

5-21-2009

## Hall v. State Clerk's Record v. 3 Dckt. 35055

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IN THE  
SUPREME COURT  
OF THE  
STATE OF IDAHO

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ERICK VIRGIL HALL,  
PETITIONER-APPELLANT,

vs.

STATE OF IDAHO,  
RESPONDENT.

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FILED - COPY  
MAY 21 2009  
Supreme Court Court of Appeals  
Entered on ATS by: \_\_\_\_\_

*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. WARDEN  
Attorney General  
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COPY

35055

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**7. ...in failing to adequately investigate Evelyn Dunaway and Rebecca McCusker.**

In this claim, Evelyn Dunaway now states in her affidavit that, contrary to what Rebecca McCusker testified to at trial, the petitioner did not threaten to kill Evelyn in a mobile home in March 2002. It is unclear whether she would have testified to that version of events at the trial if asked. No reason is given to suspect that Ms. McCusker testified falsely at the trial. There is nothing about this claim indicating that trial counsel was ineffective. The claim should be dismissed.

**8. ...in failing to adequately investigate Michelle Deen.**

The substance of this claim is that when Ms. Deen was charged with a drug offense in 2002, someone put a note in the Court file indicating that Ms. Deen had wanted to talk to the police about a “deal” apparently in connection with her arrest. The undersigned knows of no connection between the note and the petitioner’s trial. No evidence is shown indicating that Ms. Deen wrote the note.

The petitioner also claims that because Ms. Deen was ordered to undergo a psychological evaluation as part of a controlled substance charge that she should have been cross-examined about that. No showing is made of the evaluations’ conclusions nor how they would have been relevant to the present case. Finally the petitioner claims that when Ms. Deen came back to the petitioner’s residence to remove her own personal property, after the relationship was over, that she and some other people took some of the petitioner’s property along with Ms. Deen’s. No showing is made or alleged as to the

outcome of this report or whether it's true or false. No showing is made that trial counsel was ineffective.

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

This claim is a restatement of claim C. The petitioner claims that the jury was shown a "mugshot" of petitioner while he was wearing a standard orange prison uniform. Trial counsel objected to the photograph of the defendant. In the photograph, it could be seen that the top of the defendant's shirt was orange. Trial counsel argued that the jury would know that the orange shirt was prison garb. The Court ruled that there was nothing about the photograph that looked like a mugshot and that there was nothing about the orange shirt that would tell jurors that the defendant was wearing prison garb. This argument is contained in transcript pages 4824-4829. The State has earlier pointed out that the Court held that even though the petitioner was in-custody and wearing a leg shackle, that fact would not be apparent to the jury. There is no factual basis to support this claim and it should be dismissed.

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

The petitioner says in his argument that this is a compilation of his other claims relating to the State's closing argument. No showing is made here that the State's arguments were improper in the first place. This claim should be dismissed.

**V. THE COMPOSITION OF JURY POOL VIOLATED SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY THEIR FAILURE TO CHALLENGE THE JURY POOL COMPOSITION.**

This is a speculative claim without factual basis that Hispanics are underrepresented and excluded from the jury pool. There is no proof of this in the claim and it should be dismissed.

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

**1. Trial counsel rendered ineffective assistance by failure to insist on appropriate procedures under I.C.R. 24.**

This refers to the stipulation by the parties and the Court that the alternates would be drawn in a different way than by lot as described in Idaho Criminal Rule 24. The petitioner does not show that this procedure has a constitutional or due process basis. No prejudice is shown to the defendant and the claim should be dismissed.

**2. ...by failing to conduct an adequate voir dire, failing to move to strike for cause, and failing to utilize a preemptory challenge to strike bias jurors.**

This claim is based upon the affidavit of an attorney in Colorado named David Lane, who claims that the "Colorado method of jury selection" is a helpful tool for the defense. In Mr. Lane's affidavit, he sets out certain questions that he believes if asked and answered would have affected jury selection in a manner favorable to the petitioner. He makes the startling assertion that trial counsel should have instructed the jurors that they had no duty to review the evidence or discuss it with their fellow jurors during penalty

phase deliberations. This is in direct contradiction of the law and the Court's instructions to the jury.

The undersigned has carefully read the so-called Colorado jury selection method and has compared it to the voir dire conducted by the Court and the parties in the instant case. The undersigned does not accept as true the petitioner's assertion that trial counsel were ineffective for not using this Colorado method. Case law does not support Mr. Lane's basic assertions. However, the State does note that trial counsel did ask most of the Colorado method questions to the jurors and received the jurors promise that they would consider all mitigation evidence in any decision they made. No prejudice is shown by the petitioner and no bias is shown relating to any of the jurors who decided the case. This claim should be dismissed.

**3. ...by failing to object to the Court's preliminary instructions to jurors.**

The jury was properly instructed as to the weighing procedure. This claim should be dismissed.

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

In each of the claimed in-chambers conferences, the Court put the substance of the conference on the record for counsel to agree or disagree with. No prejudice is shown to the petitioner and no due process violation is claimed. This claim should be dismissed.

**Y. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO RAISE CHALLENGES TO ANY NON-STATUTORY AGGRAVATING CIRCUMSTANCES.**

**1. ...in failing to challenge the introduction of victim impact evidence.**

Idaho case law and United State's Supreme Court case law permits the use of victim impact statements. The petitioner does not claim that the statements did not meet the requirements of the case law. The petitioner argues that the jury should have been instructed that the victim impact statements were not evidence. However, he points to no case law validating his assertion. This claim should be dismissed.

**2. ...in failing to challenge the introduction of any non-statutory aggravating circumstance.**

The petitioner claims that trial counsel should have challenged certain non-statutory aggravating circumstances. Petitioner does not allege that there were non-statutory aggravating circumstances, or if there were what he claims them to be. He does not point to any case law supporting his assertion. This claim should be dismissed.

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

The petitioner admits that he is asserting that for the petitioner to be successful on this claim that trial counsel would have had to raise challenges to statutory aggravating circumstances that the Idaho Supreme Court has previously upheld as being constitutional.

He asserts in claim number 1 that the aggravating circumstances are vague and overbroad and that in number 2, an inadequate limiting instruction was given. These are matters of



law that are available for appeal. No showing is made that trial counsel was ineffective in any respect regarding them or that there is any reason to think that the trial court would have found in the petitioner's favor. These claims should be dismissed.

3. **...in failing to challenge the "propensity" aggravating circumstances on the 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*, and that it permits the jury to find an aggravating circumstance by preponderance of the evidence.**

No argument is made to support this claim. It is a matter of law that is available for appeal, but as such is not proper for post conviction claim. It should be dismissed.

4. **...in failing to challenge aggravating circumstances on the grounds that there was insufficient evidence to find the aggravating circumstance beyond a reasonable doubt.**

This is speculation only with no argument or factual basis and should be dismissed.

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

1. **...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.**

The petitioner makes no effort to prove that the District Court lacked the qualifications to judge the petitioner's case. He similarly makes no effort to show why Idaho's death penalty scheme was unconstitutional. The petitioner suggests that defense counsel's phrase "substantially mitigation impaired" has some legal meaning outside the State Appellate Public Defender's Office and that if the trial court was unfamiliar with the phrase that this unfamiliarity has some due process consequences. His claim, if it is one,

is entirely fantasy. The Court clearly understood the requirements of the law whether or not it was immediately familiar with a name of a specific Supreme Court case. There is no substance to any of the petitioner's assertions in this claim. It should be dismissed.

**2. ...in failing to object to jurors use of inaccurate transcripts while viewing videotaped interrogations of petitioner.**

This claim refers to use of transcripts to assist the jurors in finding places on the videotape that they may want to review. While the transcripts may not have contained every precise detail, it is a mischaracterization to refer to them as inaccurate. Both parties and the Court believed that the transcripts would be of assistance to the jury as an "index" to assist them in finding places in a long interview. Otherwise, the jury was instructed that the transcripts did not have independent evidentiary value. No prejudice is shown to the defendant and this claim should be dismissed.

**3. ...by failing to object to the prosecutor's misconduct during opening and closing arguments at both phases of the trial.**

This claim is that trial counsel failed to object to prosecution's arguments. The State has earlier responded to claim I that the State's arguments were not improper. This claim is merely a restatement of the earlier claim and should be dismissed.

**4. ...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.

The jury was properly instructed that the burden of proof was upon the State to prove each aggravating circumstance beyond a reasonable doubt. The jury was properly instructed that the death penalty could not be imposed unless each juror individually found proof beyond a reasonable doubt of the existence of the aggravator and that all mitigation outweighed each aggravator individually. The petitioner is unable to show how these instructions were improper or unconstitutional. This claim should be dismissed.

- 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.**

As stated above, the jury was properly instructed .

- 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.**

Except for making a claim, the defendant makes no effort to support the claim with an appeal to case law or due process. It is an assertion only and should be dismissed.

- 5. ...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 the defendant to choose between constitutional rights.**

Under the current scheme, jurors findings are reflected in the written verdict form. That finding is available for later review as is the evidence the jury heard. The petitioner makes no showing that due process requires anything else. Unanimous agreement on what is mitigation is not required.

6. **...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.**

There is no due process requirement under the United States Constitution that a jury make written findings concerning the evidence they considered for either a penalty phase or a guilt phase. There is no current Idaho State law setting out that requirement. The petitioner can point to no evidence that he claims was used to support multiple aggravators. Without any of those things the claim of ineffective assistance of counsel must fail.

7. **...by failing to object to the Court's instruction regarding the governor's power to commute or pardon.**

The instruction regarding the governor's commutation powers is a correct statement of the law. The petitioner does not point to any prejudice to the defendant as a result of the instruction. The petitioner's argument is nothing but speculation and should be dismissed.

**8. ...in failing to raise international law violations.**

The State denies that there is any international law that works independently of, or “trumps” Idaho and US constitutional law. The petitioner received a constitutionally valid trial and sentencing. Nothing about the procedure deprived him of a “meaningful clemency process” or “arbitrarily deprived him of his life.” Even if the international covenant on civil and political rights were binding on this Court, the petitioner’s trial would not be in violation of it. No prejudice can be shown to the petitioner and the claim should be dismissed.

**BB. DEPRIVATIONS OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL’S FAILURE TO RAISE AND PRESERVE CLAIMS BY FILING MOTIONS IN LIMINE.**

**1. ...in failing to file a motion in limine to preclude evidence of petitioner’s prior convictions for burglary and escape.**

The petitioner claims that burglary and escape were irrelevant to any statutory aggravator. That is a bald assertion. He overlooks the statutory aggravator of propensity, which burglary and escape go directly to. Additionally, however they can be considered as non-statutory aggravators. This claim is without substance and should be dismissed.

**2. ...in failing to file a motion in limine to preclude the State from making improper closing arguments at both phases of the trial.**

There was nothing improper about any of the State’s closing arguments in this case and no showing that trial counsel could have predicted what the State’s argument would be since this was the first jury sentencing in a death penalty case in Idaho. No showing has been made of ineffective assistance of counsel.

3. **...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.**

The petitioner's speculation on this claim ends with his request that the Court withhold judgment on this claim until a later time. It should be dismissed for lack of factual or legal basis.

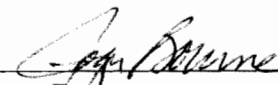
4. **...in failing to file a motion in limine to preclude introduction of the reenactment photographs depicting the victim's deceased body hogtied and ligatures.**

Trial counsel vigorously opposed the introduction of the reenactment photographs, but the Court overruled the objection and admitted them. The photographs in question were State's Exhibits 118, 119, and 120. See transcript pages 4001-4028. There is no basis here to support a claim of ineffective assistance of counsel.

For the reasons stated above, the petitioner has not met his burden of proof. This petition should be dismissed.

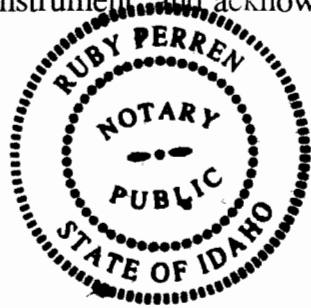
RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of May 2006.


**GREG H. BOWER**  
Ada County Prosecutor

  
\_\_\_\_\_  
Roger Bourne  
Deputy Prosecuting Attorney

STATE OF IDAHO            )  
  ) ss.  
County of Ada                )


On this 31 day of May 2006, before me, a Notary Public for Idaho, appeared **ROGER BOURNE**, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.



  
\_\_\_\_\_  
Notary Public for the State of Idaho  
Residing at: Mendham, Idaho  
My Commission Expires: 10/27/10

**CERTIFICATE OF MAILING**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing document was delivered to State Appellate Public Defender, 3647 Lake Harbor Lane, Boise, Idaho 83703, through the Mail, this 31 day of May 2006.

  
\_\_\_\_\_

MOLLY J. HUSKEY  
State Appellate Public Defender  
State of Idaho  
I.S.B. # 4843

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. *412*

JUN - 2 2006

J. DAVID NAVARRO, Clerk  
By *[Signature]* DEPUTY

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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,	)	
	)	CASE NO. SPOT0500155
Petitioner,	)	
	)	<b>MOTION TO SUSPEND</b>
v.	)	<b>POST-CONVICTION</b>
	)	<b>PROCEEDINGS</b>
STATE OF IDAHO,	)	
	)	
Respondent.	)	<b>(CAPITAL CASE)</b>
_____	)	

COMES NOW the Petitioner, Erick Virgil Hall, by and through his counsel at the State Appellate Public Defender, (herein "SAPD"), and pursuant to the Fifth, Sixth, and Eighth Amendments as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, Sections 5, 6, 7, and 8 of the Idaho Constitution, I.C. § 19-4901 et seq., I.C. § 19-2719, and moves this Court to suspend the current post-conviction proceedings pending the outcome in State v. Erick Hall, Ada County Case No. H0300624.

**RELEVANT FACTS**

1. This Court appointed the SAPD to represent Petitioner in the above-captioned post-conviction proceedings. These proceedings stem from the underlying criminal case



involving Petitioner's conviction and death sentence for the murder of Lynn Henneman in Ada County Case No. H0300518, (herein "the Henneman case.").

2. During the underlying criminal proceedings, Petitioner was also facing the charge of first degree murder and a potential death sentence in a separate case, Ada County Case No. H0300624, (herein "the Hanlon case").
3. During the underlying case, the Court determined that the Henneman case would proceed to trial prior to the Hanlon case.
4. The Hanlon case is currently scheduled to proceed to trial in July 2007.

## ARGUMENT

### I.

#### **POST-CONVICTION COUNSEL'S DUTY TO RAISE ALL ARGUABLY MERITORIOUS CLAIMS WILL POTENTIALLY UNDERMINE PETITIONER'S CONSTITUTIONAL RIGHTS IN THE HANLON CASE.**

**A. As A Petitioner In These Capital Post-Conviction Proceedings, Mr. Hall Has A Statutory And Constitutional Right To Meaningful Post-Conviction Proceedings Which Requires His Counsel To Raise All Arguably Meritorious Claims For Relief In These Proceedings.**

Mr. Hall has a statutory and federal due process right to meaningful post-conviction proceedings. *See Evitts v. Lucey*, 469 U.S. 387, 401(1985) ("[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and, in particular, in accord with the Due Process Clause."); *State v. Beam*, 121 Idaho 862, 864, 828 P.2d 891, 893 (1992) (recognizing that capital post-conviction proceedings serve to protect a condemned person's federal and state right to due process); *Hernandez v. State*, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct. App. 1999) ("failing to provide a post-conviction applicant with a meaningful opportunity to have his or her claims presented may

be violative of due process”); *Roberts v. State*, 840 So.2d 962, 971 (Fl. 2002) (recognizing that post-conviction proceedings “involve interests and considerations that are more closely aligned with those traditionally and fundamentally protected in criminal proceedings” and thus must comport with due process) (citations omitted); *Gibson v. Trant*, 58 S.W.3d 103, 113 (Tenn. 2001) (“The purpose of post-conviction, after all, is . . . to enforce the constitutional guarantees of a fair trial”); *see generally* I.C. § 19-4901 et seq., and I.C. § 19-2719. Petitioner relies in large part on the assistance of post-conviction counsel to protect his right to meaningful post-conviction proceedings by conducting an independent and thorough investigation, and by raising all arguably meritorious claims. *See* 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (herein “ABA Guidelines”), Guideline 10.15.1 (“Duties Of Post-Conviction Counsel”). The failure to raise all possible claims in these initial proceedings may result in procedural bar. *See* I.C. § 19-2719(3), (5); *Pizzuto v. State*, 127 Idaho 469, 903 P.2d 58 (1995); *State v. Rhoades*, 120 Idaho 795, 820 P.2d 665 (1991).

**B. As A Criminal Defendant In The Hanlon Case, Mr. Hall Has A Constitutional Right To The Effective Assistance Of Counsel, To A Fair Trial, And To Present A Defense.**

As a criminal defendant in the Hanlon case, Mr. Hall has a Sixth, Eighth, and Fourteenth Amendment right to present a defense, including the presentation of mitigation evidence at a capital sentencing, a Sixth Amendment and Fourteenth Amendment due process right to a fair trial, an Eighth Amendment and Fourteenth Amendment due process right to heightened reliability in capital proceedings, and a Sixth Amendment right to counsel. *See e.g.*, *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment...or in the Compulsory Process or Confrontation clauses of the Sixth

Amendment...the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’”) (citations omitted); *Strickland v. Washington*, 466 U.S. 668, 684-685 (1984) (“The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment”); *Lockett v. Ohio*, 438 U.S. 586 (1978) (discussing the constitutional significance of mitigation evidence in a capital case); *Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (discussing the heightened protections afforded capital cases). These constitutional rights include the right to avoid premature disclosure of one’s defense and trial strategy. *See e.g., Ex parte Moody*, 684 So.2d 114, 118 (Ala. 1996) (relying on a defendant’s Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution, holding that *ex parte* hearings on motions for expert assistance should be held to avoid premature disclosure of the defense to the prosecution); *see generally Hickman v. Taylor*, 329 U.S. 495 (1947) (discussing the protections afforded attorney work product). Mr. Hall’s Fourteenth Amendment right to equal protection is also implicated since, as discussed below, Mr. Hall is forced to reveal his defenses and trial strategy prematurely due to his status as a capital petitioner. *Cf. Griffin v. Illinois*, 351 U.S. 12 (1956) (“A monied defendant is not required to prematurely disclose his or her defense to the prosecution, therefore, an indigent defendant should not be required to do so. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”); *United States v. Meriwether*, 486 F.2d 498, 506 (5th Cir.1973) (“When an indigent defendant's case is subjected to pre-trial scrutiny by the prosecutor, while the monied defendant is able to proceed without such scrutiny, serious equal protection questions are raised.”)

**C. These Post-Conviction Proceedings Should Be Suspended To Protect Mr. Hall's Constitutional Rights In The Hanlon Case.**

Mr. Hall has filed an Amended Petition in which he has raised the claim that his trial counsel rendered ineffective assistance of counsel at the capital sentencing hearing in the Henneman case. *See e.g.*, Amended Petition, Claim O.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.”); P.3. (“Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Effectively Cross-Examine Norma Jean Oliver.”); and Claim S (“Deprivation Of Effective Assistance Of Counsel Due To Their Failure To Conduct An Adequate Sentencing Phase Investigation.”) As support for these claims, Mr. Hall attached the affidavits of various witnesses who should have testified in the Henneman case. These witnesses are potential witnesses in the Hanlon case. For instance, all the mitigation witnesses that should have been called in the Henneman case will also be relevant to any capital sentencing proceeding in the Hanlon case. *See e.g.*, Amended Petition, pp. 156-57 (identifying Jean Hall McCracken, Frank McCracken Sr., Frankie McCracken, Tiffaney Conner, Kenneth Douglas, John Thompson, and Kimberly Bacon as witnesses that should have been called to testify and identifying how they would have testified.) Presumably, trial counsel in the Hanlon case will call these witnesses if Mr. Hall is convicted in that case.

In addition, Mr. Hall has raised a claim that “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.” Amended Petition, Claim S.4. To support this claim, Petitioner will request that Petitioner be transferred for neurological testing. Any testing that indicates neurological deficits will thereafter be disclosed as support for this claim, thereby providing the State a preview of relevant evidence at any sentencing in the Hanlon case.

Finally, Mr. Hall has raised a claim that “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.” Amended Petition, Claim. P.7. In this claim, Mr. Hall asserted that his trial counsels’ lack of investigation of the Hanlon case, rendered them ineffective in determining how to address the Court’s ruling that a challenge to the propensity aggravator would open the door to evidence from the Hanlon case. Petitioner asserted in relevant part:

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.<sup>1</sup> Finally, Petitioner fears disclosing too much information will prematurely disclose his defense in the on-going prosecution of him for the capital 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.

Amended Petition, pp. 149-50 (emphasis in original). Thus, to support a claim for post-conviction relief, Mr. Hall has stated that he believes DNA evidence may call into question his

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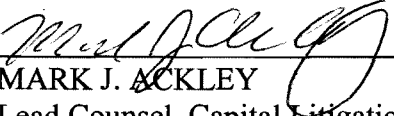
<sup>1</sup> Petitioner anticipates obtaining a declaration from Dr. Mark Cunningham stating that in his opinion Petitioner does not present a continuing threat to the community if sentenced to life in prison without the possibility of parole.

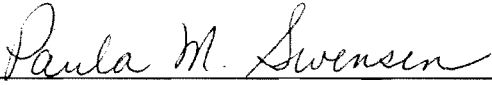
involvement in the Hanlon case.<sup>2</sup> Therefore, to support claims in these post-conviction proceedings, not only is Mr. Hall forced to provide evidence relevant to a potential sentencing hearing in the Hanlon case, he is also forced to reveal potential guilt-phase defenses.

### CONCLUSION

To provide the necessary factual support for his post-conviction claims, Mr. Hall is forced to give the prosecution an opportunity to scrutinize potential evidence and trial strategy in the Hanlon case before that case goes to trial. Further, with leave of the Court, Mr. Hall anticipates filing a final amended petition raising additional claims and providing additional support for claims previously raised. To protect Mr. Hall's constitutional rights at his upcoming trial in the Hanlon case, Mr. Hall respectfully requests this Court to suspend these proceedings until completion of the Hanlon case.

DATED this 2<sup>nd</sup> day June, 2006.

  
\_\_\_\_\_  
MARK J. ACKLEY  
Lead Counsel, Capital Litigation Unit

  
\_\_\_\_\_  
PAULA M. SWENSEN  
Co-Counsel, Capital Litigation Unit

---

<sup>2</sup> Petitioner anticipates submitting a report from an independent DNA expert to support his assertions. If these proceedings are not suspended, then the State will have an opportunity to scrutinize such report prematurely.

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on this 2nd day of June, 2006, a true and correct copy of the foregoing document, MOTION TO SUSPEND POST-CONVICTION PROCEEDINGS, was mailed, postage prepaid, to the following:

ERICK VIRGIL HALL INMATE # 33835 IMSI PO BOX 51 BOISE ID 83707	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail
THOMAS F. NEVILLE DISTRICT JUDGE 200 W. FRONT BOISE ID 83702	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail

*Barbara Thomas*

BARBARA THOMAS  
Administrative Assistant

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

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4:12  
JUN - 2 2006  
By J. DAVID NAVARRO, Clerk  
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

ERICK VIRGIL HALL,	)	
	)	CASE NO. SPOT0500155
Petitioner,	)	
	)	<b>SECOND ADDENDUM</b>
v.	)	<b>TO AMENDED PETITION</b>
	)	<b>FOR POST-CONVICTION</b>
STATE OF IDAHO,	)	<b>RELIEF</b>
	)	
Respondent.	)	<b>(CAPITAL CASE)</b>
_____	)	

COMES NOW PETITIONER, Erick Virgil Hall, by and through his counsel at the State Appellate Public Defender (SAPD), and files this Second Addendum to Petitioner's Amended Petition for Post-Conviction Relief (Amended Petition) filed with the Court on April 17, 2006.

The purpose of this Second Addendum is to give notice of a potential error 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.

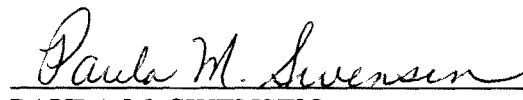
Petitioner submits the following corrections to the Amended Petition:

1. On page 175, the following sentence should be deleted: “Mr. McNeese’s job also includes developing the IDOC protocol to be used in executions.”

This assertion relates to issues surrounding Ann McNeese’s service as a juror in the underlying criminal case as well as the State’s closing argument that lethal injection is a painless and humane procedure. Petitioner’s preliminary investigation had revealed that Mr. McNeese worked on the execution protocol. This was Petitioner’s good faith belief at the time the Amended Petition was filed. Within the past few days, however, additional investigation has suggested that Mr. McNeese may not have been involved in developing the protocol after all. Petitioner reserves the right to re-state this assertion upon completion of discovery and a full investigation.

DATED this 3<sup>rd</sup> day June, 2006.

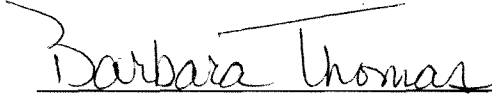
  
MARK J. ACKLEY  
Lead Counsel, Capital Litigation Unit

  
PAULA M. SWENSEN  
Co-Counsel, Capital Litigation Unit

### CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2<sup>nd</sup> day of June, 2006, a true and correct copy of the foregoing document, SECOND 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	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail
THOMAS F. NEVILLE DISTRICT JUDGE 200 W. FRONT BOISE ID 83702	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail

  
 \_\_\_\_\_  
 BARBARA THOMAS  
 CLU Administrative Assistant

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

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4:12

JUN - 2 2006

By J. David Navarro, Clerk  
DEPUTY

**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

**RENEWED MOTION FOR  
ACCESS TO COMPLETED  
JURY QUESTIONNAIRES**

**(CAPITAL CASE)**

COMES NOW the Petitioner, ERICK VIRGIL HALL, by and through his counsel at the State Appellate Public Defender, and renews his motion for an Order granting Petitioner access to the completed jury questionnaires from the underlying capital case number H0300518. Petitioner relies on the Sixth and Eighth Amendments and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, comparable sections of the Idaho Constitution, Idaho Criminal Rule 23.1, and all matters of record.


Petitioner filed a Stipulation made with the State to the release of the jury questionnaires to the Court on October 31, 2005. The State later objected to the release of juror contact or identifying information. The proposed order for their release was discussed during a telephonic hearing held on January, 6, 2006, and further addressed at in-court hearings held on February 15 and March 2, 2006. The Court indicated it would release the questionnaires only if juror-

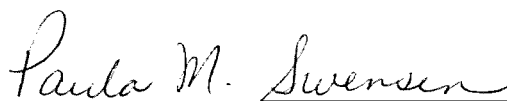
identifying information were redacted. Petitioner submitted another proposed order complying with the Court's instructions. At the March 2, 2006, hearing, the Court indicated it would sign Petitioner's proposed order so long as the State did not object. Petitioner submitted the proposed order.

Petitioner has followed-up with the State and the Court on several occasions. (*See, e.g.*, e-mail from SAPD to court personnel and prosecutor dated 01/06/06 regarding changes to proposed order as requested by the Court; e-mail from SAPD to Court and prosecutor dated 1/10/06 regarding revisions proposed order; e-mail from SAPD to prosecutor dated 1/13/06; e-mail from SAPD to court personnel and prosecutor dated 3/22/06 asking for status of order.) The State has made no objection to the proposed order since the hearing on March 2, 2006.

Petitioner moves this Court to sign the attached proposed Order forthwith, so that Petitioner may continue to investigate his post-conviction claims. As the State noted during trial, the questionnaires "became our bible" during jury selection. (Tr., p. 5445, Ls. 1-3.) These documents are critical to meaningful post-conviction proceedings.

Dated this 1<sup>st</sup> day of June, 2006.

  
\_\_\_\_\_  
MARK J. ACKLEY  
Deputy, State Appellate Public Defender

  
\_\_\_\_\_  
PAULA M. SWENSEN  
Deputy, State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 2<sup>nd</sup> day of June, 2006, served a true and correct copy of the forgoing RENEWED MOTION FOR ACCESS TO COMPLETED JURY QUESTIONNAIRES as indicated below:

ERICK VIRGIL HALL INMATE # 33835 IMSI PO BOX 51 BOISE ID 83707	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail
THOMAS F. NEVILLE DISTRICT JUDGE 200 W. FRONT BOISE ID 83702	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail

Barbara Thomas  
 BARBARA THOMAS  
 Administrative Assistant

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

NO. \_\_\_\_\_ FILED P.M. 4:19  
A.M. \_\_\_\_\_

JUN - 2 2006

By J. David Navarro, Clerk  
DEPUTY

**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

**NOTICE OF HEARING**

**(CAPITAL CASE)**

COMES NOW, Erick Virgil Hall, Defendant-Appellant, and notices the following motions for a hearing on a date previously scheduled by this Court on the 20th day of June, 2006, at 1:30 p.m.: Motion To Suspend Post-Conviction Proceedings and Renewed Motion For Access To Completed Jury Questionnaires. The hearing will be held before the Honorable Thomas F. Neville at 200 West Front Street, Boise, Idaho.


DATED this 2<sup>nd</sup> day of June, 2006.

