5-21-2009

Hall v. State Clerk's Record v. 2 Dckt. 35055

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IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

ERICK VIRGIL HALL,

PETITIONER-APPELLANT,

vs.

STATE OF IDAHO,

RESPONDENT.

Appealed from the District Court of the Fourth Judicial District of the State of Idaho, in and for ADA County

Hon THOMAS F. NEVILLE, *District Judge*

MOLLY HUSKEY
State Appellate Public Defender

Attorney for Appellant

LAWRENCE G. WASDEN
Attorney General

Attorney for Respondent

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him that he didn't—he had it in the wrong place")) The State did not believe the anal sexual assault took place, however. The State in fact had dismissed the forcible anal sex charge because the State did not believe it had happened.[16] The fact that the State originally charged Petitioner with forcible anal and vaginal rape, indicates that Petitioner was charged based upon Ms. Oliver's statements. The fact that the State dropped the anal rape charge indicates they did not find that allegation credible. This is supported by the fact that the State does not mention forcible anal rape in its opening sentencing statement, even though the State does discuss why the charges were reduced from forcible to statutory rape. (Tr., p. 4736, Ls. 12-16 (oral and vaginal sex); Tr., p. 4738, L. 24 - p. 4739, L. 4) Ms. Oliver herself believed that Petitioner had only been charged with statutory rape (Tr., p. 4776, L. 9), the charge Petitioner ultimately pled guilty to. Despite that, the State elicited testimony from Ms. Oliver regarding anal rape.

Ms. Oliver never even testified that there was a vaginal forcible rape. (Tr., p. 4767, Ls. 2-7 (the witness "thinks" Petitioner had sexual intercourse with her)) It was only in response to a leading question that the witness acknowledged nonconsensual sexual intercourse and that was only in response to a leading question. (Tr., p. 4775, Ls. 15-19 (witness responds "no" to State's leading question whether she wanted to have sexual intercourse with Petitioner))

The State also had reason to believe that Ms. Oliver was incompetent to testify. Ms. Oliver was "too distraught to even talk to" trial counsel, a fact brought out prior to her testimony. (Tr., pp. 4755-4756) Ms. Oliver had been on medication but was not on

[16] Petitioner will offer further support of this fact when the Court allows discovery on the issue. The limited information Petitioner has access to indicates that no anal rape occurred.

medication at the time she testified, even though she admitted having a chemical imbalance. (Tr., p. 4777, Ls. 2-7, p. 4783, Ls. 17-18) On direct, Ms. Oliver could not recall critical events relating to the rape. (Tr., p. 4760, L.15 ("I only remember bits and pieces"); p. 4761, L.18 ("I can't remember"); p. 4762, Ls. 4-5 (she met Petitioner at Mountain Billiards "I think, but I'm not sure"); p. 4762, L. 18 (she's "not quite sure" whether they sat around in the trailer at all); p. 4763, L. 24-25 ("I closed my eyes – I don't' know [what happened]. I can't remember"); p. 4764, L. 12 ("I can't remember [if she couldn't talk because Petitioner was strangling her]. I don't think I could."); p. 4764, L. 14 ("I don't know [if I was scared]."); p. 4765, L. 3 ("I can't remember [what it was like what I woke up.]"); p. 4765, L. 21 ("I can't remember"); p. 4766, L. 3 ("I can't remember), L. 6 ("I can't remember), L. 9 ("I don't know. I'm sorry"), L. 17 ("I'm not sure."); p. 4768, L. 1 ("I don't know."), L. 10 ("I don't remember); p. 4769, L. 7 ("I can't remember"), L.13 (witness does "not really" remember getting up the next morning); p. 4771, L. 3 (witness "can't really remember" being arrested at the Sands Motel); p. 4771, L. 6 (witness "can't really remember" getting put into back seat of police car at Sands Motel); p. 4771, L. 9 (witness "doesn't know" if she wound up at the juvenile detention jail); p. 4771, L. 21 (witness "can't remember" meeting with police officer at Intermountain Hospital because "it's a blur")) On cross-examination, Ms. Oliver explained that she was on SSI because she has a chemical imbalance and is unable to keep a job. (Tr., p. 4780, Ls. 6-18)

In a statement made to a federal investigator in West Virginia, Ms. Oliver admitted that she's been diagnosed with bipolar disorder, borderline personality disorder, post-traumatic stress disorder, and was not medicated when she testified. (Exhibit 16.)

She recalls fleeing from Petitioner and jumping into "a yard filled with dogs, I think they bit me." There was no evidence of dog bites when Ms. Oliver spoke to Detective Hess, and no indications of dog bites in the emergency room report of Dr. Vickman. (Exhibit 2, Exhibit 17.) Ms. Oliver further reported that she "pretty much lived" at Intermountain Hospital, had been hospitalized at Intermountain two or three times, and had been there for a year at one time. Ms. Oliver "passed out" before the rape trial. Ms. Oliver's most recent statement is filled with inconsistencies regarding the events surrounding the purported rape.

Wendy Levy disputes Ms. Oliver's version of the 1991 events. Ms. Levy states that she saw Ms. Oliver come out of the shower that following day, and "saw no marks, scratches, bruises, or injuries of any kind on her face, neck, shoulders, arms or hands." (Exhibit 7.) Ms. Levy states that she asked Petitioner to ask Ms. Oliver to leave the property because she believed "there was something wrong with Ms. Oliver." Ms. Levy was interviewed by the prosecutor's office. See Claim D.1, *supra*.

Not only did the State put on an incompetent witness as part of its sentencing case against Petitioner, it attempted to explain away the reduction in the 1991 rape charges against Petitioner to statutory rape by putting other state officials on the witness stand to *bolster* Ms. Oliver's credibility, when those witnesses had every reason to know that Ms. Oliver was in fact incompetent to testify. *See (Patrick) Hall, supra,* (stating that corroboration by other testimony does not establish that the testimony by the incompetent witness is based on his own perception rather than on information acquired from others). The next witness called by the State was Detective Daniel Hess, whose testimony was nothing more than a substitute for the testimony of Norma Jean Oliver, and was rife with

inadmissible hearsay that violated the Confrontation Clause. (Tr., pp. 4784-4813). The State's examination was especially misleading when, after the Detective stated on recross-examination that he did not know whether a competency evaluation had been conducted on Ms. Oliver, the State followed up with questions designed to allow the Detective to testify that Ms. Oliver was competent. (Tr., p. 4811, Ls. 21-23 (Detective did not know whether competency evaluation had been conducted); Tr., p. 4812, Ls. 9-13 (prosecutor questioning whether Detective was able to carry on a conversation with Ms. Oliver, and whether Ms. Oliver "tracked and gave appropriate answers")) If in fact Ms. Oliver was legally incompetent to testify at that time, then the State's questioning was highly misleading.

The State also elicited materially false testimony from Detective Hess. From a photograph from which the State admits is "difficult" to discern injuries, Detective Hess testified that there was swelling on the neck and throat just under Ms. Oliver's jaw line. (Tr., p. 4793, L. 22 – p. 4794, L. 1.) His report, however, does not note this injury, and Dr. Vickman's report does not note swelling and specifically states that there were external signs of bruising on neck. The State also elicited testimony of significant facial bruising:

> Q. Start, Detective with No. 148. It's difficult on a photo I know, but if you could tell us what we're seeing, what that photo was taken for and what it's meant to show?
>
> A. On the left side of her face in the area of the left side of her nose was bruising on the cheek bone. There was bruising right in this area here (indicating) was significant bruising on the cheek bone and the jaw line on this side of her face."

(Tr., p. 4793, Ls. 16-21.) The photographs do not support this testimony. Dr. Vickman's report contradicts this testimony. (See Report, noting "minimal bruising on the left cheek

of her face.)[17] The State further elicited testimony from Det. Hess that Ms. Oliver had scratches and bruises on her left hand. (Tr., p. 4794, Ls. 5-17.) However, Dr. Vickman's report states her examined Ms. Oliver's hands when she claimed she had discomfort, but that he "could not see any sign of external injury." (Exhibit 17.)

Shortly after Detective Hess' testimony, the State then called Jay Rosenthal, the former county prosecutor assigned to the Norma Jean Oliver rape case,[18] to explain why the State had reduced the forcible rape charges to statutory rape charges. Mr. Rosenthal's testimony essentially bolstered Ms. Oliver's credibility in the instant trial, while at the same time misleading the jury as to Ms. Oliver's competency in the original rape case. Mr. Rosenthal testified that the forcible rape charges were reduced to statutory rape because Ms. Oliver was "vulnerable," "fragile," "terrified," and "unable to effectively go on with the case in front of a jury" or withstand cross-examination based in part on the recommendation of her treatment providers. (Tr., pp. 4952-4954) If in fact, however, the charges were reduced because Ms. Oliver was not legally competent to testify, as suggested by Mr. Rosenthal's claim that his decision to reduce charges rested in part on the recommendation of Ms. Oliver's psychiatrist and case worker (Tr., p. 5953, Ls. 12-25), then his testimony was extremely misleading, and irreparably prejudiced Petitioner's sentencing trial.

In addition to prosecutorial misconduct, on this record, the Court had an independent duty to inquire into Ms. Oliver's competency, and move to strike her testimony *sua sponte*. I.R.E. 602 (witness may not testify to a matter unless evidence is

[17] Given that the State turned over a copy of Dr. Vickman's report in discovery, they too had possession of that report.

[18] Mr. Rosenthal is now a Deputy Attorney General, as is juror McNeese's husband, Timothy McNeese.

introduced sufficient to support a finding that the witness has personal knowledge of the matter); *State v. Johnson*, 92 Idaho 533, 447 P.2d 10 (1968)(holding where a witness said he remembered nothing about a certain time period, he effectively declared himself incompetent to answer questions relating to that period); *State v. (Patrick) Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986)(holding trial judge erred in allowing testimony of victim who expressed uncertainty as to whether his testimony was based on actual memories; corroboration by other testimony does not establish that the testimony by the witness is based on his own perception rather than on information acquired from others).

The admission of this testimony violated the Sixth Amendment, and because this was a capital sentencing proceeding, the admission of this testimony violated the Eighth Amendment and the Due Process. There is a reasonable likelihood that the false and misleading testimony could have affected the judgment of the jury.

5. The Prosecutor Deliberately Injected Extra-Record And Materially Misleading Evidence Through Leading Questions To Detective Daniel Hess.

In cross-examining Detective Hess, the prosecutor asked:

> Q. All right. And to your knowledge, and looking at your police report, was that rape kit done and ultimately examined by the State Forensic Laboratory?
>
> A. It was.
>
> Q. It's kind of in the days before DNA testing, but did the laboratory tell you whether or not there was any sperm found in the sex crimes kit?
>
> A Yes, there –
>
> MR. MYSHIN: Objection. Foundation, confrontation.
>
> THE COURT: Well, I think you can lay more foundation. I'll sustain the objection to that part. Back up for a moment.

Q. BY MR. BOURNE: Did you -- after you knew that the sex crimes kit had been taken, did you know that it had been submitted to the -- would be the -- in those days it was the Department of Law Enforcement Forensic Lab, I think?

A. I delivered it.

Q. Okay. And at some point thereafter, did you speak to Criminalist Pam Marcum who gave you -- just yes or no, who gave you some information about her findings on the sex crimes kit?

A. Yes.

Q. And after she gave you information about the sex crimes kit, did you write down in your police report what it was that she had told you?

A. Yes.

Q. And do you see that's still there in your report that you've read in preparation for this?

A. Yes, sir.

Q. All right. What did Pam Marcum tell you?

MR. MYSHIN: Judge, objection. Confrontation.

THE COURT: I'll note your objection.
Overruled and allow the witness to respond.

THE WITNESS: She indicated that there was sperm found on the swabs.

MR. BOURNE: All right. One second. (Brief delay.) Thank you. No further questions of the witness.

(Tr., p. 4804, L. 20 – p. 4806, L. 11.) The question suggested that DNA testing was not available in 1991. This is materially misleading, as DNA testing was certainly available in 1991. Moreover, the prosecutor injected evidence into the testimony by asking the question itself. Through the leading question, the prosecutor essentially testified that the rape kit results were reliable evidence of sexual assault, and the only reason they didn't

conduct DNA testing was because it was unavailable and thus suggesting that the DNA testing would merely confirm what was already known. There is a reasonable likelihood that the false and misleading testimony could have affected the judgment of the jury.

6. The Prosecution Committed Misconduct By Misrepresenting Conclusions That Could Be Drawn From The DNA Test Results Taken From Christian Johnson.

The prosecution misrepresented the test results by stating that DNA testing excluded Christian Johnson as killer. (Tr., p. 3423, Ls. 11-12.) The prosecution made this assertion knowing that the defense considered presenting Mr. Johnson as a potential alternate perpetrator at trial. Further, the prosecution made this assertion knowing it to be false; at most, the lack of Christian Johnson's DNA found on the victim only established that he did not leave any semen. Thus, he could have been a co-perpetrator of rape. Moreover, the lack of DNA does not exclude Mr. Johnson as the actual killer. Trial counsel made this very point outside the presence of the jury, but failed to object. (Tr., p. 3682, Ls. 5-10.)

F. PROSECUTORIAL MISCONDUCT FOR USING TECHNIQUES TO DISSUADE MITIGATION WITNESSES FROM TESTIFYING OR PREDISPOSE THEM TO DISREGARD OR DOWNPLAY VALID MITIGATING EVIDENCE.

During the course of Petitioner's reinvestigation of this case, he has learned that the State, either acting through its prosecuting attorneys, or their agents, committed misconduct when interviewing potential mitigation witnesses. Specifically,

- Jean McCracken, Erick's mother, states that on September 27, 2004, a man working with the prosecution contacted her. He told her that the defense team was going to say at trial that Frank, Erick's father, and her had raised Erick to be a killer and that they were responsible for what Erick had become. The prosecution also asked her if she thought Erick's drug use excused his behavior. Jean did not testify at the sentencing.

- Tamara McCracken, Erick's older half-sister, was also contacted by the prosecution. She was asked whether she was a good Christian and believed that someone did something wrong shouldn't they be held accountable for it. They asked if she had ever killed anyone. They suggested that since she had the same childhood but hadn't killed anyone that the defense team should not based a defense upon Erick's childhood. Tamara resented the insinuations and attempts to trivialize the trauma Erick and she had experienced. Tamara testified at the sentencing.

Based on these two incidents alone, Petitioner has reason to believe that the State committed other acts of misconduct. Petitioner asserts that the State's conduct violated Petitioner's First, Fifth, Sixth, Eighth, and Fourteenth Amendment rights, and based on the evidence to date, warrants reversal of his sentencing. Petitioner needs additional time to finish his investigation and to determine whether the State's misconduct extended to guilt-phase witnesses.

G. ADMISSION OF TESTIMONIAL AND OTHER HEARSAY VIOLATIONS VIOALTED PETITIONER'S SIXTH AMENDMENT AND DUE PROCESS RIGHTS

Petitioner's Sixth Amendment right to confront witnesses against him was violated when witnesses testified to hearsay without a showing that the hearsay declarants were unavailable, and without prior opportunity for Petitioner to have cross-examined those declarants. Admission of testimonial statements without both unavailability and prior opportunity to cross-examine the hearsay declarant, violates the Confrontation Clause of the Sixth Amendment. *Crawford v. Washington*, 541 U.S. 26, 59 (2004). Among statements considered testimonial are those statements obtained with the "involvement of government officers in the production of testimony with an eye toward trial." *Id.* at 56 n.7.

For example, Detective Hess' testimony violated the Confrontation Clause when he testified about hearsay statements purportedly made to him by Ms. Oliver. Clearly Ms. Oliver was not an "unavailable" witness in the *Crawford* sense, given that she testified, therefore any hearsay statements were inadmissible. Detective Hess testified as follows on redirect examination by the State:

> Q. All right. And when you were speaking with Norma Jean, did she tell you whether or not the defendant had tied her up with her clothing during this rape?
>
> A. Yes, she told me that.
>
> Q. What did she tell you about that?
>
> A. She explained that she had been unconscious a couple of times and woke up undressed and was bound with her clothing, her pants and her shirt.
>
> Q. Did she say whether or not she had been gaged (sic) with something?
>
> A. Yes, she did.
>
> Q. Did she say at some point that the defendant wanted her to perform oral sex on him but she couldn't because she was gaged (sic)?
>
> A. That's what she told me.
>
> Q. And that she was able to spit the gag out and talk to him about what he was doing to her?
>
> A. Yes.
>
> Q. Did she tell you whether or not she was frightened or that she thought that he was going to kill her?
>
> A. She told me that, yes.
>
> Q. And at one point when she woke up did she tell you that, in so many towards at least, that she thought she might be dead because she couldn't feel anything?
>
> A. Yes, that's what she said.

MR. BOURNE: Good, thank you. That's all.

(Tr., p. 4810, L. 5 – p. 4811, L. 16)(sic added). Norma Jean Oliver's statements were inadmissible through Detective Hess, and their admission violated *Crawford* and the Confrontation Clause of the Sixth Amendment. Petitioner's Confrontation Clause rights were also violated when Detective Hess testified about results of the rape kit conducted on Ms. Oliver. (Tr., p. 4804, L. 10 – p. 4806, L. 8.)

Petitioner requires additional time to assess all confrontation, *Crawford*, and hearsay violations.

H. THE PROSECUTION COMMITTED MISCONDUCT BY ASKING THE JURY TO SPECULATE THE WORST SCENARIO, BY PRESENTING ARGUMENT INCONSISTENT WITH THE EVIDENCE, AND BY ALLUDING TO EVIDENCE OF ANOTHER MURDER.

To prove murder of the first degree, the State had to prove the element of premeditation or prove that the murder was committed during the perpetration of a rape or kidnapping. To prove premeditation, the State had to prove that Petitioner made the conscious decision to kill. In support of their argument that Petitioner had plenty of opportunity to premeditate, the State asserted that the victim was not rendered unconscious from an initial blow to her head, but rather was screaming[19] and struggling against her perpetrator for at least three minutes, during which time the decision to kill was made. (Tr., p. 4657, L. 18 – 4661, L. 24.) Roger Bourne, argued in part,

> Now, I'll bet she didn't go easy. That's why her purse is 200 feet away from her shoe. That's why she had to be tied up to control her. If the first blow knocked her out why did he have to tie her up? She'd be unconscious.

[19] Mr. Bourne's argument is a continuation of his opening statement and earlier portions of his closing argument in which he encouraged the jury to speculate that the victim was screaming based on the premise that she was abducted in an area where her screams would not be heard. (Tr., p. 3430, L. 21 – p. 3421, L. 2; p. 4655, Ls. 11-16.)

...
She's flailing around so he has to tie her up. Not just tie her up, he's able to remember a double overhand knot on each of her arms. Is that goal directed behavior? **Or does he try to bury her with sand to control her?** Obviously he's doing the obvious thing. Well, to kill her is he tying a knot around her ankle trying to choke her to death by her foot? Chokes her to death by her neck, doesn't he. That's because he's thinking. He knows how to kill somebody the same as we all know. If you tighten this up it will kill her.

(Tr., p. 4660, Ls. 1-5; p. 4663, Ls. 9-20) (emphasis added).

The State's argument that Ms. Henneman was conscious when strangled to death impermissibly called for speculation. The State's proffered theory was that Ms. Henneman was alive and conscious when tied up and hogtied, and then strangled to death by tightening the ligatures. However, the only evidence presented that the victim was hogtied at all was evidence that can only occur post-mortem. In other words, the argument that the victim was alive when hogtied was inconsistent with the State's own expert's opinion. (Tr., p. 4030, Ls. 10-12; p. 4008, Ls. 3-7 (Q. Are you suggesting that this occurred when the person was alive? A. No. I believe they were strangled and then placed on her stomach when this was done.) Finally, the State inexplicably makes rhetorical reference to Petitioner burying his victim in sand to control her. This is a clear reference to the Cheryl Hanlon case intended to prejudice Petitioner with evidence of another highly publicized murder he was charged with committing.

Petitioner cannot fully state this claim as he is still investigating facts that will show that the State's misconduct cannot be deemed harmless beyond a reasonable doubt. For example, Petitioner still does not know exactly what the jury heard from his multiple police interrogations. Petitioner is aware however that in one unredacted videotaped interrogation, Petitioner apparently purports to have buried Cheryl Hanlon in sand.

I. PROSECUTORIAL MISCONDUCT IN SENTENCING-PHASE CLOSING ARGUMENTS

While counsel for the prosecution has traditionally been afforded latitude in closing argument, *see e.g., State v. Priest*, 128 Idaho 6, 14, 909 P.2d 624, 632 (Ct.App.1995), there are limits that, if exceeded, can constitute reversible error. For instance, it is improper for a prosecutor to make misstatements of the evidence during argument, *State v. Martinez*, 136 Idaho 521, 37 P.3d 18 (Ct. App. 2001) (holding that cumulative effect of prosecutorial misconduct, including improper closing argument, was not harmless error); to express a personal belief as to the credibility of witnesses, *State v. Porter*, 130 Idaho 772, 786, 948 P.2d 127, 141 (1997); and to make personal attacks on trial counsel. *See United States v. Young*, 470 U.S. 1, 9 & n. 7 (1985); *State v. Page*, 135 Idaho 214, 223, 16 P.3d 890, 899 (2000).[20] In the capital context, prosecutorial

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[20] The ABA Standards Relating To Prosecution Function, Standard 3-5.8, further provides:

> (a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> (c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.
>
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

Standard 3-5.9 provides:

> The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of

misconduct during closing arguments is given heightened scrutiny. Accordingly, it may constitute reversible error for the prosecutor to impede the jury's consideration of mitigation through improper argument. *See Penry v. Lynaugh*, 492 U.S. 302, 326 (1989).

1. The Prosecution Committed Misconduct By Making An Improper Closing Argument Regarding The Definition Of Mitigation By Asserting That Mitigation Evidence Is Limited To Evidence That Is Causally Linked To The Defendant's Criminal Conduct, Evidence That Excuses The Defendant's Criminal Conduct, And Evidence That Prevented The Defendant From Choosing Not To Kill.

An individual juror must be free to consider a mitigating factor, regardless of whether other members of the jury agree as to its existence. *Mills v. Maryland*, 486 U.S. 367 (1988); *McKoy v. North Carolina*, 494 U.S. 433 (1990) ("each juror [must] be permitted to consider and give effect to mitigating evidence"). It is not enough "simply to allow the defendant to present mitigating evidence to the sentencer," rather there must not be any impediment, through evidentiary rules, jury instructions, *Hitchcock v. Dugger*, 481 U.S. 393 (1987), or ***prosecutorial argument***. *Penry v. Lynaugh*, 492 U.S. 302, 326 (1989).

In this case, the State's closing argument impeded the jury's consideration of valid mitigating evidence by mischaracterizing the law. Specifically, the State argued that mitigating circumstances are limited to circumstances that excuse a defendant's criminal conduct or circumstances causally connected to the defendant's conduct.

In early 2004, the United States Supreme Court, applying the "low threshold for relevance," specifically rejected the view that mitigating evidence is only relevant if it is causally connected to the crime. *Tennard v. Dretke*, 542 U.S. 274, 284 (2004). Later that

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common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

year, the Court revisited the issue and characterized the "nexus" requirement as "a test we never countenanced and now have unequivocally rejected." *Smith v. Texas,* 543 U.S. 37, 45 (2004). Thus, trial counsel, as well as the prosecutor, both having tried capital cases previously, and both preparing for their first capital jury sentencing, should have been well aware that there is no nexus requirement for the definition of, and consideration of, mitigating circumstances. Indeed, the rationale for these decisions was well established prior to Petitioner's sentencing.

Nearly thirty years ago, the Supreme Court released its opinion in *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion). In *Lockett,* the Court defined a mitigating circumstance as "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.,* at 604. In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Supreme Court applied the rule in *Lockett*. The facts and outcome in *Eddings* are instructive when judging the State's argument in the case at bar.

In *Eddings,* in the course of imposing and affirming the defendant's death sentence, the trial judge and the Oklahoma Court of Criminal Appeals had respectively found that evidence of Eddings' young age and violent family history was not valid mitigating evidence because it did not tend to provide an excuse from criminal responsibility. *Id.*, at 113-14.[21] In reversing, the Supreme Court found that the evidence **was** relevant mitigating evidence, noting that "[e]vidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation. *Id.*, at 115 (citation omitted). Lest there be any confusion about the different between legal excuses

[21] While the Court of Criminal Appeals found the evidence of Eddings' family history "useful in explaining" his behavior, the court found that it did not "excuse" it. *Id.,* at 114.

to criminal responsibility and mitigating circumstances reducing moral culpability, the Court clarified:

> All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.

Id.

Idaho has adopted the broadest definition of mitigation. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981).

> We generally note that the concept of mitigation is broad. Mitigating circumstances have been defined as: "Such as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability." Black's Law Dictionary (5th ed. 1979) at 903.

Id. at 415, 631 P.2d at 197. The *Osborn* Court stated that mitigating circumstances include the defendant's "background, his age, upbringing and environment or any other matter appropriate to a determination of the degree of culpability." *Id.* This "open ended allowance of mitigating evidence provides the defendant with the opportunity to present every possible justification for a sentence of less than death." *State v. Creech*, 105 Idaho 362, 369, 670 P.2d 463, 470 (1983), *reversed in part on other grounds by Arave v. Creech*, 507 U.S. 463 (1993); *Sivak v. State*, 112 Idaho 197, 731 P.2d 192 (1986). As the Court stated in *Sivak*, "[b]oth *Lockett* and *Eddings* established the vital importance of requiring the sentencer to consider any evidence proffered by the defendant which tends to mitigate against the justness or appropriateness of the death penalty for this particular defendant." *Id.*, at 201, 731 P.2d at 196. Such evidence need not be related to any degree of culpability for the crime.

In *Sivak,* the Idaho Supreme Court held that evidence of a defendant's post-crime conduct in prison, must be considered if offered in mitigation of punishment. *Id.* at 201-02, 731 P.2d at 196-97 (citing *Skipper v. South Carolina*, 476 U.S. 1, 6 (1986)("[A] defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination.") In *Skipper,* the U.S. Supreme Court held that mitigation does not have to relate specifically to culpability. *Id.* Addressing a capital defendant's attempt to use his post-crime good behavior as evidence in mitigation of punishment, the Court stated:

> The State does not contest that the witnesses petitioner attempted to place on the stand would have testified that petitioner had been a well-behaved and well-adjusted prisoner, nor does the State dispute that the jury could have drawn favorable inferences from this testimony regarding petitioner's character and his probable future conduct if sentenced to life in prison. Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, *see Koon* I, *supra*, 278 S.C., at 536, 298 S.E.2d, at 774, there is no question but that such inferences would be "mitigating" in the sense that they might serve "as a basis for a sentence less than death." *Lockett*, *supra*, 438 U.S., at 604, 98 S.Ct., at 2965.

Skipper v. South Carolina, at 5 (emphasis added). Thus, both the State and trial counsel were on notice that the definition of mitigation is broad and that a jury's ability to consider all possible evidence that might serve as a basis for a sentence of less than death cannot be impeded by improper argument. *Penry v. Lynaugh*, at 326. Nevertheless, without objection, the State made the following arguments:[22]

> The issue in this case that deals with the propensity factor, and that is the issue that makes mitigation relevant or not relevant, is the issue of choice to kill, right? That's what we're talking about here is the choice to kill.

[22] Nearly the entirety of the prosecutor's argument is improper for the reasons stated above; however, to save space, Petitioner only cites to portions of the argument. Petitioner moves this Court to take judicial notice of the entirety of the Reporter's Transcript and Clerk's Record for purposes of this post-conviction case.

That's at the core of this thing, is the choice to kill or not to kill. Not whether he had a bad background, or not whether he would choose to marry the same person I would or that you would, or the choice to have the same kind of a home or not, or the same kind of a job or not. The core issue here is choice. And don't kid yourself that there's a difference between moral culpability and criminal responsibility.

(Tr., p. 5491, Ls. 3-17.)

But the reason we didn't cross examine [Drs. Cunningham and Pettis] beyond the few relevant questions was because what they are saying is not relevant to the question at hand. That what they have to say about the defendant's background doesn't help you decide that mitigation, aggravation issue. Because the issue, as I see it, at rock bottom is the choice to kill or not to kill. And so if he had a bad background -- well, let me put it a different way. If the defendant could choose to kill or not to kill Lynn Henneman in September of 2000, then he is as responsible for his actions as we are responsible for our actions. And it doesn't matter what his background was like, whether it was a good background or bad background if he could choose to kill or not to kill. If he couldn't choose to kill or not to kill, he couldn't make that choice, then similarly it doesn't matter what his background is. For instance if he was delusional, if he was hallucinating, if he was psychotic, if he thought that by pulling that thing tight around Lynn's neck he was really just wringing out the clothes from the washing machine, then he's not responsible because he can't make a choice, he's psychotic. And it doesn't matter whether he comes from a good background or bad background, does it -- I mean it's not like we hold people responsible for their actions if they're psychotic, if they come from good background but not from bad ones. It's not like we only prosecute people from the -- that have good families for murder when they make choices or we don't prosecute people from bad backgrounds for murder when they commit choices. That's why I didn't cross examine those doctors, besides asking them "Could the defendant make a choice? Did he know right from wrong? Did he understand the consequences? Did he have a mental illness? Was he delusional or psychotic or for some other reason couldn't make the mental connection that he had to make?" The doctors both said he could make choices. He knew right from wrong. He understood consequences. He's not psychotic. Now, if none of those things apply and the defendant could make a choice then he's responsible for the choice that he made the same as we are. We all come from a background that influences our choice. But don" get confused on choices how to live our life versus choices of kill or not to kill. The defendant's choices on how to live his life are influenced by his background the same as ours are, where to live, how to live, who to marry, what job to do, how to spend our day. But the choice to kill or not to kill is an entirely different thing and nothing you heard from these people tell you that the

defendant doesn't know the difference between right and wrong, doesn't understand consequences, couldn't make the choice...

(Tr., p. 5493, L. 11 – p. 5495, L. 17.)

Counsel did it again today. He says that the doctors talked about head injury, and being hit on the head by his brothers and such. Did the Harvard medical doctor and a Ph.D. forensic psychologist give you one reason to think that the defendant has somehow been injured in his head by being hit on head when he was a kid? Did he say we gave the following psychological tests and they clearly show that the defendant can't understand consequences, cause and effect, the relation of A to B? No. Why didn't they? It's because they're not trying to help you find the truth here. They said, well, there's all kind of serotonin uptake inhibitors that do all this. Did the Harvard medical doctor tell you that he did a test on the defendant to show that the defendant needs a serotonin uptake inhibitor or that he was lacking in serotonin or anything else? He didn't. Why not? It's because he doesn't. There's not the cause and effect relationship that they want.

(Tr., p. 5496, L. 21 – p. 5497, L. 15.)

I say what these good men say is interesting background, but it doesn't help you with the core issue, which is could the defendant choose to kill Lynn Henneman in September or choose not to kill her? And you know that he can choose to kill her because he did. And you know that he could choose not to kill her because he chose not to kill her. He could have. That's what turns this mitigation into mitigation or not. This is the difference between mitigation and an abuse excuse. I didn't think about it, they thought of it. They said not abuse excuse. We want to tell you that right up front. The heck it isn't. That's just exactly what it is. This is a sympathy and I have sympathy for the defendant and I'll bet all of you do too if half the stuff that we heard about his childhood is true, then I have sympathy for him. But it's an excuse, because they cannot make the cause and effect relationship.

(Tr., p. 5503, Ls. 1-19.)

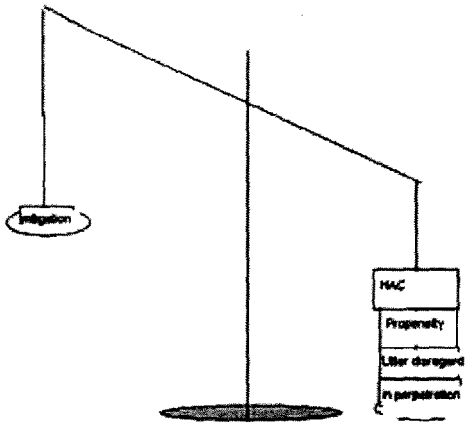
We told you to begin with that the business here is the question of whether or not the aggravation outweighs the mitigation. And to understand that you have to understand whether it's really mitigation or not. And that's why I wanted to spend the time with you to help you understand that the defendant could make choices. Because if he can make a choice then the things you heard about his background is not mitigating. It's sad but it's not mitigating. And there's nothing about that that somehow indicates that he couldn't choose to kill.

(Tr., p. 5504, L. 16 – p. 5505, L. 2.)

The State's argument impeded the jury's ability to consider valid mitigation by informing them that mitigation is limited to that evidence which has a causal relation to the defendant's criminal conduct. The State did not argue that the jury should afford little weight to the mitigation evidence presented. Instead, the State argued that there was absolutely no mitigating evidence presented based on the improper standard that they promulgated for the jury. The State's argument was flagrant intentional misconduct and prejudiced Petitioner. Because of the State's misrepresentation of the law governing the consideration of, and the definition of, mitigating circumstances, the jury failed to consider relevant mitigating evidence and Petitioner's death sentence must be vacated.

2. The Prosecution Committed Misconduct By Making An Improper Closing Argument Regarding The Manner In Which Mitigation Is Weighed Against The Aggravation.

While arguing their view of mitigation, the State presented a slide that depicted the weighing of aggravating circumstances against mitigating circumstances. The illustration was that of a scale, likened to the scales of justice, with the term "mitigation" on one side weighed against all four aggravating circumstances the State sought to prove to the jury: "HAC," "Propensity," "Utter disregard," and "In perpetration." The illustration resembled the following:



As shown above, the prosecution drew a scale leaning heavily in favor of the four aggravating circumstances weighed aggregately against the mitigation. Drawing upon the scale in its argument, the prosecution asserted that Petitioner deserved the death penalty.

The State's argument and illustration is a grossly simplified and misleading characterization of the weighing process required under I.C. § 19-2515(8)(a)(ii). The statute requires that all of the mitigation presented by the defense be weighed against ***each*** of the statutory aggravators it has found as proven beyond a reasonable doubt. *State v. Charboneau,* 116 Idaho 129, 774 P.2d 299 (1989). The scale depicted by the prosecution misstates the requirements under the law and constitutes gross misconduct. This misconduct requires this Court to vacate Petitioner's death sentence.

3. The Prosecution Committed Misconduct By Arguing That The Defense Experts Were Hired Guns.

During their closing argument, the prosecution encouraged the jury to view Petitioner's experts as hired guns.[23]

[23] The prosecution also dropped the occasional remark suggesting that the jury should not listen to "big city" (Dallas and San Francisco) "Harvard" educated, (Tr., p. 5496, L. 23 – p. 5497, L. 2), boys like Petitioner's experts. This is part of the "don't trust these strangers" appeal to regional bias taken by the State that trial counsel had seen in other cases, yet did nothing to preclude such improper attacks on their experts.

> These men you heard from San Francisco and Dallas yesterday, experts. You heard a full day of it. Couple of things you don't want to forget. They're in the business of supplying criminal defendants with excuses. You heard hours about poor Erick. And yet the first time you heard that he can decide what he did, that he was accountable, that he wasn't schizophrenic, that he wasn't psychotic was when Mr. Bourne raised his hand and in the three or four questions he asked got that out of him and forgot that part. Most of what they told you doesn't have anything to do with this case. It just doesn't. The show you saw cost $100,000. $100,000. And did it tell you anything that you didn't already know about human nature? I don't think it did. And ask yourself a couple of things, are they neutral observers of the evidence or are they hired to try to convince you to spare the defendant? Was that testimony you heard from the witness stand and from the podium or was it a performance? I suggest to you that that's what it was. It was a performance and it is done frequently enough by Dr. Cunningham that he is good at it. He could be preaching on Sunday. He has done -- does this 15 times a year and he's got it down. Coat yourself with the skepticism that protects you from that sort of thing.

(Tr., p. 5460, L. 25 – p. 5462, L. 2.) This argument is a constitutionally improper personal attack on the credibility of Petitioner's witnesses and seeks to penalize Petitioner for exercising his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, to present a defense, to counsel, and to fairness and reliability in death penalty cases.

A defendant has a constitutional right to present a defense that includes the right to expert assistance. In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the U.S. Supreme Court held that "the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition." *Id.* at 70. The prosecution cannot attack a defendant for exercising his constitutional rights.

A defendant's right to counsel can be violated by a prosecutor's improper examination of a witness or argument that seeks to penalize the defendant for exercising his constitutional right. *State v. Masters*, No. M2003-00305-CCA-R3-CD, 2004 WL

1208872, at *10 (Tenn. Crim. App. Jun. 2, 2004). In *Masters*, the court held that the defendant's rights were not violated during cross-examination of his experts when the prosecutor sought to attack "the reliability and impartiality of the witnesses in part because of their attitudes toward capital punishment. *Id.* However, when the prosecution goes beyond attacking the reliability and impartiality of a witness, the risk of depriving the defendant of a fair trial increases significantly. One such instance is where the state suggests that because the defense experts were paid hefty fees, their testimony would weigh heavily in favor of the defense. *State v. Smith*, 167 N.J. 158, 185, 770 A.2d 255, 272 (N.J. 2001); *see also State v. Schneider,* 402 N.W.2d 779, 788 (Minn.1987) ("Experts are not the paid harlots of either side in a criminal case and should not be portrayed in such a light.").

Petitioner asserts that the prosecutor's argument in his case went beyond attacking the reliability and impartiality of his experts, and thus deprived him of his right to a fair trial and his right to present a defense in mitigation of punishment. This misconduct requires this Court to vacate Petitioner's death sentence.

4. The Prosecution Committed *Doyle* Error By Eliciting Through Dr. Mark Cunningham Testimony That Petitioner Did Not Speak To Him About The Crimes For Which He Had Been Charged.

A *Doyle* violation only occurs when the State attempts to elicit evidence at trial of an accused's post-*Miranda* silence as evidence against him. *Doyle v. Ohio*, 426 U.S. 610 (1976). "*Doyle* rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." *Greer v. Miller*, 483 U.S. 756,763 (1987) (citations and internal quotes omitted).

Q. Okay. I believe that you didn't ask the defendant anything about the murder of Lynn Henneman when you spoke to him.

A. No, sir.

Q. So you didn't hear any of the details about the murder from his lips.

A. That's correct.

(Tr., p. 5387, Ls. 1-17.) Here, it appears the State elicited Petitioner's post-arrest silence in an attempt to insinuate a lack of remorse and to undermine his experts' opinions based on his childhood. This violated *Doyle* and requires, alone, and in conjunction with all other claims of error listed herein, a new sentencing.

