previously failed with an F. He was described as always goofing off and clowning around. His personality was said to become more outgoing, and he was described as always smiling and trying to get others to laugh. His niceness to other students, as described by a girl classmate, caused him to be picked on by bullies. He had a very close friend and the boys were described as "inseparable." In 1983, this friend shot himself, committing suicide. Reportedly, Chris was shocked but did not get an opportunity to talk to anyone about his feelings. According to his sister, the mother told her that the boy shot himself, then went about her routine business. She went to Chris' room and found him crying. According to reports, Chris tended to withdraw into his room for days at a time, coming out only to get food which he took back to the room. His room was described as being always dark and a "pigsty."

Chris attended Santa Barbara High School for the next three years, where his GPA never went above 2.00 and he was placed on probation on 02/82 for poor grades which were attributed to poor attendance. After being tested by the School psychologist, Dr. Frank Puchi, Chris was reported to have problems in visual problems, including Visual Perception, and Visual Memory. Chris' mother met with the psychologist and, reportedly, a followup appointment was made for Chris, but the record does not show if it took place. Dr. Puchi had recommended that Chris undergo a visual screening which, apparently, was not carried out. An

uncle of Chris, John Spreitz, a psychologist, who was aware of the report, stated to Ms. Fischer that with those results he would have ordered a full battery of tests and might have had Chris hospitalized. He felt the results were indicative of an ADD disorder.

Other family developments reported in the social history included the death of another of Chris' uncles,, Butch, who died in 1982 of cancer. Reportedly, they were very close but no one has been able to report about Chris' feelings regarding his uncle's illness and death. The history also showed that Gretchen, Chris' sister, got into trouble and she was arrested in 1982 for vandalizing homes in the neighborhood. During the court proceedings, Gretchen alleged that she had been sexually molested by their stepfather. She was placed in the custody of her natural father in 1983. The history did not reveal whether or not Chris was aware of the alleged behavior or became aware of it later. The family was referred and attended counseling for about a month or two, but the counselor passed away and no record of the sessions has yet been found.

Chris' school progress deteriorated and he began to attend The Dubin Learning Center, a private tutorial agency, in 1983. Mr. Dubin reported that Chris needed individual assistance because of his academic deficits and to deal with his low self confidence and poor self image. The tutoring was discontinued after the summer, apparently because of the cost of it. Yet, Chris' stepfather and grandfather cosigned a loan to buy him a motorcycle. Despite Chris' dismal school progress, he played football all three years. He reportedly had problems with his coordination and did not get to play, except when the team was so far ahead they couldn't lose. His team mates reported that Chris took the teasing and never got angry at his limited opportunity to play.

According to reports, Chris never dated in high school, but hung around with a group that partied a lot. He drank a lot. The only effect this had on him was to make him talk excessively. Because of Chris' reported many traffic violations, the family was notified that their insurance would be canceled. He was thrown out of the house twice, first by his stepfather, then by his mother. Chris traded his motorcycle for a truck in which he slept and with which he went to work. He continued in school for a while but eventually dropped out.

The history shows that Chris became involved with the juvenile criminal system, including an arrest in 1984 for receiving stolen property. Apparently he bought a motorcycle from two coworkers, but he claimed he did not know it had been stolen. The mother was reportedly away in China and the stepfather stated that Chris was a "good kid who had gotten involved with the wrong people. The record stated that Chris got an apartment and roomed with a

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guy who had been heavily involved in drugs. Chris' sister, who had been placed in a group home, ran away and eventually moved in with Chris. She herself reported that she was uncontrollable. Chris enrolled at Santa Barbara City College, but dropped out.

In 1986 Chris contacted his father who lived in Tucson and Chris moved to Tucson in the spring of 1986. In the fall, he enrolled in Canyon Del Oro High School. The father and his wife stated that they felt he was in a "typical teen mode," and that his room was like a swamp. He drank beer and they had to hide some of it or he would drink it all. After about a year, he got out on his own. He kept unusual hours, sleeping all day and staying up all night. After awhile, Chris moved back to Santa Barbara. He apparently went back and forth between Tucson and Santa Barbara.

Chris' father and stepmother stated that they noticed he had mood swings whenever he talked with his mother, apparently because she was always making promises and plans which always seemed to fall through. He reportedly dated several women during 1986 and 1987, two of whom were interviewed by Ms. Fischer. Neither of them observed any violent behavior on his part. They reported that they had been more aggressive than he was, in terms of sexual behavior.

Chris obtained work managing a Pizza restaurant in Santa Barbara in 1987, and he continued his relationship with one of the women he had dated earlier. His friends perceived that everything was fine with him. However, several months later, the woman apparently broke off the relationship, leaving him a "Dear John" letter, which made him become very upset. He returned to Tucson and went to work as a personal aide and caretaker for a man who was a paraplegic. He enjoyed that work and enrolled at Pima Community College with a major in nursing. He left that job, by "mutual agreement" with his employer, but they remained friends and got in touch occasionally. His ex-employer died in 1992.

Chris dropped out of his college program. Reports stated that he became wilder in his partying and began to show significant changes in his behavioral pattern, including mood swings and becoming short tempered. Chris returned to Santa Barbara in May of 1989 and wanting to go home to his mother. She had reportedly offered him a job taking care of her apartments in return for getting an apartment for himself at $125 a month. When he got there, he found she had given that job to a college student, instead. Reportedly, she sent him back to Tucson so that he could "square things with his employer and room mate." He arrived back in Tucson about a week before he was arrested for the killing of a female victim in May of 1989.

Witnesses who were interviewed by investigators expressed their surprise that he was in prison and in death row. According to their statements, it was not conceivable that Chris could have

murdered someone. They had never known him to display a temper or any sign of violence, and described him as a kind and gentle person.

Following is Chris report regarding his history prior to his arrest leading to his conviction for first degree murder. Soon after he arrived back in Tucson in May 14 or 15, 1989, he began looking for a job. He stated that while he had been staying with his mother in Santa Barbara, all he did was drink and party. He picked up application forms and had about four or five interviews which, he felt, were unsuccessful. He had been going out with Lucy, a woman who was 13 years older than him. He went out with her on Wednesday, prior to the event of the murder. According to Chris, she "weirded out" because he was so much younger and was so "flaky" and indicated to him that she may not want to pursue their relationship. He stated that at the time he didn't understand it, because he thought he had "got his act together," he had been drinking what to him seemed a very moderate amount (about a six-pack of beer and two to three vodka collins). However, he admitted, he had been "stoned, smoking weed and snorting."

The next day, on Thursday, Chris had gone drinking at a club with his roommate, consuming large amounts of alcohol (it was "thirsty Thursday and beer was being sold at 1 or 5 cents). His roommate, apparently did not have Chris' tolerance for alcohol, got sick and began vomiting. Chris took him back to the apartment, about 10:00 P.M.. Afterward he tried calling Lucy several times. When she answered, he could tell she was angry at him, probably upset because of his acting obnoxiously. He took a 12-pack and was going to her apartment, but stopped and had a few drinks with an acquaintance to whom he gave a ride to pick up some cocaine. He proceeded to Lucy's place but saw her walking from a bar where she had been, and was walking home. She told him to go away. Chris felt he had to be with someone, saw a woman and went to talk to her, to ask if he could "hang out with her."

According to Chris' report, she swung a bottle of wine at him. He punched her and she fell and hit the ground. From that point, he reported, he can't remember much of what happened afterward. He said he recalled that he was very detached as if watching someone in a film, without sound. He also remembered thinking "I gotta go, this is not a good place." He drove out to the desert and left the victim there.

In response to my question, Chris stated that he didn't know if she was drunk or dead or what? When he opened the trunk, she came at him "like a bobcat" and they were scuffling. The next thing he remembered was driving on a side street on his way home. He was pulled over by the police, because his car was smoking, apparently after he had hit the oil pan (he found out later). He

had blood over him and told the police that he had been in a fight "with a Black guy," and they let him go after citing him for the car smoke.

He arrived at his apartment and showered and went to bed. His roommate was there with his girlfriend and she later told him that he had talked with her and he hugged her. When he woke up in the morning and saw his clothes in the bathroom, he could tell something had happened but could not remember what.

I asked Chris to tell me if he had any fights or engaged in any violence during the period in his life that he abused alcohol or other substances. He replied that he did not engage in any altercations even when he drank heavily. He had experienced several episodes of "blackouts," periods during which he was apparently conscious and engaged in various behaviors, but was not able to recall them after he came out of it. In one example he gave, he was 16 years old and was drunk. Apparently, another youth hit him over the eye. Chris apparently never noticed it or remembered it until he was told about the incident. He had previously been hurt in the same eye at school by another youth who had mistaken him for someone else. The boy apologized to him and Chris accepted the apology and did not hit him back.

I also asked Chris to tell me about his relationships with women, including sexual relationships. His reply was that he had several casual and short term relationships. An exception was a woman who was 2 to 3 years older and that relationship lasted about two to three years. He stated that he didn't like relationships with girls or women his own age because they tended to play "head games" and he found it easier to relate to older women. He told about a relationship with an older woman with whom he could talk like to an aunt or surrogate mother and he felt very confident with her. They were mostly just friends but occasionally they would have sex. She even tried to set him up with one of her younger friends.

His most intimate friendship, according to Chris was with his school friend Devon at about the age of sixteen. The friend committed suicide by shooting himself. After that, according to Chris, he could never get into a deep relationship. Chris was asked to discuss his relationship with his mother. He said that up to the age of 3.5 years, before his sister was born, she spent a lot of time with him. He recalled one time when they went to the ocean and he hung at her neck while she went swimming. The feeling of intimacy he felt from her declined drastically after the parents divorce, when she worked at two jobs to take care of him and his sister. He doesn't remember dwelling on any negative feelings, stating that she was doing things to improve herself, including going to school. When asked if his mother abused him or neglected him, he denied it and did not seem interested in discussing it further.

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Chris recalled when to his surprise, his stepfather moved into their home, when he was about 4.5 to five years old. He doesn't remember discussing it with his mother. Whereas he recollected that his natural father had been physically abusive to his mother, his new surrogate father did not abuse her. He remembered that there was an incident when he heard his mother and stepfather appearing to be fighting and she cried out, he ran to the room, jumped on the stepfather and started to hit him, but his parents both calmed him down and he found that they were play-wrestling. Chris stated that he always related well with his stepfather. I asked him about who disciplined him and how, and he responded that they each had a different style. His mother would "fly off the handle," while the stepfather was more "laid back."

According to Chris' account, he started "detaching from his parents at about the age of thirteen. He had several friends and referred to himself as "a beta male," explaining that in comparison with the alpha male in a pack who is dominating and aggressive, he was a follower. One reason for his becoming more detached from his parents was that their marriage was going through rough times and did not pay much attention to him. They started to become separated in 1988 and were divorced in 1989, at the time he was arrested for stealing a motorcycle. He said, of himself, "I've always been a 'go-with-the-flow' person."

Regarding the time of his trial, Chris stated that he recalls that his attorney never called any witnesses. He had been examined by three mental health doctors, but only Dr. Todd Flynn testified at his sentencing. Regarding his statement of confession to the police, Chris stated that he had repeatedly answered their questions stating that he didn't recall what happened at the time the victim died, but that he eventually let them lead the way and they told him that the victim had gotten in the car voluntarily and that he raped her after they went to the desert.

I questioned Chris regarding his drinking history, specifically about the reported 'blackouts.' He stated that he never knew about them until his friends would confront them. He remembered one time a friend said to him "I can't believe you did that and don't remember it," after Chris had burned a pizza that he had put in the oven. In another incident he woke up with a woman in bed and did not remember having picked her up. In another incident, he did not remember that he had gone out with his cousin, and they had switched cars. He kept arguing with the cousin about where he had put the car, after he woke up in his house six hours later.

The reviewed record contained a report by Dr. Todd Flynn who examined Chris and testified in connection with the sentencing. In the Background section, the report stated that Chris'

childhood was characterized by "a punitive, controlling, emotionally cold mother, poor social adjustment with peers and the absence of a healthy male role model. Drug and alcohol abuse dominated his teenage years." Despite the critical statements by Chris' sister, his uncle and an aunt which led Dr. Flynn to infer that the mother was punitive and controlling, Chris himself would look up to her, tried very hard to please her and do anything she wanted and wanted very much for her to love him.

Dr. Flynn detailed Chris' history of drinking and smoking marijuana beginning at the age of about 12 or 13. The effect of these substances was to relax him and give him confidence. In the early years no one had noticed how much he abused alcohol, which he would take from the family's liquor cabinet and vodka which he would steal from the liquor stores. In Dr. Flynn's judgement the parents did not recognize Chris' substance abuse problem and he never was taken for treatment. The psychologist also cited a report from a cousin that Chris had blackouts while drinking. He concluded that Chris' substance abuse problem probably qualified as a physiological dependence. He also commented that there was no evidence of violence in his history. The report mentioned an incident which happened a short time before the "current offense," in which Chris had acted aggressively toward a woman, when he allegedly intimidated a prostitute into having sex with him without paying. He was described by others as being physically underdeveloped and being a "social outsider at the school."

Dr. Flynn's view of Chris' sexual adjustment led him to characterize him as "substituting bragging for actual accomplishment." He certainly seemed to have more difficulty with women of his own age, and tended to be oriented toward older women. The victim was 17 years older than him. In his report Dr. Flynn commented on the connection, based on research, between increasing alcohol abuse and an increase in risk for violence and noted that Chris' increasing physiological dependence on alcohol, his control over anger impulses and his unusual use of aggression toward a woman seemed to emerge simultaneously in the period prior to the murder. Noting that Chris had been viewed as a peaceful and passive individual through his teen years and early adult life, "there was no escaping the deep seated anger and resentment" that had been rooted in childhood, based on chronic neglect, rejection and evaluation by the parents, specially by the mother he had tried so hard to please. Among the qualities Chris failed to develop from his dysfunctional family was a sense of personal insight and skills which would help him learn to resolve conflicts and to control the anger that he kept inside until the very crucial moment.

In the conclusion of his report, Dr. Flynn described a likely scenario that helped explain the apparent senseless killing. Accordingly, in the weeks prior to the fateful event, Chris had

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been steadily escalating his drinking, as he experienced one failure after another, including rejection by women he was trying to please, his mother, his girlfriend and the stranger he confronted looking for companionship. In the short hours immediately preceding the killing, the full blunt of his deteriorating control and inhibition was triggered by an alcoholic rage that brought together all the destructive elements that led to the tragic death of the victim.

Dr. Flynn's opinion regarding the issue of mitigation of sentencing was stated as being based on the criterion for "statutory mitigation," by which the subject is incapable of conforming his actions to the requirement of the law due to a mental defect that detrimentally affects his ability to appreciate the nature of his actions. This defect, according to statute, falls short of meeting the stricter test for insanity which requires a more severe impairment of the ability to know the wrongfulness of one's actions.

Results of Current psychological tests

Behavioral Observation and Mental Status:

Mr. Spreitz presented himself for this examination dressed cleanly in his prison uniform and well groomed. His head was completely shaven. He related in a very pleasant and cooperative manner, openly answering all my questions without apparent defensiveness and completing all tests that I administered to him with apparent interest and good effort. His speech and thought processes were considered to be clear, coherent and goal directed. There was no evidence of any psychotic thought processes nor of significant depression or anxiety. The defendant projected an image of a bright, alert and well informed individual who was not trying to create any impression, but was just being himself during this examination. His mood was calm and congenial and his affect was considered to be congruent with the mood and context. Memory and other cognitive functions were grossly within normal limits with no apparent impairment.

Results of intelligence testing (WAIS-R) and screening for organic impairment of brain functions (BVRT):

The client's performance yielded I.Q. scores which fell in the range of "Average" to "Very Superior" intellectual functioning.

Verbal I.Q. Score = 149 ("Very Superior" level)
Performance I.Q. = 104 ("Average" level)
Full Scale I.Q. = 116 "High Average" level)

The obtained scores were considered to be reliable indicators of the defendant's current ability in the various skill areas that were assessed. The gap between the Verbal scales and the

Performance (psychomotor) scales, while statistically significant, did not seem to reflect any significant clinical condition. In fact, the relatively lower Performance I.Q. Score was considered to be consistent with Mr. Spreitz' history of some weakness in the area of coordination. While such a relative weakness may have affected him developmentally, e.g. his lack of athletic prowess in the football team in high school, there seems to be no indication of disability or handicap at present.

The BVRT performance while revealing some visuomotor weakness, did not reach a level that would be considered pathological, and did not suggest the existence of an acquired organic impairment of brain functions at present of any significant severity. The observed errors, however, were considered to be consistent with the client's history of visuomotor problems discovered in a psychoeducational assessment in school, and with the possible existence of an ADD disorder that was suggested as a result of that examination, as well as some of the problems that were described in his educational history.

