5-21-2009

Hall v. State Clerk's Record v. 6 Dckt. 35055

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

ERICK VIRGIL HALL,

PETITIONER-APPELLANT,

vs.

STATE OF IDAHO,

RESPONDENT.

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

Hon THOMAS F. NEVILLE, *District Judge*

MOLLY HUSKEY
State Appellate Public Defender

Attorney for Appellant

LAWRENCE G. WASDEN
Attorney General

Attorney for Respondent

VOLUME VI

TABLE OF CONTENTS.....PAGE NO.

VOLUME I

TABLE OF CONTENTS.....PAGE NO.

VOLUME II

VOLUME III

TABLE OF CONTENTS.....PAGE NO.

TABLE OF CONTENTS.....PAGE NO.

VOLUME IV

TABLE OF CONTENTS.....PAGE NO.

VOLUME V

TABLE OF CONTENTS.....PAGE NO.

VOLUME VI

TABLE OF CONTENTS.....PAGE NO.

VOLUME VII

TABLE OF CONTENTS.....PAGE NO.

VOLUME VIII

TABLE OF CONTENTS.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

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)**

Petitioner, ERICK VIRGIL HALL, provides notice of hearing on his Motion for Permission to Appeal. The hearing shall be held before the Honorable Thomas F. Neville, 200 W. Front Street, Boise, Idaho, at a date and time yet to be determined by the Court and the parties.

DATED this 23rd day of August, 2007.

Paula M. Swensen
PAULA M. SWENSEN
Co-Counsel, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23rd day of August, 2007, 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	X U.S. Mail ____ Statehouse Mail ____ Facsimile ____ Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	____ U.S. Mail ____ Statehouse Mail ____ Facsimile X Hand Delivery ____ E-Mail

Barbara Thomas

BARBARA THOMAS
CLU Administrative Assistant

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 RESPONSE TO REQUEST FOR ADMISSIONS**

COMES NOW, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and responds to the petitioner's request for admissions as follows.

The petitioner seeks an admission from the State that a Boise Police Report, DR # 026815 describing Norma Jean Oliver's arrest as a runaway on November 18, 1990, over a year prior to the defendant's Rape charge, was not provided as part of discovery in the Henneman murder case *State v. Hall*, Ada County Case No. H0300518. The State admits that that police report was not provided as part of discovery in the murder case.

Similarly, the petitioner seeks an admission from the State that two other police reports under DR # 127-536 and 127-686, which both describe Norma Jean Oliver's arrests as a runaway on December 2 and 3, 1991, were not provided as part of discovery in the underlying murder case. It appears to the State that those reports were not provided as part of discovery.

However, the State denies that any of the above-referenced police reports are subject to discovery. The State denies that there is any impeachment value or other exculpatory value to the police reports themselves nor their contents. The State denies that the reports are relevant or material in any respect.

Post conviction counsel has observed that the State redacted the date of birth used by Ms. Oliver in her November 1990 contact with the police under DR # 026815. Counsel has asked that date of birth be provided. That date of birth is [redacted]

Petitioner's counsel has asked the State to review the two tape recordings of conversations between Detective Hess and Norma Jean Oliver and the petitioner made on December 4, 1991. The State observes that the two tape recordings in the possession of the Prosecutor's Office appear to be copies of the originals. The Ada County Prosecutor's Office is not in possession of the originals, but only those copies. As reported earlier, it appears that the Garden City Police Department purged the original rape file sometime after the conviction and no longer has the original recordings. The copies that the Ada County Prosecutor's Office has are available for petitioner's counsel to review.

RESPECTFULLY SUBMITTED this 24th day of August 2007.

GREG H. BOWER
Ada County Prosecutor

ROGER BOURNE
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing State's Response to Request for Admissions to the State Appellate Public Defender's Office, 3647 Lake Harbor Lane, Boise, Idaho 83703 by depositing the same in the United States Mail, postage prepaid, this 24 day of August 2007.

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

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 **MOTION FOR EXPERT ACCESS TO PETITIONER** **(Capital Case)**

Petitioner, ERICK VIRGIL HALL, by and through his attorneys at the State Appellate Public Defender's Office, moves this Honorable Court to order the Twin Falls County Adult Detention Facility to grant Dr. James Merikangas of Bethesda, Maryland, access to Petitioner in a quiet and confidential setting suitable for interview, testing, and evaluation. Petitioner moves that such access be granted on Thursday, September 13, 2007 from 6 p.m. to 9 p.m. In the event that Petitioner is transported back to the Ada County Jail prior to the time set for access, Petitioner moves in the alternative for the Court to order the Ada County Jail to grant access to Dr. Merikangas, under the same conditions, on either Thursday, September 13, 2007 from 6 p.m. to 9 p.m. or Friday, September 14, 2007 from 9:00 a.m. to 12:00 p.m., depending on the Petitioner's physical location, and the Court's jury selection schedule in Case No. H0300624. Petitioner further moves that his hands be unrestrained for the testing, as deemed necessary by

Dr. Merikangas.[1] Undersigned co-counsel has discussed the visit with the State's representative, Roger Bourne, who stated he had no objection to Petitioner's request.

This request is necessary to develop Petitioner's claim that trial counsel rendered ineffective assistance of counsel in failing to adequately investigate and present evidence of Mr. Hall's neurological and mental deficits and/or illness. *See* Amended Petition for Post-Conviction Relief, Claim S.4, pp.160-163. Dr. Merikangas has had one previous visit with Petitioner at the Idaho Maximum Security Institution ("IMSI"). However, Petitioner was not provided a "quiet and confidential setting necessary to a thorough examination. *See* Attachment A (Affidavit of Dr. James Merikangas, dated April 13, 2006, p.4 (filed as Exhibit 26 to the Amended Petition for Post-Conviction Relief, and stating that ". . . a psychiatric interview in a confidential setting is also indicated to further elucidate a psychiatric diagnosis as [Erick] was unable to be frank, open and forthcoming in the presence of his jail guards.")

Moreover, recent brain scans conducted on Petitioner and reviewed by Dr. Merikangas definitively show neurological damage, which supports the need for the additional visit to complete the neuron-psychiatric examination with questions specifically related to the results of the scans, conducted under appropriately confidential conditions.

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.

---

[1] Dr. Merikangas and any accompanying SAPD personnel will, of course, submit any required liability waivers to the appropriate jail personnel.

Dated this 6th day of September, 2007.

Respectfully submitted;

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 10th day of September, 2007, served a true and correct copy of the forgoing MOTION FOR EXPERT ACCESS TO PETITIONER as indicated below:

ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	____ Statehouse Mail ____ U.S. Mail ____ Facsimile __✓__ Hand Delivery
ERICK VIRGIL HALL INMATE # 33835 IMSI PO BOX 51 BOISE ID 83707	____ Statehouse Mail __✓__ U.S. Mail ____ Facsimile ____ Hand Delivery

Barbara Thomas

BARBARA THOMAS
Administrative Assistant

NO. _____
A.M. FILED P.M. 2:02

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

SEP 12 2007

J. DAVID NAVARRO, Clerk
By _____ DEPUTY

ERICK VIRGIL HALL, Petitioner, v. THE STATE OF IDAHO, Respondent.	Case No. SPOT0500155 ORDER TO PROVIDE TRANSCRIPT OF HEARING HELD IN ADA COUNTY CASE NO. HCR18591 (CAPITAL CASE)

In accordance with this Court's decision granting the petitioner's request for certain records, and the Court otherwise being fully informed,

IT IS HEREBY ORDERED that ~~Vanessa Starr, Court Reporter for the Honorable Joel D. Horton, provide to Petitioner in the instant case~~ a certified transcript of the hearing held on October 28, 2003, in the case of State v. Hall, Ada County Case No. HCR18591 be prepared. Said transcript shall be provided to Petitioner's counsel as follows:

Mr. Mark J. Ackley
Deputy State Appellate Public Defender
Capital Litigation Unit
3647 Lake Harbor Lane
Boise, ID 83703

IT IS SO ORDERED.

Dated this 12th day of September, 2007.

Thomas F. Neville
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12 day of September, 2007, I served a true and correct copy of the foregoing ORDER TO PROVIDE TRANSCRIPT OF HEARING HELD IN ADA COUNTY CASE NO. HCR18591 by method indicated below to:

MARK ACKLEY STATE APPELLATE PUBLIC DEFENDER 3647 LAKE HARBOR LANE BOISE ID 83703	_____ U.S. Mail _____ Statehouse Mail _X_ Facsimile _____ Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W FRONT STEET 3RD FLOOR BOISE ID 83702 287-7709	_____ U.S. Mail _____ Statehouse Mail _X_ Facsimile _____ Hand Delivery

Deputy Clerk

NO.
A.M. FILED P.M. 12:15

SEP 12 2007

J. DAVID NAVARRO, Clerk
By
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 **ORDER TO CONDUCT MEDICAL TESTING** (CAPITAL CASE)

Upon motion of Petitioner, lack of objection from Respondent, and the Court otherwise being fully advised:

IT IS ORDERED that the Twin Falls County Adult Detention Facility ~~shall~~ Sheriff and the allow Dr. James R. Merikangas of Bethesda, Maryland, to visit with Erick Virgil Hall, on September 13, 2007 from 8 p.m. to 10 p.m.

IT IS FURTHER ORDERED that Petitioner be provided a quiet and confidential setting, which is suitable for neurological interview and evaluation, ~~and~~ one or both of Petitioner's hands shall be unrestrained for any portions of the interview or testing, as deemed necessary by Dr. Merikangas. Petitioner's attorneys and agents will submit any requisite liability waivers prior to the visit.

IT IS SO ORDERED this 12th day of September, 2007.

Honorable Thomas F. Neville
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 12th day of September, 2007, served a true and correct copy of the foregoing ORDER FOR EXPERT ACCESS TO PETITIONER as indicated below:

STATE APPELLATE PUBLIC DEFENDER 3647 LAKE HARBOR LANE BOISE, ID 83703 334-2985	____ Statehouse Mail ____ U.S. Mail __X__ Facsimile ____ Hand Delivery
GARY RANEY, SHERIFF ADA COUNTY JAIL 7210 BARRISTER DRIVE BOISE, ID 83704	____ Statehouse Mail ____ U.S. Mail ____ Facsimile __X__ Hand Delivery
ADA COUNTY MARSHAL'S DEPT. 200 W. FRONT STREET, ROOM 4193 BOISE, ID 83702	

Twin Falls Co. Sheriff
via Fax +
hand-delivery through
Ada Co. Sheriff

DEPUTY COURT CLERK

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** **COURT'S ORDER DENYING PETITIONER'S MOTION FOR JUROR CONTACT**

The petitioner, Erick Virgil Hall, by and through his attorneys, the State Appellate Public Defender's Office, has moved this Court for unrestricted access to the jurors who found the petitioner guilty of Rape, Kidnapping and First Degree Murder and determined a sentence of death for murdering Lynn Henneman. The petitioner supported his motion for juror contact with a memorandum filed June 1, 2007. The memorandum sets out the petitioner's view of the law and also details the specific questions that the petitioner would ask of each of the named jurors.

On July 9, 2007, the State filed a written objection to the petitioner's motion for unrestricted access to the jurors citing case law and Idaho Rule of Evidence 606(b).

The Court heard argument from the parties on the motion on August 8, 2007. Based upon the briefing done by the parties, together with argument and the Court being otherwise fully informed, the Court denies the petitioner's motion for access to the jurors for the reasons set out below.

To begin with, the Court finds that the issue of access to jurors is part of discovery and as such, is within the sound discretion of the Court. The Court has earlier ruled on the petitioner's motion for discovery and has held that requests for discovery are only granted to the extent that they are necessary to protect the substantial rights of the petitioner and that the request must be related to a specific claim in the Petition for Post Conviction Relief. A request for discovery cannot be simply a "fishing expedition." *Aeschliman v. State*, 132 Idaho 397 (Ct. App. 1999). An allegation based simply on speculation should not justify the granting of a discovery motion. *Raudebaugh v. State*, 135 Idaho 602 (S. Ct. 2001).

The Court finds that the claims made by the petitioner relating to possible jury misconduct are made without factual support. The petitioner makes no effort to support his claims with any objective or observable conduct. For instance, the petitioner has not included evidence from bailiffs, marshals, the sheriff's office transport team, court clerks or court reporters, or any other persons who were in a position to observe the jury, to give the slightest indication that the jurors were involved in misconduct or that they violated the Court's instructions. The Court specifically instructed the jury that they were only to consider "evidence admitted at trial." Opening instructions Tr. pg 3404. The Court instructed the jury that:

> You should keep an open mind throughout the trial and not form or express an opinion about the case. You should only reach your decision after you have heard all of the evidence, after you have heard my final instructions and after the final arguments. Opening instructions Tr. pg 3407.

The Court also instructed the jury as follows:

> Fourth, during this trial do not make any investigation of this case or inquire outside the courtroom on your own. Do not go to any place mentioned in the testimony without an explicit order from me to do so. You must not consult any books, dictionaries, encyclopedias, or any other source of information unless I specifically authorize you to do so. Tr. pg 3408 – 3409.

The Court is satisfied that the jury was properly instructed and the Court has no reason to think that the jury did not follow those instructions. Therefore, the Court knows of no reason to permit questioning of the jury in these areas for what would only amount to a "fishing expedition."

The petitioner argued that Idaho Rule of Evidence 606(b) is nothing more than an "admissibility rule" as it related to testimony or affidavits from jurors. The Court rejects that view and finds that Idaho case law has interpreted Idaho Rule of Evidence 606(b) as a prohibition on testimony from jurors about their verdicts except in the following limited circumstances:

1. When extraneous, prejudicial information was improperly brought to the jury's attention;
2. Outside influence was improperly brought to bear on a juror; or
3. The verdict was determined by resort to chance. *State v. Webster*, 123 Idaho 233 (Ct. App. 1993).

The Court of Appeals made a similar holding in *State v. Turner*, 136 Idaho 629 (Ct. App. 2001). From those cases and others, the Court finds that I.R.E. 606(b) among other purposes, serves to protect jurors from "post trial inquiry or harassment." *Levinger v. Mercy Medical Center*, 139 Idaho 192 (S. Ct. 2003). This Rule then clearly is more than an "admissibility rule."

During the hearing on the petitioner's motion, the Court ruled specifically on each of the areas of inquiry contemplated by the petitioner. The Court incorporates by reference its ruling from the bench on that motion, from August 8, 2007, including its findings of fact and conclusions of law, as if set forth fully herein.

For the reasons set out above, together with the reasons articulated by the Court on the record, the petitioner's motion for unrestricted access to the jurors is denied. AND IT IS SO ORDERED this 13th day of September, 2007.

T Neville

THOMAS F. NEVILLE
District Judge

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

NO. _____
A.M. FILED P.M. 2:50
SEP 13 2007
J. DAVID NAVARRO, Clerk
By _____ DEPUTY

ERICK VIRGIL HALL,

Petitioner,

v.

THE STATE OF IDAHO,

Respondent.

Case No. SPOT0500155

ORDER TO RELEASE RECORDS OF NORMA JEAN OLIVER

(CAPITAL CASE)

In accordance with this Court's decision at a hearing held on August 8, 2007, and the Court otherwise being fully informed that records in possession of the Social Security Administration may contain documents relevant to these capital post-conviction proceedings,

IT IS HEREBY ORDERED that the Social Security Administration, Suite 101, 1249 S. Vinnell, Boise, Idaho 83709, shall release all records included in the Social Security Administration's file for **Norma Jean Oliver**, DOB [redacted] SSN [redacted] Said records shall be limited to the following time frame: **1991 through 2004**.

This Court will review such documents *in camera* for a determination of relevance before providing copies to the respective parties. Accordingly, said records shall be sent in time to be physically received in chambers by September 27, 2007 by:

Honorable Thomas F. Neville
200 W. Front Street, STE. 5100
Boise, Idaho 83702-7300

Dated this 13th day of September, 2007.

THOMAS F. NEVILLE
District Judge, Ada County

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of September, 2007, I served a true and correct copy of the foregoing ORDER TO RELEASE RECORDS OF NORMA JEAN OLIVER by method indicated below to:

MARK ACKLEY STATE APPELLATE PUBLIC DEFENDER 3647 LAKE HARBOR LANE BOISE ID 83703	_____ U.S. Mail _____ Statehouse Mail __X__ Facsimile _____ Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W FRONT STEET 3RD FLOOR BOISE ID 83702	_____ U.S. Mail _____ Statehouse Mail __X__ Facsimile _____ Hand Delivery

Deputy Clerk, Ada County

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

FILED P.M. 1:35

SEP 13 2007

J. DAVID NAVARRO, Clerk
DEPUTY

ERICK VIRGIL HALL,

Petitioner,

v.

THE STATE OF IDAHO,

Respondent.

Case No. SPOT0500155

ORDER TO RELEASE MEDICAL AND PSYCHOLOGICAL/PSYCHIATRIC RECORDS OF NORMA JEAN OLIVER

(CAPITAL CASE)

In accordance with this Court's decision granting the petitioner's request for certain records, and the Court otherwise being fully informed,

IT IS HEREBY ORDERED that **Margaret Farmer** release all reports, notes, and other documents relating to the medical, psychological, and psychiatric treatment or counseling of **Norma Jean Oliver, DOB** [redacted] for the following years: 1991, 1992, 2003, 2004.

This order includes the release of Alcohol and Drug Abuse Medical Records, which are protected by the Federal confidentiality rules set forth in 42 C.F.R. Chap.1, Part 2, Subpart C 2.32. This order, in accordance with federal confidentiality laws, prohibits the further disclosure of such records unless such further disclosure is expressly ordered pursuant to 42 C.F.R. Chap. 1, Part 2. This information cannot be used for the purpose of criminally investigating or prosecuting Ms. Oliver for activities relating to her alcohol or drug abuse records.

The information authorized for release may indicate the presence of a communicable disease or venereal disease which may include, but is not limited to, diseases such as hepatitis, syphilis, gonorrhea, or the human immunodeficiency virus, also known as acquired immune deficiency syndrome (AIDS).

This order specifically requires the release of medical, psychological and psychiatric information.

Said records shall be ~~sent to~~ physically received in Chambers at the Ada County Courthouse no later than September 27, 2007 by:

Honorable Thomas F. Neville
200 W. Front Street, STE. 5100
Boise, Idaho 83702-7300

IT IS SO ORDERED.

Dated this 13th day of September, 2007.

Thomas F. Neville
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of September, 2007, I served a true and correct copy of the foregoing ORDER TO RELEASE MEDICAL AND PSYCHOLOGICAL/PSYCHIATRIC RECORDS OF NORMA JEAN OLIVER by method indicated below to:

MARK ACKLEY STATE APPELLATE PUBLIC DEFENDER 3647 LAKE HARBOR LANE BOISE ID 83703	_____ U.S. Mail _____ Statehouse Mail __X__ Facsimile _____ Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W FRONT STEET 3RD FLOOR BOISE ID 83702	_____ U.S. Mail _____ Statehouse Mail __X__ Facsimile _____ Hand Delivery

Deputy Clerk

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

A.M. NO. FILED P.M. 1:34

SEP 13 2007

J. DAVID NAVARRO, Clerk
By DEPUTY

ERICK VIRGIL HALL, Petitioner, v. THE STATE OF IDAHO, Respondent.	Case No. SPOT0500155 ORDER TO RELEASE MEDICAL AND PSYCHOLOGICAL/PSYCHIATRIC RECORDS OF NORMA JEAN OLIVER (CAPITAL CASE)

In accordance with this Court's decision granting the petitioner's request for certain records, and the Court otherwise being fully informed,

IT IS HEREBY ORDERED that **Dr. Lamar Heyrend** release all reports, notes, and other documents relating to the medical, psychological, and psychiatric treatment or counseling of **Norma Jean Oliver, DOB** [redacted] for the following years: 1991, 1992, 2003, 2004.

This order includes the release of Alcohol and Drug Abuse Medical Records, which are protected by the Federal confidentiality rules set forth in 42 C.F.R. Chap.1, Part 2, Subpart C 2.32. This order, in accordance with federal confidentiality laws, prohibits the further disclosure of such records unless such further disclosure is expressly ordered pursuant to 42 C.F.R. Chap. 1, Part 2. This information cannot be used for the purpose of criminally investigating or prosecuting Ms. Oliver for activities relating to her alcohol or drug abuse records.

The information authorized for release may indicate the presence of a communicable disease or venereal disease which may include, but is not limited to, diseases such as hepatitis, syphilis, gonorrhea, or the human immunodeficiency virus, also known as acquired immune deficiency syndrome (AIDS).

This order specifically requires the release of medical, psychological and psychiatric information.

Said records shall be ~~sent~~ physically received in chambers at the Ada County Courthouse no later than September 27, 2007 by:

JM

Honorable Thomas F. Neville
200 W. Front Street
Boise, Idaho 83702-7300

IT IS SO ORDERED.

Dated this 13th day of September, 2007.

Thomas F. Neville
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of September, 2007, I served a true and correct copy of the foregoing ORDER TO RELEASE MEDICAL AND PSYCHOLOGICAL/PSYCHIATRIC RECORDS OF NORMA JEAN OLIVER by method indicated below to:

MARK ACKLEY STATE APPELLATE PUBLIC DEFENDER 3647 LAKE HARBOR LANE BOISE ID 83703	____ U.S. Mail ____ Statehouse Mail _X_ Facsimile ____ Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W FRONT STEET 3RD FLOOR BOISE ID 83702	____ U.S. Mail ____ Statehouse Mail _X_ Facsimile ____ Hand Delivery

Deputy Clerk

NO. _____
A.M. _____ FILED P.M. 1:35

SEP 13 2007

J. DAVID NAVARRO, Clerk
By _____ 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

ORDER TO RELEASE MEDICAL AND PSYCHOLOGICAL/PSYCHIATRIC RECORDS OF NORMA JEAN OLIVER

(CAPITAL CASE)

In accordance with this Court's decision granting the petitioner's request for certain records, and the Court otherwise being fully informed,

IT IS HEREBY ORDERED that **Intermountain Hospital** release all reports, notes, and other documents relating to the medical, psychological, and psychiatric treatment or counseling of **Norma Jean Oliver, DOB** [redacted] for the following years: 1991, 1992, 2003, 2004.

This order includes the release of Alcohol and Drug Abuse Medical Records, which are protected by the Federal confidentiality rules set forth in 42 C.F.R. Chap.1, Part 2, Subpart C 2.32. This order, in accordance with federal confidentiality laws, prohibits the further disclosure of such records unless such further disclosure is expressly ordered pursuant to 42 C.F.R. Chap. 1, Part 2. This information cannot be used for the purpose of criminally investigating or prosecuting Ms. Oliver for activities relating to her alcohol or drug abuse records.

The information authorized for release may indicate the presence of a communicable disease or venereal disease which may include, but is not limited to, diseases such as hepatitis, syphilis, gonorrhea, or the human immunodeficiency virus, also known as acquired immune deficiency syndrome (AIDS).

This order specifically requires the release of medical, psychological and psychiatric information.

Said records shall be [redacted] physically received in Chambers at the Ada County Courthouse no later than September 27, 2007 by:
Honorable Thomas F. Neville
200 W. Front Street, STE. 5100
Boise, Idaho 83702-7300

IT IS SO ORDERED.

Dated this 13th day of September, 2007.

Thomas F. Neville
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of September, 2007, I served a true and correct copy of the foregoing ORDER TO RELEASE MEDICAL AND PSYCHOLOGICAL/PSYCHIATRIC RECORDS OF NORMA JEAN OLIVER by method indicated below to:

MARK ACKLEY STATE APPELLATE PUBLIC DEFENDER 3647 LAKE HARBOR LANE BOISE ID 83703	_____ U.S. Mail _____ Statehouse Mail __X__ Facsimile _____ Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W FRONT STEET 3RD FLOOR BOISE ID 83702	_____ U.S. Mail _____ Statehouse Mail __X__ Facsimile _____ Hand Delivery

Deputy Clerk

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

FILED A.M. NO. P.M. 1135

SEP 13 2007

J. DAVID NAVARRO, Clerk
By DEPUTY

ERICK VIRGIL HALL, Petitioner, v. THE STATE OF IDAHO, Respondent.	Case No. SPOT0500155 ORDER TO RELEASE MEDICAL AND PSYCHOLOGICAL/PSYCHIATRIC RECORDS OF NORMA JEAN OLIVER (CAPITAL CASE)

In accordance with this Court's decision granting the petitioner's request for certain records, and the Court otherwise being fully informed,

IT IS HEREBY ORDERED that **Dr. Lawrence Vickman** release all reports, notes, and other documents relating to the medical, psychological, and psychiatric treatment or counseling of **Norma Jean Oliver,** [redacted] for the following years: 1991, 1992, 2003, 2004.

This order includes the release of Alcohol and Drug Abuse Medical Records, which are protected by the Federal confidentiality rules set forth in 42 C.F.R. Chap.1, Part 2, Subpart C 2.32. This order, in accordance with federal confidentiality laws, prohibits the further disclosure of such records unless such further disclosure is expressly ordered pursuant to 42 C.F.R. Chap. 1, Part 2. This information cannot be used for the purpose of criminally investigating or prosecuting Ms. Oliver for activities relating to her alcohol or drug abuse records.

The information authorized for release may indicate the presence of a communicable disease or venereal disease which may include, but is not limited to, diseases such as hepatitis, syphilis, gonorrhea, or the human immunodeficiency virus, also known as acquired immune deficiency syndrome (AIDS).

This order specifically requires the release of medical, psychological and psychiatric information.

Said records shall be ~~sent to:~~ physically received in chambers at the Ada County Courthouse no later than September 27, 2007 by:

Honorable Thomas F. Neville
200 W. Front Street, STE. 5100
Boise, Idaho 83702-7300

IT IS SO ORDERED.

Dated this 13th day of September, 2007.

Thomas F. Neville
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of September 2007, I served a true and correct copy of the foregoing ORDER TO RELEASE MEDICAL AND PSYCHOLOGICAL/PSYCHIATRIC RECORDS OF NORMA JEAN OLIVER by method indicated below to:

MARK ACKLEY STATE APPELLATE PUBLIC DEFENDER 3647 LAKE HARBOR LANE BOISE ID 83703	_____ U.S. Mail _____ Statehouse Mail __X__ Facsimile _____ Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W FRONT STEET 3RD FLOOR BOISE ID 83702	_____ U.S. Mail _____ Statehouse Mail __X__ Facsimile _____ Hand Delivery

Deputy Clerk

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

NO. A.M. FILED P.M. 1:30

SEP 13 2007

J. DAVID NAVARRO, Clerk By DEPUTY

ERICK VIRGIL HALL, Petitioner, v. THE STATE OF IDAHO, Respondent.	Case No. SPOT0500155 ORDER TO RELEASE MEDICAL AND PSYCHOLOGICAL/PSYCHIATRIC RECORDS OF NORMA JEAN OLIVER (CAPITAL CASE)

In accordance with this Court's decision granting the petitioner's request for certain records, and the Court otherwise being fully informed,

IT IS HEREBY ORDERED that **St. Alphonsus Hospital** release all reports, notes, and other documents relating to the medical, psychological, and psychiatric treatment or counseling of **Norma Jean Oliver, DOB** [redacted] for the following years: 1991, 1992, 2003, 2004.

This order includes the release of Alcohol and Drug Abuse Medical Records, which are protected by the Federal confidentiality rules set forth in 42 C.F.R. Chap.1, Part 2, Subpart C 2.32. This order, in accordance with federal confidentiality laws, prohibits the further disclosure of such records unless such further disclosure is expressly ordered pursuant to 42 C.F.R. Chap. 1, Part 2. This information cannot be used for the purpose of criminally investigating or prosecuting Ms. Oliver for activities relating to her alcohol or drug abuse records.

The information authorized for release may indicate the presence of a communicable disease or venereal disease which may include, but is not limited to, diseases such as hepatitis, syphilis, gonorrhea, or the human immunodeficiency virus, also known as acquired immune deficiency syndrome (AIDS).

This order specifically requires the release of medical, psychological and psychiatric information.

Said records shall be ~~sent to~~ physically received in Chambers no later than September 27, 2007 by:

JM

Honorable Thomas F. Neville
200 W. Front Street, STE. 5100
Boise, Idaho 83702-7300

IT IS SO ORDERED.

Dated this 13th day of September, 2007.

Thomas F. Neville
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of September, 2007, I served a true and correct copy of the foregoing ORDER TO RELEASE MEDICAL AND PSYCHOLOGICAL/PSYCHIATRIC RECORDS OF NORMA JEAN OLIVER by method indicated below to:

MARK ACKLEY STATE APPELLATE PUBLIC DEFENDER 3647 LAKE HARBOR LANE BOISE ID 83703	_____ U.S. Mail _____ Statehouse Mail __X__ Facsimile _____ Hand Delivery	334-2985
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W FRONT STEET 3RD FLOOR BOISE ID 83702	_____ U.S. Mail _____ Statehouse Mail __X__ Facsimile _____ Hand Delivery	287-7709

Deputy Clerk

NO. _____

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

FILED A.M. P.M. 1:34
SEP 13 2007
J. DAVID NAVARRO, Clerk
By _____ DEPUTY

ERICK VIRGIL HALL,

Petitioner,

v.

THE STATE OF IDAHO,

Respondent.

Case No. SPOT0500155

ORDER TO RELEASE MEDICAL AND PSYCHOLOGICAL/PSYCHIATRIC RECORDS OF NORMA JEAN OLIVER

(CAPITAL CASE)

In accordance with this Court's decision granting the petitioner's request for certain records, and the Court otherwise being fully informed,

IT IS HEREBY ORDERED that **Bonnie Pitman** release all reports, notes, and other documents relating to the medical, psychological, and psychiatric treatment or counseling of **Norma Jean Oliver, DOB** [redacted] for the following years: 1991, 1992, 2003, 2004.

This order includes the release of Alcohol and Drug Abuse Medical Records, which are protected by the Federal confidentiality rules set forth in 42 C.F.R. Chap.1, Part 2, Subpart C 2.32. This order, in accordance with federal confidentiality laws, prohibits the further disclosure of such records unless such further disclosure is expressly ordered pursuant to 42 C.F.R. Chap. 1, Part 2. This information cannot be used for the purpose of criminally investigating or prosecuting Ms. Oliver for activities relating to her alcohol or drug abuse records.

The information authorized for release may indicate the presence of a communicable disease or venereal disease which may include, but is not limited to, diseases such as hepatitis, syphilis, gonorrhea, or the human immunodeficiency virus, also known as acquired immune deficiency syndrome (AIDS).

This order specifically requires the release of medical, psychological and psychiatric information.

Said records shall be ~~sent to:~~ physically received in chambers at the Ada County Courthouse no later than September 27, 2007 by:

JM

Honorable Thomas F. Neville
200 W. Front Street, STE. 5100
Boise, Idaho 83702-7300

IT IS SO ORDERED.

Dated this 13th day of September, 2007.

Thomas F. Neville
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of September, 2007, I served a true and correct copy of the foregoing ORDER TO RELEASE MEDICAL AND PSYCHOLOGICAL/PSYCHIATRIC RECORDS OF NORMA JEAN OLIVER by method indicated below to:

MARK ACKLEY STATE APPELLATE PUBLIC DEFENDER 3647 LAKE HARBOR LANE BOISE ID 83703	____ U.S. Mail ____ Statehouse Mail _X_ Facsimile ____ Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W FRONT STEET 3RD FLOOR BOISE ID 83702	____ U.S. Mail ____ Statehouse Mail _X_ Facsimile ____ Hand Delivery

Deputy Clerk

NO. _____
A.M. 10:26 FILED P.M. _____

SEP 17 2007

J. DAVID NAVARRO, Clerk
By _____ 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 GRANTING IN PART AND DENYING IN PART PETITIONER'S SUPPLEMENTAL MOTION FOR DISCOVERY**

The petitioner requests documents from several agencies and depositions in his supplemental motion for discovery. The Court took up the motion and heard argument by both sides on August 8, 2007. Based upon the briefing done by the parties, argument and the Court being otherwise fully informed, the Court orders as follows:

The Court grants the motion for Norma Jean Oliver's medical (and mental health) records from St. Alphonsus Hospital, ~~relating to her rape examination in December 1991.~~ Dr. Lawrence Vickmon, Intermountain Hospital, Dr. Lower Hayward, Margaret Farmer, and Bonnie Pitman from 1991 and 1992 and also

~~The Court grants the petitioner's motion for Norma Jean Oliver's mental health records from Intermountain Hospital from 1991 and 1992 and also~~ from 2003 and 2004. The Court will require that those records be delivered to the Court for in-camera inspection. The Court will determine whether any of the records contain material relevant to claims made by the petitioner in his Petition for Post Conviction Relief.

The Court grants the petitioner's motion for an order permitting a subpoena to be sent to the Social Security Administration for Norma Jean Oliver's social security records relating to her mental health. The Court grants that order for all of her mental health records up through 2004. Those records must also be delivered to the Court for in-camera inspection. The Court will release any records that it appears are relevant to claims made by the petitioner.

The Court grants the petitioner's request for an order directing Payette County to deliver any records of juvenile prosecutions against Norma Jean Oliver from 1990 and 1991. Those records are to be delivered to the Court for in camera inspection. The Court will release any records that appear to be relevant to a claim made by the petitioner.

The Court grants the petitioner's motion for a transcript of the hearing before the Honorable Joel D. Horton on the question of the release of the Pre-Sentence Investigation Report from the defendant's 1991 Rape conviction.

The Court grants the petitioner's motion for the release of April Sebastian's Pre-Sentence Investigation Report. However, that report will be reviewed by the Court in-camera and only portions of that report will be released to the extent that they are relevant to any claims made by the petitioner.

The Court grants the stipulated order for the release of certain items on Wesley Allan Dodd that are currently being held by the sheriff's office in Clark County, Washington.

The Court denies the petitioner's motion for deposition of Glen Elam, Jay Rosenthal, Daniel Hess, Roger Bourne and Greg Bower for the reasons stated on the record in open Court during the hearing held on August 8, 2007. No showing has been made by the petitioner that those depositions are necessary to protect the substantial rights of the petitioner.

For the reasons set out above, and additionally for the reasons stated on the record on August 8, 2007, the petitioner's motion for discovery is denied in part and granted in part.

