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LAW CLERK Vol. 8 24

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

ERICK VIRGIL HALL,

PETITIONER-APPELLANT,

vs.

STATE OF IDAHO,

RESPONDENT.

FILED - COPY
MAY 2 1 2009
Supreme Court ___ Court of Appeals ___
Entered on ATS by: ___

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

Hon THOMAS F. NEVILLE, *District Judge*

MOLLY HUSKEY
State Appellate Public Defender

Attorney for Appellant

LAWRENCE G. WASDEN
Attorney General

Attorney for Respondent

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DEC 2 1 2007

J. DAVID NAVARRO, Clerk
By M. STROMER
DEPUTY

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

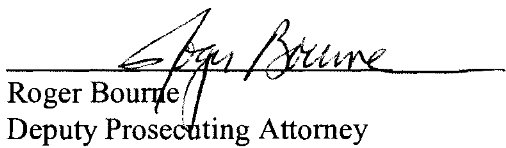
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL, Petitioner,	**Case No. SPOT0500155**
vs.	**STATE'S MOTION TO DISMISS**
THE STATE OF IDAHO, Respondent.	

COMES NOW, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and moves this Court to dismiss the Final Amended Petition for Post Conviction Relief filed in the above entitled case pursuant to I.C. §19-4906. The reasons for dismissal are fully set out in the State's Response to the Final Amended Petition filed herewith.

RESPECTFULLY SUBMITTED, this 21st day of December 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 the State Appellate Public Defender's Office, 3647 Lake Harbor Lane, Boise, Idaho 83703 through the United States Mail, this 21 day of December 2007.

NO.____________
A.M.__________ FILED P.M. 2:11

DEC 21 2007

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

ERICK VIRGIL HALL, Petitioner, vs. THE STATE OF IDAHO, Respondent.	**Case No. SPOT0500155D** **STATE'S RESPONSE TO 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 makes the State's response to the petitioner, Erick Virgil Hall's Amended Petition for Post Conviction Relief as follows.

The State admits that this Court has jurisdiction over the action pursuant to various Idaho statutes and rules. The State denies that any international human rights laws are applicable or give the Court additional authority that it did not otherwise have.

The State admits that the petitioner is in the custody of the Idaho State Department of Corrections pursuant to a judgment and sentence pronounced by this Court in Ada County after

conviction in Ada County case number H0300518 for the crimes of Count I, Murder in the First Degree; Count II, Rape; Count III, Kidnapping in the First Degree. After a finding by jury that the death penalty was the appropriate punishment for the defendant's criminal behavior, this Court imposed a sentence of death in January 2005 for the crime of Murder with consecutive fixed life sentences for Rape and Kidnapping. The State admits that the petitioner pled not guilty and that a jury returned verdicts of guilty and the death sentence.

The State admits that the petitioner is restrained of his liberty pursuant to the convictions referred to above, but denies that the restraint is illegal in any respect and denies that the convictions and sentences were obtained in violation of the law or of the Constitution of United States or the State of Idaho. The State denies each and every claim upon which the petitioner relies in support of any of his claims.

The State will respond to the specifics of the petitioner's claims using the same numbering system set up by the petitioner. However, before doing so a review of the current law on post conviction claims for ineffective assistance of counsel and other similar claims is appropriate. The Idaho Supreme Court has stated the standard for judging ineffective assistance of counsel claims in *Pratt v. State*, 134 Idaho 581 (Sup. Ct. 2000) as follows:

> The benchmark for judging a claim of ineffective assistance of counsel is "when a counsel's conduct so undermined the proper functioning of the adversarial process, that the trial cannot be relied on as having produced a just result." *State v. Matthews*, 133 Idaho 300 (S.Ct.1999), *cert. denied*, 2000 WL 198035 (2000) (quoting, *Strickland v. Washington*, 466 U.S. 668 (1984)). The test for evaluating whether a criminal defendant has received the effective assistance of counsel is two-pronged and requires the petitioner to establish: (1) Counsel's conduct was deficient because it fell outside the wide range of professional norms; and (2) The petitioner was prejudiced as a result of that deficient conduct. *Ray v. State*, 133 Idaho 96 (1999). (Citing Strickland, 466 U.S. at 687). In assessing the reasonableness of attorney performance, counsel is "presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 329-30 (citing *Strickland*, 466 U.S. at 690). In addition, strategic and tactical decisions will not be second guessed or serve as a basis for post-conviction relief under a claim of ineffective assistance of counsel unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law, or other short comings capable of objective review. *Giles v. State*, 125 Idaho 921 (1994), *cert. denied*, 513 U.S. 1130 (1995).

The Idaho Court of Appeals further defined "prejudiced" as it relates to an ineffective assistance of counsel claim in *Goodwin v. State*, 138 Idaho 269 (Ct. App. 2002).
The court stated:

> To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Hassett v. State*, 127 Idaho 313, 316, (Ct. App. 1995); *Russell v. State*, 118 Idaho 65 (Ct. App. 1990); *Davis v. State*, 116 Idaho 401 (Ct. App. 1989). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758 (1988); *Russell, supra*. To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Aragon, supra*, and *Russell, supra*.

In other words, it is not good enough for current counsel to argue that trial counsel conducted the trial differently than current counsel would have done. It is not even good enough to argue that trial counsel committed a mistake in the law or the facts. The petitioner must establish that trial counsel's representation fell below an objective standard of reasonableness, the defendant was prejudiced, and that the outcome of the trial would have been different but for the deficient performance.

The court is not required to accept either the petitioner's mere conclusory allegations, unsupported by admissible evidence, or the petitioner's conclusions of law. *Roman v. State*, 125 Idaho 736 (Ct. App. 1987); *Baruth v. Gardner*, 110 Idaho 156 (Ct. App. 1986). The *Goodwin* court went on to say that a petition for post conviction relief differs from a complaint in a civil action because the petition must contain more than "a short and plain statement of the claim" that would be sufficient for a civil complaint under I.R.C.P. 8(a)(1):

> Rather, an application for post conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. *Idaho Code §19-4903*. In other words, the application must present or be accompanied by admissible evidence supporting its allegations or the application will be subject to dismissal.
>
> Idaho Code §19-4906 authorized summary disposition of an application for post conviction relief, either pursuant to motion of a party or upon the courts own initiative. Summary dismissal is permissible only when the applicant's

> evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue was presented, an evidentiary hearing must be conducted. *Citations omitted.*

An ineffective assistance of counsel claim is not a test of whether "another lawyer, with the benefit of hindsight, would have acted differently, but whether counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington supra*

As the Ninth Circuit Court of Appeals has recently emphasized, "the relevant inquiry under *Strickland* is not what defense counsel could have pursued, but whether the choices made by defense counsel were reasonable." *Siripongs v. Calderon*, 133 F.3d. 732, 736 (9th Cir. 1998).

Finally, it is important to point out that the petitioner's claims cannot be mere conclusions, but must be supported by admissible evidence. As the Idaho Supreme Court stated in *State v. Lovelace*, 140 ID 53 (Sup. Ct. 2003):

> Lovelace's argument that counsel should and would have advocated for a plea bargain, but for his campaign challenge to the sitting prosecutor whom he claimed was 'soft on crime' is speculative and nothing more than a conclusion. We do not give evidentiary value to mere conclusory allegations that are unsupported by admissible evidence. *Paradis v. State*, 110 Idaho 543 (1986). 140 ID at page 61.

GROUNDS FOR RELIEF

A. Trial counsel rendered ineffective assistance of counsel by failing to adequately investigate and present evidence on Erick Hall's neurological damage, mental retardation, and mental illness

The State denies that trial counsel was ineffective in any respect relating to this claim. The jury heard everything of substance related to the defendant's neurology and mental state. While trial counsel did not have a PET scan and an MRI done on the petitioner, the PET scan and MRI that have been done as part of these post conviction proceedings, have not developed material information. That is, no information has been developed that would probably cause a different result.

The State will begin with what information the jury did have and then compare it with the "new" information developed by Dr. Merikangas. Before the trial ever began, trial counsel had

the petitioner and the circumstances of the murder and the defendant's life evaluated by at least five (5) physiatrists and psychologists. Beginning at page 395 of Amil Myshin's depositions as shown in petitioner's Exhibits 13 and 14, the mental health experts are described. Those psychologists are Clay H. Ward, Ph.D. Psychologist; Karen Froming Ph.D., Psychologist; Linda J. Gummow, Ph.D., Neuropsychologist; Mark Cunningham, Ph.D., Forensic psychologist; Rodderick Pettis, MD Psychiatrist. The vitae of the four psychologists are attached to Mr. Myshin's deposition as Exhibits A B C and D. Exhibit E consists of Dr. Gummow's testing results and notes and Exhibit F is a billing record from Dr. Froming. These doctors spent hundreds of hours with the defendant and with his background. Dr. Gummow for instance billed for nearly ninety (90) hours of work with the defendant. Myshin deposition page 399. She also conducted the "standard battery of psychological testing". Myshin deposition page 402. There is nothing about the psychological testing that supports the petitioners current claim that he has mental retardation or mental illness. None of those mental health experts testified that he had mental retardation or mental illness. Rather, the document entitled "Confidential Work Product---Do Not Cite" from Dr. Gummow dated November 29, 2003, shows that the defendants verbal IQ was 88, his performance IQ was 101, and his full scale IQ 86. SAPD bate stamp number 17133. More importantly, there is nothing about any of the testing conducted that shows an inability to make life choices.

Dr. Pettis, testified that he had reviewed the neuropsychological testing material and he testified that the defendant knew right from wrong and could choose to kill or not to kill.

Dr. Pettis testified about the following conditions concerning the defendants mental state: page 5208 as a child, the defendant had poor hygiene and was shy, withdrawn and isolated; page 5208 as a child, the petitioner was anxious and depressed and showed signs of post traumatic stress disorder and psychosis; page 5213 the petitioner's central nervous system was not developing normally as a child; page 5215-5221. Dr. Pettis testified as to the petitioner's IQ, his attention deficit and impulsivity and other things about the petitioner development as a child; at 5225 Dr. Pettis testified about a dythymiac disorder; at 5229 Dr. Pettis testified about an anti-social and mood disorder, low self esteem, violence and other things in the defendant's family; at page 5238 Dr. Pettis testified about sexual activity in the defendant's family; at page 5243 Dr. Pettis testified about post traumatic stress disorder as it relates to the petitioner; at 5250-5251 Dr.

Pettis testified that he didn't think the petitioner's brain was working properly as a child; at 5253 he referred to the petitioner as having impaired brain function as a child; at 5266-5273 the doctor testified as to drug use and its effects; at 5280 the doctor testified that the petitioner had good memory; at 5282 the doctor testified that the petitioner was not delusional at the time of the murder, he was not psychotic and was not hallucinating; at 5283 Dr. Pettis testified that the petitioner knew right from wrong; at 5284 the doctor testified that the defendant could choose to kill or not to kill; at 5286 the doctor testified that the petitioner's IQ test were done by a neuropsychologist.

Dr Cunningham, a forensic psychologist testified that the evaluation that he, Dr. Cunningham, had done was the "cardiovascular surgery of forensic psychology" and that he testified in approximately fifteen (15) cases a year.

Dr Cunningham testified at page 5300 that Dr. Pettis had focused on the petitioner's development and neurology, where as Dr. Cunningham was focused on the defendant's family and family background and the effect that had on the defendant.

Dr Pettis testified about his view of what PET scans do, page 5249 and how head injuries can be cumulative and cause the petitioner's brain to not work properly. Tr. pg. 5250. Dr. Cunningham also referred to the petitioner's head injuries as a child and said that neuropsychological testing as an adult showed that he had a brain dysfunction. Tr. pg. 5319. Apparently the "dysfunction" was not significant enough to merit further description. Dr. Cunningham testified that the defendant's background of "toxic parenting" affected the choices he made, but he never said that Mr. Hall could not make life choices or take care of himself because his brain didn't function properly. Dr. Merikangas doesn't say that either.

To suggest that trial counsel was ineffective by failing to adequately investigate the defendant's mental state is to ignore the evidence of what was done and to misstate the record. The jury had every material piece of evidence concerning the petitioner's cognitive ability of any substance.

Second, the PET scan and MIR results as described by Dr. Merikangas do not add any substance to what the jury already knew. To begin with, the PET scan and MIR were completed in February, 2007, that is six and a half (6½) years after the murder. There is no evidence to suggest that the results of those tests bear any relevance to September 2000 when Erick Hall

murdered Lynn Henneman. The jury did know that the petitioner was not using methamphetamine at the time of the murder. See generally the testimony of Lisa Hogarth. Tr. pg. 4236-4249. Evelyn Dunaway testified that she got Erick Hall started using methamphetamine sometime between September 2001 and March 2002. Tr. pg. 4844. She testified that she would inject methamphetamine into him. Tr. pg. 4852. In petitioner's Exhibit 15, to the Petitioner's Second Amended Petition for Post Conviction Relief, Ms. Dunaway states in her affidavit that on the day of their break up "Erick was upset and coming down from a methamphetamine high. He was paranoid and yelled that I had betrayed him." Paragraph 15, page 4 Evelyn Dunaway affidavit. Dr. Pettis testified that methamphetamine use can damage a person's central nervous system. Tr. pg. 5270 lines 6-16.

We know that in the six and a half (6½) years that passed between the time of the murder and the PET scan, the defendant aged, injected methamphetamine and drank alcohol to excess. The testimony about the alcohol came out generally during the Hanlon murder trial. Regardless of what the PET scan and MRI really show, Dr. Merikangas cannot relate those results to the time of the murder given the time that lapsed in between, together with the defendant's substance abuse. The State also points out the defendant was born in [redacted] He murdered Lynn Henneman in September 2000, when he was twenty nine and a half (29½) years old. His PET scan was done just a month before he turned thirty six (36) years old. That six and a half (6½) years between the murder and the PET scan is approximately eighteen percent (18%) of the defendant's life up to that point.

Besides the above, there is nothing definitive in the Merikangas report. Dr. Merikangas states that the MRI test shows "White matter hyper intensity." Dr. Merikangas says this means "Messages are not sent efficiently from one part of his brain to another." Dr. Merikangas says "White matter lesions can also [be] the result of using drugs like cocaine or methamphetamine. As discussed above, Erick has a history of using these drugs." Dr. Merikangas' Third Affidavit page 7. This is another example of why the MRI scan, done in February 2007, is irrelevant to the murder in September 2000. The drugs he used after the murder could explain the white matter lesions, but have nothing to do with the murder.

Dr. Merikangas says that these white matter lesions are located in Erick Hall's temporal and frontal lobes. The doctor says that temporal lobe damage "Can result in 1) disturbance of

auditory sensation and perceptions, 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."

There is no evidence that the defendant suffered any of the above described maladies in September 2000. If it is true that temporal lobe damage can result in those things, there is no evidence that this defendant did suffer from those things in September 2000.

Dr. Merikangas says that this potential frontal lobe damage "Provides a *possible explanation* of his criminal behaviors in this case." Dr. Merikangas' assertion that this potential temporal lobe damage is a possible explanation, is not material evidence and gives the court no reason to think that, had the jury heard it, the outcome would have been different.

Dr. Merikangas also speaks of the "prominence of ventricles." Dr. Merikangas says that Mr. Hall's ventricles are enlarged and he opines that this enlargement is "likely the result of his combined head injuries." Dr. Merikangas does not attempt to draw any conclusions about the effect of this enlargement on the petitioner's behavior, but merely points it out.

Dr. Merikangas then describes what he calls "thin corpus callosum." He says that this thin corpus callosum can be associated with fetal alcohol disorder. He says that fetal alcohol syndrome can include poor judgment and poor impulse control. Dr. Merikangas says that this "offers a *possible explanation* for his criminal activity." While the petitioner may have had poor impulse control in some respects, the record is clear that he exercised good control in other areas relating to his use of violence against women. For instance, the petitioner did not kill Norma Jean Oliver, Michelle Deen, Evelyn Dunaway, or Rebecca McCusker, even when they provoked him. There is nothing about this information that would have changed the outcome.

Dr. Merikangas also described that the PET scan shows decreased activity in the temporal lobes. He opines that this indicates damage to those areas of the petitioner's brain. He says that abnormalities in these areas are associated with aggressive impulsive behavior and poor judgment. While that may be true, Dr. Merikangas does not attempt to quantify the amount of suspected damage nor draw conclusions about how much damage is required to affect behavior. That is, do all people whose PET scan looks like the petitioner's commit murder? If this damage causes aggressive behavior, why isn't Mr. Hall always aggressive and impulsive? In other

words, as Dr. Merikangas says it, this "provides a *possible* further explanation for his criminal activity."

In his conclusion, Dr. Merikangas points out that he has not spoken to the petitioner about the crime, but guesses that the above described findings "*could account* for his alleged actions that evening…"

There is nothing about this affidavit that should cause the Court to lose confidence in the jury's verdict. In summary, despite the petitioner's assertions to the contrary, there is nothing about the Dr. Merikangas report that "could have effectively countered the State's argument that Erick made the "choice" to kill." Rather, the evidence clearly shows that the petitioner made some good choices and some bad choices, like the average person, but there was no evidence that he could not make the choice to kill or understand consequences.

Dr. Cunningham inflates the speculative findings in Dr. Merikangas' report and attempts to turn them into specific findings of brain damage effecting impulse control. He then attempts to cast that into a specific explanation for the petitioner's behavior without any scientific basis. He completely ignores the other evidence of the petitioner's good behavior and doesn't even pretend that there is a likely difference between how the defendant presented in February 2007 compared to how he was when he murdered Lynn Henneman in September 2000. The petitioner criticizes the State for referring to Dr. Cunningham as "a performer" in the State's closing argument. After reading Dr. Cunningham's affidavit, Petitioner's Exhibit 11, it looks all the more like the State had it right.

Third, Mr. Myshin testified that he intentionally did not have a PET scan or MRI scan done on the petitioner. As shown above, he was correct in his assessment. The scans cannot be relied upon to show abnormality, let alone an explanation for specific behavior.

Besides that, Mr. Myshin knew that Idaho Code §18-207 would require that the State's experts would have access to the petitioner before any mental health testimony would be admissible. Mr. Myshin testified at his deposition at page 410 that he had concerns about what the state's experts would get out of Erick Hall if they interviewed him in depth as allowed by Idaho Code §18-207. Mr. Myshin stated:

> Q. --- What areas did you feel like they (the State's experts) might get into that wouldn't be beneficial for Erick?

A. Erick is extremely difficult to control. You can't control what he is going to say. And I was afraid that he would fly of the handle and incriminate himself even more, produce statements that would then be admissible against him. The whole time I represented Erick, I was concerned about controlling him.

Q. In the respect of what he would say?

A. What he would say, what he would do, how he would look. All of it.

Q. And you thought that things could come out of interviews with him that would harm him in the sense of either incrimination or show a side of him that was not under control?

A. Correct.

Q. And under the state of the law, 18-207, did you think that there was any way to avoid State's access to Erick if you started down the mental health side of the equation?

A. No. Myshin deposition pgs. 409, 410 and 411.

Since Mr. Myshin could expect to gain very little by the scans and risk the potential of additional incriminating statements, his decision to use the mental health experts as he did was objectively reasonable

The State notes that the petitioner's post conviction counsel has had access to all the psychological testing that was done prior to trial. Mr. Myshin characterized those tests done by Dr. Gummow as being the "standard battery of psychological testing." Myshin deposition pg. 402. He also refers to Dr. Gummow as being a "pro" and basically says that he allowed her wide latitude in the type of testing that she wanted to do. Myshin deposition Tr. pg. 435. And as stated above, all of that testing was reviewed by a psychiatrist, Dr. Pettis.

As noted, post conviction counsel had access to all of that testing and has not produced evidence that any of those tests show that Mr. Hall was mentally ill or retarded. Similarly, the petitioner's claim that he has neurological damage is not quantified or tied to specific behavior or the ability to make choices. The undersigned assumes that if any of those tests showed such a thing it would have been presented as part of this final petition.

Mr. Myshin was right to assume that the State's experts would have made that same observation to the jury if Mr. Myshin had attempted to present the results of psychological testing to the jury. As it currently stands, the testing done by post conviction counsel would have given Mr. Myshin nothing more to argue to the jury than that some testing done six and a half (6½) years after the murder, might "offer a possible explanation for his criminal activity." As described below, Dr. Merikangas would have the Court believe that these scan results mean a great deal more than they do.

The State has attached the affidavit of Helen Mayberg, M.D. She is a psychiatrist and an expert in the uses and limitations of PET scans and MRIs in the diagnosis of neurological and psychiatric brain disorders. The summary of her experience in this area is that PET scans **CANNOT** be used for diagnosing "residual effects of post traumatic brain injury." Affidavit, paragraph 10. PET scans also have no utility in diagnosing congenital brain abnormalities from fetal exposure to alcohol or brain damage from drug use. Affidavit, paragraph 11.

None of the conclusions that Dr. Merikangas or Dr. Cunningham attempt to draw from the PET and MRI scans have a scientific basis. No quantitive comparisons were done. No scientifically valid correlations have been shown between the scan patterns and independent criteria. Without comparison and correlation, no valid conclusions can be drawn from the PET scan. The MRI and PET scan findings are non-specific without age and gender matched control subjects, the results "cannot even be confirmed as abnormal and more likely reflect normal variations". Affidavit, paragraph 17.

None of the conclusions suggested as possible explanations by Drs. Merikangas and Cunningham are supportable. Their "conclusions" should not give the Court reason to think that the jury would have reached a different conclusion had they heard this information.

As will be discussed below, several witnesses pointed out that Mr. Hall did not injure them when he had the opportunity, even though he was provoked. See generally the testimony of April Sebastian, Michelle Deen and Evelyn Dunaway. The State points out that Lynn Henneman was a stranger to the defendant. She was walking on the greenbelt, and was kidnapped, dragged away from the greenbelt into the underbrush where she was raped, beaten, tied up, strangled and her body disposed of. That certainly shows premeditation, the intent to kill, planned goal directed behavior, and an understanding of consequences. Post conviction counsel cannot pretend that these things

did not occur nor that the petitioner is unable to make those types of decisions. There is nothing about this evidence that shows ineffective assistance of counsel. No experienced attorney is claiming that Mr. Myshin's analysis of the tradeoff was wrong. This claim should be dismissed.

B. Trial counsel rendered ineffective assistance of counsel by failing to adequately investigate and present mitigating evidence.

(a) Trial counsel failed to adequately investigate and present evidence of Erick Hall's traumatic childhood through live testimony of family members including his mother and father.

(b) Trial counsel failed to locate, interview, and present the testimony of Erick Hall's foster parents and foster brother.

For the State to respond to this claim, it is necessary to briefly review what the jury did hear about the defendant's childhood. In the penalty phase, the defendant called Betty Jean Kirk, who was his cousin. Ms. Kirk lived near the defendant and was frequently in the defendant's house and was able to testify about his upbringing. He also called Deanna Hormann. Ms. Hormann is the defendant's sister. She was able to give a detailed account of his childhood. The defendant called Shawndra Hemming. She is the defendant's half-sister, but was raised with the defendant and gave details of the defendant's upbringing. The defendant also called Tamara McCracken. Ms. McCracken is a half-sister to the defendant and was raised with the defendant. She gave specific details of the defendant's upbringing.

The defendant called Dr. Pettis. Dr. Pettis testified that he looked at every document that had ever been created about the defendant. He testified that he interviewed every family member "who would cooperate." Tr. pg. 5201. He talked to Tamara, Deanna, Shawndra and Betty, who all testified. He also interviewed the defendant's mother and father along with Frank Jr. and Johnny. Dr. Pettis advised that he spent a hundred to a hundred and fifty hours in the process of interviewing the defendant's family and others who knew him. He also spent twelve hours of interviews with the defendant. Dr. Pettis testified at great length about the details of the defendant's upbringing, including the sexual practices in the house, neglect, physical and verbal abuse, the defendant's educational history, foster homes, juvenile legal troubles and drug use. He

related every hearsay or double hearsay statement from every family member that he talked to without any objection from the State. Dr. Cunningham did the same.

Dr. Cunningham testified that he spent two hundred hours going over every piece of paper created about the defendant's life and in interviewing the defendant's family members. He also interviewed Deanna Hormann, the defendant's mother, Betty Kirk, a brother named John Thompson, Tamara, Frank Jr., Shawndra, and the defendant's father. Dr. Cunningham also spent approximately five hours with the defendant. He testified at great length concerning every significant detail of the defendant's upbringing. He referred to the work he had done as the "cardiovascular surgery of forensic psychology." Trial Tr. pg 5389.

The petitioner now claims that other family members should have been called as witnesses. Nothing in the affidavits from these people is new information that the trial jury did not hear. The testimony from these witnesses can only be characterized as cumulative to what the jury already heard.

In *Babbitt v. Calderon*, 151 F.3d 1170 (C.A. 9, 1998) the defendant made an argument similar to Mr. Hall's. *Babbitt's* defense to a murder charge was post traumatic stress disorder. *Babbitt* had his brother testify about *Babbitt's* Vietnam experience and his wife testify about his strange behavior. He had two mental health experts diagnosis *Babbitt* as having a "PTSD induced disassociative state" at the time of the murder and so he was unable to form the required intent. Post conviction counsel argued that trial counsel should have called Vietnam veterans to testify about PTSD because the experts testimony "might have lacked the emotional power of the testimony of veterans."

The Court held that trial counsel was not ineffective and the testimony of the veterans was cumulative to what the jury heard. The Court held as follows:

> There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S. Ct. 2052. Thus, "judicial scrutiny of counsel's performance must be highly deferential." Id. The test is not whether another lawyer, with the benefit of hindsight, would have acted differently, but whether "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. At 687, 689, 104 S.Ct. 2052. In other words, as this court has recently emphasized, "the relevant inquiry under *Strickland* is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were

reasonable. Siripongs v. Calderon, 133 F.3d 732, 736 (9th Cir.1998) ("Siripongs II"), petition for cert. filed (U.S. May 21, 1998) (No. 97-9175). While a lawyer is under a duty to make reasonable investigations, a lawyer may make a reasonable decision that particular investigations are unnecessary. See *1174 *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052. To determine the reasonableness of a decision not to investigate, the court must apply "a heavy measure of deference to counsel's judgments." Id.

The court as stated above, held that trial counsel was not ineffective. It also held that there was no prejudice. It was undisputed that *Babbitt's* Vietnam experience was traumatic. The issue was whether that trauma caused PTSD and the disassociative state. The veterans could not have testified to that.

Hall's argument is essentially the same. It is undisputed that he had a terrible upbringing. The jury heard hours of undisputed testimony from family members, a social worker and Dr. Pettis and Cunningham. Those experts opined that this background affected Hall's ability to make choices. More family testimony is cumulative to what the jury heard. It adds no more weight to the doctor's opinion.

Trial counsel's investigation was reasonable and thorough. They interviewed every family member who would cooperate. (Dr. Pettis, Tr. pg. 5201) That post conviction counsel has found more who will cooperate years after the trial is not the test. See also *Siripongs v. Calderon,* 133 F.3d. 732 (9th Cir.1998)

The defendant's half-sister, Tamara McCracken, states in her affidavit that she believes the State attempted to undermine the effectiveness of her testimony or attempted to dissuade her from testifying. The State specifically denies that allegation and points out that Tamara McCracken did testify. Nothing in Tamara McCracken's affidavit even begins to suggest that the State attempted to dissuade her from testifying.

Additionally, Amil Myshin testified at his deposition that he intentionally did not call the defendant's parents. Mr. Myshin testified as follows:

A. Yeah. You know, our theory was that Erick had this horrific childhood, and that his mother and father were monsters. At some point Linda, (Dr. Linda Gummow) I felt, wanted to go in a different direction. She wanted to look into his birth circumstances — there is some research in that area — and that perhaps the mother didn't need to be vilified, that she could be brought in as a sympathetic character. And that's not the direction we

wanted to go, really. We wanted to vilify them, and had plenty of good reason to vilify them. Tr. pg 45, lines 9-20.

Mr. Myshin goes on to explain that he was worried that if the parents testified, they may be viewed by the jury as sympathetic characters. The obvious effect of that may be to dilute the intended argument that Erick Hall was the victim of these people and so should be viewed in a sympathetic light.

Mr. Myshin's strategic decision is clearly well thought out and reasonable under the circumstances. He cannot now be second-guessed by petitioner's counsel and have petitioner's counsel substitute his theory.

In subparagraph (b), the petitioner complains that foster parents were not called as witnesses. However, there is nothing about their affidavits that was not fully covered in detail by the witnesses who did testify as described above. Their information is strictly cumulative. These claims should be dismissed.

(c) Trial counsel failed to adequately investigate and present evidence of an alternate perpetrator of the murder and co-perpetrator of the rape.

To begin with, there is no evidence that there is an "alternate perpetrator." The claim is based upon the theory that Patrick Hoffert was involved in the murder based upon completely fabricated reports by two women, Lisa Lewis and Peggy Hill. Those two women told Detective Dave Smith in approximately August 2004, that they had seen Lynn Henneman with Erick Hall in Garden City on the day of her disappearance. They said that the woman they identified as Lynn Henneman appeared to be lost and they, along with Erick Hall, gave her directions back to her hotel, which was approximately a mile and a half away. They advised that while they were talking to Ms. Henneman, Patrick Hoffert drove up in a pickup truck with a woman, stayed for a few minutes, and then drove away. They said that Erick Hall walked with her to the greenbelt to show her the way to her hotel.

Ms. Lewis and Ms. Hill have recently embellished their story to increase the participation in that story of Patrick Hoffert. The Hoffert story, as now claimed by Lewis, was not given to Detective Smith in his summer 2004 interview of Hill and Lewis as can be seen by his police report, Petitioner's Exhibit 9.

Patrick Hoffert committed suicide the day after Henneman's disappearance. He shot himself while in the residence of his girlfriend, Deirdre Muncy. A detailed account of the police investigation of that suicide is contained as Petitioner's Exhibit 10. Ms. Muncy was interviewed by police and gave a detailed account of the events leading up to the suicide, which are contained in that report. Ms. Muncy attributes no statements to Hoffert in that interview that could possibly be interpreted as connecting him to the Lynn Henneman murder. Rather, his suicide appears to be over the state of his relationship with Ms. Muncy.

Ms. Lewis now says that Deirdre Muncy told Ms. Lewis that shortly before his suicide Hoffert said he had "raped a girl." According to Lewis, Ms. Muncy did not say that Hoffert said who "the girl" was. The State assumes that Deirdre Muncy will not confirm this supposed statement by Hoffert since the petition does not contain any affidavit from Deirdre Muncy and Ms. Muncy did not say that to the police. In its present form then, this supposed statement from Hoffert is double hearsay and as such is not admissible evidence that could support a claim. Lewis's assertion that Hoffert told her that "he made sure the woman got back to her hotel" is also inadmissible hearsay. Since there is no admissible evidence to support the claim that Patrick Hoffert is an alternate perpetrator, the claim should be dismissed.

However, there is more reason to dismiss this claim than just the failure of the petitioner's evidence. When Ms. Lewis and Ms. Hill came to the attention of the police in the summer of 2004, shortly before the trial, their names and statements were turned over to the defense team as part of discovery. Mr. Myshin stated in his deposition that he remembered the details of the Lewis and Hill statements and further testified that he had his office investigator interview those two women. Deposition Tr. pg 73. Mr. Myshin testified that Ms. Lewis and Ms. Hill did not tell his investigator about the supposed statements made by Patrick Hoffert. Mr. Myshin had not heard those statements prior to trial. Myshin deposition Tr. pgs. 71-74 and 411-414. That is further evidence that Ms. Hill and Ms. Lewis embellished their story after the trial as part of the post conviction proceedings.

However, even if Hill and Lewis had made those statements prior to trial, the effect of the Hill and Lewis information was to put Erick Hall with Lynn Henneman a few hours before her death. Mr. Myshin testified that evidence putting Erick Hall and Lynn Henneman together a few hours before her death would have been detrimental to the defense of the case with no admissible

evidence to offset it. It is the undersigned's view that no experienced attorney would suggest putting evidence before the jury that connected the defendant to the murder in a circumstantial case.

Finally, the story told by Hill and Lewis is so inconsistent with the provable facts as to clearly show that it is false. The specifics of the comparison of the Lewis and Hill story is compared with the timeline of Lynn Henneman's known activity as developed by Detective Smith in the affidavit of Dave Smith, which is attached.

For at least three reasons then, the petitioner's view of the Lewis Hill story as supporting an alternate perpetrator theory should be dismissed: (1) because it is clearly a recent fabrication; (2) it connects the defendant to the crime; (3) their story is impossible given what is known about the facts.

(d) Trial counsel failed to adequately investigate and present evidence of Erick Hall's good character as an adult.

The information contained in the petition and its attachments from six people who knew the defendant, is cumulative of the type of information that the jury did hear about the defendant. Michelle Deen testified that "Erick was a really nice guy when I first met him. He was really trying to help me out the first month I met him . . . ." She also testified that Erick Hall helped her stay away from Methamphetamine. Tr. pg 4816. She also testified that it was "Erick's nature to help other people." Tr. pg 4833. She testified that he started a lawn mowing business for himself and that she helped him. Tr. pg 4834. She testified that he had "an anger problem and he has a lot of hurts, too." Tr. pg 4835. Ms. Deen also testified about a woman named Jennifer, who Ms. Deen met at El-Ada. Ms. Deen said that Jennifer called Erick her uncle and "she loved him." Tr. pg 4837, line 11. Ms. Deen also said that homeless people tried to help each other. Tr. pg 4837.

Evelyn Dunaway testified that Erick let her come live in his trailer and that Evelyn brought her own daughter Crystal Dunaway and Crystal's children to live in the trailer also. Evelyn also testified that when she moved in with the defendant, that the defendant was allowing another family to stay in his trailer as well. That family included some small children. Tr. pg 4850.

April Sebastian testified that Erick Hall was helpful to her family. She said that she would sometimes call Erick and he would come and fix her car and that she considered Erick to be her friend. She said that he got along "really good" with her kids. Tr. pg 4890 and 4891. She also said that Erick never said a bad word to April and that when April found out about the trouble Evelyn and Erick were having together, it was a shock because "he was always a nice, kind person." Tr. pg 4893 and 4894. She also testified that Erick was interested in homeless people and that he had a lot of people stay at his house. She said that Erick took homeless people in and helped them get food and "things like that." Tr. pg 4894.

Additionally, there is a down side to this type of evidence for the defendant. What it shows is that the defendant is capable of behaving himself when he chooses to. This flies in the face of the testimony of the defendant's experts, Dr. Pettis and Dr. Cunningham, who testified that the defendant would have difficulty making good choices because of his terrible upbringing and "toxic parenting." If he can choose to be kind to some people, it shows that he knows right from wrong and can choose to be violent and murderous towards others. In the view of the undersigned, evidence of this type strengthens the State's argument that, for all of the defendant's problems, he can control his behavior when he chooses to do so.

There is nothing about this claim that shows ineffective assistance of counsel, nor prejudice and should be dismissed. This evidence is cumulative of what the jury heard.

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

The petitioner makes no showing of a factual basis for this claim. Indeed, the petitioner merely says that he "believes that the jurors were able to discern this device." No factual showing is claimed. The State observes at page 2067 the Court noted that the restraint was not visible. The Court said, "...he is in custody although it's not apparent." This claim should be dismissed.

D. Trial Counsel rendered ineffective assistance of counsel by failing to adequately investigate the State's case in aggravation: Norma Jean Oliver.

(a) Trial counsel failed to investigate Norma Jean's mental health problems.

The basic claim here is that Norma Jean Oliver said in 2006 that she was initially diagnosed as being bi-polar manic depressive, but her later doctors have said that she has posttraumatic stress disorder and a borderline personality disorder. The petitioner claims that trial counsel should have discovered this. He then makes the leap to arguing that if trial counsel had discovered this mental health history, counsel could have kept Norma Jean Oliver from testifying at all because she was incompetent, or at least she could have been impeached with that information. None of the information provided by the petitioner supports that argument. The description of those illnesses, provided as exhibits, all show that these illnesses can manifest themselves in a variety of ways from mild to severe. The petitioner, of course, bases his argument on those illnesses in their most severe form. The interview of Norma Jean Oliver done by a State Appellate Public Defender's investigator in April 2006, certainly does not support the notion that Norma Jean was incompetent. In that interview, she is lucid, her memory is good, she speaks well, she tracks with the interviewer and the details she recalls about the rape are consistent with what she has always said happened.

In addition to details about the crime, it shows that Norma Jean was living on her own in a residence in West Virginia. She received social security supplemental income, but apparently uses that money to purchase her own food and otherwise provide for herself. The interview also shows that she had a good command of the English language and was able to track the questions asked by the investigator and make appropriate answers. She readily admitted that she didn't remember some details and so stated when asked the question. There is nothing inappropriate about the interview which would cause the Court to rule that she was incompetent. In most respects, the content of the interview was completely consistent with her testimony and the additional details she remembered would have been helpful to the prosecution in the presentation of the evidence to the jury.

As shown by the attached affidavit of victim-witness coordinator Shelly Parker, Norma Jean Oliver leads a fairly normal life. To the knowledge of the victim-witness coordinator, Norma Jean Oliver had a driver's license and an automobile in West Virginia. She lived on her own with no roommate. She received the financial assistance referred to above, but took care of her own needs including having a telephone.