The current findings were compared to previous results. Dr. Allender's administration of the WAIS-R yielded I.Q. Scores which were not significantly deviant from those obtained in this assessment. The I.Q. scores in his testing was reported as ranging from 104 to 108, in the high side of the Average range. These scores are somewhat depressed compared to the current findings, and may reflect the defendant's emotional state at a time closer to the offense, his arrest and the criminal proceedings. The current, more elevated scores probably reflect a considerable improvement in adjustment, on the defendant's part, which freed him up for a better test performance. In any case, these results indicate a very high potential for learning in an individual who is intellectually quite capable, even in a college or university setting. Certainly, such results were surprising in view of his quite poor academic accomplishment through high school.

Results of personality testing:

The subject's pattern of responses was analyzed using a computer-assisted program, with norms for correctional inmates that provided statistically likely hypotheses regarding his psychological adjustment and personality structure. Mr. Spreitz' responses to the MCMI-III yielded a profile that was considered to be valid for interpretation in that the built-in scales for detecting unusual response sets did not detect any tendency in the subject to manipulate his presentation. The pattern of responses was rated as showing little or no indication that the defendant is expected to act out violently. He was depicted as an inmate who would avoid risk-taking behavior and would not engage in efforts to escape from prison. He was, similarly rated as unlikely to act impulsively. The hypothetical profile

included a risk, though not substantial, for future suicidal action and indicated that the subject reported he has had a previous attempt.

The personality descriptors identified in Mr. Spreitz' profile suggested he may be a fearfully dependent and socially anxious, self demeaning and dejected person. He is considered to be likely hesitant to assert himself and would prefer to lean on others for guidance and security. He usually takes a passive role in relationships. He lacks initiative and appears to lack an adult level of autonomy. He willingly accepts blame and criticism even when it is not deserved. He does, however, harbor feelings of resentment to those he perceives to be abusive and inconsiderate. His expression of such resentment, however, is indirect, such as withdrawal from the situation. In conflict-ridden social situations, he is likely to be conciliatory.

The computer assisted interpretive program includes a comparison of this profile with respect to DSM diagnostic categories. In Mr. Spreitz' case the suggested diagnostic impression includes, dysthymia, on Axis I, and Dependent, Depressive and Avoidant personality on Axis II. It also identified the defendant as having a proneness for alcohol and psychoactive substance abuse.

The MCMI-III results, when contrasted with MMPI-2 results reported by Dr. Flynn and in Dr. Allender's reviewed materials, as well as Dr. Blinder's report of results on a different version of the Millon test. They were found to be consistent in that all four profiles provided evidence for a tendency toward depressive illness and a vulnerability for alcohol and other substance abuse.

The findings of my own testing, combined with the results reported by earlier examiners, are congruent in providing evidence for a chronic depressive reaction and a chronic and severe alcohol abuse in a young adult whose childhood was fraught with neglect the absence of a nurturing family environment. Resentment and anger that naturally would be generated from such a background were suppressed in an adolescence and young adulthood that were characterized by moodiness, below par academic achievement and social immaturity and inadequacy.

Conclusions

Diagnostic Impression (DSM-IV):

Axis I: 303.90 Alcohol Dependence, currently in remission in a restricted and protected setting

311 Dysthymic Disorder, currently in early partial remission

Axis II: Personality Traits: Dependent

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What is remarkable about Chris Spreitz' present mental condition is the absence of any apparent significant pathological symptoms or behavioral problems, in contrast to a very disturbed adjustment as a child, teen and young adult in a very confusing social environment, prior to his incarceration. Improbable as it may seem, his life in prison has provided him not only protection from his self-destructive pattern of substance abuse and alcohol dependence, but also gave him a very predictable and clear social environment. He has probably matured more during this period of his life than in his earlier life of "freedom."

The significance of this phenomenon for the current legal issues, is that it helps provide clarity regarding the question of the defendant's mental condition at the time of the commission of the crime, and of his psychological development leading to it - his cognitive, behavioral and emotional development. Because of this, his current period of relative "normalcy" can be seen as evidence to support mitigation of sentence.

Statutory mitigation requires evidence that a mental condition or defect rendered the defendant unable to appreciate the wrongfulness of his actions, at a level short of the criteria needed for a determination of insanity. In my opinion, to reasonable psychological certainty, the data obtained in this evaluation, gleaned from many separate sources, supports a conclusion that Mr. Spreitz, at the time of the murder of the victim in this case, was suffering from the cumulative effects of severe childhood neglect and abuse expereinced in a severely dysfunctional family. Dr. Flynn stated in his report that these were not dramatic in the usual sense in which we think of abuse and neglect. However, he did not have available to him reports of interviews with Chris' sister, Gretchen and with his stepfather, Steven Spreitz and others, which contained information that the boy had been physically abused and beaten. Emotional abuse can be and, in Chris' case, was very detrimental in preventing the normal development of characteristics and behaviors that could have helped prevent the unfortunate outcome of this case.

The child's emotional abuse and neglect were not perpetrated by monsters. All of his parents and parent surrogates cared for and may even have loved him strongly, but each in his/her own way were inadequate to their tasks and responsibilities. They themselves, according to the reviewed history may have been victims of neglect and abuse in their childhood families. Without singling out any one of them as being purposely malicious, they were responsible for the boy growing up in a home of violence among parents, and lack of proper recognition of his need for attention, nurturance and guidance. This became evident to its highest extent when they failed to recognize his pathology as it developed into a major clinical problem of severe substance abuse and dependence. When it was finally noticed, no parent

M-B

took the step that they were responsibly obliged to do, that is to get him professional clinical intervention.

Very predictably, Chris Spreitz became involved in alcohol abuse at a very early age in childhood and entered adolescence with a full blown substance abuse disorder which could have been detected and treated early but was not. That he probably suffered from other psychological problems, including the possibility of ADD and a tendency toward depression, was not as significant a contribution to the ultimate crime, as was the development of alcohol abuse and dependence, since these destroyed the ability the defendant could have had to suppress and inhibit destructive angry impulses that led to the killing of the victim. It is well known that some individuals are more prone physiologically than others to become dependent on alcohol. The outcome of a lifelong dependence disorder is very predictable both, in terms of physical illness (e.g. liver disease), and mental illness (depression, bipolar disorder. Many criminal offenses are probably attributable directly and indirectly to alcoholism. One of it's aspects, commonly referred to as "blackouts" literally renders the person unable to be aware of or appreciate his actions or control them.

In Arizona, at present, alcoholism or related substance abuse cannot be used in defense of a criminal action. However, at the time of the offense committed by Mr. Spreitz, the statutes were different. I was supplied by you with a copy of the insanity statute, as it existed at the time of the offense, which I reviewed and considered in forming my opinions. Therefor, based on the clinical findings and the legal criteria, it is my opinion that the defendant does qualify for statutory mitigation and also did qualify, at the time of his trial, for an insanity defense. He did not possess, at the time of his offense, the mental and emotional qualities that would have made it possible for him to avoid his criminal action. He was physiologically dependent on alcohol, which means that he did not have the choice not to drink. Had he been given an opportunity for treatment and then wasted it, he could have been considered culpable. If he suffered from a "blackout" at the time of the murder, which is quite likely, then he would not even have the conscious ability to know what he was doing, much less that it was wrongful. The key psychological finding, for The Court, is that Mr. Spreitz could not have conformed to what the law would have required him to do, due to his mental defects and impairments.

There are other, non-statutory factors which The Court can consider for mitigation. First, it is clear that with respect to the alcohol dependence, the defendant is rehabilitable, since he has, in fact abstained for ten years. The results are visible in terms of improvement in his emotional, behavioral and cognitive adjustment. His record in prison was not made available to me, although I believe it could be available. Based on Mr. Spreitz'

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report, he has had no disciplinary problems and, certainly no violent behavior. Given his apparent credibility and in the absence of a different report, this could be taken as evidence in support of mitigation. Mr. Spreitz very much likes his "new self," and will gladly accept any opportunity to redeem himself, even if he never walks the streets again. His prosocial disposition and his intelligence leads me to believe that he can make positive contributions to others, even in prison, and can further develop his education and competence, given an opportunity.

Another possible non-statutory mitigating factor is the lack of a pattern of violence in the defendant's life and lack of previous felony convictions. He is very unlikely to present a management problem in prison and has, in fact, not done so for the past ten years.

Thank you for the opportunity to assist you in this very interesting case.

Sincerely,

Joseph Geffen, Ph.D., DABPS, FACFE
Clinical and Forensic Psychologist, Licensed
Diplomate, American Board of Forensic Examiners

FILED
PATRICIA A. NOLAND
CLERK, SUPERIOR COURT
July 31, 2000 (10:07 a.m.)
By: Judy Etchison

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE PRO TEMPORE: HON. PAUL S. BANALES

CASE NO. **CR-27745**

COURT REPORTER: NONE

DATE: July 31, 2000

STATE OF ARIZONA

V.S..

CHRISTOPHER JOHN SPREITZ

MINUTE ENTRY

RE: PETITION FOR POST-CONVICTION RELIEF FILED MARCH 28, 2000:

PROCEDURAL BACKGROUND:

On August 18, 1994, Petitioner was convicted by a jury of first degree murder, kidnapping and sexual assault of Ruby Reid. On December 21, 1994, Judge William N. Sherrill, Pima County Superior Court, sentenced Petitioner to death on count one, the first degree murder charge, and further imposed aggravated sentences of fourteen (14) years as to count two, the sexual assault charge, and count three, the kidnapping charge. Sentences as to count two and three were to run consecutively. Defendant's judgments of guilt and sentences were affirmed on appeal. *State* v. *Spreitz*, 190 Ariz. 129, 945 P.2d 1250 (1997)*(en banc)*, *cert. denied* (1998).

On March 28, 2000, Petitioner filed his first Petition for Post-Conviction Relief (PCR) pursuant to Rule 32, *Arizona Rules of Criminal Procedure*. In his Petition, Petitioner raises ten (10) issues which are outlined as follows:

1. Ineffective assistance of trial counsel at the guilt/innocence phase (Claim I, pages 17-33);
2. Ineffective assistance of counsel at the sentencing phase (Claim II, pages 33-51);
3. Ineffective assistance of counsel on appeal (Claim III, pages 51-52);
4. Ineffective assistance of counsel generally (Claim IV, pages 52-54);

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5. The instruction on premeditation violated the Petitioner's constitutional rights (Claim V, pages 54-55);

6. The felony murder instruction violated the Petitioner's constitutional rights (Claim VI pages 55-58);

7. The Court's failure to instruct the jury that they need not return a verdict (Claim VII, page 58);

8. The Court erroneously found kidnapping as an aggravating factor (Claim VIII, pages 59-60);

9. The trial court applied an erroneous quantum of proof necessary to consider intoxication as a mitigating factor (Claim IX, pages 60-62); and

10. The trial court erroneously applied A.R.S. § 13-703(G)(1) as it relates to Petitioner's dysfunctional upbringing (Claim X, pages 62-68).

The State filed a Response to the Petition, opposing any relief requested by Petitioner.[1] Petitioner then filed his reply to the State's opposition on June 20, 2000.

II. LEGAL ANALYSIS AND CONSIDERATIONS:

For the sake of simplicity, the ten issues raised by Petitioner in his PCR can be classified and consolidated under three main topics--

(1) The ineffective assistance of counsel, both trial and appellate (Issues 1 through 4);

(2) The appropriateness of certain jury instructions/failure to instruct (Issues 5 through 7); and

(3) The trial court's consideration, or lack thereof, of mitigating and aggravating factors (Issues 8 through 10).

The Court will address and discuss the issues accordingly.

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[1] Although the State argues that Petitioner has presented precluded or non-colorable claims, the State indicates that Petitioner should be allowed an evidentiary hearing to make a record. See State's Response to Petition for Post-Conviction Relief, at page 14 (lines 11-12). However, the State does not indicate as to which issue or issues Petitioner should be allowed to make a record.

PART 1: INEFFECTIVE ASSISTANCE OF COUNSEL

INTRODUCTION

Petitioner argues numerous instances in which trial and appellate counsel were ineffective. See the discussion in Part 1, *infra*. On appeal, Petitioner made only one claim of ineffective assistance of counsel, arguing that trial counsel was ineffective when counsel admitted guilt in his opening statement to the jury (thereby abandoning all other defenses). This issue was decided against Petitioner. 190 Ariz. at 146-47. No other claims of ineffective assistance of counsel were raised or argued by Petitioner on appeal. Not having done so, Petitioner has effectively waived any further such claims for Rule 32 purposes. *E.g.*, *State* v. *Herrera*, 183 Ariz. 642, 905 P.2d 1377 (App. 1995). However, to the extent that Petitioner is claiming that appellate counsel was ineffective for failing to raise any such claims, the Court will consider and discuss each issue on the merits.

1. INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE (Issue 1)

a. Counsel's failure to argue speedy trial violation (Claim IA, pages 17-25):

Petitioner claims that trial counsel was ineffective in that trial counsel failed to argue that his speedy trial rights were violated under Rule 8, *supra* , as well as under the Sixth Amendment of the United States Constitution and Art. 2, § 24 of the Arizona Constitution. The lengthy pretrial period--five years from arraignment to trial--was analyzed and discussed in detail on direct appeal by the Arizona Supreme Court, which rejected Petitioner's claim of speedy trial violations under Rule 8 and the Sixth Amendment theories. The Supreme Court found that Petitioner himself waived his speedy trial rights under Rule 8; furthermore, the Court noted that Petitioner did not complain about the delay until just

before trial.[2] The Court found that counsel was not deficient for failing to protest the delay, much less that counsel's performance prejudiced the Petitioner. See the discussion in *Spreitz*, 190 Ariz. at 136-40.

b. Failure to Present Insanity Defense (Claim IB, at pages 25-26):

Petitioner argues that trial counsel was ineffective in not pursuing an insanity defense. In support of this claim, Petitioner attaches a 16-page report by Dr. Joseph Geffen, Ph.D. See Exhibit 1 of the Appendix, as attached to PCR (report dated March 28, 2000). In his report, Dr. Geffen concluded as follows:

> ". . .[I]t is my opinion that the defendant does qualify for statutory mitigation and also did qualify, at the time of his trial, for an insanity defense. He did not possess, at the time of his offense, the mental and emotional qualifies that would have made it possible for him to avoid his criminal actions. . . .If he suffered from a "blackout" at the time of the murder, which is quite likely, then he would not even have the conscious ability to know what he was doing, much less that it was wrongful. . .". See Exhibit 1 at page 16.

First of all, it is clear from the record in this case that the facts or evidence simply did not support an insanity defense. Indeed, Dr. Geffen's opinion that the Petitioner may have suffered from an alcoholic blackout at the time of the offense does not give rise to, nor does it support, an insanity defense. *Cf. State* v. *Schurz*, 176 Ariz. 46, 857 P.2d 156 (1993); *and see* the discussion in *Spreitz*, 190 Ariz. at 150 (referring to Dr. Todd Flynn's testimony at the mitigation hearing, wherein Dr. Flynn opined that Petitioner was not suffering from any emotional or cognitive disorder which would have affected his ability to distinguish right from wrong or to conform his behavior to the law).

Secondly, it is also clear from the record that trial counsel's strategy, in defending Petitioner at trial, was to concede that Petitioner was in fact responsible for the victim's death but that his conduct did amount to first degree murder (and thus possibly saving him from the death penalty). Therefore, trial

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[2] Much of the delay was attributed to the fact that Petitioner's case was a test case in Pima County for the admissibility of RLFP DNA evidence.

counsel's decision not to present an insanity defense was a reasonable, strategic decision.[3]

c. Failure to Object to Irrelevant and Prejudicial Testimony Regarding Homosexuality (Claim IC, pages 27-28):

Petitioner argues that his trial counsel was ineffective by failing to object to a police officer's testimony regarding Petitioner's alleged homosexuality.[4] Petitioner argues that the testimony of Petitioner's alleged homosexuality was extremely prejudicial and would have inflamed the jury, especially those who may have harbored bias against homosexuals in general.

In the context in which this discussion took place between the Petitioner and the officer, the statements made by Petitioner to Sgt. Chacon, and the explanation given by Sgt. Chacon as to why he posed the question to Petitioner, was far more probative than any possible prejudice. It is obvious, from the nature of his response to Sgt. Chacon, that Petitioner was attempting to alleviate any concerns on the part of Sgt. Chacon regarding the officer's observations of blood and fecal material on Petitioner's clothes. Regardless, such evidence can be deemed harmless in light of the overwhelming evidence of

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[3] On appeal, the Supreme Court noted that it was strategically sound for defense counsel to admit Petitioner's responsibility for the victim's death and to argue that Petitioner could only be found guilty of manslaughter or second degree murder. The Court further noted that defense counsel argued against any finding of kidnapping or sexual assault in an effort to preclude a guilty verdict on the theory of felony murder. 190 Ariz. at 147. The fact that a particular course of strategy later proves unsuccessful does not constitute ineffective assistance of counsel. *State* v. *Valdez*, 160 Ariz. 9, 770 P.2d 313 (1989).

[4] Shortly after the Petitioner had killed the victim, he was confronted by Sgt. Victor Chacon of the Tucson Police Department, who noticed that there was blood and fecal matter on Petitioner's clothes. When Sgt. Chacon asked Petitioner if he was gay, Petitioner responded "A little bit". Sgt. Chacon went on to testify that homosexuals often transfer fecal matter between themselves while having sex. See reporter's transcript, 8/10/94 at 251 [hereinafter referred to as "R.T."].