IT IS SO ORDERED this 16th day of ~~August~~ September 2007.

THOMAS F. NEVILLE
District Judge

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

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.	)	**MOTION FOR FRAGILE-X BLOOD TEST**
	)	
	)	
THE STATE OF IDAHO,	)	
	)	
Respondent.	)	**(Capital Case)**
	)	

COMES NOW the Petitioner, ERICK VIRGIL HALL, by and through his attorneys at the State Appellate Public Defender's Office, and respectfully request this Court to order Ada County Jail to conduct a blood draw of Petitioner and send it to Annette K. Taylor, M.S., Ph.D., Kimball Genetics, Inc., 101 University Boulevard, Suite 330, Denver, CO 80206 for Fragile-X testing. Kimball Genetics will send all necessary materials and instructions to the Ada County Jail.

Respondent, by and through Mr. Roger Bourne, has informed undersigned counsel that the State has no objection to this motion. Petitioner is aware that trial counsel in the Hanlon case has filed a similar motion.

This request is necessary to develop Petitioner's claim that trial counsel rendered ineffective assistance of counsel in failing to adequately investigate and present evidence of either Mr. Hall's neurological and mental deficits, or mental illness or both. *See* Amended Petition for Post-Conviction Relief, Claim S.4, pp.160-163. This motion is made pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and it is based upon all matters of record.

Petitioner was examined and recently re-examined by Dr. James Merikangas and, based on his neurological findings and a childhood diagnosis of mild mental retardation, he recommended Erick Hall be tested for Fragile-X syndrome. This syndrome is a genetic disorder caused by mutation of the FMR1 gene on the X chromosome. Fragile-X impacts behavior in several different ways; in males it can include attention deficit disorders, aggression, speech disturbances, mood disorder, panic episodes, hand biting, autistic behaviors, low IQ, poor eye contact, and unusual responses to various stimuli. Petitioner has exhibited many of these symptoms throughout his life; however, he has never been tested for this syndrome. If present, Fragile-X syndrome would have provided powerful mitigating evidence of a genetic defect affecting Mr. Hall's perceptions and behaviors.

The testing itself will be simple to arrange. Petitioner requires only that the Ada County Jail conduct the appropriate blood draw and send the samples by overnight mail (eg. Federal Express) to: Annette K. Taylor, M.S., Ph.D., Kimball Genetics, Inc., 101 University Boulevard, Suite 330, Denver, CO 80206. The lab will make all arrangements for the test, the expenses for which will be incurred by the State Appellate Public Defender. The lab will provide full instructions to the jail concerning the procedures of sending the blood draw. Because time is of the essence, Petitioner request the sample be taken and shipped as soon as possible.

CONCLUSION

Petitioner exhibited clear indications of neurological and mental deficits, or mental illness or both, yet trial counsel failed to investigate the issue or conduct neurological testing. Because the completion of this test 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.

Dated this 1st day of October, 2007.

Respectfully submitted;

Paula Swensen

PAULA M. SWENSEN
Co-Counsel, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this ___ day of October, 2007, served a true and correct copy of the forgoing MOTION FOR EXPERT ACCESS TO PETITIONER as indicated below:

ROGER BOURNE
ADA COUNTY PROSECUTOR'S OFFICE
200 W. FRONT, SUITE 3191
BOISE ID 83702

_____ Statehouse Mail
_____ U.S. Mail
_____ Facsimile
_____ Hand Delivery

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

_____ Statehouse Mail
_____ U.S. Mail
_____ Facsimile
_____ Hand Delivery

NICOLE OWENS

NO. _____
A.M. 8:05 FILED P.M. _____
OCT - 3 2007
J. DAVID NAVARRO, Clerk
By _____ 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 **ORDER TO CONDUCT FRAGILE-X BLOOD TEST** (CAPITAL CASE)

Motion having been made and Court otherwise being fully informed,

IT IS HEREBY ORDERED THAT the Ada County Jail conduct a blood draw of Petitioner, Erick Virgil Hall, and send to: Annette K. Taylor, M.S., Ph.D., Kimball Genetics, Inc., 101 University Boulevard, Suite 330, Denver, CO 80206 for Fragile-X testing. Kimball Genetics will send all necessary materials and instructions to the Ada County Jail.

IT IS FURTHER ORDERED THAT the results of the testing be forwarded 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.

It is so ordered.

Dated this 2nd day of October, 2007.

T Neville

Honorable Thomas Neville
District Judge

JM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3 day of October, 2007, I served a true and correct copy of the foregoing ORDER TO CONDUCT MEDICAL TESTING AND ORDER TO TRANSPORT by method indicated below to:

MARK ACKLEY STATE APPELLATE PUBLIC DEFENDER 3647 LAKE HARBOR LANE BOISE ID 83703	X U.S. Mail ____ Statehouse Mail ____ Facsimile ____ Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	X U.S. Mail ____ Statehouse Mail ____ Facsimile ____ Hand Delivery

Deputy Clerk

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, ISB # 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 **FINAL AMENDED PETITION FOR POST-CONVICTION RELIEF** **(CAPITAL CASE)**

COMES NOW the Petitioner, Erick Virgil Hall, by and through his attorneys at the State Appellate Public Defender, and petitions this Honorable Court for post-conviction relief from the conviction and sentences imposed by this Court in the Fourth Judicial District, in State v. Hall, Ada County case no. H0300518, on January 18, 2005. This Court has jurisdiction over the action pursuant to I.C. § 19-2719; §§ 19-4901, *et seq.*; I.C.R., Rule 57; and Article I, Sections 1 and 5 of the Constitution of the State of Idaho. Mr. Hall relies on Article I, §§ 1, 5, 6, 7, 8, 13, 17, and 18 of the Constitution of the State of Idaho, and the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as International Human Rights Law in support of this Final Amended Petition for Post-Conviction Relief (herein "Final Amended Petition").

I. BACKGROUND (I.C.R. 57(a)(1) through (a)(6))

1. Mr. Hall is in the custody of the State of Idaho Department of Correction, detained at the Idaho Maximum Security Institution near Boise, Idaho.

2. Judgment and sentence were pronounced by the Honorable Thomas F. Neville, District Judge of the Fourth Judicial District of the State of Idaho, in Ada County, Boise, Idaho.

3. Mr. Hall stands convicted in Ada County case no. H0300518 of the crimes of:

   Count I, Murder in the First Degree

   Count II, Rape

   Count III, Kidnapping in the First Degree

4. The Court imposed sentences as follows on the 18th day of January, 2005:

   Count I, for Murder: Death

   Count II, for Rape: Life in Prison without possibility of parole

   Count III, for Kidnapping: Life in Prison without possibility of parole

   The sentences for Counts II and III are to run consecutively.

5. Mr. Hall pled not guilty and a jury returned verdicts of guilty to the crimes charged.

6. Other than post-trial motions and a Notice Of Appeal, which cannot be litigated under Idaho law until these post-conviction matters are concluded, this is Mr. Hall's first attempt in any court to obtain relief from the convictions and sentences herein challenged.

II. ILLEGAL RESTRAINT OF LIBERTY

Mr. Hall is a person restrained of his liberty in that he is a prisoner of the State of Idaho, under the custody of the Idaho State Board of Corrections, held on death row at the Idaho Maximum Security Institution. This restraint is pursuant to the following conviction and sentence imposed on January 18, 2005, by this Court presiding in the Fourth Judicial District, in State v. Hall, Ada County case no. H0300518: Murder in the First Degree, Kidnapping in the First Degree, and Rape. This restraint is illegal in that the convictions and sentences were obtained in violation of the constitutions of the United States and of the State of Idaho and in violation of court rules, statutes and other law as set forth *infra* in section IV.

III. CONTENTS OF FINAL AMENDED PETITION

A. Exhibits

Idaho Code § 19-4903 addresses the contents of an application/petition for post-conviction relief and states in relevant part that, "Affidavits, records, or other evidence supporting its allegations shall be attached to the application or the application shall recite why they are not attached." I.C. § 19-4903. The contents of this Final Amended Petition are limited due pending *in camera* review of documents by the Court, to the lack of complete cooperation by all of Mr. Hall's trial team members, as well as various rulings by this Court imposing restrictions on Mr. Hall's ability to investigate relevant information, including the following.

1. Glenn Elam, the investigator on Mr. Hall's trial defense team in the underlying criminal proceedings, has relevant information regarding the course and scope of trial counsels' investigation. Mr. Elam has spoken to Mr. Hall's current investigator, Michael Shaw, but has refused to sign an affidavit without authorization from Amil Myshin, lead trial counsel. Mr.

Myshin has not given such authorization. An affidavit of Michael Shaw is attached in lieu of Mr. Elam's affidavit. (Exhibit 36.)

2. The Court has denied numerous of Mr. Hall's post-conviction discovery requests, including his request to depose Mr. Elam. The litigation and all relevant filings, including the Court's order denying numerous requests, are a matter of record in these post-conviction proceedings, and are incorporated herein by reference.

3. The Court has imposed an absolute prohibition on any jury contact. The litigation and all relevant filings, including the Court's order prohibiting any jury contact, are a matter of record in these post-conviction proceedings, and are incorporated herein by reference.

B. JUDICIAL NOTICE

The Idaho Rules of Evidence, Rule 201, provides in part that a "court **shall** take judicial notice if requested by a party and supplied with the necessary information." I.R.E. 201 (d) (emphasis added). The rule was amended, effective July 1, 2007, to ensure that appellate courts are aware of the adjudicative facts of which the lower court took notice. The relevant portion of the amended rule provides,

> When a party makes an oral or written request that a court take judicial notice of records, exhibits or transcripts from the court file in the same or a separate case, the party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all parties copies of such documents or items.

I.R.E. 201 (d). Mr. Hall requests the Court take judicial notice of the complete Clerk's Record and Reporter's Transcript from the underlying criminal case, Ada County case no. H0300518, and of other documents and transcripts as identified and requested in this Final Amended Petition.

IV. GROUNDS FOR RELIEF

Mr. Hall asserts that the convictions and sentences entered against him were obtained in violation of laws of the United States and of Idaho, including the Fourth,

Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article I, §§ 1, 5, 6, 7, 8, 13, 17, and 18, of the Constitution of the State of Idaho, provisions of the Idaho Code and the Idaho Criminal Rules as well as international law.

Within this Final Amended Petition, Mr. Hall has raised numerous grounds for relief based on various types of claims including, but not limited to, claims of ineffective assistance of counsel (*Strickland* claims) as well as *Brady* violations.[1] Mr. Hall alleges he is entitled to relief on each independent claim. Further, Mr. Hall alleges that even if the claims do not meet the governing level of prejudice on their own, when jointly considered, the accumulation of error creates the degree of prejudice entitling Mr. Hall to relief. *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992).

A. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Adequately Investigate And Present Evidence Of Erick Hall's Neurological Damage, Mental Retardation And Mental Illness[2]

1. Introduction

Trial counsel did not conduct any neurological testing of Mr. Hall despite ample evidence of numerous closed head injuries and other symptoms of neurological damage.

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[1] *See Strickland v. Washington*, 466 U.S. 668, 687 (1984), and *Brady v. Maryland,* 373 U.S. 83 (1963). To prove a *Strickland* violation, Mr. Hall must show (1) deficient performance and (2) prejudice. Prejudice is established by showing that but for counsels' deficient performance, there is a reasonable probability that the outcome would have been different. A reasonable probability is a probability that undermines confidence in the outcome of the trial or sentencing. To prove a *Brady* violation, Mr. Hall must show that the State failed to disclose (1) material and (2) exculpatory evidence. Materiality has been defined to mean a "reasonable probability of a different result." Where not otherwise stated herein, Mr. Hall asserts that he has established all requisites for his *Strickland* and *Brady* claims.

[2] This claim focuses on Mr. Hall's neurological damage. While Mr. Hall has not presented evidence of mental illness and mental retardation to satisfy the Idaho statute for excluding the death penalty, he hereby seeks to preserve this claim for future litigation as technology, testing techniques, and standards of decency evolve.

Trial counsel had no plausible reason for failing to conduct the testing; further, the testing that has been conducted during Mr. Hall's post-conviction investigation has uncovered significant neurological damage.

2. Applicable Legal Standards

The Sixth Amendment right to counsel guarantees a criminal defendant effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-686 (1984). Idaho has adopted the *Strickland* two-prong test in evaluating whether a criminal defendant was denied the right to the effective assistance of counsel. *Dunlap v. State*, 141 Idaho 50, 59, 106 P.3d 376, 385 (2004). Specifically, a defendant must prove counsel's performance was deficient and counsel's deficient performance prejudiced his case. *Id.* To show deficient performance, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. *Id.* To show prejudice, the defendant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Id.* A defendant must prove his claims by a preponderance of the evidence. *Id.* at 56, 106 P.3d at 382.

When assessing the reasonableness of counsel's decisions, this Court owes deference to counsel's strategic decision; however, "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega,* 528 U.S. 470, 481 (2000) (citation omitted). Accordingly, courts must first focus on whether the investigation itself was reasonable. *Wiggins v. Smith,* 539 U.S. 510, 523 (2003) ("[W]e focus on whether the investigation supporting counsel's decision . . . *was itself reasonable.*") (emphasis in original) (citation omitted); *Strickland* 466 U.S. at 691 (holding that counsel has "a duty to make reasonable investigations or to make a

reasonable decision that makes particular investigations unnecessary."); *Conner v. Quarterman,* 477 F.3d 287, 293-94 (5th Cir. 2007) ("The judgment is whether counsel's investigation was reasonable, not whether counsel's trial strategy was reasonable.") (citation omitted).

3. Analysis

The use of a wide array of mental health experts, various testing instruments, and various neurological and medical tests has become the standard of practice for effective representation of capital defendants. It is particularly important in a capital case that trial counsel thoroughly investigate the possibility of brain damage. Trial counsel operates below the prevailing standard of practice in a capital case if he fails to obtain a physical and neurological examination. The importance of a medical and neurological examination is evidenced in the commentary to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (herein "ABA Guidelines"), which provides in relevant part that:

> ...mental health experts are essential to defending capital cases. Neurological and psychiatric impairment, combined with a history of physical and sexual abuse, are common among persons convicted of violent offenses on death row....the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase. Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process. **Counsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination.** Diagnostic studies, neuropsychological testing, **appropriate brain scans**, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary.

(Exhibit 1, ABA Guidelines, Commentary to Guideline 4.1 (emphasis added) (footnotes omitted).) Thus, at a minimum, trial counsel must arrange neurological and medical

examinations. Then, if the examinations reveal potential damage, trial counsel must arrange for further testing, including the appropriate brain scans.

a. Deficient Performance

In this case, trial counsel utterly abandoned the duty to investigate neurological damage, without any reasonable explanation, even though Erick Hall had a history warranting a neurological examination.[3] Erick had a history of head injuries, black outs, and bizarre and erratic behavior. (*See e.g.*, Exhibit 2 (Affidavit of Wendy Levy); Exhibit 3 (Second Affidavit of Dr. James Merikangas, dated October 14, 2006);[4] Exhibit 5 (Affidavit of Deanna Jean (McCracken) Horman); Exhibit 6 (Affidavit of Jean Hall McCracken); Exhibit 7 (Affidavit of John August Thompson); Exhibit 8 (Affidavit of Frank ("Frankie") Alvin Charles McCracken); and Exhibit 9 (Affidavit of Kenneth S. Douglas).) This history was available to trial counsel, and they certainly knew of at least Erick's erratic behavior, history of headaches, and history of head injuries. (*See e.g.*, Tr., p.5055, L.11–p.5056, L.25; p.5081, Ls.7–10; p.5004, Ls.4 -7.) Nonetheless trial counsel failed to arrange for even minimal standard neurological and medical testing to determine whether brain scans or other testing was warranted.

The theory of the mitigation case was that Erick did not represent the worst of the worst murderers for which the death penalty is reserved, because of the emotional trauma stemming from the abuse and neglect of his childhood. (*See* Exhibit 10 (Affidavit of Rosanne Dapsauski).) However, there was nothing about the mitigation theory of the

[3] A neurological examination is *always* warranted, even without any significant historical indicators of potential neurological damage. However, in this case, there was ample reason to believe that Erick required at least the preliminary neurological examination to determine whether further testing was required.

[4] Dr. Merikangas' curriculum vitae is submitted as Exhibit 4.

case that precluded further investigation and presentation of neurological damage. *Id.* Indeed, Dr. Cunningham, who testified for the defense at sentencing, agrees that evidence of brain damage would have been extremely helpful, and he would have incorporated such evidence into his testimony. (Exhibit 11, pp.2-3 (Affidavit of Mark Cunningham, Ph.D.).)[5]

During depositions of trial counsel, trial counsel confirmed that Erick was never subjected to brain scans, such as PET and MRI scans, during the course of their representation. (Tr., 9/14/06 deposition of Amil Myshin, p.54, Ls.2-11; Tr., 9/13/06 deposition of D.C. Carr, p.88, Ls.1-5.) Counsel further confirmed that none of their experts, including their testifying experts, Dr. Roderick Pettis (psychiatrist) and Dr. Mark Cunningham (forensic psychologist), ever advised trial counsel **not** to obtain such testing. (Tr., 9/13/06 deposition of D.C. Carr, p.93, Ls.7-9 (Q. "Did they ever say, 'Don't do this testing'? A. No, they never said that."); Tr., 9/14/06 deposition of Amil Myshin, p.58, Ls.11-13 (Q. "Okay. And did Dr. Cunningham and Dr. Pettis ever say, 'Don't do brain scans.' A. I don't remember.").)[6]

Amil Myshin indicated one reason he did not request brain scans was because such scans were not relevant to the mitigation case presented to the jury, which focused on Erick's traumatic childhood and upbringing. (Tr., 9/14/06 deposition of Amil Myshin,

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[5] Dr. Cunnigham's curriculum vitae is submitted as Exhibit 12.

[6] The transcript of the 9/14/06 deposition of Amil Myshin with the depositions exhibits is attached hereto as Exhibit 13. The transcript of the 11/16/06 deposition of Amil Myshin with the deposition exhibits is attached hereto as Exhibit 14. The transcript of the 9/13/06 deposition of D.C. Carr is attached hereto as Exhibit 15. Because the exhibits to that deposition are so lengthy, Mr. Hall is submitting them as Exhibits 15A-15B. The transcript of the 12/8/06 deposition of D.C. Carr is attached hereto as Exhibit 16. The depositions will be cited to as transcript citations, e.g., "Tr., 9/14/06 deposition of Amil Myshin, p.1, Ls.1-10." Mr. Hall requests the Court take judicial notice of the deposition transcripts, with their respective exhibits.

p.56, Ls.9-22.) As Mr. Myshin rhetorically stated, "why do all of that [brain imaging], if you're not going to use it?" (Tr., 9/14/06 deposition of Amil Myshin, p.56, Ls.21-22.) While Mr. Myshin recognized brain scans showing brain abnormalities or brain damage could only have strengthened their mitigation case, he explained that at the time of his representation he feared such testing would subject Erick to the prosecution's experts. (Tr., 9/14/06 deposition of Amil Myshin, p.54, Ls.15-17 ("...I didn't want to open Erick up to the state's experts in those areas."); p.58, Ls.14-20 (admitting brain scans showing structural or functional defects in the brain would have been favorable evidence); Tr., 11/16/06 deposition of Amil Myshin, p.409, Ls.12-17 ("I thought it would open up Erick to your [State's] experts in a lot of areas, and I didn't want that to happen. So it was not so much that it would water it down. I chose not to go that way because I did not want to open him up."))[7] However, elsewhere in his deposition testimony, Mr. Myshin conceded, and D.C. Carr agreed at his deposition, that this fear was misplaced; specifically, both counsel acknowledged that if the results of the brain scans were not helpful, then the defense would not have had to disclose those results to the prosecution. (Tr., 9/14/06 deposition of Amil Myshin, p.58, Ls.6-10; Tr., 9/13/06 deposition of D.C. Carr, p.91, Ls.12-19.) Indeed, Mr. Myshin conceded during his deposition testimony, but apparently failed to recognize during his representation, that brain scans could have been conducted, and results obtained, **prior** to making a decision whether to present such evidence to the jury. (Tr., 9/14/06 deposition of Amil Myshin, p.60, L.3 – p.61, L.9.) D.C. Carr agreed.

[7] It is worth noting that Mr. Myshin's response here is to a very broad question from the State which encompassed more than just the decision not to conduct brain scans, but rather included reference to presenting a mental health mitigation case that would include **psychological** testing, which is beyond the scope of this claim.

(Tr., 9/13/06 deposition of D.C. Carr, p.98, L.15 – p.99, L.7; Tr., 12/08/06 deposition of D.C. Carr, p.383, Ls.11-14.)[8]

Therefore, based on trial counsels' deposition testimony, there was no objectively reasonable basis to forgo brain scans. Instead, trial counsels' decision, even assuming without conceding it to be a tactical decision, was based on lack of adequate preparation and an ignorance of the relevant law. Negative results would not have been disclosed, would not have subjected Erick to the prosecution's experts, and would not have undermined the defense experts' testimony because the defense experts' opinions were not based or otherwise dependent upon a showing of brain damage. Positive results, on the other hand, would have strengthened the mitigation case, and while disclosure of such results could arguably potentially have permitted the state to perform additional brain scans, it would not have opened the floodgates for additional interviews or interrogations by State experts. Further, given the relatively objective nature of brain scans, like PET and MRI scans, it would have been difficult for the prosecution to justify spending taxpayer money on additional scans, as opposed to merely having their own experts interpret the defense scans conducted by the defense.

b. Prejudice

In the course of post-conviction investigation, Mr. Hall's counsel enlisted the assistance of Dr. James Merikangas, a nationally recognized neurologist and psychiatrist.

[8] Trial counsel's post-conviction concessions are consistent with applicable law. *See* I.C.R. 16(c)(2) (limiting disclosure to the prosecution of "results or reports of physical or mental examinations" to results or reports "which the defendant intends to introduce in evidence at the trial, or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to testimony of the witness."); *see also* I.C. § 18-207(4) (precluding the presentation of expert mental health evidence to a jury unless such evidence has been fully subjected to the adversarial process).

(*See* Exhibit 4.) Dr. Merikangas' initial and subsequent examination of Erick indicated that further medical testing and brain scans were warranted because Erick exhibited evidence of neurological and physical impairment. Erick's blood pressure was extremely high, he indicated he had frequent and severe headaches, he was unable to walk on his heels or toes, and he was unable to walk tandem without swaying. He had a scar on his right parietal scalp. Dr. Merikangas noted that Erick's facial appearance, patterns of hair on his scalp, the appearance of his ears, the space between his lips and his nose, and the shape of his palate indicated the possibility of congenital malformation of the brain. (Exhibit 3.)

Erick also exhibited psychiatric anomalies. (Exhibit 3.) During the examination, Erick drew a "very strange person" "without a face" and "without genitalia." After asking him to draw the face, Erick "drew a face without eyebrows or ears." Under standard scoring, this drawing was appropriate for a child of eight or nine years old. (Exhibit 3.) On the basis of the examination and of Erick's history, Dr. Merikangas requested Erick undergo an MRI scan, a PET scan, and various other blood tests and x-rays.[9]

The results of the brain scans establish trial counsel's deficient performance prejudiced Erick, as the scans show Erick suffers from both anatomical and functional brain damage. First, the MRI scans showed anatomical damage. Specifically, the MRIs showed (a) the presence of foci of white matter hyperintensity on Erick's brain, (b)

[9] Dr. Merikangas has recommended, and Mr. Hall's counsel has arranged a further blood test for Fragile-X Syndrome, but the results will not be available for at least two weeks. However, Mr. Hall asserts that he does suffer from this chromosomal abnormality, and will either provide evidence of the abnormality or withdraw this portion of the ineffective assistance claim upon receipt of the test results.

prominence of the ventricles of Erick's brain, and (c) an abnormally thin corpus callosum. (Exhibit 17 (Third Affidavit of Dr. James Merikangas, dated September 26, 2007).) Second, the PET scan showed abnormally low metabolic activity level (or functioning) in the various areas of the brain. Specifically, the PET scan showed (a) a severe decrease in activity in the medial temporal regions bilaterally extending to the tips of the temporal poles, and (b) a moderate decrease in activity extending from the insular regions bilaterally into the posterior aspects of both frontal lobes. The decreased metabolic activity level in those areas indicates damage to those areas of Erick's brain.

i. *Anatomical Brain Damage*

With respect to the anatomical abnormalities, based on the MRI scan, Dr. Merikangas found Erick suffers from the following brain damage:

(a) *White Matter Hyperintensity*

Dr. Merikangas found that Erick has foci of white matter hyperintensity, called lesions, on in his brain, which are abnormal, and "particularly troubling when found in a 36-year-old." (Exhibit 17.) In Erick's case, the white matter lesions are located in his temporal and frontal lobes, which may have a significant impact on behavior. Dr. Merikangas explained the roles of the frontal and temporal lobes as follows:

> The temporal lobe is located beneath and behind the frontal lobe. It is involved in the processing of auditory sensation and perception, and contains the hippocampus, an area of the brain associated with memory formation. Temporal lobe damage can result in (1) disturbance of auditory sensation and perception, (2) disturbance of selective attention of auditory and visual input, (3) disorders of visual perception, (4) impaired organization and categorization of verbal material, (5) disturbance of language comprehension, (6) impaired long-term memory, (7) altered personality and affective behavior, and (8) altered sexual behavior.
>
> The frontal lobes are considered our emotional control center and home to our personality. Most importantly, the frontal lobes are involved in

impulse control. There is no other part of the brain where lesions can cause such a wide variety of symptoms. The frontal lobes are involved in motor function, problem solving, spontaneity, memory, language, initiation, judgment, impulse control, and social and sexual behavior. Frontal lobe damage can result in (1) disturbed motor function, (2) suppressed spontaneous facial movements, (3) inhibited or excessive speech, (4) difficulty in interpreting feedback from the environment, (5) perseveration on a response, (6) risk taking, (7) impaired associated learning, i.e. impaired use of external cues to help guide behavior, (8) dramatic change in social behavior, and (9) abnormal sexual behavior.

This is particularly significant in Erick's case, because of the nature of the conviction against him, i.e., a crime involving the sexual homicide of a stranger, and other past allegations. The damaged regions of his brain are associated with sexual behavior and impulse control. This finding, especially in conjunction with his family and social history, provides a possible explanation of his criminal behaviors in this case.

(Exhibit 17.)

(b) *Prominence Of Ventricles*

Erick's MRI also showed damage to his ventricular system, due to atrophy of his brain, and probably caused by head injuries:

. . . The ventricular system consists of four communicating cavities (ventricles) in the brain that are filled with cerebrospinal fluid and are continuous with the central canal of the spinal cord. Erick's ventricles are abnormally prominent. Large ventricles are caused by either too much pressure inside the brain or atrophy of the brain. Atrophy is the loss of brain tissue and causes impairment. Alzheimer's disease, for example, is associated with significant brain atrophy, and one would see enlarged ventricles because of the atrophy. In other words, when the brain shrinks, the fluid cavities (ventricles) become larger.

In my professional opinion, Erick's ventricles are enlarged because his brain is atrophied. In other words, Erick's ventricles are enlarged because he has lost brain tissue. Enlargement of the ventricles can exist at birth, occur later in life because of disease, or can be the result of head injuries. Given Erick's history, it is likely his enlarged ventricles are the result of head injuries. Damage resulting from head injuries is cumulative; meaning, several minor head injuries can have the same result as one major head injury. Thus, Erick's enlarged ventricles are likely the result of his combined head injuries.

(Exhibit 17.)

(c) *Thin Corpus Callosum*

Erick's MRI also showed damage to the corpus callosum. Specifically, it was abnormally thin or narrow, which is associated with Fetal Alcohol Spectrum Disorder (FASD). (Exhibit 17). As explained by Dr. Merikangas:

> FASD is an umbrella term describing the range of effects that can occur in an individual who was prenatally exposed to alcohol. Prenatal exposure to alcohol is a well known cause of behavioral, cognitive, and psychological problems, and is also associated with learning disabilities. FASD symptoms also include poor judgment and poor impulse control.
>
> FASD is consistent with reports that Erick's mother drank during her pregnancies, Erick's low birth weight, Erick's history of behavioral and mood problems, Erick's shortened philtrum, and Erick's history of learning disabilities and childhood mild mental retardation. Given Erick's history and the results of the MRI, it is my professional opinion that [ ] FASD is the likely cause of Erick's abnormally thin corpus callosum. FASD is consistent with Erick's problems with impulse control and aggressive behavior and, again, offers a possible explanation for his criminal activity.

(Exhibit 17).

ii. *Functional Brain Damage*

With respect to the functional abnormalities, based on the PET scan, Dr. Merikangas found the following functional brain damage: (a) a severe decrease in activity in the medial temporal regions bilaterally extending to the tips of the temporal poles; and (b) a moderate decrease in activity extending from the insular regions bilaterally into the posterior aspects of both frontal lobes. (Exhibit 17) The decreased activity level in each of those areas of the brain indicates brain damage to those areas. (Exhibit 17.) The impact of such damage is significant:

> . . . Regardless of the cause, abnormalities in these areas of the brain are associated with aggressive impulsive behavior, poor executive functioning, poor judgment and low intelligence. The diminished activity in these areas of Erick's brain is consistent with problems with impulse control and aggressive behavior, and provides a possible further explanation for his criminal activity.

(Exhibit 17.)

Clearly, the above neurological results are highly significant and highly mitigating, and should have been presented to the jury. The evidence of brain damage was not cumulative of the evidence presented regarding Erick's horrific childhood. Furthermore, brain damage is something entirely outside of Mr. Hall's control, and directly affects his *adult* behavior. Thus, presentation of brain damage could have effectively countered the State's argument that Erick made the "choice" to kill. (*See* Tr., p. 5491, Ls.3-17; p.5493, L.11 – p.5495, L.17; p.5503, Ls.1 – 19; p.5504, L.16 – p.5505, L.2.) Indeed, the State's "choice" argument was premised in part on Erick's *lack* of brain damage:

> Counsel did it again today. He says that the doctors talked about head injury, and being hit on the head by his brothers and such. **Did the Harvard medical doctor and a Ph.D. forensic psychologist give you one reason to think that the defendant has somehow been injured in his head by being hit on head when he was a kid?** Did he say we gave the following psychological tests and they clearly show that the defendant can't understand consequences, cause and effect, the relation of A to B? No. Why didn't they? It's because they're not trying to help you find the truth here. . . .There's not the cause and effect relationship that they want.

(Tr., p.5496, L. 21 – p. 5497, L.15 (emphasis added).) This argument either would not have been presented or would have carried no weight had the jury known that Erick **does** have brain damage.

At the very least, presenting evidence of brain damage would have provided the jury with some explanation for Erick's aggression, lack of impulse control, physical violence, and sexual violence. They would have been compelled to give meaningful consideration to the neurological damage that, but for trial counsel's failure to investigate would have been presented to them:

> Erick's brain is anatomically and functionally abnormal. Erick has anatomical damage to his frontal and temporal lobes, and an abnormally developed corpus callosum. Erick's brain is also functionally impaired in the temporal lobe regions. It is my professional opinion to a reasonable degree of medical certainty that Erick's sexual behaviors and difficulties with impulse control and the exercise of good judgment are consistent with the brain damage identified by the brain scans. Based on the directive of Mr. Hall's attorneys, I have not spoken to Mr. Hall about the crime itself. However, in light of the evidence presented at trial and assuming guilt based on the jury's verdict, it is readily apparent that the specific damage to Erick's brain could account for his alleged actions that evening and alleged prior criminal behavior.
>
> The results of the brain scans are consistent with Erick's history of head injuries, pervasive developmental deficits, and other childhood deficits, disorders, and mistreatment. Moreover, Erick's background would cause him to develop multiple and serious emotional triggers. While persons with undamaged brains may have those triggers and not react violently, it is much more difficult for a person with brain damage—particularly brain damage affecting impulse control—to resist the urge to react violently. While brain damage does not excuse Erick's violent behavior, it may explain and mitigate his actions. Erick's brain simply does not function like a healthy adult's brain, and his behavior, therefore, should be judged accordingly.

(Exhibit 17). The jury was thus deprived of compelling evidence of a damaged brain, and deprived of the opportunity to infer that Erick's behavior on the night of the crimes in question were at the very least performed by a neurologically damaged individual who was simply unable to make "choices" in the same manner as a person with an undamaged brain.

The deprivation of this information cannot be understated. When provided with this new information of brain damage, Dr. Mark Cunningham attested that the information was "[e]xtraordinarily important" and would have dramatically strengthened his testimony. (Exhibit 11, p.2.) Dr. Cunningham explained the evidence of brain damage was a critical bridge to explaining Erick's deficits and behavior as an adult, including at the time of the offense:

> These clinical findings of brain abnormalities in Mr. Hall as an adult were critically absent from information available to me at trial. Though there had been documentation of Mr. Hall's deficient cognitive abilities and developmental deficits in childhood, I did not have the benefit of these clinical findings of abnormal brain functioning in Mr. Hall as an *adult*. Accordingly, I could neither incorporate this profoundly important conclusion into my analysis of damaging development factors impinging on Mr. Hall, his life trajectory, or his mental resources at the time of the offense.
>
> Abnormal brain functioning and the tragically synergistic combined effects of brain damage and pervasively traumatic experience were fundamentally important factors in explaining Mr. Hall's disturbed development and marginal adult adjustment; as well as his criminal history, impulse control deficits, and vulnerability to aggression - particularly when accompanied by substance abuse.
>
> Had I had these findings of brain abnormalities in Mr. Hall I would have offered testimony supporting a nexus between Mr. Hall's brain dysfunction and his criminal history and offense conduct. I would have testified that there is a relationship between brain dysfunction and violent offending, particularly in the face of traumatic experience and substance abuse. I would have cited and discussed psychological, psychiatric, and neurological literature which identify that brain damage is present in disproportionately high incidence among violent offenders.

(Exhibit 11, p.3.) Dr. Cunningham, who has testified in many capital cases, correctly noted the importance of brain damage as mitigation. (Exhibit 11, p.3 ("The diagnosable presence of brain dysfunction and its potential association with violent acts can be a significant mitigating factor in a jury's deliberation regarding whether a penalty of death is justified.")

