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SUPERIOR COURT DEPUTY

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

STATE OF ARIZONA,)
)
Plaintiff,)
) Cause No. CR-13057
vs.)
)
ROBERT WAYNE MURRAY,) CLOSING ARGUMENT/
ROGER WAYNE MURRAY,) JUDGMENT & SENTENCING
)
Defendants.) 98 pg.
_____)

Before the Honorable James E. Chavez, Judge

Monday, October 26, 1992

9:43 a.m.

Kingman, Arizona

Reporter's Transcript of Proceedings

Appearances:

For the State:	James J. Zack, Deputy County Attorney 315 N. Fourth Street Kingman, Arizona 86401
For Robert W. Murray:	M. Ruth O'Neill, Attorney at Law
For Roger W. Murray:	Frank E. Dickey, Jr., Gerald Gavin, Deputy Public Defenders Kingman, Arizona 86401

Reported by: Rick A. Pulver, Official Reporter

P R O C E E D I N G S

THE COURT: Okay. Please be seated. Okay. This is CR-13057, State of Arizona versus Robert Wayne Murray and Roger Wayne Murray.

Are we ready for closing arguments?

MR. ZACK: Thank you, Your Honor. This Court, of course, is faced with making the most difficult decision that it ever will have to make. However, the Court has guidance from the law. This is not an arbitrary process as at least one defense counsel seems to think it is. It is a process governed by law and evidence. And the Court has heard a lot of evidence both at trial and the ag/mit hearing several weeks ago. Your Honor, it's the position of the State that the evidence in this case compels only one result, and that is the imposition of the death penalty for both defendants. The law is clear that the Court shall impose the death penalty if it finds one or more aggravating factors and no mitigating factors sufficient to call for leniency.

The Court has read the State's position on aggravating factors in the Presentencing Memorandum I filed a month or two ago, and I'm not going to dwell on those at this time. I am going to spend some time discussing the mitigation offered by the defense. Before I do that, I have read a lot of cases, I am sure the Court

1 has, as well as defense counsel. There seems to be in
2 some cases a tendency of the court, a judge, to go ahead
3 and find some mitigation just to show that it thought
4 about it, kind of perhaps sometimes as a -- add to the
5 defense and death penalty imposed, and it appears the
6 courts in some cases have gone out of their way to find
7 mitigation that's not really there. The State would urge
8 the Court to consider carefully all mitigation offered and
9 not find it unless it's actually supported by the conduct
10 of the evidence.

11 If this Court decides to impose the death
12 penalty and does find mitigation, the State wants the
13 decision of the Court to be maintained throughout the
14 appellate process. What happens, of course, is the
15 mitigation stays in the record forever while the defense,
16 through innumerable appellate opportunities, attacks the
17 aggravation, and to the extent that it succeeds, the
18 higher viewing courts are left with aggravation that may
19 be lessened, but the mitigation remains forever in the
20 appellate process. Again, the State would urge the Court
21 to make a clear determination in its own mind before it
22 finds mitigation, and make that finding based upon
23 evidence and not to show that it considered it and threw
24 some in just to appease any defense counsel's argument.

25 With that in mind, I am going to go through the

1 mitigation offered by the defense. Again, the State
2 submits there's absolutely none, and certainly none proved
3 by a preponderance of the evidence. Let me start with the
4 defendant Robert Murray using both the notes that I made
5 by the defense counsel in argument or in discussion at the
6 mitigation hearing and the Presentencing Memorandum. I am
7 going to go through them one at a time and discuss them.

8 The defendant Robert Murray proposes a
9 mitigator that a sentence less than death will, in this
10 case, adequately protect society. The State submits that
11 is simply not a mitigating factor. There's absolutely no
12 case law that allows the Court to find that. That is just
13 something that is not worthy of consideration in
14 mitigation in any way. Certainly if this Court decides
15 not to impose a death penalty, it will impose, and the
16 State would urge, two consecutive life sentences on the
17 defendant Robert Murray as well as Roger Murray.
18 Certainly that does protect society. The death penalty is
19 not decided on whether a defendant can be rehabilitated --
20 or, that society will be protected, excuse me.

21 The defendant Robert Murray next urges as a
22 mitigating factor that he is capable of being
23 rehabilitated. Again, the State submits that's not a
24 mitigating factor, and it's certainly not one supported by
25 evidence in this case. Bear in mind, the defendant has

1 not been rehabilitated even though he's had numerous
2 opportunities. Defendant Robert Murray has two prior
3 felony convictions, and this crime that he's convicted of
4 here is far worse than those. That does not show a
5 pattern that would allow any even supposition of the --
6 that the defendant is capable of rehabilitation. The
7 defendant Robert Murray also offered the escape letter
8 that was submitted into evidence at the ag/mit hearing in
9 which he indicates he would try to get out, take every
10 opportunity, and come back for his little brother. Again,
11 there's no evidence to support the notion that the
12 defendant Robert Murray is capable of being rehabilitated.
13 That is not a mitigating factor in any event.

14 The defense also claims in that portion of its
15 brief that Robert Murray, the father, has a parental
16 relationship with his children and that shows
17 rehabilitation. I believe the information submitted shows
18 that he virtually never supported his children. He's far
19 behind in child support, tens of thousands of dollars. At
20 least \$10,000. Again, that is not somebody who is trying
21 to rehabilitate himself and/or is even capable. Again, if
22 one looks at the criminal history of Robert Murray, it
23 shows exactly the opposite of any capability of being
24 rehabilitated. It shows that there's a declining ability
25 to conform his conduct as to what society requires.

1 The defendant Robert Murray next urges as a
2 mitigating factor the defense of intoxication. The
3 defense is apparently trying to claim the defendant was
4 intoxicated at the time of these offenses, and that simply
5 is not supported by any evidence whatsoever. There is
6 evidence the defendants were drinking prior to the offense
7 up in Temple Bar, but there's actually no evidence
8 submitted even by the live witness who was here at trial
9 that the defendant appeared intoxicated, either of them.
10 This argument applies to both Robert and Roger. So,
11 there's no evidence of intoxication. Also referring to
12 some cases that discuss intoxication as a mitigator, State
13 v. Gillies, 142 Ariz. 564. There the court said that the
14 crime took practically eight hours, and it would be
15 incomprehensible to believe that at some point during the
16 crime the defendants in that case couldn't have known that
17 what they were doing was certainly wrong and being able to
18 conform their conduct to norms.

19 This crime had to have taken at least an hour
20 or two. It's inconceivable to believe that even if they
21 had some drinks, at some point they didn't realize what
22 they were doing was not only wrong or the conduct was
23 beyond what anybody would be allowed to do. That, again,
24 in State v. Atwood, at 110 Ariz. Adv. Rep., Page 45. The
25 court there noted an intoxication mitigator requires

1 actually two elements. The defendant has the burden to
2 both show intoxication and its effect. The state -- the
3 court there said not being able to think clearly in
4 reality, is not the same as not being able to appreciate
5 the wrongfulness of conduct. There the defendant claimed
6 that the drinking impaired the ability to think clearly.
7 In reality, that is not an intoxication mitigator.
8 Intoxication mitigator is if a person is both intoxicated
9 and the effect is not being able to appreciate the
10 wrongfulness of the conduct.

11 In here, there's overwhelming evidence the
12 defendants knew their conduct was wrong by the fact that
13 they attempted to conceal everything, to run and hide, do
14 all those things that a person knowing they did wrong, and
15 knowing that, they should be able to appreciate their
16 wrongfulness of conduct. They did every step they could
17 not to be caught, including trying to elude the police in
18 the chase.

19 Along with the intoxication claim, again,
20 there's no evidence to support intoxication, but I'd point
21 out that that crime was apparently planned before they
22 went to Temple Bar and started drinking. Keep in mind the
23 evidence at trial. The defendants were in Las Vegas the
24 weekend before, and we know from the ag/mit hearing that
25 they purchased a shotgun, purchased a hacksaw, sawed the

1 gun, sawed off the shotgun length, came to Kingman the
2 night before the murders and stayed the night in Kingman.
3 Then, the evening of the murders went to Temple Bar on the
4 other side of Grasshopper Junction, obviously zeroing in
5 on what they are going to do and where they are going to
6 go. Also the atlas found in the defendants' vehicle had
7 Grasshopper Junction circled.

8 So, any claims of intoxication, even if the
9 defendants had been intoxicated, they had already planned
10 what they were going to do prior to going to Grasshopper
11 Junction by arming themselves with shotguns, going back
12 toward Vegas from Kingman, circling it on the map, and
13 that was obviously all before they had went to Temple Bar
14 and had some drinks. The State would submit that if the
15 defendants had had to drink at all, it was at that point
16 to seal their courage to go do what they were going to do.
17 It was -- the planning was done beforehand. This was not
18 the crime of -- I mean, the crime was not the result of
19 intoxication. The intoxication, if there was any, was
20 only to get the courage to do what they had planned to do
21 previously.

22 The defendant Robert Murray next urges as a
23 mitigating fact that he should not receive the death
24 penalty because he was less involved in the offenses being
25 the codefendant. Your Honor, throughout that whole case,

1 right from the conception, there's been a lot of
2 conjecture as to who was the leader and who was the
3 follower, and different theories point to either
4 defendant. The State would submit that is an exercise in
5 futility to even attempt to decide who was more involved
6 than the other, primarily because there's just no evidence
7 to determine that. In talking about the upbringing,
8 childhood, anything else you want, but when we get down to
9 the bottom there's no evidence to show that one was far
10 more involved than the other. The evidence clearly shows
11 both snuck into Grasshopper Junction; clearly shows that
12 two people were murdered with shots from four different
13 weapons being fired; both defendants are armed at the
14 conclusion when they were captured; the loot was in the
15 car. There's no way to determine from the evidence, only
16 from speculation, who was more involved.

17 The State would submit that there's no
18 mitigation, that that claim -- and the claim is not even
19 supported by any evidence. I'd also point out along that
20 ground, it doesn't make any difference. In State v.
21 Gillies, again, as I mentioned in the previous hearing,
22 there the defendant's sentence of death, he did not
23 actually kill the victim himself, he handed the rock to a
24 codefendant and let the codefendant kill the victim. So,
25 that is not a mitigating factor in any way.

1 The defendant Robert Murray next urges as a
2 mitigator that this Court should not sentence him to death
3 because his criminal behavior is rooted in his
4 dysfunctional childhood. Your Honor, there was a lot of
5 testimony at the ag/mit hearing as to the childhood of
6 both defendants. Some of what I am going to say applies
7 to both defendants. Specifically with regard to Robert
8 Murray, however, in the State v. Gretzler case, 135 Ariz.
9 58, it noted, evidence of a difficult family history and
10 of emotional disturbance is typically introduced by
11 defendants in mitigation; it may be relevant for minors,
12 but it loses weight with adulthood. Robert Murray is in
13 his late 20's. Family background is a long time before
14 that, and as the court noted in Gretzler, it loses weight
15 as the defendant gets older. Nonetheless, the childhood
16 of both defendants in this case is not a mitigating
17 factor.

18 You think about it, you know, dysfunctional
19 childhood, and what should sound like mitigation, and one
20 at first thinks of perhaps some intercity ghetto youth
21 raised in abject poverty, no place to go, no family
22 around, no money, raised in an environment of crime all
23 around him. That is not these defendants. These
24 defendants in fact were afforded a childhood that is far
25 better than a lot. Certainly not perfect, the State's not

1 going to say it is, but it was not that bad of a
2 childhood. There's no evidence that drugs or alcohol were
3 in the house. There's no evidence of poverty. In fact,
4 the defendants were apparently well fed, had all the types
5 of childhood experiences in terms of having a mother at
6 home waiting for them after school. Got birthdays and
7 Christmases, they all managed to eat, they had clean
8 clothes, they also had a roof over their head. This was
9 not a grossly dysfunctional childhood.

10 A lot has been made about the father of the
11 defendants. Certainly the State does not believe any
12 child should be struck with fists or any other objects
13 beyond a simple spanking perhaps at times, and both those
14 defendants were. However, when reading the defense
15 documents prior to sentencing and prior -- strike that --
16 prior to the testimony, it sounded like the father came
17 home and beat them every night. From the evidence
18 especially as to Robert Murray, he was struck with fists,
19 I believe 12 times in 16 years. Certainly nobody should
20 ever be, but this is not the type of constant beating and
21 constant abuse that the defense would have the Court
22 believe it is. Further, they had schools available to the
23 children. They were allowed to participate in sports.
24 They had essentially everything that most children hope to
25 have that don't have that.

1 If the father had disappeared when they were
2 children, then I am sure the defense would be up here
3 arguing that, well, they didn't have a father around and
4 that should be showing a dysfunctional childhood. Here
5 there was a father around. He may have been fairly
6 distant. That, by itself, does not raise to some sort of
7 dysfunctional childhood which somehow set those children
8 on the course that would lead to murder. The defendants
9 had a decent childhood, not perfect, but certainly no
10 worse than many children face in any childhood or family
11 background. By the evidence, is not mitigation.

12 The defense of Robert Murray has also suggested
13 as mitigation, that is from my notes from the ag/mit
14 hearing in addition to the written memos, the defense is
15 that the defendant was a follower. I discussed that a
16 little bit earlier, but there's no evidence of that,
17 especially not with this defendant. The defense also
18 urges that the defendant's prior criminal history was
19 nonviolent as a mitigator. That kind of a bizarre
20 argument, mitigator, that it's better than having no
21 criminal history so you can't even talk about whether it's
22 violent or not. The fact is, the defendant does have a
23 criminal history, and while it does not involve murder or
24 assaults as far as the State can prove, the fact is that
25 he does have convictions. He is not in as good a position

1 as a defendant would be who had no criminal history.

2 Those are essentially the mitigators offered by
3 the defendant Robert Murray. I am going to go back and
4 discuss them a little bit more in the context in the
5 mitigation offered by Robert Murray. However, going
6 through them one at a time, there's certainly no evidence
7 that the Court can find any of those by a preponderance of
8 the evidence.