Ms. Parker purchased an airline ticket for Norma Jean to fly from West Virginia to Boise. The airline ticket was waiting for Norma Jean at the airport. Norma Jean got herself to the

airport, picked up the ticket and flew to Boise, which was not a direct flight. Norma Jean had to make a plane change and took care of her own luggage. Norma Jean stayed by herself in a Boise hotel when she arrived and she went to various restaurants to eat. Norma Jean and her clothing were clean, neat and appropriate. Apparently none of Norma Jean's family lives near her in West Virginia. She is on her own there.

Norma Jean reads, writes and speaks English. As can be seen from her testimony and from the transcript of her interview, her conversations were appropriate in every respect.

In other words, there is no reason to think that she is so handicapped from her mental history that she would be excluded as a competent witness.

Additionally, Norma Jean Oliver's recollection of the facts are consistent with the physical evidence. Specifically, Detective Hess observed scratches, bruises and other marks on Norma Jean consistent with the forcible rape that she describes. Norma Jean Oliver's clothing was found in the camp trailer where the rape occurred. Detective Hess testified that the clothing was soiled, apparently with fecal material and her pants had been ripped up the seams. All of this is consistent with Norma Jean's description of being strangled until she passed out and having her clothes ripped off of her. Of course, her sex crimes kit was positive for the presence of semen. The physical location of the camp trailer to the shed and to the larger trailer are also consistent with what Norma Jean remembered as is the fact that the trailer had bunk beds inside it.

(b) Trial counsel failed to identify and investigate Norma Jean's inconsistent statements and motive to lie and retaliate against Erick Hall.

As stated above, Norma Jean's statements are consistent with the physical evidence. The petitioner argues that the evidence may show that the rape occurred some days earlier than Norma Jean testified to. However, a close reading of the report shows that the rape occurred just when Norma Jean said it did. The evidence is that December 1, 1991, was on a Sunday. The defendant told Detective Hess that he had contact with Norma Jean on Sunday but upon finding out that she was a runaway, "chased her off, and called the police."

At approximately 2:00 a.m. on Monday morning, December 2, 1991, Norma Jean was arrested by Boise Police. The report says that dispatch had received information from an anonymous caller named Erick that a female runaway was staying in the Sands Motel. The

female runaway turned out to be Norma Jean and she was arrested at about that time. The report says that Norma Jean was held in detention pending the arrival of her parents from Payette, who were on their way to pick her up.

The next official report was written forty-six hours later on Tuesday night, December 3, 1991. At just a few minutes before midnight, Norma Jean was arrested again by Boise Police again at the Sands Motel. It appears that she was taken from the Sands Motel to juvenile detention and from detention to Intermountain Hospital. Norma Jean reported the rape to Intermountain Hospital staff who in turn notified the Garden City Police Department. Detective Hess contacted Norma Jean on the afternoon of Wednesday, December 4, 1991. After hearing Norma Jean's report, Detective Hess had contact with the defendant and arrested him later on in the evening of December 4.

The defendant/petitioner, Erick Hall, advised Detective Hess that he had met Norma Jean on Sunday, December 1, but then had chased her off, when he discovered that she was a runaway, and called the police. The defendant said that he had consensual sex with Norma Jean late Monday night or early Tuesday morning, December 2 or December 3. He had a scratch on his face which he initially said that he had gotten from a cat, but then admitted that Norma Jean had scratched him while they were playing around. He said that Norma Jean left on Tuesday, December 3, which is what Norma Jean says. Hall's version is that somebody came and picked up Norma Jean. Norma Jean's recollection is that she ran away from the residence and made her way to the Sands Motel where she was arrested at approximately 11:53 p.m. on that Tuesday night.

Despite that fairly clear history, the petitioner tries to argue that the rape must have occurred sometime before Sunday and that Norma Jean's actions of coming back to the residence and not reporting to the police immediately are inconsistent with what a rape victim would do. The evidence does not support this assertion.

The petitioner argues that the sex between Hall and Norma Jean was consensual and that Norma Jean made up this story in retaliation for Erick turning her into the police. The petitioner cannot explain Norma Jean's torn and fecal stained clothing under the mattress in the little trailer nor can he explain the scratches, bruises and other marks on Norma Jean.

The petitioner argues that Norma Jean did not make up this story until she was, "facing big trouble in Payette County," because of her runaways. To begin with, being a runaway is a status offense and is a long way short of "big trouble." Additionally, the registry of actions from 1990 show that Norma Jean's juvenile brushes with the law had very little consequence to her. There is no evidence that Payette County had any intent of prosecuting her for the 1991 runaway actions. The Boise Police report says she was to be held for pickup by her parents.

After several pages of attempting to convince the Court that Norma Jean was lying, the petitioner suddenly argues that Norma Jean was telling the truth about statements made to her by the defendant. He is particularly interested in her recollection that, after the rape, Erick stopped and said, "Oh, my God, I'm sorry," because he thinks that statement somehow casts the petitioner in a better light. Of course, the context is that the statement was made during the perpetration of a forcible rape, which the petitioner wants to ignore.

The petitioner also argues that former Detective Dan Hess deliberately lied during his testimony in the penalty phase. The argument generally centers on Detective Hess stating that he did not know the details of Norma Jean Oliver's troubles at home which had caused her to run away. The transcript of the taped interview between Detective Hess and Norma Jean Oliver does show that Norma Jean gave Detective Hess some details about her troubled home life. What the petitioner ignores is that the interview between Detective Hess and Norma Jean Oliver occurred in December 1991. Detective Hess was testifying in October 2004, nearly thirteen years later. The specifics of Norma Jean's home life are not detailed in Detective Hess's report and there is no evidence that Detective Hess reviewed the contents of the taped interview with Norma Jean Oliver at any time in the intervening thirteen years. As a matter of fact, the petitioner points out that the existence of the tape recording was not discovered by the State until some years after the Hall trial. So to now characterize Detective Hess's misstatement as a lie is a gross mischaracterization. There is no reason to think that it is other than innocent misrecollection.

Whichever it is, there is nothing about Norma Jean's home life that is relevant to the direct or cross-examination of either Norma Jean Oliver or Detective Hess. While it appears that Norma Jean Oliver's home life had been abusive, including the fact that she had been struck by her father at some point in the past, there is no reason to believe that the bruises and scratches

that Detective Hess photographed are a result of that abuse. Norma Jean certainly never said the bruises were caused by abuse at home.

Detective Hess's testimony concerning statements made by the defendant explaining how the defendant received a scratch are generally accurate.

In an additional effort to discredit Detective Hess, the petitioner argues that the hospital records of Norma Jean's rape examination would have been helpful to the defendant if the jury had known the details. The hospital records indicate that not all of the bruising which shows on the photographs were noted by hospital staff. The explanation for this could be either that hospital staff did not do a thorough examination or that the bruises showed up later.

In a glaring example of the petitioner focusing on the tree instead of the forest, he suggests that trial counsel should have used these medical reports for cross-examination because they do not document all of the marks shown in the photographs. However, what they do show that would have been helpful to the State and deadly for the petitioner, is the following. (1) "The patient has some tenderness, minimal bruising on the left cheek of her face." (2) "She has discomfort to palpation in and about the frontal part of her neck, without any choke marks. Also, discomfort to palpation in the back of her neck." (3) "She has tenderness to palpation of the muscles of the mid-back, which are quite tense and tender, with no external sign of bruising. A few contusions which look fresh on both elbows." (4) "She had discomfort in her hands as well. I could not see any sign of external injury." (5) "External genitalia, clear. *There was some tenderness at the lower part of the vaginal orifice, but no evidence of any tearing. There was evidence of bruising just inside the anal canal.* No evidence of any bleeding there. The vagina was clear. The cervix was closed and clear and nulliparous. Bimanual exam revealed a tenderness in the vaginal orifice only, but no other problems. Digital rectal exam was not performed." (6) Norma Jean Oliver's description of the rape events were also detailed in the hospital report and are consistent with the details that she gave Detective Hess. These details include the date and time that the rape occurred, that she was choked around the neck and rendered almost unconscious. That the defendant performed oral, vaginal and anal intercourse on her, and that she had been threatened with a hammer and told she would be killed if she didn't cooperate. *Petitioner's Exhibit 65*.

At a minimum, those details corroborate the statements of Norma Jean Oliver and could not possibly be viewed by an experienced attorney as being helpful to the petitioner.

Finally, Mr. Myshin describes the application of his experience relating to cross-examination of Norma Jean Oliver in his deposition. Beginning at page 388, he states the following:

> Q. . . . did it appear to you that Norma Jean Oliver was fragile when she testified and needy in the sense that she might be perceived as being – that the jury might like her because of her pathetic situation?
>
> A. Yeah. I mean, I don't know if it comes out in a transcript, but she was pathetic. And she seemed to me that she didn't know what the heck she was talking about, that she didn't remember things. And I think with a witness that is too fragile, yeah, you push and try to break them. And I've done it. About the only thing I remember about her is the way she was acting and that she couldn't remember things. And she was pitiful, and I think anybody that had seen that would have had a similar reaction to it.
>
> Q. Were you worried about being a bully in her case, or being perceived as a bully if you tried to push her very hard?
>
> A. Yeah, and I'm not sure I needed to. Amil Myshin deposition pg. 388 – 389.

In summary, while the petitioner has demonstrated that there was some information that the jury did not hear, there is no showing of prejudice to the defendant. Rather, some of the information referred to by the petitioner and the suggested bullying would have only made the petitioner's situation worse. This claim should be dismissed.

E. Trial Counsel Rendered ineffective assistance of counsel in failing to adequately investigate the State's case in aggravation: Evelyn Dunaway and Michelle Deen

1. Trial counsel conducted an inadequate investigation of Evelyn Dunaway.

The petitioner's complaint about the Evelyn Dunaway testimony is that she had additional testimony that was not elicited. Approximately 2½ years after her testimony, Ms. Dunaway produced an affidavit with some additional details of her life with Erick Hall. At the outset, it is important to note, that her affidavit does not contradict her trial testimony. She would have

testified that the petitioner attempted to help her stop using methamphetamine. She also would have testified that the petitioner was kind to a boy that was living in the petitioner's house.

That information is basically cumulative to the information that did come out through Michelle Deen and Ms Dunaway during their testimony. The details of the testimony of those two women is more fully.set out in the State's response to claim B(d). To that extent, the details in Ms. Dunaway's affidavit are cumulative to what the jury heard.

Ms. Dunaway would also say that when the petitioner was committing all the acts of violence against her, that he was coming down from his use of methamphetamine. Adding methamphetamine use to the petitioner's list of faults hardly seems to be positive information.

Ms Dunaway would say that she did not hear the petitioner make a death threat against Rebecca McCusker. Ms. McCusker was merely a neighbor who came over to see if she could help Ms. Dunaway when Ms. McCusker heard the sounds of the beating. It seems unlikely that Ms. McCusker would be lying or mistaken about that. It is easy to see why Ms. Dunaway could have missed that piece of confrontation.

There is nothing about this claim that shows ineffective assistance of counsel or prejudice. This claim should be dismissed.

2. Trial counsel conducted an inadequate investigation of Michelle Deen.

Ms Deen's testimony could not have been more clear on the fact that she was using methamphetamine during the time that she lived with the petitioner. She testified as follows:

> A. Yes. I had a meth problem and Erick Hall said that he would help me stay off my meth, that he did not want it around him and that he didn't want it in his home, and for me to stay away from it. Tr. pg. 4816.
>
> Q.... At the time that you had started to have a relationship or started to speak to each other, had you had a drug problem?
>
> A. Yes, sir.
>
> Q. Okay. And had that lasted for a while?
>
> A. I was using for a little bit and then when I met Erick Hall he had helped me.—
>
> Q um hum um hum.

A.—Stay off of it.

Ms. Deen testified that she was ultimately convicted of possession of methamphetamine and was on probation at the time of her testimony. The fact that she had been convicted twice does not add anything to the knowledge that the jury had about her. It is possible that she would not have been impeached at all with another drug conviction since drug offenses are not typically seen as reflecting on the person's credibility. No prejudice to the defendant is shown here.

The petitioner found a note in Ms Deen's court file. The note says that the defendant, presumably Ms. Deen, wanted to talk to the police about a "deal". Apparently Ms. Deen wanted to cooperate with law enforcement authorities in return for consideration on her charges because as the notes says it was "somebody else's dope". According to the note, the "D" failed to go through with the cooperation.

There is nothing about that note that reflects upon Ms. Deen's credibility concerning her testimony of contact with the defendant two years before the note.

Petitioner points out that because a condition of Ms. Deen's drug convictions was that she underwent standard court ordered substance abuse and psychological evaluations. The petitioner does not allege what the psychological evaluation shows, but argues that the mere fact that she had a psychological evaluation could have been used to "undermine Ms. Deen's credibility". There is no factual basis to support that claim. It should be dismissed.

F. Trial counsel rendered ineffective assistance of counsel in failing to adequately investigate the State's case in aggravation: April Sebastian.

The basis of this claim is that Amil Myshin was "actively representing" April Sebastian at the time she testified in the penalty phase against the petitioner. The petitioner asserts that Mr. Myshin's cross-examination of Ms. Sebastian was less severe, because he liked her, than his cross-examination would have been otherwise. The petitioner ignores the positive information that Mr. Myshin did elicit from Ms. Sebastian about the petitioner. An example is that he was kind and friendly to her and fixed her car, etc. See generally Trial Tr. pg 4890, 4891, 4894. All of which suggest that Mr. Myshin elicited useful information from the witness. More detail of April's testimony is set out in the State's response to Claim B(d).

More importantly, however, is the failure of the petitioner to point out what information April Sebastian had that Mr. Myshin could have questioned her about but didn't. As it stands, the petitioner's assertion that Mr. Myshin's relationship with Ms. Sebastian caused him to cross-examine less harshly, is merely a bald assertion. It should be dismissed.

G. Trial counsel labored under multiple and varied conflicts of interest that adversely affected their performance.

1. Trial counsel actively represented April Sebastian.

As stated in F above, the petitioner can point to nothing about Mr. Myshin's conduct of his cross-examination that should have or could have been different but for Mr. Myshin's relationship with April Sebastian. No prejudice is shown and this claim should be dismissed.

The petitioner also asserts that the State offered Ms. Sebastain "benefits" in exchange for her testimony against Mr. Hall. There is no evidence to support this assertion. The petitioner has no information from Ms. Sebastian or from any other source to support this bald assertion, it should be dismissed.

2. Trial counsel's caseloads.

There is no evidence that trial counsel's caseload interfered with his ability to properly and thoroughly conduct the petitioner's defense. This allegation should be dismissed as being a bald assertion.

H. Trial counsel rendered ineffective assistance of counsel in failing to preclude the testimony of Norma Jean Oliver.

1. **Trial counsel failed to preclude the testimony of Norma Jean Oliver due to her lack of competency to testify.**

> Idaho Rule of Evidence 601. General rule of competency.
> Every person is competent to be a witness except: (a) incompetency determined by court. Persons whom the court finds to be incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

Under the above Rule, Norma Jean Oliver's competency is presumed unless the Court determined that she was incapable of receiving impressions or relating them truly. The evidence

shows that after thirteen years, Norma Jean Oliver remembered some details and had forgotten others. There is nothing about that circumstance that suggests that Norma Jean was incapable of receiving just impressions or relating them truly. The accuracy of her recollection of events was for the jury to determine, as with every witness. This allegation should be dismissed.

I. Trial counsel rendered ineffective assistance of counsel by failing to adequately litigate factual and legal challenges to the introduction of evidence of prior criminal acts by Erick Hall.

The basis for this claim is that the defendant's Grand Theft conviction, Escape conviction, and his actions with Evelyn Dunaway, Michelle Deen, and Rebecca McCusker should have been excluded because they were irrelevant and highly prejudicial. All of the information complained of by the petitioner is specifically admissible in a pre-sentence report under Idaho Criminal Rule 32. All of the information referred to above is directly relevant to the propensity aggravator. All of that information shows how the defendant progressed in his criminal career from non-violent crimes to violent crimes over a period of years and is directly relevant to a jury's assessment of whether the defendant's disregard for society's rules makes him a continuing threat.

Not only is the information directly relevant, but it constitutes impeachment questions to be asked friends and family members of the petitioner when they give opinions about his good conduct. The evidence is admissible under that theory as well.

Finally, the petitioner complains that trial counsel's "motion to exclude" the testimony of the various girlfriends was inadequate because it did not cite to legal authority in support of the motion. The undersigned notes that the petitioner cited to no legal authority either. This allegation should be dismissed.

The petitioner argues in subparagraph (c) through (g) that the evidence in aggravation implicates the Fifth, Eighth and Fourteenth Amendments. Those claims are nothing more than an appellate argument on the validity of the list of aggravating circumstances under Idaho Code §19-2515 which, so the claim goes, also involves non-statutory aggravating circumstances. Idaho Code §19-4901(b) sets out that post conviction relief is not a substitute for an appeal. The petitioner makes no showing that a motion citing to the U.S. Constitution would have been any more successful. This claim should be dismissed.

J. Trial counsel rendered ineffective assistance of counsel by failing to raise and adequately preserve legal challenges to the introduction of evidence of alleged prior criminal acts by Erick Hall against Norma Jean Oliver.

The petitioner notes that trial counsel did move to exclude evidence of the petitioner's 1991 Rape conviction under Idaho Rule of Evidence 404(b) as being either irrelevant or that its probative value was outweighed by the danger of unfair prejudice. The Court ruled that the evidence involving that crime was admissible.

The petitioner's claim is basically an appellate argument against the Court's ruling. It should be dismissed for that reason. However, it is the State's view that the defendant's violence towards women, particularly as it relates to rape and strangling, is directly relevant to what the defendant did to Lynn Henneman because it shows that he has "a proclivity, a susceptibility, and even an affinity toward committing the act of murder." *State v. Dunlap*, 125 Idaho 530 (S.Ct. 1993).

In subparagraph 3, the petitioner argues that he did not have a fair trial and an opportunity to present a defense to the facts of the Norma Jean Oliver crime. This is just an assertion without factual or legal basis. The truth is, the defendant's conviction for statutory rape was put before the jury as was his claim that his sexual intercourse with Norma Jean Oliver was consensual. Of course, nothing kept the defendant from taking the stand and restating his view if he had cared to. In subparagraphs 4 through 9, the petitioner argues that the use of the rape conviction violates a plea agreement from 1991, or surprised the defendant because he didn't know of its potential consequences, or that it violates the rule against double jeopardy because the defendant had already been punished for that crime.

The undersigned is aware of nothing in American Criminal Jurisprudence that suggests a defendant should assume that his criminal record will not be considered at his sentencing for future crimes. As referred to above, Idaho Criminal Rule 32 specifically requires a pre-sentence report to set out the defendant's prior criminal history. The use of a defendant's prior criminal conviction is not res judicata. These claims should be dismissed.

The State denies claims 11 through 13 and argues that there has been no showing made that trial counsel was ineffective for not making these groundless arguments.

K. The prosecutor committed misconduct during sentencing-phase closing arguments.

a. The prosecutor impeded the jury's consideration of mitigation by misstating the definition of mitigation.

The petitioner correctly cites to US Supreme Court case law holding that the sentencing court or jury must have access to all relevant mitigating evidence. The Court has held that the threshold for relevance is low. The Court said in *Smith v. Texas*, 543 US 37 (2004):

> Rather, we held that the jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a "low threshold for relevance," which is satisfied by "evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonable deem to have mitigating value." Quoting *Tennard v. Dretke*, 542 US 274 (2004) and *McKoy v. North Carolina*, 494 US 433 (1990).

The death sentence in *Smith v. Texas supra* was reversed because the Texas court would not allow evidence to go to the jury concerning the defendant's troubled childhood because there was "no evidence of any link or nexus between his troubled childhood or his limited mental abilities and this capital murder."

The US Supreme Court held in *Smith v. Texas* that there was no requirement that a "nexus to the crime" be shown before otherwise relevant mitigating evidence is admissible.

The petitioner does not argue that any relevant mitigating evidence was withheld from the jury by the Court. Rather, the petitioner argues that it was improper for the State to argue to the jury the State's view of the weight of the mitigating evidence. While difficult to follow, the State believes that the petitioner is arguing that because the US Supreme Court has dictated that the trial court must admit relevant mitigating evidence, the State is somehow precluded from arguing the persuasiveness of the evidence. Or in other words, the State cannot argue that there is no nexus between the mitigating evidence and the crime because the Court cannot use the nexus test in deciding the admissibility of the mitigating evidence.

To get to that illogical conclusion, the petitioner has to ignore the holdings in several appellate opinions. The cases cited by the petitioner direct the trial courts to admit relevant mitigating evidence. The cases cited do not hold that prosecutors may not argue the "nexus"

between the mitigating evidence and the crime nor that the mitigating evidence is otherwise irrelevant or unpersuasive. To the contrary, the United States Supreme Court upheld the death penalty and discussed the State's argument concerning certain mitigating evidence in *Ayers, acting warden v. Belmontes*, 549 U.S. ____ 127 S.Ct. 469, 166 L.2d 334 (2006). In that case, *Belmontes* was convicted in California of first-degree murder. The jury then determined that he should be sentenced to death. The issue in the case was a jury instruction in the sentencing phase. *Belmontes* argued to the jury that he could lead a constructive life in prison and could thereby be of some value to the community. The defendant also claimed a religious conversion and argued that his conversion would contribute to his living peaceably in prison.

The prosecutor argued that the defendant's claimed religious conversion did not fit within any of the statutory mitigation categories nor in the "catch all" category, but admitted that the conversion could be a "proper subject of consideration." The court found that the prosecutor's argument to the jury went only to the persuasiveness of the evidence and not the jury's ability to consider the religious conversion at all. The court found that the argument and the jury instructions were proper.

The State's argument is much the same as the argument in the *Belmontes* case. However, to fully understand the State's argument, it is necessary to understand the thrust of the defense mitigation case, so the argument can be seen in context.

The defense mitigation case was centered around Dr. Robert Pettis, who is a medical doctor specializing in psychiatry, and on Dr. Mark Cunningham, who is a clinical psychologist specializing in forensic psychology. Dr. Pettis testified that he had spent between one hundred and one hundred fifty hours working on the petitioner's case. That work included the review of every document he could find concerning the defendant. TR 5200-5201. He personally interviewed as many family members as he could get to cooperate with him. TR 5201. He spent about twelve hours or so with the defendant. TR 5202. The focus of Dr. Pettis' testimony could be generally described as a discussion about the development of the brain and the central nervous system, and the effect of the defendant's environment upon the defendant's development. Dr. Pettis discussed the defendant's head injuries, the defendant's IQ, both when the defendant was a

child and at present, impaired brain functioning due to bad parenting and the various effects of genetics and mental disorders on the defendant. Dr. Pettis described the petitioner as follows:

> ...but what you see when he gets to school is documentation that these two factors, that biological and social had already damaged him by the time he got in kindergarten. He is messed up because he's got anxiety. He can't go into classrooms, he can't participate. He's got biology limiting his cognitive ability to function. He can't learn—he's not learning, algebra and numbers. He's got depression. The pictures and the things that he drew for her shows loneliness, despair and depression and anxiety. Tr. pg. 5275
>
> ... and of course, one of the endpoints for all of that, because they are rejected by peers, the family doesn't work right, nothing in society has helped you and saved you, is you end up with maladapted social behavior and it goes from there. Tr. pg. 7276.

On cross examination Dr. Pettis described the petitioner as a "very damaged individual." Transcript 5283. Dr. Pettis went on to say that he thought that the petitioner's "judgment about right from wrong was effected by all of the things that I've talked about." When asked if the petitioner knew right from wrong, Dr. Pettis said, "more or less." Tr. pg. 5283.

The State asked Dr. Pettis if the petitioner had a choice in deciding whether or not to kill Lynn Henneman. Dr. Pettis agreed that the petitioner had a choice, but stated the following:

> Right. And what I would say about choice is, it is affected by all of the things that we have been talking about. But that doesn't mean the person doesn't have a choice, no, you're right. Tr. pg. 5284.

Finally, Dr. Pettis agreed that not all people who come from bad backgrounds turn out to be murderers, and some people from advantaged backgrounds turn out to be murderers.

Dr. Cunningham then testified. His emphasis was on the effects of the petitioner's environment on the petitioner's ability to make choices. Dr. Cunningham interviewed many of the petitioner's close family members and also reviewed "virtually every piece of paper I think that had been created in Erick's life that has been retrieved I reviewed." TR 5299. Dr. Cunningham testified that he had spent over two hundred hours in that review along with interviewing the defendant. Dr. Cunningham testified in excess of three hours and the entire message of his testimony dealt with the defendant's ability to make choices based upon his terrible upbringing compared to choices made by individuals who had a stable upbringing. Both

Dr. Pettis and Dr. Cunningham testified extensively about the things they had been told concerning how the defendant was raised. They emphasized and reemphasized what they described as "toxic parenting." They emphasized that the defendant was a "damaged individual." TR 5283. Dr. Cunningham described the defendant as having a "brain dysfunction." TR 5308 and TR 5319. Dr. Cunningham said that "there are very significant problems with Erick's wiring that were evident by the time—certainly it was apparent to school personnel by the time he was six years old." TR 5318 and 5319.

In summation, Dr. Cunningham testified that because of the defendant's terrible upbringing, which was described in detail for hours, the defendant's judgment and ability to make choices or their quality was affected. Dr. Cunningham used a PowerPoint presentation which portrayed a house with a damaged foundation to graphically illustrate that the defendant's life was shaky because his foundation was damaged.

Dr. Cunningham also showed a sloping plane with a square box labeled "choices." The plane was sloped because of the defendant's upbringing indicating that Erick's ability to make choices was affected. This was compared to a person who came from an advantaged background and the box labeled "choice" would sit on a level surface instead of a slanting surface.

Dr. Cunningham framed his presentation in the following way. Trial counsel was referring to the defendant and the defendant's conviction for first-degree murder.

> Q. Did he have a choice as to whether he engaged in that conduct? ("He" refers to the defendant and "conduct" refers to the murder of Lynn Henneman for which the defendant had just been convicted.)
>
> A. Absolutely.
>
> Q. What difference does history and background have to do with that?
>
> A. The impact of the history and background that you come from is in the nature of the choice issue. In other words, once you get to this (indicating) age—everybody has a choice. If he didn't have a choice, you'd be not guilty by reason of insanity, or you wouldn't meet some essential element of the offense. The point is, we don't all get the same choice, and that's where history and background comes to bear.
>
> Q. Can someone like this choose a bad outcome?
>
> A. Oh, yes, sir.

Q. Explain.

A. Well, this is an issue that's of fundamental importance in forensic psychology and developmental psychology and that is, here's the person and here are the bad outcomes (indicating). And the question is how did this person get over here to these bad outcomes, the psychological disorder or drug dependency or criminal activity? Tr. pgs. 5300 and 5301.

After describing the defendant's upbringing and referring to his graphics concerning the sloping ramp, Dr. Cunningham said the following:

> Now, this guy has a choice, not the same choice as this person does (indicating), he's got a choice that's on this ramp. Now the angle that that ramp is on is what we are talking about when we talk about family, background and history. That's what mitigation is about, that's what moral culpability is, is the angle that the ramp is on that the choices are made from. Not whether there was a choice or not but what kind of angle was the choice on. TR 5304 and 5305.

Defense counsel then asks whether the defendant's background and upbringing is merely an excuse for his behavior. Trial counsel asked the following:

> Q. Now, this sounds like abuse excuse. Is it?
> A. Well, not according to the US Department of Justice and . . .
> Tr. pg. 5305.

Dr. Cunningham described the type of research that the US Department of Justice does in this area and then states the following:

> Now, as the Justice Department has studied this arena, they have identified and looked at—besides the research, they are sponsoring themselves here in the last ten years, they are looking across the last thirty years of research and are identifying what they call "risk factors." Those are factors that elevate the angle of the ramp as well as protected factors. Those are things that would stand between this person and the bad outcomes. And, of course, the best prevention is one that reduces the risk factors and increases the protective factors. Tr. pgs. 5306 and 5307

Dr. Cunningham emphasized his theme of the environmental affect on choices as follows:

> Q. Okay. This study. When they do this, do they provide some explanation on how a person chooses to become involved in the criminal activity?

A. Yes, sir. And some of this is intuitive as we look at these risk and protective factors. People who have lots of protective factors and not many risk factors, they mostly make good choices. People who have lots of risk factors and not many protective factors are at grave risk for making very poor choices. Choice is what you get after the scales are already loaded with either protective or risk factors. TR 5317. . . .

Now, we don't make our choices in a vacuum though. They don't just come out of nowhere. Instead what you have is, there's wiring, that's what the state of your nervous system with the genetic disposition and the developmental disorders like Erick had, the attention deficit disorders, the intellectual problems, interacting with what family are you raised in, with what community you are apart of. And it's all of these together (indicating) that form the person that makes the choice to behave in a particular way. As we think of those Department of Justice factors, that's largely kind of simplifying it. They're talking about wiring, family and community. Tr. pg. 5318.

There can be no question that the thrust of Dr. Cunningham's testimony was that the defendant's ability to make choices was warped by his upbringing. And while the defendant could choose to kill Lynn Henneman or not to kill her, his ability to make that choice was different than a person's choice who did not come from the same background the defendant came from. Trial counsel used Dr. Cunningham and Dr. Pettis' theme in his closing argument. Trial counsel asked the jury to be lenient on the defendant because of the defendant's upbringing and the effect that upbringing had on his choices.

In his closing argument, Mr. Myshin referred to a chart that was divided in half with the word **RESPONSIBILITY** on one side and **CULPABILITY** on the other. In his closing argument, counsel made the following remarks concerning those words as they relate to choice. He said:

Responsibility versus culpability. In the first closing argument that I just heard, the State wants you to remain on the left side of this chart (indicating). They want you to stay in the first trial. They want you to focus on the issues that you already decided. Think about that. Under criminal responsibility we have: Could he control himself? Did he have a choice? Did he know right from wrong? What did he do? You decided these issues (indicating). You haven't decided, nor have you been asked to decide that Mr. Hall is insane and therefore is incompetent in making these decisions, or

knowing the difference between right and wrong or what he did. You decided those issues. You don't need to decide them again, nor do you need to dwell entirely on the first part of this case. You must shift gears. You must shift gears to the sentencing phase.

> You have already found criminal responsibility. You have already held Mr. Hall responsible for the crime that he's charged with. Everyone of them you have found him guilty of. Now you must decide culpability, moral culpability.
>
> The issues now before you are what diminished his control? What shaped the choice? What shaped his morality and value system and how did he get here? We are not saying that Mr. Hall didn't know the difference between right and wrong or that he didn't have a choice. We are saying that those decisions, those choices are not made in a vacuum and they are not the same choices for everyone.
>
> I remember in the prosecution's second closing argument in the guilt phase of this case the argument with the egg timer and the thought the prosecutor said was going through Mr. Hall's mind. You are not viewing this through a healthy intelligent person's eyes. You must view it through this damaged person's eyes. You must transport yourself back to a time that's long gone but a time when the world was viewed through a child's eyes and you must understand what happened to that child to ever get to the point where you can say honestly to yourself, I know what diminished his control. I know what shaped it. I know what his morality and value system is and I know how we got there (indicating). TR 5470, 5471 and 5472.

Mr. Myshin basically ended his argument using the same focus that is quoted above. He said:

> There's good in everyone I believe—say that with an open heart and open mind. There is good in everyone. We are all God's children. Some of us are better off than others. Some of us make our choices better than others. Some of us are damaged. And some of us like Erick who are so damaged their choices are not made in a vacuum. Their choices are made through damage that they have received. They perceive the world and their choices through that lens.
>
> We don't choose who our parents are. We don't choose where we grow up. We don't choose the things that are done to us and by the time we make the choices they are made through that same filter. TR 5487.

The State responded to the defense argument and to the defense mitigation case in its rebuttal argument. The prosecutor said:

> Well, we've got to frame the issue here all right enough. And the issue here is the issue of choice. But it's not general choices, it's not the choice of who to marry or where to work or where to live or how to live our lives. The issue in this case that deals with the propensity factor, and that is the issue that makes mitigation relevant or not relevant, is the issue of choice to kill, right? That's what we are talking about here is the choice to kill. That's at the core of this thing, is the choice to kill or not to kill. Not whether he had a bad background, or not whether he would choose to marry the same person I would or that you would, or the choice to have the same kind of a home or not, or the same kind of a job or not. The core issue here is choice.
>
> And don't kid yourself that there is a difference between moral culpability and criminal responsibility. That's a Dr. Pettis way of trying to draw you off, or a Dr. Cunningham way of drawing a red herring across the track. Those both described the same thing. If a person has the choice to kill and chooses to kill then he is criminally responsible and morally culpable for what he did.
>
> *Now, I am not here to try and minimize the defendant's background.* It's just that the background isn't the choice to kill. The defendant made the choice to kill and we all know that people kill who come from bad backgrounds and who come from good backgrounds and so what's that mean? What conclusion do we draw from that? Do we draw the solid concrete cause and effect relationship that Dr. Pettis and Cunningham wants you to draw, that because he's got a faulty wiring he had to kill Lynn in September of 2000?
>
> Well, we know that's not true. *Tr. pgs. 5490, 5491 and 5492.*

The prosecutor talked at length about the bad choices and the good choices that the defendant made for the purpose of showing that the defendant was capable of making good choices when he wanted to. The purpose was to show that his background did not cause him to be unable to make good choices. His bad background did not prevent him from choosing not to kill Lynn Henneman. Some examples the prosecutor gave in the closing were that the defendant had made bad choices with some of his former girlfriends. For instance, he had choked a girlfriend named Michele, which is an example of a bad choice, but he chose not to kill Michele, when she left him, indicating that he made a good choice there. He choked another girlfriend named Evelyn, which was a bad choice, but he did not kill Evelyn even when she bit him. The

defendant made a bad choice by raping Norma Jean in 1991, but he did not kill her even though he could have. He threatened to kill a woman named Rebecca when she was in the house with him, showing bad judgment. However he did not kill her showing that he was capable of good judgment.

The petitioner argues in his Final Amended Petition for Post Conviction Relief that the State's argument somehow impeded the jury's ability to consider mitigation by arguing that mitigation must be linked to the defendant's criminal conduct. The petitioner completely ignores the point that his own experts were trying to make i.e. that there is a direct cause and effect relationship between the petitioner's bad upbringing and his choice to kill. The State did not argue that the jury could not consider the experts' testimony. The State argued the persuasiveness of the experts' testimony, not the jury's ability to consider it. The defense argued that the defendant's background diminished the defendant's ability to make choices. The State responded to that argument by pointing out that, while the defendant came from a terrible background, the defendant made good choices and bad choices like everybody else. The State argued that counsel and his experts were incorrect and that there was no cause and effect relationship between the defendant's background and the crime. Therefore the mitigation had no persuasive weight.

The petitioner has not cited to any case indicating that the State is precluded from arguing that proffered mitigation testimony is less mitigating if there is no nexus between it and the crime. Rather, the case law is the opposite, as shown in the *Belmontes* case referred to above. The Arizona Supreme Court has repeatedly held that while mitigation evidence cannot be withheld from the jury because of a lack of nexus between the evidence and the crime, a lack of nexus between the mitigation and the crime is relevant to the weight of the mitigation evidence. An example is *State of Arizona v. Anderson*, 111 P.3d 369 (2005). In that case, the defendant complained that during the cross examination of the defendant's mitigation expert the prosecution "questioned the expert's lack of formal education 'to make any connection between upbringing and adult conduct.'" The defendant also objected to the State's closing argument wherein the prosecutor emphasized that there was no connection between the defendant's upbringing and the murder. The prosecutor said "nothing in his childhood caused that." 111 P.3d at 392

The Arizona Supreme Court held that none of the prosecutor's statements were improper. The Arizona Court held that while United States Supreme Court decisions require a liberal rule of admissibility for mitigating evidence, there is "no constitutional prohibition against the State arguing that the evidence is not particularly relevant or that it is entitled to little weight." 111 P.3d at 392. The Court found that the prosecutor's comments simply went to the weight of the defendant's mitigation evidence.

The Arizona Supreme Court made a similar finding in *State of Arizona v. Hampton*, 140 P.3d 950 (2006). In that case, the defendant's mitigation evidence showed that he had a "horrendous childhood." The court stated as follows:

> Moreover, while we do not require that a nexus between the mitigating factors and the crime be established before we consider the mitigation evidence . . . the failure to establish such a causal connection may be considered in accessing the quality and strength of the mitigation evidence. *State v. Newell*, 212 Ariz. 389, 132 P.3d 833 at 849 (2006) (internal citation omitted); *Accord Johnson*, 212 Ariz. 440, 133 P.3d 750; *Anderson II*, 212 Ariz. 349-50, 111 P.3d 391-92. Hampton's troubled upbringing is entitled to less weight as a mitigating circumstance because he has not tied it to his murderous behavior. Further, Hampton was thirty years old when he committed his crimes, lessening the relevance of his difficult childhood.

In another Arizona case, the *State of Arizona v. Roque*, 141 P.3d 368 (2006) the court addressed comments made by the state during a penalty phase. There, the defendant contended that the following comments made by the prosecutor improperly narrow the jury's consideration of mitigating evidence. The transcript showed the following:

> Ask yourselves if (Roque's) low IQ affected his life. Did his low IQ cause this murder? No. Does (Roque's family history of mental illness) excuse his conduct? Is that why he killed Mr. Sodhi, because of his mother's illness? Of course not.