Mark J. Ackley  
MARK J. ACKLEY  
Deputy State Appellate Public Defenders

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 2nd day of June, 2006, served a true and correct copy of the attached NOTICE OF HEARING by the method indicated below:

ERICK VIRGIL HALL INMATE # 33835 IMSI PO BOX 51 BOISE ID 83707	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail
THOMAS F. NEVILLE DISTRICT JUDGE 200 W. FRONT BOISE ID 83702	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail

  
\_\_\_\_\_  
BARBARA THOMAS  
CLU Administrative Assistant

cD

ORIGINAL

JUN 07 2008

MOLLY J. HUSKEY  
State Appellate Public Defender  
State of Idaho  
I.S.B. # 4843

J. DAVID MAJARRIEGO, CLERK  
By: *[Signature]*  
DEPUTY

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

**MOTION FOR ORDER TO  
CONDUCT MEDICAL TESTING  
AND ORDER FOR TRANSPORT**

**(CAPITAL CASE)**

**COMES NOW** the Petitioner, ERICK VIRGIL HALL, by and through his attorneys, and moves this Court for an Order transporting Petitioner to Intermountain Medical Imaging, Outpatient Radiology Clinic, 2929 E. Magic View Drive, Meridian, Idaho, for the purpose of conducting neurological and other medical testing. Per IDOC policies and procedures, the date and time of transport shall not be disclosed to Petitioner prior to transport, and shall not be disclosed to Petitioner's counsel or anyone other than necessary Intermountain Medical Imaging and IDOC personnel until after testing is completed and Petitioner is returned to the Idaho Maximum Security Institution.

This motion is made pursuant to I.C. § 19-2719, I.C. §§ 19-4901, et seq., the Fifth, Sixth, and Eighth Amendments to the United States Constitution, the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, corresponding sections



of the Idaho Constitution, and all matters of record in the underlying criminal case.

## ARGUMENT

### A. Mr. Hall Is Constitutionally Entitled To An Independent Mental Health Examination.

This testing is necessary for meaningful post-conviction proceedings. In Petitioner's Amended Petition for Post Conviction Relief (Amended Petition), he raised the claim that 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. (Amended Petition, pp. 160-163, Claim S.4).

Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003, hereinafter "ABA Guidelines"), Guideline 10.7.A.1. A thorough investigation must include exploration of "anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant." Commentary to ABA Guideline 10.7.A.1; *see Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978).

A constitutionally adequate investigation includes close scrutiny of "mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage." Commentary to ABA Guideline 10.7.A.1; *see also Ake v. Oklahoma*, 470 U.S. 68, 76-77, 80 (1985)(holding that indigent defendants could be denied "meaningful access to justice" if denied independent mental health experts); *Powell v. Collins*, 332 F.3d 376 (6th Cir. 2003)(reversing petitioner's death sentence because the trial court failed to appoint an independent psychiatrist who was qualified to conduct appropriate testing to diagnose petitioner with organic brain damage when the court appointed psychiatrist testified

that she did not have the qualifications to perform such testing); *Hoskins v. State*, 702 So.2d 202 (Fla. 1997)(reversing death sentence and holding that defendant was entitled to a PET-scan based on neuropsychologist's recommendation); *see also Caro v. Woodford*, 280 F.3d 1247, 1255 (9th Cir. 2002)(holding counsel ineffective for, *inter alia*, failing to investigate and present evidence of client's brain damage).

B. Investigation Of Neurological or Neuropsychological Damage Was Clearly Warranted At Trial And Is Clearly Warranted Now To Give Meaning To The Instant Post-Conviction Proceedings

The need for a complete neuropsychological examination is not only critical to establishing the claims raised in the Amended Petition, it is clearly warranted by Petitioner's neurological symptoms and history of head injury. Trial counsel did not conduct neurological testing of Petitioner, even though there were and are ample indications of neurological damage, and a lengthy history of head injuries, black outs and bizarre behaviors.

First, Petitioner has a history of head injuries. As a child, Petitioner fell off his bicycle and hit the back of his head and lost consciousness for up to a few minutes. (Amended Petition, 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. (Amended Petition, Exhibit 32.) Petitioner is still in the process of investigating other head injuries, including documentation that Petitioner hit a telephone pole while riding a motorbike when he was five years old; that his siblings threw rocks at his head and hit his head with other objects on a near daily basis over the course of five to six years during childhood; that Petitioner fell of a swing onto a hard surface and hit the top of his head while in middle school; that Petitioner fell off a roof and injured his head and neck and lost consciousness; that Petitioner's brother threw him down a stairway when he was fourteen or fifteen years old and he hit his head and lost consciousness; that Petitioner was hit in the head

with a brick; that Petitioner split open his head on a phalange; and that Petitioner hit his head on the corner of a table when he fell out of bed. Petitioner has a history of severe headaches dating back to his early childhood

In addition to head injuries, Petitioner has a long history of bizarre neurological and/or neuropsychiatric symptoms. Interviews with Petitioner's friends, acquaintances, and family members have uncovered prenatal exposure to amphetamines, black outs or lapses in memory, and abnormally pronounced mood swings. Wendy Levy 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." (Amended Petition, 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. (Amended Petition, Exhibit 27.) Petitioner's mother describes witnessing similar black outs, and describes experiencing her own "[s]imilar explosions with this blackout-type memory loss." (Amended Petition, Exhibit 28.) Various witnesses have characterized the mood swings as "Jekyll and Hyde," and describe explosive outbursts. (Amended Petition, Exhibits 7, 27, 28, 29, and 30.) Family members describe Petitioner as bipolar and ADHD. (Amended Petition, Exhibits 28 and 31.) One family member describes him as "mentally ill, incompetent, [having] developmental delays," exhibiting "severe attachment disorder" and "ADHD." (Amended Petition, Exhibit 31.) Petitioner's mother took amphetamines while pregnant with him. (Amended Petition, Exhibit 28.) All of the symptoms and injuries described above are indicators that Petitioner has neurological and/or neuropsychological damage.

Petitioner was recently examined by Dr. James Merikangas, who conducted a preliminary examination of Petitioner. Dr. Merikangas noted that Petitioner's blood pressure was extremely high, he had frequent and severe headaches, was unable to walk on his heels or toes, and was

unable to walk tandem without swaying. Petitioner had a scar on the right parietal scalp. (Amended Petition, Exhibit 26.) Even though the preliminary examination was brief due to the conditions of the exam, Dr. Merikangas noted neurological or psychiatric anomalies warranting further investigation, including Petitioner's drawing of 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." Dr. Merikangas found the drawing was appropriate for a child of eight or nine years old under standard scoring. (Amended Petition, Exhibit 26.) *See Eddings v. Oklahoma*, 455 U.S. 104, 107, 116 (1982)(vacating death sentence of juvenile offender and remanding for consideration of mitigating circumstances after noting that petitioner's mental and emotional development were at a level several years below his chronological age, and specifically instructing 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.")

Based on Petitioner's history and preliminary examination findings, Dr. Merikangas has recommended blood work, an MRI scan of the brain, a PET scan of the brain, and an x-ray of the cervical spine. (Attachment A (Requisition For Radiological Consultation), Attachment B (Requisition For Radiological Consultation), and Attachment C (Requisition For Blood Testing), attached hereto; *see also* Exhibit 26 to Amended Petition.) These tests are necessary for a complete neuropsychiatric examination and evaluation.

### CONCLUSION

Petitioner exhibited clear indications of neurological and neuropsychological damage, yet trial counsel failed to investigate the issue or conduct neurological testing. Because the completion of these tests is necessary and material to the adequate development of critical issues of neurological and mental health relating to ineffective assistance of counsel as set forth in the

Amended Petition, this Court should allow the necessary medical testing, the results of which will support this claim.

### **PRAYER FOR RELIEF**

WHEREFORE, Petitioner respectfully requests that this Court enter an Order granting that the following:

(1) That Petitioner, Erick Virgil Hall, be transported by the Idaho Department of Corrections to Intermountain Medical Imaging, Outpatient Radiology Clinic, 2929 E. Magic View Drive, Meridian, Idaho, at a date and time agreed upon by Intermountain and IDOC, but no later than 30 days from the date of the Order;

(2) IDOC shall make all testing arrangements with Shawne Stinson at Intermountain Medical Imaging, (208) 367-7522;


(3) That, for security purposes, Petitioner and his counsel shall not be notified of the date and time of the examination or transfers, but that all questions regarding the specific testing to be conducted shall be directed to Petitioner's counsel;

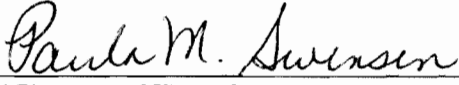
(4) That, based on the recommendations of Dr. James Merikangas, Intermountain Medical Imaging perform the following radiological and serological tests:

- (a) (structural) MRI scans of the brain, with and without contrast;
- (b) PET scan of the brain;
- (c) X-Ray of the cervical spine;
- (c) VDRL/RPR blood testing;
- (d) T3, T4, T7, and TSH blood testing;
- (e) 5 hour glucose tolerance testing; and
- (f) blood test for syphilis;

(5) That Intermountain Medical Imaging forward the results of the testing only to Dr. Merikangas at 4938 Hampden Lane, #428, Bethesda, Maryland 20814, to be kept by him in accordance with the privileges attendant to doctor/patient and attorney/client unless otherwise requested by Petitioner, through his attorneys of record, or as ordered by the Court.

Dated this 7<sup>th</sup> day of June, 2006.

  
\_\_\_\_\_  
MARK J. ACKLEY  
Deputy, State Appellate Public Defender

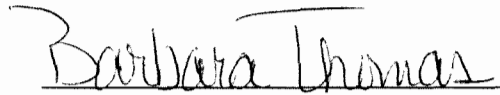
  
\_\_\_\_\_  
PAULA M. SWENSEN  
Deputy, State Appellate Public Defender

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have on this 7<sup>th</sup> day of June, 2006, served a true and correct copy of the forgoing MOTION FOR ORDER TO CONDUCT MEDICAL TESTING AND ORDER FOR TRANSPORT as indicated below:

ROGER BOURNE \_\_\_\_\_ Statehouse Mail  
ADA COUNTY PROSECUTOR'S OFFICE \_\_\_\_\_ U.S. Mail  
200 W. FRONT, SUITE 3191 \_\_\_\_\_ Facsimile  
BOISE ID 83702  Hand Delivery

ERICK VIRGIL HALL  Statehouse Mail  
INMATE # 33835  U.S. Mail  
IMSI \_\_\_\_\_ Facsimile  
PO BOX 51 \_\_\_\_\_ Hand Delivery  
BOISE ID 83707

  
BARBARA THOMAS  
Administrative Assistant

ATTACHMENT A

00437



James R. Merikangas, M.D.  
4938 Hampden Lane #428  
Bethesda, Maryland 20814  
(301) 654-1934 telephone  
(301) 654-9834 fax  
Neuropsych2001@yahoo.com

**REQUISITION FOR RADIOLOGICAL CONSULTATION**

Last Name Hall First Name ERICK Middle Initial V

Address IMSI P.O. Box 51 City Boise

State ID Zip 83707 Home phone — Work phone —

Date of birth [REDACTED] Social Security # [REDACTED]

Primary Insurance \_\_\_\_\_

Address \_\_\_\_\_ City \_\_\_\_\_

State \_\_\_\_\_ Zip \_\_\_\_\_ Phone \_\_\_\_\_

Policy Holder Name \_\_\_\_\_ Date of birth \_\_\_\_\_

Employer N/A Social Security # \_\_\_\_\_

Policy # \_\_\_\_\_ Group # \_\_\_\_\_ Group Name \_\_\_\_\_

**EXAMINATION REQUESTED:**

*w/o contrast*

<input checked="" type="checkbox"/> MRI scan of <u>Brain</u>	Xray of <u>_____</u>
<u>_____</u> CAT scan of <u>_____</u>	Bone spect of <u>_____</u>
<u>_____</u> Spect scan of <u>_____</u>	Other study of <u>_____</u>

DIAGNOSIS: 780.01  
784.0  
907.0

OTHER CLINICAL INFORMATION: 6' tall weight: 225

Note: Please give copy of films or CD images to patient address at top

James R. Merikangas, M.D.

4-11-06  
Date

ATTACHMENT B

James R. Mcrikangas, M.D.  
4938 Hampden Lane #428  
Bethesda, Maryland 20814  
(301) 654-1934 telephone  
(301) 654-9834 fax  
Neuropsych20017@hotmail.com

**REQUISITION FOR RADIOLOGICAL CONSULTATION**

Last Name Hall First Name ERICK Middle Initial ✓

Address FMSI P.O. Box 51 City Boise

State ID Zip 83707 Home phone — Work phone —

Date of birth 

Primary Insurance \_\_\_\_\_

Address \_\_\_\_\_ City \_\_\_\_\_

State \_\_\_\_\_ Zip \_\_\_\_\_ Phone \_\_\_\_\_

Policy Holder Name \_\_\_\_\_ Date of birth \_\_\_\_\_

Employer N/A Social Security # \_\_\_\_\_

Policy # \_\_\_\_\_ Group # \_\_\_\_\_ Group Name \_\_\_\_\_

**EXAMINATION REQUESTED:**

_____ MRI scan of _____	_____ Xray of _____
_____ CAT scan of _____	_____ Bone spect of _____
_____ Spect scan of _____	_____ PET Scan _____
	_____ Other study of <u>Brain</u>

DIAGNOSIS: 780.01  
784.0  
907.0

OTHER CLINICAL INFORMATION: 6' tall weight 225

Note: Please give copy of films or CD images to ~~patient~~ patient address at top

James R. Mcrikangas, M.D.

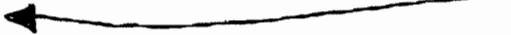
4-11-06  
Date

ATTACHMENT C


00441

James R. Merikangas, M.D.  
4938 Hampden Lane #428  
Bethesda, Maryland 20814  
Office: (301) 654-1934  
Fax: (301) 654-1834  
Neuropsych2001@a.hotmail.com

Please send results to:



REQUISITION FOR BLOOD TESTING:

Patient name: Freick Virgil Hall D.O.B. 

Neuroprofile:

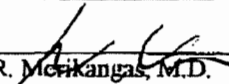
- |                            |               |
|----------------------------|---------------|
| CBC with differential      | Glucose       |
| Platelet count             | BUN           |
| Sedimentation rate         | Creatinine    |
| Antinuclear antibody (ANA) | Sodium        |
| Rheumatoid factor          | Potassium     |
| <u>VDRL/RPR</u>            | Chloride      |
| <u>T3, T4, T7, TSH</u>     | CO2           |
| Serum iron and TIBC        | Calcium       |
| Serum folate               | Phosphorus    |
| Serum vitamin B12          | Uric acid     |
| Alkaline phosphatase       | Total protein |
| LDH                        | Albumin       |
| ASAT (SGOT)                | Globulin      |
| ALAT (SGPT)                | A/G ratio     |
| GGT                        | Ceruloplasmin |
| CPK                        | Cholesterol   |
| Bilirubin                  | Triglycerides |

- |  |  |
|--|--|
| <input type="checkbox"/> Urinalysis                                  | <input type="checkbox"/> Toxoplasmosis titer |
| <input checked="" type="checkbox"/> Five hour glucose tolerance test | <input type="checkbox"/> Lead level          |
| <input type="checkbox"/> Lyme titer                                  | _____  |
| <input type="checkbox"/> Toxoplasmosis titer                         | _____  |
| <input type="checkbox"/> HIV*  | _____  |

\*Special signature form required

DIAGNOSIS: 780.01  
784.0  
907.0

OTHER CLINICAL INFORMATION: 6' tall weight: 225  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

  
James R. Merikangas, M.D.

4-11-06  
Date

JUN 07 2006

By J. DAVID NEWARRO, CLERK  
DEPUTY

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

**NOTICE OF HEARING**

**(CAPITAL CASE)**

COMES NOW, Erick Virgil Hall, Defendant-Appellant, and notices the following motion for a hearing on a date previously scheduled by this Court on the 20th day of June, 2006, at 1:30 p.m.: Motion For Order to Conduct Medical Testing and Order For Transport. The hearing will be held before the Honorable Thomas F. Neville at 200 West Front Street, Boise, Idaho.


DATED this \_\_\_ day of June, 2006.

Mark J. Ackley  
MARK J. ACKLEY  
Deputy State Appellate Public Defenders

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7<sup>th</sup> day of June, 2006, served a true and correct copy of the attached NOTICE OF HEARING by the method indicated below:

ERICK VIRGIL HALL INMATE # 33835 IMSI PO BOX 51 BOISE ID 83707	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail
THOMAS F. NEVILLE DISTRICT JUDGE 200 W. FRONT BOISE ID 83702	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail

  
\_\_\_\_\_  
BARBARA THOMAS  
CLU Administrative Assistant

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

NO. \_\_\_\_\_  
A.M. 9 P.M. \_\_\_\_\_  
JUN 17 2006  
By: J. David Navarro Clerk  
DEPUTY

**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  
**NOTICE OF FILING OF  
CORRECTION TO AFFIDAVIT  
OF DR. JAMES MERIKANGAS, M.D.**


(CAPITAL CASE) **ORIGINAL**

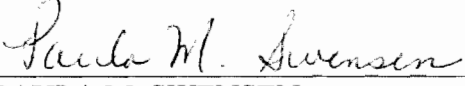
COMES NOW the Petitioner, ERICK VIRGIL HALL, by and through his attorneys at the Office of the State Appellate Public Defender, and submits the following correction to the affidavit of Dr. James Merikangas, M.D.

Petitioner submitted the original affidavit of Dr. Merikangas as Exhibit 26 to his Amended Petition for Post-Conviction Relief, filed April 17, 2006. Petitioner placed the Court and State on notice of a possible error in his Addendum to Amended Petition for Post Conviction Relief, filed May 24, 2006.



DATED this 9<sup>th</sup> day of June, 2006.

  
\_\_\_\_\_  
MARK J. ACKLEY  
Lead Counsel, Capital Litigation Unit

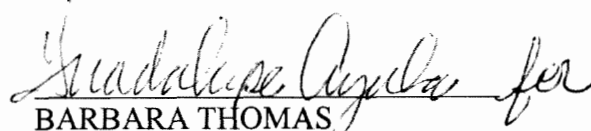
  
\_\_\_\_\_  
PAULA M. SWENSEN  
Co-Counsel, Capital Litigation Unit

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have on this 10<sup>th</sup> day of June, 2006, served a true and correct copy of the forgoing NOTICE OF FILING as indicated below:

ROGER BOURNE \_\_\_\_\_ Statehouse Mail  
ADA COUNTY PROSECUTOR'S OFFICE \_\_\_\_\_ U.S. Mail  
200 W. FRONT, SUITE 3191 \_\_\_\_\_ Facsimile  
BOISE ID 83702 X Hand Delivery

ERICK VIRGIL HALL \_\_\_\_\_ Statehouse Mail  
INMATE # 33835 \_\_\_\_\_ U.S. Mail  
IMSI \_\_\_\_\_ Facsimile  
PO BOX 51 X Hand Delivery  
BOISE ID 83707

  
BARBARA THOMAS  
Administrative Assistant

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,	)	
	)	CASE NO. SPOT0500155
Petitioner,	)	
	)	<b>AFFIDAVIT OF</b>
v.	)	<b>DR. JAMES MERIKANGAS, M.D.</b>
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	<b>(CAPITAL CASE)</b>
_____	)	

State of Idaho )  
                  ) ss.  
Ada County    )

Dr. James Merikangas, M.D., states under penalty of perjury that the following is true to the best of his knowledge:

**BACKGROUND**

1. I have been retained by the Idaho State Appellate Public Defenders Office (SAPD) as an expert in neurology and psychiatry to review certain matters in the case of State of Idaho v. Erick V. Hall, Ada County case no. SPOT0500155, and to perform a preliminary neurological and psychiatric examination of Erick Virgil Hall.

2. My education, employment and experience are set forth in the attached Curriculum Vitae.

## **MATERIALS REVIEWED**

3. I have reviewed various materials provided to me by SAPD, including records and reports from Anaheim Union High School District, Ada County Sheriff, Camas Police Department, Clark County Juvenile Court Education Program, Department of Corrections (includes IMSI, SICI & ISCI), Immunization Record, C. Kirk Johnson, Kaiser Permanente Medical Care Program, Minnehana School, Mission Creek Youth Camp, neuropsychological report worksheet of Jean Hall McCracken and Erick Virgil Hall, Oregon State Dept. Human Services, Vancouver Public Schools, WA State Social Services, Robert Janss High School, trial presentation of Dr. Roderick W. Pettis, 2004 Presentence Investigation Report; results of testing including 3/23/88 WRAT – R2, 4/15/88 Mooney Problem Check List, 4/15/88 Ebner Sentence Completion Task, 4/28/88 Diagnostic Evaluation, 5/4/88 Client Substance Index, 5/12/88 Keystone Skills Profile, 5/30/91 Substance Abuse/Life Circumstance Evaluation, 5/8/03 California Computerized Assessment Package, 5/8/03 SIRS Interview Booklet, 5/8/03 TOMM: Score Sheet, 5/8-9/03 Halstead-Reitan Battery (HRB), 5/9/03 RCFT, 5/3/03 California Verbal Learning Test-Second Edition, 5/10/03 D-KEFTS, 5/13/03 Conger & Gummow test data analysis, 10/2/03 MCMI – III, 10/2/03 DAPS Profile Form: Men, 11/15/03 MCMI- III Interpretive Report, 11/29/03 Conger & Gummow test data analysis, 5/4/04 Expanded Halstead-Reitan Battery, WAIS – III Response Booklet; Transcript of police interrogations from March 13, 2003, March 29, 2003, and April 1, 2003; transcript of sentencing testimony of Dr. Mark D. Cunningham, Shawndra Hemming, Deanna Horman, Betty J. Kirk, Tamara McCracken, and Dr. Robert Pettis; CD of pictures of Erick Hall and pictures of body scene recovery.

## **PRELIMINARY FINDINGS**

4. I examined Erick Hall at the Idaho Maximum Security Institution on April 4, 2006, at the request of the Idaho State Appellate Public Defender.

5. The examination was conducted in an open visiting room, which was not private. Therefore a complete psychiatric examination could not be completed, as Erick was inhibited by the presence of prison guards who could listen to his interview in that non-confidential setting. Doctor-patient and attorney-client privilege, therefore, were compromised. Attorneys Mark Ackley and Paula Swensen were present.

6. My preliminary notes are as follows. Erick Hall was born to a mother who abused drugs and alcohol. He suffered from intrauterine growth retardation and weighed only 4 pound 13 ounces at his birth, which was two to three weeks early. It was noted that his nose was flattened during the birth process. He suffered from neglect and physical and sexual abuse in childhood. He witnessed the physical and sexual abuse of his mother and siblings. He suffered from enuresis. His mother abandoned him when he was 7 and had no stable home during his developmental years that were often marked by staying in group homes, foster homes and intermittently with his mother or his father or his grandmother. Because of this chaotic and unstable home situation he was diagnosed as having profound emotional disturbances. He was also diagnosed as suffering from mild mental retardation, pervasive developmental deficits and attention deficit hyperactivity disorder. He only went as far as the eighth grade in school. His

mathematics skills were at the fourth grade level. He began to abuse drugs and alcohol at a very early age.

A Vancouver Public Schools report prepared when he was 6 years 7 months old indicates that he had enuresis (loss of urinary control at night) as well as wetting during the day. According to the school report his hygiene and grooming were poor and that he often "sits alone and chews on his arm". From the Vancouver Public Schools Report of December 6, 1977, it was noted "Erick appears to be nervous and often frightened. He seems to be in perpetual motion. He tends to withdraw during playtime. He refuses to enter into games with others unless he is persuaded. When in the group, he is restless and agitated. He often sits by himself and chews his arm. He emits many guttural sounds and wiggles and plays his arms. He tells strange tales about Big Foot, who he claims is in his bedroom". At that time his verbal IQ was tested at 69, performance IQ at 81 for a full scale of 73. He was noted to have difficulty with abstract reasoning and "Erick seemed lost within his own dream world". He had findings that were "Indicative of severe problems related to an underdevelopment of eye-hand motor coordination and visual perception". The school psychologist diagnosed him as emotionally disturbed and suffering from mild mental retardation.

7. Based on my review of these materials, preliminary neuropsychiatric testing was indicated.

8. At the time of my evaluation, Erick was noted to be six feet tall and weighed 225 pounds. He appeared well-developed and well-nourished and in no acute distress. On mental status he is unable to spell the word "world" backwards. He only remembered two out of three cities after five minutes. He was unable to do subtractions of serial sevens past 93 without mistakes. There was no cyanosis, jaundice, edema or pallor. He had a large pigmented scar on the left posterior thorax in the region of the scapula and below which was patchy, (consistent with a burn from splashed liquid), about a foot in diameter. His blood pressure was 190/100 in both arms with a pulse of 90. His head circumference was 58cm. He had a scar on the right parietal scalp and it is noted that his hair swirls were counterclockwise on the right and clockwise on the left occipital region. His palate was high, but not arched. He had a wide space between the first and second toes of each foot. He had a short philtrum and small ears.

9. The heart was regular without murmurs. The lungs were clear. Strength was symmetrical. He is right handed. Plantar response was down going bilaterally and palmomental was negative bilaterally. Sensory examination was intact to pin, light touch and vibration. Deep tendon reflexes were symmetrically 2+. On examining the movements of his head on his neck there was a loud snapping sound when he put his head in extension and flexion. This was felt to be at about C2.

10. Cranial nerve I, he could not identify cloves or vanilla. Cranial nerve II, pupils were round regular equal reactive to light and accommodation. Optic discs and fundi appear normal. Fields are full to confrontation. Optokinetic nystagmus was intact in both directions. Cranial nerves III, IV and VI, extraocular movements were full without nystagmus. Cranial nerves V and VII were symmetrical. Cranial nerve VIII was midline. Air conduction was greater than bone conduction. Cranial nerves IX, X, XI and XII appeared normal.

11. He was unable to walk on heels or toes claiming that he had pain, but he was also not able to walk tandem without swaying. Romberg was negative. Rapid alternating coordinated movements of the hands were difficult to assess because of an injury to his tendons in his right wrist. Finger to nose testing was done accurately. When asked to draw a clock face he drew a rectangular clock saying he was unable to draw circles.

12. The Harris-Goodenough Draw a Person Test was administered and, although he claims to be an artist, he drew a very strange person with a nude body without ears, without genitalia, and missing a navel on the abdomen. The feet were elliptical with straight horizontal lines indicating toes. Initially he did not draw any facial features. After asking him to draw in the facial features, he drew a face without eyebrows or ears. By standard scoring procedure this came out to be 27 which would be appropriate for an eight or nine year old child.

13. On interview he indicated that he had claustrophobia and his throat tightens when he is in small places. He reported he was not coordinated enough to play baseball, but played soccer when he was able to do sports. He indicated that he was "antsy" in grade school and that he quit school in the ninth grade. He indicated that there was mental illness on his mother's side of the family with Aunt Betty and her brother who had attempted suicide and was described as bipolar. His Uncle Alan was mentally retarded.

#### **RECOMMENDED TESTING**

14. Because of his hypertension, the multiple physical anomalies, his history of a head injury and abuse, low birth weight and hyperactivity, an MRI scan of the brain and a PET scan of the brain and cervical spine x-ray are indicated, as well as blood tests to include thyroid functions, 5 hour glucose tolerance test, and a test for syphilis. These are medically indicated for the diagnostic evaluation to be within the standard of care for neuropsychiatry.

15. My requisitions for radiological consultation and requisition for blood testing are attached to this affidavit. The recommendations are based on preliminary diagnoses: 780.01 (alteration of consciousness), 784.01 (headaches), and 907.0 (late effect of head injury without mention of skull fracture). To my knowledge these tests have not previously been conducted on Erick.


16. My understanding is that SAPD personnel are interviewing family members and others not previously interviewed by trial counsel or their experts. This information is relevant for a complete and final psychiatric evaluation.

17. Furthermore, a psychiatric interview in a confidential setting is also indicated to further elucidate a psychiatric diagnosis as he was unable to be frank, open and forthcoming in the presence of his jail guards. I would be available to perform this examination in the future when permitted.

Dated this 13 day of April, 2006.

  
James R. Merikangas, M.D.

Subscribed and sworn to before me  
this 13 day of April, 2006.

  
Notary Public for Maryland

My commission expires:

NOTARIAL SEAL  
Jeong Soo Kim, Notary Public  
Montgomery County, Bethesda, Maryland  
My Commission Expires Jan. 8, 2008

NO. \_\_\_\_\_  
A.M. 10:19 FILED P.M. \_\_\_\_\_

**JUN 14 2006**

By J. DAVID NAVARRO Clerk  
DEPUTY

**GREG H. BOWER**  
Ada County Prosecuting Attorney

**Roger Bourne**  
Deputy Prosecuting Attorney  
Idaho State Bar No. 2127  
200 West Front Street, Room 3191  
Boise, Idaho 83702  
Phone: 287-7700  
Fax: 287-7709

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. SPOT0500155**  
**STATE'S MOTION FOR THE**  
**PRODUCTION OF**  
**DOCUMENTS AND FOR**  
**ORDER WAIVING THE**  
**ATTORNEY-CLIENT**  
**PRIVILEGE**

**COMES NOW**, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and moves this Court for its order directing the Ada County Public Defender to provide access to or make copies for the Ada County Prosecutor of all attorney notes relating to the mental health of Erick Hall, or any reports or documents, generated by any mental health expert who saw, spoke to, tested or evaluated Erick Hall for the purpose of assisting the Ada County Public Defender's Office in preparation for the trial of Erick Hall in Ada County Case No. H0300518 together with all testing instruments and test results administered by mental

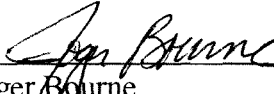


health professionals to Erick Virgil Hall so that the State can prepare to rebut the claims of the petitioner that his trial counsel was ineffective for failing to conduct an adequate penalty phase investigation as alleged in claim "S" of the Amended Petition for Post Conviction Relief.

Further, the State moves the Court to declare that the attorney-client privilege that existed between the Ada County Public Defender's Office, its employees, investigators or consultants and the petitioner Erick V. Hall in the Henneman murder case is waived as required by Idaho Rule of Evidence 502(d)(3).