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Petitioner's guilt.

d. Lack of Defense Theory/Failure to Present Witnesses/Lack of Petitioner's Participation in the Decision-Making Process (Claim ID, pages 28-30):

Petitioner argues that trial counsel was ineffective for lacking any theory of the defense and for failure to call any witnesses on Petitioner's behalf.[5] Petitioner further argues that trial counsel never discussed or consulted with Petitioner the fact that no witnesses would be called, including calling Petitioner as a witness. Petitioner did not testify.

As previously discussed, insanity was not a viable defense in Petitioner's case. Trial counsel obviously understood and accepted the fact that the evidence overwhelmingly demonstrated Petitioner's responsibility for the victim's death. The most sound and realistic strategy, in terms of defending Petitioner at his trial, was to simply admit Petitioner's responsibility for the victim's death but to make every effort to negate any premeditation (and thus preclude a conviction on first degree murder). Whether or not Petitioner participated in the decision to call or not to call witnesses in the defense portion of the case is really of no consequence since Petitioner is bound by his counsel's trial strategy. *State v. Levato*, 186 Ariz. 441, 924 P.2d 445 (1996). Nor is there any indication in the record that Petitioner wanted to take the stand and was not allowed to do so. *State v. Allie,* 147 Ariz. 320, 327-8, 710 P.2d 430 (1985).

e. Failure to Present Evidence Regarding Petitioner's Intoxication (Claim IE, pages 30-32):

Petitioner argues that trial counsel was ineffective for failure to present evidence of Petitioner's intoxication at the time of the murder. However, there was in fact evidence presented at trial that Petitioner had been drinking on the night in question, including the fact that Petitioner may have been

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[5] For example, Petitioner argues that trial counsel could have submitted the defense of temporary insanity.

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intoxicated.[6] Petitioner argues that trial counsel should have called certain witnesses, such as Lucy Eremic, as well as Scott Jouett. According to Petitioner, Ms. Eremic would have testified that he sounded intoxicated when she spoke to him that evening. Jouett would have testified that Petitioner often suffered blackouts when he had been drinking. First of all, Eremic's testimony would have been cumulative. Secondly, Jouett's testimony would not have been admissible since he was not in a position to comment on Petitioner's condition on the night in question.

f. Failure to Aggressively Pursue a Plea Bargain (Claim IF, page 32):

Petitioner argues that trial counsel was ineffective in not aggressively pursuing a plea agreement. Petitioner goes on to argue that had trial counsel not continued the trial in order to allow the State to omplete it's DNA testing, the State would have probably offered the Petitioner a plea bargain. There is no evidence whatsoever that the State would have, at any time, offered Petitioner a plea in this matter. Thus, Petitioner's claim that the State would have offered the Petitioner a plea bargain is pure speculation and does not give rise to any colorable claim. *See*, for example, *State v. Meeker*, 143 Ariz. 256, 693 P.2d 911 (1984). Furthermore, a defendant in a criminal case has no constitutional right to a plea agreement. *State* v. D*raper*, 162 Ariz. 433, 784 P.2d 259 (1989).

g. Failure to Request/Object to Certain Jury Instructions (Claim IG, pages 32-3):

Regarding his arguments made under Claims V, VI and VII (which are discussed in Part 2 *infra*), Petitioner incorporates his arguments regarding certain jury instructions. For the reasons

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[6] Petitioner's friend, Craig Clark, and Clark's girlfriend, Alana Owens, both testified that Petitioner had been drinking on the night in question. Clark testified that he had been drinking "nickel beers" for more than three hours with Petitioner and that he drove Petitioner home on the night of the murder. R.T., 8/10/94, at 289, 91-92 and 305. Owens testified that Petitioner "seemed a little drunk" when he came home. R.T., 8/11/94 at 336-337. Interestingly enough, Petitioner himself argues that there was "substantial evidence" that Petitioner was intoxicated the time he committed the murder. See PCR, Claim IX, at page 60 (lines 22-3).

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indicated by the Court in Part 2, this Court cannot find any basis for relief under Rule 32 based upon these claims.

2. INEFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE (Issue 2):

a. Counsel's Failure To Understand Or Research State's Theory Of Aggravation (Claim IIA, pages 33-9):

Petitioner argues that trial counsel completely failed to understand the State's sole theory of an aggravating circumstance, i.e., that the murder was committed in an especially cruel manner. See A.R.S. § 13-703(F)(6). Petitioner further argues that trial counsel did not adequately research the case law regarding cruelty as an aggravating circumstance. The record clearly demonstrates that trial counsel (Marshall Tandy) completely understood that the sole aggravating factor relied upon by the State in seeking the death penalty was, to use counsel's own words, the "notion of cruelty". R.T., 12/12/94 at page 3. The record also demonstrates that trial counsel recognized that the element of cruelty addresses the infliction of pain on the victim, whether it is physical or mental. In any event, the Supreme Court conducted its own independent review of the aggravating and mitigating factors in this matter, and having done so, the Supreme Court determined that the aggravating circumstance of especial cruelty in Petitioner's murder of Ruby Reid outweighed all factors mitigating in favor of leniency. 190 Ariz. at 151. Thus, even if trial counsel did not completely understand the aspect of cruelty as an aggravating factor, or if he did not adequately research it, Petitioner suffered no prejudice since the facts themselves warrant a finding that the murder was committed in an especially cruel manner.

b. Counsel's Failure To Present Evidence To "Humanize" Petitioner (Claim IIB, pages 39-41):

Petitioner argues that his trial counsel was ineffective for failure to call a number of witnesses at the mitigation hearing. In his Appendix to the PCR, Petitioner attaches no less than 15 affidavits (and one declaration) by his parents, former stepfather and stepmother, as well as immediate family members,

relatives and acquaintances of Petitioner.[7]

According to Petitioner, all of the witnesses whose affidavits were attached in his Appendix would have testified at the mitigation hearing had they been requested to do so. In this way, Petitioner argues the evidence would have demonstrated that he was a good, kind and decent individual, having suffered from alcoholism and childhood abuse, and that trial counsel failed to adequately demonstrate this at the time of the mitigation hearing held on November 28, 1994. However, a review of these affidavits leads to the conclusion that these witnesses' testimony would have been cumulative and, in some instances, counterproductive to Petitioner's theory of mitigation. According to Dr. Todd Flynn, forensic psychologist, who was called by the defense at the mitigation hearing, Petitioner had a long history of alcohol and substance abuse and clearly suffered from alcoholic blackouts. See R.T., at page 12, lines 4-24. Indeed, Dr. Flynn opined that Petitioner was a "physiological alcoholic" who could function with a high level of energy after drinking heavily. Id: page 13, lines 19-25 and page 20, line 7-14. Dr. Flynn also testified that he could find no history of violent behavior in Petitioner's past other than some minor episodes of recent origin. R.T., at page 24, lines 1-19. Even more significant, Dr. Flynn indicated that Petitioner lacked the potential for violent behavior and that he found no basis for diagnosing Petitioner as having an antisocial personality according to the DSM-IV.[8] R.T., page 24, lines 20-25; page 25; and page 26, lines 21-23. Dr. Flynn also related facts that supported Petitioner's claim that he had a dysfunctional upbringing and that he suffered from childhood abuse, both physical and

[7] The list includes former teachers and classmates, as well as childhood friends. Also included was an affidavit from Tammy Brunner (Exhibit 9), who is the mother of Petitioner's daughter.

[8] The Diagnostic and Statistical Manual of Mental Disorders, 4th edition.

emotional.[9]

Thus, any further testimony regarding Petitioner's dysfunctional upbringing, alcoholism and lack of antisocial behavior would have been repetitious and cumulative. Some of the proposed testimony would have been inconsistent with Petitioner's claim that he may have suffered from an alcoholic blackout at the time of the offense or that he suffered from severe childhood abuse. For example, Susan Mendenhall, Petitioner's mother, indicates that she was a considerate, conscientious mother who could not even recall a single instance in which she argued with Petitioner while he was growing up. Steven Spreitz, Petitioner's former stepfather, mostly describes his stormy relationship with Petitioner's mother. Petitioner's natural father, Raymond Jackson, indicates that Petitioner had no alcohol problem when etitioner was living with him during some of Petitioner's high-school years and that he does not recall Petitioner ever being drunk or belligerent.

The fact remains that none of the testimony presented at the mitigation hearing, as well as any of the testimony Petitioner now proposes to introduce in mitigation, would change the sole and most significant aggravating factor in this case, i.e., that the murder was committed in an especially cruel manner. *See*, for example, *State v. Smith*, 138 Ariz. 79, 673 P.2d 17 (1983) (Supreme Court found that cumulative mitigation was "significant" but not sufficiently substantial to call for leniency in light of extreme cruelty and brutality of the offense).

c. Counsel's Failure To Investigate And Document Petitioner's Childhood Head Injuries (Claim IIC, pages 42-3):

Petitioner argues that trial counsel failed to properly investigate and document the alleged fact that Petitioner suffered severe head injuries as a child which may have provided an explanation for

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[9] This aspect of Petitioner's childhood was discussed at such great length, prompting Dr. Flynn to testify that "we have already talked ad nauseam about the deprived pathogenic home environment which I would consider nonstatutory factors." R.T., at page 29, lines 11-13.

Petitioner's behavior in the instant case. There is insufficient evidence to indicate that Petitioner suffered significant head injuries as a child which would demonstrate, in any manner whatsoever, that he was unable to conform his conduct to the law or appreciate the wrongfulness of his behavior. There is no evidence whatsoever that Petitioner suffered from any cognitive deficits, organic or otherwise. Thus, there is no basis for claiming that trial counsel was ineffective for failing to investigate or document Petitioner's alleged head injuries as a child. *Compare State* v. *Rockwell*, 161 Ariz. 5, 775 P.2d 1069 (1989 *with State v. Stokley*, 182 Ariz. 505, 898 P.2d 454 (1995).

d. Counsel's Failure To Present Evidence Of Petitioner's Extensive Childhood Abuse And The Striking Resemblance Between The Victim And Petitioner's Mother (Claim IID, pages 43-5):

Petitioner argues that trial counsel failed to adequately present evidence of Petitioner's extensive childhood abuse. Petitioner further argues that trial counsel failed to elicit testimony or evidence of the "striking physical resemblance" between Petitioner's mother and the victim herein. Neither states a colorable claim of ineffective assistance of counsel. First of all, there was more than sufficient evidence of Petitioner's abuse as a child, both physical and emotional. Secondly, any possible resemblance between Petitioner's mother and the victim in this case, Ruby Reid, would really be of no consequence.

e. Counsel's Failure To Present Evidence Of Petitioner's Intoxication At The Time Of Offense (Claim IIE, pages 45-6):

Petitioner once again argues that trial counsel was ineffective for failure to present available evidence of Petitioner's intoxication at the time of the offense, this time arguing that counsel should have such presented such evidence at the time of Petitioner's sentencing. As previously discussed, there was more than sufficient evidence of Petitioner's drinking and/or intoxication (on the night in question) presented at trial and the trial court certainly considered such evidence at the time of sentencing. However, such evidence did not qualify as a mitigating factor. See the discussion in Part 3, Section 2, *ifra.*

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f. Counsel's Failure To Object To the Preparation Of The Presentence Report Or To Be Present At Petitioner's Interview Regarding The Report (Claim IIF, pages 46-51):

Petitioner argues that a preparation of the presentence report in his case violated his constitutional rights under the United States and Arizona Constitutions. He also argues that trial counsel was ineffective for failing to be present during his presentence interview with the probation officer.

First of all, the rules require that a presentence report be prepared in every case. Rule 26.4(a), *supra*. Secondly, the statutory scheme regarding sentencings in capital cases contemplate that the sentencing judge use information contained in the presentence report at the time of sentencing. A.R.S. § 13-703(C); *see State* v. *Clabourne*, 142 Ariz. 335, 690 P.2d 54 (1984). Therefore, trial counsel was not ineffective in failing to object to a Presentence Report in this matter.

Nor was counsel ineffective for failing to attend the presentence interview conducted by the probation officer. Petitioner cites no authority for this argument and the court finds that such a claim is without any merit whatsoever.

3. INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL (Issue 3)

a. Counsel's Failure To Challenge Trial Counsel's Ineffectiveness Per Rule 32 (Claim IIIA, page 51):

Petitioner argues that appellate counsel was ineffective for failing to challenge the ineffectiveness of trial counsel in a Rule 32 proceeding, as opposed to arguing the matter on appeal.[10] While the preferred method of challenging trial counsel's ineffectiveness is by way of a Rule 32 proceeding, the failure to do so does not necessarily constitute ineffectiveness of appellate counsel.

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[10] As previously indicated, appellate counsel did argue that trial counsel was ineffective by admitting Petitioner's guilt in his opening statement to the jury (and in doing so, effectively abandoned all defenses available to Petitioner at the time). See the discussion in Part 1, section 1, *supra*.

State v. *Valdez, supra.* However, as clearly indicated in the instant proceedings, Petitioner has failed to allege any facts or submit any evidence, if true, which would demonstrate appellate counsel's ineffectiveness. Effective advocacy requires that appellate counsel weed out the more weaker arguments and focus on those issues or arguments that are more likely to prevail on appeal. *State* v. *Smith*, 169 Ariz. 243, 818 P.2d 228 (App. 1991). And once the issues have been narrowed and presented, appellate counsel's failure to raise other potential claims or arguments constitutes a waiver of those issues and cannot later be resurrected in post-conviction proceedings under the guise of claiming ineffective assistance of counsel. *State v. Herrera, supra.*

b. Counsel's Ineffectiveness To Raise, On Appeal, The Issue Of Requesting Certain Jury Instructions Or Objecting To Others (Claim IIIB, pages 51-2):

Petitioner argues that appellate counsel was ineffective in not raising, on appeal, the issue of trial counsel's ineffectiveness in failing to request certain jury instructions, as well failing to object to others that were given. These arguments are essentially outlined in Part 2, *infra*, and the Court's findings therein are incorporated herein by reference.

c. Counsel's Failure To Challenge The Sentence Of The Court (Claim IIIC, page 52):

Petitioner argues that appellate counsel was ineffective in failing to challenge the sentence of the Court for those reasons outlined in Claims VIII through X of his Petition. These claims are discussed in Part 3, *infra*, and the Court's findings therein are incorporated herein by reference.

4. GENERAL LEGAL PRINCIPLES OF INEFFECTIVE ASSISTANCE OF COUNSEL (Issue 4, Claim IV, pages 52-4)

Petitioner argues that trial counsel committed numerous tactical or strategical errors throughout his trial and that the cumulative effect of these errors violated Petitioner's constitutional rights to a fair trial. Petitioner claims that given the numerous errors and deficiencies of trial counsel, both individually and collectively, there is a reasonable probability that it would have changed the outcome of the trial,

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sentencing or appeal.

Petitioner has not outlined or submitted all of the alleged errors, deficiencies or mistakes allegedly made by trial counsel during the course of his trial. Suffice to say even the most capable and able trial attorney often makes certain tactical or strategical decisions which, upon hindsight, prove to be less than choice decisions. The fact that trial counsel did not make an objection in every instance that an objection could have been made or failed to contest the admissibility of every item of evidence does not support a claim that trial counsel was ineffective. All that is required is that a defendant receive effective assistance of counsel. *Strickland* v. *Washington*, 466 U.S. 668 (1984). And Petitioner has presented no claims or arguments herein which, if true, would support a colorable claim for ineffective assistance of counsel, both at the trial and appellate level. *E.g.*, *State* v.s.. *Borbon*, 146 Ariz. 392, 706 P.2d 718 (1985).

PART 2: ISSUES REGARDING JURY INSTRUCTIONS

INTRODUCTION

In terms of the issues raised in Claims V through X of the PCR (see discussion in Parts 2 and 3, *infra*), Petitioner argues that there were fundamental and structural errors that warrant a reversal of his conviction and sentence. First of all, he argues that both trial and appellate counsel were ineffective for failing to raise these issues, and secondly, that such errors cannot be waived for purposes of any relief requested under Rule 32.[11] As discussed below, each of these claims are precluded under Rule

[11] Petitioner apparently concedes that failure to raise these issues on appeal would normally constitute a waiver and preclusion for purposes of Rule 32. However, Petitioner argues that they are not precluded since they are based on newly-discovered evidence and that Petitioner is not responsible for failing to raise theses issues at trial or on appeal. Finally, he argues that there has been a significant change in the law that requires reversal of his conviction and sentence.

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32.2(a)(3), *supra*. Furthermore, the record does not support any basis for relief under any of the grounds asserted by Petitioner.

1. THE JURY INSTRUCTION ON PREMEDITATION (Issue 5, Claim V, pages 54-5)

Petitioner concedes that the jury instruction on premeditation met its statutory definition under A.R.S. § 13-1101(1). Nevertheless, Petitioner argues that the instruction violated his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article 2, Section 4 of the Arizona Constitution. He claims that the premeditation instruction is inadequate, allowing the jury to convict an individual on first or second degree murder "based on a whim." Any such argument could have been raised on appeal. Not having done so, it is waived. *State* v. *Herrera, supra.* Also, there was no error in giving the instruction. *State* v. *Haley*, 194 Ariz. 123, 978 P.2d 100 (App. 1998).