5. The Prosecution Committed Misconduct By Misrepresenting The Testimony Of Michelle Deen And Evelyn Dunaway.

The prosecutor committed misconduct during closing argument in mischaracterizing Michelle Deen's and Evelyn Dunaway's testimony to establish that Petitioner choked them during sex:

> So, as we talk, as you look at this record and we think and talk about propensity, let's talk for a moment about the defendant's prior conduct and his appetite.
> ....
> So has he exhibited by prior conduct or conduct in the commission of the murder at hand a propensity to commit murder which will probably constitute a continuing threat to society? I think you know the answer to this. Let's talk for a moment about the women you met, I guess it was last Saturday. Evelyn Dunaway, choked, beaten. Do you remember when she told you about how the defendant pulled her out through a window of the car and bit her in the fact? She left that night. It became clear to her what – where this was leading. She left that night. Michelle Deen. **Michelle Deen told you after she had been choked, beaten, sexually abused**, that she snuck out at two o'clock in the morning with the clothes on her back to get away from the defendant. And you remember we didn't pick these people. The defendant picked them.

(Tr., p. 5456, L. 16 – p. 5458, L. 4) (emphasis added). In the State's rebuttal closing argument, the prosecutor argued:

> And the last one propensity. Has he shown a propensity to commit murder and probably constitute a continuing threat? Well, you've looked at the evidence. You know, do we start to see a pattern going on here? Well, what – you know what he did to Norma Jean. You know what he did to Lynn. You know what he did to Michelle. You know what he did to Evelyn. **It's all pretty much the same**, except he only killed once so far in that group.

(Tr., p. 5507, Ls. 9 – 17)(emphasis added).

Ms. Deen did not testify that Petitioner choked her while having sex. Nor did Ms. Dunaway. Yet the State mischaracterized their testimony to draw a prejudicial parallel between Petitioner's prior behavior with women and the facts alleged in the Henneman homicide for the purpose of establishing the propensity aggravator.

6. The Prosecution Committed Misconduct By Encouraging The Jury To Speculate In The Course Of Determining Whether The Propensity Aggravator Existed Beyond A Reasonable Doubt.

In closing argument, the prosecution impermissibly characterized as fact matters based on pure speculation.

> Well, let me ask you this one other question that will maybe kind of state the obvious. Did he have to kill her? Did he have to kill Lynn or did he do it for fun? Say that he grabs Lynn at the ambush point at the edge of the bridge like he told you about and drags her down there and he's got her under the bridge, he's got a knife. You know, he's got a knife if not that one some knife because he has to cut through the hem of her parents too thick to rip. He has to cut that and tear the rest. You know he's got a knife you think he could have put the knife to Lynn's throat and said "give me your purse, lady. Give me your wedding ring." Now, Lynn's a smart woman. What do you think she would have said, "cut my throat, I'm not going to give you my purse." Of course not. She would have given him the purse. She would have given him the ring. She's a smart woman. She's experienced, she's been around people.
>
> What happens if he said "Now give me sex or I'm going to cut your throat." Do you think she'd have given him sex to save her life? I think

she would have. Not going to die over that. So why does he kill her? Doesn't have to kill her. He kills her because he wants to, because he's sadistic and brutal towards women. He doesn't have to kill her.

What does the instruction tell you that it's a person who likes to kill, who kills without the normal amount of provocation who kills because they have an affinity. What's their affinity? They like it. That's what it is. That's what we're talking about here. He doesn't have to do that to her. He does it because he likes it.

Does he kill Lynn with the normal amount of provocation? Man, there was no provocation. He doesn't have to do anything to her. She's walking down -- she's walking home thinking of the kids that are going to like stuff she's bought that she's carrying in her purse. There's no provocation for that. She tries to get away from him and he chases her down. That's the only logical conclusion you can draw from the way that crime scene looks. She apparently dropped her purse as she was running. He catches her down there and that's where she was found 250 feet away.

(Tr., p. 5507, L. 21 – 5509, L. 16.)

7. The Prosecution Committed Misconduct By Making An Argument Inconsistent with Evidence Outside The Record.

The prosecution had the opportunity to rebut the testimony of the defense experts during the penalty phase of the trial, yet they called no expert witness. Indeed, the prosecution had their own professional witnesses, Dr. Michael Estess and Dr. Robert Engle, who they no doubt had to compensate to review Petitioner's experts' opinions as well as their testimony. Dr. Estess was even present in the courtroom to view the defense expert testimony at the sentencing. Nevertheless, the prosecution, after consultation during a recess, chose not to call either doctor as a witness, presumably because they could not rebut the defense experts' opinions.

Petitioner cannot fully state this claim as Dr. Estess has refused to discuss his findings or opinions of the defense testimony with Petitioner. Further, Petitioner is still

awaiting a hearing and ruling on his Motion For Discovery, filed January 5, 2006, in which he made several requests relevant to this claim.

8. The Prosecution Committed Misconduct In Arguing For Imposition Of The Death Penalty To Deter Future Crimes By Other Would-Be Criminals And As Retribution For The Victim's Family.

While the potential for mistakes in the determination of punishment may be tolerable in other areas of the criminal law, "in capital cases 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." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)(emphasis added). The Supreme Court elaborated on the principle of individualized sentencing in *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), wherein the Court held that, to be fair, a capital sentencing scheme must treat each person convicted of a capital offense with that "degree of respect due the uniqueness of the individual." *Id.*, at 605. The plurality concluded:

> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

Id.

It follows that consideration of general deterrence, as a factor supporting the imposition of the death penalty, is fundamentally inconsistent with individualized sentencing. Chief Justice Burger contrasted noncapital cases, stating, "in [such] cases,

the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes." *Id.,* at 604-05. Accordingly, where **noncapital** defendants later claimed that their rights were violated by consideration of general deterrence at sentencing, courts rejected their claims. *See e.g., United States v. Frank,* 864 F.2d 992, 1009-10 (3rd Cir.1988); *United States v. Barker,* 771 F.2d 1362, 1368-1369 (9th Cir.1985) (same); *U.S. v. Thomas*, 884 F.2d 540 (10th Cir. 1989) (same). From an oft-quoted passage from the Third Circuit opinion in *Frank*,

> the recognition of a substantive liberty interest in individualized treatment in sentencing would be inconsistent with the generally accepted notion that both retribution, which focuses on the interests of the victim rather than the status of the defendant, and general deterrence, which focuses on the interests of society at large rather than the status of the defendant, are appropriate societal versions for imposing sanctions.

United States v. Frank, 864 F.2d at 1009-10. Accordingly, because a capital defendant does have constitutional right to individualized sentencing treatment, consideration of general deterrence in determination of punishment is impermissible. *See e.g., People v. Love*, 366 P.2d 33 (Cal. 1961) (holding that it was improper for the prosecution during closing argument to argue that the death penalty was a more effective deterrent than life imprisonment), *overruled on other grounds by People v. Morse*, 388 P.2d 33 (Cal. 1964). An argument made, or evidence presented, of general deterrence is a constitutional violation no matter how clothed. Accordingly, inviting the jury to "send a message" to other would-be criminals is equally improper because it may tip the scales in favor of a death sentence. *See Com. v. Baker*, 511 A.2d 777 (Pa. 1986). In *Baker*, the Pennsylvania Supreme Court noted,

> Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to "send a message" of extreme disapproval for the defendant's acts. ... A defendant might thus be

> executed, although no sentencer had ever made a determination that death was the appropriate sentence.

Id., at 788.

General deterrence arguments are intended to dissuade the jury from granting mercy by distracting them from the individual defendant by encouraging them to consider a legitimate, but irrelevant, societal interest in preventing others from commiting crime. *See Wilson v. Kemp*, 777 F.2d 621 (11th Cir. 1985). In *Wilson*, the Eleventh Circuit reversed the defendant's death sentence, holding that the prosecutor's argument regarding deterrent effects and society's greater good swayed the focus of the jury away from the consideration of mitigating evidence in favor of evidence irrelevant to its consideration. *Wilson v. Kemp*, 777 F.2d at 624.

The Idaho Supreme Court has also recognized that general deterrence is not a legitimate consideration in death penalty sentencing. *See State v. Pratt*, 125 Idaho 546, 873 P.2d 800 (1993). In *Pratt,* the district court had referenced deterrence in its findings when imposing the death penalty. The Idaho Supreme Court found that the district court's comments about deterrence were made **after** it had already properly made all the required findings for imposition of the death penalty. Therefore, the Court was able to determine with certainty, and as a matter of law, that any consideration of deterrence did not affect the district court's findings and constituted mere surplusage, which, **by itself**, would not invalidate the death sentence. No such assurances exist in Petitioner's case. Indeed, there is every reason to believe that the jury considered general deterrence when making its findings.[24]

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[24] Petitioner does not assert that the societal goal of deterring crime is not a valid consideration in determining whether a state should **adopt** the death penalty -- that is a

During closing arguments, the Ada County Prosecutor, Greg Bower, argued that the jury should consider the community's interest in deterring future crimes as justification for imposing the death penalty. Specifically, Mr. Bower argued,

> A few last thoughts: If your verdict for death, saves just one person in the future, saves just one person in the future your sacrifice and your time will not have been in vain.

(Tr., p. 5462, Ls. 3-6.) Mr. Bower further argued,

> For the last year and a half Mr. Bourne and I have done our job. And now it's time to end this and hand the baton to you. How many times have you sat? How many times have you sat at the breakfast table reading the newspaper and read about a horrible crime and said to your suppose [sic], "Why don't they do something about this? This is our town. Why don't they do something about this?" Well the reversal of that is, now you are they. You are they. There is in your hands. Trust each other. You've run a long path together. Trust each other. Remember last week to. Take your common sense and your skepticism back into the jury room with you. Don't forget it. And finally the law is only as strong -- the law is only as strong as the weakest part on this jury which is heart.

(Tr., p. 5462, L. 24 – p. 5463, L. 15.)(sic added). Here, Mr. Bower is telling the jury that the societal function of the jury is law enforcement. Specifically, by imposing the death penalty, the jury ("they"), will reduce instances of "horrible crime[s]" in the future that they have all read about in the past. Mr. Bower is also stating that a jury, by listening to their heart and granting mercy, is weakening the law. *See also* Tr., p.5512, L.24 – p.5513, L.14 (suggesting to jurors that they have civic and patriotic duty to impose death penalty in this case).

The State continued this line of argument in its rebuttal. Specifically, Deputy Ada County Prosecutor, Roger Bourne argued,

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matter solely for legislative consideration. It nevertheless remains improper for a jury to consider alleged deterrent effects of the death penalty in deciding whether it should be **imposed**. *See People v. Love, supra.*

> Is Lynn's life worth nothing? Is a loss (sic) worth nothing? Did we go through all this for nothing? **What about retribution to her family? What about the protection of society? What about deterrence of others?**

(Tr., p. 5510, L. 22 – p. 551, L. 2) (sic added)

The State's argument drew persuasive support, not from evidence presented, i.e., evidence that the death penalty actually deters future crime, but from the beliefs and opinions expressed by various members of the jury in their written questionnaires and their oral testimony during voir dire. Indeed, in stark contrast to trial counsel who did not weave its overall theory of defense into voir dire, the State began prepping the jury for a death sentence during voir dire. The following jurors testified that they believed the death penalty generally deters crime: Elizabeth Ann Keeney, John Basil Jasper, Ann McNeese, and James David Kennedy. The State's questioning of Juror James David Kennedy included the following colloquy.

> Q. [Mr. Bourne] Well, let's talk about the death penalty just for a minute. You've told us that you are of the view that the death penalty is a deterrent and that it is appropriate in some murder cases and that you could assess it under the proper circumstances. Is that still your view today?
>
> A. Yeah, a little bit of qualification there I guess. It is -- any form of punishment is more deterrent, that's kind of legal for speeding and whatever. Death penalty with carrying it out 30 years later may not be as much deterrent as one sooner. It can be a deterrent in some cases and whether people get it or not depends on all kinds of situations, so.
>
> Q. Do you think society sends a message by assessing the death penalty -- I mean **you think that a jury sends a message to the community and to the defendant and others** by assessing the death penalty even if it takes several years before it's carried out?
>
> A. If that's a possibility, it's -- if there's a possibility of a death penalty I think that should be a consideration of somebody making a choice or decision, yeah, I think it would still work.

(Tr., p. 3029, L. 15 – p. 3030, L. 14)(emphasis added). Here the State deftly primed Mr. Kennedy for their closing argument. Trial counsel, with no experience in capital jury sentencing, apparently ignorant of State's slight of hand and the constitutional grounds for precluding this tactic, did not even notice they were already losing their case. The difference between life and death should not come down to a prosecutor out lawyering trial counsel. Through trial counsel's questioning, it became apparent that the juror's beliefs about the death penalty deterring crime was not a passing belief but one forged through experience with working with inmates at a correctional institution. (Tr., p. 3045, L. 24 – p. 3047, L. 21.)

Another juror, Ann McNeese, responded to questioning by the State as follows:

> Q. [Roger Bourne] Yeah. Looks like you've got some pretty strong opinions about why crime rates are up, whether the system is harsh enough or too harsh. My view is that -- or as I read your views I should say, I'm of the impression that you think there should be more deterrent effect to the criminal justice system to keep the crime rates down. Do I read that correctly?
>
> A. Yes.
>
> * * *
>
> A. [Ms. McNeese] ... I mean it's -- I really don't know what makes a person a murderer. I can't relate to that at all. But I would say a lot of that does have to do with society.
>
> Q. It can --
>
> A. It's too liberal a society.
>
> * * *
>
> Q. Okay. All right. You think that some kinds of conduct are so bad by themselves that -- that is that the crime is so heinous that the death penalty is society's way of expressing itself about the death penalty -- or about the crime I mean to say?

A. They probably use it as a deterrent, yes.

Q. All right. Okay. Now, do you think that the death penalty holds the defendant -- well, let me ask it a different way. Do you think that life without parole holds a defendant as responsible for his choices as the death penalty holds them responsible for his choices? Or do you think one or the other one is more a serious message?

A. They would be the same.

Q. Okay. Do you think that society's telling a person that they've crossed the threshold and are deserving of the death penalty is a stronger statement about responsibility than life without parole is?

A. Yes.

(Tr., p. 2498, Ls. 7-15; p. 2501, Ls. 13-21; p. 2503, L. 16 – p. 2504, L. 11.)

Another juror, Elizabeth Keeney, responded to questioning by trial counsel as follows:

Q. Have you always been in favor of the death penalty?

A. No.

Q. Okay.

A. No. I think -- I feel like the death penalty is a deterrent to crime. It seems like the prison system is not a deterrent to crime, it seems to me in all cases. But I think that if we use the death penalty -- I mean when someone is convicted of -- and sentenced to death, if the evidence is clear and convincing --

Q. Um-hum.

A. -- beyond a shadow of a doubt, then do it.

Q. Um-hum.

A. Because I think it's pretty well known that an person can sit on death row for many, many, many years. And so what's that say? You know.

Q. And I take it that your view of it changed at some point? You didn't believe that in the beginning or some other time, some earlier time?

A. Has it changed? No, I think this opinion has solidified. I don't know that I'd say it's changed. I think I was probably more without opinion on it.

Q. Okay. Can you pinpoint in time when you changed?

A. Nope -- or something.

Q. Something happen?

A. No, I don't know. Maybe it's just get older. I don't know.

Q. Why do you think it's a deterrent?

A. The death penalty?

Q. Yes.

A. Oh, because I think if somebody that was considering committing a crime knew that they were going to give their life I think would be a deterrent.

Q. Okay.

A. If they knew that, that our justice system was imposing that and sticking with it. I think that would be a deterrent. It's just like in other countries where they -- you steal something they chop off your arm.

Q. Um-hum.

A. I think that crime rate is much lower because people like to keep their limbs. Just a personal opinion.

Q. Okay. It's an eye for an eye kind of thing?

A. Yeah.

(Tr., p. 2093, L. 14 – p. 2095, L. 14.) As discussed elsewhere, Ms. Keeney attended the same church with, and knew a lot of information about, Angie Abdullah, the victim of murder in a capital case that was proceeding to trial on the same courtroom floor and at the same time as Ms. Keeney was giving her voir dire testimony. (Tr., 2074, Ls. 12-19.)

Another juror, John Jasper, responded to questioning by trial counsel as follows:

Q. How long have you felt in support of the death penalty?

A. As far as I can remember. I've never thought about it.

Q. Okay. Has your view ever changed?

A. No.

Q. Been pretty consistently in support of it?

A. Yes.

Q. Okay. How strong are your views?

A. Well, I tend to think they're pretty strong. It's not that they could never be changed if the right argument came upon it. I mean everything is always subject to change. But at this point that's the way I feel about it. That's the way it should be.

Q. Okay. I guess I want to ask you two questions. One is, why do you feel the way you feel and why do you feel so strongly about it?

A. Well, society as a whole -- I think the most deterrent -- the biggest deterrent we can have to keep people on the straight and narrow is a deterrent -- in the case of a child, to keep a child from doing things wrong they know that there's punishment. The punishment is not great then it's not going to be a big deal to them. If the punishment is severe -- I know as I was growing up that I would rather do the right thing so I wouldn't get a spanking growing up as a child because the deterrent was great enough. You know, it hurts I don't want that so I did the right thing. So if the deterrent is grate enough then it would sway more people to stay within the laws and the bounds of laws.

Q. Do you mean a deterrent to crime in general or just to murder?

A. Well, to murder. To any crime. I mean if the punishment is severe enough it would deter people from doing the crime.

Q. Um-hum. Do you think that a life sentence is a powerful punishment?

A. It is.

Q. Do you think it acts as a deterrent?

A. Somewhat.

Q. Okay. Can you explain that for me?

A. Well, I guess it would depend upon the person. If they were not able to function within society, to them serving time in jail for life they've got a roof over their heads, you know, they're going to have their meals, they can go out and exercise. And it is a deterrent in a way, but it could be more of a deterrent if there was more restrictions. Kind of hard to explain.

Q. Yeah. I think I understand what you're saying. Well, if a crime is called life without possibility of parole, would you believe that?

A. Yes.

Q. Okay. And if there's no hope of ever getting out of prison, do you think that makes it worse than the possibility of parole?

A. Yes. Yes, that would definitely make it worse.

(Tr., p. 2151, L. 9 – p. 2153, L. 20.)[25]

Despite the exercise of due diligence, it is impossible for Petitioner to fully state this claim as Petitioner has not yet received the juror questionnaires. These questionnaires likely include more information on the juror's views of the death penalty as a deterrent to future crime. Further, these questionnaires were critical; as the State noted, they were the parties' "bible" during voir dire. (Tr., p. 5445, Ls. 1-3.) Further, the Court has improperly precluded Petitioner from unrestricted access to jurors that would provide additional support for this claim. Finally, Petitioner needs additional time to consult with an expert in criminal justice for the purpose of showing trial counsel could have precluded this argument as inconsistent with evidence, or sought to rebut the

[25] Testimony regarding deterrence from jurors John Jasper and Elizabeth Keeney was actually elicited by trial counsel. This fact does not change the claim but only shows that the State cannot show that the prosecutorial misconduct was not harmless beyond a reasonable doubt.

argument with the presentation of evidence. As Justice Breyer noted in his concurring opinion in *Ring:*

> Studies of deterrence are, at most, inconclusive. See, *e.g.,* Sorensen, Wrinkle, Brewer, & Marquart, Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas, 45 Crime & Delinquency 481 (1999) (no evidence of a deterrent effect); Bonner & Fessenden, Absence of Executions: A special report, States With No Death Penalty Share Lower Homicide Rates, N.Y. Times, Sept. 22, 2000, p. A1 (during last 20 years, homicide rate in death penalty States has been 48% to 101% higher than in non-death-penalty States); see also Radelet & Akers, Deterrence and the Death Penalty: The Views of the Experts, 87 J.Crim. L. & C. 1, 8 (1996) (over 80% of criminologists believe existing research fails to support deterrence justification).

Ring v. Arizona, 536 U.S. at 615. Despite the need for further investigation to fully state this claim, Petitioner asserts that he is entitled to relief as stated.

9. The Prosecution Committed Misconduct By Expressing Their Personal Opinion That The Death Penalty Was The Appropriate Punishment.

Prosecutors are given leeway in making closing arguments. Prosecutors can appropriately argue the record, highlight the inconsistencies or inadequacies of the defense, and forcefully assert reasonable inferences from the evidence. *Bates v. Bell*, 402 F.3d 635 (6th Cir. 2005) (reversing death sentence for prosecutorial misconduct in making improper arguments). However, prosecutors cannot put forth their opinions as to credibility of a witness, guilt of a defendant, **or appropriateness of capital punishment.** *Id.* (emphasis added). This is because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Id.* (quoting *United States v. Young*, 470 U.S. 1, 18-19 (1985)).

During closing arguments, the Ada County Prosecutor stated his opinion that the death penalty was the appropriate punishment for Petitioner's crimes. Specifically, Greg Bower argued,

> You said you could impose the death penalty in the right case, but what you wanted was overwhelming proof. And I think that this is the right case. And I think that you know this is the right case.

(Tr., p. 5445, Ls. 14-18.) This represents an improper personal opinion of the appropriate punishment for this case, was improper, and warrants reversal on its own, and in conjunction with all other claims raised by Petitioner.

10. The Prosecution Committed Misconduct By Making Extra-Record Argument That Lethal Injections Are Painless and Humane.

The State argued that executing Petitioner would be a humane form of death, especially when compared to the asserted suffering of the victim. This argument had no support in the record, began in *voir dire*, and continued into closing argument where the State argued,

> Are those things the same? Is execution the same as what he did to Lynn Henneman? It's not. It's not anything like it. It's nothing like it. Being executed is like going into a surgery and getting put to sleep and not waking up. Is that what happened the Lynn?

(Tr., p. 5511, L. 24 – p. 5512, L. 4.)

Not only is this argument improper because based on information not in the record, Petitioner asserts that rather than being a humane form of execution; the drugs used to kill death row inmates can actually cause an excruciatingly painful and protracted death. According to an April 2005 report by the British journal, "The Lancet," as many as four of ten prisoners put to death by injection in the United States may receive inadequate anesthesia, causing them to remain conscious in tremendous pain. Therefore, Petitioner

claims that the State's argument was improper in two ways: (1) it was based upon an assertion of fact not supported by evidence in the record, and (2) it was based on the false assertion that Petitioner's execution will necessarily be painless. This argument violated Petitioner's rights to a due process, his right to a fair trial and his right to be free from cruel and unusual punishments as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Petitioner is still investigating and researching for case law developments; information on botched, problematic, or otherwise suspicious/unusual lethal injection execution situations; documented cases where more than one dose of a chemical was administered; toxicology data available at the time of Petitioner's sentencing; and any other relevant data and information. Petitioner is in the process of identifying a competent and independent medical expert to provide an affidavit in support of this claim. Petitioner cannot attach such an affidavit at this time due to time constraints.

11. The Prosecution Committed Misconduct By Arguing That A Life Sentence Would Be Too Lenient And Otherwise Speculating As To What Might Happen To Petitioner If A Death Sentence Were Withheld.

The State argued that a life sentence would be too lenient, in part by, speculating as to what might happen to petitioner if a death sentence were withheld, and by speculating as to what the Court might impose for Petitioner's other crimes. The prosecution argued:

> You heard the instructions and you know what the potential sentences are for these cases. You know that the defendant's given life without parole that he can be in general population in five years. You know that in general population he'll have access to a number of things television, gym, contact visits, he'll have access to sunshine. Remember the last picture that -- go down. But the last picture that Mickey showed you of Lynn sitting in the sunshine? She won't sit in the sunshine again. You give the defendant life without parole, he will.

(Tr., p. 5460, Ls. 9-20.) This statement encourages the jury to discount a life sentence as easy living and violates the principle in capital cases that jurors must be able to give legitimate consideration to life sentences. *See California v. Brown*, 479 U.S. 538 (1987); *Franklin v. Lynaugh*, 487 U.S. 164 (1988); *Penry v. Lynaugh*, 492 U.S. 302 (1989), *Mills v. Maryland*, 486 U.S. 367 (1988); *Simmons v. South Carolina*, 111 S.Ct. 2187 (1994); *see also* Claim E.1, *supra* (discussing materially false and misleading testimony of Dennis Dean regarding conditions of confinement).

The prosecutor then told the jury that imposing a life sentence was the equivalent of imposing no punishment at all:

> Counsel says give life. Here's the deal. You know that Judge Neville can give the defendant life on the rape, a life on the kidnapping. You know he's got one and so he's going to go to prison for life. He's got two rapes now that one prior conviction, he's going to go to prison for life.
> And so when Counsel says give him life, what he's really saying is give him nothing. Because the Ada County Prosecutor could stand up right now and say to Judge Neville, "We move to dismiss the murder charge. Dismiss it, we're done." And Judge Neville could give the defendant a life sentence for rape and a life sentence for kidnapping and the dismissal of the murder charge would not add a minute's time because he only has one life. And so when Counsel says "give the defendant life." And what he's really saying is give him nothing because he's already been -- going to get life so don't do anything else to him. Let's just let that go. Give him nothing. I think you ought to know that because that's the point of this. Is Lynn's life worth nothing? Is a loss worth nothing? Did we go through all this for nothing? What about retribution to her family? What about the protection of society? What about deterrence of others? What about the punishment for the defendant that he knows he deserves, that he earned, that he worked on, that he knew he had coming when he talked to the detectives back in March of 2003. What about those goals of society? Are we just going to give him nothing? We have talked about the minimum sentence and maximum sentence, but it isn't life. Giving him life is nothing. It's Brere Rabbit don't throw me in the brier patch because I'm already there. That's the deal.

(Tr., p. 5510, L. 1 – p. 5511, L. 12.)

This was again, pure speculation. While the sentences for rape and kidnapping have a maximum of life imprisonment, they do not carry mandatory minimums. For the prosecutor to tell the jurors that the Court **would** impose life sentences for the rape and kidnapping was not only outrageous, it fundamentally altered the **only** decision properly before the jury—the proper sentence for murder, and only after finding at least one statutory aggravator beyond a reasonable doubt. It focused the jury's attention on matters not within their concern. The prosecutor in effect told each juror that his or her **only** moral choice was death, when the law requires each juror to make a "reasoned moral response." *See Penry, supra; Mills, supra; Simmons, supra.* Petitioner asserts that the prosecutor's misconduct warrants reversal of his death sentence.

12. The Prosecution Committed Misconduct By Arguing That Petitioner Showed A Lack Of Remorse.

The prosecutor impermissibly argued during closing argument that Petitioner's silence demonstrated an apparent lack of remorse that should be considered as a factor weighing in favor of the death penalty:

> The family coming up here to give impact statements is enough to put a bronze statue on its knees for sorrow. None of us even know Lynn and I know the effect it had on me and what I could see from you. What effect did it have on the defendant? **Did he weep?** Did he bury his face in his hands and agonize over the things that he had done? **Does he show you remorse?** Did he give you confidence to think that he won't do this again, that he's learned his lesson, **that he's repentant**, that he's sorry, that he's willing to change his life, that he wants to make amends to Lynn's family? Does he do that? Is this letter that says "I'm going to offer myself as a sacrifice for your loss". **Is that a way of showing that he's repentant?**

(Tr., p. 5506, Ls. 7 – 22)(emphasis added).

Petitioner had the right to remain silent under the Fifth and Fourteenth Amendments. No negative inference from Petitioner's failure to testify is permitted.

Mitchell v. United States, 526 U.S. 314, 329 (1999). This rule applies at sentencing as well as the guilt phase. *Id.* Thus, just as a jury cannot infer guilt from a failure to testify, it cannot infer lack of remorse from a failure to testify at sentencing. allow him to do without adverse consequences, and his silence may not be converted by a prosecutor into an expression of lack of remorse. The prosecutor invited the jury to do and thereby violated Petitioner's right to remain silent.

In conclusion, when ruling on all the forgoing claims of prosecutorial misconduct in closing argument, Petitioner respectfully requests this Court to review Justice Blackmun's dissent in *Darden v. Wainwright*, 477 U.S. 168 (1986), where he, joined by Justices Brennan, Marshal, and Stevens, quoting in part a Second Circuit dissent, stated:

> This court has several times used vigorous language in denouncing government counsel for such conduct as that of the [prosecutor] here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offense, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, 'Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend-rules. If prosecutors win verdicts as a result of "disapproved" remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure. The deprecatory words we use in our opinions on such occasions are purely ceremonial.' Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this court--recalling the bitter tear shed by the Walrus as he ate the oysters--breeds a deplorably cynical attitude towards the judiciary (footnote omitted).

Id., 477 U.S. at 205-206 (internal citations and quotations omitted).

J. TRIAL COUNSEL LABORED UNDER MULTIPLE AND VARIED CONFLICTS OF INTERESTS THAT ADVERSELY AFFECTED THEIR PERFORMANCE.

1. Trial Counsels' Competing Obligations To Attend To Other Cases Created A Conflict Of Interest Adversely Affecting Counsels' Performance.

Petitioner's conflict claim summarized as follows: trial counsel had a duty not to zealously represent all clients. That duty creates an inherent conflict for counsel if their caseload does not permit enough time for adequate preparation. Something has got to give, and that, in Petitioner's case, was effective representation.

It is common knowledge that public defenders carry heavy caseloads. *See Bell v. Quintero*, 125 S.Ct. 2240 (2005) (noting the "shuffle of a heavy caseload" carried by public defenders). The American Bar Association has described the problems associated with excessive caseloads.

> One of the most significant impediments to the furnishing of quality defense services for the poor is the presence of excessive workloads. . . . All too often in defender organizations[,] . . . attorneys are asked to provide representation in too many cases. . . . Unfortunately, not even the most able and industrious lawyers can provide quality representation when their workloads are unmanageable. Excessive workloads, moreover, lead to attorney frustration, disillusionment by clients, and weakening of the adversary system.

ABA Guidelines, Commentary to Guideline 6.1 (citations, footnotes, and quotations omitted).

While Petitioner is still investigating this claim, he is aware that one of his trial lawyers, D.C. Carr, has recently left the Ada County Public Defender's Office. Petitioner has reason to believe that heavy caseloads influenced Mr. Carr's decision to leave the office and enter private practice. Along these lines, Petitioner notes that there were times

during the underlying criminal proceedings that Mr. Carr was not present, presumably attending to his other cases.[26] Further, one of the lead attorneys at the Ada County Public Defender's Office, August Cahill, has previously testified that an attorney's caseload in that office is not decreased if the attorney is assigned a capital case. Mr. Cahill also conceded that he was not familiar with the ABA Guidelines governing workload. State v. Michael Jauhola, Ada County case no. SPOT0100492D, (Tr., p. 4083, L. 22 – p. 4085, L. 14); *see also* ABA Guidelines, Guidelines 6.1, 10.3, and accompanying Commentary.

Petitioner cannot fully state this claim due to the trial team's failure to adequately cooperate in his reinvestigation of the case. Further, Petitioner is still awaiting a hearing and ruling on his Motion For Discovery, filed January 5, 2006. Nevertheless, Petitioner asserts that trial counsels' duty to attend their other cases adversely affected their performance in his case.

2. Norma Jean Oliver

Trial counsel had the duty to investigate or reinvestigate the Norma Jean Oliver rape charges, in order to rebut the State's evidence purporting to show propensity. However, Amil Myshin represented Petitioner on the charges initiated by Ms. Oliver, and thus worked under a conflict of interest in reinvestigating that case because an adequate reinvestigation would have shown ineffective assistance in the previous case.

Petitioner has reasonable grounds to believe that counsel's investigation on the original 1991 rape case was severely deficient. The extent to which Mr. Myshin's conflict of interest adversely affected his performance is also being investigated. Review

[26] *See e.g.,* (Tr., p. 3682, L. 24 – p. 3683, L. 2.)

of the requested records is a necessary part of current counsels' investigation. Further, Petitioner cannot fully state this claim as he is still awaiting a hearing and ruling on his Motion For Discovery, filed January 5, 2006.

3. April Sebastian

April Sebastian testified against Petitioner at his sentencing. At the time of her testimony, she was actively represented by Petitioner's trial counsel, Amil Myshin, in her upcoming "rider" hearing in the case of State of Idaho v. April Sebastian, Ada County case no. H0400228. (Tr., pp. 4868-70; pp. 4875-96.) At the time of her testimony, Ms. Sebastian also had another active case, State of Idaho v. April Sebastian, Ada County case no. H0400335//M0401584. Mr. Myshin cross-examined Ms. Sebastian without ever receiving a waiver from her of confidential matters, including information learned through the attorney/client relationship or through Mr. Myshin's investigation and research on her behalf.

Following her testimony, Ms. Sebastian appeared for her "rider" hearing with her counsel, Amil Myshin (Exhibit 18.). The district court presiding over the case granted her probation with recommendation from the State. The extent to which Ms. Sebastian's cooperation with the State assisted her in getting probation is being investigated.

Petitioner has reasonable grounds to believe that the State offered Ms. Sebastian benefits in her other cases in exchange for her testimony against Petitioner. For instance, based on a review of court documents, Ms. Sebastian was not a good candidate for probation, appearing to have failed on probation twice previously (Exhibit 19, Exhibit 20.) The extent to which Mr. Myshin's conflict of interest adversely affected his performance is also being investigated. Review of the requested records is a necessary

part of current counsels' investigation. Further, Petitioner cannot fully state this claim as he is still awaiting a hearing and ruling on his Motion For Discovery, filed January 5, 2006.

4. Christian Johnson

Petitioner believes that either of his trial counsel, or other members of the Ada County Public Defender's Office represented Christian Johnson. Petitioner is still investigating this claim and reserves the right to withdraw it upon completion of his reinvestigation of the case.

K. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO FAILURE TO REQUEST PRETRIAL EVIDENTIARY HEARING FOR THE PRESENTATION OF FACTS ALLEGED IN SUPPORT OF THE NOTICED AGGRAVATING CIRCUMSTANCES.

Trial counsel should have requested a pretrial evidentiary hearing for the State's evidence in support of the noticed aggravating circumstances. The purpose of the hearing would have been three-fold: (1) to provide notice to the defense so that they could adequately prepare for sentencing; (2) to ensure that the evidence was reliable; and (3) to ensure that the facts offered in support of the aggravating circumstances existed by a preponderance of the evidence; and (4) that the noticed aggravating circumstances were based on independent evidence. Trial counsel should have relied on grounds for the motion including the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

L. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO CASELOAD.

Petitioner incorporates by reference his arguments under Claim L.1. Petitioner asserts that trial counsel rendered ineffective assistance of counsel by failing to decline

assignment of additional cases, or in the alternative, by failing to remove themselves from Petitioner's case due to excessive caseloads. Petitioner asserts these failures constitute deficient performance.

To demonstrate prejudice, Petitioner asserts that prejudice should be presumed in that his counsels' obligations to other clients effectively denied him counsel. *United States v. Cronic*, 466 U.S. 648 (1984). Alternatively, applying the *Strickland* standard, Petitioner asserts that but for counsels' deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different.

Petitioner cannot fully state this claim due to the trial team's failure to adequately cooperate in his reinvestigation of the case. Further, Petitioner is still awaiting a hearing and ruling on his Motion For Discovery, filed January 5, 2006. Nevertheless, Petitioner asserts that trial counsels' duty to attend their other cases adversely affected their performance in his case.

M. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO FAILURE TO SUPPRESS EVIDENCE.

Trial counsel were ineffective in (a) failing to claim a *Miranda* violation during Petitioner's interrogations, and (b) failing to move to suppress the third interrogation on the basis that Petitioner had already been formally charged and his Sixth Amendment right to counsel had attached by the time of interrogation.

Petitioner has not had the opportunity to review the interrogations, reports, pleadings, and transcripts relevant to this claim and reserves the right to either expound or withdraw this claim after further investigation. In addition, Petitioner requires additional materials, requested in his discovery motion, in order to precisely state the

deficient performance and prejudice—namely enhanced videotapes and the videotapes as played to the jury.

With regard to (c), Petitioner's Sixth Amendment right to counsel attaches the moment formal judicial proceedings have been initiated. *Massiah v. United States*, 377 U.S. 201 (1964). The right is triggered when judicial proceedings are initiated against the accused, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Brewer v. Williams*, 430 U.S. 387, 398 (1977). Once the right attaches, the state, including the police and their agents, may not interefere with the accused's right to counsel. *Illinois v. Perkins*, 110 S.Ct. 2394, 2398-2399 (1990).

The formal complaint was filed against Petitioner in the Henneman case at 3:50 p.m. on April 1, 2003. (Exhibit 21.) The April 1st interrogation with Detectives Allen and Mace did not take place until 5 p.m. (Tr., p. 4177, L. 23 – p. 4178, L.21). Thus, the interrogation violated Petitioner's Sixth Amendment right to counsel. Trial counsel were ineffective under the *Strickland* standard in failing to move to suppress statements obtained from Petitioner in this interrogation.

N. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO FAILURE TO MOVE FOR CHANGE OF VENUE, OR, IN THE ALTERNATIVE, FAILING TO MOVE TO HAVE A JURY FROM ANOTHER COUNTY IMPANELED.

Criminal defendants are entitled to a trial before an **unbiased** jury. This right is guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Sections 7 and 13 of the Idaho Constitution, Idaho Code §§ 19-1902, -2019, and -2020, and Idaho Criminal Rule 24(b). "The bias or prejudice of even a single juror is enough to violate that guarantee." *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000).

The Supreme Court has long held that where a criminal case receives excessive publicity, the defendant's rights to an unbiased jury and, consequently, a fair trial, may be violated if the trial court does not take prophylactic measures, such as changing venue to a place less saturated by publicity, to insulate the insulate the jury's decision-making process from the outside influences of the publicity. *See, e.g., Marshall v. United States*, 360 U.S. 310 (1959) (remanding case for a new trial where seven jurors had been exposed to news accounts containing information which was not presented at trial); *Irvin v. Dowd*, 366 U.S. 717 (1961) (vacating the conviction of a prisoner sentenced to death based on the saturation of the jury pool with pretrial publicity and the fact that eight out of twelve jurors came into the trial with a preconceived opinion that the defendant was guilty); *Rideau v. Louisiana*, 373 U.S. 723 (1963) (holding that the trial court had erred in denying the defendant's motion for a change of venue where the media, prior to trial, had broadcast a taped confession of the defendant); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (holding that the defendant's right to a fair trial was violated due to circus-like media involvement); *Estes v. Texas*, 381 U.S. 532 (1965) (reversing defendant's conviction because the media had broadcast the defendant's pretrial hearing).