9 Turning then to defendant Roger Murray in his
10 proffered mitigation. In the Post Hearing Memorandum
11 filed by Roger Murray, I am going to go through those
12 mitigators that are offered. First one is physical abuse.
13 I have discussed that in terms of Robert. In terms of
14 Roger, it was not the every day abusive childhood, and
15 there's no -- the mother and sister testified that, yes,
16 they were, Roger was struck occasionally, but it was not a
17 daily event. Perhaps once a month he was physically
18 touched by his father, and only on rare occasions was he
19 struck by anything more than a spanking or hand. Yet, I
20 have discussed that pretty much with Robert's, and I'd
21 incorporate those comments into Roger. The physical abuse
22 as a child, by itself, is not a mitigating factor, and the
23 evidence doesn't support it even if it were.

24 The next mitigation offered for Roger Murray is
25 his age. I believe he was 20 years old, 20 at the time of

1 these offenses. Talking about age as a mitigator as
2 discussed essentially in case law, in just being 20 or 19
3 or 21, or whatever age, does not in itself create a
4 mitigating factor. What the case law talks about is that
5 young people tend to be less mature and more impulsive,
6 and essentially age is weighed with impulsive conduct. In
7 State v. Walton, 159 Ariz. 571, rejected the age of 20 as
8 being a mitigating factor. The court there noted that the
9 crime was not an impulsive act given the extent and
10 duration of the offense. This case that's before the
11 Court was not an impulsive act. I discussed that earlier,
12 I talked about it. I'd also cite State v. Gerlaugh, 144
13 Ariz. 449. There, the court considering age 19 as a
14 mitigating factor, rejected it when it noted that the
15 crime in Gerlaugh was not a hasty, impulsive act. And
16 again, in this case this crime was not. We had the prior
17 planning, they talked about that -- I talked about
18 earlier, over the course of a day or two, and the segment
19 -- I'll discuss the evidence about the shotgun at this
20 time.

21 We'd note from the evidence that essentially a
22 day or two prior to the murders the defendants went and,
23 again, purchased a shotgun, went to the trouble of sawing
24 it off. We know they did that because of the fact the
25 phone number of the seller was found in their car, along

1 with the address he gave them over the phone, along with
2 the fact the seller identified that shotgun through serial
3 numbers, being when he sold that it was full length a day
4 or two prior to the murders, and that same gun was found
5 in the defendants' possession in the middle of the console
6 of the car when they were caught, and the hacksaw that was
7 obviously used to saw off that shotgun was found there.
8 This is not compulsive, that is calculated planning for
9 what the defendants did.

10 Age also includes some element of maturity.
11 The Court's received letters from the defendants, both of
12 them, that sound fairly intelligent and mature. We are
13 not dealing with, again, a young, stupid, impulsive type
14 person as some of the cases on age discuss, we are talking
15 about people that know the system, know right from wrong,
16 know how to control behavior when they want to, and so
17 choose not to. This is not an immature crime. This is
18 one that's cold and calculated. I'd also point out in
19 Gerlaugh the court noted that the defendant had been
20 involved in similar crimes four days before the murder in
21 Gerlaugh, and that was discussed in context of age.

22 The State presented evidence at the last
23 hearing, substantial evidence, that two weeks prior to the
24 murders the defendants, both of them, including Roger,
25 went to the residence of Sally Cothorn. Roger went in

1 first based on the pretense of using the telephone. Left,
2 came back 10 minutes later with his brother, and committed
3 an hour and-a-half or two hour long ransack of the house
4 of Sally Cothorn. She identified the defendant here in
5 court, the defendant Roger Murray. She identified him in
6 a photograph, and a photo line-up prior to that. The
7 evidence is clear and certainly rebuts any mitigation of
8 age that the defendant engaged in similar conduct to this
9 in, and again, not an impulsive manner, some two weeks
10 beforehand. The State submitted that testimony to negate
11 things like impulsivity, age, not being able to conform to
12 any type of norm, any other factor for leniency urged by
13 at least one of the defendants here. We have people who
14 are on a crime spree, both defendants, again engaged in
15 very similar behavior two weeks prior to this offense, and
16 it negates a lot of mitigation offered by the defense in
17 that context.

18 I want to discuss Robert Murray for a minute.
19 The victim, Sally Cothorn, could not identify Robert
20 Murray as being in the house. However, the thermal
21 underwear and the mask was obtained from the defendant's
22 residence, the part that -- the body of that matched up
23 perfectly to the hood found where the defendants obviously
24 abandoned the victim's vehicle in that case, all pointing
25 to Robert Murray being there. Also, Robert Murray

1 introduced on his own behalf, through testimony or the
2 statements of Mr. Motter, to show his lesser involvement
3 in the instant offense. However, that same statement that
4 the Court -- the defense urges for mitigation, also
5 contains the evidence that the defendant Robert Murray was
6 in fact the second person present at Sally Cothorn's
7 house, and the Court can consider that in its statement
8 proffered by the defense. They can't pick and choose what
9 they want in there. He's indicated in there along with
10 the other. The Court can clearly conclude that both the
11 defendants were the persons who assaulted and robbed Sally
12 Cothorn, and it certainly negates any mitigation offered
13 by the defense.

14 The defendant Roger Murray also urges his
15 environment as a mitigating factor, along with family
16 relations. I have already discussed these. They are a
17 similar type notion. I'd just re-urge the Court to
18 consider the testimony, the evidence the Court heard from
19 the mother of the defendant, the sister, and the aunt as
20 well. They primarily show that it was not the type of
21 dysfunctional childhood that calls for mitigation. Roger
22 Murray also urges medical treatment as a mitigating
23 factor, sites evidence of Dr. Potts and Dr. Hewitt that he
24 was never treated. That is not supported by the evidence
25 in the medical history and mental history of Roger Murray.

1 Court documents and jail documents indicate that he was
2 offered and received a year of counseling as a youth.
3 It's just not supported by evidence to say that he never
4 had a chance for treatment. He was given treatment.
5 That's documented in the items submitted to the Court at
6 the hearing.

7 Along those lines, let me talk about Dr. Potts'
8 report for a minute, first primarily with regard to Roger,
9 but also Robert. Dr. Potts certainly went out of his way
10 to make the findings he did. Any expert, any doctor's
11 opinion is only as good as the information upon which it's
12 based. Dr. Potts', the opinion which went beyond what the
13 Court asked him for, is still based on information that is
14 just plain erroneous, going through his report and what he
15 bases some of his conclusions on. For example, Dr. Potts
16 makes -- goes out of his way to make mention that Roger
17 Murray would urinate in the corner of his bedroom, and
18 that's supposed to mean something to Dr. Potts. However,
19 I don't know where Dr. Potts got that, it doesn't say in
20 his report, but the defendant's own mother denies that
21 ever happened. So, Dr. Potts' use of that information is
22 not supported by evidence. Dr. Potts claims the defendant
23 lost consciousness a number of times in reaching his
24 conclusion. No one familiar, his own family, his mother,
25 his aunt who saw, was at school all the time when he was

1 growing up, did not say that. That was simply not
2 supported by their testimony.

3 Dr. Potts goes on to say that the defendant
4 Roger Murray was frequently beaten by his father. The
5 evidence, the testimony in court by his own mother
6 indicates that is clearly not true. Dr. Potts says that
7 the defendant Roger Murray is impulsive. However, his own
8 sister, I believe it was Angela Hall, testified that Roger
9 did not get upset easily. Ruby Bradford testified the
10 defendant was capable of sitting down, reading, which Dr.
11 Potts' same notion about defendant's being impulsive, says
12 he's incapable of sitting down, doing any task of any kind
13 -- strike that. Ruby Bradford, Brenda Murray, said he
14 would sit down and read books. Dr. Potts says the
15 defendant Roger Murray did not attend school. That's just
16 not supported by the testimony from his mother and aunt,
17 and the State also knows the defendant completed,
18 according to his mother, a junior college course in the
19 paralegal curriculum.

20 Dr. Potts makes mention that the defendant
21 Roger Murray, and again, I don't know where he gets all
22 this stuff, I presume from the day or two that he's been
23 up here talking a little bit to the defendant, that he was
24 in frequent fights. Not according to Ruby Bradford who
25 was the teacher at the school that he went to, and not

1 according to his family. Dr. Potts says Roger Murray was
2 hyperactive. His family doesn't support that. Ruby
3 Bradford who's seen hundreds and hundreds of children in
4 her role as a teacher noted that, and said repeatedly
5 Roger was a normal boy, he was active in sports, he was
6 active just like normal boys are, and she did not note
7 that he was hyperactive. Dr. Potts also says that, again,
8 that Roger Murray didn't -- never received counseling.
9 That's not supported by the records submitted to the
10 Court. Claims that Roger Murray had had multiple head
11 injuries, and again, that's not supported by the testimony
12 from his own family.

13 And along the same lines, discussing Robert
14 Murray for a moment. Again, Dr. Potts talks about
15 beatings of Robert, and that I believe from the testimony
16 and the evidence, that even if, he may have been struck
17 inappropriately six times in 12 years. Dr. Potts said
18 that Robert's now affected by excessive demands of his
19 father. That's not supported by the testimony. Doing
20 work for your father and not getting paid is certainly not
21 something out of the ordinary. Questioning the notes made
22 that the father's been more of an ogre than a father, to
23 work for him and not pay him. Certainly that is probably
24 more the norm than the exception. Dr. Potts also notes
25 that, he says -- almost quote it, there's very little

1 doubt that the defendant Robert Murray was acutely
2 intoxicated at the time of the offense, and heaven knows
3 where Dr. Potts got that, because that is absolutely
4 unsupported by evidence that I discussed previously.

5 Dr. Potts also states that Robert Murray used
6 cocaine at the time of the offense. I have no idea where
7 that comes from. It's not supported in any documents, any
8 evidence, any testimony anywhere. So, Dr. Potts'
9 conclusion is just based upon bad information. It's not
10 even what the Court asks for, but again, he had to stretch
11 things on Robert Murray to come up with some conclusion
12 that he should not receive the death penalty. It's
13 obvious from Dr. Potts' report he does not believe in the
14 death penalty, and went out of his way to find that
15 somehow the sort of documents submitted should preclude
16 him from being sentenced to death.

17 Along the same lines, Dr. Potts talks about
18 Roger Murray being hard-wired to do whatever he's going to
19 do, and that's certainly a nice modern slang term that's
20 used a lot, but again, it's not supported by any
21 evidence. There's no physical evidence of, you know,
22 organic brain problems. Certainly the defendant's had
23 chances to get whatever brain scans or whatever medical
24 work-ups that he chose or would have wanted to, and
25 there's been absolutely no evidence submitted to this

1 Court to show Roger's, and for that matter Robert,
2 suffered from any organic medical problems whatsoever. As
3 to Dr. Potts' report in terms of both defendants, he does,
4 because of other tests done by other doctors, have to
5 admit that essentially both defendants were within a range
6 of normal cognitive abilities, certainly normal
7 intelligence, along those lines.

8 While not specifically stated in the written
9 documents, both defendants offer mental state as some sort
10 of mitigation. At least that's been alluded to in their
11 comments to the Court, and I think you can deduce that
12 from their general mitigation effort. Just on mental
13 state for a moment. In looking at some case law out of
14 State v. Walton and Gerlaugh, both, they note that
15 sociopathy and personality disorders have not sufficed to
16 tilt the balance in favor of leniency. The same type of
17 cases that perhaps do call for leniency is what they
18 discussed about slow, dull, brain damaged defendants, and
19 there's no evidence that these defendants are any of
20 those, do any of that. There's no evidence the defendants
21 have ever been out of touch with reality. No
22 hallucinations, no evidence either defendant had any
23 problem knowing right from wrong. That's supported by all
24 the evidence in the case, their conduct in the crime,
25 their concealment, and by the testimony of these family

1 members.

2 Along with the mental state, kind of get to the
3 background again. There's a good discussion, State v.
4 Brewer, 106 Ariz. Adv. Rep. 3. Again, just note that the
5 case notes that mere character or personality disorders
6 alone are insufficient to constitute mitigation. It notes
7 that the type of cases where mental state is appropriate
8 mitigation, in severe illnesses like schizotypal psychotic
9 illness, command hallucinations and voices. Those are the
10 kind of things that the court considers in mental state.
11 It's not what you find in this case. The type of evidence
12 the Court has before it in this case, in relating to
13 Brewer, even if there were any mental problems, there's
14 absolutely no evidence in this case that the disorders, if
15 any, controlled either defendants' conduct or impaired his
16 mental capacity to not appreciate what they were doing or
17 whether it's right or wrong. Again, the Brewer case notes
18 that personality disorders and sociopathy is not
19 mitigation. It takes something much more in terms of
20 mental problems with the defendants to require mitigation.
21 Again, from Dr. Potts' report, he can't make a diagnosis
22 of anything that severe to call for mitigation.

23 Final mitigator offered by Roger Murray is that
24 somehow the evidence of culpability is less with regard to
25 Roger Murray, and cites the letter introduced into

1 evidence by Roger that was purportedly written by Robert
2 Murray that he killed people at Grasshopper Junction.
3 That's in evidence before the Court. Even if Robert
4 Murray did write that, and he may well have, there's
5 certainly nothing in that letter that says that Roger
6 wasn't equally involved, if you read that letter, and
7 there's nothing that you can find in there that shows,
8 that would say that the defendant Robert Murray was the
9 sole actor and Roger was not there at all or not
10 participating. Plus, the fact the verdicts in this case
11 returned by the jury aptly belie any notions of -- the
12 defendant Roger Murray was less culpable. Both defendants
13 were convicted, along with felony murder, of premeditated
14 murder.

15 Along those lines, Roger Murray's attorneys
16 keep saying that the State admits it can't prove who
17 killed the victims in this case, which of course is an
18 absolute misstatement that the State ever said -- the
19 State told the jury that it could not prove which of both
20 of those defendants fired which shots, but would prove
21 both were there when the killings took place. And just
22 because you can't prove who pulled the trigger on any one
23 gun, does not mean that one is less responsible than the
24 other, and the jury so found.

25 In sum, Your Honor, going through the

1 mitigation one at a time, the State submits that none of
2 those factors can be found by a preponderance of the
3 evidence. The defendants also urge that taken together,
4 there's mitigation. If one looks at each or rolls all the
5 mitigators up into one, that's sufficient to call for
6 leniency. The sum is not bigger than the parts. You have
7 to find the parts before you can come up with the gross
8 statement that as a whole it calls for mitigation. Again,
9 when one looks at the individual evidence or items of
10 mitigation offered, it's just not there. What is there,
11 the mitigation that -- the State has already presented to
12 the Court, there can be no question that the State proved
13 beyond a reasonable doubt at trial that the defendants,
14 each defendant, committed the murder for pecuniary gain;
15 that two victims were killed; that is one or more
16 homicides committed during the commission of an offense,
17 and finally, that the defendants committed the offenses in
18 a especially cruel, heinous or depraved manner.

