5-21-2009

Hall v. State Clerk's Record v. 7 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

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hearing describing the jury as the last "link-in-the-chain-of-law-enforcement." Specifically, the prosecutor argued:

> In closing let me just say that you are part of a very important chain called the chain of law enforcement. And law enforcement and justice don't work in our country unless you do your part. The police officers can be as well trained as you want them and the forensic sciences can be as well trained as you want in the sciences. And they can go out an[d] investigate crimes as competently and professionally as this group has done. And I think that Officer Robinson and those associated with him have done an excellent job. You can have the best prosecutors around. And I want to tell you that I believe Mr. Moss is one of the best prosecutors in the State. And they work together like this because they are part of the chain of law enforcement that keeps our community safe. But the third link in that chain is a jury, which when they're given the proper evidence and they are given the proof beyond a reasonable doubt, they have the fortitude to be able to act upon that and to preserve that chain unbroken. And the fourth link in the chain, of course, is the judge who has the courage and also the wisdom to impose the appropriate sentence. Now, none of this works unless you do your job.

Id. at 834. The court found his argument trivialized the jury's importance because it suggested the jury is only the last link in a long decision. It found "[t]his suggestion that the jury is simply a link in a chain of law enforcement which includes the police, the prosecutor, and the judge is just plain wrong. It minimizes the important role of the jury and tends to align neutrals-judge and jury-with a party to the case-the state itself." *Id.* (internal quotations omitted).

In this case, like in *Leavitt*, the comments made during closing arguments were improper because they trivialized the jury's role by linking them to the prosecution and taking the bulk of the weight of the decision to impose death off the jurors shoulders. Here is the argument in all its glory:

> A last few 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. . . . It's been a long journey from September 24th to October 27th. By my count it's almost 1500 days Dave Smith and Cory Stambaugh carried the ball for

most of those 1500 days. They waited during that time. They themselves gathered DNA from, I recollect, over 130 people, over two and a half years that they waited to solve this crime. They tested those people. They tested half a million people by running the DNA sample through CODIS. They never gave up. They kept trying. And if it weren't for those strands of DNA that gave you the insurance you need, Erick Hall would still be out there. He would still been out there. No they carried the baton. They did their job. 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, "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.*

* * *

Well, for generations the citizens of our country have been asked to do hard things . . . . We'll wait for you.

(Tr., p.5462, L.3 – p.5463, L.15; p.5512, L.24 – p.5513, L.14 (emphasis added).) The prosecutor, by using a baton analogy to describe how the case had passed from law enforcement, to the prosecutor, and now to the jury, improperly trivialized the jury's importance and created a link-in-the-chain argument that destroyed the neutrality of the jury and squarely aligned them on the side of the State. Further, this improper argument took the sole burden of imposing death away from the sentencing jury by implying the jury was working together with law enforcement and the prosecution; thus, the State made it easier for the jury in this case to impose a death sentence. Finally, the prosecutor applied the concept that a chain is only as strong as its weakest link, analogizing the jury's heart, i.e., compassion and mercy, to the weakest link. Accordingly, this argument further undermines the jury's ability to meaningfully consider mitigation. *See* section a, *supra*.

h. The Prosecutor Expressed His Personal Belief And Opinion That The Death Penalty Was The Proper Punishment For Mr. Hall

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

During closing arguments, Ada County Prosecutor, Greg Bower, an elected official of Idaho State government, stated his opinion that the death penalty was the appropriate punishment for Mr. Hall, arguing,

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

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

i. The Prosecutor Argued That Lethal Injection Is Painless And Humane

The State argued that executing Mr. Hall would be a humane form of death, especially when compared to the asserted suffering of Ms. Henneman.

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

(Tr., p.5511, L.24 – p.5512, L. 4.)

Not only is this argument improper because it is not based any information in the record and because it calls for comparative justice which results in the death penalty regardless of mitigating circumstances, Mr. Hall further asserts that, rather than being a humane form of execution, the drugs used to kill death row inmates can actually cause an excruciatingly painful and protracted death. Indeed courts throughout the country are currently entertaining challenges to lethal injection, including the United States Supreme Court. See Claim AA. According to an April 2005 report by the British journal, "The Lancet," as many as four of ten prisoners put to death by injection in the United States may receive inadequate anesthesia, causing them to remain conscious in tremendous pain. (Exhibit 81.) Therefore, Mr. Hall claims that the State's argument was improper in three ways: 1) it was based upon an assertion of fact not supported by evidence in the record; 2) it was based on the false assertion that Mr. Hall's execution will necessarily be painless; and 3) it distracts the jury from its obligation to conduct an individualized sentencing by urging the choice of punishment based on irrelevant considerations. This argument violated Mr. Hall's rights to a due process, his right to a fair trial and his right to be free from cruel and unusual punishments as guaranteed by the Sixth, Eighth, and Fourteenth Amendments.

j. The Prosecutor Argued That A Life Sentence Would Be Too Lenient And Urged The Jury To Speculate As To What Might Happen To Mr. Hall If A Death Sentence Were Withheld

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

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

(Tr., p.5460, Ls.9-20.) This statement encourages the jury to discount a life sentence as minimal punishment and violates the principle in capital cases that jurors must be able to give legitimate consideration to life sentences. *See California v. Brown*, 479 U.S. 538 (1987); *Franklin v. Lynaugh*, 487 U.S. 164 (1988); *Penry v. Lynaugh*, 492 U.S. 302 (1989), *Mills v. Maryland*, 486 U.S. 367 (1988); *Simmons v. South Carolina*, 111 S.Ct. 2187 (1994).

The prosecutor went so far to argue that that imposing a life sentence was the equivalent of imposing no punishment at all:

> Counsel says give life. Here's the deal. You know that Judge Neville can give the defendant life on the rape, a life on the kidnapping. You know he's got one and so he's going to go to prison for life. He's got two rapes now that one prior conviction, he's going to go to prison for life. And so when Counsel says give him life, what he's really saying is give him nothing. Because the Ada County Prosecutor could stand up right now and say to Judge Neville, "We move to dismiss the murder charge. Dismiss it, we're done." And Judge Neville could give the defendant a life

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

(Tr., p.5510, L.1 – p.5511, L.12.)

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

k. The Prosecutor Argued That Mr. Hall Committed Post-Mortem Acts To The Victim's Body In Arguing That The Jury Should Find The "Especially Heinous, Atrocious And Cruel" Aggravating Factor

During closing argument, the State suggested that Erick Hall committed unspecified, depraved acts to Ms. Henneman's body. The argument was unsupported by the evidence, authorized the jury to consider post-mortem conduct in finding the "heinous, atrocious and cruel" aggravator, and the prosecutor's use of a picture of the body of Ms. Henneman was designed to inflame the passions of the jury and to distort the jury's consideration of the evidence supporting the aggravator. Mr. Hall incorporates by reference Claim Q.1, *infra*.

L. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Object To Prosecutorial Misconduct During Sentencing-Phase Closing Arguments

Trial counsel should have objected to the misconduct in the State's closing arguments both in the guilt and the sentencing phases. Mr. Hall incorporates by reference the facts and legal arguments from his previous claims, specifically, Claim K. Trial counsels' failure to object, and alternatively request a mistrial, admonishment, and curative instruction constitutes deficient performance. Mr. Hall asserts that but for counsels' deficient performance, there is a reasonable probability that he would not have been convicted of murder of the first degree or sentenced to death.

Based on professional standards of performance in addition to trial counsels' years of experience with the prosecutors in this case, counsel was intimately familiar with the State's tactics in closing arguments, or at least should have been. Trial counsel should have anticipated the prosecutors' arguments and moved to preclude them by way

of a motion in limine. *See* ABA Guidelines, Commentary to Guideline 10.8 (footnotes and quotations omitted).[70]

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

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[70] *See* ABA Guidelines, Commentary to Guideline 10.11 ("Counsel should also object to and be prepared to rebut arguments that improperly minimize the significance of mitigating evidence[315] or equate the standards for mitigation with those for a first-phase defense.[316]".) Footnote 315, written before *Tennard*, *supra*, provides:

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

Footnote 316 provides:

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

M. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Request A Pretrial Evidentiary Hearing For The Presentation Of Facts Alleged In Support Of The Noticed Aggravating Circumstances

Trial counsel should have requested a pretrial evidentiary hearing for the State's evidence in support of the noticed aggravating circumstances. The purpose of the hearing would have been three-fold: (1) to provide notice to the defense so that they could adequately prepare for sentencing; (2) to ensure that the evidence was reliable; and (3) to ensure that the facts offered in support of the aggravating circumstances existed by a preponderance of the evidence; and (4) that the noticed aggravating circumstances were based on independent evidence. Trial counsel should have relied on grounds for the motion including the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. As a result of trial counsel's failure, they were inadequately prepared to defend Mr. Hall's case at sentencing. In support of this claim, Mr. Hall incorporates herein by reference Claims D, E, F, H, I, J, P, and Q.

N. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Fully Preserve Sentencing-Phase Motions On Federal Grounds

Trial counsel must be diligent in protecting a defendant's constitutional claims from future attacks by the government that the claims were not properly preserved appellate and federal *habeas corpus* proceedings. *See* ABA Guidelines, Guideline 10.8.A.3.c. As stated in part in the Commentary,

> One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial. For this reason, trial counsel in a death penalty case must be especially aware not only of strategies for winning at trial, but also of the heightened need to fully preserve all potential issues for later review.

ABA Guidelines, Commentary to Guideline 10.8 (footnotes and quotations omitted).

1. Trial Counsel Failed To Fully Insulate Their "Motion To Declare Idaho's Capital Sentencing Scheme Unconstitutional" From Future Attacks By The Government That The Claim Was Not Sufficiently Preserved

Trial counsel rendered ineffective assistance of counsel in failing to fully protect their challenges to the constitutionality of the new death penalty statute claims from procedural default attacks from the government. While trial counsel did cite numerous United States Supreme cases, because of the near certainty that the government will assert some sort of procedural bar on nearly every claim in state appellate and federal habeas corpus proceedings, trial counsel should have cited specific constitutional provisions violated if for no other reason than to preserve the claim against future legal challenges.

For instance, trial counsel complained that there are no definitions or explanations of weighing, sufficiently compelling, unjust, mitigating circumstances, and that the statute fails to explain the weighing process or define aggravating circumstances. (R., pp. 204-205.) It is a fair reading of the motion that trial counsel challenged these statutory provisions based on the case law set forth elsewhere in the motion. To absolutely ensure subsequent consideration of the claims on their merits, trial counsel should have rested their motion on the following constitutional grounds: the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.[71]

[71] Mr. Hall does not concede that the claims in this particular motion are not properly preserved for future review, but makes this claim on the basis that counsel had a duty to fully insulate their claims against future procedural attack. In light of the wealth of case law in which condemned inmates have lost valid claims under severe default rules, trial counsel took a short-sighted and even flippant approach trial counsel took to their motion practice, at times captioning motions, "Yet Another Motion To..." and often not citing to a single constitutional provision in support. (R., pp. 142-44.)

2. Trial Counsel Failed To Raise Any Constitutional Grounds In Support Of Their Objection To Dennis Dean's Testimony Regarding Risk Assessment

Dennis Dean testified for the State regarding Mr. Hall's possible custody status if convicted on the murder charge and sentenced. Trial counsel objected to Mr. Dean's testimony as to risk assessment, and argued that the defense was precluded from questioning Mr. Deen without risk of "opening the door" to evidence of the Hanlon murder, and that there would be a denial of confrontation. (Tr., p.4924, L.18 – p.4936, L.7.) At no time did counsel state the federal constitutional bases for the objection. Counsel should have rested the objection on the Constitutional grounds: the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

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

The jury was instructed to consider and weigh all evidence presented at sentencing. The jury was also instructed that "victims" have a right to personally address them regarding the victim's personal characteristics and the emotional impact of the defendant's crimes. (Tr., p.4955, L.16 – p.4956, L.3.) The jury was never told that victim impact is not evidence, or if it is evidence, how it should be used in the weighing process. The instructions gave the jury absolutely no guidance on how to utilize such statements in assessing the gravity of aggravating circumstances, the existence or weight of mitigation, and the weighing of aggravators against the mitigation. *See Booth v. Maryland*, 482 U.S. 496 (1987) (holding Eighth Amended prohibits introduction of victim impact evidence); *Payne v. Tennessee,* 501 U.S. 808 (1991) (modifying *Booth* in holding that Eighth Amendment does not erect a per se bar against victim impact evidence, but leaving prohibition of characterizations and opinions about the crime, the defendant, and the

appropriate sentence intact, and noting that introduction of victim impact evidence could violate due process under some circumstances).

It is reasonably likely that the jury, considered victim impact as non-statutory aggravating circumstances. As such, without a proper limiting construction, the victim impact is unconstitutionally vague in violation of the Eighth Amendment and violated Mr. Hall's rights to due process and notice as protected by the Fifth, Sixth, and Fourteenth Amendments. *See Lowenfield v. Phelps,* 484 U.S. 231, 244 (1988) ("a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'")

It is also reasonably likely that the jury used the victim impact when weighing the aggravators against the mitigation, even though victim impact is irrelevant to any of the statutory aggravating circumstances. It is also reasonably likely that the jury used the victim impact in a way that precluded or otherwise undermined their ability to give meaningful consideration to Mr. Hall's mitigating evidence. *See Lockett v. Ohio,* 438 U.S. at 604; *State v. Fain,* 116 Idaho 82, 98, 774 P.2d 252, 268 (1989) ("The broadest of views must be entertained in considering all potentially mitigating factors."). Finally, the introduction of unsworn victim impact statements not subjected to cross-examination violated Mr. Hall's right to confront witnesses against him. Thus, the introduction of victim impact violated Mr. Hall's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and parallel provisions of the Idaho Constitution.

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

Evidence of nonstatutory aggravating circumstances was introduced against Mr. Hall including his convictions for Escape and Grand Theft, as well as evidence that he committed a forcible rape against Norma Jean Oliver, and other alleged bad conduct with former girlfriends and acquaintances. With the advent of jury sentencing, trial counsel should have challenged the admissibility of non-statutory aggravating circumstances on the following grounds:

- That such evidence was not pled by way of Indictment or Information in violation of Mr. Hall's state statutory and constitutional rights;
- That Mr. Hall was not given adequate notice as entitled by the state and federal due process clauses;
- That I.C. 19-2515, in its latest post-*Ring* incarnation, does not provide for consideration of nonstatutory aggravating circumstances; and
- That due to the lack of guidance available by Idaho law in the context of jury sentencing, jury consideration of non-statutory aggravators violates the Eighth Amendment.

If deemed admissible, then trial counsel should have made litigated the following:

- That state and federal due process requires that the jury should be instructed that the prosecution bore the burden of proving the existence of nonstatutory aggravating circumstances beyond a reasonable doubt; and
- That the jury should be instructed that they cannot consider nonstatutory aggravating circumstances when making their determination of whether a statutory aggravating circumstance exists beyond a reasonable doubt or when weighing the statutory aggravators against the mitigation.

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

Q. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Raise Challenges To The Statutory Aggravating Circumstances

Aggravating circumstances must "genuinely narrow the class of death-eligible persons" in a way that reasonably "justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 462 U.S. 862, 877 (1983). Both on their face, and as applied, aggravating circumstances must permit the sentencer to make a "principled distinction between those who deserve the death penalty and those who do not." *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); *Maynard v. Cartwright*, 486 U.S. 356 (1988) ("[t]he construction or application of an aggravating circumstance is unconstitutionally broad or vague if it does not channel or limit the sentencer's discretion in imposing the death penalty"). Even if an aggravating circumstance is vague on its face, it can nevertheless support a death sentence if the state courts have narrowed its scope to a constitutionally sufficient degree and if such a narrowing construction actually guided the sentencer in the case under review. *Godfrey v. Georgia*, 446 U.S. 420 (1980).

Mr. Hall asserts, for at least a few of the claims below, that trial counsel was ineffective for failing to raise challenges that the Idaho Supreme Court, and even in one case, the United States Supreme Court, have previously rejected. *See* ABA Guidelines, Commentary to Guideline, 10.8 ("As described in the commentary to Guideline 1.1, counsel also has a duty, pursuant to Subsection (A)(3)(a)-(c) of this Guideline, to preserve issues calling for a change in existing precedent; the client's life may well depend on how zealously counsel discharges this duty.") Indeed, the importance of challenging existing precedent has been demonstrated over the past few years, where the

Supreme Court has agreed to revisit issues and overrule precedent in capital cases.[72] Especially in light of the advent of jury sentencing, trial counsel should have considered raising all claims for reconsideration by the Idaho Supreme Court and federal courts.[73] The failure to raise a claim on the ground that it has been rejected may cost a capital defendant his life.[74]

1. Trial Counsel Failed To Challenge The *"Especially Heinous, Atrocious Or Cruel"* Aggravating Circumstances As Vague And Overbroad

The jury entered a special verdict finding beyond a reasonable doubt that "the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity."

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[72] *See Roper v. Simmons,* 543 U.S. 551 (2005) (holding that it is unconstitutional to execute juveniles, overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989)); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that it is unconstitutional to execute the mentally retarded, overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989)); *Ring v. Arizona,* 536 U.S. 584 (2002) (holding that a jury must find aggravating circumstances beyond a reasonable doubt, overruling *Walton v. Arizona,* 497 U.S. 639 (1990)).

[73] Indeed, prior to *Ring*, the Idaho Supreme Court had relied on the "important distinction" between judge and jury sentencing in upholding constitutional challenges to various aspects of Idaho's death penalty scheme. *See e.g., State v. Lovelace,* 140 Idaho 73, 81, 90 P.3d 298, 306 (2004) ("Although we have presumed that sentencing judges were able to sort out truly relevant, admissible evidence presented in the form of victim impact statements, to allow the introduction of victim testimony espousing the death penalty for consideration by a jury is reversible error."); *State v. Lankford*, 116 Idaho 860, 877, 781 P.2d 197, 214 (1989) (recognizing that Idaho's "especially heinous, atrocious or cruel" aggravating circumstance may be unconstitutional if relied upon in a jury sentencing).

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

(R. p.609.) This statutory aggravating circumstance, set forth in I.C. § 19-2515(9)(e), is unconstitutional on its face and as applied. *Maynard v. Cartwright,* 486 U.S. 356 (1988).

In *Maynard,* the Supreme Court held that a similar aggravating circumstance under the Oklahoma death penalty statute was unconstitutionally vague pursuant to the Eighth Amendment to the United States Constitution. *Id.* at 363-365. In *State v. Lankford,* 116 Idaho 860, 781 P.2d 197 (1989), the Idaho Supreme Court upheld the aggravator, distinguishing *Maynard* based on the Oklahoma statute at issue, stating,

> There is, however, an important distinction between the Oklahoma and Idaho aggravating circumstance statutes. The distinction is that Oklahoma has jury sentencing while Idaho adheres to judicial sentencing in capital murder cases. These aggravating circumstances are terms of art that are commonly understood among the members of the judiciary. As a result, the potential for inconsistent application that exists as a result of jury sentencing is eliminated where the judge sentences.

Id. at 877, 781 P.2d at 214. Of course, this distinction no longer applies. Accordingly, the question is whether an adequate limiting construction was given.

The Court's jury instruction no. 44, limiting the construction of the aggravator, read as follows:

> The terms especially "heinous," "atrocious," or "cruel," are considered separately; but in combination with "manifesting exceptional depravity." The terms heinous, atrocious or cruel are intended to refer to those first-degree murders where the actual commission of the first-degree murder was accompanied by such additional acts as to set the crime apart from the norm of first-degree murders.
>
> A murder is especially heinous if it is extremely wicked or shockingly evil.
>
> "Atrocious" means outrageously wicked and vile.
>
> "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.
>
> The statutory aggravating factor does not exist unless the murder was especially heinous, especially atrocious, or especially cruel, and such heinousness, atrociousness or cruelty manifested exceptional depravity. It might be thought that every murder involves depravity. However, exceptional depravity exists only where depravity is apparent to such an

> extent as to obviously offend all standards of morality and intelligence. The terms "especially heinous manifesting exceptional depravity," "especially atrocious manifesting exceptional depravity," or "especially cruel manifesting exceptional depravity" focus upon a defendant's state of mind at the time of the offense, as reflected by his words and acts.

(R. p.693 Jury Instruction No. 5, filed 10/22/04); *see also* Tr., p.4726, L.12 – p.4727, L.20.)

The limiting instruction given to the jury was inadequate. While the instruction adds words, those words do not add meaning of constitutional significance. In short, the limiting construction does not genuinely narrow the class of murderers eligible for the death penalty and does not adequately guide the jury's discretion. *But see Leavitt v. Arave,* 383 F.3d 809, 835-837 (9th Cir. 2004) (holding that Idaho's aggravator has been adequately defined by limiting instructions, while not condoning the actual choice of words). In particular, and a point not addressed in *Leavitt*, the limiting instruction was inadequate because it did not necessarily preclude the jury's consideration of circumstances occurring after the victim's death when determining whether the aggravator existed. *Cf. State v. Kingsley*, 252 Kan. 761, 851 P.2d 370, 390 (1993) (holding that in regard to the "heinous, atrocious or cruel" factor: "[t]he murder is complete with the death of the victim. Subsequent abuse of the body would not constitute the manner in which the murder was committed"); *see also Robedeaux v. State*, 866 P.2d 417, 435 (Okla. Crim. App. 1993).

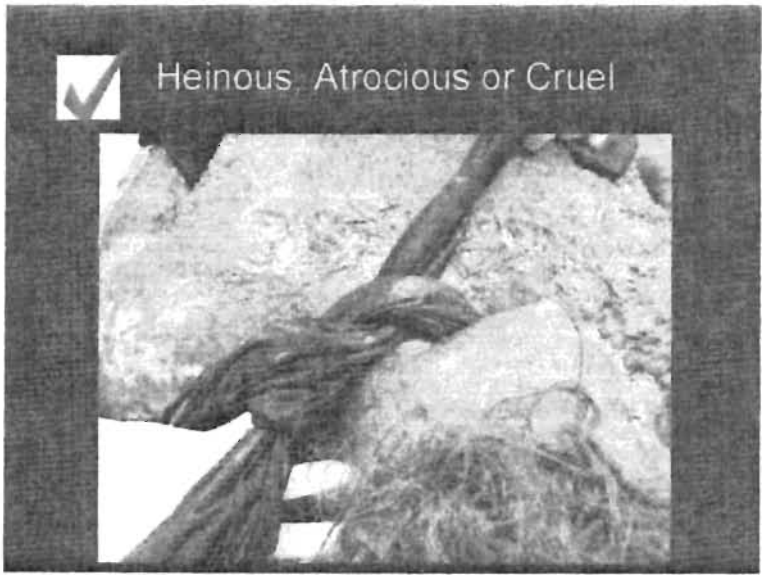
The error in the instruction was important, because of uncertainty about the order and timing of the victim's wounds. *See* Claim C, *supra.* Reasonable jurors might have concluded that some of these other injuries were incurred post mortem, or that the evidence failed to show beyond a reasonable doubt when they were incurred. On such a

record, an instruction which authorized consideration of post mortem injuries or other treatment of the body was prejudicially erroneous.

Indeed, the State encouraged such an interpretation of the aggravator, stating:

> Exceptional depravity. What do you think was going on the riverbank for a minimum of six hours while Lynn was tied up and dead and laying on a flat surface so that her lividity could take? What was going on at that time? The defendant had to be there with her, or he had to come back to her because she had to get from that flat surface into the water. She didn't do that by herself. The water didn't come up and go down and float her away. That's exceptional depravity.

(Tr., p.5505, Ls.11-20.) Here, the State is suggesting that Erick Hall committed some unspecified depraved acts to Ms. Henneman's body. Not only was this argument unsupported by the evidence, it also authorized the jury to consider post-mortem conduct in finding this aggravator. Indeed, the State relied on a highly prejudicial photograph during their PowerPoint presentation which identified the body in its post-mortem state **after two weeks in the water.**



(Exhibit 45.) This photograph is not an accurate reflection of the condition of the body due to the murder, but rather reflects the deteriorating effects of being in the water for

approximately two weeks. The prosecutor used this photograph to inflame the passions of the jury and to distort the jury's consideration of the evidence supporting the aggravator. *See* Claim K.3.k and Claim L, *supra*. Accordingly, Mr. Hall's death sentence should be vacated.

2. Trial Counsel Failed To Challenge The *"Utter Disregard For Human Life"* Aggravating Circumstances As Vague And Overbroad

The jury entered a special verdict finding beyond a reasonable doubt that "by the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life." (R. p.609.) This statutory aggravating circumstance, set forth in I.C. § 19-2515(9)(f), is unconstitutional on its face and as applied.

The Court's jury instruction no. 45, limiting the construction of the aggravator, read as follows:

> "Exhibited utter disregard for human life," with regard to the murder or the circumstances surrounding its commission, refers to acts or circumstances surrounding the crime that exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer. "Cold-blooded" means marked by absence of warm feeling: without consideration, compunction, or clemency, matter of fact, or emotionless. "Pitiless" means devoid of or unmoved by mercy or compassion. A "cold-blooded, pitiless slayer" refers to a slayer who kills without feeling or sympathy. The utter disregard factor refers to the defendant's lack of conscience regarding killing another human being.

(R. p.693 (Jury Instruction no. 5); *see also* Tr., p.4727, L.21 – p.4728, L.19.)

The Supreme Court has held that Idaho's limiting instruction is sufficient under the Eighth Amendment. *Arave v. Creech*, 507 U.S. 463, 468 (1993). The limiting instruction was satisfactory because it defined a "state of mind that is ascertainable from surrounding facts." *Id.* at 1541-1542. Because some murderers do exhibit feeling, the Court also determined that the aggravator genuinely narrowed the class of persons

eligible for the death penalty. *Id.* Nevertheless, trial counsel should have objected to this instruction as inadequate to save the aggravating circumstance, thus at a minimum, absolutely ensuring preservation of the issue, for a higher court.

The limiting instruction was also inadequate because it did not necessarily preclude the jury's consideration of circumstances occurring after the victim's death when determining whether the aggravator existed, by failing to define the language "circumstances *surrounding* [the murder's] commission," to circumstances *during* the commission of the murder. This point was not addressed by the Supreme Court in *Creech. But see State v. Wood*, 132 Idaho 88, 103-04, 967 P.2d 702, 717-18 (1998) (permitting consideration of post-mortem conduct in consideration of the "utter disregard" aggravator). The error in the instruction was important, because of the lack of evidence regarding Mr. Hall's state of mind, the manner of Ms. Henneman's death, and the order and timing of the victim's wounds.

3. Trial Counsel Failed To Challenge The *"Propensity To Commit Murder Which Will Probably Constitute A Continuing Threat To Society"* Aggravating Circumstances As Impermissibly Lessening The State's Burden And As Vague And Overbroad

The jury entered a special verdict finding beyond a reasonable doubt that "the defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will **probably** constitute a continuing threat to society." (R. p.610 (emphasis added).) Trial counsel rendered ineffective assistance of counsel in failing to challenge the "propensity" aggravating circumstances on the grounds other grounds that asking a jury to find that a defendant "probably" constitutes a continuing threat to society unconstitutionally lowers the State's burden of

proving all aggravating circumstances beyond a reasonable doubt. *See Ring v. Arizona,* 536 U.S. 584, 586-587 (2002); *In re Winship,* 397 U.S. 358, 364 (1970).

The Court's jury instruction no. 46, limiting the construction of the aggravator, read as follows:

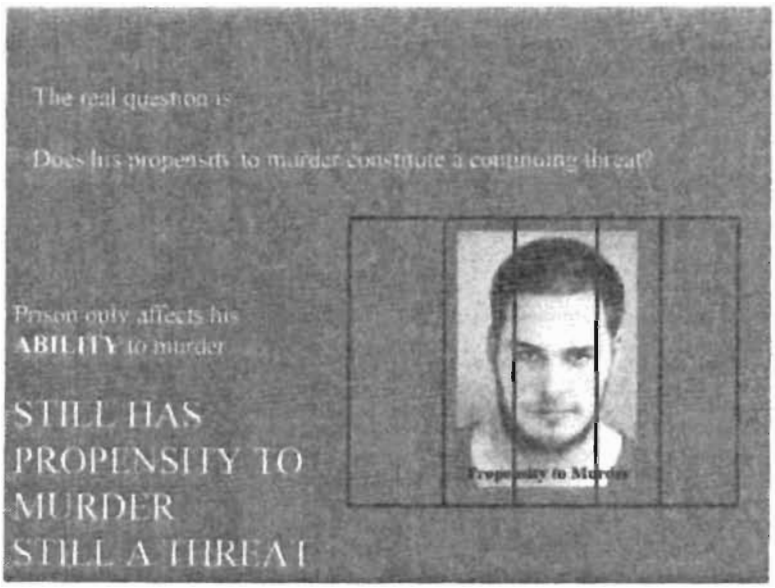
> The phrase "exhibited a propensity to commit murder which will probably constitute a continuing threat to society" means conduct showing that the defendant is more likely than not to be a continuing threat to society. Such finding cannot be based solely upon the fact that you found the defendant guilty of murder. In order for a person to have a propensity to commit murder, the person must be a willing, predisposed killer, a killer who tends toward destroying the life of another, one who kills with less than the normal amount of provocation. Propensity requires a proclivity, a susceptibility, and even an affinity toward committing the act of murder.

(R. p.693 (Jury Instruction no. 5); *see also* Tr., p.4728, L.20 – p.4729, L.8.) The jury instruction does not save the aggravator because it simply defines "probably" as "more likely than not," a preponderance of the evidence standard which unconstitutionally diminishes the State's burden of proof. *But see State v. Sivak*, 105 Idaho 900, 04-905, 674 P.2d 396, 400-401 (1983) (rejecting the claim that the "probably" language diminished the State's burden of proof).

Trial counsel also rendered ineffective assistance of counsel by failing to challenge the aggravating circumstance as unconstitutionally vague and overbroad on its face and as applied, or otherwise inadequately defined by jury instructions. The instructions given by the Court were inadequate for three reasons.