Dr. Cunningham also would have testified about Erick's FASD, and the relationship between FASD and related childhood and *adult* deficits, including deficits in impulse control and judgment, had he had some confirmation of FASD, such as the results of the recent MRI scan:

> Dr. Merikangas, in his Third Affidavit, further reported that the MRI scan had revealed the corpus callosum of Erick's brain to be abnormally thin or

> narrow. The corpus callosum is a large group of neuronal fibers connecting the two hemispheres of the brain. Such thinning is consistent with exposure to alcohol in utereo [sic], i.e., Fetal Alcohol Spectrum Disorder (FASD). Also consistent with FASD are the learning deficits, attention deficits, impulsivity, and other symptoms exhibited by Erick in childhood. Further consistent with FASD is his mother's history of drug and alcohol abuse. The information available at trial resulted in me suspecting FASD, but I lacked sufficient confirmatory data to offer this factor to the jury. Had I had the results of the MRI scan and associated clinical interpretation, I would have had the necessary level of confirmation. Accordingly, I would have described the both the childhood implications of FASD as well as FASD-related deficits in impulse control and judgment that persist in adulthood.
>
> Because prenatal exposure to alcohol occurs at the most innocent and vulnerable stage of life, damaging the child even from earliest formation, a capital jury may give this factor particular weight. This is weight is [sic] augmented if accompanied by perspectives that alcohol exposures that are outside of any conceivable volitional choice of the fetus materially affect the quality of volitional choices this fetus-all-grownup makes in adulthood.

(Exhibit 11, pp.3-4.) Thus, not only would the confirmatory evidence of FASD have provided Dr. Cunningham with explanations for Erick's adult behavior, it would also have undercut the State's "choice" argument.

Given the powerfully mitigating nature of brain damage – over which a defendant exercises no choice in having, and which has profound implications on impulse control, sexual and aggressive behavior, and judgment – there can be no doubt that there is a reasonable probability that Erick Hall would have received a life sentence had trial counsel investigated and presented evidence of brain damage.

4. Conclusion

Trial counsel, without any reasoned basis, did not conduct medical and neurological testing to determine whether Mr. Hall exhibited signs of physical or neurological damage which would have warranted further testing, including brain scans.

This uninformed and unwarranted decision fell well below the standard of performance in a capital case. Because of trial counsel's deficient performance, trial counsel failed to uncover highly relevant, and highly mitigating evidence of both anatomical and functional brain damage, to areas of Mr. Hall's brain that are inextricably linked to impulse control, sexual behavior, aggression, and judgment. But for trial counsels' failure to conduct testing, there is a reasonable probability that the jury would have shown mercy toward Mr. Hall in the form of a life sentence.

B. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Adequately Investigate And Present Mitigating Evidence

1. Introduction

Trial counsel rendered ineffective assistance of counsel by failing to present mitigating evidence and by failing to present evidence to rebut the State's case in aggravation, all of which was available upon reasonable investigation. As a result, the jury was presented with incomplete information upon which to base their decision to impose the death penalty. Had the jury been presented a complete picture of Erick Hall, there is a reasonable probability that they would have imposed a life sentence.

Trial counsel built their sentencing case almost entirely around Erick's developmental years. Their apparent goal was for the jury to understand Erick's childhood and find mercy in their hearts with that understanding. Trial counsel presented expert testimony from both a psychologist and psychiatrist – however, the testimony was almost entirely focused on Erick's childhood. However, the presentation of Erick's traumatic childhood was incomplete, and it did not present evidence of Erick's positive adult behavior. Moreover, trial counsel did not rebut the State's case in aggravation, and did not present evidence of co-perpetrator involvement in the crimes at issue.

2. Applicable Legal Standards

The applicable standard for ineffective assistance of counsel claims is set forth in Claim A.2, *supra*. In a capital trial, trial counsel has a duty to conduct a thorough investigation in preparation for the penalty phase. *See Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000). This includes both the duty to conduct a thorough mitigation investigation, and a duty to conduct an investigation into the State's case in aggravation. The ABA Guidelines provide in part:

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

ABA Guidelines, Commentary to Guideline 1.1 (emphasis added). In short, the constitutional demand on counsel to conduct a thorough investigation of the penalty phase is high.

Presentation of some mitigating evidence, even if strong, is not enough if other mitigating evidence is available upon reasonable investigation. In *Rompilla*, the Supreme Court found counsel ineffective for failing to conduct an adequate mitigation investigation despite consulting with mental health experts and conducting an investigation into the defendant's background. Specifically, trial counsel failed to examine a court file on the defendant's prior conviction for rape and assault where the filed included additional mitigating evidence. In *Wiggins*, the Supreme Court found counsel ineffective based on an inadequate mitigation investigation despite the fact that counsel arranged psychological testing for their client and obtained some government records to assist in developing their client's social history. Finally, in *Williams*, the Supreme Court found counsel ineffective in failing to adequately investigate their client's background despite a "competently handled [the] guilt phase of the trial." *Id.* at 395-96. Thus, the Supreme Court has recognized the effectiveness of counsel's assistance will be subjected to great scrutiny in a capital case.

3. Analysis

This claim is divided into four subclaims: **subclaim a** addresses trial counsel's failure to investigate and present testimony from Erick's family; **subclaim b** addresses trial counsel's failure to investigate and present testimony of Erick's foster parents and foster brother; **subclaim c** addresses trial counsel's failure to investigate evidence of an alternate perpetrator of the murder and co-perpetrator of the rape; and **subclaim d**

addresses trial counsel's failure to adequately investigate and present evidence of Erick's good character as an adult.

a. Trial Counsel Failed To Adequately Investigate And Present Evidence Of Erick Hall's Traumatic Childhood Through Live Testimony Of Family Members Including His Mother And Father

Trial counsel built the sentencing case almost entirely around Erick Hall's developmental years.[10] Trial counsel failed to interview all available family members and failed to elicit or present compelling mitigation from family members interviewed. Trial counsel's failures to investigate and present compelling mitigation evidence left the jury with an incomplete picture of Erick. But for trial counsel's deficient performance, there is a reasonable probability that the jury would have imposed a life sentence.

i. Shannon Pambrun

Shannon Pambrun is Erick's older half-brother. Shannon and Erick had the same mother.[11] Trial counsel failed to locate Shannon prior to trial. (Exhibit 10, pp.8-9.) Post-conviction investigators located Shannon and interviewed him. Shannon had a wealth of information about Mr. Hall's childhood, including mitigating information that was not presented at trial.

Trial counsel in a capital case must conduct an intense and thorough investigation to uncover any mitigating evidence. Specifically, "Because the sentencer in a capital case must consider in mitigation, 'anything in the life of a defendant which might militate

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

[11] Erick's birth certificate lists Shannon's father, Roy Pambrun, as Erick's father, but their mother has always maintained that Frank McCracken is Erick's biological father.

against the appropriateness of the death penalty for that defendant,' 'penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.'" (ABA Guidelines, Commentary to Guideline 10.7, *quoting Brown v. State*, 526 So. 2d 903, 908 (Fla. 1988) (citing *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987)); Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, THE CHAMPION, Jan./Feb. 1999, at 35.)[12] In the case of the client charged with a capital offense, the investigation begins at the moment of conception. *Id.* It is absolutely necessary to locate and interview the client's family members for the penalty phase investigation. *Id.*

According to Rosanne Dapsauski, the trial team's mitigation specialist, she spent little time attempting to locate Shannon, even though the trial team believed that Shannon might corroborate and provide additional insight into family dynamics and the extent of the abuse Erick suffered. (Exhibit 10, pp. 8-9.) Although Ms. Dapsauski recalled using a "People Finders" or other similar on-line service, this seems unlikely, as Shannon Pambrun is readily locatable using both "People Finder" and "People Finders," which both show a Shannon Pambrun located in Duluth, MN. (Exhibit 18; Exhibit 19.) Moreover, even if an on-line service produced no results, the defense team should have, but did not, utilize a skip tracing service which provides more detailed results. (Exhibit 10, p.8.) In short, Shannon Pambrun was readily locatable, but the "investigative efforts [to locate him] were not exhaustive and seemed to fall to the back burner . . . ." (Exhibit 10, pp.8-9.) Given that Shannon was Erick's only older sibling by Jean Hall McCracken,

[12] *See also Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

locating Shannon was critical, and the trial team's failure to locate him constituted deficient performance.

The trial team's failure to locate Shannon prejudiced the sentencing-phase of trial. Shannon confirmed and expanded upon the frequent abuse that Erick suffered and witnessed as a child. He verified how Erick observed Frank punching and choking Jean. (Exhibit 20.) Additionally, he described how Erick was frequently beaten by his father and, after Frank's departure, by Jean's boyfriends. Shannon confirmed that Erick was hit in the head by rocks thrown by his siblings.

As the older brother, Shannon recalls Erick's strange behaviors, which began when Erick was very young. As a baby, Erick would be happy one moment, then cry uncontrollably for no apparent reason the next. He recalled that Erick would have extreme mood swings even at a young age, could be explosive when someone touched his head or the back of his neck, and would become "someone else" at times. His anger would dissipate as quickly as it came. Shannon recalls that Erick began hearing voices when he was approximately eight years old. He described Erick as especially "odd" and "different from [the] other siblings." Sometimes when Shannon would fight with Erick, Shannon "knew that he was not Erick but someone else." (Exhibit 20.)

Shannon confirmed that Frank beat his mother while she was pregnant. He also stated that his mother used alcohol heavily and was a "closet drinker." Shannon also attested that Jean abused alcohol during her pregnancies. (Exhibit 20.)

Shannon confirmed that molestation was an ongoing family theme, and added details not provided by other siblings. Erick's uncle Allen tried to molest all of the boys, including Erick. Shannon believes that his Uncle Mark was molesting the children. One

of Jean's boyfriends molested at least two of the girls. Several of Jean's boyfriends sexually abused the children. Moreover, Jean was sexually inappropriate to the boys, kissing and hugging Shannon inappropriately, and inappropriately kissing Frankie. In retrospect, Shannon now sees how some of Jean's sexual behavior was inappropriately directed toward Erick as well. Shannon confirmed that there was sexual activity between many of the siblings and cousins, a strong indicator that the children grew up in a sexually abusive environment. (Exhibit 20.)

Given the extent of Shannon's knowledge, the corroboration his testimony would have provided, and the new information he could have testified to or provided to the experts, there is a reasonable probability that the information obtained from Shannon would have changed the outcome of the sentencing trial such that Erick would have received a life sentence. Dr. Mark Cunningham, who testified for Erick at the sentencing phase of trial, did not have the benefit of the information provided by Shannon. (Exhibit 11.) Dr. Cunningham would have testified that Erick hearing voices at the age of eight, along with accompanying odd behavior, was consistent with recurrent if not longstanding psychotic experience in childhood and adolescence. (Exhibit 11, p.5.) Shannon's information also would have provided "important perspectives" Dr. Cunningham did not otherwise have, regarding sexual molestation and perverse family sexuality. (Exhibit 11, p.5.) Most importantly, Dr. Cunningham would have presented the fact that Erick's Uncle Allen, attempted to molest Shannon and his brothers, including Erick. (Exhibit 11, p.5.) Dr. Cunningham also would have incorporated Shannon's belief that their Uncle Mark was molesting the children, and his descriptions of inappropriate kissing between Erick's mother (Jean), Erick's brother Frankie, as well as her inappropriate sexualized

behavior towards Erick. (Exhibit 11, p.5.) "As Mr. Hall's capital offense had a sexual context, experiences and exposures to disturbed sexuality in his background have particular importance and relevance." (Exhibit 11, p.5.) This information, in combination with the information uncovered in post-conviction regarding sexual molestation while in foster care, (*see* Claim B.3.b.i, *infra*), was critical, and was not presented solely due to the trial team's failure to conduct an adequate investigation.

ii. *Jean Hall McCracken*

Jean, Erick's mother was never called to testify even though she was willing to and had planned on doing so. Jean admits that she used drugs during her pregnancy with Erick. Jean provides further confirmation and further evidence of head injuries sustained by Erick, as well as incidents where Erick "would almost black out in terms of being conscious of what he was doing, saying, or engaged in." Jean also describes similar experiences she has had, suggesting a genetic component to Erick's behaviors. Based on a layperson's perspective, but bolstered by her intimate knowledge of Erick's childhood behaviors, Jean believes that Erick is bipolar. Additionally, Jean experienced the loss of a loved-one by violence when her father was murdered in 1998. Thus, as a witness, Jean would have bridged the gap between the loss the victim's family felt and the loss that a convicted murderer's mother feels. Like so many of Erick's family members and friends, Jean loved him and did not want to see him executed. Jean was willing to testify to all these matters despite the State's efforts to dissuade her from presenting mitigating circumstances at her son's sentencing hearing. (*See* Claim V, *infra*; Exhibit 6.)[13]

[13] Jean died in January, 2007.

During the course of the post-conviction investigation of this case, Erick has discovered that both Jean and Frank would have been willing to testify for the defense. Indeed, Jean expected to testify but was told at the last moment by trial counsel that she was not necessary. (Exhibit 6.) Jean was necessary, and so was Frank. Both seek to a certain extent to downplay the abuse and neglect experienced by all family members, and each tend to point the finger at the other, or at failures of institutions established to assist them. Nevertheless, Mr. Hall's parents do accept responsibility for their failures, and just as importantly, both love their son...despite his failures. *See U.S. v. Honken*, 381 F.Supp.2d 936 (N.D. Iowa 2005) (noting that jury considered mitigating value in the fact that the defendant was loved by his mother, and the emotional trauma that she would be feel from the execution of her son).

The jury should have heard their stories, and the stories of other relatives; because only by hearing their stories could the jury truly have understood Erick's childhood and "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

iii. *Frank McCracken, Sr.*

Frank McCracken, Sr., Erick's father, acknowledged that he was physically and verbally abusive to Jean in front of the children. He reported signs of abuse to Erick following Erick's return from a juvenile detention center. "When Erick came back to California from the boy's home in 1986-87 he had markings on his back from having an iron pressed into his body." Frank concluded that he loves Erick, "he is my son, he's always been my son, and he will always be my son." (Exhibit 21.) Frank did not testify at Erick's trial.

iv. *Frank McCracken, Jr. ("Frankie")*

Frankie McCracken is Erick's older half-brother. Frankie further confirmed the degree of violence in the McCracken family. Frankie has also experienced significant problems in the criminal justice system, having spent eight years in prison. (Exhibit 8.) Frankie did not testify at Erick's trial.

v. *Tiffaney Conner*

Tiffaney Conner is Erick's youngest half-sister. While she has no real memories of Erick as a child, she treasure a picture of him holding her when she was a baby. Tiffaney feels a strong connection to Erick as an adult and loves him. She hopes to continue a relationship with him despite his incarceration. "My letters are my most prized possession of my brother." (Exhibit 22.) Tiffaney did not testify at Erick's trial.

vi. *Kenneth Douglas*

Kenneth Douglas is Erick's cousin. Kenneth related further instances of violence in Erick's childhood. He also described another serious head injury when Erick fell off a second story roof and hit his head on a rock sidewalk. Also, apparently drawing from a layperson's perspective, Kenneth describes Erick's childhood behaviors as characteristic of "manic depressive, Bi-Polar, and schizophrenic." (Exhibit 9.) Kenneth did not testify at Erick's trial.

vii. *John Thompson*

John Thompson is Erick's younger brother. John described the disruption in the household and characterizes Erick's childhood mood swings as a "Dr. Jekyll and Mr. Hyde" split personality. John also confirmed Shannon's abuse of Erick. (Exhibit 7.) John did not testify at Erick's trial.

viii. *Kimberly Bacon*

Kimberly Bacon was married to Erick's older brother, Shannon, and knew Erick when Erick was a teenager. She was never contacted by trial counsel. She provided more information confirming family accounts of Shannon's explosive, unpredictable violence. Her testimony would have bolstered claims that Shannon was extremely abusive, would have added accounts of Erick witnessing Shannon's violence against Kimberly, and would have described the relationship between Shannon and Erick as one in which "Shannon kept Erick around so he could have a scapegoat." Kimberly, who since meeting Erick has worked at Columbia River Mental Health for two years as a specialist, describes Erick's behavior as a teenager as "mentally ill, incompetent, and [having] developmental delays," suffering from "severe attachment disorder," "major mental instability issues," and "extreme mood swings." (Exhibit 23.) Kimberly did not testify at Erick's trial.

In addition to family members who did not testify, Mr. Hall attaches the affidavits from testifying family members whose testimony was incomplete due to trial counsels' ineffectiveness in interviewing them and preparing them for their testimony:

ix. *Shawnra McCracken Hemming*

Shawnra McCracken Hemming is Erick's older half-sister. Shawnra testified at the sentencing phase of Erick's trial, but she felt inhibited from disclosing all details of their troubled childhood, because she felt the jury might find the details unbelievable. She loves her brother, and notes the important role he plays in their family. (Exhibit 24 ("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."))

x. *Tamara McCracken*

Tamara McCracken is Erick's older half-sister. Tamara testified at the sentencing phase of Erick's trial, but trial counsel failed to elicit mitigating information. Had she been asked, Tamara would have testified as to how much she loves her brother, and the turmoil that his execution will cause her. In addition, Tamara would have testified that the State tried to undermine the effectiveness of her testimony, or even dissuade her from testifying. (Exhibit 25.)

xi. *Deanna McCracken*

Deanna McCracken is Erick's younger sister. Deanna testified at the sentencing phase of Erick's trial, but would have provided additional information had trial counsel asked. Deanna would have testified that she has heard that when her mother was pregnant with Erick, her father, Frank, hit and kicked her in the stomach. She also describes moments where Erick would "black out and go into rages." In such circumstances, after Erick calmed down, he would have no memory of the incident. (Exhibit 5.)

b. Trial Counsel Failed To Locate, Interview, And Present The Testimony Of Erick Hall's Foster Parents And Foster Brother

In the capital sentencing context, it is critically important for the trial team to investigate all aspects of the client's upbringing, including any foster homes or institutions at which the client was housed or incarcerated. ABA Guidelines, Commentary to Guideline 10.7 ("If the client was incarcerated, institutionalized or placed

outside of the home, as either a juvenile or an adult, the defense team should investigate the possible effect of the facility's conditions on the client's contemporaneous and later conduct.") In Erick's case, the sentencing investigation failed to uncover critical witnesses to sexually abusive foster care situations, as well as mitigating evidence of the extraordinary depths of Erick's emotional and psychological fragility from positive but short-lived foster care placement.

i. *Linda McQuery And Jeff Langston*

Erick was placed in foster care with Linda McQuery when he was sixteen years old. The trial team never attempted to ascertain the circumstances of that placement. Ms. Dapsauski verified that she "conducted little investigation" into Erick's foster care placement, even though "Erick Hall told us that his foster mother, Linda McQuery had 'jumped' him, i.e., sexually abused him." (Exhibit 10, p.9.) She acknowledged that she located Ms. McQuery, but never attempted to interview her.

The trial team's failure to adequately investigate Erick's foster placement with Ms. McQuery had dire and utterly avoidable consequences. First, despite the fact that Erick disclosed being sexually abused by his foster mother, trial counsel did not present that information. Dr. Mark Cunningham verified that he did not include the McQuery information in his testimony because of the lack of corroboration. (Exhibit 11, p.5 ("I did not testify to this at trial as I had no corroboration of such a relationship.") The lack of corroboration, however, was the direct result of trial counsel's failure to investigate Erick's foster care placement.[14]

[14] Mr. Hall contends, moreover, that evidence of sexual abuse should have been presented even *without* corroboration. However, the corroboration was readily available.

Post-conviction investigators located and interviewed Erick's foster brother, Jeff Langston, who was placed with Erick under Linda McQuery's care. Mr. Langston has provided an affidavit in which he states he was seduced by Linda McQuery and maintained an incestuous sexual relationship with her during the two months that he and Erick resided at McQuery's house. (Exhibit 26, p.3.) Jeff was seventeen years old; Erick was sixteen years old. Dr. Cunningham has verified that, had he known this information, he would have incorporated it into his testimony. (Exhibit 11, p.5 ("I would have viewed this as providing important confirmation of perverse sexuality in this setting and inferentially supportive of his report of also being sexually abused. I would have testified to this at trial.").)[15] The McQuery household, along with confirmation of family incest and abuse described by Erick's brother Shannon, would have established the pervasive nature of Erick's exposure to perverse, incestuous familial relationships. In a murder case involving rape, this was highly relevant information for the jury's consideration.

Jeff Langston also provided powerful mitigating evidence of psychological disorders, including poor attention to hygiene, mood swings, and odd and erratic behavior. Jeff stated that Erick described hearing voices, and observed Erick making odd comments as though he was reacting to voices speaking to him. He described how Erick, without provocation, would begin "ranting and raving" and "pacing and waving his arms around." (Exhibit 26, pp.3.) Had Dr. Cunningham had this information, he would have testified that it was consistent with a psychotic disorder and, when combined with the

[15] Dr. Cunningham also would have testified that Erick's report of having had an incestuous relationship with his foster mother supported that Erick was at least aware of the incestuous relationship between McQuery and Jeff Langston. "The highly sexually disturbed family context of the McQuery household represented still another instance of poor family sexual boundaries." (Exhibit 11, p.5)

information provided by Shannon, is "[c]onsistent with recurrent if not longstanding experience of psychotic experience in childhood and adolescence . . . ." (Exhibit 11, p.5.)

ii. *Harry And Sophronia Selby*

The trial team also failed to locate and interview Harry and Sophronia Selby. Erick was placed with Harry and Sophronia in the fall of 1985, in Tillamook, Oregon. The Selbys were Erick's foster parents for approximately five and one-half months. (Exhibit 27, p.3 (Affidavit of Sophronia Selby).) According to Rosanne Dapsauski, she was unable to locate them; however, she stated that the trial team "should have conducted a greater investigation of Erick's foster parents." (Exhibit 10, p.9.) Post-conviction investigators successfully located the Selbys living in Idaho.[16]

Both Harry and Sophronia provided heartbreaking and valuable mitigating information about Erick. Sophronia described Erick being dropped off at the foster home:

> [The placement service] dropped Erick off at the Selby home. Erick did not have any personal belongings with him. He only had the clothes he was wearing. The clothes that Erick was wearing were very dirty and smelled. It was obvious from the smell that the clothes had not been washed in a long time. They also smelled like cigarette smoke.
>
> Erick stayed in the clothes he arrived in for almost a week. We were finally able to convince him to shower and change. . . .

(Exhibit 27, p.3.)

[16] A simple search for the Selbys in Idaho revealed their current address, and the Selbys immediately responded to a letter from the SAPD.

Erick's hygiene was problematic while he lived with the Selby's. They were lucky to get him to shower a couple of times a week.[17] They remember Erick being very quiet, overly scared and insecure. He was extra cautious in everything he did in the home, and went out of his way not to be noticed. Erick always stayed physically close to Harry Selby and, other than attending school, it was about four months before Erick went outside the house without Harry. Additionally, they also reported Erick suffered frequently from severe headaches. (Exhibit 27.)

Shortly after Erick's placement, the Selbys visited Erick's home in order to obtain his belongings. The yard was unkempt, the paint was cracking, and there was garbage all along the porch. The door to the house was ajar. Two young girls answered Harry Selby's knock. They were dirty, minimally dressed, and their hair was uncombed. They were home alone. From what Harry could see through the door, the floor was very dirty, and there was garbage strewn about the floor. (Exhibit 28.)

Sophronia Selby believes that Erick had been sexually abused. Erick never wanted to take his coat off, regardless of the weather. He always insisted on remaining fully clothed, and would not shower or change even though he had a private bathroom. (Exhibit 27, p.5.) Harry Selby noted that, "Erick used his clothing as some sort of protection." (Exhibit 28, p.3.) Erick was uncomfortable with demonstrations of affection, such as hugs. (Exhibit 27, p.5.) When the Selbys told Erick they had been informed he was leaving their care, Erick seemed resigned, sad, and "seemed to start closing in within himself again." (Exhibit 28, p.5.)

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[17] Erick's problems with hygiene as well as his extremely unstable home life were confirmed by Cookie Quirk, who was Erick's probation counselor in Vancouver, Washington, from the time Erick was twelve to the time he was seventeen. (Exhibit 29.)

The trial team's failure to uncover the information from the Selbys had a significant impact on Erick's sentencing trial. First, the Selby's confirm that Erick's home was a mess, and the young children were dirty and left unattended. Second, the Selbys could have provided powerful testimony of a very frightened teenager, plagued by the baggage of his childhood, literally afraid of the external world beyond *his clothing*. Third, Dr. Cunningham would have incorporated the information provided by the Selbys as he found it significant that Erick appeared so insecure, vulnerable and anxious as a teenager:

> Important in the observations of Harry and Sophronia Selby were their recollections of the insecurity, vulnerability, and anxiety exhibited by Erick Hall as a teen. Such descriptions provide a compelling understanding of the trauma of his childhood, as well as the resultant inadequacy and fearfulness that later took expression in his violent offense conduct. These observations would have corrected misapprehensions the jury might have otherwise had that he was and had been simply volitionally predatory. Illustrative of Erick's fearfulness, Mr. Selby reported that Erick was reluctant to remove his clothing for them to be washed or to take a bath because he felt vulnerable without them on. He reported that Erick had a pronounced "deer in the headlights" look and was reluctant to even venture outside of the house alone *for four months*. Whether Erick's profound feelings of safety and body vulnerability were the result of pervasive developmental trauma, or arose from specific sexual abuse and trauma, or both, is uncertain. Regardless of etiology, in the absence of such anecdotal descriptions the jury had little mechanism know or give informed weight to these demonstrations of the extent of Erick's traumatic experience in childhood as reflected in extreme anxiety. Unfortunately, these were unavailable at the time of trial.

(Exhibit 11, pp.5-6.) Thus, the result of the inadequate investigation of the case in mitigation was that the jury was deprived the description of Erick as a profoundly troubled, fearful, vulnerable, and anxious teenager. This information could have bridged the gap between the testimony provided about Erick's troubled childhood to the adult who the jury found guilty of committing these crimes.

c. Trial Counsel Failed To Adequately Investigate And Present Evidence Of An Alternate Perpetrator Of The Murder And Co-Perpetrator Of The Rape

During these post-conviction proceedings, Mr. Hall has established that the DNA evidence shows that there was more than one perpetrator involved in the crime of rape. *See infra,* Claim JJ. During the course of this post-conviction investigation, Mr. Hall has identified a possible co-perpetrator of the rape, and alternate perpetrator of the murder. That person, Patrick Hoffert, was seen with Lynn Henneman the day she disappeared. The following day Patrick Hoffert committed suicide.

i. Deficient Performance

Trial counsel failed to conduct a reasonable investigation of the possible connection between Lynn Henneman's murder and Patrick Hoffert's suicide. Had trial counsel conducted an adequate investigation, counsel would have identified a possible co-perpetrator of the rape, and possible alternate perpetrator of the murder. This claim is divided into three sources of evidence that were readily available to trial counsel including: (a) police reports; (b) two witnesses (Lisa Manora Lewis and Peggy Jean Hill); and (c) lead sheets.

(a) Police Reports

According to a Boise Police Department report, Lisa Lewis and Peggy Hill told Detective Dave Smith and Scott Birch of the Attorney General's Office that they had seen and spoken with Lynn Henneman near the Greenbelt on the night she was abducted. (Exhibit 30.) According to the report, Ms. Lewis indicated that Ms. Henneman asked for directions to the DoubleTree Inn. According to Ms. Lewis, Erick Hall and Patrick Bernard Hoffert then arrived, at which point Mr. Hall spoke briefly to Ms. Henneman.

Ms. Hill told the police that she noticed Ms. Henneman's yellow sapphire ring and that Mr. Hall left with Ms. Henneman. This report was disclosed in discovery. Despite the fact that it appears their statements would be helpful to the prosecution, the State did not call either Ms. Lewis or Ms. Hill to testify at the trial.[18]

In addition, according to a Garden City Police Department report, the morning after Ms. Henneman's disappearance Patrick Hoffert, the other individual placed with Ms. Henneman the night before, committed suicide. (Exhibit 31.) An investigation was conducted both by the Garden City Police Department and the coroner's office. It is not clear whether the police or the prosecution ever actively investigated a connection between Ms. Henneman's murder and Patrick Hoffert's suicide. It is clear however that at some point the State realized there might be a connection and disclosed this report in discovery. However, the trial team failed to adequately investigate these leads, and, as discussed below, failed to provide critical testimony that Patrick Hoffert's suicide was indeed linked to Lynn Henneman's rape and murder.

Despite the information provided to trial counsel in discovery, the trial team failed to conduct an adequate and independent investigation of Patrick Hoffert's connection to Lynn Henneman's disappearance.

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[18] *See* Claim U. It appears that one possible reason the State did not call these witnesses is because, as noted below, there is much more to the story than reflected in the police report. However, Mr. Hall cannot fully state this claim because the Court has denied his motion to depose the prosecutors.

(b) Lisa Manora Lewis & Peggy Jean Hill

During the late afternoon or early evening of the day Lynn Henneman disappeared, Lisa Lewis and Peggy Jean Hill were outside on Allworth Street in Garden City, between 49th Street and Bradley Street. A woman, later identified by both women as Lynn Henneman, walked by several times and appeared to be lost. (Exhibit 32 (Affidavit of Lisa Lewis, dated February 10, 2006); Exhibit 33 (Affidavit of Peggy Jean Hill, dated February 10, 2006).) The woman asked Ms. Lewis for directions to the Greenbelt and the DoubleTree hotel. While Ms. Hill, Ms. Lewis, and Ms. Henneman were talking, Patrick Hoffert and his girlfriend Deirdre Muncy stopped to give directions, and Erick Hall stopped on his bicycle. Ms. Lewis and Ms. Hill departed, leaving Ms. Henneman with Patrick Hoffert, Deirdre Muncy, and Erick Hall. Later that evening, Patrick Hoffert told Ms. Lewis that "he made sure the woman got back to her hotel." (Exhibit 32.) The following evening, Patrick Hoffert committed suicide by shooting himself in the head. (Exhibit 31.) Just subsequent to Patrick Hoffert's suicide, Deirdre Muncie told Ms. Lewis that Patrick had stated he had "raped the girl." (Exhibit 32.)

By the time Patrick Hoffert killed himself, there were missing person flyers and media reports regarding Lynn Henneman's disappearance all over Boise. When police showed up to investigate the suicide, Ms. Lewis informed them that she believed she had seen Ms. Henneman the previous day. (Exhibit 32.) A few weeks later, while at the Garden City Police Department on a separate matter related to dog tags, Ms. Lewis was asked about Ms. Henneman's disappearance; however, she was told to mind her own business when she began talking about the Patrick Hoffert connection. (Exhibit 32.) Ms. Hill called the Garden City Police Department, the Boise Police Department, and the

FBI on several occasions to report she had seen Ms. Henneman the night of her disappearance, but law enforcement did not respond. (Exhibit 33.) Ms. Hill again tried to contact local law enforcement after Lynn Henneman's body was discovered, and yet again in 2003. (Exhibit 33.) In 2004, Ms. Lewis was interviewed by Detective Dave Smith and another man; during this interview she identified Ms. Henneman's photo from an array. (Exhibit 32.) In May of 2004, Detective Dave Smith contacted Ms. Hill, and she provided him with the information she had regarding Ms. Henneman's disappearance. (Exhibit 33.)

(c) Lead Sheets

Police lead sheets confirm Ms. Lewis and Ms. Hill contacted law enforcement consistent with their recollection, as recounted in their affidavits. (See attachments to Exhibits 34 and 35 (containing police lead sheets.) Trial counsel's files contained a mere 12 lead sheets in the entire Henneman investigation, out of hundreds of lead sheets, and thousands of pages of follow-ups to those lead sheets.[19] The trial team had access to the lead sheets, but none of the lead sheets in trial counsel files were relevant to either Lisa Lewis or Peggy Hill's claims.

Trial counsel did receive the discovery regarding Patrick Hoffert, but failed to adequately pursue the lead sheets, even though the involvement of another person in Lynn Henneman's disappearance, rape, or murder could have been highly mitigating for Erick Hall, as the true extent of his culpability would have been called into question.

[19] It is unknown whether Glen Elam obtained or reviewed other lead sheets, but even if he had, he clearly did not recognize the significance of the lead sheets uncovered by Mr. Hall's post-conviction investigator.

The investigation of the Hoffert case was presumably assigned to Glen Elam. (Exhibit 10, p.11; Exhibit 36.) Trial counsel's investigator, Glen Elam, interviewed Ms. Lewis on August 12, 2004.[20] (Exhibit 37 (audio of interview of Lisa Lewis by Glen Elam); Exhibit 38 (transcript of audio of interview of Lisa Lewis by Glen Elam).) In that interview, Ms. Lewis told him about seeing Lynn Henneman on September 24, 2000. She explained that she was positive about her identification. She told Mr. Elam she heard Deirdre Muncie state several times that Patrick Hoffert said he raped a girl. Mr. Elam instructed her that she would be subpoenaed to testify at Erick's trial. (Exhibit 37; Exhibit 38.)

Ms. Lewis was never subpoenaed, however, even though she could have provided strong evidence that Patrick Hoffert was involved in at least the rape of Lynn Henneman, and inferentially, her kidnapping and murder. Ms. Hill could have provided corroborating evidence of the events. Mr. Elam told Erick's post-conviction investigator that he attempted to contact Deirdre Muncie, but was unsuccessful. However, minimal effort was actually made to contact her. Mr. Hall's post-conviction investigator obtained notes from Mr. Elam which indicated that Mr. Elam assigned the Deirdre Muncie interview to another investigator, who merely left a business card at Ms. Muncie's

[20] Mr. Elam told post-conviction investigator Michael J. Shaw that he had interviewed several people who claimed they saw Lynn Henneman lost in Garden City. Mr. Elam claims they had inconsistencies in their stories, but post-conviction counsel is unable to confirm this because of the Court's denial of the request to depose Mr. Elam, and trial counsel's refusal to allow Mr. Elam to sign an affidavit. (Exhibit 36.) However, post-conviction investigation has not uncovered major inconsistencies.

residence and made some telephone calls in an attempt to reach her.[21] (Exhibit 36; Exhibit 39 (notes from Glen Elam to John Anzuoni regarding interview of Ms. Muncie.) There is no indication that any further attempts were made to reach Deirdre Muncie.[22]

The explanations for the failure to follow up on the Patrick Hoffert–Lynn Henneman connection are nothing more than post hoc attempts to justify a failure to adequately investigate, and are based on incorrect memories of that investigation. For example, Mr. Elam did not recall that Ms. Lewis even *told* him that Deirdre Muncie heard Patrick Hoffert say he had raped a girl. (Exhibit 36, p.3.) When confronted with the statement, Mr. Elam then speculated that he probably did not follow up on Ms. Lewis' claim because of her lack of specificity regarding who had been raped. (Exhibit 36, p.3.) However, it is clear from the taped interview Ms. Lewis was referring to Lynn Henneman. (Exhibit 37; Exhibit 38.)