The Arizona court noted that the United States Supreme Court had reversed a death penalty in the *Tennard v. Dretke, 542 US 274* case referred to above. In *Tennard*, the Texas court did not instruct the jury that the jury could consider the defendant's low IQ as mitigating evidence and the prosecutor argued that his I.Q. was irrelevant. The Arizona court in *Roque* held that *Roque's* jury instructions allowed all mitigation evidence to be considered by the jury so that *Roque's* case was unlike *Tennard's* case in that respect. Therefore, when the prosecutor made

the above argument concerning the nexus between *Roque's* IQ and the murder, the argument was proper because it merely went to the weight the prosecutor thought the jury should give the mitigation evidence. The argument did not make the evidence inadmissible or otherwise keep it from the jury's consideration.

The United States District Court for the District of Arizona in the case of *Jones v. Schriro*, 450 F.Supp.2d 1023 (August 2006) made a similar holding. The *Jones* case is a federal habeus corpus case following conviction in state court for murder with the resulting death sentence. The sentencing was done by the trial court, not by a jury. The court considered the defendant's mitigation evidence which was that the defendant suffered from ADHD and a low level mood disorder. The trial court considered the evidence but held that the ADHD was of little or no mitigating value because it bore "no causal relationship to violent conduct."

The Federal District Court held that the trial court was required to consider all relevant mitigation evidence, but held that the court was "free to assess how much weight to assign such evidence." The District Court held that the sentencing court could assign minimal significance to the ADHD testimony because there was no causal connection between that testimony and the murder.

Finally, in the case of *Sims v. Brown*, 425 F.3d 560 (9th Circ. 2005), the Ninth Circuit recently upheld a death penalty where the State argued that the defendant's bad childhood did not qualify as mitigating evidence because (1) every adult violent felon had a bad childhood and (2) because there was "nothing to bridge the background of what happened in [Sim's] family to the murders we have dealt with here." 425 F.3d at 578. Sim's childhood mitigation evidence was nearly identical to Erick Hall's.

The Ninth Circuit found that the prosecutors statements "do not suggest that the jury cannot consider Sim's background as a mitigating factor but rather that it *should not* find his background, shocking though it was, mitigated the vicious murders he committed and attempted." at 580. The prosecutor referred to Sim's background as "shocking."

The prosecutor in Hall's case made essentially the same argument and said at page 5503:

> This is a sympathy – and I have sympathy for the defendant and I'll bet all of you do too if half the stuff we heard about his childhood is true, then I have sympathy for him. But it's an excuse, because they cannot make the cause and effect relationship." lines 14-19.

The jury was properly instructed. In Instruction #39, the jury was told to weigh all mitigating circumstances . . .. In Instruction #40, the jury was told that it is the Court, not the lawyers who instruct the jury. Instruction #41 instructs the jury that they are to consider all of the evidence admitted during the trial. Instruction #47 defines mitigation. It includes the defendant's condition or background that suggests a sentence other than death is just. The jury was told that, "mitigating factors may include any fact or circumstance that inspires sympathy, compassion or mercy for the defendant." Instruction #47.

The jury was correctly instructed. The State's argument was nothing more than a comment on the persuasiveness of the mitigation evidence.

The trial court cannot withhold relevant mitigating evidence from the jury on the grounds that there is no nexus shown between the mitigation evidence and the defendant's criminal conduct. Once relevant mitigating evidence is before the jury and the jury is properly instructed to consider it, the State is aware of no case holding that the prosecution is precluded from arguing that the mitigation evidence has no value because there is no nexus between it and the crime. Indeed, logic would indicate that the jury's view of a nexus between the mitigation and the crime would be part of the jury's weighing process. The State's argument was nothing more than a thorough response to defense counsel's argument that the defendant's upbringing caused him to chose to kill. This allegation should be dismissed.

b. **The prosecutor diminished the relative weight of the mitigation by mischaracterizing the weighing process.**

In this case, the jury was correctly instructed on the need to weigh all mitigation against each aggravating circumstance. The verdict form could not have been more clear that all mitigation was to be weighed against each individual aggravating circumstance. Trial counsel, in his closing argument, also correctly argued that all mitigation needed to be weighed against each individual aggravator separately. The drawing of the scale in the petitioner's argument was not an effort by the State to instruct the jury on the method of weighing. Rather, it was only to show that all of the mitigation was not sufficiently compelling to make the death penalty unjust. The jury was correctly instructed and the argument was not misconduct.

c. **The prosecutor made disparaging and inflammatory comments about the defense experts.**

The petitioner argues that the State impermissibly argued that the defense experts were "hired guns." To begin with, the petitioner cannot point to any argument where the words "hired guns" or the equivalent were used. Second, even if those words had been used, the petitioner points to no legal authority that an argument of that sort was impermissible. The bias or reliability of a witness is always subject to argument. Nothing about the petitioner's claim shows that the prosecutor's arguments were improper.

K (d). The prosecutor misrepresented the evidence: Evelyn Dunaway and Michelle Deen.

The petitioner cites to an excerpt from closing argument. Nothing in the excerpt shows a misrepresentation of the testimony of Deen or Dunaway and does not support the claim made.

K (e). The prosecutor presented argument inconsistent with evidence outside the record.

This is mere speculation by the petitioner with no citation to admissible evidence. It should be dismissed.

K (f). The prosecutor argued that imposition of the death penalty for Mr. Hall was justified by general deterrence and retribution.

Reference by the State to general deterrence was proper under the facts of this case. The jury knew that the defendant had committed a horrible murder as part of a rape, where he strangled the victim. The jury also knew that the defendant had raped and strangled Norma Jean Oliver and had violently choked and beaten at least two girlfriends. He had threatened to kill them and had threatened to kill another woman in his neighborhood. The jury was charged with deciding whether the State had proven beyond a reasonable doubt that the defendant had a propensity to commit murder that would probably constitute a continuing threat. The State's argument was a logical extension of the evidence supporting that charge, that is, the defendant did have a propensity to commit murder and that by sentencing him to death, the lives of other innocent people would be saved. That is a proper argument under these facts. The portions of the opinions cited by the petitioner do not hold otherwise.

The State did argue that the death penalty was proper retribution for the life taken by the defendant. None of the cases cited by the petitioner hold otherwise. The State is aware that

several courts have held that retribution, incapacitation and general deterrence are proper themes for closing arguments. The following are examples: *Collins v. Francis*, 728 F.2d 1322 (11 Cir 1984); *Spivey v. Head*, 207 F.3d 1263 (11 Cir 2000); "A sentence is reasonable if at the time of imposition it appears necessary to achieve *392 'the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to the given case.'" *State v. Lundquist*, 134 Idaho 831, 836, 11 P.3d 27, 32 (2000) (quoting from *State v. Toohill*, 103 Idaho 565 (Ct. App. 1982)).

This claim should be dismissed.

K (g). The prosecutor mischaracterized the role of the jury as a link in the chain of law enforcement.

The "link in the chain" argument that was disapproved in *Leavitt v. Arave*, 383 F.3d 809 (9 Cir. 2004) is substantially different than the argument made to the jury in the penalty phase of the petitioner's trial. In the *Leavitt* case, the jury was characterized as a link in the chain of law enforcement. In the petitioner's trial, the prosecutor did no more than state that law enforcement had done their job, the prosecution had now completed their job, and it was now time for the jury to do their job. There is nothing about that argument that suggests that the jury is part of law enforcement. Nothing else about the closing argument cited by the petitioner "undermines the jury's ability to meaningfully consider mitigation."

K (h). The prosecutor expressed his personal belief and opinion that the death penalty was the proper punishment for Mr. Hall.

The excerpt of the closing argument cited by the petitioner is the prosecutor making the obvious point that the verdict of proof beyond a reasonable doubt in the guilt phase was overwhelming proof. He does not state his opinion as to the propriety of the death sentence.

K (i). The prosecutor argued that lethal injection is painless and humane.

The excerpt of the closing argument referred to by the petitioner is merely part of an argument showing that Lynn Henneman's murder was much more painful and horrific for her

than execution will be to the petitioner. Additionally, the British Journal cited by the petitioner only indicates that some prisoners "may" receive inadequate anesthesia. This claim is baseless.

K (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.

There is nothing about the quoted closing argument that is improper. The jury was properly instructed and the argument was not false or misleading.

K (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.

The petitioner does not cite to any particular part of the closing argument that he finds objectionable. The State declines to comb through the closing argument to attempt to make his argument for him. The State denies that the argument was improper in any respect.

L. Trial counsel rendered ineffective assistance of counsel by failing to object to prosecutorial misconduct during sentencing-phase closing arguments.

There was no prosecutorial misconduct during sentencing phase closing arguments. There were no objections available to trial counsel that would likely have been sustained. The petitioner cites to ABA guidelines suggesting that counsel should object to arguments that "improperly minimize" the significance of mitigating evidence. The guideline then suggests that the State's argument that "not everybody who was abused as a child grows up to commit capital murder or that mental illness did not 'cause' the defendant to commit the crime" is objectionable on Eighth Amendment grounds. No opinions are cited to nor is there any other legal basis cited in support of this comment to the ABA guidelines. That appears to be merely the opinion of somebody in the ABA, without a legal basis. The claim should be denied.

M. Trial counsel rendered ineffective assistance of counsel by failing to request a pre-trial evidentiary hearing for the presentation of facts alleged in support of the noticed aggravating circumstances.

The State properly gave notice to the defense of the evidence the State intended to use in support of the charged aggravating circumstances. The aggravating circumstances were properly charged and proven. Trial counsel was not ineffective in any respect relative to this claim. It should be dismissed.

N. Trial counsel rendered ineffective assistance of counsel by failing to fully preserve sentencing-phase motions on federal grounds.

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.

This claim is completely speculative and without any legal or factual basis. It should be denied.

2. Trial counsel failed to raise any constitutional grounds in support of their objection to Dennis Dean's testimony regarding risk assessment.

This argument is entirely speculative and with no legal basis shown to support it. In the context of the Court's rulings concerning risk assessment and the Hanlon murder case, Mr. Dean's testimony on risk assessment was entirely proper. This claim should be dismissed.

O. Trial counsel rendered ineffective assistance of counsel in failing to challenge the introduction of victim impact evidence.

This claim is entirely speculative and should be dismissed. Also, it does not appear to be a proper claim for post conviction relief as it is actually an appellate issue, which is not cognizable under Idaho Code §19-4901.

P. Trial counsel rendered ineffective assistance of counsel in failing to challenge the introduction of any non-statutory aggravating circumstances.

The petitioner argues that his convictions for Escape, Grand Theft and Rape along with other alleged bad conduct with former girlfriends was inadmissible non-statutory aggravating circumstances. To the extent that information may support non-statutory aggravating circumstances, it is entirely appropriate to put it before the jury. However, the defendant's prior

criminal record shows a disrespect for the law and is evidence of a danger to the community that supports the propensity aggravating factor. This claim should be dismissed.

Q. Trial counsel rendered ineffective assistance of counsel in failing to raise challenges to the statutory aggravating circumstances.

1. Trial counsel failed to challenge the "especially heinous, atrocious or cruel" aggravating circumstances as vague and overbroad.

This aggravator has been upheld by the Idaho Supreme Court, as the petitioner points out, in *State v. Lankford*, 116 Idaho 860 (1989). No showing is made that trial counsel was ineffective in any respect regarding this aggravator since it has been upheld by the Idaho Supreme Court. This is an appellate issue and should not be considered by this Court in post conviction. Otherwise, the instruction and the State's argument on the evidence was proper.

2. Trial counsel failed to challenge the "utter disregard for human life" aggravating circumstance as vague and overbroad.

This aggravator was upheld in *Arave v. Creech*, 507 U.S. 463 (1993). Trial counsel's actions in regard to this aggravating circumstance have not been shown to be ineffective considering the holding of the United States Supreme Court. This claim should be dismissed.

3. Trial counsel failed to challenge the "propensity to commit murder which will probably constitute a continuing threat to society" aggravating circumstance as impermissibly lessening the State's burden and as vague and overbroad.

The Idaho Supreme Court has approved of the Court's jury instruction relating to this aggravator in *State v. Sivak*, 105 Idaho 900 (1983). There has been no showing made that trial counsel was ineffective in any respect relating to this aggravator.

4. Trial counsel failed to request a definition of "society" limiting it to the prison context.

This appears to be speculation only without any legal basis. It should be dismissed.

R. Trial counsel rendered ineffective assistance of counsel by failing to raise legal challenges to Idaho's death penalty scheme.

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.

This appears to be entirely an appellate issue and should not be considered in post conviction. It appears that the Idaho Supreme Court has upheld this weighing process in *State v. Osborn*, 102 Idaho 405 (1981).

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.

This appears to be an appellate issue. The jury was properly instructed.

3. Trial counsel failed to challenge the Court's instruction that the jurors have a duty to consult with one another regarding their findings.

There is nothing in the petitioner's argument that suggests that jurors consulting with one another interferes with the exercise of the jurors own reasoned moral judgment. The jurors were polled and expressed their individual consent to the verdict. This is an appellate issue and should not be considered in post conviction.

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 chose between constitutional rights.

This appears to be entirely speculative. No showing is made that a defendant has a constitutional right to written findings. This is an appellate issue and should be dismissed.

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.

No showing is made here that trial counsel was ineffective in any respect relating to this claim. No prejudice is shown. The *Sivak* case refers to death penalty sentencing done by a court, not a jury. The petitioner has no constitutional or statutory right to written findings in jury sentencing. The evidence supports each aggravator independently.

6. Trial counsel failed to object to the Court's instruction regarding the governor's power to commute or pardon.

The jury was properly instructed on the law. No showing is made that counsel was ineffective nor that there was any prejudice. This matter should be dismissed.

7. Trial counsel failed to raise international law violations.

No international law or treaty has been cited to which makes the death penalty or the Idaho statutes illegal in any respect. This claim should be dismissed.

8. Trial counsel failed to raise the ex-post facto application of the death penalty statute.

The death penalty statute is not ex-post facto as it applies to the defendant. See *State v. Lovelace*, 140 Idaho 73 (S.Ct. 2004).

S. The State violated Brady: Norma Jean Oliver.

a. The State failed to disclose the nature and extent of Norma Jean Oliver's mental health problems.

The petitioner begins this claim by asserting that the "State is very familiar with Norma Jean Oliver." The petitioner pretends that because Norma Jean Oliver was arrested in Ada County in 1990 and 1991 as a runaway from Payette County, that the Ada County Prosecutor's Office became "familiar" with her. The petitioner makes the assertion of familiarity despite not having a shred of evidence to show that the Ada County Prosecutor's Office or an Ada County court had any contact with her over her runaway problems.

The petitioner points to the fact that Norma Jean Oliver was the victim of a rape prosecuted by this office beginning in December 1991. She had contact with then Ada County Deputy Prosecutor Jay Rosenthal and she testified at a Grand Jury proceeding. The defendant pled guilty and there is no evidence that this office had contact with her after her Grand Jury testimony in that case. Thirteen years passed after that rape charge without any contact between this office and Norma Jean Oliver, during which time Jay Rosenthal retired from the office.

While it appears to be the case that Mr. Rosenthal had contact with Norma Jean's mental health providers at Intermountain Hospital, and determined that she was "too fragile" to assist in the prosecution, that information was also known by Mr. Myshin, who defended the petitioner in

the 1991 rape case. There is no evidence that Mr. Rosenthal knew any details about Norma Jean Oliver's mental health history except that she was "fragile." The petitioner's assertion that the State was aware that "Norma Jean was referred for inpatient, long term treatment at Intermountain Hospital" is without factual basis in the record and is not true.

When Norma Jean Oliver testified in 2004, the State had no more information about her mental health, her problems at home thirteen years earlier or more information about her runaway, than the State had had in 1991. As a matter of fact, at the time of this writing, the undersigned does not have much more information about her than the State had in 1991. Norma Jean Oliver was interviewed by a Public Defender investigator in 2006. That was apparently the first time that she advised that she had been diagnosed with any sort of mental health problem. The State has seen no documents to support her statements. The State knows nothing about her life between 1991 and 2004, except that she apparently permanently left Idaho to move to West Virginia. In short, the State was not in possession prior to trial, nor is now in possession of, any Brady evidence about Norma Jean Oliver to disclose to trial counsel. The State denies that there is any Brady violation.

Further, the State denies, what is apparently the petitioner's implication, that the State had some duty to search out records on Norma Jean's mental health, or to search out her Payette County juvenile history or to search for police reports relating to her arrest in Ada County for being a runaway. While the State does have the obligation to know what is in police files relating to the investigation itself, the State is under no obligation to do background checks on witnesses from sources that are not connected to the investigation and are not government sources. Intermountain Hospital for instance is not a government agency and the State has no access to the private mental health records of a witness. Further, police reports and juvenile records in another county are not part of the criminal investigation of either the original rape nor the penalty phase of the petitioner's trial. A search of either the Henneman murder investigation reports nor of the 1991 rape file would have revealed Norma Jean's 1990 Payette County juvenile record not that she had been arrested in Ada County and returned to her parents for runaway. Additionally, there is nothing about a juvenile record for runaway that could be used to impeach Norma Jean, neither could mental health records unless they show her to be incompetent. No such information has been brought to the attention of the undersigned.

In any event, the information that she had been to Intermountain Hospital and had been arrested for runaway, was conveyed to the jury at the time of her testimony. The jury may well have formed the same opinion that Amil Myshin formed which was that she was pathetic and didn't know what the "heck she was talking about." Myshin deposition transcript pg 388.

i. 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 undersigned is unaware of whether the prosecutor's office had a copy of the Grand Jury transcript from the 1991 proceedings, or acquired a copy of that transcript near the time of the 2004 trial or thereafter as part of the post conviction proceedings.

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.

Mr. Rosenthal's status with the office has been set out above. The State has also earlier disclosed in post conviction discovery that the 1991 rape file contains no other information about Ms. Oliver's mental health than the Dan Hess report. The State denies that the State had knowledge of Norma Jean's mental health except that she was contacted in the Intermountain Hospital, and as she testified, had a "chemical imbalance." That information was conveyed to the petitioner's defense.

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 portion of the transcript cited by the petitioner in support of this claim shows nothing more than that Mr. Rosenthal had contact with Lamar Heyrend at Intermountain Hospital. There is no indication that Dr. Heyrend told Mr. Rosenthal any of the specifics about Ms. Oliver's mental health status. Mr. Rosenthal eventually determined that she was too "fragile" to withstand cross-examination, but that may well have been based upon his observation of Norma Jean himself while preparing her for testimony.

iv. The State had knowledge of the 1992 pre-sentence report from the Norma Jean Oliver rape case.

The State did not possess a copy of the pre-sentence report from the 1991 rape case. The Court itself did not have a copy of that report in the rape file as is shown on the record from the hearing held on the petitioner's request for a copy of the pre-sentence report. To the understanding of the undersigned, a copy of that pre-sentence report was found in one of the other felony files connected to the defendant as part of a probation violation. The State through the prosecutor's office, nor the Court to the State's knowledge, had a copy of the pre-sentence report. The State is under no duty to find old pre-sentence reports about the defendant to comb through them in case they contain information about the State's witness.

v. The State had knowledge of Norma Jean Oliver's mental health condition based on her status as a prosecution witness.

The State had no knowledge of the defendant's mental health condition beyond Detective Hess's contact with her at Intermountain Hospital.

b. The State failed to disclose favorable evidence of Norma Jean's inconsistent statements and motive to lie and retaliate against Mr. Hall.

i. The State possessed or had knowledge of copies of Boise Police Department reports detailing multiple arrests of Norma Jean Oliver between November 1990 and December 1991.

The State had no knowledge of Norma Jean Oliver's juvenile history in Payette County nor did it have knowledge of Norma Jean's arrest in 1990 or 1991 except for her arrest that landed her in Intermountain Hospital. The State cannot now imagine, even if the State had specific knowledge of that information, how it is relevant to a Brady claim.

Further, the State specifically denies that it has admitted in post conviction discovery that the Ada County Prosecutor's Office, or the investigation centered around Norma Jean Oliver or Erick Hall, possessed or had knowledge of the police reports that have been discovered through the post conviction proceedings. The State denies this claim.

ii. The State had knowledge of the 1992 pre-sentence report from the Norma Jean Oliver rape case.

This seems to be an exact restatement of Claim iv, directly above, concerning the pre-sentence report. The State did not have the report for Claim iv and continues to not have the pre-sentence report for Claim ii.

iii. The State possessed or had knowledge of Detective Daniel Hess's tape recorded interviews of Norma Jean Oliver and Erick Hall.

The record in discovery is clear. The State initially contacted the Garden City Police Department at the request of the petitioner and learned that they did not have copies of the Hess tape recordings. The prosecutor's office did not have copies of those tapes in the Henneman murder file and so notified the petitioner. Sometime after that, copies of those tapes were located. Copies of those copies were turned over to the petitioner. Ultimately the prosecutor's office took those tapes to a recording business who through filtering were able to make better quality copies for the petitioner.

Mr. Ackley calls this gamesmanship. As baseless as this claim is, the State takes the inference of misconduct seriously and points to the obvious fact, that if the State was involved in gamesmanship, it would not have turned over copies of the tapes at all.

The petitioner infers misconduct relating to Joi Reno and the Payette County juvenile records for Ms. Oliver. The State did contact Ms. Reno in an effort to locate her, after her name was brought to the State's attention as part of the post conviction proceedings. The contact was only to locate her, in case she was needed later, but she was not interviewed.

The State made inquiry of the Payette County Clerk, the Payette County Sheriff, and the Payette County Prosecutor's Office, in an effort to locate juvenile records. None of those agencies indicated to the prosecution that they could find those records and only advised that if they did they would call back. That was done only at the request of the petitioner and in an effort by the undersigned to help them find records that they thought they couldn't find on their own. The State denies that it took a "laissez-faire" approach to discovering this information and specifically denies that the information is Brady information.

In any event, despite the petitioner's protestations, the undersigned sees no material relevance to the tape recordings or the juvenile records nor prejudice to the petitioner by their lack. The petitioner has a fundamental misunderstanding of what Brady requires. A witness can be impeached by some felony convictions, not by juvenile runaway arrests. The State is not obliged to invent theories of imaginable defenses and then look for juvenile records in other counties that may be related.

iv. 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 number 18591, held December 19, 1991.

This is a duplicate of Claim i above and has been responded to.

v. The State possessed or had knowledge of copies of Boise Police Department reports listing potential witnesses to Norma Jean's post-rape behavior.

No police reports were withheld from the petitioner. The State is under no obligation to search for other juvenile arrests for a witness. The State points out that had the State done that search and had they found Ms. Reno, the State would also have found the other witness who would testify that Norma Jean Oliver told that witness that she had been raped. The State also points out that whether or not Ms. Reno witnessed Norma Jean engaging in sexual activities in the Sands Motel does not make that information admissible for impeachment of Ms. Oliver.

c. The State failed to disclose favorable evidence of Norma Jean's problems at home.

i. The State possessed or had knowledge Detective Dan Hess's tape recorded interviews of Norma Jean Oliver and Erick Hall.

There is no indication in the report or the tapes that the injuries suffered by Norma Jean came from her family situation. If they had been, the State believes that Norma Jean would have been confronted with that in the extensive interview conducted with her in 2006 by the Public Defender.

ii. The State possessed or had knowledge of a copy of a transcript of the Grand Jury proceedings in the case of *State v. Erick Hall*, Ada County . . .

It becomes clear why this final amended petition is three hundred pages long. This is the third time this claim has been made and the State has previously denied it twice and does so again here.

d. The State failed to disclose favorable evidence of Norma Jean's prior misconduct.

i. The State possessed or had knowledge of a copy of a Boise Police Department report detailing Norma Jean's prior misconduct.

The petitioner apparently thinks that evidence that Norma Jean was a runaway would have been new news to the jury and that two runaways would somehow be impeachable evidence. No

showing has been made by the petitioner that this information is impeachable nor that its lack is prejudicial. Besides, the undersigned did not have it and was under no obligation to look for it.

e. The State failed to disclose favorable evidence of inaccuracies in Detective Hess's report.

i. The State possessed or had knowledge of Detective Hess's tape recorded interviews of Norma Jean Oliver and Erick Hall.

The State has earlier responded to this claim.

ii. The cumulative prejudice due to the prosecutor's failure to disclose favorable evidence of Norma Jean Oliver's allegation satisfies the prejudice prong of Brady.

No prejudice has been shown of any kind.

T. The State violated Brady: April Sebastian, Michelle Deen, and Wendy Levy.

1. The State withheld favorable evidence regarding April Sebastian.

The State did not withhold favorable evidence regarding April. The State recommended probation for Ms. Sebastian at the conclusion of her rider, which was after the Hall trial and sentencing. The petitioner attempts to substitute his judgment for the Court's on whether or not Ms. Sebastian was a good candidate for probation. The State offered Ms. Sebastian nothing for her testimony in the Hall case and the petitioner has no factual basis to prove otherwise. No prejudice is shown.

2. **The State withheld favorable evidence regarding Michelle Deen.**

a. The State withheld evidence of a prior felony conviction.

A reading of Ms. Deen's testimony shows that the jury knew that she was a Methamphetamine user and that she was convicted of possession of Methamphetamine. The jury knew she had done a "rider" at the South Boise Women's Correctional Facility and was on probation at the time she testified. She testified that she was using Methamphetamine at the time she knew Erick Hall and that he had attempted to help her to stop using. A second conviction is nothing more than cumulative, even if it fit the rule allowing impeachment for felonies. Since it is a drug offense, it may not be used for impeachment without the Court's specific order. There is no

reason to think that two convictions would make her testimony less believable than one given that she readily admitted she was using Methamphetamine at the time she lived with Erick Hall.

b. The State withheld evidence of Michelle Deen's past attempts to broker deals with the police to avoid prosecution.

There is no evidence that the Ada County Prosecutor's Office knew anything about the note contained in the Court file. There is no foundation in the evidence that Ms. Deen did the things suggested in the note, though the inference is there. There is nothing about that note that suggests that the State withheld evidence. The note itself was a public file, not a law enforcement file. The note says that the "D" talked to police about a "deal," but then did not thereafter contact law enforcement. There is nothing about that note that suggests untruthfulness or that suggests a Brady violation.

c. The State withheld evidence of Michelle Deen's compromised mental health as reflected in by Court-ordered substance abuse and psychological examinations.

Apparently as part of her sentencing, Ms. Deen underwent standard substance abuse and psychological evaluations. The petitioner does not allege what those evaluations showed nor does he claim how the evaluation could have been used to "undermine" Ms. Deen's credibility. He has not shown how that information would be admissible. This claim should be dismissed.

3. The State withheld favorable evidence regarding Wendy Levy.

Ms. Levy states in her affidavit that she had positive information about the petitioner, but she does not state in her affidavit that she conveyed that information to whoever it was that interviewed her. This claim fails because there is no factual basis to support the assertion that the prosecution knew the information that Ms. Levy claims to have. This claim should be dismissed.

U. The State violated Brady by failing to disclose evidence of an alternate perpetrator of the murder and co-perpetrator of the rape.

The State has fully responded to this claim in B(a) – (c). The State did not have the information about Patrick Hoffert from Peggy Hill and Lisa Lewis at the time of trial because they had not yet invented the story. The State did turn over the information about Lewis and Hill to the defense during discovery.

V. The State committed misconduct by dissuading mitigation witnesses from testifying or predisposing them to disregard mitigating evidence.

Nothing about the quoted affidavit supports this claim and the State specifically denies it.

W. The State committed numerous Napue violations.

1. The prosecutor elicited materially false testimony from Dennis Dean regarding Idaho Department of Correction's inmate classification system, directives for classification and conditions of confinement.

There is nothing about the cited evidence that created a "materially false impression." The evidence was accurate and the jury was specifically told that under the current classification system, the petitioner would not be eligible for minimum custody. It is the petitioner, rather, who is trying to create a materially false impression. No reasonable reading of that testimony supports the claim.

2. The Prosecutor deliberately created the materially false impression that Mr. Hall seriously choked Evelyn Dunaway while engaging in sexual intercourse.

There is nothing about the cited testimony that factually supports the defendant's claim. No reasonable reading of that testimony supports the claim.

3. The Prosecutor deliberately created the materially false impression that Mr. Hall choked Michelle Deen while engaging in forcible sexual intercourse.

No reasonable reading of the cited testimony supports the petitioner's claim.

4. The Prosecutor elicited materially false testimony from Norma Jean Oliver.

Nothing about the cited testimony has been shown to be materially false. This claim should be dismissed.

5. 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.

Detective Hess testified in 2004 that he did not know what Norma Jean Oliver's troubles at home were in 1991. While the tape-recorded testimony of Norma Jean Oliver shows that she did give some details about her family trouble in 1991, there is no evidence that Detective Hess had reviewed that tape recording in the intervening thirteen years. Rather, the evidence shows that the

Y. The admission of testimonial and other hearsay statements which violated Mr. Hall's Sixth Amendment and Due Process rights.

1. Hearsay introduced through Detective Daniel Hess.

It is the State's view that the Rules of Evidence do not apply to sentencing hearings, which would include hearsay. See Idaho Rule of Evidence 101(e) (3). Further, it is the State's view that the *Crawford v. Washington*, case cited by the petitioner, does not apply since the statements made by Detective Hess were attributable to Norma Jean Oliver and she had testified and was available for further testimony. The testimony elicited from Detective Hess, that the lab had found sperm on swabs taken from Ms. Oliver is hearsay. Nonetheless, that hearsay supported the defendant's story that he had consensual sex with Ms. Oliver and as such was not prejudicial.

2. Hearsay introduced through Dennis Dean.

The "pen packet" consisted of official documents under seal and as such was admissible. That is a well established exception to the hearsay rule. This claim should be dismissed.

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.

The State has responded to this claim in response to claim Y. Trial counsel's actions were not ineffective.

AA. Lethal Injection.

The State has earlier responded to this identical claim under claim K(3)(i).

BB. Mr. Hall's Fifth, Sixth, Eighth, and Fourteenth Amendment Rights were violated when he was improperly shackled during the course of his trial.

Mr. Hall wore a leg brace underneath his clothing during his court appearances. The petitioner makes the wholly unsupported assertion that the jury knew that he was shackled. Without any factual basis, the petitioner says that the leg brace made "clicking noises which the jurors would have been able to hear." There is no evidence that the jury ever saw Mr. Hall walk.

tape was not found until after the trial. Rather than being false testimony, all of the evidence showed that this is at most an innocent misrecollection. This claim should be denied.

6. The State committed misconduct by misrepresenting conclusions that could be drawn from the DNA test results taken from Christian Johnson.

The basis of this claim appears to be entirely fantasy. The petitioner asserts, without any evidence whatsoever, that Christian Johnson had sexual intercourse with Ms. Henneman, but did not leave any semen. How the petitioner translates that fantasy into State misconduct is unclear. What is clear, is that the State turned over all DNA test results to the defendant prior to trial.

X. The State committed misconduct by indirectly commenting on Mr. Hall's invocation of his right to remain silent during cross-examination of Dr. Cunningham and in closing arguments.

To begin with, the petitioner waived his Miranda Rights when being interviewed by law enforcement and made hours of statements to law enforcement on at least three different occasions. This is not a post Miranda silence violation as claimed by the petitioner.

The cited transcript only shows that Dr. Cunningham was biased in his research and in his presentation of the facts because he did not ever ask the defendant about the crime. That question does not reflect upon the defendant's desire to speak or to remain silent. Instead, the evidence shows that the defendant did cooperate for several hours of interview by Dr. Cunningham and Dr. Pettis. There is no suggestion that the defendant would have refused to answer the question if Dr. Cunningham had asked it.

The petitioner cites to the State's final argument relating to the petitioner's visible conduct in the courtroom. Mr. Myshin had earlier argued in his penalty phase closing that Erick Hall was remorseful for what he had done and that he had expressed his remorse in the letter "To the family of Lynn H." The State's argument is merely response to that, i.e. despite counsel's claim that he is remorseful, by asking "does he look remorseful". That is not a comment on his right to remain silent, but is a comment on a statement that he made during his interview and upon trial counsel's use of that statement.

There is no evidence to support that claim. Rather, the evidence in the trial record shows that it was not apparent. The Court said the following:

> Take up State v. Erick Virgil Hall. This is case number H0300518. Monday afternoon. Counsel present last week are again present today. Mr. Hall is present not—he is in-custody although it is not apparent. Tr. pg. 2067

The only evidence for the petitioner to rely on is that the defendant's custody status was not apparent. No prejudice has been shown and this claim should be dismissed.

CC. Trial Counsel rendered ineffective assistance of counsel by failing to suppress evidence of Mr. Hall's third interrogation.

If the State understands this claim correctly, the petitioner is asserting that once a criminal complaint is filed against the defendant, the defendant's Sixth Amendment right to counsel attaches and law enforcement officers can no longer interview the defendant. That is a completely novel argument without any legal basis to support it.

The black letter law is that the Sixth Amendment right to counsel attaches "at or after the initiation of adversarial judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information or arraignment." *McNeil v. Wisconsin*, 501 U.S. 171 (1991). In Idaho, this adversarial proceeding is the initial appearance. *State v. Valdez*, 117 Idaho 302 (Ct.app. 1990).

As stated above, this is black letter law and the State could add additional Idaho and U.S. Supreme Court cases, but will not on the assumption that briefing is not needed in this well settled area of the law. This claim should be dismissed.

DD. Trial counsel rendered ineffective of counsel by failing to move for change of venue, or, in the alternative, failing to move to have a jury from another county empanelled.

1. Trial counsel failed to obtain and analyze copies of the articles and television and radio broadcasts that had saturated Ada County.

The State's response to the petitioner's claim that trial counsel was ineffective for their jury selection practices is more fully set out in response to the petitioner's Claim FF below. Rather than discuss each of these jurors again, the State points out that every juror was asked

whether he or she had "formed or expressed an unqualified opinion that the defendant is either guilty or not guilty of the offense charged." The record indicates that none of the jurors responded affirmatively. The question of whether or not the Colorado Jury Method considers pre-trial publicity to be important in the selection process is more fully discussed under Claim FF. The State merely adds that no showing has been made that the jury was biased on account of pre-trial publicity. None of the publicity that occurred between the time of Ms. Henneman's disappearance in September 2000 and the defendant's arrest in March 2003 connected the defendant to the crime. None of the attached articles written during the trial are relevant. There is nothing about that publicity prevented the defendant from receiving a fair trial.

It is worth noting, however sadly, that the death of Lynn Henneman is far from the only reported death in the community that has generated publicity. At about the same time frame as this case, Brent Tortolano was charged with killing his girlfriend, Penny Moore, by shooting her in the head. H0201392. In October of 2002, Azad Abdullah was charged with the murder of his wife and the arson of their home. In November 2002, Ross McCabe fired at officers and was shot and killed by the police in downtown Boise. In December 2002, Erick Gallion was charged with murdering Kurt Peterman by shooting him. H0300235. In January 2003, Curtis Thorngren was found shot to death in his home in Meridian. Also in March 2003, Vincent Olsen was charged with the killing of Cameron Davis, the son of a state legislative leader. M0302969. Darrel Payne was charged with the rape, kidnapping and murder of an innocent stranger near the Boise State University campus in the summer of 2000. A fair and impartial jury in Ada County heard and decided that case.

The petitioner attempts to convince the Court that because there was "extensive" publicity about Ms. Henneman's disappearance and murder, the citizens of Ada County cannot sit fairly as jurors in the defendant's case. There is no evidence to support that theory. There is no evidence to suggest that because Ms. Henneman disappeared from the greenbelt, a person who uses the greenbelt, or knows about the greenbelt, or is proud of the greenbelt because it is a pleasant part of Boise, will somehow not hold the State to its burden of proof. The logical extension of this illogical argument is that nobody in Boise could sit as a juror on a murder that occurred in Boise if there had been pretrial publicity about the murder and the jurors liked Boise. There is no factual basis to support that theory.

As stated above, none of the jurors had formed an unqualified opinion that the defendant was guilty.

The State also points out that an Ada County jury was nearly selected to try the defendant for the Hanlon murder, even after the publicity concerning the defendant's arrest, charge, conviction and death sentence in the Henneman murder. But for a front-page Statesman's story in the middle of jury selection, telling the jury of the Henneman conviction, the defendant would have been tried by an Ada County jury. There is no evidence to support the petitioner's theory that jurors retain information from news stories for the months and years that the petitioner asserts. This claim and its subparts should be dismissed.

EE. Trial counsel rendered ineffective assistance of counsel by stipulating to a deviation of property jury selection procedures.

The complaint here is that trial counsel and the State stipulated that the parties would know who the alternates were at the end of jury selection. Idaho Criminal Rule 24 requires that alternate jurors would be determined by lot at the conclusion of the case. Even though the parties knew who the alternates were, the alternates did not know and so to the extent that this procedure was invented so that all of the jurors would equally pay attention, that effect was achieved by this procedure.

In any event, there is no showing made that this effected the fairness of the trial nor is it proven or argued that the petitioner had a constitutional right to this particular type of jury selection procedure. No prejudice has been shown and this claim should be dismissed.

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.

The basic assertion in this claim is that trial counsel did not use the "Colorado Method" for jury selection. The petitioner repeatedly refers to the declaration of David Layne, who claims to be an expert in capital jury selection and implies that the Colorado Method is the only method that works in capital jury selection. Mr. Layne clearly sets forth his method in his declaration and claims that because trial counsel did not follow his method, they were ineffective. However,

where it suits him, the petitioner also argues that trial counsel were ineffective when they did follow the Colorado Method, because by so doing, they did not elicit information about pretrial publicity.

