No. 22-982

In the
Supreme Court of the United States

RYAN THORNELL,

Petitioner,

v.

DANNY LEE JONES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

JEAN-CLAUDE ANDRE
Counsel of Record
BRYAN CAVE LEIGHTON PAISNER
120 Broadway, Suite 300
Santa Monica, CA 90401-2386
(310) 576-2148
jcandre@bclplaw.com

Counsel for Respondent

JASON DALE LEWIS
Counsel of Record
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-7989
jason.lewis@azag.gov

Counsel for Petitioner

Petition for Writ of Certiorari Filed: April 6, 2023
Certiorari Granted: December 13, 2023

JOINT APPENDIX

TABLE OF CONTENTS

Special Verdict Re: Tisha Weaver
(December 9, 1993) JA1

Special Verdict Re: Robert Weaver
(December 9, 1993) JA8

Transcript of Oral Argument
(February 23, 2000) JA15

Minute Order
(May 23, 2000). JA86

March 21, 2006 Evidentiary Hearing Exhibit # 1
Declaration of Pablo Stewart, M.D. JA90

March 21, 2006 Evidentiary Hearing Exhibit # 23
Report of Psychiatric Evaluation by Dr. Jack Potts, Dated December 3, 1993 . . . . JA130

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following page in the appendix to the Petition for Certiorari:

Appendix A Order and Amended Opinion in the United States Court of Appeals for the Ninth Circuit
(November 7, 2022). . . . . App. 1

Appendix B Opinion in the United States Court of Appeals for the Ninth Circuit
(June 28, 2021) . . . . App. 113

Appendix C Order in the United States District Court for the District of Arizona (May 24, 2018). . . . . App. 166

Appendix D Order Re: Claims 20(O), 20 (P), and 20(T) in the United States District Court for the District of Arizona (August 31, 2006) . . . . App. 188

Appendix E Opinion in the Supreme Court of Arizona (May 7, 1996). . . . . App. 241

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MOHAVE

CAUSE NO. CR-14141

[Filed December 9, 1993]

STATE OF ARIZONA,
Plaintiff,

vs.

DANNY LEE JONES,
Defendant.

SPECIAL VERDICT
RE: TISHA WEAVER

Based on the jury verdict IT IS THE JUDGMENT OF THE COURT that the defendant is guilty of Count II First Degree Murder of Tisha Weaver, a Class I Felony, in violation of A.R.S. 13-1105A1 and 13-703 which occurred on March 26, 1992.

The Court conducted a separate sentencing hearing under A.R.S. 13-703B on December 8, 1993. Both parties had the opportunity to present evidence and argument concerning the existence or nonexistence of the aggravating and mitigating circumstances enumerated in A.R.S. 13-703(F) and (G). Both parties were given the opportunity to present any other relevant mitigation for the Court's consideration. All material in the presentence report was disclosed to defendant's counsel and to the prosecutor.

Based on the evidence introduced at the Trial, and the evidence received at the sentencing hearing, the Court renders this special verdict:

Aggravation:

The Court finds that statutory aggravating factors Fl, F2, F4, F7 and F10 have not been proven.

As to statutory aggravating circumstance F3, because the State has withdrawn this aggravating circumstance the Court does not consider it.

As to statutory aggravating circumstance F5, the Court finds beyond a reasonable doubt that the defendant committed the offense as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value. The evidence shows that the defendant wanted to get out of Bullhead City because of pending warrants. The evidence showed the defendant knew of Robert Weaver's gun collection. Defendant took the guns and used them to obtain a ride to Las Vegas and to obtain cash for living expenses tn Las Vegas.

As to statutory aggravating circumstance F6, the Court finds beyond a reasonable doubt that the defendant committed the offenses in an especially heinous, cruel or depraved manner. The evidence showed that Katherine Gumina and Tisha Weaver had been in front of the television set in the livingroom of their residence. The defendant assaulted Ms. Gumina causing Tisha to run and hide under her parents bed. Physical evidence from the bedroom showed that Tisha was dragged from under the bed, struck several times with a blunt instrument and then suffocated. She had

time to contemplate her fate. She knew that something terrible had happened to her grandmother. She struggled for life with the defendant. Tisha Weaver suffered great physical and emotional pain. The Court, therefore, finds that the murder was "especially cruel."

The Court also finds that the murder was heinous and depraved. Tisha Weaver, a seven year old, was a helpless victim of the adult male defendant armed with a baseball bat. The murder of Tisha Weaver is senseless. She could not have stopped the defendant from stealing the guns or the car. The only motive for her murder was the elimination of the seven year old as a witness. She was beaten beyond that necessary to kill her.

As to statutory aggravating circumstance F8, the Court finds beyond a reasonable doubt that the defendant has been convicted of one or more other homicides, as defined in A.R.S. 13-1101 which occurred during the same act of violence by the defendant. The jury found defendant guilty of the First Degree Murder of Robert Weaver which occurred during the same violent episode.

As to statutory aggravating circumstance F9, the Court finds beyond a reasonable doubt that the defendant was an adult at the time the offense was committed and the victim was under the age of fifteen years of age.

The Court finds as to statutory mitigating circumstance G1, that this circumstance has not been proven. The Court finds, based on Dr. Sparks' trial testimony and Dr. Potts testimony and report; that the

defendant has proven non-statutory mitigation in that the defendant has a long-term substance abuse problem and that at the time of the offenses the defendant was under the influence of drugs and alcohol. The defendant's conduct in the commission of the offenses, however, shows that the defendant did appreciate the wrongfulness of his conduct and that his ability to conform his conduct to the requirements of the law was not significantly impaired. The physical evidence at trial shows that Robert Weaver was sitting in his garage when the defendant struck him without warning with a baseball bat. Tisha Weaver was killed while attempting to hide under her parents bed. This is not conduct arising from anger explosion or delusion caused by drug or alcohol use, but conduct more consistent with the State's theory that the defendant committed the acts of murder so that he could steal Robert Weaver's guns.

During the commission of the offenses or shortly thereafter, the defendant used a ruse to get Russell Decker to leave the residence. After the murders, the defendant retrieved his belongings from Toni Hubbard, ditched the car and took a taxi cab to Las Vegas. This conduct shows that the defendant understood the wrongfulness of his acts and took steps to avoid prosecution. In addition, the only source of information that the defendant was without sleep for 3 to 5 days and using large quantities of methamphetamines is the defendant. Based on the discussion below the Court looks upon defendant's statements with suspicion.

The Court finds as to statutory mitigating circumstance G3, that this circumstance has not been

proven. At the trial and at the sentencing hearing the defendant presented evidence that Frank Spelazo was involved in the commission of the murders. This assertion came from the defendant and Cordell Reid. It is obvious that the defendant and Mr. Reid manufactured this tale while sharing a pod at the jail. Mr. Reid's statements were proven false by the testimony of the prosecutor's investigator, Larry Butler. In the past the defendant has shown that he is willing to lie if it benefits himself. For example, comparing State's Exhibit #136, the 1991 Presentence Investigation, with the sentencing hearing, shows that the defendant falsified all information given to the Probation Officer for the 1991 report. In addition, the physical evidence at trial showed that all three victims were murdered with the same blunt instrument; therefore, the defendant has not shown that another participated in the commission of these offenses.

The Court finds that statutory mitigating circumstances G2, G4 and G5 have not been proven.

The Court does find that non-statutory mitigation has been shown by a preponderance of the evidence as follows:

1. That the defendant had a chaotic and abusive childhood;

2. That the defendant has a long standing substance abuse problem which may be caused by genetic loading and aggravated by head trauma.

The evidence supporting these mitigating factors was presented at the sentencing hearing and Dr. Pott's report.

The defendant also presented non-statutory mitigation that he has potential for rehabilitation, that there is a likelihood that he suffers from cyclothymia and that the defendant has a sense of remorse and responsibility for his actions. The Court finds that these non-statutory mitigating factors have not been shown by a preponderance of the evidence.

In defendant's Rule 15.2g disclosure the defendant raised non-statutory mitigation in that the victim's family has publicly indicated indifference to the imposition of the death penalty and that the death penalty is not necessary because he can be given a true life sentence. The Court finds that these have not been proven.

The Court concludes that the State has proved beyond a reasonable doubt aggravating factors F5, F6, F8 and F9.

Defendant proved by a preponderance of the evidence non-statutory mitigating circumstances as follows:

1. The defendant suffers from long-term substance abuse.
2. At the time of the offense the defendant was under the influence of alcohol and drugs.
3. The defendant has a chaotic and abusive childhood.

4. The defendant has a long standing substance abuse problem which may be caused by genetic factors and aggravated by head trauma.

The Court has considered each of the mitigating circumstances offered by defendant and proved to exist and finds that they are not sufficiently substantial to out weigh the aggravating circumstances proved by the State and to call for leniency.

From the evidence at trial and the jury's verdict the Court concludes beyond a reasonable doubt that the defendant was the one who killed Tisha Weaver.

Defendant is therefore sentenced to death. Pursuant to Rule 26.15 Arizona Rules of Criminal Procedure, the Clerk is ORDERED to file a Notice of Appeal from this judgment and sentence.

DATED this 9th day of DECEMBER, 1993.

/s/ James E. Chavez
HONORABLE JAMES E. CHAVEZ

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MOHAVE

CAUSE NO. CR-14141

[Filed December 9, 1993]

STATE OF ARIZONA, Plaintiff,	)
vs.	)
DANNY LEE JONES, Defendant.	)

SPECIAL VERDICT
RE: ROBERT WEAVER

Based on the jury verdict IT IS THE JUDGMENT OF THE COURT that the defendant is guilty of Count I First Degree Murder of Robert Weaver, a Class 1 Felony, in violation of A.R.S. 13-1105A1 and 13-703 which occurred on March 26, 1992.

The Court conducted a separate sentencing hearing under A.R.S. 13-703B on December 8, 1993. Both parties had the opportunity to present evidence and argument concerning the existence or nonexistence of the aggravating and mitigating circumstances enumerated in A.R.S. 13-703(F) and (G). Both parties were given the opportunity to present any other relevant mitigation for the Court's consideration. All material in the presentence report was disclosed to defendant's counsel and to the prosecutor.

Based on the evidence introduced at the Trial, and the evidence received at the sentencing hearing, the Court renders this special verdict:

Aggravation:

The Court finds that statutory aggravating factors F1, F2, F4, F7, F9 and F10 have not been proven.

As to statutory aggravating circumstance F3, because the State has withdrawn this aggravating circumstance, the Court does not consider it.

As to statutory aggravating circumstance F5, the Court finds beyond a reasonable doubt that the defendant "committed the offense as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value." The evidence shows that the defendant wanted to get out of Bullhead City because of pending warrants. The defendant knew of Robert Weaver's gun collection. Defendant killed Robert Weaver to get the guns and used them to obtain a ride to Las Vegas and to obtain money for living expenses in Las Vegas.

As to statutory aggravating circumstance F6, the Court finds beyond a reasonable doubt that the defendant committed the offenses in an especially heinous or depraved manner. The physical evidence showed that the defendant initially struck Robert Weaver on the west side of the garage with a baseball bat . The initial injuries were sufficient to cause a large pool of blood but insufficient to cause death. Sometime later, in all likelihood after defendant committed the assault within the residence, he returned to find Robert Weaver still alive. Blood smears at the scene shows

that Robert Weaver attempted to run from defendant around Katherine Gumina's car, which was parked in the garage. On the east side of the garage the defendant struck Robert Weaver in the head several more times. The last blow was delivered while the victim knelt helplessly on the floor of the garage. The initial blows were all that were needed to kill the victim. The defendant by continuing to beat Robert Weaver with a bat inflicted gratuitous violence beyond that necessary to kill the victim.

In addition, after the initial blows, the victim was completely helpless to defend himself and could only make a futile effort to flee. The defendant could have taken the guns and car with little or no resistance from Robert Weaver. The killing was therefore senseless.

Robert Weaver had time to contemplate his fate as he fled from the defendant. The killing therefore was cruel.

As to statutory aggravating circumstance F8, the Court finds beyond a reasonable doubt that the defendant has been convicted of one or more other homicides, as defined in A.R.S. 13-1101 which were committed during the commission of the offense. The jury found defendant guilty of the First Degree murder of Tisha Weaver which occurred during the same violent episode.

The Court finds as to statutory mitigating circumstance G1, that this circumstance has not been proven. The Court finds, based on Dr. Sparks' trial testimony and Dr. Potts testimony and report; that the defendant has proven non-statutory mitigation in that

the defendant has a long-term substance abuse problem and that at the time of the offenses the defendant was under the influence of drugs and alcohol. The defendant's conduct in the commission of the offenses, however, shows that the defendant did appreciate the wrongfulness of his conduct and that his ability to conform his conduct to the requirements of the law was not significantly impaired. The physical evidence at trial shows that Robe rt Weaver was sitting in his garage when the defendant struck him without warning with a baseball bat. Tisha Weaver was killed while attempting to hide under her parents bed. This is not conduct arising from an anger explosion or delusion caused by drug or alcohol use, but conduct more consistent with the State's theory that the defendant committed the acts of murder so that he could steal Robert Weaver's guns.

During the commission of the offenses or shortly thereafter, the defendant used a ruse to get Russell Decker to leave the residence. After the murders, the defendant retrieved his belongings from Toni Hubbard, ditched the car and took a taxi cab to Las Vegas. This conduct shows that the defendant understood the wrongfulness of his acts and took steps to avoid prosecution. In addition, the only source of information that the defendant was without sleep for 3 to 5 days and using large quantities of methamphetamines is the defendant. Based on the discussion below the Court looks upon defendant's statements with suspicion.

The Court finds as to statutory mitigating circumstance G3, that this circumstance has not been proven. At the trial and at the sentencing hearing the

defendant presented evidence that Frank Spelazo was involved in the commission of the murders. This assertion came from the defendant and Cordell Reid. It is obvious that the defendant and Mr. Reid manufactured this tale while sharing a pod at the jail. Mr. Reid's statements were proven false by the testimony of the prosecutor's investigator, Larry Butler. In the past the defendant has shown that he is willing to lie if it benefits himself. For example, comparing State's Exhibit #139, the 1991 Presentence Investigation, with the sentencing hearing, shows that the defendant falsified all information given to the Probation Officer for the 1991 report. In addition, the physical evidence at trial showed that all three victims were murdered with the same blunt instrument; therefore, the defendant has not shown that another participated in the commission of these offenses.

The Court finds that statutory mitigating circumstances G2, G4 and G5 have not been proven.

The Court does find that non-statutory mitigation has been shown by a preponderance of the evidence as follows:

1. That the defendant had a chaotic and abusive childhood.
2. That the defendant has a long standing substance abuse problem which may be caused by genetic loading and aggravated by head trauma.

The evidence supporting these mitigating factors was presented at the sentencing hearing and Dr. Pott's report.

The defendant also presented non-statutory mitigation that he has potential for rehabilitation, that there is a likelihood that he suffers from cyclothymia and that the defendant has a sense of remorse and responsibility for his actions. The Court finds that these non-statutory mitigating factors have not been shown by a preponderance of the evidence.

In defendant's Rule 15.2g disclosure the defendant raised non-statutory mitigation in that the victim's family has publicly indicated indifference to the imposition of the death penalty and that the death penalty is not necessary because he can be given a true life sentence. The Court finds that these have not been proven.

The Court concludes that the State has proved beyond a reasonable doubt aggravating factors F5, F6 and F8.

Defendant has proved by a preponderance of the evidence non-statutory mitigating circumstances as follows:

1. The defendant suffers from long-term substance abuse.

2. At the time of the offense the defendant was under the influence of alcohol and drugs.

3. The defendant has a chaotic and abusive childhood.

4. The defendant has a long standing substance abuse problem which may be caused by genetic factors and aggravated by head trauma.

The Court has considered each of the mitigating circumstances offered by defendant and proved to exist and finds that they are not sufficiently substantial to out weigh the aggravating circumstances proved by the State and to call for leniency.

From the evidence at Trial and the jury's verdict, the Court concludes beyond a reasonable doubt that the defendant was the one who killed Robert Weaver.

Defendant is therefore sentenced to death. Pursuant to Rule 26.15 Arizona Rules of Criminal Procedure, the Clerk is ORDERED to file a Notice of Appeal from this judgment and sentence.

DATED this 9th day of DECEMBER, 1993.

/s/ James E. Chavez
HONORABLE JAMES E. CHAVEZ

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

Cause No. CR-14141

[Filed February 23, 2000]

STATE OF ARIZONA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
DANNY LEE JONES,	)
	)
Defendant.	)
	)

Oral Argument

Before the Honorable James E. Chavez, Judge

February 23, 2000

9:11 a.m.

Kingman, Arizona

Reporter's Transcript of Proceedings

Appearances:

For the State: (Telephonically)	Dawn M. Northup Assistant Attorney General 1275 West Washington Street Phoenix, Arizona 85007-2997
For the Defendant: (Telephonically)	David Goldberg 421 Pinon Trail Flagstaff, Arizona 86001

Reported by: Kimberly Bigelow, Official Reporter

[p.2]

P R O C E E D I N G S

THE COURT: Okay. This is Judge Chavez. Do we have Mr. Goldberg on the phone?

MR. GOLDBERG: Yes, you do, your Honor.

THE COURT: And Ms. Northup?

MS. NORTHUP: Yes, I'm here.

THE COURT: Okay. And this is CR-14141, State of Arizona versus Danny Lee Jones. And we're dealing with a Rule 32 petition filed by Mr. Goldberg. And this is scheduled for an informal conference. I do have a court reporter and a court clerk present.

And I guess I'll start by taking a look at the petition. I'll tell you up front that I am going to summarily deny claims 12 through 23. I don't believe I have any authority to rule on those that have already been addressed by the Supreme Court.

I will also tell you that I'm most interested in hearing about arguments with regard to claim number 5.

MS. NORTHUP: I'm sorry, your Honor, claim 5?

THE COURT: Yes. Claim 5, 24-F, G, and I. And actually with respect to 24-F, paragraphs one and two, I will set an evidentiary hearing. With respect to paragraph 24-G, I'll set an evidentiary hearing. And with respect to 24-I, paragraph 7, I'll set an evidentiary hearing.

So with that, I guess I'd rather argue paragraph

[p.3]

number five -- I mean, claim number 5, and the remainder of 24-F and 24-I last.

Somebody is shuffling papers. I'm not sure. Can you hear me?

MR. GOLDBERG: Yes, your Honor.

MS. NORTHUP: Yes, I can hear you.

THE COURT: Okay. All right. So what I think I'd like to do is just open it up for arguments as to one through four and six through 11 and 25 all at one time and let you argue those together, Mr. Goldberg. And then the State can respond. And then we'll take up number five. And then, after that, we'll deal with the remainder of 24-F and 24-I.

MR. GOLDBERG: Just so I have this clear, your Honor.

THE COURT: Yes.