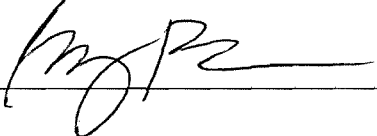
**RESPECTFULLY SUBMITTED**, this 13<sup>th</sup> day of June 2006.

**GREG H. BOWER**  
Ada County Prosecutor

  
\_\_\_\_\_  
Roger Bourne  
Deputy Prosecuting Attorney

#### **CERTIFICATE OF MAILING**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing document was delivered to the State Appellate Public Defender's Office, 3647 Lake Harbor Lane, Boise, Idaho 83703 through the United States Mail, this 13 day of June 2006.

  
\_\_\_\_\_

MOLLY J. HUSKEY  
State Appellate Public Defender  
State of Idaho  
I.S.B. # 4843

NO. \_\_\_\_\_ FILED  
AM. \_\_\_\_\_ P.M. *4/8*

JUN 14 2006

J. DAVID NAVARRO, Clerk  
By \_\_\_\_\_ DEPUTY

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

**NOTICE OF HEARING**

**(CAPITAL CASE)**

COMES NOW, Erick Virgil Hall, Defendant-Appellant, and notices the following motions for a hearing on a date previously scheduled by this Court on the 20th day of June, 2006, at 1:30 p.m.: Motion To Disqualify. The hearing will be held before the Honorable Thomas F. Neville at 200 West Front Street, Boise, Idaho.

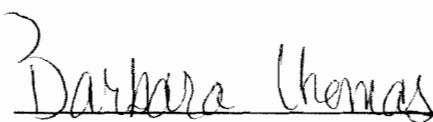
DATED this \_\_\_ day of June, 2006.

*Mark J. Ackley*  
\_\_\_\_\_  
MARK J. ACKLEY  
Deputy State Appellate Public Defenders

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 14<sup>th</sup> day of June, 2006, served a true and correct copy of the attached NOTICE OF HEARING by the method indicated below:

ERICK VIRGIL HALL INMATE # 33835 IMSI PO BOX 51 BOISE ID 83707	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail



BARBARA THOMAS  
CLU Administrative Assistant

00456

MOLLY J. HUSKEY  
State Appellate Public Defender  
State of Idaho  
I.S.B. # 4843

NO. \_\_\_\_\_ FILED  
AM. \_\_\_\_\_ P.M. 4:16

JUN 14 2006

J. DAVID HAVARRO, Clerk  
By \_\_\_\_\_ DEPUTY

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,	)	
	)	CASE NO. SPOT0500155
Petitioner,	)	
	)	<b>MOTION TO DISQUALIFY</b>
v.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	<b>(CAPITAL CASE)</b>
_____	)	

**COMES NOW** Petitioner, Erick Virgil Hall, by and through his counsel, the State Appellate Public Defender, and hereby moves this Honorable Court, pursuant to I.R.C.P., Rule 40(D), I.C.R., Rule 25(b)(4), and his state and federal due process right to an unbiased judge and to meaningful post-conviction proceedings, to recuse itself from these post-conviction proceedings.

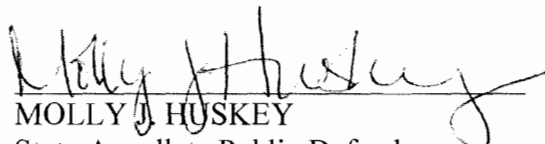
Petitioner relies upon three grounds to support his motion that the Court must disqualify itself. Petitioner sets forth such grounds in the attached Memorandum in Support of Motion to Disqualify, incorporated by reference in the affidavit of Mark J. Ackley, as required by the Idaho Rules of Civil Procedure. Rule 40 provides in relevant part:

Any such disqualification for cause shall be made by a motion to disqualify accompanied by an affidavit of the party or the party's attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion. Such motion for disqualification for cause may be made at any time. The presiding judge or magistrate sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions.

I.R.C.P. 40(d)(2)(B); *see also* I.C.R. 25(c).

The Court is without authority to act further in this case except to grant or deny this motion for disqualification. I.C.R.P. 40(d)(5); I.C.R. 25(e). However, Petitioner respectfully requests another Court hear argument on this motion. *See Offutt v. United States*, 348 U.S. 11 (1954)(holding that federal trial court should have recused itself from presiding over the criminal contempt charges levied against trial counsel, where trial counsel and the court had become "personally embroiled").

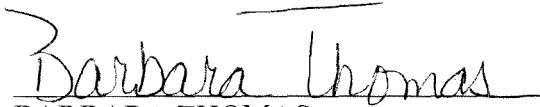
DATED this 14<sup>th</sup> day June, 2006.

  
MOLLY J. HUSKEY  
State Appellate Public Defender

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on this 14<sup>th</sup> day of June, 2006, a true and correct copy of the foregoing document, MOTION TO DISQUALIFY COURT FROM PRESIDING OVER POST-CONVICTION, was mailed, postage prepaid, to the following:

ERICK VIRGIL HALL INMATE # 33835 IMSI PO BOX 51 BOISE ID 83707	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail

  
BARBARA THOMAS  
Administrative Assistant

JUN 14 2006

By J. David Navarro Clerk  
DEPUTY

**GREG H. BOWER**  
Ada County Prosecuting Attorney

**Roger Bourne**  
Deputy Prosecuting Attorney  
Idaho State Bar No. 2127  
200 W. Front Street, Room 3191  
Boise, Id. 83702  
Telephone: (208) 287-7700

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. SPOT0500155

**NOTICE OF HEARING**

**TO: ERICK VIRGIL HALL, and STATE APPELLATE PUBLIC DEFENDER,** his Attorney of Record, you will please take notice that on the 20th day of June 2006, at the hour of 1:30 of said day, or as soon thereafter as counsel can be heard, Deputy Prosecuting Attorney Roger Bourne will move this Honorable Court on the State's Motion to Dismiss and State's Motion for the Production of Documents and for Order Waiving the Attorney-Client Privilege in the above-entitled action.

**DATED** this 13<sup>TH</sup> day of June 2006.

**GREG H. BOWER**  
Ada County Prosecuting Attorney

By: Roger Bourne  
Deputy Prosecuting Attorney

**CERTIFICATE OF MAILING**

**I HEREBY CERTIFY** that I mailed a true and correct copy of the foregoing Notice of Hearing to State Appellate Public Defender's Office, 3647 Lake Harbor Lane, Boise, Idaho 83703 by depositing the same in the Interoffice Mail, postage prepaid, this 13 day of June 2006.



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Session: Neville062006  
Session Date: 2006/06/20  
Judge: Neville, Thomas F.  
Reporter: French, Janet

Division: DC  
Session Time: 13:24

Courtroom: CR501

Clerk(s):  
Ellis, Janet

State Attorneys:

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0001

Case Number: SPOT0500155D  
Plaintiff: ERICK VIRGIL HALL  
Plaintiff Attorney: ACKLEY, MARK  
Defendant: STATE OF IDAHO  
Co-Defendant(s):  
Pers. Attorney:  
State Attorney: BOURNE, ROGER  
Public Defender:

2006/06/20

13:40:59 - Operator  
Recording:

13:40:59 - New case  
, STATE OF IDAHO

13:41:25 - Other: HUSKEY, MOLLEY  
present on behalf of Petitioner

13:41:38 - Other: SWENSON, PAULA  
present on behalf of Petitioner

13:41:48 - Judge: Neville, Thomas F.

The Court had seven motions noticed up for today's hearing including a Motion

13:42:26 - Judge: Neville, Thomas F.

to Disqualify. The motion to disqualify is a threshold issue which did not

13:43:05 - Judge: Neville, Thomas F.

comply with the 14 day rule. Inquires if State prepared  
13:43:19 - State Attorney: BOURNE, ROGER  
Mr. Bourne stated not prepared to hear this today, would like to brief the  
13:43:38 - State Attorney: BOURNE, ROGER  
issue. Believe can have a written response by the end of the week.  
13:44:25 - Judge: Neville, Thomas F.  
Since this is threshold issue and proper notice not given, Court will grant  
13:44:47 - Judge: Neville, Thomas F.  
the Motion for add'l time. Court will set this over to July 5, 2006 @ 9:00  
13:46:20 - Judge: Neville, Thomas F.  
a.m. Depending on Court's ruling on the Motion to Disqualify, the Court will  
13:46:45 - Judge: Neville, Thomas F.  
proceed to as many as the other motions as we can get through.  
13:47:43 - Judge: Neville, Thomas F.  
The Court requested that Mr. Bourne file copy up in chambers.  
. Mr. Bourne  
13:48:13 - Judge: Neville, Thomas F.  
will file response by June 23rd. Inquired if Petitioner would have a  
13:48:52 - Judge: Neville, Thomas F.  
response.  
13:48:59 - Other: HUSKEY, MOLLEY  
Could file by June 28th or 29th  
13:49:08 - Judge: Neville, Thomas F.  
Court will request response be filed by June 28th.  
13:49:38 - Operator  
Stop recording:

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00463

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4:22

JUN 22 2006

J. DAVID NATAFARO, Clerk  
By \_\_\_\_\_ DEPUTY

**GREG H. BOWER**  
Ada County Prosecuting Attorney

**Roger Bourne**  
Deputy Prosecuting Attorney  
Idaho State Bar No. 2127  
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Respondent, )  
)  
\_\_\_\_\_ )

**Case No. SPOT0500155D**  
**STATE'S OBJECTION TO THE  
PETITIONER'S MOTION TO  
DISQUALIFY THE COURT**

**COMES NOW**, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and makes the State's objection to the petitioner's Motion to Disqualify Judge Neville from the pending post-conviction proceedings as follows.

The motion filed by the State Appellate Public Defender to disqualify the Court, appears to the State to be a claim by petitioner's counsel, Mark Ackley, that the Court is actually biased or at least has the appearance of bias against Mr. Ackley. It does not appear to be an allegation that the Court is biased against the petitioner. Rather, the allegation is that because the Court has

*MS*

found that Mr. Ackley has filed frivolous claims in the past the Court is either actually biased or has the appearance of bias against Mr. Ackley. To support the motion, Mr. Ackley explains the course of events involved in the case of *State v. Darrell Payne*, H0000866, SPOT0200630D and cites to certain statements made by the Court relating to the Court's view of some of the claims filed by Mr. Ackley in the "*Payne*" case.

The law in Idaho is clear that for the petitioner to be successful in a motion to disqualify the Court, the burden of proof is upon the petitioner to prove actual bias. It is the State's view that no actual bias has been shown by the petitioner and that there is no appearance of bias. It appears to the State that Mr. Ackley, through his various filings in *Payne* and in the present case, has developed a reputation for sometimes filing frivolous claims. That is, making allegations that he cannot support by a factual or legal showing, even though he claims he has a good faith basis for the allegation. The State has argued that many of his claims were frivolous in the *Payne* case and also in the current case. Further, the Court has found that some of Mr. Ackley's claims are frivolous. Mr. Ackley may now be "stuck" with the reputation that he has earned for himself as it relates to some of his claims. However, in the motion to disqualify, he ignores the fact that the Court has ruled in his favor on significant issues and he ignores the state of the law in Idaho that the Court's rulings against the defendant in a criminal case do not by themselves show bias. The state of the law in Idaho is set out below.

#### **THE LAW IN IDAHO**

The law in Idaho on the question of the disqualification of the trial judge is well settled. The Idaho Supreme Court recently restated its earlier holdings on judge disqualification in capital cases in *State v. Pizzuto*, 134 Idaho 799 (2000). The Honorable Judge Reinhardt had sentenced Pizzuto to death. Judge Reinhardt had also presided over murder trials of Pizzuto's

co-defendants, James Rice and William Odom. Pizzuto argued in his first petition for post-conviction relief that Judge Reinhardt should have been disqualified for cause because he had been exposed to information about the murder through the Rice and Odom trials. Judge Reinhardt denied the motion.

Pizzuto also argued that Judge Reinhardt should disqualify himself because Pizzuto alleged that Judge Reinhardt knew that the prosecution had “suppressed” certain information that was favorable to Pizzuto. This information primarily concerned the credibility of Rice and Odom as witnesses. Pizzuto argued that Judge Reinhardt was prejudiced because he was aware of the impeachment evidence that was allegedly withheld, as well as because of the information that he had about Odom and Rice. Judge Reinhardt refused to disqualify himself and the Supreme Court upheld his decision as follows:

It has been held that the right to due process requires an impartial trial judge. *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437 (71 L.Ed. 749 (1927)); *State v. Lankford*, 116 Idaho 860 (1989). However, a judge may not be disqualified for prejudice unless it is shown that the prejudice is directed against the party and is of such nature and character as would render it improbable that under the circumstances the party could have a fair and impartial trial. *State v. Lankford, supra*; *State v. Waterman*, 36 Idaho 259 (1922) *Bell v. Bell*, 18 Idaho 636 (1910). In order to constitute legal bias or prejudice, allegations of prejudice in post-conviction and sentence reduction proceedings must state facts that do more than simply explain the course of events involved in a criminal trial. *State v. Lankford*, 113 Idaho 688 (1987). ‘In Idaho a judge cannot be disqualified for actual prejudice unless it is shown that the prejudice is directed against the litigant and is of such a nature and character that it would make it impossible for the litigant to get a fair trial.’ *State v. Lankford*, 113 Idaho 688 (1987); *State v. Waterman*, 36 Idaho 259 (1922). Whether the judge’s involvement in the defendant’s case reaches the point where disqualification from further participation in a case becomes necessary is left to the sound discretion of the trial judge. *Sivak v. State*, 112 Idaho 197 ( ); *Pizzuto I*, 119 Idaho at 776 (1991). This court has also observed that even where a trial judge is exposed to prejudicial information, judges are usually presumed to be ‘capable or disregarding that which should be disregarded’ in our judicial system. See *Sivak*, 112 Idaho at 205. We

therefore hold that Pizzuto has failed to show that Judge Reinhardt abused his discretion in refusing to disqualify himself.

The *Pizzuto* holding quoted above is on all fours with the holdings in other capital cases. In *State v. Wood*, 132 Idaho 88 (1988), the defendant pled guilty to the murder of a little girl and was sentenced to death by Judge Winmill. Wood argued that Judge Winmill should have recused himself without motion from either party on the basis that he had ties to the victim, the lead investigator, and other people connected to the case. Wood alleged that Detective Shaw, the victim and her family, and two of the lawyers in the firm that represented Wood all attended the same church and “the judge saw the victim’s father on a regular basis.” The judge was also required to rule on the admissibility of purported church doctrine that the defendant offered to impeach members of the same church that the judge belonged to. Judge Winmill denied the defendant’s motion to recuse and the Supreme Court affirmed the denial.

The Court cited the Code of Judicial Conduct as follows:

Judges should disqualify themselves in proceedings in which impartiality might reasonably be questioned or where personal knowledge of disputed evidentiary facts might reasonably affect their impartiality in the proceedings. *Code of Judicial Conduct*, Canon 3(C)(1). ‘Whether a judge’s involvement in a case reached a point where disqualification from further participation in a defendant’s case becomes necessary is left to the sound discretion of the judge himself.’ *Sivak v. State*, 112 Idaho (1986).

The Court ruled that there was no indication that Judge Winmill knew about the disputed church doctrine, the doctrine itself was irrelevant, and further ruled that the mere fact that he belonged to the same organization as some of the other trial participants was not itself a reasonable basis for questioning his impartiality.

The court cited *Sivak, supra*, as follows:

When addressing a motion to disqualify brought under Criminal Rule 25, which was denied, the judge must recognize the case has been judged, that lasting opinions have been formed, and that the judge must determine if

the proper legal analysis, which the law requires, can be performed. If the judge can make the proper legal analysis, then the motion to disqualify should be denied. *Sivak*, 127 Idaho at 389. The Court of Appeals has pointed out that the ‘practice of having the sentencing judge also handle the post-conviction relief proceedings is approved by our Supreme Court, absent a showing of either actual bias or prejudice on the part of that judge.’ *Freeman v. State*, 114 Idaho 521 (Ct.App. 1988).

The Court also held that it would not permit a judge to be questioned about his “thought process or the grounds upon which a case was decided by a judge.” Citing *United States v. Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941) (A judges thought process relevant to judicial decisions is not within the purview of an examination). “Public policy and convenience prohibit judges from being called as witnesses to state the grounds upon which they decided former cases.” *People v. Drake*, 841 P.2d 364, 367 (Co. Ct.App. 1992). Consequently, Wood would not have been allowed to inquire into what Judge Winmill thought when he decided the case.

In *State v. Fetterly*, 115 Idaho 231 (1988), the Court again considered a defendant’s motion to disqualify the sitting district judge, the Honorable Judge Lodge. Judge Lodge sentenced Fetterly and his co-defendant, Karla Windsor, to death. The Windsor death sentence was later determined to be disproportionate, and the case was sent back to Judge Lodge for resentencing. Judge Lodge disqualified himself from further proceedings in the Windsor case reasoning that the mitigating factors did not outweigh the aggravating factors and so the death penalty was still appropriate. Thereafter, the Windsor case was assigned to a different judge.

Fetterly then moved to disqualify Judge Lodge arguing that the judge was biased against him as evidence by the judge’s position in the Windsor case. Judge Lodge denied the defendant’s motion and the Supreme Court upheld the denial and quoted from *State v. Beam*, 115 Idaho 208 (1988), where a motion to disqualify the court had also been denied:

Every trial judge who rules upon a post-conviction proceeding or an I.C.R. 35 motion to reduce sentence will previously have prejudged the matter, often formed extremely strong opinions as to the sentence which should be imposed, and will no doubt be convinced that the procedure followed and the sentence imposed was correct, particularly where the trial court proceedings have been affirmed on appeal by this Court. It would be an unusual case in which a trial judge, when called upon to rule on an I.C.R. 35 motion to reduce sentence would not approach the case on the basis that the sentence imposed was correct, and require the defendant to shoulder 'the burden of showing the original sentence was unusually severe.' *State v. Martinez*, 113 Idaho 535 (1987). Coming to the case with that frame of mind does not constitute bias or prejudice within the meaning of I.C.R. 25(b)(4) and does not require disqualification of the trial judge. In this case, the judge in question had presided at the trial of both Beam and Scroggins. He had heard all of the evidence of this brutal murder and raping of an innocent 13-year-old girl. He had presided at the sentencing proceedings in which extensive mitigation and aggravation evidence was presented to the court. Based upon all of that evidence, the trial court had arrived at the judgment that the aggravating circumstances outweighed the mitigating circumstances and served for only the most heinous of first-degree murders. The very nature of the sentencing process in capital cases requires a trial judge to form strong opinions and convictions that the defendant merits the most severe penalty. It would be extremely unlikely and no doubt improper for a trial court to impose a death penalty unless it had formed the strong opinion and belief that the defendant had no redeeming features, and the circumstances of the particular case justified the imposition of this most serious penalty known to the law. Accordingly, when a trial judge is called upon to rule upon a petition for post-conviction relief, or a motion for reduction of sentence under I.C.R. 35, particularly in a case where the death penalty has been imposed, he comes to the case after having already formed strong opinions and beliefs regarding the atrocious nature of the crime, the unredeemable character of the defendant, and the need of society to impose this most serious of criminal penalties. A trial court is not required to erase from his mind all that has gone before, and indeed, it is doubtful that any human being could. Rather, when faced with an I.C.R. 25(b)(4) motion to disqualify for bias and prejudice in a post-conviction or I.C.R. 35 proceeding, the trial judge need only conclude that he can properly perform the legal analysis which the law requires of him, recognizing that he has already prejudged the case, formed strong and lasting opinions of the worth of the defendant, and the sentence that ought to be imposed to punish the defendant and protect society. We conclude that the trial judge did not err in refusing to disqualify himself from participating in post-conviction and I.C.R. 35 sentence reduction proceedings in this case. Merely because he had disqualified himself from further participation in the resentencing of appellate Beam's co-defendant, Scroggins, and in the



process had expressed strong disagreement with this court's action in *State v. Scroggins*, 110 Idaho 380 (1986), which vacated Scroggins' death penalty sentence. *Emphasis added.*

The Court determined that Fetterly's case as it related to Windsor, was no different than Beam's case and so upheld the denial of the motion to disqualify.

The Court also denied a motion to disqualify Judge Newhouse in *State v. Sivak*, 127 Idaho 387 (1995) (Sivak III). A motion to disqualify was also denied in *State v. Fields*, 127 Idaho 904 (1995).

Finally, in *Liteky v. United States*, 510 U.S. 540, 550-52 (1994), the United States Supreme Court discussed recusal of a trial judge based upon bias and prejudice when a case is remanded for retrial as follows:

The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: 'Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions.' *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (CA2 1943). Also not subject to deprecatory characterization as 'bias' or 'prejudice' are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon sit remand, and to sit in successive trials involving the same defendant.

Relying upon *Lietky*, the Ninth Circuit considered this issue in *Poland v. Stewart*, 117 F.3d 1094 (9<sup>th</sup> Cir. 1997). Poland was convicted of two murders and sentenced to death. However, the Arizona Supreme Court, on the basis of jury misconduct, overturned the convictions. *State v. Poland*, 645 P.2d 784 (1982) (*Poland I*). When the case was returned to the trial court, the newly elected prosecutor moved to dismiss the charges on the basis of

insufficient evidence. The trial court denied the motion. Poland moved to disqualify the trial judge for bias. The motion was referred to another judge who found no bias and denied the motion. Poland was convicted a second time and sentenced to death. *Poland*, 117 F.3d at 1096-97. Poland subsequently filed a federal habeas petition claiming the trial judge's sitting on the case after denying the state's motion created "'an appearance of injustice' and thus violated his due process rights." *Id.* at 1103. The Ninth Circuit reasoned Poland had failed to demonstrate hostility by the trial court, and relied upon the holding in *Liteky* in affirming the denial of the motion to disqualify.

As can be seen from the Court's position in these cited cases, the burden of proving actual bias and prejudice is squarely upon the petitioner. Mere allegations or merely citing the Court's findings against the defendant in the underlying charge will not satisfy a petitioner's motion to disqualify. Citing a desire to depose the Court also will not justify disqualification.

#### **PETITIONER'S ALLEGATIONS**

The petitioner has alleged that certain comments by the Court referencing three claims made by Mr. Ackley from the *Payne* case indicate either actual bias or an appearance of bias. The Court's comments cited by the petitioner refer to certain claims that the Court found to be frivolous in the *Payne* case.

The first claim that the Court found to be frivolous was an accusation by Mr. Ackley that the Court had either gone to the legislature and testified concerning the death penalty statute or had been influenced by the testimony of Paul and Shirley Blomberg, the parents of Payne's victim, when they testified at the legislature. Mr. Ackley had absolutely no factual basis to support that claim and the Court found it to be frivolous.

A second frivolous claim made by Mr. Ackley was that the Court had looked up passages of scripture cited by Mr. Blomberg during a victim impact statement and that somehow the Court had been overly influenced by that reference to scripture. Again, Mr. Ackley had no factual basis to prove that the Court had ever looked up the passages of scripture cited by Mr. Blomberg and the Court found the claim to be frivolous.

Also in the *Payne* case, Mr. Ackley claimed that the trial Court had ruled in certain ways because of the Court's pending reelection campaign. Mr. Ackley cited to absolutely no factual basis to support this spurious claim and the Court found it to be frivolous and that it was not made in good faith.

Mr. Ackley claims that because the trial Court is aware that Amil Myshin and Gus Cahill, who were trial counsel for Mr. Payne, were veteran defense attorneys, and in the Court's opinion some of the best defense attorneys in the State, somehow reflects badly on Mr. Ackley due to Mr. Ackley's age and relative lack of experience compared to trial counsel. While it is true that the Court has spoken highly of trial counsel, the Court's opinion is based on its decades of experience with them. The Court did not say that it would never find them to be ineffective and the Court did not say that Mr. Ackley had less credibility than trial counsel. The Court is not required to forget what it knows about trial counsel.

Mr. Ackley claims that the Court should recuse itself if the Court had contact with any of the jurors. Mr. Ackley claims no factual basis for the allegation that the Court spoke with jurors and while Mr. Ackley points to the recent Idaho case of *Gillingham Construction Inc. v. Newby-Wiggins Construction Inc.*, 142 Idaho 15 (2005) which contains an admonition by the Idaho Court of Appeals that trial courts are not to speak to jurors if there are pending motions,

he does not point to any legal basis indicating that the Court must disqualify itself if in fact there was juror contact. Rather, Mr. Ackley just makes the bald assertion that if the Court spoke to jury members it should recuse itself.

During the litigation of the Payne post-conviction proceedings, the State responded to Payne's petitions for post-conviction relief. In the State's response, the State argued that the above referenced claims made by Mr. Ackley were frivolous. The State made that argument as to several other of Mr. Ackley's claims as well. In denying the petition for post-conviction relief, the Court found that the above referenced claims were frivolous and had been filed without a good faith basis. In a later motion to disqualify, the Court found that even though Mr. Ackley made some frivolous claims the Court had no bias against the petitioner and could make the required legal analysis. The Court later ruled in Mr. Ackley's favor on the petitioner's claim that Mr. Payne should be resentenced by a jury due to the United States Supreme Court's recent holding in *Ring v. Arizona*.


In a motion to disqualify the court in *Payne*, the Court made findings that some of Mr. Ackley's allegations were not supported either factually or legally and that some of Mr. Ackley's beliefs were "pure speculation." Those are findings of the Court based upon the evidence and argument that it had before it. Those findings are no different than the evidentiary rulings referred to in the above referenced cases where the defendants have moved to disqualify the trial court that heard the cases of co-defendants or earlier portions of their own cases. There is nothing different here. The State would expect that the Court would have "formed strong and lasting opinions of the worth of the defendant and the sentence which ought to be imposed to punish the defendant and protect society." *Beam supra*.

## CONCLUSION

It appears to the State that the Court has ruled in Mr. Ackley's favor on some allegations and against him on others. The Court has made necessary findings to support the Court's rulings. Some of those findings are not flattering to Mr. Ackley. Nevertheless, the Court's findings are objectively reasonable based upon the state of the record. No showing has been made that the Court cannot give Erick Hall a fair trial. Mr. Ackley's argument taken to its logical conclusion would require that a trial judge must disqualify itself from all subsequent proceedings unless the trial judge ruled in Mr. Ackley's favor on every point and on every motion made during the underlying proceedings. Otherwise, if the Court ruled against Mr. Ackley and made findings that some of his motions were not well grounded, there would be an appearance of bias and the Court would have to recuse itself. This is clearly not the state of the law and the motion for recusal should be denied.

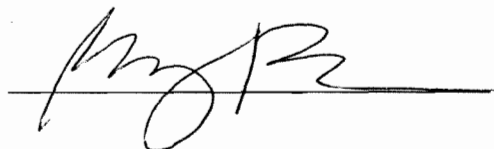
RESPECTFULLY SUBMITTED this 22<sup>ND</sup> day of June 2006.

**GREG H. BOWER**  
Ada County Prosecutor

  
\_\_\_\_\_  
Roger Bourne  
Deputy Prosecuting Attorney

**CERTIFICATE OF MAILING**

I **HEREBY CERTIFY** that a true and correct copy of the foregoing document was delivered to Mark Ackley, State Appellate Public Defender's Office, 3647 Lake Harbor Lane, Boise, Idaho 83703, through the United States Mail, this 22 day of June 2006.

A handwritten signature in black ink, appearing to be "M. Ackley", written over a horizontal line.

NO. \_\_\_\_\_ FILED 4:22  
A.M. \_\_\_\_\_ P.M.

JUN 22 2006

J. DAVID NAVARRO, Clerk  
By \_\_\_\_\_ DEPUTY

**GREG H. BOWER**  
Ada County Prosecuting Attorney

**Roger Bourne**  
Deputy Prosecuting Attorney  
Idaho State Bar No. 2127  
200 W. Front Street, Room 3191  
Boise, Id. 83702  
Telephone: (208) 287-7700

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,	)	<b>Case No. SPOT0500155</b>
	)	
	)	<b>NOTICE OF HEARING</b>
vs.	)	
	)	
THE STATE OF IDAHO,	)	
	)	
Respondent.	)	

**TO: ERICK VIRGIL HALL, and STATE APPELLATE PUBLIC DEFENDER,** his Attorney of Record, you will please take notice that on the 5th day of July 2006, at the hour of 9:00 of said day, or as soon thereafter as counsel can be heard, Deputy Prosecuting Attorney Roger Bourne will move this Honorable Court on the State's Motion to Dismiss and State's Motion for the Production of Documents and for Order Waiving the Attorney-Client Privilege in the above-entitled action.

DATED this 22 day of <sup>June</sup>~~July~~ 2006.

**GREG H. BOWER**  
Ada County Prosecuting Attorney

By: R. Bourne  
Roger Bourne  
Deputy Prosecuting Attorney

AM)

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing Notice of Hearing to State Appellate Public Defender's Office, 3647 Lake Harbor Lane, Boise, Idaho 83703 by depositing the same in the Interoffice Mail, postage prepaid, this 22 day of ~~July~~<sup>June</sup> 2006.



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NO. \_\_\_\_\_  
FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 2:08

JUN 27 2006

J. DAVID NAVARRO, Clerk  
By D. Mesgan  
DEPUTY

**GREG H. BOWER**  
Ada County Prosecuting Attorney

**Roger Bourne**  
Deputy Prosecuting Attorney  
Idaho State Bar No. 2127  
200 West Front Street, Room 3191  
Boise, Idaho 83702  
Phone: 287-7700  
Fax: 287-7709

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THE STATE OF IDAHO, )  
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Respondent, )  
)  
\_\_\_\_\_ )

**Case No. SPOT0500155**  
**AMENDED STATE'S MOTION  
FOR THE PRODUCTION OF  
DOCUMENTS AND FOR  
ORDER WAIVING ATTORNEY-  
CLIENT PRIVILEGE**


COMES NOW, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and amends the State's earlier motion for the production of documents. The original motion asked the Court to order that the Ada County Public Defender's Office provide the State access to certain documents. The undersigned has been informed by Amil Myshin that he no longer has any of the requested documents because his entire file has been turned over to the State Appellate Public Defender.