19 And again, as I note in there, it's difficult
20 to define some of those terms with various factors, but
21 just to go back to what the court said in Robinson, and
22 quote, as difficult as it may be to define the depravity,
23 the gangland style acts of forcing two elderly persons to
24 lay face down on the floor, tying them up and essentially
25 shooting them, amounts to depraved conduct, and that is

1 almost precisely the facts of this case. So, any
2 exception being, as I noted earlier, the victims in this
3 case were not tied up. And again, the only reason for
4 that can be is the defendants knew all along, they had
5 them helpless on the floor, they were going to shoot them
6 before they left and there was no need to tie them up.
7 The victims were equally helpless. I will save some other
8 comments for rebuttal.

9 The State would submit, again, to look at each
10 mitigator, but also look at the evidence. And the
11 defendant does in fact have a burden of proof. And when
12 the evidence, any evidence that is credible for mitigation
13 is considered with the evidence the State offers in
14 rebuttal, essentially the prior assault and robbery in
15 Alabama on Sally Cothorn two weeks before, and the
16 purchase of the shotgun the day or two prior to these
17 murders and planning it was involved, would certainly
18 negate any mitigation offered.

19 THE COURT: On behalf of Robert Murray, do you have
20 any comments, Ms. O'Neill?

21 MS. O'NEILL: Yes, I do, Your Honor. Judge, just to
22 clarify something that Mr. Zack said at the beginning of
23 his presentation. The case law clearly states that the
24 Court is required to consider all mitigation which is
25 presented, even if there is mitigation presented which may

1 not actually rise to the level of preponderance of the
2 evidence. I have cited a number of cases in my
3 Presentence Memorandum and will rely on those and make a
4 couple others as I go through this. The Court is familiar
5 with, I am sure, those cases as well as the cases cited by
6 the State. And I may not be referring to them
7 specifically, but I take it the Court is familiar with all
8 of those things. So, I'd like to start out, Judge, by
9 just saying that I believe that most of the -- that I
10 believe that most of the argument that I filed in the
11 Presentence Memorandum before the aggravation/mitigation
12 portion of this case that this Court can consider is still
13 applicable here, especially as regards
14 aggravating/mitigating factors in this case.

15 As the Court knows, the State must prove
16 aggravating factors beyond a reasonable doubt. They must
17 do it as they would at trial with their evidence, and in
18 this case, Judge, the State chose not to present any
19 evidence at the aggravation/mitigation part of this case
20 as far as proving their aggravating factors are concerned.
21 Therefore, Judge, if you are going to find the aggravating
22 factors in this case, you would have to have found them
23 based on things that were testified to or physical
24 evidence presented at the trial that was held back in June
25 in this case. And as the cases clearly say, just a

1 finding of premeditation is not enough to find aggravating
2 factors. You must find aggravating factors in addition to
3 the finding of first degree murder, whether felony murder
4 or premeditated murder.

5 Whatever our view is about the justice of the
6 jury verdict, Judge, is going to have to wait until later,
7 and that's really not the issue right now. But the issue
8 today is, of course, what you have to do, and you have to
9 decide whether or not you are going to sentence my client
10 to death, or whether or not you are going to impose some
11 other sentence, keeping in mind that for ag -- armed
12 robbery, excuse me -- the way my client has been
13 convicted, you must sentence him to prison for no less
14 than seven years, no more than 21 years. Whatever
15 sentence, he must do at least two-thirds before he's
16 eligible to be paroled from that charge. On the first
17 degree murder charges, the Court is faced only with the
18 possibility of life imprisonment or death.

19 If the Court chooses to impose life
20 imprisonment, technically my client would be eligible for
21 parole after 25 years served on each charge. However, the
22 Court then has to decide whether or not those sentences
23 would be served concurrently or consecutively. That
24 becomes important in the Court's calculations, we believe,
25 because the Court can structure a sentence which will

1 actually be a natural life sentence, even though in
2 Arizona there is not a provision for what is called in
3 some cases natural life as a penalty because there is an
4 eligibility to be considered by the parole board after a
5 certain number of years. As I have set forth in my
6 Presentence Report Memorandums, there's ways that the
7 Court can do that which will guarantee that my client is
8 probably going to be dead before his first review date
9 ever comes up, and that is without imposing a death
10 penalty.

11 We believe that in this case it would be cruel
12 and unusual punishment to sentence Robert Murray to death.
13 We believe that the death penalty in this case as applied
14 to Robert Murray would constitute unconstitutional cruel
15 and unusual punishment. One. We also believe that the
16 Arizona statute wrongly assigns a mandatory presumption of
17 death, and we object to that for the record, although this
18 Court is going to have to follow that statute in
19 determining what is going to happen here today. Although
20 Mr. Zack is saving most of his argument on his aggravating
21 factors apparently for his rebuttal, which is his right,
22 I would like to address those briefly again based -- and
23 again relying on my Memorandum.

24 We believe that the State has failed to prove
25 the aggravating factor that the offense -- that the

1 murders, and we are talking about the murders here with
2 this, that they were committed in an especially cruel,
3 heinous or depraved manner. Basically the way the cases
4 have defined cruel, heinous or depraved, especially cruel,
5 heinous or depraved, some things might be considered cruel
6 and some things may be evidence of cruelty, some things
7 may be evidence of heinous or depravity, although those
8 two things tend to stay together, they tend to be
9 consistently discussed by the cases as if they were one
10 thing, and cruelty is another thing. All the cases
11 regarding cruelty, and several of them have been cited to
12 the Court already, require finding that the victim
13 consciously suffered. This element has not been proven.
14 We don't have any evidence from the testimony at trial
15 regarding whether or not either Mr. Morrison or Ms.
16 Appelhans was conscious or consciously suffered, whether
17 it was mental or physical pain. We have a little bit of
18 testimony that there may have been some shots that were
19 not fatal initially as far as Ms. Appelhans is concerned,
20 but we don't have any evidence whether or not she was
21 conscious. And if she wasn't conscious, this Court cannot
22 find cruelty and cannot find that these murders were
23 especially cruel. That's what the cases say.

24 Heinous or depraved requires a finding of
25 Gretzler factors from State versus Gretzler. It requires

1 finding more than one, at least regarding some of them,
2 and I discuss that in my Memorandum. Certainly there is
3 language that suggests that if one or two Gretzler factors
4 are found, that may not be sufficient to find heinous or
5 depraved conduct. The other thing that the Court needs to
6 consider in determining whether or not this aggravating
7 factor exists, and although it can be presented in two
8 different ways, either cruelty, or heinous or depraved,
9 it's one aggravating factor. The Court -- we ask the
10 Court to keep in mind language from the case law that says
11 and acknowledges that to some extent the very fact of a
12 first degree murder is somewhat cruel, or heinous or
13 depraved in most situations, but the death penalty is
14 reserved for those cases which are worse than the normal
15 first degree murder. And I know these people sitting in
16 the back here who knew Mr. Morrison, knew Ms. Appelhans,
17 are thinking, well, of course it was cruel or it was
18 heinous, or of course it was depraved, but you have to
19 find, Judge, that it wasn't just cruel or heinous or
20 depraved, or even all three. You have to find a higher
21 level, that it was worse than the average first degree
22 murder.

23 Now, I know that sounds hard to do, and it is
24 real hard to do. I don't know. I would imagine that the
25 Court has been considering this carefully and it must be

1 giving you a lot of problems trying to decide what's an
2 average amount and what is an especially cruel or
3 especially heinous or depraved, and have they met that.
4 Once again, Judge, the feelings of the people who write
5 letters or want to tell you what kind of loss they have
6 suffered, are not the issue in this aggravating factor.
7 You have to look at the testimony at trial, the trial in
8 the guilt phase, because that's the only testimony that
9 you have got to look at, and decide whether or not those
10 aggravating factors have been proven beyond a reasonable
11 doubt. And they haven't been. So, we ask the Court not
12 to find any of them, not to find that aggravating factor
13 in this case.

14 The State has proposed two other aggravating
15 factors. We would submit that even if they are proved,
16 they do not justify the imposition of the death penalty in
17 this case because the Court has other sentencing options.
18 Specifically, Judge, we ask the Court to consider that
19 there is mitigation in this case, and that must be weighed
20 against the aggravating factors which may be found. We
21 concede that there is an aggravating factor, and that
22 aggravating factor is that there were two victims.
23 However, we'd ask the Court not to give that great weight
24 and even consider the slightest mitigation outweigh that,
25 because after all, Judge, you can sentence my client

1 separately for both of those offenses and you can sentence
2 him consecutively for both of those offenses, and you can
3 give him 50 calendar years for both those offenses before
4 a parole board even looks at this case. So, we'd ask you
5 not to give that a lot of weight.

6 Judge, we do not believe that the State has
7 proven beyond a reasonable doubt that the motive for the
8 killings in this case was pecuniary gain, because the
9 State did not present evidence at the jury trial in the
10 guilt phase of this case that the motive for the killings
11 of pecuniary gain was sufficient to support a finding that
12 they proved it beyond a reasonable doubt. They proved, at
13 least as far as the jury was concerned, armed robbery, but
14 pecuniary gain requires something other than the fact that
15 a theft type crime was involved in the killings. It
16 requires that the motivation for the killings is pecuniary
17 gain. We would ask the Court not to find that. However,
18 we do know that one of the Gretzler factors in finding of
19 heinous or depraved is senselessness. If the killing was
20 committed for pecuniary gain, then it wasn't senseless.
21 There was a reason for it.

22 If you are going to find it, Judge, it
23 certainly cuts against the finding of heinous or depraved
24 in the case, and that's something that the Court should
25 also take into consideration when it's balancing what the

1 evidence is in deciding what the State has proven on those
2 aggravators. Keep in mind that by the finding of some
3 things, you may not be able to find something else because
4 of evidence that, if it supports one finding, isn't going
5 to find the other as far as those things are concerned.
6 Basically we would suggest to the Court that if pecuniary
7 gain is going to be found, not only is Robinson
8 distinguished from this case by the fact that these were
9 not senseless killings, but it's also distinguished
10 because, as Mr. Zack has admitted, the victims were not
11 bound similarly.

12 There is no evidence in this case as there was
13 in the Robinson case that the victims were conscious and
14 suffered, because in the Robinson case one of the victims
15 survived and testified. You had evidence in this case.
16 You don't have the evidence about what happened and what
17 the people were feeling and what was going on. We don't
18 know when the killings took place in relationship to when
19 items were stolen. We don't know how long it took. Mr.
20 Zack suggests it took at least an hour. That's not very
21 long, and it doesn't mean the killings happened last.
22 There's just not enough evidence one way or the other.
23 And I know, and luckily as far as aggravating factors are
24 concerned, Judge, we don't have to prove beyond a
25 reasonable doubt that they are not there. My client still

1 does have the constitutional right to hold the State to
2 its burden on those aggravators.

3 The evidence is not there, and in the Robinson
4 case one of the people who was shot survived and testified
5 and said this is what happened, this is what happened,
6 then this is what happened, gave a chronology to a certain
7 point, discussed the feelings of the victim's in the case,
8 himself and spouse, and that evidence was on the record in
9 Robinson. It's not on the record here. The only thing we
10 have here on the record is the fact of the killings. We
11 don't know what, when they happened in relationship to
12 anything else. We don't know. The State has presented
13 testimony that people may have been dragged from the
14 patio. Perhaps they were unconscious from the time of the
15 patio. We don't know one way or the other. If they were
16 unconscious, they couldn't suffer, they couldn't be
17 especially cruel. And if you don't have sufficient
18 judgment factors, it's not especially heinous or depraved.
19 We especially ask that that not be found, and I know I
20 went back to it again, but I just want the Court to be
21 very clear about our position on that.

22 Once again, we think that as far as pecuniary
23 gain, there was a significant issue whether or not that
24 has been proven beyond a reasonable doubt by competent
25 evidence at the guilt phase, and that's where you have to

1 look, Judge, because that's the only place that you have
2 to look at the guilt phase to determine that aggravator.

3 Going on to issues in mitigation. The Court,
4 when we presented our case at the aggravation/mitigation
5 hearing, received in evidence several things. They
6 included live testimony, they included a videotape of
7 William Motter, and they included several documents which
8 are also evidence in this case which the Court must
9 consider. Those documents include interviews conducted by
10 Mr. Freeman with various people who know my client, many
11 of whom also discussed Roger, at least peripherally. They
12 include records from other courts, such as courts in
13 Alabama. There were probation records included in that,
14 and I am sure the Court has read those by now. They
15 include things like the discussion of my client's drug
16 problem. You have in evidence the report of Dr. Potts,
17 and that is in evidence and that is evidence for the Court
18 to consider, as well as various other documents,
19 miscellaneous documents that we've also presented for the
20 Court's consideration. All of that is evidence.

21 Also, Judge, in looking at the evidence for
22 mitigation, you still have to go back to the trial and
23 look at the guilt phase of the trial. And look at the
24 testimony of Mike Legg, who testified that when he got to
25 the bar at Temple Bar Resort at 6:00 o'clock at night, my

1 client was already there and he was already drinking; that
2 my client was there when he left at least at 9:00 o'clock,
3 and we have some problems about time, but the earliest he
4 would have left was about 9:00. He was still drinking.
5 He was still drinking alcohol. We know that he told John
6 Freeman that he was drinking and told Nick Ingrassi that
7 he was drinking alcohol. He was drinking Jack Daniels.
8 He didn't have one that he was nursing all through -- in
9 Mr. Ingrassi's report it says four to six. We don't have
10 Mr. Grinder here, because he's in Mexico, to testify
11 specifically, but you do have those things in evidence
12 too. Don't forget Mike Legg's testimony. This wasn't a
13 quick drink and on the road again, this was a long term
14 that they were sitting in the bar. That's something that
15 the Court needs to consider. Those things are also
16 evidence to consider in mitigation in determining what
17 mitigators to find in the case.