MR. GOLDBERG: At this time you have not ruled on one through four and five, the remainder of 24 and 25; right?

THE COURT: Nor have I ruled on six, seven, eight, nine, 10 and 11. I've ruled on 12 through 23.

MR. GOLDBERG: Okay.

THE COURT: On those I'm summarily denying the petition. So I've tried to clear up the issues for you. The ones I'm most concerned about are the remainder of 24-F, 24-I, and paragraph number five.

MR. GOLDBERG: Claim five.

THE COURT: Claim five, yes. The remainder, you know,

[p.4]

frankly speaking, are probably going to be dismissed after oral arguments, but I'm going to listen to what you have to say about those.

MR. GOLDBERG: That's fine, your Honor. I'm just curious before I begin as to what I -- why I would be going first because the State asked for oral argument and it's their position that the remainder of these claims are precluded.

THE COURT: That's fine. If you want to waive your opening argument, that's fine with me.

MR. GOLDBERG: I think the argument set forth in the petition, to be frank -- and I'd just reiterate what

I've already put in writing to what the Court has already read. So I would just have the State at this point argue why it believes the remainder of the claims you've listed are precluded.

THE COURT: Thank you. Ms. Northup.

MS. NORTHUP: All right. Well, in my response that claims one through 23, including claim five, are all precluded under Rule 32.2, and the main reason being that they -- those were claims that were not raised or presented to the Arizona Supreme Court on direct appeal.

And under Rule 32.2(A)(3), which should be read in the disjunctive, contrary to the position counsel took in the reply, the rule doesn't apply only to successive

[p.5]

collateral proceedings.

This is the first Rule 32 in this case, so the other part of Rule 32.2 applies. And that is claims that could have been raised at trial or on direct appeal but were not are waived, and they cannot be raised for the first time in a Rule 32. So I believe claim five falls into that category.

These are claims that clearly could have been raised on direct appeal but were not, and should be summarily denied.

THE COURT: All right. Thank you. Let's see. Mr. Goldberg, your response.

MR. GOLDBERG: Yes, your Honor. Specifically with regards to claim five, it would have been impossible for Mr. Jones to raise that either. And that would really belie the State's argument as far as "precluded" because a lot of this information was not discovered until I was appointed to the case and did some investigation on my own and had further investigation done by two different investigators, including investigation ongoing by Mr. Cooper which was approved by the Court.

So it seems to be illogical to say you can be precluded from raising something that you never knew about until the actual sentencing -- sentencing hearing when Mr. Butler testified Mr. Novak had no idea that a polygraph

[p.6]

was done of Mr. Sperlazzo until after the case.

That would not be an issue that could have been raised on direct appeal because ineffective assistance of counsel, unless it's patently ineffective assistance, cannot be raised on direct appeal anyway. And that is really tied up into this -- into this claim five, as well as the other evidence that I've listed there that I only discovered on Mr. Jones' behalf when I was given access to the State's file by the Mohave County Attorney's office.

So claim five, I believe, is subject to an evidentiary hearing and should not be precluded as a matter of law.

Now, claims one through four -- first of all, we have a fundamental disagreement on how you read Rule 32 -- in the provision of Rule 32. And my positions are set forth in the reply.

I believe if the drafters of the Rule intended this to be disjunctive, meaning if you could have raised it on direct appeal, then you cannot raise it in -- specifically cannot raise it in a 32, your first and only Rule 32 in a capital case, then they would have stated that. And they have not stated that in the rule.

So I would urge the Court to consider it was written in the alternative, meaning you have in a subsequent Rule 32 -- which used to be the normal in these cases but

[p.7]

now is obviously precluded so the rule is really outdated. It's the practice has outdated the rule, is what I'm trying to say.

So that now that this is the first forum for Mr. Jones to actually raise these issues, because his previous counsel did not raise them, can be ineffective assistance on all of these other claims that the Court has mentioned as -- and that is the subject obviously of claim 25.

And rather than be redundant, when I drafted this petition and accompanying memorandum, I basically incorporated the merits of all of these remaining claims as being ineffective assistance, and that contrary to the cases the State cited, they do not, as a matter of law, preclude it either. That's only

precluded if the Court finds after hearing that there is -- there was no prejudice suffered by Mr. Jones or these were made with due diligence by previous counsel.

MS. NORTHUP: Your Honor, if I could just briefly respond.

THE COURT: Yes.

MS. NORTHUP: On claim five, claim five in and of itself is raised as a substantive issue, due process issue on the merits. It's not raised as a newly discovered evidence claim, nor is it in claim five raised as an

[p.8]

ineffective assistance of counsel claim.

So our position that claim -- claim five, as it's set forth, is precluded because it could have been raised on direct appeal or it could have been brought to the Court's attention following. Defense counsel certainly knew about Frank Sperlazzo. And he certainly knew before direct appeal about the lie detector test.

Now to the extent that it's repeated as an ineffective assistance of counsel claim later on, then I agree that part would be further developed in an evidentiary hearing. It's not couched as a newly discovered evidence claim as it's written.

So our position is as it's -- in claim five, it's precluded. I'm not arguing that he can't have further development that sets it forth as a ineffective assistance claim.

Now to the extent he set that as an ineffective claim, yes, we can go forward on that claim. But I don't think claim 25, which is sort of a catch-all claim, where he doesn't specifically set forth each and every claim and establish why it's Strickland ineffectiveness is inefficient.

Now, this particular claim, I believe, was reiterated later on under one of the claims 24. So I think we have to be careful to distinguish between the claims that

[p.9]

are raised as newly discovered and ineffective and not blur that with substantive claims that are clearly precluded.

THE COURT: All right. Thank you. Well, frankly I agree with the State's interpretation of the rule. I believe he read it in the disjunctive rather than as the defense counsel reads it, and that is that if it could have been raised on appeal or could have been raised at trial and wasn't, then the claim is precluded.

And I think there are very good reasons for this rule. I don't think the practice has outrun the rule, as defense counsel says. And I -- I guess there were some things that I was prepared to point out about some of these claims, which I think the claim distorts what actually happened. And I guess I'll go ahead and say that at least because I was unhappy with claim number three where we're talking about a juror there.

And what the juror is doing -- I'm asking two questions at a time and she's answering the first

question. Finally, if you read the entire transcript, you see that I cleared it up and asked her one question at a time and her answers were appropriate.

And this claim number three distorts the issue by only including a small quote where I asked her two questions at the same time and she answers one of them, you know, that's not the -- the only time.

[p.10]

There was another claim -- let me see if I can find it here. I know I marked it. Claim number eight where counsel says the Court did not listen to all of the arguments -- all of the evidence before ruling.

Well, the fact of the matter is two of the things here that counsel is saying I didn't listen to are things that he complains that I listened to at other times. In other words, two of the witnesses here were witnesses for the State, the grandmother of -- Tisha Weaver's grandmother and Robert Weaver's father.

And basically, as I recall this, and I don't have the transcript in front of me to go back and look, but I think I told counsel that even though I felt under victim rights the victims were entitled to have a say, that I would not consider it on sentencing.

You know, it's true that I had a draft of the special verdict ready prior to this hearing because we were going to go to sentencing on that day. It's also true we took a break. And, you know, now six or seven years later, I can't remember specifically, but I think I could have, if I didn't, I think I probably did make changes during that break. And to bring it up here as

though I didn't listen to the evidence at all is really deceptive.

But at any rate, the bottom line here is these issues are all precluded, and that includes number five. I

[p.11]

listed that as one I wanted to hear about because I was surprised when I read Mr. Novak's affidavit where he said in his affidavit that he didn't get some of this material before the trial because it was never raised during the trial. And it was an issue that he was clearly familiar with during the trial as far as the issue of Frank Sperlazzo. So I -- I was very surprised to see that in his affidavit. He claimed to know very little about --

MR. GOLDBERG: Your Honor. If I may, just for the record, please.

THE COURT: Well, if you let me finish. . .

MR. GOLDBERG: Okay.

THE COURT: I was very surprised to hear that he claims that he did not know very much about the Sperlazzo matter in his affidavit.

So, yes, Mr. Goldberg.

MR. GOLDBERG: Your Honor, what had occurred in the investigation of this Rule 32 was that I had contacted the County Attorney's office and the County Attorney graciously let me look through their entire file, which they have stated is their policy after

conviction, to have an open-file policy. And in that file they made me copies of Mr. Butler, who was then the County Attorney's investigator, the investigator assigned to the County Attorney's office, his file.

[p.12]

I showed those documents and the results of his notes, which involve what he investigated on the Sperlazzo matter, to Mr. Novak, and that is what he's speaking of in his affidavit. He had never seen any of that information nor was it ever given to him during or prior to trial. And that would include up to the point where Mr. Butler testified in the sentencing hearing, I think it was on rebuttal at the sentencing hearing, that the polygraph was actually given to Mr. Sperlazzo.

So he really didn't -- other than that -- that snippet from Mr. Butler's testimony, the other information I've set forth in claim five is what Mr. Novak is saying he had never been told or stated about.

The reason any of this even started was because Austin Cooper, who was the public defender's investigator assigned to Mr. Jones' case, and on his own Mr. Cooper wrote a letter to the -- to the prosecution saying, "This is the information we have. Would you investigate it," and got -- tried to get the police to help him investigate this Sperlazzo matter. And that's what, I believe, prompted Mr. Butler's investigation here.

So that's really the substance of claim five, that this information was not given to Mr. Jones' counsel so that he could not make informed decisions prior to trial and/or sentencing.

[p.13]

THE COURT: Well, I guess there's another thing that I wanted to mention, and that is that hearsay is admissible when it's relevant towards mitigation either proffered by the defense or the prosecution. And some of these claims are based on hearsay that was admitted with regard to mitigation. And that's clearly -- the statute clearly says that mitigation evidence, if it's relevant towards mitigation, it can be offered as hearsay. The rules don't apply if it's relevant.

So at any rate, let me get to the bottom line here. With regard to claims one, two, three, four, five, six, seven, eight, nine, 10, 11, and 25, the Court is denying those claims on the grounds that they are precluded.

And so let's go to claim number 24. And we can revisit the issue of the Sperlazzo matter in claim number 24 so. . .

MR. GOLDBERG: Your Honor.

THE COURT: Yes.

MR. GOLDBERG: Are you saying up through -- I can't hear because there is like papers shuffling or something.

THE COURT: Okay. Claims one through 23 and 25 are all denied because they're precluded.

MR. GOLDBERG: Okay.

THE COURT: So let's talk about claim number 24.

MS. NORTHUP: Your Honor, I guess I'll start with 24 --

[p.14]

let me go back -- 24-A. There is several -- there's claims under 24 that are -- that the record has been adequately developed, and the Court can rule and assess the claim under Strickland based on the existing record. And I believe that goes, for example, for claim 24-A.

When you look at Mr. Novak's affidavit, he never says that he believed that his co-counsel did a poor job or that she wasn't qualified to assist him. All he really says is that she didn't, at that time, have sufficient experience to satisfy the ABA guidelines for appointment of counsel, which are really irrelevant.

Strickland is the standard by which you assess counsel's conduct. And there is certainly no constitutional right to two lawyers. So I think the record on this one is adequate in that Mr. Novak had Ms. Carty assist him while she was there, and after she left he decided to proceed by himself. As you know, a lot of defense lawyers go to trial by themselves. So I don't know that we really need to develop that claim any further.

Again, Mr. Novak's affidavit doesn't go so far as to say that he believed her performance was deficient. Do you want me to go on to claim B or would you have defense counsel respond to each one?

THE COURT: Well, let's take these one at a time.

Mr. Goldberg.

[p.15]

MR. GOLDBERG: Your Honor, 24-A really sets forth and incorporates the rest of 24 because, again, these -- these type of pleadings get incredibly long. And rather than to burden the Court by reiterating stuff that I've put later in this petition -- for example, Mr. Novak's co-counsel was singularly in charge of the suppression issue in this case, and singularly without any experience had never conducted even a suppression hearing at that point in her -- in her really brand new legal career, had made decisions or did not even decide matters that clearly affected Mr. Jones' right to effective assistance. And that's really what I'm saying.

You can take 24-A and "C" together, for example, in that 24-A should be grounds for relief because the facts -- the facts that are set forth in "C" show that her inexperience and lack of qualifications led to a decision that highly prejudiced Mr. Jones.

And by that I'm saying I had submitted as evidence, and State had -- had agreed to this prior to Ms. Northup -- previous counsel had stipulated to its admissibility of documents, which would have prayed had -- and these were in co-counsel's possession at the time, would have proved that the officer who testified at the suppression hearing was not entirely truthful.

By that I'm saying he said that they followed

[p.16]

their procedures. Those documents, which are the evidentiary lists of the items impounded, proved otherwise. They did not follow a standard set of

procedures, and it was not an inventory search conducted according to their -- the Las Vegas Police Department standards and policies.

And so the Supreme Court, which never saw these documents to this point, has not -- would possibly and probably have ruled differently on this issue on direct appeal, because what the Supreme Court ruled on direct appeal was that the officer testified that they followed their policies and procedures and that's good enough to -- to comply with cases such as Opperman.

They talk about inventory searches, but these directly impeach what this officer testified to. And Ms. Carty never submitted them or confronted the witness with them. So that really supports 24-A and C, your Honor.

THE COURT: All right. Well, we'll talk about "C" in a minute. As far as 24-A, Court doesn't find that a colorable claim is raised in that issue, so I am denying "A."

Let's go to 24-B.

MS. NORTHUP: 24-B, the failure to investigate the Frank Sperlazzo issue. Again, I think the way that this claim is couched, I think there is enough in the record, including Mr. Novak's affidavit, for the Court again to rule that it doesn't present a colorable claim under Strickland,

[p.17]

and that is they were claiming that he failed to investigate the Frank Sperlazzo defense. And defense

counsel is the one who brought the Frank Sperlazzo issue to the State.

So I argued perhaps an evidentiary hearing would be warranted had Mr. Jones told his lawyer about Frank Sperlazzo and he did nothing, but that's not what happened. He asked that Sperlazzo be investigated.

Once Cordell Reid's credibility was shot following some interviews, and Mr. Novak knew about Mr. Reid's extensive criminal history, and that essentially is how that evidence was going to come in, he certainly had a reasonable basis for not calling Mr. Reid to present this whole Frank Sperlazzo issue. He had absolutely no credibility.

And so the way the issue is couched in that counsel -- it sounds like counsel just failed to present some viable defense, and I don't believe that that's the case. I think he looked into it. He asked that it be investigated. It was investigated, and he decided not to go forward with it.

THE COURT: Mr. Goldberg.

MR. GOLDBERG: Your Honor, when I presented this to the Court to the deadlines that were originally set forth in this case, I anticipated an investigator other -- I don't know if the Court recalls, but we went through two different investigators trying to develop this further. Specifically

[p.18]

the information that I've presented on page 63 of my accompanying memorandum.

I cannot in good faith at this point say that I have factual information to support what I've set forth there, and what I'm talking about is that there were potentially other witnesses that were never found in the neighborhood that had heard arguments and things of that nature that would have corroborated what Mr. Reid would have had to say if he would have been called as a witness. And these things were not investigated by defense counsel.

THE COURT: Okay. So I guess -- I just want to make clear that you're telling me that you agree that you have not been able to find any additional witnesses?

MR. GOLDBERG: Not at this time, no, your Honor.

THE COURT: All right. At this time then I am going to deny claim 24-B.

Let's go to claim 24-C. And we talked about that a little bit, but let's talk about it again. Ms. Northup.

MS. NORTHUP: All right. Claim 24-C, essentially the argument that was put forth by defense counsel was the fact that the -- I believe it was Vints in Las Vegas didn't have authority to consent to the search of the closet or to Mr. Jones' belongings, and that was the issue litigated by defense counsel. That was the issue presented to the Arizona Supreme Court and adversely decided.

[p.19]

The Court alternatively argued so that the -- the primary basis of the Court's ruling was it was a valid consent search. Alternatively, even if it wasn't, when the items were inventoried, it would have been discovered -- inevitably discovered.

I can't personally say I've gone through the inventory sheet and I'm aware of what counsel is talking about as far as the discrepancies. To make the issue clear for future, you know, review, I don't have a problem with, you know, the Court reviewing the inventory sheet and the -- what the officer had testified about. I believe it's probably just a mere technicality. I don't think it would have made any difference in the Court's ruling, but perhaps we should have the Court look at that and make a ruling that it wouldn't have made any difference.

I haven't looked at those inventory sheets, so I don't know how the officer, you know, could have been impeached any differently.

And I'd like to reiterate that I believe I cited US Supreme Court case that inexperience in and of itself -- there have been defense lawyers whose first major case is a felony file. The effect that that may have been her first big evidentiary hearing shouldn't be enough, and she -- she put forth the issues she believed had the most merit, you know. I would probably agree -- had agreed with her.

[p.20]

Mr. Novak doesn't say that she never consulted with him about strategically what claims to argue. I would guess that she probably did consult with him.

But this whole inventory issue the Arizona Supreme court ruled that adequate procedures were followed. I don't know that this inventory sheet would have made any difference, but I have no problem with the Court looking at that if defense counsel wants to submit it.

THE COURT: Mr. Goldberg.

MR. GOLDBERG: Excuse me?

THE COURT: Mr. Goldberg.

MR. GOLDBERG: Your Honor, first of all, just so the record is clear, I had asked Ms. Carty to author an affidavit. She refused under Neglice (phonetic) versus Superior. She's currently a public defender with the Maricopa County Public Defender's Office.

But I would, should the Court grant a evidentiary hearing, subpoena her to explain her decisions. She refused to talk to me or an investigator about this case, even though obviously the fact that an ineffective assistance claim is made automatically waives any attorney-client privilege.

But in any event, your Honor, her motion, if you look at that in the instruments to this case, was a boilerplate public defender motion.

[p.21]

It says essentially this: "Criminal defendants, like all citizens of this country, are entitled to reasonable searches and seizures under the Fourth Amendment."

Standard warrant unless it fits within the exceptions. The State doesn't fit within any of the exceptions, so the Court should suppress the evidence. That was her written motion. That does not set forth any specific issues or claims. Only until State responds and the evidentiary hearing happens does the defense counsel go on the defense.

And a motion to suppress is not such a defensive motion as an offensive motion from the defense perspective because you are defensively and proactively trying to get the Court to suppress something because your rights have been violated. And you have to point out to the court why that is so. That was never done in writing or at the evidentiary hearing.

What the State said is, one, this was a consent search by the -- the couple that were -- had put Mr. Jones up in Las Vegas, on his behalf; and two, it was an inventory search by the Las Vegas Police once the evidence was taken out to the car in Las Vegas and put in the trunk of the car.

The Supreme Court reviewed both of those issues

[p.22]

but did not adequately review the inventory search issue, and that's the prejudice I'm showing here from Ms. Carty's experience.