*ccm*

Therefore, the State amends its motion moving that the Court order that the Ada County Public Defender and/or the State Appellate Public Defender provide access to the requested documents. This motion is made pursuant to Idaho Civil Rule 26 and Idaho Code §19-4906(c).

**RESPECTFULLY SUBMITTED**, this 27<sup>th</sup> day of June 2006.

**GREG H. BOWER**  
Ada County Prosecutor

  
\_\_\_\_\_  
Roger Bourne  
Deputy Prosecuting Attorney

**CERTIFICATE OF MAILING**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing document was delivered to the State Appellate Public Defender's Office, 3647 Lake Harbor Lane, Boise, Idaho 83703 through the United States Mail, this 27 day of June 2006.

  
\_\_\_\_\_

JUN 27 2006

J. DAVID NAVARRO, Clerk  
By: *[Signature]*  
DEPUTY

**GREG H. BOWER**  
Ada County Prosecuting Attorney

**Roger Bourne**  
Deputy Prosecuting Attorney  
Idaho State Bar No. 2127  
200 W. Front Street, Room 3191  
Boise, Id. 83702  
Telephone: (208) 287-7700

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
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ERICK VIRGIL HALL,	)	
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Petitioner,	)	<b>Case No. SPOT0500155</b>
	)	
	)	<b>NOTICE OF HEARING</b>
vs.	)	
	)	
THE STATE OF IDAHO,	)	
	)	
Respondent.	)	

**TO: ERICK VIRGIL HALL, and STATE APPELLATE PUBLIC DEFENDER,** his Attorney of Record, you will please take notice that on the 5th day of July 2006, at the hour of 9:00 of said day, or as soon thereafter as counsel can be heard, Deputy Prosecuting Attorney Roger Bourne will move this Honorable Court on the Amended State's Motion for the Production of Documents and for Order Waiving the Attorney-Client Privilege in the above-entitled action.

**DATED** this 27 day of June 2006.


**GREG H. BOWER**  
Ada County Prosecuting Attorney

*[Signature]*  
By: Roger Bourne  
Deputy Prosecuting Attorney

*P. W.*

**CERTIFICATE OF MAILING**

**I HEREBY CERTIFY** that I mailed a true and correct copy of the foregoing Notice of Hearing to State Appellate Public Defender's Office, 3647 Lake Harbor Lane, Boise, Idaho 83703 by depositing the same in the <sup>US</sup>~~Interoffice~~ Mail, postage prepaid, this 27 day of June 2006.



---

**ORIGINAL**

FILED 2:03 P.M.

JUN 30 2006

*Melanie Ornelas*  
CLERK  
DEPUTY

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,	)	
	)	CASE NO. SPOT0500155
Petitioner,	)	
	)	<b>THIRD ADDENDUM</b>
v.	)	<b>TO AMENDED PETITION</b>
	)	<b>FOR POST-CONVICTION</b>
STATE OF IDAHO,	)	<b>RELIEF</b>
	)	
Respondent.	)	<b>(CAPITAL CASE)</b>
_____	)	

COMES NOW PETITIONER, Erick Virgil Hall, by and through his counsel at the State Appellate Public Defender (SAPD), and files this Third Addendum to Petitioner's Amended Petition for Post-Conviction Relief (Amended Petition) filed with the Court on April 17, 2006. The purpose of this Third Addendum is to make five corrections to the Amended Petition. The first four corrections involve attaching four affidavits to the Amended Petition in support of claims raised therein.

*MA*

Each of the affidavits was referenced as attached affidavits to the Amended Petition but was unintentionally omitted upon filing.<sup>1</sup> In addition, Petitioner makes one correction to the Amended Petition.

Petitioner submits the following as support for his Amended Petition:

1. Exhibit 37, Affidavit of Frank Owen McCracken: This exhibit supports Petitioner's Claim S.1, Amended Petition, pp.154-158 ("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.");
2. Exhibit 38, Affidavit of Tiffaney Leandra Conner: This exhibit supports Petitioner's Claim S.1, *supra*;
3. Exhibit 39, Affidavit of Shawnra McCracken Hemming: This exhibit supports Petitioner's Claim S.1, *supra*;
4. Exhibit 40, Affidavit of Tamara McCracken: This exhibit supports Petitioner's Claim S.1, *supra*, and Claim F, Amended Petition, pp.54-55 ("Prosecutorial misconduct for using techniques to dissuade mitigation witnesses from testifying or predispose them to disregard or downplay valid mitigating evidence.").

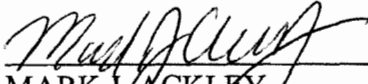
In addition, Petitioner notes the following correction:

---

<sup>1</sup> As stated in prior addenda, this 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.

5. Amended Petition, pp. 173-174, n. 44 should reference Exhibit 35 (Affidavit of David Lane).

DATED this 30<sup>th</sup> day June, 2006.

  
\_\_\_\_\_  
MARK J. ACKLEY  
Lead Counsel, Capital Litigation Unit

### CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30<sup>th</sup> day of June, 2006, a true and correct copy of the foregoing document, THIRD 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	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail
THOMAS F. NEVILLE DISTRICT JUDGE 200 W. FRONT BOISE ID 83702	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail

\_\_\_\_\_  
BARBARA THOMAS  
CLU Administrative Assistant

EXHIBIT 37

00485



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,	)	
	)	CASE NO. SPOT0500155
Petitioner,	)	
	)	<b>AFFIDAVIT OF</b>
v.	)	<b>FRANK OWEN</b>
	)	<b>MCCRACKEN</b>
STATE OF IDAHO,	)	
	)	
Respondent.	)	<b>(CAPITAL CASE)</b>
_____	)	

STATE OF IDAHO, )  
  ) ss  
County of Ada      )

COMES NOW, Frank Owen McCracken, being first duly sworn, deposes and says:

1. All matters set forth are based on personal knowledge unless otherwise noted.
2. I live at 212 North Dale in Anaheim, California. I deliver auto parts as my current employment.
3. Although not listed as the biological father on his birth certificate, I know that I am Erick Virgil Hall's father.
4. I was not interviewed by the prosecution for Erick's trial.

5. I was previously interviewed by the defense team on January 24, 2004, and on August 8, 2004. I was not called to testify.
6. Had I been asked to testify, I would have testified about the following events:
7. I had three children, Tammy, Frank Alvin Charles, and Shawnra with a woman who was not Erick's mother. Then the mother died and I was on my own as a father with three children.
8. I went through a couple of babysitters. One woman was named Ima, and things did not work out with her. Ima was friends with a woman named Jean. Jean told me she wished she had a babysitting job like that, so we made an arrangement that Jean would watch the children. Jean was seeing a man named Roy. I later learned that Jean and Roy had a child named Shannon with Roy. Roy broke up with Jean and left her.
9. Jean and I became romantically involved. It made practical sense for us to live together and raise the children together. After several months, Jean told me she was pregnant, and Erick was born in Long Beach, CA in 1971.
10. After my children John and Steven were born, we moved to Washington because it was a more family-oriented place. After Deanna was born, I had a vasectomy.
11. I worked graveyard shifts and was not home a lot at night. During the day, Jean would watch the children.
12. Jean and I had verbal and physical fights in which I used to hit her in front of the children.

13. I left Jean and came back to California in 1982 with my daughter Shawnra, when the Washington shipyard closed and the economy declined. My son Frank Alvin Charles committed a crime and went to prison at that time.
14. I married a woman named Tina after returning to California.
15. I am not aware of a lot of things that happened with members of the family who remained behind in Washington at that time, but know there were problems and allegations of child abuse which were evaluated by Children's Services in Oregon and Washington. I believe that Jean may have moved the children from place to place to stay one step ahead of them.
16. Jean abandoned the children who remained with her in Washington. Erick went to a youth home and John and Steven went to a foster home. I wanted to bring my sons down to California, but Tina did not want me to bring them to California.
17. When Erick came back to California from the boys home in 1986-87 he had markings on his back from having an iron pressed into his body. He wouldn't say who had done it.
18. Erick did not stay for very long in California and did not get along too well with his cousins. The Buena Park police picked him up after he ran away, and he said he didn't want to stay in California. He went back to be with Jean and we lost all contact with him.
19. Erick was a quiet boy with a big imagination. He lived in his own world. When Godzilla first came out, Erick was very interested in it and made up stories about him. Erick loved animals. He had a cat, called Tigger, and had a close bond with the cat.

20. Erick is a talented and creative artist, intelligent, and handsome. I love Erick. He is my son, he's always been my son, and he will always be my son. I believe at times I was not a great father, but I did the best I could. I don't want him to get the death penalty.

DATED this 7 day of April, 2006.

  
FRANK OWEN MCCRACKEN

I, Michael Jay Shaw, a notary public, do hereby certify that on this 7<sup>th</sup> day of April, 2006, personally appeared before me FRANK OWEN MCCRACKEN, who, being by me first duly sworn, that he is the above mentioned person and that (s)he signed the foregoing document and that the statements therein contained are true.




  
Notary Public for Idaho  
My commission expires 10/4/2011

EXHIBIT 38

00490

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,	)	
	)	CASE NO. SPOT0500155
Petitioner,	)	
	)	<b>AFFIDAVIT OF</b>
v.	)	<b>TIFFANEY LEANDREA CONNER</b>
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	<b>(CAPITAL CASE)</b>
_____ )		

STATE OF IDAHO, )  
  ) ss  
County of Ada        )

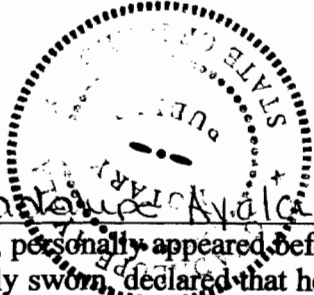
COMES NOW, Tiffany LeAndrea Conner, being first duly sworn, deposes and says:

1. All matters set forth are based on personal knowledge unless otherwise noted.
2. I live at 904 N.E. 106<sup>th</sup> Ave. in Vancouver, Washington. Erick and I share the same mother, Jean Hall McCracken; therefore, I am Erick's youngest half-sister by 13 years.
3. I was not contacted by the Prosecution about Erick's case.
4. I was previously interviewed by the defense team in 2004 but was not asked to testify.
5. I was very young when Erick left the home and do not have memories of him. I love my brother. I have one picture of Erick. In this picture, Erick is holding me

when I was around 1 year old. I hold onto this picture because it is something that connects me to my brother.

6. My letters are my most prized possession of my brother because that's all I have to remember him.
7. I have a son, Dakota, who is two and a half. Dakota's father, Randall Bunch, has been in jail on several occasions. I understand how difficult it is to maintain a relationship with an incarcerated person, and wish to do so with Erick. Our connection is very important to me. In a choice of incarceration versus death, I will always choose incarceration. Although Erick is incarcerated, I want the opportunity to get to know my brother better and maintain a relationship with him.
8. I have a brother named John. John's son, Tyler, who is my nephew, has been diagnosed with Attention Deficit Hyperactive Disorder (ADHD). My mother has learned more about how to deal with and understand ADHD through new medical research and medicine to treat the disorder. I believe Erick has ADHD too, and my mother did not have the benefits of this new information when Erick was younger. My mother sees similarities between Tyler and Erick as well.
9. My nephew Devon, John's oldest son, has been diagnosed with ADD and takes special education classes. Again, I believe the similarities between Devon and Erick exist. Assistance is available for Devon that was not available for Erick.
10. I live with my mother. I have seen my mom suffer because of her lack of education. I've also seen her not obtain assistance when she sought help. The state of Oregon mislead her and tried to terminate her rights to her sons John and Steven, my brothers. The State of Oregon mislead her by saying that this was helping her, when what it really did was tear apart the family structure and hurt our family.
11. This misrepresentation of "help" continues to tear at the relationship between my brothers, Steven and John, and my mother.
12. My family is very important to me. I would like to have an opportunity to get in touch with my niece, Amanda Stroud's daughter, through Amanda's mother Kathy Stroud. Although I've never met her, I want my niece to know that she has a family here in Washington who loves her and cares about her.
13. I love my brother and do not want him to get the death penalty.

DATED this 8<sup>th</sup> day of April, 2006.



  
Tiffany LeAndrea Conner

I, Guadalupe Ayala, a notary public, do hereby certify that on this 8<sup>th</sup> day of April, 2006, personally appeared before me Tiffany LeAndrea Conner, who, being by me first duly sworn, declared that he is the above mentioned person and that (s)he signed the foregoing document and that the statements therein contained are true.

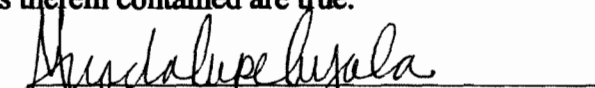
  
Notary Public for Idaho  
My commission expires 4.11.2012



EXHIBIT 39

00494

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

**AFFIDAVIT OF  
SHAWRNA MCCRACKEN  
HEMMING**

**(CAPITAL CASE)**

STATE OF IDAHO, )  
 ) ss  
County of Ada )

COMES NOW, Shawrna McCracken Hemming, being first duly sworn, deposes and says:

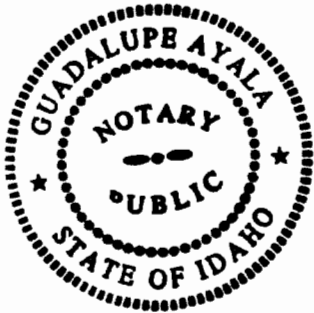
1. That all matters set forth are based on personal knowledge unless otherwise noted.
2. That I live at 212 North Dale in Anaheim, California. I am the last child born to Frank McCracken and Victoria McCracken. I believe that Erick and I share the same father, Frank McCracken Sr.; therefore, I am Erick's older half sister by 1 and 1/2 years.
3. That I was previously interviewed by the defense team on January 18, 2004 and January 24, 2004 and I testified on October 25, 2004.

4. I was contacted by the Prosecution about Erick's case before his trial. He seemed to be perturbed that I was not willing to speak with him. I felt that he was trying to make me feel guilty for loving my brother.
5. I love my brother and do not want to see him get the death penalty. He is an important part of our family.
6. I felt I did not completely answer the questions during my testimony. I was very nervous and felt that because our childhood was so horrific, it was not believable. I feel guilty that my testimony did not help him. I wish that I could have been more open with my answers and been better able to explain how bad our living situation was growing up.

DATED this 7 day of April, 2006.

Shawna McCracken Hemming  
SHAWNNA MCCRACKEN HEMMING

I, Guadalupe Ayala, a notary public, do hereby certify that on this 7<sup>th</sup> day of April, 2006, personally appeared before me Shawna McCracken Hemming, who, being by me first duly sworn, declared that he is the above mentioned person and that (s)he signed the foregoing document and that the statements therein contained are true.



Guadalupe Ayala  
Notary Public for Idaho  
My commission expires 4.11.12

EXHIBIT 40

00497

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,	)	
	)	CASE NO. SPOT0500155
Petitioner,	)	
	)	<b>AFFIDAVIT OF</b>
v.	)	<b>TAMARA MCCRACKEN</b>
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	<b>(CAPITAL CASE)</b>
_____	)	

STATE OF IDAHO, )  
                                  ) ss  
County of Ada        )

COMES NOW, Tamara McCracken, being first duly sworn, deposes and says:

1. All matters set forth are based on personal knowledge unless otherwise noted.
2. I live at 1768 N. Willow Woods Dr. in Anaheim, California. I am the first child born to Frank McCracken and Victoria McCracken. I believe that Erick and I share the same father, Frank McCracken Sr.; therefore, I am Erick's older half sister by eight years.
3. I was contacted by the Prosecution about Erick's case before his trial and asked whether if I was a good Christian and believed that someone did something wrong shouldn't they be held accountable for it. I responded that they should. They asked if I had ever killed anyone, and I said no. They suggested that I had the same childhood and implied that I hadn't killed anyone so why should Erick have

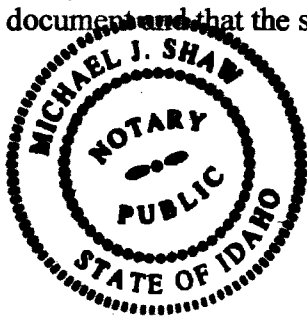
a defense based upon his childhood. I resented this insinuation by the Prosecution and attempt to trivialize the trauma Erick and I experienced.

4. I was previously interviewed by the defense team on January 24, 2004 and August 8, 2004.
5. On October 3, 2004, I called the defense team because I had decided not to testify.
6. I love my brother, and I decided that it was something I needed to do. I do not want him to get the death penalty. I still see Erick as a little boy. I decided to put myself through the stress and emotional turmoil in order to testify. I testified on October 25, 2004.

DATED this 7<sup>TH</sup> day of April, 2006.

Tamara McCracken  
TAMARA MCCRACKEN

I, Michael J. Shaw, a notary public, do hereby certify that on this 7<sup>TH</sup> day of April, 2006, personally appeared before me TAMARA MCCRACKEN, who, being by me first duly sworn, declared that he is the above mentioned person and that (s)he signed the foregoing document and that the statements therein contained are true.



Michael J. Shaw  
Notary Public for Idaho  
My commission expires 10/4/2011

ORIGINAL

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 2:03

MOLLY J. HUSKEY  
State Appellate Public Defender  
State of Idaho  
I.S.B. # 4843

JUN 30 2006

J. DAVID NAVARRO, Clerk  
By *[Signature]*  
DEPUTY

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,	)	
	)	CASE NO. SPOT0500155
Petitioner,	)	
	)	
v.	)	<b>NOTICE OF HEARING</b>
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	<b>(CAPITAL CASE)</b>

COMES NOW, Erick Virgil Hall, Defendant-Appellant, and notices the following motion for a hearing on a date previously scheduled by this Court on the 5th day of July, 2006, at 9:00 a.m.: Motion For Issuance of Subpoenas for Depositions and Subpoenas Duces Tecum for Production of Documents. The hearing will be held before the Honorable Thomas F. Neville at 200 West Front Street, Boise, Idaho.

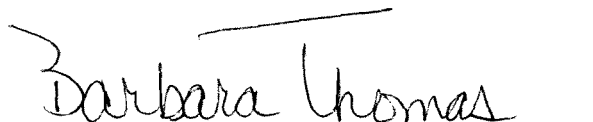
DATED this 29<sup>th</sup> day of June, 2006.

*Paula M. Swensen*  
\_\_\_\_\_  
PAULA M. SWENSEN  
Deputy State Appellate Public Defenders

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30<sup>th</sup> day of June, 2006, served a true and correct copy of the attached NOTICE OF HEARING by the method indicated below:

ERICK VIRGIL HALL INMATE # 33835 IMSI PO BOX 51 BOISE ID 83707	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail
THOMAS F. NEVILLE DISTRICT JUDGE 200 W. FRONT BOISE ID 83702	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail

  
\_\_\_\_\_  
BARBARA THOMAS  
CLU Administrative Assistant



Session: Neville070506  
Session Date: 2006/07/05  
Judge: Neville, Thomas F.  
Reporter: French, Janet

Division: DC  
Session Time: 08:52

Courtroom: CR501

Clerk(s):  
Ellis, Janet

State Attorneys:

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0001

Case Number: SPOT0500155D  
Plaintiff: HALL, ERICK VIRGIL  
Plaintiff Attorney: Ackley, Mark  
Defendant: STATE OF IDAHO  
Co-Defendant(s):  
Pers. Attorney:  
State Attorney: BOURNE, ROGER  
Public Defender:

2006/07/05

09:26:49 - Operator  
Recording:  
09:26:49 - New case  
, STATE OF IDAHO  
09:27:28 - Operator  
Stop recording:  
09:28:30 - Operator  
Recording:  
09:28:30 - Record  
, STATE OF IDAHO  
09:29:06 - Other: Ackley, Mark  
counsel for petitioner  
09:29:19 - Other: Swenson, Paula  
Counsel for Petitioner  
09:29:25 - Judge: Neville, Thomas F.

Court states initial motion to Disqualify is threshold motion. The Court has

09:29:58 - Judge: Neville, Thomas F.  
received State's objection to Motion to Disqualify

09:30:37 - Plaintiff Attorney: HUSKEY, MOLLY  
Ms. Huskey argues Motion to Disqualify

09:39:13 - Judge: Neville, Thomas F.  
The Court responded regarding the motion and memorandum signed by Ms. Huskey

09:39:51 - Plaintiff Attorney: HUSKEY, MOLLY  
Concurs, did careful review of the record before signing these motions and

09:45:00 - Plaintiff Attorney: HUSKEY, MOLLY  
memorandum. Continues argument, requests Court disqualify or in alternative

09:45:18 - Plaintiff Attorney: HUSKEY, MOLLY  
authorize interlocutory appeal.

09:45:54 - State Attorney: BOURNE, ROGER  
Mr. Bourne responded

09:54:29 - Plaintiff Attorney: HUSKEY, MOLLY  
objects to Mr. Bourne arguing issues that aren't the subject of this motion

09:54:46 - State Attorney: BOURNE, ROGER  
Mr. Bourne stated Ms. Huskey arguing Court claiming alphabet soup petition

09:55:25 - Judge: Neville, Thomas F.  
Court overruled

09:55:38 - State Attorney: BOURNE, ROGER  
Mr. Bourne cont'd to argument

10:01:18 - State Attorney: BOURNE, ROGER  
Request Court deny on appearance claim and bias claim

10:01:35 - Plaintiff Attorney: HUSKEY, MOLLY  
Ms. Huskey responded

10:11:59 - Plaintiff Attorney: HUSKEY, MOLLY  
Requeste Court grant motion and disqualify it self and if denied, request

10:12:25 - Plaintiff Attorney: HUSKEY, MOLLY  
Court articulate reasons and certify for appeal

10:12:37 - Judge: Neville, Thomas F.  
The Court will rule on the motion as filed. This is a matter of discretion.

10:13:08 - Judge: Neville, Thomas F.  
This Court is not biased against the defendant or Mr. Ackley either

10:13:56 - Judge: Neville, Thomas F.  
personally or professionally. This Court has gone the extra mile to protect

10:14:19 - Judge: Neville, Thomas F.

00503

Mr. Hall during the trial. Court remains confident that it can remain

10:14:44 - Judge: Neville, Thomas F.  
unbiased against defendant in the future. The Court has set over Maynard,

10:16:02 - Judge: Neville, Thomas F.  
Dunn, Norris, Payne & Hall and Hall again, and remain confident that it will

10:16:35 - Judge: Neville, Thomas F.  
remain unbiased. Court requested Mr. Bourne prepare an order articulating

10:17:34 - Judge: Neville, Thomas F.  
the Court's ruling. The Court will take recess to continue other hearings.

10:21:27 - Judge: Neville, Thomas F.  
The Court has been working on a draft of proposed order for release of juror

10:21:48 - Judge: Neville, Thomas F.  
questionnaires

10:22:22 - Other: Ackley, Mark  
Mr. Ackley responded no problems with Court's suggestions.

10:24:07 - Judge: Neville, Thomas F.  
Court takes short recess

10:24:20 - Operator  
Stop recording:

10:51:01 - Operator  
Recording:

10:51:01 - Record  
, STATE OF IDAHO

10:51:03 - Judge: Neville, Thomas F.  
The Court continues with hearing

10:52:19 - Judge: Neville, Thomas F.  
The Court will take up the hearing on the Motion to suspend post conviction

10:52:38 - Judge: Neville, Thomas F.  
proceeding

10:52:47 - Other: Ackley, Mark  
Mr. Ackley argued motion.

10:59:32 - Other: Ackley, Mark  
Request to suspend the post conviction case pending the Hanlon trial on 2007

11:01:40 - Judge: Neville, Thomas F.  
The Court had made the State bend over backwards, they were disallowed the

11:02:02 - Judge: Neville, Thomas F.  
use of the Hanlon case.

11:02:22 - Plaintiff Attorney: Ackley, Mark  
Responded

00504

11:06:54 - State Attorney: BOURNE, ROGER  
Mr. Bourne responded

11:13:10 - State Attorney: BOURNE, ROGER  
Request Court deny the Motion to Suspend proceedings

11:16:07 - Plaintiff Attorney: Ackley, Mark  
Mr. Ackley responded

11:16:15 - Judge: Neville, Thomas F.  
If Court were to suspend proceedings, would not be able to meet the

11:17:39 - Judge: Neville, Thomas F.  
obligations of proceeding expeditiously. Will all reasons stated on record,

11:19:48 - Judge: Neville, Thomas F.  
Court denies Motion to Suspend Post Conviction Proceeding, request State

11:20:08 - Judge: Neville, Thomas F.  
prepare order. Proceeding to Motion for Subpoena Duces Tecum

11:21:45 - Plaintiff Attorney: Ackley, Mark  
Mr. Ackley responded

11:22:15 - Plaintiff Attorney: Ackley, Mark  
Regarding production of documents, Mr. Myshin provided about 200 pages of

11:22:42 - Plaintiff Attorney: Ackley, Mark  
notes within the last month. Regarding Mr. Carr's files, do not know the

11:23:39 - Plaintiff Attorney: Ackley, Mark  
state of his files when he left the public defender's office

11:32:17 - Judge: Neville, Thomas F.  
Mr. Myshin agreeing to deposition, Mr. Carr requests compensation,

11:34:07 - Judge: Neville, Thomas F.  
mitigation specialist will depose with Court order and Mr. E lam

11:34:33 - Plaintiff Attorney: Ackley, Mark  
Mr. Ackley responded

11:34:44 - State Attorney: BOURNE, ROGER  
Mr. Bourne responded

11:40:44 - Judge: Neville, Thomas F.  
Court inquired if any objection to depositions being taken

11:40:59 - State Attorney: BOURNE, ROGER  
No objection to trial counsel

11:42:14 - Plaintiff Attorney: Ackley, Mark  
Mr. Ackley responded, would like to see if there is a system in place that

11:42:48 - Plaintiff Attorney: Ackley, Mark  
would show the case load for Mr. Myshin and Mr. Carr

11:44:39 - Judge: Neville, Thomas F.  
Court regarding counsel's files

11:44:51 - Plaintiff Attorney: Ackley, Mark  
Mr. Myshin has assured that his files have all been turned over, but do not

11:45:21 - Plaintiff Attorney: Ackley, Mark  
know about Mr Carrs

11:50:52 - Judge: Neville, Thomas F.  
Regarding depositions of Glen Elam & Roseann will deny those depositions at this

11:51:23 - Judge: Neville, Thomas F.  
time without prejudice. Regarding Mr. Carr & Mr. Myshin will grant under the

11:52:04 - Judge: Neville, Thomas F.  
rules. In respect to identifying all cases working on, not appropriate or

11:53:33 - Judge: Neville, Thomas F.  
relevant. Believe it would be overly oppressive, Regarding emails would

11:54:58 - Judge: Neville, Thomas F.  
also be oppressive and not sure they were even addressed, regarding subpoena

11:55:27 - Judge: Neville, Thomas F.  
duces tecum to turn over files of Mr. Carr left behind, Court will grant.

11:56:16 - Judge: Neville, Thomas F.  
Court will ask Mr. Askley to prepare order on these issues.

11:58:30 - Judge: Neville, Thomas F.  
Going to flip side of this motion, State's Motion in Limine.

11:58:55 - State Attorney: BOURNE, ROGER  
Mr. Bourne stated most interested in attorney client privilege, would like to see

11:59:40 - State Attorney: BOURNE, ROGER  
Mr. Myshin review his notes prior to deposition.

12:07:23 - Plaintiff Attorney: Ackley, Mark  
Mr. Ackley responded, inquired if could do depositions without court orders

12:08:03 - Plaintiff Attorney: Ackley, Mark  
if they are willing to.

12:09:26 - State Attorney: BOURNE, ROGER  
Mr. Bourne indicated would like to consider further but would at least like

12:10:04 - State Attorney: BOURNE, ROGER  
to know the topic of what may be deposed on

12:10:22 - Judge: Neville, Thomas F.  
The Court would need to maintain some control and would be inclined to have a

12:11:03 - Judge: Neville, Thomas F.

court order authorizing depositions even to those who voluntarily submit.

12:11:40 - Judge: Neville, Thomas F.  
Court grants Motion for attorney/client privilege. Regarding attorney notes of Mr.

12:13:49 - Judge: Neville, Thomas F.  
Hall and Mental Health experts

12:14:03 - State Attorney: BOURNE, ROGER  
Mr. Bourne will amend the motion to make more broad

12:18:11 - Plaintiff Attorney: Ackley, Mark  
Mr. Ackley responded

12:18:18 - Judge: Neville, Thomas F.  
The Court grants State's motion. Request State prepare order

12:20:56 - Judge: Neville, Thomas F.  
Court does not contemplate getting to the Motion to Dismiss today

12:24:11 - Operator  
Stop recording:

14:51:55 - Operator  
Recording:

14:51:55 - Record  
, STATE OF IDAHO

14:52:40 - Judge: Neville, Thomas F.  
The Court has received the James Merikangas C.V. during the break

14:54:24 - Judge: Neville, Thomas F.  
The Court understands counsel have worked on some things during the break.

14:55:07 - Plaintiff Attorney: Ackley, Mark  
Mr. Ackley argued the Motion to transport for Medical testing.