2. THE INSTRUCTION ON FELONY MURDER (Issue 6, Claim VI, pages 55-58)

Petitioner claims that the felony murder instruction submitted to the jury violates his due process rights under the Fifth and Fourteenth Amendments of the United States Constitution and Article 2, Section 4 of the Arizona Constitution. Petitioner argues that the jury was erroneously instructed that the killing need not occur while "engaged in the felony," which he claims is inconsistent with the term "in the course of the offense." Again, this argument should have been raised on appeal, and not having done so, it is waived. Furthermore, there was no error in giving the instruction. *State* v. *Miles,* 186 Ariz. 10, 918 P.2d 1028 (1996).

3. FAILURE TO INSTRUCT THAT THE JURY NEED NOT RETURN A VERDICT (Issue 7, Claim VII, page 58)

Petitioner claims that his due process rights under the Fifth and Fourteenth Amendment of the United States Constitution and Article 2, Section 4 of the Arizona Constitution were violated by the Court's failure to instruct the jury that they need not return a verdict. Not only is this claim precluded, having been raised on appeal, but there is absolutely no requirement to advise a jury that they need

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not return a verdict. *State* v. *Thomas,* 133 Ariz. 533, 652 P.2d 1380 (1982).

PART 3: THE COURT'S CONSIDERATION, OR LACK THEREOF, OF MITIGATING AND AGGRAVATING FACTORS

1. KIDNAPPING AS A NON-STATUTORY AGGRAVATING FACTOR (Issue 8, Claim VIII, pages 59-60)

Petitioner claims that the trial court erroneously found kidnapping as an aggravating factor in imposing the death penalty inasmuch as kidnapping is not a statutory aggravating factor. See A.R.S. § 13-703. First of all, this issue was never raised on appeal (and is thus waived). Secondly, the record does not reflect that the trial court found kidnapping as an aggravating factor. As previously discussed, the Supreme Court conducted its own independent review of the mitigating and aggravating factors and determined that the trial court's imposition of the death sentence was supported by the record. See the discussion in *Spreitz*, 190 Ariz. at 147-51.

2. THE COURT'S FAILURE TO CONSIDER DEFENDANT'S ALCOHOLISM/DRUG ADDICTION AS A MITIGATING CIRCUMSTANCE (Issue 9, Claim IX, pages 60-62)

Petitioner argues that the trial court failed to consider Petitioner's long-term alcoholism and substance abuse as a mitigating factor. Separate and apart from whether or not any residuals from Petitioner's long-term problems with alcohol and substance abuse affected his cognitive abilities on the night in question, Petitioner argues that Petitioner's history of alcoholism and substance abuse, in and of itself, constituted a non-statutory mitigating factor which the trial court should have considered at the time of sentencing.[12]

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[12] Petitioner argues that the Arizona Supreme Court confused this issue as well. See the Court's discussion in *Spreitz*, 190 Ariz. at 149-150.

Once again, this issue was never raised on appeal and is thus waived. Even so, it must be demonstrated, under A.R.S. § 13-703(G)(1), that there is a causal link between the history of alcohol or substance abuse and the offense itself. *E.g.*, *State* v. *Stokley*, *supra* 182 Ariz. at 523. Without some basis for explaining or defining the individual's behavior at the time of the offense, the Petitioner's history of alcohol or substance abuse would be inconsequential (which is exactly what the trial court and Supreme Court concluded). *State v. Kayer*, 194 Ariz. 423, 984 P.2d 81 (1999).

At times, the court can and should consider an individual's long-term alcoholism and substance abuse, usually in conjunction with other factors or diagnosis, as non-statutory mitigation. However, the impact or effect of the alcoholism or substance abuse must be substantial and of such severity that it provides a sufficient basis for explaining the defendant's conduct, character or ability to control his behavior at the time of the offense. *See*, for example, *State v. Rockwell, supra* (where defendant's alcoholism, violent and unpredictable behavior, as well as destructive conduct in personal relationships, occurred after defendant suffered severe head injuries and loss of right leg in motorcycle accident, court found that these factors, along with defendant's young age and "unique circumstances of his conviction," were sufficiently substantial to call for leniency, notwithstanding the fact that the mitigating factors failed to make defendant any less accountable for his crime); *State* v. *Herrera*, 174 Ariz. 387, 850 P.2nd 100 (1993) (finding that mitigating circumstances taken as a whole, i.e., duress, age, dysfunctional childhood, borderline I.Q. and alcohol use at time of the offense, required leniency); *see also State* v. *Stevens*, 158 Ariz. 595, 764 P.2d 724 (1988) (where defendant diagnosed as alcohol and drug dependent, as well as having an impulsive, passive-aggressive personality, and where psychiatrist opined that defendant's heavy use of alcohol and drugs shortly before the murder affected his ability to conform his behavior to the requirements of the law, death sentence vacated and reduced to life).

As previously discussed, there is no evidence in Petitioner's case to suggest that he suffered any long-term effects from his alcohol or drug abuse that precluded him from controlling his behavior.

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Petitioner did not suffer from any cognitive or emotional deficits that rendered him incapable of controlling his conduct. Therefore, the trial court did not err in failing to find Petitioner's history of alcohol or substance abuse as a separate, non-statutory mitigating factor. *E.g., State* v. *Tittle*, 147 Ariz. 339, 710 P.2d 445 (1985) (finding that defendant's history of heroin abuse, including use of heroin on the day of the murder, held insufficient to qualify as mitigation where defendant's drug history or use did not impair his ability to appreciate wrongfulness of his conduct).

3. THE COURT'S FAILURE TO CONSIDER PETITIONER'S DYSFUNCTIONAL UPBRINGING AS A SEPARATE MITIGATING FACTOR (Issue 10, Claim X, pages 62-3)

Petitioner argues that the trial court failed to consider his dysfunctional upbringing as a separate non-statutory mitigating factor. As with his previous argument regarding Petitioner's history of alcohol and substance abuse, Petitioner argues that his dysfunctional upbringing should have been considered as a separate non-statutory mitigating factor.[13] This issue was never raised on appeal and is thus waived. Regardless, there must be some connection or nexus between the dysfunctional or subnormal childhood upbringing and the offense in question in order for it to be considered as a mitigating circumstance. *E.g.*, *State* v. *Lee*, 189 Ariz. 590, 944 P.2d 1204 (1997); *State* v. *Jones*, 185 Ariz. 471, 917 P.2d 200 (1996). Thus, a dysfunctional upbringing is a relevant mitigating circumstance only if a defendant can show that something in his background had an effect or impact on his behavior that was beyond his control. *See*, for example, *State* v. *Trostle*, 191 Ariz. 4, 951 P.2d 869 (1987) (defendant's abusive childhood, including physical abuse, sexual abuse and neglect, resulted in long-term psychological damage; Court concluded that defendant had an impaired ability to conform his conduct to the law's

[13] Once more Petitioner argues that the Arizona Supreme Court failed as well to make this distinction. In other words, Petitioner argues that his dysfunctional childhood should be considered as a mitigating factor, separate and apart from any consideration as to whether it had any causative affect on his behavior at the time of the murder.

requirements). There is no evidence whatsoever that Petitioner's traumatic or dysfunctional childhood impacted or affected his ability to perceive, comprehend or control his actions. *E.g.*, *State* v. *Hurles*, 185 Ariz. 199, 914 P.2d 1291 (1996). Therefore, the trial court did not err in failing to find Petitioner's dysfunctional family history to be a separate mitigating circumstance warranting leniency. *State* v. *Smith*, 193 Ariz. 452, 974 P.2d 431 (1999) (although defendant demonstrated a dysfunctional upbringing, court found and concluded that mitigating circumstances, individually and collectively, were not sufficiently substantial to call for leniency); *State* v. *Poyson*, 325 Ariz. Adv. Rep. 11, 16 (July 16, 2000) (defendant failed to demonstrate that traumatic childhood somehow rendered him unable to control his behavior).

III. FINDINGS AND CONCLUSIONS:

In light of the above discussions, the Court concludes and finds as follows:

1. Each of the ten issues (including the sub-issues) which Petitioner raises in his PCR could have and should have been raised on appeal. Not having done so, each of Petitioner's claims are deemed waived and thus precluded under Rule 32.2(a)(3), *supra*;

2. Even if any of the claims were not waived or not precluded, this Court cannot find any basis or support for concluding that any of Petitioner's arguments give rise to a colorable claim. Even if Petitioner were able to demonstrate or prove any of the facts or evidence that he submits in support of each of his claims, there is no reasonable probability that it would have changed the outcome of his trial, sentence, or appeal; and

3. The Court finds that Petitioner's claims do not present any material issue of fact or law which would entitle Petitioner to relief or a hearing. Rule 32.6(c), *supra.*

ACCORDINGLY,

IT IS ORDERED denying Petitioner's claim for relief under Rule 32.

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IT IS FURTHER ORDERED dismissing the Petition for Post-Conviction Relief filed March 28, 2000.

IT IS SO ORDERED.

PAUL S. BANALES
JUDGE PRO TEMPORE

cc: Hon. Paul S. Banales
Criminal Calendaring
Clerk of Court - Appeals
Attorney General - Phoenix
Sean Bruner, Esq., Bruner & Upham, P.C.
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No. 09-99006

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER SPREITZ,

Petitioner - Appellant,

v.

CHARLES L. RYAN, et al.,

Respondents - Appellees.

On Appeal from the United States District Court
District of Arizona, No. CV-02-121-TUC-JMR

RENEWED MOTION TO STAY THE APPEAL AND REMAND FOR APPLICATION OF *MARTINEZ* AND TO SUPPLEMENT THE PENDING STAY MOTION

Death Penalty Habeas Corpus Case

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COUNSEL FOR PETITIONER-APPELLANT

RENEWED MOTION TO STAY THE APPEAL AND REMAND FOR APPLICATION OF *MARTINEZ* AND TO SUPPLEMENT THE PENDING STAY MOTION

Petitioner-Appellant Christopher Spreitz ("Spreitz"), through counsel, renews his pending Motion to Stay the Appeal and for Remand Pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) ("Stay Motion"), Ninth Cir. Dkt. 49-1, and moves to supplement that motion with the reports of Pablo Stewart, M.D., a psychiatrist, and Paula Lundberg-Love, Ph.D., a psychologist and psychopharmacologist. Those reports are attached as Renewed Stay Motion Exhibits 1 & 2. The production of evidentiary support for the Stay Motion was delayed by the federal sequester then in effect. *See* Dkt. 66-1 at 1-2. The motion is brought pursuant to Fed. R. App. P. 27(a)(1) & (2), and 28 U.S.C. § 2106. Counsel for Respondents, Arizona Assistant Attorney General Jacinda Lanum, indicated on January 26, 2017, that Respondents will await the filing of this motion before deciding how to respond.

The parties have filed supplemental briefs on the application of *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (*en banc*), to Spreitz's pending claim of ineffective assistance of appellate counsel, which is based on counsel's failure to raise a non-frivolous so-called causal nexus claim on direct appeal in the Arizona Supreme Court. Dkts. 892, 95. Spreitz will file a timely reply on or before February 13, 2017. Dkt. 91. While Spreitz continues to view that claim as

meritorious, it falls short of demonstrating to this Court the full extent of the deficiencies that plagued Spreitz's capital sentencing hearing.

Accuracy and reliability in the imposition of death sentences are required under the Eight Amendment. *See Sawyer v. Smith*, 497 U.S. 227, 243 (1990). A district court in this Circuit has aptly found "mitigating evidence about the individual's background and character [significant] to the accuracy and reliability of the capital sentencing process," and granted relief on a claim of ineffective assistance of counsel ("IAC") where mitigating evidence was not investigated and presented. *Hendricks v. Calderon*, 864 F. Supp. 929, 946 (N.D.Ca. 1994), *aff'd*, 70 F. 3d 1032 (9th Cir. 1995).

While the causal nexus portion of the IAC claim alleges that Spreitz was prejudiced where the Arizona Supreme Court failed to attribute any weight to the *non-statutory* mitigating evidence of Spreitz's history of alcoholism and drug addiction between the ages of 12 and 22, the evidence in support of the pending Stay Motion, including the opinions of Dr. Stewart and Dr. Lundberg-Love, had they been obtained by trial counsel, would have proven the compelling *statutory* mitigating factor, A.R.S. § 13-703(G)(1), that Spreitz's capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law at the time of the offense was significantly impaired. *See* Renewed Stay Motion Exh. 1 at 8-10; Exh. 2 at 6-7. Their opinions would also have demonstrated to the

sentencer how Spreitz, *with no history of violent behavior*, could have inflicted the injuries on the victim, Ruby Reid. *See* Renewed Stay Motion Exh. 1 at 9-10; Exh. 2 at 7.

In *Detrich v. Ryan*, 740 F.3d 1237, 1254 (9th Cir. 2013) (*en banc*), this Court remanded for a determination of cause and prejudice pursuant to *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012). The basis for the decision to remand in *Detrich* rather than for the appellate court to decide the matter was that IAC claims require investigation and factual development; this Court operates "more effectively as a reviewing court rather than a court of first instance"; this Court had remanded for the district court to make the "initial decision . . . on prior cases"; and, the petitioner "moved in our court for a remand and not for a ruling under *Martinez.*" *Id.* at 1246, 1248-49, 1254. Spreitz meets those criteria for remand.

Thus, Spreitz renews the Stay Motion and respectfully requests that the Court forego adjudication of the pending appeal and remand with instructions for the district court to order Spreitz to file a supplemental *Martinez* brief. The remand would serve the interest of judicial economy by eliminating piecemeal litigation of claims related to the deficiencies in Spreitz's capital sentencing. The remand would serve to narrow the facts and issues that might be returned to this Court on appeal after remand.

The Motion relies for support on the attached Memorandum in Support, the two expert reports attached hereto, the initial Stay Motion (Dkt. 49-1) and related pleadings and exhibits, and the briefs and excerpts of record filed herein.

MEMORANDUM IN SUPPORT

I. Introduction.

Spreitz moved this Court on March 20, 2013, to stay his appeal and remand to the district court so that he could attempt to establish cause and prejudice, in the form of his state post-conviction relief ("PCR") counsel's ineffectiveness, to excuse the procedural default of two IAC claims based on counsel's omissions at Spreitz's capital sentencing hearing. *See* Dkt. 49-1. The stay motion was based on *Martinez*, 132 S. Ct. 1309, which answered a question left open by the Court for 20 years, to wit, whether a habeas petitioner has a right to effective assistance of counsel in state PCR proceedings such that PCR counsel's ineffectiveness under the familiar standard of *Strickland v. Washington*, 466 U.S. 668 (1984), might serve as cause and prejudice to excuse the procedural default of claims of ineffective assistance of counsel ("IAC") at trial. While the *Martinez* Court denied the claim of a constitutional right to effective counsel in PCR proceedings, 132 S. Ct. at 1315, the Court did find an equitable remedy to excuse the procedural default of trial counsel IAC claims where a petitioner could demonstrate that PCR

counsel rendered ineffective assistance in failing to adequately present the petitioner's IAC claims in the PCR proceedings. *Id.* at 1318.

The claims in the § 2254 petition for which Spreitz seeks to excuse the procedural default are:

> Claim 1.4(C)4: Counsel Failed to Present at Sentencing Evidence of the Extent of Abuse Which Petitioner Suffered During Childhood. ER 151 (renumbered by district court at ER 360 as Claim 4.2-D); and,
>
> Claim 1.4(C)5: Counsel Never Presented the Available Evidence that Petitioner Was Intoxicated at the Time the Offense Was Committed. ER 155 (renumbered by district court at ER 361 as Claim 4.2-E).

Ninth Cir. Dkt. 49 at 8, 12.

While it had not yet been decided when the parties presented oral argument on this appeal and the Court ordered it submitted, the Court's decision in *Dickens v. Ryan*, 740 F.3d 1302, 1319-22 (2014) (*en banc*), permits a habeas petitioner to apply *Martinez* to demonstrate cause and prejudice to excuse his failure to exhaust *facts* that would have supported the petitioner's "new" or "newly-enhanced" claim of ineffective assistance of trial counsel in the state PCR proceedings.[1] *Dickens* controls and permits the remand requested here.

[1] Spreitz cited in his Reply to Response to Motion to Stay Appeal and for Remand for Application of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), orders in three other capital habeas appeals from Arizona, which were decided prior to the *en banc* grant in *Dickens* in which this Court had already remanded pursuant to *Martinez* to determine whether IAC of PCR counsel served as cause and prejudice to excuse procedurally defaulted facts. Dkt. 66-1 at 3 (citations omitted).