It's obvious if you look at the testimony of the suppression hearing, along with the Supreme Court's decision, and I've cited all of this in my brief and it's Exhibit J to my petition for post-conviction relief, and that is Las Vegas Police Department's property reports.

Now the officer -- I think it was Officer Montoya testified what their procedures were on an inventory search on every case. If they were going to take property in, they would list specifically. And gave an example in his testimony, if there was one pair of size 34 blue jeans, that's what they would write down. That's what he testified to. If you look at Exhibit J, the actual impound sheets, that was not done.

So the Trial Court's assumption that the inventory procedures were followed was inaccurate because had Ms. Carty just looked at the documents that were given to her in discovery, she would have found that the impound records proved otherwise and she could have brought that to Officer Montoya's attention on cross-examination.

She could have subpoenaed a -- the custodian of property from Las Vegas.

She could have submitted this evidence to the

[p.23]

Court and then argued affectively to the Court that an inventory search was not done. That as a result, all of this evidence and the fruits of this evidence should have been suppressed. And obviously the prejudice here was Gerhardt. Had this evidence been suppressed, Mr. Novak's entire defense on this, and this is what he said on the record, would have been different. Meaning, originally he was going with a lack of evidence defense. You can't prove this and that with the bloody clothes in evidence and all the resulting DNA that was done on that.

He would have had no real colorable – I mean, it would have been laughable to even bring that up to the jury. So he abandoned that.

So that's the prejudice that results. And I think I've shown at least preliminarily to be entitled to an evidentiary hearing to the colorable claim of ineffective assistance on this issue.

MS. NORTHUP: Your Honor, if I could just briefly reply.

THE COURT: Yes.

MS. NORTHUP: I don't know that. To me this is really a matter of law. The Court -- and it's more -- I don't think Ms. Carty needs to come in and explain why she did or did not do something.

Based on the record, the Court can look at her

[p.24]

performance and rule under Strickland. And the bottom line is maybe she didn't put her best argument in writing, but she did argue at the evidentiary hearing. The issue was before the Court; the appropriate argument, the claim. The issue was framed for the Court. The Court knew that it was ruling on a consent issue.

So the fact that she may have -- a different lawyer may have done it differently isn't a test. So the Court can look at the record under Strickland. Her performance was adequate. The fact that defense counsel would have done it differently isn't the standard.

Now, on the inventory issue, we don't need an evidentiary hearing for that. The Court can simply look at the inventory sheet and compare it to the testimony and either reiterate its ruling or rule for the first time that it wouldn't have made any difference that adequate procedures were followed and that it was still a valid consent search. And even if it wasn't, it would have been inevitably discovered in the inventory search.

But that's really an issue of law. I don't think we need an evidentiary hearing on that. The Court can simply look at this additional evidence that defense counsel has submitted and go from there.

THE COURT: All right. Well, thank you. I'm going to take that issue under consideration. I guess I will say at

[p.25]

this point is I don't see what difference it makes whether the motion to suppress was brilliant or not. She got her hearing and she brought in her witnesses and the State had their witnesses and, you know, they adequately had a -- quite a hearing about it, and the issues were argued.

So I agree with the State that the written motion doesn't make that much difference. The point is she got the hearing anyway, and raised these issues anyway.

MR. GOLDBERG: Your Honor, if I may.

THE COURT: That's not really an issue for the Court. I will take it under consideration as to the suppression.

MR. GOLDBERG: She never subpoenaed or presented any evidence to the Court. The State was the only one that presented witnesses at that evidentiary hearing.

THE COURT: Okay.

MR. GOLDBERG: So I just -- is that one taken under advisement then?

THE COURT Under consideration solely as to the inventory search, not as to the other issues raised. And I'll let you know by minute order on that one. So "C" is under consideration. "D."

MS. NORTHUP: "D," there are various pretrial issues raised under this claim. I believe the first one -- and, again, our position on this is that the Court can

analyze the ineffectiveness claim under Strickland based on the

[p.26]

existing record.

And the first claim is that the defense counsel didn't call Mr. Jones to testify at the suppression hearing regarding the -- his subjective belief that he had exclusive control over his belongings in the closet. And as I point out in my response, it really would have been irrelevant. The fact that Mr. Jones believed that he had exclusive control over one half the closet wasn't -- isn't the test. It's whether it's reasonably apparent.

So the Court did make the proper analysis. And the Arizona Supreme Court looked at this issue and again found that, you know, whether or not the -- whether their control over the premises was reasonably apparent -- and, of course, it was their apartment, their closet -- and it was probably reasonable that just -- to find that they had control over the closet.

So I don't know that counsel -- you could certainly rule without any further evidence on the issue of whether counsel should have called Mr. Jones to testify about something I don't think would have really added to the issue.

And, again, the same goes with the fact that he claims that Mr. Novak should have called his client to testify regarding the motion to suppress his statements. And his statements were never used at trial. I believe he

[p.27]

invoked his Miranda rights only after a few minutes into the -- the statement: So I don't -- I can't see why defense counsel would have called his client when there really was no issue on his statements at trial. They were never used.

And I don't believe the State really -- as a matter of fact, I think there is something in the record, I'm not sure, where the State really conceded that they weren't using anything -- any of his statements and it was a really very short interview. He invoked. So I think the Court can rule based on the record on that claim as well.

Then the same with the claim on counsel's -- he did file a motion in limine to preclude evidence of Jones' prior admission and admission of recent photographs. So he's not claiming that Mr. Novak was ineffective for not filing those kinds of motions, he just claims he didn't do them adequately. And, again, I think the Court can rule from the record based on that.

And also it would be very difficult to establish prejudice on that particular claim because the Arizona Supreme Court looked at the underlying issue and held that it was not error to consider -- to admit the misdemeanor theft convictions.

And also I believe the Court ruled on the merits of the photographs, so I don't know that you could ever

[p.28]

establish ineffectiveness on that claim when the underlying issue was adversely decided by the Arizona Supreme Court. So I believe that is most of the pretrial issue claims raised in 24-D.

THE COURT: Mr. Goldberg.

MR. GOLDBERG: Your Honor, first I want to point out that an ineffective assistance claim can be considered cumulatively. I mean, we look at -- we can look at a trial attorney's performance pretrial and throughout trial in determining whether there was, one, deficient performance and, two, whether there was prejudice to Mr. Jones.

Now, upon the merits, the Supreme Court does not necessarily look at cumulatively what this -- these issues or the lack of diligence or experience provided Mr. Jones at trial. So to say, well, the Supreme Court held that the admission by the Court, and albeit incorrect, of a misdemeanor that did not involve dishonesty did not prejudice Mr. Jones because his prior felonies were admitted.

It's not to say that that coupled with the fact that there were gruesome photos that should not have been admitted if counsel properly objected and raised the issue coupled with the fact that there was evidence that could have been suppressed that wasn't suppressed because the Trial Court was not provided with all of the information

[p.29]

that it could have been provided.

That cumulatively affected Mr. Jones and prejudiced Mr. Jones' case, and that's what I'm saying in 24-D, is what was all of 24.

I would ask the Court to consider cumulatively counsel's performance not just picking through individually as the State, I think, would rather the Court do. And saying this one thing, does that not prejudice Mr. Jones? Well, sure.

In a multiple week murder trial, one thing, unless it's really, really grievous, the Court is not going to be able to say that that prejudiced him enough to mandate a new trial or relief, but cumulatively perhaps does.

So on 24-D, first of all, Mr. Jones could have provide first-hand testimony as to the control issue. There was no first-hand testimony from the Vints, and the Supreme Court on appeal assumed that the Vints would have testified as the officers testified.

And it's my position that was hearsay and that an affective trial attorney would have objected at that point and argued that the Court could not consider that in the suppression hearing. And now we're talking about 1992 or '93, not today, that the officers could not testify as to what the Vints said about control of that closet, and force the State to bring the Vints in to testify or concede the

[p.30]

issue on that.

And that also pertains to Mr. Jones' motion to suppress testimony as well. There was no other testimony on his -- you know, other than very, very general testimony from the -- from one officer about his level of intoxication and state of mind and whether any of those statements were inadmissible.

That's really all I have to say, your Honor. I think I've presented the prejudice that I believe flows from the lack of performance on the pretrial issues.

MS. NORTHUP: Your Honor, can I just make one brief comment.

THE COURT: Yes.

MS. NORTHUP: I do ask the Court to look at defense counsel's overall performance in the trial. And you are probably in the best position to do that. You were there. Instead of nit-picking little issues or strategies that another lawyer may have done differently.

So I agree with defense counsel that overall performance should be looked at when considering these claims.

My argument with regard to the Arizona Supreme Court decision on the merits of the underlying claim really doesn't go to the performance prong Strickland. My argument is that it's very -- I don't know how you can establish

[p.31]

prejudice for a lawyer's failure to do something that the Arizona Supreme Court, in essence, says has no merits.

So my argument is that you have to establish both prongs of Strickland, not just the performance prong, and that prejudice can't be established when the underlying claim is meritless.

THE COURT: Well, let me say this for the record. Mr. Novak is a very good attorney, and he did a very good job with this difficult trial in my opinion. And I don't see most of the issues that are raised in -- in paragraph D or claim 24-D as being ineffective assistance of counsel at all.

I think, first of all, as to having the defendant testify, the prosecutor probably would have leapt with joy at the thought of being able to cross-examine Mr. Jones. Even if he couldn't get into the facts of the case very much, he certainly could have gotten an idea of what Mr. Jones was going to be like on the stand.

And it's very rare to see a defendant testify on a motion to suppress even on another case. And I suspect if the defendant had testified Rule 32 petition counsel wouldn't be in here saying that that was ineffective assistance of counsel.

But, at any rate, as far as the motions in limine, Mr. Novak raised those issues, he didn't ask that the theft

[p.32]

misdemeanors be sanitized. But, on the other hand, I mean, if they were sanitized, then that means the jury would be free to speculate that those were assault misdemeanors rather than theft misdemeanors. And at that particular time I probably would not have sanitized it anyway given the -- the law at the time and -- and the fact that it was considerably different than the charge that he was facing. And he raised these issues.

If there was a mistake that was made on the misdemeanors, I guess it was my mistake. And the same goes with the gruesome photographs. So I don't see that counsel was ineffective with regard to claim 24-D at all, and I am denying the allegations raised in 24-D. So let's take up "E."

MS. NORTHUP: All right. "E," here there are -- and this is really looking at counsel's conduct through a magnifying glass.

There are different various jury selection issues raised here. For example, the first one is Juror Alvarado claiming that defense counsel should have raised some challenge. But I think when the record is -- the whole record is reviewed, and I've looked through this, counsel did an adequate job during jury selection. He did raise a Batson challenge. I believe Juror Alvarado and the prosecutor responded. And basically the response was race

[p.33]

and gender-neutral reasons.

The real -- the prosecutor used, I believe, a peremptory strike to remove her because -- and he explains this. "I did it because I saw her making contact with Mr. Novak and she smiled at him."

Well, that was his reason for excusing her. So I don't know that counsel really should have done anymore on that -- that issue.

The same kind of follows with the rest of them. He really -- the record really establishes, and I point out the record cites in my response, they had a reasonable basis for either not following up or following up the way he did.

For example, I believe one of them was Deann Benton. Counsel claims that defense counsel should have further questioned her about her impartiality based on some answers in the questionnaire. But during the -- the oral voir dire, I believe all of that was really clarified.

For example, it was brought out that she had been a corrections officer. Her son was a deputy and another son worked for the Department of Corrections. So I think that's enough of a reason basis for a defense lawyer to use a peremptory strike on her. But she doesn't really -- there was nothing in the record to really indicate that she couldn't be a fair and impartial juror.

So I pretty much set forth under 24-E the reasons

[p.34]

for counsel's decision. And I cite for the record and I believe the record demonstrates that, you know, counsel adequately followed up on these, that he did an adequate job during voir dire. And if there is any particular juror that the Court had a question with, I'd be glad to address that.

THE COURT: All right. Mr. Goldberg.

MR. GOLDBERG: Your Honor, as to the first subpart, I think that the Court -- and I would ask the Court to refer -- even though the Court summarily denied this claim substantively, but also consider it here by incorporation. I believe it's my first claim. Let's see. Yeah.

THE COURT: Well, I remember claims one and three.

MR. GOLDBERG: Right. And specifically what the State's just presented on this specific point, there is the obvious case law that came down around this time, and that's why the Court, I think, had a subsequent hearing but did not clearly on the record say, yeah, I remember.

I don't believe the Trial Court said that it remembered this -- this particular woman having eye contact and smiling at Mr. Novak, or something along those lines. So that's -- the State is saying that on the record is really not enough. And it wasn't in 1993, and it's not now. There has to be something from the Trial Court that acknowledges -- acknowledges that fact.

Also gender issues were -- were not the law then.

[p.35]

But they were being raised in Arizona at that time. I mean, I would be -- I would be able to present you, for example, training materials from public defender's agencies that tell counsel, you know, in ongoing training, even though this has not been addressed by the US Supreme Court, you should raise gender issues.

And that is my argument, that that's why the State struck this juror, because she was a woman, not because -- even though Mr. Novak did raise the fact that she was hispanic, but also that she was a woman, and went as far as to say that on the record.

The remaining subparts of this particular issue, I believe that the record does warrant at least questioning Mr. Novak as to why he would not question the jurors as to their obvious prejudice and then have to use a peremptory strike to get rid of them rather than develop the record so he could move to strike for these kind of jurors.

For example -- I've listed these out, so I'm really not going to reiterate this. And that would be subpart two. Because if you can develop the record -- trial counsel can develop the record to the point where the judge has to strike for cause, then you've got one more peremptory to use. And really that is prejudice if you have a jury ultimately based on as close as to what you want to pick as possible.

[p.36]

MS. NORTHUP: Your Honor, if I could just briefly point out --

THE COURT: Yes.

MS. NORTHUP: -- that several women did serve on the jury, so I think the issue with Ms. Alvarado was -- was more of a -- a race issue.

Again, it's couched effectiveness, and Mr. Novak brought it to the attention of the Court. He did challenge it. If there's an error, it's a substantive issue, not Mr. Novak's performance. And it was an issue that again relates back to a claim that should have been raised on direct appeal.

So -- and, again, there were several women on the jury, so I don't know that you could -- an evidentiary hearing is really going to develop anything further on any of these claims.

THE COURT: All right. Thank you. Well, I think it was at Mr. Novak's request we had the written voir dire and then we had -- we ended up having individual voir dire. I remember that. And I thought it was very extensive. And I've read your claim number 24-E and, frankly, I do not believe Mr. Novak was ineffective. Especially as to the Batson issue. I mean, he raised the issue.

I do not believe he was ineffective in jury selection. And the bottom line here is there wasn't

[p.37]

ineffective assistance of counsel in selecting the jury, and 24-E is denied.

Okay. 24-F. And I already said I would set an evidentiary hearing on paragraphs one and two, so let's not talk about those two.

MS. NORTHUP: Okay. Well, I believe the last -- I kind of -- I kind of put them in categories of the ones we claim should have an evidentiary hearing and ones we shouldn't. The last one I have is 24-H, the jury instruction on intoxication. And our position in the response is, again, that's an issue of law. That doesn't require an evidentiary hearing.

THE COURT: Okay. Ms. Northup, hold on a second because 24 -- 24-F --

MS. NORTHUP: "F" as in "Frank."

THE COURT: Yes. 24-F has more than two paragraphs. I said I would set an evidentiary hearing on paragraphs one and two.

MS. NORTHUP: Okay.

THE COURT: But paragraph -- there's a paragraph three.

MS. NORTHUP: Okay.

THE COURT: And I'd like to talk about those.

MS. NORTHUP: Okay. So one and two there is an evidentiary hearing.

THE COURT: Yes. Right.

[p.38]

MS. NORTHUP: Paragraph three. All right. All right. Yeah, this is a claim that I believe the Court can look at -- can look at the closing argument and basically rule based on the existing record. And I don't think it needs to be developed any further. It's just simply a question of law.

If you read the closing argument and you look at the cases, did the prosecutor improperly shift the burden of proof? And our position was that nothing the prosecutor said was improper, nor did he shift the burden of proof. It certainly is fair game to comment on the lack of contradicting evidence or the fact that the defense theory of the case isn't supported by the evidence. So I think -- I don't think he overstepped the bounds there, so I think you can rule as a matter of law that closing argument was proper and, therefore, counsel had no reason to object to it and can't be ineffective.

THE COURT: Okay. Mr. Goldberg.

MR. GOLDBERG: Your Honor, obviously defense counsel did not object to any of these statements. And I think they should speak for themselves that they do shift the burden of proof. And to determine the prejudice on this would really involve questioning jurors as well, which the Court precluded when I first was appointed on this case. We had a -- a hearing on some of these preliminary issues and I remember the Court ordering that the jurors could not be

[p.39]

contacted. So it would be pretty difficult to show prejudice.

However, I would still point out that there were many, many statements in closing and rebuttal closing by the prosecutor that specifically say the defendant has some kind of burden of proof here. And for Mr. Novak to just sit there and let those go by is clearly below the standard of somebody who is trying a capital case.

MS. NORTHUP: Your Honor.

THE COURT: Yes.

MS. NORTHUP: In response, I'd just like to point out on contacting the juror issue, to suggest that you can establish prejudice by asking the jurors about their subjective thoughts and their mental processes is -- that would be completely inadmissible. You cannot -- and I believe it's Rule 24.1, something that specifically prohibits a jury verdict from ever being impeached by talking to jurors about what impact any particular kind of evidence an argument had on them. So you can't establish prejudice by talking to the jurors.

And, again, I think this is just an issue -- it's just an issue of law. The Court can -- can reread the arguments and rule as a matter of law that the prosecutor's arguments were not improper. And if that's the conclusion, which I believe the Court should reach, then the -- you know

[p.40]

there is no ineffectiveness claim. I don't really see that this needs to be further developed at an evidentiary hearing. The closing argument is the closing argument and it's part of the record.

THE COURT: Well, I agree that that would not be proper to talk to the jurors about this, nor to try to establish some kind of prejudice through the jurors. And, in fact, I have read through the allegations here in paragraph three and, you know, the defense raised a defense that some other dude did it. I guess that's a common terminology for it.

And I guess the State is free to ask why they didn't bring in argument to support it. And I don't believe the argument was improper and I probably would have overruled any objection to it. So paragraph three is denied. We will have an evidentiary hearing on paragraphs one and two.

I've already said we will have evidentiary hearing on 24-G, so 24-H is next. And that's the one I believe, Ms. Northup, you were starting to argue.

MS. NORTHUP: Correct. Let me go back to that. All right. 24-H. Again, I think this is another issue that you don't -- we don't need to have an evidentiary hearing on. It's an issue of law on whether or not a jury instruction under I believe it was 13-503, which was existing back at that time, should have been given.