Notwithstanding the fact that the United States Supreme Court has held that a defendant's right to a fair trial can be violated without a particularized showing of prejudice, *see Rideau*, 373 U.S. 723,[27] Idaho's appellate courts sometimes adhere to the view that in order to prevail on a claim related to pretrial publicity, the defendant must

[27] The dissent took issue with this aspect of the *Rideau* decision, complaining that the majority opinion, which had failed to "establish[ ] any substantial nexus between the televised 'interview' and the defendant's trial, which occurred almost two months later," was not faithful to precedent. *Rideau*, 373 at 1420-23.

affirmatively demonstrate prejudice, *i.e.*, that his own jury was biased.[28] *See, e.g., State v. Yager*, 139 Idaho 680, 687-88, 85 P.3d 656, 663-64 (2004); *State v. Fee*, 124 Idaho 170, 175, 857 P.2d 649, 654 (Ct. App. 1993); *State v. Fetterly*, 109 Idaho 766, 769 & n.1, 710 P.2d 1202, 1205 & n.1 (1985). However, they do not always do so. In *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986), the Court of Appeals noted that:

> a defendant's inability to make a detailed and conclusive showing of prejudice is not a proper ground for refusing to change venue. Prejudice seldom can be established or disproved with certainty. Rather, it is sufficient for the accused to show "a *reasonable likelihood* that prejudicial news [coverage] prior to trial will prevent a fair trial." Sheppard v. Maxwell, 384 U.S. 333, 363 ....

Hall, 111 Idaho at 829, 727 P.2d at 1257, (emphasis and alteration in original). *See also State v. Sheahan*, 139 Idaho 267, 278, 77 P.3d 956, 967 (2003) (adopting the "reasonable likelihood" standard set forth in *Hall*). Regardless of whether a showing of prejudice is a strict requirement though, the Idaho courts have said that there are certain basic factors that should be considered *on appeal* in evaluating the question of whether pretrial publicity had necessitated a change of venue below: (1) the nature and content of the pre-trial publicity; (2) the amount of time elapsed between the pretrial publicity and the trial (and sentencing); (3) whether there is evidence, *e.g.*, affidavits, indicating prejudice, or a lack thereof, in the community where the defendant is to be tried; (4) *voir dire* testimony by actual jurors indicating whether or not they had pre-formed opinions as to

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[28] In this regard, the Idaho courts often do not distinguish between motions to change venue based on pretrial publicity and other claims involving biased jurors. Petitioner respectfully contends that, to the extent that the Idaho courts fail to recognize pretrial publicity cases as different, the Idaho courts are in error. Petitioner contends that *Rideau* recognized that these cases are a unique subset of "unfair trial/biased juror" cases in that the defendant is not required to prove prejudice and move to strike individual jurors for cause.

the defendant's guilt or innocence; and (5) whether the defendant moved to strike any of the jurors for cause. *Hall*, 111 Idaho at 830, 727 P.2d at 1258.

In the present case, the nature and volume of pretrial publicity that the case received should have caused trial counsel to investigate and weigh a motion to change venue. This would have required counsel to obtain and analyze the articles and television and radio broadcasts that had saturated Ada County, and either conduct a poll or obtain affidavits evidencing the level of bias that existed in Ada County. In addition, counsel should have filed a motion to change venue and, if that motion had been denied, developed a record that would have allowed Petitioner to challenge that denial on direct appeal. This would have required counsel to question potential jurors during *voir dire* as to the amount, and nature, of the pretrial publicity to which they had been exposed, as well as their preconceived opinions as to Petitioner's guilt, and it would have required counsel to move to strike apparently biased jurors for cause and to exercise peremptory strikes against those apparently biased jurors for whom for-cause challenges had been unsuccessful.

1. Trial Counsel Was Ineffective For Failing To Obtain And Analyze Copies Of The Articles And Television And Radio Broadcasts That Had Saturated Ada County.

Had trial counsel engaged in an adequate investigation and analysis, they would have discovered that both quantity and the nature of the publicity in this case, and in the other crimes for which Petitioner has been charged, rendered it impossible to find an impartial jury composed of Petitioner's peers.

The first flurry of news coverage resulted from Lynn Henneman's disappearance. That news coverage, stretching from September 26, 2000, through November 10, 2000,

which included near-daily stories in *The Idaho Statesman*,[29] as well as extensive television news coverage,[30] is detailed, in part, below:[31]

- September 26, 2000. One day after she was reported missing, the *Statesman* reported Ms. Henneman's disappearance in the banner headline of its "Local" section. Patrick Orr, *Woman missing since Sunday, police say*, IDAHO STATESMAN, Sept. 26, 2000, at 1B. The article detailed the highly visible efforts to find Ms. Henneman: a dive team, Life Flight flying over the Boise river, and Idaho Mountain Search and Rescue team. *Id.* It also included a picture of Ms. Henneman. *Id.*

- September 28, 2000. The *Statesman*'s front-page banner headline was that some of Ms. Henneman's personal effects had been found. Patrick Orr, *Boy finds missing woman's purse*, IDAHO STATESMAN, Sept. 28, 2000, at 1A, 12A. That article indicated that after the effects had been discovered, police engaged in a throrough search of the immediate vicinity—in full view of the

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[29] The *Statesman*, headquartered in Boise, and claiming Ada and Canyon Counties as its primary markets, *see* The Idaho Statesman (visited Apr. 14, 2006) <http://custserv.idahostatesman.com/ CustSvc/advertising_services/adv-pdfs/market-profile/2005BoiseMSASnapshot.pdf>, is, by far, the most widely circulated Idaho newspaper. The Idaho Newspaper Association reports the *Statesman*'s circulation as 68,060 copies. *See* Idaho Newspaper Association (visited Apr. 12, 2006) <http:///www.idahopapers.com/map.html>. In comparison, the next most widely circulated Idaho newspaper is the Post Register, at only 26,551 copies. *See* Idaho Newspaper Association (visited Apr. 12, 2006) http:///www.idahopapers.com/map.html

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It is interesting to note that undersigned counsel has searched for, but has been unable to locate *any* articles regarding Ms. Henneman's disappearance and death, or Petitioner, in either the Coeur D'Alene Press or the Idaho State Journal, two of the major newspapers in north Idaho and east Idaho, respectively. *See* Idaho Newspaper Association (visited Apr. 12, 2006) <http:///www.idahopapers.com/map.html>. Thus, the chances of prejudice attributable to pretrial publicity in this case could have been cut drastically by transferring venue to a court in north or east Idaho.

[30] In response to Petitioner's requests for information, only one of four local network affiliates voluntarily provided Petitioner with materials related to its coverage of Ms. Henneman's disappearance and death, Ms. Hanlon's death, and the Petitioner. Copies of those materials are provided on the DVDs and corresponding transcripts marked as Exhibit 22 and provided herewith. The other three network affiliates have refused to cooperate with Petitioner and, thus, this claim cannot be fully developed unless or until this Court allows Petitioner to obtain issue subpoenas.

[31] All of the articles from the Statesman are marked as Exhibit 23 and are provided herewith.

public. *Id.* at 12A. One witness to the search commented that she knew the search had to do with Ms. Henneman "because they kept it so hush-hush." *Id.* (quoting a local resident). In discussing Ms. Henneman's disappearance generally, the article also indicated that "[t]he news media has really hit the airwaves hard with her picture ...." *Id.* at 12A (quoting the spokeswoman for the Garden City Detective Unit). It also indicated that the publicity was apparently working as detectives had already received fifty different tips. *Id.* Finally, the article again included a picture of Ms. Henneman. *Id.*

- September 29, 2000. Another banner headline about Ms. Henneman's disappearance appeared in the "Local" section of the *Statesman*. Patrick Orr, *Henneman may have gone to comedy club*, IDAHO STATESMAN, Sept. 29, 2000, at 1B. That article revealed that the publicity campaign had led to the police receiving some 34 more tips in only 24 hours. *See id.* It also included Ms. Henneman's picture. *Id.*

- September 30, 2000. The *Statesman* ran a front-page story revealing that a $20,000 reward was being offered for information leading to the arrest and conviction of anyone involved in Ms. Henneman's disappearance. Emily Simnitt & Patrick Orr, *$20,000 reward offered*, IDAHO STATESMAN, Sept. 30, 2000, at 1A, 7A. That article also reported that a "tearful" press conference had been given by Ms. Henneman's family:

> [F]amily members aid Henneman is a friendly person who rarely showed anger.
>
> "I miss Lynn," [Micki] Husienga [Ms. Henneman's mother] said. "She was the mediator between Mark and Laura (Henneman's brother and sister). I want my daughter back. Please try to help just a little bit more."
>
> Henneman's older brother, Mark Husienga, described her as someone who would naturally strike up a conversation with anyone. "I don't know if I've ever seen her angry," he said.
>
> Mark Husienga also said he hoped the reward would keep up the momentum of support the family has already received from the community.
>
> Micki Husienga said when she went to pick up Mark Husienga and his wife, Diane, from the airport, several people hugged her and expressed their support.

Id. at 7A. The article also included a very moving photo of at least five members of Ms. Henneman's family holding each other during that press conference; it included a second emotional picture of Ms. Henneman's

husband obviously breaking down, with his hands covering his face, it included yet another picture of Ms. Henneman. *Id.* at 1A, 7A.

With regard to the community's support of Ms. Henneman's family, the article indicated that Boise residents had been passing out missing person fliers, and it urged all Boise residents and businesses to turn on their lights on Sunday, October 1, 2000, as a show of support for the family. *See id.* at 1A, 7A.

- October 1, 2000. For the fourth day in a row, the *Statesman* reported on Ms. Henneman's disappearance, but only to say that no new leads had developed. *No leads develop in hunt for woman*, IDAHO STATESMAN, Oct. 1, 2000, at B1. It also reiterated the *Statesman*'s plea that anyone with any information about Ms. Henneman's disappearance come forward. *Id.*

- October 4, 2000. In an article prominently displayed on the first page of its "Local" section, the *Statesman* reported that Ada County residents were feeling uneasy about using the "Crown Jewel" of their community, the Boise River Greenbelt, in light of Ms. Henneman's disappearance: "Henneman's recent disappearance has many shaken up. 'Seeing those pictures [the missing person fliers] everywhere is haunting. It really makes you apprehensive.... I didn't really start worrying about it until this last incident.'" Patrick Orr, *Greenbelt incidents make users nervous*, IDAHO STATESMAN, Oct. 4, 200, at 1B, 5B (quoting a local resident). In discussing the public's unease, the article highlighted two previous rape-killings on the Greenbelt in recent years—that of Kay Lynn Jackson in 1998, and that of Samantha Maher earlier in 2000. *Id.* at 5B. But, at the same time, it included a large photo of a bicycle police patrol, *id.* at 1B, and included numerous reassurances from officers that the Greenbelt is actually relatively safe, *id.* at 1B, 5B.

- October 8, 2000. The banner headline on the cover of the *Statesman* indicated that Lynn Henneman's body had apparently been found. Jeff McKinni & Patrick Orr, *Body Found in Boise River*, IDAHO STATESMAN, Oct. 8, 2000, at 1A, 9A. This article included a timeline and an annotated map of the Greenbelt and downtown Boise, showing, among other things, where Ms. Henneman had last been seen and where her body was recovered; two photos of officers, apparently at the scene of the body recovery; and yet another photo of Ms. Henneman. *Id.* at 1A, 9A.

- October 9, 2000. The day after reporting her body apparently found by a fisherman, the *Statesman* reported, in another front-page banner headline, that Ms. Henneman's body had been positively identified. Patrick Orr, *Coroner confirms body's identity*, IDAHO STATESMAN, Oct. 9, 2000, at 1A, 9A. That article quoted the Ada County Coroner, Erwin Sonnenberg, as asserting unequivocally: "It was definitely a homicide. There were no gun wounds or stab wounds, but there are other findings we can't release right now that indicate it was a homicide." *Id.* at 1A (quoting Mr. Sonnenberg). The article

also discussed the high-profile "massive search," which had included boats, divers, search-and-rescue dogs, and helicopters, that had failed to uncover Ms. Henneman's body. *Id.* Finally, the article included yet another picture of Ms. Henneman. *Id.* at 1A.

- October 10, 2000. For the third day in a row, the *Statesman* carried a front-page banner headline about Ms. Henneman. Patrick Orr, *Searchers find items from slain woman*, IDAHO STATESMAN, Oct. 10, 2000, at 1A, 8A. The article reported that additional items belonging to Ms. Henneman had been found: "Right now, we are not disclosing what those items are, but there are some things we know are hers, Boise Police Spokesman Jim Tibbs said at the scene Monday. "We need to look at all the evidence before we can release that information." *Id.* (quoting police spokesman). It also included an annotated Greenbelt/downtown map, two large photos of police officers' evidence recovery efforts, and another photo of Ms. Henneman. *Id.* at 1A, 8A.

- October 11, 2000. In another front-page banner headline, the *Statesman* again, for the second time in eight day, addressed the public's safety concerns in light of Ms. Henneman's disappearance and apparent murder. Patrick Orr, *Boise to step up Greenbelt security*, IDAHO STATESMAN, Oct. 11, 2000, at 1A, 7A. The article quoted then-police chief Don Pierce as saying: "I think first and foremost it was a traumatic event for this community. The Greenbelt is one of our most prized possessions, and when something like this happens, it is like someone steals one of our possessions." *Id.* at 1A.

  In a separate article, carrying its own banner headline, and appearing on the first page of the *Statesman*'s "Local" section, it was reported that the Ada County Coroner was expected to reveal the cause of Ms. Henneman's death later that day. Patrick Orr, *Cause of woman's death expected today*, IDAHO STATESMAN, Oct. 11, 2000, at 1B, 6B. It went on to repeat the earlier-reported "knowledge" that certain items found in or near the Boise River over previous days "definitely" belonged to Ms. Henneman. *Id.* at 1B. The article included another photo of Ms. Henneman. *Id.* at 1B. It also reported that Ms. Henneman's family had expressed gratitude to the citizens of Boise for all their support, but were also "fearful for the citizens of Boise, because there is a killer on the loose." *Id.* at 1B, 6B (quoting a Boise lawyer who had been in contact with the family).

- October 12, 2000. In its fifth Henneman-related front-page banner-headlined article in a row, and again including a picture of Ms. Henneman, the *Statesman* reported that, although the Ada County Coroner would not publicly reveal his opinion as to the cause of Ms. Hennman's death, he had "ruled out stabbing, shooting, and blunt head trauma," and another newspaper had reported that she was "probably strangled" to death. Patrick Orr, *N.Y. newspaper: Henneman was 'probably strangled,'* IDAHO STATESMAN, Oct. 12, 200, at 1A, 6A. The article went on to report that police had said that they were withholding the exact cause of death for tactical reasons:

> Sonnenberg said not releasing the information could be a helpful tactic in determining whether any leads are true or in questioning potential suspects, though they have none.
>
> "It helps if leads come in on information that has not been released," he said. "There are some things the people don't know but a perpetrator does know."
>
> ...
>
> Boise Police Spokesman Lt. Jim Tibbs said Wednesday releasing information about the evidence could be detrimental to the investigation.
>
> "At the initial stage of this investigation, especially in a case this unique, so little information is available that you do not publicize everything you have found," he said.
>
> Not publicizing sensitive information can help detectives when they are interviewing potential suspects, Tibbs said.
>
> "Again, you have to think down the road instead of running to the media," he said.

Id. at 1A, 6A. In addition, the article noted that the reward for information about Ms. Henneman's death had been increased to $30,000 with the anonymous $10,000 contribution of a local businessman. *Id.* at 6A.

In the "Local" section of the *Statesman*, Ms. Henneman's obituary appeared. *Obituaries*, IDAHO STATESMAN, Oct. 12, 2000, at 7B. That obituary indicated that Ms. Henneman had "become a part of the community" during the previous two weeks, it asked that the "residents of the Treasure Valley" pray for the Henneman family, and it urged "the residents of the Treasure Valley" to attend a public memorial service to be held on October 19, 2000. *Id.* The obituary also included another picture of Ms. Henneman. *Id.*

- October 13, 2000. For the sixth day in a row, the *Statesman* reported on the Henneman's, but only to say that no new no information had been released by the police. *No new info released in Henneman case*, IDAHO STATESMAN, Oct. 13, 2000, at B1. That article indicated that police had, by then received in excess of 300 tips from members of the community. *Id.*

- October 20, 2000. [Officer tells women to trust instincts, stay safe][32]

[32] In some instances, Petitioner has provided the Court with only a date and an article title. In such instances, Petitioner knows that an article, believed to support his claims, was published, but he has not yet been able to obtain a copy of that article. For the most

- October 23, 2000. In a front-page banner headline, the *Statesman* again discussed the community's safety concerns regarding the Greenbelt in light of Ms. Henneman's death. Emily Simnitt, *Police to rethink Greenbelt safety after attack*, IDAHO STATESMAN, Oct. 23, 2000, at 1A, 7A. That article reported on an apparent attempted attack on a 20-year old woman which garnered a "heightened [police] response [which] was due in part to a partially implemented plan to beef up security around the Greenbelt after Henneman was slain near the pathway on about Sept. 24." *Id.* at 1A. Despite the overwhelming police response, the article indicated that members of the public were still greatly disturbed:

> "It's outrageous (that) as women, we can't go out walking any place after dark," said Sue Fellen, whose office is near the Greenbelt. "The city is paying attention, but obviously, it's not doing enough. They need to take this seriously."
>
> "We need to send the message to bad people: 'Don't come to our town because there are consequences to pay.'"
>
> ...
>
> For Bryana Deits, the stronger officer presence and better lighting discussed by police and the parks department can't come soon enough. Deits, who moved to Boise three weeks ago from Seattle, says she's more scared here. On Sunday afternoon, Deits carefully chose a spot in the open and close to busy Broadway Avenue in which to picnic.

Id. at 7A. The article went on to detail measures that were being taken to enhance Greenbelt security, including stepping up bike, horse, and motorcycle patrols, increasing lighting, adding telephones, and moving transients out of the area (even though police acknowledged that transients have as much of a right to use the park system as do other residents, and that they had no reason to believe that transients had been involved in the most recent attack). *Id.*

- October 27, 2000. In a banner headline on the front page of its "Local" section, the Statesman reported a new lead in the Henneman case. Emily Simnitt, *Task force investigates Henneman lead*, IDAHO STATESMAN, Oct. 27,

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part, undersigned counsel represents that articles have not been obtained due to technical difficulties with the *Idaho Statesman*'s website and a lack of cooperation from *Idaho Statesman* staff. Petitioner believes that, given sufficient time and discovery, he will be able to obtain the missing articles, and that all of the articles, taken together, will demonstrate that his trial counsel provided ineffective assistance for failing to adequately develop some form of a "motion for change of venue or, in the alternative, motion to have a jury from another county impaneled," and for failing to file the same.

2000, at 1B. That article indicated that Ms. Henneman was seen talking to someone on the Greenbelt shortly before she diappeared, but it also reported that the police still refused to disclose the cause of her death, and whether she had been sexually assaulted, for tactical reasons: "'Hypotehtically, let's say she was sexually assaulted,' Boise Det. Dave Smith said. 'If we put that out, the killer knows we know and might leave the area.'" *Id.* It also included Ms. Henneman's picture again, as well as another plea from help from the community, promising a $42,500 reward for information leading to an arrest and conviction. *Id.*

- November 10, 2000. [Henneman task force loses members.]

This summary of the early news coverage of the Henneman case makes a number of things clear: (1) not only was the media spreading information about the Henneman case through traditional channels, but police, Ms. Henneman's family, and concerned members of the community were actively reaching out to everyone in the community—not just news readers/watchers—through pleas for information and missing person posters; (2) the net result of these combined efforts was that Ms. Henneman's death was thrust to the forefront of Boise's consciousness virtually every day for over a month; (3) Ms. Henneman's disappearance and death were deeply emotional, not only for her family, whose personal suffering was shared with the entire community, but also for the community as whole, many of whom were able to empathize with the family's personal loss; (4) Ms. Henneman's disappearance and death, which had come relatively soon after two prior rape/murders on the Greenbelt, was a terrifying event not only for those Ada county residents who regularly used the Greenbelt, but for all members of the local community who perceived the Greenbelt to be a symbol of everything that is great about the Treasure Valley; and (5) the police were completely in control of the information that was disseminated to the public through the various media outlets, such that where police suspicions were presented, they were given as fact, and where the police suspicions were in doubt, they were presented as being withheld for tactical reasons. In the aggregate,

this coverage virtually guaranteed that all of Ada County's residents would have strong feelings about whoever might eventually be charged with harming Ms. Henneman. They felt deep and pain and fear, and they had been led to believe that everything the police said was fact.

After November 2000, although the specifics of the Henneman case were no longer reported on a near-daily basis, the case never strayed far from people's minds. Throughout 2001 and 2002, the major media outlets occasionally reported on the fact that no progress had been made in the Henneman case, but were actually more likely to report on the related issue of the public's safety concerns regarding the Greenbelt

- April 4, 2001. [City to light Greenbelt tunnels]
- April 26, 2001. [Ada residents still worry about Greenbelt safety]
- June 10, 2001. [Guardians of the Greenbelt]
- August 20, 2001. [Group seeks to light Greenbelt]
- September 25, 2001. [Clues still sought in Henneman case]
- October 20, 2001. [Boise adds to Greenbelt trail security]
- November 19, 2002. [Police chief tries to allay CIU fears]
- April 11, 2002. [Boiseans to gather on birthday of flight attendant slain in 2000]
- April 13, 2002. [Boiseans show their support for slain woman's family]
- June 19, 2002. [Boise council awards bid to light up the Greenbelt]
- September 24, 2002. [Murders, other crimes prompt Boise Police to increase Greenbelt safety] [2 years later, detectives still search for killer]

It is undersigned counsels belief that these articles demonstrate that, although months had passed since the discovery of Ms. Henneman's body, the residents of Ada County had not forgotten either: their deep sense of hurt over Ms. Henneman and her

family's suffering; or their new-found fear that their beloved Greenbelt was no longer a safe place to recreate.

On March 1, 2002, anther tragic event greatly impacted the Henneman investigation and, ultimately, Petitioner's prospects of getting a fair trial in the Henneman case: Cheryl Ann Hanlon was found dead in the Boise foothills. That event led to more saturation-style media coverage, and eventually led to Petitioner being labeled a "killer" in the public's eye.

- March 2, 2003. In a front-page banner-headlined article, the *Statesman* reported that Cheryl Ann Hanlon had been found dead on a North End hillside, the victim of an apparent ligature strangulation. Chereen Langrill, *Woman found strangled on North End hillside*, IDAHO STATESMAN, Mar. 2, 2003, 2003, at 1, 8. The article contained a small map of the North End, twp photos of the body recovery scene, a photo of Ms. Hanlon, and pleas for citizens to help the police by calling in all potential tips. *Id.* at 8.

- March 3, 2003. In a banner-headlined article on the first page of the *Statesman*'s "Local" section, the paper provided a sketch and a physical description of a man supposedly seen with Ms. Hanlon shortly before she turned up dead. Jonathon Brunt, *Sketch of man released by police*, IDAHO STATESMAN, Mar. 3, 2003, at 1, 7. The article also included another picture of Ms. Hanlon, another map of the North End, another plea for help from the community, and a photo of Ms. Hanlon's truck. *Id.* at 1, 7. Finally, the article, intimated that Ms. Hanlon's apparent murder might be related to one or more of the numerous other unsolved Boise murders, including those of Kay Lynn Jackson and Lynn Henneman. *Id.* at 1, 7.

- March 4, 2003. In another banner-headlined article on the first page of the *Statesman*'s "Local" section, the paper reported again on Ms. Hanlon's apparent murder, providing another picture of her, another composite sketch and physical description of the man she was supposedly seen with, and another plea for information from the community. Jonathon Brunt, *Police following up tips in killing*, IDAHO STATESMAN, Mar. 4, 2003, at 1, 3. The article also included a number of safety tips for area residents. *Id.* at 3.

- March 5, 2003. On the first page of its "Local" section, the *Statesman* reported that Ms. Hanlon had leisurely strolled into the foothills alone, had stopped at some point, had struggled with her assailant, and then had been dragged downhill to the place where her body was ultimately found. Chereen Langrill, *Police: Murder victim walked into foothills*, IDAHO STATESMAN, Mar. 5, 2003, at 1, 3. That version of events, apparently derived from police

measurements of footprints at the scene, was presented by the police (through the *Statesman*) as fact. *See id.* at 1. The article also provided another picture of Ms. Hanlon, another composite sketch and physical description of the man she was supposedly seen with, and another plea for information from the community. *Id.* at 1, 3.

- March 15, 2003. On its front page, the *Statesman* reported that Petitioner had been charged with the murder of Ms. Hanlon. Patrick Orr, *Transient charged in Hanlon death*, IDAHO STATESMAN, Mar.15, 2003, at 1, 11. That article prominently referred to Petitioner as a "transient," which was the same negative label that had been used to describe the homeless people who were *assumed* to present safety challenges on the Greenbelt after Ms. Henneman's death. *See Police to rethink Greenbelt safety after attack*, IDAHO STATESMAN, Oct. 23, 2000, at 1A, 7A. It also offered a side-by-side comparison of the composite sketch of the individual supposedly last seen with Ms. Hanlon, to Petitioner's unflattering mug shot. Patrick Orr, *Transient charged in Hanlon death*, IDAHO STATESMAN, Mar.15, 2003, at 1. It also made it appear that the police had, without doubt, found their man:

> "The city of Boise can breathe a sigh of relief that Eric Hall is off the streets," Boise Police Chief Don Pierce said Friday morning.
>
> Pierce said Hall admitted to detectives late Thursday that he killed Hanlon, 42, in the foothills near 5th and Alturas streets in the early morning hours of March 1.
>
> ...
>
> Piece also said detectives had amassed a significant amount of physical evidence tying Hall to the sexual assault and murder but declined to specify the evidence.
>
> Investigators believe Hall sexually assaulted Hanlon and strangled her to death, then tried to conceal her body in a shallow hole by covering her with grass and tree branches, Pierce said.
>
> Detectives say Hall then took Hanlon's car, eventually abandoning it near 13th and Franklin streets.

Id. at 1, 11. The article then went on to detail what it called Petitioner's "extensive" criminal history, highlighting his conviction for statutory rape after having been accused of sexually assaulting and choking a 17-year old girl, and his subsequent charge of failure to register as a sex offender. *Id.* at 11. It also indicated that Petitioner had been implicated based on tips from the public: "'This is a very good example of how we rely on our community to

help us,' Pierce said, praising the more than 100 people who came forward with tips on the case." *Id.* at 11. Finally, the article included yet another picture of Ms. Hanlon, as well as a photograph of Boise Police Chief Don Pierce. *Id.* at 1, 11.

In a separate article, the Statesman reported that a DNA sample taken from Petitioner would be sent out-of-state for analysis. Chereen Langrill, *DNA tests in slaying may be delayed*, IDAHO STATESMAN, Mar. 15, 2003, at Local 11.

- March 18, 2003. On the front page of its "Local" section, the *Statesman* ran an article reiterating many of the inflammatory content of its March 15 article. Patrick Orr, *Suspect in Hanlon killing faces hearing on March 28*, IDAHO STATESMAN, Mar. 18, 2003, at Local 1. It included Petitioner's unflattering mugshot; it reported that prosecutors claimed he "used a belt to strangle Hanlon," as if that allegation had already been established as fact; it asserted that Petitioner had admitted to killing Ms. Hanlon; it stated that police had categorized Petitioner as a "transient"; it implied that Petitioner may have raped and killed either Kay Lynn Jackson or Lynn Henneman; and it detailed his criminal history, highlighting the unproven allegation that he had raped, bound, and choked a 17year old girl. *Id.*

- March 29, 2003. [Murder suspect also charged with rape]

The intense media coverage surrounding Ms. Hanlon's death, while at first playing to the community's fear for the safety of its young women and, perhaps, outrage for having to be concerned with such matters, later offered the community an expedient path to peace of mind: get rid of Erick Hall. The media coverage, driven by police statements, portrayed Petitioner as a "transient" sexual deviant, with a penchant for strangulation during rape, who has lived a life of crime. Thus, it dehumanized him. Furthermore, it portrayed his guilt in the Hanlon case as having been already established, and it implied that Petitioner may be guilty of other unsolved murders in Boise. And, even if he is not guilty of other crimes, it implied that Petitioner was certainly guilty of something and, therefore, should be removed from society: "The city of Boise can breathe a sigh of relief that Eric Hall is off the streets ...." Patrick Orr, *Transient charged in Hanlon death*, IDAHO STATESMAN, Mar.15, 2003, at 1 (quoting the Boise

Police Chief). Thus, it also made him a lightening rod for all of the community's frustration about its crime problems.

On April 2, 2003, based on the DNA sample obtained from Petitioner in relation to the Hanlon case, the State accused Petitioner of raping and murdering Lynn Henneman. As detailed below, that charge only served to heighten the prejudicial reporting on Petitioner.

- April 3, 2003. In a prominent article on its front page, the Statesman reported that Petitioner had been charged with Ms. Henneman's murder. Patrick Orr, *Suspect charged in Henneman murder*, IDAHO STATESMAN, Apr. 3, 2003, at 1, 6. That article included a sub-headline reading "DNA test shows Eric [sic] Hall killed flight attendant in 2000, Boise police say," which appeared next to the unflattering mugshot of Petitioner. *Id.* The article then went to great length to report that in police officers' minds, trial would be nothing more than technicality because Petitioner had already been "proven" guilty beyond all doubt:

> Boise police say DNA evidence links the same man to two brutal rape/murders, providing a major break in a 2½-year old murder case that changed the way Boise residents view safety on the Greenbelt.
>
> ...
>
> Lead Detective Dave Smith and others in the department took the case personally, Pierce said ....
>
> ...
>
> Two and a half years later, Pierce said, Boise is a safer place with the Henneman murder finally solved.
>
> "Today, we know the man who killed her, Eric [sic] Virgil Hall, is behind bars," Pierce said Wednesday during a news conference. "We are 100 percent certain we have our man."

Id. at 1, 6. After all of that, however, "Pierce declined further comment, saying he wants to ensure Hall gets a fair trial." *Id.* at 6. Detective Smith, however, picked up right where Chief Pierce had left off. According to the *Statesman*, Detective Smith claimed that the "details at the Hanlon crime scene ... immediately brought to mind the Henneman case.... 'Right at the

(scene), we had strong feelings there might be a match here,' Smith said."[33] *Id.* at 6 (alteration in original).

The *Statesman*'s lead article on April 3, 2003 also tugged at the public' heartstrings. It was topped by a large picture of Ms. Henneman's relatives, at taken at the previous day's City Hall news conference announcing that Petitioner had been charged, showing them overcome with emotion. *Id.* at 1. Later, it had a large photo of Ms. Henneman's husband and sister hugging at the conclusion of the press conference. *Id.* at 6. The article said that during the news conference, Ms. Henneman's parents and sister stood behind Chief Pierce, "at times holding each other for support," while Ms. Henneman's husband stood quietly to the side. *Id.* It then quoted Ms. Henneman's husband, Walter Us, as being just as convinced of Petitioner's guilt as Chief Pierce and Detective Smith were, and printed his request that "justice" be done: "'I am sad another person had to die to catch this killer, but I am glad he is behind bars and will have to face justice," Us said. Lynn deserves justice. All we can do is pray and hope for the best and pray justice is carried out.'" *Id.* at 1, 6 (quoting Ms. Henneman's husband).

Finally, it is worth noting that the article touched on the psychological effects of Ms. Henneman's disappearance and death on the Boise community. It noted that "Henneman's disappearance as she walked along the river to her hotel frightened city residents and led to several safety improvements on Boise's Greenbelt." *Id.* at 1, 6. It made it clear that Ms. Henneman's disappearance and death had changed the way many Boiseans viewed their community: *See id.* at 6.

In its April 3, 2003 edition, the Statesman devoted a full page (besides the front-page coverage) to Petitioner's alleged crimes. At the top of the page was an article detailing Ms. Henneman's family's two and a half year ordeal. Patrick Orr, *Henneman's family has mixed feelings about arrest*, IDAHO STATESMAN, Apr. 3, 2003, at 6. In that article, it was noted that Petitioner's

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[33] It should be noted that Detective Smith's claim on or about April 3, 2003, which was reiterated by the Statesman on April 5, 2003 and April 24, 2003, Jonathon Brunt, *Henneman suspect fell through cracks of DNA testing*, IDAHO STATESMAN, Apr. 5, 2003, at 8; Patrick Orr, *Suspect to plead in rape, killing of woman*, IDAHO STATESMAN, Apr. 24, 2003, at Local 6, is directly at-odds with statements made by Chief Pierce a few weeks earlier. *See* Patrick Orr, *Transient charged in Hanlon death*, IDAHO STATESMAN, Mar.15, 2003, at 1 ("Pierce said a DNA sample has been taken from Hall and will be compared against DNA evidence from other major unsolved crimes in Boise, likely including the Lynn Henneman and the Kay Lynn Jackson rape/murderer cases in 2000 and 1998 and last year's serial rape attacks in the Winstead Park area. However, he said, there is no suspected link to those cases at this point."); Patrick Orr, *Suspect in Hanlon killing faces hearing on March 28*, IDAHO STATESMAN, Mar. 18, 2003, at Local 1 (same). Thus, one has to wonder whether Detective Smith's statement is true or whether, perhaps, his recollection was altered by the DNA testing results.

arrest had "eased the minds" of the family, and had given them "some relief." *Id.* Interestingly, the article appeared with a large photo of a tough- and serious-looking Detective Smith posing next to an American flag. *Id.* In the article, Ms. Henneman's family and Chief Pierce heaped praise upon Detective Smith, portraying him as a tireless advocate of justice:

> "This guy is just fantastic," Micki Husienga said, pointing at Smith.
>
> ...
>
> "For the last two and a half years, Micki has been calling and saying 'Dave, I love you, and I have been praying for you' ..." Smith said....
>
> Smith said he took the case personally, working on the case at least a week—chasing every lead, re-examining old clues, scouring the Internet for similar cases and getting DNA samples from people of interest while working on his regular caseload.
>
> "These are the kinds of cases where good detectives become intimately, personally involved in the case," Chief Don Pierce said.

Id. at 6.

Also in the April 3, 2003 edition of the *Statesman* was an article largely vilifying Petitioner. *See* Jonathon Brunt, *Suspect in two slayings has lengthy criminal record*, IDAHO STATESMAN, Apr. 3, 2003, at 6. In that article, which contained a second copy of Petitioner's unflattering mugshot, Petitioner's prior criminal history was detailed, with particular attention paid to the fact that he had been on probation for "assaulting a different woman when one of the victims [Ms. Hanlon] was killed ...." *Id.* However, the article did finally reveal some information that did not come directly from the police: it quoted a friend as saying that Petitioner had cried and asserted his innocence, and that he is actually a kind and gentle young man. *Id.*

- April 4, 2003. The *Statesman* reported that Petitioner had been arraigned in the Henneman case. Patrick Orr, *Suspect arraigned on rape, murder charges*, IDAHO STATESMAN, Apr. 4, 2003, at Local 1. The article then went on to offer the police department's version of the facts without question: "he [Petitioner] eventually confessed to [the Hanlon murder]"; and "[a] DNA sample taken from Hall linked him with the two murders ...." *Id.* The article then went on to quote a friend of Petitioner's who, despite her faith in him, had already been persuaded by the State's evidence which had been reported in the media, and her misperception of the strength of that evidence:

> [Jillian] Stone said she first met Hall during the summer of 2000 at Julia Davis Park. "He was like a father figure to me, so the first time I heard about this, I didn't believe it—there was no way he could have done it. But DNA doesn't lie."
>
> She added: "Now I think, 'What if that was me?'"

Id.

- April 5, 2003. The *Statesman*, in a front-page article that provided yet another copy of Petitioner's unflattering mugshot, as well as much more flattering photos of his two alleged victims, reported that despite Petitioner's criminal record, the State did not have a sample of Petitioner's DNA on-hand when it started investigating the Henneman and Hanlon murders because he had been released from prison before Idaho's DNA sampling law went into effect. Jonathon Brunt, *Henneman suspect fell through cracks of DNA testing*, IDAHO STATESMAN, Apr. 5, 2003, at 1, 8. The clear implication of this article is that if the DNA sampling law had gone into effect sooner, then Petitioner would have been apprehended sooner and Ms. Hanlon might never have been killed. *See id.* However, this implication pre-supposes the accuracy of the DNA testing and interpretation, and Petitioner's guilt.

- April 14, 2003. Lest there have been any confusion about whether the *Statesman* had prematurely adjudged Petitioner guilty in its April 5, 2003 article, the newspaper made its position clear in an April 14, 2003 editorial:

> It's outrageous to think that Eric [sic] Virgil Hall, now accused of killing two women in Boise, could sit in prison for seven years without submitting to a DNA test. But it's downright scary to think that other violent criminals may have slipped by the DNA database because of lack of administrative follow-up.

Editorial, *DNA testing is a must, preferably at booking*, IDAHO STATESMAN, Apr. 14, 2003, at Local 8. Thus, the newspaper labeled Petitioner a violent criminal and, by arguing that his alleged crimes had "slipped by the DNA database," it presupposed that he is actually guilty of those crimes. It then went on to argue that DNA matches are indisputable by quoting then-Ada County Sheriff, Vaughn Killeen: "'DNA determines guilt or innocence,' Killeen said. 'It's more reliable than eyewitness accounts. If I were falsely accused of a crime, I'd want to have the DNA testing.'" *Id.* It should be noted that the *Statesman*'s editorial also featured Petitioner's unflattering mugshot.

- April 24, 2003. On the front-page of its "Local" section, the Statesman reported that Petitioner had been arraigned in the Henneman case. Patrick Orr, *Suspect to plead in rape, killing of woman*, IDAHO STATESMAN, Apr. 24,

2003, at Local 1, 6. In that article, the *Statesman*, which referred to Petitioner not as "the man" or "the person," but rather "the transient" accused of killing Ms. Henneman, reiterated: the details of Ms. Henneman's disappearance and death; the fact that Petitioner stood accused of killing not only Ms. Henneman, but also Ms. Hanlon; the allegation that Petitioner had confessed to killing Ms. Hanlon; the allegation that "[a] DNA sample taken from Hall after his arrest in the Hanlon killing linked him with the Henneman killing"; and Detective Smith's questionable claim that the Hanlon crime scene immediately brought the Henneman case to mind because it appeared to involve a similar *modus operandi*. *Id.* at 1, 6. In addition, the article indicated that, in discussing supposedly secret grand jury proceedings, the Ada County Prosecutor had selectively leaked information which he obviously felt would help his chances of convicting Petitioner: the fact that multiple out-of-state experts had testified "that DNA taken from murder suspect Eric [sic] Hall matched DNA taken from victim Lynn Henneman." *Id.* at 6.