When trial counsel was presented with the additional facts developed through a more thorough investigation than they had conducted by trial counsel, Amil Myshin stated, "There seems to be more information about this incident than we knew about at the time. And I guess conceivably, had we done a more thorough investigation, perhaps we would have found that out." (Tr., 9/14/06 deposition of Amil Myshin, p.72, Ls.19-23.)

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[21] Mr. Elam shared limited information and files with Mr. Hall's post-conviction investigator; and has since refused to cooperate without the approval of trial counsel, Amil Myshin, who has refused any such cooperation.

[22] Deirdre Muncie has denied the statement attributed to Patrick Hoffert to Mr. Hall's post-conviction investigator; however, she was not under oath or investigation, and is not required to cooperate in any way with post-conviction counsel. Had she failed to cooperate with trial counsel, however, they could have subpoenaed her, or cross-examined her if the State chose to call her. Even if she continued to deny the statement, Ms. Lewis could have rebutted her testimony, and Ms. Hill could have bolstered Ms. Lewis' testimony – at a minimum, creating doubt for the jury as to the true extent of Erick Hall's involvement and culpability.

Mr. Myshin conceded that the additional evidence could have helped Mr. Hall's case. (Tr., 11/16/06 deposition of Amil Myshin, p.413, Ls.4-12.) Indeed, according to Mr. Myshin, he did not know that Deidre Muncy purportedly told others that Patrick Hoffert stated he "raped the girl" just after Ms. Henneman's disappearance and just prior to his suicide, and that had he known, that "may have changed what I did" at trial. (Tr., 11/16/06 deposition of Amil Myshin, p.413, L.20 – p.415, L.14.)

Trial counsel were questioned whether they investigated the claims contained in the report. Amil Myshin testified that they did not conduct a thorough investigation because the report was not disclosed until late in the case. (Tr., 9/14/06 deposition of Amil Myshin, p.68, L.5 – p.72, L.18 (indicating that the defense did not receive discovery of the Hoffert incident until "late in the case," on or about August 9, 2004).[23]

ii. *Deficient Performance*

Trial counsel's failure to conduct a reasonable investigation left the jury without critical information it may have found mitigating. Evidence tending to identify someone else as an alternate perpetrator of the murder or the co-perpetrator of rape may obviously lessen a defendant's moral culpability.[24] Thus, any doubt the jury may have had whether

[23] Again, Mr. Hall cannot fully state this claim because the Court denied his request to conduct a deposition of Glenn Elam, the individual who would have investigated the possible Hoffert connection. D.C. Carr, appears to have a flawed memory on the subject. (*See* Tr., 9/13/06 deposition of D.C. Carr, p.216, L.3 – p.220, L.15 (recalling that the defense did not learn of the Hoffert incident until sentencing had concluded, and that they learned of the incident through their independent investigation, not through discovery provided by the State); *but see* p.221, L.16 – p.225, L.10 (recalling that the defense discussed whether to pursue an alternate or co-perpetrator theory based on Patrick Hoffert).) Additionally, trial counsel, Amil Myshin, has refused to allow Mr. Elam to sign an affidavit. (Exhibit 36.)

[24] In addition, once the DNA evidence presented by the State is challenged as it has been through post-conviction proceedings, i.e., by demonstrating that the DNA sample

Erick murdered Lynn Henneman is mitigating evidence at the penalty phase. This type of evidence is particularly important in this case because there were no eyewitnesses. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality)(". . . we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); *Eddings v. Oklahoma*, 455 U.S. 104, 112, 113-114 (1982). Therefore, without an eye witness, and the evidence there may have been a co-perpetrator or alternate perpetrator, the jury likely would have imposed a sentence less than death. The prejudice from this claim should be considered cumulatively with other sentencing phase prejudice.

d. Trial Counsel Failed To Adequately Investigate And Present Evidence Of Erick Hall's Good Character As An Adult

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

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contained more than one contributor; the evidence of guilt of murder is far from overwhelming. While the jury may have still convicted Mr. Hall of rape, there is a reasonable probability that the jury would not have convicted Mr. Hall of murder. *See* Claim JJ, *infra*.

Had trial counsel adequately investigated and presented mitigating circumstances of Erick's adolescence and adulthood including mitigating evidence near the time of the crime, there is a reasonable probability that the jury would have imposed a life sentence, because they would have seen that Erick had redeeming qualities, and was not defined solely by the actions for which the jury convicted him.

This information was readily available. The post-conviction investigation has uncovered evidence of caring, loving relationships, with i) Wendy Levy, ii) Evelyn Dunaway, iii) Jennifer Demunbrun, iv) Amber Lynn (Peterson) Fox, v) Timothy Turley, and vi) Laura Turley.

i. Wendy Levy

Wendy Levy was interviewed by trial counsel and provided them with similar information similar to the information she provided during the post-conviction investigation, but was never called to testify. (Exhibit 2.) Ms. Levy would have testified that Erick played with her children, was good with her children, including her special-needs daughter, and that her children referred to him as their "Uncle Erick." Erick assisted with chores, provided food and money to the family when they were hungry, and otherwise attempted to provide for the family. He was never violent in any manner with any of the members of the family. He was a talented artist, playful, a good worker, and protective of Wendy and her children. Erick referred to Wendy as his sister.

ii. Evelyn Dunaway

Evelyn Dunaway, who testified for the State at sentencing regarding violent incidents between herself and Erick, nonetheless had loving things to say about him, which were never elicited by trial counsel. Erick tried to help Evelyn quit a meth habit

and she describes him as "very caring with regard to talking to [her], and supporting [her] as [she] tried to stay off drugs." (Exhibit 40.) Erick exhibited compassion and generosity toward her children and the children of another family living with them—spoon-feeding them medicine when they were sick, drawing pictures for them, and purchasing a drawing book for them. Evelyn, the same woman the State used to depict Erick as a violent monster, states that he "had a lot of good qualities," and would pick her flowers almost every day and "did a number of very kind things" for Evelyn. Erick was "genuinely nice and wanted to help people" and took in homeless people and fixed up bicycles for people who had no transportation. Evelyn continues to hold onto a photograph of herself and Erick, and likes "to think about the good times [they] shared together." To this day, she has feelings of care and concern for Erick. To the best of Evelyn's recollection, trial counsel did not interview her.

iii. Jennifer Demunbrun

Jennifer Demunbrun is Wendy Levy's daughter. She was interviewed by a member of the defense team, and Jennifer indicated her willingness to testify for Erick. However, she was never subpoenaed or otherwise called to testify. Jennifer would have testified that Erick lived with her family when she was approximately twelve years old. She referred to Erick as her uncle. Erick was a great babysitter:

> He was gentle, he never raised his voice toward us, he never hit us, and he did not neglect us or leave us alone. Erick treated us as though we were his children. He took us to the park to feed the ducks, cooked meals for us, and if we were sick he would encourage us to eat or take our medicine. Erick never behaved in a violent manner with any members of my family.

(Exhibit 41.) Erick took care of Jennifer when she was sick in 2000 or 2001. He would wake her up to eat, to drink water, to take medicine, and he watched Jennifer's children for her. Clearly, trial counsel should have called Jennifer to testify on Erick's behalf.

iv. Amber Lynn (Peterson) Fox

Amber Lynn Fox was a friend and roommate of Jennifer Demunbrun. Amber had a consensual sexual relationship with Erick Hall. They had sex a few times over the course of a month. Erick was always gentle with her and never engaged in rough or abusive behavior. Erick never choked her or engaged in any other bizarre or violent behavior with Amber. (Exhibit 44.)

v. Timothy Turley

Tim Turley is a long-time friend of Erick's. He was interviewed by a member of Erick's defense team, and was told he would be called to testify. Tim was transported from jail to the courthouse, but was never called to testify or given a reason why he was not called. Tim met Erick around 1987 or 1988. They became good friends. Tim's family came to know and love Erick, and his daughters still refer to him as "Uncle Erick." Tim considers Erick to be his brother. Erick is the godfather to one of Tim's children. In the summer of 2000, Erick prevented Tim from committing suicide:

> In the summer of 2000, Erick happened to show up at my house. I had been out of prison for a few months, and was having a very difficult time. I had been planning to kill myself that day, and had a gun. I was in the process of putting the gun up to my head and in my mouth. Erick ran over to me and knocked the gun out of my mouth. He picked me up, took me out to his car, and drove around with me for several hours. He gave me food, cigarettes, and talked to me until I got to the point where I could think again and figure out what to do. A week or two after that I left Idaho and moved to a different state to try to put my life back together.

(Exhibit 42.) Erick was an advocate for the underdog, and Tim never feared Erick or saw him behave in a violent manner. Erick tried to help Tim quit drugs. To this day, he is very bitter that he was not called to testify for Erick, and believes his testimony about Erick's character and intervention when Tim tried to commit suicide could have made a difference in the jury's sentence.

vi. Laura Turley

Laura Turley is Tim Turley's cousin's ex-wife. Laura was never interviewed by the defense, but would have told them and would have testified that she and Erick became pen pals and frequently talked on the telephone when Erick was incarcerated in 1993. Laura states that Erick was her "Rock of Gibraltar," and was a steady, positive, important part of her life. Erick called her when she was in labor, and became the godfather of her youngest daughter. Erick was always loving, friendly, and giving. Laura has never seen Erick act in a frightening or violent manner. (Exhibit 43.)

C. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Consult A Pathologist To Assist In Challenging The State's Presentation Of Dr. Glenn Groben's Testimony And To Present A Compelling Case In Rebuttal Of Such Testimony

Trial counsel has a duty to investigate the case for evidence in mitigation as well as evidence that can be used to rebut the State's case in aggravation. ABA Guidelines, Guideline 10.11(A).

> Counsel should prepare for the prosecutor's case at the sentencing phase in much the same way as for the prosecutor's case at the guilt/innocence phase. Counsel should use available discovery mechanisms to ascertain the aggravating and rebuttal evidence the prosecution intends to introduce, and then thoroughly investigate to determine whether this evidence can be excluded, rebutted, or undercut.

ABA Guidelines, Commentary to Guideline 10.11. To prepare for the State's evidence, expert assistance is often necessary. *See* ABA Guidelines, Commentary to Guideline 4.1 ("Analyzing and interpreting such evidence is impossible without consulting experts—whether pathologists, serologists, microanalysts, DNA analysts, ballistics specialists, translators, or others.")

Trial counsel was ineffective in failing to present expert testimony challenging the testimony of Dr. Glen Groben, the county medical examiner who performed the autopsy on Ms. Henneman. In fact, trial counsel never consulted with an independent pathologist, **until the case had already concluded**. Consequently, counsel permitted the virtually uncontested testimony of Dr. Groben on crucial issues at the guilt phase, i.e. cause of death, and the sentencing phase, i.e., manner of death. Trial counsel's performance is clearly deficient. As the Supreme Court has stated, trial counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington,* 466 U.S. 668, 691 (1984). With respect to experts, trial counsel must act reasonably in deciding whether or not to seek or retain a particular expert. *See e.g., Dugas v. Coplan,* 428 F.3d 317, 327-334 (1st Cir. 2005) (analyzing why trial counsel's failure to thoroughly investigate a "not arson" defense in an arson case, and consult with an arson expert, was not an informed, tactical decision, but was deficient performance).

In this case, trial counsel conducted no investigation into the cause and manner of Lynn Henneman's death. Trial counsel was asked about their failure to consult a pathologist during their depositions. Amil Myshin testified that he did not anticipate the effect of the hogtie reenactment and if he could do it again, then he would have utilized

Dr. Aiken instead of simply trying to argue that Dr. Groben's testimony was consistent with the defense theory that Ms. Henneman died quickly. (Tr., Deposition of Amil Myshin, 9/14/06, p.64, L.13 – p.67, L.14.) This is not a matter of hindsight, as Mr. Myshin testified, "I didn't make a conscious choice not to talk to [Dr.] Sally [Aiken]. It just didn't happen. Or I didn't think of it, or something happened that I didn't do it. And I wish I had." (Tr., 9/14/06, deposition of Amil Myshin, p.76, Ls.16-20.)

Competent counsel on the other hand would have consulted a forensic pathologist or other expert to review Dr. Groben's findings and to make an independent determination of cause of death or injuries inflicted upon Ms. Henneman before and after her death. Trial counsel should have obtained independent consultation in each of these areas to truly subject the prosecution's case to the level of adversarial testing demanded in capital cases at both the guilt and penalty phases at trial.

The State presented evidence, and argument, that Ms. Henneman was not only hogtied, but hogtied while conscious, and that she suffered a terrifying and tortuous death. (Exhibit 45 (PowerPoint disc used by State in case no. H0300518).) The State used Dr. Groben's testimony as the basis for setting out an egg timer to support a finding of premeditated murder, and further, to dramatize the horror of dying in this manner to support, at a minimum, the utter disregard aggravator:

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

(Tr., p.5452, Ls.11-22.) The State's argument was based nearly entirely on testimony elicited from Dr. Glenn Groben.

Mr. Hall's post-conviction investigation has included consultation with Dr. Sally Aiken, a pathologist with the Spokane County Medical Examiner's officer in Spokane, Washington. (Exhibit 46.) Dr. Aiken actually consulted with trial counsel in the underlying criminal case, but not until **after** the trial and jury sentencing had already concluded. (Tr., 9/14/06, deposition of Amil Myshin, p.61, L.16 – p.64, L.8; Exhibit 46.) Had trial counsel consulted with Dr. Aiken in a timely manner, they would have been able to preclude, rebut, or otherwise undermine much of Dr. Groben's testimony, most notably his testimony regarding the cause and manner of Ms. Henneman's death.

Dr. Groben testified that Ms. Henneman died of ligature strangulation, and that it would have taken three to five minutes for death to occur. (Tr., p.3989, Ls.507; p.4040, Ls.19-20). Dr. Aiken strongly disagrees:

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

(Exhibit 46.)

In addition, Dr. Aiken strongly disavows Dr. Groben's re-enactment of ligatures because it was "not based on a reasonable degree of medical probability." (Exhibit 46.) Dr. Aiken disputes that ligatures were necessarily applied at all, and rejects Dr. Groben's testimony to the jury that there was no way to know whether the ligatures, if any, were applied before or after death. (*See* Tr., p.4078, L.19 – p.4079, L.3.) Dr. Aiken would

have testified that the lack of injury beneath the ligature of the left wrist argues against this ligature being present premortem. (Exhibit 46.)

Had counsel consulted with Dr. Aiken, there would have been doubt as to the cause of death, no consideration of speculative theories about the cause of death, and no consideration of speculative theories about horror endured by the victim. Trial counsel could have kept highly prejudicial speculative displays from the jury. In short, trial counsel completed failed to subject this vital part of the State's case to meaningful adversarial testing. But for trial counsel's failures, there is a reasonable probability that the jury would not have found the aggravators, or at least would not have concluded that they outweighed the mitigation.

D. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate The State's Case In Aggravation: Norma Jean Oliver

1. Introduction

The jury at Mr. Hall's October 2004 capital sentencing was presented evidence that nearly thirteen years earlier in December 1991, Erick kidnapped, forcibly raped, and threatened to murder Norma Jean Oliver. At that time, Norma Jean was seventeen years old, and Erick was twenty. The evidence the jury heard was based on Norma Jean's allegations which had originally led to an Indictment against Mr. Hall for two counts of forcible rape. (Exhibit 47 (Garden City Police Department, General Report by Detective Hess, dated December 4, 1991, regarding alleged forcible rape of Norma Jean Oliver); Exhibit 48 (Indictment); Exhibit 55 (*State v. Erick Hall*, Ada County Case No. HCR 18591, PSI (filed under seal)).) However, the charges were eventually amended, and in

April 1992, pursuant to a plea agreement with the State, Mr. Hall entered a plea of guilty to one count of statutory rape. (Exhibit 49; Exhibit 50.)

The State pieced together this story for the jury through the testimony of three witnesses: Norma Jean Oliver, Detective Daniel Hess (who initially investigated the allegations), and Jay Rosenthal (who initially prosecuted and negotiated the plea agreement on behalf of the State). The State called Norma Jean first. Norma Jean struggled with her memory throughout her testimony.[25] Norma Jean testified that at age seventeen, she was living with her parents in Fruitland, Idaho. (Tr., p.4758, Ls.12-14.) She was not "getting along with [her] parents very well" and often ran away, on occasion to Boise, Idaho. (Tr., p.4758, Ls.18-25.) Sometime in late November or early December 1991, she once again ran away to Boise; her plan this time was to go all the way to California. (Tr., p.4760, Ls.6-9.) While still in Boise, she went a local bar and pool hall called Mountain Billiards. (Tr., p.4759, Ls.5-16.)[26] While at the bar/pool hall, she met up with Charles ("Chuck") Barton and Erick Hall. (Tr., p.4759, L.21- p.4762, L.7.) Chuck and Erick were roommates, sharing a trailer in Garden City, Idaho. (Tr., p.4759, L.25 – p.4762, L.12.)[27] At some point, Chuck told Norma Jean that he would help her get to California, and Norma Jean agreed to come back to their trailer. (Tr., p.4760, Ls.2-12.)

Norma Jean ended up going to the trailer that night. (Tr., p.4759, L.5 – p.4762, L.12.) At the trailer, she, Erick, and Chuck hung out for awhile before calling it a night.

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[25] Without objection, the State elicited much of Norma Jean's testimony through leading questions.

[26] *See also* testimony of Detective Hess. (Tr., p.4807, Ls.12-13 (describing Mountain Billiards as "a local bar and pool room").)

[27] *See also* testimony of Detective Hess. (Tr. p.4797, Ls.23-25 (indicating that Chuck and Erick lived together in the trailer).)

(Tr., p.4762, Ls.13-18.) Erick and Chuck slept on their bunk beds; Chuck on top, Erick on bottom. (Tr., p.4763, Ls.4-6, 14-17.) Norma Jean testified that she chose to sleep on a chair near the door in the trailer. (Tr., p.4763, Ls.7-9.)

Sometime that night and into the early hours of the next morning, Norma Jean testified that she was awakened by Erick choking her. (Tr., p.4763, L.18 – p.4764, L.5.) She testified that Erick continued to strangle her until she passed out. (Tr., p.4764, Ls.5-22.) She testified she awoke in a shed outside the trailer with her arms bound by her own clothes. (Tr., p.4764, Ls.21-22; Tr., p.4765, Ls.1-24.) She then testified she "think[s]" Erick forced her to have sexual intercourse with him, and described how he began to have anal sex but then switched to vaginal intercourse. (Tr., p.4767, Ls.2-8.) Afterward, Erick unbound her, wrapped her in a blanket, and took her back to the trailer to his bottom bunk. (Tr., p.4767, Ls.9-19.) She testified that she could not remember whether they had sex again in the trailer. (Tr., p.4769, Ls.3-7.) Norma Jean explained that Chuck never heard any of the commotion because he was sleeping and because she kept quiet to avoid upsetting Erick. (Tr., p.4767, Ls.20-23; p.4768, Ls.2-7.)

Norma Jean testified that after forcing her to have sex, Erick then held her against her will for the better part of the day, threatening to kill her with a hammer and throw her body into the Boise River. (Tr. pp.4756-4783.) However, Norma Jean stated that Erick let her go take a shower in the trailer home on the property. (Tr., p.4769, Ls.14-19.) She could not recall if there was anyone else at the trailer home, but after taking her shower, she returned to the smaller trailer and Erick. (Tr., 4769, Ls.23-25.) Norma Jean testified that her name came across a police scanner and Erick said they had to get out of there. (Tr., p.4770, Ls.5-13.) During the confusion, Norma Jean fled the trailer, hopped some

fences, and made her way to some friends at the Sands Motel in Boise. (Tr., p.4770, Ls.9-21.) Eventually she was taken to Intermountain Hospital where she informed hospital personnel of the rape. (Tr., p.4771, Ls.7-11.)

Norma Jean described her injuries from the attack, including bruises, cuts, scratches, and a blown blood vessel in her eye. (Tr., p.4772, L.19 – p.4774, L.15 (noting in part that, "[o]n the one eye, the white part of my eye was all red from being strangled. It broke all the blood vessels in my eye.").) Norma Jean testified that she must have scratched Erick at some point, because he said something to the effect that "he was going to scratch me because I scratched him." (Tr., p.4774, Ls.6-7.)

During cross-examination, trial counsel elicited evidence that Norma Jean was receiving social security benefits and at some point had been prescribed medication for an unspecified mental health condition that she described as a "chemical imbalance." (Tr., p.4777, Ls.2-7; p.4780, Ls.3-18; p.4783, Ls.17-18.) During re-direct examination, the State elicited testimony suggesting that Norma Jean did not require medication for her condition. (Tr., p.4777, Ls.5-7 ("Okay. Have you taken some [medication] in the past but you don't take it now? A. Yes.").)

The State's next witness was Detective Daniel Hess from the Garden City Police Department. Detective Hess testified that he was contacted by Intermountain Hospital regarding Norma Jean's allegations. (Tr., p.4786, Ls.3-13.) Detective Hess's investigation of the allegations included interviews of both Norma Jean and Erick. (Tr., p.4787, Ls.9-12; p.4795, Ls.14-18.) During his interview with Norma Jean, Hess obtained some preliminary information about her background before discussing her allegations. For instance, Hess testified that Norma Jean told him a little bit about some

family troubles she was having but he did not know the nature or extent of such problems. (Tr. p.4806, Ls.18-25 (Q. Were you aware that Miss Oliver had had an extensive history of family trouble? A. Just from my conversation with her, yes. Q. Did you know what the nature of that trouble was? A. I have no idea. Q. Did you ever try to find out? A. No.").) After obtaining preliminary information from Norma Jean, Hess obtained her statement.

Without objection, Detective Hess testified to the details of the rape as stated to him by Norma Jean. (Tr., p.4810, L.12 – p.4811, L.14.) Hess also testified that while interviewing Norma Jean, he noticed several cuts and bruises on her body. Photographs of Norma Jean's injuries, including scratches and bruises on her arms, were introduced as evidence through Hess. (Tr., p.4790, L.13 – p.4795, L.3)

During his interview with Erick, Detective Hess confronted Erick with Norma Jean's allegations. Erick admitted to having sex with Norma Jean, but claimed it was consensual. (Tr., p.4780, Ls.7-8 ("He, of course, denied it and said that they had had no physical altercation.").) Hess asked Erick about a scratch under his eye. According to Hess, Erick first said that a cat had scratched him, before admitting that Norma Jean had actually scratched him when they were playing around. (Tr., p.4799, L.9 – p.4800, L.1.) Erick was taken into custody and eventually charged with two counts of forcible rape.

The State completed their presentation of evidence on the prior rape allegations through Jay Rosenthal, the former prosecutor who represented the State in the prior prosecution. Rosenthal testified that pursuant to a plea agreement, the State agreed to amend the charge to statutory rape. The reason for amending the charge was to spare Norma Jean the trauma of having to testify. (Tr., p.4952, L.25 – p.4953, L.3.)

Specifically, due to her fragile state, Rosenthal had been informed by Norm Jean's medical providers at Intermountain that they did not believe Norma Jean could withstand cross-examination. (Tr., p.4953, Ls.4-25.) Erick was sentenced to five years in prison. (Exhibit 50.)

The State argued that Norma Jean's testimony supported the "propensity" statutory aggravating circumstance. (Tr., p.5455, L.18 – p.5457, L.16.) Indeed, the State spent a good deal of their argument discussing the Norma Jean rape and specifically compared the similarities between that rape and the murder of Lynn Henneman, illustrating the purported similarities in their PowerPoint presentation. (Tr., p.5456, L.20 – p.5457, L.11; Exhibit 45.) The jury found the "propensity" aggravating circumstance beyond a reasonable doubt and sentenced Mr. Hall to death.[28]

2. Applicable Legal Standards

The applicable standard for ineffective assistance of counsel claims is set forth in Claim A.2, *supra.*

3. Analysis

A reasonable investigation must be "thorough and independent." ABA Guidelines, Guideline 10.7 (stating that counsel has "an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty"); *see also Haliym v. Mitchell,* 492 F.3d 680, 717 (6th Cir. 2007) (relying in part on the ABA Guidelines, Guideline 10.7). "To assume the accuracy of whatever information the client may initially offer or the prosecutor may choose or be compelled to disclose is to render

[28] Mr. Hall maintains that due to inadequate jury instructions and improper closing argument by the prosecution, the jury relied on such testimony not only in finding the propensity aggravator, but also in finding other statutory and non-statutory aggravating circumstances, and in weighing the mitigation.

ineffective assistance of counsel." ABA Guidelines, Commentary to Guideline 1.1. The duty to make a thorough and independent investigation extends to any alleged prior misconduct. As stated in the ABA Guidelines,

> If the defendant has any prior criminal history, the prosecution can be expected to attempt to offer it in support of a death sentence. Defense counsel accordingly must comprehensively investigate—together with the defense investigator, a mitigation specialist, and other members of the defense team—the defendant's behavior and the circumstances of the conviction . . . . If uncharged prior misconduct is arguably admissible, defense counsel must assume that the prosecution will attempt to introduce it, and accordingly must thoroughly investigate it as an integral part of preparing for the penalty phase.

ABA Guidelines, Commentary to Guideline 1.1 (footnotes omitted); *see also* Commentary to Guideline 10.7 ("Counsel must also investigate prior convictions, adjudications, or unadjudicated offenses that could be used as aggravating circumstances or otherwise come into evidence.").

Trial counsel did not make a reasonable investigation of Norma Jean's allegations. They did not interview available witnesses or even review available transcripts of Norma Jean and Detective Hess's prior grand jury testimony. Instead, trial counsel relied on the minimal discovery disclosed by the State.

> Q. Did you reinvestigate the 1991 case as part of this case?
> A. As far as reviewing it, all the evidence, yes. As far as going out and seeking witnesses, no.
> Q. Did you have the grand jury transcript from the '91 rape case at Erick's trial?
> A. Was there a grand jury?
> Q. Yes, there was.

(Tr., 11/16/06 deposition of Amil Myshin, p.330, Ls.14-22.)

The minimal discovery provided by the State included a police report prepared by Detective Hess, summarizing his investigation. The report referenced tape-recorded interviews of Norma Jean and Erick Hall. (Exhibit 47, p.2 ("I began my interview [of

Norma Jean] on Micro cassette tape."); p.4 ("I spoke to Hall on micro cassette tape.").) Trial counsel relied solely on Detective Hess's written report. See footnote 83, *infra*; R., p.373 (stating that the only available evidence to prepare for Norma Jean's allegations consisted of "one sided" police reports "of little assistance to the defense.")

With the State's assistance, trial counsel conducted a last minute interview of Norma Jean. By the time the interview occurred, the guilt phase had concluded, trial counsel had already given their opening statement for the sentencing phase, and Norma Jean, the State's first witness, was less than two hours away from taking the stand. (Tr., p.4751, Ls.14-24 (indicating to the jury that they will be in recess to give trial counsel the opportunity to speak to witnesses they had not spoken to yet); p.4755, L.21 – p.4756, L.3.) The interview was conducted by Amil Myshin without the assistance of the defense team's investigator.[29] The interview took place at the prosecutor's office, with the prosecutors present. The interview was discussed at the post-conviction depositions.

> Q. And do you recall why you did that interview at the prosecutor's office?
> A. We interviewed her. We hadn't had a chance to interview her. Amil interviewed.
> Q. And why hadn't you had a chance.
> A. She lived in another state.
> Q. Do you remember if there were any attempts to contact her prior to this?
> A. I do not know.

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[29] Trial counsel should not conduct witness interviews. *See,* fn. 39 *infra*. Indeed, trial counsel agreed that he prefers to have investigators interview witnesses. (Tr., 11/16/06 deposition of Amil Myshin, p.343, Ls.4-22.) This is further evidence that trial counsel was unprepared to conduct a meaningful interview of Norma Jean. It appears that trial counsel conducted the Norma Jean interview because he was pressed for time and could not wait for Glenn Elam or another investigator. (Tr., 11/16/06 deposition of Amil Myshin, p.344, Ls.8-11 ("I tend to be a run-and-gun guy. I move fast. I think fast. I do things quickly. I don't wait for people. We don't have a ton of investigators").) Such a "run-and-gun" approach by an attorney unfamiliar and ill equipped to deal with Norma Jean's mental problems and unprepared to address numerous weaknesses in her story, rendered it a near certainty that the interview of Norma Jean would be a bust.

(Tr., 12/8/06 deposition of D.C. Carr, p.299, Ls.11-19); *see also* (Tr., 11/16/06 deposition of Amil Myshin, p.327, L.24 – p.328, L.1 (indicating that they "didn't know where she was.");[30] p.328, L.2 – p.329, L.16, p.331, L.10 – p.333, L.5; p.329, Ls.6-17; Tr. 9/13/06 deposition of D.C. Carr, p.200, L.1 – p.207, L.24 (failing to recall whether there were any pretrial attempts to interview Norma Jean); Tr., 12/8/06 deposition of D.C. Carr, p.300, Ls.16-19 (indicating that Amil Myshin conducted the interview without an investigator); Exhibit 10 (affidavit of Rosanne Dapsauski, indicating that the mitigation specialist did not seek to interview Norma Jean).)[31] Not surprisingly, the eleventh hour interview yielded little information. (Tr., p.4755, L.21 – p.4756, L.3 (stating that Norma Jean "was too distraught" to effectively interview her prior to her testimony).

Trial counsel understandably objected to the introduction of the evidence on grounds that evidence of forcible rape that allegedly occurred thirteen years earlier would be very difficult to defend. (Tr., p.765, Ls.18-19 ("[T]he case is so old and so stale that it's going to be very difficult to rebut.").) In addition, trial counsel believed that the 1992 presentence investigation report had been destroyed and that potential witnesses had died. (R., p.373; Tr., p.765, L.9 – p.766, L.16.) However, once the Court ruled that the

[30] This answer does not make sense. All trial counsel had to do was ask the State where Norma Jean could be located and the State would have been required to provide her address. *See* I.C.R. 16(b) (6).

[31] This Court has refused to allow the deposition of Glenn Elam, the defense team's investigator. Mr. Elam is unwilling to cooperate with post-conviction counsel without Amil Myshin's approval. Mr. Myshin has specifically stated to the SAPD's investigator, "I wish you would leave him alone." (Exhibit 36.) Accordingly, Mr. Hall asserts that his state and federal due process rights to meaningful post-conviction proceedings have been violated.

evidence would be admissible, trial counsel had an obligation to pursue reasonable avenues of investigation.

A reasonable investigation would have uncovered a wealth of favorable information that could have been used to preclude, or at least rebut, the evidence presented. The favorable evidence is set forth in the following subclaims: **subclaim a** addresses trial counsel's failure to investigate Norma Jean's mental health problems; **subclaim b** addresses trial counsel's failure to investigate Norma Jean's inconsistent statements and motive to lie and retaliate against Mr. Hall; **subclaim c** addresses trial counsel's failure to investigate Norma Jean's problems at home; **subclaim d** addresses trial counsel's failure to investigate Norma Jean's prior misconduct; **subclaim e** addresses trial counsel's failure to identify inaccuracies in Detective Hess's report; and **subclaim f** addresses trial counsel's failure to identify the degree of leniency reflected in Erick Hall's plea agreement. Each of these subclaims independently, and in conjunction with each other, establishes both prongs of the *Strickland* standard. *See infra,* section 4.

a. Trial Counsel Failed To Investigate Norma Jean's Mental Health Problems

The Sixth Amendment Confrontation Clause guarantees a criminal defendant the right to cross-examine adverse witnesses and "includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable." *Pennsylvania v. Ritchie,* 480 U.S. 673, 678 (1987). A criminal defendant may question a witness's credibility or even competency to testify by eliciting evidence of the witness's compromised mental health. *See Silva v. Brown*, 416 F.3d 980, 987-988 (9th Cir. 2005) (recognizing that evidence calling into question a witness's competency to testify is powerful impeachment material); *Freeman v. U.S.*, 284 F.Supp.2d 217, 225-226 (D.

Mass. 2003) (recognizing that a witness's untreated bipolar disorder calls into question the reliability of the witness's testimony); *Commonwealth v. Barroso*, 122 S.W.3d 554, 562-563 (Ky. 2003) (recognizing that certain mental disorders are highly probative on the issue of credibility); *Gage v. Metropolitan Water Reclamation Dist. of Greater Chicago,* 365 F.Supp.2d 919, 928 (N.D. Ill. 2005) (noting that "Bipolar disorder, like schizophrenia, can distort a witness' reaction to events."); (Exhibit 63 (DSM IV-TR, description of bipolar disorder).) Based on trial counsel's inadequate investigation, and resulting ineffective cross-examination, the jury had very little information about Norma Jean's mental health condition both at the time of the alleged rape and at the time of her testimony.

i. *Deficient Performance*

Following their last minute interview, trial counsel realized that Norma Jean had obvious mental problems and counsel even questioned her competency to testify. However, counsel did not pursue an investigation of her mental health, or request an inquiry into her competency, but instead hoped that her "hysteria" might cut in their favor at trial.

> Q. What was her demeanor at the interview?
> A. She was a mess. I don't know if "hysterical" is a fair word. I don't think she was that, but it was -- how would I describe it? It was obvious to me she has mental problems. I could say that much about her.
>
> * * *
>
> Q. Given her demeanor in the interview, did you have any questions about her competency to testify?
> A. I suppose. I mean, I don't think I released that. I mean, I thought -- under some of those circumstances, the hysteria cuts both ways. . . . I don't remember the question and answer, but I think there was a lot of things she didn't remember.