18 I will talk for just a second about Dr. Potts's
19 report. Mr. Zack suggests that he didn't evidently do his
20 homework. And in doing this, Dr. Potts did know that this
21 was a Court evaluation. He wasn't doing it for one side
22 or the other, he was doing it for this Court's purposes to
23 assist this Court in reaching an appropriate decision as
24 far as sentencing, and that's what he says in his first
25 paragraph which is addressed to you. Judge, also, he

1 lists the things that he looked at, reviewed, read, and
2 was familiar with before he interviewed Robert Murray, and
3 things that he used as a basis for coming to his opinion,
4 and there's 10 of them. Actually, there's more than 10,
5 because under 8, Interviews of Numerous People, is A
6 through J.

7 So, that's a lot of documentation that he
8 reviewed. And he reviewed things like Mohave County
9 Presentence Investigation Report, letters from Detective
10 Lent he had so much problems with, letters from interested
11 parties, including the defendant's mother, and many
12 letters from friends and relatives of the deceased.
13 Letters apparently written from one brother to the other,
14 a lot of juvenile and adult criminal actions in Alabama,
15 police reports in reference to the investigation of the
16 double homicide in this case. He read the police reports
17 in this case, Judge. This isn't all coming out of left
18 field. He read the grand jury transcripts, he read the
19 interviews, he read police reports in reference to the
20 incident that Mr. Zack, we believe, erroneously put forth
21 as what he called rebuttal in this case. He read my
22 client's school records, he looked at all of that, and he
23 interviewed my client. And he looked to those items,
24 those documents to see what he could find that would
25 support or discount what my client said, and he came to an

1 opinion based on a careful review of all the evidence and
2 lengthy discussions with my client. He saw him on two
3 different days. And some of the information in there,
4 yes, is self-reported, but that doesn't mean that it can
5 be discounted and should be disregarded by this Court when
6 Dr. Potts is coming to his conclusions.

7 Another thing that Dr. Potts does, Judge, is he
8 evaluates the person he's interviewing. He can -- he's a
9 psychiatrist. He does correctional psychiatry. He works
10 at the Maricopa County Jail. What he does is talks to
11 people in situations like Robert Murray's, and he is aware
12 of the signs, and he's familiar with the signs of
13 deception and malingering and all those sorts of things
14 that psychiatrists take into account when they are making
15 those reports. I'd point out to this Court that this is
16 in evidence and that the State has not rebutted it by any
17 evidence whatsoever, whether it be by cross-examining Dr.
18 Potts, and the Court had set up another hearing date that
19 he could have brought Dr. Potts in if he wanted to for
20 purposes of asking him questions about the report, and
21 didn't do it. And we admit, Judge, that this report does
22 not say that Robert Murray is insane. We never said he
23 was insane. We never submitted to this Court that he was
24 insane.

25 But, this report is important, because when you

1 take this evidence, and it's in evidence and it is
2 evidence, and you look at the other information that's
3 before this Court, then you can -- we ask you to do that
4 in considering the evidence that has been presented, the
5 other evidence that, some of which also supports the
6 findings here, such as the testimony by Mrs. Murray and
7 Mrs. Bradford regarding Robert's problems with
8 incontinence there, by getting more of that information in
9 regarding Kenneth Murray, his father's illegal activities,
10 regarding the abuse that was suffered. And Mr. Zack makes
11 a real big deal about 12 times. Well, Brenda Murray
12 testified that on about 12 occasions when she was present,
13 Kenneth Murray beat Robert Murray with his fists. On one
14 of those occasions he hit him so hard that Kenneth Murray
15 broke his own hand. She didn't say he socked him 12 times
16 in 16 years. He beat him with his fists on 12 occasions.
17 That's a totally different thing from what Mr. Zack is
18 trying to say, and that includes the times she's aware of.

19 How many times do you have to be beaten by your
20 father with his fists before it's a dysfunctional family,
21 Judge? Maybe once isn't enough. But, we know from
22 testimony in this courtroom of at least a dozen times,
23 once so severe the father injured himself in his rage.
24 Those things are corroborated. The opinion is
25 corroborated by testimony that was presented, and we ask

1 the Court to give Dr. Potts' expert opinion in this case.
2 weight where it belongs in determining whether or not the
3 evidence supports the mitigation that's presented in this
4 case. We believe that we have proved substantial
5 mitigation in this case. Once again, we have a burden of
6 a preponderance of the evidence, which is significantly
7 lower than beyond a reasonable doubt. More likely than
8 not is the way, is the common standard.

9 Let's talk about intoxication. What evidence
10 specifically do we have in the record regarding
11 intoxication? Well, Robert Murray made statements to Dr.
12 Potts, and Dr. Potts using his training and experience
13 evaluated these statements, looked at the other
14 information in the case, and came to an opinion, and his
15 opinion is that Robert Murray was acutely intoxicated at
16 the time of the offense. The fact that some of his
17 opinion is based on evidence, on information that isn't
18 specifically in evidence, doesn't mean that you can't
19 consider the opinion and give it the weight that it
20 deserves, and the rules of evidence say that. He is
21 allowed to his opinion on things that aren't in evidence.
22 We have made an effort, Judge, to put all kinds of things
23 in evidence to support this opinion because we wanted the
24 Court to know that it wasn't coming out of left field,
25 that it was based on a lot of information that was

1 gathered and obtained from Dr. Potts. So, you have his
2 professional opinion that Robert Murray was acutely
3 intoxicated.

4 We would submit that if that's all you had,
5 Judge, that you could find by a preponderance of the
6 evidence that Robert Murray was intoxicated at the time of
7 the offense. That's not all we have at trial. Once
8 again, you have the testimony of Mike Legg, of the
9 defendants, Robert Murray, was at the bar at Temple Bar
10 when Mike Legg arrived at 6:00 p.m. That Robert Murray
11 was still there when Mike Legg left sometime around 9:00
12 p.m., and that he was drinking, and it wasn't -- he wasn't
13 nursing a single drink. You have the testimony from John
14 Freeman regarding his interview with Robert Grinder, the
15 bartender, and even a little bit from Mr. Ingrassi
16 regarding what Grinder told him. You don't have any
17 testimony from anybody that Robert Murray was not under
18 the influence. You have testimony that Robert Grinder
19 didn't volunteer to Mr. Ingrassi that the guys were
20 falling all over themselves, but a lack of testimony is
21 not proof, and a lack of testimony is not rebuttal.
22 There's no testimony that says that they were not under
23 the influence.

24 When you look at what was going on, on the day
25 as Robert Murray reported to Dr. Potts, regarding alcohol,

1 regarding marijuana, regarding cocaine, and we know,
2 Judge, that Robert Murray has had a problem with marijuana
3 and with cocaine since he was first in trouble at least as
4 an adult, because it's in the probation reports that you
5 got from Alabama. The State has presented nothing to
6 rebut the evidence put forth regarding intoxication. We
7 believe that it's been proven by a preponderance of the
8 evidence. There's one other thing that is in evidence
9 that we ask the Court to consider. William Motter, when
10 he gave his lengthy interview with Detective Ingrassi,
11 says that according to Roger, and remember, he talked to
12 Roger, Roger's the one who spilled his guts to Bill
13 Motter, it's over cocaine. The cocaine use that Dr. Potts
14 is talking about that Robert was doing, although not on
15 the day of the offense according to the self-report, was
16 discussed by William Motter with Detective Ingrassi before
17 this interview with Dr. Potts, before the trial, back in
18 April of 1992. It's over cocaine. That's another piece
19 of evidence, not by itself, another piece of evidence that
20 the Court needs to put into the mix to determine whether
21 or not Dr. Potts's opinion regarding acute intoxication is
22 more likely than not there by a preponderance of the
23 evidence.

24 Another mitigating factor which we believe we
25 have proven and which we believe that the Court should

1 give substantial weight, is Robert Murray's lesser
2 involvement in this offense. We believe that there is
3 ample evidence to show this. Once again, we rely very
4 heavily on the statement of Bill Motter. Remember, Judge,
5 the State has attempted to introduce this videotape
6 against Roger Murray, as well. Even though Detective
7 Ingrassi may have been less than generous with his
8 discussions about Mr. Motter when I was trying to get the
9 tape, and the State obviously thought that Mr. Motter's
10 testimony was reliable enough to attempt to introduce it
11 in its case, too. So, just as far as weighing the
12 credibility of Mr. Motter, we'd ask this Court to keep
13 that in mind. But, what does Motter say? Motter says
14 that Roger Murray says he shot Jackie Appelkans five
15 times, including once with a shotgun.

16 Go back to the trial testimony, Judge. In the
17 trial, the medical examiner's testimony, Jackie Appelkans
18 was shot five times. Motter says Roger Murray told him he
19 shot the guy two or three times. Go back to the trial.
20 The medical evidence, Mr. Morrison was shot three times.
21 Mr. Motter told Detective Ingrassi on the videotape that's
22 in evidence, he said Roger said his brother didn't want to
23 shoot anybody, and Roger said he fired eight shots.
24 Judge, that should be a preponderance of evidence that
25 says Robert Murray did not want to shoot anybody, and

1 there's a good chance that he didn't fire and shoot.
2 Based on that evidence, we find -- we think that that
3 should be enough to show that he was less involved. But,
4 there's other things that the Court can consider to
5 support that conclusion.

6 And Mr. Zack went on about saying there were
7 all those separate mitigating factors that I was alluding
8 to about my client's lack of violent history, and the fact
9 that he's not such a bad guy, that he resolves things,
10 mostly things that are in evidence in other statements.
11 Judge, that is not probably a mitigating factor on its
12 own. That's not why it was introduced. That was
13 introduced to bolster the inference to be drawn from Mr.
14 Mottter's statements, which is people who knew Robert
15 Murray, know this isn't the kind of thing that he would
16 do, that he wouldn't want to kill people. He liked guns,
17 but he didn't want to kill people. Roger was mean. It
18 didn't surprise too many people in Alabama that Roger was
19 charged with this offense, but they were shocked that
20 Robert was. Those sorts of things. The fact that he was
21 not violent by nature, that when he was a bouncer at the
22 bar that he tried to resolve things peacefully. All of
23 that shows that he's not a cold-blooded violent person.
24 He's a thief. His record shows he's a thief, and he
25 didn't have a lot of support growing up, teaching him to

1 -- that taking people's money was wrong, or doing such
2 dishonest things were wrong based on his upbringing, but
3 he was not violent by nature.

4 There's another piece of evidence too, Judge.
5 If the Court's going to continue to consider Mrs.
6 Cothern's testimony about what happened when she was
7 robbed in Alabama, we'd ask the Court to also consider
8 this, because Mr. Motter talked about it when he got on
9 the stand, and Mrs. Cothern talked about it, too, and that
10 was that the person who wanted to do Mrs. Cothern harm
11 wasn't Robert Murray either, it was Roger. Mrs. Cothern
12 said it was the little man that threatened to hurt, it was
13 the little man that was running around barking orders,
14 that the big man didn't want to hurt her. The big man
15 tried to loosen up that pillowcase so she could breath
16 better. Didn't do a very good job of it, she says, but he
17 tried. That's what -- she thought he had a gun, too, but
18 he didn't want to shoot anybody. She said the big man
19 talked the little man out of hurting her, but he was
20 taking orders from the little guy. The little guy was
21 clearly in charge.

22 Yes, the people who know Robert Murray say he's
23 not too bright, he's not a leader, he's a follower. By
24 itself, being a follower isn't a mitigating factor maybe,
25 but when you look at that and you look at the fact that

1 he's a follower and you look at the fact that in Alabama
2 he was a follower, and he didn't want to hurt anybody,
3 even though he did have a gun, didn't want to hurt
4 anybody, and clearly didn't want to hurt anybody, that
5 also supports a finding of lesser involvement in the
6 killings in this case.

7 Judge, the State has asked that you not
8 consider the ability of my client to be rehabilitated in
9 determining that as a mitigating factor. Clearly the case
10 law in the state of Arizona does allow the Court to
11 consider the possibility of rehabilitation, the capacity
12 of rehabilitation, as a mitigating factor. We believe
13 that the fact that my client has relatively stable
14 employment, and because his history in the past when he
15 has been incarcerated is that he's not prone to disrupt
16 the process -- he certainly, in Alabama, was released to a
17 work furlough program when he became eligible. He has no
18 history of escaping or violating parole. Now, that's
19 Robert. If you look at what happened even in Mohave
20 County, Robert has not been involved in problems at the
21 jail. He isn't quiet about what he thinks is problems, he
22 thinks is the things the jail is causing, and he is quick
23 to write kite requests as to why things are what they are,
24 but he goes through orderly channels and he follows the
25 directions when he is pursuing whatever complaints he may

1 have about things going on over at the jail.

2 That's really not something that should be a
3 major issue as far as Robert is concerned in the
4 sentencing decision. But, he is not someone who, when
5 he's in a prison situation, in a jail situation, that he
6 can't conform to the requirements of the rules. And of
7 course, Judge, if you are thinking about newspaper reports
8 and stuff like that, everything that has happened at the
9 jail has only been alleged against Roger, it hasn't been
10 against Robert as far as any destruction or anything like
11 that. He has an ability to follow the rules. He may
12 follow them to the letter and annoy people with all of his
13 kites, but he's doing it by a procedure that the jail has
14 established.

15 Also, as Dr. Potts has indicated, Robert does
16 not possess a antisocial personality. Mr. Zack was
17 talking about the fact that that's not considered a
18 mitigating factor as far as mental states. It's not.
19 That's what the cases say, but Robert's not an
20 antipersonality disorder. He's been able to learn skills.
21 He's worked as a cook, he's worked as a bouncer. He
22 doesn't have high skills, but he's got a GED. That's all
23 the education that he's got. He got the GED pretty much
24 on his own, which is another thing that the Court can
25 consider as far as his ability to take the circumstances

1 and try and make something out of them.

2 Whatever -- Judge, whatever you do today, he's
3 not going to be outside prison ever again. But, if he's
4 able to become rehabilitated and be within the confines of
5 the prison system, be more than just a drain on the state
6 resources so that some day maybe in 10 or 15 years he can
7 mop the floors or go to the kitchen and be one of the
8 cooks and something like that and give something back for
9 his room and board that he's being incarcerated with,
10 that's something that's positive for society and it's
11 positive for the Department of Corrections. The fact that
12 he has the ability to be rehabilitated and to learn from
13 his mistakes, I think the Court should consider that in
14 mitigation as well in deciding what the proper penalty to
15 impose is.

