APPENDIX

IN THE

SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA,
Appellee,

v.

ROBERT ALLEN POYSON,
Appellant.

No. CR-98-0510-AP
Filed November 2, 2020

Appeal from the Superior Court in Mohave County
The Honorable Steven F. Conn, Judge
No. CR-96-865

DEATH SENTENCES AFFIRMED

COUNSEL:

Mark Brnovich, Arizona Attorney General, Brunn (Beau) W. Roysden III, Solicitor General, Lacey Stover Gard, Chief Counsel, David R. Cole, Senior Litigation Counsel, Capital Litigation Section, Phoenix, Attorneys for State of Arizona

Emily Skinner, Arizona Capital Representation Project, Phoenix, Attorney for Robert Allen Poyson

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JUSTICE BOLICK authored the opinion of the Court, in which CHIEF JUSTICE BRUTINEL, VICE CHIEF JUSTICE TIMMER, and JUSTICES GOULD, and MONTGOMERY joined*.

JUSTICE BOLICK, opinion of the Court:

¶1 The Ninth Circuit Court of Appeals found this Court erred on independent review of Robert Allen Poyson's death sentences and remanded the case to federal district court with instructions to grant a writ of habeas corpus unless the State initiates proceedings either to correct the constitutional error in Poyson's death sentences or to vacate the sentences. We granted the State's motion to conduct a new independent review and now affirm Poyson's death sentences.

BACKGROUND

¶2 As a child, Poyson suffered delayed development, physical abuse, the tragic loss of the only true father figure he knew, and rape at the age of eleven by a family friend. Following these traumatic events, he struggled academically, abused alcohol and drugs, committed numerous juvenile offenses, failed to maintain stable employment, and ultimately ended up homeless. In 1996, Elliot and Leta Kagen met Poyson and let him stay on their remote property in Golden Valley, Arizona, for $100 a month. Poyson became angry with the Kagens after learning they charged him the entire cost of their monthly rent and, along with fellow tenants Frank Anderson and Kimberly Lane, plotted to kill the Kagens, their son, and another tenant, Roland Wear, so they could steal Wear's truck and flee to Chicago.

¶3 Poyson's first victim was Leta's son, Robert Delahunt, whom Poyson and Anderson beat and stabbed to death over the course of forty-five minutes. Poyson then killed Leta in her bed with a single shot to the face and beat Wear to death as he tried to flee. Poyson, Anderson, and Lane proceeded to steal Wear's truck and flee to Illinois, where they were arrested. *See State v. Poyson* ("*Poyson I*"), 198 Ariz. 70, 74 ¶¶ 4–6 (2000).

* Justice John R. Lopez, IV and Justice James P. Beene have recused themselves from this case.

¶4 A jury convicted Poyson on three counts of first-degree murder. *Id.* During sentencing, the trial court found three aggravating factors beyond a reasonable doubt: (1) each murder was committed in expectation of pecuniary gain, (2) the murders of Delahunt and Wear were committed in an especially cruel manner, and (3) multiple homicides were committed. *Id.* at 78 ¶ 23. Finding only one mitigating factor, cooperation with law enforcement, the trial court sentenced Poyson to death. *Id.* at 73 ¶ 1, 81 ¶ 41.

¶5 On direct review, this Court found additional mitigating factors of age, family support, and potential for rehabilitation, but nevertheless upheld Poyson's sentence because the mitigating evidence was not sufficiently substantial to call for leniency. *Id.* at 82 ¶ 48.

¶6 In 2003, Poyson filed a petition for post-conviction relief, which the trial court denied. This Court denied his subsequent petition for review. *See Poyson v. Ryan* ("*Poyson III*"), 879 F.3d 875, 886 (9th Cir. 2018), *cert. denied*, 138 S. Ct. 2652 (2018). Poyson then filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona, which was denied. *Poyson v. Ryan* ("*Poyson II*"), 685 F. Supp. 2d 956, 961 (D. Ariz. 2010). The Ninth Circuit reversed and granted relief, concluding that habeas relief was warranted because this Court erred in its independent review of the death sentences when considering Poyson's mitigation evidence. *Poyson III*, 879 F.3d at 890–93. The Ninth Circuit reasoned that this Court's application of the "unconstitutional causal nexus test" to Poyson's mitigation evidence of a troubled childhood and mental health issues constituted error under *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and this error "had [a] 'substantial and injurious effect or influence'" on the sentencing decision. *Poyson III*, 879 F.3d at 890–93 (quoting *McKinney v. Ryan*, 813 F.3d 798, 822 (9th Cir. 2015).

¶7 Consistent with *State v. Hedlund*, 245 Ariz. 467, 470 ¶ 4 (2018), *cert. denied*, 140 S. Ct. 1270, we granted the State's motion to conduct a new independent review. We have jurisdiction under article 6, section 5(6) of the Arizona Constitution and A.R.S. §§ 13-755(A), -4031, and -4032(4).

DISCUSSION

I. Scope of Review

¶8 In granting the State's motion, we ordered the parties to submit briefing on "[w]hether the proffered mitigation is sufficiently substantial to warrant leniency in light of the existing aggravation." This order reflects that our new independent review is focused on correcting the constitutional error identified by the Ninth Circuit. *See, e.g.*, *Hedlund*, 245 Ariz. at 470 ¶ 5.

¶9 The Ninth Circuit found error with our application of an unconstitutional causal nexus test to exclude Poyson's mitigating evidence of childhood abuse and mental health issues. Thus, our independent review is limited to considering the mitigating factors without the causal nexus requirement and reweighing them against the established aggravators in this case. *See id.*; *State v. Styers*, 227 Ariz. 186, 188 ¶ 7 (2011).

¶10 Poyson argues, however, that his case is non-final and therefore he should be entitled to jury resentencing under *Hurst v. Florida*, 577 U.S. 92 (2016), and *Ring v. Arizona*, 536 U.S. 584 (2002). We recently rejected this same argument in *Hedlund*, 245 Ariz. at 470 ¶ 6, and do so again here, reaffirming the scope of review established in our prior cases. *See, e.g.*, *State v. McKinney* ("*McKinney I*"), 245 Ariz. 225, 227 ¶ 6 (2018); *Hedlund*, 245 Ariz. at 470 ¶ 6; *Styers*, 227 Ariz. at 188 ¶ 7.

¶11 Poyson's case became final in 2001 after the Supreme Court denied his writ of certiorari. *Poyson v. Arizona*, 531 U.S. 1165 (2001). *See Styers*, 227 Ariz. at 187 ¶ 5 (finding a "case is final when 'a judgment of conviction has been rendered, the availability of appeal exhausted, and . . . a petition for certiorari finally denied . . . .'" (quoting *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987))). As such, Poyson's case is here on collateral review. *See McKinney v. Arizona* ("*McKinney II*"), 140 S. Ct. 702, 708 (2020) ("As a matter of *state* law, the reweighing proceeding in McKinney's case occurred on collateral review."). Because his case became final before *Ring* and *Hurst* were decided, Poyson is not entitled to the benefit of jury resentencing in this collateral proceeding. *See id.* ("*Ring* and *Hurst* do not apply retroactively on collateral review."); *Hedlund*, 245 Ariz. at 470 ¶ 6 (holding that jury resentencing proceedings under *Ring* do not apply to cases deemed final).

¶12 Finally, for the same reasons as in *Hedlund*, we decline Poyson's invitation to consider evidence developed after the original proceedings as part of our independent review. *Hedlund*, 245 Ariz. at 470–71 ¶ 9 ("[A]dditional evidence should be admitted first in the trial court rather than in this Court.").

II. Independent Review

¶13 In 2000, this Court upheld Poyson's death sentences, finding that the mitigation evidence was not "sufficiently substantial to call for leniency." *Poyson I*, 198 Ariz. at 82 ¶ 48. However, the Ninth Circuit concluded this Court failed to consider mitigating evidence that was not causally related to Poyson's crimes. *Poyson III*, 879 F.3d at 889. Accordingly, we conduct a new independent review of the mitigation evidence and balance it against the aggravators.

Aggravator

¶14 The jury found, and this Court agreed on direct review, that the State proved the existence of three statutory aggravators: A.R.S. § 13-703(F)(5) (murder committed for pecuniary gain); -703(F)(6) (murder committed in an especially cruel manner); and -703(F)(8) (multiple murders committed).[1] *Poyson I*, 198 Ariz. at 81 ¶ 40.

¶15 Poyson challenges the trial court's finding of the (F)(5) and (F)(8) aggravators, arguing they were not proven beyond a reasonable doubt and that the plain language of § 13-755 requires us to reconsider aggravating factors in our independent review. Because the Ninth Circuit found no error in the aggravating factors, we reject this argument. *See Hedlund*, 245 Ariz. at 470 ¶ 5 (review limited to mitigating factors and reweighing them against the established aggravators); *Styers*, 227 Ariz. at 188 ¶ 7 ("Because no error was found regarding these aggravating factors, in this independent review we deem those factors established.").

[1] After Poyson's sentencing, Arizona's capital sentencing statutes were reorganized and renumbered as A.R.S. §§ 13-751 to -759 (2009). 2008 Ariz. Sess. Laws, ch. 301, §§ 26, 38–41 (2d Reg. Sess.). We cite to the previous versions, as used in Poyson's sentencing, for consistency.

Mitigating Factors

¶16 Poyson "has the burden of proving mitigating factors by a preponderance of the evidence." *Hedlund*, 245 Ariz. at 471 ¶ 12. "When he fails to do so, the asserted mitigation is entitled to no weight." *Id.* When assessing the weight and quality of a mitigating factor, we can consider how the mitigating factor relates to the offense. *Styers*, 227 Ariz. at 189 ¶ 12. This Court will consider all mitigating evidence presented without requiring a causal nexus between the evidence and the crime. But "we may consider the failure to show such a connection as we assess 'the quality and strength of the mitigation evidence,'" and may attribute less mitigating weight to evidence that lacks a connection to the crime. *Id.* (quoting *State v. Newell*, 212 Ariz. 389, 405 ¶ 82 (2006)); *see also Poyson III*, 879 F.3d at 888.

¶17 In this proceeding, Poyson claims the existence of two statutory mitigating factors and six non-statutory mitigating factors. For each, we determine if the factor has been proved by a preponderance of the evidence and then assign mitigating weight to that factor. In so doing, we consider only the evidence presented at sentencing.

A. Impairment

¶18 Poyson claims the existence of the statutory mitigator of impairment as well as non-statutory mitigating factors of substance abuse and mental health issues. Because all these mitigating factors deal with some aspect of the defendant's impairment, we address them together.

¶19 Impairment is a statutory mitigator when "[t]he 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." A.R.S. § 13-751(G)(1). Personality or character disorders do not typically satisfy this statutory mitigator. *State v. Medina*, 232 Ariz. 391, 412 ¶ 103 (2013). Yet even when mental health issues or substance abuse fail to satisfy this statutory mitigator, we often consider such evidence as non-statutory mitigation. *State v. Prince*, 226 Ariz. 516, 542 ¶ 113 (2011); *State v. Moore*, 222 Ariz. 1, 21 ¶ 121 (2009).

¶20 Substance abuse and mental health issues are entitled to little weight when there is no connection to the crime and no effect on the defendant's ability to conform to the requirements of the law or appreciate the wrongfulness of his conduct. *Prince*, 226 Ariz. at 542 ¶ 113 (noting mental health mitigation is weighed in proportion to the defendant's ability to conform or appreciate the wrongfulness of his conduct); *State v. Garcia*, 224 Ariz. 1, 22 ¶ 104 (2010) (finding evidence of long-term drug addiction entitled to little weight because no connection to crime or mental function at time of murder).

¶21 We will not find that a defendant's ability to conform or appreciate the wrongfulness of his conduct was impaired when the defendant's actions were planned and deliberate, or when the defendant seeks to cover up his crime. *See Hedlund*, 245 Ariz. at 472–73 ¶ 20 (finding that evidence showing the defendant "acted lucidly in planning and executing the crimes and in attempting to dispose of and hide the murder weapon" undermines arguments of significant impairment); *McKinney I*, 245 Ariz. at 227 ¶ 10 (finding PTSD mitigation evidence insufficiently substantial to warrant leniency when defendant's actions during the murder were "planned and deliberate"); *State v. Bocharski*, 218 Ariz. 476, 499 ¶ 111 (2008) (finding weight of defendant's alcohol impairment weakened by his "purposeful steps to avoid prosecution"); *State v. Rienhardt*, 190 Ariz. 579, 591–92 (1997) ("[A] defendant's claim of alcohol or drug impairment fails when . . . the defendant took steps to avoid prosecution shortly after the murder, or when it appears that intoxication did not overwhelm the defendant's ability to control his physical behavior.").

¶22 On direct review, we agreed with the trial court's conclusion that Poyson did not prove the statutory impairment mitigator, finding "scant evidence that [Poyson] was actually intoxicated on the day of the murders." *Poyson I*, 198 Ariz. at 79 ¶ 32. We also found Poyson's mental health issues did not control his conduct or impair his judgment and therefore afforded them no mitigating weight. *Id.* at 81–82 ¶ 43.

¶23 As an initial matter, we reaffirm our finding that Poyson failed to prove the existence of the (G)(1) statutory impairment mitigator. Our independent review similarly finds "scant evidence" of Poyson's intoxication at the time of the murders. Although Poyson drank heavily the night before the murders, he did not drink the day of the murders. On the day of the murders, Poyson smoked marijuana to allay the effects of his

hangover and claimed he had a PCP "flashback" during the murder of Delahunt. But as we determined in our direct review, this evidence is insufficient to show Poyson was substantially impaired when he murdered Delahunt, Leta, and Wear. Poyson exhibited numerous examples of "goal-oriented" behavior that belie a claim of substantial impairment. Indeed, Poyson took preparatory steps, such as cutting the telephone wires to prevent calls for help, checking the murder weapon to ensure proper functioning, and obtaining bullets beforehand. Additionally, he made conscious attempts to conceal his crimes after the fact, such as covering Wear's body with debris**.** These deliberate actions indicate that Poyson's drug and alcohol use neither rendered him unable to conform his conduct to the requirements of the law nor left him unable to appreciate the wrongfulness of his actions.

¶24 Poyson also provided evidence of long-term substance abuse and mental health issues. As an adolescent, he had "a clear and chronic history of substance abuse." Before trial, he was variously diagnosed with depression, polysubstance dependence, and antisocial personality disorder. Dr. Celia Drake, who conducted a forensic evaluation of Poyson, concluded that "there are a multitude of factors which have predisposed Robert Poyson to his history of delinquency and subsequent criminal acts." Thus, the evidence shows that Poyson suffered from mental health issues, and we find the non-statutory mitigating factor established. *See Prince*, 226 Ariz. at 542 ¶ 114. Nevertheless, no evidence developed at trial suggests that Poyson's mental health issues significantly impaired his capacity to conform his behavior to the law or appreciate the wrongfulness of his conduct. As explained above, *supra* ¶ 23, Poyson took deliberate and calculated steps to ensure that his murderous plot and flight from Golden Valley would be successful and that he would avoid capture by law enforcement. Moreover, Poyson's own statements demonstrate he knew his actions were wrong, morally and legally. Accordingly, we assign little weight to this mitigation evidence.

¶25 Ultimately, despite some evidence of drug abuse and his mental health issues, the record indicates Poyson was capable of conforming to the law and appreciated the wrongfulness of his conduct. His actions were not intoxicated and impulsive but constituted a planned and deliberate attack on his three victims over the course of a night. And despite his low intelligence, he was able to flee across the country and

briefly evade capture by law enforcement. As a result, we give little weight to his drug use or mental health issues as mitigation evidence.

B. Age

¶26 Poyson was nineteen years old at the time of the murders. A defendant's age can be a statutory mitigating factor. A.R.S. § 13-751(G)(5). The mitigating weight of a defendant's age depends upon the "defendant's level of intelligence, maturity, involvement in the crime, and past experience." *McKinney I*, 245 Ariz. at 227 ¶ 11 (quoting *State v. Jackson*, 186 Ariz. 20, 30 (1996)). As such, the mitigating weight is less when the defendant was a major participant in the crime or has a substantial criminal history. *Id.* at 227–28 ¶¶ 11–12 (attributing little mitigating weight to twenty-three-year-old defendant who took a leading role in executing and planning burglaries leading to murder); *State v. Hargrave*, 225 Ariz. 1, 18 ¶ 80 (2010) ("We discount age as a mitigating factor when the defendant had a significant criminal record or actively participated in the murders."); *State v. Womble*, 225 Ariz. 91, 104 ¶¶ 57–58 (2010) (finding significance of a nineteen-year-old defendant diminished when he is a major participant and helps plan the crime in advance).

¶27 While the trial court found Poyson failed to establish the (G)(5) mitigator, this Court attributed some mitigating weight to this factor on direct review. *Poyson I*, 198 Ariz. at 81 ¶ 39. However, this weight was ultimately diminished by Poyson's criminal history, as well as his extensive participation in these crimes. *Id.* A review of the record leads us to conclude the same today.

¶28 First, Poyson had a long history of adjudicated offenses as a juvenile, including sexual assault of a minor and multiple violent offenses. Second, despite Poyson now claiming he was manipulated by Anderson, his own testimony clearly demonstrates he was a major participant in the murders of Delahunt, Leta, and Wear. Regarding the murder plans, he claimed, "I came up with most of it but [Anderson] came up with a little bit." Poyson was the one who searched for murder weapons beforehand and who devised a plan to goad Anderson into killing Delahunt when Anderson hesitated. Ultimately, Poyson delivered the fatal blow to each of his victims.

¶29 Given Poyson's substantial role in these murders and his previous juvenile offenses, we afford his age little mitigating weight.

C. Abusive Childhood

¶30 When childhood abuse is established by a preponderance of the evidence, its mitigating weight depends on the age of the defendant at the time of the murder and the causal connection between the abuse and crime committed. *Prince*, 226 Ariz. at 541 ¶ 109. The mitigating weight of childhood abuse may diminish as a defendant ages. *See State v. Hidalgo*, 241 Ariz. 543, 558 ¶ 68 (2017) (defendant did not "convincingly" explain how admittedly "cruel and traumatic" childhood conditions caused murders committed by twenty-three-year-old adult). The mitigating weight of childhood abuse is also reduced when there is no causal link between the abuse and the murder. *Hedlund*, 245 Ariz. at 473 ¶ 25 (assigning evidence of defendant's abusive childhood little weight when it did not affect defendant's ability to conform his behavior to the law or render him "unable to differentiate right from wrong"). And evidence that murders were planned or deliberate and not motivated by passion or rage decreases the mitigating effect of prior childhood abuse. *State v. Cropper*, 223 Ariz. 522, 529 ¶ 30 (2010); *State v. Armstrong*, 218 Ariz. 451, 465 ¶¶ 75–76 (2008).

¶31 The trial court found Poyson proved he suffered from a dysfunctional childhood, physical abuse, mental abuse, neglect, sexual abuse, and family tragedy. The record establishes that as a child, Poyson was subjected to physical abuse by his caregivers, was forced to consume alcohol at the age of three or four, was raped at eleven years old by a family friend, and had an unstable childhood with multiple stepfathers. Following the suicide of a stepfather he had grown close to and the sexual assault, Poyson began to struggle academically, frequently got into trouble, and started drinking alcohol. Evaluations taken while he was a juvenile and undergoing treatment attributed his antisocial behavior to his chaotic upbringing and childhood abuse. During trial, Poyson introduced a report from Dr. Drake, who attributed his behavioral problems and need for attention to his inconsistent parenting and the lack of treatment he received as a juvenile.

¶32 Because Poyson was only nineteen when he committed the triple murder, the childhood abuse he endured is temporally proximate to

his crimes. However, the causal link is weak. While Poyson's situation and mental health issues may be attributed to his childhood abuse, any connection is weakened by the fact that the murders were not spontaneous or motivated by rage or passion but were planned, deliberate, and calculated. Poyson planned the murders ahead of time with Anderson and Lane. He engaged in planning and preparation by finding ammunition to use, disabling the Kagens' telephone so they could not call for help, and tricking Delahunt to join in their plan so he would not expose them. Even after the murders, Poyson demonstrated his ability to appreciate the wrongfulness of his conduct was not impaired by seeking to conceal Wear's body and suggesting Anderson get rid of Wear's truck so they would not be caught.

¶33 While Poyson's abusive childhood is given some mitigating weight because of his age, its weight is not substantial because Poyson has not proved his abuse impacted his ability to conform his behavior to follow the law or to know right from wrong.

D. Remorse and Cooperation with Law Enforcement

¶34 When established, the presence of remorse can serve as a non-statutory mitigating factor, *Prince*, 226 Ariz. at 543 ¶ 121, as can admissions of guilt or cooperation with law enforcement. *State v. Miller*, 186 Ariz. 314, 326 (1996). But when the sincerity of the remorse is in question, its mitigating weight is reduced. *Medina*, 232 Ariz. at 413 ¶¶ 112–113 (finding sincerity of defendant's remorse doubtful when grounded in fear of being caught); *Cropper*, 223 Ariz. at 529 ¶¶ 27–28 (sincerity of remorse doubted when defendant's behavior contradicted his expressions of remorse). Similarly, admissions of guilt or cooperation with law enforcement are afforded little mitigating weight when the defendant has nothing to lose by cooperating or confessing. *See, e.g.*, *State v. Murdaugh*, 209 Ariz. 19, 36 ¶ 84 (2004) (concluding evidence of cooperation entitled to little mitigating weight when defendant agreed to cooperate only after learning police found the crime scene).

¶35 During sentencing, the trial court found Poyson established he was remorseful by a preponderance of the evidence but that his remorse was not mitigating because it did not stop him from going through with a

procession of murders and did not lead him to turn himself in. On direct review, this Court agreed. *Poyson I*, 198 Ariz. at 82 ¶ 45.

¶36 In fact, the record is replete with evidence that Poyson had some remorse for the murders he committed. Poyson stated he had second thoughts about going through with it, even at the beginning of the spree while killing Delahunt, until Anderson talked him back into it. During his interview with police, Poyson explicitly expressed remorse for what he had done, especially as to the murder of Delahunt, with whom he had a particularly close relationship. Both officers who interviewed Poyson, as well as his mitigation specialist, testified that they believe Poyson had remorse for what he did. Ultimately, Poyson's remorse is mitigating but pales in significance when compared to the strong aggravating factors.

¶37 Regarding Poyson's cooperation with law enforcement, both the trial court and this Court on direct review found his cooperation to be mitigating. *Id.* ¶ 48. The record demonstrates that while on the run with Anderson and Lane, Poyson wanted to turn himself in. But once he was finally apprehended, he initially falsely downplayed Lane's involvement in the murders while confessing to his part in the murders. Given that Poyson had little to gain from not cooperating and that he originally sought to conceal Lane's involvement in the murders, his confessions and cooperation are given little mitigating weight.

E. Potential for Rehabilitation and Good Behavior

¶38 The potential for rehabilitation can be considered a mitigating factor. *State v. Villalobos*, 225 Ariz. 74, 82 ¶ 34 (2010). During sentencing, the trial court determined there was insufficient evidence to prove this as a mitigating factor. But on direct review, this Court disagreed and found the rehabilitation factor was entitled to some mitigating weight because expert testimony showed Poyson was able to be rehabilitated in institutional settings. *Poyson I*, 198 Ariz. at 82 ¶ 46. We find no reason to disagree with that conclusion.

¶39 Although we do not consider evidence that was not before the trial court on direct review, Poyson now wants us to consider the mitigating weight of his good behavior in prison and his status as a model inmate. He cites *Skipper v. South Carolina*, 476 U.S. 1, 7 (1986), for the premise that this

Court cannot exclude and refuse to consider evidence of good behavior in prison. Poyson also cites our previous decision in *State v. Richmond*, where we found that the defendant's good behavior in prison was sufficiently mitigating to warrant leniency. 180 Ariz. 573, 580–81 (1994), *abrogated on other grounds by State v. Mata*, 185 Ariz. 319 (1996). Yet *Richmond* is distinguishable. The procedural posture of *Richmond* was significantly different; the Court was considering evidence presented in a prior resentencing, not new evidence developed in post-conviction proceedings. *See id.* at 580 n.8. Moreover, the defendant presented "quite persuasive and most unusual" testimony from guards and prison counselors who gave specific examples about how the defendant had gone out of his way to better not only himself but also the lives of his fellow inmates. *Id.* at 580–81. Here, Poyson has not presented such compelling evidence of reform beyond being a model prisoner. Furthermore, in more recent cases, this Court has assigned very little mitigating weight to good behavior because inmates are expected to be good. *See, e.g.*, *State v. Payne*, 233 Ariz. 484, 518 ¶ 157 (2013); *State v. Kiles*, 222 Ariz. 25, 42 ¶ 89 (2009); *State v. Dann*, 220 Ariz. 351, 375 ¶ 141 (2009). Thus, even if we consider Poyson's good behavior in prison to be mitigating, we would only assign it minimal weight.

F. Family Support

¶40 Family ties and support may be mitigating, but general statements of support are entitled to little weight. *Medina*, 232 Ariz. at 413 ¶ 111; *State v. Jones*, 197 Ariz. 290, 313 ¶ 77 (2000). While the trial court found Poyson failed to establish meaningful family support, on direct review this Court found evidence of family support from the testimony, cooperation, and written letters of Poyson's relatives but accorded it minimal mitigating weight. *Poyson I*, 198 Ariz. at 82 ¶ 47. We do the same today.

Leniency is Not Warranted

¶41 When conducting independent review, "we must consider the aggravator[s] . . . and all mitigating evidence presented to determine whether the mitigation evidence individually or cumulatively is sufficiently substantial to call for leniency." *Hedlund*, 245 Ariz. at 475 ¶ 34.

"We consider the quality and the strength, not simply the number, of aggravating and mitigating factors." *Hidalgo*, 241 Ariz. at 558 ¶ 69.

¶42 Here, all three aggravating factors are particularly weighty. The cruelty aggravator is "entitled to great weight." *McKinney I*, 245 Ariz. at 228 ¶ 15. The evidence of the prolonged and brutal way Poyson murdered both Delahunt and Wear strongly supports assigning considerable weight to this aggravator. The pecuniary gain aggravator is also especially strong and "weighs heavily in favor of a death sentence," *id.* ¶ 14, when pecuniary gain is the "catalyst for the entire chain of events leading to the murders." *State v. McKinney*, 185 Ariz. 567, 584 (1996). *See also Hedlund*, 245 Ariz. at 475 ¶ 34. Given that the murders of Delahunt, Leta, and Wear were not simply incidental to the stealing of Wear's truck but were an integral part of the plan, the pecuniary gain aggravator is especially strong here.

¶43 Of the three aggravators, the strongest is the multiple homicides aggravator. Compared to other aggravators, we have consistently given "extraordinary weight" to this aggravator. *See, e.g.*, *Hidalgo*, 241 Ariz. at 558 ¶ 69; *State v. Garza*, 216 Ariz. 56, 72 ¶ 81 (2007). Even when the multiple homicides aggravator is the only aggravator weighed against multiple mitigating factors, we have found the mitigation insufficient to warrant leniency. *See, e.g.*, *Moore*, 222 Ariz. at 23 ¶¶ 137–38 (finding significant mitigating evidence of age and drug abuse insufficient to warrant leniency in light of multiple murders aggravator); *Dann*, 220 Ariz. at 376–77 ¶¶ 137–39, 145–49, 152 (finding mitigating evidence of childhood abuse, impairment, and family support insufficient to warrant leniency in light of sole aggravator of multiple murders); *Armstrong*, 218 Ariz. at 466 ¶ 83–84 (similar).

¶44 In arguing for leniency, Poyson likens his case to three decisions where we reduced the death sentence to a life sentence: *Bocharski*; *State v. Roque*, 213 Ariz. 193 (2006); and *Richmond*. Yet these cases can easily be distinguished. First, unlike Poyson, all the defendants in these cases were convicted and sentenced for only one count of murder and did not have the multiple murder aggravator. *Bocharski*, 218 Ariz. at 481 ¶ 1; *Roque*, 213 Ariz. at 203 ¶ 9; *Richmond*, 180 Ariz. at 575. Considering the extraordinary weight we apply to this aggravator, this is a significant difference. Second, each of these cases involve the presence of only one

aggravator, unlike Poyson's case involving three, and none of the aggravators in Poyson's case are present in these other cases. *Bocharski*, 218 Ariz. at 499 ¶ 112; *Roque*, 213 Ariz. at 231 ¶ 170; *Richmond*, 180 Ariz. at 580.

¶45 Finally, the mitigating evidence in these other cases had much more support and weight than the evidence Poyson presented. In *Bocharski*, we noted how the evidence of the defendant's childhood abuse was unique in its depth and that experts specifically testified that the defendant's childhood abuse helped cause the defendant to commit murder. 218 Ariz. at 498–99 ¶¶ 109–10. Unlike *Bocharski*, Poyson had no expert testify in definite terms as to whether his childhood abuse would have caused him to commit murder. In *Roque*, we gave substantial mitigating weight to the defendant's mental health issues, as all four mental health experts who testified agreed his mental health issues impaired his capacity to conform with the law. 213 Ariz. at 230–31 ¶ 168. In addition to Poyson lacking such a definite diagnosis, the record actually demonstrates that Poyson's capacity to conform to the law was not impaired. And in *Richmond*, we found the defendant's reformation in prison to be mitigating as the defendant presented substantial evidence of how he bettered himself and the lives of other inmates from both prison counselors and guards. 180 Ariz. at 580–81. But beyond some evidence of self-improvement and a light disciplinary history, Poyson has not presented any similar substantial evidence.

¶46 Having considered all the mitigating evidence, we conclude it is not sufficient to warrant leniency in light of the three aggravators proven by the State, especially given the extraordinary weight of the multiple murders aggravator and the particular weightiness of the other two aggravators. *See McKinney I*, 245 Ariz. at 227 ¶¶ 7–10 (affirming defendant's death sentence upon weighing pecuniary gain and especially cruel aggravators against childhood abuse and mental health mitigators); *Hargrave*, 225 Ariz. at 19 ¶ 86 (affirming defendant's death sentence involving same three aggravators as Poyson); *State v. Boggs*, 218 Ariz. 325, 340–342 ¶¶ 73–83, 344 ¶¶ 94–95 (2008) (affirming death sentence in light of same three aggravators weighed against similar mitigation evidence).

CONCLUSION

¶47 We affirm Poyson's death sentences.

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-98-0510-AP
Appellee,	)	
	)	Mohave County Superior
v.	)	Court
	)	No. CR-96-865
ROBERT ALLEN POYSON,	)	
	)	**FILED 12/07/2020**
Appellant.	)	
	)	
	)	

O R D E R

On November 24, 2020, Appellant Poyson filed a "Motion for Reconsideration." Upon consideration of the Court,

IT IS ORDERED denying the motion.

DATED this 7th day of December, 2020.

/s/
WILLIAM G. MONTGOMERY
Duty Justice

TO:
Lacey Stover Gard
David R Cole
Emily Skinner
Robert Allen Poyson, ADOC 140419, Arizona State Prison, Florence Central Unit
Dale A Baich
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kj

SUPREME COURT OF ARIZONA
EN BANC

STATE OF ARIZONA, Appellee, vs. ROBERT ALLEN POYSON, Appellant.	)	Supreme Court No. CR-98-0510-AP Mohave County No. CR-96-865 **O P I N I O N**

Appeal from the Superior Court of Mohave County
The Honorable Steven F. Conn, Judge

AFFIRMED

Janet Napolitano, Attorney General — Phoenix
By Paul J. McMurdie and J.D. Nielsen
Attorneys for Appellee

John W. Rood, III — Phoenix
Attorney for Appellant

Z L A K E T, Chief Justice.

¶1 A jury convicted defendant Robert Allen Poyson on three counts of first degree murder, one count of conspiracy to commit first degree murder, and one count of armed robbery. The trial court sentenced him to death for the murders, and to terms of imprisonment for the other offenses. Defendant appeals from his capital convictions and sentences.[1] We review this case pursuant

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[1] Poyson also filed a notice of appeal from his robbery and conspiracy convictions but did not raise or brief any issues pertaining to them. We therefore affirm those convictions and sentences. See State v. Van Adams, 194 Ariz. 408, 411 n.1, 984 P.2d 16, 19 n.1 (1999), cert. denied, 120 S. Ct. 1199 (2000); Ariz. R. Crim. P. 31.2(b).

to Art. 6, § 5(3) of the Arizona Constitution, A.R.S. § 13-4031, and Rule 31.2(b), Ariz. R. Crim. P. For the following reasons, we affirm.

FACTS

¶2 Poyson met Leta Kagen, her fifteen year-old son, Robert Delahunt, and Roland Wear in April of 1996. The defendant was then nineteen years old and homeless. Kagen allowed him to stay with her and the others at their trailer in Golden Valley, near Kingman, Arizona. In August of the same year, Kagen was introduced to forty-eight year-old Frank Anderson and his fourteen year-old girlfriend, Kimberly Lane. They, too, needed a place to live, and Kagen invited them to stay at the trailer.

¶3 Anderson informed the defendant that he was eager to travel to Chicago, where he claimed to have organized crime connections. Because none of them had a way of getting to Chicago, Anderson, Poyson and Lane formulated a plan to kill Kagen, Delahunt, and Wear in order to steal the latter's truck.