15:01:41 - State Attorney: BOURNE, ROGER  
Mr. Bourne responded

15:12:02 - State Attorney: BOURNE, ROGER  
Request Court deny or at least wait until Deposition of Amil Myshin

15:12:23 - State Attorney: BOURNE, ROGER  
completed.

15:14:06 - Plaintiff Attorney: Ackley, Mark  
Mr. Ackley responded

15:30:57 - Judge: Neville, Thomas F.  
The Court will deny motion without prejudice until depositions of trial

15:31:26 - Judge: Neville, Thomas F.  
counsel have been taken

15:33:47 - Judge: Neville, Thomas F.  
Court denies, request Mr. Bourne prepare an order. Inquires

what

- 15:34:04 - Judge: Neville, Thomas F.  
stipulations reached regarding discovery
- 15:34:33 - Plaintiff Attorney: Ackley, Mark  
Mr. Ackley responded
- 15:36:26 - State Attorney: BOURNE, ROGER  
Mr. Bourne stated can put a stipulation together on what items agreed on.
- 15:48:42 - Plaintiff Attorney: Ackley, Mark
- 15:48:45 - Judge: Neville, Thomas F.  
Court would like memorize the stipulation regarding discovery with a formal
- 15:49:36 - Judge: Neville, Thomas F.  
order for the Court file. Court would like to schedule hearing time for next
- 15:50:17 - Judge: Neville, Thomas F.  
round of motions
- 15:50:30 - Plaintiff Attorney: Ackley, Mark  
Would like to schedule depositions first before having next hearing set.
- 15:53:11 - State Attorney: BOURNE, ROGER  
Mr. Bourne responded.
- 15:54:42 - Judge: Neville, Thomas F.  
The Court identified Wednesday, September 27 @ 9:00 a.m. for hearing, have
- 15:55:06 - Judge: Neville, Thomas F.  
the whole day but will set half day at this point.
- 15:55:41 - Operator  
Stop recording:
-

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

NO. \_\_\_\_\_ FILED P.M. 4:29  
JUL - 6 2006

ERICK VIRGIL HALL, )  
Petitioner, )  
v. )  
STATE OF IDAHO, )  
Respondent. )

BY J. DAVID NAVARRO, Clerk  
DEPUTY

CASE NO. SPOT0500155

**ORDER GRANTING  
ACCESS TO COMPLETED  
JURY QUESTIONNAIRES**

**(CAPITAL CASE)**

Motion having been made and the Court otherwise being sufficiently advised during a telephonic hearing held on January 6, 2006, in-court hearings held on February 15 2006, and in part by stipulation of the parties

**IT IS HEREBY ORDERED** pursuant to I.C.R. 23.1 that the Ada County Jury Office custodian of the completed jury questionnaires, as assisted by this Court's staff, in Ada County Case No. H0300518, State v. Erick Hall, provide to Petitioner's counsel those questionnaires over which she has custody, as specified below:

- a. The custodian shall make copies of the questionnaires for **only those** prospective jurors who were passed or excused for cause, that is those brought into the court room for questioning or excused beforehand by stipulation;
- b. The custodian shall redact all names, addresses, phone numbers and information from which identity could be readily determined of the aforementioned prospective jurors; and
- c. The custodian shall provide copies of the aforementioned questionnaires (as redacted) directly to counsel for Petitioner or their agent forthwith.



**IT IS FURTHER HEREBY ORDERED** pursuant to I.C.R. 23.1 that Petitioner's counsel be provided copies of any jury questionnaires (as redacted) retained by or in the possession of the district court presiding in Ada County Case No. H0300518, State v. Erick Hall, including the twenty-six page jury questionnaire (as redacted) specifically tailored for the death/life qualification process, as specified below:

- a. Petitioner's access to copies of the aforementioned questionnaires is limited to only those prospective jurors who were passed or excused for cause, that is those brought into the courtroom for questioning or excused beforehand by stipulation;
- b. The aforementioned questionnaires shall be redacted of all names, addresses, phone numbers, and information from which identity could be readily determined.

**IT IS FURTHER HEREBY ORDERED** pursuant to I.C.R. 23.1 that counsel for the Petitioner shall take measures to protect juror confidentiality and shall not relinquish possession of any of the aforementioned questionnaires or otherwise provide copies to Petitioner.

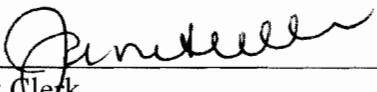
Dated this 6<sup>th</sup> day of July, 2006.

  
\_\_\_\_\_  
THOMAS F. NEVILLE  
District Judge

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 6 day of July, 2006, I served a true and correct copy of the foregoing ORDER GRANTING ACCESS TO COMPLETED JURY QUESTIONNAIRES by method indicated below to:

MARK ACKLEY STATE APPELLATE PUBLIC DEFENDER 3647 LAKE HARBOR LANE BOISE ID 83703	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input checked="" type="checkbox"/> Facsimile - <i>email</i> <input type="checkbox"/> Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input checked="" type="checkbox"/> Facsimile - <i>email</i> <input type="checkbox"/> Hand Delivery

  
\_\_\_\_\_  
Deputy Clerk

NO. \_\_\_\_\_  
FILED P.M. 4:10  
A.M. \_\_\_\_\_

JUL 11 2006

J. DAVID NAVARRO, Clerk  
By [Signature]  
DEPUTY

**GREG H. BOWER**  
Ada County Prosecuting Attorney

**Roger Bourne**  
Deputy Prosecuting Attorney  
Idaho State Bar No. 2127  
200 West Front Street, Room 3191  
Boise, Idaho 83702  
Phone: 287-7700  
Fax: 287-7709

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. SPOT0500155

ORDER DENYING MOTION  
TO DISQUALIFY NUNC  
PRO TUNE

*Jm*

**THIS COURT HAVING HEARD** argument and having considered the  
Petitioner's Motion to Disqualify this Court for cause, denies the motion. The Court  
recognizes that the decision to grant or deny a motion for disqualification for cause is a  
matter of discretion. After the hearing on the matter, the Court denies the motion for  
the reasons stated on the record. Specifically, the Court finds that the defendant's

*2*

motion, memorandum and supporting affidavit do no more than explain the course of events involved in a previous criminal case and that there is nothing about the previous criminal case that causes the Court to be biased against this petitioner nor against petitioner's counsel. This Court is confident that it can make the proper legal analysis necessary in the present case and that the Court has no bias against the petitioner or counsel and finds that there is no appearance of bias or prejudice.

*FM* For the reasons stated herein and on the record on July 5, 2006, the Motion to <sup>ref</sup> *disqualify*

*FM* Disqualify is denied. *This order shall be effective the date it was made or*  
*FM* *on the record, July 5, 2006, none pro tunc.*  
**IT IS SO ORDERED** this 11<sup>th</sup> day of July, 2006.

*Thomas F. Neville*  
**THOMAS F. NEVILLE**  
District Judge

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. 4:11

JUL 11 2006

By J. David Navarro Clerk  
DEPUTY

**GREG H. BOWER**  
Ada County Prosecuting Attorney

**Roger Bourne**  
Deputy Prosecuting Attorney  
Idaho State Bar No. 2127  
200 West Front Street, Room 3191  
Boise, Idaho 83702  
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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. SPOT0500155**

**ORDER DENYING THE  
MOTION TO SUSPEND  
POST-CONVICTION  
PROCEEDINGS**

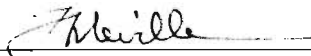
**AFTER HEARING ARGUMENT** on the petitioner's Motion to Suspend Post-Conviction proceedings and the Court being otherwise fully informed, the Court denies the motion for the reasons stated on the record on July 5, 2006. In summary, the Court is satisfied that there would be no benefit to the petitioner from a suspension of the proceedings given that any information developed during the pending post-conviction

**ORDER DENYING THE MOTION TO SUSPEND POST-CONVICTION PROCEEDINGS (HALL), Page 1**

**00514**

proceedings would ultimately need to be given to the State in discovery or as required by Idaho Code §18-207. Therefore, the petitioner is not prejudiced by a “premature disclosure” of his strategy as he claims in the motion. For those reasons together <sup>with</sup> the reasons stated on the record, the Motion to Suspend Proceedings is denied.

**IT IS SO ORDERED** this 11<sup>th</sup> day of July, 2006.

  
\_\_\_\_\_  
**THOMAS F. NEVILLE**  
District Judge

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4:12

JUL 11 2006

By J. David Navarro Clerk  
DEPUTY

**GREG H. BOWER**  
Ada County Prosecuting Attorney

**Roger Bourne**  
Deputy Prosecuting Attorney  
Idaho State Bar No. 2127  
200 West Front Street, Room 3191  
Boise, Idaho 83702  
Phone: 287-7700  
Fax: 287-7709

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, )  
)  
\_\_\_\_\_ )

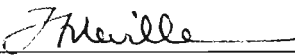
Case No. SPOT0500155  
**ORDER DENYING  
PETITIONER'S MOTION TO  
TRANSPORT FOR MEDICAL  
TESTING**

**THE COURT HAVING HEARD** the petitioner's Motion to Transport for Medical Testing denies the same without prejudice for the reason that no showing has *yet* been made of the expected relevance of the requested testing. No information was contained in the motion or supporting memorandum or affidavit of what a "P.E.T." scan does or what its results would likely show that might be relevant to issues in the

pending petition. The Court grants leave to refile the motion with additional documentation at a time after the depositions are completed of trial counsel.

IT IS SO ORDERED this 11<sup>th</sup> day of July, 2006.

JM

  
\_\_\_\_\_  
THOMAS F. NEVILLE  
District Judge



NO. \_\_\_\_\_ FILED  
A.M. \_\_\_\_\_ P.M. 4:12

JUL 11 2006

By J. DAVID NAVARRO Clerk  
DEPUTY

**GREG H. BOWER**  
Ada County Prosecuting Attorney

**Roger Bourne**  
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200 West Front Street, Room 3191  
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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,	)	Case No. SPOT0500155
vs.	)	
	)	ORDER WAIVING
THE STATE OF IDAHO,	)	ATTORNEY-CLIENT
	)	PRIVILEGE AND GRANTING
Respondent,	)	STATE'S ACCESS TO
	)	DOCUMENTS
_____	)	

**THE COURT HEARD ARGUMENT** and comments from counsel on the State's Motion to Waive the Attorney-Client Privilege and for State access to documents as amended during argument. The Court grants both motions. Pursuant to Idaho Rule of Evidence 502(d)(3), the attorney-client privilege is waived as to all communications made between the petitioner Erick Hall and his trial counsel and their

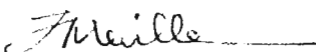
**ORDER WAIVING ATTORNEY-CLIENT PRIVILEGE AND GRANTING STATE'S ACCESS TO DOCUMENTS (HALL), Page 1**

**00518**

staff or their consultants in the case of *State v. Erick Hall*, Ada County case number H0300518, the Henneman case. The attorney-client privilege is also waived as to any communications made in the Hanlon murder case, Ada County case number H0300624, that are relevant to any claims made in the pending post-conviction petition.

It is further ordered, based upon the State's motion, that the State have access to all notes and documents that trial counsel made or had access to during the trial or in preparation for the trial of the Henneman murder case. The State is also granted access to all notes taken by trial counsel, their investigators or consultants which were available to or used by trial counsel during their preparation for the trial. The Court understands that those documents and notes are now in the possession of the State Appellate Public Defender. The Court orders the State Appellate Public Defender to give the State and trial counsel access to those notes and documents <sup>in order</sup> to prepare for trial counsel's depositions, but leaves the mechanics of copying or reviewing the originals up to the parties unless further Court intervention is needed.

**IT IS SO ORDERED** this 11<sup>th</sup> day of July, 2006.

  
\_\_\_\_\_  
**THOMAS F. NEVILLE**  
District Judge

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. 8:05 P.M.

JUL 19 2006

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

By J. DAVID NAVARRO, Clerk  
DEPUTY

ERICK VIRGIL HALL, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 STATE OF IDAHO, )  
 )  
 Respondent. )

CASE NO. SPOT0500155

**ORDER GRANTING IN PART, AND DENYING IN PART, PETITIONER'S MOTION FOR ISSUANCE OF SUBPOENAS FOR DEPOSITIONS AND SUBPOENAS DUCES TECUM FOR PRODUCTION OF DOCUMENTS**

(Capital Case)

**AFTER HEARING ARGUMENT** on the Petitioner's Motion For Issuance Of Subpoenas For Depositions And Subpoenas Duces Tecum For Production Of Documents, and the Court otherwise being sufficiently advised, the Court grants in part, and denies in part, the motion for reasons stated fully on the record during a hearing held July 5, 2006 as follows:

Petitioner's motion for issuance of subpoenas compelling the presence of Petitioner's trial counsel, Amil Myshin and D.C. Carr, at a date and location to be determined by the parties for the purpose of obtaining their depositions is **GRANTED**.

Petitioner's motion for issuance of subpoenas compelling the presence of Petitioner's trial-level investigators, Glenn Elam (Ada County Public Defender investigator), and Rosanne Dapsauski (mitigation specialist), for the purpose of obtaining their depositions is **DENIED** without prejudice. The Court grants leave to file a motion to reconsider at a time following the depositions of trial counsel.

Petitioner's motion for issuance of subpoenas duces tecum compelling the production of any files of D.C. Carr held by the Ada County Public Defender Office that are relevant to Mr. Carr's representation of Petitioner in the underlying criminal case, *State v. Erick Hall*, Ada

**ORDER GRANTING IN PART, AND DENYING IN PART, PETITIONER'S MOTION FOR ISSUANCE OF SUBPOENAS FOR DEPOSITIONS AND SUBPOENAS DUCES TECUM FOR PRODUCTION OF DOCUMENTS (HALL)**

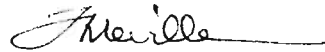
00520

County case number H0300518, and have not been previously disclosed, is **GRANTED**.  
Petitioner's similar request for files of Amil Myshin was withdrawn on the record during the July 5, 2006 hearing.

Petitioner's motion for issuance of subpoenas duces tecum compelling the production of documentation identifying the cases each trial team member worked on from April 1, 2003, through January 18, 2005 is **DENIED**.

Petitioner's motion for issuance of subpoenas duces tecum compelling the production of all email correspondence between the trial team and the Court or Court personnel is **DENIED**.

**IT IS SO ORDERED** this 18<sup>th</sup> day of July, 2006.



THOMAS F. NEVILLE  
District Judge

MOLLY J. HUSKEY  
State Appellate Public Defender  
State of Idaho  
I.S.B. # 4843

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4:35

JUL 19 2006

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

J. DAVID NAVARRO, Clerk  
By J. Navarro  
DEPUTY

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,	)	CASE NO. SPOT0500155
	)	
v.	)	<b>MOTION FOR PERMISSION TO APPEAL</b>
	)	<b>THE DENIAL OF PETITIONER'S</b>
	)	<b>MOTION TO DISQUALIFY</b>
STATE OF IDAHO,	)	
	)	
Respondent.	)	(Capital Case)

COMES NOW Petitioner, ERICK VIRGIL HALL, by and through his attorneys at the office of the Idaho State Appellate Public Defender (SAPD), and hereby moves this Honorable Court for permission to appeal, pursuant to the Idaho Appellate Rules, Rule 12, from this Court's Order Denying Petitioner's Motion to Disqualify *Nunc Pro Tunc*, filed July 11, 2006, effective July 5, 2006.

ORDER  
*This motion is hereby DENIED without a hearing. AND IT IS SO ORDERED. Dated: July 20, 2006.*  
Meville  
DISTRICT JUDGE

MOTION FOR PERMISSION TO APPEAL THE  
DENIAL OF PETITIONER'S MOTION TO DISQUALIFY

## ARGUMENT

### I.

#### **PERMISSION TO APPEAL SHOULD BE GRANTED AS THE MOTION TO DISQUALIFY PRESENTS A CONTROLLING QUESTION OF LAW AS TO WHICH THERE ARE SUBSTANTIAL GROUNDS FOR DIFFERENCE OF OPINION AND AN IMMEDIATE APPEAL WILL MATERIALLY ADVANCE THE ORDERLY RESOLUTION OF THE LITIGATION**

##### **A. Introduction and Relevant Background**

On June 14, 2006, Petitioner moved to disqualify this Court from presiding over these proceedings on the basis that the Court is biased against Petitioner and/or his counsel, or at least that there exists an appearance of bias. The motion was grounded on various unfavorable comments this Court has made about Petitioner's lead counsel, and post-conviction proceedings generally, as well as favorable comments about Petitioner's trial counsel. Petitioner asserted that this Court's bias, or the appearance of bias, stemmed from a flawed recollection of events that apparently created a lasting negative impression upon the Court. In addition, Petitioner argued that the Court should disqualify itself if it engaged in any *ex parte* contact with any juror in light of the Court's invitation to the jurors to discuss the case following their verdicts in the penalty phase of the trial and after they were relieved of their service but prior to formal sentencing and the current post-conviction proceedings. Petitioner supported his motion by way of affidavit and memorandum, with numerous attached motions, pleadings, and transcripts citing the various comments by the Court and establishing that the Court's memory was flawed.

On June 22, 2006, the State filed an objection to the motion to disqualify. *See* State's Objection To The Petitioner's Motion To Disqualify The Court (herein "State's Objection"). The State argued in part that Petitioner's motion was merely a recitation of adverse rulings in

a separate case, and as such, did not set forth legitimate grounds for disqualification. (State's Objection, pp.2, 8, 11.) The State did not cite to, or accurately reference, any of the motions, pleadings, or transcripts that Petitioner had attached to his memorandum in support of his motion.

On July 11, 2006, following a hearing on the motion held July 5, 2006, this Court entered a written order *nunc pro tunc* denying Petitioner's motion. The Court adopted the majority of the State's argument including its position that the Petitioner's motion "[did] no more that explain the course of the events...." See Order Denying Motion To Disqualify *Nunc Pro Tunc*, effective July 5, 2006, p.2. The Court neither addressed whether it had any contact with the jurors after their release nor whether its comments about Petitioner's counsel stemmed from a flawed recollection of events.

**B. Relevant Legal Standards For Interlocutory Appeals**

Idaho Appellate Rule 12 provides a mechanism for a party to seek permission to file an immediate appeal from an interlocutory order. The rule mandates that a motion for permission to appeal must be made to the district court prior to filing a motion for permissive appeal to the Idaho Supreme Court, and must be filed within fourteen days from the date of entry of the order at issue. I.A.R. 12(b). A district court should grant permission for an interlocutory appeal where there is a "controlling question of law" as to which there are "substantial grounds for difference of opinion" and where allowing an immediate appeal "may materially advance the orderly resolution of the litigation." I.A.R. 12(a). "It was the intent of I.A.R. 12 to provide an immediate appeal from an interlocutory order if substantial legal issues of great public interest or legal questions of first impression are involved."

*Budell v. Todd*, 105 Idaho 2, 4, 665 P.2d 701, 703 (1983). Petitioner can satisfy this threshold showing.

**C. Permission To Appeal Should Be Granted As The Motion To Disqualify Presents A Controlling Question Of Law As To Which There Are Substantial Grounds For Difference Of Opinion And An Immediate Appeal Will Materially Advance The Orderly Resolution Of The Litigation**

The denial of Petitioner's motion presents a controlling question of law. Specifically, whether a district court must disqualify itself from presiding over a capital post-conviction case on grounds of bias, or the appearance of bias, based on circumstances including the following: (1) that during this case, the underlying criminal case, and in an unrelated case, the Court made unfavorable comments about Petitioner's lead counsel, as well as post-conviction proceedings generally, where such comments stemmed from a flawed recollection of events and created at least an appearance that the Court is biased against Petitioner and/or his counsel; and (2) that during the underlying criminal case, the Court invited jurors to discuss the case with the Court following their release from service and after rendering a verdict but prior to formal sentencing and post-conviction proceedings, and where the Court has not clarified in these proceedings whether the Court actually spoke to any of the jurors.

There are substantial grounds for difference of opinion regarding this controlling question of law. Specifically, while the case law generally supports Petitioner's motion, there has been no case cited by either Petitioner or the State that is directly on point. Thus, Petitioner drew upon supporting principles to support his motion, while the State drew false analogies to cases standing for the valid proposition that a motion to disqualify will fail if based solely on a recitation of proceedings, or upon adverse rulings.<sup>1</sup> In short, due to the

---

<sup>1</sup> Petitioner hereby incorporates by reference the legal and factual argument contained in his Motion To Disqualify and the State's Objection.



unique facts of this case, this case presents an issue of first impression appropriate for immediate consideration by the Idaho Supreme Court. *See Budell v. Todd*, 105 Idaho at 4, 665 P.2d at 703 (“It was the intent of I.A.R. 12 to provide an immediate appeal from an interlocutory order if . . . legal questions of first impression are involved.”)

Finally, allowing an immediate appeal will materially advance the orderly resolution of this litigation because Petitioner asserts that if this Court continues to preside over the post-conviction proceedings, his due process right entitling him to an unbiased judge and the appearance of justice will continue to be violated. Petitioner asserts that for the Court to rule on his pending post-conviction claims would violate his rights under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and Article I §§ 6, 13 of the Idaho Constitution.

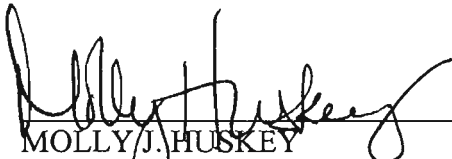
### CONCLUSION

Neither the State nor the Court acknowledged that the Court’s comments evincing at a minimum the appearance of bias stem from a false recollection of events. The apparent unwillingness of the Court to recognize the impropriety and inaccuracy of its statements leads Petitioner to believe that the Court’s false impression and bias is deep seated. Further, there is a question regarding whether the Court engaged in *ex parte* contact with the jurors in this case, again due in large part by the Court’s failure to address this aspect of Petitioner’s motion. Under the unique facts of this case, a controlling question of law exists as to which there are substantial grounds for difference of opinion. Allowing an immediate appeal will materially advance the orderly resolution of this litigation under the special procedures for unitary appellate review of criminal and post-conviction proceedings required in capital

cases. Accordingly, Petitioner respectfully requests that this Court grant permission to appeal from this Court's post-conviction order denying Petitioner's motion for disqualification and then stay these post-conviction proceedings pending resolution of the appeal by the Idaho Supreme Court.

Dated this 19<sup>th</sup> day of July, 2006.

Respectfully submitted,

  
MOLLY J. HUSKEY  
Idaho State Appellate Public Defender

CERTIFICATE OF SERVICE

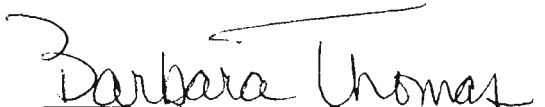
I HEREBY CERTIFY that I have on this 19<sup>th</sup> day of July, 2006, served a true and correct copy of the foregoing MOTION FOR PERMISSION TO APPEAL THE DENIAL OF PETITIONER'S MOTION TO DISQUALIFY, as indicated below:

ERICK V. HALL  
INMATE #33835  
IMSI  
PO BOX 51  
BOISE ID 83707

U.S. Mail  
 Statehouse Mail  
 Facsimile  
 Hand Delivery

ROGER BOURNE  
ADA COUNTY PROSECUTOR'S OFFICE  
200 W FRONT STEET 3RD FLOOR  
BOISE ID 83702

U.S. Mail  
 Statehouse Mail  
 Facsimile  
 Hand Delivery

  
BARBARA THOMAS  
Administrative Assistant

FILED 5:1  
 P.M.  
 11 2006  
*Melanie One*  
 DEPUTY

**GREG H. BOWER**  
 Ada County Prosecuting Attorney

**Roger Bourne**  
 Deputy Prosecuting Attorney  
 Idaho State Bar No. 2127  
 200 West Front Street, Room 3191  
 Boise, Idaho 83702  
 Phone: 287-7700  
 Fax: 287-7709

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,	)	<b>Case No. SPOT0500155</b>
vs.	)	
	)	<b>PARTIAL AGREEMENT ON</b>
THE STATE OF IDAHO,	)	<b>DISCOVERY</b>
	)	
Respondent,	)	
	)	
_____	)	

**COMES NOW**, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, representing the respondent and Mark Ackley, State Appellate Public Defender's Office, representing the petitioner Erick Hall, who together put before the Court their agreement on some of the items requested in the petitioner's Motion for Discovery.

On page 6 of the motion for discovery item I.G.4, the State agrees that the Court may order a transcript of the hearing, held October 28, 2003, to release the 1992 pre-sentence investigation report made for the defendant's rape conviction.

X

On page 7, item I.G.6. of the motion, the State agrees to inquire as to whether or not any police reports or recordings relating to Norma Jean Oliver's 1991 arrest for runaway are still in existence, and if they are in existence, to provide them to the petitioner.

Further, on page 7 relating to request I.G.8(a), the State agrees that the Court may enter an order granting access for the petitioner's counsel to a copy of the Grand Jury transcript from the petitioner's 1991 rape case.

On page 7, item I.G.8(b) and I.G.8(c) the petitioner has clarified that by "contact sheet" he means the negatives for the photos. The State will inquire as to whether the negatives still exist and will provide them if they do. As to subparagraph (c), the petitioner has clarified that photocopies of the photos of Ms. Oliver in the rape case will suffice and the State agrees to provide color photocopies of the photos if the State has color photos, or black and white photocopies if the State does not have color photos, unless the negatives are available.

As to I.G.8(g) on page 7, the State agrees to inquire as to whether a tape recording still exists of the petitioner or Norma Jean Oliver from the 1991 rape case and to provide them to the petitioner if they do exist.

On page 13, 14, and 15, the petitioner requests certain information from the Coroner's office. The State has agreed to inquire of the Coroner's office about certain of the items and to report on their availability to the petitioner.

On page 18, request II.A.4, the State agrees to provide copies of the Powerpoint slides used in the closing arguments by the State, if they are available.

On page 21, request III.F.7, the State agrees to provide the police reports relating to the petitioner's failure to register as a sex offender in Ada County case number M0303573.


On page 21, request III.F.6, the State agrees to provide the police reports in the State's file documenting the petitioner's prison escape for which he was charged.


On page 22, request III.F.12, the State agrees to look in its file to see whether Lynn Henneman's cellular phone records are available showing her phone use from the time of her disappearance forward to the termination of her telephone service.

On page 23, request IV.G, the State agrees to inquire as to whether or not there was any reward money offered for assistance in the Henneman case and whether or not any reward was claimed in that case.

RESPECTFULLY SUBMITTED, this 30<sup>th</sup> day of August 2006.

**GREG H. BOWER**  
Ada County Prosecutor

  
Mark Ackley  
Attorney for Petitioner

  
Roger Bourne  
Deputy Prosecuting Attorney

Session: Neville092706  
Session Date: 2006/09/27  
Judge: Neville, Thomas F.  
Reporter: French, Janet

Division: DC  
Session Time: 08:44

Courtroom: CR501

Clerk(s):  
Ellis, Janet

State Attorneys:

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0001

Case Number: SPOT0500155D  
Plaintiff: HALL, ERICK  
Plaintiff Attorney: ACKLEY, MARK  
Defendant: STATE OF IDAHO  
Co-Defendant(s):  
Pers. Attorney:  
State Attorney: BOURNE, ROGER  
Public Defender:

2006/09/27

09:14:11 - Operator  
Recording:  
09:14:11 - New case  
, STATE OF IDAHO  
09:14:30 - Judge: Neville, Thomas F.  
Petitioner not present for the record  
09:15:03 - Other: Swanson, Paula  
present on behalf of the Petitioner as well  
09:15:14 - Judge: Neville, Thomas F.  
Court made record of unscheduled telephone conference at tail end of trial  
09:15:40 - Judge: Neville, Thomas F.  
deposition of D.C. Carr on September 13th. Court advised did not have  
09:16:23 - Judge: Neville, Thomas F.

Court reporter on that occasion. Mr. Ackley advised the Court that the

09:16:52 - Judge: Neville, Thomas F.  
deposition was not complete and needed to continue deposition over to later

09:17:10 - Judge: Neville, Thomas F.  
date. Agreement to set over to October 19th

09:17:39 - Plaintiff Attorney: ACKLEY, MARK  
Mr. Ackley concurred, did make record of that in the transcript as well.

09:18:36 - Judge: Neville, Thomas F.  
The Court also held another telephone conference last night about 5:10

09:18:57 - Judge: Neville, Thomas F.  
regarding what would be on schedule for today. Court received an email

09:19:43 - Judge: Neville, Thomas F.  
transmitted yesterday. Mr. Ackley stated was trying to make written

09:20:29 - Judge: Neville, Thomas F.  
requests, Mr. Ackley stated would like to be more thoughtful and complete

09:20:46 - Judge: Neville, Thomas F.  
written requests. Court stated that depositions will be complete on Oct.

09:21:34 - Judge: Neville, Thomas F.  
19th and transcripts complete thereafter, and would be preferable to do this

09:21:52 - Judge: Neville, Thomas F.  
hearing once. Mr. Ackley stated could have written responses by November 3rd

09:23:24 - Judge: Neville, Thomas F.  
and could have this hearing on November 9th.

09:23:45 - Plaintiff Attorney: ACKLEY, MARK  
Mr. Ackley stated written supp. justification to discovery requests could be

09:24:13 - Plaintiff Attorney: ACKLEY, MARK  
done by November 3rd.

09:24:55 - Judge: Neville, Thomas F.  
Court not requesting Mr. Bourne to respond in writing prior to November 9th.

09:25:43 - Judge: Neville, Thomas F.  
Court will set this over to November 9th at 9:00 a.m.

09:25:58 - Plaintiff Attorney: ACKLEY, MARK  
Mr. Ackley stated Roseanne Depkowski agreed to be deposed and will provide an

09:26:23 - Plaintiff Attorney: ACKLEY, MARK  
order for an October 4th deposition.