(Tr., 11/16/06 deposition of Amil Myshin, p.329, Ls.5-10; p.332, Ls.14-22.) Had trial counsel conducted an earlier interview of Norma Jean or at least requested and reviewed her 1991 grand jury testimony, they would have known to further investigate her mental health well in advance of trial. At the very least, trial counsel should have requested a private interview of Norma Jean, outside the presence of the prosecutors.

(a) *Interviewing Norma Jean*

Trial counsel was woefully unprepared to interview and cross-examine Norma Jean. Trial counsel even acknowledged to the Court their pretrial interview was ineffective. (Tr., p.4755, L.21 – p.4756, L.3 (noting that Norma Jean "was too distraught" to effectively interview her prior to her testimony).) Had trial counsel conducted a meaningful investigation, they would have located and interviewed Norma Jean.[32]

Based on her post-conviction interview, Norma Jean would have readily discussed with trial counsel her mental health history. Trial counsel would have learned Norma Jean has been to Intermountain Hospital on multiple occasions, has been diagnosed with mental illness, and has even been given a brain scan, **all prior** to the alleged *forcible* rape. (Exhibit 51; Exhibit 52.)[33] Specifically, Norma Jean has been

[32] There is no reason to believe that Norma Jean would not have agreed to an interview or answered specific questions about her mental health history. Indeed, Norma Jean agreed to give a tape-recorded interview during these post-conviction proceedings. The interview was conducted at her house in West Virginia. She was fully informed that her interviewer was working on behalf of Erick Hall. (Exhibit 51 (audio of interview); Exhibit 52 (transcript of audio of interview).) If for some reason Norma Jean would have refused to cooperate with trial counsel, then counsel could have moved to depose her or at least conduct a meaningful interview well in advance of her testimony and without the prosecutor's presence.

[33] Intermountain is short for Intermountain Hospital, a psychiatric hospital located in Boise, Idaho that provides various services including acute inpatient treatment.

diagnosed with Borderline Personality Disorder, Bipolar Disorder, and Post-Traumatic Stress Disorder. Moreover, counsel would have learned that Norma Jean was **not** taking her medication at the time of the alleged forcible rape.

(b) *Norma Jean's 1991 Grand Jury Testimony*

Trial counsel neither requested nor reviewed Norma Jean's prior grand jury testimony, apparently unaware that she had previously testified regarding her rape allegations. In fact, Norma Jean testified before a grand jury on December 19, 1991. (Exhibit 53 (filed under seal).) The transcript of her testimony was available to trial counsel in the State's file. Even if Norma Jean had not been as forthcoming with trial counsel as she was in these post-conviction proceedings, a cursory review of the grand jury transcript would have put counsel on notice to further pursue Norma Jean's mental health as part of an attack on her credibility or competency to testify. The grand jury transcript provides in part:

Q. Okay. What are they treating you for at Intermountain? Do you know?
A. Just -- well, when I got there, it was like **they didn't want me to go home, because they know my history.**
Q. Okay.
A. And I have -- **I have been there before.** And so, they're -- like, **they were trying to find out what was wrong and why I had made some of the decisions I did, and they came up with that I had a chemical imbalance.**
Q. Okay. You're not crazy? They're not telling you you're crazy, are they?

Admission for inpatient treatment requires a probable DSM-IV Axis I diagnosis and one or more other criteria including, but not limited to, a recent history of substantial self-mutilation or other self-endangering behavior; disordered, psychotic or bizarre behavior such that the patient cannot function in everyday activities; severe depression with functional impairment; and severe anxiety with functional impairment. *See* http://www.intermountainhospital.com/acuteIT.php. Mr. Hall requests that the Court take judicial notice of these facts.

A. No.

(Exhibit 53, Grand Jury Tr., 12/19/91, p.22, Ls.6-17 (emphasis added).)[34] Based on this testimony alone trial counsel would have known there was something about Norma Jean's home life that concerned her treatment providers at Intermountain, she had previously been treated at Intermountain, and she suffered from some sort of "chemical imbalance" that had been diagnosed prior to the alleged forcible rape.

Had trial counsel conducted even a minimal investigation, then they would have known to search for additional information of Norma Jean's mental health through available medical, mental health records, and social security records.[35]

ii. *Prejudice*

Norma Jean's testimony, in conjunction with the testimony given by Detective Hess and Jay Rosenthal, was critical to the State's case in aggravation and its effort to obtain the death penalty for Mr. Hall.[36] Accordingly, it was vitally important for trial counsel to undermine the State's evidence. However, due to trial counsel's lack of investigation, preparation, and resulting ineffective cross-examination, the jury had no reason to question Norma Jean's testimony, her credibility, or her competency to testify. In fact, the jury knew only that she suffered from a "chemical imbalance" at the time of

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[34] The term "crazy" can describe someone diagnosed with a mental illness. *See Bowles v. McGivern*, 680 N.W.2d 378 at *2 (Iowa App. 2004) (unpublished). As noted above, it appears that Intermountain diagnosed Norma Jean with at least one mental illness; therefore, to elicit testimony that they were **not** telling Norma Jean that she was "crazy," is misleading.

[35] Mr. Hall is currently awaiting the Court's *in camera* review and disclosure of relevant medical, mental health, and social security records. This claim will have to be amended upon receipt of any relevant records.

[36] A full discussion of the State's case is reserved for the section below addressing the cumulative prejudice from trial counsel's deficient performance. *See* section 4, *infra*.

her testimony which apparently did not require medication. (Tr., p.4777, Ls.2-7; p.4780, Ls.3-18; p.4783, Ls.17-18.)

The jury did not have a full understanding of Norma Jean's compromised mental health. The jury should have been informed that the real reason Norma Jean was not taking medication at the time of her testimony was **not** because it was unnecessary, but rather because she had trouble finding the help of "good doctors." (Exhibit 51; Exhibit 52 Tr., p.36, Ls.13-25 (emphasis added).) In addition, the jury should have been informed that Norma Jean was suffering from serious mental disorders at the time of the alleged forcible rape and was not taking any medication at that time.

Due to trial counsel's deficient performance, the jury did not realize that Norma Jean's untreated mental disorders likely undermined her capacity to accurately perceive reality, to conform her behavior to accepted norms, and ultimately to testify truthfully. Indeed, the symptoms of Norma Jean's mental disorders shed new light on important elements of the State's evidence. The symptoms of Norma Jean's mental disorders, e.g., borderline personality disorder and bipolar disorder, are discussed in turn.

As noted, the jury never heard that Norma Jean suffers from borderline personality disorder. The jury should have been informed that Norma Jean's disorder "is marked by at least five of the following symptoms: (1) [I]mpulsiveness in, inter alia, substance abuse; (2) instability of mood, interpersonal relationships and self-image; (3) sieges of depression, irritability and anxiety; (4) lack of anger control and recurrent physical fights; (5) threats of suicide and attempts at self-mutilation; (6) uncertainty about career or long-term goals; and (7) persistent feeling of boredom or emptiness." *McGoffin v. Barnhart,* 288 F.3d 1248, 1250 n.2 (10th Cir.2002) (citation omitted). Individuals like

Norma Jean who suffer from this disorder may display impulsivity in at least two areas that are potentially self-damaging, including unsafe sex and self-mutilating behavior such as cutting themselves. *Salazar v. Barnhart,* 468 F.3d 615, 622 (10th Cir. 2006) (citation omitted); (*see also* Exhibit 64, Diagnostic And Statistical Manual Of Mental Disorders (4th ed. – Text Revision 2000) (herein "DSM IV-TR"), p.710. Common symptoms of this mental illness include sexual impulsivity and self-mutilation. Sexual impulsivity would have tended to support Erick's version of his encounter with Norma Jean, from her sexual aggressiveness, including "grabbing his parts," to their consensual sex. Sexual impulsivity was also consistent with Joi Reno's observations that Norma Jean was "physically promiscuous" at the Sands Motel. (Exhibit 54, p.2.) Self-mutilation would have offered an alternate explanation for the physical observations by law enforcement and medical personnel and supported the statements of both Erick Hall and Wendy Levy that they did not see any injuries on Norma Jean when she left the trailer. (Exhibit 2.)

In addition, the jury never heard that Norma Jean suffers from Bipolar Disorder. The jury should have been informed that Norma Jean's disorder is marked by extreme changes in mood, thought, energy and behavior. If left untreated, the disorder tends to worsen, and the person experiences full-fledged manic and depressive episodes. Some symptoms of manic episodes include: grandiose delusions, inflated sense of self-importance; racing speech, racing thoughts, flight of ideas; impulsiveness, poor judgment, distractibility; reckless behavior; and, in the most severe cases, delusions and hallucinations. (*See* Exhibit 42.) Bipolar disorder, "like schizophrenia, can distort a witness' reaction to events." *Gage v. Metropolitan Water Reclamation Dist. of Greater Chicago,* 365 F.Supp.2d 919, 928 (N.D.Ill.2005); *Keats v. State,* 115 P.3d 1110, 1119

(Wyo. 2005) (finding trial counsel ineffective in failing to obtain defendant's medical records where counsel was aware that defendant had been diagnosed with bipolar disorder, an "illness [that] distorts a person's sense of reality."); (*see also* Exhibit 3, pp.382-397.) Erick Hall has always maintained that he had consensual sex with Norma Jean. (Exhibit 56A (audio of interview of Erick Hall by Detective Hess); Exhibit 57A (transcript of interview of Erick Hall by Detective Hess).) He also has maintained that he forced her to leave and called the police on her. (Exhibit 56A; Exhibit 57A.) It is entirely reasonable, in light of the nature of Norma Jean's mental illness, to accept that Norma Jean may have a distorted sense of what actually happened. In addition, when Erick was interviewed by Detective Hess, he described some of the symptoms of bipolar disorder when he claimed he overheard Norma Jean laughing *and* crying on the phone after he initially rejected her sexual advances. (Exhibit 47, p.4 (according to Erick, Norma Jean "started grabbing his 'parts'" and "he told her that she couldn't be doing that. He then said that she used his phone and that she was talking to a friend she would laugh then cry and stated that some one was messing with her...").)

b. Trial Counsel Failed To Identify And Investigate Norma Jean's Inconsistent Statements And Motive To Lie And Retaliate Against Erick Hall

The Sixth Amendment guarantees criminal defendants the right to cross-examine adverse witnesses to uncover possible bias, expose the witness's motivation in testifying, contradict the witness's testimony with prior inconsistent statements, or undermine the witness's credibility with prior bad acts. *Delaware v. Van Arsdall,* 475 U.S. 673, 678 (1983); *Davis v. Alaska,* 415 U.S. 308, 315-316 (1974); *California v. Green,* 399 U.S. 149, 158-159 (1970); *State v. Guinn*, 114 Idaho 30, 38, 752 P.2d 632, 640 (Ct. App.

1983) (describing impeachment with prior acts as "a proper and important function of the constitutionally protected right of cross-examination"). The failure to conduct an effective cross-examination of state witnesses may require a new trial. *See, e.g., Nixon v. Newsome*, 888 F.2d 112 (11th Cir. 1989) (finding ineffective assistance of counsel for the failure to impeach a state witness despite being based upon strategic reasons); *United States v. Tucker*, 716 F.2d 576 (9th Cir. 1983) (stating that "a competent lawyer would have recognized the critical importance of using the prior inconsistent statements for impeachment").

Based on trial counsel's inadequate investigation, and resulting ineffective cross-examination, the jury did not hear numerous inconsistencies and material omissions in Norma Jean's story. In addition, the jury did not hear evidence that she had a motive to lie and retaliate against Mr. Hall.

i. *Deficient Performance*

This subclaim addresses different aspects of Norma Jean's testimony juxtaposed with evidence that was readily available to counsel had they conducted an adequate investigation. The evidence is set forth in five sections: **section (a)** addresses Norma Jean's trouble with the law; **section (b)** addresses Norma Jean's reason to retaliate against Mr. Hall; **section (c)** addresses Norma Jean's encounter with Erick Hall at Mountain Billiards; **section (d)** addresses the sleeping arrangements at Erick's trailer and events during the night; **section (e)** addresses Norma Jean's testimony about Erick's odd behavior and expression of remorse; **section (f)** addresses Norma Jean's escape from the trailer; and **section g** addresses Norma Jean's delay in reporting the rape and other activities at the Sands Motel.

(a) *Problems With The Law*

The jury was informed that after Norma Jean escaped from the trailer, she made her way to the Sands Motel where the police ultimately took her to juvenile detention and Intermountain Hospital. The jury was not specifically informed that Norma Jean was arrested; indeed, the jury had every reason to believe that the police who responded to the Sands Motel were responding to rape allegations and transported her to juvenile detention and Intermountain as a matter of protocol when dealing with juveniles outside their jurisdiction. The jury should have been informed that Norma Jean was actually arrested at the Sands Motel on juvenile runaway charges and that she would have been returned home for prosecution but for the fact that she alleged to have been raped.

Had trial counsel conducted a reasonable investigation, they would have learned that Norma Jean was a chronic runaway. Indeed, police reports indicate that between November 1990 and December 1991, she was arrested **three** times in Boise for being a runaway. (Exhibits 58-62.) These reports contain favorable evidence, directly relevant to Norma Jean's rape allegations. Specifically, one police report indicates that Norma Jean was arrested at the Sands Motel on December 2, 1991. According to the report, Norma Jean was to be returned to her home in Fruitland and prosecuted by Payette County. (Exhibit 61, p.1.) Apparently Norma Jean ran away from home the very next day, returning to Boise and the Sands Motel because a second police report indicates that in the late evening of December 3, 1991, Norma Jean was arrested again. (Exhibit 62 ("At that location, we did find a runaway (Norma Jean Oliver), who I had arrested for the same offense at the same location just two nights earlier. Norma Jean was taken into custody by Officer Lowe.").)

It appears that the alleged forcible rape occurred at Erick Hall's trailer prior to both arrests, likely on December 1, 1991. The jury should have been informed that Norma Jean had multiple opportunities to disclose the rape to law enforcement but never did so until it was clear she was facing big trouble in Payette County. *See infra,* section g. In fact, it appears that once Norma Jean reported that she had been raped, rather than being returned home, she was admitted to Intermountain Hospital's long-term care unit. (Exhibit 55, p.8 (noting that at the time of her interview, Norma Jean was "currently committed to Intermountain Hospital on the residential unit."); p.9 ("Ms. Oliver says [that after reporting the rape] she was then placed into the long-term unit and is receiving counseling for the rape. She expects to be discharged from Intermountain by June 1st.").) At this time, it is not clear whether Norma Jean was ever returned home and prosecuted in Payette County, or whether she remained in the care of Intermountain Hospital until her eighteenth birthday.[37]

(b) *Reasons To Retaliate*

The jury had no reason to believe that Norma Jean was in any way motivated to falsely accuse Erick Hall of forcible rape. The jury should have been informed that Erick Hall turned Norma Jean in to the police leading to her arrest on December 2, 1991. The police report detailing the arrest indicates that the police had been informed of Norma Jean's whereabouts at the Sands Motel by "an anonymous caller named only 'Eric' . . . ." (Exhibit 61, p.1) Indeed, Erick Hall told Detective Hess "that he called the Cops on her because of being a runaway and he knew she was going to the Sands Motel in Boise."

[37] Until receipt of records from Intermountain Hospital and Payette County it cannot be stated with certainty when Norma Jean was released from Intermountain, whether she ever returned home, or whether she was ever prosecuted for her offenses.

(Exhibit 47, p.5.) Erick's reporting Norma Jean to the police, led to her arrest, thwarted her plans to go to California, led to her return to her home in Fruitland,[38] and set the stage for her prosecution by Payette County authorities. Thus, Norma Jean had a reason to retaliate against Erick which the jury never heard.

(c) *Meeting Erick At Mountain Billiards*

Norma Jean testified that she met Erick at Mountain Billiards, and suggested that this was the first time she had ever met him. (Tr., p.4759, Ls.5-20; p.4761, L.24 – p.4762, L.4.) In addition, she testified that she was not acting like she was eighteen years old and was not drinking alcohol at Mountain Billiards. (Tr., p.4778, Ls.10-21.)

Q. Okay. Do you remember what you were doing at Mountain Billiards?
A. No.
Q. Were you drinking beer?
A. No, not that I know of because I wasn't a drinker.

(Tr., p.4778, Ls.10-15.) Thus, Norma Jean told the jury that she knew that she did not drink beer that night, despite her lack of specific recollection, because she "wasn't a drinker." As a relative stranger who was completely sober, Norma Jean's testimony that she refused to have sex with Erick made sense.

Contrary to the strong implications of her sentencing testimony, Norma Jean had seen Erick "approximately six or seven times" prior to meeting him at Mountain Billiards. (Exhibit 55, p.8.) Further, she told Detective Hess during her taped interview that she had sexual intercourse on two prior occasions, and that one time she was drunk. (Exhibit 56B; Exhibit 57B (Tr., p.20).) Thus, apparently Norma Jean was not quite as averse to alcohol as she alleged. This has been confirmed by interviewing her other

[38] *See infra,* subclaim c, addressing the abuse that Norma Jean faced at her home.

acquaintances in December 1991. Trial counsel could have presented the testimony of Joi Reno on this matter. As Ms. Reno stated in her affidavit,

> I recall I had met Norma Jean Oliver within a few months prior to December 1991 at a Boise bar called Mountain Billiards, and she was new to this circle of friends. Ms. Oliver went by the alias "D.J.," and stayed with several of my friends at the Sands Motel. . . . I used methamphetamine, marijuana, and drank alcohol with Ms. Oliver on numerous occasions with this circle of friends off and on over the course of about six to eight weeks. I saw Ms. Oliver drink alcohol that had been purchased by other friends over the age of 21 while at Mountain Billiards.

(Exhibit 54.) Trial counsel should have cross-examined Norma Jean about these facts (and presented the testimony of Joi Reno and Detective Hess if necessary). This evidence would have raised questions in the jury's mind whether Norma Jean intentionally falsified her testimony, and in fact had been drinking and portraying herself as an adult, thus raising the likelihood that she agreed to have sex with Erick and corroborating Erick's version to Detective Hess that he believed Norma Jean was eighteen but realized she was a runaway when her name came across the police scanner.

(d) *Sleeping Arrangements At The Trailer*

Norma Jean testified at Erick's sentencing that she chose to sleep in a chair rather than sleep with Erick in the lower bunk bed. (Tr., p.4762, L.19 – p.4764, L.5.) Norma Jean's choice to sleep apart from Erick was completely consistent with her testimony that she refused to have sex with him. However, contrary to her sentencing testimony, Norma Jean told the presentence investigator that she at least initially joined Erick in his bed. According to the investigator:

> After Ms. Oliver arrived at the camper she states the defendant invited her to sleep in his bed rather than sleeping on the floor. Ms. Oliver believes she made it "perfectly clear" to the defendant that she would not have sex with him. According to Ms. Oliver when the defendant began taking her underwear off **she got up** and curled up on a tiny chair in the camper.

(Exhibit 55, p.8 (emphasis added).) Norma Jean gave a similar version of events in her tape-recorded interview with Detective Hess. The fact that Norma Jean started the night with Erick in his bed was omitted from Detective Hess's written report; accordingly, this fact was unknown to trial counsel and never heard by the jury. Had the jury heard such evidence, it would have given additional weight to Erick's version of facts that they engaged in consensual sex that night.

(e) *Erick's Impulses And Remorse*

Trial counsel sought to elicit testimony from Norma Jean that Erick seemed to lose control during the alleged rape but then regained his composure, stopped, and even apologized for what he did to her.

Q. Okay. When some of this had happened do you remember when Erick stopped?
A. What?
Q. Do you remember a time when Erick stopped doing what he was doing? Do you remember he stopped and said --
A. When we were asleep.
Q. Yeah, okay.
A. I'm not – I'm confused.
Q. All right. Well, do you remember Erick stopping and saying, "Oh my God, I'm sorry"?
A. Not that -- I don't know.
Q. Okay. Did Erick apologize to you?
A. I'm not sure. I'm thinking but I'm not – it's – I'm not sure.
Q. Do you remember telling me that he apologized to you?
A. I remember saying that I think that he apologized.
Q. Okay.
A. I was sitting there trying to think, to see what was going on. Maybe I wanted him to say sorry, I remember because -- but that I did because I wanted him to.
Q. I see. Okay.

(Tr., p.4778, L.22 – p.4779, L.21.) In this instance, trial counsel knew the answers to the questions he was asking, apparently through his last minute interview, and possibly his

review of Detective Hess's report. However, counsel was unprepared to either refresh Norma Jean's recollection or impeach her with prior inconsistent statements.[39]

When Norma Jean testified she could not recall whether Erick suddenly stopped and apologized, trial counsel should have played her own tape-recorded statement to Detective Hess in which she said exactly that, or at least refreshed her recollection with her statements in Detective Hess's report. (Exhibit 56B; Exhibit 57B, p.15; Exhibit 47, p.2 ("...and suddenly snapped out of it and stated 'what have I done'..."); Exhibit 55, p.9) (indicating that Erick "all of a sudden he came to" and when he realized what had occurred he said, "my God, what have I done, I can't believe what I just done.").) Along these lines, trial counsel failed to establish that Norma Jean actually felt sorry for Erick because he "did something like that and because he didn't know better." (Exhibit 55, p.10.)[40] Due to trial counsel's inability to conduct an effective examination, the jury heard no evidence to support the theory that Erick may have blacked out or otherwise

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[39] Because trial counsel himself conducted the interview of Norma Jean, without the presence of the defense team's investigator, he was unprepared to impeach her and nearly made himself a witness by posing the question, "Q. Do you remember telling me that he apologized to you?" The ABA Guidelines warn against trial counsel conducting relevant investigation, stating in part:

> Counsel lacks the special expertise required to accomplish the high quality investigation to which a capital defendant is entitled and simply has too many other duties to discharge in preparing the case. Moreover, the defense may need to call the person who conducted the interview as a trial witness.

ABA Guidelines, commentary to Guideline 4.1 (footnote omitted).

[40] While it seems reasonable that Norma Jean may have forgotten these important details thirteen or fourteen years later, she somehow re-remembered them during her post-conviction interview. (Exhibit 51; Exhibit 52 (Tr., p.50 ("I think, I think for a brief moment, he had uh, said uh, 'Oh, God what have I done,' you know, but I'm not sure.")).)

been overcome by impulses at the time he assaulted Norma Jean and again thirteen years later, when he assaulted Ms. Henneman.[41]

(f) *Norma Jean's "Escape"*

"There is little doubt that an alleged rape victim's conduct after the fact is probative of whether a rape in fact occurred." *See Henson v. State,* 535 N.E.2d 1189, 1193 (Ind. 1989). Norma Jean testified that after the rape and after being held against her will for the better part of the day, she took advantage of confusion that occurred after Erick heard her name come across a police scanner in the trailer. (Tr., p.4770, Ls.9-10.) She testified that the next thing she remembered was that she "took off away from him" and "started hopping a couple of fences here and there" until she ultimately "ended up over at the Sands Motel" with some friends. (Tr., p.4770, Ls.11-25.) At some point after her arrival at the Sands Motel, Norma Jean testified that she remembers going to Intermountain Hospital. (Tr., p.4771, Ls.1-14.)

In a post-conviction interview, Norma Jean stated that after she escaped, she asked a neighbor in the area to drive her to the Sands Motel. (Exhibit 51; Exhibit 52 (Tr., p.25).) Trial counsel would have known to investigate this story had they requested and reviewed Norma Jean's grand jury testimony. (Exhibit 53, p.17, L.20, – p.18, L.7.) When questioned about the neighbor's assistance, Norma Jean volunteered that rather than going directly to the Sands Motel, and to presumed safety, Norma Jean first asked the neighbor to drive her back to the trailer, **the very place where she had allegedly been forcibly raped and held against her will in mortal fear**. (Exhibit 51; Exhibit 52 (Tr.,

[41] Had trial counsel conducted a reasonable investigation, they would have obtained the testimony of numerous family members detailing incidents of head injuries and black outs. *See supra,* Claim B.3.a.

p.24).) Norma Jean states that she then went back to the trailer to get her belongings. She did not know whether Erick would be at the trailer upon her return. (Exhibit 51; Exhibit 52 (Tr., p.22).) Immediately returning to the scene of a kidnapping and rape after escaping her captor, rather than seeking safety, does not appear to be the type of conduct one would expect from a rape victim. This additional information would have further undermined Norma Jean's story and would have weighed heavily in support of Erick's version that he kicked Norma Jean out of the trailer when he realized that she was wanted as a runaway.

(g) *Norma Jean's Delay In Reporting The Rape And Other Activities At The Sands Motel*

Norma Jean testified that she could not recall whether, after her arrival at the Sands Motel, she was arrested and taken into police custody; however, she did recall eventually being taken to Intermountain Hospital. (Tr., p.4771, Ls.1-14.) She did not testify how long she was at the Sands Motel before being taken to Intermountain. The jury had no reason to suspect there was any delay in reporting the rape. (Tr., p.4771, Ls.15-18 ("Q. Okay. When you were at Intermountain Hospital did you tell some people there what had happened to you at Erick's? A. Yes.") In short, as far as the jury was aware, Norma Jean reported the rape to law enforcement as soon as possible following her return to safety at the Sands Motel.

Norma Jean testified that she went to the Sands Motel where some of her friends were staying. (Tr., p.4770, Ls.17-25.) According to a police report readily available to trial counsel, one witness at the Sands Motel was Joi Reno. (Exhibit 62.) Ms. Reno would have testified that she saw Norma Jean at the Sands Motel shortly before her arrest

and that at that time Norma Jean was sexually provocative with their male friends and certainly did not act like she had recently been raped.

> I recall I had met Norma Jean Oliver within a few months prior to December 1991 at a Boise bar called Mountain Billiards, and she was new to this circle of friends. Ms. Oliver went by the alias "D.J.," and stayed with several of my friends at the Sands Motel. . . . On December 4, 1991, I received a telephone call from one of my friends at the Sands Motel asking me to go to the motel and pick up Ms. Oliver, since she needed a ride and I was the only person who had a car at that time. I had little regard for Ms. Oliver, and reluctantly went to the motel to pick her up. I don't recall where she wanted to go. While I was at the Sands Motel, the police came to the motel looking for a runaway. Ms. Oliver lied to me and denied that she was a runaway or that the police were looking for her. We were both arrested, and I recall that my father was contacted and came to pick me up. . . . That day, Ms. Oliver never told me that she had been raped by anyone. To the contrary, her behavior was flirtatious, and [she was] comfortable engaging in physical and sexual behavior with the other males at the Sands Motel after the date of her alleged rape.

(Exhibit 54.) While courts are reluctant to permit the admission of evidence about a victim's sexual history, there are elements of a witness's sexual history that are recognized as highly relevant.[42] For instance, evidence of a victim's sexual history may be relevant and admissible to show consent, other false allegations of rape, or the witness's sexual behaviors with others around the time of the alleged rape. *See* I.R.E. 412 (b)(2)(B-D); *see also e.g., State v. Botelho,* 753 A.2d 343, 347 (R.I. 2000) (noting that prior *or* subsequent allegations of sexual abuse against other individuals, *regardless if proven false*, may be relevant and admissible to challenge a victim's credibility in a rape

[42] Idaho Code § 18-6105 and I.R.E. 412, generally govern the admissibility of a victim's prior sexual history. The statute and rule, however, apply by their plain language to rape prosecutions, not capital sentencing proceedings. Further, the statute and rule do not establish a complete ban to the admissibility of such information. For instance, I.C. § 18-6105 sets forth a procedure for a defendant to establish the admissibility of such evidence outside the presence of the jury. Under I.R.E. 412, evidence of a victim's sexual history may be admissible to show consent, other false allegations of rape, or sexual behaviors with others around the time of the alleged rape. *See* I.R.E. 412 (b)(2)(B-D).

case). In this case, had trial counsel interviewed available witnesses, counsel would have discovered that *after* the alleged forcible rape, Norma Jean returned to the Sands Motel and was sexually active with men in the motel room.[43] This would not only be inconsistent with someone who had just been raped, it is also consistent with someone who suffers from an untreated Borderline Personality Disorder. *See supra,* section D.3.a.; (Exhibit 64.)[44]

As noted above, the jury was informed that after Norma Jean escaped from the trailer, she made her way to the Sands Motel where the police ultimately took her to

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[43] It appears that Norma Jean may have told some of her friends that she had been raped. In a post-conviction interview with Kate Elg, Ms. Elg states that she was at the Sands Motel in the early morning of December 2, 1991, when she saw Norma Jean come into the motel and go directly to the bathroom. Ms. Elg states that she saw Kevin Leo Bates follow her into the bathroom. Norma Jean was arrested a short time later based on Erick Hall's report to the police. While Norma Jean did not allege to her arresting officer that she had been raped, according to Ms. Elg, she was told by Edwin Sammis that Norma Jean had been raped. Ms. Elg's statement is based on multiple layers of hearsay and thus not likely admissible. However, if it were admissible, then it would tend to undermine only that portion of Mr. Hall's claim that Norma Jean did not act like a rape victim *immediately* after she left the trailer. Ms. Elg's statement does not undermine any other aspect of Mr. Hall's claims and further, is not inconsistent with Ms. Reno's statement that two days later, on December 4, 1991, Ms. Reno saw Norma Jean at the Sands Motel acting sexually promiscuous with the young men in the room, behavior that one would not expect a rape victim to engage in within days of being raped.

[44] Norma Jean's statement in her post-conviction interview suggest that there may be prior allegations or incidents of rape or other abuse in her background. For instance, Norma Jean was somewhat equivocal stating that she did not *think* she had been raped in the past. (Exhibit 51; Exhibit 52.) Further, she stated that she believes she was a virgin at the time of the rape. (Exhibit 51; Exhibit 52 (Tr., p47).) However, Norma Jean told Dr. Lawrence Vickman that she was not a virgin, and last had consensual sex on November 13, 1991, and November 28, 1991, just weeks and days prior to the alleged forcible rape. (Exhibit 65 (medical report of Dr. Vickman, dated 12/04/01, p.1.) In addition, she told Detective Hess that she had sex on two prior occasions, and on one of those occasions was a little bit drunk. (Exhibit 56B; Exhibit 57B.) Mr. Hall is still awaiting the Court's *in camera* review of and receipt of any relevant records from various medical and mental health facilities. This claim may need to be amended upon receipt of any relevant records.

juvenile detention and Intermountain Hospital. The jury was not specifically informed that Norma Jean was arrested; indeed, the jury had every reason to believe that the police who responded to the Sands Motel were responding to rape allegations and transported her to juvenile detention and Intermountain as a matter of protocol when dealing with juveniles outside their jurisdiction. The jury had no idea that Norma Jean actually delayed reporting the rape to law enforcement through two arrests. (Exhibit 103 (Affidait of Wade Spain).) Indeed, it was only after Intermountain Hospital personnel suggested that Norma Jean had been raped, that she first reported the rape.

> Q. Okay. And I take it Margaret asked you what had taken place?
> A. Yeah. I go -- I said -- I told her that I had gotten into a little fight. She goes, "Did you get raped?", and I'm like, "Well, yeah." She goes, "Well do you [sic] me to call the cops," and I go, "Well, yeah, if you want to."

(Exhibit 53, p.19, Ls.19-22.)[45] Accordingly, contrary to the evidence before the jury, there was significant delay in reporting the rape. The jury should have known that during the interim between the purported forcible rape and reporting the rape, Norma Jean had been taken back to her home in Fruitland, run away back to Boise, and returned to the Sands Motel where she was at a minimum sexually provocative with others at the motel. It is entirely likely that Norma Jean would never have reported her rape, and continued her quest to evade her parents and law enforcement, but for the fact that she was arrested a second time.

[45] Mr. Hall is still awaiting medical and mental health records from Intermountain Hospital and Margaret Farmer. This claim will be amended upon receipt of relevant records.

ii. *Prejudice*

The jury had no reason to question Norma Jean's allegations. Her testimony, along with the testimony of Detective Hess and Jay Rosenthal, was virtually unchallenged. The jury should have been informed of the numerous inconsistencies in her story, as well as her motivation to lie to avoid prosecution and an abusive home life, and finally the reason she had to retaliate specifically against Erick Hall. Independently, and taken in conjunction with trial counsel's other deficiencies; there is a reasonable probability that Mr. Hall would not have been sentenced to death but for trial counsel's failure to conduct a reasonable investigation of Norma Jean and her allegations. *See infra,* section 4.

c. Trial Counsel Failed To Investigate Norma Jean's Problems At Home

Norma Jean testified that she was having some problems at home, but she did not describe the nature or extent of her problems. (Tr., p.4758, L.12 – p.4760, L.9; p.4777, L.25 – p.4778, L.7 (testifying that she ran away because she did not like the way she "was being treated" at home).) Neither the prosecution nor trial counsel posed any additional questions regarding Norma Jean's home life and why she was a runaway.

i. *Deficient Performance*

Trial counsel failed to request or review Detective Hess's tape-recorded interview of Norma Jean. *See* footnote 83, *infra.* The taped interview reveals that Norma Jean stated that her father abused her at home. (Exhibit 56B; Exhibit 57B (Tr., p.34.) The abuse had lasted from her childhood through her late teenage years, and was one reason that Norma Jean continually ran away from home. The abuse included beatings. (Exhibit 56B; Exhibit 57B (Tr., p.34 (describing being thrown across the room by her father)).)

This history is not reflected in Detective Hess's written report, and thus not uncovered by trial counsel's nominal preparation.