¶4 On the evening of August 13, 1996, Lane lured Delahunt into a small travel trailer on the property, ostensibly for sex. There, Anderson commenced an attack on the boy by slitting his throat with a bread knife. Poyson heard Delahunt's screams and ran to the travel trailer. While Anderson held Delahunt down, the defendant bashed his head against the floor. He also beat the victim's head with his fists, and pounded it with a rock. This,

however, did not kill Delahunt, so Poyson took the bread knife and drove it through his ear. Although the blade penetrated the victim's skull and exited through his nose, the wound was not fatal. Defendant thereafter continued to slam Delahunt's head against the floor until he lost consciousness. According to the medical examiner, Delahunt died of massive blunt force head trauma. In all, the attack lasted about 45 minutes. Remarkably, Kagen and Wear, who were in the main trailer with the radio on, never heard the commotion coming from the small trailer.

¶5 After cleaning themselves up, Poyson and Anderson prepared to kill Kagen and Wear. They first located Wear's .22 caliber rifle. Unable to find any ammunition, the defendant borrowed two rounds from a young girl who lived next door, telling her that Delahunt was in the desert surrounded by snakes and the bullets were needed to help rescue him. Defendant loaded the rifle and tested it for about five minutes to make sure it would function properly. He then stashed it near a shed. Later that evening, he cut the telephone line to the trailer so that neither of the remaining victims could call for help.

¶6 After Kagen and Wear were asleep, Poyson and Anderson went into their bedroom. Defendant first shot Kagen in the head, killing her instantly. After quickly reloading the rifle, he shot Wear in the mouth, shattering his upper right teeth. A struggle ensued, during which the defendant repeatedly clubbed Wear in the

head with the rifle. The fracas eventually moved outside. At some point, Anderson threw a cinder block at Wear, hitting him in the back and knocking him to the ground. While the victim was lying there, the defendant twice kicked him in the head. He then picked up the cinder block and threw it several times at Wear's head. After Wear stopped moving, the defendant took his wallet and the keys to his truck. In order to conceal the body, the defendant covered it with debris from the yard. Poyson, Anderson, and Lane then took the truck and traveled to Illinois, where they were apprehended several days later.

TRIAL ISSUES

Admission of Statements to Police

¶7 Poyson was arrested just after 10:00 p.m. on August 23, 1996, at an Evanston, Illinois homeless shelter. Over the next twenty-four hours, he was questioned three times at the Evanston police station and made incriminating statements. He now challenges the admission of those statements at trial, contending that they were involuntary, given without proper Miranda warnings, and recorded in violation of the Illinois eavesdropping statute.

¶8 Soon after he was brought into custody, the defendant was placed in an interview room and handcuffed to a beam mounted on the wall. He was then questioned by Sgt. Ralph Stegall of the Illinois State Police. After being advised of his Miranda rights, the defendant confessed to the murders of Delahunt, Kagen, and Wear.

This first interview began at 10:40 p.m. and lasted just over two hours. Defendant was then left alone in the interview room for about an hour and a half. During this period, he was given a cigarette, a cold soda and a cheeseburger. He was also allowed to use the bathroom. Stegall then conducted a second interview, which began at 2:55 a.m. and ended at 3:25 a.m. Defendant was advised of his Miranda rights and again made incriminating statements. Afterward, he was taken back to his holding cell, where he slept for five or six hours.

¶9 The final interview began on the evening of August 24, 1996, at 8:38 p.m. and lasted about two hours. This time, the defendant was interviewed by Detective Eric Cooper of the Mohave County Sheriff's Office, who had flown to Illinois. Defendant was advised of his rights and then gave a detailed, tape-recorded account of his involvement in the murders. He drank a soda during the interview and smoked a cigarette during a five to ten minute break.

¶10 Poyson argues that these confessions were given under conditions so oppressive that his statements must be deemed involuntary. In Arizona, confessions are presumed to be involuntary, and the State has the burden of proving otherwise. See State v. Scott, 177 Ariz. 131, 136, 865 P.2d 792, 797 (1993). In ruling on voluntariness, a court must examine the totality of circumstances. See id.; State v. Arnett, 119 Ariz. 38, 42, 579

P.2d 542, 546 (1978). Although "personal circumstances, such as intelligence and mental or emotional status, may be considered in a voluntariness inquiry, the critical element . . . is whether police conduct constituted overreaching." State v. Stanley, 167 Ariz. 519, 524, 809 P.2d 944, 949 (1991); see also Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, 522 (1986) (holding that "coercive police activity is a necessary predicate" to an involuntariness finding); Scott, 177 Ariz. at 136, 865 P.2d at 797. A trial court's finding of voluntariness will be sustained absent clear and manifest error. See Scott, 177 Ariz. at 136, 865 P.2d at 797; Arnett, 119 Ariz. at 38, 579 P.2d at 546.

¶11 Defendant relies on his allegedly vulnerable mental state at the time of the statements. He emphasizes that he was depressed and remorseful when he made them. Defendant also cites his age (twenty at the time of the confessions), his "low average intelligence," and his fright at being interrogated by the police. He does not, however, point to any evidence in the record indicating that the officers exploited his remorse, his age, or his fear to gain a confession. In fact, we find no suggestion of police overreaching. The three interviews were not long, and occurred over a twenty-four hour period. One lasted only thirty minutes. The others were each about two hours in length. We find no indication that the questioning was particularly intense or marked by coercion. The officers scrupulously advised the

defendant of his Miranda rights. Although handcuffed, he could comfortably sit or stand as he chose. See United States v. Elie, 111 F.3d 1135, 1144 (4th Cir. 1997) (noting that handcuffing alone does not establish involuntariness). The officers never denied the defendant an opportunity to eat, drink, smoke, or use the bathroom. In fact, they made sure those needs were taken care of while he was in their custody.

¶12 Poyson makes much of the fact that the interviews took place at night and suggests that the police exploited his fatigue to extract a confession. We reject this contention. Sgt. Stegall testified that the defendant was alert and answered questions coherently. Defendant never asked for an opportunity to sleep nor did he otherwise indicate that he was too tired to continue the interviews. Nothing in the record establishes a sleep-deprived condition that the police should have recognized on their own. After the first two interviews with Stegall, the defendant was left undisturbed in his cell for over fourteen hours. By his own account, he slept five or six of those hours. Nothing the police did prevented him from getting more sleep prior to the final interview that evening with Detective Cooper.

¶13 In short, the State proved that the defendant's statements were voluntary. See, e.g., State v. Spears, 184 Ariz. 277, 285-86, 908 P.2d 1062, 1070-71 (1996) (confession during a 4:00 a.m. interview held voluntary where defendant was in custody

for sixteen hours without being offered food, drink or bedding, and without having used the bathroom); Scott, 177 Ariz. at 136-37, 865 P.2d at 797-98 (confession held voluntary where defendant went to police station at 2:00 a.m., was questioned for fourteen hours, and was given soft drinks and cigarettes upon request).

¶14 Defendant next argues that he did not receive proper Miranda warnings before the interview with Detective Cooper. The officer testified that he advised Poyson of his rights before he turned on the tape recorder. Although the warnings themselves were not recorded, the following exchange took place when the questioning began:

Cooper: [A] couple of minutes ago, Bobby, I advised you of your Miranda rights, is that correct?

Poyson: Yes, you did.

Cooper: And did I do it from memory or did I read 'em?

Poyson: You read 'em and from memory.

Cooper: Okay. And did you understand those rights?

Poyson: Yes, I did.

Cooper: Okay, Do you re - can you just repeat 'em back to me?

Poyson: I HAVE THE RIGHT TO REMAIN SILENT. AND ANYTHING I SAY CAN AND WILL BE USED AGAINST ME IN A COURT OF LAW.

I HAVE THE RIGHT TO AN ATTORNEY. IF I CANNOT AFFORD ONE, ONE WILL, ONE WILL [sic] BE APPOINTED TO ME.

Cooper: Okay. And did you understand all that?

Poyson: Yes, I did.

[Capitals in original].

Defendant argues that because he did not say the words, "I have the right to an attorney present during questioning" when repeating what he had been told, there is evidence that Cooper never specifically advised him of that right. Thus, he asserts, the Miranda warnings were defective. After hearing testimony at the suppression hearing, the trial court found that the officer properly advised Poyson and concluded that the defendant simply "paraphras[ed] his rights in a manner less sophisticated than might be done by a lawyer or a police officer."

¶15 The trial court's ruling on a motion to suppress will be upheld absent clear and manifest error. See State v. Spreitz, 190 Ariz. 129, 144, 945 P.2d 1260, 1274 (1997); Stanley, 167 Ariz. at 523, 809 P.2d at 948. Here, the court's finding was not clearly erroneous. Cooper testified that he read Poyson his rights, and the defendant has never explicitly denied that fact. When questioned at the suppression hearing, Poyson said that he could not recall whether he was so advised; however, he conceded on cross-examination that it was possible the officer may have done so. On re-direct, the defendant repeated this testimony. Perhaps the best evidence on this subject is the statement itself, in which the defendant admits that Cooper read him his rights both from a card and from memory. This admission was made only minutes after

the warnings were read, when the defendant's recollection was fresh. Based on such evidence, the trial court could reasonably find that Poyson was fully advised, even though he was not able to recite the Miranda litany verbatim.

¶16 Finally, the defendant contends that the interview with Cooper was taped in violation of the Illinois eavesdropping statute and should have been suppressed. Illinois law makes it a crime to record a conversation without the permission of the parties. See 720 Ill. Comp. Stat. Ann. 5/14-1 to 5/14-5 (West 1993 & Supp. 1999). Statements obtained in violation of the statute are inadmissible in both civil and criminal cases. See id. 5/14-5.

¶17 The trial court found that Cooper obtained permission prior to questioning, although the only recorded request for permission occurs about a third of the way through the interview. Cooper said that he asked for, and received, consent to tape the interview before it began. Sgt. Stegall testified that he did not specifically recall whether Cooper requested permission to record the interview. Nevertheless, he said that he would not have participated in the interview unless Cooper had secured permission. Defendant denied that Cooper ever sought his consent to record their discussion. It is clear that the trial judge regarded Cooper and Stegall as the more credible witnesses. We cannot say that his resolution of this factual conflict was clearly erroneous.

Admission of the Palm Print

¶18 Defendant argues that the trial court erred in denying his motion to preclude evidence of a palm print found in the small travel trailer where Robert Delahunt was murdered.

¶19 On February 4, 1998, the court ordered both the prosecution and defense to "disclose to the other side any names of witnesses, addresses of witnesses, [and] statements or reports that have been written by such witnesses" no later than two weeks before the trial date of March 2, 1998. On February 25, defense counsel interviewed Glenda Hardy, a print examiner for the Arizona Department of Public Safety. During the interview, Ms. Hardy referred to a "bloody palm print" that was taken from a shelf in the travel trailer where Delahunt was killed, which she identified as belonging to the defendant.

¶20 Defendant asked the trial court to exclude the palm print because the State had violated the discovery deadline. He asserted that Hardy's previous reports had referred only to "latent" prints (which he understood to mean "invisible") and had never mentioned a "bloody palm print." The late disclosure was unduly prejudicial, he argued, because "[u]p to that point, there was no physical evidence linking Robert Poyson to those homicides." The court denied the motion on the ground that previous reports had disclosed the existence of "latent prints." "Perhaps [the State] didn't refer to [the palm print] with as much specificity as they could have," the court said, "but I think the State has complied with the

discovery requirements." For the same reason, the court also denied the defendant's motion to continue in order to have an expert analyze the palm print.

¶21 A trial court's erroneous decision to admit evidence not timely disclosed by the prosecution may, under some circumstances, be deemed harmless. See State v. Krone, 182 Ariz. 319, 321, 897 P.2d 621, 623 (1995). Error is harmless if the reviewing court can say, beyond a reasonable doubt, that it did not contribute to or affect the verdict. See State v. Fulminante, 193 Ariz. 485, 500, 975 P.2d 75, 90 (1999); Krone, 182 Ariz. at 321, 897 P.2d at 623; State v. McVay, 127 Ariz. 450, 453, 622 P.2d 9, 12 (1980). This is a fact-specific inquiry; there is no bright-line method of determining whether a particular error is harmless. See State v. Bible, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993).

¶22 Assuming, arguendo, that the trial court should not have admitted the palm print, we nevertheless conclude that the error was harmless. During his interview with Detective Cooper, Poyson gave a tape-recorded statement in which he admitted his involvement in these murders. The jury heard the tape at trial. Along with this voluntary confession, the State presented physical evidence from the scene and testimony by the medical examiner, all of which confirmed that the murders occurred exactly as the defendant said they had. Given the weight of this evidence, a jury would almost certainly have returned a guilty verdict even without the palm

print. Any error in admitting it or in denying the motion for a continuance was harmless beyond a reasonable doubt. See, e.g., State v. Sharp, 193 Ariz. 414, 420, 973 P.2d 1171, 1177, cert. denied, 120 S. Ct. 341 (1999) (admission of victim's broken and bloodied eyeglasses, which were found hidden under defendant's mattress, was harmless error in light of overwhelming evidence against defendant); State v. Spreitz, 190 Ariz. 129, 142, 945 P.2d 1260, 1273 (1997)(erroneous admission of gruesome autopsy photos was harmless due to the overwhelming evidence of defendant's guilt, "including, most importantly, his own uncoerced confession"); Bible, 175 Ariz. at 588, 858 P.2d at 1191 (erroneous admission of DNA evidence was harmless where other evidence unequivocally pointed to defendant's guilt).

SENTENCING ISSUES

AGGRAVATION

¶23 The trial court found that the State proved the following three aggravating factors beyond a reasonable doubt: that each of these murders was committed in expectation of pecuniary gain, see A.R.S. § 13-703(F)(5); that the murders of Delahunt and Wear were especially cruel, see id. § 13-703(F)(6); and that the defendant was convicted of multiple homicides committed during the same offense. See id. § 13-703(F)(8). Defendant does not challenge these findings. Nevertheless, we must independently review the aggravating circumstances identified by the trial court. See

A.R.S. § 13-703.01(A); State v. Tankersley, 191 Ariz. 359, 371, 956 P.2d 486, 498 (1998).

Pecuniary Gain

¶24 For the pecuniary gain factor to apply, the State must prove beyond a reasonable doubt that receiving something of value was a "motive, cause or impetus [for the murder] and not merely the result." State v. Spencer, 176 Ariz. 36, 43, 859 P.2d 146, 153 (1993). In this case, the record is replete with evidence that the defendant and Anderson committed the murders in order to steal Roland Wear's truck. As soon as Anderson arrived in Golden Valley, he told the defendant that he was eager to leave. Two days later, the pair agreed to kill Delahunt, Wear and Kagen so that they could steal the truck and drive to Chicago. As Poyson admitted in his confession, this was the motive for the killings. This evidence is sufficient to support the pecuniary gain aggravator. See State v. Trostle, 191 Ariz. 4, 17-18, 951 P.2d 869, 882-83 (1997) (upholding (F)(5) finding where the defendant's motivation for the murder was to facilitate stealing a truck).

Especially Cruel, Heinous or Depraved

¶25 A murder is especially cruel if the victim consciously suffers physical pain or mental anguish before death. See, e.g., State v. Bolton, 182 Ariz. 290, 311, 896 P.2d 830, 851 (1995); State v. Medrano, 173 Ariz. 393, 397, 844 P.2d 560, 564 (1992). "Mental anguish can result when the victim experiences significant

uncertainty about his or her ultimate fate." State v. Schackart, 190 Ariz. 238, 248, 947 P.2d 315, 325 (1997); see also State v. Medina, 193 Ariz. 504, 513, 975 P.2d 94, 103 (1999). Here, the State proved beyond a reasonable doubt that Delahunt and Wear engaged in protracted struggles for their lives, during which they undoubtedly experienced extreme mental anguish and physical pain.

¶26 The existence of mental distress is apparent from the length of time during which both victims fought off the attacks of the defendant and Frank Anderson, as well as the victims' statements during the attacks. After Delahunt's throat was slashed, he struggled with Anderson and the defendant for some forty-five minutes before dying. He had two defensive wounds on his left hand, confirming that he was conscious throughout the ordeal. See Medrano, 173 Ariz. at 397, 844 P.2d at 564; State v. Amaya-Ruiz, 166 Ariz. 152, 177, 800 P.2d 1260, 1285 (1990). According to the defendant's confession, Delahunt repeatedly asked why he and Anderson were trying to kill him. Likewise, after being shot in the mouth, Wear fought with Poyson and Anderson for several minutes before he died. During the attack, Wear begged the defendant not to hurt him, saying "Bobby, stop. Bobby don't. I never did anything to hurt you." In our view, it is beyond dispute that these victims suffered unspeakable mental anguish. See Medina, 193 Ariz. at 513, 975 P.2d at 103 (concluding that victim's cries of "Please don't hit me. Don't hit me. Don't. Don't,"

evidenced both physical and mental pain and suffering); State v. Rienhardt, 190 Ariz. 579, 590, 951 P.2d 454, 455 (1997) (upholding cruelty finding where victim experienced twenty minute ride to the desert after being told he would be killed, and made statements revealing that he feared for his life).

¶27 Clearly, the victims also suffered severe physical pain. Delahunt's throat was slashed by Anderson. Defendant then slammed the victim's head against the floor and pounded it with a rock. Later, he drove a knife into Delahunt's ear while the boy was still conscious and struggling. Similarly, Wear suffered a gunshot wound to the mouth that shattered several of his teeth. He was then struck in the head numerous times with a rifle. Like Delahunt, he was conscious during much of the attack. Thus, the State proved beyond a reasonable doubt that the victims suffered great physical pain before their deaths. See State v. Apelt (Michael), 176 Ariz. 349, 367, 861 P.2d 634, 652 (1993) (affirming cruelty finding where victim was conscious when struck repeatedly with great force, stabbed in the back and chest, and her throat was slashed); State v. Brewer, 170 Ariz. 486, 501, 826 P.2d 783, 799 (1992) (upholding cruelty finding where victim was conscious during forty-five minute attack).

Multiple Homicides

¶28 The murders occurred over a relatively short period of time (about five hours), at the same residence, and were a part of

a single course of conduct. See State v. Djerf, 191 Ariz. 583, 597, 959 P.2d 1274, 1288 (1998) (upholding (F)(8) finding where all four murders were committed in the same house during a period of about five hours). Thus, Poyson was convicted of one or more other homicides committed during the course of each victim's murder. See A.R.S. § 13-703(F)(8). This aggravating factor was proven beyond a reasonable doubt.

MITIGATION

¶29 The trial court found that the defendant did not prove any of the statutory mitigating factors set out in A.R.S. § 13-703(G)(1)-(5). Defendant challenges the court's (G)(1) and (G)(5) findings. We independently review the mitigating circumstances. See A.R.S. § 13-703.01(A).

Drug Use

¶30 The trial court rejected Poyson's claim that drugs significantly impaired his ability to appreciate the wrongfulness of his actions or to conform his conduct to the requirements of the law. See A.R.S. § 13-703(G)(1). It reasoned that because the defendant was able to carry out the plan to murder Kagen, Wear, and Delahunt, it is unlikely that he was impaired by drugs. Defendant, on the other hand, argues that his drug use in the days leading up to, and on the day of, the murders caused significant impairment.

¶31 A.R.S. § 13-703 (G)(1) is phrased disjunctively. See State v. Rossi, 154 Ariz. 245, 251, 741 P.2d 1223, 1229 (1987).

Thus, the defendant can show either that he was unable to conform his conduct to the requirements of the law, or that he could not appreciate the wrongfulness of his conduct; he is not required to prove both. See id. In this case, we hold that the defendant has failed to prove either prong of the statute.

¶32 We cannot say that the defendant's drug use rendered him unable to conform his conduct to the requirements of the law. First of all, there is scant evidence that he was actually intoxicated on the day of the murders. Although Poyson purportedly used both marijuana and PCP "on an as available basis" in days preceding these crimes, the only substance he apparently used on the date in question was marijuana. However, the defendant reported smoking the marijuana at least six hours before killing Delahunt and eleven hours before the murders of Kagen and Wear. Thus, even if he was still "high" at the time of these crimes, it is unlikely that he was so intoxicated as to be unable to conform his conduct to the requirements of the law. In order to constitute (G)(1) mitigation, the defendant must prove substantial impairment from drugs or alcohol, not merely that he was "'buzzed.'" State v. Schackart, 190 Ariz. 238, 251, 947 P.2d 315, 328 (1997).

¶33 Defendant also claims to have had a PCP "flashback" during the murder of Delahunt. The trial court did not find the evidence credible on this point. We agree. Other than the defendant's self-reporting, nothing in the record supports this

claim, nor is there evidence that any such "flashback" had an effect on his ability to control himself. Even taking the evidence at face value, the episode appears to have lasted only a few moments during Delahunt's murder. The defendant was apparently not under the influence of PCP at any other time. Thus, the flashback could not have affected his decision to begin the attack or to continue it once the flashback subsided; nor could it have played a role in his decision to kill Kagen and Wear later that night. We are therefore not convinced that Poyson's ability to control his conduct was significantly affected by PCP use.

¶34 Other evidence in the record belies the defendant's claim of impairment. For instance, he was able to concoct a ruse to obtain bullets from the neighbor. He also had the foresight to test the rifle, making sure it would work properly when needed, and to cut the telephone line to prevent Kagen and Wear from calling for help. These actions, coupled with the deliberateness with which the murders were carried out, lead us to conclude that the defendant was not suffering from any substantial impairment on the day in question. See State v. Tittle, 147 Ariz. 339, 343-44, 710 P.2d 449, 453-54 (1985) (detailed plan to commit murder was inconsistent with claim of impairment).

¶35 Poyson's attempts to conceal his crimes also indicate that he was able to appreciate the wrongfulness of his actions. For example, he had Kimberly Lane sneak him into the main trailer

after murdering Delahunt so that he could wash the blood from his hands. He also covered Wear's body with debris in order to delay its discovery by police after he and the others had fled. These actions show that he "understood the wrongfulness of his acts and attempted to avoid prosecution." State v. Jones, 185 Ariz. 471, 489, 917 P.2d 200, 218 (1996) ((G)(1) not satisfied where defendant took significant steps to conceal his crimes and evade capture); see also State v. Sharp, 193 Ariz. 414, 424, 973 P.2d 1171, 1181, cert. denied, 120 S. Ct. 341 (1999) ((G)(1) not proven where defendant attempted to hide evidence that might link him to the crime). We also note that the defendant was able to recall in remarkable detail how he committed these murders. We have found this to be a significant fact in rejecting a perpetrator's claim that he could not appreciate the wrongfulness of his actions. See, e.g., State v. Gallegos, 185 Ariz. 340, 345, 916 P.2d 1056, 1061 (1996); Rossi, 154 Ariz. at 251, 741 P.2d at 1229; State v. Wallace, 151 Ariz. 362, 369, 728 P.2d 232, 239 (1986). We hold, therefore, that the defendant failed to prove the (G)(1) mitigating circumstance.

Age

¶36 Although Poyson was only nineteen at the time of the murders, the trial court ruled that his age was not a statutory mitigating factor under A.R.S. § 13-703(G)(5). The judge acknowledged that he was "relatively young, chronologically

speaking," but said that he was not so young, "[a]s far as the criminal justice system goes." The court cited the fact that the defendant had lived on his own for some time before the crimes and had been working. Defendant argues that because of his age and immaturity, he was easily influenced by others, including his co-defendants in this case.

¶37 "The age of the defendant at the time of the murder can be a substantial and relevant mitigating circumstance." State v. Laird, 186 Ariz. 203, 209, 920 P.2d 769, 775 (1996). We have found the (G)(5) factor to exist in cases where defendants were as old as nineteen and twenty. See State v. Trostle, 191 Ariz. 4, 21, 951 P.2d 869, 886 (1997) (twenty); State v. Bolton, 182 Ariz. 290, 314, 896 P.2d 830, 854 (1995) (nineteen); State v. Herrera, Jr., 176 Ariz. 21, 34, 859 P.2d 131, 144 (1993) (twenty); State v. Greenway, 170 Ariz. 155, 170, 823 P.2d 22, 37 (1991) (nineteen). Chronological age, however, is not the end of the inquiry. To determine how much weight to assign the defendant's age, we must also consider his level of intelligence, maturity, past experience, and level of participation in the killings. See Trostle, 191 Ariz. at 21, 951 P.2d at 886; Laird, 186 Ariz. at 209, 920 P.2d at 775. If a defendant has a substantial criminal history or was a major participant in the commission of the murder, the weight his or her age will be given may be discounted. See, e.g., State v. Gallegos, 185 Ariz. 340, 346, 916 P.2d 1056, 1062 (1996); Bolton, 182 Ariz.

at 314, 896 P.2d at 854; Greenway, 170 Ariz. at 170, 823 P.2d at 37.

¶38 At his sentencing hearing, Poyson presented evidence that he was of "low average" intelligence. We agree with the trial court that this fact was shown by a preponderance of the evidence. Defendant also presented some evidence that he was immature and easily led by others. One of his cousins, for example, believed that because he lacked a consistent father figure growing up, he was prone to be influenced by older men like Frank Anderson. Arguably, these facts weigh in favor of assigning some mitigating weight to the defendant's age. However, he was no stranger to the criminal justice system. As a juvenile, he had committed several serious offenses, including burglary and assault, for which he served time in a detention facility. Moreover, it is clear that he was a major participant in these murders at both the planning and execution stages.

¶39 We conclude that Poyson's age is a mitigating circumstance. However, in light of his criminal history and his extensive participation in these crimes, we accord this factor little weight. See Jackson, 186 Ariz. at 31-32, 918 P.2d at 1049-50 (discounting defendant's age based on his high level of participation in the murder); Gallegos, 185 Ariz. at 346, 916 P.2d at 1062 (same); Bolton, 182 Ariz. at 314, 896 P.2d at 854 (same).

INDEPENDENT REWEIGHING

¶40 A.R.S. § 13-703.01(A) requires us to independently review and reweigh the aggravating and mitigating circumstances in every capital case in order to determine the propriety of the death sentence. See, e.g., State v. Medina, 193 Ariz. 504, 516, 975 P.2d 94, 106 (1999). As noted above, the trial court found, as to victims Wear and Delahunt, that the State had proven three statutory aggravators: A.R.S. §§ 13-703(F)(5), murder committed for pecuniary gain; (F)(6), murder committed in an especially cruel manner; and (F)(8), multiple homicides. As to the victim Kagen, the court concluded that the State had proven two aggravators: (F)(5) and (F)(8). The trial court also held that the defendant had failed to prove any statutory mitigators. We agree with the court's findings regarding the aggravating factors. However, as indicated above, we believe the defendant's age is a mitigating circumstance that should be given some weight, albeit minimal.

¶41 Poyson also presented evidence regarding several nonstatutory mitigating factors but the trial judge found that he had proven only one by a preponderance of the evidence: cooperation with law enforcement. As to the others, the court concluded that either (1) the mitigator had not been proven, or (2) the mitigator had been proven but was not entitled to any weight. Defendant challenges several of these rulings. We briefly summarize the court's findings and the evidence presented at the sentencing hearing.

Drug Use

¶42 The trial judge refused to accord any weight to the defendant's substance abuse as a nonstatutory mitigating circumstance. It characterized the defendant's claims that he had used drugs or alcohol in the past or was under the influence of drugs on the day of the murders as little more than "vague allegations." As discussed above, we agree.

Mental Health

¶43 The trial court found that Poyson suffers from "certain personality disorders" but did not assign any weight to this factor. Dr. Celia Drake diagnosed the defendant with antisocial personality disorder, which she attributed to the "chaotic environment in which he was raised." She found that there was, among other things, no "appropriate model for moral reasoning within the family setting" to which the defendant could look for guidance. However, we find no indication in the record that "the disorder controlled [his] conduct or impaired his mental capacity to such a degree that leniency is required." State v. Brewer, 170 Ariz. 486, 505, 826 P.2d 783, 802 (1992); see also Medina, 193 Ariz. at 517, 975 P.2d at 107 (holding that the defendant's personality disorder "ha[d] little or no mitigating value" where the defendant's desire to emulate his friends, not his mental disorder, was the cause of his criminal behavior). We therefore accord this factor no mitigating weight.

Abusive Childhood

¶44 The trial court found that the defendant failed to prove a dysfunctional family background or that he suffered physical or sexual abuse as a child. Defendant presented some evidence that as a youngster he was physically and mentally abused by several stepfathers and his maternal grandmother. He also self-reported one instance of sexual assault by a neighbor. Again, however, defendant did not show that his traumatic childhood somehow rendered him unable to control his conduct. Thus, the evidence is without mitigating value.

Remorse

¶45 The trial court found that the defendant was remorseful about the commission of the offenses but gave that circumstance no weight. The court thought that if he were truly remorseful, he would have prevented one or two of the killings or would have turned himself in. Defendant presented some evidence of remorse. Sgt. Stegall testified that during questioning Poyson expressed remorse, particularly about the murder of Delahunt. In his statement to Detective Cooper, the defendant said that he felt "bad" about all of the murders. We find this evidence unpersuasive and, like the trial judge, accord it no real significance.

Potential for Rehabilitation

¶46 The trial court ruled that the defendant failed to prove that he could be rehabilitated. The judge said that "[i]f there is

anything that has been presented to even suggest that, I must have missed it." Dr. Drake's report suggests that the defendant is rehabilitatable, based on his past history of success in other institutional settings. She said that "[t]here are some indications that he . . . was responsive to the structure provided in various placements. In discharge summaries from all three institutions in which he was placed there was documented progress." We find that this evidence has some mitigating value. See State v. Murray, 184 Ariz. 9, 40, 906 P.2d 542, 573 (1995) (potential for rehabilitation can be a mitigating circumstance).

Family Support

¶47 The trial court found that the defendant failed to establish any meaningful family support. At the mitigation hearing, the defendant's mother and aunt testified. Other relatives cooperated with Mr. Abbott, the defense mitigation specialist, during his investigation, and several family members wrote letters asking the court to spare Poyson's life. We accord this factor minimal mitigating weight. See State v. Gonzales, 181 Ariz. 502, 515, 892 P.2d 838, 851 (1995) (family support can be given de minimis weight in mitigation).

¶48 After our independent review, we conclude that even crediting defendant's cooperation with law enforcement, age, potential for rehabilitation, and family support, the mitigating evidence in this case is not sufficiently substantial to call for

leniency.

ISSUES RAISED TO AVOID PRECLUSION

¶49 Defendant seeks to preserve numerous constitutional challenges to Arizona's death penalty scheme. We have dispositively addressed these issues in previous cases as follows:

¶50 Prosecutor has unfettered discretion to seek the death penalty, rejected in State v. Sharp, 193 Ariz. 414, 426, 973 P.2d 1171, 1183, cert. denied, 120 S. Ct. 341 (1999).

¶51 Pecuniary gain aggravating factor does not sufficiently narrow the class of death eligible individuals, rejected in State v. West, 176 Ariz. 432, 448-49, 862 P.2d 192, 208-09 (1993).

¶52 Judge alone makes aggravation or mitigation findings, rejected in State v. Schackart, 190 Ariz. 238, 260, 947 P.2d 315, 337 (1997).

¶53 The death penalty discriminates against young, poor and male defendants, rejected in Schackart, 190 Ariz. at 260, 947 P.2d at 337.

¶54 Capital punishment is unconstitutional on its face and as applied, rejected in State v. White, 194 Ariz. 344, 355, 982 P.2d 819, 830 (1999), cert. denied 120 S. Ct. 1272 (2000) (not unconstitutional on its face); State v. Van Adams, 194 Ariz. 408, 422, 984 P.2d 16, 30 (1999), cert. denied, 120 S. Ct. 1199 (2000) (not per se cruel and unusual punishment); Schackart, 190 Ariz. at 260, 947 P.2d at 337 (not imposed arbitrarily and irrationally).

¶55 No opportunity to death-qualify the sentencing judge, rejected in Schackart, 190 Ariz. at 260, 947 P.2d at 337.

¶56 A.R.S. § 13-703(F)(6) violates the Equal Protection Clause, rejected in State v. Gallegos, 185 Ariz. 340, 348, 916 P.2d 1056, 1064 (1996).

¶57 No statutory standards for weighing, rejected in Schackart, 190 Ariz. at 260, 947 P.2d at 337.

¶58 No proportionality review, rejected in Schackart, 190 Ariz. at 260, 947 P.2d at 337.

¶59 The statute does not require sentencer to find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, rejected in White, 194 Ariz. at 355, 982 P.2d at 830.

DISPOSITION

¶60 For the foregoing reasons, we affirm the defendant's convictions and sentences.

THOMAS A. ZLAKET, Chief Justice

CONCURRING:

CHARLES E. JONES, Vice Chief Justice

STANLEY G. FELDMAN, Justice

FREDERICK J. MARTONE, Justice

RUTH V. McGREGOR, Justice

FILED
TIME 3:45 pm
NOV 20 1998
LINDA SEAPY
CLERK SUPERIOR COURT
BY: DEPUTY

SUPERIOR COURT OF ARIZONA
MOHAVE COUNTY
KINGMAN AZ

3	NOV. 20, 1998	STEVEN F. CONN	CINDY ROTH
Div.	Date	Judge	Linda Seapy, Clerk By: Deputy Clerk

NO: CR-96-865

STATE OF ARIZONA
Vs.

County Attorney by:
DEREK CARLISLE

ROBERT ALLEN POYSON,

BILLY K. SIPE, JR.
Defense Counsel

DATE OF BIRTH: MAY 15, 1976.