09:26:49 - Judge: Neville, Thomas F.  
Court has ordered the G/J of prior rape case involving Norma  
n Jean Oliver

09:28:37 - Operator  
Stop recording:



ORIGINAL

MOLLY J. HUSKEY, I.S.B. # 4843  
State Appellate Public Defender  
State of Idaho

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

NO. \_\_\_\_\_ FILED P.M. 4:55  
A.M. \_\_\_\_\_

DEC - 6 2006

J. DAVID NAVARRO, Clerk  
By [Signature]  
DEPUTY

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. )  
)  
THE STATE OF IDAHO, )  
)  
Respondent. )

Case No. SPOT0500155

**EX PARTE MOTION FOR EXPERT  
ACCESS TO PETITIONER**

**(Capital Case)**

COMES NOW the Petitioner, ERICK VIRGIL HALL, by and through his attorneys, the State Appellate Public Defender's Office, and moves this Honorable Court to order the Department of Correction (DOC) and the Idaho State Maximum Security Institution (IMSI) to grant Myla H. Young, Ph.D. of Walnut Creek, California, access to Petitioner in a quiet and confidential setting suitable for interview, testing, and evaluation. Petitioner moves that such access be granted on the 14<sup>th</sup> and 15<sup>th</sup> of December, 2006, between the hours of 8 a.m. and 5 p.m.

Further, although the Court denied Petitioner's motion to generally use *ex parte* procedures, but because the Court permitted counsel to apply on a case-by-case basis, Petitioner moves that this Order be granted *ex parte*. This request is necessary to develop the following

✓

claims as stated in Petitioner's Amended Petition for Post-Conviction Relief, filed April 17, 2006 (hereinafter "Amended Petition):

1. Claim S.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. (Amended Petition, pp. 160-163.)

Petitioner has claimed, and must be allowed to establish evidence to support his claim that trial counsel was ineffective in failing to establish neurological deficits, mental retardation, and mental illness. Although trial counsel did have neuropsychological testing conducted by Dr. Linda Gummow, they did not utilize Dr. Gummow's results or testimony. At a minimum, Dr. Gummow's testing must be reviewed by Petitioner's experts for technique, thoroughness, and accuracy. In particular, Petitioner contends that Dr. Gummow's I.Q. testing was inaccurate or inadequately administered. (*See* Amended Petition, p.160, n.43.)

2. Claim BB.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. (Amended Petition, pp. 204-205.)

Petitioner requires expert assistance in determining how the later IQ testing could have been handled. Part of this assessment necessitates a determination of whether the testing was accurate in the first instance.

Petitioner prays that such access be granted to Dr. Young on the 14<sup>th</sup> and 15<sup>th</sup> of December, 2006, between the hours of 8 a.m. and 5 p.m. and that said Order allow the medical equipment necessary to the examination, as specified in Attachment A.

This motion is made pursuant to I.C. §§ 19-4001, et seq., and 19-870 and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and it is based upon all

matters of record and upon the accompanying AFFIDAVIT OF PAULA M. SWENSEN , which is by this reference herein incorporated in its entirety.

Dated this 6<sup>th</sup> day of December, 2006.

Respectfully submitted;

*Mark J. Ackley (by Paula M. Swensen)*  
MARK J. ACKLEY  
Chief, Capital Litigation Unit

*Paula M. Swensen*  
PAULA M. SWENSEN  
Deputy, Capital Litigation Unit

ATTACHMENT A

00537

**MYLA H. YOUNG, Ph.D., ABPN**

**Diplomate – American Board of Professional Neuropsychology  
PSY 11916**

Date: \_\_\_\_\_

Stop Watch (2)

Pencils (2)

Pens (2)

Highlighter (1)

Paper

Test Forms

File Folder

Laptop Computer

Stimulus Booklets with Spiral Binders:

TOMM (2)

WAIS III (1)

WIAT II (2)

EFT (1)

Short Category Test (5)

WMS III (2)

WAIS III

Plastic Blocks (9)

Stimulus Cards (3 x 5) (52)

Metal Tray with Pegs (25)

Smell Identification Cards (4 booklets)

EFT

Cardboard Pieces (18)

Wooden Board with 3 pegs and 5 discs

Wisconsin Card Sort

Box of 3 x 5 cards (132)

Finger Tapping Board

Audio Tape

CD Disc

Wooden Board with 10 wooden shapes, Stand and Blindfold

Binders (3 ring ) (2)

Other:

\_\_\_\_\_

\_\_\_\_\_

**00538**

Filed Thursday, December 21, 2006 at 04:18 PM

J. DAVID NAVARRO, CLERK OF THE COURT

BY: [Signature]  
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(s)

VS

STATE OF IDAHO, DEFENDANT  
Defendant(s)

CASE NO. SP-OT-05-00155\*D

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

**Post Conviction Relief Thursday, January 04, 2007 at 09:00 AM**

Judge: Thomas F Neville

Courtroom:

I certify that copies of this Notice were served as follows on Thursday, December 21, 2006.

MARK ACKLEY  
STATE APPELLATE PUBLIC DEFENDER  
VIA EMAIL

ROGER BOURNE  
ADA COUNTY PROSECUTING ATTORNEY  
VIA INTER DEPT MAIL

Mailed \_\_\_\_\_ Hand Delivered \_\_\_\_\_ Faxed x *email* ✓

Dated: Thursday, December 21, 2006

J. DAVID NAVARRO  
Clerk of the Court

By: [Signature]  
Deputy Clerk

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

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4:25

JAN - 8 2007

By J. David Navarro Clerk  
DEPUTY

**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

**FOURTH 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 files this Fourth Addendum to Petitioner's Amended Petition for Post-Conviction Relief (Amended Petition) filed with the Court on April 17, 2006. The purpose of this Fourth Addendum is to (A) submit an exhibit referenced in the Amended Petition, but inadvertently omitted from the exhibits submitted with the Amended Petition; (B) submit certified copies of court documents to replace those same documents submitted as exhibits to the Amended Petition without certification; and (C) submit additional affidavits and documents in support of claims raised in the Amended Petition.

A. Exhibit Referenced In The Amended Petition, But Inadvertently Omitted From The Exhibits Submitted With The Amended Petition.

Exhibit 36 was referenced in the Amended Petition but was unintentionally omitted upon filing. See Amended Petition, p. 175 (Claim W.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.”) Exhibit 36 contains multiple subparts, as follows:

1. Exhibit 36A: ACLU News Article regarding Timothy McNeese, dated September 15, 1999.
2. Exhibit 36B: Findings of Fact, Conclusions of Law, Memorandum Decision and Order Relating to Plaintiff’s Motion for Sanctions, filed September 13, 1999, District of Idaho Case No. CIV 91-0299-S-LMB, imposing sanctions against Deputy Attorney Generals Stephanie Altig and Timothy McNeese.
3. Exhibit 36C: *Gomez v. Vernon*, 255 F.3d 1188 (9<sup>th</sup> Cir. 2001), upholding imposition of sanctions against Deputy Attorney Generals Stephanie Altig and Timothy McNeese.

B. Certified Copies Of Court Documents Submitted As Exhibits To The Amended Petition.

The following are court documents constituting exhibits originally submitted with either the Amended Petition or subsequently filed addenda. The originals were not certified copies. Petitioner now submits certified copies of those same documents, utilizing the same exhibit numbers as originally designated.

1. Exhibit 3: *State v. Erick Hall*, Indictment, Ada County Case No. 91-99, filed December 19, 1991.
2. Exhibit 4: *State v. Erick Hall*, Amended Information/Indictment, Ada County Case No.HCR18591, filed April 23, 1991.
3. Exhibit 5: *State v. Erick Hall*, Order Regarding Dismissal of Probation Violation Allegations (Count II), Ada County Case No. 18094, dated April 23, 1992.
4. Exhibit 6: *State v. Michelle Deen*, Commitment, Ada County Case No. H0200584, Commitment and Cover Sheet with Handwritten Note regarding deal.



5. Exhibit 18: *State v. April Sebastian*, Register of Actions, Order Suspending Sentence and Order of Probation, and Court Minutes from 11/30/04, Ada County Case No. H0400228.
6. Exhibit 19: *State v. April Sebastian*, Register of Actions, Ada County Case No. M9513860.
7. Exhibit 20: *State v. April Sebastian*, Register of Actions, Ada County Case No. M9703840.
8. Exhibit 21: *State v. Erick Hall*, Complaint, Ada County Case No. M0303573.
9. Exhibit 33: *State v. Michelle Deen*, Register of Actions, Ada County Case No. H0301398.

C. Additional Affidavits And Documents In Support Of Claims Raised In The Amended Petition.

Petitioner further submits the following documents and affidavits in support of claims as specified below. Petitioner has continued with the exhibit numbering system used in the Amended Petition and subsequently filed Addenda to the Amended Petition.

1. Exhibit 42: DSM IV-TR, description of Bipolar Disorder. This exhibit supports the following claim in the Amended Petition:
  - a. Claim D.1.a, Amended Petition, pp.28-30 (“The State committed *Brady* violations by not disclosing documentation or information that Ms. Oliver suffers from Bipolar Disorder or other conditions tending to undermine her credibility as a witness.”).
2. Exhibit 43: Idaho State Police evidence receipts, affidavit and report dated December 6, 1991, regarding results of sex crimes kit on Norma Jean Oliver. This exhibit supports the following claims in the Amended Petition:
  - a. Claim D.1.b, Amended Petition, p.30 (“The State committed *Brady* violations by not disclosing the complete results of the sexual crimes examination and testing (“rape kit”) conducted in the Norma Jean Oliver statutory rape case.”)
  - b. Claim E.4, Amended Petition, pp.46-52 (“The Prosecutor Elicited Materially False Testimony From Norma Jean Oliver.”)

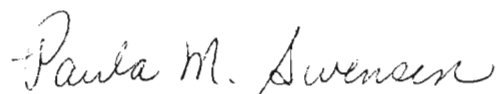
3. Exhibit 44: Trial counsel's copies of pictures introduced at trial as State's Exhibits 141-142, 145-148. This exhibit supports the following claims in the Amended Petition:
  - a. Claim D.1.c, Amended Petition, pp.30-31 ("The State committed *Brady* violations by not disclosing all photographic evidence that would have impeached the testimony of Norma Jean Oliver and Detective Daniel Hess and tended to show that Petitioner only committed the crime to which he pled, non-forcible statutory rape.")
  - b. Claim E.4, Amended Petition, pp.46-52 ("The Prosecutor Elicited Materially False Testimony From Norma Jean Oliver.")
4. Exhibit 45: *State v. April Sebastian*, Register of Actions, Ada County Case No. M0401584 (bound over to Case No. H0400228). This exhibit supports the following claim in the Amended Petition:
  - a. Claim D.2, Amended Petition, pp.32-33 ("The Prosecution Violated *Brady* By Failing to Disclose Favorable Evidence Pertaining to April Sebastian.")
5. Exhibit 46: *State v. Michelle Deen*, Register of Actions; Order for Substance Abuse Evaluation, Providing Funds, & Access to Defendant; Judgment of Conviction and Commitment; Order Suspending Sentence and Order of Probation; Ada County Case No. H0301398, showing representation by Amil Myshin. This exhibit supports the following claims in the Amended Petition:
  - a. Claim D.3, Amended Petition, pp.33-35 ("Prosecution Violated *Brady* By Failing To Disclose Favorable Evidence Pertaining To Michelle Deen Regarding Her Prior Criminal Convictions, Her Past Attempts To Broker Deals With The Police To Avoid Prosecution, And Her Compromised Mental Health As Reflected In By Court-Ordered Substance Abuse And Psychological Examinations.")
  - b. Claim S.8, Amended Petition, pp.166-167 ("Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate Michelle Deen.")
6. Exhibit 47: *State v. Michelle Deen*, Registers of Actions and note contained in court file, Ada County Case No. Case No. H0200584/M0203902, showing representation by both Amil Myshin and D.C. Carr. This exhibit supports the following claims in the Amended Petition:
  - a. Claim D.3, Amended Petition, pp.33-35 ("The Prosecution Violated *Brady* By Failing To Disclose Favorable Evidence Pertaining To Michelle Deen Regarding Her Prior Criminal Convictions, Her Past Attempts To Broker

- Deals With The Police To Avoid Prosecution, And Her Compromised Mental Health As Reflected In By Court-Ordered Substance Abuse And Psychological Examinations.”)
- b. Claim S.7, Amended Petition, pp.166-167 (“Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate Michelle Deen.”)
7. Exhibit 48: *State v. Rebecca McCusker*, Register of Actions, Ada County Case No. M0406765, child endangerment charges filed in 1994. This exhibit supports the following claims in the Amended Petition:
    - a. Claim D.4, Amended Petition, p.35 (“The Prosecution Violated *Brady* By Failing To Disclose Favorable Evidence Pertaining To Rebecca McCusker.”)
    - b. Claim S.7, Amended Petition, pp.165-166 (“Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate Evelyn Dunaway And Rebecca McCusker.”)
  8. Exhibit 49: *State v. Brian McCusker*, Register of Actions, Ada County Case No. M0404198, child endangerment charges filed in 1994. This exhibit supports the following claims in the Amended Petition:
    - a. Claim D.4, Amended Petition, p.35 (“The Prosecution Violated *Brady* By Failing To Disclose Favorable Evidence Pertaining To Rebecca McCusker.”)
    - b. Claim S.7, Amended Petition, pp.165-166 (“Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate Evelyn Dunaway And Rebecca McCusker.”)
  9. Exhibit 50: “Inadequate anesthesia in lethal injection for execution,” *The Lancet*, 2005:365: 1412-14. This exhibit supports the following claim in the Amended Petition:
    - a. Claim I.10, Amended Petition, pp.84-85 (“The Prosecution Committed Misconduct By Making Extra-Record Argument That Lethal Injections Are Painless and Humane.”)
  10. Exhibit 51: *State v. Erick Hall*, transcript of grand jury proceedings, Ada County Grand Jury Case No. 18591 (filed under seal). This exhibit supports the following claim in the Amended Petition:
    - a. Claim P.3, Amended Petition, pp.145-146 (“Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Effectively Cross-Examine Norma Jean Oliver.”)

11. Exhibit 52: *State v. Erick Hall*, Ada County Case No. H0300624, discovery documents found in trial counsels' files, including report of Dr. Vickman, with hand-written discovery numbers in lower right corners. This exhibit supports the following claim in the Amended Petition:
  - a. Claim P.3, Amended Petition, pp.145-146 ("Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Effectively Cross-Examine Norma Jean Oliver.")
  
12. Exhibit 53: *State v. Erick Hall*, Court Minutes, Ada County Case No. HCR18591/ 18094/17804, showing sentence of 5 years, with one year fixed on Case No. HCR18591. This exhibit supports the following claim in the Amended Petition:
  - a. Claim P.5, Amended Petition, pp.146-147 ("Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Effectively Cross-Examine Jay Rosenthal.")
  
13. Exhibit 54: Forensic Analytical, letter to Ada County Public Defender, dated May 4, 2004. This exhibit supports the following claim in the Amended Petition:
  - a. Claim R.1, Amended Petition, pp.152-153 ("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.")
  
14. Exhibit 55: Cellmark, amended report, dated April 28, 2003. This exhibit supports the following claim in the Amended Petition:
  - a. Claim R.1, Amended Petition, pp. pp.152-153 ("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.")
  
15. Exhibit 56: Affidavit of Amber Lynn (Peterson) Fox, dated June 7, 2006. This exhibit supports the following claim in the Amended Petition:
  - a. Claim S.5, Amended Petition, pp.163-165 ("Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate And Present Evidence Of Petitioner's Good Character As An Adult.")

16. Exhibit 57: Affidavit of Timothy Turley, dated November 30, 2006. This exhibit supports the following claim in the Amended Petition:
- a. Claim S.5, Amended Petition, pp.163-165 (“Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate And Present Evidence Of Petitioner’s Good Character As An Adult.”)
17. Exhibit 58: Affidavit of Laura Turley, dated July 3, 2006. This exhibit supports the following claim in the Amended Petition:
- a. Claim S.5, Amended Petition, pp.163-165 (“Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate And Present Evidence Of Petitioner’s Good Character As An Adult.”)
18. Exhibit 59: Affidavit of Rick Giambo, dated July 5, 2006. This exhibit supports the following claim in the Amended Petition:
- a. Claim S.5, Amended Petition, pp.163-165 (“Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate And Present Evidence Of Petitioner’s Good Character As An Adult.”)
19. Exhibit 60: Affidavit of Jennifer Demunbrun, dated September 7, 2006. This exhibit supports the following claims in the Amended Petition:
- a. Claim D.1, Amended Petition, pp.26-32 (“The Prosecution Violated *Brady* By Failing To Disclose Favorable Evidence Pertaining To Norma Jean Oliver.”)
  - b. Claim D.6, Amended Petition, p.36 (“The Prosecution Violated *Brady* By Failing To Disclose Favorable Evidence Pertaining To Wendy Levy.”)
  - c. Claim E.4, Amended Petition, pp.46-52 (“The Prosecutor Elicited Materially False Testimony From Norma Jean Oliver.”)
  - d. Claim S.5, Amended Petition, pp.163-165 (“Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate And Present Evidence Of Petitioner’s Good Character As An Adult.”)

DATED this 8<sup>th</sup> day January, 2007.



PAULA M. SWENSEN  
Co-Counsel, Capital Litigation Unit

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on this 8<sup>th</sup> day of January, 2007, a true and correct copy of the foregoing document, FOURTH 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	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail
THOMAS F. NEVILLE DISTRICT JUDGE 200 W. FRONT BOISE ID 83702	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> E-Mail

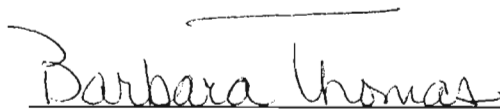
  
\_\_\_\_\_  
BARBARA THOMAS  
CLU Administrative Assistant

EXHIBIT 3

00548

GREG H. BOWER  
Ada County Prosecuting Attorney  
602 West Idaho Street  
Boise, Idaho 83702-5954  
Telephone: (208) 383-1237

NO. \_\_\_\_\_  
FILED 3:00  
A.M. P.M.

DEC 19 1991

J. DAVID NAVAFRO, Clerk  
By: *[Signature]*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,  
Plaintiff,  
-vs-  
ERICK VIRGIL HALL,  
Defendant.

Grand Jury No. 91-99  
I N D I C T M E N T

18591

Erick Virgil Hall is accused by the Grand Jury of Ada County by this Indictment, of the crime(s) of RAPE, FELONY, I.C. 18-6101, TWO COUNTS, committed as follows:

COUNT I

That the defendant, ERICK VIRGIL HALL, on or about the 3rd day of December, 1991, in the County of Ada, State of Idaho, did accomplish an act of vaginal sexual intercourse with a female person, Norma Jean Oliver, and the aforementioned act was accomplished where Norma Jean Oliver was under the age of eighteen years, to-wit: of the age of 17 years, DOB [REDACTED] and/or the



victim resisted but her resistance was overcome by force or fear in that the defendant choked her, tied her up and gagged her.

COUNT II

That the defendant, ERICK VIRGIL HALL, on or about the 3rd day of December, 1991, in the County of Ada, State of Idaho, did accomplish an act of anal sexual intercourse with a female person, Norma Jean Oliver, and the aforementioned act was accomplished where Norma Jean Oliver was under the age of eighteen years, to-wit: of the age of 17 years, DOB [REDACTED] and/or the victim resisted but her resistance was overcome by force or fear in that the defendant choked her, tied her up and gagged her.

All of which is contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the State of Idaho.

A TRUE BILL

Presented in open Court this 19th day of December, 1991.



Foreman of the Grand Jury of  
Ada County, State of Idaho.

STATE OF IDAHO }  
COUNTY OF ADA } SS.  
I, J. David Navarro, Clerk of the District Court of the Fourth  
Judicial District of the State of Idaho, in and for the County  
of Ada, do hereby certify that the foregoing is a true and cor-  
rect copy of the original on file in this office. In witness  
whereof, I have hereunto set my hand and affixed my offi-  
cial seal this \_\_\_\_\_ day  
of \_\_\_\_\_ 20\_\_\_\_  
J. DAVID NAVARRO, Clerk  
By: \_\_\_\_\_ Deputy

00550

Names of Witnesses Examined  
By the Grand Jury:

NORMA JEAN OLIVER  
DANIEL L. HESS

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EXHIBIT 4

**00552**

April 23, 1992  
Amo

GREG H. BOWER  
Ada County Prosecuting Attorney

Deputy Prosecuting Attorney  
602 West Idaho Street  
Boise, Idaho 83702-5954  
Telephone: (208) 383-1237

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,  
Plaintiff,

-vs-

ERICK VIRGIL HALL,  
Defendant.

*Amo*  
*Amended*  
INFORMATION *Amo*

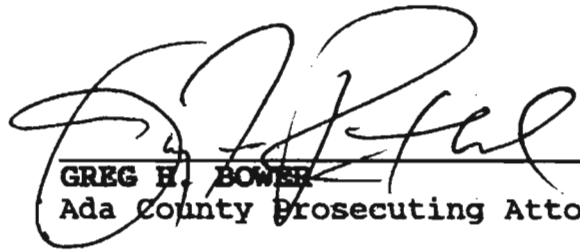
HCR18591

GREG H. BOWER, Prosecuting Attorney, in and for the County of Ada, State of Idaho, who in the name and by the authority of the State, prosecutes in its behalf, comes now into District Court of the County of Ada, and states that ERICK VIRGIL HALL is/are accused by this Information of the crime of: RAPE, FELONY I.C., 18-6101 which crime was committed as follows:

That the Defendant, ERICK VIRGIL HALL, on or about the 3rd day of December, 1991, in the County of Ada, State of Idaho, did accomplish an act of vaginal sexual intercourse with a female person, Norma Jean Oliver, and the aforementioned act was

accomplished where Norma Jean Oliver was under the age of eighteen years, to-wit: of the age of 17 years, DOB [REDACTED]

All of which is contrary to the form, force and effect of the statute in such case and against the peace and dignity of the State of Idaho.

  
\_\_\_\_\_  
GREG H. BOWER  
Ada County Prosecuting Attorney

STATE OF IDAHO }  
COUNTY OF ADA } SS.  
I, J. David Navarro, Clerk of the District Court of the Fourth  
Judicial District of the State of Idaho, in and for the County  
of Ada, do hereby certify that the foregoing is a true and cor-  
rect copy of the original on file in this office. In witness  
whereof, I have hereunto set my hand and affixed my offi-  
cial seal this \_\_\_\_\_ day  
of \_\_\_\_\_ 20\_\_\_\_  
J. DAVID NAVARRO, Clerk  
By \_\_\_\_\_ Deputy

EXHIBIT.5

00555

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

NO. 100  
FILED  
AM. \_\_\_\_\_ P.M. 1:00

MAY 1 1992

J. DAVID NAVARRO, CLERK  
BY [Signature]  
DEPUTY

THE STATE OF IDAHO, )  
 )  
Plaintiff, )  
 )  
vs. )  
Erick Hall, )  
 )  
Defendant. )

Case No. 18094

ORDER RE DISMISSAL  
OF PROBATION VIOLATION  
ALLEGATION(S)

Upon motion made in open court, and the Court being advised;  
IT IS HEREBY ORDERED That:

( ) All Allegations in the Motion for Probation Violation  
filed on \_\_\_\_\_, be and the same are hereby  
DISMISSED.

(X) Allegation(s) II  
of the Motion for Probation Violation filed on  
\_\_\_\_\_, be and the same are hereby  
DISMISSED.

Dated this 23rd day of April 1992

[Signature]  
ALAN M. SCHWARTZMAN  
District Judge

STATE OF IDAHO }  
COUNTY OF ADA } SS.  
J. David Navarro, Clerk of the District Court of the Fourth  
Judicial District of the State of Idaho, and for the County  
of \_\_\_\_\_ do hereby certify that the foregoing is a true and cor-  
rect copy of the original on file in this office. In witness  
whereof, I have hereunto set my hand and affixed my offi-  
cial seal this \_\_\_\_\_ day  
of \_\_\_\_\_ 20 \_\_\_\_\_  
By [Signature] J. DAVID NAVARRO, Clerk  
00556 Deputy

nc

EXHIBIT 6

00557



MAY 3 - 2002

J. DAVID NAVARRC  
By *Marlene G.*  
DEPUTY

**GREG H. BOWER**  
Ada County Prosecuting Attorney

Melissa Moody  
Deputy Prosecuting Attorney  
200 W. Front Street, Room 366  
Boise, Idaho 83702  
Phone: 287-7700  
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MICHELLE DEEN, )  
 Defendant. )

140200584  
Case No. M0203902  
**COMMITMENT**  
Defendant's DOB: [REDACTED]  
Defendant's SSN: [REDACTED]

THE ABOVE NAMED DEFENDANT, MICHELLE DEEN, having been brought before this Court for a Preliminary Examination on the 3 day of May, 2002, on a charge that the Defendant(s) on or about the 9th day of February, 2002, in the County of Ada, State of Idaho, did commit the crime(s) of: I. POSSESSION OF A CONTROLLED SUBSTANCE, FELONY, I.C. §37-2732(c); and II. POSSESSION OF DRUG PARAPHERNALIA, MISD., I.C. §37-2734A as follows:

COUNT I

That the defendant, MICHELLE DEEN, on or about the 9th of February 2002, in the County of Ada, State of Idaho, did unlawfully possess a controlled substance, to-wit: Methamphetamine, a Schedule II controlled substance.

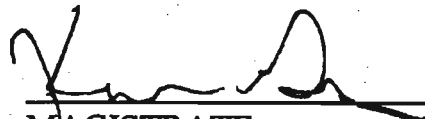
COUNT II

That the defendant, MICHELLE DEEN, on or about the 9th of February 2002, in the County of Ada, State of Idaho, did possess with the intent to use drug paraphernalia, to-wit: syringes, used to inject a controlled substance.

The Defendant(s) having so appeared and having had/having waived preliminary examination, the Court sitting as a Committing Magistrate finds that the offense charged as set forth has been committed in Ada County, Idaho, and that there is sufficient cause to believe that the Defendant(s) is/are guilty of committing the offense as charged.

WHEREFORE, IT IS ORDERED that the Defendant(s) be held to answer to the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, to the charge herein set forth. Bail is set in the sum of \$ 5,000.

DATED this 3 day of May, 2002.