[p.41]

Our position is that the instruction given adequately covered the -- the issue. And, again, to reiterate that the claim -- this claim relates solely to the attempted first-degree murder conviction. He clearly wasn't entitled to a intoxication instruction as it related to the first-degree murders.

So our position is that the jurors were told -- as a matter of fact, they were probably told more than they should have been told because the instruction that was given actually allowed them to consider his intoxication for the first-degree murder charges, which he was not otherwise entitled to. So I think he really got more than he was entitled to.

So, again, I don't clearly -- I don't believe there was deficient performance and certainly no prejudice based on failure to request an instruction that was worded differently when, in essence, I believe he got an instruction that probably was even more favorable.

THE COURT: Mr. Goldberg.

MR. GOLDBERG: That was -- your Honor, in '92 and '93 that's the standard. Criminal law did allow for instructions on this issue, and it was routinely given. And in any case that involved -- in this case there was even expert testimony and Mr. Jones' own testimony about his level of intoxication at the time of the offense, which was

[p.42]

fair game back then before they abolished 503.

But the prejudice is he was convicted as charged and he got 25 to life on it. Again, we -- I agree with what she said on the last argument. I mean, we can't go ask the jurors would that change your mind especially, what, seven years later. But the proof is in the conviction hearing. He was convicted and sentenced for intentionally attempting to murder the grandmother Miss Gumina.

In terms of whether he got more or something, you know, along those lines than he deserved, the law in '92 and '93 was -- and it continues to this day and even with the Mott decision and all the ones that followed, that the jury can consider whether a person has the ability to premeditate. And if that involves a psychological, mental or emotional defect so they -- I mean, that's all that's left of the Christianson type of argument anyway, after Mott at this point in time.

But in '92 and '93 it was clearly the law that the jury could consider whether a person's intoxication of drugs or alcohol, or both in this case, intoxication would allow them to premeditate. So he didn't get anything that he wasn't entitled to as a matter of law on that instruction.

The fact that he got that on the first-degree counts doesn't clear up that he didn't get them on the attempted first degree.

[p.43]

MS. NORTHUP: Well, your Honor, he did get an instruction that says they can consider whether or not his intoxication -- whether it may have affected his ability to premeditate as to the crimes of first-degree

murder and attempted first-degree murder. So I think the jurors were told.

It wasn't couched in the exact words under 13-503, but they were instructed that they could consider his intoxication on whether or not he could premeditate. So -- and, again, the Court -- it's an issue of law.

The Court can look at the facts of the case. And, you know, our position is that, you know, there is overwhelming evidence that this was a premeditated, intentional act. So I don't think it would have made any difference that an alternative argument would -- the primary argument being that the instruction that was given was adequate.

THE COURT: Well, I don't believe there was any prejudice with regard to this. It probably should have been an instruction more specifically with regard to the attempted murder, but there was an instruction regarding intoxication. And that would have applied to all three of the -- of first-degree murder and attempted first-degree murder. I guess that's two. So the court finds that there is no prejudice with regard to this allegation, and I am

[p.44]

denying 24-H.

Okay. Let's go to paragraph "I." I did say that I would have a hearing -- evidentiary hearing on paragraph 7 of 24-I, so the other six need to be argued. I think seven was the last one.

MS. NORTHUP: All right. 24-I. I think, again, this -- this Court probably is in the best position to rule on this claim without any further evidence. And I believe that -- and, again, the underlying portion or the substantive portion of the claim, and that is on direct appeal, they raised a claim of victim impact testimony being improperly considered. That was rejected by the Arizona Supreme Court.

And I believe it was in the opinion where they point out that the Court did say that it would not consider victim impact evidence. And the Court presumed to be able to disregard the inflammatory or irrelevant information.

So, again, I don't think we really need an evidentiary hearing on it. The Court is in the best position to rule that victim -- again, to reiterate, victim impact evidence wasn't considered as far as the capital convictions were concerned. And I don't think that prejudice can be established because the Arizona Supreme Court rejected the underlying claim.

MR. GOLDBERG: Are we going to do these one by one, your Honor?

[p.45]

THE COURT: Yes, why don' t we do them one by one.

MR. GOLDBERG: Okay. I'm looking at the Supreme Court's decision and I don't see where they actually address this issue on the merits. I don't think appellate counsel even raised the issue of impact evidence at all. Perhaps she's --

MS. NORTHUP: Well --

MR. GOLDBERG: -- mixing this with another capital case she has. I don't see it in here.

MS. NORTHUP: Look at footnote three on page 490.

MR. GOLDBERG: Footnote three.

MS. NORTHUP: Although it wasn't raised on appeal, they considered it. We briefly addressed the issue. We upheld that a trial judge in a capital case is --

MR. GOLDBERG: I see that. I still wouldn't consider that. That's really dicta in my opinion, your Honor. But I'll leave that to the Court on this issue.

I think the record is pretty clear there was a lot of written and testimonial victim impact evidence, and Mr. Novak never objected to it on any ground. And the Court heard it and none of that pertained to what the sentence should be or how it impacted the family that -- on the attempted count, even though Miss Gumina -- like the other two victims died -- it was all addressed towards the death and what happens to Mr. Jones for the deaths of these

[p.46]

people.

So I don't think the Court ever said -- the Trial Court now I'm speaking of -- on the record that it was only going to consider these. I don't think this issue was ever discussed to be honest with you, your Honor.

THE COURT: Well, my recollection is that -- and I can't say I have a clear recollection of it, but the way I

always do it on these cases is I tell them I believe there -- the victims are entitled to make a statement, but that I will not consider it with regard to the sentence. And that's what I did in this case.

And so whether I discussed it on the record or not, it really doesn't matter because that's how it's done. The problem is, of course, the victims have a right to make a statement. And yet the Court has very clear guidelines it has to go by in death penalty cases.

And so that's the -- the difficulty, is how do you -- how do you do both. And so I allow them to make statements, but I do not consider their statements towards sentencing. And I believe that I told counsel that, and I believe that's why Mr. Novak didn't object when the people wrote letters or made their statements is because -- and I think I probably made the same statement about the -- about the -- the presentence report.

I think -- I do it the same way in all of these

[p.47]

cases, and that is I tell them I won't consider any portion of the presentence report unless it's submitted as an exhibit, you know. So I -- just based on my own recollection, I can't say for sure that it happened, but that's the way I do it. And there's no prejudice here and there's no -- I don't believe counsel was ineffective, so paragraph one is denied.

MS. NORTHUP: Paragraph two, here the claim is simply that reliance on a court-appointed psychiatrist at sentencing is in and of itself ineffective. And once I

got into and I read what Dr. Potts had to say, it may be different had Dr. Potts been, you know, borderline on his opinion, but he clearly was defense oriented.

And, in fact, I wasn't there, but I can gleam from the record that the prosecutor was so frustrated by it because he was supposed to be, you know, an independent expert appointed by the Court and it didn't turn out that way.

In fact, he was very much favorable to the defense and his opinion was as well. So I don't know what counsel should have done differently here. He relied on Dr. Potts' testimony and presented it. And as I said in my response, I don't think he had any reasonable basis to use anyone else.

THE COURT: Mr. Goldberg.

MR. GOLDBERG: Your Honor, what I'm saying in two is

[p.48]

that -- is that -- and I think current practice not only by the court, but I think the Court should take judicial notice now of what Mr. Novak does now in capital cases -- because I think he has had capital cases since this one before your Honor -- is that mental health experts come in all shapes and sizes.

Dr. Potts is very competent. I mean, I can -- I can agree with that. I've seen him testify. I've had him testify for years. But he's a psychiatrist; he's not a neuropsychologist. And that's really a lot of the issues that we're dealing with or should have been dealt with

and presented to the Court in mitigation in this case. And that's what I'm saying there.

Now, going to 26.5 is not really at this point standard defense practice. You don't ask the Court, after your client is convicted of a capital offense, to start working on your mitigation. I mean, the motions for funding for neuropsychological testing comes as soon as you're appointed on the case. And I think the Court can take judicial notice of that.

And that's the practice in Mohave County and in any other county in the state for that matter. And that's not what happened here. Mitigation in terms of -- not necessarily factual information, but hard psychological and psychiatric evidentiary mitigation was not done.

[p.49]

And then, of course, the Court has its deadlines on how long to -- Dr. Potts and anybody else, had Mr. Novak actually requested somebody else -- to prepare this evidence, instead of the year and a half that this case pended before trial, to work on this case.

Now, Dr. Potts as a psychiatrist has two months, maybe three months to work on this. So that's really the substance of my claim in subpart two.

MS. NORTHUP: Your Honor.

THE COURT: Yes.

MS. NORTHUP: It's really subpart three, though, that he's arguing. Subpart two merely is a claim that he -- he relied on a court-appointed psychiatrist and

that was ineffective and the -- the issue about recognizing that -- the need for an additional expert. If that's really part of subpart three.

But, I mean, I think the record adequately establishes that he had a reasonable basis for using Dr. Potts and, you know, didn't need to -- you know, he relied on Dr. Potts. And what counsel is really arguing is that it was ineffective assistance of Dr. Potts for not recognizing that further stuff should have been done. But that really falls under claim three. I think claim two is more limited than that.

THE COURT: Well --

[p.50]

MR. GOLDBERG: Your Honor, if I may, please.

THE COURT: Sure.

MR. GOLDBERG: Perhaps I did mix two and three together in that argument, but two also -- I mean, the case law is pretty clear that you're entitled to your own expert in these cases, not a court-appointed one off a list that the Court nominates and the Court agrees to, like a Rule 11.

In capital cases, you know, fundamental fairness requires that an indigent defendant have at his disposal someone in his camp to search and follow up on things that are issues or potential issues in mitigation, not somebody who is going to do a scripted or more limited review of the mental health issues.

THE COURT: Well, Dr. Potts was a very good expert. He was defense oriented. The prosecutor, I can

remember, was very upset about that. But, you know, I -- I don't think that two is the correct issue. We ought to be looking at three. I'm going to deny two because I don't think counsel was ineffective as far as Dr. Potts. Let's talk about three.

MS. NORTHUP: All right. On claim three the issue is trial counsel was ineffective for failing to request -- recognize the need for additional neuropsychological testing. And the -- again, you can blur the merits of this with ineffectiveness. Counsel did ask for additional

[p.51]

testing.

As a matter of fact, he asked for it more than one time. After receiving Dr. Potts' report and learning about some head injuries, he asked that the sentencing be continued for additional testing and then he renewed his request again.

So the real issue was did the Court error by denying the request for a continuance for additional testing, and that issue was addressed by the Arizona Supreme Court.

So when you're looking at the ineffectiveness claim, I don't really think you need to go much further than the fact he did recognize a need for it, so he wasn't ineffective.

And you don't need an evidentiary hearing on that. And the substantive issue of whether the Court should have granted an evidentiary -- or a continuance so that additional testing could have been done was --

was addressed on the merits by the Arizona Supreme Court.

And, in fact, this Court as well as the Arizona Supreme Court considered what Dr. Potts had to say about the -- the additional head injuries and found it to be not statutory mitigation.

So the Court held that, in essence, additional testing would have just corroborated Dr. Potts' testimony

[p.52]

and would have been cumulative to mitigation that the Court had already found to exist.

So I don't believe we need an evidentiary hearing. This is couch ineffectiveness claim and I cite to the record where counsel did recognize the need for additional testing.

MR. GOLDBERG: Your Honor, I would point out that he did not recognize these issues. As I said before really -- I'll incorporate what I said before on the last subpart here. He did not recognize these issues at a time where something realistically could have been done.

Doing the tests that are now -- and I think, again, I'd ask the Court to take judicial notice that if capital defense counsel asked for money and are usually given money if they state facts to show there is potential mental health issues such as neuropsychological test batteries, CAT scans, MMRs, those sort of things, CAT scans of the brain to show

that link physically -- physical evidence, physical proof to the trial judge that there's a link.

Now the Supreme Court can sit up there in isolation with a written record and say, well, Dr. Potts couldn't say there was a link between his behavior on the night of the murders and the fact that he had multiple head injuries at a trial. Sure he can't. Dr. Potts did a couple

[p.53]

of standardized tests and an interview with Mr. Jones for a couple of hours after Mr. Jones was brought down to the Madison Street Jail.

Because, first of all, Dr. Potts is a psychiatrist; he's not a neuropsychologist. He's not somebody who is trained to deal with head injuries. There are plenty of experts out there that are. And I asked for funding in this case at the beginning of the case for these types of tests. The Court denied it.

So to be honest with you, I am hard-pressed -- and I put this in my request to prove prejudice because how can I prove something I don't have prejudice for. Had I had a CAT scan here that showed you these are the areas that control aggression and these are the areas that have been permanently damaged and scared in '92 and '93, we would -- we might not even be talking about this at all because Mr. Jones might have received life sentences instead of a death sentence.

So that's really the substance of three here, your Honor. This came too late in the game. And even -- I think, as I point out in my written pleadings, the

prosecutor saw this. And had there been something here, he would have asked for something.

To be honest with you, after reading Mr. Novak's affidavit, to put him on the stand and ask him in '92 or '93

[p.54]

I think he was about two or three years out of law school. This was his first capital case. He wasn't really educated in these cases.

Now if you ask him now and take judicial now and now that he's a trained litigator, he does ask for this stuff upfront, not when the Court is ready to proceed to sentencing hearing. And when you're in the sentencing hearing with witnesses who say why they need a couple of months and some more testing, it's too late. The train is on the way down its track at that point, and it's really hard to stop it. So that's really the substance of this claim.

MS. NORTHUP: I will briefly respond.

THE COURT: Yes.

MS. NORTHUP: And that is you do have to look at counsel's conduct at the relevant time, not based on what's done now. And you're correct, admittedly the most effect was for getting all of this neuropsychological stuff now wasn't the practice then, but that is how his conduct is gauged. And he was relying on an expert. And the issue is couched not with newly discovered evidence. The issue is ineffective assistance of counsel.

So the bottom line is he relied on his expert. And when he asked for additional testing to be done, he asked for it. So when you talk about the prejudice problem,

[p.55]

I don't think you can even get past the deficient performance prong because he -- he did request it and he did recognize a need for it. So, again, I -- I think -- I don't think we really need to have an evidentiary hearing on the ineffectiveness claim.

THE COURT: Well, I agree we have to go by what was supposed to be done then versus now. I mean this is seven years ago or so that we're talking about. But at any rate, I'll set an evidentiary hearing on paragraph three and we'll see where we go from there. Paragraph four.

MS. NORTHUP: All right. Claim of counsel's ineffective for not filing a sentencing memorandum or responding to the State's.

Again, I don't think we really need an evidentiary hearing on this. The bottom line is that all relevant mitigation was presented to the Court. Although he didn't do it extensively in writing, he presented an extensive lengthy argument in support of the defense proffers mitigation and rebutting the State's aggravated circumstances.

So I think, based on the record, I don't know what difference it would have made had the same arguments been reduced to writing. The Court was presented with all, you know, relevant mitigating

circumstances. And it was probably done more effectively in oral argument.

[p.56]

THE COURT: Mr. Goldberg.

MR. GOLDBERG: I would just point out, your Honor, that what -- this is the only thing I'm going to add to what I wrote here, is that the Court had said before, prior to the actual sentencing hearing and actual oral argument, the Court had already drafted its special verdict. And it was -- I believe your Honor said before that you were uncertain, but you believe you made some changes to it.

Now, I'm -- I'm arguing that had all of these arguments been developed in writing, the Court would have more time to consider these arguments and not adopted what the State -- State's position was as to the evidence at trial and what it proved. That's all, your Honor.

THE COURT: Right. Well, the other thing, of course, is that if I had heard something in oral argument that I hadn't thought of, I could have stopped and gone out and had another draft. I mean, I was working on that until the very end.

But at any rate, I don't see any issues. I don't think counsel was ineffective for not filing a written memorandum. Paragraph four is denied. Let's take paragraph five.

MS. NORTHUP: Five, counsel's failure to object to presentence reports, other cases, and various hearsay statements at sentencing.

[p.57]

Again, I don't think there is anything in the record that shows that this Court relied on statements of other victims in other cases when it sentenced Mr. Jones.

And the fact that Mr. Jones proffered his drug addiction and his childhood experiences as mitigating circumstances and -- may offer presentence reports that supported or rebutted it admissible.

With regard to not objecting to the hearsay statements of Cordell Reid and Frank Sperlazzo, I point out that in -- on one hand they argue that the State should have done more and gotten more information on Sperlazzo and Reid, and on the other hand, once it was investigated and the State then used some of the information, then counsel should have objected to it at sentencing.

So the fact that -- I mean, I guess what they're claiming is that Larry Butler's testimony was hearsay, but the defense counsel is the one who asked that Larry Butler investigate Sperlazzo.

So when the facts come out they -- he would have been remiss to object to what Mr. Butler, you know, had found out. And the hearsay -- clearly hearsay testimony was admissible in a sentencing proceeding when it pertains to aggravating or mitigating circumstances.

So, again, I don't really see where counsel had any reason -- basis to object to any of this testimony.

[p.58]

Especially when it was properly admitted to either support or rebut mitigating or aggravating circumstances.

THE COURT: Mr. Goldberg.

MR. GOLDBERG: Your Honor, I guess really what we're talking about here is five and six together. It does -- I set forth six separately about Larry Butler's hearsay testimony and that sort of thing and in terms of that being disclosed prior -- was never listed as a witness, which the rules of procedure -- anyway, in any event, as to five, I think the Court brought this up earlier, but I want to reiterate that the rules of procedure that allow hearsay evidence in capital cases only apply to mitigation when presented by State or defense. The State is still bound by the rules of evidence. That's clear.

The statutes provide that; the rules provide that. That was not followed here. And defense counsel did not object to it.

Now, to look at the substance -- and that was in the rule then, so I can't -- I really can't see how the Court could escape the conclusion that that's ineffective. I mean, you have the book in front of you. And I'm pretty sure that Mr. Novak even brought this up on the record at some point. And you hear somebody ask a question that's going to bring out some hearsay,

and why don't you object? I don't know why. Maybe we could ask Mr. Novak that, if he

[p.59]

can remember from seven years ago.

These witnesses were never presented, though. And because they were -- their testimony -- what they would have said was not presented. And I believe it was improper for the Court to consider it as well as the prior sentence reports, the inconsistenties. That was hearsay.

The Court did put that in its special verdict. It believed that Mr. Reid and Jones fabricated this defense, that Mr. Jones had said one thing on one occasion in a prior -- on a prior criminal offense, and was saying another thing now, and it discounted his mitigation to that effect. That was -- so the court did consider hearsay here in the sentencing process.

MS. NORTHUP: Well, your Honor, the way I read Rule 26.7(B), it reads to me that any party may introduce reliable relevant evidence, including hearsay, to show aggravating or mitigating circumstances. So I think the rule then was the same as it is now, that hearsay is admissible by either party. So I don't really think counsel had a reasonable basis for objecting to any of this evidence.