16 We also believe that the Court should consider
17 Robert's dysfunctional childhood and his lack of
18 socialization to be law abiding in mitigation. It is true
19 that as the person becomes older the effects of childhood
20 are probably weighed less as mitigators than they would be
21 if he was 16 or 17 or 18. However, the fact that the
22 cases say that it be given less weight, while we admit to
23 that, we do not see cases that say it should be given no
24 weight. And although it may not be a lot of weight, we
25 ask that you consider it to be as much weight as perhaps

1 the aggravator of more than one person being killed in the
2 course of the crime. That kind of fairly slight weight we
3 would ask that you give it, but -- we do believe that it's
4 been proven by a preponderance of the evidence.

5 We know that he wasn't socialized to be a law
6 abiding citizen. We have evidence of that. Dr. Potts
7 confirms that that's the way things go when the kind of
8 things that happened with Robert's life occur. He was
9 beaten. Not daily, but he was beaten severely on several
10 occasions by a father who otherwise was fairly distant and
11 uncaring, and basically not at all a father figure in the
12 sense that he didn't nurture, he didn't guide his sons and
13 daughters to become good citizens and productive members
14 of society. What guiding he did give them, he took them
15 out and showed them how to collect debts for his
16 bookmaking operations.

17 And Judge, I know that when you talk about
18 bookies and illegal gambling and you live 40 miles from
19 Nevada where it's legal, there may be a tendency by some
20 people who hear this information or read this information
21 to say, well, that's not such a big deal, but we're in a
22 special situation because there's only two states that
23 have legalized gambling. There's a few more than that now
24 on Indian reservations that may have some forms of
25 gambling, but for the most part it's illegal in most

1 parts of the country. It's illegal in Alabama, and by
2 engaging in this kind of activity, Kenneth Murray was
3 teaching his children that it's okay to break the law as
4 long as you get some profit by it. As long as you don't
5 get caught, it's okay.

6 So, on one side we have Kenneth Murray. On the
7 other side we have Brenda. Well, Brenda, Judge, loved her
8 kids, but she was in a bad situation. She wanted to
9 protect them from the father, but she did it according to
10 the information that you have, and the evidence as in the
11 interviews that have been submitted. What she did was lie
12 to protect them and told them that it's okay to lie, and
13 that's not teaching your kids to be good citizens, either.
14 We also have evidence in the testimony of Mr. Price. Mr.
15 Price, I believe it is -- that's in one of these
16 interviews that's in evidence, regarding the fact that Ken
17 and Brenda would leave the kids alone for a week. Robert
18 -- this was what was in Robert's -- and Mr. Price were
19 hanging out together and they were friends, and that was
20 when Robert was in junior high school and Robert was by
21 himself, basically no adult supervision when he was in
22 junior high school, for a week at a time.

23 All of this is inconsistent parenting, all of
24 this is inappropriate parenting. Maybe it wouldn't be
25 enough to get Ken and Brenda Murray to get locked up, but

1 we are not here to do a child abuse trial. We are here to
2 decide whether or not by a preponderance of the evidence
3 Robert Murray's dysfunctional childhood had an effect on
4 the man that he has become and the path that he has taken,
5 and even though at the age of 27 it shouldn't be given as
6 much weight pursuant to the case law maybe as it would if
7 he was 17, it's still something that we ask the Court to
8 consider to some extent in mitigation.

9 In addition to things that are strictly
10 aggravation/mitigation, there is some other things that we
11 believe that the Court needs to consider in determining
12 what the appropriate penalty is. One of those things is
13 an analysis under the Enmund and Tison cases because,
14 Judge, in order to justify imposition of the death
15 penalty, you have to find that Robert Murray was a willing
16 participant in the killings. That's basically what the
17 cases say. If he hands the rock to the person who bashes
18 his head in, he's a willing participant. If he's the
19 driver of the getaway car, he's not -- probably can't get
20 the death penalty, and this is a case that falls somewhere
21 in between. We have evidence that suggests that Robert
22 Murray very well is -- very likely that he didn't fire any
23 of the shots that killed Mr. Morrison or Ms. Appelhans.
24 We don't have any evidence that he actually did pull any
25 triggers. We do have evidence that Roger claimed credit

1 for all the shots that were fired.

2 So, we do have some evidence that he didn't
3 actually kill. And the first prong of Enmund is whether a
4 person actually killed, and I think that the State cannot
5 prove beyond a reasonable doubt that my client actually
6 killed anyone. So, the first prong of Enmund is not met.
7 The State itself can't prove who fired which gun, whether
8 anybody -- whether there were two people firing guns,
9 whether there was one person firing guns. They can't
10 prove who fired the shots that killed Mr. Morrison and Ms.
11 Appelhans. I think that's probably what Mr. Dickey has
12 meant all along when he's been saying the State can't
13 prove who killed the victims. He says it, and that's
14 basically true. That's basically what Mr. Zack said, they
15 can't prove who fired the shots that caused the deaths.

16 The other evidence regarding the first prong,
17 and I think that the State cannot find in the first part
18 of the Enmund about the actual killing, but then you have
19 to look at the issue of intent to kill. And when the
20 Court looks at that, we ask the Court also to look at the
21 evidence that the State was allowed to present through
22 Mrs. Cothorn, through the videotape, regarding the pattern
23 of activity that happened in Alabama. And clearly, in
24 Alabama Robert didn't intend to kill, and was successful
25 probably because he was sober that night, and maybe Roger

1 was sober, we don't know, was more persuasive and able to
2 talk him out of doing harm to Mrs. Cothorn. We have also
3 Mr. Motter's testimony that Robert didn't want to kill
4 anybody. So, as far as intent to kill, once again, we
5 would submit that Enmund isn't met in that prong, either.

6 The other possible prongs in Enmund that would
7 justify a death penalty is attempt to kill. And once
8 again, an attempt to kill requires, as the Court's aware
9 from probably reading the jury instructions on a number of
10 occasions, to take a step in the furtherance toward doing
11 a killing. And if it's been successful, being able to
12 complete it, that would be the murder. That would be the
13 murder, bringing the gun, if he's the one that carried the
14 gun into the place, which the State hasn't proven in and
15 of itself. It does not show an intent or an attempt to
16 kill. Purchasing a gun doesn't show an intent or an
17 attempt to kill. People purchase guns all the time.
18 Sawing off the gun. If Robert's the one who did it, and
19 the State can't prove whether that was Robert or Roger,
20 doesn't prove an intent or an attempt to kill. Because, I
21 am sure the Court is aware of cases where armed robberies
22 are committed with sawed-off shotguns and nobody gets
23 shot.

24 So, the mere fact that the shotgun, the mere
25 fact of the sawing off the shotgun, which we don't know

1 whether Robert did or not, the mere fact the shotgun being
2 there, we don't know whether that's Roger's responsibility
3 or Robert's. We don't have that proof. That's not
4 sufficient to show for an attempt to kill under Enmund.
5 If Enmund was the only law that the Court could look at
6 whether or not to impose the death penalty, it would be
7 inappropriate in this case to give Robert the death
8 penalty. Unfortunately for Robert, the Supreme Court
9 looked at the Tison case and said, well, there's some
10 other things to consider, and that is the level of
11 involvement. We would submit, Judge, that Tison does not
12 do away with Enmund's requirements, it just enlarges them
13 a little bit so that if the court finds that a defendant's
14 involvement is so substantial that even though Enmund
15 isn't met, the involvement justifies the death penalty.

16 Once again, handing the rock to the person who
17 bashes somebody's head in, even though it's probably an
18 intent or an attempt to kill maybe, that couldn't be
19 proved beyond a reasonable doubt, but it's pretty -- it's
20 pretty close to the edge there, that sort of thing.
21 However, the findings required by Tison must be proven,
22 and based on evidence presented at either the guilt phase
23 of the trial or aggravation/mitigation phase, no such
24 evidence has been presented in this case. The State may
25 argue inferences from the evidence that is there regarding

1 the -- and even probably argue by virtue of the fact that
2 my client has been convicted, that he was involved. That
3 does not in and of itself allow a finding under Tison,
4 even though it may allow a conviction by a jury, because
5 there's doubt about who fired the shots. And because
6 there is no evidence regarding whether or not my client
7 willingly allowed the shots to be fired, we would submit
8 that Tison is not met, either. That this is far enough
9 away from the rock in the hand and close enough to,
10 although it's not equal to, the getaway driver, that the
11 Court should not be able to impose a death penalty under
12 either analysis in this case.

13 Judge, I know that the family members of the
14 victims have a right to allocution in this case. And I
15 imagine that if they exercise it, it will probably be
16 during Mr. Zack's rebuttal since it wasn't in the first
17 part of his argument, and we are probably not going to
18 have a chance to say too much about that. We would urge
19 the Court to remember, however, that any recommendations
20 for the appropriate penalty are not appropriate
21 considerations for the Court in deciding what penalty you
22 pronounce in this case. I know that when I got to the
23 legal defender's office this morning there was a copy of a
24 letter from Mr. Morrison's brother, once again urging this
25 Court to impose a death penalty. We'd ask the Court to

1 disregard that letter as far as any recommendations are
2 concerned. If the Court doesn't feel that it can do that,
3 we'd ask the Court to recuse itself from the sentencing
4 part of this proceeding. And we'd ask the Court also to
5 disregard any pleas for killing my client as a way to make
6 up for the losses that these people have suffered.

7 We know, Judge, that these people have suffered
8 loss. I think that anybody who sat through this trial has
9 to feel for the people left behind when Mr. Morrison and
10 Ms. Appelhans were killed, and we understand that, and our
11 condolences go out to them. But, as far as any
12 recommendations they may make about what it will take for
13 them to be satisfied that justice was done, and whether or
14 not the death penalty is appropriate, those are things
15 that are for the Court to determine. The reason why death
16 penalties were stricken in 1972 and found
17 unconstitutional, is because they were basically mob
18 justice. There was no discretion, and so anything could
19 be considered and anything would justify a death penalty
20 for certain types of crimes. When the Supreme Court
21 allowed the states to apply death penalties again, in
22 murder cases, they did so with an understanding that the
23 decision of whether or not to impose death would be
24 governed by the law and by a fairly dispassionate
25 interpretation of very passionate evidence. And they

1 clearly outline and have continued to clearly outline
2 which is and is not a consideration by the court.

3 Any recommendations which have come before this
4 Court or which may come before this Court later today as
5 part of the victim's allocation which are passionate pleas
6 for execution, go back to that mob psychology, and we'd
7 ask the Court to disregard that. That is not what justice
8 is about. That is not what the decision that this Court
9 has to come to is all about. The law requires that you
10 act in a way that these people who have suffered so much
11 may think is cold, but the Court must act dispassionately
12 in reviewing the factors. That's what the law requires,
13 and we believe that the most just thing that you can do,
14 Judge, in determining a sentence for Robert Murray, is to
15 not impose a death penalty for either of those murders.
16 To impose life imprisonment on each. And this Court, if
17 it chooses, can make those run consecutively.

18 We'd ask the Court to consider all the other
19 information in determining what the appropriate sentence
20 for the aggravate -- for -- excuse me, I am saying that
21 armed robbery is -- and determine a just and fair sentence
22 for that count and use the reason and the law to guide you
23 in determining how those sentences should run. We believe
24 that the amount of time that my client can get, depending
25 on what you do with those things, will assure that he is

1 punished for what he has been convicted of. It will
2 assure that society is protected, and those are things
3 that are part of the process in determining an appropriate
4 sentence. We believe that what aggravation does exist in
5 this case, should not be given significant weight. We
6 believe that the mitigators in this case, especially my
7 client's lesser involvement, should be given substantial
8 weight, and all of them should be given some weight. We
9 ask this Court not to impose the death penalty for those
10 reasons.

11 THE COURT: Thank you. Would counsel approach the
12 bench, please?

13 (An off the record discussion was had at the bench.)

14 THE COURT: Okay. For the record, it's already
15 almost 11:30. I am going to recess until 1:00 o'clock,
16 where we will begin with Mr. Dickey's closing argument.
17 We are in recess.

18 (A recess was taken from 11:22 a.m. to 1:00 p.m.)

19 THE COURT: Okay. Please be seated. Okay. We are
20 back on the record.

21 Mr. Dickey?

22 MR. DICKEY: If it please the Court, counsel. In
23 this particular case the defendant Roger Murray would
24 incorporate by reference and make part here of his Trial
25 Memorandum and his Post Trial Memorandum. We will try not

1 to repeat all the matters contained therein. We believe
2 that those memos speak for themselves. Your Honor, in
3 this type of situation, a case where the State is seeking
4 the death penalty, the Supreme Court has found death to be
5 cruel and unusual unless and until it is individualized
6 and limited severely in its application. The Court -- as
7 this Court well knows, the courts were set up to protect
8 the individual from the power of the government, and that
9 is what Roger is asking that you do in this particular
10 case. You are in the position of a juror, and the juror
11 of course has more power than anyone else in the world,
12 because a jury makes the decision as to what is to happen
13 to an individual when a case is presented to them. In any
14 case, the State makes the original determination as to
15 what to do.

16 Death is political. The State does not have to
17 ask for the death penalty. Once that decision is made,
18 then of course the matter goes through the court
19 proceedings. The Supreme Court of the United States has
20 basically indicated that the only way that the Arizona
21 death penalty statute is constitutional is because it is
22 severely limited in its application according to the
23 decision that the Supreme Court of the United States has
24 handed down. Basically what the Supreme Court of the
25 United States seems to say in its cases is that death

1 should be the exception rather than the rule. If the
2 Court interprets the cases, death penalty cases as the
3 State would seek to have it interpreted, then obviously
4 it's unconstitutional under the United States Supreme
5 Court rulings. In the Poland case the Supreme Court of
6 the United States indicated that finding aggravating
7 circumstances does not require the imposition of the death
8 penalty under the Arizona statutes, nor does the finding
9 of mitigation mean that the death penalty cannot be
10 imposed. Basically what it is saying, that the
11 individualized application must be done in each particular
12 case.

13 Now, during the course of the proceedings in
14 the post trial, the penalty phase trial of the case, Roger
15 presented a number of things which, under Lockett v. Ohio,
16 constituted many aspects of his life which calls for a
17 penalty less than death. Presented the evidence of the
18 sociologist, Dr. Hewitt. The evidence of the
19 psychiatrist, Dr. Potts, sets forth background of the
20 defendant. And while I'm talking about Dr. Potts, this
21 was a request for examination that was made by the State.
22 The State in this case requested that he have a
23 psychiatrist be appointed. As a matter of fact, even
24 suggested that Dr. Potts be appointed. Ms. O'Neill gave
25 the name of another doctor whom she believed -- I believe

1 it was Dr. Bendheim, who might be appointed to do the
2 tests. But the State suggested Dr. Potts. Now the State
3 is trying to disparage the conclusions and decisions that
4 Dr. Potts made based on his education and experience. We
5 believe that in this case Dr. Potts' evaluation should
6 carry great weight with this Court, and we believe that
7 Dr. Potts' evaluation was right on the money as far as
8 Roger is concerned.

9 The sociologist in his evaluation of the case
10 further reinforced the position that Roger has taken
11 throughout, that he is a product of his background and
12 that this in part could result from his upbringing. As
13 the Court well knows, Roger grew up in essentially what
14 was a lawless environment. He did not apparently receive
15 the emotional nurturing that he needed. He was brought up
16 in a lawless environment because, as Ms. O'Neill has
17 pointed out, the father was engaged in an illegal business
18 in Alabama. Sure, he had some of the help and family
19 living that most people do have over the course of their
20 lifetime, but it didn't appear to be enough. Also, as
21 pointed out, the system, that is, the legal system, the
22 judicial system, failed Roger back at a time when it could
23 have made a difference. The Court knows from the
24 documentation presented that Roger got himself in trouble
25 at an early age, and the state through its agencies did

1 not apparently address those problems.

2 Roger was removed from school because of the
3 incident involving the taking of a gun to school when he
4 was young. Sure, he received treatment during the period
5 of time that he was involved with the legal system, but it
6 did not address the underlying emotional situation that
7 caused Roger to do the things that he did. Got involved
8 with alcohol and drugs, contact with the authorities.
9 These were not addressed, even though -- his family
10 apparently, in part, was unaware of what took place.
11 Still, it's obvious from reading the reports that much of
12 Roger's activities were the result from the use of alcohol
13 and drugs.

14 As indicated, the law does not require death.
15 The law gives the prosecutor a great deal of discretion.
16 In any case the prosecutor has the power and the ability
17 to make deals. Now, we're not lessening the fact that two
18 people were killed in this particular case, but how this
19 case can equate with a case such as the John Gotti case,
20 where Sammy "The Bull" Gravano who admitted to 16 murders
21 plus other types of crimes including robbery, extortion,
22 and that sort of thing, was given a deal in exchange for
23 his testimony. We submit there's something wrong with a
24 system that allows a person who is a confessed murderer to
25 essentially escape punishment, but someone who is charged

1 with a law offense is punished because he or she elects to
2 go to trial and have their day in court and is convicted.

3 As the Court well knows from the evidence which
4 was presented at trial, the State's case is full of
5 conclusions, logical or not. Roger agrees with Ms.
6 O'Neill's evaluation of the lack of proof of the
7 aggravating factors based on the trial testimony. The
8 business of the pecuniary gain, the prosecutor says, is
9 proved because they were caught with the loot. However,
10 if the Court looks at this alleged aggravating factor, I
11 am sure it will see that there is nothing in the evidence
12 which was presented which would show the sequence of
13 events. When did the people die? If you follow the
14 State's theory logically and this was for pecuniary gain,
15 then the evidence should have shown that Dean Morrison was
16 killed outside the house, as in the patio where the State
17 assumes that the first contact took place. And Jackie
18 should have been found dead out in the dirt where the
19 alleged footprints were supposed to have been found. So,
20 it doesn't follow that what the State is claiming is what
21 took place, because there is an absolute lack of
22 evidence.

23 Now, under the Enmund and McDaniel cases,
24 Enmund, Supreme Court of the United States, and McDaniel
25 out of the Arizona Supreme Court, the court cannot impose

1 the death penalty unless the court makes the findings that
2 are required under those cases, and that has to be based
3 upon proof presented at the trial, not speculation. In
4 this particular case, Roger submits that the evidence does
5 not show who killed. The evidence presented at trial does
6 not show who killed, who attempted to kill, who intended
7 to kill. All it shows basically is that two people were
8 dead, the place had been ransacked, and that later on the
9 defendants, Roger and Robert Murray, were found in
10 possession of items from the premises. Under these
11 circumstances the State has failed to show the elements
12 necessary for the exception to the Enmund and McDaniel
13 cases. If we just had one person here who was involved,
14 then there might not be the problem. The problem is that
15 there are two people involved, and the burden is upon the
16 State to prove who did what. The State has not done that.

17 Now, the State claimed, well, they were there
18 at least an hour. Unfortunately, what the State is doing
19 is concluding matters upon which there is -- based upon
20 which there is a lack of proof. The State had
21 opportunities to determine matters and prove matters
22 during the trial. Who -- they could have proved perhaps
23 who did fire the shots by doing powder tests. They could
24 have gone ahead and by attempting to determine the time of
25 death, establish when the crime could have been committed.

1 Really, they didn't do that. The State didn't do that.
2 There are two separate crimes alleged, robbery and the two
3 murders. The thing about that is, that we have the State
4 saying, well, there's evidence that these were planned
5 because of all these items, the gun, supposed purchase of
6 the gun. We don't know when the Murrays acquired the gun,
7 or in fact where they acquired it. All the State could
8 show was that a big man acquired it, and later it was
9 found in the Murray vehicle.

10 Suppose the robbery was planned, but the murder
11 was an accident? The murders were accidents because of
12 the use of drugs and/or alcohol in the commission of the
13 offense? If the murders had been planned, then why
14 weren't the people taken out at the first contact? They
15 could have been taken in and held in a particular place.
16 Now, there wasn't any evidence as to why the Murray's were
17 drinking and what their reason was for them to drink. The
18 prosecutor of course said to steel their nerves. It could
19 have been that they just liked to drink and that's what
20 they were doing. So, we submit that there wasn't any
21 evidence to substantiate what the State is claiming or the
22 basis for it's claims in the case.

23 Now, Roger's mitigation involved the evidence
24 of how he grew up. I've touched on that a little bit
25 before, but it's obvious that he was subjected over a

1 period of time to mental and physical abuse. If the Court
2 will recall, his sister said that he was always getting
3 blamed for things that she did. In other words, he was
4 the one who was the fall guy for whatever happened. And I
5 submit, that type of situation has to have an effect,
6 especially on a person who is growing up in a
7 dysfunctional situation where you have no -- a really
8 overly strict father and overly indulgent mother. Now,
9 the easy way out of course is to go ahead and impose the
10 death penalty. However, as the Court well knows from the
11 documentation, it takes more, and much more money to
12 execute a person than it does to put them away for their
13 natural lives. I mentioned there was no evidence of
14 planning, there was no mention of how the Murray's got the
15 gun. The prosecution, from the results, wants to have the
16 Court infer that all these things that the Court (sic) is
17 claiming must have happened over the period of time
18 involved.

19 Now, Dr. Hewitt testified to the impulsivity of
20 Roger. We believe that Dr. Potts reached the same
21 conclusion. And in reading materials on what has happened
22 to Roger before, the picture seems to become clear and
23 obvious that here is a person who wants to be noticed. He
24 has a need to be noticed. He wants to be the macho man,
25 as indicated with regard to his football. He wanted the

1 family to approve of him and his activities, but he was
2 ignored, at least by his father who he wanted to obtain
3 approval from. We submit that this is evidence of a
4 person who is crying out for help and not receiving it
5 either from the family or from the authorities. We submit
6 that in this particular case the evidence also shows from
7 the reports involving Roger's background, that he was
8 involved in a number of matters, but always with other
9 people. This would tend to indicate that he was a talker
10 and a follower, not a leader, because he got in the
11 trouble with other people, and drugs and alcohol were
12 involved.

13 Now, the Murray brothers of course have been in
14 jail since the time of this incident, so they have had an
15 opportunity to consider what has happened in this case,
16 and of course hindsight is always 100 percent. Now, with
17 regard to the Motter tape, I need to remind the Court that
18 the Motter tape was not introduced against Roger, it was
19 only introduced in the case to show mitigation on behalf
20 of Robert, so the Court cannot consider the Motter tape
21 against Roger because it was not admitted against him. By
22 the same token, the letters that were submitted by Roger
23 show that mitigation as to him, that he did not kill, and
24 that is because the letters which were submitted were
25 authenticated to have been written by Robert, and as such,

1 that is an admission basically by Robert. It doesn't say
2 we killed, it says I killed. The singular rather than the
3 plural. The letters, of course, were not used until after
4 the jury verdict, so the jury had no opportunity to hear
5 about the letters.

6 Let's talk about plans. If you read the
7 letters, the inference can be drawn that the person who
8 had been doing the planning is not Roger Murray, but
9 Robert Murray. You read the alleged code letter. Who is
10 doing the planning and putting forth the ideas? It's
11 Robert, not Roger. The same is true of the other two
12 letters. It indicates planning by Robert as to what he
13 wants to do, not Roger. We submit that the evidence shows
14 that Roger was a follower. He looked up to his brother.
15 It indicated in the letter, I believe from Paul Michael,
16 he looked up to his brother, sort of worshipped him. So,
17 I submit that the leader in this case was not Roger, but
18 was Robert. And that under the circumstances, if the
19 Court cannot determine who actually did the killings, then
20 it is submitted that the Court cannot impose the death
21 penalty because of the fact that the Court has to be able
22 to find that the State has proved beyond a reasonable
23 doubt who in fact did the killing, which in fact the State
24 has admitted it cannot prove.

25 Impulsive. Obviously from what the Court knows

1 about Roger, and obviously -- he's obviously impulsive.
2 It's obvious that he is hyperactive in the case. His
3 hyperactivity I believe is proved by the problems that
4 he's had in the jail. His impulsivity, something doesn't
5 go his way, he gets unhappy about it.

6 MR. ZACK: I'd object that he's arguing items not in
7 the evidence before this Court.

8 THE COURT: Your objection is noted, Mr. Zack. You
9 may proceed, Mr. Dickey.

10 MR. DICKEY: Basically any case involving the
11 request for the death penalty, the overriding
12 consideration is not punishment, but is vengeance, pure
13 and simple, because the death penalty only puts -- kills a
14 person who is condemned to death by the actions of the
15 State. It does not prevent other people from committing
16 the offense. If the sum total of mitigation is believed,
17 it shows that Roger should not have the death penalty
18 imposed as to him. I guess the longer I'm around, the
19 more I am convinced that, and maybe become more tolerant
20 later on, of man's inhumanity to man. This offense was a
21 senseless offense. It was senseless from both the fact
22 that property was taken from some people who were not
23 doing anything wrong, but it was also senseless from the
24 fact that it did not have to happen.

25 Roger and Robert didn't have to be involved in

1 this particular incident, and of course it affects not
2 only them, but also their families, and of course the
3 families of the people who have lost loved ones. But
4 Roger and Robert also have family, and they are important
5 to their family as indicated by the witnesses who came to
6 testify on their behalf. If you look at the Alabama case,
7 and we believe that this particular case is one that is
8 not proper rebuttal, but if you look at that, the evidence
9 showed that the person who was doing the ransacking was
10 the smaller person, while the larger person was standing
11 guard. It think a reasonable inference could be made that
12 the same method of operation could have been the situation
13 in the present case. The shotgun shells were not found on
14 Roger, they were found on Robert.

15 In this particular type of case, rehabilitation
16 really doesn't mean anything, because if the life
17 sentences are imposed, then obviously Roger and Robert are
18 going to be in prison for probably the rest of their
19 natural lives. So, an adjustment maybe to incarceration
20 is something that should have been addressed, but we
21 believe that that of course is a matter for the State to
22 present if it does wish to present matters relating to
23 that subject.

24 In this case Roger of course has indicated in
25 his letter to the Court that he is remorseful for his

1 involvement in the case. Whenever that happens, whether
2 it's caused by someone or it's natural, there is a loss.
3 As indicated, both the family of the deceased folks and
4 the Murray's will suffer a loss if the Court imposes the
5 death penalty. The individualized determination as to
6 Roger, we submit, should be to impose the other sentence,
7 that is, the life sentence on Roger. We'd ask the Court
8 to consider the limitations in Payne versus Tennessee on
9 any statements that are made by any parties who wish to
10 speak or have spoken on behalf of the deceased people.

11 As the Court will recall with regard to Motter,
12 which the State attempted to introduce against Roger, we
13 had no opportunity to cross-examine and no opportunity to
14 present evidence which would show whether or not he was
15 worthy of belief. It's interesting to point out, though,
16 that during the presentation, that the -- not the
17 presentation, but the part of the case that related to the
18 foundation for the admission of the tape, that the
19 prosecutor seemed to take the position that Mr. Motter was
20 unworthy of belief and was a professional snitch.

21 Now, the circumstances of this case are filled
22 with what might be called factual loopholes. There's a
23 great deal of speculation about what happened, but an
24 awful lot of lack of proof. Under the circumstances and
25 the evidence presented, the defendant, Roger Murray, takes

1 the position that the death penalty as to him is
2 inappropriate and that the lesser penalty other than death
3 should be imposed, that is the life sentences. We submit
4 that under all of the evidence presented, especially the
5 evidence of Dr. Potts and the sociologist, those are
6 entitled to great weight because they are opinions of
7 learned people based upon a thorough study of the case.
8 We submit that those alone are sufficient mitigation to
9 avoid the imposition of the death penalty. We would ask
10 the Court to impose life as to Roger.

11 THE COURT: Mr. Zack?

12 MR. ZACK: Well, Your Honor, I am not sure. One of
13 the victim's survivors may want to address the Court.
14 Your Honor, this is Donna Corsaut, the mother of Jackie
15 Appelhans.

16 THE COURT: Could you spell that for the court
17 reporter?

18 MS. CORSAUT: Donna Corsaut, C-o-r-s-a-u-t. I would
19 like to address Roger and Robert. Is that permissible?

20 THE COURT: Well, whatever you'd like to say, say it
21 to me. I think that's permissible. Why don't we do it
22 that way.

23 MS. CORSAUT: I would like to know what my daughter
24 ever done to them that they killed her. I didn't find
25 them guilty, a jury found them guilty.

1 THE COURT: Is there anything else you'd like to
2 say?

3 MS. CORSAUT: That's -- I would like to know if they
4 are going for an appeal, and if they gave my daughter an
5 appeal. And even though they had to kill her, why destroy
6 her to where I couldn't see her to tell her goodbye. I
7 thank you.

8 THE COURT: Thank you. Mr. Zack, any others?

9 MR. ZACK: Your Honor, there were some points that
10 I could make on the various statements by defense
11 counsel. I think the Court's probably heard enough. The
12 Court has heard all the evidence to make up its own mind.
13 Just a couple points I do want to make. At the sentencing
14 hearing the focus is necessarily on the defendants.
15 However, at some point we have to stop and remember the
16 victims. We have to remember Dean Morrison and Jackie
17 Appelhans. We have to remember that they were good people
18 trying to live their lives, asking for nothing more than
19 they earned, and would come to the help of others. The
20 epitome of what good people should be in society. The
21 question is raised, why have the death penalty or should
22 it be imposed in these cases. Your Honor, people are
23 killed every day, people are murdered every day, and
24 people who are convicted of first degree murder are
25 sentenced to life on a regular basis. However, this is

1 not that kind of case.

2 How can we as a society say that certain
3 murders that are so inhuman, certain murders that are so
4 cruel, certain murders that are so cowardly, certain
5 murders that are so senseless, how can society say that it
6 is outraged and put those in separate categories. It says
7 that because the people through their representatives have
8 said we as society want to protect ourselves, and we will
9 include the death penalty to do so. The law has made that
10 death penalty a very limited sanction. It's for very
11 limited types of murders. Your Honor, if we are going to
12 have a death penalty, it's for murderers such as Roger and
13 Robert Murray.

14 THE COURT: Does the defendant Robert Murray wish to
15 say anything before I proceed with sentencing?

16 ROBERT MURRAY: No.

17 MS. O'NEILL: No, Your Honor.

18 THE COURT: Does the defendant Roger Murray wish to
19 say anything before I proceed with sentencing?

20 MR. DICKEY: Yes, Your Honor, he does.

21 ROGER MURRAY: I'd like to address the family of Mr.
22 Morrison and -- if it's okay?

23 THE COURT: Yes. Whatever you have to say, you can
24 say it now.

25 ROGER MURRAY: It -- I am sorry about this. You

1 just don't understand. If there is anything that I could
2 do, I swear, I would. That's --

3 THE COURT: Ms. O'Neill, is there any reason why
4 sentence should not now be pronounced?

5 MS. O'NEILL: Your Honor, other than the reasons
6 that we have previously put before this Court by way of
7 objection to certain items that have been submitted to the
8 Court. We'd include in our objection, just for the
9 record, that a letter that was sent over by Ms. Chastain
10 from the county attorney's office on October 21st. I am
11 not aware of any other legal cause.

12 THE COURT: Thank you. Mr. Dickey, is there any
13 reason why sentence cannot now be --

14 MR. DICKEY: None that I can think of, other than
15 what we have already raised during the course of these
16 proceedings both before trial, during trial, and after
17 trial.

18 THE COURT: Well, of course your objections have all
19 been noted for the record in the past, and the Court has
20 considered them and ruled on them. Based on the jury
21 verdict in this case, the Court finds that the defendant,
22 Robert Murray, Robert Wayne Murray, is guilty of Armed
23 Robbery. It's a dangerous, nonrepetitive Class 2 Felony,
24 a violation of ARS 13-1904, 13-801, 13-701, which occurred
25 on May 14th, 1991.

1 Defendant Robert Wayne Murray, it's also the
2 judgment of the Court that the defendant is guilty of
3 Murder in the First Degree of Jacqueline Appelhans, a
4 Class 1 Felony, in violation of ARS 13-1105, 13-703, which
5 occurred on May 14th, 1991.

6 It's the judgment of the Court that the
7 defendant is guilty of Murder in the First Degree of Dean
8 Morrison -- this is Robert Wayne Murray again -- a Class 1
9 Felony, in violation of ARS 13-1105, 13-703, which
10 occurred on May 14th, 1991.

11 I have a special verdict with regard to the
12 First Degree Murder offenses which are with regard to the
13 Armed Robbery. The Court finds that there are several
14 aggravating circumstances. One is that the offense was
15 committed for pecuniary advantage; that death was caused
16 in the commission of the offense; and the defendant had
17 prior felonies within 10 years.

18 With regard to the robbery offense, the Court
19 sentences the defendant to 21 years imprisonment. It's
20 ordered that the defendant is committed to the Department
21 of Corrections for 21 years, with credit for 200 -- I am
22 sorry, 531 days presentence incarceration. There's a \$100
23 Felony Assessment Fee with regard to that offense.

24 The Court finds with regard to Robert Wayne
25 Murray as to both the First Degree Murder of Dean Morrison

1 and the First Degree Murder of Jacqueline Appelhans, the
2 Court has made special findings, and I will read those.
3 The Court conducted a separate sentencing hearing under
4 ARS 13-703(D) October 5th, 6th, and 7th, 1992. Both
5 parties had the opportunity to present evidence and
6 argument concerning the existence or nonexistence of the
7 aggravating and mitigating circumstances enumerated in ARS
8 13-703(F) and (G). Both parties were given the
9 opportunity to present any other relevant mitigation for
10 the Court's consideration. All material in the
11 Presentence Report was disclosed to defense counsel and to
12 the prosecutor.

13 Based upon the evidence introduced at the trial
14 and the evidence received at the sentencing hearing, the
15 Court renders this special verdict. The Court finds as
16 follows. With regard to aggravation, the Court finds that
17 no evidence was presented with regard to statutory
18 aggravated circumstances F1, F2, F3, and F4, and the Court
19 finds that those have not been proven.

20 As to statutory aggravating circumstance F5,
21 the Court finds beyond a reasonable doubt that the
22 defendant committed the offense as consideration for the
23 receipt or in expectation of the receipt of anything of
24 pecuniary value. At trial the evidence showed that the
25 defendant and his brother invaded the cafe and home where

1 Jackie Appelhans and Dean Morrison resided and worked.
2 They ransacked the buildings and took a number of items
3 including cash. When they were stopped several hours
4 later by DPS officers, the property was found in the
5 defendants' vehicle. The murders were committed in the
6 course of and in furtherance of the robbery and flight
7 from the robbery.

8 As to statutory aggravating circumstance F6,
9 the Court finds beyond a reasonable doubt that the
10 defendant committed the offense in an especially heinous,
11 cruel or depraved manner. As used in this statute, cruel
12 focuses on the mental anguish of the victim, and heinous
13 or depraved focuses on the defendant's state of mind. The
14 evidence at trial showed the victims Jacqueline Appelhans
15 and Dean Morrison were kidnapped at gunpoint, forced to
16 lie down in the living room at Grasshopper Junction. The
17 invasion of the property occurred in the middle of the
18 night and by surprise. The victims had no opportunity to
19 defend themselves or to summon aid. The victims clearly
20 had significant time to consider the uncertainty of their
21 fate. The Court finds beyond a reasonable doubt that the
22 killings were cruel.

23 In addition, the evidence at trial showed that
24 the defendants inflicted gratuitous violence on the
25 victims Jacquelin Appelhans and Dean Morrison. They were

1 shot numerous times with different weapons, including
2 shotgun blasts to the head.

3 The evidence shows that the victims were
4 helpless at the hands of the defendants' when they were
5 executed. Both victims were elderly, clad in bath robes
6 and lying on the floor. The killings were senseless. The
7 murders occurred in a remote location. The victims could
8 not have summoned aid easily at night. By killing the
9 victims, the defendants gave themselves more time to
10 implement their escape plan.

11 The only motive for the killings was to
12 eliminate witnesses and to assure the defendants' escape
13 from detection. The Court finds beyond a reasonable
14 doubt that the killings were heinous and depraved.

15 As to the statutory aggravating circumstance
16 F7, the Court finds that this circumstance has not been
17 proven.

18 As to the statutory aggravated circumstance F8,
19 the Court finds that beyond a reasonable doubt that the
20 defendant has been convicted of one or more other
21 homicides as defined by ARS 13-1101, which were committed
22 during the commission of the offense. The jury verdict
23 makes further discussion unnecessary.

24 As to statutory aggravating circumstance F9 and
25 F10, no evidence was produced at the hearing and the Court

1 finds they are unproven.

2 As to statutory mitigation, the Court finds the
3 statutory mitigating circumstances G1, G2, G4, and G5 have
4 not been proven.

5 As to the statutory mitigating circumstance G3,
6 the defendant submitted evidence at the hearing that the
7 defendant was legally accountable for the conduct of
8 another under provisions of ARS 13-303; that his
9 participation was relatively minor, although not so minor
10 as to constitute a defense to prosecution. The evidence
11 at the trial showed that the offenses were committed by
12 the defendants acting in concert. The footprints of both
13 defendants were found at the scene. Both defendants were
14 armed at the time of the arrest. Robert Murray drove the
15 vehicle when stopped. There were numerous bullet wounds
16 to both victims in this case.

17 At the hearing on mitigation the defense
18 submitted evidence that Robert is a follower and Roger is
19 the leader of the two. The defense also presented a taped
20 interview with William Motter. Mr. Motter on the tape
21 alleges that Roger admitted the killings. Mr. Motter's
22 testimony is simply not reliable. Motter has trouble
23 remembering some of the statements made by Roger, which
24 even if accurately reported by Motter, may be the result
25 of Roger Murray's bragging or desire to protect his

1 brother.

2 In rebuttal the State presented evidence to
3 show that Robert sent a coded message telling Roger that
4 Robert would escape and come back for him. Hardly the
5 thing a follower would do. In addition, the sawed-off
6 shotgun found in the vehicle at the time of the
7 defendants' arrest was purchased in Las Vegas a short time
8 prior to the murders. The evidence suggests that Robert
9 purchased the gun.

10 The evidence at trial and in rebuttal shows
11 that these murders were planned. The plan for these
12 murders was remarkably similar to that used in the attack
13 on Sally Cothorn. There is no evidence to suggest that
14 the killings were done by Roger on impulse. The brothers
15 acted together for pecuniary gain and killed to escape
16 detection. They are equally liable for their actions.

17 The Court finds that the defense did not prove
18 this mitigating factor by a preponderance of the
19 evidence.

20 At the mitigation hearing the defense presented
21 evidence of four additional non-statutory mitigating
22 circumstances. The defendant -- one, the defendant was
23 intoxicated on the night the crimes were committed; two,
24 the defendant is capable of being rehabilitated; three,
25 the defendant suffered from a dysfunctional childhood;

1 four, a sentence less than death will adequately protect
2 society.

3 With regard to non-statutory mitigation No. 1,
4 the Court finds that the defendant has not proved by a
5 preponderance of the evidence that the defendant was
6 intoxicated on the night that the crime was committed.
7 The evidence shows that the defendants were drinking at
8 Temple Bar before the murders. The defense presented no
9 evidence that the alcohol consumed by the defendant
10 affected his state of mind. In fact, the evidence at
11 trial showed that the defendant was able to conduct
12 several complicated physical maneuvers, including the
13 invasion of the Morrison-Appelhans' residences in carrying
14 out the offenses in this case. The defendant drove a
15 motor vehicle at high rates of speed just prior to
16 apprehension. Despite Dr. Potts' statement that the
17 defendant was acutely intoxicated at the time of the
18 offense, no proof exists in the record to support that
19 statement.

20 With regard to non-statutory mitigation No. 2,
21 the Court finds that the defendant has shown by a
22 preponderance of the evidence that the defendant is
23 capable of being rehabilitated. At the hearing, the Court
24 admitted as evidence the Rule 26.5 examination and report
25 conducted by Dr. Potts. After reviewing the defendant's

1 background, Dr. Potts concluded that the defendant can be
2 rehabilitated. The State did not challenge that
3 conclusion at the hearing.

4 With regard to non-statutory mitigation No. 3,
5 the Court finds that the defendant suffered from a
6 dysfunctional childhood. The defense produced witnesses
7 and transcripts of witnesses at the hearing which support
8 the defense contention that the defendant was subjected,
9 as a child, to abnormal physical abuse, inconsistent
10 discipline, and a dysfunctional environment. Dr. Potts
11 states: Robert was condemned by having a father who was
12 overly rigid and a mother who was overly permissive and
13 protected him from the wrath of his father. Because of
14 his large size he was the subject of physical punishment
15 on almost daily occurrences. Being a bed wetter until his
16 early teens was embarrassing enough, but suffering from
17 fecal incontinence contributed to his feelings of not
18 being understood. And later, the defendant was reared in
19 an environment not conducive to good role modeling. The
20 mother was overprotective, with the father being distant,
21 harsh, and relatively uncaring. As a boy, Robert Wayne
22 Murray suffered shame and isolation because of his urinary
23 and bowel problems. These were neither recognized nor
24 treated, condemning him to being an outcast. The State
25 did not refute this evidence at the hearing.

1 With regard to non-statutory mitigation No. 4,
2 the Court finds that, quote, a sentence less than death
3 will adequately protect society, unquote, is not a
4 relevant separate mitigator but involves the Court's
5 balancing its aggravating and mitigating factors.

6 In conclusion, the Court concludes that the
7 State has proved beyond a reasonable doubt statutory
8 aggravating factors F-5, F6, and F8. The State has not
9 proved statutory aggravating factor F1, F2, F4, F7, F9,
10 and F10.

11 The Court concludes that the defendant has not
12 proven statutory mitigating factor G1, G2, G3, G4, and
13 G5. The defense has proven non-statutory mitigating
14 factors 2 and 3.

15 The Court has considered each of the mitigating
16 circumstances offered by the defendant, and looked in the
17 records for any other mitigation, and found none. The
18 Court finds that mitigating circumstances proved to exist
19 are not sufficiently substantial to outweigh the
20 aggravating circumstances proved by the State and to call
21 for leniency.

22 As part of the verdict in this case the jury
23 was asked to answer the following questions: Did any
24 juror find premeditation. The jury answered yes. If your
25 answer to No. 1 is yes, was the jury unanimous in finding

1 premeditation. The jury answered yes. The jury
2 unanimously found that the defendant participated in the
3 killings.

4 With regard to the First Degree Murder charge
5 of Jacqueline Appelhans, the defendant is therefore
6 sentenced to death. With regard to the First Degree
7 Murder charge of Dean Morrison, the defendant is therefore
8 sentenced to death.

9 Pursuant to Rule 26.15 of the Arizona Rules of
10 Criminal Procedure, the clerk is ordered to file a Notice
11 of Appeal from this judgment and sentence.

12 Restitution of \$4,680.78 is ordered. And the
13 defendant is ordered to pay the \$200 Felony Assessment
14 Fee.

15 With regard to Roger Murray, it's the judgment
16 of the Court that the defendant is guilty of Armed
17 Robbery. It's a dangerous, nonrepetitive Class 2 Felony,
18 in violation of ARS 13-1904, 13-801, 13-701, which
19 occurred May 14th, 1991.

20 The Court finds the following aggravation and
21 mitigation. That the offenses were committed -- this is
22 aggravation. That the offenses were committed for
23 pecuniary advantage; that death was caused in the
24 commission of the offense; and the defendant had prior
25 felonies within 10 years. In mitigation, the Court finds

1 none.

2 It's ordered that the defendant is to be
3 imprisoned for 21 years, consecutive to the First Degree
4 Murder sentences. It's also ordered to pay restitution in
5 the amount of \$4,680.78. There is a total of \$300 Felony
6 Assessment Fee on these cases. The defendant is given
7 credit for 531 one days presentence incarceration.

8 It's also the judgment of the Court that the
9 defendant is guilty of Murder in the First Degree of
10 Jacqueline Appelhans, a Class 1 Felony, in violation of
11 ARS 13-1105, 13-703, which occurred on May 14th, 1991.
12 It's the judgment of the Court that the defendant is
13 guilty of murder in the first degree of Dean Morrison, a
14 Class 1 Felony, in violation or ARS 13-1105, 13-703, which
15 occurred on May 14th, 1991.

16 Once again, I have a separate special verdict
17 with regard to the counts in this case and I will read
18 them together, the findings of the Court together. The
19 Court conducted a separate sentencing hearing under ARS
20 13-703(B) on October 5th, 6th, and 7th, 1992. Both
21 parties had the opportunity to present evidence and
22 argument concerning the existence or nonexistence of the
23 aggravating and mitigating circumstances enumerated in ARS
24 13-703(F) and (G). Both parties were given the
25 opportunity to present any other relevant mitigation for

1 the Court's consideration. All material in the
2 Presentence Report was disclosed to defendant's counsel
3 and to the prosecutor.

4 Based upon the evidence introduced at the trial
5 and the evidence received at the sentencing hearing, the
6 Court renders this special verdict. With regard to
7 aggravation, the Court finds that no evidence was
8 presented with regard to statutory aggravating
9 circumstances F1, F2, F3, and F4, and the Court finds that
10 they have not been proven.

11 As to the statutory aggravating circumstance
12 F5, the Court finds beyond a reasonable doubt that the
13 defendant committed the offense as consideration for the
14 receipt or in expectation of the receipt of anything of
15 pecuniary value. At trial the evidence showed that the
16 defendant and his brother invaded the cafe and home where
17 Jackie Appelhans and Dean Morrison resided and worked.
18 They ransacked the buildings and took a number of items
19 including cash. When they were stopped several hours
20 later by DPS officers, the property was found in the
21 defendants' vehicle. The murders were committed in the
22 course of and in the furtherance of the robbery and flight
23 from the robbery.

24 As to statutory aggravating circumstance F6,
25 the Court finds beyond a reasonable doubt that the

1 defendant committed the offense in an especially heinous,
2 cruel or depraved manner. As used in this statute, cruel
3 focuses on the cruel anguish of the victim, and heinous or
4 depraved focuses on the defendant's state of mind. The
5 evidence at trial showed the victims Jacqueline Appelhans
6 and Dean Morrison were kidnapped at gunpoint and forced to
7 lie down in the living room at Grasshopper Junction. The
8 invasion of the property occurred in the middle of the
9 night and by surprise. The victims had no opportunity to
10 defend themselves or to summon aid. The victims clearly
11 had significant time to consider the uncertainty of their
12 fate. The Court finds beyond a reasonable doubt that the
13 killings were cruel.

14 In addition, the evidence at trial showed that
15 the defendants inflicted gratuitous violence on the
16 victims Jacqueline Appelhans and Dean Morrison. They were
17 shot numerous times with different weapons, including
18 shotgun blasts to the head.

19 The evidence shows that the victims were
20 helpless at the hands of the defendants' when they were
21 executed. Both victims were elderly, clad in bath robes
22 and lying on the floor. The killings were senseless. The
23 murders occurred in a remote location. The victims could
24 not have summoned aid easily at night. By killing the
25 victims, the defendants gave themselves more time to

1 implement their escape plan.

2 The only motive for the killings was to
3 eliminate witnesses and assure the defendants' escape from
4 detection. The Court finds beyond a reasonable doubt that
5 the killings were heinous and depraved.

6 As to the statutory aggravating circumstance
7 F7, the Court finds that this circumstance has not been
8 proven.

9 As to statutory aggravating circumstance F8,
10 the Court finds beyond a reasonable doubt that the
11 defendant has been convicted of one or more other
12 homicides as defined in ARS 13-1101, which were committed
13 during the commission of the offense. The jury verdict in
14 this case makes further discussion unnecessary.

15 As to statutory aggravating circumstance F9 and
16 F10, no evidence was presented at the hearing and the
17 Court finds that they are unproven.

18 As to statutory mitigating circumstance G2 and
19 G4, the Court finds that they have not been proven.

20 As to statutory mitigating circumstance G1, the
21 defense cites Dr. Potts' examination of the defendant as
22 proof of the defendant's, quote, serious and debilitated
23 physical and mental disorders, unquote. In his report Dr.
24 Potts states that multiple head injuries sustained
25 throughout his youth quite probably contributed to further

1 deterioration in reference to his ability to control
2 impulses; he's also possibly having seizure episodes which
3 have been masked as uncontrollable violence. No proof
4 exists in the record to support this contention. No
5 evidence of organic brain damage was presented to the
6 Court. The Court rejects this conclusion of Dr. Potts.

7 Dr. Potts further states, his abilities to
8 conform his conduct to the requirements of the law are
9 markedly diminished because of illicit substance abuse.

10 The defense presented no evidence that the
11 defendant was intoxicated at the time of the offense.
12 There is some evidence that the defendant habitually used
13 drugs and alcohol which may support Dr. Potts' statement.

14 Dr. Potts also concludes that it is clear that
15 the defendant suffered from an attention
16 deficit/hyperactivity disorder. He has been hyperactive
17 throughout his life.

18 There is evidence in this case that the
19 defendant suffered from a dysfunctional childhood and
20 attention deficit/hyperactivity disorder. The defendant
21 may have been physically abused by his father, although
22 evidence of this is weak. The defendant's parents
23 disciplined inconsistently.

24 While there is no question that the defendant
25 suffered from less than an ideal environment as a child,

1 it is also clear that the defendant is an antisocial
2 personality. The offenses did not occur by impulse, the
3 defendants planned and carried out a complicated series of
4 actions in a remote location. The getaway involved using
5 the victim's tow truck as a decoy. The Court finds that
6 the defense has not proven statutory mitigated
7 circumstance G1.

8 As to statutory mitigating circumstances G3,
9 the defendant submitted evidence at the hearing that the
10 defendant was legally accountable for the conduct of
11 another under the provisions of ARS 13-303, but his
12 participation was relatively minor, although not so minor
13 as to constitute a defense to prosecution. The evidence
14 at the trial showed that the offenses were committed by
15 the defendants acting in concert. The footprints of both
16 defendants were found at the scene. Both defendants were
17 armed at the time of the arrest. There were numerous
18 bullet wounds to both victims in this case.

19 At the hearing on mitigation, the defense
20 submitted evidence of Roger as a follower and Robert as
21 the leader of the two. The evidence consisted primarily
22 of Exhibits S-N and S-0, letters written by Robert
23 Murray.

24 The evidence at trial and in the State's
25 rebuttal shows that the defendants planned the murders.

1 The plan for the murders was remarkably similar to that
2 used in the attack on Sally Cothorn. There is no evidence
3 to suggest that Robert committed these murders alone. At
4 trial, the footprint evidence showed that Roger was the
5 more active of the two. The brothers acted together for
6 pecuniary gain and killed to escape detection. They are
7 equally liable for their actions.

8 The Court finds that the defense did not prove
9 this mitigating factor by a preponderance of the
10 evidence.

11 The Court finds that statutory mitigating
12 circumstance G5 has not been proven.

13 At the mitigation hearing the defendant
14 presented evidence of additional non-statutory mitigating
15 circumstances. One, the defendant was intoxicated on the
16 night the crimes were committed; two, the defendant
17 suffers from a dysfunctional childhood; three, Dr. Potts'
18 report; four, physical abuse as a child; five,
19 environment; six, family relations; seven, medical
20 treatment, or the lack of medical treatment; eight,
21 defendant's remorse.

22 With regard to non-statutory mitigation No. 1,
23 the Court finds the defendant has not proved by a
24 preponderance of the evidence that the defendant was
25 intoxicated on the night the crime was committed. The

1 evidence showed that the defendants were drinking at
2 Temple Bar before the murders. The defense presented no
3 evidence that the alcohol consumed by the defendant
4 affected his state of mind. In fact, the evidence at
5 trial shows that the defendant was able to conduct several
6 complicated physical maneuvers, including the invasion of
7 the Morrison-Appelhans' residences in carrying out the
8 offenses in this case. Despite Dr. Potts' statement that
9 the defendant was intoxicated at the time of the offense,
10 no proof exists in the record to support that statement.

11 With respect to non-statutory mitigation No. 2,
12 the Court finds that the defendant suffered from a
13 dysfunctional childhood. The defense produced witnesses
14 and transcripts of witnesses at the hearing which support
15 the defense contention that the defendant was subjected to
16 abnormal physical abuse as a child, inconsistent
17 discipline, and a dysfunctional environment.

18 Dr. Potts states the defendant was reared in a
19 rather chaotic household where his best friend was neither
20 his father nor his older brother, but his younger sister.
21 He learned to lie to avoid his father's overpunitive
22 reproaches. His mother also reinforced his lying by
23 siding with the children against their father.

24 At the mitigation hearing Dr. Hewitt opined
25 that the defendant was brought up in a non-nurturing

1 family environment and that he suffered from excessive
2 corporal punishment by his father, thus confirming Dr.
3 Potts' analysis. The State did not refute this evidence
4 at the hearing.

5 As to non-statutory mitigating circumstance No.
6 3, the Court determines that the defendant's mental health
7 as reported by Dr. Potts does constitute independent
8 mitigation in this case.

9 As to non-statutory mitigating circumstance 4,
10 physical abuse as a child; 5, environment; 6, family
11 relations, the Court considered these as mitigation
12 evidence of a dysfunctional childhood and they have not
13 been proven to be independent mitigating factors.

14 As to non-statutory mitigating circumstance 7,
15 the lack of medical treatment, the Court finds that this
16 has not been proven. Exhibit S-1, Roger Murray's criminal
17 and juvenile record shows the defendant was treated at the
18 Attention Home For Boys. He was evaluated at the River
19 Bend Center For Mental Health, and the Alabama Youth
20 Services Diagnostic and Evaluation Center. He was treated
21 by juvenile authorities and sent to boot camp as an adult.

22 At to non-statutory mitigating circumstance 8,
23 defendant's remorse, the Court finds that it has not been
24 proven. The Court has also looked for any other
25 mitigation in the record, and found none.

1 The Court concludes that the State has proved
2 beyond a reasonable doubt statutory aggravating factors
3 F5, F6, and F8. The State has not proved statutory
4 aggravating factors F1, F2, F3, F4, F7, F9, and F10.

5 The Court concludes that the defendant has not
6 proven statutory mitigating factors G1, G2, G3, G4, and
7 G5. The defense has proven non-statutory mitigating
8 factors 2 and 3.

9 The Court has considered each of the mitigating
10 circumstances offered by the defendant and proved to
11 exist, and finds that they are not sufficiently
12 substantial to outweigh the aggravating circumstances
13 proved by the State and to call for leniency.

14 As part of the verdict in this case the jury
15 was asked to answer the following questions: Did any
16 juror find premeditation. The jury answered yes. If your
17 answer to No. 1 is yes, was the jury unanimous in finding
18 premeditation. The jury answered yes. The jury
19 unanimously found that the defendant participated in the
20 killings.

21 The defendant is therefore sentenced -- with
22 regard to the First Degree Murder of Jacqueline Appelhans,
23 the defendant is sentenced to death. With regard to the
24 First Degree Murder charge for the killing of Dean
25 Morrison, the defendant is therefore sentenced to death.

1 Pursuant to Rule 26.15 of the Arizona Rules of
2 Criminal Procedure, the clerk is ordered to file a Notice
3 of Appeal from this judgment and sentence.

4 Both defendants will be required to provide
5 proof of a thumb print.

6 Okay. The record will reflect that the
7 defendants have placed their thumb prints on the documents
8 in open court. We are in recess.

9 (The proceedings concluded at 2:11 p.m. on October
10 26, 1992.)

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Certificate of Reporter

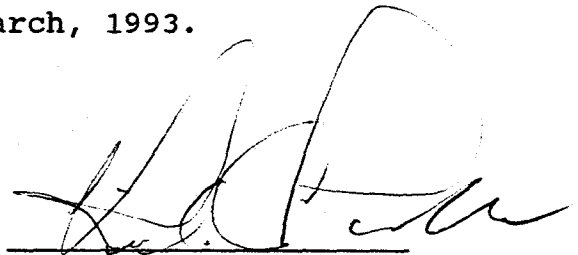
I, Rick A. Pulver, Official Reporter in the Superior Court of the State of Arizona, in and for the County of Mohave, do hereby certify that I made a shorthand record of the proceedings had in the foregoing entitled cause at the time and place hereinbefore stated;

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 3rd day of March, 1993.



RICK A. PULVER