To begin with, the petitioner claims that trial counsel was "shockingly inadequate" in their preparation for and conduct of jury selection. The petitioner claims that trial counsel was learning the Colorado Method as they went along and implies that trial counsel had put no thought into jury selection. To support this claim, the petitioner selectively quotes portions of Mr. Myshin and Mr. Carr's depositions. While it is true that trial counsel had not previously selected a jury in a capital case where there would be jury sentencing, it is false and misleading to suggest that trial counsel had not carefully prepared for jury selection. Mr. Myshin testified that he has tried many cases over more than a twenty-year career. Mr. Myshin advised that he knew that the penalty phase needed to be discussed during jury selection. Mr. Myshin began at page 79:

> 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 (selecting a jury for capital sentencing). So I looked to the Colorado Method as something I was being told was the accepted practice. And so here's an old dog trying to learn new tricks.
>
> We went to these seminars — and now I am talking about the Colorado Method. We went to these seminars, and tried to learn how this was done. I studied the materials; we participated in exercises in these classes. And it was foreign.
>
> Mr. Myshin goes on to say at page 81:
>
> So we tried to learn the Colorado Method. We tried to use it. It was a dismal failure. We were just — we were angering these jurors. We were — it didn't feel right. But we persevered and tried.

Mr. Myshin goes on to describe that he hired Rolf Kehne as a jury consultant. Mr. Myshin advised that he knew that Mr. Kehne was educated in the Colorado Method and he was a Colorado Method instructor, but even with the help of Mr. Kehne, the Colorado Method was doing more damage than good. Mr. Myshin made it crystal clear that he understood the Colorado Method and

that he knew what the Colorado Method suggested he do, but doing it was just angering the jurors. Mr. Myshin said beginning at page 86:

> We were all frustrated. We were all very tired, and we were all very frustrated. Because frankly, Judge Neville let us do whatever the heck we wanted to. He let us have an enormous amount of time with these jurors. He didn't really interfere.
>
> But I think it was obvious to everyone it wasn't working. Because I think at one point he says, 'you know, Marji Shepard is telling us that the jurors are pissed off. And that's not good.'

Mr. Myshin describes his understanding of the Colorado Method beginning on page 87 and 88 as follows:

> Okay. My understanding of the Colorado Method is, you are supposed to select jurors based solely upon their view of the death penalty. Forget everything else: forget all of the publicity, whether they like you, whether they seem reasonable, any of that stuff. You are supposed to forget all of that and select them solely on their point of view about the death penalty.

Mr. Myshin further describes how to "strip the juror" of all defenses. That is how counsel is to get the juror to the bedrock of what they really think about the death penalty and mitigation. But Mr. Myshin says that the jurors did not understand what mitigation was and didn't know how they would apply it in the sentencing context. Mr. Myshin again stated at page 91, that the Colorado Method of questioning was angering the jurors. Mr. Myshin summed up at page 94 as follows:

> Yes. They were also being frustrated with what their opinions about the death penalty were. You got the impression that a lot of these jurors didn't have an opinion about it. And so then you can't go for the next step in the Colorado Method. I mean, it ain't working. You are not getting the kind of information you need.

Mr. Myshin also talked about the Colorado Method of rating jurors by number. He said at page 94:

> A. . . .well, you are supposed to rate them by that (referring to the Colorado Method chart). And that's what we tried to do. And if you've looked at that chart, there are some incredibly subtle differences between these different numbers.

> Q. Right. (By Mr. Ackley)
>
> A. And it's — to me, it's a very subjective decision about what number to assign to a juror.
>
> Q. Do you know if the Colorado Method was supposed to be subjective, or is it supposed to be objective?
>
> A. It's not supposed to be subjective.
>
> Q. It's supposed — okay.
>
> A. Which is what voir dire is, is subjective. But it's not supposed to be that; it's supposed to be — you're supposed to get the answers out of these people that fit in to those categories. And then you assign numbers, and then you select the jurors based upon their numbers alone. That's what it is supposed to do. And according to your guy, it's supposed to be the simplest thing in the world.

Mr. Myshin advised that after a week of using the Colorado Method, and seeing that it doesn't really accomplish what it's claimed to accomplish, the defense team decided to use a blend of Mr. Myshin's tried and tested jury selection methods with the Colorado Method. In short, Mr. Myshin would attempt to develop a relationship with a juror, contrary to the Colorado Method, and then get the relevant information from the jurors rather than strictly use the rigid Colorado Method.

He still used what the Colorado Method called "Insulate and Isolate." That means insulating "life givers" and isolating "death givers." Mr. Myshin advised that he also talked to jurors about "jurors rights" which is something that he has been doing for years. Myshin deposition Tr. Pg. 103 and 104. Mr. Myshin also demonstrated his understanding of "mitigation impaired" and testified that he spent "a lot of time" on researching the law on jury sentencing issues. Myshin deposition pg 107 – 110.

In the end, Mr. Myshin strongly disagrees with Mr. Layne's claim that the jury selection was poorly done. Mr. Myshin further disagrees that the Colorado Method is simple and objective. Tr. pg 117.

As it relates to the petitioner's claim about trial counsel's failure to ask concerning pre-trial publicity, Mr. Myshin points out the contradictions in the claim. At page 119, Mr. Myshin points

out that the Colorado Method says that trial counsel is not to ask questions about pre-trial publicity, but is required to concentrate solely on the juror's view of the death penalty. At page 122, Mr. Myshin says the following:

> A. Wait a second. I mean, you want this both ways. You want me to use the Colorado Method. You say I can't use it; I didn't use that well. Then you want to turn around and say, 'why didn't you do it the other way?'
>
> How can you have it both ways? Either you use the Colorado Method, or you don't use the Colorado Method. And you are saying, 'well, you didn't use the Colorado Method correctly.'
>
> And the Colorado Method says specifically: you don't care about publicity, you don't care whether they like you. You don't care whether they've done anything in their lives. You only care about their view of the death penalty.
>
> Q. Right. (By Mr. Ackley).

Mr. Myshin is correct. The petitioner cannot have it both ways. The petitioner admits that every juror who was seated 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." None of the jurors seated responded affirmatively. Despite this obvious duplicity, the petitioner again asserts in this claim that trial counsel should have gone deeper into pre-trial publicity despite the dictates of the Colorado Method. Trial counsel was not ineffective in their voir dire questioning.

The petitioner also "asserts" that jurors should have been excused for the following reasons. He asserts that juror number 6 should have been excused because she had difficulty with sequestration. He asserts that juror number 51 should have been excused because she was a regular greenbelt user. He asserts that because juror 62 knew the murder victim in an unrelated case she should have been challenged for cause and excused. He asserts that juror 63 had hearing aids and so possibly couldn't hear critical evidence. He asserts that since juror 68 had worked at the Maximum Security Prison sometime in the past he should be disqualified for jury service. All of those claims are nothing more than bald assertions without a legal basis. Nothing about those assertions is grounds for cause to be excused from jury service.

He next asserts that because juror number 83 was married to a deputy attorney general assigned to the department of corrections that she should have been challenged for cause. He asserts that because her husband was sanctioned by a federal district court in 1999 for opening prisoner mail that this somehow translates into this juror's inability to sit fairly. He makes the bald assertion, without a shred of factual basis, that this juror's husband was "likely" familiar with Erick Hall and that there is a "reasonable probability" that he talked about Erick Hall with his wife, the juror. He also asserts that because Jay Rosenthal, a deputy attorney general, was a witness in the case, the juror was not able to "objectively weigh his testimony." There is no evidence that any of these claims are true. Of the hundreds of inmates in the Department of Corrections what is the probability that the juror's husband talked to the juror about Erick Hall. Hall was released from prison in 1999. There is no evidence that he was a discipline problem while in prison so as to bring him to the attention of the prison administration. This claim is entirely made up.

The petitioner then asserts that because juror 85 was an investigator for the U.S. Investigative Services he would be unable to "objectively weigh law enforcement testimony" and should have been excused. There was no factual basis to find that in the record. He asserts that because juror number 102 admitted that his "mind wanders" sometimes in the afternoon this juror should have been excused. That is not a legal ground for cause. He asserts that because juror 110 had managed Corrections Industries that that somehow biases the juror. There is no legal or factual basis for the assertion. Finally, he asserts that because juror 111 worked for the Sheriff's Office and was a former neighbor of Detective Dave Smith, that she should have been excused for cause. The juror was extensively examined about that and assured the Court that her knowledge of Detective Smith would not interfere with her ability to be fair.

Finally, David Layne, the Colorado Method promoter, speaks specifically about some of the jurors. He speaks at length about juror 83, the wife of the deputy attorney general. Despite the fact, as Amil Myshin testified, the ranking of jurors is a subjective process, Mr. Layne views his numerical ranking of this juror, who he had never seen, as meaning she was a "virtual certain vote for death." A review of the transcript shows the voir dire of this juror to be much different than a "certain vote for death." The transcript shows the following:

At page 2497 the juror says her mind is open to mental health evidence. At page 2504 she considers the death penalty and a life sentence to be equal in punishment. At page 2512, she

advises that she does not talk to her husband about his work. At 2511 she says that she has not discussed the case with her husband. At page 2515 she says that she is in favor of the death penalty, but advises that it depends on the case and that sometimes the death penalty is appropriate but in other cases a prison sentence is appropriate. At pages 2518 and 2519, she testified that in her view not all premeditated murder is worthy of the death penalty. At page 2519, she promises to weigh mitigation. At page 2521, she again states that not all premeditated acts are worthy of the death penalty. At page 2525, she says that she will consider genetics and upbringing as mitigation and that she understands that there is a difference between considering mitigation and "really considering it." She promises to "consider its value." At 2526 and 2527, she appreciates that upbringing can have a cause and effect relationship on how a person turns out. At page 2527, she talks about her stepson being in and out of jail and drug court. At page 2530 she testifies that she has a high opinion of psychiatric and psychological testimony. At page 2533 she agrees that she will give respect to other jurors and certainly won't be a bully. Also at 2533 she testifies that a life sentence would hold a person responsible for the crime the same as the death penalty would.

There is nothing about the cited testimony that would indicate the juror should be excused for cause or that a failure to excuse her for cause shows ineffective assistance of counsel.

Mr. Layne made similar comments about several other jurors, but a close look at the voir dire transcript shows testimony much the same as juror number 83. There is nothing about the voir dire that indicates ineffective assistance of counsel. What Mr. Layne's selective quoting of the transcript also shows is that he is not so much an expert as he is an advocate for the petitioner. He is not so much attempting to inform the Court as he is attempting to persuade, regardless of the facts. The Colorado method may look good on paper, but even in the hands of a skilled practitioner like Amil Myshin, it did not work with these real jurors. This claim should be dismissed.

GG. Trial counsel rendered ineffective assistance of counsel by failing to adequately challenge juror number 60 for cause.

As to this juror, the Court ruled that he would not excuse her for cause. The Court stated:

> The Court: I've allowed counsel great leeway on this case, because now you know that she'll likely philosophically not give great weight to the categories of mitigation evidence that you've put down there. That doesn't leave you happy, but that's not

even close to a grounds for disqualifying her, not even close. . .Tr. pg 2025 lines 20-25 and Tr. pg. 2026 line 1

The Court: I wrote that you asked her about genetics, circumstances of birth, sympathy, mercy. There are other things that I didn't write in my notes that you asked her. Would you be persuaded by this? She said I would consider it but it may not convince me. That's what she said. . . TR pg 2029 lines 1-6

The Court: I don't know what 'substantially mitigation impaired' means. She's agreeing to do what will be her duty to do in this case, which is to consider all evidence, both in aggravation, mitigation. The weight she assigns to that is her choice. TR pg 2030 lines 2-7

The fact that a juror is not persuaded by the mitigation evidence that counsel has available, does not disqualify the juror for cause. Trial counsel did the only thing he could do, and that is use a preemptory challenge. No ineffective assistance has been shown and this claim should be dismissed.

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.

The defendant was present at all critical stages of his trial. There is no showing that the chamber's conferences weren't thereafter described on the record with the defendant present. No prejudice has been shown. This claim should be dismissed.

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 jury was properly instructed. All of the instructions taken together, including instruction 15, clearly set out what the elements of the crime of first-degree murder are. This claim should be dismissed.

JJ Trial counsel rendered ineffective assistance of counsel by failing to challenge the State's presentation of DNA evidence.

The substance of this claim as stated by the petitioner, is that Kathryn Colombo "downplayed" the importance of the existence of a 13th allele at the D5 marker by referring to it as a

"stutter artifact" or a "technical artifact" or "contamination." Counsel uses a BSU professor, Greg Hampikian to opine that Kathryn Colombo downplayed the result, even though Dr. Hampikian cites excerpts from the transcript showing that Kathryn Colombo made it clear there could have been a second male contributor to the sperm fraction.

During direct and cross-examination, the question of the 13th allele was discussed several times, the State notes some of them as follows.

At transcript page 4466, Ms. Colombo refers to that allele and describes it as being, "over the stutter cutoff, but just barely. It could be a technical artifact. It has met our reporting guidelines, so it is in the table. I cannot make any conclusions about that type because it is just so little information."

At page 4467, Ms. Colombo states, "there was no other type observed in these sperm fractions where we saw secondary types that were not consistent with possible carryover from the nonsperm fraction. So this was the only instance." Ms. Colombo is referring to the 13th allele at D5.

She points out at page 4468 that the petitioner matches at all of the markers.

At page 4489, Ms. Colombo states unequivocally that there could be a second donor as follows:

> Q. Could there be a second male there?
>
> R. There could be.
>
> Q. Okay. Now, as we go out to the – out towards the end there. The D5 category, Yes. Is it possible that a second male contributed the 13 allele?
>
> A. That is possible. It's not consistent with the type obtained from a nonsperm donor, not consistent with the primary donor at that location. So it could either be technical artifact, it could be the true nature of the sample. It could have been picked up along the way. There is no way for me to determine where that type came from.
>
> Q. Okay. So it's possible that it could have come from a second male?
>
> A. Possible. TR. pg. 4489 lines 6-21

The subject again came up at page 4505.

Q. Now, if there is a difference in the time of depositing the sample, does that effect it?

A. Yes. If there is a sample that was deposited, specifically in a sexual assault case, we see cases where an individual says that they had sex with another person two weeks prior to the attack and maybe that we're getting some residual, small amount of DNA from that partner from two weeks ago, so in terms of a sexual assault that could come into play.

Q. And it's also true that if there are only hours separating, correct?

A. Not typically, no.

Q. It's possible?

A. It could be possible, yes. TR. pg. 4505 lines 11-25

The second contributor issue was again discussed at page 4521. Referring to the 13th allele, the following occurred:

Q. Well, it could have come from another contributor?

A. That is correct. TR. pg. 4521 lines 22-24

The subject was again discussed at page 4526 as follows:

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

A. It's possible. We've got one reading, it's the only reading, a small type that cannot be attributed to the nonsperm donor or the primary source of the sperm fraction. So I don't know where that came from. TR. pg. 4526 lines 19-25

On page 4528 and 4529, the subject is again discussed and Ms. Colombo admits that she cannot account for the 13th allele. However, she does point out that Walter Us and Christian Johnson are categorically excluded as donors. TR. pg. 4529 lines 1-7

For the petitioner to pretend that the jury was not aware of the possibility of a second sperm donor is to completely ignore the testimony. The affidavit from Greg Hampikian adds nothing to the knowledge that the jury already had. He suggests that the 13th allele came from the victim being "inseminated." There is no way for him to know how that 13th allele got to the place that it was discovered. He can no more tell that it is a result of insemination than he can tell that it was not yet

"picked up along the way" during the testing process as indicated by Kathryn Colombo. He can also not tell that the single allele came from a male. Ms. Colombo only says it is possible the allele came from a male. There is nothing about this information that shows ineffective assistance of counsel. This claim should be dismissed

Also, trial counsel retained a DNA expert, as shown above, to review all relevant DNA evidence. Myshin deposition Tr. pg. 205 line 3 and 4. Mr. Myshin intentionally cross examined Ms. Colombo to show that the 13th allele may show the presence of a third person. TR. pg. 205 and 206. The B.S.U. professor's opinion adds nothing. No showing of ineffective assistance has been made.

KK. Trial counsel rendered ineffective of counsel by eliciting evidence of other bad acts.

There is nothing about the portion of the transcript cited that would cause the jury to be suspicious about any other case. The phrase "analyzed in a separate case" could refer to nothing more than another criminal case he was excluded from, a paternity investigation in a civil case, or any number of other things. It's not likely that the jury would have put any weight on such a minor point. This claim should be dismissed.

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.

This has been thoroughly responded to in Claim B above and should be dismissed.

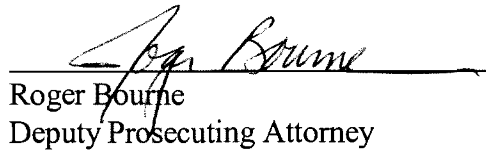
MM. Trial counsel rendered ineffective assistance of counsel by failing to object to shackling or failing to adequately object to evidence of defendant's custodial status.

This has been thoroughly responded to Claim BB above, and should be dismissed.

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

RESPECTFULLY SUBMITTED this 21 day of December 2007.

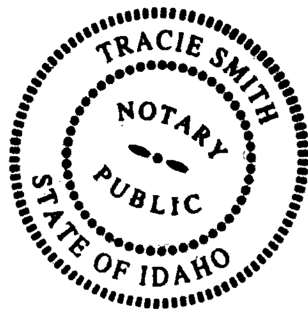
GREG H. BOWER
Ada County Prosecutor

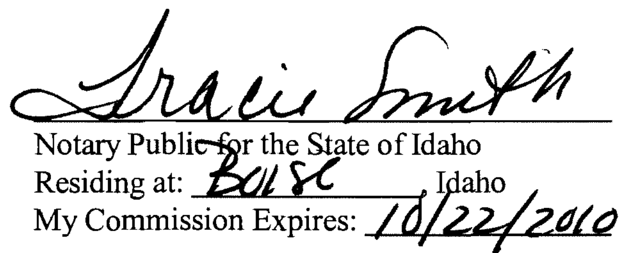


Roger Bourne
Deputy Prosecuting Attorney

STATE OF IDAHO)
) ss.
County of Ada)

On this 21 day of December 2007, before me, a Notary Public for Idaho, appeared **ROGER BOURNE**, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.





Notary Public for the State of Idaho
Residing at: BOISE, Idaho
My Commission Expires: 10/22/2010

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing document was delivered to State Appellate Public Defender, 3647 Lake Harbor Lane, Boise, Idaho 83703, through the Mail, this 21 day of December 2007. hand delivered

L Smith

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

ERICK VIRGIL HALL, Petitioner, vs. THE STATE OF IDAHO, Respondent.	**Case No. SPOT0500155** **AFFIDAVIT OF HELEN MAYBERG M.D.**

BEING FIRST DULY SWORN your affiant declares as follows:

1. I am a physician specializing in neurology, neuropsychiatry and functional brain imaging. My education, training, and experience are summarized below. I have been retained by the Ada County Prosecutor's Office to address the appropriate uses and limitations of positron emission tomography (PET) and magnetic resonance imaging (MRI) in the diagnosis and assessment of neurological and psychiatric disorders. More specifically, I have been asked to address the issue of whether these brain scans provide

Exhibit A

scientifically reliable evidence that (1) establishes or confirms any specific neurological or psychiatric diagnosis in the defendant, or (2) confirms the contribution of brain damage to the defendant's behavior at the time of his purported crimes.

2. I received my medical degree from the University of Southern California and served as a resident in neurology at the Neurological Institute in New York, Columbia University College of Physicians and Surgeons in New York City. I am a board-certified neurologist. I completed a post-doctoral research fellowship in functional brain imaging in the Division of Nuclear Medicine at the Johns Hopkins School of Medicine in Baltimore, Maryland. Upon completion of my fellowship, I remained on the faculty of the Johns Hopkins School of Medicine in the Departments of Radiology/Nuclear Medicine, Neurology, and Psychiatry until 1991. In 1991, I was recruited to the Research Imaging Center and the Departments of Medicine (Neurology), Psychiatry, and Radiology at the University of Texas Health Science Center in San Antonio, where I worked until December of 1998. Between December of 1998 and December of 2003, I was Professor of Psychiatry and Medicine (Neurology) and the Sandra Rotman Chair in Neuropsychiatry at the Rotman Research Institute at the University of Toronto. I am currently a Professor of Psychiatry and Neurology at Emory University School of Medicine.

3. I have conducted research and published original research papers in the fields of neurology, neuropsychiatry, and neuroimaging. These publications are listed in my curriculum vitae, attached hereto as Exhibit A. I have been a standing committee member of grant review study sections at the National Institutes of Health, with specific responsibility for reviewing grants targeting the use of neuroimaging to study various neurological and psychiatric diseases. I am now or have served in the past on the editorial Boards of the following peer-reviewed journals: *NeuroImage, Human Brain Mapping, Biological Psychiatry, NeuroInformatics, Brain Structure and Function,Brain Imaging and Behavior, and Brain Stimulation.* In addition, I am an ad hoc reviewer for a number of other peer-reviewed journals, including: *Journal of Neuroscience, Nature, Nature Neuroscience, American Journal of Psychiatry, Archives of General Psychiatry, Biological Psychiatry, Journal of Neuropsychiatry and Clinical Neuroscience, Annals of*

Neurology, Neurology, Proceedings of the National Academy of Science, and Brain, among others. My academic responsibilities over the past 20 years have included: neuropsychiatric research using PET and MR imaging tools; clinical patient care duties related to the diagnosis and treatment of hospitalized and out-patient neurological patients; the teaching of clinical neurology to neurology and psychiatry residents, medical interns and medical students; and teaching and training in the use of PET and MRI to residents, medical students, post-doctoral fellows and faculty researchers. I have written extensively on the application of brain imaging technology, including numerous peer-reviewed articles and abstracts specifically focusing on PET and MR imaging. In addition, I served as Chairman of a Committee of the Brain Imaging Council of the Society of Nuclear Medicine which developed the position paper "Ethical Clinic Practice of Functional Brain Imaging" published in the *Journal of Nuclear Medicine* in June 1996. A copy of this position paper is attached hereto as Exhibit B and incorporated by reference.

4. In formulating my opinions in this case, I have reviewed the following materials relating to Mr. Hall:

a) FDG PET scans of Mr. Hall's brain from InterMountain Medical Imaging in Boise, dated 2/15/07 and provided on CD.

b) PET scan Report of Ian C. Davey, MD dated 2/21/07

c) MRI Scans: Xerox picture of 2 axial slices from the MRI study performed at InterMountain Medical Imaging in Boise on 2/21/07 attached to the MRI report generated by Vicken Garabedian MD (2/21/07)

d) First, Second and Third Affidavits of James Merikangas MD

5. I was not provided with either films or digital images of the MRI study or medical or jail records of the defendant in and around the PET/MRI exams to establish if Mr. Hall was taking any medications at the time of the imaging studies. No toxicology

screen is described in the PET scan report documenting absence of illicit or prescribed drugs in his system at the time of the PET study.

6. I did not review past medical or psychiatric records or expert examinations of the defendant or details of his past trials or convictions. The prosecution has informed me that the murder under discussion occurred in September of 2000, more than 6-and-a-half years prior to the PET and MRI scans. I have further been informed that testimony showed that Mr. Hall used intravenous methamphetamine in 2001 and 2002, and alcohol in 2003. Such drug and alcohol abuse is also described in Dr. Merikangas' affidavit, including the use of cocaine. As Mr. Hall has been incarcerated since 2003, it is assumed that he has not used either since his arrest. As stated above, no toxicology screen was reported at the time of the PET documenting absence of illicit or prescribed drugs in his system.

7. My opinions below are based upon my training, experience, and review of the published medical and scientific literature and are consistent with the statements published by the Brain Imaging Council of the Society of Nuclear Medicine in 1996, the Academy of Neurology in 1991, and the American College of Radiology in 2002 (and revised in 2006), copies of which are attached hereto as Exhibit C and incorporated by reference. Updates on these articles have not been published because the degree of general acceptance of PET has not substantially changed.

8. Positron Emission Tomography (PET), also referred to as a PET scan, is an imaging procedure used to study brain function. PET scanning involves the injection of a radioactive chemical into the body, which is taken up by various organs, including the brain, and then measured using specialized sensors. Using different chemicals, various aspects of brain physiology can be assessed. PET using F18-fluorodeoxyglucose (FDG) provides information about cellular energy metabolism, which is an index of regional brain function. This technique provides complementary, but different information from that obtained using x-ray computed tomography (CT) or magnetic resonance imaging (MRI), which identify structural features of the brain.

9. The use of PET for the clinical diagnosis and treatment of individual patients is extremely limited. Generally recognized and accepted uses of FDG PET scans include the evaluation of EEG-proven temporal lobe epilepsy (for the purpose of lesion lateralization prior to surgery), brain tumors (tumor grading and to differentiate radiation necrosis from tumor recurrence), and in the differential diagnosis of dementia (Alzheimer's disease versus vascular dementia versus fronto-temporal dementia). PET scans are <u>not</u> used as a general brain screening test.

10. PET is not a generally recognized test for diagnosing residual effects of past traumatic brain injury. To date, there are no prospective, replicated studies demonstrating consistent and reliable patterns that correlate with either the presence of a past injury or specific neurological, psychiatric, or neuropsychological sequel of injury. The error rate (sensitivity and specificity) of the test for this diagnosis is not known. As such, these scans cannot be used for diagnostic purposes, to predict long-term outcome or to quantify the degree of disability.

11. Furthermore, and contrary to Dr. Merikangas' claims, oxygen deprivation, high fevers, infections or measles, are also not recognized differential diagnoses of bilateral temporal metabolic abnormalities on FDG PET. PET scans also have no utility in the diagnosis of congenital brain abnormalities resulting from fetal exposure to alcohol or brain damage due to past repeated use of alcohol, cocaine and/or methamphetamine.

12. In general, in order for PET or any medical procedure to provide a scientifically reliable means to diagnose a specific medical condition, scan abnormalities must first be identified and statistically confirmed in groups of patients with that condition verified using independent clinical and pathological criteria. A scientifically valid correlation must then be shown between the scan patterns and the independent clinical/pathological criteria before the significance of specific abnormalities can be attributed to a specific disease or condition. Lastly, group patterns must be shown to be reliably detectable in individual subjects, including a determination of sensitivity and specificity (to determine error rate, false positives and false negatives). In general, in order for a test to evolve from a research observation to an accepted clinical procedure that can be used in

individual patients, results of these various steps must be peer-reviewed, published and replicated. None of these steps has occurred with respect to the use of PET to diagnose any of the conditions opinioned in Dr. Merikangas' affidavit.

13. Dr. Davey who read the PET scan at InterMountain Medical Imaging, reported decreased activity in the medial temporal lobes and temporal poles bilaterally. He offered no differential diagnosis for these findings, concluding they were nonspecific. His findings and conclusions were based solely on a subjective clinical reading of the PET scan pictures which cannot be confirmed in the absence of normative data from healthy controls of comparable age and gender to Mr. Hall scanned under comparable conditions on the same scanner. No such quantitative comparisons were performed to determine if Mr. Hall's scan is in fact statistically and significantly different from the normal variations in scans of healthy subjects. This is the only way to validate if in fact the scans are even abnormal. This is also the necessary first step before making any attempts to offer a differential diagnosis based on published scan patterns of known neurological conditions.

14. Even if the reported bilateral medial and anterior temporal lobe findings are assumed to be true abnormalities, they are not diagnostic of any specific neurological, psychiatric condition as opined by Dr. Merikangas. Furthermore, conclusions suggesting a causal link between the PET findings and aggressive impulsive behavior, poor executive functioning, poor judgment and low intelligence are without scientific basis as is the attempt to link such scan findings identified on 2/15/07 to Mr. Hall's criminal activity many years prior.

15. The MRI scans also reported some nonspecific findings, namely mild prominence of the ventricles without cortical atrophy (upper limits of normal) and a few tiny foci of white matter hyperintensities on the T2 images (also upper limits of normal). These findings are not diagnostic of any specific neurological or psychiatric disorder and Dr. Garabedian, the radiologist of record, offered no differential diagnosis, concluding the study was normal. Nonetheless, Dr. Merikangas opined otherwise concluding significant damage to the white matter and significant cortical atrophy likely due to

multiple traumatic brain injuries. Despite no mention of an abnormal corpus callosum in the Radiologist's report, Dr. Merikangas further concluded that the corpus callosum was abnormally thin and narrow consistent with fetal alcohol spectrum disorder.

16. As with the PET scans, no quantitative measurements of either brain volume (to quantify cortical atrophy) or corpus callosum thickness, shape or volume have been provided to confirm such claims. No statistical comparison between the defendant's scan and scans from healthy control subjects of like age and gender have been performed to confirm that white matter hyperintensities, cortical atrophy and corpus callosum thickness deviates from normative limits. In the absence of confirmation of true abnormalities, cause and effect links of these scan findings to specific behavioral abnormalities in the defendant are not scientifically supportable.

17. To summarize, there are no established structural or functional neuroimaging scan patterns diagnostic of any of the congenital, developmental, neurological or psychiatric disorders/syndromes considered contributory by Dr. Merikangas. Neither are there reliable scan patterns that correlate with impulse control and aggressive behavior that might explain his criminal activity. The reported PET and MRI scan findings are at best, non-specific and do not conform to any published research or clinical conditions. In the absence of age and gender match control subjects and quantitative comparisons of Mr. Hall's scans to such control groups, the PET and MRI findings cannot even be confirmed as abnormal and more likely reflect normal variations.

18. With the information currently available, there is no scientific basis to conclude that the MRI or PET scans provide objective evidence of a biologically based brain disease responsible for the defendant's behavior as an infant, child, adolescent or adult or specifically, at the time of the crimes for which he has been accused. Furthermore, any conclusions based on these scan findings that the defendant suffers from a brain based defect of mind and reason that renders him substantially incapable of (1) conforming his conduct to the requirement of law or (2) appreciating the wrongfulness of his conduct are also scientifically unsupportable.

I reserve the right to modify these opinions in light of additional information that may be forthcoming and to amend this report in light of such new information.

Further your affiant sayeth not.

DATED this 19 day of December, 2007.

Helen Mayberg MD.
Helen Mayberg, M.D.

STATE OF Georgia)
) ss.
County of DeKalb)

On this 19 day of December 2007, before me, a Notary Public, appeared **Helen Mayberg, M.D.**, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Linda H Donoff
Notary Public for the State of Georgia
Residing at: 5805 Carlton Way Stone Mtn GA 30087
My Commission Expires: 8-5-2009

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing document was delivered to State Appellate Public Defender, 3647 Lake Harbor Lane, Boise, Idaho 83703 through the United States Mail, this 21 day of Dec 2007.

[signature]

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CV REVISED: NOVEMBER 2007

BIRTHDATE: [redacted]
BIRTHPLACE: California
CITIZENSHIP: USA

CURRENT TITLES AND AFFILIATIONS

ACADEMIC APPOINTMENTS

Primary Appointment
Professor, Psychiatry and Neurology
Emory University School of Medicine

Adjunct Clinical Appointment
Associate Staff, Toronto Western Hospital (Neurology & Psychiatry)
Professor of Psychiatry and Neurology, University of Toronto

PREVIOUS ACADEMIC AND PROFESSION APPOINTMENTS

1999-2003 Sandra A. Rotman Chair in Neuropsychiatry
Professor of Psychiatry and Medicine (Neurology)
Rotman Research Institute
University of Toronto
Toronto, Ontario Canada

1999-2003 Director, Sandra Rotman Program in Neuropsychiatry
Rotman Research Institute, University of Toronto

1999-2001 Director, Mental Health Research Program
Sunnybrook Medical Center, Univ of Toronto

1994-1998 Associate Professor, with Tenure (1997)
1991-1994 Assistant Professor
School of Medicine, Departments of Medicine (Neurology)
Psychiatry, and Radiology
School of Biomedical Sciences, Graduate Faculty for Radiology
Senior Scientist, Research Imaging Center
University of Texas Health Science Center at San Antonio

1990-1991 Assistant Professor
1987-1989 Instructor
Departments of Radiology (Nuclear Medicine)
Neurology, and Psychiatry
Johns Hopkins University School of Medicine
Baltimore, Maryland

1985-1987 Research Fellow
Johns Hopkins PET Facility
Division of Nuclear Medicine
Department of Radiology and Radiological Sciences
Johns Hopkins University School of Medicine
Baltimore, Maryland

PREVIOUS CLINICAL APPOINTMENTS

1999-2003 Baycrest Centre for Geriatric Care (Neurology & Psychiatry)
Center for Addiction and Mental Health

1991-1998 Attending Staff, Neurology, Psychiatry and Nuclear Medicine
University Hospital and the Audie Murphy Memorial VA Hospital
University of Texas Health Science Center at San Antonio

1985-1991 Attending Staff, Neurology
1987-1991 Attending Staff, Radiology (Nuclear Medicine)
Johns Hopkins University School of Medicine
Baltimore, Maryland

LICENSURES, BOARDS, AND SPECIALTY BOARDS

1998 Royal College of Physicians and Surgeons of Canada (Neurology)
1987 American Board of Neurology and Psychiatry (Neurology)
1982 National Board of Medical Examiners

2004 Georgia 54848
1998 Ontario, Canada 73175
1992 Texas J1305
1985 Maryland D32936
1982 New York 151325
1982 California G47745

EDUCATION

1972-1976 University of California, Los Angeles
Degree: B.A. Psychobiology 1976

1976-1977 University of California, Irvine
Graduate studies: Department of Radiological Sciences

1977-1981 University of Southern California, School of Medicine
Degree: M.D. 1981

POST-GRADUATE TRAINING

1981-1982 Intern, Internal Medicine
Los Angeles County-USC Medical Center
Los Angeles, California

1982-1985 Resident, Neurology
The Neurological Institute of New York
Columbia University, College of Physicians and Surgeons
New York, New York

1985-1987	Research Fellow Johns Hopkins PET Facility (Supervisor Henry Wagner, MD) Department of Radiology, Division of Nuclear Medicine Johns Hopkins University School of Medicine Baltimore, Maryland

COMMITTEE MEMBERSHIP

NATIONAL AND INTERNATIONAL

2007-	Dana Alliance for Brain Initiatives, invited member
2006-	Councilor, American Neurological Association
2005-	NIH/NINDS: National Advisory Neurological Disorders and Stroke Council, member
2004-	National Alliance for Research on Schizophrenia and Depression (NARSAD), Scientific Advisory Board
2003-2004	National Advisory Mental Health Council Workgroup: Setting Priorities for Basic Sciences of Mental Health
2003-	Depression and Bipolar Support Alliance (DBSA), Scientific Advisory Board
1998-2000	Study Section - NIH Center for Scientific Review Brain Disorders and Clinical Neuroscience (ZRG1 BDCN-6)
1996-1998	Study Section - National Institute of Mental Health (NIMH) Clinical Neuroscience and Biological Psychopathology (CNBP)

INSTITUTIONAL

2007	Member, Search Committee, Neuroradiology Chief, Dept of Radiology, Emory
2005-2006	Member, Comprehensive Neurosciences Center (CNC) development project, Emory. Alzheimers disease, Parkinson's disease, and Child Depression Subcomittees, Emory.
2004-	Member, Dept of Psychiatry Promotions Committee, Emory
2004-	Member, Center for Behavioral Neuroscience (CBN), Emory
1999-2001	Member, Scientific Advisory Board, PET Centre, Clarke Institute/CAMH, U of Toronto
2000	Search Committee Member, Cameron Wilson Chair in Depression Studies, U Toronto
2000	Search Committee Member, Alzheimer's Chair, Rotman Research Institute
2000	Search Committee Member, Psychopharmacology Chair, Rotman Research Institute
1995-1998	Member, UTHSCSA, President's Committee on Accreditation
1994-1998	Member, San Antonio State Hospital Research Advisory Panel
1994-1995	Chairman, UTHSCSA, Institutional Review Board
1993-1994	Deputy Chairman, UTHSCSA, Institutional Review Board
1992-1995	Member, UTHSCSA Institutional Review Board
1993	Chair, UTHSCSA IRB committee-Consent form Language on Radiation Exposure Risk

CONSULTANTSHIPS

2002-2004	Graduate Training Program in Translational Investigation (K30 Ext Advisory Board) University of California Los Angeles, PI: Julio Lucinio, MD
2000	NIAID/NIH Chronic Fatigue Syndrome "State of the Science," Rockville, MD
1999-2001	Center for Studies of Late Life Depression (External advisory committee) U Pittsburgh, PI: Charles F. Reynolds, MD
1997-1999	Geriatric Depression (Consultant), University of Pittsburgh, PI: Charles F. Reynolds, MD
1996-1999	Mental Health Clinical Research Center (Consultant), University of Pittsburgh, PI: David J. Kupfer, MD
1995-1999	Chronic Fatigue Center (External Advisory Board), University of Washington, Seattle.