SENTENCE OF IMPRISONMENT

_ The State is represented by the above named Deputy County Attorney; the Defendant is present with counsel named above.

Court Reporter SANDRA BRICE is present.

The defendant is advised of the charge, the determination of guilt and is given the opportunity to speak.

Pursuant to A.R.S. §13-607, the Court finds as follows:

[] **WAIVER OF TRIAL:** The defendant knowingly, intelligently and voluntarily waived his/her right to a trial with a jury, his/her right to confront and cross examine witnesses, his/her right to testify or remain silent and his/her right to present evidence and call his/her own witnesses after having been advised of these rights. The determination of guilt was based upon a plea of guilty.

[ ] **WAIVER OF JURY TRIAL:** The defendant knowingly, intelligently and voluntarily waived his/her right to a trial by jury after having been advised of his/her right to same. The determination of guilt was based upon a trial to the Court.

[X] **JURY VERDICT:** The determination of guilt was based upon a verdict of guilty after a jury trial.

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the Court enters the following Judgment and Sentence.

3	NOV. 20, 1998	STEVEN F. CONN	CINDY ROTH
Div.	Date	Judge	Deputy Clerk

NO: CR-96-865
STATE VS. ROBERT ALLEN POYSON

IT IS THE JUDGMENT OF THE COURT that the Defendant is guilty of the following crime(s), that upon due consideration of all the facts, law and circumstances relevant here, the Court finds that suspension of sentence and a term of probation are not appropriate and that a sentence of imprisonment with the Department of Corrections is appropriate.

THE COURT FURTHER FINDS that there are circumstances sufficiently substantial to call for a Presumptive or Aggravated or Mitigated term as indicated. These circumstances are stated by the Court on the record.

AS PUNISHMENT, IT IS ORDERED that the defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

OFFENSE: CONSPIRACY TO COMMIT FIRST DEGREE MURDER - COUNT I

FELONY CLASS: 1

IN VIOLATION OF A.R.S. § 13-1003, 13-1005, 13-604, 13-701 & 13-801

DATE OF OFFENSE: AUGUST 12, 1996

SENTENCE: LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE FOR 25 CALENDAR YEARS

and the reasons therefore are stated by the Court on the record.

This sentence is to date from November 20, 1998. The defendant is to be given credit for 819 days served prior to sentencing.

AND;

AS PUNISHMENT, IT IS ORDERED that the defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

OFFENSE: FIRST DEGREE MURDER (ROBERT DELAHUNT) - COUNT II

FELONY CLASS: 1

IN VIOLATION OF A.R.S. § 13-~~1005~~ 1105, 13-604, 13-703, 13-701 & 13-801

3	NOV. 20, 1998	STEVEN F. CONN	CINDY ROTH
Div.	Date	Judge	Deputy Clerk

NO: CR-96-865
STATE VS. ROBERT ALLEN POYSON

DATE OF OFFENSE: AUGUST 13, 1996

SENTENCE: DEATH

and the reasons therefore are stated by the Court on the record.

This sentence is to date from November 20, 1998.

AND;

AS PUNISHMENT, IT IS ORDERED that the defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

OFFENSE: FIRST DEGREE MURDER (LETA KAGEN) - COUNT III

FELONY CLASS: 1

IN VIOLATION OF A.R.S. § 13-1105, 13-604, 13-703, 13-701 & 13-801

DATE OF OFFENSE: AUGUST 13, 1996

SENTENCE: DEATH

and the reasons therefore are stated by the Court on the record.

This sentence is to date from November 20, 1998 .

AND;

AS PUNISHMENT, IT IS ORDERED that the defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

OFFENSE: FIRST DEGREE MURDER (ROLAND WEAR) - COUNT IV

FELONY CLASS: 1

3	NOV. 20, 1998	STEVEN F. CONN	D. BARBER
Div.	Date	Judge	Deputy Clerk

NO: CR-96-865
STATE VS. ROBERT ALLEN POYSON

IN VIOLATION OF A.R.S. § 13-~~1005~~ 1105, 13-604, 13-703, 13-701 & 13-801

DATE OF OFFENSE: AUGUST 13, 1996

SENTENCE: DEATH

and the reasons therefore are stated by the Court on the record.

This sentence is to date from November 20, 1998 .

AND;

AS PUNISHMENT, IT IS ORDERED that the defendant is sentenced to a term of imprisonment and is committed to the Arizona Department of Corrections as follows:

OFFENSE: ARMED ROBBERY - COUNT V

FELONY CLASS: 2

IN VIOLATION OF A.R.S. § 13-1904, 13-604, 13-701 & 13-801

DATE OF OFFENSE: AUGUST 13, 1996

SENTENCE: 10.5 YEARS WITH THE ARIZONA DEPT OF CORRECTIONS

[ ]	MITIGATED	[X]	PRESUMPTIVE [ ] AGGRAVATED
[ ]	NONDANGEROUS	[X]	DANGEROUS PURSUANT TO A.R.S. §13-604
[X]	NONREPETITIVE	[ ]	REPETITIVE PURSUANT TO A.R.S. §13-604
[ ]	NONDANGEROUS BUT VIOLATIVE OF A.R.S §13-604.01(B)	[ ]	DANGEROUS AND VIOLATIVE OF A.R.S. §13-604.01(A)

[X] **This sentence is to be concurrent with Counts I, II, III and IV.**

and the reasons therefore are stated by the Court on the record.

This sentence is to date from November 20, 1998; Defendant is to be given credit for 819 days served prior to sentencing.

3	NOV. 20, 1998	STEVEN F. CONN	D. BARBER
Div.	Date	Judge	Deputy Clerk

NO: CR-96-865
STATE VS. ROBERT ALLEN POYSON

IT IS ORDERED that the Defendant will pay restitution in the amount of $3,000.00.

The defendant is advised concerning rights of appeal/review and written notice of those rights are provided.

[ ] **ORDERED** exonerating any bond.

[ ] **ORDERED** granting the State's Motion to Dismiss, pursuant to the plea agreement.

ORDERED authorizing the Sheriff of Mohave County to deliver the defendant to the custody of the Arizona Department of Corrections to carry out the term of imprisonment set forth herein.

ORDERED that the Clerk of the Court shall remit to the Department of Corrections a copy of this order together with all pre-sentence reports, probation violation reports, medical and psychological reports relating to the defendant and involving this case.

Let the record reflect that the defendant's fingerprint is permanently affixed to this sentencing order in open Court.

3 Div. | Nov 20 1998 Date | STEVEN F. CONN Judge | C ROTH Deputy Clerk

NO: CR-96-865

STATE VS. Robert A. Poyson

FILED: Notice of Rights of Appeal/Review signed by the defendant.

Hearing concludes at 3:45 ~~a.m.~~/p.m.

Steven F. Conn
JUDGE OF THE SUPERIOR COURT

Cc:
Mohave County Attorney's Office
Billy K. Sipe, Jr
Defense Counsel

Mohave County Probation Department

Mohave County Jail

Mohave County Jail
WARRANTS & TRANSPORTS

Arizona Department of Corrections

Alhambra Reception Center
or
~~Perryville Reception Center~~

Honorable Steven F. Conn
Division 3

[ ]

[ ]
Fingerprint

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT ALLEN POYSON, *Petitioner-Appellant*, v. CHARLES L. RYAN, *Respondent-Appellee*.	No. 10-99005 D.C. No. 2:04-cv-00534-NVW ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
Neil V. Wake, District Judge, Presiding

Argued and Submitted February 15, 2012
San Francisco, California

Filed March 22, 2013
Amended November 7, 2013
Argued and Submitted En Banc September 18, 2017
Amended January 12, 2018

Before: Sidney R. Thomas, Chief Judge, and Raymond C. Fisher and Sandra S. Ikuta, Circuit Judges.

Order;
Opinion by Judge Fisher;
Concurrence by Judge Ikuta

SUMMARY*

Habeas Corpus / Death Penalty

The panel granted a petition for panel rehearing, filed an amended opinion reversing the district court's denial of Robert Allen Poyson's habeas corpus petition challenging his death sentence, and remanded.

The panel held that the Arizona Supreme Court denied Poyson his Eighth Amendment right to individualized sentencing by applying an unconstitutional causal nexus test to his mitigating evidence of a troubled childhood and mental health issues. The panel held that the error had substantial and injurious effect or influence in determining the sentence, and therefore granted habeas relief on this claim.

The panel denied relief on Poyson's claim that the Arizona courts failed to consider his history of substance abuse as a nonstatutory mitigating factor. The panel wrote that the state courts did consider the evidence and simply found it wanting as matter of fact. The panel wrote that the state supreme court did not misconstrue the state trial court's findings, so it did not deprive Poyson of meaningful appellate review of his death sentence.

The panel agreed with the district court that Poyson's ineffective assistance of counsel claim is procedurally defaulted because it is fundamentally different from the claim he presented in state court.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel denied Poyson's motion for reconsideration of its March 2013 order denying his motion for remand under *Martinez v. Ryan*, 566 U.S. 1 (2012).

Judge Ikuta concurred because the three-judge panel is bound by the decision in *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc), but wrote separately to highlight how *McKinney*'s erroneous conclusion that a causal nexus error had a "substantial and injurious effect" on a state court's decision infects the panel's decision in this case.

COUNSEL

Therese Michelle Day (argued), Assistant Federal Public Defender; Jon M. Sands, Federal Public Defender; Office of the Federal Public Defender, Phoenix, Arizona; for Petitioner-Appellant.

J.D. Nielsen (argued) and Jon G. Anderson, Assistant Attorneys General; Lacey Stover Gard, Chief Counsel; Mark Brnovich, Attorney General; Capital Litigation Section, Office of the Attorney General, Phoenix, Arizona; for Respondent-Appellee.

ORDER

The petition for panel rehearing filed April 12, 2013 (Dkt. 69), which remains pending pursuant to this court's April 2, 2014 order (Dkt. 79), is **GRANTED**.

The opinion filed November 7, 2013, and reported at 743 F.3d 1183, is **AMENDED**. An amended opinion is filed concurrently with this order.

No further petitions for rehearing may be filed.

OPINION

FISHER, Circuit Judge:

Robert Allen Poyson was convicted of murder and sentenced to death in 1998. After pursuing direct review and seeking postconviction relief in state court, he filed a habeas petition in federal district court. The district court denied the petition, and Poyson appeals.

Poyson raises three claims on appeal, each of which has been certified by the district court pursuant to Fed. R. App. P. 22(b) and 28 U.S.C. § 2253(c): (1) the Arizona courts applied an unconstitutional causal nexus test to mitigating evidence; (2) the Arizona courts failed to consider mitigating evidence of his history of substance abuse; and (3) his trial counsel provided ineffective assistance of counsel during the penalty phase of his trial by failing to investigate the possibility that he suffered from fetal alcohol spectrum disorder. We agree with Poyson on his first claim. We conclude his second claim

is without merit. And we hold his third claim is procedurally defaulted.

As to the first claim, we hold the Arizona Supreme Court denied Poyson his Eighth Amendment right to individualized sentencing by applying an unconstitutional causal nexus test to his mitigating evidence of a troubled childhood and mental health issues. We reach this conclusion because (1) the Arizona Supreme Court sentenced Poyson in 2000, which was in the midst of the 15-year period during which that court consistently applied an unconstitutional causal nexus test to evidence of a capital defendant's family background or mental condition, *see McKinney v. Ryan*, 813 F.3d 798, 802–03 (9th Cir. 2015) (en banc); (2) in sentencing Poyson, the Arizona Supreme Court gave Poyson's proffered evidence *no weight*, and it expressly did so *because of* the absence of a causal connection between the evidence and his crimes, *see State v. Poyson*, 7 P.3d 79, 90–91 (Ariz. 2000); (3) in affording that evidence no weight, the Arizona Supreme Court cited a passage in one of its earlier cases that we have specifically identified as articulating that court's unconstitutional causal nexus test, *see id.* (quoting *State v. Brewer*, 826 P.2d 783, 802 (Ariz. 1992)); *McKinney*, 813 F.3d at 815; and (4) although the Arizona Supreme Court couched its decision in terms of "mitigating weight" and "mitigating value," our case law makes clear that the court deemed the evidence nonmitigating *as a matter of law*, *see McKinney*, 813 F.3d at 816–17. The Arizona Supreme Court's application of this unconstitutional causal nexus test was "contrary to" the Supreme Court's decision in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *see* 28 U.S.C. § 2254(d)(1), and constituted a violation of Poyson's rights under the Eighth Amendment. We further hold the error "had substantial and injurious effect or influence in determining"

the sentence. *McKinney*, 813 F.3d at 822 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)). We therefore grant habeas relief on Poyson's causal nexus claim.

We deny habeas relief on Poyson's claim that the Arizona courts failed to consider his history of substance abuse as a nonstatutory mitigating factor. Poyson argues the state courts unconstitutionally refused to *consider* mitigating evidence, a claim arising under *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The state courts, however, did consider the evidence. They simply found it wanting as a matter of fact, finding the evidence failed to prove a history of substance abuse. There was therefore no constitutional violation under *Lockett* and *Eddings*. Nor was there a constitutional violation under *Parker v. Dugger*, 498 U.S. 308, 321 (1991). The state supreme court did not misconstrue the state trial court's findings, so it did not deprive Poyson of meaningful appellate review of his death sentence.

Finally, we agree with the district court that Poyson's ineffective assistance of counsel claim is procedurally defaulted because it is fundamentally different from the claim he presented in state court. Although it is true that "new factual allegations do not ordinarily render a claim unexhausted, a petitioner may not 'fundamentally alter the legal claim already considered by the state courts.'" *Beaty v. Stewart*, 303 F.3d 975, 989–90 (9th Cir. 2002) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986)). Poyson's federal petition raises a theory of deficient performance – failure to investigate and present mitigating evidence of fetal alcohol spectrum disorder – that the state courts had no "meaningful opportunity to consider." *Vasquez*, 474 U.S. at 257. The claim is therefore procedurally defaulted.

I. BACKGROUND

A. The Crimes

Poyson was born in August 1976. The facts of his crimes, committed in 1996, were summarized as follows by the Arizona Supreme Court in *State v. Poyson*, 7 P.3d 79, 83 (Ariz. 2000).

Poyson met Leta Kagen, her 15 year-old son, Robert Delahunt, and Roland Wear in April 1996. Poyson was then 19 years old and homeless. Kagen allowed him to stay with her and the others at their trailer in Golden Valley, near Kingman, Arizona. In August of the same year, Kagen was introduced to 48 year-old Frank Anderson and his 14 year-old girlfriend, Kimberly Lane. They, too, needed a place to live, and Kagen invited them to stay at the trailer.

Anderson informed Poyson that he was eager to travel to Chicago, where he claimed to have organized crime connections. Because none of them had a way of getting to Chicago, Anderson, Poyson and Lane formulated a plan to kill Kagen, Delahunt and Wear in order to steal the latter's truck.

On the evening of August 13, 1996, Lane lured Delahunt into a small travel trailer on the property, ostensibly for sex. There, Anderson commenced an attack on the boy by slitting his throat with a bread knife. Poyson heard Delahunt's screams and ran to the travel trailer. While Anderson held Delahunt down, Poyson bashed his head against the floor. Poyson also beat Delahunt's head with his fists, and pounded it with a rock. This, however, did not kill Delahunt, so Poyson took the bread knife and drove it through his ear.

Although the blade penetrated Delahunt's skull and exited through his nose, the wound was not fatal. Poyson thereafter continued to slam Delahunt's head against the floor until Delahunt lost consciousness. According to the medical examiner, Delahunt died of massive blunt force head trauma. In all, the attack lasted about 45 minutes.

After cleaning themselves up, Poyson and Anderson prepared to kill Kagen and Wear. They first located Wear's .22 caliber rifle. Unable to find ammunition, Poyson borrowed two rounds from a young girl who lived next door, telling her that Delahunt was in the desert surrounded by snakes and the bullets were needed to rescue him. Poyson loaded the rifle and tested it for about five minutes to make sure it would function properly. He then stashed it near a shed. Later that evening, he cut the telephone line to the trailer so that neither of the remaining victims could call for help.

After Kagen and Wear were asleep, Poyson and Anderson went into their bedroom. Poyson first shot Kagen in the head, killing her instantly. After quickly reloading the rifle, he shot Wear in the mouth, shattering Wear's upper right teeth. A struggle ensued, during which Poyson repeatedly clubbed Wear in the head with the rifle. The fracas eventually moved outside. At some point, Anderson threw a cinder block at Wear, hitting him in the back and knocking him to the ground. While the victim was lying there, Poyson twice kicked him in the head. He then picked up the cinder block and threw it several times at Wear's head. After Wear stopped moving, Poyson took his wallet and the keys to Wear's truck. To conceal the body, Poyson covered it with debris from the yard. Poyson, Anderson and Lane then took

the truck and traveled to Illinois, where they were apprehended several days later.

B. Trial and Conviction

A grand jury indicted Poyson on three counts of first degree murder, one count of conspiracy to commit murder and one count of armed robbery. The jury convicted on all counts in March 1998, following a six-day trial.

C. Sentencing

1. *Mitigation Investigation*

Following the guilty verdicts, the state trial court approved funds to hire a mitigation specialist to assist in preparing for Poyson's sentencing. Counsel retained investigator Blair Abbott.

In a June 1998 memorandum, Abbott informed counsel that Poyson's mother, Ruth Garcia (Garcia), used drugs during the first trimester of her pregnancy and recommended that counsel investigate the possibility that Poyson suffered brain damage as a result. The memorandum advised counsel that "one of the significant issues should be the hard core drug abuse of both [of Poyson's] parents, preconception and in the first trimester of Ruth's pregnancy." Abbott wrote that "Ruth Garcia's heavy drug abuse in the pre pregnancy and early on in the pregnancy undoubtedly caused severe damage to her unborn child."

In September 1998, Abbott mailed trial counsel "Library & Internet research regarding drug & alcohol fetal cell damage; reflecting how these chemicals when taken in the

first trimester [a]ffect subsequent intelligence, conduct, emotions, urges etc [sic] as the child grows into adulthood."

2. *Presentence Investigation Report*

The probation office prepared a presentence investigation report in July 1998. Poyson told the probation officer that he had a bad childhood because he was abused by a series of stepfathers, who subjected him to physical, mental and emotional abuse. Poyson also said he suffered from impulsive conduct disorder, which was diagnosed when he was 13. Poyson would not answer any questions on his substance abuse history or juvenile record.

3. *Presentencing Hearing*

In October 1998, the trial court held a one-day presentencing hearing. Poyson's trial counsel called three witnesses to present mitigating evidence: his aunt, Laura Salas, his mother, Ruth Garcia, and the mitigation investigator, Blair Abbott. Counsel also introduced 56 exhibits. Poyson did not testify. The witnesses testified about Poyson's drug and alcohol abuse and the mental and physical abuse inflicted on Poyson by his stepfather, Guillermo Aguilar, and maternal grandmother, Mary Milner. They also testified that Poyson's stepfather, Sabas Garcia (Sabas), committed suicide in 1988, and that Sabas' death had a devastating effect on Poyson. They further testified that Garcia used drugs and alcohol during the first three months of her pregnancy with Poyson.

4. *Poyson's Sentencing Memorandum*

In early November 1998, Poyson filed a sentencing memorandum urging the court to find three statutory and 25 nonstatutory mitigating circumstances.[1] As relevant here, Poyson argued his history of drug and alcohol abuse, troubled childhood and personality disorders constituted both statutory and nonstatutory mitigating circumstances.

a. *Substance Abuse*

Poyson argued his substance abuse was a statutory mitigating circumstance because it impaired his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law at the time of the murders. *See* Ariz. Rev. Stat. Ann. § 13-703(G)(1) (1998). In the alternative, he argued that, even if his substance abuse was not causally related to the murders, it constituted a nonstatutory mitigating circumstance. In support of these arguments, Poyson emphasized his parents' use of drugs and alcohol at the time of his conception, his mother's use of drugs and alcohol during pregnancy, an incident in which

[1] At the time of Poyson's sentencing, Arizona law required the sentencing judge to impose a sentence of death if the court found one or more aggravating circumstances and "no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. § 13-703(E) (1998). The law enumerated 10 aggravating circumstances, *see id.* § 13-703(F), and five statutory mitigating circumstances – including diminished capacity, duress, minor participation and the defendant's age, *see id.* § 13-703(G). The sentencing court also was required to consider any *nonstatutory* mitigating circumstances offered by the defendant – i.e., "any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense." *Id.*

Poyson was involuntarily intoxicated at the age of three or four, Poyson's abuse of alcohol beginning at age 13 and Poyson's five-month placement at WestCare, a residential treatment facility, for substance abuse treatment in 1992, when he was 15. Poyson also pointed to evidence that he used PCP two days before the murders, used alcohol the night before the murders, used marijuana the day of the murders and suffered a PCP flashback during Delahunt's murder.

b. *Troubled Childhood*

Poyson argued his troubled childhood was a statutory mitigating circumstance because it affected his behavior at the time of the murders. In the alternative, he argued his troubled childhood constituted a nonstatutory mitigating circumstance. Poyson emphasized his mother's use of drugs and alcohol during the first trimester of pregnancy. He argued alcohol and drug use during pregnancy can cause brain damage and birth defects and lead a child to engage in delinquent and criminal behavior. He also attached to the sentencing memorandum several scientific articles on fetal alcohol syndrome. The memorandum pointed out that Poyson never knew his biological father, lacked a stable home life, was physically and mentally abused by several adults (including Aguilar and Milner), was devastated by Sabas' suicide and was sexually abused and sodomized by a neighbor on one occasion shortly after Sabas' death. Poyson emphasized that his delinquent behavior and substance abuse began shortly after the death of Sabas and the sexual assault.

c. *Mental Health Issues*

The sentencing memorandum argued Poyson suffered from several personality disorders, constituting a nonstatutory

mitigating circumstance. The memorandum pointed to a 1990 psychiatric evaluation by Dr. Bruce Guernsey. According to the sentencing memorandum, Guernsey diagnosed Poyson with severe "conduct disorder," reported that Poyson exhibited symptoms of antisocial behavior, "manic depression" or "impulsive conduct disorder" and recommended Poyson be prescribed medication to control his behavior. Poyson also pointed to a 1990 Juvenile Predisposition Investigation by Nolan Barnum. Barnum too recommended Poyson be prescribed medication to control his behavior. A 1993 psychological evaluation performed by Jack Cordon and Ronald Jacques from the State Youth Services Center in St. Anthony, Idaho, diagnosed Poyson with "mild mood disturbance." Dr. Celia A. Drake, who Poyson's counsel retained to perform a forensic evaluation of Poyson, diagnosed "Adjustment Disorder with depressive mood, mild intensity," and "Anti-social Personality Disorder." Dr. Drake also found Poyson's overall intellectual functioning to be "in the low average range."

5. *Sentencing Hearing and Imposition of Sentence*

The state trial court held a sentencing hearing and imposed sentence in late November 1998.

The court found the state had proved, beyond a reasonable doubt, three aggravating circumstances for the murders of Delahunt and Wear: the murders were committed in expectation of pecuniary gain; the murders were especially cruel; and multiple homicides committed during the same offense. *See* Ariz. Rev. Stat. Ann. § 13-703(F)(5), (6), (8) (1998). The court found two aggravating circumstances applicable to Kagen's murder: pecuniary gain; and multiple homicides. *See id.* § 13-703(F)(5), (8).

The court found Poyson failed to prove any statutory mitigating factors. Poyson's difficult childhood and mental health issues were not statutory mitigating factors under § 13-703(G)(1) because they did not significantly impair Poyson's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.[2] The court explained:

> There has certainly been evidence that the defendant had gone through a turbulent life, perhaps had mental-health issues that would distinguish him from the typical person on the street.
>
> Listening to his description of how these murders were committed, based upon a description of somewhat a methodical carrying out of a plan, the Court sees absolutely nothing on the record, in this case, to suggest the applicability of this mitigating circumstance.

Turning to nonstatutory mitigating factors, the court first explained the three-step analysis it used to evaluate each nonstatutory mitigating circumstance proffered by Poyson: "[1] to analyze whether the defense has shown this fact by a preponderance of evidence, and then if they have, [2] to determine whether I would assign that any weight as a

[2] *See* Ariz. Rev. Stat. Ann. § 13-703(G)(1) (1998) ("Mitigating circumstances [include] [t]he 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.").

mitigating factor, and of course, for any that . . . pass both of those two tests, [3] I have to weigh them all along with the other factors in the final [sentencing] determination in this case." The court then proceeded to consider Poyson's mental health issues, troubled childhood and history of substance abuse as potential mitigating factors.

a. *Mental Health Issues*

The court rejected Poyson's mental health issues as a nonstatutory mitigating factor at the second step in the analysis. The court found Poyson had proven he suffered from personality disorders, but gave them no weight because they were not causally related to the murders:

> [T]he defendant had some mental health and psychological issues. I think . . . the defense has established that there were certain . . . personality disorders that the defendant, in fact, may have been suffering from.
>
> The Court, however, does not find that they rise to the level of being a mitigating factor because I am unable to draw any connection whatsoever with such personality disorders and the commission of these offenses.[3]

[3] The court rejected evidence of Poyson's low IQ for similar reasons. At the first step in the analysis, the court found that "there is certain evidence in this case that would support the proposition that the defendant's mental capacity may be diminished, at least compared to the norm in the population, and that his I.Q. may be low, at least compared to the norm in the population." The court, however, gave this circumstance no mitigating weight in light of the planning and sophistication that went

b. *Troubled Childhood*

The court similarly rejected Poyson's difficult childhood as a nonstatutory mitigating factor. At step one, the court found the "defense has shown that defendant suffered a dysfunctional childhood, that he was subjected to physical and sexual abuse, and that he was subjected to certain levels of mental abuse." At step two, however, the court gave these circumstances no mitigating weight because they were not causally connected to the murders: "The Court finds absolutely nothing in this case to suggest that his latter conduct was a result of his childhood." The court also found "the defense has established, by a preponderance of the evidence, that the defendant lost a parent figure and was subjected to sexual abuse at a relatively young age." The court rejected this factor at step two, however, because it was "not convinced that there is any connection between that abuse, that loss, and his subsequent criminal behavior."

c. *Substance Abuse*

Finally, the court rejected Poyson's history of substance abuse at both steps one and two in the analysis: Poyson failed to establish a significant history of drug or alcohol abuse and, even if he could do so, the court would have given the evidence no weight because he failed to establish a causal connection between the substance abuse and the crimes. The court said:

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into the crimes – "certain prep[ar]atory steps that were taken – admittedly, not overly-sophisticated, but attempts were made to do certain things, to disable warning systems to enable these murders to be committed and to get away with the loot that was the purpose of the murders; specifically, the vehicle."

> The argument is made that the defendant was subjected to alcohol abuse and drug abuse. Other than very vague allegations that he has used alcohol in the past or has used drugs in the past, other than a fairly vague assertion that he was subject to some sort of effect of drugs and/or alcohol at the time, that these offenses were committed, I really find very little to support the allegation that the defendant has a significant alcohol and/or drug abuse, and again, going back to the methodical steps that were taken to murder three people to get a vehicle to get out of Golden Valley, it's very difficult for me to conclude that the defendant's ability to engage in goal-oriented behavior was, in any way, impaired at the time of the commission of these offenses.

Ultimately, the state trial court found only one nonstatutory mitigating factor – Poyson's cooperation with law enforcement. The court concluded this one mitigating factor was insufficiently substantial to call for leniency and imposed a sentence of death.

6. *Arizona Supreme Court Decision*

The Arizona Supreme Court affirmed Poyson's conviction and sentence on direct appeal. *See State v. Poyson*, 7 P.3d 79 (Ariz. 2000). As required by Arizona law, the court "independently review[ed] the trial court's findings of aggravation and mitigation and the propriety of the death sentence." Ariz. Rev. Stat. Ann. § 13-703.01(A) (2000).

With respect to statutory mitigating factors, the supreme court agreed with the trial court that Poyson's drug use was not a statutory mitigating circumstance under § 13-703(G)(1). *See Poyson*, 7 P.3d at 88–89. In the court's view, there was "scant evidence that he was actually intoxicated on the day of the murders." *Id.* at 88. "Although Poyson purportedly used both marijuana and PCP 'on an as available basis' in days preceding these crimes, the only substance he apparently used on the date in question was marijuana," and Poyson "reported smoking the marijuana at least six hours before killing Delahunt and eleven hours before the murders of Kagen and Wear." *Id.* The evidence that Poyson experienced a PCP flashback during the murder of Delahunt was not credible, and even if the flashback occurred, it lasted only a "few moments." *Id.* at 88–89. Poyson was "not under the influence of PCP at any other time." *Id.* at 89. Poyson's claims of substantial impairment were also belied by his deliberate actions, including concocting a ruse to obtain bullets from a neighbor, testing the rifle to make sure it would work properly when needed, cutting the telephone line and concealing the crimes. *See id.* The court then turned to nonstatutory mitigation, agreeing with the trial court that Poyson's substance abuse, mental health and abusive childhood were not nonstatutory mitigating circumstances.

a. *Substance Abuse*

As to substance abuse, the supreme court agreed with the trial court that Poyson's evidence failed at step one because it did not show a history of drug or alcohol abuse:

> The trial judge refused to accord any weight to the defendant's substance abuse as a nonstatutory mitigating circumstance. It

> characterized the defendant's claims that he had used drugs or alcohol in the past or was under the influence of drugs on the day of the murders as little more than "vague allegations." As discussed above, we agree.

Id. at 90.

b. *Mental Health Issues*

With respect to mental health issues, the supreme court agreed with the trial court that Poyson's personality disorders, although proven at step one, were entitled to no weight at step two because they were not causally connected to the murders:

> The trial court found that Poyson suffers from "certain personality disorders" but did not assign any weight to this factor. Dr. Celia Drake diagnosed the defendant with antisocial personality disorder, which she attributed to the "chaotic environment in which he was raised." She found that there was, among other things, no "appropriate model for moral reasoning within the family setting" to which the defendant could look for guidance. However, we find no indication in the record that "the disorder controlled [his] conduct or impaired his mental capacity to such a degree that leniency is required." *State v. Brewer*, 170 Ariz. 486, 505, 826 P.2d 783, 802 (1992); *see also* [*State v. Medina*, 193 Ariz. 504, 517, 975 P.2d 94, 107 (1999)] (holding that the defendant's personality disorder "ha[d] little or no mitigating value" where the defendant's

> desire to emulate his friends, not his mental disorder, was the cause of his criminal behavior). We therefore accord this factor no mitigating weight.

Id. at 90–91 (last alteration in original).

c. *Troubled Childhood*

The supreme court also agreed with the trial court's assessment of Poyson's troubled childhood. The court found Poyson established an abusive childhood at step one, but gave this consideration no weight at step two because of the absence of a causal nexus:

> Defendant presented some evidence that as a youngster he was physically and mentally abused by several stepfathers and his maternal grandmother. He also self-reported one instance of sexual assault by a neighbor. Again, however, defendant did not show that his traumatic childhood somehow rendered him unable to control his conduct. Thus, the evidence is without mitigating value.

Id. at 91.

Ultimately, the Arizona Supreme Court found three aggravating factors (pecuniary gain, murder committed in an especially cruel manner and multiple homicides), one statutory mitigating factor (Poyson's age) and three nonstatutory mitigating factors (cooperation with law enforcement, potential for rehabilitation and family support).

See id. at 90–91.[4] The court concluded the mitigating evidence was not sufficiently substantial to call for leniency and affirmed the death sentence. *See id.* at 91–92; Ariz. Rev. Stat. Ann. § 13-703.1(B) (2000).

D. State Postconviction Review

The Arizona Superior Court denied Poyson's petition for postconviction relief in 2003. The court provided a reasoned decision on Poyson's claim of penalty phase ineffective assistance of counsel (his third claim in this appeal) but not on Poyson's claims that the Arizona courts failed to consider relevant mitigating evidence (his first and second claims on appeal). In 2004, the Arizona Supreme Court summarily denied Poyson's petition for review.

E. Federal District Court Proceedings

Poyson filed a federal habeas petition in 2004. In 2010, the district court denied the petition. The court rejected on the merits Poyson's claims that the Arizona courts failed to consider mitigating evidence. The court also concluded Poyson's penalty phase ineffective assistance of counsel claim was procedurally defaulted because it was "fundamentally different than [the claim] presented in state court." Poyson timely appealed.

[4] The Arizona Supreme Court thus found three more mitigating factors than the trial court found. The appellate court nonetheless agreed with the trial court that a death sentence was warranted.

F. Proceedings in This Court

We originally heard argument on Poyson's appeal in February 2012. We issued an opinion in March 2013, *Poyson v. Ryan*, 711 F.3d 1087 (9th Cir. 2013), and an amended opinion in November 2013, *Poyson v. Ryan*, 743 F.3d 1185 (9th Cir. 2013). In April 2014, we stayed proceedings on Poyson's petition for panel rehearing pending the resolution of en banc proceedings in *McKinney v. Ryan*, 730 F.3d 903 (9th Cir. 2013).[5] Our en banc court decided *McKinney* in December 2015. *See McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc). In May 2016, we extended the stay on Poyson's petition for rehearing pending resolution of Supreme Court proceedings in *McKinney*. In October 2016, following the Supreme Court's denial of the petition for writ of certiorari in *McKinney*, we further extended the stay and directed the parties to file supplemental briefs addressing the impact of *McKinney* on the issues presented in this appeal. Following the parties' briefing, we heard oral argument on the petition for rehearing in September 2017. This amended opinion follows.