THE COURT: Well, actually what I looked at yesterday, to make sure I understood the rules, 13-703 -- let me see if I can find it here. 13-703. Well, it's been amended, but I think the part I was looking at is the same. Let me see if

[p.60]

I can find it.

(Pause in proceedings.)

MR. GOLDBERG: That would be subpart C, your Honor.

THE COURT: Okay. Yeah. There's a sentence in there that says, "Any information relevant to any mitigating circumstance included in subsection G of this section may be presented by either the prosecution or the defendant regardless of it's admissibility under the rules governing admission of evidence at criminal trials."

But -- and then it goes on to say that "aggravating circumstances: Evidence presented towards aggravating circumstances is governed by the rules of evidence."

So -- and this is what my belief was at the time that we conducted this hearing. And my belief today is that hearsay is admissible if it's relevant towards mitigation. And that's why I don't believe five or six -- the failure to object was -- as to five anyway, is not ineffective assistance of counsel because any objections would have been denied anyway or overruled.

So -- and I don't really see there is any ineffective assistance of counsel. I think I could be -- well, as to paragraph five, it is ordered denying that claim. And then as to paragraph six, let me see what . . .

MR. GOLDBERG: Excuse me, your Honor.

[p.61]

THE COURT: Well, as to paragraph six, that involves the polygraph; is that correct?

MS. NORTHUP: Your Honor, I believe I read in the record, and I believe it was following sentencing or it was in I believe the sentencing transcript, where the prosecutor was at -- the polygraph is mentioned because that's how I knew about it . So I don't -- maybe Mr. Novak didn't remember. And I can probably find that in the transcript, but I think he did know about the polygraph. And so -- and I don't think he was really surprised at all by what Mr. Butler was going to say once he investigated the Frank Sperlazzo defense.

Especially since he was the one who had asked that -- that the State's investigator do just that. So -- and defense counsel did raise a hearsay objection when -- when Larry Butler testified about what Cordell Reid had told him.

So I don't really see where the fact that counsel did not object to rebuttal testimony by Butler -- why he would have objected to that because his testimony only became necessary because of the defense raised by Mr. Jones.

THE COURT: Well, you know, with regard to paragraph six, I think I'll set that for an evidentiary hearing and we can -- you can get a copy of the transcript and present it at that time.

[p.62]

And I guess I'll just say I think with regard to Cordell Reid, I mean, one of the reasons neither party wanted to present him is he was -- he had a terrible record. And I believe that I presided over a case that he had in this court, and I think it was a theft case.

But at any rate, I know he had a terrible record and was -- whoever was going to be able to cross-examine him, he was going to be able to impeach him fairly easily.

MS. NORTHUP: That's correct, your Honor. And Mr. Novak does state on the record when he was arguing this before the Court that -- and I believe it came up in the context of his motion to withdraw -- and then after the State represented that it was not going to call him, Mr. Novak indicated, well, based on his knowledge of Mr. Reid's prior history that he -- he was not planning on calling him either.

So I think Mr. Novak's reasons for not calling Mr. Reid and the fact that he -- after he had been interviewed knew his -- he had no credibility. I mean, that -- that could certainly be developed further. But I think there's -- there's an adequate record of that as well.

THE COURT: Right. I think that's all true. Okay. Well let me summarize then. I think we're done with arguments on these.

So I'm going to set evidentiary hearing as to

[p.63]

24-F, paragraphs one and two; 24-G; 24-I, paragraphs three, six, and seven. And then I have under consideration whether to set a hearing or a ruling as to paragraph 24-C solely as to the inventory search. All other claims are dismissed.

MS. NORTHUP: Your Honor.

THE COURT: Yes.

MS. NORTHUP: I think I have in my notes that on -- and you may have said this, but on claim 24-F, subpart -- let's see. You said 24-F, subparts one and two. Just one and two?

THE COURT: Right. Paragraph three was denied.

MS. NORTHUP: Okay.

THE COURT: Okay. So now I think we need to set this evidentiary hearing. So I guess I'm wondering how long counsel will need to prepare for it.

MR. GOLDBERG: Your Honor, I was thinking the end of next month because I have -- oh, I have at least one witness that has -- maybe two that have to travel from out of state.

THE COURT: Well, how much time do you need for -- how much time do you think the hearing on this will take?

MR. GOLDBERG: I cannot even venture to guess, your Honor. I would assume an entire day though. That would really depend on how much -- it would depend on a couple things.

One, the State has a right under Rule 32 to have

[p.64]

Mr. Jones testify, whether he wants to or not. So I don't know whether they're going to do that or not and how long that can -- how long that would involve. And also I'm not sure at this point, your Honor, how long it would take the court to have him transferred up to Mohave County from death row.

THE COURT: Well, that depends on you. You're going to provide me an order for transportation and I'll sign it.

MR. GOLDBERG: Excuse me?

THE COURT: You're going to provide me with an order for transportation and I'll sign it.

MR. GOLDBERG: Right.

THE COURT: I can do that fairly easily, as soon as I get the transportation order.

MR. GOLDBERG: I just don't know what the time table -- I would assume the Mohave County Sheriff's Department would go down and get him.

THE COURT: They need a couple of weeks' notice.

MR. GOLDBERG: That's what I thought, for security measures.

THE COURT: Well, we're going to need my secretary in here. Would you go get Anji.

MS. NORTHUP: And, your Honor, if we could set a date. It would probably be helpful, since it's basically their burden, we can -- because I'm not so sure that I at this

[p.65]

point, based on their witness list, I would have any independent witnesses. I would probably call some of the same people they would call or just cross-examine some of their witnesses. So I don't know, unless I see who they are going to call, to see if I need to call any witnesses.

(Anji entered the courtroom.)

THE COURT: Well, I'll reserve a full day and we can start at, say, nine o'clock in the morning. But I'll try to reserve a full day whenever we can set it.

I need to find a day that's completely clear on my calendar except for maybe a little bit in the morning. Anji, we're looking for a full day in late March or early April for an evidentiary hearing.

(Judge and Anji confer.)

THE COURT: I'm looking at April 4th. It's a clear day. What do we have on the 5th in case we spill over?

MR. GOLDBERG: That would be fine, your Honor.

ANJI: Just some review hearings.

THE COURT: Ms. Northup?

MS. NORTHUP: Yes, that's fine.

THE COURT: So let's set it on April 4th, 9:00 a.m. I'm going to tie up that day, so this has got to go on that day.

MR. GOLDBERG: That would be fine, your Honor. Your Honor, I have one question.

[p.66]

THE COURT: Yes.

MR. GOLDBERG: If I file a motion to transport Mr. Jones, can I assume then that the Court will -- the Court -- that the sheriff's department will have him there at least the day before? I can couch the proposed order if you want one to conform to have him there the morning of the third so I can meet with him at the jail instead of having to go my own self to have to travel to Florence to see him again.

THE COURT: Right. I think you need to put in there the date you want him in the jail, and a date before would be fine with me. I'll sign it and -- and send the original and copies directly to my secretary. I'll sign it and then she will make sure they get delivered.

MR. GOLDBERG: On the motion to transport?

THE COURT: Yes.

MR. GOLDBERG: Okay.

THE COURT: It needs --

MS. NORTHUP: Your Honor, can we set a date of which to identify our list of witnesses?

THE COURT: Right. On that motion to transportation make sure there is an order attached.

MR. GOLDBERG: Right.

THE COURT: That's all. And then my secretary will take care of it. And then how much time do you need to file

[p.67]

a list of witnesses that you're going to present and evidence?

MR. GOLDBERG: We're going to do this on April the 4th?

THE COURT: Right.

MR. GOLDBERG: I'd say two weeks before that, your Honor, if that's ample notice.

THE COURT: Well, Ms. Northup.

MS. NORTHUP: Let's see.

MR. GOLDBERG: Some of the witnesses, to be honest with you, your Honor, I have to make sure that a couple of them -- I know where they are, okay. They've had contact with Mr. Cooper.

THE COURT: Okay.

MR. GOLDBERG: To make sure that he can get to them and serve them with a subpoena and so forth, I want to do that two weeks in advance.

MS. NORTHUP: And, your Honor, I just want to make sure I have enough time because once I look at

what the proposed testimony is, my position may be that it pertains to an issue that, you know, has been precluded or I have to have enough time to be able to talk to these people beforehand. So . . .

THE COURT: Well, right. I guess, Mr. Goldberg, I'm not saying you have to have them subpoenaed or that they will definitely testify, all I'm saying is that you give a

[p.68]

list of those you intend to try to get for the hearing.

MR. GOLDBERG: So the same potential witness list that's filed under Rule 15, these are potential witnesses?

THE COURT: Right. And then maybe two weeks before both of you can have an informal conference just between yourselves and clarify who, you know, is going to testify.

MR. GOLDBERG: That would be fine.

MS. NORTHUP: All right.

THE COURT: So maybe you can give her a list a week from today and give you her list a week after that. And then, let's see, so a week from today would be March 1st and a week after that would be March 8th. And then two weeks before the hearing, which would be March 21st, you can both maybe try to clarify who actually is going to testify. Does that -- is that an adequate time table?

MR. GOLDBERG: That will work, your Honor.

MS. NORTHUP: Yes, your Honor.

MR. GOLDBERG: You want that filed with the Court though, right, the State's and my list?

THE COURT: I guess just to make sure it got sent, you can file it with the Court also.

MR. GOLDBERG: All right.

MS. NORTHUP: And if I could ask defense counsel, could you fax it to me because it saves about three days in the mail.

[p.69]

MR. GOLDBERG: Fax it to you. Okay.

MS. NORTHUP: Thank you.

THE COURT: Anything else?

MR. GOLDBERG: No, your Honor. Well, one other thing, your Honor. Would that be -- this is just a point on funding, because we had addressed this issue at I think the last time or the time before that we had a conference on this case.

THE COURT: Right.

MR. GOLDBERG: And you had authorized additional funds once we got to this procedure -- to this point, after I had filed my reply.

THE COURT: For counsel?

MR. GOLDBERG: For counsel. And I don't know at this point how much money Mr. Cooper has billed the Court.

THE COURT: I don't know either.

MR. GOLDBERG: He did not make me privy to that sort of thing. If I needed additional funds to him -- since he's there in Kingman he -- I would have him serve subpoenas and so forth and contact these witnesses to make sure they're at this hearing, I think the original allocation was $2,000 for him. I don't know if that's for him. And there was some work done by Mr. Hanratty at the beginning, whether that funding is precluded or used up.

THE COURT: I don't know the answer to that question.

[p.70]

I guess as far as counsel is concerned, I believe the -- the amounts that we can get partially funded have gone up. Maybe I'm wrong about that.

MR. GOLDBERG: Right. Yeah.

THE COURT: But at any rate, you're not fired yet. You can keep working.

MR. GOLDBERG: I guess that's a blessing.

THE COURT: Yeah. There you go. And as far as Mr. Cooper is concerned, you can have -- ask him if -- I guess if he needs more funds, I'll take a look at it.

MR. GOLDBERG: He can go directly to you? We don't have to go through a motion or anything?

THE COURT: Just have him send me a letter for more funds and how much it's going to be and I'll look at it.

MR. GOLDBERG: All right.

THE COURT: I think that's the easiest way to do it.

MR. GOLDBERG: Okay.

THE COURT: All right. Anything else.

MR. GOLDBERG: I think that's it, your Honor.

MS. NORTHUP: No, your Honor.

THE COURT: All right. Thank you. That concludes this hearing. Thank you.

(The proceedings were concluded at 10:57 a.m.)

[p.71]

Certificate of Reporter

I, Kimberly Bigelow, 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 typewritten pages constitute a full, true, and accurate transcript of said record, all to the best of my knowledge and ability.

Dated this 4th day of May, 2000.

/s/ K. Bigelow
Kimberly Bigelow, CSR #11584, CCR #638, RPR

**IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE**

NO. CR-14141

[Dated May 23, 2000]

**HONORABLE JAMES E. CHAVEZ
DIVISION IV
DATE: May 23, 2000**

**VIRLYNN TINNELL, CLERK
*ag**

MINUTE ORDER

STATE OF ARIZONA, Plaintiff, vs. DANNY LEE JONES, Defendant.	))))))))

After the informal conference on February 23, 2000, the court set evidentiary hearing on petitioners post-conviction claims as follows:

1. Claim 24F (paragraphs one and two),
2. Claim 24G
3. Claim 24I (paragraphs three, six and seven)

At the start of the evidentiary hearing held on April 4, 2000, petitioner advised the court that no

evidence would be presented with regard to claim 24F paragraph two and that counsel would rely on the petition and supporting documents.

IT IS ORDERED denying claim 24F paragraph two.

With regard to claim 24F paragraph one, petitioner claims "trial counsel was unprepared for cross examination, failed to object to critical inadmissable testimony and permitted prejudicial and inadmissible evidence to be heard and viewed by the jury."

Petitioners primary complaint with this claim is that defense counsel did not interview all of the witnesses. At the evidentiary hearing, Mr. Novak explained that he had not interviewed the witnesses because he knew what they would say and he had the assistance of an expert witness who helped him with cross-examination.

With regard to Claim 24G petitioner says "Trial counsel was ineffective in failing to request funding for and present necessary witnesses and testing for trial." Petitioner alleges counsel should have obtained funds for various experts.

At the hearing Mr. Novak testified that he sought funding for an expert regarding defendants substance addiction and for a crime scene reconstructionist. The addiction expert was paid over $5,000 by the Court. The expert on reconstruction conducted pretrial work for $1,000. At the reconstruction experts' suggestion, Mr. Novak did not call him at trial. Contrary to petitioners claim, no other experts would have been of assistance to the defense.

With regard to Claim 24I, petitioner alleges that trial counsel was ineffective at sentencing by failing ". . . to recognize the need for neurological and psychological testing . . ."

The report and testimony of Dr. Potts who was appointed by the Court, adequately addressed defendant's mental health issues at sentencing.

In addition, in paragraph 6, petitioner claims that defense counsel did not object to Mr. Butler's rebuttal testimony. Contrary to the petitioner's claim, it is clear from the record that the subject matter of Butler's testimony was disclosed to the defense. Mr. Butler's testimony addressed an issue raised by the defense. Any objection to the testimony would have been overruled.

In Claim 241(7), petitioner alleges that "Trial counsel failed to present meaningful additional witnesses and available evidence to support Jones' proposed mitigation."

Testimony at the hearing showed that counsel presented the available witnesses and evidence to support mitigation. The additional witnesses and evidence suggested by petitioner would have been redundant.

The court finds that the petitioner has not met its burden of proof of showing deficient performance by trial counsel.

IT IS THEREFORE, ORDERED denying the Petition for Post Conviction Relief.

cc:

Dawn M. Northup
Assistant Attorney General
Criminal Appeals Section
1275 West Washington
Phoenix AZ 85007-2997

James J. Zack, Chief Deputy
Mohave County Attorney

David Goldberg
421 Pinon Trail
Flagstaff AZ 86001
Attorney for Defendant

Honorable Janet Napolitano
Arizona Attorney General Defender

Honorable James E. Chavez
Division IV

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CIV 01-0384-PHX-SRB

[Death Penalty Case]

DANNY LEE JONES,)
Petitioner,)
)
-vs-)
)
DORA B. SCHRIRO, et al.,)
Respondents.)
)

EXHIBIT# 1

DECLARATION OF PABLO STEWART, M.D.

I, Pablo Stewart, M.D., declare as follows:

1. I am a physician licensed to practice in California, with a specialty in clinical and forensic psychiatry. I have extensive clinical, research, and academic experience in the diagnosis, treatment, and prevention of substance abuse and related disorders, including the management of patients with dual diagnoses and the use of psychotropic medication and diagnostic, treatment, and community care programs for persons with Post Traumatic Stress Disorder.

2. I have written and published numerous articles in peer review journals on topics that include dual diagnoses, psychopharmacology and the treatment of psychotic disorders and substance abuse. I have designed and taught courses on protocols for

identifying and treating psychiatric patients with substance abuse histories and have supervised psychiatric residents in teaching hospitals. I have worked closely with local and state governmental bodies in designing and presenting educational programs about psychiatry, substance abuse, and preventative medicine.

3. I received my Bachelor of Science from the United States Naval Academy, Annapolis, Maryland, in 1973, with a major in chemistry. I received my Doctor of Medicine Degree from the University of California, San Francisco, School of Medicine in 1982.

4. I served as a Physician Specialist to the Westside Crisis Center, San Francisco Ca., from 1984 to 1987 and the Mission Mental Health Crisis Center from 1983 to 1984. I have served as Medical Director of the Comprehensive Homeless Center, Department of Veterans Affairs Medical Center in San Francisco CA; where I had overall responsibility for the medical and psychiatric services at the Homeless Center; Chief of the Intensive Psychiatric Community Care Program Department of Veterans Affairs Medical Center in San Francisco, CA; Chief of the Substance Abuse Inpatient Unit, Department of Veterans Affairs Medical Center in San Francisco CA, where I had overall clinical and administrative responsibilities for the unit; and Psychiatrist at the Substance Abuse Inpatient Unit, where I provided consultation to the Medical/Surgical Units regarding patients with substance abuse issues. I am currently the Chief of Psychiatric Services at Haight Ashbury Free Clinic in San Francisco, California, a position I have held since 1991.

5. In addition to my clinical and teaching responsibilities, I have experience in forensic psychiatry. From 1988 to 1989, I was Director of Forensic Psychiatric Services for the City and County of San Francisco where I had administrative and clinical responsibilities for psychiatric services provided to the inmate population of San Francisco. My duties included direct clinical and administrative responsibility for the Jail Psychiatric Services and the Forensic Unit at San Francisco General Hospital. From 1986 to 1990, I was Senior Attending Psychiatrist, Forensic Unit, University of California, San Francisco General Hospital, where I was responsible for a twelve (12) bed maximum security psychiatric ward. One of my duties was advising the San Francisco City Attorney on issues pertaining to forensic psychiatry.

6. I also serve as medical and psychiatric consultant to the monitors of the agreement between the United States and Georgia to improve the quality of juvenile justice facilities, critical mental health, medical and educational services, and treatment programs. The monitor is the Institute of Crime, Justice and Corrections at George Washington University in Washington. D.C. I have qualified and testified as a psychiatric expert witness in federal court cases regarding the implementation of constitutionally mandated psychiatric care to California's inmate population at different maximum security and psychiatric care facilities. I serve as a Technical Assistance Consultant to the Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration, Department of Health and

Human Services; and Psychiatric Consultant to the San Francisco Drug Court.

7. In 1985, I received the Mead-Johnson American Psychiatric Association Fellowship for demonstrated commitment to public sector psychiatry and was selected as the Outstanding Psychiatric Resident by the graduating class of the University of California, San Francisco, School of Medicine. In 1985 - 1986, I was the Chief Resident, Department of Psychiatry, University of California San Francisco General Hospital and had direct clinical supervision of seven psychiatric residents and three to six medical students.