First, the limiting instruction does not limit consideration of prior conduct to prior murders, or at minimum, to prior conduct showing a propensity to commit murder. This is important because the jury was presented with evidence of prior bad acts that did not involve murder, or even violent acts. *See supra,* Claims I and J.

Second, the limiting instruction does not limit consideration of the defendant's "continuing threat to **society**" to an incarcerated environment. In other words, the relevant "society" is left undefined by the statute or the instruction.[75] This is important because the prosecution urged the jury to find this aggravator based solely on a finding of propensity, without regard to any actual likelihood that he would commit another murder while incarcerated in prison. (Tr., p.5459, Ls.18-21) ("If you're tempted to give him prison over this, remember prison only affect (sic) his ability to murder? He still has that propensity to murder. He's still a threat.") (sic added).) This point was reinforced by the prosecutor's PowerPoint presentation.



(Exhibit 45.)

Finally, the instruction does not distinguish this aggravator from the "especially heinous, atrocious, or cruel" aggravator (hereinafter "HAC"). The jury could determine that both aggravating circumstances exist on the single determination that the defendant

[75] Accordingly, trial counsel should have requested a definition of "society" limiting it to the prison context. *See* Claim Q.4.

enjoys to kill. Specifically, "cruel" as used in the "HAC" aggravator means murder "with utter indifference to, **or even enjoyment of**, the suffering of others." (emphasis added).) This definition is sufficiently similar to "propensity," which is described a person with "an affinity toward committing the act of murder," to render the "propensity" aggravator unconstitutionally duplicative.

4. Trial Counsel Failed To Request A Definition Of "Society" Limiting It To The Prison Context

Trial counsel should have requested a definition of "society" limiting it to the prison context. Mr. Hall incorporates by reference herein section Q.3, *supra*.

R. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Raise Legal Challenges To Idaho's Death Penalty Scheme

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

1. Trial Counsel Failed To Challenge The Constitutionality Of The Death Penalty Statute For Its Failure To Assign A Burden Of Proof To The Jury's Weighing Findings

A defendant cannot be sentenced to death, even if aggravators are found, unless it is also found that the aggravating circumstances outweigh the mitigation. *See e.g., State v. Charboneau*, 116 Idaho 129, 153, 774 P.2d 299, 323 (1989) ("We hold that the trial court may sentence the defendant to death, only if the trial court finds that all the mitigating circumstances do not outweigh the gravity of each of the aggravating circumstances found and make imposition of death unjust.") Unless this additional finding is made, the maximum punishment is life without the possibility of parole.

Accordingly, based on the rule of law set forth in *Ring v. Arizona*, 536 U.S. 584 (2002), this finding represents a finding that must be presented to a jury and found to exist beyond a reasonable doubt. As the Supreme Court enunciated the rule of law:

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

Id. at 600 (citations omitted). Accordingly, trial counsel rendered ineffective assistance of counsel in failing to challenge the Idaho death penalty scheme for removing from the State the burden of proving this fact beyond a reasonable doubt.

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

2. Trial Counsel Failed To Challenge The Constitutionality Of The Death Penalty Statute For Its Failure To Define "Sufficiently Compelling" In A Manner Requiring That The Individual Aggravating Circumstances Outweigh The Mitigation

Under well-established Idaho law, the rule is that a defendant cannot be sentenced to death unless it found that the aggravating circumstances **outweigh** the mitigation. *See*

e.g., State v. Charboneau, 116 Idaho 129, 153, 774 P.2d 299, 323 (1989) (holding that a defendant can be sentenced to death, only if it is found "that all the mitigating circumstances do not outweigh the gravity of each of the aggravating circumstances found and make imposition of death unjust.") Accordingly, if the mitigation outweighs the gravity of each of the aggravators, by any degree, then the defendant cannot be sentenced to death. Under Idaho law, even where the mitigation is only of equal weight to the gravity of the aggravation, the maximum punishment is fixed life.

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

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

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

There is simply no way of knowing whether the jury imposed a death sentence even if they believed the mitigation was of equal weight to the aggravation. Indeed, there is a reasonable probability that the jury believed that the mitigation outweighed the aggravation, but not in such a manner or degree as to make imposition of the death penalty unjust. It may very well be that the jury believed that the mitigation must substantially outweigh the aggravation for the imposition of the death penalty to be unjust

under the facts of this case. The State advocated this unconstitutional interpretation of the statute. In closing argument, the State argued:

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

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

3. Trial Counsel Failed To Challenge The Court's Instruction That The Jurors Have A Duty To Consult With One Another Regarding Their Findings

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

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

4. Trial Counsel Failed To Request A Special Jury Instruction Requiring The Jury To Provide Written Mitigation Findings And Failed To Challenge The New Death Penalty Statute On Grounds That It Forces A Defendant To Choose Between Constitutional Rights

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

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

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

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

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

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

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

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

5. Trial Counsel Failed To Request A Special Jury Instruction Requiring Written Jury Findings Delineating The Evidence Considered In Finding The Aggravating Circumstances And Failed To Request An Instruction To The Jury That The Same Evidence Can Be Used To Find Multiple Aggravating Circumstances Only If Additional Aggravating Evidence Is Found To Support The Other Aggravator Beyond A Reasonable Doubt

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

6. Trial Counsel Failed To Object To The Court's Instruction Regarding The Governor's Power To Commute Or Pardon

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

> The governor of the State of Idaho has the authority to grant a commutation or pardon for any crime except treason, based upon a

> recommendation from the Idaho Department of Pardons and Parole. Such a commutation or pardon could apply to either a life or death sentence.

(Tr., p.5438, L.25 – p.5439, L.5.) This instruction was constitutionally infirm for several reasons including, but not limited to the following. First, the instruction has not been approved by the Idaho Legislature or the Idaho Supreme Court. Second, the instruction is not an accurate and complete statement of Idaho law. Third, the instruction failed to instruct the jury not to speculate on what parole authorities will do in the future. Fourth, the instruction diminishes the jury's sense of responsibility for the gravity of their decision in violation of the Eighth and Fourteenth Amendments. *But see California v. Ramos,* 463 U.S. 992, 1001-1005, 1014 (1983). Fifth, the instruction diverts the jury from its individualized sentencing determination mandated by the Eighth and Fourteenth Amendments. *But see Ramos, supra.* Finally, Mr. Hall asserts that his federal right to due process was violated because there is a reasonable likelihood that the jury utilized the instruction in an unconstitutional manner.

While the Supreme Court decision in *Ramos* would seemingly approve this instruction, the rationale of *Ramos* is called into question by *Ring.* Specifically, when rejecting Ramos' *Beck*[76] argument that the instruction diverts the sentencer's attention from a "central focus," the Court distinguished *Beck* on the grounds that *Beck* involved the guilt/innocence phase where the prosecution bore the burden of proving elements of capital murder whereas Ramos' case involved an instruction at the penalty phase involving no similar "central issue." *Ramos,* 463 U.S. at 1007-09. Mr. Hall asserts that *Ramos* no longer controls since capital sentencing now involves a jury's determination of

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

elements, or at least the functional equivalent of elements, during the penalty phase. Accordingly, the instruction is unconstitutional.

In addition to these specific grounds, Mr. Hall's counsel should have asserted that the instruction violated Mr. Hall's federal constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as the concomitant rights under the Idaho Constitution providing greater, but not less, protection than the federal constitution. Each of these constitutional violations was due to trial counsels' failure to object to the instruction. Mr. Hall asserts that he has satisfied both prongs of *Strickland.* Mr. Hall requires additional time to research the factual and legal foundation for this claim.

7. Trial Counsel Failed To Raise International Law Violations

Trial counsel was ineffective in failing to raise international law violations on behalf of Mr. Hall, which prejudiced Mr. Hall under *Strickland.* The convictions and sentences entered against Mr. Hall were obtained in violation of international law. Mr. Hall's death sentence was obtained in violation of The International Covenant on Civil and Political Rights (ICCPR), which prohibits death sentences where (a) the accused will endure a prolonged incarceration on death row which violates Article 7, (b) the accused does not have access to a meaningful clemency process, which violates Article 6, (c) the accused is arbitrarily deprived of his life, which violates Article 6, and (d) the accused is denied his rights to due process, which violates Article 14. Mr. Hall's death sentence was also obtained in violation of the American Declaration of the Rights and Duties of Man, Article XXVI (guaranteeing an "impartial" hearing to the accused), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

(providing protection for the less culpable co-defendant who refuses to cooperate as Damocles' Sword of the death penalty is held over his head).

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

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

U.S. Const., Article VI, § 2.

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

8. Trial Counsel Failed To Raise The Ex-Post Facto Application Of The Death Penalty Statute

Trial counsel should have raised the claim that the new death penalty statute that required jury sentencing was an ex-post facto application of the statute to Mr. Hall's case. Both the United States and Idaho Constitutions preclude the State from passing or applying ex-post facto laws. *See* U.S. Const., art. I, § 10; Idaho Const., art. I, § 16.

Ms. Henneman was killed on or about September 24, 2000. At that time, Idaho's death penalty statute was unconstitutional. *See Ring v. Arizona*, 536 U.S. 584 (2002). The new statute, requiring jury sentencing, did not take effect until February 13, 2003. *See* § 19-2515 (historical and statutory notes). The application of the new statute therefore violated the ex-post facto provisions of the United States and Idaho Constitutions. *But see Dobbert v. Florida*, 432 U.S. 282 (1977); *State v. Lovelace*, 140 Idaho 73, 90 P.3d 298 (Idaho 2004).

S. The State Violated *Brady:* Norma Jean Oliver[77]

1. Introduction

The State is very familiar with Norma Jean Oliver. As a juvenile, Norma Jean was arrested on numerous occasions for being a runaway. Although Payette County prosecuted these cases, several of her arrests occurred in Ada County between 1990 and 1991. Between December 1991 and April 1992, she was the victim and main witness in the Ada County prosecution of Erick Hall for two counts of rape. She was interviewed by former Garden City Police Detective Daniel Hess and by Deputy Ada County

[77] Because the Court has denied Mr. Hall's motion to depose the prosecutors and Jay Rosenthal and denied his motion to disclose the prosecutor's files, the Court has limited Mr. Hall's ability to state this claim.

Prosecutor Jay Rosenthal. Both Detective Hess and Mr. Rosenthal learned a significant amount about Norma Jean's problems at home as well as her mental health problems. Both were aware that Norma Jean had previously been treated, and was currently being treated for mental health issues at Intermountain Hospital in Boise. Norma Jean testified before an Ada County Grand Jury in the Hall case. Ultimately, Mr. Rosenthal negotiated a favorably plea agreement in the Hall case based on her treatment providers' opinions that she was too "fragile" to withstand cross-examination. The State was aware of the fact that after the rape allegations, Norma Jean was referred for in-patient, long-term treatment at Intermountain Hospital.

Sometime in 2003 or 2004, the State identified Norma Jean as a critical prosecution witness for Erick Hall's capital sentencing. The State located her in West Virginia and flew her to Boise. Norma Jean consulted with the State's victim advocate and was prepared for her testimony by either the prosecutors, their agents, or both. The State was aware of Norma Jean's mental problems, her problems at home, and her problems with the law. The State, however, failed to disclose this favorable evidence to trial counsel.

2. Applicable Legal Standards

The Fourteenth Amendment Due Process Clause guarantees a criminal defendant the right to the production of exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1963). Pursuant to *Brady*, prosecutors must turn over exculpatory evidence when the prosecutors have knowledge of and access to such evidence. *United States v. Santiago,* 46 F.3d 885, 893 (9th Cir.1995). *Brady* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is

material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

The prosecutor is responsible for "any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Idaho has recognized that the duty of disclosure extends not only to all the government agents investigating and prosecuting the offense, but also "any others who have participated in the investigation or evaluation of the case who either regularly report, or with reference to the particular case have reported, to the office of the prosecuting attorney." *State v. Gardner,* 126 Idaho 428, 433 885 P.2d 1144, 1149 (Ct. App. 1994) (quoting I.C.R. 16 (a)); *see also State v. Roles,* 122 Idaho 138, 149, n. 6, 832 P.2d 311, 322, n. 6 (Ct. App. 1992) (noting that a prosecutor's duty under the Due Process Clause is coextensive with that under I.C.R. 16) (citation omitted).[78]

Favorable evidence includes evidence tending to exculpate the accused as well as any evidence adversely affecting the credibility of the government's witnesses. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150 (1972). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433. The "material" standard for establishing prejudice is the same as the prejudice standard under *Strickland. United States v. Bagley,* 473 U.S. 667, 682 (1985).

3. Analysis

Mr. Hall alleges that the state violated its obligations under *Brady* to disclose favorable evidence. This claim parallels the *Strickland* claim above and is divided into

[78] *See also* I.C. 19-2515 (6) ("Disclosure of evidence to be relied on in the sentencing proceeding shall be made in accordance with Idaho criminal rule 16.")

five subclaims: **subclaim a** addresses the State's failure to disclose the nature and extent of Norma Jean's mental health problems; **subclaim b** addresses the State's failure to disclose inconsistencies in Norma Jean's story, her motive to lie, and her motive to retaliate against Mr. Hall; **subclaim c** addresses State's failure to disclose favorable evidence of Norma Jean's problems at home; **subclaim d** addresses State's failure to disclose favorable evidence of Norma Jean's prior misconduct; and **subclaim e** addresses State's failure to disclose favorable evidence of inaccuracies in Detective Hess's report. Each of these subclaims independently, and in conjunction with each other, establishes both prongs of the *Brady* standard.

Unless otherwise noted herein, this claim, and its individual subclaims, parallel Mr. Hall's *Strickland* claims. *See supra,* Claim D.[79] To the extent that the Court finds that trial counsel did not perform deficiently in failing to uncover favorable evidence, this claim addresses the State's failure to disclose such favorable evidence. Because the favorable nature of the evidence and the prejudice associated with trial counsel's failure to obtain such evidence was established in the *Strickland* claim and the subclaims, those factual and legal elements are incorporated herein by reference. Therefore, for purposes of this claim, unless otherwise noted, Mr. Hall focuses on the State's possession or knowledge of such evidence.

[79] To the extent that the Court finds that trial counsel did not perform deficiently in failing to uncover the favorable evidence, this claim (and its subclaims) addresses the State's failure to disclose such favorable evidence known to the prosecution or within its possession.

a. The State Failed To Disclose The Nature And Extent Of Norma Jean Oliver's Mental Health Problems

This claim is similar to the *Strickland* claim above, in which Mr. Hall demonstrated that Norma Jean Oliver suffers from various mental disorders, including Borderline Personality Disorder and Bipolar Disorder, which could have been used to undermine her credibility or call into question her competency to testify.[80] *See supra,* Claim D.3.a. The State had possession of documents, or otherwise had knowledge of information, indicating the nature and extent of Norma Jean's compromised mental health, or which at least would have caused trial counsel to further investigate and uncover the nature and extent of Norma Jean's mental health problems.

i. The State Possessed Or Had Knowledge A Copy Of The Transcript Of The Grand Jury Proceedings In The Case Of State v. Erick Hall, Ada County, Case No. 18591, Held December 19, 1991

The State was in actual possession of a transcript of the grand jury proceedings in the case of State v. Erick Hall, Ada County, Case No. 18591, held December 19, 1991. In fact, a copy was located in the State's file from the underlying capital case. The State disclosed a copy of the transcript after requested by Mr. Hall during these post-conviction proceedings.[81] **The fact that the State possessed or had knowledge a copy of the grand jury transcript should be specifically admitted or denied in the State's answer to this petition.** I.R.C.P. 8(b) ("A party shall state in short and plain terms the defenses to

[80] Norma Jean disclosed during these post-conviction proceedings that she suffers from these disorders. (Exhibit 51; Exhibit 52 (Tr., p.5.))

[81] This Court granted Mr. Hall's motion for a copy of the grand jury transcript in its discovery order filed February 16, 2007.

each claim asserted and shall admit or deny the averments upon which the adverse party relies.")

The favorable evidence contained in this transcript was discussed in Mr. Hall's *Strickland* claim. *See supra,* Claim D.3.a.(i).(b).. In short, the State possessed or had knowledge evidence via the grand jury transcript that Norma Jean suffered from a "chemical imbalance," had spoken at length to former Ada County Deputy Prosecutor Jay Rosenthal about her history, and that Intermountain Hospital, a psychiatric hospital, had expressed concerns about sending her home because of her history. (Exhibit 53.)

ii. *The State Had Knowledge Of Norma Jean's Mental Health Problems Through Jay Rosenthal, A Former Deputy Ada County Prosecutor And State's Witness In Mr. Hall's Capital Case*

The State had knowledge of Norma Jean's mental health problems through former Deputy Ada County Prosecutor Jay Rosenthal who prosecuted the 1991 rape case. Mr. Rosenthal testified that he was informed by Norma Jean's mental health treatment providers at Intermountain Hospital that Norma Jean was suffering from mental health problems and that she was too fragile to testify. (Tr., p.4953, L.12 – p.4954, L.9.) At a minimum, the State had imputed knowledge of this exculpatory information through Rosenthal due to his status as a former deputy prosecutor and as a current Idaho Deputy Attorney General. In addition, the State had knowledge of his anticipated testimony due to his status as a prosecution witness. Not only should such knowledge be presumed, but in this particular case, it is clear through the State's leading questions that they had knowledge of exculpatory information. (*See e.g.,* Tr., p.4953, Ls.12-14 ("Q. Did you discuss her testimony with her medical health professionals? A. I did.") **The fact that the State had knowledge of Norma Jean's mental health problems through Jay**

Rosenthal, should be specifically admitted or denied in the State's answer to this petition. I.R.C.P. 8(b)

iii. *The State Had Knowledge Of Norma Jean's Mental Health Problems Via Intermountain Hospital Based On The Role Intermountain Hospital Took In Assisting The Prosecution In The 1991 Norma Jean Rape Case*

The State had knowledge of exculpatory information and documentation within the possession of Intermountain Hospital. Although Intermountain Hospital is not typically considered an agent of the prosecution, in the 1991 rape case, Intermountain Hospital personnel and treatment providers were potential witnesses for the prosecution had the case proceeded to trial. (*See e.g.,* Tr., p.4771, Ls.11-18 (indicating that Norma Jean reported the rape to Intermountain Hospital personnel); p.4786, Ls.14-25 (indicating that Detective Hess was briefed by Intermountain Hospital personnel).) Moreover, Intermountain Hospital provided counsel for the prosecutor, assisting him in his decision to negotiate a settlement.

> 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.) Thus, any favorable evidence known to Intermountain Hospital or within its possession should be imputed to the State.

iv. *The State Had Knowledge Of The 1992 Presentence Report From The Norma Jean Oliver Rape Case.*

The 1992 presentence report from the rape case contains information that Norma Jean had been admitted into Intermountain Hospital's long-term care unit, again suggesting the presence of serious mental disorders. The State, through its agents, possessed or had knowledge the 1992 report even if acting in good faith in failing to disclose it prior to the trial and sentencing. **The fact that the State actually possessed or had knowledge a copy of the presentence report should be specifically admitted or denied in the State's answer to this petition.** I.R.C.P. 8(b)

In this case, the presentence investigator, while technically appointed by the district court, worked closely with the prosecution. The report indicates that the investigator relied heavily on governmental and prosecutorial contacts including the FBI, CIB, Mr. Hall's probation officer, and significantly, the prosecutor's file material. Further, at some point, the prosecutor was privy to the information in the PSI. *See* I.C.R. 32(g) (indicating that disclosure of the contents of the PSI "shall be made" available to the prosecuting attorney). Further, a copy of the PSI was likely possessed by yet another governmental agency which works closely with the prosecution, the Idaho Department of Corrections. *See* I.C.R. 32(h)(1) (indicating that a copy of the PSI "shall be available to the Idaho Department of Corrections" while the defendant is in their custody).

v. *The State Had Knowledge Of Norma Jean Oliver's Mental Health Condition Based On Her Status As A Prosecution Witness*

Because the Court has denied Mr. Hall's motion to depose the prosecutors and denied his motion to disclose the prosecutor's files, the Court has limited Mr. Hall's ability to state this claim. Nevertheless, Mr. Hall asserts that the State was aware of the nature and extent of Norma Jean's mental health condition based on her status as a former victim represented by the State and as a prosecution witness at Mr. Hall's capital sentencing. **The fact that the State had knowledge that Norma Jean Oliver suffered from various mental disorders, including but not limited to Borderline Personality Disorder and Bipolar disorder, or that she had taken antidepressants or antipsychotic medications in the past should be specifically admitted or denied in the State's answer to this petition.** I.R.C.P. 8(b)

Based on Norma Jean's status alone, it is more likely than not that the State was aware of the nature and extent of her mental problems. The State's knowledge is reflected in its opening statement, in which the prosecutor stated, "She didn't like living with her parents. She was having trouble there, **she had some emotional trouble besides** and decided that the grass was greener in California . . . ." (Tr., p.4734, Ls.17-20.) Thus, the State knew that Norma Jean was having "emotional trouble" **beyond** her troubles at home. The State's knowledge is also reflected in the transcript of its State's direct examination of Norma Jean:

Q. Okay. Are you taking any medication right now?
A. No.
Q. Okay. Have you taken some in the past but you don't take it now?
A. Yes.
Q. Okay.

(Tr., p.4777, Ls.2-8.) It is inconceivable that the prosecutor asked such potentially risky questions unless he already knew the answers.[82] Further, once the questions were asked, it opened the door for the defense to ask follow-up questions. Thus, it is extremely unlikely that the State would have opened the door to such questions without first interviewing Norma Jean ahead of time about her medication history and her mental health problems.

Regardless of how the prosecution gained knowledge of Norma Jean's mental health problems, whether through various witnesses or reports, one thing is clear, this case closely mirrors the facts in *Freeman v. United States.*, 284 F.Supp.2d 217 (D. Mass. 2003). In *Freeman*, the prosecuting attorney received information (via a letter) from a psychiatrist for the main and uncorroborated government witness in a criminal prosecution. Specifically, the psychiatrist informed the prosecutor that the witness suffered from psychological problems and that she would likely decompensate under cross-examination by defense attorneys. *Id.* at 225. The prosecutor failed to disclose this information to the defendant. The court recognized that the letter did not actually identify the witness's disorder. *Id.* However, the court noted that the information would have at least allowed the defense lawyers to inquire directly of the psychiatrist or to obtain other information as to the severity of the witness's disorder, i.e., Bipolar Disorder. *Id.* at 224-225. The court concluded that withholding the information "foreclosed a promising avenue of investigation for the defense." *Id.* at 225. Further, the withheld information was deemed material because it "it brought into question the

[82] From a review of the transcript in its entirety, it is clear that the State prepped its witnesses prior to putting her on the stand. Unlike trial counsel, the State erred on the side of preparation as opposed to relying on a "run-and-gun" approach to preparing for witness examinations.

reliability of the government's main, and uncorroborated, witness" and "could reasonably have been taken to put the whole case in [ ] a different light." *Id.* at 226 (quotations omitted).

In this case, the jury had no reason to question Norma Jean's ability to accurately perceive events at the time of the alleged forcible rape or to accurately testify regarding such events at the sentencing hearing. Like the defense lawyers in the *Freeman* case, had trial counsel been provided this information, they could have further investigated the nature and extent of Norma Jean's mental condition prior to trial, discovering that she suffers from Borderline Personality Disorder, Bipolar Disorder, and Post-Traumatic Stress Disorder. Had the jury heard evidence of Norma Jean's disorders and the symptoms associated with them when untreated, there is a reasonable probability that the outcome of the proceedings would have been different. In conclusion, Mr. Hall incorporates herein by reference the prejudice analysis set forth for his *Strickland* claim involving the same evidence. *See infra,* Claim D.3.a.ii and D.4.[83] In addition, even if this evidence is not material under *Brady* taken in isolation, this evidence in conjunction with other favorable evidence noted in this claim and elsewhere in this petition, satisfies the *Brady* standard.

b. The State Failed To Disclose Favorable Evidence Of Norma Jean's Inconsistent Statements And Motive To Lie And Retaliate Against Mr. Hall

This claim mirrors Mr. Hall's *Strickland* claim, in which he demonstrated that Norma Jean had made inconsistent statements about the events surrounding the alleged

[83] The Supreme Court has adopted the prejudice test from *Strickland* for determining whether withheld exculpatory evidence is material. *United States v. Bagley,* 473 U.S. 667, 682 (1985).

forcible rape, and further, had a motive to lie and retaliate against Mr. Hall. *See supra,* Claim D.3.b, *supra.*

i. *The State Possessed Or Had Knowledge Copies Of Boise Police Department Reports Detailing Multiple Arrests Of Norma Jean Oliver Between November 1990 And December 1991*

The State was in possession of police reports indicating that Norma Jean was a chronic runaway and that she was going to be returned to her home in Fruitland, Idaho, where she would be prosecuted by Payette County authorities as a juvenile runaway. (Exhibits 59-62.) The State disclosed these reports following litigation of Mr. Hall's motion for discovery. **In addition, the State has filed an admission in a post-conviction discovery response admitting that they possessed or had knowledge of such reports but did not disclose them to trial counsel.** (Exhibit 82.) Even without this admission, it is clear that the State possessed or had knowledge this information through their agents, the police. *See Kyles v. Whitley,* 514 U.S. 419, 437 (1995) (holding that the prosecution is responsible for "any favorable evidence known to the others acting on the government's behalf in the case, including the police.") One of the withheld police reports indicated that Erick Hall reported Norma Jean for being a runaway, thus providing her a motive to retaliate against him. (Exhibit 61.)

ii. *The State Had Knowledge Of The 1992 Presentence Report From The Norma Jean Oliver Rape Case*

The State was in possession of the 1992 presentence report in the rape case. *See supra,* section 3.a.iv, incorporated herein by reference. The report is relevant to this claim because it indicates 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 and may never have been returned home or even prosecuted for being a runaway. (Exhibit 55.) In addition, this report indicates that Norma Jean initially joined Erick in his bed that night, in contradiction with her grand jury and trial testimony. (Exhibit 55.) Finally, the report indicates that Norma Jean told the investigator that at some point during the rape Erick seemed to snap out of it, regain his composure, and apologize for his actions. (Exhibit 55.) Norma Jean even told the investigator that she felt sorry for Erick because he did not seem to know what he was doing.

iii. *The State Possessed Or Had Knowledge Detective Daniel Hess's Tape-Recorded Interviews Of Norma Jean Oliver And Erick Hall*

The State was in possession of Detective Daniel Hess's tape-recorded interviews of Norma Jean Oliver and Erick Hall. (Exhibit 56A; Exhibit 56B.)[84] The tape recordings were disclosed by the State during post-conviction proceedings. It is not yet clear whether the recordings were in the prosecutor's file or located at the Garden City Police

[84] Mr. Hall is aware of the States' Response to Discovery, dated July 22, 2003, contained in trial counsel's files. (Exhibit 102.) (The State filed a response with the Court on July 23, 2003, (R., p.72), which does not reflect what was presumably disclosed to trial counsel.)

In that Response, the State purports to be disclosing copies of audio tapes of Detective Hess' interviews with Erick Hall and Norma Jean Oliver, regarding DR #91-2582. (Exhibit 102.) However, the "Discovery Log" attached to the Response does not reflect that the State disclosed those audios—the Discovery Log does not list the Hess audios. Furthermore, trial counsel files did not contain the Hess audios, even though they did contain other media that were referenced in the Discovery Log. For example, trial counsel's files contained a videotape of the body recovery, a CD of autopsy photographs, and a videotape of the interview of Erick Hall on March 29, 2003, all of which *were* itemized in the Discovery Log. Furthermore, even if the tapes had been disclosed, it is likely that they were of the same inaudible and unusable quality as the tapes initially "disclosed" to SAPD during the post-conviction investigation and discovery process. See note 84, *infra*. Mr. Hall asserts that the burden is on the State to prove they disclosed the audios. However, even if the State is able to do so, i.e., the audios were in fact disclosed, then it is further evidence of trial counsel's ineffectiveness.

Department, in either event, they were known to the State.[85] These recordings were withheld in violation of the prosecution's obligations under *Brady* and I.C.R. 16.