- May 6, 2003. [Greenbelt patrols spring into action]
- May 8, 2003. [Execution sought in Henneman slaying]
- May 20, 2003. [Plea in Henneman case delayed]
- May 22, 2003. In an article on the front-page of the "Local" section, the *Statesman* reported that Petitioner had been indicted in the Hanlon case. Patrick Orr, *Hall indicted in Hanlon murder, rape case*, IDAHO STATESMAN, May 22, 2003, at Local 1. The article contained cursory summaries of both cases and highlighted what the police/Statesman saw as the damning evidence: Petitioner's "extensive" criminal record; a DNA sample which "linked him to the Henneman killing"; and the questionable claim that the Hanlon crime scene bore such similarities to the Henneman case that that crime scene immediately brought the Henneman case to mind for investigators. *Id.* It should be noted that this article also once again showcased the unflattering mugshot of Petitioner, and a smiling picture of Ms. Hanlon. *Id.*
- May 29, 2003. [Recent rash of murders strains police, prosecutors]
- June 7, 2003. [Not guilty pleas entered in two Ada County murder cases]

As the above news reports make clear, after Petitioner had been charged with Ms. Henneman's death, the police began to use the press to begin conditioning the community to internalizing the themes that it would later develop during *voir dire* and, ultimately, at trial. The press portrayed Detective Smith, the lead investigator on the Henneman case,

as being a indefatigable proponent of justice: a tough, hardworking cop on the outside, but a caring man on the inside whose only flaw is sometimes he take the pursuit of "justice" too personally. *See generally, e.g.*, Patrick Orr, *Henneman's family has mixed feelings about arrest*, IDAHO STATESMAN, Apr. 3, 2003, at 6. At the same time, the press reported that the officers involved in the Henneman case, whose integrity and professionalism had already been bolstered, could personally vouch for the "fact" of Petitioner's guilt. *See, e.g.*, Patrick Orr, *Suspect charged in Henneman murder*, IDAHO STATESMAN, Apr. 3, 2003, at 6 ("We are 100 percent certain we have our man.") (quoting Police Chief Pierce). At the same time, the press characterized the police department's evidence as being virtually incontrovertible. First, it treated the police department's characterization of the DNA evidence as being the unquestionable truth. Second, it adopted Detective Smith's after-the-fact and highly suspect contention that once he saw the Hanlon crime scene, it immediately brought the Henneman case to mind because of an allegedly similar *modus operandi*. Third, it portrayed Petitioner as evil: it included a sinister-looking mugshot with every article; it adopted the police department's dehumanizing label of "transient"; and it highlighted what it repeatedly called Petitioner's "extensive" criminal record at every turn while, at the same time, trying to draw analogies between the pending rape/murder charges and his prior statutory rape conviction and assault charge. Indeed, if there is any doubt about the degree to which the police had shaped the public's preconceptions about the case through their use of the media, one need turn no further than the statements given to the *Statesman* by Jillian Stone. Ms. Stone was a friend of Petitioner's who, at one time, had trusted him so much that she though of him as a father-figure. But even Ms. Stone was quickly convinced of

Petitioner's guilt and the infallibility of the State's DNA evidence—not by evidence adduced at trial or by a jury's verdict, but by the pretrial media publicity (as driven by the statements of the police): "[T]he first time I heard about this, I didn't believe it—there was no way he could have done it. But DNA doesn't lie. Now I think, 'What if that was me?'" Patrick Orr, *Suspect arraigned on rape, murder charges*, IDAHO STATESMAN, Apr. 4, 2003, at Local 1 (quoting Ms.Stone).

Any time the press shows the police and, in particular, the lead investigator on a case, such adoration, treating the individual officers as saviors of the community, and also presents the State's evidence as categorically true, while at the same time denigrating the defendant and treating him as sub-human, there is always going to be a risk that the public will develop a tremendous prejudice against the defendant. However, that risk was heightened in this case because the messages offered to the public by the press were the very types of messages that the public so *wanted* to embrace. In this case, the public was so deeply saddened, angered, and terrified by the circumstances of Ms. Henneman and Ms. Hanlon's deaths, that it must have been comforting to hear—and to believe—that the cause of all the suffering had been removed from society and, therefore, that the streets of Boise were once again safe. *See, e.g.*, Patrick Orr, *Suspect charged in Henneman murder*, IDAHO STATESMAN, Apr. 3, 2003, at 1 ("Today, we know the man who killed her, Eric [sic] Virgil Hall, is behind bars.") (quoting Chief Pierce).

While the intensity of the news coverage surrounding the Hanlon and Henneman cases certainly diminished after Petitioner was indicted in those cases, it did not go away. Consequently, neither case strayed far from the public consciousness. As detailed below,

from the winter of 2003 to the start of the Henneman trial in the fall of 2004, both cases continued to be the subject of publicity.

- November 30, 2003. On the front page of its "Local" section, the *Statesman* reported that the $42,500 reward that had been offered for information leading to an arrest and conviction in the Henneman case would not be given to anyone because the case was "solved" by police work, not a tip. Patrick Orr, *Reward won't be given for solving homicide*, IDAHO STATESMAN, Nov. 30, 2004, at Local 1, 5. In that article, besides proclaiming Petitioner's guilt in the Henneman case by referring to it as having been "solved," the newspaper reiterated a number of its previous prejudicial statements. It continued to refer to Petitioner as "Boise transient"; it made it clear that Petitioner stood accused of two crimes which the police now claimed involved a similar *modus operandi*; and it repeated the police department's assertion that "[t]he DNA samples matched Hall with both Hanlon and Henneman." *Id.*

- January 17, 2004. [Trial put off in Henneman slaying]

- January 24, 2004. [October trial set in slaying of Lynn Henneman]

- February 10, 2004. [Bill would require more criminals to have DNA test]

- February 23, 2004. [Greenbelt seems safer—and stats say it is]

- February 24, 2004. [City is investing wisely in keeping Greenbelt safe]

- February 26, 2004. [Volunteers free up Garden City police for more time on street]

- March 24, 2004. On the front page of its "Local" section, the *Statesman* reported that during the previous afternoon another young woman had turned up dead near the Boise Greenbelt. Kathleen Kreller & Patrick Orr, *Passer-by discovers body of woman in Boise pond*, IDAHO STATESMAN, Mar. 24, 2004, at Local 1. Later, this woman was identified as Amanda Stroud, an individual who was listed as a potential State's witness in the Henneman case.

- March 25, 2004. On the front page of its "Local" section, the Statesman reported that the dead body found two days earlier near the Greenbelt was that of Amanda Stroud. Patrick Orr, *Police seek clues to where woman was living*, Idaho Statesman, Mar.25, 2004, at Local 1, 3. It further reported that the cause of her death was unknown. *Id.*

- March 27, 2004. [Dead woman linked to murder suspect]

- April 3, 2004. [Toxicology results pending in woman's death]

- April 22, 2004. [Tests fail to show how woman, 21, died]
- September 22, 2004. [Courthouse to host 2 big trials]

The above media coverage, while certainly not as intense as it had been at previous times, undoubtedly kept the Hanlon and Henneman cases on the public's collective mind. Moreover, since the coverage had been so persistent for so long (it was just about four years between Ms. Henneman's disappearance and Petitioner's trial), the State's message, as reported through the media, had no doubt become ingrained in people's thinking about the cases. Indeed, as the Idaho Court of Appeals has already recognized: "When prospective jurors are incessantly exposed to news stories selectively packaged for mass consumption, they may become subtly conditioned to accept a certain version of facts at trial. Such repetitive exposure may diminish the jurors' ability to separate information absorbed before trial from information during trial." *State v. Hall*, 111 Idaho 827, 830, 727 P.2d 1255, 1258 (Ct. App. 1986) (discussed favorably in *State v. Sheahan*, 139 Idaho 267, 278, 77 P.3d 956, 967 (2003)). This danger seems especially insidious in cases such as this one—where some, but not a great deal, of time has passed between the most frenzied media coverage and the actual trial. In this case, enough time has passed (approximately a year and half between the time that the police, amid great pomp and circumstance, announced that they had collared "their man," and the time that Petitioner was actually tried) for potential jurors to forget the details of what they had heard and seen in the news, such that their biases would not have been readily articulable during jury selection, but an insufficient amount of time had passed for those potential jurors to have forgotten their much more subtle biases about the police, the evidence, and the defendant.

In light of both the quantity and the quality of the pretrial publicity in this case, trial counsel should have, at the very least, thoroughly investigated and considered the issue of whether it was possible for Petitioner to receive a fair trial before an unbiased jury in Ada County. ABA Guidelines, Commentary to Guideline 10.7 ("Counsel should maintain copies of media reports about the case for various purposes, including to support a motion for change of venue, if appropriate, to assist in the *voir dire* of the jury regarding the effects of pretrial publicity, to monitor the public statements of potential witnesses, and to facilitate the work of counsel who might be involved in later stages of the case.") Moreover, because even a cursory review of the pretrial publicity that occurred in this case reveals that there was "a reasonable likelihood that prejudicial news coverage prevented a fair trial in violation of the Sixth Amendment to the United States Constitution," *State v. Sheahan*, 139 Idaho 267, 77 P.3d 956, 967 (2003), and, thus, a change of venue would likely have been granted, counsel should have done more than simply investigate; counsel should have fully developed and litigated a motion for a change of venue.

2. Trial Counsels' Failure To Poll The Community And/Or Obtain Affidavits Demonstrating A Community Bias Against Petitioner.

Although the sheer volume and prejudicial nature of the pretrial publicity in this case was sufficient to warrant a change of venue, *see, e.g., Rideau v. Louisiana*, 373 U.S. 723 (1963), counsel was, nevertheless, required to do more than rely on the publicity itself; counsel was required to develop a *thorough* motion to change venue, highlighting all possible grounds for that motion to be granted. *See* ABA Guidelines, Commentary to Guideline 10.8 ("Whether raising an issue specific to a capital case (such as requesting individual, sequestered voir dire on death-qualification of the jury) or a more common

motion shaped by the capital aspect of the case (such as requesting a change of venue because of publicity), counsel should be sure to litigate all of the possible legal and factual bases for the request. This will increase the likelihood that the request will be granted and will also fully preserve the issue for post-conviction review in the event the claim is denied."). That means that counsel had an obligation to obtain evidence that the community was, in fact, biased against Petitioner. *See Hall*, 111 Idaho at 830, 727 P.2d at 1258 ("Among the factors considered [when reviewing a judge's denial of a motion to change venue] are the existence of affidavits indicating prejudice, or lack of prejudice, in the community where the defendant was tried ....") Thus, in this case, trial counsel should have made some effort to document, in a systematic and reliable way, the bias of the community, *i.e.*, the jury pool.

In the present case, every indication is that trial counsel made no effort whatsoever to document, in a systematic and reliable way, the bias of the community.[34] Because such an effort would likely have revealed an overwhelming bias against Petitioner, and because such bias would likely have led to a motion for change of venue being granted, Petitioner's trial counsel was ineffective.

3. Trial Counsels' Failure To File A Motion To Change Venue Or, In The Alternative, To Have A Jury From Another County Impaneled.

Because no motion for change of venue was filed, this Court was never given the opportunity to review the significant amount of damaging media coverage regarding this case and Petitioner generally. As discussed above, such a motion would have been extremely compelling, and would have been likely to succeed based solely upon the

[34] Because trial counsel has refused to disclose their notes or to otherwise cooperate with post-conviction counsel, this claim cannot be fully developed until such time as Petitioner is allowed to engage in discovery.

prejudicial media coverage. However, it would have been more thorough, and would have had a better chance to succeed if supported by evidence—such as affidavits or a poll—quantifying the level of actual bias against Petitioner. Either way though, trial counsel was ineffective for failing to file any motion to change venue.

4. Trial Counsels' Failure To Develop An Adequate Record For Appeal By Failing To Adequately Question Potential Jurors During *Voir Dire* As To The Amount, And Nature, Of The Pretrial Publicity To Which They Had Been Exposed.

As discussed above, the Idaho courts have been incorrect when they have said that in order to obtain a change of venue based upon unfair pretrial publicity the defendant must show that he was actually prejudiced by inclusion of a juror, specifically proven to be biased, on his jury. *See, e.g., Rideau v. Louisiana*, 373 U.S. 723 (1963). Nevertheless, there can be no doubt that inclusion of a juror, specifically shown to be biased, warrants vacation of the defendant's conviction. *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000). Thus, in this case, trial counsel should have thoroughly examined all of the prospective jurors regarding the extent to which they had been exposed to, and influenced by, pretrial publicity—whether to make a record to appeal a denial of a motion for change of venue (had one been filed) or to ferret out instances of actual bias. *See* ABA Guidelines, Commentary to Guideline 10.8 ("Whether raising an issue specific to a capital case (such as requesting individual, sequestered voir dire on death-qualification of the jury) or a more common motion shaped by the capital aspect of the case (such as requesting a change of venue because of publicity), counsel should be sure to litigate all of the possible legal and factual bases for the request. This will increase the likelihood that the request will be granted and will also fully preserve the issue for post-conviction

review in the event the claim is denied."). However, as set forth in detail below, trial counsel utterly failed to do so.[35]

Linda Ostolasa (Juror No. 6)

Ms. Ostalasa, and the rest of a mini-panel of six prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr. Vol. I, p.850, Ls.22-24.) The record indicates that none of the jurors responded affirmatively. (Tr. Vol. I, p.850, L.25.) Later, in response to a question from the prosecutor, Ms. Ostalasa indicated that she had seen "the media" before. (Tr. Vol. I, p.1060, Ls.17-18.) But it is not clear whether the prosecutor was talking about a news program or fictional television programming when he asked that question. (*See* Tr. Vol. I, p.1060, Ls.5-23.) Either way, it is obvious that these questions, which were the only questions that could have gone anywhere toward delving into the question of whether Ms. Ostolasa had come into contact with any of the extensive pretrial publicity in this case, or had formed some type of opinions about the case based on that publicity, were not well-crafted for that purpose. Thus, trial counsel should have followed up with questions of their own. However, they did not. They did not ask a single question about pretrial publicity, or Ms. Ostolasa's pre-conceptions about the case, before passing her for cause. (*See generally* Tr. Vol. I, p.1067, L.18 – p.1083, L.5.)

Betty Clark Mitchell (Juror No. 51)

Ms. Clark Mitchell, and the rest of a mini-panel of six prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion

[35] Undersigned counsel is not aware of the extent to which the juror questionnaires inquired into matters of pretrial publicity since Petitioner has not yet received them.

that the defendant is either guilty or not guilty of the offense charged." (Tr. Vol. II, p.1766, Ls.10-12.) The record indicates that none of the jurors responded affirmatively. (Tr. Vol. I, p.1766, L.13.)

The prosecutor asked Ms. Clark Mitchell if she was a Greenbelt user, and Ms. Clark Mitchell answered affirmatively. (Tr. Vol. II, p.1829, L.15 – p.1830, L.3.) Later, the prosecutor asked Ms. Clark Mitchell if she remembered the details of the Henneman case and whether she was a television news watcher, and Ms. Clark Mitchell answered affirmatively again—to both questions. (Tr. Vol. II, p.1831, Ls.9-18.) Thereafter, the prosecutor tried to elicit testimony along the lines of "but that's all I can remember about the case," but Ms. Clark Mitchell kept coming up with additional details that she could recall—she volunteered that she remembered that Ms. Henneman's body was not found for some time, that Ms. Henneman's disappearance and death "was a huge story," that she was exposed to the details of the Henneman case through newspapers and television news, and that Petitioner was finally "caught" and arrested. (*See* Tr. Vol. II, p.1831, L.9 – p.1832, L.10.)

Despite the fact that Ms. Clark Mitchell had said that she was a Greenbelt user, that she had been exposed to the extensive (prejudicial) news coverage about the Henneman case, and that she remembered that Petitioner had been "caught," trial counsel never asked any worthwhile follow-up questions about the publicity issue. (*See generally* Tr. Vol. II, p.1832, L.21 – p.1849, L.16.) Instead, counsel asked cursorily whether Ms. Clark Mitchell could recall Petitioner's background or the circumstances of his being charged and, when she said no to both questions, counsel tried to essentially rehabilitate her by asking, in a leading fashion, whether, when she said Petitioner had been "caught,"

she meant to imply that she believed he was guilty. (Tr. Vol. II, p.1833, Ls.2-16.) Ms. Clark Mitchell answered this last question with a "no." (Tr. Vol. II, p.1833, Ls.11-16.) Ultimately, trial counsel passed Ms. Clark Mitchell for cause. (Tr. Vol. II, p.1849, L.16.)

An effective *voir dire* would have entailed deeper, more probing, questions about what Ms. Clark Mitchell knew about: the Henneman case, including the highly emotional fact of her disappearance on the Greenbelt and the spectacle that was made of her family's suffering; the Hanlon case and the allegations of a similar *modus operandi* between the two cases; and the media's repeated assertions of Petitioner's guilt.

Elisabeth Keeney (Juror No. 62)

Ms. Keeney, and the rest of a mini-panel of six prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr. Vol. II, p.1985, Ls.17-19.) The record indicates that none of the jurors responded affirmatively. (Tr. Vol. I, p.1985, L.20.)

The prosecutor asked Ms. Keeney what she remembered about the Henneman case, and Ms. Keeney testified that she could recall little. (Tr. Vol. II, p.2074, L.20 – p.2076, L.5.) The only follow-up to this line of questioning on the part of trial counsel was to ask whether Ms. Keeney had followed recent articles in the newspaper regarding capital juries in general. (Tr. Vol. II, p.2103, L.22 – p.2104, L.4.) Ms. Keeney responded negatively, indicating that she does not like the Statesman, and that was it. (Tr. Vol. II, p.2104, Ls.5-16.)

Again, an effective *voir dire* would have entailed deeper, more probing, questions about what Ms. Keeney knew about: the Henneman case, including the highly emotional

fact of her disappearance on the Greenbelt and the spectacle that was made of her family's suffering; the Hanlon case and the allegations of a similar *modus operandi* between the two cases; and the media's repeated assertions of Petitioner's guilt.

Tammie Johnson (Juror No. 63)

Ms. Johnson, and the rest of a mini-panel of six prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr. Vol. II, p.1985, Ls.17-19.) The record indicates that none of the jurors responded affirmatively. (Tr. Vol. I, p.1985, L.20.)

The prosecutor asked Ms. Johnson if she could remember anything specific about the Henneman case. (Tr. Vol. II, p.1211, L.24 – p.2112, L.2.) As Ms. Johnson answered that question, first saying that she could not remember any specifics, but then beginning to recite those details that she did remember, the prosecutor cut her off "[t]hat suits us just fine." (Tr. Vol. II, p.2112, Ls.3-6.) At that point, Ms. Johnson, probably feeling that her knowledge of the case actually wasn't important, stated simply: "Just from the paper, you know." (Tr. Vol. II, p.2112, L.7.)

Trial counsel did not ask a single follow-up question about Ms. Johnson's exposure to pretrial publicity, or any pre-conceived opinions that she may have developed based on that publicity, before passing her for cause. (*See generally* Tr. Vol. II, p.2121, L.22 – p.2136, L.22.) Again, an effective *voir dire* would have entailed deep, probing, questions about what Ms. Johnson knew about: the Henneman case, including the highly emotional fact of her disappearance on the Greenbelt and the spectacle that was made of her family's suffering; the Hanlon case and the allegations of a similar

modus operandi between the two cases; and the media's repeated assertions of Petitioner's guilt.

John Jasper (Juror No. 65)

Mr. Jasper, and the rest of a mini-panel of six prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr. Vol. II, p.1985, Ls.17-19.) The record indicates that none of the jurors responded affirmatively. (Tr. Vol. II, p.1985, L.20.)

The prosecutor asked Mr. Jasper if he and his family used the Greenbelt, and Mr. Jasper explained that they had done so on a regular basis. (Tr. Vol. II, p.2146, Ls.12-16.) However, he did not follow up with any questions about whether this case had alarmed Mr. Jasper, or even whether he knew anything about this case going into it. (*See generally* Tr. Vol. II, p.2140, L.3 – p.2149, L.2.)

Even though Mr. Jasper had indicated that he and his family had used the Boise Greenbelt and, therefore, he was a prime candidate for having been influenced by the media's coverage of the Henneman case, trial counsel never questioned him further about his feelings about the Greenbelt or about this case. (*See generally* Tr. Vol. II, p.2149, L.5 – p.2169, L.22.) Nor did counsel question him about pretrial publicity at all. (*See generally* Tr. Vol. II, p.2149, L.5 – p.2169, L.22.)

Omar Alloway (Juror No. 68)

Mr. Alloway, and the rest of a mini-panel of four prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr. Vol. II, p.2177, L.24

– p.2178, L.1.) The record indicates that none of the jurors responded affirmatively. (Tr. Vol. II, p.2178, L.2.)

Neither the prosecutor nor trial counsel ever asked Mr. Alloway a single question about the quantity and nature of the pretrial publicity to which he had been exposed, or whether such publicity could have caused him to form preconceptions about this case. (*See generally* Tr. Vol. II, p.2227, L.9 – p.2238, L.22 (prosecution's *voir dire*); p.2239, L.1 – p.2268, L.2 (defense's *voir dire*).)

Ann McNeese (Juror No. 83)

Ms. McNeese, and the rest of a mini-panel of four prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr. Vol. II, p.2441, Ls.10-12.) The record indicates that none of the jurors responded affirmatively. (Tr. Vol. II, p.2441, L.13.)

In response to the prosecutor's questions, Ms. McNeese admitted that she remembered, based on television and newspapers, that this case is "the case about the woman that was the flight attendant .... It's just that the case on the Grrenbelt, she was found murdered." (Tr. Vol. II, p.2491, Ls.2-12.) Ms. McNeese indicated, however, that she did not know how Petitioner came to be charged in the case. (Tr. Vol. II, p.2491, Ls.15-17.) Later, Ms. McNeese told the prosecutor that her strong pro-death penalty views were formed, at least in part, based on her knowledge of criminal cases as reported in the newspaper and on television. (Tr. Vol. II, p.2497, L.16 – p.2498, L.15.)

After all of that, trial counsel failed to follow up in any meaningful way. Counsel did ask if she had ever talked about the Henneman case with her husband (who happens

to be a Deputy Attorney General) and, eventually, after twice denying that she had done so, Ms. McNeese grudgingly admitted that they may have discussed the case "in passing" because "[i]t's odd to have murder cases in Boise." (Tr. Vol. II, p.2511, L.5 – p.2512, L.1.) However, trial counsel never sought to find out the details of what Ms. McNeese may have known about the Henneman case, what she may have discussed with her husbands, and what opinions, preconceptions, or biases she may have formed. (*See generally* Tr. Vol. II, p.2507, L.12 - p.2534, L.4.)

Later, trial counsel asked Ms. McNeese about other high-profile criminal cases, such as those of Scott Peterson and O.J. Simpson. (Tr. Vol. II, p.2515, L.23 – p.2517, L.16.) In response to counsel's questions, Ms. McNeese indicated that she had formed opinions as to both defendants' guilt based on what she had heard through the media and, with regard to the Scott Peterson case, which was ongoing at that time, she had adjudged the defendant guilty at "day one." (Tr. Vol. II, p.2515, L.23 – p.2517, L.16.) Yet, trial counsel never tried to relate these questions back to the Henneman case by asking why, if she was interested in the Peterson and Simpson cases out of southern California, she was not interested in a high-profile case right here at home. (*See generally* Tr. Vol. II, p.2507, L.12 - p.2534, L.4.) Nor did counsel ever question her ability to remain neutral and unpersuaded by the pretrial publicity where she readily admitted that she had formed steadfast opinions as to defendants' guilt based on pretrial publicity in the past. (*See generally* Tr. Vol. II, p.2507, L.12 - p.2534, L.4.)

Joann Frances Brown (Juror No. 85)

Ms. Brown, and the rest of a mini-panel of four prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the

defendant is either guilty or not guilty of the offense charged." (Tr. Vol. II, p.2441, Ls.10-12.) The record indicates that none of the jurors responded affirmatively. (Tr. Vol. II, p.2441, L.13.)

The prosecutor asked Ms. Brown what she could recall about the Hennemen case from what she had read in the newspaper. (Tr. Vol. II, p.2562, Ls.17-19.) Ms. Brown indicated that she remembered that a flight attendant had gone missing and that Ms. Henneman's name had "hooked" her, but that Petitioner's name did not, and that she could not recall the circumstances of his being charged in this case. (Tr. Vol. II, p.2562, L.20 – p.2563, L.11.) However, trial counsel never followed up with these responses in any way. (*See generally* Tr. Vol. II, p.2567, L.20 – p.2594, L.17.) Counsel never sought to ferret out the specific details of what she had read and seen, never sought to jog her memory about individual news stories, and never sought to determine whether she had formed any preconceptions about the case.

Lori Ann Green (Juror No. 89)

Ms. Green, and the rest of a mini-panel of five prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr. Vol. II, p.2607, Ls.9-11.) The record indicates that none of the jurors responded affirmatively. (Tr. Vol. II, p.2607, Ls.12-13.)

The prosecutor asked Ms. Green what she knew about the Henneman case going into it. (Tr. Vol. II, p.2693, Ls.5-6.) Ms. Green responded by saying that she did not "know a whole lot." (Tr. Vol. II, p.2693, Ls.7; 10-11.) She indicated that she read about Ms. Henneman's disappearance and death, but was not aware that a suspect had been

found. (Tr. Vol. II, p.2693, Ls.7-11; p.2693, L.21 – p.2694, L.4.) She further indicated that she did not know anything about the defendant or how he came to be implicated in the Henneman case. (Tr. Vol. II, p.2693, Ls.15-20.)

Trial counsel, once again, failed to adequately follow up on the publicity issue. The only question counsel presented to Ms. Green was in leading form: "I understand from what you said before, you haven't been following this case particularly closely?" (Tr. Vol. II, p.2713, Ls.19-21.) Not surprisingly, Ms. Green responded in the negative. (Tr. Vol. II, p.2713, L.22.) Thus, counsel once again utterly failed to ferret out the specific details of what this juror had read and seen, never sought to jog her memory about individual news stories, and never sought to determine whether she had formed any preconceptions about the case.

Luke Anson Call (Juror No. 102)

Mr. Call, and the rest of a mini-panel of four prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr. Vol. II, p.2836, Ls.21-23.) The record indicates that none of the jurors responded affirmatively. (Tr. Vol. II, p.2836, L.24.)

In response to the prosecutor's questions, Mr. Call indicated that he gets his local news on the *Statesman*'s website. (Tr. Vol. II, p.2858, L.25 – p.2859, L.11.) However, the prosecutor never asked whether Mr. Call had read anything about this case on that website or had, in any other way, obtained any information about this case. (*See generally* Tr. Vol. II, p.2847, L.17 – p.2869, L.4.)

Although trial counsel followed up on the publicity, counsel did so in a cursory and wholly inadequate way. Counsel asked Mr. Call whether he remembered anything reading about this case, and Mr. Call responded affirmatively. (Tr. Vol. II, p.2869, L.24 – p.2870, L.3.) Counsel then asked if Mr. Call remembered reading anything about the case other than that information which was contained in the juror questionnaire, and Mr. Call responded negatively. (Tr. Vol. II, p.2870, Ls.4-9.) Finally, counsel asked if Mr. Call knew anything about Petitioner, and Mr. Call again responded negatively. (Tr. Vol. II, p.2870, Ls.10-11.) Without ferreting out the specific details of what this juror had read and seen, without jogging his memory as to what he had been exposed to, and without seeking to determine whether he had formed any preconceptions about the case, counsel moved on to other topics and, ultimately, passed Mr. Call for cause. (*See generally* Tr. Vol. II, p.2870, L.12 – p.2892, L.15.)

James Kennedy (Juror No. 110)

Mr. Kennedy, and the rest of a mini-panel of eight prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr. Vol. II, p.2951, Ls.6-8.) The record indicates that none of the jurors responded affirmatively. (Tr. Vol. II, p.2951, Ls.8-9.)

The prosecutor asked Mr. Kennedy simply: "And it looks like you have heard that the –Lynn Henneman's body was—well, she disappeared and then her body was found. Have you heard much beyond that? (Tr. Vol. II, p.3021, Ls.18-21.) In response, Mr. Kennedy said no, he works a lot and does not have time to watch much television. (Tr. Vol. II, p.3021, Ls.22-24.) At that point, the prosecutor positively reinforced Mr.

Kennedy's downplaying of his knowledge of the case, explaining: "That suits us fine.... The less you know before you walk in here the easier it is for you to make decisions." (Tr. Vol. II, p.3021, L.25 – p.3022, L.4.)

Trial counsel did follow up on the pretrial publicity issue, but not in a meaningful way. Counsel started by mischaracterizing and downplaying Mr. Kennedy's knowledge of the case: "you say that you haven't heard anything about this case?" (Tr. Vol. II, p.3069, L.24 – p.3070, L.1.) Mr. Kennedy clarified the facts, while at the same time apparently taking the cue of both attorneys: "Not very much. Heard a little bit, yeah." (Tr. Vol. II, p.3070, L.2.) At that point, the follow-up question from counsel was a leading query confirming that Mr. Kennedy had not heard how Petitioner came to be implicated in the case, again conveying a subtle message that counsel really did not want to hear what Mr. Kennedy knew about the case. (Tr. Vol. II, p.3070, L.3-4.) Moreover, when Mr. Kennedy's answer indicated that he did not understand the question ("Mr. Hall's what—the defendant. Yeah, we read the charges and stuff."), counsel almost immediately abandoned the inquiry and passed Mr. Kennedy for cause. (Tr. Vol. II, p.3070, Ls.3-8.) Thus, not only did counsel generally fail to ask relevant questions, but the few questions that counsel did ask were terrible because they were not calculated to determine what Mr. Kennedy had actually heard or what preconceptions Mr. Kennedy might actually have and, in fact, conveyed to Mr. Kennedy that the "correct" response was to say "no, I don't know anything about the case."

Diane Proctor (Juror No. 111)

Ms. Proctor, and the rest of a mini-panel of eight prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the

defendant is either guilty or not guilty of the offense charged." (Tr. Vol. II, p.2951, Ls.6-8.) The record indicates that none of the jurors responded affirmatively. (Tr. Vol. II, p.2951, Ls.8-9.)

The prosecutor asked Ms. Proctor about the fact that she knew Dave Smith, the lead detective in the Henneman case. (Tr. Vol. II, p.3075, Ls.2-12.) However, he never asked Ms. Proctor if she had seen the extremely favorable media coverage of Mr. Smith during the pendency of the Henneman case. (*See generally* Tr. Vol. II, p.3073, L.23 – p.3086, L.5.) In fact, he never asked if Ms. Proctor had seen any pretrial coverage of the case. (*See generally* Tr. Vol. II, p.3073, L.23 – p.3086, L.5.)

Again, trial counsel utterly failed to follow up in a productive manner. Counsel again raised the issue of pretrial publicity with a leading question conveying the message that the "correct" was to say "no, I know nothing about this case:" "You have indicated you know something about this case, and I don't know that you know anything other than what we've already told you. But do you know anything about?" (Tr. Vol. II, p.3086, Ls.17-21.) Not surprisingly, Ms. Proctor parroted back many of the same words used by counsel in his leading question: "I know nothing about it, other than what's been reported in the *Statesman* early on." (Tr. Vol. II, p.3086, Ls.22-23.) At that point, counsel confirmed that Ms. Proctor believed that her memory of the case was constrained to Ms. Henneman's disappearance and death in the 2000 timeframe, not Petitioner's becoming a suspect in the 2003 timeframe, and was content to move on to other matters. (Tr. Vol. II, p.3086, L.24 – p.3087, L.5.) Counsel never sought to investigate the issue of whether Ms. Proctor had been traumatized by the event or preconditioned to look favorably upon the State's evidence; counsel was concerned only with the issue of whether she knew that

Petitioner stood accused of murder in the Hanlon case as well, but did not even examine that issue carefully.

5. **Trial Counsel Failed To Develop An Adequate Record For Appeal By Failing To Question Potential Jurors During *Voir Dire* As To Their Preconceived Opinions As To Petitioner's Guilt And The Sentence That He Should Receive.**

See Claim N.4, *supra*

6. **Trial Counsel Failed To Develop An Adequate Record For Appeal By Failing To Move To Strike Biased Jurors For Cause.**

Petitioner cannot fully state this claim because he is still conducting his reinvestigation of the case, as well as awaiting receipt of the jury questionnaires, discovery, cooperation from trial counsel, and permission from the Court to contact the jurors.

7. **Trial Counsel Failed To Develop An Adequate Record For Appeal By Failing To Exercise Peremptory Strikes To Remove Jurors Who Had Admitted That Pretrial Publicity Had Caused Them To Be Biased Against Petitioner, But Who Were Not Removed For Cause.**

Petitioner cannot fully state this claim because he is still conducting his reinvestigation of the case, as well as awaiting receipt of the jury questionnaires, discovery, cooperation from trial counsel, and permission from the Court to contact the jurors.

O. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO FAILURE TO PRECLUDE AND OBJECT TO TESTIMONY.

1. **Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Object To, Or Otherwise Preclude, Opinion Evidence Of Dr. Glen Groben Not Based Upon A Reasonable Degree Of Medical Probability, And Their Failure To Move For A Mistrial When Dr. Groben Testified Before The Juror Inconsistently With An Opinion Relayed During His Voir Dire Outside The Presence Of The Jury.**

To be admissible, an expert's opinion must be based on a reasonable degree of medical probability. *Bloching v. Albertson's, Inc.*, 129 Idaho 844, 934 P.2d 17 (1997). Expert opinion, which is speculative, conclusory, or unsubstantiated by facts in the record, is of no assistance to the jury in rendering its verdict, and therefore is inadmissible under IRE 702. *State v. Alger*, 115 Idaho 42, 764 P.2d 119 (1988); *Bromley v. Garey*, 132 Idaho 807, 979 P.2d 1165 (1999) (trial court did not err in excluding testimony of ballistics expert where expert never performed testing and only speculated about possible causes); *but see State v. Schneider*, 129 Idaho 59, 921 P.2d 759 (Ct. App. 1996) (Ct. App. 1996) (where expert previously expressed opinion on cause of death, subsequent testimony on other possible causes properly expressed qualifications on that opinion). Expert opinion testimony based upon a mere possibility of a causal connection does not satisfy the standard for admissibility. *Bloching v. Albertson's, Inc., supra.* Petitioner also asserts that due process and the need for heightened reliability in capital cases guaranteed by the Fifth, Eighth and Fourteenth Amendments requires that Dr. Glen Groben's opinions should have been, but were not, supported by a preponderance of evidence. In addition, permitting Dr. Groben to base his opinions on mere speculation or possibilities violated Petitioner's rights to confrontation under the Sixth Amendment.

Petitioner asserts that several opinions related by Dr. Groben were objectionable as speculative, conclusory, unsubstantiated, or based upon mere possibilities. Trial counsel apparently shared this opinion, and moved to strike Dr. Groben's reenactment opinion based on a lack of foundation, relevance and prejudice, (Tr., p. 3967, L. 14 – p. 3969, L. 17; p. 4001, L. 4), but did not specifically move to exclude or strike such opinion, the assumptions upon which the opinion was based, as well as other independent

opinions based on IRE 702 or the constitutional grounds asserted above. Opinions that should not have been admitted included the following:

- That "[t]here were seven defects on [the victim's] head, but only five of those could I say were definitively impacts. (Tr., p. 3981, Ls. 17-19)

- That the cause of death was ligature strangulation. (Tr., p. 3989, Ls. 5-7 (Q. Do you have an opinion, Doctor, on the cause of death of Lynn Henneman? A. Ligature strangulation.); p. 4069, Ls. 3-11.).)

- That the cause of death was not drowning. (Tr., p. 3990, Ls. 21-23.)

- That the victim's body was lying on a hard surface with the upper body in contact with that surface for at least a twelve-hour period. (Tr., p. 3994, Ls. 4-7; Tr., p. 4056, Ls. 17-20 (Q. So you think that the person died and then remained on a flat surface on the shore for the full 12 hours you think? A. Probably did, yeah.); p. 4057, Ls. 1-2 (So 12 hours is a good median, happy medium there. So I can't say for sure.).)

- That the lividity on the victim's body was due to being hogtied and that the reenactment photographs were an accurate rendition of the victim's post-mortem condition. (Tr., p. 4000, L. 20 – p. 4001, L. 23.)

- Any opinions in regard to the reenactment photographs due to inconsistencies in Dr. Groben's testimony and bias for the prosecution. Specifically, while the jury was in recess and during voir dire in aid of the defense objection to the photographs on relevance grounds, Dr. Groben testified that the victim was hog-tied after death. (Tr., p. 4030, Ls. 10-12; p. 4008, Ls. 3-7 (Q. Are you suggesting that this occurred when the person was alive? A. No. I believe they were strangled and then placed on her stomach when this was done.) Following this testimony, the State made an argument that despite Dr. Groben's testimony, the victim may have been alive when tied up. (Tr., p. 4008, Ls. 22-23.) Subsequently, during cross-examination, trial counsel inquired whether the victim was tied before or after death, presumably assuming that the doctor would testify consistently with his voir dire testimony. However, the doctor stated that he had no way of knowing thus leaving the jury with the impression that the victim may have been alive and conscious when hogtied. (Tr., p. 4078, L. 19 – p. 4079, L. 3) (Q. Okay. Do you have any way of knowing whether the hands were tied before or after death? A. No. Q. In the scenario that you had photographed with the -- using the -- the cloth, I guess, to tie both wrists and the ankles together. Do you have any way of knowing whether that could have happened before or after death? A. No.) Trial counsel was ineffective for failing to move for a mistrial. In the alternative, trial should have moved to have the record read back for impeachment purposes and

requested a special instruction from the Court that the jury could use such prior statement to establish the truth of the matter asserted and to question Dr. Groben's credibility.

- That the victim died approximately thirty minutes after her last meal. (Tr., p. 4038, Ls. 6-10.)
- That the victim's right arm was broken post-mortem but prior to the body being placed in the river. (Tr., p. 4056, Ls. 2-5) ("So that would be the most logical assumption on that. I can't say for sure though. That's just my opinion on when it would have occurred.)
- That the alcohol in the victim's body was produced post-mortem. (Tr., p. 4061, Ls. 5-10.)

In support of this claim, Petitioner submits the affidavit of Dr. Sally Aiken in which she notes numerous opinions by Dr. Groben that were conflated, were not based on a reasonable degree of medical probability, or were otherwise not based on sound science. (Exhibit 24.)