[5] In May 2014, while our stay was in place, the Supreme Court denied Poyson's petition for writ of certiorari. *See Poyson v. Ryan*, 134 S. Ct. 2302 (2014). The Court also denied Poyson's motion to defer consideration of the petition for writ of certiorari. *See id.* The state contends we were required to lift our stay and issue the mandate once the Supreme Court denied certiorari. We disagree. Because we issued our stay under Fed. R. App. P. 41(d)(1), rather than Fed. R. App. P. 41(d)(2), the authorities upon which the state relies, including Rule 41(d)(2)(D), do not apply here. *See Alphin v. Henson*, 552 F.2d 1033, 1034–35 (4th Cir. 1977), *cited with approval by Bell v. Thompson*, 545 U.S. 794, 806 (2005).

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. §§ 1291 and 2253(a). We review de novo the district court's denial of Poyson's petition for habeas corpus, and we review the district court's findings of fact for clear error. *See Brown v. Ornoski*, 503 F.3d 1006, 1010 (9th Cir. 2007). Dismissals based on procedural default are reviewed de novo. *See Robinson v. Schriro*, 595 F.3d 1086, 1099 (9th Cir. 2010). We address Poyson's three claims in turn.

III. DISCUSSION

A. Causal Nexus Test

Poyson argues the Arizona courts applied an unconstitutional causal nexus test to mitigating evidence of his mental health issues, traumatic childhood and substance abuse history, in violation of his Eighth and Fourteenth Amendment rights to an individualized sentencing. He contends the state courts improperly refused to consider this evidence in mitigation because he failed to establish a causal connection between the evidence and the murders. He argues the state courts' actions violate his constitutional rights as recognized in *Tennard v. Dretke*, 542 U.S. 274, 283–87 (2004), *Smith v. Texas*, 543 U.S. 37, 45 (2004) (per curiam), and earlier decisions. These cases hold that requiring a defendant to prove a nexus between mitigating evidence and the crime is "a test we never countenanced and now have unequivocally rejected." *Smith*, 543 U.S. at 45.

Because Poyson filed his federal habeas petition after April 24, 1996, he must not only prove a violation of these rights but also satisfy the Antiterrorism and Effective Death

Penalty Act of 1996 (AEDPA). *See Fenenbock v. Dir. of Corr. for Cal.*, 681 F.3d 968, 973 (9th Cir. 2012).

Under AEDPA, we may not grant habeas relief with respect to any claim adjudicated on the merits in state court unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). We review the last reasoned state court decision addressing the claim, which for Poyson's causal nexus claim is the Arizona Supreme Court's decision affirming Poyson's death sentence on direct appeal. *See Crittenden v. Ayers*, 624 F.3d 943, 950 (9th Cir. 2010). Poyson relies on AEDPA's "contrary to" prong, arguing the Arizona Supreme Court's decision in *State v. Poyson*, 7 P.3d 79 (Ariz. 2000), was contrary to *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

1. *Exhaustion*

As a threshold matter, we agree with Poyson that he has fully exhausted this claim. The state argues that in state court Poyson raised a causal nexus claim with respect to only mental health issues and his troubled childhood, not his history of substance abuse. We disagree. Having reviewed the record, we conclude Poyson exhausted the claim with respect to all three categories of mitigating evidence. *See Powell v. Lambert*, 357 F.3d 871, 874 (9th Cir. 2004) ("A petitioner has exhausted his federal claims when he has fully and fairly presented them to the state courts.").

2. *The Arizona Supreme Court's Decision Was Contrary to Clearly Established Federal Law*

Lockett, *Eddings* and *Penry* held "a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty." *Penry*, 492 U.S. at 318. "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer." *Id.* at 319. "The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Id.* "[T]he sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime." *Id.* (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

Under these decisions, a state court may not treat mitigating evidence of a defendant's background or character as "irrelevant or nonmitigating as a matter of law" merely because it lacks a causal connection to the crime. *Towery v. Ryan*, 673 F.3d 933, 946 (9th Cir. 2012), *overruled on other grounds by McKinney*, 813 F.3d at 824. The sentencer may, however, consider "causal nexus . . . as a factor in determining the weight or significance of mitigating evidence." *Lopez v. Ryan*, 630 F.3d 1198, 1204 (9th Cir. 2011), *overruled on other grounds by McKinney*, 813 F.3d at 818. "The . . . use of the nexus test in this manner is not unconstitutional because state courts are free to assess the weight to be given to particular mitigating evidence." *Schad v. Ryan*, 671 F.3d 708, 723 (9th Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 2548 (2013), *and overruled on other*

grounds by McKinney, 813 F.3d at 819. As the Court explained in *Eddings*:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. . . . The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings, 455 U.S. at 113–15.

In *McKinney*, 813 F.3d at 815, we held, "[f]or a little over fifteen years, the Arizona Supreme Court routinely articulated and insisted on [an] unconstitutional causal nexus test." Under this test, "family background or a mental condition could be given weight as a nonstatutory mitigating factor, but only if defendant established a causal connection between the background or condition and his criminal behavior." *Id.* Beginning in 1989, "[a]s a matter of law, a difficult family background or mental condition did not qualify as a nonstatutory mitigating factor unless it had a causal effect on the defendant's behavior in committing the crime at issue." *Id.* at 816. The Arizona Supreme Court "finally abandoned its unconstitutional causal nexus test for nonstatutory mitigation" in the mid-2000s. *Id.* at 817.

McKinney recognized that, in AEDPA cases, "we apply a 'presumption that state courts know and follow the law' and accordingly give state-court decisions 'the benefit of the

doubt.'" *Id.* at 803 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)). But that "presumption is rebutted . . . where we know, based on its own words, that the Arizona Supreme Court did not 'know and follow' federal law." *Id.* at 804.

McKinney also recognized that "[t]he Arizona Supreme Court articulated the causal nexus test in various ways but always to the same effect." *Id.* at 816. "The Arizona Court frequently stated categorically that, absent a causal nexus, would-be nonstatutory mitigation was simply 'not a mitigating circumstance.'" *Id.* (quoting *State v. Wallace*, 773 P.2d 983, 986 (Ariz. 1989)). "Sometimes, the court stated that evidence offered as nonstatutory mitigation that did not have a causal connection to the crime should be given no 'weight.'" *Id.* Other times, "the Arizona Supreme Court stated that evidence of a difficult family background or mental illness was 'not necessarily' or not 'usually' mitigating, and then (often in the same paragraph) held as a matter of law that the evidence in the specific case before the Court was not mitigating because it had no causal connection to the crime." *Id.* at 817.

In the case before us, we conclude the Arizona Supreme Court applied an unconstitutional causal nexus test to Poyson's mitigating evidence of a difficult childhood and mental health issues. *First*, the court gave no weight at all to the evidence, and it did so because the evidence bore no causal connection to the crimes. *See Poyson*, 7 P.3d at 90–91. With respect to Poyson's childhood, the court ruled:

> Defendant presented some evidence that as a youngster he was physically and mentally abused by several stepfathers and his maternal grandmother. He also self-reported one

> instance of sexual assault by a neighbor. Again, however, **defendant did not show that his traumatic childhood somehow rendered him unable to control his conduct. Thus, the evidence is without mitigating value**.

Poyson, 7 P.3d at 91 (emphasis added). With respect to Poyson's mental health issues, the court ruled:

> The trial court found that Poyson suffers from "certain personality disorders" but did not assign any weight to this factor. Dr. Celia Drake diagnosed the defendant with antisocial personality disorder, which she attributed to the "chaotic environment in which he was raised." She found that there was, among other things, no "appropriate model for moral reasoning within the family setting" to which the defendant could look for guidance. However, **we find no indication in the record that "the disorder controlled [his] conduct** or impaired his mental capacity to such a degree that leniency is required." *State v. Brewer*, 170 Ariz. 486, 505, 826 P.2d 783, 802 (1992); *see also Medina*, 193 Ariz. at 517, 975 P.2d at 107 (holding that the defendant's personality disorder "ha[d] little or no mitigating value" where the defendant's desire to emulate his friends, not his mental disorder, was the cause of his criminal behavior). **We therefore accord this factor no mitigating weight**.

Id. at 90–91 (emphasis added) (alterations in original). This is some evidence that the court applied an unconstitutional causal nexus test in Poyson's case. *See McKinney*, 813 F.3d at 821 (holding the Arizona Supreme Court applied an unconstitutional causal nexus test based in part on "the factual conclusion by the sentencing judge, which the Arizona Supreme Court accepted, that McKinney's PTSD did not 'in any way affect[ ] his conduct in this case'" (alteration in original)).

Second, the Arizona Supreme Court affirmed Poyson's death sentence in 2000, in the midst of the 15-year period during which that court "*consistently* articulated and applied its causal nexus test." *McKinney*, 813 F.3d at 803 (emphasis added). Indeed, the Arizona court issued its decision in Poyson's case just a few months before it decided *State v. Hoskins*, 14 P.3d 997 (Ariz. 2000), *supplemented*, 65 P.3d 953 (Ariz. 2003), a case *McKinney* singled out as exemplifying the Arizona Supreme Court's unconstitutional practice. *See McKinney*, 813 F.3d at 814–15. This fact further supports the conclusion that the Arizona Supreme Court applied an unconstitutional causal nexus test in Poyson's case.

Third, in applying a causal nexus test to Poyson's mental health evidence, the Arizona Supreme Court cited a passage from *State v. Brewer*, 826 P.2d 783, 802 (1992), that *McKinney* specifically identified as applying an unconstitutional causal nexus test. *Compare Poyson*, 7 P.3d at 90–91 (quoting *Brewer* and stating "we find no indication in the record that 'the disorder controlled [his] conduct or impaired his mental capacity to such a degree that leniency is required'" (alteration in original)), *with McKinney*, 813 F.3d at 815 (citing this precise language in *Brewer* as exemplifying

the Arizona Supreme Court's unconstitutional causal nexus test). This fact too supports the conclusion that the Arizona Supreme Court applied an unconstitutional causal nexus test in Poyson's case. *See McKinney*, 813 F.3d at 821 (concluding the Arizona Supreme Court applied an unconstitutional test in part based on the court's "pin citation to the precise page in [*State v. Ross*, 886 P.2d 1354, 1363 (Ariz. 1994),] where it had previously articulated that test").

Fourth, although the Arizona Supreme Court said the evidence in Poyson's case was "without mitigating value" and would be accorded "no mitigating weight," suggesting the possibility that the court applied a causal nexus test as a permissible weighing mechanism, *McKinney* makes clear that the court instead applied an unconstitutional causal nexus test, treating the evidence as irrelevant or nonmitigating *as a matter of law*. *See id.* at 816 (holding the state court applied an unconstitutional test where "the court stated that evidence offered as nonstatutory mitigation that did not have a causal connection to the crime should be given no 'weight'"); *id.* (holding the state court applied an unconstitutional causal nexus test where it said "a difficult family background is not always entitled to great weight as a mitigating circumstance" (quoting *State v. Towery*, 920 P.2d 290, 311 (Ariz. 1996))); *id.* at 820 (holding the state court applied an unconstitutional causal nexus test where it said "[a] difficult family background, including childhood abuse, does not necessarily have substantial mitigating weight absent a showing that it significantly affected or impacted a defendant's ability to perceive, to comprehend, or to control his actions" (quoting *State v. McKinney*, 917 P.2d 1214, 1226 (Ariz. 1996))).

For these reasons, we conclude the Arizona Supreme Court applied an unconstitutional causal nexus test to

Poyson's evidence of a troubled childhood and mental health issues. "This holding was contrary to *Eddings*." *Id.* at 821. Accordingly, as in *McKinney*, we "hold that the decision of the Arizona Supreme Court applied a rule that was 'contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States.'" *Id.* (alteration in original) (quoting 28 U.S.C. § 2254(d)(1)).

With respect to Poyson's evidence of a history of substance abuse, however, we conclude there was no *Eddings* error. The state supreme court rejected this evidence at step one in the analysis, adopting the trial court's finding as a matter of fact that Poyson had failed to establish a history of substance abuse by a preponderance of the evidence. *See Poyson*, 7 P.3d at 90. The court's treatment of Poyson's substance abuse evidence thus was not contrary to *Eddings*.

3. *On De Novo Review, Poyson Has Shown the Arizona Supreme Court Applied an Unconstitutional Causal Nexus Test*

Because AEDPA is satisfied, we review Poyson's constitutional claim de novo. *See Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008) (en banc). We begin by asking whether Poyson has shown a constitutional violation. If Poyson has made this showing, we consider whether he was prejudiced under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

Poyson has satisfied the first part of this inquiry. The Supreme Court's decisions in *Tennard v. Dretke*, 542 U.S. 274, 287 (2004), *Smith v. Texas*, 543 U.S. 37, 45 (2004) (per curiam), *Lockett*, *Eddings* and *Penry* all prohibit a state from requiring a defendant to prove a nexus between mitigating evidence and the crime. As discussed above, the Arizona

Supreme Court violated this rule in Poyson's case. Poyson has therefore established that the Arizona Supreme Court applied an unconstitutional causal nexus test to evidence of his troubled childhood and mental health issues.

4. *Poyson Was Prejudiced*

"The harmless-error standard on habeas review provides that 'relief must be granted' if the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *McKinney*, 813 F.3d at 822 (quoting *Brecht*, 507 U.S. at 623). "There must be more than a 'reasonable possibility' that the error was harmful." *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015) (quoting *Brecht*, 507 U.S. at 637). "[T]he court must find that the defendant was actually prejudiced by the error." *Id.* (quoting *Calderon v. Coleman*, 525 U.S. 141, 146 (1998) (per curiam)). Under this standard:

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

McKinney, 813 F.3d at 822 (alteration in original) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). Accordingly, "[w]hen a federal judge in a habeas proceeding

is in grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict, that error is not harmless. And, the petitioner must win." *Id.* (alteration in original) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)).

Our analysis once again is guided by *McKinney*, where we held the causal nexus error was prejudicial under circumstances similar to those presented here. *See id.* at 822–24. Here, as in *McKinney*, there were three aggravating factors – pecuniary gain; especially cruel, heinous or depraved murders; and multiple homicides. *See Poyson*, 7 P.3d at 87–88; *McKinney*, 813 F.3d at 823. Here, as in *McKinney*, the improperly disregarded evidence concerned the defendant's traumatic childhood and mental health issues. *See Poyson*, 7 P.3d at 90–91; *McKinney*, 813 P.3d at 819.

As in *McKinney*, moreover, the evidence of a traumatic childhood in this case was particularly compelling. Both of Poyson's parents abused drugs and alcohol at the time of his conception. His mother used LSD on a daily basis. She continued to abuse drugs and alcohol – including daily use of LSD – while she was pregnant with Poyson. Poyson never knew his biological father, an alcoholic. During his childhood, his mother was in relationships with many different men, and Poyson lacked a stable home life. One of these men, Guillermo Aguilar, physically and mentally abused Poyson, subjecting Poyson to repeated beatings. Aguilar brutally whipped Poyson with an electrical cord, and he eventually was sent to jail for abusing Poyson and his siblings. Others of these men abused drugs and alcohol. One even drank and did drugs with Poyson.

Poyson also suffered a number of physical and developmental problems as a child. He was developmentally delayed in areas such as crawling, walking and speaking. He had a speech impediment, fell behind in school and received special education services. He sustained several head injuries. Once, when he and his brother were playing, he had a stick impaled in his head. He suffered severe headaches, and passed out unconscious on several occasions. He was involuntarily intoxicated as a young child. He was subjected to physical abuse not only by Aguilar but also by his mother, who once hit him so hard it dislodged two teeth, and in particular by his maternal grandmother, Mary Milner, who beat him repeatedly and savagely.

When Poyson was 10 or 11 years old, he suffered two traumatic events that, according to witnesses at Poyson's sentencing, forever changed his life. Of the many adult men in Poyson's life, Poyson was close with just one of them, Sabas Garcia, his stepfather and the one true father figure Poyson ever had. When Poyson was 10 or 11, however, Sabas committed suicide by shooting himself in the head. Poyson was devastated by Sabas' death, which changed Poyson completely. He became distant, spending time away from home. He didn't care anymore. He began using and abusing drugs and alcohol, and he began having behavioral problems. His contacts with law enforcement also began at this time, and his performance in school suffered dramatically. Before Sabas' death, Poyson had overcome his earlier developmental challenges to become an A or B student, but after Sabas' death he began receiving Cs, Ds and Fs, and he eventually dropped out of school. His family life became even less stable. He bounced around from relative to relative, living from time to time with his mother, an aunt, his grandmother and another stepfather. Shortly after Sabas'

death, moreover, Poyson suffered a second severe trauma in his life when he was lured to the home of a childhood friend and violently raped. The attacker threw Poyson face down on a bed and brutally sodomized him.

Under the circumstances of this case, which closely track those in *McKinney*, we conclude the Arizona Supreme Court's application of an unconstitutional causal nexus test "had a 'substantial and injurious effect or influence' on its decision to sentence [Poyson] to death." *McKinney*, 813 F.3d at 824 (quoting *Brecht*, 507 U.S. at 623).

B. Failure to Consider Substance Abuse

At sentencing, Poyson presented evidence of a history of drug and alcohol abuse, but the state trial court and the state supreme court declined to treat the evidence as a nonstatutory mitigating factor. The trial court found Poyson had presented only "very vague allegations that he has used alcohol . . . or . . . drugs in the past," and found "very little to support the allegation that the defendant has a significant alcohol and/or drug abuse" history. The supreme court agreed that Poyson's claims to have "used drugs or alcohol in the past" were "little more than 'vague allegations.'" *Poyson*, 7 P.3d at 90.

Poyson contends the state courts' conclusions that he provided only "vague allegations" of substance abuse were unreasonable determinations of the facts under 28 U.S.C. § 2254(d)(2) and violated his constitutional rights under *Lockett*, 438 U.S. at 605, *Eddings*, 455 U.S. at 112, and *Parker v. Dugger*, 498 U.S. 308, 321 (1991). We disagree.

Poyson's claim – that "[b]ecause his death sentence is based upon [an] unreasonable determination of facts, [he] is

entitled to habeas relief" – misunderstands the law. Even assuming that the state courts' determination that Poyson provided only "vague allegations" of substance abuse was an unreasonable determination of the facts under § 2254(d)(2), an issue we need not reach, Poyson's claim fails because he cannot demonstrate his constitutional rights were violated. *See Wilson v. Corcoran*, 562 U.S. 5–6 (2010) (per curiam) (holding that although § 2254(d)(2) relieves a federal court of AEDPA deference when the state court makes an unreasonable determination of facts, it "does not repeal the command of § 2254(a) that habeas relief may be afforded to a state prisoner 'only on the ground' that his custody violates federal law"); *see also Frantz v. Hazey*, 533 F.3d 724, 737 (9th Cir. 2008) (en banc) (holding AEDPA does not "require any particular methodology for ordering the § 2254(d) and § 2254(a) determination[s]"). An unreasonable determination of the facts would not, standing alone, amount to a constitutional violation under *Lockett*, *Eddings* or *Parker*.

Lockett invalidated an Ohio death penalty statute that precluded the sentencer from considering aspects of the defendant's character or record as a mitigating factor. *See* 438 U.S. at 604. *Eddings* held that a sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. *See* 455 U.S. at 113–15. Here, the state courts considered Poyson's evidence of substance abuse, but found it wanting as a matter of fact and that Poyson failed to prove a history of substance abuse. Thus, there was no constitutional violation under *Lockett* and *Eddings*.

Nor has Poyson shown a constitutional violation under *Parker*. There, the state supreme court reweighed aggravating and mitigating circumstances before affirming a death sentence. *See Parker*, 498 U.S. at 321–22. The court's

reweighing, however, was premised on its erroneous assumption that the state trial court had found that there were no mitigating circumstances. *See id.* The Supreme Court held the state supreme court's action deprived the defendant of "meaningful appellate review," and thus that the sentencing violated the defendant's right against "the arbitrary or irrational imposition of the death penalty." *Id.* at 321. In Poyson's view, *Parker* stands for the broad proposition that, "[w]hen a state court's imposition of the death penalty is based not on the characteristics of the accused and the offense but instead on a *misperception of the record*, the defendant is not being afforded the consideration that the Constitution requires." In *Parker*, however, the state supreme court had misconstrued the state trial court's findings, something that did not occur here. *Parker* does not hold that a state court's erroneous factual finding in assessing mitigation evidence necessarily amounts to a constitutional violation. Rather, it suggests the opposite:

> This is not simply an error in assessing the mitigating evidence. Had the Florida Supreme Court conducted its own examination of the trial and sentencing hearing records and concluded that there were no mitigating circumstances, a different question would be presented. Similarly, if the trial judge had found no mitigating circumstances and the Florida Supreme Court had relied on that finding, our review would be very different.

Id. at 322.

In sum, we hold Poyson is not entitled to habeas relief, because he has not shown a constitutional violation under *Lockett*, *Eddings* or *Parker*. Because Poyson has raised arguments under only *Lockett*, *Eddings* and *Parker*, we need not decide whether, or under what circumstances, a state court's erroneous factfinding in assessing mitigating evidence can itself rise to the level of a constitutional violation.

C. Penalty Phase Ineffective Assistance of Counsel

In his federal habeas petition, Poyson argued he received ineffective assistance of counsel during the penalty phase of his trial because his trial counsel failed to investigate the possibility that he suffered from fetal alcohol spectrum disorder (FASD). The district court ruled Poyson failed to present this claim to the state courts, and hence that the claim was procedurally defaulted. Poyson challenges that ruling on appeal. We review de novo. *See Robinson*, 595 F.3d at 1099.

A state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus. *See Picard v. Connor*, 404 U.S. 270, 275 (1971); *Weaver v. Thompson*, 197 F.3d 359, 363–64 (9th Cir. 1999); 28 U.S.C. § 2254(b)(1)(A). This rule "reflects a policy of federal-state comity, an accommodation of our federal system designed to give the State an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Picard*, 404 U.S. at 275 (citations and internal quotation marks omitted). "A petitioner can satisfy the exhaustion requirement by providing the highest state court with a fair opportunity to consider each issue before presenting it to the federal court." *Weaver*, 197 F.3d at 364.

"[A] petitioner may provide further facts to support a claim in federal district court, so long as those facts do not 'fundamentally alter the legal claim already considered by the state courts.'" *Lopez v. Schriro*, 491 F.3d 1029, 1040 (9th Cir. 2007) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986)).[6] "[T]his rule allows a petitioner who presented a particular [ineffective assistance of counsel] claim, for example that counsel was ineffective in presenting humanizing testimony at sentencing, to develop additional facts supporting that particular claim." *Moormann v. Schriro*, 426 F.3d 1044, 1056 (9th Cir. 2005) (citing *Weaver*, 197 F.3d at 364). "This does not mean, however, that a petitioner who presented any ineffective assistance of counsel claim below can later add unrelated alleged instances of counsel's ineffectiveness to his claim." *Id.* (citing *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) (en banc)).

1. *State Proceedings*

In his state habeas petition, Poyson raised two ineffective assistance of counsel claims relevant here. In the first claim, Poyson alleged trial counsel "was ineffective because he failed to request the appointment of experts in the field of mental health early in the case." He alleged the investigation for both phases of the trial should have begun "immediately" upon counsel's appointment, including "the immediate appointment of experts for both parts of the trial." Counsel's failure "to immediately secure the appointment of mental health experts . . . prejudiced" him in two ways. First, it

[6] For purposes of review under 28 U.S.C. § 2254(d)(1), factual allegations must be based on the "record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011).

precluded him from presenting a defense of "diminished capacity" with respect to the Delahunt murder during the guilt phase of the trial. Second, "the failure of counsel to immediately pursue mitigation caused the loss of mitigating information" that could have been presented at sentencing. Poyson presented a report by a neuropsychologist retained during the state habeas proceedings, Robert Briggs, Ph.D. According to Poyson, Briggs' report showed Poyson "was brain-damaged" at the time of the murders, but had since "recovered, due to his long stay first in jail, then on condemned row, without chemical or physical insult to his brain." In Poyson's view, "the report leaves no doubt that neurophyschological testing shows that he was impaired at the time of the crime." This mitigating evidence had been "lost forever."

In the state petition's second claim, Poyson alleged trial counsel failed to properly present mitigation and psychological evidence because counsel "did nothing to show the trial court how [his] abusive childhood caused, or directly related to, [his] conduct during the murders." He alleged trial counsel were deficient because they were "required to make some attempt to correlate Mr. Poyson's physically and psychologically abusive background with his behavior," because "a connection between the two would be much more powerful in mitigation than the abuse standing alone."

2. *Federal Petition*

Poyson's federal petition presented a substantially different claim – counsel's failure to investigate Poyson's possible fetal alcohol spectrum disorder. Poyson alleged trial counsel were ineffective because they "failed to make any effort to investigate and develop" evidence that Poyson

suffered from FASD. He alleged defense counsel "failed to investigate the obvious possibility that [he] suffered from FASD," made "no effort" to "pursue this fertile area of mitigation" and "ignored obvious evidence that [he] was exposed to drugs and alcohol *in utero*." Poyson further alleged he was prejudiced by counsel's deficient performance:

> Their failure to adequately investigate and substantiate [evidence that Petitioner was exposed to drugs and alcohol *in utero*] profoundly prejudiced Petitioner. Adequate explanation during the pre-sentence hearing of the effect of FASD on Petitioner's brain would likely have convinced the trial court that Petitioner had a lesser degree of culpability.

3. *Analysis*

The district court concluded the claim raised in the federal petition had not been fairly presented to the Arizona courts:

> This Court concludes that the claim asserted in the instant amended petition is fundamentally different than that presented in state court. Petitioner's argument in support of [this claim] is based entirely on trial counsel's alleged failure to investigate and develop mitigation evidence based on Petitioner's *in utero* exposure to drugs and alcohol. This version of Petitioner's sentencing [ineffective assistance of counsel] claim has never been presented to the Arizona

> courts. While it is true that new factual allegations do not ordinarily render a claim unexhausted, a petitioner may not "fundamentally alter the legal claim already considered by the state courts." *Beaty v. Stewart*, 303 F.3d 975, 989–90 ([9th Cir.] 2002) (citing *Vasquez*, 474 U.S. at 260). To do so deprives the state court of "a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary." *Vasquez*, 474 U.S. at 257. Here, Petitioner is not simply proffering additional evidentiary support for a factual theory presented to the state court. Rather, he is alleging an entirely new theory of counsel ineffectiveness; one that has not previously been presented in state court.

We agree. Poyson presented not only new facts in support of a claim presented to the state court, but also a fundamentally new theory of counsel's ineffectiveness – one that the Arizona courts lacked "a meaningful opportunity to consider." *Vasquez*, 474 U.S. at 257. The district court therefore properly dismissed Poyson's penalty phase ineffective assistance of counsel claim as procedurally defaulted.

IV. CONCLUSION

We reverse the district court's judgment denying the writ of habeas corpus. We remand with instructions to grant the writ with respect to Poyson's sentence unless the state, within a reasonable period, either corrects the constitutional error in his death sentence or vacates the sentence and imposes a

lesser sentence consistent with law. *See McKinney*, 813 F.3d at 827. We do not reach Poyson's contention, raised for the first time in his supplemental briefing, that he is entitled to a new sentencing proceeding before a jury under *Ring v. Arizona*, 536 U.S. 584 (2002), *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Magwood v. Patterson*, 561 U.S. 320, 332 (2010).

REVERSED AND REMANDED.

* * *

Poyson's motion for reconsideration of our March 2013 order denying his motion for a remand under *Martinez v. Ryan*, 566 U.S. 1 (2012), is without merit. Our intervening decision to remand in *Dickens v. Ryan*, 740 F.3d 1302, 1320 (9th Cir. 2014) (en banc), did not change our holding in *Sexton v. Cozner*, 679 F.3d 1150, 1161 (9th Cir. 2012), that a remand is not required where, as here, the record is sufficiently complete for us to hold that counsel's representation was not ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984). The additional evidence Poyson offers does not show remand was necessary. That Dr. Robert Briggs was placed on and then removed from probation by the Arizona Board of Psychological Examiners does not change our previous conclusion that Poyson's postconviction relief counsel reasonably relied on Dr. Briggs, the retained neuropsychological expert who was aware of Poyson's exposure to drugs and alcohol in utero but did not advise counsel that Poyson suffered from fetal alcohol spectrum disorder. The motion (Dkt. 74) is therefore **DENIED**.

IKUTA, Circuit Judge, concurring:

Our en banc decision in *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc) (*McKinney II*), erred in concluding that any *Eddings* error had a "substantial and injurious effect," *id.* at 822 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)), on the Arizona Supreme Court's decision to affirm the defendant's death sentence. *State v. McKinney*, 185 Ariz. 567, 917 P.2d 1214 (1996) (*McKinney I*). As a result, our decision today is wrongly decided. Nevertheless, as a three-judge panel, we are bound by *McKinney II* until either the Supreme Court or a future en banc panel overrules it. Therefore, I concur in the majority opinion and write separately only to point out how *McKinney II*'s error in applying *Brecht* infects our decision here.

I

Under AEDPA, we must determine whether the decision of the Arizona Supreme Court is contrary to or an unreasonable application of clearly established Supreme Court precedent. 28 U.S.C. § 2254(d)(1). It is clearly established that a sentencer may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Eddings v. Okla.*, 455 U.S. 104, 114 (1982) (italics in original); *see also Lockett v. Ohio*, 438 U.S. 586, 604 (1978). While the sentencer "may determine the weight to be given relevant mitigating evidence," it "may not give it no weight by excluding such evidence from [its] consideration." *Eddings*, 455 U.S. at 114–15. Applying *Lockett* and *Eddings*, the Supreme Court held that a state cannot adopt a "causal nexus" rule, that is, a rule precluding a sentencer from considering mitigating evidence unless there is a causal nexus between that evidence and the crime. *Tennard v. Dretke*, 542 U.S.

274, 287 (2004). The sentencer may, however, consider "causal nexus . . . as a factor in determining the weight or significance of mitigating evidence." *Lopez v. Ryan*, 630 F.3d 1198, 1204 (9th Cir. 2011) *overruled on other grounds by McKinney II*, 813 F.3d at 819.

In this case, the Arizona Supreme Court stated only that it accorded no mitigating weight to Poyson's evidence of mental health and an abusive childhood. *State v. Poyson*, 198 Ariz. 70, 81–82 (2000). Before *McKinney II*, we held that this decision was not an unreasonable application of *Lockett*, *Eddings*, and *Tennard* because we could not presume that the Arizona Supreme Court had refused to consider the mental health and abusive childhood evidence as a matter of law. *See Poyson v. Ryan*, 711 F.3d 1087, 1090 (9th Cir. 2013). Rather, as instructed by the Supreme Court, we adopted the "presumption that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002); *see Poyson*, 711 F.3d at 1099.

McKinney II flipped this presumption. It held that we must presume the Arizona Supreme Court applied the unconstitutional causal nexus test between 1989 and 2005, even when, as here, the court expressly discussed the weight of the evidence. 813 F.3d at 803, 809, 816. This reasoning is contrary to *Visciotti*, as the *McKinney II* dissent made clear. *See McKinney II*, 813 F.3d at 827–850 (Bea, J., dissenting). No further elaboration of this error is needed.

II

I write separately to highlight *McKinney II*'s second error: its conclusion that a causal nexus error has a "substantial and

injurious effect" on a state court's decision. 813 F.3d at 822–23.

A

Under *Brecht*, even if a state court unreasonably errs in applying Supreme Court precedent, a federal court may not provide habeas relief unless the error had a "substantial and injurious effect." 507 U.S. at 623. "There must be more than a 'reasonable possibility' that the error was harmful." *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015) (quoting *Brecht*, 507 U.S. at 637). Rather, a "court must find that the defendant was actually prejudiced by the error." *Id.* (quoting *Calderon v. Coleman*, 525 U.S. 141, 146 (1998) (per curiam)). Even an *Eddings* error may be harmless. *Greenway v. Ryan*, 866 F.3d 1094, 1100 (9th Cir. 2017) (per curiam).

In determining that the Arizona Supreme Court's presumed causal nexus error in *McKinney I* was prejudicial, *McKinney II* failed to provide a reasoned or reasonable application of *Brecht*. Instead, without any meaningful analysis, *McKinney II* conclusorily held that the evidence presumed excluded under Arizona's presumed causal nexus test "would have had a substantial impact on a capital sentencer who was permitted to evaluate and give appropriate weight to it as a nonstatutory mitigating factor." *McKinney II*, 813 F.3d at 823. Therefore, *McKinney II* held, the Arizona Supreme Court's "application of the test had a 'substantial and injurious effect or influence' on its decision to sentence [the defendant] to death." *Id.* at 823–24 (quoting *Brecht*, 507 U.S. at 623). In reaching this conclusion, *McKinney II* came close to enunciating a per se rule that when a state

court's application of a causal nexus test excludes mitigating evidence, such an error will not be harmless.