Similarly, trial counsel failed to request or review the 1991 grand jury transcript. Norma Jean's grand jury testimony reveals that her treatment providers at Intermountain Hospital were concerned about her problems at home, and did not want her to return. (Exhibit 53, (Tr., p.22, Ls.6-9 ("[T]they didn't want me to go home, because they know my history.")).) Trial counsel never reviewed the tape-recorded interview or the grand jury testimony.

ii. *Prejudice*

The jury was presented with evidence of Norma Jean's injuries, allegedly sustained at the hands of Erick Hall. (Tr., p.4772, L.19 – p.4774, L.15; p.4790, L.13 – p.4795, L.3) The jury should have been informed that Norma Jean was being physically abused by her father at home and that such abuse included being thrown across the room. Such abuse could have accounted for Norma Jean's injuries since she was taken back to her home after the alleged forcible rape.[46] In fact, Wendy Levy, a witness present at the camper where Norma Jean showered after the alleged forcible rape, and who was never questioned by trial counsel about the incident, would have testified that she did not see any injuries on Norma Jean. According to Ms. Levy:

> Erick Hall told me Ms. Oliver had bought him drinks at Mountain Billiards, and that they had had consensual sex in the camp trailer. I

[46] As noted below, the jury believed that Norma Jean was taken to Intermountain Hospital on the day she escaped from Erick. As such, it is hard to explain how she could have received her injuries from home. However, had trial counsel conducted a reasonable investigation, they would have learned that after the alleged rape, Norma Jean was arrested at the Sands Motel and taken back home, only to return again to Boise and the Sands Motel where she was arrested a second time and taken to Intermountain. *See* subclaim b.i.(a) *supra*.

believe Ms. Oliver followed Erick to my home from Mountain Billiards and was interested in him.
The following morning, Ms. Oliver used the shower and I saw her come out of the bathroom. She was wearing a tank top and jeans, and I saw no marks, scratches, bruises, or injuries of any kind on her face, neck, shoulders, arms, or hands. While she was on my property, I did not see Ms. Oliver carrying a duffel bag, backpack, or extra clothing of any kind. I told Erick I believed there was something wrong with Ms. Oliver and asked him to ask Ms. Oliver to leave my property.

(Exhibit 2.) Based on this additional evidence, readily available to trial counsel, it is entirely conceivable that Norma Jean was abused by her father (perhaps for running away and for being arrested), suffering the injuries that were later photographed and ultimately presented to Mr. Hall's capital sentencing jury.

d. Trial Counsel Failed To Investigate Norma Jean's Prior Misconduct

A witness's prior misconduct may be relevant to her credibility. Norma Jean was not questioned regarding any prior misconduct. Had counsel conducted even a minimal investigation, they would have discovered information involving prior misconduct calling into question her credibility and character for truthfulness.

i. Deficient Performance

The jury had no reason to believe that Norma Jean would lie to a law enforcement officer, in this case Detective Hess. However, the jury should have known that Norma Jean was perfectly capable of lying to the police, and had done so in the past.

Had trial counsel conducted a reasonable investigation, they would have discovered a police report detailing Norma Jean's arrest approximately one year prior to her allegations against Erick Hall. Specifically, on November 19, 1990, Norma Jean was arrested as a runaway and gave a false name and date of birth to police officers during their criminal investigation. (Exhibit 60.) Norma Jean's prior conduct constituted a

criminal act and an act of dishonesty that trial counsel could have used to undermine her credibility. *See* I.C. § 18-5413 (2) ("A person is guilty of a misdemeanor if he knowingly gives or causes to be given false information regarding his or another's identity to any law enforcement officer investigating the commission of an offense."); I.R.E. 608(b) (permitting inquiry into specific instances of conduct concerning the witness's character for untruthfulness).[47] In this context, Norma Jean's "use of a false name [and date of birth] is an indication of dishonesty that goes to the very heart of the question of [her] testimonial credibility . . . ." *People v. Walker,* 633 N.E.2d 472, 476 (N.Y. 1994).

ii. *Prejudice*

As noted through this claim, it was vitally important for trial counsel to undermine the State's evidence. However, due to trial counsel's lack of investigation, preparation, and resulting ineffective cross-examination, the jury had no reason to question Norma Jean's credibility; specifically, the jury had no reason to think that she would lie to law enforcement. The cumulative prejudice of counsel's deficient performance identified in this subclaim is discussed below in conjunction with the other subclaims. *See infra,* section 4.

e. Trial Counsel Failed To Identify Inaccuracies In Detective Hess's Report

Detective Hess's testimony was important to the State's presentation of Norma Jean's allegations in two respects. First, Detective Hess provided the foundation for the

[47] The Court allowed the State to reach **thirteen years** into Mr. Hall's past for prior conduct which purportedly reflected on his character. It is hard to conceive that the Court would have precluded Mr. Hall from eliciting prior bad conduct of Norma Jean just **one year** prior to her allegations, where such conduct is clearly probative of her character for untruthfulness. Indeed, failure to permit such cross-examination would have constituted a violation of Mr. Hall's Sixth Amendment right to confrontation.

introduction of photographs of Norma Jean's injuries. Second, Detective Hess filled in numerous gaps in Norma Jean's testimony by testifying to statements she made to him during his interview with her. *See infra,* Claim Y. It appears that Detective Hess testified relatively consistent with his written report. However, there were numerous inaccuracies in Detective Hess's report and testimony that trial counsel should have identified for the jury.

i. *Deficient Performance*

Trial counsel failed to cross-examine Detective Hess about inconsistencies between his testimony and his taped interviews of Norma Jean and Erick. Specifically, in cross-examination, trial counsel asked Detective Hess whether he had spoken to Norma Jean about her trouble at home.

> Q. Were you aware that Miss Oliver had had an extensive history of family trouble?
> A. Just from my conversation with her, yes.
> Q. Did you know what the nature of that trouble was?
> A. I have no idea.
> Q. Did you ever try to find out?
> A. No.

(Tr. p.4806, Ls.18-25.) This is false testimony. Had trial counsel (and possibly Detective Hess), reviewed Detective Hess's taped interview of Norma Jean they would have discovered that Detective Hess spoke at length with Norma Jean about her history of family trouble. Indeed, Norma Jean told Hess that she had been physically abused by her father for years. Abuse included being thrown across the room. The abuse occurred throughout her childhood and up to the point of her interview with Hess. It was because of the abuse that Norma Jean so often ran away from home. Indeed, this abuse provided Norma Jean a strong motive to fabricate a story to prevent her from being taken back

home and also provided an alternate explanation for the injuries that were observed by Detective Hess.

In addition, trial counsel failed to cross-examine Detective Hess about inconsistencies between his observations of Norma Jean's injuries and Norma Jean's testimony. Norma Jean testified that Erick caused blood vessels to blow in her eye when he was strangling her. (Tr., p.4772, L.19 – p.4774, L.15 (noting in part that, "[o]n the one eye, the white part of my eye was all red from being strangled. It broke all the blood vessels in my eye.").) Trial counsel should have elicited testimony from Detective Hess that he never observed such injuries. Indeed, the presence of such injuries is not reflected in Hess's report, in the photographs, or in Dr. Vickman's report.[48]

Finally, Detective Hess suggested in his testimony that Erick made inconsistent statements to him. First, Hess testified Erick initially stated that he believed Norma Jean was eighteen years old, but then later admitted he knew she was a juvenile runaway.

Q. At first did he say what he thought her age was?
A. He said he thought she was 18. Someone had told her -- told him that she was 18.
Q. Someone had told him?
A. Yes.
Q. Did he say that he thought that she was 18 because he saw her drinking beer also?
A. Yes.
* * *

[48] If trial counsel could not elicit this inconsistency from Detective Hess, then counsel should have elicited such testimony from Dr. Vickman or at least admitted Dr. Vickman's report which does not indicate the presence of such injuries. (Exhibit 65.) It is unimaginable that Detective Hess and Dr. Vickman would have failed to note the hemorrhaged blood vessels in her eye when such is commonly understood as corroborative of strangulation. *See e.g., State v. O'Leary,* 903 A.2d 997, 1002 (N.H. 2006); *State v. Ford,* 592 S.E.2d 294 at *2 (N.C. App. 2004) (unpublished).

Q. All right. Now, at some point did he say that he knew that she was a run-away, that is that Norma Jean was a run-away and that he had run her off?
A. He did.

(Tr., p.4797, Ls.14-22; p.4799, Ls.4-8) The State exploited this alleged inconsistency in argument. (Tr., p.4738, Ls.1-4 ("The defendant said at first . . . that he thought she was 18 but later said he knew she was a run-away and shooed her away and run her off . . .").) However, Erick was not inconsistent in his statements. Instead, Erick told Hess that he initially believed Norma Jean was eighteen years old based on what he was told and based on the fact that she was drinking beer at Mountain Billiards. Later, when he heard her name come across the police scanner, he realized that she was a juvenile runaway. Accordingly, he told her that she had to leave. Thus, Erick was consistent in his statements. The jury should have been told the truth rather than lies that tended to undermine Erick's version of events.

In addition, Detective Hess also testified that Erick changed his statement regarding how he received scratches on his face.

Q. Did you -- when you were looking at the defendant did you observe whether or not he had any scratches on him?
A. He had one on the left side of his face.
Q. Close to his eye?
A. Just below the eye.
Q. Did you ask him how that scratch got there?
A. I did.
Q. What did he say?
A. At first he said a cat had scratched him, that they were playing with a cat. And then he went on to say that someone had clawed him and I said who and he said Norma Jean.
Q. Did he say that -- what the circumstances were that caused her to claw him?
A. He just said they were playing around and foolishness and that type of thing.

(Tr., p.4799, L.9 – p.4800, L.1.) The State also exploited this alleged inconsistency in argument. (Tr., p.4738, Ls.6-8 ("When asked how come he had a scratch under his eye he said that the cat had scratched him and then that this Norma Jean had charged him . . . ").) However, Erick did not give inconsistent statements. Instead, Erick told Hess that the scratches were a result of a combination of being scratched by his cat and Norma Jean. Erick told Hess that Norma Jean pulled the cat's tail and the cat scratched him. Thus, Erick was consistent in his statements. It is worth repeating that the jury should have been told the truth rather than lies tending to undermine Erick's version of events.

ii. *Prejudice*

The rape case was essentially a "he said, she said" case where Norma Jean's credibility and Erick's credibility were central to the jury's consideration. Trial counsel failed to utilize Detective Hess to undermine Norma Jean's version of the facts, notably, by failing to elicit testimony that he did not observe any injuries to her eyes and by failing to elicit testimony that would have established an alternate explanation for the injuries he did observe. Conversely, trial counsel allowed Detective Hess to testify in an untruthful manner which portrayed Erick as a liar.

In a case like this, counsel's deficient performance was highly prejudicial. In short, as noted in the other subclaims, due to trial counsel's failures, the jury had no reason to question Norma Jean's credibility, while being supplied plenty of invalid reasons to question Erick Hall's credibility. *See e.g., U.S. v. Hermundson,* 210 F.3d 386 at * 9 (9th Cir. 2000) (Kleinfeld, J., dissenting) (unpublished) ("[I]n a he-said she-said case, the jury has to decide who is lying. Evidence that someone presents him or herself so differently in different settings as to suggest lack of authenticity can be very helpful to

the jury."); *Watson v. State*, __ A.2d __, 2007 WL 2622110 at * 4-5 (Del. Supr ,2007) (unpublished) (discussing the importance of witness credibility in "he said, she said" rape cases).

f. Trial Counsel Failed To Identify The Degree Of Leniency Reflected In Erick Hall's Plea Agreement

A prosecutor's willingness to enter a favorable plea agreement with a criminal defendant is clearly dependent upon a number of factors, including the prosecutor's belief about the defendant's degree of actual culpability versus the degree of punishment available under the crimes charges, and the prosecutor's assessment for a successful prosecution. In this case, the jury heard that Erick was sentenced to five years in prison pursuant to a plea agreement. The jury believed the sole reason for the favorable plea agreement was because of Norma Jean's fragile mental condition.

> Q. Did you discuss her testimony with her medical health professionals?
> A. I did. She was at Intermountain Hospital in the Adolescent Unit. She was, as I recall, being treated by Lamar Heyrend who was a psychiatrist, she had a case worker discussed it with those individuals. And I spent a great deal of time, along with a victim witnesses coordinator, with her trying to prepare her to testify.
> Q. And ultimately did you decide that you could not proceed to trial with her as a witness?
> A. I did. It was my decision, as well as the recommendation of the those people who were treating her.
> Q. So how did you proceed?
> A. Proceeded with a reduction to a statutory rape and a negotiated resolution.
> Q. And that was because of the weakness in your case?
> A. It was because of the inability of Norma Jean to be able to sit in a situation like this and in front of a jury and be subjected to cross examination.

(Tr., p.4953, L.12 – p.4954, L.9.) Because five years is not an insubstantial sentence, the jury had no reason to believe that the leniency in the agreement was in any way reflective of a reduced degree of culpability on Erick's behalf, or in any way reflective on any

difficulty in proving the forcible rape charges. Trial counsel could have demonstrated both through an effective examination of Jay Rosenthal.

Trial counsel should have elicited from Mr. Rosenthal that Erick faced up to a life sentence for the charged offenses. *See* I.C. § 18-6104 (prescribing minimum sentence of one year and maximum sentence of life imprisonment). Further, trial counsel should have elicited testimony that the State actually recommended more than the actual sentence imposed. Specifically, the State recommended a seven year sentence, **with two years fixed**, and a 180 day rider. The jury should have heard that after reviewing Mr. Hall's presentence report, the presiding district court judge, the Honorable Alan Schwartzman, sentenced Erick to a five year sentence, **with just one year fixed**, and where Erick had already served a minimum of 160 days in jail. (Exhibit 55 (cover).)

Had the jury known that Erick faced a life sentence, then they would have known just how favorable the plea agreement was, and had the jury further known that a district court judge imposed a ***lesser*** sentence than that recommended by the State, then the jury would have known that Erick's culpability was deemed minimal at best. Mr. Hall asserts that in conjunction with the other errors by trial counsel he has established the requisite level of prejudice to have his death sentence vacated.

4. <u>The Cumulative Prejudice Due To Trial Counsels' Ineffective Investigation Of Norma Jean Oliver's Allegations Satisfies The Prejudice Prong Of *Strickland*</u>

While Mr. Hall asserts that each of the subclaims above satisfy both prongs of *Strickland*, this Court need not decide whether the individual deficiencies alone meet the prejudice standard because the Court can find the requisite prejudice from the totality of counsel's errors and omissions. *See Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992)

(applying the doctrine of cumulative error to *Strickland* claims). Thus, to demonstrate prejudice, Mr. Hall must show that but for all of the deficiencies noted above (and elsewhere in this petition), there is a reasonable probability that the outcome of his sentencing would have been different. *Dunlap v. State*, 141 Idaho 50, 59, 106 P.3d 376, 385 (2004).

The State relied heavily on Norma Jean Oliver in its case. This fact is reflected in both the opening statement and closing arguments. The State spent nearly half its opening statement discussing the anticipated evidence involving the rape, and even greater emphasis was placed on the evidence during closing argument, which included a side-by-side illustrative comparison of the rape with the murder of Lynn Henneman. (Tr., p.4734, L.9 – p.4739, L.13; p.5456, L.20 – p.5457, L.11.); (Exhibit 45.)

Without the evidence of the Norma Jean rape, the State had little evidence to support the "propensity" aggravating circumstance. Specifically, other than the rape, the State relied on the following to support the propensity aggravator: 1) a 1991 conviction for Grand Theft (possession of stolen property); 2) a 1995 conviction for escape; 3) various acts of violence attributed to Mr. Hall through the testimony of former girlfriends and acquaintances, Evelyn Dunaway, Michelle Deen, and Rebecca McCusker.

The grand theft conviction involved a guilty plea to possession of stolen property thirteen years before sentencing. (Tr., p.4919, Ls.19-20.) The property was a 1974 station wagon. (Exhibit 66 (cover).) The crime, involving a co-defendant, did not involve any violence. The victim was not a person, but an entity, B.P. Auto Sales. The car was recovered with minimal damage. This evidence was far from compelling, was

mishandled by trial counsel, and should never have been admitted. (*See* Exhibit 66, p.1 ("Victim's Statement")); *see infra,* Claim I.1.

The escape occurred in 1994 when Erick left prison grounds without permission while working in the dairy of the South Idaho Correctional Institution, outside the walls of the Idaho State Penitentiary. (Tr., p.4920, Ls.18-22.) Erick claimed that he left because he had reason to believe his loved ones were in danger. He admitted his guilt. No one was injured. His conditions of confinement were not even close to the conditions he is facing in a maximum security institution. This evidence was far from compelling, was mishandled by trial counsel, and should never have been admitted. (*See* Exhibit 67); *see also infra,* Claim I.2.

The remaining evidence relied upon by the State was the testimony of Evelyn Dunaway, Michelle Deen, and Rebecca McCusker. This evidence varied in degrees of alleged violence, none of which rose to the level of rape or homicide. (Tr., pp.4839-4855; pp.4813-4839; pp.4856-4875.) This evidence was far from compelling, was mishandled by trial counsel, and should never have been admitted. *See infra,* Claim I.3.

Because the other evidence in support of the "propensity" aggravator was so weak, it was vitally important for trial counsel to aggressively defend Mr. Hall against the previously-untested allegations of forcible rape and kidnapping. The wealth of favorable evidence available through a reasonable investigation is summarized in Chart A below, and consisted of evidence that undermined all aspects of the State's presentation of evidence in support of Norma Jean's allegations that Erick forcibly raped her – from evidence of Norma Jean's improper motive and bias to evidence undermining her credibility and competency to testify. Had trial counsel rendered effective assistance, not

only is there a reasonable probability that the jury would not have found the propensity aggravator beyond a reasonable doubt, but there is also a reasonable probability that the jury would not have found any of the aggravating factors, or at least found the aggravators did not outweigh the mitigation. *See infra,* Claim Q (noting that the failure to provide instructions on the use of the rape evidence undermines all the jury's findings).

Chart A

CLAIM: Trial counsel rendered ineffective assistance of counsel by failing to conduct a reasonable investigation of Norma Jean Oliver's allegations that Erick Hall kidnapped, violently raped, and threatened to murder her.	
FAVORABLE EVIDENCE WHICH WAS NOT PRESENTED TO THE JURY	SOURCE OF EVIDENCE
• Norma Jean suffers from Borderline Personality Disorder, Bipolar Disorder, and Post-Traumatic Stress Disorder • Norma Jean suffered from these disorders at the time of the rape (to be confirmed upon receipt of medical records) • Norma Jean likely was not taking her medication at the time of rape • Norma Jean was not taking her medication at the time she gave her testimony not because it was not necessary but rather because she was having trouble finding "good doctors"	• Transcript of Norma Jean's 1992 grand jury testimony located in the prosecutor's file, requested and received in post-conviction discovery • Tape-recorded interview of Norma Jean by Sharon Callis, conducted during post-conviction proceedings • Anticipated medical, mental health, and social security records for the Court's *in camera* review
• Norma Jean was a victim of child abuse at home; the abuse included Norma Jean being thrown across the room; her injuries included black eyes and could have accounted for the scratches and bruises observed by Detective Hess and medical personnel • Norma Jean apparently ran away from home due to continuing abuse in December 1991	• Tape-recorded interview of Norma Jean by Detective Hess referenced in his written report, requested and received in post-conviction discovery • Anticipated medical, mental health, and social security records (referenced above)
• Norma Jean gave a false name and date of birth to law enforcement on November 18, 1990, during their investigation of a curfew violation	• Boise Department Police Report, no.026815, dated 11/19/90, requested and received in post-conviction

	discovery
• Norma Jean testified that she does not drink; however, she told Detective Hess that she would drink on occasion and noted that she was drunk the first time she ever had sex; Joi Reno saw Norma Jean drunk on numerous occasions in late 1991 • Norma Jean testified that she went to sleep in a chair at Erick's trailer; however, she told Detective Hess that she initially joined Erick in his bed • Norma Jean was acting sexually promiscuous and otherwise inconsistent with the expected behavior of a victim of violent rape within two days of the alleged forcible rape • Norma Jean told Detective Hess that she had sex twice before, the first time awhile ago when she was a little bit drunk and the second time more recent; Norma Jean told Dr. Vickman that she last had consensual sex twice in the previous month on 11/13/91 and 11/28/91 • Erick heard Norma Jean's name come over the police scanner indicating that she was in fact a juvenile; Erick told Norma Jean to leave the trailer and then reported her to the police • Wendy Levy saw Norma Jean go to the shower but did not notice any injuries or behavior consistent with someone who had been raped • Wendy Levy told Erick to have Norma Jean leave the trailer because she was odd • Erick's report led to Norma Jean's arrest and return home for prosecution • Norma Jean told Detective Hess and the presentence investigator that Erick seemed to snap out of it, stopped what he was doing, and apologized for his behavior • Norma Jean told the presentence investigator that she felt sorry for Erick • Norma Jean (after escaping) returned to the trailer to get her clothes without regard for her safety • Norma Jean delayed reporting the rape to authorities until arrested for being a runaway at the Sands Motel (the second time she had been arrested in two days) • Norma Jean was placed in the care of	• Tape-recorded interviews of Erick Hall and Norma Jean by Detective Hess (referenced above) • Detective Hess's police report, dated 12/04/91, disclosed during the underlying criminal case • Boise Police Department Report, no.127-536, dated 12/02/91, requested and received in post-conviction discovery • Boise Police Department Report, no.127-686, dated 12/04/91, requested and received in post-conviction discovery • Presentence Report, State v. Hall, Ada County, case no. M9108836/HCR18591 • Tape-recorded interview of Norma Jean conducted during post-conviction proceedings (referenced above) • Affidavit of Wendy Levy, obtained during post-conviction proceedings • Affidavit of Joi Reno, obtained during post-conviction proceedings • Saint Alphonsus Emergency Room report by Dr. Lawrence Vickman, dated 12/04/91, disclosed during the underlying criminal case

Intermountain Hospital and may never have been returned home or prosecuted for her offenses	
• Detective Hess gave false testimony regarding the alleged discrepancies in Erick's statement • Detective Hess gave false testimony regarding his alleged lack of knowledge of the nature and extent of Norma Jean's problems at home • Neither Detective Hess's report, nor the photographs indicate that Norma Jean had broken blood vessels in either eye; the lack of injuries to her eyes is corroborated by Dr. Vickman's report and inconsistent with Norma Jean's testimony	• Tape-recorded interview of Erick Hall by Detective Hess referenced in his written report, requested and received in post-conviction discovery • Tape-recorded interview of Norma Jean by Detective Hess (referenced above) • Saint Alphonsus Emergency Room report by Dr. Lawrence Vickman (referenced above)
• Erick faced up to life in prison based on Norma Jean's allegation but was sentenced by the district court to a five year term with one year fixed; the judge gave a more lenient sentence then that recommended by Jay Rosenthal	• Idaho Code § 18-6104 • Court file: State v. Hall, Ada County, case nos. M9108836/HCR18591

E. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate The State's Case In Aggravation: Evelyn Dunaway & Michelle Deen

1. Trial Counsel Conducted An Inadequate Investigation Of Evelyn Dunaway

Evelyn Dunaway is a former girlfriend of Erick Hall. In the course of investigating evidence to support the death penalty, the State interviewed Ms. Dunaway on multiple occasions and eventually called her as a witness at Erick's sentencing. (Exhibit 40, p.4.) Through her testimony, the State elicited aggravating (though irrelevant) testimony about specific instances in which she and Erick fought, and he allegedly choked her. (Tr., p.4846, Ls.7-9.)

Trial counsel never conducted an interview of Ms. Dunaway. (Exhibit 40, p.4.) Ms. Dunaway was interviewed during these post-conviction proceedings. After

interviewing Ms. Dunaway, it is clear that the jury was presented with an incomplete picture of Erick Hall as an adult.

In her affidavit, Ms. Dunaway explains how she met Erick and almost immediately moved in with him in September 2001. (Exhibit 40, p.2.) At that time, Ms. Dunaway was heavily addicted to methamphetamine. (Exhibit 40, p.2.) Erick was not using drugs at that time. According to Ms. Dunaway:

> I was using about a gram of meth every day, injecting intravenously. Erick was not using at that time, and I was trying to quit. Erick was very caring with regard to talking to me, supporting me as I tried to stay off drugs, and even keeping my drug-using friends away from the trailer home.

(Exhibit 40, p.2.) According to Evelyn, Erick eventually began using methamphetamine again. Then, in March 2002, an incident occurred which Evelyn described to the jury. Specifically, Ms. Dunaway described her breakup with Erick. (Tr., p.4844, L.21 – p.4856, L.6 (describing how Erick pulled her through the window of her car, slammed her on her head and said he was going to kill her).) However, neither the State nor Mr. Hall's trial counsel elicited the full story. For instance, at the time of the incident, Erick was coming down from a high on methamphetamine, and was not thinking clearly:

> Erick and I broke up in March 2002. On the day of the break-up, I know that Erick was upset and coming down from a methamphetamine high. He was paranoid and yelled that I had betrayed him.

(Exhibit 40, p.4.) In addition, Ms. Dunaway gave a written statement to the police regarding this incident which further explains the nature of Erick's paranoia. According to Ms. Dunaway in her report, Erick was angry with her because he believed she was using drugs. (Exhibit 68, p.1.) It is not clear whether Ms. Dunaway's written statement and her affidavit are completely consistent or not; however, it is clear that there was

much more to the story than the jury heard. Moreover, if trial counsel had interviewed Ms. Dunaway, then they would have known that she could have given additional testimony to refute the more aggravating version of the story told by Rebecca McCusker in her testimony. Ms. McCusker testified that Erick threatened to kill her when she came to the trailer that night. However, as Ms. Dunaway stated in her affidavit, "Erick never threatened to kill Rebecca, in contrast with her trial testimony." (Exhibit 40, p.4.)

Ms. Dunaway also testified about some of her sexual experiences with Erick. (Tr., p.4847, Ls.2-16.) The State used isolated and incomplete stories about Erick's relationship with Evelyn to portray him as a sadistic hunter of women. This is a gross distortion of the truth, utilized by the State to obtain the death penalty; and trial counsel did nothing about it. Trial counsel should have given the jury the full range of Evelyn's experience with Erick, and the jury would have seen Erick (and his relationship with Evelyn) in an entirely different light. As stated in the ABA Guidelines,

> Family members and friends can provide vivid first-hand accounts of the poverty and abuse that characterize the lives of many capital defendants. These witnesses can also humanize the client by allowing the jury to see him in the context of his family, showing that they care about him, and providing examples of his capacity to behave in a caring, positive way. . . .

ABA Guidelines, Commentary to Guideline 10.11. Had trial counsel conducted a reasonable investigation, Ms. Dunaway could have given the following testimony:

> There was another family living in Erick's house at that time, and they had four or five children. One of their little boys, Wesley, became sick, and was coughing uncontrollably. I saw Erick sit Wesley up to ease his cough, and then Erick spoon fed him some medicine to make him feel better. I told Erick, "What are you doing? You're stealing my heart." Erick's behavior really made me take notice of him because of the compassion he showed Wesley. Erick [also] spent time with my children when we met at Pojos and would draw pictures for my son Billy, who was approximately eleven years old at the time. Billy still has the drawings, and is interested in art and drawing. On one occasion, Erick bought Billy a drawing book.

* * *

> Erick [ ] had a lot of good qualities. He picked and brought flowers to me almost every day, which I really enjoyed. . . . Erick was genuinely nice and wanted to help people. . . . Erick did a number of really kind things such as allowing homeless people to stay with him in his trailer home, and fixing up bikes for people who had no transportation. On one occasion in 2002, Erick talked with my friend Carrie Smith and me about repairing and giving bikes to all of the homeless people in Boise.
>
> * * *
>
> I continue to hold on to a photograph of Erick and me together, and I like to think about the good times we shared together.
>
> * * *
>
> I have feelings of care and concern for Erick and I do not want him to get the death penalty.

(Exhibit 40, p.5.)

In conclusion, the State used Evelyn Dunaway to prove the propensity aggravator and to otherwise put non-statutory aggravating evidence before the jury. As the State argued in closing,

> You know what he did to Lynn. You know what he did to Michelle. You know what he did to Evelyn. It's all pretty much the same, except he only killed once so far in that group. Now then does that mean that he has a propensity? Does he have an appetite that he likes to hurt women? Is he sadistic? Does he like to hunt them?

(Tr., p.5507, Ls.14-20.) Had trial counsel conducted a reasonable investigation, they could have rebutted aspects of Ms. Dunaway's aggravating testimony. Further, counsel could have elicited additional mitigating evidence. There is a reasonable probability that but for trial counsel's deficient performance, i.e., their failure to even interview Ms. Dunaway, the jury would not have found the propensity aggravating circumstance and would not have found that the aggravators outweighed the mitigation.

2. Trial Counsel Conducted An Inadequate Investigation Of Michelle Deen

Michelle Deen testified against Mr. Hall at his sentencing. (Tr., pp.4813-39.) She testified that she had one prior felony conviction. Had trial counsel conducted an adequate investigation, they would have discovered that Ms. Deen has two prior felony convictions (only one of which was disclosed by the State). (Exhibit 70; Exhibit 71.) Both of Ms. Deen's prior felony convictions arose from drug use around the timeframe in which she testified about incidents with Erick Hall. The jury should have heard that Ms. Deen was using methamphetamine during the timeframe in which she testified about events. The use of methamphetamine clearly would have called into question Ms. Deen's ability to accurately perceive events at the time and then to recall such events years later.

In addition, had trial counsel conducted an adequate investigation, they would have discovered that Ms. Deen, on at least one prior occasion, had attempted to negotiate favorable treatment by turning State's evidence. Specifically, Mr. Hall has located a handwritten note among other court documents in Ms. Deen's court file which states:

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

(Exhibit 69.) This appears to be a note reflecting the circumstances surrounding Ms. Deen's arrest on February 9, 2002, for multiple drug-related offenses, including felony possession of a controlled substance, State v. Michelle Deen, Ada County, case

no. H0200584.[49] Trial counsel could have used this note to further undermine Ms. Deen's credibility.

Finally, Mr. Hall has discovered in his post-conviction investigation of the case that that Ms. Deen underwent court-ordered substance abuse **and** psychological evaluations in the case of State v. Deen, Ada County, case no. H0301398. (Exhibit 71.) Trial counsel could have used this information to further undermine Ms. Deen's credibility.

F. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Adequately Investigate The State's Case In Aggravation: April Sebastian[50]

April Sebastian testified against Mr. Hall at his sentencing. At the time of her testimony, she was actively represented by Mr. Hall's trial counsel, Amil Myshin, in her upcoming "rider" hearing in the case of State of Idaho v. April Sebastian, Ada County case no. H0400228. (Exhibit 72); *see* Claim G.1, *infra*. Mr. Hall asserts that trial counsel's investigation and subsequent cross-examination of April Sebastian was both deficient and prejudicial under *Strickland,* at a minimum when taken in light of the accumulation of prejudice due to counsel's errors at sentencing. During cross-examination, trial counsel seemed more concerned with Ms. Sebastian's well being than with impeaching her testimony:

Q. Tell him that. How were you making a living?

---

[49] Mr. Hall's post-conviction counsel interviewed Ms. Deen, who stated that she failed to follow through with a deal. She also said she had no recollection of the matter. In either event, the note shows that Ms. Deen is willing to cut deals in return for leniency, which could have been used to impeach her credibility on cross-examination.

[50] Mr. Hall cannot fully state this claim as he is still awaiting the Court's *in camera* review of April Sebastian's presentence report and addendum to presentence report, and any attached documentation, in State v. April Sebastian, Ada County, case no. H0400228. *See* Order Regarding Discovery, p.8, filed 2/16/07.

A. I was stealing from stores, you know, ashamed of myself now, but, yeah, I stole from stores and re-sell stuff, sell it to people to make a living, pay my bills.
Q. In fact, that's not an uncommon way for some folks to make a living?
A. Huh-uh, it's not.
Q. Stealing and either taking it back to stores or selling it to people, things like that?
A. Yes.
Q. Okay. But you're doing better now?
A. Oh, yes.
Q. In fact, I think you were telling me that you're working on your GED?
A. Yes.
Q. And you're feeling pretty good about the future?
A. Yes.
Q. All right.
A. Yes, new programs out.
Q. You think you're benefiting from them?
A. Yes, I am.
Q. And I'm sure when you get out you're going to have a happy life?
A. Yeah, a totally different life.
Q. Good. Good for you, April. Thanks.
A. Yes.

(Tr., p.4895, L.6 – p.4896, L.9.) Amil Myshin was asked in his deposition about preexisting relationship and subsequent cross-examination of his client, April Sebastian.[51] Mr. Myshin could not recall whether a conflict caused him to hold any punches in his cross-examination of Ms. Sebastian. (Tr., 11/16/06 deposition of Amil Myshin, p.386, Ls.6-22 (indicating a fondness for Ms. Sebastian); p.387, Ls.3-9 (failing to recall whether a conflict could have caused him to refrain from cross-examining Ms. Sebastian); p.423, L.5 – p.424, L.18 (acknowledging that it would be difficult to know if he were holding back during a cross-examination because he liked someone and stating that it would be difficult to conceal liking a witness, which "probably isn't a good thing.") Trial counsel's cross-examination of a critical witness who testified that Mr. Hall told her that

[51] Trial counsel's approach to Ms. Sebastian was no doubt influenced by his ongoing attorney-client relationship with her. *See infra,* Claim G.

he hits people over the head and takes their money, amounted to nothing more than a friendly "chat" with a friend, rather than the "crucible" of adversarial testing demanded by the Sixth Amendment.

G. Trial Counsel Labored Under Multiple And Varied Conflicts Of Interests That Adversely Affected Their Performance

1. Trial Counsel Actively Represented April Sebastian[52]

April Sebastian testified against Mr. Hall at his sentencing. At the time of her testimony, she was actively represented by Mr. Hall's trial counsel, Amil Myshin, in her upcoming "rider" hearing in the case of State of Idaho v. April Sebastian, Ada County case no. H0400228. (Tr., pp. 4868-70; pp. 4875-96.) Mr. Myshin cross-examined Ms. Sebastian without ever receiving a waiver from her of confidential matters, including information learned through the attorney/client relationship or through Mr. Myshin's investigation and research on her behalf. Nor did Mr. Myshin seek a waiver from Mr. Hall.

Following her testimony, Ms. Sebastian appeared for her "rider" hearing with her counsel, Amil Myshin (Exhibit 72.) The district court presiding over the case granted her probation with recommendation from the State. The extent to which Ms. Sebastian's cooperation with the State assisted her in getting probation is being investigated, and Mr. Hall is awaiting *in camera* review of Ms. Sebastian's PSI and related documents.

Mr. Hall has reasonable grounds to believe that the State offered Ms. Sebastian benefits in exchange for her testimony against Mr. Hall. For instance, based on a review

[52] Mr. Hall cannot fully state this claim as he is still awaiting the Court's *in camera* review of April Sebastian's presentence report and addendum to presentence report, and any attached documentation, in State v. April Sebastian, Ada County, case no. H0400228. *See* Order Regarding Discovery, p.8, filed 2/16/07.

of court documents, Ms. Sebastian was not a good candidate for probation, appearing to have failed on probation twice previously (Exhibit 73; Exhibit 74.)