8. I have served as an Examiner for the American Board of Psychiatry and Neurology and am a Diplomat of the same Board. I am active in several professional associations and have served as the President, Secretary-Treasurer and Councilor-at-large of the Alumni-Faculty Association, University of California, San Francisco, School of Medicine; Vice President of the Northern California Area, Alumni-Faculty Association, University of California, San Francisco; and Associate Clinical Member of the American Group Psychotherapy Association.

9. I have held academic appointments as Associate Clinical Professor, Assistant Clinical Professor, and Clinical Instructor in the Department of Psychiatry, University of California, San Francisco, School of Medicine, since 1989. I received the Henry J. Kaiser Award for Excellence in Teaching in 1987 and was selected by the graduating class of the University of California, San Francisco, School of Medicine as one of the top ten faculty members for the academic year

1994 - 1995, 1990 - 1991, and 1988 - 1989. I designed, planned and taught "Drug and Alcohol Abuse" and "Alcoholism," one unit courses covering major aspects of drug and alcohol abuse; supervised fourth-year medical students in the care of dual diagnostic patients at the Psychiatric Continuity Clinic, Haight Ashbury Free Clinic; facilitated a weekly psychiatric intern seminar on "Psychiatric Aspects of Medicine"; and lectured on addictionology and substance abuse to the School of Pharmacy, UCSF.

10. At the request of counsel for Danny Lee Jones, ("Danny"), I conducted a psychiatric evaluation of Danny in order to determine and identify the significant factors that influenced his behavior and cognitive functioning at the time of the offense and over the course of his life. This evaluation included a mental status examination, a structured psychiatric diagnostic interview, and a lengthy open-ended interview designed to elicit a medical and psychiatric history as well as any evidence of malingering.

11. I interviewed Danny at the Arizona Department of Corrections, Special Management Unit IT (SMU II), the facility for death sentenced prisoners, on March 18, 2002; his mother, Peggy Jones; and his step-father Randy Jones. I also reviewed and relied on the reports of Drs. Shoba Sreenivasan and David Foy.

12. I reviewed the relevant trial, sentencing and post-conviction transcripts. I have also reviewed the Arizona Supreme Court Opinion issued in this case, as well as the presentence report. In addition, I reviewed contemporaneous documentation concerning Danny's social and medical history, including his school

medical, military, criminal, and incarceration records. I also reviewed numerous investigative reports and declarations of family members that describe Danny, his parents, and their interfamilial dynamics. These are the kinds of materials routinely relied upon by members of my profession in reaching their opinions.

13. My interview of Danny was conducted in a private interview room. Prison officials required that I wear a padded vest and safety goggles as routine safety measures required for all contact visits with all death sentenced prisoners, even though Danny has demonstrated no signs of aggressive or disruptive behavior during visits.

14. Danny appeared his stated age of 37. He was well groomed, was dressed in a prison uniform, and was cooperative throughout the interview. He is slightly overweight and average in height (5' 9").

BACKGROUND AND FACTUAL INFORMATION

Peggy Jones' (Danny's Mother) Childhood

15. Peggy (Goodson) Jones is Danny's mother. She was born in North Carolina in 1949. Her father left her mother when Peggy was five (5) months old and completely disappeared from her life when she was nine (9) years old (only later to appear in Peggy's life when she was a young adult). Peggy's mother and grandmother worked to support the family. When Peggy was four (4) years old her mother married Enloe Schuler. Schuler was not a good provider and therefore, Peggy's mother continued to support the family. When Peggy was about nine (9) years old, Schuler began

raping Peggy. This continued for two (2) years until Peggy moved in with her aunt to escape her stepfather.

16. Peggy was always a sickly child and was also underweight. She experienced "fits" or seizure-like attacks which where never diagnosed. Because of the stresses and responsibilities at home, Peggy was not able to complete school and by age fourteen (14) she was working full-time.

Jimmy Beck (Danny's biological father)

17. Peggy met Jimmy Beck (Beck), Danny's biological father when she was thirteen (13) years old and he was eighteen (18) years old. Peggy married Beck, when she was fourteen (14) years old, to get out of her house. Beck was an alcoholic, a thief, a gambler and unable to maintain steady employment. In addition, Beck had a learning disability, as he was unable to pass in school. Jimmie Beck's parents were first cousins. His mother was an alcoholic and drank until she passed out every night. Beck's mother also had "nervous breakdowns" and was hospitalized several times for them.

18. For Peggy, life with Beck was not what she hoped. Due to his drinking, gambling, and stealing, Peggy was forced to support the family. Soon after they were married Beck became violent. He raped Peggy repeatedly and also forced Peggy to have sex with his friends. When she refused, he would hit her. Beck's physical and emotional abuse included berating Peggy, pushing her against walls and slapping and hitting her with his fists. Peggy suffered broken bones at Beck's hands.

Chrome Exposure, Malnutrition and Pregnancy

19. Peggy began working at a chrome-plating factory when she was fourteen (14) years old. At this factory she was required to stand for eight (8) to ten (10) hours a day working off the conveyor belt. Her job was to take the freshly chrome-dipped hubcaps off the conveyor belt, sand, clean and buff them. She was given only goggles and cotton gloves for protection form the highly caustic chemicals. The turnover rate at the factory was high because of the employees succumbing to the overpowering odors caused by the cleaning fluid and other chemicals used in the chroming process. Peggy was sick almost every day. A month after starting work at the chrome-plating factory, Peggy became pregnant with Danny. Peggy worked at this factory for most of her pregnancy.

20. Due to her poverty and nausea induced by her job, Peggy suffered from malnutrition. A typical day of eating consisted of a pot of coffee, several packs of cigarettes and mayonnaise and bread sandwiches, since, aside from beer, that was often the only food in their refrigerator. During her pregnancy Peggy was severely malnourished and only weighed ninety-eight (98) pounds. She never ate breakfast or dinner. Shortly before Danny was born, Peggy got a job as a waitress at a restaurant and she was able to eat a free lunch there - her only real food of the day.

21. The physical abuse from Beck did not subside while she was pregnant with Danny. Beck continued to beat Peggy. In one instance, after a beating from Beck, when she was three (3) months pregnant, she began bleeding and was told by her doctor that her placenta

was separating. Two weeks before Danny was born Beck pushed Peggy down the stairs. As she laid at the bottom of the stairs, Beck ordered her to get up. When she could not get up, Beck punched her in the face, kicked her in the stomach and left. This incident left her with a black eye and vaginal bleeding.

Danny's Birth

22. Peggy's labor and delivery was extremely complicated. The doctor attempted to give Peggy an epidural (an injection given in the epidural space to decrease sensation to the lower extremities of the body), but missed. Peggy was in labor for forty-eight (48) hours and was in and out of consciousness throughout. Moreover, four (4) hours before Danny was born, Peggy's heart stopped. In addition Danny was in breech position (feet first) and the umbilical cord was wrapped around his neck constricting his airflow. The doctor used forceps to turn Danny around and finally pull him out of the birth canal. Danny was deprived of oxygen at least twice during birth: once when Peggy's heart stopped, and then again while the cord was wrapped around his neck. Once it was all over, Danny was bruised on both temples, his jaw, the base of his neck, the back of his head, below his elbows and knees, and along his spine. Danny was given pain medication.

23. It was clear that Beck did not want Danny. First he proposed that Peggy leave Danny with her mother and move away with him. Then Beck's mother called Peggy, claiming that she could sell Danny for $5,000 and she would split the money with her. She had already found a buyer. Due to these pressures, Peggy left Beck soon after Danny's birth.

Richard Eland (Danny's first step-father)

24. When Danny was about one-and-a-half (1½) years old, and Peggy was about seventeen (17) years old, she met Richard Eland ("Eland"). Approximately a year later they were married. About six (6) months into the marriage, Eland began drinking heavily and using drugs. When Peggy turned eighteen (18) years old, Eland threw her a birthday party. During the party Peggy jokingly teased Eland about something. Eland took it the wrong way and picked Peggy up by the throat and pinned her against the wall until she started to turn blue. Two of his friends had to pull Eland away. A few months later, when Peggy was eight (8) months pregnant with Carrie, Eland's abuse began again without end. Thereafter, Eland often beat Peggy, breaking her jaw twice. He even shot at her once. Danny was often a witness to these incidents. Right after Eland shot Peggy, she walked into Danny's room and found him talking to an imaginary friend. Eland's abuse was not limited to Peggy.

25. When Danny was about three-and-a-half (3½) years old, Carrie, Danny's sister, was home. Eland was the disciplinarian of the family. As punishment, Eland would often make Danny sit in a highchair for long periods of time. When Peggy finally took Danny out, Eland knocked Peggy across the room for doing it. In order to punish Danny, Eland would make him stand in a corner for prolonged periods, hit him with a wooden spoon and hit him bard on the back of the head and ear. Danny often had earaches because of this. One time Eland made Danny sit there for three-and-a-half (3½) hours.

26. As Eland could not keep a job, he often watched the children while Peggy worked. On one of these occasions, Eland put a piece of soap in Danny's mouth, taped his mouth shut with duct tape, and locked him in the closet where his mother found him when she came home.

27. When Danny was about five-and-a-half (5½) years old Peggy found Danny barely conscious lying underneath a slide attached to a swing set. Eland was standing over him. Although Eland denied it, Peggy suspected Eland had hurt Danny, since Danny had never fallen off the slide before. Danny's face was all red and he threw up. Peggy wanted to take Danny to the hospital but Eland did not let her.

28. Danny tried to protect his mother. During one incident, Eland was in the garage working with an electric saw. Eland held the saw to Peggy's throat and said "[i]t would be so easy to cut your jugular." Danny tried to help Peggy but she ordered him inside the house. Once she got away from Eland, she searched for Danny. Peggy found Danny hidden under the kitchen table shaking and crying. He told Peggy, "Mommy, I thought you were dead." Danny witnessed so many incidents that finally when he was about four (4) years old Danny told Eland "[y]ou hit my mom one more time and I'm gonna kill you."

29. By the time Danny started first grade, Eland was gone. Although Peggy realized Eland had caused some trauma to her children she did not realize the impact of it until years later. When Danny was about nine (9) years old, Eland committed suicide. Peggy told her children about the suicide. Shortly after that, the

school called Peggy to inform her that Carrie was biting other children hard enough to take chunks of flesh off. Peggy took both Danny and Carrie to a counselor. During one of the sessions, the counselor gave Carrie a doll and asked her "[i]f this were [Eland], what would you do to him?" Carrie took the doll and banged his head repeatedly on the edge of the table, tore his arms and legs off and said "I hate him. He was mean to my Mommy. And he died and I did not get to tell him." Carrie was at most two (2) years old when Eland and Peggy separated and she did not experience the violence to the extent Danny did. Danny, unlike his sister, has not been able to express his anger towards Eland.

Randy Jones (Danny's Second Step-father)

30. Peggy married Randy Jones ("Randy") in 1972, when Danny was about eight (8) years old. Randy was a deputy sheriff and worked the night shift. Randy had recently returned from the Republic of Vietnam, where he served for a year with the Marines. For Danny, their marriage was sudden. Randy was just this man that all of a sudden appeared in his life and then the next thing Danny realized, Randy and Peggy were dating and then he moved in. Danny soon realized that Randy was just another version of Eland.

31. Life with Randy was not any better than with Peggy's other husbands. Randy was a heavy drinker. In addition, Randy was controlling, arrogant, sarcastic and believed he was superior to everyone else and was a racist. For example, Peggy's sister is married to a Hispanic man, Mario. Although Mario has been a member of their family for twenty-seven (27) years,

Randy has not spoken one word to him nor has he ever acknowledged Mario's presence at any family gathering.

32. Randy controlled Peggy and the children. Peggy was not allowed to have a job, friends of her own, and had to follow Randy's "rules", no matter how ridiculous. Randy would often drop by the house unexpectedly while he was on patrol to make sure everyone was following the "rules". Peggy had to go behind Randy's back and break some of the "rules" so that the children would have some freedom. However, if Randy found out there would be serious consequences. Randy's control was not all in the form of psychological abuse, he would also hit Peggy and the children. This would occur frequently when he was drinking, which he did all the time.

33. Randy was manipulative and controlling even when Peggy tried to leave him. Once he asked Danny and Carrie to decide if they wanted him to leave. The children voted to let Randy stay, because they thought that's what Peggy really wanted. In addition, at least two (2) times, Randy threatened to kill himself. Once right in front of the children he held a gun to his head and threatened to pull the trigger. A second time Randy and Peggy were in the hallway when Carrie saw Randy with a gun to his head and Peggy on her knees, begging him not to do it.

34. The environment at home was very tense. Randy kept loaded guns all over the house (on the coffee table, refrigerator and under the bed). Randy would often sit in front of the television pulling the trigger to one of his guns, over and over and over again.

This was done, ostensibly, to "break-in" these weapons, however this is another example of his not-so-subtle method of controlling and intimidating his family. Danny knew better than to touch the guns, which were never locked, "the belt was the safety." Randy made sure Carrie and Danny knew that if they ever touched the guns they would be beaten.

35. Randy was not the father Danny was searching for. Randy berated Danny and told him he was no good and that he would grow up to be like his father, Jimmie Beck, and end up in jail. Randy made Danny believe that everything that went wrong in the family was Danny's fault. Danny was to blame for his parents' fights, the fights his parents had with his sister, the family's financial problems, and his mother's medical problems. (When Danny was in grammar school Peggy was in and out of the hospital with uterine tumors and lumps in her breasts.)

36. Randy played military-style "head-games" on the children and ran drills. He would make Danny and Carrie "line up" in the living room then gave them a set amount of time, in seconds, to run to their rooms, change into their pajamas and return to the same spot in the living room. Randy made them repeat this over and over and over again, changing clothes, back and forth many times in a row. There were lectures that lasted hours, where Danny and Carrie were not allowed to move. In addition, their rooms were inspected daily and if they were not to Randy's liking, Danny and Carrie would be punished.

37. Randy was also very manipulative. He would punish both Danny and Carrie in an abusive manner

(like punching Danny in the stomach so hard that it made him double over or holding Carrie against the wall heater until she was burnt). However, when Danny or Carrie told Peggy about the abuse, Randy accused them of lying and they would then be punished again for lying. Peggy rarely believed them. Danny and Carrie soon learned not to tell. As part of Randy's punishments, he would hit Danny and Carrie with a leather belt or the buckle. Danny and Carrie never knew which end they were going to be hit with. He would prolong the whipping by taking his time picking out the belt in front of the children. Carrie remembered one buckle in particular that had several large metal rings.

38. Randy's punishments and rules grew more bizarre as the children got older. One time, Carrie colored in Danny's book, and to punish Carrie for what she did, Randy made Danny whip Carrie with the belt. Danny did not want to do it but Randy made him. Another example of Randy's bizarre, torturous behavior is when he made Carrie stay up for three (3) nights in a row in her room, naked. Randy allowed her to sit on the bed but not lay down. He would go into her room periodically during the night to make sure she was awake.

39. This was one of several incidents that either had a sexual theme, or was sexually inappropriate. For example, at some point Carrie wanted to be a model and talked about it with both Randy and Peggy. After the discussion, and after Peggy had left the house to run an errand, Randy suggested that Carrie model for him while he took pictures. This "felt wrong" to Carrie

and she refused. However, Randy's inappropriate comments about Carrie's appearance continued and he told her she looked like a prostitute, and commented on her nipples, and even to pulled down her top to expose her breasts.

40. It was not unusual that all three, Danny, Carrie and Peggy, would be "grounded" by Randy. Randy was just as abusive and demeaning to Peggy, as he was to Danny and Carrie, often times in front of them. He hit her, yelled at her, told her she was no good and that no one would want her. The abuse got so unbearable for Danny that when he was just seven (7) or eight (8) years old, he decided that he was going to kill Randy if he did not stop hurting Peggy. This was not the last time Danny felt he needed to protect his mother against Randy. When Danny was about fourteen (14) years old, Randy was yelling at Peggy and Danny heard Randy hit Peggy. Danny grabbed a baseball bat, determined to protect his mother. He went into their bedroom but could not determine if Peggy had been hit or not, so he retreated.

41. Because of Randy's drinking, his job, financial stresses, and his abusive behavior, Peggy separated from him many, many times. During one of the separations, Randy insisted Peggy leave Danny with him. This separation lasted for a couple months.

Danny's Head Injuries

42. Danny suffered a series of head injuries throughout his life, starting from birth. The use of forceps in order to turn Danny around because of his breeched position, left him bruises on both temples, at

the base of his neck, and the back of the head, among other injuries. Starting at about age four (4), Danny had blackouts and would pass out, often hitting his head during the episodes.

43. As stated above, when Danny was about five-and-a-half (5½) years old, Peggy found Danny regaining consciousness, lying underneath the swing set. She suspected Eland, Danny's first step-father, had hit Danny or thrown him off the slide. Danny's face was red and he vomited, indicating he had a concussion. Eland inflicted other early childhood head injuries. Eland would constantly hit Danny hard on the side of the head, on his ear or right behind his ear. Danny often had earaches as a result of Eland's blows.

44. When Danny was about eleven (11) years old, he fell head-first off a roof onto the metal frame of a horizontal dolly, in an attempt to retrieve a ball. His eye hit the metal bar of the dolly. He was unconscious for about five (5) to ten (10) minutes. Danny was taken to a hospital emergency room. He had a concussion, his eye was swollen shut and he had swelling in the brain. The doctor was amazed that Danny did not break his eye socket. Danny's blood vessels were broken and he had to wear a band around his eye for a while. He also experienced dizziness, double-vision and migraines. In fact, Danny continues to suffer from migraines.

45. When Danny was about fifteen (15) years old, he fell off a second story scaffold and hit his head as he was helping a neighbor prepare a house for painting. He had a bruise on his left temple and a temple headache for days after the fall.

46. As a young adult, Danny had at least three (3) car accidents where he lost consciousness.

47. In 1983, when Danny was in the military, he was mugged and beaten with a two-by-four. A Sheriff, found Danny unconscious, in a ditch. He was taken to a hospital where he was released several days later with a diagnosis of head trauma, alcohol intoxication and concussion.

48. When Danny was about twenty-three (23) years old, he was beat up at a family wedding by a man who was jealous of Danny. The man kicked Danny in the head and left him all bloody. Danny's head swelled up as a result.

49. In addition, in 1992, Danny was assaulted in the Mohave County Jail by six (6) men. That assault left Danny with permanent damage to his left eye.

Substance abuse-

50. Danny would spend weekends with his grandparents at "the desert house," in Yucca Valley. Danny's grandfather Joe LeSuer and his Uncle Dale liked to see how drunk they could get Danny. When Danny was about nine (9) years old, they made Danny drink a six (6) pack of beer and he was violently ill for days.