Petitioner asserts that trial counsels' failure to object or otherwise preclude Dr. Groben's opinions constituted deficient performance that creates a reasonable probability that the outcome would have been different both at trial and at sentencing. Petitioner also asserts that trial counsels' failure to move for a mistrial, after Dr. Groben testified before the jury that he had know way of knowing whether the victim was alive when hogtied where he had just testified outside the presence of the jury that he believed the victim was dead when hogtied. Petitioner was prejudiced because there is a reasonable probability that a mistrial would have been granted. Further, if the motion for mistrial had been denied, then counsel should have asked the court reporter to playback Dr. Groben's testimony to both undermine his credibility and to establish that the victim was in fact deceased at the time she was hogtied. Trial counsels' failure to take such measures also prejudiced Petitioner. Since Dr. Groben's testimony was relevant at both trial and

sentencing, there is a reasonable probability that Petitioner would not have been convicted of murder of the first degree or sentenced to death.

Petitioner cannot fully state this claim as he is still investigating this claim and is anticipating additional relevant evidence to be disclosed following a positive ruling on his Motion For Discovery, filed January 5, 2006, and scheduled for hearing in June 2006.

2. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Object To, Or Otherwise Preclude, Testimony Of Norma Jean Oliver Due To Her Lack Of Competency To Testify.

Trial counsel filed a motion in limine to exclude the testimony of Norma Jean Oliver. (R., p.372-375.) In their motion, counsel noted that the circumstances to which Ms. Oliver was to testify were thirteen years old and involved criminal charges resulting in a plea agreement that precluded any contemporaneous cross-examination.

Trial counsel was fully aware of her state of mind prior to Ms. Oliver taking the stand. Prior to her testimony, the Court inquired about upcoming witnesses:

THE COURT:	Okay. Who is your first witness?
MR. BOURNE:	Norma Jean Oliver.
THE COURT:	And you have had the opportunity, Mr. Myshin, to prepare for this?
MR. MYSHIN:	Yeah.
THE COURT:	All right.
MR. MYSHIN:	I mean she was too distraught to even talk to.
THE COURT:	Okay. All right. And then the second witness tonight, sir was?

Tr., p.4755, L.21 – p.4756, L.3.

Trial counsel should have moved to exclude Ms. Oliver's testimony based on a lack of competence. Trial counsels' failure to object to or move to strike Ms. Oliver's testimony based on her incompetence was both deficient and prejudicial under *Strickland*. Trial counsel obviously heard the testimony of Ms. Oliver, yet failed to move to strike her testimony or preclude further testimony. A witness' lack of recollection is grounds for exclusion of testimony. I.R.E. 602 (witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter); *see* Claim F.3, supra, *State v. Johnson, supra*, *State v. (Patrick) Hall, supra.* The admission of this testimony violated the Sixth Amendment, and because this was a capital sentencing proceeding, the admission of this testimony violated the Eighth Amendment and the Due Process under the Fifth and Fourteenth Amendments.

3. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Object To, Or Otherwise Preclude, Testimony Of Other Criminal Acts.

Petitioner asserts that evidence of other criminal activity was used as non-statutory aggravating circumstances. (Tr., p. 5518, L. 5 – p. 5520, L. 20.) As such, the Court should have instructed that the State bore the burden of proving such circumstances beyond a reasonable doubt. Such other criminal acts included the alleged forcible rape of Norma Jean Oliver. Petitioner was entitled to a jury finding beyond a reasonable doubt on such crimes based on his rights as guaranteed by the Fifth, Eighth, and Fourteenth Amendments.

In addition, with the advent of jury sentencing, and the inability, or limited ability, of juries to disregard irrelevant or otherwise inadmissible evidence, Petitioner submits that evidence of other crimes should not be admitted into evidence as support for statutory aggravating circumstances unless they are proven to have occurred beyond a

reasonable doubt. *But see* State v. Creech, 105 Idaho 362, 670 P.2d 463 (1983). In the alternative, Petitioner asserts that where evidence of other crimes are admitted as support for statutory aggravators, the Court should instruct the jury to disregard such evidence unless the jury finds that the other crimes are proven beyond a reasonable doubt. *See People v. Kennedy*, 36 Cal.4th 595, 636 (2005). Further, Petitioner asserts that even if evidence of other crimes are admissible upon a mere preponderance of the evidence, trial counsel should have moved for a pretrial evidentiary hearing to determine the reliability and sufficiency of the evidence prior to admission before a jury.

Petitioner asserts that evidence that he forcibly raped Norma Jean Oliver, i.e., evidence of another charged crime to which he pled guilty to reduced charges, would not have been admissible under any of these claims. Petitioner asserts that he has satisfied both prongs of *Strickland.*

4. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Object To, Or Otherwise Preclude, Hearsay Testimony.

Trial counsel failed to object to or inadequately objected to numerous instances of the admission of inadmissible hearsay violating both the rules of evidence and the Confrontation Clause to the United States Constitution and applicable state and federal case law. *See* Claim G, *supra.* Petitioner requires additional time to analyze the trial transcripts in order to fully state this claim.

P. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO FAILURE TO EFFECTIVELY CROSS-EXAMINE WITNESSES AND REBUT STATE THEORIES.

1. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Effectively Cross-Examine Dr. Groben And Rebut The State's Presentation Of Evidence That The Victim Was Hogtied And Suffered A Terrifying And Tortuous Death.

The State's evidence and subsequent argument that the victim was not only hogtied, but hogtied while conscious, and that the victim suffered a terrifying and tortuous death was based nearly entirely on the testimony of Dr. Glenn Groben. Trial counsel failed to hire a forensic pathologist or other expert to review Dr. Groben's results and make an independent determination of cause of death or injuries inflicted upon the victim prior to her death. Trial counsel should have obtained independent consultation in each of these areas to truly subject the prosecution's case to the level of adversarial testing demanded in capital cases at both the guilt and penalty phases at trial.

During Petitioner's reinvestigation of the case, he has consulted with Dr. Sally Aiken. Dr. Aiken is a pathologist with the Spokane County Medical Examiner's officer in Spokane, Washington. (Exhibit 24.) Dr. Aiken also consulted with trial counsel on both the Hanlon and Henneman cases; however, trial counsel failed to consult with her until **after** Petitioner's trial and jury sentencing. (Exhibit 24.) Had trial counsel consulted with Dr. Aiken in a timely manner, they would have been able to preclude much of Dr. Groben's speculative testimony. They also would have been able to effectively cross-examine Dr. Groben.

For instance, Dr. Groben testified that the victim died of ligature strangulation (Tr., p. 3989, Ls. 5-7), and that it would take three to five minutes for death to take place. (Tr., p. 4040, Ls. 19 – 20). Dr. Aiken strongly disagrees, and states:

> An article of clothing around the neck is not enough evidence to draw the conclusion that strangulation occurred. Dr. Groben's opinion in this regard is speculation. The decedent had no internal neck injuries. . . . Dr. Groben cannot exclude the possibility that this ligature was applied after death to aid in moving the body, for example. In my opinion, the cause of death would have been listed most accurately as "homicidal violence of unknown etiology."

(Exhibit 24.)

Dr. Aiken also disavowed Dr. Groben's re-enactment of ligatures because it was "not based on a reasonable degree of medical probability." Dr. Aiken disputes that ligatures were necessarily applied at all, and rejects Dr. Groben's testimony to the jury that there was no way to know whether the ligatures, if any, were applied before or after death. (See Tr., p. 4078, L. 19 – p. 4079, L. 3.) Dr. Aiken would have testified that the lack of injury beneath the ligature of the left wrist argues against this ligature being present premortem. (Exhibit 24.)

Trial counsel's failure to consult with Dr. Aiken was highly prejudicial. The State used Dr. Groben's testimony as the basis for setting out an egg timer to support a finding of premeditated murder, to dramatize the horror of dying in this manner to support, at a minimum, the utter disregard aggravator:

> ...This utter disregard aggravating factor refers to the defendant's lack of conscience regarding the killing of a human being. Again doesn't this jury instruction look like it was written for Erick Hall? Doesn't it look like it was written to describe him? You know that it fits. Last Thursday Mr. Bourne talked to you about this utter disregard and how Lynn was killed. He did it with his egg timer and you've been in the courtroom with a lot of high tech things. But what has been more dramatic at showing you what this was like with this egg timer?

(Tr., p. 5452, Ls. 11-22.) The State also admitted the highly inflammatory "re-enactment photos of the victim's nude, partly decomposed body "hog-tied."

Had counsel consulted with Dr. Aiken, there would have been doubt as to the cause of death, no consideration of speculative theories about the cause of death, and no consideration of speculative theories about horror endured by the victim. Trial counsel could have kept highly prejudicial speculative displays from the jury.

Dr. Aiken would have testified at Petitioner's trial or sentencing regarding her findings if she had been contacted prior to Petitioner's conviction and sentence of death, and her testimony would have contradicted that of Dr. Groben. Further, timely consultation with Dr. Aiken would have at least provided trial counsel with an opportunity to effectively cross-examine Dr. Groben.

In summary, consultation with Dr. Aiken would have provided trial counsel with the information necessary to challenge Dr. Groben's testimony regarding: cause of death; cause of lividity patterns; whether, even if present, ligatures were applied before death; time of death; the murder weapon; the number pre-mortem head wounds; Dr. Groben's qualifications; and the accreditation status and reliability of the Ada County Coroner's Office.

Dr. Aiken requested trial counsel provide X-rays, microscopic slides and formal toxicology reports. (Exhibit 24.) Dr. Aiken never received this information from trial counsel. These items and others are still necessary to conduct a full review of the case, but Petitioner is awaiting a decision on his Motion for Discovery. This investigation, then, is ongoing, and further information will be provided to Dr. Aiken in order to obtain a complete consultation. Nevertheless, Petitioner asserts that he has satisfied both prongs of *Strickland*.

2. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Effectively Cross-Examine Catherine Colombo And Rebut The State's Argument That Petitioner Was The Only Contributor Of DNA Removed From The Victim.

The DNA testing prior to trial showed that there was a 13th allele at the D5 marker. Neither Petitioner nor the victim had a 13th allele at that location. Trial counsel

was ineffective in failing to call an independent DNA expert as a witness to dispute the misleading conclusions given to the jury despite the presence of the 13th allele.[36]

Kathryn Colombo testified for the State regarding the DNA evidence. Even though Ms. Colombo acknowledged that the 13th allele "could be the true nature of the sample" (Tr., p. 4467, Ls. 15-16), she downplayed its importance by repeatedly testifying that it could be a "stutter artifact," a "technical artifact," or "contamination." (Tr., pp. 4466, L. 20 – p. 4467, L. 15.) Ms. Colombo testified that she could not "make any conclusions about that type because it's just so little information." (Tr., p. 4467, Ls. 3-4.) Trial counsel was ineffective in allowing the State's expert to downplay the probability of a second semen contributor by labeling it a mere "possibility" among other, unlikely possibilities.

Dr. Colombo's conclusions were based on an assumption that there were only two sources of the DNA and that the non-sperm donor is one source:

> Q. Okay. And in that letter do you say that your calculations, or your conclusions are based upon the assumption that there was only one contributor to the – one male contributor to the sperm fraction?
>
> A. No. I stated that there are only two sources of the DNA and that the non-sperm donor is one source. Those are the assumptions.
>
> Q. Assumptions.
>
> A. Correct.
>
> Q. In fact, you used the word, didn't you?

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[36] It appears as though trial counsel did consult with a DNA analyst at Forensic Analytical. However, due to trial counsel's failure to consult with and fully disclose files to post-conviction counsel, it is unknown the extent of the consultation. It appears that trial counsel did not attempt to retain a DNA expert for trial for either consultation or expert testimony. Thus, Petitioner asserts that counsel's failures precluded adequate cross examination and rebuttal of the State expert's DNA testimony, to the prejudice of Petitioner.

A. I did. And actually in the original reports I told you that there was an original report written in December of 2000, and that I then amended it on April 28th, 2003. And the only difference between those two reports is that I crossed out that assuming two people in the chart. And we decided to do that because the primary profile is so clear and so unambiguous you don't need to make any assumptions in order to pull out that primary profile.

Q. Is it possible that there was a second male contributor to the sperm fraction?

A. It's possible. We've got one reading, it the only reading, a small type that cannot be attributed to the non-sperm donor or the primary source of the sperm fraction. So I don't know where that came from.

Q. Thank you.

(Tr., p. 4525, L. 23 – p. 4526, L. 25.) The non-sperm donor is, of course, the victim. Trial counsel was ineffective in failing to elicit that the 13th allele was in fact positive evidence of a second sperm donor, and for not adequately challenging the assumptions upon which Ms. Colombo based her findings.

Petitioner has consulted with Dr. Greg Hampikian, Ph.D. Dr. Hampikian teaches at Boise State University and his expertise is in forensic biology and DNA analysis. (Exhibit 8.) After reviewing data and testimony,[37] Dr. Hampikian is certain, "to a reasonable degree of medical probability," that **"the semen sample recovered from the victim includes DNA from more than one male."** (Exhibit 8.) Dr. Hampikian's analysis shows that the 13th allele is a "real" DNA peak, and it indicates a second male contributor. Had trial counsel called an expert to testify, the jury would have heard testimony similar to Dr. Hampikian's conclusion, "The most direct interpretation of the

[37] Again, these consultations are still in preliminary stages due to time restrictions and failure to receive discovery necessary to expert consultation.

DNA evidence presented at trial is that a second male contributor is included in the semen sample recovered from the victim. The best evidence of this is the 13th allele at D5." (Exhibit 8.)

This was critical information to a jury determination both at the guilt and penalty phases of trial, and casts doubt on Petitioner's role in the homicide and therefore casts doubt on Petitioner's moral culpability as to guilt and punishment. Trial counsel's failure to adequately consult with an expert at trial and failure to call an expert to testify, left the jury with a muddled, confusing picture of the DNA evidence at best and the belief that the 13th allele was a meaningless bit of stutter or contamination at worst, leaving Petitioner as the sole moral agent involved in the homicide. Petitioner asserts that he has satisfied both prongs of *Strickland.*

3. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Effectively Cross-Examine Norma Jean Oliver.

Trial counsel's cross-examination of Ms. Oliver fell well below the standards of acceptable trial practice and was both deficient and prejudicial under *Strickland*. Trial counsel failed to cross-examine Ms. Oliver about discrepancies between her grand jury testimony in the statutory rape case and her testimony at Petitioner's sentencing trial.[38] Trial counsel failed to cross-examine Ms. Oliver about discrepancies between her testimony and Dr. Hess' report. Trial counsel failed to cross-examine Ms. Oliver about discrepancies between her testimony and Dr. Vickman's emergency room report, which

[38] Petitioner does not yet have the Grand Jury transcripts, but has good cause to believe that there will be significant discrepancies given Ms. Oliver's inability to testify in the rape case, and her lack of memory at Petitioner's sentencing. Furthermore, it does not appear that trial counsel obtained transcripts of the grand jury proceedings or used those transcripts to cross examine Ms. Oliver, Detective Hess or Jay Rosenthal. The failure to obtain prior testimony to prepare for cross-examination is in itself woefully deficient.

was contained in trial counsel's files. These failures, as well as those described in Claims D.1 and E.4, fell well below an objectively reasonable standard for effectiveness. But for trial counsel's ineffectiveness, there is a reasonable probability that outcome of the trial and the sentencing would have been different.

4. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Effectively Cross-Examine Detective Daniel Hess.

Trial counsel's cross-examination of Detective Daniel Hess fell well below the standards of acceptable trial practice and was both deficient and prejudicial under *Strickland*. Trial counsel failed to cross-examine Det. Hess about discrepancies between his report and Ms. Oliver's testimony,[39] his report and his own testimony, his report and Dr. Vickman's emergency room report. Petitioner asserts that he has satisfied both prongs of *Strickland*.

5. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Effectively Cross-Examine Jay Rosenthal.

Trial counsel's cross-examination of Jay Rosenthal fell well below the standards of acceptable trial practice and was both deficient and prejudicial under *Strickland*. In addition to failing to cross-examine Mr. Rosenthal about the reduction of charges against Petitioner with respect to the Norma Jean Oliver case, trial counsel failed to cross-examine Mr. Rosenthal about Petitioner's ultimate sentence for the statutory rape. Petitioner received a mere five years, with one year fixed in that case. This sentence is just barely above the mandatory minimum sentence, and the statute allows a maximum of a life sentence. I.C. § 18-6104 (prescribing minimum sentence of one year and

[39] It appears as though Detective Hess had reviewed his reports (Tr., p. 4789, Ls. 10-14), so it is inexplicable why trial counsel did not effectively use the reports during the cross-examination.

maximum sentence of life imprisonment). The low sentence, presumably recommended by the Mr. Rosenthal as part of a plea agreement, indicates either that the State's case against Petitioner was weak, or that the State did not believe Ms. Oliver's allegations of violence. Petitioner asserts that he has satisfied both prongs of *Strickland*.

6. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Effectively Cross-Examine April Sebastian.

Trial counsel's cross-examination of April Sebastian was both deficient and prejudicial under *Strickland*. Counsel was actively representing Ms. Sebastian at the time of Petitioner's trial. (*See* Claims J.3, *supra*.) During cross-examination, trial counsel seemed more concerned with Ms. Sebastian's well being than with impeaching her testimony:

> Q. Tell him that. How were you making a living?
>
> A. I was stealing from stores, you know, ashamed of myself now, but, yeah, I stole from stores and re-sell stuff, sell it to people to make a living, pay my bills.
>
> Q. In fact, that's not an uncommon way for some folks to make a living?
>
> A. Huh-uh, it's not.
>
> Q. Stealing and either taking it back to stores or selling it to people, things like that?
>
> A. Yes.
>
> Q. Okay. But you're doing better now?
>
> A. Oh, yes.
>
> Q. In fact, I think you were telling me that you're working on your GED?
>
> A. Yes.
>
> Q. And you're feeling pretty good about the future?

A. Yes.

Q. All right.

A. Yes, new programs out.

Q. You think you're benefiting from them?

A. Yes, I am.

Q. And I'm sure when you get out you're going to have a happy life?

A. Yeah, a totally different life.

Q. Good. Good for you, April. Thanks.

A. Yes.

THE COURT: Redirect?

MR. BOURNE: Not any on that. Thank you.

(Tr., p. 4895, L. 6 – p. 4896, L. 11.) Trial counsel's cross-examination of a critical witness who testified that Petitioner told her he hit people over the head and take their money, amounted to nothing more than a friendly "chat," rather than the "crucible" it is supposed to be.

Petitioner requires additional time to continue to investigate Ms. Sebastian's incentives to testify favorably for the State, her representation by Petitioner's trial counsel, and the substance of her testimony. Petitioner anticipates that much of the information will be contained in the discovery he has requested.

7. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Rebut The State's Presentation Of Evidence That Petitioner Has A Propensity To Murder And Probably Constitutes A Continuing Threat To The Community Through The Testimony Of Dr. Mark Cunningham.

Trial counsel apparently believed that the Court's ruling that any presentation of evidence by the defense that Petitioner would not pose a continuing threat to the

community if not executed would necessarily open the door to evidence of the Hanlon homicide investigation. Competent capital counsel would have persisted.

Specifically, trial counsel should have sought through a motion in limine to clear the path for the introduction of testimony of Dr. Mark Cunningham that, in his expert opinion, Petitioner does not pose a continuing threat to society. Dr. Cunningham's assessment would have been based on Petitioner's criminal history, his past behavior while incarcerated, and other information, including the facts uncovered in the Hanlon homicide investigation. A motion in limine would have included the following points:

- Reliance on the Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights, including his constitutional right to due process, to present a defense, and to present mitigation evidence.

- Reliance on IRE 703 which provides that "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

- Permission for the State to conduct a risk assessment of Petitioner with consideration of the same evidence in the Hanlon case.

- A comparison of the State's risk assessment with the assessment made by Dr. Mark Cunningham. If the State's risk assessment indicates that Petitioner probably constitutes a continuing threat, then a determination of whether evidence of the Hanlon homicide was a determinative or relevant factor in that assessment of future dangerousness.

If the State's risk assessment did depend on the Hanlon homicide for the divergent results, then trial counsel would not present evidence. However, if the State's risk assessment did not depend on the Hanlon homicide for the divergent results, then there would have been no reason for introduction of evidence from the Hanlon homicide investigation. Petitioner asserts that even a risk assessment by the State would not have found that facts suggesting that Petitioner committed a rape/murder of another woman in

addition to the victim makes Petitioner more of a risk when incarcerated. If Petitioner's assertion is correct, and the Court still did not permit trial counsel to proceed, then the issue would have been properly preserved for appeal.

In addition, Petitioner asserts that trial counsel should have asserted that they could not make an informed decision whether to present the testimony of Dr. Mark Cunningham **because they had not yet conducted an adequate investigation of the Hanlon case.** Therefore, any strategic decision not to present the full testimony of Dr. Cunningham so as to preclude opening the door to evidence from the Hanlon homicide was necessarily unreasonable because it was not based on an adequate investigation.

Petitioner asserts that an adequate investigation of the Hanlon case would have either: (1) precluded introduction of the evidence under any circumstance; or (2) seriously undermined the State's presentation of the Hanlon case if the defense opened the door. Petitioner asserts that either of these two outcomes would have occurred **because of serious questions about the DNA evidence in the Hanlon case**. Petitioner has reasonable grounds to assert that DNA testing, had it been conducted by trial counsel at that time, would have shown that he is excluded as the perpetrator of rape against Cheryl Hanlon and thus likely excluded as her killer.

Petitioner cannot fully state this claim due to the trial team's failure to adequately cooperate in his reinvestigation of the case. Further, Petitioner requires additional time to consult with Dr. Cunningham.[40] Finally, Petitioner fears disclosing too much information will prematurely disclose his defense in the on-going prosecution of him for the capital

[40] Petitioner anticipates obtaining a declaration from Dr. Mark Cunningham stating that in his opinion Petitioner does not present a continuing threat to the community if sentenced to life in prison without the possibility of parole.

murder of Ms. Hanlon. At this time, the Hanlon trial is scheduled for April 2007. Petitioner requests that these proceedings be suspended so as to preclude unnecessary, premature and prejudicial disclosures of his defense in that case. While Petitioner's reinvestigation is not yet complete and he still awaits a hearing and ruling on his Motion For Discovery, filed January 5, 2006, he nevertheless asserts that he has satisfied both prongs of *Strickland*.

Q. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL FOR ELICITING AGGRAVATING EVIDENCE.

Through careless cross-examination, i.e., by asking open-ended, non-leading questions on cross, trial counsel eliciting evidence suggesting that Petitioner was suspected of committing rapes other than that of the victim in the underlying case. (Tr., p. 4428, Ls. 9-13.)

Petitioner cannot fully state this claim due to the trial team's failure to adequately cooperate in his reinvestigation of the case. Further, Petitioner is still awaiting a hearing and ruling on his Motion For Discovery, filed January 5, 2006. Nevertheless, Petitioner asserts that trial counsels' performance was deficient and that there is a reasonable probability that but for counsels' deficient performance the outcome of the trial and sentencing would have been different.

R. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO THEIR FAILURE TO CONDUCT AN ADEQUATE GUILT PHASE INVESTIGATION.

The ABA Guidelines set forth trial counsels' obligations to conduct a thorough investigation in preparation for both phases of the case, guilt/innocence and penalty. Guideline 10.7.A.1. provides in relevant part that,

The investigation regarding guilt should be conducted regardless of any

> admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.

The Commentary further provides:

> With respect to the guilt/innocence phase, trial counsel must independently investigate the circumstances of the crime and all evidence—whether testimonial, forensic, or otherwise—purporting to inculpate the client. To assume the accuracy of whatever information the client may initially offer or the prosecutor may choose or be compelled to disclose is to render ineffective assistance of counsel. As more fully described *infra* in the text accompanying notes 195-204, the defense lawyer's obligation includes not only finding, interviewing, and scrutinizing the backgrounds of potential prosecution witnesses, but also searching for any other potential witnesses who might challenge the prosecution's version of events, and subjecting all forensic evidence to rigorous independent scrutiny.

ABA Guidelines, Commentary to Guideline 1.1.

1. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate And Present Evidence Of An Alternate Perpetrator Of The Murder And Co-Perpetrator Of Rape.

Trial counsel retained an independent expert in part for the purpose of reviewing the DNA testing conducted by Cellmark forensic laboratories. Trial counsels' expert indicated that there was a possibility of a contributor to the DNA sample other than the victim and Petitioner. However, rather than pursue this line of investigation or retain the services of their experts to assist them in the cross-examination of the State's expert, trial counsel ended their investigation of an alternate or co-perpetrator theory.

Had trial counsel conducted an adequate investigation, they would have discovered evidence linking Patrick Hoffert to the crime. S*ee supra,* claim D-7, incorporated herein by reference. As additional support for this claim, Petitioner submits the affidavit of Dr. Greg Hampikian, who will testify to a reasonable degree of medical probability that based on Cellmark's own testing, there is a contributor to the DNA

removed from the victim that belongs neither to the victim nor to the Petitioner. (Exhibit 8.)

Trial counsel should have investigated and presented evidence of an alternate perpetrator through evidence from lay witnesses in combination with the opinions of an qualified and independent expert DNA. Trial counsels' failures constitute deficient performance. But for counsels' deficient performance, there is a reasonable probability that Petitioner would not have been convicted of murder of the first degree or sentenced to death.

S. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO THEIR FAILURE TO CONDUCT AN ADEQUATE SENTENCING PHASE INVESTIGATION.

Trial counsel has a duty to conduct a thorough investigation in preparation for the penalty phase at trial. *See Rompilla v. Beard*, ___ U.S. ___, 124 S. Ct. 2456 (2005); *Wiggins v. Smith*, 539 US 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000). In *Rompilla*, the Supreme Court found counsel ineffective for failing to conduct an adequate mitigation investigation despite consulting with mental health experts and conducting an investigation into the defendant's background. Specifically, trial counsel failed to examine a court file on the defendant's prior conviction for rape and assault where the filed included additional mitigating evidence. In *Wiggins*, the Supreme Court found counsel ineffective on basis of inadequate mitigation investigation despite the fact that counsel arranged psychological testing for their client and obtained some government records to assist in developing their client's social history. Finally, in *Williams*, the Supreme Court found counsel ineffective in failing to adequately investigate their client's background despite a "competently handled the guilt phase of the trial." *Id.* at 395-96.

Thus, the high court has recognized that the effectiveness of counsel's assistance will be subjected to great scrutiny in a capital case. In short, the constitutional demand on counsel to conduct a thorough investigation of the penalty phase is high. Consistent with such demands, the ABA Guidelines provide in part:

> At that [penalty] phase, trial counsel must both rebut the prosecution's case in favor of the death penalty and affirmatively present the best possible case in favor of a sentence other than death. If the defendant has any prior criminal history, the prosecution can be expected to attempt to offer it in support of a death sentence. Trial counsel accordingly must comprehensively investigate—together with the defense investigator, a mitigation specialist, and other members of the defense team—the defendant's behavior and the circumstances of the conviction. Only then can counsel protect the accused's Fourteenth Amendment right to deny or rebut factual allegations made by the prosecution in support of a death sentence, and the client's Eighth Amendment right not to be sentenced to death based on prior convictions obtained in violation of his constitutional rights. If uncharged prior misconduct is arguably admissible, trial counsel must assume that the prosecution will attempt to introduce it, and accordingly must thoroughly investigate it as an integral part of preparing for the penalty phase. Along with preparing to counter the prosecution's case for the death penalty, trial counsel must develop an affirmative case for sparing the defendant's life. A capital defendant has an unqualified right to present any facet of his character, background, or record that might call for a sentence less than death. This Eighth Amendment right to offer mitigating evidence "does nothing to fulfill its purpose unless it is understood to presuppose that the defense lawyer will unearth, develop, present, and insist on the consideration of those 'compassionate or mitigating factors stemming from the diverse frailties of humankind.'" Nor will the presentation be persuasive unless it (a) is consistent with that made by the defense at the guilt phase and (b) links the evidence offered in mitigation to the specific circumstances of the client.

ABA Guidelines, Commentary to Guideline 1.1.

1. **Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate And Present Evidence Of Erick Hall's Traumatic Childhood Through Live Testimony Of Family Members Including His Mother And Father.**

Trial counsel built their sentencing case almost entirely around Petitioner's developmental years.[41] Their apparent goal was for the jury to understand Petitioner's childhood and find mercy in their hearts with that understanding. Most of the defense's case focused negatively on Petitioner's mother and father, Jean and Frank McCracken. Neither testified. Trial counsels' failure to call Petitioner's parents, and other family members, to testify was objectively unreasonable. Further, trial counsel failed to fully elicit mitigating evidence through the testimony of family members that did testify. Their failures undermine the confidence in the outcome of the sentencing proceedings.

During the course of Petitioner's reinvestigation of this case, he has discovered that both Jean and Frank would have been willing to testify for the defense. Indeed, Jean expected to testify but was told at the last moment by trial counsel that she was not necessary. Jean was necessary, and so was Frank. Both seek to a certain extent to downplay the abuse and neglect experienced by all family members, and each tend to point the finger at the other, or at failures of institutions established to assist them. Nevertheless, Petitioner's parents do accept responsibility for their failures, and just as importantly, both love their son...despite his failures. *See U.S. v. Honken*, 381 F.Supp.2d 936 (N.D. Iowa 2005)(noting that jury considered mitigating value in the fact that the defendant was loved by his mother, and the emotional trauma that she would be feel from the execution of her son)

The jury should have heard their stories, and the stories of other relatives; because only by hearing their stories could the jury have truly understood Petitioner's childhood

[41] Indeed, as discussed below, counsels failed to adequately investigate and present evidence of Petitioner's later years. In addition, it appears that trial counsel spent absolutely no time investigating a defense to the presentation of the State's case in aggravation through various witnesses, primarily Norma Jean Oliver.

and "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). In support of this claim, Petitioner attaches the affidavits from the following family members who did not testify:

- Jean Hall McCracken: Jean, Erick's mother was never called to testify although she was willing and planned on it. Jean admits that she used drugs during her pregnancy with Erick. Jean provides further confirmation and further evidence of head injuries sustained by Erick, as well as incidents where Erick "would almost black out in terms of being conscious of what he was doing, saying, or engaged in." Jean also describes similar experiences she has had, suggesting a genetic component to Erick's behaviors. Based on a layperson's perspective, but bolstered by her intimate knowledge of Erick's childhood behaviors, Jean believes that Erick is Bi-Polar. Jean has also experienced the loss of a loved one by violence, noting that her father was murdered in 1998. As a witness, Jean would have bridged the gap between the loss the victim's family felt and the loss that a convicted murderer's mother feels.[42] Like so many of Erick's family members and friends, Jean loves him and does not want to see him executed. Noted elsewhere, Jean was willing to testify to all these matters despite the prosecution's efforts to dissuade her from presenting mitigating circumstances at her son's sentencing hearing.

- Frank McCracken: Frank Sr., Erick's father, acknowledges that he was physically and verbally abusive of Jean in front of the children. He reports signs of abuse to Erick following his time at juvenile detention center. "When Erick came back to California from the boy's home in 1986-87 he had markings on his back from having an iron pressed into his body." Frank concludes that he loves Erick, "he is my son, he's always been my son, and he will always be my son." Frank does not want Erick to be executed.

- Frankie McCracken: Frankie, Erick's older half-brother, further confirms the degree of violence in the McCracken family. Frankie has also experienced significant problems in the criminal justice system, having spent eight years in prison. He does not want Erick to be executed.

[42] The information provided by Jean, including confirmation of her prenatal substance abuse and other incidents of head injuries and strange behaviors is relevant to Dr. Merikangas' on-going neurological and psychiatric evaluation but was not available at the time of the doctor's preliminary report.

- Tiffaney Conner: Tiffaney, Erick's youngest half-sister, has no real memories of him as a child but does treasure a picture of him holding her when she was a baby. Tiffaney does feel a strong connection to him as an adult and loves him. She does not want him to be executed and hopes to continue a relationship with him despite his incarceration. "My letters are my most prized possession of my brother."

- Kenneth Douglas, Erick's cousin, further tells of instances of violence in Erick's childhood. He also describes another serious head injury when Erick fell off a second story roof and hit his head on the rock sidewalk. Also apparently drawing from a layperson's perspective, Kenneth describes Erick's childhood behaviors as characteristic of "manic depressive, Bi-Polar, and schizophrenic." He does not want Erick to be executed.

- John Thompson: John, Erick's younger brother, does not want his older brother to be executed. John describes the disruption in the household and characterizes Erick's mood swings dramatically as a "Dr. Jekyll and Mr. Hyde" split personality as a child. John also confirms Shannon's abuse of Erick.

- Kimberly Bacon: Kimberly was married to Erick's older brother, Shannon, and knew Erick as a teenager. She was never contacted by trial counsel. She has much more information that confirms family accounts of Shannon's explosive, unpredictable violence. Her testimony would have bolstered claims that Shannon was extremely abusive, would have added accounts of Erick witnessing Shannon's violence against Kimberly, and would have described the relationship between Shannon and Erick as one in which "Shannon kept Erick around so he could have a scapegoat." Kimberly, who since meeting Erick has worked at Columbia River Mental Health for two years as a specialist, describes Erick's behavior as a teenager as "mentally ill, incompetent, and [having] developmental delays," suffering from "severe attachment disorder," "major mental instability issues," and "extreme mood swings."

In addition, Petitioner attaches the affidavits from testifying family members whose testimony was incomplete due to trial counsels' ineffectiveness in interviewing them and preparing them for their testimony:

- Shawnra McCracken Hemming: Shawnra, Erick's older half-sister felt inhibited from disclosing all details of their troubled childhood, feeling that the jury might find it unbelievable. She also loves her brother, and notes the important role he plays in their family.

- Tamara McCracken: Tamara, Erick's older half-sister, would have testified just how much she loves her brother, that she does not want to see him die, and the turmoil that his execution will cause her. In addition, Tamara would have testified to the techniques that the State utilized to try to undermine the effectiveness of her testimony, or even dissuade her from testifying. While Tamara testified, trial counsel failed to elicit any of these mitigating facts.

- Deanna McCracken: Deanna, Erick's younger sister, would have testified that she has heard that when her mother was pregnant with Erick, her father, Frank, hit and kicked her in the stomach. She also describes moments where Erick would "black out and go into rages." In such circumstances, after Erick calmed down, he would have no memory of the incident.

Petitioner cannot fully state this claim due to the trial team's failure to adequately cooperate in his reinvestigation of the case. Further, Petitioner is still awaiting a hearing and ruling on his Motion For Discovery, filed January 5, 2006. Nevertheless, Petitioner asserts that trial counsels' performance was deficient and that there is a reasonable probability that but for counsels' deficient performance the outcome of the trial and sentencing would have been different.

2. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate And Present Evidence Of An Alternate Perpetrator Of The Murder And Co-Perpetrator Of Rape.

Petitioner incorporates by reference all facts and legal arguments from, D.7, D.8, E.6, P.2, and asserts that trial counsel rendered ineffective assistance by failing to adequately investigator an alternate perpetrator or co-perpetrator theory. Trial counsels' deficient performance creates a reasonable probability that the outcome would have been different.

Petitioner cannot fully state this claim due to the trial team's failure to adequately cooperate in his reinvestigation of the case. Further, Petitioner is still awaiting a hearing and ruling on his Motion For Discovery, filed January 5, 2006.

3. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate And Present Evidence Of Institutional Failure In Addition To Evidence Of Abuse In Petitioner's Teen-age Years.

Evidence that institutions created for the benefit of abandoned and neglected youth failed a capital defendant is valid mitigating evidence. *See In re Lucas*, 33 Cal.4th 682 (2004) (vacating death sentence due to ineffective assistance of counsel in failing to adequately investigate and present mitigating evidence including evidence of institutional failure) In the reinvestigation of his case, Petitioner has located and interviewed Gayle Ihringer, an attorney who formerly represented Petitioner when he was juvenile housed at the Clark County Juvenile Detention Center in Vancouver, Washington.

Attached is an affidavit obtained from Ms. Ihringer. (Exhibit 25.) Ms. Ihringer relates incidents in which the juvenile system and the psychologist at the detention center failed Petitioner and perpetuated the abuse and neglect that he experienced as a child. For example, around the time that Petitioner was housed at the center, there were reports that one of the teacher's had previously molested a child; another teacher posted papers on the classroom walls that identified various youth using names such as 'Prison Barbie,' and 'Jail Janis.' After Petitioner had left the center, she sued the center for placing special education youth in closet-sized rooms and locking the doors for extended periods of time. On one occasion a youth at the center was contained in such a room for 105 school days.

Ms. Ihringer notes that Under the Individuals with Disabilities Education Act (IDEA), it is mandatory that all special education youth be re-evaluated every three years. In addition, changes in placements also trigger mandatory assessments in Washington. She states that based on the poor practices of the center, and in particular, its psychologist, Petitioner did not received a properly Individualized Education Plan (IEP)

even though one should have been completed for Erick Virgil Hall when his placement was changed to Mission Creek.

Petitioner cannot fully state this claim due to the trial team's failure to adequately cooperate in his reinvestigation of the case. Further, Petitioner is still awaiting a hearing and ruling on his Motion For Discovery, filed January 5, 2006. Nevertheless, Petitioner asserts that he has satisfied both prongs of *Strickland*.

4. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate And Present Evidence Of Petitioner's Neurological Deficits, Mental Retardation and Mental Illness.

Trial counsel did not have Petitioner submit to any neurological testing despite ample evidence of closed head injuries and other neurological problems. Trial counsel also did not seek psychiatric diagnoses of Petitioner or adequately examine Petitioner's childhood diagnosis of mild mental retardation.[43]

During the reinvestigation of this case, counsel is uncovering evidence of neurological and physical impairment that require additional investigation. Petitioner has consulted with Dr. James Merikangas, an expert in neuropsychiatry. (Exhibit 26.) Petitioner's consultation is not yet complete. Dr. Merikangas met with Petitioner one time, and during that preliminary examination, Petitioner's blood pressure was extremely high, indicated he had frequent and severe headaches, was unable to walk on his heels or

[43] Due to trial counsel's failure to consult with Petitioner's attorneys, and due to the time constraints imposed by the Court, counsel does not fully understand the pre-trial investigation into mental illness and mental retardation. It is counsel's understanding that an intelligence test was administered and that Petitioner's score was higher than the score he achieved as a child. However, Petitioner maintains that the more recent intelligence testing was inaccurate or inadequately administered, and will either withdraw this claim or provide further support for the claim after conducting an adequate investigation. In any case, any significant discrepancies between test score should have been explained and must be explored.

toes, and was unable to walk tandem without swaying. Petitioner had a scar on the right parietal scalp. (Exhibit 26.) Dr. Merikangas is recommending blood work, an MRI scan of the brain, a PET scan of the brain, and x-ray of the cervical spine. (Exhibit 26.).

Full psychiatric examination is also warranted. Due to Petitioner's inability to obtain an Order from the Court, Dr. Merikangas was not given the usual "quiet and confidential setting" required for Petitioner to be forthcoming in answering sensitive questions. However, even in his brief testing of Petitioner, Dr. Merikangas noted psychiatric anomalies that warrant further investigation. Dr. Merikangas notes in his affidavit that Petitioner drew a "very strange person" drawn "without a face" and "without genitalia." After asking Petitioner to draw the face, Petitioner "drew a face without eyebrows or ears." Under standard scoring, this drawing was appropriate for a child of eight or nine years old. (Exhibit 26.)

Interviews with Petitioner's friends, acquaintances and family members have uncovered prenatal exposure to amphetamines, extensive head injuries, black outs or lapses in memory, and abnormally pronounced mood swings. Wendy Levy has witnessed Petitioner, as an adult, experience "lapses in memory or brief losses of memory," where "Erick would pause and have a blank look in his eyes," before becoming "re-oriented." (Exhibit 7.) Petitioner's sister describes an occasion where Erick went into a rage over his brother Shannon. Afterwards, when Deanna tried to discuss the incident with Erick, Erick had no memory of the event. (Exhibit 27.) Petitioner's mother describes witnessing similar black outs, and describes experiencing her own "[s]imilar explosions with this blackout-type memory loss." (Exhibit 28.) Various witnesses have characterized the mood swings as "Jekyll and Hyde," and

describe explosive outbursts. (Exhibit 7.), (Exhibit 29.), (Exhibit 27.), (Exhibit 28), (Exhibit 30.) Family members describe Petitioner as bipolar and ADHD. (Exhibit 28.), (Exhibit 31.) One family member describes him as "mentally ill, incompetent, [having] developmental delays," exhibiting "severe attachment disorder" and "ADHD." (Exhibit 31.)

Petitioner's mother took amphetamines while pregnant with him. (Exhibit 28.) Petitioner fell off his bicycle and hit the back of his head and lost consciousness for up to a few minutes. (Exhibit 28.) He required a hospital trip, and for several years afterward complained about severe headaches and neck pain, and eye pain. He fell off a roof, and when he landed on his feet he fell forward and hit his head on a rock sidewalk. (Exhibit 32.) All of the symptoms and injuries described above are indicators that Petitioner has neurological damage and/or mental illness.

Witnesses also describe Petitioner's lack of adaptive skills, a critical factor in diagnosing mild mental retardation. Wendy Levy describes Petitioner as being "uncomfortable in crowds," desiring to provide for her family but lacking the "skills and understanding about how to appropriately do so," unable to keep a job, "completely unfocused and lost in determining a future course of action," lacking the "skills to organize himself, structure events in his life, or plan into the future." Ms. Levy reports that several times Petitioner told her he "ate out of the garbage can at a McDonald's." (Exhibit 7.)

Petitioner cannot fully state this claim due to the trial team's failure to adequately cooperate in his reinvestigation of the case. Petitioner's reinvestigation is not yet complete and he still awaits a hearing and ruling on his Motion For Discovery, filed

January 5, 2006. However, given the preliminary evidence of neurological damage, mental illness and mental retardation uncovered thus far, Petitioner asserts that trial counsel was deficient in failing to pursue leads readily available, and that will be able, upon proper investigation, to satisfy both prongs of *Strickland*.

5. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate And Present Evidence Of Petitioner's Good Character As An Adult.

Petitioner was deprived of the effective assistance of counsel in failing to adequately investigate and present evidence of Petitioner's good character as an adult.

During sentencing proceedings, the defense offered testimony from family members and two experts that described Petitioner's horrific childhood. However, trial counsel failed to adequately investigate Petitioner's life in adolescence and adulthood. In their closing argument, the prosecution argued this very fact to the jury. Thus, it was difficult for the jury to discern that the child, so damaged and abused, nonetheless developed into an adult with kind, generous and loving characteristics. The jury was left with the impression that there were no mitigating circumstances in Petitioner's adult life.

Had trial counsel adequately investigated and presented mitigating circumstances of Petitioner's adolescence and adulthood including mitigating evidence near the time of the crime, it is reasonably probable that the jury would have found that the mitigation outweighed the aggravation and sentenced Petitioner to a life sentence.

This information was readily available. In the course of Petitioner's reinvestigation, Petitioner has discovered evidence of caring, loving relationships. Wendy Levy was interviewed by trial counsel and provided them with similar information, but was never called to testify. (Exhibit 7.) Ms. Levy would have testified

that he played with her children, was good with her children, including her special-needs daughter, and that her children referred to him as their "Uncle Erick." Petitioner assisted with chores, provided food and money to the family when they were hungry and otherwise attempted to provide for the family. He was never violent in any manner with any of the members of the family. He was a talented artist, playful, a good worker, and protective of Wendy and her children. Petitioner referred to Wendy as his sister.

Evelyn Dunaway, who testified for the State at sentencing regarding violent incidents between herself and Petitioner, nonetheless had loving things to say about him, which were never elicited by trial counsel. Petitioner tried to help Evelyn quit a meth habit and describes him as "very caring with regard to talking to [her], and supporting [her] as [she] tried to stay off drugs." (Exhibit 15.) Petitioner exhibited compassion and generosity toward her children—spoon-feeding them medicine when they were sick, drawing pictures for them, and purchasing a drawing book. Evelyn, the same woman the State used to depict Petitioner as a violent monster, states that he "had a lot of good qualities," and would pick her flowers almost every day and "did a number of very kind things" for Evelyn. Evelyn states that Petitioner was "genuinely nice and wanted to help people" and took in homeless people to stay and fixed up bicycles for people who had no transportation. Evelyn continues to hold onto a photograph of herself and Petitioner, and likes "to think about the good times [they] shared together." To this day, she has feelings of care and concern for Petitioner and does not want him to be executed. To the best of Evelyn's recollection, trial counsel did not interview her.

While this claim is still under investigation, Petitioner nonetheless asserts that trial counsel's failure to adequately investigate and present evidence of Petitioner's mitigation as an adult was both deficient and prejudicial under *Strickland.*

6. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate The State's Experts' Opinions By Requesting Appropriate Discovery Of Their Reports.

Petitioner believes that reports from Dr. Michael Estess and Dr. Robert Engle contain exculpatory and material evidence. He believes that the reports of their findings regarding Petitioner's mental health and his propensity for murder and risk of committing murder in the future would be consistent with his experts' findings as well as inconsistent with the State's evidence and arguments. Even if reports were not generated, Petitioner's counsel should have moved for the preparation of reports.

Petitioner cannot fully state this claim as Dr. Estess has refused to discuss his findings or opinions of the defense testimony with Petitioner. In addition, trial counsel has refused to adequately consult with Petitioner and has not disclosed all documents in their possession that may include materials relevant to this claim. Finally, Petitioner is still awaiting a hearing and ruling on his Motion For Discovery, filed January 5, 2006, in which he made several requests relevant to this claim.

7. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate Evelyn Dunaway And Rebecca McCusker.

Trial counsel was ineffective under the *Strickland* standard for failing to adequately investigate the state's witnesses prior to sentencing. Had counsel interviewed Evelyn Dunaway, they would have had information with which to impeach Rebecca McCusker. Ms. McCusker testified that she and her sister intervened on the day Petitioner and Ms. Dunaway broke up, and that Petitioner would not allow her to leave

his home and told her and Ms. Dunaway that he would kill them both. (Tr., p. 4862, Ls. 8 – 19.)

In the course of reinvestigating this case, however, Petitioner has interviewed Ms. Dunaway. Ms. Dunaway disputes Ms. McCusker's account of the events of that day, and specifically states that "When April Stone and Rebecca McCusker came into the trailer home in March 2002, Erick never threatened to kill Rebecca, in contrast with her trial testimony." (Exhibit 15.)

8. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate Michelle Deen.

Trial counsel was ineffective under the *Strickland* standard for failing to adequately investigate the state's witnesses prior to sentencing. Had counsel investigated Michelle Deen, they would have had information with which to impeach her testimony and illustrate her motive to testify falsely against Petitioner.

In the course of reinvestigating this case, Petitioner has uncovered information of previous deals. In Ada County case no. M0203902/H0200584, Ms. Deen was charged with felony possession of a controlled substance. In that court file, Petitioner discovered a note, stating that Ms. Deen contacted the author of the note and stated she wanted to talk to the police about a "deal." (Exhibit 6.) This case was opened in April of 2002, and did not close until August of 2005. The "Cover Sheet" immediately follows a document filed May 3, 2002, prior to Petitioner's trial.

In Ada County case no. M031644/H0301398, Ms. Deen was again charged with felony possession of a controlled substance. The register of actions, which Petitioner readily obtained from the courthouse, shows that Ms. Deen was ordered to undergo a court ordered psychiatric evaluation. The Order was entered on June 30, 2004, prior to

Petitioner's trial. Trial counsel should have cross-examined her about the necessity of an evaluation.

Trial counsel also failed to investigate Petitioner's claim that Ms. Deen testified falsely because she was angry that he and Janet Hoch reported Ms. Deen to the police after Ms. Deen burglarized Petitioner's residence. In the course of reinvestigating this case, Petitioner was easily able to obtain police reports from the Boise City Police Department confirming Petitioner's claim. (Exhibit 34.)

T. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT SHACKLING OR FAILING TO ADEQUATELY OBJECT TO EVIDENCE OF DEFENDANT'S CUSTODIAL STATUS.

Trial counsel should have asserted, argued and moved for written findings from the court stating that shackling was not visible, or asserted, argued and moved for a mistrial if the shackling was visible to any juror at any time. This failure was both deficient prejudicial. See Claim C, *supra*.

Trial counsel also failed to adequately object to and argue an objection to admission of States Exhibit No. 149, which was a mug shot of Petitioner taken while he was wearing a standard orange prison uniform. (Tr., p. 4824, L. 19 – p. 4829, L. 17). Counsel did object, however, counsel never argued any constitutional basis for the objection. *See Estelle v. Williams*, 425 U.S. 501, 503, 505 (1976) (making a defendant appear in prison garb poses such a threat to the "fairness of the factfinding process" that it must be justified by an "essential state policy.") Trial counsel should have objected on the basis of due process under the Fifth and Fourteenth Amendments.

U. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL FOR THEIR FAILURE TO OBJECT TO PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENTS.

Trial counsel should have objected to the misconduct in the prosecution's closing arguments both in the guilt and the sentencing phases. Petitioner incorporates by reference the facts and legal arguments from claims previous claims. Counsels' failure to object constitutes deficient performance. Petitioner asserts that but for counsels' deficient performance, there is a reasonable probability that he would not have been convicted of murder of the first degree or sentenced to death.

Petitioner cannot fully state this claim due to the trial team's failure to adequately cooperate in his reinvestigation of the case. While Petitioner's reinvestigation is not yet complete and he still awaits a hearing and ruling on his Motion For Discovery, filed January 5, 2006, he nevertheless asserts that he has satisfied both prongs of *Strickland.*

V. The Composition of Jury Pool Violated Sixth, Eighth, and Fourteenth Amendments, And Petitioner Was Deprived The Effective Assistance Of Counsel By Their Failure To Challenge The Jury Pool Composition.

The composition of Petitioner's petit jury, the pool from which the petit jury was selected, and the composition of the grand jury did not represent a "fair cross-section of the community," and thus violated Petitioner's rights under the Sixth Amendment, Due Process and Equal Protection Clause of the Fourteenth Amendment, and the Eighth Amendment. Petitioner asserts that Hispanics are underrepresented and systematically exclude from the jury pool, and therefore petit and grand juries are not selected from a fair cross-section of the community.

Petitioner was entitled to select a jury from a fair cross-section of the community. *See Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975). It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. *Smith* v. Texas, 311 U.S. 128, 130 (1940). A jury system that results in systematic exclusion of a cognizable group violates the Equal Protection Clause of the Fourteenth Amendment. *See also*, *Williams v. Florida*, 399 U.S. 78 (1970)(holding 6-person jury scheme violative of the Sixth Amendment for failure to provide juries drawn from a cross section of the community).

In addition, Petitioner asserts that trial counsel rendered ineffective assistance in failing to challenge the composition of the jury pool. Petitioner requires additional time and discovery to substantiate these claims, and reserves the right to withdraw the claims at a later date.

W. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DURING THE JURY SELECTION PROCESS.

Despite the exercise of due diligence, it is impossible for Petitioner to fully state this claim as Petitioner has not yet received the juror questionnaires. These questionnaires were critical in the selection of a jury. As the State noted, the questionnaires were the parties' "bible" during voir dire. (Tr., p. 5445, Ls. 1-3.) Further, the Court has improperly precluded Petitioner from unrestricted access to jurors that would provide additional support for this claim. Nevertheless, Petitioner asserts that he is entitled to relief on this claim as set forth below.

The Sixth Amendment guarantees the right to an impartial jury. Trial counsel attempted to utilize a nationally recognized technique for effective assistance of counsel in jury selection known as the "Colorado Method." This technique is based on capital

jury selection jurisprudence as set forth in *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (holding "juror[s] who will automatically vote for the death penalty in every case" or are unwilling or unable to give meaningful consideration to mitigating evidence must be disqualified from service); *Wainwright v. Witt*, 469 U.S. 412, 424-26 (1985) (holding that trial judges may exclude jurors whose "views on [capital punishment] would 'prevent or substantially impair the performance of [their] duties . . . .'"); *Adams v. Texas*, 448 U.S. 38, 42, 49 (1980) (invalidating statute disqualifying any juror who would not swear "that the mandatory penalty of death or imprisonment for life would not affect his deliberations on any issue of fact"); *Witherspoon v. Illinois*, 391 U.S. 510, 519-23 (1968) (holding that the exclusion in capital cases of jurors conscientiously scrupled about capital punishment, without inquiring whether they could consider the imposition of the death penalty in the appropriate case, violated a defendant's constitutional right to an impartial jury.)

Because the defendant must demonstrate that the juror lacks impartiality, voir dire must be adequate to uncover such bias. *Morgan v. Illinois*, 504 U.S. at 733-34. It is not enough simply to ask the jurors if they could be fair and follow the law. *Id.*, at 734-36. The defendant must be able to ascertain whether the prospective jurors find mitigating evidence irrelevant or even not worth their consideration. *Id.*, at 735.

The ABA Guidelines, pertaining to the effective assistance of counsel in a capital jury selection, state that:

> Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques: (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and (3) for rehabilitating potential

> jurors whose initial indications of opposition to the death penalty make them possibly excludable.

Guideline 10.10.2.B. Counsel should devote substantial time to determining the makeup of the venire, preparing a case-specific set of voir dire questions, planning a strategy for voir dire, and choosing a jury most favorable to the theories of mitigation that will be presented. Guideline 10.10.2, Commentary. Given the intricacy of the process and the sheer amount of data to be managed, counsel should consider obtaining the assistance of an expert jury consultant. Guideline 10.10.2.C.

1. Trial Counsel Rendered Ineffective Assistance By Failure To Insist On Appropriate Procedures Under ICR 24

Idaho Criminal Rule 24 requires that all jurors, including alternate jurors be selected in the same manner, and be removed by lot at the conclusion of the trial:

> . . . At the conclusion of closing arguments, jurors exceeding the number required of a regular panel shall be removed by lot. Those removed by lot may be discharged after the jury retires to consider its verdict, unless the court otherwise directs as provided below.

I.C.R. 21(d). There is no discretionary component to the first requirement of this rule, "jurors exceeding the number **shall be removed by lot**." When a state implements procedures designed to ensure a fair trial, including a fair jury selection process, it must follow that process or violate a defendant's due process rights. *Hicks v. Oklahoma, supra.* Trial counsel was therefore ineffective in stipulating to an alternate procedure wherein the above prescribed procedure was abandoned:

> MR. MYSHIN: And the other thing that has always given me heartburn is this notion that alternate jurors are selected by lot and –
>
> THE COURT: I agree with you, sir. I think I am coming at this -- you and I and Mr. Bower and Mr. Bourne and the Court have always agreed in the past that this was a solution in search of a problem. I respect former Justice Walters' committee and the work he did. He was motivated by an effort, sincere effort to improve the system, but there wasn't a problem

here to fix. And I was hoping that by stipulation we would just agree to do it the way we've always done it, which is the persons that end up sitting in -- I will have a chart for you, seating chart that I'll show you. This is the way we've done it before, the way we did it in State versus Payne in fact. The persons that end up sitting in Boxes 13, 14 and 15 are alternates No. 1, No. 2 and No. 3 respectfully, but we don't tell them. We don't tell them that they're alternates unless and until their services are no longer needed when the jury is sent out to deliberate, so that human nature being what it is, these folks will pay careful attention to every single thing that happens in the trial and will only get the disappointing news when it is necessary to tell them. I think you and I are on the same page.

MR. MYSHIN: We are, Judge, entirely on the same page. I just would like to add fuel to the fire and tell you that it is my information that the civil lawyers are the ones that cooked up this dismissal by lot idea. So it's not us fine criminal lawyers. I think it's more the subject –

THE COURT: Sometimes they don't understand the differences in nature between civil and criminal cases. I think the whole purpose of the struck jury system is to know who you have coming and to know who's there and to know, for example, that the person in Box 13 is Alternate No. 1 and the person in Box 14 is Alternate No. 2 and Box 15 is Alternate No. 3, and that that means something and we all know who they are in advance, but we don't tell them that. Mr. Bourne, are you -- this is the way we've always -- are you okay with it?

MR. BOURNE: We'll stipulate.

THE COURT: Okay. Mr. Myshin subject of a stipulation?

MR. MYSHIN: Yes, sir.

(Tr., p. 607, L. 21 – p. 609, L. 18.) Trial counsel was prejudicially ineffective under *Strickland* in failing to guarantee that Petitioner receive all of the procedural protections he was afforded by the State of Idaho. Investigation into this claim is ongoing, and in part relies on receiving jury questionnaires and conducting juror interviews.

2. Trial Counsel Rendered Ineffective Assistance By Failing To Conduct An Adequate Voir Dire, Failing To Move To Strike For Cause, And Failing To Utilize A Preemptory Challenge To Strike Biased Jurors.

Petitioner asserts that trial counsel performance during jury selection was both deficient and prejudicial under *Strickland*. Petitioner has retained an expert attorney, David Lane, to assist in evaluating trial counsels' performance during *voir dire,* especially in light of trial counsels' use of a jury selection technique known around the country as "The Colorado Method of Jury Selection." (Exhibit 35.) The details of the Colorado Method are set forth in Mr. Lane's declaration.

Mr. Lane concludes that "trial counsel attempted to utilize the Colorado method, however the effort was absolutely premised upon a complete lack of understanding of the basic principals of this technique." (Exhibit 35.) "Trial counsel's *voir dire* in every instance was ineffective in identifying and ranking jurors, in stripping jurors to help in the identification process and in insulating or isolating jurors, or in challenging mitigation-impaired jurors for cause." (Exhibit 35.) Mr. Lane concluded:

> **The *voir dire* conducted in this matter was among the worst examples of capital *voir dire* undersigned counsel has ever read.** Trial counsel failed repeatedly to challenge jurors for cause even in the face of the juror telling the court and counsel that they would automatically vote for the death penalty or that they were substantially impaired in their ability to give meaningful consideration to mitigating evidence.
> ...
> As a result, the jury consisted of many 7-rated jurors who should have been excused for cause.

(Exhibit 35 at 39-40)(emphasis added).[44]

[44] Mr. Lane's noted that he was "somewhat circumspect" in his analysis due to the lack of jury questionnaires, but was confident based on the *voir dire* "that the level of

Petitioner relies in part on the declaration of Mr. Lane to support his claim that trial counsel was constitutionally deficient in failing to move to strike jurors for cause, which left Petitioner with a biased, mitigation-impaired jury. In addition to those grounds set forth in the affidavit, Petitioner asserts that trial counsel should have moved to strike the following jurors for cause for the reasons set forth below. All of the following claims require further investigation, including jury questionnaires and juror interviews. Petitioner reserves the right to withdraw any claim at a future date if such claim is not supported by facts uncovered during Petitioner's reinvestigation.

Juror Linda Ostolas indicated she would have great difficulty with sequestration beyond a "few days." (Tr., p. 1056, Ls. 8-11.) Trial counsel should have moved to strike for cause.

Juror Betty Mitchell indicated THAT she is a regular Greenbelt user. (Tr., p. 1829, Ls. 15-24.) Petitioner asserts that this juror's familiarity with the Greenbelt biased her views of the crime and the Petitioner. Trial counsel should have moved to strike for cause.

Juror Elisabeth Keeney knew Angie Abdullah, attended the same church, and knew "a lot of information about her." (Tr., p. 2074, Ls. 12-19.) Petitioner asserts that this juror's relationship with Angie Abdullah, the alleged victim in a near-simultaneous capital murder trial, biased her views of the crime and Petitioner. Trial counsel should have moved to strike for cause.

Juror Tammie Johnson had hearing impediments, had to wear hearing aids, and suffered from hearing loss most of her life. (Tr., p. 2117, L. 22 – p. 2118, L.3, p. 2123,

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performance by trial counsel in the *voir dire* is far below the standard of that of reasonably effective trial counsel." (Exhibit ___ at 17, n.4.)

Ls. 7-21.) Given the poor quality of the police interrogation tapes played to the jury, Petitioner asserts that this juror was unable to hear critical evidence offered at trial. Trial counsel should have moved to strike for cause.

Juror Omar Alloway previously worked for IDOC, including work at the maximum security prison. (Tr., p. 2251 – p. 2252.) Petitioner asserts that this juror's dealings with the correctional system, inmates, and death row inmates biased his views of the crime and the Petitioner. Trial counsel should have moved to strike for cause.

Juror Ann McNeese is married to Timothy McNeese, who is a Deputy Attorney General for the State of Idaho. Mr. McNeese is specifically assigned to the IDOC. His job includes defending against conditions of confinement lawsuits, including those brought by death-sentenced inmates. (*See* Gomez v. Spalding, D. Idaho, Civ. 91-0299-S-LMB.) Conditions of confinement were referenced during the sentencing phase of Petitioner's trial. *See*, e.g., Tr., p. 4904 et seq. (testimony of Dennis Dean). Mr. McNeese's job also includes developing the IDOC protocol to be used in executions. Mr. McNeese was sanctioned by the federal district court for opening prisoner mail during a conditions lawsuit, and possibly faced or faces bar sanctions. (Exhibit 36.) Petitioner asserts that trial counsel should have moved to strike Ms. McNeese for cause. Ms. McNeese ultimately served as the foreperson. It is hardly reasonable to assume that the wife of an advocate for the State in carrying out death sentences would not be affected by her husband's employment when determining whether to impose the death sentence. Further, Petitioner served a 10-year term in the IDOC during the period that Mr. McNeese served as the Deputy Attorney General. It is likely that Mr. McNeese was familiar with Erick Hall and there is a reasonable probability that he shared discussions

about inmates, possibly including Petitioner, as well as information about conditions of confinement and other matters that a juror might consider, appropriately or not, during the sentencing process with his wife. As stated, Petitioner does not have trial transcripts, the record or files in this case and thus has not had the opportunity to review them. In addition to the above, because a key State witness—Jay Rosenthal—also worked for the Attorney General's office, Ms. McNeese was not able to objectively weigh his testimony. Furthermore, Ms. McNeese worked for IDOC, which biased her views of the crime and Petitioner. Moreover, Ms. McNeese's cousin was raped and murdered. It is unreasonable to assume that that event did not color Ms. McNeese's views of crime and punishment. Petitioner asserts that that event biased her views of the crime and Petitioner. Trial counsel should have moved to strike for cause.

Juror Joann Brown's husband was an investigator for the U.S. Investigative Services. (Tr., pp. 2547 – 2548.) Petitioner asserts that this juror was unable to objectively weigh law enforcement testimony and had biased views toward the crime and Petitioner.

Juror Luke Call admitted that his mind wanders in the afternoon. (Tr., p. 2863, L. 25 – p. 2864, L.3.) Petitioner asserts that this juror was unable to hear evidence at trial and sentencing.

Juror James Kennedy works for the Department of Transportation and works with a Deputy Attorney General. (Tr., p. 3020, Ls. 19-20.) The juror works, with his son, with the Ada County Court. (Tr., p. 3022, Ls. 10-16.) The juror worked at the penitentiary for several years, and managed Correction Industries, and had inmates working for him. (Tr., p. 3044, Ls. 13-16, p. 3045, Ls. 5-6.) The juror worked for the

Department of Law Enforcement. (Tr., p. 3051, Ls. 1-2.) Petitioner asserts that this juror's background biased his views against the crime and Petitioner.

Juror Diane Proctor works for the Sheriff's Office and was a former neighbor of Detective Dave Smith, a key prosecution witness. (Tr., p. 3074, Ls. 6-7, p. 3075, Ls. 3-9.) Petitioner asserts that this juror's background biased her views against the crime and Petitioner. Trial counsel should have moved to strike for cause.

3. Trial Counsel Rendered Ineffective Assistance By Failing To Object To The Court's Preliminary Instructions To Jurors.

The preliminary question asked by the Court prior to the commencement of *voir dire* by counsel simply asked whether the jurors would weigh aggravation against mitigation and arrive at a decision. This is a burden-shifting question, as the prosecutor has to prove an aggravator beyond a reasonable doubt prior to the weighing process. Trial counsel was ineffective under *Strickland* in failing to object to the court's erroneous instructions to jurors. Instructions that shift the burden of persuasion violate the Fourteenth Amendment's requirement that the state prove every element of a criminal offense beyond a reasonable doubt. *See Sandstrom v. Montana*, 442 U.S. 510 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

X. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO ENSURE THAT ALL PROCEEDINGS WERE RECORDED AND THAT PETITIONER WAS PRESENT FOR ALL PROCEEDINGS.

Numerous unrecorded proceedings were held in chambers without Petitioner's presence. Trial counsel rendered ineffective assistance of counsel in failing to protect Petitioner's Sixth Amendment right to be present and his due process right to meaningful appellate and post-conviction review. The ABA Guidelines provide in part:

> [C]ounsel at every stage must ensure that there is a complete record respecting all claims that are made, including objections, motions, statements of grounds, questioning of witnesses or venire members, oral and written arguments of both sides, discussions among counsel and the court, evidence proffered and received, rulings of the court, reasons given by the court for its rulings, and any agreements reached between the parties. If a court refuses to allow a proceeding to be recorded, counsel should state the objection to the court's refusal, to the substance of the court's ruling, and then at the first available opportunity make a record of what transpired in the unrecorded proceeding.

ABA Guidelines, Commentary to Guideline 10.8. *See also Dobbs v. Zant*, 506 U.S. 357, 358 (1993). Proceedings that Petitioner is aware took place off the record and outside his presence include:

- An unrecorded in-chambers conference with the Court, trial counsel, and the State in which the parties discussed a note received from the jury foreman during jury deliberations. (Tr., p. 5463, L. 25 – p. 5464, L. 11.) (noting that jury foreperson Ann McNeese was concerned that her privacy, i.e., identity, had been violated in open court).

- An unrecorded in-chambers conference with the Court and trial counsel in which the parties discussed retaining attorney Rolf Kehne as a jury consultant. (Tr., p. 2062, Ls. 3-8.) There was no mention of Petitioner's presence.

- An unrecorded discussion between trial counsel and the Court in which the parties discussed trial counsel's intention not to file a brief, and the decision to not employ Mr. Kehne "from this point forward" as a jury consultant. (Tr., p. 2067, Ls. 10-20.) There was no mention of Petitioner's presence.

- An unrecorded, in-chambers conference with the Court, trial counsel, and the State in which the parties discussed expert access to Petitioner, use of experts, and the defense's Motion to Suppress. (Tr., p. 530, L.9 - p. 535, L. 20.) There was no mention of Petitioner's presence.

- An unrecorded, in-chambers conference with the Court, trial counsel, and the State in which the parties discussed the videotapes and transcripts of the interrogations of Petitioner. (Tr., p. 359, L. 9 – p. 362, L.3.) Petitioner was not present, apparently at the request of trial counsel. (Tr., p. 359, Ls. 3-12.)

- An unrecorded, in-chambers conference with the Court, trial counsel, and possibly the State in which the parties discussed the logistics and substance of what portions of the videotapes would be shown and "the issues that Defense was concerned about." (Tr., p. 431, Ls. 3-17.) There was no mention of Petitioner's presence.

Petitioner is still investigating this claim. His investigation has been compromised by trial counsels' failure to adequately consult with him, making it difficult, if not impossible, to identify matters that are not of record.

Y. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO RAISES CHALLENGES TO ANY NONSTATUTORY AGGRAVATING CIRCUMSTANCES.

1. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Challenge The Introduction Of Victim Impact Evidence.

The jury was instructed to consider and weigh all evidence presented at sentencing. The jury was also instructed that "victims" have a right to personally address them regarding the victim's personal characteristics and the emotional impact of the defendant's crimes. (Tr., p. 4955, L. 16 – p. 4956, L. 3.) The jury was never told that victim impact is not evidence. The instructions gave the jury absolutely no guidance on how to utilize such statements in assessing the gravity of aggravating circumstances, the existence or weight of mitigation, and the weighing of aggravators against the mitigation.

It is reasonably likely that the jury, considered victim impact as non-statutory aggravating circumstances. As such, without a proper limiting construction, the victim impact is unconstitutionally vague in violation of the Eighth Amendment and violated Petitioner's rights to due process and notice as protected by the Fifth, Sixth, and Fourteenth Amendments.

It is reasonably likely that the jury used the victim impact when weighing the aggravators against the mitigation. Victim impact is irrelevant to any of the statutory

aggravating circumstances. The introduction of the victim impact without additional instructions violated Petitioner's due process rights, as protected by the Fifth and Fourteenth Amendments, as well as his rights under the Sixth and Eighth Amendments.

It is reasonably likely that the jury used the victim impact in a way that precluded or otherwise undermined their ability to give meaningful consideration to Petitioner's mitigating evidence in violation of Petitioner's due process rights, as protected by the Fifth and Fourteenth Amendments, as well as his rights under the Sixth and Eighth Amendments.

In addition, introduction of unsworn victim impact statements not subjected to cross-examination violated Petitioner's right to confront witnesses against him under the Sixth Amendment, as well as his rights under the Fifth, Eighth, and Fourteenth Amendments.

Due to time constraints and Petitioner's duty to investigate matters outside the record as well as matters hidden within the record, Petitioner has not had sufficient time to consider all elements of this legal issue, as well as other legal issues in this case, and reserves the right to provide further factual and legal support for this and all other issues raised in this Amended Petition. Nevertheless, Petitioner asserts that he has satisfied both prongs of *Strickland*.

2. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Challenge The Introduction Of Any Nonstatutory Aggravating Circumstances.

Beyond the victim impact evidence, other nonstatutory aggravating circumstances were introduced against Petitioner, including his convictions for Escape and Burglary as well as evidence that he committed a forcible rape against Norma Jean Oliver. Petitioner

asserts that none of this evidence was admissible for reasons stated in this claim and through the Amended Petition.

Prior to *Ring v. Arizona*, the Idaho Supreme Court, in *State v. Creech,* 105 Idaho 362, 670 P.2d 463 (1983), held that the finding of aggravating circumstances other than those listed in I.C. § 19-2515, was not error as long as at least one statutory aggravating circumstance was found beyond a reasonable doubt:

> 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.

Id. at 369-70, 670 P.2d at 470-71.

In the advent of jury sentencing, trial counsel should have challenged the admissibility of non-statutory aggravating circumstances on the following grounds:

- That such evidence was not pled by way of Indictment or Information;
- That jury was not properly instructed on the manner in which to consider nonstatutory aggravating circumstances and likely weighed them when finding statutory aggravating circumstances beyond a reasonable doubt and when weighing such statutory aggravators against the mitigation;
- That I.C. 19-2515, in its latest incarnation post-*Ring*, does not provide for consideration of nonstatutory aggravating circumstances and provides an exclusive list of statutory aggravating circumstances;
- That neither the statute nor the instructions given offer any guidance to jury and thus affords them unbridled discretion;
- That the jury was not instructed to find the nonstatutory aggravating circumstances beyond a reasonable doubt; and
- That Petitioner was not given adequate notice.

Trial counsel should have objected to nonstatutory aggravating circumstances based on Petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Petitioner asserts that he has satisfied both prongs of *Strickland.*

Z. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO RAISES CHALLENGES TO THE STATUTORY AGGRAVATING CIRCUMSTANCES.

Aggravating circumstances must "genuinely narrow the class of death-eligible persons" in a way that reasonably "justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 462 U.S. 862, 877 (1983). Further, both on their face, and as applied, aggravating circumstances must permit the sentencer to make a "principled distinction between those who deserve the death penalty and those who do not." *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); *Maynard v. Cartwright*, 486 U.S. 356 (1988) ("[t]he construction or application of an aggravating circumstance is unconstitutionally broad or vague if it does not channel or limit the sentencer's discretion in imposing the death penalty").

Even if an aggravating circumstance is vague on its face, it can nevertheless support a death sentence if the state courts have narrowed its scope to a constitutionally sufficient degree and if such a narrowing construction actually guided the sentencer in the case under review. *Godfrey v. Georgia*, 446 U.S. 420 (1980). Applying this principle, the U.S. Supreme Court held that Idaho's limiting instruction of the "utter disregard for human life" aggravating circumstance, specifically, that the aggravator "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," was sufficient under the Eighth Amendment. *Arave v. Creech*, 507 U.S. 463, 468 (1993). Idaho's limiting instruction was satisfactory because it defined a "state of mind that is ascertainable from surrounding facts." *Id.* at 1541-42. Because some murderers do exhibit feeling, the Court also determined that the aggravating circumstance genuinely narrowed

the class of persons eligible for the death penalty as required by *Zant v. Stephens*, 462 U.S. 862 (1983). *Id.*

Petitioner recognizes that he is asserting, for at least a few of the claims below, that trial counsel was ineffective for failing to raise challenges that the Idaho Supreme Court, and even in one case, the U.S. Supreme Court, have previously rejected. Nevertheless, trial counsel has a duty to consider all potential claims in capital cases. *See* ABA Guidelines, Commentary to Guideline, 10.8 ("As described in the commentary to Guideline 1.1, counsel also has a duty, pursuant to Subsection (A)(3)(a)-(c) of this Guideline, to preserve issues calling for a change in existing precedent; the client's life may well depend on how zealously counsel discharges this duty.") Indeed, over the past few years, the U.S. Supreme Court has expressed a willingness to overrule precedent in capital cases. *See e.g., Roper v. Simmons,* 543 U.S. 551 (2005) (holding that it is unconstitutional to execute juveniles, overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989)); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that it is unconstitutional to execute the mentally retarded, overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989)); *Ring v. Arizona,* 536 U.S. 584 (2002) (holding that a jury must find aggravating circumstances beyond a reasonable doubt, overruling *Walton v. Arizona,* 497 U.S. 639 (1990)).

With the advent of jury sentencing, counsel should have considered raising all claims for reconsideration by the Idaho Supreme Court and federal courts. *See State v. Lankford*, 116 Idaho 860, 877, 781 P.2d 197, 214 (1989) (recognizing that Idaho's "especially heinous, atrocious or cruel" aggravating circumstance may be

unconstitutional if relied upon in a jury sentencing). The failure to raise a claim on the grounds that it has been repeatedly rejected may cost a capital defendant his life.[45]

This following does not represent a final statement of this claim. Petitioner requires additional time to fully state the legal and factual grounds for all challenges to the statutory aggravating circumstances listed under this claim.

1. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Challenge Aggravating Circumstances As Vague And Overbroad.

Trial counsel should have argued that, in light of jury sentencing in Idaho, the following aggravating circumstances were vague and overbroad in violation of the Eighth Amendment:

a. The "especially heinous, atrocious or cruel" aggravating circumstance set forth in I.C. § 19-2515(9)(e).

b. The "utter disregard for human life" aggravating circumstance set forth in I.C. § 19-2515(9)(f).

c. The "propensity" aggravating circumstance set forth in I.C. § 19-2515(9)(h). *But see State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983).

2. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Challenge Aggravating Circumstances On The Grounds That An Inadequate Limiting Construction Was Given.

Trial counsel should have argued that, in light of jury sentencing in Idaho, that the limiting instructions were insufficient to pass muster under the Eighth Amendment:

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[45] For example, in *Smith v. Murray*, 477 U.S. 527 (1986), the Supreme Court declined to address the merits of a petitioner's claim that his Fifth Amendment rights were violated by the testimony of a psychiatrist who had examined him without warning him that the interview could be used against him. Appellate counsel failed to assert this claim because the Virginia Supreme Court had rejected such claims. The Supreme Court subsequently found such testimony unconstitutional in *Estelle v. Smith*, 451 U.S. 454 (1981). The Court concluded that the claim was not deemed sufficiently novel to constitute cause for the procedural default. *Id.*, at 536-37. Mr. Smith was barred from raising the issue in federal habeas proceedings, *id.*, at 539, and later executed.

a. The "especially heinous, atrocious or cruel" (herein "HAC") aggravating circumstance set forth in I.C. § 19-2515(9)(e). *But see Leavitt v. Arave,* 383 F.3d 809 (9th Cir. 2004).

The limiting instruction given to the jury was inadequate, in part, because it did not preclude the jury's consideration of circumstances occurring after the victim's death when determining whether the aggravator existed. *Cf. State v. Kingsley*, 252 Kan. 761, 851 P.2d 370, 390 (1993) (holding that in regard to the "heinous, atrocious or cruel" factor: "[t]he murder is complete with the death of the victim. Subsequent abuse of the body would not constitute the manner in which the murder was committed"); *Robedeaux v. State*, 866 P.2d 417, 435 (Okla. Crim. App. 1993) (same)

b. The "utter disregard for human life" aggravating circumstance set forth in I.C. § 19-2515(9)(f). *But see Arave v. Creech*507 U.S. 463, 468 (1993).

The limiting instruction given to the jury was inadequate, in part, because it does not limit the language, "circumstances surrounding [the murder's] commission," to pre-mortem conduct of the defendant. *Cf. State v. Kingsley*, 252 Kan. 761, 851 P.2d 370, 390 (1993) (holding that in regard to the "heinous, atrocious or cruel" factor: "[t]he murder is complete with the death of the victim. Subsequent abuse of the body would not constitute the manner in which the murder was committed"); *Robedeaux v. State*, 866 P.2d 417, 435 (Okla. Crim. App. 1993) (same); *but see State v. Wood*, 132 Idaho 88, 103-04, 967 P.2d 702, 717-18 (1998).

c. The "propensity" aggravating circumstance set forth in I.C. § 19-2515(9)(h). *But see State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983).