Spreitz pleaded in the Stay Motion that, with fact development in the district court on remand, he would be in a position to plead "substantial" underlying claims of ineffective assistance of counsel as required by *Martinez*, 132 S. Ct. at 1318. *See* Dkt. 49-1 at 2-4, 16-17. Spreitz attached in support of the Stay Motion undersigned counsel's declaration that described the results of his investigation of Spreitz's social history, including interviews with Spreitz and his mother. *See* Dkt. 49-2 at 1-4.[2] By the time Spreitz filed his Reply to Respondents' opposition to the Stay Motion, the FPD was able to secure declarations from both Spreitz and his mother, which were attached to the Reply, Dkts. 66-2, 66-3, respectively, and which corroborated the accounts in counsel's declaration of the physical abuse Spreitz suffered as a child at the hands of his parents and the horrific domestic violence has saw visited upon his mother by his abusive father.

Spreitz also attached to the Stay Motion an e-mail from Dr. Stewart, a trauma and addictive medicine specialist, who stated that he reviewed several documents and found "there is more than enough data to suggest that Mr. Spreitz is suffering from PTSD," and that "a psychiatric evaluation of Mr. Spreitz [should] be conducted to determine the presence of PTSD or any other trauma-related condition." Dkt. 66-5 at 2.

[2] The FPD was appointed very late in this appeal, on July 3, 2012, Dkt. 39, after prior counsel filed the briefs in this Court and obtained one continuance of oral argument that was originally set for June 14, 2012. *See* Dkts. 35, 36.

In the Stay Motion, Spreitz also cited a report of Dr. Roy Mathew, M.D., regarding Spreitz's alcohol and cocaine intoxication on the night of the offense, and the enhanced psychostimulant effect of their metabolite, cocaethylene. Although evidentiary development had not been allowed by the district court, and consideration of Dr. Mathew's report is barred from this Court's review by *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011), because it was not presented to the state courts, Dr. Mathew's report was attached in support of the § 2254 petition by Spreitz's prior federal habeas counsel, Sean Bruner, and it appears in the Excerpts of Record filed by Mr. Bruner with Appellant's Opening Brief. *See* Dkt. 11, ER 667-71. Mr. Bruner was also Spreitz's PCR counsel whose ineffective assistance is alleged as "cause" in the Stay Motion and, thus, it was Mr. Bruner who failed to timely obtain a report of the type produced by Dr. Mathew and present it in the state PCR proceedings to support the ineffective assistance of trial counsel claim set forth as Claim 1.4(C)(5) above.

Spreitz also informed the Court in the Reply that due to the effects of the federal sequester then in place, the Federal Public Defender was without sufficient funds to retain Dr. Stewart in this matter to be able to fully plead facts necessary to support the Stay Motion. Dkt. 66-1 at 1-2. Dr. Stewart's preliminary review of documents was for no fee. It was anticipated that when the sequester lifted, and

Dr. Stewart's schedule permitted, Spreitz would retain Dr. Stewart to perform a clinical interview and evaluation of Spreitz.

II. The content of the reports of Dr. Stewart and Dr. Lundberg-Love.

A. The report of Dr. Stewart.

Consistent with Spreitz's earlier representations to the Court, after funding was secured and Dr. Stewart cleared space in his schedule, Spreitz was ultimately able to retain Dr. Stewart. Dr. Stewart completed the attached Report of Psychiatric Evaluation (November 1, 2016), Renewed Stay Motion Exh. 1. Dr. Stewart was provided with a substantial number of relevant documents for review, which numbered 24 in total, including excerpts of trial transcripts, all prior mental health evaluations, and the declarations of Spreitz and his mother described above that detail the abusive family situation in which Spreitz was raised. *See id.* at 3 ¶¶ 22, 23. On May 5, 2016, Dr. Stewart travelled from the location of his practice, San Francisco, California, to the Arizona State Prison in Florence, Arizona, to perform a clinical interview of Spreitz.

After detailing the substantial physical and emotional abuse suffered by Spreitz and the domestic violence Spreitz personally observed, Dr. Stewart reports that Spreitz meets the various criteria under the Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) ("DSM-IV") for a diagnosis of PTSD but, due to the "extremely high standard established for this diagnosis," he "was not able to

conclusively find that . . . Mr. Spreitz sufficiently met the totality of the criteria required for a diagnosis of PTSD at the time of the encounter with Ms. Reid." *Id.* at 9. He did conclude, however, significant childhood trauma "would have impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." *Id.* Dr. Stewart's opinion supports the (G)(1) statutory mitigating factor. According to Dr. Stewart, PTSD and Spreitz's exposure to trauma in childhood might have resulted in "an exaggerated startle response or acting impulsively with respect to the encounter with Ms. Reid," behaviors symptomatic of persons suffering from PTSD. *Id.*

Dr. Stewart also reviewed the documents describing Spreitz's history of alcoholism and his alcohol intoxication at the time of the offense, as well as Spreitz's cocaine use that night, and the psychopharamacology report of Dr. Lundberg-Love that quantifies the alcohol and cocaine ingestion, and discusses the combined effect of alcohol and cocaine intoxication on Spreitz's cognition and behavior. *See* Renewed Stay Motion, Ex. 2. Dr. Stewart concurs with Dr. Lundberg-Love that Spreitz suffered from alcohol and cocaine intoxication at the time he encountered Ms. Reid, but also from the enhanced psychostimulant effect of the metabolite cocaethylene. *Id.* at 8.

Absent from the mental health reports of all prior mental health experts in this case is the observation of Dr. Stewart that Spreitz became an alcoholic at a

young age due in large measure to a "genetic link" based on the alcoholism of his father and both grandfathers, and possible alcoholism of his mother, whom family members described as "consum[ing] daily quantities of Jack Daniels." Renewed Mot. Ex. 1 at 5. As Dr. Stewart stated:

> In this case, that genetic loading rendered it more likely that Mr. Spreitz would suffer from alcohol abuse and/or physiological dependence on alcohol. Evidence of that genetic loading would have supported at trial the theory that Mr. Spreitz was a "physiological alcoholic" whose intoxication would not have been noted by the officers who stopped and encountered Mr. Spreitz in the early morning hours of May 19, 1989.

Id.

Yet, the evidence as to how Spreitz was perceived when officers stopped him after the offense because his vehicle emitted smoke was extremely important. The sentencing court ruled that Spreitz was not intoxicated and did not meet the (G)(1) statutory mitigating factor because Officers Ramon Batista and Victor Chacon testified repeatedly at the guilt phase that when they stopped Spreitz 30 minutes after the offense, they noted "nothing of any significance" to suggest he was intoxicated. ER 470. *See State v. Spreitz*, 190 Ariz. 129, 133-34, 945 P.2d 1260, 1264-65 (1997) (summarizing Batista's testimony to the effect that Spreitz smelled of beer but "defendant's actions evidenced no physical or mental impairment"). Dr. Stewart reviewed the trial testimony of Officers Batista and Chacon, and the transcript of Spreitz's post-arrest interview with Detective Mike

Millstone in which Millstone told Spreitz that he was not "fall down" or "blackout" drunk when he encountered Ms. Reid, which he based on Batista and Chacon's observations. Renewed Motion Exh. 1 at 6. As Dr. Stewart concludes, however, neither of the officers who stopped Spreitz was able as a matter of medical science to render an opinion with respect to Spreitz's alcohol intoxication at the time of the offense due to their not having provided appropriate testing. *Id.* In addition, they were ignorant of the fact that Spreitz also ingested cocaine just before the offense, which would have "mitigated the depressant symptoms of his alcohol consumption so as not to allow police officers who stopped Mr. Spreitz to be aware of the level of his alcohol intoxication." *Id.* at 6.

Dr. Stewart describes the physical changes to the brain caused by the ingestion of cocaine, which he terms the "hijacking of the brain chemistry." *Id.* Cocaine alone causes a "euphoria that would have been accompanied by hyperactivity, hypervigilance, anxiety, anger, impaired judgment, impulsivity, and aggression." *Id.* at 7. It would have caused deficits in Spreitz's cognitive functioning that "would have decreased markedly his ability to engage in rational, appropriate and non-aggressive behavior during a confrontation with Ms. Reid." *Id.* When alcohol was combined with cocaine, a metabolite known as "cocaethylene" formed that enhanced the psychostimulant effects of the cocaine described with respect to cocaine above and which would have "significantly

impaired Mr. Spreitz's capacity to conform his conduct to the requirements of law at the time of the incident involving him and Ms. Reid in the early morning hours of May 19, 1989." *Id.* at 8. According to Dr. Stewart, the "effects [of cocaethylene] were well established at the time of the incident and Mr. Spreitz's trial." *Id.*

In conclusion, Dr. Stewart states that the physical and emotional abuse of Spreitz as a child, which resulted in a DSM-IV diagnosis of childhood exposure to trauma, and the combination of alcohol and cocaine intoxication would have impaired Spreitz's "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." *Id.* at 9. *See* A.R.S. § 13-703(G)(1).

B. The report of Dr. Lundberg-Love.

Dr. Lundberg-Love assessed Spreitz's alcohol and cocaine intoxication, and produced on August 28, 2016, her report of Psychophamacological Consultation. *See* Renewed Stay Motion, Exhibit 2. Dr. Lundberg-Love quantifies both the amounts of alcohol and cocaine ingested by Spreitz on May 18 and the early morning hours of May 19, 1989. With respect to alcohol consumption, quantity was determined based on the trial testimony of Spreitz's roommate Chris Clark, a prosecution witness, the Presentence Report, and Spreitz's self-report, as disclosed to Dr. Mathew. *Id.* at 2. The evidence showed that Spreitz consumed a 12-pack

and two additional beers on May 18th before attending nickel beer night with Mr. Clark at a Tucson tavern. *Id.* Spreitz estimated that he drank on the order of 16 cups of beer between 7:30 and 10:30 p.m. *Id.* Spreitz consumed four more beers from a six-pack he bought at a 7-11 after dropping Mr. Clark at their residence and prior to the encounter with Ms. Reid. At 12:30 a.m. on May 19, 1989, Spreitz took three hits of crack cocaine with a man to whom he gave a ride home from the 7-11. *Id.*

Dr. Lundberg-Love applied *Julien's Primer of Drug Action* (13th ed. 2014) to "reliably estimate" Spreitz's "blood alcohol concentration," known by the shorthand "BAC," based on his weight at that time, 170 lbs., gender, the number of drink equivalents imbibed, and the rate at which his body would have metabolized the alcohol. *Id.* at 3. She calculates his BAC at the time of the offense to have been approximately .575 grams%, "an extraordinarily high BAC" slightly more than seven times the legal limit of .08grams% for intoxication. *Id.* Spreitz was not "stuporous" due to his "tolerance to the chronic exposure of large amounts of alcohol," known as "tissue tolerance." *Id.* Spreitz's "long term, chronic, extensive addiction to alcohol resulted in a tolerance to impact of alcohol that one would observe in a lesser addicted or non-addicted person." *Id.*

She further found that each hit of cocaine administered 250 to 1000 milligrams of cocaine to his blood and brain. *Id.* at 4. Due to the alcohol

consumption in close proximity to the cocaine ingestion, liver enzymes also metabolized the cocaine, forming the compound "cocaethylene." *Id.* Dr. Lundberg-Love explains that the cocaine Spreitz ingested would have had a half-life of four hours beginning when he ingested it at 12:30 a.m. on May 19, 1989, and the cocaethylene's half-life was six hours. *Id.* After setting forth the Mechanisms of Action of Alcohol in the Brain and the Mechanisms of Action of Cocaine in the Brain, that is, the medical science involved, she reached conclusions as to how the ingestion of alcohol and cocaine affected Spreitz at the time of the offense and in its aftermath.

> With respect to alcohol intoxication, Dr. Lundberg-Love concludes:
>
> > Alcohol's ability to inhibit the activity of glutamate neurons and enhance the activity of GABA neurons augment one another to depress the cognitive processes of the brain, which impairs executive functioning, impairs memory, and impairs the ability of the inhibitory pathways of the brain to stop inappropriate behavior such as aggression. In effect, the brain circuitry that mediates one's ability to make non-aggressive, appropriate choices is hijacked. Thus, one is at the mercy of one's emotions, and the neural "brakes" that typically keep those emotions in check, are no longer functioning effectively. So a person who might not have a history of aggression can become very angry and aggressive under the influence of alcohol, particularly given the amounts consumed by Mr. Spreitz.

Id. at 6.

> Turning to cocaine and cocaethylene, Dr. Lundberg-Love concludes:
>
> > Mr. Spreitz's ingestion of cocaine would have enhanced the activity of dopamine in the brain by blocking the dopamine transporter and likely elicited agitation, impulsivity, anxiety, suspiciousness, paranoia

> and aggression. Cocaine ingestion makes it more difficult to inhibit aggressive behavior. When cocaine is ingested with alcohol, the metabolite cocaethylene is formed, which exacerbates the toxicity of the cocaine, i.e., it increases the psychostimulant effects of cocaine described above and contributes to the hijacking of the brain circuitry. Once aggression is triggered, an individual may engage in what is known as "stereotypic" behavior which means that the individual may repetitively engage in aggression/injurious behavior even after a person with whom he is in confrontation may be defenseless, incapacitated or deceased. With respect to the initiation of aggression, adding cocaine and cocaethylene to the amount of alcohol ingested by Mr. Spreitz was just like metaphorically adding fuel to the fire.

Id. at 6-7. She further concludes:

> [T]he dopaminergic stimulant properties of cocaine and cocaethylene (i.e., increased alertness, increased motor activity, racing thoughts, enhanced motor activity) do not reverse the neurochemical depressant effects of alcohol, they can mask the depressant effects of alcohol, such that the level of Mr. Spreitz's inebriation might not have appeared to the police officers to be as significant as it was. In effect, the ingestion of cocaine with alcohol has the effect of rendering one a much more alert and active "drunk."

Id. at 7. Thus, Dr. Lundberg-Love's psychopharmacological opinion, like the opinion of Dr. Stewart, is contrary to the officers' assessment that Spreitz was not intoxicated and impaired at the time of the encounter with Ms. Reid.

III. The reports of Dr. Stewart and Dr. Lundberg-Love bolster Spreitz's arguments that his Stay Motion trial IAC claims are substantial.

As Spreitz noted in the Stay Motion, Dkt. 49-1 at 8, *Martinez* applies only where the defaulted underlying trial counsel IAC claims are "substantial," 132 S. Ct. at 1318-19, which triggers consideration of the IAC of state post-conviction

relief ("PCR") counsel as "cause" as part of the test for cause and prejudice to excuse the procedural default of the claims. The *Martinez* Court defined "substantial" as having "some merit." *Id.* In support of that definition, the Court cited the test for when a federal court must grant a certificate of appealability ("COA"). *Id.* (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). The standard for a COA is a "threshold" or "gateway" test that "does not require full consideration of the factual or legal bases adduced in support of the claims." *Miller-El*, 537 U.S. at 336. The petitioner must show only that reasonable jurists could debate the merits of the constitutional claim asserted. *Id.* at 338. "Stated otherwise, a claim is 'insubstantial' if 'it does not have any merit or . . . is wholly without factual support.'" *Detrich*, 740 F.3d at 1245 (quoting *Martinez,* 132 S. Ct. at 1319).

As Spreitz notes in the Stay Motion, Dkt. 49-1 at 8, the two trial counsel IAC claims at issue here are substantial for *Martinez* purposes. The district court denied relief on each claim in its Order Re: Renewed Motion for Evidentiary Development, ER 361, 363, but granted a COA as to both claims in its Memorandum of Decision and Order. *See* ER 64 (Claims 4.2-D, 4.3-E). Because the claims merit a COA under *Miller-El*, 537 U.S. at 338, those claims therefore also meet the test of *Martinez* that requires that the claims be "substantial." The claims are also substantial because the Supreme Court and federal appellate courts have recognized the mitigating effect of evidence of childhood trauma and

intoxication at the time of a homicide and expert opinions thereon within the context of deciding claims of ineffective assistance of trial counsel under *Strickland*, 466 U.S. 668. *See* Stay Motion, Dkt. 49-1, at 10-11 (gathering Supreme Court authorities); *Doe v. Ayers*, 782 F.3d 425, 438-42 (9th Cir. 2015) (childhood trauma, alcohol and cocaine addiction, and alcohol intoxication at the time of the offense as mitigation); *Styers v. Schriro*, 547 F.3d 1026, 1035 (9th Cir. 2008) (PTSD as mitigation); *Ainsworth v. Woodford*, 268 F.3d 868, 875 (9th Cir. 2001) (alcoholism from age 5 and drug addiction as mitigation); *Hedrick v. True*, 443 F.3d 342, 353 (4th Cir. 2006) (evidence of alcohol intoxication and genetic link to alcoholism as mitigation); *Hill v. Mitchell*, 400 F.3d 308, 312-15 (6th Cir. 2005) (history of cocaine addiction and intoxication at the time of the offense as mitigation).