The tape recordings include information that is not included in Detective Hess's report, and which contradicts Detective Hess's testimony in two areas: 1) that he did not discuss the nature and extent of Norma Jean's problems at home during his interview with her; and 2) that Erick made inconsistent statements to him during the interview. *See*

[85] The State initially alleged that the tape recordings had either been destroyed or misplaced. (*See* Exhibit 82 (State's Response to the Discovery Order, dated 3/15/07, p.4.)) If Mr. Hall had relied on the State's response, then the recordings would never have been disclosed. Instead however, Mr. Hall moved to depose Detective Hess regarding the lost recordings. Prior to a hearing on Mr. Hall's motion, the tapes turned up. (*See* Exhibit 83 (State's Supplemental Response to the Discovery Order, dated 6/15/07, p.1.)) Had Mr. Hall relied on the copies disclosed by the State, then most of the contents would have been inaudible. Instead however, Mr. Hall listened to the State's copies and discovered that their copies were almost entirely audible. Whether this is an example of gamesmanship or not, is irrelevant. The fact is that the State has not taken its *Brady* obligations seriously either during the underlying criminal proceedings or during these post-conviction proceedings. For example, elsewhere in this petition, Mr. Hall submits the affidavit of Joi Reno. Ms. Reno states that Norma Jean was not acting like she had recently been raped, instead engaging in sexual activity with others at the Sands Motel. Ms. Reno also states that she witnessed Norma Jean using drugs in December 1991, including drinking alcohol at Mountain Billiards. Ms. Reno was contacted by an agent of the State sometime in 2006. The time of the State's post-conviction interview corresponds with Mr. Hall's post-conviction attempts to identify the names of individuals that were staying with Norma Jean at the Sands Motel. It seems clear that had Mr. Hall not conducted his own investigation, the State would never have disclosed the exculpatory evidence learned from their post-conviction interview of Ms. Reno. While it is not necessary to show bad faith by the State to demonstrate a *Brady* violation, there is evidence of it in this case. Yet another example of the State's laissez-faire approach to discovering *Brady* information is the State's minimal effort to obtain Norma Jean's juvenile records from Payette County. (Exhibit 82 (State's Response to the Discovery Order, 3/15/07, pp.3-4 ("An inquiry has been made of Payette County and the undersigned has been informed that no records were immediately available to the clerk of the court in Payette. The clerk advised the undersigned that if any records could be found, the clerk would call. No call was received.")) A simple follow-up call by the SAPD's investigator yielded much more information including an ROA that has been submitted for the Court's review and determination whether additional records should be disclosed. All of this must be considered when assessing the State's anticipated answer to this petition that they have complied with *Brady*.

supra, Claim D.3.e. The tape also indicates that Norma Jean stated that at some point during the rape Erick seemed to snap out of it, regain his composure, and then apologize for his actions. (Exhibit 56B; Exhibit 57B (Tr., p.15.) Finally, the taped interview indicates that contrary to her statements to Detective Hess and subsequent testimony, she may have presented herself as eighteen years old and may have been drinking the night of the purported forcible rape. (Exhibit 56B; Exhibit 57B (Tr., p.20 (informing Detective Hess during her taped interview that she had sexual intercourse on two prior occasions, one time she was drunk)).)

iv. *The State Possessed Or Had Knowledge A Copy Of The Transcript Of The Grand Jury Proceedings In The Case Of State v. Erick Hall, Ada County, Case No. 18591, Held December 19, 1991*

The State was in actual possession of a transcript of the grand jury proceedings in the case of State v. Erick Hall, Ada County, Case No. 18591, held December 19, 1991. *See supra,* section 1.i. In her grand jury testimony, Norma Jean stated that she received a ride back to the Sands Motel from a neighbor in the Garden City trailer park. Had the State disclosed the grand jury transcript, trial counsel would have known to investigate this story, including discussing it with Norma Jean during their eleventh hour interview. In a post-conviction interview, Norma Jean stated that rather than having the neighbor take her directly to the Sands Motel, she first returned to the trailer to get some clothes. (Exhibit 51; Exhibit 52 (Tr., p.25).)

v. *The State Possessed Or Had Knowledge Of Copies Of Boise Police Department Reports Listing Potential Witnesses To Norma Jean's Post-Rape Behaviors*

The State was in possession of a police report indicating that Norma Jean was arrested at the Sands Motel on December 2, 1991, and then again on December 3, 1991, both following the alleged forcible rape. (Exhibit 61; Exhibit 62.) One of the withheld police reports contains the names of other individuals at the Sands Motel, including Joi Reno. (Exhibit 62.) Had trial counsel known Ms. Reno's name, they should have interviewed her and would have learned that Ms. Reno witnessed Norma Jean engaging in sexual activity with others at the Sands Motel. Trial counsel would also have discovered that Ms. Reno witnessed Norma Jean using drugs in December 1991, including drinking alcohol at Mountain Billiards.

c. The State Failed To Disclose Favorable Evidence Of Norma Jean's Problems At Home

This claim mirrors Mr. Hall's *Strickland* claim, in which he demonstrated that Norma Jean had been abused over a number of years by her father, that such abuse was one of the reasons she ran away from home, and that the injuries from such abuse could have provided an alternate explanation for the injuries observed by Detective Hess and Dr. Vickman. *See supra,* Claim D.3.c.

i. *The State Possessed Or Had Knowledge Detective Daniel Hess's Tape-Recorded Interviews Of Norma Jean Oliver And Erick Hall*

The State was in possession of Detective Daniel Hess's tape-recorded interviews of Norma Jean Oliver and Erick Hall. *See infra,* section 3.iii. The taped interview of Norma Jean indicates that her father abused her at home. (Exhibit 56B; Exhibit 57B.)

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.35 (describing being thrown across the room by her father)).). This history is not reflected in Detective Hess's written report, and thus was not uncovered by trial counsel's nominal preparation. Had this information been presented to the jury, it would have appeared that the State was attempting to cover up the alternate explanation for Norma Jean's injuries and highlighted the lack of investigation of the rape case.

ii. *The State Possessed Or Had Knowledge Of A Copy Of The Transcript Of The Grand Jury Proceedings In The Case Of State v. Erick Hall, Ada County, Case No. 18591, Held December 19, 1991*

The State was in actual possession of a transcript of the grand jury proceedings in the case of State v. Erick Hall, Ada County, Case No. 18591, held December 19, 1991. *See supra,* section 3.iv. 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.8-9 ("[T]they didn't want me to go home, because they know my history.")

d. The State Failed to Disclose Favorable Evidence of Norma Jean's Prior Misconduct

This claim mirrors Mr. Hall's *Strickland* claim, in which he demonstrated that Norma Jean had previously given a false name and date of birth to law enforcement. *See supra,* Claim D.3.d.

i. *The State Possessed Or Had Knowledge A Copy Of A Boise Police Department Report Detailing Norma Jean's Prior Misconduct*

The State was in possession of a police report indicating that Norma Jean was arrested at the Sands Motel on December 2, 1991, and then again on December 3, 1991, both following the alleged forcible rape. (Exhibit 61; Exhibit 62.) *See supra,* section 3.b.i. One of the withheld police reports detailed 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.)

e. The State Failed to Disclose Favorable Evidence of Inaccuracies in Detective Hess's Report

This claim mirrors Mr. Hall's *Strickland* claim, in which he demonstrated that Norma Jean had previously given a false name and date of birth to law enforcement. *See supra,* Claim D.3.d.

i. *The State Possessed Or Had Knowledge Of Detective Daniel Hess's Tape-Recorded Interviews Of Norma Jean Oliver And Erick Hall*

The State was in possession of Detective Daniel Hess's tape-recorded interviews of Norma Jean Oliver and Erick Hall. *See infra,* section 3.b.iii. The taped interview of Norma Jean provides favorable information including: 1) inconsistencies between Detective Hess's testimony and his taped interview of Norma Jean; and 2) inconsistencies between Detective Hess's testimony and his taped interview of Erick Hall.

4. The Cumulative Prejudice Due To The Prosecutor's Failure To Disclose Favorable Evidence Of Norma Jean Oliver's Allegations Satisfies The Prejudice Prong Of *Brady*

Because this claim virtually mirrors the *Strickland* claim, Mr. Hall incorporates by reference the cumulative prejudice analysis from the *Strickland* claim. *See supra,* Claim D.4.

T. The State Violated *Brady:* April Sebastian, Michelle Deen, And Wendy Levy

1. The State Withheld Favorable Evidence Regarding April Sebastian[86]

April Sebastian testified against Mr. Hall at his sentencing on October 23, 2004. 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 v. April Sebastian, Ada County, case no. H0400228. (Tr., pp.4868-70; pp.4875-96.) (Exhibit 72.) Following her testimony, Ms. Sebastian appeared in court with Mr. Myshin on November 19, 2004, and on November 30, 2004, for her "rider" hearing. (Exhibit 72.) The district court presiding over the case granted her probation **based on a recommendation from the State**. (Exhibit 72.) Mr. Hall has reasonable grounds to believe that the State offered Ms. Sebastian benefits in her other cases based on her willingness to give testimony against Mr. Hall. For instance, based on a review of court documents, Ms. Sebastian was not a good candidate for probation, appearing to have failed on probation twice previously. (Exhibit 72.)

2. The State Withheld Favorable Evidence Regarding Michelle Deen

The State used Michelle Deen for two reasons: 1) to portray Erick Hall as a monster; and 2) to argue that Erick Hall was not using drugs in 2001. It is impossible to

[86] 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.

fully state this claim because the Court denied Mr. Hall's request for discovery. *See* Order Regarding Discovery, p.8, filed 2/16/07. Accordingly, the analysis of this claim is somewhat abbreviated. Nevertheless, Mr. Hall asserts that on the record before him the State committed Brady violations for withholding favorable evidence including: 1) evidence of an additional prior felony conviction; 2) evidence of attempts (at least in the past) by Ms. Deen to negotiate favorable treatment by turning State's evidence; and 3) evidence of Ms. Deen's compromised mental health.

a. The State Withheld Evidence Of A Prior Felony Conviction

Michelle Deen testified against Mr. Hall at his sentencing. (Tr., pp.4813-39.) It was elicited during her testimony that Ms. Deen had a prior felony conviction. Mr. Hall has discovered through his post-conviction investigation that Ms. Deen was convicted of at least one other felony. The State had an obligation to disclose Ms. Deen's full criminal record including both felony convictions stemming from the cases of State v. Michelle Deen, Ada County, case no. H0301398, and State v. Michelle Deen, Ada County, case no. H0200584. (Exhibit 70; Exhibit 71.) Both of these cases arise 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.

b. The State Withheld Evidence Of Michelle Deen's Past Attempts To Broker Deals With The Police To Avoid Prosecution

Michelle Deen has attempted in the past to seek favorable treatment from the State by implicating others in criminal activity. 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. Trial counsel could have used this note to further undermine Ms. Deen's credibility.

c. The State Withheld Evidence Of Michelle Deen's Compromised Mental Health As Reflected In By Court-Ordered Substance Abuse And Psychological Examinations

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. Trial counsel could have used this information to further undermine Ms. Deen's credibility.

3. The State Withheld Favorable Evidence Regarding Wendy Levy

The State interviewed Wendy Levy in the course of investigating its case. (Exhibit 2.) Ms. Levy provided evidence to the State that was exculpatory. Accordingly, the State found nothing helpful from Ms. Levy and chose not to call her as a witness. However, the State withheld the exculpatory evidence from Mr. Hall.

The evidence provided to the State included, but was not limited to, evidence regarding Erick Hall's positive, non-violent relationships with previous girlfriends. This evidence was exculpatory because it tended to mitigate against imposition of the death sentence **and** it undercut the State's argument that Mr. Hall has a propensity to murder based on a history of violent sex crimes against former girlfriends. The State had an affirmative obligation to disclose this evidence to the defense. None of that evidence was disclosed to trial counsel.

U. The State Violated *Brady* By Failing to Disclose Evidence Of An Alternate Perpetrator Of The Murder And Co-Perpetrator Of Rape

Mr. Hall raised two similar claims as ineffective assistance of counsel for failing to investigate the possible connection between Lynn Henneman's death and Patrick Hoffert's suicide. Mr. Hall incorporates fully be reference herein Claim B.3.c, *supra*; Claim U, infra; and Claim LL, *infra*).

One of the police reports that trial counsel failed to utilize in their investigation was disclosed by the State; however, according to trial counsel, that report was withheld until late in the proceedings, effectively precluding an adequate investigation. Moreover, the State failed to disclose lead sheets indicating that Peggy Hill and Lisa Lewis had told the police that Patrick Hoffert not only was seen with Lynn Henneman on the day she disappeared, but on the following day he claimed that he had "raped the girl" prior to committing suicide.

Trial counsel files only included 12 lead sheets. The police had over 500 lead sheets, and multiple follow-up reports and documents of many of the lead sheets. There were thousands of pages of information included with the lead sheets. It appears that the State did not disclose exculpatory lead sheets involving the Patrick Hoffert-Lynn

Henneman connection. Even if the trial team had full access to those lead sheets, the State was still obligated to disclose exculpatory *Brady* information. It is not enough to have an open file policy and leave small bits of *Brady* information buried amongst thousands of pages of materials for trial counsel to uncover. Thus, the State withheld material evidence corroborating both Lisa Lewis and Peggy Hill's statements regarding the connection between Patrick Hoffert's suicide and Lynn Henneman's rape and murder. (Exhibit 34; Exhibit 35.)

Evidence tending to identify someone else as the perpetrator is obviously exculpatory and material. *Grube v. Blades*, 2006 WL 297203 (D. Idaho 2006) (slip copy, memorandum order). In this case, 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 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.

The value of this evidence applies not only to the guilt phase, but also to the penalty phase. In this case, there were no eyewitnesses. Any doubt that the jury may have had whether Erick murdered Lynn Henneman is mitigating evidence at the penalty phase. The prejudice from this claim should be considered cumulatively with other sentencing phase prejudice.

V. The State Committed Misconduct By Dissuading Mitigation Witnesses From Testifying Or Predisposing Them To Disregard Mitigating Evidence[87]

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

- Jean McCracken, Erick's mother, stated that on September 27, 2004, a man working with the prosecution contacted her. He told her that the defense team was going to say at trial that Frank, Erick's father, and her had raised Erick to be a killer and that they were responsible for what Erick had become. The prosecution also asked her if she thought Erick's drug use excused his behavior. Jean did not testify at the sentencing. (Exhibit 6.)

- Tamara McCracken, Erick's older half-sister, was also contacted by the prosecution. She was asked whether she was a good Christian and believed that if someone did something wrong shouldn't they be held accountable for it. They asked if she had ever killed anyone. They suggested that since she had the same childhood but hadn't killed anyone that the defense team should not based a defense upon Erick's childhood. Tamara resented the insinuations and attempts to trivialize the trauma she and Erick had experienced while growing up. Tamara testified at the sentencing. (Exhibit 25.)

Based on these two incidents alone, Mr. Hall has reason to believe that the State committed other acts of misconduct. Mr. Hall asserts that the State's conduct violated his right to due process, right to present a defense at sentencing, and right to present mitigation under the Fifth, Sixth, Eighth, and Fourteenth Amendment to the United States' Constitution, and warrants reversal of his sentencing.

[87] Further development of this claim has been precluded by the court's denial of Petitioner's discovery requests. (*See* Order Regarding Discovery, p.15.)

W. The State Committed Numerous *Napue* Violations

The deliberate deception of a court and jurors by the presentation of evidence known to be false violates the Fourteenth Amendment. The same result obtains when the government, although not soliciting false evidence, allows it to go uncorrected when it appears. *Giglio v. United States*, 405 U.S. 150 (1972). In other words, the state cannot create a materially false impression regarding the facts of the case or the credibility of the witnesses. In *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), the Supreme Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213 (1942). In *Napue v. Illinois*, 360 U.S. 264 (1959), the Court stated that, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.*, at 269; *see also Giglio v. United States*, 405 U.S. 150, 153 (1972).

Prosecutor falsehoods alone do not automatically entitle a petitioner to relief. Relief is compelled when the false impressions are "material," which means when "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976); *Napue v. Illinois*, 360 U.S. 264 (1959); *Mooney v. Holohan*, 394 U.S. 103 (1935). The record must suggest a reasonable likelihood that during deliberations the jurors could have considered the false evidence or argument.

1. The Prosecutor Elicited Materially False Testimony From Dennis Dean Regarding Idaho Department of Corrections Inmate Classification System, Directives For Classification And Conditions Of Confinement

During the sentencing trial, the State created a materially false impression of how the Idaho Department of Corrections (IDOC) would determine Mr. Hall's custody status, and the conditions of confinement to which Mr. Hall would be subjected. At sentencing, the State called Dennis Dean, the Inmate Records Placement Manager with the IDOC. (Tr., p.4904, Ls.9-11.) Mr. Dean described the initial classification process for offenders, and explained that classification was a "risk assessment" done to determine how best to house an inmate. (Tr., p.4906, L.24 – p.4907, L.6.) The State elicited testimony that the IDOC system has three prison levels of "secured" facilities—maximum, medium, and minimum—and other non-secured facilities such as work centers. (Tr., p.4905, L.17 – p.4906, L.1.)[88]

The prosecutor deliberately and repeatedly elicited materially misleading information from Mr. Dean suggesting that Mr. Hall, if sentenced to life without the possibility of parole, could be housed at a minimum custody facility:

Q. Okay. So if a person were, say at the medium security facility and they were misbehaving, showing disrespect to staff or breaking things or doing a variety of other rule violations, they could get more points and go to maximum security?
A. Yes.
Q. Then, over time, if they behaved and did certain things, they could lose points and ultimately go to minimum custody?
A. Yes, those points – detention points would fall off after a year.

[88] This information alone is incorrect. According to IDOC, there are at least 5 levels of custody. (Exhibit 84.) (IDOC Offender Classification). Furthermore, Mr. Dean's claims or implications that classifications are based on purely "objective" criteria are false. (Tr., p. 4907, Ls. 9-10); (Exhibit 85.)

(Tr., p.4911, Ls.6-15) The prosecutor asked about conditions at minimum secured facilities, and elicited that inmates at those facilities can work on "fire fighting crews [] that work out of that facility," can work on "road crews," "have the opportunity to work outside," have access to "a therapeutic community," and can "attend classes." (Tr., p.4915, Ls.9-25) This examination was designed to deliberately mislead the jury into believing that Mr. Hall would be eligible for minimum security despite first degree murder, rape, and kidnapping convictions, using the assumption that the Mr. Hall would receive a life without parole sentence. (Tr., p.4949, L.22- p.4950, L.8.)

The State did finally elicit testimony on redirect examination that Mr. Hall would not be eligible for minimum custody under the current IDOC classification system. However, the State immediately pointed out that the classification system is not state law, but merely IDOC policy, and that "from time to time points and classifications have to change based on prison populations and crowding and various things like that." (Tr., p.4950, Ls.4-7.) It is improper to rely on speculative future housing policy changes to obtain a sentence of death. Overall, the State left the jurors with the overwhelming, and incorrect, impression that Mr. Hall could be eligible to live in a minimum secured facility at some point, which is not the case. The prejudice was especially acute because the State drew attention to the fact that Mr. Hall's escape in 1994 was from a minimum secured facility. (Tr., p.4920, Ls.18-25.)

The State also improperly and prejudicially implied that Mr. Hall would eventually be housed in "country-club-like" conditions. Mr. Dean testified that the medium secured facility was "like a little town," "something like a college campus," with a gymnasium, dining room, chapel, where inmates could go to work, play at the ball field,

earn wages, attend college classes, and live in a therapeutic environment. (Tr., p.4913, L.18 – p.4915, L.6.) According to the IDOC Directive 303.02.01.001, however, "medium custody" offenders "shall be held within the confines of a secure perimeter," movement "shall be structured and monitored," and inmates "shall normally be under continuous armed staff supervision and in restraints" whenever outside the facility. The IDOC medium security facility is surrounded by multiple layers of razor wire, attack dogs, and armed guards. The State's presentation of Mr. Hall's "conditions of confinement" if sentenced to life without parole is extremely misleading, irrelevant to the jury's sentencing determination, and highly prejudicial in that it encouraged the jury to make its sentencing determination based on improper, irrelevant, and incorrect information. There is a reasonable likelihood that the false and misleading testimony could have affected the judgment of the jury.

2. The Prosecutor Deliberately Created The Materially False Impression That Mr. Hall Seriously Choked Evelyn Dunaway While Engaging In Sexual Intercourse

The State argued at sentencing that Mr. Hall's history with girlfriends and other women established his propensity to commit murder. The State's questioning of Ms. Dunaway was materially misleading and unduly prejudicial. Specifically, the State's examination of Ms. Dunaway was designed to and did leave the impression that Mr. Hall seriously choked Ms. Dunaway while having sexual intercourse with her:

Q. Okay. Would that have been in March of 2002?
A. Possibly.
Q. All right. Was that the end of the relationship then?
A. It was.
Q. Okay. Was there another time before that when Erick choked you with his hands?
A. Yes.
Q. Where did that take place?

A. In our bedroom.
Q. At that same trailer?
A. Yes.
Q. Why was he mad at you that day?
A. I don't remember.
Q. Okay. How serious was the choking? Was it --
A. It was serious.
Q. Tell us what happened, that you remember?
A. There was a couple times -- I don't remember.
Q. Was it bad enough to scare you?
A. Yes.
Q. I mean did he come up from behind you, or sit on you, or how did it work?
A. He would sit on me.
Q. **I just need to ask you one other area**, Evelyn, that I don't care to ask you but I need to anyway. While you were living there with him in the trailer for those months did you have a sexual relationship with him?
A. We did.
Q. I just need to know kind of in terms of frequency. Was -- how often was there sexual intercourse between you?
A. Daily.
Q. Was it sometimes more than daily?
A. Yes.
Q. Was that of your -- of your instigation or his? Did he want sex --
A. Sometimes both but more him.

(Tr., p.4846, L.1 – p.4947, L.16 (emphasis added).) Given that Ms. Henneman was purportedly raped and choked to death, the connection the State wished the jury to infer is obvious: Mr. Hall has a propensity for choking women while having sex. 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.) However, Ms. Dunaway never testified that Mr. Hall choked her while having sex. Indeed, Ms. Dunaway has subsequently provided an affidavit stating that Mr. Hall never choked her while having sex. (Exhibit 40.) Thus, the State

deliberately asked questions in such a way that the jurors would naturally make the connection between sexual intercourse and choking, without regard for the truth. The State used Evelyn Dunaway to prove the propensity aggravator and to otherwise put non-statutory aggravating evidence before the jury. Accordingly, Mr. Hall's death sentence should be vacated.

3. The Prosecutor Deliberately Created The Materially False Impression That Mr. Hall Choked Michelle Deen While Engaging In Forcible Sexual Intercourse

In further support of its propensity theory and other non-statutory aggravating factors, the State called Mr. Hall's former girlfriend, Michelle Deen, to testify. As with Ms. Dunaway, the State's questioning of Ms. Deen was materially misleading and highly prejudicial. The State's examination of Ms. Deen was designed to and did leave the impression that Mr. Hall choked her while raping her:

> Q. Now, I hate to be indelicate and I -- but I told you I was going to have to be some and so I need to ask you about your sexual relationship with the defendant. Who decided when and where and how and such as that in terms of when you were going to have sexual relations?
> A. Erick did.
> Q. And how did he decide that, I mean, and how did he convey that to you?
> A. It just pretty much when he wanted it, it was right then and there.
> Q. Did it matter if you said no?
> A. It didn't matter.
> Q. If you did say no, what would happen?
> A. It would still happen. It would be pretty much take my clothes off and have sex.
> Q. Did he ever have to use force on you to get you –
> A. He's a very strong man. I couldn't fight Erick back if I wanted to.
> Q. Did there come a point when, you know, August when he put you in a headlock over something that had come up?
> A. He put me in a headlock, and I can't remember the situation why he put me in a headlock. He had me in a headlock on the couch and he told me that if I yelled or moved that all he had to do was to twist my neck and he could kill me. And he told me not to tell nobody about this, about our situation or he'd kill me.

Q. Okay. How hard did he squeeze?
A. It was very forceful. It hurt really bad. I couldn't move. I was too scared.
Q. Did -- (brief delay.) Did it interfere with your breathing?
A. I couldn't breathe that well after he did it. You know, during the time he did it it was hard for me to breathe and I didn't want to move or say anything, because I didn't want to die.
Q. Okay, now. When you -- after this all happened, did you decide to leave?
A. Yes, I did. Erick went to bed -- we went to bed one night, he got sound to sleep and I snuck out and left.

(Tr., p. 4820, L. 22 – p. 4822, L.16). The prosecutor thus "linked" instances of sexual intercourse with an incident not involving sex where Mr. Hall placed Ms. Deen in a head lock. Ms. Deen never testified that Mr. Hall choked her during sex, yet the State's questioning was designed to connect sex with force. Given that the victim, Lynn Henneman, was purportedly raped and choked prior to her death, the connection the State wished the jury to infer is obvious. There can be no doubt that the erroneous conclusion the prosecutor calculated jurors would draw was material, given the allegations about the manner of Ms. Henneman's death.

4. The Prosecutor Elicited Materially False Testimony From Norma Jean Oliver[89]

Mr. Hall incorporates fully by reference herein Claims D and S. 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.,

[89] Mr. Hall cannot fully state this claim as he is awaiting discovery of Norma Jean Oliver's medical and psychiatric records. Additionally, Mr. Hall's discovery request for prosecutor notes was denied.

p.4777, Ls.5-7 ("Okay. Have you taken some [medication] in the past but you don't take it now? A. Yes.").) However, 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." Norma Jean stated, during the post-conviction interview, that:

> Q. So you pretty much told me what you were -- what your diagnosis was and everything. And so are you on medication now? Did they give you medications since you're on SSI?
> A. Yeah.
> Q. What --
> A. I wasn't -- I wasn't on anything there for the longest time, like during the --
> Q. Trial?
> A. **Last hearing, I wasn't on any meds, because it's difficult to find good doctors, I guess.** And I've been on medication for the past three months, I think.

(Exhibit 51; Exhibit 52, Tr., p.36, Ls.13-25 (emphasis added).) Because the Norma Jean Oliver rape was central to the State's case in aggravation, her credibility and mental health were at issue. Furthermore, the jury gave great weight to Ms. Oliver's testimony, (*see* Exhibit 86 (including KTVB, Channel 7, juror interview). Thus, the State's questioning of Ms. Oliver was materially misleading and highly prejudicial.

5. <u>The State Elicited Materially Misleading Evidence Through Leading Questions To Detective Daniel Hess And Allowed False Or Materially Misleading Cross-Examination Testimony To Go Uncorrected</u>

Mr. Hall incorporates fully by reference herein Claims D.3.e and S. The State elicited materially misleading and prejudicial testimony from Detective Hess, allowed Hess' materially misleading and prejudicial testimony to go uncorrected, and incorporated such testimony into its closing arguments to the jury.

During cross-examination, Detective Hess testified that he did not know the nature of Norma Jean Oliver's troubles at home. (Tr., p.4806, Ls. 18-25 (Q. Did you know what the nature of that [family] trouble was? A. I have no idea.).) This was false testimony. Detective Hess's taped interview of Norma Jean revealed that Hess spoke at length with Norma Jean about her history of family trouble. Norma Jean told Hess that she had been physically abused by her father for years up to the point of her interview with Hess, and the abuse including having been thrown across the room. It was because of the abuse that Norma Jean so often ran away from home. (Exhibit 56B; Exhibit 57B (Tr., p.34).)

On direct examination, Detective Hess suggested that Erick made inconsistent statements to him. First, Hess testified that Erick initially stated that he believed Norma Jean was eighteen years old, but then later admitted that he knew she was a juvenile runaway, as though Erick were "changing his story." (Tr., p.4797, Ls.14-22; p.4799, Ls.4-8. (testifying that Erick first said he thought Norma Jean was 18, but later said he knew she was a runaway).) 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. (Exhibit 56A; Exhibit 57A (Tr., p.22).)

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.

Second, Detective Hess testified that Erick changed his statement regarding how he received scratches on his face. (Tr., p.4799, L.9 – p.4800, L.1 (testifying that Erick first stated that a cat scratched him, but then said that Norma Jean clawed him).) The State again 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. (Exhibit 56A; Exhibit 57A (Tr., p.8).) Thus, Erick was consistent in his statements.

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

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

X. The State Committed Misconduct By Indirectly Commenting On Mr. Hall's Invocation Of His Right To Remain Silent During Cross-Examination Of Dr. Mark Cunningham And In Closing Arguments

In *Doyle v. Ohio*, 426 U.S. 610 (1976), the Supreme Court held that a prosecutor violates due process when he uses a defendant's post-arrest, post-*Miranda* silence against him either in examining witnesses or argument to the jury.

> Q. Okay. I believe that you didn't ask the defendant anything about the murder of Lynn Henneman when you spoke to him.
> A. No, sir.
> Q. So you didn't hear any of the details about the murder from his lips.
> A. That's correct.

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

Further, the State impermissibly argued during closing argument that Mr. Hall's silence at trial demonstrated an apparent lack of remorse that should be considered as a non-statutory aggravating factor for the jury's consideration when weighing the mitigation against the aggravation:

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

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

Mr. Hall had the right to remain silent under the Fifth and Fourteenth Amendments. No negative inference from Mr. Hall's failure to testify is permitted. *Mitchell v. United States*, 526 U.S. 314, 329 (1999). This rule applies at sentencing as well as the guilt phase. *Id.* Thus, just as a jury cannot infer guilt from a failure to testify, it cannot infer lack of remorse as a non-statutory aggravating factor from a failure to testify at sentencing.

Y. The Admission Of Testimonial And Other Hearsay Statements Which Violated Mr. Hall's Sixth Amendment And Due Process Rights

Admission of testimonial statements without both unavailability and prior opportunity to cross-examine the hearsay declarant violates the Confrontation Clause of the Sixth Amendment. *Crawford v. Washington*, 541 U.S. 36, 59 (2004). Among statements considered testimonial are those statements obtained with the "involvement of government officers in the production of testimony with an eye toward trial." *Id.* at 56 n.7. Mr. Hall's Sixth Amendment right to confront witnesses against him was violated when the State presented hearsay through Dennis Deen and Detective Daniel Hess.

1. Hearsay Introduced Through Detective Daniel Hess

Mr. Hall's Sixth Amendment right to confront witnesses against him was violated when the State elicited testimonial hearsay statements attributed to Norma Jean through the testimony of Detective Hess, without a showing that Norma Jean was unavailable, and without prior opportunity for Mr. Hall to have cross-examined Norma Jean about such statements. Without objection, the State elicited the following testimony:

> Q. All right. And when you were speaking with Norma Jean, did she tell you whether or not the defendant had tied her up with her clothing during this rape?
> A. Yes, she told me that.
> Q. What did she tell you about that?

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

(Tr., p.4810, L.12 – p.4811, L.15). Norma Jean's statements were inadmissible through Detective Hess, and their admission violated *Crawford* and the Confrontation Clause of the Sixth Amendment.

Admission of the statements was prejudicial. The State had previously unsuccessfully sought to obtain the same testimony from Norma Jean; their failure to obtain the testimony in a constitutionally permissible fashion did not permit them to violate Mr. Hall's Sixth Amendment rights by eliciting her testimonial statements through Detective Hess. (*See e.g.,* Tr., p.4766, Ls.4-9 ("Q. Okay. Did you have something in your mouth? A. I can't remember. Q. Okay. Did you at one time have to spit something out of your mouth? A. I don't know. I'm sorry.").) Accordingly, Detective Hess's statements were necessary to the State's case, and therefore prejudicial to Mr. Hall. The statements linked "facts" regarding the Norma Jean Oliver rape to fact alleged by the state regarding the Lynn Henneman rape-murder; namely, gagging and tying the victim with her clothing, and the victim's fear of being killed.