Even if the State did not offer any benefit to Ms. Sebastian in exchange for her testimony, trial counsel should have aggressively cross-examined her regarding her expectation of any benefits. Ms. Sebastian was well acquainted with the criminal court system. Instead of an aggressive cross-examination, however, Ms. Sebastian received kind, gentle questions – exactly the kind one would expect from one's own attorney.

2. Trial Counsels' Caseload[53]

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

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

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

Mr. Hall is aware that one of his trial lawyers, D.C. Carr, left the Ada County Public Defender's Office. Mr. Hall asserts that heavy caseloads influenced Mr. Carr's decision to leave the office and enter private practice. (Tr. 9/13/06, deposition of D.C. Carr, p.24, Ls.11-24.) There were times during the underlying criminal proceedings that

[53] Mr. Hal cannot fully state this claim because his request for documentation of trial counsel's caseload was denied. Order Denying Discovery, pp.21, 22.

Mr. Carr was not present, presumably attending to his other cases.[54] Further, one of the lead attorneys at the Ada County Public Defender's Office, August Cahill, has previously testified that an attorney's caseload in that office is not decreased if the attorney is assigned a capital case. Mr. Cahill also conceded that he was not familiar with the ABA Guidelines governing workload. (Exhibit 75 (Michael Jauhola v. State, Ada County case no. SPOT0100492D, (Tr., p. 4083, L. 22 – p. 4085, L. 14)); Exhibit 76 (State v. Abdullah, Ada County case no. H0201384 (R., pp.114-115 (Gus Cahill's motion stating that "Counsel for the Defendant currently has a complete felony case load in addition to the case at hand; R.pp.142-146 (Toryanskis' motion stating that, "The Public Defender's Office is currently operating under a high and record-setting caseload . . . ." Tr., Vol. I, p.27, Ls.11-16)).[55]) *See also* ABA Guidelines, Guidelines 6.1, 10.3, and accompanying Commentary.

Mr. Hall asserts that heavy case loads led to the deprivation of the effective assistance of counsel and both the guilt and sentencing phases of his capital trial.

H. Trial Counsel Rendered Ineffective Assistance of Counsel In Failing To Preclude The Testimony Of Norma Jean Oliver

1. Trial Counsel Failed To Preclude The Testimony Of Norma Jean Oliver Due To Her Lack Of Competency To Testify

Ms. Oliver was incompetent to testify. Ms. Oliver was "too distraught to even talk to" trial counsel, a fact brought out prior to her testimony. (Tr., pp.4755-4756) Ms. Oliver had been on medication but was not on medication at the time she testified, even though she admitted having a chemical imbalance. (Tr., p.4777, Ls.2-7, p.4783, Ls.17-

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

[55] Mr. Hall requests the Court take judicial notice of the portions of the Jauhola and Abdullah cases, submitted as Exhibits 75 and 76.

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

In addition, on this record, the Court had an independent duty to inquire into Ms. Oliver's competency, and move to strike her testimony *sua sponte*. I.R.E. 602 (witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter); *State v. Johnson*, 92 Idaho 533, 447 P.2d 10 (1968) (holding where a witness said he remembered nothing about a

certain time period, he effectively declared himself incompetent to answer questions relating to that period); *State v. (Patrick) Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986) (holding trial judge erred in allowing testimony of victim who expressed uncertainty as to whether his testimony was based on actual memories; corroboration by other testimony does not establish that the testimony by the witness is based on his own perception rather than on information acquired from others).

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

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

(Tr., p.4755, L.21 – p.4756, L.3.)

Trial counsel should have moved to exclude Ms. Oliver's testimony based on a lack of competence. Trial counsels' failure to object to or move to strike Ms. Oliver's testimony based on her incompetence was both deficient and prejudicial under *Strickland*. Trial counsel obviously heard the testimony of Ms. Oliver, yet failed to move to strike her testimony or preclude further testimony. A witness' lack of recollection is grounds for exclusion of testimony. I.R.E. 602; *see* Claim D.3.a, *supra*, *State v. Johnson, supra*,

State v. (Patrick) Hall, supra. The admission of this testimony violated the Sixth Amendment, and because this was a capital sentencing proceeding, the admission of this testimony violated the Eighth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendments.

I. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Adequately Litigate Factual And Legal Challenges To The Introduction Of Evidence Of Prior Criminal Acts By Erick Hall

The State introduced Mr. Hall's prior convictions through the testimony of Dennis Dean. *See* Claim D.4, *supra.* There were three judgments of conviction introduced: a grand theft by possession of stolen property conviction from 1991, the rape conviction stemming from the guilty plea to the statutory rape of Norma Jean in 1992,[56] and an escape conviction from 1995. (Tr., p.4919, Ls.3-20). In addition, prior bad acts involving Erick Hall's girlfriends were introduced. Trial counsel was ineffective for failing to argue, on both legal and factual grounds, that the convictions and prior bad acts involving girlfriends should be excluded. The introduction of this testimony was highly prejudicial to Mr. Hall. The State specifically argued that they would establish propensity based on prior bad acts:

> At the conclusion, Ladies and Gentlemen, we'll argue to you firmly supports the aggravating circumstance that the defendant probably constitutes a continuing threat to society, not just because, if it wasn't enough that he killed Lynn Henneman, but because of the way he lived his life before, up to and including that time and afterwards.

(Tr., p.4742, Ls.17-23.) This argument specifically referred to the grand theft conviction, the escape conviction, and the prior bad acts regarding girlfriends. (Tr., p.4733, L.2 – p.4742, L.23.) At the end of the sentencing phase, the State presented the same

[56] Trial counsel's failure to preclude Norma Jean Oliver's testimony is discussed elsewhere in the Petition. *See* Claims D and H.

arguments for propensity, and used a time line to discuss prior convictions and bad acts as the basis for that aggravator. (Exhibit 45; (Tr., p.5454, L.20 – p.5459, L.21).)

1. Grand Theft Conviction

Trial counsel failed to object to the introduction of the 1991 grand theft conviction. (*See* R., pp.372-374 (motion in limine); p.405 (motion to exclude).) Trial counsel should have argued that the grand theft conviction was inadmissible because it was irrelevant under I.R.E. 401, its probative value was substantially outweighed by unfair prejudice and was excludable under I.R.E. 403, and violated Mr. Hall's Fifth, Sixth, and Fourteenth Amendment rights to a fair trial and to present a defense. *See* Claim J.2, *infra*.

Trial counsel failed to argue that the facts surrounding the grand theft conviction were factually irrelevant to the capital sentencing. The grand theft conviction involved a guilty plea to possession of stolen property *thirteen years* before the sentencing trial in this case. The "official" version of the crime shows that someone other than Erick stole an automobile – Erick's crime was possession of the stolen vehicle. (Exhibit 66.) The "victim's" version of the crime shows minimal harm. The property was a 1974 station wagon, with an estimated value of $400. The crime did not involve any violence. The victim was not a person, but a business entity, B.P. Auto Sales. The car was recovered with minimal damage. The owner of B.P. Auto Sales, Mr. Kelley, said he didn't particularly care if he was reimbursed for the $60 it cost to repair the car, because it had already been sold. (Exhibit 66.) This evidence was completely irrelevant to Erick Hall's sentencing in this case, and should never have been admitted.

The introduction of the grand theft conviction was prejudicial. The State used the conviction in arguing the propensity aggravating factor to the jury. (Tr., p.4733, L.1-p.4734, L.8 (arguing that what the jury was about to hear about Erick Hall, including the grand theft conviction, would convince the jury beyond a reasonable doubt of the propensity aggravator); p.5455, Ls.7-17 (talking about propensity on a time line showing acts committed through Erick's adult life, including the grand theft, and arguing that mitigation involved events much farther in the past); (Exhibit 45). The admission of the grand theft conviction also violated the Eighth Amendment. *See* section 3.d, *infra*.

2. Escape Conviction

While trial counsel moved to preclude introduction of the escape conviction, the motion was superficial and inadequate. Trial counsel filed a "Motion In Limine" on September 8, 2004. (R., pp.372-374.) In that motion trial counsel moved to exclude the "1994 case involving escape" on the sole ground that "The crime of escape has no relevance here and details of it should be excluded." (R., p.372, 373.) Trial counsel cited no authority and offered no factual detail. Indeed, trial counsel did not even cite to the case number for the escape. At a motions hearing, trial counsel argued that the escape conviction was irrelevant, but did not cite any authority. (Tr., p.771, L.25 – p.772, L.5.) Trial counsel noted that the escape involved Mr. Hall walking away from a minimum security arrangement.

As with the grand theft conviction, trial counsel should have argued that the escape conviction was inadmissible because it was irrelevant under I.R.E. 401, its probative value was substantially outweighed by unfair prejudice and was excludable

under I.R.E. 403, and violated Mr. Hall's Fifth, Sixth, and Fourteenth Amendment rights to a fair trial and to present a defense. *See* Claim J.2, *infra*.

Trial counsel should have argued that any relevance to future escapes or dangerousness was superficial at best, i.e., that the facts of the 1994 escape were so dissimilar to any possible future circumstances to preclude its introduction. The escape occurred in 1994 when Erick left the dairy of the South Idaho Correctional Institution. (Exhibit 67.) Erick walked away from the dairy without permission. The dairy is located outside the walls of the Idaho State Penitentiary. (Exhibit 67.) Any argument that the facts of this "escape" were relevant to the propensity aggravating circumstance should have been easily rebutted by trial counsel by referencing the facts of the crime.

The introduction of the escape conviction, like the grand theft conviction, was used to establish the propensity aggravating factor, and was therefore highly prejudicial. (Tr., p.4739, L.14 – p.4740, L.5; 4742, Ls.17-23.)

Furthermore, for the jury to hear that Mr. Hall had an *escape conviction*, when that jury was to decide between life imprisonment and the death penalty is beyond the pale given the factual circumstances of the escape conviction. Had the jury imposed a life sentence, there was no chance that Erick would be in circumstances similar to those surrounding the 1994 escape—i.e., able to just walk away from the institution—yet the jury was left with the possibility of Erick's future escape based upon his past "escape." Its introduction was therefore totally irrelevant and highly prejudicial. The admission of the escape conviction also violated the Eighth Amendment. *See* section 3.d, *infra*.

3. Prior Bad Acts Involving Girlfriends And Acquaintances

On September 15, 2004, trial counsel filed a "Motion to Exclude" the testimony of "the various women that [Erick Hall] has lived with who knew him in 2001, 2002, and 2003." (R., p.405.) The motion was one page, did not identify any of the women, and merely argued that the evidence should be excluded under I.R.E. 404 as the evidence was being offered to show the defendant acted in conformity with a character trait, which the State was arguing would be evidence for the propensity aggravator. (R., p.405.) Trial counsel cited no additional authority, and no legal or factual analysis. (See Tr., pp.771-793 (arguing only that rules of evidence apply to State's case in aggravation, but not defense case in mitigation).)

Evelyn Dunaway, Michelle Deen, and Rebecca McCusker testified for the State. This evidence varied in degrees of alleged violence, none of which rose to the level of rape or homicide. (Tr., pp.4839-4855; pp.4813-4839; pp.4856-4875.) This evidence should never have been admitted. *See* Claim D.4. Trial counsel should have argued, both factually and legally, that the evidence was irrelevant and highly prejudicial to Mr. Hall. Had trial counsel raised any number of the legal grounds available to exclude the evidence, then the evidence would never have been admitted. These grounds are discussed in turn.

a. I.R.E. 401 and 402

The evidence was introduced was to establish the propensity aggravator. However, evidence of the prior acts was not relevant for purposes of establishing a propensity to commit **murder**, and therefore should not have been admitted. The fact that Mr. Hall had allegedly engaged in abusive conduct toward previous girlfriends, even

if true, does not make it more probable that he has a propensity to commit murder; therefore, evidence of the prior bad acts should have been excluded as irrelevant. *See* Claim J.1, *infra*.

b. I.R.E. 403

To the extent trial counsel failed to specifically cite I.R.E. 403 in the motion to exclude, counsel rendered ineffective assistance. The purported relevance of the evidence was substantially outweighed by the danger of unfair prejudice. *See* I.R.E. 403. Here, there was an impermissible risk that the jury would "convict" Mr. Hall of the propensity aggravating circumstance (or simply as an evil person) and would use the evidence against him in the weighing process of all aggravators. *See* Claim J.2, *infra*.

c. Fifth And Fourteenth Amendment: Right To Have All Elements Proven Beyond A Reasonable Doubt

It is a basic principle of due process that a criminal defendant's conviction must be based on a jury finding beyond a reasonable doubt that he is guilty of each element of the crime charged. *See United States v. Gaudin,* 515 U.S. 506, 511, (1995). The Supreme Court has stated "The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense." *Carella v. California,* 491 U.S. 263, 265, (1989) citing *In re Winship,* 397 U.S. 358, 364 (1970). Mr. Hall asserts that the failure to hold the State to the burden of proving the prior bad acts beyond a reasonable doubt violated his rights to due process of law. *See* Claim J.5.

d. Idaho Code § 19-2515, Due Process, And The Eighth Amendment

To the extent the prior bad acts were not admissible to support or to establish any statutory aggravating circumstance, they were inadmissible for any reason. Mr. Hall asserts that in light of jury sentencing, the list of aggravating circumstances under Idaho Code § 19-2515 is exclusive. Thus, non-statutory aggravating circumstances are inadmissible under Idaho's statue, the introduction of which violates Mr. Hall's right to due process under the federal and state constitution. Further, their admission violates the Eighth Amendment since the jury was not instructed how they could be used. *See* Claim P, incorporated herein by reference; see Claim J.10.

e. Fifth, Eighth And Fourteenth Amendment: Right To Heightened Reliability In Capital Cases

The Due Process Clause and the Eighth Amendment are implicated by virtue of the fact that heightened reliability in capital cases is required to insure that the death penalty is not imposed in an arbitrary manner. *See* Claim J.11, *infra*. The introduction of uncharged prior bad acts lacks the degree of reliability necessary in capital cases as required by due process and the Eighth Amendment.

f. Fourteenth Amendment: Right To The Presumption Of Innocence

Mr. Hall was entitled to the presumption of innocence in the penalty phase of his capital case on the uncharged prior bad acts. That presumption of innocence was violated when a jury, having found him guilty of capital murder, was charged with determining whether he committed prior bad acts for which he was never convicted. *See* Claim J.12, *infra*.

g. Trial Counsel's Failure To Rebut The Prior Bad Acts: The Sixth Amendment Right To The Effective Assistance Of Counsel

Trial counsel should have been prepared to offer evidence rebutting the State's picture of Erick as abusive, as there was ample evidence of Erick's loving nature. Trial counsel's failure to do so constituted ineffective assistance. *See* Claim B.3.d (noting Erick's positive characteristics as an adult).

J. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Raise And Adequately Preserve Legal Challenges To The Introduction Of Evidence Of Alleged Prior Criminal Acts By Erick Hall Against Norma Jean Oliver

The duty to investigate prior misconduct encompasses a duty to make available legal challenges to prior convictions. ABA Guidelines, Commentary to Guideline 10.11 ("If the prosecution relies upon a prior conviction (as opposed to conduct), counsel should also determine whether it could be attacked as the product of an invalid guilty plea, as obtained when the client was unrepresented by counsel, as a violation of double jeopardy, or on some other basis" (footnotes omitted).)

In this case, trial counsel filed a motion in limine to exclude evidence of the 1991 rape case. (R., p.372.) The legal grounds for counsel's motion were that the evidence was irrelevant under I.R.E. 404(b), and even if relevant, that the probative value was outweighed by the danger of unfair prejudice. A hearing was held during which counsel summarized the factual basis for their motion as follows:

> [T]his 1991 case was charged as a forcible rape. It was resolved as a statutory rape and, of course, there were -- there's a dispute in the evidence as to whether or not it was forcible or not. There probably is no dispute in the evidence that sex occurred and that Ms. Oliver was a minor at the time and Mr. Hall was an adult. He obviously went to prison for that case. The problem, of course, is as I've stated in my motion, is that the case is so old and so stale that it's going to be very difficult to rebut.

(Tr., p.765, Ls.9-19.) Trial counsel also noted that a potential witness was now deceased and that the presentence report generated in the case had been destroyed. (Tr., p.765, L.12 – p.766, L.16.)[57] Without conceding lack of relevance, the State focused its argument on the premise that the rape case, and other bad acts, reflect on Mr. Hall's character, the central focus of the sentencing hearing, and thus were admissible. (Tr., p.779, Ls.12-21 ("This is generally relevant about the defendant's character. . . . The rape is relevant. The escape is relevant. Beating up his girlfriends is relevant. Not working is relevant and everything else about him is relevant for the jury to decide the particularized sentence that fits him and fits society.").)

The Court indicated that it would permit the evidence of the rape so long as the State gave trial counsel sufficient notice of the evidence they sought to elicit. (Tr., p.779, L.22 – p.781, L.18.) Accordingly, the Court denied the motion.

At Mr. Hall's sentencing, the State used the evidence to argue the existence of the utter disregard aggravator and the propensity aggravator. In addition, the Sate presented the evidence as generally reflective of Mr. Hall's poor character, i.e., as nonstatutory aggravating circumstances.

Had trial counsel raised any number of the legal grounds available to exclude the evidence, then the evidence would never have been admitted. These grounds are discussed in turn.

[57] See Exhibits 98 and 99, showing that the 1992 PSI was ordered released. However, purportedly, no one from the State could find the PSI until after Erick was sentenced to death.

1. I.R.E. 401 and 402

The primary purpose for which the evidence was introduced was to establish the propensity aggravator.[58] However, evidence of a prior **rape** is not relevant for purposes of establishing a propensity to commit **murder**, and therefore should not have been admitted. I.R.E. 401 provides a definition of relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Additionally, I.R.E. 402 states that only relevant evidence is admissible; irrelevant evidence is therefore not admissible. The fact that Mr. Hall had previously been convicted of statutory rape does not make it more probable that he has a propensity to commit murder; therefore, evidence of the prior rape should have been excluded as irrelevant. Likewise, even if the evidence were to establish that Mr. Hall forcibly raped Norma Jean, such evidence would still only show (arguably) a propensity to rape or even to commit violent acts, but not a propensity to murder.[59]

In *State v. Dunlap,*125 Idaho 530, 534, 873 P.2d 784, 788 (1993), the Idaho Supreme Court considered whether evidence of a pending **murder** charge was relevant to

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[58] The State also used the evidence to support the utter disregarding aggravator. Mr. Hall asserts that the lack of relevance to that aggravator is clearly self-evident but reserves the opportunity to respond to any argument the State presents related to this issue. The use of the evidence as a non-statutory aggravating circumstance is discussed elsewhere. *See infra,* Claims P and J.10.

[59] The Idaho Legislature chose to define the propensity statutory aggravating circumstance narrowly rather than broadly. Specifically, I.C. § 19-2515 (9)(h) provides this aggravator exists only where the State has proven beyond a reasonable doubt the defendant "by prior conduct . . . has exhibited a propensity to commit murder . . . ." Idaho arguably could have, but chose not to, define the aggravator as one involving a propensity to commit violent acts.

prove that defendant had the propensity to commit murder. **The defendant did not contest whether he committed the crime**; instead, he only objected to such evidence on the basis that it was not relevant because he had not been convicted of the crime at the time of his sentencing hearing. *Id.* at 535, 873 P.2d at 789. In fact, the defendant agreed the district court could consider that he actually committed the crime if the court determined the evidence was admissible. *Id.* at 534 n.3, 873 P.2d at 788 n.3. The district court ruled that the evidence of the Ohio killing was admissible because it was both reliable and was otherwise admissible under the law. *Id.* at 535, 873 P.2d at 789.

The Idaho Supreme Court affirmed the district court's ruling. The court relied on its earlier decision in *Creech*, where it had defined propensity as "a proclivity, a susceptibility, and even an affinity toward committing the act of murder." *State v. Creech,* 105 Idaho 362, 371, 670 P.2d 463, 472 (1983). Applying this definition, the court found that Mr. Dunlap's pending homicide charge was relevant to whether he had a propensity to commit murder." *Dunlap*, 125 Idaho at 535, 873 P.2d at 789. The court further found that the introduction of the evidence was not unfairly prejudicial, relying on its decision in *Sivak v. State,* 112 Idaho 197, 731 P.2d 192 (1986) where the court stated that a "sentencing **judge** is entitled to consider a wide range of relevant evidence when he evaluates what the appropriate sentence for each particular defendant he sentences must be." *Sivak*, 112 Idaho at 214, 731 P.2d at 209.[60]

[60] The *Sivak* court relied heavily on the law that at a capital sentencing hearing at that time, factfinding was the province of the district court. All these cases must be reconsidered in light of subsequent Supreme Court cases. Prior to *Ring*, for example, the Idaho Supreme Court relied on the presumption that judges, unlike juries, were capable of weeding through irrelevant and prejudicial evidence. *See State v. Lankford,* 116 Idaho 860, 877, 781 P.2d 197, 214 (1989) (recognizing that Idaho's "especially heinous,

In both in *Dunlap* and *Creech*, the defendants did not challenge whether they actually committed the homicides for which they had not yet been convicted, but simply alleged that such crimes were not relevant because they had not been convicted. *See Dunlap,* 125 Idaho at 535-536, 873 P.2d at 789-790. In contrast, the prior crime at issue in Mr. Hall's case was not a prior homicide, and there was certainly no concession of guilt to the crime since Mr. Hall only pled guilty to statutory rape, not forcible rape. In addition, at least in *Dunlap*, the court relied on the expert testimony of Dr. Michael Estess that Dunlap "has the propensity to commit murder in the future." *Id.* at 536, 873 P.2d at 790. There was no such corroboration in Mr. Hall's case. Thus, under the narrowly defined statutory propensity aggravator, Mr. Hall's prior conviction of statutory rape, which was alleged to have been forcible but never tried as such, would not demonstrate a propensity to commit violence or murder and is therefore irrelevant and inadmissible.

2. I.R.E. 403

To the extent trial counsel failed to specifically cite I.R.E. 403 in their motion, counsel rendered ineffective assistance of counsel. The purported relevance of the evidence was substantially outweighed by the danger of unfair prejudice. *See* I.R.E. 403. I.R.E. 403 provides any evidence, even relevant evidence, should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Rhoades,* 119 Idaho 594, 603 (1991). Here, there was an impermissible risk that the jury would "convict" Mr. Hall of the propensity aggravating circumstance (or simply as an evil person) and would use the evidence against him in the weighing process of all

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atrocious or cruel" aggravating circumstance may be unconstitutional if relied upon in a jury sentencing).

aggravators. *See Porous Media Corp. v. Pall Corp.,* 173 F.3d 1109, 1117 (8th Cir.1999) (acknowledging the risk that prior bad acts "often invite the jury to base its decision upon sheer hostility toward a party or upon the impermissible inference that the party acted in conformity with its prior misdeeds").[61]

3. Fifth, Sixth, And Fourteenth Amendment: Right To A Fair Trial And To Present A Defense

Mr. Hall was deprived of his right to a fair trial when the State introduced evidence of a prior charged offense that allegedly occurred thirteen years prior to his capital sentencing proceeding. Trial counsel indicated that they were unprepared to defend the case due to a lack of investigative resources, the loss of witnesses, and the destruction of evidence. As the Idaho Supreme Court has stated,

> It is utterly repugnant to fairness and justice to accuse a person with the perpetration of a specific and definite crime, and then make that a pretext for trying him, without notice, for another alleged offense against which he is unprepared to defend, thereby producing a prejudice and bias against him in the minds of the jury.

State v. Larsen, 42 Idaho 517, 518, 246 P. 313, 314 (1926). In other words, to "comport with prevailing notions of fundamental fairness . . . criminal defendants [must] be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta,* 467 U.S. 479, 485 (1984); *see also Chambers v. Mississippi,* 410 U.S. 284, 294 (1973) ("[T]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.") Mr. Hall did not have a full and fair opportunity to defend against the charge because of the passage of time, the lack of investigative resources, and the loss or destruction of evidence.

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[61] Similarly, there is the danger that the jury, having convicted Mr. Hall of rape and capital murder, would not be able to afford him the presumption of innocence on the charge of forcible rape. *See infra,* section J.12, incorporated herein by reference.

4. Fifth And Fourteenth Amendment: Right To Know Consequences Of A Guilty Plea

Due process requires that a guilty plea be knowing and voluntary. *Boykin v. Alabama,* 395 U.S. 238, 242-43 (1969). The defendant must have "a full understanding of what the plea connotes and of its consequences." *Id.* at 243-244 (noting that a guilty plea waiver involves privilege against self-incrimination, right to trial by jury, and right to confront accusers). In 1992, Mr. Hall entered a guilty plea to the amended charge of statutory rape. He gave up significant constitutional rights by pleading guilty in exchange for the State's agreement to drop one count of forcible rape and amend the other to statutory rape. While Mr. Hall may have been informed of the consequences of pleading guilty to statutory rape, he properly presumed that the forcible rape charges had been finally adjudicated and that he would not be either tried or punished for such charges. Accordingly, to utilize the forcible rape charges to aggravate Mr. Hall's sentence from life to death violated due process.

5. Fifth And Fourteenth Amendment: Right To Have All Elements Proven Beyond A Reasonable Doubt

It is a basic principle of due process that a criminal defendant's conviction must be based on a jury finding beyond a reasonable doubt that he is guilty of each element of the crime charged. *See United States v. Gaudin,* 515 U.S. 506, 511, (1995). The Supreme Court has stated "The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. *Carella v. California,* 491 U.S. 263, 265, (1989) citing *In re Winship,* 397 U.S. 358, 364 (1970). Mr. Hall asserts that the

failure to hold the State to the burden of proving the forcible rape beyond a reasonable doubt violated his rights to due process of law.

6. Fourteenth Amendment Due Process: Right To Rely On The Plea Agreement

By entering into a plea agreement with Mr. Hall, the State became constitutionally bound to its terms. The disposition of criminal charges by agreement between the prosecutor and the accused has been universally recognized as an important component of our system of justice. *State v. Rutherford,* 107 Idaho 910, 912, 693 P.2d 1112, 1115 (1985) (*citing Santobello v. New York,* 404 U.S. 257, 260 (1971)). In *Santobello,* the Supreme Court established that plea bargains implicate due process. "[W]hen a plea bargain rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262. In this case, the State promised to finally adjudicate the charged offenses as a statutory rape. The State cannot now renege on its promise because it suits its purposes in seeking the death penalty. As the Idaho Supreme Court has stated, "a party to an agreement cannot refuse to adhere to the terms of a bargain because it later discovers information which may have caused it to enter a different bargain without suffering the consequences of a breach." *Rutherford,* 107 Idaho at 914, 693 P.2d at 1116 (*quoting Matter of Palodichuk,* 589 P.2d 269, 271 (Wash. App. 1978).)

As eloquently stated by Justice Brandeis, "[O]ur government is the potent, the omnipresent, teacher. For good or ill, it teaches the whole people by its example." *Olmstead v. United States,* 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). Expounding on these words was the Florida Court of Appeals in *State v. Davis,* 188 So.2d 24 (Fl. App. 1966), where that court stated:

> If the government breaks its word, it breeds contempt for integrity and good faith. It destroys the confidence of citizens in the operation of their government and invites them to disregard their obligations. That way lies anarchy. We deal here with a pledge of public faith -- a promise made by state officials -- and one that should not be lightly disregarded.

Id. at 27. To allege that Mr. Hall forcibly raped Norma Jean Oliver constitutes a breach of that plea agreement. Trial counsel should have sought specific performance of the deal, i.e., the State could only allege that he had committed a statutory rape, or sought to set aside the conviction.

7. Fifth And Fourteenth Amendment: Right Against Double Jeopardy

The State was precluded from arguing that Mr. Hall violently raped Norma Jean where they had previously reached a negotiated plea agreement for a conviction to non-violent statutory rape. The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The constitutional prohibition against double jeopardy has been held to consist of three separate guarantees: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishment for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

When the government enters into a plea bargaining agreement and the court accepts the accused's guilty plea to a lesser offense, the prosecutor is precluded from changing its position to prosecute the defendant for the greater offense. *See United States v. Sanchez,* 609 F.2d 761, 762 (5th Cir.1980). The double jeopardy provision serves to "preserve finality of judgments in criminal prosecutions and to protect the defendant from prosecutorial overreaching." *Garrett v. United States,* 471 U.S. 773, 795 (1985) (O'Connor, J., concurring).

In this case, the State was allowed to prosecute Mr. Hall for the same or greater offense of forcible rape to aggravate Mr. Hall's sentence from life to death. This second prosecution violated double jeopardy.

8. Fifth And Fourteenth Amendment: Right Against Double Jeopardy (The Doctrine Of Collateral Estoppel)

The Fifth Amendment of the United States Constitution prohibits courts from convicting a defendant of multiple offenses, arising from the same set of facts, occasion, time, and place. This is known as the doctrine of collateral estoppel which has been recognized by the United States Supreme Court as a concept integrated into the Fifth Amendment guarantee against double jeopardy. *See Ashe v. Swenson,* 397 U.S. 436 (1970). Collateral estoppel provides that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. Collateral estoppel bars relitigation of an issue previously decided in a judicial or administrative proceeding if the party against whom the prior decision is asserted had a "full and fair opportunity" to litigate that issue in an earlier case. *Allen v. McCurry,* 449 U.S. 90, 95 (1980) (citations omitted).

The doctrine of collateral estoppel has been restated as follows:

> When there is an identity of the parties in subsequent actions, a party must establish four essential elements for a successful application of issue preclusion to the later action: (1) the issue sought to be precluded must be the same as that involved in the prior action; (2) the issue must have been actually litigated; (3) the issue must have been determined by a valid and binding final judgment; and (4) the determination of the issue must have been essential to the judgment.

Grella v. Salem Five Cent Savings Bank, 42 F.3d 26, 30 (1st Cir. 1994).

In this case, the State had a "full and fair opportunity" to litigate the forcible rape charges in 1992, but sought the benefit of a plea agreement to avoid trial. The issue of

forcible rape was actually litigated, and at a minimum, determined by a valid and binding final judgment, i.e., the plea agreement. Thus, application of collateral estoppel would have precluded the State from relitigating the facts of the forcible rape charges.

9. Fifth And Fourteenth Amendment: Right Against Double Jeopardy (The Doctrine Of Res Judicata)

The doctrine of res judicata, like collateral estoppel, "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Allen v. McCurry,* 449 U.S. 90, 94 (1980). Idaho law follows a transactional approach to res judicata which bars the relitigation of not only matters that were litigated between parties in a preceding action, but also any matters that could have been litigated in that action. *U.S. Bank Nat'l Ass'n v. Kuenzli,* 134 Idaho 222, 226, 999 P.2d 877, 881 (2000).

> It is "well established" in Idaho law that "in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also every matter which might and should have been litigated in the first suit." Under the doctrine of res judicata, or claim preclusion, "a valid and final judgment rendered in an action extinguishes all claims arising out of the same transaction or series of transactions out of which the cause of action arose."

Id. at 226, 999 P.2d at 881 (citations omitted).

Judicial economy and fairness are both considerations which mandate an end to litigation and "[a]fterthoughts or after discoveries however understandable and morally forgivable are generally not enough to create a right to litigate anew." *Matter of Reilly v. Reid,* 379 N.E.2d 172, 175 (N.Y. 1978). While the State did not realize in 1992 that thirteen years later it would help their case to litigate the forcible rape charges, it simply does not matter. Because the State had a prior opportunity to litigate the case, it would not be judicially efficient or fair to Mr. Hall to litigate it thirteen years later after the State

agreed to a plea agreement and the guilty plea to statutory rape was entered. Thus, application of res judicata would have precluded the State from relitigating the facts of the forcible rape charges.

10. Idaho Code § 19-2515, Due Process, And The Eighth Amendment

To the extent the forcible rape case was not admissible to support or to establish any statutory aggravating circumstance; it was inadmissible for any reason. Mr. Hall asserts that in light of jury sentencing, the list of aggravating circumstances under Idaho Code § 19-2515, is exclusive. Thus, non-statutory aggravating circumstances are inadmissible under Idaho's statue, the introduction of which violates Mr. Hall's right to due process under the federal and state constitution. Further, their admission violates the Eighth Amendment since the jury was not instructed how they could be used. *See* Claim P, incorporated herein by reference; see Claim J.10.

11. Fifth, Eighth And Fourteenth Amendment: Right To Heightened Reliability In Capital Cases

The Due Process Clause and the Eighth Amendment are implicated by virtue of the fact that heightened reliability in capital cases is required to insure that the death penalty is not imposed in an arbitrary manner. *See e.g. Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (explaining that the Eighth Amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case."); *Beck v. Alabama,* 447 U.S. 625, 637-638 (1980) (recognizing that capital sentencing procedures are entitled to a heightened level of due process). In this case, due to the passage of time, the loss and destruction of evidence, and significantly, the difficulties that Norma Jean had with her own memory of the incident, the evidence

supporting the charges of forcible rape lack the degree of reliability necessary in capital cases as required by due process and the Eighth Amendment. *See* Claims H and J.

12. Fourteenth Amendment: Right To The Presumption Of Innocence

"The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams,* 425 U.S. 501, 503 (1976); *see also In re Winship*, 397 U.S. 358, 363 (1970) (noting that the standard of proof beyond a reasonable doubt "plays a vital role in the American scheme of criminal procedure" in that it "provides concrete substance for the presumption of innocence."). The Supreme Court has recognized that the presumption of innocence applies to unrelated criminal conduct at capital sentencing. *See Johnson v. Mississippi,* 486 U.S. 578, 585 (1988) (invalidating death sentence in which prior conviction that served as an aggravating factor was overturned by state court because "unless and until petitioner should be retried, he must be presumed innocent of that charge.").