IV. Remand is necessary for a determination of PCR counsel's ineffectiveness under *Martinez*.

As Spreitz notes in the Stay Motion, the district court set forth in emphatic terms just how deficient Spreitz's appointed federal habeas counsel Bruner's performance had been in failing to investigate and produce evidence in support of the IAC claims sought to be remanded here. With respect to Claim 4.2-D, the IAC claim premised on the failure to investigate and present Spreitz's childhood trauma and to produce such evidence to a mental health expert, the district court ruled that, "[a]lthough Petitioner alleges that [trial] counsel failed to provide 'overwhelming

evidence of pervasive and violent physical abuse,' to [sentencing defense psychologist Dr. Todd Flynn, Ph.D.], he fails to identify this evidence." ER 360. While the district court was referring to Bruner's performance in the § 2254 proceeding, the characterization applies with equal force to Bruner's deficient performance in the state PCR proceedings. The state PCR court found the meager evidence Bruner attached to the PCR petition in support of childhood dysfunction and intoxication to be "repetitious and cumulative" to what was presented at sentencing. ER 374. The court concluded that: "more than sufficient evidence of Petitioner's abuse as a child, both physical and emotional," existed at sentencing. *Id.*

That characterization is belied not only by the quantum of evidence of physical abuse of Spreitz by his father produced in support of the Stay Motion and Dr. Stewart's report, but also the evidence of Spreitz's *exposure* to the horrific physical abuse of his mother by his father, which is recognized in the DSM-IV (at p. 424) to cause PTSD. *See* Renewed Stay Motion Exh. 1 at 8-9. Spreitz mother described her ex-husband as an alcoholic with violent tendencies and who, at 6'3", 225 lbs., was vastly superior in size and strength compared to her at 130 lbs. and to Spreitz who, when severely beaten at age 13 by his father, weighed less than 125 lbs. Stay Motion Exh. 66-3 at 3 ¶ 10, at 3-4 ¶ 14. The evidence was not presented at capital sentencing.

Bruner's performance was also deficient with respect to the intoxication claim in the state PCR proceeding, Claim 4.2-E here, because he failed to unearth available evidence that his client used cocaine on the night of the homicide. Red flags existed for Bruner and trial counsel, Marshal Tandy, to explore cocaine addiction and intoxication at the time of the offense. Dr. Martin Blinder, M.D., a psychiatrist who performed an evaluation on May 31, 1989, just after Spreitz's arrest, made a passing reference to Spreitz's personal deterioration "the last several months" that included use of cocaine. ER 714. The Presentence Report, ER 481, quoted Spreitz as saying he used cocaine prior to the homicide. However, trial counsel included neither Dr. Blinder's report nor the Presentence Report in the materials he provided to the defense sentencing psychologist, Dr. Flynn. *See* ER 687-89 (report), 388-436 (testimony).

Thus, it is understandable that the PCR court ruled that "more than sufficient evidence of Petitioner's drinking and/or intoxication (on the night in question) was presented at trial." ER 375. Bruner failed to contradict that assertion with available evidence and opinions that would have established: 1) Spreitz's cocaine intoxication and its psychostimulant effect at the time of the offense; 2) the enhanced or amplified psychostimulant effect of cocaethylene; 3) Spreitz's genetic predisposition to alcoholism that rendered more likely that he was a physiologic alcoholic; 4) his "tissue tolerance" based on his historical extremely high volume

of alcohol consumption that caused him to appear not to be impaired even when intoxicated; and, 5) the ability of cocaine and cocaethylene to "mask" the depressant effects of his alcohol intoxication when the officers stopped him after the homicide.

Conclusion

Spreitz respectfully requests to supplement the Stay Motion with the reports of Dr. Stewart and Dr. Lundberg-Love. He renews his request that the Court stay his appeal and remand the matter to the district court for consideration of the two trial IAC claims outlined above and a determination of whether Spreitz has demonstrated "cause and prejudice" under *Martinez* to excuse the procedural default of facts supporting those claims. Finally, Spreitz requests that the district court be ordered to issue the writ of habeas relief as to Spreitz's death sentence should he prove the IAC of trial and PCR counsel.

Respectfully submitted this 1st day of February, 2017.

Jon M. Sands
Federal Public Defender
Timothy M. Gabrielsen
Assistant Federal Public Defender

By s/Timothy M. Gabrielsen
TIMOTHY M. GABRIELSEN
Counsel for Petitioner-Appellant

Certificate of Service

I hereby certify that on this 1st day of February, 2017, I electronically transmitted the attached document to the Clerk's office of the United States Court of Appeals for the Ninth Circuit using the CM/ECF System for filing and transmitted a Notice of Electronic Filing to the following registrants:

Ms. Jacinda Lanum
Arizona Assistant Attorney General
Attorney General's Office
400 W. Congress, S-315
Tucson, AZ 85701

s/Teresa Ardrey
Teresa Ardrey
Legal Secretary
Capital Habeas Unit

Exhibit 1

Report of Psychiatric Evaluation of Christopher Spreitz
November 1, 2016

PABLO STEWART, M.D.
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REPORT OF PSYCHIATRIC EVALUATION

CHRISTOPHER SPREITZ

Date of evaluation: May 5, 2016
Date of report: November 1, 2016

I. Purpose of Evaluation

I have been retained by the Federal Public Defender, District of Arizona, to review records and conduct a psychiatric evaluation of Christopher Spreitz, a 50-year-old (DOB 6/10/66) male incarcerated at the Arizona State Prison in Florence, Arizona. I was specifically asked to evaluate the effects of alcohol, cocaine and their metabolite, cocaethylene, on Mr. Spreitz's cognitive functioning and behavior on the night he is alleged to have killed a Tucson woman, Ruby Reid, in May 1989. I am aware from the Arizona Supreme Court opinion on direct appeal that Mr. Spreitz was alleged to have picked up Ms. Reid on a Tucson street, removed her to a desert location, attempted to have sexual relations with her, and, ultimately, killed her by striking her with a rock. He was convicted and sentenced to death.

I was asked to determine whether, with development of a thorough social history and an appropriate mental health/substance abuse evaluation, Mr. Spreitz's trial counsel may have been able to prove the existence of non-statutory mitigating evidence or the statutory mitigating factor found in 13 A.R.S. § 703(G)(1):

> The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

After review of all of the records listed below, with the exception of the psychopharmacological report of Dr. Paula Lundberg-Love, Ph.D., of August 28, 2016, which I reviewed prior to completing this report, I evaluated Mr. Spreitz on May 5, 2016. The evaluation lasted two hours.

Focus on the effects of the cocaine use, and the combined effect of alcohol and cocaine intoxication, was particularly important in light of the fact that it appears, from my review of submitted documents, that the Arizona trial court was never informed of the effects of Mr. Spreitz's ingestion of cocaine in the period immediately preceding the encounter with Ms. Reid. In addition, the court was never apprised of the effects of cocaethylene, which formed by Mr. Spreitz's combining cocaine with alcohol in the hour or so immediately preceding the encounter with Ms. Reid. There is no reference in the report or sentencing testimony of defense psychologist Todd Flynn, Ph.D., to cocaine ingestion or the formation of cocaethylene and its

potent psychostimulant effects on Mr. Spreitz's cognition and behavior at the time he encountered Ms. Reid.

I also assess the evaluation of Mr. Spreitz performed by another defense psychologist, Joseph Geffen, Ph.D., in the state post-conviction proceedings. His evaluation was also deficient because it omitted any reference to Mr. Spreitz's ingestion of cocaine prior to the encounter with Ms. Reid. It also failed to address the combined effect of alcohol and cocaine.

I have reviewed the psychopharmacological report of Dr. Lundberg-Love and largely concur with her assessment. I describe below the effects of cocaine, alcohol and cocaethylene on Mr. Spreitz's cognition and behavior on the date of the offense. I provide diagnoses below based in pertinent part on the diagnostic criteria of the Diagnostic and Statistical Manual of Mental Disorders, 4th edition (1994) ("DSM-IV"), which was in use by mental health professionals at the time of Mr. Spreitz's trial.

II. Education, Qualifications, and Experience.

I am a physician licensed to practice in California and Hawaii, with a specialty in clinical and forensic psychiatry. I have appeared as an expert in various state and federal courts in the United States. I have testified as an expert witness in the field of psychiatry and addiction medicine in the State of Arizona, including at an evidentiary hearing in the Superior Court of Pima County in a capital post-conviction case, *State v. Miles*, Pima Cty. Super. Ct. No. 040238, April 23, 2015. There I gave testimony on the effects of Cocaine Withdrawal Syndrome and also diagnosed an alcohol-related neurodevelopmental disorder (ARND).

I received my Bachelor of Science from the United States Naval Academy, Annapolis, Maryland, in 1973. Thereafter I served as an infantry officer in the United States Marine Corps. In 1982, I received my Doctor of Medicine Degree from the University of California, San Francisco, School of Medicine. I have published numerous articles in peer review journals on topics that include dual diagnoses, psychopharmacology and the treatment of disorders and substance abuse. I have designed and taught courses on protocols for identifying and treating psychiatric patients with substance abuse histories. I have worked with local and state governmental bodies in designing and presenting educational programs about psychiatry, substance abuse, and preventative medicine. I have served as an Examiner for the American Board of Psychiatry and Neurology and am a Diplomat of the same board. I have held academic appointments in the Department of Psychiatry, University of California, San Francisco, School of Medicine, since 1986.

My CV, which is attached to this report, highlights my experience in the diagnosis of persons suffering from addiction to drugs and alcohol who were admitted to inpatient facilities, including the VA Medical Center in San Francisco and Marin Alternative Treatment in California. From April 1991 to February 1995, I was the chief of the Substance Abuse Inpatient Unit at the Department of Veterans Affairs Medical Center in San Francisco. I have also held numerous positions with responsibility for ensuring the quality of clinical services provided by community based programs, including the San Francisco Target Cities Project; the Comprehensive Homeless Center, Department of Veterans Affairs Medical Center, San Francisco; the Intensive Psychiatric Community Care Program, Department of Veterans Affairs Medical Center, San Francisco; the Haight Ashbury Free Clinic, San Francisco; and the Westside Crisis Center and the Mission Mental Health Crisis Center in San Francisco.

In addition to clinical and teaching responsibilities, I have experience in forensic and correctional psychiatry. A portion of my work today involves the evaluation of persons with cases in the criminal justice system, including in pretrial, trial and post-conviction postures. I have also appeared as a correctional psychiatric expert in several federal court cases regarding the implementation of constitutionally mandated psychiatric care to California's inmate populations at different maximum security and psychiatric care facilities. I have recently been appointed monitor in *Ashoor Rasho, et al. v. Director John R. Baldwin*, et al., No.:1:07-CV-1298-MMM-JEH (District Court, Peoria, Illinois.) This case involves the provision of constitutional mental health care to the inmate population of the Illinois Department of Corrections.

II. Records Reviewed

The Federal Public Defender has provided me with the following records:

1. 5/22/89 Post-offense Interview of Chris Spreitz;
2. 9/11/97 Direct Appeal Opinion, *State v. Spreitz*, 190 Ariz. 129 (1997);
3. 8/10/94 Transcript of Opening Statement, *State v. Spreitz*, Pima County No. CR-27745;
4. 8/10/94 Transcript of Guilt Phase Testimony of Officer Ramon Batista;
5. 8/10/94 Transcript of Guilt Phase Testimony of Officer Victor Chacon;
6. 8/10/94 Transcript of Guilt Phase Testimony of Craig Clark;
7. 8/11/94 Transcript of Guilt Phase Testimony of Alana Owens;
8. 8/11/94 Transcript of Guilt Phase Testimony of Detective Karen Wright;
9. 8/12/94 Transcript of Guilt Phase Testimony of Det. Karen Wright (cont.);
10. 8/16/94 Transcript of Testimony of Dr. Thomas Henry, M.D.;
11. 1/1/89 Report of Dr. Martin Blinder, M.D.;
12. 11/28/94 Presentence Report;
13. 11/28/94 Transcript of Penalty Phase Testimony of Dr. Todd Flynn, Ph.D.;
14. 11/21/94 Report of Dr. Todd Flynn, Ph.D. (Letter to Marshall D. Tandy, Esq.);
15. 12/21/94 Transcript of Sentencing;
16. 3/28/00 Report of Dr. Joseph Geffen, Ph.D.;

17. 2/4/03 Report of Dr. Joseph Geffen, Ph.D.;

18. 3/7/00 Report of Cheryl Fischer;

19. 2/10/03 Report of Cheryl Fischer;

20. 12/9/02 Report of Dr. Roy Mathew, M.D.;

21. 1/3/05 Report of Dr. James Sullivan, Ph.D.;

22. 6/6/13 Declaration of Chris Spreitz;

23. 6/12/13 Declaration of Susan Mendenhall;

24. 8/28/16 Report of Psychopharmacological Consultation of Dr. Paula Lundberg-Love, Ph.D.

IV. Mr. Spreitz's history.

I am aware of Mr. Spreitz's history from my clinical interview and review of the above materials, including the social histories performed by mitigation investigator Cheryl Fischer, the report and sentencing hearing testimony of Dr. Flynn, the reports of Dr. Geffen in the initial state post-conviction proceeding and in federal habeas corpus proceedings, and the declarations of Mr. Spreitz and his mother, Susan Mendenhall. I do not recount that history in its entirety here. Instead I focus on the portions of that history that are relevant to the issues for which I was retained to evaluate Mr. Spreitz.

A. Physical and emotional abuse.

It is clear that Mr. Spreitz suffered physical and emotional abuse and neglect at the hands of both his mother and father as a child. He was also exposed to the repeated physical abuse of his mother by his father. It is reported that, on one occasion, Mr. Spreitz's father struck his mother with his fists, causing her to sustain black eyes, which she covered with sunglasses, and a bloody lip. Ms. Mendenhall reports that a domestic violence charge was brought against her ex-husband for that incident and he was fired from his job as a deputy sheriff. Although Dr. Flynn minimized the abuse to which Mr. Spreitz was exposed to in the family home, stating the abuse was not "dramatic" or "acute," the thorough social histories compiled for the federal proceedings, including the 2013 declarations of Mr. Spreitz and his mother, compel a far different conclusion. Mr. Spreitz describes in his declaration one incident in which his mother sent him and his sister Gretchen from their home in Santa Barbara to San Jose, California, to visit their father. There his father punched him in the head with a closed fist and sent him reeling across the floor. Mr. Spreitz was 13 at the time and weighed less than 125 lbs., and his father was a large man his mother describes as having been 6'3", 225 lbs. His mother observed the injury upon Mr. Spreitz's return to Santa Barbara.

Mr. Spreitz reported that his mother beat him with hand paddles, a belt, a mixing spoon, a wood brush, and Hot Wheels tracks. She broke a wood paddle over his back when he was a teenager. As near as I can tell, that is the only incident of physical abuse of Mr. Spreitz to which Dr. Flynn was privy, and that lone account came from Mr. Spreitz's sister. Mr. Spreitz's mother

claims a lack of memory as to some of the instruments she used to punish Mr. Spreitz, except for the paddle, but she does not deny the accuracy of Mr. Spreitz's recollection of those events or instruments. Ms. Mendenhall admits that she understated her abuse of Mr. Spreitz when she was first approached by a trial investigator. She and Mr. Spreitz each state that her comment to the trial investigator that Mr. Spreitz was "spanked but he never was knocked in the head or thrown or struck with instruments" was not true. Mr. Spreitz, his sister and other relatives describe Ms. Mendenhall as having been an emotionally-distant parent. They also describe her as being a very controlling mother who, despite his best efforts, Mr. Spreitz could never please. Ms. Mendenhall acknowledges now that her methods of disciplining Mr. Spreitz when he was young might now be considered to constitute abuse.

B. Substance abuse.

As has been detailed in the social histories and prior mental health reports and testimony, Mr. Spreitz began to consume alcohol at the age of 12. He also experimented with marijuana and other drugs. By his late teenage years, he suffered from alcohol dependence. He was frequently intoxicated and reported consuming alcohol mornings prior to attending junior high school classes. Alcoholic blackouts were described in Dr. Flynn's report, based on information provided to the defense by a cousin of Mr. Spreitz. The cousin has stated that one could not tell if Mr. Spreitz was drunk even after a period of heavy drinking. The cousin described Mr. Spreitz as able to function normally when intoxicated with alcohol, including being able to engage in conversation and to maintain an automobile within the proper lane. Mr. Spreitz's continued abuse of alcohol caused his mother to order him out of the home. On one occasion, according to his sister Gretchen, he was relegated to sleeping in a doghouse. Family members report that, as Mr. Spreitz became older, he mixed cocaine use with his abuse of marijuana and alcohol. Although his parents and his stepfather were aware of his substance abuse, it appears that no treatment was ever arranged for Mr. Spreitz.

There is a known genetic link to alcohol abuse and dependence. When first-degree relatives such as parents, siblings, aunts, uncles and grandparents suffer from a drug or alcohol problem, a child is at much greater risk to develop that problem sometime in life. Mr. Spreitz's father and his maternal and paternal grandfathers have been described as alcoholics, as has his mother's sister. Mr. Spreitz's maternal grandfather was treated for alcoholism at Carrillo State Mental Hospital in California. Family members described Mr. Spreitz's mother as having consumed daily quantities of Jack Daniels during his youth and as noticeably drunk on occasion. Mr. Spreitz recalled his mother drinking Jack Daniels almost every night after work. In this case, that genetic loading rendered it more likely that Mr. Spreitz would suffer from alcohol abuse and/or physiological dependence on alcohol. Evidence of that genetic loading would have supported at trial the theory that Mr. Spreitz was a "physiological alcoholic" whose intoxication would not have been noted by the officers who stopped and encountered Mr. Spreitz in the early morning hours of May 19, 1989.