Mr. Hall's Sixth Amendment rights were also violated when Detective Hess testified about results of the rape kit conducted on Norma Jean. (Tr., p.4804, L.10 – p.4806, L.8.) Over trial counsel's objection, Detective Hess testified that a criminalist with the Department of Law Enforcement Forensic Lab, Pamela Marcum, told him she found sperm on the swabs taken from Ms. Oliver. This clearly violated *Crawford* and should have been excluded. Moreover, the admission of this testimony prejudiced Mr. Hall, because it implied that Norma Jean Oliver's story was correct when, in fact, the sperm could have come from a consensual sexual encounter with either Mr. Hall or any other sexual partner.

2. Hearsay Introduced Through Detective Dennis Dean

Without objection, the State introduced a "pen packet," through Dennis Dean, the Inmate Records Placement Manager for the Idaho Department of Corrections. (Tr., p.4939, L.20 – p.4940, L4; R., p.699 (State's Exhibit 150).) The packet was prepared by the Idaho Department of Correction and contains various legal documents including three judgments of conviction, one for escape, one for statutory rape, and one for grand theft.

While judgments of conviction are generally admissible, the documents in this case included statements that were not admissible because they were testimonial, irrelevant, and their probative value, if any, was substantially outweighed by the danger of unfair prejudice. *See Crawford*, *supra*, I.R.E. 401 – 403. The documents included statements attributed to the district courts that Erick Hall stated that there was no legal cause why the judgments should not be entered against him. In addition, the documents suggest that Erick Hall had no mitigating evidence to present for those crimes. Finally, the statutory rape judgment of conviction states that Amil Myshin represented Erick on

that charge. This suggests to the jury that Amil Myshin would have been in the best position to defend Norma Jean's allegations at the capital sentencing hearing if possible, and also suggested that Jay Rosenthal's testimony should not be questioned on the matter of the reason for the plea bargain. Thus, the statements beyond the judgments of convictions themselves were inadmissible, and their introduction prejudiced Erick Hall.

Z. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Object To The Admission Of Testimonial And Other Hearsay Statements Which Violated Mr. Hall's Sixth Amendment And Due Process Rights

Mr. Hall incorporates by reference Claim Y, *supra*.[90] Trial counsel's failure to object to the testimonial and other hearsay statements constituted deficient performance and resulted in prejudice as discussed above. In addition, Mr. Hall notes *Crawford v. Washington* was issued in March 2004. Mr. Hall's trial was not held until October 2004. Trial counsel should have been familiar with this landmark opinion in Sixth Amendment jurisprudence.

AA. Lethal Injection

Idaho prescribes execution by lethal injection.[91] I.C. § 19-2716 ("...punishment of death shall be inflicted by continuous, intravenous administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent....") Executing Mr. Hall by lethal injection is unconstitutional, however. *See, e.g., Harbison v.*

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[90] Mr. Hall acknowledges that trial counsel objected to Detective Hess' testimony regarding the results of the sex crimes kit swabs on confrontation grounds, and claims ineffective assistance of counsel only to the extent trial counsel did not cite to the Sixth Amendment to the United States Constitution or the *Crawford* opinion.

[91] Post-conviction counsel is unaware of any IDOC policy regarding the exact protocol for execution by lethal injection. However, it is becoming readily apparent that lethal injection is not the painless, "humane" manner of execution it was once portrayed, and can cause excruciating pain, albeit sometimes masked by a paralytic agent.

Little, __ F.Supp.2d __, 2007 WL 2821230 (M.D.Tenn. 2007) (holding Tennessee's new lethal injection procedures are cruel and unusual, because they present "a substantial risk of unnecessary pain" violate death row inmate Edward Jerome Harbison's constitutional protections under the Eighth Amendment, and noting that the protocols do not adequately ensure that inmates are properly anesthetized during lethal injections, a problem that could "result in a terrifying, excruciating death"); Baze v. Rees, __ S.Ct. __, 2007 WL 2075334 (mem.) (granting petition for writ of certiorari to review question of whether Kentucky's lethal injection execution method violates the Eighth Amendment).

BB. Mr. Hall's Fifth, Sixth, Eighth, And Fourteenth Amendment Rights Were Violated When He Was Improperly Shackled During The Course Of His Trial

1. Introduction

Mr. Hall wore a "leg brace" during all court appearances. (Tr., p.592.) According to the State, the brace was worn under clothing, but would lock whenever Mr. Hall stood and his leg would remain stiff, unless he pressed a button to the side of the brace that released it. (Tr., p.592, Ls.7-15.) Mr. Hall would have to push the button as he walked. (Tr., p. 593, Ls. 4-6.) This was a new device that the Court had never previously employed. (Tr., p. 592, Ls. 23-24.) The Court made no findings whether the device was detectable and no findings whether the device was necessary. Mr. Hall asserts that the jurors were able to discern that he was wearing this device and thus knew he was shackled. (*See* Affidavit of Erick Virgil Hall.)[92]

[92] Mr. Hall's affidavit will be submitted under separate cover.

2. Applicable Legal Standard

The Fifth and Fourteenth Amendments prohibit using physical restraints visible to the jury absent a trial court determination that restraints are justified by a state interest specific to the particular defendant on trial. *Deck v. Missouri*, 544 U.S. 622, __, 125 S.Ct. 2007, 2009 (2005) (citing *Holbrook v. Flynn*, 475 U.S. 560 (1986)). This basic rule embodies notions of fundamental fairness. *Deck*, 125 S.Ct. at 2011; *see also*, *Estelle v. Williams*, 425 U.S. 501, 503, 505 (1976) (making a defendant appear in prison garb poses such a threat to the "fairness of the factfinding process" that it must be justified by an "essential state policy"). Visible shackling undermines the presumption of innocence, the related fairness of the factfinding process, the right to counsel and right to secure a meaningful defense, and the maintenance of a dignified juridical process that includes respectful treatment of the defendant. *Deck*, 125 S.Ct. at 2013 (citing *Coffin v. United States*, 156 U.S. 432, 453 (1895)) (presumption of innocence "lies at the foundation of the administration of our criminal law"); *Holbrook*, 475 U.S. at 569 (restraint suggests that the justice system itself sees "a need to separate a defendant from the community at large"); *Gideon v. Wainwright*, 372 U.S. 335, 340-341 (1963) (holding the Sixth Amendment guarantees the right to counsel in order to secure a meaningful defense); *Illinois v. Allen*, 397 U.S. 337, 344 (1970) (shackling affronts the "dignity and decorum of judicial proceedings"). The prohibition against shackling applies with equal force during the penalty phase of a capital trial. *Deck*, 125 S.Ct. at 2010-2014. Given the severity and finality of a death sentence, jury accuracy in making the decision between life and death is no less critical than the decision between guilt and innocence. *Deck*, 125 S.Ct. at 2014.

Absent adequate justification and findings regarding the specific circumstances of the case, visible shackling is inherently prejudicial. *Deck*, 125 S.Ct. at 2014-2016 (citing *Holbrook*, 475 U.S. at 568.) The effects cannot be shown from a trial transcript. *Deck*, 125 S.Ct. at 2015. Thus, the defendant need not demonstrate actual prejudice to make out a due process violation. *Id.* Rather, the State must prove beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained. *Id.*, (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

3. Analysis

The jurors were able to discern that Mr. Hall was shackled during the guilt phase and penalty phase of his trial. First, the leg device made clicking noises which the jurors would have been able to hear each time he stood up before the court. Second, in order to return to a seated position, Mr. Hall had to press a button on the device, which also would have been noticeable by the jurors. The jury was therefore aware that court authorities considered him a danger to the community, inevitably affecting their perception of Mr. Hall. *Deck*, 125 S.Ct. at 2014 (reasoning that shackling almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community, and shackling almost inevitably affects adversely the jury's perception of the character of the defendant). Mr. Hall relies on his affidavit, to be submitted, to establish this matter, as the district court's refusal to allow post-conviction counsel to interview jurors precludes Mr. Hall from otherwise fully developing this claim. (*See* Tr., 12/8/06, deposition of D.C. Carr, p. 309 (explaining he would have missed any noises made by the leg device because he has "high frequency loss" of hearing).)

Here, because propensity was an aggravating factor, the use of shackles was especially prejudicial at the sentencing phase of the trial. The State specifically argued in closing that Mr. Hall was dangerous:

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

(Tr., p.5508, L.19 – p.5509, L.4.)

Even aside from the statutory aggravating factor, the dangerousness of the defendant is nearly always a relevant factor in jury decision making even where the State does not specifically argue the point, and thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations--considerations that are often unquantifiable and elusive--when it determines whether a defendant deserves death. *Deck*, 125 S.Ct. at 2014. By forcing Mr. Hall to appear before the jury in shackles that were discernable, there was a "thumb [on] death's side of the scale." *Id.*, quoting *Sochor v. Florida*, 504 U.S. 527, 532 (1992).

4. Conclusion

Absent written findings to the contrary, and because the leg restraint made Mr. Hall's custody status and physical restraint apparent to the jurors, the use of the restraining device, absent a determination that they were "justified by a state interest specific to [that] particular trial," violated "a basic element of the 'due process of law' protected by" the Fifth and Fourteenth Amendments, and violated the presumption of

innocence. *Deck*, 125 S.Ct. at 2012.[93] Moreover, the shackling device impermissibly affected the jury's determination of aggravating factors and the weighing of those factors, in violation of the Eighth Amendment, as well as Mr. Hall's Sixth Amendment right to present a meaningful defense.

CC. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Suppress Evidence Of Mr. Hall's Third Interrogation

The applicable standard for ineffective assistance of counsel claims is set forth in Claim A.2, *supra*. In this case, trial counsel was ineffective in failing to move to suppress the April 1, 2003, interrogation (herein "third interrogation") of Erick Hall because Erick had already been formally charged and his Sixth Amendment right to counsel had attached by the time the interrogation commenced. The introduction of the third interrogation was highly prejudicial.

The Sixth Amendment right to counsel attaches the moment formal judicial proceedings are initiated. *Massiah v. United States*, 377 U.S. 201 (1964). The right is triggered when judicial proceedings are initiated against the accused, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Brewer v. Williams*, 430 U.S. 387, 398 (1977). Once the right attaches, the state, including the police and their agents, may not interfere with the accused's right to counsel. *Illinois v. Perkins*, 496 U.S. 292, 299 (1990).

The formal complaint was filed against Erick Hall in the Henneman case at 3:50 p.m. on April 1, 2003. (Exhibit 87.) The third interrogation of Erick by Detectives Allen

[93] The Court cannot now make the requisite factual findings based on its extra-record recollection without making itself a witness in the instant post-conviction proceedings. *See Dyas*, 317 F.3d 934, 936-937 (state court determination that jury could not have seen the shackles was unreasonable in absence of any inquiry to establish facts concerning what jury could see).

and Mace did not take place until 5:00 p.m. on April 1, 2003. (Tr., p.4177, L.23 – p.4178, L.21). Thus, the interrogation violated Mr. Hall's Sixth Amendment right to counsel, and trial counsel was ineffective under the *Strickland* standard in failing to move to suppress statements obtained from Mr. Hall in this interrogation.

Videotape of most of the third interrogation was played to the jury. (Tr., p.4178, p.4180-4182.) The interrogation was captured on a set of three videotapes, which were all played, with some short redactions. (Tr., pp.4197–4208; R., p.699, (State's Exhibits 132-134).) The interrogation included highly damaging statements from Mr. Hall, which prejudiced both the guilt and sentencing phases of the trial. For example, Erick was questioned about what might have triggered his anger the night of the Henneman murder:

> Mace: What – what made that anger boil over that night? And why – why did you take it out on her? I mean, why – why did it all get channeled right there?
>
> Hall: I don't know. I guess what they say, opportunity knocks, you answer it. I don't know. Wrong place at the right time.

(R., p.695, (Suppression Hearing Exhibit 4, p.53 (transcript of April 1, 2003, interrogation)).) Erick's statement that "opportunity knocks" was highly damaging and was incorporated into the State's closing argument at the guilt phase of trial to establish that Erick had murdered Lynn Henneman, despite the fact that there was a possible alternate perpetrator, *see* Claim B.3.c, *supra*, and Claim LL, *infra*, and despite the fact that Erick did not recall killing her:

> The defendant made a statement that I think we need to focus on. Mace says, "What made that anger boil over that night? And why did you take it out on her? I mean why, why did it all get channeled right there?" And you can see the defendant's words before you. He says, "I don't know. I guess what they say, opportunity knocks, you know, answer, I don't know. Wrong place at the right time."

(Tr., p.4625, L.25 – p.4626, L.8.) The State also used the same statement in their closing arguments at the sentencing phase in order to establish the propensity statutory aggravating circumstance:

> The fourth and final aggravator, the one we told you we would offer proof on. Propensity to commit – that "The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.
> * * *
> The Defense told you that opportunity knocks. And you know that he said well, wrong place, right time. The opportunity that knocked for the defendant, in addition to having a woman to rape, this is something -- somebody to steal from. Walter told you about the ring, the beautiful sapphire ring he gave her. Dr. Groben told you that it was gone. It wasn't on the body when they found her. Do you know that the only thing, other than what he hit her with, what he took from – the defendant took from the scene was the wallet and the contents and he sure didn't leave the money. The wrong place at the right time.

(Tr., p.5454, L.20 – p.5455, L.1, p.5458, L.22 – p.5459, L.9); (Exhibit 45.)

During the third interrogation, Detective Mace persuaded Erick to write a letter to the family of Lynn Henneman. (R., p.695 (Suppression Hearing Exhibit 4, pp.91-92 (transcript of April 1, 2003 interrogation)).) The letter was introduced at Erick's trial. (Tr., p.4211, Ls.1-11; (R., p.699 (State's Exhibit 136).) The letter also was used by the State to establish that Erick killed Lynn Henneman:

> The defendant made a written statement, you got a chance to watch this, and, of course, we tried to move this thing along for you, but it went pretty fast because we fast forwarded it during the time that he was writing that written statement out. But this is what he wrote during that time. You've got the exhibit if you want to look at it again. But the most important thing I think he said in there is "You probably hate me for taking from you something so dear and closely cherished, the life is something that no person has the right to take, no one but the one who owns it." Signed Erick Hall.
>
> Would you write a letter like that to the parents of a murdered woman if you didn't kill her?

(Tr., p.4625, Ls.6-19.) Thus, because trial counsel failed to move suppress the interrogation and its fruits on the basis that Erick's right to counsel under the Sixth Amendment had already attached, the State was again able to argue that Erick was Lynn Henneman's killer -- even though, as discussed above, other evidence points to the fact that another person could have been an alternate or co-perpetrator of the murder.

In sum, trial counsel should have moved to suppress the introduction of the third interrogation of Erick Hall on the grounds that his Sixth Amendment right to counsel had attached prior to the interrogation. Had they done so, the jury would not have been exposed to Erick's damaging statements and the letter to the Henneman family. Because the evidence was highly inculpatory, there is a reasonable probability that the outcome of both the guilt and the sentencing phases of the trial would have been different.

DD. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Move For Change Of Venue, Or, In The Alternative, Failing To Move To Have A Jury From Another County Impaneled

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

The Supreme Court has long held that where a criminal case receives excessive publicity, the defendant's rights to an unbiased jury and, consequently, a fair trial, may be violated if the trial court does not take prophylactic measures, such as changing venue to a place less saturated by publicity, to insulate the jury's decision-making process from the

outside influences of the publicity. *See, e.g., Marshall v. United States*, 360 U.S. 310 (1959) (remanding case for a new trial where seven jurors had been exposed to news accounts containing information which was not presented at trial); *Irvin v. Dowd*, 366 U.S. 717 (1961) (vacating the conviction of a prisoner sentenced to death based on the saturation of the jury pool with pretrial publicity and the fact that eight out of twelve jurors came into the trial with a preconceived opinion that the defendant was guilty); *Rideau v. Louisiana*, 373 U.S. 723 (1963) (holding that the trial court had erred in denying the defendant's motion for a change of venue where the media, prior to trial, had broadcast a taped confession of the defendant).

Notwithstanding the fact that the United States Supreme Court has held that a defendant's right to a fair trial can be violated without a particularized showing of prejudice, *see Rideau*, 373 U.S. 723, Idaho's appellate courts have sometimes held that the defendant must affirmatively demonstrate prejudice, *i.e.*, that his own jury was biased.[94] *See, e.g., State v. Yager*, 139 Idaho 680, 687-88, 85 P.3d 656, 663-64 (2004); *State v. Fee*, 124 Idaho 170, 175, 857 P.2d 649, 654 (Ct. App. 1993); *State v. Fetterly*, 109 Idaho 766, 769 & n.1, 710 P.2d 1202, 1205 & n.1 (1985). However, they do not always do so. In *State v. Hall*, 111 Idaho 827, 727 P.2d 1255 (Ct. App. 1986), the Court of Appeals noted that:

> a defendant's inability to make a detailed and conclusive showing of prejudice is not a proper ground for refusing to change venue. Prejudice seldom can be established or disproved with certainty. Rather, it is sufficient for the accused to show "a *reasonable likelihood* that prejudicial

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[94] Even if this view were correct, Mr. Hall has been precluded from conducting juror interviews, and therefore could not establish the prejudice sometimes erroneously required by the Idaho appellate courts.

> news [coverage] prior to trial will prevent a fair trial." *Sheppard v. Maxwell*, 384 U.S. 333, 363 ....

Hall, 111 Idaho at 829, 727 P.2d at 1257, (emphasis and alteration in original). *See also State v. Sheahan*, 139 Idaho 267, 278, 77 P.3d 956, 967 (2003) (adopting the "reasonable likelihood" standard set forth in *Hall*). Regardless of whether a showing of prejudice is a strict requirement though, the Idaho appellate courts have said that there are certain basic factors that should be considered in evaluating the question of whether pretrial publicity had necessitated a change of venue below: (1) the nature and content of the pre-trial publicity; (2) the amount of time elapsed between the pretrial publicity and the trial (and sentencing); (3) whether there is evidence, *e.g.*, affidavits, indicating prejudice, or a lack thereof, in the community where the defendant is to be tried; (4) *voir dire* testimony by actual jurors indicating whether or not they had pre-formed opinions as to the defendant's guilt or innocence; and (5) whether the defendant moved to strike any of the jurors for cause. *Hall*, 111 Idaho at 830, 727 P.2d at 1258.

In the present case, the nature and volume of pretrial publicity that the case received should have caused trial counsel to move for a change of venue. Trial counsel should have aggressively investigated the above factors, and presented the results of the investigation to the Court in support of the motion.

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

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

The first flurry of news coverage resulted from Lynn Henneman's disappearance. That news coverage, stretching from September 26, 2000, through November 10, 2000, which included near-daily stories in *The Idaho Statesman*,[95] as well as extensive television news coverage,[96] is detailed, in part, below:[97]

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

- September 28, 2000. The *Statesman*'s front-page banner headline was that some of Ms. Henneman's personal effects had been found. Patrick Orr, *Boy*

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

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

[96] In response to Mr. Hall's requests for information, only one of four local network affiliates voluntarily provided materials related to its coverage of Ms. Henneman's disappearance and death, Ms. Hanlon's death, and Mr. Hall. Copies of the transcripts of the coverage is submitted as Exhibit 86. The other three network affiliates refused to cooperate.

[97] All of the articles from the Statesman are marked as Exhibit 88 and are provided herewith.

finds missing woman's purse, IDAHO STATESMAN, Sept. 28, 2000, at 1A, 12A. That article indicated that after the effects had been discovered, police engaged in a throrough search of the immediate vicinity—in full view of the public. *Id.* at 12A. In discussing Ms. Henneman's disappearance generally, the article also indicated that "[t]he news media has really hit the airwaves hard with her picture ...." *Id.* at 12A (quoting the spokeswoman for the Garden City Detective Unit). It also indicated that the publicity was apparently working as detectives had already received fifty different tips. *Id.* It also included a picture of Ms. Henneman. *Id.*

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

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

- October 1, 2000. For the fourth day in a row, the *Statesman* reported on Ms. Henneman's disappearance, but only to say that no new leads had developed.

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

- October 8, 2000. The banner headline on the cover of the *Statesman* indicated that Lynn Henneman's body had apparently been found. Jeff McKinni &

Patrick Orr, *Body Found in Boise River*, IDAHO STATESMAN, Oct. 8, 2000, at 1A, 9A. This article included a timeline and an annotated map of the Greenbelt and downtown Boise, showing, among other things, where Ms. Henneman had last been seen and where her body was recovered; two photos of officers, apparently at the scene of the body recovery; and yet another photo of Ms. Henneman. *Id.* at 1A, 9A.

- October 9, 2000. The day after reporting her body apparently found by a fisherman, the *Statesman* reported, in another front-page banner headline, that Ms. Henneman's body had been positively identified. Patrick Orr, *Coroner confirms body's identity*, IDAHO STATESMAN, Oct. 9, 2000, at 1A, 9A. That article quoted the Ada County Coroner, Erwin Sonnenberg, as asserting unequivocally: "It was definitely a homicide." The article also discussed the high-profile "massive search," which had included boats, divers, search-and-rescue dogs, and helicopters, that had failed to uncover Ms. Henneman's body. *Id.* Finally, the article included yet another picture of Ms. Henneman. *Id.* at 1A.

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

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

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

their support, but were also "fearful for the citizens of Boise, because there is a killer on the loose." *Id.* at 1B, 6B (quoting a Boise lawyer who had been in contact with the family).

- October 12, 2000. In its fifth Henneman-related front-page banner-headlined article in a row, and again including a picture of Ms. Henneman, the *Statesman* reported that, although the Ada County Coroner would not publicly reveal his opinion as to the cause of Ms. Hennman's death, he had "ruled out stabbing, shooting, and blunt head trauma," and another newspaper had reported that she was "probably strangled" to death. Patrick Orr, *N.Y. newspaper: Henneman was 'probably strangled,'* IDAHO STATESMAN, Oct. 12, 200, at 1A, 6A. In addition, the article noted that the reward for information about Ms. Henneman's death had been increased to $30,000 with the anonymous $10,000 contribution of a local businessman. *Id.* at 6A.

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

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

- October 20, 2000. [Officer tells women to trust instincts, stay safe][98]

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

[98] In some instances, Mr. Hall has provided the Court with only a date and an article title. In such instances, Mr. Hall knows that an article was published, but he has not been able to obtain a copy of that article.

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

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

- October 27, 2000. In a banner headline on the front page of its "Local" section, the Statesman reported a new lead in the Henneman case. Emily Simnitt, *Task force investigates Henneman lead*, IDAHO STATESMAN, Oct. 27, 2000, at 1B. That article indicated that Ms. Henneman was seen talking to someone on the Greenbelt shortly before she disappeared, but it also reported that the police still refused to disclose the cause of her death, and whether she had been sexually assaulted, for tactical reasons: "'Hypothetically, let's say she was sexually assaulted,' Boise Det. Dave Smith said. 'If we put that out, the killer knows we know and might leave the area.'" *Id.* It also included Ms. Henneman's picture again, as well as another plea from help from the community, promising a $42,500 reward for information leading to an arrest and conviction. *Id.*

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

This summary of the early news coverage of the Henneman case makes a number of things clear: (1) not only was the media spreading information about the Henneman case through traditional channels, but police, Ms. Henneman's family, and concerned members of the community were actively reaching out to everyone in the community

through pleas for information and missing person posters; (2) the net result of these combined efforts was that Ms. Henneman's death was thrust to the forefront of Boise's consciousness virtually every day for over a month; (3) Ms. Henneman's disappearance and death were deeply emotional, not only for her family, whose personal suffering was shared with the entire community, but also for the community as whole, many of whom were able to empathize with the family's personal loss; (4) Ms. Henneman's disappearance and death, which had come relatively soon after two prior rape/murders on the Greenbelt, was a terrifying event not only for those Ada county residents who regularly used the Greenbelt, but for all members of the local community who perceived the Greenbelt to be a symbol of everything that is great about the Treasure Valley; and (5) the police were completely in control of the information that was disseminated to the public through the various media outlets, such that where police suspicions were presented, they were given as fact, and where the police suspicions were in doubt, they were presented as being withheld for tactical reasons. In the aggregate, this coverage virtually guaranteed that all of Ada County's residents would have strong feelings about whoever might eventually be charged with harming Ms. Henneman. They felt deep and pain and fear, and they had been led to believe that everything the police said was fact.

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

- April 4, 2001. [City to light Greenbelt tunnels]

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

These articles demonstrate that, although months had passed since the discovery of Ms. Henneman's body, the residents of Ada County had not forgotten: they had a deep sense of hurt over Ms. Henneman and her family's suffering; and they had a new-found fear that their beloved Greenbelt was no longer a safe place to recreate.

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

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

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

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

- March 5, 2003. On the first page of its "Local" section, the *Statesman* reported that Ms. Hanlon had leisurely strolled into the foothills alone, had stopped at some point, had struggled with her assailant, and then had been dragged downhill to the place where her body was ultimately found. Chereen Langrill, *Police: Murder victim walked into foothills*, IDAHO STATESMAN, Mar. 5, 2003, at 1, 3. That version of events, apparently derived from police measurements of footprints at the scene, was presented by the police (through the *Statesman*) as fact. *See id.* at 1. The article also provided another picture of Ms. Hanlon, another composite sketch and physical description of the man she was supposedly seen with, and another plea for information from the community. *Id.* at 1, 3.

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

> "The city of Boise can breathe a sigh of relief that Eric Hall is off the streets," Boise Police Chief Don Pierce said Friday morning.

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

Id. at 1, 11. The article then went on to detail what it called Mr. Hall's "extensive" criminal history, highlighting his conviction for statutory rape after having been accused of sexually assaulting and choking a 17-year old girl, and his subsequent charge of failure to register as a sex offender. *Id.* at 11. It also indicated that Mr. Hall had been implicated based on tips from the public: "'This is a very good example of how we rely on our community to help us,' Pierce said, praising the more than 100 people who came forward with tips on the case." *Id.* at 11. Finally, the article included yet another picture of Ms. Hanlon, as well as a photograph of Boise Police Chief Don Pierce. *Id.* at 1, 11.

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

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

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

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

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

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

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

Id. at 1, 6. After all of that, however, "Pierce declined further comment, saying he wants to ensure Hall gets a fair trial." *Id.* at 6. Detective Smith, however, picked up right where Chief Pierce had left off. According to the *Statesman*, Detective Smith claimed that the "details at the Hanlon crime scene ... immediately brought to mind the Henneman case.... 'Right at the (scene), we had strong feelings there might be a match here,' Smith said."[99] *Id.* at 6 (alteration in original).

The *Statesman*'s lead article on April 3, 2003 also tugged at the public' heartstrings. It was topped by a large picture of Ms. Henneman's relatives, at taken at the previous day's City Hall news conference announcing that Mr. Hall had been charged, showing them overcome with emotion. *Id.* at 1.

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

Later, it had a large photo of Ms. Henneman's husband and sister hugging at the conclusion of the press conference. *Id.* at 6. The article said that during the news conference, Ms. Henneman's parents and sister stood behind Chief Pierce, "at times holding each other for support," while Ms. Henneman's husband stood quietly to the side. *Id.* It then quoted Ms. Henneman's husband, Walter Us, as being just as convinced of Mr. Hall's guilt as Chief Pierce and Detective Smith were, and printed his request that "justice" be done: "'I am sad another person had to die to catch this killer, but I am glad he is behind bars and will have to face justice," Us said. Lynn deserves justice. All we can do is pray and hope for the best and pray justice is carried out.'" *Id.* at 1, 6 (quoting Ms. Henneman's husband).

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

In its April 3, 2003 edition, the Statesman devoted a full page (besides the front-page coverage) to Mr. Hall's alleged crimes. At the top of the page was an article detailing Ms. Henneman's family's two and a half year ordeal. Patrick Orr, *Henneman's family has mixed feelings about arrest*, IDAHO STATESMAN, Apr. 3, 2003, at 6. In that article, it was noted that Mr. Hall's arrest had "eased the minds" of the family, and had given them "some relief." *Id.* Interestingly, the article appeared with a large photo of a tough- and serious-looking Detective Smith posing next to an American flag. *Id.* In the article, Ms. Henneman's family and Chief Pierce heaped praise upon Detective Smith, portraying him as a tireless advocate of justice:

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

> "These are the kinds of cases where good detectives become intimately, personally involved in the case," Chief Don Pierce said.

Id. at 6.

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

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

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

Id.

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

See id. However, this implication pre-supposes the accuracy of the DNA testing and interpretation, and Mr. Hall's guilt.

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

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

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

- April 24, 2003. On the front-page of its "Local" section, the Statesman reported that Mr. Hall had been arraigned in the Henneman case. Patrick Orr, *Suspect to plead in rape, killing of woman*, IDAHO STATESMAN, Apr. 24, 2003, at Local 1, 6. In that article, the *Statesman*, which referred to Mr. Hall not as "the man" or "the person," but rather "the transient" accused of killing Ms. Henneman, reiterated: the details of Ms. Henneman's disappearance and death; the fact that Mr. Hall stood accused of killing not only Ms. Henneman, but also Ms. Hanlon; the allegation that Mr. Hall had confessed to killing Ms. Hanlon; the allegation that "[a] DNA sample taken from Hall after his arrest in the Hanlon killing linked him with the Henneman killing"; and Detective Smith's questionable claim that the Hanlon crime scene immediately brought the Henneman case to mind because it appeared to involve a similar *modus operandi*. *Id.* at 1, 6. In addition, the article indicated that, in discussing supposedly secret grand jury proceedings, the Ada County Prosecutor had selectively leaked information which he obviously felt would help his chances of convicting Mr. Hall: the fact that multiple out-of-state experts had testified "that DNA taken from murder suspect Eric [sic] Hall matched DNA taken from victim Lynn Henneman." *Id.* at 6.