51. Danny's sadistic introduction to alcohol and drugs was by his grandfather Joe. Danny's grandfather began using beer and pot as a tool to keep Danny quiet about the sexual abuse he was committing. Often times the predator will make the child believe that they are also doing something wrong, giving the child the

impression that they are in a conspiracy together. Danny's grandfather began giving him beer when he was as young as nine (9) years old. Danny continued to drink and smoke with his grandfather, Joe LeSuer, for years, which is also how long the sexual abuse lasted.

52. Danny smoked marijuana all through junior high school. Toward the end of junior high school, he was smoking every day whenever he could (at lunch time, before school etc.). In addition, he was drinking from a twelve (12) pack to a case of beer a week. The first time Danny tried hard liquor, he had just witnessed the accidental death of his good friend when he was about fifteen (15) years old. This accident occurred while Danny and his friend were racing down a mountain road on home-made luge boards. His friend's board was accidentally bumped by Danny's and he went flying off the ravine. Danny began drinking hard liquor to deal with the guilt he felt and still does, over his friend's death.

53. Because Randy was a police officer, Danny had to prove himself to his friends in order to fit in and not be rejected as the kid of a cop. He had to "party twice as hard" in order to avoid being picked on.

54. By the time Danny reached the ninth (9th) grade he was using marijuana and drinking every day. He cut a lot of school to get high and drunk. He always found a way to get the drugs or alcohol.

55. When Danny started high school, he began experimenting more and more with harder drugs. He tried Valium and went through a period of using LSD (about two hundred (200) times) in high school. Danny

was also snorting cocaine at that time and using "speed," or "black beauties", which are amphetamines, in addition to alcohol. Danny got these drugs from friends or dealers in high school. He and his friends would pool their money together to buy drugs. By the time Danny was approaching twelfth (12th) grade, he was using up to one (1) gram of cocaine on the weekends.

56. Danny was failing high school. In an effort to "clean up his act" and join the Marines, Danny stopped using most of the drugs and graduated from a continuation school. On graduation day, Danny smoked two (2) joints laced with PCP.

57. Once Danny joined the military, he was routinely drug-tested so he stopped using drugs; however, his alcohol abuse escalated. Shortly after returning home from boot camp, Danny drank a fifth of Jack Daniels and had a "blackout." After boot camp, Danny's performance was poor because of his drinking and he was getting in a lot of trouble. Because of this, Danny was transferred to Camp LeJuene, North Carolina. At that time Danny was drinking two (2) fifths of hard liquor a week. It was at this point that Danny began doing cocaine and speed.

58. In July 1983, while Danny was in Atlantic Beach in North Carolina, he buried a gallon of vodka in the sand and drank it with a straw and blacked out. He was later found lying unconscious in a ditch along the highway, by a Morehead City Police Officer, who took him to the hospital. Danny had been mugged and beaten with a two-by-four.

59. While in North Carolina, Danny was placed in a six (6) week inpatient program and prescribed Antabuse, but was terminated after five (5) weeks because of a larceny charge. By this time, hospital records indicate, Danny could tolerate a fifth of liquor in a twenty-four (24) hour period.

60. After his discharge from the Marines, Danny returned home. About one (1) month later he began using cocaine, methamphetamine (“meth”), marijuana and alcohol Sometimes he would get “too high” and would use marijuana and alcohol to come down. Danny began injecting meth and cocaine in 1985. He would often mix the two for a more potent high. He was using around three and a half (32) grams intravenously every day.

61. Danny tried to quit on his own but was unable. He even admitted himself to a hospital emergency room complaining of withdrawal symptoms. Finally, in February 1986, Danny entered a twenty-eight (28) day inpatient program at Northern Areas Substance Abuse Council (NASAC), which he successfully completed. Danny however, failed to complete the follow-up program consisting of Alcoholics Anonymous and Narcotics Anonymous meetings and began abusing drugs and alcohol again.

62. Danny knew his habits were out of control and that he needed help. After a suicide attempt in 1987, where he tried to cut his wrists and chest with glass, Danny realized he hit bottom. He sought help from his probation officer who arranged for Danny’s admission into Delancey Street Foundation, a rehabilitation facility. He was accepted immediately.

Danny was a resident there from July 7, 1987 to March 20, 1989.

63. However, the day he left Delancey Street, he started using cocaine again. Danny stayed with a friend from Delancey Street who had been released a couple weeks before and he continued to abuse cocaine/alcohol. Danny stole some money from his friend and stayed at motel room with a prostitute for thirty (30) days in Carson City, Nevada. Danny smoked crack for twenty-eight (28) of those days straight. This was his first experience with crack cocaine.

64. Danny then returned to his parents' home for a short time. Because he was living in his parents' home, he only used alcohol and marijuana. Danny was also periodically experiencing blackouts. During this same period, Danny moved in with his sister and brother-in-law. Danny was trying not to start using heavy drugs again, but his brother-in-law used cocaine and Danny could not resist the temptation and began using again. When he left his sister's home, he moved to Bullhead City, Arizona, to his grandparents' home. He was snorting meth and drinking daily. In an effort to control his drug and alcohol abuse, he would try to only have twenty (20) dollars with him at any one time.

65. By the end of 1991, Danny was working temporary jobs and stealing to support his drug habit, which was out of control. Danny was back to using up to three and a half (3 2) grams of cocaine a day and was on a dangerous cycle of doing cocaine and/or meth and then using marijuana or alcohol to come down.

66. In Bullhead City meth was plentiful. Danny would typically be awake continuously for several days at a time. He might sleep every fourth (4th) or fifth (5th) day. This is what is called a "run." By this time he was using approximately two (2) grams of meth a day; snorting it, smoking it and shooting it. Danny's longest run lasted thirteen (13) days. While on this run Danny began to see shadows and lights began to bother him. In addition, he became short-tempered and paranoid at times. This is when Danny met Frank Sperlazzo. Frank was a meth dealer.

PSYCHIATRIC DIAGNOSES

Introduction and Summary

67. Any accurate assessment of an individual's mental health requires a full and informed understanding of that individual's life experiences and his functioning over time. In order to understand Danny's physical, psychiatric and psychological development, it is important to consider the biological, environmental, social, and psychiatric factors that affected both him and his family and to examine the interrelationships among these different realms.

68. A devastating accumulation of risks/deficiencies shaped Danny's childhood and adolescent development and had a direct impact on his behavior as a young adult. Before Danny was born he was at risk. Danny was born with a genetic predisposition for learning disabilities, substance abuse and mental illness, which is evident in both sides of his family, primarily from the paternal side. In addition,

Danny was compromised by a toxic and nutritionally deficient fetal development.

69. After surviving a near fatal birth, Danny's life only got more difficult. He suffered verbal, psychological, physical and sexual abuse at the hands of his first step-father, second step-father, grandfather and to some extent his mother. Although his mother, as a result of a form of Battered Woman Syndrome, had a passive role, her inability to defend Danny against the abuse isolated Danny and reinforced, Danny's perception that he was worthless. The effects of child abuse are severe, disabling and frequently irreversible, even with treatment. An abused child is left with physical and emotional scars and changes in brain physiology, which remain long after the abuse, or the threat of abuse ceases. This extensive child abuse causes life-long damage clinically diagnosed as Post Traumatic Stress Disorder (PTSD).

70. In Danny, child abuse was only one factor/risk contributing to his cognitive dysfunction. Cognitive dysfunction was previously described as "organic brain damage." Danny suffered a series of head injuries, which began at birth and continued into his adult life. Another contributing factor/risk was Danny's toxic and nutritionally deficient fetal development, which included chrome exposure as well as nicotine.

71. As stated above, Danny was genetically predisposed to substance abuse. His familial pattern illustrates generations of substance abuse. In addition, Danny's attraction to substances were propelled by a need to self-medicate effects of PTSD, Attention-

Deficit/Hyperactivity Disorder (AD/HD) and a Mood Disorder. This actually created a dangerous cycle where alcohol and drugs only partially treated these conditions and resulted in serious complications of his drug and alcohol use.

72. Danny's abuse, psychiatric disorders and biological factors/risks have been significantly interrelated his entire life. This physical and psychiatric history cannot be separated from the actions that have placed Danny on death row. Likewise, in order to understand the casual connection between these psychiatric findings and the crimes, all of factors/risks must be considered together as they are not mutually exclusive, but in fact interwoven.[1]

I. Cognitive Dysfunction

a. Head Injuries

73. As set forth in greater detail above, Danny suffered a series of head injuries throughout his entire life, beginning with his birth. The first few years of Danny's life, Eland was responsible for the blows, which, on one occasion rendered Danny unconscious and caused him to vomit, indicating he had sustained a concussion.

74. As an adolescent Danny fell off a roof and a scaffold, causing loss of consciousness and concussions. He also experienced dizziness, double-vision and migraines, which he continues to suffer from to this

---

[1] The reader will find the disorders and, therefore, the facts supporting those findings are under several categories. This illustrates the nature of the interrelationship.

day. This pattern of head injuries continued as a young adult. Danny had at least three (3) car accidents where he lost consciousness.

75. Finally in 1983, when Danny was in the military, he was mugged and beaten with a two-by-four and was found unconscious in a ditch. In addition to these incidents, as a result of substance abuse, Danny was in several "bar fights" during which he suffered numerous head injuries.

76. Any one of the head injuries/traumas illustrated above, could have caused the cognitive impairment diagnosed by Dr. Sreenivasan. However, the cumulative effect of repeated head trauma is an increase in aggressive outbursts, mood instability and general impulse control problems. Danny's cognitive and emotional functioning have been compromised by cumulative brain injury rendering Danny susceptible to impulsive behavior.

b. Substance Abuse

77. Danny's sadistic introduction to alcohol and drugs was by his grandfather Joe LeSuer. Danny's grandfather began using beer and pot as a tool to keep Danny quiet about the sexual abuse he was committing. Often times the predator will make the child believe that they are also doing something wrong, giving the child the impression that they are in a conspiracy together.

78. This began Danny's battle with long-term substance abuse that did not end until he was incarcerated for this crime. Early substance abuse (possibly as early as nine (9) years old), is indicative of

self-medicating for PTSD (caused by, among other events, physical and sexual abuse), ADHD and a Mood Disorder. As illustrated above, Danny's alcohol and drug abuse escalated to near lethal quantities.

79. By the time Danny was in high school he was using cocaine and LSD. After joining the military he moved on to amphetamines and meth in addition to hard liquor. Once discharged, he began mixing cocaine and methamphetamine for a more potent high. Sometimes he would get "too high" and would use marijuana and alcohol to come down. He was using around three and a half (32) grams intravenously every day. Danny tried every drug imaginable and he knew he was out of control.

80. Danny tried several times to stop using drugs and alcohol, but either failed the program or started using immediately after. His drug use put him in the hospital for withdrawal symptoms and an attempted suicide.

81. This long-term poly-substance abuse has compromised Danny's cognitive and emotional functioning and further rendered Danny susceptible to impulsive behavior.

c. Attention-Deficit/Hyperactivity Disorder (AD/HD)

82. Danny school records reflect a below average student. Danny recalled having problems in school. He tried to keep up by using "tricks" like putting his fingers on words that went together but soon school got too difficult and he could not keep up. He decided to

start "cutting" classes. He would rather be known as a "kid who cut" classes than an "idiot" or "stupid."

83. Danny's undiagnosed AD/HD caused him serious problems. He was unable to function at school and was more susceptible to being misunderstood as a behavior problem rather than a special needs student, therefore Danny chose to do drugs and cut school instead.

84. AD/HD is an organically-mediated disorder of the brain's neurotransmitters' system. This neurotransmitter deregulation, results in significant cognitive dysfunction. This AD/HD condition further contributed to his cognitive dysfunction. Just as his substance abuse and head injuries, Danny's AD/HD also contributed to his impulse control problems.

d. Post Traumatic Stress Disorder (PTSD)

85. As noted in Dr. Foy's report, a previously unrecognized problem associated with Post Traumatic Stress Disorder (PTSD), is cognitive dysfunction. To avoid repetition, please refer to Dr. Foy's well-written account of Danny's life history and diagnosis, regarding PTSD, with which I completely concur.

e. Mood Disorder, Not Otherwise Specified [NOS]

86. Without medication and therapy, a Mood Disorder can be a severely debilitating mental illness. In addition, Mood Disorders, such as Danny's,[2] also contribute to his cognitive dysfunction. From an early age, Danny displayed symptoms consistent with a

---

[2] See Section IV below.

Mood Disorder. This Mood Disorder has both an organic and a psychological ideology. The organic portion is most likely due to both sides of his family having an extensive history of Mood Disorders. It is an accepted medical fact that Mood Disorders are genetically-determined mental conditions. The psychological portion of this Mood Disorder is the extensive physical, sexual and emotional abuse he was subjected to at a very early age.

87. The combination of these functions resulted in Danny's display of explosive outbursts, aggression and significant mood swings, that began around age thirteen (13). He was even treated for this condition for a short period of time with a mood stabilizer, Lithium. During this period of Lithium treatment his mother stated AI got my son back.@ Unfortunately, Danny did not continue this treatment. (Of note, Danny is currently being treated with Lithium and the antidepressant, Elavil by the Arizona Department of Corrections).

f. Prenatal Factors

88. It is well-established that a child's fetal development is critical. Danny was exposed to a series of prenatal trauma that negatively impacted his development and functioning.

89. As stated above, when Peggy discovered she was pregnant with Danny she was working at a chrome-plating factory. She was only fourteen (14) years old at the time. Peggy's job was to take the freshly chrome-dipped hubcaps off the conveyor belt, sand, clean and buff them. She was not given a face

mask and she inhaled the chemicals and dust all day. This was a difficult job for even the healthiest person. This was evidenced by the high turnover rate. Peggy was sick almost every day (even before she was pregnant), however she needed the job in order to support her family.

90. The dangers of chrome vary based on the degree of exposure. Peggy's exposure to Chromium VI (Cr-VI), as described by Peggy was exceptionally high. Because of her age (14 years old), the exposure had a heightened effect on her physically and on her central nervous system. In addition, without ventilation and without a mask, Peggy buffed hubcaps for eight (8) to ten (10) hours a day, thus inhaling the dust created by the Cr-VI.[3]

91. Worker safety now requires local exhaust and proper ventilation, which was not required when Peggy worked with Cr-VI. Further recommendations now include splash-proof goggles, face shield, chemical resistant gloves, apron and boots. None of these protections were available for Peggy.

92. Birth complications, such as Danny's, are consistent with exposure to Cr-VI. In addition testicular problem, which are well-documented with Danny are also consistent with Cr-VI exposure.

---

[3] While some of the known effects are discussed in this declaration, others may include cell, chromosomal DNA and neurological damage. Birth complications as well as elevated levels of chrome in the umbilical cord, placenta, and breast milk, were present in woman exposed to chrome during their pregnancy. See David Freeman=s Declaration, July 29, 2002.

Furthermore, because Cr-VI is a known carcinogen, exposure in smokers creates an increased risk.

93. High levels of exposure, of the type that Peggy was exposed to, appear to cause neurological damage.

94. Nicotine and caffeine intake (even without the CR-IV exposure), are proven to be detrimental to fetal development. As set forth above, because of a lack of money, Peggy's nutrition consisted of a pot of coffee, mayonnaise and bread sandwiches and packs of cigarettes. During her pregnancy Peggy was malnourished and relied on nicotine and caffeine to get her through the day. The effects of nicotine on fetal development are well-established. More recently the harmful effects of caffeine have been exposed. These include an increased risk of miscarriage, low birth weight, heart abnormalities, Sudden Infant Death Syndrome (SIDS). In addition caffeine also interferes with the absorption of vitamins and mineral causing fetal malnutrition.

95. In addition to the toxins and malnutrition, Danny also suffered fetal trauma at the hands of his biological father, Jimmie Beck. Beck continued to beat Peggy while she was pregnant with Danny. After one of these beatings, when Peggy was three (3) months pregnant, she began bleeding and was told by her doctor that her placenta was separating. In addition, two weeks before Danny was born Beck pushed Peggy down the stairs, punched her in the face and kicked her in the stomach. This incident left her with a black eye and bleeding again. These bleeding episodes are indications of fetal trauma.

96. The combination of chrome exposure, nicotine and caffeine ingestion, coupled with malnutrition and the fetal trauma caused by beatings by Beck, supports the finding that Danny's fetal development contributed to his impaired cognitive development.

II. POST TRAUMATIC STRESS DISORDER (PTSD)

97. At a very early age Danny lived through several traumatic experiences that created "formidable, possibly insurmountable, obstacles in the path of appropriate, normal psychological development . . ." See Dr. Foy's Report dated September 8, 2002. Those traumatic experiences include Danny's long-term observations of his mother being beaten by two (2) step-fathers, long-term physical abuse and tyrannical discipline, repeated sexual abuse (fondling, oral sex and sodomy) at the hands of his (step) grandfather and the tragic death of his friend for which Danny felt responsible. To avoid repetition, please refer to Dr. Foy's well-written account of Danny's life history and diagnosis, regarding PTSD, with which I completely concur.

III. POLY-SUBSTANCE ABUSE

98. Danny's genetic loading combined with his abusive and traumatic childhood, family environment and underlying mental illness and cognitive dysfunction, caused him to be predisposed to the disease of substance abuse.

a. Genetic Predisposition

99. Danny's biological and genetic history has predisposed him to substance abuse. Danny's biological father, paternal grandmother and grandfather were alcoholics. Jimmie Beck, Danny's biological father, was already an alcoholic when Peggy met him, when he was eighteen (18) years old. He had been stealing alcohol from his father from the time he was twelve (12) years old. Often times, Peggy would stay out of the house until he passed out in order to avoid the conflicts and/or beatings. Danny's paternal grandmother, Wanda, was an alcoholic and drank until she passed out on the couch. Wanda developed liver problems, most likely due to her drinking.

100. Studies confirm a strong correlation between a genetic history of substance abuse disorders and predisposition to developing the disease of substance abuse. Also this social history demonstrates the severity of addictions within the family. Although Danny's alcohol and drug use began as a method of self-medication, his excessive use sprang from a genetically inherited predisposition to the disease of substance abuse.

b. Self-Medicate

101. Danny's attraction to substances was propelled by a need to self-medicate effects of PTSD, Attention-Deficit/Hyperactivity Disorder (AD/HD) and a Mood Disorder. This actually created a dangerous cycle where alcohol and drugs only partially treated these conditions and resulted in serious complications secondary to his drug and alcohol use.

IV. Attention-Deficit/Hyperactivity Disorder (AD/HD)

102. Attention Deficit/Hyperactivity Disorder (AD/HD) has damaging effects in several psychiatric aspects. In addition to causing cognitive dysfunction[4], the effects of AD/HD is responsible for many individuals' need to self-medicate with alcohol or drugs.[5] Notwithstanding these collateral effects of AD/HD, the severity of this disorder can be debilitating in untreated individuals. Individuals with AD/HD are impulsive, disorganized, socially inappropriate and generally unable to succeed. These characteristics can make daily functioning extremely difficult. Often times, AD/HD goes undiagnosed and untreated because the child is dismissed as a behavioral problem.