V. The effects of substance abuse at the time of the encounter with Ms. Reid.

A. Alcohol intoxication.

Mr. Spreitz reported to Detective Millstone that he experienced blackouts when he drank a lot of alcohol, and he acknowledged that he drank "an awful lot" and "a hell of a lot" of beer on the evening of May 18, 1989. Millstone interview, 5/22/89, at p. 7. He estimated that he consumed 16-17 eight-ounce beers at a Tucson bar prior to smoking crack cocaine, driving to the

home of a female friend, and then picking up the victim. He also consumed beer earlier that day.

Mr. Spreitz's failure to recall the events of May 19, 1989, in his interview with Detective Millstone and in subsequent interviews, including with other mental health evaluators, is consistent with someone who suffered from alcohol dependence and sufficient alcohol toxicity to cause him to black out during his encounter with the victim. Detective Millstone's opinion that Mr. Spreitz did not suffer an alcoholic blackout that night, which was formed in large part on the reporting of his Tucson Police Department colleagues who stopped Mr. Spreitz in his car at 1:45 a.m. and reported he was not "fall down drunk" or "blackout drunk," is unsupported by medical science. Millstone interview, pg. 8-9. Mr. Spreitz's physiological dependence on alcohol caused him to function appropriately while he was in the presence of the Tucson officers and not give the impression he was intoxicated. The officers, in the absence of any testing, were unqualified to make a judgment as to Mr. Spreitz's level of alcohol intoxication. The officers also were unaware of Mr. Spreitz's consumption of cocaine only an hour or so before the officer pulled him over because his car burned oil.

B. Cocaine abuse.

Nowhere in Dr. Flynn's letter to defense counsel or in his sentencing hearing testimony does Dr. Flynn even mention being aware that Mr. Spreitz smoked crack cocaine just prior to the incident involving him and Ms. Reid or that the addition of cocaine use to his alcohol consumption in close proximity to the homicide would have greatly exacerbated deficits in his cognitive functioning and behavior and mitigated the depressant symptoms of his alcohol consumption so as to not allow the police officers who stopped Mr. Spreitz to be aware of his level of alcohol intoxication. Of course the officers also would not have known Mr. Spreitz to have been intoxicated with cocaine and to have suffered the magnified effects of cocaine when combined with large quantities of alcohol.

Mr. Spreitz first reported his prior use of cocaine to a defense investigator, who relayed that information to Dr. Martin Blinder, M.D., a psychiatrist who evaluated Mr. Spreitz on May 31, 1989, on behalf of attorney William Lane. Dr. Blinder was informed that "the last several months [Mr. Spreitz] has been drinking heavily, using cocaine, not cleaning up his room, exhibiting marked mood swings, etc." Neither in his report nor in his sentencing hearing testimony did Dr. Flynn state that Mr. Spreitz's defense counsel or a defense team member showed him the report of Dr. Blinder or that Dr. Flynn knew from any source of Mr. Spreitz's prior cocaine use.

A Presentence Report was produced on November 28, 1994, the same date as Dr. Flynn's sentencing hearing testimony. Although Dr. Flynn testified to the materials that informed his evaluation of Mr. Spreitz, he did not identify the Presentence Report as something he saw or considered. Trial testimony of Dr. Flynn, 11/28/94, p. 6. Mr. Spreitz related to the probation officer that, after dropping off his roommate who had become ill while drinking beer with Mr. Spreitz, Mr. Spreitz stopped to buy more beer. Mr. Spreitz stated the following with respect to a man he encountered at the 7-11:

> The defendant gave the black male a ride, and they used cocaine together. Reportedly, they did a "couple quick lines," then the defendant left for his friend's residence. When he got to her residence, she would not answer the door. The defendant stated he was drunk and obnoxious, and remembered sitting there for a

> minute or two. He got back in his vehicle and drove down the road, which was when he saw the victim sitting on a curb.

Presentence Report, 11/28/94, p. 3.

In the clinical interview with me, Mr. Spreitz indicated that he smoked crack cocaine with the black man he picked up at 7-11. Mr. Spreitz indicated this was only the first or second time he had smoked crack. He had used cocaine previously, including at his apartment, but had always snorted it. Mr. Spreitz has also reported to his present defense team that he consumed four of the beers of the six-pack he bought at 7-11 prior to his attempted encounter with Lucy Eremic in the early morning hours of May 20, 1989.

A Tucson police officer confirmed that Mr. Spreitz and a black male were at the 7-11 at 12:30 a.m. The same officer later stopped Mr. Spreitz for a traffic violation at 1:45 a.m. From Mr. Spreitz's post-arrest statement and the prosecution's other trial evidence, it appears that the entirety of the events described in the Presentence Report happened in that short time span.

The materials I reviewed reflect that, in the subsequent state post-conviction proceedings, Dr. Geffen reported that Mr. Spreitz stated that he was having relationship difficulty with Ms. Eremic due to his being "stoned, smoking weed and snorting." Dr. Geffen failed to grasp the significance of Mr. Spreitz's cocaine use prior to his encounter with Ms. Eremic, as there is no mention in Dr. Geffen's report of Mr. Spreitz's "snorting." The first mental health practitioner to elicit and report Mr. Spreitz's use of cocaine in proximity to the encounter with Ms. Reid was Roy Mathew, M.D., who evaluated Mr. Spreitz earlier in the federal habeas corpus proceedings. Dr. Geffen was again retained in the federal habeas corpus proceeding, and only then did he note Dr. Mathew's discussion of Mr. Spreitz's ingestion of alcohol and cocaine, and the formation of cocaethylene.

C. The effect of cocaine and alcohol on Mr. Spreitz's functioning.

An essential feature of alcohol intoxication is the presence of clinically significant maladaptive psychological or behavioral changes such as inappropriate aggressive behavior, impaired judgment and impaired social functioning. DSM-IV, p. 196. Those changes may also impair memory. As Dr. Lundberg-Love notes, alcohol intoxication has the effect of depressing cognitive processes of the brain, which impair executive functioning and memory, and the ability of inhibitory pathways of the brain that stop aggression. Even in the absence of cocaine ingestion, Mr. Spreitz's alcohol intoxication would have caused deficits in cognitive functioning that would have decreased markedly his ability to engage in rational, appropriate and non-aggressive behavior during a confrontation with Ms. Reid. It also impaired his ability to remember what occurred in the desert.

Mr. Spreitz's cocaine use in the hour prior to the encounter with Ms. Reid caused him to experience euphoria that would have been accompanied by hyperactivity, hypervigilance, anxiety, anger, impaired judgment, impulsivity, and aggression. When the brain communicates with other cells, neurons (nerve cells) communicate across synapses (spaces) to sites on receiving neurons called receptors. In the areas of the brain known as pleasure centers, which are activated by activities such as eating and socializing, the neurotransmitters dopamine and, to a lesser extent, serotonin and nor-epinephrine, deliver chemical or electrical messages across the synapses momentarily to the receptors, then return back across the synapses to the neurons. Cocaine ingestion causes an abnormally large amount of dopamine to flood the synapses,

causing an amplified message to the receptors, and serves as a one-way dam to block the recycling. The user experiences an intense pleasure or energy and the additional psychostimulant effects described above. This actually causes a change or hijacking of the brain chemistry. In addition, crack cocaine delivers cocaine to the brain faster and more concentrated than in other forms. That more rapid delivery of crack cocaine at such greater concentrations intensifies the neurochemical changes in the brain and the corresponding "rush" of the pleasurable feelings and other psychostimulant effects.

Mr. Spreitz's ingestion of cocaine after having consumed vast quantities of alcohol formed a metabolite known as cocaethylene. Much is known about the effects of cocaethylene, and those effects were well established at the time of the incident and Mr. Spreitz's trial. The cocaethylene amplified the psychostimulant effects of Mr. Spreitz's cocaine use at the time of the homicide. I agree with the descriptions of the effect of cocaethylene given by Dr. Lundberg-Love on brain science and medicine. Cocaethylene would have significantly impaired Mr. Spreitz's capacity to conform his conduct the requirements of law at the time of the incident involving him and Ms. Reid in the early morning hours of May 19, 1989. This impairment is much greater than one would experience by intoxication with alcohol or cocaine alone.

VI. The effects of childhood trauma.

I have considered a diagnosis of Posttraumatic Stress Disorder (PTSD), DSM-IV, p. 424, an anxiety disorder, due to the pervasive abuse Mr. Spreitz suffered and to which he was exposed in childhood. Mr. Spreitz meets the diagnostic criteria for a diagnosis of PTSD, as set out in the DSM-IV:

A. Mr. Spreitz experienced and witnessed events that threatened death or serious injury to himself or his mother; and, his response involved intense fear, helplessness or horror.

B. Mr. Spreitz continues to experience physiological reactivity to cues that symbolize or resemble an aspect of those events. He continues to experience anxiety when he observes or hears confrontations between inmates or inmates and guards at the prison in Florence even at the age of 50 and removed for 30 years from the abuse he suffered or observed as a child.

In his declaration, Mr. Spreitz states:

> To this day, my heart rate accelerates and my body shakes when I hear guards or inmates arguing outside my cell. I believe this is due in large part to the abuse I suffered and my recollection of altercations between my father and mother and, later, my stepfather and mother. The shakes create an inner vibrating feeling. The abuse occurred 30 years ago but I am still affected by it. When it occurs, I attempt to pull back, to tell myself that it does not involve me but I still find myself reacting to it.
>
> In or about 1987, when I was 21 years old, I felt that same heart rate acceleration and fear during an argument with my girlfriend Tammy in Tucson. We argued on the first floor of a residence. I went upstairs to remove myself from the argument. She followed me upstairs. I

eventually lowered myself down from a second floor balcony to flee her and the symptoms I was experiencing.

C. Mr. Spreitz persistently avoids stimuli associated with the trauma. In the clinical interview, he demonstrated an aversion to discussing the childhood abuse.

D. Mr. Spreitz experiences symptoms of increased arousal. I found him to have difficulty concentrating during the clinical interview. In addition, he demonstrated hypervigilance, reacting to the sounds that occurred outside the interview room during the clinical interview.

E. Mr. Spreitz has experienced the symptoms for greater than one month. He has experienced them since childhood.

F. The disturbance causes clinically significant distress in his social functioning.

Even though Mr. Spreitz satisfies the criteria listed above, I was not able to conclusively find, however, that Mr. Spreitz sufficiently met the totality of the criteria required for a diagnosis of PTSD at the time of the encounter with Ms. Reid or that he currently suffers from PTSD. This is due to the extremely high standard established for this diagnosis. Regardless if he meets all of the diagnostic criteria for PTSD, his experiencing significant childhood trauma would have impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. Of note, the diagnosis of PTSD and/or his exposure to childhood trauma were worthy of consideration during trial because their occurrence at the time of the offense might have resulted in Mr. Spreitz engaging in an exaggerated startle response or acting impulsively with respect to the encounter with Ms. Reid.

Conclusion

I diagnose Mr. Spreitz as follows:

Alcohol intoxication at the time of the offense;

Alcohol dependence;

Cocaine intoxication;

Childhood exposure to trauma, rule out PTSD.

A second diagnosis made by Dr. Flynn was intermittent explosive disorder. While I diagnose Mr. Spreitz as suffering from Alcohol Dependence, DSM-IV (p. 196), due to his acquired tolerance of alcohol, and alcohol intoxication at the time of the offense, DSM-IV, p. 196-97, I reject Dr. Flynn's diagnosis of intermittent explosive disorder on the basis that Mr. Spreitz failed to meet the diagnostic criteria. DSM-IV at 609-10. For that diagnosis, the DSM-IV requires that "the aggressive episodes" not be due to the "direct physiological effects of a substance (e.g., a drug of abuse, a medication)." Mr. Spreitz's aggression on the evening of May 19, 1989, is unquestionably related to his abuse of substances, alcohol and cocaine, and the

consequent formulation of cocaethylene. In addition, there are insufficient incidents of explosive violence identified in the records provided to support this diagnosis.

I am able to conclude beyond a reasonable psychiatric certainty that Mr. Spreitz's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired at the time of the encounter with Ms. Reid in the early morning hours of May 19, 1989, due to his ingestion of alcohol and cocaine, the effects of those drugs, the effect of the metabolite cocaethylene superimposed upon his history of significant childhood trauma.

Pablo Stewart, M.D.

Exhibit 2

Psychopharmacological Consultation
August 28, 2016

Tyler Counseling & Assessment Center, L.L.P.

1121 E. S.E. Loop 323, Suite 204
Tyler, Texas 75701
Phone: (903) 581-0933
Fax: (903) 581-3977

Psychopharmacological Consultation

Name:	**Christopher J. Spreitz**	**Marital Status:**	**Single**
DOB:	**06/10/1966**	**Ethnicity:**	**White**
Age:	**50 years**	**Education:**	**GED**
Gender:	**Male**	**Report Date:**	**08/28/2016**
Consultant:	**Paula K. Lundberg-Love, Ph. D.**		

Reason for Referral:

The case of Christopher J. Spreitz was referred to our office by Timothy M. Gabrielsen, who is an Assistant Federal Public Defender for the District of Arizona Capital Habeas Unit. Mr. Gabrielsen requested that I review a number of records regarding this case and opine on the effects of cocaethylene, a compound that is formed when an individual ingests alcohol and cocaine, on the behavior of Mr. Spreitz at the time of crime for which he is currently incarcerated.

Records Reviewed:

The Direct Appeal Opinion *State v. Spreitz,* September 11, 1997
Trial Day 2 (08/10/1994) Pages 201-11 – The Prosecution's Opening Statement
Trial Day 2 (08/10/1994) Pages 219-37 – Trial Testimony of Officer Ramon Batista
Trial Day 2 (08/10/1994) Pages 242-63 – Trial Testimony of Officer Victor Chacon
Trial Day 2 (08/10/1994) Pages 278-308 – Trial Testimony of Craig Clark
Trial Day 3 (08/11/1994) Pages 324-49 – Trial Testimony of Lana Owens
Trial Day 3 (08/11/1994) Pages 451-83 – Trial Testimony of Det. Karen Wright
Trial Day 4 (08/12/1994) Pages 493-518 – Trial Testimony of Det. Karen Wright
Trial Day 5 (08/16/1994) Pages 605-49 – Trial Testimony of Thomas Henry, M.D.
Transcript of Confession of Chris Spreitz (05/22/1989)
Report of Dr. Martin Blinder (06/01/1989)
Presentence Report (11/28/1994)
Capital Sentence Hearing (11/28/1994) Pages 4-52 – Testimony of Todd Flynn, Ph. D.
Report of Todd Flynn, Ph. D. (11/21/1994)
Capital Sentence Hearing (12/21/1994) Pages 31-39
Report of Joseph Geffen, Ph. D. (03/28/2000)
Report of Joseph Geffen, Ph. D. (02/04/2003)
Report 1 of Cheryl Fischer (03/07/2000) Pages 1-15
Report 2 of Cheryl Fischer (02/10/2003) Pages 1-43
Report of Roy Mathew, M. D. (12/09/2002)
Report of James Sullivan, Ph. D. (01/03/2005)

Declaration of Christopher Spreitz (06/06/2013)
Declaration of Susan Mendenhall (06/12/2013)
A primer of drug action 13th edition (2014) by Advokat, Comaty & Julien (pages 125 - 142 and 201-211)
Stahl's Essential Psychopharmacology 4th edition by Stephen M. Stahl (pages 537-575; 34, 298)

Mr. Spreitz' Alcohol and Cocaine Use Prior to the Crime for Mr. Spreitz is Currently Incarcerated:

Based upon a review of information contained in the report of Dr. Roy Mathew as well as information provided by Christopher Spreitz, himself, Mr. Spreitz had ingested exceedingly large amounts of alcohol prior to the time of the crime. He had also smoked marijuana and crack cocaine. Specifically, upon arising at 11:00 AM on Wednesday, May 19, 1989, Chris smoked two bowls of marijuana prior to a breakfast of cereal. After breakfast he purchased 12 beers which he consumed between the hours of 2:00-6:00 PM. When Chris' roommate, Craig Clark, arrived home after 6:00 PM, they purchased 12 more beers, two of which Chris consumed prior to going to a nightclub with his roommate at 7:30 PM. The nightclub was selling 8-ounce cups of beer for 5 cents apiece. Chris reported drinking at least 16 cups of beer between 7:30-10:30 PM, when he took his roommate home because Craig felt sick. Chris then decided to visit his girlfriend, Lucy. On the way to her residence, he stopped at a Seven-Eleven store to purchase a six-pack of beer. After purchasing the beer, Mr. Spreitz encountered a man to whom he had given rides to the man's cocaine dealer on previous occasions. When the man asked for a ride again, Chris took him to the cocaine dealer. The man went inside, came back with some crack cocaine and shared some with Chris. When questioned by his current attorney about how much cocaine he smoked that night, Mr. Spreitz indicated that he had "two to three hits" of cocaine. Of the six beers that Chris purchased at the Seven Eleven store, he consumed four of those prior to the time of the crime. So to summarize, from 11:00 AM on Wednesday until the time of the homicide, Mr. Spreitz ingested 34 beers and 2-3 "hits" of crack cocaine.