- May 6, 2003. [Greenbelt patrols spring into action]

- May 8, 2003. [Execution sought in Henneman slaying]

- May 20, 2003. [Plea in Henneman case delayed]

- May 22, 2003. In an article on the front-page of the "Local" section, the *Statesman* reported that Mr. Hall had been indicted in the Hanlon case. Patrick Orr, *Hall indicted in Hanlon murder, rape case*, IDAHO STATESMAN, May 22, 2003, at Local 1. The article contained cursory summaries of both cases and highlighted what the police/Statesman saw as the damning evidence: Mr. Hall's "extensive" criminal record; a DNA sample which "linked him to the Henneman killing"; and the questionable claim that the Hanlon crime scene bore such similarities to the Henneman case that that crime scene immediately brought the Henneman case to mind for investigators. *Id.* It should be noted that this article also once again showcased the unflattering mugshot of Mr. Hall, and a smiling picture of Ms. Hanlon. *Id.*

- May 29, 2003. [Recent rash of murders strains police, prosecutors]

- June 7, 2003. [Not guilty pleas entered in two Ada County murder cases]

As the above news reports make clear, after Mr. Hall had been charged with Ms. Henneman's death, the police began to use the press to begin conditioning the community to internalizing the themes that it would later develop during *voir dire* and, ultimately, at trial. The press portrayed Detective Smith, the lead investigator on the Henneman case, as being a indefatigable proponent of justice: a tough, hardworking cop on the outside, but a caring man on the inside whose only flaw is sometimes he took the pursuit of "justice" too personally. *See generally, e.g.*, Patrick Orr, *Henneman's family has mixed feelings about arrest*, IDAHO STATESMAN, Apr. 3, 2003, at 6. At the same time, the press reported that the officers involved in the Henneman case, whose integrity and professionalism had already been bolstered, could personally vouch for the "fact" of Mr. Hall's guilt. *See, e.g.*, Patrick Orr, *Suspect charged in Henneman murder*, IDAHO STATESMAN, Apr. 3, 2003, at 6 ("We are 100 percent certain we have our man.") (quoting Police Chief Pierce). At the same time, the press characterized the police department's evidence as being virtually incontrovertible. First, it treated the police department's

characterization of the DNA evidence as being the unquestionable truth. Second, it adopted Detective Smith's after-the-fact and highly suspect contention that once he saw the Hanlon crime scene, it immediately brought the Henneman case to mind because of an allegedly similar *modus operandi*. Third, it portrayed Mr. Hall as evil: it included a sinister-looking mugshot with every article; it adopted the police department's dehumanizing label of "transient"; and it highlighted what it repeatedly called Mr. Hall's "extensive" criminal record at every turn while, at the same time, trying to draw analogies between the pending rape/murder charges and his prior statutory rape conviction and assault charge. Indeed, if there is any doubt about the degree to which the police had shaped the public's preconceptions about the case through their use of the media, one need turn no further than the statements given to the *Statesman* by Jillian Stone. Ms. Stone was a friend of Mr. Hall's who, at one time, had trusted him so much that she though of him as a father-figure. But even Ms. Stone was quickly convinced of Mr. Hall's guilt and the infallibility of the State's DNA evidence—not by evidence adduced at trial or by a jury's verdict, but by the pretrial media publicity (as driven by the statements of the police): "[T]he first time I heard about this, I didn't believe it—there was no way he could have done it. But DNA doesn't lie. Now I think, 'What if that was me?'" Patrick Orr, *Suspect arraigned on rape, murder charges*, IDAHO STATESMAN, Apr. 4, 2003, at Local 1 (quoting Ms.Stone).

Any time the press shows the police and, in particular, the lead investigator on a case, such adoration, treating the individual officers as saviors of the community, and also presents the State's evidence as categorically true, while at the same time denigrating the defendant and treating him as sub-human, there is always going to be a risk that the

public will develop a tremendous prejudice against the defendant. However, that risk was heightened in this case because the messages offered to the public by the press were the very types of messages that the public so *wanted* to embrace. In this case, the public was so deeply saddened, angered, and terrified by the circumstances of Ms. Henneman and Ms. Hanlon's deaths, that it must have been comforting to hear—and to believe—that the cause of all the suffering had been removed from society and, therefore, that the streets of Boise were once again safe. *See, e.g.*, Patrick Orr, *Suspect charged in Henneman murder*, IDAHO STATESMAN, Apr. 3, 2003, at 1 ("Today, we know the man who killed her, Eric [sic] Virgil Hall, is behind bars.") (quoting Chief Pierce).

While the intensity of the news coverage surrounding the Hanlon and Henneman cases certainly diminished after Mr. Hall was indicted in those cases, it did not go away. Consequently, neither case strayed far from the public consciousness. As detailed below, from the winter of 2003 to the start of the Henneman trial in the fall of 2004, both cases continued to be the subject of publicity.

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

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

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

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

- February 23, 2004. [Greenbelt seems safer—and stats say it is]
- February 24, 2004. [City is investing wisely in keeping Greenbelt safe]
- February 26, 2004. [Volunteers free up Garden City police for more time on street]
- March 24, 2004. On the front page of its "Local" section, the *Statesman* reported that during the previous afternoon another young woman had turned up dead near the Boise Greenbelt. Kathleen Kreller & Patrick Orr, *Passer-by discovers body of woman in Boise pond*, IDAHO STATESMAN, Mar. 24, 2004, at Local 1. Later, this woman was identified as Amanda Stroud, an individual who was listed as a potential State's witness in the Henneman case.
- March 25, 2004. On the front page of its "Local" section, the Statesman reported that the dead body found two days earlier near the Greenbelt was that of Amanda Stroud. Patrick Orr, *Police seek clues to where woman was living*, Idaho Statesman, Mar.25, 2004, at Local 1, 3. It further reported that the cause of her death was unknown. *Id.*
- March 27, 2004. [Dead woman linked to murder suspect]
- April 3, 2004. [Toxicology results pending in woman's death]
- April 22, 2004. [Tests fail to show how woman, 21, died]
- September 22, 2004. [Courthouse to host 2 big trials]

The above media coverage, while certainly not as intense as it had been at previous times, undoubtedly kept the Hanlon and Henneman cases on the public's collective mind. Moreover, since the coverage had been so persistent for so long (it was just about four years between Ms. Henneman's disappearance and Mr. Hall's trial), the State's message, as reported through the media, had no doubt become ingrained in people's thinking about the cases. Indeed, as the Idaho Court of Appeals has already recognized: "When prospective jurors are incessantly exposed to news stories selectively packaged for mass consumption, they may become subtly conditioned to accept a certain version of facts at trial. Such repetitive exposure may diminish the jurors' ability to separate information absorbed before trial from information during trial." *State v. Hall*,

111 Idaho 827, 830, 727 P.2d 1255, 1258 (Ct. App. 1986) (discussed favorably in *State v. Sheahan*, 139 Idaho 267, 278, 77 P.3d 956, 967 (2003)). This danger seems especially insidious in cases such as this one—where some, but not a great deal, of time has passed between the most frenzied media coverage and the actual trial. In this case, enough time has passed (approximately a year and half between the time that the police, amid great pomp and circumstance, announced that they had collared "their man," and the time that Mr. Hall was actually tried) for potential jurors to forget the details of what they had heard and seen in the news, such that their biases would not have been readily articulable during jury selection, but an insufficient amount of time had passed for those potential jurors to have forgotten their much more subtle biases about the police, the evidence, and the defendant.

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

change of venue would likely have been granted. Thus, trial counsel should have fully developed and litigated a motion for a change of venue.

2. Trial Counsel Failed To Poll The Community And/Or Obtain Affidavits Demonstrating A Community Bias Against Erick Hall[100]

Although the sheer volume and prejudicial nature of the pretrial publicity in this case was sufficient to warrant a change of venue, *see, e.g., Rideau v. Louisiana*, 373 U.S. 723 (1963), counsel should have done more than rely on the publicity itself; counsel was required to develop a *thorough* motion to change venue, highlighting all possible grounds for that motion to be granted. *See* ABA Guidelines, Commentary to Guideline 10.8 ("Whether raising an issue specific to a capital case (such as requesting individual, sequestered voir dire on death-qualification of the jury) or a more common motion shaped by the capital aspect of the case (such as requesting a change of venue because of publicity), counsel should be sure to litigate all of the possible legal and factual bases for the request. This will increase the likelihood that the request will be granted and will also fully preserve the issue for post-conviction review in the event the claim is denied."). That means that counsel had an obligation to obtain evidence that the community was, in fact, biased against Mr. Hall. *See Hall*, 111 Idaho at 830, 727 P.2d at 1258 ("Among the factors considered [when reviewing a judge's denial of a motion to change venue] are the existence of affidavits indicating prejudice, or lack of prejudice, in the community where

[100] Post-conviction counsel has not polled the community, because any polling after the fact, i.e., after the Henneman trial, would necessarily be tainted by the coverage of the trial itself and by the fact that Mr. Hall was convicted and sentenced to death. Moreover, following the Henneman trial, the State went forward on the Hanlon charges. The community sentiment at the time of the Henneman trial, then, cannot be "reconstructed." The Court must therefore rely heavily on the quantity and nature of the publicity prior to the Henneman trial.

the defendant was tried ....") Thus, in this case, trial counsel should have made some effort to document, in a systematic and reliable way, the bias of the community, *i.e.*, the jury pool.

In the present case, every indication is that trial counsel made no effort whatsoever to document, in a systematic and reliable way, the bias of the community. (Tr., 11/16/06 deposition of Amil Myshin, p.287, Ls.2-10 (trial counsel did not conduct any sort of community polling).) Because such an effort would likely have revealed an overwhelming bias against Mr. Hall, and because such bias would likely have led to a motion for change of venue being granted, Mr. Hall's trial counsel was ineffective.

3. Trial Counsel Failed To Move For A Change Of Venue Or, In The Alternative, To Have A Jury From Another County Impaneled

Trial counsel was ineffective for failing to file a motion for a change of venue or, in the alternative, a motion to impanel a jury from another county. As discussed above, such a motion would have been extremely compelling, and would have been likely to succeed based solely upon the prejudicial media coverage.

It appears that trial counsel never seriously considered moving for a change of venue, despite the overwhelming quantity and prejudicial nature of the pre-trial publicity. Although trial counsel briefly indicated they *thought* about filing such a motion, neither could recall any discussions about moving for a change of venue. (Tr., 9/14/06 deposition of Amil Myshin, p.125 Ls.6-19 (stating that he "considered" filing a motion for change of venue, but did not recall why they did not file one); Tr., 12/08/06 deposition of D.C. Carr, p.262 ("Q. Was there any discussion amongst the trial members of moving for a change of venue? A. "Yeah, I think Amil – I don't remember. I can't say. I'm just making

things out of my head. I'm sure I thought about it, and I'm sure Amil thought about it.").)

Trial counsel's complete lack of recollection about a change of venue motion suggests that trial counsel did not seriously consider moving for one:

> Q. ...do you remember if you filed for a change of venue in this case?
> A. I don't. I don't remember. Did we?
> Q. No.
> A. I don't recall."
> Q. Do you recall any – I suppose that you don't recall any decision whether you should file one or not file one, then? If you don't recall whether one was filed, I would be surprised if you recalled.
> A. No. I don't recall.

(Tr., 9/13/06 deposition of D.C. Carr, p.125, Ls.4-15.) Trial counsel should have seriously investigated filing a motion for change of venue. Trial counsel was aware of the media coverage of Erick Hall and that the media had linked his name to both the Henneman and Hanlon murders. (Tr., 9/1406 deposition of Amil Myshin, p.158, L.15 – p.159, L.4; Tr., 12/08/06 deposition of D.C. Carr ("Q. But you had concerns about the publicity? A. Um-hmm. I think that was somewhat the nexus of the case of keeping Hanlon out of Henneman and that whole thing, yeah. Absolutely."); Tr., 9/13/06 deposition of D.C. Carr (recalling that he saw publicity about Erick sexually abusing a seventeen year old).)

Trial counsel also did not consider impaneling a jury from another county. Trial counsel stated his belief that the "best" juries or at least the "liberal" juries come from Ada County. (Tr., 11/16/06 deposition of Amil Myshin, p.287, L.20 - p.288, L.2.) However, this cannot be a legitimate strategic choice, as there is nothing to indicate that trial counsel even considered impaneling a jury from another county, or that Ada county seats "liberal" juries. Moreover, Mr. Myshin has spent his thirty years of practice in the

Ada County, and his *only* criminal trial experience has been in Ada County—he's been with the Ada County Defender's office for the past 22 years. (Tr., 11/16/06 deposition of Amil Myshin, p.392, Ls.2-24.)

Due to the overwhelming quantity of media coverage of Erick Hall and the Henneman and Hanlon murders, trial counsel should have moved for a change of venue or, in the alternative, moved to impanel a jury from another county. But for their deficient performance, there is a reasonable probability that Erick Hall would have received a life sentence from an unbiased jury. *See* section 1, *supra*; *see* Claim FF, *infra*.

4. Trial Counsel Failed To Adequately Question Potential Jurors During *Voir Dire* As To The Amount, And Nature, Of The Pretrial Publicity To Which They Had Been Exposed

As discussed above, the Idaho courts have been incorrect when they have said that in order to obtain a change of venue based upon unfair pretrial publicity the defendant must show that he was actually prejudiced by inclusion of a juror, specifically proven to be biased, on his jury. *See, e.g., Rideau v. Louisiana*, 373 U.S. 723 (1963).[101] Nevertheless, there can be no doubt that inclusion of a juror, specifically shown to be biased, warrants vacation of the defendant's conviction. *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000). Thus, in this case, trial counsel should have thoroughly examined all of the prospective jurors regarding the extent to which they had been exposed to, and influenced by, pretrial publicity—whether to make a record to appeal a denial of a motion for change of venue (had one been filed) or to ferret out instances of actual bias. *See* ABA Guidelines, Commentary to Guideline 10.8 ("Whether raising an issue specific to a capital case (such as requesting individual, sequestered voir dire on

[101] Not only is this approach incorrect, it is impossible to establish in this case, due to the Court's prohibition on juror contact.

death-qualification of the jury) or a more common motion shaped by the capital aspect of the case (such as requesting a change of venue because of publicity), counsel should be sure to litigate all of the possible legal and factual bases for the request. This will increase the likelihood that the request will be granted and will also fully preserve the issue for post-conviction review in the event the claim is denied."). However, as set forth in detail below, trial counsel utterly failed to do so.

a. Juror No. 6

Juror No. 6, and the rest of a mini-panel of six prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr., p.850, Ls.22-24.) The record indicates that none of the jurors responded affirmatively. (Tr., p.850, L.25.) Later, in response to a question from the prosecutor, Juror No. 6 indicated that she had seen "the media" before. (Tr., p.1060, Ls.17-18.) But it is not clear whether the State was talking about a news program or fictional television programming when it asked that question. (*See* Tr., p.1060, Ls.5-23.) Either way, it is obvious that these questions, which were the only questions that could have gone anywhere toward delving into the question of whether Juror No. 6 had come into contact with any of the extensive pretrial publicity in this case, or had formed some type of opinions about the case based on that publicity, were not well-crafted for that purpose. Thus, trial counsel should have followed up with questions of their own. However, they did not. They did not ask a single question about pretrial publicity, or Juror No. 6's pre-conceptions about the case, before passing her for cause. (*See generally* Tr., p.1067, L.18 – p.1083, L.5.)

b. Juror No. 51

Juror No. 51, and the rest of a mini-panel of six prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr., p.1766, Ls.10-12.) The record indicates that none of the jurors responded affirmatively. (Tr., p.1766, L.13.)

The State asked Juror No. 51 if she was a Greenbelt user, and she answered affirmatively. (Tr., p.1829, L.15 – p.1830, L.3.) Later, the State asked her if she remembered the details of the Henneman case and whether she was a television news watcher, and Juror No. 51 answered affirmatively again—to both questions. (Tr., p.1831, Ls.9-18.) Thereafter, the State tried to elicit testimony along the lines of "but that's all I can remember about the case," but she kept coming up with additional details that she could recall—she volunteered that she remembered that Ms. Henneman's body was not found for some time, that Ms. Henneman's disappearance and death "was a huge story," that she was exposed to the details of the Henneman case through newspapers and television news, and that Mr. Hall was finally "caught" and arrested. (*See* Tr., p.1831, L.9 – p.1832, L.10.)

Despite the fact that Juror No. 51 had said that she was a Greenbelt user, that she had been exposed to the extensive (prejudicial) news coverage about the Henneman case, and that she remembered that Mr. Hall had been "caught," trial counsel never asked any worthwhile follow-up questions about the publicity issue. (*See generally* Tr., p.1832, L.21 – p.1849, L.16.) Instead, counsel asked cursorily whether she could recall Mr. Hall's background or the circumstances of his being charged and, when she said no to both questions, counsel tried to essentially rehabilitate her by asking, in a leading

fashion, whether, when she said Mr. Hall had been "caught," she meant to imply that she believed he was guilty. (Tr., p.1833, Ls.2-16.) Juror No. 51 answered this last question with a "no." (Tr., p.1833, Ls.11-16.) Ultimately, trial counsel passed her for cause. (Tr., p.1849, L.16.)

An effective *voir dire* would have entailed deeper, more probing, questions about what Juror No. 51 knew about: the Henneman case, including the highly emotional fact of her disappearance on the Greenbelt and the spectacle that was made of her family's suffering; the Hanlon case and the allegations of a similar *modus operandi* between the two cases; and the media's repeated assertions of Mr. Hall's guilt.

c. Juror No. 62

Juror No. 62, and the rest of a mini-panel of six prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr., p.1985, Ls.17-19.) The record indicates that none of the jurors responded affirmatively. (Tr., p.1985, L.20.)

The prosecutor asked Juror No. 62 what she remembered about the Henneman case, and she testified that she could recall little. (Tr., p.2074, L.20 – p.2076, L.5.) The only follow-up to this line of questioning on the part of trial counsel was to ask whether she had followed recent articles in the newspaper regarding capital juries in general. (Tr., p.2103, L.22 – p.2104, L.4.) Juror No. 62 responded negatively, indicating that she does not like the Statesman, and that was it. (Tr., p.2104, Ls.5-16.)

Again, an effective *voir dire* would have entailed deeper, more probing, questions about what Juror No. 62 knew about: the Henneman case, including the highly emotional fact of her disappearance on the Greenbelt and the spectacle that was made of her

family's suffering; the Hanlon case and the allegations of a similar *modus operandi* between the two cases; and the media's repeated assertions of Mr. Hall's guilt.

d. Juror No. 63

Juror No. 63, and the rest of a mini-panel of six prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr., p.1985, Ls.17-19.) The record indicates that none of the jurors responded affirmatively. (Tr., p.1985, L.20.)

The prosecutor asked Juror No. 63 if she could remember anything specific about the Henneman case. (Tr., p.1211, L.24 – p.2112, L.2.) As she answered that question, first saying that she could not remember any specifics, but then beginning to recite those details that she did remember, the State cut her off "[t]hat suits us just fine." (Tr., p.2112, Ls.3-6.) At that point, Juror No. 63, probably feeling that her knowledge of the case actually wasn't important, stated simply: "Just from the paper, you know." (Tr., p.2112, L.7.)

Trial counsel did not ask a single follow-up question about Juror No. 63's exposure to pretrial publicity, or any pre-conceived opinions that she may have developed based on that publicity, before passing her for cause. (*See generally* Tr., p.2121, L.22 – p.2136, L.22.) Again, an effective *voir dire* would have entailed deep, probing, questions about what she knew about: the Henneman case, including the highly emotional fact of her disappearance on the Greenbelt and the spectacle that was made of her family's suffering; the Hanlon case and the allegations of a similar *modus operandi* between the two cases; and the media's repeated assertions of Mr. Hall's guilt.

e. Juror No. 65

Juror No. 65, and the rest of a mini-panel of six prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr., p.1985, Ls.17-19.) The record indicates that none of the jurors responded affirmatively. (Tr., p.1985, L.20.)

The State asked Juror No. 65 if he and his family used the Greenbelt, and he explained that they had done so on a regular basis. (Tr., p.2146, Ls.12-16.) However, he did not follow up with any questions about whether this case had alarmed him, or even whether he knew anything about this case going into it. (*See generally* Tr., p.2140, L.3 – p.2149, L.2.)

Even though Juror No. 65 had indicated that he and his family had used the Boise Greenbelt and, therefore, he was a prime candidate for having been influenced by the media's coverage of the Henneman case, trial counsel never questioned him further about his feelings about the Greenbelt or about this case. (*See generally* Tr., p.2149, L.5 – p.2169, L.22.) Nor did counsel question him about pretrial publicity at all. (*See generally* Tr., p.2149, L.5 – p.2169, L.22.)

f. Juror No. 68

Juror No. 68, and the rest of a mini-panel of four prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr., p.2177, L.24 – p.2178, L.1.) The record indicates that none of the jurors responded affirmatively. (Tr., p.2178, L.2.)

Neither the State nor trial counsel ever asked Juror No. 68 a single question about the quantity and nature of the pretrial publicity to which he had been exposed, or whether such publicity could have caused him to form preconceptions about this case. (*See generally* Tr., p.2227, L.9 – p.2238, L.22 (prosecution's *voir dire*); p.2239, L.1 – p.2268, L.2 (defense's *voir dire*).)

g. Juror No. 83

Juror No. 83, and the rest of a mini-panel of four prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr., p.2441, Ls.10-12.) The record indicates that none of the jurors responded affirmatively. (Tr., p.2441, L.13.)

In response to the State's questions, Juror No. 83 admitted that she remembered, based on television and newspapers, that this case is "the case about the woman that was the flight attendant .... It's just that the case on the Greenbelt, she was found murdered." (Tr., p.2491, Ls.2-12.) Juror No. 83 indicated, however, that she did not know how Mr. Hall came to be charged in the case. (Tr., p.2491, Ls.15-17.) Later, Juror No. 83 told the State that her strong pro-death penalty views were formed, at least in part, based on her knowledge of criminal cases as reported in the newspaper and on television. (Tr., p.2497, L.16 – p.2498, L.15.)

After all of that, trial counsel failed to follow up in any meaningful way. Counsel did ask if she had ever talked about the Henneman case with her husband (who happens to be a Deputy Attorney General) and, eventually, after twice denying that she had done so, she grudgingly admitted that they may have discussed the case "in passing" because "[i]t's odd to have murder cases in Boise." (Tr., p.2511, L.5 – p.2512, L.1.) However,

trial counsel never sought to find out the details of what Juror No. 83 may have known about the Henneman case, what she may have discussed with her husbands, and what opinions, preconceptions, or biases she may have formed. (*See generally* Tr., p.2507, L.12 - p.2534, L.4.)

Later, trial counsel asked Juror No. 83 about other high-profile criminal cases, such as those of Scott Peterson and O.J. Simpson. (Tr., p.2515, L.23 – p.2517, L.16.) In response to counsel's questions, she indicated that she had formed opinions as to both defendants' guilt based on what she had heard through the media and, with regard to the Scott Peterson case, which was ongoing at that time, she had adjudged the defendant guilty at "day one." (Tr., p.2515, L.23 – p.2517, L.16.) Yet, trial counsel never tried to relate these questions back to the Henneman case by asking why, if she was interested in the Peterson and Simpson cases out of southern California, she was not interested in a high-profile case right here at home. (*See generally* Tr., p.2507, L.12 - p.2534, L.4.) Nor did counsel ever question her ability to remain neutral and unpersuaded by the pretrial publicity where she readily admitted that she had formed steadfast opinions as to defendants' guilt based on pretrial publicity in the past. (*See generally* Tr., p.2507, L.12 - p.2534, L.4.)

h. Juror No. 85

Juror No. 85, and the rest of a mini-panel of four prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr., p.2441, Ls.10-12.) The record indicates that none of the jurors responded affirmatively. (Tr., p.2441, L.13.)

The State asked Juror No. 85 what she could recall about the Hennemen case from what she had read in the newspaper. (Tr., p.2562, Ls.17-19.) She indicated that she remembered that a flight attendant had gone missing and that Ms. Henneman's name had "hooked" her, but that Mr. Hall's name did not, and that she could not recall the circumstances of his being charged in this case. (Tr., p.2562, L.20 – p.2563, L.11.) However, trial counsel never followed up with these responses in any way. (*See generally* Tr., p.2567, L.20 – p.2594, L.17.) Counsel never sought to ferret out the specific details of what she had read and seen, never sought to jog her memory about individual news stories, and never sought to determine whether she had formed any preconceptions about the case.

i. Juror No. 89

Juror No. 89, and the rest of a mini-panel of five prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr., p.2607, Ls.9-11.) The record indicates that none of the jurors responded affirmatively. (Tr., p.2607, Ls.12-13.)

The State asked Juror No. 89 what she knew about the Henneman case going into it. (Tr., p.2693, Ls.5-6.) She responded by saying that she did not "know a whole lot." (Tr., p.2693, Ls.7; 10-11.) She indicated that she read about Ms. Henneman's disappearance and death, but was not aware that a suspect had been found. (Tr., p.2693, Ls.7-11; p.2693, L.21 – p.2694, L.4.) She further indicated that she did not know anything about the defendant or how he came to be implicated in the Henneman case. (Tr., p.2693, Ls.15-20.)

Trial counsel, once again, failed to adequately follow up on the publicity issue. The only question counsel presented to Juror No. 89 was in leading form: "I understand from what you said before, you haven't been following this case particularly closely?" (Tr., p.2713, Ls.19-21.) Not surprisingly, she responded in the negative. (Tr., p.2713, L.22.) Thus, counsel once again utterly failed to ferret out the specific details of what this juror had read and seen, never sought to jog her memory about individual news stories, and never sought to determine whether she had formed any preconceptions about the case.

j. Juror No. 102

Juror No. 102, and the rest of a mini-panel of four prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr., p.2836, Ls.21-23.) The record indicates that none of the jurors responded affirmatively. (Tr., p.2836, L.24.)

In response to the State's questions, Juror No. 102 indicated that he gets his local news on the *Statesman*'s website. (Tr., p.2858, L.25 – p.2859, L.11.) However, the State never asked whether he had read anything about this case on that website or had, in any other way, obtained any information about this case. (*See generally* Tr., p.2847, L.17 – p.2869, L.4.)

Although trial counsel followed up on the publicity, counsel did so in a cursory and wholly inadequate way. Counsel asked Juror No. 102 whether he remembered anything reading about this case, and the juror responded affirmatively. (Tr., p.2869, L.24 – p.2870, L.3.) Counsel then asked if him remembered reading anything about the

case other than that information which was contained in the juror questionnaire, and he responded negatively. (Tr., p.2870, Ls.4-9.) Finally, counsel asked if Juror No. 102 knew anything about Mr. Hall, and he again responded negatively. (Tr., p.2870, Ls.10-11.) Without ferreting out the specific details of what this juror had read and seen, without jogging his memory as to what he had been exposed to, and without seeking to determine whether he had formed any preconceptions about the case, counsel moved on to other topics and, ultimately, passed Juror No. 102 for cause. (*See generally* Tr., p.2870, L.12 – p.2892, L.15.)

k. Juror No. 110

Juror No. 110, and the rest of a mini-panel of eight prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr., p.2951, Ls.6-8.) The record indicates that none of the jurors responded affirmatively. (Tr., p.2951, Ls.8-9.)

The State asked Juror No. 110 simply: "And it looks like you have heard that the Lynn Henneman's body was—well, she disappeared and then her body was found. Have you heard much beyond that? (Tr., p.3021, Ls.18-21.) In response, Juror No. 110 said no, he works a lot and does not have time to watch much television. (Tr., p.3021, Ls.22-24.) At that point, the State positively reinforced the juror's downplaying of his knowledge of the case, explaining: "That suits us fine.... The less you know before you walk in here the easier it is for you to make decisions." (Tr., p.3021, L.25 – p.3022, L.4.)

Trial counsel did follow up on the pretrial publicity issue, but not in a meaningful way. Counsel started by mischaracterizing and downplaying Juror No. 110's knowledge

of the case: "you say that you haven't heard anything about this case?" (Tr., p.3069, L.24 – p.3070, L.1.) Juror No. 110 clarified the facts, while at the same time apparently taking the cue of both attorneys: "Not very much. Heard a little bit, yeah." (Tr., p.3070, L.2.) At that point, the follow-up question from counsel was a leading query confirming that Juror No. 110 had not heard how Mr. Hall came to be implicated in the case, again conveying a subtle message that counsel really did not want to hear what he knew about the case. (Tr., p.3070, L.3-4.) Moreover, when Juror No. 110's answer indicated that he did not understand the question ("Mr. Hall's what—the defendant. Yeah, we read the charges and stuff."), counsel almost immediately abandoned the inquiry and passed him for cause. (Tr., p.3070, Ls.3-8.) Thus, not only did counsel generally fail to ask relevant questions, but the few questions that counsel did ask were terrible because they were not calculated to determine what Juror No. 110 had actually heard or what preconceptions he might actually have and, in fact, conveyed to him that the "correct" response was to say "no, I don't know anything about the case."

l. Juror No. 111

Juror No. 111, and the rest of a mini-panel of eight prospective jurors, was asked by the Court whether any of them had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." (Tr., p.2951, Ls.6-8.) The record indicates that none of the jurors responded affirmatively. (Tr., p.2951, Ls.8-9.)

The State asked Juror No. 111 about the fact that she knew Dave Smith, the lead detective in the Henneman case. (Tr., p.3075, Ls.2-12.) However, he never asked her if she had seen the extremely favorable media coverage of Mr. Smith during the pendency

of the Henneman case. (*See generally* Tr., p.3073, L.23 – p.3086, L.5.) In fact, he never asked if she had seen any pretrial coverage of the case. (*See generally* Tr., p.3073, L.23 – p.3086, L.5.)

Again, trial counsel utterly failed to follow up in a productive manner. Counsel again raised the issue of pretrial publicity with a leading question conveying the message that the "correct" was to say "no, I know nothing about this case:" "You have indicated you know something about this case, and I don't know that you know anything other than what we've already told you. But do you know anything about?" (Tr. Vol. II, p.3086, Ls.17-21.) Not surprisingly, Juror No. 111 parroted back many of the same words used by counsel in his leading question: "I know nothing about it, other than what's been reported in the *Statesman* early on." (Tr., p.3086, Ls.22-23.) At that point, counsel confirmed that she believed that her memory of the case was constrained to Ms. Henneman's disappearance and death in the 2000 timeframe, not Mr. Hall's becoming a suspect in the 2003 timeframe, and was content to move on to other matters. (Tr., p.3086, L.24 – p.3087, L.5.) Counsel never sought to investigate the issue of whether Juror No. 111 had been traumatized by the event or preconditioned to look favorably upon the State's evidence; counsel was concerned only with the issue of whether she knew that Mr. Hall stood accused of murder in the Hanlon case as well, but did not even examine that issue carefully.