  
\_\_\_\_\_  
MAGISTRATE

COVER SHEET

STATE OF IDAHO, )  
 Plaintiff )  
 vs. )  
 DEEN MICHELLE )  
 374 RIMVIEW )  
 BOISE ID 83706 )  
 SS# 519-94-7195 DOR 8/26/1969 )  
 Defendant )

CR. M0203902.01  
 Prosecuting Agency  
 Private  
 Public Defender

ARRAIGNMENT

Bond \_\_\_\_\_ Surety \_\_\_\_\_ ROR \_\_\_\_\_

Charges(s):  
 S 37-2732 F CONTROLLED SUBSTANCE VIOL GUILTY ( ) NOT GUILTY  
 S 37-2734-A M DRUG PARAPHERNALIA POSSES GUILTY ( ) NOT GUILTY

Continuances

To \_\_\_\_\_ At \_\_\_\_\_ .M. For \_\_\_\_\_  
 To \_\_\_\_\_ At \_\_\_\_\_ .M. For \_\_\_\_\_  
 To \_\_\_\_\_ At \_\_\_\_\_ .M. For \_\_\_\_\_  
 To \_\_\_\_\_ At \_\_\_\_\_ .M. For \_\_\_\_\_  
 To \_\_\_\_\_ At \_\_\_\_\_ .M. For \_\_\_\_\_

Preliminary:  
 Held On \_\_\_\_\_ Waived \_\_\_\_\_ Discharged \_\_\_\_\_ Bound Over \_\_\_\_\_  
 Trial With/Without \_\_\_\_\_ Jury held on \_\_\_\_\_  
 Amended Complaint: Guilty \_\_\_\_\_ Not Guilty \_\_\_\_\_

Disposition:  
 Not Guilty \_\_\_\_\_ Guilty \_\_\_\_\_ Dismissed \_\_\_\_\_ Withheld Judgment \_\_\_\_\_  
 Penalty: Fined \$ \_\_\_\_\_ Costs \$ 24.50 Jail \_\_\_\_\_

*2-9 - Narc. arrest made  
 by patrol. D arrested w/  
 18.4g of meth (+). D wanted  
 to talk to police re: "deal."  
 D said meth not hers +  
 didn't want to go down on  
 someone else dope. D then  
 failed to contact cops after  
 they spoke. 2 syringes found  
 w/ dope*

day of

STATE OF IDAHO }  
 COUNTY OF ADA } SS.  
 I, J. David Navarro, Clerk of the District Court of the Fourth  
 Judicial District of the State of Idaho, in and for the County  
 of Ada, do hereby certify that the foregoing is a true and cor-  
 rect copy of the original on file in this office. In witness  
 whereof, I have hereunto set my hand and affixed my offi-  
 cial seal this \_\_\_\_\_ day  
 of \_\_\_\_\_ 20\_\_\_\_ at \_\_\_\_\_  
 J. DAVID NAVARRO, Clerk  
 By \_\_\_\_\_ Deputy

00560

EXHIBIT 18

00561

COURT 1 District  
ISSUING AGENCY M Meridian  
MUNICIPALITY ME Meridian City  
JUDGE 191 Ronald J Wilper  
CASE REF M0401584  
PROSECUTOR A 101 SPEC PROS-Attorney Gen  
VICTIM COORDINATOR A 062 Mandie Metier  
2/23/2004 Case Created Bind Over M0401584

Defendant(s):  
01 SEBASTIAN APRIL MAE LE# 059733

Charge(s):  
001 S 18-1401 BURGLARY Felony Disposed 6/22/04  
002 S 18-2407 PETIT THEFT Misdemeanor Disposed 6/22/04  
003 S 20-227-B PROBATION VIOLATION Felony Disposed 10/24/04

Register of Actions:

ENTERED---CNT---EVENT-----  
2/23/2004 001 Commitment and Papers  
2/23/2004 001 Defendant Transferred In M0401584 D.01  
2/23/2004 001 Count Bound From M0401584 D.01 C.001  
2/23/2004 001 Bond Transferred From M0401584 D.01 C.001  
2/23/2004 002 Count Bound From M0401584 D.01 C.002  
2/23/2004 Event Scheduled 0900 3/02/2004  
2/23/2004 001 Bond Reduced or Amended to \$5000.00  
2/23/2004 003 Charge Created  
2/25/2004 Information and Papers Filed  
2/25/2004 Notice of Hearing  
2/25/2004 Motion for Bond Reduction  
3/02/2004 Arraignment  
3/02/2004 001 Not Guilty Plea  
3/02/2004 002 Not Guilty Plea  
3/02/2004 Jury Trial Set 5/05/2004  
3/02/2004 Event Scheduled Pre-Trial Conference 4/27/2004  
3/04/2004 Notice of Jury Trial  
4/08/2004 State/City Request for Discovery  
4/08/2004 State/City Response to Disc. Req  
4/15/2004 Notice of Intent to Use IRE  
404(b) & ICR 16  
4/19/2004 State/City Response to Disc. Req/Addendum  
4/27/2004 Pre-Trial Conference  
4/27/2004 001 Change Plea to Guilty Before Tri  
4/27/2004 Event Scheduled Sentencing Hearing 6/08/2004  
4/30/2004 Plea Form  
6/08/2004 Event Scheduled Sentencing Hearing 6/22/2004  
6/22/2004 Sentence Hearing  
6/22/2004 001 Retained Jurisdiction 180 days  
6/22/2004 001 Sentenced to ISCI 5y 84d cr  
6/22/2004 002 Dismissed Before Trial or Hearin  
6/24/2004 Judgment of Convctn  
6/24/2004 001 Exoneration of Bond A7-2097936 6/24/2004  
11/19/2004 Order to Transport  
11/19/2004 Rider Hearing 11/30/2004  
11/30/2004 Rider Hearing  
11/30/2004 001 Judgment Reconsidered  
11/30/2004 001 Judgment Reconsidered S 18-1401 BURG  
11/30/2004 001 Sentence Modified- Fines  
11/30/2004 001 Sentenced to Fine & Costs \$88.50  
11/30/2004 001 Sentence Modified- P D Fees  
11/30/2004 001 Sentenced to Reimburse P D \$250.00  
11/30/2004 001 Sentence Modified- Restitution  
11/30/2004 001 Sentenced to Restitute \$350.90  
11/30/2004 001 Sentence Modified- Incarceration  
11/30/2004 001 Sentenced to ISCI 5y 5y sp 84d cr  
12/01/2004 Order Suspending Sentence  
& Order of Probation  
1/14/2005 001 Fine Agreement Set 1/14/2005  
3/16/2005 001 Partial Payment A1746480 \$52.00  
7/11/2005 001 Partial Payment A1779816 \$104.00  
11/02/2005 001 Partial Payment A1813815 \$52.00  
3/03/2006 001 Partial Payment A1850723 \$52.50  
4/25/2006 001 Partial Payment A1867494 \$100.00  
5/22/2006 001 Fines & Costs Modified Rest J & S refund 5/22/2006  
6/08/2006 001 Partial Payment A1881551 \$107.55  
7/14/2006 001 Final Payment A1895758 \$167.45  
9/12/2006 Arraignment 9/19/2006  
9/12/2006 003 Bond Set at \$50000.00  
9/12/2006 Order PD Appointed

9/12/2006 Arraignment Arraignment 9/19/2006  
9/13/2006 Order for pv  
9/14/2006 Notice of Hearing  
9/14/2006 Motion for Bond Reduction  
9/14/2006 Defendant Request For Discovery  
9/14/2006 Event Scheduled Hearing 9/19/2006  
9/19/2006 Arraignment  
9/19/2006 Event Scheduled Admit/Deny Hearing 9/26/2006  
9/19/2006 Motion for PV  
9/26/2006 Admit/Deny Hearing  
9/26/2006 Event Scheduled Admit/Deny Hearing 10/10/2006  
9/28/2006 Defendant Request For Discovery  
9/28/2006 Sub of Counsel/  
Barnum  
9/29/2006 Petition for Apptmnt  
of Special Prosecutr  
9/29/2006 Order for Appointment of  
Special Prosecutor  
10/06/2006 State/City Response to Disc. Req  
10/10/2006 Admit/Deny Hearing  
10/10/2006 Event Scheduled Admit/Deny Hearing 10/17/2006  
10/17/2006 Admit/Deny Hearing  
10/17/2006 Event Scheduled Admit/Deny Hearing 10/24/2006  
10/18/2006 State/City Response to Disc. Req  
10/24/2006 Admit/Deny Hearing  
10/24/2006 003 Guilty Plea  
10/24/2006 003 Final Judgment, Order or Decree  
10/24/2006 003 Sentenced to Jail 90d 48d cr  
Concurrent  
10/24/2006 003 Placed on Probation 5y  
Standard Terms  
10/25/2006 Order for Revoke of Proba-  
tion & Reinstate

STATE OF IDAHO }  
COUNTY OF ADA } SS.

I, J. David Navarro, Clerk of the District Court of the Fourth  
Judicial District of the State of Idaho, in and for the County  
of Ada, do hereby certify that the foregoing is a true and cor-  
rect copy of the original on file in this office. In witness  
whereof, I have hereunto set my hand and affixed my offi-  
cial seal this 4th day

of January 2007  
J. DAVID NAVARRO, Clerk  
By [Signature] Deputy

DEC - 1 2004

J. DAVID NAVARRO  
By: *[Signature]*  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,

Plaintiff,

vs.

APRIL MAE SEBASTIAN aka LAMING,

Defendant.

DOB: [REDACTED]  
SSN: [REDACTED]

Case No. H0400228

ORDER SUSPENDING SENTENCE  
AND ORDER OF PROBATION

WHEREAS, on the 27<sup>th</sup> day of April, 2004, April Mae Sebastian aka Laming pled guilty in the District Court of the Fourth Judicial District in and for the County of Ada to the crime of Count I: Burglary, a felony under I.C. §18-1401 and, on the 22<sup>nd</sup> day of June, 2004, was committed to the custody of the Idaho State Board of Correction, under the Unified Sentence Law of the State of Idaho, for an aggregate term of five (5) years, to be served as follows: a minimum period of confinement of one (1) year, followed by a subsequent indeterminate period of custody not to exceed four (4) years with said term to commence immediately.

AND WHEREAS the court retained jurisdiction for 180 days to suspend execution of Judgment pursuant to Section 19-2601(4), of the Idaho Code;

AND WHEREAS, the District Court, having ascertained the desirability of suspending execution of the judgment and placing the defendant on probation for the balance of said sentence;

STATE OF IDAHO }  
COUNTY OF ADA } SS.  
I, J. David Navarro, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the foregoing is a true and correct copy of the original on file in this office. In witness whereof, I have hereunto set my hand and affixed my official seal this \_\_\_\_\_ day of \_\_\_\_\_, 2004.  
J. DAVID NAVARRO, Clerk

1 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that said defendant, April  
2 Mae Sebastian aka Laming be placed on probation commencing on November 30, 2004, and  
3 sentence is hereby suspended for the balance of the five (5) year period upon the following  
4 conditions, to-wit:

5 1. That the probation is granted to and accepted by the probationer, subject to all its  
6 terms and conditions, and with the understanding that the court may, at any time, in case of the  
7 violation of the terms of the probation, cause the probationer to be returned to the court for the  
8 imposition of sentence as prescribed by law, or any other punishment as the court may see fit to  
9 hand down.

10 2. That the probationer shall be under the legal custody and control of the Director of  
11 Probation and Parole of the State of Idaho, and the District Court, and subject to the rules of  
12 probation as prescribed by the Board of Correction and the District Court.

13 3. Special Conditions, to-wit:

14 1. The probationer does hereby agree and consent to the search of her person,  
15 automobile, real property, and any other property, at any time, and at any  
16 place, by any law enforcement officer, peace officer, or probation officer, and  
17 does waive her constitutional rights to be free from such searches.

18 2. The probationer shall complete any training or counseling program established  
19 by the probation officer.

20 3. The probationer shall pay \$17.50 court costs, \$6.00 P.O.S.T. fees, \$50.00 fine  
21 for Victims' Compensation Fund, \$10.00 County Justice Fund fees and \$5.00  
22 ISTARS Fund fees in such manner as shall be established by the probation  
23 officer.

24 4. The probationer shall contribute such monthly sum for probation supervisions  
25 as shall be established by the Idaho State Board of Correction in an amount not  
to exceed the maximum allowable by Idaho Code 20-225.

5. The probationer shall pay \$250.00 to the public defenders for reimbursement  
for legal fees in such manner as shall be set by the probation officer.

6. The probationer shall make restitution in the amount of \$3000.00, joint and  
several with co-defendant, in such a manner as established by the probation  
officer.

COUNTY OF ADA } SS.  
J. David Navarro, Clerk of the District Court of the Fourth  
Judicial District of the State of Idaho, in and for the County  
of Ada, by the undersigned, who is a true and cor-  
rect copy of the original on file in this office. In witness  
whereof, I have hereunto set my hand and affixed my offi-  
cial seal this \_\_\_\_\_ day  
of \_\_\_\_\_ 2004  
J. DAVID NAVARRO, Clerk  
By \_\_\_\_\_ Deputy



- 1 7. The probationer shall not have a checking account nor credit cards unless specifically approved by her probation officer.
- 2 8. The probationer shall acquire a GED or high school diploma with the time set by the probation officer.
- 3
- 4 9. The probationer shall become and remain fully employed or be enrolled as a full time student. She shall not terminate employment without securing other employment. She shall notify her employer of her conviction.
- 5
- 6 10. The probationer shall submit, at her own expense, to a chemical test of her blood, breath or urine for the detection of substance abuse, when requested by the probation officer.
- 7
- 8 11. The probationer shall not associate with individuals specified by the probation officer.
- 9
- 10 12. The probationer shall not frequent any establishment where alcohol is a major source of income.
- 11
- 12 13. The probationer shall serve sixty (60) days in the Ada County Jail, the court shall suspend sixty (60) days to be imposed at the discretion of her probation officer.
- 13
- 14 14. The probationer shall submit to a polygraph examination at her own expense if requested by the probation officer.
- 15
- 16 15. The probationer shall not purchase, carry or have in her possession any firearms or other weapons.
- 17
- 18 16. The probationer shall not purchase, possess or consume any alcoholic beverages while on probation.
- 19
- 20 17. The probationer shall not purchase, possess, or consume any drug or narcotic unless specifically prescribed by a medical doctor.
- 21
- 22 18. The probationer shall receive credit for one hundred and sixty-one days served prior to the entry of this order.

23 4. THAT THE PROBATIONER, IF PLACED ON PROBATION TO A DESTINATION OUTSIDE THE STATE OF IDAHO, OR LEAVES THE CONFINES OF THE STATE OF IDAHO, WITH OR WITHOUT PERMISSION OF THE DIRECTOR OF PROBATION AND PAROLE, DOES HEREBY WAIVE EXTRADITION TO THE STATE OF IDAHO AND ALSO AGREES THAT THE PROBATIONER WILL NOT CONTEST ANY EFFORT BY ANY STATE TO RETURN THE PROBATIONER TO THE STATE OF IDAHO.

STATE OF IDAHO  
 COUNTY OF ADA  
 J. DAVID NICHOLS, Clerk  
 I, J. DAVID NICHOLS, Clerk of the District Court of the Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the foregoing is a true and correct copy of the original on file in this office. In witness whereof, I have hereunto set my hand and affixed my official seal this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

00566

1 Sentenced and dated this 30<sup>th</sup> day of November 2004.

2  
3 Ronald J. Wilper  
District Judge

4  
5  
6  
7  
8  
9 **ACKNOWLEDGEMENT OF PROBATIONER**

10 This is to certify that I have read or had read to me and fully understand and accept all the  
11 conditions, regulations and restrictions under which I am being granted probation. I will abide by  
12 and conform to them strictly and fully understand that my failure to do so may result in the  
13 revocation of my probation and commitment to the Board of Correction to serve the sentence  
originally imposed.

14 \_\_\_\_\_  
Probationer's Signature

15 \_\_\_\_\_  
Date of acceptance

16 WITNESSED:

17 \_\_\_\_\_  
18 Probation and Parole Officer  
19 State of Idaho

20  
21 STATE OF IDAHO } SS  
COUNTY OF ADA }  
22 L. J. David Navarro, Clerk of the District Court of the Fourth  
Judicial District of the State of Idaho, in and for the County  
of Ada, do hereby certify that the foregoing is a true and cor-  
23 rect copy of the original on file in this office. In witness  
whereof, I have hereunto set my hand and affixed my offi-  
24 cial seal this \_\_\_\_\_ day  
of \_\_\_\_\_ 2004  
By: J. DAVID NAVARRO, Clerk  
25

CERTIFICATE OF MAILING

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, on this 1st day of <sup>December</sup> ~~November~~ 2004, one copy of the: ORDER SUSPENDING SENTENCE AND ORDER OF PROBATION as notice pursuant to Rule 77(d) I.C.R. to each of the attorneys of record in this cause in envelopes addressed as follows:

ADA COUNTY PROSECUTING ATTORNEY  
INTERDEPARTMENTAL MAIL

ADA COUNTY PUBLIC DEFENDER  
INTERDEPARTMENTAL MAIL

ADA COUNTY JAIL  
VIA MARSHAL'S OFFICE  
INTERDEPARTMENTAL MAIL

DEPARTMENT OF CORRECTIONS  
CENTRAL RECORDS  
1299 N. ORCHARD, SUITE 110  
BOISE IDAHO 83706

PSI DEPARTMENT/P&P  
INTERDEPARTMENTAL MAIL

J. DAVID NAVARRO  
Clerk of the District Court  
Ada County, Idaho

By *Shay Abbott*  
Deputy Clerk

STATE OF IDAHO }  
COUNTY OF ADA } SS.  
I, J. David Navarro, Clerk of the District Court of the Fourth  
Judicial District of the State of Idaho, in and for the County  
of Ada, do hereby certify that the foregoing is a true and cor-  
rect copy of the original on file in this office. In witness  
whereof, I have hereunto set my hand and affixed my offi-  
cial seal this \_\_\_\_\_ day  
of \_\_\_\_\_ 2004  
J. DAVID NAVARRO, Clerk  
By \_\_\_\_\_ Deputy

Session: WILPER113004

Pac

Session: WILPER113004  
Session Date: 2004/11/30  
Judge: Wilper, Ronald J.  
Reporter: Wolf, Sue

Division: DC  
Session Time: 08:19

Courtroom: CR507

Clerk(s):  
Johnson, Inga

State Attorneys:  
Darrington, Shane  
Hansen, Ammon  
Medema, Jonathan  
Norton, Lynn  
Rosenthal, Jay

Public Defender(s):  
Loschi, Jonathon  
Myshin, Amil  
Simonaitis, David  
Smith, Larry

Prob. Officer(s):

Court interpreter(s):

Case ID: 0009

Case Number: H0400228  
Plaintiff:  
Plaintiff Attorney:  
Defendant: Sebastian, April  
Additional audio and annotations can be found in case: 0011.  
Co-Defendant(s):  
Pers. Attorney:  
State Attorney: Darrington, Shane  
Public Defender: Myshin, Amil

2004/11/30  
09:38:42 - Operator  
Recording:  
09:38:42 - New case  
Sebastian, April  
09:39:18 - General:

STATE OF IDAHO }  
COUNTY OF ADA } SS.  
I, J. David Navarro, Clerk of the District Court of the Fourth  
Judicial District of the State of Idaho, in and for the County  
of Ada, do hereby certify that the foregoing is a true and cor-  
rect copy of the original on file in this office. In witness  
whereof, I have hereunto set my hand and affixed my offi-  
cial seal this \_\_\_\_\_ day  
of \_\_\_\_\_ 20\_\_\_\_  
J. DAVID NAVARRO, Clerk  
By \_\_\_\_\_ Deputy

00569

Def. presnt in CUSTODY for Rider Review.  
 09:39:46 - Judge: Wilper, Ronald J.  
 Recess to allow def. to review report  
 09:39:54 - Operator  
 Stop recording:

Case ID: 0011

Case Number: H0400228  
 Plaintiff:  
 Plaintiff Attorney:  
 Defendant: Sebastian, April  
 Previous audio and annotations can be found in case: 0009.  
 Co-Defendant(s):  
 Pers. Attorney:  
 State Attorney: Darrington, Shane  
 Public Defender: Myshin, Amil

09:51:01 - Operator  
 Recording:  
 09:51:01 - Recall  
 Sebastian, April  
 09:51:11 - General:  
 Def. has read report now.  
 09:51:47 - State Attorney: Darrington, Shane  
 Recs- prob  
 09:52:05 - Public Defender: Myshin, Amil  
 Recs prob  
 09:52:27 - Defendant: Sebastian, April  
 Comments own behalf  
 09:53:00 - Judge: Wilper, Ronald J.  
 Probation, 5 yrs beginning today. Cr 161d. Sp Cond- 4th...  
 training... ct  
 09:55:34 - Judge: Wilper, Ronald J.  
 costs... mo. sums... PD 250...rest-350.90 J&S...no cking/cr.  
 crds...  
 09:56:55 - Judge: Wilper, Ronald J.  
 GED...fulltime emp./stu... notify emp of conviction... BBU..  
 .no  
 09:57:25 - Judge: Wilper, Ronald J.  
 association... no bars... polygraph... no weapons... no alco  
 hol... no  
 09:57:43 - Judge: Wilper, Ronald J.  
 drugs... 60d acj,susp-imposed by PO. Rights, PSI's returned.  
 09:58:21 - Operator

STATE OF IDAHO }  
 COUNTY OF ADA } SS.  
 I, J. David Navarro, Clerk of the District Court of the Fourth  
 Judicial District of the State of Idaho, in and for the County  
 of Ada, do hereby certify that the foregoing is a true and cor-  
 rect copy of the original on file in this office. In witness  
 whereof, I have hereunto set my hand and affixed my offi-  
 cial seal this \_\_\_\_\_ day  
 of \_\_\_\_\_ 20\_\_\_\_  
 J. DAVID NAVARRO, Clerk  
 By \_\_\_\_\_ Deputy

00570

Stop recording:

STATE OF IDAHO }  
COUNTY OF ADA } SS.

I, J. David Navarro, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the foregoing is a true and correct copy of the original on file in this office. In witness whereof, I have hereunto set my hand and affixed my official seal this \_\_\_\_\_ day

of JUN 20 1971  
By J. David Navarro Deputy

005'71

EXHIBIT 19

00572

COURT 2 Magistrate  
ISSUING AGENCY B Boise City  
MUNICIPALITY BO Boise City  
JUDGE 278 Richard A Schmidt  
CASE REF \ 5/6  
PROSECUTOR B 043 Randall S. Grove  
10/23/1995 Case Created

Defendant(s):  
01 SEBASTIAN APRIL MAE LE# 059733 FPC# 0488431

Charge(s):  
001 S 18-8001 DRIVERS LICENSE USING WHI Misdemeanor Disposed 4/08/  
002 S 49-1229 INSURANCE FAILURE TO MAIN Infractions Disposed 4/08/  
003 S 20-227-B PROBATION VIOLATION Misdemeanor Disposed 8/28/  
004 S 18-1801 CONTEMPT OF COURT Misdemeanor Disposed 12/26/

Register of Actions:

ENTERED---CNT---EVENT-----  
10/23/1995 Case Opened  
10/23/1995 Event Scheduled Arraignment 11/07/1995  
10/23/1995 Arrested on Warrant, Sequence# .01  
10/23/1995 001 Finger Print Card# Added 0488431  
10/23/1995 Bond Set at \$250.00  
10/23/1995 001 Bonded Posted 500 FS5-00219612  
10/23/1995 001 Type of Bond Posted - SURETY  
10/23/1995 001 Bonded By HOERNER BAIL BONDS  
10/23/1995 002 Citation added from Booking -Citation B 666181  
11/07/1995 Arraignment  
11/07/1995 Order Appointing Public Defender  
11/07/1995 001 Not Guilty Plea  
11/07/1995 002 Not Guilty Plea  
11/07/1995 Jury Trial Set 4/08/1996  
11/07/1995 Event Scheduled Pre-Trial Conference 3/26/1996  
11/15/1995 Defendant Request For Discovery  
12/28/1995 State/City Response to Disc. Req  
12/28/1995 Defendant Request For Discovery  
3/26/1996 Pre-Trial Conference  
4/08/1996 001 Change Plea to Guilty Before Tri  
4/08/1996 001 Final Judgment, Order or Decree  
4/08/1996 001 Sentenced to Fine & Costs \$166.50  
4/08/1996 001 Sentenced to Jail 180d 150 d SP  
4/08/1996 001 Placed on Probation 24m  
Standard Terms  
4/08/1996 002 Order for Dismissal  
4/08/1996 Rights  
4/08/1996 Order Jail Release  
4/08/1996 D/L Suspension- Judgment  
4/08/1996 001 Fine Agreement Set 9605117  
4/09/1996 Notice of Penalties  
4/11/1996 Finger Print Card# Sent to BCI 0488431  
10/15/1996 Bench Warrant Created M9513860.01-01  
10/15/1996 Amended Complaint  
10/31/1996 Motion For BW for PV  
11/04/1996 Bench Warrant Issued M9513860.01-01 11/04/1996  
1/14/1997 001 Reviewed & Retained Class Update  
3/10/1997 Warrant Return Filed  
5/06/1997 Arraignment  
5/06/1997 003 Not Guilty Plea  
5/06/1997 Event Scheduled PV Hearing 8/28/1997  
5/21/1997 Defendant Request For Discovery  
6/13/1997 State Objection to  
Request for Disc.  
6/16/1997 Motion to Compel Discovery  
6/23/1997 Order Compel Discovery  
7/10/1997 State/City Response to Disc. Req/SUPPLEMENTAL  
8/28/1997 Probation Violation Hearing  
8/28/1997 003 Change Plea to Guilty Before Tri  
8/28/1997 003 Final Judgment, Order or Decree  
8/28/1997 003 Sentenced to Restitute \$100.00  
8/28/1997 003 Sentenced to Restitute  
8/28/1997 Reorder Fines  
10/20/1997 001 Partial Payment A1018363 \$30.00  
12/17/1997 Contempt Warrant Created M9513860.01-02  
12/17/1997 Warrant Created M9513860.01-02  
12/17/1997 001 Amended Complaint  
12/17/1997 Affidavit Created  
12/26/1997 004 Warrant Dismissed  
12/26/1997 Warrant Backed Off



Report: CJ3R024  
User: TC/MITKC

A D A C O U N T Y  
Register of Actions  
Case#: M9513860

PAGE 2 TC100  
1704

1/07/1998 001 Partial Payment A1033460 \$100.00  
3/19/1998 001 Final Payment A1050089 \$40.50

STATE OF IDAHO }  
COUNTY OF ADA } SS.

I, J. David Navarro, Clerk of the District Court of the Fourth  
Judicial District of the State of Idaho, in and for the County  
of Ada, do hereby certify that the foregoing is a true and cor-  
rect copy of the original on file in this office. In witness  
whereof, I have hereunto set my hand and affixed my offi-  
cial seal this 6th day

of January 2007  
J. DAVID NAVARRO, Clerk  
By: [Signature] Deputy  
00574

EXHIBIT 20

00575

COURT 2 Magistrate  
ISSUING AGENCY B Boise City  
MUNICIPALITY BO Boise City  
JUDGE 284 Tom Morden  
CASE REF 5/30/97  
PROSECUTOR B 035 Sandra M. Carter  
3/28/1997 Case Created

Defendant(s):  
01 SEBASTIAN APRIL MAE LE# 059733 FPC# 9013041

Charge(s):  
001 S 18-2403-1P THEFT PETIT Misdemeanor Disposed 9/24/  
002 S 20-227-B PROBATION VIOLATION Misdemeanor Disposed 9/10/  
003 S 20-227-B PROBATION VIOLATION Misdemeanor Disposed 10/14/

Register of Actions:

ENTERED---CNT---EVENT-----  
3/28/1997 Case Opened  
3/28/1997 Event Scheduled Arraignment 5/30/1997  
3/28/1997 001 Charge Booked by ACSO -Citation B 710674  
3/28/1997 001 Finger Print Card# Added 9013041  
3/28/1997 001 Bond Set at 300 IC-1277972  
3/28/1997 001 Bonded Posted 300 IC-1277972  
3/28/1997 001 Type of Bond Posted - SURETY  
3/28/1997 001 Bonded By ANOTHER BAIL BONDS  
3/28/1997 Order To Release for no PC  
4/04/1997 001 Exoneration of Bond IC-1277972 4/04/1997  
5/30/1997 Arraignment  
5/30/1997 Order Appointing Public Defender  
5/30/1997 001 Not Guilty Plea  
5/30/1997 Event Scheduled Pre-Trial Conference 9/24/1997  
6/13/1997 State/City Request for Discovery  
6/26/1997 State/City Request for Discovery  
6/26/1997 State/City Response to Disc. Req  
9/24/1997 Pre-Trial Conference  
9/24/1997 001 Change Plea to Guilty Before Tri  
9/24/1997 001 Final Judgment, Order or Decree  
9/24/1997 001 Sentenced to Fine & Costs \$553.50  
9/24/1997 001 Sentenced to Reimburse P D \$50.00  
9/24/1997 001 Sentenced to Jail 180d 150d sp 1d cr  
9/24/1997 001 Placed on Probation 24m  
Standard Terms  
Theft Class  
9/24/1997 Order NO CONTACT WITH  
WAREMART!  
9/24/1997 001 Fine Agreement Set 9708574  
9/25/1997 Finger Print Card# Sent to BCI 0109013041  
10/20/1997 001 Partial Payment A1018333 \$62.00  
12/16/1997 Affidavit Created  
12/22/1997 Bench Warrant Created M9703840.01-01  
12/22/1997 Amended Complaint  
2/09/1998 001 Partial Payment A1040731 \$60.00  
3/12/1998 Affidavit Created  
3/17/1998 001 Partial Payment A1049156 \$62.50  
4/10/1998 001 Partial Payment A1055256 \$63.00  
5/12/1998 001 Partial Payment A1061875 \$62.50  
6/24/1998 Motion for PV warrant  
9/04/1998 001 Partial Payment A1089957 \$50.00  
9/04/1998 Bench Warrant Issued M9703840.01-01 9/04/1998  
9/09/1998 002 Arrested on Warrant, Sequence# .01  
9/09/1998 Event Scheduled Arraignment 9/10/1998  
9/09/1998 002 Arrested on Warrant, Sequence# .01  
9/09/1998 002 Bond Set at \$10000.00  
9/09/1998 Event Scheduled Arraignment 9/10/1998  
9/10/1998 001 Final Payment A1090783 \$255.50  
9/10/1998 Warrant Return Filed  
9/10/1998 Arraignment 9/10/1998  
9/10/1998 Arraignment  
9/10/1998 002 Order for Dismissal  
9/24/1998 Bench Warrant Created M9703840.01-02 STATE OF IDAHO } SS.  
9/24/1998 Amended Complaint  
10/14/1998 003 Warrant Dismissed  
10/14/1998 Warrant Backed Off

STATE OF IDAHO } SS.  
COUNTY OF ADA }  
I, J. David Navarro, Clerk of the District Court of the Fourth  
Judicial District of the State of Idaho, in and for the County  
of Ada, do hereby certify that the foregoing is a true and cor-  
rect copy of the original on file in this office. In witness  
whereof, I have hereunto set my hand and affixed my offi-  
cial seal this 4th day  
of January, 1998. 00576  
J. DAVID NAVARRO, Clerk  
By: [Signature]

EXHIBIT 21

00577

NO. \_\_\_\_\_ FILED \_\_\_\_\_ 3:50  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

APR 1 - 2003

by David Navarro, Clerk  
DEPUTY

**GREG H. BOWER**  
Ada County Prosecuting Attorney

**Roger Bourne**  
Deputy Prosecuting Attorney  
200 W. Front Street, Room 3191  
Boise, Idaho 83702  
Phone: 287-7700  
Fax: 287-7709

U0303573

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, )  
)  
Plaintiff, )  
vs. )  
)  
ERIC VIRGIL HALL, )  
)  
Defendant. )  
)  
\_\_\_\_\_ )

**COMPLAINT**

Defendant's DOB: [REDACTED]  
Defendant's SSN: [REDACTED]

PERSONALLY APPEARED before me this 1st day of April, 2003, Roger Bourne, Deputy Prosecuting Attorney, in the County of Ada, State of Idaho, who, being first duly sworn, complains and says that ERIC VIRGIL HALL, on or about the 24<sup>th</sup> day of September, 2000, in the County of Ada, State of Idaho, did commit the crime(s) of: I. MURDER IN THE FIRST DEGREE, FELONY, I.C. §18-4001, 02, 03(a) and (d); II. KIDNAPPING IN THE FIRST DEGREE, FELONY, I.C. §18-4501, 02, and III. RAPE, FELONY, I.C. 18-6101(3), as follows:

### COUNT I

That the Defendant, ERIC VIRGIL HALL, on or about the 24<sup>th</sup> day of September, 2000, in the County of Ada, State of Idaho, did willfully, unlawfully, deliberately, with premeditation and with malice aforethought, kill and murder Lynn Beth Henneman, a human being, by strangling her around her neck from which she died;

### OR IN THE ALTERNATIVE

Did willfully, unlawfully, and with malice aforethought kill and murder Lynn Beth Henneman, a human being, by strangling her around her neck which caused her death, the said murder being committed during the perpetration of a felony, to-wit: kidnapping and/or rape.