In order to offer a reasonable assessment of the impact of the amounts of alcohol and cocaine consumed by Chris on his cognitive and emotional behavior at the time of the crime, one must first estimate what Mr. Spreitz's blood alcohol level would have been. To do that one must understand that the average person metabolizes about 10-14 milliliters of 100 percent alcohol per hour, independent of the blood level of alcohol. This rate is fairly consistent across individuals. It takes an hour to metabolize the amount of alcohol contained in a 12 ounce of bottle of 5 percent beer or a 6-ounce glass of 8-10 percent microbrew or fortified beer. If a person consumes more alcohol in a given hour than can be metabolized (i.e., than one drink) one's blood level of alcohol will predictably increase. Consequently, there is a limit to the amount of alcohol an individual can ingest in an hour without becoming "drunk." Thus, the kinetics of alcohol metabolism allow not only an estimation of blood alcohol concentration (BAC), after drinking a known quantity of alcoholic beverage, but also an estimation of the fall in BAC over time after drinking ceases. The BAC is an index of motor and intellectual functioning and is the basis for the definition of "intoxication." Currently, in all states of the United States a BAC of 0.08 grams% is defined as "intoxication." However, one needs to understand that the behavioral effects of alcohol are not "all-or-none." Alcohol progressively impairs a person's motor, emotional, and cognitive abilities

as a function of the BAC. As a result one can reliably estimate the BAC, given the number of drink equivalents imbibed, the body weight, and the gender of an individual.

At the time of the crime Chris Spreitz weighed 170 pounds, according to his attorney, Tim Gabrielsen, who determined that Chris' weight at the time of his arrest was included in a police report. The Blood Alcohol Concentration (BAC) chart for men in *Julien's Primer of Drug Action* (pg. 130) provides an estimated blood alcohol concentration as a function of weight and the number of drinks consumed. Since the weights listed in the table closest to that of Chris are 160 pounds and 180 pounds, we will use the 180 pound weight because the higher one's body weight, the lower the BAC. Hence, if we use the 180 pound body weight to calculate what Chris Spreitz's BAC would have been at the time of the crime, it will provide a more conservative estimate. Mr. Spreitz drank 12 beers between 2:00-6:00 PM. If he had drunk this amount of beer within one hour his BAC would have been .25 grams%. However, given that the body can metabolize .015 grams% alcohol per hour, ingestion of 12 beers over a four hour period would have put his blood level at .19 grams% (.25 grams% -.06 grams% = .19 grams%) at 6:00 PM. Chris then drank two more beers from 6:00-7:30 PM which would have added .04 grams% to the BAC of .19 grams% for a total of .23 grams%. However, during that 1.5 hour time period while he was drinking the two beers, the amount of alcohol that would have been simultaneously metabolized would have given Chris a BAC of .23 grams% - .02 grams% = .21 grams%. From 7:30 -10:30 PM Mr. Spreitz then ingested 16 beers at a nightclub while metabolizing three alcoholic drinks during that time period. Hence, by 10:30 PM Chris' BAC would have been .54 grams% (.21 grams% + .33 grams %) - .045 grams% (metabolized) for a total BAC of .495 grams %. This means that Mr. Spreitz BAC level was 6.18 times the level for legal intoxication (.495/.08 = 6.18) at 10:30 PM. However, Chris purchased six more beers and consumed four of these prior to the time of the crime. That means that a **conservative** estimate of his BAC at the time of the crime was .495 grams% + .08 grams% (.02 grams% x 4 = .08) for a total of .575 grams%, which is an extraordinarily high BAC. Indeed, it is 7.18 times the legal limit for intoxication.

Initially, one might wonder how Chris was able to drive a car or even why he was not stuporous. But, in part, that is a function of tolerance to the chronic exposure of large amounts of alcohol. Sometimes it is referred to as "tissue tolerance." But the body adapts to alcohol exposure such that the behavioral and even biological impact of alcohol is "less potent" for lack of a better term. An individual who wasn't addicted to alcohol to the extent to which Mr. Spreitz was addicted, could have died of respiratory depression at this BAC. But Chris' long term, chronic, extensive addiction to alcohol resulted in a tolerance to impact of alcohol that one would observe in a lesser addicted or non-addicted person. This sort of effect is also observed in people addicted to opiate drugs like heroin. Opiate addicts develop a tolerance to its effects such that they can ingest an amount of drug that would result in respiratory depression and death in a non-addicted person. Indeed, it is not uncommon for opiate addicts who have been incarcerated or in treatment, where they had no access to the drug, then use the drug as soon as they are released, to die of an overdose because their level of tolerance has been significantly reduced.

In addition to being intoxicated by alcohol, Mr. Spreitz also smoked crack cocaine with an acquaintance just prior to the crime. Chris has estimated that he inhaled 2-3 "hits" of crack. An average dose of crack administered in that manner would have been between 250-1000

milligrams of cocaine. When crack cocaine is smoked the drug molecules pass through the membrane of the lungs and are directly absorbed into the blood stream and are sent to the brain without any of the cocaine being metabolized by the liver. So absorption is rapid and complete. Hence, inhalation of two to three hits of crack cocaine would have resulted in administration of a dose of cocaine that could range from 250 -1000 milligrams. However, when cocaine is concurrently ingested with alcohol, a unique ethyl ester of benzoylecognine, which is the primary metabolite of cocaine, is produced by the liver enzymes that metabolize the drug. That metabolite is called cocaethylene. Cocaethylene is pharmacologically as active as cocaine, itself, with respect to its ability to block the presynaptic dopamine transporter. The dopamine transporter is essentially a "pump" in the dopamine neurons of the brain that recycle the neurotransmitter, dopamine. So this means that the brain of Chris Spreitz was not only intoxicated with alcohol and cocaine, but also a third compound, cocaethylene. Effectively, he had two different compounds simultaneously flooding his brain with dopamine, serotonin, and norepinephrine. Cocaethylene is more toxic than cocaine, exacerbates the toxicity of cocaine itself, and increases the craving for more cocaine.

Another important issue with respect to the influence of cocaine and cocaethylene on behavior is the different half-lives of cocaine and cocaethylene. The half-life of a drug is the amount of time that it takes for one-half of the dose administered to be eliminated from the body as measured by its level in blood plasma. The half-life for cocaine in the plasma is about 50 minutes. The half-life of cocaethylene is 150 minutes, which mean that the effects of cocaethylene far outlast the effects of cocaine. However, the level of a drug in the plasma does not necessarily reflect the levels of a drug that are present in the brain. In order to determine the level of a compound in the brain, one would have to measure its presence in cerebrospinal fluid, which is an invasive procedure involving lumbar puncture. This is an important fact because while cocaine is rapidly removed from the plasma, it is more slowly removed from the brain. This means that once cocaine gets into the brain, it can continue to effect brain chemistry and behavior until it diffuses out of the brain and is removed from the plasma. The same is true for cocaethylene. According to Julien, cocaine can be detected in the brain for 8 or more hours after an **initial dose of the drug.** So with multiple "hits" of cocaine and multiple formations of cocaethylene metabolites, both molecules will be present to some degree in the brain even if the person does not seem to be exhibiting a "high." Since Chris Spreitz would have taken his three doses of cocaine (conservative estimate 50 milligrams x 3 = 150 milligrams) at approximately 12:30 AM, a conservative estimate is that Chris would have been under the influence of cocaine for more than four hours. Given that the formation of cocaethylene would also be approximately 150 milligrams and its half-life is 150 minutes, Chris would have been under the influence of cocaethylene for six hours. So when the police officer stopped Mr. Spreitz the night of the crime, his BAC, conservatively estimated, would have been .575 grams% and he was under the influence of cocaine and cocaethylene.

Mechanisms of Action of Alcohol in the Brain:

Identifying the mechanisms of action of alcohol (ethanol) in the brain has evolved as a result of research conducted over the past few decades. Because it is both water-soluble and lipid-soluble, it can dissolve into all body tissues. This fact led to the hypothesis that alcohol exerted its effects through a general depressant action on neural membranes by distorting,

disorganizing, perturbing, or fluidizing them. This mechanism of action could explain the non-specific, generalized depressant activities of the drug, but it did not explain the evidence that alcohol disturbed the synaptic activity of various neurotransmitters including the excitatory transmitter, glutamate, the inhibitory neurotransmitter, gamma-aminobutyric acid (GABA), and various intracellular transduction processes that modulate memory, cognitive performance and motor performance.

Ethanol is a potent inhibitor of activity at the NMDA-glutamate receptor. It depresses the responsiveness of the NMDA receptors to release glutamate, particularly in brain areas such as the hippocampus, amygdala and the corpus striatum. This action appears to underlie the consequences of severe intoxication as seen in impairment of memory and motor performance. This attenuation of glutamate responsiveness is exacerbated by alcohol's enhancement of inhibitory GABA neurotransmission.

Alcohol activates the GABA-mediated increase in the influx of chloride ions across the neuronal membrane which results in inhibition of nerve cells. Behaviorally, this inhibition results in sedation, muscle relaxation, and impairment of cognitive and motor skills. Ethanol and stress may interact such that GABA-mediated inhibition may lead to the activation of opioid receptors that, in turn, influence the rewarding effects associated with the stimulation of dopamine neurons. Ethanol binds to a receptor subunit of the GABA-A receptor complex different from that of other positive allosteric modulators of GABA like drugs such as Ativan and Xanax. As a result of this GABA-A action, the activity of other transmitter systems is affected. The abuse potential follows from the ultimate effect of augmenting the dopamine pathway from the ventral tegmental area to the nucleus accumbens, amygdala, and to the frontal cortex.

A dysfunctional brain opioid system may also be involved in heavy alcohol drinking and alcohol dependence such as that engaged in by Chris Spreitz. Ethanol may induce opioid release, which in turn triggers dopamine release in the brain reward system, especially in the nucleus accumbens and orbitofrontal cortex

There is also some literature that emphasizes the role of serotonin in the actions of alcohol and as a mediator of alcohol reward, preference, dependence and craving. Chronic alcohol consumption results in augmentation of serotonin activity, via stimulation of the serotonin two (5-HT2) and serotonin three (5-HT3) receptors. These receptors are located on dopamine neurons in the nucleus accumbens, which is the reward center of the brain. Serotonin dysfunction has been postulated to play a role in the pathogenesis of some types of alcoholism. Serotonin receptors also are involved in impulsivity, which is a core behavior that contributes to the vulnerability to addiction and relapse, such that reduced serotonin activity is associated with greater impulsivity.

Mechanism of Action of Cocaine in the Brain:

Cocaine potentiates the actions of three neurotransmitters in the brain, dopamine, norepinephrine, and serotonin. Potentiation occurs as a result of cocaine's ability to block the active transport (recycling) of these transmitters from the space between nerve cells (the synapse) back into the nerve cell itself. It is thought that cocaine's blockade of the dopamine transporter is crucial for its behavior-reinforcing and psychostimulant properties. Blockade of the

dopamine transporter by cocaine and cocaethylene markedly increases the levels of dopamine within the synapses. Increased levels of dopamine in the nucleus accumbens of the brain and other components of the dopaminergic reward system seem to be responsible for the euphoric and psychostimulant effects of the drug.

However, the ability of cocaine to block the serotonin transporter is also related to the reinforcing effects of cocaine. Animals that lack the 5-HT1B receptor show a greater response to cocaine. Some research data also suggest that people with altered serotonin receptor function may have an increased susceptibility to cocaine dependence.

Increasing the activity of dopamine, serotonin, and norepinephrine simultaneously in the brain impairs the ability of an individual to be able to think, plan and behave in a logical, rational manner. Changing brain chemistry necessarily changes behavior such that the ability of a person to deliberate, exercise judgment, coolly reflect and plan is seriously impaired. When the brain is "flooded" with these neurotransmitters, the circuitry of the brain that normally inhibits aggression and enables one to reflect upon the consequences of one's actions is effectively "hijacked." This means that biochemically and neuropharmacologically, Chris Spreitz's ingestion of cocaine contributed to his inability to control his behavior and enhanced his aggression.

Conclusions:

Chris Spreitz ingested massive amounts of alcohol in concert with cocaine prior to the crime for which he is currently incarcerated. In order to comprehend the various mechanisms whereby the consumption of these drugs can trigger/enhance violent behavior, and impair memory, one needs to understand the nexus of these drugs on the circuitry of the brain. Alcohol's ability to inhibit the activity of glutamate neurons and enhance the activity of GABA neurons augment one another to depress the cognitive processes of the brain, which impairs executive functioning, impairs memory, and impairs the ability of the inhibitory pathways of the brain to stop inappropriate behavior such as aggression. In effect, the brain circuitry that mediates one's ability to make non-aggressive, appropriate choices is hijacked. Thus, one is at the mercy of one's emotions, and the neural "brakes" that typically keep those emotions in check, are no longer functioning effectively. So a person who might not have a history of aggression can become very angry and aggressive under the influence of alcohol, particularly given the amounts consumed by Mr. Spreitz.

Similarly, Mr. Spreitz's ingestion of cocaine would have enhanced the activity of dopamine in the brain by blocking the dopamine transporter and likely elicited agitation, impulsivity, anxiety, suspiciousness, paranoia and aggression. Cocaine ingestion makes it more difficult to inhibit aggressive behavior. When cocaine is ingested with alcohol, the metabolite cocaethylene is formed, which exacerbates the toxicity of the cocaine, i.e., it increases the psychostimulant effects of cocaine described above and contributes to the hijacking of the brain circuitry. Once aggression is triggered, an individual may engage in what is known as "stereotypic" behavior which means that the individual may repetitively engage in aggression/injurious behavior even after a person with whom he is in confrontation may be defenseless, incapacitated or deceased. With respect to the initiation of aggression, adding

cocaine and cocaethylene to the amount of alcohol ingested by Mr. Spreitz was just like metaphorically adding fuel to the fire.

Alcohol also significantly impairs memory. Memory is impaired because the inhibition of glutamate activity and the enhancement of activity at the GABA-A receptor disrupts the processing and storage of memory. This occurs even when low doses of alcohol are consumed. Given the large amounts of alcohol ingested by Mr. Spreitz, it is not surprising that he had significant memory blackouts of what had occurred that night. Indeed, with the amount of alcohol consumed by Chris, it is at first difficult to understand why he wasn't sedated. But therein lie the effects of cocaine and cocaethylene. While the dopaminergic stimulant properties of cocaine and cocaethylene (i.e., increased alertness, increased motor activity, racing thoughts, enhanced motor activity) do not reverse the neurochemical depressant effects of alcohol, they can mask the intensity of the depressant effects of alcohol, such that the level of Mr. Spreitz's inebriation might not have appeared to the police officers to be as significant as it was. In effect, the ingestion of cocaine with alcohol has the effect of rendering one a much more alert and active "drunk."

Hence understanding and explaining the psychopharmacological effects of alcohol, cocaine and cocaethylene upon Mr. Spreitz's behavior would have assisted Mr. Spreitz's trial counsel in helping the sentencing court understand the significant impact of this drug "cocktail" upon the likelihood of Mr. Spreitz engaging in violent and aggressive behavior. It also would explain why Mr. Spreitz has virtually no memory of his actions that led to the victim's death and no comprehension as to how he could commit the fatal acts, given his lack of a violent history. I hope that this psychopharmacological consultation helps to clarify the impact of neurochemistry on behavior.

Respectfully,

Paula Lundberg-Love, Ph. D.

Paula Lundberg-Love, Ph. D.
Professor of Psychology
Licensed Professional Counselor

FILED

MAR 4 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRISTOPHER J. SPREITZ, Petitioner - Appellant, v. CHARLES L. RYAN, Respondent - Appellee.	No. 09-99006 D.C. No. 4:02-CV-00121-JMR District of Arizona, Tucson ORDER

Before: PAEZ, BERZON, and TALLMAN, Circuit Judges.

Christopher Spreitz filed a motion to stay the proceedings and remand this case to the district court for application of *Martinez v. Ryan*, 566 U.S. 1 (2012). Ninth Cir. Dkt. 49. The State filed a response opposing the motion, ninth cir. dkt. 58, and Spreitz filed a reply, ninth cir. dkt. 66. Spreitz renewed his motion to stay on February 1, 2017. Ninth Cir. Dkt. 98. The state also opposed this motion. Ninth Cir. Dkt. 99.

Spreitz argues that his post-conviction counsel was ineffective for failing to adequately develop the record supporting two claims of ineffective assistance of trial counsel. We have carefully considered all of the briefs and evidence, and we conclude that Spreitz has not made a sufficient showing to warrant a remand to the district court.

Therefore, the motions are DENIED.

FILED

AUG 3 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRISTOPHER J SPREITZ, Petitioner-Appellant, v. CHARLES L. RYAN, Respondent-Appellee.	No. 09-99006 D.C. No. 4:02-CV-00121-JMR District of Arizona, Tucson ORDER

Before: PAEZ, BERZON, and TALLMAN, Circuit Judges.

Appellant's motion to reconsider the order denying his motion to remand pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), Dkt. #112, is **DENIED**.