

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS E. CREECH,

Petitioner,

v.

TIM RICHARDSON, WARDEN, IDAHO MAXIMUM SECURITY INSTITUTION,

Respondent.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth
Circuit No. 10-99015**

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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INDEX TO APPENDIX

APPENDIX A:	Order and Amended Opinion, Dkt. 256 <i>Creech v. Richardson</i> 9th Cir. Ct. App. No. 10-99015 Feb. 6, 2023.....	App. 001–045
APPENDIX B:	Memorandum Decision and Order, Dkt. 365 <i>Creech v. Richardson</i> U.S. Dist. Ct. No. 1:99-cv-224 March 24, 2017.....	App. 046–076
APPENDIX C:	Memorandum Decision and Order on Remand, Dkt. 325 <i>Creech v. Richardson</i> U.S. Dist. Ct. No. 1:99-cv-224 Jan. 29, 2016	App. 077–128
APPENDIX D:	Memorandum Decision and Order, Dkt. 173 <i>Creech v. Hardison</i> U.S. Dist. Ct. No. 1:99-cv-224 March 29, 2006.....	App. 129–163
APPENDIX E:	<i>Creech v. State</i> , 51 P.3d 387 (Idaho 2002)	App. 164–168
APPENDIX F:	<i>State v. Creech</i> , 966 P.2d 1 (Idaho 1998)	App. 169–187
APPENDIX G:	<i>State v. Creech</i> , 670 P.2d 463 (Idaho 1983)	App. 188–235
APPENDIX H:	Dr. Steven Brown testimony at resentencing Mar. 15, 1995.....	App. 236–281
APPENDIX I:	Dr. John Stoner testimony at original sentencing Jan. 11, 1982.....	App. 282–322

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

THOMAS E. CREECH,

Petitioner-Appellant,

v.

TIM RICHARDSON, Warden,

Respondent-Appellee.

No. 10-99015

D.C. No. 1:99-
cv-00224-BLW

**ORDER AND
AMENDED
OPINION**

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, Chief District Judge, Presiding

Argued and Submitted September 20, 2021
Pasadena, California

Filed July 20, 2022
Amended February 6, 2023

Before: William A. Fletcher, Jay S. Bybee, and Morgan
Christen, Circuit Judges.

Order;
Opinion by Judge W. Fletcher

SUMMARY*

Habeas Corpus/Death Penalty

The panel filed (1) an order (a) amending and replacing an opinion filed July 20, 2022, (b) denying a petition for panel rehearing, and (c) denying on behalf of the court a petition for rehearing en banc; and (2) an amended opinion affirming the district court’s denial of Thomas Eugene Creech’s second amended habeas corpus petition challenging his death sentence.

In 1981, while serving two life sentences for multiple convictions for first-degree murder, Creech beat a fellow inmate to death. After pleading guilty, he was sentenced to death in Idaho state court. Creech obtained federal habeas relief with respect to his sentence, and was resentenced to death in 1995. In a second petition, Creech thereafter unsuccessfully sought federal habeas relief in the district court.

The district court granted certificates of appealability (COAs) as to two issues.

First, Creech argued that the district court improperly denied part of Claim 4, in which he alleged that his attorneys provided ineffective assistance of counsel (IAC) at his 1995 resentencing by failing to investigate and present mitigation evidence in a timely and adequate fashion, failing to hire a mitigation specialist, and relying on an unqualified mental health expert. The Idaho

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

Supreme Court rejected Creech’s IAC claims at the 1995 resentencing, holding that Creech failed to prove either deficient performance or prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). In denying habeas relief prior to this court’s remand under *Martinez v. Ryan*, 566 U.S. 1 (2012), the district court reaffirmed that holding. The panel agreed with the district court that the Idaho Supreme Court reasonably found a lack of prejudice under the second prong of *Strickland*. The panel held further that under 28 U.S.C. § 2254(e)(2) the district court was correct in declining to hold an evidentiary hearing on the new evidence that Creech sought to introduce to bolster his IAC resentencing claim.

Second, Creech argued under *Martinez* that five allegedly procedurally defaulted sub-claims of IAC at the 1995 resentencing should be heard on the merits. Under *Martinez*, a federal habeas court may find cause to excuse a procedural default where (1) the underlying ineffective assistance claim is substantial; (2) the petitioner was not represented or had ineffective counsel during the state post-conviction review (PCR) proceeding; (3) the state PCR proceeding was the initial review proceeding; and (4) state law required (or forced as a practical matter) the petitioner to bring the claim in the initial review collateral proceeding. Only the first and second requirements were at issue here, and in practical effect, the prejudice analysis under both of those requirements is the same—there must be a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. At the time of the district court’s decision after this court’s *Martinez* remand, the court could consider new evidence supporting a claim of IAC by PCR counsel in determining whether a petitioner satisfies the

requirements of *Martinez* without running afoul of 28 U.S.C. § 2254(e)(2) and *Cullen v. Pinholster*, 563 U.S. 170 (2011). After the panel heard oral argument, however, the Supreme Court decided *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), greatly restricting the circumstances in which a federal habeas court deciding *Martinez* claims may consider evidence beyond that already contained in the state court record. The district court considered all of the proffered new evidence and held that it was insufficient to transform into a new IAC claim the part of Claim 4 that alleged IAC during Creech's 1995 resentencing. The district court held that the sub-claims at issue in this appeal were therefore not procedurally defaulted new claims and that *Martinez* did not apply. The panel wrote that even in the absence of *Ramirez*, it would have agreed with the district court because the new evidence introduced on federal habeas review in support of Creech's argument that he suffers from brain damage and an organic brain disorder was largely duplicative of evidence that had been introduced during his 1982 sentencing and his 1995 resentencing. The panel agreed with the district court that, considering the mitigation evidence as whole, proffered additional evidence of brain damage and organic factors was not sufficient to transform Creech's ineffective-assistance-of-trial-counsel sub-claims into new claims. Under *Ramirez*, the panel reached the same result. Because it could not consider the evidence presented for the first time to the district court, Creech's *Martinez* claim necessarily fails.

Creech sought to appeal four uncertified issues.

The panel denied a COA as to Creech's claims (1) that the district court erred in summarily denying his motion for reconsideration of its denial of his second habeas petition,

(2) that the Idaho Supreme Court violated the Due Process Clause by refusing to allow him to withdraw his guilty plea prior to his first resentencing, and (3) that the duration of Creech’s confinement for his murder constitutes cruel and unusual punishment in violation of the Eighth Amendment.

The panel granted a COA as to Creech’s argument under *Magwood v. Patterson*, 561 U.S. 320 (2010), that claims in his second federal habeas petition attacking his guilty plea are not “second or successive” under 28 U.S.C. § 2244(b) and should be decided on the merits. Based on *Magwood* and later cases decided by this circuit, the panel concluded that because Creech’s original sentence was vacated and a new sentence was imposed, the claims are not barred as second or successive. Rather than remand the claims to the district court, the panel denied them, holding that the Idaho courts (1) did not unreasonably find Creech’s arguments as to trial counsel’s purported conflict of interest to be without merit, (2) did not unreasonably conclude that Creech failed to show that trial counsel should have moved to withdraw his guilty plea on the ground that Creech was incompetent, (3) did not unreasonably conclude that Creech failed to show that IAC at the guilt phase on the basis of trial counsel’s purported failure to communicate with him, and (4) did not unreasonably reject Creech’s claim that counsel’s failure to investigate his purported history of violence led him to plead guilty rather than insist on going to trial on a theory of self-defense.

COUNSEL

Jonah J. Horwitz (argued), Christopher M. Sanchez, and Bruce D. Livingston, Assistant Federal Public Defenders; Deborah A. Czuba; Teresa A. Hampton; Federal Defender Services of Idaho, Capital Habeas Unit, Boise, Idaho; Denise I. Young, Attorney at Law, Tucson, Arizona; for Petitioner-Appellant.

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Vanessa O. Wells and Yi Zhang, Hogan Lovells US LLP, Redwood City, California; for Amicus Curiae The National Association for Public Defense.

ORDER

The opinion filed on July 20, 2022, and published at 40 F.4th 1013, is hereby amended and replaced by the amended opinion filed concurrently with this order.

With this amendment, the panel has unanimously voted to deny the petition for panel rehearing. Judge Christen has voted to deny the petition for rehearing en banc, and Judges W. Fletcher and Bybee so recommend.

The full court has been advised of the petition, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

Appellant’s petition for panel and en banc rehearing (Dkt. No. 244) is **DENIED**. No further petitions for rehearing or rehearing en banc will be entertained.

OPINION

W. FLETCHER, Circuit Judge:

Petitioner-Appellant Thomas Eugene Creech appeals the denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. In 1981, while serving two life sentences for multiple convictions of first-degree murder, Creech beat a fellow inmate to death. After pleading guilty, he was sentenced to death in Idaho state court. Creech obtained federal habeas relief with respect to his sentence. He was resentenced to death in 1995. After the reimposition of the death penalty in 1995, in a second petition Creech unsuccessfully sought federal habeas relief in federal district court.

The district court granted certificates of appealability (“COAs”) as to two issues, and Creech appeals both of those issues. First, Creech argues that the district court improperly denied part of Claim 4 of his habeas petition, in which he alleges that his attorneys provided ineffective assistance of counsel (“IAC”) at his 1995 resentencing. Second, Creech argues under *Martinez v. Ryan*, 566 U.S. 1 (2012), that five allegedly procedurally defaulted subclaims of IAC at the 1995 resentencing should be heard on the merits.

In addition, Creech seeks to appeal four uncertified issues. First, Creech argues that the district court erred in summarily denying reconsideration of its decision denying relief under *Martinez*. Second, Creech argues that the Idaho courts unconstitutionally prevented him from withdrawing his guilty plea. Third, Creech argues under *Magwood v. Patterson*, 561 U.S. 320 (2010), that claims in his second federal habeas petition are not “second or successive” under 28 U.S.C. § 2244(b) and should be decided on the merits. Fourth, Creech argues under *Lackey v. Texas*, 514 U.S. 1045 (1995), that we should remand this case for the district court to determine whether the duration of his confinement while awaiting execution constitutes cruel and unusual punishment under the Eighth Amendment.

We affirm the district court on the two certified issues. We grant a COA as to the third uncertified issue and affirm the district court on that issue. We deny COAs as to the first, second, and fourth uncertified issues.

I. Background

A. The Crime and Guilty Plea

While serving life sentences for first-degree murder, Creech beat to death a fellow inmate, David Dale Jensen, in the maximum security tier of the Idaho State Correctional Institution. Jensen, in prison for stealing a car, was twenty-three years old and suffered from physical and mental disabilities. He was partially paralyzed, and a plastic plate had been surgically embedded in his skull.

Creech attacked Jensen, repeatedly hitting him in the head with a battery-filled sock until the plate embedded in his skull shattered, his skull caved in, and blood was

splashed on the floors and walls. *State v. Creech* (“*Creech I*”), 670 P.2d 463, 465 (Idaho 1983). Creech took breaks during the beating. After the sock broke and the batteries fell out, Creech kicked Jensen in the throat while Jensen lay sprawled on the floor. Jensen was found by a prison guard and taken to the hospital. He died on the operating table the same day. Creech had four prior murder convictions when he killed Jensen. Creech claimed responsibility for killing twenty-six people, and the bodies of eleven of his victims were later recovered in seven states.

Creech was charged with first-degree murder for killing Jensen. Represented by the Idaho Public Defender’s office, he initially entered a plea of not guilty. He later wrote a letter to the trial judge, Judge Robert Newhouse, requesting a change of plea hearing.

Judge Newhouse held a change of plea hearing in response to Creech’s letter. Creech’s attorney, Rolf Kehne, informed the court that Creech was pleading guilty against his advice and requested a five-day continuance. Creech indicated he did not want a continuance. Kehne then asked to withdraw from representation on the ground that Creech refused to follow his legal advice. Judge Newhouse denied the request, stating, “I think he should at least have counsel to inform him of the law and what’s going on.” After the prosecution summarized the evidence it was prepared to present at trial, and after a plea colloquy, Judge Newhouse accepted Creech’s guilty plea and ordered a presentence report.

B. Initial Sentencing Hearings

Creech’s first sentencing hearing was held in January 1982. The prosecution and the defense each presented expert mental health testimony. Dr. Floyd LaMarr

Heyrend, a psychiatrist with training in neurology who had served as a witness for Creech in one of Creech's prior murder trials, appeared for the prosecution. Dr. Heyrend had testified in the prior trial that Creech had antisocial personality disorder and acted impulsively without adequate forethought and sufficient consideration for others, but that Creech could appreciate the wrongfulness of his conduct and conform that conduct to the requirements of the law. At Creech's 1982 sentencing hearing, Dr. Heyrend testified that Creech could presently "recognize the wrongfulness of his behavior," but also that there was some evidence that Creech exhibited schizotypal thinking and could drift into florid psychosis during times of stress. Based on prior testing in 1974 and 1975 and an electroencephalogram conducted the week before his testimony, Dr. Heyrend opined that Creech did not suffer from organic brain disorder.

Psychologist Dr. John Stoner testified for Creech. He testified that Creech had antisocial personality disorder, schizotypal personality disorder, and borderline personality disorder. Dr. Stoner testified that Creech's strikingly uneven performance on different types of mental tests "strongly suggest[ed] the presence of an organic brain disorder." He testified that Creech would have been able to appreciate the wrongfulness of his actions at the beginning of the encounter with Jensen, but that, once the attack commenced, Creech had "a rage reaction during which he would neither appreciate the wrongfulness nor be able to conform his behavior; that is, he went into a self-maintaining assaulting rage." Dr. Stoner testified that individuals with similar disorders to Creech had no prospects of therapeutic rehabilitation.

Creech took the stand on his own behalf. He testified that he had killed twenty-six people, a number of whom he believed had gang-raped his deceased former wife. He testified that two other inmates had asked him “to kill Jensen for money,” and another inmate offered to help him escape from the penitentiary in exchange for Jensen’s killing. Creech testified that he gave someone a knife to give to Jensen; that Jensen then attacked Creech with the knife as an effort to impress other inmates who “wouldn’t accept him because he was partially crippled”; and that Creech then killed Jensen. When asked on cross-examination what sentence he wanted Judge Newhouse to give him, Creech replied, “I want him to sentence me to death.”

On January 25, 1982, in a written decision, Judge Newhouse sentenced Creech to death. He found in mitigation that Creech had been justified in protecting himself against an unprovoked attack by Jensen. However, he also found that Jensen, “a young, inexperienced, handicapped man” with “both physical and mental impairments,” had been “under the complete domination and control” of Creech once the attack began, and that Jensen’s murder, “once commenced, appears to have been an intentional, calculated act.” Judge Newhouse found that five statutory aggravating factors under Idaho Code § 19-2515 had been proven beyond a reasonable doubt: (1) Creech had previously been convicted of four first-degree murders—two in 1976, one in 1979, and one in 1980; (2) Creech “exhibited utter disregard for human life” during Jensen’s murder; (3) Jensen’s murder came within the definition of Idaho Code statutory aggravating factor § 18-4003(c) because Creech was serving a first-degree murder sentence at the time of the crime; (4) Jensen’s murder came

within the definition of Idaho Code statutory aggravating factor § 18-4003(e) because Creech killed Jensen while both were incarcerated in the Idaho State Correctional Institution; and (5) Creech, “by prior conduct or conduct in the commission of the murder at hand . . . exhibited a propensity to commit murder which will probably constitute a continuing threat to society.”

On February 24, 1983, the Idaho Supreme Court vacated Creech’s death sentence because it had not been imposed in open court in the presence of Creech and his counsel as required by Idaho law. On remand, Judge Newhouse held a hearing at which Creech and his counsel were present. Judge Newhouse read his previous findings into the record and again sentenced Creech to death. Judge Newhouse did not permit Creech to present additional mitigation evidence at the second sentencing hearing. On May 23, 1983, a divided Idaho Supreme Court affirmed. *Creech I*, 670 P.2d at 465.

C. First State Post-Conviction Review Proceedings

In state court post-conviction review (“PCR”) proceedings before Judge Newhouse, Creech moved to withdraw his guilty plea. He asked for no other relief. *See State v. Creech* (“*Creech II*”), 710 P.2d 502, 504 (Idaho 1985). During a four-day evidentiary hearing in February 1984, Creech testified extensively about the details of Jensen’s death and his reasons for pleading guilty. On March 6, 1984, Judge Newhouse denied Creech’s motion to withdraw his plea. The Idaho Supreme Court affirmed. *Id.* at 507.

D. First Federal Habeas Proceedings

Creech sought federal habeas corpus under 28 U.S.C. § 2254. Our court granted relief with respect to Creech’s sentence. We held: (1) the state trial court committed constitutional error when it refused to allow Creech to present additional mitigation evidence at his second sentencing hearing; (2) the trial court applied two statutory aggravating factors, Idaho Code § 18-4003(c) and (e), without making the requisite findings of specific intent to kill; and (3) the trial court applied an unconstitutionally vague “utter disregard for human life” aggravating factor. *Creech v. Arave* (“*Creech III*”), 947 F.2d 873, 881–85, 888 (9th Cir. 1991). The Supreme Court reversed our third holding. It held that the Idaho Supreme Court’s limiting construction of Idaho’s “utter disregard” aggravating factor saved the instruction from unconstitutionality. *Arave v. Creech* (“*Creech IV*”), 507 U.S. 463, 471 (1993). The Court did not disturb our other two holdings, leaving intact our remand for resentencing. *Id.* at 478–79.

E. Resentencing Hearing in 1995

Although no longer a public defender, Kehne represented Creech at his third sentencing hearing, assisted by his law partner John Adams. Kehne and Adams obtained several continuances in order to investigate and prepare for the hearing. A five-day resentencing hearing was held before Judge Newhouse in March and April of 1995.

The defense called four witnesses, including Creech, at the hearing. Creech’s sister, Virginia Plageman, and her husband, Michael, each testified about Creech’s personality, family background, and childhood. Virginia discussed the family’s mental health problems, including

depression, social withdrawal, and anger management. She testified that Creech's maternal grandparents were cousins and that Creech's mother "left society" after her youngest son died at the age of thirteen months. Virginia also described Creech's three surviving brothers, two of whom had been convicted of murder or manslaughter.

Virginia testified that Creech's childhood was characterized by poverty and physical abuse, but she specified that the abuse was not sexual. She testified that, on one occasion, Creech fell down a staircase onto concrete; was knocked unconscious; bled from his nose, mouth, and possibly ears; and was hospitalized for a few days before their mother took him home against medical advice. Virginia testified that Creech had experienced escalating problems beginning in early childhood, and that he struggled to discern the difference between right and wrong. She testified that, in recent years, Creech had calmed down and had become more loving and kind. She testified that Creech's wife, whom he had married after his conviction in this case, had been a positive influence on him.

Dr. Steven Brown, a clinical psychologist, also testified for Creech. Dr. Brown had interviewed Creech twice and had reviewed the updated presentence reports, psychiatric records, and hospital records. He testified that Creech scored in the ninety-sixth percentile for psychopathic traits when compared to the general prison population. He testified that Creech was a "prototypical or classic psychopath, and that if any psychopaths have a biological predisposition," then "somebody who has such an extreme form as Mr. Creech probably does." Dr. Brown noted the significance of the fact that two of Creech's brothers were also murderers: "The fact that two of his brothers are

murderers is strong anecdotal evidence that there's a genetic contribution in his family. It's fairly outstanding that there are three murderers in one family." Though Creech's electromyography test results were within normal limits and there was no direct evidence of a biological basis for Creech's condition, Dr. Brown testified that "there's probably a biological contribution."

The State called six witnesses whose testimony focused on Creech's conduct in prison and whether he posed a security concern.

On April 17, 1995, Judge Newhouse again sentenced Creech to death. He found the following facts in mitigation: (1) Creech was forty-four years old, and most violent acts are committed by males younger than thirty; (2) Creech completed high school through eleventh grade and had acquired his GED; (3) Creech took pride in cooperating with law enforcement; (4) Creech was creative, writing songs, poetry, and prose and playing the guitar; (5) Creech's current wife had been a positive influence on him; and (6) Creech may be biologically predisposed to violence.

Judge Newhouse found the same five statutory aggravating factors he had found in 1982. However, this time, in discussing aggravating factors under Idaho Code § 18-4003(c) and (e), he found that Creech had attacked Jensen with specific intent to kill. Judge Newhouse noted that "[Creech] indicates an intention to commit further murders if he is ever released" and that "[a]nything less than total isolation would give rise to a substantial chance of the defendant killing again." He concluded, "The protection of society demands that Thomas Eugene Creech receive the death penalty."

F. Second State Post-Conviction Review Proceedings

During Creech's second state court PCR proceedings before Judge Newhouse, Creech was represented by Idaho Public Defender August Cahill. Creech claimed that Kehne and Adams had been ineffective at his resentencing hearing in 1995. After several continuances, a four-day evidentiary hearing was held in October 1996. Creech presented testimony from his ex-wife Emma Jean Asbrock and their daughter Shelley Renae Creech. Asbrock and Shelley testified that Creech may have suffered sexual abuse at the hands of his aunt and uncle when he was a child. Shelley also discussed her own and her mother's mental health difficulties. Kehne and Adams took the stand, testifying that they had been ineffective at Creech's 1995 resentencing hearing. Judge Newhouse denied relief, finding that "Mr. Kehne ha[d] performed with outstanding competence in a case where the chance for success was extremely remote." After consolidating Creech's appeal from the trial court's judgment with his appeal from the denial of PCR relief, the Idaho Supreme Court affirmed. *State v. Creech* ("*Creech V*"), 966 P.2d 1, 23 (Idaho 1998).

G. Second Federal Habeas Proceedings

Creech timely filed a second § 2254 habeas petition on January 20, 2000. Proceedings were stayed until January 2005 while Creech unsuccessfully pursued other state post-conviction relief. On March 24, 2005, Creech filed a second amended petition, the operative pleading in this appeal.

In March 2006, the district court found that certain claims, including some IAC claims, had been procedurally defaulted. It permitted discovery with respect to these claims but warned that the claims "will be dismissed

unless, after a period of limited discovery, Petitioner can show cause and prejudice to excuse any default.” Procedural default in PCR proceedings was then governed by the cause and prejudice standard of *Coleman v. Thompson*, 501 U.S. 722 (1991). The court allowed mental health experts and a mitigation specialist to meet with Creech.

Creech filed a motion for an evidentiary hearing in August 2007. Creech proffered additional mitigation evidence in support of his motion. That evidence provided substantial additional support for the conclusion that Creech suffered from an organic brain disorder. In March 2008, the district court denied Creech’s motion for an evidentiary hearing.

The district court held that 28 U.S.C. § 2254(e)(2) foreclosed an evidentiary hearing on the additional mitigating evidence Creech submitted in support of his motion. The court nonetheless considered the additional evidence on the merits, concluding that “[m]uch of this information was already before the state courts, albeit in a less specific way.” The court wrote that the “state courts already assumed the truth of Dr. Brown’s testimony in 1995 that there could be a biological aspect to Creech’s violent behavior, and that fact was not significant to the outcome.” In the court’s view, “[a] neurologist’s opinion that Creech has brain damage may be more specific than Dr. Brown’s testimony, but it would have provided only a modest counterweight to the heavy aggravating factors.”

The district court dismissed Creech’s second amended habeas petition with prejudice on March 31, 2010. The court granted COAs on five claims. One of the COAs authorized an appeal from the denial of the part of Claim 4

that alleged IAC at Creech's resentencing in 1995. Creech timely appealed four of the five claims as to which COAs had been granted, including the district court's denial of the part of Claim 4 addressed to IAC at the 1995 resentencing.

After oral argument on appeal, the Supreme Court decided *Martinez v. Ryan*, 566 U.S. 1, 17 (2012), holding that IAC by PCR counsel in an initial-review PCR proceeding can excuse a procedural default of a claim of IAC of trial counsel. We remanded to the district court to consider, in light of *Martinez*, whether counsel had been ineffective during Creech's second PCR proceeding in failing to present certain sub-claims under Claim 4. All of the sub-claims at issue alleged IAC at the 1995 resentencing.

Seventeen possibly defaulted sub-claims under Claim 4 were before the district court on remand. The district court held that Creech waived all but six of the sub-claims by failing to argue them. Of the remaining six, the district court found that only one, contained in ¶ 100(a), had been procedurally defaulted. That sub-claim was that trial counsel had failed to "prepare, develop, and present a coherent sentencing strategy" at the 1995 resentencing. The district court held that PCR counsel had not performed deficiently in failing to present that sub-claim, and, in the alternative, that there was no prejudice resulting from the failure to present it. The district court held that the other five sub-claims, contained in ¶¶ 100(b), (d), (j), (o)(iii) and (o)(iv), had not been procedurally defaulted by PCR counsel. Rather, it held, they had been presented by Creech's counsel to the PCR court, had been decided adversely by that court, and had been decided adversely by the federal district court.

Creech presented additional evidence on remand. Creech’s counsel submitted various medical records, as well as a declaration that she had consulted with a neuropsychologist who had concluded, based on those medical records, that Creech may have suffered from an organic brain disorder. Properly considering this new evidence under the law in effect at the time, the district court concluded that it was comparable to the evidence submitted to the district court in support of Creech’s pre-remand motion for an evidentiary hearing, and that it added little to the information that had been before the state PCR court. The court wrote, “Over the course of the two sentencing hearings and the state postconviction proceedings, it had been well-established that Creech might, indeed, have some . . . biological or genetic component that contributed to his antisocial and violent behavior”

The district court on remand held that the entirety of the additional evidence of IAC that Creech sought to present in district court, both before and after our *Martinez* remand, was insufficient under *Dickens v. Ryan*, 740 F.3d 1302, 1318–19 (9th Cir. 2014) (en banc), to “fundamentally alter[]” these five sub-claims and thereby to transform them into unexhausted and procedurally defaulted new claims. The court wrote, “The evidence that Petitioner brings forward in this Court, although more specific, adds little substance to the evidence that the state courts considered when adjudicating Petitioner’s mitigation-based IATC claims. The evidence submitted for the first time in this Court simply does not substantially improve the evidentiary posture of those claims.” Because the sub-claims had not been transformed into procedurally defaulted new claims, *Martinez* did not apply.

The district court reaffirmed its previous grant of a COA as to the part of Claim 4 alleging IAC at the 1995 resentencing. It granted a new COA as to its denial of Creech's request for relief under *Martinez* as to the five sub-claims contained in ¶¶ 100(b), (d), (j), (o)(iii) and (o)(iv). It denied a COA as to any other issue.

Creech filed a motion for reconsideration. He proffered additional new evidence that he argued fundamentally altered the five sub-claims and transformed them into new claims. The district court denied the motion for reconsideration, refusing to consider the additional new evidence on the ground that it could, and should, have been presented as part of the initial proceeding on remand. The district court denied a COA as to this issue.

Rather than appeal on all of the grounds on which he previously appealed to this court, Creech now appeals only the two certified issues and four uncertified issues described at the beginning of our opinion.

II. Standard of Review

We have jurisdiction pursuant to 28 U.S.C. § 2253. We review de novo a district court's dismissal of a habeas petition. *Runnigeagle v. Ryan*, 825 F.3d 970, 978 (9th Cir. 2016) (citing *Sexton v. Cozner*, 679 F.3d 1150, 1153 (9th Cir. 2012)). We review for clear error the district court's findings of fact. *Buckley v. Terhune*, 441 F.3d 688, 694 (9th Cir. 2006) (en banc) (citing *Riley v. Payne*, 352 F.3d 1313, 1317 (9th Cir. 2003)). We review for abuse of discretion the denial of a request for an evidentiary hearing. *Stanley v. Schriro*, 598 F.3d 612, 617 (9th Cir. 2010) (citing *Schriro v. Landrigan*, 550 U.S. 465, 468 (2007)).

We may grant habeas relief under the Antiterrorism and Effective Death Penalty Act (“AEDPA”) only if the state court’s decision “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d). The phrase “clearly established Federal law” “refers to the holdings, as opposed to the dicta, of the Supreme Court’s decisions as of the time of the relevant state-court decision.” *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

State-court findings of fact are presumed to be correct. This presumption can be rebutted only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

III. Discussion

As a preliminary matter, relying on *Browning v. Baker*, 875 F.3d 444 (9th Cir. 2017), Creech argues that we should broaden the COA on the first issue—IAC at the 1995 resentencing under Claim 4—to include every claim and sub-claim addressed to that issue. We wrote in *Browning*:

While an individual claiming IAC “must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,” the court considers counsel’s conduct *as a whole* to determine whether it was constitutionally adequate[.] The district court distorted this inquiry by separating Browning’s IAC

argument into individual “claims” of IAC corresponding to particular instances of [defense attorney] Pike’s conduct. This approach was misguided. Rather, the IAC portion of the COA should have been crafted at a higher level of generality.

Id. at 471 (citations omitted).

In the case before us, the question at issue was whether Creech received IAC during his 1995 resentencing. *Browning* was decided after the district court’s decisions, while the case was on appeal to us. If *Browning* had been available to the district court, it might have used slightly different language in order to make clear that it was analyzing Creech’s “counsel’s conduct *as a whole* to determine whether it was constitutionally adequate.” *Id.* But it is clear that this is what the district court did.

In its initial decision denying habeas relief, the district court headed its analysis of Creech’s IAC claim under Claim 4 as “Ineffective Assistance of Counsel at the Resentencing (Claim 4, ¶¶ 100(b)(d)(j)(o)(q))”. Each of the specified subparagraphs of ¶ 100 alleged instances of IAC during Creech’s 1995 resentencing. The court then spent thirteen pages analyzing the IAC resentencing claim as a whole, considering the entirety of the attorney conduct of which Creech complained. The initial COA granted by the district court was similarly encompassing. Claim 4 had alleged IAC of trial counsel in many respects, including but not limited to IAC at the 1995 resentencing. The court granted a narrowed COA for Claim 4, but included in the COA all of the attorney conduct relevant to the 1995 resentencing. The court wrote: “[T]he Court will certify an appeal over the Court’s resolution of Claim[] . . . 4 (but

only to the extent that Creech alleges that he was deprived of his right to effective assistance of counsel at the 1995 resentencing proceeding)”

In its decision denying habeas after our remand under *Martinez*, reaffirming its previous grant of a COA for the part of Claim 4 that alleged IAC at the 1995 resentencing, the court used much of the same wording as it had used previously in granting the COA for this part of Claim 4. The court wrote, “The Court reaffirms its previous grant of a certificate of appealability with respect to its resolution of the merits of the non-defaulted aspects of Claim[] . . . 4 (to the extent Creech alleges that he was deprived of his right to the effective assistance of counsel at the 1995 resentencing proceeding)”

In our *Martinez* remand order, we instructed the district court to consider “whether any of Creech’s ineffective assistance of counsel *claims* previously found procedurally defaulted” may be heard under *Martinez*. Faithful to our remand order, the district court discussed each of Creech’s remanded IAC contentions, calling them “sub-claims.” In holding that sub-claims ¶¶ 100(b), (d), (j), (o)(iii) and (o)(iv) were not procedurally defaulted within the meaning of *Martinez*, the district court did not consider these sub-claims independently. Rather, it considered them together, in the context of the entirety of Creech’s claim of IAC at resentencing.

A. Certified Claims

1. Claim 4: Ineffective Assistance of Counsel at the 1995 Resentencing

Creech argues under Claim 4 that his trial counsel was ineffective during his 1995 sentencing proceeding for

failing to investigate and present mitigation evidence in a timely and adequate fashion, failing to hire a mitigation specialist, and relying on an unqualified mental health expert. The Idaho Supreme Court rejected Creech’s IAC claims at the 1995 resentencing, holding that Creech failed to prove either deficient performance or prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). *Creech V*, 966 P.2d at 17–21. In denying habeas relief to Creech prior to our remand under *Martinez*, the district court held that the Idaho Supreme Court had reasonably concluded that Creech failed to demonstrate prejudice under *Strickland*. On remand from our court under *Martinez*, the district court reaffirmed that holding. We agree with the district court.

The two-part standard for evaluating IAC claims is set forth in *Strickland*. First, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” 466 U.S. at 688. In order to minimize “the distorting effects of hindsight,” courts evaluating IAC claims “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689. Counsel’s performance must be judged “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690. “The question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom.” *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690).

Second, the defendant must “affirmatively prove prejudice” by showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 693–94. “A reasonable probability

is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* at 686. We “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies” if “it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice.” *Id.* at 697.

“Surmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). States must be given wide latitude in applying rules of general applicability such as the *Strickland* standard. *Cf. Yarborough v. Alvarado*, 541 U.S. 652, 663–64 (2004). “The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so.” *Richter*, 562 U.S. at 105 (internal quotation marks and citations omitted). Our review “is limited to the record that was before the state court that adjudicated the claim on the merits.” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

We agree with the district court that the Idaho Supreme Court reasonably found a lack of prejudice under the second prong of *Strickland*. The district court noted that Creech’s case was “far from a blank slate” when it remanded for the 1995 resentencing. At the 1995 resentencing hearing, Judge Newhouse took judicial notice of the entire record. That record included the testimony of Dr. Stoner at the first sentencing hearing and the testimony of Dr. Brown at the 1995 resentencing hearing. It also included a voluminous presentence report, updated at

Kehne’s request, that contained substantial mental health evidence. Creech’s counsel at the 1995 hearing supplemented the record with character reference letters and testimony regarding Creech’s family background and mental health history; evidence of the physical and verbal abuse Creech suffered as a child; evidence of a serious childhood head injury; evidence of the positive influence of Creech’s wife; expert testimony that there was likely a biological basis for Creech’s violent tendencies; and evidence of Creech’s progress in becoming a calmer, less angry person.

The only new mitigation evidence that was presented in the state PCR proceeding in 1996 was the testimony of Asbrock, Creech’s ex-wife, and Shelley, his daughter. Asbrock testified that Creech had been the victim of childhood sexual abuse, but her testimony was vague as to the details. When asked about abuse that occurred in Creech’s childhood home, Asbrock responded, “Yes. I think a lot of this is a big part, what happened somewhat in abuse and incest. You keep— . . . You keep getting abused and abused, and I don’t—I think someone should have put a stop to it.” As her testimony continued, Asbrock indicated Creech had been sexually abused by his aunt and uncle. When asked the name of the uncle, she said, “Aunt Thelma, in the bathtub—I can’t remember the man’s name. But I know what he did. It wasn’t right to continue that over and over.” She indicated that she knew about the abuse because Creech and others told her twenty-five or thirty years earlier.

Shelley's testimony was less specific than her mother's. She stated in her direct examination:

Q. Have you heard the same sorts of things about Tom's family that we heard today from your mom?

A. I've heard a lot of stories.

Q. Okay.

A. And on that issue, I had letters. But I don't know. I lost everything. I don't know. You know, I know it was in Mount Orab. I don't know.

Q. And these were letters that your dad wrote telling you about things that had happened to him as a child?

A. Yeah.

Q. And that he had been abused as a child?

A. Yeah.

Q. And that there had been problems in his—in his home when he was growing up?

A. And that's why I could write my dad and let him know things that had happened. And I couldn't even go to nobody else.

Asbrock's and Shelley's testimony was undermined by their own mental health problems. Asbrock had suffered some kind of breakdown at the airport immediately prior to coming to court to give her testimony, and she was frequently incoherent while on the stand. Shelley testified that she had been diagnosed with schizophrenia,

depression, and borderline personality disorder. She became agitated and confused on cross-examination.

To establish prejudice under Strickland, any additional mitigation evidence presented at the PCR IAC hearing, together with the mitigation evidence already in the record, must outweigh the aggravating evidence in the record. That aggravating evidence included Jensen’s brutal murder in the prison, Creech’s four prior murder convictions, and Creech’s testimony that he had committed many other murders and intended to kill more people if given the opportunity. We agree with the district court that the state court reasonably concluded that there was no reasonable probability that calling Asbrock and Shelley as witnesses at the 1995 resentencing hearing would have changed the outcome of that proceeding. *See, e.g., Pinholster*, 563 U.S. at 202 (“Given what little additional mitigating evidence Pinholster presented in state habeas, we cannot say that the California Supreme Court’s [denial of his IAC claim] was unreasonable.”); *Bobby v. Van Hook*, 558 U.S. 4, 12 (2009) (per curiam) (holding no prejudice where only two potential witnesses not interviewed by defense counsel would have added any new information of value and the information provided only “minor additional details” about defendant’s background); *King v. Schriro*, 537 F.3d 1062, 1074 (9th Cir. 2008) (holding no prejudice where defendant did not present evidence of what a more complete social and medical history investigation would have revealed).

As noted above, Creech had sought to “bolster” his IAC resentencing claim by introducing in the district court evidence that had never been presented to the state court. The district court held that an evidentiary hearing on this proffered new evidence was precluded by 28 U.S.C. §

2254(e)(2). In the alternative, the court held, further, that if it were to ignore the limitation of evidentiary hearings contained in § 2254(e)(2) and were to consider on the merits the evidence not presented to the state PCR court, it would nonetheless deny relief. *Inter alia*, the court wrote, “A neurologist’s opinion that Creech has brain damage may be more specific than Dr. Brown’s testimony, but it would have provided only a modest counterweight to the heavy aggravating factors”

We hold that the district court was correct in denying relief on Creech’s IAC resentencing claim under Claim 4. We hold, further, under § 2254(e)(2) that the district court was correct in declining to hold an evidentiary hearing on the new evidence that Creech sought to introduce to bolster his IAC resentencing claim.

2. *Martinez* Remand: Five Allegedly Procedurally Defaulted Sub-claims

a. *Martinez*

In *Martinez*, the Supreme Court announced an equitable exception to the longstanding rule of *Coleman v. Thompson* that ineffective assistance of PCR counsel cannot establish cause to overcome a procedural default. The Court held:

Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Martinez, 566 U.S. at 17. The Court refined the *Martinez* inquiry in *Trevino v. Thaler*, 569 U.S. 413 (2013). Under *Martinez*, a federal habeas court may find cause to excuse a procedural default where:

(1) the underlying ineffective assistance of trial counsel claim is “substantial”; (2) the petitioner was not represented or had ineffective counsel during the PCR proceeding; (3) the state PCR proceeding was the initial review proceeding; and (4) state law required (or forced as a practical matter) the petitioner to bring the claim in the initial review collateral proceeding.

Dickens, 740 F.3d at 1319 (citing *Trevino*, 569 U.S. at 423).

A petitioner must satisfy all four requirements, *id.*, but only the first and second requirements are at issue here. With respect to the first requirement, a petitioner must “demonstrate that the underlying [IAC] claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.” *Martinez*, 566 U.S. at 14 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). “Thus, there must be a substantial showing of a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Runnigeagle*, 825 F.3d at 982 (quoting *Strickland*, 466 U.S. at 694). To satisfy the second requirement, the petitioner must demonstrate that PCR counsel “was ineffective under the standards of *Strickland*,” which requires a petitioner to “show not only that PCR counsel performed deficiently, but also that . . .

“there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different.” *Martinez*, 566 U.S. at 14; *Runnigeagle*, 825 F.3d at 982 (quoting *Pizzuto v. Ramirez*, 783 F.3d 1171, 1178 (9th Cir. 2015)).

In practical effect, the prejudice analysis under both the first and second *Martinez* requirements is the same. Under both requirements, the required analysis is the prejudice prong of *Strickland*: There must be a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694; *see Runnigeagle* 825 F.3d at 982 (reciting the *Strickland* prejudice standard under both the first and second *Martinez* requirements); *cf. Detrich v. Ryan*, 740 F.3d 1237, 1245–46 (9th Cir. 2013) (en banc) (plurality opinion) (interpreting the first and second *Martinez* requirements differently).

Pursuant to our remand under *Martinez*, the district court considered six sub-claims of Claim 4, all of which alleged IAC at the 1995 resentencing proceeding. Creech appeals its decision as to five of those sub-claims. At the time of the district court’s decision after our *Martinez* remand, the court could consider new evidence supporting a claim of IAC by PCR counsel in determining whether a petitioner satisfies the requirements of *Martinez* without running afoul of § 2254(e)(2) and *Pinholster*. *See Dickens*, 740 F.3d at 1320. After we heard oral argument, however, the Supreme Court decided *Shinn v. Ramirez*, 142 S. Ct. 1718, 1734 (2022), greatly restricting the circumstances in which a federal habeas court deciding *Martinez* claims may consider evidence beyond that already contained in the state court record.

b. Sub-claims ¶¶ 100(b), (d), (j), (o)(iii) and (o)(iv)

All of the sub-claims included in the district court's COA are addressed to IAC at Creech's 1995 resentencing. Sub-claim ¶ 100(b) alleges that post-conviction counsel failed to conduct an adequate investigation of matters in mitigation, including Creech's mental health and that of his family. Sub-claim ¶ 100(d) alleges failure to retain qualified mental health experts to address issues of Creech's mental health. Sub-claim ¶ 100(j) alleges failure to investigate Creech's mental health issues including the effect of head injuries. Sub-claim ¶ 100(o)(iii) alleges failure to present mitigating evidence of the mental condition of Creech's daughter, which could support claims of organic causes for Creech's aggressive behavior. Finally, sub-claim ¶ 100(o)(iv) alleges failure to present evidence of severe mental illness of Creech's mother.

The district court concluded that each of these sub-claims had been presented to, and exhausted in, the state court as part of Creech's IAC claim under Claim 4 that his counsel had been ineffective at his 1995 resentencing. Prior to the Supreme Court's decision in *Ramirez*, a claim previously presented to a state court could become a new unexhausted (and procedurally defaulted) claim if new evidence presented to the district court under *Martinez* either "fundamentally alter[ed] the legal claim already considered by the state courts" or "place[d] the case in a significantly different and stronger evidentiary posture than it was when the state courts considered it." *Dickens*, 740 F.3d at 1318 (citations omitted) (first quoting *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986); and then quoting *Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1988)). The district court recognized that, if a previously exhausted claim was supplemented on federal habeas with sufficient

new supporting evidence, the claim could be transformed into a new, unexhausted, and procedurally defaulted claim.

As recounted above, the district court considered all of the proffered new evidence and held that it was insufficient to transform into a new IAC claim the part of Claim 4 that alleged IAC during Creech's 1995 resentencing. The court held that sub-claims ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv) were therefore not procedurally defaulted new claims and that *Martinez* did not apply.

Even in the absence of *Ramirez*, we would have agreed with the district court. The new evidence introduced on federal habeas review in support of Creech's argument that he suffers from brain damage and an organic brain disorder was largely duplicative of evidence that had been introduced during his 1982 sentencing and his 1995 resentencing.

Creech's sister, Virginia Plageman, had testified at Creech's 1995 resentencing hearing that when Creech was a child he had fallen down a staircase onto concrete; that the fall had knocked him unconscious; that he had bled from his nose, mouth, and possibly ears; that he had been hospitalized for a few days as a result of the fall; and that his mother had taken him home prematurely, against medical advice. Dr. Stoner had testified for Creech at his original sentencing hearing in 1982. He testified that Creech's performance on mental tests "strongly suggest[ed] the presence of an organic brain disorder." Dr. Brown had testified for Creech at his resentencing hearing in 1995. He testified that Creech was a psychopath. Under our case law, that testimony, standing alone, could have been aggravating rather than mitigating evidence. *See, e.g., Mann v. Ryan*, 828 F.3d 1143, 1161 (9th Cir. 2016)

(referring to “Dr. Flynn’s damning suggestion that he might be a psychopath”). But Dr. Brown was testifying on behalf of rather than against Creech, and he had presented evidence that was, on the whole, mitigating. He testified that there probably was a “biological predisposition” for Creech’s psychopathy. He testified that it was highly unusual that Creech and two of his brothers were murderers, and that there was “probably a biological contribution” to Creech’s mental state and behavior. Evidence of possible brain damage from a severe fall requiring hospitalization, of an “organic brain disorder,” and of a “biological predisposition” and “biological contribution” to a mental disorder—that is, evidence of mental dysfunction caused by factors beyond a defendant’s control—is mitigating evidence.

We agree with the district court that, considering the mitigation evidence as a whole, *see Browning*, 875 F.3d at 471, the proffered additional evidence of brain damage and organic factors was not sufficient to transform Creech’s ineffective-assistance-of-trial-counsel sub-claims into new claims. The court wrote:

The evidence that Petitioner brings forward in this Court, although more specific, adds little substance to the evidence that the state courts considered when adjudicating Petitioner’s mitigation-based IATC claims. The evidence submitted for the first time in this Court simply does not substantially improve the evidentiary posture of those claims.

Under *Ramirez*, we reach the same result. Because we cannot consider the evidence presented for the first time to the district court, Creech's *Martinez* claim necessarily fails.

B. Uncertified Claims

Creech seeks a COA for four uncertified claims. For a COA to issue, Creech must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El*, 537 U.S. at 336 (alteration in original) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

1. Summary Denial of Reconsideration

Creech seeks a COA on his claim that the district court erred in summarily denying his motion for reconsideration of its denial of his second habeas petition. In his motion for reconsideration, Creech sought to present additional mitigating evidence beyond the new evidence he had already presented to the district court in connection with his second petition. In denying his motion for reconsideration, the district court held, *inter alia*, that even if the court were to consider the new evidence presented in connection with the motion for reconsideration as if it were part of Creech's initial *Martinez* proceeding, there was no prejudice. We deny a COA. Under *Ramirez*, we may not consider the evidence Creech submitted in support of his motion for reconsideration. He therefore cannot demonstrate prejudice as a result of PCR counsel's performance as required by *Martinez*.

2. Withdrawal of Guilty Plea

Creech seeks a COA for his claim that the Idaho Supreme Court violated the Due Process Clause by refusing to allow him to withdraw his guilty plea prior to his first resentencing. The district court denied relief on this claim, correctly concluding that Creech's argument was, in effect, that the Idaho Supreme Court had incorrectly decided a question of state law. *See Creech V*, 966 P.2d at 21–22. The Idaho Court's construction of its own law was not "an obvious subterfuge to evade the consideration of a federal issue," and we are bound by its holding that Creech's withdrawal claim is barred by state preclusion law. *See Peltier v. Wright*, 15 F.3d 860, 862 (9th Cir. 1994). We therefore decline to grant a COA for this claim.

3. *Magwood* Claims

Creech seeks a COA for multiple claims attacking his guilty plea. He refers to these claims as "*Magwood* claims," invoking the Supreme Court's decision in *Magwood v. Patterson*, 561 U.S. 320 (2010). These claims were exhausted during his second PCR proceeding in state court and were presented to the district court in both his first and second habeas petitions. When Creech raised them in his second habeas petition, the district court rejected these claims as second or successive under 28 U.S.C. § 2244(b). After the district court's decision, the Court decided *Magwood*, holding that claims in a second federal habeas petition challenging the sentence imposed in a new state court judgment are not second or successive, even if addressed to issues other than sentencing. *Id.* at 342.

Creech asks that we grant a COA as to his guilty plea claims and remand to the district court to allow that court to

address them on the merits in the first instance. We grant the COA. We conclude, based on *Magwood* and later cases decided by our circuit, that the claims are not barred as second or successive. However, rather than remand them to the district court, we deny them ourselves.

a. Applicability of *Magwood*

“We review de novo the district court’s determination that a petition is ‘second or successive’ under AEDPA.” *Gonzalez v. Sherman*, 873 F.3d 763, 767 (9th Cir. 2017). In *Magwood*, the Supreme Court held that a second federal habeas petition challenging a sentence imposed in an intervening state court judgment was not a second or successive petition. *Magwood* left open the question whether § 2244(b) would allow a petitioner who obtains a new sentence to challenge “not only his resulting, *new* sentence, but also his original, *undisturbed* conviction.” 561 U.S. at 342 (emphases in original). We answered that question in *Wentzell v. Neven*, 674 F.3d 1124 (9th Cir. 2012). We held that “the basic holding of *Magwood*” must extend to cases where a new petition challenges undisturbed parts of the judgment, including a petitioner’s original conviction, because *Magwood* requires us to “interpret successive applications with respect to the judgment challenged and not with respect to the particular components of that judgment.” *Id.* at 1127 (quoting *Johnson v. United States*, 623 F.3d 41, 46 (2d Cir. 2010)). “[W]here a first habeas petition results in an amended judgment, a subsequent petition is not successive,” even if its claims could have been raised in a prior petition or the petitioner ‘effectively challenges an unamended component of the judgment.’” *Id.* (quoting *Johnson*, 623 F.3d at 46); see also *Gonzalez*, 873 F.3d at 768–69 (“In short, under the law of this circuit and the Supreme Court, a petition is not

second or successive when there is an amended judgment and the petition is the first one following that amended judgment.”).

Although *Creech III* and *Creech IV* left Creech’s conviction for Jensen’s murder undisturbed, Creech may nonetheless challenge that conviction in his second federal habeas petition because his original sentence was vacated and a new sentence was imposed. Creech’s second habeas petition is thus not second or successive as to his guilt-phase claims.

b. Discussion of *Magwood* Claims

As noted above, public defender Rolf Kehne represented Creech at trial. Creech claims that, were it not for a conflict of interest in the public defender’s office and were it not for Kehne’s deficient performance, he would not have pleaded guilty and would instead have gone to trial on the question of guilt. Specifically, Creech argues that his trial counsel were ineffective because (1) the Ada County Public Defender’s Office (“ACPDO”) labored under a conflict of interest while representing him; (2) Kehne failed to move to withdraw the guilty plea based on Creech’s incompetence and failed to seek additional testing for brain damage; (3) Kehne failed to investigate the purported influence of Sheriff Chuck Palmer in Creech’s decision to plead guilty; and (4) Kehne failed to investigate Jensen’s allegedly violent history. We take the arguments in turn.

i. Conflict of Interest

Creech argues that the ACPDO labored under a conflict of interest in the pre-plea stage. Creech argues that, before he was represented by Kehne, he was briefly represented in

different hearings by four other public defenders in the ACPDO. One of these attorneys, Laird Stone, also represented inmate Keith George, who had witnessed Jensen's death. George provided deposition testimony describing Creech's actions in continuing the attack on Jensen after Jensen had stopped fighting. Creech argues that George's testimony contributed to Creech's perception that the case was hopeless and that the court would automatically impose the death penalty, which induced him to plead guilty.

The record belies Creech's argument. Kehne affirmatively sought a continuance to investigate whether the public defender's office had a conflict arising from potential witnesses against Creech who had been represented by the public defender. During argument in the trial court, Kehne clarified that the office was representing another inmate, presumably George, who was trying to reach a deal and was represented by Stone. The prosecution represented to the court that no offers of a deal had been extended to that other inmate, that there was nothing more than a potential conflict of interest, and that the prosecution would inform the public defender's office if an offer of a deal was extended. The trial court determined that there was a potential but not an actual conflict. When George testified in his deposition in August 1981, he was no longer represented by the public defender's office. Creech concedes that the prosecution did not cut George a deal for testimony until his deposition, when it is undisputed he was represented by a private attorney.

Therefore, no actual conflict existed at the time of George's deposition. *See Noguera v. Davis*, 5 F.4th 1020, 1035 (9th Cir. 2021) ("An 'actual conflict' means a 'conflict of interest that adversely affects counsel's

performance,’ not simply ‘a theoretical division of loyalties.’” (quoting *Mickens v. Taylor*, 535 U.S. 162, 171, 172 n.5 (2002))). The state trial court investigated the potential conflict and found that none existed. *See Alberni v. McDaniel*, 458 F.3d 860, 870–71 (9th Cir. 2006). Moreover, the details in George’s deposition testimony were not more damaging than the admissions Creech had made to police against the advice of counsel prior to his change of plea hearing. Contrary to Creech’s assertion, it is apparent that his decision to plead guilty against Kehne’s advice was wholly unrelated to ACPDO’s representation of George. The Idaho courts did not unreasonably find Creech’s arguments as to Kehne’s purported conflict of interest to be without merit. *See Creech V*, 966 P.2d at 21.

ii. Failure to Argue Creech’s Incompetence or to Obtain Further Mental Testing

Creech argues that Kehne should have moved to withdraw his guilty plea on the ground that Creech was incompetent to plead guilty and that Kehne should have tested Creech for brain damage, which would have raised issues about his competence to plead guilty. Creech asserts that the assessments of Drs. Stoner and Heyrend, along with a suicide attempt the day before he appeared in court to change his guilty plea, should have indicated to Kehne that Creech was incompetent to plead guilty and that further testing was necessary.

We addressed Creech’s competence to plead guilty in our decision in 1991. There is nothing in the current record that leads us to change our earlier conclusion that the record discloses “no evidence that Creech was incompetent to plead guilty.” *Creech III*, 947 F.2d at 879–80. When Dr. Heyrend was asked whether Creech “did not intend to

plead guilty or did not recognize the consequences of that legal act,” he replied “I really have no information in that area.” Dr. Stoner testified that Creech, although impulsive and impaired in his judgment, could understand the proceedings against him and was capable of communicating adequately with counsel.

Although Creech, at Kehne’s insistence, reserved the right to withdraw his guilty plea if psychological evaluations showed Creech incompetent to plead guilty, those evaluations did not suggest that Creech was incompetent to plead guilty such that Kehne should have pursued further testing or moved to withdraw the plea. Even assuming that Kehne should have pursued further testing, his failure to do so was not prejudicial, as nothing in Dr. Brown’s later testimony at the 1995 resentencing hearing suggests that Creech had been incompetent to plead guilty. *See United States v. Howard*, 381 F.3d 873, 877–78 (9th Cir. 2004) (“To establish that his counsel provided ineffective assistance in light of [petitioner’s] alleged incompetency, [petitioner] must first demonstrate that he was indeed incompetent to plead guilty.”). The Idaho courts did not unreasonably conclude that Creech failed to show that Kehne should have moved to withdraw his guilty plea on the ground that Creech was incompetent. *See Creech V*, 966 P.2d at 21.

iii. Failure to Communicate or Move to Withdraw the
Guilty Plea Based on Undue Influence

Creech argues that Kehne was ineffective for failing to adequately communicate with him prior to his guilty plea, which resulted in Kehne’s failure to challenge and investigate Sheriff Chuck Palmer’s alleged coercion of Creech into pleading guilty, and for subsequently failing to

move to withdraw the guilty plea based on Sheriff Palmer's influence on Creech.

During Creech's state PCR proceedings, Palmer testified that he had an ongoing relationship with Creech dating back to the early 1970s. Palmer described the relationship as one of "mutual respect." He recalled that Creech told him early on that he wanted to plead guilty, and that he "encourage[d] [Creech] to do that, if that was what he wanted to do." However, Palmer insisted that he told Creech not to discuss matters pertaining to the murder with him outside the presence of counsel.

The record shows that Creech was motivated to plead guilty independent of any supposed influence by Palmer. During the change-of-plea hearing, Kehne informed Judge Newhouse that Creech was pleading guilty against his advice, and Creech rejected Kehne's advice that they seek a five-day continuance before entering a guilty plea. During the plea colloquy, Creech testified under oath that he had discussed the plea with counsel, was not influenced by the conduct of others, and believed that he had adequate time to discuss the matter with counsel. *Doe v. Woodford*, 508 F.3d 563, 571 (9th Cir. 2007) ("Solemn declarations in open court carry a strong presumption of verity." (quoting *Blackledge v. Allison*, 431 U.S. 63, 74 (1977))); *United States v. Kaczynski*, 239 F.3d 1108, 1115 (9th Cir. 2001) ("We give 'substantial weight' to [a petitioner's] in-court statements." (quoting *United States v. Mims*, 928 F.2d 310, 313 (9th Cir. 1991))).

Even assuming that Kehne rendered deficient performance for failing to adequately communicate with Creech prior to the change-of-plea hearing, Creech cannot demonstrate prejudice. The record contains ample

evidence that Creech desired to plead guilty of his own accord, and he has not shown that, even if Kehne had presented a motion to withdraw his guilty plea based on Palmer's alleged influence, the motion would have had a reasonable chance of success. *See United States v. Yong*, 926 F.3d 582, 590 (9th Cir. 2019) ("A plea of guilty entered by an individual fully aware of the plea's direct consequences 'must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper" (quoting *Kaczynski*, 239 F.3d at 1114)). The Idaho Supreme Court did not unreasonably conclude that Creech failed to show IAC at the guilt phase on the basis of Kehne's purported failure to communicate with him. *See Creech V*, 966 P.2d at 19–20.

iv. Failure to Investigate Jensen's History

Finally, Creech argues that counsel's failure to investigate Jensen's purported history of violence led Creech to plead guilty rather than insist on going to trial on a theory of self-defense. Even assuming that Kehne's failure to investigate Jensen's history constituted deficient performance, Creech cannot demonstrate prejudice. We agree with our determination in 1991 that it is "inconceivable . . . , and not merely improbable" that Creech "would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received" if he had gone to trial on a theory of self-defense. *Creech III*, 947 F.2d at 879 (quoting *Evans v. Meyer*, 742 F.2d 371, 375 (7th Cir. 1984)). Even accepting for the sake of argument that Jensen had a violent predisposition, there is no reasonable probability that this additional evidence would have outweighed the

countervailing and aggravating evidence. *Allen v. Woodford*, 395 F.3d 979, 1002 (9th Cir. 2005) (no prejudice where additional mitigation evidence would have been “insufficient to outweigh the overwhelming evidence in aggravation”). The Idaho courts did not unreasonably so conclude. *See Creech V*, 966 P.2d at 18–19.

4. *Lackey* Remand

Creech seeks a COA for a claim that the duration of Creech’s confinement for this murder, now forty years, constitutes cruel and unusual punishment in violation of the Eighth Amendment. He relies on Justice Stevens’s memorandum respecting the denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995) (mem.). The district court found the claim procedurally defaulted and dismissed it with prejudice. Even putting aside the procedural default, we note that neither the Supreme Court nor the Ninth Circuit has ever held that the duration of a death row inmate’s confinement prior to execution amounts to cruel and unusual punishment. *Smith v. Mahoney*, 611 F.3d 978, 998 (9th Cir. 2010) (collecting cases). We therefore decline to grant a COA for this claim.

C. *Post-Ramirez* Motion

After the Supreme Court decided *Ramirez*, Creech moved for leave to file replacement or supplemental briefs. Creech contends that, had he known that he would not be able to introduce new evidence on federal habeas review under *Martinez*, he would have made different strategic choices as to which arguments to pursue in his appeal from the district court’s decision after our post-*Martinez* remand. He seeks to file replacement or supplemental briefs based on strategic choices he says he would have made had he known that he was unable to make any arguments under

Martinez. However, Creech filed such briefs when he appealed the district court's denial of his second amended habeas petition. We heard oral argument based on those briefs in March 2012 shortly before *Martinez* was decided. In those briefs, Creech made precisely the sort of strategic choices that he now says he wants to make—choices as to what arguments to make on appeal when he has no viable arguments under *Martinez*. After we heard argument in the pre-*Martinez* appeal, we voted unanimously to deny all claims adversely to Creech except for those that became available post-argument under *Martinez*. Replacement or supplemental briefs of the sort Creech seeks to file would thus make no difference to the outcome. We therefore deny Creech's motion to file replacement or supplemental briefs.

Conclusion

We affirm the district court's denial of Creech's second amended habeas petition.

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

THOMAS EUGENE CREECH,

Petitioner,

v.

AL RAMIREZ, Warden,

Respondent.

Case No. 1:99-cv-00224-BLW

CAPITAL CASE

**MEMORANDUM DECISION AND
ORDER**

Thomas Eugene Creech, the Petitioner in this habeas corpus case, is an Idaho state prisoner under a sentence of death. Currently pending is Petitioner's Motion for Reconsideration (Dkt. 336) of the Court's January 29, 2016 Memorandum Decision and Order (Dkt. 325). In that decision—on remand from the Ninth Circuit—the Court concluded that *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), did not apply to excuse the procedural default of certain claims of ineffective assistance of trial counsel.

In his Motion, Petitioner asks that the Court reconsider its *Martinez* Order on six grounds. First, Petitioner argues that the Court incorrectly articulated and applied the legal standard as to whether post-conviction review counsel performed deficiently during initial-review collateral proceedings. (Dkt. 336-1 at 3-9.)

MEMORANDUM DECISION AND ORDER - 1

Second, Petitioner asserts that the Court's *Martinez* analysis was incorrect because the Court required a showing of *Strickland*¹ prejudice from post-conviction review counsel's performance. (*Id.* at 9-15.)

Third, Petitioner challenges the Court's determination that he forfeited any *Martinez* arguments as to the claims set forth in ¶¶ 100(o)(i), (o)(ii), (o)(v), and (q) of Claim 4. (*Id.* at 15-18.)

Fourth, Petitioner argues that the Court applied an incorrect legal framework in deciding whether to hold an evidentiary hearing on the applicability of *Martinez*. (*Id.* at 19-21.)

Fifth, Petitioner contends the Court incorrectly determined that the claims set forth in ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv) of Claim 4 are not fundamentally altered from the claims raised in state court and that, therefore, the claims are not procedurally defaulted and not subject to *Martinez*. (*Id.* at 21-79.)

Sixth and finally, Petitioner asserts that the Court incorrectly denied a certificate of appealability on two issues. (*Id.* at 79-81.)

For the reasons that follow, Petitioner's Motion will be denied, and the Court will issue a new judgment in favor of Respondent.

¹ See *Strickland v. Washington*, 466 U.S. 668, 687-97 (1984) (holding that ineffective assistance of counsel requires a showing that (1) counsel performed deficiently, and (2) counsel's deficient performance was prejudicial).

1. Standard of Law for Reconsideration of Interlocutory Orders²

Federal courts have the “inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient.” *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001) (internal quotation marks and emphasis omitted). Although courts have authority to reconsider prior orders, they “should be loath to do so in the absence of extraordinary circumstances such as where the initial decision was ‘clearly erroneous and would work a manifest injustice.’” *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983)).

Although the “the availability of new evidence or an expanded factual record” can, in some circumstances, be a basis to reconsider an interlocutory order, *Gray v. Carlin*, No. 3:11-CV-00275-EJL, 2015 WL 75263, at *2 (D. Idaho Jan. 6, 2015), a motion for reconsideration should not be used “as a vehicle to identify facts or raise legal arguments which could have been, but were not, raised or adduced during the pendency of the motion of which reconsideration was sought,” *Jones v. Casey’s Gen. Stores*, 551 F. Supp. 2d 848, 854-55 (S.D. Iowa 2008) (internal quotation marks omitted).

² Because the Court concludes that Petitioner has failed to meet the standard required for reconsideration of interlocutory orders, it need not consider Respondent’s argument that the Motion for Reconsideration is more appropriately considered under the stricter standard for reconsideration of final orders as set forth in Federal Rule of Civil Procedure 59(e).

2. Petitioner Has Not Established Extraordinary Circumstances to Justify Reconsideration of the Court’s Decision on the Applicability of *Martinez*

A. With respect to Claim 4, ¶ 100(a), the Court did not commit clear error in determining that Petitioner’s initial post-conviction review counsel (“PCR counsel”) provided objectively reasonable representation under the second prong of Martinez.

In Claim 4, ¶ 100(a), Petitioner asserted that his counsel’s strategy in presenting mitigation evidence at the resentencing proceeding was objectively unreasonable. He claimed that counsel “failed to bring professional skill and knowledge to the proceedings, resulting in the absence of a reliable adversarial proceeding” and that counsel’s sentencing presentation “was a disjointed presentation of random reminiscences and unsupported psychological theories.”³ Though this ineffective-assistance-of-counsel (“IAC”) claim was procedurally defaulted, the Court could still hear the merits of the claim if the *Martinez* exception applied—that is, if the underlying IAC claim was substantial and if PCR counsel rendered ineffective assistance in allowing the claim to be defaulted.⁴ *Martinez*, 132 S. Ct. at 1315; *Trevino v. Thaler*, 133 S. Ct. 1911, 1918, 1921 (2013).

³ The Court has noted that this claim is distinct from Petitioner’s claims, in other subparagraphs of Claim 4, which assert ineffectiveness with respect to mitigation evidence that resentencing counsel failed to discover or to present at resentencing. (Dkt. 325 at 23.)

⁴ The third and fourth prongs of the *Martinez* test are not at issue. *See Trevino*, 133 S. Ct. at 1918, 1921 (describing the *Martinez* test as follows: (1) the underlying claim of ineffective assistance of counsel must be a “substantial” claim; (2) the “cause” for the procedural default consists of there being “no counsel” or only “ineffective” counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the “initial” collateral review proceeding where the ineffective assistance of trial counsel claim could have been brought; and (4) state law requires that an ineffective assistance of counsel claim be raised in an initial-review collateral proceeding, or by “design and operation” such claims must be raised that way, rather than on direct appeal).

In determining whether PCR counsel rendered deficient performance for purposes of the second *Martinez* prong, the Court considered what legal standard should apply to the review of PCR counsel's performance—that is, what constitutes objectively reasonable (or unreasonable) representation during an initial-review collateral proceeding? The Court determined that, “in undertaking the *Strickland* analysis when evaluating PCR counsel's performance under *Martinez*, a federal court's review must be *more* deferential than that afforded trial counsel, but *less* deferential than that afforded direct appeal counsel.” (Dkt. 325 at 26.) The Court then stated that it did not need to define the standard more precisely because, “under any attorney performance standard,” PCR counsel did not render deficient performance. (*Id.*) That is, under the standard applicable either to trial counsel or to direct appeal counsel, PCR counsel's performance did not fall below an objective standard of reasonableness.

Petitioner first takes issue with the Court's conclusion that PCR counsel's performance should be viewed more deferentially than trial counsel's performance, and he then scolds the Court for failing to articulate the standard more precisely, arguing that the Court should have “spell[ed] out exactly where in that gray area the standard lay.” (Dkt. 336-1 at 5.) As to Petitioner's first point, he simply disagrees with the Court's analysis—a matter for appeal, not reconsideration.

As to Petitioner's second point, the Court declines the invitation to exhaustively articulate the appropriate standard where it is clear that, even under the standard applicable to trial counsel's performance, PCR counsel's failure to include this claim on

initial collateral review was not objectively unreasonable. The Court considered cases involving claims of deficient performance of *both* trial and appellate counsel in its analysis and determined that, under either standard, PCR counsel's performance was not deficient. (Dkt. 325 at 28-29.)

The Court does not see a problem with that type of analysis. And neither does the Ninth Circuit. *See Runnigeagle v. Ryan*, 825 F.3d 970, 982 (9th Cir. 2016) ("It is not necessary here to delineate precisely what PCR counsel's duties are, and how they are similar to or different from those of trial or appellate counsel. . . . Even if we accept Runnigeagle's contention that PCR counsel has a broad duty to investigate and preserve potentially meritorious trial-level IAC claims, Runnigeagle simply does not carry his burden to show that [PCR counsel] made errors so serious that he was not functioning as counsel.") (internal quotation marks and alterations omitted).

At bottom, Petitioner simply has not rebutted the "strong presumption" that his PCR counsel's failure to include ¶ 100(a) in Petitioner's initial post-conviction petition was the result of a reasonable tactical decision that fell within "the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The Court's decision as to PCR counsel's performance was not clearly erroneous and would not result in manifest injustice. Further, even if the failure to include this claim constituted deficient performance of PCR counsel, Petitioner has not shown a reasonable probability that, but for this failure, Petitioner would have been granted post-conviction relief. (*See* Dkt. 325 at 29.) Therefore, reconsideration is not warranted.

MEMORANDUM DECISION AND ORDER - 6

B. The Court properly followed Ninth Circuit precedent in requiring that Petitioner establish Strickland prejudice from PCR counsel's performance to satisfy the second prong of Martinez, and its conclusion that Petitioner had not established such prejudice is not clearly erroneous.

Petitioner renews his argument that he does not need to show prejudice from PCR counsel's performance in order to satisfy the second prong of *Martinez*—that PCR counsel rendered ineffective assistance in the initial post-conviction petition. However, that argument has been rejected by the Ninth Circuit Court of Appeals.

The Circuit has held that the second prong of *Martinez* is not satisfied unless a petitioner shows “not only that PCR counsel performed deficiently, but also that this prejudiced the petitioner, i.e., that there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different.” *Runnigeagle*, 825 F.3d at 982 (internal quotation marks omitted). *See also Pizzuto v. Ramirez*, 783 F.3d 1171, 1178 (9th Cir. 2015) (same); *Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014) (same), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc). The Circuit has explicitly refused to reconsider this standard. *See Runnigeagle*, 825 F.3d at 982 n. 13 (“We decline to revisit the *Clabourne/Pizzuto* standard.”).

Despite the fact that *Clabourne*, *Pizzuto*, and *Runnigeagle*—all of which describe the second prong of *Martinez* as requiring *Strickland* prejudice—were decided *before* briefing on the Motion for Reconsideration was completed,⁵ Petitioner stubbornly clings

⁵ *Clabourne* and *Pizzuto* were issued before Petitioner filed the Motion and his opening brief in support of the Motion, and *Runnigeagle* was issued before Petitioner filed his reply.

to the plurality opinion in *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) (en banc), in arguing for a different standard.

The *Detrich* plurality stated that a prisoner “need not show actual prejudice resulting from his PCR counsel’s deficient performance, over and above his required showing that the trial-counsel IAC claim [is] ‘substantial’ under the first *Martinez* requirement”). 740 F.3d at 1245-46 (plurality). However, the Circuit has now definitively resolved the fractured opinions in *Detrich* and has come to a different conclusion than the *Detrich* plurality. See *Clabourne*, 745 F.3d at 377. Though Petitioner argues that *Clabourne*’s analysis of *Detrich* was incorrect, this Court has neither the authority nor the inclination to change the law as set forth by the Ninth Circuit.⁶ Thus, the Court’s decision on this issue was not clearly erroneous and did not work a manifest injustice.

C. The Court did not commit clear error in finding that Petitioner forfeited any Martinez argument as to Claim 4, ¶¶ 100(o)(i), (o)(ii), (o)(v), and (q).

The Court previously found that Petitioner had not provided specific argument with respect to eleven traditional IAC claims—as set forth in ¶¶ 99(h), 99(j), 100(e), 100(g), 100(h), 100(i), 100(m), 100(o)(i), 100(o)(ii), 100(o)(v), and 100(q) of Claim 4—and one conflict-of-interest claim as set forth in Claim 30. (Dkt. 325 at 11-13.) Therefore, the Court held that Petitioner forfeited any *Martinez* argument as to those claims.

⁶ Petitioner’s continued insistence on the applicability of the *Detrich* plurality opinion perhaps illustrates the problems that can arise when the en banc court cannot produce a majority opinion. However, the confusion left behind by *Detrich* is no more, thanks to *Clabourne*, *Pizzuto*, and *Runningeagle*. If Petitioner does not like the way the Ninth Circuit has described and applied the second *Martinez* prong, he will have to take it up with that court en banc.

Petitioner now challenges the Court's finding that he forfeited *Martinez* arguments on four of those claims: those set forth in ¶¶ 100(o)(i), (o)(ii), (o)(v), and (q) of Claim 4.⁷ (Dkt. 336-1 at 15.) These claims were all denied on the merits in state court and in this Court. Petitioner contends that the Court's previous issuance of a certificate of appealability ("COA")—on the merits of these four sub-claims—equates to a substantiality finding. *See Runnigeagle*, 825 F.3d at 983 ("*Martinez* suggests, via a 'Cf.' citation to *Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003), that the substantiality standard is comparable to the standard for a certificate of appealability to issue under 28 U.S.C. § 2253(c)(2)."). Therefore, Petitioner insists, he reasonably relied on his reference to the COA in his briefing as completely and specifically arguing that the default of these purportedly fundamentally-altered claims is excused by *Martinez*.

Petitioner's argument fails for several reasons. First, substantiality is only one of the four prongs of *Martinez*. Therefore, Petitioner's passing reference to the Court's issuance of a COA, with respect to the merits of the claims in ¶¶ 100(o)(i), (o)(ii), (o)(v), and (q), could possibly have constituted argument only on the first prong of *Martinez*—a

⁷ These claims asserted sentencing IAC for failure to present relevant mitigation evidence with respect to the following: an incident where Petitioner saved the life of another person (¶ 100(o)(i)); Petitioner's purported attempt to get help for the victim, David Jensen (¶ 100(o)(ii)); behavior of IDOC employees, inmates, and Jensen himself that allegedly constituted participation and solicitation of, or consent to, the murder (¶ 100(o)(v)); and Petitioner's mental health issues, including personality disorder diagnoses (¶ 100(q)).

prong that the Court was not necessarily required to even address.⁸ *See Martinez*, 132 S. Ct. at 1319 (“When faced with the question whether there is cause for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial, i.e., it does not have any merit or that it is wholly without factual support, or that the attorney in the initial-review collateral proceeding did not perform below constitutional standards.”). In his *Martinez* briefing, Petitioner all but ignored the prejudice portion of the second prong of *Martinez*—ineffective assistance of PCR counsel. That Petitioner might have mistakenly believed he did not need to present argument on that prong does not justify reconsideration.

Second, Petitioner erroneously contends that the Court previously found the claims in ¶¶ 100(o)(i), (o)(ii), (o)(v), and (q) to be procedurally defaulted, and that this conclusion excuses Petitioner’s failure to adequately brief *Martinez* arguments as to these claims. (Dkt. 336-1 at 16-17.) He asserts he “cannot reasonably be blamed for relying on this Court’s own previous ruling.” (*Id.* at 17.) Contrary to Petitioner’s contention, however, the Court determined that the claims in ¶ 100(o)—which obviously includes sub-claims (o)(i), (o)(ii), and (o)(v)—and the claim in ¶ 100(q) “were fairly presented to the Idaho Supreme Court and *are free of a state procedural bar.*” (Dkt. 173 at 13-14 (emphasis added).) The Court’s recitation of properly exhausted claims did, indeed, include those at issue in ¶¶ 100(o) and (q), and Petitioner’s contrary assertion is

⁸ For example, with respect to Claim 4, ¶ 100(a), the Court did not consider substantiality under the first *Martinez* prong because it concluded that Petitioner failed to satisfy the second *Martinez* prong, that of ineffective assistance of PCR counsel. (Dkt. 325 at 30 n.10.)

inaccurate.⁹ (*Id.*) The state court and this Court both addressed the merits of the claims in ¶¶ 100(o)(i), (o)(ii), (o)(v), and (q). (Dkt. 279 at 22-36.)

Finally, Petitioner contends he appropriately raised the *Martinez* issue with respect to ¶¶ 100(o)(i), (o)(ii), (o)(v), and (q) simply by stating that “the majority of the Trial IAC Claims were not presented to the state court and are procedurally defaulted.” (Dkt. 336-1 at 16, citing Dkt. 308 at 4-5.) This argument is frivolous.

The Court cannot, and will not, assume that a petitioner seeks to excuse the default of an IAC claim under *Martinez* merely by noting that the claim was defaulted. *Martinez* is a cause-and-prejudice doctrine. Whether a claim is procedurally defaulted and whether cause and prejudice exist to excuse that default are, quite obviously, two distinct inquiries—that principle has been clear for four decades. *See Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (“[W]e deal only with contentions of federal law which were not resolved on the merits in the state proceeding due to [a petitioner’s] failure to raise them

⁹ Petitioner has apparently realized this mistake. In his reply brief in support of his Motion for Reconsideration, he acknowledges that ¶ 100(q) had previously been found to be exhausted and non-defaulted. (Dkt. 362 at 18.) Petitioner then argues that the Court’s conclusion that ¶ 100(q) was properly exhausted “was never correct,” meaning that the even under pre-*Martinez* law, the claim was procedurally defaulted. (*Id.*)

The Court declines Petitioner’s invitation to reverse its previous decision that the claim in ¶ 100(q) *as presented in the Second Amended Petition*—not as presented with the additional evidence—was properly exhausted, considering it was Petitioner himself who successfully argued so. (*See* Dkt. 157 at 27-28 (arguing that ¶ 100(q) and ¶ 100(o) were not defaulted).) Pursuant to the doctrine of judicial estoppel, having already convinced the Court that ¶ 100(q), as it was asserted in the Second Amended Petition, was raised and addressed on the merits in state court, Petitioner “cannot now reverse [that] position in order to suit [his] current objectives.” *Whaley v. Belleque*, 520 F.3d 997, 1002 (9th Cir. 2008). Because Petitioner’s statement that the Court’s previous procedural default decision was “never correct” is *not* based on the change in law brought about by *Martinez*, judicial estoppel is appropriate in this instance. *Cf. Lopez v. Ryan*, No. CV-97-224-TUC-CKJ, 2015 WL 5817642, at *14 (D. Ariz. Oct. 6, 2015) (declining to apply the doctrine of judicial estoppel when petitioner’s change in position was based on *Martinez v. Ryan*).

there as required by state procedure. We leave open for resolution in future decisions the precise definition of the cause-and-prejudice standard”) (internal quotation marks omitted). The refusal to acknowledge this longstanding and fundamental principle is akin to a head-in-the-sand approach to lawyering and is most certainly *not* a basis for reconsideration.¹⁰ Further, as noted above, after *Clabourne*, *Pizzuto*, and *Runnigeagle*—all of which were decided before briefing on the instant Motion was completed—it is clear that the default of a substantial claim is not enough to establish prejudice as to the second *Martinez* prong. Instead, a petitioner must show a reasonable probability of a different outcome in the initial PCR proceedings. Thus, stating that a claim is defaulted, or asserting deficient performance of PCR counsel but not prejudice, does *not* constitute argument that PCR counsel rendered ineffective assistance.

The Court need not guess at a litigant’s argument, or deem an issue raised when it was not. It remained—at all times—Petitioner’s burden to tell the Court which claims he believed were subject to the *Martinez* exception *and why*. By failing to do so with respect to the claims in ¶¶ 100(o)(i), (o)(ii), (o)(v), and (q) of Claim 4, Petitioner forfeited his *Martinez* arguments on those claims. It would have been improper for the Court to usurp

¹⁰ Petitioner’s counsel are warned that presentation of frivolous arguments in the future may be grounds for sanctions. See Fed. R. Civ. P. 11(b) (“By presenting to the court a pleading, written motion, or other paper . . . an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief . . . the claims defenses and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.”); and Fed. R. Civ. P. 11(c)(1) (“If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.”).

the role of Petitioner's counsel by making up its own arguments that could have been, but were not, presented by Petitioner in his briefs.

For the foregoing reasons, Petitioner has not shown any extraordinary circumstances to justify reconsideration on this basis.

D. *The Court applied the appropriate legal standard in determining that Petitioner was not entitled to an evidentiary hearing on the applicability of Martinez to Claim 4, ¶ 100(a).*

Petitioner argues that the Court used an improper framework in deciding whether to grant an evidentiary hearing on whether *Martinez* applies to his claim, in ¶ 100(a) of Claim 4, that resentencing counsel rendered ineffective assistance with respect to the way in which he presented mitigation evidence at the resentencing hearing. (Dkt. 336-1 at 19.) At the time of the Court's decision in January 2016, the standards for determining when a *Martinez* cause-and-prejudice hearing is warranted were not entirely clear. At the very least, however, the Ninth Circuit had determined that a *Martinez* hearing is not always required when a petitioner seeks to invoke the exception. *See Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) (en banc) (stating that a "district court *may take evidence to the extent necessary* to determine whether the petitioner's claim of ineffective assistance of trial counsel is substantial under *Martinez*") (emphasis added).

Since the Court's January 2016 ruling, the Circuit has clarified the standard required to obtain an evidentiary hearing under *Martinez*. In *Runnigeagle*, the court held that an evidentiary hearing was not required because the "documentary evidence submitted fully presented the relevant facts," and, therefore, "oral testimony and cross-examination [were] not necessary." 825 F.3d at 990. The petitioner in *Runnigeagle* was

not entitled to an evidentiary hearing on the applicability of the *Martinez* exception because he had “made no showing that [the witnesses’] testimony would differ materially from their declarations.” *Id.*

In this case, Petitioner had complete incentive to bring forward all of his evidence in support of his *Martinez* arguments when the Court was first considering those arguments. His claim that he should be excused from his failure to do so—as well as the issue of whether such evidence is barred by 28 U.S.C. § 2244 or by the scope of the limited remand in this case—will be addressed in Section 2.E., below. On the record before the Court at the time of its January 2016 decision, there were no issues that would have required the Court to make credibility determinations, and an evidentiary hearing was unnecessary. The documentary evidence was sufficient for the Court to resolve the *Martinez* issue. *See Runnigeagle*, 825 F.3d at 990.

Petitioner has not established that the Court applied an incorrect legal standard when it denied his request for a *Martinez* hearing, and extraordinary circumstances do not exist to justify reconsideration on this basis.¹¹

¹¹ The Ninth Circuit has determined that § 2254(e)(2), which limits the circumstances under which a petitioner may receive an evidentiary hearing in federal court, does not restrict a federal court’s ability to hold a hearing on the applicability of *Martinez*. *Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014) (en banc) (stating that a *Martinez* argument is not a constitutional “claim” subject to § 2254(e)(2)). However, § 2254(e)(2) “continues to have force” with respect to claims that were not adjudicated on the merits in state court. *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011).

Thus, it is unclear how a court should apply § 2254(e)(2) if it determines that the default of an IAC claim is, in fact, excused under *Martinez*. In such a case, the statute would not prohibit an evidentiary hearing to determine whether a defaulted IAC claim is substantial and whether PCR counsel rendered ineffective assistance, but it *would* appear to prohibit an evidentiary hearing on the merits of that underlying IAC claim—meaning that the court would have to ignore all of the evidence it had just considered at the *Martinez* hearing. Because Petitioner is not entitled to an evidentiary hearing on the applicability of the *Martinez* exception, the Court need not wade into this legal quagmire at this time.

E. The Court did not commit clear error in holding that the claims set forth in ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv) of Claim 4 are not fundamentally altered from the claims decided on the merits in state court.

To properly exhaust a constitutional claim, a petitioner must fairly present that claim in state court. “A claim has not been fairly presented in state court if new factual allegations either fundamentally alter the legal claim already considered by the state courts, or place the case in a significantly different and stronger evidentiary posture than it was when the state courts considered it.” *Dickens*, 740 F.3d at 1318 (internal quotation marks and citations omitted).

The Court previously determined that the claims set forth in Claim 4, ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv) were not fundamentally altered from the claims that the state courts (and this Court) considered on the merits.¹² (Dkt. 325 at 30-48.) Therefore, because those claims were not procedurally defaulted, *Martinez* offers no relief. First, Petitioner disagrees with the Court’s decision on the basis of the evidence that was in the record at the time of the Court’s January 2016 ruling. (Dkt. 336-1 at 22-33.) Because Petitioner has not shown clear error or manifest injustice in the Court’s decision, he is not entitled to reconsideration on that basis.

However, Petitioner’s primary argument is that this Court did not have all of the relevant evidence when it concluded that these claims were not fundamentally altered.

¹² Petitioner also argues that Claim 4, ¶ 100(q) is “relevant to the fundamentally altered analysis.” (Dkt. 336-1 at 22.) Though Petitioner forfeited any fundamentally-altered/*Martinez* argument as to this claim (*see* § 2.C., *supra*; Dkt. 325 at 9-13), he again asserts that the Court’s previous COA on the merits of ¶ 100(q) means that this claim is substantial under *Martinez*. As already noted, however, substantiality is only the first prong of *Martinez*, and argument as to that prong does not constitute argument as to the second *Martinez* prong.

(*Id.* at 33-79.) According to Petitioner, he did not present all of the available evidence at the time the Court was considering his *Martinez* arguments, and he asserts that the additional evidence—which he has now presented—requires an evidentiary hearing to determine whether the claims in ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv) are fundamentally altered. (*See* Attachments to Dkt. 336 & 362.)

In deciding this issue, it is important to distinguish between the iterations of ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv) *as set forth in the Second Amended Petition*—which were not defaulted and which were denied on the merits in state court and in this Court—and the potentially fundamentally-altered claims in ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv) *as supplemented with the additional evidence submitted on remand*. If the supplemented claims are fundamentally altered, they are “new” claims that have not been properly exhausted and are, therefore, procedurally defaulted. This raises the question of whether the Court can consider Petitioner’s additional evidence at all.

- i. Petitioner is not entitled to submit additional evidence in support of his Motion for Reconsideration
 - a) *Consideration of the additional evidence would violate the successive petitions bar of 28 U.S.C. § 2244*

Neither party has raised the issue of whether the successive petitions bar, *see* 28 U.S.C. § 2244, applies to the evidence submitted after this Court entered its final judgment—specifically, the evidence Petitioner has submitted with his Motion for Reconsideration. However, because the failure to obtain authorization from the Circuit to proceed with a successive petition is jurisdictional, *Rishor v. Ferguson*, 822 F.3d 482, 490 (9th Cir. 2016), the Court must raise the issue sua sponte. The Court concludes that

consideration of the evidence submitted with Petitioner's Motion for Reconsideration would violate § 2244.

Habeas corpus law is clear that all claims arising from a particular state court judgment must be brought in a single federal habeas corpus petition. Any claims not raised in that petition are barred, unless the petitioner secures authorization from the United States Court of Appeals to file a successive petition. 28 U.S.C. § 2244(a) & (b).

Post-judgment motions cannot be used to avoid the successive petitions bar and bring new claims not previously presented in federal court. In *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005), the Supreme Court determined that a Rule 60(b) motion that seeks to present newly discovered evidence, that seeks to add a new ground for relief, that attacks the resolution of a claim on the merits, or that seeks to vacate the judgment because of a subsequent change in substantive law going to the merits decision is subject to § 2244.

Gonzalez emphasized that a petitioner may use Rule 60(b) when he “merely asserts that a previous ruling which *precluded a merits determination* was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.” 545 U.S. at 532 n.4 (emphasis added). *Gonzalez*, of course, was decided long before *Martinez*, and it did not address the successive petitions bar as it relates to a claim that actually *was decided on the merits*, but later alleged by the petitioner to be fundamentally altered by the supplementation of new evidence submitted post-judgment.

After *Martinez* was decided, the United States Court of Appeals for the Ninth Circuit issued several opinions clarifying whether petitioners could bring post-judgment motions to reconsider or consider anew procedurally defaulted claims subject to *Martinez*, without running afoul of § 2244. In *Jones v. Ryan*, the Ninth Circuit clarified: “*Gonzalez* firmly stands for the principle that new claims cannot be asserted under the format of a Rule 60(b) motion, and instead Rule 60(b) is properly applied when there is some problem going to the integrity of the court process on the claims that were previously asserted.” 733 F.3d 825, 836 (9th Cir. 2013). In that case, the petitioner was trying to take advantage of *Martinez* to assert, in a Rule 60(b) motion, new claims that had not been included in his federal habeas corpus petition. The Circuit rejected this attempt, explaining as follows:

[T]he rule announced in *Gonzalez*, that a valid Rule 60(b) motion attacks some defect in the integrity of the federal habeas proceedings, must be understood in context generally to mean the integrity of the prior proceeding with regard to the claims *that were actually asserted* in that proceeding. That Jones did not raise in his first habeas proceeding the claims he wants to raise here does not render the adjudication of the claims that he *did* raise suspect.

Id. (emphasis added) (internal quotation marks, citation, and alterations omitted). The court went on to hold that, even if the Rule 60(b) motion were not subject to § 2244, *Martinez* did not constitute an extraordinary circumstance justifying relief from judgment. *Id.* at 840.

In *Lopez v. Ryan*, the Ninth Circuit did not address whether the petitioner’s Rule 60(b) motion was, “in substance,” a successive petition. 678 F.3d 1131, 1139 n.2 (9th

Cir. 2012). Rather, the court held that *Martinez* did not constitute an extraordinary circumstance justifying relief under that rule. The court also declined to address the petitioner's argument that it should expand the *Martinez* exception from post-conviction counsel's failure to *raise* a claim to post-conviction counsel's failure to *develop* the factual basis of a claim that was actually raised. *Id.* at 1137. Instead, the court merely "note[d] tension" between that theory and *Cullen v. Pinholster*,¹³ and then determined that the underlying IAC claim was insubstantial. *Id.* at 1137, 1139.

In *Dickens*, the Ninth Circuit answered the question left open in *Lopez*, but not in the context of a post-judgment motion. In state court, Dickens had presented a conclusory or "naked" *Strickland* claim without sufficient factual support—simply "that sentencing counsel did not effectively evaluate whether Dickens suffered from any medical or mental impairment." 740 F.3d at 1319 (internal quotation marks and alteration omitted). In his federal petition, Dickens "substantially improved" or "fundamentally altered" the "evidentiary posture" of this claim by asserting that his attorney failed to discover that Dickens suffered from Fetal Alcohol Syndrome ("FAS") and organic brain damage. *Id.*

Having asserted only the fundamentally altered claim in his federal petition,

¹³ *Pinholster* also left this question unresolved. *Pinholster* held that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."). 563 U.S. at 181. The Court declined to decide where to draw the line between new claims and claims adjudicated on the merits, but suggested that new evidence brought forward to supplement a claim decided on the merits could "present a new claim." *Id.* at 186 n.10. The Court did not resolve the parties' dispute over whether new evidence rendered a claim unadjudicated (the State's position) or whether new evidence should be deemed mere support for a properly exhausted claim (the petitioner's position). *Id.* at 1402 n.11. After *Martinez*, the positions of the parties on IAC claims are often reversed, with the petitioner arguing that an IAC claim was unadjudicated and the state arguing that the claim was decided on the merits in state court.