Such a quasi per se rule may be plausible when the sentencer in a particular case is a jury. If a state rule excludes certain mitigating evidence from the jury's consideration as a matter of law, either the evidence will not be presented to the jury or the jury will be instructed to disregard it if they find no causal nexus. Because we presume a jury follows its instructions, *Penry v. Johnson*, 532 U.S. 782, 799 (2001), and a jury generally does not give reasons for its decision, it is reasonable to presume that the jury could not meaningfully consider even strong mitigating evidence in reaching its verdict if it were excluded under a causal nexus rule, *see Abdul-Kabir v. Quarterman*, 550 U.S. 233, 255 (2007). A court could determine that strong mitigating evidence which was excluded from consideration "would have had a substantial impact on a capital sentencer who was permitted to evaluate and give appropriate weight to it as a nonstatutory mitigating factor." *McKinney II*, 813 F.3d at 823. Accordingly, in the absence of other factors (such as the presence of aggravating factors that "overwhelmingly outweighed" the mitigating evidence, *see Greenway*, 866 F.3d at 1100), an *Eddings* error could have a substantial and injurious effect.

But the quasi per se rule adopted by *McKinney II* is entirely implausible when the sentencer is a state supreme court. Unlike a jury, a state supreme court has the authority to review and consider all the evidence in the record; this is particularly important, when as in Arizona, the state supreme court "reviews capital sentences de novo, making its own determination of what constitute legally relevant aggravating and mitigating factors, and then weighing those factors

independently." *McKinney II*, 813 F.3d at 819 (citing Ariz. Rev. Stat. Ann. § 13-755). A state supreme court's decision that certain categories of evidence are not mitigating is effectively the court's conclusion that such evidence does not merit much weight. Just like a jury, a state supreme court can reasonably conclude that if a defendant's mental impairments did not play a part in causing the defendant to commit a brutal offense, the impairments do not mitigate the defendant's behavior.

A state supreme court's conclusion about the mitigating weight of various types of evidence does not have the effect of excluding evidence as a matter of law. Nor does such a conclusion preclude a state supreme court from weighing the evidence differently in a different case. While a jury must follow instructions, the state court is free to disregard its instructions to itself because a state supreme court may always revisit its precedent. As the Arizona Supreme Court has explained, "while we should and do pay appropriate homage to precedent, we also realize that we are not prisoners of the past." *Lowing v. Allstate Ins. Co.*, 176 Ariz. 101, 107 (1993) (quoting *Wiley v. The Indus. Comm'n of Ariz.*, 174 Ariz. 94, 103 (1993)). Indeed, even *McKinney II* acknowledged that by the mid-2000s, the Arizona Supreme Court had stopped applying the precedent that *McKinney II* presumed compelled the use of a causal nexus test. 813 F.3d at 817.

Finally, unlike a jury, a state supreme court generally explains its reasons, and so may articulate its conclusion that defendant's impairments merited little or no mitigating weight. *See Greenway*, 866 F.3d at 1100. Where a state supreme court has reached a reasoned conclusion that aggravating circumstances outweigh mitigating evidence in

a particular case, there does not seem to be a reasonable possibility that the state supreme court would reach a different result merely because a federal court announces that the state court has secretly maintained an unconstitutional causal nexus rule all along. *See id.*

B

Because *McKinney II* failed to distinguish between a state supreme court and a jury, its *Brecht* analysis fails.

In *McKinney I*, the Arizona Supreme Court explained that it "conducts a thorough and independent review of the record and of the aggravating and mitigating evidence to determine whether the sentence is justified, . . . consider[ing] the quality and strength, not simply the number, of aggravating or mitigating factors." 185 Ariz at 578. In its opinion, the Arizona Supreme Court reviewed the defendant's evidence of childhood abuse and post-traumatic stress disorder (PTSD). *Id.* at 587. It determined that the judge had fully considered evidence from several witnesses that defendant had "endured a terrible childhood," as well as the PTSD diagnosis. *Id.* But the court held that "a difficult family background, including childhood abuse, does not necessarily have substantial mitigating weight absent a showing that it significantly affected or impacted the defendant's ability to perceive, comprehend, or control his actions." *Id.* After considering the defendant's abusive childhood and its impact on his behavior and ability to conform his conduct, the Arizona Supreme Court found there was no error in determining that the evidence of childhood abuse was "insufficiently mitigating to call for leniency." *Id.*

In light of the Arizona Supreme Court's reasoned consideration and weighing of the mitigating evidence, there was no basis for concluding that this same evidence would have a different impact – let alone a substantial impact – on the same court on resentencing simply because a federal court provides a reminder that *Eddings* precludes a sentencer from applying the causal nexus rule. *McKinney II*, 813 F.3d at 823–24. *Brecht* does not permit "mere speculation" about the potential prejudice to a defendant. *Davis*, 135 S. Ct. at 2198 (quoting *Calderon* 525 U.S. at 146). Because there is not a reasonable possibility that the presumed legal error influenced the Arizona Supreme Court, or have more than a slight effect, the sentence should stand. *See Kotteakos v. United States*, 328 U.S. 750, 764 (1946); *Davis*, 135 S. Ct. at 2198. *McKinney II* erred in ruling otherwise.

III

Because we are bound by *McKinney II*'s erroneous application of *Brecht*, its error infects this appeal as well. In our case, the Arizona Supreme Court considered Poyson's mitigating evidence regarding his mental health and abusive childhood, but stated merely that it accorded these factors "no mitigating weight." *Poyson*, 198 Ariz. at 81–82. On the other hand, the Arizona Supreme Court found that the evidence supported aggravating circumstances of (1) pecuniary gain, (2) especially cruel, heinous, or depraved murder, and (3) multiple homicide. *Id* at 78–79. Based on its findings, the court upheld Poyson's death sentence. *Id* at 82. The court did so while performing its duty to "independently review and reweigh the aggravating and mitigating circumstances in every capital case . . . ." *Id.* at 81.

Here, the Arizona Supreme Court reviewed and considered Poyson's mitigating evidence, and balanced it against the case's aggravating circumstances. Accordingly, there is no basis for concluding that our correction of any presumed *Eddings* error "would have had a substantial impact on a capital sentencer who was permitted to evaluate and give appropriate weight to it as a nonstatutory mitigating factor." *McKinney II*, 813 F.3d at 823. We should therefore conclude that any presumed causal nexus error was not prejudicial, and therefore Poyson is not entitled to relief.

Because we are bound by *McKinney II* (at least for the time being), we are unable to reach this correct conclusion. As a result, I reluctantly concur in the majority opinion.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

STATE OF ARIZONA,
Plaintiff,
vs.
ROBERT ALLEN POYSON,
Defendant.

Cause No. CR-96-865
JUDGMENT AND SENTENCING

BEFORE THE HONORABLE STEVEN F. CONN, JUDGE

November 20, 1998
1:37 p.m.
Kingman, Arizona

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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Reported by: Kimberly M. Faehn, Official Reporter

SUPERIOR COURT, DIVISION III, KINGMAN, ARIZONA

P R O C E E D I N G S

THE COURT: This is Cause No. CR-96-865, State versus Robert Allen Poyson. Show the presence of the defendant; Mr. Sipe, representing the defendant; and Mr. Carlisle, representing the State.

Mr. Sipe, I note that Mr. Novak is not here. Is that with your agreement?

MR. SIPE: Yes.

THE COURT: All right. This is the time set for judgment and sentencing in this matter.

Mr. Poyson, we have your date of birth somewhere in the file. Here we go, 8/15/76; is that correct?

THE DEFENDANT: Yes.

THE COURT: Mr. Poyson, have you had a chance to read the presentence report that was prepared in this case?

THE DEFENDANT: Yeah.

THE COURT: Are there any corrections or mistakes in that report that either you or Mr. Sipe want to bring to my attention at this time that have not already been addressed through the presentencing hearing?

MR. SIPE: No, Your Honor.

THE COURT: Mr. Sipe -- and before counsel begin, let me just sort of synopsize what I've done here. I have reviewed the -- I think what was essentially the discovery-type listing of mitigating factors; that's

primarily the nonstatutory mitigating factors that were set forth by the defense. That was shortly after the guilty verdict, I believe. That was a list of 26 factors that was later supplemented with one more, so there are 7 -- excuse me -- 27 nonstatutory mitigating factors that are being urged in this case. I have reviewed that document.

I've reviewed the sentencing memoranda of both the defense and the State. I've gone back and I have reviewed virtually all -- everything that has happened in this case that I have any sort of documentation for.

Mr. Sipe, anything that you want to say on behalf of your client?

MR. SIPE: Two housekeeping matters.

Number one, there was an additional nonstatutory mitigating circumstance, which -- I had written a letter to Mr. Carlisle; I have not made it an actual pleading, but it is in my sentencing memorandum, and that would be the disparity in sentencing of co-defendant Kimberly Lane.

THE COURT: All right. I'll write that down on my list. What's the other housekeeping matter?

MR. SIPE: Also on the sentencing memorandum, blue-bound sentencing memorandum on the nonstatutory mitigators, I have two number 13's, which I can only assume my computer malfunctioned, and in order to keep the other

numbers intact we should probably just make the second 13, 13A. That way we don't have to change all of the other numbers.

THE COURT: All right, and may -- may have actually missed that when I was going through. I've written down on my notes that 13 was the defendant's good behavior while incarcerated.

MR. SIPE: I'm following the numbers in the blue-bound sentencing memorandum, not the pleadings which I filed shortly after the verdicts, and hopefully Your Honor has received --

THE COURT: Oh, in fact, yeah, let me get that. I thought I had brought in everything, so . . .

(Off the record briefly.)

THE COURT: And again, do you have an index or list? I know I've looked at that before, but I'm trying to remember. Okay. Here we go, yeah.

MR. SIPE: Page 16.

THE COURT: All right. Okay. So, you want to have the follower one just be labeled 13A?

MR. SIPE: Yes, Your Honor, just to keep the other numbers in order in the event that they're referred by number either by you or some other court.

THE COURT: All right. Any other housekeeping matters?

MR. SIPE: No, thank you.

THE COURT: All right. Proceed.

MR. SIPE: The jury verdict in this case, regardless of your sentence this afternoon, will assure that Mr. Poyson will spend the rest of his life in prison. Consequentially, he will also die in prison.

The issue or decision to be made today is who makes a decision when he dies and how he dies. The State has proposed and alleged certain aggravating factors under the statute for their position that Mr. Poyson should die by the State by lethal injection.

Regarding the victim Robert Delahunt, State has alleged that was an especially heinous, cruel or depraved murder. That's the F.6 aggravating circumstance. They've also alleged that as to the victim Roland Wear, but of course, not to the victim Leta Kagen. Certainly there's no evidence of that, anyway.

As far as the Delahunt murder, the testimony at trial showed that it was a blunt-force trauma; basically, skull fractures which caused his death. The testimony also showed that one or both of the skull fractures would have rendered him unconscious immediately and would have caused death immediately. There was a knife wound to his head, and as horrific as this was, very obvious that was not the cause of death.

In fact, trial testimony was that Mr. Delahunt may have very well been unconscious, if not dead, prior to receiving that wound. There's no question that there was a struggle with Mr. Delahunt prior to him receiving the fatal blow; but again, according to trial testimony, the fatal blow was a type of blow that would render him unconscious immediately, if not dead immediately. So, the State has failed to prove that aggravator by a preponderance of evidence as to Mr. Delahunt.

As far as the heinous and depraved aspect of it, there are five factors the Court can look at. None of those factors applies in this case. Certainly no evidence that Mr. Poyson was relishing the murder of Mr. Delahunt. In fact, the opposite is true. There's certainly no gratuitous violence upon Mr. Delahunt. No mutilation, no evidence that Mr. Delahunt was helpless.

The State has alleged that it was a sensless murder. I certainly agree with the State that murder to Mr. Delahunt, as opposed as any other person, is senseless. I think every murder is senseless, but case law is very clear that senselessess alone and helplessness alone is not sufficient to be an F.6 aggravating circumstance. So, State has failed to prove any of those five factors; again, regarding the heinous, depraved nature of this.

Mr. Wear's cause of death was the same blunt

force trauma to the head. Again, he received several skull fractures. Again, trial testimony was it would have caused him to be rendered unconscious immediately and caused death immediately. There were multiple fractures to the skull, but the trial testimony was that they cannot be sure what came in what order. It's very clear that it was not a very long struggle with Mr. Wear, that when the brick was dropped on his head, that's what caused him to die very immediately.

So, again, based on the fact that it was a quick death, the cruel prong of this was not met by the State beyond a reasonable doubt, proved beyond a reasonable doubt. Similarly, as far as the heinous or depraved aspect, no evidence anyone relished the murder, gratuitous violence. No mutilation, no indication he was helpless; and again, certainly was senseless as all murders are but that alone is not enough to become an F.6 aggravating circumstance.

The State also indicated in their motion that Mr. Wear was under other stress because his lover Leta Kagen had been murdered and he was aware of this; however, there was no evidence presented at the trial or at any other hearing that he knew that Ms. Kagen was deceased.

State has also alleged the F.8 aggravated circumstance that multiple homicides occurred, and in this case certainly three homicides did occur.

The State has also alleged an F.1 aggravating circumstance that Mr. Poyson has previously been convicted of an offense punishable by death or life, and I think you have Mr. Poyson's criminal history and it clearly shows that he's never been convicted of a prior offense where death or life could be imposed. I know the State is using the other murders as F.1 factors, but that does not apply in this case. It has to be something that occurs in time.

The State is also trying to use armed robbery as an aggravating circumstance, as far as having a serious prior offense conviction; but again, very clear that has to be a conviction that's prior to the homicide, not something that occurred at the same time. Also, the armed robbery did occur at the same time as the murder, so it can't be used as an aggravator, and also it would be the underlying basis for the felony murder in this case as well.

So, because there is not historical priors as far as a serious offense or a conviction punishable by death or life, that aggravating factor has not been proven by the State beyond a reasonable doubt.

The final aggravating circumstance is pecuniary gain. Certainly, it's the State's position that these murders occurred only so the truck could be stolen. However, the State has not met this beyond a reasonable doubt. In fact, there has been testimony presented that, at least to

Roland Wear and Leta Kagen, might have even been a revenge killing as opposed to being -- the motivation being pecuniary gain.

Mr. Delahunt's murder occurred several hours prior to anything being taken from the residence. So, certainly that can't be said to have been caused because of pecuniary gain either.

And has Your Honor read both of my memorandums?

THE COURT: Yes.

MR. SIPE: Okay. In my memorandum, I did discuss the defense' proposed mitigation in great detail. I'm not going to go through every one of those factors this afternoon, but I do want to touch upon some of the more important mitigating factors and also respond to some of the State's arguments against those mitigating circumstances.

Certainly age is a statutory mitigating circumstance in this case. Mr. Poyson was 19 when the homicides occurred. In State v. Trostle, the defendant in that case was 20. Court found that as a statutory mitigating circumstance. State v. Greenway, the defendant was 19. The Court found that to be a statutory mitigating circumstance.

The Court, of course, also looks at things other than just a defendant's raw age in determining whether age is a mitigating circumstance. In this case,

the evidence has shown that Bobby is easily influenced by other people, manipulated by other people, and those are some of the factors that case law talks about. His family, Ruth Garcia, Laura Salas testified that he's a follower, not a leader.

There's a lot of testimony about how he was very slow in his development, could not crawl or take steps until he was 18 months old, could not speak until he was about two and a half years of age. He was in speech therapy, special education. Was always behind for his age. Dr. Drake, in her report, indicates that Mr. Poyson's intellectual functioning is in the low average range.

So, all other factors that exist in this case, Your Honor, dictate that his age of 19, and the other factors, are statutory mitigating circumstances in this case. One of the other mitigators, nonstatutory, is remorse, and that is certainly something that courts do consider a mitigating circumstance.

In the State's response, the State says that they question Mr. Poyson's sincerity in this case. This is a person who asked for the death penalty because he said that's what he deserved when he was first questioned in connection with this case. So, I don't see how the State can question his remorsefulness when it's at that level.

In Dr. Kaperonis' report, which the State

cited, Dr. Kaperonis also questioned his sincerity. The problem with Dr. Kaperonis opinion is that his interview with Mr. Poyson occurred about a year later in a sterile clinical setting as opposed to a situation where, just after his arrest within a week of these homicides having a chance to talk to him, and certainly once a person relates a story several times, is removed from the incident by a year, certainly you become somewhat desensitized to what had happened, and I think that Dr. Kaperonis' opinion, being a year later, really has absolutely no weight or bearing on this issue.

And Mr. Poyson's remorse is well-documented. Sergeant Ralph Stegall testified that when he interviewed Mr. Poyson he was very remorseful. Former Detective Eric Cooper testified that Mr. Poyson was very remorseful. In fact, was crying at one point during the interview.

At the aggravation mitigating hearing there was testimony from his family, who has had contact with Bobby, of course, that he was very remorseful. Blair Abbott, who had a lot of contact with Bobby, testified that Bobby was very remorseful, and the cases where remorse is not found as mitigators are cases where it's obvious it's manufactured, it's self-serving. Cases where defendants have previously lied, and none of that is here, Your Honor.

When a person confesses and then says I deserve

to be put to death, that is not a self-serving statement, and I think that the overwhelming evidence in this case has shown by a preponderance of evidence that Mr. Poyson is truly and sincerely remorseful for these homicides. It's not self-serving, it's not manufactured, and the State has presented no evidence whatsoever to counter his real remorse in this case.

Another nonstatutory ag -- mitigating circumstance which we've alleged is cooperation with law enforcement and, again, his confession. The evidence showed he was very and extremely cooperative with law enforcement. If you remember the testimony, I believe probably at the motion to suppress his statements, the officers in Illinois had called out for him when he was in the homeless shelter. He came out voluntarily. They placed him under arrest. He did not resist in any way. He was very cooperative the entire time.

He confessed on three different occasions to law enforcement. He assisted them with the whereabouts of some of the physical evidence out at the crime scene. He basically solved the case for law enforcement by telling them exactly what happened and in the greatest detail law enforcement could ever hope for, and his conviction came as a result from the confession.

I think Your Honor would agree that there is

really no physical evidence presented against Mr. Poyson or any other witnesses against him that he committed these homicides. It was certainly just simply his -- his statements. Also what's remarkable in his confession, taped confession to Eric Cooper, which I know Your Honor has heard, is he even corrected Mr. Cooper several times about some minor details and some minor facts.

Again, his extent of cooperation with law enforcement was just unimaginable in this case. Certainly much more cooperative than most people in this situation, and again, separately I think you can find the fact that he did confess on three separate occasions as a mitigating circumstance, and coupled with the fact that was really the only evidence against him.

As far as his work history, the State has alleged we haven't proven it or it means nothing because it's sporadic. The reason it was, quote, sporadic was as the testimony showed he did move a lot from place to place and, of course, when you leave one location to another, you often have to get a different job as well, but the evidence of has shown that he does have a very solid work history. In fact, has always worked, whether he was a juvenile or as an adult. So that has been certainly proven by the preponderance of evidence.

Drug use. Judge, and that was a factor which

we tied into a statutory and a nonstatutory mitigating factor. Again, the evidence in this case was overwhelming as far as Mr. Poyson's drug use. Blair Abbott testified he was a garbage pail-type drug user, in the sense that he would take every type of drug he could get his hands on, and certainly had been taking drugs perhaps the day of and day before the homicides occurred and was having a PCP flashback at least during Delahunt's murder. Again, the evidence in this case is overwhelming as far as the extent of his drug use and his drug addiction.

Personality disorders. Some of the personality disorders that psychologists and other professionals have given opinions on in the past, severe conduct disorder, maybe manic depressive or may have impulsive conduct disorder, and I think what's significant about the personality disorders in this case is that when he was a juvenile he was recommended to be on medication, to be prescribed certain medications to help control his behavior, to help control the personality disorders, yet he never took advantage of the this opportunity, probably because of economic reasons for this.

So, here's a person who's been diagnosed; even Dr. Drake, even Dr. Kaperonis, Dr. Malatesta have all stated he has certain personality disorders but they have never been treated, even though they should have been treated back when

he was a juvenile.

One of the other significant mitigators which we're proposing is Frank Anderson's influence upon Bobby Poyson. There's absolutely no question that these murders would not have occurred had Frank Anderson and his 14-year-old girlfriend Kimberly Lane come down from California to this area. Bobby Poyson had lived out there with these people for several months and lived with them in complete peace and harmony, but after Frank Anderson and Kim Lane show up, they all get murdered.

There's certainly no question that Bobby Poyson was not going to do anything to these people on his own or even had formed that thought but for the influence of Mr. Anderson, and the testimony at the aggravation/mitigation hearing again showed that Bobby Poyson is easily influenced by other people, especially older men. He's a follower, not a leader.

Ralph Stegall testified in this case at the motion to suppress statements that Bobby Poyson was influenced by Frank Anderson. Ralph Stegall truly believed this. Ralph Stegall was convinced -- well, Ralph Stegall was convinced that Frank Anderson convinced Bobby Poyson to commit these murders; and again, Dr. Malatesta, as the State pointed out in their motion, said that there's no evidence Bobby Poyson was pathologically influenced by Frank

Anderson.

Again, that's an interview a year later in a completely different setting, clinical environment, sterile setting, after a significant passage of time. But, again, when you talk about some fairly significant -- very significant time frame shortly after these murders, shortly after Bobby Poyson is interviewed and telling everything that happened basically purging his soul to the officers in this case, that's when Ralph Stegall has a lot of experience, was convinced that yes, Bobby Poyson was very influenced, manipulated and convinced by Frank Anderson to be involved in these murders.

There's absolutely no question these would not have occurred but for Frank Anderson. The evidence in this case showed that Mr. Anderson's 14-year-old girlfriend, Kimberly Lane, was the first person who brought up the idea of murder. It's very clear thereafter that Frank Anderson came up with the plan to shoot everybody, and that's how these people were going to be murdered.

Very clear that Bobby Poyson said no, he can't do that, because there are no bullets, and then Frank Anderson comes up with the idea well, let's get a knife; we'll just simply cut their throats, which of course is exactly what he did to Robert Delahunt. Even after Frank Anderson cut Robert Delahunt's throat, when Bobby went into

the little trailer to see what was going on, he did not want to go through with it. Even told Bobby, Robert Delahunt, this is just a joke, nothing's going to happen, but it was Frank Anderson who said no, I've already started it, we have to continue.

And again, Ralph Stagall testified that it was his opinion that Frank Anderson took Bobby to a point just too far, and then even after all this happened it was Bobby Poyson who wanted to turn himself in but Frank Anderson would not let him. So there's no question that Bobby was influenced, under substantial duress by Frank Anderson in being involved in these homicides.

One of the other factors which we have proposed, both as a statutory and nonstatutory, is Bobby's dysfunctional childhood. In the State's motion they said that we have failed somehow to prove this element and this issue, but they -- the evidence has been overwhelming which we presented to you. Certainly more than just a preponderance of evidence that Bobby Poyson came from a dysfunctional childhood.

In fact, we showed substantially that his dysfunctional childhood began before he was even born. The evidence showed that his natural father and his mother used drugs and alcohol very heavily for approximately three years, that his natural father engaged in bizarre self-destructive

behavior, like jumping off stoves head first into the ground, jumping out of moving vehicles, and there's been documents which indicate he's tried to commit suicide before, and Ruth Garcia testified that she's aware that he's been diagnosed with mental illnesses.

So, these are his parents and this is what's going on, even before he's born, and then during the first trimester of her pregnancy, before she knew she was pregnant, Ruth Garcia still used drugs, still used alcohol, and even after she found out she was pregnant she testified that she continued to drink some wine from time to time throughout her pregnancy and also smoked cigarettes throughout the entire pregnancy.

So, Bobby comes from a childhood that was dysfunctional before he even came into this world. And when he was sixteen years of age, a treatment classification profile worksheet was prepared, and it stated Bobby comes from a chronic multi-problem family, including child abuse, alcoholism, neglect, drug addiction and violence.

In 1993, a psychological evaluation was conducted, and it was stated Bobby's antisocial behavior can be traced through his chaotic family life. Bobby comes from a chronic dysfunctional family which includes once again child abuse, neglect, alcoholism, drug addiction, violence and multiple relationships with men. So, there's no question

he comes from a dysfunctional family.

There was testimony that one of his stepfather's, Guillermo, beat him. I think Ruth said that he was brutal to the family, both physically and mentally, to the point where she finally had him prosecuted and thrown in jail. There's also testimony that Bobby's grandmother was fairly brutal in the way that she had disciplined the family and she beat everybody on a regular basis.

Again, that's been proven substantially to this Court, so it's obvious Bobby comes from just a very dysfunctional childhood. Never even knew his father. Never even met his father. He left before Bobby was even born, and is, of course, now serving a substantial prison sentence in Colorado, and as testimony showed Ruth had several different relationships, several different men she was married to during Bobby's upbringing. There was just never that stability that he needed. Every time he got used to someone, someone else would come into his life.

Another factor is family tragedy, and as I stated in my memorandum, there are two very significant events that happened to young Bobby Poyson which changed his life; unfortunately, for the worse. Number one, the death of Sabas Garcia. He was a stepfather of Bobby's and someone that Bobby liked a lot, someone that Bobby loved. He was the only stepfather that Bobby got along with well, and they were

extremely close.

Unfortunately, at a young, young age Mr. Garcia had cancer and decided to brutally end his life, and we admitted into evidence his suicide note, which is on two polaroid photographs taken of Sabas and the family. And as Ruth said, when she testified, this changed Bobby, and he was simply never the same after this happened.

The second significant event that happened was shortly thereafter, Bobby was sexually assaulted by a godfather-type figure. In fact, he was sodomized by this person, fairly brutally, and the State pointed out that well, he didn't report it, and that's certainly not unusual for children of that age not to report these types of incidents, especially when Bobby was confused by it because there were other kids about his age that continued to associate with this person, and Bobby assumed -- the testimony will show -- that maybe what he did to me was acceptable and was okay because he's continuing to associate with these young people.

So, it's very common, understandable that this was not something that was immediately reported to the authorities. In fact, the testimony at the hearing showed that this is almost a norm for that type of community; beatings going on all the time, and it was just a pretty tough, tough way of life, and I assume they just didn't

report things like this, and there's again reasons why these go unreported; but again, every single juvenile document you have, every single psychological report you have points to these two incidents as a turning point for Bobby, and despite the fact that before that he certainly had a troubled life, a chaotic life, he did pretty darn well.

We presented to you his school records to show you the type of grades he made. As a young child he made very good grades and any grades that any parent would be proud of. He received many awards. He was involved in some activities. Made his mother Mother's Day cards, and he was just typically a -- seemed like fairly a normal young man at that time, and going to school and making goods grades and not getting into trouble, not abusing drugs, not abusing alcohol, even though he had a pretty chaotic life when these two tragedies occurred. Ms. Ruth testified he was just never the same, and that's what started him into using drugs, into using alcohol and having behavior problems which again were never checked; that is, he was never prescribed medications which was recommended that he take.

So, I just wanted to touch upon some of the mitigators which I've included in my memorandum, but of course every mitigator in my memorandum, I think the evidence has shown, we have proven sufficiently enough. This case is very similar to a recent case, as far as the mitigation goes,

to State v. Trostle, which I'm sure Your Honor has probably thoroughly read prior to today's date. In that case, as I mentioned earlier, the defendant was 20 years of age, he was convicted of first degree murder.

The Court found two aggravating circumstances; pecuniary gain, especially heinous, cruel, depraved nature. Basically, it was shotgun execution-type murder. The lower court sentenced Mr. Trostle to death. The Arizona Supreme Court overturned that and reduced it to a life sentence. And what's interesting is so many of the factors that apply and the Court considered in that case also apply to Bobby Poyson.

For instance, when they are talking about the good one mitigator, the state supreme court said that yes, Mr. Trostle knew what he did was wrong; however, he provides sufficient mitigation evidence to show that even though he could have appreciated the wrongfulness of his conduct, his ability to conduct himself according to the law requirement was impaired at the time of the offense.

Their mitigation expert talked about his traumatic upbringing as a child and resulting medical -- was mental disturbance because of these traumatic experiences, and influenced his criminal action. Came from an abusive childhood. His mom used drugs. His father was separated from him when he was very young.

Of course, in this case Bobby has never even

met his natural father. Grandmother's beating; would beat him regularly, as in this case. His grandfather was convicted of sexually molesting him. Again, Mr. Poyson was sexually molested as a child. In Trostle's case he acted out sexual -- sexual impropriety with other children. He was placed, by juvenile authorities, in a residential treatment program and educational program, such as this case.

Psychological evaluation warned of escalating development of problems. He had a high risk of developing anti-social behavior patterns, as in this case. When he was a juvenile, the juvenile staff stated in a report that Mr. Trostle would need a great deal of aftercare support. However, as in this case, received very little follow-up treatment after being released.

He was also diagnosed with some personality disorders, including conduct disorder, severe polysubstance abuse disorder, just like in this case. The experts for the defense also testified that he demonstrated extreme social dysfunction and inability to function independantly in the general community. He was probably not ready to be reintegrated into society after his release from the residential program.

And like this case, Mr. Poyson had been incarcerated. He had been in residential treatment programs, but when he was released he generally did not go to

sufficient aftercare programs. He continued to be in this chaotic life-style, this unsubstantial home environment where he just didn't have resources to pull through on this.

Again, Mr. Trostle, there's an absence of any stablizing factors in it. His family life, his own experiences, his victim of abuse, significantly predisposed him to repeat such behaviors as he developed further.

Also, stated by a defense expert in that case as an individual who could not have been expected to conform to the expectations and demands of society, behave in a legal and responsible manner, given the history of his development and the circumstances in which he was in when the crimes occurred.

In that case the Judge again overturned his death sentence because of substantial evidence, as in this case, which was presented concerning his chaotic upbringing, and what's interesting in Trostle is, unlike all the other cases, there was no connection between this chaotic life-style and upbringing and the murders.

In this case, in fact, State pretty much criticized that by stating there's no meaningful link that exists between his abuse as a child and a crime of this magnitude. So, for the first time it seems that the state supreme court is not requiring that link, that nexus, because how can you prove that.

I mean, how -- kind of hard to prove when a person comes from a chaotic childhood that years later they're involved in something, such as homicide, and kind of hard to ever show that nexus and link. That's why all cases pretty much say it's not found in this case, but this is a case where it's not found and even the dissent critisizes it.

Yet it was substantial enough to overturn its death sentence, and pretty much the last paragraph of the majority opinion just said evidence causes us to question whether death is appropriate. Where there is a doubt whether that sentence should be imposed, we will resolve that doubt in favor of a life sentence and simply overturn the death sentence.

There are some other mitigating factors which the Court found which apply in this case, such as age. Again, Mr. Trostle being 20. The other age factors they also discussed, they said that his age was average, above Mr. Poyson's rating. Other evidence established he was immature, easily influenced, as in this case; a follower, as this case; easily manipulated and pushed to do what others with stronger willpower wanted him to do.

Other mitigator, cooperation with the police, as in this case. Dysfunctional family background; past drug and alcohol abuse, as in this case. The Court also took into consideration the loving family relationship; and again,

that's one of the nonstatutory mitigators that I have proven in this case, as far as the family support that he has.

The state supreme court also considered his ability to function well in structured environment. One of the mitgating circumstances in my memorandum is the fact that he can be rehabilitated in structured environment. There's certainly documentation to prove that which is in the record and discussed in my memorandum lack of prior violent felony conviction and remorse, as in this case.

What's interesting is that the state supreme court also said that there's no scale upon which to measure what is or is not sufficiently substantial because there's a statute; as the statute is worded, if the State proves beyond a reasonable doubt one mitigator, then the presumption is death, and it will be death unless the State -- unless the defendant has substantial mitigation sufficiently to call for leniency and even recently the U.S. State Supreme Court questions how can you measure substantially sufficient. How can that be done?

And in this case, Judge, we have proven several statutory and nonstatutory mitigating circumstances. The case law said that the mitigating circumstances have to be considered individually and accumulatively by the Court in determining whether or not it's sufficiently substantial to call for leniency, but when you look at the Trostle case,

Judge, and you look at the mitigators we have presented in this case, it's almost identical.

There are two aggravating circumstances in that case; yet, supreme court or state supreme court reversed the death conviction based on Trostle, Judge.

And based on all of the mitigating factors that we have proven to you in this case, that's supported by the record, supported by the case law, we ask you to find that that mitigation is substantially sufficient and calls for leniency and therefore impose a life sentence.

THE COURT: Mr. Poyson, is there anything that you would like to say at this time on your own behalf?

THE DEFENDANT: No, Your Honor.

THE COURT: Mr. Carlisle?

MR. CARLISLE: Your Honor, and you didn't actually mention it, but I'm assuming that you have received the State's notice of aggravating factors which was filed right after the verdicts were rendered in this case?

THE COURT: Yes. Yes, I have.

MR. CARLISLE: And also the State's sentencing memorandum?

THE COURT: Yes.

MR. CARLISLE: Actually, I'll probably do it the same order Mr. Sipe did. With respect to the aggravating factors, you heard all the testimony at the trial. You heard -- and

I'll agree with Mr. Sipe -- the most compelling evidence in this case is obviously the defendant's confessions, both his taped confession and his confession to Sergeant Stegall, and with respect to the especially cruel, heinous or depraved aspect, and the case law is fairly clear that you can find that aggravating factor if you find that it's either especially cruel or especially heinous or depraved, and the State believes that the murder of Robert Delahunt and the murder of Roland Wear were both especially cruel.

The testimony was that -- or excuse me -- Mr. Poyson's own statements were that Robert Delahunt struggled for approximately 45 minutes, and they can speculate that they rendered him unconscious, but his own statements are that he struggled for 45 minutes.