PI: Deidra Buchwald, MD

EDITORIAL BOARDS

2001-present NeuroInformatics
1999-present Depression & Anxiety
1998-present NeuroImage
1997-present Human Brain Mapping
1997-2007 Biological Psychiatry (Executive Committee 2001-2003)
2006- Brain Imaging and Behavior
2006- Brain Structure and Function
2007- Brain Stimulation

MANUSCRIPT REVIEWER

Journal of Neuroscience
Proceedings National Academy of Science
Science
Nature
Nature Neuroscience
Nature Neuroscience Reviews
Neuron
American Journal of Psychiatry
Archives of General Psychiatry
Biological Psychiatry
Molecular Psychiatry
Neuropsychopharmacology
Neuroimage
Human Brain Mapping
Cerebral Blood Flow & Metabolism
Brain
Annals of Neurology
Neurology
Epilepsia
Movement Disorders
Journal of Nervous and Mental Disorders
Psychophysiology
Journal of Neuropsychiatry
Brain Research

HONORS AND AWARDS

2007 Falcone Prize in Mood Disorders Research, NARSAD
2007 Plenary Lecture, British Neuroscience Association, York UK
2007 David Seegal AOA Visiting Professor and Lectureship, Columbia University , NYC
2007 Edwin Gildea Lecturer, Washington University, Dept of Psychiatry, St. Louis, MO
2006 Dal Grauer Lecturer, University of British Columbia, Vancouver, Canada
2006 Ved P. Sachdev MD, Endowed Lecturer, Dept Neurosurgery, Mount Sinai New York
2003 Arnold Pfeffer Prize for the year 2001, Journal of Neuropsychoanalysis (w/ Mario Liotti)
2003 American College of Neuropspychopharmacology (elected member)
2002 Distinguished Investigator Award, NARSAD
2002 Harold Lawn Memorial Lecturer, University of Minnesota
2000 The McMillan Lecturer, Women College Hospital, Toronto
2000 American Neurological Association (elected member)
1999 Litchfield Lecturer, Oxford College, England
1999 Sandra Rotman Chair in Neuropsychiatry, University of Toronto
1999 Fellow, Royal College of Physicians of Canada
1997 Bexar County Medical Society, 3rd Annual Women in Medicine, Honoree
1996 Gerald Klerman Memorial Award runner-up, NARSAD
1995 Independent Investigator Award, NARSAD
1994 Charles A. Dana Foundation Clinical Hypotheses Program Award
1991 Young Investigator Award, NARSAD
1980 NIH Student Research Fellowship: Psychopharmacology
1978 USC Psychiatry Summer Research Fellowship Award

1973 Alpha Lambda Delta, Scholastic Honor Society, UCLA

SOCIETY MEMBERSHIPS

2003- American College of Neuropsychopharmacology (elected member)
Awards Committee (2003)
Program Committee (2005-08)

2000- American Neurological Association (elected member)
Council Member (2006-2009)

2000- Biological Psychiatry
Program (2002-), Membership (2001-) committees
Journal Editorial Executive Committee (2001-2003)

1997- Organization for Human Brain Mapping
Council Member; Secretary (2000-2003)
Program Committee, reviewer (1997-present)

1995- American Neuropsychiatry Association
Program Committee (1999-present)
Research Committee Advisor (2001-present)

1991- Society of Cerebral Blood Flow and Metabolism

1989- Society of Nuclear Medicine
Program Committee, reviewer (1995-present)
President, President-elect, VP; Brain Image Council (1997-2000)
Ethics Committee (1995-1999)
Chair, Subcom on Ethical Clinical Practice of Functional Brain Imaging (1994-1996)
Board of Trustees Brain Imaging Council (1992-1994)

1986- Society for Neuroscience
Program Committee (2006-2008)

1985- American Association for the Advancement of Science

1982- American Academy of Neurology

ORGANIZATION OF NATIONAL OR INTERNATIONAL CONFERENCES

Chair and Scientific Director, Rotman Research Institute 12th annual Conference, Emotions and the Brain; Toronto, Ontario March 25-26, 2002

Chair and Symposium Organizer, American Neuropsychiatric Association Annual Meeting, Evolution of Functional Imaging in Neuropsychiatry: Integrative Methods & Systems Models, Orlando Feb, 1997.

Chair and Symposium Organizer, American Academy of Neurology Annual Meeting, PET: Clinical and Research Applications in Neurology. Boston, May 2, 1994.

Session Chair. Society of Nuclear Medicine Annual Meeting, PET Applications: Neurology; 98, 99, 00

RESEARCH FOCUS

My research concerns the characterization of neural systems mediating mood and emotions in health and disease using functional neuroimaging. Defining brain mechanisms underlying major depression is the primary goal, with an emphasis on development of algorithms that will discriminate patient subgroups, optimize treatment selection, and provide markers of disease vulnerability. This work is the foundation for our development and testing of a new intervention for treatment resistant patients using deep brain stimulation.

GRANT SUPPORT

ACTIVE SUPPORT

Project Title: Imaging Predictors of Treatment Response for Depression
Principal Investigator: Helen Mayberg MD
Funding Source: MH 1R01MH073719 NIMH
Support Period: 09/01/06 – 08/31/2010
Funding Amount: Annual Direct Costs: $417,835

Project Title: Predictors of Antidepressant Treatment Response: The Emory CIDAR
Principal Investigator: Charles B. Nemeroff, MD, PhD (Mayberg CoDirector, PI Project 1)
Funding Source: P50 MH077083-01 NIMH
Support Period: 07/1/06 – 03/31/11
Funding Amount: Annual Direct Costs: $1,500,000

Project Title: Deep Brain Stimulation for Bipolar-2 Treatment Resistant Depression
Principal Investigator: Helen Mayberg, MD
Funding Source: Stanley Medical Research Foundation SMRI#06T-901
Support Period: 09/1/06 – 08/31/09
Funding Amount: Total Direct Costs: $661,000

Project Title: Deep Brain Stimulation Clinical Research Program for Treatment Resistant Depression (DCRP-TRD)
Principal Investigator: Helen Mayberg, MD
Funding Source: Woodruff Fund
Support Period: 09/1/06 – 08/31/08
Funding Amount: Total Direct Costs: $270,000

Project Title: Deep Brain Stimulation for Treatment Resistant Depression
Principal Investigator: Helen Mayberg, MD
Funding Source: Dana Foundation
Support Period: 01/1/07 – 12/31/08
Funding Amount: Total Direct Costs: $400,000
Project Title: Investigation of Structural & Functional Neuroanatomy of Late-Life Depression

Project Title: Emory Conte Center for the Neuroscience of Mental Disorders
Principal Investigator: Charles B. Nemeroff, MD, PhD (Mayberg PI-Project 8)
Funding Source: P50 MH58922 renewal NIH/NIMH
Support Period: 09/01/04 – 08/31/09
Funding Amount: Annual Direct Costs: $1,500,000

Project Title: Neural Substrates of Depression Risk after Child Abuse
Principal Investigator: Christine Heim, PhD (Mayberg, Mentor)
Funding Source: 1K01 MH073698-01
Support Period: 7/01/06 –6/31/11
Funding Amount $170,059

Project Title:	Investigating structural-functional brain abnormalities in late-life depression
Principal Investigator	Paul Holtzheimer MD (Mayberg, Mentor)
Funding Source:	NIH/NIMH 1K23MH077869-01
Support Period:	04/01/2007-03/31/2010
Funding Amount	$171,059

Project Title:	Functional Neuroanatomy of Recovery From Depression
Principal Investigator:	Greg Siegel, PhD (U Pittsburgh) (Mayberg, co-Investigator)
Funding Source:	NIMH Grant 1 RO1 MH074807-01A
Support Period	4/01/06- 3/30/10
Funding Amount	$200,000

Project Title:	Treatment for Bipolar Depression: Acute and Prophylactic Efficacy with Citalopram
Principal Investigator:	Nassir Ghaemi, MD (Mayberg, Co-Investigator)
Funding Source:	1 R01 MH078060-01
Support Period	7/1/07-6/30/12
Funding Amount	$306,657 (Yr 1)

Project Title:	Multi-electrode Approaches to probing affective circuits in awake animals
Principal Investigator:	Donald Rainnie (Mayberg, Co-Investigator)
Funding Source:	Center for Behavioral Neuroscience
Support Period	8/1/06-7/30/07
Funding Amount	$30,000

PENDING SUPPORT

Project Title:	Predictors of treatment response, relapse, and recurrence in major depression.
Principal Investigator:	Ed Craighead, PhD (Mayberg, co-Investigator)
Funding Source:	NIH/NIMH
Support Period	07/01/2007 – 06/30/2012
Funding Amount	

Project Title:	Metabolic Allostasis in Stress Induced Anovulation
Principal Investigator:	Sarah Berga, MD (Mayberg, co-Investigator)
Funding Source:	NIH/NICHD
Support Period	12/01/2007-11/30/2012
Funding Amount	$321,791 (Yr 1)

PREVIOUS SUPPORT

Principal Investigator:	Henry Blumberg, MD
Key Personnel:	Paul Holzheimer, MD
Mentor:	Helen Mayberg, MD
Funding Source:	NIH/NCRR K12 RR017643
Support Period	Active 9/01/05-8/31/07

Project Title:	Sylvio O. Conte Center for the Neuroscience of Mental Disorders
Principal Investigator:	Charles B. Nemeroff, M.D. (Mayberg, project co-investigator)
Funding Source:	NIMH
Support Period:	9/1/99-8/31/04
Funding Amount:	$13,079,284 USD (5 yrs total)

Project Title:	Limbic-Cortical Metabolic Changes as a Final Common Pathway of Depression Remission: A Comparison of Reboxetine and Cognitive Behavioural Therapy
Principal Investigator:	Helen S. Mayberg, M.D. (2 co-investigators)
Funding Source:	CIHR
Support Period:	6/1/01-5/31/06
Funding Amount:	$439,249 CAD

Project Title:	Deep Brain Stimulation for Refractory Major Depression
Principal Investigator:	Helen S. Mayberg, M.D. (2 co-investigators)
Funding Source:	NARSAD Distinguished Investigator Award
Support Period:	5/1/02-4/31/05
Funding Amount:	$100,000 USD

Project Title:	Age Related Changes in Cortico-limbic Brain Networks for Episodic Memory
Principal Investigator:	Cheryl Grady PhD (Mayberg co-investigator)
Funding Source:	Medical Research Council of Canada
Support Period:	3/1/00 - 2/27/05
Funding Amount:	$594,000 CAD

Project Title:	Defining the Functional Interaction of Depression and Mood Lability in Mood Processing: A PET Mood Induction Study in Parkinson's Disease.
Principal Investigator:	Taresa Stefurak (Mayberg, mentor)
Funding Source:	NARSAD Young Investigator Award
Support Period:	5/1/02-4/31/04
Funding Amount:	$60,000 USD

Project Title:	Brain Reward System, Depression and Nicotine Dependence
Principal Investigator:	Usoa E. Busto, Pharm. D. (Mayberg co-investigator)
Funding Source:	NIH/NIDA
Support Period:	9/1/01-8/31/04
Funding Amount:	$546,000 CAD

Project Title:	Brain Reward System Dysfunction in Major Depression: An fMRI Study
Principal Investigator:	Claudio A. Naranjo, M.D. (Mayberg co-investigator)
Funding Source:	CIHR
Support Period:	9/1/01-8/31/04
Funding Amount:	$219,000 CAD

Project Title:	Anterior Cingulate Function in Bipolar Disorder: Testing a Network Model of Mood Regulation
Principal Investigator:	Helen S. Mayberg, M.D. (2 co-investigators)
Funding Source:	Stanley Foundation Research Award NAMI Research Institute
Support Period:	1/1/99 - 12/31/00
Funding Amount:	$150,000 USD

Project Title:	Interactive Effects of Mood and Cognitive Challenges on Anterior Cingulate Function in Remitted Depression
Principal Investigator:	Mario Liotti, M.D., Ph.D. (HS Mayberg, Mentor)
Funding Source:	NARSAD Young Investigator's Award
Support Period:	9/15/98 - 8/14/00
Funding Amount:	$60,000 USD

Project Title:	Anterior Cingulate Metabolism in Depression: Testing a Network Model of Mood Regulation
Principal Investigator:	Helen S. Mayberg, M.D. (2 co-investigators)
Funding Source:	NARSAD Independent Investigator's Award
Support Period:	9/15/95 - 8/14/98
Funding Amount:	$100,000 USD

Project Title:	Fluoxetine Effects on Mood, Cognition and Metabolism
Principal Investigator:	Helen S. Mayberg, M.D. (4 co-investigators)
Funding Source:	National Institute of Mental Health-1R29 MH49553-01
Support Period:	10/1/92 - 9/31/98
Funding Amount:	$350,000 USD

Project Title:	Testing a Model of Mood: Affective Challenges in Active and Remitted Depression
Principal Investigator:	Helen S. Mayberg, M.D. (2 co-investigators)
Funding Source:	Charles Dana Foundation, Clinical Hypotheses in Neuroscience Program
Support Period:	1/1/95 - 6/30/98
Funding Amount:	$100,000 USD

Project Title:	The Effects of Prozac Treatment on Mood, Cognition, and Brain Glucose Metabolism in Patients with Primary Unipolar Depression
Principal Investigator:	Helen S. Mayberg, M.D. (4 co-investigators)
Funding Source:	Eli Lilly and Company (physician initiated application)
Support Period:	9/1/93 - 12/31/96
Funding Amount:	$50,000 USD

Project Title:	Brain Glucose Metabolism in Idiopathic Depression and Depression Associated with Basal Ganglia Disorders
Principal Investigator:	Helen S. Mayberg, M.D. (4 co-investigators)
Funding Source:	National Alliance Research on Schizophrenia & Depression (NARSAD) Young Investigator's Award
Support Period:	7/1/91 - 6/30/94
Funding Amount:	$60,000 USD

Project Title:	Program for Study of Neuroreceptor Binding in Man
Principal Investigator:	Henry Wagner, M.D. (Johns Hopkins)
Co-Investigator:	Helen S. Mayberg, M.D.
Funding Source:	National Institute of Health
Support Period:	12/1/89 - 11/30/94
Funding Amount:	$898,983 USD

Project Title: Opiate Receptor Quantification in Alzheimer's Disease
Principal Investigator: J. James Frost, M.D. (Johns Hopkins)
Co-Investigator: Helen S. Mayberg, M.D.
Funding Source: National Institute on Aging
Support Period: 7/1/90 - 6/30/93
Funding Amount: $235,264 USD

FORMAL TEACHING

MEDICAL/GRADUATE STUDENTS
1991-1998 Neurology Clinical Clerkship (3 months/year)(UTHSCSA)
1992-1998 Lecture, Functional Brain Imaging; Year 1 Neuroscience Course (UTHSCSA)
1996-1998 Lecture, Epilepsy; Year 2 Neuroscience Course (UTHSCSA)
1996-1998 Lecture, Functional Brain Imaging; PhD students, Pharmacology (UTHSCSA)
1996-1998 Lecture, Clinical PET. MA, PhD students, Radiological Sciences (UTHSCSA)
2004- Research Electives, Neurosciences Graduate Program (Emory)
2005- Lecture, Neural Circuits in Depression; Year 2 Neuroscience (Emory)

RESIDENTS
1999-2000 Lecture, Psychiatric Applications of PET imaging. Psychiatry Residents (U Toronto)
2001-2003 Lecture, Functional Neurosurgery Course, Neurosurgery Residents, (U Toronto)
2004- Seminar, Functional Imaging and Depression, Yr 2 Psychiatry residents (Emory)
2005- Course, Neurology for Psychiatry Residents (Emory)

INSTITUTIONAL/LOCAL GRAND ROUNDS
Emory Psychiatry 2006
Emory Neurology 2004
UT/Sunnybrook Hosp 2002 (Clinical Neuroscience Rounds)
UT/Mt Sinai Hospital 2001 (Pain Clinic Rounds)
Rotman Research Inst 2000 (Research Rounds)
Toronto Psychiatric Soc 2000
U Toronto Neurology 2000, 2001
U Toronto Psychiatry 1999, 2000, 2001/b, 2002a/b, 2003a/b
UTHSCSA Radiology 1998 (Teleconference to Mexico)
UTHSCSA Neurology 1991, 1995, 1998
UTHSCSA Psychiatry1996, 1998

TRAINING PROGRAMS
1987-1991 Functional Brain Imaging Training, Research and Clinical activities
Nuclear Medicine Residents and Fellows
Johns Hopkins Dept of Radiology, Division of Nuclear Medicine
1991-1998 PET Imaging, Research and Clinical activities
Nuclear Med Residents; MD and PhD post-Docs, Radiological Sciences PhD students
Research Imaging Center
The University of Texas Health Science Center at San Antonio
1999-2003 Sandra Rotman Program in Neuropsychiatry (Post-doc research fellowship program)
Functional Neuroimaging focus (PET, fMRI)

RESIDENCY PROGRAMS
1987-1991 Clinical Attending, Johns Hopkins Neurology Consult Service (2 months/year)
1991-1998 Clinical Attending, UTHSCSA Neurology in-patient and Consult Service (3 mo/yr)

SUPERVISORY TEACHINGS

PHD STUDENTS (OUTSIDE PROJECT SUPERVISOR/THESIS COMMITTEES)

Robin Westmacott (Psychology) U Toronto	Post-Doc, 1st year, Neuropsychology
Michelle Keightley (Psychology), U Toronto	PhD student, 4th year.
Eva Svboda (Psychology), U Toronto	PhD student, 3rd year.
Laura Cardenas (Pharmacology), U Toronto	PhD student, 4th year
Elyse Katz (Neuroscience), Emory University	PhD Student, 2nd year
Cameron Craddock (Electrical/Computer Engineering), Georgia Institute of Technology	PhD Student
Teresa Madsen (Neuroscience), Emory	PhD Student

MASTER'S STUDENTS (PRIMARY SUPERVISOR)

Kim Goldapple (IMS) U Toronto	MA student 3rd year
Ali Mazaheri (IMS) U Toronto	MA student 3rd year

POST-DOCTORAL FELLOWS

Steven Brannan MD (Psychiatry) UTHSCSA→	Project Manager, Cyberonics Co, Houston Tx
Mario Liotti MD, PhD (Neurology), UTHSCSA	Associate Professor, University of Nottingham, UK
Stephanie Kruger MD (Psychiatry), Toronto→	Assistant Professor, Psychiatry, Dresden, Germany
Philippe Fossati MD (Psychiatry), Toronto→	Assistant Prof, Psychiatry, Salpetrier Hosp, France
Taresa Stefurak MD (Neurology), Toronto→	Clinical Scientist, Rotman Research Inst, Toronto
Raj Ramasubbu (Psychiatry), Sabbatical, Emory	Associate Professor, Psychiatry, U Calgary

K-AWARD MENTORING (PRIMARY MENTOR)

Christine Heim PhD (Psychiatry) Emory
Paul Holzhheimer, MD (Psychiatry) Emory

K-AWARD MENTORING (OUTSIDE MENTOR)

Ziad Nahas, MD (Psychiatry) MUSC
Lam Phan, MD (Psychiatry) U Florida
Charles Conway, MD (Psychiatry) U Saint Louis (MO)
Alex Dranowsky MD, PhD (psychiatry) Columbia U (NY)

VISITING PROFESSORSHIPS AND INVITED LECTURES

2007	Mark Rayport Memorial Lecture, University of Toledo, OH
2007	Plentary Lecturer, American Academy of Neurosurgery, Las Vegas, NV
2007	Plentary Lecturer, British Neuroscience Association, North Yorkshire, UK
2007	Neurosurgery Grand Rounds, Johns Hopkins, Baltimore, MD
2007	Psychiatry Grand Rounds, Johns Hopkins, Baltimore, MD
2007	David Seegal AOAS Visiting Professorship Lecture, Columbia University , NYC
2007	Visiting Neuroscience Lecturer, Dept of Neuroscience, Stanford University, CA
2007	Psychiatry Grand Rounds, Stanford University, CA
2006	Plenary Speaker, Psychiatry Update, Copenhagen, Denmark

2006 Psychiatry Grand Rounds, MUSC, Charlotte, SC

2006 Psychiatry Grand Rounds, Vanderbilt University, Nashville, TN

2006 Dal Grauer Lecturer, University of British Columbia, Vancouver, Canada

2006 Psychiatry Grand Rounds, Columbia University, NYC

2006 Psychiatry Grand Rounds, University of Chicago, Illinois

2006 Psychiatry Grand Rounds, Dartmouth University, New Hampshire

2006 Keynote Speaker, International Neuropsychiatry Meeting, Sydney, Australia

2006 Ved P. Sachdev MD, Endowed Lecturer, Mount Sinai, Dept of Neurosurgery, New York

2006 Presidential Lecture Speaker, Society for Biological Psychiatry Annual Meeting, Toronto

2005 Lecturer/Panelist, Mind and Life Institute XIII meeting with the Dalai Lama, Washington DC

2005 Invited Discussant, The Dalai Lama at Stanford: Craving, Suffering and Choice, Stanford CA

2005 Psychiatry Grand Rounds, University of Pennsylvania

2005 Lehmann lecturer, McGill University, Dept of Psychiatry, Montreal, Canada

2005 Keynote, Petersberg Symposium on Depression, Bonn, Germany

2005 Psychiatry Grand Rounds, University of North Carolina, Chapel Hill

2005 European College Neuropsychopharmacology, Young Scientists Workshop, Nice, France

2005 Keynote, Swiss Societies for Neuroscience and Biological Psychiatry Meeting, Zurich

2005 Psychiatry Grand Rounds, University of Texas, Galveston

2005 NIMH Alliance for Research Progress, Winter Science Meeting, Bethesda, MD

2005 Psychiatry Grand Rounds, University of Alabama, Birmingham

2004 Psychiatry Grand Rounds, Beth Israel Hospital, Albert Einstein School of Medicine, NY

2004 Psychiatry Grand Rounds, Centre for Addiction and Mental Health, University of Toronto

2004 Institute of the Humanities, University of Montana, Missoula

2004 Invited Speaker, Workshop on Brain Mechanisms in the Placebo Response NIMH, MBBH

2004 Distinguished Speaker, Medical Student Research Day, UTHSCSA, San Antonio

2004 Visiting Professor, Behavioral & Cognitive Neurosciences, U Groningen, Netherlands.

2004 Future Leaders in Psychiatry. Emory University, Palm Beach, Florida.

2004 10th Annual Health and Emotions Conference. University of Wisconsin, Madison.

2004 Psychiatry Grand Rounds, Dept of Psychiatry, University of Washington, Seattle.

2004 Neuroscience Seminar, Dept of Psychiatry, University of Illinois at Chicago.

2003 Visiting Professor, Littman Psychiatric Research Day, Key Note Speaker, In Search of Depression Circuits: A functional Neuroimaging Odessey. U of Calgary

2003 Grass Neuroscience Lecturer, The Neurology of Depression. Univ Mississippi, Jackson MI

2003 Norway Mental Health Research Conference, Foreign Guest Lecturer. 4 Lectures.

2002 Psychiatry Grand Rounds, Dept of Psychiatry, Modulating limbic-cortical circuits in depression: Targets of Antidepressant Treatments. University of Michigan.

2002 Center for Behavioral Neurobiology, Seminar Series, In Search of Depression Circuits. Emory University, Atlanta GA

2002 Neuroscience Colloquium Speaker. Dept of Neuroscience, Depression Circuits: The Functional Neuroimaging Evidence. University of Rochester, NY

2002 Neurobiology Seminar Speaker. Dept of Neurobiology, In support of a Depression Circuit. Yale Medical School, CN.

2002 Psychiatric Neuroscience: A Primer for Physicians, Massachusetts General Hospital CME Course, 'Major Depressive Disorders' Lecture, Boston MA

2002 Presidential Symposium Plenary Speaker, Society for Biology Psychiatry, Philadelphia PA.

2002 Harold Lawn Memorial Lecture. Dept Psychiatry, In Search of Depression Circuits. University Minnesota, Minneapolis, MN

2002 Massachusetts General Hospital, Harvard Medical School, Psychiatry Grand Rounds, Boston

2002 Psychiatric Institute of NY, Columbia University College of Physicians and Surgeons, Psychiatry Grand Rounds, "Is There a Depression Circuit?, New York, NY

2002 Neurological Institute of NY, Columbia University College of Physicians and Surgeons, Neurology Grand Rounds, "The Neurology of Depression", New York, NY

2002 Mass Mental Health Center, Harvard Medicine School, Psychiatry Grand Rounds, The Neurology of Depression. Boston

2001 McMaster University, Department Psychiatry Research Day, Keynote Speaker, "The Neurology of Depression: Role of Limbic-Cortical Interactions. Hamilton, Ontario.

2001 University of California San Francisco, Department of Psychiatry Grand Rounds, "The Neurology of Depression". San Francisco, California.

2001 Dalhousie University, Department of Psychiatry, 11th Annual Research Day. Keynote Speaker. Pathways in Depression: Lessons from Healthy & Depressed Populations. Halifax

1999 Emory University School of Medicine, Department of Psychiatry Grand Rounds, "The Neurology of Depression", Atlanta, Georgia.

2001 The Harvey Stancer Lecture, "The Neuropsychopathology of Depression," University of Toronto, Department of Psychiatry Research Day, Keynote speaker. Toronto, Ontario.

2001 International Congress on Schizophrenia Research, Plenary lecture, "The Neurology of Depression: Perspectives from Functional Neuroimaging. Whistler, B.C.

2000 White House Office of Science Technology: Crime Technology Initiative Forum "Neuroscience Meets the Criminal Justice System: Present Status and Future Scientific and Ethical Implications," Washington, DC.

2000 10th Annual Rotman Research Institute Frontal Lobes Conference. "Mapping Mood: Anevolving emphasis on limbic-cortical interactions". Toronto, Canada

2000 Medical University of South Carolina, Department of Psychiatry, Grand Rounds," The Neurology of Depression," Charleston, South Carolina.

1999 Litchfield Lecturer, Oxford College. "The Functional Neuroanatomy of Mood: Clues from

	Imaging Studies of Depression and Normal Sadness," Oxford, England.
1999	New England Medical Center/Tufts University School of Medicine. "The Neuroimaging of Depression," Boston, MA
1999	The Boston Society of Neurology and Psychiatry, "Mania and Depression in Neurological Diseases". "PET in Neurological Disorders, " Boston, MA.
1998	The Baylor College of Medicine, Department of Psychiatry and Behavioral Sciences Grand Rounds, "The Neurology of Depression," Houston, TX.
1998	The John L. McClellan Veterans' Hospital, Department of Psychiatry Grand Rounds, "Traumatic Brain Injury and Forensic Responsibility," Little Rock, AR.
1998	The International Neuropsychological Society, The Neurology of Depression, Honolulu. HI

INVITATIONS TO NATIONAL OR INTERNATIONAL CONFERENCES

2005	Invited Speaker, Royal College of Psychiatry, Edinburgh, UK
2004	American Stroke Association, 29th International Stroke Conference. San Diego
2003	European Neuropsychopharmacology (ENCP), Keynote speakers, Brugge, Belgium.
2003	Canadian College Neuropsychopharmacology (CCNP), Keynote speaker. Towards Development of Brain-based Algorithms for Diagnosis & Optimised Treatment Montreal
2003	Anxiety Disorders Association of America (ADA). Neurocircuits in Mood and Anxiety Research Symposium. Defining Dysfunctional Depression Circuits. Toronto, Canada
2003	16th Annual Conference of the General Practice of Psychotherapy Association, Keynote speaker, A Functional imaging Perspective on the Treatment of Depression Toronto, Canada
2003	Pasteur Institute, Conference on Depression, In Search of Depression Circuits:Paris, France
2002	1st Arvid Carlsson Symposium. Motivation, Mind & Movement in Neuropsychiatric Disease. Defining Dysfunctional Limbic-Cortical Circuits in Depression. Gottenburg, Sweden.
2002	NATO Psychiatric Imaging Advanced Research Workshop. PET studies of Dep. Italy.
2002	Organization for Human Brain Mapping, Education Program, fMRI Course, Experimental Design: "Mapping Emotions." Sendai, Japan
2002	Course Director, 12th Rotman Res Inst Conference: Emotions and the Brain, Toronto.
2001	Matter to Mind Symposium on Bipolar Disorder. Depression Circuits. IOP, London
2001	American Association Neurosurgeons, Annual meeing. Symposium on "The Neurology of Depression: Functional Neurosurgery of Psychiatric Disorders. Toronto, Ontario
2000	British Association for Psychopharmacology, The Neuro-psychopathology of Mood Regulation & Depression: Converging Evidence in Unipolar and Bipolar pts, Cambridge UK.
1998	Oxford Autumn School in Cognitive Neuroscience, Oxford University, "Mapping Mood: Neuroimaging Studies of Depression," Oxford, England.
1999	International Symposium: Depression in Neurology. "The Neurology of Depression: A Functional Imaging Perspective".Sao Paulo, Brazil.
1998	British Neuroscience Association/Glaxo Welcome Symposium on Neuroimaging, "State and Trait Markers of Depression Identified using PET," Oxford, England.

1998 The 50th Annual Meeting, The American Academy of Neurology. Dinner Seminar, "Frontal Subcortical Circuits and Human Behavior: From Theory to Practice," .Minneapolis, MN.

1998 The 7th International Conference: Peace Through Mind/Brain Science, "The Neurology of Depression: A Functional Imaging Perspective,. Hamamatsu City, Japan. "

DOCUMENTARY/MEDIA COVERAGE

1997 BBC Documentary, 'The Last Defense.' Functional Neuroimaging as Forensic Evidence.
2000 CBC Radio. 'Depths of Despair: A Primer on Depression'
2002 Discovery TV. The Nature of Things. The Frontal Lobes
2003 CTV. Depression: The Hidden Dragon.
2003 TVO. Placebo. Ontario Public Television
2004 Walrus Magazine, Canada. Biographical Profile
2005 NPR. DBS for Depression
2006 60 Minutes. DBS for Depression
2006 W5 Canada. DBS for Depression
2006 Scientific American Mind. Biographical Profile
2006 NY Times Sunday Magazine. DBS for Depression
2007 NY Times Sunday Magazine NeuroLaw

PUBLICATIONS

RESEARCH ARTICLES

1. Cohen B, Herschel M, Miller E, **Mayberg HS,** Baldessarini R: Radioreceptor assay of haloperidol tissue levels in the rat. *Neuropharmacology* 19:663-668, 1980

2. Hui A, Ehresman G, Quismorio F, Boylen T, **Mayberg HS,** Koss M: Wegeners granulomatosis: EM and immunofluorescent studies. *Chest* 80:753-756, 1981

3. Wernicke JF, Sweet PM, van den Noort S, **Mayberg HS,** Armentrout SA: A humoral lymphocyte transformation inhibition factor in multiple sclerosis. *J of Clin & Lab Immun* 12(4):187-195, 1983

4. Kumar AJ, Rosenbaum AE, Naidu S, Wener L, Citrin CM, Lindenberg R, Kim WS, Zinreich SJ, Molliver ME, **Mayberg HS,** Moser HW: Adrenoleukodystrophy: correlating MR Imaging with CT. *Radiology* 165:497-504, 1987

5. **Mayberg HS,** Robinson RG, Wong DF, Parikh R, Bolduc P, Price T, Dannals RF, Links JM, Wilson AA, Ravert HT, Wagner HN Jr: PET imaging of cortical S2-serotonin receptors following stroke: Lateralized changes and relationship to depression. *Am J Psychiatry* 145(8):937-943, 1988

6. Frost JJ, **Mayberg HS,** Fisher RS, Douglass KH, Dannals RF, Links JM, Wilson AA, Ravert HT, Rosenbaum AE, Snyder SH, Wagner HN Jr: Mu-opiate receptors measured by positron emission tomography are increased in temporal lobe epilepsy. *Ann Neurol* 23:231-237, 1988

7. Starkstein SE, Preziosi TJ, Berthier ML, Bolduc PL, **Mayberg HS,** Robinson RG: Depression and cognitive impairments in Parkinson's Disease. *Brain* 112:1141-1153, 1989

8. Frost JJ, Douglass KH, **Mayberg HS,** Dannals RF, Links JM, Wilson AA, Ravert HT, Crozier WC, Wagner HN: Multi-compartmental analysis of C-11-Carfentanil binding to opiate receptors in man measured by positron emission tomography. *J Cereb Blood Flow Metab* 9:398-409, 1989

9. **Mayberg HS,** Starkstein SE, Sadzot B, Preziosi TJ, Andrezejewski PL, Dannals RF, Robinson RG: Selective hypometabolism in the inferior frontal lobe in depressed patients with Parkinson's Disease. *Ann Neurol* 28:57-64, 1990

10. **Mayberg HS,** Moran TH, Robinson RG: Remote lateralized changes in cortical 3H-Spiperone binding following focal frontal cortex lesions in the rat. *Brain Research* 514:127-131, 1990

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12. Frost JJ, **Mayberg HS,** Sadzot B, Dannals RF, Lever JR, Links JM, Ravert HT, Wilson AA, Wagner Jr. JH: Comparison of C11-diprenorphine and C11-carfentanil binding to opiate receptors in man by positron emission tomography.*J Cereb Blood Flow Metab* 10:484-492, 1990

13. Sadzot B, **Mayberg HS,** Frost JJ: Detection and quantification of opiate receptors in man by positron emission tomography. Potential applications to the study of pain. *Neurophysiol Clin* 20:323-334, 1990

14. Starkstein SE, Bolduc PL, **Mayberg HS,** Preziosi TJ, Robinson RG: Cognitive impairments and depression in Parkinson's Disease: follow-up study. *J Neurol Neurosurg Psych* 53:597-602,1990.

15. Cidis-Meltzer CC, Leal JP, **Mayberg HS,** Wagner HN Jr, Frost JJ: Correction of PET data for partial volume effects in human cerebral cortex by MRI. *JCAT* 14:561-70, 1990

16. Cidis-Meltzer CC, Bryan R, Holcomb H, Kimball A, **Mayberg HS,** Sadzot B, Leal JP, Wagner HN, Frost JJ: Anatomical localization for PET using MR Imaging. *JCAT* 14:418-26, 1990

17. **Mayberg HS,** Sadzot B, Cidit-Meltzer CC, Fisher RS, Lesser RP, Dannals RF, Lever JR, Wilson AA, Ravert HT, Wagner HN, Bryan RN, Cromwell CC, Frost JJ: Quantification of Mu and non-Mu opiate receptors in temporal lobe epilepsy using positron emission tomography. *Ann Neurology* 30:3-11, 1991

18. **Mayberg HS,** Parikh RM, Morris PLP, Robinson RG: Spontaneous remission of post-stroke depression and temporal changes in cortical S2-Serotonin receptors. *J Neuropsych and Clin Neurosci* 3:80-83, 1991

19. Sadzot B, Price JC, **Mayberg HS,** Douglass KH, Dannals RF, Lever JR, Ravert HT, Wilson AA, Wagner HN Jr, Feldman MA, Frost JJ: Quantification of human opiate receptor concentration and affinity using high and low specific activity 11C-diprenorphine and positron emission tomography. *J Cereb Blood Flow Metab* 11:204-219, 1991

20. Sadzot B, **Mayberg HS,** Frost JJ: Imaging opiate receptors in the human brain with positron emission tomography. *Acta Psychiatrica Belgica*, 1991

21. Sadzot B, **Mayberg HS,** Price JC, Frost JJ: Mise en evidence et quantification des recepteurs opiaces cerebraux chez l'homme par tomographie a emissions de positons. *Circulation et Metabolisme du Cerveau* 8:235-249, 1991

22. Tune L, Brandt J, Frost JJ, Harris G, **Mayberg HS,** Steele C, Burns A, Sapp J, Folstein MF, Wagner HN, et al: Physostigmine in Alzheimer's disease: effects on cognitive functioning, cerebral glucose metabolism analyzed by PET and cerebral blood flow analyzed by SPECT. *Acta Psychiatrica Scandinavica Suppl* 366:61-65, 1991

23. Berthier ML, Starkstein SE, Leiguarda R, Ruiz A, **Mayberg HS,** Wagner H, Price TR, Robinson RG: Transcortical aphasia. Importance of the nonspeech dominant hemisphere in language repetition. *Brain* 114(PT3):1409-1427, 1991

24. **Mayberg HS**: Functional brain scans as evidence in criminal court: An argument for caution. *J Nucl Med* 33(6):18N-25N, 1992

25. **Mayberg HS,** Starkstein SE, Peyser CP, Brandt J, Dannals RF, Folstein S: Paralimbic frontal lobe hypometabolism in depression associated with Huntington's Disease. *Neurology*, 42:1791-7, 1992

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27. Starkstein SE, **Mayberg HS,** Preziosi TJ, Robinson RG: A prospective longitudinal study of depression, cognitive decline and physical impairments in patients with Parkinson's Disease. *J Neurol Neurosurg Psychiatry* 55(5):377-382, 1992

28. Morris PLP, **Mayberg HS,** Bolla K, Wong DF, Dannals RF, Starkstein SE, Robinson RG: Cortical S2-serotonin receptors and cognitive performance following stroke. *J Neuropsych and Clin Neurosci.* 5:395-400, 1993

29. Müeller-Gäertner HW, **Mayberg HS,** Fisher RS, Lesser RP, Wilson AA, Ravert HT, Dannals RF, Wagner HN, Uematsu S, Frost JJ: Decreased hippocampal muscarinic cholinergic receptor binding measured by ^{123}I-Iododexetimide and SPECT in epilepsy. *Ann Neurol,* 34:235-38, 1993

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35. Society of Nuclear Medicine Brain Imaging Council : Ethical clinical practice of functional brain imaging. *J Nucl Med,* 37:1256-1259, 1996 (Mayberg, Senior Author).

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54. **Mayberg H.** Depression II: localization of pathophysiology**.** Am J Psych 2002 159(12):1979

55. **Mayberg HS**, Lozano AM: Editorial: Penfield revisited? Understanding and modifying behavior

by deep brain stimulation for PD. Neurology 2002; 59:1298-99

56. **Mayberg HS.** Modulating Limbic-Cortical Circuits in Depression: Targets of Antidepressant Treatments. *Seminars in Clinical Neuropsychiatry* 2002: 7: 255-268

57. **Mayberg HS,** Silva JA, Brannan SK, Tekell JL, McGinnis S, Mahurin RK, Jerabek PA. The Functional Neuroanatomy of the Placebo Effect, *Am J Psych*, 2002 159:728-737

58. Liotti M, **Mayberg H**, McGinnis S, Brannan S, Jerabek P. Mood Challenge in Remitted Unipolar Depression unmasks disease-specific CBF abnormalities. *AmJ Psych* 2002;159:1830-40

59. **Mayberg HS**. Modulating Dysfunctional Limbic-Cortical Circuits in Depression: Towards Development of Brain-based Algorithms for Diagnosis and Optimised Treatment. *British Medical Bulletin* 2003; 65:193-207.