Dickens was faced with a motion to dismiss on grounds of procedural default. The federal district court granted the motion to dismiss, and on appeal Dickens asserted that *Martinez* provided him with a new path for his procedurally defaulted claim to be heard. The *Dickens* court concluded that, notwithstanding the fact that the state courts had adjudicated the original, inadequately-raised claim on the merits, Dickens could proceed to a *Martinez* hearing on the claim that Dickens’s trial counsel was ineffective at sentencing for failing to present the FAS and organic brain damage facts, because it was a “fundamentally altered” claim that was significantly different from the claim that had been decided on the merits. *Id.* at 1319. *Dickens* further instructed that § 2254(e)(2) did not bar the federal court from taking new evidence in the *Martinez* hearing. *Id.* at 1321-22. Importantly, Dickens *had* brought his new, fundamentally altered claim in his federal petition—he was *not* attempting to assert fundamentally altered claims for the first time in a post-judgment motion.

This Court has previously addressed how to apply *Martinez* to the issue of fundamentally altered claims in the context of a post-judgment motion under Rule 59(e). In *Row v. Beauclair*, the Court considered “whether *Dickens* permits a petitioner to use a Rule 59(e) motion to raise *Martinez* by creating a procedurally defaulted companion claim[,] based on *Pinholster*-barred supplemental facts[,] from the fully exhausted but inadequately raised claim that was decided on the merits by the state and federal courts.” No. 1:98-cv-00240-BLW, Dkt. 600 at 18-19, 2015 WL 1481416, at *9 (D. Idaho Mar. 31, 2015) (unpublished). The Court held that “Rule 59(e) can be applied without

transgressing 28 U.S.C. § 2244 (the successive petitions bar), with or without a *Martinez* question.” *Id.* at 15; 2015 WL 1481416, at *7.

However, use of Rule 59(e) *does* violate the successive petitions bar if the petitioner attempts to apply the rule beyond its appropriately narrow context. That is, a petitioner may “create a fundamentally altered and procedurally defaulted claim from a merits-decided claim for *Martinez* purposes in a Rule 59(e) motion” without violating the successive petitions bar, but only if “(1) the *significantly different and stronger evidentiary posture of the claim was presented in the habeas corpus petition prior to entry of judgment* (whether as a separate companion claim or as an additional factual basis for a properly-exhausted claim), and (2) the resulting procedurally defaulted claim is actually fundamentally different from the one decided on the merits by the federal district court.” *Id.* at 18; 2015 WL 1481416, at *9 (emphasis added). *See also Rishor*, 822 F.3d at 495 (“In sum, we hold that Rishor’s motion for reconsideration [under Rule 59(e)] properly asked the district court to reconsider the merits of two claims that *were raised in Rishor’s initial habeas petition*. Rishor’s motion for reconsideration was, therefore, part and parcel of his one full opportunity to seek habeas relief and should not be construed as a second or successive habeas petition.”) (emphasis added).

The petitioner in *Row* asserted her fundamentally altered claims prior to the entry of judgment. Thus, consideration of those claims and Row’s new supporting evidence did not violate the successive petitions bar. *Row*, 2015 WL 1481416, at *10 (“Because Row raised the original claims *plus the additional evidence* in her Second Amended Petition

before judgment was entered, the Court concludes that it is appropriate to construe Petitioner’s Second Amended Petition as presenting alternative claims (original and fundamentally altered), to the extent that the procedurally defaulted claim is fundamentally different from the original merits-decided claim.”) (emphasis added)).

Considering *Gonzalez, Jones, Lopez, Dickens, Rishor*, and *Row* together, the Court holds that all of the evidence submitted by Petitioner with his Motion for Reconsideration—to the extent that evidence fundamentally alters (or substantially improves) the claims as they were asserted in state court—is barred by 28 U.S.C. § 2244. A fundamentally altered claim thus presented is a “new” claim. *See Dickens*, 740 F.3d at 1318 (“As an initial matter, we agree with the district court that Dickens failed to exhaust his ‘new’ [i.e., fundamentally altered or substantially improved] IAC claim.”). Therefore, Petitioner’s argument that the additional evidence, presented after this Court’s previous entry of final judgment, fundamentally alters the claims set forth in ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv) would—if accepted—render those claims “new” claims that are subject to the successive petitions bar. That the Court’s previous judgment was vacated and the case remanded for consideration of *Martinez* because the *Martinez* issue was initially raised to the Ninth Circuit in a motion to remand after oral argument—rather than in a post-judgment motion as in *Jones, Lopez, Row* and *Rishor*—makes no discernible difference to this Court.

For the foregoing reasons, the Court concludes that consideration of Petitioner’s additional evidence, submitted in support of the Motion for Reconsideration and after the

previous final judgment was entered, and allowing Petitioner to assert what he contends are fundamentally altered claims, would violate the successive petitions bar. *See* 28 U.S.C. § 2244.

b) Consideration of the additional evidence would exceed the scope of the Ninth Circuit’s limited remand

“[I]n both civil and criminal cases, . . . a district court is limited by [the Circuit’s] remand in situations where the scope of the remand is clear.” *Mendez-Gutierrez v. Gonzales*, 444 F.3d 1168, 1172 (9th Cir. 2006). In remanding this case, the Ninth Circuit granted this Court the authority “to reconsider Creech’s ineffective assistance of counsel claims in light of *Martinez*.” (Dkt. 293 at 1.) As that language reveals, this case is before this Court on a limited remand. It is not a free-for-all. Specifically, there is no language in the Ninth Circuit’s order suggesting that the Court of Appeals empowered this Court to reopen the record and accept additional, post-remand evidence.

The scope of the remand is clear: “The district court should determine whether Creech’s state post-conviction counsel was ineffective and whether any of Creech’s ineffective of assistance of counsel claims *previously found procedurally defaulted* are substantial.”¹⁴ (*Id.* (emphasis added).) The Court did not previously find the sub-claims in ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv) to be procedurally defaulted. Rather, these claims

¹⁴ The remand order also instructed the Court, if it determined that the default of a claim was excused under *Martinez*, to “consider the interplay” between *Martinez* and *Pinholster* in considering whether to grant an evidentiary hearing, and to consider whether “stay-and-abeyance is appropriate for any of Creech’s ineffective assistance claims.” (Dkt. 293 at 1-2.)

were denied on the merits in state court and in this Court. Therefore, consideration of those claims is outside the scope of remand.

Moreover, if the new evidence submitted on remand did fundamentally alter the claims, they would be new claims that the Court also did not previously find to be defaulted. Thus, to conclude either (1) that the Second Amended Petition's iterations of these claims were procedurally defaulted,¹⁵ or (2) that the supplemented claims are now fundamentally altered by the additional evidence, would exceed the limited remand authorized by the Ninth Circuit—regardless of whether that evidence is also barred by § 2244. *See United States v. Broussard*, 611 F.3d 1069, 1073 (9th Cir. 2010) (“Because our remand was limited to [a] single [sentencing] issue, the district judge was powerless to alter the other terms of Broussard’s sentence.”).

The Court acknowledges that, in its January 2016 Order, it did not consider whether Petitioner’s arguments as to his purportedly fundamentally altered claims—the allegedly “new” claims set forth in ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv) based on the additional supporting evidence—would exceed the scope of the Ninth Circuit’s limited remand. However, after reviewing the remand order, the Court has determined that it lacks the authority to reopen the pre-remand record and take new evidence for purposes

¹⁵ As the Court explains in footnote 9, *supra*, Petitioner is also judicially estopped from arguing that the iterations of the claims in ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv), *as set forth in the Second Amended Petition*, are procedurally defaulted because he previously successfully argued to the Court that they were decided on the merits in the Idaho state courts. (*See* Dkt. 157 at 21-22, 25, 27; Dkt. 173 at 13-14.)

of determining whether the newly-supplemented sub-claims in ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv) are fundamentally altered and subject to *Martinez*.

- c) *Petitioner's reasons for failing to bring forth the additional evidence in a timely manner are not extraordinary circumstances justifying reconsideration*

Even if consideration of the evidence presented with Petitioner's Motion for Reconsideration would not violate the successive petitions bar or exceed the limited remand, Petitioner has not established that his stated reasons for failing to submit the additional evidence with his original *Martinez* briefing constitute extraordinary circumstances that warrant reconsideration. *See Jones v. Ryan*, 733 F.3d at 840 (“[T]he Supreme Court's decision in *Martinez* does not constitute such an ‘extraordinary circumstance’ as to warrant reopening of Jones's case under Rule 60(b)(6), even were we to disregard that Jones's assertion of new claims takes him outside of Rule 60(b).”).

In his opening brief in support of the instant Motion, Petitioner claims that he refrained from previously presenting all of his evidence because he subjectively believed he had to offer only a “broad[] preview [of] the evidence . . . ; the detailed presentation, and the factual development that allowed it were—in Mr. Creech's view—to come at the [*Martinez*] hearing itself”—a hearing which, of course, had not been granted. (Dkt. 336-1 at 33.) In other words, Petitioner expected that this Court would grant a *Martinez* hearing based only on what he chose to submit.

The Court is not in the habit of granting motions for reconsideration simply because a litigant did not expect the Court to disagree with that litigant's position. Optimism about one's legal argument is one thing—scrambling for something new and

asking for a do-over once that argument is rejected is another. At the time he was briefing the *Martinez* issue, Petitioner understood—at the very least—that to warrant an evidentiary hearing, he had to show that cause and prejudice under *Martinez* would be established if his allegations were true. *See Clark v. Lewis*, 1 F.3d 814, 820 (9th Cir. 1993) (“An evidentiary hearing is not necessary to allow a petitioner to show cause and prejudice if the court determines as a matter of law that he cannot satisfy the standard.”). The Court’s decision that he did not meet this burden was not clearly erroneous and did not work a manifest injustice.

Petitioner’s belief that the evidence he submitted would be enough to warrant an evidentiary hearing did not carry the day, but that is not an extraordinary circumstance warranting reconsideration. Petitioner made a judgment call as to what to submit to the Court, and he must abide by it. The Court was not required to predict that there was evidence that Petitioner decided to hold back, and Petitioner is not entitled to a second bite at the apple on this issue.¹⁶

Petitioner also claims that he did not previously provide all of his evidence because the Court’s understanding of the second prong of *Martinez*—that it requires a

¹⁶ On remand, the Court allowed Petitioner the opportunity to file a pre-judgment motion for reconsideration, rather than immediately entering a new, post-remand judgment after its January 2016 ruling, because the law regarding the *Martinez* exception is still continuing to develop. The Court envisioned that the parties and the Court could use a motion for reconsideration as a vehicle to apply any subsequent clarifying precedent to the *Martinez* issues in this case, prior to the case proceeding to the Ninth Circuit. Contrary to Petitioner’s implication (Dkt. 336-1 at 36), that opportunity was not intended as a license to submit evidence that could have—and should have—been submitted (at the latest) when the Court was determining the applicability of *Martinez* in the first instance. *See Jones v. Casey’s Gen. Stores*, 551 F. Supp. 2d at 854-55 (stating that a motion for reconsideration is not “a vehicle to identify facts . . . which could have been, but were not, raised or adduced” previously).

showing of prejudice from PCR counsel's performance—was not clear at the time he filed his previous *Martinez* briefing. According to Petitioner, he had a “good-faith disagreement” with the Court as to what *Martinez* required and believed that the “more lenient standard enunciated by the *Detrich* plurality controlled.”¹⁷ (Dkt. 336-1 at 34-35.) In essence, Petitioner contends that his previous understanding of the second *Strickland* prong, though ultimately incorrect, should prompt the Court to consider even more evidence than it already has.

After the parties' original *Martinez* briefing was completed, the Ninth Circuit decided several cases that clarified the second prong of *Martinez* by requiring a showing of *Strickland* prejudice. One of these cases was *Clabourne*, 745 F.3d 362, which held definitively that such a showing is required. Later, *Pizzuto* and *Runnigeagle* reaffirmed that holding. *Pizzuto*, 783 F.3d at 1178; *Runnigeagle*, 825 F.3d at 982. The parties did not have the benefit of these three cases when initially briefing the applicability of *Martinez*. However, Petitioner's reliance on his previous belief as to what he needed to show under the second *Martinez* prong does not excuse his failure to present the additional evidence, because the State explicitly argued in its response brief that *Martinez* required a showing of *Strickland* prejudice as to PCR counsel—a position that this Court, as well as the Ninth Circuit, later adopted. (*See* Dkt. 315 at 32-36.)

¹⁷ The Court notes that *Detrich* was decided on September 3, 2013—after Petitioner filed his opening *Martinez* brief on remand (*see* Dkt. 308), but before he filed his reply brief (*see* Dkt. 318).

Because the State raised the issue, Petitioner knew it was possible that the Court would accept the State's argument and adopt a legal standard requiring a showing of *Strickland* prejudice with respect to *Martinez*'s second prong. Rather than presenting all of the evidence that might establish ineffective assistance of PCR counsel under *the State's* argued standard, Petitioner chose to rely only on (1) *his own* argued standard as to the required showing on the second *Martinez* prong, and (2) the evidence he actually provided. That Petitioner's litigation strategy did not result in the outcome he desired does not constitute an extraordinary circumstance that warrants reconsideration.

Petitioner does not contend that he could not previously have obtained and submitted the additional evidence. This is not a case where the most recent evidence is newly available. Rather, that evidence was simply untapped or withheld from the Court's review by Petitioner—an entirely different circumstance than newly available evidence. *Compare Gray*, 2015 WL 75263, at *2 (stating that the *availability* of new evidence can justify reconsideration) *with Jones v. Casey's Gen. Stores*, 551 F. Supp. 2d at 854-55 (stating that a motion for reconsideration is not “a vehicle to identify facts . . . which *could have been, but were not,*” previously presented) (emphasis added).

Petitioner also raises, in sealed affidavits, a third, “sensitive” potential reason why not all of Petitioner's evidence was presented earlier. (*See* Dkt. 336-1 at 36 n.8 & Att. 58, 59 (sealed).) However, the alleged effect of what those affidavits describe on Petitioner's evidentiary submissions amounts to little more than speculation. Instead of the reason alleged in the affidavits, the most likely reason why additional evidence was not

submitted after remand but before the filing of the Motion for Reconsideration is that—as the Court has explained—the consideration of such evidence would violate the successive petitions bar and exceed the limited remand. Therefore, Petitioner has not established that this third potential reason justifies reconsideration.

- ii. Even considering all of the evidence, including Petitioner’s most recent submissions, the Court concludes that Petitioner has not satisfied the second prong of *Martinez* as to ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv).

Finally, even if the Court were to consider all of Petitioner’s evidentiary submissions—even those submitted with his Motion for Reconsideration—and even if the Court assumes that the additional evidence fundamentally alters the claims in ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv), Petitioner has still not shown a reasonable probability that he suffered prejudice from PCR counsel’s representation. Therefore, *Martinez* does not apply.

This Court and other courts have previously recounted the details of the horrific, deliberate murder of David Jensen—a vulnerable and disabled inmate—and the Court will not repeat them here. Simply put, Petitioner committed one of the most meticulously-planned and carefully-orchestrated murders that the undersigned has seen in thirty years on the bench. (*See* Dkt. 325 at 41 n.11 (“Creech specifically planned Jensen’s murder, to the extent that (1) he made two different deadly weapons, so that (2) other inmates would give the weapons to Jensen, so that (3) Creech could take the weapons away and use them to kill Jensen, so that (4) it would appear that Creech killed Jensen in self-defense.”).) Further, Petitioner continued to beat Jensen even after Jensen was

completely incapacitated and helpless, lying sprawled on the floor with a shattered skull plate.

The Court rejects Petitioner’s distasteful attempt to minimize the brutal nature of his crime. Specifically, Petitioner (1) objects to the use of the word “chilling” in the State’s briefs (which is a quote from the U.S. Supreme Court) to describe his murder of Jensen, and (2) accuses the United States Supreme Court, this Court, and the state courts of improperly relying on uncharged murders to unfairly denigrate him. (Dkt. 362 at 60-61.)

Setting aside any bickering about the adjectives chosen to describe Petitioner’s crime, the Court notes the objective facts that Petitioner has been convicted of four other murders and was in prison for life when he killed Jensen. At the end of the day, Petitioner is a multiple murderer who—as David Jensen tragically discovered—is not deterred from killing by a sentence of life imprisonment.

Considering all of the circumstances and all of the evidence in the record, even the evidence submitted on remand and in support of the instant Motion, the Court concludes Petitioner has not established a reasonable probability that, had his initial PCR counsel performed differently, the post-conviction court would have vacated Petitioner’s death sentence and granted him another resentencing hearing. Therefore, *Martinez* does not apply to excuse the default of the purportedly fundamentally altered claims in ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv).

F. The Court will not reconsider its decision on the scope of the COA.

Petitioner has not shown that the Court's decision on the scope of the COA was clearly erroneous or would work a manifest injustice. He may, of course, request that the Ninth Circuit expand the COA.

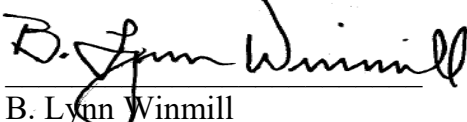
ORDER

IT IS ORDERED:

1. Petitioner's Motion for Leave to File Memorandum in Excess of Fifteen Pages (Dkt. 361) is GRANTED.
2. Petitioner's Motion for Reconsideration (Dkt. 336) is DENIED.
3. The Court does not find its resolution of Petitioner's Motion for Reconsideration to be reasonably debatable—that is, reasonable jurists would agree that Petitioner has not established extraordinary circumstances that would warrant reconsideration. Therefore, an additional certificate of appealability will not issue with respect to the Court's denial of the Motion. See 28 U.S.C. § 2253(c); Rule 11 of the Rules Governing Section 2254 Cases.



DATED: **March 24, 2017**


B. Lynn Winmill
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

THOMAS EUGENE CREECH,
Petitioner,

v.

AL RAMIREZ, Warden,¹
Respondent.

Case No. 1:99-cv-00224-BLW

CAPITAL CASE

**MEMORANDUM DECISION AND
ORDER ON REMAND**

Thomas Eugene Creech, the Petitioner in this federal habeas corpus action, is an Idaho state prisoner under a sentence of death. In 2006, the Court determined that a number of Creech's claims—including various claims of ineffective assistance of trial counsel—were procedurally defaulted and that Creech had not established cause and prejudice to excuse the default. (Dkt. 173, 181.) On March 31, 2010, the Court denied habeas relief on the merits of the remaining claims and entered final judgment.² (Dkt. 279, 280.) Having been granted a certificate of appealability on certain claims, Creech appealed to the Ninth Circuit Court of Appeals.

¹ Respondent Al Ramirez is substituted for his predecessor, John Hardison, as Warden of the Idaho Maximum Security Institution. *See* Fed. R. Civ. P. 25(d).

² On June 9, 2010, the Court denied Creech's motion to alter or amend the judgment, which pertained only to Claim 1. (Dkt. 283.) Claim 1 is not currently at issue.

Shortly after oral argument in the Ninth Circuit, the Supreme Court decided *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which determined for the first time that ineffective assistance of postconviction review counsel (“PCR counsel”) can, under certain circumstances, constitute cause to excuse the default of an underlying claim of ineffective assistance of trial counsel (“IATC”).³ The Ninth Circuit granted Creech’s motion to remand for reconsideration, in light of *Martinez*, of his ineffective assistance of counsel (“IAC”) claims. (Dkt. 293.) The panel instructed this Court to determine whether the *Martinez* exception applies to Creech’s IAC claims that were previously determined to be procedurally defaulted. The parties have addressed the issue in supplemental briefs.

The Court has carefully considered the pleadings, briefs, and record in this case—including the state court record—and has determined that oral argument is unnecessary. *See D. Idaho Loc. Civ. R. 9.2(h)(5)* (“Motions and petitions shall be deemed submitted and shall be determined upon the pleadings, briefs, and record. The court, at its discretion, may order oral argument on any issue or claim.”). Accordingly, the Court enters the following Order concluding that the exception established in *Martinez v. Ryan* does not apply to excuse the default of Creech’s IATC claims.

BACKGROUND

The parties are familiar with the factual and procedural background of Creech’s conviction, as well as all state and federal court proceedings, and the Court has

³ Although the Ninth Circuit has since extended *Martinez* to underlying claims of ineffective assistance of direct appeal counsel, *Nguyen v. Curry*, 736 F.3d 1287, 1293 (9th Cir. 2013), Creech does not argue that the procedural default of any IADAC claim is excused under *Martinez*. (*See* Dkt. 308, 318.)

previously recounted that background in its prior orders. The Court specifically adopts, as if fully incorporated in this Memorandum Decision and Order, the factual description set forth in its March 31, 2010 decision denying habeas relief. (*See* Dkt. 279.) The underlying facts of Creech's crime and the course of the judicial proceedings will be recited here only for context and as necessary to explain the Court's decision.

Creech was serving two Idaho life sentences for murder—having had his previous death sentence vacated—when, on May 13, 1981, he brutally murdered fellow prisoner David Jensen. Jensen was partially disabled; part of his brain had been removed and, as a result, Jensen had a plastic plate in his skull. After an altercation between the two inmates, Creech beat Jensen with a battery-filled sock. After Jensen was incapacitated by this first salvo, completely helpless and with his skull plate shattered, Creech stomped repeatedly on Jensen's neck and head. (*Id.* at 2-3.)

Jensen had been seen as a troublemaker and had previously antagonized Creech, for example, by spilling syrup on a floor that Creech had just cleaned. Initially it could have appeared that Jensen had instigated the altercation, though Creech later admitted that he had planned to kill Jensen. The sentencing court found the following facts, which are presumed correct under 28 U.S.C. § 2254(e)(1):

[T]he murder which occurred on "B" tier in the penitentiary was planned and executed by Tom Creech to kill David Jensen. All the weapons which were used in this murder were made by Tom Creech. Jensen was egged on to attack Creech so the justification of self-defense could be used. Jensen had earlier suffered a head injury resulting in a plastic plate covering part of his skull and limited coordination. Tom Creech referred to him as "spastic."

MEMORANDUM DECISION AND ORDER ON REMAND - 3

Creech was the janitor for “B” tier and the only inmate who could be out simultaneously with another inmate. On May 13th, Jensen was released from his cell for his hour of exercise and shower. Jensen approached Creech holding a weapon made up of batteries in a sock. The sock was later determined to be Creech’s. Words were exchanged and Jensen swung the weapon at Creech. Creech was not in fear of his life; he merely took the weapon and punched Jensen in the face. Jensen retreated.

Creech went to his cell and made a second weapon out of a toothbrush, razor blade, and wire. He took this weapon to a second inmate who in turn gave it to Jensen and urged a second attack. Jensen came out of his cell and again swung at Creech causing slight cuts. Creech went to his own cell and brought out a radio, plugged it in near Jensen’s cell and turned it on loud. Creech went into Jensen’s cell and began beating him with the battery-filled sock.

Creech took breaks during the beating. At one time he believed that he had mortally injured Jensen but yet returned to the cell where Jensen lay helpless and sprawled on the floor[,] and [Creech] proceeded to beat [Jensen] with his hands, kicking him several times in the throat. Ultimately Jensen died on the operating table. The pathologist report determined that David Jensen’s death resulted from the shattering of his skull bone and plate. Thomas Eugene Creech did deliberately and with premeditation kill David Jensen....

(State’s Lodging H-35 at 264-66.)

At the time Creech murdered Jensen, Creech had previously been convicted of four other murders—two in Idaho and two in Oregon. But, as the Supreme Court noted in 1993, Creech “has admitted to killing or participating in the killing of at least 26 people. The bodies of 11 of his victims—who were shot, stabbed, beaten, or strangled to death—

have been recovered in seven States.^[4] Creech has said repeatedly that, unless he is completely isolated from humanity, he likely will continue killing.” *Arave v. Creech*, 507 U.S. 463, 465-66 (1993).

Creech was charged with first-degree murder and represented by Rolf Kehne, an attorney with the Ada County Public Defender’s Office. Creech pleaded guilty to Jensen’s murder—against Kehne’s advice—and was sentenced to death by the judge after a sentencing hearing (“the 1982 sentencing”).⁵ This Court denied relief on Creech’s first federal habeas petition, filed in 1986. On appeal, the Ninth Circuit found several constitutional problems with Creech’s death sentence. Although the United States Supreme Court granted review on one of those issues and ruled in favor of the state, the case was remanded for resentencing because of the other errors identified by the Ninth Circuit. (Dkt. 279 at 4-5.)

The state trial court held a new sentencing hearing in 1995 (“the 1995 resentencing”), at which Creech was represented by Kehne—who was then in private practice—and Kehne’s law partner, John Adams. The witnesses who testified for the defense were Creech’s sister, his brother-in-law, and a mental health expert. These witnesses provided evidence that Creech was “verbally and physically abused,” that

⁴ The true number of Creech’s murder victims will likely never be known. Creech himself stated to the sentencing court on March 27, 1995, that although he had previously confessed to killing 42 people, he did not actually kill that many. (State’s Lodging H-36 at 419.) What remains undisputed after almost 35 years is that Creech has been convicted of 5 murders, has almost certainly committed at least several more, and was serving a life sentence at the time he killed Jensen.

⁵ The trial court initially sentenced Creech to death by written order, but the Idaho Supreme Court remanded for the pronouncement of sentence in Creech’s presence. The judge then read the earlier sentence into the record, with Creech present, without taking new evidence.

Creech suffered a serious head injury as a child as a result of falling down the stairs, that two of Creech's brothers were also incarcerated for homicide, that Creech was a talented artist and poet, that Creech had been calmed by his relationship with his new wife, and that Creech "probably had a genetic or biological predisposition for violence." (*Id.* at 23-24.)

After the resentencing hearing, the judge found five statutory aggravating factors: (1) Creech had been convicted of prior murders; (2) Creech's murder of Jensen exhibited utter disregard for human life; (3) Creech was under a prison sentence for first-degree murder when he killed Jensen; (4) Creech murdered another inmate with specific intent; and (5) Creech exhibited a propensity to commit murder that would likely constitute a continuing threat to society. (*Id.* at 6.) The judge considered various mitigating factors, including that (1) Creech was aging, (2) had completed his GED while serving in the army, (3) had cooperated with law enforcement in the past, (4) was creative, (5) had credited his wife for reduced disciplinary infractions, and (6) might have a biological component making him predisposed to violence. (*Id.*; State's Lodging H-35 at 263-64.)

Having weighed the aggravating and mitigating factors, the judge again imposed the death penalty:

Thomas Eugene Creech murdered David Jensen while they were both inmates at the Idaho State Corrections Institute. The arguments presented at the earlier hearing that it was somehow the prison officials' fault for putting Jensen in the tier with killers; that Creech was angry because Jensen spilled syrup on the floor that Creech had just cleaned; or that Jensen was an obnoxious punk who was going to be hurt by someone on that tier do not come close to justifying this

murder. Tom Creech kills almost on whims with little regard or interest in the consequences. He may “feel bad” at times about some of these murders, but he has no control or chooses not to exercise control over his actions. The protection of society demands that Thomas Eugene Creech receive the Death Penalty.

(State’s Lodging H-35 at 268-69 (emphasis added).) Creech’s sentence was upheld on appeal.

With the assistance of counsel, Creech filed a petition for state postconviction relief. Creech was assigned a new attorney from the Ada County Public Defender’s Office, August Cahill, who amended and supplemented the petition. The petition asserted, among other things, that Creech’s trial counsel rendered ineffective assistance by failing to adequately develop and present evidence of mitigation for purposes of sentencing. (State’s Lodging I-38 at 81-82.)

Cahill requested and was granted numerous continuances. The evidentiary hearing on Petitioner’s postconviction petition was not held until over sixteen months after Cahill’s appointment. Creech’s witnesses at the hearing provided evidence that, among other things, Creech had been sexually abused as a child and Creech’s daughter had been hospitalized several times for mental illness. (Dkt. 279 at 25.) Several witnesses suggested that Creech’s trial attorneys had been ineffective at the 1995 resentencing proceeding, including Kehne and Adams themselves.

After denying Creech’s request to continue the evidentiary hearing to gather more evidence, the state district court denied postconviction relief. (*Id.* at 26; State’s Lodging I-38 at 191-217.) As to Creech’s mitigation-based IAC claims, the court concluded that,

MEMORANDUM DECISION AND ORDER ON REMAND - 7

even assuming the truth of the evidence presented at the postconviction hearing, the court still would have imposed the death penalty, and, therefore, Creech had not established a reasonable probability that he was prejudiced by trial counsel's performance:

Accepting for purposes of this decision the testimony elicited at the post-conviction relief hearing as to what evidence Kehne could have or should have secured to give as many mitigating factors as possible, *this court's firm belief is that the outcome of the sentencing would not have changed.* This court's interest was (1) whether Creech had killed Jensen; (2) was Creech predisposed to take human life and (3) was he incapable of comprehending the outcome of his actions. The childhood history of Creech was incidental to this court; *the possibility of a biological predisposition was listed as a mitigating factor by this court;* and the suggestion that the victim was a punk was also listed. However, *when it is all said and done this court determined that Thomas Eugene Creech was an adult male of at least normal intelligence who was able to comprehend the results of his actions and did with specific intent kill another inmate while imprisoned as a result of an earlier conviction.* The second prong of the ineffective assistance test has not been met.

(State's Lodging I-38 at 209-10 (emphasis added).)

In 1999, Creech filed this habeas petition, which was stayed for a time while he exhausted additional claims in state court. Creech obtained no relief in state court. This case was reopened, and Creech filed a Second Amended Petition asserting 45 claims. (Dkt. 131.) The Second Amended Petition contains over 60 IAC sub-claims. The Court determined that most of those IAC sub-claims, as well as a conflict of interest claim initially asserted in a successive state postconviction petition, were procedurally defaulted. (Dkt. 173 at 13-14, 21.) The Court later concluded that Creech had not shown cause and prejudice to excuse the default of those claims. The governing law with respect

to postconviction counsel's representation was, at that time, set forth in *Coleman v. Thompson*, 501 U.S. 722 (1991). Therefore, ineffective assistance of PCR counsel was not available to Creech as potential cause to excuse the default of his IATC and conflict of interest claims.

Because *Martinez v. Ryan* has established an equitable exception to the *Coleman* rule that applies, under certain circumstances, to IAC and conflict of interest claims, the Court now considers whether some of Creech's habeas claims may be excused from procedural default pursuant to that exception.

DISCUSSION

1. Summary of IATC Claims at Issue

Creech initially asserts that eighteen of his IATC sub-claims should be heard (or re-heard) on the merits based on the *Martinez* exception. (Pet. Suppl. Op. Brief re: *Martinez*, Dkt. 308, at 3, identifying Claim 4, ¶¶ 99(h) & (j); Claim 4, ¶¶ 100(a), (b), (d), (e), (g), (h), (i), (j), (m), (o)(i), (o)(ii), (o)(iii), (o)(iv), (o)(v) & (q); and Claim 30 as subject to *Martinez*.) However, Creech's Supplemental Opening Brief provides specific argument on only six sub-claims: those set forth in ¶¶ 100(a), (b), (d), (j), (o)(iii), and (o)(iv) of Claim 4.⁶

⁶ Unfortunately, aside from the bare identification of the claims that Creech contends are subject to *Martinez* (see Dkt. 308 at 3), Creech's briefing does not identify by number the particular IATC claims that he specifically addresses and supports with argument. The Court was thus required to comb through Creech's supplemental briefs numerous times at length and compare them with his Second Amended Petition, to determine which claims Creech had actually placed at issue on remand.

A. *Claims Specifically Supported with Argument in Creech's Martinez Briefing*

One of the IAC sub-claims that Creech squarely puts at issue in his *Martinez* briefing was previously determined by this Court to be procedurally defaulted:

Claim 4, ¶ 100(a): Failure to prepare, develop, and present a coherent sentencing strategy.

(Dkt. 308; *see also* Dkt. 131 at 24.)

The other five claims that Creech supports with specific argument regarding *Martinez* were denied on the merits by the Idaho Supreme Court and by this Court. Creech asserts that these claims—all of which are mitigation-based IAC claims—were adjudicated on an inadequate record due to PCR counsel's ineffectiveness and, therefore, should be re-heard on the merits on an expanded record pursuant to the *Martinez* exception:

Claim 4, ¶ 100(b): Failure to conduct an adequate and independent investigation of matters in mitigation, including but not limited to family interviews presenting significant genetic history of mental illness, that Creech was raised by a mentally ill parent, history of serious head injuries, institutionalization, and Creech's prior psychotic experiences.

Claim 4, ¶ 100(d): Failure to timely retain qualified mental health experts to address the issues of mental health clearly apparent in Creech's case, including organic brain damage, psychosis or mental impairment, which allegedly rendered Creech unable to make rational decisions and impaired his judgment and ability to respond rationally to perceived circumstances and conform his conduct to requirements of law.

- Claim 4, ¶ 100(j): Failure to retain qualified mental health experts to investigate and assist in the investigation and development of mitigation evidence to include mental health issues, including the extent and effect of known and unknown head injuries.
- Claim 4, ¶ 100(o)(iii): Failure to present relevant mitigating evidence with respect to Creech's daughter, whose mental condition would support claims of organic causes for the aggressive behavior identified in Creech.
- Claim 4, ¶ 100(o)(iv): Failure to present relevant mitigating evidence with respect to Creech's mother, who suffered from crippling mental illness and whose mental illness impaired her ability to adequately parent, and with whom Creech was especially close while growing up.

(Dkt. 308; see also Dkt. 131 at 24-27; Dkt. 279.)

B. Claims with Forfeited or Waived Martinez Arguments

The remaining sub-claims that Creech nominally asserts are subject to *Martinez* are not addressed in any specific way in Creech's supplemental briefing. These include the following claims of ineffective assistance of trial counsel with respect to the guilt phase:

- Claim 4, ¶ 99(h): Failure to investigate and present evidence of the assaultive history of acts by the victim, which would have corroborated Creech's belief that he acted in self-defense; and
- Claim 4, ¶ 99(j): Failure to secure adequate testing concerning the brain damage that could have affected Creech's ability to control his behavior and thus undermines the finding of Creech's guilty plea and raise issues of mitigation.

(Dkt. 308; *see also* Dkt. 131 at 23-24.)

The IATC claims that Creech fails to support with specific argument and evidence also include the following claims of ineffective assistance during the 1995 resentencing proceedings:

Claim 4, ¶ 100(e):	Failure to investigate and present defenses and mitigating circumstances surrounding uncharged criminal activity presented at sentencing, including propensity to confess to homicides and offenses not committed by Creech;
Claim 4, ¶ 100(g):	Failure to investigate, develop and present evidence rebutting aggravating evidence considered by the trial court, including evidence regarding Mr. Creech's standing within the prison community;
Claim 4, ¶ 100(h):	Waiver of Creech's right to Fourth, Fifth, Sixth and Fourteenth Amendment protection and evidentiary privileges for "all past and future" psychological testing and interviews, effectively permitting evidence, advice, consultation and privileged information to be used in aggravation;
Claim 4, ¶ 100(i):	Failure to investigate and present evidence in mitigation regarding cultural behavior patterns relating to Creech's childhood and incarceration;
Claim 4, ¶ 100(m):	Failure to research Eighth Amendment jurisprudence as it applies to the preparation and presentation of evidence in mitigation;
Claim 4, ¶ 100(o)(i):	Failure to present relevant mitigating evidence with respect to an incident where Creech saved the life of another person;
Claim 4, ¶ 100(o)(ii):	Failure to present relevant mitigating evidence with respect to Creech's attempt to get help for Jensen;
Claim 4, ¶ 100(o)(v):	Failure to present relevant mitigating evidence with respect to participation, facilitation, solicitation by, and

consent to the offense or circumstances which led to the Jensen's death, by Department of Correction employees, as well as by other inmates, including but not limited to Walter Balla and David Jensen himself; and

Claim 4, ¶ 100(q): Failure to present sufficiently developed and supported evidence of mental health issues, including personality disorder diagnoses not accepted in the scientific or medical community and appropriate only in aggravation, not mitigation of sentence.

(Pet. Suppl. Op. Brief re: *Martinez*, Dkt. 308; Sec. Am. Pet., Dkt. 131.)

Finally, Creech does not provide any specific *Martinez* argument with respect to Claim 30, which asserts that his trial counsel labored under a conflict of interest.⁷ (Pet. Suppl. Op. Brief re: *Martinez*, Dkt. 308; Sec. Am. Pet., Dkt. 131.)

Because Creech offers no particular argument or evidentiary support for these twelve claims—eleven traditional IATC claims and one conflict of interest claim—the Court finds that Creech's *Martinez* arguments regarding these claims have been either forfeited or voluntarily waived.⁸ See *Fields v. Blades*, Case No. 1:95-cv-00422-BLW (Dkt. 318), 2015 WL 1481397, at *12 (March 31, 2015) (footnote omitted) (unpublished) (“[T]he only IATC sub-claims that Petitioner specifically supports with argument regarding *Martinez* are [eleven specific claims]. Therefore, the Court will address only

⁷ The Ninth Circuit has held that *Martinez* can apply not only to traditional, *Strickland*-type IAC claims, but also to claims, based on *Cuyler v. Sullivan*, 446 U.S. 335 (1980), that counsel labored under a conflict of interest. See *Pizzuto v. Ramirez*, 783 F.3d 1171, 1178 (9th Cir. 2015).

⁸ Consideration of the merits of Claim 4, ¶¶ 99(h) and (j) is barred for the additional reason that those sub-claims are subject to the successive petitions bar. See 28 U.S.C. § 2244(b). As the Court previously determined, Petitioner is barred from asserting any guilt phase claims in this habeas matter, because he had a full and fair opportunity to challenge the validity of his conviction in his first habeas corpus action. (Dkt. 279 at 10-13; see also *Creech v. Arave*, Case No. CV-86-1042-HLR.)

those eleven IATC claims.”); *FDIC v. Garner*, 126 F.3d 1138, 1145 (9th Cir. 1997) (“Appellants present no case law or argument in support of this claim. Accordingly, we deem the argument waived.”); *see also United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (9th Cir. 1997) (distinguishing between the concepts of forfeiture and waiver).

Thus, the only claims currently at issue with respect to the *Martinez* exception are the following: subparagraphs 100(a), 100(b), 100(d), 100(j), 100(o)(iii), and 100(o)(iv) of Claim 4.

2. Standard of Law for Procedural Default and Cause and Prejudice under *Martinez v. Ryan*

A habeas petitioner must exhaust his or her remedies in the state courts before a federal court can grant relief on constitutional claims. *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). To do so, the petitioner must invoke “one complete round of the State’s established appellate review process,” fairly presenting all constitutional claims to the state courts so that they have a full and fair opportunity to correct alleged constitutional errors at each level of appellate review. *Id.* at 845.

When a habeas petitioner has not fairly presented a constitutional claim to the highest state court, and it is clear that the state court would now refuse to consider it because of the state’s procedural rules, the claim is said to be procedurally defaulted. *Gray v. Netherland*, 518 U.S. 152, 161-62 (1996). If a petitioner’s claim is procedurally defaulted, a federal district court generally cannot hear the merits of the claim. However, if a petitioner shows adequate legal cause for the default and prejudice arising from the

default, the federal court may address the claim on the merits. *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

To show “cause” for a procedural default, a petitioner must ordinarily demonstrate that some objective factor external to the defense impeded his or his counsel’s efforts to comply with the state procedural rule at issue. *Id.* To show “prejudice,” a petitioner generally bears “the burden of showing, not merely that the errors [in his proceeding] constituted a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire [proceeding] with errors of constitutional dimension.” *United States v. Frady*, 456 U.S. 152, 170 (1982).

A petitioner does not have a federal constitutional right to the effective assistance of counsel during state postconviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 554 (1987); *Bonin v. Vasquez*, 999 F.2d 425, 430 (9th Cir. 1993). As a result, the general rule is that any errors of counsel during a postconviction action cannot serve as a basis for cause to excuse a procedural default. *Coleman*, 501 U.S. at 752.

Martinez v. Ryan worked a “remarkable” change in the law governing procedurally defaulted IAC claims. *Lopez v Ryan*, 678 F.3d 1131, 1136 (9th Cir. 2012). *Martinez* altered the long-standing rule that postconviction counsel’s ineffectiveness could not be used to excuse the procedural default of a habeas claim. In effect, *Martinez* created the potential for an exception to the overall ban on new evidence in § 2254 actions that was pronounced in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011) (interpreting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)). *Martinez* makes it

possible for procedurally defaulted ineffective assistance of trial counsel claims to be heard de novo, with new supporting evidence, on federal habeas corpus review. *See Dickens v. Ryan*, 740 F.3d 1302, 1320 (9th Cir. 2014) (en banc) (“We reject any argument that *Pinholster* bars the federal district court’s ability to consider Dickens’s ‘new’ IAC claim. . . . *Pinholster* says nothing about whether a court may consider a ‘new’ claim, based on ‘new’ evidence not previously presented to the state courts.”). The *Martinez* exception applies only to claims that are both exhausted and procedurally defaulted.

In *Trevino v. Thaler*, the Supreme Court described and clarified the *Martinez* cause and prejudice test as consisting of four necessary prongs: (1) the underlying claim of ineffective assistance of counsel must be a “substantial” claim; (2) the “cause” for the procedural default consists of there being “no counsel” or only “ineffective” counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the “initial” collateral review proceeding where the IAC claim could have been brought; and (4) state law requires that an IAC claim be raised in an initial-review collateral proceeding rather than on direct appeal, or by “design and operation” such claims must be raised that way. 133 S. Ct. 1911, 1918, 1921 (2013).

The failure to meet any one of these four prongs means that the *Martinez* exception is unavailable to excuse the procedural default of the underlying IAC claim. *See Martinez*, 132 S. Ct. at 1319.

A. First Prong of Martinez: Substantiality of Underlying IAC Claim

Under the first prong of a *Martinez* analysis, a petitioner must bring forward facts demonstrating that his IAC claim is substantial. The United States Supreme Court has defined “substantial” as a claim that “has some merit.” *Martinez*, 132 S. Ct. at 1318 (comparing the standard for certificates of appealability from *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). Stated inversely, a claim is “insubstantial” if “it does not have any merit or . . . is wholly without factual support.” *Id.* at 1319.

Determining whether an IAC claim is substantial requires a federal court to examine the claim under *Strickland v. Washington*, 466 U.S. 668 (1984). A petitioner asserting ineffective assistance of counsel under *Strickland* must show that (1) “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment,” and (2) counsel’s errors “deprive[d] the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687.

Under the first *Strickland* prong, whether an attorney’s performance was deficient is judged against an objective standard of reasonableness. *Id.* at 687-88. A reviewing court’s inquiry into the reasonableness of counsel’s actions must not rely on hindsight:

Judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct

from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id. at 689 (internal citations and quotation marks omitted).

Strategic decisions, such as the choice of a defense or which witnesses or other evidence to present, "are virtually unchallengeable" if "made after thorough investigation of law and facts relevant to plausible options." *Id.* at 690. Moreover, an attorney who decides not to investigate a particular theory or issue in the case is not ineffective so long as the decision to forego investigation is itself objectively reasonable. *Id.* at 690-91.

If a petitioner shows that counsel's performance was deficient, the next step in the *Strickland* inquiry is the prejudice analysis. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. To satisfy the prejudice standard, a petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is defined as a "probability sufficient to undermine confidence in the outcome." *Id.*

These standards from *Strickland* for determining deficient performance and prejudice are, of course, the standards for an eventual review of the merits of the

underlying IAC claim. The first *Martinez* prong is not the same as a merits review, but, as the *Martinez* Court explained, it is more akin to a preliminary review of a *Strickland* claim for purposes of determining whether a certificate of appealability should issue. *Martinez*, 132 S. Ct. at 1318-19 (comparing *Miller-El*, 537 U.S. 322). Under this standard, a court may conclude that a claim is substantial when a petitioner has shown that resolution of the merits of the *Strickland* claim would be “debatable among jurists of reason,” or that the issues presented are “adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 336.

B. Second Prong of Martinez: Ineffective Assistance of PCR Counsel

Second, to be entitled to application of the *Martinez* exception, a petitioner must demonstrate that he had no counsel on initial postconviction review, or that PCR counsel was “ineffective under the standards of *Strickland*,” which includes showing both deficient performance and a reasonable probability of prejudice caused by that performance. *Martinez*, 132 S. Ct. at 1318; *Strickland*, 466 U.S. at 694, 700.

i. Deficient Performance of PCR Counsel

Not just any error or omission of PCR counsel will be deemed “deficient performance” that will satisfy *Martinez*. If the PCR “attorney in the initial-review collateral proceeding did not perform below constitutional standards,” the PCR attorney’s performance does not constitute “cause.” *Martinez*, 132 S. Ct. at 1319. The *Strickland* standards for analyzing deficient performance set forth above apply with equal force to PCR counsel in the context of a *Martinez* argument. Importantly, PCR counsel “is not necessarily ineffective for failing to raise even a nonfrivolous claim.” *Sexton v. Cozner*,

679 F.3d 1150, 1157 (9th Cir. 2012). If PCR counsel’s performance was deficient, then the court must consider whether that performance was prejudicial under *Strickland*. *Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014) (petition for reh’g and reh’g en banc pending), *called into question on other grounds by McKinney v. Ryan*, ___ F.3d ___, 2015 WL 9466506 (9th Cir. Dec. 29, 2015) (en banc).

ii. Prejudice from PCR Counsel’s Performance

As to prejudice, the petitioner must show a reasonable probability that, had PCR counsel not performed deficiently, the result of the postconviction proceedings would have been different. *Id.* (cumulating and discussing all opinions from *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013)). This prejudice determination “is necessarily connected to the strength of the [underlying] argument that trial counsel’s assistance was ineffective.” *Id.*

Therefore, even if Creech were to show, under the first *Martinez* prong, that his IATC claims are substantial, he must still show, under the second *Martinez* prong, that postconviction counsel rendered deficient performance *and* that, “but for post-conviction counsel’s failure to raise [the substantial IAC] claims, there is a reasonable probability that the result of the post-conviction proceeding would have been different.” *Id.* at 378. These two inquiries will, at times, collapse into one. *Id.* at 382 (“Under the circumstances of this case, if [the petitioner] succeeds in demonstrating that he was prejudiced by the failure of his post-conviction counsel, he will necessarily have established that there is at least ‘some merit’ to his claim that he suffered ineffective assistance of trial counsel at resentencing.”). The Court may address either inquiry first, and the resolution of one

prong may obviate the need to address the other. *Martinez*, 132 S. Ct. at 1319 (“When faced with the question whether there is cause for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial, *i.e.*, it does not have any merit or that it is wholly without factual support, or that the attorney in the initial-review collateral proceeding did not perform below constitutional standards.”).

C. *Third Prong of Martinez: Initial State Collateral Review Proceeding*

The third prong of the *Martinez* test is that the state collateral review proceeding in which the underlying IAC claim was defaulted must have been the first post-conviction review proceeding where the IAC claim could have been raised. *Trevino*, 133 S. Ct. at 1918. In other words, the post-conviction proceeding must have been “the equivalent of a prisoner’s direct appeal” for the IAC claim. *Martinez*, 132 S. Ct. at 1317. A petitioner may not use as cause attorney error that occurred in “appeals from initial-review collateral proceedings, second or successive collateral proceedings, [or] petitions for discretionary review in a State’s appellate courts.” *Id.* at 1320.

D. *Fourth Prong of Martinez: State Law Treatment of IAC Claims*

The fourth prong of the *Martinez* test is that state law must require (by law or by reason of design and operation) that an ineffective assistance of trial counsel or appellate counsel claim be raised in an initial-review collateral proceeding. *Trevino*, 133 S. Ct. at 1918, 1921. The parties do not dispute that, in Idaho, IAC claims must generally be raised in a postconviction petition rather than on direct appeal.

3. *Martinez* Analysis of the IATC Sub-Claims presented in Claim 4, ¶¶ 100(a), (b), (d), (j), (o)(iii), and (o)(iv) of the Second Amended Petition

Creech argues that some of his procedurally-defaulted ineffective assistance of counsel claims may properly be heard (or reheard with additional evidence) on the merits pursuant to *Martinez v. Ryan*. If necessary, a court should hold an evidentiary hearing to determine the applicability of the *Martinez* exception. See *Detrich*, 740 F.3d at 1246-47 (plurality). However, “[a]n evidentiary hearing is not necessary to allow a petitioner to show cause and prejudice if the court determines as a matter of law that he cannot satisfy the standard.” *Clark v. Lewis*, 1 F.3d 814, 820 (9th Cir. 1993).

As explained below, Creech cannot, as a matter of law, satisfy the *Martinez* standard for cause and prejudice as to Claim 4, ¶ 100(a). Further, the Court determines that *Martinez* does not apply to Claim 4, ¶¶ 100(b), (d), (j), (o)(iii), or (o)(iv), because those claims are not fundamentally altered from the claims decided on the merits by the Idaho Supreme Court and, therefore, are not procedurally defaulted. For these reasons, the Court will deny Creech’s request for an evidentiary hearing on the *Martinez* issue.

A. *Claim 4, ¶ 100(a): The IATC Claim That this Court Determined to Be Procedurally Defaulted and Did Not Consider on the Merits*

In Claim 4, ¶ 100(a), Creech asserts that trial counsel failed to prepare, develop, and present a coherent strategy. As described in Creech’s Supplemental Opening Brief, trial counsel allegedly “did not pursue a sentencing presentation based upon reasoned strategic judgment,” but, instead, “pursued a course that was based on inattention to the evidence in his possession.” (Dkt. 308 at 10.) Creech claims that (1) trial counsel “failed

to bring professional skill and knowledge to the proceedings, resulting in the absence of a reliable adversarial proceeding,” and (2) trial counsel’s sentencing “was a disjointed presentation of random reminiscences and unsupported psychological theories.” (*Id.*) The Court previously determined that this claim was procedurally defaulted.

It is important to note the difference between the claim in ¶ 100(a), which attacks trial counsel’s *strategy* in presenting mitigating evidence, and the claims in ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv), which attack counsel’s failure to adequately investigate and present mitigating evidence. The former claim challenges the way in which counsel presented the mitigating evidence that they offered at resentencing, while the latter claims challenge the failure to gather different or additional mitigating evidence to present at resentencing.

At issue with respect to Claim 4, ¶ 100(a) are the first two prongs of the *Martinez* cause-and-prejudice test: (1) whether this sentencing-strategy IATC claim is substantial; and (2) whether Creech’s PCR counsel rendered ineffective assistance in failing to raise this claim.

After carefully considering the entire record, the Court concludes that Creech has not satisfied the second prong of *Martinez* with respect to his sentencing-strategy IATC claim. PCR counsel did not perform deficiently by pursuing other IAC claims instead of ¶ 100(a), and—even if PCR counsel was deficient—Creech cannot establish a reasonable probability that he was prejudiced by PCR counsel’s failure to pursue this claim.

Therefore, Creech's PCR counsel did not render ineffective assistance by failing to pursue Claim 4, ¶ 100(a).

i. Standard of law used in evaluating PCR counsel's performance under *Martinez*

The parties disagree over the standard to be applied in evaluating PCR counsel's effectiveness for purposes of a *Martinez* analysis. Precisely how to determine whether PCR counsel's performance was deficient is an open question, but it is informed by the standards applicable in evaluating attorney performance in the context of claims of ineffective assistance of trial and direct appeal counsel.

As to the deficient performance prong of the *Strickland* test for PCR counsel, the state argues that the Court should use the same standard that courts apply when considering claims of ineffective assistance of direct appeal counsel ("IADAC"). (Dkt. 315 at 35-36.) In *Jones v. Barnes*, the Supreme Court held that direct appeal counsel need not "press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." 463 U.S. 745, 751 (1983). The Court recognized that "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Id.* at 751-52. It is generally very difficult for a petitioner to prevail on an IADAC claim because the review of direct appeal counsel's performance is extremely deferential.

The application of a similar standard in the context of PCR counsel's performance is supported by the Ninth Circuit's statement in *Sexton* that PCR counsel "is not

necessarily ineffective for failing to raise even a nonfrivolous claim.” 679 F.3d at 1152.

Because PCR counsel, like direct appeal counsel, must make tactical decisions as to which errors to challenge, the state contends that it should be just as difficult to establish the deficient performance prong with respect to a claim of ineffective assistance of PCR counsel as it is to do so with respect to a claim of deficient performance of direct appeal counsel.

Creech contends, on the other hand, that the standard applicable to the question of deficient performance of PCR counsel should be less stringent than that applied to IADAC claims because “collateral counsel does not function in the same manner as appellate counsel.” (Dkt. 318 at 6.) PCR counsel must function as an investigator and seek out facts to support the petitioner’s postconviction claims, rather than relying only on the trial record as direct appeal counsel does. In this respect, PCR counsel is in a similar position to trial counsel, who must independently investigate the facts and develop a defense strategy. Creech thus appears to contend that the Court should evaluate PCR counsel’s performance by the same standards as the performance of trial counsel in an IATC claim.

Both parties make salient points. Because PCR counsel’s role is to expand the record through investigation rather than rely solely on the existing trial record, the standard applicable to PCR counsel’s performance should be easier for a petitioner to satisfy than the standard applicable to direct appeal counsel’s performance. However, because PCR counsel takes on a case after it has already become final and must make

reasoned judgments about which claims of trial error have a greater degree of potential success on postconviction review, PCR counsel should also not be judged against exactly the same deficient-performance standard as trial counsel. Therefore, the Court has determined that, in undertaking the *Strickland* analysis when evaluating PCR counsel's performance under *Martinez*, a federal court's review must be *more* deferential than that afforded trial counsel, but *less* deferential than that afforded direct appeal counsel.

Ultimately, the Court need not define this standard more precisely. The Court concludes as a matter of law that, under any attorney performance standard, PCR counsel acted reasonably in choosing not to pursue Claim 4, ¶ 100(a) in Creech's initial-review postconviction proceedings. Further, even if the Court were to assume that PCR counsel performed deficiently in failing to pursue ¶ 100(a), Creech cannot demonstrate a reasonable probability that he was prejudiced by PCR counsel's performance.⁹

⁹ Creech's briefing, filed before the Ninth Circuit decided *Clabourne*, focuses primarily on the first prong of *Martinez* (substantiality) and the deficient performance aspect of the second *Martinez* prong, largely to the exclusion of the question whether PCR counsel's representation during the initial review collateral proceeding resulted in prejudice. Creech acknowledges this and contends that, "[u]nder *Martinez*, prejudice at the collateral proceeding, at the most, requires only a showing of a defaulted claim of substantial trial IAC." (Dkt. 318 at 7.)

As the circuit has clarified, however, that is an incorrect statement of law. To invoke *Martinez*, a petitioner must establish *both* substantiality of the underlying IATC claim *and* ineffective assistance of PCR counsel, which includes *Strickland* prejudice. *Clabourne*, 745 F.3d at 376-77. Indeed, the Supreme Court was careful to state that the *Martinez* exception requires the petitioner to show that PCR counsel was "ineffective *under the standards of Strickland*." *Martinez*, 132 S. Ct. at 1318. Although Creech states that his interpretation of the PCR prejudice prong is based on the confluence of the different opinions in *Detrich v. Ryan*, this proposed synthesis of the *Detrich* opinions is erroneous, as *Clabourne* later concluded. Neither party requested leave to supplement his *Martinez* briefing after *Clabourne* was decided.

- ii. Creech has not demonstrated that his PCR counsel performed deficiently in pursuing other, mitigation-based sentencing IAC claims instead of Claim 4, ¶ 100(a), nor has Creech established a reasonable probability that the failure to present ¶ 100(a) to the PCR court resulted in *Strickland* prejudice

Again, the *Martinez* exception applies to a substantial IAC claim if (1) PCR counsel provided deficient performance, and (2) there is a reasonable probability that, had PCR counsel performed adequately, the outcome of the postconviction proceeding would have been different—*i.e.*, Creech’s death sentence would have been vacated and he would have been granted another resentencing hearing. *See Clabourne*, 745 F.3d at 376-77; *Strickland*, 466 U.S. at 694.

Claim 4, subparagraph 100(a) asserts that Creech’s counsel’s strategy at the 1995 resentencing was “based on inattention to the evidence in his possession.” (Dkt. 308 at 10.) Creech argues that trial counsel should have presented the mitigating evidence in the defense’s possession in a coherent manner, rather than as “a disjointed presentation of random reminiscences and unsupported psychological theories.” (*Id.*)

However, generally speaking, “only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). Subparagraph 100(a) challenges a strategic decision of counsel as to how to present mitigating evidence. For this claim to succeed, Creech would have to show that, even though counsel *presented* certain mitigating evidence, counsel did so in a deficient manner. As *Strickland* instructs, it is extremely difficult to make out an IAC claim challenging a tactical or strategic decision on how best to pursue a defense.

MEMORANDUM DECISION AND ORDER ON REMAND - 27

Strickland, 466 U.S. 690-91. Indeed, the claims identified in ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv)—which challenge the failure of counsel to adequately investigate and present certain mitigating evidence in the first place—were stronger and had a better chance of success in state court than the claim that trial counsel’s sentencing strategy was not coherent and was based on inattention to mitigation evidence in the defense’s possession. It is unsurprising that PCR counsel chose to pursue those claims rather than the weaker claim set forth in ¶ 100(a).

Consideration of the standards applicable to the performance of trial and direct appeal counsel leads the Court to conclude that Creech’s PCR counsel’s choice of which sentencing IAC claims to assert and which to abandon, like a choice of which defense to present at trial or which issues to raise on appeal, was well within the bounds of reasonable professional judgment. *See Jones*, 463 U.S. at 752-53 (“There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. . . . A brief that raises every colorable issue runs the risk of burying good arguments”); *Correll v. Stewart*, 137 F.3d 1404, 1411 (9th Cir. 1998) (holding that counsel’s failure to develop a mens rea defense was reasonable because such a defense “would have conflicted with the primary defense theory of misidentification”); *Turk v. White*, 116 F.3d, 1264, 1267 (9th Cir. 1997) (counsel’s selection of self-defense theory was reasonable and obviated his need to investigate defendant’s claim of incompetency). PCR counsel’s decision to focus on the failure-to-investigate-and-present claims set forth in ¶¶ 100(b), (d), (j), (o)(iii), and

(o)(iv), rather than raise a *Strickland* challenge to the tactical way in which counsel chose to present evidence at the 1995 resentencing as set forth in ¶ 100(a), did not constitute deficient performance.

Moreover, the Court need not rest its *Martinez* decision on PCR counsel's performance alone, because Creech has shown no prejudice. As already noted, Claim 4, ¶ 100(a)—which asserts that Creech's counsel failed “to prepare, develop, and present a coherent sentencing strategy”—is not a challenge to the type of mitigation evidence that counsel presented, or failed to present, at the 1995 resentencing hearing. (Dkt. 131 at 24.) Instead, it is a challenge to the *manner* in which counsel presented mitigating evidence, a much weaker claim. Therefore, under *Strickland*, Creech's PCR counsel “remain[ed] above an objective standard of competence (prong one) and . . . caused [Creech] no prejudice (prong two) for the same reason—because [PCR counsel] declined to raise a weak issue.” *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989). Even assuming that Creech's PCR counsel performed deficiently in failing to pursue Claim 4, ¶ 100(a), Creech has not demonstrated a reasonable probability that, had PCR counsel pursued a claim challenging trial's strategic decision on how to present mitigating evidence at sentencing, Creech would have succeeded in the initial postconviction proceeding and would have received another resentencing hearing.

Therefore, because Creech has not satisfied either *Strickland* prong with respect to his PCR's counsel's failure to fairly present Claim 4, subparagraph 100(a) to the state courts, Creech has not satisfied the second prong of *Martinez*.¹⁰

B. Claim 4, ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv): IATC Sub-Claims That the State Courts (and this Court) Adjudicated on the Merits

Subparagraphs 100(b), (d), (j), (o)(iii), and (o)(iv) of Claim 4 assert that trial counsel failed to adequately investigate and present mitigation evidence at sentencing with respect to family mental health issues (particularly Creech's mother's and daughter's mental illnesses), serious head injuries, organic brain damage, psychosis, and mental impairment. (Dkt. 131 at 24-27.) The state courts considered similar claims on the merits. Therefore, because the *Martinez* exception does not apply to IAC claims that were adjudicated on the merits in state court, the Court must now determine whether Claim 4, ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv) are the same claims as those previously decided by the Idaho state courts.

In *Dickens v. Ryan*, the Ninth Circuit held that *Martinez* can apply not only to IAC claims never adjudicated in state court, but also to IAC claims that *were* adjudicated on the merits, but were adjudicated on an inadequate record as a result of PCR counsel's ineffectiveness. 740 F.3d at 1319-20. In state court, Dickens had presented a conclusory or "naked" *Strickland* claim without sufficient factual support—the claim asserted only that "sentencing counsel did not effectively evaluate whether Dickens suffered from any

¹⁰ For this reason, the Court need not address whether Claim 4, ¶ 100(a) is substantial under the first prong of *Martinez*.

medical or mental impairment.” *Id.* at 1319 (internal quotation marks and alteration omitted). In his federal petition, Dickens “substantially improved” the “evidentiary posture” of this claim by asserting that his attorney failed to discover that Dickens suffered from Fetal Alcohol Syndrome (FAS) and organic brain damage. *Id.*

Having asserted only the fundamentally-altered claim in his federal petition, Dickens was faced with a motion to dismiss on grounds of procedural default. The federal district court granted the motion to dismiss, and on appeal Dickens asserted that *Martinez* provided him with a new path for his procedurally defaulted claim to be heard. The *Dickens* court concluded that, notwithstanding the fact that the Arizona courts had adjudicated the original, inadequately-raised claim on the merits, Dickens could proceed to a *Martinez* hearing on the claim that Dickens’s trial counsel was ineffective at sentencing for failing to raise the FAS and organic brain damage facts as a defense, because it was a “fundamentally altered” claim that was different from the claim that had been decided on the merits. *Id.* at 1319-20. *Dickens* further instructed that § 2254(e)(2) did not bar the federal court from hearing new evidence in a *Martinez* hearing. *Id.* at 1321-22.

Pursuant to *Dickens*, this Court may consider whether *Martinez* applies to Claim 4, subparagraphs 100(b), (d), (j), (o)(iii), and (o)(iv)—claims that Creech’s trial counsel failed to adequately investigate and present mitigation evidence at sentencing with respect to family mental health issues (in particular the mental illness of Creech’s mother and daughter), serious head injuries, organic brain damage, psychosis, and mental

impairment—only if those claims are fundamentally altered such that they constitute new claims not previously decided on the merits in state court.

A claim is considered fundamentally altered if the claim is now in a “significantly different and stronger evidentiary posture” than it was when the state courts considered the merits of the original claim. *Id.* To determine whether ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv) are fundamentally altered, the Court must compare the mitigation evidence presented in the state courts with the mitigation evidence Creech has now brought forward in this Court.

i. Mitigation evidence previously presented in state court

a) *1982 sentencing hearing*

The Court has previously described the evidence submitted by defense counsel at the 1982 sentencing hearing:

Kehne offered the testimony of three witnesses in mitigation of punishment: Creech, a jailor, and a psychologist, Dr. John Stoner. (State’s Lodging B-5, pp. 201-43.) Dr. Stoner testified that Creech had an antisocial personality, meaning that he tended to be impulsive, lacked empathy, and did not learn from punishment. (State’s Lodging B-5, p. 210.) Dr. Stoner agreed that this type of disorder was a type of “learning deficit” that was probably developed in childhood. (State’s Lodging B-5, p. 212.) Dr. Stoner also claimed that Creech suffered from a shizotypal personality, which is manifested in withdrawal, isolation, and occasionally bizarre thinking. (State’s Lodging B-5, p. 213.)

(Dkt. 279 at 22-23.) Dr. Stoner also testified that he believed Creech suffered from some type of organic brain disorder. (State’s Lodging B-5 at 226-27.)

b) 1995 resentencing hearing

The defense called three witnesses in mitigation at the 1995 resentencing hearing. First, Creech's brother-in-law, Michael Plageman, testified. (State's Lodging H-36 at 135.) Michael stated that Creech created artwork and poetry for family members, and that of all of Michael's brothers-in-law, Creech was the most amiable. (*Id.* at 137-39.)

Virginia Plageman, Michael Plageman's wife and Creech's sister, also testified on Creech's behalf at the resentencing hearing. Virginia testified that the family had a history of depression, "especially on [her] mother's side." (*Id.* at 144.) She stated that the family was "quick-tempered" and jealous and that "there's definitely some disorder within the family." (*Id.* at 148-49.) According to Virginia, Creech's mother "just left society" and became "antisocial" after Creech's younger brother died at the age of 13 months. (*Id.* at 154-55.) Virginia stated that all of the children, including Creech, had been "verbally and physically abused." (*Id.* at 156.)

Virginia also testified that Creech took a serious fall down a flight of stairs when he was five or six years old. Creech was taken to the hospital, and hospital records show that he sustained a concussion, but Creech's mother later took him out of the hospital against medical advice. (*Id.* at 161-62.) Creech's behavior changed after the fall, and he had a "hard time making decisions, and knowing, really, right from wrong." (*Id.* at 167.) He began stealing and running away from home, and was in juvenile detention by the age of 11 or 12. (*Id.* at 166.)

Virginia stated that Creech was a talented poet and singer, that he had begun to change as a result of his incarceration, and that Creech's new wife had been very encouraging and had helped Creech "tremendously." (*Id.* at 174.) Creech had become "more settled, more mellow, more sensible, more understanding," (*Id.* at 171.) Virginia testified that Creech was not the same person that he was when he murdered Jensen and that he had "more kindness and love in his heart." (*Id.* at 173.)

The final witness for the defense at the resentencing hearing was psychological expert Dr. Steven Thomas Brown. Dr. Brown's report on his evaluation of Creech was entered into evidence. (*See* Dkt. 309, Att. 1.)

Dr. Brown also reviewed records from a psychiatric evaluation of Creech conducted at the prison in 1974. The doctor evaluating Creech in 1974 diagnosed him with antisocial personality disorder and noted that Creech also showed some signs of depression. (State's Lodging H-36 at 188-89.) Other records indicated to Dr. Brown that Creech had a "very disturbed background, [and] he had a primitive personality." (*Id.* at 189.) Dr. Brown also noted that Dr. Stoner had determined Creech might have a brain disorder. Dr. Brown considered Creech's childhood head injuries as well as the fact that Creech's two brothers had also been convicted of homicide. (*Id.* at 190-93.)

Consistent with other doctors who had examined Creech, Dr. Brown diagnosed Creech with antisocial personality disorder. Dr. Brown described Creech as "a classic psychopath" and discussed how recent scientific literature supported an understanding that psychopathy was related to "some biological disturbance." (*Id.* at 197-98.) Dr.

MEMORANDUM DECISION AND ORDER ON REMAND - 34

Brown stated several times that Creech “probably” was biologically predisposed to psychopathy. (*Id.* at 276, 277, 288.) Dr. Brown pointed out that although a genetic predisposition to psychopathy “in no way . . . determine[s] the course of [a person’s] life,” Creech’s genetics and biology constituted “a [nontrivial] contribution over which Mr. Creech had no control.” (*Id.* at 217.) Dr. Brown also testified that Creech had undergone a “sharp reduction” in antisocial behavior in the years since he murdered David Jensen. (*Id.* at 278.)

c) Postconviction evidentiary hearing

Mitigation evidence presented by Creech during the evidentiary hearing on his state postconviction petition included the following:

Creech’s ex-wife Emma testified that Creech was sexually abused as a child by his aunt and uncle and that Creech’s family “all knew it” yet did nothing to stop it. (State’s Lodging I-39 at 58-62.) Emma also testified that she had informed Rolf Kehne, Creech’s trial attorney, of the abuse prior to the resentencing hearing. Emma stated that Shelley Creech, Creech’s daughter, also had mental health problems and had been hospitalized several times for mental illness. (*Id.* at 66-68, 74-75.) Emma stated that she had two daughters, but that only Shelley “has the same thing [Creech] has.” (*Id.* at 77.)

Shelley Creech then took the stand. She confirmed that she had been hospitalized numerous times for multiple mental illnesses, including schizophrenia, depression, borderline personality disorder, and “some other things” she could not recall. (*Id.* at 82.) She testified that Creech had written her regularly from prison, that Creech had tried to

maintain a father-daughter relationship despite being incarcerated for much of her life, and that it would be difficult for her to share some of the things that had happened to her with family members other than Creech. (*Id.* at 88.) Shelley had also dealt with serious drug problems, going all the way back to when she was 5 years old. (*Id.* at 93.) She testified that Kehne did not speak to her prior to Creech's resentencing. (*Id.* at 80.)

Former Ada County Sheriff Chuck Palmer testified that several years before Jensen's murder, when Creech was jailed on two other murder charges, Creech suffered a seizure and tore up his cell. Palmer was able to "calm down" these problems and stated that Creech was cooperative and respected his authority. (*Id.* at 103-05.)

John Adams, Kehne's co-counsel at the resentencing hearing, testified as "both a factual witness and an expert on death penalty defense." (State's Lodging I-38 at 201.) Adams stated that he and Kehne were not prepared for the 1995 resentencing, based on both time and financial restraints. Adams testified that he and Kehne made several mistakes, such as Kehne's failure to withdraw as Creech's counsel so he could testify as a witness with respect to a motion to withdraw Creech's guilty plea, their failure to "give [Creech's] case the attention, the time, the work that [they] should have done," their failure to "get the background on [the victim] . . . to do something about His Honor's findings" with respect to whether Jensen was a vulnerable inmate, and their failure to challenge the validity of two of Creech's previous murder convictions. (State's Lodging I-39 at 185-98, 216-18.)

According to Adams, he and Kehne retained a mitigation investigator “extremely late in the proceedings,” and they “didn’t have an adequate investigation.” (*Id.* at 201.) Adams believed the mitigation investigation was inadequate in part because he and Kehne did not bring to the sentencing court’s attention Creech’s sexual abuse, Creech’s daughter’s schizophrenia, or the issue of whether prosecutors in large, well-funded counties, like Ada County, were more likely to seek the death penalty than those in smaller counties. (*Id.* at 207-09.) Adams testified extensively as to the other death penalty cases that he and Kehne were working on at the time of Creech’s resentencing, stating that they gave those cases priority over Creech’s. (*Id.* at 185-97, 229-31.)

Kehne testified at the postconviction evidentiary hearing that he did not present sufficient mitigating evidence in Creech’s 1995 resentencing proceedings. As accurately summarized by the state court when it denied the postconviction petition,

Kehne stated he should have addressed Creech’s childhood as well as his family history of mental illness. Kehne did not know of the sexual molestation of Creech. Although he was aware of the family’s history of mental illness, the daughter’s mental health history is significant and should have been brought out. He knew he needed to attack the aggravating evidence and knew that the earlier presentencing investigation report would be used by the court. He didn’t try to limit aggravating testimony to live witnesses; didn’t try to collaterally attack any of the earlier murder convictions; didn’t attack other unadjudicated murders; didn’t try to withdraw Creech’s guilty plea, should have tried to impugn Jensen as a victim, but the records received were edited; and did not advise Creech to remain silent and that counsel could be present at mental health interviews.

(State’s Lodging I-38 at 202-03.)

Glenn Elam, the investigator assigned to Creech's postconviction case by the public defender's office, testified that he was not able to do everything he should have done to prepare the postconviction case. (State's Lodging I-39 at 348, 366-76.) Elam clarified that he did not work on Creech's case before or during the 1995 resentencing proceedings. (*Id.* at 351.) Elam testified that, in preparation for resentencing, "a mitigation expert should have been hired, a neurological report regarding Creech's childhood head injury should have been created, Creech's juvenile records and school records should have been gathered; and [the defense] should have focused upon the sexual abuse aspect of Creech's early years." (State's Lodging I-38 at 203 (state district court accurately describing Elam's testimony).)

Former Ada County Prosecutor Jim Harris, who prosecuted Creech for Jensen's murder, testified that he did not recall whether Kehne had ever contacted him concerning the decision to seek the death penalty against Creech. (State's Lodging I-39 at 416.) Harris stated that "to the best of [his] recollection, financial considerations were not a factor" in the decision to seek the death penalty. (*Id.* at 417.)

Creech's final witness at the postconviction evidentiary hearing was Amil Myshin, who testified as an expert in death-penalty litigation. Myshin stated that "an attorney who may also be a fact witness should not continue to represent a defendant" and that Creech's attorneys should have challenged two of Creech's previous murder convictions and the murders that Creech confessed to committing but for which he had not been tried. "At the minimum, a mitigation expert should have been hired and Creech's family history

of mental illness, sexual abuse and head injury should have been explored and developed. The psychiatric testimony on Creech should have been scrutinized and every effort made to reduce the effect of the testimony.” (State’s Lodging I-38 at 204 (state court’s accurate summary of Myshin’s testimony).)

ii. Evidence and offers of proof presented to this Court, but not to the state courts

The Court now recounts the evidence and offers of proof regarding mitigation that Creech presented in this federal habeas action but did not present to the state courts. Specifically, Creech has asserted that additional brain testing “would have revealed bilateral brain damage that affected Creech’s insight, judgment and capacity to exercise social inhibitions.” (Dkt. 245 at 25.)

With his merits briefing, Petitioner made the following offer of proof to support this contention:

1. Neurological testing performed in 2005 and available in 1995 would have revealed damage to Mr. Creech’s frontal lobes. An examination done near in time to the resentencing proceedings would have revealed bilateral brain damage with the right side more damaged than the left. A major dysfunction in the circuits that subserve the frontal lobes would have been discovered.
2. This neurological damage would most likely influence Mr. Creech’s behavior and thought by reducing his judgment, insight and capacity to reflect on his actions. His ability to plan is defective because of his

neurological damage.^[11] He demonstrates poor attention and has evidence of attention deficit.

3. In addition to the neurological findings, testimony regarding the existing medical and social records would indicate that Mr. Creech had never been examined by a neurologist until 2005.
4. A qualified mental health professional would, based upon the records reviewed by Dr. Brown or available to counsel in 1995, have identified specific areas of additional investigation: investigation of evidence of physical and sexual child abuse to Mr. Creech based upon records of hospital admissions and discharges against medical advise [sic]; investigations into the parental and ancestral incidents of mental illness based upon interviews with the client; confirmation of mental illness in Mr. Creech based upon evidence of dissociation and personality disorders; investigation of childhood and adolescent upbringing through interviews with extended and immediate family members; investigation into Mr. Creech's inability to conform to societal expectations through review of military, educational and social records.
5. A mitigation investigation specialist would have testified that members of Mr. Creech's family, including siblings, in-laws, aunts and uncles, wives

¹¹ The state court factual findings fail to show that Creech's ability to plan is defective. Creech specifically planned Jensen's murder, to the extent that (1) he made two different deadly weapons, so that (2) other inmates would give the weapons to Jensen, so that (3) Creech could take the weapons away and use them to kill Jensen, so that (4) it would appear that Creech killed Jensen in self-defense. Creech's capacity to make plans is not deficient—he simply makes malevolent plans.

and former girlfriends would have provided details into the Creech family dynamics and observations of behavior consistent with mental illness.

Information about sexual abuse in the family would also have been provided. Family members would have testified about the physical and emotional abuse to the Creech children and abuse between the Creech parents. Information about Mr. Creech's involvement in auto accidents would have been revealed.

6. Records would have revealed limited coping skills by Mr. Creech based upon educational, military and correctional documents. Military records would have documented that Mr. Creech performed poorly in the military and was not able to meet the military's expectation resulting in discharge from the service.

(Dkt. 245-2 at 2-3.)

Creech had also previously submitted evidence to this Court along with his motion for an evidentiary hearing on the merits of some of his habeas claims, including ¶¶ 100(b) and (d). (*See* Dkt. 211, 212, 228.) This evidence includes declarations from Creech's sister and brother. Virginia Plageman—who testified at the 1995 resentencing—expounded upon her testimony and added more detail as to (1) Creech's "early signs of mental illness," (2) his mother's instability, her non-nurturing and sometimes violent behavior, and her tendency to "[run] around with men," and (3) other family members' mental health issues and alcoholism. (Dkt. 212-1 at 2-3.) Virginia and her brother, Billy

Creech, both described an incident where their aunt tried to kill their mother. Billy also stated that he and Virginia “knew something was very wrong with [Creech] from a young age” and “tried to talk to [their] mother about getting [him] some psychiatric help” as a child, but that their mother “wouldn’t hear of it.” (*Id.* at 6.)

The evidence Creech submitted with his motion for an evidentiary hearing on the merits also included a report of Creech’s social history prepared by Joyce Naffziger, a mitigation specialist. (Dkt. 228-1 at 33-55.) The report explained that Creech’s early developmental years were rife with “[h]ead injuries, dysfunctional parents, a family history of addiction and mental health problems, and an unstable and often violent environment.” (*Id.* at 33.) As support for this statement, Naffziger described various occurrences in Creech’s past, including his physical and potentially sexual abuse at the Ohio State Reformatory, his self-mutilation and suicide attempts, and his tendency to start fires in family residences. (*Id.* at 46-51.)

Creech also submitted neuropsychological evaluations of Creech conducted by Dr. Michael M. Gelbort and Dr. Jonathon H. Pincus. Both determined that Creech might suffer from a brain disorder that limited his ability to react logically or to control his impulses. (*Id.* at 56-62.)

- iii. The Sub-Claims Set Forth in Claim 4, ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv) Are Not Fundamentally Altered and, Therefore, Are Not Subject to *Martinez*

For the reasons that follow, the Court concludes that the claims presented in subparagraphs 100(b), (d), (j), (o)(iii), and (o)(iv) of Claim 4 are not fundamentally altered from those adjudicated on the merits in the Idaho Supreme Court (and by this

MEMORANDUM DECISION AND ORDER ON REMAND - 42

Court). Therefore, these claims are not procedurally defaulted, and *Martinez v. Ryan* does not apply.

As an initial matter, Creech argues that this Court did not previously consider the evidence and offers of proof he provided with his motion for an evidentiary hearing and his merits briefing. (Dkt. 308 at 17; Dkt. 318 at 20.) Creech is mistaken.

This Court did, in fact, consider Creech's previous offers of proof and the evidence he provided to support his mitigation-based IAC sub-claims set forth in ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv). Creech is correct that the Court reaffirmed its previous decision that the evidence was not provided to the state courts, that Creech had a full and fair opportunity to develop the evidence, and that an evidentiary hearing in federal court was thus prohibited by 28 U.S.C. § 2254(e)(2).¹²

Keeping in mind the severity of the ultimate punishment, however, the Court reviewed Creech's evidentiary submissions anyway, determining that "nothing contained therein tend[s] to show that habeas relief would be warranted if the Court expanded the record or held an evidentiary hearing." (Dkt. 279 at 34.) Far from refusing to look at that evidence, the Court considered it and found that it would not have made a difference to the sentencing court. "A neurologist's opinion that Creech has brain damage may be more specific than Dr. Brown's testimony [at the 1995 resentencing hearing], but it would have provided only a modest counterweight to the heavy aggravating factors,

¹² The Court issued its decision before the Supreme Court held, in *Pinholster*, that evidentiary hearings on federal habeas claims are barred not only if the requirements in § 2254(e)(2) are not met, but also if the claims were adjudicated on the merits by the state courts. 563 U.S. at 181 ("We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.").

which included Creech's extensive criminal history showing a predisposition to commit murder, and his decision to kill a weaker prison inmate over a petty dispute in an especially brutal manner." (*Id.* at 35.) Similarly, though the details of Creech's social history set forth in the Naffziger report were more specific than the evidence revealed at the sentencing and postconviction hearings, it would not have been remotely sufficient for the sentencing court to refrain from imposing the death penalty.

Because the Court, in its merits decision, reviewed and considered Creech's evidentiary submissions as to Claim 4, subparagraphs 100(b), (d), (j), (o)(iii), and (o)(iv), the only pieces of evidence that this Court had not considered when it denied these claims on the merits are Creech's current counsel's June 3, 2013 declaration, which primarily deals with the issue of whether Creech has an organic brain disorder, as well the documents attached thereto.

In her Declaration, Creech's current counsel states that she "consulted with a neuropsychologist licensed to practice in the state of Idaho to prepare the Supplemental Opening Brief addressing the application of *Martinez v. Ryan* to [Creech's] case." (Decl. of Teresa A. Hampton, Dkt. 309-1, at ¶3.) The neuropsychologist reviewed "available test results, medical and mental health history and notations from institutions, limited test raw data, and reports and records," and discussed with counsel "testimony and witness interviews detailing family history and witness testimony from Petitioner's state proceedings." (*Id.* at ¶5.) According to the Declaration, the consultation between counsel and the neuropsychologist resulted in a determination that Creech may suffer from an

organic brain disorder, such as a “disorder[] of the frontal-subcortical circuits” or “frontal lobe dysfunction,” which can cause “poor impulse control and emotional liability” and “difficulties in cognitive, behavior and emotional response.” (*Id.* at ¶¶18, 20.)

The Declaration describes the neuropsychological disorder of “disinhibition,” which, among other things, can contribute to the following:

- a. Disproportionate behavioral reactions based on emotional responses to a given situation;
- b. Impulsive behavioral reactions to needs (such as need for attention, approval, esteem);
- c. Disproportionate behavioral and emotional reactions to perceived threats;
- d. Inability to inhibit behavioral responses once the behavior is started;
- e. Inability to regulate emotional responses to a situation, such as anxiety, anger or despair. The emotional response is usually very extreme and intense; and
- f. Inability to regulate, control or stop obsessive thoughts that result in maladaptive emotional or behavioral response.

(*Id.* ¶19.)

This offer of proof is comparable to the neuropsychological evaluations conducted by Drs. Gelbort and Pincus, which the Court has already considered. Dr. Pincus determined that Creech suffers from “bilateral brain damage.” (Dkt. 228-1 at 62.) Dr. Pincus stated that the “behavioral result” of this damage would be “to reduce [Creech’s] capacity to plan well. His insight, judgment, and capacity to exercise social inhibitions

would all be impaired. He would be impulsive. Combined with the mental symptoms that he has and had at the time of his sentencing trial, and the history of severe abuse, physical and sexual, that he suffered during childhood, the neurological damage would have been likely to have a malign significance with regard to his behavior.” (*Id.*) Similarly, Dr. Gelbort determined that Creech’s “deficits are indicative of minimal brain dysfunction, [and] appear to be long-standing in nature, and limit the patient’s ability to think/ behave in a logically reasonable and adaptive fashion.” (*Id.* at 58.)

As the Court previously stated, “[m]uch of this information was already before the state courts, albeit in a less specific way, including evidence that Creech grew up in an abusive and dysfunctional household, that his mother and probably other relatives suffered from mental illness, that he injured his head in a childhood fall, and that he had cognitive, coping, and learning deficits.” (Dkt. 279 at 34.) Over the course of the two sentencing hearings and the state postconviction proceedings, it had been well-established that Creech might, indeed, have some a biological or genetic component that contributed to his antisocial and violent behavior, that he suffered from a serious head injury as a child, that his family members struggled with mental illness, and that his childhood was traumatic, frightening, and violent, but the state courts were not persuaded that these mitigating factors outweighed the aggravating factors so as to justify a life sentence instead of the death penalty.

The documentary evidence attached to counsel’s declaration is also duplicative of, or quite similar to, the evidence presented during the 1995 resentencing and/or Creech’s

postconviction evidentiary hearing. Creech contends that, when considered together with the evidence described above, the following records place his mitigation-based IAC claims in a substantially better light: (1) medical records of Creech's mother Zolia (also known as Faye); (2) records of Creech's stay at Brown County Hospital for an "anxiety reaction"; (3) records of Creech's military history that indicate Creech had a "nervous condition since childhood"; and (4) medical records from Mercy Hospital regarding Creech's childhood fall, which show that Creech was conscious when he arrived at the hospital and that he suffered a cerebral concussion.¹³ (Dkt. 309, Att. 4-7.)

The medical records of Creech's mother are not substantially more persuasive than the evidence—already considered by the state courts—that Creech's mother suffered from mental illness and was far from an ideal parent. Further, the Court has reviewed the attached records of Creech's anxiety reaction and subsequent hospital stay, his military records, and the medical records of Petitioner's childhood fall (and removal from the hospital against medical advice), and concludes that these records do very little to alter the evidentiary posture of the mitigation-based IATC claims that were adjudicated on the merits in state court.

Although the mitigation evidence Creech has submitted to this Court supports an inference that Creech might have a genetic or biological predisposition to violence, that he suffered a traumatic childhood, and that he has a family history of mental illness, the postconviction court already had such evidence before it. The evidence that Petitioner

¹³ The documents attached to counsel's Declaration also include Dr. Brown's psychological evaluation of Creech. (*See* Dkt. 309, Att. 1.) This report was admitted at Creech's 1995 resentencing hearing.

brings forward in this Court, although more specific, adds little substance to the evidence that the state courts considered when adjudicating Petitioner's mitigation-based IATC claims. The evidence submitted for the first time in this Court simply does not substantially improve the evidentiary posture of those claims. *See Dickens*, 740 F.3d at 1318. For these reasons, Claim 4, subparagraphs (b), (d), (j), (o)(iii), and (o)(iv) are not fundamentally altered, are not procedurally defaulted, and, therefore, are not subject to the exception established in *Martinez v. Ryan*.

CONCLUSION

Subparagraphs 100(b), (d), (j), (o)(iii), and (o)(iv) of Claim 4 were adjudicated on the merits by the Idaho Supreme Court, and evidence submitted to this Court does not establish that these sub-claims are fundamentally altered. The only procedurally-defaulted IAC sub-claim that Creech places at issue is Claim 4, subparagraph 100(a): that counsel failed to prepare, develop, and follow a coherent sentencing strategy. Creech's other *Martinez* arguments have been forfeited or waived.

As to ¶ 100(a), Creech's PCR counsel performed reasonably and competently in not pursuing this claim during Creech's state postconviction proceedings. Further, even if Creech could show that his PCR counsel performed deficiently, Creech has not established a reasonable probability that, but for PCR counsel's alleged errors, the result of the state postconviction proceeding would have been different. *See Clabourne*, 745 F.3d at 377.

The entirety of the record reveals that Creech is a multiple murderer who has little to no regard for human life. Having been previously spared the death penalty, his sentence of life imprisonment did not deter him from viciously murdering a partially-disabled prisoner in a particularly horrific manner. This Court is convinced that there is nothing PCR counsel could have done in pursuing Claim 4, ¶ 100(a) that would have persuaded the state postconviction court to vacate Creech's death sentence and grant him another resentencing hearing.

For the foregoing reasons, *Martinez* does not apply to excuse the procedural default of Creech's IATC claims.

CERTIFICATE OF APPEALABILITY

In the event that Creech files a timely notice of appeal, the Court has evaluated the issues decided on remand with respect to whether a certificate of appealability should issue. *See* 28 U.S.C. § 2253(c); Rule 11 of the Rules Governing Section 2254 Cases. The Court previously granted a certificate of appealability with respect to its resolution of the merits of the non-defaulted aspects of Claims 2, 3, 4 (to the extent Creech alleges that he was deprived of his right to effective assistance of counsel at the 1995 resentencing proceeding), 25, and 27. (Dkt. 279 at 56.) The proceedings on remand have encompassed only the *Martinez* issue.

A certificate of appealability may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This showing can be established by demonstrating that "reasonable jurists could debate

whether (or, for that matter, agree that) the petition should have been resolved in a different manner” or that the issues were “adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)).

The Court has concluded that Creech cannot, as a matter of law, satisfy the second prong of *Martinez* with respect to Claim 4, ¶ 100(a), which is the only procedurally-defaulted IATC sub-claim with respect to which Creech specifically asserts a *Martinez* argument. Having carefully considered the issue, the Court additionally finds that, because the evidence in mitigation is heavily and conclusively outweighed by the overwhelming evidence of the aggravating factors found by the trial court—including the horrific nature of Creech’s crime and the fact that Creech is a multiple murderer who killed a disabled prisoner while serving a life sentence—reasonable jurists would agree that Creech’s *Martinez* argument as to Claim 4, ¶ 100(a) is without merit, on the grounds that he cannot demonstrate deficient performance of PCR counsel or a reasonable probability of prejudice as a result of PCR counsel’s representation.