The medical examiner said the slashed throat was not a fatal injury. The knife being driven through the skull was not a fatal injury. He speculated that those -- that the skull fractures could have rendered him unconscious, but he could have been conscious. He did -- and by the testimony of the person that was there, Robert Poyson, Mr. Delahunt was still alive, he was still struggling. He had defensive wounds on his hands that would be consistent with him struggling.

He indicates that -- Mr. Poyson indicates that Robert Delahunt took the knife away from his attackers and he

had wounds that were consistent with that. Eric Cooper indicated that while he was testifying he showed the wounds that he received because Robert Delahunt was struggling, was trying vainly to save himself. And during that struggle, during that 45 minutes it took to kill him, he did suffer incredibly, both physically and mental anguish. He had already overheard that they were planning on killing everybody there to take the truck. He knew that, and he was begging for his life. He was trying deseparately to stay alive.

The State feels that this was an especially cruel murder. With respect to the heinous or depraved, the State believes that there was gratuitous violence inflicted. There is the slashed throat. There is the knife that's driven through the skull. There is the repeated smashing of the head. Mr. Poyson, in his confesion, said that he smashed Delahunt's head against the floor, that he smashed it with his fist, that he smashed it with a rock, and there's just numerous head injuries, and based on that, State believes that when you look at all those injuries, there is gratuitous violence in this case.

With respect to Mr. Delahunt, with respect to Mr. Wear, and also the other factors that State argued in it's sentencing memorandum, with respect to Mr. Wear, he was shot, he got up, he struggled with both Mr. Anderson and

Mr. Poyson, he was struggling also for his life. He was hit repeatedly with the rifle. There were splatters of blood in the room. There was the broken stock of the rifle after he had been hit with it. He managed to struggle outside where again he was hit repeatedly with the rifle, with both the butt and the -- apparently the trigger mechanism of the rifle.

According to Robert Poyson's own statements, that he hit him until eventually the trigger mechanism or the handle broke and stuck in to a Mr. Wear's head, and that's when he finally stopped, finally knocked him to ground. While trying to get up, he was hit in the back with a cinder block, and Bobby Poyson goes over, started kicking him in the head, telling him -- yelling at him to stay down, and still, that's not good enough and he takes and he smashed his head like an eggshell with the cinder block. State believes that that was also especially cruel.

With respect to the multiple homicides, defense has conceded there were multiple homicides in this case. I think case law is pretty clear that if you find that there were multiple homicides with respect to one of the victims, then you found that it applies to all of the victims, and the State was arguing basically in the alternative, somewhat akin to State v. Rogovich, that if the first one, the murder of Robert Delahunt was a different episode -- and State doesn't

believe it is -- then the F.1 factor would apply with respect to the murder of Robert Delahunt.

With respect to the other two, the State believes that this was all one course of conduct and that because it was all one course of conduct, the multiple homicides aggravating factor applies.

With respect to pecuniary gain, Mr. Sipe concedes basically that none of these murders would have happened if it wasn't for Roland Wear and Kim Lane -- or excuse me -- if wasn't for Frank Anderson and Kim Lane showing up and wanting to go to Chicago or go to Kentucky or wherever it is exactly they wanted to go. They said that they were going to go to Chicago. They indicated they wanted to go to Chicago, that they were going to go live this life of luxury as mafia godfather and goddaughter; and basically, Bobby Poyson would be an enforcer-type person and so that was their whole goal was to go to Chicago, and so to get to Chicago they needed to steal the truck.

I think, going back a step, that's what makes these crimes so senseless and so, well, heinous or depraved, based on their senselessness that they were out in the middle of nowhere. Everybody concedes that these murders took place out in the middle of nowhere. They didn't need to kill three people to take the truck. They could have just taken the truck. They could have cut phone line. Neighbors did not

have a phone. They could have just taken the truck. Left in the middle of the night, they would have been to Flagstaff, they probably would have been out of Arizona before anybody even discovered what had happened.

Instead they murdered three people to take the truck, and that's the whole goal is to get the truck so that they can go to Chicago. Clearly this murder was committed with the expectation of pecuniary gain.

With respect to the final two aggravating factors, defense is arguing the same with respect to both those, the F.1 factor with respect to the conspiracy count and the F.2 factor with respect to the armed robbery count, and the case law is fairly clear that as soon as conviction comes in, as soon as the jury said this person is guilty, that's when the conviction applies.

With respect to the F.1 and F.2, I think I cited a case in there -- there's other cases that aren't necessarily cited in this particular portion of the State's brief, but I think in Rogovich they found that it applied. There's numerous cases, and basically I didn't really spend a lot of time arguing that because the case law is very clear that it's when the jury verdict is rendered. That's when a prior conviction occurs for purposes of F.1 and F.2.

With respect to the mitigating factors, and I just wanted to touch on a couple of them, Mr. Sipe was

especially arguing that this case was very similar to State v Trostle; however, Mr. Trostle's mental problems were much more acute, much more well-developed, in the testimony, than those of Mr. Poyson, and I think one of the key factors is the State talked about -- or excuse me -- that the Court talked about, and Mr. Sipe mentioned was Mr. Trostle's inability to perform in society and to conform his conduct.

Well, Mr. Sipe admitted basically that that does not apply to Mr. Poyson. He lived at this house for several months, did not have plans on killing anybody, was able to conform his conduct. He did have jobs. He had worked very sporadically.

State does not believe that his work history should be a mitigating factor because he doesn't seem to have ever worked for longer than a couple of months, but he was able to perform, to live a normal life. He had a job. He had jobs. He was paying rent. You know, he apparently was, at some point, baby-sitting Robert Delahunt, so he was doing all of these things. He was able to conform his conduct to that which was required.

Mr. Sipe stated repeatedly, none of this would have happened if it wasn't for Frank Anderson and Kim Lane showing up. Well, if none of this would have happened but for the presence of those two, then clearly he was able to conform his conduct to that which is required. You can't

have it both ways. You can't say that none of this would have happened if it wasn't for these other two, then to say, well, it was bound to happen because he can't conform his conduct.

So, the State believes that they haven't shown that mitigating factor, that they haven't proven that mitigating factor. With respect to the other mitigating factors, the State believes that -- I've addressed those issues in my sentencing memorandum, that none of those factors taken together are substantially great enough that they should call for leniency in this case.

The State would also would ask that the death penalty be imposed, and further would ask that you make a specific finding that any of the aggravating factors are sufficient to call for the death penalty in this case. Thank you.

THE COURT: Mr. Sipe, anything further?

MR. SIPE: Nothing further, Your Honor.

THE COURT: Mr. Poyson, you were charged in the Indictment in this case, in Count I, with conspiracy to commit first degree murder, a class 1 felony. You were found guilty of that offense by the jury.

Based upon the jury's determination of guilt, it is the judgment of the Court that the defendant is guilty of the offense of conspiracy to commit first degree murder, as

charged in Count I. It's a class 1 felony. There's no designation as to dangerousness or repetitiveness that would apply on that. It was committed on or about August 12, 1996, and it's in violation of A.R.S. Section 13-1003, 13-1105, 13-604, 13-701 and 13-801.

You were charged in Count II of the Indictment with murder in the first degree of Robert Delahunt. You were found guilty of that offense by the jury. Based upon the jury's determination of guilt, it is the judgment of the Court that the defendant is guilty of the offense of murder in the first degree, as charged in Count II. It's a class 1 felony. It was committed on or about August 13th, 1996, and it's in violation of A.R.S. Section 13-1105, 13-073 and 13-801.

You were charged in Count III of the Indictment with murder in the first degree of Leta Kagen. You were found guilty by the jury of that offense. Based upon the jury's determination of guilt, it is the judgment of the Court that the defendant is guilty of the offense of murder in the first degree, as charged in Count III. It's a class 1 felony. It was committed on or about August 13, 1996, and it's in violation of A.R.S. Section 13-1105, 13-073 and 13-801.

You were charged in Count IV with murder in the first degree of Roland Wear. You were found guilty of that

offense by the jury. Based upon the jury's determination of guilt, it is the judgment of Court that defendant is guilty of the offense of murder in the first degree, as charged in Count IV. It's a class 1 felony. It was committed on or about August 13, 1996, and it's in violation of A.R.S. Section 13-1105, 13-073 and 13-801.

You were also charged in Count V with armed robbery, a dangerous class 2 felony. You were found guilty of that offense by the jury. Based upon the Jury's determination of guilt, it is the judgment of the Court that the defendant is guilty of the offense of armed robbery, as charged in Count V. It's a dangerous but nonrepetitive class 2 felony. It was committed on or about August 13, 1996, and it's in violation of A.R.S. Section 13-1904, 13-604, 13-701 and 13-801.

The Court has reviewed the entire file in this matter. I've considered everything that has been presented at every hearing that has been held in this case. That includes any of the pretrial motions, and including certainly the voluntariness hearing, the evidence presented at trial, the evidence presented at the presentencing hearing. I have read the notices that were filed by counsel. I have read the memoranda that have been filed by counsel. I have read anything that has been attached to those memoranda. I've also reviewed the mental health reports that were prepared,

pursuant to the Rule 11 process.

I should advise counsel of something that you, of course, are aware of, and that is that I was the judge on the jury trial of Kimberly Lane's case so I'm certainly familiar with the evidence that was presented at her trial.

Certainly to the extent that I would rely upon or would consider relying upon anything presented at her trial in order to make a decision in this case, I have not done so and I have not gone back and independently reviewed my notes or any transcripts of the testimony in her trial. I am, of course, aware of the sentence that was imposed in her case and I have specifically thought about that because that is one of the factors that I'm being asked to consider.

I have very limited knowledge about the proceedings in Mr. Anderson's case. In fact, most of what I know about his case I've either gleaned through the media or have been told by attorneys that were involved in either of the Lane or the Poyson cases.

I've considered all of the arguments that have been presented. I have read the cases that have been cited by counsel, to the extent that I felt that it was necessary to do so, or to the extent that I was not already familiar with the propositions that were set forth in those cases.

Mr. Sipe, other than anything else that has already been placed on the record, is there any other legal

cause why sentence should not now be pronounced?

MR. SIPE: No.

THE COURT: All right. Why don't you all just remain at the table since -- since I have to be talking for a while now. I want to start off with what I would consider the easy parts of this decision and simply get the non-murder charges out of the way.

No legal cause appearing, as to Count I, conspiracy to commit first degree murder, the defendant is sentenced to life imprisonment without the possibility of release on any basis until he has served at least 25 calendar years.

As to Count V, the armed robbery charge, the Court sees no purpose in going through and identifying potential aggravating and mitigating circumstances, because I certainly intend to cover every possible base, as far as a sentence that could be imposed on the murder charge, and I am firmly convinced that whatever I do on the armed robbery charge is going to be absolutely meaningless. So, the Court finds no aggravating or mitigating circumstances.

It's ordered, on the armed robbery charge, that the defendant is sentenced to 10.5 years in prison, which is the presumptive sentence for a dangerous class 2 felony. The beginning date of each of those sentences -- in other words, the conspiracy sentence and the armed robbery sentence --

will be today's date. The defendant will receive credit against each of those sentences for 819 days served in custody prior to today's date.

It's ordered that those two sentences will be served concurrently with one another. It's also ordered that the defendant will pay restitution in the amount of $3000. I will not enter any orders as to whether I realistically expect that that will be paid because I don't.

As to the murder counts, addressing first the aggravating factors which under A.R.S. Section 13-703.F have to be proven by the State beyond a reasonable doubt, unless I indicate otherwise -- and I think except for one of them, this discussion is going to cover all three victims equally.

The first statutory aggravating factor is that the defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was impossible, and I'll discuss the second one in conjunction with this because they're very closely related.

A.R.S. Section 13-703F.2, is whether the defendant was previously convicted of a serious offense, whether prepatory or completed. I'm actually simply not convinced that the purpose of the legislature in enacting either of these two aggravating factors was to built in to every case where more than one person was murdered the

opportunity to argue not only the F.8 aggravating factor but also the F.1 and the F.2 aggravating factors.

Keeping in mind that the entire purpose of what we're going through now is to determine whether there is anything about this defendant that separates him from the norm -- and that's not the norm in society, but the norm of other people who commit murders -- and I believe that that policy would be undermined by a finding of the F.1 or the F.2 aggravating factors. I don't believe that they are intended to apply in this sort of circumstance, and I don't think that any one of the cases that have been cited by the State really firmly support that proposition.

The Court finds that the State has failed to prove, beyond a reasonable doubt, the aggravating factors that are set forth in A.R.S. Section 13-703.F.1 or 13-703.F.2.

As far as 13-703.F.3, which is whether in the commission of the offense the defendant knowingly created a grave risk of death to another person or persons, in addition to the victim of the offense, actually an argument could be made that this applies because he not only created a grave risk of death he actually killed other people, but that obviously would be included within one of the other aggravating factors.

I believe this aggravating factor is meant to

cover a person who actually survived and is not murdered along with other people.

The Court finds that the State has failed and, in fact, has not attempted to prove, beyond a reasonable doubt, the application of A.R.S. Section 13-703.F.3. As to the F.4, whether the defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value, there is no evidence in this case that would support the defendant having offered something of value that he had to anyone else to participate in this murder.

The State (sic) finds that there is no evidence to establish, beyond a reasonable doubt, the existence of the aggravating factors set forth in 13-703.F.4, 13-703.F.5, as to whether the defendant committed the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value.

This is a factor that was subject to some dispute for the first several years after the death penalty statute was enacted. There is, at least, I think, two out of five members of the supreme court who very agressively maintained that this factor was meant to apply only to a murder-for-hire situation.

They consistently dissented in opinions, and after a period of time in which they had continued to dissent, I believe that they ceased dissenting and basically

made the observation that if the legislature had seen fit to change the statute to clarify that it was supposed to apply only to murder for hire, they had plenty of opportunity do that.

I think that the case law is very clear at this time that this is not a factor that applies exclusively to a murder for hire. It also includes a situation where the expectation of getting something of monetary worth is a reason behind the commission of the offense.

Now the danger in the application of this aggravating factor that there are many murders that are committed and once a person realizes that the other person is dead and has no use for their property, a decision is made to take property, and those are cases in which this factor would not apply. That is clearly not the situation that we have here.

The desire to get something of value and the fact that -- that any common, decent person would think that it was something of very little value compared to the behavior that was engaged in to get it is really not relevant. The fact is that the desire to get the means of transportation to get them out of Golden Valley and get to Chicago, or wherever it was they that they were going, was the sole reason, the driving force behind the commission of these murders.

I believe that the State has proven that overwhelmingly by the evidence. The Court determines that the State has proven, beyond a reasonable doubt, the applicability of the aggravating factors set forth in A.R.S. Section 13-703.F.5, that all three murders were committed by the defendant in the expectation of the receipt of something of pecuniary value.

The sixth factor, the one that we could probably all talk about all day, if we were so inclined, 13-703.F.6, is whether the defendant committed the crimes in an especially cruel, heinous or depraved manner. Probably the key word here is especially, and this is the factor that the cases have emphasized over and over again. It's not to be interpreted too broadly.

Part of the reason that this factor is even subject to federal review is because of the very detailed state appellate decisions which have interpreted this factor and have narrowed it down and have fine-tuned what this factor actually means. The statute of course speaks in the disjunctive, so it's not necessary to find all three of them.

The testimony, I think, was very clear that as to Robert Delahunt and Roland Wear, they were eventually killed only after a protracted and horrible struggle had taken place in which two of them were literally fighting for

their lives; a fight which they eventually lost, and it's very clear that each of them maintained consciousness for a considerable period of time. Robert Delahunt, after having his throat slashed. Roland Wear, after actually having been shot, and having a struggle.

It is indisputable that the two of them have to have suffered physical pain, have to have realized, at some point, that the struggle was going to continue until they were dead, and they had to have been literally looking at death in the eye, knowing that that was coming for a considerable period of time.

This is certainly especially cruel, and the Court finds that the evidence establishes, beyond a reasonable doubt, the existence of the aggravating factor set forth in A.R.S. Section 13-703.F.6, that the murders of Robert Delahunt and Roland Wear were committed in an especially cruel manner.

On the other hand, the murder of Leta Kagen -- and this is where any person with any ounce of decency hesitates to use the language that the appellate courts talk about because it sounds like we're adopting some sort of blase attitude toward murder, and we're discussing murder as if this was a good murder or a benign murder or a murder that was not offensive to anyone's sense of human decency, but unfortunately the appellate decisions really force us to

engage in this type of analysis.

The murder of Leta Kagen was over and done with immediately. She probably literally never knew what was coming, never knew what was happening, probably never even realized that she was awake, and she was dead before she had any recognition of what was going on. It is impossible to say that she suffered under those circumstances, because she simply did not have a clue as to what was going on, and the cases that talk about especially cruel make it clear that that type of murder is not an especially cruel murder, even though may be reprehensible in a lot of ways.

The Court finds that the evidence does not show, beyond a reasonable doubt, that the aggravating factor of 13-703.F.6 applies as to the murder of Leta Kagen because the killing of her was not committed in an especially cruel manner, as defined by the appellate decision. The especially heinous or depraved factor is probably the one that has been subject to the most discussion in recent cases.

Just addressing a couple of those factors, I am not convinced that there was anything gratuitous about the injuries that were inflicted upon any of the three victims. On the contrary, I find that every injury that was inflicted on any one of these three victims was very much goal-oriented.

It had a very specific reason; that was to end

the life of the person who was about to receive the injury, and at least my understanding is that once that that had been accomplished there were no more injuries inflicted upon anyone who was dead, and that, of course, is because they had other things to do, they had to move on and kill the next person.

So, I do not find that there is any evidence that there is any gratuitous violence that was inflicted upon any one of the victims. As far as the crimes being senseless or purposeless, of course in -- in the parlance of any normal person in society killing someone to take a vehicle is senseless and is stupid. But the fact is, these people were killed for a specific purpose. It may be a purpose that no one can understand or agree with, but the fact is, these crimes were committed for a very specific reason and that is to kill people and prevent them from either resisting the taking of their vehicle or reporting it to police or doing anything to prevent the goal or the aim of this criminal endeavor, and I do not find that it was a senseless or purposeless killing in the sense that the cases have discussed that.

As far as the relishing of the murders, there has been no evidence of comments that were made after the murders, songs that were sung, keeping of souvenires, any other behavior that would establish that the defendant did

anything other than just take care of his business, which was to kill three people, and then get in the vehicle, which was the purpose of his business, and go on about his way.

And I do not find that the relishing of the offenses has been shown. The helplessness, I suppose an argument could be made that Leta Kagen was helpless simply because she was shot virtually while she was asleep. I am not inclined to find that, that that exists. I think that it would be anomalous to find the helplessness of Mr. Wear and Mr. Delahunt as aggravating factors in light of the prolonged struggles that they put up.

The Court finds as to 13-703.F.6, that the evidence does not show, beyond a reasonable doubt, that any one of the three murders was especially heinous or depraved. As to A.R.S. Section 13-703.F.7, whether the defendant was in custody at the time; he clearly was not. The evidence does not show the existence of 13-703.F.7.

As to 13-703.F.8, that the defendant has been convicted of one or more other homicides which were committed during commission of the offense, that clearly has been established. I can see absolutely no point in even discussing that any further. That is a factor which applies to every one of the three murders.

So, the Court finds that the evidence has established, beyond a reasonable doubt, the existence of

13-703.F.8, as to all three of the murders.

13-703.F.9, clearly does not apply. Well, maybe not clearly. It may have been close, but I believe that the evidence established that Mr. Delahunt was over fifteen at the time of the offense. None of the victims were over 70.

The evidence does not show, beyond a reasonable doubt, the existence of the aggravating factors set forth in A.R.S. Section 13-703.F.9. F.10 is whether any victim was a peace officer. That is not a factor in this case. The evidence has not shown, beyond a reasonable doubt, the existence of the aggravating factors set forth in A.R.S. Section 13-703.F.10.

Moving to the statutory mitigating factors that are set forth in A.R.S. Section 13-703.G, keeping in mind that the burden is on the defense to prove these mitigating factors, by a preponderance of evidence. A.R.S. Section 13-704.G.1 is whether 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.

There has certainly been evidence that the defendant had gone through a turbulent life, perhaps had mental-health issues that would distinguish him from the typical person on the street.

Listening to his description of how these

murders were committed, based upon a description of somewhat a methodical carrying out of a plan, the Court sees absolutely nothing on the record, in this case, to suggest the applicability of this mitigating circumstance.

The Court finds that the defense failed to prove, by a preponderance of evidence, the existence of the mitigating factors set forth in A.R.S. Section 13-703.G.1.

G.2 is whether the defendant was under unusual and substantial duress. I certainly think of duress as someone pointing a gun at someone or someone threatening a person with bodily harm. If they do not carry out some sort of course of conduct, it seems to me that the only duress that the defendant was under is that he didn't like living where he was living in Golden Valley.

There may be lots of people who don't like where they're living, either in Golden Valley or elsewhere in Mohave County, and I just don't see anything about the defendant's situation to suggest that he was under substantial duress, especially since he'd been there for some time before the commission of these murders.

The Court finds that the defense has failed to establish, by a preponderance of the evidence, the existence of the mitigating factors set forth in A.R.S. Section 13-703.G.2.

G.3 would be that the defendant was legally

accountable as an accomplice but that his participation was relatively minor. The evidence in this case was overwhelming that the defendant is the one who killed the three victims. His guilty verdict in this case was clearly not based upon any sort of technical accomplice-liability theory. He played an active role. He was the leading participant in the murder of these three people.

The Court finds that the defense has failed to establish, by a preponderance of evidence, the existence of the mitigating factors set forth in A.R.S. Section 13-703.G.3.

G.4 is whether the defendant could not reasonably have foreseen that his conduct would cause or create a grave risk of causing death to another person. I think it would be absurd to even argue this under the circumstances. The entire purpose of everything that the defendant engaged in was, in fact, to kill someone, and he did not stop his course of conduct until the killing was over. The defense has failed to establish by a preponderance of evidence that the -- has failed to show by a preponderance of evidence the existence of the mitigating factors set forth in A.R.S. Section 13-703.G.4.

G.5 is a little more problematic, and that is the age of the defendant. The defendant was 19 at the time. I am certain that both sides can cite cases in support of their

respective positions for people around this same age in which this was found a mitigating factor or people around the same age for which was this was not found a mitigating factor.

I think the one thing that cases make it clear is that age is not just a number that we look at. We don't plug the number into some computer. If it's below a certain amount, it's mitigation; if it's above a certain amount, it's not mitigation.

The issue is not how young or how old a person is but what connection there may be with their age and the behavior that they engaged in. The defendant was relatively young, chronologically speaking.

As far as the criminal justice system goes, he was not so young. He had been part of that system for some period of time. He was no longer living at home. He had effectively been emancipated for a period of time. He was working on at least a sporadic basis, and there are certainly no questions in this case as to what the defendant's age was, but I do not find his age to have been a mitigating circumstance under the circumstances of this case.

The Court specifically finds that the defense has failed to establish, by a preponderance of evidence, the existence of the mitigating circumstances set forth in A.R.S. Section 13-703.G.5.

Addressing the nonstatutory mitigating factors

that have been set forth, what I have attempted to do on these is to sort of engage in a two-part analysis, which may, in fact, be essentially the same thing I've done with the statutory ones, and that is to analyze whether the defense has shown this fact by a preponderance of evidence, and then if they have, to determine whether I would assign that any weight as a mitigating factor, and of course, for any that I -- any that pass both of those two tests, I have to weigh them all along with the other factors in the final determination in this case, and I'll try to go through -- and I wrote down in my notes the same numbering scheme that was used by Mr. Sipe, and I'll try to refer to that just for ease of reference in the record.

The first statutory mitigating factor that was alleged was personality disorders of the defendant. Again, the defendant had some mental health and psychological issues. I think, depending on what you define a mental or a personality disorder to be, the State -- or excuse me -- the defense has established that there were certain men -- personality disorders that the defendant, in fact, may have been suffering from.

The Court, however, does not find that they rise to the level of being a mitigating factor because I am unable to draw any connection whatsoever with such personality disorders and the commission of these offenses.

So, the Court finds that the defense has failed to establish, by a preponderance of evidence, that the personality disorders of the defendant were a nonstatutory mitigating factor.

The second nonstatutory mitigating factor alleged is remorse. I am convinced that the defense has established, by a preponderance of evidence, that the defendant was and is, in fact, remorseful about the commission of these offenses.

When I consider the fact that he had time to reflect upon what he was doing, since killing three people did take some period of time, and considering the fact that his remorse could have kicked in at some point and maybe prevented one or two of these murders from taking place -- keeping in mind the fact that even though he may have discussed turning himself in; he, in fact, did not turn himself in -- even though I find that remorse has been established in this case, I find that it is not, in fact, a nonstatutory mitigating factor.

The Court finds that the defense has failed to show, by a preponderance of evidence, that the defendant's remorse is a nonstatutory mitigating factor.

The cooperation with law enforcement. It's clear that once he was apprehended the defendant did cooperate, gave a full confession.

I certainly wondered hypothetically to myself what sort of case the State would have had against this defendant but for his confession. They probably would have been forced to try to make some sort of deal with other co-defendants, which probably would have resulted in inappropriate dispositions of their cases.

I believe that the defendant's cooperation with law enforcement has been shown and is, in fact, a mitigating factor in this case.

The Court finds that the defense has established, by a preponderance of evidence, the existence of the nonstatutory mitigating factor that the defendant cooperated with law enforcement.

Several of these others kind of blend together, and it's sort of hard to discuss them separately.

The number 4 nonstatutory mitigating factor is the dysfunctional family and childhood.

Number 5 is the physical and sexual abuse in the defendant's childhood.

And number 6 is the mental abuse in the childhood of the defendant.

I was certainly struck, at the presentencing hearing, by the fact that Mr. Poyson had a childhood that I certainly would not have wanted to have been part of and would not have wanted my children to be part of or anyone

that I know.

I can think of people that I know who have been abused as children, who have had parents die when they were young, who have been exposed to separation and anxiety that would certainly be comparable to that that was suffered by Mr. Poyson, and I can think of people who have gone through things remarkably similar to Mr. Poyson and have become productive upstanding members of the community, and I am finding that defense has shown that defendant suffered a dysfunctional childhood, that he was subjected to physical and sexual abuse, and that he was subjected to certain levels of mental abuse.

The Court finds absolutely nothing in this case to suggest that his latter conduct was a result of his childhood.

The Court finds that the defense has failed to establish, by a preponderance of evidence, the nonstatutory mitigating factors of his dysfunctional family and child background, the physical and sexual abuse in his childhood or the mental abuse in his childhood.

Number 7 is the character of the defendant, and I guess I'm forced to flip to the paperwork to remind myself what this could possibly be based on. I guess this is based upon certain things that the defendant did as a child, which probably every child has managed to rise to the level of at

least one of these at some point.

I would concede that the defense has shown that there are certain manifestations that the defendant was a good child. Enough time passed between that and the commission of these horrible crimes that the Court finds that even though the defendant may have been a good child, that that is not a mitigating factor. The defense has failed to establish, by a preponderance of evidence, the existence of the nonstatutory mitigating factor that the defendant had a good character as a child.

The defense has also argued, as a nonstatutory mitigating factor, the defendant's diminished mental capacity and his low I.Q., and this -- this may, to some extent, be incorporated within one of the statutory factors, but there is nothing to prevent me from discussing a fine variation of that as a possible nonstatutory mitigating factor.

The Court would concede that there is certain evidence in this case that would support the proposition that the defendant's mental capacity may be diminished, at least compared to the norm in the population, and that his I.Q. may be low, at least compared to the norm in the population.

However, when you weigh that against the defendant's description of the murders, certain prepatory steps that were taken -- admittedly, not overly-sophisticated, but attempts were made to do certain

things, to disable warning systems to enable these murders to be committed and to get away with the loot that was the purpose of the murders; specifically, the vehicle.

The Court finds that even though there is evidence that the defendant may have a diminished mental capacity and a lower-than-average I.Q., that the defense has failed to establish, by a preponderance of evidence, the nonstatutory mitigating factor of the defendant's diminished capacity and low I.Q.

The defense asserts that potential for rehabilitation of the defendant is a mitigating factor, a nonstatutory mitigating factor. If there is anything that has been presented to even suggest that, I must have missed it. There has been evidence that defendant has been subject to incarceration supervision in the juvenile system, which apparently had very little lasting impact upon him.

I can certainly note, as I will note later, that the defendant has not been any sort of problem, at least as I can tell, during the pendency of this case. That doesn't necessarily equate with rehabilitation.

The Court finds that the defense has failed to establish, by a preponderance of evidence, the nonstatutory mitigating factor that there is potential to rehabilitate the defendant.

The next nonstatutory mitigating factor argued

is the giving of the felony murder instruction in this case. It's clear to me that the evidence overwhelmingly supported the finding of the jury that the defendant, with premeditation, killed the three victims. This would certainly pass the Enmund v Florida test. It would pass the Arizona v Tison test.

The Court is not convinced that the guilty verdict in this case was even slightly based upon or was exclusively based upon a felony murder instruction. It's clear that defendant acted with premeditation. The over -- the evidence of his having done so was overwhelming. I do grant that a felony murder instruction was given in this case.

But the Court finds that the defense has failed to establish, by a preponderance of evidence, that the giving of that instruction would be a nonstatutory mitigating factor.

Next one is that other cases involving multiple homicides have resulted in something less than the death penalty. I am familiar with the cases that have been cited. There very well may be some other cases in which multiple deaths have arisen.

Interestingly, I can think of one other case involving very similar circumstances to this in which multiple deaths were involved and the death penalty was

given, and that was in Frank Anderson's case. If I'm going to look at other reported case that have nothing to do with this case, I feel that I'm just as justified in looking at what happened to other people involved in this case.

From what little I know about the evidence that was presented to implicate Frank Anderson in this case, I would have to suspect that the evidence establishing Mr. Poyson's culpability was far in excess of that concerning Mr. Anderson, at least as far as the actual physical involvement in the murders in question.

The Court concedes that there are other cases in which multiple homicides have resulted in a life sentence, but the Court finds that the defense has failed to establish, by a preponderance of evidence, the existence of the nonstatutory mitigating factors set forth concerning other cases where death was not imposed.

The next factor would be the defendant's demeanor during the trial. I will go on record as saying that this defendant has been as well-behaved during these proceedings as any defendant that I have ever had to deal with. And I don't say that as if that's something to be proud of, but I've certainly dealt with people that have been a problem.

It is certainly refreshing to deal with people who are not problems, who are not being boisterous,

obnoxious, overly-aggressive in court. Of course, this may very well be a desire to present one's self in the best light to a judge and a jury.

I am convinced that the defendant legitimately is acting in court the way that he ought to act and is not doing so out of some devious or nefarious plan, but the fact is he's simply doing what should be expected from any person and that is to comply with the minimal norms of civilty, and to be in court in a quiet and respectful manner.

The Court finds that the defense has established that defendant's demeanor during the trial was exemplary but that the defense has not established, by a preponderance of evidence, that this, in and of itself, would constitute a nonstatutory mitigating factor.

The next argument is that the defendant lacks a record of serious crime. Crimes, if we're talking about adult crimes, that is certainly true. Some of the evidence that is present in the record establishes that some of the defendant's prior misbehavior involves sexual offenses, setting peoples hair on fire, other less-serious crimes.

There is very little to indicate, in the record, that the defendant is some person who had absolutely no record of serious crimes and then suddenly he merged on the scene out of nowhere to commit these murders. One can almost see this coming when one looks at the progression of criminal

behavior that the defendant had engaged in.

The Court finds that the defense has not established, by a preponderance of evidence, that defendant lacks a record of serious crimes; and therefore, I don't even have to consider whether it would have been a mitigating factor.

The next one is that the defendant was a follower of the co-defendant Anderson. Again, I can only go on what was presented during the trial. In this case, certainly there is evidence that Kimberly Lane was the first person to mention that Frank Anderson may have started the ball rolling, as far as Mr. Delahunt.

After these people made some somewhat faint initial overtures, Mr. Poyson stepped in, needed no one to tell him what to do, took over and essentially murdered three people, pretty much on his own. And there's no indication that he was forced to do this, that was coerced to do this, was somehow intimidated into doing this by Mr. Anderson.

The Court finds that the defense has failed to establish, by a preponderance of evidence, that the defendant was a follower of Frank Anderson, and this would not be a nonstatutory mitigating factor.

Next one that's argued is the safety of the community. I guess the argument here is that there is no need to protect the community because I have the authority to

lock up the defendant forever and he will never be a danger to the community.

I guess the Tison case is the one that immediately jumps to mind. Someone who was incarcerated, group of people that were incarcerated, got out and killed maybe a dozen people. I don't feel that much of an obligation to protect other people that maybe incarcerated in the Department of Corrections, but there's certainly numerous examples of people who have murdered other people while incarcerated.

I am not convinced that the defense has shown, by a preponderance of evidence, that the safety of the community will be furthered by the decision that I make concerning the sentence to be imposed in this case, and that is not a nonstatutory mitigating factor.

The next argument is that execution of the defendant would have no deterrent value. I am inclined to agree, from everything that I have read, that the execution of this defendant would probably not be likely to deter other persons from committing crimes in the future.

Even though we all operate under the assumption that what we do in the court system has meaning, it's difficult for me to imagine a person, sometime in the future, who is going to begin to commit a murder, is going to think to himself wait a minute, remember what happened to Bobby

Poyson; I don't think I will commit this murder after all. And I would like to think that what we do has that effect. I doubt that it does.