60. Keightley ML, Winocur G, Graham SJ, **Mayberg HS**, Hevenor SJ, Grady CL. An fMRI study investigating cognitive modulation of brain regions associated with emotional processing of visual stimuli, Neuropsychologia, 2003; 41:585-596.

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Deprivation on Waking Human Regional Brain Activity. *Thalamus*, in press 2004.

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Neuroimaging Clin N Am. 17(4):557-67, 2007.

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88. Farb NAS, Segal ZV, **Mayberg H**, Bean JU, McKeon D, Anderson AK. Attending to mind and body: Mindfulness training reveals distinct neural modes of self-awareness. Soc Cog Aff Neurosci, 2007, in press

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

ERICK VIRGIL HALL, Petitioner, vs. THE STATE OF IDAHO, Respondent,	**Case No. SPOT0500155** **AFFIDAVIT OF SHELLY PARKER**

BEING FIRST DULY SWORN your affiant declares as follows:

1. That your affiant, Shelly Parker, is a victim-witness coordinator with the Ada County Prosecutor's Office and has been so employed since approximately 1990.

2. That one of your affiant's duties is to assist attorneys in this office to make travel arrangements for out of state witnesses. That your affiant assisted with

Exhibit 04518

the travel arrangements for Norma Jean Oliver during the prosecution of Erick Hall conducted by Greg Bower and Roger Bourne in the fall of 2004.

3. That in the fall of 2004, your affiant had telephone contact with Norma Jean Oliver, who at that time was living in West Virginia. Your affiant made arrangements with Norma Jean Oliver to fly to Boise for testimony in the penalty phase of the Erick Hall case. Your affiant arranged for the purchase of an airline ticket for Norma Jean Oliver. That ticket was for pick up at the airport by Norma Jean Oliver. The flight was not a direct flight to Boise.

4. From your affiant's contact with Norma Jean Oliver, your affiant knew that Norma Jean lived in a residence by herself. Your affiant knew that Norma Jean received social security income, but took care of herself with that social security money. Your affiant knows that Ms. Oliver had a driver's license and an automobile during that time. Your affiant knows that Norma Jean Oliver was able to get herself to the airport, pick up the ticket, get on the airplane with whatever luggage she had and fly to Boise. Upon arrival in Boise, your affiant arranged for hotel accommodations for Norma Jean Oliver, who stayed by herself in a hotel room. Norma Jean was also able to go to various restaurants for meals and turn in receipts for reimbursement.

5. To your affiant's observations, when your affiant met Norma Jean upon Norma Jean's arrival to Boise, Norma Jean presented herself in a clean, neat and appropriate appearance with her person and clothing. Your affiant was able to speak with Norma Jean, who understood your affiant. Norma Jean

responded appropriately during conversations with your affiant. It appeared to your affiant that Norma Jean reads, writes and understands English. To your affiant's understanding, none of Norma Jean's close family lived near Norma Jean in West Virginia.

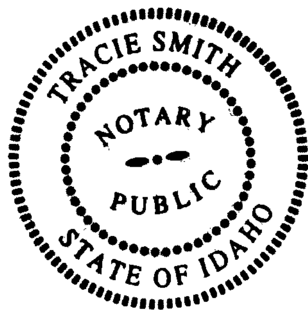
Further your affiant sayeth not.

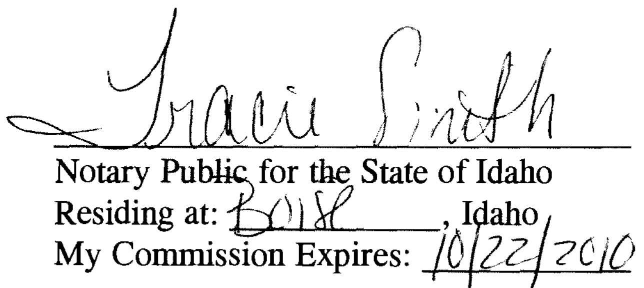
DATED this 5th day of ~~November~~ December 2007.

SHELLY PARKER

STATE OF IDAHO)
) ss.
County of Ada)

On this 5th day of ~~November~~ December 2007, before me, a Notary Public for Idaho, appeared **SHELLY PARKER**, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.





Notary Public for the State of Idaho
Residing at: Boise, Idaho
My Commission Expires: 10/22/2010

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Ada County Prosecuting Attorney

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

ERICK VIRGIL HALL, Petitioner, vs. THE STATE OF IDAHO, Respondent,	)	**Case No. SPOT0500155** **AFFIDAVIT OF DAVE SMITH**

BEING FIRST DULY SWORN your affiant declares as follows:

1. That your affiant has recently retired as a detective with the Boise City Police Department. He was employed in law enforcement for approximately twenty-nine years. As such, your affiant was the lead detective in the investigation surrounding the disappearance and murder of Lynn Henneman beginning in September 2000, through the trial of Erick Hall in the fall of 2004.

2. That your affiant is aware that there is a pending Final Amended Petition for Post Conviction Relief where certain claims have been made concerning statements by Peggy Jean Hill and Lisa Manora Lewis regarding Patrick Hoffert. Your affiant has read the affidavits of Lewis and Hill that are attachments to the Second Amended Petition for Post Conviction Relief.

3. Your affiant initially interviewed Lewis and Hill back in 2004 and made a police report containing a synopsis of the information received from Lewis and Hill. In summary, Lewis and Hill said that they had contact in Garden City with who they believed to be Lynn Henneman on a Sunday evening back near the time of Lynn Henneman's disappearance. Lewis said that they had seen Ms. Henneman in the evening hours stating that the sun had not set but that it was dusk. Lewis guessed that there were one or two hours of daylight left. Lewis and Hill described that Henneman appeared to be lost and that she asked them for directions. They advised that as they were speaking to Lynn Henneman, Erick Hall came riding up on a bicycle and that about that time a person named Pat came to the location with a women in a pickup truck. Both Lewis and Hill advised that Erick Hall engaged Lynn Henneman in conversation directing her how to get back onto the greenbelt and from there back to the Doubletree Inn where Henneman was staying. Lewis and Hill thought that Henneman left in an easterly direction, which would be back towards the Doubletree Inn. Lewis said that she saw Erick Hall peddling his bicycle in the same direction Lynn Henneman was walking. Hill said she thought that Hall went with Henneman from that meeting. Pat and the woman left in the pickup truck in a different direction.

4. Lewis and Hill said that their contact with Lynn Henneman occurred on Adams Street at approximately the intersection of Adams and 49th Street in Garden City. This location is at least a mile and a half west of the

Doubletree Inn where Lynn Henneman had been staying. Your affiant knew that Lynn Henneman had been at the Boise Art Museum leaving at about five o'clock on that Sunday afternoon and that she had been in the Tablerock Brewpub roughly between 6:25 p.m. and 7:00 p.m. that same night. Your affiant knew that Lynn Henneman was seen on the greenbelt by Miriam Colon at a location between the Tablerock Brewpub and the Doubletree Hotel, walking in a westerly direction toward the hotel after 7:00 p.m. Your affiant knew that the sun set on that day at approximately 7:36 p.m. When Ms. Colon saw Ms. Henneman, Ms. Henneman was only a few hundred yards from the hotel.

5. Based upon the above information, your affiant believed that Ms. Hill and Ms. Lewis were not telling the truth about their contact with Lynn Henneman. If Lynn Henneman had been in Garden City an hour or two before sunset as Hill and Lewis claim, that would mean she was in Garden City sometime between 5:30 and 6:30 p.m. The Boise Art Museum is just across the street from the Tablerock Brewpub on Capitol Blvd near the Boise River. Your affiant was satisfied that Lynn Henneman could not have walked all the way from the Boise Art Museum to Garden City and then back to the Tablerock Brewpub between 5:00 and 6:30 p.m. Your affiant knows that distance would have been approximately a six-mile roundtrip on the greenbelt.

6. Once that timeline was established, your affiant was positive that Lynn Henneman could not have left the Boise Art Museum at 5:00, walked over three miles into Garden City to have contact with Hill and Lewis and then walked the three miles back to the Brewpub to eat dinner between 6:25 and 7:00. Ms. Henneman would have walked past her hotel twice, once on her way into Garden City and once on her way back to Boise. Your affiant believes that Hill and Lewis are either completely mistaken about the

woman they saw in Garden City or they are making up the story for attention or for some other reason.

7. Besides that, Ms. Henneman had stayed at that hotel on two previous occasions in the few weeks before her death. She had eaten a salad at the Brewpub on those other trips that she ate again on the day of her death. It is unlikely that she would get lost and walk clear into Garden City where Hill and Lewis said they saw her. It's especially unlikely given that she would have had to walk past the hotel to get to Hill and Lewis.

8. Additionally, that timing does not fit with the Lewis and Hill theory that Erick Hall (or now Patrick Hoffert) followed Henneman onto the greenbelt and killed her. She ate dinner between 6:30 and 7:00 alone and was seen walking by herself alone on the greenbelt after 7:00. She was walking away from the location of the Brewpub in the direction of her hotel. She was only a short distance from her hotel when last seen. Neither Patrick Hoffert nor Erick Hall were seen walking with her on the greenbelt.

9. Further, your affiant is aware that the State Appellate Public Defender's Office, is now attempting to foster the claim that the person named Pat, who arrived when Lewis and Hill were speaking to Lynn Henneman, was somehow involved in Lynn Henneman's disappearance. Your affiant notes that Lisa Lewis states in her 2006 affidavit that "later that evening, I spoke to Pat Hoffert and he told me he made sure the woman got back to her hotel." affidavit page 2. Lewis then states that she believes that "Pat Hoffert was connected to her (Henneman's) disappearance." Lewis says that Deidre Muncy, Hoffert's girlfriend, later told Lewis that Pat Hoffert said he had "raped the girl," just before he killed himself, without any reference to who "the girl" was.

10. None of the above information about Patrick Hoffert was given to your affiant during the interviews your affiant conducted with Hill and Lewis

back in 2004. It appeared to your affiant at the time of his interview with Lewis and Hill that they were making every effort to be thorough in their description of the details they claimed to know. They said nothing about Hoffert telling them that he had made sure the woman got back to her hotel. Information indicating that a man said he had taken Lynn Henneman to her hotel on the night that she was killed and that he had raped a girl would have been significant to both Hill and Lewis and to your affiant. No such information was conveyed. Based upon your affiant's contact with Lewis and Hill, together with the facts that your affiant knows about Lynn Henneman's other activities on the night of her disappearance, your affiant is certain that these statements about Patrick Hoffert are not true and are just a more recent effort by these women to draw attention to themselves.

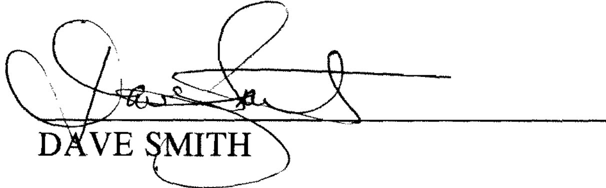
11. Hill and Lewis and their story did not come to your affiant's attention, as stated above, until the summer of 2004. That was over three and a half years after Lynn Henneman's murder. Hill and Lewis claim they tried to tell the Garden City Police about Erick Hall's connection to Lynn Henneman near the time of her disappearance, but that the Garden City Police wouldn't listen. They told this story to a Boise Police officer who told your affiant. Your affiant has checked with the Garden City Police Department and is satisfied that Hill and Lewis did not attempt to convey any information to law enforcement concerning Erick Hall or Patrick Hoffert.

12. Your affiant is also aware that the petitioner alleges that the prosecution failed to disclosed favorable evidence connecting Christian Johnson to the Henneman homicide. Your affiant believes that all information about Christian Johnson and his "connection to the Henneman homicide" was released through police reports and testified to at the trial. Your affiant initially believed that Christian Johnson may have been connected to the homicide because he was seen talking with Lynn Henneman on the

greenbelt shortly before her disappearance. However a comparison of Christian Johnson's DNA to the DNA sample taken from Lynn Henneman eliminated Johnson as a donor. There was no other evidence connecting Johnson to Lynn Henneman and indeed Johnson's alibi for the remainder of the evening was confirmed at the time by investigators. So far as your affiant knows, there is no evidence connecting Christian Johnson to the homicide.

Further your affiant sayeth not.

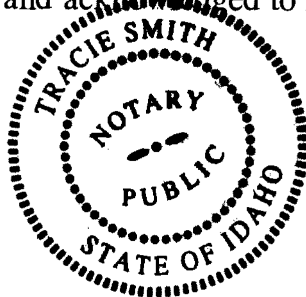
DATED this 7th day of Dec., 2007.

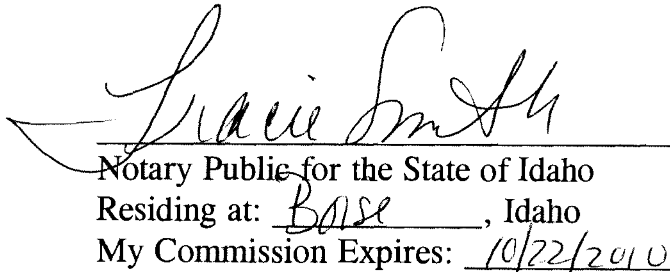


DAVE SMITH

STATE OF IDAHO)
) ss.
County of Ada)

On this 7th day of December 2007, before me, a Notary Public for Idaho, appeared **DAVE SMITH**, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.





Notary Public for the State of Idaho
Residing at: Boise, Idaho
My Commission Expires: 10/22/2010

FILED
A.M. 8:55 P.M.
JAN 18 2008
J. DAVID NAVARRO, Clerk
By [signature]
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

ERICK VIRGIL HALL,	)	
	)	
Petitioner,	)	**Case No. SPOT0500155**
vs.	)	
	)	**ORDER DENYING PETITIONER'S MOTION FOR PERMISSIVE APPEAL**
THE STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	
______________________________	)	

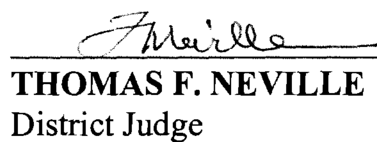
THIS COURT HAVING considered the Petitioner's Motion for Permissive Appeal, denies the same. The petitioner had earlier moved this Court for permission to have access to the jury panel which tried the underlying criminal case, and for permission to depose Glen Elam, an Ada County Public Defenders Office investigator. The Court had denied the Petitioner's motion both for access to the jury, and for permission to do a deposition of Glen Elam.

The Petitioner has now moved for permission to appeal those orders under Idaho Appellate Rule 12. The Petitioner's motion for appeal by permission came on for hearing on November 15, 2007. The Court heard arguments from both sides and has considered the written motion and the State's objection. After being fully informed, the Court denies the Petitioner's motion for permission to appeal from the Court's order denying access to the jury, and from the order denying permission to depose Mr. Elam.

The Court recognizes that whether or not to grant permission for appeal is a matter of discretion. The Court does not find that either of these motions involve a controlling question of law to which there is substantial grounds for difference of opinion. The Court

finds that the immediate appeal from these orders will not materially advance the orderly resolution of this post conviction matter. The Court more fully set out its reasons for the denial at the time of the hearing on November 15, 2007, and incorporates those findings into this Order by reference. For the reasons stated above, together with the reasons put on the record at the November 15, 2007, hearing, the motion for permissive appeal is denied.

IT IS SO ORDERED this 18th day of ~~December 2007~~ January, 2008.



THOMAS F. NEVILLE
District Judge

NO.________________
A.M. 9:50 FILED P.M.________

JAN 18 2008

J. DAVID NAVARRO, Clerk
By ________________
DEPUTY

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

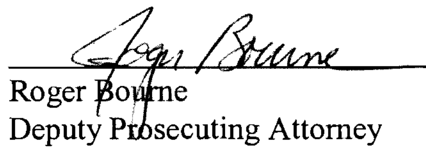
ERICK VIRGIL HALL, Petitioner, vs. STATE OF IDAHO, Respondent,	**Case No. SPOT0500155D** **ADDENDUM TO STATE'S RESPONSE TO FINAL AMENDED PETITION FOR POST CONVICTION RELIEF: STATE'S RESPONSE TO PETITIONER'S CLAIM C**

COMES NOW, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and puts before Court and Petitioner the State's Response to Claim C in the Petitioner's Final Amended Petition for Post Convocation Relief. The State's Response to Claim C, concerning Dr. Aikens' affidavit was mistakenly left out of the State's Response. Instead the State responded to the petitioner's claim BB twice. Once at BB and also at C.

The undersigned also observes that page 57 and 58 in the State's copy of the Response are in the wrong order which caused some confusion to the State and may have done the same for the Court and Counsel.

RESPECTFULLY SUBMITTED this 17th day of January 2008.

GREG H. BOWER
Ada County Prosecutor



Roger Bourne
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing document was delivered to Mark Ackley, Kimberly Simmons, Erik Lehtinen, State Appellate Public Defender's Office, 3647 Lake Harbor Lane, Boise, Idaho 83703, through the United States Mail, this 18th day of January 2008. - hand delivered in court

C. Trial counsel rendered ineffective assistance of counsel in failing to consult a pathologist to assist in challenging the State's presentation of Dr. Glen Groben's testimony and to present a compelling case in rebuttal of such testimony

The argument here is that Dr. Aiken, a Spokane pathologist, has some disagreement with Dr. Groben's findings and she should have been consulted by trial counsel. A close reading of Dr. Groben's testimony and a comparison of that testimony with Dr. Aiken's affidavit, shows that there is no material difference between the two and no showing of prejudice to the petitioner.

Dr. Aiken says certain things in her affidavit, which the petitioner claims support his argument that trial counsel rendered ineffective assistance. Dr. Aiken's points are as follows, though not necessarily in any order of significance.

1. Aiken affidavit, page 8. Dr. Aiken says that she disagrees with Dr. Groben that stomach contents clear the stomach between thirty minutes and two hours after a meal. She says that stress can play a factor in stomach emptying as shown by burn patients who live for several days without meals, but who still held food in their stomachs at autopsy.

Of course, long-term stress as in a burn situation is not present here. Dr. Aiken states that "most esteemed forensic pathologists in the country are split on this issue" which infers that some "esteemed pathologists" agree with Dr. Groben.

Dr. Groben indicates that the sources he has reviewed are consistent with his estimate of time. He expands the potential time during cross-examination, up to as long as three and a half (3½) hours. Transcript page 4082. This indicates that there is not much difference between Dr. Aiken and Dr. Groben. After all, Dr. Aiken does not say that Dr. Groben is incorrect. Rather, she just says that she is not sure.

2. Dr. Aiken says that the alcohol level in Lynn Henneman's blood could be from drinking alcohol or from decomposition. Dr. Groben agrees at transcript page 4061 - 4062 that the alcohol could be from either Ms. Henneman's consumption or from decomposition.

3. Dr. Aiken says that she is not certain that Lynne Henneman died from strangulation. She says that since there were no internal neck injuries, Dr. Groben cannot be certain that her death was a result of ligature strangulation. Dr. Groben agrees that Lynn Henneman's death could have come from a combination of things including strangulation, drowning, or bleeding to death due to the head wounds. Transcript pages 4068-4072 and 4078. Dr. Aiken does not state conclusively that Lynn Henneman did not die from strangulation, only that the drowning or beating cannot be excluded. She and Dr. Groben appear to be in agreement on that issue.

4. Dr. Aiken indicates that Dr. Groben cannot be certain that Lynn Henneman was not rendered unconscious by one of the first blows to her head and as a result did not suffer from the other injuries. Dr. Groben agrees with that assessment beginning at transcript page 3982 and again at transcript page 4080 – 4081.

5. Dr. Aiken takes issue with the "reconstruction" photos showing that Lynn Henneman was "hogtied." Dr. Aiken says that she "can't exclude that the reconstruction is correct" but states that she can't tell whether this was done premortem or postmortem. Dr. Groben agrees with that assessment at transcript page 4033 by saying that he's not sure when the ligatures were applied, only saying that it was at or near the time of death.

6. Dr. Aiken states that since there are no markings on Lynn Henneman's wrists or ankles, Dr. Groben is unable to tell when the ligatures were tied on to her. Dr. Groben agrees that he can't be certain and so states at transcript page 4078-4079.

7. Dr. Aiken indicates that she cannot tell what the weapon was that caused the injuries to Lynn Henneman's head. She can only say that she is certain it was not a fist. Dr. Groben agrees that he is not certain what the weapon was, but can tell that it was not a fist. Transcript page 3980-3981.

8. Dr. Aiken says that of the seven blows to Lynn Henneman's head, two of them were premortem. She does not state an opinion on whether any of the others were pre or postmortem. Dr. Groben says that of the seven blows, he can be certain that five were premortem based upon the blood that he saw underneath the injury. He is not certain about the other two blows. So it appears that Dr. Aiken and Dr. Groben agree that two of the seven blows were premortem. Dr. Groben believes that three more were premortem. Dr. Aiken is not certain of that, but does not opine that Dr. Groben is wrong. This difference may be at least in part based upon the fact that Dr. Groben was present at the autopsy and saw things that are not showing up well enough in the photos for Dr. Aiken to form an opinion on. In any event, the difference between the two experts on this issue is not material.

Despite all of the venom expressed by Dr. Aiken in her affidavit, when it comes down to the specifics, there is not any material difference between the opinions expressed by Dr. Aiken as compared with the opinions expressed by Dr. Groben. It appears that trial counsel had the benefit of Dr. Aiken's thinking during his cross examination or that if he did not have the benefit of her thinking, he certainly cross examined along the same lines as Dr. Aiken expressed in her affidavit. Dr. Aiken is certain that Lynn Henneman was murdered. She states:

"In my opinion, the cause of death would have been listed most accurately as "homicidal violence of unknown etiology."" Quibbling over whether Erick Hall drowned Lynn Henneman or strangled her or did both in combination does not change the trials outcome. No prejudice is shown to the defendant in this claim and it should be dismissed.

Session: Neville011808 Division: DC Courtroom: CR503
Session Date: 2008/01/18 Session Time: 08:49
Judge: Neville, Thomas F.
Reporter: ROBERTSON, DAWNELL

Clerk(s):
Ellis, Janet

State Attorneys:

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0003
Case Number: SPOT0500155D
Plaintiff: HALL, ERICIK
Plaintiff Attorney:
Defendant: STATE OF IDAHO
Co-Defendant(s):
Pers. Attorney: ACKLEY, MARK
State Attorney: BOURNE, ROGER
Public Defender:

2008/01/18
10:35:31 - Operator
Recording:
10:35:31 - New case
, STATE OF IDAHO
10:36:08 - Judge: Neville, Thomas F.
Court takes up post conviction case, the Court has entered e arlier an order
10:37:19 - Judge: Neville, Thomas F.
denying permissive appeal. Court has completed its incamera view of the
10:38:34 - Judge: Neville, Thomas F.
Norma Jean Oliver records. There are two binders which the Court has gone
10:39:13 - Judge: Neville, Thomas F.
through. Court has taken broad view of relevency. Court ha

s redacted
10:39:44 - Judge: Neville, Thomas F.
relatively little. Court goes through binders explaining re dactions.
10:46:40 - Judge: Neville, Thomas F.
Going to Binder 2, Most of binder provided except sections 9 & 10 and have
10:51:55 - Judge: Neville, Thomas F.
been redacted. Court will request that no copies be made of counsel's
10:54:34 - Judge: Neville, Thomas F.
copies. Counsel are free to spend as many hours as needed t o show Mr. Hall
10:54:46 - Judge: Neville, Thomas F.
these materials, but it is not to leave counsel's presence o r be left in
10:55:00 - Judge: Neville, Thomas F.
possession of the petitioner or left at Dept. of Correction, must be in
10:55:16 - Judge: Neville, Thomas F.
personal control/possession with counsel at all time. Court states this is
10:55:49 - Judge: Neville, Thomas F.
all private information of a frail woman, and wants to prote ct her privacy.
10:56:32 - Judge: Neville, Thomas F.
Court does not know at this point what will be admissable, b ut is relevent.
10:57:15 - Judge: Neville, Thomas F.
Going to next section, PSI of April Sebastian. Court has go ne through page
10:57:31 - Judge: Neville, Thomas F.
by page which included original PSI, which Court only includ ed front page,
10:58:53 - Judge: Neville, Thomas F.
and then the conviction for the forgery and then investigato r comments.
11:02:21 - Judge: Neville, Thomas F.
Court then had an APSI which Court provided some of that, th e three pages.
11:03:14 - Judge: Neville, Thomas F.
Cout had two other addenda which had no relevence. Same ru les should apply
11:04:20 - Judge: Neville, Thomas F.
to these documents as well regarding copying. Court receive d a proposed
11:05:20 - Judge: Neville, Thomas F.
agenda from Mr. Ackley. Court would like to recess and then

take up that
11:05:43 - Judge: Neville, Thomas F.
agenda.
11:06:10 - Operator
Stop recording: (On Recess)
11:15:44 - Operator
Recording:
11:15:44 - Record
, STATE OF IDAHO
11:16:12 - Judge: Neville, Thomas F.
The Court responded re: records turned over, request propose
d order re: the
11:17:16 - Judge: Neville, Thomas F.
Court's ruling. Court cont'd to Social Security motion.
11:18:30 - Pers. Attorney: ACKLEY, MARK
Mr. Ackley responded the motion reflects the email sent last
night. Mr.
11:19:44 - Pers. Attorney: ACKLEY, MARK
Ellsbury from social security administration suggested that
the Court order
11:20:11 - Pers. Attorney: ACKLEY, MARK
Ms Oliver to turn over,
11:20:41 - Judge: Neville, Thomas F.
The Court stated that seems to be heavy handed.
11:20:54 - Pers. Attorney: ACKLEY, MARK
Mr. Ackley stated tried to address through subpoena duces te
cum.
11:22:59 - Judge: Neville, Thomas F.
Court inquired if State would communicate with Ms. Oliver
11:23:46 - State Attorney: BOURNE, ROGER
Mr. Bourne responded, could try to work through victim witne
ss coordinator,
11:25:17 - State Attorney: BOURNE, ROGER
State's position they are not important, but if Court believ
es, could try to
11:25:36 - State Attorney: BOURNE, ROGER
obtain and have Court view in camera
11:28:54 - Judge: Neville, Thomas F.
The Court will set a review date for Feb. 8, 2008 @ 3:00 p.m
. for
11:29:17 - Judge: Neville, Thomas F.
review/status of record
11:30:05 - Pers. Attorney: ACKLEY, MARK
Mr. Ackley stated some of juvenile records are in binder and
will review
11:30:21 - Pers. Attorney: ACKLEY, MARK
those to see if any issues left.
11:30:33 - Pers. Attorney: ACKLEY, MARK

Mr. Ackley requested to have time to file sub. response to S
tate's Motion to
11:30:49 - Pers. Attorney: ACKLEY, MARK
Dismiss which is 75 pages. Will be attaching couple of affi
davits to the
11:31:10 - Pers. Attorney: ACKLEY, MARK
response. Request 45 days to respond, to March 3rd
11:31:44 - State Attorney: BOURNE, ROGER
no objection.
11:31:48 - Judge: Neville, Thomas F.
Court set March 3rd.
11:31:55 - Pers. Attorney: ACKLEY, MARK
Mr. Ackley stated next would need hearing, request 14 days a
fter the response
11:32:11 - Pers. Attorney: ACKLEY, MARK
filed, or if State replies.
11:33:07 - Operator
Stop recording:
11:34:13 - Operator
Recording:
11:34:13 - Record
, STATE OF IDAHO
11:34:27 - Judge: Neville, Thomas F.
The Court will set May 1st and May 2nd for hearing
11:36:10 - Operator
Stop recording:

ORIGINAL

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

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

NO.______ FILED A.M.______ P.M. 12:22

JAN 25 2008

J. DAVID NAVARRO, Clerk
By ______ DEPUTY

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

ERICK VIRGIL HALL, Petitioner,	Case No. SPOT0500155
v.	**MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM** (Norma Jean Oliver)
THE STATE OF IDAHO, Respondent.	**(CAPITAL CASE)**

Petitioner, ERICK VIRGIL HALL, by and through his attorneys at the State Appellate Public Defender, moves this Honorable Court to issue a subpoena duces tecum for Norma Jean Oliver pursuant to I.C. §§ 19-3005, 19-3006.

Mr. Hall relies on his rights under I.C. §§ 19-4001, et seq., I.C. § 19-2719, as well as his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and it is based upon all matters of record. In further support of this motion, Mr. Hall incorporates by reference the following prior motions, memoranda, and pleadings: Motion for Discovery, filed January 5, 2006; Memorandum in Support of Motion for Discovery, filed January 5, 2006; Supplemental Memorandum in Support of Motion for Discovery, filed December 29, 2006; Sealed Supplemental Motion for Discovery, filed June 1, 2007; (Sealed) Memorandum of Fact and Law

Regarding Contested Testimony of Prosecution Witness, Norma Jean Oliver, filed June 11, 2007; and Mr. Hall's Final Amended Petition for Post-Conviction Relief, filed October 5, 2007.

The Court has the authority pursuant to I.C. § 19-3005 and I.C. § 19-3006 to issue a subpoena duces tecum to secure the presence of an out-of-state witness and to secure the production of documents. The statute provides in relevant part:

> If a person in any state, which by its laws has made provisions for commanding persons within its borders to attend and testify in criminal hearings or prosecutions in this state, is a **material witness** in a hearing or prosecution pending in a court of record in this state, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required at such hearing or prosecution. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

I.C. § 19-3005 (2) (emphasis added).

Ms. Oliver currently resides in West Virginia. By its laws, West Virginia has made provisions for commanding persons within its borders to attend and testify in criminal hearings or prosecutions in Idaho. *See* W.Va.Code, 62-6A-1, *et seq*. Ms. Oliver is a material witness in Mr. Hall's post-conviction case and in the underlying criminal case. The only real question is whether the Court can rely on I.C. § 19-3005, where the statute purports to apply only to "criminal hearings or prosecutions."

Post-conviction proceedings are technically "civil in nature." *See e.g., Gilpin-Grubb v. State,* 138 Idaho 76, 79-80, 57 P.3d 787, 790-91 (2002). However, post-conviction proceedings are more accurately described as "quasi-criminal" in nature. As the Supreme Court of Florida explained, "Unlike a general civil action, [ ], wherein parties seek to remedy a private wrong, a habeas corpus or other postconviction relief proceeding is used to challenge the validity of a conviction and sentence. *State ex rel.*

Butterworth v. Kenny, 714 So.2d 404, 409-10 (Fla.1998) (recognizing that habeas corpus proceedings, while technically classified as civil actions, are actually quasi-criminal in nature). The Florida court cited to the Supreme Court cases of *Murray v. Giarratano,* 492 U.S. 1, 13 (1989) (O'Connor, J., concurring) (postconviction proceeding is a civil action designed to overturn a presumptively valid criminal judgment), and *O'Neal v. McAninch,* 513 U.S. 432, 440 (1995) (habeas is a civil proceeding involving someone's custody rather than mere civil liability).

In the context of capital cases, the Idaho Supreme Court has at least implicitly recognized the quasi-criminal nature, and at a minimum, explicitly recognized the special nature, of capital post-conviction proceedings. Specifically, in *State v. Beam,* 121 Idaho 862, 828 P.2d 891 (1992), the Court noted that capital post-conviction proceedings serve a vital function in challenging a presumptively valid criminal judgment and sentence of death. As the Court stated,

> Without a provision for challenging a sentence of death, a person who has received a sentence of death might be denied due process of law under the Constitution of the State of Idaho and the United States Constitution. . . . The purposes served by I.C. § 19-2719(3) "ensure that death sentences are not carried out so as to arbitrarily deprive a defendant of his [or her] life."

Id. at 864, 828 P.2d at 893 (citations omitted). As the Supreme Court of Missouri explained:

> It is apparent that such post-conviction proceedings can operate directly on the judgment in the criminal case. The purpose of such a motion is to modify or vacate the criminal judgment, obtaining either outright release of the defendant, or a modification of the judgment and sentence in some particular, or a reversal and remand wherein the prisoner would obtain a new trial. If a new trial is granted, the original prosecution then continues. These post-conviction proceedings, therefore, are also quasi criminal in nature. As a matter of fact, Rule 27.26 is contained in that portion of the rules of this court listed as 'Rules of Criminal Procedure.'

State v. Keeble, 427 S.W.2d 404, 407 (Mo. 1968) (footnote omitted). Like Missouri, the Idaho Criminal Rules, Rule 57 provide for the filing and processing of a petition for post-conviction relief. Indeed, Rule 57 provides in part that the petition shall be processed as a civil case "except as otherwise ordered by the trial court." I.C.R. 57(b).

Alternatively, the Court has the authority under the criminal case to issue the requested subpoena duces tecum. *See* I.A.R. 13 (c) (10) (authorizing the district court to enter any order affecting the "substantial rights" of the defendant as authorized by law). Rule 13 (c)(10) is described as a "catch-all" provision. *See e.g., State v. Wilson,* 136 Idaho 771, 40 P.3d 129 (Ct.App. 2001). Indeed, in ordering the discovery of the records, the Court implicitly found that the records are necessary to protect Mr. Hall's "substantial rights." *Raudebaugh v. State,* 135 Idaho 602, 605, 21 P.3d 924, 927 (2001) (holding that a district court is not required to order post-conviction discovery unless discovery is necessary to protect an applicant's substantial rights).

In conclusion, Mr. Hall respectfully submits that due to the quasi-criminal nature of these post-conviction proceedings and the Court's authority to process this case, at least in part, as a criminal case under I.C.R. 57(b), the Court has the authority to issue a subpoena duces tecum for the attendance of Norma Jean Oliver and for the production of her requested social security records. In the alternative, the Court has the authority to issue the requested subpoena duces tecum pursuant to I.A.R. 13 (c)(10).

Dated this 25th day of January, 2008.

Respectfully submitted;

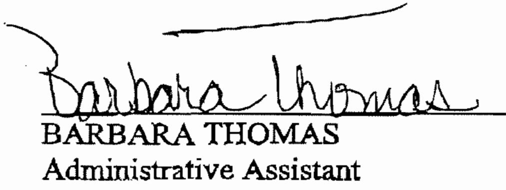
Paula M. Swensen for MARK J. ACKLEY
Lead Counsel, Capital Litigation Unit

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 25th day of January, 2008, served a true and correct copy of the forgoing MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM (NORMA JEAN OLIVER) as indicated below:

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



BARBARA THOMAS
Administrative Assistant

ORIGINAL

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

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

NO. ____ FILED
A.M. ____ P.M. 12:21

JAN 25 2008

J. DAVID NAVARRO, Clerk
By ____ DEPUTY

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

ERICK VIRGIL HALL, Petitioner,	CASE NO. SPOT0500155
v.	**NOTICE OF HEARING**
STATE OF IDAHO, Respondent.	**(CAPITAL CASE)**

Petitioner, Erick Virgil Hall, hereby provides notice that a hearing will be held regarding the Motion for Issuance of Subpoena Duces Tecum for Norma Jean Oliver. The hearing will be held during the previously scheduled status hearing, before the Honorable Thomas F. Neville at 200 W. Front St., Boise, Idaho on the 8th day of February, 2008, at 3:00 p.m.

DATED this 25th day of January, 2008.

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

CERTIFICATE OF SERVICE

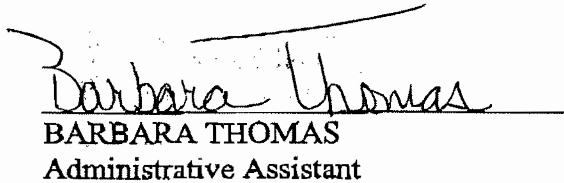
I HEREBY CERTIFY that I have this 25th day of January, 2008, served a true and correct copy of the attached NOTICE OF HEARING by the method indicated below:

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

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

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

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



BARBARA THOMAS
Administrative Assistant

NO. ______
FILED
A.M. ______ P.M. 2:31

FEB - 8 2008

J. DAVID NAVARRO, Clerk
By ______ DEPUTY

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

ERICK VIRGIL HALL, Petitioner, v. THE STATE OF IDAHO, Respondent.	Case No. SPOT0500155 ORDER ON DISCOVERY DISCLOSED JANUARY 18, 2008 REGARDING NORMA JEAN OLIVER AND APRIL SEBASTIAN

Following the Court's in-camera review of records which the Court previously had ordered be disclosed, the Court disclosed to counsel for the Petitioner and counsel for the State two binders of partially-redacted documents, including medical and mental health records of Norma Jean Oliver, and the Presentence Investigation Report of April Sebastian and Addendum thereto from Ada County Case No. H0400228.

Due of the sensitive nature of the documents, **the Court hereby Orders the following**:

1. counsel may not make copies of the documents without Court approval;

2. the documents must remain in the personal, physical possession of counsel, said possession including secure storage in counsel's office; and

3. counsel may review and discuss the documents with the Petitioner, the Petitioner may review or read the documents, but any such review shall take place in counsel's presence, and neither the original documents nor copies thereof may be otherwise provided to Petitioner or left with him outside counsel's presence.

It is so ordered.

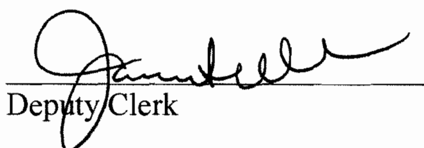
Dated this 8th day of ~~January~~ February, 2008.