In sum, trial counsel's failure to adequately question jurors about exposure to pretrial publicity violated Mr. Hall's right to an unbiased jury.[102] (*See* Exhibits 13-16

[102] Again, Mr. Hall cannot fully develop this claim because of the Court's order prohibiting juror contact. However, it is reasonable to believe that the jury pool had been

(juror questionnaires admitted during depositions of Amil Myshin and D.C. Carr, indicating juror exposure to media).)

EE. Trial Counsel Rendered Ineffective Assistance Of Counsel By Stipulating To A Deviation Of Proper Jury Selection Procedures

Both Idaho statutory authority and rule require that alternate jurors be selected by lot. Idaho Code § 19-1904 states that jurors in excess of the number required must be removed by lot at the conclusion of the trial:

> A court may direct that one (1) or more jurors in addition to the regular panel be called and impaneled to sit as alternate jurors. All jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges prior to deliberations. **At the conclusion of closing arguments, jurors exceeding the number required of a regular panel shall be removed by lot.** Those removed by lot may be discharged after the jury retires to consider its verdict. If more than one (1) additional juror is called, each party is entitled to two (2) peremptory challenges in addition to those otherwise allowed by law; provided however, that if only one (1) additional juror is called, each party shall be entitled to one (1) peremptory challenge in addition to those otherwise provided by law.

I.C. § 19-1904 (emphasis added). Likewise, Idaho Criminal Rule 24 requires that all excess jurors be removed by lot at the conclusion of the trial:

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

I.C.R. 24(d). There is no discretionary component to the selection of alternate jurors – jurors exceeding the number of required jurors "**shall be removed by lot.**" When a state implements procedures designed to ensure a fair trial, including a fair jury selection

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saturated with media exposure, and that trial counsel's failure to ask appropriate questions could not possibly have weeded out bias.

process, it must follow that process or violate a defendant's due process rights. *Hicks v. Oklahoma, supra.* Trial counsel was therefore ineffective in stipulating to an alternate procedure wherein the above prescribed procedure was abandoned:

> MR. MYSHIN: And the other thing that has always given me heartburn is this notion that alternate jurors are selected by lot and –
>
> THE COURT: I agree with you, sir. I think I am coming at this -- you and I and Mr. Bower and Mr. Bourne and the Court have always agreed in the past that this was a solution in search of a problem. I respect former Justice Walters' committee and the work he did. He was motivated by an effort, sincere effort to improve the system, but there wasn't a problem here to fix. And I was hoping that by stipulation we would just agree to do it the way we've always done it, which is the persons that end up sitting in -- I will have a chart for you, seating chart that I'll show you. This is the way we've done it before, the way we did it in State versus Payne in fact. The persons that end up sitting in Boxes 13, 14 and 15 are alternates No. 1, No. 2 and No. 3 respectfully, but we don't tell them. We don't tell them that they're alternates unless and until their services are no longer needed when the jury is sent out to deliberate, so that human nature being what it is, these folks will pay careful attention to every single thing that happens in the trial and will only get the disappointing news when it is necessary to tell them. I think you and I are on the same page.
>
> MR. MYSHIN: We are, Judge, entirely on the same page. I just would like to add fuel to the fire and tell you that it is my information that the civil lawyers are the ones that cooked up this dismissal by lot idea. So it's not us fine criminal lawyers. I think it's more the subject –
>
> THE COURT: Sometimes they don't understand the differences in nature between civil and criminal cases. I think the whole purpose of the struck jury system is to know who you have coming and to know who's there and to know, for example, that the person in Box 13 is Alternate No. 1 and the person in Box 14 is Alternate No. 2 and Box 15 is Alternate No. 3, and that that means something and we all know who they are in advance, but we don't tell them that. Mr. Bourne, are you -- this is the way we've always -- are you okay with it?
>
> MR. BOURNE: We'll stipulate.
>
> THE COURT: Okay. Mr. Myshin subject of a stipulation?
>
> MR. MYSHIN: Yes, sir.

(Tr., p. 607, L.21 – p.609, L. 18.) Trial counsel's performance was clearly deficient, as they had an obligation to challenge any irregular jury selection procedures. See ABA Criminal Justice Section Standards: Defense Function, Standard 4-7.2(a) ("Defense counsel should prepare himself or herself prior to trial to discharge effectively his or her function in the selection of the jury, including the raising of any appropriate issues concerning the method by which the jury panel was selected . . . .")

Trial counsel's stipulation prejudiced Mr. Hall under *Strickland* because, by failing to guarantee that Mr. Hall receive all of the procedural protections he was afforded by the statutory requirement that jurors be selected by lot, they effectively changed the jury that would have sat, and instead seated the jury which convicted and sentenced Mr. Hall to death. In the penalty trial, this was particularly prejudicial because if even one alternate juror would have voted for life and had sat on the jury, Mr. Hall would have been guaranteed a life sentence. Moreover, biased jurors did site on the jury. See Claim FF, *infra.* Thus, there is a reasonable probability that the outcome of the trial would have been different.

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

1. Introduction

Trial counsel attempted to utilize a nationally recognized technique for effective assistance of counsel in jury selection known as the "Colorado Method," based on techniques designed to ensure that a capitally-charged defendant is tried by an impartial jury, as set forth in United States Supreme Court capital jury selection jurisprudence. However, as discussed below, trial counsel's efforts were premised upon a complete lack

of understanding of the Colorado Method, or of general principles of capital jury-selection generally. As a result of trial counsel's woefully inadequate voir dire, Mr. Hall's jury consisted of many jurors who should have been excused for cause, either because the juror would automatically vote for the death penalty or because the juror was substantially impaired in his or her ability to give meaningful consideration to mitigating evidence, thus depriving him of his Sixth Amendment right to an impartial jury.

Because trial counsel purported to use the Colorado Method, Mr. Hall retained a well-known expert in the Colorado Method of capital jury selection, Mr. David Lane. Mr. Lane has provided several highly instructive declarations, which set forth the principles of the method, and critique trial counsel's use of the method. (Exhibit 89 (Declaration of David Lane, dated April 16, 2006); Exhibit 90 (Second Declaration of David Lane, dated June 14, 2007).)

2. Applicable Legal Standards

The applicable standard for ineffective assistance of counsel claims is set forth in Claim A.2, *supra*. The Sixth Amendment further guarantees the right to an impartial jury. Under *Lockett v. Ohio*, 438 U.S. 586 (1978) anything which bears upon the record, background and history of the defendant, or circumstances of the crime and lessens the perpetrator's moral culpability is *per se* mitigation and must be considered by the jury. If a juror is substantially impaired in his or her ability to consider and give effect to anything which *Lockett* permits them to consider and give effect to in defense counsel's actual case, the juror must be challenged for cause as being substantially impaired in his or her ability to follow the law.

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

3. Analysis

a. Deficient Performance

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

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

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

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

In this case, trial counsel was shockingly inadequate in preparing for and in conducting voir dire. Trial counsel admitted they were learning the Colorado Method as they were conducting jury selection. (Tr., 9/14/06 deposition of Amil Myshin, p.77, Ls.13-14 ("We were trying to learn the Colorado method, and trying to use it."); Tr., p.79, Ls.20-25 ("So this is all new. There has to be a way to relate to lay people what this all means. And it's incredibly complicated. I really felt, I guess at that point, that this was all new ground for us, to try and do all of this for the first time."); Tr., 80, Ls.9-14 ("So, although – I mean, it was – I don't know how to say it, except that I was doing something outside my realm of experience. And I was taking all the experience that I had

and virtually disregarding it. And I found that very, very difficult.").)[103] This is confirmed by the fact that they retained another attorney, Rolf Kehne, to consult with them about the method, when Mr. Kehne happened to show up to watch the voir dire. The use of Mr. Kehne was completely happenstance:

> A. He – Rolf showed up at voir dire, unsolicited. He was in the back of the courtroom, and on breaks I would approach him and say – and at that time I didn't even know that he taught it [the Colorado Method]. Well, I did, because he taught us right before that. He taught us that before that, but I didn't know the extent that he taught it. I guess he taught it a lot, I've learned, later.
> Q. The Colorado method?
> A. Yeah. But I knew that he did that seminar with us at the office and stuff.
>
> And so I was like, "Tell me, you know, what?" And he would give me suggestions, and I would relate those to Amil.
>
> And from that – it was interesting, because he sat in the very back of the courtroom, and he'd edge his way up toward the front.
>
> And it was like, finally it was like we were – at our breaks we were all talking together. It was like, you know, I don't know whether I made the suggestion to Amil, or whether we talked. I don't know how it came about. But Amil was like, "Well, let's get him on." We decided to bring him on.
>
> So Amil went ex parte back to the judge and talked to him and said, "Hey, I need to get him paid. We'd like to bring him on."
>
> And during that time – and I think that was early on; and then we would consult, and then I landed up – and this was all my doing. I landed up consulting with him on a couple right during the voir dire, because that's how frustrated I was getting. Like, "Feed me, tell me where I'm going with this."

(Tr., 9/13/06 deposition of D.C. Carr, p.171, L.12 – p.172, L.21.) The fact that trial counsel relied upon someone who happened to wander into the courtroom evidences the defense team's lack of preparation to conduct voir dire. (*See* Exhibit 90, p.2 ("It was

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[103] Although trial counsel indicates they had some limited training regarding the Colorado Method, it is unclear what quality and quantity of training they received. See Exhibit 90, p.2 n.2 (explaining that "various manifestations of the 'Colorado Method' [are] taught in places throughout the country, often times having nothing whatsoever to do with the actual 'Colorado Method'").

apparent from reading the trial transcript that there was very little preparation, if any, put into this by the trial team. Relying upon Mr. Kehne shows that trial counsel was doing jury selection 'by the seat of their pants' which is wholly inadequate.").) "Rolf's involvement is irrefutable evidence that the defense team was floundering badly with the Colorado Method. Grabbing people who wander into and out of the courtroom to assist in one of the most critical aspects of trial is hardly the level of planning and skill envisioned by the Sixth Amendment's right to the effective assistance of counsel." (Exhibit 90, p.6.)

Mr. Kehne's tenure as a jury selection consultant was as short-lived as it was random. Just one day after the court authorized trial counsel to use Mr. Kehne to assist with jury selection, the court objected to using Mr. Kehne to provide briefing on critical jury selection issues, namely the meaning of "mitigation impaired." (Tr., p. 2032, Ls.12-24; p.2060, L.9 – p. 2062, L.17.) Trial counsel agreed to provide the briefing following the weekend break, but never did so, despite the fact that the court stated "I don't know anything about Whitt [sic]." (Tr., p.2063, Ls.11-17; p.2032, Ls.21-22.) *Wainwright v. Witt* is a seminal case is death penalty jury selection jurisprudence and holds that jurors whose "views on [capital punishment] would 'prevent or substantially impair the performance of [their] duties . . . .' are excludable for cause. *Witt*, 469 U.S. at 424-26 (1985). For trial counsel not to educate the court on this seminal case is incomprehensible. In any case, by Monday morning, Mr. Kehne was no longer on the case, and trial counsel informed the court it did not intend to file briefing. (Tr., p.2067, Ls.10-21.) Trial counsel were once again left to their own inadequate understanding of capital jury selection, and never again mentioned *Witt*.

The failure to brief the *Witt* issue illustrates trial counsel's utter unfamiliarity with the constitutional underpinnings of capital jury selection. Mr. Carr testified that, after speaking to Mr. Kehne, he could not find "anything meaningful regarding meaningful consideration to present to the judge." (Tr., 9/13/06 deposition of D.C. Carr, p.176, Ls.10-14.) This is black-letter law. Mr. Myshin testified that proponents of the Colorado Method people use the phrase "mitigation impaired," but *Morgan* does not use that terminology. (Tr., 9/14/06 deposition of Amil Myshin, 9/14/06, p.107, Ls.16-21.) While technically correct that the case law does not use the precise term "mitigation impaired," the phrase is well known shorthand for the concept that a juror who cannot give meaningful consideration to mitigation should be challenged for cause under *Morgan*. (Exhibit 90, p.12.) Mr. Myshin also testified that he had not read any cases dealing with the "mitigation impairment" upon which the Colorado Method is based, even though, of course, any method of capital jury selection is dependent upon United States Supreme Court precedent dealing with that concept, and *Morgan* and its progeny deal with the concept without necessarily using that precise phrase. (Tr., 9/14/06 of deposition of Amil Myshin, pp.107-108; Exhibit 90, pp.12-13.)

Trial counsel failed to understand or implement the most basic principles of the Colorado Method. The structure of the Colorado Method is extremely simple. It includes the identification of potential jurors in death penalty cases through a ranking system, based solely upon their responses regarding the death penalty, with ranking of one through seven, seven being automatic death penalty jurors who should always be challenged for cause. (Exhibit 90, p.3, pp.7-9.) At the end of the process, picking the jury is purely a matter of ranking where the *only* criteria for selection is based upon the

lowest number in the ranking system. (Exhibit 90, p.16.) A higher ranked juror will never be selected over a lower ranked juror regardless of other characteristics. (Exhibit 90, p.16.)

Trial counsel acknowledged that he did not prepare a strategy going into individual voir dire. (Tr., 9/14/06 deposition of Amil Myshin, p.155.) The lack of preparation, in addition to lack of understanding of the legal principles of capital jury selection and their application, led to that trial counsel's *voir dire* in every instance was ineffective in identifying and ranking jurors, in stripping jurors to help in the identification process, and in insulating or isolating jurors, or in challenging mitigation-impaired jurors for cause. (Exhibit 90, p.17.) Mr. Hall relies on and incorporates herein by reference the entirety of Mr. Lane's analysis of trial counsel's questioning of jurors, as set forth in Exhibits 89 and 90. Mr. Lane's concluded that:

> **The *voir dire* conducted in this matter was among the worst examples of capital *voir dire* undersigned counsel has ever read.** Defense counsel failed repeatedly to challenge jurors for cause even in the face of the juror telling the court and counsel that they would automatically vote for the death penalty or that they were substantially impaired in their ability to give meaningful consideration to mitigating evidence. Defense counsel was unable to intelligently rank almost all of the jurors, except those who indicated that they were a virtual certain vote for death and even then, many of those jurors ultimately sat on the case. Defense counsel did virtually nothing to insulate potential life-giving jurors from feeling pressure in the deliberative process to have to justify their personal moral judgments. Defense counsel did virtually nothing to isolate strong death penalty proponents on the jury who would demand explanations from lifegivers. Defense counsel never discussed the differences between fact-based decision making at the guilt phase and the normative personal decision making process based upon personal morality at the penalty phase with any juror.

(Exhibit 90, pp.39-40 (emphasis added).)

Trial counsel also failed to realize that the Colorado Method did *not* preclude them from inquiring into traditional areas of voir dire, including jurors' exposure to pre-trial publicity. For example, a juror who has been tainted by extensive pretrial publicity who has been rated a number 4 juror for death penalty beliefs should be challenged before a number 4 rated juror who has not been so tainted. (Exhibit 90, p.5.); *see* Claim DD, *supra*.

In addition to those grounds set forth in the affidavit, Mr. Hall asserts that trial counsel should have moved to strike the following jurors for cause for the reasons set forth below.[104]

Juror No. 6 indicated she would have great difficulty with sequestration beyond a "few days." (Tr., p.1056, Ls. 8-11.) Trial counsel should have moved to strike for cause.

Juror No. 51 indicated that she is a regular Greenbelt user. (Tr., p.1829, Ls.15-24.) Mr. Hall asserts that this juror's familiarity with the Greenbelt biased her views of the crime and the Mr. Hall. Trial counsel should have moved to strike for cause.

Juror No. 62 knew Angie Abdullah, attended the same church, and knew "a lot of information about her." (Tr., p.2074, Ls.12-19.) Mr. Hall asserts that this juror's relationship with Angie Abdullah, the alleged victim in a near-simultaneous capital murder trial, biased her views of the crime and Mr. Hall. Trial counsel should have moved to strike for cause.

Juror No. 63 had hearing impediments, had to wear hearing aids, and suffered from hearing loss most of her life. (Tr., p.2117, L.22 – p.2118, L.3, p.2123, Ls.7-21.) Given the poor quality of the police interrogation tapes played to the jury, Mr. Hall

[104] Petitioner cannot further develop this claim due to the Court's refusal to allow Mr. Hall's post-conviction counsel to interview jurors.

asserts that this juror was unable to hear critical evidence offered at trial. Trial counsel should have moved to strike for cause.

Juror No. 68 previously worked for IDOC, including at the maximum security prison. (Tr., p.2251 – p.2252.) Mr. Hall asserts that this juror's dealings with the correctional system, inmates, and death row inmates biased his views of the crime and Mr. Hall. Trial counsel should have moved to strike for cause.

Juror No. 83 is married to a Deputy Attorney General for the State of Idaho. Her husband is specifically assigned to the IDOC. His job includes defending against conditions of confinement lawsuits, including those brought by death-sentenced inmates. (*See* Exhibit 92, *Gomez v. Spalding*, D. Idaho, Civ. 91-0299-S-LMB.) Conditions of confinement were referenced during the sentencing phase of Mr. Hall's trial. (*See*, e.g., Tr., p.4904 et seq. (testimony of Dennis Dean).) Her husband was sanctioned by the federal district court for opening prisoner mail during a conditions lawsuit, and possibly faced or faces bar sanctions. (Exhibits 91-93.) Mr. Hall asserts that trial counsel should have moved to strike this juror for cause. She ultimately served as the foreperson. It is hardly reasonable to assume that the wife of an advocate for the State in defending against death-sentences would not be affected by her husband's employment when determining whether to impose the death sentence. Further, Mr. Hall served a 10-year term in the IDOC during the period that this juror's husband served as the Deputy Attorney General. It is likely that her husband was familiar with Erick Hall and there is a reasonable probability that he shared discussions about inmates, possibly including Mr. Hall, as well as information about conditions of confinement and other matters that a juror might consider, appropriately or not, during the sentencing process with his wife.

In addition to the above, because a key State witness—Jay Rosenthal—also worked for the Attorney General's office, this juror was not able to objectively weigh his testimony. Furthermore, this juror worked for IDOC, which biased her views of the crime and Mr. Hall. Moreover, the juror's cousin was raped and murdered. It is unreasonable to assume that event did not color her views of crime and punishment. Mr. Hall asserts that event biased her views of the crime and Mr. Hall. Trial counsel should have moved to strike for cause.

Juror No. 85 husband was an investigator for the U.S. Investigative Services. (Tr., pp.2547–2548.) Mr. Hall asserts that this juror was unable to objectively weigh law enforcement testimony and had biased views toward the crime and Mr. Hall.

Juror No. 102 admitted that his mind wanders in the afternoon. (Tr., p.2863, L.25–p.2864, L.3.) Mr. Hall asserts that this juror was unable to hear evidence at trial and sentencing.

Juror No. 110 works for the Department of Transportation and works with a Deputy Attorney General. (Tr., p.3020, Ls.19-20.) The juror works, with his son, with the Ada County Court. (Tr., p.3022, Ls.10-16.) The juror worked at the penitentiary for several years, and managed Correction Industries, and had inmates working for him. (Tr., p.3044, Ls.13-16, p.3045, Ls.5-6.) The juror worked for the Department of Law Enforcement. (Tr., p.3051, Ls.1-2.) Mr. Hall asserts that this juror's background biased his views against the crime and Mr. Hall.

Juror No. 111 works for the Sheriff's Office and was a former neighbor of Detective Dave Smith, a key prosecution witness. (Tr., p.3074, Ls.6-7, p.3075, Ls.3-9.)

Mr. Hall asserts that this juror's background biased her views against the crime and Mr. Hall. Trial counsel should have moved to strike for cause.

In sum, trial counsel's attempt to use the Colorado Method was an abysmal failure, based on a lack of understanding of the principles underlying the method. Trial counsel further compounded the problem by not inquiring into specific areas of potential bias of individual jurors, all to Mr. Hall's prejudice.

b. Prejudice

As a result of trial counsel's utter failure to effectively employ the Colorado Method or its constitutional underpinnings, the jury consisted of many 7-rated jurors who should have been excused for cause or jurors who should have been rated 7, had they been properly examined during voir dire. The jurors who would have been inclined to give a life sentence were never adequately identified and given the tools to insulate their personal moral decision making from others on the jury who would demand explanations, justifications, or defenses to those moral judgments.

There is a limited class of fundamental constitutional errors that "defy analysis by 'harmless error' standards." *Neder v. United States*, 527 U.S. 1, 7 (1999). "Errors of this type are so intrinsically harmful as to require automatic reversal *i.e.,* affect substantial rights, without regard to their effect on the outcome. *Id.* As explained by the Supreme Court:

> Those cases, we have explained, contain a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." . . . Such errors " infect the entire trial process," . . . . and " necessarily render a trial fundamentally unfair." . . . Put another way, these errors deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair."

Id. at 8-9. *See also, James v. State*, 222 S.W.2d 302 (Mo. App. 2007) (presuming prejudice where one juror biased). Trial counsel is ineffective when he fails to question a prospective juror about information disclosed by the juror on a questionnaire, where the answers "raise[ ] legitimate questions about [the juror's] impartiality." *State v. Lamere*, 112 P.3d 1005 (Mont. 2005).

Trial by a biased jury is structural error, and prejudice is presumed. Because impartiality goes to "the fundamental integrity of all that is embraced in the constitutional concept of trial by jury," *Turner v. Louisiana*, 379 U.S. 466, 472 (1965), whenever it is threatened, "the probability of deleterious effects on fundamental rights calls for close judicial scrutiny." *Estelle v. Williams*, 425 U.S. 501, 504 (1976). *See Ristaino v. Ross*, 424 U.S. 589, 596 (1973) (holding prejudice must be presumed with respect to potential bias under circumstances such that "impermissible threat to the fair trial guaranteed by due process is posed"); *see also, James v. State, supra* (holding error is structural).

If ever a case called for a presumption of prejudice, this is the one. Trial counsel's failure to ask even elementary questions, challenge for cause, or exercise peremptory challenges in anything more than a random manner, left Erick Hall with a jury that must be presumed biased. Even if bias is not presumed, there is enough record evidence to support Mr. Hall's claim that, but for the deficient performance of trial counsel, there is a reasonable probability that he would have received a life sentence.[105] .

[105] Even if Mr. Hall had the burden of showing *actual* juror bias, he has been precluded from developing it because of the Court's order prohibiting juror contact.

Juror No. 83

As summarized by David Lane:

> The juror tells defense counsel that if the crime was premeditated, "then I think it should be the death penalty." (2518). There is no effort to strip the juror, however, by this answer she has pegged herself as an automatic death penalty juror. There is no effort by defense counsel to elicit responses from this juror regarding any other mitigation and shockingly, defense counsel never challenges her (or any other jurors who actually served) for cause, even though she is substantially impaired in her ability to give meaningful consideration to mitigation.

(Exhibit 89, p.32.)[106]

Of particular note, counsel inexplicably excused lower numbered jurors than Juror No. 83, which is a cardinal violation of the Colorado Method. (Exhibit 90, p.40.) This juror, Juror No. 83, was ranked a 7 on her questionnaire and a 6 in her voir dire, for a total numerical score of 13. She was never challenged by the defense even though based upon her numerical score, she was a virtual certain vote for death. Based upon the defense ratings, there were only four jurors peremptorily challenged by them who were rated either equally unfavorably or worse than juror number 83. Jurors numbered 60 and 94 were challenged with questionnaire scores of 6 and a voir dire score of 7 for a 13 composite score. This made sense as the voir dire score of 7 is usually given more weight than questionnaire scores. Jurors numbered 77 and 104 were 7 rated jurors in both categories and should have been a granted challenge for cause if made. The defense used peremptory challenges appropriately for those two jurors even though a complete record should have been made that those jurors were substantially impaired in their ability to give meaningful consideration to mitigation. In every other instance, however, the defense permitted juror number 83 to sit with a composite score of 13 yet used nine

[106] Mr. Lane's references transcript page citations in parentheses in his declaration.

peremptory challenges for *lower* rated jurors. The defense challenged juror number 1 (composite score of 11); number 5 (composite 12); number 13 (composite 12) number 22 (composite 11); number 30 (composite 11); number 41 (composite 10); number 54 (composite 11); number 73 (composite 9) and; number 90 (composite 12).

Juror No. 102

Again, there was no effort by trial counsel to determine under what circumstances this juror would find the death penalty appropriate. (Exhibit 89, p.34.) "This is the most elementary task for any defense attorney in a capital case." (Exhibit 89, p.34.) Therefore, trial counsel would have no idea of when this juror would vote to impose death.

Similar to Juror No. 83, trial counsel inexplicably failed to move to strike Juror No. 102 for cause, and failed to exercise a peremptory challenge on him. This juror, like Juror No. 83, was ranked a 7 on his questionnaire and a 6 in voir dire. Again, there is no reasonable explanation for leaving a higher rated juror than those struck with peremptories.

Choosing jurors who were more likely to vote for death than the jurors who the defense was excusing represents an abandonment of any semblance of the Colorado method. (Exhibit 90, p.19.) There can be no justification for such a choice, and choosing a juror who is a virtual certain vote for death and excusing other jurors less likely to vote for death resulted in an unconstitutionally biased, mitigation-impaired jury in this case.

Trial counsel utterly failed to "strip" jurors, i.e., ascertain their true feelings about the death penalty, and utterly failed to ascertain if jurors could give meaningful consideration to mitigation, as illustrated by the following examples.

Juror No. 6

Juror No. 6 is an example of a juror who needs stripping because she is hiding behind the cloak of manslaughter as an example of what is in her mind a "murder" which would not warrant the death penalty. (Exhibit 89, pp.18-19.)

Trial counsel did not adequately strip this juror. He failed to determine how she felt about the death penalty when there is no crime of passion involved, and should have used the facts of the case at issue to do so. If trial counsel had used the facts alleged by the State, and the juror responded by saying that under those facts everyone would get death in her mind, she would be "substantially impaired in her ability to give meaningful consideration to mitigation" and would have been challenged successfully for cause. It is essential to keep in mind that the law *mandates* that no juror fail to give meaningful consideration to mitigation. (Exhibit 89, p.21.) This juror indicated she would not be able to give meaningful consideration, when she said that childhood history and upbringing, would not be "a major in her decision." Inexplicably, trial counsel ranked this juror as a 5 on the questionnaire and a 4 on voir dire. According to David Lane, "It is unknown why these rankings were given as the identification questions were completely lacking." (Exhibit 89, p.22.)

Juror No. 51

This juror provided "the classic juror answer, which requires stripping," when she said the death penalty is appropriate in some circumstances, but not all. (Exhibit 89, p.24.) Yet trial counsel made no effort to determine what those circumstances might be. "Defense counsel does not have the foggiest idea what the juror means by this response,

yet he does nothing to ascertain what the juror means. It is impossible to identify and rank this juror given the abject failure by defense counsel to strip the juror and ascertain what the juror's feelings are about the death penalty." (Exhibit 89, pp.24-25.) There is also no effort to determine what sort of mitigation would be meaningful to this juror. "[I]t was impossible to rank this juror and counsel had no idea what her views were on the death penalty." (Exhibit 89, p.25.)

Juror No. 62

The State grossly misled this juror in defining the degree of attention that must be given to mitigation as something she has to "listen to" but does not necessarily have to "pay attention" to. (Exhibit 89, p.25.) Trial counsel failed to object. Trial counsel made no effort to strip this juror:

> Defense counsel never identifies or ranks this juror in terms of what she believes regarding the death penalty. Clearly she is in favor of it, but no effort is made to determine whether given the horrific facts of the Hall case, this juror could really ever consider any verdict but death. There was no effort to strip the juror or to assess whether in this case she was an automatic death penalty juror. It appears likely that an automatic vote for death upon conviction was approved by defense counsel.

(Exhibit 89, p.26.) In her questionnaire, this juror gave every indication that she would *not* be able to give meaningful consideration to mitigating factors such as alcohol and drug abuse, childhood trauma, and poor socio-economic status. She also said she would use the death penalty as a deterrent, an "eye for an eye."

Juror No. 63

Trial counsel engaged in no stripping of this juror and failed to ascertain her views on the death penalty.

> In her questionnaire she indicates that she thinks the death penalty needs to be enforced more often to be a good deterrent. (2125). If everything had

> been proven she could give the death penalty. (2128). Again, this is an example of a juror giving an indication that if guilt is proven, death is a virtual certainty. Counsel should have pushed the juror with stripping questions such as "assume guilt is proven beyond all doubt, and it is a cold-blooded, brutal kidnapping, rape murder of an absolutely blameless, innocent victim. What do you think about the death penalty under those circumstances?" If the juror indicates that under those circumstances, no mitigation on earth would result in anything but a death penalty, the juror should be challenged for cause as substantially impaired in her ability to give meaningful consideration to mitigation. This never occurs and defense counsel is never able to intelligently rank this juror.

(Exhibit p.89, p.28.) Trial counsel inexplicably ranked this juror a 4.

Juror No. 68

This juror indicated strong pro-death penalty feelings when he stated "the crime and penalty match each other." He also stated that "if you kill someone then your life is on the line at that point in time." (2237). This juror indicated that he would not be able to consider mitigation. When asked "If a person rapes and murders and then claims he was taking drugs at the time, do you think that deserves a lesser penalty," the juror answered "No." (2237) According to David Lane, "This juror is clearly an automatic death penalty juror and should be rated a 7." However, trial counsel shockingly rated him as 4 based on his questionnaire and a 5/6 after voir dire. There is no reasonable explanation for this rating.

Juror No. 93

Trial counsel should have move to strike Juror No. 93 for cause:

> The juror on her questionnaire indicated that she was a ten out of ten in her strength for the death penalty. She has "no problem with the death penalty as long as I'm absolutely positive, no question in my mind the guilt." (2715). In her questionnaire she apparently said that she believes in an "eye for an eye." (2718). There is no effort made by defense counsel to challenge an obvious 7 who will automatically vote for the death penalty upon a conviction. There is no effort to strip the juror and tell her to assume that Mr. Hall is guilty beyond a reasonable doubt and she is quite

> certain of his guilt. She would almost certainly have said that in that case she would impose the death penalty.