103. Although it is unclear exactly how AD/HD is caused, prenatal trauma and deficits,[6] such as those experienced by Danny, substantially increase the risk of AD/HD.

V. Mood Disorder, Not Otherwise Specified (NOS)

104. This mood disorder category includes disorders with criteria that do not fit into any other category or has symptoms, which may fit under more than one disorder. Diagnostic and Statistical Manual of

---

[4] See Section I (c).

[5] See Section III (b).

[6] See Section I (f) for a complete description of these factors.

Mental Disorders, (Fourth Edition, Text-Revised) ["DSM-IV-TR"], p. 410.

a. Prenatal Factors-

105. In addition to causing cognitive dysfunction, the above-described prenatal factors/deficiencies, can also lead to the type of mood disorder observed in Danny.[7]

b. Paternal Family

106. Danny's biological father more than likely suffered from an Affective Disorder such as Bipolar Disorder, which is a major mental illness. According to Peggy, Beck had a "learning disability" because he was "flunking out of school" when she met him.

107. In addition to being an alcoholic, Beck was also physically abusive, especially when he was drunk. He hit Peggy and offered her to his friends for sex. When she refused to have sex with his friends he would beat her.

108. Beck could not hold a job, therefore Peggy was the primary income earner at age fourteen (14). Peggy and Beck lived in a series of travel trailers and once even in a railroad boxcar once. Beck had no sense of planning for the future. When he did not gamble or drink what little money he earned, Beck would spend it on his girlfriends.

109. Beck was involved in risk-taking behaviors. He would run stop signs, drag-race or try to flip the

---

[7] See Section I (f) for a complete description of these factors.

car. In addition he experienced dramatic mood swings. At times Beck was full of energy and happy. During these periods of hypomania, he would stay up several nights in a row to complete a project. On the other extreme, there were times when Beck was depressed, stayed at home and did not shower, shave or brush his teeth for days. These symptoms are all indicative of Bipolar Disorder, formally known as Manic Depression.

110. In addition to being an alcoholic, Danny's paternal grandmother, Wanda, was also mentally unstable. She had several mental breakdowns and had to be hospitalized. It was also Wanda's idea to sell Danny and went so far as find to a buyer.

111. Danny's paternal grandfather, James, was also an alcoholic. Danny's paternal uncle, Bobby, also had a "mental breakdown" and had to be hospitalized. In addition, another paternal uncle (half-brother to Danny's biological father) was developmentally disabled.

c. Maternal Family

112. Danny's maternal family are prone to mood swings and impulsive behavior. Peggy's mother, Blanche has been married six (6) times, twice to the same man. Once she gave away all her belongings, two homes, cars and furniture in order to move away, only to return penniless months later. In addition she is a gambler and an "escapist." Blanche would literally run into the woods to get away from her problems.

113. Peggy's father also has a history of impulsive behavior including quitting his job six (6) months

before retirement, resulting in this losing all his benefits from thirty (30) years of employment.

114. In Peggy's family there is also a history of unidentified neurological impairments and problems. Peggy had "fits" as a child and had a couple of "seizures" when Danny was growing up. In addition, Danny has a cousin who is mentally retarded and other with brain tumors. Danny's Aunt Gale, is currently suffering from brain hemorrhages.

115. As previously noted, mood disorders of the type that affects Danny, carry a strong genetic component. The diagnosis of this disorder is further bolstered by the familial history of multi-generational mental illness.

c. Head Injuries/Trauma

116. As stated above, Danny has an extensive history of head injures and trauma.[8] In addition to causing cognitive dysfunction, head injuries, such as the type suffered by Danny, can cause or exacerbate an already existing mood disorder.

117. Danny's extensive familial history, in addition to his own symptomatic behavior, is indicative of a genetic predisposition to a mood disorder. This, coupled with several factors/risks of prenatal trauma and substantial head injuries, lead to the conclusion that Danny also suffers from a serious mental illness categorized as Mood Disorder, NOS.

---

[8] See Section I (a) and the background and factual information above for the detailed accounts of substantial head trauma.

CONCLUSIONS

118. In addition to reviewing documents, investigative interviews and declarations relating to Danny's social, medical and psychiatric history I also reviewed relevant trial, sentencing and post-conviction transcripts. As part of understanding how and why Danny ended up on death row, I reviewed accounts of the crime. It is apparent from the records that Robert Weaver was beaten with a baseball bat in manner, which may be considered "overkill." Danny has not wavered in taking responsibility for Mr. Weaver's death. The circumstances surrounding Mr. Weaver's death are a direct consequence of Danny's abused and unfortunate past. It is of great significance that Danny had to at least twice in his young life defend himself in a life-threatening situation with a baseball bat. One of the times, was when he stopped his grandfather from continuing years of severe sexual abuse by threatening him with a baseball bat. It is my professional opinion that at the time of Mr. Weaver's death Danny was acting under the effects of PTSD, as diagnosed by Dr. Foy.

119. It is further my professional opinion, which I hold to a medical certainty, that Danny suffers from cognitive dysfunction, formally defined as "organic brain damage" The causes and contributing factors surrounding Danny's "brain damage" are extensive, complex and interwoven.[9] This psychiatric condition is further compromised by Post Traumatic Stress Disorder, Poly-Substance Abuse, Attention-

---

[9] See Section I, Cognitive Dysfunction.

Deficit/Hyperactivity Disorder and a Mood Disorder, NOS.[10] The result of these mental illnesses, biological, environmental, social and other compromising factors, culminated in, at the time of the murder, an impairment in Danny's capacity to appreciate the wrongfulness of his actions and/or to conform his conduct to that required by the law. In other words, for all the reasons stated in this declaration, Danny's conduct was out of control, impulsive and once he started, he could not stop.

120. In addition, I have reviewed Danny's account of the crimes. Danny has explained the involvement of an individual named "Frank." Danny asserts that "Frank" is the person who murdered the child, Tisha Weaver. There is no evidence that Danny has ever mistreated, abused or harmed, any child in any way. In fact, Danny was by all accounts, a good step-father and now is a good father. Further, as stated by Dr. Foy, Danny has a history of submissive, almost child-like behavior, against older males, that he perceives are more powerful than him. This is reminiscent and a direct effect, of all the males that abused him in the past. As a result, it is my professional opinion that Danny's psychological profile supports the events as described by Danny on the night of the crimes, including Frank's responsibility for Tisha Weaver's murder.

I declare under of perjury under the laws of the State of California and the United States that the

[10] See Sections II, III, IV and V.

foregoing is true and correct. Executed this 10th day of September, 2002.

/s/ Pablo Stewart, MD
Pablo Stewart, M.D.

JACK L. POTTS, M.D.
FORENSIC PSYCHIATRY

10037 NORTH 42ND STREET
PHOENIX, ARIZONA 85028

December 3, 1993

Honorable James E. Chavez, Judge
Division IV
Mohave County Superior Court
Kingman, Arizona

Re: State of Arizona CR – 14141
vs.
Danny Lee Jones

Dear Judge Chavez:

This is in reference to the above-named individual. In late September 1993 your court ordered that I perform an evaluation pursuant to Rule 26.5 of the Arizona Rules of Criminal Procedure on Mr. Jones. I was provided numerous documents prior to completing my report. I also had a delay in getting this report to your court partly because of having not received the Probation Department's Presentence Investigation until the 1st of December. I did have an opportunity of spending a couple hours interviewing Mr. Jones on November 26, 1993. At that time he had been transported to our offices in Phoenix at the Madison Street Jail by the Mohave County Sheriff's Office.

The information I reviewed prior to completing this report included:

1. Adult Probation Office Presentence Investigation (with attachments) completed by Mr. Alan Chamberlain;
2. Medical Records from the Department of Human Resources, Nevada Mental Health Institute of Sparks, Nevada (May, 1987);
3. Police reports regarding the offense as forwarded to me by Mr. John S. Taylor, Deputy County Attorney;
4. Letters from the Churchill Council on Alcohol and Other Drugs, Fallon, Nevada, the Northern Area Substance Abuse Council, Inc. Reno, Nevada and the Delancey Street Foundation, San Francisco, California;
5. Interviews with the defendant and his mother Mrs. Peggy Jones;
6. MMPI - 2 test results.

Prior to interviewing the defendant I informed him of the nature of our conversation and the fact that it would not be privileged. The defendant was fully aware that I would be sending my report to your court to hopefully aid in sentencing.

Mental Status Examination

Mr. Jones presented as a 29 year old divorced Caucasian male who is the father of a 16 month old daughter. When seen the defendant was dressed in routine orange jailhouse garb. He presented neatly groomed with no obvious physical deformities. He was alert and oriented to his name, the date, our location, and his present circumstances. The defendant's affect was appropriate throughout our conversation. He had good eye contact and showed no manifestations of

suffering from perceptual disturbances such as auditory or visual hallucinations. He also denied suffering from such experiences. The defendant's memory was grossly intact for both recent and remote events. His cognitive abilities appeared to be consistent with his educational achievements. He apparently attended approximately three years of community college; two years while in San Francisco and one year after high school. I would estimate the defendant's I.Q. as being within the normal range. The defendant's abilities to abstract and conceptualize were consistent with his cognitive abilities. His judgment was good as tested. The defendant was neither homicidal nor suicidal at the time of our interview. Mr. Jones did complain of having intermittent nightmares regarding the offense. At the time of our interview he was receiving Zantac twice a day, Vistaril [illegible] 00 mg. per day in divided doses, Elavil 100 mg. in divided doses, an unknown antihypertension medication and an antimigraine medication on an as needed basis. None of the medications the defendant was receiving, I felt, interfered with the interview or the defendant's competency.

Social and Developmental History

Information that was covered in the Probation Department's report will not be duplicated here. A synopsis will be undertaken.

Danny Lee Jones was born of the union between Peggy (now) Jones and Jimmy Beck. The defendant's mother was 15 at the time of her son's birth. She apparently had a difficult and prolonged labor lasting 48 hours and requiring the use of forceps in the delivery. Apparently

Danny's mother had to be hospitalized on at least one occasion a couple of months before delivery. Furthermore. The defendant's mother noted that the defendant's father who was 18 years old at the time pushed her down some stairs 2 weeks prior to the birth of her son. Mrs. Jones denies using any alcohol or illicit drugs during the pregnancy. However, a nurse was sent home with her and her son to live with them for approximately one month after the birth; apparently over concern for the health of the child and possibly the mother.

Apparently the defendant's father left them before or very shortly after his son's birth. Danny was essentially reared by his mother and maternal grandmother during the next three to four years. He, according to his mother, was a normal child with regular development. However, he lost a bit of weight at around 8 months of age possibly secondary to the onset of childhood asthma. He also was noted by his mother to have digestive problems as an infant/child.

When Danny was approximately 3 years of age his mother married Richard Eland. That union lasted three and a half years during which time the defendant's mother was grossly abused as evidenced by receiving a fractured jaw and fractured ribs. The stepfather was also physically and psychologically abusive to Danny. Richard Eland who eventually suicided was a gambler, drug addict and alcoholic. It was during this marriage that Peggy Jones gave birth to the defendant's half-sister Carrie Ford who is four years his junior.

When Danny was approximately six years old his mother married an L.A. Deputy Sheriff, Randy Jones. This new stepfather was noted by the defendant to be quite stern and a disciplinarian yet certainly not physically abusive. Also, it is to be noted that during the defendant's childhood his maternal grandmother and uncles and aunts were available and provided good support to him. It was when he was entering his teens that Danny started to get in trouble. He had previously seen a counselor or psychiatrist in order to help deal with his anger and adjustment to Randy Jones when he was about six years of age.

According to his mother, Danny seemed to undergo a personality change when he was approximately 14 years of age. She, for example, remembers that he would come home after school and go to bed right away; something which was clearly out of character from the mischievous teenager who had started experimenting with alcohol and tobacco while cutting classes. It appears that Danny experienced his first serious head trauma when about 6 or 7 years of age. He was hit on the head and was unconscious for approximately 5 minutes. At approximately 11 years of age the defendant fell off a roof and was again unconscious for about 10 minutes. In the ninth grade or when he was approximately 15 years of age the defendant started heavily using drugs such as LSD and cocaine. He obviously continued using alcohol. His mother noted increasing "mood swings" and irritability around this time. He was expelled from high school as a senior.

The defendant under the watchful eye of his stepfather and mother attended "continuation school". Apparently

Danny did quite well and graduated receiving straight A's. He appeared to do well under structured supervision and decided to enter the Marine Corps. The defendant received a bad conduct discharge after serving time in the brig. He received no treatment for his problems with substance abuse and became increasingly involved with the criminal justice system after not having any record as a juvenile. He suffered alcoholic blackouts and periods of unconsciousness. The defendant entered various mental health or drug treatment facilities never succeeding until he went to the Delancey Street Foundation program in San Francisco for almost two years, 1987 to 1989. After having that program where he had become a journeyman plumber the defendant continued to not only use but sell drugs; primarily amphetamines and cocaine. He served time in county jail and was arrested over the years for nonviolent and usually misdemeanant crimes. After violating probation on a felony theft charge the defendant was tried for the current offense.

Significant Medical History

Besides having asthma as a child the defendant underwent two hernia operations when 11 and 12 years old. He also had numerous head injuries which were enumerated above. Furthermore, the defendant was apparently hospitalized for pneumonia secondary to I.V. drug abuse in 1991. He also was apparently brutally beaten in April of this year while in Mohave County custody resulting in visual problems and migraine headaches.

Mr. Jones' mental health history is primarily related to alcohol and drug treatment programs. However, there is some evidence that he was treated for a brief period of time with the mood stabilizing medication lithium. Apparently this medication helped not only control his inability and explosiveness but also his alcohol abuse.

The defendant's genetic history is significant for his father having been a drug addict, a binge alcoholic and a convict. Also, a paternal uncle spent about four years in a psychiatric hospital according to the defendants mother. The paternal grandfather and grandmother also had problems with alcohol.

Psychological Testing

The defendant completed the MMPI-2 on November 26, 1993. At my request the test was scored and interpreted by David Beigen, Ph.D., a licensed psychologist. It was a valid profile with the Welsh Code being: 1 *36 4' 2-0857/9: (L-F-K/).

The testing indicated that Mr. Jones was quite defensive. He was felt to be quite unlikely to "act out". He has little insight into his anger and prefers to use medical explanations for his behavior or feelings rather than focusing on his own psychological problems. He does tend to bottle up things and according to the test profile may leave unresolved chronic anger towards family members. He may in fact be terrified of himself. He does have an underlying somewhat paranoid disposition.

Statements Regarding the Offense

The defendant states that he had been abusing large quantities of alcohol, cannabis, and amphetamines prior to the offense. He was apparently awake for five days before the fight that lead to the deaths of the victims. Mr. Jones says that at the time of the fight he was fearful for his personal safety. After being attacked with a bat he exploded and assaulted Robert Weaver. Apparently he was startled by Kathleen Gumina when in the house and reflexively assaulted her. The defendant continues to deny having killed seven year old Teshia Ruth Weaver.

Analysis

During the early part of his life the defendant was reared in a chaotic and at times grossly hostile environment where physical abuse was too prevalent. He also had a genetic predisposition for not only substance abuse but quite probably an affective disorder such as manic-depressive illness or the attenuated form – cyclothymia. The fact that at times the defendant has been characterized as a "time bomb" as well as his positive response to lithium carbonate quite strongly points toward the presence of a treatable mental disorder.

In fact, there is evidence that individuals who have binge drinking problems may respond to lithium as do those with other cyclical disorders such as manic - depressive illness. The positive family history for alcohol and drug abuse quite probably condemned Mr. Jones to follow in the footsteps of his biologic father. Even if the defendant had been able to successfully

complete a treatment program, I believe the series of head injuries he suffered, his attempts at self-medication, as well as serious anger difficulties contributed to not only by amphetamine and other substance abuse but his affective disorder, condemned him further.

Layered on top of the very potent biologic predisposition we find repeated serious head trauma suffered before antisocial acts began. The fact that the defendant responded to the mood stabilizing medication lithium is strong evidence that he does have an underlying mood disorder that was and presently is treatable. Treating individuals with lithium can clearly decrease their antisocial behavior. The defendant's mother even noted that her son seemed considerably less irritable and had a significantly longer "fuse" when on the medication. He even decreased his consumption of alcohol, at least according to her observations; something that is not uncommon when, as I mentioned above, there is an affective/cyclical component to behavior.

The psychological testing and the defendant's history as well as clinical presentation is consistent with an individual who quite likely is fearful of turning out like his grossly abusive first stepfather. He in fact was unable to protect himself or his mother had to maintain an even external appearance for fear of retaliation and further abuse. The years he had of a relatively "normal" childhood and adolescence simply came too late and were not strong enough to counter the earlier abuse added to his genetic predisposition for problems.

Recommendations

The defendant is fully aware of having to spend the rest of his life incarcerated. In fact it may be this punishment and imposed structure that will finally keep his explosiveness and drug abuse in check. I believe that in some basic and possibly unconscious way the defendant has wanted the discipline and structure that he only touched upon in the "continuation school", the Marine Corps, and the Delancey Street Foundation program. Had he been able to get the structure either through proper diagnosis and medications (an endogenous structure) or, through more sustained controlled programs, there is a good chance the defendant could have overcome his early childhood problems and the genetic loading that went with it.

Contrary to the Probation Officer's beliefs, Mr. Jones is remorseful and accepts responsibility for his crimes. His substance abuse and his acute intoxication unequivocally contributed to the offense having occurred. Had he not been intoxicated and hyperaroused on amphetamines combined with alcohol and marijuana, I believe the victims would now be alive; his past behavior is not consistent with that of a vicious murderer. I believe that Mr. Jones' capacity to conform his conduct to that of the law was clearly impaired at the time of the offenses primarily because of his intoxication but also because of the other confounding issues I have raised.

With the mitigating factors of:

1. The chaotic and abusive childhood that the defendant suffered;
2. His genetic loading for substance abuse and possibly an affective disorder;
3. His intoxication at the time of the offense with a concomitant decrease in an ability to conform his conduct to the law;
4. The potential for rehabilitation;
5. The likelihood that he suffers from a major mental illness – cyclothymia (an attenuated form of Bipolar Affective Disorder, i.e., manic-depressive illness);
6. The head trauma he suffered which increases the potential for neurologic sequelae contributing to his behavior; and,
7. His sense of remorse and responsibility;

I believe an aggravated sentence is unwarranted in this case.

I anticipate pursuing some further information in the next couple of days. I will remain available to the Court and the attorneys if there are questions as to my opinions.

I thank the Court for their patience and support in my requests not only for delays but information.

Respectfully,

/s/ Jack Potts, M.D.
Jack Potts, M.D.