The one that I would note is that the execution of the defendant would certainly deter him from committing any further murders, and I don't say that facetiously because there are people who have been sentenced to prison even for the rest of their lives who have murdered other people.

Court finds that the defense has proven, by a preponderance of evidence, that the execution of the defendant is not likely to deter people other than himself from committing crimes. The Court, however, does not feel that that rises to the level of being a mitigating factor. Defense has not shown, by a preponderance of evidence, that the mitigating circumstances exist that the execution of the defendant would fail to deter people other than himself.

As far as the childhood neglect is concerned, that would be the same as the finding that I made earlier concerning certain levels of his childhood. The defense has shown, by a preponderance of evidence, that the defendant was subjected to neglect in his childhood, but have failed to show, by a preponderance of evidence, that that would be a mitigating factor.

The fact that the defendant confessed, to me, is same thing as his cooperation with the police. It's included

within that. Because it's been raised twice I will acknowledge that the State -- that the defense has shown, by a preponderance of evidence, that the defendant confessed and that that is a mitigating factor that I am only considering at one time.

The fact that the defendant has expressed a death wish, I'm not really sure what that would be based on, other than perhaps an isolated comment that the defendant may have made in an interview. It's a temptation to compare the avowell that he has a death wish, on the one hand, to the 35 or 40 mitigating factors that are being offered on his behalf to just not imposing the death penalty.

Although, I don't rule out possibility that someone represented by counsel could want to be subjected to execution and that does not prevent counsel from doing the job that they are ethically required to do. I simply am not convinced that the defendant has any legitimate desire to be put to death because of the crimes that he has committed.

The Court finds that the defense has failed to show, by a preponderance of evidence, that the defendant has any sort of death wish or that that would be a nonstatutory mitigating factor.

The next issue is the defendant's work history. I am left with the impression, based upon the entire record

in this case, that there has been little to indicate any significant work history on the part of the defendant, nothing to indicate that he went to a job on a regular basis, was involved in any sort of employment situation that was meant to eventually better him, and this is not to denigate menial low-paying jobs, but I believe that the record portrays a person who worked only sporadically, who did not have any sort of work plan that he was engaged in. Even if he did work, there's certainly no indication that that prevented him from committing these crimes.

The Court finds that the defense has failed to establish, by a preponderance of evidence, that there is anything to suggest that the defendant had a good work history. Even if I had found that they had established that, I would not treat that as a nonstatutory mitigating factor.

It's argued that certain school achievements were made by the defendant. This may, to some extent, be inconsistent with some of the other claims; although, I understand that the argument is being made there was a turning point in the defendant's life, and up until that point he was doing well, and it's when these tragedies struck that his life then turned around. And I've gone through numerous certificates of awards, things that have been submitted to me, concerning the defendant's childhood.

I think I probably already covered this, in a sense. I would be willing to find that the State -- that the defense has established, by a preponderance of evidence, that the defendant achieved certain things while he was in school. These are so far removed from the crimes that were committed as an adult that the Court's not willing to treat them as mitigating factors.

So, the Court finds that the defense has failed to establish, by a preponderance of evidence, the nonstatutory mitigating factor that the defendant had certain achievements in school.

Family tragedy. It is certainly easy, I'm sure for someone who has not had a parent die young, or a substitute parent die young or someone who has not been sexually abused as a child, to make light of this, and I have absolutely no intention of doing that. I have been reading presentence reports for 20 years now and I'm absolutely convinced that people who are sexually abused as children are far more likely to offend as adults.

There may have been minimal testimony that was presented which supported a finding of this, but the Court is convinced that the defense has established, by a preponderance of evidence, that the defendant lost a parent figure and was subjected to sexual abuse at a relatively young age. The Court is not convinced that there is any

connection between that abuse, that loss, and his subsequent criminal behavior.

So, the Court does find that the defenses established, by a preponderance of evidence, that the defendant was subject to family tragedy and family loss, but they have not established by a preponderance of evidence that that would be a nonstatutory mitigating factor in this case.

And we are getting near the end. The next argument that was made is the defendant's current family support. It's hard for me to say this without seeming mean-hearted or -- or cruel, but I was astonished at some point during this case to find out that the defendant actually had relatives that were living in this immediate area.

The one impression that I had throughout this case, up until we got to the sentencing phase, was that poor Mr. Poyson had been cut loose, was stuck out in Golden Valley, didn't have family anywhere nearby and was completely on his own, and was -- was virtually isolated there with no sort of family contact, and when I found out that he had family that was a half hour away, I was amazed.

I guess I was amazed because I had never heard of it before. Just seemed completely in contradiction to the image that I had of this person who virtually had no family

contact. And that's not to rule out the possibility that there was simply no reason to present it or have me know it before then, but I have the impression that the family support in this case has not been very significant.

It may have been more significant when the issue became whether the defendant was going to be executed or not; and again, I don't mean any disrespect to anyone, but I find that defense has failed to establish, by a preponderance of evidence, even the existence of significant family support of the defendant.

The argument is made that the defendant was subjected to alcohol abuse and drug abuse. Other than very vague allegations that he has used alcohol in the past or has used drugs in the past, other than a fairly vague assertion that he was subject to some sort of effect of drugs and/or alcohol at the time, that these offenses were committed, I really find very little to support the allegation that the defendant has a significant alcohol and/or drug abuse, and again, going back to the methodical steps that were taken to murder three people to get a vehicle to get out of Golden Valley, it's very difficult for me to conclude that the defendant's ability to engage in goal-oriented behavior was, in any way, impaired at the time of the commission of these offenses.

The Court finds that the defense has failed to

establish, by a preponderance of evidence, the nonstatutory mitigating factors of the defendant's alcohol abuse and/or drug abuse.

I believe the next to the last argument that is made is the disparity between the sentence of this defendant and the co-defendant Lane. I have the benefit of the doubt of having presided over both of those cases. The co-defendant Lane, of course, could not have been sentenced to death because of her age; although, I can imagine circumstances in which that, in and of itself, wouldn't be a sufficient explanation for a disparity.

I think the disparity in the sentences is far more based upon her limited, almost nonexistent involvement in the actual murders themselves, and it's her culpability, her liability, as established at her trial I think was almost based exclusively on prepatory comments that she made, perhaps some very limited involvement on the periphery of the Delahunt murder, and I think how the Court analyzed her involvement is certainly reflected in the sentence that she received. I think she received a total of 32 years in prison, which I'm not suggesting is a minimal or a nominal sentence, but compared to -- compared to what I could have sentenced her to, under the circumstances, I think the sentence imposed clearly reflected my analysis of what penalty ought to be imposed in her case.

The Court finds that the -- that the defense has established, by a preponderance of evidence, that there is a disparity; in other words, a difference in the sentence of the co-defendant Lane and what the defendant could get in this case if he were to receive the death penalty, but Court determines that that is not an unfair disparity, it's a disparity that's completely supported by the facts.

So, the Court finds that the defense has failed to establish, by a preponderance of evidence, the nonstatutory mitigating factor that there was an unfair disparity compared with the sentence of the co-defendant Lane.

Even though it's not, I think, mentioned in the sentencing memorandum, I just do want to acknowledge another factor that was set forth, and I don't think that the defense is abandening this because they have filed a previous pleading listing, as a nonstatutory mitigating factor, the financial impact of the imposition of the death penalty, and to cover all basis, I have certainly considered that.

I would agree wholeheartedly that contrary to what probably every person in the country, that isn't intimately involved in the court system, thinks it's far more expensive to execute people than it is to incarcerate them for the rest of their lives, and that's because the cost of appeals and legal representations are far in excess of the

cost of simply incarcerating people.

The Court does not feel that that is a factor that should be considered in making decisions. One could argue that people shouldn't be in jail for committing minor offenses because it costs more to put people in jail than to just turn them back on the streets and hope that they don't commit another crime.

Any attempt at law enforcement or any attempt to impose upon a significant portion of the population a necessity to conform their behavior to the dictates of society is always going to involve some sort of expense, and I am not willing to treat what is a very recognizable expense in imposing the death penalty as a nonstatutory mitigating factor.

The Court finds that the defense has failed to establish, by a preponderance of evidence, the nonstatutory mitigating factor involving the imposition of the -- or the cost of the imposition of the death penalty.

That leaves us with the aggravating factors that all three crimes were committed in the expectation of pecuniary gain, that the killings of Delahunt and Wear were committed in an especially cruel manner, and that each offense, each murder was simply one of three murders that were being committed at the time. I am weighing them against the nonstatutory mitigating factors -- factor

that the defendant cooperated with law enforcement and confessed.

Mr. Poyson, you and your attorney will come forward, please.

MR. SIPE: We prefer to stay at the table, Your Honor.

THE COURT: That's fine with me.

Court finds that the one mitigating circumstance that I have identified is insufficient to outweigh the overwhelming aggravating factors that have been identified. There is nothing about that one mitigating factor that convinces me that I should do anything other than impose the death penalty in this case.

It's ordered, Mr. Poyson, as to Counts II, III and IV, for the first degree murder of Robert Delahunt, Leta Kagen and Roland Wear, that you are sentenced to be executed. You are sentenced to death.

Recognizing that no case is ever immune from appellate review, I do want to make a record at this time, that it is my intention that if, for some reason, any one of these three sentences would be reversed because of an appellate decision that the death penalty was improperly imposed, it would be my intention to sentence the defendant to natural life on all three of these offenses.

So, if any appellate court makes a decision, in the future, that the imposition of any one of these

death penalties was improper, they need not remand it for sentencing because if I were not imposing the death penalty, I would be imposing a natural life sentence for each one of these three offenses.

That is a sentence which is relatively new, hasn't been interpreted by a lot of court decisions. I will go one step further, say that if any one of these sentences, the death sentences, is reversed on appeal, if my imposition of a natural life sentence should be reversed on appeal, it would be my intention that any of the sentences that were imposed in this case that were going to be treated as life sentences with the defendant being eligible for release only after having served 25 calendar years, would all be served consecutively, or one after the other; although, concurrent with the sentences that were sentenced -- that were imposed for the armed robbery and the conspiracy, with the same credit on the first of the three consecutive sentences that were given for the conspiracy and the robbery.

It's ordered directing the clerk to file a notice of appeal in this matter with the supreme court immediately following the completion of this hearing. The defendant is -- well, Mr. Poyson, I'll need your right thumbprint, at this time, on the sentencing order, and you can just stay there. We'll do it right there.

Record will reflect the defendant has placed

his right thumbprint on the sentencing order in open court.

It's ordered remanding the defendant to the custody of the sheriff to transport him to the Department of Corrections to carry out the sentences just ordered.

Is there anything further at this time, counsel?

MR. SIPE: No.

THE COURT: All right. We'll stand at recess.

(The proceedings recessed at 4:40 p.m.)

Certificate of Reporter

I, Kimberly M. Faehn, Official Reporter in the Superior Court of the State of Arizona, in and for the County of Mohave, do hereby certify that I made a shorthand record of the proceedings had at the foregoing entitled cause at the time and place hereinbefore stated;

That said record is full, true and accurate;

That the same was thereafter transcribed under my direction; and

That the foregoing seventy-four (74) typewritten pages constitute a full, true and accurate transcript of said record, all to the best of my knowledge and ability.

Dated this 27th day of January, 1999.

Kimberly M. Faehn, Official Reporter

TAPE RECORDED INTERVIEW No. 96-1705

ROBERT POYSON
(Suspect)

Interview by: Det. Eric Cooper, D39
Mohave County Sheriffs Office
Kingman, AZ

COOPER: The following will be a taped statement of Bobby Poyson [P-o-y-s-o-n] as given to Detective Cooper of the Mohave County Sheriffs Department. This statement's being taken at the Evanston Police Department in Evanston, Illinois. Uh, today's date is August 24, 1996. The time is 2038 hours.

For the record, would you state your name.

POYSON: Robert POYSON.

COOPER: And would you state your name.

STEGAL: Uh, Sgt. Ralph Stegal with the Illinois State Police.

COOPER: Okay. Um, a couple minutes ago, Bobby, I advised you of your Miranda rights, is that correct?

POYSON: Yes, you did.

COOPER: And did I do it from memory or did I read 'em?

POYSON: You read 'em and from memory.

COOPER: Okay. And did you understand those rights?

POYSON: Yes, I did.

COOPER: Okay. Do you re -- can you just repeat 'em back to me.

POYSON: I HAVE THE RIGHT TO REMAIN SILENT. AND ANYTHING I SAY CAN AND WILL BE USED AGAINST ME IN A COURT OF LAW.

I HAVE THE RIGHT TO AN ATTORNEY. IF I CANNOT AFFORD ONE, ONE WILL, ONE WILL BE APPOINTED TO ME.

COOPER: Okay. And you understood all that?

POYSON: Yes, I did.

COOPER: Okay. Bobby, could I see the bottom of your shoes for a (inaudible)? Okay. And these are the shoes you wore that night?

POYSON: Yes.

COOPER: Okay. I'm gonna be taking those--or--yeah, somebody'll be taking those from you today, okay, and we'll get you another pair of shoes.

POYSON: Mm-hm.

TAPE RECORDED INTERVIEW - ( ). 96-17052

ROBERT POYSON
(Suspect)

Interview by: Det. Eric Cooper, D39
Mohave County Sheriffs Office
Kingman, AZ

COOPER: Um, Bobby, what's your date of birth?

POYSON: 8/15/76.

COOPER: And how old are you?

POYSON: Twenty years old.

COOPER: Okay. And where you were born?

POYSON: Twin Falls, Idaho.

COOPER: Okay. And, um, what's the highest grade of school you completed?

POYSON: Eleventh.

COOPER: Do you remember what year that was?

POYSON: No, no, I don't.

COOPER: Can you read, write and understand the English language?

POYSON: Huh?

COOPER: Do you read, write, and understand the English language?

POYSON: Yes, I do.

COOPER: Okay. You were living out at 2575 Yavapai in Golden Valley is that correct?

POYSON: No, 2725.

COOPER: Oh, 2725, I'm sorry.

POYSON: South Yavapai Road, yes.

COOPER: Okay. And who all was living there?

POYSON: It was me, Leta Kagen, Elliott Kagen, Roland Wear and Robert Dellahunt.

COOPER: Okay. And was Robert, um, Leta's son?

POYSON: Yeah.

COOPER: And Roland was her boyfriend,

POYSON: Uh-huh, her lover.

COOPER: right? Her lover. And Elliott was her husband?

POYSON: Yes.

TAPE RECORDED INTERVIEW : No. 96-170 ROBERT POYSON (Suspect)

Interview by: Det. Eric Cooper, D39
Mohave County Sheriffs Office
Kingman, AZ

COOPER: And at least some point during the time that you were staying there, Elliott and Roland shared a bed with, with Leta?

POYSON: Every night.

COOPER: Every night, okay. Did Elliott get kicked out of the house?

POYSON: No, he didn't.

COOPER: Why was he gone?

POYSON: He was at Raven Shield's house. Raven Shield was getting stuff ready 'cause he was gonna get his leg amputated off and so he was preparing for all the hard work and all the labor and stuff that he couldn't do after he got his leg amputated so Elliott was there helping him.

COOPER: Okay. When did you start living there?

POYSON: April.

COOPER: Of '96?

POYSON: Yes.

COOPER: And how did you come to live there?

POYSON: I was homeless, I didn't have a place to go. Um, Elliott Kagen rented a motel room at the Riverside Casino in Laughlin for me and a friend. I explained to them that night that I didn't have a place to stay, that's the reason why I was renting a motel room. And Leta told me that she had a, that she had two and a half acres at her house and that I could go there, I could live there and just pay rent, a hundred dollars a month. And at that time, I didn't know how much they were gettin' charged for rent. And

COOPER: And so she...

POYSON: I went there, I started living there and pay--started payin' my rent.

COOPER: Okay. What was your relationship with Leta?

POYSON: Just a friend.

COOPER: Close friend, just a..an acquaintance?

POYSON: Just a friend. She was my landlord and I paid my rent.

COOPER: Okay. Did you call her any other name besides Leta?

POYSON: Mom.

COOPER: And why did you call her mom?

TAPE RECORDED INTERVIEW - Ca(. 96-17052 - ROBERT POYSON
(Suspect)

Interview by: Det. Eric Cooper, D39
Mohave County Sheriffs Office
Kingman, AZ

POYSON: Because I felt like she was my mom because she brought me off the streets. She did more for me than my mom has been doing for me lately so...

COOPER: Okay. Um, what were, what was your relationship with Elliott?

POYSON: We didn't get along.

COOPER: How come?

POYSON: Elliott beat Robert, he used to beat him consistently. Put bruises on him, throw rocks at him, slam him up, slam him up against the walls. And when I got there, Robert started telling me stuff that Elliott did. He didn't trust nobody. He wouldn't get close to noboody. So I started talkin' to him and I found out that Elliott started doin' all this stuff to him. And then one day Elliott decided he was gonna throw rocks at Robert and then he tried to charge Robert and I stood in front of him.

COOPER: Okay. What type of stuff was Elliott doing to Robert?

POYSON: Just beating him. If Robert made a mistake or if Elliott didn't like the way Robert was acting, he would him, he would smack him. He would push him up against the wall, throw rocks at him.

COOPER: Okay. What was your relationship with Roland?

POYSON: We didn't get along.

COOPER: How come?

POYSON: Sometimes I was late on my rent and Roland always wanted it to be on time and never, never to be late. If I didn't have enough money for rent because I needed something else, I couldn't pay all my rent at one time, he got mad and he wanted it all on the third of the month. That way I, I would have that whole month to, to go without paying rent. And he always tried to mess around with me. He grabbed me by the throat one time and I flipped him over my back. And...

COOPER: Was that when you were playing basketball?

POYSON: No.

COOPER: Okay. What's your relationship to Robert?

POYSON: We were pretty close. Uh, he was like a little brother to me. I always told him that I would never let anybody hurt him again and I turned around and I hurt him. He told me everything.

COOPER: How did you meet Frank Anderson and Kimberly?

POYSON: They came to, they came to the house one day. A guy named Gene...

TAPE RECORDED INTERVIEW - No. 96-1705

ROBERT POYSON
(Suspect)

Interview by: Det. Eric Cooper, D39
Mohave County Sheriffs Office
Kingman, AZ

COOPER: What, what's Gene's last name do you know?

POYSON: I don't know. It was a friend of the family. Brought 'em over there and said they didn't have a place to stay and they needed to get into town. So -- and Leta let them stay there.

COOPER: Now, this Gene that brought him down, does Elliott know who he is?

POYSON: Yes, he does.

COOPER: Where does Gene live do you know?

POYSON: No, I don't. As far as I know, is he's got a trailer, he hitches it up and leaves and then comes back and unhitches it. I don't know where.

COOPER: What kinda car does he drive?

POYSON: He drives a van.

COOPER: A van?

POYSON: Yeah. A gray van.

COOPER: Do you know what type of..whether they're Arizona plates or Nevada or California?

POYSON: Arizona.

COOPER: Arizona plates. Okay.

Have you ever seen him driving anything else?

POYSON: No.

COOPER: Okay. Let's go to the day that Frank and Kimberly arrive. About what time was that?

POYSON: About ten thirty, eleven o'clock at night.

COOPER: And do you remember what day of the week that was?

POYSON: No, I don't.

COOPER: Okay. How -- was it just befo..a couple days before this whole thing took place?

POYSON: Yeah.

COOPER: Was it on a weekend or a weekday?

POYSON: I don't know.

COOPER: Uh, did they get there during the day or at night?

POYSON: Night.

TAPE RECORDED INTERVIEW - C No. 96-17052

ROBERT POYSON
(Suspect)

Interview by: Det. Eric Cooper, D39
Mohave County Sheriffs Office
Kingman, AZ

COOPER: Late or early?.

POYSON: Late. About ten, eleven o'clock.

COOPER: When they get there, Gene brings 'em is that right?

POYSON: Yes.

COOPER: And this is worked out for them to stay there. Were, were, were they just to stay there for a while or was this just a...

POYSON: Uh, Leta took Frank into town, took 'em to health and welfare to try to get on being homeless and me, and (unintelligible) having to support Kim. She went, took him there, got him some papers for disability and stuff like that. And then took him out job hunting and as far as I know, they were gonna stay there for a little while. But when Frank approached me, he told me he wanted to leave soon.

COOPER: Okay. Now, they get there you said about ten, ten thirty, is that correct?

POYSON: Yes.

COOPER: Okay. Do you guys all go straight to bed or what, what goes on?

POYSON: We stay up -- I stayed up, I talked to Kim for a little while. Showed her all the dogs 'cause she liked animals. Showed her all the cats and then went inside. We played some cards. And then I turned around, I went to sleep.

COOPER: How old's Kim?

POYSON: To my knowledge, eighteen. Until I found yesterday that she was a minor. I don't know how old she is.

COOPER: How did you -- well, how did you find out yesterday that she was (inaudible)?

POYSON: Um, he, the sergeant, told me that she was bein' placed in juvenile custody and that's when I found out.

COOPER: Okay. So ya'll stay up pretty late. Where, where do you sleep in the house?

POYSON: Um, right across the bedroom from where Leta, Roland and Elliott sleep.

COOPER: So there, there's that one door that, that leads in between those two

POYSON: Yeah.

COOPER: rooms? So you're in that back bedroom?

POYSON: Yes.

COOPER: Okay. Where'd Robert sleep?

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(Suspect)

Interview by: Det. Eric Cooper, D39
Mohave County Sheriffs Office
Kingman, AZ

POYSON: He sleeps in the other room in front of mine.

COOPER: Okay. And then Leta and Roland and Elliott have that other?

POYSON: The big room.

COOPER: Okay. Um, describe the living conditions there.

POYSON: Its just like living out in the old days. Um, we had to go haul our own water. We had no electricity, no lights. We, we just barely got a phone put in. Um, no transportation. We were five miles from the nearest place. Um, we had next door neighbors and that's about it.

COOPER: Let's talk about your next door neighbors for a second. They had a daughter named Carmen, you knew her, right?

POYSON: Yes, I did.

COOPER: Okay. All right, so they ke--they get there on late that ni..that one night, was it the next day that Leta takes 'em to go job hunting?

POYSON: Yes.

COOPER: Okay. And did you go with them?

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POYSON: No.

COOPER: Who all went?

POYSON: Leta, Robert, Roland, Kim and Frank.

COOPER: Okay.

POYSON: I stayed home by myself.

COOPER: And was there any reference made about getting Robert registered for school?

POYSON: Yes, that's why they left.

COOPER: So that's why they went (inaudible).

POYSON: That was the main reason they left was to go get Robert registered for school.

COOPER: Okay. And do you remember about what time they left?

POYSON: About eleven.

COOPER: In the morning?

POYSON: Yeah.

COOPER: And what time did they get home?

POYSON: About three or four in the afternoon.

COOPER: Do you remember what day of the week this was?

POYSON: No. I knew either Monday or Tuesday.

COOPER: Was it the day of the incident or the day before?

POYSON: Day before.

COOPER: Okay. Um, in order to, to clarify this, uh, we know the incident took place on Tuesday, okay, if that'll help you any. Late Tuesday night or into Tuesday evening and into the early hours Wednesday morning. Will that help you out a little bit as far as timewise, Robert?

POYSON: (Inaudible).

COOPER: Okay. Now, do they call you Robert or Bobby?

POYSON: They call me Bobby.

COOPER: Okay, which do you prefer?

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POYSON: Don't matter.

COOPER: Okay. So that would've been Monday. When they came home, uh, they..had they done any shopping or anything?

POYSON: Yeah, they did. They went I guess Leta picked up her food stamps that night or that morning.

COOPER: So she did some grocery shopping?

POYSON: Yeah.

COOPER: Okay. Um, anything -- what, what happens Monday night? Any problems or anything?

POYSON: And we start talkin' about it. Just talkin' about what we're gonna do. First, it, it originally started out, we were just gonna kill Roland and tie up Leta and take Robert with us.

COOPER: Okay, let me back up for a second. "We start talkin'", who's "we"?

POYSON: Me, Frank and Kim.

COOPER: And who brought it up?

POYSON: Kim. She brought it up as a joke saying because Frank started talkin' about he wanted to get outta here and Kim's--Kim stated that she could always, we could always kill her-- or kill them and take the truck.

And then we all laughed about it. And about, well, early Tuesday morning, Frank approached me and he looked like he was joking and then he got serious and he said, "Let's kill 'em." And I looked at him and he asked me if I was down and I told him yeah.

COOPER: Why? I mean these were, these were...

POYSON: Leta, I found out in June that Leta was only gettin' charged a hundred dollars a month on rent. That's what Leta was chargin' me for rent.

COOPER: So you were angry at her?

POYSON: And I felt she was rippin' me off. She was stealin' my money. Because I was paying their rent while Leta went to Laughlin and did all that stuff, played Keno and played

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POYSON: bingo while I had to stay home watch Robert and pay a hundred dollars rent a month, and I was still a babysitter.

COOPER: And not being paid for it.

POYSON: Huh-uh. And I didn't like the way Leta had showed respect to Robert. She showed Robert no respect. Always treated him like shit. Roland did, too. Roland always stated that he was just a spoiled little brat and that he needed to get his ass kicked. And Elliott always beat him. I didn't like Elliott.

COOPER: Okay. So Frank comes up to you Tuesday or Mon..Tuesday, right

POYSON: Tuesday morning.

COOPER: and brings this up and its basically because he doesn't want to be there and he wants

POYSON: (Inaudible). He wants

COOPER: to get out of there.

POYSON: to get out of there.

COOPER: And all this was basically so you guys could steal Roland's truck?

POYSON: Yeah.

COOPER: (Inaudible).

POYSON: On my part it was a little bit of getting revenge for them treating me like shit and stealin' from me.

COOPER: Now, Kim, at this point, is the first one that brings this up, right?

POYSON: Yes.

COOPER: Okay. And she brings it up also Tuesday morning?

POYSON: Yeah.

COOPER: Okay. Who brings it up first, her or Frank?

POYSON: Frank does.

COOPER: And --

POYSON: And in the morning.

COOPER: Okay. And, and when did she talk to you about it?

POYSON: We went for a walk and I started tellin' her that all we had to do was find the

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POYSON: bullets and we'd have--they'd have to hurry up and get Leta out of there because Leta was supposed to go grocery shopping again and go talk to Elliott on Tuesday. And so Kim got 'em out of there or Frank got 'em out of there. Frank had 'em go into town and when they went into town, I ran around the house looking for bullets and I couldn't find any. And then I approached Frank when he got back and I told him there's no way we can do it. And he asked me why and I said I couldn't find no bullets.

COOPER: Now, who all goes into town?

POYSON: It was just Frank, Leta and Roland.

COOPER: And where was Robert?

POYSON: Robert was there with us. Well, we started talkin' -- Monday night while we were getting drunk, we started talkin' about bringin' Robert into it. We were gonna have Robert come with us. And he said he would do it as long as we ne..we didn't kill his mom. He didn't care if we killed, um, Roland. He just didn't want his mom killed.

COOPER: So he's originally part of that?

POYSON: Yeah.

COOPER: Was he in on the conversation Tuesday?

POYSON: No.

COOPER: What...

POYSON: He helped us look for the bullets and that's about it.

COOPER: What put him outside being part of this?

POYSON: It was just telling Robert that stuff because Robert overheard us talking about it.

COOPER: So Robert never really was going to be part of it?

POYSON: No.

COOPER: Okay.

POYSON: But Robert overheard us talkin' about it so we brought it up to him. He heard us Monday, Monday afternoon about three o'clock when we were talkin' about it.

COOPER: Okay, now, you, you say you talked about it Tuesday morning, so let's go back to Monday now, Monday afternoon. I guess when you first brought it up.

POYSON: Uh-huh.

COOPER: Who first, the very first person who mentioned it?

POYSON: Kim.

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COOPER: Kim. And she mentions it to who?

POYSON: To just to me and Frank

COOPER: And what does,

POYSON: in general.

COOPER: what does Kim say?

POYSON: Said well we could always kill them and take their truck.

COOPER: And, and she appeared to be joking?

POYSON: Yeah. She started laughing.

COOPER: Okay. And did you or Frank take her seriously?

POYSON: I took her seriously.

COOPER: Why was that?

POYSON: Because the way she laughed. The way she had her laugh. It was like a devilish evil laugh.

COOPER: So you, you, at one point, tell me you think she was joking, but

POYSON: (Unintelligible).

COOPER: you took her seriously?

POYSON: Yeah, the wa--the way she, she said it, she said it like it was a joke but yet also in another way, it..hers laugh and her smile but devilish. Like she was serious about it.

COOPER: Okay. So then the plot actually starts Monday about three o'clock in the afternoon?

POYSON: Yeah.

COOPER: And this is when Robert overhears it?

POYSON: Uh-huh.

COOPER: And you guys bring him into it but you really have no intent to making him part of it

POYSON: Yeah.

COOPER: is that correct? Okay.

Tuesday, Frank and Kim get Leta and Roland to go into town?

Interview by: Det. Eric Cooper, D39
Mohave County Sheriffs Office
Kingman, AZ

POYSON: No.

COOPER: All right.

POYSON: Frank gets Leta and Roland to go into town.

COOPER: I'm sorry.

POYSON: Kim stayed there with me and Robert and we looked for bullets.

COOPER: Okay. So now, Tuesday when Frank and Leta and Roland are in town, you and Kim and Robert are looking for bullets?

POYSON: Yes.

COOPER: And you didn't find any?

POYSON: No.

COOPER: Okay. So what happens next?

POYSON: Uh, well, they come back and then I tell Frank that we can't do it and he wanted to know why and I told him, well, I couldn't find no bullets 'cause our original plan was to shoot 'em all. And then Frank said, well, we could always slice their throats. And so I went around the house, I started looking for a knife. I couldn't find one

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POYSON: and then Frank walked up to me with a, it was like a bread knife and he said, well, we can use this. And I said all right. And then we walked all -- me, Kim and Frank walked out into the trailer, we sat down and we started talking about how we were gonna do it.

COOPER: Okay. Before I forget, you know the tape recorder's on, right?

POYSON: Yes, I do.

COOPER: And you don't have a problem with that?

POYSON: No.

COOPER: Okay. Uh, when Frank brings out the butter knife, its--or--the bread knife, is Kim aware, Kimberly aware of this?

POYSON: (Unintelligible).

COOPER: So she knows now you have the weapon?

POYSON: Yeah.

COOPER: Okay. So you guys -- what, what happens next?

POYSON: Um, I walked up to Frank -- well, we went into the trailer and went into the trailer about six o'clock Tuesday night.

COOPER: Who's "we"?

POYSON: Me and Frank and Kim and Robert. And then Kim walked out and Robert walked out and I told Frank, well, let's start it now. Let's get, let's get it overwith. Because I wa..I just wanted Robert -- I didn't, I didn't even want to see Robert.

COOPER: Okay.

POYSON: It was originally planned for Frank to kill Robert and I was to kill Leta and Roland.

COOPER: What's the relationship between Frank and Kim?

POYSON: Lovers.

COOPER: Okay. Okay, so you tell Frank let's just get it done with, then what happens?

POYSON: Frank says, all right. I lure Robert into the trailer and I walk out.

COOPER: That's that little travel trailer over there, right?

POYSON: Yeah, where Robert was killed. And I walked out. And Frank -- I walked out. A half an hour later about six thirty, six forty five, I, I walked back. I think its done and over--overwith. I walked back and Robert's walking outside, pacing outside.

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COOPER: Why was he pacing outside?

POYSON: I don't know. And then I walked up...

COOPER: Well, let me, let me ask a question real quick. Because from one point, you're not gonna kill Robert, now you are. What changed your mind as far as not killing Robert or killing (inaudible)?

POYSON: We were gonna kill him the whole time.

COOPER: Okay.

POYSON: That was the whole plan.

COOPER: Okay.

POYSON: We just wanted him to think that we weren't going to.

COOPER: Okay. Okay, so you walked back and, and Robert's?

POYSON: Pacing. So I go in the trailer and I asked Frank what happened. He says, well, let's not do it now. Let's wait until it starts gettin' dark. And I said all right. To me, when I looked at Frank, he looked a little paranoid like he didn't want to do it. And I asked him if he wanted to stop and he said no, he wanted to do it. So we walked out and go and sit down by the truck, pulled the tailgate down and sit down and start talking.

COOPER: Who's "we"?

POYSON: Me, Frank and Kim. Robert's walking with us and then he goes in the house. Um, then I started talkin' to Frank. I saw Frank was gettin' paranoid so I set up a situation to where it would get Frank jealous and Frank would kill Robert and it was basically that. Robert was to make love to Kim with Frank watching. So tha' I went with it. At first, it was supposed to be me, Frank watching while Kim and Robert made love on the bed. Robert got paranoid because Frank kept tryin' to walk up and start doing it. And this was about seven thirty, eight o'clock.

Uh, Frank keeps walkin' up to the bed while Kim and Robert are kissing and making out. And Robert gets paranoid. I jump up and I say, well, what's wrong, Robert. And he said, well, I, I just don't wanna get stabbed if I do this. And...

COOPER: Why, why would he say that?

POYSON: He had a suspicion.

COOPER: Okay. Now,

POYSON: Because of the way Frank kept walking up to him and he had his hands behind his back.

COOPER: Did he have the knife in his hand at that time?

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POYSON: Yeah.

COOPER: Okay.

POYSON: Yes, he did.