(Exhibit 89, pp.33-34.) As illustrated by the above examples, trial counsel failed miserably to strip jurors or to determine their abilities to give meaningful consideration to mitigation.

Trial counsel also failed to insulate jurors who may have voted for life or isolate those jurors who seemed likely to vote for death:

> The concept of the "Jurors Bill of Rights" was developed by David Wymore and the Colorado Public Defenders. This idea is designed to empower weaker life giving jurors and cause pro-death penalty jurors to not only back off, but to even have them protect life givers. It is designed to "insulate and isolate" each juror from the pressures exerted by other jurors. In essence, it instructs jurors that they are to scrupulously follow the law and make a **personal moral judgment** based upon their own reasoning and moral judgment as to whether death is the appropriate punishment in a given case. In other words, the decision to execute is not deemed a collective decision. It is the individualized determinations of twelve separate jurors which is expressed through the verdict. This is precisely what the law requires.

(Exhibit 89, pp.11-12.) Trial counsel did not understand the concept. Instead of properly educating the jurors about insulating and isolating, trial counsel repeatedly engaged in meaningless questioning about "bullying." (*See e.g.*, Exhibit 89, pp.26, 34.) Additionally, effective insulating/isolating can only occur after a juror has been identified, i.e., properly ranked.

4. Conclusion

Trial counsel's performance during voir dire was shockingly inadequate, and their attempts to use the Colorado Method were wholly ineffective due to their lack of understanding of the method, their lack of understanding of the constitutional

underpinnings of that method or any capital jury selection method, and their lack of preparedness. Their failures led to the impaneling of a biased, mitigation-impaired jury.

GG. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Adequately Challenge Juror No. 60 For Cause

Trial counsel failed to adequately move to strike prospective Juror No. 60 for cause. During the voir dire, the juror indicated she thought "they should get the death penalty" if defendant "thought about it." (Tr., pp.2017-2018.) The juror flat out stated that, once guilt was established, there was no issue left. (Tr., p.2020, L.1 – p.8 ("What else do you need to know [once guilt is established]?"); see Tr., p.2020-2021(stating circumstances of birth, character, sympathy and mercy do not matter in deciding punishment).) Trial counsel seemingly started to explore whether the juror would be an automatic death penalty juror. (*See* Tr., pp.2020-2021.) The prosecutor eventually objected, and trial counsel attempted to explain that the juror was "substantially mitigation impaired." Trial counsel moved to strike her for cause, which was denied. When the Court asked for a definition of "mitigation impaired," trial counsel had no ready answer. (Tr., p. 2032, Ls.12-24; p.2060, L.9 – p. 2062, L.17.) The Court then denied their motion to strike the juror for cause. Furthermore, trial counsel stated they would provide briefing, which never happened. *See* Claim GG, *supra*, incorporated herein by reference. Thus, trial counsel had to use a peremptory challenge to strike the juror, when, if properly prepared, the motion to strike for cause would have been granted.

HH. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Ensure That All Proceedings Were Recorded And That Mr. Hall Was Present For All Proceedings

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

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

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

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

- An unrecorded in-chambers conference with the Court and trial counsel in which the parties discussed retaining attorney Rolf Kehne as a jury consultant. (Tr., p. 2062, Ls. 3-8.) There was no mention of Mr. Hall's presence. (*See also*, Deposition of Amil Myshin, 9/14/06, p.81, Ls.16-18 ("So I went into Judge Neville's chambers and I said, 'I want to do this,' and he said 'Okay.'")

- An unrecorded discussion between trial counsel and the Court in which the parties discussed trial counsel's intention not to file a brief, and the decision to not employ Mr. Kehne "from this point forward" as a jury

consultant. (Tr., p. 2067, Ls. 10-20.) There was no mention of Mr. Hall's presence.

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

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

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

Erick Hall had the right, guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendment, to be present at all critical stages of the criminal proceedings where his presence would contribute to the proceeding's fairness. *See Kentucky v. Stincer*, 482 U.S. 730 (1987).

II. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Object To The Lack Of A Willfulness Instruction Regarding The Elements Of First Degree Murder

The applicable standard for ineffective assistance of counsel claims is set forth in Claim A.2, *supra*. Jury instruction 13A listed the elements of first degree murder, but did not include the elements that the killing be "willful" and "deliberate," only that it be "premeditated" and committed with "malice aforethought." (R., p.693 (Jury Instruction No. 13A).) The alternative for premeditation was that the killing occurred during the perpetration of a felony. Idaho Code § 18-4003 specifies that "All murder which is . . . perpetrated by any kind of willful, deliberate and premeditated killing is murder of the

first degree." Thus, omitting the willful and deliberate components in the instructions was error.

Trial counsel was ineffective in failing to object to the omission, in violation of the Sixth Amendment, because the omissions clearly render Instruction 13A an erroneous statement of the law, and failing to object to the instruction led to a violation of the Due Process Clause of the Fourteenth Amendment. *See Sandstrom v. Montana*, 442 U.S. 510, 521 (1979); *Polk v. Sandoval*, __ F.3d __, 2007 WL 2597437 (9th Cir. 2007) (reversing and remanding murder conviction on due process grounds where jury instruction on premeditation relieved the state of proving elements three necessary elements of premeditation, willfulness, and deliberation). While the subsequent instruction number 15 includes the terms willful and deliberate, the elements instruction does not. Furthermore, while instruction 15 defines "deliberate," there is no definition of "willful" in the instructions. The omissions clearly would have misled the jury into believing the state need not demonstrate either deliberateness or willfulness to prove first degree murder, thereby reducing the State's burden of proof.

As the Court observed in *State v. Aragon,* 107 Idaho 358, 363, 690 P.2d 293, 298 (1984), there are distinct definitions associated with the terms willfulness, deliberation, and premeditation. Each of these terms must be sufficiently defined to the jury in order to make the distinction between first degree murder and second degree murder clear. *Id.* (finding instructions did not blur the distinction between first and second degree murder).

> On the one hand, the jury was informed of the definition of murder, and that it involves killing with malice. Malice was defined as a "state of mind" manifested by an intentional or deliberate act. The jury was instructed that malice may be express or implied. These were proper definitions of malice and its interrelationship with the definition of murder.

> Further, the jury was instructed that if nothing more than malice, or the intent to do any unlawful act, was proven beyond a reasonable doubt, then the crime could not be first degree murder. The jury was instructed that if it could find beyond a reasonable doubt three other elements-willfulness, deliberation and premeditation-then the defendant was guilty of first degree murder. Malice, the intent to act feloniously, was properly distinguished from willfulness, the intent to take life, premeditation, conceived beforehand, and deliberation, done with reflection. The jury was properly instructed on the additional elements to prove first degree murder, and thus there was no error.

Id.[107]

In contrast to *Aragon,* the jury in Mr. Hall's case was not properly or sufficiently instructed regarding the elements that must be proven by the State beyond a reasonable doubt to justify a first degree murder conviction. Under these circumstances, Mr. Hall was prejudiced by counsel's failure to object to the erroneous instruction, and there is a reasonable probability that the outcome of the trial would have been different had trial counsel objected to the omissions.

JJ. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Challenge the State's Presentation of DNA Evidence

Trial counsel was ineffective in failing to present expert testimony challenging the testimony of Kathryn Colombo who testified for the State that there was only one contributor to the DNA evidence taken from Ms. Henneman's body.

As noted elsewhere in this petition, 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—

[107] Notably, the jury in *Aragon* was instructed that malice is express "when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature", while it is implied "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." *Aragon*, 107 Idaho at 361, 690 P.2d at 297.

whether pathologists, serologists, microanalysts, DNA analysts, ballistics specialists, translators, or others.") In this case, trial counsel failed to challenge the DNA testimony presented by the State through Kathryn Colombo.

The jury was left with the impression that there was only one male contributor to the DNA sample, when it is likely that there were two contributors. While Ms. Colombo testified that there was a "possibility" of a second male contributor to the DNA sample, she downplayed that possibility to the extent it effectively did not exist. (Tr., p.4466, L.25 – p.4467, L.4 ("It was over the stutter cut-off, but just barely."); p.4472, Ls.19-21 ("...it means that Erick Virgil Hall is the primary source of the DNA obtained from the sperm fraction"); p.4478, L.8 ("There's only one male primary source."); pp.4489, Ls.6-21; 4525, L.23 – p.4526, L.25); *see also* Exhibit 94 (Cellmark, Amended Report, dated 4/28/03).) Trial counsel's examination focused on the presence of a 13th allele, an aspect of DNA that could neither be attributed to Ms. Henneman nor Erick Hall. While Ms. Colombo acknowledged that the 13th allele "could be the true nature of the sample," she effectively minimized its importance by repeatedly testifying that it could be a "stutter artifact," a "technical artifact," or "contamination." (Tr., p.4466, L.20 – p.4467, L.16.) Trial counsel was ineffective in allowing the State's expert to minimize the **probability** of a second semen contributor by labeling it a mere "possibility" among other unlikely possibilities. Trial counsel was aware of the problems with the DNA evidence, and even acknowledged his belief that the presence of the 13th allele indicated "that there was somebody else involved." (Tr., 9/14/06 deposition of Amil Myshin, p.68, Ls.8-20.) In fact, trial counsel retained a DNA expert but for out-of-court consultation only. (*See* Exhibit 95.) Trial counsel could have presented expert DNA testimony but

inexplicably resorted to cross-examination without the assistance of, or the presentation of evidence by, an independent defense DNA expert. (Tr., 9/14/06 deposition of Amil Myshin, p.205, L.3 – p.206, L.8; *see also* Tr., 9/13/06 deposition of D.C. Carr, p.216, Ls.3-16 (explaining that the defense theory "was that somebody else did it, or there was somebody with Erick"); Tr., 12/08/06 deposition of D.C. Carr, p.357, Ls.17-20 (agreeing that there was not much evidence beyond the DNA evidence which connected Mr. Hall to the crime); p.358, Ls.13-23 (admitting he hoped that the jury would not find the DNA evidence compelling); p.377, Ls.2-12 (admitting feeling the DNA evidence against Mr. Hall was strong); p.388, Ls.11-25 (acknowledging that there "was some abnormality with the DNA").)

The State's interpretation of the DNA evidence effectively excluded any other contributor to the DNA sample from Ms. Henneman's body other than Erick Hall. As a consequence, the jury had no reason to believe that anybody other than Mr. Hall was responsible for the rape and murder of Ms. Henneman. Had trial counsel presented the testimony of a DNA analyst to support their defense theory with more than an ineffective cross-examination and argument, there is a reasonable probability that Mr. Hall would not have been convicted of murder or sentenced to death.

In support of this claim, Mr. Hall submits the affidavit of Greg Hampikian, Ph.D. Dr. Hampikian teaches at Boise State University and his expertise is in forensic biology and DNA analysis. (Exhibit 96.) After reviewing the data and the testimony, Dr. Hampikian is of the opinion, "to a reasonable degree of medical probability," that **"the semen sample recovered from the victim includes DNA from more than one male."** (Exhibit 96.) Dr. Hampikian's analysis demonstrates that the 13th allele is a

"real" DNA peak, and it indicates a second male contributor. Had trial counsel called an expert to testify, the jury would have heard testimony similar to Dr. Hampikian's conclusion: "The most direct interpretation of the DNA evidence presented at trial is that a second male contributor is included in the semen sample recovered from the victim. The best evidence of this is the 13th allele at D5." (Exhibit 96.)

Trial counsel's failure to adequately consult with an expert at trial and failure to call an expert to testify, left the jury with a muddled, confusing picture of the DNA evidence at best and the belief that the 13th allele was a meaningless bit of stutter or contamination at worst, leaving Mr. Hall as the sole moral agent involved in the homicide. Mr. Hall asserts that he has satisfied both prongs of *Strickland,* and his convictions and sentences should be vacated.

KK. Trial Counsel Rendered Ineffective Assistance Of Counsel By Eliciting Evidence Of Other Bad Acts

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

Rachel Cutler, the lab manager for the Idaho State Police Forensic Services Laboratory, testified that she received one envelope containing two boxes, each of which contained saliva swabs from Mr. Hall. (Tr., p.4424, L.16 – p.4426, L.19.) She sent out the swabs from one box to Cellmark for DNA testing. On cross-examination, trial counsel carelessly elicited the fact that the samples contained in the second box were tested in another case:

Q. Good morning.
A. Good morning.
Q. What did you do with the other box?
A. I left it in the evidence envelope it arrived in.
Q. And what happened to it after that?
A. It was analyzed in a separate case.
Q. And stored then in the lab?
A. For a time.
Q. Thank you.

(Tr., p.4428, Ls.5-16.) Trial counsel knew that Mr. Hall was charged in another rape-murder, and should have known that the second box would have been used for evidence against Mr. Hall in that case. While perhaps appropriate in a case involving a defendant not suspected in any other crime, asking that question in this case was careless and constituted deficient performance.

The answer elicited was damning. Clearly, exposing the jurors to evidence of Mr. Hall's involvement in another crime—one requiring DNA, and thus likely another rape or murder—is highly prejudicial at both the guilt and penalty phases of trial. There is a reasonable probability that, but for counsels' elicitation of the highly prejudicial evidence, the outcome of the trial and sentencing would have been different.

LL. Trial Counsel Rendered Ineffective Assistance Of Counsel For The Guilt-Innocence Phase Of Trial By Failing To Conduct An Adequate Investigation Of The Possible Connection Between Lynn Henneman's Murder And Patrick Hoffert's Suicide

Mr. Hall incorporates herein by reference Claims B.3.c and ii.

MM. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Object To Shackling Or Failing To Adequately Object To Evidence Of Defendant's Custodial Status

Mr. Hall incorporates herein by reference Claims BB.

V. PRAYERS FOR RELIEF

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

1. To allow further civil discovery as warranted by receipt and review of pending discovery disclosures pursuant to the IRCP and ICR 57(b);
2. For leave to amend the Final Amended Petition as more information becomes available upon receipt of discovery;
3. For an evidentiary hearing on the merits upon completion of discovery;
4. For an order vacating the convictions and sentences imposed against Mr. Hall;
5. For such other, or further relief as, to the Court, seems just and equitable.

DATED this 5th of October, 2007.

for Paula M. Swensen
MARK J. ACKLEY
Deputy State Appellate Public Defender

Paula M. Swensen
PAULA M. SWENSEN
Deputy State Appellate Public Defender

VERIFICATION

STATE OF IDAHO)
) ss.
County of Ada)

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

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

DATED this ____ day of October, 2007.

Erick V. Hall
ERICK VIRGIL HALL
Petitioner

SUBSCRIBED AND SWORN to before me this ____ day of October, 2007.

_____
Notary Public for Idaho
Residing at_____
My commission expires_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 5th day of October, 2007, served a true and correct copy of the forgoing FINAL AMENDED PETITION FOR POST-CONVICTION RELIEF as indicated below:

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

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

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

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

Barbara Thomas
BARBARA THOMAS
Administrative Assistant

ORIGINA

NO. _____
FILED
A.M. _____ P.M. 2:30
OCT 12 2007
DAVID NAVARRO, Clerk
By _____ DEPUTY

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

MARK J. ACKLEY, I.S.B. # 6330
PAULA M. SWENSEN, I.S.B. # 6722
Deputy State Appellate Public Defenders
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

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

ERICK VIRGIL HALL, Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. SPOT0500155 **NOTICE OF FILING OF TABLE OF CONTENTS TO FINAL AMENDED PETITION FOR POST-CONVICTION RELIEF** **(CAPITAL CASE)**

Petitioner, ERICK VIRGIL HALL, by and through his attorneys at the Office of the State Appellate Public Defender, files the following document: Table of Contents to Final Amended Petition for Post-Conviction Relief, filed on October 5, 2007.

Dated this 11th day of October, 2007.

Paula M. Swensen
PAULA M. SWENSEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of October, 2007 a true and correct copy of the foregoing document, NOTICE OF FILING OF TABLE OF CONTENTS TO FINAL AMENDED PETITION FOR POST-CONVICTION RELIEF, was mailed, postage prepaid, to the following:

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

____ U.S. Mail
____ Statehouse Mail
____ Facsimile
__X__ 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

Barbara Thomas
BARBARA THOMAS
Administrative Assistant

TABLE OF CONTENTS TO
FINAL AMENDED PETITION FOR POST-CONVICTION RELIEF

***Hall v. State*, Ada County Case No. SPOT0500155**
October 5, 2007

ORIGINAL

FILED
A.M. P.M. 2:30

OCT 12 2007

CANYON NAVARRO, Clerk
By Melanie Andreuso
DEPUTY

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

MARK J. ACKLEY, I.S.B. # 6330
PAULA M. SWENSEN, I.S.B. # 6722
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3647 Lake Harbor Lane
Boise, Idaho 83703
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL, Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. SPOT0500155 **NOTICE OF FILING OF INDEX OF EXHIBITS TO FINAL AMENDED PETITION FOR POST-CONVICTION RELIEF** **(CAPITAL CASE)**

Petitioner, ERICK VIRGIL HALL, by and through his attorneys at the Office of the State Appellate Public Defender, files the following document: Index of Exhibits to Final Amended Petition for Post-Conviction Relief.

The Index of Exhibits is current through October 5, 2007, and includes all exhibits filed with the Final Amended Petition.

Dated this 12th day of October, 2007.

FOR PAULA M. SWENSEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of October, 2007 a true and correct copy of the foregoing document, NOTICE OF FILING OF INDEX OF EXHIBITS TO FINAL AMENDED PETITION FOR POST-CONVICTION RELIEF, was mailed, postage prepaid, to the following:

ERICK VIRGIL HALL INMATE # 33835 IMSI PO BOX 51 BOISE ID 83707	____ U.S. Mail ____ Statehouse Mail ____ Facsimile __X__ 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

Barbara Thomas
BARBARA THOMAS
Administrative Assistant

Hall v. State, Ada County Case No. SPOT0500155
Index of Exhibits to
Final Amended Petition for Post-Conviction Relief
October 5, 2007

Exh. No.	Description of Exhibit
1	ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Revised Edition, February 2003 (bound separately)
2	Affidavit of Wendy Levy, dated April 5, 2006
3	Second Affidavit of Dr. James Merikangas, dated October 14,2006
4	Curriculum Vitae of Dr. James Merikangas
5	Affidavit of Deanna Jean (McCracken) Horman, dated April 10, 2006
6	Affidavit of Jean Hall McCracken, dated April 9, 2006
7	Affidavit of John August Thompson, dated April 9, 2006
8	Affidavit of Frank ("Frankie") Alvin Charles McCracken, dated April 9, 2006
9	Affidavit of Kenneth S. Douglas, dated April 9, 2006
10	Affidavit of Rosanne Dapsuaski, dated April 25, 2007
11	Affidavit of Mark Cunningham, Ph.D., dated October 1, 2007
12	Curriculum Vitae of Mark Cunningham, Ph.D.
13	Transcript of Deposition of Amil Myshin, taken on September 14, 2006, with deposition exhibits
14	Transcript of Deposition of Amil Myshin, taken on November 16, 2006, with deposition exhibits
15	Transcript of Deposition of D.C. Carr, taken on September 13, 2006
15A-15B	Exhibits to Transcript of Deposition of D.C. Carr, taken on September 13, 2006
16	Transcript of Deposition of D.C. Carr, taken on December 8, 2006
17	Third Affidavit of Dr. James Merikangas, dated September 26, 2007
18	Search results for Shannon Pambrun using "People Finder"
19	Search results for Shannon Pambrun using "People Finders"
20	Affidavit of Shannon Pambrun, dated September 4, 2007
21	Affidavit of Frank Owen McCracken, Sr., dated April 7, 2006
22	Affidavit of Tiffaney Leandra Conner, dated April 8, 2006
23	Affidavit of Kimberly A. Bacon, dated April 9, 2006
24	Affidavit of Shawnra McCracken Hemming, dated April 7, 2006
25	Affidavit of Tamara McCracken, dated April 7, 2006
26	Affidavit of Jeff Langston, dated March 24, 2007
27	Affidavit of Sophronia Selby, dated March 23, 2007
28	Affidavit of Harry Selby, dated March 23, 2007
29	Affidavit of Cookie Quirk, dated April 8, 2006
30	Boise Police Department/Ada County Sheriff, Supplemental Report, dated 9/24/00, regarding interviews of Lisa Lewis and Peggy Jean Hill

Exh. No.	Description of Exhibit
31	Garden City Police Department, report by Detective Stephen Bartlett, dated October 24, 2000, regarding Patrick Hoffert suicide
32	Affidavit of Lisa Lewis, dated February 10, 2006
33	Affidavit of Peggy Jean Hill, dated February 10, 2006
34	Second Affidavit of Lisa Lewis, dated September 14, 2007 (with lead sheets)
35	Affidavit of Peggy Jean Hill, dated September 17, 2007 (with lead sheets)
36	Affidavit of Michael J. Shaw, dated August 31, 2007
37	CD of Audio of interview of Lisa Lewis by Glen Elam, conducted on August 12, 2004
38	Transcript of audio of interview of Lisa Lewis by Glen Elam, conducted on August 12, 2004
39	Notes from Glen Elam to John Anzuoni regarding task to interview Ms. Muncie
40	Affidavit of Evelyn Denise Dunaway, dated April 14, 2006
41	Affidavit of Jennifer Demunbrun, dated September 7, 2006
42	Affidavit of Timothy Turley, dated November 30, 2006
43	Affidavit of Laura Turley, dated July 3, 2006
44	Affidavit of Amber Lynn (Peterson) Fox, dated June 7, 2006
45	CD of PowerPoint used in State's closing argument in case no. H0300518
46	Affidavit of Dr. Sally S. Aiken, dated April 14, 2006
47	Garden City Police Department, General Report by Detective Hess, dated December 4, 1991, regarding alleged rape of Norma Jean Oliver
48	*State v. Erick Hall*, Indictment, Ada County Case No. 91-99, filed December 19, 1991
49	*State v. Erick Hall*, Amended Information/Indictment, Ada County Case No.HCR18591, filed April 23, 1991
50	*State v. Erick Hall*, Court Minutes, Ada County Case No. HCR18591/ 18094/17804, showing sentence of 5 years, with one year fixed on Case No. HCR18591
51	CDs containing interview of Norma Jean Oliver, conducted in West Virginia on April 8, 2006, by Sharon Callis
52	Transcript of interview of Norma Jean Oliver, conducted in West Virginia on April 8, 2006, by Sharon Callis
53	*State v. Erick Hall*, transcript of grand jury proceedings, Ada County Grand Jury Case No. 18591 (FILED UNDER SEAL)
54	Affidavit of Joi Reno, dated September 12, 2007
55	PSI, *State v. Erick Hall*, Ada County Case No. HCR18591 (FILED UNDER SEAL)
56A	CD of interview of Erick Hall by Detective Hess on December 4, 1991
56B	CD of interview of Norma Jean Oliver by Detective Hess on December 4, 1991
57A	Transcript of interview of Erick Hall by Detective Hess on December 4, 1991
57B	Transcript of interview Norma Jean Oliver by Detective Hess on December 4, 1991

Exh. No.	Description of Exhibit
58	Registers of Action from Payette County Juvenile Magistrate Court, *State v. Norma Jean Oliver*
59	Boise Police Department Juvenile Processing Form, regarding Payette County case no. 90059215, regarding Norma Jean Oliver apprehension as a runaway, dated 10/5/90
60	Boise Police Department, Case Status Report and General Report, regarding apprehension of runaway of Norma Jean Oliver on 11/18/90
61	Boise Police Department, Miscellaneous Report and Case Status Report, DR no. 127-536, occurring on 12/2/91, regarding apprehension of Norma Jean Oliver as a runaway at the Sands Motel
62	Boise Police Department, Miscellaneous Report, Dr no. 127-686, occurring on 12/3/91, regarding arrest of Joi Reno at the Sands Motel, and referencing finding runaway Norma Jean Oliver
63	DSM IV-TR, description of Bipolar Disorder
64	DSM IV-TR, description of Borderline Personality Disorder
65	St. Alphonsus Hospital, report of Dr. Vickman, dated December 4, 1991, regarding alleged rape of Norma Jean Oliver
66	PSI, *State v. Erick Hall*, Ada County Case No. CR 17804 (FILED UNDER SEAL)
67	PSI, *State v. Erick Hall*, Ada County Case No. CR M9400534 (FILED UNDER SEAL)
68	Boise Police Department/Ada County Sheriff's Department, Standard Statement Form of Evelyn Dunaway, DR no. 208-655
69	*State v. Michelle Deen*, Ada County case no. M0203902/H0200584: Commitment and Cover Sheet with handwritten note regarding deal
70	*State v. Michelle Deen*, Ada County case no. M0203902/H0200584: Registers of Action and Court Minutes, showing representation by both Amil Myshin and D.C. Carr
71	*State v. Michelle Deen*, Ada County case no. H0301398, Register of Actions (showing order dated 12/5/03 for Substance Abuse Evaluation and order dated 6/30/04 order for probation including Psychiatric Evaluation); Order for Substance Abuse Evaluation, Providing Funds, & Access to Defendant; Judgment of Conviction and Commitment; Order Suspending Sentence and Order of Probation; showing representation by Amil Myshin
72	*State v. April Sebastian*, Register of Actions, Order Suspending Sentence and Order of Probation, and Court Minutes from 11/30/04, Ada County Case No. H0400228
73	*State v. April Sebastian*, Register of Actions, Ada County case no. M9513860
74	*State v. April Sebastian*, Register of Actions, Ada County Case No. M9703840
75	Michael Jauhola v. State, Ada County case no. SPOT0100492D, (Tr., p. 4083, L. 22 – p. 4085, L. 14)
76	State v. Abdullah, Ada County case no. H0201384: R., pp.114-115; R.pp.142-146; and Tr., Vol. I, p.27, Ls.11-16
77	State v. Darrell Payne, Idaho Supreme Court, case no. 28589: Tr., pp.4684-4862

Exh. No.	Description of Exhibit
78	State v. Jauhola, Idaho Supreme Court, case nos. 27490/31435: Tr., pp.2858-3210
79	State v. Thomas Creech, Idaho Supreme Court, case nos. 10252, 3/27/95: Tr., pp.365-419
80	State v. Robin Row, Idaho Supreme Court, case nos. 18945, 11/12/93: Tr., pp.4013-4040
81	"Inadequate anesthesia in lethal injection for execution," The Lancet, 2005:365: pp.1412-14
82	State's Response To The Discovery Order, dated 3/15/07
83	State's Supplemental Response to the Discovery Order, dated 6/15/07
84	Idaho Department of Corrections, Offender Classification information
85	Idaho Department of Corrections, Directive regarding policy
86	Transcripts of KTVB news coverage of Lynn Henneman and Cheryl Hanlon homicides (including interview with juror James Kennedy)
87	*State v. Erick Hall*, Complaint, Ada County Case No. M0303573
88	Idaho Statesman articles (bound separately – 2 volumes)
89	Declaration of David Lane, dated April 16, 2006
90	Second Declaration of David Lane, dated June 14, 2007
91	ACLU News Article regarding Timothy McNeese, dated September 15, 1999
92	*Gomez v. Spaulding*, Case No. CIV 91-0299-S-LMB (D. Idaho), Findings of Fact, Conclusions of Law, Memorandum Decision and Order Relating to Plaintiff's Motion for Sanctions, filed September 13, 1999, (imposing sanctions against Deputy Attorney Generals Stephanie Altig and Timothy McNeese)
93	*Gomez v. Vernon*, 255 F.3d 1188 (9th Cir. 2001) (upholding imposition of sanctions against Deputy Attorney Generals Stephanie Altig and Timothy McNeese)
94	Cellmark, amended report, dated April 28, 2003
95	Forensic Analytical, letter to Ada County Public Defender, dated May 4, 2004
96	Affidavit of Greg Hampikian, Ph.D., dated April 14, 2006
97	Affidavit of Erick Hall (to be submitted)
98	*State v. Erick Hall*, Ada County case no. HCR18591, Register of Actions (NJO rape case, shows that PSI ordered released in 10/03)
99	*State v. Erick Hall*, Ada County case no. HCR18591, Order Releasing PSI, (NJO rape case, shows that PSI ordered released in 10/03 to Amil)
100	Idaho State Police evidence receipts, affidavit and report dated December 6, 1991, regarding results of sex crimes kit on Norma Jean Oliver
101	Trial counsel's copies of pictures introduced at trial as State's Exhibits 141-142, 145-
102	*State v. Erick Hall*, Ada County case no. H0300518, Response to Discovery, including discovery log dated July 22, 2003
103	Affidavit of Wade Spain, dated October 2, 2007

ORIGINAL

NO. _____
FILED
A.M. _____ P.M. 2:30

OCT 12 2007

J. DAVID NAVARRO, Clerk
By _____
DEPUTY

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

MARK J. ACKLEY, I.S.B. # 6330
PAULA M. SWENSEN, I.S.B. # 6722
Deputy State Appellate Public Defenders
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

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

ERICK VIRGIL HALL, Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. SPOT0500155 **NOTICE OF FILING OF ORIGINAL VERIFICATION PAGE WITH NOTARY SEAL TO FINAL AMENDED PETITION FOR POST-CONVICTION RELIEF** **(CAPITAL CASE)**

Petitioner, ERICK VIRGIL HALL, by and through his attorneys at the Office of the State Appellate Public Defender, files the following document: Original Verification Page with Notary Seal to Final Amended Petition for Post-Conviction Relief.

Dated this 12th day of October, 2007.

Paula M. Swensen
PAULA M. SWENSEN
Deputy State Appellate Public Defender

04272

VERIFICATION

STATE OF IDAHO)
) ss.
County of Ada)

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

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

DATED this 4th day of October, 2007.

Erick V. Hall
ERICK VIRGIL HALL
Petitioner

SUBSCRIBED AND SWORN to before me this 4th day of October, 2007.