First, the limiting instruction given to the jury was inadequate, in part, because it permitted the jury to consider circumstances occurring after the victim's death when determining whether the aggravator existed. *Cf. State v. Kingsley*, 252 Kan. 761, 851

P.2d 370, 390 (1993) (holding that in regard to the "heinous, atrocious or cruel" factor: "[t]he murder is complete with the death of the victim. Subsequent abuse of the body would not constitute the manner in which the murder was committed"); *Robedeaux v. State*, 866 P.2d 417, 435 (Okla. Crim. App. 1993) (same)

Second, the limiting instruction does not distinguish this aggravator from the "especially heinous, atrocious, or cruel" aggravator. The jury could determine that both aggravating circumstances exist on the single determination that the defendant enjoys to kill. Specifically, "cruel" as used in the "HAC" aggravator means murder "with utter indifference to, **or even enjoyment of**, the suffering of others.") (emphasis added). This definition is sufficiently similar to "propensity," which is described a person with "an affinity toward committing the act of murder," to render the "propensity" aggravator unconstitutionally duplicative.

Third, the limiting instruction does not limit consideration of the defendant's "continuing threat to society" to an incarcerated environment. Instead, the jury was invited to consider the risk to the public upon the speculation that the defendant might be released, or might escape, from prison. Specifically, the prosecution urged the jury to find this aggravator based solely on a finding of propensity, without regard to any actual likelihood that he would commit another murder. (Tr., p. 5459, Ls. 18-21) ("If you're tempted to give him prison over this, remember prison only affect (sic) his ability to murder? He still has that propensity to murder. He's still a threat.").)(sic added). In addition, trial counsel should have requested a definition of "society" limiting it to the prison context.

3. **Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Challenge The "Propensity" Aggravating Circumstances On The Grounds Other Grounds That Asking A Jury To Find That He "Likely Constitutes A Continuing Threat To Society" Is Unconstitutional In Violation Of The Mandate Of *Ring V. Arizona,* In That It Permits The Jury To Find An Aggravating Circumstances By A Preponderance Of The Evidence.**

4. **Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Challenge Aggravating Circumstances On The Grounds That There Was Insufficient Evidence To Find The Aggravating Circumstances Beyond A Reasonable Doubt.**

Trial counsel should have argued that there was insufficient evidence to find the following aggravating circumstances:

a. The "especially heinous, atrocious or cruel" aggravating circumstance set forth in I.C. § 19-2515(9)(e).

b. The "utter disregard for human life" aggravating circumstance set forth in I.C. § 19-2515(9)(f).

c. The aggravating circumstance set forth in I.C. § 19-2515(9)(g).

d. The "propensity" aggravating circumstance set forth in I.C. § 19-2515(9)(h).

AA. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO ADEQUATELY RAISE LEGAL CHALLENGES.

To render effective assistance of counsel, capital counsel must consider all legal claims potentially available to protect the client's constitutional rights and stay abreast of the latest developments in the law that might provide additional claims for the client. ABA Guidelines, Guidelines 10.8.A.1; 10.8.C.1.

1. **Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Move To Challenge The Idaho Death Penalty Scheme And Disqualify The District Court For Lack Of Qualifications To Preside Over A Capital Case.**

Trial counsel should have challenged the Idaho death penalty scheme on the grounds that it does not require judicial qualifications for district court judges to preside over capital cases. In addition, trial counsel should have moved to disqualify this Court from presiding over this case due to a lack of death penalty qualifications in light of all the new law and issues applicable to capital jury sentencing which were previously irrelevant under Idaho's former death penalty scheme. Trial counsel should have drawn upon the language and rationale of Illinois Supreme Court Rule 42 that provides:

> (a) In order to insure the highest degree of judicial competency during a capital trial and sentencing hearing Capital Litigation Seminars approved by the Supreme Court shall be established for judges that may as part of their designated duties preside over capital litigation. The Capital Litigation Seminars should include, but not be limited to, the judge's role in capital cases, motion practice, current procedures in jury selection, substantive and procedural death penalty case law, confessions, and the admissibility of evidence in the areas of scientific trace materials, genetics, and DNA analysis. Seminars on capital cases shall be held twice a year.
>
> (b) Any circuit court judge or associate judge who in his current assignment may be called upon to preside over a capital case shall attend a Capital Litigation Seminar at least once every two years.

The Special Supreme Court Committee on Capital Cases explained the need for the rule in part as follows:

> The committee's proposal to require judicial training follows from the finding that reliability and fairness in a capital trial depend upon the skill and knowledge of the trial judge, the prosecutor, and counsel for the defense. The training requirement for judges complements rules establishing minimum qualifications for trial counsel and prosecutors in capital cases.... Rule 43 is intended to increase judicial training and access to information and should not be viewed as a limitation on the kind or amount of training judges receive. For example, in requiring attendance at seminars, Rule 43 is not intended to foreclose the use of video

> conferencing, Internet access, or other technological means to participate in training from remote locations. Trial judges are encouraged to participate in additional training whenever possible. It is contemplated that any judge who presides over a capital case on or after the effective date of paragraph (b) of the rule will have prior thereto attended a Capital Litigation Seminar.

The "reliability and fairness" required in capital cases is mandated by the Fifth, Eighth, and Fourteenth Amendments. Trial counsel should have relied on these constitutional mandates in challenging Idaho's death penalty scheme, which currently only requires qualifications for trial counsel. *See* ICR 44.3. Further, trial counsel should have moved to disqualify this Court as unqualified to preside over a capital case, especially in light of the new death penalty scheme requiring jury sentencing. Trial counsels' failures to make these challenges constituted deficient performance. Their deficient performance prejudiced Petitioner because the "reliability and fairness" of his proceedings was undermined by the lack of the Court's "skill and knowledge" in fundamental areas of capital jurisprudence. For instance, during jury selection, the Court indicated that it was not familiar with some constitutional concepts common in capital jury sentencing litigation. For instance:

- The Court did not understand what trial counsel meant when counsel moved to excuse a potential juror on the grounds that the juror was "substantially mitigation impaired." (Tr., p. 2030, Ls. 2-3.)

- The Court did not understand what trial counsel meant when counsel relied on the decision in *Wainwright v. Witt,* 469 U.S. 412 (1985), in support of a motion to excuse a juror for cause. (Tr., p. 2032, Ls. 21-22)("I don't know anything about Whitt (sic). Do you want to give me a cite?")(sic added).[46]

[46] In *Witt,* the Supreme Court clarified the standard for excusing a potential capital juror for cause, holding that "the standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.*, at 424. A recent Westlaw search of all state and federal cases for ("Wainwright v. Witt") yielded 2085 results, exceeding by approximately 500

- The Court expressed frustration with Rolf Kehne's assistance as a jury consultant. (Tr., p. 2062, Ls. 9-14) ("I'm now getting a cite Whitt (sic) v. Waynewright (sic) that I've not heard before, that I've never had a chance to look at. Sixth Amendment has been referred to in ways that are unclear without a chance to reflect on it, and a brief that's promised after the weekend.") (sic added).[47]

- The Court readily invited trial counsel to elicit a waiver from Petitioner his right to challenge his counsels' ineffectiveness during the jury selection process. (Tr., p. 2536, L. 23 – p. 2540, L. 19.)

Trial counsel had a duty to assess the new death penalty statute, in all its facets. Trial counsel should have recognized the need for qualified judges, just as they should have recognized the need to reassess what it means to be a qualified trial lawyer in the State of Idaho with the advent of jury sentencing. Trial counsels' failure to challenge the lack of a judge-qualifying procedure and their failure to move to disqualify this Court as unqualified constituted deficient performance. Petitioner asserts that but for counsels' deficient performance, he would not have been convicted of murder of the first degree or sentenced to death.

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similar searches for ("Woodson v. North Carolina") and ("Ring v. Arizona"), but falling short of ("Furman v. Georgia") with just under 3000 results. The same search for ("Wainwright v. Witt") but limited to Idaho cases yielded just two results, the most recent decided over fifteen years ago, *State v. Enno*, 119 Idaho 392, 807 P.2d 610 (1991). It is a simple and natural consequence of Idaho's long history of judicial sentencing, that Idaho district and appellate courts are not accustomed with addressing capital jury selection procedures. This fact is born out by the somewhat crude but meaningful Westlaw search demonstrations.

[47] Beyond the right to effective assistance of counsel, the Sixth Amendment provides that an "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...") The Sixth Amendment jury-trial right "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd,* 366 U.S. 717, 722 (1961). At its core, the right contemplates that jurors will render their decision based on the law and the facts presented. *See Turner v. Louisiana,* 379 U.S. 466, 472-73 (1965). The right to an impartial juror in capital cases is likewise grounded, not in the Eighth Amendment, but in the Sixth Amendment. *Wainwright v. Witt,* 469 U.S. at 414.

2. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Object To Jurors Use Of Inaccurate Transcripts While Viewing Videotaped Interrogations Of Petitioner.

Trial counsel failed to object to the use of transcripts as "an aid to understanding" video tape recordings of police interrogations of Petitioner. (Tr., p. 4024, L. 13 – p. 4027, L. 18) The videotapes were of "pretty marginal" quality. (Tr., p. 4020, L.8) The transcripts were inaccurate and the transcripts of those videotapes stated "inaudible" in places where a person could hear what was being said. (Tr., p. 4020, Ls. 12-16) Trial counsel's failure to object to the jury's use of these transcripts was clearly deficient. Investigation of this claim is ongoing, since counsel for Petitioner have not yet received copies of the transcripts provided to the jury, or the tapes—as played—to the jury. At least one juror had a significant hearing impediment and would most likely have relied on the transcripts rather than the poor audio quality of the tape. (Tr., p. 2217, L. 22 – p. 2118, L. 3, p. 2123, Ls. 7-21)

3. Trial Counsel Rendered Ineffective Assistance By Failing To Object To The Prosecutor's Misconduct During Opening And Closing Arguments At Both Phases Of The Trial.

Trial counsel rendered ineffective assistance by failing to object to the prosecution's improper arguments at both phases of the trial. In support of this claim, Petitioner incorporates by reference Claims I, Trial counsel were ineffective for allowing each these arguments to be presented to the jury without objection. But for trial counsels' failure to object and request a mistrial, and in the alternative, request an admonishment and corrective instruction by the Court, there is a reasonable probability that the result of the proceedings would have been different.

4. Trial Counsel Rendered Ineffective Assistance By Failing To Challenge The Failure Of Idaho's Death Penalty Scheme And Instructions To Adequately Address The Weighing Process.

a. Trial counsel should have challenged the constitutionality of the death penalty statute for its failure to assign a burden of proof to the jury's weighing findings.

A defendant cannot be sentenced to death, even if aggravators are found, unless it is also found that the aggravating circumstances outweigh the mitigation. *See e.g., State v. Charboneau*, 116 Idaho 129, 153, 774 P.2d 299, 323 (1989) ("We hold that the trial court may sentence the defendant to death, only if the trial court finds that all the mitigating circumstances do not outweigh the gravity of each of the aggravating circumstances found and make imposition of death unjust.") Unless this additional finding is made, the maximum punishment is life without the possibility of parole. Accordingly, based on the rationale of *Ring*, this finding represents a finding that must be presented to a jury and found to exist beyond a reasonable doubt. The rule adopted by the Court in *Ring* states:

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Ring, 536 U.S. at 600 (citations omitted). *See also, Woldt v. People*, 64 P.3d 256 (Colo. 2003) (holding that the determination of whether aggravation outweighs mitigation is of the type of factual finding encompassed by *Ring*); *Johnson v. State,* 118 Nev. 787, 59 P.3d 450 (2002).

Trial counsel rendered ineffective assistance of counsel in failing to challenge the Idaho death penalty scheme for removing from the State the burden of proving this fact beyond a reasonable doubt.

In addition, by failing to assign the burden upon the State, the new death penalty statute impermissibly shifts the burden of proof upon the defendant to disprove an element, or functional equivalent of an element, or even just an essential fact. This violates the defendant's rights to due process under the Fifth and Fourteenth Amendments, *see Mullaney v. Wilbur*, 421 U.S. 684 (1975), as well as his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. *But see State v. Osborn*, 102 Idaho 405, 417, 631 P.2d 187, 199 (1981) (holding pre-Ring, that the scheme does not violate due process because weighing process is not part of an element of the offense).

Petitioner asserts that trial counsels' failures to challenge the weighing process satisfies both prongs of *Strickland*.

b. Trial counsel should have challenged the constitutionality of the death penalty statute for its failure to define "sufficiently compelling" in a manner requiring that the individual aggravating circumstances outweigh the mitigation.

Under well-established Idaho law, the rule is that a defendant cannot be sentenced to death unless it found that the aggravating circumstances **outweigh** the mitigation. *See e.g., State v. Charboneau*, 116 Idaho 129, 153, 774 P.2d 299, 323 (1989) (holding that a defendant can be sentenced to death, only if it is found "that all the mitigating circumstances do not outweigh the gravity of each of the aggravating circumstances found and make imposition of death unjust.") Accordingly, if the mitigation outweighs the gravity of each of the aggravators, by any degree, then the defendant cannot be

sentenced to death. Under Idaho law, even where the mitigation is only of equal weight to the gravity of the aggravation, the maximum punishment is fixed life.[48]

Trial counsel should have challenged the new Idaho death penalty statute because it does not provide that the individual aggravators must **outweigh** the mitigation. The death penalty statute provides in relevant part:

> If the statutory aggravating circumstance has been proven beyond a reasonable doubt, whether all mitigating circumstances, when weighed against the aggravating circumstance, are sufficiently compelling that the death penalty would be unjust.

I.C. § 19-2515 (8)(a)(ii). The statute does not define "sufficiently compelling" as requiring the aggravation to "outweigh" the mitigation. The instructions likewise provide no definition for "sufficiently compelling" and do not require that the jury find that individual aggravators each "outweigh" the mitigation.

There is simply no way of knowing whether the jury imposed a death sentence even if they believed the mitigation was of equal weight to the aggravation. Indeed, there is a reasonable probability that the jury believed that the mitigation outweighed the aggravation, but not in such a manner or degree as to make imposition of the death penalty unjust. It may very well be that the jury believed that the mitigation must substantially outweigh the aggravation for the imposition of the death penalty to be unjust under the facts of this case. The State advocated this unconstitutional interpretation of the statute. In closing argument, the Ada County Prosecutor argued:

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[48] In *Kansas v. Marsh*, 04-1170 (cert granted May 31, 2005) (case below: 102 P.3d 445 (Kansas)), the United States Supreme Court is presented with the question of whether a death penalty statute violates the Eighth Amendment if it provides for the death penalty to be imposed when the sentencing jury finds the aggravating and mitigating factors to be equal. To the extent the Idaho Supreme Court construes the new death penalty statute in a fashion inconsistent with its prior construction, Petitioner asserts that such construction violates the Eighth Amendment.

> And I believe that when we go back over these things you will agree that these aggravating factors have been proven beyond a reasonable doubt and that the mitigation does not outweigh the aggravation **in a manner** that would make the death penalty unjust...

(Tr., p. 5447, Ls. 6-11.) It is worth repeating: the prosecutor tells the jury that the law requires imposition of the death sentence so long as "the mitigation does not outweigh the aggravation **in a manner** that would make the death penalty unjust." What could that mean other than that the jury could find that the mitigation outweighs the aggravation, but perhaps not "in a manner" that would make the death penalty unjust? The prosecutor played off the lack of guidance provided by the statute or the instructions, and, in the course of doing so, violated Petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Trial counsel, seemingly ignorant of the prosecutor's slight of hand, failed to object, and moreover, failing to challenge the death penalty weighing scheme as unconstitutional and in failing to request a jury instruction for the proper weighing required as set forth in *Charboneau* and its progeny.

> c. Trial counsel should have challenged the Court's instruction that the jurors have a duty to consult with one another regarding their findings, including their findings of whether mitigation exists and whether the mitigation is sufficiently compelling as to make the imposition of the death penalty unjust because the instruction undermines the defendant's constitutional rights to the individual opinion of each juror who exercises his or her own personal moral judgment despite competing views or moral beliefs of the other jurors.

A capital defendant has a due process and Eighth Amendment right to the individual opinion of each juror who exercises his or her own reasoned moral judgment, regardless of the competing views or beliefs of the other jurors. *See e.g., Simmons v. South Carolina*, 512 U.S. 154, 172 (1994)(Souter, J. and Steven, J., concurring); *Mills v. Maryland*, 486 U.S. 367, 382 (1988).

These rights were violated by the Court's Instruction No. 51 informing the jurors that they had a duty to consult with one another before making their own individual decisions, and to deliberate with the goal of reaching an agreement as a group. (Tr., p. 5439, Ls. 10 – p. 5440, L. 5.) Further, the instruction suggesting that even the juror's individual beliefs about the existence of a mitigating fact, i.e., whether certain evidence presented was actually mitigating, and the weight afforded to any mitigation found, should be subjected to the views of the other jurors. Petitioner asserts that trial counsels' failures satisfy both prongs of *Strickland*.

5. Trial Counsel Rendered Ineffective Assistance By Failing To Request A Special Jury Instruction That Would Require The Jury To Provide Written Findings Delineating The Mitigating Circumstances That Were Found And In Their Failure To Challenge The New Death Penalty Statute On Grounds That It Forces A Defendant To Choose Between Constitutional Rights.

Prior to the new death penalty statute, a judge was required to make written findings setting forth any statutory aggravating circumstance found and set forth in writing any mitigating factors considered. I.C. § 19-2515(f) (Michie 2000). The failure to make such written findings constituted reversible error. *State v. Osborn*, 102 Idaho 405, 415-16, 631 P.2d 187, 197-98 (1981).

A written findings requirement serves two purposes: (1) it helps to ensure that the imposition of the sentence of death is reasoned and objective as constitutionally required, and (2) it protects a capital defendant's right to meaningful appellate review. *See Osborn,* at 414-15; 631 P.2d at 196-97. Without the findings, the reviewing court cannot determine whether the fact-finder overlooked or ignored any mitigation that was presented, whether the evidence supports the aggravating factors found, and whether the

fact-finder properly weighed all factors. *Id.* at 415, 631 P.2d at 197; *State v. Pratt*, 125 Idaho 546, 873 P.2d 800 (1993).

Pursuant to the current version of the statute, if a defendant waives the right to a jury at his sentencing proceeding, the district court is still required to make written findings of the aggravation, mitigation considered, and the weighing process. I.C. § 19-2515(8)(b). In contrast, when a defendant chooses not to waive his Sixth Amendment right to a jury, he must forgo the written findings requirement; a jury is only required to indicate on special verdict forms whether a statutory aggravating circumstance has been proven beyond a reasonable doubt, and "whether all mitigating circumstances, when weighed against the aggravating circumstance, are sufficiently compelling that the death penalty would be unjust." I.C. § 19-2515(8)(a).

Because the jury is not required to specify the mitigating circumstances it found, a defendant who chooses to have a jury make the findings of fact at his sentencing proceeding relinquishes his constitutional right to have his sentence meaningfully reviewed by the district court and by the Idaho Supreme Court on direct appeal and as a part of its mandatory sentencing review under I.C. § 19-2827. Without a complete record, the district court and the Idaho Supreme Court are precluded from conducting a meaningful review which includes a determination whether imposition of the death sentence was reasoned and objective or the result of arbitrariness and passion. *See e.g., Osborn,* at 415, 631 P.2d at 197 ("If the findings of the lower court are not set forth with reasonable exactitude, this court would be forced to make its review on an inadequate record, and could not fulfill the function of 'meaningful appellate review' demanded by the decisions of the United States Supreme Court."); *see also State v. Lankford*, 116

Idaho 860, 877, 781 P.2d 197, 214 (1989) (recognizing the increased potential of arbitrary and inconsistent imposition of the death penalty by juries).

Trial counsel should have requested a special verdict form requiring the jury to delineate the mitigating circumstances it found and the weighing of such mitigation against the individual aggravating circumstances when rendering its sentencing decision. Petitioner has been deprived of his Fifth, Eighth, and Fourteenth Amendment rights to have this Court and an appellate court make a meaningful determination of whether his sentence was the product a reasoned and objective, as opposed to an arbitrary and unguided, analysis.

Trial counsel should have requested special written findings from the jury, as required of judges, on all the federal constitutional grounds stated above. In addition, counsel should have asserted that the new death penalty statute is unconstitutional because it forces a defendant to choose between his Sixth Amendment right to a jury trial and his Fifth, Eighth, and Fourteenth Amendment rights. Because of trial counsel's ineffectiveness, Petitioner has lost the necessary predicate for his right to a meaningful review. Petitioner's sentence should thus be vacated and be afforded a new sentencing proceeding where the sentencer is required to provide adequate written findings.

6. Trial Counsel Rendered Ineffective Assistance By Failing To Request A Special Jury Instruction That Would Require The Jury To Provide Written Findings Delineating The Evidence Considered In Finding The Aggravating Circumstances And By Failing To Request An Instruction To The Jury That The Same Evidence Can Be Used To Find Multiple Aggravating Circumstances So Long As Additional Aggravating Evidence Is Found To Support The Other Aggravator Beyond A Reasonable Doubt.

In determining whether a certain aggravating circumstance exists, the jury may consider the same evidence they considered in relation to a different aggravator so long

as the jury finds *additional* aggravating evidence to support a finding of that particular aggravator beyond a reasonable doubt. *Sivak v. State*, 112 Idaho 197, 210, 731 P.2d 192, 205 (1986). Trial counsel should have requested written findings and an instruction to prohibit improper duplication of evidence in support of multiple aggravating circumstances. Without written findings, the record is insufficient to determine whether the jury properly considered additional aggravating evidence to support its finding of each of the aggravating circumstances. The lack of findings violated Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Petitioner asserts that he has satisfied both prongs of *Strickland* showing that trial counsels' failures denied him effective assistance of counsel.

7. Trial Counsel Rendered Ineffective Assistance By Failing To Object To The Court's Instruction Regarding The Governor's Power To Commute Or Pardon.

At the request of the State, and without objection by trial counsel, (Tr., p. 5420, Ls. 1-4), the Court gave the following instruction, not previously approved by Idaho appellate courts or contained in the proposed Idaho Supreme Court death penalty instructions:

> The governor of the State of Idaho has the authority to grant a commutation or pardon for any crime except treason, based upon a recommendation from the Idaho Department of Pardons and Parole. Such a commutation or pardon could apply to either a life or death sentence.

(Tr., p. 5438, L. 25 – p. 5439, L. 5.) This instruction was constitutionally infirm for several reasons including, but not limited to the following. First, the instruction has not been approved by the Idaho Legislature or the Idaho Supreme Court. Second, the instruction is not an accurate and complete statement of Idaho law. Third, the instruction failed to instruct the jury not to speculate on what parole authorities will do in the future.

Fourth, the instruction diminishes the jury's sense of responsibility for the gravity of their decision in violation of the Eighth and Fourteenth Amendments. *But see California v. Ramos,* 463 U.S. 992, 1001-1005, 1014 (1983). Fifth, the instruction diverts the jury from its individualized sentencing determination mandated by the Eighth and Fourteenth Amendments. *But see Ramos, supra.* Finally, Petitioner asserts that his federal right to due process was violated because there is a reasonable likelihood that the jury utilized the instruction in an unconstitutional manner.

While the Supreme Court decision in *Ramos* would seemingly approve this instruction, the rationale of *Ramos* is called into question by *Ring*. Specifically, when rejecting Ramos' *Beck*[49] argument that the instruction diverts the sentencer's attention from a "central focus," the Court distinguished *Beck* on the grounds that *Beck* involved the guilt/innocence phase where the prosecution bore the burden of proving elements of capital murder whereas Ramos' case involved an instruction at the penalty phase involving no similar "central issue." *Ramos,* 463 U.S. at 1007-09. Petitioner asserts that *Ramos* no longer controls since capital sentencing now involves a jury's determination of elements, or at least the functional equivalent of elements, during the penalty phase. Accordingly, the instruction is unconstitutional.

In addition to these specific grounds, Petitioner's counsel should have asserted that the instruction violated Petitioner's federal constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as the concomitant rights under the Idaho Constitution providing greater, but not less, protection than the federal constitution. Each of these constitutional violations was due to trial counsels' failure to object to the

[49] *Beck v. Alabama*, 447 U.S. 625 (1980).

instruction. Petitioner asserts that he has satisfied both prongs of *Strickland*. Petitioner requires additional time to research the factual and legal foundation for this claim.

8. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Raise International Law Violations.

Trial counsel were ineffective in failing to raise international law violations on behalf of Petitioner, which prejudiced Petitioner under *Strickland*. The convictions and sentences entered against Petitioner were obtained in violation of international law. Petitioner requires additional time to research this claim, but his preliminary investigation shows that his death sentence was obtained in violation of The International Covenant on Civil and Political Rights (ICCPR), which prohibits death sentences where (a) the accused will endure a prolonged incarceration on death row which violates Article 7, (b) the accused does not have access to a meaningful clemency process, which violates Article 6, (c) the accused is arbitrarily deprived of his life, which violates Article 6, and (d) the accused is denied his rights to due process, which violates Article 14. Petitioner's death sentence was also obtained in violation of the American Declaration of the Rights and Duties of Man, Article XXVI (guaranteeing an "impartial" hearing to the accused), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (providing protection for the less culpable co-defendant who refuses to cooperate as Damocles' Sword of the death penalty is held over his head).

The ICCPR, American Declaration of the Rights and Duties of Man, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment were signed and ratified by the United States. Idaho may not impose or execute Petitioner's death sentence without violating the Supremacy Clause of the United States Constitution, which states:

> All Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Article VI, § 2.

Moreover, Petitioner's death sentence does and will violate (a) the American Convention of Human Rights, the Vienna Convention on the Law of Treaties, and the Vienna Convention on Consular Relation, which have not yet been signed by the United States, but which inform Customary International Law. The United States is obligated to pay heed to Customary International Law. *The Paquete Habana*, 175 U.S. 677, 670 (1900)("[I]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determinations.") Petitioner's death sentence further violates the principle of *jus cogens*. A *jus cogens* norm is an elementary right of humanity, so basic as to be recognized by the international community as a norm from which no derogation is permitted. Vienna Convention on the Law of Treaties, Article 53; Restatement 3d of Foreign Relations Law, § 102. The execution of the neurologically damaged, mentally ill and/or mentally retarded violates this principle.

BB. DEPRIVATIONS OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSELS' FAILURE TO RAISE AND PRESERVE CLAIMS BY FILING MOTIONS IN LIMINE.

"Because '[p]reserving all [possible] grounds can be very difficult in the heat of battle during trial,' counsel should file written motions in limine prior to trial raising any issues that counsel anticipate will arise at trial." Commentary, ABA Guidelines, Guideline 10.8 (footnotes and quotations omitted). Trial counsel rendered ineffective assistance of counsel by failing to file numerous motions in limine. Trial counsels' failure

to file motions in limine left them in the dark as to whether critical evidence would be admitted at trial and precluded adequate preparation and presentation of a defense at both the guilt and penalty phases. But for trial counsels' failure to file each of the following motions in limine there is a reasonable probability that the result of the proceedings would have been different.

1. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To File A Motion In Limine To Preclude Evidence Of Petitioner's Prior Convictions For Burglary And Escape.

Without objection, the State introduced at sentencing Petitioner's prior convictions for burglary and escape. This evidence was irrelevant to any aggravating circumstance properly before the jury and thus inadmissible. Trial counsel should have moved in limine to preclude the evidence. The introduction of such evidence violated Petitioner's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

2. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To File A Motion In Limine To Preclude The State From Making Improper Closing Arguments At Both Phases Of The Trial.

Elsewhere in his Amended Petition, Petitioner notes numerous improper arguments made by the prosecution. Based on trial counsels' years of experience with the prosecutors in this case, including trial experience in which some of their previous client's were sentenced to death, counsel was intimately familiar with the State's tactics in closing arguments. Thus, counsel should have anticipated the prosecutors' arguments and moved to preclude them by way of a motion in limine.[50] Trial counsels' performance

[50] See ABA Guidelines, Commentary to Guideline 10.11 ("Counsel should also object to and be prepared to rebut arguments that improperly minimize the significance of

was deficient. Petitioner incorporates by reference the legal arguments in claims I.1-12, and asserts that motions in limine would have precluded the State's misconduct and created a reasonable probability that the outcome would have been different.

3. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To File A Motion In Limine To Determine Whether Limiting The Scope Of The Mitigation Presented To Petitioner's Childhood Would Preclude The State From Eliciting The IQ Score Test Results Of Petitioner As An Adult.

Trial counsel elicited mitigating evidence from Petitioner's childhood including an intelligence quotient (herein "IQ") test scores that placed him in the mildly mentally retarded range of intelligence. Counsel had previously disclosed to the State that

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mitigating evidence[315] or equate the standards for mitigation with those for a first-phase defense.[316]".) Footnote 315, written before *Tennard*, *supra*, provides:

> Prosecutors will frequently try to argue, for example, that "not everybody" who is abused as a child grows up to commit capital murder or that mental illness did not "cause" the defendant to commit the crime. *See* Haney, *supra* note 93, at 589-602. Both of these arguments are objectionable on Eighth Amendment grounds because they nullify the effect of virtually all mitigation. *See id.*; *supra* text accompanying notes 277-80. In any event, counsel can seek to counter such arguments by emphasizing the unique combination of factors at play in the client's life and demonstrating that there are causal connections between, for example, childhood abuse, neurological damage, and violent behavior. *See, e.g.*, Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143, 1157-66 (1999) (reviewing psychological and medical "research on the correlation between childhood abuse and adult violence").

Footnote 316 provides:

> Arguments confusing the standards for a first phase defense and mitigation also violate the Eighth Amendment. *See generally* Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982) (finding unconstitutional trial judge's failure to consider defendant's violent upbringing as a mitigating factor at sentencing); *see generally* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21 (1997).

Petitioner tested at a significantly higher, yet subaverage, range as an adult. Entering the sentencing phase, trial counsel apparently either hoped that their limited scope of defense would not open the door to Petitioner's subsequent higher IQ score or hoped that the prosecution would just kind of forget about it.

Had trial counsel filed a motion in limine then they would have been able to make informed decisions. One possible informed decision would have been to elicit the damaging information on direct. It is impossible at this time for Petitioner to state the full nature of this claim due to trial counsels' failure to adequately consult with Petitioner's current counsel and because Petitioner's reinvestigation of the case is not yet complete. In addition to speaking to trial counsel, Petitioner must yet speak to Drs. Linda Gummow, Mark Cunningham and Roderick Pettis regarding their professional views on how to handle the intelligence scores.[51]

Further, the Court should withhold judgment on this claim and all others in this Amended Petition, as Petitioner may determine to withdraw this claim if it cannot justify sacrificing attorney-client communications and work product. Petitioner's counsel cannot make this assessment without adequate consultation with trial counsel and without review of **all** their files and notes.

4. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To File A Motion In Limine To Preclude Introduction Of The Reenactment Photographs Depicting the Victim's Deceased Body Hogtied In Ligatures.

Trial counsel was in possession of highly aggravating evidence depicted in various reenactment photographs made at the direction of Dr. Glen Groben. Trial counsel

[51] Petitioner has only had preliminary discussions with Dr. Mark Cunningham regarding his involvement of the case. Meaningful discussions require prior consultation with trial counsel.

was thus on notice that the State may attempt to utilize those at both phases of the trial. Counsel clearly believed the photographs were irrelevant and unduly prejudicial yet failed to file a motion in limine or even to coordinate their oral arguments following their objection. *See e.g.,* (Tr., p. 4012, Ls. 1-3.) Trial counsels' performance was deficient. Had counsel filed a motion in limine with the factual and legal arguments in Petitioner's claims O.1 and P.1, hereby incorporated by reference, then counsel would have successfully precluded the State from using the reenactment photographs resulting in a reasonable probability that the outcome would have been different at both phases of the trial. At the very least, trial counsel would have been on notice that such evidence would be admitted, and thus in a position to prepare a defense.

V. PRAYERS FOR RELIEF

WHEREFORE, the Petitioner, Erick Virgil Hall, respectfully prays this Honorable Court:

1. To allow civil discovery pursuant to the IRCP and ICR 57(b);
2. For leave to file a final amendment to the Amended Petition as more information becomes available during the course of these proceedings;
3. For an evidentiary hearing on the merits of a finalized petition;
4. For an order vacating the convictions and sentences imposed against Petitioner;
5. For such other, further relief as, to the Court, seems just and equitable.

DATED this 11th day ~~March~~ April of 2006.

MARK J. ACKLEY
Deputy State Appellate Public Defender

PAULA M. SWENSEN
Deputy State Appellate Public Defender

for
ERIK R. LEHTINEN
Deputy State Appellate Public Defender

VERIFICATION

STATE OF IDAHO)
) ss.
County of Ada)

Erick Hall, being first duly sworn, deposes and says:

That I am the Petitioner in the above entitled action; that I have read the foregoing PETITION FOR POST-CONVICTION RELIEF, and I know the contents thereof, and that the facts contained therein are true and correct as I verily believe based upon his review of the record, conversations with Petitioner.

DATED this 17th day of April, 2006.

Erick V. Hall
ERICK VIRGIL HALL
Petitioner

SUBSCRIBED AND SWORN to before me this 17th day of April, 2006.

JILL WHITTINGTON NOTARY PUBLIC STATE OF IDAHO

Jill Whittington
Notary Public for Idaho
Residing at Ada County
My commission expires 3/27/12

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 11th day of April, 2006, served a true and correct copy of the forgoing PETITION FOR POST-CONVICTION RELIEF as indicated below:

ROGER BOURNE
ADA COUNTY PROSECUTOR'S OFFICE
200 W. FRONT, SUITE 3191
BOISE ID 83702

_____ Statehouse Mail
_____ U.S. Mail
_____ Facsimile
✓ Hand Delivery

ERICK VIRGIL HALL
INMATE # 33835
IMSI
PO BOX 51
BOISE ID 83707

✓ Statehouse Mail
_____ U.S. Mail
_____ Facsimile
_____ Hand Delivery

Barbara Thomas
BARBARA THOMAS
Administrative Assistant

Filed
Monday, May 15, 2006 at 02:03 PM
J. DAVID NAVARRO, CLERK OF THE COURT
BY: _____ Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL, PLAINTIFF Plaintiff,	)	Case No: SPOT0500155D
Vs.	)	**AMENDED NOTICE OF HEARING**
STATE OF IDAHO, DEFENDANT Defendant.	)	

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

All Motions **Tuesday, June 20, 2006** **01:30 PM**
(PREVIOUSLY SET FOR JUNE 23, 2006 @ 9:00 a.m.)

Judge: Thomas F Neville

ADA COUNTY COURTHOUSE 200 W. Front Street, Boise, Idaho

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on the 15th TodayDateMont, TodayDateYear.

STATE APPELLATE PUBLIC DEFENDER
ATTN: MARK ACKLEY

Mailed_____ Hand Delivered_____ Email X

ROGER BOURNE
ADA COUNTY PROSECUTING ATTORNEY

Mailed_____ Hand Delivered_____ Email X

Dated: Monday, May 15, 2006

J. DAVID NAVARRO
Clerk of the Court

By: _____
Deputy Clerk

ORIGINAL

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. #4843

MARK J. ACKLEY, I.S.B. #6330
PAULA M. SWENSEN, I.S.B. #6722
Deputy State Appellate Public Defenders
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL, Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. SPOT0500155 **ADDENDUM TO AMENDED PETITION FOR POST-CONVICTION RELIEF** **(CAPITAL CASE)**

COMES NOW PETITIONER, Erick Virgil Hall, by and through his counsel at the State Appellate Public Defender (SAPD), and by agreement with the State, files this Addendum to Petitioner's Amended Petition for Post-Conviction Relief (Amended Petition) filed with the Court on April 17, 2006.

The purpose of this Addendum is to correct errors inadvertently made in the Amended Petition. The Addendum does not purport to correct typographical or grammatical errors. Petitioner anticipates filing a final amended petition, with leave of the Court, upon the completion of discovery and the full investigation necessary for post-conviction counsel to identify and raise all "arguably meritorious" claims. *See* ABA Guidelines for the Appointment

and Performance of Defense Counsel in Death Penalty Cases, Guidelines 10.15.1(C), (E); I.C. § 19-4906(a) ("court may make appropriate orders for amendment of the application..."); I.R.C.P. 15(a) (the court shall grant leave freely to amend "when justice so requires"). A final amended petition will correct any typographical or grammatical errors.

Petitioner submits the following corrections to the Amended Petition:

1. On page 38, Petitioner states: "This information does not appear in trial counsels' files..." This refers to the identification made by Ms. Lewis when shown the photographic array.

2. On page 50, Petitioner states: "His report, however, does not note this injury, and Dr. Vickman's report does not note swelling and specifically states that there were external signs of bruising on neck."

   The sentence should read: "His report, however does not note this injury, and Dr. Vickman's report does not note swelling and specifically states that there were **no** external signs of **choking** on the neck."

3. On page 152, Petitioner states: "Had trial counsel conducted an adequate investigation, they would have discovered evidence linking Patrick Hoffert to the crime."

   Based in part on current counsels' meeting with Amil Myshin on May 23, 2006, trial counsel was aware of evidence linking Patrick Hoffert to the crime, but did not recall why this theory was not pursued.

4. On page 164, Petitioner states: "Petitioner exhibited compassion and generosity toward her children—spoon-feeding them medicine when they were sick, drawing pictures for them, and purchasing a drawing book."

   Petitioner's reference to "spoon-feeding" Evelyn Dunaway's children is inaccurate. Ms. Dunaway's affidavit states that Petitioner spoon fed the child of another family living with Ms. Dunaway. (*See* Exhibit 15 (affidavit of Evelyn Dunaway).)

5. The Affidavit of Dr. James Merikangas states that Petitioner could not identify the scent of either vanilla or cloves. (*See* Exhibit 26.)

Petitioner believes he was able to identify the scent of vanilla, but not cloves. Petitioner intends to submit a corrected affidavit, upon confirmation with Dr. Merikangas.

6. On page 171, Petitioner quotes from Idaho Criminal Rule 24, but incorrectly cites to "I.C.R. 21(d)." The citation should read "I.C.R. 24(d)."

7. On pages 174-175, footnote no. 44, fails to reference a particular exhibit. The reference should be to Exhibit 35 (declaration of David A. Lane).