### COUNT II

That the Defendant, ERIC VIRGIL HALL, on or about the 24<sup>th</sup> day of September, 2000, in the County of Ada, State of Idaho, did willfully seize and detain Lynn Beth Henneman with the intent to cause her to be detained against her will within the State of Idaho, for the purpose of committing rape and/or serious bodily injury upon Lynn Beth Henneman and where Lynn Beth Henneman was not liberated unharmed.

### COUNT III


That the Defendant, ERIC VIRGIL HALL, on or about the 24<sup>th</sup> day of September, 2000, in the County of Ada, State of Idaho, did penetrate the vaginal opening of Lynn Beth Henneman, a female person, with his penis, and where Lynn Beth Henneman resisted, but her resistance was overcome by force and violence in that the Defendant repeatedly struck her on the head and choked her.

All of which is contrary to the form, force and effect of the statute in such case, and against the peace and dignity of the State of Idaho.


Said Complainant therefore prays that a Warrant issue for the arrest of the Defendant and that ERIC VIRGIL HALL may be dealt with according to law.

**GREG H. BOWER**

Ada County Prosecuting Attorney

By:   
Roger Bourne  
Deputy Prosecuting Attorney

SUBSCRIBED AND SWORN to before me this 1<sup>st</sup> day of April, 2003.

  
MAGISTRATE

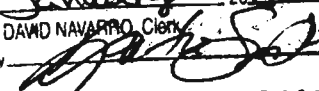
STATE OF IDAHO }  
COUNTY OF ADA } SS.  
I, J. David Navarro, Clerk of the District Court of the Fourth  
Judicial District of the State of Idaho, in and for the County  
of Ada, do hereby certify that the foregoing is a true and cor-  
rect copy of the original on file in this office. In witness  
whereof, I have hereunto set my hand and affixed my offi-  
cial seal this 4<sup>th</sup> day  
of January, 2007  
J. DAVID NAVARRO, Clerk  
By:  Deputy

EXHIBIT 33

00581



COURT 1 District  
ISSUING AGENCY B Boise City  
MUNICIPALITY BO Boise City  
JUDGE 185 Joel D. Horton  
CASE REF M0311644  
PROSECUTOR A 179 Erika K. Klein  
11/04/2003 Case Created Bind Over M0311644

Defendant(s):  
01 DEEN MICHELLE VERNEDETH

Charge(s):  
001 S 37-2732(c) POSSESSION OF A CONTROLLE Felony Disposed 1/14/  
002 S 37-2734A DRUG PARAPHERNALIA POSSES Misdemeanor Disposed 12/03/

Register of Actions:

ENTERED	CNT	EVENT
11/04/2003	001	Committment and Papers
11/04/2003	001	Defendant Transferred In M0311644 D.01
11/04/2003	001	Count Bound From M0311644 D.01 C.001
11/04/2003	001	Bond Transferred From M0311644 D.01 C.001
11/04/2003	002	Count Bound From M0311644 D.01 C.002
11/04/2003	002	Bond Transferred From M0311644 D.01 C.002
11/04/2003		Event Scheduled 090011/12/2003
11/06/2003		Information and Papers Filed
11/10/2003		Notice of Hearing
11/10/2003		Motion for Bond Reduction
11/12/2003		Event Continued entry of plea
11/19/2003		Event Continued entry of plea
12/03/2003		Arraignment (Con't)
12/03/2003	001	Guilty Plea
12/03/2003	002	Dismissed Before Trial or Hearin
12/03/2003		Event Scheduled Sentencing Hearing 1/14/2004
12/03/2003		Order of Dismissal - Ct 2
12/05/2003		Order for Sub. Abuse Eval. Prov. Funds, Access
1/14/2004		Sentence Hearing
1/14/2004	001	Retained Jurisdiction 180 days
1/14/2004	001	Sentenced to Fine & Costs \$1088.50
1/14/2004	001	Sentenced to Restitute \$100.00
1/14/2004	001	Sentenced to ISCI 4y 95d cr Concurrent
1/16/2004		Judgment of Convict- ion & Commitment
6/15/2004		Order to Transport
6/15/2004		Rider Hearing 6/30/2004
6/30/2004		Rider Hearing
6/30/2004	001	Judgment Reconsidered
6/30/2004	001	Judgment Reconsidered S 37-2732(c) POSS
6/30/2004	001	Sentence Modified- Fines
6/30/2004	001	Sentenced to Fine & Costs \$148.50
6/30/2004	001	Sentence Modified- P D Fees
6/30/2004	001	Sentenced to Reimburse P D \$250.00
6/30/2004	001	Sentence Modified- Restitution
6/30/2004	001	Sentenced to Restitute \$100.00
6/30/2004	001	Sentence Modified- Incarceration
6/30/2004	001	Sentenced to ISCI 4y 4y sp 95d cr
6/30/2004	001	Sentence Modified- Probation
6/30/2004	001	Placed on Probation 4Y STD.TRMS,90D DISC JT PYSCH EVAL.100HRS CS
7/02/2004		Order Suspending Sentence & Order of Probation
7/27/2004	001	Fine Agreement Set 7/27/2004
3/21/2005	001	Partial Payment A1747791 \$52.00
4/26/2005	001	Partial Payment A1757897 \$52.00
6/06/2005	001	Partial Payment A1768649 \$52.00
6/23/2005	001	Partial Payment A1775325 \$52.00
8/08/2005	001	Partial Payment A1787992 \$100.00
9/06/2005	001	Partial Payment A1796360 \$100.00
10/06/2005	001	Final Payment A1806086 \$102.50
8/03/2006		Notice of Hearing
8/03/2006		Event Scheduled Hearing 8/23/2006
8/23/2006		Hearing
8/25/2006		Order Placing Def. on Unsupervised Prob. & Eliminating "Special Cond C(6)" from the Def. Jdmt

Report: CJ3R024  
User: TCSMITKC

A D A C O U N T Y  
Register of Actions  
Case#: H0301398

PAGE 2 TC10  
1/0.

STATE OF IDAHO }  
COUNTY OF ADA } SS.

I, J. David Navarro, Clerk of the District Court of the Fourth  
Judicial District of the State of Idaho, in and for the County  
of Ada, do hereby certify that the foregoing is a true and cor-  
rect copy of the original on file in this office. In witness  
whereof, I have hereunto set my hand and affixed my offi-  
cial seal this 11<sup>th</sup> day

of January, 2007  
J. DAVID NAVARRO, Clerk  
By [Signature] 200583

EXHIBIT 36A

**00584**



BECOME A CARD-CARRYING MEMBER OF THE ACLU:

> JOIN NOW

ABOUT THE ACLU

SUPREME COURT

LEGISLATIVE UPDATE

ACTION CENTER

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Printer-Friendly

**Prisoners' Rights:**  
The ACLU's National Prison Project is the only national litigation program on behalf of prisoners. Since 1972, the NPP has represented more than 100,000 men, women and children. The NPP continues to fight unconstitutional conditions and the "lock 'em up" mentality that prevails in the legislatures. Learn more about our project and take action to protect the rights guaranteed to all Americans.

GET INVOLVED

> JOIN THE ACLU

> DONATE NOW

> GET ACLU EMAIL

> TAKE ACTION

Urge Congress to Shut Down Guantanamo Bay and Secret Prisons - And Restore Rights

> SUPREME COURT



Home : Prisoners' Rights : General

ISSUES

### Federal Court Sanctions Government Attorneys Who Secretly Read Prisoners' Legal Mail (9/15/1999)

#### FOR IMMEDIATE RELEASE

BOISE, ID -- In a case brought by the American Civil Liberties Union, a federal court has ruled that government attorneys here violated "ethical and professional obligations" when they secretly read prisoners' confidential legal mail.

In a stinging decision issued earlier this week, United States Magistrate Judge Larry M. Boyle granted the ACLU's request for sanctions against Deputy State Attorneys General Stephanie Altig and Timothy McNeese, saying that their action "constituted bad faith conduct" and "manifests an attitude of complete disregard for the judicial process."

The judge found that Altig and McNeese, who represented the state Department of Corrections in an ACLU prisoner class-action case tried last year in Boise, had "implicitly authorized and encouraged" prison employees "to secretly search for, inspect, examine, read, copy and then deliver confidential attorney-client correspondence or documents to Altig over a period of several months."

The matter was such a serious breach of professional conduct, the ACLU said, that a former Chief Justice of the Idaho Supreme Court agreed to assist the ACLU in the case.

"For any attorney to intercept confidential legal documents is a gross ethical violation, but for senior government attorneys to do so is really beyond the pale," said Margaret Winter, Associate Director of the ACLU's National Prison Project. "We are relieved that the court has put a stop to this and restored the fundamental right of attorney-client privilege for prisoners in Idaho."

Stephen Pevar, an attorney with the national ACLU whose correspondence to clients was intercepted, also welcomed the court's ruling. "I am both gratified and grateful," he said, speaking from his office in Denver. "At stake here, really, was the very practice of prisoner litigation," he added. "Inmates have few rights in prison, but the right to communicate with an attorney cannot be tossed aside."

Pevar and the ACLU's National Prison Project had represented the Idaho prisoners in a case alleging that prison officials retaliated against them for challenging the conditions of their confinement. Judge Boyle ultimately ruled that several of the prisoners had indeed been subjected

IN THIS SECTION

- General
- Conditions of
- Medical Care
- Mental Health
- Over-incarceration
- Restrictions on
- Rights
- Women in Prison

RELATED INFORMATION

- Publications
- Legal Documents
- Legislative Documents
- Resources
- Fact Sheets

SAFE & FREE  
KEEP AMERICA  
SAFE AND FREE  
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VOTING RIGHTS  
WORKING TO  
RENEW AND RESTORE  
THE VOTING RIGHTS ACT  
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to illegal retaliation.

The secret surveillance came to light when the state's lawyers filed a motion for contempt against Pevar, claiming that he had made statements to the court which were inconsistent with statements he made in confidential letters to his clients.

According to corrections department lawyers, Pevar's statements in court showed he was guilty of fraud and that the prisoners' lawsuit should be dismissed. Pevar denied this claim, and Judge Boyle ultimately rejected the charges and ordered the state's lawyers to turn over all letters they had copied and to cease their surveillance.

In his ruling, Judge Boyle noted, "the attorney-client privilege has been recognized as among the oldest of the privileges for confidential communications known to the common law."

Attorneys in the case are Pevar and Winter of the national ACLU, and former Idaho Supreme Court Chief Justice Charles McDevitt, now in private practice in Boise.

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EXHIBIT 36B

00587

U.S. COURTS  
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NOEL PUENTE GOMEZ  
JAMES SPALDING  
PLAINTIFFS  
DEFENDANTS

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

NOEL PUENTE GOMEZ, et al.,	)	
	)	Case No. CIV 91-0299-S-LMB
Plaintiffs,	)	
	)	
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
JAMES SPALDING, et al.,	)	MEMORANDUM DECISION
	)	AND ORDER RELATING TO
Defendants.	)	PLAINTIFFS' MOTION FOR
	)	SANCTIONS

Currently pending before the Court is Plaintiffs' Motion for Order to Show Cause Why Deputy Attorneys General Stephanie Altig and Timothy McNeese Should Not Be Sanctioned for Professional Misconduct (Motion for Sanctions) (Docket No. 594).

Having carefully reviewed the record, and considered oral argument of counsel, the Court enters the following Findings of Fact, Conclusions of Law, Memorandum Decision and Order Relating to Plaintiffs' Motion for Sanctions.

FINDINGS OF FACT, CONCLUSIONS OF LAW, MEMORANDUM DECISION  
AND ORDER RELATING TO PLAINTIFFS' MOTION FOR SANCTIONS -1

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I.

**BACKGROUND**

Plaintiffs have moved the Court to sanction attorneys Stephanie Altig (Altig) and Timothy McNeese (McNeese) for conduct which allegedly violated professional and ethical standards required of them as attorneys admitted to practice before the United States District Court for the District of Idaho. According to Plaintiffs' allegations, Altig and McNeese obtained or acquired, read and used information contained in attorney-client correspondence sent from attorney Stephen Pevar (Pevar) to members of the class of inmate plaintiffs he represented in this instant action. Plaintiffs assert that the correspondence was clearly subject to the attorney-client privilege as well as the work product doctrine and that Altig and McNeese's receiving and retaining the documents from employees of the Idaho Department of Correction (IDOC) was inappropriate.

Plaintiffs also assert that Altig committed an ethical violation by speaking personally with and discussing matters relevant to the instant litigation with inmate Cootz, a member of the class of inmates who she knew was represented by Pevar. The Court finds and thus concludes that this claim fails for failure of proof and will not be addressed further herein.

By way of brief summary relevant to the history of these proceedings, on October 29, 1997, Defendants filed a Motion for Order to Show Cause why Plaintiffs should not be held in contempt. The motion was accompanied by the Affidavit of Diana K. Phillips, which attached a transcript of the December 10, 1996 hearing during which Defendants assert Pevar made fraudulent misrepresentations to the Court. In that motion Defendants also requested leave of Court to file Pevar's letters under seal, as well as the affidavits of IDOC employees who provided Altig with copies of Pevar's letters.

Defendants assert that the correspondence Altig obtained from IDOC employees constituted evidence that Pevar had engaged in a fraud upon the Court and, therefore, any



assertion of the attorney-client privilege was lost. Further, Defendants maintain that any confidentiality had been waived or lost because the correspondence had been left in a public area of the prison law library and the inmates had failed to take reasonable precautions to ensure that IDOC employees would not have access to the correspondence. As a sanction for Pevar's alleged fraudulent misrepresentations, Defendants requested that the Court dismiss Plaintiffs' action.

On January 12, 1998, the Court denied Defendants' motion. At that time, the Court reviewed not only the transcript of statements made by Pevar during the December 10, 1996 hearing, but also considered the procedural context in which Pevar's statements were made and the context in which relief was being sought.

In the December 10, 1996 hearing, Pevar argued that hundreds of instances of actual court access injury existed. His correspondence to inmates, however, reveals that, while he believed hundreds of such instances existed, he had only been able to find evidence of a few cases. It appears from a review of the record that Pevar, as counsel for Plaintiffs, based his belief that instances of actual access to court injuries existed on the depositions of IDOC employees that had previously been conducted, and the fact that there were a large number of non-English speaking Hispanic inmates housed at IDOC. Further, Pevar also argued that his ability to locate and present evidence of actual injury had been impeded by Defendants' failure to fully comply with his or the inmate law clerks' attempts to contact those who may have actually suffered access to court injuries. Accordingly, upon reviewing Pevar's statements from the transcript of the December 10, 1996 hearing in the light and context in which they were made, together with the admissions made to his inmate clients contained in the correspondence which ultimately came into the Defendants' possession, the Court, in both January 1998 and at this time, views Pevar's statements as argument of counsel, and as an optimistic characterization or interpretation of what he had learned from the depositions and interviews he had

conducted. In light of the circumstances, the Court concluded in January 1998, and still concludes at this time, that Pevar's argument did not constitute fraudulent misrepresentations of fact or a fraud which would warrant dismissing this action as requested by Defendants.

On February 18, 1999, Plaintiffs moved the Court to order Altig and McNeese to show cause why they should not be sanctioned for professional misconduct (Docket No. 594). The Court construed Plaintiffs' motion as a request for sanctions against Altig and McNeese and scheduled the matter for an evidentiary hearing with the burden of proving professional misconduct on Plaintiffs.

In response to Plaintiffs' allegations of professional and ethical misconduct made in Plaintiffs' Motion for Sanctions now pending before the Court, Altig and McNeese assert that their conduct was reasonable, that they did not violate established professional and ethical rules, and that their conduct was actually necessary in order to comply with those rules, specifically to alert the Court that Pevar had committed a fraud. Altig and McNeese point out that when they received the correspondence from a prison employee familiar with these proceedings, they were told by that employee that the correspondence contained evidence indicating that Pevar had made fraudulent or material misrepresentations to the Court on December 10, 1996. As a result, Altig and McNeese maintain that they acted reasonably in receiving and reading the materials, and later seeking direction from their superiors on how to proceed within the Attorney General's Office, waiting for such guidance, and eventually following the counsel given by their superiors.

In the instant proceedings, Plaintiffs seek an order from the Court declaring that Altig and McNeese violated the inmates' and counsel's First Amendment rights, in addition to failing to comply with applicable professional and ethical responsibilities. Further, Plaintiffs seek an award of attorney fees and expenses incurred as a result of

Defendants' alleged misconduct and request that this Court refer Altig and McNeese to the Disciplinary Committee of the Idaho State Bar.

On June 28, 1999, the Court commenced a three-day evidentiary hearing during which witnesses were called and evidence was presented by both parties relating to the allegations of professional and ethical violations. Counsel for the respective parties presented closing oral arguments to the Court on July 6, 1999, and subsequently submitted proposed findings of facts and conclusions of law. Accordingly, the matter has been fully submitted. After considering the evidence, applicable legal authorities and arguments of counsel, the Court now enters its decision on Plaintiffs' Motion for Sanctions.

## II.

### LEGAL PRINCIPLES

#### A. Court Authority for Imposing Sanctions for Ethical Violations

The federal district court "has the duty and responsibility of supervising the conduct of attorneys who appear before it." *Erickson v. Newmar Corp.*, 87 F.3d 298, 300 (9th Cir. 1996). As part of that responsibility, courts have broad power to impose sanctions for unethical or improper conduct. The United States Court of Appeals for the Ninth Circuit has indicated:

Whenever an allegation is made that an attorney has violated his moral and ethical responsibility, an important question of professional ethics is raised. It is the duty of the district court to examine the charge, since it is that court which is authorized to supervise the conduct of the members of its bar. The courts, as well as the bar, have a responsibility to maintain public confidence in the legal profession.

*Gas-A-Tron of Arizona v. Union Oil Co. of California*, 534 F.2d 1322, 1324-25 (9th Cir. 1976) (quoting *Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382, 1385-86 (3rd Cir.

1972)). "Where ... the conduct giving rise to the imposition of sanctions occurred outside the presence of the court, counsel should be provided an opportunity to explain his [or her] conduct." *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983).

The power to impose sanctions upon attorneys appearing before a court is derived from several sources: federal statute, local rules, and the court's inherent power. "For a sanction to be validly imposed, the conduct in question must be sanctionable under the authority relied on." *Cunningham v. County of Los Angeles*, 879 F.2d 481, 490 (9th Cir. 1988) (internal quotations omitted). Federal judges have "an arsenal of sanctions they can impose for unethical behavior. These sanctions include monetary sanctions, contempt, and disqualification of counsel." *Erickson*, 87 F.3d at 301.

District of Idaho Local Civil Rule 83.5 provides:

All members of the bar of this court and all attorneys permitted to practice in this court shall familiarize themselves with and comply with the standards of professional conduct required of members of the Idaho State Bar and decisions of any court applicable thereto which are hereby adopted as standards of professional conduct of this court. These provisions shall not be interpreted to be exhaustive of the standards of professional conduct. In that connection, the Idaho Rules of Professional Conduct for the Idaho State Bar should be noted. No attorney permitted to practice before this court shall engage in any conduct which degrades or impugns the integrity of the court or in any manner interferes with the administration of justice therein.

....

In the event any attorney engages in conduct which may warrant discipline or other sanctions, the court or any district judge may, in addition to ... imposing ... appropriate sanctions pursuant to the court's inherent powers or the Fed. R. Civ. P., refer the matter to the disciplinary body of any court before which the attorney has been admitted to practice.

D. Id. L. Civ. R. 83.5(a)-(b). Accordingly, the Local Rules provide that a court may refer

to standards of professional conduct imposed upon members of the Idaho State Bar in the process of determining whether such standards have been violated and to decide whether an attorney should be sanctioned for his or her conduct or behavior.

On November 1, 1986, by order of the Supreme Court of Idaho, the Idaho Rules of Professional Conduct became effective and binding upon all members of the Idaho State Bar. The Rules of Conduct provide that an attorney shall not communicate with a party the attorney knows to be represented by counsel about the subject matter of such representation, while representing a client an attorney shall respect the rights of third persons, and an attorney shall make reasonable efforts to ensure that the rules of professional conduct are complied with when supervising a subordinate lawyer. I.R.P.C. §§ 4.2; 4.4; 5.1(b), (c). In addition to supervising the conduct of a subordinate lawyer, the Rules of Conduct require an attorney to make reasonable efforts to ensure that the conduct of a non-lawyer assistant is compatible with professional obligations imposed upon the attorney. I.R.P.C. § 5.3. Finally, the Rules of Conduct provide that actions of a lawyer which are prejudicial to the administration of justice are improper and constitute professional misconduct. I.R.P.C. § 8.4(d).

The statutory basis for the Court imposing sanctions upon an attorney who engages in unprofessional conduct is 28 U.S.C. § 1927, which provides in pertinent part:

Any attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. The Ninth Circuit has also held that the "imposition of costs and fees under § 1927 may be made only on a finding that the attorney acted 'recklessly or in bad faith.'" *T.W. Elec. Serv., Inc. v. Pacific Elec. Cont. Assn.*, 809 F.2d 626, 638 (9th Cir. 1987) (quoting *U.S. v. Associated Convalescent Ent.*, 766 F.2d 1342, 1346 (9th Cir. 1985)); *Estate of Blas v. Winkler*, 792 F.2d 858, 860 (9th Cir. 1986); *Barnd v. City of*

*Tacoma*, 664 F.2d 1339, 1343 (9th Cir. 1982).

In addition to the statutory power to impose sanctions for attorney misconduct, the power to sanction is also held by a court pursuant to its inherent authority. The United States Supreme Court has declared that “[t]he inherent powers of federal courts are those which ‘are necessary to the exercise of all others,’ [and that b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.” *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488 (1980) (internal quotation omitted). “While recklessness may be the standard under § 1927, ... it is an insufficient basis for sanctions under a court’s inherent power. Instead, counsel’s conduct must constitute[ ] or [be] tantamount to bad faith.” *Keegan Management Co., Sec. Litig. v. Keegan Management Co.*, 78 F.3d 431, 436 (9th Cir. 1996) (quoting *Piper*, 447 U.S. at 767, 100 S.Ct. at 2465). As a result, “[i]n sanctioning counsel, ‘courts may not invoke inherent powers without a ‘specific finding of bad faith.’” *Keegan Management Co.*, 78 F.3d at 437 (quoting *Yagman v. Republic Ins.*, 987 F.2d 622, 628 (9th Cir. 1993) (quoting *United States v. Stoneberger*, 805 F.2d 1391, 1393 (9th Cir. 1986)). In this regard, “[a] finding of bad faith ‘does not require that the legal and factual basis for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy, or *mala fides*, the assertion of a colorable claim will not bar assessment of attorneys’ fees.” *Mark Ind., Ltd. v. Sea Captain’s Choice, Inc.*, 50 F.3d 730, 732 (9th Cir. 1995) (quoting *Lipsig v. National Student Marketing Corp.*, 663 F.2d 178, 181 (D.C. Cir. 1980)).

Accordingly, when a finding of bad faith has been made, “[a] trial court’s inherent powers unquestionably include the power to assess attorney’s fees against any counsel who willfully abuses judicial process or otherwise conducts litigation in bad faith.” *Barn*d, 665 F.2d at 1342. The Ninth Circuit has recognized that “[a]ssessment of attorney’s fees and other costs in this instance would serve to protect the trial court’s

control of the trial process by deterring similar conduct in the future, ... and would promote the just, speedy, and inexpensive determination of actions consistent with Fed. R. Civ. P. 1." *Id.*

**B. Attorney-Client Privilege and Waiver of the Privilege**

Whether the sanctions as requested by Plaintiffs are appropriate will depend, in large part, upon whether the correspondence sent by Pevar to members of the class of inmate plaintiffs involved in this instant action consisted of privileged documents intended to be confidential professional communications. The Federal Rules of Evidence provide:

[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Fed. R. Evid. 501.

Under federal law, the attorney-client privilege has been recognized as "the oldest of the privileges for confidential communications known to the common law." *UpJohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). "Although the underlying rationale for the privilege has changed over time, ... courts long have viewed its central concern as one 'to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'" *United States v. Zolin*, 491 U.S. 554, 562, 109 S.Ct. 2619, 2625-26, 105 L.Ed.2d 469 (1989) (quoting *UpJohn*, 449 U.S. at 289, 101 S.Ct. at 682). "That purpose, of course, requires that clients be free to make full disclosure to their attorneys' of past wrongdoings, ... in order that the client may obtain

the aid of persons having knowledge of the law and skilled in its practice.” *Zolin*, 491 U.S. at 562, 101 S.Ct. at 2626 (quoting *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976); *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888)).

“The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice, ... as well as an attorney’s advice in response to such disclosures.” *In re Grand Jury Investigation*, 974 F.2d 1068, 1070 (9th Cir. 1992). The proponent of the attorney-client privilege has the burden to establish its applicability to the communications at issue. *United States v. Landof*, 591 F.2d 36, 38 (9th Cir. 1978). The eight essential elements of the attorney-client privilege are:

Where legal advice of any kind is sought ... from a professional legal advisor in his capacity as such, ... the communications relating to that purpose, ... made in confidence ... by the client, ... are at his instance permanently protected ... from disclosure by himself or by the legal advisor... unless the protection be waived.

*In re Grand Jury Investigation*, 974 F.2d at 1071 n.2 (quoting *In re Fischel*, 557 F.2d 209, 211 (9th Cir. 1977)).

With respect to whether the protections of the attorney-client privilege are waived as a result of the disclosure of the privileged communications, the Ninth Circuit has indicated that “the circumstances surrounding the disclosure are to be considered.” *United States v. de la Jara*, 973 F.2d 746, 749 (9th Cir. 1992). In this context, the Ninth Circuit has “held that the attorney-client privilege may be waived by implication, even when the disclosure of the privileged material was ‘inadvertent’ or involuntary.” *Id.* at 749-50. However, when the disclosure of privileged material has occurred on an involuntary basis, the privilege will be “preserved if the privilege holder has made efforts ‘reasonably designed’ to protect and preserve the privilege. Conversely, ... the privilege [will be deemed] to be waived if the privilege holder fails to pursue all reasonable means



of preserving the confidentiality of the privileged matter.” *Id.* at 750.

Inasmuch as the attorney-client privilege effectively prevents the full disclosure of relevant information from the ultimate factfinder, it should be applied “only where necessary to achieve its purpose.” *Fisher*, 425 U.S. at 403, 96 S.Ct. at 1577. As a result, while the privilege must ensure that confidences between client and attorney are protected from disclosure, “the reason for that protection – the centrality of open client and attorney communication to the proper functioning of our adversary system of justice – ‘ceases to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing.’” *Zolin*, 491 U.S. at 562-63, 109 S.Ct. at 2625 (quoting 8 J. WIGMORE, EVIDENCE § 2298, p. 573). Accordingly, “[i]t is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the ‘seal of secrecy,’ between lawyer and client does not extend to communications ‘made for the purpose of getting advice for the commission of a fraud’ or crime.” *Zolin*, 491 U.S. at 563, 109 S.Ct. at 2626 (quotation omitted).

**C. The Attorney Work Product Doctrine**

While the attorney-client privilege protects confidential communications between client and attorney from disclosure, “the memoranda, statements and mental impressions” prepared by the attorney in anticipation of litigation fall outside the scope of the privilege. *Hickman v. Taylor*, 329 U.S. 495, 508, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947). Although the Supreme Court has indicated that “written statements, private memoranda and personal recollections prepared or formed by an adverse party’s counsel in the course of his legal duties” are not privileged or irrelevant for discovery purposes, “it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.” *Id.* at 509-10, 67 S.Ct. at 393. In this regard, the Supreme Court has observed that

[p]roper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant

from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, or course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways – aptly though roughly termed ... as the "Work product of the lawyer." Were such materials open to opposing counsel in mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

*Id.* at 510-11, 67 S.Ct. at 393-94. "[T]he general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify the production through a subpoena or court order." *Id.* at 512, 67 S.Ct. at 394. In this context, Federal Rule of Civil Procedure 26 provides:

[A] party may obtain discovery of documents and tangible things otherwise discoverable ... and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative ... only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of

an attorney or other representative of a party concerning the litigation.

Fed. R. Civ. P. 26(b)(3).

**D. Formal Opinions of the Standing Committee on Ethics and Professional Responsibility**

The Model Rules of Professional Conduct are

not law but rather merely a suggested body of ethical principles and rules upon which reasonable lawyers, concerned about the proper role of the legal profession in American society, have reached a consensus. Since "advance notice is essential to the rule of law" and since "it is desirable that an attorney or client be aware of what actions will not be countenanced," ... the provisions of the Model Code, standing alone, present no just basis for disqualification of a lawyer. Until the Model Code is adopted as law by the courts, the legislature, or the regulatory authority charged with the discipline of lawyers in a particular jurisdiction, the canons and disciplinary rules of the Model Code are merely hortatory, not proscriptive.

*Paul E. Iacono Structural Eng'r, Inc. v. Humphrey*, 722 F.2d 435, 438 (9th Cir. 1983).

The American Bar Association, Standing Committee on Ethics and Professional Responsibility (Committee) issues formal opinions relating to standards of professional conduct and ethics. On November 10, 1992, the Committee issued a formal opinion, based upon the Model Rules of Professional Conduct, relating to the inadvertent disclosure of confidential materials. The Opinion provides:

A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them.

Evidentiary Hearing Exhibit Oths -1, p. 1. On July 5, 1994, the Committee issued a