Thomas F. Neville
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of Febru, 2008, I served a true and correct copy of the foregoing ORDER ON DISCOVERY DISCLOSED JANUARY 18, 2008, REGARDING NORMA JEAN OLIVER AND APRIL SEBASTIAN by method indicated below to:

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



Deputy Clerk

Session: Neville020808 Division: DC Courtroom: CR501
Session Date: 2008/02/08 Session Time: 08:40
Judge: Neville, Thomas F.
Reporter: Wolf, Sue

Clerk(s):
Ellis, Janet

State Attorneys:

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0006
Case Number: SPOT0500155D
Plaintiff: ERICK HALL
Plaintiff Attorney: SWENSON, PAUL
Defendant: STATE OF IDAHO
Co-Defendant(s):
Pers. Attorney:
State Attorney: BOURNE, ROGER
Public Defender:

2008/02/08
15:23:51 - Operator
Recording:
15:23:51 - New case
, STATE OF IDAHO
15:24:27 - Other: OWENS, NICOL
from SAPD's office as well.
15:24:49 - Judge: Neville, Thomas F.
Court believes today's hearing was for the purpose of review of social
15:25:19 - Judge: Neville, Thomas F.
security office.
15:26:05 - Judge: Neville, Thomas F.
Court received today, State's objection to issuance of subpoena duces tecum.
15:26:59 - Plaintiff Attorney: SWENSON, PAUL

Ms. Swenson stated would like to sign the motion for subpoen
a duces tecum/
15:28:10 - Judge: Neville, Thomas F.
The Court recalled from last hearing that the State would tr
y to contact Ms.
15:28:28 - Judge: Neville, Thomas F.
Oliver re: signing a consent.
15:28:39 - State Attorney: BOURNE, ROGER
Mr. Bourne stated that Ms. Oliver does decline to sign the c
onsent. Spoke
15:29:34 - State Attorney: BOURNE, ROGER
with Ms. Oliver's mother and that Ms. Oliver received the pa
pers, but does
15:29:53 - State Attorney: BOURNE, ROGER
not want to sign the consent and wanted to speak to a lawyer
.
15:30:32 - Judge: Neville, Thomas F.
Court did enter some proposed orders that resulted from the
last hearing.
15:32:21 - Judge: Neville, Thomas F.
The question is whether to grant the motion for subpoena duc
es tecum.
15:32:42 - Plaintiff Attorney: SWENSON, PAUL
Ms. Swenson argues Ms. Oliver is a material witness in the u
nderlying case
15:33:27 - Plaintiff Attorney: SWENSON, PAUL
and records received thus far.
15:33:57 - Judge: Neville, Thomas F.
Court took an expansive view that the records could be relev
ent
15:34:20 - Plaintiff Attorney: SWENSON, PAUL
Ms. Swenson stated beyond fishing expedition. Based on some
review of the
15:34:56 - Plaintiff Attorney: SWENSON, PAUL
medical records, there are inconsistencies and mental issues
. Have a good
15:35:24 - Plaintiff Attorney: SWENSON, PAUL
faith belief there could be some relevence in the social sec
urity records.
15:36:11 - Plaintiff Attorney: SWENSON, PAUL
Ms. Oliver spoke with an investigator in 2006 in West Virgin
ia at request of
15:36:32 - Plaintiff Attorney: SWENSON, PAUL
SAPD, and her memory was not good at this time. Claiming an
ineffective
15:37:08 - Plaintiff Attorney: SWENSON, PAUL
assistance of counsel when they could have asked for these r
ecords.

15:37:31 - Judge: Neville, Thomas F.
Does Court have authority to order her to release these reco rds. She did not
15:37:58 - Judge: Neville, Thomas F.
agree to sign a consent.
15:39:12 - Plaintiff Attorney: SWENSON, PAUL
Ms. Swenson believes Court does have authority to order this .
15:40:00 - State Attorney: BOURNE, ROGER
Believes this is a fishing expedition, request Court conside r the impaact
15:40:16 - State Attorney: BOURNE, ROGER
this could have on Ms. Oliver vs. the prejudice to the petit ioner
15:41:52 - State Attorney: BOURNE, ROGER
nothing in record to show Norma Jean incompetent. Request C ourt not order
15:45:07 - State Attorney: BOURNE, ROGER
her to consent and exercise its discretion. Don't believe t hese records
15:46:51 - State Attorney: BOURNE, ROGER
would do anything
15:47:01 - Plaintiff Attorney: SWENSON, PAUL
Ms. Swenson argued social security records would be helpful. Ms. Oliver was
15:47:45 - Plaintiff Attorney: SWENSON, PAUL
receiving social security at time of Hall trial in 2004
15:48:10 - Judge: Neville, Thomas F.
Discovery is in Court's discretion in a post conviction pro ceeding. Court
15:49:04 - Judge: Neville, Thomas F.
has a duty at times to review social security records throug h felony
15:49:21 - Judge: Neville, Thomas F.
sentencings as well as in civil matters. Court familiar wit h what is
15:49:36 - Judge: Neville, Thomas F.
generally in those records. Court agrees with State that pe titioner would
15:54:51 - Judge: Neville, Thomas F.
benefit looking at Ms. Oliver's social security records. St ate has now taken
15:56:33 - Judge: Neville, Thomas F.
all reasonable actions to get Ms. Oliver to consent, and she has now declined
15:56:54 - Judge: Neville, Thomas F.
to sign that consent. Court does not believe it has authori ty to order her

15:57:17 - Judge: Neville, Thomas F.
to waive her privacy rights. If Court had authority, Court well decline to
15:57:50 - Judge: Neville, Thomas F.
exercise that authority. When Court weighs the privacy inte rest of Ms.
15:59:17 - Judge: Neville, Thomas F.
Oliver and defendants needs, Court does not want to victamiz e her again.
15:59:57 - Judge: Neville, Thomas F.
Never the Court's intention to do this. Court well request M r. Bourne prepare
16:01:17 - Judge: Neville, Thomas F.
an order denying Motion for subpoena duces tecum, outlining the Court's
16:01:44 - Judge: Neville, Thomas F.
ruling.
16:03:04 - Plaintiff Attorney: SWENSON, PAUL
Ms. Swenson inquired further about juvenile records.
16:03:21 - Judge: Neville, Thomas F.
Court's recollection is that Mr. Ackley believed he may have a solution for
16:03:37 - Judge: Neville, Thomas F.
those or may have some in the records provided by the Court.
16:04:44 - Plaintiff Attorney: SWENSON, PAUL
Ms. Swenson inquired if Court would sign an order releasing the juvenile
16:05:00 - Plaintiff Attorney: SWENSON, PAUL
records.
16:06:22 - Judge: Neville, Thomas F.
The Court responded.
16:07:40 - Plaintiff Attorney: SWENSON, PAUL
Ms. Swenson indicated there was a battery that ocurred aroun d the time of the
16:07:55 - Plaintiff Attorney: SWENSON, PAUL
rape case.
16:07:59 - Judge: Neville, Thomas F.
Inquired of State
16:10:21 - State Attorney: BOURNE, ROGER
Mr. Bourne responded
16:11:15 - Judge: Neville, Thomas F.
16:11:18 - Plaintiff Attorney: SWENSON, PAUL
Ms. Swenson stated would abide by all Court's orders of hand ling keeping
16:11:36 - Plaintiff Attorney: SWENSON, PAUL
private.
16:16:43 - Judge: Neville, Thomas F.
Court well allow Ms. Swenson to contact Payette Co. and inqu

ire further.
16:17:04 - State Attorney: BOURNE, ROGER
Mr. Bourne requested that Ms. Oliver be left alone until the re is further
16:18:14 - State Attorney: BOURNE, ROGER
order of the Court.
16:18:21 - Plaintiff Attorney: SWENSON, PAUL
Ms. Swenson requested that if the State is contacted by Ms. Oliver or if
16:18:46 - Plaintiff Attorney: SWENSON, PAUL
consent form received by Ms. Oliver that SAPD be advised.
16:19:45 - Judge: Neville, Thomas F.
Court re: 19-1506, victims be contacted, Court would sign an order that she
16:21:29 - Judge: Neville, Thomas F.
not be contacted, unless there is further contact by them.
16:21:55 - Operator
Stop recording:

NO. ______
FILED
A.M. ______ P.M. 12:02

FEB - 8 2008

J. DAVID NAVARRO, Clerk
By ______ DEPUTY

GREG H. BOWER
Ada County Prosecuting Attorney

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

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

ERICK VIRGIL HALL,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

Case No. SPOT0500155D

STATE'S OBJECTION TO THE PETITIONER'S MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM

COMES NOW, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and puts before the Court the State's objection to the petitioner's motion to issue a duces tecum subpoena to Norma Jean Oliver requiring her to travel to Idaho from West Virginia and forcing her to consent to the release of her Social Security Administration records.

The State's objection falls under two main headings. First, this is a fishing expedition. The petitioner has not shown any compelling need for the information to protect the petitioner's substantial rights. Second, with all due respect, the State believes that this Court does not have

the authority to force Norma Jean Oliver to involuntarily sign a consent form for the records. Norma Jean Oliver is not a party to the pending litigation, rather she is an innocent victim. The petitioner's motion would victimize her further.

As an officer of the Court, the undersigned states the following as facts known to the Ada County Prosecutor's Office. Pursuant to the Court's directive, the State was able to make telephonic contact with Norma Jean Oliver on about January 24th or 25th. After explanation, Ms. Oliver was reluctant to agree to sign a consent form for her Social Security Administration records. She could not understand how those records were important to the case. However, as stated above, she reluctantly agreed to sign a consent form. The undersigned, together with the victim coordinator, explained to her that we would send a form to her and that she would need to sign it, have her signature notarized and then mail it back to us. She agreed to that procedure.

Thereafter, a consent form was sent to her on Wednesday, January 30, 2008 in overnight mail. An envelope was sent along for her to return the signed and notarized consent form. The prosecutor's office expected to receive that consent for back from her on approximately Monday, February 4, 2008.

On approximately Friday, January 31, 2008, Norma Jean's father contacted the undersigned by telephone. He conveyed to the undersigned that he was upset that we had contacted Norma Jean again. He conveyed that every time Norma Jean is contacted, it upsets her, as she has to relive the rape and associated trauma from years earlier. The undersigned explained to Norma Jean's father what the circumstances were and the reason for our recent contact. He conveyed that Norma Jean told him she did not what to be contacted again and that she did not want to sign the consent form. The undersigned explained to Norma Jean's father, as had been explained to Norma Jean, that she was not under Court order to sign the form, but that the Court

had asked me to inquire of her about it. Norma Jean's father said that he would talk to Norma Jean again, but expected that she did not want to cooperate further in the case. He advised that she did not want further contact in this case and he believed that she would not sign the consent form. The undersigned explained to the father that I would wait for Norma Jean to call me and tell me that she did not want to sign the consent form or that I would call her for her to tell me that personally.

The undersigned has had no further contact from Norma Jean Oliver and Norma Jean Oliver has not returned telephone calls despite repeated messages left on her answering machine. The undersigned believes that this is Norma Jean Oliver's clear indication that she will not sign a consent form and that she wants to be left alone. She has not returned the signed form.

Going back to the State's first ground for objecting to the subpoena. As stated above it is the State's view that this is a fishing expedition. The undersigned has reviewed the Intermountain Hospital records provided by the Court. They show that in 1992 Norma Jean Oliver was believed to be bi-polar. However, there is no indication in those records that the hospital staff who interviewed her believed that she was incapable of receiving just impressions or of accurately relating them. There is no indication in the records that she would have been incompetent to testify in 1992.

Ms. Oliver was clearly capable of receiving just impressions of the facts and of relating them truly when she testified in 2004. Additionally, she was able to accurately relate information when she was interviewed by the SAPD investigator in 2006, as shown in the recordings provided as part of the petition for post conviction relief. In 2006 Ms. Oliver was able to carry on a normal conversation and answer questions with lucidity. Idaho Rule of Evidence 601 states that "every person is competent to be a witness except: (a) person's whom the Court finds to be

incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly." There is no reason to think that Norma Jean Oliver is incompetent under that definition. The petitioner's desire to review further records is a fishing expedition without support from the known facts. Her memory was very good in 2006.

The State's second reason for objection is that the Court does not have authority to force this young woman to come to Idaho to sign a consent form. If the Court believes it has the authority to force her to sign, the Court should not exercise that authority under these facts. While the State believes that the Court has authority to cause a material witness to come to Idaho to testify and to bring documents in her possession that are material to her testimony, the State knows of no authority allowing the Court to force her to come to Idaho to sign a consent in a discovery matter to which she is not even a party.

The State is aware that litigants can be forced to waive constitutional rights or loose the benefit of certain claims. Obvious examples are requiring a civil litigant to waive the 5th Amendment in depositions or suffer the loss of claims that the deposition would support. Obviously defendant's can be forced to chose between waiving 4th Amendment rights or forfeit probation. Ms. Oliver is not in that position. Ms. Oliver has a privacy right under Federal law as clearly set out in the letter to the Court from the office of General Counsel of the Social Security Administration, signed by Thomas M. Elsberry. That privacy right which attaches to the social security records is protected by sanctions for improper disclosure including criminal penalties. The State assumes that consent, to be valid, needs to be voluntarily executed. Since Ms. Oliver is an innocent victim, and not a party, the Court does not have subject matter jurisdiction over her to force her consent. If she refused to sign, the Court would have no other enforcement power than contempt.

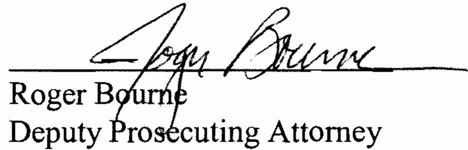
Finally, the State believes that the Court should weigh the impact this action will have on this young woman, as described by her father, against the need for Social Security Administration records. First, if the Court cannot get the records, how can it be ineffective assistance of counsel if trial counsel didn't get them. Second, there is no reason to think that the records will show Ms. Oliver to be incompetent. She has testified at the grand jury in 1992 and again at this trial in 2004. She underwent a lengthy interview by the SAPD in 2006. Her description of what the petitioner did to her was generally consistent throughout. It is consistent with the known facts. There is no reason to believe that the Social Security Administration records will show her unable to truly convey just impressions. Third, the action will re-traumatize an innocent victim for no good reason. Idaho Code §19-3005(1) which is the uniform act to secure attendance of witnesses, gives the Court authority to weigh whether the out of state subpoena would cause undue hardship to the witness against the need for the subpoena. The State urges the Court to weigh this and deny the motion.

Finally, it appears to the State, that Ms. Oliver has exercised her rights under the victim's rights amendment to the Idaho Constitution and under Idaho Code §19-5306(g) to refuse an interview and to refuse to be contacted by any person acting on behalf of the defendant. She should not be contacted without the Courts order.

For the reasons set out above, the State urges the Court to deny the petitioner's motion for subpoena.

RESPECTFULLY SUBMITTED this 8 day of February 2008

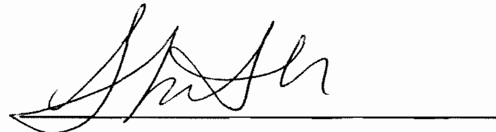
GREG H. BOWER
Ada County Prosecutor



Roger Bourne
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing document was delivered to Mark Ackley, State Appellate Public Defender's Office, 3647 Lake Harbor Lane, Boise, Idaho 83703, through the United States Mail, this 8 day of February 2008.



NO. ____
FILED
A.M. ____ P.M. 4'50

FEB 15 2008
J. DAVID NAVARRO, Clerk
By ____ DEPUTY

GREG H. BOWER
Ada County Prosecuting Attorney

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

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

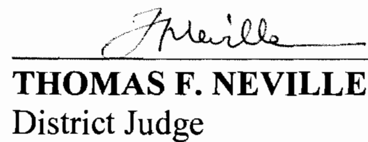
ERICK VIRGIL HALL, Petitioner, vs. THE STATE OF IDAHO, Respondent.	**Case No. SPOT0500155** **ORDER RESTRICTING CONTACT WITH NORMA JEAN OLIVER**

On February 8, 2008, the State informed the Court that Norma Jean Oliver's parents have advised the Ada County Prosecutor's Office that Norma Jean Oliver no longer desires contact with either the State or by any person acting on behalf of the petitioner. Based upon the information provided by the State, the Court believes that Norma Jean Oliver is exercising her rights as a victim under Idaho Code §19-5306 and the corresponding Victim Rights Amendment to the Idaho Constitution, and no longer desires to be contacted by either the State or by any person acting on behalf of the petitioner. The Court finds that Norma Jean Oliver is a victim for purposes of the statute and as such is exercising her rights under

the statute. Therefore, the Court orders that neither the State nor any person acting on behalf of the petitioner have any further contact with Norma Jean Oliver concerning this case without further order of the Court. The State may receive contact from Norma Jean Oliver concerning her Social Security Administration records or other matters if she initiates contact.

The Court made findings on the record at the hearing on February 8, 2008 and incorporates them into this order by ~~reference as if they were fully set out herein.~~

IT IS SO ORDERED this 15th day of February, 2008.



THOMAS F. NEVILLE
District Judge

NO. ______
FILED
A.M. ______ P.M. 4:50

FEB 15 2008

J. DAVID NAVARRO, Clerk
By ______ DEPUTY

GREG H. BOWER
Ada County Prosecuting Attorney

Roger Bourne
Deputy Prosecuting Attorney
Idaho State Bar No. 2127
200 West Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

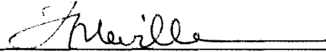
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL,	)	
	)	
Petitioner,	)	**Case No. SPOT0500155**
vs.	)	
	)	**ORDER DENYING**
THE STATE OF IDAHO,	)	**PETITIONER'S MOTION**
	)	**FOR ISSUANCE OF**
Respondent.	)	**SUBPOENA DUCES TECUM**
	)	
______________________________	)	

The petitioner's motion for issuance of subpoena deuces tecum for Norma Jean Oliver's Social Security Administration records came on for hearing on February 8, 2008. The Court has received briefing from both the petitioner and the State and after argument, ~~and~~ the Court otherwise being fully informed, denies the motion for the issuance of the subpoena. At the hearing on the motion, the Court denied the motion for the issuance of subpoena on the record and set out its analysis in detail. The Court incorporates its findings

and conclusions of law from that February 8, 2008 hearing into this order by reference as if those findings were fully set out herein. The petitioner's motion for issuance of subpoena deuces tecum to Norma Jean Oliver is denied.

IT IS SO ORDERED this 15th day of February, 2008.



THOMAS F. NEVILLE
District Judge

ORIGINAL

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

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

NO.____ FILED A.M.____ P.M. 12:15
MAR - 5 2008
J. DAVID NAVARRO, Clerk
By ____ DEPUTY

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

ERICK VIRGIL HALL, Petitioner-Appellant, v. STATE OF IDAHO, Respondent.	ADA COUNTY CASE NO. SPOT0500155 **NOTICE OF APPEAL** **(Capital Case)**

TO: THE STATE OF IDAHO, AND ITS ATTORNEY OF RECORD, THE ADA COUNTY PROSECUTING ATTORNEY, AND THE ATTORNEY GENERAL OF THE STATE OF IDAHO, NOTICE IS HEREBY GIVEN THAT:

1. Petitioner-Appellant Erick Hall appeals against the above-named Respondent to the Idaho Supreme Court from the following orders entered by the District Court of the Fourth Judicial District, by the Honorable Thomas F. Neville during the capital post-conviction proceedings in the above-entitled matter:

   a. The Order Denying Petitioner's Motion For Juror Contact, entered by the district court on September 13, 2007; and

   b. That portion of the Order Granting In Part And Denying In Part Petitioner's Supplemental Motion For Discovery, entered by the district court on September 17, 2007, denying Petitioner's request to depose

investigator Glenn Elam, the investigator assigned to the underlying criminal matter in Ada County Case No. H0300518.

2. Petitioner-Appellant intends to raise the following issues:

   a. The district court erred in denying Petitioner's Motion For Juror Contact; and

   b. The district court erred in denying Petitioner's request to depose the lead trial investigator, Mr. Glenn Elam.

3. Petitioner-Appellant has been granted permission to appeal the above issues to the Idaho Supreme Court, pursuant to Idaho Appellate Rule 12(c), by the Idaho Supreme Court's "Amended Order Granting Motion For Permission To Appeal," dated February 17, 2008, Supreme Court Docket No. 99586, a copy of which is attached hereto.

4. Petitioner-Appellant requests the Reporter's Transcripts of all hearings conducted to date in Ada County Case No. SPOT0500155 be prepared.

5. Petitioner-Appellant requests a complete to-date Clerk's Record of Ada County Case No. SPOT0500155 be prepared including all documents in the trial court file of every nature, kind, and description, including briefs or memoranda filed or lodged.

6. I certify that:

   a. A copy of this Notice of Appeal has been served on the Reporter;

   b. Petitioner-Appellant is indigent and represented by appointed counsel, the Idaho State Appellate Public Defender, and is therefore exempt from

paying for transcripts and clerk's record, which should be provided at the expense of the County; and

c. Service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 5th day of March, 2008.

Paula Swensen for Mark J. Ackley
MARK J. ACKLEY
Lead-Counsel, Capital Litigation Unit

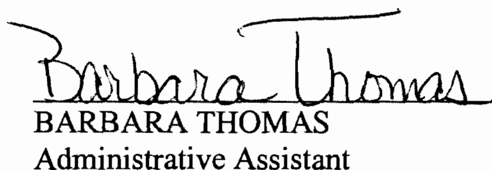
Paula Swensen
PAULA M. SWENSEN
Co-Counsel, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 5th day of March, 2008, served a true and correct copy of the forgoing NOTICE OF APPEAL as indicated below:

Recipient	Method
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	____ Statehouse Mail ____ U.S. Mail ____ Facsimile _X_ Hand Delivery
L. LAMONT ANDERSON OFFICE OF THE ATTORNEY GENERAL POST OFFICE BOX 83720 BOISE ID 83720-0010	____ Statehouse Mail ____ U.S. Mail ____ Facsimile _X_ Hand Delivery Supreme Court box
ERICK HALL INMATE #66593 IMSI PO BOX 51 BOISE ID 83707	____ Statehouse Mail _X_ U.S. Mail ____ Facsimile ____ Hand Delivery
HON. THOMAS F. NEVILLE DISTRICT JUDGE FOURTH JUDICIAL DISTRICT 200 W. FRONT STREET BOISE ID 83702	____ Statehouse Mail ____ U.S. Mail ____ Facsimile _X_ Hand Delivery
J. DAVID NAVARRO DISTRICT COURT CLERK 200 W. FRONT STREET BOISE ID 83702	____ Statehouse Mail _X_ U.S. Mail ____ Facsimile ____ Hand Delivery
SUE WOLF COURT REPORTER ADA COUNTY DISTRICT COURT 200 W FRONT STREET BOISE ID 83702	____ Statehouse Mail _X_ U.S. Mail ____ Facsimile ____ Hand Delivery
JEAN HIRMER 6216 N. PARK MEADOW WAY BOISE, IDAHO 83713	____ Statehouse Mail _X_ U.S. Mail ____ Facsimile ____ Hand Delivery

JANET FRENCH 8601 USTICK ROAD BOISE, ID 83704	____ Statehouse Mail _X_ U.S. Mail ____ Facsimile ____ Hand Delivery
DAWNELL ROBERTSON ASSOCIATED REPORTING INC. 11618 W. JEFFERSON STREET BOISE, ID 83702	____ Statehouse Mail _X_ U.S. Mail ____ Facsimile ____ Hand Delivery
ANDREA CHANDLER ASSOCIATED REPORTING INC. 11618 W. JEFFERSON STREET BOISE, ID 83702	____ Statehouse Mail _X_ U.S. Mail ____ Facsimile ____ Hand Delivery
MELANIE GORCZYCA 2387 SOUTH CHIPPER WAY BANBURY MEADOWS EAGLE, ID 83616	____ Statehouse Mail _X_ U.S. Mail ____ Facsimile ____ Hand Delivery
JEFF LAMAR M&M COURT REPORTING SERVICE 421 W. FRANKLIN STREET BOISE, ID 83702	____ Statehouse Mail _X_ U.S. Mail ____ Facsimile ____ Hand Delivery
LAURA WHITING TUCKER & ASSOCIATES 605 W. FORT STREET BOISE, ID 83702	____ Statehouse Mail _X_ U.S. Mail ____ Facsimile ____ Hand Delivery



BARBARA THOMAS
Administrative Assistant

In the Supreme Court of the State of Idaho

IN THE MATTER OF THE MOTION FOR PERMISSION TO APPEAL.

ERICK VIRGIL HALL,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

MAR 04 2008
STATE APPELLATE PUBLIC DEFENDER

AMENDED
ORDER GRANTING MOTION FOR PERMISSION TO APPEAL

Supreme Court Docket No. 99586
Ada County Case No. OT0500155

Ref. No. 07S-320

A MOTION FOR PERMISSION TO APPEAL AND STATEMENT IN SUPPORT THEREOF with attachments was filed by counsel for Petitioner November 29, 2007. Thereafter, a RESPONSE TO PETITIONER'S MOTION FOR PERMISSION TO APPEAL with attachments was filed by counsel for Respondent December 12, 2007. Subsequently, a NOTICE OF FILING with attachment of Order Denying Petitioner's Motion for Permissive Appeal filed in the District Court January 18, 2008, was filed in this Court by counsel for Appellant January 23, 2008. The Court is fully advised; therefore, after due consideration,

IT HEREBY IS ORDERED that Petitioner's MOTION FOR PERMISSION TO APPEAL be, and hereby is GRANTED on discretionary decisions:

1. Contact with jurors; and
2. Deposition of Investigator, Glenn Elam.

IT FURTHER IS ORDERED that the Plaintiff shall file a Notice of Appeal with the Clerk of the District Court within twenty-one (21) days from the date of this Order, which appeal shall proceed as if from a final judgment or order entered by the District Court.

DATED this 22nd day of February 2008.

By Order of the Supreme Court

Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Thomas F. Neville

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-Appellant, vs. STATE OF IDAHO, Respondent.	Supreme Court Case No. 35055 CERTIFICATE OF EXHIBITS

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

I FURTHER CERTIFY, that the following documents will be submitted as CONFIDENTIAL EXHIBITS to the Record:

1. Exhibit # 51 (Under Seal) to Fourth Addendum To Amended Petition For Post-Conviction Relief, filed January 8, 2007.
2. Sealed Supplemental Motion For Discovery, filed June 1, 2007.
3. Sealed Notice Of Filing Of Attachments To Sealed Supplemental Motion For Discovery, filed June 5, 2007.
4. Sealed Notice Of Filing Of Audio Citations To Interview Of Norma Jean Oliver, filed June 11, 2007.
5. Appendix 10 – Sealed Supplemental Motion For Discovery – to Notice Of Filing Of Appendices To Motion For Permission To Appeal, filed August 23, 2007.
6. Medical Records From Intermountain Hospital, in accordance with Order To Release Medical And Psychological/Psychiatric Records Of Norma Jean Oliver, filed September 13, 2007.
7. Exhibits 53 and 55 to Final Amended Petition For Post-Conviction Relief, filed October 5, 2007.
8. Response To The State's Motion To Dismiss (Filed Under Seal), filed March 3, 2008.

I FURTHER CERTIFY, that the following documents will be submitted as EXHIBITS to the Record:

1. Appendix A and Appendix B to Motion For Discovery, filed January 5, 2006.
2. Memorandum Of Law In Support Of Motion For Discovery, filed January 5, 2006.
3. Memorandum In Support Of Motion To Reconsider Oral Orders Re: Ex Parte Procedures For Expert Access And Restrictions On Juror Contact, filed January 20, 2006.
4. State's Memorandum In Support Of The State's Objection To The Motion For Discovery, filed March 1, 2006.
5. Affidavit Of Mark J. Ackley In Support Of Motion To Disqualify, filed June 14, 2006.
6. Memorandum In Support Of Motion To Disqualify, filed June 14, 2006.
7. Affidavit Of Service, filed August 24, 2006.
8. Affidavit Of Service, filed August 24, 2006.
9. Affidavit Of Paula M. Swensen In Support Of Ex Parte Motion For Expert Access To Petitioner, filed December 6, 2006.
10. Supplemental Memorandum In Support Of Motion For Discovery, filed December 29, 2006.
11. Memorandum In Support Of Renewed Motion For Order To Conduct Medical Testing And Order For Transport, filed February 12, 2007.
12. Memorandum In Support Of Motion For Juror Contact, filed June 1, 2007.
13. Notice Of Filing Of Appendices To Motion For Permission To Appeal, filed August 23, 2007.
14. Transcript of Hearing Held October 28, 2003, Boise, Idaho, filed September 28, 2007.
15. Exhibits 1 thru 103 to Final Amended Petition For Post-Conviction Relief, filed October 5, 2007.
16. Jury Contact Letters Submitted As Exhibits During Court Proceeding.
17. Note From Bailiff Regarding Communication From A Juror.
18. Email received from the court reporter indicating that the status conference scheduled for that day was not reported with calander attached.

19. Affidavit Of Mark J. Ackley In Support Of Objection To The Record, filed April 17, 2009

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 22nd day of January, 2009.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

SEAL

CERTIFICATE OF EXHIBITS

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

ERICK VIRGIL HALL, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	Supreme Court Case No. 35055 CERTIFICATE OF SERVICE

I, J. DAVID NAVARRO, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

STATE APPELLATE PUBLIC DEFENDER
ATTORNEY FOR APPELLANT
BOISE, IDAHO

LAWRENCE G. WASDEN
ATTORNEY FOR RESPONDENT
BOISE, IDAHO

J. DAVID NAVARRO
Clerk of the District Court

Date of Service: FEB 18 2009

By BRADLEY J. THIES
Deputy Clerk

SEAL

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-Appellant, vs. STATE OF IDAHO, Respondent.	Supreme Court Case No. 35055 CERTIFICATE TO RECORD

I, J. DAVID NAVARRO, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 5th day of March, 2008.

J. DAVID NAVARRO
Clerk of the District Court

By BRADLEY J. THIES
Deputy Clerk

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

MARK J. ACKLEY, I.S.B. # 6330
NICOLE OWENS, I.S.B. # 7679
Deputy State Appellate Public Defenders
Capital Litigation Unit
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

ORIGINAL
NO. ___ FILED A.M. ___ P.M. 4:40
MAR 17 2009
J. DAVID NAVARRO, Clerk
By ___ DEPUTY

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

ERICK VIRGIL HALL, Appellant,
v.
STATE OF IDAHO, Respondent.

Case No. 35055

OBJECTION TO THE RECORD

(Capital Case)

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

Case No. SPOT0500155

(Capital Case)

NOTICE IS HEREBY GIVEN that Erick Hall, the Appellant-Petitioner in the above-captioned proceeding, by and through his counsel at the State Appellate Public Defender (hereinafter "SAPD"), hereby objects to the record on appeal pursuant to Idaho Appellate Rule 29. This objection is based on Mr. Hall's right to a meaningful appeal under Idaho Code § 19-2719(6), his right to due process and heightened safeguards of the Eighth and Fourteenth

Amendments to the United States Constitution, and his rights afforded by the Idaho Constitution, Article I, Sections 7 and 13. *See Cootz v. State,* 117 Idaho 38, 40, 785 P.2d 163, 165 (1989) (holding that the scope of due process under the Idaho Constitution is not "necessarily bound by the interpretation given to due process by the United States Supreme Court.").

ARGUMENT

Idaho Appellate Rule 29 governs the settlement of the record and transcript on appeal. The rule provides in relevant part:

> The parties shall have 28 days from the date of the service of the transcript and the record within which to file objections to the transcript or the record, including requests for corrections, additions or deletions. . . . Any objection made to the reporter's transcript or clerk's or agency's record must be accompanied by a notice setting the objection for hearing and shall be heard and determined by the district court or administrative agency from which the appeal is taken. After such determination is made, the reporter's transcript and clerk's or agency's record shall be deemed settled as ordered by the district court or administrative agency. The reporter's transcript and clerk's or agency's record may also be settled by stipulation of all affected parties.

I.A.R. 29(a). The record and transcript was served on the parties on February 18, 2009. (R. Vol. VIII, p.1574.) Thus, this objection is timely filed. At the time of this filing, the parties have not yet discussed any stipulations.

This objection is not intended to cause unnecessary delay, but rather, it is based on the good faith belief that the record must be corrected and augmented to protect Mr. Hall's substantial rights in his interlocutory appeal.[1] Accordingly, Mr. Hall requests the following types of corrections and additions to the record including: I) corrections of typographical errors; II) additions of documents; and III) additions of transcripts.

---

[1] This objection is somewhat limited in nature and scope due to the limited issues on interlocutory appeal. Mr. Hall reserves his right to object to the consolidated record on appeal should this case proceed to that stage in the future.

I. CORRECTION OF TYPOGRAPHICAL ERRORS[2]

1. The transcript of a hearing held on Mr. Hall's motion for access to the grand jury transcripts is currently dated ***December*** 3, 2005. The date should be corrected to ***October*** 3, 2005. (*See* R. 35055 Vol. I, p.3 (Register of Actions); p.69 (Court Minutes).)

2. The transcript of a hearing held on Mr. Hall's request for ex parte contact with jurors indicates that the district court stated in part, "I don't have a transcript of ***today's*** proceedings . . ." (Tr. 2/15/06, p.14, Ls.10-11.) Mr. Hall believes that the court actually stated, "I don't have a transcript of ***that day's*** proceedings," referring to a prior telephone conference held on January 6, 2006.

3. The transcript of a hearing held on Mr. Hall's request for ex parte contact with jurors indicates that his post-conviction counsel stated in part, ". . . the uniformity argument, ***nonarbitrate on capricious*** post-conviction procedural safeguards. . ." (Tr. 2/15/06, p.36, Ls.4-6.) Mr. Hall believes that his counsel actually stated "***nonarbitrary and noncapricious***" drawing upon language sometimes used in death penalty jurisprudence.

4. The transcript of a hearing held on Mr. Hall's request for ex parte contact with jurors indicates that his post-conviction counsel stated in part, ". . . I think this is more or less ***anadolently***, but we have all been referring -- or relying to a certain extent on ***antidotes*** today . . . " (Tr. 2/15/06, p.51, Ls.13-16.) Mr. Hall believes that his counsel actually stated "more or less ***anecdotally*** . . . relying to a certain extent on ***anecdotes*** today"

---

[2] Mr. Hall's counsel has not yet had the opportunity to obtain and review the audio recordings of the hearings noted below, for the purpose of confirming these corrections. Where necessary to confirm the requested corrections, counsel will attempt to listen to the recordings prior to the hearing on this objection to the record.

referring to the fact that the district court and counsel had either referenced or relied upon various anecdotes when addressing the jury contact issue.

5. The transcript of a hearing held on Mr. Hall's request for discovery indicates that his post-conviction counsel referenced a person by the name of "***Kristen*** Johnson." (Tr. 1/10/07, p.25, L.13.) Mr. Hall believes that his counsel actually stated, "***Christian*** Johnson," referring to a prosecution witness during the underlying criminal case.

6. The transcript of a hearing held on Mr. Hall's request for discovery indicates that his post-conviction counsel stated, "We, as post-conviction counsel, do have the access to NCIC to do this very exhaustive criminal record check." (Tr. 1/10/07, p.46, Ls.9-11.) Mr. Hall believes that his counsel actually stated the opposite, i.e., "We, as post-conviction counsel, do ***not*** have the access to NCIC . . . ."

7. The transcript of a hearing held on Mr. Hall's request for discovery indicates that his post-conviction counsel stated, ". . . I want the complete focus to be on the prosecutorial misconduct for Brady violation." (Tr. 1/10/07, p.91, Ls.6-8) Mr. Hall believes that his counsel actually stated the opposite, i.e., ". . . I ***don't*** want the complete focus to be on the prosecutorial misconduct for Brady violation."

8. The transcript of a hearing held on Mr. Hall's request for permission to contact the jurors in the underlying criminal case refers to Mr. Hall's "***litigation*** specialist." (Tr. 8/08/07, p.114, L.4.) This should be corrected to reflect "***mitigation*** specialist."

9. The transcript of a hearing held on Mr. Hall's request for permission to contact jurors and his request for depositions contains repeated misspellings of the names Glen Elam, Amil Myshin, Donald Paradis, Mike Jauhola, (Thomas) Raduebaugh, Greg Bower, (Azad) Abdullah, Greg Hampikian, James Merikangas, Roderick Pettis and (Cheryl) Hanlon, as

"Elan," "Mission," "Pardus," "Ehola," "Rowdbau," "Bauer," "Abdula," "Hampekian," "Marakingus," "Rodrick," and "Hanlin" respectively. (Tr. 8/08/07, p.61, L.19; p.62, Ls.4, 10, 11, and 14; p.63, Ls.4-5; p.63, Ls.17 and 23; p.65, Ls.4 and 23; p.66, L.3; p.74, Ls.14 and 24; p.81, L.20; p.83, L.12; p.85, L.24; p.86, L23; p.88, L.18; p.91, L.11; p.134, L.25; p.136, Ls.7 and 22; p.146, L.22; p.147, Ls.14 and 25; p.148, Ls.4 and 14; p.149, L.4; p.153, L.5.) These should be corrected.[3]

II. ADDITION OF DOCUMENTS

10. Discovery Response to the Court: This document was filed on March 16, 2007. (R. Vol. I, p.6 (Register of Actions).) Mr. Hall's counsel will bring copies of the discovery response to the hearing on this motion if such copies are necessary to complete the record.