A final note is necessary in fairness to trial counsel. Specifically, throughout the Amended Petition, Petitioner referenced the ongoing lack of cooperation by trial counsel. (*See, e.g.*, Amended Petition, p. 4 at n.2, p. 23 at n.8, p. 34 at n.12, p. 90, p. 93, p. 133, p. 143, p. 150, p. 158, p. 160 at n.43, and p. 179.) Petitioner notes that the refusal of D.C. Carr continues to date. However, on May 23, 2006, Petitioner's current counsel met Amil Myshin for several hours. At that meeting, Mr. Myshin disclosed a file folder of hand-written notes containing Mr. Myshin's thought processes, team assignment, and witness summaries, among other matters. The folder contains over two hundred (200) pages of such notes. Mr. Myshin hadn't reviewed his notes prior to the meeting. Even a cursory review of the note indicates many relevant areas which Mr. Myshin's had no recollection. Petitioner's counsel anticipates that the notes will contain factual information relevant to claims made in the Amended Petition, will provide further factual support for claims raised, and will provide a basis for raising additional claims or even narrowing or withdrawing current claims.

DATED this 24th day May, 2006.

MARK J. ACKLEY
Lead Counsel, Capital Litigation Unit

PAULA M. SWENSEN
Co-Counsel, Capital Litigation Unit

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of May, 2006, a true and correct copy of the foregoing document, ADDENDUM TO AMENDED PETITION FOR POST-CONVICTION RELIEF, was mailed, postage prepaid, to the following:

ERICK VIRGIL HALL INMATE # 33835 IMSI PO BOX 51 BOISE ID 83707	X U.S. Mail ____ Statehouse Mail ____ Facsimile ____ Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	____ U.S. Mail ____ Statehouse Mail ____ Facsimile X Hand Delivery ____ E-Mail
THOMAS F. NEVILLE DISTRICT JUDGE 200 W. FRONT BOISE ID 83702	____ U.S. Mail ____ Statehouse Mail ____ Facsimile X Hand Delivery ____ E-Mail

Barbara Thomas

BARBARA THOMAS
CLU Administrative Assistant

GREG H. BOWER
Ada County Prosecuting Attorney

Roger Bourne
Deputy Prosecuting Attorney
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL, Petitioner, vs. THE STATE OF IDAHO, Respondent,	**Case No. SPOT0500155D** **STATE'S RESPONSE TO THE AMENDED PETITION FOR POST CONVICTION RELIEF AND STATE'S MOTION TO DISMISS**

COMES NOW, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and makes the State's response to the petitioner, Erick Virgil Hall's Amended Petition for Post Conviction Relief as follows.

The State admits that this Court has jurisdiction over the action pursuant to various Idaho statutes and rules. The State denies that any international human rights laws are applicable or give the Court additional authority that it did not otherwise have.

The State admits that the petitioner is in the custody of the Idaho State Department of Corrections pursuant to a judgment and sentence pronounced by this Court in Ada County after conviction in Ada County case number H0300518 for the crimes of Count I, Murder in the First Degree; Count II, Rape; Count III, Kidnapping in the First Degree. After a finding by jury that the death penalty was the appropriate punishment for the defendant's criminal behavior, this Court imposed a sentence of death in January 2005 for the crime of Murder with consecutive fixed life sentences for Rape and Kidnapping. The State admits that the petitioner pled not guilty and that a jury returned verdicts of guilty and the death sentence.

The State admits that the petitioner is restrained of his liberty pursuant to the convictions referred to above, but denies that the restraint is illegal in any respect and denies that the convictions and sentences were obtained in violation of the law or of the Constitution of United States or the State of Idaho. The State denies each and every claim upon which the petitioner relies in support of any of his claims. Further, the State denies that the petitioner requires additional time for the filing of any amended petition given the amount of time that has transpired from the original conviction to date.

The State will respond to the specifics of the petitioner's claims using the same numbering system set up by the petitioner. However, before doing so a review of the current law on post conviction claims for ineffective assistance of counsel and other similar claims is appropriate. The Idaho Supreme Court has stated the standard for judging ineffective assistance of counsel claims in *Pratt v. State*, 134 Idaho 581 (Sup. Ct. 2000) as follows:

> The benchmark for judging a claim of ineffective assistance of counsel is "when a 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." *State v. Matthews*, 133 Idaho 300 (S.Ct.1999), *cert. denied*, 2000 WL 198035 (2000) (quoting, *Strickland v. Washington*, 466 U.S. 668 (1984)). The test for evaluating whether a criminal defendant has received the effective assistance of counsel is two-pronged and requires the petitioner to establish: (1) Counsel's conduct was deficient because it fell outside the wide range of professional norms; and (2) The petitioner was prejudiced as a result of that deficient conduct. *Ray v. State*, 133 Idaho 96 (1999). (Citing Strickland, 466 U.S. at 687). In assessing the reasonableness of attorney performance, counsel is "presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 329-30 (citing *Strickland*, 466 U.S. at 690). In addition, strategic and tactical decisions will not be second guessed or serve as a basis for post-conviction relief under a claim of ineffective assistance of counsel unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law, or other short comings capable of objective review. *Giles v. State*, 125 Idaho 921 (1994), *cert. denied*, 513 U.S. 1130 (1995).

The Idaho Court of Appeals further defined "prejudiced" as it relates to an ineffective assistance of counsel claim in *Goodwin v. State*, 138 Idaho 269 (Ct. App. 2002).

The court stated:

> To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Hassett v. State*, 127 Idaho 313, 316, (Ct. App. 1995); *Russell v. State*, 118 Idaho 65 (Ct. App. 1990); *Davis v. State*, 116 Idaho 401 (Ct. App. 1989). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758 (1988); *Russell, supra*. To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Aragon, supra*, and *Russell, supra*.

In other words, it is not good enough for current counsel to merely point out that trial counsel conducted the trial differently than current counsel would have done. It is not even good enough to point out that trial counsel committed a mistake in the law or the facts. The petitioner must establish that trial counsel's representation fell below an objective standard of reasonableness, the defendant was prejudiced, and that the outcome of the trial would have been different but for the deficient performance.

The court is not required to accept either the petitioner's mere conclusory allegations, unsupported by admissible evidence, or the petitioner's conclusions of law. *Roman v. State*, 125 Idaho 736 (Ct. App. 1987); *Baruth v. Gardner*, 110 Idaho 156 (Ct. App. 1986). The *Goodwin* court went on to say that a petition for post conviction relief differs from a complaint in a civil action because the petition must contain more than "a short and plain statement of the claim" that would be sufficient for a civil complaint under I.R.C.P. 8(a)(1):

> Rather, an application for post conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. *Idaho Code §19-4903*. In other words, the application must present or be accompanied by admissible evidence supporting its allegations or the application will be subject to dismissal.
>
> Idaho Code §19-4906 authorized summary disposition of an application for post conviction relief, either pursuant to motion of a party or upon the courts own initiative. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue was presented, an evidentiary hearing must be conducted. *Citations omitted.*

An ineffective assistance of counsel claim is not a test of whether "another lawyer, with the benefit of hindsight, would have acted differently, but whether counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington supra*

As the Ninth Circuit Court of Appeals has recently emphasized, "the relevant inquiry under *Strickland* is not what defense counsel could have pursued, but whether the choices made by defense counsel were reasonable." *Siripongs v. Calderon*, 133 F.3d. 732, 736 (9th Cir. 1998).

Finally, it is important to point out that the petitioner's claims cannot be mere conclusions, but must be supported by admissible evidence. As the Idaho Supreme Court stated in *State v. Lovelace*, 140 ID 53 (Sup. Ct. 2003):

> Lovelace's argument that counsel should and would have advocated for a plea bargain, but for his campaign challenge to the sitting prosecutor whom he claimed was 'soft on crime' is speculative and nothing more than a conclusion. We do not give evidentiary value to mere conclusory allegations that are unsupported by admissible evidence. *Paradis v. State*, 110 Idaho 543 (1986). 140 ID at page 61.

GROUNDS FOR RELIEF

A. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO TRIAL COUNSEL'S FAILURE TO ACT WITH DILIGENCE IN ENSURING THAT ALL OF THEIR CLAIMS WERE FULLY INSULATED FROM ANY FUTURE CLAIMS BY THE GOVERNMENT THAT THE CLAIMS WERE NOT SUFFICIENTLY PRESERVED.

1. ...ineffective assistance for failing to fully insulate "motion to allow defense to provide copy of Grand Jury transcript to the defendant from future attacks that the claim was not sufficiently preserved."

The petitioner admits that trial counsel did move to provide a Grand Jury transcript to the petitioner, but that the motion was only "partially denied." The petitioner claims no prejudice nor does he cite to any case law. The petitioner shows no reason to think that the claim is not "fully insulated." The claim should be dismissed.

2. ...ineffective assistance for failing to insulate their "motion to declare Idaho's capital sentencing scheme unconstitutional."

The petitioner admits that trial counsel did file a motion to declare the scheme unconstitutional, but only claims that there should have been other specific constitutional provisions alleged. No showing is made that the constitutional claims cannot be argued on appeal nor that the motion is not "insulated." The claim should be dismissed.

3. ...failing to insulate a motion to establish voir dire proceedings.

The petitioner admits that trial counsel did file such a claim and does not show that it was denied by the Court. This claim should be dismissed.

4. ...to preclude Idaho Rule of Evidence 404(b) evidence.

The petitioner admits that trial counsel did file such a motion. To the undersigned's knowledge, the Court granted the motion by precluding the use of the Hanlon murder facts and the statements of Amanda Stroud. The State was allowed to use the Norma Jean Oliver rape case and the petitioner's escape conviction during sentencing. The petitioner makes no effort to show what further could have been done by trial counsel. The claim should be dismissed.

5. ...by failing to raise constitutional grounds in support of their "motion to exclude"

No prejudice is shown. The petitioner makes no effort to show what trial counsel could have done differently. This is a bald assertion unsupported by admissible evidence. It should be dismissed.

6. ...ineffective assistance of counsel by failing to raise constitutional grounds of their "ex parte motion to appoint jury selection consultant."

To the undersigned's knowledge, trial counsel did use Rolf Kehne as a jury consultant. There is no evidence asserted by the petitioner that the trial Court ever denied trial counsel's motion for a jury consultant or that the trial Court dismissed Mr. Kehne. This is a bald assertion without a factual basis and it should be dismissed.

7. **...failing to raise constitutional grounds to support their "motion to strike/dismiss aggravating circumstances."**

The petitioner admits that the motion was made by trial counsel. No showing is made citing to different constitutional provisions than those referred to in the motion nor that the claim has not been preserved. This claim should be dismissed.

8. **Ineffective assistance of counsel for failing to raise constitutional grounds in support of their objection to Dennis Deen's testimony.**

The petitioner admits that the motion was made, but makes no effort to show how arguing additional constitutional basis for the objection would have been successful. This claim should be dismissed.

B. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL'S FAILURE TO ADEQUATELY LITIGATE ERRORS OCCURING DURING THE GRAND JURY PROCEEDINGS.

1. **...ineffective assistance of counsel for failing to move to dismiss the Amended Indictment on the grounds that it charged an additional or different offense than initially presented to the Grand Jury.**

The petitioner admits that trial counsel filed motions to declare Idaho's capital sentencing scheme unconstitutional and to dismiss or strike the aggravating circumstances. The petitioner has made no showing that those motions in combination with the argument do not adequately preserve the issues for appellate review. The petitioner does not show why the petitioner would be precluded from making the arguments that he asserts in the petition. This claim should be dismissed.

2. ...trial counsel failed to move to dismiss the Indictment on the ground that the Grand Jury failed to find that each aggravator outweighed mitigation.

It appears to the undersigned that the petitioner thinks the Grand Jury was required to weigh mitigation against aggravation rather than determine probable cause. No legal justification is forwarded to support this novel argument. The Grand Jury did not sentence the defendant to death. The Grand Jury's obligation was only to determine the question of probable cause on the existence of certain charged statutory aggravators. The petitioner's analysis that the Grand Jury must do the weighing is completely novel and appears to be made up by the petitioner. The claim should be dismissed.

3. ...failing to object to the interlineation of "drowning" as one of three possible causes of death.

The petitioner makes no effort to support his argument that a "unanimity instruction" is a requirement under these facts. This claim should be dismissed.

C. THE PETITIONER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN HE WAS IMPROPERLY SHACKLED DURING THE COURSE OF HIS TRIAL.

The petitioner makes no showing of a factual basis for this claim. Indeed, the petitioner merely says that he "believes that the jurors were able to discern this device." No factual showing is claimed. The State observes at page 2067 the Court noted that the restraint was not visible. The Court said, "...he is incustody although it's not apparent." This claim should be dismissed.

D. THE STATE COMMITTED MULTIPLE BRADY VIOLATIONS.

1. ...by failing to disclose favorable evidence pertaining to Norma Jean Oliver.

The apparent claim is that trial counsel did not cross-examine Ms. Oliver from the emergency room report nor Detective Hess's police report. No claim is made that either of those two reports contain information useful for cross-examination nor that any prejudice resulted. This claim should be dismissed.

a. ...by not disclosing documentation or information that Ms. Oliver suffers from bi-polar disorder or other conditions tending to undermine her credibility as a witness

The petitioner pretends in this claim that the jury and trial counsel were not told that Norma Jean Oliver had been treated for mental illness. The petitioner ignores Ms. Oliver's own statements that she had a chemical imbalance; that she stayed in Intermountain Hospital for a while; that she is currently on SSI because she can't hold a job and that her memory of the events were not very good because she did not want to remember the things that happened to her on the night of the rape; and that Detective Hess initially interviewed her at Intermountain Hospital. Jay Rosenthal later testified that she was fragile at the time of the crime; that she was staying at Intermountain Hospital in the adolescent unit and that she was being treated by a psychiatrist named Lamar Heyrend.

Otherwise, the State is not in possession of any Intermountain Hospital medical records and does not know if any exist. Further, the State is not informed as to whether or

not Ms. Oliver was diagnosed with any particular disorder in 1991. No material information favorable to the defendant was withheld. There was no Brady violation.

b. ...not disclosing the complete results of the "rape kit."

The petitioner asserts without factual basis that the rape kit contained exculpatory evidence. There is no factual basis upon which a ruling could be made in the petitioner's favor. This should be dismissed.

c. ...by not disclosing all photographic evidence that would have impeached the testimony of Norma Jean Oliver and Detective Daniel Hess...

The petitioner's claim is only argument as to the relative value of the photographs utilized at trial. The photographs speak for themselves. No showing is made that some photos were withheld. No prejudice has been shown and this claim should be dismissed.

d. ...by not disclosing evidence suggesting that Norma Jean Oliver was incompetent to testify.

All of the information about Norma Jean Oliver's memory and ability to testify was before the jury. No evidence is known by the undersigned to indicate that Norma Jean Oliver was legally incompetent to testify. No factual basis has been shown and this claim should be dismissed.

e. ...by not disclosing incentives given to Ms. Oliver to testify.

No factual basis has been shown and no incentives are suggested. This should be dismissed.

2. The prosecution violated Brady by failing to disclose favorable evidence pertaining to April Sebastian.

The petitioner suggests without factual basis that the State offered Ms. Sebastian a benefit in exchange for her testimony. The claim is not true and there is no factual basis to support the claim. It should be dismissed.

3. ...by failing to disclose favorable evidence pertaining to Michelle Deen.

The petitioner makes the assertion that the State did not disclose Ms. Deen's full criminal record. The State notes that at transcript page 4823 Ms. Deen admitted that she had been convicted of possession of methamphetamine and was on probation. She also said that she had done a "Rider." A record check shows that Michelle Deen does have two felony convictions; a 2002 possession of controlled substance and a 2003 possession of a controlled substance. The jury was on notice that Ms. Deen had been convicted of at least one felony and possibly two if one resulted in probation and the other in a rider. Arguably she could not be impeached by either conviction because they are both drug offenses. There is nothing about this that would cause the Court to lose confidence in the outcome.

The petitioner claims that there is significance to the fact, if it is one, that Ms. Deen underwent court ordered substance abuse and psychological evaluations in her case. There is no evidence to suggest that the result of either of those was evidence favorable to the defendant. The claim should be dismissed.

4. ...failing to disclose favorable evidence pertaining to Rebecca McCusker.

The petitioner asserts that Ms. McCusker had a motivation to retaliate against the petitioner. No evidence to support the claim is suggested. It should be dismissed.

5. ...failing to disclose favorable evidence pertaining to Evelyn Dunaway.

This is merely a claim without a factual basis and should be dismissed.

6. ...failing to disclose favorable evidence pertaining to Wendy Levy.

The petitioner claims that Ms. Levy provided evidence to the State that was exculpatory. In Ms. Levy's affidavit, she claims that she was interviewed by the prosecution and the defense prior to the petitioner's conviction and sentencing. Whatever information she had, she claims she told both the prosecution and the defense, neither of whom called her as a witness.

7. ...failing to disclose favorable evidence pertaining to a potential alternate perpetrator.

To begin with, the State has no evidence suggesting that there is an "alternate perpetrator." The claim is based upon what appears to be completely fabricated reports by two women, Lisa Lewis and Peggy Hill. They told Detective Dave Smith in May 2004 that they had seen Lynn Henneman in Garden City on the day of her disappearance with Erick Hall. Ms. Lewis and Ms. Hill have recently embellished their story to increase the participation in that story of a person named Patrick Hoffert. The Hoffert story, as now claimed by Lewis, was not given to Detective Smith in his May 2004 interview of Hill and Lewis, as can be seen from his police report, petitioner's Exhibit #9.

Lewis said that Diedre Muncy states that Hoffert said he had "raped the girl" without any further reference to who "the girl" was. This is double hearsay and as such is not admissible evidence that can support a claim. Lewis's assertion that Hoffert told her that "he made sure the woman got back to her hotel" is also inadmissible hearsay. There is no admissible evidence to support the claim that the State failed to disclose favorable evidence. This claim should be dismissed.

8. ...by failing to disclose favorable evidence connecting Christian Johnson to the Henneman homicide.

All information tending to connect Christian Johnson to the Henneman homicide was given to the jury by Detective Smith during the trial. DNA results eliminated Christian Johnson as a suspect as did his alibi witnesses. This claim is speculation only and should be dismissed.

E. THE STATE COMMITTED NUMEROUS NAPU VIOLATIONS.

1. The prosecutor elicited materially false testimony from Dennis Deen regarding Idaho Department of Corrections Inmate Classification System...

There is nothing in this assertion indicating that there was anything false about the testimony of Dennis Deen. Dennis Deen testified that the petitioner would not be eligible for minimum custody under the current classification system.

2. **The prosecutor deliberately created the materially false impression that the petitioner seriously choked Evelyn Dunaway while engaging in sexual intercourse.**

The petitioner cites an excerpt from the transcript of Ms. Dunaway's testimony. There is nothing in that excerpt that supports his claim. This should be dismissed.

3. **The prosecutor deliberately created the materially false impression that the petitioner choked Michelle Deen while engaging in forcible sexual intercourse.**

Again, the petitioner quotes an excerpt from the testimony of Michelle Deen. There is nothing in that excerpt that supports the defendant's claim. It should be dismissed.

4. **The prosecutor elicited materially false testimony from Norma Jean Oliver.**

The petitioner argues the weight of Norma Jean Oliver's testimony in the context of the other testimony at the trial. There is nothing about his argument that supports his claim that the prosecutor elicited false testimony. All of the relevant information was before the jury so they could make a determination of what weight to give Ms. Oliver's testimony.

5. **The prosecutor deliberately injected extra-record and materially misleading evidence through leading questions to Detective Daniel Hess.**

The petitioner cites to a certain excerpt from the testimony of Detective Hess. There is nothing in that excerpt that supports his claim. It should be dismissed.

6. The prosecution committed misconduct by misrepresenting conclusions that could be drawn from the DNA test results taken from Christian Johnson.

The petitioner's argument to support this claim appears to be nothing more than wild speculation that Christian Johnson raped Lynn Henneman and did not leave any semen. He doesn't even pretend to have evidence to support this. It should be dismissed.

F. PROSECUTORIAL MISCONDUCT FOR USING TECHNIQUES TO DISSUADE MITIGATION WITNESSES FROM TESTIFYING OR PREDISPOSE THEM TO DISREGARD OR DOWN PLAY VALID MITIGATING EVIDENCE.

The bald assertion here is that the State somehow influenced Tamara McCraken and Jean McCraken from cooperating with the defense. Tamara McCraken testified for the defense in the penalty phase beginning at transcript page 4971. Jean McCraken was interviewed for two hours and twenty-two minutes by Dr. Cunningham, transcript page 5299. She was also interviewed by Dr. Pettis, transcript page 5202. No showing is made why she did not testify. No prosecution agent used any technique to dissuade any witness from testifying or to otherwise affect their testimony.

G. ADMISSION OF TESTIMONIAL AND OTHER HEARSAY VIOLATIONS VIOLATED PETITIONER'S SIXTH AMENDMENT AND DUE PROCESS RIGHTS.

This is a claim that inadmissible hearsay under the *Crawford* decision was put before the jury through Detective Hess concerning things that Norma Jean Oliver had told Detective Hess. Since Ms. Oliver testified and was available for cross-examination, there

is no *Crawford* violation. Additionally, Idaho Rule of Evidence 101(e)(3) indicates that the Rules of Evidence do not apply at sentencing hearings.

H. THE PROSECUTION COMMITTED MISCONDUCT BY ASKING THE JURY TO SPECULATE THE WORST SCENARIO BY PRESENTING ARGUMENT INCONSISTENT WITH THE EVIDENCE AND BY ALLUDING TO EVIDENCE OF ANOTHER MURDER.

The excerpts of argument cited by the petitioner appear to be proper comment on the facts and a proper method of drawing inferences from the facts. There is nothing in the quoted excerpts that support this claim and it should be dismissed.

I. PROSECUTORIAL MISCONDUCT IN SENTENCING PHASE CLOSING ARGUMENTS.

1. The prosecution committed misconduct by making an improper closing argument regarding the definition of mitigation by asserting that mitigation evidence is limited to evidence that is causally linked to the defendant's criminal conduct, evidence that excuses the defendant's criminal conduct, and evidence that prevented the defendant from choosing not to kill.

There is nothing about the arguments cited that shows misconduct. The State is as free to argue its view of the weight of the evidence as is the defendant. The argument did not impede the jury's ability to consider mitigation nor did it impede the defendant's ability to present evidence. Whether the mitigation was "valid" or had any weight to it of any kind was a jury determination that could be argued by both sides. This claim should be dismissed.

2. The prosecution committed misconduct by making an improper closing argument regarding the manner in which mitigation is weighed against the aggravation.

In this case, the jury was correctly instructed on the need to weigh all mitigation against each aggravating circumstance. The verdict form could not have been more clear that all mitigation was to be weighed against each individual aggravating circumstance. Trial counsel, in his closing argument, also correctly argued that all mitigation needed to be weighed against each individual aggravator separately. The drawing of the scale in the petitioner's argument was not an effort by the State to instruct the jury on the method of weighing. Rather, it was only to show that all of the mitigation was not sufficiently compelling to make the death penalty unjust. The jury was correctly instructed and the argument was not misconduct.

3. The prosecution committed misconduct by arguing that the defense experts were hired guns.

The petitioner argues that the State impermissibly argued that the defense experts were "hired guns." To begin with, the petitioner cannot point to any argument where the words "hired guns" or the equivalent were used. Second, even if those words were used, the petitioner shows no legal basis suggesting that an argument of that sort was impermissible. The bias or reliability of a witness is always subject to argument. Nothing about the petitioner's claim shows that the prosecutor's arguments were improper.

4. **The prosecution committed Doyle error by eliciting through Dr. Mark Cunningham testimony that petitioner did not speak to him about the crimes for which he had been charged.**

The petitioner cites an excerpt from the State's cross-examination of one of the defense experts. The excerpt shows that the expert did not ask the defendant anything about the murder of Lynn Henneman. It was not suggested that the defendant refused to answer questions. It showed that the expert was biased in his research and presentation of the facts.

5. **The prosecution committed misconduct by misrepresenting the testimony of Michelle Deen and Evelyn Dunaway.**

The petitioner cites to an excerpt from closing argument. Nothing in the excerpt shows a misrepresentation of the testimony of Deen or Dunaway and does not support the claim made.

6. **The prosecution committed misconduct by encouraging the jury to speculate in the course of determining whether the propensity aggravator existed beyond a reasonable doubt.**

There is nothing improper in the excerpt of the closing argument quoted by the petitioner as support for this claim.

7. **The prosecution committed misconduct by making an argument inconsistent with evidence outside the record.**

This is mere speculation by the petitioner with no citation to admissible evidence. It should be dismissed.

8. The prosecution committed misconduct in arguing for imposition of the death penalty to deter future crimes or other would-be criminals and as retribution for the victim's family.

There is nothing improper about the excerpts of closing arguments cited by the petitioner. The petitioner does not cite to any authority standing for the proposition that a State argument as to retribution, protection of society or deterrence is improper.

9. ...by expressing their personal opinion that the death penalty was the appropriate punishment.

The excerpt of the closing argument cited by the petitioner is the prosecutor making the obvious point that the verdict of proof beyond a reasonable doubt in the guilt phase was overwhelming proof. He does not state his opinion as to the propriety of the death sentence.

10. ...by making extra-record argument that lethal injections are painless and humane.

The excerpt of the closing argument referred to by the petitioner is merely part of an argument showing that Lynn Henneman's murder was much more painful and horrific for her than execution will be to the petitioner. Additionally, the British journal cited by the petitioner only indicates that some prisoners "may" receive inadequate anesthesia. This claim is baseless.

11. ...by arguing that a life sentence would be too lenient and otherwise speculating as to what might happen to petitioner if the death sentence were withheld.

There is nothing about the quoted closing argument that is improper. The jury was properly instructed and the argument was not false or misleading.

12. ...by arguing that petitioner showed a lack of remorse.

The petitioner's argument is that the State's argument was a comment on the defendant's right to remain silent. Nothing about the quoted argument makes any reference to the defendant's silence. The argument refers to his observable conduct in the courtroom. It was not improper.

J. TRIAL COUNSEL LABORED UNDER MULTIPLE AND VARIED CONFLICTS OF INTEREST THAT ADVERSELY AFFECTED THEIR PERFORMANCE.

1. Trial counsel's competing obligations to attend to other cases created a conflict of interest adversely affecting counsel's performance.

The petitioner cites to no facts supporting this allegation. It should be dismissed.

2. Norma Jean Oliver.

The petitioner asserts that Mr. Myshin had a conflict of interest that adversely affected his ability to investigate Ms. Oliver's case. Besides the assertion, the petitioner has no facts to support this claim.

3. April Sebastian.

The petitioner asserts that Mr. Myshin represented April Sebastian in past criminal cases. The petitioner asserts that this was a conflict for Mr. Myshin, but points to no facts to support this assertion. He also asserts that the State offered Ms. Sebastian benefits in exchange for her testimony. No facts are contained in the argument to support that claim.

4. Christian Johnson.

No facts are asserted to support this claim.

K. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO FAILURE TO REQUEST PRETRIAL EVIDENTIARY HEARING FOR THE PRESENTATION OF FACTS ALLEGED IN SUPPORT OF THE NOTICED AGGRAVATING CIRCUMSTANCES.

This seems to be nothing more than an assertion by the petitioner without the support of admissible evidence or legal authority.

L. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO CASELOAD.

This seems to be a restatement of the claim made J1, that trial counsel had large caseloads. It is again asserted without any accompanying factual basis.

M. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO FAILURE TO SUPPRESS EVIDENCE.

The petitioner admits that he has not reviewed the trial proceedings to determine whether this claim is correct. It should be dismissed.

N. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO FAILURE TO MOVE FOR CHANGE OF VENUE, OR IN THE ALTERNATIVE, FAILING TO MOVE TO HAVE A JURY FROM ANOTHER COUNTY EMPANELED.

No showing is made by the petitioner indicating that any juror was biased due to pretrial publicity. The claim should be dismissed.

> **1– 4. The petitioner claims ineffective assistance of counsel for failing to analyze media broadcasts, to poll the community, to change venue or impanel a jury from another county and for failing to question jurors sufficiently about pretrial publicity.**

While the petitioner cites to certain pretrial publicity, he cites to no facts indicating that any of the seated jurors were biased due to pretrial publicity. Whether or not the

community had an opinion is of no relevance. The only question is whether the petitioner received a fair trial from an unbiased jury and there is no evidence to think otherwise. These claims should be dismissed.

5-7. Ineffective assistance claims for failing to develop an adequate record of juror's knowledge, for failing to know who to strike for cause and failing to use preemptory challenges correctly on publicity questions.

Again, the petitioner has no facts to support any of these claims. The undersigned recalls that in addition to extensive questioning during jury selection, the parties had the benefit of the jury questionnaires which also asked about pretrial publicity. These claims should be dismissed.

O. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO FAILURE TO PRECLUDE AND OBJECT TO TESTIMONY.

1. ...in failing to object to, or otherwise preclude, opinion evidence by Dr. Groben as not being based upon a reasonable degree of medical certainty.

The record shows that Dr. Groben did testify that his opinions were to a reasonable degree of medical certainty or that otherwise the evidence that he observed supported the conclusions that he drew. The fact, if it is one, that another pathologist disagrees with Dr. Groben is not evidence that Dr. Groben is incorrect or that trial counsel rendered ineffective assistance of counsel.

2. **...in failing to object to, or otherwise preclude, testimony of Norma Jean Oliver due to her lack of competency to testify.**

The fact that a witness remembers certain things and does not remember other things does not render the witness incompetent to testify. The petitioner makes no effort to show why a motion to strike Ms. Oliver's testimony would likely have been granted.

3. **...in failing to object to, or otherwise preclude, testimony of other criminal acts.**

The State assumes that this claim is in relation to the defendant's prior criminal record, which was presented to the jury during the penalty phase. This seems to be no more than an assertion by the petitioner and should be dismissed.

4. **...in failing to object to, or otherwise preclude hearsay testimony.**

The petitioner says that he requires additional time to analyze this claim. It should be dismissed.

P. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO FAILURE TO EFFECTIVELY CROSS EXAMINE WITNESSES AND REBUT STATE THEORIES.

1. **...in failing to effectively cross examine Dr. Groben and rebut the State's presentation of evidence that the victim was hogtied and suffered a terrifying and tortuous death.**

The argument here is that Dr. Aiken, a Spokane pathologist, has some disagreement with Dr. Groben's findings and should have been consulted by trial counsel. It is the identical claim made in 01. A close reading of Dr. Groben's testimony and a comparison of that testimony with Dr. Aiken's affidavit, shows that there is no material difference between the two and no showing of prejudice to the petitioner.

2. ...in failing to effectively cross examine Kathryn Colombo and rebut the State's argument the petitioner was the only contributor of DNA removed from the victim.

The substance of this claim is that Kathryn Colombo "downplayed" the importance of the existence of a 13th allele at the D5 marker by referring to it as a "stutter artifact" or a "technical artifact" or "contamination." Counsel uses a BSU professor, Greg Hampikian to opine that Kathryn Colombo downplayed the result, though Dr. Hampikian cites excerpts from the transcript showing that Kathryn Colombo made it clear there could have been a second male contributor to the sperm fraction.

During direct and cross-examination, the question of the 13th allele was discussed several times, the State notes some of them as follows.

At transcript page 4466, Ms. Colombo refers to that allele and describes it as being, "over the stutter cutoff, but just barely. It could be a technical artifact. It has met our reporting guidelines, so it is in the table. I cannot make any conclusions about that type because it is just so little information."

At page 4467, Ms. Colombo states, "there was no other type observed in these sperm fractions where we saw secondary types that were not consistent with possible carryover from the nonsperm fraction. So this was the only instance." Ms. Colombo is referring to the 13th allele at D5.

She points out at page 4468 that the petitioner matches at all of the markers.

At page 4489, Ms. Colombo states unequivocally that there could be a second donor as follows:

Q. Could there be a second male there?

R. There could be.

Q. Okay. Now, as we go out to the – out towards the end there. The D5 category, Yes. Is it possible that a second male contributed the 13 allele?

A. That is possible. It's not consistent with the type obtained from a nonsperm donor, not consistent with the primary donor at that location. So it could either be technical artifact, it could be the true nature of the sample. It could have been picked up along the way. There is no way for me to determine where that type came from.

Q. Okay. So it's possible that it could have come from a second male?

A. Possible.

The subject again came up at page 4505.

Q. Now, if there is a difference in the time of depositing the sample, does that effect it?

A. Yes. If there is a sample that was deposited, specifically in a sexual assault case, we see cases where an individual says that they had sex with another person two weeks prior to the attack and maybe that we're getting some residual, small amount of DNA from that partner from two weeks ago, so in terms of a sexual assault that could come into play.

Q. And it's also true that if there are only hours separating, correct?

A. Not typically, no.

Q. It's possible?

A. It could be possible, yes.

The second contributor issue was again discussed at page 4521. Referring to the 13th allele, the following occurred:

Q. Well, it could have come from another contributor?

A. That is correct.

The subject was again discussed at page 4526 as follows:

Q. Is it possible that there was a second male contributor to the sperm fraction?

A. It's possible. We've got one reading, it's the only reading, a small type that cannot be attributed to the nonsperm donor or the primary source of the sperm fraction. So I don't know where that came from.

On page 4528 and 4529, the subject is again discussed and Ms. Colombo admits that she cannot account for the 13th allele. However, she does point out that Walter Us and Christian Johnson are categorically excluded as donors.

For the petitioner to pretend that the jury was not aware of the possibility of a second sperm donor is to completely ignore the testimony. The affidavit from Greg Hampikian adds nothing to the knowledge that the jury already had. He suggests that the 13th allele came from the victim being "inseminated." There is no way for him to know how that 13th allele got to the place that it was discovered. He can no more tell that it is a result of insemination than he can tell that it was "picked up along the way" during the testing process as indicated by Kathryn Colombo. There is nothing about this information that shows ineffective assistance of counsel. This claim should be dismissed.

3. ...in failing to effective cross examine Norma Jean Oliver.

The petitioner asserts that there are certain discrepancies that trial counsel should have examined Norma Jean Oliver about. He does not state what the discrepancies are so there is no factual basis to support this claim. It should be dismissed.

4. ...in failing to effectively cross examine Detective Daniel Hess.

This allegation is the same as the one for Ms. Oliver. The petitioner does not assert what discrepancies he thinks Detective Hess should have been cross examined about. This claim should be dismissed.

5. ...in failing to effectively cross examine Jay Rosenthal.

The petitioner asserts that the type of sentence the petitioner received for his rape of Norma Jean Oliver suggests that Mr. Rosenthal thought the State's case against the petitioner was weak or that the State did not believe Ms. Oliver's allegations of violence. Jay Rosenthal clearly testified that he went ahead with the plea agreement because he thought Ms. Oliver was too fragile to withstand cross-examination during a trial. There is no factual basis for this allegation. It should be dismissed.

6. ...in failing to effectively cross examine April Sebastian.

The petitioner makes no suggestion of what evidence existed that trial counsel could have used to impeach Ms. Sebastian with. A reading of Ms. Sebastian's cross examination shows that trial counsel elicited a number of good things about Erick Hall from Ms. Sebastian. Since the petitioner asserts no factual basis to support this claim it should be dismissed.

7. **...in failing to rebut the State's presentation of evidence that petitioner has a propensity to murder and probably constitutes a continuing threat to society through the testimony of Dr. Mark Cunningham.**

The substance of this claim is that trial counsel should have convinced the Court to allow Dr. Mark Cunningham to opine that the petitioner was not a continuing threat to society despite the Court's ruling that if he did so, the State could present evidence about the Hanlon murder. The petitioner makes certain assertions about the Hanlon case not being adequately investigated and speculates about how some DNA testing may have come out in the Hanlon case. However, no factual basis is shown as to what trial counsel could have done differently to convince the Court otherwise nor how Dr. Cunningham would have handled the propensity question in light of the fact that the defendant had killed twice. The petitioner makes no effort to explain how he thinks the jury would have reacted to the knowledge that the defendant was a multiple murderer when considering the death penalty question. This claim should be dismissed.

Q. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL FOR ELICITING AGGRAVATING EVIDENCE.

In the State's view, there is nothing about the excerpt of testimony referred to by the petitioner that tends to support the claim that the petitioner was suspected of committing other rapes through the carelessness of trial counsel. This claim should be dismissed.

R. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO THEIR FAILURE TO CONDUCT AN ADEQUATE GUILT PHASE INVESTIGATION.

1. **...in failing to adequately investigate and present evidence of an alternate perpetrator of the murder and co-perpetrator of rape.**

This is a restatement of the earlier claim that Patrick Hoffert is the murderer. This claim is fabricated out of the notion that the 13th allele in the DNA is Patrick Hoffert. Since there is no factual basis to support that, the claim should be dismissed.

S. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO THEIR FAILURE TO CONDUCT AN ADEQUATE SENTENCING PHASE INVESTIGATION.

Beneath this heading, the petitioner claims in numbers 1, 3, and 4 that trial counsel should have put on more information at the sentencing phase about the defendant and the effect that his traumatic childhood had upon him. They do not point to the existence of any additional psychological or psychiatric evidence, but claim that other friends or family members could have offered additional information about the petitioner's abusive childhood. These claims should be dismissed as being cumulative since the jury heard hours of this type of information. As stated above, "the relevant inquiry under *Strickland* is not what defense counsel could have pursued, but whether the choices made by defense counsel were reasonable." *Siripongs v. Calderon*, 133 F.3d 732 at 736 (9th Circ. 1998).

In claim number 2, the petitioner restates his theory that there is an alternate perpetrator of the murder and a co-perpetrator of the rape. There is no substance to this claim and it should be dismissed.

In claim number 5, the petitioner claims that Evelyn Dunaway and Wendy Levy would have provided evidence of the petitioner's good character as an adult. They rely upon an affidavit from Evelyn Dunaway that she signed in April 2006. Some of the statements made by Ms. Dunaway in that affidavit are directly contradictory to statements that she made during the trial. The fact that a year and a half after the trial she is willing to say some good things about his character is not an indication that trial counsel rendered ineffective assistance. In the context, no showing has been made that counsel's conduct fell below an objective standard nor that prejudice has been shown.

6. ...in failing to adequately investigate the State's expert's opinions by requesting appropriate discovery of their reports.

As the State understands it, the substance of this claim is that the petitioner speculates that Dr. Michael Estess and Dr. Robert Engle made reports that contain exculpatory material and that those reports were withheld from trial counsel. He claims that trial counsel should have received the reports from Dr. Estess and Dr. Engle or should have asked the Court to force them to generate reports. Since neither Dr. Estess nor Dr. Engle testified at the trial, it is unclear how the petitioner thinks trial counsel would have accomplished this. Additionally, since no factual basis is shown that there were reports nor that they contain material helpful to the petitioner, this claim should be dismissed.