Accordingly, Mr. Hall was entitled to the presumption of innocence in the penalty phase of his capital case on the unrelated charge of forcible rape.[62] That presumption of innocence was violated when a jury, having found him guilty of capital murder, was charged with determining whether he committed a rape for which he was never convicted. This is so because it is likely that the jury, given the nature of Norma Jean's allegations, allowed the proof beyond a reasonable doubt for the conviction of capital murder and rape to impact its consideration of whether the 1991 rape occurred as alleged

[62] While the presumption of innocence no longer applies "once the defendant has been afforded a fair trial and convicted of the offense for which he was charged," Mr. Hall was never convicted of forcible rape. *Herrera v. Collins,* 506 U.S. 390, 399 (1993).

by Norma Jean and the State. As a consequence, Mr. Hall's due process right to the presumption of innocence was violated.

13. Sixth And Fourteenth Amendment: Right To A Fair Trial[63]

Jay Rosenthal testified that the reason he settled the case was solely because of Norma Jean's fragile condition, not because of any weaknesses in State's evidence, i.e., Norma Jean's story. Trial counsel should have precluded Jay Rosenthal's testimony. The alleged reason for settling the case was not relevant and could not be rebutted by Mr. Hall, in violation of his right to due process and his rights to confrontation and fair rebuttal under the Sixth and Fourteenth Amendments. Further, the State effectively used Mr. Rosenthal, a former prosecutor and then current Idaho Deputy Attorney General, to bolster or vouch for Norma Jean's testimony, a further violation of his Sixth and Fourteenth Amendment (due process) right to a fair trial.

K. The Prosecutor Committed Misconduct During Sentencing-Phase Closing Arguments

1. Introduction

In the quest to obtain the death penalty for Erick Hall, the State resorted to final arguments that were misleading, inflammatory, excessive, and prejudicial. Trial counsel failed to objection to any of the improper argument. *See infra,* Claim L., *infra.*

2. Applicable Legal Standards

"The desire for success should never induce [the prosecutor] to obtain a verdict by argument based upon anything except the evidence in the case and the conclusions

[63] This Court has limited Mr. Hall from developing a further factual basis for this claim by denying access to the State's files. *See* Order Regarding Discovery (requests for "prosecutor documents" regarding witnesses).

legitimately deducible from the law applicable to the same." *State v. Givens,* 28 Idaho 253, 268, 152 P. 1054, 1058 (1915). While counsel for the prosecution has traditionally been afforded latitude in closing argument, there are limits that, if exceeded, can constitute reversible error. *See State v. Beebe,* --- P.3d ----, 2007 WL 2377331 (Idaho App., 2007); *State v. Phillips,* 144 Idaho 82, 156 P.3d 583, 587-588 (Ct. App. 2007).[64]

The Idaho Court of Appeals recently discussed the range of prosecutorial argument prohibited by the defendant's constitutional right to a fair trial. *See State v. Phillips,* 144 Idaho 82, 156 P.3d 583, 587-588 (Ct. App. 2007). Improper argument includes: expressions of personal opinions and beliefs about the credibility of a witness or the guilt of the accused; disparaging or inflammatory comments or descriptions of counsel, defendant, or a witness; misrepresentations or mischaracterizations of the evidence or law; undue emphasis on irrelevant facts or reference to facts not in evidence; comments (direct or indirect) on the defendant's invocation of his right to remain silent; and appeals to emotion, passion, or prejudice of the jury through inflammatory tactics. *Id.* at 85, 156 P.3d at 587.

Where prosecutorial misconduct is shown, the test for harmless error is whether the appellate court can conclude, beyond a reasonable doubt, that the result of the trial would not have been different absent the misconduct. *State v. Martinez,* 136 Idaho 521,

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[64] In non-capital cases, where a prosecutor commits misconduct in closing argument without objection by trial counsel, a court will only consider the error if the defendant can demonstrate that the misconduct constitutes fundamental error. *See State v. Lovelass,* 133 Idaho 160, 167, 983 P.2d 233, 240 (Ct. App. 1999). Fundamental error occurs if the prosecutor's summation is egregious or inflammatory such that any ensuing prejudice cannot be remedied by a curative jury instruction. *Id.* However, because this is a capital case, a capital defendant need not show fundamental error to obtain relief for otherwise unpreserved sentencing errors. *See State v. Osborn,* 102 Idaho 405, 411, 631 P.2d 187, 193 (1981) (holding that sentencing errors will be considered even if no objection was entered by trial counsel).

523, 37 P.3d 18, 20 (Ct. App. 2001). However, in some circumstances, the Idaho Court of Appeals has suggested that, "if there is a pattern of repetitious misconduct by an individual prosecutor or a particular prosecutor's office," then reversal might be necessary despite a finding that the error was otherwise harmless. *Phillips,* 144 Idaho at 88, 156 P.3d at 590 (citing Justice Blackmun's dissent in *Darden v. Wainwright,* 477 U.S. 168, 205-206 (1986)).

3. Analysis

The prosecution committed misconduct during the sentencing-phase closing arguments. This claim is divided into the following ten subclaims: **subclaim a** addresses the misstatement of the definition of mitigation; **subclaim b** addresses the mischaracterization of the weighing process; **subclaim c** addresses disparaging and inflammatory comments about defense experts; **subclaim d** addresses misrepresentations of the evidence; **subclaim e** addresses argument inconsistent with evidence outside the record; **subclaim f** addresses arguments for the death penalty premised on deterrence and retribution; **subclaim g** addresses mischaracterization of the role of the jury as a link in the chain of law enforcement; **subclaim h** addresses personal opinions that the death penalty is the appropriate punishment; **subclaim i** addresses speculation of facts not in evidence that that lethal injection is painless and humane; and **subclaim j** addresses speculation about future conditions of confinement and the possibility of escape or commutation of sentence. Each of these subclaims independently establishes that the State committed reversible misconduct; however, the claims have a cumulative effect and should be considered in conjunction with one another.

a. The Prosecutor Impeded The Jury's Consideration Of Mitigation By Misstating The Definition Of Mitigation

"[E]ach juror [must] be permitted to consider and give effect to mitigating evidence." *McKoy v. North Carolina*, 494 U.S. 433, 464 (1990) (relying on the principles stated in *Mills v. Maryland*, 486 U.S. 367 (1988)). It is not enough "simply to allow the defendant to present mitigating evidence to the sentencer," rather there must not be any impediment, through evidentiary rules, jury instructions, or prosecutorial argument. *Hitchcock v. Dugger*, 481 U.S. 393 (1987), *Penry v. Lynaugh*, 492 U.S. 302, 326 (1989).

The definition of mitigation for the jury's consideration and weighing is broad. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (defining mitigation as "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."); *State v. Osborn,* 102 Idaho 405, 415, 631 P.2d 187, 197 (1981) ("We generally note that the concept of mitigation is broad" and includes circumstances "[s]uch as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.") (citation omitted). Applying this broad definition, the Supreme Court has recognized a capital defendant's difficult family history and emotional disturbance is valid mitigation. *See Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). Similarly, the Idaho Supreme Court has recognized the relevance of a capital defendant's "background, his age, upbringing and environment or any other matter appropriate to a determination of the degree of culpability." *Osborn,* 102 Idaho at 415, 631 P.2d at 197. Applying the "low threshold for relevance," the Supreme Court has specifically rejected the view that mitigating evidence is only relevant if it is causally connected to the crime. *Tennard v. Dretke*, 542 U.S. 274,

284 (2004); *see also Smith v. Texas,* 543 U.S. 37, 45 (2004) (holding that a "nexus" requirement for purposes of establishing relevant mitigation is "a test we never countenanced and now have unequivocally rejected.").

In this case, the State's closing argument impeded the jury's consideration of valid mitigating evidence by mischaracterizing the law. Specifically, the State argued that relevant mitigation is limited either to circumstances that remove the defendant's ability to choose not to engage in criminal conduct or to circumstances that are causally connected to the defendant's criminal conduct. These arguments impede a jury from giving meaningful consideration to mitigation by equating mitigation with first-phase defenses that would justify the crime (i.e., self-defense and defense of others), lower the degree of the crime (i.e., heat of passion), or completely negate the defendant's mens rea or another element of the crime. The State made the following arguments:

> The issue in this case that deals with the propensity factor, and that is the issue that makes mitigation relevant or not relevant, is the issue of choice to kill, right? That's what we're talking about here is the choice to kill. That's at the core of this thing, is the choice to kill or not to kill. Not whether he had a bad background, or not whether he would choose to marry the same person I would or that you would, or the choice to have the same kind of a home or not, or the same kind of a job or not. The core issue here is choice. And don't kid yourself that there's a difference between moral culpability and criminal responsibility.

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

> But the reason we didn't cross examine [Drs. Cunningham and Pettis] beyond the few relevant questions was because what they are saying is not relevant to the question at hand. That what they have to say about the defendant's background doesn't help you decide that mitigation, aggravation issue. Because the issue, as I see it, at rock bottom is the choice to kill or not to kill. And so if he had a bad background -- well, let me put it a different way. If the defendant could choose to kill or not to kill Lynn Henneman in September of 2000, then he is as responsible for his actions as we are responsible for our actions. And it doesn't matter what his background was like, whether it was a good background or bad

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

(Tr., p.5493, L.11 – p.5495, L.17.)

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

(Tr., p.5496, L. 21 – p. 5497, L.15.)

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

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

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

(Tr., p. 5504, L.16 – p. 5505, L.2.)

The State's argument impeded the jury's ability to consider valid mitigation by informing them that mitigating circumstances (if even mitigation at all) are only relevant to the extent they are either linked to the defendant's criminal conduct or somehow prevented the defendant from making choices. Because of the State's misrepresentation of the law governing the consideration of, and the definition of, mitigating circumstances, the jury failed to consider relevant mitigating evidence when sentencing Mr. Hall to death. This Court cannot conclude beyond a reasonable doubt that the State's misconduct

did not contribute to the jury's verdict. Accordingly, Mr. Hall's death sentence must be vacated.

Moreover, the individual prosecutors in this case, have engaged in "a pattern of repetitious misconduct" requiring reversal even if this Court deems the error harmless beyond a reasonable doubt. *See Phillips,* 144 Idaho at 88, 156 P.3d at 590 (recognizing that recurring prosecutorial misconduct may justify automatic reversal). Specifically, in 2002, the same prosecutorial team in this case argued that the death penalty should be imposed on Darrell Payne. A theme throughout their argument was that circumstances constitute mitigation only if they prevent a defendant from making choices. The following is taken from the transcript of the State's rebuttal closing argument:

> And the second thing I'd like you to remember, Judge, is the word "choice". Because we are here today because of choices that Darrell Payne made. And no matter what else we talk about today or what weight you put on the things that the experts have testified to, it doesn't change the fact that the defendant made choices. And as a matter of fact, I was reading again this morning the testimony of Dr. Gummow when she testified at Pages 158 and 159. She had been talking about depression and – on a number of things and I asked her this: "And while I'm thinking about it, are you saying that he didn't have the ability to make a choice?" And she said, "About what?" And I said, "About what we're talking about." And she said, "About the murder?" And I said "yes." And she said, "The actual pulling of the trigger?" And I said, "Yes." And she said, "He probably did have the ability to make the choice to pull the trigger or not." And I said, "Did he have the choice to buy handcuffs or not?" And she said, "Certainly." And I asked, "Did he have a choice to get a gun and load it or not?" and She said, "Yes." And I said, "Okay. And he had the ability to make those choices?" And she said, "Yes."
>
> And so the other thing I'd like you to remember today, Judge, is that we are here because Darrell Payne made choices that he had the opportunity to make, which means that he could have chosen not to do the things that he did, and yet he did make those choices. He did buy those handcuffs, he did buy those gloves, he did get that gun, he did load the gun, he did put it to the back of her head and he did pull the trigger. And whatever else you want to believe about whether or not he ate pizza before he killed her or after, or whether he wrote the note before or after makes almost no difference. Because Darrell Payne made choices and he had the same

> opportunity to make choices that you or I have and he chose to do what brings us to the courtroom. And so if you would remember those two things, Judge, what he did to Samantha and that he did it by choice I would appreciate it.
> * * *
> And I don't think that this case is about revenge, Judge. I think it's about choices. The defendant chose to do the things that he did knowing what the potential consequences were. And that means that when he made the choice to do the act he chose the consequence. He can not now say through Counsel that he did not chose the consequence of pulling the trigger, the consequence to Samantha and the consequence to himself. Because he knew what the laws were. He knew that the death penalty was a consequence for pulling that trigger. This isn't news to him. He didn't just fall into the United States of America from some foreign country where murder is legal. He knew what the consequences were.
> * * *
> They're trying to find a way to keep him from looking responsible from making his own choices. That's what this is all about. He couldn't choose because he was compulsive, disorganized, history of suicide, he's psychotic, Judge, he couldn't make his decision. Well, yeah, except that he only says that he heard voices sometimes and he was depressed. That's what that kind of comes down to.

(Exhibit 77 (Tr., State v. Darrell Payne, Idaho Supreme Court, case no. 28589, p.4762, L.19 – p.4764, L.11; p.4765, Ls.4-18; p.4795, Ls.12-20.).)

In 2001, the same prosecutorial team argued that the death penalty should be imposed on Michael Jauhola, applying at least in part, the same formula. The following is taken from that argument:

> But only the defendant chose to kill. There is nothing about his background that indicates that he was taught to kill, or that his parents killed, or that they had him help kill. He has a troubled background, and to the extent that that's mitigating, it's not an explanation.
> * * *
> Judge, in conclusion, I have to say that there's no justification for what the defendant did. There is no mitigation in what he did or how he did it.
> * * *
> The defendant didn't have the right to do that. And I think that any lesser sentence than the death penalty will depreciate the seriousness of the offense and will send the wrong message. If there was ever a case where the death penalty was greater justification -- well, was more appropriately justified, there aren't many . . . .

(Exhibit 78 (Tr., State v. Jauhola, Idaho Supreme Court, case nos. 27490/31435, p.3147, Ls.18-23; p.3151, L.24 – p.3152, L.2; p.3153, L.16 – p.3153, L.24.).)

In 1995, the same prosecutorial team argued that the death penalty should be imposed on Thomas Creech. The following is taken from that argument:

> I guess two other things bear speaking about, and once of them is that somehow Mr. Creech should be excused from his conduct of killing Mr. Jensen, that, as counsel said it, Mr. Jensen asked for it by pouring syrup on the floor. Now, I'll agree that there are certain kinds of actions that have been used to justify murder or homicide before. And, of course, one those is when you are threatened with great bodily harm or death, you can respond with deadly force. Or when you're defending somebody else from apparent great bodily harm or death, you can respond with deadly force. But that's not what were' talking about here. We're talking about a man who poured syrup on the floor, if he did, and then trying to justify that somehow that Jensen was asking for it, so to speak. And the facts belie that. There's no indication here of any kind that Mr. Creech or anybody else was threatened by Jensen. Jensen may have been obnoxious on the tier, but I suspect that a lot of people who are on that tier are pretty obnoxious because that's the kind of people that get there. It certainly didn't justify homicide in any respect.
> * * *
> I guess it goes without saying that this defendant is responsible for his acts. And Dr. Brown said so on page 11 in his report where he says: "Finally, it should be completely clear that I am not suggesting that psychopaths are not responsible for their behavior." I mean we're trying to make a theory here that there's something maybe biologic about (illegible) and that's the most Dr. Brown can say is maybe there's some contribution genetically to a psychopath and then arguing to the court that the defendant has no choice, that is just false. It has nothing to do with the facts and it has nothing to do with what we now of human behaviors.

(Exhibit 79 (Tr., State v. Thomas Creech, Ada County case no. 10252, 3/27/95, case nos. **, p.414, L.6 – p.415, L.6; p.416, Ls.12-25.).)

Finally, in 1993, Roger Bourne (unclear whether assisted by Greg Bower) argued that the death penalty should be imposed on Robin Row. The following is taken from that argument:

In other words, Judge, it appears to me that when the defendant chooses to, she can be a productive citizen. Now, even though there is some mitigation in that I suppose, I think the real crux of that, Judge, is aggravation. That means that she can make a choice. And that in our case she chose to commit a crime of staggering proportions, whereas for years before she had conducted herself as a productive citizen.

* * *

In either case it's crystal clear that the defendant does not fit the classic definition of alexithymic. Even if she did, it is not a mental illness. It's not a mental condition. It's only a description of the way people react to other people. That's all that it is. As a result, it cannot be said, it can't be argued that because she's alexithymic she kills. There is not connection between the two. One does not cause the other. And I know that it's popular and trendy to say a person who is same could not do this kind of a horrible crime. But we have to remember that we don't think like criminals think. I could not do that. I'm certain that the Court could not do that, but – could not kill as occurred here, but that does not mean that a person who can is necessarily insane. Rather, the psychological testing that Dr. Norman ignored indicates that she is sane.

* * *

Now, in addition we know that alexithymic or not or sociopathic or not, she can conduct herself by the dictates of the law when she chooses to. She can hold down a job, she can keep up a tidy house, she can see that her children get to school, she can help other homeless people, she can do – she can make friends, she can go to birthday parties, she can do any of those things if she chooses to. In this case she chose to break the law. It's as simple as that. Now, - and not only did she choose to break the law, but she chose to break the law as part of an elaborate plan, a plan that involved literally weeks of planning.

* * *

Those things show that she is able to plan and she is able to rationally think and able to put together a plan based upon one logical concept linked to another. And I suggest that that's not mitigating at all. That there is not mitigating substance in the defendant's psychological profile. If anything, it is as aggravating as it could be. If on the other hand the defendant had – was unable to keep a job, lived under a bridge, couldn't take care of herself, then maybe the defendant could argue, well, I've go this psychological problem, and I – every time I walk in a store I steal and it's beyond my control. It's nothing like that. She controls herself and the people who are around her at her will.

(Exhibit 80 (Tr., State v. Robin Row, Ada County case no. 18945, 11/12/93, p.4019, Ls.23 – p.4020, L.6; p.4024, L.16 – p.4025, L.8; p.4025, L.18 – p.4026, L.5; p.4026, L.17 – p.4027, L.5.).)[65]

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

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

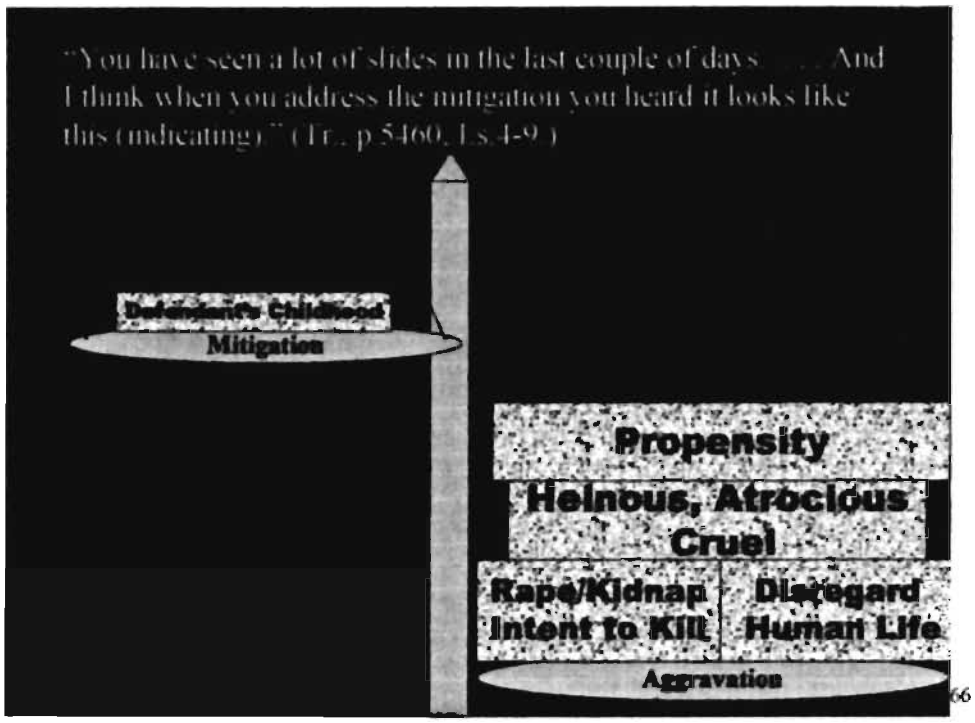
Id., 477 U.S. at 205-206 (internal citations and quotations omitted).

b. The Prosecutor Diminished The Relative Weight Of The Mitigation By Mischaracterizing The Weighing Process

While arguing their case for the death penalty, the State presented a PowerPoint slide that depicted the weighing of aggravating circumstances against mitigating

[65] Mr. Hall requests the Court take judicial notice of the transcripts of closing arguments in Payne, Jauhola, Creech, and Row, as submitted in Exhibits 77-80.

circumstances. The slide is that of a scale, likened to the scales of justice, with the term "mitigation" on one side weighed against all four aggravating circumstances the State sought to prove to the jury. The State presenting the following the jury by illustration and argument:



(Exhibit 45.)

The State's argument and illustration is a gross mischaracterization of the weighing process required under I.C. § 19-2515 (8)(a)(ii). Idaho's death penalty statute requires that all of the mitigation presented by the defense be weighed against ***each*** of the statutory aggravators it has found as proven beyond a reasonable doubt. *State v. Charboneau,* 116 Idaho 129, 774 P.2d 299 (1989). The scale depicted by the prosecution

[66] The State's actual argument has been inserted into the slide for purposes of this petition. The actual slide, without the argument insert, is attached. (Exhibit 45.)

misstates the requirements under the law and constitutes gross, intentional misconduct.[67] This misconduct requires this Court to vacate Mr. Hall's death sentence.

c. The Prosecutor Made Disparaging And Inflammatory Comments About The Defense Experts

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

In its closing argument, the State encouraged the jury to view Mr. Hall's experts as big-city, outsiders who were paid to give a performance without any real regard to the individual defendant.

> These men you heard from San Francisco and Dallas yesterday, experts. You heard a full day of it. Couple of things you don't want to forget. They're in the business of supplying criminal defendants with excuses. You heard hours about poor Erick. And yet the first time you heard that he can decide what he did, that he was accountable, that he wasn't schizophrenic, that he wasn't psychotic was when Mr. Bourne raised his hand and in the three or four questions he asked got that out of him and forgot that part. Most of what they told you doesn't have anything to do with this case. It just doesn't. The show you saw cost $100,000. $100,000. And did it tell you anything that you didn't already know about human nature? I don't think it did. And ask yourself a couple of things,

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[67] From argument in another death penalty case, approximately three years earlier:

> THE COURT: And you would agree that you take each one of those aggravating factors separately and weigh them again the entire body of mitigating evidence?
> MR. BOURNE: Yes. And the Supreme Court rules are clear on that, that each statutory aggravator has to be weighed individually against the mitigation.

(Tr., State v. Darrell Payne, Idaho Supreme Court, case no. 28589, p.4774, Ls.14-21.)

> are they neutral observers of the evidence or are they hired to try to convince you to spare the defendant? Was that testimony you heard from the witness stand and from the podium or was it a performance? I suggest to you that that's what it was. It was a performance and it is done frequently enough by Dr. Cunningham that he is good at it. He could be preaching on Sunday. He has done -- does this 15 times a year and he's got it down. Coat yourself with the skepticism that protects you from that sort of thing.

(Tr., p.5460, L.25 – p.5462, L.2.) The prosecution crosses the line of permissible attacks on the impartiality of an expert witness, by suggesting that because the defense experts were paid hefty fees, their testimony would weigh heavily in favor of the defense. *State v. Smith*, 770 A.2d 255, 272 (N.J. 2001). "Experts are not the paid harlots of either side in a criminal case and should not be portrayed in such a light." *State v. Schneider,* 402 N.W.2d 779, 788 (Minn. 1987). "Referring to a defense expert witness" as "that high falootin' expert" and to his testimony as an "infomercial" is improper. *Butler v. State,* 102 P.3d 71, 85 (Nev. 2004). "[T]o attempt to establish a defendant's guilt by making unwarranted personal attacks on his attorney and the witness is not only unfair, but it impugns the integrity of the system as a whole. Such comments dangerously overshadow what a defendant's case is really about, and we presume that they prejudice a defendant." *State* v. *Lundbom*, 773 P.2d 11, 13 (Or. 1989).

Here, the State impugned the integrity of Mr. Hall's experts by saying they are in the business of supplying excuses, their testimony was a performance, and the same performance is done frequently. This argument is a constitutionally improper personal attack on the character and credibility of Mr. Hall's expert witnesses and seeks to penalize him for exercising his Sixth, Eighth, and Fourteenth Amendment rights to due process, to present a defense, to counsel, and to fairness and reliability in death penalty cases. This misconduct requires this Court to vacate Mr. Hall's death sentence.

d. The Prosecutor Misrepresented The Evidence: Evelyn Dunaway & Michelle Deen

The prosecutor gave a false and misleading argument by misstating the testimony of Michelle Deen and Evelyn Dunaway for the purpose of suggesting that Mr. Hall choked them during sex.

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

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

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

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

Neither Ms. Deen nor Ms. Dunaway testified that Mr. Hall choked them while having sex. The State intentionally mischaracterized their testimony to draw a prejudicial parallel between Mr. Hall's prior behavior with women and the facts alleged in Ms.

Henneman's murder for the purpose of establishing the propensity aggravator and non-statutory aggravating circumstances.

e. The Prosecutor Presented Argument Inconsistent With Evidence Outside The Record

The State had the opportunity to rebut the testimony of the defense experts during the penalty phase of the trial, yet they called no expert witness. Indeed, the State had its own professional witnesses, Dr. Michael Estess and Dr. Robert Engle, who they no doubt had to compensate to review Mr. Hall's experts' opinions as well as their testimony. Dr. Estess was even present in the courtroom to view the defense expert testimony at the sentencing. Nevertheless, the prosecution, after consultation during a recess, chose not to call either doctor as a witness, presumably because they could not rebut the defense experts' opinions. Accordingly, under such circumstances, it constitutes misconduct for the State to denigrate the character and opinions of Mr. Hall's experts when their own experts could not contradict them.

Mr. Hall cannot fully state this claim as Dr. Estess has refused to cooperate with Mr. Hall's post-conviction investigation and because the Court denied Mr. Hall's motion for discovery of their files. *See* Order Regarding Discovery, p.14, filed 2/16/07.

f. The Prosecutor Argued That Imposition Of The Death Penalty For Mr. Hall Was Justified By General Deterrence And Retribution

"[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the **individual offender** and the circumstances of the **particular offense** as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (emphasis added). The Supreme Court elaborated on

the principle of individualized sentencing in *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), wherein the Court held that, to be fair, a capital sentencing scheme must treat each person convicted of a capital offense with that "degree of respect due the uniqueness of the individual." *Id.*, at 605. The plurality concluded:

> The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

Id. In contrast, in non-capital cases, "the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes." *Id.*, at 604-05. Accordingly, some courts have held in noncapital cases, a defendant's rights were not violated by consideration of general deterrence at sentencing. *See e.g., United States v. Frank,* 864 F.2d 992, 1009-10 (3rd Cir.1988). From an oft-quoted passage in *Frank*,

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

Id. at 1009-1010 (emphasis added). Conversely, because a capital defendant does have constitutional right to individualized sentencing treatment, consideration of general deterrence or retribution in determination of punishment is impermissible.

Federal and state courts have condemned such argument on similar grounds. *See Bates v. Bell,* 402 F.3d 635 (6th Cir. 2005) (condemning argument that voting for a life sentence would be tantamount to voting for a death sentence for some future victim);

Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985) (holding that the prosecutor's argument regarding deterrent effects and society's greater good swayed the focus of the jury away from the consideration of mitigating evidence in favor of evidence irrelevant to its consideration); *People v. Love*, 366 P.2d 33 (Cal. 1961) (holding that it was improper for the prosecution during closing argument to argue that the death penalty was a more effective deterrent than life imprisonment), *overruled on other grounds by People v. Morse*, 388 P.2d 33 (Cal. 1964); *Comm. v. Baker*, 511 A.2d 777, 788 (Pa. 1986) (noting that a jury might "wish to 'send a message' of extreme disapproval for the defendant's acts . . . although no sentencer had ever made a determination that death was the appropriate sentence."). Most recently, the Eighth Circuit held that general deterrence arguments are improper because they prevent individual determination of sentence and place too high of a burden on each defendant. In *Weaver v. Bowersox,* 438 F.3d 832 (8th Cir. 2006), the prosecutor had argued to the jury, "You people represent the entire community. You represent society. You have to give a message here. . . . The message has to be death for these types of people. That's the only message they are going to understand." *Id* at 836. The prosecutor further argued this case went beyond the defendant and if the jury did not impose the death penalty then there would be no deterrence. *Id.* The Eighth Circuit Court of Appeals condemned the argument stating, "The argument that a signal must be sent from one case to affect other cases puts an improper burden on the defendant because it prevents an **individual determination** of the appropriateness of capital punishment." *Id* at 841. Additionally, the court held that "invoking a jury's general fear of crime to encourage the application of the death penalty in a particular case is unfairly **inflammatory** . . . Using the conscience of the community

as a guiding principle for punishment puts too significant of a burden on a single defendant." *Id.*

Idaho courts have addressed deterrence arguments as well. In *State v. Pratt*, 125 Idaho 546, 873 P.2d 800 (1993), the district court had referenced deterrence in its findings when imposing the death penalty. The Idaho Supreme Court found that the district court's comments about deterrence were made **after** it had already properly made all the required findings for imposition of the death penalty. Therefore, the Court was able to determine with certainty that any consideration of deterrence did not affect the district court's findings. More recently, the Idaho court of appeals condemned closing arguments based on deterrence and retribution in *State v. Beebe,* __ P.3d __, __ Idaho __, 2007 WL 2377331 (Ct. App., 2007). The Court of Appeals held that "Urgings, explicit or implied, for the jury to render a verdict based on factors other than the evidence admitted at trial and the law contained in the jury instructions have no place in closing arguments." *Id.* at 5. The court found the prosecutor's comments about concerns to protect the public and the rights of the victims were improper. *Id.*

Here, during closing arguments, the prosecutor (Greg Bower) argued in part the following:

> A few last thoughts: If your verdict for death, saves just one person in the future, saves just one person in the future your sacrifice and your time will not have been in vain.
> * * *
> For the last year and a half Mr. Bourne and I have done our job. And now it's time to end this and hand the baton to you. How many times have you sat? How many times have you sat at the breakfast table reading the newspaper and read about a horrible crime and said to your suppose [sic], "Why don't they do something about this? This is our town. Why don't they do something about this?" Well the reversal of that is, now you are they. You are they. There is in your hands. Trust each other. You've run a long path together. Trust each other. Remember last week to. Take your

> common sense and your skepticism back into the jury room with you. Don't forget it. And finally the law is only as strong -- the law is only as strong as the weakest part on this jury which is heart.

(Tr., p.5462, Ls.3-6; p.5462, L.24 – p.5463, L.15.)[68] The State continued this line of argument in its rebuttal. Specifically, prosecutor Roger Bourne argued, "Is Lynn's life worth nothing? Is a loss (sic) worth nothing? Did we go through all this for nothing? What about retribution to her family? What about the protection of society? What about deterrence of others?" (Tr., p.5510, L.22 – p.551, L.2)

It is highly likely that these arguments resonated with the jurors. Indeed, the prosecution primed the jury for this argument as early as voir dire. Numerous jurors testified in voir dire that they believed the death penalty generally deters crime. (Tr., p.2074, Ls.12-19; p.2093, L.14 – p.2095, L.14; p.2151, L. 9 – p.2153, L 20; p.2498, Ls.7-15; p.2501, Ls.13-21; p.2503, L.16 – p.2504, L.11; p.3029, L.15 – p.3030, L.14).[69] Accordingly, the State cannot meet its burden of establishing that this error is harmless beyond a reasonable doubt. Further, even if this Court finds that the error is harmless, reversal should be automatic as this argument is part of a pattern of repetitive misconduct

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[68] This argument is particularly prejudicial as it appears to play off the community's fear and passion as described by the media coverage of this case. For instance, one newspaper article quoted a Boisean stating "We need to send the message to bad people: 'Don't come to our town because there are consequences to pay.'" *Police to rethink Greenbelt safety after attack,* Idaho Statesman, Oct. 23, 2000, at 7A. The prosecutor drew on this sentiment by stating, "How many times have you sat at the breakfast table reading the newspaper and read about a horrible crime and said to your suppose [sic], 'Why don't they do something about this? This is our town. Why don't they do something about this?' Well the reversal of that is, now you are they. You are they."

[69] Testimony regarding deterrence from Juror No. 65 and Juror No. 62 was actually elicited by trial counsel. This fact does not change the claim but only shows that the State cannot show that the prosecutorial misconduct was not harmless beyond a reasonable doubt.

by the State in capital cases. For instance, three years ago, in the Payne case, the prosecutor Roger Bourne argued,

> But sometimes a person by his actions crosses a threshold. And when a person crosses that threshold they give up their right to live in society. They give up the right to live in any part of society because the thing that they have – they have done is so far beyond what society will stand for that society says we will not tolerate this kind of behavior at all. We won't put up with it. And society has a right to protect itself, and society has a right to send a message that that's enough, we've put up with all we're going to stand for. Society demands retribution for the life of this young woman. It has a duty to protect itself and to send out a message loud and clear to other people like Darrell Payne that we're not kidding. When you kill somebody under these circumstances you are facing the death penalty.

(Exhibit 77 (Tr., State v. Darrell Payne, Idaho Supreme Court, case no. 28589, p.4767, Ls.6-22).)

While Mr. Hall believes he has made a sufficient showing to vacate his death sentence, he does note that the Court's ruling that his investigative team cannot interview, or contact in any way, the jurors, significantly limits his ability to fully state this claim.

g. The Prosecutor Mischaracterized The Role Of The Jury As A Link In The Chain Of Law Enforcement

Arguments by prosecutors that mischaracterize or trivialize the role of a capital sentencing jury are improper. *See McGautha v. California,* 402 U.S. 183, 208, (1971) (explaining it is essential that jurors recognize "the truly awesome responsibility of decreeing death for a fellow human [so that they] will act with due regard for the consequences of their decision"). By mischaracterizing and trivializing the responsibility of the jury, prosecutors engage in reversible error. *Leavitt v. Arave,* 383 F.3d 809, 834 (9th Cir. 2004) (internal quotations omitted). In *Leavitt*, an Idaho case, the Ninth Circuit specifically condemned the argument made by the prosecutor at a capital sentencing