11. Jury Contact Letters Submitted as Exhibits During Court Proceedings: On August 8, 2007, while arguing Mr. Hall's motion for permission to contact jurors in the underlying criminal case, Mr. Hall's post-conviction counsel submitted two letters to the district court as exhibits in support of the motion. The letters were utilized for juror interviews conducted in Dunlap v. State, a capital post-conviction case in Caribou County. (Tr. 8/08/07, p.112, Ls.12-19; p.113, L.24 – p.114, L.19.) Mr. Hall's counsel will bring copies of the letters to the hearing on this motion if such copies are necessary to complete the record.

12. Note from Bailiff Regarding Communication from a Juror: During the underlying criminal trial, a juror made a complaint to the bailiff regarding trial counsel based in part on the fact that trial counsel was twirling a paper clip. The bailiff wrote a note and gave

[3] The transcript from this hearing also contains numerous misspellings of the jurors' names. However, because Mr. Hall intends to refer to the jurors in his appellate briefing by juror number

it to the district court. During the post-conviction hearing on Mr. Hall's motion for permission to contact jurors, the district court stated that it would "look for [the note] and provide it and make it part of the record." (Tr. 8/08/07, p.132, L.18 – p.133, L.23.)[4]

13. Notice of Filing of Appendices to Motion for Permission to Appeal: This document, including its voluminous attached appendices, was filed in the district court on August 23, 2007. Although the document is not listed in the Register of Actions, a conformed, file stamped copy of the notice, without the appendices, is attached as proof of filing. Mr. Hall's counsel will bring copies of the notice as filed with the appendices attached to the hearing on this motion if such copies are necessary to complete the record.

III. ADDITION OF TRANSCRIPTS AND COURT MINUTES

In his Notice of Appeal, Mr. Hall requested transcripts for "all hearings" conducted in the post-conviction proceedings. (R. 35055 Vol. VIII, p.1566.) Mr. Hall has confirmed that two hearings addressing matters on this appeal are not currently in the appellate record. These two hearings happen to represent the first time (January 6, 2006) and the last time (November 15, 2007) the issue of jury contact was addressed in the post-conviction proceedings prior to the Supreme Court's acceptance of the issue for interlocutory appeal.

14. Transcript and court minutes for telephonic hearing held on January 6, 2006: There is no entry in the Register of Actions and no court minutes in the record for this telephonic hearing. (*See* R. 35055 Vol. I, *passim.*) The record however demonstrates that a hearing

---

only, there does not seem to be any obvious reason to correct these errors.

[4] At the time of filing this objection, Mr. Hall's counsel has a recollection that perhaps the note could not be located. Prior to the hearing on this objection, counsel will review his files to see if he can confirm or contradict his recollection. If the note was not preserved, then that fact should be established for the record.

occurred. Based on other portions of the record, Mr. Hall's counsel has pieced together the following summary of events surrounding that hearing.[5]

On October 31, 2005, the parties filed a stipulation for access to the jury questionnaires in the underlying criminal case. (R. 35055, pp.71-73.) Thereafter, post-conviction counsel contacted the district court's staff to schedule a hearing to discuss the stipulation. (Tr. 2/15/06, p.17, Ls.20-23.) The district court calendared the conference for January 6, 2006. (Tr. 2/15/06, p.17, Ls.15-23.) A telephonic conference was held on January 6, 2006, with representatives for both parties participating therein. (Tr. 2/15/06, p.17, Ls.15-19.) During the conference, the parties and the district court discussed issues relating to the jury questionnaires. (Tr. 2/03/06, p.5, L.25 – p.6, L.5.)[6]

There is arguably some dispute over the nature and scope of the discussions during this telephonic conference which cannot be resolved absent a transcript of the conference. For example, post-conviction counsel recalled that during discussions about access to the jury questionnaires, the district court prohibited counsel from initiating any contact with the jurors. Accordingly, post-conviction counsel captioned a subsequent motion to lift restrictions on jury contact as a motion to "reconsider" the court's oral order. (R. 35055 Vol. I, p.112 (". . . the Petitioner . . . moves this Honorable Court to reconsider oral Orders made during the telephonic hearing held on January 6, 2006 . . .

[5] This summary does not represent an adequate substitute for a transcript of the hearing, but is included herein to facilitate the district court's ruling on the motion and to demonstrate the relevance and necessity for the transcript in the pending interlocutory appeal.

[6] The hearing may also be relevant to an issue should this case proceed to a consolidated appeal. Specifically, it appears that Mr. Hall's counsel made an oral motion for the district court to adopt *ex parte* procedures for facilitating expert access to Mr. Hall. (*See* R. 35055 Vol. I, pp.112-15.)

wherein the Court placed restrictions on counsels' abilities to contact jurors in the underlying capital trial."); Tr. 2/15/06, p.18, Ls.8-18 ("I cannot say with certainty whether the Court ordered us not to have contact with jurors prior to express authorization, but I can say I had a very strong impression at least that if I were to do that, I could find myself in contempt of Court.").) However, the district court maintained that it did not enter an order at the conference, and thus asserted that the subsequent motion was improperly captioned. (Tr. 2/15/06, p.14, Ls.3-9 ("I do recall being asked about my views on various matters, including . . . access to jurors and having -- and engaging in dialogue, but don't recall entering orders. But -- so the way the motion to reconsider is captioned is a little surprising to me."); p.18, Ls.14-16 ("I was strong. I didn't want you to [contact the jurors] without coming back with a specific motion. I said that orally."); p.19, Ls.15-19 ("I know I didn't enter any written orders. I didn't. I thought I was just responding to Counsel's general, how do you feel about this and that sort of thing. And I was responding as honestly as I could at the time. And so to see that motion for reconsideration of orders entered, it sounds like it is taking it beyond where it really was.").) In response, post-conviction counsel relied on the record to demonstrate what was said at the hearing. (Tr. 2/15/06, p.19, Ls.3-8 ("And so if this was best captioned . . . a motion for no restrictions, or something to that extent, rather than a motion to reconsider, then I'll -- I mean, I'll just stand by the record."); p.19, L.23 – p.20, L.2.)

15. Transcript and court minutes for hearing held on November 15, 2007: A hearing was on November 15, 2007 regarding Mr. Hall's motion for permissive appeal. There is no entry in the Register of Actions and no court minutes in the record for this conference. (*See* R. 35055 Vol. I, *passim*.) The record however demonstrates that a hearing occurred, during

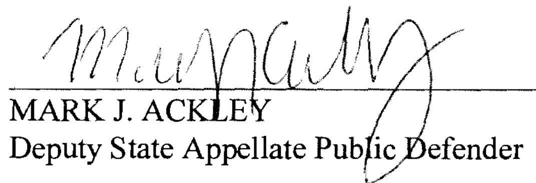
which arguments were presented by the parties and factual findings were made by the district court. (R. Vol. VIII, pp.1527-28.) Mr. Hall has confirmed that the hearing was recorded and transcribed. The hearing was reported by Susan M. Wolf from Tucker and Associates, LLC. Court minutes were also prepared.

CONCLUSION

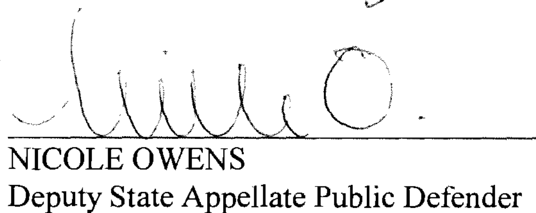
The Idaho Constitution, Article 1, § 13, and the Fourteenth Amendment to the United States Constitution guarantee that no person shall be deprived of life, liberty or property without due process of law. Although a person does not have a constitutional right to appeal, the Idaho Legislature has provided a statutory right in I.C. § 19-2719(6). A person exercising this statutory right is entitled to a meaningful appeal consistent with the guarantees of due process from both the Idaho Constitution and the United States Constitution. *See Evitts v. Lucy,* 469 U.S. 387, 392 (1985) (holding that where a state has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant . . . the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.") (citation omitted); *see also Ebersole v. State,* 91 Idaho 630, 636, 428 P.2d 947, 953 (1967) (holding that the inability to review a transcript of the defendant's arraignment precluded an effective appeal and violated due process). Mr. Hall's right to a meaningful appeal is illusory if he is not given the opportunity to rely upon all documentation and court proceedings relevant to the points of error assigned on this appeal. *See Hardy v. United States,* 375 U.S. 277, 279-80 (1964); *Griffin v. Illinois,* 351 U.S. 12, 18-19 (1956). Accordingly, Mr. Hall respectfully requests that the record and transcript be corrected and augmented as noted in this objection to the record. Mr. Hall respectfully submits that the failure to do so will violate his right to a meaningful appeal under Idaho Code § 19-2719(6), his right to due process and

heightened safeguards of the Eighth and Fourteenth Amendments to the United States Constitution, and his rights afforded by the Idaho Constitution, Article I, Sections 7 and 13.

Dated this 17th day of March, 2009.



MARK J. ACKLEY
Deputy State Appellate Public Defender



NICOLE OWENS
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 17th day of March, 2009, served a true and correct copy of the foregoing OBJECTION TO THE RECORD, as indicated below:

ERICK V. HALL INMATE #33835 IMSI PO BOX 51 BOISE ID 83707	_X_ U.S. Mail _____ Statehouse Mail _____ Facsimile _____ Hand Delivery
L. LAMONT ANDERSON IDAHO ATTORNEY GENERAL'S OFFICE 700 W STATE STREET 4TH FLOOR BOISE ID 83720	_____ U.S. Mail _X_ Statehouse Mail _____ Facsimile _____ Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W FRONT STREET 3RD FLOOR BOISE ID 83702	_____ U.S. Mail _____ Statehouse Mail _____ Facsimile _X_ Hand Delivery

MELISSA RICHESON GALLEGOS
Administrative Assistant

01586

NO. ______ FILED
A.M. ______ P.M. ______
AUG 2 3 2007
J. DAVID NAVARRO, Clerk
By J. WHITNEY
DEPUTY
CONFORMED COPY

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,	CASE NO. SPOT0500155
v.	**NOTICE OF FILING OF APPENDICES TO MOTION FOR PERMISSION TO APPEAL**
STATE OF IDAHO, Respondent.	**(CAPITAL CASE)**

Petitioner, ERICK VIRGIL HALL, by and through his attorneys at the Office of the State Appellate Public Defender, submits the following appendices to his Motion for Permission to Appeal filed by fax on August 22, 2007:[1, 2]

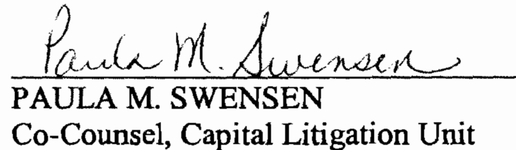
- Appendix 1: Motion to Reconsider Orders Re: *Ex Parte* Procedures and Restrictions on Juror Contact
- Appendix 2: Memorandum of Law in Support of Motion to Reconsider Orders Re: *Ex Parte* Procedures and Restrictions on Juror Contact

[1] Attachments originally filed with the appendices and/or referenced in the appendices are not included with this filing.

[2] If the Motion for Permission to Appeal was not received on August 22, 2007, due to Ada County Courthouse closure and/or electrical problems, Petitioner is re-filing the same Motion simultaneously with this Notice of Filing.

- Appendix 3: Motion for Juror Contact
- Appendix 4: Memorandum in Support of Motion for Juror Contact
- Appendix 5: Letter from Michael J. Shaw to jurors in Abdullah v. State, Ada County Case No. SPOT0500308
- Appendix 6: Motion for Discovery
- Appendix 7: Memorandum of Law in Support of Motion for Discovery
- Appendix 8: Supplemental Memorandum in Support of Motion for Discovery
- Appendix 9: Order Regarding Discovery
- Appendix 10: Sealed Supplemental Motion for Discovery (under seal)
- Appendix 11: Affidavit of Michael J. Shaw

DATED this 23rd day of August, 2007.



PAULA M. SWENSEN
Co-Counsel, Capital Litigation Unit

01588

CERTIFICATE OF SERVICE

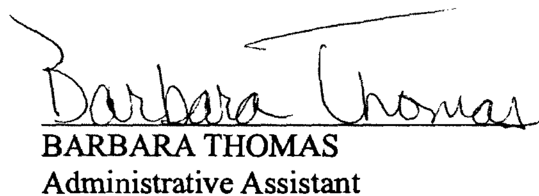
I HEREBY CERTIFY that I have on this 23rd day of August, 2007, served a true and correct copy of the forgoing NOTICE OF FILING as indicated below:

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
__X__ U.S. Mail
_____ Facsimile
_____ Hand Delivery



BARBARA THOMAS
Administrative Assistant

01589

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

MARK J. ACKLEY, I.S.B. # 6330
NICOLE OWENS, I.S.B. # 7679
Deputy State Appellate Public Defenders
Capital Litigation Unit
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

ORIGINAL

NO. ______ FILED A.M. ______ P.M. 4:44

MAR 19 2009

J. DAVID NAVARRO, Clerk
By ______ DEPUTY

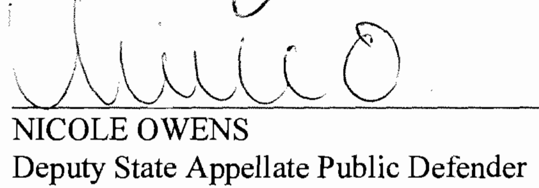
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL, Appellant, v. STATE OF IDAHO, Respondent.	**Case No. 35055** **NOTICE OF HEARING** (Capital Case)
ERICK VIRGIL HALL, Petitioner, v. STATE OF IDAHO, Respondent.	**Case No. SPOT0500155** (Capital Case)

COMES NOW the Appellant-Petitioner, Erick Virgil Hall, by and through his counsel at the State Appellate Public Defender, and provides notice that a hearing will be held on his Objection to the Record, filed March 17, 2009. In coordination with the Court's clerk, and by agreement of the parties, the hearing will be held on the 9th day of April, 2009, at 1:30 p.m., before the Honorable Thomas F. Neville at 200 W. Front St., Boise, Idaho.

DATED this 19th day of March, 2009.

MARK J. ACKLEY
Deputy State Appellate Public Defender



NICOLE OWENS
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 19th day of March, 2009, served a true and correct copy of the foregoing NOTICE OF HEARING, as indicated below:

ERICK V. HALL INMATE #33835 IMSI PO BOX 51 BOISE ID 83707	_X_ U.S. Mail ____ Statehouse Mail ____ Facsimile ____ Hand Delivery
L. LAMONT ANDERSON IDAHO ATTORNEY GENERAL'S OFFICE 700 W STATE STREET 4TH FLOOR BOISE ID 83720	____ U.S. Mail _X_ Statehouse Mail ____ Facsimile ____ Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W FRONT STREET 3RD FLOOR BOISE ID 83702	____ U.S. Mail ____ Statehouse Mail ____ Facsimile _X_ Hand Delivery
SUE WOLF COURT REPORTER ADA COUNTY DISTRICT COURT 200 W FRONT STREET BOISE ID 83702-7200	____ U.S. Mail ____ Statehouse Mail ____ Facsimile _X_ Hand Delivery

MELISSA RICHESON GALLEGOS
Administrative Assistant

NO.____
A.M.____ FILED P.M. 2:28

APR 0 2 2009

J. DAVID NAVARRO, Clerk
By A. GARDEN
DEPUTY

LAWRENCE G. WASDEN
Attorney General
State of Idaho

STEPHEN A. BYWATER
Deputy Attorney General
Chief, Criminal Law Division

L. LaMONT ANDERSON, ISB #3687
Deputy Attorney General
Criminal Law Division
Capital Litigation Unit
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 334-4539

Attorneys for Respondent

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

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

ERICK VIRGIL HALL,	)	Case No. SPOT0500155
Petitioner,	)	
vs.	)	RESPONSE TO PETITIONER'S OBJECTION TO THE RECORD
STATE OF IDAHO,	)	
Respondent.	)	

COMES NOW, Respondent, State of Idaho ("state"), by and through its attorney of record, L. LaMont Anderson, Deputy Attorney General and Chief, Capital Litigation Unit, and does hereby respond to Petitioner's ("Hall") Objection to the Record filed March 17, 2009. Hall has divided his objections into the following three categories: (1) correction of typographical errors; (2) addition of documents; and (3) addition of transcripts and court minutes.

The state notes it is Hall's burden to establish there is an error in the record that must be corrected. *See* State v. Wallace, 116 Idaho 930, 932, 782 P.2d 53 (Ct. App. 1989) (because a transcript certified to be correct by the court reporter "shall be deemed prima facie a correct statement of the testimony taken and the proceedings had," the party challenging the correctness of the transcript must overcome the presumption of correctness). Unless Hall can meet his burden, this Court must deny his requests to alter the record.

I. **Typographical Errors**

A. Incorrectly Dated Transcript

Hall initially contends the date of a hearing regarding his motion for access to grand jury transcripts is incorrectly dated December 3, 2005, and should be corrected to October 3, 2005. (Objection, p.3, ¶1.) In reviewing the transcript and talking with Hall's counsel, Mark Ackley, there are actually two incorrect dates on the transcript currently dated October 3, 2004. The first error is on page 3, which states the hearing was on October 3, **2004**. The second error is on page 5, which states the hearing was on **December** 3, 2005. As demonstrated by the Notice of Hearing (R., pp.67-68) and the court minutes (R., p.69), the correct date is October 3, 2005. Because Hall has overcome the presumption of correctness, the state has no objection to these errors being corrected and the transcript correctly stating that the hearing occurred on October 3, 2005.

B. Typographical Errors

Hall contends there are a number of typographical errors in various transcripts (Objection, pp.3-4, ¶¶2-8), which his attorney concedes he has "not yet had the

opportunity to obtain and review the audio recordings of the hearings noted" (Objection, p.3 n.2). In State v. Salazar, 95 Idaho 305, 306, 507 P.2d 1137 (1973), the court discussed the necessity of having a transcript that contains a verbatim reporting of the oral proceedings. In other words, court reporters are not permitted to correct statements made during a hearing in the written transcript, but must report exactly what was stated during the hearing. During the course of court hearings, individuals often make grammatical errors. Those errors must be reported verbatim by the court reporter.

While several of Hall's objections may appear to make "grammatical sense," until Hall can meet his burden of establishing the court reporter actually misreported something that was stated in court, and it was not merely an individual making a grammatical misstatement at the hearing, the state must object to his requests to make typographical changes to the transcripts, particularly where Hall's basis for objection is only his "belief" as to what was actually stated during a hearing and not a review of the audio recordings. Therefore, the state objects to the changes requested in paragraphs 2-8 of Hall's Objection to the Record.

C. Misspelled Names

Hall contends the transcript for a hearing on August 8, 2007, has several misspelled names. (Objection, pp.4-5, ¶9.) While the court reporter indicated the spelling of several of the names was "phonetic," the state has no objection to the following corrections: (1) "Elam" for "Elan"; (2) "Myshin" for "Mission"; (3) "Paradis" for "Paradus"; (4) "Jauhola" for "Ehola"; (5) "Bower" for "Bauer"; (6) "Raudebaugh" for

"Rowdbau";[1] (7) "Abdullah" for "Abdula"; (8) "Hampikian" for "Hampekian"; (9) "Merikangas" for "Marakingus"; (10) "Roderick" for "Rodrick"; and (11) "Hanlon" for "Hanlin."

II. **Additional Documents**

A. Discovery Response

Hall contends a "Discovery Response to Court" listed in the Register of Actions should be included in the Clerk's Record. (Objection, p.5, ¶10.) If Hall can meet his burden of establishing this pleading was actually filed with the clerk by presenting a conformed copy of it, the state has no objection it being added to the Clerk's Record.

B. Juror Contact Letters

Hall contends he offered two letters as an exhibit during the hearing on August 8, 2007. (Objection, p.5, ¶11.) While the exhibit is not identified by number, the transcript establishes they were submitted as an exhibit during counsel's argument. (Tr., 8-8-07, p.113, L.24 – p.114, L.10.) Therefore, the state has no objection the exhibit being added to the Clerk's Record.

C. Note From Bailiff

Hall contends that on August 8, 2007, there was discussion regarding an alleged "note from the bailiff," in which the bailiff allegedly wrote a note, which was then given to the district court, regarding a juror's alleged complaint. (Objection, pp.5-6, ¶12.) The transcript reveals there was discussion regarding the alleged "note," and the district court

[1] Hall actually proposes the following correction, "Raduebaugh." (Objection, p.4. ¶4.) However, the name is from State v. Raudebaugh, 135 Idaho 602, 21 P.3d 924 (2001).

stated, “we'll look for it and provide it and make it part of the record.” (Tr., 8-8-07, p.132, L.18 – p.133, L.23.) While the state questions the relevance of the alleged “note” in this interlocutory appeal and whether it should be part of the record in this case, if the note still exists, the state has no objection to it being added to the Clerk's Record.

D. Notice Of Filing Of Appendices

Based upon Hall's having attached a conformed copy of the Notice of Filing of Appendices to Motion for Permission to Appeal, the state has no objection to the pleading and appendices attached to the pleading being added to the Clerk's Record.

III. **Additional Transcripts**

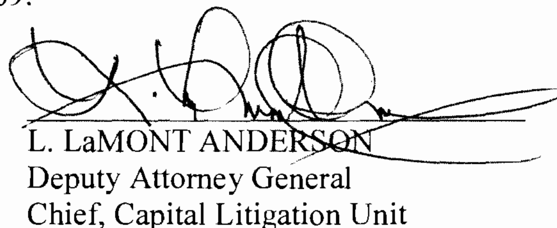
A. January 6, 2006

Hall contends there was a hearing on January 6, 2006, and moves to have the hearing transcribed and added to the record. (Objection, pp.6-9, ¶14.) If such a hearing actually took place and was recorded, the state has no objection to it being transcribed.

B. November 15, 2007

Hall contends there was a hearing on November 15, 2007, which was recorded and transcribed, and moves to have the transcript of the hearing added to the record. (Objection, pp.8-9, ¶15.) If such a hearing actually took place, was recorded, and has been transcribed, the state has no objection to the transcript being added to the record.

DATED this 31st day of March, 2009.



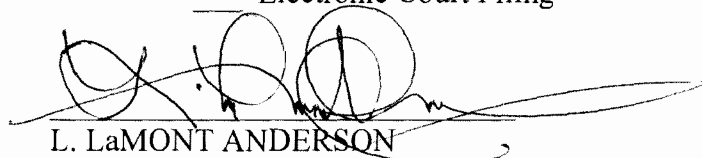
L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on or about the 31st day of March, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

Mark J. Ackley
State Appellate Public Defender's Office
3647 Lake Harbor Lane
Boise, ID 83703

X U.S. Mail
___ Hand Delivery
___ Overnight Mail
___ Facsimile (208) 334-2985
___ Electronic Court Filing



L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit

Session: Neville040909 Division: DC Courtroom: CR501
Session Date: 2009/04/09 Session Time: 12:59
Judge: Neville, Thomas F.
Reporter: Wolf, Sue

Clerk(s):
Ellis, Janet

State Attorneys:

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0001
Case Number: CVPC0521649
Plaintiff: HALL, ERICK VIRGIL
Plaintiff Attorney: ACKLEY, MARK
Defendant: RESPONDENT, STATE OF IDAHO
Co-Defendant(s):
Pers. Attorney: ANDERSON, LAMONT
State Attorney:
Public Defender:

2009/04/09
13:58:38 - Operator
Recording:
13:58:38 - New case
RESPONDENT, STATE OF IDAHO
13:59:11 - Judge: Neville, Thomas F.
Time set for Objections to Clerks record
14:00:13 - Judge: Neville, Thomas F.
The Court inquired what is left re: objections to the record
. Court
14:00:58 - Judge: Neville, Thomas F.
inquired about January 6, 2006 if still at issue
14:01:12 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley responded
14:01:30 - Judge: Neville, Thomas F.
The Court is aware there is no entry on the ROA, no court mi
nutes or
14:01:52 - Judge: Neville, Thomas F.
recording. The Court is not aware of a transcript at this p
oint.
14:04:25 - Judge: Neville, Thomas F.
The Court would typically make a record at the next hearing
that happened,
14:05:59 - Judge: Neville, Thomas F.
which would have been on January24, 2006
14:08:18 - Plaintiff Attorney: ACKLEY, MARK

Mr. Ackley stated the next three hearings following the tele
phonic conference
14:09:18 - Plaintiff Attorney: ACKLEY, MARK
from January 6th.
14:10:26 - Judge: Neville, Thomas F.
The Court at this point can't call it a hearng, and may be o
verstating that.
14:11:01 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley responded, thought it was hearing.
14:19:27 - Judge: Neville, Thomas F.
The Court has an email from Janet French, the court reporter
at that time.
14:19:41 - Judge: Neville, Thomas F.
She has checked her notes and noted, that Mark Ackley was no
t present in the
14:22:05 - Judge: Neville, Thomas F.
courtroom at time scheduled. The Court and counsel went in
chambers and
14:22:44 - Judge: Neville, Thomas F.
called Mr. Ackley and then proceeded off the record with a c
onference.
14:23:42 - Judge: Neville, Thomas F.
The Court in receipt of court calendar as well and notes it
was set for stat
14:24:37 - Judge: Neville, Thomas F.
conference
14:24:41 - Pers. Attorney: ANDERSON, LAMONT
Mr. Anderson stated should probably add that email to the re
cord as well
14:25:09 - Judge: Neville, Thomas F.
The Court will add the court calendar as well, which shows i
t was on calendar
14:25:33 - Judge: Neville, Thomas F.
for status conference.
14:25:41 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley requested to limit the record to that something w
as scheduled and
14:25:56 - Plaintiff Attorney: ACKLEY, MARK
helpful for email to be in record as well.
14:26:22 - Judge: Neville, Thomas F.
The Court inquired what else today can be done.
14:26:44 - Judge: Neville, Thomas F.
Notes Mr. Anderson does not object to having these things in
the record
14:27:16 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley goes to #10
14:28:25 - Judge: Neville, Thomas F.
Court believed that now in the record
14:29:22 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley goes to #11
14:29:34 - Judge: Neville, Thomas F.
Have those and should be resolved
14:29:44 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley goes to #12
14:30:12 - Judge: Neville, Thomas F.
Court does have that note, and will add to the record
14:30:32 - Plaintiff Attorney: ACKLEY, MARK
Item #13, the notice and all its appendices

14:31:39 - Judge: Neville, Thomas F.
Court has all those documents
14:33:21 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley going to #14, addressed re: January 6, hearing
14:33:46 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley stated believe #15 is in there as well.
14:35:48 - Pers. Attorney: ANDERSON, LAMONT
Mr. Anderson stated believe ID supreme Court # should be on the transcript on
14:36:17 - Pers. Attorney: ANDERSON, LAMONT
this case as well.
14:36:47 - Judge: Neville, Thomas F.
The Court will have court reporter make transcript and add I D supreme Court
14:37:08 - Judge: Neville, Thomas F.
number to hat as well.
14:37:24 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley going to items 1-9, states items 1 & 9, state has no objection to
14:37:53 - Plaintiff Attorney: ACKLEY, MARK
those corrections to the transcript and typographical errors . Dec. 3, 2005
14:38:39 - Plaintiff Attorney: ACKLEY, MARK
in record and should October 3, 2005.
14:38:58 - Plaintiff Attorney: ACKLEY, MARK
Mr. Anderson concurred, State's response, acutallly two date s to correct and
14:39:21 - Plaintiff Attorney: ACKLEY, MARK
both should be October 3, 2005
14:40:09 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley stated Jeane Hirmer prepared that transcript.
14:41:33 - Judge: Neville, Thomas F.
The Court inquired how counsel would like that done, correct ing the copies
14:42:03 - Pers. Attorney: ANDERSON, LAMONT
Mr. Anderson stated could provide the reporter with order an d have her make
14:42:18 - Pers. Attorney: ANDERSON, LAMONT
new pages
14:42:20 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley in paragarph #9,
14:42:50 - Judge: Neville, Thomas F.
Repreated misspellings of names.
14:43:04 - Judge: Neville, Thomas F.
Inquired if same reporter
14:43:10 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley stated the August 8, 2007 was Jeff Lamar, M & M c ourt reporting.
14:44:07 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley going to items 2-8, Ms. Nixon was going to get au dio for Mr.
14:45:05 - Plaintiff Attorney: ACKLEY, MARK
Ackley to listen and have not had chance to get the discs. Request until
14:45:22 - Plaintiff Attorney: ACKLEY, MARK
Friday, the 17th to get those to listen to.
14:46:02 - Plaintiff Attorney: ACKLEY, MARK
Will prepare an affidavit after hearing those, and Mr. Ander

son stated would
14:46:16 - Plaintiff Attorney: ACKLEY, MARK
stipulate with a showing Mr. Mr.Ackley.
14:46:31 - Judge: Neville, Thomas F.
Court stated that sounds sensible. Inquired if anything fut
her today.
14:46:46 - Plaintiff Attorney: ACKLEY, MARK
nothing to add
14:46:52 - Pers. Attorney: ANDERSON, LAMONT
nothing to add
14:46:58 - Operator
Stop recording:

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

MARK J. ACKLEY, I.S.B. # 6330
NICOLE OWENS, I.S.B. # 7679
Deputy State Appellate Public Defenders
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

NO. ______ FILED A.M. ______ P.M. 4:24
APR 17 2009
J. DAVID NAVARRO, Clerk
By ______ DEPUTY

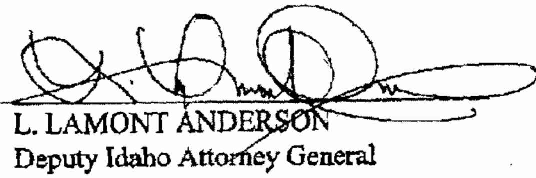
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL, Appellant, v. STATE OF IDAHO, Respondent.	**Case No. 35055** **STIPULATION OF PARTIES REGARDING OBJECTION TO THE RECORD** (Capital Case)
ERICK VIRGIL HALL, Petitioner, v. STATE OF IDAHO, Respondent.	**Case No. SPOT0500155** (Capital Case)

COMES NOW, the Petitioner, Erick V. Hall, by and through his counsel, Mark J. Ackley, and the Respondent, State of Idaho, by and through Deputy Idaho Attorney General L. LaMont Anderson, and hereby stipulate that the changes noted in the attached Affidavit of Mark J. Ackley in Support of the Objection to the Record should be made to the relevant transcripts cited therein.

DATED this 17th day of April, 2009.

MARK J. ACKLEY
Deputy State Appellate Public Defender



L. LAMONT ANDERSON
Deputy Idaho Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 17th day of April, 2009, served a true and correct copy of the forgoing STIPULATION OF PARTIES REGARDING OBJECTION TO THE RECORD as indicated below:

ERICK V. HALL INMATE #33835 IMSI PO BOX 51 BOISE ID 83707	_X_ U.S. Mail _____ Statehouse Mail _____ Facsimile _____ Hand Delivery
L. LAMONT ANDERSON IDAHO ATTORNEY GENERAL'S OFFICE 700 W STATE STREET 4TH FLOOR BOISE ID 83720	_____ U.S. Mail _X_ Statehouse Mail _____ Facsimile _____ Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W FRONT STREET 3RD FLOOR BOISE ID 83702	_____ U.S. Mail _____ Statehouse Mail _____ Facsimile _X_ Hand Delivery

MELISSA RICHESON GALLEGOS
Administrative Assistant

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

MARK J. ACKLEY, I.S.B. # 6330
NICOLE OWENS, I.S.B. # 7679
Deputy State Appellate Public Defenders
Capital Litigation Unit
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

NO.______ FILED
A.M.______ P.M. 1:55
APR 21 2009
J. DAVID NAVARRO, Clerk
By______ DEPUTY

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

ERICK VIRGIL HALL, Appellant, v. STATE OF IDAHO, Respondent.	**Case No. 35055** **ORDER REGARDING OBJECTION TO THE RECORD** (Capital Case)
ERICK VIRGIL HALL, Petitioner, v. STATE OF IDAHO, Respondent.	**Case No. SPOT0500155** (Capital Case)

MOTION HAVING BEEN MADE and the Court otherwise being fully informed, Petitioner's Objection to the Record is granted in part. A hearing was held on April 9, 2009, during which the parties presented oral argument. The Court ruled from the bench. The Court's findings and rulings are reflected on the record and incorporated herein by reference. This Order does not amend the Court's findings and rulings but simply memorializes its rulings. Following

the hearing, the parties filed a written stipulation relevant to Petitioner's Objection to the Record. That stipulation has likewise been considered by the Court. For ease of reference, this Order follows the structure of Petitioner's Objection to the Record, and the parties' stipulation. Accordingly, **IT IS HEREBY ORDERED** that:

Correction of Typographical Errors to Various Transcripts

1. Request I.1: The reporter's transcript currently provides in part that a hearing was held on **December** 3, 2005; the transcript shall be changed to **October** 3, 2005, to reflect the correct date of that hearing. (R. 35055 Vol. I, p.3 (Register of Actions); p.69 (Court Minutes).)

2. Request I.3: The reporter's transcript currently provides in part, "the uniformity argument, **nonarbitrate on capricious** post-conviction procedural safeguards. . ." (Tr. 2/15/06, p.36, Ls.4-6) (Emphasis added.). The emphasized language shall be changed to "nonarbitrary noncapricious."

3. Request I.4: The reporter's transcript currently provides in part, "I think this is more or less **anadolently**, but we have all been referring -- or relying to a certain extent on **antidotes** today . . . " (Tr. 2/15/06, p.51, Ls.13-16) (Emphasis added.). The emphasized language shall be changed to "anecdotally" and "anecdotes," respectively.

4. New Request: The reporter's transcript from the hearing held on January 11, 2007 shall be changed to reflect the following additional language (noted by emphasis): "Yeah, and I think Aeschliman **as well, addresses that. Both in non-capital context by the way. And also,** it's interesting to note, in Raudebaugh . . ." (*See* Tr. 1/11/07, p.23, Ls.22-23.)

5. Request I.5: The reporter's transcript contains a misspelling: **Kristen** Johnson should be changed to Christian Johnson. (*See* Tr. 1/11/07, p.25, L.13) (Emphasis added.).

6. Request I.6: The reporter's transcript currently provides in part, "We, as post-conviction counsel, **do** have the access to NCIC to do this very exhaustive criminal record check." (Tr. 1/11/07, p.46, Ls.9-11) (Emphasis added.). The emphasized language shall be changed to "do not."

7. Request I.7: The reporter's transcript currently provides in part, "I **want** the complete focus to be on the prosecutorial misconduct for Brady violation." (Tr. 1/11/07, p.91, Ls.6-8) (Emphasis added.). The emphasized language shall be changed to "don't want."

8. Request I.8: In relevant part, the transcript currently references a "***litigation*** specialist." (Tr. 8/08/07, p.114, L.4) (Emphasis added.). The transcript is inaccurate. The emphasized language should be changed to "mitigation."

9. Request I.9: The reporter's transcript for a hearing held on August 8, 2007, contains the following misspellings: "Elan," "Mission," "Pardus," "Ehola," "Rowdbau," "Bauer," "Abdula," "Hampekian," "Marakingus," "Rodrick," and "Hanlin." (*See* Tr. 8/08/07, p.61, L.19; p.62, Ls.4, 10, 11, and 14; p.63, Ls.4-5; p.63, Ls.17 and 23; p.65, Ls.4 and 23; p.66, L.3; p.74, Ls.14 and 24; p.81, L.20; p.83, L.12; p.85, L.24; p.86, L23; p.88, L.18; p.91, L.11; p.134, L.25; p.136, Ls.7 and 22; p.146, L.22; p.147, Ls.14 and 25; p.148, Ls.4 and 14; p.149, L.4; p.153, L.5.) These misspellings shall be changed to Elam, Myshin, Paradis, Jauhola, Raudebaugh, Bower, Abdullah, Hampikian, Merikangas, Roderick and Hanlon, respectively.

Addition of Documents

10. Discovery Response to the Court: This document, filed on March 16, 2007, shall be made part of the record. (*See* R. Vol. I, p.6 (Register of Actions).)

11. Jury Contact Letters Submitted as Exhibits During Court Proceeding: These letters shall be made part of the record. (*See* Tr. 8/08/07, p.112, Ls.12-19; p.113, L.24 – p.114, L.19.)

12. Note from Bailiff Regarding Communication from a Juror: This note shall be made part of the record. (*See* Tr. 8/08/07, p.132, L.18 – p.133, L.23.)

13. Notice of Filing of Appendices to Motion for Permission to Appeal: This document, and its attached appendices, filed on August 23, 2007, shall be made part of the record.

Addition of Transcripts and Court Minutes

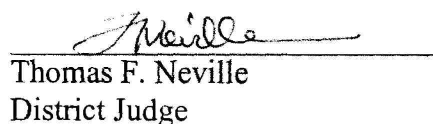
14. Transcript and court minutes for telephonic status conference held on January 6, 2006: No court minutes and no recording exist to be added to the record. As discussed during the hearing held on April 9, 2009, a copy of the Court's calendar for January 6, 2006, and a copy of an email received from the court reporter indicating that the status conference scheduled for that day was not reported, shall be made part of the record.

15. Transcript and court minutes for hearing held on November 15, 2007: The court minutes and the transcript of the hearing held on November 15, 2007, shall be made part of the record.

16. New Request: The court minutes and the transcript from the hearing held on April 9, 2009, shall be prepared and made part of the record.

IT IS SO ORDERED.

Dated this 21st day of April, 2009.



Thomas F. Neville
District Judge