The Court further concludes that reasonable jurists could not dispute that Creech has failed to specifically support a *Martinez* argument as to the sub-claims identified in Claim 4, ¶¶ 99(h) and (j); Claim 4, ¶¶ 100(e), (g), (h), (i), (m), (o)(i), (o)(ii), (o)(v), and (q); and Claim 30, and, therefore, that his *Martinez* arguments with respect to those claims have been forfeited or waived.

However, the Court concludes that reasonable jurists could potentially debate whether the sub-claims set forth in Claim 4, ¶ 100(b), (d), (j), (o)(iii), and (o)(iv) are fundamentally altered from the claims decided on the merits in state court, for purposes of a *Martinez* analysis. Therefore, the Court will grant a certificate of appealability with respect to this issue.

ORDER

IT IS HEREBY ORDERED:

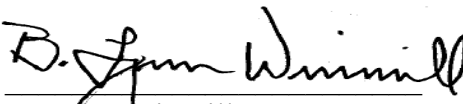
1. Respondent Al Ramirez is SUBSTITUTED for his predecessor as Warden of the Idaho Maximum Security Institution. *See* Fed. R. Civ. P. 25(d).
2. The Court reaffirms its previous dismissal of Claim 4, ¶ 100(a) as procedurally defaulted. Because Creech cannot satisfy the second prong of *Martinez v. Ryan*, that exception does not apply to excuse the procedural default of ¶ 100(a) of Claim 4.
3. The sub-claims set forth in Claim 4, ¶¶ 100(b), (d), (j), (o)(iii), and (o)(iv) are not fundamentally altered from the claims adjudicated on the merits in state court and, therefore, are not subject to the *Martinez* exception.
4. The Court reaffirms its previous grant of a certificate of appealability with respect to its resolution of the merits of the non-defaulted aspects of Claims 2, 3, 4 (to the extent Creech alleges that he was deprived of his right to the effective assistance of counsel at the 1995 resentencing proceeding), 25, and 27. The Court now grants an additional certificate of appealability on

Claim 4, but *only* with respect to whether the sub-claims set forth in subparagraphs 100(b), (d), (j), (o)(iii), and (o)(iv) are fundamentally altered from the original claims decided on the merits by the Idaho state courts.

5. The Court will allow Petitioner to file a motion to reconsider **within 28 days**. If no such motion is filed, a new judgment will be entered.



DATED: January 29, 2016


B. Lynn Winmill
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

THOMAS EUGENE CREECH,	)	
	)	Case No. CV 99-0224-S-BLW
Petitioner,	)	
	)	<u>CAPITAL CASE</u>
v.	)	
	)	MEMORANDUM DECISION
JOHN HARDISON, Warden,	)	AND ORDER
	)	
Respondent.	)	
_____	)	

INTRODUCTION

Before the Court are Respondent's Motion to Dismiss *Teague*-barred Claims (Docket No. 133) and Respondent's Motion to Dismiss Procedurally Defaulted Claims (Docket No. 134). Also pending is Petitioner's Second Motion for Discovery. (Docket No. 160.) To avoid further delay, the Court has determined that these matters will be decided on the briefing and record without oral argument. D. Idaho L. Civ. R. 7.4(d).

For the reasons set forth more fully herein, the Court concludes that Claims 7 and 35-43 are *Teague*-barred and will be dismissed. The Court will reserve its ruling on Respondent's remaining *Teague* arguments until after additional pleadings have been filed. The Court further concludes that the following habeas

claims have been procedurally defaulted: 4 (in part), 8, 10 (in part), 11 (in part), 13, 16, 17, 19, 22 (in part), 29-32, 44, and 45. These claims will be dismissed unless, after a period of limited discovery, Petitioner can show cause and prejudice to excuse any default.

PROCEDURAL BACKGROUND

In 1981, the State of Idaho charged Thomas Creech with first-degree murder for the beating death of fellow prison inmate David Dale Jensen. Creech pled guilty to the charge and was sentenced to death. After a remand for resentencing in open court, the Idaho Supreme Court affirmed the conviction and sentence. *State v. Creech*, 670 P.2d 463 (Idaho 1983) (*Creech I*). Creech's subsequent request to withdraw his guilty plea was unsuccessful. *State v. Creech*, 710 P.2d 502 (Idaho 1985) (*Creech II*).

In January 1986, Creech filed his first federal habeas petition, which was denied. On appeal, the Ninth Circuit affirmed in part and reversed in part, concluding that three constitutional errors occurred during the sentencing proceeding. *Creech v. Arave*, 947 F.2d 873, 881-85 (9th Cir. 1991) (*Creech III*). The United States Supreme Court granted certiorari on a single issue, holding that Idaho's "utter disregard" aggravating circumstance, as interpreted by the state supreme court, adequately channels a sentencer's discretion for purposes of the

Eighth Amendment. *Arave v. Creech*, 507 U.S. 463 (1993) (*Creech IV*). Because the Supreme Court did not review the Ninth Circuit's finding of other errors, the case returned to state court for a new sentencing hearing. *Id.* at 478-79.

While Creech was awaiting resentencing, he filed a second Motion to Withdraw Guilty Plea. The district court concluded that all issues regarding the validity of the guilty plea had already been resolved, and it denied the Motion.

On April 17, 1995, the district court resentenced Creech to death. Creech's appointed counsel, who had represented him since the inception of the case, filed an application for post-conviction relief and requested permission to withdraw. The district court granted this request and substituted the Ada County Public Defender. Creech's assigned public defender, August Cahill, amended the post-conviction application and included allegations of ineffective assistance of counsel. After an evidentiary hearing, at which trial and sentencing counsel testified, the district court denied relief.

Cahill represented Creech during the consolidated appeal from the reimposition of a death sentence and from the denial of post-conviction relief. The Idaho Supreme Court affirmed. *State v. Creech*, 966 P.2d 1 (Idaho 1998) (*Creech V*).

In 1999, Creech initiated the current federal habeas proceeding. The matter

was later stayed so that Creech could attempt to exhaust additional claims in a new state post-conviction proceeding. In 2002, the Idaho Supreme Court dismissed the new action pursuant to the timeliness and waiver provisions of Idaho Code § 19-2719. *Creech v. State*, 51 P.3d 387 (Idaho 2002) (*Creech VI*). The federal case was also stayed while Creech pursued another application for post-conviction relief based upon *Ring v. Arizona*, 536 U.S. 584 (2002), which was also dismissed.

After the most recent stay was lifted, Creech returned to federal court and filed a Second Amended Petition, raising forty-five claims. In accordance with the Court's scheduling order, Respondent filed the pending motions. Creech also submitted a Motion for Discovery, which was denied.

Creech has since replied to Respondent's motions, and he has renewed his request for discovery on cause and prejudice issues. These matters are now ripe for adjudication.

NON-RETROACTIVITY

Respondent first contends that Creech impermissibly seeks the application of new rules of constitutional law in thirty-two of claims, in violation of the non-retroactivity principles set out in *Teague v. Lane*, 489 U.S. 288 (1989). Creech counters that *Teague* requires an initial screening of constitutional claims, and he suggests that *Teague* issues should be resolved only after additional pleadings and

briefing have been filed. With the following exception, the Court will grant Creech's request.

The Court sees no purpose, however, in allowing Creech's *Ring*-based claims to linger in this proceeding (Claims 7, 35-43).¹ In *Ring*, the Supreme Court followed its recent decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and held that any aggravating fact that would make a defendant eligible for the death penalty must be proved to a jury, rather than a judge, beyond a reasonable doubt. 536 U.S. at 603-09. The Supreme Court has since determined that *Ring* announced a new rule that is not retroactive to cases that were final when it was decided. *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (rejecting an argument that *Ring* worked either a substantive change or a watershed procedural change in the law).

Here, the parties agree that Creech's conviction became final for *Teague* purposes on June 1, 1999, one year before *Apprendi* and nearly three years before

¹ These claims are: Claim 7 (involuntary guilty plea because Creech was not notified of the "elements" that made him eligible for a death sentence); Claim 35 (sentenced to death for first degree murder, not "capital murder"); Claim 36 (sentenced to death in excess of the statutory maximum based upon guilty plea to first degree murder, not "murder plus aggravator"); Claim 37 (denial of jury factfinding on the aggravating circumstances); Claim 38 (denial of notice in the charging document of the aggravating circumstances); Claim 39 (denial of preliminary hearing on aggravating circumstances); Claim 40 (denial of the right to jury sentencing); Claim 41 (denial of the right to jury factfinding on mitigation); Claim 42 (denial of the right to jury factfinding on weighing).

In Claim 43, Creech contends that he was denied equal protection of the law because similarly situated defendants whose convictions were not final at the time *Ring* was announced received the benefit of the new rule. This appears to be a camouflaged argument that the new rule should be retroactive, which the Supreme Court has rejected.

Ring. Because *Summerlin* determined conclusively that *Ring* is not retroactive, Claims 7 and 35-43 are clearly *Teague*-barred and will be summarily dismissed. With this exception, the Court will defer its decision on *Teague* issues until after additional pleadings have been filed in this case.

The Court now turns to Respondent's contention that, other than Claims 2 and 4, ¶ 99(d)&(k), the remaining claims in the Second Amended Petition were not presented at the correct time or in the correct manner in state court and are procedurally defaulted, in whole or in part, in this habeas proceeding.

LEGAL FRAMEWORK FOR EXHAUSTION AND PROCEDURAL DEFAULT

1. Fair Presentation

A habeas petitioner must first exhaust his state court remedies before a federal court can grant relief on a constitutional claim. 28 U.S.C. § 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). To exhaust state court remedies properly, the petitioner must have fairly presented his constitutional claims, giving the state courts a full and fair opportunity to correct the alleged error at each level of appellate review. *Baldwin v. Reese*, 541 U.S. 27 (2004).

The mere similarity between a state law claim and a federal claim does not constitute fair presentation of the federal claim, and general references in state court to broad constitutional principles, such as due process, equal protection, and

the right to a fair trial, are likewise insufficient. *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (similarity of claims is insufficient); *see also Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) (appeal to broad principles insufficient). The petitioner must ordinarily cite the federal constitutional provision that supports his claim, federal cases that apply the constitutional rule, or state court cases that clearly analyze the federal claim. *Lyons v. Crawford*, 232 F.3d 666, 670 (9th Cir. 2000); *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003). Additionally, if the petitioner fundamentally alters the claim by pleading new material facts in federal court, the requirement of fair presentation has not been satisfied. *Kelly v. Small*, 315 F.3d 1063, 1069 (9th Cir. 2003); *Belmontes v. Brown*, 414 F.3d 1094, 1117-18 (9th Cir. 2005) (citations omitted).

2. Independent and Adequate State Rule

When a habeas petitioner has not fairly presented a constitutional claim to the highest state court, and it is clear that the state court would now refuse to consider it because of the state's procedural rules, the claim is procedurally defaulted. *Gray v. Netherland*, 518 U.S. 152, 161 (1996). A habeas claim is also defaulted when the petitioner actually raised the constitutional claim in state court, but the state court denied or dismissed the claim after invoking a procedural bar that is independent of federal law and is adequate to support the judgment.

Coleman v. Thompson, 501 U.S. 722, 729-30 (1991). To be “independent,” the state court’s decision must not be interwoven with federal law or rest primarily upon federal law. *Bennett v. Mueller*, 322 F.3d 573, 581 (9th Cir. 2003). To be “adequate,” the state procedural rule must be “clear, consistently applied, and well established” at the time of the petitioner’s default. *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994). A claim that rests upon an independent and adequate state law ground will not be considered in a habeas proceeding unless the petitioner can establish cause for his procedural default and actual prejudice, or he can show a miscarriage of justice in his case, which means that he is probably innocent.

Coleman, 501 U.S. at 750.

The respondent has the initial burden to plead the existence of an independent and adequate state law ground. *Bennett*, 322 F.3d at 585-86. If the petitioner then places the defense in issue by citing inconsistent application of the procedural bar, the ultimate burden is on the respondent to demonstrate the adequacy and applicability of the bar. *Id.*

3. Mandatory Sentencing Review in Idaho

In a situation apparently unique to Idaho, certain constitutional sentencing claims will be reviewed in a habeas proceeding regardless whether the petitioner fairly presented those claims.

The Idaho Supreme Court has a statutory duty to review any death sentence to determine, in part, whether it is based upon “passion, prejudice, or any other arbitrary factor.” Idaho Code § 19-2827(c)(1). In *Beam v. Paskett*, 3 F.3d 1301, 1306 (9th Cir 1993), a panel of the Ninth Circuit Court of Appeals determined that the Idaho Supreme Court considers as part of its mandatory review certain constitutional sentencing errors without regard for whether they were raised on appeal. Whether *Beam* is interpreted as carving out a special category of proper exhaustion for “implicitly” considered sentencing claims, or whether *Beam* creates an exception to the procedural default of such claims, the practical effect is that sentencing claims that fall within its ambit will not be barred from review in federal habeas. See *Hoffman v. Arave*, 236 F.2d 523, 536 (9th Cir. 2001) (reaffirming *Beam*).

The scope of habeas review, though, is no broader than the Idaho Supreme Court’s mandatory review. See *Beam*, 3 F.3d at 1306. Claims that make a broad-based constitutional challenge to Idaho’s death penalty process, are based on matters outside of the record before the Idaho Supreme Court, or allege that the Idaho Supreme Court itself erred during its direct or post-conviction review, are not encompassed by that review.²

² In addition, as the Court has noted in other capital habeas cases, it continues to question the reasoning upon which *Beam* is based. The Court doubts that the Idaho Supreme Court has

Creech's attempt to expand the scope of the Idaho Supreme Court's review, either as part of § 19-2827 or review for "fundamental error," is unpersuasive. Aside from capital sentencing issues, the general rule in Idaho is that the burden is on the appellant to demonstrate error on appeal, and the appellate court will not independently search the record for error. *Woods v. Crouse*, 620 P.2d 798, 799 (Idaho 1980). An Idaho appellate court may, in its discretion, review a trial error that was not preserved in the lower court, *but that has been presented to it on appeal*, if it deems the error to be fundamental. *See, e.g., State v. Broadhead*, 84 P.3d 599, 603 (Idaho Ct. App. 2004). The Idaho Supreme Court has not dispensed with the requirement that a non-sentencing claim must be presented on appeal, even in capital cases, and the cases that Creech cites are not to the contrary.

In *State v. Osborn*, 631 P.2d 187 (Idaho 1981), the Idaho Supreme Court reviewed an error that was raised for the first time on appeal as part of its statutory review of the death sentence. *Id.* at 191-93. The court also noted, in dicta, that it would be vigilant in capital cases to consider non-sentencing constitutional errors that may not have been technically preserved below but that have been presented

truly had a fair opportunity to pass on constitutional sentencing claims that, as a practical matter, were not revealed until the petitioner arrived in federal court. Such a practice seems antithetical to the comity and federalism principles that support the exhaustion requirement.

In any event, *Beam* is still controlling law in this jurisdiction, and until it is expressly overruled, or Idaho narrows its mandatory review, this Court must follow *Beam*.

on appeal. *Id.* Contrary to Creech's argument, *Osborn* cannot be stretched to stand for the principle that the state court implicitly considers all constitutional errors of any stripe regardless whether the appellant brings those errors to its attention.

Likewise, in *State v. Sivak*, 674 P.2d 396 (Idaho 1983), the court addressed *sua sponte* whether the exclusion of a jury during the capital sentencing process violated the state constitution. *Id.* at 399. This issue, of course, relates to sentencing procedure rather than fundamental error that may have occurred during trial.

Finally, it is true that in *State v. Leavitt*, 755 P.2d 599 (Idaho 1989), the Idaho Supreme Court noted that it had "carefully reviewed the record for any indication of prejudicial error occurring at trial, regardless whether or not error has been specifically asserted by the defendant." *Id.* at 602. This expansive language is an anomaly. Creech has cited no capital case other than *Leavitt* that clearly indicates that the Idaho Supreme Court will routinely search the entire record for error unrelated to the imposition of sentence when the appellant has not raised such error on appeal, and the Court has found none. *See, e.g., State v. Lankford*, 747 P.2d 710 (Idaho 1987) ("[e]rror will not be presumed on appeal but must be affirmatively shown by the appellant"); *State v. Pizzuto*, 810 P.2d 680, 688 (Idaho

1991) (same); *cf. State v. Wood*, 967 P.2d 702, 708-09 (Idaho 1998) (addressing the merits of an issue that was raised in the appellant's brief but that was lacking in citation to authority).

With the standards governing exhaustion and procedural default in mind, the Court addresses the claims in the Second Amended Petition.³

ANALYSIS OF CLAIMS

1. Mandatory Sentencing Review

The following claims were at least implicitly reviewed and denied on the merits as part of Idaho's statutory sentencing review, as interpreted by *Beam*, and will not be dismissed as procedurally defaulted: 1-3, 5-6, 14, 15 (only to the extent it alleges error by the district court), 18 (same), 20, 23, 24, 26-28, 33-34. All other claims that may have a sentencing component do not fall within the scope of review as framed by *Beam*.⁴

2. Remaining Claims

a. Claim 4: Ineffective Assistance of Counsel

Creech raises over sixty subclaims of ineffective assistance of counsel. The

³ The only issue before the Court is whether the claims are defaulted by a state procedural rule. The Court expresses no opinion regarding the effect of any decision in Creech's previous federal habeas matter on these claims.

⁴ These include: Claim 16 (general attack on statute); Claim 17 (error during direct appeal); Claim 19 (general attack); Claim 21 (general attack); Claim 25 (general attack), and Claim 29 (general attack).

Court finds that the following general allegations were fairly presented to the Idaho Supreme Court and are free of a state procedural bar:

- (1) Trial counsel failed to move to withdraw based upon a conflict of interest, but this claim is limited to “a major disagreement” between counsel and Creech about whether to plead guilty and counsel’s alleged status as a witness “about the plea,” meaning the circumstances surrounding Creech’s decision to enter a guilty plea. *Second Amended Petition*, ¶ 99(c); *State’s Lodging J-42*, pp. 91-93; *Creech V*, 966 P.2d at 21. Creech’s allusion to other “known conflicts of interest” is procedurally defaulted. *Creech VI*, 51 P.3d at 389-90.
- (2) Trial counsel failed to communicate adequately and consistently with Creech. ¶ 99(i); *Creech V*, 966 P.2d at 19-20.
- (3) Trial counsel did not conduct an adequate and independent mitigation investigation in anticipation of sentencing, in the following ways: (a) counsel failed to conduct a reasonable investigation into Creech’s “background and personal history,” *see Creech V*, 966 P.2d at 18-19; (b) counsel failed to investigate the victim’s history of assaultive behavior (limited to sentencing claim); (c) counsel failed to retain mental health experts before sentencing; and (d) counsel failed to

present mitigating mental health evidence at the sentencing hearing. ¶

99(h)(but only to the extent that it applies to sentencing); ¶

100(b)(d)(j)(o)&(q); *State's Lodging J-42*, pp.77-86; *Creech V*, 966 P.2d at 18-19.

In his appellate brief during the 1998 appeal, Creech inserted a few conclusory allegations that he attempts to bring again here.⁵ In refusing to entertain the merits, the Idaho Supreme Court applied the state rule of appellate procedure that requires a party to support an issue on appeal with argument and citation to authority and the record, or the appellate court will deem the party to have waived the issue. *Creech V*, 966 P.2d at 18-22 (citing Idaho Appellate Rule 35(a)(6) and *State v. Zichko*, 923 P.2d 966, 970 (Idaho 1996)). Creech suggests that the Idaho Supreme Court has not consistently enforced this rule, particularly in capital cases. In support, he cites *State v. Wood*, 967 P.2d 702, 708-09 (Idaho 1998), in which the court disregarded the rule to reach the merits.

Conversely, Respondent has directed the Court's attention to the Ninth Circuit's decision that Idaho's appellate waiver rule is generally adequate to preclude federal review, noting that "Idaho appellate courts have been relying on

⁵ These include the following: counsel was ineffective because he did not challenge the admission of prior convictions; counsel failed to adequately protect Creech's rights regarding communications with mental health professionals; and counsel's vague deficiencies in preparing Creech's motion to withdraw the guilty plea. *State's Lodging J-42*, pp. 86-87, 89-94.

these provisions for many years, including in cases before [the petitioner's] original conviction, to reject appeals.” *Zichko v. Idaho*, 247 F.3d 1015, 1021 (9th Cir. 2001) (citing cases). In addition to Creech’s case, Respondent has also cited other capital cases in which the Idaho Supreme Court has enforced this bar. *State v. Hairston*, 988 P.2d 1170, 1185 (Idaho 1999); *State v. Porter*, 948 P.2d 127, 150 (Idaho 1997).

This Court concludes that Respondent has carried his burden to show that the state rule was clear, consistently applied, and well established at the time of Creech’s default. *Bennett*, 322 F.3d at 585-86. At most, *Wood* represents a minor deviation that does not render the rule inadequate. *See Wood v. Hall*, 130 F.3d 373, 378 (9th Cir. 1997) (noting that the exercise of judicial discretion, or the occasional act of grace, will not make a state court’s invocation of a rule inadequate).

Creech also asserts that the state court misapplied its own rule. The federal question before the Court is limited to whether the rule is firmly established and consistently applied. Once that determination has been made, the Court lacks the authority to review whether the state court applied its own procedural rule correctly. *See Poland v. Stewart*, 169 F.3d 573, 584 (9th Cir. 1999). In any case, the Court agrees that Creech did not support these particular allegations with

sufficient argument or citation; the state court was not required to wade through the oblique references in his brief, or scour the record, to conjure up issues for appellate review.

Aside from the fairly presented claims listed above and subclaims ¶ 99(d)&(k), which are not at issue, all other allegations of ineffective assistance were not presented at the correct time or in the correct manner and are defaulted.

b. Claims 8-13: Involuntary Guilty Plea

In these six related claims, Creech asserts that he did not knowingly, intelligently, and voluntarily plead guilty. The Court concludes that Creech has properly exhausted Claims 9, 10 (in part), 11 (in part), and 12, and those claims are ripe for review. The other claims are not properly exhausted.

In Claim 8, Creech asserts that the Ada County Sheriff plied him with various privileges while he was awaiting trial, coercing him to plead guilty. In the statement of facts portion of his state court appellate brief, Creech mentioned, in passing, the Sheriff's influence on his decision to plead guilty, but the Idaho Supreme Court determined that Creech had failed to support any issue in that regard with argument and citation. *Creech V*, 966 P.2d at 22. This is an independent and adequate state ground, and the claim is defaulted.

In Claim 9, Creech contends that he was forced to represent himself at the

change of plea hearing without a knowing and voluntary waiver of his Sixth Amendment right to counsel, in violation of *Faretta v. California*, 422 U.S. 806 (1975). The Court concludes that Creech raised the substance of this claim during the 1985 appeal from the denial of his first request to withdraw his guilty plea.⁶ *See State's Lodging G-28*, pp. 38-39.

In Claim 10, Creech contends that he was deprived of the assistance of counsel because of an actual conflict of interest. The factual basis for this claim appears to be somewhat similar to Claim 4, ¶ 99(c)&(i), and to the extent that it is based upon a lack of communication or a breakdown in communication between attorney and client, it is properly exhausted. *State Lodging J-43*, pp. 91-93. To the extent that it is based upon matters beyond that factual basis, the claim has not been properly exhausted.

In Claim 11, Creech again alleges a conflict of interest. *Second Amended Petition*, p. 44. Creech seems to rely primarily upon the Ada County Public Defender's simultaneous representation of Creech and various other inmates who may have been potential witnesses to the crime. This aspect of Claim 11 is similar

⁶ Respondent's argument that Creech cannot rely upon briefing in the Idaho Supreme Court prior to the 1995 resentencing hearing to show fair presentation of this claim is unavailing. The Idaho Supreme Court was alerted to the federal nature of the claim and had an opportunity to address it. This is sufficient for fair presentation. Additionally, because the claim alleges a constitutional error at the change of plea hearing and not an error during one of the original sentencing hearings, it was not mooted when Creech received sentencing relief in 1993.

to Claim 30, and both have been procedurally defaulted. *See Creech VI*, 51 P.3d at 389-90. But to the extent that Creech contends that a conflict developed because of counsel's status as a witness about Creech's decision to plead guilty and the circumstances surrounding the change of plea hearing, he raised a similar, albeit vague, allegation in state court, which was denied on the merits. *State's Lodging J-42*, pp. 91-93; *Creech V*, 966 P.2d at 21. This portion of the claim is properly exhausted.

In Claim 12, Creech raises a due process argument that he was not permitted to litigate his renewed motion to withdraw his guilty plea before the resentencing hearing. This claim was fairly presented to the Idaho Supreme Court and was denied by that court as lacking in merit. *State's Lodging J-43*, p. 94.

Finally, in Claim 13, Creech contends that he was unconstitutionally compelled to choose between the exercise of his right to be free from cruel and unusual punishment and his constitutional trial rights. This claim has never been raised in the Idaho Supreme Court and is now defaulted.

Despite the fair presentation of some of the guilty plea claims, Respondent contends that the issues cannot be reviewed because the Idaho Supreme Court's invoked the doctrine of res judicata to reject all guilty plea matters during the 1998 appeal. *Creech V*, pp. 21-22. This Court disagrees with this assertion. A state

court's invocation of res judicata to reject a claim under these circumstances "simply means that the state courts have already resolved the matter and want nothing more to do with it." *See Porter v. Gramley*, 112 F.3d 1308, 1315-16 (7th Cir. 1997) (holding that a state court's reliance on res judicata does not result in a procedural default); *accord Davis v. Lambert*, 388 F.3d 1052, 1058 (7th Cir. 2004).

c. Claim 16

Creech alleges that Idaho's death penalty statute fails to channel the sentencer's discretion in a meaningful way, in violation of the Eighth and Fourteenth Amendments. This claim was not presented to the Idaho Supreme Court. It is not a *Beam*-type claim because it is a frontal attack on the statute. The claim is now defaulted.

d. Claim 17

Creech's contention that the Idaho Supreme Court failed to perform its statutory duty to determine whether the death penalty is excessive has not been properly exhausted. Because the Idaho Supreme Court does not review its own decision as part of its mandatory duties under § 19-2827, the claim was not implicitly denied during the 1998 appeal and is now defaulted.

e. Claim 19

Creech again brings a general attack on the Idaho death penalty process by

alleging that the statute unconstitutionally shifts the burden of proof from the State to the defendant. Though Creech raised a claim regarding the mandatory nature of Idaho's death penalty, he did not frame it as a burden-shifting argument. *State's Lodging J-42*, pp. 61-63. The claim now defaulted, and it is not saved by *Beam*.

f. Claim 21

Here, Creech does allege that Idaho's death penalty is mandatory. He raised the claim in state court. The Idaho Supreme Court relied upon the doctrine of res judicata and declined to revisit the matter. *Creech V*, 966 P.2d at 15. For the reasons expressed previously, this is not an independent and adequate state procedural ground that will bar federal review.

g. Claim 22

In this claim, Creech alleges that the disparate financial resources of Idaho counties result in an arbitrary and capricious application of the death penalty. This claim was not fairly presented under the Eighth Amendment, but is properly exhausted to the extent that Creech relies upon the Sixth Amendment right to the effective assistance of counsel and the due process and equal protection clauses of the Fourteenth Amendment. *State's Lodging J-42*, pp. 97-98; *Creech V*, 966 P.2d at 22 (addressing a substantive equal protection claim).

h. Claim 25

Creech contends that Idaho's aggravating factor based upon a "propensity to commit murder" is unconstitutionally vague. This claim was presented during the 1998 appeal, but the Idaho Supreme Court concluded that it had been "fully litigated" in previous state court appeals, and it would not reconsider its previous decision. *Creech V*, 966 P.2d at 11. The claim has been properly exhausted.

i. Claim 29

Creech contends that the cumulative effect of various infirmities in Idaho's capital sentencing statute violate the Eighth and Fourteenth Amendments. This claim was not raised in state court, and it is not a *Beam*-type claim because it constitutes a broad-based attack on Idaho's death penalty statute. Therefore, it has been procedurally defaulted.

j. Claim 30: Public Defender's Conflicts of Interest

Creech raised this claim during his successive post-conviction proceeding in June 2000. The Idaho Supreme Court concluded that it was waived under Idaho Code § 19-2719 because Creech did not raise it at the correct time. *Creech VI*, 51 P.3d at 389-90. The claim has been defaulted.

k. Claim 31

Creech's allegation that the time and waiver provisions of Idaho Code § 19-2719 are unconstitutional has been defaulted in the Idaho Supreme Court. *Creech*

VI, 51 P.3d at 390-91.

1. Claim 32

In this claim, Creech contends that unfettered prosecutorial discretion in seeking a death sentence violates his constitutional rights. This is not the same as Creech's allegation based upon divergent financial resources of each county. The claim has never been presented and is now defaulted.

m. Claim 44

Creech contends that he had a right to jury sentencing under the Idaho Constitution, and that the state courts have deprived him of a right guaranteed to him under state law, in violation of federal due process. Although Creech alleged in state court that he had a right to jury involvement in sentencing, he has not framed the claim in this manner. The claim is therefore defaulted.

Alternatively, to grant relief this Court would be required to conclude that the Idaho Supreme Court has consistently misinterpreted its own constitution. *See, e.g., State v. Leavitt*, 120 P.3d 283, 286 (Idaho 2005). The interpretation of a state constitution is solely a matter of state law, and Creech's attempt to transform this issue into a federal question is unavailing. Thus, the claim will be dismissed on that basis. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

3. Conclusion

The following claims are procedurally defaulted: 4 (in part), 8, 10 (in part), 11 (in part), 13, 16, 17, 19, 22 (Eighth Amendment), 29-32, 44, and 45. The bulk of Creech's claims are defaulted based upon the timeliness and waiver provisions of Idaho Code § 19-2719, and the Court will now address whether that statute is an independent and adequate state procedural bar.

ADEQUACY OF IDAHO CODE § 19-2719

On April 2, 1984, the Idaho Legislature enacted special procedure for capital cases with the express purpose of eliminating "unnecessary delay in carrying out a valid death sentence." *See* Idaho Code § 19-2719. These provisions supplement the Uniform Post-Conviction Procedure Act (UPCPA), Idaho Code §§ 19-4901 – 4909, but to the extent that they conflict with the UPCPA, the special capital provisions will control.

The more specific capital provisions contain a shorter statute of limitations and a strict waiver provision. In particular, a convicted capital defendant must bring all known or reasonably known legal or factual challenges to his conviction or sentence within forty-two days of the filing of judgment. Idaho Code § 19-2719(3). A capital defendant who does not bring all known or reasonably known claims within forty-two days of judgment is deemed to have waived those claims, and Idaho courts have no power to consider such claims in later proceedings.

Idaho Code § 19-2719(5). A successive petition containing new claims will only be considered if the defendant makes a prima facie showing that he could not have reasonably known of the claims within the statute's time limitations, and, further, that he presented the claims within a reasonable time after they could have been discovered. *See Paz v. State*, 852 P.2d 1355, 1357 (Idaho 1993) (noting that the statute places a "heightened burden" on the defendant to plead the limited exception for previously unknown claims).

1. Independence

Creech's argument that § 19-2719 is not independent of federal law is without merit. In particular, Idaho Code § 19-2719(5) operates automatically to waive a claim if the state court determines that the capital defendant should have reasonably known of the claim within forty-two days of judgment. There is no indication that the state courts review the underlying merits of a proffered federal claim before deciding whether it has been waived, or that a state court's application of the statute is otherwise based upon an antecedent determination of federal law.

2. Adequacy

Creech also challenges the adequacy of § 19-2719. With a single exception, the Court finds that Respondent has carried his burden to prove that the procedural bar is adequate.

Idaho Code § 19-2719 was enacted ten years before Creech's post-conviction proceedings commenced in 1995. Creech had sufficient notice of its provisions, and the statute was clear, consistently applied, and well established at that time. *See Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994) (defining adequacy of state procedural ground). Particularly, the Idaho Supreme Court had strictly construed the timeliness and waiver provisions before Creech's post-conviction proceeding, and it has adhered to that construction since then. *See, e.g., Fetterly v. State*, 825 P.2d 1073 (Idaho 1991); *Paz v. State*, 852 P.2d 1355, 1357 (Idaho 1993); *Pizzuto v. State*, 903 P.2d 58, 60-61 (Idaho 1995); *Porter v. State*, 80 P.3d 1021 (Idaho 2003); *see also Rhoades v. State*, 17 P.3d 243 (Idaho 2000) (successive claims not raised within a reasonable time of discovery); *cf. Sivak v. State*, 8 P.3d 636, 644 (Idaho 2000) (successive claim barred under § 19-2719(5)(b) as resting upon cumulative evidence). The possible exceptions contained in *Dunlap v. State*, 961 P.2d 1179 (Idaho 1998), and *McKinney v. State*, 992 P.2d 150 (Idaho 1999), are minor deviations that will not render the rule inadequate.

a. Idaho Code § 19-2719 is Constitutional

Creech contends that the shortened time limitation and the waiver provision violate his rights to due process and equal protection. The Court adheres to its

previous decision that the statute is constitutional. *See, e.g., Fetterly v. Paskett*, 747 F. Supp. 594, 600-01 (D. Idaho 1990) *remanded on other grounds* by 997 F.2d 1295 (9th Cir. 1993).

b. The Applicability of *Hoffman*

Creech next asserts that the Ninth Circuit's decision in *Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001), saves all of his defaulted claims of ineffective assistance of counsel. While Creech's argument is too broad, the Court finds merit in his argument with respect to ineffective assistance of counsel on appeal after the reimposition of a death sentence in 1995.

In *Hoffman*, the petitioner was represented by the same attorneys during his trial, his initial state post-conviction matter, and during the consolidated appeal from those proceedings. *Id.* at 528, 532-33. The Ninth Circuit held that because counsel could not have been expected to argue their own ineffectiveness at the time that they were required to do so, strict enforcement of Idaho Code § 19-2719 frustrated the petitioner's right to raise that particular constitutional claim in state court. *Id.* at 534-36. Consequently, the petitioner was allowed to go forward with his ineffectiveness claims in federal court.

Unlike *Hoffman*, Creech was represented by different counsel during his first post-conviction proceeding, and his ability to raise claims of ineffective assistance

of trial and sentencing counsel in state court was not impaired. Indeed, Creech's post-conviction counsel did raise several such claims, and included selected claims in the appeal to the Idaho Supreme Court. The Ninth Circuit has recently concluded that *Hoffman* does not extend to this type of situation. *Leavitt v Arave*, 383 F.3d 809, 839-40 (9th Cir. 2004).

On the other hand, the state court's conclusion that Creech waived a claim regarding his *appellate* counsel's representation does implicate the fairness concerns expressed in *Hoffman*.

The Idaho Supreme Court has recognized that allegations of ineffective assistance of appellate counsel cannot be raised within forty-days of the entry of judgment, and the court has concluded that such claims must be raised within a reasonable time after they are known or reasonably should have been known. *Paz v. State*, 852 P.2d 1355, 1357 (1993). In *Leavitt*, the Ninth Circuit observed that this "reasonable time" procedural bar will ordinarily be an adequate. 383 F.3d at 840.

Here, however, the Idaho Supreme Court specifically found that Creech had waived his claim by not including it in the post-conviction proceeding following the 1995 sentencing. *Creech VI*, 51 P.3d at 390-91. Obviously, it was impossible for Creech to raise such a claim at that time because counsel had not yet filed an

appellate brief. The state court's decision in this regard may reflect an oversight based upon Creech's general reluctance to disentangle or winnow his numerous allegations against trial, sentencing, post-conviction, and appellate counsel. But regardless whether there was a more appropriate procedural bar, the state court's decision that Creech waived a true claim of ineffective assistance of appellate counsel at a time that he could not have presented the claim frustrated his right to seek review. *Hoffman*, 236 F.3d. at 534-36. Therefore, Creech's allegation that Attorney August Cahill was ineffective during the direct appeal following the resentencing hearing will be addressed in this proceeding, subject to the following limitations.

First, the Court is not persuaded by Creech's attempt to conflate the appeal with the post-conviction proceeding. It is well settled that a petitioner does not have the constitutional right to the effective assistance of counsel during state collateral proceedings. *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Bonin v. Calderon*, 77 F.3d 1155, 1159 (9th Cir. 1996); *Leavitt v Arave*, 383 F.3d 809, 839 n.39 (9th Cir. 2004). Additionally, a claim of ineffective assistance of post-conviction counsel cannot serve as a basis for relief in a federal habeas proceeding. 28 U.S.C. § 2254(i). Thus, the allegations for which the procedural default is excused *do not* include counsel's purported ineffectiveness during the post-

conviction proceeding. In reaching this conclusion, the Court is not convinced by Creech's argument that the procedural system in Idaho for litigating post-conviction issues before the direct appeal, and then consolidating the direct appeal with the appeal from the denial of post-conviction relief, creates a due process right to the effective assistance of counsel during the post-conviction proceeding. *See Oxford v. Delo*, 59 F.3d 741, 748 (8th Cir. 1995) (rejecting an argument that a similar hybrid post-conviction and appellate proceeding is so bound up together as to guarantee a right to counsel during the post-conviction proceeding).

For similar reasons, Creech's allegations of ineffective assistance will only include issues that were or could have been raised as part of the appeal from the judgment of conviction and sentence and will not include allegations that counsel was ineffective in presenting, or failing to present, post-conviction issues to the Idaho Supreme Court. As Creech had no constitutional right to the effective assistance of counsel during the post-conviction proceeding, he likewise did not have a constitutional right to the effective assistance of counsel with respect to raising those matters on appeal. *See Lowe-Bey v. Goose*, 28 F.3d 816, 818 (8th Cir. 1994) (analyzing a hybrid system and finding that the petitioner would only have a constitutional right to counsel regarding direct appeal matters).

Accordingly, Creech's claims of ineffective assistance of counsel during the

direct appeal after the 1995 resentencing will not be dismissed as procedurally defaulted. All other defaulted claims will be dismissed unless Creech can demonstrate cause and prejudice.

CAUSE AND PREJUDICE

A petitioner has an opportunity to excuse a procedural default if he can establish valid cause for the default and actual prejudice as a result of the constitutional error.⁷ *Murray v. Carrier*, 477 U.S. 478, 488 (1986). To show cause, the petitioner must ordinarily demonstrate that some objective factor external to the defense impeded his or his counsel's efforts to comply with the state procedural rule at issue. *Id.* at 488. To show prejudice, the petitioner bears the burden of demonstrating that the errors "worked to his actual and substantial disadvantage, infecting his entire [proceeding] with errors of constitutional dimension." *United States v. Frady*, 456 U.S. 152, 170 (1982).

1. Conflict of Interest

Creech alleges that the office of the Ada County Public Defender was operating under a conflict of interest because that office represented other state prison inmates who were potential witnesses to the crime. He appears to contend

⁷ Creech does not argue that a fundamental miscarriage of justice exists, and that exception will not be addressed. *See Murray*, 477 U.S. at 495-96.

that this alleged conflict excuses any default that may have occurred under § 19-2719 when counsel did not develop various claims in the post-conviction proceeding. This argument is without merit.

Initially, this Court finds no evidence in the record that the public defender's representation was affected by an actual conflict of interest based upon any duty of loyalty that the office purportedly owed to another client that it represented in the early 1980s. *See Mickens v. Taylor*, 535 U.S. 162, 165 (2002). More specifically, there is no evidence that Cahill's representation was limited during the post-conviction proceeding by such a conflict, but even if it were, this argument would fail as a matter of law. Because Creech had no constitutional right to counsel during that proceeding, any contention that counsel's conflict excuses his failure to develop another claim during at that time fails. *Moran v. McDaniel*, 80 F.3d 1261, 1271 (9th Cir. 1996).

Moreover, neither Cahill nor the Ada County Public Defender intentionally interfered with Creech's right to pursue post-conviction remedies without authorization in order to suppress previous errors, as was the case in *Manning v. Foster*, 224 F.3d 1129, 1135 (9th Cir. 2000). Cahill actively represented Creech during post-conviction matters, including during the evidentiary hearing at which several witness testified.

2. Ineffective Assistance of Counsel

Creech alternatively asserts that the cause of the default of his habeas claims is ineffective assistance of counsel. Attorney error that amounts to an independent violation of a defendant's constitutional right to the assistance of counsel may establish cause. *Coleman v. Thompson*, 501 U.S. 735, 753 (1991). But the ineffective assistance claim upon which the petitioner relies to excuse the default of another habeas claim must have, itself, been properly exhausted and free of procedural default. *Edwards v. Carpenter*, 529 U.S. 446, 454 (2000).

In this case, the only claims of ineffective assistance of trial and sentencing counsel that are free of procedural default are those limited allegations that have been addressed with respect to Claim 4, and Creech has not explained how those allegations excuse the default of another claim. All other claims of ineffective assistance of trial or sentencing counsel are themselves procedurally defaulted. *See Edwards*, 529 U.S. at 453. Post-conviction counsel's alleged deficiencies will not serve as cause. *Coleman*, 501 U.S. at 753.

As discussed, however, the Court has concluded that the Idaho Supreme Court's imposition of § 19-2719(5) to bar Creech's allegations of ineffective assistance of appellate counsel is inadequate to prevent federal review. Accordingly, Creech will also be given an opportunity to demonstrate that

ineffective assistance of appellate counsel is the cause for the default of another claim. The scope of the procedural claim will be limited in the same manner as the substantive claim.

In light of this decision, the Court finds that good cause supports Creech's renewed request to depose August Cahill with respect to his representation during the appeal. *See* Rule 6 of the Rules Governing Section 2254 Cases; *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997). After the completion of this limited discovery, Creech may file a short supplemental brief demonstrating why cause and prejudice excuses any defaulted claims. Respondent may submit an equally-short responsive brief.

Creech's renewed request to depose all other attorneys who represented him at any time in state court matters, and the investigator for the Ada County Public Defender's office, is denied.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that Respondent's Motion to Dismiss *Teague*-barred Claims (Docket No. 133) is GRANTED in part, and Claims 7, and 35-43 in the Second Amended Petition are DISMISSED with prejudice as *Teague*-barred. The remainder of Respondent's Motion is DENIED

without prejudice.

IT IS FURTHER ORDERED that Respondent's Motion to Dismiss Procedurally Defaulted Claims (Docket No. 134) is conditionally GRANTED in part and DENIED in part. The following claims are procedurally defaulted and will be dismissed with prejudice unless Petitioner can establish cause and prejudice to excuse a default: 4 (in part), 8, portions of 10 and 11, 13, 16, 17, 19, 22 (to the extent it relies on the Eighth Amendment), 29-32, 44, and 45. Claim 44 is DISMISSED as failing to state a cognizable habeas claim. The following claims will not be dismissed as procedurally defaulted: 1-3, 4 (as noted herein), 5, 6, 9, 10 (as limited), 11 (same), 12, 14, 15 (sentencing court's error), 18 (same), 20, 21, 22 (Sixth and Fourteenth Amendment basis), 23-28, 33, and 34.

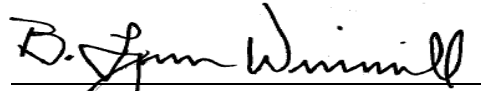
IT IS FURTHER ORDERED that Petitioner's Second Motion for Discovery (Docket No. 160) is GRANTED in part and DENIED in part. Petitioner may depose his state court appellate counsel, August Cahill. This discovery must be completed within thirty (30) days of the date of this Order.

IT IS FURTHER ORDERED that within sixty (60) days of the date of this Order, Petitioner shall file a supplemental brief, which he may support with relevant material developed during discovery, demonstrating why cause and prejudice excuses the default of another habeas claim. Within thirty (30) days of

receiving Petitioner's supplement brief, Respondent may file a supplemental response. Both the supplemental brief and supplemental response will be limited to 20 pages. No reply brief shall be filed.

DATED: **March 29, 2006**




B. LYNN WINMILL
Chief Judge
United States District Court

137 Idaho 573

Supreme Court of Idaho,
Boise, March 2002 Term.

Thomas Eugene CREECH, Petitioner-Appellant,

v.

STATE of Idaho and James Spalding, Director of
the Department of Correction, and Dave Paskett,
Warden of the Idaho Maximum Security Institute,
Department of Correction, State of Idaho, Respondents.

No. 27309.

|

June 6, 2002.

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Rehearing Denied Aug. 1, 2002.

Synopsis

After defendant's conviction for murder and death sentence and denial of his first petition for post-conviction relief was affirmed on appeal, 670 P.2d 463 and 966 P.2d 1, defendant filed successive petition for post-conviction relief. The District Court, Fourth Judicial District, Ada County, Ronald J. Wilper, J., dismissed petition. Defendant appealed. The Supreme Court, Trout, C.J., held that claims of ineffective assistance of counsel, claim challenging constitutionality of statutory scheme for capital post-conviction proceedings, and claim that length of confinement was unconstitutional were known or reasonably could have been known at time defendant filed his first petition for post-conviction relief.

Appeal dismissed.

Kidwell, J., filed a specially concurring opinion.

Attorneys and Law Firms

****388 *574** Hampton & Elliott, Boise, for appellant.
Teresa A. Hampton argued.

Hon. Alan G. Lance, Attorney General, Boise, for
respondents. L. LaMont Anderson, Deputy Attorney General,
argued.

**OPINION AND ORDER GRANTING
MOTION TO DISMISS APPEAL**

TROUT, Chief Justice.

This is a motion by the State of Idaho ("the State") to dismiss the appeal of Thomas Eugene Creech ("Creech") pursuant to I.C. § 19-2719. Creech appeals the district court's order dismissing his successive petition for post-conviction relief in a capital case.

I.**FACTUAL AND PROCEDURAL BACKGROUND**

Creech was originally convicted of and sentenced to death for first-degree murder after pleading guilty in 1981. Creech thereafter appealed, which was upheld by this Court. *State v. Creech*, 105 Idaho 362, 364, 670 P.2d 463, 465 (1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1327, 79 L.Ed.2d 722 (1984) ("Creech I"). Creech then filed a motion to withdraw his guilty plea, but filed no other petition for post conviction relief at the time. This motion was denied by the district court, and affirmed by this Court. *State v. Creech*, 109 Idaho 592, 710 P.2d 502 (1985) ("Creech II") (holding the record was sufficient to find that allowing the guilty plea to stand would not be manifestly unjust, and ordering Creech to make all remaining post-conviction relief motions). The case was then heard in federal district court on a habeas corpus petition, and thereafter appealed to the Ninth Circuit and the United States Supreme Court, which ultimately resulted in the Ninth Circuit ordering Creech to be resentenced so that additional mitigating information occurring since the original plea could be considered. Creech was resentenced in 1995. Creech then filed a petition for post-conviction relief. This Court affirmed Creech's conviction, sentence and denial of post-conviction relief. *State v. Creech*, 132 Idaho 1, 966 P.2d 1 (1998), cert. denied, 526 U.S. 1147, 119 S.Ct. 2025, 143 L.Ed.2d 1036 (1999) ("Creech III").

On June 10, 1999, Creech initiated new federal habeas proceedings. On June 14, 1999, the federal district court granted a stay of execution so Creech could file another petition in state court. On June 1, 2000, Creech returned to state court and filed a successive petition for post-conviction relief, raising five claims.¹ The State filed a response and motion to dismiss on June 30, 2000. Creech filed a reply, and after hearing oral argument on the State's motion, the district court granted the State's motion, dismissing Creech's successive post-conviction petition. The district

judge concluded Creech failed to establish that his first four successive post-conviction claims were not known or could not reasonably have been known within the forty-two day period set forth in I.C. § 19-2719. Creech's fifth successive claim was dismissed by the district court pursuant to *McKinney v. State*, 133 Idaho 695, 992 P.2d 144 (1999).

Creech appealed to this Court and the State moved to dismiss the appeal pursuant to I.C. § 19-2719.

II.

STANDARD OF REVIEW

The only issue before this Court is whether we should dismiss Creech's appeal based **389 *575 upon the provisions of Idaho Code § 19-2719. Idaho courts have no power to consider waived claims. I.C. § 19-2719(5).² **THUS, THIS COURT ONLY HAS JURISDICTION TO REVIEW THE ALLEGATIONS IN Creech's successive petition to determine whether his claims were known or reasonably could have been known within statutory time limits set by Idaho Code § 19-2719 and are, therefore, barred. If such claims are barred, no appeal on the merits will be heard, and this Court must dismiss Creech's successive petition.**

The expedited procedure for post-conviction review in capital cases is contained in Idaho Code § 19-2719. *Porter v. State*, 136 Idaho 257, 259, 32 P.3d 151, 153 (2001). The statute provides a defendant with one opportunity to raise all challenges to the conviction and sentence in a petition for post-conviction relief, except in those unusual cases where it can be demonstrated that the issues were not known and reasonably could not have been known within the time frame allowed by the statute. I.C. § 19-2719(5); *Porter at id.*; *Fields v. State*, 135 Idaho 286, 17 P.3d 230 (2000); *State v. Rhoades*, 120 Idaho 795, 820 P.2d 665 (1991). A claim that reasonably could be known immediately upon the completion of the trial and can be raised in a post-conviction petition, if not raised in the first post-conviction petition, is deemed waived. *Id.*; *Fields*, 135 Idaho at 290, 17 P.3d at 234; *Rhoades*, 120 Idaho at 797, 820 P.2d at 667. Any successive petition for post-conviction relief not within the exception of subsection (5) of the statute is to be dismissed summarily. I.C. § 19-2719(11).

In this case, we are presented with a motion by the State to dismiss Creech's appeal. When this Court is presented with

a motion to dismiss by the State based upon the provisions of Idaho Code § 19-2719, the proper standard of review this Court should utilize is to directly address the motion, determine whether or not the requirements of section 19-2719 have been met, and rule accordingly. *See, e.g., Porter v. State*, 136 Idaho 257, 259, 32 P.3d 151, 153 (2001); *Rhoades v. State*, 135 Idaho 299, 17 P.3d 243 (2000); *Paradis v. State*, 128 Idaho 223, 912 P.2d 110, 114 (1996); *Pizzuto v. State*, 127 Idaho 469, 471, 903 P.2d 58, 60 (1995); *Paz v. State*, 123 Idaho 758, 852 P.2d 1355 (1993); *Fetterly v. State*, 121 Idaho 417, 825 P.2d 1073 (1992), *cert. denied*, 506 U.S. 1002, 113 S.Ct. 607, 121 L.Ed.2d 542 (1992).

III.

DISCUSSION

A petitioner bringing a successive petition for post-conviction relief has a heightened burden and must make a *prima facie* showing that issues raised in that petition fit within the narrow exception provided by the statute. *Pizzuto v. State*, 127 Idaho 469, 471, 903 P.2d 58, 60 (1995); *Paz v. State*, 123 Idaho 758, 852 P.2d 1355 (1993). This is a burden Creech has failed to meet. Creech raises five claims in his second petition for post-conviction relief. The first three claims involve ineffective assistance of counsel, the fourth relates to the constitutionality of the statutory scheme for capital post-conviction proceedings, and the fifth challenges the constitutionality of the length of Creech's confinement thus far. Each claim will be addressed individually:

Ineffective Assistance of Counsel Claims

Creech first claims in his petition that the appointment of the Ada County public defender's office created a conflict of interest because representation of Creech was materially limited by the public defender's representation of other clients allegedly identified as material witnesses by the State, and the public defender never obtained a waiver of that conflict from Creech. Essentially, Creech claims that because the public defender represented some inmates at the prison, and because the murder Creech is sentenced to death for was committed at the same prison, the inmates were potential witnesses **390 *576 against him, creating a conflict of interest.

The transcript of a preliminary hearing in 1981 reveals Creech's trial counsel requested a continuance due to an alleged conflict of interest because of the public defender's

representation of other individuals. The public defender even conceded he was aware of the potential conflict. This clearly indicates this claim was known or reasonably could have been known at the time Creech filed his first post-conviction petition in 1995.

Creech next claims Rolfe Kehne, who represented Creech at his resentencing, was ineffective because the funds for his defense were controlled by the Ada County public defender's office and Kehne was unable to obtain the funds to present a proper defense, limiting his investigation and presentation of mitigation evidence.

Again, this claim is untimely. The terms of Kehne's contract were available to Creech at the time he filed his first post-conviction petition in 1995. Prior to resentencing, Kehne filed a motion regarding costs of experts and investigation, noting the alleged issues surrounding his contract with the public defender. Additionally, in *Creech III*, 132 Idaho 1, 17-21, 966 P.2d 1, 17-21 (1998), Creech raised a claim regarding Kehne's investigation. Thus, the record clearly reflects that at the time of the initial petition, Creech was aware of the possible existence of claims of ineffective assistance.

Third, Creech claims the Ada County public defender's office was ineffective on appeal and post-conviction through both Rolf Kehne, who represented Creech through the 1995 sentencing, and August Cahill, who represented Creech through the post-conviction proceedings in 1995 and 1996 and the 1998 Idaho Supreme Court appellate proceedings by failing to raise ineffective assistance of counsel claims against Kehne, failing to investigate an alleged conflict of interest between the presentence investigator and psychiatrist, and failing to properly represent Creech during post-conviction and appellate proceedings. Creech asserts that trial counsel and appellate counsel were effectively the same because the case was assigned to the Ada County public defender's office, given to Kehne first, who was Cahill's supervisor, then given to Cahill in 1999.

Again, Creech fails to state why this claim was not brought forward earlier. The majority of information pertaining to this claim was contained in the original sentencing, and in fact was before this Court in 1998 in *Creech III*. Creech has also failed to point to any facts regarding the alleged conflict between the presentence investigator and psychiatrist. With respect to Creech's claim regarding ineffective assistance of appellate counsel, this Court has previously held that when a petitioner is represented by the same attorney at trial, on direct appeal

and in the first post-conviction proceeding, the petitioner waives the issue of ineffective assistance of counsel by not raising it in the first petition. *McKinney v. State*, 133 Idaho 695, 701, 992 P.2d 144, 150 (1999), *cert. denied*, 530 U.S. 1208, 120 S.Ct. 2207, 147 L.Ed.2d 240 (2000) (citing *Paz v. State*, 123 Idaho 758, 760, 852 P.2d 1355, 1357 (1993)). Thus, Creech has failed to make a *prima facie* showing that this claim fits within the exception of Idaho Code § 19-2719(5).

Constitutionality of Statutory Scheme for Capital Post-Conviction Proceedings

Creech's fourth claim challenges the statutory scheme for capital post-conviction proceedings, arguing it is unconstitutional. This Court has previously concluded that successive claims involving the procedure and application of Idaho's death penalty statutory scheme are claims which were known or reasonably could have been known when the petitioner's first post-conviction petition was filed. *Lankford v. State*, 127 Idaho 100, 100-01, 897 P.2d 991, 991-92 (1995). Additionally, this Court has repeatedly upheld the constitutionality of Idaho Code § 19-2719. *Id.*; *State v. Rhoades*, 120 Idaho 795, 820 P.2d 665 (1991), *cert. denied*, *Rhoades v. Idaho*, 504 U.S. 987, 112 S.Ct. 2970, 119 L.Ed.2d 590 (1992); *State v. Beam*, 115 Idaho 208, 766 P.2d 678 (1988), *cert. denied*, *Beam v. Idaho*, 489 U.S. 1073, 109 S.Ct. 1360, 103 L.Ed.2d 827 (1989).

While *Lankford* only addressed Idaho's death penalty statutory scheme, the same **391 *577 analysis is equally applicable to the post-conviction relief statutes. Idaho Code section 19-2719 was in existence at the time Creech filed his second petition; thus, Creech's fourth claim was known or reasonably could have been known at the time he filed his first petition for relief in 1995.

Constitutionality of Length of Creech's Confinement

Finally, Creech claims the length of his confinement is unconstitutional. This claim was known or reasonably could have been known at the time he filed his first petition for relief in 1995. The State argues Creech could have raised this claim in his prior petition, citing three federal cases in support: *Gretzler v. Stewart*, 146 F.3d 675, 676 (9th Cir.1998); *Bonin v. Calderon*, 77 F.3d 1155, 1160-61 (9th Cir.1996); *Turner v. Jabe*, 58 F.3d 924, 930-31 (4th Cir.1995). This Court declined to rely on these cases in *McKinney v. State*, 133 Idaho 695, 992 P.2d 144 (1999), *cert. denied*, 530 U.S. 1208, 120 S.Ct. 2207, 147 L.Ed.2d 240 (2000), because "in each, the petitioner had already been on death row over a

decade when filing the first petition.” *Id.* at 702, 992 P.2d at 151. The defendant in *McKinney* had been on death row only three years when he filed his first petition for post-conviction relief. In this case, however, when Creech filed his first post-conviction petition on May 9, 1995, he had already been on death row for over thirteen years. Based upon Creech's length of confinement, we conclude the issue of the courts' alleged failure to expeditiously resolve his claim was ripe at the time Creech filed his first petition.

In addition, “[d]eath row prisoners are not entitled to have their sentences commuted to life because of the delay caused by their own unsuccessful collateral attacks on their sentences.” *McKinney* at *id.*

IV.

CONCLUSION

Creech failed to raise the claims in his successive petition within the time specified in [Idaho Code § 19-2719](#) because he has made no showing the claims were not known and could not reasonably have been known at the time he filed his initial petition. Therefore, we hold Creech has waived his claims pursuant to the statute, and grant the State's motion to dismiss Creech's appeal.

Justice KIDWELL, specially concurring.

Although I concur in the decision to dismiss Creech's petition, I am writing separately because I believe it is important that this Court's opinion not be read as indicating that this Court lacks jurisdiction to consider an appeal from a district court's decision to dismiss a successive petition for post-conviction relief under [I.C. § 19-2719](#). See *Sivak v. State*, 134 Idaho 641, 8 P.3d 636 (2000).

In several recent cases, this Court has affirmed district court decisions dismissing successive petitions, as opposed to dismissing the appeals from those decisions. See, e.g., *Id.*; *Pizzuto v. State*, 134 Idaho 793, 10 P.3d 742 (2000); *McKinney v. State*, 133 Idaho 695, 992 P.2d 144 (1999). Additionally, in the recent cases in which this Court has dismissed petitioners' appeals, the dismissals were generally³ based upon this Court's independent review of the petition and independent determination that the petition was facially insufficient, under [I.C. § 19-2719](#), to warrant further appellate procedures. See, e.g., *Rhoades v. State*, 135 Idaho 299, 17 P.3d 243 (2000); *Row v. State*, 135 Idaho 573, 575, 21 P.3d 895, 897 (2001). I agree with this Court's dispositions in those cases and I do not interpret those cases or [I.C. § 19-2719\(5\)](#) as implying that this Court lacks jurisdiction to consider a petitioner's appeal from a district court's decision to dismiss a successive petition for post-conviction relief.

All Citations

Justices SCHROEDER, WALTERS and Justice Pro Tem WESTON, CONCUR.

137 Idaho 573, 51 P.3d 387

Footnotes

1 This Court will consider Creech's June 2000 petition as his second petition and his 1995 petition as his first. Although Creech moved to withdraw his guilty plea prior to 1995, no other post-conviction petitions were filed at that time. See [Creech II](#) at 592, 710 P.2d at 502 (this Court initially describes the appeal as a post-conviction relief proceeding; however the appeal only reviewed the denial of Creech's motion to withdraw his guilty plea and order to consolidate post-conviction motions into one proceeding); and [Creech III](#) at 5, 966 P.2d at 5 (stating “[n]o other post-conviction petitions or issues were filed.”).

2 [Idaho Code § 19-2719\(5\)](#) states:

If the defendant fails to apply for relief as provided in this section and within the time limits specified, he shall be deemed to have waived such claims for relief as were known, or reasonably should have been

known. The courts of Idaho shall have no power to consider any such claims for relief as have been so waived or grant any such relief.

- 3 *Porter v. State*, 136 Idaho 257, 32 P.3d 151 (2001), utilized an analysis of the district court's decision throughout the opinion, but disingenuously suggested in the Conclusion section that the question was “not appealable.”

132 Idaho 1
Supreme Court of Idaho,
Boise, December 1997 Term.

STATE of Idaho, Plaintiff–Respondent,

v.

Thomas Eugene CREECH, Defendant–Appellant.

Thomas Eugene CREECH, Petitioner–Appellant,

v.

STATE of Idaho, Respondent.

Nos. 22006, 23482.

|

Aug. 19, 1998.

|

Rehearing Denied Oct. 23, 1998.

Synopsis

Following affirmance of murder conviction and death sentence, 105 Idaho 362, 670 P.2d 463, and denial of post-conviction relief, 109 Idaho 592, 710 P.2d 502, defendant petitioned for federal habeas corpus relief. The United States District Court for the District of Idaho denied petition, and defendant appealed. The United States Court of Appeals for the Ninth Circuit reversed, 928 F.2d 1481 and 947 F.2d 873. Granting certiorari, the United States Supreme Court, 507 U.S. 463, 113 S.Ct. 1534, 123 L.Ed.2d 188, remanded for resentencing. On remand, the District Court, Fourth Judicial District, Ada County, Robert G. Newhouse, J., imposed death penalty and denied defendant's petition for post-conviction relief. Defendant appealed. The Supreme Court, Silak, J., held that: (1) Double Jeopardy Clause did not bar state trial court at resentencing from reweighing existing information and changing a mitigating circumstance to an aggravating circumstance; (2) trial court did not err at resentencing in considering presentence investigation reports that had been presented at prior sentencing hearings; (3) “law of the case” doctrine barred arguments with respect to certain alleged errors by trial court at resentencing; (4) res judicata barred relitigation of certain issues in view of rulings by federal courts in habeas proceeding; (5) death sentence did not violate defendant's rights under Eighth and Fourteenth Amendments, even though two of five statutory aggravating circumstances listed by trial court allegedly only repeated elements of first-degree murder; (6) defendant had adequate notice of nonstatutory aggravating circumstances; (7) defendant failed to establish ineffective assistance of counsel; (8) prosecution of defendant in county that had sufficient funds to seek death

sentence did not violate his equal protection rights; and (9) state was not entitled to attorney fees and costs incurred on appeal, despite frivolous nature of certain issues asserted by defendant.

Affirmed.

Attorneys and Law Firms

****4 *4** Alan E. Trimming, Ada County Public Defender; August H. Cahill, Jr., Deputy Ada ****5 *5** County Public Defender, Boise, for appellant. August H. Cahill, Jr. argued.

Alan G. Lance, Attorney General; Michaelina B. Murphy, Deputy Attorney General, Boise, for respondent. Michaelina B. Murphy argued.

Opinion

SILAK, Justice.

This is an appeal from a death sentence imposed upon appellant Thomas Eugene Creech (Creech) entered on April 17, 1995, after his plea of guilty to first degree murder, and an appeal from a denial of his petition for post-conviction relief. A portion of this case is before the Court for mandatory review pursuant to Idaho Code section 19–2827. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

On May 13, 1981, while serving a life sentence in the Idaho State Correctional Institution for two counts of first degree murder, Creech killed fellow inmate David Dale Jensen (Jensen). On the day of his death, Jensen made two attacks on Creech. In the first, Jensen attacked Creech with a battery-filled sock. Creech disarmed Jensen. Jensen later attacked Creech with a toothbrush with a razor blade attached to it. Upon this second attack, Creech hit Jensen with the battery-filled sock. The blows to Jensen's head killed him. Part of Jensen's brain had been removed prior to his incarceration, and he had a plastic plate in his skull.

Creech originally pled not guilty to the first degree murder charge, but in late August 1981, Creech requested that he be allowed to change his plea from not guilty to guilty. On August 28, 1981, Creech was present in court. The district

judge interrogated Creech and Creech made clear his wish to plead guilty against the advice of his counsel, Rolf Kehne (Kehne). Kehne requested a continuance for a week which was denied. Kehne then requested that he be allowed to withdraw from representing Creech which was also denied. The district court accepted Creech's plea of guilty.

A sentencing hearing was held in January 1982, and the district court thereafter issued its findings sentencing Creech to death. However, because Creech was not present at sentencing, this Court issued an order vacating the sentence and remanding the case to the district court so that the sentence could be imposed in open court with Creech and his counsel present. Pursuant to that order, on March 17, 1983, the district court imposed the death penalty on Creech in the presence of Creech and his counsel. Creech appealed to this Court raising numerous issues. We affirmed Creech's conviction and the imposition of the death penalty. *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983).

On May 19, 1983, Creech filed a motion to withdraw his guilty plea pursuant to I.C.R. 33(c). Creech raised numerous issues regarding defects in his guilty plea. In January 1984, the district court issued an order stating that the Supreme Court had returned and remitted the case back to the district court, ordered that all post-conviction relief proceedings and all other post-trial motions be filed by February 6, 1984, and that any matters not filed by that date would be deemed waived. Within the time prescribed, Creech renewed his motion to withdraw his guilty plea. Creech cited nine reasons as supportive of his motion to withdraw the plea. No other post-conviction petitions or issues were filed. On February 27, 1984, testimony was heard on that motion. This Court affirmed the district court's denial of the motion in *State v. Creech*, 109 Idaho 592, 710 P.2d 502 (1985). The Court held that the record was sufficient to find that allowing the guilty plea to stand would not be manifestly unjust. *Id.* at 597, 710 P.2d at 507.

Creech next filed a petition for writ of habeas corpus in the United States District Court for the District of Idaho. Relief was denied on June 18, 1986. Creech appealed to the United States Court of Appeals for the Ninth Circuit raising numerous issues. The Court of Appeals reversed the federal district court's denial of Creech's petition on three grounds: (1) the trial court erred in refusing to allow Creech to present new mitigating evidence at his resentencing hearing on March 17, 1983, which would have pertained to Creech's good behavior and peaceful adjustment between the time of

his first sentencing in January 1982 and his resentencing in March 1983; (2) at Creech's sentencing hearing, the trial court found two aggravating circumstances without making a required finding beyond a reasonable doubt; and (3) one of the aggravating circumstances applied by the trial court, that Creech demonstrated an "utter disregard for human life," is unconstitutionally vague. *Creech v. Arave*, 947 F.2d 873, 881–85 (9th Cir.1991).

The State of Idaho then appealed to the United States Supreme Court which granted certiorari, limited to the question whether the "utter disregard" aggravating factor, as interpreted by the Idaho Supreme Court in *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981), is unconstitutionally vague. *Arave v. Creech*, 507 U.S. 463, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993). The Supreme Court held that the "utter disregard" circumstance, as defined in *Osborn*, on its face meets constitutional requirements. 507 U.S. at 478, 113 S.Ct. 1534. The Court thus reversed, in part, the judgment of the Court of Appeals and remanded for further proceedings. The Court noted that Creech was entitled to resentencing by the state district court pursuant to the Court of Appeals' ruling that the trial judge improperly refused to allow Creech to present new mitigating evidence when he was resented in open court. *Id.* at 478–79, 113 S.Ct. 1534.

On April 14, 1993, the United States District Court for the District of Idaho entered an Order on Remand to the Idaho Supreme Court. A resentencing hearing was scheduled before the state district court for December 27, 1993. However, pursuant to a stipulation, the sentencing hearing was continued to March 7, 1994, because Creech could not be fully prepared by the December 27th date. The sentencing hearing was later vacated and rescheduled an additional five times before commencing on March 13, 1995.

On April 21, 1994, Creech renewed his motion to withdraw his guilty plea raising some of the same issues he had raised previously, and raising some new grounds. The district court denied Creech's motion, ruling that whether all these issues had been ruled on by the district court or not, the motion to withdraw Creech's guilty plea was res judicata since it had previously been ruled on by the district court and the Idaho Supreme Court.

In August 1994, counsel for Creech requested that an updated presentence report be prepared, which the district court allowed. In March 1995, Creech moved to strike portions of the presentence investigation report, but the district court

denied the motion. The district court thereafter entered its findings and imposed the death penalty under I.C. § 19–2515. On May 9, 1995, Creech then filed his petition for post-conviction relief which the district court denied.

Creech appeals from both his conviction and the imposition of the death penalty, and from the denial of his post-conviction relief petition. On December 16, 1996, this Court issued an order consolidating these appeals, Supreme Court Docket Nos. 22006 and 23482. A death warrant was issued on January 2, 1997, but was stayed pending this consolidated appeal.

II.

ISSUES ON APPEAL

DIRECT APPEAL ISSUES

- A. Whether the district court committed reversible error by changing its findings in aggravation.
- B. Whether the district court committed reversible error by considering evidence of previous hearings.
- C. Whether the district court committed reversible error by denying Creech's motion to strike portions of the presentence investigation report.
- D. Whether the district court erred in weighing the unconstitutionally vague circumstance propensity to murder, and in finding that Creech “by prior conduct and by conduct in the commission of the murders at hand has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.”
- **7 *7 E. Whether the “utter disregard” aggravating circumstance relied upon by the district court is unconstitutionally vague and overbroad.
- F. Whether the district court's reliance on elements of the offense as statutory aggravating circumstances violated Creech's rights under the Eighth and Fourteenth Amendments.
- G. Whether the district court erroneously considered and weighed non-statutory aggravating circumstances against mitigating circumstances.

H. Whether Creech is entitled to a new sentencing hearing because the Idaho capital sentencing scheme unconstitutionally provides a mandatory sentencing formula violative of the Eighth Amendment.

I. Whether Idaho's death penalty scheme violates the Sixth Amendment to the United States Constitution by lack of jury participation.

J. Whether the district court's refusal to consider Creech's reduced capacity to conform his conduct to law due to mental defect and disease requires reversal.

K. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and Creech.

III.

ANALYSIS

A. The District Court Did Not Commit Reversible Error By Changing A Mitigating Circumstance To An Aggravating Circumstance In Its Findings At Creech's 1995 Resentencing.

Creech argues that the district court committed reversible error by significantly changing its findings in support of the death sentence. In its 1982 findings, the district court found that as a mitigating factor, “[Creech] did not instigate the fight with [Jensen], but [Jensen], without provocation, attacked him. [Creech] was initially justified in protecting himself.” In its 1995 findings, however, the court found, as an aggravating circumstance, that the murder of Jensen was planned and executed by Creech. Creech claims that the record fails to show any reason for this change and that the change is in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

In support of his argument, Creech relies on *Arizona v. Rumsey*, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984), which applied the Double Jeopardy Clause to a capital sentencing proceeding. *Rumsey* involved a conviction of first degree murder and an initial sentence of life imprisonment due to the trial court's finding that no aggravating or mitigating circumstances were present to warrant the imposition of the death penalty. 467 U.S. at 205, 104 S.Ct. 2305. On cross-appeal by the state to the Arizona Supreme Court, however, the court set aside the life sentence and remanded for redetermination of aggravating

and mitigating circumstances and for resentencing of the murder conviction, the court having found that the trial court erroneously interpreted the law with respect to one of the statutory aggravating factors. *Id.* at 206–07, 104 S.Ct. 2305. On remand, at the conclusion of a new sentencing hearing, the trial court found present the statutory aggravating factor it had previously misinterpreted, found no mitigating factors and thus sentenced Rumsey to death. *Id.* at 207–08, 104 S.Ct. 2305. The United States Supreme Court, relying on *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), ultimately held that this death sentence violated the Double Jeopardy Clause because Rumsey had initially been sentenced to life imprisonment which was essentially an acquittal on the merits of the central issue of whether death was the appropriate punishment, *i.e.*, that the prosecution had failed to prove its case. Thus, the Court held that this decision barred any retrial of the appropriateness of the death penalty. *Id.* at 211, 104 S.Ct. 2305.

Creech asserts that likewise when a sentencing court finds certain facts in mitigation, the court should be estopped from finding different facts later, and that to do so would violate the Double Jeopardy Clause.

We find *Rumsey* to be inapposite to the case at bar. In the present case, the district **8 *8 court consistently imposed the death penalty at both the 1982 and 1995 sentencing hearings. The only difference at the second sentencing was that after the court received additional information from the updated presentence report (which was compiled at the request of Creech), it reinterpreted its finding with respect to the circumstances surrounding the attack of Jensen. Pursuant to *Poland v. Arizona*, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986), we hold that it was not error for the district court to change its finding.

In *Poland*, the trial court sentenced the two Poland brothers to death for first degree murder based on a statutory aggravating factor that the crime was “especially heinous, cruel or depraved.” 476 U.S. at 149, 106 S.Ct. 1749. On appeal, the Arizona Supreme Court held that there was insufficient evidence to support the trial court’s finding of the “especially heinous” aggravating circumstance, but found that the trial court had misapplied the law when it did not find that the Polands had committed the offense for pecuniary gain, another statutory aggravating factor. *Id.* at 150, 106 S.Ct. 1749. After a new trial, the Polands were again convicted of first degree murder and sentenced to death based upon three aggravating factors found to be present at the second trial. *Id.*

On appeal to the United States Supreme Court, the Polands argued that the Double Jeopardy Clause barred the imposition of the second death sentence because the Arizona Supreme Court had essentially acquitted them of the death penalty by finding that the evidence was insufficient to support the only aggravating circumstance found by the trial court. *Id.* at 155, 106 S.Ct. 1749. The Supreme Court disagreed:

We reject the ... petitioners' argument ... that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an “acquittal” of that circumstance for double jeopardy purposes. *Bullington* indicates that the proper inquiry is whether the sentencer or reviewing court has “decided that the prosecution has not proved its case” *that the death penalty is appropriate*. [Footnote omitted]. We are not prepared to extend *Bullington* further and view the capital sentencing hearing as a set of minitrials on the existence of each aggravating circumstance.

Id. at 155–56, 106 S.Ct. 1749. (Emphasis in original). The Court thus concluded that the trial court’s rejection of the “pecuniary gain” aggravating circumstance in this case was not an “acquittal” of that circumstance for double jeopardy purposes. *Id.* at 156–57, 106 S.Ct. 1749.

In the present case, the United States Supreme Court remanded the case for one reason: to allow Creech to present mitigating evidence at his sentencing hearing which he was not allowed to do at his 1983 hearing. *Creech*, 507 U.S. at 478, 113 S.Ct. 1534. No reviewing court has ever held in this case that the State failed to prove its case that the death penalty was the appropriate punishment. The remand was solely to give Creech the opportunity to provide any new mitigating evidence which may have become available since his initial 1982 sentencing, which was voided by this Court because the district court failed to sentence Creech in Creech’s presence. Thus, when the resentencing hearing occurred in 1995, the Double Jeopardy Clause did not bar the trial court from resentencing Creech to death. After considering all of the evidence presented, including the additional evidence set forth in the updated presentence report, the district court simply reinterpreted its earlier mitigation finding that Creech had initially acted in self-defense to one in aggravation, that the attack on Jensen was a ruse and that Creech murdered him with premeditation. This was based on statements made by Creech himself. The district court’s reinterpretation has no effect on the first sentence because even then, when this circumstance was considered

by the district court to be a mitigating one, the court still sentenced Creech to death pursuant to the other statutory aggravating circumstances present. Thus, we hold that the district court was not barred by the Double Jeopardy Clause from reconsidering existing information, changing mitigating factors and weighing evidence differently at the most recent sentencing.

****9 *9 B. The District Court Did Not Commit Reversible Error By Considering Evidence Of Previous Hearings.**

Prior to Creech's resentencing in March 1995, the district court took judicial notice of Creech's entire file back to 1981. Creech claims that he objected to this and that it was reversible error for the court to have considered evidence adduced at prior hearings.

We find Creech's argument to be without merit for two reasons. First, our review of the record indicates that the only objection made by Creech was to any hearsay evidence contained in the presentence investigation report dated September 1981, not to the sentencing court taking judicial notice of Creech's file. Second, notwithstanding any objection, it was appropriate for the district court to consider the prior evidence in this case. Prior to Creech's resentencing in 1995, he had two previous sentencing hearings for which a presentence investigation report was compiled. From that report, as well as from the testimony, the district court gathered sufficient information to conclude that the imposition of the death penalty was warranted in this case. When the United States Supreme Court remanded this case for another resentencing, it was for the sole purpose of allowing Creech to introduce new mitigating evidence. See *Arave v. Creech*, 507 U.S. 463, 478–79, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993). There was no order by the Supreme Court prohibiting the state sentencing court from reviewing prior evidence, information or testimony.

Further, this Court previously considered and rejected a similar argument in *State v. Sivak*, 119 Idaho 320, 806 P.2d 413 (1990). In that case, we had directed the district court on remand to allow Sivak to present additional mitigating evidence. On appeal after resentencing, this Court held that, contrary to Sivak's argument, so long as the district court could properly weigh the aggravating and mitigating circumstances, consideration of evidence presented at prior hearings was appropriate, for the purpose of the remand was not to repeat the entire sentencing process. *Id.* at 323, 806 P.2d at 416.

Thus, we hold that the district court did not err in considering evidence adduced at previous hearings.

C. The Issue Whether The District Court Committed Reversible Error By Denying Creech's Motion To Strike Portions Of The Presentence Investigation Report Is Barred By The Doctrines Of Law Of The Case And Res Judicata.

Creech argues that the district court erred by denying his motion to strike portions of the presentence investigation report. Creech's motion was filed in response to the district court's pronouncement that it would take judicial notice of Creech's entire file, including presentence reports. Creech moved that any hearsay evidence be stricken from the updated presentence report as it violated his constitutional right to confront and cross-examine the declarants. Creech argued that all evidence at the sentencing hearing should be from "live witnesses" subject to cross-examination.

We hold that this issue is barred by the doctrine of law of the case as it has previously been decided by this Court.¹ See ***10 **10** *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983). At the commencement of the sentencing hearing in January 1982, the State requested that the district court take judicial notice of the court's entire file, including the 1981 presentence report. Creech objected and argued that the entire sentencing record be produced by live testimony in open court. The district court treated Creech's request as a motion and denied it. On appeal, this Court preliminarily noted that "a sentencing decision made solely on the basis of live testimony is not constitutionally mandated." *Id.* at 365, 670 P.2d at 466. We further noted that "[t]he use of the presentence report over defendant's objection has been upheld, despite the contention that the report contained hearsay." *Id.* (citations omitted). Thus, this Court held that the district court's admission of the presentence report was not error. *Creech*, 105 Idaho at 368, 670 P.2d at 469. For purposes of the present appeal, we note that although the presentence report was updated for the 1995 resentencing, the only additions were disciplinary offenses committed during Creech's incarceration since 1981. Thus, the updated presentence report was nearly identical to the 1981 report that was the issue of the 1983 *Creech* opinion.

We hold that this issue is also barred by the doctrine of res judicata as the Ninth Circuit Court of Appeals also held that Creech's right to confrontation was not violated by the admission of the presentence report:

It is apparent [] that Creech had the opportunity, other than through cross-examination, to dispute the accuracy of the presentence report prior to and at his January, 1982 sentencing hearing because his counsel was given the report prior to the sentencing hearing.... We conclude that Creech's right to confrontation was not violated in this case.

Creech v. Arave, 947 F.2d 873, 880–81 (9th Cir.1991). In denying Creech's motion to strike portions of the presentence report, the district court ruled that Creech had been given “a full opportunity to present favorable evidence; a full and reasonable opportunity to examine all of the materials contained in the presentence report; and a full opportunity to explain and rebut adverse evidence, as required.” The court also noted that the updated presentence report had been completed and delivered to Creech's counsel in mid-October 1994, approximately five months prior to the commencement of the resentencing hearing in March 1995.

Creech next argues that the issue was not totally resolved in *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983). He claims that while testimony may be appropriate for non-crucial information in the presentence report, critical information with respect to the consideration of aggravating circumstances must be supported by live testimony. This Court has also previously ruled on and rejected this argument. In *Sivak v. State*, 112 Idaho 197, 731 P.2d 192 (1986), we held:

[N]ot only is Sivak interpreting *Creech* unreasonably narrowly, but his distinction between “critical” and “non-critical” testimony is unworkable. Whose testimony should be deemed “critical” and at what phase of the defendant's trial? What may be deemed critical to the judge or jury at the guilt phase of a trial may not be critical at the sentencing phase and vice versa.... Therefore, we continue to adhere to our ruling in *Creech* and the position of the United States Supreme

Court that the sixth amendment to the United States Constitution does not require that a capital defendant be afforded the opportunity to confront and cross-examine live witnesses in his sentencing proceedings.

Id. at 216, 731 P.2d at 211.

Thus, we hold that this issue has been previously decided and will not be reconsidered.

****11 *11 D. The Issue Whether The District Court Erred In Finding That The Aggravating Circumstance “Propensity To Murder” Was Appropriate In This Case Is Barred By The Doctrine Of Law Of The Case.**

Creech argues that the statutory aggravating circumstance “propensity to commit murder,” I.C. § 19–2515(h)(8), is unconstitutionally vague, was not proven beyond a reasonable doubt, and was unconstitutionally applied by the district court. This issue has previously been decided by this Court in this case and is therefore barred by the doctrine of law of the case.

In *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), Creech argued that the aggravating circumstance “propensity to commit murder,” pursuant to former I.C. § 19–2515(f)(8), was unconstitutionally vague, and challenged the district court's findings with respect to this circumstance. The Court held that this aggravating circumstance was not unconstitutionally vague:

[W]e reject appellant's assertion that I.C. § 19–2515(f)(8) is impermissibly vague.... Under *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)] and *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)], that statutory language does not fail as being facially unconstitutional.... Here, ... it cannot be asserted that the “propensity” circumstance could conceivably be applied to every murderer coming before a court in this state. We would construe “propensity” to exclude,

for example, a person who has no inclination to kill but in an episode of rage, such as during an emotional family or lover's quarrel, commits the offense of murder.... [R]ather we construe the "propensity" language to specify that person who is a willing, predisposed killer, a killer who tends toward destroying the life of another, one who kills with less than the normal amount of provocation.

Id. at 370–71, 670 P.2d at 471–72. After holding that the "propensity to commit murder" circumstance is not unconstitutionally vague, we held that the district court's finding that this aggravating factor was present was correct:

As applied to this particular defendant, the finding of propensity was clearly tailored and correct. The defendant here committed murder at least four times prior to the instant offense, twice in Idaho and also in Oregon and in California. There presently exist other pending charges of murder in the first degree against him.... Creech's own statements claim responsibility for approximately 40 murders. However vague the statutory language might be argued to be in the ordinary case (which assertion we have already rejected), nevertheless, as applied in the instant case, we hold beyond any doubt whatsoever that the appellant here has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

Id. at 371, 670 P.2d at 472.

This decision makes clear that the issue has been fully litigated and decided by the district court and by this Court, and it is therefore barred from being reviewed by this Court again.

E. The Issue Whether The "Utter Disregard" Aggravating Circumstance Relied Upon By The District Court Is Unconstitutionally Vague And Overbroad Is Barred By The Doctrines Of Law Of The Case And Res Judicata.

Creech argues that the "utter disregard for human life" aggravating circumstance, I.C. § 19–2515(h)(6), as applied in Idaho, is unconstitutionally vague. We hold that this issue has previously been decided in this case and in Creech's federal habeas corpus proceedings and is therefore barred from consideration by the doctrines of law of the case and res judicata.

Creech first raised this issue in *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983). We held in that case that pursuant to our decision in *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981), which held that the challenged statutory language was sufficiently narrow and limited to withstand a challenge of unconstitutional unfairness, likewise former I.C. § 19–2515(f)(6), now **12 § 19–2515(h)(6), *12 is not unconstitutionally vague. *Id.* at 370, 670 P.2d at 471. In *Osborn*, the Court concluded that the phrase "utter disregard for human life" is "meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." *Osborn*, 102 Idaho at 419, 631 P.2d at 201.

Creech next presented this issue to the federal courts. The Ninth Circuit Court of Appeals held that the "utter disregard" aggravating circumstance was unconstitutionally vague, *Creech v. Arave*, 947 F.2d 873, 884–85 (1991). The United States Supreme Court reversed the Ninth Circuit on this issue, holding:

Unlike the Court of Appeals, we do not believe it is necessary to decide whether the statutory phrase "utter disregard for human life" itself passes constitutional muster. The Idaho Supreme Court has adopted a limiting construction, and we believe that construction meets constitutional requirements.

Arave v. Creech, 507 U.S. 463, 471, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993). The limiting construction to which the Supreme Court referred was our interpretation of this aggravating factor in *State v. Osborn*, *supra*. The Court therefore concluded that “the ‘utter disregard’ circumstance, as defined in *Osborn*, on its face meets constitutional requirements.” 507 U.S. at 479, 113 S.Ct. 1534.

Thus, it is clear that this issue has been definitively decided, not only by this Court, but by the United States Supreme Court as well, and is not subject to review again.

F. The District Court's Reliance On Elements Of The Offense As Statutory Aggravating Circumstances Did Not Violate Creech's Rights Under The Eighth And Fourteenth Amendments To The United States Constitution.

Two of the five statutory aggravating factors listed by the district court in its findings imposing the death penalty, were as follows:

- C. The murder was one defined as Murder of the First Degree by [Section 18–4003, Idaho Code](#), subsection (c). The defendant was under a sentence of Murder of the First Degree at the time of his actions and with specific intent caused the additional death of David Jensen.
- D. The murder was one defined as Murder of the First Degree by [Section 18–4003, Idaho Code](#), subsection (e). The defendant with specific intent committed the murder of a fellow inmate while both were incarcerated in the Idaho State Correctional Institution.

Creech claims that the district court's listing of these aggravating circumstances did nothing more than repeat the definition of first degree murder contained in [I.C. § 18–4003\(c\) and \(e\)](#). Relying on *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.1985), Creech argues that such action by the district court was constitutionally impermissible because imposing the death penalty on the basis of an aggravating circumstance that duplicates an element of the offense does not sufficiently narrow the class of persons eligible to receive the death penalty.

Creech initially made this argument to the Ninth Circuit Court of Appeals in 1991, but later retracted it when he became aware that *Collins v. Lockhart*, *supra*, had been overruled:

Creech originally argued, relying on *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985), that the sentence was unconstitutional because these two aggravating factors were nothing more than elements of first degree murder. Acknowledging that *Collins* has been overruled, *see Perry v. Lockhart*, 871 F.2d 1384, 1392 (8th Cir.), *cert. denied*, 493 U.S. 959, 110 S.Ct. 378, 107 L.Ed.2d 363 (1989), Creech no longer makes this argument.

Creech v. Arave, 947 F.2d 873, 882 n. 8 (9th Cir.1991).

In his reply brief, Creech acknowledges that *Collins v. Lockhart*, *supra*, was overruled by *Lowenfield*, but argues that *Lowenfield* is distinguishable from the present case because it involved a jurisdiction where the jury applies the law.

****13 *13** In *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir.1989), the Eighth Circuit overruled *Collins* due to the Supreme Court's decision in *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). In *Lowenfield*, the petitioner argued that his death sentence should be vacated because the sole aggravating circumstance found by the jury at the sentencing phase was identical to an element of the crime of which he was convicted, first degree murder. In considering *Lowenfield*'s argument, the Supreme Court noted that Louisiana had five statutorily established grades of homicide. The Court also noted that Louisiana had further narrowed its definition of first degree murder into five separate parts. In affirming the death sentence, the Court held that the use of “aggravating circumstances” was not an end in itself and that there was no reason why narrowing could not be performed in additional ways:

It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition

of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.

Lowenfield, 484 U.S. at 246, 108 S.Ct. 546.

The Court concluded that the Louisiana capital sentencing process was sufficiently narrow to meet constitutional requirements despite the duplication of an aggravating circumstance:

Here, the “narrowing function” was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that “the offender has a specific intent to kill or to inflict great bodily harm upon more than one person.” The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more.

Id.

In the present case, although we have considered Creech's constitutional arguments based on *Collins v. Lockhart*, *supra*, even if such arguments were meritorious, they do not affect the constitutionality of this death sentence. The district court specifically found that three other statutory aggravating circumstances were present. I.C. § 19–2515(h) requires that only one aggravating circumstance be found beyond a reasonable doubt before the death penalty may be imposed. Thus, the death penalty would have been imposed regardless of the two findings which Creech argues duplicate the elements of the crime.

Creech's constitutional rights under the Eighth and Fourteenth Amendments of the United States Constitution have therefore not been violated.

G. The District Court Did Not Erroneously Consider And Weigh Non Statutory Aggravating Circumstances Against Mitigating Circumstances.

Creech argues that the district court considered several aggravating factors that are not listed in I.C. § 19–2515(h) as the statutory aggravating factors. He claims that this is unconstitutional because he was not given notice of these factors before the sentencing hearing. Creech also argues that the aggravating factors found in I.C. § 19–2515(h) comprise an exclusive list, and that the statute permits consideration of only those factors found beyond a reasonable doubt. We find this argument to be without merit.

Creech first raised this issue in *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983). In that decision we noted that Creech's concern appeared to have arisen because of the **14 *14 format chosen by the district court in drafting its findings. The 1982 findings were organized into separate sections entitled “Facts and Argument Found in Mitigation,” “Facts and Arguments Found in Aggravation,” and “Statutory Aggravating Circumstances Found Under Section 19–2515(f), Idaho Code.” In that case, this Court held that the finding of aggravating circumstances other than those listed in I.C. § 19–2515(f), now 19–2515(h), was not error as long as at least one statutory aggravating circumstance was found by the district court beyond a reasonable doubt:

The court is not limited as to the circumstances it may find in aggravation to those listed under I.C. § 19–2515(f). Thus, that section of the court's findings denominated “5. Facts and Arguments Found in Aggravation,” although including circumstances not statutorily listed and not expressly found beyond a reasonable doubt, is not error.... Such an interpretation is not contradicted by I.C. § 19–2515(f), which merely lists the statutory aggravating circumstances, at least one of which must exist beyond a reasonable doubt if the ultimate sanction of death is to be imposed.... We hold that the list of aggravating factors set forth in the statute is not exclusive, albeit one of those factors must necessarily be found to exist beyond a reasonable doubt for a sentence of death to be upheld.

Creech, 105 Idaho at 369–70, 670 P.2d at 470–71.

In the present case, the district court in its 1995 findings also used a similar format: “4. Facts Found in Mitigation,” “5. Facts Found in Aggravation,” and “6. Statutory Aggravating Circumstances Found Under Section 19–2515(f), Idaho

Code.” In his brief in the present case, Creech lists the seven non-statutory aggravating factors found by the district court in 1995 of which he claims he did not have notice. Four of the factors are identical to ones found by the district court in 1982. Because this Court has already held that it was not error for the district court to weigh these aggravating factors, we will not address Creech's claim that his constitutional rights were violated because he had no notice of these factors.

The primary difference between the 1982 and 1995 findings under this section is that the court found that Creech had murdered Jensen with premeditation, that all of the weapons used in the murder were made by Creech, and that Creech “took breaks” during his beating of Jensen. The court noted that Creech had told different versions to different people with respect to what happened on that day, but based upon a review of the investigation and Creech's own statements, the court concluded that the murder was planned and executed by Creech. The court also found in its 1995 findings that Creech had confessed to killing others in the past, that several bodies had been found based upon information received from Creech, and that these murders resulted from either perceived personal affronts or personal gain. Finally, the court found that as Creech has aged his violent behavior has not declined and that only isolation has stopped the violence. We hold that Creech had more than adequate notice of the above findings. All of this information has been contained in the record since 1982, was produced by either Creech or one of Creech's witnesses or was found in the presentence investigation report.

Furthermore, we have already held and reaffirm our holding that it was not error for the district court to weigh these non-statutory aggravating factors and that the list of statutory aggravating factors found in I.C. § 19-2515(h) is not exclusive. As long as the court finds at least one statutory aggravating factor beyond a reasonable doubt, it is free to consider and weigh other aggravating factors individually as well. *State v. Charboneau*, 116 Idaho 129, 150–51, 774 P.2d 299, 320–21 (1989). In the present case, the district court found beyond a reasonable doubt three such aggravating factors: (1) that Creech has been convicted of first degree murder on three separate occasions prior to the present offense pursuant to I.C. § 19-2515(h)(1); (2) that Creech exhibited an utter disregard for human life pursuant to I.C. § 19-2515(h)(6); and (3) that Creech, by his prior conduct or conduct in the commission of the present murder, exhibited a propensity to commit murder and will probably be a continuing threat to society pursuant to I.C. § 19-2515(h)(8).

Thus, because the district court **15 *15 formally found these statutory aggravating factors, and that these findings were not outweighed by mitigating circumstances, we hold there has been no error.

H. The Issue Whether Idaho's Death Sentence Statute Mandates A Sentencing Formula Which Is In Violation Of The Eighth Amendment Thus Entitling Creech To A New Sentencing Hearing Is Barred By The Doctrine Of Res Judicata.

I.C. § 19-2515(c) provides:

Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court *shall* sentence the defendant to death *unless* the court finds that mitigating circumstances which may be presented are sufficiently compelling that the death penalty would be unjust.

(Emphasis added.) Creech argues that this statute violates the Eighth Amendment because it is too rigid. Specifically, Creech claims that I.C. § 19-2515(c) is unconstitutional because it removes an “individualized determination” and a “moral response” in sentencing.

This identical issue was raised by Creech before the Ninth Circuit Court of Appeals in *Creech v. Arave*, 947 F.2d 873 (9th Cir.1991). In that case, the Ninth Circuit, relying on *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990), specifically held that I.C. § 19-2515(c) is constitutional. *Creech*, 947 F.2d at 886. The United States Supreme Court did not grant certiorari on this issue. Thus, the Ninth Circuit having found Idaho's sentencing statute constitutional, reconsideration of this issue is barred by the doctrine of res judicata.

I. The Issue Whether Idaho's Death Penalty Scheme Violates The Sixth Amendment To The United States

**Constitution By Lack Of Jury Participation Is Barred
By The Doctrines Of Law Of The Case And Res
Judicata.**

Creech argues that the Sixth Amendment to the United States Constitution guarantees a jury trial on the existence of aggravating circumstances when a potential death sentence is involved. Creech claims that [I.C. § 19–2515](#) links an enhanced punishment to specifically enumerated factual findings and then usurps the jury's fundamental role in deciding whether the facts have been established.

This issue was also previously raised by Creech and decided by this Court and the Ninth Circuit Court of Appeals. [State v. Creech](#), 105 Idaho 362, 670 P.2d 463 (1983), stated:

We hold that there is no federal constitutional requirement of jury participation in the sentencing process and that the decision to have jury participation in the sentencing process, as contrasted with judicial discretion sentencing, is within the policy determination of the individual states.... [W]e would agree with our legislature that judicial control of the sentencing process is preferable to jury participation, in that the constitutionally mandated consistency of result is more probable in the case of judicial sentencing.

[Id.](#) at 373, 670 P.2d at 474.

In [Creech v. Arave](#), 947 F.2d 873 (9th Cir.1991), the Court of Appeals similarly held that Creech's argument had no merit: "Creech's argument has been fully rejected by the Supreme Court.... We therefore find that ... Creech had no constitutional right to a jury trial on the existence of aggravating circumstances." 974 F.2d at 885–86.

Thus, we decline to reconsider this issue and the death sentence is affirmed.

**J. The District Court Considered Creech's Mental
Capacity In Imposing The Death Sentence.**

Creech argues that the district court erred because it refused to consider Creech's reduced mental capacity when weighing aggravating factors against mitigating factors. We find this argument to be without merit.

****16 *16** At his 1995 resentencing hearing, Creech produced Dr. Brown, a psychologist, who testified that there was "probably" a biological component to Creech's violent personality. However, Dr. Brown further testified that this did not mean Creech was incompetent to stand trial nor that it had any bearing on whether Creech should be held criminally responsible for his actions.

That the district court considered this evidence is clear from a review of the court's written findings. Under the section entitled "Facts Found in Mitigation," the court specifically found:

There may be a biological reason for the defendant to be predisposed to violence. There is no independent factual basis presented for this theory as it relates to this individual. However, for the purpose of sentencing this court will accept that the defendant may be biologically predisposed to violence.

In his reply brief, Creech acknowledges that while the district court did find a genetic component to Creech's behavior, there was no discussion in the court's findings of the psychological and psychiatric testimony at the original proceedings, and therefore it is unclear whether this mitigating evidence was properly considered. We also find this argument to be without merit.

In [State v. Creech](#), 105 Idaho 362, 670 P.2d 463 (1983), Creech previously argued that the district court failed to consider his reduced mental capacity at the time of the murder as a mitigating circumstance. The district court's findings from that sentencing hearing contained no mention whatsoever of Creech's mental capacity, and therefore, Creech claimed that since the court did not mention such evidence, it must not have considered it. We rejected Creech's argument, holding that a sentencing court is not required to specifically list each and every piece of evidence it may have considered in mitigation:

While I.C. § 19–2515(d) directs that “the court shall set forth in writing any mitigating factors considered,” the practical effect of that statute is not to require the judge to set out each and every circumstance *presented* to him in mitigation, but rather, the plain language of the statute, we hold, requires the judge to list that evidence which, in his capacity as a fact finder, he has found to be valid, competent, and pertinent to the issue of whether the death penalty should be imposed. To accept appellant’s contention would result in a requirement that the judge set forth in writing every consideration that has been raised or has occurred to him as a potential factor in mitigation, a requirement we deem to be unworkable, impossible, and not to be gleaned from the statutory language.

Id. at 372, 670 P.2d at 473 (quoting I.C. § 19–2515(d)). (Emphasis in original.)

Thus, we hold that although the district court in its findings presently before the Court did not specifically list or mention the evidence adduced at Creech’s original sentencing with respect to his mental capacity, this does not mean that it was not considered by the court. Further, the fact remains that the court did consider the testimony of Dr. Brown in the 1995 resentencing and expressly found Dr. Brown’s conclusion that Creech may be genetically predisposed to violence to be a mitigating factor and so stated in its findings. A reversal of the death sentence is therefore not required.

K. Due To The 1994 Amendment To I.C. § 19–2827, The Death Sentence In This Case Will Not Be Reviewed In Terms Of Either Excessiveness Or Proportionality.

Creech argues that his death sentence is excessive and disproportionate to the crime he committed and requests that the sentence be vacated and the case remanded for resentencing.

Idaho Code Section 19–2827 provides for an automatic review by this Court of all death sentences imposed by the trial courts in this state. Prior to 1994, I.C. § 19–2827(c)(3) required the Court to determine whether a sentence was “excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” I.C. § 19–2827(c)(3) (1977). However, the 1994 Idaho Legislature amended this section eliminating the requirement **17 *17 that the Court conduct a proportionality review. See 1994 Idaho Sess. Laws, ch. 127, §1, p. 285. After the

amendment, I.C. § 19–2827(c)(3) now requires that the Court determine “[w]hether the sentence of death is excessive.” I.C. § 19–2827(c)(3) (1994).

In *State v. Fields*, 127 Idaho 904, 908 P.2d 1211 (1995), in discussing the 1994 amendment, we noted that prior to the amendment excessiveness was decided by determining whether the penalty was disproportionate to the penalty imposed in similar cases. *Id.* at 918, 908 P.2d at 1225. Thus, the Court held that the elimination of the proportionality language from I.C. § 19–2827(c)(3) rendered the term “excessive” in that section meaningless. *Id.* We therefore declined to undertake any review of whether the sentence was excessive other than to conduct an independent review of whether the district court’s findings and weighing of aggravating and mitigating circumstances were supported by the record. *Id.* We reaffirmed this holding in *State v. Sivak*, 127 Idaho 387, 393, 901 P.2d 494, 500 (1995).

Thus, in the present case, we decline to consider whether Creech’s death sentence is excessive. We have already held that the district court’s findings weighing the aggravating and mitigating factors surrounding the crime are supported by the record. The death sentence is therefore affirmed.

POST-CONVICTION ISSUES

L. Whether the district court erred in denying Creech’s petition for post-conviction relief.

1. Ineffective assistance of counsel claims.
 - a. Whether the investigation and performance of trial counsel at the 1995 resentencing was deficient with respect to mitigating evidence involving Creech’s background and personal history.
 - b. Whether trial counsel’s preparation and presentation of evidence relating to mental health issues was deficient.
 - c. Whether trial counsel’s performance was deficient because he did not challenge the admission of prior convictions.
 - d. Whether trial counsel’s performance was deficient because he failed to spend sufficient time with Creech.

- e. Whether trial counsel failed to protect Creech's rights regarding communications with mental health professionals.
- f. Whether trial counsel failed to raise or preserve meritorious issues in appellate proceedings.
- g. Whether trial counsel's performance was deficient because he should have moved to withdraw as attorney of record.
- h. Whether trial counsel's performance was deficient in preparing Creech's motion to withdraw his guilty plea.

2. Whether Creech should have been allowed to withdraw his guilty plea.

3. Whether Creech was denied equal protection under the Fourteenth Amendment to the United States Constitution.

4. Whether the district court abused its discretion by denying Creech a continuance of hearing on the petition for post-conviction relief to allow Creech to present further evidence.

The State raises the following additional issue on appeal:

- M. Whether attorney fees and costs should be awarded to the State on the post-conviction relief issues.

L. The District Court Did Not Err In Denying Creech's Petition For Post Conviction Relief.

1. Ineffective assistance of counsel claims.

Creech raises several arguments claiming he was denied effective assistance of counsel with respect to his 1995 resentencing, in violation of the Sixth Amendment to the United States Constitution. We find no merit in Creech's arguments.

In order to prove ineffective assistance of counsel, Creech must satisfy the two-prong test set forth by the United States ^{**18} Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, Creech must prove that counsel's performance was

deficient. 466 U.S. at 687, 104 S.Ct. 2052. With respect to this performance component, the Court stated:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Id. at 689, 104 S.Ct. 2052. Thus, the Court held that an evaluating court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

Second, Creech must prove that his counsel's deficient performance prejudiced the defense. *Id.* at 687, 104 S.Ct. 2052. This requires a showing that defense counsel's errors were so egregious that the defendant was deprived of a fair trial. *Id.* With respect to this prong of the test, the Supreme Court held as follows:

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694, 104 S.Ct. 2052. See also *State v. Fields*, 127 Idaho 904, 912, 908 P.2d 1211, 1219 (1995); *State v. Pratt*, 125 Idaho 546, 568, 873 P.2d 800, 822 (1993).

a. Creech has failed to prove that the investigation and performance of trial counsel at the 1995 resentencing was deficient with respect to mitigating evidence involving Creech's background and personal history.

Creech first challenges the death sentence on the ground that the sentencing procedures were inadequate. In support

of this assertion, Creech makes reference to testimony and statements of his former attorneys, John Adams and Rolf Kehne, in which they allegedly stated that the investigation, preparation and presentation of mitigating evidence (provided by themselves), were wholly inadequate. Next, Creech simply asserts that Kehne and Adams failed to investigate his personal history and thus did not supply the sentencing court with ample mitigating evidence, thereby violating his Sixth Amendment right to effective assistance of counsel.

Under the *Strickland v. Washington* test, as adopted in *State v. Fields*, 127 Idaho 904, 908 P.2d 1211 (1995), the first question is whether the assistance rendered was deficient. 466 U.S. at 687, 104 S.Ct. 2052. Creech does not detail the deficiencies made by his counsel of which he complains. In fact, Creech has never stated what was *not* provided to the sentencing court for consideration. Creech testified at the resentencing. His brother-in-law testified about family history and Creech's good points. His sister testified extensively regarding Creech's family history, head trauma, and general disposition as a child and adult. Creech's expert witness, Dr. Brown, testified that he reviewed Creech's prison psychological and psychiatric records, descriptions of the crime scene, the presentence investigation report, Oregon State Hospital records, results from I.Q. and psychological tests, hospital records, prison disciplinary reports, and personal history information. All of these documents were supplied to Dr. Brown by Creech's counsel. Additionally, Dr. Brown testified as to the genetic, biological and mental condition of Creech. Further, Creech's presentence investigation report contained over thirty pages of personal history from early childhood to 1995. Creech has not identified what other information should have been included. Thus, we hold that there is no objective information provided by Creech, or obvious omissions in the records and transcripts in this case which would support a finding that Creech's counsels' performance was deficient in investigating Creech's personal history.

Moreover, in its memorandum decision denying Creech's petition for post-conviction relief, the district court ruled that additional **19 *19 mitigating evidence or information regarding the victim would not have changed the outcome of the criminal case:

Accepting for purposes of this decision the testimony elicited at the post conviction relief hearing as to what

evidence Kehne could have or should have secured to give as many mitigating factors as possible, this court's firm belief is that the outcome of the sentencing would not have been changed. This court's interest was (1) whether Creech had killed Jensen; (2) was Creech predisposed to take human life and (3) was he incapable of comprehending the outcome of his actions. The childhood history of Creech was incidental to this court; the possibility of a biological predisposition was listed as a mitigating factor by this court; and the suggestion that the victim was a punk was also listed. However, when it is all said and done this court determined that Thomas Eugene Creech was an adult male of at least normal intelligence who was able to comprehend the results of his actions and did with specific intent kill another inmate while imprisoned as a result of an earlier conviction. The second prong of the ineffective assistance test has not been met.

Creech speculates that additional information may have helped. However, the district court clearly stated in its findings and conclusions imposing the death penalty that all of the mitigating factors combined did not outweigh each individual aggravating factor. The district court's denial of Creech's petition for post-conviction relief is therefore affirmed.

b. Creech has failed to prove that the preparation and presentation of evidence by counsel relating to mental health issues was deficient.

Creech argues that his attorneys failed to present mitigating evidence regarding mental health issues, including sexual abuse victimization and heredity issues. We find this argument to be without merit. Creech was interviewed by Dr. Brown, a psychologist, who gave testimony at the resentencing concerning mental health and heredity issues. Creech's sister also testified at the resentencing and stated that there was no sexual abuse in the family. Further, mental

health issues were extensively covered at the 1982 sentencing. Creech does not state exactly what mitigating evidence was omitted by his trial counsel. Thus, we hold that Creech has failed to satisfy his burden under the *Strickland* test of proving that his counsel's performance was deficient and that but for the deficiencies the outcome would have been different. As previously noted, the district court expressly stated that the outcome of the resentencing hearing would not have changed with additional mitigating evidence.

c. The issue whether trial counsel's performance was deficient because he did not challenge the admission of prior convictions is waived.

Creech makes a conclusory statement that his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution were violated by the unopposed admission of his prior convictions in the penalty phase of this case. He also claims that he was denied effective assistance of counsel under the Sixth Amendment because his attorney objected only to the admission of the presentence report and did not specifically challenge those prior convictions on constitutional grounds.

We decline to address the merits of this issue. Creech cites no legal authority to support his claim that his due process rights were violated. Failure to provide legal citations waives the issue. I.A.R. 35(a)(6); *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). He also fails to cite to any decision, record, transcript or any other documentation to support his statement that his prior convictions were unconstitutional. Finally, Creech cites to no authority and provides no argument to support his claim that he was denied effective assistance of counsel with respect to the admission into evidence of the fact of his earlier convictions.

d. Creech has failed to prove that trial counsel's performance was deficient because he did not spend sufficient time with Creech.

Creech next claims that he was denied effective assistance of counsel because **20 *20 Kehne did not spend a sufficient amount of time with him and that this affected the outcome of both the guilt and penalty phases of the case. We find this argument to be without merit.

With respect to the guilt phase of this case, Creech changed his plea from not guilty to guilty over the objections of Kehne. Further, Creech specifically stated to the court at the August 28, 1981 hearing at which he changed his plea, that he had

sufficient time to discuss the matter with Kehne, that Kehne advised Creech to his satisfaction of his rights, defenses, and the possible consequences of pleading guilty, that he wished to change his plea to guilty against the advice of Kehne and that he was satisfied with Kehne's representation in the matter. The Ninth Circuit Court of Appeals also found that Creech was uncooperative and unwilling to listen to the advice of his counsel:

[A]ny omission on Kehne's part was not the result of his incompetence as counsel. Creech simply did not allow his counsel to inform him of the elements of the offense or possible defenses. The transcript of the August 28 [1981] plea hearing shows that Kehne explicitly told the court in Creech's presence that the guilty plea was against his advice. As the district court properly noted, "a defendant may not be forced to abide by the advice of counsel." [Footnote omitted]. Furthermore, at that hearing Creech told the court that he had discussed the plea with counsel, that he believed he had sufficient time to discuss his plea with counsel, that he was satisfied with his attorney's representation, and that he understood that by pleading guilty he was giving up any defense to the charge.

Creech v. Arave, 947 F.2d 873, 877 (9th Cir.1991).

With respect to the penalty phase of the case, Creech offers no facts which would support a finding that the sentence would have been less than death had he had spent more time with his attorney.

Thus, Creech has failed to prove that he was denied effective assistance of counsel in this respect.

e. The issue whether trial counsel failed to protect Creech's rights regarding communications with mental health professionals is waived.

Creech claims that at the sentencing hearing, Kehne allowed Creech to make statements against his interest which contributed to the sentences imposed. Creech claims that these statements resulted in part from trial counsel's failure to adequately advise Creech of his rights during interviews with defense mental health experts.

We again decline to address this issue as Creech has made only conclusory assertions and wholly fails to cite to any legal authority, the record or the transcript to support this allegation. There is no indication of which rights Creech should have

been apprised nor what statements were made against his interest. The issue has thus been waived. *I.A.R. 35*; *Zichko*, 129 Idaho at 263, 923 P.2d at 970.

f. The issue whether trial counsel failed to raise or preserve meritorious issues in appellate proceedings is waived.

Creech claims that his counsel did not raise all the appropriate issues in the direct appeal and therefore, he has been prejudiced in obtaining appellate relief. He also claims that a corollary issue is whether Kehne should have advised the district court in his motion to withdraw that Creech's strongest ground for appeal was ineffective assistance of counsel.

We decline to address this issue as Creech has provided no argument and does not even attempt to state what "appropriate issues" Kehne allegedly failed to raise in the direct appeal. Creech has again failed to cite to any legal authority, the record or the transcript to support his assertions. The issue has therefore been waived. *I.A.R. 35(a)(6)*; *Zichko*, 129 Idaho at 263, 923 P.2d at 970.

*****21 *21 g. Creech has failed to prove that trial counsel's performance was deficient because he should have moved to withdraw as attorney of record.***

Creech argues that Kehne should have withdrawn as his attorney after he entered his guilty plea because Kehne was a witness, thus creating a conflict. We find this argument to be without merit for two reasons.

First, after Creech entered his guilty plea, Kehne did move to withdraw as Creech's counsel, but the district court denied the motion. As this Court stated in Creech's first post-conviction relief appeal:

Defendant was represented by counsel prior to the hearing when he entered his guilty plea and his counsel was present at the hearing. Although defense counsel asked to be dismissed from the case because defendant refused to comply with his advice, the district court refused so that defendant could continue to have the advice of counsel.

State v. Creech, 109 Idaho 592, 596, 710 P.2d 502, 506 (1985).

Second, other than claiming there was a "void in the record," Creech has failed to show how he was prejudiced by the continued representation of Kehne. This Court previously held that it was not manifestly unjust to let the guilty plea stand. *Id.* at 597, 710 P.2d at 507. Creech has not shown how that decision would have differed had Kehne testified in his behalf. Thus, Creech has not satisfied his burden of proving ineffective assistance of counsel under the *Strickland* test.

h. The issue whether trial counsel's performance was deficient in preparing Creech's motion to withdraw his guilty plea is waived.

Creech claims that Kehne did not properly prepare the motion to withdraw his guilty plea. Creech argues that Kehne should have presented the best evidence available, the testimony of the participants in the original plea hearing, the judge, the prosecutor and Kehne.

We decline to address this issue as Creech makes only conclusory statements and fails to state how he was prejudiced. There is no argument as to how the outcome of these proceedings would have differed had Kehne acted as a witness on Creech's behalf and presented testimony of the judge and prosecutor. Creech has also failed to provide any legal authority for his argument. This issue is therefore waived. *I.A.R. 35(a)(6)*; *Zichko*, 129 Idaho at 263, 923 P.2d at 970.

2. The issue whether Creech should be allowed to withdraw his guilty plea is barred by the doctrine of res judicata.

After Creech was originally sentenced to death in 1983, he filed a motion to withdraw his guilty plea. After an evidentiary hearing, the district court denied the motion. This Court affirmed the district court, holding that the record was sufficient to find that allowing the guilty plea to stand would not be manifestly unjust. *State v. Creech*, 109 Idaho 592, 597, 710 P.2d 502, 507 (1985).

In 1991, the Ninth Circuit Court of Appeals remanded the case for resentencing to allow the introduction of additional mitigating evidence. *Creech*, 947 F.2d at 881. That resentencing hearing was originally scheduled for December 1993. However, due to Creech's claims of unpreparedness and counsel's conflicting schedule, the hearing was vacated

six times until it finally commenced in March 1995. In April 1994, prior to the resentencing hearing, Creech filed another motion to withdraw his guilty plea. The district court denied Creech's motion, ruling that it was barred by res judicata since the district court and this Court had previously ruled on it.

On this appeal, Creech argues that he was denied due process when he was prevented from litigating his motion to withdraw his guilty plea filed before the resentencing in March 1995. He claims that raising this issue is not barred by res judicata because the district court and this Court previously examined the issue under the standard for post-sentence withdrawals in 1985 (whether a manifest injustice is shown), whereas this motion is to be examined under a pre-sentence ****22 *22** standard which is less stringent than the manifest injustice standard.

We find Creech's argument to be wholly without merit. The timing of the filing of Creech's second motion to withdraw in this case is irrelevant and does not create a new issue simply because it was coincidentally filed and decided prior to the resentencing due to scheduling delays. Timing will not allow a second review of the same issue. As stated above, the purpose of the remand was not to relitigate all issues, but rather to provide Creech with an opportunity to introduce additional mitigating evidence. Thus, we reject Creech's assertion that a new issue is before the Court as the guilty plea issue had been fully litigated and was completed. The claim is barred by res judicata.

In the statement of facts section of his opening brief, Creech makes a passing reference to his relationship with former Ada County Sheriff, E.C. "Chuck" Palmer, and makes a vague assertion that Palmer improperly coerced Creech into pleading guilty. Creech states that after he was charged with Jensen's murder he was housed at the Ada County Jail and that he trusted Sheriff Palmer. Creech then states that while he was at the Ada County Jail: "The Sheriff discussed religious subjects with Creech, urging him to atone for his crimes. *Apparently this lead [sic] Creech to plead guilty.*" (Emphasis added). This is the only reference to Sheriff Palmer in Creech's entire brief and the only reference to any supposed wrongdoing. Creech makes no legal argument with respect to this claim, nor does he provide any citations or references to the record or transcript. Thus, Creech's obscure reference to Palmer in the introductory portion of his brief will not be addressed. I.A.R. 35(a)(6); *Zichko*, 129 Idaho at 263, 923 P.2d at 970.

3. Creech has failed to prove that he was denied equal protection under the Fourteenth Amendment to the United States Constitution.

Creech argues that he was denied equal protection because he was prosecuted in Ada County, a county that had sufficient funds to seek the death penalty, as opposed to a smaller county which would not have sought the death penalty for financial reasons. Creech seems to argue that the imposition of the death penalty in larger counties is not based upon a valid justification, but rather shows disparate treatment of two classes of litigants, persons convicted of first degree murder in small counties and persons convicted of first degree murder in large counties. We find this argument to be without merit.

In determining whether there has been an equal protection violation, we must first identify (1) the classification which is being challenged, and (2) the standard under which the classification will be reviewed. *State v. Beam*, 115 Idaho 208, 211, 766 P.2d 678, 681 (1988). Second, we must determine whether the appropriate equal protection standard has been satisfied. *Id.* Unless the party is a member of a suspect class, *i.e.*, those classes which have historically been encumbered with disabilities or have been subjected to unequal treatment due to race, religion, sex or alienage, which requires strict scrutiny, we need only find that the classification be rationally related to a legitimate state interest. *Davis v. Moran*, 112 Idaho 703, 706–07, 735 P.2d 1014, 1017–18 (1987) (citing *City of New Orleans v. Duke*, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976)).

We hold that Creech has failed to establish that he is a member of a suspect class. Thus, the rational relationship analysis applies. In this case the State is the prosecutor recommending that the death penalty be imposed and the district court deciding that the death penalty would be an appropriate punishment. In both cases, this act is within the sound discretion of an officer of the court who need only have a legitimate state purpose in seeking or imposing the death penalty. The legitimate purpose stems from the first degree murder itself, and the weighing of aggravating and mitigating circumstances. Creech has thus failed to establish that he was denied equal protection.

4. The district court did not abuse its discretion in denying Creech's request for a continuance of the post-conviction relief hearing.

Creech argues that the district court abused its discretion by denying his request ****23 *23** for a continuance of the

post-conviction hearing. He claims that had he been given more time, he would have collected additional “empirical evidence” to support his equal protection claim that large counties impose the death penalty more than small counties for financial reasons. We find this argument to be wholly without merit.

The decision to grant or deny a motion for a continuance is vested within the sound discretion of the trial court. *State v. Tapia*, 127 Idaho 249, 255, 899 P.2d 959, 965 (1995). We hold that the district court did not abuse its discretion in denying Creech's last request for a continuance. The hearing, originally scheduled for August 7, 1995, was vacated and continued four times, and was not actually held until October 1, 1996, approximately fourteen months later. We conclude that counsel for Creech had more than enough time to collect any empirical data he may have sought. In any event, because the equal protection issue was without merit, additional time to prepare this argument would not have resulted in a different decision by the district court. Thus, the denial of Creech's request for a continuance is affirmed.

M. The State Is Not Entitled To An Award Of Attorney Fees And Costs On The Post-Conviction Issues.

The State claims that it is entitled to an award of attorneys and costs pursuant to I.C. § 12–121 and I.A.R. 40 and 41. The State argues that the issues presented by Creech on his appeal from the denial of his post-conviction petition are frivolous, barred by res judicata, lack citation to the record or legal authority, and present arguments contrary to well-settled state and federal case law.

While we agree with the State that certain of Creech's issues presented in his petition for post-conviction relief are barred by res judicata, lack citation to legal authority and the record, and merely present conclusory statements, this Court has never assessed attorney fees and costs against a capital defendant and we decline to do so now. Such a decision could have a chilling effect on defense counsel, virtually all of whom are public defenders or court appointed. When a defendant is faced with the death penalty, the most serious of punishments, he or she should be allowed to exhaust every arguably meritorious possibility for relief. Thus, we hold that the State is not entitled to an award of attorneys fees and costs.

IV.

CONCLUSION

For all of the foregoing reasons, we affirm the judgment of conviction, the imposition of the death sentence and the denial of Creech's petition for post-conviction relief. The State's request for attorney fees and costs on the post-conviction appeal is denied.

TROUT, C.J., and JOHNSON, SCHROEDER and WALTERS, JJ., concur.

All Citations

132 Idaho 1, 966 P.2d 1

Footnotes

- 1 The doctrine of “law of the case” is well established in Idaho and provides that

“upon an appeal, the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal ...”

Suits v. First Sec. Bank of Idaho, 110 Idaho 15, 21, 713 P.2d 1374, 1380 (1985) (quoting *Fiscus v. Beartooth Elec. Coop., Inc.*, 180 Mont. 434, 591 P.2d 196, 197 (1979)). See also, *Creem v. Northwestern Mut. Fire*

Ass'n, 58 Idaho 349, 352, 74 P.2d 702, 703 (1937). In other words, “[t]he decision on an issue of law made at one stage of a proceeding becomes precedent to be followed in successive stages of that same litigation.” *Sun Valley Ranches, Inc. v. Prairie Power Coop.*, 124 Idaho 125, 129, 856 P.2d 1292, 1296 (Ct.App.1993). Thus, this Court’s pronouncements on issues of law set forth in *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), will not be addressed again on this successive appeal.

The doctrine of res judicata is also applicable to certain of the issues raised by Creech on this appeal. This doctrine applies to any issues raised by Creech and adjudicated in his habeas corpus proceeding in the federal courts. Habeas corpus proceedings, like state post-conviction relief proceedings, are separate and distinct proceedings, separate from criminal proceedings, and are civil in nature. See, e.g., *State v. Beam*, 115 Idaho 208, 210, 766 P.2d 678, 680 (1988); *Paradis v. State*, 110 Idaho 534, 536, 716 P.2d 1306, 1308 (1986). Thus, when legal issues are decided in a criminal action on direct appeal, the defendant is barred by the doctrine of res judicata from raising them again in a post-conviction relief proceeding. *State v. Beam*, 115 Idaho at 210, 766 P.2d at 680; *State v. Fetterly*, 115 Idaho 231, 233, 766 P.2d 701, 703 (1988). Similarly, when an issue is decided in a federal habeas corpus proceeding, the doctrine of res judicata applies to prevent the issue from being addressed again by this Court on remand.

105 Idaho 362

Editor's Note: Additions are indicated by **Text** and deletions by **Text** .

Supreme Court of Idaho.

STATE of Idaho, Plaintiff-Respondent,

v.

Thomas Eugene CREECH, Defendant-Appellant.

Nos. 14480, 15000.

|

May 23, 1983.

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Rehearing Denied Sept. 21, 1983.

Synopsis

Defendant was convicted in the District Court, Fourth Judicial District, Ada County, Robert G. Newhouse, J., of first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court, Shepard, J., held that: (1) sentencing court did not err in considering nonoral testimony in form of written presentencing investigation report; (2) trial court did not err in its findings on matter of aggravating and mitigating circumstances; (3) aggravating circumstances that defendant exhibited utter disregard for human life and propensity to commit murder are not unconstitutionally vague; (4) process of weighing aggravating and mitigating circumstances under sentencing statutes as applicable to capital cases is not unconstitutional; (5) jury participation in sentencing process leading to death sentence was not constitutionally mandated; and (6) imposition of death penalty was not, under the circumstances, influenced by passion, prejudice, or any other arbitrary factor, nor was it excessive or disproportionate to sentences imposed in similar cases.

Affirmed.

Huntley, J., dissented and filed opinion.

Bistline, J., dissented and filed opinions on original consideration and on denial of petition for rehearing.

Attorneys and Law Firms

***363 **464** Rolf Kehne, Boise, Klaus Wiebe, Ada County Public Defenders Office, for defendant-appellant.

***364 **465** David H. Leroy, Jim Jones, Attys. Gen., Lynn E. Thomas, Sol. Gen., Boise, for plaintiff-respondent.

SHEPARD, Justice.

This is an appeal from a death sentence imposed upon defendant-appellant Thomas Eugene Creech after his plea of guilty to the charge of first degree murder. The cause is before this Court pursuant to the provisions of **I.C. § 19-2827**, "Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Idaho," and also upon an appeal filed by Creech, asserting error in certain proceedings, actions and orders of the trial court. We hold that the sentence was validly imposed in conformity with the statutory requirements for the imposition of a death sentence and that the sentence imposed was not in violation of either the Constitution of the State of Idaho or the Constitution of the United States. We affirm.

The following facts regarding the particular offense are disclosed by the record. At the time of the offense here in question, Creech was an inmate of the Idaho State Correctional Institution, serving a life sentence for first degree murder. The victim of this offense, Dale Jensen, had been convicted of car theft and was serving a sentence in the same institution. Jensen had some years earlier sustained a gunshot **wound** to the head which had necessitated the removal of part of his brain and the placement of a plastic plate in his skull. His speech and motor functions were impaired to some extent. At the time of the offense, both Creech and Jensen were housed in the maximum security tier of the institution.

In the maximum security tier, only one inmate at any one time was ordinarily allowed out of his cell. Creech, however, had been made a janitor and thus, while Creech was performing cleaning duties, he might be out of his cell while another inmate was out of his cell for exercise or shower privileges.

Prior to the offense in question, Creech and Jensen had engaged in argument over television and over Jensen's littering and dirtying the floor, for which Creech, as janitor, was responsible. Apparently the two were not on good terms. Although Creech himself has given more than one version of the murder, it appears that on the day in question, while Jensen was out of his cell, Jensen approached Creech and swung a weapon at him which consisted of a sock containing batteries. Creech took the weapon away from Jensen, who returned to his cell but emerged with a toothbrush to which

had been taped a razor blade. When the two men again met, Jensen made some movement toward Creech, who then struck Jensen between the eyes with the battery laden sock, knocking Jensen to the floor. The fight continued, according to Creech's version, with Jensen swinging the razor blade at Creech and Creech hitting Jensen with the battery filled sock. The plate imbedded in Jensen's skull shattered, and blood from Jensen's skull was splashed on the floor and walls. Finally, the sock broke and the batteries fell out, and by that time Jensen was helpless. Creech then commenced kicking Jensen about the throat and head. Sometime later a guard noticed blood, and Jensen was taken to the hospital, where he died the same day. There is some evidence in the record indicating that Creech had been enticed by other inmates to "do Jensen in," but the district judge did not decide or find that the murder had been performed on contract or by plan.

Creech was charged with first degree murder and initially pleaded not guilty. However, later and apparently in response to a letter from Creech, he and his counsel were brought into court to entertain Creech's request to change his plea to guilty. Over the objections of defense counsel, that guilty plea was accepted and the court set a date for a sentencing hearing. Prior to that sentencing hearing, defendant's counsel demanded a jury trial on the issue of aggravating and mitigating factors and also demanded sentencing by a jury. Defense counsel further demanded a ***365 **466** sentencing hearing formal in nature and based solely on the testimony of live witnesses, and he objected to any consideration of hearsay evidence to be used in the formulation of findings on aggravation and mitigation. All of those demands were denied.

At the sentencing hearing, testimony was offered by both the State and the defense, relating to the mental condition of Creech. A psychiatrist, testifying on behalf of the State, offered as his professional opinion that Creech did not suffer from any [organic brain syndrome](#), did not generally depart from reality in his day to day life, and was able to appreciate the wrongfulness of his conduct and conform his acts to the requirements of the law. A psychologist, testifying for the defense, offered as his opinion that Creech, during the fight with Jensen, lost his capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law. The psychologist further testified that, in his opinion, Creech suffered from [antisocial personality disorder](#), from a learning deficit, from [schizotypal personality disorder](#), and from a [borderline personality disorder](#). The district court, although not expressly ruling on the sanity of Creech, did find

that the defendant was of adequate intelligence and capable of being trained and educated, and further found that the murder was an intentional and calculated act.

Following the conclusion of the sentencing hearing, the district court made its written findings and pronounced sentence of death upon Creech.¹

The issues presented on this appeal are whether [I.C. §§ 19-2515—2516](#) require a judge's findings in mitigation and aggravation and the imposition of sentence to be based solely on evidence adduced from witnesses personally present and testifying in open court at the sentencing hearing; whether the district judge here committed error in his weighing of the aggravating and mitigating circumstances; and finally, whether the imposition of the death penalty, under our statutory scheme which allows the imposition of the death penalty by a judge without participation or recommendation of jury, is unconstitutional. We answer all three issues in the negative and affirm the holding of the district court below.

At the outset of the sentencing hearing the State requested that the court take judicial notice of the court's entire file and of the presentence report which the district judge had ordered be prepared. Defendant objected and demanded that the entire sentencing record be produced by live witnesses testifying in open court, basing his demand on [I.C. §§ 19-2515—2516](#) and the case law interpreting those statutes. That demand was treated as a motion, which was denied.

We note at the outset that a sentencing decision made solely on the basis of live testimony is not constitutionally mandated. [Rule 32\(c\) of the Federal Rules of Criminal Procedure](#) provides as a matter of course that the probation service of the court shall make a presentence investigation and report to the court before imposition of sentence. The use of the presentence report over defendant's objection has been upheld, despite the contention that the report contained hearsay. *Gregg v. Georgia*, 428 U.S. 153, 203–204, 96 S.Ct. 2909, 2939–2940, 49 L.Ed.2d 859 (1976); *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); ****467** *Gregg v. United States*, 394 U.S. 489, 89 S.Ct. 1134, 22 L.Ed.2d 442 (1969); *State v. Johnson*, 101 Idaho 581, 618 P.2d 759 (1980); *United States v. Ferreboeuf*, 632 F.2d 832 (9th Cir.1980), ***366** cert. denied, 450 U.S. 934, 101 S.Ct. 1398, 67 L.Ed.2d 368 (1981); *Gelfuso v. Bell*, 590 F.2d 754 (9th Cir.1978). This Court has held that the trial judge has broad discretion in deciding what evidence is admissible at the sentencing hearing, *State v. Johnson*, *supra*, and that

the rules of evidence do not apply to the sentencing process, *State v. Johnson*, *supra*; *State v. Tucker*, 97 Idaho 4, 539 P.2d 556 (1975). All of the above holdings comport with the constitutional mandate “that there be taken into account the circumstances of the offense together with the character and propensities of the offender.” *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, at 55, 58 S.Ct. 59, at 60, 82 L.Ed. 43 (1937). *Accord Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Williams v. Oklahoma*, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959); *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). We further note that the United States Supreme Court has in several instances set aside a death sentence, where the Court deemed that the circumstances under which the sentence was imposed did not allow the proper in-depth consideration of the particular circumstances of both the offender and the offense involved. *Enmund v. Florida*, *supra*; *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Roberts v. Louisiana*, 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Winston v. United States*, 172 U.S. 303, 19 S.Ct. 212, 43 L.Ed. 456 (1899). *See also*, *Jurek v. Texas*, 428 U.S. 262, 271–273, 96 S.Ct. 2950, 2956–2957, 49 L.Ed.2d 929 (1976).

Thus, the argument of appellant that the matters which may be considered at a sentencing hearing must be limited to testimony adduced from witnesses there present must find its foundation, if any, in interpretation of the language of I.C. §§ 19–2515–2516. I.C. § 19–2515 provides in pertinent part:

“(a) After a plea or verdict of guilty, where a discretion is conferred upon the court as to the extent of the punishment, the court, upon the oral or written suggestion of either party that there are circumstances which may be properly taken into view either in aggravation or mitigation of the punishment, may, in its discretion, hear the same *summarily*, at a specified time, and upon such notice to the adverse party as it may direct.

“(c) In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the

defendant shall be entitled to present all relevant evidence in aggravation and mitigation ... Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to complete the record.” (Emphasis added.)

I.C. § 19–2516 provides:

“19–2516. Inquiry into circumstances—Examination of witnesses.—*The circumstances must be presented by the testimony of witnesses examined in open court*, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. *No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section.*” (Emphasis added.)

***367 **468** Here the district court accepted a presentence report compiled by a probation officer which included recitations of prior murder convictions, pending charges of first degree murder, other felonies of which Creech had been charged or convicted, the transcript from a prior trial in which Creech was convicted of first degree murder, reports of psychiatric interviews, letters from Creech, and the manuscript of an autobiographical paper written by Creech, all of which material was considered by the sentencing judge in the instant case.

Appellant asserts that any reasonable interpretation of I.C. § 19–2516 mandates that only oral testimony is to be admitted and considered in a sentencing hearing and hence the admission and consideration of the written presentence report was error, particularly where as here appellant had demanded that the hearing be limited to live testimony.

Appellant's assertion regarding the requirements of I.C. § 19–2516 has been considered and rejected by this Court in the recent case of *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981). In *Osborn* it was held that the statute does not displace or exclude the discretion otherwise granted to the state as to the procedure of presenting evidence of aggravating circumstances at the sentencing hearing. There the Court stated:

“The last sentence of I.C. § 19–2516 makes it clear that we are to treat both sections as together setting forth the procedure to be followed in such hearings. The statute provides that evidence previously presented at trial need not be repeated and indeed may be amplified if desired. The parties are ‘entitled to present all [other] relevant evidence’ they desire. The manifest intent is to place as much possible relevant information as can be provided before the sentencing court. This also serves to provide this court with as much information and as complete a record as possible for appellate review.” *Id.*, 102 Idaho at 411–412, 631 P.2d 193–194 (brackets in original).

In *Osborn* it was noted that the “unreasoning adherence to the formal requirements [of I.C. § 19–2516] would not materially add to the achievement of statutory objectives” and held that the admission of the presentence report was not error. *Id.*, 102 Idaho at 413, 631 P.2d 195.

Under the established rules of statutory construction, we are required to construe the language of I.C. § 19–2515 as being consistent with the language of I.C. § 19–2516, if such construction is at all possible. As we explained in *Union Pacific R. Co. v. Board of Tax Appeals*, 103 Idaho 808, 654 P.2d 901, 904 (1982):

“Statutes which are *in pari materia* are to be construed together to the end that legislative intent will be effected. [Citations omitted.] As stated in *Meyers v. City of Idaho Falls*, 52 Idaho 81, 89–90, 11 P.2d 626, 629 (1932):

“The rule that statutes *in pari materia* are to be construed together means that each legislative act is to be interpreted with other acts relating to the same matter or subject. Statutes are *in pari materia* when they relate to the same subject. Such statutes are taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. For the

purpose of learning the intention, all statutes relating to the same subject are to be compared, and so far as still in force brought into harmony by interpretation.’ (Citations omitted.)”

Since both statutes deal with the same subject matter, *i.e.*, sentencing procedures, we are enjoined to compare and harmonize them.

I.C. § 19–2515(c) clearly requires that, “[i]n all cases in which the death penalty may be imposed, the court *shall*, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law.” Hence, *368 **469 no discretion exists in the court, other than to order the conducting of a presentence investigation. I.C. § 20–220 sets out the scope of such investigation, requires a written report, and mandates:

“The parole and probation officer shall inquire into the circumstances of the offense, criminal record, social history and present condition of the defendant. Whenever practicable, such investigation shall include a physical and mental examination of the defendant.”

A logical extension of appellant's argument would require an investigation to be completed, a written report to be submitted, but upon the demand of the defendant, the court to refrain from reading the report. Such a result would be, of course, anomalous and unnecessary. We hold that the closing language of I.C. § 19–2516 clearly and unambiguously provides an exception to the otherwise required oral testimony and that those authorizations of I.C. § 19–2515 fall within the purview of the intended exception.

Appellant argues that interpreting the presentence investigation requirements of I.C. § 19–2515 as an exception to the live witness requirement of I.C. § 19–2516 renders the live witness requirement a nullity. As noted above, we do not find the two statutes to be irreconcilable because of the exception language, but in any event, if the provisions of the two statutes could not be harmonized, then the provisions of I.C. § 19–2516 would be construed to be superseded, since I.C. § 19–2515 is the later enacted statute. *Mickelsen v. City of Rexburg*, 101 Idaho 305, 612 P.2d 542 (1980).

As stated in *State v. Yoelin*, 94 Idaho 791, 794, 498 P.2d 1264, 1267 (1972), the court is free to consider the results of the prehearing investigation if the reliability of the information contained in the report is insured by certain protections, *i.e.*,

“(1) that the defendant be afforded a full opportunity to present favorable evidence; (2) that the defendant be afforded a reasonable opportunity to examine all the materials contained in the pre-sentence report; (3) that the defendant be afforded a full opportunity to explain and rebut adverse evidence.”

Accord *State v. Johnson*, 101 Idaho 581, 618 P.2d 759 (1980), citing *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949); *State v. Ballard*, 93 Idaho 355, 461 P.2d 250 (1969). Here there is no contention that the defendant was not afforded those protections, and the defendant has at no point, either here or below, challenged the truth of any of the material contained in the presentence report.

We hold that the court's admission of and consideration of the presentence report was not error.

Appellant next asserts that the district court committed reversible error in its finding of aggravating and mitigating circumstances. He asserts that the aggravating circumstances are unsupported in the record; that the court wrongly included in its weighing process non-statutory aggravating circumstances; that the statutory aggravating circumstances which the court may consider as listed in I.C. § 19-2515(f) are unconstitutionally vague; that the court unconstitutionally failed to consider the reduced capacity of the defendant at the time of the murder as being a mitigating circumstance; and that the weighing process of I.C. § 19-2515 is unconstitutional, in that it allows the imposition of a death sentence where aggravating circumstances do not outweigh mitigating circumstances beyond a reasonable doubt.

The decisions of the United States Supreme Court require that sentencing discretion be directed and limited, so as to promote consistency and to prevent a death sentence from being “wantonly” and “freakishly” imposed (*Furman v. Georgia*, 408 U.S. 238, 310, 92 S.Ct. 2726, 2762, 33

L.Ed.2d 346 (1972) (Stewart, J., concurring)), and to provide a “meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not” (*id.*, at 313, 92 S.Ct. at 2764 (White, J., concurring); *Lockett v. Ohio*, 438 U.S. 586, 599, 98 S.Ct. 2954, 2962, 57 L.Ed.2d 973 (1978) (Burger, C.J., writing for the plurality); *369 **470 *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976) (Stewart, J., announcing the judgment of the court and an opinion in which Powell and Stevens, JJ., join)). At the same time, the sentencing process must allow flexibility, in order that it be humane and sensitive to the individual defendant. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), citing *Lockett v. Ohio*, *supra*.

Thus, an almost unavoidable conflict presents itself to a legislature attempting to design a sentencing process that is both a consistent and principled system of punishment and one that is flexibly humane and cognizant of the uniqueness of each individual defendant. See, *Eddings v. Oklahoma*, *supra*. In Idaho, the aggravating circumstances which a sentencing judge may consider in pronouncing sentence in a capital case are clearly laid out in I.C. § 19-2515, and thus, to the extent possible, arbitrariness or the influence of prejudice is avoided, but the necessary individual consideration is nonetheless preserved. The open-ended allowance of mitigating evidence provides the defendant with the opportunity to present every possible justification for a sentence of less than death. Such an unlimited mitigation provision was approved in *Eddings v. Oklahoma*, *supra*. We hold, therefore, that the sentencing provisions of I.C. §§ 19-2501—2523 satisfy those guidelines, as we understand them, from the various holdings of the United States Supreme Court in death penalty cases.

We turn now to whether the sentencing judge complied with those statutory provisions. Appellant argues that the court erred in finding beyond a reasonable doubt that the defendant had previously been convicted of other murders; that the defendant had exhibited utter disregard for human life and a propensity to commit murder; that the defendant was under sentence for first degree murder at the time of his actions; and that both defendant and his victim were inmates at the state penitentiary when the crime occurred. We have reviewed the record and hold that the evidence at the sentencing hearing clearly supports the trial court's findings of aggravating and mitigating circumstances.

Appellant next asserts that the trial court erred, in that the judge weighed non-statutory aggravating circumstances

against mitigating circumstances, thereby allegedly violating the strictures of I.C. § 19–2515. This contention appears to arise from the format chosen by the court in drafting its findings. The findings were organized into sections, *i.e.*,

“4. Facts and Argument Found in Mitigation * * *

“5. Facts and Arguments Found in Aggravation [not expressly found beyond a reasonable doubt] * * *

“6. Statutory Aggravating Circumstances Found Under Section 19–2515(f), Idaho Code [expressly found beyond a reasonable doubt] * * *.” (Material in brackets added.)

The court is not limited as to the circumstances it may find in aggravation to those listed under I.C. § 19–2515(f). Thus, that section of the court's findings denominated “5. Facts and Arguments Found in Aggravation,” although including circumstances not statutorily listed and not expressly found beyond a reasonable doubt, is not error. I.C. § 19–2515(a) permits the court, upon the suggestion of either party that there are circumstances which might properly be considered in aggravation or mitigation, to hear those circumstances. That language strongly suggests that a judge should hear all relevant evidence which either party desires to set forth. Such an interpretation is not contradicted by I.C. § 19–2515(f), which merely lists the statutory aggravating circumstances, at least one of which must exist beyond a reasonable doubt if the ultimate sanction of death is to be imposed. As above stated, a wide scope of evidence of the personality and background of the accused must be available to the trial judge in order for the sentence to fit the individual defendant. *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). We hold that the list of aggravating factors set forth in the statute is not exclusive, albeit one of those factors must necessarily be found to exist beyond a reasonable doubt for a sentence of death to be upheld. Where as here the sentencing judge formally finds, and his findings are substantiated, that there are statutory aggravating factors and those factors are not outweighed by mitigating circumstances, he has complied with the statutory directives. We find no error.

Appellant next asserts that certain factors set forth as aggravating circumstances by I.C. § 19–2515(f) are unconstitutionally vague, and he specifically challenges the findings that the appellant here had exhibited “utter disregard for human life,” I.C. § 19–2515(f)(6), and a “propensity to commit murder,” I.C. § 19–2515(f)(8).

In *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981), relying on *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and on *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), we held that the challenged statutory language was sufficiently narrow, direct and objective to withstand a constitutional challenge of unconstitutional unfairness. We stated:

“A ... limiting construction must be placed upon the aggravating circumstances in I.C. § 19–2515(f)(6), that ‘[b]y the murder, or the circumstances surrounding its commission, the defendant exhibited utter disregard for human life.’ To properly define this circumstance, it is important to note the other aggravating circumstances with which this provision overlaps. The second aggravating circumstance, I.C. § 19–2515(f)(2), that the defendant committed another murder at the time this murder was committed, obviously could show an utter disregard for human life, as could the third aggravating circumstance, I.C. § 19–2515(f)(3), that the defendant knowingly created a great risk of death to many persons. The same can be said for the fourth aggravating circumstance, I.C. § 19–2515(f)(4), that the murder was committed for remuneration. Since we will not presume that the legislative intent was to duplicate any already enumerated circumstance, thus making I.C. § 19–2515(f)(6) mere surplusage (*See, e.g., Norton v. Dept. of Employment*, 94 Idaho 924, 500 P.2d 825 (1972)), we hold that the phrase ‘utter disregard’ must be viewed in reference to acts other than those set forth in I.C. §§ 19–2515(f)(2), (3), and (4). We conclude instead that the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, *i.e.*, the cold-blooded, pitiless slayer.” *State v. Osborn, supra*, 102 Idaho at 418–419, 631 P.2d 200–201.

We hold that, by this limiting definition, we as a reviewing court have fulfilled the requirements of *Godfrey v. Georgia, supra*, having thus tailored and consistently applied the law according to a principled definition that avoids the arbitrary and capricious infliction of the death penalty. We therefore hold that the statutory aggravating circumstance of I.C. § 19–2515(f)(6), that by the murder and the circumstances surrounding it defendant exhibited an utter disregard for human life, is not unconstitutionally vague.

Likewise, we reject appellant's assertion that I.C. § 19–2515(f)(8) is impermissibly vague. That statute provides, as an aggravating circumstance, that “[t]he defendant, by prior conduct or conduct in the commission of the murder at hand,

has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.” Under *Gregg* and *Furman*, that statutory language does not fail as being facially unconstitutional. Here, as contrasted with the argument in *Osborn* regarding the “utter disregard for human life,” it cannot be asserted that the “propensity” circumstance could conceivably be applied to every murderer coming before a court in this state. We would construe “propensity” to exclude, for example, a person who has no inclination to kill but in an episode of rage, such as during an emotional family or lover’s quarrel, commits the offense of murder. We would doubt that most of those convicted of murder would *371 **472 again commit murder, and rather we would construe the “propensity” language to specify that person who is a willing, predisposed killer, a killer who tends toward destroying the life of another, one who kills with less than the normal amount of provocation. We would hold that propensity assumes a proclivity, a susceptibility, and even an affinity toward committing the act of murder.

In *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (opinion of Stewart, J., in which Powell and Stevens, JJ., joined), a similar provision from Georgia’s statutory list of aggravating circumstances was upheld, the Court noting that the Georgia Supreme Court had sufficiently narrowed its meaning to avoid its being indiscriminately applied. The Court stated, “[T]he petitioner points to § 27–2534.1(b)(3) which speaks of creating a ‘great risk of death to more than one person.’ While such a phrase might be susceptible of an overly broad interpretation, the Supreme Court of Georgia has not so construed it.” *Id.*, 428 U.S. at 202, 96 S.Ct. at 2939.

In *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), the Court rejected an argument that the circumstance of “a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” was unconstitutionally vague. There the appellant had contended that the provision required the court to predict the future. It was noted that such speculation on future behavior is made by courts countless times daily in every sentencing decision and in every determination of bail, and by parole authorities constantly in probation decisions. *Jurek*, *supra*, 428 U.S. at p. 275, 96 S.Ct. at p. 2957 (opinion of Stewart, J., joined by Powell and Stevens, JJ.). White, J., joined by Chief Justice Burger and Rehnquist, J., concurred in the holding that the statutory aggravating circumstances of the Texas statute were sufficiently narrow in definition to withstand a challenge for vagueness. *Accord*

Proffitt v. Florida, 428 U.S. 242, 255, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913 (1976). It has also been noted that, where a uniform process of appellate review is built in by way of a statutory requirement, there is an increased likelihood of consistent, well-guided application of such statutory aggravating circumstances. Such a system “can assure consistency, fairness and rationality in the evenhanded operation of the state law ... [T]his [type of] system serves to assure that sentences of death will not be ‘wantonly’ or ‘freakishly’ imposed.” *Proffitt v. Florida*, 428 U.S. 242, 259–260, 96 S.Ct. 2960, 2969–2970, 49 L.Ed.2d 913 (opinion of Powell, J., in which Stewart and Stevens, JJ., joined). *Accord Jurek v. Texas*, *supra*, 428 U.S. at 276, 96 S.Ct. at 2958; *Gregg v. Georgia*, *supra*, 428 U.S. at 205, 96 S.Ct. at 2940. Here our legislature has required that every capital sentencing decision be reviewed by this Court and has, in I.C. § 19–2827, further enhanced uniform application by requiring comparison of capital cases.

As applied to this particular defendant, the finding of propensity was clearly tailored and correct. The defendant here committed murder at least four times prior to the instant offense, twice in Idaho and also in Oregon and in California. There presently exist other pending charges of murder in the first degree against him. The testimony of an eyewitness to one of Creech’s previous murders, coupled with psychiatric evidence, tends to prove that the appellant is violent and vengeful and that he experiences no remorse for his actions. Letters written by Creech to law enforcement personnel detail numerous alleged murders beyond those for which he has already been convicted and intimate his intentions to kill in the future. Creech’s own statements claim responsibility for approximately 40 murders. However vague the statutory language might be argued to be in the ordinary case (which assertion we have already rejected), nevertheless, as applied in the instant case, we hold beyond any doubt whatsoever that the appellant here has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

Appellant next asserts that the trial court erred in its findings regarding aggravation *372 **473 and mitigation, in that the court failed to consider the reduced capacity of the defendant at the time of the murder as a mitigating circumstance. Appellant argues that since the court did not mention such evidence in its finding, it must not have considered such evidence. While I.C. § 19–2515(d) directs that “the court shall set forth in writing any mitigating factors considered,” the practical effect of that statute is not to require

the judge to set out each and every circumstance *presented* to him in mitigation, but rather, the plain language of the statute, we hold, requires the judge to list that evidence which, in his capacity as a fact finder, he has found to be valid, competent, and pertinent to the issue of whether the death penalty should be imposed. To accept appellant's contention would result in a requirement that the judge set forth in writing every consideration that has been raised or has occurred to him as a potential factor in mitigation, a requirement we deem to be unworkable, impossible, and not to be gleaned from the statutory language.

Clearly, the court heard and considered evidence of appellant's mental status from the testimony of the psychiatrist and the psychologist and from the voluminous information available in the presentence report. The court reasonably concluded that appellant was of average intelligence, that he had exhibited an excessive violent rage in committing the crime, and that he was beyond rehabilitation. The sentencing court is charged with evaluating the expert testimony and will not have its findings reversed absent a clear abuse of discretion. *Simpson v. Johnson*, 100 Idaho 357, 597 P.2d 600 (1979); *Roemer v. Green Pastures Farms, Inc.*, 97 Idaho 591, 548 P.2d 857 (1976). This rule of evidence applies in criminal as well as in civil cases. I.C.R. 26. We hold the above findings of the trial court are amply supported by the evidence.

Appellant next asserts that the process of weighing aggravating and mitigating circumstances, as set forth by I.C. § 19–2515(b), is unconstitutional. Appellant urges us to adopt a standard that, before a death sentence may be imposed, “the sentencing authority must be persuaded beyond a reasonable doubt that total mitigation is outweighed by total aggravation, and that beyond a reasonable doubt the imposition of death is justified,” and that otherwise the penalty must be less than death.

That same contention was dealt with by this Court in *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981). *Osborn* is controlling and dispositive here. We there stated:

“The weighing process, in our opinion does not involve shifting the burden of persuasion but is concerned instead with the presentation of relevant information to the sentencer in order that a reasoned and considered decision can be reached. The defendant's burden is merely to raise, in the aggravation-mitigation hearing, any factors which might possibly tend to mitigate his culpability for the offense. He has full opportunity to present and

argue those factors. The court below then evaluates those factors under the guidelines set forth in the statute. His decision, including his reasoning, is then set forth in detail and this court reviews the entire process. While it is possible to speak of a ‘burden’ of persuasion on the defendant to establish why he should receive leniency, we feel that, under our sentencing process, the facts speak for themselves once presented. The completeness of the evaluative process below and the mandatory review by this court, we feel, withstands constitutional scrutiny. *Tichnell v. State*, 287 Md. 695, 415 A.2d 830, 848–50 (1980); *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253, 1258–9 (1978), *cert. den.* 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979).” *State v. Osborn*, *supra*, 102 Idaho at 417, 631 P.2d at 199.

Appellant next asserts that Idaho's death penalty provisions are unconstitutional, in that jury participation is not required in the sentencing decision, but rather the discretion to impose a death sentence is vested in a judge. At other places or at other times, juries have been given an integral *373 **474 role in imposing the death sentence. However, we hold that jury participation in the sentencing process is not constitutionally required.

Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and its progeny have consistently conditioned the validity of death penalty provisions upon their capacity to be consistently, specifically, and non-arbitrarily interpreted. The consensus of the holdings in death penalty cases is that a death penalty scheme fails the constitutional test if it is reasonably susceptible of irregular, wanton, or freakish application, not only as codified by the legislature but also as interpreted by the courts. We deem consistency to be a key requirement in the upholding of death penalty provisions as being constitutional.

On the subject of comparative consistency of judge or jury sentencing, it was stated in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976):

“This Court has pointed out that jury sentencing in a capital case can perform an important societal function, *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15 [88 S.Ct. 1770, 1775 n. 15, 20 L.Ed.2d 776] (1968), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore

is better able to impose sentences similar to those imposed in analogous cases.” *Id.*, 428 U.S. at 252, 96 S.Ct. at 2966 (Stewart, J., joined by Powell and Stevens, JJ.). (Emphasis added.)

See also *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

We hold that there is no federal constitutional requirement of jury participation in the sentencing process and that the decision to have jury participation in the sentencing process, as contrasted with judicial discretion sentencing, is within the policy determination of the individual states. We are left to an examination of the exercise of discretion by our legislature in its adoption of policy. Even assuming that it is appropriate for this Court to examine the validity of the legislative policy determination, we would agree with our legislature that judicial control of the sentencing process is preferable to jury participation, in that the constitutionally mandated consistency of result is more probable in the case of judicial sentencing.

Our attention is drawn to no authority or data, other than the bare assertion of appellant, which indicates that judges do not reflect community norms. Contrary to what may be the case in some states, Idaho's judges are not ivory tower elitists. Although they may wear the robe and sit on an elevated bench, they nevertheless are elected from the communities in which they are required to reside. Our magistrate judges are required to stand for retention and the percentage of their retention vote is generally assumed to, in part at least, be a result of their community's evaluation of them and the extent to which they comply with the community's norms and values. Indeed, in the last election, a number were evidently not held by the electorate to represent the community norms and values and so were terminated in office. So also our district judges must stand for election every four years, with the resultant oft-contested judicial seats. The outcome of recent elections demonstrates that our district judges are not insulated from their communities and that their positions are anything but lifetime sinecures.

Further, in evaluating our legislatively mandated death penalty sentencing in Idaho, we note that the Supreme Court of the United States has often recognized that legislative enactments are a reliable gauge and “indicia of societal values.” *Woodson v. North Carolina*, 428 U.S. 280, 288, 96 S.Ct. 2978, 2983, 49 L.Ed.2d 944 (1976), citing *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). We hold that the policy judgment of our legislature, which

places capital sentencing discretion in the district judges of our state with mandatory appellate review vested in this Court *374 **475 of statewide jurisdiction, meets any test of constitutionality.

Finally, we turn to the requirements of I.C. § 19-2827, whereby in every death penalty case this Court is enjoined to review the record to ascertain whether passion, prejudice or any other arbitrary factor has influenced the determination to impose the death sentence and whether the death sentence is excessive or disproportionate to that imposed in similar cases.

We have reviewed three of the more recent cases to come before this Court which have involved the death penalty. In *State v. Creech*, 99 Idaho 779, 589 P.2d 114 (1979), and *State v. Lindquist*, 99 Idaho 766, 589 P.2d 101 (1979), although both Creech and Lindquist had been sentenced to death, this Court vacated the death sentences, on the basis that *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), had effectively invalidated Idaho's then mandatory death penalty statutes. In *State v. Needs*, 99 Idaho 883, 591 P.2d 130 (1979), this Court affirmed the trial court's holding that at the time defendant Needs was sentenced on her first degree murder conviction, no valid sentencing statute existed for the crime of first degree murder, and hence we affirmed the trial court's maximum sentence for second degree murder.

Since the legislative amendment in 1977 of our death sentence provisions to their present form, only one case has been presented to this Court which dealt with a first degree murder conviction or a homicide sufficiently heinous as to arguably be comparable to the circumstances here as a “similar case” under I.C. § 19-2827, i.e., *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981). In *Osborn*, the Court did not find the death sentence to be disproportionately harsh, but remanded to the trial court for findings relating to the mitigating factors.

We conclude that in our consideration of the proportionality of the sentence imposed here, those “similar cases” most nearly comparable are *Creech*, *Lindquist*, *Needs*, and *Osborn* since, despite the invalidation of the sentences on other grounds, nevertheless the facts and circumstances underlying the imposition of the death penalty in those cases are worthy of consideration in weighing whether the sentence imposed in the instant case is disproportionate.

The death penalty was imposed in *Creech I*, which resulted from a conviction for two counts of first degree murder. The record there reveals substantially the same personal

background of Creech as is shown in the instant case. The circumstances of that offense indicated that Creech was hitchhiking with a female friend and they were given a ride by two men who during the course of the trip were interpreted by Creech as attempting to flirt with his friend. Creech shot the two men in cold blood and threw their bodies off the side of the road. According to the eyewitness, Creech displayed no emotion thereafter and acted as if the killings were of no moment.

Lindquist and the victim's husband conspired to murder the victim for the purpose of collecting life insurance policies. Several attempts were made on the life of the victim and finally Lindquist, at the instance of the victim's husband, met the pregnant victim at a remote site, where he shot her several times through the windows of her car and then completed the killing by pulling her from the car and clubbing her to death.

In *Osborn*, the defendant had worked with and was a friend of the victim, who had threatened to inform on the defendant for a robbery offense. The victim's partially clothed body was found alongside a road. She had been extensively beaten about the head and face, and shot three times in the head, once in the shoulder, and once in the abdomen.

In *Needs*, the defendant had previously been convicted of homicide and on several occasions had threatened to kill the victim, who was her husband. She was convicted of the murder of her husband. The remains of the victim consisted of a partially burned torso without head or arms. Although the torso contained numerous stab wounds, they did not cause death, which probably *375 **476 resulted from gunshots, decapitation or a slit throat. As above noted, although the death sentence may well have been justified, it was held that no valid sentencing statute then existed for the crime of first degree murder.

We hold that none of these recent Idaho murder decisions militates toward the granting of leniency in the present case. We find no instance in which a defendant found guilty of such previous crimes as those of Thomas Creech has been found deserving of a sentence less than death. We have examined cases dating back more than 50 years² and our examination fails to disclose that any such remorseless, calculating, cold-blooded multiple murderer has (with the exception of *Creech I*) ever been before this Court. See however, *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (Ariz.1983). We hold that the death penalty imposed in this case is both proportionate and just.

Although claims of unconstitutional double jeopardy and ex post facto application of law are not raised by appellant, since resentencing has taken place as discussed *supra*, we have considered such possible problems. We find no constitutional violation in either regard. *Knapp v. Cardwell*, 667 F.2d 1253 (9th Cir.), cert. denied, 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982). See also, *State v. Gretzler*, *supra*.

In accord with the foregoing, we affirm the trial court's imposition of the death penalty.

DONALDSON, C.J., and BAKES, J., concur.

HUNTLEY, Justice, dissenting.

Despite the fact that the nature of the crime together with the aggravating factors make this case one where, if ever the death penalty is to be imposed, it should be here, I must dissent.

I would remand for utilization of proper sentencing procedures because the precedent the majority sets here, if followed in future cases, will do great violence to two very basic tenets of the criminal justice system of this state:

(1) the right to trial by jury and

(2) the right of the accused to confront the witnesses against him.

*376 **477 I

The Idaho Constitution, as first approved on July 3, 1890, and as it reads today, provides in Art. 1, § 7:

“Right to trial by jury.—The right of trial by jury shall remain inviolate”

That right of trial by jury as it existed at the time our constitution was adopted provided for jury participation in the capital sentencing process. Section 17 of the Criminal Practice Act of 1864 provided in pertinent part:

“[A]nd the jury before whom any person indicted for murder shall be

tried, shall, if they find such person guilty thereof, designate by their verdict, whether it be murder of the first or second degree; but, if such person shall be convicted on confession in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly. Every person convicted of murder of the first degree, shall suffer death; and every person convicted of murder in the second degree, shall suffer imprisonment in the territorial prison for a term not less than ten years, and which may be extended to life.”

In other words, the jury, by determining whether the party was guilty of either first or second degree murder, determined whether or not the death penalty would be imposed.

In *Blue Note Inc. v. Hopper*, 85 Idaho 152, 157, 377 P.2d 373 (1962), we stated:

“The provisions of the constitution pertaining to the right to trial by jury are construed to apply as it existed at the date of the adoption of the constitution.”

Accord: *Anderson v. Whipple*, 71 Idaho 112, 227 P.2d 351 (1951); *Christensen v. Hollingsworth*, 6 Idaho 87, 53 P. 211 (1898); *Comish v. Smith*, 97 Idaho 89, 540 P.2d 274 (1975).

Idaho continued to employ the jury in the capital sentencing process during all of the intervening years until the Supreme Court of the United States struck down the death penalty statutes of most states through its 1972 decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346.

At the time of *Furman*, I.C. § 18–4004 read:

“Punishment for murder.—Every person guilty of murder in the first degree shall suffer death or be punished by imprisonment in the state prison for life, and the jury may decide which punishment shall be inflicted. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten years and the imprisonment may extend to life.”

In its first post-*Furman* session (1973), the Idaho legislature deleted the jury function from I.C. § 18–4004 and made all convictions of first degree murder subject to the death penalty. This was done in an attempt to remove the “cruel and unusual punishment” aspects disapproved in *Furman*. I.C. § 18–4004 was amended by striking out the words as lined out below:

“18–4004. PUNISHMENT FOR MURDER.—Every person guilty of murder in the first degree shall suffer death or be punished by imprisonment in the state prison for life, and the jury may decide which punishment shall be inflicted. every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten years and the imprisonment may extend to life.”

The 1973 amendment restored the law to its 1864 standing.

After the United States Supreme Court in a series of cases declared statutes of other states which were similar to Idaho's 1973 version unconstitutional, the Idaho legislature responded in 1977 with the present statutory scheme providing for inquiry into mitigating or aggravating circumstances as set forth in I.C. § 19–2515 et seq. That amendment changed the statute back to its pre-1973 language except that it omitted restoring the jury function and added the reference to I.C. § 19–2515:

“18-4004. PUNISHMENT FOR MURDER. Every Subject to the provisions of 19-2515, Idaho Code, every person guilty *377 **478 of murder in of the first degree shall suffer be punished by death or by imprisonment for life. Every person guilty of murder in of the second degree is punishable by imprisonment in the state prison not less than ten (10) years and the imprisonment may extend to life.”

Except for four states which entirely abolished capital punishment in the nineteenth century, every American jurisdiction has at least at some time employed jury sentencing in capital cases. *McGautha v. California*, 402 U.S. 183, 200 n. 11, 91 S.Ct. 1454, 1463 n. 11, 28 L.Ed.2d 711 (1971). During a period of over a century, beginning in 1838, jurisdiction after jurisdiction that retained the death penalty replaced its mandatory capital punishment law with discretionary jury sentencing, *Woodson v. North Carolina*, 428 U.S. 280, 291-92, 96 S.Ct. 2978, 2985, 49 L.Ed.2d 944 (1976) (plurality opinion). By the time of the *Furman* decision in 1972, Colorado was the only state in the nation to impose capital punishment without jury involvement in the sentencing process.

Despite the long history at common law and under statutory law of the states throughout this nation of involving the jury in the capital sentencing process, the Idaho legislature in the present statute enacted in 1977 totally excluded the jury from its traditional function. The legislative history shows that the legislature was not even presented with a bill which provided for jury participation. The only bill presented, was one drafted by the attorney general, Senate Bill 1082, which was presented to the legislature with the following statement of purpose:

“RS 1954

S 1082

STATEMENT OF PURPOSE

Only a few years ago, the United States Supreme Court made new “rules” concerning the imposition of the death penalty for serious crimes. *So that we conformed with this U.S. Supreme Court interpretation* of the federal Constitution, the Idaho Legislature enacted in 1973 our present death penalty Sections 18-4003 and 18-4004, Idaho Code.

Then, last year, the United States Supreme Court again changed the rules relating to capital punishment—after many states, like Idaho, had acted in response to its previous decision. The Court, in five cases, set forth new, more definitive rules concerning sentencing where the death penalty was sought to be imposed.

The purpose of this bill is to codify into Idaho law these present requirements imposed on the states by these most recent United States Supreme Court decisions on capital punishment so that we will conform with this latest expression of the law.” (Emphasis supplied.)

The statement of purpose is misleading insofar as it suggests that the Supreme Court decisions mandated the removal of the jury from its traditional powers and functions; the United States Supreme Court never at an earlier time or in this “latest expression of the law” required jury non-involvement.

This dissent would be incomplete without a statement of some of the reasons why jury participation in the capital sentencing process is required, not only upon the basis of historical practice, but also from the standpoint of compliance with the mandates of the constitutions of the United States and the State of Idaho. An excellent presentation of these matters is set forth in appellant's brief, at pp. 69 through 80, which I adopt by reference and affix hereto as Appendix A.

Since jury participation in the capital sentencing process is part of the right to “trial by jury” as guaranteed inviolate by Art. 1, § 7 of the Idaho Constitution, I would reverse and remand for proper sentencing and would urge the legislature to amend the statutes to provide for proper jury participation in order that future capital punishment cases will not be subject to this serious defect.

II

Idaho Code § 19–2516 requires that the hearing to determine aggravating and mitigating *378 **479 circumstances during the sentencing process must be presented by the testimony of live witnesses, that section reading in pertinent part:

“The circumstances must be presented by the testimony of witnesses examined in open court ...”

The attorneys for Mr. Creech made timely and appropriate motion to have the proceeding conducted through the use of live witnesses. The court denied the motion and took “judicial notice” of its file. The file contained letters with no foundation, a presentence report containing a mass of information (much of which was uncorroborated or unattributed), and newspaper clippings. The court also considered a transcript of a preliminary hearing which was conducted before discovery had been completed.

The position asserted by the majority that the only way to reconcile I.C. § 19–2516 (providing for witnesses) with I.C. § 19–2515 (requiring that a presentence investigation report be ordered) is illogical and a fallacious syllogism.

The two sections can be read together with the following meaning:

- (1) A presentence report shall be ordered in every capital case; § 19–2515(c);
- (2) Findings of aggravating and mitigating circumstances can be based upon the presentence report and representations of counsel *unless* either party demands a formal hearing;
- (3) If requested by either party, the court must make findings of statutory aggravating and mitigating circumstances based only on a live record. § 19–2516;
- (4) All evidence and the presentence report can be relied on during the weighing process.

In *Mullaney v. Wilbur*, 421 U.S. 684, 698, 95 S.Ct. 1881, 1889, 44 L.Ed.2d 508 (1975), the United States Supreme Court stated:

“Where proof of specified facts may determine whether a defendant will live or die, the constitutional requirement for the procedure controlling the proof cannot depend on the state's choice of the stage of the litigation at which the proof is to occur. If, as here, the determination of certain statutorily defined facts ‘may be of greater importance than the difference between guilt or innocence for many lesser crimes,’ the state cannot avoid the constitutional requirements for proof of those facts ‘by characterizing them as factors that bear solely on the extent of the punishment.’ ”

Capital sentencing is qualitatively different from other sentencing proceedings, and there is therefore a need for special reliability in the proceedings. This was recognized by the United States Supreme Court in *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976):

“[T]he penalty of death is qualitatively different from a sentence of imprisonment however long. Death, in its finality, differs more from life imprisonment than a 100 year term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”

The result flowing from the majority decision today is rather a curious anomaly in Idaho law. I know of no other proceeding in district court, presided over by a district judge, and presented by attorneys, wherein hearsay and other incompetent and unreliable evidence is permitted. The one exception we now carve out for relaxed and non-professional evidentiary standards is in capital sentencing proceedings.

Perhaps to some the capital sentencing proceeding is not as important as other matters routinely conducted in our district courts—I prefer to believe that the proceedings rank very high on the scale of importance—both to the concerned defendant and to all of those who believe that one important measure of the quality of a society is the standard of fairness

and procedural safeguards provided by the criminal justice system.

***379 **480** *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982), noting that the United States Supreme Court has not directly ruled on the issue, held that the capital sentencing proceeding, even though in a hearing bifurcated from the trial on guilt or innocence, is an integral part of the trial and that therefore it is required that the defendant have a right to confront and cross-examine witnesses, *Proffitt*, 685 F.2d at 1253, reading as follows:

“Although the [Supreme] Court has held capital sentencing proceedings must meet certain procedural requirements, it has not yet delineated the exact scope of constitutional procedural protection to which capital defendants are entitled. See *Gardner v. Florida*, 430 U.S. [349] at 358 n. 9, 97 S.Ct. [1197] at 1204 n. 9 [51 L.Ed.2d 393]. Whether the right to cross-examine adverse witnesses extends to capital sentencing proceedings has not been specifically addressed by the Supreme Court and is an issue of first impression in this Circuit. We must therefore decide this question in accord with the general principles articulated by the Supreme Court in its recent death penalty decisions.

The focus of the Court's current capital sentencing decisions has been toward minimizing the risk of arbitrary decisionmaking. [Citations omitted.] Whereas earlier cases had focused on the quantity of information before the sentencing tribunal, recently the Court has shown greater concern for the quality of such information. *Gardner v. Florida*, 430 U.S. at 359, 97 S.Ct. at 1205. Thus, it has recognized the defendant's interest both in presenting evidence in his favor, *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, *supra*, and in being afforded the opportunity to explain or rebut evidence offered against him. *Gardner v. Florida*, 430 U.S. at 362, 97 S.Ct. at 1207. Reliability in the factfinding aspect of sentencing has been a cornerstone of these decisions. *Id.* at 359–60, 362, 97 S.Ct. at 1205; *Woodson v. North Carolina*, 428 U.S. at 305, 96 S.Ct. at 2991.

In *Gardner v. Florida* *supra*, the Supreme Court held that a judge's reliance, in imposing the death penalty, on information not disclosed to the defendant or his attorney violated the defendant's rights to due process and freedom from cruel and unusual punishment. *Gardner* is premised on the principle that death sentences may not constitutionally be imposed on the basis of information that the capital defendant has been afforded no opportunity

to rebut.^[1] See *id.* at 362, 97 S.Ct. at 1206. The holding in *Gardner* narrowly viewed, simply prohibits the use of ‘secret information’; the Court did not in that case address the scope of the capital defendant's procedural rights in attempting to rebut information that has openly been presented to the sentencing tribunal. In reaching its decision in *Gardner*; however, the Court emphasized the unacceptability of the ‘risk that some information accepted in confidence may be erroneous, or may be misinterpreted, by the ... sentencing judge.’ *Id.* at 359, 97 S.Ct. at 1205. Moreover, the Court expressly recognized the importance of participation by counsel and adversarial debate to eliciting the truth and ‘evaluating the relevance and significance of aggravating and mitigating’ evidence. *Id.* at 360, 97 S.Ct. at 1205. The Supreme Court's emphasis in *Gardner* and other capital sentencing cases on the reliability of the factfinding underlying the decision whether to impose the death penalty convinces us that *the right to cross-examine adverse witnesses applies to capital sentencing hearings*. The Supreme Court has recognized the cross-examination as ‘the “greatest legal engine ever invented for the discovery of truth” ’ *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970) (quoting 5 J. Wigmore, Evidence § 1367 (3d ed. 1940)). ***380 **481** ‘The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the custodial right of confrontation, and helps assure the “accuracy of the truth-determining process.” It is, indeed, “an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.” Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal process. *But its denial or significant diminution calls into question the ultimate “ ‘integrity of the fact-finding process’ ”* [emphasis in original] and requires that the competing interest be closely examined.’ *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973) (citations omitted).

Where expert witnesses are employed, cross-examination is even more crucial to ensuring accurate fact-finding. Since, as in this case ... information submitted by an expert witness generally consists of opinions, cross-examination is necessary not only to test the witness's knowledge and competence in the field to which his testimony relates but also to elicit the facts on which he relied in forming his opinions.

Finally, we note that the decision of the former Fifth Circuit in *Smith v. Estelle*, 602 F.2d 694 (5th Cir.1979), *aff'd*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), buttresses our conclusion that appellant had a constitutional right to cross-examine Dr. Sprehe before the doctor's report could be used in determining sentence. In *Smith*, we reversed a death sentence that was based in part on the testimony of a psychiatrist whose name the prosecution had intentionally omitted from its witness list. A primary basis for the decision in that case was that the prosecution's failure to disclose its intent to call the doctor *prevented the defendant's counsel from conducting effective cross-examination*. See *id.* at 699–701 & n. 7. Although the court did not specifically address whether the defendant had a constitutional right to cross-examine the psychiatrist, it concluded that his testimony, ‘not effectively cross-examined by the [defense attorneys,] carries no assurance of reliability whatever,’ *id.* at 701, and hence that its use in sentencing the defendant violated the principles set forth in *Gardner v. Florida*. The reasoning in *Smith* clearly supports the view that the right to cross-examine adverse witnesses applies to capital sentencing proceedings, at least where necessary to ensure the reliability of the witnesses' testimony.” [2] (Emphasis supplied.)

Since the sentencing procedure is an integral part of the trial, the defendant should be entitled in Idaho to both the participation of a jury and the right to confront and cross examine witnesses. This case should be remanded for a hearing which provides those two fundamental constitutionally mandated elements of due process and fair trial.

The magnitude and numerosity of Creech's crimes makes it unpopular and therefore difficult for me to urge any further proceedings and delay in bringing this saga to its ultimate conclusion. Nevertheless, I think more important than any one case is the preservation of our judicial process.

APPENDIX A

P. THE EIGHTH AMENDMENT'S PRINCIPLE THAT DEATH SENTENCES MUST SATISFY EVOLVING STANDARDS OF DECENCY AND THE DIGNITY OF MAN REQUIRES JURY PARTICIPATION IN CAPITAL SENTENCING.

In view of the “awesome finality of a capital case,” **482 *Kinsella v. Singleton*, 361 U.S. 234, 249 [80 S.Ct. 297, 305, 4 L.Ed.2d 268] (1960) *381 (Harlan, J., concurring and dissenting), the Supreme Court has repeatedly recognized the crucial role juries play in the determination whether a capital defendant merits the death sentence. *Gregg v. Georgia*, *supra*, 428 U.S. at 181–82, 190–92 [96 S.Ct. at 2928–2929, 2933–2934]; see, *Duncan v. Louisiana*, 391 U.S. 145, 156 [88 S.Ct. 1444, 1451, 20 L.Ed.2d 491] (involvement of jury in capital cases reflects a “reluctance to entrust plenary powers over ... life [and death] ... to one judge or a group of judges.”²⁵

That the Eighth Amendment requires at least some jury participation in capital sentencing can best be appreciated by reference to the substantive Eighth Amendment standards the Court has invoked in holding that the death penalty is not invariably cruel and unusual punishment.

Basically, The Court has explained that a particular punishment is not cruel and unusual if it satisfies two criteria. First, the penalty must accord with contemporary moral and social values by reflecting “the evolving standards of decency that mark the progress of a maturing society.” *Gregg v. Georgia*, *supra*, 428 U.S. at 173 [96 S.Ct. at 2925], quoting *Trop v. Dulles*, 356 U.S. 86, 101 [78 S.Ct. 590, 598, 2 L.Ed.2d 630] (1958) (plurality opinion). Second, the punishment must respect “the dignity of man” by serving legitimate penological goals and by bearing a reasonably proportionate relationship to the crime for which it is imposed. *Gregg v. Georgia*, *supra* 428 U.S. at 173 [96 S.Ct. at 2925]. In holding that the penalty of death for murder does not necessarily violate these standards, the *Gregg* plurality's unmistakable theme was that, under the Eighth Amendment, imposition of the death penalty on a defendant must find validation in the responsible moral and social values of the community that condemns him. An essential medium of those values is the jury.

To support its conclusion that imposition of the death penalty in some circumstances could accord with “evolving standards of decency,” the *Gregg* plurality looked to the two most reliable sources of responsible public attitudes and values: legislatures and juries.²⁶ Thus, even with respect to the *general* question whether the death penalty comports with evolving social and moral standards, the plurality found it necessary to rely on patterns of jury behavior. The plurality's emphasis on *evolving* standards, *id.* at 172–73 [96 S.Ct. at 2924–2925], suggests that this Eighth Amendment principle is organic, requiring the courts to continually refer to the moral development of American society. The courts

cannot rely on legislatures alone as reflectors of responsible community values. Legislators confront capital punishment abstractly. They determine whether a society is willing to have a law permitting capital punishment, not whether the society, through the instrument *382 **483 of the jury, is willing to carry out that law. *Lockett v. Ohio*, 438 U.S. 586, 625 [98 S.Ct. 2954, 2983, 57 L.Ed.2d 973] (1978) (White, J., concurring and dissenting).²⁷ Moreover, a statute is static, and, as public values change, it may become a less reliable indicator than the judgment of a jury. Therefore, unless juries, one of the two essential barometers of social values, play some role in capital sentencing, the courts cannot confidently determine whether capital punishment does indeed continue to comport with responsible public views.²⁸

The Eighth Amendment demands more, however, than general social approval of the death penalty as a permissible means of punishment. Because the death penalty is “so profoundly different from all other penalties,” *Lockett v. Ohio*, *supra*, 438 U.S. at 605 [98 S.Ct. at 2965] (plurality opinion), the Eighth Amendment also demands *individualized* consideration of the propriety of the death sentence in every capital case. *Ibid.* Given “[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual,” *Ibid.*, state capital sentencing schemes must ensure that individual death sentences satisfy the moral demands of evolving standards of decency. See *Woodson v. North Carolina*, 428 U.S. 280, 303–305 [96 S.Ct. 2978, 2990–2991, 49 L.Ed.2d 944] (1976) (plurality opinion); *Godfrey v. Georgia*, 446 U.S. 420, 427–28 [100 S.Ct. 1759, 1764–1765, 64 L.Ed.2d 398] (1980) (plurality opinion). Whatever partial role the legislature can play in reflecting responsible public sentiment on the *general* validity of the death penalty, only a jury can ensure that a *particular* death sentence meets this Eighth Amendment command. As the *Gregg* plurality stressed, “ ‘one of the most important functions any jury can perform in making ... a selection [between life imprisonment and death for a defendant convicted in a capital case] ... is to maintain a link between contemporary community values and the penal system.’ ” *Gregg v. Georgia*, *supra* 428 U.S., at 181 [96 S.Ct., at 2929] (plurality opinion), quoting *Witherspoon v. Illinois*, *supra*, 391 U.S. at 519 n. 15 [88 S.Ct. at 1775 n. 15]; see *Proffitt v. Florida*, 428 U.S. 242, 252 [96 S.Ct. 2960, 2966, 49 L.Ed.2d 913] (1976) (plurality opinion).

In testing the death penalty against the second substantive Eighth Amendment requirement, the “dignity of man,” *Gregg* stated that one of the two legitimate penological goals

justifying execution was retribution. *Gregg v. Georgia*, *supra*, 428 U.S. at 183 [96 S.Ct. at 2929]. *Gregg* thereby reinforced the principle that the proper infliction of the death penalty is an essentially communal decision requiring a reflection of responsible communal values.²⁹ “Indeed, *383 **484 the decision that capital punishment may be the appropriate sanction *in extreme cases* is an expression of *the community's belief* that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.” *Gregg v. Georgia*, *id.*, at 184 [96 S.Ct. at 2930] (footnote omitted) (emphasis added). Here again, jury involvement in capital sentencing is necessary to ensure as a general matter that the death penalty properly reflects the attitude of society toward a given class of crime. But as the same plurality noted on the same day in *Woodson v. North Carolina*, *supra* 428 U.S. at 304 [96 S.Ct. at 2991], “the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of *the character and record of the individual offender and the circumstances of the particular offense* as a constitutionally indispensable part of the process of inflicting the penalty of death.” (emphasis added). Thus, a prevailing social belief in retribution must justify not only the *general* permissibility of the death penalty but also the infliction of the death sentence in particular cases. In this regard, the jury is indispensable in ensuring that society does indeed seek retribution against the particular defendant: “[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.” *Witherspoon v. Illinois*, *supra*, 391 U.S. at 519–20 [88 S.Ct. at 1775–1776].

Q. JUDGES ALONE CANNOT ADEQUATELY REFLECT COMMUNITY VALUES IN THE SENTENCING PROCESS

The “qualitative difference between death and other penalties calls for a greater degree of *reliability* when the death sentence is imposed.” *Lockett v. Ohio*, *supra*, 438 U.S. at 604 [98 S.Ct. at 2964] (plurality opinion) (emphasis added). A death penalty procedure is unconstitutional if it is so unreliable that it “creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.” *Id.* at 605 [98 S.Ct. at 2965]. Since the Court has held that death sentences must comport with the community's sense of evolving standards of decency and its legitimate desire for moral retribution, an essential question is whether judges alone can *reliably* reflect the communal values that are the source of the constitutionality of capital punishment.

By definition, juries, not judges, are “the cross-section of the community,” reflecting community values. *Duren v. Missouri*, 439 U.S. 357, 359 [99 S.Ct. 664, 666, 58 L.Ed.2d 579] (1979). Only a representative jury assures “meaningful community participation.” *Ballew v. Georgia*, 435 U.S. 223, 235 [98 S.Ct. 1029, 1036, 55 L.Ed.2d 234] (1978) (plurality opinion). Jurors, unlike judges, are selected to enhance the likelihood that they represent the whole range of community beliefs and backgrounds, *Taylor v. Louisiana*, 419 U.S. 522, 531–33 [95 S.Ct. 692, 698–699, 42 L.Ed.2d 690] (1975); the different segments of the community bring to the representative jury “perspectives and values that influence both jury deliberation and result,” *id.*, at 532 n. 12 [95 S.Ct. at 698 n. 12]. See *Humphrey v. Cady*, 405 U.S. 504, 509 [92 S.Ct. 1048, 1052, 31 L.Ed.2d 394] (1972). Moreover the sheer difference in size between a twelve-member jury panel and a single judge may bear significantly on the validity of a sentencing decision under the Eighth Amendment. Canvassing expert empirical studies, the United States Supreme Court has concluded that the likelihood that a decision in a criminal case correctly applies “the common sense of the community to the facts” increases with the number of decisionmakers. ****485** *Ballew v. Georgia*, *supra*, 435 U.S. at 232 [98 S.Ct. at 1035]. ³⁰

***384** Twelve individuals are obviously more likely to reflect the prevailing views of society than one person. ³¹

A jury need not engage in questionable speculation to determine what community sentiment would say in a particular case. Its very function is to bespeak that community sentiment by exercising its own judgment. The jury's response is society's response. *Witherspoon v. Illinois*, *supra*, 391 U.S. at 519–20 [88 S.Ct. at 1775–1776]. “The jury ... is a significant and reliable objective index of contemporary values because it is so directly involved,” *Gregg v. Georgia*, *supra*, 428 U.S. at 181 [96 S.Ct. at 2928]. By contrast, judges cannot themselves speak for community sentiment. If they are to fulfill the demands of the Eighth Amendment by bringing evolving standards of decency and principles of retribution to bear in a capital punishment case, they can do so only indirectly since “[C]ourts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits.” *Dennis v. United States*, 341 U.S. 494, 525 [71 S.Ct. 857, 875, 95 L.Ed. 1137] (1951) (Frankfurter, J., concurring). Unable to represent community sentiment, a judge must undertake to ascertain it. That is necessarily a difficult task, ³² made even more difficult because judges—whether considered in terms

of race, sex, or economic class—do not reflect the wide range of backgrounds or beliefs within the community. ³³ “[T]he reluctance of juries in many cases to impose the sentence [of death] may well reflect the humane feeling that this most irrevocable sanction should be reserved for a small number of extreme cases,” *Gregg v. Georgia*, *supra*, 428 U.S. at 182 [96 S.Ct. at 2929]. For a variety of reasons, judges appear less likely to reflect that same reluctance. ³⁴

***385 **486** As a means of reliably reflecting community sentiment on capital punishment, bringing lay jurors into the sentencing process “ ‘places the real direction of society in the hands of the governed ... and not in ... the government.’ ” Powell, *Jury Trial of Crimes*, 23 Wash. & Lee L.Rev. 1, 5 (1966) quoting *De Tocqueville, Democracy in America* 282 (Reeve Tran.1948). Quintessentially, the right to a jury “is granted to criminal defendants in order to prevent oppression by the government,” *Duncan v. Louisiana*, 391 U.S. 145, 155 [88 S.Ct. 1444, 1450, 20 L.Ed.2d 491] (1968), and to protect against “arbitrary action” by the complaint, biased, or eccentric judge. *Id.*, at 156 [88 S.Ct. at 1451]. It “reflects a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizens to one judge or to a group of judges.” *Ibid.* ³⁵

***386 **487** These concerns are even more compelling where life stands immediately in the balance.

BISTLINE, Justice, dissenting.

PART I

CONSTITUTIONAL RIGHT TO JURY

Travesty. Such is my view of a majority opinion which chooses to answer a dissenting view by ignoring it. In the ordinary case it is pretty much a matter of choice to disdain comment on a contrary view, but in a death sentence case it is a travesty, and especially is this so where this Court can as a collegial group not only ascertain and apply precedent, but add saving gloss to legislative enactments.

In this year of 1983, as to the constitutional right to have a jury make the determination between life and death, the majority contentedly declares that “At other places or at other times juries have been given an integral rule in imposing the death sentence.” “Other times” are in most recent times. Since creation of Territorial Idaho in 1863 and passage of

the 1864 Criminal Practice Act, and continuing through the time of Idaho's admittance to the Union in 1890 and until 1973 when the first post-Furman legislature thought it was by *Furman* required to provide an automatic death penalty on every first degree murder conviction, death sentencing was a jury determination. The accused participated in the selection of the jury who would determine his fate. That has purportedly been taken away from the convicted murder, and his fate falls to one solitary person—who, if it were to be known, would undoubtedly rather see the question back where it always was—with a jury of twelve. This has been well documented in the dissenting opinion of Justice Huntley wherein on the strength of history and precedent he illustrates that for over 110 years it was the jury who made the decision of death or life. His assertion that the right of an accused to have a jury impose the sentence of death flows from the Idaho Constitution is beyond conscientious dispute. A majority of the Court, obviously unable to mount a tenable attack on that assertion, say only that that elimination of the jury function is a mere matter “of the legislative policy,”—from which point their opinion quickly digresses into an exaltation of the common qualities of Idaho trial judges who, unlike their federal counterparts, realize “that their positions are anything but lifetime sinecures.” A position of vulnerability to popular emotions is not necessarily a plus.

Having joined Justice Huntley's opinion, there is little reason for further espousing that which he had laid before the majority. But, having read in the majority opinion that they have “conducted an extensive and thorough review of Idaho murder cases,” I, too, have deemed it appropriate to review those cases listed in footnote 2 of the majority opinion, and I have gone back to include in my survey some of those early cases which wholly substantiate Justice Huntley's declaration that it was ever, both prior to statehood and afterward, clearly the right of the people and of the accused to have a jury determination.

In *People v. Walters*, 1 Idaho 271 (1869), the defendant was charged with murder in the first degree. The jury, knowing that a first degree conviction required execution, recommended the mercy of the Court.

*He the Juror in the above
indicted cause find the deft. guilty as charged
in the indictment and recommend him to the
mercy of the court*
I Jackson
Foreman of Jury

***387 **488** Notwithstanding the jury's recommendation, the Court followed the mandate of the law.

*The Judgment of this court and
the sentence of the law is, that you hang ^{hanging}
are to be taken from hence to the prison from ^{which}
you came and from thence to the place of execution
and there on Wednesday the 12th day of May
next between the hours of twelve at noon and
six o'clock in the afternoon, you are to be hanged
by your neck until you are dead.*
And may God
whose laws you have broken, have mercy on
your soul.
Chas Jones
Dist Judge
Walter
Attest
By J. N. Haskins
Clk

***388 **489** In 1870 a territorial jury convicted the defendant of first degree murder, and accordingly he was executed. *People v. Ah Choy*, 1 Idaho 317 (1870). In 1874 another territorial jury convicted another defendant of first degree murder, and he, too, suffered judgment of death. *People v. Waters*, 1 Idaho 560 (1874). Three years later four defendants charged with first degree murder escaped the noose upon jury convictions of second degree murder. *People v. Ah Hop, Yung Sing, Ah Pong, and Hung Chu*. 1 Idaho 698 (1878).

In 1877 the territorial legislature in recodifying statutory law, revised the statute declaring the penalty for murder to read as it did until a 1919 amendment, other than for designation of the “Territorial Prison” instead of “State Prison.” In 1901, in enacting the Idaho Code Annotated, following admission to the Union, the language was then changed to “State Prison”—but all this time there was no change in the penalty for first degree murder, which was death, and it was mandatory.

So, in the transition from territory to statehood, although the typewriter had by then replaced the pen, it was still the jury that made the determination. Conviction of first degree murder meant death. A jury not so disposed could circumvent the death penalty only by returning a verdict of guilty of second degree murder. Thus, in *State v. Perry*, 4 Idaho 224, 38 P. 655 (1894), following admission into the Union, the jury's verdict was:

“We, the jury in the above entitled action, find the defendant guilty of murder of the first degree.

H.L. Beeroft, Foreman.”

And, as before statehood, the penalty was death:

“That, whereas, the said Charles Perry, having been duly convicted of the crime of murder of the first degree;

“It is therefore ordered, adjudged and decreed that the said Charles Perry be taken from this Courtroom to the County Jail of this, Bannock County, State of Idaho, and that he be there held until the 28th day of September, A.D., 1894, and that upon said day, between the hours of nine o'clock A.M., and four o'clock P.M., within the walls of said jail, or at some convenient private place within the said Bannock County, and in the manner made and provided by the Statutes of this State in such case, he, the said Charles Perry, be hung by the neck until he is dead.” And the Sheriff of Bannock County, Idaho, is hereby directed to enforce the execution of this judgment. D.W. Standrod, Judge.”

In 1911 the statute governing the penalty for first degree murder was changed to read as it continued to read until amended after *Furman*. The penalty now became either death or life imprisonment, and the jury continued to make that decision. Had it so read in 1864, with discretion in the jury, Simeon Walters would not have been executed. In 1910, Fred Gruber, too, was executed, the last person whose fate was decided by a jury which had no discretion where it did render a verdict of murder in the first degree. The jury's verdict in Gruber's case:

“We, the jury, duly empaneled and sworn to try the above entitled cause, for our verdict say:

“That we find the defendant, Fred Gruber, guilty of the crime of murder of the first degree as charged in the information.

T.J. McAndrew, Foreman.”

The judgment of the Court:

“that the said defendant, Fred Gruber, be taken hence to the County Jail of the County of Kootenai, State of Idaho, and from there forthwith conveyed and taken to the State Penitentiary of the State of Idaho, in the County of Ada, State of Idaho, and that on the 20th day of May, A.D. 1910, between the hours of eight o'clock in the forenoon and two o'clock in *389 **490 the afternoon of said day, within the walls of the said State Penitentiary of the State of Idaho, the said defendant, Fred Gruber shall by the warden of the State Penitentiary of the State of Idaho, be hanged by the neck until he, the said Fred Gruber shall be dead, and may the Lord have mercy on your soul.”

The Gruber execution may have been unpopular. At any rate, the next legislature amended the statute to provide that the jury could decide between punishment by death or by life imprisonment.¹ The statute remained unchanged until after *Furman*, and it is helpful to note the manner in which the jury continued to administer its sentencing function as part and parcel of the defendant's right to such determination.

Vicente Ramirez appears to be the first defendant convicted of first degree murder after the jury was given the alternative between a life sentence or death. In his case, in their own language the jurors fixed his penalty at execution. *State v. Ramirez*, 33 Idaho 803, 199 P. 376 (1921).² The jury did not do so with his co-defendant whom they also convicted of first degree murder.

State v. Hoagland, reviewed in the majority's survey, was tried in early 1923. The jury's verdict:

“We, the jury, duly sworn and empanelled in the above entitled cause, find the defendant David L. Hoagland guilty of murder in the first degree, as charged in the information, and fix the penalty at death.

J.W. Pottenger, Foreman.”

In accordance therewith he was executed.

Other first degree murder verdicts after 1911 in cases cited in the majority's review are, in inverse order, but in chronological order forward:

"We, the jury, duly impanelled and sworn to try the above entitled cause, for our verdict say that we find the defendant guilty of the crime of murder in the first degree, as charged in the information on file herein, and fix his punishment as imprisonment in the State prison for life.

J.A. Stoner, Foreman."

State v. Redding [Reding], 52 Idaho 260, 13 P.2d 253 (1932).

"We, the jury, empanelled in the above entitled cause, find the defendant, Douglas Van Vlack, guilty of murder in the first degree, as charged in the information, and fix his punishment at death.

W.S. McGowen, Foreman."

State v. Van Vlack, 57 Idaho 316, 65 P.2d 736 (1936).

"We, the Jury in the above entitled cause, find the defendant, Ralph Golden, guilty of murder of the first degree, and we decide that the punishment to be inflicted shall be imprisonment in the state prison for life.

Fay H. Rose, Foreman."

State v. Golden, 67 Idaho 497, 186 P.2d 485 (1947).

"We, the jury in the above entitled cause, find the defendant William Lawrence Owen guilty of murder of the first degree. We decide that the punishment to be inflicted shall be death.

D.L. BUSH, Foreman."

State v. Owen, 73 Idaho 394, 253 P.2d [203] 394 (1953).

"We, the jury in the above entitled action, find the defendant Robert Clokey GUILTY OF MURDER OF THE FIRST DEGREE, as charged in the Information, and recommend as punishment therefor the DEATH PENALTY.

Chet Moulton, Foreman."

***390 **491** *State v. Clokey*, 83 Idaho 322, 364 P.2d 159 (1961).

"WE, THE JURY, duly impaneled in the above-entitled action, find the defendant Guilty of Murder of the First Degree, and fix the punishment as imprisonment in the State Prison for life.

JAMES F. CAREY, Foreman."

State v. Gonzales, 92 Idaho 152, 438 P.2d 897 (1968).

"We, the Jury in the above entitled case, find the defendant guilty of Murder in the First Degree as charged in the Information.

"We further find that the defendant shall be punished by imprisonment in the Idaho State Penitentiary for life.

James W. Buckley"

State v. Foley, 95 Idaho 222, 506 P.2d 119 (1973).

State v. Foley, involving a pre-*Furman* crime, appears to have been the last murder case where the jury had the discretion to decide between life imprisonment or death. *Furman* then intervened, following which the legislature returned to the law as it was prior to 1911—a mandatory death penalty upon conviction of first degree murder. As pointed out in the majority opinion, some death sentences were imposed, but were set aside upon the authority of *Woodson v. North Carolina*, 428 U.S. 280 [96 S.Ct. 2978, 49 L.Ed.2d 944] (1976). The legislature responded by returning to the law as it was following the 1911 amendment. The penalty was set at either death, or, imprisonment for life. I.C. § 18-4004 as amended by Ch. 154, § 3, Sess. Laws 1977. The legislature, however, was unmindful of the constitutional right to a jury determination, and passed the Act as presented to it by the attorney general.³

Since the passage of the 1977 Act the Court has received eight appeals from imposed death sentences. The case now before us is the second. The first was *State v. Osborn*, 102 Idaho 405, 631 P.2d 18 (1981), wherein Osborn's judge-imposed sentence, as per the 1977 Act, was reversed and the cause remanded for resentencing in accordance with the views expressed in the Court's opinion—an opinion which I did not join. The district court, the Honorable Arthur P. Oliver, flatly refused to again consider the imposition of a death penalty, for reasons which I shall shortly lay out and discuss. The

attorney general acquiesced in the district court's refusal by not challenging it, and in that first application of the 1977 Death Penalty Act, precedent has been set which strongly suggests the desirability of the pre-*Furman* statute which placed the death or life determination upon the shoulders of twelve jurors.

Osborn, after initially pleading not guilty, moved the trial court to withdraw that plea, and enter a plea of guilty to first degree murder. His attorney did not at any time, either in the trial court or on the appeal, express any thought that *Osborn* was constitutionally entitled to a jury determination as to his guilt, and, if guilty, then as to his fate. Hence there was no consideration of that issue in the *Osborn* opinions. The right to jury involvement at sentencing has been raised for the first time in this case, and even as I pen my views, counsel for Mr. Creech has filed in this Court a motion for an order vacating the sentence and judgment *391 **492 herein, and at the same time moving this Court to allow him to withdraw his guilty plea.⁴

Concluding my views on the constitutionality of the present statutory scheme under which Mr. Creech was sentenced to death without proper regard for the Idaho Constitution which declares in [Article I](#), Declaration of Rights, that "The right to trial by jury shall remain inviolate, ..." § 7 (the major portion of which deals with criminal actions), I pause to say that I, as one person, and most likely Mr. Creech and his counsel as others interested, would be grateful in the extreme were the majority to, in their opinion, explain the error they find in Justice Huntley's proposition that:

"The provisions of the constitution pertaining to the right to trial by jury are construed to apply as it existed at the date of the adoption of the constitution."

Justice Huntley did not create and then advocate the proposition, but rather simply stated it as a well-entrenched principle in our Idaho jurisprudence. To my understanding it is a general rule recognized in all jurisdictions.

If that were not enough persuasion to at least evoke a response from the majority, there is also the teaching of *State v. Miles*,

[43 Idaho 46, 248 P. 442 \(1926\)](#) where a unanimous Court, a bare 36 years after statehood, stated:

"The rule is well established that the guaranty of right of trial by jury secures that right as it existed under the common law and territorial statutes in force at the date of the adoption of our Constitution."

[43 Idaho at 49, 248 P. at 442](#) (citations mooted).

The proposition involved had been earlier examined in an opinion by Justice Ailshie, regarded by many as Idaho's foremost Justice, in a case wherein it was contended by the attorney general that the Board of Pardons, as established in the 1899 Constitution, could "impose any conditions whatever upon the granting of a parole." [Art. 4, § 7](#) (since amended). In passing on the question presented, the Court observed the delineations of governmental power:

"There can be no doubt but that, under the Constitution and statute as above cited, the board of pardons may, upon the granting of a pardon, commutation or parole, attach such conditions as they see fit, so long as they are not immoral, illegal or impossible of performance, provided they are to be kept and performed or complied with during the term for which the prisoner was sentenced by the judgment of the court. Under our Constitution it is the duty and prerogative of the legislative department to define crimes and fix the maximum and minimum penalty that may be imposed for the commission thereof. *It is the duty of the judicial department to try offenders against those laws, and, upon conviction, to sentence them under the statute. Under the laws of this state, there is no such thing as an indefinite or indeterminate sentence* as is provided for in many of the states from which authorities have been cited by the Attorney General. *In this state the sentence and judgment of the court must be specific, certain, and definite.* The board of pardons belongs to the executive department of the state, and its privilege and prerogative is that of granting clemency. It is a board of clemency, rather than a punitive body. Instead of pronouncing judgment and sentence, and imposing punishment, its prerogative and authority is that of forgiving offenses and remitting penalties, wiping out judgments and sentences of conviction either in whole or in part." (Emphasis added.)

In re Prout, 12 Idaho 494, 498–99, 86 P. 275, 276 (1906).

In the interim between *Prout* (1906) and *Miles* (1926), there was yet another case, *In re Dawson*, 20 Idaho [178] 180, 117 P. 696 (1911), wherein our predecessors on this *392 **493 Court again paused to dwell upon our criminal justice system and the function of a jury under the Idaho Constitution. It was not a capital case, but a felony charge of larceny, to which the defendant pleaded guilty five days after he was charged, whereupon he was sentenced to the penitentiary—wherefrom by habeas corpus petition he sought his release on two grounds, one of which was that the right to jury trial provision found in the Idaho Constitution precluded the court's jurisdiction to commit him to the penitentiary on a guilty plea. In passing upon that contention, the Court made these observations:

“The language used in [sec. 7 of article 1 of the Constitution](#) was no doubt intended to preserve to the citizens of the state the right of trial by jury *as it existed under the common law*, and such right is retained in all cases which were triable by jury at common law ‘[W]herever a right to this trial is guaranteed by the Constitution without qualification or restriction, it must be understood as retained in all those cases which are triable by jury at common law, and *with all the common-law incidents to a jury trial so far at least as they can be regarded as tending to the protection of the accused.*’ ”

Id. at 182, 117 P. at 697 (quoting Cooley, Constitutional Limitations, 7th ed., p. 453) (emphasis added).

The Court in *Dawson* further elaborated that:

“[T]he right of every one to have his cause tried or to be tried himself if accused of crime by a jury is guaranteed and established beyond the power of the Legislature to abridge it.... ‘The trial by jury, secured to the subject by the Constitution, is a trial according to the course of the common law, and *the same, in substance, as that which was in use when the Constitution was formed.*’ ”

Id. at 184, 117 P. at 698 (quoting *East Kingston v. Towle*, 48 N.H. [57] 64) (emphasis added).

It is clear, then, that the right to trial by jury must be examined in light of the practices at common law and the statutes of Idaho when our constitution was adopted and approved by the citizens of Idaho. In territorial Idaho and in statehood until 1911, as at common law, the uniform practice was to

make death the exclusive and mandatory sentence for certain specified offenses. *Woodson v. North Carolina*, [428 U.S. 280], 96 S.Ct. 2978, 2983 [49 L.Ed.2d 944] (1976) (citing H. Bedau, *The Death Penalty in America*, 5–6, 15, 27–28 (rev. ed. 1967)). A jury in the Territory of Idaho by convicting a person of first degree murder therefore also determined the punishment to be imposed—death. The judge's role was merely to pronounce the judgment, a matter in which he had no discretion. Such was the statutory law since 1864, and even with some non-capital cases, the legislature placed “a duty upon the court ... to impose the punishment prescribed.” R.S.1877, § 6306—now I.C. § 18–106. (See *In re Erickson*, 44 Idaho 713, 260 P. 160 (1927).) Idaho followed the common-law practice of giving the jury the role of sentencer in capital cases—the jury being statutorily given the exclusive power to determine when the death penalty would be imposed. As has been seen, Section 17 of the Idaho Criminal Practice Act of 1864, set forth in Justice Huntley's dissent, provided that:

“[T]he jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, *designate by their verdict, whether it be murder of the first or second degree; ... Every person convicted of murder of the first degree, shall suffer death; and every person convicted of murder in the second degree, shall suffer imprisonment in the territorial prison for a term not less than ten years, and which may be extended to life.*” (Emphasis added.)

In 1887, a mere three years before the Idaho Constitution was adopted and approved, the Idaho Revised Statutes provided that:

“Sec. 6563. Every person guilty of murder in the first degree *shall suffer death*, and every person guilty of murder in the second degree is punishable by *393 **494 imprisonment in the Territorial prison not less than ten years, and the imprisonment may extend to life.”

Idaho Revised Statutes, Title VII, ch. 1, § 6563 (emphasis added).

At that same time the trial jury's function was set out thus:

“Sec. 3938. A trial jury ... is a body of men ... sworn to *try and determine by a unanimous verdict a question of fact.*”

Idaho Revised Statutes, Title VII, ch. 1, § 3938. (Emphasis added.)

It was a question of fact whether a person was guilty of murder in the first or the second degree. This determination could only be made by a jury and it could only be made by a unanimous jury. Since the time the Territory was created, it took a unanimous vote of twelve jurors to determine that a person was to die.

The 1887 Revised Statutes of the Territory specifically distinguished between those cases in which the judge could exercise his discretion in meting out punishment and those in which the punishment was determined by the jury as a result of its verdict of guilty for a specified crime.⁵ See R.S. 1877, §§ 6306, 6307 (now I.C. §§ 18–106, 18–107. R.S. 6307 was amplified by R.S. 7992.)

“Sec. 7992. After a plea or verdict of guilty, *where a discretion is conferred upon the court, as to the extent of the punishment*, the court, upon the oral suggestion of either party that there are circumstances which may be properly taken into view either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily, at a specified time, and upon such notice to the adverse party as it may direct.” (Emphasis added.)

Now I.C. § 19–2515 (amended in 1977.)

The common-law practice of England, and the practice codified in 1864 and 1887, of requiring jurors to determine whether a sufficient crime was committed to warrant the imposition of the death penalty, was preserved by the Idaho Constitution, art. 1 § 7 and also by art. 21, § 2, as readily confirmed by reading the Proceedings of the Idaho Constitutional Convention.

The Proceedings of the Constitutional Convention revolving around art. 1 § 7 shed further insight as to the intent of the framers, leaving no doubt as to the verity of the above statements of the Court in *Miles*, *Prout*, and *Dawson*. It was proposed by Mr. Claggett that a verdict could be rendered by a majority of $\frac{5}{6}$ of the jurors “in all criminal actions except where the death penalty is imposed by law.” Idaho Constitutional Convention Proceedings and Debates, p. 151. The framers rejected his proposal and ultimately adopted the provision now in force which allows for less than unanimous verdicts only in non-felony cases.

In reviewing their recorded considerations of that issue, we are fortunate today to have irrefutable evidence that those

public leaders, of whom nearly one-half were practicing lawyers (Vol. I, Idaho Constitutional Convention, p. 160), were acutely aware that § 7 of Article I would guarantee forever that the legislature could not impinge upon the right of an accused to have a jury of his fellow men make the death penalty decision. Mr. Heyburn said it with an eloquence befitting a Thomas Jefferson or a James Madison:

“Mr. Chairman, I cannot agree with the gentleman in regard to the wisdom of changing entirely the system that is as old as government itself, *that no man shall be deprived of his rights, of his liberty or his life, except by a unanimous verdict of a jury of his fellow citizens who have no interest other than to see that justice is done him*. This principle has been deemed so important that at one time the demand that man should be protected by right of trial by jury revolutionized the civilized world.... It is the strong arm of the law that stands between the weak and the strong, between *394 **495 rich and poor, between oppressed and oppressor.... [I]t is still not necessary for us to say that less than a unanimous verdict shall deprive any man of either his liberty or his personal rights. *We cannot afford in the interest of economy nor in the interest of speedy justice—or of speedy trial, more properly speaking—to lessen by one hair's breadth the safeguard, the insurance every man has that his property or his rights will not be taken away from him, unless it is clear, beyond a reasonable doubt that they do not belong to him, and that that reasonable doubt is to be determined by a unanimous verdict.*”

Id. at 152–53 (emphasis added).

Although Mr. Claggett, the sponsor of the proposed $\frac{5}{6}$ majority rule proposal contended that the requirement of unanimous verdicts in criminal cases paralyzed the law

enforcement power of the state, even he recognized that capital cases are unique:

“MR. CLAGGETT.... We all know the defendant has every benefit from reasonable doubt. We all know he has a double advantage in impaneling the jury. We all know that when there has once been a verdict of acquittal he cannot be called in question again, no matter how wrong the verdict may be. And we all know in addition that the court has power to suspend judgment on the verdict after conviction, in order that application may be made to the governor for pardon in any case which may arise now and then, where the conviction is wrong, or where, if not wrong, the punishment is too severe, so that there is ample opportunity given before the execution of the judgment of the court for a review of the case by the governor or board of pardons. Now I ask whether all these things taken together, one and all, do not constitute too much advantage on the part of the defendant, and whether the strong arm of the state, which is stretched out and whose function is to protect the people, is not paralyzed by this system of a unanimous verdict.

“Mr. BATTEN. I will ask you, why make an exception in capital cases?

“Mr. CLAGGETT. Out of mere tenderness to human life, and because *if the death penalty is once inflicted you can never rectify the error*; but on the question of imprisonment you have the entire term of his imprisonment to correct it.”

Id. at 251 (emphasis added).

....

“Mr. AINSLIE ... I say it is legitimate in civil proceedings that a jury of three-fourths should find a verdict. I believe it will facilitate litigation and dispatch many suits a great deal quicker than by having a unanimous verdict. But when we come to the life and liberty of the citizen, whether it means imprisonment in the county jail or ninety and nine years in the penitentiary, I say we should pause and be governed to a large extent by the experience of those who have gone before us.... [A]nd you will find that they have never yet undertaken to

advocate the doctrine that five-sixths of a jury should find a verdict in a criminal case. Therefore I oppose the motion made by the gentleman from Shoshone, and I hope this body will not adopt it.”

Id. at 258.

Clearly the right, indeed the safeguard, to have a jury of fellow citizens make the decision of death was foremost in the minds of the framers when they assembled in the year 1899 and drafted the Constitution of Idaho which was accepted by the people and the Union.

From 1864 until 1977 imposition of the death penalty in Idaho has *not* been a function of trial judges. During that period of time the legislature set the penalty and the judge merely pronounced judgment accordingly. If the jury returned a verdict of guilty of first degree murder, the judge was under a duty to pronounce a judgment that the defendant suffer the death penalty. This is exemplified nicely in *People v. Walters*, *supra*, where the Territorial judgment on the verdict of guilty of first degree murder stated “The Judgment of this court and *the sentence of the law* is ...” Nor was there any room for discretion in the *395 **496 court. Although the Revised Statutes of 1877 § 639 provided for an aggravation-mitigation hearing, it had no applicability where the verdict in a first degree murder case was guilty of first degree murder. Obviously that procedure would not have withstood scrutiny under decisions of the United States Supreme Court which were handed down in 1972 and 1977.

A forerunner in many areas of criminal law, in 1911 the legislature did give the jury some leeway in capital sentencing, and from that time on until the legislature acted again in 1972, the jury, as a component part of the court (*see State v. Ramirez*, 34 Idaho 623, 203 P. 279 (1921),

“the jury, in a case triable by a jury, is as much a part of the court as the judge. Each has certain legal duties and functions, and the combined action of the jury and the judge makes up and merges in the final judgment. *The action of the jury in imposing the death penalty* merged in the judgment and became a part of the decision of the court.” (Emphasis added.)

34 Idaho at 634, 203 P. at 283.

became vested with the same discretion that judges had in non-capital cases where the legislature had not set a mandatory penalty. So, and as has been now well pointed out, from and after 1911 the jury, upon convicting a defendant of first degree murder would decide between imposing a sentence of death or a sentence of life imprisonment. Done away with, at that early time, then, was the mandatory death sentence which would over fifty years later in the seventh decade of the twentieth century be held offensive as violative of the Constitution of the United States.

Becoming then applicable were those provisions enacted in 1877 and now codified as I.C. § 19-2515(a), which, prior to 1977 read exactly as it had read for 110 years, and provided for the presentation of evidence on circumstances both mitigation or aggravation of the punishment. In this manner the Idaho procedure governing the death penalty had all of the requisite features which the Supreme Court of the United States would later require—other than, perhaps guidelines.

But even there, although the legislature did nothing toward providing criteria for the juries to consider in deciding between life sentences and death sentences, the courts of Idaho were not remiss.

Time constraints in meeting the rules of this Court for issuing opinions—with death penalty cases in no way distinguished from run-of-the-mill monetary judgments in small claims court—prevent an exhaustive review, but suffice it to say that my personal knowledge is that trial judges in Idaho have properly instructed the jury. An example which is preserved in our Idaho Reports by reason of a challenge to such instructions is *State v. Clokey*, *supra*. The trial court instructed the jury that certain evidence had been admitted “not for the purpose of establishing or tending to establish the guilt or innocence of this defendant ... but is relevant and may be considered by you only as it may assist you in arriving at the punishment to be inflicted upon the defendant should you find him guilty of murder in the first degree.” The Court used the opportunity of *Clokey* to remind the trial bench and bar that in such cases, where there is exercisable discretion in sentencing, evidence should be admitted in mitigation and aggravation—solely going to the determination of punishment:

“The first paragraph of said instruction informs the jury that in the event they find the defendant guilty of murder of the first degree they may then determine whether the penalty to be imposed shall be death or confinement in the

state penitentiary for life. Such instruction is in conformity with I.C. § 18-4004. Said instruction then calls attention to the evidence which was adduced during the trial regarding the *background and history* of the defendant *and his experiences and behavior in matters not related* to the alleged crime for which he was being tried.

“In this connection evidence was introduced by and on behalf of appellant *396 **497 showing appellant's place and date of birth; that his father died when he was between five and seven years old; that he was mistreated when a boy at home; that in 1929 he was found guilty of first degree robbery and as punishment therefor served three years and seven months in San Quentin prison; during the years that followed he worked at four or five different trades or occupations; that he suffered a serious accidental injury while working in the mines; that he had been convicted of reckless driving and drunken driving during the past two years and that he had a hit and run charge pending at the time of this trial; that his son became involved in trouble and was committed in the Industrial Training School at St. Anthony, Idaho; that after the son returned to the home appellant and his son got into a fight, shortly after which his wife, Betty Clokey, obtained a divorce.

“Such evidence is unrelated to the crime here charged and it is such evidence of biographical facts that the court refers to in said instruction No. 16. It is evidence regarding the *background and history*, the *experiences and behavior* of appellant which the jury may consider only as it may assist them in arriving at the punishment in the event the jury finds defendant guilty of murder of the first degree.

“One of the reasons for permitting the introduction of evidence of biographical facts where such facts are unrelated to the offense charged is that the law recognizes that previous good or bad conduct should be considered in fixing punishment for crime. Our statute provides the court with discretionary power to consider circumstances in aggravation or mitigation of punishment as follows:

“ ‘After a plea or verdict of guilty, where a discretion is conferred upon the court as to the extent of the punishment, the court, upon the oral suggestion of either party that there are circumstances which may be properly taken into view either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily, at a specified time, and upon such notice to the adverse party as it may direct.’ I.C. § 19-2515.

“I.C. § 19–2516 requires that the hearing be had in open court.

“This Court has considered the language used in I.C. § 19–2515 and has stated that:

“ ‘It may be open to debate as to whether the “circumstances” mentioned in § 19–2515, I.C., refer particularly to circumstances surrounding the commission of the crime and tending to aggravate or mitigate the character of the conduct involved, or whether such circumstances include also the convict, himself, as an individual, which would include his background, his age, upbringing and environment or any other matter appropriate to a determination of the degree of culpability. We think that the statute should be given the broader interpretation, particularly in a capital case. *James v. State*, 53 Ariz. 42, 84 P.2d 1081.’ *State v. Owen*, 73 Idaho 394, 253 P.2d 203, 207.

“This Court has also determined that in cases where the jury may fix the punishment it should have opportunity, under proper instructions, to consider circumstances in aggravation or mitigation of the punishment.

In *State v. Owens*, supra, this Court said:

“ ‘It, therefore, appears that the law contemplates that in fixing the penalty, the court, when requested by either party, may and should hear and consider circumstances in aggravation or mitigation of the punishment. It logically follows that if it is proper for the court to hear and consider such evidence, the jury where it is called upon to fix the punishment, should have the opportunity to consider such proof, subject, of course, to a proper instruction limiting the jury's consideration *397 **498 of such evidence to the determination of punishment, and cautioning that it is not to be considered in determining guilt or innocence, or be allowed to influence the determination of that question.’ ”

State v. Clokey, 83 Idaho at 327–28, 364 P.2d at 162–63.

In *State v. Owen*, supra, quoted in the above excerpt from *Clokey*, the trial court sustained the State's objection to the defendant's evidence offered “to show facts and circumstances of defendant's age, upbringing and environment for the purpose of mitigating punishment.” 73 Idaho at 401, 253 P.2d at 207. The ruling of the trial court was held to be error, but on a four-one decision of this Court, a new trial was not ordered; instead, by a three-two split of the

Court, which held that there had been a fair trial on the issue of guilt, the death penalty sentences of the jury were commuted to life imprisonment. 73 Idaho at 420–21, 253 P.2d at 219–20. The *Owen* court's opinion should have made it clear to the trial bench and bar that charges of first degree murder would encompass, at the same time, a trial of the guilt issue and a trial of the punishment issue:

“However, the law does recognize that previous good or bad conduct should be considered in fixing the punishment for crime. Such is the underlying principle of the persistent violator statute. § 19–2514, I.C. The courts have long recognized that the first offender should be accorded more lenient treatment than the habitual criminal. In addition to considerations of humanity, justice and mercy, the object is to encourage and foster the rehabilitation of one who has for the first time fallen into error, and whose character for crime has not become fixed. *State v. O'Dell*, 71 Idaho 64, 225 P.2d 1020.

“Our statute also provides the court with discretionary power to consider circumstances in aggravation or mitigation of punishment, as follows:

“ ‘After a plea or verdict of guilty, where a discretion is conferred upon the court as to the extent of the punishment, the court, upon the oral suggestion of either party that there are circumstances which may be properly taken into view either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily, at a specified time, and upon such notice to the adverse party as it may direct.’ § 19–2515, I.C.

“And § 19–2516, I.C., requires that the hearing be had in open court. It may be open to debate as to whether the ‘circumstances’ mentioned in § 19–2515, I.C., refer particularly to circumstances surrounding the commission of the crime and tending to aggravate or mitigate the character of the conduct involved, or whether such circumstances include also the convict, himself, as an individual, which would include his background, his age, upbringing and environment or any other matter appropriate to a determination of the degree of culpability. We think that the statute should be given the broader interpretation, particularly in a capital case. *James v. State*, 53 Ariz. 42, 84 P.2d 1081.

“It, therefore, appears that the law contemplates that in fixing the penalty, the court, when requested by either party, may and should hear and consider circumstances in aggravation or mitigation of the punishment. It logically

follows that if it is proper for the court to hear and consider such evidence, the jury where it is called upon to fix the punishment, should have the opportunity to consider such proof, subject, of course, to a proper instruction limiting the jury's consideration of such evidence to the determination of punishment, and cautioning that it is not to be considered in determining guilt or innocence, or be allowed to influence the determination of that question. The offer of proof in behalf of the defendant Owen is as follows:

“ ‘Mr. Doane: Comes now the defendant William Lawrence Owen and *398 **499 offers to prove by the present witness that the defendant William Lawrence Owen was born in Tannover, California, on October 2, 1911, in a family consisting of his mother and father, one sister and one twin brother; that his father's occupation was that of a railroad foreman; that his nationality was Welsh and half-breed American Indian; that his mother was a full-blooded American Indian of the Wylacki tribe in northern California; that in the year 1917 when the defendant was of the age of six years his mother died; that the defendant had no real home life in the ordinary meaning of the term, and lived from time to time with his siter and other relatives; that he completed his formal schooling at the age of fourteen and thereupon proceeded to provide for himself, and his first major occupation was that of deck boy on a sailing vessel, upon which vessel he served for two and a half to three years; that since that experience at sea the defendant learned foundary moulding as his trade and has followed that trade ever since that time, and just prior to his coming to the State of Idaho, approximately two weeks before the date of September 7, 1951, was so engaged in his occupation.’

“The offer made by defendant Hastings consists of a lengthy recital of his military service in the United States Army commencing with his voluntary enlistment on July 9, 1940, and ending with his discharge in July, 1945. It contains a detailed statement of the different periods and places of service, engagements in which he or his unit participated, time, place and manner of wounds suffered and of decorations conferred, and also as to decorations and citations conferred upon the regiment, battalion and division in which he served. Except for his military record, he offered no evidence as to age, upbringing, and environment, which was not admitted. Such a detailed statement of military exploits, engagements, wounds and medals, would have a natural tendency to prejudice the jury in the defendant's favor, and the nature of the offer here would suggest that that was perhaps its purpose. However,

we think a briefer statement of military service would be a proper part of a background sketch.

“It is the general practice, at least in important criminal trials, to permit any witness to testify briefly and generally as to his background, giving such facts as date and place of birth, family relationship and occupation, to better enable the jury to appraise the general character of the witness. Each of the defendants was a witness in his own behalf and should have been permitted to testify to such general biographical facts in his capacity as a witness, if for no other purpose. Owen was permitted to testify only to the date and place of his birth. Hastings was permitted to testify to the date of his birth, that in 1932 when he was ten years of age his father died, and that his mother had remarried. The court should have admitted the evidence offered by Owen and anything of a like character which Hastings may have desired to introduce. 70 C.J., Witnesses, § 919.

“However, since the offers were expressly limited to mitigation of punishment, and since the question of guilt is free from doubt, and since the error can be expunged by a commutation of the sentence, we hold that it does not require reversal of the judgment.”

State v. Owen, 73 Idaho at 402–04, 253 P.2d at 207–09.

It is, then, abundantly clear that for at least thirty years, as documented by *State v. Owen*, *supra*, there was a sentencing scheme in Idaho that very nearly comported with the requirements the United States Supreme Court would in the 1970's require as mandated by the United States Constitution. The death penalty was not mandatory, but left with the jury, upon hearing evidence in mitigation or aggravation, the *399 **500 discretionary choice between inflicting the death penalty or life imprisonment. An element probably lacking was the requirement of a specific instruction to the juries of Idaho defining aggravating circumstances, the existence of one or more of which would justify and dictate the imposition of the death penalty and the requirement that the jury set out in writing the requisite aggravating factor(s) proven beyond a reasonable doubt—in which respect, other than for a bifurcation of trials with the second stage to follow and hinge upon there being in the first stage a conviction of first degree murder, the Idaho procedure was much like that in Missouri, as outlined in *Bullington v. Missouri*, 451 U.S. 430 [101 S.Ct. 1852, 68 L.Ed.2d 270] (1981).

When, in 1973, the legislature (apparently acting at the behest of Idaho's attorney general, as was for certain the

situation in 1977) returned to the mandatory death sentence, although the jury was indeed the sentencer even as it was prior to the 1911 amendment which allowed for the exercise of discretion, a step was taken in the wrong direction insofar as was concerned the mandate of the Supreme Court of the United States. Then, when the legislature passed the sweeping provisions of the 1977 Act, although it came close to meeting the requirements of *Woodson*, it misperceived *Woodson's* content to the extent that it believed itself behooved to abolish the jury function (as evidenced by the Statement of Purpose set out in the opinion of Justice Huntley) which is mandated by our Idaho Constitution, guaranteeing that the right to trial shall remain inviolate.

Had the majority of the Court engaged in any meaningful review of the history of death sentencing in Idaho, “at other times,” while it would be hard pressed to affirmatively show that until *Furman* the jury in Idaho was not in fact the sentencer in nearly all capital cases, it could point to *State v. Arnold*, 39 Idaho 589, 229 P. 748 (1924), as authority for a judge to substitute himself as the court sentencer in place of the jury when a defendant enters a plea of guilty to a charge of first degree murder. *Arnold* had the misfortune to be the first person in Idaho to ever enter a plea of guilty to first degree murder, and, although it doesn't appear in the Court's four-to-one opinion, *Arnold* also had the misfortune to be a black man charged with first degree murder. *Arnold's* case recently came under study by a class of approximately fifty law students, most of them in their third year, at the same time they were reviewing another more famous case of that era, namely *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Every person in that class was of the opinion that *Arnold* was not only wrongly decided, but a tragedy in the history of Idaho jurisprudence—not on any thought that *Arnold* wasn't guilty, but on the misfeasance of the criminal justice system. The main point of concern with *Arnold* is that, being an indigent for whom counsel was appointed, and fearing to place his life in the hands of a jury who would decide his fate if he went to trial on the issue of guilt or innocence, which was upon the advice of counsel that only a jury could sentence him to death under Idaho law, he pleaded guilty and was *by the judge* sentenced to death four days later. The facts and circumstances, succinctly laid out in the dissenting opinion of Justice William A. Lee, are:

“The affidavit of appellant, which is not controverted as to the principal facts, states that following his arrest and prior to his arraignment and plea he was taken by the sheriff from the jail where he was being held awaiting trial, into the country and was seized by a mob, blindfolded and hanged,

after which he was let down and required by the mob to give information about the commission of the alleged crime and the whereabouts of his alleged accomplice, in the nature of a confession of guilt; that when he was brought before the trial court and stated that he was without means with which to employ counsel to represent him the court appointed counsel to do so, and such counsel *400 **501 advised him that public sentiment in the community was so high against him that if he entered a plea of not guilty and stood trial he would more than likely be given the death penalty, but that if he entered a plea of guilty the judge would not have authority to impose the death penalty upon him; and that when he entered a plea of guilty the judge did ask him if he realized that the death sentence might be pronounced against him on such plea and that he was so frightened he did not answer but relied upon the advice of counsel which the state had furnished him, and believed that the confession which the mob had extorted from him could be used if he stood trial, and so allowed the plea of guilty to stand, but that had he believed the judge had authority to sentence him to death upon his plea of guilty he would not have entered such plea.

“The plea of guilty was entered on the 11th of September, 1923, and the judgment of the court that appellant should suffer the death penalty was entered on the 15th of September thereafter. Upon securing additional counsel appellant, on October 8, 1923, moved that the judgment be vacated and that he be permitted to withdraw his plea of guilty and enter a plea of not guilty, which motion was denied.” *State v. Arnold*, 39 Idaho [589] 604, 605 [229 P. 748] (1924), Lee, Justice, dissenting.

State v. Arnold, 39 Idaho at 604–05, 229 P. at 753.

The four member majority, not only upheld the trial judge's ruling that he could impose the sentence upon a plea of guilty to first degree murder, but also upheld the ruling below that *Arnold*, whose plight had attracted the attention of illustrious counsel of experience⁶ (the appointed attorney who had pleaded *Arnold* guilty had been admitted to the bar just a month or so before—another travesty) was not entitled to withdraw his guilty plea and enter a plea of not guilty. Regarding the latter use the Court was content to assume that the lower court “In denying the motion ... evidently concluded that, upon the showing made, it did not appear that the appellant had entered a plea of guilty in ignorance of his rights, or because he had been misled by erroneous advice of counsel.” 39 Idaho at 603, 229 P. at 752.

As to the authority of the judge to impose the death sentence, concerning which issue there was no precedent in Idaho, this appearing to be the first such case where an accused pleaded guilty to murder in the first degree, 39 Idaho at 594, 229 P. at 749, the Court relied upon two propositions which were said to uphold the validity of a judge-imposed death sentence:

(1) It being the duty of the court to pronounce judgment, where there is a guilty plea to first degree murder, "the court must do so." 39 Idaho at 597 [229 P. 748], citing *State v. Ramirez*, 34 Idaho [623, 203 P. 279], *supra*, and *State v. Hoagland*, [39] 34 Idaho [405, 228 P. 314], *supra*, mentioning also two cases from California.

(2) The requirement of § 9024, Compiled Statutes, which provided that "Upon a plea of guilty of a crime distinguished or divided into degrees, the court must before passing sentence, determine the degree." 39 Idaho at 595, 229 P. at 750.

The second ground was absolutely untenable. In two places the *Arnold* majority recognized that Arnold had pleaded guilty to murder in the first degree. So long as that plea was allowed to stand, the degree of the crime had already been determined.

The first ground is likewise on unsound footing. Following *Arnold* the Idaho cases *401 **502 are replete with expressions recognizing that the jury must on a first degree murder conviction impose one of two available sentences, imposition of a life term or imposition of death. The word "may" as used in Compiled Statutes 8212, which prior to 1973 continued to read the same, I.C. § 18-4004, other than for *Arnold's* case, has always been understood to mean that instead of an automatic death judgment on conviction of first degree murder, following the 1911 amendment, the jury while it may still give the death penalty, may also instead give a term of life imprisonment. Hence, entirely without legal foundation was the *Arnold* Court's statement that "The only effect of Compiled Statute § 8212, is that, where there is a jury trial on a plea of not guilty, the jury may decide which punishment shall be inflicted. Even in such case, if the jury does not decide the penalty, the court must do so." Such statements were clearly made in contravention of the Idaho Constitution which in murder cases, to the exclusion of all other crimes where the death penalty is not a possibility, leaves death sentencing for a jury determination. Reliance on *State v. Hoagland*, *supra*, and *State v. Ramirez*, *supra*, was wholly misplaced. Both were first degree murder informations which were tried to a jury, and in both instances,

as was constitutionally required, the respective juries imposed the sentences of death. In *Hoagland*, which was decided just 28 days before *Arnold*, there were some issues of magnitude, but no discernible issue as to the right of a defendant to have a sentence of death imposed upon him by a jury, and only a jury. The *Hoagland* Court's total discussion of Compiled Statute § 8212 is this:

"Appellant suggests that the jury fixes the punishment. Under the provisions of C.S., sec. 8212, it might be observed that this section provides that the jury may decide the punishment to be inflicted, whether death or life imprisonment. If the jury fails to fix the punishment that duty then devolves upon the court. The fixing of the punishment by the jury at death was not shown to be the result of any bias or prejudice on the part of any juror and their *voir dire* examination fails to disclose any objection to their proper qualifications in this respect."

State v. Hoagland, 39 Idaho at 420, 228 P. at 319.

Exactly what this passage had to do with *Hoagland's* appeal is not at all understood. "Appellant suggests that the jury fixes the punishment." Such is not and does not purport to be an assignment of error. And, the jury did fix the punishment. Anything found in that entire paragraph is ostensibly pure dictum, and, one might surmise in view of the two cases being under consideration at the same time, with *Arnold's* opinion falling shortly upon the heels of the opinion in *Hoagland's* case, perhaps a gratuitous statement in *Hoagland* to be used as bootstrapping for an untenable position the Court was taking in *Arnold*. I see no other reason whatever for the paragraph in *Hoagland*. It never was the law, and it never became the law. But in *Arnold* it was claimed to be the law, to the great detriment of Noah Arnold. It is my understanding that in those days the Court prepared its own headnotes. Something is to be said for the fact that, in headnoting an opinion with fourteen headnotes, the above excerpted paragraph from page 420 [228 P. 314] was given no mention whatever. Nor does that curious statement ever appear to have been ever relied upon other than in *State v. Arnold*.

In *State v. Ramirez*, 33 Idaho 803 [199 P. 376], *supra*, the only issue involving Compiled Statute § 8212 revolved around an appeal contention that the death penalty judgment could not be carried out because the jury had returned a verdict fixing the punishment at execution, which the Court disposed of by saying that “The verdict of the jury, however, was not uncertain.”

The Court in *Arnold*, *supra*, was guilty of improperly relying upon *Hoagland* and *Ramirez*, and rendered a decision contrary to *402 **503 the mandate of Art. 1 § 7 of our Idaho Constitution. Better it should have heeded the words of Justice William A. Lee who wrote:

“The right of those accused of crime to a jury trial extends to the guilty as well as to the innocent, and in some jurisdictions human life cannot be taken by sanction of law without the verdict of a jury. In states not having such a provision I think the instances are comparatively rare where upon a plea of guilty the death penalty has been inflicted. It was recently stated upon credible authority that in one of the older jurisdictions, in more than 300 pleas of guilty of murder entered, only one person was executed upon such a plea, indicating the reluctance of courts to impose the death penalty except upon the verdict of guilty by a jury.

“An application to withdraw a plea of guilty in a capital case should be allowed where such application is made soon after the entry of the plea, and where it further appears that a confession of guilt was obtained by unlawful means and the plea of guilty has been made in the belief that such confession would be used against the accused if he stood trial, and all the other facts and circumstances were such as to induce a plea of guilty that might not otherwise have been made. This is more nearly in harmony with the humane policy of the law that human life will not be taken for the commission of crime unless all the usual and ordinary safeguards with which the law surrounds an accused person have been scrupulously complied with.

“The United States supreme court, speaking through Mr. Justice Harlan, in *Hopt v. Utah*, 110 U.S. 574, 4 Sup.Ct. 202, 28 L. Ed. 262, said: ‘The natural life, says Blackstone, ‘cannot legally be disposed of or destroyed by any individual neither by the person himself nor by any other of his fellow creatures, merely upon their own authority.’ 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential

in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused; much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation of atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Com. 11.’

“I am also of the opinion that the information in this case is fatally defective in that it does not comply with C.S., sec. 8827, and fails to be direct and certain as to the offense charged. Appellant's counsel say they are unable to find any authority or precedent that sustains the sufficiency of this information, and I think none can be found. It is beside the question to say that because appellant understands he is being charged with murder the information is therefore sufficient within the requirements of the law. He understood the nature of the charge when he was being hanged by the mob, but that did not obviate the necessity of filing a formal charge as required by law, in the trial court. The information itself is a sufficient and conclusive answer to the claim that this has been done.

“Entirely aside from any question as to the guilt of this appellant there should be no appearance of the courts approving or countenancing in any degree some of the proceedings resorted to by which this plea of guilty was probably obtained. I think a refusal to allow its withdrawal may be reasonably construed as a condonation of such unlawful acts. The language of the supreme court of Nebraska, in *Reynolds v. State*, 58 Neb. 49, 78 N.W. 483, seems to me peculiarly appropriate to the situation here, wherein it is said:

“ ‘It has been suggested, and is doubtless true, that in this case “outraged justice *403 **504 has laid her avenging lash on the back of one who honestly deserves the scourge,” but we cannot for that reason alone affirm the judgment. The jurisdiction of the courts is not co-ordinate with that of the mob.’ ” (Emphasis added.)

State v. Arnold, 39 Idaho 605–607, 229 P. 753–54.

Thirty years later, and now thirty years ago, Justice Keeton wrote simply but with equal eloquence, and with a firmness of mind, that the accuseds in Idaho must have all of their rights if the criminal justice system as envisioned by the founders of the federal and state constitutions is to survive:

“The real question presented is whether or not the guilt of the appellants has been established in the manner and

by the procedure provided by law, long recognized and established, and based on experience and sound reasoning.

“We should never lose sight of the fact that the guilt or innocence of appellants and the degree of crime are questions in the first instance to be determined by the jury. Our inquiry concerns the method, means and procedure by which the guilt was established and punishment imposed.

“If the appellants were convicted, or might have been convicted, and the death penalty imposed, because of errors in the proceedings taken against them, then it must be apparent to all that every other person similarly situated and placed on trial would be in exactly the same position; and the rules of law and procedure adhered to here must, of necessity, be applicable to all other persons.

“Under our rules of law and procedure, well recognized and established, before a person's liberty or life can be taken, it is necessary that he first be tried in a court of competent jurisdiction, before an impartial jury. When such a jury is impaneled, it is the exclusive judge of the facts—and in this particular proceeding, may, if it sees fit, determine the punishment to be imposed.

“Trial means a fair trial; that is, the accused's legal rights, during the proceedings had, must be safeguarded and respected, not alone in the observance of the naked forms of law, but in the recognition and just application of the principles applicable to the case. Until such time as an accused has been so tried and found guilty, he cannot be legally convicted.

....

“It is far more important for society to accord a defendant in a criminal action a fair trial than he forfeit his life in expiation of the crime.

“The rules of law and procedure which apply to the appellants are, and should be, measured by the same yardstick and exactly the same standards as apply to all other persons; and in determining the appellants' rights, we necessarily measure and determine the rights of all others who might be similarly situated. A fair trial for those accused of crime protects the liberties of all.

....

“If a person in a civil matter is wrongly deprived of his property, or a person in a criminal proceedings wrongly convicted of a less serious crime, it might be possible in some way to partially rectify the wrong done. Were the sentence imposed in this proceeding executed, regardless of how wrong it might be, no rectification could ever be made. It is impossible to call back the dead.”

State v. Owen, 73 Idaho at 425–430, 253 P.2d at 223–26.

I have always been and remain impressed by the views of Justice Lee and Justice Keeton. There is far more at stake today than the life of Thomas Creech. Although the majority today can in apparent conscience restrict their review of the history of death penalty in Idaho by the casual observation that “At other places or at other times juries have been given an integral *404 **505 role in imposing the death sentence,” I submit that the views of Justice Huntley, meaning his own and those which he adopts as his own in the appendix to his opinion, make it abundantly clear that, historically since the time when the thirteen colonies broke free of English rule and English judges, and thereafter drafted the Constitution which has been the backbone of justice in these United States, the American people have by far and large for the most part restricted death sentencing to a jury of the accused's peers.

It is equally clear and beyond refute that Justice Huntley is entirely correct in his assertion that the Constitution of the State of Idaho now requires and forever has required that it be twelve jurors and not a single judge who will in Idaho impose the sentence of death.

II.

UNCONSTITUTIONALITY OF THE 1977 ACT AS BEING APPLIED

The Court's opinion delivered today, authored by Justice Shepard, and which commands a bare majority of the Court's membership is reminiscent of his views which were set forth

in his dissenting opinion in *State v. Lindquist*, 99 Idaho 766, 589 P.2d 101 (1979) wherein, in declaring his view to affirm a death sentence, he concluded:

“With all deference and respect to our brethren on the Bench of the United States Supreme Court, I regret that I can neither understand what they have said as a court, where they now stand as a court or where they may be going in this important area of the law involving capital cases and the death penalty. I may well be wrong in my interpretation of what they have said and what they will do. I believe it is equally possible that today's majority may be in error in their understanding. I am sure the sentencing judge here suffered an agony of the spirit much greater than that of Mr. Justice Blackmun. This Judge had need to face the human rather than decide in the sanctity and solitude of his chambers while considering an abstract principle. The trial judge shouldered his heavy burden and I think this Court should affirm his decision, leaving to the United States Supreme Court, if they so desire, the option of deciding the fate of Phillip Lewis Lindquist.” 99 Idaho at 775 [589 P.2d 101].

Although the *Lindquist* majority opinion authored by Justice Bakes readily recognized as a matter of law that Idaho's then existing death penalty statutes were invalid in light of “*Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) which held unconstitutional a North Carolina mandatory death penalty statute *virtually* identical to the Idaho statute...” 99 Idaho at 768, 589 P.2d at 110, the *Lindquist* dissent set forth in detail the facts of Lindquist's crime. Those facts were then, and remain, unpalatable, but cannot affect the obligation of an Idaho court to adhere to the Constitution of the United States and apply its precepts as the Supreme Court of the United States interprets and applies that Constitution. Admittedly, to have joined the Lindquist and Creech⁷ execution bandwagons would have met with large spread public favor. Today, four years after *Creech* and *Lindquist*, that same Creech is again before the Court on review of the imposition of a death sentence. Once again a popular decision would be to affirm that death sentence. Of this there can be no doubt. Even before sentence was imposed upon Creech by the district court, the Boise Statesman, by far Idaho's newspaper of *405 **506 largest circulation, in its Sunday edition of September 20, 1981, both editorialized on his fate and carried a lead article authored by its managing editor:

The

Idaho STATESMAN

Editorials

Execution for Creech

A few people by their crimes leave society no choice but to kill them for its own protection. Thomas Eugene Creech who has been convicted of five murders, is one of those people. He should be sentenced to death for the most recent of his murders, the May 13 slaying of fellow Idaho Penitentiary inmate David Jensen.

Longtime readers of this editorial page will recognize that this stance is a turnaround for The Statesman. The change of position, taken with a good deal of soul-searching, reflects changes in membership on the editorial board and concurrent changes in the beliefs of some members. (For an explanation of why the position was changed, see the Dear Reader column on the opposite page.)

The general philosophical position in favor of the death penalty is based upon the belief that society must protect itself, and that in an imperfect world there is no way to protect against some people so dangerous and so irredeemable except to end their lives. Creech is the example that proves the point.

In 1976, Creech was sentenced to death for the 1974 murders of two men near Donnelly. That sentence was reduced to two terms of life imprisonment when the Idaho Supreme Court declared the state's 1973 mandatory death penalty law unconstitutional.

The court's decision was a good one. It followed a U.S. Supreme Court ruling that mandatory death penalties are arbitrary and capricious because they do not allow judges to consider mitigating factors in cases. The Idaho law was rewritten in 1977 to include a list of factors to guide sentencing and meet the constitutional requirements laid down in the U.S. Supreme Court decision.

In 1979, Creech pleaded guilty to another murder that took place in 1974, this one the shooting death of a Portland man. Creech again escaped the death penalty. Oregon's capital punishment law also had been declared unconstitutional.

On Friday, a California state appeals court upheld Creech's first-degree murder conviction in 1980 for the 1974 slaying of a Sacramento man. That crime, like the others, preceded a ruling that the state death-penalty law in effect at the time was unconstitutional.

Then, last May, Creech beat Jensen to death with a sock full of flashlight batteries while the two inmates were incarcerated together during an exercise period.

Jensen was no model citizen; at age 23 he had been in and out of jail on theft convictions. Still, he deserved protection. And if Oregon or Idaho had had viable death penalty laws in force at the time of Creech's earlier murders, Jensen might have been protected. He might be alive today.

By all accounts Jensen was a wayward but unviolent young man who never should have been locked up with someone like Creech, who had been implicated in three earlier attacks on jail inmates. For that mistake, prison authorities have to bear the blame. But to argue ****507 *406** that improving administration of our prisons and parole systems negates the need for the death penalty is to ignore reality. It is the nature of institutions that mistakes are made.

If steps can be taken to end the possibility that mistakes will result in harm to members of society, then those steps must be taken. Obviously, there is at least one such step—to put to death those who have proved beyond all reasonable doubt that they are a threat to the life of anyone with whom they come in contact.

To take the step involves a terrible responsibility. Capital punishment must be used sparingly and with every effort to be fair to the convicted murderer. Yet, if society is to protect itself absolutely against the likes of Thomas Creech, then such people must die.

****508 *407** THE IDAHO STATESMAN,
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Why The Statesman now favors the death penalty

By ROD SANDEEN

Managing editor

To support or oppose capital punishment requires an examination of one's deepest convictions.

So it was with The Statesman editorial board last week. In a 5-4 vote, the board endorsed the death penalty, a reversal of a longstanding position.

The catalyst for the switch was Thomas E. Creech, who has been convicted of five murders, three of them in Idaho. His latest victim, a fellow inmate at the Idaho Penitentiary, was beaten to death with a sock filled with flashlight batteries.

Creech, 31, admitted killing the inmate, David Jensen, and pleaded guilty last month to first-degree murder. At that time, he told several persons he wanted to be executed.

In Idaho, that means death by lethal injection. The director of Corrections selects the deadly substance. It is administered by remote control while the condemned person lies strapped to a stretcher.

The Statesman opposed this form of punishment in 1978. "To paraphrase Gertrude Stein, murder is murder is murder," the editorial said. "Execution is just a pretty name for it."

But three years later, as an editorial in today's paper says, The Statesman is endorsing the death penalty.

The decision was made after the issue was debated at a board meeting. Proponents said the death penalty is needed to protect society. Some people, the majority argued, have no redeeming qualities. They remain a threat to society as long as they are alive.

Frustration was expressed at our permissive legal system, which seems to turn criminals loose while they remain a threat to others. The argument was made that if Creech's original death sentence had been carried out, he would not have killed Jensen, the 23-year-old inmate from Pocatello who had the misfortune to be alone with Creech during an exercise period.

No members of the board thought the death penalty served as a deterrent. The belief was that people who plot and carry out a murder—the type of killing for which the death penalty is applied—don't plan to get caught. The board also reasoned that because most murders are crimes of passion, capital punishment doesn't serve as a deterrent. Those killings

are committed in a fit of anger. Their victims usually are acquaintances or relatives.

Those who opposed the editorial position made strong arguments, too.

One distinctive quality that puts America above many other nations is the value it puts on human life, they said. In El Salvador, Iran and many other countries, the disregard for human life is appalling. For Americans purposefully to kill a human being, no matter what the circumstances, erodes the value of all human life, opponents argued.

The minority also asserted that the real motive for the death penalty is revenge. As many supporters of the death penalty will admit, capital punishment is an expression of society's wrath at murder by killing its murderers.

The subject of the death penalty came before the board after Creech killed Jensen. Sensing controversy and divided opinion, board members agreed to come to grips individually with the issue and debate it openly two weeks later, near the time Creech is due back in court. His presentence investigation is due Friday.

With that preparation, the debate was quick. Everyone gave his opinion.

Members agreed readers deserved an explanation because of the gravity of the subject. Readers have a right to expect consistency in the editorial positions of the newspaper. If positions on significant issues change, readers should be told why.

The change in the makeup of the board in the last three years accounts for a significant reason why the position was reversed. But more telling is the role of Creech himself. He seems without conscience, without chance of rehabilitation. He, in fact, wants to be sentenced to death.

With Creech as the focal point of a death penalty debate, the change in position seems inevitable.

***408 **509** Ordinarily such articles would not find their way into an appellate opinion. But, ordinarily such articles are not part of an appellate record. Here, sad to say, they are part of the appellate record which we review. Ordinarily, if in an appellate court record, they are found as exhibits to motions

for change of venue prior to a trial or motions directed at excessive publicity which allegedly deprived an accused of a fair trial. Such is not so here.

The articles are part of the appellate record because they were in the presentence report submitted to and considered by the trial court in reaching its sentencing decision, concerning which Justice Huntley has written separately, and to which I will hereinafter turn, *infra*, time permitting.

In addition to the public favor which might reasonably be expected by yielding to the views of the local newspaper, just three weeks prior to that publication, a most highly respected district judge at a resentencing hearing in a capital case stated on the record at that hearing his firm conviction "That the present makeup of the members of the Supreme Court of the State of Idaho would not affirm a death sentence, I'm satisfied of that, under any circumstances, factual circumstances, that were presented to them." Upon that basis, but also noting the Court's agonizing on having previously imposed a death sentence on that defendant, noting also the defendant's agony in two or three years incommunicado on death row while the Idaho Supreme Court reviewed his findings of fact and conclusions, the court said: "And for this reason, *I refuse to follow the mandate of the Supreme Court* and make findings in mitigation." *State of Idaho v. Osborn*, 102 Idaho 405 [631 P.2d 187] (1983).

The trial court's remarks, being newsworthy, were given prominent statewide dissemination. So thusly it has been made evident that a decision from this Court upholding any death sentence, and especially one for Mr. Creech, was hailed as popular even before Mr. Creech came before the district court for sentencing.

Shunning such influences, and agreeing with Justice Huntley that no person shall be put to death without due process of law, no matter how deserving of that penalty, and regardless of his own desire for such an execution, for reasons expressed by Justice Huntley, I must also conclude that in this case the sentencing procedure was a total failure of due process under both the Constitutions of the United States and of the State of Idaho, specifically alluding to the remarkable use of a presentence report comprised almost exclusively of hearsay, without any right of any cross-examination. Obvious in the extreme, and with constitutional due process concerns put aside, the statutory procedure selected by the legislature for reaching the decision between a sentence of life and death was not followed.

The legislature specifically has required that where imposition of death is a sentence which may be imposed, the only alternative being a life sentence, there will be a sentencing hearing, the purpose of which is for HEARING relevant evidence and argument of counsel. I.C. § 19–2515(c). While “relevant evidence” is a term which may, perhaps, be open for discussion, the word “hearing” is not. Since statehood, and before, this Court has steadfastly distinguished between evidence which a trier of an issue *hears* live from the witnesses, and evidence which, like on appellate review, is by affidavits, documents; or, otherwise put, a “cold record.”

That the trial judge made use of the presentence report, perhaps almost exclusively, is not to his discredit—not according to a three member majority who experience no trouble in seeing that resolution of a life or death issue may be determined “from the voluminous information available in the presentence report.”

Defense counsel's request for a hearing (by a jury) where the aggravating and mitigating factors would be decided on the basis of live testimony of witnesses should have been honored. Whatever may be the law under the Federal Rules of Civil Procedure, relied upon by the majority, although I.C. § 19–2515(c) directs the trial judge to “order *409 **510 a presentence investigation to be conducted,” the statute does not, nor does it purport to, nor could it when viewed under a due process challenge, declare that the report of that investigation, or any part of it, may become the evidence upon which a judge (properly a jury) may render a death sentence. It will serve as a source of information to prosecutors and defense counsel, but that is and should be the extent of its permissible use. Where a defendant has been tried by a jury and by it convicted of first degree murder, evidence of the crime is already before the sentencer, be it judge or the same jury who rendered the verdict. The statute recognizes this, and provides that “Evidence admitted at the trial shall not be considered and need not be repeated at the sentencing hearing.” Clearly, then, the statute contemplates that where there has not been a trial, that evidence will necessarily have to be presented to the sentencing authority—be it judge or jury. The majority in this case are of a different view, obviously. Hence it bothers them not that the facts of the homicide were laid before the trial judge in the form of newspaper articles and editorials, and in garbled reports of a number of taped interviews with the sheriff's department conducted with Creech—the first of which in my reading of

the presentence report discloses to have taken place with a complete absence of any *Miranda* warnings.

The majority's reliance on some recent Idaho cases for the wholesale admission of such hearsay (The presentence report consists of 13 pages. To it are attached various documents which go to a depth of 2 ½ inches.) is misplaced. Those cases, *State v. Johnson*, 101 Idaho 581, 618 P.2d 759 (1980), *State v. Tucker*, 97 Idaho 4, 539 P.2d 556 (1975), to which might have been added *State v. Coutts*, 101 Idaho 110, 609 P.2d 642 (1980), and *Ybarra v. Dermitt*, 104 Idaho 150, 657 P.2d 14 (1983), did not involve sentencing for first degree murder. Nor does *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981) sustain the *Osborn* majority opinion in its condoning of the use of wholesale, random, hearsay. In *Osborn* that defendant, too, pleaded guilty to first degree murder. The *Osborn* Court did say, with which I did not agree, that it was there permissible to use the cold record of a preliminary hearing transcript in lieu of live testimony presenting evidence of the crime, notwithstanding the mandatory language of I.C. § 19–2515(c); and it was to that issue, and that issue alone, that the majority said, responsive to my own contrary view, that there had been no error on the part of the trial judge at the sentencing hearing. The Court did not there say or intimate that the hearsay running rampant in a presentence report could be the evidence upon which a judge could hinge his decision in a post-conviction trial of the nature of the defendant's crime and the nature of his past and of his character. The majority simply choose to ignore that in *Osborn* counsel for the defendant not only pleaded his client guilty, did not, in the face of the 1977 Act, claim a right to jury trial at sentencing, and did himself rely upon the preliminary testimony and material in the presentence report in presenting matters in mitigation. I can understand a majority opinion which in *Osborn* thus theorized that the error in not following the statute was waived, even though it is generally believed that a valid death sentence can be imposed only when the statutory procedure is closely adhered to, but I cannot comprehend a majority opinion which allows rampant hearsay at the sentencing trial, but not at guilt trials. It would seem that the second trial is considerably more important than is the first.

The majority ignore the highly singular fact that today's presentence investigation and report are of rather recent origin, and, from my own study, came into existence where a defendant notified the trial judge of his intent to ask for leniency, usually some form of withheld judgment or suspended sentence, coupled with a term of probation. This Court, however, has misused the procedure to the detriment of

those who were supposed to benefit therefrom. As suggested reading I submit my dissents in *Coutts*, *Johnson*, and *Ybarra*.

***410 **511** For my part, with what I consider proper and due deference to the holdings of the Supreme Court of the United States, in matters of death sentencing, I cannot in good conscience look away when the statutory procedures are not followed. Nor will I fail to require the same due process at a capital sentencing trial which has always been required at the guilt-innocence trial. At the same time, where the statute flatly requires the imposition of death whenever one or more aggravating factors are found to exist, and they are not outweighed by mitigating factors found to exist, I am much troubled by the knowledge that prosecuting attorneys apparently are thought to have unlimited discretion in bargaining away first degree informations which they have themselves signed, and that they apparently are thought to have the discretion to determine both before and after conviction whether the death penalty will be sought—in which respect district judges are apparently of the view that a prosecutor's election to not seek the death penalty is the end of the inquiry, or at the least a mitigating factor. Back of it all prosecutors initially assume the right to decide what homicides will be charged as first degree murder, and which will not. This latter may be an unavoidable circumstance, but it would seem that if justice, including the death penalty, is to be dealt evenhandedly, once a prosecutor charges first degree murder, from that time on he is committed to laying his first degree murder charge before a jury. After that, if the jury convicts, it should not be the prosecutor, but a jury who determines a just and mete sentence.

III.

DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL

Time constraints permitting, there is in my view more which can be said concerning the issues discussed by Justice Huntley. There is also the need to discuss and question the due process issues which arise if the Court determines to issue its opinion without allowing briefs or argument of counsel attendant to the resentencing of Mr. Creech which just took place in district court on the 17th day of February of this year, a transcript of which hearing was furnished to the Clerk of this Court on April 6, 1983, a scant two weeks ago as I write this far along into my own opinion, which is done without the benefit of briefs of the parties. A more pressing need, however, is to express considerable doubt upon

the constitutionality of the process by which Creech was brought into court on the court's own motion to go through the formality of entering a guilty plea. The circumstances of this affair put me much in mind of *Boykin v. Alabama*, 395 U.S. 238 [89 S.Ct. 1709, 23 L.Ed.2d 274] (1969). Other than for lack of jury involvement under the Idaho legislature's capital sentencing procedures, there is little difference and, as I will point out, both jurisdictions provide for an automatic appeal from a death sentence. Where in Alabama an “automatic appeal in capital cases also requires the reviewing court to comb the record for ‘any error prejudicial to the appellant, even though not called to our attention in brief of counsel’ *Lee v. State*, 265 Ala. 623, 630, 93 So.2d 757, 763,” *Boykin*, 395 U.S. at 241 [89 S.Ct. at 1711], in Idaho on automatic appeal from a death sentence, it was recently held that under I.C. § 19–2827 “we may not ignore unchallenged errors We have previously recognized as much in this state by holding that fundamental error, even absent objection at trial will be reviewed on appeal.” *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981). Obviously under this rule we are also obliged to make that same review on automatic appeal even though plain or fundamental error as was involved in *Boykin* is not assigned by appellate counsel.

The High Court in *Boykin* held that “It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary.” 395 U.S. at 242 [89 S.Ct. at 1711]. The *Boykin* defendant pleaded guilty on his first arraignment; Mr. Creech pleaded not guilty initially. At a subsequent hearing when a guilty plea was entered for him, the trial ***411 **512** court conducted the hearing, allowed cross-examination by the prosecutor, admitted the prosecutor's offered exhibits, and made oral findings:

“THE COURT: Very well. Thank you very much, Mr. Creech. You may step down. I believe you have been very candid with the Court.

“For the record, the Court will find that the defendant understands the nature of the offense to which he has just plead guilty and he understands the consequences of his plea of guilty, and that there is a factual basis for the guilty plea, and that the guilty plea was freely and voluntarily made.

“I will accept the guilty plea and I will direct my Clerk to enter the same.”

This does not satisfy my notions of due process. Time having run out on me, I must necessarily save for another time or some other place an in-depth review of this strange affair. Creech had pleaded not guilty, and in due time a jury would pass upon his guilt or innocence. His court-appointed attorney adamantly opposed the procedure—which was against his advice—and insisted on being allowed to withdraw from further representation of Creech. The motion was denied, although from that time on Mr. Creech really had no further need for the attorney whose advice he disregarded. Time permitting, Mr. Creech might have followed that advice, but the trial judge moved too precipitately for any meaningful reflection; at the time the trial judge assumed the responsibility for helping Mr. Creech along in his bent for self-destruction, for which Mr. Creech had a Gilmore-like penchant as the members of this Court personally observed in connection with the first *Creech* case, and as is more than amply demonstrated in various sections of the presentence report attachments, Mr. Creech was then and there divested of effective assistance of counsel—which was his guarantee under both the United States and Idaho Constitutions. The precipitate manner in which it all came about is not an acceptable procedure.

Creech, following the homicide at the penitentiary, was turned over to county authorities and incarcerated at the county jail. I have already mentioned the impermissible tape questioning transcripts of which one is in the presentence report along with other question and answer transcripts where he was given *Miranda* warnings prior to being taken through the same routine without the warnings.

From the jail Creech, the defendant, Creech the counseled defendant, wrote his own letter to the district judge declaring that he wanted to enter a plea of guilty. Assuming the letter was received by the judge on the next day, as was probably so, the very next day after receipt, or at least no later than two days after the letter was sent, the judge apparently had Creech delivered to his courtroom, and apparently summonsed Creech's counsel as well. And then the hearing took place as aforesaid—of which the record contains a transcript.

In the first place I think that there is something lacking in our criminal justice system where criminal defendants are allowed to bypass their counsel and engage in direct dealings with the court. Such conduct in my view is improper, disruptive, productive of error and possible injustice, and cannot be tolerated. In so saying I level my criticism not at the particular judge, but at the practice. As alluded to above,

in Mr. Creech's first case before this Court he took it upon himself to bypass counsel and write directly to the Court. And, he was not the first; nor was he the last. As often as such communications have been received and circulated to the Court membership, I have denounced and remonstrated against the practice continuing. It is an evil, and it will produce evil rewards.

Here, to me it seems inescapable that Mr. Creech, unless he omnisciently knew that the statutory scheme for death sentencing was unconstitutional, cannot realistically be said to have knowingly and intelligently waived his right to a jury trial of the degree of his guilt, and if found guilty of first degree murder, then, in turn, to have at the *412 **513 same time waived his right to have that same jury, from the evidence which they heard from live witnesses as to his crime, as to his past, to his mental condition, and to his prognosis, decide whether he should die or live.

OPINION ON DENIAL OF PETITION FOR REHEARING

BISTLINE, Justice.

I.

My vote was to grant the rehearing, although I concede that there is not a strong likelihood that there would be any change in the votes to affirm and the votes to reverse, notwithstanding that the majority has not as yet addressed in this case the well-documented dissenting views that the Idaho Constitution guarantees that persons convicted of first degree murder in Idaho shall have their life-or-death fate decreed by jurors of their peers. In another death penalty case, *State v. Sivak*, 1983 Opinion No. 118, Supreme Court No. 14435, the author of that 3–2 majority opinion, who is part of the 3–2 majority in Creech's case, has attempted to explain away the right of the Idaho Constitution, but the attempt is feeble and unconvincing. Notwithstanding that any Idaho court which has ever addressed the proposition has always held that the guarantee of Art. 1, § 7 is to be construed to apply as it existed at the date of the adoption of our Constitution, the majority opinion in the *Sivak* case points to convictions of second degree murder, of which it says the “sentencer was the judge, and not the jury.” A comparison is made to first degree burglary and second degree burglary. This is sophistry at its best. No one has ever contended that jury sentencing at the time of the adoption of our Idaho Constitution was

ever applicable other than in criminal cases charging first degree murder. The *Sivak* majority declines to enter upon a discussion of *People v. Walters*, 1 Idaho 271, (1869), where the jury, full well knowing that their verdict of first degree murder would send the defendant to the gallows, nevertheless so convicted him, but recommended the mercy of the Court—a futile recommendation to a judge who was without any authority to dispense mercy in going through the formality of imposing the written judgment of execution by hanging which the law required. Was the judge in *People v. Walters* the determiner of the sentence? Or was it the jury?

Who was the sentencer in the first degree murder following admission to statehood? Again it was the jury. Exactly as had been so in territorial days, all the part a judge played was to affix his official signature to the judgment and death warrant. *State v. Perry*, 4 Idaho 224, 38 P. 655 (1894).

The *Sivak* majority provides no discussion of the enlightening 1911 amendment to the statutory provisions. Obviously of the belief that the responsibility for sentencing in first degree murder cases belonged to the jury, and with it the correlative right in the defendant to have his sentence so fixed, the 1911 legislature placed some discretion in the hands of the jury—with no discretion whatever entrusted to judges—who as before would simply sign the written judgments, which were the formal documentation of the decision rendered by the jury. Alive and interested in the outcome of the 1936 VanVlack trial, *State v. VanVlack*, 57 Idaho 316, 65 P.2d 736 (1936), I well remember that his jury found him guilty of murder in the first degree and imposed his punishment at death, whereas in my first year of law school another jury set the defendant's penalty for first degree murder at life imprisonment. *State v. Golden*, 67 Idaho 497, 186 P.2d 485 (1947). The *Sivak* majority has not in *Sivak*, nor in this case, demonstrated how Idaho district judges, both in territorial days, and then in statehood until *Furman*, were invested with any discretionary authority in sentencing for first degree murder convictions. The reason is simply that the matter of determining between life and death was entirely in the hands of the jury. It was thusly so at the time our Idaho Constitution, including its Art. 1, § 7, was adopted. The author of *Sivak* concedes that Art. 1, § 7 “has been *413 **514 interpreted in several of the cases as guaranteeing the right of trial by jury as it existed at the time of the adoption of the Constitution.” In what some trial attorneys may see as a deft display of judicial sleight-of-hand, the *Sivak* author cites for the proposition so stated by him the case of *People v. Burnham*, 35 Idaho 522, 207 P. 589 (1922).¹ Contrary to indications, this was

not a criminal case, but a statutory action to remove a civil officer—which the court noted as being in the nature of quo warranto, a civil and not a criminal action. The *Sivak* author, and those who joined that majority opinion, might have better commented on this Court's holdings in the criminal cases of *In re Dawson*, 20 Idaho 178, 180, 117 P. 696 (1911), and the earlier case of *In re Prout*, 12 Idaho 494, 86 P. 275 (1906)—excerpts of both cases being prominently set forth in my *Creech* dissent, Part I. As matters now stand the only response by the *Creech* majority to the proposition that jury sentencing is constitutionally mandated must be found by resorting to *Sivak*, which response is neither responsive nor convincing. If it be that the majority has simply determined to overrule *In re Dawson*, as indicated by the judicial sleight-of-hand of citing the non-criminal cases, in preference to *In re Dawson*, a criminal case, it seems that a more outward stance would be more befitting a case so grave as this.

II.

When the Court heard oral argument at Twin Falls last fall the Solicitor General was adamant in his belief that the presence of the defendant at the pronouncement of sentence was a formality that could be dispensed with, notwithstanding the clear language of a statute requiring his presence. Oral argument in that vein paralleled the State's brief:

“No proceeding was conducted for the purpose of orally announcing the sentence imposed upon the appellant, and that circumstance is the basis of appellant's claim of error.

“The complaint made here by appellant relates to a highly formalistic defect (if it is a defect at all) of the kind which the court is enjoined to ignore. Rule 52, I.C.R. Appellant was given every conceivable opportunity to present evidence, to argue, and to speak personally at the sentencing stage of the action against him. The long-standing test for determining whether the defendant's absence at a particular point in the proceedings amounted to constitutional error was set forth in *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. [330] 3340, 78 L.Ed. 674 (1934), and was reaffirmed in *Faretta v. California*, 422 U.S. 806 [95 S.Ct. 2525], 45 L.Ed.2d 562 (1975), and *State v. [Carver] Carter*, 94 Idaho 677, 496 P.2d 676 (1972).

....

“The central purpose of the due process clause, as it applies to criminal cases, is to secure to the defendant the

right to be fairly treated in the proceedings taken against him. *Faretta v. California*, *supra*; *Snyder v. Massachusetts*, *supra*; *State v. Carver*, *supra*. ‘Fundamental fairness,’ as far as the concept is relevant to the appellant’s argument, required only that the appellant be afforded every reasonable opportunity to present evidence and argument in mitigation, to make a personal statement, and to make appropriate legal objections. *Faretta v. California*, *supra*; *Snyder v. Massachusetts*, *supra*; *State v. Carver*, *supra*; *State v. Higley*, 621 P.2d 1043 (Mont.1980); *State v. Walker*, 536 P.2d 657 (1975); *People v. Coyle* [88 Cal.App.2d 967], 200 P.2d 546 (Cal.1948), *cert. denied*, 337 U.S. 909 [69 S.Ct. 1042, 93 L.Ed. 1721], *reh. denied* 337 U.S. 934 [69 S.Ct. 1485, 93 L.Ed. 1740].

“Clearly, these considerations do not bear materially on the facts of appellant’s case. Appellant was not denied any opportunity to be heard on any matter of mitigation or defense. The only ‘proceeding’ he missed was the judge’s personal *414 **515 deliberations about the sentence. Appellant could not have participated further than he did, even if the court had brought the appellant into the courtroom and read the opinion in open court. Thus, the privilege of presence sought by appellant ‘would be useless, or the benefit but a shadow,’ *Snyder v. Massachusetts*, *supra*, and the defendant’s absence in such circumstances had no constitutional significance. Nor, for the same reason, could a rule or statutory violation of no consequence be the basis for setting aside the appellant’s sentence on the theory that it was a violation of state statute and rule. Rule 52, I.C.R.

“Appellant, without the support of any authority whatever, argues that due process of law is tested by the application of factors other than the potential of absence to frustrate the fairness of the proceedings.

“He argues that fundamental fairness requires that the prisoner be ‘looked in the eye’ at the time of sentencing, that person to person confrontation at the time sentence is announced is necessary because it may induce the judge to be more ‘humane’ in passing sentence, and that fundamental fairness as an element of the due process clause requires that closed, secret proceedings at sentencing be prevented.

“The suggestion that the due process clause requires the judge to look the defendant in the eye at the time sentence is pronounced in order to influence the judge to be more ‘humane,’ smacks of an argument that somehow

the due process clause requires that the sentencing judge be intimidated by the magnitude of the task before him and thereby frightened away from a death sentence. Respondent has found no case supporting this theory, and the appellant cites none. In fact, guided discretion at sentencing requires that the judge be influenced only by objective factors related to the offender and his crime. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

....

“Appellant also argues that because the sentence was not orally announced he was not given the opportunity to state whether there was any ‘legal cause’ why sentence should not be pronounced.

“The defendant’s right to be heard before sentence is pronounced is undisputed. Rule 33(1), I.C.R.; *State v. Goodrich*, 97 Idaho 472, 546 P.2d 1180 (1976). However, the right of allocution requires only that ‘a trial judge before sentencing must directly address the defendant, and offer him personally a clear opportunity to make a statement in his own behalf, and to present any information in mitigation of punishment...’ *State v. Goodrich*, 97 Idaho at 480 [546 P.2d 1180]. Appellant was not only offered the right to speak several times, but he took advantage of the right of allocution and made a lengthy statement to the court before sentencing. The right of allocution does not contemplate that the defendant may continue to speak forever, or that his counsel may do so. Orderly process requires that at some time the proceeding come to an end and the judge announce the sentence.”

Respondent’s Brief, pp. 13–18.

Notwithstanding this strong contention from the State, the Court, some three and one-half months after hearing argument, entered its order vacating the death sentence which the district judge had imposed on Creech:

“In the above-entitled cause, defendant Creech entered a plea of guilty to a charge of first degree murder and in accordance with I.C. § 19–2515, the district court conducted a hearing into mitigating or aggravating circumstances and thereafter on the 25th day of January, 1982, the district court purported to impose the death sentence upon the defendant; and

“The cause being before this Court both on appeal by the defendant and also pursuant to the automatic review of death sentences mandated by I.C. § 9–2827; and

“It appearing from the record, without any contention otherwise by the respondent *415 **516 State of Idaho, that contrary to the requirements of I.C. § 19–2503 and I.C.R. 43(a), the trial judge purported to impose sentence in the absence of defendant and his counsel and without the presence of defendant and his counsel in open court, but rather by means of a written imposition of a sentence of death;

“NOW, THEREFORE, IT IS HEREBY ORDERED that the sentence of death imposed upon the defendant in the absence of the defendant and his counsel be and the same hereby is vacated and the cause is remanded to the Honorable Robert Newhouse, District Judge of the Fourth Judicial District of the State of Idaho, Ada County, who shall within fourteen (14) days from the date of this Order, in open court and in the presence of defendant and his counsel, enter a judgment of conviction and impose such sentence upon the defendant Thomas Eugene Creech as to the said District Judge may appear to be just and appropriate. In the event that said shall impose a sentence of death, a warrant therefor shall issue in accordance with I.C. § 19–2705; and

“IT IS FURTHER ORDERED that on the completion of said proceedings a transcript thereof shall be immediately prepared, delivered and lodged with this Court not later than five (5) days from the completion of said proceedings; and

“IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this cause pending compliance with this Order and thereafter will determine the issues on appeal; and

“IT IS FURTHER ORDERED that this Order be served upon the Honorable Robert G. Newhouse, District Judge of the Fourth Judicial District, the Office of the Attorney General, and counsel for the defendant.”

My vote was against this piecemeal procedure; my reasons are readily stated. First of all, there was no precedent for vacating (in essence reversing) the district court judgment without this Court issuing the supporting opinion which has forever been the procedure and has basis in statutory law. There was also no precedent for this Court's order commanding the district

judge to enter judgment of conviction and impose sentence within fourteen days. There was likewise no precedent for this Court in reversing the judgment to retain jurisdiction. This part of the order was tantamount to an instruction to the district judge to again impose a sentence of death. It readily follows, as night follows day, that if the district judge held a sentencing hearing and imposed a life sentence, there would be no automatic review as is provided where the sentence is death. It is of little wonder that the district judge on reading the order of this Court declared to the press that it was so much nit-picking, and that he would bring Creech into his court and read him the judgment imposing the death sentence which had not theretofore been read to Creech in open court.

Secondly, the action taken by the Court certainly bore out the contentions of the Solicitor General as above set forth. If the attorney general was correct, then the Court erred in vacating the death sentence which was first imposed. If the solicitor general was incorrect, the office was entitled to a written opinion passing upon the contention. Such was not forthcoming. Instead, the rather serious break in precedent was handled by a footnote:

“The district judge executed a written document which imposed the death sentence upon Creech. That document was served upon Creech and his counsel. I.C. § 19–2503 and I.C.R. 43(a) require sentence to be pronounced in open court with a defendant and his counsel being present. The district judge did not conform with those requirements. This Court, therefore, by order of the 24th day of February, 1983, vacated said sentence of death and remanded the cause to the district court for imposition of such sentence as the district judge might find just and appropriate to be imposed upon Creech in open court with Creech and his counsel present. Consistent with that order of remand, the district judge convened the court on the 17th day of March, *416 **517 1983 and in the presence of Creech and his counsel, imposed the death penalty upon Creech. The execution of that

death penalty was stayed pending these proceedings before this Court.”

State v. Creech, [See *supra*, 105 Idaho at p. 365, n. 1, 670 P.2d at p. 466 n. 1.]

The footnote is accurate, other than that it implies that the district judge conducted a sentencing hearing to determine a “just and appropriate” sentence. There was no hearing. The district judge merely brought the defendant into his courtroom and read to him his former judgment imposing the death sentence. From this judgment Creech again appealed to this Court, where it was assigned Supreme Court No. 15000. The first appeal resulting in the order above set forth was No. 14480. After that order was entered, Creech was no longer under any sentence of death, and so remained until March 17, 1983, at which time the district judge carried out the mandate of this Court's order as the district judge read that order. The district judge read it as simply requiring the formality of having Creech present in court for imposition of the same death penalty previously imposed. In that regard the view of the district judge was amply sustained by a “press release” which the Court prepared and issued along with its order, which was as follows:

“The Idaho Supreme Court issued an Order today remanding the death sentence of Thomas Eugene Creech to the district court.

“The Court pointed out in its Order that the trial judge had imposed the death sentence by a written document rather than imposing the sentence in open court in the presence of Creech and his attorney as required by statute and court rule. Therefore, the Court vacated the death sentence and remanded the case to the district court with instructions that it again impose a sentence upon Creech in open court in the presence of Creech and his attorney.

“The Order indicated that the Supreme Court would retain jurisdiction of the case and that the district court, after resentencing, should immediately furnish the Supreme Court with a transcript of the proceedings.”

If there was any uncertainty in the order itself, the press release clearly told the district judge that the Supreme Court was, notwithstanding the vacating of the death sentence, continuing to lay hold of the case. In other words, the district judge was all at one time being told to conduct a sentencing hearing and arrive at a “just and appropriate” sentence and

also to reimpose the death sentence. This is exactly what the judge did, and as I have said there was no hearing. Although the district court cannot be faulted for obeying a clear mandate from this Court, there simply was no authority or precedent whereby and whereunder this Court could reverse and remand for resentencing and yet retain jurisdiction of the case. Better that this Court would have agreed with the solicitor general than to have created such a convoluted situation as the one remanded to the district court. Other than for the language of the order and the press release it is hardly to be doubted that a district judge on reversal or vacation of a judgment imposing sentence should not in a capital case conduct the type of a hearing which is statutorily mandated, or as was so in another recent case, flatly defy the mandate of this Court. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981), and *State v. Osborn*, 104 Idaho 809, 663 P.2d 1111 (1983).

Thirdly, there could not be, and was not, an orderly administration of justice—important in all cases, but especially critical in capital sentencing cases—with this court vacating the judgment and its imposed death sentence, and at the same time declaring that it somehow retained the jurisdiction acquired when the first appeal was taken on the initial sentencing. Defense counsel was aware that Creech, who had been first sentenced to death on the 25th day of January, 1982, was entitled to the same statutory hearing which this Court directed in *Osborn I*, but, also saw that this Court was strangely insisting that it had continuing jurisdiction after vacating the *417 **518 judgment the appeal from which gave this Court jurisdiction—along with the statutory provisions for automatic review. Accordingly, made aware that the district judge read this Court's order and press release as merely requiring the formality of Creech's presence, defense counsel—faced with a duality of jurisdiction, and aware of the deadline that this Court's order imposed upon the district court, and with Creech's main counsel not available, moved this Court for a stay of the order insofar as it directed the district court to act within fourteen days. Responsive thereto this Court ordered that the time for the hearing on remand was extended—“shall be conducted on or after March 14, 1983,” and on or before April 4, 1983. This order was entered on the 3rd day of March, 1983. The opening paragraph of the order contained a recitation the language of which could not but have fortified the district judge's view that he was not to actually accord Creech a second sentencing hearing:

“The Court having entered an ORDER herein on February 24, 1983, temporarily remanding this case to the District Court for the purpose of requiring District Judge Robert G. Newhouse to announce and impose sentence upon the defendant Thomas Eugene Creech in open court and in the present of said defendant and his counsel;”

The district court, thus having been granted on the 3rd day of March, 1983, a span of time from the 14th day of March, 1983, until the 4th day of April, 1983, ordered, on the 15th day of March, 1983, that Creech and his counsel appear before the court two days later on the 17th day of March at 9:00 a.m. “so that this court may conduct a hearing and carry out all of the directives of the Idaho Supreme Court.” R., No. 15000, p. 14. Defense counsel immediately filed post-remand motions which included:

- (1) Motion (of March 16, 1983) to vacate and reset the sentencing hearing, based on the grounds that one and one-half days of actual preparatory time was insufficient.
- (2) Motion (of March 16, 1983) to compel discovery of institutional (state penitentiary) jackets of Creech and the inmate who was killed by Creech.
- (3) Motion (of March 16, 1983) to compel State's disclosure of witnesses (former prison inmates) who by supporting affidavit were alleged to possess knowledge relative to aggravating and mitigating circumstances.

When court convened at 9:15 a.m. on March 17, 1983, with Creech present, the district court proceeded to read aloud the written findings in aggravation and mitigation which he had previously entered, adding that “For the record, at the time I do affirm and reiterate these findings as of today.” The court then took up the pending motions, including those above alluded to, and denied each and every one, and also denied objections to some of the previous and reiterated findings in aggravation. A further objection that a sentencing hearing under I.C. § 19–2516 required inquiry by live sworn testimony was also denied. Defense counsel requested and

was granted permission to file with the court motions for jury sentencing and a motion for appointment of a designated medical examiner to evaluate Creech's ability to intelligently comprehend the proceedings. These motions were all denied. Of significance, in the process there was this exchange between defense counsel and the court:

“MR. KEHNE: If the Court reads the Supreme Court's order as authorizing the Court to do only as it already has done—in other words, read the findings and also read the sentence of death in open court—then I suppose there is no point in me having time to prepare a sentencing review.

“I had actual notice of this hearing Tuesday night, and that simply is not time for me to prepare a series of witnesses to come in and try to prove mitigating circumstances surrounding the crime.

“I think the Supreme Court's order leaves a little bit to be desired in the amount of direction it gives. On the one hand it sounds like it empowers the Court only to read the findings and the death *418 **519 sentence in open court and follow the statutes on arraignment for sentence.

“On the other hand, the order authorizes the Court to impose any sentence which it feels to be just and appropriate under all the circumstances, which I would suggest gives us the authority to start from Square One and put on evidence and try to convince the Court to impose a sentence other than death.

“And if we are to have such hearing, I have to have more notice in advance to get people here in a day and a half.

“THE COURT: Thank you, Mr. Kehne.

“Mr. Bower, do you have any comments you would like to make in that regard?

“MR. BOWER: No.

“THE COURT: Very well. I am going to deny the motion. I will state why. The Idaho Supreme Court in my opinion has, by their statements, gone along with all the hearings I have had in regard to sentencing.

“I can't see that there is any more required in this particular proceeding other than an argument. I don't intend to let the witnesses all come back and all the presentence people brought in and go back clear through farther than that point before I made these findings.

“And I have also been given a deadline, I do note for the record, that I have to have this done. And I might add, this is about the only time I have. I have solid cases that should be heard between now and the deadline.

“So I am going to deny the motion to continue the motion vacating sentencing hearing and reset.

“MR. KEHNE: Just to clarify the record so I'm not charged with a waiver that I didn't intend, would the Court's ruling be the same if I secured from the Supreme Court an order extending the deadline?

“THE COURT: Oh, yes, I think we ought to get this matter going. I think it's up to the Supreme Court to control this matter. If you get an order, you are welcome to do so, Mr. Kehne, and I will abide by the same.

“MR. KEHNE: But as the order reads now, even if the Court had more time, the Court would rule that we are not to start all over again with witnesses?

“THE COURT: Well, not without cause. You haven't given me any cause.

Tr., Vol. 4, pp. 22–25.

All motions being denied, the district court concluded the hearing of March 17, 1983, by again sentencing Creech to death.

III.

As a natural by-product of the unprecedented manner in which this appeal has been processed, we now have pending before us yet a third appeal, which is relevant to that which I wrote in Part III of my opinion released in April of this year. There I mentioned Creech's letter to the district judge advising of his desire to enter a plea of guilty of the charge of first degree murder, and the alacrity with which he was

ordered brought before the judge so he could do so. Effective assistance of counsel was rendered meaningless, but even so, counsel was not allowed to withdraw. At that point, and again at the resentencing under this Court's mandate, aid of counsel was useless to Creech. That is ground which has been well-ploughed. I mention it only in connection with Creech's change of mind and his motion to withdraw that guilty plea. Under the dual jurisdiction that this Court created, Creech made a supported motion in both this Court and the district court. This Court denied the motion as inappropriately made in an appellate court. Ordinarily this would be so had this Court not retained a jurisdiction apparently concurrent with the district court. Creech has since presented his motion in the district court, where it was denied, and now that will be before us on appeal when the briefs are in. This Court has indeed woven a tangled web. While it may be, as some say, that Thomas Creech should be helped along in his quest for self-destruction, it is a pity that the orderly administration of ***419 **520** criminal justice has broken down in the process.

IV.

On the issue of lack of due process at a sentencing trial to determine whether a person will live or die, it surely must be the law that such a trial is as deserving of due process as the trial at which guilt or innocence is determined. I incorporate here the additional views which are set forth in my opinion in *State v. Sivak*, 1983 Opinion No. 118, Sup.Ct. No. 14435, time constraints under the rules of the Court so dictating. Rather obviously, the majority in this case have now ignored two opportunities to explain away the fundamental error in destroying Creech's constitutional right to the *effective* assistance of counsel.

All Citations

105 Idaho 362, 670 P.2d 463

Footnotes

- 1 The district judge executed a written document which imposed the death sentence upon Creech. That document was served upon Creech and his counsel. *I.C. § 19–2503* and *I.C.R. 43(a)* require sentence to be pronounced in open court with a defendant and his counsel being present. The district judge did not conform with those requirements. This Court, therefore, by order of the 24th day of February, 1983, vacated said

sentence of death and remanded the cause to the district court for the imposition of such sentence as the district judge might find just and appropriate to be imposed upon Creech in open court with Creech and his counsel present. Consistent with that order of remand, the district judge convened the court on the 17th day of March, 1983 and in the presence of Creech and his counsel, imposed the death penalty upon Creech. The execution of that death penalty was stayed pending these proceedings before this Court.

- 2 I.C. § 19–2827(g) instructs this Court to “collect and preserve the records of all cases in which the penalty of death was imposed from and including the year 1975.” Further, we are charged with determining in each case “[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” I.C. § 19–2827(c)(3). Although we read these provisions as requiring a comparison of the capital cases from 1975 to the present, we have deemed it appropriate to conduct an extensive and thorough review of Idaho murder cases. Our survey has included the following:

State v. LePage, 102 Idaho 387, 630 P.2d 674 (1981). *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981); *State v. Garcia*, 102 Idaho 378, 630 P.2d 665 (1981); *State v. Otto*, 102 Idaho 250, 629 P.2d 646 (1981); *Watkins v. State*, 101 Idaho 758, 620 P.2d 792 (1980); *State v. Fuchs*, 100 Idaho 341, 597 P.2d 227 (1979); *State v. Lopez*, 100 Idaho 99, 593 P.2d 1003 (1979); *State v. Warden*, 100 Idaho 21, 592 P.2d 836 (1979); *State v. Needs*, 99 Idaho 883, 591 P.2d 130 (1979); *State v. Creech*, 99 Idaho 779, 589 P.2d 114 (1979); *State v. Lindquist*, 99 Idaho 766, 589 P.2d 101 (1979); *State v. Ward*, 98 Idaho 571, 569 P.2d 916 (1977); *State v. Beason*, 95 Idaho 267, 506 P.2d 1340 (1973); *State v. Foley*, 95 Idaho 222, 506 P.2d 119 (1973); *State v. Atwood*, 95 Idaho 124, 504 P.2d 397 (1972); *State v. Gomez*, 94 Idaho 323, 487 P.2d 686 (1971); *State v. Radabaugh*, 93 Idaho 727, 471 P.2d 582 (1970); *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), *cert. denied*, 401 U.S. 942, 91 S.Ct. 947, 28 L.Ed.2d 223 (1971); *King v. State*, 93 Idaho 87, 456 P.2d 254 (1969); *State v. Gonzales*, 92 Idaho 152, 438 P.2d 897 (1968); *Carey v. State*, 91 Idaho 706, 429 P.2d 836 (1967); *State v. Hall*, 86 Idaho 63, 383 P.2d 602 (1963); *State v. Clokey*, 83 Idaho 322, 364 P.2d 159 (1961); *State v. Burris*, 80 Idaho 395, 331 P.2d 265 (1958); *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957); *State v. Owen*, 73 Idaho 394, 253 P.2d 203 (1953); *State v. Buchanan*, 73 Idaho 365, 252 P.2d 524 (1953); *State v. Golden*, 67 Idaho 497, 186 P.2d 485 (1947); *State v. Boyatt*, 59 Idaho 771, 87 P.2d 992 (1939); *State v. Van Vlack*, 58 Idaho 248, 71 P.2d 1076 (1937); *State v. Reding*, 52 Idaho 260, 13 P.2d 253 (1932); *State v. Wilson*, 41 Idaho 616, 243 P. 359 (1925); *State v. Hoagland*, 39 Idaho 405, 228 P. 314 (1924); *State v. Ramirez*, 34 Idaho 623, 203 P. 279 (1921).

- 1 Since the persons supplying most of the presentence information were not in court, Creech could not “rebut” through the device of cross-examination. (The presentence report was thirteen pages long with attachments of hearsay measuring 2 # inches in depth.)
- 2 The Creech presentence report contained reports of several Idaho psychiatrists and psychologists, a presentence report with attachments from Ohio, including psychiatric evaluations from Ohio physicians and psychologists, numerous newspaper stories, psychiatric evaluations from Oregon doctors and numerous other materials supplied by persons not presented for cross-examination.
- 25 Dictum in *Proffitt v. Florida*, 428 U.S. 242, 252 [96 S.Ct. 2960, 2966, 49 L.Ed.2d 913] (1976) (plurality opinion), notes that the Court has never expressly stated that the Constitution requires jury sentencing in capital cases. *Proffitt*, however, approved a capital sentencing scheme very different from Idaho’s. In contrast to the complete exclusion of the jury in Idaho, the Florida scheme entitles the defendant to an advisory jury verdict on penalty, *id.*, at 249, 251–53 [96 S.Ct. at 2965, 2966–2967], and the sentencing judge must abide by a jury recommendation of mercy unless “the facts suggesting a death sentence [are] ... so clear and convincing that virtually no reasonable person could differ.” *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975), *quoted in Proffitt v. Florida*, *supra*, 428 U.S., at 249 [96 S.Ct., at 2965]. Plainly, *Proffitt* in no way resolved the constitutionality of all-judge capital sentencing; indeed, in two *post-Proffitt* cases a majority of

the Supreme Court has expressly reserved any decision on that issue. *Bell v. Ohio*, 438 U.S. 637, 642 n. * [98 S.Ct. 2977, 2980 n. *, 57 L.Ed.2d 1010] (1978); *Lockett v. Ohio*, 438 U.S., 586, 609 n. 16 [98 S.Ct. 2954, 2967 n. 16, 57 L.Ed.2d 973].

- 26 The plurality noted that a majority of the state legislatures had reenacted the death penalty after the Court's 1972 *Furman* decision, *Gregg v. Georgia*, 428 U.S. 153, 179–81 [96 S.Ct. 2909, 2928–2929, 49 L.Ed.2d 859] (1976) (plurality opinion), and that since *Furman* American juries, though imposing the death penalty infrequently, had done so often enough to suggest that they did not categorically disapprove of the penalty. *Id.*, at 181–82 [96 S.Ct. at 2928–2929].
- 27 The tendency of juries to nullify the legislative intent of some criminal laws indicates that the legislature alone cannot represent the evolution of community sentiment in criminal matters. Examples are abundant. American juries regularly refused to convict for liquor violations during Prohibition, and continue to refuse. *H. Kalven & H. Zeisel, The American Jury*, 292 n. 10 (1966). A survey of traffic law enforcement studies concludes that increasing the penalties for drunken driving changes jury behavior in such cases so as to minimize or even annul the increase. Ross, *The Neutralization of Severe Penalties: Some Traffic Studies*, 10 L. & Soc.Rev. 403, 410 (1976). And as sentiment against the Vietnam War rose from 1968 to 1971, so did jury acquittals in draft-evasion cases. Kritzer, *Enforcing the Selective Service Act: Deterrence of Potential Violators*, 30 *Stan.L.Rev.* 1149, 1156 n. 31 (1978).
- 28 Indeed, in the last 9 years, 8 of the Justices have written or joined opinions that look to the pattern of jury verdicts in support of a conclusion about the constitutionality of the death penalty, either generally, or for particular crimes. *Lockett v. Ohio*, 438 U.S. 586, 624–25 [98 S.Ct. 2954, 2983–2984, 57 L.Ed.2d 973] (1978) (White, J., concurring and dissenting); *Coker v. Georgia*, 433 U.S. 584, 596 [97 S.Ct. 2861, 53 L.Ed.2d 982] (1977) (White, J., joined by Stewart, Blackmun, & Stevens, JJ.); *Woodson v. North Carolina*, *supra*, 428 U.S., at 293 [96 S.Ct., at 2986] (Stewart, Powell & Stevens, JJ.); *Furman [Gregg] v. Georgia*, *supra*, 428 U.S., at 181 [96 S.Ct., at 2928] (Stewart, Powell & Stevens, JJ.); *Furman v. Georgia*, *supra*, 408 U.S. at 439–40 [92 S.Ct. at 2828–2829] (Powell, J., dissenting, joined by Burger, C.J., and Blackmun & Rehnquist, JJ.); *id.*, at 299–300 [92 S.Ct. at 2757–2758] (Brennan, J.).
- 29 The plurality stressed that “capital punishment is an expression of society’s moral outrage at particularly offensive conduct,” and that “[t]he instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law” *Gregg v. Georgia*, 428 U.S. 153, 183 [96 S.Ct. 2909, 2929, 49 L.Ed.2d 859] (1976) (plurality opinion), quoting *Furman v. Georgia*, 408 U.S., at 308 [92 S.Ct., at 2761] (Stewart, J., concurring).
- 30 *Ballew* also amassed considerable empirical evidence to prove that reducing the number of decisionmakers in a criminal case impairs the accuracy, fairness, thoroughness and consistency of the decision, generally to the detriment of the defendant. *Ballew v. Georgia*, 435 U.S. 223, 232–39 [98 S.Ct. 1029, 1035–1038, 55 L.Ed.2d 234] (1978) (plurality opinion).
- 31 Significantly, every state authorizing jury involvement in capital sentencing appears to require a jury of twelve persons. Gillers, *supra* note 22, at 63 n. 298.
- 32 Judges may theoretically have access to community sentiment through social contact, as well as through such sources as polls, editorials, journals, and newspaper reports. Cook, *Public Opinion and Federal Judicial Policy*, 21 *Am.J.Pol.Sci.* 567, 576 (1977). Unfortunately, these sources greatly overstate the willingness of members of the community to impose the death penalty on specific defendants for specific crimes. Research on jury behavior reveals that jurors are substantially more lenient when trying an actual case and sitting through deliberations than they will otherwise indicate. Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 *Stan.L.Rev.* 491 511–12 (1978)

(shadow juries drawn randomly and not subject to peremptory challenges vote guilty far more often than real juries; probably because the defendant's liberty was not in their hands). People who favor the death penalty in the abstract are more lenient when presented with descriptions of actual cases.

- 33 As of 1979 judges in state courts of general trial jurisdiction earned salaries ranging from \$24,400 in Oklahoma to \$54,205 in California, with a mean of approximately \$41,000. Nat'l Center for St. Cts., *Survey of Judicial Salaries 1* (Sept. 1979). As of 1977 in these general jurisdiction courts, only 2.5 percent of the 5,155 judges were women, and 20 states had no women at all on these courts. Cook, *Women Judges: The End of Tokenism*, in *Women in the Courts*, 84, 87–88 (Nat'l Center for St. Cts. 1978). It appears that as of 1977 only 2.6 percent of the judges on these general trial courts were black. G.W. Crockett, *Number and Distribution of Black Judges* (March 1977) (unpublished charts on file with Nat'l Center for St. Cts.). Finally, the rigorous educational requirements for admission to the bar make it inevitable that the average educational attainment of judges will far exceed that of the community in general.
- 34 Kalven and Zeisel's classic report shows that judges and juries disagree in a substantial number of cases. In a study of 3576 trials, judge and jury reached the same decision about a criminal defendant only 72 percent of the time. *H. Kalven & H. Zeisel, supra* note 27, at 68. In their specific study of the death penalty, the authors report that judge and jury disagreed about the imposition of a death sentence in 19 percent of the cases, *id.*, at 436. To view the results yet another way, in those cases where one or both recommended death, judge and jury disagreed 60 percent of the time. In those cases in which either the judge or jury or both would have voted for the death penalty, in 40 percent, judge and jury agreed, and in 40 percent only the judge would have voted for the death penalty, yet in only 20 percent of the cases would the jury but not the judge vote for execution. Thus, the juries were essentially twice as lenient as the judges. *Ibid.* As a United Nations Report concludes:

“[A]mong the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favour the retention of capital punishment. The specialists of the social sciences, penologists, doctors and writers on social science or criminology are, in their great majority, abolitionists. The supporters of capital punishment, apart from a number of political figures and persons holding high public office, are generally jurists with a traditional training and judges.”

United Nations, Dept. of Economic and Social Affairs, *Capital Punishment* (ST/SOA/SD/9–10–64 (1968).

The reason for these differences may lie in the greater reluctance of judges to depart from what they perceive to be the letter of the law. See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869 [71 L.Ed.2d 1] (1982). Kalven and Zeisel discovered in more than one judge “a kind of envy of the freedom of the jury to reach a decision which he as a judge could not reach” *Kalven & Zeisel, supra*, at 428. The judge's role as a strict enforcer even restricts his discretion in sentencing decisions where that discretion would seem to be wholly lawful. As one judge said of draft evasion cases: “I am opposed to conscription. I also believe that the war in Vietnam is both immoral and impractical. My sentencing policies are based upon the fact that as long as law exists, it should be imposed to effectuate its intent and purpose.” Cook, *Sentencing Behavior of Federal Judges: Draft Cases—1972*, 42 *Cinn.L.Rev.* 597, 623 (1973). At the same time, Cook's study also reveals that as judges (unlike individual jurors) accrue experience in a given type of case, their sentencing settles into distinct and regular patterns of severity or leniency, *id.*, at 602–03, so that the judge's first decision whether a person lives or dies may inspire far more deliberation and consideration than subsequent decisions. For individual jurors, however, the gravity with which they approach their decisions in capital cases will rarely be affected by such routinization.

Florida studies cited in Gillers, *supra* note 22, at 67–68 n. 318, report that sentencing judges were significantly more inclined to impose death than the juries that recommended sentences to them. The studies also show that the judges' decisions seem to correlate with the race, sex, and social background of the defendant and victim, while the juries showed no evidence of any such biases.

35 The *Proffitt* plurality's speculation that "judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury and therefore is better able to impose sentences similar to those imposed in analogous cases," *Proffitt v. Florida*, *supra*, note 25, 428 U.S., at 252 [96 S.Ct., at 2966], must, of course, be read in the context in which it was made: as a statement of the probable result of the Florida system in which an advisory jury sentence may be mitigated at the discretion of the trial judge, or increased from life imprisonment to death only where a life sentence would be manifestly unreasonable. *Id.*, at 249–50 [96 S.Ct. at 2965–2966]; See, note 25, *supra*. Moreover, empirical evidence suggests that individual state trial judges are not likely to achieve consistency among death sentences meted out across the state. Gillers, *supra* note 22, at 58–59; Cook, *supra* note 32, at 623. Rather the state can better take advantage of the purported ability of judges to ensure consistency in capital sentencing, at no cost to the defendant's right to jury sentencing, by relying on the automatic appeal procedure by which this Court must review each death sentence in comparison to other cases involving similar crimes or defendants. I.C. § 19–2827. See, *Gregg v. Georgia*, 428 U.S., at 204–06 [96 S.Ct., at 2939–2940]; *id.*, at 211–12, [96 S.Ct. at 2942–2943] (White, J., concurring).

1 The statute as amended in 1911 is set forth in the opinion of Justice Huntley.

2 This is not the same opinion as that cited in the majority's survey, *State v. Ramirez*, 34 Idaho 623, 203 P. 279 (1921).

3 At oral argument in this case we were advised by the Honorable Lynn Thomas, Solicitor General for the State of Idaho, that the 1977 Act was attributable to his personal efforts. Justice Huntley has pointed out in his opinion that the statement of purpose clearly, but erroneously, misled the legislature into the belief that enactment of the bill as presented was mandated by the United States Supreme Court. I very much doubt that there was any intentional thought directed toward omitting the jury function. In other cases the solicitor general has been adamant that, until a 1982 constitutional amendment, the right of jury trial in felony cases was mandatory and could not be waived by a defendant, with or without the State's consent. *State v. Hightower*, 101 Idaho 749, 620 P.2d 783 (1980); *State v. Davis*, 661 P.2d 308 (Idaho 1983).

4 Prior to receipt of this motion I have already written one portion of this dissent wherein the procedure whereby Mr. Creech was allowed to enter a guilty plea against the advice of counsel comes under discussion. To that I will presently turn.

5 To my reading of the 1887 Penal Code, capital offenses were the only offenses in which the sentencing discretion rested not with the court but with the jury.

6 Two of the attorneys who volunteered their services on behalf of Noah Arnold would themselves later serve on the Supreme Court which turned awry their contentions, namely the Honorable E.B. Smith and the Honorable William M. Morgan.

7 A companion case decided at the same time as *Lindquist* and which simply followed its holding, *State v. Creech*, 99 Idaho 779, 589 P.2d 114 (1979). The defendant in *Creech* was shown to be an amoral multiple murderer, as equally an unpopular defendant as *Lindquist*.

- 1 An additional case cite is [Christensen v. Hollingsworth, 6 Idaho 87, 53 P. 211 \(1898\)](#). The trial bench and bar may well be surprised to see a citation to a civil case which was brought to reform a mortgage—purely an equitable non-jury type of action.

In the Supreme Court of the State of Idaho

THE STATE OF IDAHO,	)	Docket No. 22066
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	
	)	
THOMAS EUGENE CREECH,	)	
	)	
Defendant-Appellant.	)	

MOTIONS and SENTENCING PROCEEDINGS

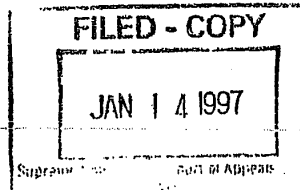
November 1992 through May 1995

Appealed from the District Court of the
Fourth Judicial District of the State of Idaho,
in and for the County of Ada, in the City of Boise,
Honorable Robert G. Newhouse, District Court Judge.

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State vs. Creech
Supreme Court, IdahoScheduling Hearing, Day 2
March 14, 1995

Page 181

BOISE, IDAHO
Tuesday, March 14, 1995
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Page 182

INDEX
State's Witnesses Page
Defense Witnesses
BROWN, Steven Thomas
Direct
Cross

Page 183

[1] THE COURT: I'll again take up case number [2] 10252. The record will note that the defendant is [3] present in the courtroom.
[4] You people may proceed, Mr. Kehne.
[5] MR. KEHNE: I'd like to call Dr. Steven [6] Brown.
[8] STEVEN THOMAS BROWN, Ph.D., [9] called as a witness by and on behalf of the [10] defense, having been first duly sworn, was examined [11] and testified as follows:
[13] DIRECT EXAMINATION
[14] BY MR. KEHNE:
[15] Q: State your full name, please?
[16] A: Steven Thomas Brown.
[17] Q: And in what city do you reside?
[18] A: Here in Boise, Idaho.
[19] Q: How are you employed?
[20] A: I'm a clinical psychologist here in [21] Boise.
[22] Q: Do you have your own office? Are you [23] self-employed?
[24] A: Yes, I'm self-employed in private [25] practice.

Page 184

[1] Q: Are you licensed by the state of Idaho?
[2] A: Yes, I am.
[3] Q: Tell us about your education, starting [4] with undergraduate?
[5] A: Well, I was born and raised in Idaho. I [6] attended local schools up through high school. [7] Then I received a scholarship to Harvard University [8] where I graduated with a bachelor's in psychology.
[9] Up through undergraduate?
[10] Q: Yes, go ahead and continue with graduate [11] school.
[12] A: Yes, I've been educated a lot, a lot of [13] years. Then I attended California School of [14] Professional Psychology for six years where I [15] received a Ph.D. in clinical psychology.
[16] Q: What year was that?
[17] A: That was in 1991.
[18] Q: Before you received your Ph.D., what [19] psychology-related experience had you had?
[20] A: Well, in order to receive my doctorate, I [21] needed to do different placement trainings, so I

Lawyer's Notes

[22] trained in approximately five different hospitals, [23] different inpatient settings, primarily in Pacific [24] Presbyterian Medical Center in San Francisco.

[25] Q: Okay. And what others?

Page 185

[1] A: I was an intern at P.M.C., which we [2] called Pacific Presbyterian, for a year. I was a [3] staff therapist there for two years. I did an [4] internship at West Coast Children's Center for a [5] year in Oakland.

[6] Actually, Albany is the exact town, but [7] it's right next door to Oakland. And I worked at [8] Northeast Lodge with severely mentally disturbed in [9] San Francisco.

[10] Q: And from where did you receive your [11] Ph.D.?

[12] A: From California School of Professional [13] Psychology in Berkeley.

[14] Q: Following your Ph.D., what experience did [15] you have related to psychology?

[16] A: Well, once you get your degree, you still [17] need a year of postdoctoral training, so I [18] apprenticed with a psychologist in San Francisco [19] where I administered psychological tests for [20] evaluations.

[21] And at that point I started to receive [22] more specific training in forensic evaluations, [23] which are evaluations used for court purposes.

[24] Q: Do you have any particular area of [25] emphasis?

Page 186

[1] A: Yes. I moved towards emphasizing the [2] forensic evaluations. For example, in graduate [3] school I took courses in forensic evaluations, and [4] then in my postdoctoral training I received [5] supervision, and further research-based education [6] as far as forensic reports.

[7] Then since that point, I've begun to [8] testify and do reports for court purposes, I guess [9] would be the simplest way to put it.

[10] Q: You have testified in courts before?

[11] A: Yes, I have.

[12] Q: And are those courts in the state of [13] Idaho?

[14] A: Yes. I've testified in Blaine County, [15] Elmore County, Twin Falls County, and Ada County.

[16] Q: Just to make this clear, we're talking [17] about testimony as a psychologist?

[18] A: Yes.

[19] Q: Can you recall some of the cases in which [20] you've testified?

[21] A: Yes. I was the principal psychological [22] consultant to the prosecution in the Odiaga murder [23] trial. I've also worked with the Ada County [24] prosecutor's office on another murder trial here in [25] town.

Page 187

[1] Q: Do you remember the name?

[2] A: MACABEE murder trial. I've testified [3] primarily, or my reports are primarily used for [4] criminal proceedings, not so much civil. And I've

Sentencing Hearing, Day 2
March 14, 1995

State vs. Creech
Supreme Court, Idaho

[5] begun doing competency to stand trial in criminal [6] responsibility evaluations.

[7] Q: You have had some contact with Mr. Creech [8] in this case. Is that right?

[9] A: Yes, I have.

[10] Q: How did that come about?

[11] A: Well, initially Dr. Kent, a psychiatrist, [12] who shared offices with me in my former office, [13] requested that I do psychological testing. He had [14] seen Mr. Creech. And then so I contacted John [15] Adams in your office and then arranged to see [16] Mr. Creech out at the maximum security facility.

[17] Q: Tell me what information you have about [18] this case and how you obtained that information?

[19] A: Well, initially I received a selection of [20] psychiatric records from John Adams, which still [21] was quite substantial. And then I also have [22] interviewed Mr. Creech twice at the prison. But in [23] addition, I've reviewed parts of the pre-sentence [24] investigation. I say parts, because it's probably [25] a foot tall, something like that.

Page 188

[1] So I've reviewed sections of the [2] description of the actual crime, and then reviewed [3] the PSI for any other psychiatric records that I [4] could determine.

[5] Q: What psychological or psychiatric records [6] have you reviewed regarding Mr. Creech?

[7] A: Well, those are listed in my review of [8] records. I've seen records from 1974 from the [9] Oregon State Hospital when Mr. Creech was 23. [10] There's a long list of records. I'm not sure you [11] want me to go - do you want me to go ahead and [12] list the findings of each one?

[13] Q: Yes.

[14] A: Oregon State Hospital, they wanted to [15] evaluate whether he was mentally ill or not with [16] regards to an upcoming trial. He was competent to [17] stand trial, though he had some superficial [18] slashing of his wrists.

[19] Then I reviewed a report from Dr. KOLBAK [20] in 1974 that was done at the Idaho State [21] penitentiary.

[22] And once again, Dr. KOLBAK felt that [23] Mr. Creech had various symptoms such as [24] depression. He claimed some psychotic [25] hallucinations. Dr. KOLBAK did not - he doubted

Page 189

[1] the validity of those hallucinations, and he ended [2] up diagnosing Mr. Creech as antisocial personality [3] disorder.

[4] I saw a letter from Dr. Estess regarding [5] Mr. Creech, and in that letter he noted Creech came [6] from a very disturbed background, that he had a [7] primitive personality.

[8] And at this point, let me explain. When [9] psychologists/psychiatrists say seriously mentally [10] ill, usually they mean schizophrenia. And at times [11] people thought maybe Mr. Creech might have that [12] sort of illness. And but on full, all of the [13] experts say that he does not have that illness and [14] I agree that he does not have a serious mental [15] illness. He has antisocial

Lawyer's Notes

personality disorder, [16] and sometimes under a great deal of stress he [17] breaks down.

[18] I reviewed Dr. Sanford's note from the [19] prison, Mr. Miller's test results from 1980 where [20] he gave Mr. Creech an MMPI. There was a report [21] from Dr. Stoner where he found Mr. Creech's I.Q. [22] was in the low average range. It gave no specific [23] answer.

[24] Q: Let me back you up a little bit. Besides [25] the MMPI, did Mr. Miller give any other tests?

Page 190

[1] A: He gave a Bender, which is, you have a [2] bunch of designs and you have somebody copy the [3] designs. And occasionally people with brain damage [4] have trouble copying the designs as they're [5] reproduced.

[6] Q: You're shown a design and then the [7] picture of the design is taken away and you're [8] asked to draw it from memory. Is that correct?

[9] A: Yes, that's a more accurate description [10] of the test.

[11] Q: And the test primarily is used to [12] determine whether there's indication of brain [13] damage. Is that right?

[14] A: Back in the '80s, it was. And now it's [15] seen as not a very good indicator of brain damage, [16] because the brain functions are much more varied [17] than can be assessed by that simple test.

[18] Q: Go ahead. We were at Dr. Stoner.

[19] A: Dr. Stoner's report. Dr. Stoner did not [20] give specific values for his different tests. He [21] thought Creech's I.Q. was low and he thought there [22] was a possible brain disorder, and again diagnosed [23] him as antisocial personality.

[24] And then finally, Dr. Kent, who evaluated [25] him concurrently with my evaluation, entertained

Page 191

[1] the idea that Mr. Creech was manic depressive, and [2] then he concluded there was not evidence for that, [3] so his diagnosis is major depression with [4] antisocial personality disorder.

[5] Q: Have you looked at any other medical [6] records other than the psychological and [7] psychiatric records?

[8] A: Well, I noticed in the PSI that there was [9] a record from 1956 from Mercy Hospital in Hamilton, [10] Ohio, which was Mr. Creech's hometown, and he had [11] fallen down the stairs and had a concussion. [12] There's not much in the records as to the degree of [13] impairment.

[14] Mr. Creech was - well, then he was five [15] years old. He was released against medical [16] recommendations. His mother decided to take him [17] out of the hospital against the doctor's advice.

[18] Q: Have you seen any records of Mr. Creech's [19] performance while incarcerated?

[20] A: I've seen a copy of the inmate profile [21] from the maximum security prison.

[22] Q: And what did you find there?

[23] A: Well, he has a long list of - well, [24] first of all, it lists his eight counts of murder, [25] where there's been bodies found, and then there's

Page 192

[1] other murders that he's confessed to where there's [2] no bodies found.

[3] Then there's also some deaths that he at [4] one point confessed to that do not seem to have [5] corroborating evidence. Then on disciplinary [6] actions, he has 29 that were listed on the report [7] that I saw.

[8] Q: And how many have there been in the last [9] about five years?

[10] A: Well, I broke - going off of the inmate [11] profile, I noticed in five-year periods, from '76 [12] to '80, he had nine write-ups.

[13] '80 to '85, he had ten write-ups. [14] '85 to '90, he had nine write-ups. [15] And then recently he had one write-up. [16] And then counsel informed me he probably has two [17] more pending or upcoming.

[18] So he averaged about nine or ten up until [19] the last five-year period where he had one or two.

[20] Q: Now, in the presentence report and the [21] psychological and psychiatric records, you read [22] about Mr. Creech's social history. Is that right?

[23] A: Yes, I did.

[24] Q: And did you go to any other information [25] for his history?

Page 193

[1] A: Well, the other information I looked at [2] was - well, I talked to Mr. Creech himself, then I [3] looked at the different summaries that were [4] contained in the records, in the other mental [5] health professionals' reports.

[6] Q: Anything else?

[7] A: Well, and then I discussed with counsel a [8] few other points. For example, I did not see it [9] noted in the records, but I've been informed that [10] he has two brothers that have also been convicted [11] of murder.

[12] So I've had a few other sources. But the [13] bulk of it has been in my interviews and my review [14] of the records.

[15] Q: You did some testing with Mr. Creech. Is [16] that right?

[17] A: Yes, I did.

[18] Q: Before we get into the specific tests, [19] would you tell the court about Mr. Creech's [20] apparent attitude toward taking the tests? In [21] other words, did it seem like he was putting [22] himself out, a good effort and so forth?

[23] A: Yes. Mr. Creech, on the two occasions [24] that I saw him, seemed eager to do the tests and [25] was cooperative with my request. On one occasion I

Page 194

[1] appeared at the penitentiary, and in a message [2] relayed through the guards, Mr. Creech refused to [3] see me.

[4] And so on one occasion, it seemed like he [5] had some trouble wanting to meet with me. But [6] besides that, he exerted good effort and what that [7] means to me is that then the test results are [8] valid.

[9] Q: Did you give him the MMPI-II?

Lawyer's Notes

[10] A: Yes, I did. I had, through the assistant [11] warden, Debbie Shields, I had the MMPI-II, which is [12] the new version, given to Mr. Creech. And he took [13] it in a, well, secure and solitary area.

[14] Q: What is the MMPI-II?

[15] A: That's a standard Personality Inventory [16] where a person answers 566 questions true or [17] false. And then we analyze it. I run it through [18] my computer and see how he compares to other [19] people.

[20] On the current testing, technically it [21] was valid, but Mr. Creech over-reported his [22] positive symptoms. So based on his history, I [23] think it gives a somewhat biased impression of [24] where he is now. He did score - his high-point [25] scores were on depression, psychopathy, and

Page 195

[1] suspicion, and this is consistent with his earlier [2] tests.

[3] So it's a little - it's below what he [4] did before, but it's the same profile.

[5] Q: And did you give Mr. Creech the [6] Rorschach?

[7] A: Yes. That's the ink-blot test. It used [8] to be much more subjectively given. Every [9] psychologist would interpret it more or less [10] according to their own impression.

[11] In the last 15 years it's become much [12] more standardized, and so I use the standardized [13] system.

[14] Q: How has it become more standardized?

[15] A: Well, a man, Dr. EXNER, has developed a [16] reliable protocol so that you get - every [17] professional gives the test in the same way. They [18] write down the responses verbatim and then they [19] score it according to a standardized system. So [20] it's what psychologists call reliable. It's able [21] to - if a bathroom scale gives you the same weight [22] day after day and your weight doesn't change, the [23] scale is reliable.

[24] If a psychological test gives the same [25] measure when a person hasn't changed, it's

Page 196

[1] reliable.

[2] Q: So two psychologists giving this test or [3] scoring this test would come up with the same [4] result. Is that what you're saying?

[5] A: Relatively.

[6] Q: Has that been supported by any empirical [7] research?

[8] A: Yes. There has been improvement in the [9] last 15 years. Instead of just saying that this [10] report has, or the findings should say something [11] about a person, they've found that people who are [12] depressed score a certain way. And then we can [13] have more confidence.

[14] For example, Mr. Creech scored high on [15] the Depressive Index, it's called, which means he's [16] like other people who are depressed. And another [17] index, the Coping Deficit Index, which means he has [18] problems getting along with other people. And as I [19] said, Mr. Creech's case is an understatement.

[20] Q: And did you give him the Hair psychopathy

Sentencing Hearing, Day 2
March 14, 1995

State vs. Creech
Supreme Court, Idaho

(21) or psychopathy checklist?
(22) A: Yes, I did.
(23) Q: Would you describe that?
(24) A: That's a new, well, relatively new (25) measure which was developed by a Canadian

Page 197

(1) psychologist to evaluate the presence of (2) psychopathy in prisoners. And it's very objective, (3) because you base a lot of your ratings on the (4) record, and Creech, as with most prisoners, has a (5) well-documented criminal history.

(6) Q: And what did you determine from the Hair (7) checklist?

(8) A: Well, from that checklist, I found that (9) Mr. Creech scored extremely high compared to other (10) prisoners, in the 96 percentile. And what that (11) means to me is he's a classic psychopath.

(12) Q: We have used the term antisocial (13) personality disorder, psychopath, and psychopathy. (14) Are those all the same thing, basically?

(15) A: Yes, they are all the same thing.

(16) Q: So what you're saying is consistent with (17) what psychologists and psychiatrists have said (18) about Mr. Creech for many years?

(19) A: Yes. Every professional who has seen (20) Mr. Creech has diagnosed him as antisocial (21) personality, and I concur with that. And this test (22) result just re-enforces that opinion.

(23) Q: What can you tell us generally about (24) people who are psychopaths or who would correctly (25) be diagnosed as antisocial personality disorder?

Page 198

(1) A: Could you be more specific with that (2) question?

(3) Q: How do psychopaths differ from the (4) general population?

(5) A: Well, in preparing this report, I went (6) and did some research, both in the library and (7) consulting with other experts, both locally and (8) nationally, to get a better handle on what makes (9) people psychopaths. And it's an interaction of (10) their biology, their psychology, and then the (11) culture they live in.

(12) Q: How do they differ from the general (13) population in their behavior and how they react?

(14) A: Well, they differ from the population in (15) what makes them a psychopath. They break the law (16) continually. They're often callused with regards (17) to other people. They're grandiose, they're (18) irresponsible.

(19) And the scientific literature now is (20) moving towards understanding the biological reasons (21) why this might happen. And there is good evidence (22) that there is some biological disturbance in (23) psychopaths.

(24) Q: Will you explain that? What evidence is (25) there that psychopathy is related to biology?

Page 199

(1) A: Well, first let me - I'll quote (2) something from my report. It's from Dr. MALLOY, (3) who is the preeminent expert. He says: I'm (4) certain that a necessary, but not a lone sufficient (5) biological

Lawyer's Notes

substrate must exist for the development (6) of a psychopathic character disorder.

(7) What that means is somebody will not (8) become a psychopath unless they have a biological (9) problem. Usually it's a genetic problem. And (10) there's many areas of evidence that bear on that (11) conclusion.

(12) Q: Okay, let's talk about it some. Are (13) there studies about twins, identical twins?

(14) A: Well, the best study was done by MEDNIK (15) in Scandanavia.

(16) The best studies on genetics are usually (17) Scandanavian because they have such good records on (18) all the different adoptions. And in this case, (19) 14,000 adopted children in Denmark were studied to (20) see if there's any relationship between a (21) biological parent who has been convicted of a (22) criminal charge, and criminality in the child, even (23) though they'd been raised with a new family.

(24) And actually, it surprised me as a (25) psychologist, because I like to emphasize the

Page 200

(1) importance the early family-home environment. But (2) actually there was a significant relationship that (3) if your parents have been convicted of a criminal (4) charge and you're given up for adoption, you're (5) much more likely than average to be convicted of a (6) criminal charge.

(7) Q: And is that compared to other people (8) who've been adopted whose parents were not (9) criminals?

(10) A: Yes. For example, the base rate was (11) about 10 percent of the kids of the average (12) population were convicted, but if you'd had a (13) parent who'd had more severe - well, more than one (14) conviction, the child's percentage went up to 30 (15) percent of them were then convicted.

(16) Q: Have there been studies regarding twins?

(17) A: Yes. Twins actually provide a natural (18) laboratory to study the influence of genetics at (19) times.

(20) And Christensen has studied identical (21) twins which share the same genes with fraternal (22) twins, who are no more related than brother and (23) sister. If one identical twin has been convicted, (24) his twin is much more likely to be convicted than (25) his fraternal twin, his identical twin.

Page 201

(1) I know that may sound confusing, but the (2) point is, is that if you share the same genetic (3) material, you're more likely to be convicted. So (4) it's a biological contribution.

(5) Q: What can we say about kids whose parents (6) are criminal, getting into good families versus (7) kids whose parents are not criminal, biological (8) parents, who go into bad families?

(9) A: Well, there is actually a comment about (10) that in the DSM-IV, which is the diagnostic manual (11) that we all use, and the newest edition points out (12) that a good family can have a dampening effect on a (13) child's genetic predisposition or even wipe it (14) out.

[15] So that a good family, as we would [16] expect, has a strong influence in curbing any sort [17] of antisocial tendencies.

[18] Q: What about the effects of genetics, in [19] other words, the child's biological parents are [20] criminal, raised - let me start over again.

[21] If a child's parents are not criminal, he [22] doesn't have the genetic makeup of psychopaths, but [23] he gets adopted by a bad family who are criminals, [24] what can we say about that?

[25] A: I'm sorry. I'm not sure I understood

Page 202

[1] your question.

[2] Q: I'm not sure I did, either. Let's move [3] on. Did you give Mr. Creech any other tests?

[4] A: Let's see. I gave him the I.Q. test.

[5] Q: And which I.Q. test did you give him?

[6] A: It's the standard test, the Wechsler [7] Adult Intelligence Scale, Revised Edition, and he [8] achieved a full-scale I.Q. of 99.

[9] Q: What is normal on that test?

[10] A: 100 is normal, so this is essentially [11] average. It's normal. And as far as his verbal [12] intelligence versus his nonverbal, there's no [13] significant difference. So he has average [14] intellectual abilities.

[15] Q: Were his efforts to take the test [16] impaired in any way by the environment?

[17] A: Well, when we took the test, we were set [18] in a room where his feet were shackled to the floor [19] and then his hands were put in belly chains, for my [20] protection, and so that limited the movement of his [21] hands somewhat. And some of the tasks are timed, [22] so that it impaired his performance probably a [23] couple points, not greatly, but slightly.

[24] Q: Have you studied the research on our [25] ability to predict dangerousness?

Page 203

[1] A: Yes, I have.

[2] Q: And what can you say about our ability to [3] predict whether somebody is going to commit a [4] homicide in the future?

[5] A: No mental health professional can predict [6] whether or not someone will be violent in the [7] long-term, and by long-term I mean more than two [8] weeks.

[9] There have been studies that show that, [10] for example, in the '80s, psychologists were wrong [11] twice as often as they were right in predicting [12] whether someone would be violent or not.

[13] Q: Are there any professional standards or [14] statements regarding whether psychologists or [15] psychiatrists ought to predict future [16] dangerousness?

[17] A: Well, that depends on the context. A lot [18] of times, even though psychologists' opinions are [19] not as valid as they could be, they're necessary in [20] the short run. In capital cases, especially, there [21] are some real reservations in the field as to [22] whether or not a prediction should be used.

[23] Q: Okay. Explain that to me.

[24] A: For example, the American Psychiatric [25]

Lawyer's Notes

Association discouraged professionals from giving a

Page 204

[1] prediction of dangerousness in a capital case, and [2] the reason they did that is because we don't have [3] very reliable and valid measures right now.

[4] And more specifically, when we make [5] mistakes, we tend to over-predict violence. And in [6] capital cases the state of the art does not exist [7] to predict it reliably and accurately.

[8] Q: Tell me a little bit more about the [9] mistakes that are made. What do you mean that [10] psychologists and psychiatrists tend to [11] over-predict future violence?

[12] A: What I can say is that we can identify [13] risk factors, which means different behaviors or [14] characteristics which makes somebody more likely to [15] commit a crime than the general population.

[16] And the best one is the history of past [17] violence. And in that case, of course, Mr. Creech [18] is extremely high.

[19] There's a strong association between age [20] and violence. Most violence happens between age 15 [21] and 30.

[22] And for psychopaths, especially the [23] amount of violence they commit after age 30 or [24] after age 40 drops. And in Mr. Creech's [25] disciplinary record, there seems to be a

Page 205

[1] corresponding drop in at least write-ups. There [2] are other factors that I've listed. I don't know [3] if I should -

[4] Q: Go ahead.

[5] A: The younger the age at the time of first [6] offense makes someone a higher risk factor. [7] Mr. Creech, I don't have a record of him committing [8] - or him having a record as a violent juvenile [9] offender. Of course, it's common sense that risk [10] increases with access to weapons or access to [11] alcohol or drugs.

[12] The availability of victims influences [13] risk for violence. That's common sense, once [14] again.

[15] So on the whole, relative to the general [16] population and to the criminal population, [17] Mr. Creech is a much higher risk than others to be [18] violent. It's somewhat lessened by his older age, [19] his lack of access to weapons, alcohol, and [20] victims.

[21] Well, one issue that I wanted to [22] emphasize, though, is psychologists can make [23] statements about groups of people. They cannot say [24] whether an individual will be violent or not. And [25] so no one can predict whether Mr. Creech will

Page 206

[1] likely be violent or not. We can say, of course, [2] compared to the general population, he's a much [3] higher risk.

[4] Q: And you mentioned that past conduct is [5] maybe the strongest indicator or predictor of [6] future conduct. Would it be fair to say that [7] everybody who gets convicted of a first-degree [8] murder has shown that he probably can

Sentencing Hearing, Day 2
March 14, 1995

State vs. Creech
Supreme Court, Idaho

stitute a [9] continuing threat to society?

[10] A: Yes. The fact that every person who's [11] been convicted of murder has done this egregious [12] violent act, they all share that risk factor.

[13] Q: By committing a first-degree murder, [14] every defendant, first-degree murderer, has [15] exhibited a propensity to commit murder which will [16] probably constitute a continuing threat to society?

[17] A: I'm not sure I understand that question.

[18] Q: Let's just deal with all the people who [19] have been convicted of first-degree murder as a [20] group. Would it be fair to say that each and every [21] one of them poses a greater threat to society than [22] someone just drawn from the general population?

[23] A: Yes, of course. That's common sense, and [24] it's what the research into violence shows, that [25] somebody who has committed a violent act, such as

Page 207

[1] murder, is at much higher risk than others.

[2] As far as the state of the field, we [3] cannot pick out different individual murderers and [4] say they're at greater risk than others.

[5] Q: Okay. Among that group of people, all [6] the people who've been convicted of first-degree [7] murder, is there any evidence suggesting there's a [8] reliable way to say which one is more dangerous [9] than another?

[10] A: There is no strong evidence that we can [11] reliably cull out murderers - cull out one murder [12] from among a group of murderers and say that [13] they're more likely to commit a further murder.

[14] Q: The courts frequently make that kind of [15] decision, I'm sure you're aware, attempt to predict [16] among first-degree murderers which ones will be [17] more dangerous than other first-degree murderers.

[18] Is there any research that suggests [19] there's a reliable way to do that?

[20] A: Well, there's research that shows that [21] then you go back to the other risk factors and each [22] risk factor, if somebody is high on all these [23] things, like they're - well, hopefully all people [24] convicted of first-degree murder are in prison, so [25] they have much more limited access to victims and

Page 208

[1] so on.

[2] But all of those, even among murderers, [3] if they're high among the other risk factors, then [4] that only increases the probability a slight amount [5] and you still cannot say which ones are going to [6] commit a crime.

[7] So to answer your question, yes, there is [8] some evidence that there are some hints as to how [9] to distinguish among murderers, but the hints [10] aren't strong enough that you could say, This is a [11] reliable scientific opinion.

[12] Q: Let's talk about the risk factors [13] regarding Mr. Creech in particular. Is there any [14] difference in the risk factors you've identified [15] about Mr. Creech in 1981 compared to his risk [16]

Lawyer's Notes

factors today?

[17] A: Well, the primary one is that he's older, [18] and that he seems to have had a drop-off in his [19] write-ups in prison.

[20] At this point let me interject that my [21] findings are not based on things that Mr. Creech [22] has told me.

[23] With respect to Mr. Creech, I think he's [24] lied repeatedly in the past. And I don't base any [25] of my conclusions on the fact of anything that he

Page 209

[1] has told me.

[2] So when I say that with reference to his [3] age and that he's had a drop in criminal activity, [4] of course, he told me that he has behaved himself [5] more in the last few years. I don't take that at [6] face value. I look at the prison profile.

[7] So the fact that he's older, and he [8] specifically has had a decrease in violent [9] activity, and that this happens generally in [10] psychopaths, that makes him less likely now as [11] opposed to 15 years ago.

[12] Q: Let's talk about the effect of age in the [13] research upon psychopaths' behavior.

[14] A: That was a question?

[15] Q: Right.

[16] A: Okay.

[17] Q: I'm sorry.

[18] A: Well, it may seem a contradiction that I [19] pointed out that psychopaths may have a genetic [20] contribution to their behavior and then say that it [21] changes over time. That is not necessarily a [22] contradiction at all.

[23] There seems to be the greatest amount of [24] crime in males who are 15 to 30. And now that [25] Mr. Creech is out of that age category, he's less

Page 210

[1] high risk.

[2] Q: And then considering that conduct is a [3] good predictor of future conduct, what can you say [4] about that as a risk factor compared to 1981?

[5] A: Well, based on the records from the [6] penitentiary, he has been written up less in the [7] last few years than he was in the previous [8] five-year blocks that I outlined before.

[9] So then relative to himself, he has less [10] risk now than he did 15 years ago.

[11] Q: And do you have any other information [12] that suggests he is less of a risk today than he [13] was in 1981?

[14] A: Well, when I looked at the I.Q. test, I [15] noticed in the records - I'm hesitating because I [16] just had found these records last week, but I'd [17] found that he'd been given the I.Q. test twice [18] before, once in '69 where he had an I.Q. of 87 and [19] once in 1981 where it says below average. So no [20] specific number.

[21] So his I.Q. is about 10 or 12 points [22] above where it had been, and so there's a [23] possibility that he's thinking more clearly now. [24] There's a suggestion that he's thinking more [25] clearly now than he was 10 or 15 years ago.

Page 211

[1] Q: If you give someone an I.Q. test two or [2] three times, it's unlikely that he'll get exactly [3] the same score. Isn't that the case?

[4] A: Well, it depends on when you - they [5] should get within two or three points, usually, if [6] it's given within a year or so and each time the [7] person is motivated and it's given appropriately. [8] Mr. Creech's was given over 20 years, a [9] 20-year span. Actually, a 25-year span.

[10] Q: What I'm trying to get you to do is put [11] in perspective this apparent ten-point gain in I.Q. [12] and tell us how significant that is.

[13] A: I can say that is not due to chance. [14] That is not due to just random variation. In fact, [15] the earlier test was about 8 points easier. So in [16] effect, he had an 18-point rise in his I.Q. The [17] test changed in 1981. Dr. Stoner does not note [18] whether he used the old test or the new test, but I [19] know over '69 he's had a 18-point increase.

[20] That is not just due to chance [21] variation. That shows that he's thinking much [22] clearer now. I guess one could say, How do you [23] know with a low score and a high score which one is [24] valid? The high score is the valid one. The [25] analogy I used is, when somebody runs a

Page 212

[1] hundred-yard dash, their fastest time is the true [2] measure of what their natural ability is.

[3] If they do less than the best time, maybe [4] they're tired or they weren't motivated or [5] something like that.

[6] So what I'm getting at is, Mr. Creech's [7] intellectual abilities are average and his current [8] test is the best measure of his intellectual [9] abilities.

[10] Q: Why would that be? Why would that [11] change?

[12] A: Why would his I.Q. score increase?

[13] Q: Right.

[14] A: Well, you know, people don't get [15] smarter. So he always had average intellectual [16] abilities. Something was interfering in prior [17] times, and it may have been the emotional turmoil [18] that he seemed to have been going through in [19] prior [19] years.

[20] It may have been that he was not [21] especially motivated to take the test, except one, [22] there's no note that he wasn't motivated in the [23] earlier tests, so I would tend to discount that [24] explanation.

[25] So my best explanation presently is that

Page 213

[1] it was due to the inner turmoil in his life.

[2] Q: Okay. Let me see if I can paraphrase [3] this and you correct me if I'm wrong. You're [4] saying that in the past, because of anger and other [5] emotions, he was not able to think as clearly when [6] he took the test as he was able when you gave him [7] the test?

[8] A: Well, as measured by the prior I.Q.s, his [9] I.Q. score has increased, and that the current [10] score is the best one, and that among the [11] alternative explanations, it's that he wasn't [12]

Lawyer's Notes

thinking clearly. He was not thinking as clearly [13] before as he is now.

[14] Q: Okay.

[15] A: His performance now is his best [16] performance he's ever given. And, for example, his [17] ability to attend and concentrate was much better [18] than it was before. So he's not as distractible or [19] impulsive or whatever his I.Q. test.

[20] Q: How does that translate to his risk?

[21] A: Okay. Now, in that way, I cannot say [22] that there's strong evidence that somebody's [23] increase in I.Q. score translates in their risk [24] assessment, but it's suggested that these results [25] suggest that he is functioning at a better level

Page 214

[1] now than he was before and that therefore he's [2] at [2] less risk than he was before.

[3] Q: Do you have any other data which suggests [4] that he's less of a risk to society now than he was [5] 15 years ago?

[6] A: Well, I've mentioned his better [7] performance on cognitive tests and I've mentioned [8] that he's older, and also that he has had a [9] decrease in his write-ups in prison.

[10] Q: How about the manner in which he's [11] housed?

[12] A: Well, that actually - I did not see his [13] cell. I met him in a conference room, I guess it [14] could be called.

[15] My understanding is that he's in a [16] solitary cell 23 hours a day and he has one hour [17] out of that cell, which he's declined to take.

[18] So my understanding is that currently he [19] does not have access to other prisoners. He sees [20] guards occasionally, is my understanding.

[21] So in relation to being housed in the [22] general population, of course, if you're in a [23] solitary cell, you're at less of a risk to commit a [24] crime because you don't have available victims.

[25] Q: Assume for a minute that he is around

Page 215

[1] guards on occasion but he has no history of [2] ever [2] assaulting or threatening a guard. What [3] does that [3] tell us about his risk to the society in which he [4] is placed?

[5] A: Well, Mr. Creech doesn't have a history [6] of assaulting guards. He's proud of that fact.

[7] From my review of the records, it seems [8] that that is correct, that Mr. Creech's assertion [9] that he doesn't have a history is substantiated in [10] the record, and therefore he does not seem to be as [11] great - he's not at risk in assaulting guards, [12] especially.

[13] I'm hesitating there, because the [14] available evidence doesn't let me predict whether [15] or not he's going to have a certain target.

[16] As I've said before, psychologists are [17] not especially good at predicting who is going to [18] be violent or not. So to make an assertion about [19] specific guards in particular is difficult.

[20] Q: Can you comment on Mr. Creech's [21] adjustment to prison life?

[22] A: Well, only in the fact that I've seen his [23]

Sentencing Hearing, Day 2
March 14, 1995

State vs. Creech
Supreme Court, Idaho

inmate profile, which I've commented on and that [24] he's had the different write-ups. And that in the [25] last five years, it seems like his number of

Page 216

[1] write-ups since he's been in his solitary cell have [2] been greatly reduced.

[3] So in that sense, in the last five years, [4] it seems to be relatively adequate within the [5] conditions under which he's housed presently.

[6] Q: Now, in the history Mr. Creech was giving [7] you, he talked about his wife Sherry?

[8] A: Yes.

[9] Q: Or Sherry. And do you have any [10] information about the effect that Sherry has had on [11] Mr. Creech and his ability to cope with his [12] environment?

[13] A: Well, Mr. Creech told me that Sherry has [14] turned his life around, and that she's one of the [15] things that helps him keep going. As I said [16] before, I don't trust anything that Mr. Creech [17] tells me.

[18] I then look to the record, and the [19] disciplinary record shows he has had a decrease in [20] his write-ups. So then it's possible that it was [21] Sherry. It's possible that he's getting older or [22] whatever, but he has had less write-ups in the [23] recent past.

[24] I do know that counsel has showed me four [25] or five books full of poetry to Sherry, and so that

Page 217

[1] Sherry seems quite important to Mr. Creech.

[2] Q: And what Tom tells you about the [3] importance of Sherry in his life is corroborated by [4] the objective facts or at least consistent with the [5] objective facts, specifically that relative absence [6] of write-ups?

[7] A: Yes. I didn't mean to give the [8] impression that everything Mr. Creech tells me I [9] disbelieve. It's that I don't believe it until I [10] see evidence to support it, and there seems to be [11] some evidence to support this idea of his.

[12] Q: If you assume for a moment that three of [13] the males in Tom's immediate family while growing [14] up, in other words, Tom and two of his brothers, [15] all three were incarcerated for a homicide, what [16] does that tell you about Mr. Creech's chance, just [17] as a young baby, for living a crime-free life?

[18] A: Well, this is a complicated question. [19] Let me make one thing really clear. When somebody [20] has a genetic predisposition, in no way does that [21] determine the course of their life. It's only one [22] of many factors. Probably most people that have a [23] genetic predisposition do not go on to be [24] psychopaths.

[25] However, it is a contribution over which

Page 218

[1] Mr. Creech had no control. The fact that two of [2] his brothers are murderers is strong anecdotal [3] evidence that there's a genetic contribution in his [4] family. It's fairly outstanding that there are [5] three murderers in one family.

[6] So I would say, and actually you cannot [7]

Lawyer's Notes

separate out the genetic from his home environment, [8] but whatever it was, there's something in the [9] Creech family that turned out murderers.

[10] Q: Among the people that eventually become [11] diagnosed as psychopaths or having anti-personality [12] disorder, do they share any common threads from [13] when they were very young?

[14] A: Is there something in their childhood [15] that they share in common?

[16] Q: Right.

[17] A: Well, they usually share many of the risk [18] factors, such as criminal parents, abusive home [19] life, violence. Now we know many of them were [20] probably attention deficit. That doesn't mean [21] attention deficit turns into antisocial, but many [22] of them had some sort of minimal brain dysfunction, [23] is what it is called.

[24] Q: Okay. Explain that.

[25] A: Well, there's good laboratory evidence

Page 219

[1] that shows that a psychopath's nervous system is [2] different from the average person. For example, [3] they'll have your average person do some little [4] task and then when they mess up, they'll shock [5] them. Well, then the average person, when they are [6] doing this task again, they're hesitant or they [7] back away. They learn from this prior painful [8] experience. They can anticipate painful [9] consequences.

[10] These laboratory studies show that [11] psychopaths have difficulty learning from being [12] shocked, and that there's some idea that their [13] nervous system is disturbed in this way.

[14] Q: And if you heard that Tom's sister [15] testified that from a very young age, Tom was [16] always pretty hyperactive, would that be consistent [17] with minimal brain dysfunction that is based on [18] biology?

[19] A: Well, yes, it is, but that is often [20] associated with antisocial personality disorder. [21] It doesn't cause any antisocial personality [22] disorder.

[23] Q: Okay. What I'm just trying to get to is [24] that evidence among Tom's problems is a biological [25] problem.

Page 220

[1] A: Right. What I'm saying is that there's [2] probably a biological contribution to Tom's [3] problems.

[4] Q: And that biological component, is it [5] significant? You're not saying it's a trivial [6] component. Right?

[7] A: No, of course. Everything we do has a [8] biological component. As a psychologist, I tend to [9] emphasize early home life and how people get along [10] with their parents. I've looked at the experts in [11] the field and there seems to be some biological [12] problem with psychopaths.

[13] Let me bring up where I think this is [14] relevant. This is the only case that I brought up [15] some sort of genetic contribution. I think it is [16] relevant in a capital sentencing. It does not mean [17] Tom Creech is not competent to stand trial. It [18] does not - I don't think it has any bearing on

State vs. Creech
Supreme Court, Idaho

Sentencing Hearing, Day 2
March 14, 1995

Lawyer's Notes

[19] whether or not he's criminally responsible. And in [20] a normal sentencing, I don't think it is relevant.

[21] But I think in a capital sentencing, the [22] fact that he had a biological contribution is [23] relevant.

[24] Q: In what way?

[25] A: Well, he had no choice over his genes.

Page 221

[1] And that probably helped contribute to this [2] messed-up central nervous system.

[3] Along that point, I want to be careful [4] that I'm not misunderstood. In my report I [5] underlined, I don't want to imply that he should be [6] in prison or that we have a treatment for this. We [7] don't. I don't want to imply that he should be in [8] a hospital. He should be in a prison. And I don't [9] mean to imply at all he's not responsible.

[10] But this is something that when [11] considering capital punishment, in my opinion, it [12] should be known to the court that this is the state [13] of the field.

[14] MR. KEHNE: Could I have this marked, please?

[15] THE CLERK: Defendant's Exhibit A marked.

[16] MR. KEHNE: And could I have this marked also, [17] please. I'm sorry.

[18] THE CLERK: Defendant's Exhibit B marked.

[19] (Exhibits A, B marked.)

[20] MR. KEHNE: If you could please hand those to [21] the witness.

[22] Q: BY MR. KEHNE: Can you identify Exhibit A [23] for me?

[24] A: That's the report I prepared for this [25] case.

Page 222

[1] Q: And it bears the date of March 9th?

[2] A: Yes, it does.

[3] Q: When in fact did you complete the report?

[4] A: I completed the report late last night.

[5] Q: When did you deliver it to Mr. Adams and [6] myself?

[7] A: This morning. If I could explain that [8] situation.

[9] Q: Okay.

[10] A: I was originally asked to do the [11] evaluation in September, and I saw Mr. Creech at [12] that time and I prepared a draft report. There was [13] anticipation of a hearing in October and a later [14] one in January. This is the first time I've [15] testified in a capital sentencing. I realized that [16] I needed more consultation, so I took my report, [17] the draft, and sent it away to a national expert [18] and had him review my report, and give me [19] feedback.

[20] At that point I needed to go back to the [21] P.S.I., which is at least a foot thick, and start [22] digging through and searching through the records, [23] and that is one of the delays in me preparing my [24] report.

[25] Q: And Exhibit A, does that appear to be an

Page 223

[1] original?

[2] A: Yes.

[3] Q: And Exhibit B is what?

[4] A: That's a copy of my resume and it's [5] slightly out of date. I haven't put on the new [6] address.

[7] MR. KEHNE: Okay. I'll move for admission of [8] A and B.

[9] MR. BOURNE: No objection, Your Honor.

[10] THE COURT: They may be marked and admitted [11] into evidence.

[12] (Exhibits A, B admitted.)

[13] Q: BY MR. KEHNE: Dr. Brown, what did you [14] learn from these national experts with whom you [15] consulted?

[16] A: Well, the one I sent my report to, he [17] gave me feedback about my report in general and [18] specifically the recommendation was to focus in on [19] the specific crime that Mr. Creech is charged with.

[20] Q: What about the specific crime?

[21] A: Well, trying to understand the specific [22] crime is one of the reasons that it delayed me in [23] my report. I went back to the P.S.I. and there's [24] volumes of testimony, and I've read part of that.

[25] It seems like there's some discrepancies

Page 224

[1] in what happened, but I ended up relying on what I [2] was told was the 1983 Supreme Court recitation of [3] the events of the crime.

[4] Q: And what's significant about the [5] circumstances of this crime compared to other [6] homicides?

[7] A: Well, in this crime, it seemed as though [8] Mr. Creech and Mr. Jensen had some grudge against [9] one another and Mr. Jensen dirtied the floor that [10] Mr. Creech was responsible for cleaning.

[11] It seemed that in the summary that I [12] reviewed, Mr. Jensen first approached Mr. Creech [13] with a bag of batteries or a sock full of batteries [14] and Mr. Creech disarmed him. Then Jensen [15] approached Mr. Creech again with a toothbrush with [16] a razor blade attached to it, and then Mr. Creech [17] proceeded to kill him.

[18] Q: What's significant about that?

[19] A: Well, taking note that there are [20] different versions and that there's some [21] speculation as to Mr. Creech's motivation, one [22] thing that is significant is that he was attacked [23] in a prison fight.

[24] Q: Okay. Is it significant that it was in [25] prison compared to attacked just out on the

Page 225

[1] sidewalk, in general?

[2] A: Well, I think prison fights are different [3] than fights in the general population.

[4] Q: In what way?

[5] A: Well, I'm not an expert on prisons. What [6] I've been told is that prisons, when one is [7] attacked in prison, one has - well, I'm hesitating [8] because it's disgusting, but there's a tendency to [9] uphold one's reputation, because you're going

Sentencing Hearing, Day 2
March 14, 1995

State vs. Creech
Supreme Court, Idaho

to be [10] in the same prison with this inmate for a long [11] time, then there is some incentive to harm the [12] prisoner.

[13] I guess what I'm referring to is the law [14] of the yard, or whatever.

[15] MR. KEHNE: I don't have any other questions, [16] Dr. Brown.

[17] THE COURT: Very well. We'll take a short [18] recess, and then you can have your cross [19] examination.

[20] (Recess.)

[21] THE COURT: Thank you. I'll again take up [22] case number 10252.

[23] It's my understanding, first, by virtue [24] of a pretrial conference, that, Mr. Bourne, because [25] of the fact you received the lateness of this

Page 226

[1] report, you wanted a certain continuance to prepare [2] for the same and it was agreed that we would take [3] up Monday morning at 9 o'clock.

[4] Now, is that correct?

[5] MR. BOURNE: That's right, Judge. Thank you.

[6] THE COURT: Is this correct, gentlemen?

[7] MR. KEHNE: Yes, sir.

[8] THE COURT: Now, the second thing, and I [9] gather that I should ask Dr. Brown, can you be here [10] Monday?

[11] THE WITNESS: Yes, I can.

[12] THE COURT: Very well. Thank you very much.

[13] Now, the only other problem that's come [14] up and I guess this is a decision the court has to [15] make, it's been requested and I know it's rather [16] unusual by the defendant that he wants to visit [17] with his immediate family, which I include only the [18] sister, and the brother-in-law and the wife.

[19] And I realize this is against the prison [20] policies, but I'm willing to go along under this, [21] Mr. Creech, only on this condition: That you will [22] be secure in the jury box, and your family will not [23] approach any closer than, I was thinking, five feet [24] or so, but I'll leave it up to the members of the [25] security staff. And no one else will be in the

Page 227

[1] courtroom and I will allot ten minutes.

[2] Now, if any of you - they're very [3] cognizant security and you know this is a problem. [4] You do talk to him by phone and this sort of thing, [5] so it isn't completely new. But if any of you [6] approach within any distance closer than the five [7] feet, why, the security guards are noted to [8] immediately terminate this interview.

[9] Now, I think it's only fair if you've [10] come this far that you can look Mr. Creech in the [11] eye and talk this far. I'm not going to go any [12] farther than that, Mr. Creech. And, of course, you [13] will be shackled, so it should be safe. I realize [14] this is done against the better judgment of the [15] security people. But I guess that's the nice thing [16] about wearing a dress. I can do things [17] occasionally that others don't.

[18] So we will continue this matter until [19] 9

Lawyer's Notes

o'clock on Monday morning, as I understand it. [20] Or are you going to put another witness on?

[21] MR. BOURNE: I wasn't going to put a witness [22] on, Judge. But before I can cross examine [23] Dr. Brown, I need all of his raw data which is his [24] tests, instruments, test results, and notes of his [25] interviews, drafts of his earlier opinions, and

Page 228

[1] everything that he's got that he's relying on, I [2] want to see and I'll need to have it today.

[3] And so if the court would order that, [4] I'll send somebody by his office and pick that up [5] today, so that I've got Wednesday, Thursday, and [6] Friday to get ready for cross examination on that.

[7] THE COURT: Does defense have any objections [8] to that? Let's start with that.

[9] MR. ADAMS: Your Honor, Dr. Brown has left. [10] I'll find him this afternoon and get it to [11] Mr. Bourne.

[12] MR. BOURNE: Now, Judge, I want to do that. I [13] want to go get it myself. I don't want to get it [14] next Monday morning.

[15] THE COURT: Very well. I think that it's [16] certainly appropriate and proper and you may direct [17] your witness that I expect him to either, one, [18] furnish copies or at least provide a room where [19] Mr. Bourne can examine them. It would be easier if [20] he gave copies and I would direct him to do so.

[21] MR. ADAMS: Yes, Your Honor.

[22] THE COURT: Is there anything further we ought [23] to take up today?

[24] MR. BOURNE: Judge, I suppose that we've [25] mentioned it in passing, and the court has

Page 229

[1] correctly stated that the state is adamantly [2] opposed to a face-to-face visit, particularly with [3] Sherry Miller, also known as Sherry Creech. We [4] think that's an extreme risk and that the court is [5] taking a risk that it shouldn't, and that it [6] doesn't need to, and that it's against prison [7] policy, and that the Ninth Circuit has upheld the [8] prison's policy of not allowing the defendant and [9] Sheryl Miller to be together.

[10] And I just want it clear that the state [11] has advised the court against doing this, in the [12] event that something bad happens here.

[13] And also, I guess we ought to make it [14] clear, that Sherry Creech is not leaving town. [15] She's not getting on an airplane directly. It's [16] the sister and brother-in-law that are getting on [17] the airplane, not the wife.

[18] THE COURT: Well, I can't see any danger in [19] this. I have great faith in the security. [20] I realize that the bureaucracy sometimes has lots of [21] reasons they want to do things, but I see [22] absolutely no danger. And for one thing, I think [23] it would be good policy in this case, and I think [24] Mr. Creech is probably calmer in a situation like [25] this and so I'm going to do it.

Page 230

[1] And I appreciate your comments, and maybe [2] I'm wrong, but I think that's the way we'll do it.

[3] Anything further?

State vs. Crecch

Sentencing Hearing, Day 2

Supreme Court, Idaho

March 14, 1995

[4] MR. KEHNE: No, thank you, Your Honor.
[5] THE COURT: Court is in recess.
[6] (The matter then concluded.)

Lawyer's Notes

te vs. Creech
 preme Court, Idaho

Scheduling Hearing, Day 3
 March 20, 1995

BOISE, IDAHO
 Monday, March 20, 1995
 APPEARANCES:
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 Boise, Idaho 83702

Page 231

Lawyer's Notes

[5] A: No.

[6] Q: Can we assume that the Thorazine, then, [7] in the amounts that he was taking, may have some [8] effect of calming the defendant down during the [9] period of time that he was taking that?

[10] A: Yes, I think the drug itself may have a [11] calming effect or probably has a calming effect. [12] And also in the sense that he's taking something [13] and he's receiving some help also seems to put [14] patients or inmates at ease.

[15] Q: Now, on the theory that you discussed of [16] the biological or possible genetic connection [17] between, well, parents and a child who ends up [18] being a psychopath, as I understand your testimony [19] so far, this is theoretical at this point, correct, [20] that there is some biological connection?

[21] A: It's a hypothesis that has good support.

[22] Q: Well, it has some correlation. But [23] there's no clinical data to support that at this [24] point as it relates to Mr. Creech. Correct?

[25] A: There's no direct evidence for Mr. Creech

Page 235

[1] that he has a biological imbalance. The evidence [2] is more indirect.

[3] Q: And as a matter of fact, the evidence, to [4] the extent that there is any, would be much more [5] strongly in favor of an environmental connection [6] than a biological connection, that is, that this is [7] a learned behavior more than a biological [8] predisposition. Correct?

[9] A: In Mr. Creech's case?

[10] Q: Well, the theory as it applies [11] generally.

[12] A: No, as the theory is generally applied, [13] it's felt that there's a biological predisposition [14] that is then exacerbated or minimized by the [15] environment.

[16] Q: Now, for the theory to apply, or the [17] theory is, rather, that the parents of children who [18] have this condition, have the condition [19] themselves. Correct?

[20] A: (No response.)

[21] Q: I mean, that's genetic?

[22] A: That would be if it's a simple, what's [23] called Mendelian transmission and it was a single [24] dominant gene.

[25] It's clear because many kids have the

Page 236

[1] disorder and their parents did not, or vice versa.

[2] It's not any simple transmission.

[3] Q: And as a matter of fact, of course, the [4] twin study that you discussed last week was [5] studying parents who had the antisocial personality [6] disorder and then studying the identical twins or [7] fraternal twins that came from that union to see [8] what effect there may be there. Correct?

[9] A: One of the studies, the Mednick study, [10] actually studied just criminal arrests in general [11] and did not specify psychopaths.

[12] Q: But in the case of Mr. Creech's parents, [13] you didn't study or test either one of those [14] people?

Page 232

[1] THE COURT: We'll again take up case number [2] 10252.

[3] And as I recollect, you were still under [4] oath, sir. And would you please return to the [5] stand. And I would advise you that you're still [6] under oath. And Dr. Brown may be cross examined.

[7] MR. BOURNE: Thank you.

[8] MR. ADAMS: Could we have one of Mr. Creech's [9] hands released so that he can assist us by taking [10] notes?

[11] THE COURT: Very well, his right hand may be [12] removed from the handcuffs so he can take notes.

[13] MR. ADAMS: Thank you, Your Honor. I'm going [14] to give him pen and paper.

[15] STEVEN THOMAS BROWN, Ph.D., [16] recalled as a witness by and on behalf of the [17] state, having been previously duly sworn, was [18] examined and further testified as follows:

Page 233

[1] CROSS EXAMINATION

[2] BY MR. BOURNE:

[3] Q: Dr. Brown, there were a couple things [4] that I wanted to talk to you about in general terms [5] before I get down to some specifics on the [6] testing.

[7] I gather this morning you checked the [8] defendant's medical file from the prison and [9] determined that during the time that you saw him [10] and that he was taking your tests, that he was also [11] taking a certain amount of Thorazine. Is that [12] correct?

[13] A: Yes. From my examination of the medical [14] record - and again I'm not a psychiatrist so it's [15] not my exact area of expertise - that he's on [16] Thorazine, PRN, which means as needed, which means [17] day in and day out he might not be taking a regular [18] dose. But periodically he was taking some [19] Thorazine.

[20] Q: And Thorazine in the amount that was [21] prescribed for him back then would be of an amount [22] that is likely to be used to calm him down more [23] than to treat some psychotic illness. Correct?

[24] A: Yes, that's correct.

[25] Q: As a matter of fact, there wasn't any

Page 234

[1] indication either in the information that you've [2] seen or from Dr. Estess to indicate that the [3] defendant is now or has ever been psychotic. [4] Correct?

Sentencing Hearing, Day 3
March 20, 1995

State vs. Creech
Supreme Court, Idaho

[15] A: Oh, no.

[16] Q: And to your knowledge, neither one of [17] them have been diagnosed as having any psychopathy [18] or any antisocial personality disorder. Correct?

[19] A: Yes, that's correct.

[20] Q: And so far as you know, neither one of [21] them have any criminal arrests. Correct?

[22] A: As far as I know, yes.

[23] Q: As a matter of fact, in the presentence [24] report, doesn't the defendant describe his dad as [25] being honest and hard working, a man who sometimes

Page 237

[1] drank a lot. His mom as being a kind person, [2] possibly overly kind, pretty mellow, but sometimes [3] drank a lot.

[4] I mean, that's how he described them. Is [5] that correct?

[6] A: Yes. And as I commented in my report, I [7] think he's exaggerating the positive qualities of [8] his parents as a way of compensating for the lack [9] of -- for the lack thereof. But that's correct, [10] that's a description he gave.

[11] Q: But since you've not either tested or [12] even met either one of them, you don't have any [13] hard data to the contrary, do you?

[14] A: No. My data about the parents -- I [15] don't have much data at all about his parents.

[16] Q: So he could be correctly describing them?

[17] A: Yes, that's true.

[18] Q: Now, in addition you talked about the [19] possibility, or the theory, anyway, that persons [20] with antisocial personalities disorder have some [21] sort of central nervous system difficulties that [22] other people don't have who don't have that [23] condition. Correct?

[1] A: Yes.

[25] Q: That's the theory?

Page 238

A: That's the current findings is that [2] there's very suggestive evidence that there's some [3] problem. And we don't know what it is exactly or what causes it.

[1] Q: However, your understanding of the [6] defendant's testing on his central nervous system, [7] the EMG shows that he is within normal limits. [1] Correct?

[1] A: Yes. And as I mentioned in my report, [10] that's one indirect measure of his problem.

[11] Q: But there's no direct evidence that he [12] has any central nervous system problems?

[13] A: No, that's correct.

[14] Q: Now, on the I.Q. test, I believe you [15] indicated that the test results are different now [16] as compared to 1969 by as many as 18 points. Do I [17] have that correct?

[18] A: Well, I think in my report I said 10 to [19] 12 points. But the earlier test is about 8 points [20] or so, in that range, yes.

[21] Q: And do you understand that he took that [22] test the first time in 1969, I believe you said?

Lawyer's Notes

[23] A: Yes.

[24] Q: And, of course, there's a fairly [25] significant difference in the defendant's

Page 239

[1] environmental situation between 1969 and the [2] present. Correct?

[3] A: Yes. My understanding is that he took [4] the test in prison or in a psychiatric facility of [5] a prison in 1969.

[6] Q: But that he had apparently been in there [7] for a relatively short time as compared to now [8] where he's been in almost 20 years. Correct?

[9] A: Yes, that's correct.

[10] Q: Of course, I mean, I know you didn't [11] administer the test or interview the people who [12] did, but the possibility of his drug use and, of [13] course, you've diagnosed him as being a [14] poly-substance abuser, that could have been a [15] significant factor in his test taking back in 1969, [16] correct, as opposed to now when he doesn't have at [17] least a ready access to that?

[18] A: Well, usually the effects of drug testing [19] on I.Q. tests would wash out after a brief period [20] of time. Say, two weeks to a month.

[21] So I'm not sure how soon after his [22] admission to prison he took the 1969 test. But the [23] drug effects would be probably minimal, my [24] estimation.

[25] Q: However, the Thorazine that he was taking

Page 240

[1] or may have been taking at the time that you gave [2] him the test may have had some calming effect on [3] him and may have had some effect on clearing his [4] mind or making it easier for him to concentrate in [5] 1994 as opposed to 1969. Correct?

[6] A: I can't answer yes or no on that [7] question. There's so many parts to it.

[8] Q: Well, is it fair to say it's a [9] possibility?

[10] A: It's a possibility that the Thorazine [11] would have a minimally positive effect on his I.Q. [12] test.

[13] Q: Now, in the I.Q. test, you opined that [14] his test scores being higher is an indication that [15] he is better able to concentrate now, and that that [16] may mean that he is less compulsive as well. Do I [17] have that correctly?

[18] A: Yes, I made that suggestion.

[19] Q: But I think you correctly characterize it [20] now that it is just a suggestion, because isn't it [21] really the case that the ability to concentrate [22] doesn't necessarily translate into the ability to [23] control impulsivity?

[24] A: Yes, that's correct.

[25] Q: I mean, those two things aren't the

Page 241

[1] same. For instance, a person can have attention [2] deficit disorder, which is the ability to [3] concentrate, and still not be hyperactive, which is [4] the ability to control behavior. Correct?

[5] A: Yes, that's correct.

[6] Q: Now, Doctor, the MMPI test results that [7] you gave me, and I appreciate you doing that, just

State vs. Creech
Supreme Court, IdahoSentencing Hearing, Day 3
March 20, 1995

Lawyer's Notes

[8] so I can kind of clear it up and make sure we're [9] dealing with the right results here, actually show [10] Mr. Creech as being age 44, which age would be [11] correct, but the report date is January 1st, 1980. [12] Is that the wrong date on the test results?

[13] A: I'm sorry, I'm laughing because that's [14] due to my inadequacy in programming my computer, [15] and that the date always shows January 1st, 1980.

[16] Q: Does it really?

[17] A: Well, on the automatic date, it's not [18] correct.

[19] Q: I wanted to make sure I had the right one [20] and I wasn't looking at a 1980 test score.

[21] A: No, no.

[22] Q: As you've indicated in your report, the [23] defendant over-reported his good qualities and [24] under-reported or underestimates his problems. I [25] believe that's what you said. Correct?

Page 242

[1] A: Yes.

[2] Q: And that his validity scale is 64. [3] Correct? Or he scores 64?

[4] A: One of those scales, yes.

[5] Q: And you would agree with me that 60 to 65 [6] is, on that scale or score between 60 to 65 on that [7] scale, is clinically significant. Right?

[8] A: Yes, it is.

[9] Q: And I gather that, as you've correctly [10] stated here, his scores on that validity are barely [11] within normal limits. I mean, he scores on the [12] outside edge of a normal limit on that validity [13] scale. Correct? I mean, he grossly overestimates [14] his good qualities and underestimates his problems?

[15] A: Yes.

[16] Q: And you indicate that the emotions that [17] he feels now are less intense now as compared with [18] his earlier testing in, I think, 1981. Is that [19] correct?

[20] A: Yes. I have conclusions which have [21] different degrees of certainty. My conclusions [22] regarding his I.Q. are with much greater certainty [23] than with his MMPI.

[24] Q: And, of course, the Thorazine may have [25] some effect on why he feels emotions less intensely

Page 243

[1] now as compared to 15 years ago or 14?

[2] A: Yes, that's correct, except it's my [3] understanding that he's intermittently throughout [4] his criminal stay been given anti-psychotic [5] medication.

[6] Q: Now, as you've indicated, the testing [7] that comes or the scoring that comes from your [8] giving him the MMPI, and I'm sure this means more [9] to you than me—but his testing comes out as [10] being 46/64, correct, which tells you certain [11] things about his personality. I mean that's the [12] way you score this thing?

[13] A: You repeated back two numbers which are [14] the difference of his two high-point scales,

and [15] technically he should be over the 65 point limit [16] before you interpret those. And he's just below [17] that.

[18] But it does—that's the profile that [19] he's been given before, so that is more or less his [20] personality profile.

[21] MR. BOURNE: Would you have this marked, [22] please. Would you mark this State's Exhibit No. 1.

[23] THE COURT: It may be so marked.

[24] MR. BOURNE: And then hand it to the witness, [25] please.

Page 244

[1] (Exhibit 1 marked.)

[2] Q: BY MR. BOURNE: I've handed you a single [3] sheet of paper that I believe you've seen before [4] you came into the courtroom marked State's Exhibit [5] No. 1. Do you recognize the description there of [6] the person whose certain scales come up to 4 and 6?

[7] A: Yes. This is from one of the primary [8] guide books to interpreting the MMPI.

[9] Q: What two scales of his are 4 and 6?

[10] A: Do you mean what 4 and 6 stand for?

[11] Q: Yes.

[12] A: 4 used to be called psychopathic [13] deviant. And 6 has to do with paranoia.

[14] Q: When you read the paragraph or two [15] paragraphs underneath that description there in the [16] single page that I've given you, do you agree with [17] the description that's put there?

[18] A: Well, this is—these three paragraphs [19] are a collection of hypotheses that are generated [20] when somebody has a score. And then you take these [21] hypotheses and look at the individual situation and [22] see if they apply.

[23] And many of these statements do apply to [24] Mr. Creech.

[25] Q: In general, then, you would agree with

Page 245

[1] that description?

[2] A: Yeah. This is the standard [3] interpretation for that score.

[4] MR. BOURNE: Judge, I move for the admission [5] of Number 1.

[6] THE COURT: Any objection?

[7] MR. KEHNE: I haven't seen it, Judge.

[8] THE COURT: I'll certainly give you a chance [9] to see it, Mr. Kehne.

[10] MR. KEHNE: Your Honor, I'll object. I don't [11] think there has been an adequate foundation at this [12] point.

[13] THE COURT: Overruled. It may be marked and [14] admitted into evidence.

[15] (Exhibit 1 admitted.)

[16] MR. BOURNE: Thank you, Judge.

[17] THE COURT: I would like to see it.

[18] Q: BY MR. BOURNE: Doctor, I'll ask you a [19] question or two about the Rorschach test as well, [20] please.

[21] You've indicated in your report that the [22]

Sentencing Hearing, Day 3
March 20, 1995

State vs. Creech
Supreme Court, Idaho

Rorschach test, which is the ink blot, and [23] interpretation of that –

[24] A: Yes.

[25] Q: – a couple of significant things. One,

Page 246

[1] that he scored positive on the depressive index and [2] that he scored positive on the coping deficit index [3] which, as you've indicated, suggests a chronic [4] problem getting along with other people.

[5] And, of course, in your words there, you [6] stated that's a gross understatement to describe [7] Mr. Creech's responses to that, correct, to the [8] coping deficit?

[9] A: Well, that's a gross understatement when [10] looking at Mr. Creech's history.

[11] I guess one comment about the Rorschach, [12] the test is designed to be used in developing a [13] treatment profile of psychiatric patients. That's [14] why it's somewhat – the use in this evaluation is [15] not what it's designed for, exactly.

[16] Q: But a couple of interesting points come [17] out of it. As you've indicated, he has trouble [18] getting along with people. The test shows, your [19] interpretation of the test shows, that actually he [20] views people as objects, objects to be used or to [21] be manipulated. Correct?

[22] A: I don't think I say that in my report.

[23] Q: No, but that's one way to interpret the [24] results, that you find to interpret the test [25] results. Correct?

Page 247

[1] A: Well, the test generates certain [2] hypotheses and then you look at the person's life [3] and see if they play out.

[4] At times Mr. Creech has treated other [5] people in a very manipulative manner, yes.

[6] Q: And he doesn't seem to connect with [7] people at all which, I gather, is what your opinion [8] comes from that he has difficulty getting along [9] with other people. Correct?

[10] A: Well, the difficulty getting along with [11] other people, again that's a statement that comes [12] from a psychiatric context, and it's a hypothesis [13] about a patient.

[14] Then I look at Creech. And when you look [15] at his life, that does not do justice in describing [16] his history.

[17] Q: And so that's why you say that generally [18] describes it but it's as much of an understatement [19] as compared to his true situation?

[20] A: Yes.

[21] Q: You indicate that he has a preoccupation [22] with death, but I notice that you say that he just [23] saw one card as having a crucifixion scene, and [24] that's just one card of 16. Right?

[25] A: Or one card out of ten, one out of 16

Page 248

[1] answers.

[2] Q: Now, on your interpretation of the [3] Rorschach test, is one interpretation – or could [4] one interpretation of that be that he sees himself [5] more as a victim, that one of the scores is high,

Lawyer's Notes

[6] relatively, which measures a feeling of [7] helplessness?

[8] A: I'm sorry, I'm not sure I understand your [9] question.

[10] Q: Well, and correct me if I'm not calling [11] this the right thing, but the Y measures 3, which [12] is the high score for helplessness. I mean, the [13] highest it can be measuring helplessness. Do I [14] have that correct?

[15] A: Yes. What you're describing is that the [16] way in which he answered the questions, he scored [17] high on the Y measure and then one interpretation [18] of that is feeling helpless.

[19] Q: And that would be the kind of score you [20] would expect to see on a person who viewed [21] themselves as a victim, a victim of whatever, [22] circumstances or whatever. But that could be one [23] of the interpretations you got from that?

[24] A: Well, again, that would be a hypothesis I [25] would hold in my mind, and then I would look at

Page 249

[1] their situation and see if it made sense.

[2] Q: It would make sense under these facts, [3] wouldn't it?

[4] A: There's various ways that Mr. Creech [5] could view himself as a victim. He could feel [6] helpless, given that he lives in this 8 by 6 cell, [7] that sort of thing.

[8] Q: And actually the Rorschach test more [9] shows a feeling on his part of anger and [10] depression, or at least is consistent with anger [11] and depression, as opposed to remorse or sorrow or [12] guilt sorts of feelings. Correct?

[13] A: Well, in general, you show – remember, [14] the tests, you show people blots and see what their [15] answers are like. There's more depression than [16] remorse over a blot. So it's hard to read too much [17] into that.

[18] Q: But you come away more with the anger and [19] depression than you do with the remorse or sorrow [20] or sadness sorts of things. Correct?

[21] A: Well, as I said, I think depression is – [22] he scored high on this index that measures [23] depression. Included in that are feelings of [24] sadness, blueness, helplessness.

[25] And so there is a certain victim side to

Page 250

[1] that. And then there's also the anger. I did not [2] see – there was some suggestion that he is – [3] well, as I mentioned in my report, he merges [4] thinking and feeling.

[5] And one problem with that is then he [6] might not think through a response. And so that – [7] you take that together with his depression and I [8] think it rounds out the picture of him.

[9] Q: As a matter of fact, that's a fairly [10] significant finding, isn't it, that is, a person [11] who is angry, who acts impulsively, as the [12] defendant apparently does, and has relatively [13] little insight into his anger? I mean, that's kind [14] of a dangerous combination, wouldn't you say?

[15] A: Then let's go back again where the test [16] starts with. It starts with a general description [17] of your average person. And so then those [18]

statements are made compared to your average (19) person, that he is more impulsive and that sort of (20) thing. I don't think it does justice to (21) Mr. Creech's situation.

(22) Q: Well, let's look at the Hare test which (23) measures inmates against inmates then, which is (24) what it does. Correct?

(25) A: Yes, it was developed to be used on

Page 251

(1) inmates.

(2) Q: So it doesn't measure Mr. Creech against (3) the so-called normal, general population of (4) people. It measures him against other inmates. (5) Correct?

(6) A: Yes.

(7) Q: And the Hare test, as opposed to some of (8) the other tests, has a very high diagnostic (9) reliability, doesn't it?

(10) A: Well, it's got high, what we call, (11) internal validity and reliability. It's designed (12) to test a subgroup of the antisocial personality (13) disorder, which is a diagnosis.

(14) Q: But I mean among professionals who use (15) it, there's a high degree of reliability in that (16) professionals who use it, often times - actually (17) 90 percent of the time - agree with each other's (18) findings on it. Right?

(19) A: Yes.

(20) Q: On the test scores. Which is kind of (21) unusual. Right?

(22) A: Yes. It's a good test in that it's not (23) - you don't ask people all these questions about (24) what things they like or don't like. You look at (25) the record and see if they have exhibited certain

Page 252

(1) behaviors or not.

(2) MR. BOURNE: I would like to have this marked (3) number 2, please, and handed to the witness.

(4) THE COURT: It may be so marked.

(5) (Exhibit 2 marked.)

(6) Q: BY MR. BOURNE: Doctor, do you recognize (7) State's Exhibit No. 2 for identification as being (8) the scoring sheet for the Hare test that you gave (9) to Mr. Creech?

(10) A: Yes.

(11) Q: And does that appear to you to be an (12) accurate copy of your scoring sheet?

(13) A: Yes, it does.

(14) Q: Now, just so we kind of make it clear (15) what we're dealing with here, there are a number of (16) - as a matter of fact there's 20 different items (17) that have been rated. And you put a score in each (18) of the boxes representing those 20 items. Right?

(19) A: Yes, I did.

(20) Q: And two is the maximum. It could be - (21) zero, one, or two would be the possible scores for (22) each box. Right?

(23) A: Yes.

(24) Q: And so in the 20 boxes, it looks like 15 (25) of the 20 are the maximum score of 2, and five of

Lawyer's Notes

Page 253

(1) the 20 are 1's. Is that your count?

(2) A: Yes.

(3) Q: And that adds up to 35. Right?

(4) A: Yes.

(5) MR. BOURNE: Mark this number 3, please.

(6) (Exhibit 3 marked.)

(7) Q: BY MR. BOURNE: You've been handed the (8) state's Exhibit No. 3 for identification. Do you (9) recognize what that is?

(10) A: This is the - well, one of the score (11) sheets.

(12) Q: That's a score sheet for the Hare PCLR (13) test that you used to interpret the score that you (14) came up with on number 2. Correct?

(15) A: It tells you how to convert raw score to (16) a percentile score.

(17) Q: And that's what you used in your report (18) where you say that he comes up with 96 percent (19) compared to other prisoners. That's the scoring (20) instrument that you used to come up with the 96 (21) percent. Right?

(22) A: Yeah, the conversion table.

(23) Q: Now, in addition to the overall score, (24) which, as you've stated here, he has 96 percent - (25) well, the degree of his psychopathy or antisocial

Page 254

(1) personality is 96 percent of all inmates who are (2) used as a basis for the test. Right?

(3) A: Well, he would score higher than 96 (4) percent. One comment about that is, I gave many of (5) these scores or many of these categories the (6) maximum score based on his lifetime career in that (7) some of them may not apply to him presently.

(8) Q: Nonetheless, that's your best effort on (9) that. Right? I mean, that's the purpose of giving (10) him the test, is to do the best you could in (11) forming a picture of this defendant?

(12) A: Yes. I'm saying there's different ways (13) you can do it. A snapshot based on him in '95 or a (14) more overview.

(15) Q: In addition to the overall score of 35, (16) there are two other scores called Factor 1 and (17) Factor 2 that are shown on the percentile ranks (18) also. Correct?

(19) A: Yes.

(20) Q: Did you make efforts to score him on (21) those two factors?

(22) A: Well, he scored very high on the whole (23) test, so he scored very high on both factors.

(24) Q: My addition, and you tell me if you (25) disagree, shows him on Factor 1 as scoring more

Page 255

(1) than - higher than 100 percent, higher than all (2) the rest. Does that sound about right to you?

(3) A: Yes. And again I think that shows that I (4) was - well, I wasn't conservative in scoring him.

(5) Q: And on Factor 2, my addition shows 97.7 (6) percent. Does that sound about right?

Sentencing Hearing, Day 3
March 20, 1995

State vs. Creech
Supreme Court, Idaho

[7] A: He scored very high, yes.
[8] Q: Factor 1 measures – you use your words [9] instead of mine, if you disagree – but would it [10] measure callousness or lack of remorse; Factor 2 [11] would measure antisocial behavior. Would that [12] be –
[13] A: Factor 1 describes more somebody's [14] interpersonal or intrapersonal traits. And then [15] Factor 2 has to do with behaviors and life-style.
[16] Q: All right. So you basically would agree, [17] then, with my description of those two things?
[18] A: Yes.
[19] Q: Now, Doctor, I'm about done. I want to [20] ask you a couple questions about what you've [21] described as mitigation, which would be on the last [22] part of page 12 and page 13 of your report.
[23] Under mitigation, in number 1, you [24] described the Jensen killing, that Mr. Creech was [25] attacked first, then disarmed his attacker. This

Page 256

[1] provocation helped precipitate Creech's own [2] attack. Correct?
[3] A: Yes.
[4] Q: Now, I don't know how far you got into [5] the facts of the police reports. Did you have the [6] police reports and the statements of Mr. Creech [7] when you were forming your opinion?
[8] A: Yes. And that was actually one reason [9] that my report was delayed. I asked to see the [10] PSI, and it was six inches thick or so, at least, [11] or part 1 was. So I read as much of the [12] description – of the transcripts, the interviews [13] of the different inmates, and so on.
[14] And then I still felt that, given the [15] vast quantity of information, it was hard to get an [16] overall picture. And then that's why I relied on [17] the summary description.
[18] Q: Part of the information, then, that you [19] read, and I'll ask you if this refreshes your [20] memory, has to do with the circumstances leading up [21] to the killing of Mr. Jensen as stated by the [22] defendant.
[23] You do recall that the defendant was [24] interviewed by Sheriff Palmer and some other Ada [25] County detectives shortly after the killing.

Page 257

[1] Correct?
[2] A: Yes.
[3] Q: And you recall that the defendant told [4] those officers at first a story about self-defense, [5] that he was basically attacked by Mr. Jensen. Do [6] you remember that?
[7] A: Yes.
[8] Q: And then you'll recall that as he gets [9] into the story a little farther or is interviewed [10] further, he changes the story or at least he [11] amplifies the story such that he makes it clear [12] that while he was attacked by Mr. Jensen, he [13] provided, that is, Mr. Creech, provided, the [14] weapons to Mr. Jensen that Mr. Jensen used to [15] attack Mr. Creech with. Do you recall that?
[16] MR. KEHNE: Judge, I would like to ask a [17] question in aid of objection.

Lawyer's Notes

[18] THE COURT: You may proceed.
[19] MR. KEHNE: Dr. Brown, did you rely on these [20] reports in coming to the conclusions you came to [21] and wrote in your report or did you rely on [22] something else?
[23] THE WITNESS: I relied on my reading of the [24] PSI and then the summary statement.
[25] MR. KEHNE: And did you rely on any findings

Page 258

[1] made by this or other courts as to this issue?
[2] THE WITNESS: Well, as I said, I had some [3] trouble getting a comprehensive overview given the [4] quantity of knowledge. So then I especially relied [5] on what I was told was the recitation, 1983 [6] recitation of the Idaho Supreme Court.
[7] MR. KEHNE: And you relied on that primarily, [8] rather than all these various reports?
[9] THE WITNESS: I was aware of the various [10] reports but I had some trouble consolidating them [11] all or reaching an overall view.
[12] MR. KEHNE: No other questions. Thank you.
[13] THE COURT: You may proceed, Mr. Bourne.
[14] MR. BOURNE: Thank you.
[15] Q: BY MR. BOURNE: What I was getting to, [16] Doctor, is that you recall reading that the [17] defendant made a weapon out of a sock with [18] batteries in it. He gave it to another inmate. He [19] transferred it to Mr. Jensen, the decedent. [20] Correct?
[21] A: Yes, I'm aware there's that version of [22] the story.
[23] Q: And that Mr. Jensen slung that at [24] Mr. Creech. Mr. Creech took it away from him and I [25] think punched Mr. Jensen. And that portion of the

Page 259

[1] fight was over. Do you remember that?
[2] A: Yes.
[3] Q: And that thereafter, Mr. Creech made [4] another weapon out of a toothbrush and a razor [5] blade by wiring the razor blade to the toothbrush, [6] transferring that to another inmate, who [7] transferred it to Mr. Jensen at the scene. Do you [8] remember that?
[9] A: Yes. I remember that that's one version.
[10] Q: And that thereafter, Mr. Jensen again, so [11] to speak, attacked Mr. Creech with this weapon and [12] that's when Mr. Creech used the batteries and sock [13] on Mr. Jensen. Do you remember that?
[14] A: Do I remember reading that?
[15] Q: Yes.
[16] A: Yes.
[17] Q: Being aware that that's what the [18] defendant says?
[19] A: Yes.
[20] Q: And you remember reading or being [21] informed that this killing was basically a setup, [22] that Mr. Creech was basically, and the people he [23] was working with, were setting Mr. Jensen up to [24] make it look like Mr. Creech would have a reason [25] for killing him, that is, by transferring

him the

Page 260

(1) weapons and such?

(2) MR. KEHNE: Judge, I'll object to that. It (3) assumes facts not in evidence. And it's very (4) argumentative that this is a setup.

(5) The doctor has testified yes, I'm aware, (6) that there are a number of versions and that this (7) is one of the versions. But for Mr. Bourne to (8) assert in his question that this was a setup, or (9) that the doctor was informed this was a setup, is (10) completely improper. It's argumentative and no (11) foundation in the facts for such an assertion.

(12) THE COURT: Well, I think I've heard the facts (13) of the case more than anybody, and I'm taking this (14) as cross examination. This is a sentencing. So as (15) far as I'm concerned it's cross examination, and (16) overruled.

(17) MR. BOURNE: Thank you.

(18) THE WITNESS: I'm sorry, what's the question?

(19) Q: BY MR. BOURNE: I'll try again. You (20) recall that Mr. Creech described this as being a (21) setup, that is, that Mr. Jensen was basically set (22) up to do this sort of attacking with weapons that (23) Mr. Creech provided?

(24) A: Yes. I'm aware that that's one of the (25) facts or one version of the crime. I noted - and

Page 261

(1) I noted that in my report. And, of course, I can't (2) settle the facts that are in dispute, and that's (3) why I tried to rely on what wasn't in dispute.

(4) And it seems as though Jensen did come at (5) Creech with a weapon, whether or not Creech was (6) supplied the weapon or not.

(7) Q: But, in any event, Mr. Creech says that (8) Mr. Creech supplied the weapon. Correct?

(9) A: Yes, he has.

(10) Q: And so are you suggesting that if that's (11) the state of the facts that Mr. Creech describes, (12) you find that to be mitigating, that Mr. Jensen (13) attacked first?

(14) A: I find it mitigating that Mr. Jensen (15) attacked Mr. Creech with a weapon.

(16) Q: And if Mr. Creech gave Mr. Jensen the (17) weapon or caused it to be given to him, do you (18) still find that mitigating?

(19) A: Well, of course, that would - that (20) changes the circumstances. But still he was still (21) attacked with a weapon even though it was somewhat (22) of a pretense.

(23) Q: Now, you've read this, Doctor, so I know (24) you know these facts, because it's part of the (25) presentence.

Page 262

(1) But let me read this to you, and I would (2) like you to tell me what part of this you find (3) to be mitigating as having to do with, number one, (4) that Mr. Creech was attacked first.

(5) MR. KEHNE: Judge, I'll object to this (6) procedure. The doctor has relied on a great deal (7) of information other than this one version given at (8) sometime by the defendant. He gave several (9) versions. And Dr. Brown looked at a lot of other

Lawyer's Notes

(10) information, most especially the Idaho Supreme (11) Court opinion, the statement of the facts there.

(12) THE COURT: Well, it's still cross (13) examination, Mr. Kehne. Overruled.

(14) Q: BY MR. BOURNE: "He went down, like I (15) told you, and I hit him a few more times and the (16) battery thing busted. Then I kicked him and the (17) blade flew and the thing went underneath the (18) shutter, and he started trying to get back up like (19) that.

(20) "And, okay, I kicked him a couple more (21) times. And he was laying there bleeding real bad (22) and breathing real funny. And I came out the (23) cell, and I went down to my cell and looked at (24) myself and I started to wash up. And I went up and (25) told Bud, I said, What should I do?

Page 263

(1) "I walked up to Bud's cell. And he says (2) that I should go back down. And right about that (3) time, he heard Jensen down there. He said, You (4) didn't kill him. And I said, No, he's probably, (5) he's gonna die, though, because he's all fucked (6) up. And he said I should go back in there again.

(7) "So I went back in there and checked him (8) and I stomped his throat real hard."

(9) Now, do you find the stomping of his (10) throat under these facts -

(11) MR. KEHNE: I'll object to that. There's no (12) foundation that anybody other than Mr. Bourne ever (13) said that at this point.

(14) THE COURT: Mr. Bourne, where are you getting (15) it?

(16) MR. BOURNE: Let me ask one more question for (17) foundation.

(18) THE COURT: Very well. You may continue with (19) your questioning.

(20) Q: BY MR. BOURNE: That's part of the (21) information that's in the presentence report, (22) Doctor. Do you remember reading that about the (23) stomping of the throat?

(24) A: Yes. And that's contained on page 7 of (25) my report.

Page 264

(1) Q: Is there anything about that that you (2) find to be mitigating?

(3) A: No. And under aggravating (4) circumstances, I listed as number 3 one of the (5) aggravating circumstances in this crime.

(6) Q: Doctor, when you were speaking with (7) Mr. Creech and interviewing him through the (8) testing, did he ever indicate to you that he had (9) found religion and he had given his life to Christ, (10) or words to that effect?

(11) A: We did not discuss that issue. It did (12) not come up in our discussion.

(13) Q: But, in any event, he didn't bring up (14) with you that he changed his life or his thinking (15) in that direction?

(16) A: On a couple of occasions, he said that he (17) had tried to reform himself. But with regard to (18) religion, no, we didn't discuss that.

(19) Q: You quote Dr. Estess in your report, (20) Dr. Brown, on page 3, and you know who Dr. Estess

Sentencing Hearing, Day 3
March 20, 1995

State vs. Creech
Supreme Court, Idaho

[21] is. Correct?

[22] A: Yes.

[23] Q: Dr. Estess is at least one of and perhaps [24] the one in charge of psychiatric services for [25] inmates at the penitentiary. Correct?

Page 265

[1] A: Yes.

[2] Q: And in speaking with him and in looking [3] at the defendant's medical file, you know that [4] Dr. Estess has seen the defendant a great number of [5] times over the years. Correct?

[6] A: Yes.

[7] Q: And you quote Dr. Estess in your report [8] as saying that Dr. Estess felt that the defendant [9] was extremely dangerous and one of the most [10] malignant personalities he had ever evaluated.

[11] Does that generally fit with the opinion [12] that you've drawn of Mr. Creech after the testing [13] and such that you've gone through?

[14] A: That he's one of the most malignant [15] people?

[16] Q: Yes.

[17] A: Yes. But I think it's important to [18] distinguish between Mr. Creech's long criminal [19] career, and then also the issue under in-
vestigation [20] now, this specific incident.

[21] Q: Well, you wouldn't disagree with [22] Dr. Estess that that's Dr. Estess's opinion. [23] Correct?

[24] A: That was Dr. Estess's opinion in 1975.

[25] Q: But at that time as compared to now did

Page 266

[1] it appear to you that Dr. Estess had changed his [2] opinion any on malignancy?

[3] MR. KEHNE: Judge, I'll object to that, [4] founda-
tion.

[5] THE COURT: I agree. Sustained.

[6] Q: BY MR. BOURNE: Would you describe him as [7] one of the most malignant personalities that you've [8] evaluated?

[9] A: Well, his crimes are among the most [10] horrible that I've seen, yes.

[11] MR. BOURNE: Thank you. That's all.

[12] I move for the admission of number 2 and [13] 3 that I have not moved for.

[14] MR. KEHNE: I don't object to those.

[15] THE COURT: Very well. They may be marked and [16] admitted into evidence.

[17] (Exhibits 2, 3 admitted.)

[18] MR. BOURNE: May I inquire of the clerk, those [19] are the only two that have not been admitted. [20] Correct?

[21] THE CLERK: Correct.

[22] MR. BOURNE: That's all. Thank you.

Page 267

[1] REDIRECT EXAMINATION

[2] BY MR. KEHNE:

[3] Q: When Dr. Estess writes describing someone [4] as "most malignant," is that a psychological or a [5] psychiatric diagnosis?

[6] A: No, it's not.

Lawyer's Notes

[7] Q: That's just basically a personal feeling?

[8] A: Well, it's his clinical impression in [9] 1975.

[10] Q: That's not something you find in the DSM, [11] the diagnostic -

[12] A: In the official diagnostic manual, no.

[13] Q: If I understood what you're saying, the [14] fact that Jensen attacked Creech, in your mind, is [15] mitigating even if Creech set the thing up. Is [16] that right?

[17] A: Yes. It seems as though it is not in [18] extreme dispute that Mr. Jensen approached [19] Mr. Creech with a weapon, and so that that helped [20] precipitate the attack. There is - so, yes, it is [21] a mitigating circumstance.

[22] Q: It may be more mitigating if Mr. Creech [23] had nothing to do with providing the weapons [24] initially?

[25] A: Oh, yes, of course.

Page 268

[1] Q: But even if he did, it's still [2] mitigating. Is that what you're saying?

[3] A: Well, I'm saying another inmate [4] approached him with a weapon, and so that - it's a [5] threatening situation.

[6] Q: Let's talk about the Hare test. That's [7] the test that discriminates inmates, psychopaths [8] from general male prison population. Is that [9] basically accurate?

[10] A: Yes.

[11] Q: Now, the normative data or the averages [12] the Hare test relies on come from the population of [13] male prisoners. Right?

[14] A: Why.

[15] Q: That includes people who forge checks. [16] Right?

[17] A: It's the - yes. If they're serving a [18] prison sentence.

[19] Q: And people who are in prison because they [20] drove without a valid license. Right?

[21] A: Well, probably people - I don't [22] understand - I'm not positive those people can be [23] sentenced. But, yeah, anybody who would be in the [24] general prison population.

[25] Q: People who just steal and never hurt

Page 269

[1] anybody?

[2] A: Yes.

[3] Q: The point I'm making is, that it includes [4] every male in the population regardless of whether [5] or not he has ever committed a violent crime. Is [6] that right?

[7] A: Yes.

[8] Q: So when you determine, based on the Hare [9] test, that Tom tests in the 96 percentile of all [10] male prisoners, that is not the same as saying Tom [11] tests in the 96th percentile of everybody serving a [12] sentence for first-degree murder?

[13] A: Oh, no, not at all.

[14] Q: And do you have any data on how that [15] would differ from 96? In other words, would his [16] percentile ranking be lower or higher if we only [17] compared him to other people doing

time for [18] first-degree murder?

[19] A: Well, I don't have data on that. I just [20] assume he would be much lower.

[21] Q: And we're here to determine or to [22] discriminate among people who are guilty of [23] first-degree murder. Not to decide whether or not [24] first-degree murder defendants are more dangerous [25] than check writers. Do you understand that?

Page 270

[1] A: Yes.

[2] Q: You mentioned that when you analyzed the [3] responses and his history in scoring the Hare test, [4] you looked at his whole life and then you contrast [5] that with another possible way of doing it, and [6] that's what you described as a snapshot. Will you [7] explain that for us a little bit more?

[8] A: Yes. I gave Tom the maximum score on [9] each one of these, based on his criminal career. [10] Another way of doing it is what he's done in the [11] last five years or so. And then he would score [12] less on the scale, if I took that, that five-year [13] snapshot.

[14] Q: Would he score considerably less?

[15] A: Yeah. A fair amount less.

[16] Q: So based on the Hare test, you would [17] expect that if you took a snapshot of five years [18] ending in about 1981, and you compared it to a [19] snapshot of five years ending today, what would the [20] difference be? Would you expect to see a [21] difference?

[22] A: Well, the Hare test is based on objective [23] records. So then you would have to look at the [24] objective records.

[25] My understanding is, he's had much -

Page 271

[1] many fewer disciplinary actions in the past five [2] years. So just on that alone, he would score [3] lower.

[4] Q: Regarding the Rorschach, I think that's [5] where you were with Mr. Bourne when he got you to [6] agree that that general profile indicated a [7] dangerous individual. Is that the Rorschach or was [8] that the MMPI?

[9] A: I'm not sure

[10] Q: Among any of those tests, the MMPI or [11] Rorschach, did you see anything that indicated that [12] Mr. Creech - I'm ignoring his history - those [13] tests, that Mr. Creech is a more dangerous person [14] than the average person serving a sentence for [15] first-degree murder?

[16] A: No, I did not.

[17] Q: Dangerousness is all relative. Right?

[18] A: And those tests are not designed [19] specifically to measure dangerousness, and there's [20] not good predictive measures of dangerousness. [21] They are psychiatric tests.

[22] MR. KEHNE: Could Dr. Brown be shown Exhibit [23] No. 1, please.

[24] (Document handed to the witness).

[25] Q: BY MR. KEHNE: Do you have before you

Lawyer's Notes

Page 272

[1] Exhibit 1?

[2] A: Yes, I do.

[3] Q: There's a description in there, in the [4] text, in words, about people who get a certain [5] profile on the MMPI. Right?

[6] A: Yes.

[7] Q: Is it true that a clinician can use [8] forms, such as number 1, sort of as a canned book [9] or boilerplate so when he sees this shape on the [10] MMPI, he can just go through there and find what [11] language is appropriate and extract it and directly [12] put it in his report? Is that one of the purposes [13] of things like Exhibit No. 1?

[14] A: When you take a whole passage from this [15] book and use it indiscriminately, it's called a [16] cookbook approach. You have it tailor-made, the [17] interpretation to fit the person. And so that [18] would be a misuse of it.

[19] And then it generates hypotheses, and [20] then you see which ones fit the individual.

[21] Q: So you would say it would be improper to [22] take Exhibit 1, that description, and put it [23] directly into a report supposedly describing [24] Tom Creech?

[25] A: Yes.

Page 273

[1] Q: And are there things in that description [2] in Exhibit 1 that in your opinion do not apply to [3] Tom Creech?

[4] A: Well, for example, females with this [5] code, you know. So there's descriptions of [6] females, that sort of thing.

[7] He never achieved this code on my [8] testing. He came close. And some of the [9] statements do describe him. But, yeah, there's [10] many statements that do not.

[11] Q: Would you go through and tell us which [12] ones those are?

[13] A: Line by line?

[14] Q: If you would.

[15] A: Persons with this code are immature, [16] narcissistic and self-indulgent.

[17] Well, Tom Creech is immature, I think [18] everyone would agree. Narcissistic, I would say [19] probably. Self-indulgent, I'm not sure if that [20] applies to him or not. Possibly.

[21] Passive, dependent. Make excessive [22] demands on others for attention and sympathy. I'm [23] not sure Tom Creech is passive or dependent.

[24] Q: Is there something in there about [25] paranoia and possible schizophrenia?

Page 274

[1] A: Yeah, I'm sure there is.

[2] Q: Are those things that apply to [3] Tom Creech?

[4] A: No. He's not schizophrenic.

[5] Q: And number 1 describes a person who gets [6] a certain profile, and that is not what Tom Creech [7] got on the test you gave him, anyway. Is that [8] right?

[9] A: Yes, that's right.

Sentencing Hearing, Day 3
March 20, 1995

State vs. Creech
Supreme Court, Idaho

[10] Q: So, really, that number 1 doesn't apply [11] to Tom Creech?

[12] A: Well, some of the statements apply, but [13] this is not his profile.

[14] THE COURT: Mr. Kehne, how much longer? We [15] ought to take a mid-morning recess.

[16] MR. KEHNE: This would be fine.

[17] THE COURT: Very well, then. We will take a [18] mid-morning recess and take up in about 15 minutes.

[19] (Recess.)

[20] THE COURT: We'll again take up case number [21] 10252. Again, Dr. Brown, you're still under oath.

[22] You may proceed.

[23] Q: BY MR. KEHNE: Dr. Brown, the prosecutor [24] asked you about the EEG or the electroencephalogram; [25] test run on Mr. Creech and you acknowledged that it

Page 275

[1] was within normal limits.

[2] What's the significance of that result [3] compared to your opinion that there's a biological [4] basis for Mr. Creech's problems?

[5] A: Well, as I mentioned in my report, that's [6] only one of many indirect measures. There's not a [7] direct measure of the type of central nervous [8] system disturbance that psychopaths probably have [9] right now. So we know that his EEG is normal.

[10] Q: Does that undermine your opinion that [11] there is a biological basis?

[12] A: No, it does not.

[13] Q: Are there other mental conditions, [14] diagnosable mental conditions, that do not show up [15] on an EEG?

[16] A: Yes, a great number of conditions are not [17] determined, cannot be determined from an EEG [18] result.

[19] Q: Let's go back to the Hare test and high [20] percentile ranking of Mr. Creech. What does that [21] tell you compared to your opinion that part of his [22] problems are biological?

[23] A: Well, he scored extremely high. And it's [24] my interpretation that he's a prototypical or [25] classic psychopath, and that if any psychopaths

Page 276

[1] have a biological predisposition, probably somebody [2] who has such an extreme form as Mr. Creech, [3] probably does have this predisposition.

[4] Q: Has there been research done or [5] information gathered about prototypical psychopaths [6] and their life histories?

[7] A: Well, most of the research is on typical [8] psychopaths. I mentioned that Mr. Creech's score [9] is above average in that regard.

[10] Yeah. And there's evidence that they [11] suffer many of the risk factors associated with [12] criminality.

[13] Q: And how about the effect of their age? [14] How do they change from, say, 16 up until 50 or so?

Lawyer's Notes

[15] A: Well, a very robust finding with regards [16] to men in general. And then with regard to [17] psychopaths in particular is that most of the crime [18] is committed between age 15 and age 30. And then [19] there's a sharp reduction after age 30.

[20] Q: And that applies to typical psychopaths [21] as well as other criminals?

[22] A: Yes. There is evidence showing that [23] psychopaths also have a sharp reduction in violence [24] after age 30, 35.

[25] I mention the citation in my reference

Page 277

[1] section.

[2] Q: But that's something that has been [3] published in literature. It's been researched [4] extensively. Something you feel pretty confident [5] about?

[6] A: Well, there has been a few published [7] studies. It's not researched extensively.

[8] Q: What did you mean when you say "this is a [9] very robust finding"?

[10] A: Robust, it means that I can state without [11] qualification that men age 15 to 30 commit most of [12] the crimes and violent crimes. And "robust" means [13] that applies in cross-cultures and that sort of [14] thing. It generalizes very well.

[15] Q: Does the high score on the Hare test [16] undermine or support the theory that Mr. Creech has [17] biological problems?

[18] A: Well, given that he's a classic [19] psychopath, it suggests that he, of all people, [20] probably has this biological predisposition.

[21] Q: And when you compare that result to the [22] history that he's got two brothers, anyway, who [23] have been imprisoned for homicide, what does that [24] tell you about the likelihood of it being [25] biologically based?

Page 278

[1] A: Well, again, that is not scientific [2] evidence. It's anecdotal evidence. It's striking [3] he has two brothers that are convicted of murder. [4] And it suggests that there was a biological [5] predisposition.

[6] Q: You have never, nowhere, given the [7] opinion that Mr. Creech is a completely safe [8] individual, as safe as anybody else on the street. [9] Right?

[10] A: Of course not. That would be absurd.

[11] Q: Comparing Mr. Creech to himself from 1981 [12] until today, what differences are there in the risk [13] - what's the word? - his risk to others in the [14] community?

[15] A: Well, based on the prison disciplinary [16] record, there's a trend towards less violence in [17] the last five years, a sharp reduction. So [18] relative to himself, he has a reduction in violent [19] activity or antisocial activity.

[20] Q: And how about his age as a predictor, [21] 1981 versus today.

[22] A: Well, as a man who is 44, 45 years old [23] now, he's passed out of the period when most crimes [24] are committed in the 15- to 30-year-age range, [25] which, when applied to Mr. Creech

specifically,

Page 279

[1] does describe when he committed his crimes for the [2] most part.

[3] Q: And how about the difference in I.Q. test [4] in 1981 to the present, what does that tell you [5] about risk factors?

[6] A: Well, the main thing it tells me is that [7] he's thinking, he's doing better on the I.Q. That [8] I can infer from that that his thinking is clear [9] and that he's not as great a risk to act out.

[10] Q: When the prosecutor was asking you [11] questions about your evidence for a biological [12] basis, not just as to Mr. Creech, but the research [13] evidence, you and he started talking about [14] genetics. And you used the phrase - when you were [15] asked about the likelihood of a criminal's parents [16] also being psychopaths, you used the phrase [17] Mendelian. You said, well, that would be the case [18] if this genetic basis were simple Mendelian [19] traits. What did you mean by that?

[20] A: Well, what I mean by that is whether - [21] you're taught in school, there's a dominant trait [22] and a recessive trait and it's carried on one [23] gene. You either have it or you don't. And no one [24] thinks that criminality or psychopathy is anything [25] that simple.

Page 280

[1] Q: So the fact that somebody's parents, a [2] psychopath's parents, may not themselves be [3] psychopath, that doesn't undermine the theory that [4] there's a genetic basis for psychopathy?

[5] A: No. It means that the transmission is [6] complicated.

[7] Q: But the research is pretty clear that it [8] does tend to run in families. Is that right?

[9] A: Yes. And that - I'm hesitating because [10] the way it runs in families tells you something [11] about the transmission.

[12] If it ran in families very strongly, then [13] you would have a very clear-cut transmission. [14] Since it's somewhat less - you never quite know [15] whether it's going to show up or not, and so the [16] transmission is much more complicated.

[17] MR. KEHNE: That's all I have. Thank you.

Page 281

[1] RE-CROSS EXAMINATION

[2] BY MR. BOURNE:

[3] Q: Doctor, there's two or three things that [4] I think are worth talking about on re-direct here - [5] or re-cross. Defense counsel asked you two things [6] about the comparison of the defendant to other [7] people who are first-degree murderers, as opposed [8] to the Hare test, which compares the defendant to [9] other males in the prison population, but males [10] generally as opposed to first-degree murderers.

[11] And I think you said that you had [12] absolutely no data to draw any conclusion from on [13] how the defendant would compare to other people on [14] death row, let's say. There has been no testing of [15] that kind. Right?

[16] A: Well, I think what I meant was, I'm not [17]

Lawyer's Notes

aware of data using the Hare to give specific [18] profiles of first-degree murderers.

[19] Q: And so the best we've got right now, or [20] the only thing we've got, of that kind is the Hare [21] test which compares the defendant to prisoners [22] generally, correct, and not the defendant to [23] first-degree murderers. Right?

[24] A: Yeah. That's how the test is designed, [25] to see if a person, a male prisoner, has traits of

Page 282

[1] psychopathy.

[2] Q: So as it stands right now, you don't have [3] any information on how the defendant would compare [4] psychologically to other people on death row or [5] other first-degree murderers. Correct?

[6] A: Well, I was speaking more specifically [7] with regard to how he scored on the Hare.

[8] Q: Right. And so once we establish that we [9] don't have any information on how the defendant [10] compares to murderers in general as opposed to how [11] the defendant compares with male prison inmates in [12] general, are you willing to give us an opinion now [13] that you assume that he would score lower if he [14] were now compared to those without any data?

[15] A: I'm sorry, I'm not sure I understand the [16] question.

[17] Q: Didn't you tell defense counsel on [18] re-direct here a few minutes ago that you assumed [19] that the defendant would test lower by comparison [20] to first-degree murderers than by comparison to the [21] prison population generally?

[22] A: Well, of course, first-degree murder is a [23] heinous crime, and so - and usually people who [24] commit it have committed other more severe crimes. [25] So if you compare him to a more severe group of

Page 283

[1] people, he would not seem so extreme.

[2] Q: But how do you know that he won't compare [3] - if we did a Hare test, where we only used [4] murderers as the comparison test, how do you know [5] that he wouldn't still compare at the 96 percentile [6] as compared to those people?

[7] A: Well, I can use my general information [8] about how tests work. If you have a smaller group [9] of people, you would not be so far of an outlier - [10] I could not make an informed decision on whether [11] he's above average or below average.

[12] Q: As a matter of fact, if we tested him as [13] against all people on death row, he still might [14] come up in the 96 percentile. Right?

[15] A: Well, not at that percentile. I can say [16] he wouldn't come out that high. But he probably [17] would come out - well, I don't have data on how he [18] would come out.

[19] Q: He might come out in the 96 percentile, [20] mightn't he?

[21] A: Well, I'm saying, based on general [22] principles of statistics, I know he would not score [23] that high.

[24] Q: But since there aren't any general [25]

sentencing Hearing, Day 3
March 20, 1995

State vs. Creech
Supreme Court, Idaho

statistics, then all you're doing is guessing on

Page 284

(1) how -

A: No, I'm not guessing at all here. This (3) is here I am quite clear. I'm using general (4) principles of statistics. And then if you have a (5) big group of people with a wide variability in the trait in question, then somebody - it's easier to score at a very high rate.

(8) If you have a smaller group of people, (9) it's harder to score at exactly the same rate. And (13) that's where I'm using general principles there.

(11) Q: But general principles aside, we don't (12) know the specifics of how he is going to compare (13) other people. I mean, somebody is going to score (14) number 100, or score at the 100 percentile, and (15) somebody is going to score in the 96th percentile, (16) and somebody is going to score in the 20th (17) percentile, right, and we don't know here he would (18) score?

(19) A: You're right, I don't have data on this (20) test with regard to first-degree murderers.

(1) Q: Now, you also talked about the Hare test (22) in terms of scoring the defendant over his whole (23) life to get the general picture or to take (24) snapshots of particular times. Right? That is, (25) over the last five years or some longer or shorter

Page 285

(1) period. Correct?

A: Yes.

(3) Q: Now, presumably if we took the Hare test (4) and only scored Mr. Creech on how he's done today, (5) or this week, he would score differently than if (6) you compared him to how he scored over the last (7) five years or the last 15 years. Right?

A: Of course, you need an adequate sample of behavior.

(10) Q: Okay, that's it exactly. And so to score (11) him over five years where he has been in almost complete isolation, being locked down 23 hours a (13) day, is certainly not the proper way or the most (14) professional way to score that test, would it be?

(1) A: Well, it shows how he's done under that (16) environment, which is extremely restrictive.

(17) Q: But it sure doesn't tell you anything (18) about what's going on in his mind, does it? It (19) only gives you a short picture. I mean, we don't (20) even need the test to do that, do we? We can look (21) at his disciplinary history and know what he's done (22) disciplinary-wise. Right?

A: I'm not sure what the question is.

(24) Q: Well, we don't need a test to tell how (25) he's done over five years if we don't look at his

Page 286

(1) entire life, do we?

(2) A: The test is helpful in showing which (3) factors have shown up on research as to be (4) important. But, yeah, a lot of it is based on (5) common-sense notions, such as how often he's been (6) violent or gotten into trouble.

(1) Q: Now, I don't want to quibble with you (8)

Lawyer's Notes

over the description that I gave you of the results (9) in the MMPI. You indicated that you didn't agree (10) with some of those. And one of the things you (11) don't degree with is how a female would come out, (12) which is in there.

(13) A: Right.

(14) Q: But you seem to describe the defendant in (15) your report pretty much the same as those several (16) paragraphs do. I read, and you tell me if I'm (17) reading your report incorrectly, that you describe (18) him as manipulative, irritable, that he finds his (19) environment to be threatening and demanding and (20) ungiving, that he's the type of person who would (21) make demands but not accede to demands, that he's (22) superficial and depressed, that he has a distorted (23) perceptual data, sees things in an unconventional (24) manner. (25) I mean, is that any different than the

Page 287

(1) description that's in those paragraphs? I mean, (2) aren't the adjectives about the same?

(3) A: Well, I think you're reading from the (4) section on my Rorschach.

(5) Q: I'm actually combining a bunch of them.

(6) A: Yeah, I've made those statements. I (7) think those are descriptions of Mr. Creech. That's (8) why - the descriptions that I feel apply to him I (9) put in my report. And so the ones in this passage (10) match what I put in my report, I agree with.

(11) Q: Doctor, let's talk about this biologic (12) connection here for just a minute. And maybe (13) there's at least some part of it you and I can (14) agree on.

(15) I take it that even if there's a biologic (16) connection, you don't have or know of any cure for (17) the - to change his biology to make him less a (18) psychopath. Right?

(19) A: No, we do not know how to do that. And (20) if I could fill that out, that's only one (21) contributing factor that makes somebody a (22) psychopath.

(23) Q: And not only that, but whether it is a (24) biologic connection or not, it doesn't make him any (25) less a psychopath, does it?

Page 288

(1) A: (No response.)

(2) Q: I mean, whether he's got a predisposition (3) biologically to be a psychopath or whether it's (4) entirely environmental, it doesn't make him any (5) less a psychopath?

(6) A: No. He's a classic psychopath.

(7) Q: And so that may help us in some sense (8) determine why he got to be the way he was. But it (9) certainly doesn't make him any less one, does it?

(10) A: No. And again let me bring up the (11) context in which I mention this. As I said, I (12) don't think it's relevant to his competency to (13) stand trial, his criminal responsibility.

(14) And it's just in this capital sentencing (15) that I think it is important that the court have (16) information that there is probably some biologic (17) contribution.

(18) Q: And I appreciate you using the word (19)

State vs. Creech
Supreme Court, Idaho

Sentencing Hearing, Day 3
March 20, 1995

"contribution," because, as you say in your [20] report, you're not suggesting that this makes him [21] or causes him to do certain things. Right?

[22] A: Oh, no. No.

[23] Q: And I guess in addition, I know you're [24] not trying to gauge dangerousness and I'm not going [25] to ask you to form an opinion on that, but whatever

Page 289

[1] - whether there's a biologic connection or not, [2] it doesn't make him any more or less dangerous than [3] if there were no biologic connection. Right?

[4] A: No. But I would put that into the [5] context of looking at the life-span of a typical [6] psychopath. And, once again, their crimes tend to [7] peak in the 15- to 30-age range.

[8] Q: But that has nothing to do with the [9] biologic connection. Right?

[10] A: No. Actually, it has a great deal to do [11] with it. When we think about why it would, and [12] it's primarily males, so we know there's something [13] about males, and then it happens in this certain [14] age group, and it crosses cultures. [15] So it doesn't seem to be just because [16] it's young men running free in the United States [17] after high school, or something like that.

[18] So then that makes it even a stronger [19] case that there is something biological going on.

[20] Q: Well, I think we would all agree that [21] there's some biological clock in us all. Right?

[22] A: Sure.

[23] Q: I mean, everybody at 35 to 40 slows down [24] doing whatever they're doing. Right?

[25] A: Sure.

Page 290

[1] Q: I mean, boxers don't box as much. [2] Runners don't run as much. Drinkers don't drink as [3] much. I mean, in some respects, we all slow down [4] as we get older. Right?

[5] A: Exactly.

[6] Q: But what my point is, is that whether we [7] do that because there's a biological thing that [8] starts us in that direction to begin with, or [9] whether there's no biological thing that starts us [10] to begin with, the point is that he is no more or [11] less dangerous as a result of whatever got him [12] going in that direction in the first place. Right?

[13] A: I think you're asking disregarding [14] causality, is he dangerous or not?

[15] Q: No. I'm only saying, it doesn't really [16] matter whether there's a genetic contribution or a [17] biological contribution. He is what he is and it [18] doesn't affect dangerousness. The age does, but [19] that's different than the genetic contribution. [20] Right?

[21] MR. KEHNE: Judge, I'll object to that. [22] That's extremely argumentative.

[23] THE COURT: Overruled, if the doctor can [24] answer it. Answer if you can.

[25] THE WITNESS: Okay. I guess it does make some

Lawyer's Notes

Page 291

[1] difference in that if there is a biological [2] predisposition, that people peak 15 to 30, then - [3] well, for whatever reason, they seem to peak [4] earlier.

[5] Q: BY MR. BOURNE: Right. They peak at a [6] particular age regardless of whether there's a [7] biologic contribution or not, right, from their [8] parents?

[9] A: Yes, yes.

[10] Q: Now, while we're talking about the age [11] peaking, you have been describing again [12] generalities that, generally speaking, as we view [13] criminals or psychopaths or antisocial [14] personalities, generally speaking, they seem to [15] peak - their criminality seems to peak at certain [16] ages and taper off at certain ages. Right?

[17] A: Yes.

[18] Q: And we try to apply that generality to [19] specifics by saying, well, generally speaking, [20] these kinds of things happen. But you're not [21] telling us that this defendant now for sure has [22] peaked in his criminality because he's beyond the [23] age where most people commit their crimes. Right?

[24] A: No, that's correct. As I said, I cannot [25] and no other professional can predict what he's

Page 292

[1] going to do.

[2] Q: I mean, if we let him go tomorrow, he [3] might kill a whole raft of people next week which [4] would fly in the face of the general terms?

[5] A: Yes. It's my understanding Mr. Creech [6] will never leave prison again. And I would never [7] suggest that he should be able to leave prison.

[8] Q: And, Doctor - well, maybe you have [9] stated as honestly as the testing allows. You have [10] repeatedly said that there is some evidence to [11] suggest certain things about this biologic [12] connection.

[13] And that's your honest answer, isn't it, [14] that there's some things that suggest it, but that [15] there's no hard data - in particular, as it [16] relates to the defendant - about any biologic [17] connection?

[18] A: Yes, that is true.

[19] MR. BOURNE: That's all.

Page 293

[1] REDIRECT EXAMINATION

[2] BY MR. KEHNE:

[3] Q: Doctor, I'm not sure what the difference [4] between hard data and soft data is. But let's talk [5] a minute about the research and the findings in the [6] field. Do you recall the Christensen study, the [7] twin study?

[8] A: Yes. That study shows that identical [9] twins, when one is a criminal, the identical twin [10] is more likely to be convicted than their fraternal [11] twin.

[12] Q: And did Christensen study the effect of [13] being a twin in families where one of the twins [14] gets adopted? In other words, the identical twins [15] are raised by different families.

entencing Hearing, Day 3
March 20, 1995

State vs. Creech
Supreme Court, Idaho

[6] A: In that study, if I'm remembering [17] correctly, they're raised in the same family. [18] There's another study on adoptees.

[19] Q: What are the findings there?

[20] A: Well, there are findings that having a [21] parent who has a record of being arrested puts one [22] at higher risk. I get - I'll finish with that. I [23] mean, I'm sorry, that's the end of my answer.

[24] Q: Are there any studies comparing the [25] effect of being raised by criminal parents versus

Page 294

[1] the effect of having psychopaths in your family [2] tree?

[3] A: I'm not sure I understand that question.

[4] Q: Well, has anybody looked at this [5] comparison? What's more dangerous? Having someone [6] in your family tree who is a psychopath but you get [7] raised by a good family, or not having any [8] psychopaths in your family tree but you get raised [9] by a criminal family, has anybody done that [10] comparison?

[11] A: Well, there has been a fair amount of [12] studies, and somewhat surprisingly and troubling [13] that you're better off being raised by the family [14] that has some criminal activity. And having the [15] genes of your biological parents, that the [16] biological contribution pushes people towards [17] criminality.

[18] Q: In other words, people who appear to have [19] the psychopath genes are likely to become [20] psychopaths even if they're raised in good [21] families?

[22] A: Well, at present there are no [23] psychopathic genes and there's no genetic profile [24] or anything like that.

[25] It's based on these twin studies where

Page 295

[1] these regularities keep showing up, that there's [2] this strong presumption that there's a biological [3] contribution.

[4] Q: Mr. Bourne asserted that whether or not [5] there's a biological basis doesn't matter, Tom is [6] what he is. Let's put this in the context in which [7] we are, and that's a capital sentencing. We decide [8] whether somebody dies or not, not whether or not [9] he's guilty.

[10] If there's a biological cause for Tom, is [11] that mitigating and, if so, how do you see that as [12] mitigating?

[13] A: Well -

[14] MR. BOURNE: Judge, I object to that. That is [15] asking the witness to draw a legal conclusion [16] that I think only the court can.

[17] THE COURT: Well, I think you got into [18] mitigating and aggravating. I'm not considering it [19] in the legal confrontation. The doctor can [20] answer. Overruled.

[21] THE WITNESS: First, let me say I think - I'm [22] tired, as I think most people are, of the abuse [23] excuse for crimes. I think a lot of times it's [24] this tendency to blame someone's criminal activity [25] on an abuse is greatly over used.

Page 296

[1] And that's what - I'm not offering [2] in-

Lawyer's Notes

formation about Thomas Creech in that vein at [3] all.

[4] I think he - well, it's a legal [5] determination, but my information about genetics [6] has no bearing on his criminal responsibility.

[7] I was offering it with regard to the fact [8] that it's a force over which he had no control that [9] the court may want to consider when deliberating [10] the death penalty. And it's only in this very [11] narrow sense that I bring up this information.

[12] Q: BY MR. KEHNE: In the sense that we don't [13] choose our family tree, we don't choose our [14] biological makeup. Is that fair?

[15] A: Yes. And those factors, among others, [16] contribute to who we are as people.

[17] MR. KEHNE: Thank you.

Page 297

[1] RECROSS EXAMINATION

[2] BY MR. BOURNE:

[3] Q: Doctor, I guess it would be fair to say [4] that you don't know whether the defendant has any [5] biological factors that have anything to do with [6] the psychopathology or not. Would that be fair to [7] say?

[8] A: I have no direct test evidence, partly [9] because the tests are not readily available and the [10] field is not at the point where we can make that [11] determination.

[12] Q: And as a matter of fact, there may not be [13] any biologic contribution to his psychopathology at [14] all. Right?

[15] A: Yes, of course.

[16] Q: It's a theory, it may or may not be, but [17] we really don't know how it applies to the [18] defendant. Correct?

[19] A: The state of the field is such right now [20] that you cannot make a strong or a definitive [21] statement about how it plays out in Mr. Creech's [22] life.

[23] Q: As you've correctly stated, there are [24] some generalities that you can make some [25] suggestions from. But you certainly cannot give us

Page 298

[1] any hard and fast rules. Right?

[2] A: No. I can't say Mr. Creech has a [3] 30 percent disturbance on such and such, no.

[4] Q: I mean we know that certain kinds of [5] children come from certain kinds of families, [6] whether it's psychopathology or being lawyers or [7] doctors. I mean, if all the parents are [8] professionals, more often than not, the kids are [9] going to come out to be being professional people, [10] too. Right?

[11] A: Yes.

[12] Q: And maybe that's biologic and maybe it's [13] environment, or maybe it's some of both. Right?

[14] A: It's some of both, right.

[15] Q: Maybe?

[16] A: Well, we know that I.Q. which plays a big [17] role in people's behavior has a hereditary - [18]

strong hereditary component.

[19] MR. BOURNE: That's all.

Page 299

[1] REDIRECT EXAMINATION

[2] BY MR. KEHNE:

[3] Q: Do you have an opinion about whether [4] biology has contributed to Tom's makeup, [5] specifically regarding the psychopathy?

[6] A: Insofar as I think he's a prototypical [7] psychopath and they typically have certain [8] disturbances, I think there is a probability that [9] he has a biological contribution.

[10] Q: And is that contribution trivial or [11] nontrivial?

[12] A: No. And I quoted an expert in the field [13] that thought it was a necessary precondition, a [14] necessary precondition to develop into being a [15] psychopath.

[16] Q: So would you call that a trivial or [17] nontrivial?

[18] A: It's a nontrivial contribution.

[19] MR. KEHNE: Thank you. That's all.

Page 300

[1] RECROSS EXAMINATION

[2] BY MR. BOURNE:

[3] Q: And that's a maybe? It might have [4] contributed?

[5] A: Yes.

[6] MR. BOURNE: That's fine. Thanks.

[7] THE COURT: Anything further?

[8] MR. KEHNE: No, Your Honor.

[9] THE COURT: Thank you very much, Dr. Brown. [10] You have been a real trouper. You may step down.

[11] (The witness left the stand.)

[12] THE COURT: You may call your next witness, [13] Mr. Kehne.

[14] MR. KEHNE: Could we take a short recess here, [15] Judge?

[16] THE COURT: Well, it's getting close to noon. [17] Is there a reason we need a recess? We just had [18] one.

[19] MR. KEHNE: We're not sure what we want to do [20] next.

[21] THE COURT: Well, all right, we'll take a [22] short recess. Let me know when you're ready.

[23] (Recess.)

[24] THE COURT: We will again take up case number [25] 10252.

Page 301

[1] Mr. Kehne or Mr. Adams, you may proceed.

[2] MR. ADAMS: As a courtesy of the bailiff at [3] this time I would like to file with the court [4] defendant's motion to strike portions of the [5] presentence investigation report.

[6] I have this morning at approximately [7] 9 o'clock hand-served a true and correct copy of [8] that on Mr. Bourne. We didn't set that for hearing [9] today, Your Honor, because obviously Mr. Bourne [10] would need time to review this and

Lawyer's Notes

formulate his [11] response.

[12] And so at a time appropriate to court and [13] counsel, we would like to hear this, and that will [14] again give us some information as to what witnesses [15] we're going to call. We're going to have the [16] court's response to this before we decide what [17] witnesses.

[18] We would ask through the courtesy of the [19] bailiff that the cassette tape provided us by [20] Mr. Bourne be marked as defendant's next. I think [21] it would be Defendant's Exhibit 3. C?

[22] THE COURT: It may be so marked. And the [23] record will note the filing of the motion.

[24] THE CLERK: Defendant's Exhibit C.

[25] (Exhibit C marked.)

Page 302

[1] MR. ADAMS: As I said, we received this from [2] Mr. Bourne. I would ask this be played at this [3] time. We do have a machine in court to play that. [4] We'll move it be admitted.

[5] THE COURT: Mr. Bourne?

[6] MR. BOURNE: Judge, I suppose we ought to make [7] some record on foundation for the thing. I do not [8] object to it. I can tell the court actually the [9] original - this is a copy - was brought to me by [10] an individual last week and said it was an old tape [11] from 1983 of Mr. Creech playing the guitar.

[12] THE COURT: That's the one I already said I [13] heard.

[14] MR. BOURNE: I heard part of it. I didn't [15] recognize the defendant's voice, but I assume it's [16] because I haven't heard it enough times to know.

[17] Defense counsel tells me they recognize [18] it as his voice and so I'm willing to stipulate to [19] it coming in. But that's how it got to court [20] today.

[21] THE COURT: Very well. The record will note [22] the stipulation, and it may be marked and admitted [23] into evidence.

[24] (Exhibit C admitted.)

[25] MR. ADAMS: Ask through the courtesy of the

Page 303

[1] bailiff that the tape be played at this time.

[2] THE COURT: Do you have any idea how long this [3] tape will take?

[4] MR. ADAMS: I'll bet it's about 15 minutes, [5] give or take a couple. It's not very long. Maybe [6] five or six songs on there, three minutes each, two [7] minutes each.

[8] THE COURT: Very well. Is it your wish to go [9] ahead and play the same?

[10] MR. ADAMS: Yes, please, Your Honor.

[11] THE COURT: It may be so played.

[12] (Tape played, 30 minutes.)

[13] MR. ADAMS: Thank you, Your Honor. I [14] apologize. I guess my recollection of the length [15] of the tape is pretty much off.

[16] THE COURT: It's all right. Are you going to [17] have any more testimony after lunch, then?

[18] MR. ADAMS: Judge, I think we're going to have [19] some written documents we want to

submit to you. (20) And until we get some kind of ruling from the court (21) on our motion, probably not.

(22) We talked with Mr. Bourne and decided it (23) would probably be best to let him go with his (24) witnesses he has here from the institution, so they (25) wouldn't be sitting here any longer than possible

Page 304

(1) after lunch.

(2) THE COURT: I gather that's satisfactory, (3) Mr. Bourne?

(4) MR. BOURNE: Yes.

(5) THE COURT: Very well. We'll take up at (6) 1:30. Court is in recess.

(7) (Noon recess.)

Page 305

(1) AFTERNOON SESSION

(2) March 20, 1995

(4) THE COURT: Again, Officer, I would have you (5) loosen the writing hand of the defendant, (6) Mr. Thomas Creech.

(7) Now, again, we'll take up for the record, (8) case number 10252. As I understood the proceedings (9) prior to lunch, the defense was going to hold up (10) and allow the state to proceed with some (11) witnesses. Is that correct?

(12) MR. ADAMS: That's correct, Your Honor. (13) However, at this time preliminarily we have the (14) originals, through the courtesy of the bailiff, of (15) many letters and documents we would submit to you (16) for inclusion in the PSI for your consideration.

(17) We've given copies of those to (18) Mr. Bourne. I have one, Judge, of a letter written (19) by former Deputy Warden Jerry Redmond. This (20) particular letter has Inmate Stewart's name on (21) them. We don't have the original of the one to (22) Mr. Creech, but, as we understand it, everybody on (23) the tier received one of these at the time. (24) I guess Mr. Bourne is going to check it (25) with his sources to make sure it is as we say it

Page 306

(1) is. Then we'll submit this to the court as well.

(2) MR. BOURNE: I'll agree with that, Judge.

(3) MR. ADAMS: Through the courtesy of the (4) bailiff, I'll hand you a photocopy of a February 8, (5) 1990 letter written by then Deputy Warden Redmond. (6) It is addressed to Inmate Stewart.

(7) I would assume Mr. Bourne is going to (8) stipulate that Mr. Creech really received an (9) identical letter.

(10) MR. BOURNE: Yes, I will.

(11) THE COURT: Very well. Are there any (12) objections to attaching all these documents, (13) including the last letter, to the presentence (14) report in this proceeding?

(15) MR. BOURNE: Judge, I've been handed these (16) things the same time the court has, so I don't know (17) what is all there and I haven't had a chance to (18) look. I certainly will do that, but I'm not in a (19) position to say one way or another.

(20) THE COURT: Very well. I will give this to my

Lawyer's Notes

(21) clerk, and maybe whenever you finish reading them, (22) we can take up any objections. I don't know that I (23) should read them ahead of time until we find out.

(24) The record will note that my clerk has (25) it, and Mr. Kehne, I think it's your duty to make

Page 307

(1) sure this is brought up again and have it (2) attached. I'll put that burden upon you.

(3) Very well. Anything else before we take (4) up Mr. Bourne's witnesses?

(5) MR. ADAMS: No. Thank you, Judge.

(6) MR. BOURNE: I'm ready to go with the state's (7) witnesses, but I'm also, I think, prepared to argue (8) the motion to strike portions of the presentence (9) report. And since that's part of the defense case (10) and may affect how they intend or if they intend to (11) call additional witnesses, I'm willing to argue (12) that at this point, too.

(13) THE COURT: Well, let's take up the motion (14) then, the court has looked it over, and hear this (15) particular motion.

(16) MR. ADAMS: Your Honor, I think the motion (17) pretty well speaks for itself as it attempts, at (18) least to the best of our ability, to delineate with (19) specificity those portions of the several PSIs that (20) have been submitted in this case.

(21) Our main problem is that we feel that (22) Mr. Creech by and through his attorneys has a right (23) to confront and cross examine witnesses and (24) evidence against him.

(25) We realize that in sentencing, there is a

Page 308

(1) certain amount of hearsay that comes in. But in a (2) capital sentencing scheme, we believe it would (3) deprive Mr. Creech of his federal constitutional (4) right to - his Sixth Amendment right to confront (5) and cross examine the witness and evidence against (6) him to allow in so much hearsay.

(7) Many of these people are no longer in the (8) area, so therefore we cannot contact them and call (9) them as witnesses to cross examine them.

(10) There's a lot of police reports in here; (11) that's all hearsay. There's newspaper articles; (12) that's, of course, hearsay.

(13) All the things we've listed, we just (14) cannot confront and cross examine those declarants (15) and that evidence.

(16) On the other hand, if some of these (17) things are going to come in and we are able to (18) locate some of the declarants for the sources of (19) the hearsay references, we ask you grant us the (20) funds and the time to contact them directly or to (21) hire an investigator to do that.

(22) But, essentially, the things we've listed (23) are items that we believe are either without the (24) foundation to establish any reliability or (25) credibility, and items of hearsay information which

Page 309

(1) we've been unable to confront. Thank you, Judge.

(2) THE COURT: Mr. Bourne?

(3) MR. BOURNE: Judge, I would make a statement (4) or two of a historical note about the nature of the (5) presentence report that's before the court.

(6) As the court knows, a presentence report (7) was done in 1981 in preparation for the sentencing (8) that took place in the spring of 1982 on (9) Mr. Creech.

(10) The presentence report that's before the (11) court today is identical to the report of 1981. As (12) a matter of fact, except for the coversheet, just (13) about everything else is the same in it, except for (14) the defendant's prison disciplinary offense (15) report. That is, the offenses that he's committed (16) in prison since 1981.

(17) And so I guess to make it clear, the (18) presentence that the court acted on in 1981 and '82 (19) is the same one we've got now with just that (20) additional information.

(21) The court will remember that we were set (22) for sentencing on August the 29th, 1994. And on (23) that day defense counsel requested that the (24) sentencing be set over so that there could be an (25) update done to the existing presentence report.

Page 310

(1) The update is the material that I (2) supplied - or, actually, that the prison supplied (3) through me to the presentence reporter, which (4) included the disciplinary offense history.

(5) No objection was made to the previous (6) presentence report at that time, only an update was (7) requested.

(8) My copy of the presentence report is (9) dated October 19th, 1994, which means that it was (10) completed and I believe delivered about five months (11) and one day ago, since today is the 20th of March.

(12) That means that defense counsel has had (13) five months to go through that presentence report, (14) decide what they wanted and what they didn't want, (15) and to get people here to testify today if they (16) determined that some of that information was (17) unreliable or unverified.

(18) Now, the irony of all this as I see it is (19) that Dr. Brown testified for a couple of hours last (20) week and a couple of hours today. He's the defense (21) expert that they called to give information and (22) opinions about the defendant's psychological (23) state.

(24) And Dr. Brown relied heavily on the (25) information contained in the presentence report for

Page 311

(1) his factual background on the defendant.

(2) He used police reports, statement of the (3) defendant, mental evaluations from a number of (4) other places, the defendant's prior criminal (5) record, his family history, and his prison offense (6) record, all of which is contained in the (7) presentence material that this court has before (8) it.

(9) And now defense counsel has moved to (10) strike all that which, in other words, means they (11) have moved to strike all of the foundational basis (12) that Dr. Brown used in forming his

Lawyer's Notes

opinion, except (13) the new testing which of course would be in a (14) vacuum without the knowledge that Dr. Brown had of (15) all of the things that the defendant has done.

(16) I think that today this motion is nothing (17) more than a transparent attempt to never get to (18) sentencing, to put this off forever, because (19) there's no claim made by the defense that the (20) information in the report is unreliable.

(21) It was relied on by the court before. (22) It's been relied on by the Idaho Supreme Court and (23) the United States Supreme Court and the Ninth (24) Circuit in between.

(25) And I think that unless there can be some

Page 312

(1) showing made that that information is unreliable, (2) that it ought to be allowed in.

(3) Now, there's a couple things I know the (4) court can either take with a grain of salt or not (5) use at all, and one, of course, is the list of (6) newspaper articles that are in there.

(7) There are several articles I assume - (8) actually I haven't read them closely myself, I (9) assume they're just in the media's synopsis what (10) they thought the facts were back at the time.

(11) If the court doesn't want those things in (12) there, that's sure all right with me. But I think (13) there has been no showing that they're somehow (14) unreliable in the sense that they're going to (15) misguide the court.

(16) There are statements made by various (17) inmates. I know that the court is intimately aware (18) of the facts of this case and I'm sure can give the (19) statements of inmates whatever weight it thinks (20) that they're due or not.

(21) There are statements made by a number of (22) professionals, mostly psychologists or other mental (23) health professionals, that have been relied on by (24) the defense expert.

(25) If the court strikes that information out

Page 313

(1) of the presentence report, I'm going to ask the (2) court to strike all of Dr. Brown's testimony (3) because, of course, he has used all that as his (4) basis in forming his opinion.

(5) I think that there's no reason to strike (6) that information. I think it's been well set out (7) by the Supreme Court in the Sivak case and others, (8) that this court can rely on a variety of (9) information that it deems to be reliable, and that (10) there is no absolute right that information in the (11) presentence be live testimony as opposed to (12) hearsay.

(13) We've got to give the defense an (14) opportunity to confront that. And they've had many (15) years between the first sentencing and now. And (16) since the remitter in this case, which was in the (17) fall of 1992 until now, to continue to do so. The (18) reason it hasn't done up to this point, there's (19) really no reason to.

(20) This is basically a combination of (21) statements made by the defendant in the police (22) reports together with mental health background.

(23) THE COURT: Anything further?

(24) MR. ADAMS: Yes, thank you, Your Honor. I'll

[25] try to address Mr. Bourne's points in the order in

Page 314

[1] which they were raised.

[2] Mr. Bourne states that the PSI currently [3] before the court is basically identical to the 1981 [4] PSI except for the inclusion of disciplinary [5] offense reports regarding the defendant which have [6] occurred since 1981.

[7] So what? So what? This is a new [8] sentencing hearing. Just because the court had [9] before it in 1981 some information, doesn't mean [10] that it should come into this.

[11] If in 1981 there was not a record made [12] about Mr. Creech's right to confront that evidence, [13] again, so what?

[14] This is a new sentencing hearing, and now [15] Mr. Creech is saying that he wants the right, his [16] constitutional right, to confront this evidence.

[17] Just because in 1981 that evidence may [18] have come in, that has no relationship and no [19] relevance whatsoever to Mr. Creech's Sixth [20] Amendment right to confront the evidence against [21] him is being afforded him in that process today.

[22] So the 1981 PSI similarity with today's [23] PSI is simply not relevant, Judge. He has the [24] right to confront the evidence.

[25] Secondly, until we see what evidence or

Page 315

[1] what witnesses Mr. Bourne is going to offer to you, [2] we don't know which of the evidence contained in [3] the PSI, which of the declarants in the PSI, are [4] going to be on the witness stand so we can confront [5] them.

[6] I don't think we should have to speculate [7] whether he's going to call no witnesses and rely [8] entirely on the PSI, or put up as many of the [9] declarants as possible so we can confront them.

[10] So until we know what he's going to put [11] on, we simply don't know which of the evidence we [12] are going to have the right to confront. And until [13] he rests his case in chief or stops putting on [14] witnesses, we're going to continue to say unless he [15] puts those people on, it ought to come out of the [16] PSI because we don't have the right to confront [17] them.

[18] We've got to see what he does before we [19] know whether we're going to confront the [20] information or not or have the ability to confront [21] it.

[22] On this idea that since Dr. Brown relied [23] on many sources of information in forming his [24] opinion, therefore all that information can come [25] in, that's clearly contrary to both due process and

Page 316

[1] the rules of evidence.

[2] The rules of evidence specifically state [3] that an expert may rely upon sources commonly [4] relied upon by people in that field regardless of [5] the admissibility of the stuff he relies on.

[6] So merely because he relies on it does [7] not mean it has to be admissible into evidence. As [8] a matter of fact, the rules of evidence state [9]

Lawyer's Notes

explicitly it doesn't have to be admissible so long [10] as that's the kind of information traditionally [11] relied upon by the experts in that field.

[12] Now, the guarantees of trustworthiness [13] and fairness built into that rule is the right of [14] Mr. Bourne to cross examine Mr. Brown on the [15] sources and basis of his information.

[16] That's where he gets the guarantees of [17] trustworthiness, not the admissibility of the [18] foundation of evidence per se, but the ability to [19] cross examine Dr. Brown: Did you rely on this? [20] Well, if you relied on that, that must mean, [21] Mr. Brown, you consider this to be reliable, [22] verifiable information, Mr. Bourne's tactic how he [23] cross examines. But he has the ability to do [24] that.

[25] I listened to his cross examination and

Page 317

[1] he didn't ask the witness whether he found that [2] information reliable or whether he tried to [3] corroborate or verify the information.

[4] Well, that's his shortcoming in cross [5] examination. That does not address the fact that [6] the evidence rule states specifically the evidence [7] upon which an expert relies does not have to be [8] admissible.

[9] Just because he relies on it doesn't mean [10] it's verified or corroborated. That's the job of [11] cross examination. That's Mr. Bourne's job. He [12] didn't do it. That doesn't mean it all comes in [13] with the PSI.

[14] Judge, because there was no prior [15] objection to many of the uncorroborated hearsay [16] components of the PSI, the Ninth Circuit, according [17] to my recollection, opine that those issues had [18] been waived back in the early eighties.

[19] We're not going to waive them again. [20] We're going to make the specific objection. The [21] Ninth Circuit didn't say it comes in.

[22] My understanding of what they said was no [23] objection means waiver. Well, we do object this [24] time.

[25] As far as statements of inmates and

Page 318

[1] medical witnesses, psychologists, that's just the [2] type of thing we're complaining about. There is no [3] reliability, there's no verification of these [4] statements.

[5] Without that, Mr. Creech's right to [6] confront and cross examine those witnesses and [7] those declarants is in serious jeopardy if you [8] allow the information to come in.

[9] We ask you again to exclude it. Thank [10] you, Judge.

[11] THE COURT: Thank you. Well, I'm going to [12] deny the motion. This presentence continually has [13] been received and reviewed by many courts all the [14] way across the United States, and certainly [15] including myself.

[16] I think it's ridiculous at this time to [17] attempt to block it from my memory; this is a very [18] important case to me.

[19] I think the court can evaluate the [20] hearsay records properly. I think the courts' [21] uniquely trained judges are to evaluate hearsay [22] matters.

[23] And I think any rights, any such matters [24] have been waived, have been decided, any rights to [25] portions in this matter, except for the newly

Page 319

[1] constituted matters - for the record, I will note [2] I don't give any credence and never have to the [3] newspaper articles, with all due respect to the [4] media, and not taking that in to account.

[5] Based on that, I'll deny the motion, and [6] direct you to prepare an appropriate order based on [7] the court file herein.

[8] MR. ADAMS: Thank you, Your Honor.

[9] THE COURT: Now, are we ready to take up [10] anything else before we take up the witnesses?

[11] MR. ADAMS: I think we're ready to proceed.

[12] THE COURT: Very well, Mr. Bourne, you may [13] proceed.

[15] ROGER ALLEN SALZMAN, [16] called as a witness by and on behalf of the state. [17] having been first duly sworn, was examined and [18] testified as follows:

[20] DIRECT EXAMINATION

[21] BY MR. BOURNE:

[22] Q: Would you state your name, please, and [23] spell your last name?

[24] A: Roger Allen Salzman, S-a-l-z-m-a-n.

[25] Q: How are you employed, sir?

Page 320

[1] A: Correctional peace officer for the State [2] of Idaho.

[3] Q: How long have you been so employed?

[4] A: Five and a half years.

[5] Q: Where are you currently assigned?

[6] A: Central control on day shift at the [7] maximum security prison here in Idaho.

[8] Q: Please direct your attention back to the [9] fall of 1989, particularly November of 1989. Were [10] you one of the officers who started up the new [11] maximum security prison?

[12] A: Yes, I was.

[13] Q: Between that time and approximately [14] November 6th, 1990, did you become acquainted with [15] the defendant in this case, Thomas Creech?

[16] A: Yes, I did. I worked in B block for [17] quite a bit during that period.

[18] Q: Was he celled in B block?

[19] A: Yes, he was.

[20] Q: On February the 6th, Officer, 1990, were [21] you working the shift on that day?

[22] A: Yes, I was.

[23] Q: Did there come a period of time on [24] February 6th when there appeared to be or appeared [25] that there had been some electronic or computer

Page 321

[1] glitch that caused something to happen?

[2] A: Yes, there was.

[3] Q: What happened?

[4] A: The doors throughout B block all opened [5]

Lawyer's Notes

simultaneously.

[6] Q: That would be the cell doors?

[7] A: Yes.

[8] Q: Did the door to the cell that Mr. Creech [9] was in come open?

[10] A: Yes, it did.

[11] Q: About how many doors came open all [12] together?

[13] A: 96 doors came open.

[14] Q: Were you on the tier when that occurred?

[15] A: Yes, I was.

[16] Q: You and who else?

[17] A: Myself and Sergeant Anderson were [18] escorting an inmate Lamere to the tier door.

[19] Q: So you hadn't gotten through the tier [20] door when the cell doors opened?

[21] A: No, sir, we had not.

[22] Q: As those cell doors came open, did that [23] surprise you?

[24] A: Very much so.

[25] Q: Did it appear to surprise the inmates who

Page 322

[1] were in the cells?

[2] A: Yes, it did.

[3] Q: Did Sergeant Anderson say something [4] generally to the inmates whose doors just came [5] open?

[6] A: Yes, sir, he did.

[7] Q: What did he say?

[8] A: Pretty much along the line of: This is a [9] test, go ahead and cell back up, we're conducting [10] an experiment.

[11] Q: But you weren't, were you?

[12] A: No, sir.

[13] Q: Did some of the inmates come out onto the [14] tier?

[15] A: Pretty much most of them did.

[16] Q: Now, I take it that when they would come [17] out on the tier, would they be able to leave the [18] prison once they are on the tier?

[19] A: No, sir, they cannot.

[20] Q: Was there a tier door that stayed shut?

[21] A: Yes, there was.

[22] Q: So they would still be locked on the tier [23] but they could come out of their cells?

[24] A: Yes, sir.

[25] Q: Is there some kind of a hallway or foyer

Page 323

[1] area there?

[2] A: It's what we call a sally port. It's [3] controlled by two locking doors, minimum of two [4] locking doors, that are controlled by the officer [5] up in the control bubble.

[6] Q: But when they left their cell, they would [7] come into a foyer area, common area?

[8] A: Common tier area, yes.

[9] Q: Did Mr. Creech come out?

[10] A: Yes, sir, he did.

[1] Q: What did he do?
[12] A: He turned and took two or three steps [13] towards Inmate Goodson's cell and shook hands with [14] him.
[15] Q: Did several of the other inmates shake [16] hands with each other?
[17] A: Yes, sir, they did.
[18] Q: About how long were the doors open before [19] they rolled shut?
[20] A: Anywhere from three to four minutes.
[21] Q: And did most all of the inmates jump back [22] in their cells as the doors closed?
[23] A: Yes, sir, they did.
[24] Q: Was Inmate Creech one of them that got [25] back in?

Page 324

[1] A: Yes, sir.
[2] Q: Did that scare you?
[3] A: Very much so.
[4] MR. ADAMS: Objection, relevance, Your Honor.
[5] THE COURT: Overruled. The answer may stand.
[6] Q: BY MR. BOURNE: Now, a few days later, [7] Officer, did you have occasion to speak with the [8] defendant Creech about that event, the doors [9] opening?
[10] A: Yes, sir, I did.
[11] Q: When that conversation started, did it [12] start by the defendant making some comment about [13] whether or not you had been scared?
[14] A: Yes, sir, it did.
[15] Q: Let me ask you this, where did the [16] conversation take place?
[17] A: At Inmate Creech's cell door, cell number [18] 64 on B block.
[19] Q: Was his door locked?
[20] A: Yes, it was.
[21] Q: You were speaking through the door?
[22] A: Through the bean-slot area, it was open.
[23] Q: Anybody else present to overhear the [24] conversation besides yourself and Mr. Creech?
[25] A: I believe the other officer that was on

Page 325

[1] the tier was down at the lower level at that time.
[2] Q: So probably just the two of you were [3] involved in the conversation?
[4] A: Yes, sir.
[5] Q: What did Mr. Creech say to you?
[6] MR. ADAMS: Objection, Your Honor. These [7] statements, we've never seen them. They have never [8] been disclosed. We specifically asked in our [9] request for discovery any and all statements of the [10] defendant intended to be introduced by the state, [11] and we haven't been disclosed any statements like [12] this.
[13] THE COURT: Overruled. I'll allow you to meet [14] any surprise.

Lawyer's Notes

[15] MR. BOURNE: And I would point out, Judge, [16] this is rebuttal and that this witness's name is on [17] discovery.
[18] THE COURT: The record will so note.
[19] Q: BY MR. BOURNE: What did he say to you?
[20] A: Pretty much made a comment about the fact [21] that I was scared the evening that the doors all [22] came open. And I admitted, of course, that I was.
[23] Q: Did he say something back to you about - [24] well, did you go on to make some comment about [25] being surprised about something?

Page 326

[1] A: Yes, sir, I did. I made the comment that [2] I was surprised that nothing had happened since [3] there were only two of us on the tier to control [4] anything that the inmates might have wanted to do.
[5] Q: Just two officers for all those inmates?
[6] A: Yes, sir.
[7] Q: What did the defendant say in response to [8] that?
[9] A: The defendant said something along the [10] line that the officers would not have been hurt in [11] any case, no matter whether something might have [12] been done or not.
[13] Q: Now, did the defendant also make another [14] comment to you about the state of his readiness the [15] next time the doors opened?
[16] MR. ADAMS: Objection, Your Honor, Mr. Bourne [17] is now pretty much leading the witness.
[18] MR. BOURNE: Directing the witness's [19] attention, Judge.
[20] THE COURT: I think it's a preliminary [21] question. Overruled.
[22] THE WITNESS: Yes, sir, he did.
[23] Q: BY MR. BOURNE: What did he say about [24] that?
[25] A: Comment, to the best of my recollection,

Page 327

[1] was that nothing had happened that time because [2] nobody was ready, but that if it happened again, [3] something more than likely would.
[4] Q: Would happen?
[5] A: Yes, sir.
[6] Q: Did the defendant say that they would be [7] ready next time?
[8] A: Yes, he did.
[9] Q: In the meantime, were steps taken, at [10] least on that day, to put special teams in and [11] around that tier area in case the doors came open [12] again?
[13] A: Yes, sir.
[14] Q: Have the doors been opened like that [15] since then?
[16] A: No, sir, they have not.
[17] Q: So apparently whatever electronic problem [18] it was got figured out?
[19] A: Yes, sir.
[20] MR. BOURNE: Thank you. That's all I have. [21]

They'll ask you some questions.

- (22) MR. ADAMS: We don't have any questions.
(23) THE COURT: Thank you very much, sir. You may (24) step down.
(25) (The witness left the stand.)

Page 328

- (1) THE COURT: You may call your next witness.
(2) MR. BOURNE: Thank you.
(4) ARVON J. ARAVE,
(5) called as a witness by and on behalf of the state,
(6) having been first duly sworn, was examined
and (7) testified as follows:
(9) DIRECT EXAMINATION
(10) BY MR. BOURNE:
(11) Q: Will you state your name and spell your (12)
first name and your last name please?
(13) A: Arvon J. Arave, A-r-v-o-n A-r-a-v-e.
(14) Q: How are you employed, sir?
(15) A: Warden at the Idaho Maximum Security (16)
Institution.
(17) Q: How long have you been employed by the
(18) Department of Corrections?
(19) A: Since February of 1981.
(20) Q: When you first came to work for the (21)
department, how were you assigned?
(22) A: I was assigned as the deputy warden over
(23) inmate management.
(24) Q: In 1981 or thereafter, did you become (25)
acquainted with the defendant in this case,
Thomas

Page 329

- (1) Creech?
(2) A: Yes, I did.
(3) Q: How did you become acquainted with him?
(4) A: He was housed in cell block 7. And he (5) was
one of the people that we reviewed at that (6)
time.
(7) Q: By a review, what did that entail?
(8) A: Well, myself and the other deputy warden (9)
and head over education talked to inmates in that
(10) area systematically, once a month approx-
imately.
(11) Q: In the intervening nearly 14 years (12)
between 1981 and now, what type of a re-
lationship (13) have you maintained with Mr.
Creech as far as (14) seeing him on a face-to-face
basis?
(15) A: I was deputy warden until March of '84, (16)
and I was his warden from '84 to 1988. And there
(17) was about a year or so in there we were
building (18) the Maximum Security Institution, so
I wasn't in (19) touch with him then.
(20) And then when we opened the Maximum (21)
Security Institution in October of '89, he was - (22)
he moved over with the original inmate pop-
ulation.
(23) Q: Between 1981 and 1988, how often would
(24) you say that you spoke with Mr. Creech during
that (25) time?

Lawyer's Notes

Page 330

- (1) A: That's hard to say. Occasionally, (2) sys-
tematically. I think it would be fair to say (3) once a
month.
(4) Q: You're warden at the maximum (5) institut-
ion. Right?
(6) A: Yes.
(7) Q: Since 1989 when you moved into there (8)
until the present, have you continued to see (9) Mr.
Creech regularly?
(10) A: Yes. I had seen him regularly. And - (11)
although in the last six months, I haven't had the
(12) occasion to talk to him too often. He and I (13)
haven't been scheduled together some way or (14)
another. Maybe once or twice.
(15) Q: Do you think that you have gotten to know
(16) Mr. Creech about as well as a warden and an
inmate (17) can get to know each other under
these (18) circumstances during that time?
(19) A: I believe so.
(20) Q: When you meet with him, I mean is it just
(21) hello, or do sometimes you sit and talk about a
(22) variety of things?
(23) A: Sometimes we would correspond back
and (24) forth with each other. On a weekly basis,
unless (25) I'm scheduled out of the institution, I
meet with

Page 331

- (1) the people that take care of him in the cell
block (2) every Wednesday morning.
(3) I generally ask how Tom is doing and what (4)
he's doing and made it a point of keeping in touch
(5) with what he's doing over the past couple
years and (6) have discussed his situation regularly
with the (7) people that take care of him.
(8) Q: And then when you meet with Mr. Creech,
(9) do you sometimes have sit-down meetings
where you (10) talk across the table, or something,
to see what (11) he's thinking?
(12) A: Sometimes we talk about what's going on
(13) at the time. He's got some concerns and I have
(14) some concerns occasionally, and we discuss
them. (15) We've been able to discuss them.
(16) Q: During the period of time that you have (17)
been warden or deputy warden, Mr. Creech has
had (18) some disciplinary offense write-ups.
Correct?
(19) A: Yes, he has.
(20) Q: The presentence report that the court has
(21) shows an incident in 1984 involving an inmate
named (22) Beam, a stabbing that - at least that's
how it is (23) described. Were you present near the
time when (24) that occurred?
(25) A: Right after, yes.

Page 332

- (1) Q: Right after. Within minutes?
(2) A: Yes, it was.
(3) Q: What had gone on there?
(4) MR. ADAMS: Objection, Your Honor, lack of (5)
foundation.
(6) MR. BOURNE: Well, let me ask a foundation (7)
question, Judge.

[8] Q: BY MR. BOURNE: Tell us what part you [9] played in the aftermath of that?
[10] A: Well, I had to give several orders. It [11] was a very serious incident that had occurred, and [12] I had to assess the situation, determine what to do [13] about it, other than an immediate emergency [14] response to it.
[15] Q: Did you speak with the people who had [16] been there?
[17] A: Yes, I did.
[18] Q: Did you go to the scene of the stabbing [19] itself?
[20] A: Yes, I did.
[21] Q: Did you speak with Mr. Creech and with [22] Mr. Beam about it?
[23] A: I did speak with Mr. Beam. I went to the [24] hospital with him, inside the prison, and I spoke [25] with him about it.

Page 333

[1] And later on I spoke with Mr. Creech [2] about it.
[3] Q: Where had the stabbing incident occurred?
[4] A: In the exercise area of the cell block.
[5] Q: What did it appear to you, without [6] assessing blame or whatever, what did it appear to [7] you had happened to allow Mr. Beam to be in a place [8] where Mr. Creech could reach him?
[9] MR. ADAMS: Objection, Your Honor, that's [10] assuming facts not in evidence, and there's not a [11] foundation for this witness to give a response.
[12] THE COURT: Overruled.
[13] Q: BY MR. BOURNE: Go ahead.
[14] A: Well, we exercise inmates separately in [15] different cages, expanded-metal cages.
[16] And my impression at the time, and my [17] understanding since then, was that Tom Creech [18] enticed Mr. Beam to come into his exercise area [19] through a break they had made in the screen at the [20] bottom. They broke the welds off, and the screen [21] was folded in towards Mr. Creech's area, and it was [22] really too small of an area to get through.
[23] And when Beam was partially through that [24] area, Tom attacked him and cut his throat with a [25] razor blade, several cuts around the throat.

Page 334

[1] Q: Was Mr. Beam able to get back out?
[2] A: No, he wasn't.
[3] Q: Did he get hung up in the wire there, [4] then?
[5] A: Yes, there was a problem there.
[6] Q: Was there another time some years later [7] - I think in '87 - when Mr. Creech was involved [8] in breaking some walls in cells in the institution?
[9] A: Yes, he was.
[10] Q: When did that occur, approximately?
[11] A: That was over in a different cell block. [12] And the death row inmates discovered that they [13] could actually kick a hole right through the wall.
[14] Q: Cinder block walls?
[15] A: And so the first two got together and [16]

Lawyer's Notes

kicked a hole in the next wall, and the next wall, [17] and the next wall down the tier until they stopped [18] at one of the last cells on the tier.
[19] Q: Was Mr. Creech involved? I mean was his [20] cell, the walls broken in his cell?
[21] A: Yes.
[22] Q: Anybody hurt during that?
[23] A: Not that I was aware of.
[24] Q: Now, Warden, since 1989 when the [25] defendant was moved into the new Maximum Security

Page 335

[1] Institution, you're aware, are you not, from [2] reading the defendant's institutional offense [3] history that his - that actually during that [4] two-year or five-year period roughly, that there [5] are only a couple of events involving the use of [6] marijuana by the defendant, and there hasn't been [7] any disciplinary offenses for violence.
[8] You're aware of that from a reading of [9] the record?
[10] A: Yes, I am.
[11] Q: How is Mr. Creech managed now, and since [12] he moved into the new institution, differently, if [13] there is one, from when he was managed before [14] moving into that place?
[15] A: Well, in my opinion there's no comparison [16] between the management of those two cell blocks. [17] The one is - the old cell block is poorly [18] constructed and obviously no rebar, no grouting, [19] and the walls could be kicked down.
[20] You cannot see the doors of the [21] individual cells. When you look down the tier you [22] can't see what is going on between the inmates back [23] and forth.
[24] You have to actually go down the tier and [25] look into the windows to see what is going on in a

Page 336

[1] narrow corridor. And the shower setup wasn't much [2] better.
[3] In the new facility, it is designed for [4] supervision of the cell doors, and from a control [5] center, you can see all the cell doors on all three [6] tiers, and you can manage and control movement much [7] better than you could over in Unit 8.
[8] Q: During the five years that the new [9] institution is being used, we've had some testimony [10] earlier in this hearing about an incident that [11] involved the stabbing of an inmate in the shower [12] when apparently the electronic door didn't work [13] right, or whatever, so that somebody thought the [14] door was locked when it really wasn't.
[15] Aside from that incident there, has that [16] block where Mr. Creech has been housed been made [17] relatively free of violence between the inmates?
[18] A: Yes, that's true. I'm not aware of any [19] major incidents that we've had on that tier, other [20] than the one stabbing.
[21] Q: Do you attribute that to improved [22] management ability, then?
[23] A: Well, definitely. I feel like that the [24] new maximum security manages tremendously much

[25] better than the old.

Page 337

[1] Q: Does Mr. Creech have access to the other [2] people, at least should I say, very reasonable [3] access to other people to victimize except for [4] corrections officers?

[5] A: Well, we try to manage the institution to [6] minimize that effect for all the inmates. People [7] are moved separately and slowly and definitely on [8] schedules. We try to do it in such a way that that [9] would minimize that possibility.

[10] Q: Now, in the past several years, have you [11] taken steps to further control and manage [12] Mr. Creech through controlling who he is able to [13] visit?

[14] A: Yes, I am.

[15] Q: Have you denied him or -- well, let me [16] ask you this. Before a person can have a visit, [17] that is, an inmate can have a visit, with a person [18] from the outside, does the institution policy allow [19] you to have the final say over whether that [20] happens?

[21] A: Yes, it does.

[22] Q: Have you on some occasion had occasion to [23] deny visitation between the defendant and some [24] other person?

[25] A: Yes, I have.

Page 338

[1] Q: Particularly, are you aware of a woman [2] who was originally named Sheryl Miller, now Sheryl [3] Creech?

[4] A: Yes.

[5] Q: Is that the defendant's wife, so far as [6] you know?

[7] MR. ADAMS: Judge, I'm going to object at this [8] point. This seems to me going well beyond [9] rebuttal. This is supposed to be a rebuttal [10] witness, and I don't recall any testimony about [11] visitation or Mrs. Creech or any of that coming in [12] in the case in chief. Thank you, Judge.

[13] THE COURT: Mr. Bourne?

[14] MR. BOURNE: Well, Judge, the defendant's [15] sister, Mrs. Plageman, indicated that Mrs. Creech [16] -- was the reason -- that the defendant has changed his [17] attitude and his behavior in the last five years.

[18] I don't intend to go far into this, just [19] ask if he's taken steps for security reasons in [20] that regard.

[21] THE COURT: Very well, I'll let you put in [22] the testimony with that offer of proof.

[23] MR. BOURNE: Thank you.

[24] THE COURT: Overruled.

[25] Q: BY MR. BOURNE: Warden, did you deny

Page 339

[1] visitation between those two people?

[2] A: Yes.

[3] Q: And without going into specifics, what [4] was your general reason for doing that?

[5] A: (No response.)

[6] Q: Is that for a security reason?

Lawyer's Notes

[7] A: Yes, it was.

[8] Q: Now, in addition to that, Warden, have [9] you authorized the monitoring of certain phone [10] calls and mail between the defendant and other [11] people?

[12] A: Yes, I have.

[13] Q: Was that done according to written prison [14] policy?

[15] A: Yes, it is.

[16] Q: What was your reason for doing that?

[17] A: I wanted to stay abreast when Tom starts [18] to become depressed and doesn't communicate with [19] the staff very well and doesn't come out of his [20] cell; it gives me reason for concern.

[21] And that was basically how I stay abreast [22] of what he's thinking, what he's communicating.

[23] And he had a couple of correspondence [24] going with some other women, and I wanted to see [25] where he was trying to take that in view of his

Page 340

[1] relationship with her and their request for [2] visiting.

[3] Q: Now, in the time that you have known [4] Mr. Creech for 14 years, between how he was and how [5] he related to you in 1981 until now, have you seen [6] any type of significant change in his attitude or [7] his thinking that you could determine by speaking [8] to him?

[9] A: Other than occasional depression, no.

[10] Q: Now, in any of the times that you have [11] spoken with Mr. Creech, has he ever indicated to [12] you any type of religious conversion that we could [13] describe as being of the type that he's given his [14] life to the Lord or wants to live his life for [15] Christ or anything of that nature? Has he ever [16] discussed anything like that with you?

[17] MR. ADAMS: Objection, Your Honor. Again, I [18] don't see this as proper rebuttal. I don't believe [19] Mr. Creech testified, for one thing, that he had [20] any type of conversion like this. So this is [21] improper rebuttal.

[22] THE COURT: I think the context of some of the [23] songs were. Overruled.

[24] MR. BOURNE: Thank you.

[25] Q: BY MR. BOURNE: You can answer.

Page 341

[1] A: No, he had not.

[2] Q: Never said anything to you about that?

[3] A: No.

[4] Q: Sometimes when inmates either have had [5] some sort of religious experience or wants you to [6] think that they have, is that a common topic [7] between other inmates and yourself?

[8] MR. ADAMS: Objection, Your Honor, lack of [9] relevance. Additionally, I think that I'm going to [10] back up a minute and ask you strike the witness's [11] last response about Mr. Creech's statements given [12] or not given regarding his religious conversions.

[13] I believe that Mr. Creech is in custody [14] and he's being interrogated, and those statements [15]

are being used against him to take his life away, (16) that he has a Fifth Amendment right not to have (17) them used against him. The warden of a prison (18) which he is held in custody, interrogate him, and (19) have him come in here as evidence against him, I (20) think, violates his Fifth and Sixth Amendment (21) rights. Thank you, Judge.

(22) THE COURT: Overruled.

(23) Q: BY MR. BOURNE: Do other inmates (24) sometimes speak to you on that topic?

(25) MR. ADAMS: Again, Your Honor, we did object

Page 342

(1) to that question as being irrelevant.

(2) THE COURT: Overruled. However, let's don't (3) get into it very far, Mr. Bourne. I have a (4) question of how much relevance it has for sure.

(5) THE WITNESS: In many cases.

(6) Q: BY MR. BOURNE: But Mr. Creech never has?

(7) A: No, he has not.

(8) Q: Based upon your extensive experience with (9) Mr. Creech and other inmates, do you trust that - (10) or have an opinion whether you could trust (11) Mr. Creech has changed somehow, that he's no longer (12) a danger to other inmates in the institution if he (13) had access to them?

(14) MR. ADAMS: Objection, Your Honor. That calls (15) for a great deal of speculation on the part of this (16) witness, and that's asking a question which the (17) state is offering as an aggravator.

(18) And I believe that's your job, Judge, not (19) the warden of the penitentiary's job. Thank you.

(20) THE COURT: Well, I think it's ultimately my (21) job for sure. But I think he can give his opinion (22) in that regard. Overruled. You may answer.

(23) Q: BY MR. BOURNE: Do you think there's been (24) any change that lessens the risk, in your mind?

(25) A: Did you ask me about trust?

Page 343

(1) Q: Yes. Would you trust him? I think my (2) question was, would you trust him that there has (3) been a significant enough change that you would (4) trust to put him in a general prison population or (5) allow him access to other inmates?

(6) A: No, I would not.

(7) MR. ADAMS: Objection, Your Honor. This (8) calls for a great deal of speculation on the part (9) of the witness. It assumes facts not in evidence. (10) That assumes that this warden at some point is (11) going to put Thomas Creech in the general (12) population. I would like to hear him say that as a (13) foundational remark before being allowed to give (14) his opinion. Thank you, Judge.

(15) THE COURT: I think the warden makes that (16) evaluation every day. Overruled.

(17) Q: BY MR. BOURNE: Go ahead and restate your (18) answer, sir.

(19) A: No, I would not.

(20) MR. BOURNE: Thank you. I think that's all on (21) direct.

Lawyer's Notes

(22) THE COURT: You may cross examine.

Page 344

(1) CROSS EXAMINATION

(2) BY MR. ADAMS:

(3) Q: Good afternoon, Warden. Do I take your (4) last comments to Mr. Bourne's questions to mean (5) regardless of this court's sentence, you're going (6) to keep Tom in the isolation in which he is (7) currently housed?

(8) A: Based on what I know today, I would keep (9) him in administrative segregation, which is (10) basically the same situation.

(11) Q: And administrative segregation is also (12) the housing conditions that you have for death (13) row. Correct?

(14) A: Yes.

(15) Q: There's no difference between death row (16) and administrative segregation, is there?

(17) A: There is - there's no difference in (18) property. There's no difference in the cell. And (19) there's no difference in the proximity of the (20) cells.

(21) The only difference is in name only and (22) who is allowed to visit.

(23) Q: So the same conditions under which he is (24) currently housed would be the conditions in which (25) you would keep him regardless of Judge Newhouse's

Page 345

(1) sentence. Correct?

(2) A: That's correct.

(3) Q: And because of the conditions in which (4) you now have him, he's generally no risk to the (5) population or the community in which he lives. (6) Correct?

(7) A: I hope so.

(8) Q: And that's compared to the population and (9) the circumstances under which he lived in 1981. (10) Correct? He was a greater risk in '81 than he is (11) today. Right?

(12) A: Do you want to re-ask that question?

(13) Q: Mr. Creech in 1981 was a greater risk to (14) the community in which he lived than he is today. (15) Correct?

(16) A: I don't know that I could answer that (17) question.

(18) Q: You've got him under better security now (19) than you had in 1981. Correct?

(20) A: Yes, I do.

(21) Q: He has less access to other prisoners (22) today than he did in 1981. Correct?

(23) A: Correct.

(24) Q: And it was your opinion then that he is (25) less of a risk to the community in which he lives

Page 346

(1) today than he was in 1981. Correct?

(2) A: I am not of the opinion that something (3) cannot happen in maximum security. I can only (4) testify that it happened. I've been surprised (5) before.

(6) Q: I'm not sure that answered my question. (7)

Let me try to re-ask it. You've got him under [8] better security today than you had him in 1981. [9] Correct?

[10] A: That's correct.

[11] Q: He has less access to everyone in the [12] world except for your correctional officers today [13] than he had in 1981. Correct?

[14] A: Correct.

[15] Q: And anytime he moves out of his cell, [16] you've got at least two correctional officers with [17] him. Correct?

[18] A: Correct.

[19] Q: And besides those two correctional [20] officers escorting Mr. Creech, you've got at least [21] a third or more correctional officers in the [22] control center watching their movement. Correct?

[23] A: Correct.

[24] Q: And when you transport him with those two [25] correctional officers, they have the option of

Page 347

[1] shackling his legs, handcuffing him and placing him [2] in belly chains. Correct?

[3] A: Correct.

[4] Q: And he's never transported in the company [5] of other prisoners, is he?

[6] A: Correct.

[7] Q: So he is less dangerous to those around [8] him today than he was in 1981. Correct?

[9] A: Correct.

[10] Q: You talked about in a 1984 incident [11] involving Inmate Beam. Isn't it true that Mr. Beam [12] testified that the reason his throat was slashed is [13] that Lacey Sivak tried to get Beam to attack [14] Creech, Beam tried it and Beam lost? Isn't it true [15] that's what Beam testified to?

[16] A: I'm not aware of his testimony, but I [17] know what he told me in the hospital.

[18] Q: Do you recall testifying in a federal [19] court case last fall in which you testified about [20] this Beam incident?

[21] A: Yes.

[22] Q: You were under oath when you testified, [23] weren't you?

[24] A: Yes.

[25] Q: And I asked you the question: Sir, what

Page 348

[1] if Lacey Sivak and Ray Beam came down here and [2] testified that Lacey Sivak told Beam go in there [3] and get Creech, Beam tried it and he lost, would [4] that change your opinion?

[5] And your answer was: Not necessarily. [6] I've heard Beam testify on Creech's behalf in this [7] courtroom before.

[8] And I asked you: Beam has denied that he [9] was lured in there by Creech, hasn't he?

[10] And your answer was: Yes. [11] Is that still your testimony today or are [12] you going to change that under-oath testimony?

[13] A: No, that's still true.

Lawyer's Notes

[14] Q: Now, in 1987 Mr. Creech and other inmates [15] kicked some walls down or made some holes in the [16] penitentiary - made some holes in the penitentiary [17] walls. Correct?

[18] A: That's correct.

[19] Q: And nobody got hurt, did they?

[20] A: No, they didn't.

[21] Q: Since 1989, the only disciplinary offense [22] report related to Mr. Creech's behavior have been [23] two in which he's alleged to have smoked [24] marijuana. Correct?

[25] A: Correct.

Page 349

[1] Q: When Tom was told of your decision that [2] his wife could not visit him, he didn't cause any [3] damage to any property, did he?

[4] A: No.

[5] Q: He didn't attack anybody, did he?

[6] A: No.

[7] Q: You've always known Tom to have a [8] religious bent in his personality. Correct?

[9] A: A what?

[10] Q: A religious bent, a religious tone to his [11] personality, to his observations on life. Correct?

[12] A: (No response.)

[13] Q: For instance, in the songs he sang for [14] the last 14 years. They're religious in [15] orientation, aren't they, many of them?

[16] A: Yes.

[17] Q: As a matter of fact, when Christmas time [18] came around this last year, you requested that Tom [19] write you a poem or a card for that religious of [20] all Christian holidays. Correct?

[21] A: Yes. He does every year.

[22] Q: We're talking about the Christmas that is [23] celebrated on the 25th of December in the Christian [24] religion. Correct?

[25] A: Yes.

Page 350

[1] Q: And this isn't something that's just [2] happened in the last couple of years, has it? It's [3] been something that has gone on since you have [4] known Tom Creech. Correct?

[5] A: Quite a while, yes.

[6] MR. ADAMS: Warden, sir, thank you for your [7] time. I don't have any more questions.

[9] REDIRECT EXAMINATION

[10] BY MR. BOURNE:

[11] Q: Warden, I suppose it's probably pretty [12] clear from the record, but just to make sure that [13] it is, when you talked about the degree of the [14] defendant's dangerousness from 1981 to the present, [15] I gather that you're not giving an opinion on the [16] defendant's mental dangerousness. I gather you're [17] talking about his access. Is that correct?

[18] A: I'm simply talking about the management [19] procedures of the facility.

[20] Q: I mean it's pretty clear, no matter how [21] dangerous a person is, if they're locked up tight [22] so that they can't get to anybody else, they may

be [23] dangerous but that they just don't have the access. [24] Right?

[25] A: That's correct.

Page 351

[1] Q: Now, apparently Mr. Beam some years after [2] the event told this story about Sivak. Do I have [3] that correct?

[4] MR. ADAMS: Objection, Your Honor. That [5] assumes facts not in evidence. And I would object [6] to the form of the question. It's leading. And I [7] think the words Mr. Bourne used are objectionable.

[8] THE COURT: Overruled. You may answer.

[9] Q: BY MR. BOURNE: Let me ask it like this: [10] Did Mr. Beam tell you one thing immediately after [11] the event and then some years later tell something [12] different?

[13] A: Yes.

[14] Q: And I take it that the story about Sivak [15] some years later was entirely different than what [16] he told you at the time?

[17] A: Yes.

[18] Q: Did it appear to you that Mr. Beam and [19] Mr. Creech had made up, so to speak, in intervening [20] years?

[21] A: Surprising enough, it did, yes.

[22] MR. BOURNE: Thank you. That's all.

[23] THE COURT: Is that all, Mr. Bourne?

[24] MR. BOURNE: Yes, sir.

[25] THE COURT: Anything further?

Page 352

[1] MR. ADAMS: No, thank you.

[2] THE COURT: Thank you very much, Warden. You [3] may step down, sir.

[4] (The witness left the stand.)

[5] THE COURT: You may call your next witness.

[7] DEBRA A. SHIELDS,

[8] called as a witness by and on behalf of the state, [9] having been first duly sworn, was examined and [10] testified as follows:

[12] DIRECT EXAMINATION

[13] BY MR. BOURNE:

[14] Q: Will you state your name, please, and [15] spell your last name?

[16] A: Debra A. Shields, S-h-i-e-l-d-s.

[17] Q: How are you employed, ma'am?

[18] A: I'm the associate warden of the Idaho [19] Maximum Security Institution.

[20] Q: You may need to scoot up just a little [21] bit. How long have you been associate warden?

[22] A: For about five years now.

[23] Q: Mrs. Shields, prior to coming to court [24] today at the request of the prosecutor's office, [25] did you put together a list of disciplinary offense

Page 353

[1] reports for Mr. Creech for the presentence report?

[2] A: Yes, I did.

[3] MR. BOURNE: Mr. Bailiff, if you would hand [4]

Lawyer's Notes

Mrs. Shields the presentence report, please.

[5] (Bailiff complied.)

[6] Q: BY MR. BOURNE: Mrs. Shields, I've had [7] handed to you what I'll represent to you to be the [8] presentence report, or the updated presentence [9] report, rather, for Mr. Creech in this case.

[10] Will you look at pages 1 through 5, [11] please, take a minute to look at that, and then [12] I'll ask you a question about it.

[13] A: (Witness complied.)

[14] Q: Have you had a chance to look at those [15] pages?

[16] A: Um-hmm.

[17] Q: Do you recognize what those are?

[18] A: Yes. It's a listing of his disciplinary [19] offense record from his incarceration.

[20] Q: For Mr. Creech?

[21] A: Correct.

[22] Q: Is that the list that you put together?

[23] A: This is a longer list. This is not the [24] list that I put together. I did another list. [25] This is the one that the presentence person typed

Page 354

[1] out.

[2] Q: Does it appear that that's a typing and a [3] compilation basically of the list that you made for [4] the presentence report?

[5] A: Yes, it appears to be the same.

[6] Q: Where did the information come from that [7] you used to make your list?

[8] A: Out of the central file, which is where [9] this one would have come from.

[10] Q: Out of Mr. Creech's central file?

[11] A: Yes.

[12] Q: Is that a file that's kept at the prison?

[13] A: Yes. We keep a file on all of the [14] inmates. It has documentation on all of their [15] behavior.

[16] Q: And so when an inmate gets a disciplinary [17] offense, is there some sort of report made of that [18] event that goes into the central file?

[19] A: Yes. There's a written report and then a [20] written copy of the findings of fact of the [21] disciplinary officer that outlined why he found the [22] inmate guilty.

[23] Q: And so it appears to me that on the [24] left-hand side of the page, there is a description [25] of the offense. Correct?

Page 355

[1] A: Um-hmm.

[2] Q: And then it looks like the page shows [3] what the defendant's plea was to that offense. [4] Correct?

[5] A: Correct.

[6] Q: And then on the right-hand side of the [7] page, what is that column?

[8] A: That's called the findings, what the [9] hearing officer - actually, all of these were [10] found guilty because anything that he was found not [11] guilty on would not have been in his

record.

[12] If the disciplinary hearing officer finds [13] someone not guilty, it never goes into their [14] record. This is what he received as sanctions for [15] being found guilty.

[16] Q: So the right-hand column, then, is the [17] sanction list?

[18] A: Correct.

[19] Q: And you gathered all that information out [20] of the defendant's central file?

[21] A: Correct.

[22] Q: Do you consider that information to be [23] reliable and verifiable?

[24] A: Yes, I do.

[25] MR. BOURNE: Thank you. That's all. No

Page 356

[1] further questions of the witness, Judge.

[3] CROSS EXAMINATION

[4] BY MR. ADAMS:

[5] Q: Ms. Shields, good afternoon. When Tom [6] was charged with a discipline offense, isn't it his [7] standard procedure to admit it when he did it?

[8] A: In some instances, I haven't been [9] present for all of them.

[10] Q: So you really don't know what went on in [11] those hearings that you're testifying about?

[12] A: I wasn't testifying about the hearings. [13] I was testifying about the written record and the [14] disciplinary offense reports that had been placed [15] in his file.

[16] Q: And you weren't at any of the hearings or [17] didn't hear the evidence used to produce those [18] reports. Is that correct?

[19] A: Some of them I have been present at, yes.

[20] Q: How many is some?

[21] A: I would have to go back and look at the [22] record. I don't know how many of those I [23] conducted. I remember one specifically. There may [24] have been more.

[25] Q: There has been about 20 in 20 years.

Page 357

[1] Correct?

[2] A: Yes.

[3] Q: You have been at one out of the 20 in the [4] last 20 years?

[5] A: I may have been present at more. I do [6] not know without going and looking at the actual [7] disciplinary.

[8] Q: So when you're testifying about the [9] reliability of an officer's findings, you're [10] stating that reliability is a matter of policy [11] rather than a matter of fact?

[12] A: Would you please repeat the question?

[13] Q: When you testified that these findings [14] are reliable, you're testifying the reliability is [15] a matter of procedure at your institution rather [16] than as a matter of fact of your own personal [17] knowledge. Correct?

[18] A: That is correct.

[19] Q: And are you going to disagree that Tom, [20]

Lawyer's Notes

out of these 20 DORs, has admitted guilt in about [21] 18 of them when he has been charged rather than [22] fighting them?

[23] A: I would have to relook at how he plead on [24] each of those.

[25] Q: So you can't disagree with that at this

Page 358

[1] point, can you?

[2] A: No, not without relooking at them.

[3] Q: You testified, ma'am, that the first five [4] pages which include these disciplinary offense [5] reports, the pleas, and the findings, were written [6] not by you or compiled by you, but rather were [7] compiled by the court's presentence investigator. [8] Is that true?

[9] A: That is correct. I had done one very [10] similar to that.

[11] Q: Do you see where there's differences [12] between what you made up from central file records [13] and from what is in those first five pages that you [14] were shown?

[15] A: The only difference that I saw was that [16] she put a lengthy description of the actual [17] offense, where all I did was list the specific [18] charge.

[19] Q: Do you know the source of the information [20] used by the investigator to provide information to [21] this judge that she didn't get from you?

[22] A: Yes. Actually, she did come to see me to [23] review a central file.

[24] Q: So she looked at the file and that's [25] where she got the information?

Page 359

[1] A: She went through his disciplinary offense [2] report. Yes.

[3] Q: That's information different than what [4] you gave her. Is that true?

[5] A: Pardon?

[6] Q: That's information different than what [7] you had given her. Is that right?

[8] A: Well, it would be the same. I mean, you [9] know, I had a piece of paper that outlined the [10] disciplinarys. And then she sat down and looked [11] through his file when she was there that day.

[12] MR. ADAMS: Thank you, ma'am, I don't have any [13] further questions.

[14] MR. BOURNE: Neither do I.

[15] THE COURT: Thank you very much. You may step [16] down, ma'am. Thank you for testifying.

[17] (The witness left the stand.)

[18] THE COURT: Mr. Bourne?

[19] MR. BOURNE: The state rests, Judge.

[20] THE COURT: Very well. The defense, what [21] procedure would you like?

[22] MR. KEHNE: Judge, if we could, why don't we [23] take a recess now and let Mr. Bourne look through [24] these letters and see which ones we can admit.

[25] And also I need to confer with co-counsel

Page 360

[1] and with the defendant.
[2] THE COURT: Very well. We'll take a [3] mid-afternoon recess.
[4] (Recess.)
[5] THE COURT: We'll again take up case number [6] 10252. By virtue of a pretrial conference, I [7] gather we were ready to take up the ruling in [8] regard to the documents that have been submitted [9] allowing them to be admitted as part of the [10] presentence report.
[11] Are there any objections to that, [12] Mr. Bourne?
[13] MR. BOURNE: Judge, there is not an objection [14] to the bulk of them. They come with a stipulation [15] from counsel and myself.
[16] There are several letters that refer to [17] the defendant, of course in a positive way, and [18] I'll just read the last name on them so you know [19] who we're talking about.
[20] Sheryl Conley, Luann Brewer, Sabra [21] Buck, Wynona Moran, Mary Mulligan, Tammy Silva, [22] And the defendant's wife, Sheryl Creech.
[23] And we would stipulate that none of those [24] people have ever had a face-the-face visit with the [25] defendant except the court's ordered visit between

Page 361

[1] the defendant and Sheryl Creech last week, I think [2] it was.
[3] So the stipulation is that they are [4] writing these things, but they have never met him [5] face-to-face. Now, of course, some of them have [6] spoken to him by phone and letter.
[7] THE COURT: Is it so stipulated?
[8] MR. KEHNE: Yes, Your Honor.
[9] THE COURT: The record will note the [10] stipulation.
[11] MR. BOURNE: And then the state objects to one [12] letter written by a woman named Kimberly Weimar, [13] W-e-i-m-a-r, which states an opinion against the [14] death penalty, but doesn't indicate that this [15] person has ever met or knows anything about the [16] defendant.
[17] THE COURT: Where is that letter in this [18] group?
[19] MR. BOURNE: I'll show you my copy to see what [20] it looks like.
[21] THE COURT: This is a copy of it, anyway. And [22] it is in this from group of documents?
[23] MR. BOURNE: I think so. It just doesn't [24] refer to the writer knows the defendant, only gives [25] an opinion on the death penalty, which I object to.

Page 362

[1] THE COURT: Counsel?
[2] MR. KEHNE: Apparently she didn't put that [3] right in the letter. My understanding from [4] Mr. Creech is that in fact this writer, [5] Ms. Weimar, is a friend of Sheryl and Tom Creech, [6] and she knows him, especially through Sheryl.
[7] THE COURT: Darned if I can find it in this [8] group of letters, however, that you gave me. Here

Lawyer's Notes

[9] it is, I found it, Excuse me. No, that's the [10] wrong one.
[11] MR. KEHNE: It's all in printing in block [12] letters, if that helps.
[13] THE COURT: It may be. Here, you look at it [14] and see if you can find it.
[15] I looked in there once, maybe I missed [16] it. All right. Very well, I have it in front of [17] me now, I apologize.
[18] Do you have a response? It certainly [19] doesn't say anything about any foundation other [20] than the fact that she feels vehemently against the [21] death sentence. I guess that's directed at me.
[22] MR. KEHNE: Judge, she didn't put it in the [23] letter. If required to, we can have her rewrite [24] that. I'll represent that she works with Sheryl [25] Creech and has known her through employment. And

Page 363

[1] through Sheryl she's spoken with Tom on three-way [2] telephone conversations.
[3] THE COURT: Are you satisfied, Mr. Bourne?
[4] MR. BOURNE: I don't have anything else to say [5] about it, Judge.
[6] THE COURT: Well, again, as I've said in [7] regard to your motion, this court - there's a lot [8] of matters in here that have such light relevance [9] the court is not going to consider. I think this [10] is very close to that area. But I'll allow it to [11] be marked and admitted and all these documents as [12] part of the presentence report, then, I gather all [13] you gentlemen will have it.
[14] Here, Mr. Bourne, I want you to keep your [15] copy because I think you want to study it.
[16] MR. BOURNE: Thank you, sir.
[17] THE COURT: Now, is there going to be any [18] further testimony by either parties?
[19] MR. KEHNE: We don't foresee any other [20] testimony. If we could have the end of the week to [21] submit some other written materials, and then set [22] another day for oral argument and allocution by the [23] defendant.
[24] THE COURT: Any objection to that procedure, [25] Mr. Bourne?

Page 364

[1] MR. BOURNE: No, Judge. Thank you.
[2] THE COURT: Well, I'll allow the defense to [3] submit any further documents into this matter.
[4] I'll set next Monday, March 27th, 1995, [5] at 9 o'clock for the oral argument in this matter, [6] all testimony having been submitted by Friday, and [7] matters in the presentence report.
[8] Since both firms are here in regard to [9] the Barnes case, I will formally move that to March [10] 29th, 1995 at 9 o'clock, which was heretofore set [11] on Monday.
[12] Is there anything further we ought to [13] take up in regard to this matter today?
[14] MR. BOURNE: Not from the state, Judge.
[15] MR. KEHNE: No, thank you.
[16] THE COURT: Thank you very much then. Court [17] is in recess.

[18] (Proceedings recessed at 3:20 p.m.)

Lawyer's Notes

BOISE, IDAHO
Monday, March 27, 1995
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Page 365

Lawyer's Notes

Page 368

[1] THE COURT: We'll take up case number 10252, [2] State of Idaho, plaintiff, versus Thomas Eugene [3] Creech.

[4] Now, as I understand it, gentlemen, the [5] procedure that we had in this matter was that we [6] would have all documents submitted to the court [7] that were going to be submitted to the court by [8] now, and we will take up arguments in this matter.

[9] MR. KEHNE: Judge, we have another affidavit.

[10] THE COURT: Very well. Any objections to the [11] filing of this affidavit?

[12] MR. BOURNE: Yes, I do, Judge. I have just [13] been given a copy of it just now and I'm partway [14] through it. What it appears to be is the affidavit [15] of the defendant, and I gather it's to support his [16] earlier motion to withdraw his guilty plea that I [17] think we heard last summer or last fall.

[18] Like I said, I haven't got all the way [19] through it, but it appears to be kind of an [20] affidavit. That, of course, is not subject to [21] cross examination in the present form, and it's not [22] been given in a situation where I can rebut it [23] through other extrinsic evidence, witnesses [24] testifying about what things really are about that [25] depends on the nature of this.

Page 367

[1] So I object to it being filed. The [2] matter that it refers to has been decided. The [3] motion to withdraw guilty plea was decided by the [4] Idaho Supreme Court years ago and has been denied [5] at this point as res judicata. I think this [6] basically back-door method of trying to get [7] uncorroborated and unsubstantiated testimony in, [8] not subject to cross examination, is improper.

[9] THE COURT: Let me read the affidavit and I'll [10] have a response on it.

[11] Very well. Any response you would like [12] the make?

[13] MR. KEHNE: Well, Judge, we don't think it [14] needs to be cross examined or disputed when it's [15] just presented to the court as an offer of proof. [16] We understand the court's ruling.

[17] The court's ruling was that the guilty [18] plea has been fully and finally decided by all the [19] courts in the nation.

[20] Our position was simply that res judicata [21] doesn't apply because a prejudgment motion to [22] withdraw a plea is judged by a different standard [23] than an after-judgment motion to withdraw a plea. [24] The different standard meaning that res judicata [25] doesn't apply.

[1] The courts disagreed. Mr. Bourne has [2] disagreed. But we think in order to preserve that [3] issue, argue on appeal, we should make an offer of [4] proof showing what we would have presented if given [5] the opportunity.

[6] Furthermore, we think that the [7] allegations in this affidavit are relevant to the [8] sentencing issues before the court.

[9] THE COURT: Well, I think under the Idaho law, [10] that the defendant has the right to present a [11] statement or submit evidence on his behalf at the [12] conclusion of all evidence.

[13] And I'm taking this affidavit in that [14] context, as a statement of Mr. Creech as if he [15] stood up and gave that to me personally. So I'm [16] going to allow it to be filed in that regard.

[17] Is there anything further we ought to [18] take up before closing argument?

[19] Very well. Mr. Bourne, I suspect that [20] you ought to proceed in regard to sentencing.

[21] MR. BOURNE: Thank you, Judge.

[22] Your Honor, as the court of course is [23] aware, I was not the attorney who handled the [24] original proceedings in this case. But I have done [25] all that I think I can do reasonably within the

Page 369

[1] last several months to become as informed as I can [2] on the prior proceedings and to read the court [3] cases and transcripts that deal with those things, [4] together with the presentence report and police [5] reports and other items that are attached.

[6] I have spoken to many people about the [7] case. I have personal knowledge of it back at the [8] time.

[9] I don't approach sentencing in a case [10] like this lightly. I don't approach it without a [11] good deal of thought as to what the appropriate [12] sentence is in light of the facts and in light of [13] the law and in light of what I understand the other [14] cases to be that are available that I can compare [15] these facts to.

[16] I've recommended the death penalty to the [17] court in writing before today and have given an [18] overview or a highlight of some of the facts that I [19] think support that. I'll try not to repeat any of [20] those, but after a reflection on the facts and the [21] law and the comparison of other cases, I believe [22] that the death penalty is proportionate and just [23] and is the appropriate one for this court to enter, [24] and that's why I recommend it.

[25] I'll make just a couple of comments about

Page 370

[1] the facts leading up to the defendant being in [2] prison in 1981 when this murder occurred. And one [3] thing that I'll point out to the court, though I [4] think the court is probably aware of it, the [5] presentence report that is the update that is [6] before the court right now leaves out one murder [7] conviction that is shown in the presentence report [8] from 1981, and I think it was just left out by [9] mistake.

[10] The defendant, in addition to being [11] convicted in Portland, Oregon in 1979 was also

[12] convicted of murder in Sacramento in 1980. [13] And that one, just by oversight, was left [14] out of this presentence. I spoke with the [15] presentence investigator about that. We checked [16] the older one and it's - just to make sure we were [17] right.

[18] Of course, the reason the defendant was [19] in prison in 1981 was from murder convictions that [20] occurred in Valley County in 1976. The defendant [21] and a woman were hitchhiking. They were picked up [22] by two men in a car in Valley County.

[23] They ultimately were able to get the car [24] stopped, get the man out, and the defendant shot [25] both of those men.

Page 371

[1] He was convicted by a jury, and Judge [2] Durtschi from this district sentenced the defendant [3] to death in 1976.

[4] Ultimately, the death penalty statutes [5] that were in effect at that time were ruled to be [6] unconstitutional. Actually the United States [7] Supreme Court ruled a similar statute [8] unconstitutional in another state.

[9] Our Supreme Court applying that ruling [10] invalidated the defendant's death penalty sentence, [11] and he was remanded for sentencing, which resulted [12] in a life sentence - two life sentences.

[13] The 1979 and 1980 murder convictions in [14] Oregon and California, he was also sentenced to [15] life, both of them being concurrent with the Idaho [16] sentences.

[17] In addition to those four convictions, or [18] the convictions for four different murders, the [19] defendant advised police officers where six more [20] bodies were that he said that he had killed, and [21] those bodies were found.

[22] I guess I should say that he indicated [23] that there were several more bodies. We only found [24] six, I guess is the way to say it. He says that he [25] is responsible for killing about 26 all together,

Page 372

[1] but not all those bodies could be found.

[2] Up to the time of 1980 - or '81 - not [3] counting Mr. Jensen, 10 bodies he could account [4] for.

[5] He was also tried in New Mexico for the [6] murder of a man named Schrader and was acquitted of [7] that murder. However, after the fact he admitted [8] he was the one who had done that despite the fact [9] there wasn't apparently enough evidence to convict [10] him.

[11] The murders that he has committed are a [12] variety of people. Some of the people that he has [13] killed have been apparently people kind of like he [14] was, people involved in drug trafficking, [15] motorcycle gang members, those types of people.

[16] Some people were not people like him, [17] including one woman he was convicted for, was [18] apparently a clerk in a convenience store that he [19] murdered during the robbery. I think that's the [20] one he was convicted of in either California or [21] Oregon; I've forgotten which.

[22] The defendant has murdered many people [23] for many reasons. He sometimes thinks and sort of

Lawyer's Notes

[24] claims, and that's sort of his reputation, is that [25] he only kills people who he thinks deserve it, of

Page 373

[1] course, which doesn't apply to the woman who was [2] the clerk in the convenience store during the [3] robbery attempt.

[4] But some people he thinks ought to be [5] killed and has kind of his own sense of justice [6] about that.

[7] That basically brings us up to 1981. The [8] defendant, of course, was incarcerated in 1974. [9] '75, I think, is when he killed the two people in [10] Valley County and has been in prison these 20 years [11] since that time.

[12] When he was in prison in 1981 and was put [13] on the same tier with David Jensen, there has been [14] a fair amount of talk about what brought that [15] murder to happen, what caused those facts to all [16] come together that resulted in that murder [17] occurring.

[18] The defendant has told some variations of [19] the story. And, of course, the Supreme Court has [20] made some reference to that. And today's story in [21] the affidavit that he gave the court is a [22] variation.

[23] However, the variations are only [24] variations on the theme. Basically, what has [25] happened is that he's told parts of the story at

Page 374

[1] various times, making the story look like it was [2] self-defense when in fact it was set up to look [3] like self-defense from the beginning but never [4] really was self-defense.

[5] And so his story that Mr. Jensen was [6] pouring syrup on the floor and that's what caused [7] this, or that the defendant attacked him and that's [8] what caused this to happen, or that his honor was [9] on the line because he needed to make a clear [10] showing that he was capable of defending himself [11] are all only parts of the story.

[12] He told the true story, which included [13] all those other things, included the syrup on the [14] floor, included Mr. Jensen attacking him with the [15] razor blade and the socks with batteries in them, [16] and they were only part of the story.

[17] But this crime was set up to look like a [18] self-defense claim, and that's the reason he's able [19] to tell the story which is truthful - Jensen [20] attacked me with the sock and the batteries - but [21] untruthful by not telling the court what really did [22] happen.

[23] And with the court's permission, I'm [24] going to read just a few excerpts of statements the [25] defendant made which make it clear that this was a

Page 375

[1] plan from the beginning.

[2] The defendant says to Sheriff Palmer in [3] one of the interviews that's contained in the [4] presentence report, and he says: "So anyways, then [5] Bud," and of course the court recalls that Bud is [6] another inmate, was at that time, in the [7] penitentiary, Bud Balla - "then Bud tells me that, [8] you know, if I got into it with this guy," [9] referring to Jensen, "instead of just," and then [10] using the F

word, "fucking him up, why didn't I [11] just go ahead and kill him. And that way that he [12] could testify against me in court, and he could [13] beat his charges that's coming up Monday on escape [14] charges and assault charges that he's got and the [15] rest of his time."

[16] And then the sheriff says to him: "So [17] Balla then told you if you would kill... Jensen, [18] that he could make a deal with the cops and the [19] prosecutor by testifying on your killing him?"

[20] And Creech says: "Right, right," that's [21] what was going to happen.

[22] And Palmer then asks: "What was you [23] going to get out of it?"

[24] This is what Mr. Creech says, referring [25] to Balla again: "He was going to write to the

Page 376

[1] people in California that gives me money and stuff [2] for making sure nobody bothers Shannon" - Shannon [3] was another inmate - "and tell them that they [4] should do me right, better than what they have been [5] doing.

[6] "And plus... he had \$150 that he just got [7] in the mail and he said that he would have that [8] sent out and put on my books and that he would make [9] sure that I had money and stuff all the time, and [10] that even with - once you guys let him go, he [11] would come back and help me escape if I wanted him [12] to, and set things up to go to Canada where he was [13] headed for.

[14] "And so then he asked me to go down and [15] get something that - because he was gonna put [16] Jensen up to fight with me. So I went down and got [17] the batteries and stuff and the two socks."

[18] So here is the plan. If Mr. Creech will [19] kill Jensen, Mr. Balla will give Mr. Creech \$150 [20] and help him escape, talk to these other people who [21] send Creech money to have them send him more money, [22] and then Balla can use that, his cooperation, for [23] leverage on his own charges.

[24] And then, of course, the officer asked: [25] "Were those yours?"

Page 377

[1] And Creech says: "The batteries?" [2] The officer says: Yeah.

[3] Mr. Creech says: "No, the batteries were [4] Alonzo's... and the socks were mine."

[5] Now, that's the setup, that's the plan [6] for the beginning. And to make sure it works, this [7] is what Mr. Creech goes on to say: "And I take 'em [8] up and I give 'em to him... and then yesterday when [9] it all happened, he'd given 'em to Jensen, that is, [10] the socks and batteries, and had Jensen come up to [11] me when I was fixing coffee and swing at me.

[12] "And it was supposed to happen right [13] there but I didn't know that it was supposed to [14] happen there.

[15] "So I took 'em away from him and punched [16] him. And I think then Jensen kinda got the feeling [17] that maybe something was wrong or something, 'cause [18] he did go up to the crash gate like he was gonna [19] tell the cops. And I made him get away from the [20] gate."

[21] So not only was there a plan, but, in [22] addition to the plan, the steps were made to carry

Lawyer's Notes

[23] the plan out, setting up Mr. Jensen, transferring [24] the sock with the batteries, and keeping him away [25] from the gate where he would tell the police that

Page 378

[1] he was in over his head.

[2] "Then he," meaning Jensen, "went and [3] showered, like I said he did. And while he was in [4] the shower, Bud says that I should give him [5] something else, and he was gonna tell him to come [6] down and get me.

[7] "So I went down and got a razor blade [8] and toothbrush outa my cell and some wire and gave [9] it to Bud and he fixed the - wiring up the razor [10] blade to the toothbrush, and gave it to Jensen when [11] he came back out of the shower.

[12] "And then I was waiting. I had a towel [13] with the batteries behind the towel in this hand, [14] and behind me like this, and while Jensen was in [15] the shower I'd already covered up his window, that [16] little window in the back."

[17] So the plan was, Jensen comes out of the [18] shower and he is given the razor blade hooked onto [19] the toothbrush. Mr. Creech already has covered up [20] Mr. Jensen's window in his cell so nobody can see [21] what's happening.

[22] Mr. Creech is waiting there with the sock [23] and batteries covered up with the towel.

[24] "And he went in his cell and he was [25] combing his hair. And I already knew that he was

Page 379

[1] gonna come out with the thing. And I was waiting [2] for him to come out. And when he come out, I had [3] the thing in this hand, the batteries and the [4] towel."

[5] So to claim now or even to claim then [6] that this was self-defense is certainly lying by [7] omission. He's leaving out all of the facts that [8] go with the story.

[9] And so to say that there have been [10] variations on this story is true, if you ignore the [11] fact that the variations are just part of the [12] whole. Right. It was self-defense because it was [13] set up to look like that.

[14] Jensen came out with the items that he [15] had been put up to use and given.

[16] But was it truly self-defense? And this [17] is what Mr. Creech said. Mr. Creech goes on to [18] say, and this is at page 14 of the transcript [19] that's attached to the presentence report, [20] Mr. Creech said: "He was swinging it, making [21] motions with it. He couldn't have really hurt me [22] real bad. If he woulda hit me hard, it woulda [23] probably cut me pretty good 'cause it was a [24] brand-new blade."

[25] And Palmer said: "He's kinda spastic, or

Page 380

[1] something. He doesn't have good control."

[2] And Creech said: "Well, his one side, [3] one of his arms is kinda," using the F word, [4] "fucked up and he shakes and bounces around."

[5] And then goes on to say: "I didn't think [6] he could do me any harm." That's what he said on [7] page 15.

[8] Now, it's pretty clear that Mr. Creech [9] wasn't

Lawyer's Notes

afraid of Mr. Jensen. He wasn't afraid of (10) him, even from the standpoint he was going to punch (11) him and hurt him, or even that the weapons would (12) hurt him.

(13) This was a setup to get gain. He was (14) killing him for gain for himself.

(15) Now, the defendant has now said in this (16) affidavit today that it has to do with his (17) reputation, but he wasn't afraid of this (18) defendant. And what's more, he was already in the (19) penitentiary for having killed four other people.

(20) If that's not reason enough to make his (21) reputation good, I don't know what is.

(22) Well, then, I've read the next part to (23) the court, actually to Dr. Brown on cross (24) examination, where he says, on page 15: "And then (25) he went down, like I told you, and I hit him a few

Page 381

(1) more times and the battery thing busted. Then I (2) kicked him and the blade flew and the thing went (3) underneath the shutter and he started trying to get (4) back up like that."

(5) The fight is over. He's already hit (6) Jensen, Jensen is down, now he's kicking him.

(7) And he says: "And, okay, I kicked him a (8) couple more times and he was laying there bleeding (9) real bad and breathing real funny.

(10) "And I came outa the cell and I went (11) down to my cell and looked at myself and started to (12) wash up. And I went up and told Bud, I said, What (13) should I do?

(14) "And I walked up to Bud's cell and he (15) says that I should go back down. And right about (16) that time, he heard Jensen down there, and he said, (17) You didn't kill him.

(18) "And I said no, he's probably, he's (19) gonna die, though, because he's all fucked up. And (20) he said I should go back in there again. So I went (21) back in there and checked him and I stomped his (22) throat real hard."

(23) Now, there has been talk before this, I (24) know in the court's earlier opinion and findings by (25) the Supreme Court, about whether or not this was

Page 382

(1) some -- I mean the what the court refers to as an (2) execution or assassination. And there's some (3) question about whether the defendant, at least in (4) the Supreme Court's mind, whether the defendant had (5) the intent to kill or whether this court actually (6) found that there was an intent to kill.

(7) And yet it's clear from what the (8) defendant said that this was a setup from the (9) beginning and that he intended to kill him with the (10) battery and socks. He knocked him down and then he (11) kicked him. Then he left, went to his cell, got (12) cleaned up, talked to Mr. Balla. Balla said, "You (13) better make sure he's dead." And so he went back (14) and stomped his throat.

(15) There's absolutely no question but that (16) the defendant had the intent to kill. That when he (17) started out on this enterprise, he had the intent (18) to kill. He carried it all through until after he

(19) got cleaned up and then went back and put the (20) finishing touches on Mr. Jensen who was down and (21) was probably already dying.

(22) And I ask the court to find beyond a (23) reasonable doubt that the defendant had the intent (24) to kill and clearly set that out.

(25) Now, Judge, regardless of what else the

Page 383

(1) defendant had done up to that point, or how many (2) people he had killed, if we knew nothing more about (3) him than these facts, the death penalty would be (4) justified.

(5) Justice O'Connor of the United States (6) Supreme Court in reviewing this case said: "The (7) facts underlying their case could not be more (8) chilling."

(9) In 1981 the Idaho Supreme Court said in (10) State versus Osborn: "That the phrase 'utter (11) disregard' is meant to be reflective of acts or (12) circumstances surrounding the crime which exhibit (13) the highest, the utmost, callous disregard for (14) human life, i.e., the cold-blooded, pitiless (15) slayer."

(16) It's hard to imagine facts that any more (17) completely describe utter disregard for human life (18) than these facts do.

(19) We're not talking here about Mr. Jensen (20) who was on the same level as Mr. Creech. (21) Mr. Jensen never killed anybody.

(22) The most violence that I can tell from (23) the presentence is that he apparently tried to kill (24) himself some years before this occurred, was (25) unsuccessful.

Page 384

(1) But the effect of it was to put a plastic (2) plate in his head and to cause one of his sides to (3) be partially paralyzed so that he was spastic, more (4) or less, as referred to by Sheriff Palmer.

(5) He was a car thief, and he got put into a (6) place where he shouldn't have been. Mr. Creech was (7) given privileges that he shouldn't have had. And (8) Mr. Jensen was manipulated by other inmates who (9) were stronger than he was.

(10) This court correctly found this (11) aggravating circumstance of 'utter disregard' beyond (12) a reasonable doubt and was upheld in that finding (13) by the highest court of this state and by the (14) highest court in the land, the United States (15) Supreme Court.

(16) These facts justified that finding beyond (17) a reasonable doubt in 1982, and they continue to (18) justify a finding of that in 1995.

(19) The facts that I've set before the court, (20) and that the court knows from the presentence (21) report, are proof beyond a reasonable doubt on the (22) other aggravating circumstances.

(23) Besides utter disregard for human life, (24) they justify that the defendant has previously or (25) was previously convicted of another murder before

Page 385

(1) he killed Mr. Jensen.

(2) Of course, he had killed four other (3) people before he had -- and had been convicted of (4) those -- before he killed Mr. Jensen.

Lawyer's Notes

[5] That the murder was murder of the [6] first-degree in that the defendant was under a [7] sentence for murder, of course which he was in for, [8] and that he killed a fellow inmate, which [9] Mr. Jensen of course was, and, as set out from the [10] defendant's own mouth, that he had the specific [11] intent to kill.

[12] I would ask the court to make those [13] findings.

[14] Additionally, they justify that the [15] defendant has exhibited a propensity to murder [16] which will probably constitute a continuing threat [17] to society.

[18] The defendant's number of murders in the [19] past is a good indicator of future behavior. In [20] 1981 the defendant had said that there were certain [21] people outside the prison that he would kill if he [22] was released which, of course, was completely in [23] keeping with his prior behavior.

[24] He also said if he were sent to prison, [25] he would kill because he liked the Ada County Jail

Page 386

[1] better. And once he got back out, within a year he [2] had stabbed an inmate that was in the prison there [3] with him, that inmate named Beam. He stabbed and [4] slashed him as Beam tried to get into the [5] defendant's exercise cage, apparently at the [6] defendant's invitation.

[7] The defendant has threatened to kill [8] several other people, including Sivak, including [9] Woods, and other inmates that he's threatened at [10] the penitentiary.

[11] As part of the evidence that the court [12] has heard, the defendant was given what's called [13] the Hare, H-a-r-e, test - that's the last name of [14] the man who put that test together - and he tested [15] the defendant against other inmates in the prison [16] population.

[17] And they find that the defendant's [18] tendencies are greater than 96 percent of the [19] inmate population, his psychopathic tendencies that [20] is. It measures antisocial behavior and [21] callousness, lack of remorse.

[22] And so basically it shows that the [23] propensity that he had in 1981, which the court [24] found, is the same now. This isn't a new Creech. [25] This is the same Creech in 1995 as it was in 1991.

Page 387

[1] The reason that he hasn't injured anybody [2] in the last several years is basically because he [3] can't. Because of the close-management system [4] there, he is not able to get to anybody else except [5] prison officials. And I'll speak to that in a [6] minute.

[7] But he never leaves his cell without [8] being in chains and with two guards, one on each [9] side of him. He hasn't got access to victims and [10] hasn't got access to weapons.

[11] Based on those facts, the Idaho Supreme [12] Court said of Creech in 1983 in that opinion at 105 [13] Idaho: "We hold that none of these recent Idaho [14] murder decisions militates towards the granting of [15] leniency in the present case.

[16] "We find no instance in which a [17] defendant

found guilty of such previous crimes, as [18] those of which Thomas Creech has been found, [19] deserving of a sentence less than death.

[20] "We have examined cases dating back more [21] than 50 years, and our examination fails to [22] disclose that any such remorseless, calculating, [23] cold-blooded, multiple murder has ever been before [24] this court."

[25] And then they say in parentheses: "With

Page 388

[1] the exception of Creech One," which was the case [2] that was before the court reviewing the 1975 [3] murders in Valley County. "We hold that the death [4] penalty imposed in this case is both proportionate [5] and just."

[6] The death sentence was proportionate and [7] just in 1982, and the question that the court needs [8] to answer of course today is whether it continues [9] to be proportionate and just. And I'll tell the [10] court that the answer is yes.

[11] This case has been on hold for the last [12] 12 years to see if the defendant has any mitigation [13] that the court could weigh against the aggravating [14] evidence that would overcome the volume of evidence [15] supporting those aggravating circumstances.

[16] My review of the evidence that we've [17] heard in this hearing and that is part of the [18] presentence report is this: That the defendant can [19] write poetry and songs, and in 1983, when that tape [20] was made, had a nice singing voice.

[21] The fact that he can write poetry and [22] songs is not new. The court knew that back in 1982 [23] when it rendered the death penalty then. There's [24] no question about it; he does have that ability.

[25] And as a matter of fact, when I hear

Page 389

[1] these tapes, this tape that we heard last week, [2] he's writing songs about Jesus, he's singing them, [3] he seems to be sincere.

[4] But apparently the fact that he sings of [5] Christ doesn't mean much about whether or not he [6] has internalized Christian teachings and virtue, [7] because between 1983 and the present while he was [8] singing songs about Jesus, he had 20 disciplinary [9] offenses, including the stabbing and slashing of [10] inmate Beam, hiding weapons and other contraband, [11] and threatening other inmates, which is not an [12] indication that he has changed his life or really [13] meant the things that he was singing about then [14] despite the fact that he appears to be sincere and [15] sings those songs.

[16] And I suggest that that mitigation, to [17] the extent that it is mitigation, does not outweigh [18] anything, but as a matter of fact is more hypocrisy [19] than anything because he continues to sing and [20] espouses one belief while his life shows another.

[21] Mitigation number two. In the last five [22] years since the defendant moved into the maximum [23] security institution, he hasn't hurt anybody, which [24] is true. Since 1989 he hasn't hurt anybody and [25] hasn't had any weapons, hasn't been found with any

IN THE SUPREME COURT OF THE STATE OF IDAHO

THE STATE OF IDAHO,
Plaintiff-Respondent,
vs.
THOMAS EUGENE CREECH,
Defendant-Appellant.

No. 14480

Appealed from the District Court of the
Fourth Judicial District of the State of Idaho,
in and for the County of Ada, Honorable
Robert G. Newhouse, District Judge presiding.

ROLF M. KEHNE
Ada County Public Defender
Boise, Idaho
Attorney for Appellant

DAVID LEROY
Attorney General
State of Idaho
Attorney for Respondent

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EXHIBIT B-5

VOLUME II

Pages 90 through 269

THE COURT REPORTERS

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689

1 JOHN W. STONER,
2 produced as a witness at the instance of the
3 defendant, being first duly sworn, was examined and
4 testified as follows:

5
6 DIRECT EXAMINATION

7 BY MR. KEHNE:

8 Q For the record, will you state your full
9 name and spell your last?

10 A John William Stoner, S-t-o-n-e-r.

11 Q What's your occupation?

12 A Psychologist.

13 Q Where do you practice?

14 A Here in Boise.

15 Q Will you tell the Court your educational
16 qualifications for the practice of psychology?

17 A BA in psychology, the College of Idaho,
18 1965. MS in vocational rehabilitation counseling,
19 1967. And a PhD, counseling psychology, University
20 of Utah, 1970.

21 Q In the course of acquiring your PhD, were
22 you required to do any practical type training
23 programs under other people's supervision?

24 A Yes, several of them.

25 Q Will you name some of those for the Court?

1 A Did an internship in vocational counseling
2 at the Employment Security office in Salt Lake City
3 for a year, and then spent three years in a clinical
4 internship at the VA Hospital in Salt Lake City
5 working in a neuropsychiatric unit dealing with
6 grossly psychotic and brain injured people.

7 Q Other than your present practice in
8 psychology, what other positions have you held in
9 a professional nature?

10 A From 1970 to 1976, I was an assistant and
11 then associate professor of psychology at the College
12 of Idaho, Caldwell.

13 Q Have you practiced any other place other
14 than Boise?

15 A I had a private practice in Caldwell
16 before moving my practice to Boise approximately one
17 year ago.

18 Q Are you a member of any professional
19 organizations?

20 A Yes. I am a member of the Idaho
21 Psychological Association and the American
22 Psychological Association.

23 Q Do you have any professional licenses to
24 practice in Idaho?

25 A Yes. I have License 47 for the State of

1 Idaho. I am a licensed psychologist.

2 Q Have you been an officer or a member of
3 any boards of professional organizations?

4 A Yes. I was treasurer and three or four
5 times a member at large of the executive committee
6 of the State Psychological Association. I am past
7 chairman of the State Licensing Board and currently
8 still a member and secretary of that board.

9 Q Do you know the person seated beside me,
10 the defendant Thomas Creech?

11 A I do.

12 Q How is it that you know him?

13 A I examined him in my office. I have to
14 look up the date.

15 Q Go ahead.

16 A In August. On August 6th of 1981. I
17 subsequently examined him two other times here at
18 the county jail.

19 Q About how long did you see him on these
20 various occasions?

21 A The first occasion about three hours,
22 and the second one again about three hours, and the
23 third one as I recall it was about two hours.

24 Q Have you associated yourself with or
25 worked with any other mental health professional in

1 coming to a diagnosis of Mr. Creech?

2 A Yes. I requested that Dr. Steve Thurber
3 do a Reitan, which is a neuropsychological evaluation,
4 of Mr. Creech, and talked to Dr. Thurber about the
5 results of that.

6 Q Can you describe for the Court what a
7 neuropsychological evaluation is and what it entails?

8 A Yes. The Reitan is a collection of tests
9 involving eye-hand coordination, tests of lateral
10 dominance.

11 Q Will you describe that and explain that
12 a little bit, Doctor, lateral dominance?

13 A Yes. It's a test of things like what
14 side of the brain tends to be controlling most of
15 your action or tends to be the dominant side of the
16 perceptions and so on. It's a test of reaction,
17 speed; generally they test all of the things that can
18 be related to brain function.

19 The results of the test then are a
20 description on a functional level of brain reactions
21 or brain functions.

22 Q You reviewed Dr. Thurber's results in
23 forming your own opinions?

24 A I discussed them with him, yes.

25 Q What tests did you yourself administer

1 to Mr. Creech?

2 A Gave him a fairly extensive battery that
3 included the Minnesota Multiphasic Personality
4 Inventory.

5 Q Can you describe that to the Court and
6 tell what types of things you learned from it?

7 A Sure. It's a 566 item true and false
8 test, a wide range of questions from physical
9 functions to hallucinatory experiences, values,
10 attitudes and so on.

11 The test has a general format of things
12 like, "I like mechanics magazines, true or false."

13 The results then are compared with what
14 normal and pathological people say to those
15 particular items and presents us then with a profile
16 of the extent of which an individual is similar to
17 various identified pathological groups.

18 Q Are you aware of any research that has
19 been done on the MMPI?

20 A Yes. MMPI is the most researched of all
21 psychological tests. There are literally thousands
22 of research articles a year on it.

23 Q Do you keep yourself abreast of that
24 literature, that research literature on the MMPI?

25 A Heavens no.

1 Q What other tests do you give?

2 A The California Psychological Inventory,
3 which is a test of similar design to the MMPI. But
4 instead of measuring the pathological traits like
5 schizophrenia and so on which is what the MMPI
6 measures, CPI measures what are called folk traits,
7 common sense aspects of the personality that make
8 more sense in describing normal range of human
9 function, things like dominance, femininity or
10 masculinity, capacity for status, sense of
11 responsibility and so on.

12 Q What other tests did you give Mr. Creech?

13 A Word Preference Personality Inventory.
14 Do you want each of these gone through in kind of
15 detail?

16 The Word Preference Personality Inventory
17 is a projective in which an individual is asked to
18 make compared judgments of preference between various
19 words.

20 When the results are summed together,
21 then you have a profile of the individual's
22 attitudes and feelings regarding various
23 constellations, their attitudes about interpersonal
24 relationships, attitudes about passivity or
25 aggressiveness and submission, optimism, those kinds

1 of values rather than the standard personality traits.

2 Q Go ahead, just list the tests.

3 A The next one is the Eysench Personality
4 Inventory which is a short screening test of
5 personality that breaks it into just some broad
6 general categories.

7 The Eysench measures the trait of
8 introversion or extroversion and neuroticism.

9 The next test was the Fear Inventory
10 which is, as the title would suggest, a long
11 collection of things that people can be afraid of.
12 The response to this is simply to go through and
13 indicate what things and to what degree you experience
14 fear to these items.

15 The next one is the Rotter Incomplete
16 Sentences. That's a projective personality test
17 which an individual was asked to complete various
18 sentences in which the first one or two words are
19 provided.

20 "I like" and then you have to finish out
21 with whatever comes to their mind first.

22 Graham Kendall Memory for Designs is a
23 screening test for organic brain damage, a test of
24 short term visual memory in which the individual
25 is required to look at a stimulus card for five

1 seconds. The card is then put away and they are asked
2 to reproduce a simple line drawing from memory. He
3 was given the Gorham Proverbs Test, two different
4 forms because I didn't -- the first one was a test
5 that required a lot of reading, and because I wasn't
6 sure I trusted those results, I readministered in a
7 clinical form in which all he had to do was tell me
8 what the meaning of proverbs were.

9 The Shipley Hartford is a quick scoring
10 test of intelligence. He was also given the
11 immediate test which is a similar test of
12 intelligence. It's a brief screening test.

13 Because of the response that I got to
14 those two, I gave him a Weschler Adult Intelligence
15 Scale which is the professional standard for
16 intelligence tests.

17 The latter is the one on which most of the
18 data is based because it's by far the most reliable.

19 Q Does the Weschler Adult Intelligence
20 Scale Test give you information other than just an
21 IQ score?

22 A Certainly. The Weschler is actually a
23 collection of about 11 different tests that are
24 related to intelligence and measures out intelligence
25 in various kinds of spheres.

1 The two largest, of course, is the
2 verbal intelligence area which are those intelligence
3 traits most closely aligned to academic performance.
4 It also then measures performance intelligence, the
5 performance IQ being how quickly you learn on a
6 nonverbal level, how quickly you learn from doing or
7 learning to make perceptual associations.

8 Q Did you review any other material
9 concerning Mr. Creech in forming your opinions?
10 For instance, have you seen the presentence
11 investigation?

12 A I have not seen the presentence
13 investigation. I have seen other materials. At the
14 time that I wrote my formal evaluation, I had not
15 seen other outside evidence other than my own testing.

16 I then completed my evaluation, and
17 subsequent to that, your office provided me with
18 earlier transcripts of interviews that had been done
19 and some testing that had been done down in
20 California I believe in a previous incarceration.

21 Q Did you discuss your contacts with
22 Mr. Creech with any mental health professionals other
23 than Dr. Thurber? Have you had the occasion, for
24 instance, to talk it over with Dr. Heyrend who
25 testified earlier?

1 A Did discuss it with Dr. Heyrend briefly.

2 Q Based on all these contacts with
3 Mr. Creech, were you able to arrive at any diagnosis?

4 A Yes. I arrived at a number of them.

5 Q Let's start with what was the primary
6 diagnosis?

7 A The primary diagnosis is antisocial
8 personality disorder.

9 Q To the extent you can, would you describe
10 that in laymen's terms emphasizing mostly how a
11 person with that disorder differs from normal people?

12 A The antisocial personality disorder is a
13 dysfunction that occurs -- it's commonly seen as the
14 criminal personality.

15 Individuals with this personality tend
16 to be impulsive, lack empathy with other people, do
17 not learn from punishment, have a long history of
18 antisocial acting out which extends back into early
19 adolescence, and will fairly consistently demonstrate
20 this pattern repeatedly without learning from past
21 experience or adverse consequences.

22 The pathology seems to be a defect in
23 the ability to learn from pain or to learn from
24 adverse experience so that they never learn to stop
25 doing that.

210

Stoner-Def-Di

788

1 They fail to develop what's called
2 anticipatory anxiety, so that the anticipation of an
3 adverse consequence is not particularly upsetting to
4 them.

5 Anticipatory anxieties are principal
6 socializing emotion if you will. Most of us when we
7 contemplate breaking a rule or sanction feel very
8 uncomfortable and, in fact, that discomfort is strong
9 enough that most of the time those thoughts don't
10 even occur to us.

11 We manage to feel our way through life
12 having developed a lot of conscience if you will
13 which has as its sword or its principal motivator
14 this anticipatory anxiety, the bad feelings of
15 anticipating a violation of a rule or conviction.

16 With that deficit then, without the
17 anticipatory anxiety, Mr. Creech cannot consider very
18 well future consequences to his behavior. While he
19 may verbally or intellectually understand them, they
20 have very little impact on his behavior.

21 Similarly, past experience has very little
22 impact on his behavior because he doesn't carry that
23 along with him. He doesn't learn or associate
24 unpleasant experience on the basis of past
25 punishments. So that does not also influence current

1 behavior.

2 He tends to differentiate between he and
3 normal people, tends to be almost entirely controlled
4 by the demands of immediate situation. Whatever his
5 mood is at the moment, whatever the situational
6 demands are at that moment will determine how he will
7 act rather than long term consequences to his
8 behavior.

9 Q Would you say this inability to develop
10 anticipatory anxiety responses is in the nature of a
11 learning deficit?

12 A Yes.

13 Q Is that something that is, at least if
14 the person is sensitive enough, is that something that
15 is observable with people at a young age?

16 A This particular kind of learning deficit?

17 Q Yes.

18 A It seems to be highly associated with
19 what's now known as mental brain dysfunction in
20 children, yes.

21 Q What ages does it seem to show up?

22 A We can make a fairly good diagnosis by
23 age six. Some people suggest it can be done by age
24 two.

25 Q Has there yet been found a neurological

1 basis for the deficit?

2 A Nothing clearly established.

3 Q What other diagnosis did you place on
4 Mr. Creech?

5 A The other two diagnoses were schizotypal
6 personality disorder which is sort of similar to
7 what Dr. Heyrend was referring to this morning as,
8 what did he call it, schizophrenia form or
9 schizophrenogenic personality. The other one is a
10 borderline personality disorder.

11 Q What would be the characteristics of the
12 schizotypal personality disorder?

13 A Schizotypal, t-y-p-a-l, the schizotypal
14 personality disorder is an individual who has a lot
15 of schizoid traits that is withdrawal, isolation,
16 feeling of being out of step with the rest of the
17 world; who also have some fairly marked bizarre
18 elements of thinking but is not so out of touch with
19 reality as to warrant formal diagnosis of
20 schizophrenic.

21 Q Did you observe in Mr. Creech some
22 bizarre thinking?

23 A I have a considerable list of things that
24 he presented as bizarre thinking. Probably most
25 important was his report to me of being possessed by

1 several different kinds of spirits, including a good
2 spirit and a bad spirit and occasionally by the
3 spirit of Tommy, who is his deceased ex-wife.

4 He reports believing that he could have
5 out of body experiences in which he leaves his body
6 as pure energy; that he intended to kill -- excuse
7 me. I will remember the prisoner's name, Shannon --
8 while he was here in the jail by leaving the local
9 facilities in the form of pure energy and going out
10 to the prison to kill Shannon.

11 Those are clearly -- even if they are not
12 hallucinatory experiences, and if they are not
13 believed to the extent of being formal delusions,
14 clearly constitute magical thinking in a rather
15 bizarre organization.

16 Q And the other diagnosis was borderline
17 personality?

18 A Borderline personality.

19 Q Would you describe the characteristics
20 of someone who gets that diagnosis?

21 A Borderline personality is somebody who
22 doesn't have it together now and never did. It's
23 again just a general label that's applied to someone
24 who chronically functions at a very marginal level,
25 who has difficulty following through in an organized
26 coherent way in most activities, who doesn't develop

214

Stoner-Def-Di

792

1 good or effective interpersonal relationships, who
2 are subject to rapid shifts in mood, including a
3 great deal of difficulty dealing with danger in a
4 modulated and controlled way.

5 Q Based on what you understand of Mr. Creech,
6 how would you predict he would confront the legal
7 system and intelligently exercise his rights?

8 A I don't think I could predict it or
9 anyone else could predict it at any given moment what
10 Mr. Creech is likely to do when facing the judicial
11 system.

12 Q How would you predict that he would be
13 different from normal people in confronting the legal
14 system or deciding whether or not to stand on a right
15 or waive a right and so forth, interact with counsel?

16 A A normal individual, the classificational
17 manner of our legal system is one who would weigh
18 his options, consider carefully what's likely to
19 happen as a result of his behavior, would interact
20 with counsel in a way that would permit both he and
21 his counsel to sort of project what his best
22 position would be in dealing with the legal system.

23 He would tend to act in a way that would
24 be in his own best interests.

25 Mr. Creech on the other hand is likely to

1 be responsive to momentary internal states that are
2 really not related at all to the legal proceedings
3 per se. And his responses then facing the court
4 would be a function of such things as whether or not
5 he is depressed at the particular moment that he is
6 confronting the court, be controlled by such things
7 as what he had for breakfast and who he talked to
8 before he walked into court.

9 If he is feeling particularly generous
10 that day, he is going to make one response. If he
11 is feeling down and sad, he is apt to make a
12 different one.

13 Q Would you predict that he would make
14 decisions concerning his rights in the legal system
15 with full appreciation of the long term consequences
16 of his decisions?

17 A No. It would be very difficult for him
18 to do that at least in any sense that a normal
19 individual would make those decisions or appreciate
20 future consequences.

21 Q If he was temporarily depressed or
22 suicidal, how would you predict that would affect his
23 behavior toward the legal system?

24 A If he was depressed or suicidal, he would
25 be far more apt to plead guilty, make those responses

1 that look like they are going to bring the thing to
2 its most rapid conclusion.

3 Q If he were temporarily depressed, would
4 you have an opinion about the reliability of his
5 statements concerning the facts if he decided to
6 plead guilty while he was depressed?

7 A I believe Mr. Creech would be essentially
8 an unreliable informant in almost any set of
9 circumstances, including whether or not he was
10 depressed or not. But that he would tend to skew his
11 story or his presentation of the facts in any way that
12 happened to meet his needs at the moment.

13 Q So if his momentary desire was to die,
14 then how would that affect the accuracy of his
15 statement of the facts?

16 A He would be prone to emphasize those
17 elements most likely to bring that about, and if
18 those were not there, he is potentially able to
19 fabricate elements to bring that about.

20 Q Did you and he discuss the actual incident
21 involving Mr. Jensen?

22 A We did.

23 Q Did he give you a version of what happened
24 and why it happened and so forth?

25 A He did.

1 Q Are you aware of whether or not he has
2 given other conflicting versions?

3 A Yes. I am aware that he has given
4 conflicting versions.

5 Q Are you aware basically of how they
6 conflict, about the content of the different versions?

7 A There are at least two that I can
8 articulate as to what their general theme was.

9 Q Will you first describe the version he
10 related to you?

11 A The version he had related to me is
12 essentially the one that included self-defense; that
13 is, that he was assaulted by Mr. Jensen. He then
14 disarmed Mr. Jensen, took the batteries and sock away
15 from him.

16 That they later returned and he was in
17 front of Mr. Jensen's cell; that Jensen cut him or
18 stabbed him with a razor blade, as I recall.

19 He then still had the sock and batteries
20 in his hand from having disarmed him earlier, swung
21 and hit him in the head and started beating on him.
22 In his version to me, he then reported that he wanted
23 to quit, but that the evil one had taken over and
24 would not let him quit, and continued to beat
25 Mr. Jensen.

1 Q Is that version consistent with what you
2 know of Mr. Creech from your interviews and the
3 psychological tests you have reviewed?

4 A There is certainly nothing in that story
5 that was inconsistent with the results of the test.

6 Q Based on your discussions with Mr. Creech
7 and the test results and everything else you have
8 considered about him, do you have an opinion about
9 his ability to appreciate the wrongfulness of his
10 actions during the course of the beating of
11 Mr. Jensen and also his ability to or his capacity to
12 conform this conduct to the requirements of the law?

13 A Yes.

14 Q What would that opinion be?

15 A Assuming the story that I just related,
16 Mr. Creech would have been able to appreciate the
17 wrongfulness of the act but would not have seen that
18 act as wrongful in attempting to disarm and defend
19 himself against an attack by Mr. Jensen.

20 Subsequent to that as he started his
21 assault, very much sounds like he had a rage reaction
22 during which he would neither appreciate the
23 wrongfulness nor be able to conform his behavior;
24 that is, he went into a self-maintaining assaulting
25 rage.

1 Q Can you describe for us a little more
2 specifically what you mean by a rage reaction? And
3 if you can think of any examples that may be common
4 to our experiences, if you could throw those in, that
5 would help us understand.

6 A Most of us don't have uncontrolled rage
7 reactions. Once Mr. Creech gets wound up, gets
8 going, becomes angry and starts assaulting -- let me
9 back up and start the answer a little differently.
10 Most of us at one time or another have been in
11 assaulting kinds of situations, childhood fights or
12 whatever, and respond with force to the degree
13 necessary for whatever our purpose is.

14 That is, anger and its expression tends
15 to be modulated. We tend to be able to exert as much
16 control as is needed and be able to stop at that
17 point.

18 Mr. Creech showed very little modulation
19 in his assault on Mr. Jensen and seemed to kind of
20 go on automatically once he started hitting, just
21 continued out of rage or anger to strike Mr. Jensen.

22 Q What do you mean by going on
23 automatically?

24 A Without considering it further; that is,
25 without stopping and saying, "Gee, that's enough. I

1 have to stop."

2 Q Do you have an opinion about whether he
3 would be capable of being aware of the extent of the
4 damage he was causing once he went into a rage
5 response?

6 A I doubt he would ever consider it.

7 Q Can you give the outlines of the other
8 version you are aware of that Mr. Creech has related
9 to other people concerning the incident with
10 Mr. Jensen?

11 A Yes. The second story I understand at
12 least to be that Mr. Creech wanted to kill Mr. Jensen
13 and needed to set up a defense against that, and so
14 arranged to have various other prisoners give
15 Mr. Jensen the necessary things to assault him with
16 and then structured and countered such that
17 Mr. Jensen was likely to assault him.

18 After he did, he then disarmed Mr. Jensen
19 and killed him, making it look like it was Jensen
20 himself that had set it up or making it look like it
21 was self-defense.

22 Q Is the second version including its
23 development of this plan and his execution of the plan
24 consistent with what you know about Mr. Creech?

25 A No.

1 Q In what ways?

2 A To begin with, Mr. Creech is not
3 particularly intelligent. While I think he is quite
4 capable of sort of fabricating the story that he just
5 outlined or that I just outlined, I think it's
6 unlikely that he would be able to put all of the
7 elements together necessary to implement that kind of
8 plan. It sound more like the sort of story that he
9 would hand out to impress an audience, particularly
10 one that appreciated knifing and those kinds of
11 actions.

12 But there are a number of elements that
13 would be inconsistent with that. The two that are
14 most important is that Mr. Creech is not particularly
15 intelligent, and that requires that sort of a chess
16 playing mentality that would be required to set that
17 up and carry it off.

18 The second is he tends to be very
19 impulsive. He reacts to momentary demands and is
20 unlikely to have carried through a plan like that over
21 a period of time necessary to bring it off.

22 Q Have you discussed with Mr. Creech his
23 relationship with Sheriff Palmer?

24 A Yes.

25 Q From what you know of that relationship,

1 would Mr. Palmer be one likely to elicit such a
2 story as the second version?

3 MR. HARRIS: Your Honor, I am going to object
4 to that. I don't think there is any foundation,
5 adequate foundation for an opinion on that question.

6 THE COURT: Sustained.

7 Q BY MR. KEHNE: What do you understand
8 the relationship between Tom and Mr. Palmer to be?

9 A From what I can tell, it seems to be
10 fairly affectionate on both parts; that is,
11 Sheriff Palmer in talking to me about Tom has
12 indicated that he has sort of enjoyed those encounters,
13 and Tom very clearly likes Sheriff Palmer and sees
14 him as a very nice person.

15 Q I believe you testified that as an
16 antisocial person, he would be marked by extreme
17 impulsivity and he would tend to react to the
18 immediate environment; right?

19 A That's right.

20 Q How would you predict his association
21 with Sheriff Palmer to affect him as far as relating
22 a version of the Jensen incident? If you have no
23 opinion, say so.

24 A I am not really sure I can answer the
25 question as you asked it.

1 MR. KEHNE: That's all I have. Thank you.

2

3 CROSS EXAMINATION

4 BY MR. HARRIS:

5 Q Dr. Stoner, you gave Mr. Creech a -- I
6 don't remember what it was called -- fear testing?

7 A Fear inventory.

8 Q Yes, fear inventory. That's supposed to
9 categorize the types of activities, real or
10 imaginary impulses that a person might be afraid of?

11 A Literally, it's just a collection of
12 things that people can become phobic about. It
13 asks for a grade of measure of how much are you
14 afraid of these things.

15 Q Are one of those things by any chance
16 being afraid of psychologists and their tests?

17 A No. That wasn't one of them.

18 Q Would it surprise you to know that
19 Mr. Creech wasn't particularly cooperative or did
20 not intend to be fully cooperative with you in your
21 testing techniques?

22 A No. It wouldn't surprise me at all. In
23 fact, I believe that's in my report.

24 Q Doesn't that influence your ability to
25 so dogmatically rely on the results of those tests?

224

Stoner-Def-X

802

1 MR. KEHNE: Object to the characterization.

2 THE COURT: Overruled. I think it's proper
3 cross examination.

4 THE WITNESS: Would you ask me the question
5 again?

6 Q BY MR. HARRIS: Wouldn't that affect your
7 ability to rely so strongly on the results of those
8 tests?

9 A My awareness that he was not trying to
10 cooperate with me? Yes, that would influence my
11 perception of him.

12 Q You are saying that if he had fully
13 cooperated and you got the same results, you would
14 be a lot more definite about those conclusions; is
15 that right?

16 A Yes.

17 Q It seems to me you were about as
18 definite as you could possibly be about your
19 conclusions saying that there is room to be even
20 more definite about them?

21 MR. KEHNE: I'll object. That's argument.

22 THE COURT: Overruled. I think he can answer.

23 THE WITNESS: I am not sure that anybody has
24 asked me for assessment of just how strongly I hold
25 those conclusions. But yes, I think there's room to

1 be more certain than I am in this case.

2 Q BY MR. HARRIS: You are the author of the
3 letter dated December 7th, 1981 regarding
4 Thomas Eugene Creech's psychological evaluation,
5 are you not?

6 A Yes.

7 Q Referring your attention to Page 3 of
8 that report you have in front of you. And I would
9 quote: (Reading) Intellectually, Mr. Creech is
10 functioning in the low average range. He has a
11 pattern of subtest scores which strongly suggest the
12 presence of an organic brain disorder (End reading).

13 Doctor, you have no medical training, do
14 you?

15 A It's hard to answer that at this point.
16 I have not gone to medical school.

17 Q Are you qualified do you feel to diagnose
18 organic brain syndrome or organic brain disorders?

19 A That requires a qualified answer.

20 Q Fine, give it.

21 A All right. Yes, there are a number of
22 tests that I routinely administer that are strongly
23 impacted by or tend to reflect organic brain
24 dysfunction so that the overall presence of some
25 kind of organic brain disorder is something when it

1 does appear on those tests, I feel qualified to
2 diagnose.

3 The specific brain dysfunction that would
4 result in those disorders, I am not qualified to
5 assess and was the reason for referral to Dr. Thurber
6 for a more specific examination.

7 Q Would it surprise you if Dr. LaMarr Heyrend,
8 a trained medical doctor, testified this morning that
9 Mr. Creech does not suffer from any organic brain
10 disorder?

11 A No. I heard him give that testimony.

12 Q You disagree with Dr. Heyrend?

13 A I do disagree with Dr. Heyrend.

14 Q Dr. Heyrend testified as well this
15 morning that in his opinion at the time of the
16 incident in this case, Mr. Creech was able to
17 appreciate the wrongfulness of his conduct and did
18 have the ability to conform his conduct to the
19 requirements of the law. Do you disagree with that
20 conclusion?

21 A We are talking now about the period of
22 time in which he was assaulting Mr. Jensen?

23 Q At the time of the incident.

24 A At the time of the beginning of the
25 incident, I don't disagree with that.

1 Q Quite simply stated, Mr. Creech lost his
2 temper; isn't that what you are saying?

3 A Yes, in an extreme.

4 Q You are saying that Mr. Creech functions
5 in the low average intelligence range; is that
6 correct?

7 A That's correct.

8 Q Have you ever read any of Mr. Creech's
9 poetry?

10 A I have.

11 Q Are you trying to tell me that that's the
12 product of a low, below average intellect?

13 A Yes.

14 Q I think you also state in here, Doctor,
15 that the most serious of his deficits seems to be
16 his ability to perform verbal abstractions. Isn't
17 it true that that poetry consists of verse after
18 verse of verbal abstractions?

19 A I am trying to remember the poetry that
20 I read. Yes, at least there is some verbal
21 abstracting going on.

22 Q You testified you were aware of two
23 stories. Mr. Creech told one evidently to you and
24 one that you understand through hearsay.

25 A That's correct.

1 Q Or perhaps through defense counsel. And
2 you say that it is inconsistent, the second story,
3 with regard to his setup of Mr. Jensen.

4 It is inconsistent with his personality
5 -- I believe that's your language. You correct me if
6 I am wrong -- at least inconsistent with what you
7 know of his mental state.

8 Would it surprise you to know that prior
9 to 1974 Mr. Creech was able to commit successfully
10 approximately a dozen murders and get away with it?

11 A No.

12 Q And you are saying that's indicative of
13 a person who cannot implement a plan of that type?

14 A The plan -- that second story about what
15 happened in prison was a bit more complex than simply
16 going out and pulling a trigger on someone.

17 I have no idea of the details of the
18 12 murders, but there's nothing that I have
19 encountered so far to suggest they were intricate
20 setups that they write movies about.

21 Q If I were to tell you that they involved
22 planned contract killings, would that influence you
23 at all?

24 A It depends on whether in filling the
25 contract he walked up and shot him or whether he had

1 set up careful schedules and so on.

2 MR. HARRIS: That's all I have.

3

4 REDIRECT EXAMINATION

5 BY MR. KEHNE:

6 Q On the Weschler -- what tests did you
7 rely on in coming to the conclusion that there may be
8 some organic brain damage in Mr. Creech?

9 A There were several that were important.
10 The first one was not on the Weschler at all. It
11 was the Memory for Designs Scale, and that was then
12 supplemented by the Digit Symbol Sub-test of the
13 Weschler Intelligence Scale.

14 Q Dr. Stoner, is there a writing instrument
15 by that pad of paper?

16 A Yes, there is.

17 Q Would you approach that and give an
18 example or some examples of the Digit Symbol Sub-test?

19 A Sure. The Digit Symbol Sub-test is a
20 test of eye-hand coordination, visual memory and
21 elements such as that.

22 On that sub-test, there are a number of
23 these figures that can be reversed or inverted. As
24 we went through, every time we encountered this
25 figure here which is a very simple sort of figure to

230

Stoner-Def-Redi

808

1 draw, he inverted it and each time produced that.

2 And the second one was this, which was
3 consistently reproduced as that. That kind of
4 left-right reversal is common for organic brain
5 disorders commonly related to learning disabilities,
6 which Mr. Creech clearly has.

7 Q Do you base that conclusion on any
8 empirical research that has been done with the
9 Weschler and the sub-test?

10 A Yes.

11 Q Before we go any further, would you just
12 show the general format, how a person takes that
13 sub-test, what he sees and what he is supposed to do?

14 A Let's see if I can remember verbatim to
15 scale. There are a series of 10 numbers in boxes at
16 the top of the page that he is looking at. Each
17 number has a little symbol beneath it.

18 For example, No. 1 has beneath it this,
19 and 2 has that symbol, and so on. And each of the
20 other numbers then has an appropriate symbol.

21 The task becomes then in 90 seconds to
22 reproduce as many of these in the space down below
23 which has a series of boxes in which there will be
24 a number, and he is to fill in the blank as rapidly
25 as possible.

1 Q Do you recall what the mean level is
2 for completion of that task, how many of those boxes
3 a numerical average of people produce?

4 A About 50 of them.

5 Q How many did Mr. Creech complete?

6 A 15.

7 Q And of those was there anything remarkable
8 -- you have mentioned two reversals. Anything else?

9 A There are only 15 responses to judge
10 remarkable from. What was remarkable was there was
11 a left-right reversal each time that could have
12 occurred.

13 Q When you give all these tests to any
14 person, do you look for the possibility that the
15 person is conning you and faking the test bad?

16 A Yes.

17 Q And you considered that in Mr. Creech's
18 case?

19 A I consider it likely in Mr. Creech's case.

20 Q Do you still attach importance to the
21 reversals you see on the Digit Symbol?

22 A Indeed that would be a tremendously
23 sophisticated performance, one that would be reading
24 consistent with any objective measure we have of his
25 intelligence.

1 Q What do you mean by that, inconsistent
2 with what? What would it require for somebody to
3 know in order to con you by intentionally reversing
4 the symbols on that test?

5 A You would have to know obviously that
6 reversing symbols in some way was related to a
7 consistent pattern that would tend to find for
8 organic brain damage and choose to exhibit that
9 pattern.

10 Q Do you find that kind of sophistication
11 very often among people taking this test?

12 A Not unless you are testing college
13 students and psych majors.

14 Q Do you have a copy of Mr. Creech's actual
15 responses on that test?

16 A On the Digit Symbol?

17 Q Yes.

18 A Yes, I do.

19 MR. KEHNE: Mr. Bailiff, could I have that
20 marked as an exhibit?

21 THE COURT: Defendant's Exhibit A is marked.

22 (Exhibit A marked.)

23 MR. KEHNE: If you would hand that to the
24 Prosecutor, I would move for the admission of
25 Exhibit A.

1 MR. HARRIS: No objection.

2 THE COURT: It may be marked and admitted into
3 evidence.

4 MR. KEHNE: Would you please hand that back to
5 Dr. Stoner?

6 Q BY MR. KEHNE: Exhibit A is his entire
7 response on the Weschler Adult Intelligence Scale?

8 A Yes.

9 Q Were there any other sub-tests on the
10 Weschler you relied on in your opinion that he suffers
11 from some organic brain damage?

12 A Yes.. The pattern of test scores itself
13 becomes very important in trying to assess organic
14 brain dysfunction. And the biggest -- the most
15 common characteristic is that individuals of organic
16 brain syndromes tend to have very uneven
17 performances. That is, they tend to do much better
18 in some intellectual areas than others.

19 An average normal individual would
20 perform essentially to the same level in all of these
21 sub-tests.

22 Q Did you see a big discrepancy in
23 Mr. Creech's performances?

24 A I did.

25 Q Would you describe that for us?

1 A The magnitude of the difference?

2 Q Yes.

3 A Yes. He is at a normal level on one of
4 the sub-tests. Gee, I don't know how to convert that
5 into layman's language. He goes down to the lowest
6 possible score on others so that he ranges at the
7 lower half of the test having scores at almost at
8 each point.

9 Q On any other tests that you gave
10 Mr. Creech, did you confirm your belief that he
11 suffers from organic brain damage?

12 A He showed a consistent impairment of
13 short term visual memory, which is another common
14 indicator of organic brain syndrome.

15 Q What tests showed you that?

16 A The Memory for Designs tests.

17 Q Will you explain using the board if it's
18 helpful to the Court how the Memory for Designs test
19 is given, how a person actually takes, what the task
20 is?

21 A Certainly. The task is there's a series
22 of 15 small cards, each of which has a single figure
23 drawn on it. The card is presented to the subject
24 for five seconds and then put away. After the card
25 is put away, they are to draw that figure.

235

Stoner-Def-Redi

813

1 Q Can you give an example of some of the
2 figures that the person is to draw from memory?

3 A That's No. 2. Those would be the first
4 three figures.

5 Q Did you notice any pattern in the
6 responses of Mr. Creech?

7 A Again, in addition to some consistent
8 omissions, there was also a problem with left-right
9 reversals again on these figures.

10 Q Again, that would be a test where someone
11 could easily fake that. In other words, fake it so
12 that he is doing worse than his best would be; is
13 that correct?

14 A That's correct. It would be very easy
15 to do badly on the test.

16 Q That is something you look for when you
17 are analyzing the test results?

18 A Yes. It is very hard to know enough
19 about the test to do badly in the same way that people
20 who are brain damaged tend to do badly.

21 Q Okay. That gets me to the next question.
22 Looking at the pattern of responses of Mr. Creech and
23 keeping in mind the possibility that he may try to
24 fake bad, did you see any patterns that you believe
25 were in addition to fake bad and were actually

1 evidence of some organic brain damage?

2 A Yes.

3 Q And those were --

4 A I am not sure how to describe this
5 verbally. Those were consistent distortions, a
6 simplification of the figure of when a part is
7 missing, instead of embellishing, he usually tended
8 to go to a simpler figure. That's again
9 characteristic of individuals who have organic brain
10 syndrome.

11 Q And again, it would be your opinion that
12 it would take more sophistication than Mr. Creech
13 possesses, more sophistication about the tests in
14 order to fake it had successfully?

15 A Yes, I believe so.

16 Q Do you have Mr. Creech's actual
17 responses to the Memory for Designs test?

18 A I do.

19 MR. KEHNE: Mr. Bailiff, I would like to have
20 this marked.

21 THE CLERK: Defendant's Exhibit B is marked.

22 (Exhibit B marked.)

23 MR. KEHNE: I would move for its admission.

24 MR. HARRIS: No objection.

25 THE COURT: It may be marked and admitted into
26 evidence.

1 Q BY MR. KEHNE: Can you describe in a
2 little more detail Dr. Thurber's testing of the
3 defendant? How long did that take, how thorough was
4 it?

5 A I really don't know. I believe he said
6 it was taking him over three hours, but I am not sure
7 the exact amount of time it took.

8 Q And you relied on that in forming your
9 opinion that he does suffer from organic brain
10 damage?

11 A Yes.

12 MR. KEHNE: I believe that's all. Thank you.

13
14 RECROSS EXAMINATION

15 BY MR. HARRIS:

16 Q Doctor, isn't it true, that Dr. Thurber is
17 of the opinion that this defendant does not have
18 organic brain syndrome?

19 A My understanding of what Dr. Thurber found
20 was that there was no organic brain syndrome which
21 is related to this crime.

22 Q Did the fact that an EEG was run and
23 resulted in normal findings convince you of anything
24 with regard to organic brain syndrome?

25 A No. It often occurs that there are organic

1 brain disorders.

2 (Brief recess while Clerk changed tape.)

3 THE COURT: We will have to hold up a minute.
4 Maybe we might as well take a short recess while we
5 are waiting.

6 THE CLERK: We won't need to take a recess.

7 THE COURT: We won't take a recess.

8 MR. HARRIS: How much did you miss?

9 THE CLERK: Just maybe a couple sentences.

10 THE COURT: The record will note my Reporter
11 is still taking everything down, Mr. Harris.

12 MR. HARRIS: I think that's all I have.

13 MR. KEHNE: I have nothing on that.

14

15 EXAMINATION

16 BY THE COURT:

17 Q Let me ask you a question, Doctor. I am
18 not sure how to phrase it exactly. Do you think
19 everyone with this antisocial personality disorder
20 or criminal personality as you phrased it, do you
21 think they are all ill or they should -- that they
22 need the benefit of your science?

23 A I am afraid the only thing my science is
24 able to do for them is diagnose them. We have been
25 incredibly ineffectual in trying to do any kind of

239

Stoner-Def-Ct

817

1 change at all. There is no therapy that is effective
2 with the antisocial personalities.

3 Q That leads me to the next thing. Do you
4 think there's anything your science can do for a
5 person of the type of the defendant Mr. Creech?

6 A There is no therapeutic program. We
7 don't have any significant chance of successfully
8 changing them.

9 THE COURT: Does that lead either counsel to
10 any question?

11 MR. HARRIS: No.

12 THE COURT: Thank you very much, Dr. Stoner.
13 You may step down.

14 MR. KEHNE: May Dr. Stoner be excused?

15 THE COURT: Any objections, Mr. Harris?

16 MR. HARRIS: No, Judge.

17 THE COURT: You are also excused from the
18 hearing, sir, and thank you for coming.

19 (The witness left the stand.)

20 MR. KEHNE: Call Lieutenant Hope.
21
22
23
24
25