COOPER: What would make -- wha' -- how did you convince him to make love to Kim with you two bein' in the trailer, at least even givin' it an attempt?

POYSON: Um, I told Robert that Frank couldn't do it because he was sterile, or not sterile, he was impotent for that time because he was too nervous 'cause of what was gonna go down. Because Robert had already knew we were gonna kill Roland. He didn't know we were gonna kill him and, and Leta. He thought we were gonna tie Leta up and steal the truck. And some way, (unintelligible) went in through the trailer and they started making out, about half way through it, Robert knew that he was gonna die, too.

COOPER: And then you guys did or, you just think that's what he thought?

POYSON: That's what I think because he kept getting up and looking and he, he wouldn't stay there and make out with Kim.

COOPER: Did he like Kim?

POYSON: Yes.

COOPER: Then what happened?

POYSON: Uh, I asked Robert what was wrong. He said he just didn't want to get killed for doing it and I told him, well, if he's gonna kill you, then he's gonna kill me. And so I, I tell Robert to get up and I tell him, well, I'll make out with her. I'll get her ready for you, Robert. And I got on the bed with Kim. I started acting like I was kissing her and I was rubbing on her side so Robert would think that I was trying to get her ready. And then I got up, I said, see, Robert, there's nothing wrong. And he goes -- and I don't remember what he said. Oh, he stated, um, that he didn't, he didn't care, 'cause he just didn't want to die. And he said he couldn't do it in front of an audience. And I told him, well, Frank has to stay. I said if..but if you want, I will leave. He says yeah, so I left. I walked out of the trailer. I was gone for about ten minutes.

COOPER: Where'd you go?

POYSON: Into the house, sat down. I made a phone call.

COOPER: Who'd you call?

POYSON: Kirstin Foster.

COOPER: Who's that?

POYSON: It was like a girl that I was seeing.

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COOPER: Where does she live?

POYSON: In Kingman.

COOPER: Do you know her phone number?

POYSON: Yeah, 692-9523. I called her just to talk until it was over because I was getting a little paranoid myself. And then I started hearing screaming. So I hung up with Kirstin and I left the house. I started walkin' towards the trailer of the little camper and Kim came running up to me with her hands behind her head and her elbow sticking out and she looked at me, she said he did it, he did it.

COOPER: Okay, let me back up for just a second. You heard yelling, where were Leta and Roland, why didn't they (inaudible)?

POYSON: In the kitchen.

COOPER: Why didn't they hear (inaudible)?.

POYSON: Leta had the radio on.

COOPER: Does she go by, does, does she go by Shockey as a nickname or something?

POYSON: Yeah.

COOPER: All right, so you walk out, Kim basically tells you that Frank did it.

POYSON: Yeah. And then as I sta--start to walk, I tell Kim to go into the house. And as I, I started to walk (unintellig.) could..because all the screaming stopped.

COOPER: Does Kim have any blood or anything on her?

POYSON: No.. I start walking out into the, start walking to the little trailer and I start hearing screaming again so I, I started running. I ran there and Frank looked up at me and he says, I can't cut him, I can't cut him. And he said, Bobby, help. So I got down there and I started -- I was gettin' ready to cut his throat and Robert looked up at me and says why are you doing this. You lied to me. And I started cryin'. And I had the knife in my hand and I backed up, I said, no, no, we were just jokin',Robert, we were just fuckin' with you. And Frank looked at me, he says no, he says I've already cut him. He says we can't change now.

COOPER: So Bobby's already been, Robert's already been cut?

POYSON: Yeah. So we start -- I started tryin' to cut him. Um, he's on the ground, Frank has his hand over Robert's mouth and Robert's still tryin' to scream, tryin' to bite and then Robert got hold of my finger and he bit down on it.

COOPER: And that's the (unintellig.) finger that you showed me. Its your little finger of your right hand?

POYSON: Yes.

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COOPER: Okay.

POYSON: And he bit on it and he wouldn't let go, so I started punching him in the head with my left hand. And when he let go, he dropped his hand I cut him again in the throat and he wouldn't, he wouldn't die, he just kept struggling and struggling. So I started takin' his head and bashing it into the ground. And then he would look up at me and keep talkin' to me, asking me why, why I was doing it. He thought..he won't tell, he won't tell. He just -- he'll go with us.

And then Kim walks in and asks is it over. Are you guys done. And as -- I look up to see Kim, Robert takes the knife out of my hand and cuts me in my left, my left hand right above my elbow. And I tell Kim to go get me a rock. So she goes out and she gets me -- its like a little cinder block. It was cinder block but it was in like a rectangle shape. No more than four or five inches big and I grips, gripped it and it had a point on the bottom and I started hitting Robert in the head with it. And Robert was still screaming.And he, he kept screaming, he wouldn't stop. So I just started bashing his head into the ground again. And then Kim came back and looked and says you guys want anything. I tell her to go get me some water and to bring me another rock, one that I can grip.

COOPER: She's comin' back and forth (unintellig.) she's not panicking or nothin?

POYSON: She is to a point but she's just tryin' to be helpful right at that time.

COOPER: So she's helping in all this?

POYSON: Yeah.

COOPER: Now, you're just telling her, I mean, this -- if you can, how are you telling her to get you another, you know, you're tellin' her to wash up and to get you another rock, right?

POYSON: Yeah.

COOPER: Isn't that what you just told me?

POYSON: No, no. I, I'm telling her to go get me a glass of water because I was startin' to get thirsty and I was gettin' blood in my mouth. And I asked her to go get me a rock that I could grip.

COOPER: When were you planning on drinking the water?

POYSON: After it was all done.

COOPER: Okay. Now, there, there's a cup outside the front door of the trailer or near the trainer near that door,

POYSON: The...

COOPER: the small travel trailer that you guys were in, would that be the cup that you used?

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POYSON: No.

COOPER: What, what did you use?

POYSON: Um, the cup that I used, I, I smashed it against the rock. It was a tall cup, it looked like a mug and it had like a little diamonds in it.

COOPER: Did it break?

POYSON: Yeah, as far as I know, it did. I heard it shatter. I don't think it broke completely.

COOPER: Okay. All right, so you're struggling in there, you send Kim to get you a rock and a glass of water?

POYSON: Yeah. And Kim comes back with the rock first...

COOPER: Are they still struggling pretty hard in there?

POYSON: Yeah. Kim comes back with the rock and I grab the rock and I start hitting Robert in the head with it trying to, hoping that Robert will just give up and let it go. He wouldn't so I asked Frank to find the ear. I have the knife in my hand at this time. I asked Frank to find the ear. And he found the ear with his two fingers and I says all right, I'm gonna put the knife by your fingers and I want you to put it in the ear. And he put the knife in his ear and I started -- I hit it twice and it bounced out. And then I panicked and I started lookin' for the knife again. I grabbed it, as I grabbed it, Robert took that away from me and then he sliced me right here in the face.

Then I take the knife away from him and I put it back in his ear and I just started hitting him, hitting the knife into his ear. And it went in and then I started hitting him on the head with the rock. Robert was struggling but he wasn't struggling as hard. He started showin' signs of being--getting tired and being weak. And that's why I just started hitting him in the head with the rock and then he wa--he wasn't moving, he was gargling. And then when he quit gargling, I got up and Kim came back with the water.

COOPER: What was Frank doing this whole time?

POYSON: Holding Robert down.

COOPER: Why the knife in the ear?

POYSON: Because I figured if I were to put it into here, it would get his brain and it would kill him.

COOPER: Why not the heart?

POYSON: We already tried twice. Frank stabbed him twice in the heart and he wouldn't die.

COOPER: Okay. So at this point, does he pass out?

POYSON: Robert?

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Mohave County Sheriffs Office
Kingman, AZ

COOPER: Yeah.

POYSON: As far as we know, he, he died.

COOPER: Okay.

POYSON: He wasn't breathing. He sho..I checked his pulse, he was showin' no signs of having a pulse. And I got up and then we went into the shed and we told Kim to go get us two more glasses of water, so that I could take my..the shirt that I had on, it was like a little tank top, a white tank top. I took it off and I started dipping it in water and I started washin' myself off.

And then we got undressed -- oh, Frank got undressed first and Kim walked up to the house to make sure that Leta and Roland weren't there and Frank went into the house to the shower.

COOPER: Where were they?

POYSON: They were in the kitchen.

COOPER: Now, you got totally undressed?

POYSON: Yes, in the shed.

COOPER: And then walked to the house?

POYSON: Yeah.

COOPER: And what were you doing?

POYSON: I was sitting there still tryin' to wash, wash myself off with the cloth. And then when Frank came back, Frank came back dressed, no blood on him. So then I snuck in. Kim snuck me in. And I went in and I took a shower. And then I grabbed some toilet paper and some like clear tape and I put toilet paper right here and I started wrapping it.with the tape.to stop the bleeding. And then after we were all washed off, we all went outside and then Leta started calling for dinner.

COOPER: About what time was that?

POYSON: About eight forty five, nine o'clock.

COOPER: Now, what was everybody's demeanor at this time, I mean, were they scared? were they happy?

POYSON: I was a little shakey. Frank was shaking a lot. He was nervous and he..it showed that he was nervous. Kim was joking about it, kind of joking and kind of looking serious and being -- you could tell by the way she was joking that she was scared..

COOPER: So Leta calls you in for dinner.

POYSON: We went in. Frank ate, Kim fed her do..her food to Stopper, the dog. I went in, I grabbed one piece -- well, I paced around the house for about five minutes tryin' to calm myself down completely and then I walked into the kitchen and I grabbed a piece of

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POYSON: chicken, a chicken leg, and I walked out. I told her all I wanted was a little bit of chicken. And then when I walked by the back door, I threw it out. And then we, we started walking and that's when Carmen showed up. Carmen walked over to give me a no because I was writing her. And then I gave her a kiss, put my arm around her and then I asked her -- I told her Robert was out in the desert and he was surrounded by snakes, and we needed some bullets.

Then she goes okay, I'll go get you some but she, and she goes you have to walk with me.

COOPER: Let me ask you a question. Didn't Leta or Roland ask where for Bob--or--where Robert was

POYSON: No.

COOPER: any time? They weren't even worried about him?

POYSON: No.

COOPER: Okay. So Carmen says you need to walk with her.

POYSON: To her house so she can go get the bullets and so we -- so me and Kim walked with Carmen. I'm holding Carmen's hand. I put my hand around Carmen as we're walking and then she goes in and she brings me two twenty two bullets.

COOPER: Where'd she get the twenty two bullets from?

POYSON: Her dad used to have a twenty two pistol and he had extra bullets and he left 'em -- I don't know where he left 'em but she knew where he left 'em.

COOPER: And what happens?

POYSON: She gave me the bullets, I gave her a kiss. Told her I'd see her the nec..tomorrow. And then me and Kim walked back.

COOPER: So Kim went over with you to the house?

POYSON: Yeah. And then I went into the house, I got the twenty/two rifle and I loaded it.

COOPER: Where'd you get the rifle from?

POYSON: The rifle belongs to Roland.

COOPER: And where was it?

POYSON: It was in Roland's room right next to the bed.

COOPER: So it was in the master bedroom?

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POYSON: Yes.

COOPER: And you load it, then what do you do?

POYSON: Then I walked outside...

COOPER: Where do you put the rifle?

POYSON: Huh? It was with me.

COOPER: In your (unintelligible) okay.

POYSON: I -- we walked outside behind the truck and that's where I start playing with it to make sure that if..because its a single shot rifle and then I start playing with it to make sure that if I shot once and I cocked it, to cock it back if the bullet wouldn't get stuck. Because the, the rifle have problems, it was doing that. So I sat out there and I played with it for about five minutes and then I walked over and I put it by the shed. There's a shed right next to the house with like a rusted, I don't know, its like the rust color tin thing sitting up. I went over and I put it on the other side of it. And I left it there until Leta and Roland went to bed.

COOPER: What time did they go to bed?

POYSON: About eleven o'clock.

COOPER: Now, between the time that you took the rifle and you tested it to make sure that you could load it and, and it would work properly, um, and eleven o'clock, were you guys in the house, walked around (unintelligible).

POYSON: No, we were outside behind the truck sitting on the she..on the tailgate and then I got up and I walked around for a little bit

COOPER: (Inaudible).

POYSON: tryin' to, tryin' to get enough, get up enough nerve to do it.

COOPER: What were you guys talkin' about while you were out there?

POYSON: About how we were gonna do it. What we were gonna take and how long it would take to get to Chicago.

COOPER: When did, when did Carmen see Robert's body?

POYSON: I don't know. Sh..the whole time I was there, Carmen didn't see it.

COOPER: Go ahead.

POYSON: Then about eleven thirty -- well, Leta and Roland went to bed about eleven or eleven thirty and then we went in the house. And I was sittin' there and we were talkin' about it, whispering about what we were gonna do and how we were gonna do it. And then I came

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POYSON: up with the idea that I would hold the gun, but Frank would have to hold the lamp. And that I would go into Leta's room with the gun and tell her I'm gonna get a book because I like to read and she knew it. I was gonna get a book and then I was gonna walk out.

COOPER: Where were you gonna get a book from?

POYSON: From her room in the master bedroom. There's -- she's got Star Trek books and a bunch of other books against the wall on a book shelf. And then I walked in [excuse me], I walked into the -- about twelve o'clock, twelve fifteen, we were all done talking about it. Frank took Kim outside because Kim didn't want to hear it or see it. And so I walked in to the bedroom -- or, uh, I sat down while Frank took Kim outside. Frank came back and we smoked a cigarette before we did it. And then we got up and we went into my room first to see if they were asleep. I opened my thing up with just a slight bit to see if they were asleep and they were asleep. So then we went into their bedroom and I went back to, to get a book. I grabbed a book and I gave it to Frank. And then Leta looked up and she goes what are you doin' and she saw the rifle.

COOPER: When did you get the rifle?

POYSON: I had the rifle when I went back into the house about eleven thirty.

COOPER: And while you guys were in the living room.

POYSON: Yeah. And then I walked -- Leta saw the rifle and she asked me, she goes put that thing back.

COOPER: A question. Which side of the bed was she on?

POYSON: [No verbal reply].

COOPER: If you're facing from the foot of the bed looking toward the bed, was she on the left

POYSON: From the foot?

COOPER: or the right? (Inaudible).

POYSON: Facing the way they were laying?

COOPER: Yeah.

POYSON: Left.

COOPER: So if you're looking at her, she was on the left; Roland was on the right.

POYSON: Yeah. Roland was next to the..closest to the wall.

COOPER: Okay. And nearest the telephone?

POYSON: Yeah.

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COOPER: Okay.

POYSON: Right above 'em.

Oh, um, about twelve o'clock I walk outside and I snipped the telephone line.

COOPER: What'd you snip it with?

POYSON: Scissors. It was like hair--hair cutting scissors. Then Leta saw the gun...

COOPER: Why'd you snip the wires, I'm sorry?

POYSON: So that they couldn't call out. If I -- like if we messed up, and I had killed one of 'em, so they couldn't call.

COOPER: Whose idea was that?

POYSON: Mine. I walked outsi.. -- well, okay, I was in the room and Leta saw the gun and she, she told me to put that thing away, talking about the gun. And so I walked on her side about to the foot to where her feet were and as she started to roll over, I picked the gun up and I aimed it and as she turned around and looked at me, she said what are you and I pulled the trigger. And she fell instantly and started gargling.

Roland jumped. I unloaded and reloaded and then pointed at Roland and I shot. Roland fell back and then jumped back up a little. And I panicked. I bumped Frank and the lantern went out.

COOPER: Okay. So Frank was in there when you did this with the lantern?

POYSON: Yeah.

COOPER: Okay.

POYSON: He had the lantern.

COOPER: Is this just like a Coleman lantern?

POYSON: Yeah.

COOPER: Then what happens?

POYSON: I run outside, me and Frank run out, we start panicking.

COOPER: Now, you say, "run outside", do you go into the living room? Did you go outside?

POYSON: Into the hallway.

COOPER: Okay.

POYSON: We start panicking. We light it again with the lighter and then by the time we light it and we're gettin' back over to where the room's at, Roland's at the door. Roland

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POYSON: starts screaming.

COOPER: Okay. I'm sorry, I'm just trying to get all...

POYSON: Yeah.

COOPER: understand everything, okay. When you come into the bedroom at first, okay, was Leta dressed or undressed?

POYSON: When we first went in?

COOPER: Right.

POYSON: She was undressed. She..all she had was a sheet over.

COOPER: Okay.

What about Roland?

POYSON: He was undressed in the bedroom.

COOPER: Did he have any underwear or anything on?

POYSON: No.

COOPER: Okay. So when he gets up out of bed, he's naked?

POYSON: He gets up -- well, okay, as we're doing the whole thing, getting the lantern to light again, we hear slapping sounds. And then I hear the phone get picked up. And I hear, I hear Roland saying, start saying hello, hello and then I heard the phone hit the wall. And then I heard somebody getting off the bed. I didn't know who it was and I hear Roland's keys. jingle because he was putting on his pants. When I saw Roland, Roland had his pants on and that's it.

Um, he, he sees me as I get to the door and he shuts the door and he starts screaming Bobby, no, Bobby,no. I've never hurt you. And so then I started kicking the door. I kicked at it about four times. The fourth time I kicked it, Frank grabbed it and pulled it away.

And Roland walked out and he started talkin' to me tryin' to get me to calm down. Said he couldn't hear me 'cause I, I started telling him, tellin' him to come on, come on. Just walk over to me.

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.(TAPE ENDED).

BEGIN SIDE B:

COOPER: The time is 2125. The date is still, uh, August 24, 1996. What we're gonna do is we're..we just went to the second side.

We're gonna take a break and,um, we'll continue this, uh, as soon as we get done with the break. Be about five minutes.

The time is 2135. We're back on tape.

COOPER: Um, we really didn't talk about this interview did we, about, uh...

POYSON: No.

COOPER: We talked about what was gonna possibly happen to you about goin' back to Arizona, um, and I think you said you wanted to waive extradition?

POYSON: Yes, I did.

COOPER: Okay. Um, during that time, did-I, did I tell you that, hey, if you talk to me, I make you a promise that something's gonna happen?

POYSON: No.

COOPER: So there's no promises, nothin' been made to you, right?

POYSON: No.

COOPER: Okay. Um, you shot Leta, you sh..did you hit Roland when you shot him?

POYSON: Yes, I did. I got him in the mouth.

COOPER: Okay. So you shot him in the mouth, he gets up and he's naked, you, you struggle there in the bedroom, is that right?

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Interview by: Det. Eric Cooper, D39
Mohave County Sheriffs Office
Kingman, AZ

POYSON: We -- uh, me and Frank were outside in the hallway...

COOPER: Well, let--let -- you shoot him, do you immediately go out into the hallway or?

POYSON: Yes, I panicked. I started backin' up and I hi'..I bumped Frank, eh, I bumped, I bumped the lantern and the lantern went out and we, we both panicked and we, we ran out into the hallway to light it again.

COOPER: But it didn't fall, it just went out?

POYSON: Yeah.

COOPER: Okay.

POYSON: We then -- I started kicking the door because when we lit it up again, by the time we lit it up and we got back to the, the entrance of the bedroom, Roland was already there tryin' to get out. And he saw me, he started screaming, started saying, Bobby, stop. Bobby, don't. I never did anything to hurt you. And I started kicking the door. The whole time I was kicking it, Roland was screaming.

COOPER: That door, which way does it open, toward the bedroom or toward the hallway?

POYSON: Towards the hallway.

COOPER: You're -- why are you kicking the door?

POYSON: Because it was just like a closet, a closet slide--sliding door. And when I shut it, it went into the room. It stayed on the wall. The wall kept it from falling.

COOPER: So was the door stuck closed?

POYSON: Yeah.

COOPER: Were you trying to open it?

POYSON: No, Roland was trying to slide it and the way I tried to open it was I was kicking it.

COOPER: Okay.

POYSON: I kicked it about four times. On the fourth time, I kicked it, it went in all the way and came all the way out and Frank grabbed it and pulled it out.

COOPER: So it ended up in the hallway?

POYSON: Yeah. And Frank -- or Roland still had hold of it and Roland used that to try to like barricade me away.

COOPER: Okay. Why was he tryin' to barricade you away?

TAPE RECORDED INTERVIEW - Ca[illegible]o. 96-17052 - ROBERT POYSON (Suspect)

Interview by: Det. Eric Cooper, D39
Mohave County Sheriffs Office
Kingman, AZ

POYSON: So that I cou..I wouldn't do anything else. Because I, I still had the rifle in my hand and I had it gripped by the barrel.

COOPER: Why did he not want you to do anything else at this point?

POYSON: He didn't want me to finish. He didn't wapt to die.

COOPER: Who was barricading you out, Frank was barricading you?

POYSON: No, Roland was.

COOPER: Roland was, okay.

POYSON: And then as he started coming towards me with the door, I started taunting him, telling him to come on, come on.. Then as he started walking towards me, I tell him, told him in a joking manner or, or in a sarcastic way, that he had somebody behind him, which Frank was behind him. Um, and then he looked and he saw Frank, and but didn't do anything and he still kept tryin' to go towards me. Frank grabbed the door from him and then threw it and then threw the lantern at him.

COOPER: Did the lantern hit him?

POYSON: Yeah.

COOPER: Where did it hit him?

POYSON: In the head.

COOPER: Then what happens?

POYSON: Then Frank ran out, we were going into my bedroom and he got another one.

COOPER: Another?

POYSON: Lan--lantern. Then Roland started coming towards me again and then I hit him with the butt or the stock of the gun. I hit him twice, the second time I fell. And then -- No, wait. I hit him three times. The first time I hit him was he started, he started talking to me and then he wanted to go in his room and grab the hearing, grab his hearing aid because Roland wears a hearing aid. And I told him all right. And then as he went into the room, I followed him. And as he turned his back to me and started reaching for it, I hit him up side the head and then he dove for me. And I moved back and I went back into, out into the hallway and then he started coming towards me again and I hit him again with the stock of the gun. And he fell and then he got back up. And then I hit him again and I tripped over something.

COOPER: Where'd you hit him?

POYSON: In the head.

~~COOPER: Were all these head..hitting him that you were (unintelligible/inaudible)?~~

TAPE RECORDED INTERVIEW - (No. 96-17052 - (ROBERT POYSON
(Suspect)

Interview by: Det. Eric Cooper, D39
Mohave County Sheriffs Office
Kingman, AZ

POYSON: Yes. And then when I fell, I panicked. I jumped up and then I st..I ran to the front door.

Frank -- my back was turned to Roland and Roland ran out the back door and Frank told me that. So I went out the front door, circled around and as I circled around the house to where the truck was, I saw Roland tryin' to get into the truck.

So I walked up on Roland and I hit him with the stock of the gun again and the stock broke, and then Roland fell. And he started crawling and then he got back on his feet. I hit him again with just the barrel of the gun. He ran, or he didn't run, he fell and as he fell he grabbed a stick and he started swinging it at me. And then as he was swinging -- when he swung away from me, I reached over and I hit him with the barrel of the gun again but he hit me. He got me on the left arm in the front of my arm right here.

COOPER: Just above the wrist?

POYSON: Yeah. Just a little scratch. And then I just kept hitting him with the barrel of the gun and then the lever for the gun to unload it and reload it, got stuck in Roland's head. Then I pulled out and I dropped the barrel because I..'cause Roland wasn't moving and I went over to where Frank was. He had, he still had the lamp on and he was outside. And then I told him its done. We're done. And then he, he looked at me he told me no, we're not done. Then I looked over and Roland was still trying to get up. And Roland got up. Frank grabbed a cinder block and threw it at Roland's back.

COOPER: (Inaudible/unintelligible).

POYSON: Roland fell. Yeah, he hit him in the back. I heard a crackling sound, then Roland fell to the ground and then Roland was still moving his head up and I kicked him twice in the head and I told him to put his head back down. Screaming put your head back down. Kicked him twice in the head and then he put his head down. I grabbed the cinder block and I threw it about three or four times at his head. And then he wasn't moving. I grabbed his wallet and then I went looking for the keys. I found the keys about five or six feet away from where Roland was laying. They were full of blood. I went in, I unlocked the door and I let Kim in. Kim was at the back of the truck the whole time.

COOPER: So she witnessed what happened outside but not inside?

POYSON: Yeah. Uh, after Roland was dead, we went in, we grabbed the stereo. We grabbed a Coleman lamp that we could pawn. It was green, it was in the back of the truck. And then we got in the truck and we left. We, we started driving off.

COOPER: Who drove?

POYSON: Frank did.

COOPER: Okay now, I wanna back up before we (inaudible), okay?

POYSON: Uh-huh.

TAPE RECORDED INTERVIEW - (e No. 96-17052 ROBERT POYSON (Suspect)

Interview by: Det. Eric Cooper, D39
Mohave County Sheriffs Office
Kingman, AZ

COOPER: The door to the trailer?

POYSON: Um, Frank locked it up. He put a board up against it so that it wouldn't fall open and nobody can get into it.

COOPER: Okay. The bandages on your arm when you went in, you put those on before dinner, the, the toilet paper and the tape,

POYSON: Yeah.

COOPER: didn't, didn't, uh, Leta ask you what happened?

POYSON: No.

COOPER: How come?

POYSON: She really didn't care what happened around there.

COOPER: And during the whole situation inside the trailer, the shooting of, of Leta and the fight with Roland, Kim was outside didn't see it?

POYSON: She didn't see what happened inside the trailer because she was outside in the back of the truck with, uh, uh, the tailgate down.

COOPER: When you're outside yelling, didn't you worry about anybody hearing you?

POYSON: No.

COOPER: How come?

POYSON: I just wanted to get it overwith. I had a struggle with Robert and then I had a struggle with Roland. And it was all supposed to be so clean. Just cut his throat, Robert wouldn't move. Um, shoot Roland and he wouldn't move. When I aimed the gun at Roland, he looked up and he looked at me and I panicked. And that's when, that's why I missed. I was aiming toward Roland's head and then I panicked and as I shot, I shot down.

COOPER: Who came up with the way that you were gonna do this?

POYSON: It was a little of both me and Frank. I came up with most of it but Frank came up with a little bit.

COOPER: And Kim was basically the one that planted the idea in everybody's head?

POYSON: Yeah.

COOPER: Now, when you're drivin' out of there, Frank's drivin', why..how come you didn't drive?

POYSON: I don't know how to drive a stick.

COOPER: When you leave there, how'd you go? How'd you leave there?

POYSON: We left the back road, uh...

TAPE RECORDED INTERVIEW - C No. 96-17052 - ROBERT POYSON
(Suspect)

Interview by: Det. Eric Cooper, D39
Mohave County Sheriffs Office
Kingman, AZ

COOPER: Did you go out the driveway?

POYSON: No. We went out, okay, the truck was parked in the back of the house by the back door.

COOPER: Oh, one, one other thing before you...
You kill Roland?

POYSON: And I covered him up. I put a garbage and a couple of big long card..well, not, not... a lot like plywood and I co..put it over him. I put a couple of sticks, two by fours and stuff, over him so that he would be hidden.

COOPER: Okay. So now you, you've hidden him, when you leave, do you have the headlights on or off?

POYSON: Off.

COOPER: Okay.

POYSON: Until we get to the road, get half -- I -- there's Yavapai, at the end of Yavapai, there's a little road that goes like this, we went out that way and we took a right onto the other road. We drove with headlights all the way to end of that road, half way down the other one and then we turned the headlights on and left.

COOPER: Whose idea was (unintellig.) leave the headlights on?

POYSON: Mine.

COOPER: Okay. And when you leave -- do you know where Shinarump, Shinarump are, uh,

POYSON: Yeah.

COOPER: (unintelligible)? Did you get, get on Shinarump?

POYSON: Yes, we did.

COOPER: And did you go toward I-40 or, or toward Golden Valley?

POYSON: I-40.

COOPER: OK.
So you get on Shinarump and you're--or--Frank's driving, where are you sitting?

POYSON: I'm sitting on right, right next to the passenger seat, passenger seat.. Kim was in the middle.

COOPER: Okay. And do you get on I-40?

POYSON: Yes, we did.

COOPER: And then where'd you go?

POYSON: Towards Flagstaff.

TAPE RECORDED INTERVIEW - (: No. 96-17052

ROBERT POYSON
(Suspect)

Interview by: Det. Eric Cooper, D39
Mohave County Sheriffs Office
Kingman, AZ

COOPER: And did you stop in Kingman at all?

POYSON: No, we didn't.

COOPER: Did Frank appear when, when he got down to Golden Valley, when he first came there, that he knew his way around Kingman or knew anything about Kingman?

POYSON: Naw-huh-uh.

COOPER: Did he ever say that he had known anybody in Kingman?

POYSON: Yes, he said he knew somebody who worked at a restaurant. He never said which restaurant. As far as I know, it was next to a motel room, next to a motel. And when -- I guess when he went there when he came back -- well, they went there Monday, Monday morning and when they came back, Frank told me that the guy left. They, they changed management and the guy that he knew that was managing the restaurant was no longer managing it.

COOPER: Okay. Okay. Now, you're on I-40 and you're headed toward Flagstaff.

POYSON: And then we just, we just hit I-40 all the way to, till we got to fifty five, I-55. We went up a little...

COOPER: Did you, did you stop on I-40 at all? (Sneeze). [Excuse me].

POYSON: We stopped in Flagstaff. We stopped in a little town -- we stopped basically at every other truck stop.

COOPER: How come?

POYSON: To try to hustle money so we could get gas.

COOPER: And were you so successful?

POYSON: Yes.

COOPER: Who was doing the hustling?

POYSON: It was Kim and Frank.

COOPER: Did you -- did you pawn anything or sell anything right away?

POYSON: Yes, we, we pawned a drill and I don't remember what else we pawned. Two things, we got fifteen dollars for both of 'em.

COOPER: Okay. And do you know where you pawned those?

POYSON: No.

COOPER: So you stopped at just about every other truck stop hustlin' money?

POYSON: Yeah.

COOPER: Did you ever stop at a truck stop where Frank said he knew somebody?

TAPE RECORDED INTERVIEW - (No. 96-17052 (ROBERT POYSON
(Suspect)

Interview by: Det. Eric Cooper, D39
Mohave County Sheriffs Office
Kingman, AZ

POYSON: Yes, uh, it was -- he used to work there. I don't remember where it was but he used to work there. I guess he worked seven years there and he was gonna try to get some gas. And then we took the tool box in and we showed 'em the tool box and he gave us ten dollars for the tool box.

COOPER: And whose tool box was that?

POYSON: Roland's.

COOPER: Uh, did Frank see his friend?

POYSON: No. He saw somebody else that worked there.

COOPER: Did he seem to know this guy?

POYSON: Yeah.

COOPER: Did he call him by name or anything?

POYSON: Huh-uh.

COOPER: Okay. And that's where you sold the tool box?

POYSON: Yes.

COOPER: And you get ten dollars for that?

POYSON: Uh-huh.

COOPER: Did you pawn the other (unintellig.) before or after that?

POYSON: After.

COOPER: So now you're, you're still on I-40 and you're still..are you still stoppin' at every other truck stop?

POYSON: Yeah.

COOPER: Okay. And then, then what happens?

POYSON: And we were stoppin' at every other truck stop and then we got to a little town and they had two pool sticks in the, in back of the seat. We grabbed those and we stopped at a bar. And Frank went in and got, uh, ten dollars for each of 'em.

COOPER: Whose idea was it to go onto I-40?

POYSON: Frank's. Well, it was my idea. He wanted to get to Chicago.

COOPER: Why Chicago?

POYSON: They told me that, all right, the whole, the whole reason why I even did it was because Frank said he was gonna be godfather of the Italian Mafia and he looked serious about it up here in Chicago. And that he would help, he would help me change my identity, change

TAPE RECORDED INTERVIEW - Ca[illegible] No. 96-17052 - ROBERT POYSON (Suspect)

Interview by: Det. Eric Cooper, D39
Mohave County Sheriffs Office
Kingman, AZ

POYSON: my face a little and then I was gonna transport and sell drugs for him. And my living situation with Leta and them compared to what I would've gotten if it was all true, I picked going up and selling drugs because I've done it before.

COOPER: Okay. So it was Frank's idea to go to Chicago?

POYSON: Yes.

COOPER: You don't know anybody here?

POYSON: No, I don't.

COOPER: Did Frank say, eh, Frank said he did.

POYSON: Yeah.

COOPER: Okay. At this point with Kimberly, she still kinda clingin' onto Frank?

POYSON: They're fighting. Um, we made it all the way to Arkansas and then they started fighting consistently over me. Because Frank knew that Kim liked me. Kim wanted to be with me instead of Frank. So they started fighting over it. And then when we hit the motel room in Wisconsin...
Well, we came here,about half way up in Chicago, about twenty miles on Fifty Seven, I-57, Frank told me it was all fake. It wasn't true.

COOPER: What wasn't?

POYSON: About the Mafia.

COOPER: What'd you do with the clothes that you guys were wearing?

POYSON: We threw 'em in the garbage at that, at the motel room at, in Wisconsin.

COOPER: Okay. What'd you do with the rock that you used?

POYSON: Both rocks are, uh, there's the little trailer and then there's a rusted old burn barrel right next to it. They're in there covered.

COOPER: So you got rid of your clothes in Wisconsin

POYSON: Yes.

COOPER: in that trash...

POYSON: Huh?

COOPER: You threw it away in the trash can?

POYSON: Well, we threw it away in a bathroom trash can, bagged it up and then Frank took it out.