PAULA SWENSEN NOTARY PUBLIC STATE OF IDAHO

Paula Swensen
Notary Public for Idaho
Residing at Boise, ID
My commission expires 10/12/2010

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of October, 2007 a true and correct copy of the foregoing document, NOTICE OF FILING OF ORIGINAL VERIFICATION PAGE WITH NOTARY SEAL TO FINAL AMENDED PETITION FOR POST-CONVICTION RELIEF, was mailed, postage prepaid, to the following:

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

____ U.S. Mail
____ Statehouse Mail
____ Facsimile
X 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

Barbara Thomas
BARBARA THOMAS
Administrative Assistant

ORIGINAL

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

MARK J. ACKLEY, I.S.B. # 6330
PAULA M. SWENSEN, I.S.B. # 6722
Deputy State Appellate Public Defenders
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

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

ERICK VIRGIL HALL, Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. SPOT0500155 **NOTICE OF FILING OF EXHIBIT 97 TO THE FINAL AMENDED PETITION FOR POST-CONVICTION RELIEF** **(CAPITAL CASE)**

Petitioner, ERICK VIRGIL HALL, by and through his attorneys at the Office of the State Appellate Public Defender, files the following document: Exhibit 97 to Final Amended Petition for Post-Conviction Relief (Affidavit of Erick Virgil Hall, dated October 18, 2007).

Dated this 19th day of October, 2007.

Paula M Swensen
PAULA M. SWENSEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of October, 2007 a true and correct copy of the foregoing document, NOTICE OF FILING OF EXHIBIT 97 TO THE FINAL AMENDED PETITION FOR POST-CONVICTION RELIEF, was mailed, postage prepaid, to the following:

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

Paula M. Swensen
PAULA M. SWENSEN

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 **AFFIDAVIT OF ERICK VIRGIL HALL**

STATE OF IDAHO,)
) ss
County of Ada.)

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

1. All matters set forth in this affidavit are based upon personal knowledge;

2. During the course of my trial in this case I wore a "leg brace" for all in court appearances;

3. The "leg brace" was worn under my clothing and would lock, causing my leg to remain in a stiff position when I stood up;

4. To sit back down again, I had to push on a ~~button~~ lever E. Hall to unlock the brace – this would have been noticeable to the jury; E. Hall

5. The brace made clicking ~~and popping~~ noises; the jurors would have been able to hear these noises every time I stood up. E. Hall

DATED this 18th day of October, 2007.

Erick V. Hall
Erick Virgil Hall

SUBSCRIBED AND SWORN before me this 18th day of October, 2007.

Paula Swensen
Notary Public for Idaho

PAULA SWENSEN NOTARY PUBLIC STATE OF IDAHO

Residing in Boise ID

My commission expires _____

GREG H. BOWER
Ada County Prosecuting Attorney

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

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

ERICK VIRGIL HALL, Petitioner, vs. THE STATE OF IDAHO, Respondent,	**Case No. SPOT0500155** **STATE'S MOTION FOR ADDITIONAL TIME TO MAKE STATE'S RESPONSE TO FINAL AMENDED PETITION FOR POST CONVICTION RELIEF**

COMES NOW, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and moves the Court for its order granting additional time to the State to make the State's response to the final Amended Petition for Post Conviction Relief. The undersigned is in the process of making response, but due to the length of the petition and the nature of the issues involved, is unable to complete the response by the previously set date of November 2, 2007. The State requests additional time, until Friday, December 7, 2007. The

undersigned has spoken to Mark Ackley of the office of the State Appellate Public Defender about this motion. Mr. Ackley offers no objection.

RESPECTFULLY SUBMITTED this 26 day of October 2007.

GREG H. BOWER
Ada County Prosecutor

Roger Bourne
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing document was delivered to Mark J. Ackley and Paula M. Swensen, Deputy State Appellate Public Defenders, 3647 Lake Harbor Lane, Boise, Idaho 83703, through the United States Mail, postage prepaid this 26 day of October 2007.

Session: Neville110907 Division: DC Courtroom: CR501
Session Date: 2007/11/09 Session Time: 08:35
Judge: Neville, Thomas F.
Reporter: Whiting, Laura

Clerk(s):
Ellis, Janet

State Attorneys:
Haws, Joshua

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0004
Case Number: SPOT0500155D
Plaintiff: HALL, ERICK VIRGIL
Plaintiff Attorney: SWENSON, PAULA
Defendant: STATE OF ID AHO
Co-Defendant(s):
Pers. Attorney:
State Attorney: BOURNE, ROGER
Public Defender:

2007/11/09
11:21:15 - Operator
Recording:
11:21:15 - New case
, STATE OF ID AHO
11:21:34 - Judge: Neville, Thomas F.
Tme as set for status conference.
11:22:50 - Judge: Neville, Thomas F.
The Court would like to set November 15, 2007 @ 2:00 p.m. fo r hearing on
11:23:43 - Judge: Neville, Thomas F.
petitioner's motion for permissive appeal and to allow Court time to review
11:24:01 - Judge: Neville, Thomas F.
in camera the medical reports and then set December 19, 2007

@ 9:00 a.m. for
11:25:15 - Judge: Neville, Thomas F.
any other hearings that counsel were ready for.
11:26:11 - Plaintiff Attorney: SWENSON, PAULA
Ms. Swenson stated State would probably file Motion to Dismi ss, do not think
11:27:11 - Plaintiff Attorney: SWENSON, PAULA
could argue that by Dec. 19th.
11:27:21 - State Attorney: BOURNE, ROGER
Mr. Bourne stated counsel stipulated to allow by Dec. 7th fo r the State's
11:27:42 - State Attorney: BOURNE, ROGER
response.
11:28:06 - Judge: Neville, Thomas F.
Court would keep the 19th open for what other matters counse l might have
11:29:52 - Operator
Stop recording:
11:33:14 - Operator
Recording:
11:33:14 - Record
, STATE OF ID AHO
11:33:15 - Judge: Neville, Thomas F.
The Court will identify Thrusday, January 17, 2008 @ 1:30 p. m. and continue
11:33:32 - Judge: Neville, Thomas F.
through to Friday, January 18, 2008 @ 9:00 for half the day.
11:34:46 - Plaintiff Attorney: SWENSON, PAULA
Ms. Swenson stated would like to make a record of an objecti on of
11:35:14 - Plaintiff Attorney: SWENSON, PAULA
incorporating the State's Order for Juror Contact that incor porates findings
11:38:37 - Judge: Neville, Thomas F.
The Court has viewed the order incorporates the August 8th
11:39:46 - Plaintiff Attorney: SWENSON, PAULA
Ms. Swenson stated objects to the State's argument that the Court
11:40:06 - Plaintiff Attorney: SWENSON, PAULA
incorporated.
11:40:10 - Judge: Neville, Thomas F.
Court will protect the petitioner's record
11:40:57 - Plaintiff Attorney: SWENSON, PAULA
Ms. Swenson stated received the Dodd documents as well as No rma Jean Oliver
11:41:17 - Plaintiff Attorney: SWENSON, PAULA
PSI transcript
11:41:24 - Judge: Neville, Thomas F.

Court noted that in Mr. Ackley's agenda
11:41:35 - Operator
Stop recording:

Session: Neville111507 Division: DC Courtroom: CR504
Session Date: 2007/11/15 Session Time: 11:05
Judge: Neville, Thomas F.
Reporter: Wolf, Sue

Clerk(s):
Ellis, Janet

State Attorneys:

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0002
Case Number: SPOT0500155D
Plaintiff: HALL, ERICK VIRGIL
Plaintiff Attorney: SWENSON, PAULA
Defendant: STATE OF IDAHO
Co-Defendant(s):
Pers. Attorney:
State Attorney: BOURNE, ROGER
Public Defender:

2007/11/15
15:00:42 - Operator
Recording:
15:00:42 - New case
, STATE OF IDAHO
15:01:23 - Other: Owens, Nicole
present on behalf of petitioner
15:01:43 - Judge: Neville, Thomas F.
Court here on Petitioner's Motion for Permission to Appeal.
15:02:29 - Plaintiff Attorney: SWENSON, PAULA
Ms. Swenson argued motion, will primarily rest on briefs sub mitted. Request
15:02:47 - Plaintiff Attorney: SWENSON, PAULA
Court consider the Court's order denying juror contact. No rule that
15:03:30 - Plaintiff Attorney: SWENSON, PAULA
prohibits juror contact but believe have made showing to all ow to go up on
15:04:07 - Plaintiff Attorney: SWENSON, PAULA
appeal. Also regarding Glen Elam, denial of that deposition , believe showing
15:04:31 - Plaintiff Attorney: SWENSON, PAULA
made there are matters controlling, that would allow to go o n appeal.
15:05:03 - State Attorney: BOURNE, ROGER
Mr. Bourne believes State has said all that it needs to say,

believe that
15:05:35 - State Attorney: BOURNE, ROGER
allowing to go on appeal now would set back another year to year and half.
15:05:51 - State Attorney: BOURNE, ROGER
Regarding Mr. Elam, no showing made that Mr. Elam would have anything new to
15:06:16 - State Attorney: BOURNE, ROGER
add.
15:06:20 - Plaintiff Attorney: SWENSON, PAULA
Regarding juror contact, if this did not go on appeal now, a nd gets reversed
15:06:59 - Plaintiff Attorney: SWENSON, PAULA
by an appeals Court later would farther remove jurors and me mories would
15:07:20 - Plaintiff Attorney: SWENSON, PAULA
fade. Need to speak with Mr. Elam.
15:07:39 - Judge: Neville, Thomas F.
In dealing with juror contact first, Court has not changed i ts views. Court
15:08:03 - Judge: Neville, Thomas F.
is comfortable with its views and rulings placed on the reco rd on August 6th.
15:08:21 - Judge: Neville, Thomas F.
This is a matter of discretion. Jurors were informed by th is Court that
15:08:43 - Judge: Neville, Thomas F.
they could speak to who they wanted to after the trial was over that they
15:09:18 - Judge: Neville, Thomas F.
choose to talk to. Jurors can be affected in their roles as jurors by being
15:11:16 - Judge: Neville, Thomas F.
exposed to things not routinely seen in their normal everyda y lives. The
15:12:57 - Judge: Neville, Thomas F.
argument that Court has singled out counsel, the Court disag rees with that
15:13:23 - Judge: Neville, Thomas F.
statement. Court feels inappropriate to contact jurors with out Court's
15:14:38 - Judge: Neville, Thomas F.
permission or knowledge. Court done not think it is appropr iate to allow
15:15:24 - Judge: Neville, Thomas F.
jury contact in this case. Court can't control the press. In abscense of
15:16:56 - Judge: Neville, Thomas F.
any evidence that there was any juror misconduct or failure to follow Court's
15:17:20 - Judge: Neville, Thomas F.
instruction, Court is comfortable with its prior rulings. I n respect to 2nd
15:17:39 - Judge: Neville, Thomas F.
part, of motion to have Glen Elam deposed. Understanding he was interviewed.
15:18:06 - Judge: Neville, Thomas F.
Mr. Elam wouldn't sign affidavit requested. Court has conc

ern if all of
15:21:02 - Judge: Neville, Thomas F.
defense staff becomes subject to interviews after every case they may not
15:21:25 - Judge: Neville, Thomas F.
want to stay in their jobs. Both Defense counsel were deposed, and
15:23:06 - Judge: Neville, Thomas F.
ultimately they are responsible for their investigators. Court will continue
15:23:37 - Judge: Neville, Thomas F.
earlier ruling and not allow deposition of Glen Elam. In affidavit of Mr.
15:24:28 - Judge: Neville, Thomas F.
Shaw, he states that Mr. Elam stated he could only sign an affidavit of his
15:25:04 - Judge: Neville, Thomas F.
lead investigator advised he could do so. Court understands that Idaho
15:26:09 - Judge: Neville, Thomas F.
appellate rule 12, Court denied Motion for permissive appeal. Stateds
15:28:18 - Judge: Neville, Thomas F.
petitoner's counsel free to file their own direct appeal with supreme court.
15:28:38 - Judge: Neville, Thomas F.
Court would also like to bring counsel back on December 17, 2007 @ 9:00 for
15:28:55 - Judge: Neville, Thomas F.
review of medical records.
15:29:43 - Judge: Neville, Thomas F.
Request State prepare an order denying.
15:29:53 - State Attorney: BOURNE, ROGER
Inquired if Court would like an order denying deposition on Glen Elam as well
15:30:10 - Judge: Neville, Thomas F.
The Court indicated it would.
15:30:46 - Judge: Neville, Thomas F.
Court trying to change schedule a bit in January.
15:31:20 - Operator
Stop recording:

ORIGINAL

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

MARK J. ACKLEY, I.S.B. # 6330
PAULA M. SWENSEN, I.S.B. # 6722
Deputy State Appellate Public Defenders
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

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

ERICK VIRGIL HALL, Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. SPOT0500155 **NOTICE OF FILING OF EXHIBIT 17 TO THE FINAL AMENDED PETITION FOR POST-CONVICTION RELIEF** **(CAPITAL CASE)**

Petitioner, ERICK VIRGIL HALL, by and through his attorneys at the Office of the State Appellate Public Defender, files the following document: Exhibit 17 to Final Amended Petition for Post-Conviction Relief (Third Affidavit of Dr. James Merikangas, dated September 26, 2007). The exhibit includes page 5, which was missing from the exhibit submitted.

Dated this 15th day of November, 2007.

Paula M. Swensen
PAULA M. SWENSEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of November, 2007 a true and correct copy of the foregoing document, NOTICE OF FILING OF EXHIBIT 17 TO THE FINAL AMENDED PETITION FOR POST-CONVICTION RELIEF, was mailed, postage prepaid, to the following:

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

X U.S. Mail
____ Statehouse Mail
____ Facsimile
____ Hand Delivery

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

____ U.S. Mail
____ Statehouse Mail
____ Facsimile
X Hand Delivery

Barbara Thomas
BARBARA THOMAS
Administrative Assistant

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

MARK J. ACKLEY, I.S.B. # 6330
PAULA M. SWENSEN, I.S.B. # 6722
Deputy State Appellate Public Defenders
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

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 **THIRD AFFIDAVIT OF DR. JAMES MERIKANGAS, M.D.** **(CAPITAL CASE)**

State of Idaho)
) ss.
County of Ada)

I, James Merikangas, M.D., being competent to testify, state under penalty of perjury that the following is true and correct to the best of my experience and knowledge:

BACKGROUND

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

transcripts, to perform neurological and psychiatric examinations, to recommend appropriate neurological testing, and to review and interpret the results of such testing.

2. My education, employment and experience are set forth in my Curriculum Vitae, which I understand has already been filed with the Court.

3. I conducted a neurological and psychiatric evaluation of Erick Hall on April 4, 2006, at the Idaho Maximum Security Institution. Erick was cooperative but somewhat subdued during that examination. I then recommended an MRI scan of the brain and a PET scan of the brain because of indications during the neurological examination of possible congenital malformation of the brain. The brain scans, a cervical x-ray, and standard blood work were also indicated by Erick's history of difficulty with hand-eye motor coordination, problems with visual perception, multiple head injuries, blackouts, memory difficulties, and mood swings. The blood work included tests for thyroid function, syphilis and blood sugar levels. The reasons for the specific testing recommended are fully set forth in my Second Affidavit, dated October 14, 2006. The recommended testing was completed on February 15 and 21, 2007.

I conducted a second examination of Erick on September 13, 2007, at the Twin Falls Adult Detention Facility, at which time I noted that Erick was abnormally grandiose, euphoric, and hypomanic.

TESTING CONDUCTED AND MATERIALS REVIEWED

4. In addition to various materials previously reviewed by me as set forth in my Second Affidavit, I reviewed the results of the following testing:

   a. Magnetic resonance imaging (MRI) scan of the brain, with and without contrast. The MRI scan is a brain image produced with radio waves and magnetism. It is a standard procedure for examining the anatomy of the brain and is used to evaluate

brain damage, brain injury or brain disease. The MRI scan gives cross sectional views of the brain based upon the chemical structural relationship of brain tissue.

b. Positron emission tomography (PET) scan. The PET scan, like an MRI, produces cross sectional views of the brain, but the picture is generated with the use of a radioactive isotope, and the scan provides an image of the brain based on brain metabolism rather than simply on brain anatomy. The PET scan, therefore, gives a picture of the brain "functioning" rather than simply its shape.

c. Venereal Disease Research Laboratory/Rapid Plasma Reagin (VDRL/RPR). This is a test for syphilis, which can affect brain development if present before birth, and can cause brain damage and psychosis if acquired later in life.

d. Thyroid testing. The thyroid controls metabolism of the body and the brain. Thyroid function tests are a routine part of the evaluation of mood and thought disorders, and are also used to evaluate high blood pressure. The T3, T4, T7 and TSH blood tests are used to evaluate specific aspects of thyroid function.

e. Five-hour glucose tolerance test. This glucose tolerance test measures both high and low blood sugar. Sugar (glucose) provides the energy for brain functioning and is the brain's only fuel. Hypoglycemia (low blood sugar) can produce the same type of brain damage that deprivation of oxygen would produce, or deprivation of thiamin which is required for metabolism. Hyperglycemia (high blood sugar) can cause a decreased level of consciousness or confusion, impair cognitive function, cause mood fluctuation, and increase depression and anxiety. The five-hour glucose tolerance test is used in diagnosing diabetes and reactive hypoglycemia. It requires the administration of glucose, and multiple blood tests over the five hours, to determine how quickly the glucose is cleared from the blood.

f. Complete C-Spine including obliques. This is a series of x-rays of the cervical spine (the neck area).

5. In addition to various materials previously by me as set forth in my Second Affidavit, and to assist me in better understanding Erick's history, I reviewed the following family member's affidavits:

a. Affidavit of Deanna Jean (McCracken) Horman, dated April 10, 2006
b. Affidavit of Jean Hall McCracken, dated April 9, 2006
c. Affidavit of John August Thompson, dated April 9, 2006
d. Affidavit of Frank ("Frankie") Alvin Charles McCracken, dated April 9, 2006
e. Affidavit of Kimberly A. Bacon, dated April 9, 2006
f. Affidavit of Kenneth S. Douglas, dated April 9, 2006
g. Affidavit of Frank Owen McCracken, Sr., dated April 7, 2006

h. Affidavit of Tiffaney Leandra Conner, dated April 8, 2006
i. Affidavit of Shawnra McCracken Hemming, dated April 7, 2006
j. Affidavit of Tamara McCracken, dated April 7, 2006
k. Affidavit of Shannon Pambrun, dated September 4, 2007

METHODOLOGY & PATIENT HISTORY

6. Human behavior is extremely complex, and is influenced by numerous factors, including genetics, family upbringing, positive and negative life experiences, and the physical and chemical make-up of the brain. The brain itself is highly complex and can be damaged at any stage of development and at any stage of life. Damage can be overt or subtle, and damage will affect behavior to varying degrees depending not just upon the extent of the damage, but also on the location of the damage. Deformation may exist at birth or may be caused later by illness, trauma, and alcohol or drug use. Even subtle damage to the brain may cause significant physical, emotional, psychiatric and behavioral problems.

Because of the complexity of the brain and of human behavior, neurology and neuropsychiatry must take into account the patient's complete history. Specific tests are useful, of course, in discovering specific brain damage (although negative results are not always dispositive of lack of damage). However, determining the extent of the damage, the cause of the damage, and the effects of the damage on behavior is a complicated undertaking which requires neurologists and neuropsychiatrists to take into account results from multiple tests, family background, and a patient's physical and mental health history.

Thus, Erick's personal history is extremely relevant in assessing and interpreting his test results, including the MRI and PET scan results. History is especially relevant in trying to ascertain the cause of brain damage. Erick's history is replete with known potential causes of or indications of brain damage. Erick birth weight was only 4 pounds,

14 ounces. Based on his family history, there is reason to believe that Erick's mother drank alcohol while pregnant with him. Erick was developmentally delayed, and was diagnosed as mildly mentally retarded as a child. He was unable to cope with kindergarten, had a very poor attention span, and required constant direction and supervision to complete tasks. Erick was an emotionally disturbed child, was frail and undernourished. He heard voices as a child, and his behavior was described as different and odd. Erick was repeatedly and severely physically abused as a child by multiple family members. Erick has a history of alcohol, cocaine, and methamphetamine abuse.

Additionally, Erick has a history of multiple head injuries, a well-established cause of brain damage. As a child, Erick fell off his bicycle, hit the back of his head and lost consciousness. Following that incident and for several years following the incident, Erick complained of severe headaches, and neck and eye pain. Erick's brother would often hit him so hard that Erick would be knocked unconscious. Erick once fell off a roof. He landed in a rose garden, but fell forward and hit his head on a rock sidewalk. He fell out of a pickup truck, and off a hay trailer. His siblings and extended family would throw rocks at Erick's head.

7. In my professional opinion, and to a reasonable degree of medical certainty, Erick's history warranted a complete neurological examination. Had I been consulted prior to Erick's sentencing trial, I would have undoubtedly recommended the same neurological testing that I recommended during the current post-conviction proceedings.

NEUROLOGICAL FINDINGS

8. **Magnetic resonance imaging (MRI)**

The MRI scans of Erick's brain showed anatomical damage. Specifically, the MRIs showed (a) the presence (foci) of white matter hyperintensity on Erick's brain, (b) prominence of the ventricles of Erick's brain, and (c) an abnormally thin corpus callosum.

(a) White Matter Hyperintensity.

Erick's MRI showed damage to his brain. Specifically it showed the presence of foci of white matter hyperintensity, called lesions. The presence of lesions indicates a disease state, and are particularly troubling when found in a 36-year-old.

What is white matter hyperintensity? Generally, there are two types of brain matter, grey matter and white matter. Grey matter refers mainly to the cerebral cortex, which is the convoluted, contoured exterior of the brain. Grey matter contains the bodies of the nerve cells. White matter connects the various grey matter areas of the brain and carries nerve impulses between nerve cells in different parts of the brain. White matter is coated with myelin, a fatty insulation. Lesions of white matter hyperintensity describe a condition where the myelin has broken down, exposing the underlying white matter. White matter is analogous to electrical wiring, with the myelin being the insulation. When the insulation breaks down, the wiring becomes exposed, and does not conduct electricity well. Thus, the fact that Erick has white matter lesions, indicates that his brain's circuitry is not functioning properly, i.e., messages are not sent efficiently from one part of his brain to another.

While it is common to see white matter lesions in certain categories of persons, it is associated with a disease state. For example, white matter lesions are associated with diseases such as high blood pressure, vascular disease, and other diseases found in the elderly. White matter lesions can also the result of using drugs like cocaine or methamphetamine. As discussed above, Erick has a history of using these drugs.

The presence of white matter lesions may affect behavior. The behavioral effects vary depending on the location of the lesions and the cause of the abnormality. In Erick's case, the white matter lesions are located in his temporal and frontal lobes.

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, (9) and 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.

(b) Prominence of Ventricles.

Erick's MRI also showed damage to his ventricular system. 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.

(c) Thin Corpus Callosum.

Erick's MRI showed damage to the corpus callosum. The corpus callosum is the great band of fibers connecting the left and right cerebral hemispheres of the human brain. It is normally the largest white matter structure in the brain, and much of the inter-hemispheric communication in the brain is conducted across the corpus callosum.

Erick's corpus callosum is abnormally thin or narrow. Thin corpus callosa are associated with Fetal Alcohol Spectrum Disorder (FASD). 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 Erick 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.

9. **Positron Emission Tomography (PET)**

The PET scan gives a picture of the brain's metabolic activity level (or functioning) in the various areas of the brain. Erick's PET scan showed functional damage. First, there was a severe decrease in activity in the medial temporal regions bilaterally extending to the tips of the temporal poles. Second, there was 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.

The cause of this decrease in Erick's brain activity is likely a result of his multiple head injuries. However, oxygen deprivation, high fevers, infections or measles can also cause these abnormalities. 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

10. **Syphilis Test**

Mr. Hall tested negative for syphilis.

11. **Thyroid Tests**

Mr. Hall tested within normal limits for thyroid function.

12. **Glucose Tolerance Testing**

Erick tested as hyperglycemic. Further testing for the possibility of diabetes is indicated.

13. **Cervical X-Ray**

There was some mild spondylitic change at C4-5 with anterior hypertrophic osteophytic spurring. There was some minimal posterior osteophytic spurring, but no narrowing of the neural foramina on the oblique views. These may be the result of neck injuries associated with Erick's head injuries or other physical trauma.

SUMMARY OF FINDINGS

14. 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.

DATED this 26 day of September, 2007.

SUBSCRIBED AND SWORN to before me this 26 day of September, 2007.

NOTARY PUBLIC
Grant E. Modderman, Notary Public
Montgomery County, Bethesda, Maryland
My Commission Expires Apr. 16, 2011

Notary Public for ~~Idaho~~ MARYLAND
Residing at 4938 HAMPDEN LN. BETHESDA MD
My commission expires APRIL 16 2011

Session: Neville121907 Division: DC Courtroom: CR501
Session Date: 2007/12/19 Session Time: 08:49
Judge: Neville, Thomas F.
Reporter: Hirmer, Jeanne

Clerk(s):
Ellis, Janet

State Attorneys:

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0002
Case Number: SPOT0500155D
Plaintiff: HALL, ERICK
Plaintiff Attorney: SWENSON, PAULA
Defendant: STATE OF IDAHO
Co-Defendant(s):
Pers. Attorney:
State Attorney: BOURNE, ROGER
Public Defender:

2007/12/19
09:32:46 - Operator
Recording:
09:32:46 - New case
, STATE OF IDAHO
09:33:29 - Other: OWEN, NICOL
present on behalf of petitioner as well.
09:33:54 - Judge: Neville, Thomas F.
Court prepared to sign an order submitted by the Court. The Court has had
09:35:25 - Judge: Neville, Thomas F.
orgnized the medical records. The bulk of the records are f rom Intermountain
09:36:45 - Judge: Neville, Thomas F.
Medical Hospital, and most is discoverable, but whether admi tted is subject

09:37:03 - Judge: Neville, Thomas F.
to argument and rules of evidence. Court also has a brief l etter from Dr.
09:37:35 - Judge: Neville, Thomas F.
Heyrend stating he has no records that his associate has it. The Court also
09:38:15 - Judge: Neville, Thomas F.
received letter from social security office and their stand on releasing
09:38:54 - Judge: Neville, Thomas F.
records.
09:39:20 - Plaintiff Attorney: SWENSON, PAULA
Ms. Swenson stated spoke with Mr. Ellsberry and talked about policies. Ms.
09:39:55 - Plaintiff Attorney: SWENSON, PAULA
Swenson stated that Ms. Oliver could sign a release of those records and
09:40:22 - Plaintiff Attorney: SWENSON, PAULA
would request that the Court sign an order to do so.
09:40:50 - Judge: Neville, Thomas F.
The Court responded
09:41:24 - Plaintiff Attorney: SWENSON, PAULA
Ms. Swenson stated that once receive the medical records fro m the Court may
09:41:43 - Plaintiff Attorney: SWENSON, PAULA
have an idea on whether social security records would be red undant or would
09:42:05 - Plaintiff Attorney: SWENSON, PAULA
be necessary.
09:42:38 - Judge: Neville, Thomas F.
The Court was surprised by in house counsel for social secur ity would stated
09:42:57 - Judge: Neville, Thomas F.
that privacy would trump a death penalty case. Court stated major features
09:44:24 - Judge: Neville, Thomas F.
of the records would be relevent some redactions would need to be made.
09:45:01 - Judge: Neville, Thomas F.
Going to the PSI for April Sebastian, mostly not relevent.
09:46:53 - Judge: Neville, Thomas F.
Court would still like counsel to leave open the afternoon o f January 17th
09:47:34 - Judge: Neville, Thomas F.
and the entire day of January 18th for this case.
09:48:19 - Judge: Neville, Thomas F.
The Court notes Motion for limited appearance in the H030062 4

09:48:57 - Plaintiff Attorney: SWENSON, PAULA
Ms. Swenson responded re: handling trial counsel to be avail able.
09:50:04 - State Attorney: BOURNE, ROGER
Mr. Bourne stated will advise Ms. Bennetts that the Court wi ll take up Hanlon
09:50:40 - State Attorney: BOURNE, ROGER
matter as well.
09:50:46 - Judge: Neville, Thomas F.
09:50:48 - State Attorney: BOURNE, ROGER
Mr. Bourne stated have not filed State's response to Amended Petition.
09:51:14 - State Attorney: BOURNE, ROGER
Believe will be able to file today the response with notoriz ed affidavit.
09:52:03 - State Attorney: BOURNE, ROGER
Believe that Mr. Ackley may want to respond to that and that would cause
09:52:24 - State Attorney: BOURNE, ROGER
State to respond to that.
09:52:44 - State Attorney: BOURNE, ROGER
Might be able to take up some of the claims on that day that are not affected
09:52:58 - State Attorney: BOURNE, ROGER
by the medical records.
09:53:06 - Plaintiff Attorney: SWENSON, PAULA
Ms. Swenson stated don't believe would be able to go forward to address the
09:53:28 - Plaintiff Attorney: SWENSON, PAULA
Motion to Dismiss. Do not want to piece meal this. Assume State's answer
09:54:04 - Plaintiff Attorney: SWENSON, PAULA
would be lengthy
09:54:08 - State Attorney: BOURNE, ROGER
Close to 100 pages.
09:54:18 - Plaintiff Attorney: SWENSON, PAULA
Would like to set out 6 weeks after disclosure of the record s. Will also
09:54:49 - Plaintiff Attorney: SWENSON, PAULA
need to contact Dr. Merikangas once State has contacted thei r expert and
09:55:08 - Plaintiff Attorney: SWENSON, PAULA
filed the affidavit.
09:55:12 - Judge: Neville, Thomas F.
Court response
09:56:49 - Plaintiff Attorney: SWENSON, PAULA
Ms. Swenson responded, would ask that on the documents, an o rder what is

09:57:19 - Plaintiff Attorney: SWENSON, PAULA
being disclosed and what is not being disclosed for appeal.
09:57:39 - Judge: Neville, Thomas F.
Court will consider.
09:58:12 - Operator
Stop recording: