

1-30-2008

## Stuart v. State Clerk's Record v. 4 Dckt. 34200

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Docket #34200

IN THE #C  
**SUPREME COURT**  
OF THE  
**STATE OF IDAHO**

GENE FRANCIS STUART

Petitioner \_\_\_\_\_ and

Appellant

VS.

STATE OF IDAHO

Respondent \_\_\_\_\_ and

Appealed from the District Court of the Second  
Judicial District for the State of Idaho, in and  
for Clearwater County

Hon. Ron Schilling District Judge

Joan M. Fisher and Oliver Loewy  
~~Capital Habeas Unit, Federal Defender Services~~  
~~of Idaho, 317 West 6th Street, Suite 204,~~  
~~Moscow, ID 83843~~

Attorney S for Appellant

L. LaMont Anderson, Attorney General's Office  
~~P.O. Box 83720, Boise, ID 83720-0010 and~~  
~~Lori Gilmore, Clearwater County Prosecutor's~~  
~~Office, P.O. Box 2627, Orofino, ID 83544~~

Attorney S for Respondent

Filed this \_\_\_\_\_ day of COPY, 20\_\_\_\_

\_\_\_\_\_  
Clerk

By \_\_\_\_\_ Deputy

34200

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ROA Report

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Gene Francis Stuart, Plaintiff vs State Of Idaho, Defendant

Gene Francis Stuart, Plaintiff vs State Of Idaho, Defendant

| Date       | Code | User  |   | Judge            |
|------------|------|-------|---|------------------|
| 12/3/2002  | NEWC | VICKY | New Case Filed  | George Reinhardt |
|            |      | VICKY | Post Conviction Relief Filing & Petition For  | George Reinhardt |
|            |      | VICKY | Writ Of Habeas Corpus   | George Reinhardt |
|            | PETN | SUE   | Petition for postconviction relief and petition for writ of habeas corpus (Appendicies A, B, & C sealed per order filed 7/2/07. | George Reinhardt |
| 12/26/2002 | MOTN | SUE   | Motion For Extension Of Time  | George Reinhardt |
| 3/11/2003  | RESP | SUE   | Answer To Fourth Petition For Post Conviction   | George Reinhardt |
| 3/19/2003  | AFFD | SUE   | Affidavits In Support Of Petition For Post-   | George Reinhardt |
|            | MISC | SUE   | Conviction Relief (Affidavits A-D SEALED)   | George Reinhardt |
|            |      |       | Document sealed   |                  |
| 3/24/2003  | HRSC | VICKY | Hearing Scheduled - (04/09/2003) Ron Schilling  | Ron Schilling    |
|            | ORDR | VICKY | Order (supreme Court Order Appoints Schilling   | Ron Schilling    |
|            | CHJG | VICKY | Change Assigned Judge   | Ron Schilling    |
| 4/9/2003   | INHD | VICKY | Interim Hearing Held  | Ron Schilling    |
|            | CMIN | VICKY | Court Minutes   | Ron Schilling    |
| 3/5/2003   | PETN | SUE   | Petition For Appoint. Of Special Prosecutor   | Ron Schilling    |
| 3/12/2003  | ORDR | VICKY | Briefing Order  | Ron Schilling    |
| 3/18/2003  | NOTC | SUE   | Notice Of And Brief In Opposition To  | Ron Schilling    |
|            | MISC | SUE   | Respondent's Petition For Appt. Of Special  | Ron Schilling    |
|            | MISC | SUE   | Prosecutor  | Ron Schilling    |
| 3/20/2003  | ORDR | SUE   | Order To Appoint Special Prosecutor   | Ron Schilling    |
| 3/14/2003  | RESP | SUE   | Petitioner's Response In Opposition To Motion   | Ron Schilling    |
|            | MISC | SUE   | For Summary Dismissal Of Petition For Post-   | Ron Schilling    |
|            | MISC | SUE   | Conviction Relief & Pet. For Writ Of H.c.   | Ron Schilling    |
| 0/10/2003  | MTDM | VICKY | Motion For Summary Dismissal  | Ron Schilling    |
|            | BRIE | VICKY | Brief In Support Of Respondents Motion For  | Ron Schilling    |
|            | BRIE | VICKY | Summary Dismissal   | Ron Schilling    |
| 0/16/2003  | MISC | SUE   | Appendices A-e In Support Of Respondent's   | Ron Schilling    |
|            | MISC | SUE   | Motion For Summary Judgment   | Ron Schilling    |
| 1/12/2003  | MOTN | SUE   | Motion For Enlargement Of Time In Which To  | Ron Schilling    |
|            | MISC | SUE   | File Brief In Opp. To Res. Mot./dismissal   | Ron Schilling    |
| 1/19/2003  | ORDR | VICKY | Order   | Ron Schilling    |
| 2/22/2003  | RESP | VICKY | Petitioner's Response In Opposition To Second   | Ron Schilling    |
|            | RESP | VICKY | Motion For Summary Dismissal Of Petition  | Ron Schilling    |
|            | RESP | VICKY | For Postconviction Relief And Petition For  | Ron Schilling    |
|            | RESP | VICKY | Writ Of Habeas Corpus   | Ron Schilling    |
| 2/26/2004  | HRSC | SUE   | Hearing Scheduled - (03/03/2004) Ron Schilling  | Ron Schilling    |

Gene Francis Stuart, Plaintiff vs State Of Idaho, Defendant

| Date       | Code | User   |  | Judge         |
|------------|------|--------|--|---------------|
| 3/2/2004   | AFFD | SUE    | Affd. In Support Of Mot. To Stay Proceedings   | Ron Schilling |
|            | MOTN | SUE    | Motion To Stay Proceedings   | Ron Schilling |
| 3/3/2004   | INHD | SUE    | Interim Hearing Held   | Ron Schilling |
|            | CMIN | SUE    | Court Minutes  | Ron Schilling |
|            | RMK9 | SUE    | Stay Pending Supreme Court Decision  | Ron Schilling |
| 3/12/2004  | MOTN | SUE    | Motion For Limited Admission   | Ron Schilling |
| 3/17/2004  | ORDR | SUE    | Order Staying Proceedings Pending Dispostion in the Idaho Supreme Court  | Ron Schilling |
|            | ORDR | SUE    | Order Granting Limited Admission and Waiver  | Ron Schilling |
| 12/23/2005 | HRSC | SUE    | Hearing Scheduled (Telephonic Status Conference 01/06/2006 10:00 AM)   | Ron Schilling |
|            |      | SUE    | Notice Of Hearing  | Ron Schilling |
|            | PROS | SUE    | Prosecutor assigned Lori Gilmore   | Ron Schilling |
| 12/27/2005 | MOTN | SUE    | Motion to lift stay  | Ron Schilling |
| 1/6/2006   | HRHD | SUE    | Hearing result for Telephonic Status Conference held on 01/06/2006 10:00 AM: Hearing Held  | Ron Schilling |
|            | CMIN | SUE    | Court Minutes  | Ron Schilling |
|            | HRSC | SUE    | Hearing Scheduled (Telephonic Scheduling Conference 03/30/2006 10:00 AM)   | Ron Schilling |
| 1/23/2006  |      | SUE    | Notice Of Hearing  | Ron Schilling |
|            |      | SUE    | Notice Of Hearing  | Ron Schilling |
| 2/10/2006  | BRIE | SUE    | Petitioner's supplemental respons in opposition to second moiton for sumary dismissal of petition for postconviction relief and petition for writ of habeas corpus | Ron Schilling |
| 2/10/2006  | BREF | SHARON | Supplemental Brief in Support of Respondents' Motion for Sumamry Dismissal   | Ron Schilling |
| 2/30/2006  | HRHD | SUE    | Hearing result for Telephonic Scheduling Conference held on 03/30/2006 10:00 AM: Hearing Held  | Ron Schilling |
|            | CMIN | SUE    | Court Minutes  | Ron Schilling |
|            | REPL | VICKY  | Petitioner's Reply to Supplemental Brief in Support of Respondents' Motion for Summary Dismissal   | Ron Schilling |
|            | HRSC | SUE    | Hearing Scheduled (Telephonic Scheduling Conference 05/22/2006 10:00 AM) To be held at the mximum security prison in Boise   | Ron Schilling |
| 2/22/2006  | AFFD | SUE    | Affidavit of Susan Kathleen Stuart   | Ron Schilling |
|            |      |        | Document sealed  |               |
|            | AFFD | SUE    | Affidavit of Jim Bigley  | Ron Schilling |
|            |      |        | Document sealed  |               |
|            | AFFD | SUE    | Affidavit of Mary Jane Bigley  | Ron Schilling |
|            |      |        | Document sealed  |               |

Gene Francis Stuart, Plaintiff vs State Of Idaho, Defendant

| Date      | Code | User | Judge   |
|-----------|------|------|---|
| 5/22/2006 | AFFD | SUE  | Affidavit of Gene Lee Dally<br>Document sealed<br>Ron Schilling       |
|           | AFFD | SUE  | Affidavit of Daniel Heagly<br>Ron Schilling                           |
|           | AFFD | SUE  | Affidavit of Malvin W. Kraft<br>Document sealed<br>Ron Schilling      |
|           | AFFD | SUE  | Affidavit of Sharie Lee Kuhl<br>Document sealed<br>Ron Schilling      |
|           | AFFD | SUE  | Affidavit of Robert Daniel McDowell<br>Ron Schilling                  |
|           | AFFD | SUE  | Affidavit of Donna Marquette<br>Document sealed<br>Ron Schilling      |
|           | AFFD | SUE  | Affidavit of Delores Mary Nichols<br>Document sealed<br>Ron Schilling |
|           | AFFD | SUE  | Affidavit of Claudia J. Petrie<br>Ron Schilling                       |
|           | AFFD | SUE  | Affidavit of Doug Seeger<br>Ron Schilling                             |
|           | AFFD | SUE  | Affidavit of Coby L. Smith<br>Ron Schilling                           |
|           | AFFD | SUE  | Affidavit of Thomas H. Thorn<br>Document sealed<br>Ron Schilling      |
|           | AFFD | SUE  | Affidavit of Sheri Wald<br>Ron Schilling                              |
|           | AFFD | SUE  | Affidavit of Esther Ziemann<br>Ron Schilling                          |
|           | AFFD | SUE  | Affidavit of Virginia Lee Presler<br>Document sealed<br>Ron Schilling |
|           | AFFD | SUE  | Affidavit of Michael A. Lowe<br>Ron Schilling                         |
|           | AFFD | SUE  | Affidavit of Debra K. Johnson<br>Ron Schilling                        |
|           | AFFD | SUE  | Affidavit of Rose Mary Connelly<br>Document sealed<br>Ron Schilling   |
|           | AFFD | SUE  | Affidavit of Coby L. Smith<br>Ron Schilling                           |
|           | AFFD | SUE  | Affidavit of Doug Seeger<br>Ron Schilling                             |
|           | AFFD | SUE  | Affidavit of Claudia J. Petrie<br>Ron Schilling                       |
|           | AFFD | SUE  | Affidavit of Delores Mary Nichols<br>Document sealed<br>Ron Schilling |
|           | AFFD | SUE  | Affidavit of Donna Marquette<br>Document sealed<br>Ron Schilling      |
|           | AFFD | SUE  | Affidavit of Robert Daniel McDowell<br>Ron Schilling                  |
|           | AFFD | SUE  | Affidavit of Sharie Lee Kuhl<br>Document sealed<br>Ron Schilling      |
|           | AFFD | SUE  | Affidavit of Malvin W. Kraft<br>Document sealed<br>Ron Schilling      |
|           | AFFD | SUE  | Affidavit of Daniel Heagy<br>Ron Schilling                            |
|           | AFFD | SUE  | Affidavit of Gene Lee Dally<br>Document sealed<br>Ron Schilling       |
|           | AFFD | SUE  | Affidavit of Mary Jane Bigley<br>Document sealed<br>Ron Schilling     |

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ROA Report

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Case: CV-2002-0000473 Current Judge: Ron Schilling  
Gene Francis Stuart, Plaintiff vs State Of Idaho, Defendant

Gene Francis Stuart, Plaintiff vs State Of Idaho, Defendant

| Date       | Code | User |  | Judge         |
|------------|------|------|--|---------------|
| 5/22/2006  | AFFD | SUE  | Affidavit of Jim Bigley  | Ron Schilling |
|            |      |      | Document sealed  |               |
|            | AFFD | SUE  | Affidavit of Susan Kathleen Stuart   | Ron Schilling |
|            |      |      | Document sealed  |               |
|            | AFFD | SUE  | Affidavit of Thomas H. Thorn   | Ron Schilling |
|            |      |      | Document sealed  |               |
|            | ADVS | SUE  | Hearing result for Motion held on 05/22/2006<br>10:00 AM: Case Taken Under Advisement To<br>be held at the mximum security prison in Boise   | Ron Schilling |
|            | CMIN | SUE  | Court Minutes  | Ron Schilling |
| 6/8/2006   | MISC | SUE  | Petitioner's supplemental authority  | Ron Schilling |
| 10/30/2006 | ORDR | SUE  | Order  | Ron Schilling |
|            | STIP | SUE  | Stipulation that parties may examine the exhibits<br>in the custody of the Clerk of the Clerk  | Ron Schilling |
| 3/12/2007  | CDIS | SUE  | Civil Disposition entered for: Beauclair, Tom,<br>Other Party; Fisher, Greg, Other Party; Gilmore,<br>Lori, Other Party; State Of Idaho, Other Party;<br>Stuart, Gene Francis, Subject.<br>order date: 3/12/2007 | Ron Schilling |
|            | MEMO | SUE  | Memorandum Opinion on Petition for Post<br>Conviction Relief and/or Writ of Habeas Corpus<br>and Motion to Correct Illegal Sentence, to Vacate<br>Sentence of Death and for New Sentencing Trial                 | Ron Schilling |
|            | SCAN | SUE  | Scanned 03/29/07   | Ron Schilling |
| 1/18/2007  | SCAN | SUE  | Scanned 04/26/2007   | Ron Schilling |
|            | JDMT | SUE  | Judgment Dismissing Case with Prejudice  | Ron Schilling |
| 1/23/2007  | NOTA | SUE  | NOTICE OF APPEAL   | Ron Schilling |
|            | APSC | SUE  | Appealed To The Supreme Court  | Ron Schilling |
|            | MOTN | SUE  | Motion that costs of appeal be at county expense   | Ron Schilling |
| 1/30/2007  | ORDR | SUE  | Order  | Ron Schilling |
| 1/8/2007   | MISC | SUE  | Amended Notice of Appeal   | Ron Schilling |
| 1/6/2007   | MISC | SUE  | Second Amended Notice of Appeal  | Ron Schilling |
| 1/28/2007  | STIP | SUE  | Stipulation  | Ron Schilling |
|            |      |      | Document sealed  |               |
| 1/2/2007   | ORDR | SUE  | Order  | Ron Schilling |
|            |      |      | Document sealed  |               |
| 1/25/2007  | NOTC | SUE  | Notice of lodging reporters transcript and clerk's<br>record   | Ron Schilling |
| 1/22/2007  | AFFD | SUE  | Affidavit in support of motion   | Ron Schilling |
|            | MOTN | SUE  | Motion for extension of time to file objections to<br>clerk's record and reporter's transcript   | Ron Schilling |
|            | ORDR | SUE  | Order  | Ron Schilling |
| 1/25/2007  | NOTC | SUE  | Notice of hearing in RE: Settlement of Clerk's<br>Record   | Ron Schilling |



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ROA Report

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Case: CV-2002-0000473 Current Judge: Ron Schilling  
Gene Francis Stuart, Plaintiff vs State Of Idaho, Defendant

Gene Francis Stuart, Plaintiff vs State Of Idaho, Defendant

| Date       | Code | User   |   | Judge         |
|------------|------|--------|---|---------------|
| 9/25/2007  | NOTC | SUE    | Notice of and objeciton to Clerk's record and reporter's transcript on appeal | Ron Schilling |
| 10/4/2007  | HRSC | BARBIE | Hearing Scheduled (Objection 10/09/2007 10:00 AM)                             | Ron Schilling |
| 10/31/2007 | ORDR | SUE    | Order   | Ron Schilling |
| 12/21/2007 | STIP | SUE    | Stipulation regarding correction of clerk's record                            | Ron Schilling |
| 1/2/2008   | ORDR | SUE    | Order regarding correction of Clerk's record                                  | Ron Schilling |

County of Shoshone )  
 )  
State of Idaho )

DV02-473  
CR81-8495  
MAR 22 2008  
SIS

STATEMENT OF ESTHER ZIEMANN

I, Esther Ziemann, state the following under penalty of perjury:

1. My name is Esther Ziemann. In approximately 1967, in perhaps my sophomore year in high school, I moved with my family to Darby, Montana from Stevensville, Montana.

2. Shortly after starting to attend Darby High School, I became friends with Sharie Toavs.

3. Our high school class was small, so we all knew one another pretty well. I knew Gene Stuart, though we didn't socialize. He hung out with Doug Seeger and some other guys. Gene did not stand out in any way. Like most of us, he just seemed ordinary. He was not into anything bad. He never got into particular trouble, I never saw him get into arguments or fights with anyone, and I never saw him lose his temper.

4. In Sharie's and my junior or senior year, her mother left the family. I understood that she left town with someone else.

5. Some time before Sharie's mother left, Sharie and Gene started going out. They were mismatched socially. Even in the relatively poor town of Darby, Gene clearly was from a lower social class than Sharie. While Gene's father owned a wrecking yard and his mother did not work, Sharie's father was a logger and rancher who owned property just outside Darby and her mother taught at the high school.

6. Gene and Sharie were together all the time after they became a couple. At some point

in our senior year, Sharie told me she was pregnant by Gene, and she and Gene married.

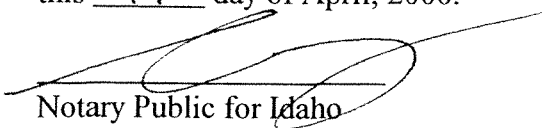
7. I knew Sharie very well. We talked about everything going on in our lives. At no time did Sharie ever complain to me about her relationship with Gene. I never saw them argue or fight. I never heard anyone else talk about them fighting, and no one every suggested that they did. If anyone had told me that Gene and Sharie had fought or that Gene had hit Sharie, I am sure I would remember it.

8. Sometime in the mid-1980s I heard that a Gene Francis Stuart was an Idaho death row inmate. I was shocked and just couldn't believe that it was the same Gene Francis Stuart I had known in high school. Then, at my 20<sup>th</sup> class reunion, it was confirmed. I am still shocked because the Gene I knew in Darby would not kill anyone.

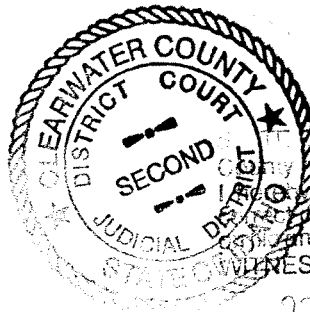
9. Before being contacted by the Capital Habeas Unit of the Federal Defenders of the Eastern District of Washington and Idaho, I have never been contacted by any police officer, court official, prosecution or defense representative with regard to Gene Stuart's case. If any such person had contacted me earlier, I would have told them everything I know about Gene's background.

*Esther J. Ziemann*  
Esther Ziemann

Subscribed and sworn to before me  
this 17<sup>th</sup> day of April, 2006.

  
Notary Public for Idaho

My commission expires:



of Clearwater, Idaho, do hereby certify that the foregoing is a full, true, and correct copy of an instrument as the same now reads and of record in my office. WITNESS my hand and official seal hereto affixed

this 22<sup>nd</sup> day of May A.D., 20 06  
ROBIN CHRISTENSEN, CLERK OF THE DISTRICT COURT EX OFFICIO AUDITOR & RECORDER

By Deputy Babie Dery

Esther Ziemann Statement -2

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County of King )  
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State of Washington )

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STATEMENT OF DANIEL HEAGY

I, Daniel Heagy, swear under penalty of perjury that the following is true:

1. My name is Daniel Heagy.
2. Gene Stuart and I were neighbors for about a year in the late 1970s in Woodinville, Washington. Our yards abutted each other and our homes were a couple hundred feet from each other. Gene was already living in his house when a friend of mine and I moved into the house next door in the spring of 1978. When a few months later I married my now ex-wife Claudia, she moved in with me and my friend. Claudia and I moved out in the spring of 1979.
3. During the time Gene and I were neighbors, we became pretty good friends. I'd stop by his place at least once or twice a week after work to hang out and have a beer while Gene worked on cars. And Gene would come over to my place occasionally to hang out. We'd get together from time to time on the weekends as well.
4. Sometime during that year, Gene's son, Gene Lee, came to live with Gene for a while. Seeing the relaxed way they interacted left no doubt in my mind that they were happy being around each other. I thought Gene was a great dad. Gene was such a great father that it is very hard for me to believe that he was charged with, let alone convicted of, hurting and killing a child.
5. During that entire year, I never once saw Gene lose his patience or become angry with or at a person. Even when something went wrong with a car he was working

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on, he was mellow.

6. Gene's wife Vicki was another matter. She was a fruitcake. She'd come over all the time complaining that Gene was beating her up, but I never saw a scratch or bruise on her. And I saw her at least once each week. I have always had strong feelings about men who hit women. If there had been any evidence supporting any of Vicki's stories, I would have believed her. But there never was.

7. Late one night, Vicki came to my house and beat on the door in near hysterics. She was completely naked. My then-wife and I let her in, and she told us that Gene had torn up the house, beat her up, tried to kill her, and locked her out naked. The first thing I noticed is that she appeared to have no injuries at all on her body. But I went over to her and Gene's house to see what was up. It was unlocked, so I went inside. No one was there, the house was neat, and there was no sign of any struggle. And I didn't see any bruises on Vicki over the next few days either. This was the kind of stuff that she did.

8. Vicki seemed to believe her own lies. She would be normal one time you would see her, then the next time would be in never-never land. She seemed to have a problem comprehending reality, and it seemed she lived in her own fantasy world.

9. Her mood changed so quickly and for no apparent reason that I thought she had multiple personalities. For example, when we were all together socializing, one minute Vicki would be laughing, and the next minute she would be angry or withdrawn.

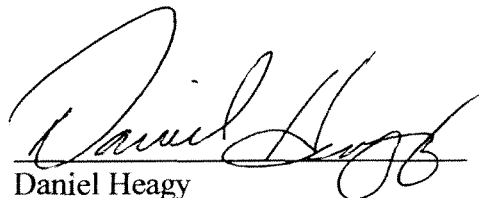
10. Vicki frequently just disappeared for days at a time. Eventually, she'd come back, but in the meantime Gene would be very worried because he had no idea where she'd gone.



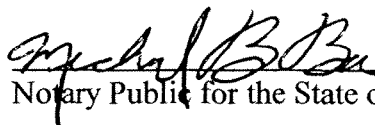
11. Vicki was very flirtatious regardless of whether Gene was present. She'd smile, play up to, and touch men. She'd try to flirt with me in front of Gene, and that always made me uncomfortable.

12. Nothing that Vicki said could be relied on to be true. She had a reputation among those who knew her in the Woodinville area for being dishonest.

13. Before being contacted by the Capital Habeas Unit of the Federal Defenders of the Eastern District of Washington and Idaho, no prosecuting attorney, defense attorney, attorney's representative, or law enforcement official has ever initiated contact with me regarding Gene Stuart or his wife Vicki Stuart. Nor do I have knowledge of any such attempt to contact me. Had any such person contacted me at any time, I would have told them everything I know about Gene Stuart and Vicki Stuart.

  
Daniel Heagy

Sworn before me this 17 day of  
September, 2005.

  
Notary Public for the State of Washington

My commission expires: 4/19/09



Page 3 of 3

... is a full, true, and  
... the same day  
... my hand and official seal hereto affixed  
... day of May A.D. 2006  
... COURT EX OFFICIO CLERK & RECORDER  
... deputy Paula Depp

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County of King        )  
                                  )  
State of Washington    )

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✓ MAY 22 2006  
SRS

STATEMENT OF DEBRA K. JOHNSON

I, Debra K. Johnson, swear under penalty of perjury that the following is true:

1. My name is Debra K. Johnson.

2. I came to know Vicki Owens in the mid-1970s. At that time, my now ex-husband Gary Hirschhorn and I were separated but not yet divorced. I was living with Gary's and my six-year old son in a house in Kirkland, Washington. Gary and Vicki had started a relationship together.

3. One afternoon, Vicki came to my house. I was alone and in the kitchen when I heard someone pounding on the front door. I looked out through the living room picture window to see who was at the door and saw it was Vicki. She saw me, too. Vicki started yelling at me. I don't remember what she was yelling, but I was afraid. The door was locked and I was not about to let her inside. But she threw herself through the picture window, breaking it and the screen and continuing to yell at me. Once inside, she cornered me in the kitchen, grabbed my long hair and wrapped it around her hand. Then she picked up a knife, dragged me down the hall by my hair, forced me into my bedroom and threw me onto the bed. Still holding me by the hair, she held the knife above me, and told me she was going to kill me. Throughout this ordeal, I was screaming. Luckily, when a neighbor came over to investigate, Vicki left.

4. Soon after Vicki left, law enforcement officials arrived. They would have

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been either the Redmond Police, Kirkland Police or the King County Sheriff or some combination, but I do not recall which.

5. Within a few months of Vicki breaking into my home and threatening to kill me, Gary asked me to meet him at a Redmond restaurant to talk about the terms of our divorce and/or our child custody. After we arrived and sat down, I saw Vicki through the window approaching the entrance. I immediately left, managing to avoid Vicki. But when I got to my car, one of my tires had been slashed. I called the Redmond Police and reported the matter. When I returned home that evening, a rock had been thrown through my back window.

6. Vicki had a reputation amongst my friends and peers in the Redmond/Kirkland community where I lived for being dangerous, mentally unstable and a liar. This included a large group of people from Redmond High School, but became larger to include others as we were all now adults. This reputation rested on various incidents, including the community belief that she had intentionally started the 1973 garage fire in which her first husband, Doug Parker, died.

7. Before being contacted by the Capital Habeas Unit of the Federal Defenders of the Eastern District of Washington and Idaho, no prosecuting attorney, defense attorney, attorney's representative, or law enforcement official has ever initiated contact with me regarding Vicki Owen. Nor do I have knowledge of any such attempt to

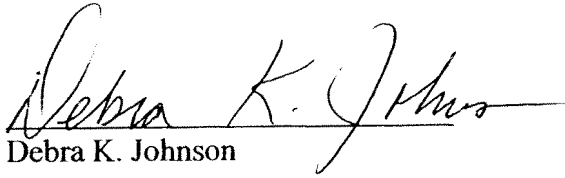
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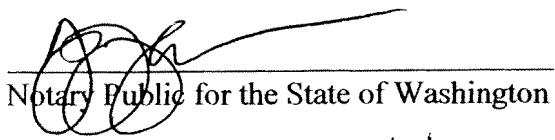
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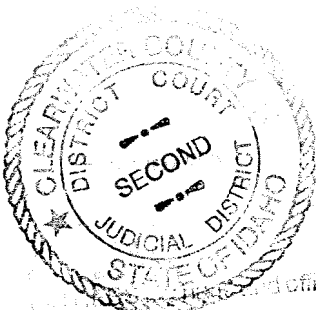
contact me. Had any such person contacted me at any time, I would have told them all I know about Ms. Owen.

  
Debra K. Johnson

Sworn before me this 17 day of Sept, 2005.

  
Notary Public for the State of Washington

My commission expires: 5/7/06



Official seal here to affixed  
22<sup>nd</sup> day of May A.D. 2006  
COURT EX OFFICIO AUDITOR & RECORDER  
Deputy Billy Day

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County of Missoula )  
)  
State of Montana )

STATEMENT OF MICHAEL A. LOWE

I, Michael A. Lowe, state the following under penalty of perjury:

1. My name is Michael A. Lowe. I live in Missoula, Montana and am employed with Big Sky Supplies, a company that installs gym floors and sells custodial supplies for schools and recreational facilities. I have owned and operated this business since 1989, when I retired from being a public school administrator. I received a B.A. in Business and a B.A. in Sociology from The College of Great Falls in 1965, and I received an M.A. in Education Administration from the University of Montana in 1969.

2. I was the principal of Darby High School from 1968 to 1970, during the time when Gene F. Stuart attended the school. Prior to being principal, I was a teacher from 1966 to 1968. After my tenure as principal at Darby I went on to be superintendent of several public school districts around the State of Montana for the rest of my career as an administrator.

3. During my tenure at Darby High, one of the big divides among the kids was economic. There were rich kids and, then, there were poor kids. This economic division existed in the general Darby community. Whether you were rich or poor had real practical consequences in terms of the opportunities available to you when you graduated. A large number of our kids were on the free hot lunch program. However this was before the time when schools became very active in the social aspect of kids' lives outside school and so it was difficult to know for sure what was really happening in their lives.

Statement of Michael A. Lowe

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4. As the high school principal, I was in a relatively unique position to observe the community. I was only 25 years old when I first became principal at Darby High. Because I was not that much older than many of the kids at the school, I felt I could relate to them more easily than most school administrators.

5. I started the wrestling program at Darby High in the fall of 1968. The hope was to provide the less fortunate kids a place to have an outlet, and a place to showcase many of their untapped skills. Nearly all Darby kids worked jobs during the summertime and most worked during the school year. Darby kids were very hard workers, and I knew that their intense work ethic could transfer to sports quite easily. The program also aimed to teach by example various lessons, including sportsmanship. Finally, I wanted a way to help the kids see places other than Darby, something that happened naturally when the team meets were scheduled in other towns. During these trips, many kids both ate at a restaurant and stayed in a motel for the first time in their lives. In fact, for many of these kids I remember even having to teach them how to properly use a knife and fork.

6. I coached Gene Stuart in 1968-69 during his sophomore and junior years at Darby High School. I thought Gene would be a good candidate for the team, so I asked him to join. He had a very strong and lean build, and he seemed interested in learning how to wrestle. He was a physical specimen. Although Gene was not big, he had nearly no fat on his body. I knew Gene to be easy going and well-liked, so I figured he would do well in our new wrestling program. Also, even though this was a time and a school where it seemed like fights were always breaking out, Gene was never one to get into fights at school. For whatever reason, the males at Darby were constantly establishing the pecking order, which involved fistfights on a regular basis. I

personally really liked Gene very much before I asked him to wrestle, and even more once I had the opportunity to coach him.

7. Gene asked his parents, but he initially came back and said he could not wrestle because his parents said he had too much work to do at home. I visited the Stuart home at one point to convince Gene's parents to let Gene join the team. I observed that the Stuarts did not have much money, and they lived in a junk yard. Generally, I had the notion that the Stuart family was troubled by alcoholism. I got this feeling because when I visited the Stuart house, I saw many empty beer cans all over the place, and it was local knowledge that Gene's parents drank a lot. When I visited the home, I was not intending to make a judgment about Gene's parents, but the place was so messy I couldn't help but think there was something odd about the family. The place was covered with dirty dishes and was generally very unclean. At that time I spoke with Bob Stuart about Gene being able to wrestle. As a result of the visit, Gene's parents ultimately agreed that Gene could wrestle. I went to the Stuarts' house on no more than a couple of occasions and while it may not have been the worst place I was in it was near the bottom.

8. I would not be surprised if Gene was physically abused by his father, Bob Stuart. Kids frequently came to school with bruises, but it was hard to tell if they were from parents or from the frequent fights that took place to establish the pecking order. Although I have no direct knowledge of abuse in the Stuart household, domestic abuse was a subject not mentioned in those days. I got the notion that Gene's father was abusive because Gene would frequently make comments such as, "My dad would beat the crap out of me if I did that," or other comments that indicated to me that Gene could at times be afraid of Bob Stuart's wrath. At that time, in spite of

any suspicions we may have had about abuse in the Stuart household, we would not have done anything about it. In a conservative school district like Darby it just wasn't done. What happened in the home stayed in the home and it was considered none of our business by school district policy. I would probably have been fired if I'd taken suspicions like that to the school board. We expected kids to do well no matter what situation they came out of. It was only later that schools began to try and deal with the students' home problems in a formal way.

9. During the two years that Gene wrestled at Darby High, he was an asset to the team. He won more matches than he lost, and he won matches as a novice against boys who had been wrestling for years. I thought of Gene as a good kid who needed direction, and a kid who took direction well when it was given. This point was made obvious by Gene's ability to pick up wrestling and be able to compete against others with more experience than he had.

10. Gene was always polite and well-behaved toward me. He had his moments of normal misbehavior at school, but nonetheless did what it took to get by. Gene was an average student at best who completed his school work and attended school, but who did not put any extra time in on his school work. Gene missed days at school like any other kid but in no way could you say that Gene was a truant. Gene was not an oddity at Darby High. In fact he was very normal while he was in high school. Gene had a very positive, unsophisticated nature. He was very open and honest about who he was and what he was doing. In no way would I describe him as a liar or dishonest. Along the same lines, Gene was not the kind of kid to try to be self-serving or to manipulate people around him. He had a very good work ethic, and I knew that he had several jobs during high school that he managed to keep even though he was pretty busy most of the time.

11. While Gene was not one of the most popular kids at school, he was good natured, got along well with others, and was accepted by his classmates. He had some pretty good friends too, so I don't think you could really call him a loner or a shallow person. Gene was not a troublemaker. I remember he did get suspended once for drinking at a school function. As I recall, the instigator then was Don Whitlow and in that situation Gene was just going along with the guys. By and large Gene followed the rules, and any trouble he got into was just mischief. Gene was certainly not someone you might characterize as being a delinquent. I don't remember his name ever coming up in connection with vandalism or stealing and there was certainly plenty of that around in Darby at the time. He seemed to like coming to school. If you paid attention to Gene, he was very open to learning and excelling at whatever he had learned. For example, learning wrestling can be very tough for most people, since it is a study of physics and geometry, and knowing how to use anatomical leverage and angles to your advantage. Gene picked up these new wrestling skills very quickly, and was able to put these scientific principles to practice on the wrestling mat while I am sure he would not have thought of this as I describe it. Because he was so open to learning in a structured wrestling practice, I found that Gene could do well as long as he got a little direction and attention.

12. Gene laughed and joked a lot. He was talkative and outgoing, and seemed to overcome his humble background while at school and participating in school activities. Gene always had a positive attitude, and he always came to school neat and clean. He was more orderly than a lot of boys his age. His clothes were not the best, but he appeared not too different in appearance than most of the kids from Darby.

13. I would try to talk to Gene and the other boys about their futures. I recall specifically

advising Gene that he might be able to get a wrestling scholarship to a smaller technical college, and that the military could also provide him with good job training. I advised Gene that college or the military was a good way to someday get a good job and to someday have a career and earn a good living. The school counselor, Larry Biere, and I generally had this conversation with most of the students in order to discuss possibilities for their futures. Since I was the wrestling coach, I especially took time out to talk with the boys who were on the wrestling team since I felt I knew them better from dealing with them on a daily basis at practice.

14. I recall Gene and many of the other boys always working on their cars. Most of the kids had no money, so they tried to put cars together for themselves and they were always patching them up and fixing them to keep them running and in the case of Gene because he enjoyed it. In fact, I always pictured Gene as being the neighborhood auto mechanic who also worked on his own cars in his garage at home. He just seemed like the kind of guy who would really excel in an area like that, plus I knew how much he and his high school friends really were interested in having cars

15. Gene starting dating Sharie Toavs during their senior year. Gene did not wrestle that winter, and he and Sharie got married. During that time period in Darby, it was not uncommon for couples to marry while still in high school. Sharie Toavs was a quiet, shy girl and a very good student. Education was important in her family which was not always true of many families in the Darby area. In fact, I always thought that she and Gene were not a good match because of their diverse interests. Even when they were in high school, I figured that Gene and Sharie would not last long. She seemed like she would get bored with Gene's interests very quickly. Sharie was much more academically gifted than Gene, and Gene seemed interested in cars, wrestling and his

male friends. I found myself wondering what they would talk about.

16. I remember Sharie dressing very sexy for the time period when she was a high school student. By this, I mean that Sharie often wore very short skirts that tended to make her stand out in a crowd which in a way was a contradiction to her shyness.

17. I think if Gene missed a lot of school after he married Sharie, it was because his priorities had shifted: being a husband and expectant father he had to provide for his family. Even so, Gene still managed to graduate. In fact considering where he came from and the situation he was in, the fact that Gene graduated was an achievement.

18. I am aware that several of Gene's contemporaries at school also got into trouble or faced severe personal shortcomings later in their lives. For instance, one of Gene's contemporaries, Abe Foster, supposedly killed a sergeant while in the military. Don Whitlow's brother Ken Whitlow is a convicted pedophile. One of Gene's friends, Cecil Mitchell, committed suicide by shooting himself in the head. This happened when he and Gene were still in High School, and it was a pretty traumatic event for everyone and it must have been especially so for Gene. Several others died in accidents.

19. I think there is something unique about the cultural and socioeconomic environment in Darby, Montana because of its isolation. This part of Montana was just beginning "to be found" at that time. Timber jobs were on the decline and unemployment was high which I am sure has something to do with a community's poverty, alcoholism and socio-economic problems in general. As were a lot of Montana communities in the late 1960's, Darby was behind the rest of the country in most economic improvements for the individual families. It was a redneck society and really was proud of this thereby isolating itself from the rest of country.

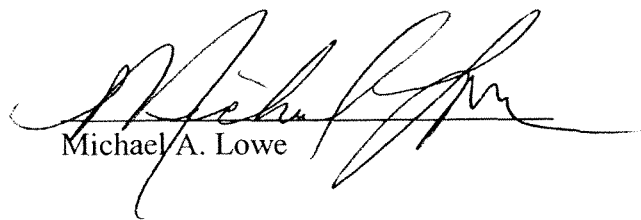


Economically and socially it was just behind the rest of the country at this time.

20. I am deeply troubled by what happened with Gene. Without excusing what Gene did, I find it hard to believe that Gene would have hurt a child on purpose, especially knowing him so well as a student. Based on everything I knew about Gene; his openness and honesty, his good relationships with others, the fact that he was pretty hardworking and responsible, that he didn't lie or cheat, and especially that he wasn't violent, he just didn't seem like the kind of kid who would do something like that.

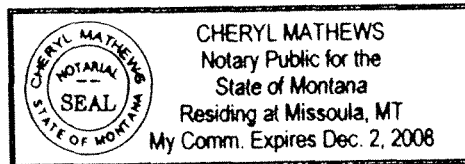
21. My years spent at Darby High School were among my favorite of my whole career. Darby High was a unique school with unique kids, and I did my best during my two years there to try to improve the quality of life for the students I oversaw. In my twenty five years as a teacher, counselor, and school administrator, and the thousands of kids that I knew over the years, Gene Stuart was memorable.

22. Before the Federal Defenders of Eastern Washington and Idaho contacted me, no police officer, court official, prosecution or defense representative ever approached me about Gene Stuart's case. If any such person had contacted me earlier, I would have told them everything I know about Gene's background.

  
Michael A. Lowe

Subscribed and sworn to before me  
this 25 day of April, 2006.

  
Notary Public for Montana



My commission expires: Dec 2, 2008

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State of Washington )

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STATEMENT OF ROBERT DANIEL MCDOWELL

I, Robert Daniel McDowell state the following under penalty of perjury:

1. My name is Robert McDowell and I am currently a paint shop foreman in the Seattle, Washington, area. I testified at Gene Stuart's Moscow, Idaho, trial in 1982.

2. I first met Gene Stuart a few years earlier in the spring of 1979 when we both lived in the Seattle, Washington, area. Our friendship grew from our common interest in restoring old Corvettes. It was clear that Gene knew much more about Corvettes than I did, so we made a deal: I would help Gene finish his Corvette that summer and learn what he knew along the way, and then Gene help me work on mine. We spent that entire summer together working on cars. Gene taught me everything I now know about working on Corvettes. He was a very patient teacher and a perfectionist about his work. At the end of the summer, Gene moved to Idaho and we saw each other during Gene's occasional visits to the Seattle area.

3. In 1981, I was scheduled to drive my car in a local fourth of July parade. I still needed to do a lot of work on my car, so I contacted Gene in Idaho and asked him to help me. He agreed and I took the car over to Orofino during my week of vacation from work. We worked on the car all week and I stayed with Gene, Kathie and Robert. They seemed to be happy together, and I saw absolutely no indication of trouble.

4. Shortly after returning to Seattle, a car kicked gravel all over my new paint job, pretty much ruining it. Not only was this going to cost me money to fix, it meant I might not be able to

have my car ready for the parade. I called Gene for advice about repainting the car quickly. He was very helpful, but I still felt overwhelmed. A day or so later, just as I was starting to repaint, Gene showed up in Washington to help. After a very long night, we finished the car just in time for me to drive to the parade. Gene's helping me out like that would have been kind had he lived next door, but the fact that he had traveled all the way from Idaho to help me was especially kind.

5. In late September or early October, 1981, Gene phoned me and explained he was calling from the jail in Orofino, Idaho. He told me he was being charged with murder and needed to raise money for a lawyer and bail. He knew I really liked one of his Corvettes, and he offered to sell it to me. I told him I did not have that much money on hand, but I would look into seeing if I could make it work. Over the next few days, Gene and I talked a few more times on the telephone about my buying his car. Gene and I agreed that I'd pay him \$5,000 for the car. I arranged to borrow the money from my girlfriend's parents.

6. However, shortly after Gene and I finalized our agreement, I was called by the police. I remember it was a weekday evening after work. They said they wanted to stop by and ask me some questions about Gene. Two plain clothes law enforcement officers came to my home in Bothell in an unmarked police car. They said we could talk better at the police station, so we went to the King County Sheriff's office in Kenmore, Washington. There, we went into a conference room. After both officers questioned me about Gene in a friendly way, they left me alone in the room by myself. Then one officer came back and got right in my face. He told me that if I bought the car from Gene life would not be pleasant for me. Based on that threat, I decided not to buy the car from Gene.

7. Shortly before Gene's trial I was contacted by phone by his lawyer, Bob Kinney, and

asked to testify at Gene's trial. I believe we had a short telephone conversation, and then a personal meeting for about ten to fifteen minutes to prepare my testimony. He gave me very little idea of what to expect when I testified. I was in my early 20s and had never done anything like that before. He basically just explained that he was going to ask me some questions, and I should answer them.

8. I did not feel prepared at all to testify. At some point when I was up on the witness stand, the prosecutor threw three or four Polaroid photos of the deceased child at me to look at. I was already nervous, but this upset me more. I was visibly upset, shocked and shaken. Gene's attorney asked me very few questions, and he did not seem prepared.

9. I know that he prepared Brett Hagedorn and Dave Wilhite even less, as I was the point person for our group and had the most contact with Gene's lawyer.

10. Gene's attorney never explained to me anything about Gene's case, including that it was a "murder by torture" case. Had I known, I would have testified better because I know Gene is not a torturer.

11. While we waited outside the courtroom on the day I testified, I noticed all of the women that were there to testify against Gene. They were all grouped together talking to one another and comparing notes on their testimony. They seemed to be ganging up on him.

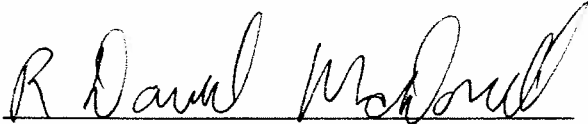
12. Vicki, Gene's ex-wife, even came up to try to convince us of how bad Gene was. She talked mostly to Dave, who was also testifying. It seemed she was trying to turn Gene's witnesses against Gene. I was not able to talk to Gene at his trial. That is the last time I saw him.

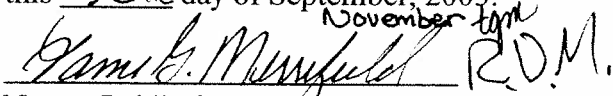
13. I knew Vicki previously when she was married to Gene because I was at her and

Gene's house every day for about a month before she left Gene in the summer of 1979. I never saw any problems between them, and never saw any bruises or injuries on Vicki. I was very surprised to later hear of Vicki's accusations against Gene at the trial.

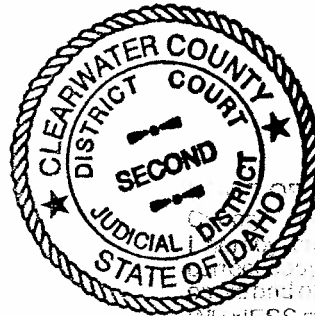
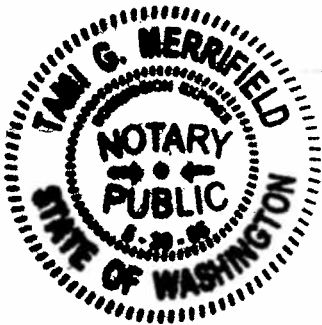
14. My dad purchased a Volkswagen from Gene and Vicki in late 1978 or early 1979 to use to commute into Seattle. I remember there was a problem with the car, but Gene worked on the car before handing it over to my dad. Many months later, my brother Pat and Dave Wilhite were driving the Volkswagen in Bothell. They were pulled over by the police, who pulled their guns and ordered the two men to get out of the car and lay face down on the ground. When an officer went over to pat search them, his gun went off accidentally, almost hitting my brother and scaring him to death. We subsequently learned that Vicki had, at some point, falsely reported that the Volkswagen was stolen when she got mad at Gene. My father is now deceased.

15. Since Gene's trial and before now, I have never been contacted by any other defense or prosecution representative. If I had been I would have gladly told them anything I know about Gene, our relationship and his background.

  
Robert Daniel McDowell

Subscribed and sworn to before me  
this 30<sup>th</sup> day of ~~September~~ <sup>November</sup>, 2005.  
  
Notary Public for Washington

My commission expires: 05-30-06



WITNESS my hand and official seal hereto affixed  
this 22<sup>nd</sup> day of May, A.D. 2006  
at \_\_\_\_\_  
County \_\_\_\_\_ State of \_\_\_\_\_  
Notary Public  
Deputy Beth De

County of Thurston  
State of Washington

CN02-473  
CN02-443  
CR01-8495  
MAY 22 2009  
SLS

STATEMENT OF CLAUDIA J. PETRIE

I, Claudia J. Petrie, swear under penalty of perjury that the following is true:

1. My name is Claudia J. Petrie.
2. In the summer of 1978, I married Daniel Heagy and moved into the house he lived in with his housemate in Woodinville, Washington. Our next door neighbors were Gene Stuart and his wife, Vicki Stuart. I lived there for about a year.
3. Gene frequently came to our house that year to ask if we knew where Vicki had gone. Vicki would disappear for days at a time.
4. Once in the middle of the night Vicki showed up naked at our door. She told some wild story about how they had a knock-down drag-out fight and Gene had thrown her outside in the snow and locked her out. She had no injuries or marks on her then or over the next few days. Daniel went to her and Gene's house just to be sure everything was okay. Gene was not there, and the house was in order. I didn't believe Vicky's story.
5. Vicki frequently told stories of horrific beatings by Gene. Gene, she said, would get jealous and beat her up. But I never once saw a scratch or bruise on her. Vicki's claims never checked out. You just couldn't believe anything Vicki said.
6. Though I never saw Gene angry or upset with anyone, Vicki was very flirtatious both in front of Gene and when Gene wasn't there. She flirted by talking (and by the way she talked and the things she said) and smiling, and by touching men on their

arms and shoulders.

7. Another time, I gave Vicki a ride to Bellevue Community College. When we arrived, Vicki told me to tell Gene that she was leaving him. She said she was heading to Nevada to become a hooker.

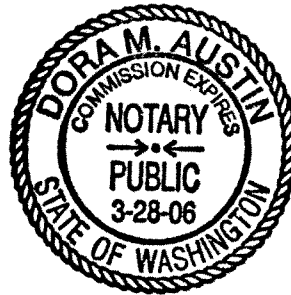
8. Before being contacted by the Capital Habeas Unit of the Federal Defenders of the Eastern District of Washington and Idaho, no prosecuting attorney, defense attorney, attorney's representative, or law enforcement official has ever initiated contact with me regarding Gene Stuart or his wife Vicki Stuart. Nor do I have knowledge of any such attempt to contact me. Had any such person contacted me at any time, I would have told them everything I know about Gene Stuart and Vicki Stuart.

*Claudia J. Petrie*  
Claudia J. Petrie

Sworn before me this 22<sup>nd</sup> day of September, 2005.

*Dora M. Austin*  
Notary Public for the State of Washington

My commission expires: 3/28/06



... is a full, true, and correct copy of the original and official seal hereto affixed

This 22<sup>nd</sup> day of May, A.D. 2006  
ROBERT J. ...  
...  
By Deputy Buli Day

County of Kitsap )  
 )  
State of Washington )

CNO2-1173  
CRS1-245 12  
CNO2-443  
MAY 22 2005  
SKD

STATEMENT OF DOUG SEEGER

I, Doug Wayne Seeger, state the following under penalty of perjury:

1. I grew up in the greater Hamilton, Montana, area. I am currently retired.
2. I met Gene Stuart in first grade and we went through all twelve years of school together. Gene and I became very close when we were teenagers. In fact, during high school Gene, Coby Smith, and I were practically inseparable and best friends.
3. Gene's home life was very tense. His father, Robert "Bob" Stuart, was very controlling. Gene had no latitude in his life. Gene was not allowed to do a lot of things that the other kids were doing.
4. Gene always had to be home right after school in order to work for his father. If Gene didn't finish the work his father assigned, he was punished.
5. Beyond making it hard for Gene to play with other kids, Gene's dad treated him like a dog. Bob Stuart seemed to have good and bad days. Sometimes he could be very pleasant, but other times he would just turn. I remember once when I was at their house working on cars with Gene, Bob came around, started talking with Gene, and then backhanded him. I saw Bob hit Gene on other occasions as well. I never saw Gene fight back or argue with his dad. Back then, we all used to get whipped from time to time. But not like that, not like Gene. I noticed that Gene came to school regularly with bruises on his face. Gene never talked about it though. Gene's sisters also came to school with bruises, but Gene's were usually worse.
6. Bob also spoke to Gene and the rest of the family in harsh and demeaning ways. It was clear that Gene's father was the head of the house and had all the power. Gene's mother was

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very subservient to his father. I remember times we'd be sitting at the table and he would say cruel things to his family. Sometimes he would just give a look and you knew they had to be quiet. It was very tense around Gene's house when Bob was around. When Bob was not home Gene and his mother and sisters were much more at ease. They would laugh and joke around together when he was not home. When Bob was around you needed to be on your toes and watch everything you said for fear of him becoming angry and violent.

7. Gene's family was very poor. Their house was small and set in the middle of Bob Stuart's junkyard. Gene had his own room growing up. As I recall, his sisters, Susan and Sandra, shared a room. I spent the night at Gene's house a few times. I particularly remember that Gene had a transistor radio he was so proud of because it was his. In general, Bob would not let Gene have anything of his own. Even the cars that Gene worked on in the junkyard could not be his. He was always working for his father. But, the transistor radio was Gene's and he loved it. The few times I spent the night I remember that we would fall asleep listening to rock and roll playing on that radio. That is a great memory of mine. It just seemed to mean so much to Gene.

8. At school Gene did not excel academically, but he could do anything he set his mind to. He was very logical and creative. He was excellent with mechanical things and other things he could do with his hands. Gene was great at wrestling. We wrestled together during high school, though I think it was only our sophomore and junior years. Making it to wrestling practices and matches was difficult for Gene. His father would not help him get to and from the practices and meets, so Gene was left to figure out his own transportation. Gene really came alive when he was wrestling. It gave him a chance to shine. He could show people that he was worth something. He rarely lost a match and seemed to enjoy every minute of it.

9. Growing up as teenage boys in rural Montana in the 1960s, we got into some scrapes. At our school if two boys had an argument or something to settle we would literally take it outside and go up to Tin Cup, a spot a few miles away from school. The kids would gather round to see who was fighting and we would duke it out. There were rules that were understood among us all. No one got hurt bad, partly because the fight was considered finished once one of the guys was down. Gene was involved in some of these fights. Unlike some other kids, Gene never fought dirty. Also, I can remember many times when Gene had the opportunity to hurt someone, but chose not to. In fact, for as long as I knew him, Gene never deliberately hurt anyone. It just wasn't his way.

10. Gene had a real tender side to him. I remember when we were getting ready for our high school prom, Gene wanted to really impress his date, Sharie Toavs, and make everything perfect for her. Even though Gene never had much money, he scrimped and saved to be sure he could get her flowers for the prom. He never really had the use of a car either, but he had me drive him over to make the arrangements and pick up the flowers. Sharie and Gene were very much sweethearts. I don't remember Gene having any other girlfriends. Then Sharie became pregnant and Sharie and Gene married each other before graduating. I don't ever remember Sharie coming to school with bruises on her or hearing anyone talk about Gene hitting Sharie. If that had happened I am sure I would remember it. Among our friends if Sharie had bruises on her or was telling people that Gene hit her, that would have traveled like wildfire.

11. During the school day Gene tried to find ways to shine and show that he was important and worth something. He was always making jokes and trying to make everyone laugh. For example, one of our teachers, Mr. Hughes, used to use the paddle on us when we were out of

line. To Gene, though, this was nothing. When he was asked to go up front and get the paddle he would bring his notebook up with him and tick off each whack to keep track of how many he was getting. I can still remember the look on his face as he did this; it was a pretty funny scene, though quite frustrating to Mr. Hughes, I'm sure.

12. Outside of school time, Gene was also a lot of fun. Even though he could not go out as much as some of the other kids, we always had a great time together when we had the chance. Coby and I understood that Gene did not have as much freedom, but we did what we could to try to hang out with him whenever we had the chance. The three of us would go to parties together and Gene and I would drink a bit. Gene couldn't hold his liquor very well. I remember being at one party where Gene chugged a fifth of some liquor, I think Jack Daniels. He was fine for about ten minutes or so, but then it hit him. He was walking outside and fell and hit his head on a car bumper. He was knocked out cold. We knew we could couldn't take him home in his condition or he was sure to get a beating. Some friends and I took him somewhere, made lots of coffee and threw him in a cold shower in order to sober him up before we brought him home. Eventually he sobered up, but I don't think we got him home on time that night.

13. I was always conscious of the fact that Gene's home life was not like mine or many of my other friends'. Gene had a curfew when he was allowed out, I knew that if he wasn't home on time he was sure to get beat by Bob. Gene didn't get into trouble or do crazy stuff like most teenagers. On one occasion, Coby, Gene and I were out in my dad's car. We had driven to Missoula that day and were back in town just hanging out. We noticed the time when it was about two minutes before Gene's curfew. I was determined to get my friend home in time so he would not get beat by his dad. I drove as fast as I could, I believe over a hundred miles an hour,

in order to get to Gene's house. Just as we were cresting the hill and about to arrive at Gene's driveway, I heard Coby yell "Look out!" and as I went to hit the brakes I saw the back end of a mule in the middle of the road straight ahead. I wasn't able to stop in time and we hit that mule with all our power. The animal came up over the car crushing the roof in on top of us. I was knocked unconscious. Coby told me that Gene was cut up pretty badly, blood was dripping down his face. Coby escaped with just a scratch, but to his embarrassment he was covered with mule manure. Our skid marks were forty-seven feet long. Because I was unconscious I don't recall the exact turn of events, but I think Gene's dad, Bob Stuart, was the first one at the scene of the accident since we were practically in his driveway when it happened. Coby told me that it was Bob who got the ambulance for us. I was taken to the hospital and finally woke up there. The photographs attached to this declaration show the car we were traveling in after the accident occurred.

14. Also during high school Gene met his future wife, Sharie Toavs. I was very good friends with Sharie, but she was definitely Gene's girl. After they were married and we all graduated from high school, the three of us, along with some other guys from Darby went down to Denver, Colorado, to attend Denver Automotive and Diesel Technical School. All of us from Darby lived in the same apartment building in Denver and got to see a lot of each other.

15. Gene and Sharie had her baby by this time, a son named Gene Lee. Gene seemed so proud of his son. You could just see when they were together that Gene loved his little boy and was proud to have him.


16. I knew Gene and Sharie were having some problems in their relationship at this time, but it just seemed like normal ups and downs to me. I never saw Sharie with any bruises or

anything like that. They seemed happy together most of the time.

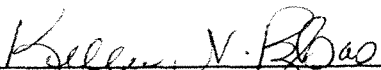
17. About a year after I got to Denver I married a woman I met in the apartment building. After that I stopped hanging out with the guys from Montana. Also, I gave up the body working because I had a hard time dealing with paint fumes. Not long after that my wife and I moved out and I got a job elsewhere in Denver. I lost contact with Gene.

18. Many years later I was shocked to learn that Gene was on death row. I have more recently re-established contact with Gene and he seems like the Gene I used to know.

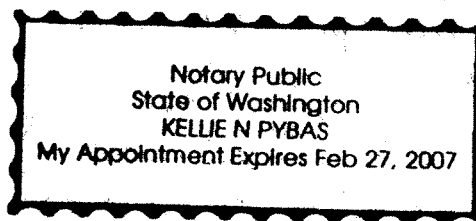
19. Before being contacted by the Capital Habeas Unit of the Federal Defenders of the Eastern District of Washington and Idaho, no prosecuting attorney, defense attorney, attorney's representative, or law enforcement official has ever initiated contact with me regarding Gene Stuart. Nor do I have knowledge of any such attempt to contact me. Had any such person contacted me at any time, I would have told them all I know about Gene Stuart.

  
\_\_\_\_\_  
Doug Seeger

Sworn before me this 1<sup>st</sup> day of  
December, 2005.

  
\_\_\_\_\_  
Notary Public for the State of Washington

My commission expires: Feb 27 2007





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**JOAN M. FISHER**  
 Idaho State Bar No. 2854  
**OLIVER W. LOEWY**  
 Limited Admission  
 Capital Habeas Unit  
 Federal Defenders of Eastern Washington & Idaho  
 317 West 6<sup>th</sup> Street, Suite 204  
 Moscow, ID 83843  
 Telephone: 208-883-0180  
 Facsimile: 208-883-1472

MARK CHRISTENSEN  
 CLERK-DISTRICT COURT  
 CLEARWATER COUNTY  
 ORCEM, IDAHO

2006 JUN -8 P 4: 22

V  
 CASE NO. 0002473

BY SPJ DEPUTY

Attorneys for Petitioner Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

|                                       |   |                                  |
|---------------------------------------|---|----------------------------------|
| <b>Gene Francis Stuart,</b>           | ) |                                  |
|                                       | ) | <b>CAPITAL CASE</b>              |
| <b>Petitioner,</b>                    | ) |                                  |
|                                       | ) |                                  |
| <b>vs.</b>                            | ) | <b>CASE NO. CV2002-00473</b>     |
|                                       | ) |                                  |
| <b>STATE OF IDAHO, and</b>            | ) | <b>PETITIONER'S SUPPLEMENTAL</b> |
| <b>TOM BEAUCLAIR, Director, Idaho</b> | ) | <b>AUTHORITY</b>                 |
| <b>Department of Correction, and</b>  | ) |                                  |
| <b>GREG FISHER, Warden, Idaho</b>     | ) |                                  |
| <b>Maximum Security Institution.</b>  | ) |                                  |
|                                       | ) |                                  |
| <b>Respondent.</b>                    | ) |                                  |
|                                       | ) |                                  |

During the May 22, 2006, oral argument on the State's motion to dismiss Mr. Stuart's *Petition For Postconviction Relief And Petition For Writ Of Habeas Corpus* ("Petition"), the Court extended the parties an opportunity to file by or on June 8, 2006, supplemental authority regarding any issue raised. Respondent asserts that the Court should dismiss Mr. Stuart's *Petition* because, pursuant to Idaho Code Section 19-2719, he should have raised each of its

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claims within 42 days of December 9, 1982, the date the district court entered its judgment against him. Among Mr. Stuart's responses is that he was still represented by trial counsel when the waiver occurred, that counsel cannot be expected to have raised any ineffective assistance of counsel claim against himself, and, therefore, that Mr. Stuart could not have raised his ineffective assistance of counsel claims within the required 42 day period. As Idaho state law authority for the proposition that counsel cannot be expected to have raised any ineffective assistance of counsel claims against himself, Mr. Stuart relies on *Porter v. State*, 139 Idaho 420, 422 n.2, 80 P.2d 1021, 1023 n.2 (2003) (Idaho Criminal Rule 44.2 requires that different counsel be appointed in postconviction proceedings "in order to obtain an objective assessment of trial counsel's performance."). But see *State v. Rhoades*, 120 Idaho 795, 807, n. 1, 820 P.2d 665, 667 n. 1 *reh'g denied* (1991) ("It must be noted that *Stuart* was not decided pursuant to I.C. §19-2719. The statute was not cited by either Stuart or the State.")

Dated this 8<sup>th</sup> day of June, 2006.

Respectfully submitted,



Joan M. Fisher  
Oliver W. Loewy  
Capital Habeas Unit  
Federal Defenders of Eastern Washington & Idaho  
208-883-0180

Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

I hereby certify that on the 08<sup>th</sup> day of June, 2006, I caused to be served a true and correct copy of the foregoing document by the United States Postal Service, first class postage affixed, addressed to:

L. LaMont Anderson  
Deputy Attorney General  
Chief, Capital Litigation Unit  
P.O. Box 83720  
Boise ID 83720-0010

*Jillie B. [Signature]*

10/27/2006 11:39 2088831472

CAPITAL HABEAS UNIT

PAGE 2

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
CROFING, IDAHO

2006 OCT 30 A 7:29

CASE NO. CV02-473

BY SK DEPUTY

**JOAN M. FISHER**  
Idaho State Bar No. 2854  
**OLIVER W. LOEWY**  
Limited Admission  
Capital Habeas Unit  
Federal Defenders of Eastern Washington & Idaho  
317 West 6<sup>th</sup> Street, Suite 204  
Moscow, ID 83843  
Telephone: 208-883-0180  
Facsimile: 208-883-1472

Attorneys for Petitioner Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

**Gene Francis Stuart,**  
  
**Petitioner,**  
  
**vs.**  
  
**STATE OF IDAHO, and**  
**TOM BEAUCLAIR, Director, Idaho**  
**Department of Correction, and**  
**GREG FISHER, Warden, Idaho**  
**Maximum Security Institution.**  
  
**Respondent.**

**CAPITAL CASE**

**CASE NO. CV2002-00473**

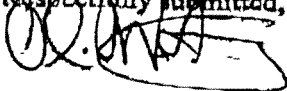
**STIPULATION THAT PARTIES  
MAY EXAMINE THE EXHIBITS  
IN THE CUSTODY OF THE  
CLERK OF THE COURT FROM  
THE UNDERLYING CRIMINAL  
CASE**

The parties stipulate that they together will examine the exhibits in the custody of the Clerk of the Court from the underlying criminal case (No. 8495). They will do so as soon as conveniently possible for the Clerk of the Court and themselves.

STIPULATION THAT PARTIES TOGETHER WILL  
EXAMINE THE EXHIBITS IN THE CUSTODY OF  
THE CLERK OF THE COURT FROM THE  
UNDERLYING CRIMINAL CASE

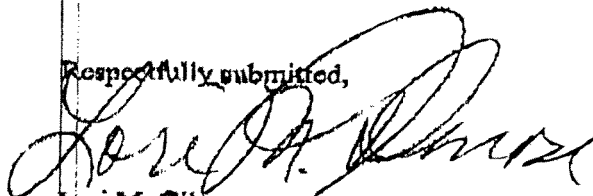
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Respectfully submitted,



Oliver W. Loewy  
Federal Defender Services  
Attorney for Petitioner  
208-883-0180

Respectfully submitted,



Lori M. Gilmore  
Bonneville County Prosecuting Attorney  
P.O. Box 2627  
Orofino, Idaho 83544-2627  
208-476-5611

STIPULATION THAT PARTIES TOGETHER WILL  
EXAMINE THE EXHIBITS IN THE CUSTODY OF  
THE CLERK OF THE COURT FROM THE  
UNDERLYING CRIMINAL CASE

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Ronald D. Schilling  
Idaho District Court Judge

Dated this 29<sup>th</sup> day of October, 2006.

Having duly considered the parties' stipulation, it is hereby ordered that:  
Counsel for Petitioner and counsel for the State may examine the exhibits in the custody of the Clerk of the Court from the underlying criminal case (No. 8495). They are directed to do so as soon as is conveniently possible for the Clerk of the Court and themselves.

Gene Francis Stuart,  
Petitioner,  
vs.  
STATE OF IDAHO, and  
TOM BEAUCLAIR, Director, Idaho  
Department of Correction, and  
GREG FISHER, Warden, Idaho  
Maximum Security Institution,  
Respondent.

ORDER

CASE NO. CV2002-00473

CAPITAL CASE

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER  
BY \_\_\_\_\_ DEPUTY

CASE NO. 00000636  
2006 OCT 30 A 7:29

CLEARWATER COUNTY  
CLERK-DISTRICT COURT  
ROBIN CHRISTENSEN  
ORDERING, IDAHO

SCANNED  
03/29/07

CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
IDAHO

2007 MAR 12 A 9:57

CASE NO. CV02-443  
CV02-473  
BY SG DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE  
OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

GENE FRANCIS STUART, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 STATE OF IDAHO, and TOM )  
 BEAUCLAIR, Director, Idaho Department )  
 of Correction, and GREG FISHER, Warden, )  
 Idaho Maximum Security Institution, )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

CASE NO. CV02-00443 and  
CV02-00473

MEMORANDUM OPINION ON  
PETITION FOR POST  
CONVICTION RELIEF AND/OR  
WRIT OF HABEAS CORPUS AND  
MOTION TO CORRECT ILLEGAL  
SENTENCE, TO VACATE SENTENCE  
OF DEATH AND FOR NEW  
SENTENCING TRIAL

This matter is before the Court on Petitions for Post Conviction Relief and/or Writ of Habeas Corpus filed by Petitioner Gene Francis Stuart in Clearwater County Cases CV02-00443 and CV02-00473. The Court heard oral arguments on the Petitions May 22, 2006. The Court extended an opportunity to the Parties to file supplemental authority by June 8, 2006. Petitioner Stuart was represented by attorney Joan M. Fisher and Oliver W. Loewy with the Federal Defenders Capital Habeas Unit. The State was represented by Deputy Attorney General L. Lamont Anderson. The Court, having considered the Petitions, briefs, affidavits and records in

the cases, having heard oral arguments of counsel, and being fully advised in the matter, hereby renders its decision.

### PROCEDURAL BACKGROUND

Petitioner Stuart (hereinafter "Stuart") was found guilty by a jury of murder by torture in the first degree and was sentenced to death in December 1982 by District Judge Andrew Schwam. Stuart appealed his conviction asserting the following grounds: (1) there was insufficient evidence to warrant a jury instruction and verdict based on first degree murder by torture; (2) an instruction on second degree murder by torture should have been given; (3) the trial court erred in denying Stuart's Motion in *Limine* wherein he sought to exclude evidence of Stuart's physical mistreatment of former wives and girlfriends; (4) the trial court erred in moving the venue of the trial to a site still within the circulation area of the source of prejudicial pretrial publicity; (5) he was denied speedy trial; (6) the sentence imposed was unconstitutional because of the vagueness of the aggravating circumstances relied upon or the failure to use a jury in the sentencing process; and (7) the sentence imposed was disproportionate to the crime committed. On appeal, the Supreme Court affirmed Stuart's conviction and death sentence. *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1986) (*Stuart I*).

Following the denial of his direct appeal, Stuart filed his first petition for post-conviction relief. The district court denied and dismissed the petition on the grounds the majority of issues had been decided on direct appeal and no petition for rehearing had been filed, making the issues *res judicata*. The district court found the three remaining issues failed to raise any legal issue or questions of fact that would entitle Stuart to a hearing or relief. Stuart

appealed and, on appeal, the Supreme Court affirmed the district court.<sup>1</sup> *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990) (*Stuart II*).

Stuart filed a second Petition for Post-conviction Relief but that Petition was dismissed by the district court. Stuart appealed, asserting the district court erred when it dismissed his second petition as untimely. On appeal, the Supreme Court found Stuart's second Petition was timely and that Stuart's allegation that his confidential conversations with his attorney had been monitored and recorded was based on newly discovered information not available to Stuart during his direct appeal or first petition for post-conviction relief. The Court reversed the district court's dismissal of the second petition and remanded the matter with instructions that an evidentiary hearing be held. *Stuart v. State*, 118 Idaho 932, 801 P.2d 1283 (1990) (*Stuart III*).

In compliance with the Supreme Court's remand, the district court held an evidentiary hearing to address Stuart's claim that the Clearwater County jail monitored and taped his telephone calls and privileged attorney conversations. However, the district court bifurcated the hearing, directing the parties to first present evidence on the question of whether the taping and monitoring of the phone calls and attorney conversations had occurred. When the district court determined Stuart had failed to meet his burden of proof on the initial question, the court found it unnecessary to address the question of whether Stuart's constitutional rights had been violated. Stuart appealed the district court's ruling. Once again, the Supreme Court reversed and remanded the matter back to the district court after finding the court's conclusions clearly erroneous. *Stuart v. State*, 127 Idaho 806, 907 P.2d 783 (1995) (*Stuart IV*).

The district court held a second evidentiary hearing on Stuart's claim that the Clearwater County Sheriff's Office had recorded confidential conversations between Stuart and his attorney

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<sup>1</sup> Stuart petitioned the Court for rehearing. The Court denied the petition for rehearing. However, the Court withdrew its original opinion and issued a substitute, but still affirming, opinion.



while Stuart was in jail. At the end of the second hearing, the trial court found Stuart's jailhouse conversations had been monitored but that his constitutional rights had not been violated.

Applying the three exceptions to the exclusionary rule, the trial court held that under the independent origin, inevitable discovery, and attenuated bases exceptions, the monitoring of the conversations did not lead to the discovery of evidence or witnesses. Stuart appealed. However, the Supreme affirmed the trial court, finding the law of the case doctrine did not prevent the adoption and application of the exceptions to the exclusionary rule in Stuart's case. *Stuart v. State*, 136 Idaho 490, 36 P.3d 1278 (2001) (*Stuart VI*).

While the appeal in *Stuart IV* was pending, Stuart filed an I.R.C.P. 60(b)(5) motion with the trial court, asserting the Supreme Court's opinion in *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993) had retroactive application and, therefore, entitled Stuart to relief. The trial court denied Stuart's motion and he appealed. The Supreme Court held the ruling in *Tribe* had no retroactive application affirming the district court's dismissal of Stuart's petition. *Stuart v. State*, 128 Idaho 436, 914 P.2d 933 (1996) (*Stuart V*).

Stuart filed his fourth post-conviction petition in August 2002 after the United States Supreme Court entered its decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) and his fifth post-conviction petition in December 2002. It is Stuart's fourth and fifth post-conviction petitions that are the subject of the opinion herein.

### **POST-CONVICTION STANDARD**

In order to be eligible for post-conviction relief, a person who has been convicted of, or sentenced for, a crime must claim:

- (1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state;

- (2) That the court was without jurisdiction to impose sentence;
- (3) That the sentence exceeds the maximum authorized by law;
- (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (5) That his sentence has expired, his probation, or conditional release was unlawfully revoked by the court in which he was convicted, or that he is otherwise unlawfully held in custody or other restraint;
- (6) Subject to the provisions of section 19-4902(b) through (f), Idaho Code, that the petitioner is innocent of the offense; or
- (7) That the conviction or sentence is otherwise subject to collateral attack upon any ground or alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy.

I.C. § 19-4901 (Supp. 2002).

An application for post-conviction relief must present “admissible evidence supporting its allegations, or the application will be subject to dismissal.” *Fenstermaker v. State*, 128 Idaho 285, 287, 912 P.2d 653 (Ct. App. 1995). In a post-conviction proceeding involving a capital crime, the parties have the same burden of proof as a civil litigant. *State v. Pratt*, 125 Idaho 546, 567, 873 P.2d 800, 821 (1993) (preponderance of the evidence standard applies); *see also Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377, 387 (1984) (state is required to establish exclusionary rule exceptions by a preponderance of the evidence). Post-conviction petitions in a capital crime case are subject to the provision of I.C. § 19-2719.

### DISCUSSION

On August 2, 2002, Petitioner Stuart filed a Petition for Post-conviction Relief and/or Writ of Habeas Corpus and Motion to Correct Illegal Sentence, to Vacate Sentence of death and for New Sentencing Trial in Clearwater County Case No. CV02-00443.<sup>2</sup> This petition seeks relief based on the opinion entered by the United States Supreme Court in *Ring v. Arizona*, 536

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<sup>2</sup> Clearwater County Case No. CV02-00443 was previously designated Clearwater County Case No. SP02-00109.

U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). On August 30, 2002, the State filed a Motion for Summary Dismissal.

On December 3, 2002, Petitioner Stuart filed a Petition for Post-conviction Relief and Petition for Writ of Habeas Corpus in Clearwater County Case No. CV02-00473.<sup>3</sup> Petitioner's allegation in this Petition can be divided into three categories: (1) misconduct on the part of the prosecutor; (2) the withholding of mitigating information; and, (3) ineffective assistance of counsel. The State moved for summary disposition on October 10, 2003.

In March 2004 the Court stayed the proceedings in Clearwater County Cases No. CV02-473 and CV02-00443 pending rulings by the United States Supreme Court in *Schriro v. Summerlin*, 542 U.S. 348 and the Idaho Supreme Court in *State v. Hoffman*, 142 Idaho 27, as the cases had the potential of being dispositive on the question of whether the *Ring* holding had retroactive application. The Court lifted the stays on January 6, 2006, after opinions were entered in *Schriro v. Summerlin* and *State v. Hoffman*.

**(A) PETITION IN CASE NO. CV02-00443**

Stuart's petition to vacate his death sentence, correct illegal sentence and for new sentencing was brought following the decision of the United States Supreme Court in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The Court in *Ring* held that the Sixth Amendment precludes a sentencing judge, sitting without a jury, to find the aggravating circumstances necessary for imposition of the death penalty. The Court reasoned that, because statutorily enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires the factors be found by a jury. *Ring v. Arizona*, 536 U.S. at 606. However, the question of whether *Ring* had retroactive application was not

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<sup>3</sup> Clearwater County Case No. CV02-00473 was previously designated Clearwater County Case No. SP02-00151.

decided until two years later when the Court heard the case of *Schriro v. Summerlin*.

In *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), the question of the applicability of the *Ring* decision was placed squarely before the Court. In deciding the question, the Court noted that when it enters a decision that results in a new rule that is substantive in nature, the new rule generally has retroactive application. *Schriro v. Summerlin*, 542 U.S. at 351. However, when the new rule is procedural in nature, it generally does not apply retroactively. *Schriro v. Summerlin*, 542 U.S. 351. The Court then held that the new rule announced in *Ring* is “a new procedural rule that does not apply retroactively to cases already final on direct review.” *Schriro v. Summerlin*, 542 U.S. at 358. A year later, relying on the Court’s decision in *Schriro v. Summerlin*, the Idaho Supreme Court held in *State v. Hoffman*, 142 Idaho 27, 121 P.3d 958 (2005), that the ruling in *Ring* had no retroactive application.

In the instant case, Stuart’s direct appeal was final well in advance of the *Ring* decision. Therefore, based on the holding in *Schriro v. Summerlin* and the holding of the Idaho Supreme Court in *State v. Hoffman*, the ruling in *Ring* has no application to Stuart’s sentence.

Nevertheless, in one of his claims at page 10 of his Petition, Stuart states:

By the twenty year judicial delay in the correct determination of the unconstitutionality of the death sentence imposed on Petitioner, Petitioner has been unconstitutionally subjected to cruel and unusual punishment in violation of the Eighth and Fourteenth amendments to the United States Constitution and Idaho Constitution, Article 1, Sections 1, 6, 13 and 18.

This claim fails because the death sentence imposed on Petitioner was not unconstitutional.

To the extent that Stuart argues that the delay itself in carrying out the sentence constitutes constitutional violations, this argument is unreasonable and not supported by authority. The delay in carrying out the sentence was necessitated in order for the Courts to examine the numerous issues raised by Stuart (as was his right). Stuart is now asking the courts

to revisit many of these issues and examine other issues that were not timely raised contrary to I.C. 19-2719.

**(B) PETITION IN CASE NO. CV02-00473**

Stuart's petition in this case raises a number of issues that are best addressed by dividing the claims into three categories: (1) misconduct on the part of the prosecutor; (2) the withholding of mitigating information; and, (3) ineffective assistance of counsel. The State contends Stuart's current post-conviction relief petition must be dismissed as it is untimely under I.C. § 19-2719. The State further contends Stuart's current post-conviction petitions fail to meet the statutory exception to the time limits set out in the statute. Stuart argues I.C. § 19-2719 is inapplicable to his case because his sentence is invalid pursuant to *Ring v. Arizona* and/or that application of I.C. § 19-2719 violates state and federal constitutional provisions and violates other Idaho law.

**(1) APPLICABILITY OF I.C. § 19-2719 TO STUART'S CASE**

As discussed above, *Ring v. Arizona* has no retroactive application to Stuart's death sentence judgment as his direct appeal was final well before *Ring* was decided. Therefore, Stuart's death sentence is a valid and lawful sentence within the contemplation of I.C. § 19-2719. The Court must, however, address Stuart's alternative argument that application of I.C. § 19-2719 to his case violates federal and state constitutional law as well as other Idaho law.

In 1984, the Idaho legislature enacted I.C. § 19-2719. The purpose of the statute, as articulated by the legislature in the language of the statute, is to eliminate unnecessary delay in carrying out death sentences. The standard for review applicable to the statute has been well established by Idaho's Supreme Court.

In capital cases, I.C. § 19-2719 modifies and supersedes the UPCPA. *McKinney*, 133 Idaho at 700, 992 P.2d at 149. The purpose of I.C. § 19-2719 is to eliminate "unnecessary delay in carrying out a valid death sentence." *Rhoades v. State*, 135 Idaho 299, 301, 17 P.3d 243, 245 (2000) (quoting *McKinney v. State*, 133 Idaho at

705, 992 P.2d at 154). The procedures and time limits of I.C. § 19-2719 must be followed in capital cases. *McKinney*, 133 Idaho at 700, 992 P.2d at 149.

Generally, in a capital case, a claimant for post-conviction relief will have only one opportunity to raise all challenges to the conviction and sentence. *Id.* All known challenges must be raised in one post-conviction application within 42 days of the filing of the judgment imposing the death penalty. *Row v. State*, 135 Idaho 573, 576, 21 P.3d 895, 898 (2001). Any known challenges or claims not raised within 42 days are deemed waived. *Id.* Our Court strictly construes the waiver provision of I.C. § 19-2719. *Id.* at 701, 992 P.2d at 150.

*Dunlap v. State*, 141 Idaho 50, 57, 106 P.3d 376 (2004).

(a) Stuart's Ex Post Facto Argument

In the instant case, Stuart's capital sentence judgment was entered prior to enactment of I.C. § 19-2719. Stuart contends that application of the subsequently enacted statute to his case violates the *ex post facto* clauses of the federal and state constitutions.

When the statute was enacted in 1984, the legislature included the following language in the session law:

This act shall apply to all cases in which capital sentences were imposed on or prior to the effective date of this act but which have not been carried out, and to all capital cases arising after the effective date of this act.

Idaho Session Laws 1984, ch. 159, § 8, p. 390.

Recognizing the legislative directive given with the enactment of the statute, Idaho's Supreme Court has stated:

The operation of I.C. § 19-2719 is not limited by the existence of previous proceedings using different procedural rules. The provisions of I.C. § 19-2719 apply "to all cases in which capital sentences were imposed on or prior to the effective date [April 2, 1984]." I.C. § 19-2719a. I.C. § 19-2719(4) requires that any habeas corpus or post-conviction remedies in capital cases must be pursued under the procedures set out in I.C. § 19-2719 and the 42-day time period of I.C. § 19-2719(3).

*McKinney v. State*, 133 Idaho 695, 703, 992 P.2d 144 (1999).

Stuart, however, contends application of the subsequently enacted statute to his case violates the *ex post facto* clause of the state and federal constitutions. The United States Supreme Court has consistently held that retroactive application of a procedural statute does not violate the *ex post facto* clause of the constitution where the change does not alter the definition of crimes or increase the punishment for criminal acts. See *Garner v. Jones*, 529 U.S. 244, 120 S.Ct. 1362, 146 L.Ed.2d 236 (2000); *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). Idaho's Supreme Court has echoed the higher Court's analysis regarding retroactive application of procedural statutes.

The *ex post facto* doctrine prohibits a state from "retroactively alter[ing] the definitions of crimes or increas[ing] the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43, 110 S.Ct. 2715, 2719, 111 L.Ed.2d 30, 39 (1990). Provisions of the federal and state constitutions prohibit changes in the law and changes in procedure that affect matters of substance. *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). A change in law will be deemed to affect matters of substance where it increases the punishment or changes the ingredients of the offense or the ultimate facts necessary to establish guilt. *Hopt v. Utah*, 110 U.S. 574, 580, 4 S.Ct. 202, 205, 28 L.Ed. 262, 265 (1884). Decisions of "substantive criminal law" are those that reach beyond issues of procedural function and address the meaning, scope, and application of substantive criminal statutes. *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir.2003), cert. granted 72 U.S.L.W. 3362-63 (Dec. 2, 2003), citing *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 1609, 140 L.Ed.2d 828, 838 (1998).

*State v. Lovelace*, 140 Idaho 73, 77, 90 P.3d 298 (2004).

Idaho Code § 19-2719 establishes the time frame in which petitions for post-conviction relief may be brought in a capital case. In addition, the statute establishes the sole standard by which a post-conviction relief petition may be brought outside of the established time frame. By definition, I.C. § 19-2719 is a procedural statute rather than a substantive statute. The difference between procedure and substance was addressed by the Court in *State v. Beam*.

The distinction between procedure and substance was well stated in *Currington*, 108 Idaho at 541, 700 P.2d at 944:

Although a clear line of demarcation cannot always be delineated between what is substantive and what is procedural, the following general guidelines provide a useful framework for analysis. Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus *creates, defines, and regulates primary rights*. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.

Quoting *State v. Smith*, 84 Wash.2d 498, 501, 527 P.2d 674, 676-77 (1974) (emphasis added).

*State v. Beam*, 121 Idaho 862, 863, 828 P.2d 891 (1992).

(b) Stuart's Due Process and/or Equal Rights Arguments

Stuart also contends that application of I.C. § 19-2719 to his case violates his due process and/or equal rights as it provides less protection to capital case petitioners for post-conviction relief than are provided to non-capital case petitioners. Idaho's appellate courts have repeatedly and consistently rejected such arguments. This Court specifically rejected this argument in *State v. Beam*, 115 Idaho 208, 766P.2d 678 (1988), cert. denied, 489 U.S. 1073, 109 S.Ct. 1360, 103 L.Ed.2d 827 (1989). Noting first that the rational basis test was the applicable standard through which the statute's constitutionality would be determined, the Court held:

We hold that the legislature's determination that it was necessary to reduce the interminable delay in capital cases is a rational basis for the imposition of the 42-day time limit set for I.C. § 19-2719. The legislature has identified the problem and attempted to remedy it with a statutory scheme that is rationally related to the legitimate legislative purpose of expediting constitutionally imposed sentences. Accordingly, I.C. § 19-2719 does not violate the defendant's constitutional right to equal protection, and the trial court correctly denied [the defendant's] post conviction petition.

*Id.* at 213, 766 P.2d at 683; see also *State v. Hoffman*, 123 Idaho 638, 647, 851 P.2d 934, 943 (1993) (applying *Beam* to reject constitutional challenge to I.C. § 19-2719), cert. denied, 511 U.S. 1012, 114 S.Ct. 1387, 128 L.Ed.2d 61 (1994); *State v. Rhoades*, 120 Idaho 795, 806-07, 820 P.2d 665, 676-74 (1991) (upholding constitutionality of I.C. § 19-2719 under due process clause of U.S. Constitution), cert. denied, 504 U.S. 987, 112 S.Ct. 2970, 119 L.Ed.2d 590 (1992).

*Lankford v. State*, 127 Idaho 100, 102, 897 P.2d 991 (1995).



(c) Stuart's Vagueness Argument

Stuart contends I.C. § 19-2719 is void for vagueness, arguing the term “known” and/or phrase “reasonably should have been known”, as used in subpart (5) of the statute, are subject to varying interpretations and impose a less stringent standard than would have been imposed had the legislature used the phrase “reasonably *could* have known”. Stuart’s argument, which cites to little or no law in support, is not persuasive.

Vagueness may invalidate a criminal law either because the statute fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits or because it may authorize and even encourage arbitrary and discriminatory enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 42, 119 S.Ct. 1849, 1859, 144 L.Ed.2d 67 (1999), citing *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1859, 75 L.Ed.2d 903, 908, 909 (1983). The test for vagueness to be applied in Idaho, if the law does not regulate constitutionally protected conduct or a significant amount of that conduct, is to ask whether the statute gives notice to those who are subject to it and whether the statute provides sufficient guidelines for the exercise of discretion by those who must enforce the ordinance. See *State v. Bitt*, 118 Idaho at 588, 798 P.2d at 47. It has long been held that a statute should not be held void for uncertainty if any practical interpretation can be given the statute. *City of Lewiston v. Mathewson*, 78 Idaho 347, 350, 303 P.2d 680 (1956).

*State v. Larsen*, 135 Idaho 754, 756, 24 P.3d 702 (2001).

A statute is not constitutionally vague merely because the legislature does not statutorily define the words. *State v. Richards*, 127 Idaho 31, 38, 896 P.2d 357 (Ct.App.1995). “Where the legislature has not provided a definition, terms in a statute are given their commonly understood, everyday meanings.” *State v. Richards*, 127 Idaho at 38. The words “known” and “reasonably should have known” are not vague words but are words commonly used and understood in the English language. Paraphrasing for brevity, Webster’s Dictionary<sup>4</sup> defines “known” as to perceive or understand and to be acquainted or familiar with a thing, place, person, etc. “Reasonable” or “reasonably” is defined as in accord with reason or logic. The distinction

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<sup>4</sup> Webster’s College Dictionary Second Random House Edition 1999.

between the use of the word “could” rather than “should”, as argued by Stuart, is difficult to address as the words have such commonly understood meanings that Webster’s Dictionary provides a history for the words but little or nothing in the way of definitions.

A constitutional challenge of a statute places upon the asserting party a high burden. “The party challenging a statute on constitutional grounds bears the burden of establishing that the statute is unconstitutional and ‘must overcome a strong presumption of validity.’” *State v. Bennett*, 142 Idaho 166, 169, 125 P.3d 522 (2005); quoting *Olsen v. J.A. Freeman Co.*, 177 Idaho 706, 709, 791 P.2d 1285, 1288 (1990). In the instant case, Stuart provides the Court with no case law sufficient to meet his burden of overcoming the presumption of validity.

Stuart’s various constitutional challenges of I.C. § 19-2719 have been previously resolved by the Idaho Supreme Court. As the Supreme Court in *Porter v. State*, 139 Idaho 420, 422, 80 P.3d 1021 (2003) stated in footnote, “Porter also challenges the constitutionality of I.C. § 19-2719 for the first time on appeal. This challenge is baseless, as we have repeatedly upheld the constitutionality of I.C. § 19-2719. *See, e.g., Creech v. State*, 137 Idaho 573, 576-77, 51 P.3d 387.390-91 (2002).” Just as Porter’s and Creech’s constitutional challenges of I.C. § 19-2719 were baseless, so are the challenges posed by Stuart.

(d) Stuart’s Separation of Powers Argument

Stuart asserts I.C. § 19-2719 removes a district court’s jurisdiction to reach the merits of post-conviction petitions filed outside the statute’s time requirements in violation of Idaho’s constitutional separation of powers doctrine. Stuart’s argument lacks merit.

In *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 4 P.3d 1115 (2000), the Court addressed the issue of legislative powers that affect the judiciary and the separation of

powers doctrine found in the Idaho Constitution. While the *Kirkland* Court was not addressing I.C. § 19-2719, the Court's analysis is nevertheless applicable.

The separation of powers doctrine is embodied in two provisions of the Idaho Constitution. Article II, § 1 provides:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

IDAHO CONST. art. II, § 1.

Article V, § 13 of the Idaho Constitution provides:

The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with the Constitution, provided, however, that the legislature can provide mandatory minimum sentences for any crimes, and any sentence imposed shall not be less than the mandatory minimum sentence so provided. Any mandatory minimum sentence so imposed shall not be reduced.

IDAHO CONST. art. V, § 13.

*Kirkland v. Blaine County Medical Center*, 134 Idaho at 470.

The Court went on to state, "Because it is properly within the power of the legislature to establish statutes of limitations, statutes of repose, create new causes of action, and otherwise modify the common law without violating separation of powers principles, it necessarily follows that the legislature also has the power to limit remedies available to plaintiffs without violating the separation of powers doctrine." *Id.* at 471.

The legislature's enactment of I.C. § 19-2719 did not remove a district court's jurisdiction to reach the merits of a post-conviction petition, as argued by Stuart. Rather, the statute merely sets a time limit for the filing of a post-conviction petition in a capital case and

provides for the filing of a petition outside the time limit if a petitioner can show certain circumstances exist to merit a late filing. If the petition is not timely filed or the exception is not met, only then is the court prevented from determining the petition on the merits. The limits that exist in I.C. § 19-2719 are analogous to statutes of limitations, time limits for appeals, as well as other time limits established by statute or court rule. Therefore, I.C. § 19-2719 does not violate the separation of powers doctrine found in the Idaho Constitution.

(2) RETROACTIVE APPLICATION OF I.C. § 19-2719 AND IDAHO LAW

Stuart is correct when he asserts that, absent an express legislative statement to the contrary, a statute will not be applied retroactively. When enacting I.C. § 19-2719, the legislature made such an express statement. As already stated by this Court in analyzing Stuart's *ex post facto* argument, when I.C. § 19-2719 was enacted in 1984, the legislature included the following language in the session law:

This act shall apply to all cases in which capital sentences were imposed on or prior to the effective date of this act but which have not been carried out, and to all capital cases arising after the effective date of this act.

Idaho Session Laws 1984, ch. 159, § 8, p. 390.

Recognizing the legislative directive given with the enactment of the statute, Idaho's Supreme Court has stated:

The operation of I.C. § 19-2719 is not limited by the existence of previous proceedings using different procedural rules. The provisions of I.C. § 19-2719 apply "to all cases in which capital sentences were imposed on or prior to the effective date [April 2, 1984]." I.C. § 19-2719a. I.C. § 19-2719(4) requires that any habeas corpus or post-conviction remedies in capital cases must be pursued under the procedures set out in I.C. § 19-2719 and the 42-day time period of I.C. § 19-2719(3).

*McKinney v. State*, 133 Idaho 695, 703, 992 P.2d 144 (1999).

Idaho's Supreme Court made clear I.C. § 19-2719 must be applied to all capital case post-conviction petitions whether the death sentence judgment was entered before or after

enactment of the statute. Therefore, the statute is applicable to Stuart's current petition. When I.C. § 19-2719 is applied, the Court must find Stuart's petition untimely unless Stuart is able to sufficiently show some or all of his claims fall within the exception found in I.C. § 19-2719(5).

### (3) STUART'S CURRENT POST-CONVICTION CLAIMS

The question the Court must address next, given Stuart's untimely filing of his current post-conviction petition, is whether all or some of his claims were known or reasonably should have been known by Stuart within the time period required by I.C. § 19-2719. As noted earlier in the Opinion, Stuart's post-conviction claims are easily divided into three categories: (1) misconduct on the part of the prosecutor; (2) the withholding of mitigating information; and, (3) ineffective assistance of counsel.

#### (a) Prosecutorial Misconduct Claims

Stuart asserts the following misconduct by the prosecutor: (1) prosecutor advised at least one witness not to say Stuart had mental health issues; (2) prosecutor knew witnesses at the preliminary hearing ingested "small white tab pills which purportedly had a calming effect"; (3) prosecutor encouraged 'prior bad act' witnesses to exchange anticipated testimony by housing them in the same small hotel for the preliminary hearing and for trial and putting witnesses in the same room during the preliminary hearing without advising them not to exchange their anticipated testimony and/or failing to take steps to insure they did not exchange anticipated testimony; (4) the prosecutor encouraged witnesses to exaggerate Stuart's misdeeds by providing a heightened sense of danger by placing police officers at the motel where the witnesses were staying, telling at least one witness that the prosecutor received a threatening call regarding Stuart, requiring Stuart to wear leg irons during the preliminary hearing and requesting additional

security measures at trial that included having uniformed and armed police in the courtroom during the trial and requiring security checks of all persons entering the courtroom.

Each of Stuart's claims of prosecutorial misconduct were known or reasonably should have been known by Stuart at the time he filed his direct appeal and/or at the time he filed his first petition for post-conviction relief. As to Stuart's first assertion of misconduct, Stuart was in the best position to know if he had at any time been diagnosed with mental health problems and who, if any, of the State's witnesses were likely to be aware of his diagnosis. Stuart had the opportunity at the preliminary hearing and again at trial to question witnesses about any knowledge they had regarding Stuart's mental health and, more importantly, Stuart had the opportunity to present his own evidence regarding Stuart's mental health. An admonition by the prosecutor to a lay witness to refrain from volunteering such a statement regarding Stuart's mental health would have been proper. Stuart knew or reasonably should have known when he filed his direct appeal and his prior post-conviction petitions what evidence, if any, was presented or not presented regarding his mental health status.

As for Stuart's assertion that the prosecutor allowed witness to openly share "pills", housed witnesses in the same motel and/or had witnesses wait in the same room, thus encouraging them to share their testimony, such information was known or should have reasonably been known to Stuart at the time of his direct appeal and/or at the time of the filing of his earlier post-conviction petitions. Stuart had the opportunity to question witnesses at the preliminary hearing and at trial, and to contact and interview them between the two proceedings, regarding their accommodations. In addition, Stuart and his counsel could have requested the court admonish the prosecutor and the witnesses that no discussions regarding the case occur between the witnesses until after the conclusion of trial. Finally, Stuart offers nothing beyond mere speculation regarding the alleged "calming pills", pills which may have been antacids,

gum, breath mints or any of a myriad of other benign legal ‘pills’.<sup>5</sup> One must remember that these vague assertions are being made more than twenty years after a jury returned a verdict of guilty.

Stuart’s final claim for prosecutorial misconduct involves the courtroom environment during his preliminary hearing and trial. Stuart was present in the courtroom during both proceedings and therefore knew or reasonably should have known when he filed his direct appeal and his earlier post-conviction petitions that he was wearing leg irons during his preliminary hearing as well as how many police officers were present during the hearing and trial.

(b) Withholding of Mitigating Information Claim

Stuart claims the prosecutor withheld certain mitigating information from the court related to Stuart’s childhood. Stuart contends he and his sisters suffered constant physical and sexual abuse at the hands of his father and that such an environment may have predisposed Stuart to mental health problems, noting his own son required psychiatric care and medication during his adolescence. In support of his claim, Stuart directs the Court to affidavits filed in this matter by his sisters, his son, his former wife, a former girlfriend, an aunt, former friends and neighbors, and the principal of Stuart’s high school in Montana.<sup>6</sup> In varying degrees, the affiants describe Stuart’s childhood as replete with serious physical abuse inflicted by Stuart’s father upon Stuart,

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<sup>5</sup> Statement of Theresa Jo Jacobson dated October 28, 2002, Appendix “A” ¶ 8, “Before testifying at the preliminary hearing, a police officer drove me to the courthouse. There, I was directed to a room. When I entered, Sharie, Vicki, Kathie (the deceased’s mother, and other women who Mr. Stuart had allegedly known and abused were already in the room. I recall that there was a policewoman in the room as well. It was in that room that I first met Sharie, Vicki, and Kathie. When I first entered the room, some were smoking cigarettes and taking small tab pills. Someone offered me a pill, saying that it would calm me down. She offered the pills to me in a normal speaking voice. Nothing she said or did suggested to me that she was joking in any way. My impression was that a police officer in the room had supplied the pills. I declined the pills, but the woman who told me about them and other potential witnesses at the table took some of the pills”

<sup>6</sup> In addition to previously filed affidavits, on May 22, 2006, Stuart filed affidavits or sworn statements from Susan Kathleen Stuart, Gene Lee Dally, Malvin Kraft, Daniel Heagy, Jane Bigley, Jim Bigley, Shari Lee Kuhl, Donna Marquette, Delores Mary Nichols, Claudia Petrie, Doug Wayne Seeger, Coby Smith, Thomas Thorn, Sheri Wald, Esther Ziemann, Virginia Lee Presler, Michael Lowe, Debra Johnson and Rose Connelly.

his siblings and his mother. The affidavits also describe a childhood in which Stuart was exposed to his father's incestuous sexual abuse of Stuart's sisters. It is this tumultuous childhood that Stuart contends the prosecutor "hid" from the court because of its potential mitigating affect. It is curious that the prosecutor is alleged to have hidden Stuart's own childhood from him.

Stuart has produced affidavits supporting a conclusion that his childhood was terrible. Nevertheless, to suggest this information was withheld from the trial court during the sentencing phase does not follow. The person with the best knowledge, insight and understanding of Stuart's childhood is Stuart and persons known to Stuart. If Stuart believed his childhood experiences were mitigating factors that should have been considered by the trial court, it was Stuart and his counsel who had the responsibility to present the information to the court. The prosecutor did not hide, nor could he hide, what was best known by Stuart and available to Stuart to present to the court.

(c) Ineffective Assistance of Counsel

The standard that must be met on post-conviction claims for ineffective assistance of counsel is well established.

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, 900 P.2d 221, 224 (Ct.App.1995); *Russell*, 118 Idaho at 67, 794 P.2d at 656; *Davis v. State*, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (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, 760, 760 P.2d 1174, 1176 (1988); *Russell*, 118 Idaho at 67, 794 P.2d at 656. 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*, 114 Idaho at 761, 760 P.2d at 1177; *Russell*, 118 Idaho at 67, 794 P.2d at 656. This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct.App.1994).



*Baker v. State*, 142 Idaho 411, 416, 128 P.3d 948 (Ct.App.2005).

It is not enough for a petitioner to simply allege his or her counsel's performance might have been better or might have contributed to conviction. Rather, the standard that must be met is to show actual unreasonable representation and actual prejudice. *Estes v. State*, 111 Idaho 430, 434, 725 P.2d 135 (1986). "A showing that defendant was denied the reasonably competent assistance of counsel is not sufficient by itself to sustain a reversal of the conviction. The defendant, in most cases, must make a showing that the conduct of counsel contributed to the conviction or the sentence imposed'." *Id.* at 434; quoting *State v. Tucker*, 97 Idaho 4, 12, 539 P.2d 556 (1975).

Stuart's current post-conviction petition asserts ineffective assistance of counsel at trial, on appeal and/or in his prior post-conviction petitions in regards to the following issues: (1) admission of prior bad act testimony; (2) admission of statements by Stuart in violation of constitutional rights; (3) confusing and erroneous jury instructions; (4) insufficient evidence of murder by torture; (5) failure to instruct jury on included offense of second degree murder by torture; (6) failure to challenge criminal statute as unconstitutionally vague; (7) speedy trial violation; (8) prosecutorial misconduct; (9) violation of right to an impartial jury; (10) failure to record critical pretrial and trial proceedings and conferences held in chambers; (11) constitutional violations because of heightened courtroom security measures; and, (12) plea offer constitutional violations. Many of Stuart's current post-conviction claims, as listed above, were raised and addressed on direct appeal. Stuart seeks to again raise these issues by alleging that his trial counsel failed to "adequately raise, brief and argue" these issues. Even if timely raised, Stuart's ineffective assistance of counsel claims should be summarily dismissed.

Stuart's ineffective assistance of trial counsel claims and his ineffective assistance of appellate counsel claims have not been asserted within a reasonable time. Stuart was sentenced to death in December 1982. His first appeal was decided in 1986. He has been before the Supreme Court on four more occasions. Stuart has had two defense attorneys' offices represent him since the withdrawal of his trial attorney; attorney Scott Chapman was appointed in November 1995 and his present attorneys were appointed on January 17, 2002, almost one year prior to the filing of this successive post-conviction petition. By measurement from any point of reference, the trial and appellate ineffective assistance of counsel claims were not raised within a reasonable time after they were known or reasonably should have been known. Idaho Code 19-2719(5). See e.g., *Porter v. State*, 136 Idaho 257, 260, 32 P.3d 151,154 (2001).

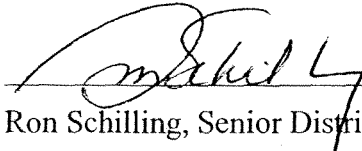
### CONCLUSION

The State's Motions for Summary Dismissal are granted in each case.

### ORDER

The State shall submit an appropriate order to the Court within fourteen days of this Opinion.

Dated this 8<sup>th</sup> day of March 2007.

  
\_\_\_\_\_  
Ron Schilling, Senior District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing OPINION ON 4<sup>th</sup> PETITION FOR POST-CONVICTION RELIEF was:

X mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 12<sup>th</sup> day of March 2007, to:

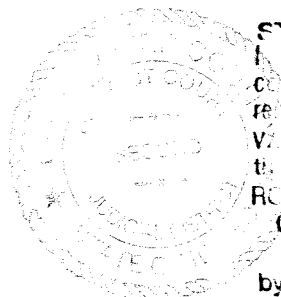
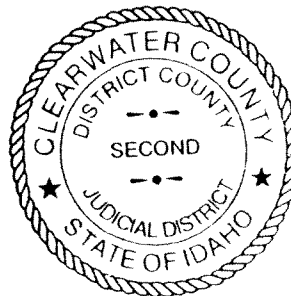
Lori Gilmor e  
Courthouse Mail  
Orofino, ID 83544

L. Lamont Anderson  
PO Box 83720  
Boise, ID 83720-0010

Joan Fisher  
Oliver Loewy  
317 W 6<sup>th</sup> St., Ste., 207  
Moscow, ID 83843

Robin Christensen, Clerk

By: Sue K. Summerton  
Deputy



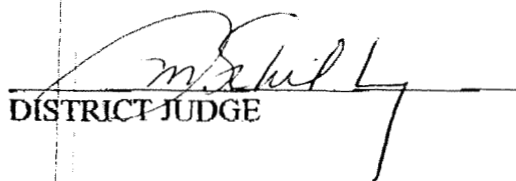
STATE OF IDAHO County of Clearwater  
I hereby certify that the foregoing is a true and correct copy of an instrument as the same now reads, and of record in my office.  
Witness my hand and official seal hereto affixed this 30<sup>th</sup> day of March AD 2007  
ROBIN CHRISTENSEN, CLERK OF THE COUNTY OF CLEARWATER  
COUNTY EX OFFICIO AUDITOR & RECORDER

by Deputy Heather Stuge



HEREBY ORDERED AND ADJUDGED that Petitioner's case is DISMISSED with prejudice.

DATED this 12<sup>th</sup> day of April, 2007.

  
DISTRICT JUDGE

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY That on or about the 10<sup>th</sup> day of April, 2007, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

L. LaMont Anderson  
Deputy Attorney General  
P.O. Box 83720  
Boise, ID 83720-0010  
Fax: (208) 334-2942

- U.S. Mail
- Hand Delivery
- Overnight Mail
- Facsimile

Joan M. Fisher  
Federal Defenders of  
Eastern Washington & Idaho  
317 W. 6th Street, Suite 204  
Moscow, ID 83843  
Fax: (208) 883-1472

- U.S. Mail
- Hand Delivery
- Overnight Mail
- Facsimile

Lori Gilmore  
Clearwater County Prosecutor  
Box 2627  
Orofino, ID 83544  
Fax: (208) 476-9710

- U.S. Mail
- Hand Delivery
- Overnight Mail
- Facsimile



Sue K. Summerton

Deputy Clerk  
District Court  
Second Judicial District

Joan M. Fisher  
Idaho State Bar No. 2854  
Oliver W. Loewy  
Limited Admission  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6<sup>th</sup> Street, Suite 204  
Moscow, ID 83843  
208-883-0180

DISTRICT COURT  
CLEARWATER, IDAHO

2007 APR 23 12:16 47  
CV02-473  
Ses

Attorneys for Petitioner Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

|                              |   |                                  |
|------------------------------|---|----------------------------------|
| <b>GENE FRANCIS STUART,</b>  | ) |                                  |
|                              | ) | Case Nos. <del>CV02</del> -00473 |
| <b>Petitioner-Appellant,</b> | ) |                                  |
|                              | ) |                                  |
| v.                           | ) | <b>MOTION THAT COSTS OF</b>      |
|                              | ) | <b>APPEAL BE AT COUNTY</b>       |
| <b>STATE OF IDAHO,</b>       | ) | <b>EXPENSE</b>                   |
|                              | ) |                                  |
| <b>Respondent.</b>           | ) |                                  |
| _____                        | ) |                                  |

Mr. Gene F. Stuart ("Petitioner"), pursuant to Idaho Appellate Rule 17 and Idaho Code Section 19-4904, moves that the Court order that all costs of appeal, including the costs of the Reporter's Transcript and the Clerk's Record, shall be at county expense. In support of this motion, Mr. Stuart states as follows:

1. Since October, 1981, Idaho courts have determined that Mr. Stuart is indigent and unable to pay litigation costs in the prosecution, appeals, and postconviction petitions relating to his prosecution in the Second Judicial District, County of Clearwater, District Court Case No. CV02-00473. Mr. Stuart has been incarcerated since September, 1981.

**MOTION THAT COSTS OF  
APPEAL BE AT COUNTY EXPENSE - 1**

00000662

2. To the best of undersigned counsel's knowledge Mr. Stuart remains and shall continue to remain throughout the appellate proceedings in the instant matter an indigent person with no means of support or ability to pay the costs of these proceedings.

3. The federal and state constitutional rights to counsel, to due process, to equal protection, and against cruel and unusual punishment guarantee Mr. Stuart the right to appeal the denial of postconviction relief in his capital case. U.S. Const. amend. VI, VII, XIV; Idaho Const. art. I, §§ 2, 6, 13

WHEREFORE, Petitioner respectfully requests that the Court enter an Order directing that all costs of appeal, including the costs of the Reporter's Transcript and the Clerk's Record, shall be at county expense.

Dated this 22 day of April 2007.



Joan M. Fisher  
Oliver Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180



**CERTIFICATE OF SERVICE**

I, Julie BRUDIE, hereby certify that on the 23<sup>rd</sup> day of April, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, first class postage prepaid where applicable, addressed to:

Lori Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, Idaho 83544

U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail

L. LaMont Anderson  
Attorney General's Office  
P.O. Box 83720  
Boise, Idaho 83720-0010

U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail

Cindy Leonhardt  
Court Reporter  
M&M Court Reporting Service Inc.  
P.O. Box 2636  
Boise, ID 83701-2636

U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail

Julie Brudie

Joan M. Fisher  
Idaho State Bar No. 2854  
Oliver W. Loewy  
Limited Admission  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6<sup>th</sup> Street, Suite 204  
Moscow, ID 83843  
208-883-0180

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY  
JUL 27 10 49 AM '19  
W02-473  
JCS

Attorneys for Petitioner Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

**GENE FRANCIS STUART,** )  
 ) **Case Nos. CV02-00473**  
 **Petitioner-Appellant,** )  
 )  
 **v.** ) **NOTICE OF APPEAL**  
 )  
 **STATE OF IDAHO,** )  
 )  
 **Respondent.** )  
 \_\_\_\_\_ )

TO: PROSECUTING ATTORNEY FOR THE COUNTY OF  
CLEARWATER, STATE OF IDAHO, THE ATTORNEY GENERAL  
FOR THE STATE OF IDAHO, AND THE CLERK OF THE DISTRICT  
COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF  
IDAHO.

Pursuant to Idaho Appellate Rules 11(a)(1), 11(a)(7), 11(c)(9), and 17, NOTICE IS  
HEREBY GIVEN THAT:

1. Gene F. Stuart, the above named appellant, appeals against the above named  
respondent to the Idaho Supreme Court from the Memorandum Opinion On Petition For Post  
Conviction Relief And/Or Writ Of Habeas Corpus and Motion To Correct Illegal Sentence, To

**Notice of Appeal - 1**

00000665

Vacate Sentence Of Death And For New Sentencing Trial filed in the above entitled action on March 12, 2007, Honorable Ron Schilling, Senior District Judge, presiding.

2. Mr. Stuart is entitled to appeal to the Idaho Supreme Court, and the order described in paragraph one is an appealable order pursuant to Idaho Appellate Rule 11(a)(1), 11(a)(7), and 11(c)(9).

3. Mr. Stuart intends to raise various issues in his appeal, including but not limited to:

a. Whether Idaho Code §19-2719 violates the Idaho constitution's separation of power's doctrine inasmuch as it removes from the district courts the jurisdiction to reach the merits of postconviction petitioners filed outside that statute's time requirements;

b. Whether the application of the 42 day filing requirement amended into Idaho Code Section 19-2719 to Mr. Stuart's case violates Idaho Code Section 73-101 ("No part of these compiled laws is retroactive, unless expressly so declared.");

c. Whether Mr. Stuart's claims of prosecutorial misconduct were untimely raised; and

d. Whether Mr. Stuart's claims of ineffective assistance of counsel were untimely raised.

4. Mr. Stuart requests that a Reporter's Transcript of all hearings in this matter be prepared. He requests that it *not* be prepared in compressed format as described in Idaho Appellate Rule 26.

5. Mr. Stuart requests that in addition to those items automatically included pursuant to Idaho Appellate Rule 28, that the Clerk's Record include *all* papers filed by each party and *all* orders and minute entries.

6. The undersigned certifies:

a. That the Honorable Ronald D. Schilling is a Senior District Judge and, as such, does not have an assigned court reporter; that on this 23rd day of April, 2007, a copy of this Notice of Appeal has been served on each court reporter who recorded hearings in this matter and whose identity is now available to undersigned counsel; that undersigned counsel has made a good faith effort to learn the identity of the court reporter for the May 22, 2006, hearing, but that Judge Schilling, the clerk's office of the Clearwater County District Court, and opposing counsel were unable to provide that court reporter's identity today; that service on the remaining court reporter(s) was accomplished by placing a copy in a properly addressed envelope, first class postage affixed, and mailing that envelope via the United States Postal Service; and that undersigned counsel will determine as quickly as possible the identity of the May 22, 2006, court reporter, immediately serve a copy of this Notice of Appeal on him or her, and also immediately advise this Court of same. See Idaho Appellate Rule 20.

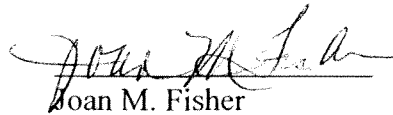
b. That Mr. Stuart is exempt from paying the estimated reporter's transcript fees because he was indigent before trial and has been ever since;

c. That Mr. Stuart is exempt from paying the estimated clerk's record fees because he was indigent before trial and has been ever since;

d. That Mr. Stuart is exempt from paying the appellate filing fee because he was indigent before trial and has been ever since; and

e. That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20, namely, the Clearwater County Prosecuting Attorney and the Attorney General for the State of Idaho.

Dated this 22 day of April 2007.



Joan M. Fisher  
Oliver Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180

**CERTIFICATE OF SERVICE**

I, Julie BRUDIE, hereby certify that on the 23<sup>rd</sup> day of April, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, first class postage prepaid where applicable, addressed to:

Lori Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, Idaho 83544

U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail

L. LaMont Anderson  
Attorney General's Office  
P.O. Box 83720  
Boise, Idaho 83720-0010

U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail

Cindy Leonhardt  
Court Reporter  
M&M Court Reporting Service Inc.  
P.O. Box 2636  
Boise, ID 83701-2636

U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail

Julie Brudie

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2007 APR 30 P 3:48

CASE NO CV02-473

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

**GENE FRANCIS STUART,** )  
 )  
 **Petitioner,** )  
 )  
 v. )  
 )  
 **STATE OF IDAHO,** )  
 )  
 **Respondent.** )  
 \_\_\_\_\_ )

**Case No. CV02-00473**

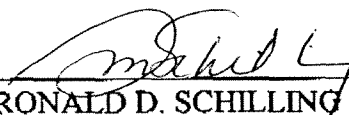
**ORDER**

Having duly considered Petitioner's *Motion That Costs Of Appeal Be At County Expense*,

IT IS HEREBY ORDERED THAT:

All costs of appeal to the Idaho Supreme Court in the instant matter, including the costs of the Reporter's Transcript and the Clerk's Record, shall be at county expense.

Entered this 25<sup>th</sup> day of April, 2007.

  
\_\_\_\_\_  
RONALD D. SCHILLING  
District Judge

ORDER -1

00000670

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a full, true and correct copy of the foregoing Order was personally delivered or mailed this 20th day of April, 2007, by first-class mail with prepaid postage to the following:

Joan M. Fisher  
Oliver Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6th Street, Suite 204  
Moscow, Idaho 83843

U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail

Lori Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, Idaho 83544

U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail

L. LaMont Anderson  
Attorney General's Office  
P.O. Box 83720  
Boise, Idaho 83720-0010

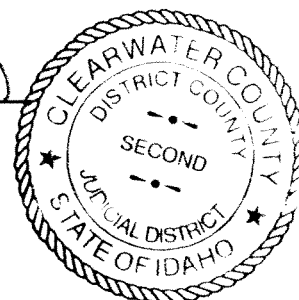
U.S. Mail  
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 Facsimile  
 Overnight Mail

Cindy Leonhardt  
Court Reporter  
M&M Court Reporting Service Inc.  
P.O. Box 2636  
Boise, ID 83701-2636

U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail

Robin Christensen Clerk

By: Sue K. Gammerton  
Deputy





Joan M. Fisher  
 Idaho State Bar No. 2854  
 Oliver W. Loewy  
 Limited Admission  
 Capital Habeas Unit  
 Federal Defender Services of Idaho  
 317 West 6<sup>th</sup> Street, Suite 204  
 Moscow, ID 83843  
 208-883-0180

CLERK OF DISTRICT COURT  
 CLEARWATER COUNTY  
 2007 JUN -8 A 11:12  
 W02-473  
 SWS DEPT

Attorneys for Petitioner Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

|                              |   |                                 |
|------------------------------|---|---------------------------------|
| <b>GENE FRANCIS STUART,</b>  | ) |                                 |
|                              | ) | <b>Case Nos. CV02-00473</b>     |
| <b>Petitioner-Appellant,</b> | ) |                                 |
|                              | ) |                                 |
| <b>v.</b>                    | ) | <b>AMENDED NOTICE OF APPEAL</b> |
|                              | ) |                                 |
| <b>STATE OF IDAHO,</b>       | ) |                                 |
|                              | ) |                                 |
| <b>Respondent.</b>           | ) |                                 |
| _____                        | ) |                                 |

TO: PROSECUTING ATTORNEY FOR THE COUNTY OF CLEARWATER, STATE OF IDAHO, THE ATTORNEY GENERAL FOR THE STATE OF IDAHO, AND THE CLERK OF THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO.

Pursuant to Idaho Appellate Rules 11(a)(1), 11(a)(7), 11(c)(9), 17, and 17(l),

NOTICE IS HEREBY GIVEN THAT:

1. On April 23, 2007, Gene F. Stuart, the above named appellant, filed his Notice of Appeal from the Memorandum Opinion and Order entered on March 12, 2007, by the Honorable Ron Schilling, Senior District Judge. The next day, undersigned counsel received the Judgment

**Amended Notice of Appeal - 1**

00000672

Dismissing Case with Prejudice ("Judgment") entered on April 18, 2007. Mr. Stuart files this instant Amended Notice of Appeal from that Judgment.

2. Mr. Stuart is entitled to appeal to the Idaho Supreme Court, and the Judgment is appealable pursuant to Idaho Appellate Rules 11(a)(1), 11(a)(7), and 11(c)(9).

3. Mr. Stuart intends to raise various issues in his appeal, including but not limited to:

a. Whether Idaho Code §19-2719 violates the Idaho constitution's separation of power's doctrine inasmuch as it removes from the district courts the jurisdiction to reach the merits of postconviction petitions filed outside that statute's time requirements;

b. Whether the application of the 42 day filing requirement amended into Idaho Code Section 19-2719 to Mr. Stuart's case violates Idaho Code Section 73-101 ("No part of these compiled laws is retroactive, unless expressly so declared.");

c. Whether Mr. Stuart's claims of prosecutorial misconduct were untimely raised; and

d. Whether Mr. Stuart's claims of ineffective assistance of counsel were untimely raised.

e. Mr. Stuart requests that a Reporter's Transcript of all hearings in this matter be prepared. He requests that it *not* be prepared in compressed format as described in Idaho Appellate Rule 26.

4. Mr. Stuart requests that in addition to those items automatically included pursuant to Idaho Appellate Rule 28, that the Clerk's Record include *all* papers filed by each party and *all* orders and minute entries.

5. Please note that there are sealed documents filed in his case. Mr. Stuart respectfully requests those documents **remain sealed** and be sent to the Supreme Court as **sealed exhibits** to this record on appeal.

6. The undersigned certifies:

a. That the Honorable Ronald D. Schilling is a Senior District Judge and, as such, does not have an assigned court reporter; that on this 7<sup>th</sup> day of May, 2007, a copy of this Notice of Appeal has been served on each court reporter who recorded hearings in this matter.

b. That the District Court electronically recorded some hearings for which no court reporter was present, including those held on January 6, 2006, and May 22, 2006.

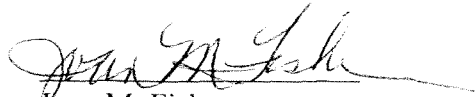
c. That Mr. Stuart is exempt from paying the estimated reporter's transcript fees because he was indigent before trial and has been ever since;

d. That Mr. Stuart is exempt from paying the estimated clerk's record fees because he was indigent before trial and has been ever since;

e. That Mr. Stuart is exempt from paying the appellate filing fee because he was indigent before trial and has been ever since; and

f. That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20, namely, the Clearwater County Prosecuting Attorney and the Attorney General for the State of Idaho.

Dated this 7<sup>th</sup> day of May, 2007.



Joan M. Fisher  
Oliver Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180

CERTIFICATE OF SERVICE

I, Jillie Brudie hereby certify that on the 17<sup>th</sup> day of May, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, first class postage prepaid where applicable, addressed to:

Lori Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, Idaho 83544

U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail

L. LaMont Anderson  
Attorney General's Office  
P.O. Box 83720  
Boise, Idaho 83720-0010

U.S. Mail  
 Hand Delivery  
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Cindy Leonhardt  
Court Reporter  
M&M Court Reporting Service Inc.  
P.O. Box 2636  
Boise, ID 83701-2636

U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail

Jillie Brudie

Joan M. Fisher  
Idaho State Bar No. 2854  
Oliver W. Loewy  
Limited Admission  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6<sup>th</sup> Street, Suite 204  
Moscow, ID 83843  
208-883-0180

CLERK-DISTRICT COURT  
CLEARWATER, IDAHO

2007 JUN 6 11:32  
CV02-473  
JCS

Attorneys for Petitioner Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

|                              |   |                             |
|------------------------------|---|-----------------------------|
| <b>GENE FRANCIS STUART,</b>  | ) |                             |
|                              | ) | <b>Case Nos. CV02-00473</b> |
| <b>Petitioner-Appellant,</b> | ) |                             |
|                              | ) |                             |
| <b>v.</b>                    | ) | <b>SECOND AMENDED</b>       |
|                              | ) | <b>NOTICE OF APPEAL</b>     |
|                              | ) |                             |
| <b>STATE OF IDAHO,</b>       | ) |                             |
|                              | ) |                             |
| <b>Respondent.</b>           | ) |                             |
| _____                        | ) |                             |

TO: PROSECUTING ATTORNEY FOR THE COUNTY OF CLEARWATER, STATE OF IDAHO, THE ATTORNEY GENERAL FOR THE STATE OF IDAHO, AND THE CLERK OF THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO.

Pursuant to Idaho Appellate Rules 11(a)(1), 11(a)(7), 11(c)(9), 17, and 17(l)

NOTICE IS HEREBY GIVEN THAT:

1. This Second Amended Notice of Appeal is filed in compliance with the Idaho Supreme Court's May 23, 2007, Order directing that Appellant, Gene F. Stuart, file within fourteen (14) days, an Amended Notice of Appeal "specifying by date and title the hearing(s)

Second Amended Notice of Appeal - 1

00000677

required to be transcribed for purposes of this Appeal.” The particular dates and related matters are set out in paragraphs 4 and 7 below.

2. Mr. Stuart is entitled to appeal to the Idaho Supreme Court, and the Judgment is appealable pursuant to Idaho Appellate Rules 11(a)(1), 11(a)(7), 11(c)(9).

3. Mr. Stuart intends to raise various issues in his appeal, including but not limited to:

a. Whether this Court’s holding in *Porter v. State*, 140 Idaho 780, 783, 102 P.3d 1099, 1102 (2004), followed by the court below, that *Schriro v. Summerlin*, 532 U.S. 348 (2004), precludes it from retroactively applying *Ring v. Arizona*, 536 U.S. 584 (2002), reflects a fundamental misunderstanding of its authority to give retroactive effect to a broader range of cases than permitted by federal retroactivity doctrine; and

b. Whether the retroactive application of Idaho Code §19-2719 to this case violates the state and federal constitutions’ prohibition against *ex post facto* laws.

4. Mr. Stuart requests that a Reporter’s Transcript of *all* hearings be prepared in this matter, including the following hearings:

a. The March 3, 2004, Scheduling Conference held in Boise, Idaho, during which Appellant’s Motion to Stay Proceedings was considered and ruled on. This hearing was reported by Cindy L. Leonhardt, C.S.R., and a transcript of the hearing has previously been prepared.

b. The January 6, 2006, telephonic Scheduling Conference. This hearing was not reported, but it was recorded electronically on tape #C3741, Clearwater County District Court, Orofino, Idaho.

- c. The March 30, 2006, telephonic Scheduling Conference. This hearing was not reported, but it was recorded electronically on tape #CD162, Clearwater County District Court, Orofino, Idaho.
- d. The May 22, 2006, Motion Hearing. This hearing was not reported, but it was recorded electronically by Court staff on tapes, tape numbers unknown, at the Idaho Maximum Security Institution, Boise, Idaho.
5. Mr. Stuart requests that the Reporter's Transcript *not* be prepared in compressed format as described in Idaho Appellate Rule 26.
6. Mr. Stuart requests that in addition to those items automatically included pursuant to Idaho Appellate Rule 28, that the Clerk's Record include *all* papers filed by each party and *all* orders and minute entries.
  6. Please note that there are sealed documents filed in this case. Mr. Stuart respectfully requests that those documents **remain sealed** and be sent to the Supreme Court as **sealed exhibits** to the record on appeal in this matter.
  7. The undersigned certifies:
    - a. That the Honorable Ronald D. Schilling is a Senior District Judge and, as such, does not have an assigned court reporter; that on this 4<sup>th</sup> day of June, 2007, a copy of this Second Amended Notice of Appeal has been served on each court reporter who recorded hearings in this matter.
    - b. That the District Court electronically recorded some hearings for which no court reporter was present, including those held on January 6, 2006, March 30, 2006, and May 22, 2006.



c. That Mr. Stuart is exempt from paying the estimated reporter's transcript fees because he was indigent before trial and has been ever since;

d. That Mr. Stuart is exempt from paying the estimated clerk's record fees because he was indigent before trial and has been ever since;

e. That Mr. Stuart is exempt from paying the appellate filing fee because he was indigent before trial and has been ever since; and

f. That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20, namely, the Clearwater County Prosecuting Attorney and the Attorney General for the State of Idaho.

Dated this 4<sup>th</sup> day of June, 2007.



Joan M. Fisher  
Oliver Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180

CERTIFICATE OF SERVICE

I, Julie Radie, hereby certify that on the 5<sup>th</sup> day of June, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, first class postage prepaid where applicable, addressed to:

Lori Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, Idaho 83544

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight Mail

L. LaMont Anderson  
Attorney General's Office  
P.O. Box 83720  
Boise, Idaho 83720-0010

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight Mail

Cindy Leonhardt  
Court Reporter  
M&M Court Reporting Service Inc.  
P.O. Box 2636  
Boise, ID 83701-2636

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight Mail

Julie Radie

**JOAN M. FISHER**  
 Idaho State Bar No. 2854  
**OLIVER W. LOEWY**  
 Limited Admission  
 Capital Habeas Unit  
 Federal Defender Services of Idaho  
 317 West 6<sup>th</sup> Street, Suite 204  
 Moscow, ID 83843  
 Telephone: 208-883-0180  
 Facsimile: 208-883-1472

ROBIN CHRISTENSEN  
 CLERK-DISTRICT COURT  
 CLEARWATER COUNTY  
 OROFINO, IDAHO

2007 JUN 28 P 1:40

CASE NO W02-473  
W02-443  
CR-81-8495  
 BY SJS DEPT

Attorneys for Petitioner Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

**SEALED**

|                             |   |                    |             |
|-----------------------------|---|--------------------|-------------|
| <b>GENE FRANCIS STUART,</b> | ) | Case Nos.          | CV-2002-473 |
| <b>Petitioner,</b>          | ) |                    | CV-2002-443 |
|                             | ) |                    | CR-81-8495  |
|                             | ) |                    |             |
| v.                          | ) | <b>STIPULATION</b> |             |
|                             | ) |                    |             |
| <b>STATE OF IDAHO,</b>      | ) |                    |             |
| <b>Respondent.</b>          | ) |                    |             |
| _____                       | ) |                    |             |

Petitioner and Respondent hereby stipulate to the sealing of the particular documents filed in the above-captioned cases, and identified and described below. Each document contains extremely intimate facts regarding living individuals, including but not limited to sexual, physical, and/or emotional abuse of Gene, his mother, his sisters, his half-sisters, and some of his extended family members by Mr. Stuart's father throughout Gene Stuart's childhood and

STIPULATION (SEALED) -1 of 5

adolescence and into his adulthood. Left unsealed, these documents could reach the public and prove extraordinarily stressful and have otherwise seriously negative effects on the declarants and others. In turn, these consequences might well have a chilling effect on the declarants and/or other potential witnesses cooperating with either party.

In particular, the parties stipulate to the sealing of the following documents:

A. Each of the three appendices to the Petition for Postconviction Relief and Petition for Writ of Habeas Corpus. In particular, the parties stipulate to the sealing of:

1. Appendix A (sworn statement of Theresa Jo Jacobson, former girlfriend of Gene Stuart (10/28/02));
2. Appendix B (transcription of Gene Stuart's paternal aunt, Elaine Haugen, interview by Clearwater County Sheriff Deputy Bob Rears (10/7/81)); and
3. Appendix C (transcription of Gene Stuart's first wife, Sharie Dally nee Toavs, interview by Orofino Police Department Sergeant Robert Harrelson and Officer Doug Graves (9/24/81)).

B. Each of the four sworn statements Petitioner filed with the Court on March 19, 2003. In particular, the parties stipulate to the sealing of:

1. the sworn statement of Virginia Leo Pressler (11/27/02), Gene Stuart's half-sister;
2. the sworn statement of Susan Kathleen Stuart (2/12/03),

STIPULATION (SEALED) -2 of 5

00000683

Gene Stuart's full-sister;

3. the sworn statement of Delores Mary Nichols (11/19/02),  
Gene's Stuart paternal aunt by marriage; and
4. the sworn statement of Rose Mary Connelly (11/19/02),  
Gene Stuart's paternal cousin by marriage.

C. Each of eleven of twenty sworn statements filed with the Court by Petitioner on May 22, 2006. In particular, the parties stipulate to the sealing of:

1. the sworn statement of Jim Bigley, friend and public school classmate of Gene Stuart (4/19/06);
2. the sworn statement of Mary Jane Bigley, an acquaintance of Gene Stuart during his high school years (11/19/02);
3. the sworn statement of Rose Mary Connelly, paternal cousin by marriage to Gene Stuart (11/19/02)<sup>1</sup>;
4. the sworn statement of Gene Lee Dally, son of Gene Stuart and Sharie Dally nee Toavs (5/2/06);
5. the sworn statement of Malvin W. Kraft, next-door neighbor to Gene Stuart's family from 1967 until Gene's family moved away from the Ravalli Valley, Montana (4/19/06);

---

<sup>1</sup>A duplicate of the statement filed March 19, 2003, was mistakenly filed on May 22, 2006.

- 6. the sworn statement of Sharie Lee Kuhl, Mr. Stuart's first wife and prosecution witness at trial regarding, among other things, Mr. Stuart's alleged prior bad acts (3/28/03);
- 7. the sworn statement by Donna Marquette, Ravalli Valley resident from Gene Stuart's birth forward (3/1/06);
- 8. the sworn statement by Delores Mary Nichols, Gene Stuart's paternal aunt by marriage (11/19/02)<sup>2</sup>;
- 9. the sworn statement of Virginia Lee Pressler, half-sister of Gene Stuart (11/27/02)<sup>3</sup>;
- 10. the sworn statement of Susan Kathleen Stuart, one of Gene Stuart's two full sisters (2/12/03)<sup>4</sup>; and

//  
 //  
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 //  
 //  
 //

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<sup>2</sup>A duplicate of the statement filed March 19, 2003, was mistakenly filed on May 22, 2006.


<sup>3</sup>A duplicate of the statement filed March 19, 2003, was mistakenly filed on May 22, 2006.

<sup>4</sup>A duplicate of the statement filed March 19, 2003, was mistakenly filed on May 22, 2006.

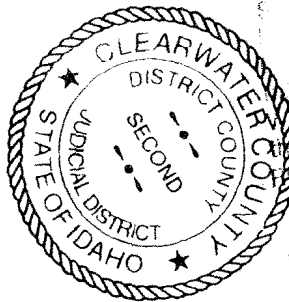
- 11. the sworn statement of Thomas H. Thorn, contemporary and schoolmate of Gene Stuart (5/18/06).

DATED this 28<sup>th</sup> day of June, 2007.

  
 L. LaMont Anderson  
 Special Prosecutor/Deputy Attorney General  
 Capital Litigation Unit  
 P.O. Box 83720  
 Boise, Idaho 83720-0010

  
 Joan M. Fisher  
 Oliver W. Loewy  
 317 West 6<sup>th</sup> Street, Suite 204  
 Moscow, Idaho 83843

STIPULATION (SEALED)-3 of 5



County of Clearwater  
 I certify that the foregoing is a full, true, and  
 copy of an instrument as the same now  
 is on file and of record in my office.  
 I WITNESS my hand and official seal hereunto affixed  
 this 28<sup>th</sup> day of June AD. 2007  
 GABIN CHRISTENSEN, CLERK OF THE DISTRICT  
 COURT EX OFFICIO AUDITOR & RECORDER  
 By Deputy Sue K. Summerton

WILLIAM L. LASEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

2007 JUL 02 P 1:01  
W02-473  
W02-443  
BY CR-81-8495  
SIS

**SEALED**

|                             |   |                  |                    |
|-----------------------------|---|------------------|--------------------|
| <b>GENE FRANCIS STUART,</b> | ) | <b>Case Nos.</b> | <b>CV-2002-473</b> |
| <b>Petitioner,</b>          | ) |                  | <b>CV-2002-443</b> |
|                             | ) |                  | <b>CR-81-8495</b>  |
|                             | ) |                  |                    |
| v.                          | ) | <b>ORDER</b>     |                    |
|                             | ) |                  |                    |
| <b>STATE OF IDAHO,</b>      | ) |                  |                    |
| <b>Respondent.</b>          | ) |                  |                    |

---

Having considered the parties' Sealed Stipulation filed with the Court on June 28, 2007, and having considered all its premises, the Court orders that:

1. The Clerk's Office shall immediately seal from public inspection Appendices A (Theresa Jo Jacobson sworn statement (10/28/02), B (Elaine Haugen taped interview transcription (interview conducted on 10/7/81 by Clearwater County Sheriff Deputy Robert Rears), and C (Sharie Dally nee Toavs taped interview transcription (interview conducted on 9/24/81 by Orofino Police Department Sergeant Robert Harrelson and Officer Doug Graves) to the Petition For Postconviction Relief And Petition For Writ Of Habeas Corpus filed in Case No. CV-2002-473, filed December 3, 2002.
2. The Clerk's Office shall immediately seal from public inspection each of the four exhibits attached to Petitioner's March 19, 2003, filing *Affidavits In Support Of Petition For Postconviction Relief*. Those four exhibits are (a) Virginia Lee Pressler sworn statement



(11/27/02), (b) Susan Kathleen Stuart sworn statement (2/12/03), (c) Delores Mary Nichols sworn statement (11/19/02), and (d) Rose Mary Connelly sworn statement (11/19/02).

3. The Clerk's Office shall immediately seal from public inspection the following statements which Petitioner filed with the Court on May 22, 2006: (a) Jim Bigley sworn statement (4/19/06), (b) Mary Jane Bigley sworn statement (4/19/06), (c) Rose Mary Connelly sworn statement (11/19/02), (d) Gene Lee Dally sworn statement (5/2/06), (e) Malvin W. Kraft sworn statement (4/19/06), (f) Sharie Lee Kuhl nee Toavs sworn statement (3/28/03), (g) Donna Marquette sworn statement (3/1/06), (h) Delores Mary Nichols sworn statement (11/19/02), (i) Virginia Lee Pressler sworn statement (11/27/02), (j) Susan Kathleen Stuart sworn statement (2/12/03), and (k) Thomas H. Thorn sworn statement (4/18/06).

DATED this 29<sup>th</sup> day of June, 2007.

  
RON SCHILLING  
Presiding Judge

**CERTIFICATE OF SERVICE**

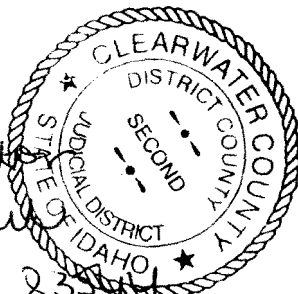
I hereby certify that on this 3<sup>rd</sup> day of July, 2007, I caused to be served a true and correct copy of the attached document upon the attorneys named below by placing it, in a properly addressed envelope with first class postage prepaid, into the U.S. Mails for delivery to the individuals at the addresses below.

Joan M. Fisher  
Oliver W. Loewy  
Capital Habeas Unit  
317 West 6<sup>th</sup> Street, Ste. 204  
Moscow, Idaho 83843 - FAX # 883-1472

L. LaMont Anderson  
Special Prosecutor/Deputy Attorney General  
Capital Litigation Unit  
P.O. Box 83720  
Boise, Idaho 83720-0010

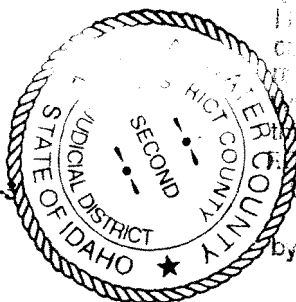
Robin Christensen, Clerk  
Sue K. Summerton - Deputy

Lori Gilmore  
Deputy Prosecutor  
Courthouse mail  
Profine ID 83544



STATE OF IDAHO County of Clearwater  
I hereby certify that the foregoing is a full, true, and correct copy of an instrument as the same now on file and of record in my office.  
I have in my hand and official seal hereto affixed this 3<sup>rd</sup> day of July, AD, 2007  
ROBIN CHRISTENSEN, CLERK OF THE DISTRICT COURT EX OFFICIO AUDITOR & RECORDER

Sealed Order - 3



by Deputy Sue K. Summerton

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
CROFTON, IDAHO

2007 JUL 25 A 11:12

CASE NO. CV2002-473

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

SJS  
DEPT

|                       |   |                       |
|-----------------------|---|-----------------------|
| GENE FRANCIS STUART,  | ) | CASE NO. CV2002-00473 |
|                       | ) | DOCKET #34200         |
| Petitioner-Appellant, | ) |                       |
|                       | ) | NOTICE OF LODGING     |
| v.                    | ) | REPORTERS TRANSCRIPT  |
|                       | ) | AND CLERK'S RECORD    |
| STATE OF IDAHO,       | ) |                       |
|                       | ) |                       |
| Respondent.           | ) |                       |

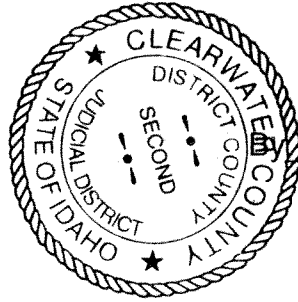
NOTICE IS HEREBY GIVEN that on July 25, 2007, the Clerk's Record and Reporters Transcripts were lodged in the above-referenced appeal.

The parties shall have twenty-eight (28) days from the date of service of the appeal record to file any objections, together with a Notice of Hearing, with the District Court. If no objection is filed, the record will be deemed settled and will be filed with the Supreme Court.

If there are multiple (Appellants) (Respondents), I will serve the record, and any transcript, upon the parties upon receipt of a stipulation of the parties, or court order stating which party shall be served. If no stipulation or order is filed in seven (7) days, I will serve the party whose name appears first in the case title.

NOTICE OF LODGING OF SUPPLEMENTAL REPORTER'S  
TRANSCRIPT AND CLERK'S RECORD - 1

00000690



ROBIN CHRISTENSEN, Clerk

*Sue K. Summerston*  
Deputy

Cc: Clerk of the Court  
Idaho Supreme Court  
P.O. Box 83720  
Boise, ID 83720-0101

NOTICE OF LODGING OF SUPPLEMENTAL REPORTER'S  
TRANSCRIPT AND CLERK'S RECORD - 1

00000691

ROBIN CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
BOZEMAN, IDAHO

2007 AUG 22 A 9:43

CASE NO. NO2-443  
CV02-473  
BY CR81-8495 DEPT  
JCS

**JOAN M. FISHER**  
ID Bar No. 2854  
**OLIVER W. LOEWY**  
Limited Admittee  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6th Street, Suite 204  
Moscow ID 83843  
Telephone: 208-883-0180  
Facsimile: 208-883-1472

Attorneys for Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR CLEARWATER COUNTY**

**GENE FRANCIS STUART,** )  
Petitioner, )  
 )  
v. )  
 )  
**STATE OF IDAHO,** )  
Respondent. )  
\_\_\_\_\_ )

Case Nos. CV-02-00443 ✓  
CV-02-00473

**AFFIDAVIT IN SUPPORT OF  
MOTION FOR EXTENSION OF TIME  
IN WHICH TO FILE  
OBJECTIONS TO CLERK'S RECORD  
AND REPORTER'S TRANSCRIPTS**

**STATE OF IDAHO,** )  
Plaintiff, )  
 )  
v. )  
 )  
**GENE FRANCIS STUART,** )  
Defendant. )  
\_\_\_\_\_ )

Case No. CR-1981-08495

**AFFIDAVIT IN SUPPORT OF  
MOTION FOR EXTENSION OF TIME  
IN WHICH TO FILE  
OBJECTIONS TO CLERK'S RECORD  
AND REPORTER'S TRANSCRIPTS**

I, Joan M. Fisher, state that the following is true to the best of my knowledge and belief,  
under penalties of perjury:

**AFFIDAVIT IN SUPPORT OF MOTION FOR EXTENSION  
OF TIME IN WHICH TO FILE OBJECTIONS TO CLERK'S RECORD  
AND REPORTER'S TRANSCRIPTS**

I am the Supervising Attorney for the Capital Habeas Unit and have been advised by Oliver W. Loewy, primary counsel responsible for the above-captioned cases, the following state of the record in these matters:

1. This postconviction action seeks guilt and sentencing phase relief primarily based on *Ring v. Arizona*, 536 U.S. 584 (2002).
2. My office received, via the United Parcel Service, the Reporter's Transcript and Clerk's record in each of the above matters on July 26, 2007.
3. As the Court is aware, Mr. Stuart is the petitioning party in each of the above three captioned cases, and all three cases arise out of his 1981 first degree murder conviction and death sentence.
4. With regard to Case No. CV-02-00443, the Reporter's Transcript appears to include a full transcript of each of the court proceedings in the above-captioned matter. As well, it appears to include no transcripts of any earlier court proceeding.
5. The Clerk's Record in Case No. CV-02-00443 includes a variety of documents *not* filed in this matter, including (a) sealed documents which Petitioner filed in the other two above captioned cases (Case Numbers CV-02-00473 and CR-1981-08495), (b) a document which purports to be a list of jury trial exhibits, (c) a document which purports to be a list of preliminary hearing exhibits, and (d) a list of the State's exhibits from an April, 1992, hearing.
6. The Clerk's Record in Case Numbers CV-02-00473 and CR-1981-08495 appears to be missing appendices to Mr. Stuart's *Petition For Postconviction Relief and Petition For*

AFFIDAVIT IN SUPPORT OF MOTION FOR EXTENSION  
OF TIME IN WHICH TO FILE OBJECTIONS TO CLERK'S RECORD  
AND REPORTER'S TRANSCRIPTS                      2

00000693

*Writ of Habeas Corpus.* While some of the appendices to that document were sealed, none appear to be included in the Clerk's Record. Similarly, appendices A-D to Petitioner's March 3, 2003, *Affidavits In Support Of Petition For Postconviction Relief.* Additional documents appear to be missing, as well.

7. In a telephone conversation with Oliver W. Loewy, the attorney with my office primarily responsible for Mr. Stuart's cases, opposing counsel L. LaMont Anderson discussed the state of the Clerk's Record and agreed that an extension in time to September 25, 2007, would allow a fully adequate examination of the Clerk's Records in these three matters and the filing of the parties' respective objections. Of course, with further examination, the parties may be able to stipulate to the Clerk's Record.

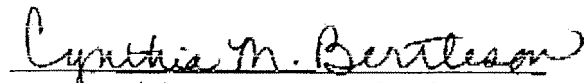
Dated this 21<sup>st</sup> day of August, 2007.



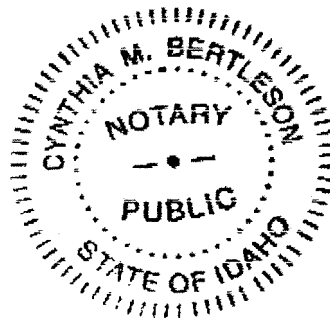
Joan M. Fisher  
Oliver W. Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180

Attorneys Petitioner/Appellant for Gene F. Stuart

Sworn before me this 21<sup>st</sup> day of  
August, 2007.

  
Notary Public for the State of Idaho

My commission expires: 8-8-12



AFFIDAVIT IN SUPPORT OF MOTION FOR EXTENSION  
OF TIME IN WHICH TO FILE OBJECTIONS TO CLERK'S RECORD  
AND REPORTER'S TRANSCRIPTS

**CERTIFICATE OF SERVICE**


I hereby certify that on the 21<sup>st</sup> day of August, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, addressed to:

L. LaMont Anderson  
Deputy Attorney General  
Idaho Attorney General's Office  
Chief, Capital Litigation Unit  
Statehouse Mail, Room 10  
PO Box 83720  
Boise ID 83720-0010

U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail

Lori M. Hood - Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, ID 83544

U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail

  
Julie Brudie



**JOAN M. FISHER**  
 ID Bar No. 2854  
**OLIVER W. LOEWY**  
 Limited Admittee  
 Capital Habeas Unit  
 Federal Defender Services of Idaho  
 317 West 6<sup>th</sup> Street, Suite 204  
 Moscow ID 83843  
 Telephone: 208-883-0180  
 Facsimile: 208-883-1472

CLERK-DISTRICT COURT  
 CLEARWATER COUNTY  
 ORANGE, IDAHO

2007 AUG 22 A 9:43

CASE NO. W02-443

BY SES DEPUTY

Attorneys for Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR CLEARWATER COUNTY**

|                             |   |                                     |
|-----------------------------|---|-------------------------------------|
| <b>GENE FRANCIS STUART,</b> | ) | <b>Case No. CV-02-00443</b>         |
| <b>Petitioner,</b>          | ) |                                     |
|                             | ) | <b>MOTION FOR EXTENSION OF</b>      |
|                             | ) | <b>TIME IN WHICH TO FILE</b>        |
|                             | ) | <b>OBJECTIONS TO CLERK'S RECORD</b> |
|                             | ) | <b>AND REPORTER'S TRANSCRIPTS</b>   |
| <b>STATE OF IDAHO,</b>      | ) |                                     |
| <b>Respondent.</b>          | ) |                                     |
| _____                       | ) |                                     |

Gene F. Stuart, Petitioner in the above-captioned action, hereby moves for an extension in time to September 25, 2007, by which the parties may file, pursuant to Idaho Appellate Rule 29(a), objections to the Clerk's Record and Reporters' Transcript. In making this motion, he relies on the accompanying declaration as well as state and federal right to due process.

**MOTION FOR EXTENSION OF TIME IN WHICH TO  
 FILE OBJECTIONS TO CLERK'S RECORD AND  
 REPORTER'S TRANSCRIPT -1**

00000696

Dated this 21<sup>st</sup> day of August, 2007.

Respectfully submitted,



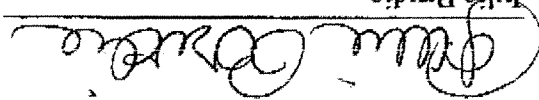
Joan M. Fisher  
Oliver W. Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180

Attorneys for Petitioner/Appellant Gene F. Stuart

MOTION FOR EXTENSION OF TIME IN WHICH TO  
FILE OBJECTIONS TO CLERK'S RECORD AND  
REPORTER'S TRANSCRIPT -2

00000697

MOTION FOR EXTENSION OF TIME IN WHICH TO  
FILE OBJECTIONS TO CLERK'S RECORD AND  
REPORTER'S TRANSCRIPT -3

  
Julie Brudie

U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail

U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail

Loth M. Hood - Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, ID 83544

L. LaMont Anderson  
Deputy Attorney General  
Idaho Attorney General's Office  
Chief, Capital Litigation Unit  
Statehouse Mail, Room 10  
PO Box 83720  
Boise ID 83720-0010

I hereby certify that on the 21<sup>st</sup> day of August, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, addressed to:

**CERTIFICATE OF SERVICE**

ADR SERVICES

FAX NO. : 208-898-9051

Aug. 21 2007 06:43PM P2

08/21/2007 17:06 2008031472

CAPITAL HABEAS UNIT

CLEARWATER COUNTY CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2007 AUG 22 A 10:48

CV 02-443

CASE NO. CV 02-473

CR 01-3495

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR CLEARWATER COUNTY

SIS

GENE FRANCIS STUART,  
Petitioner,

Case Nos. CV-02-00443  
CV-02-00473

v.

ORDER

STATE OF IDAHO,  
Respondent.

STATE OF IDAHO,  
Plaintiff,

Case No. CR-1981-08495

v.

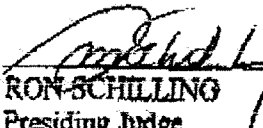
ORDER

GENE FRANCIS STUART,  
Defendant.

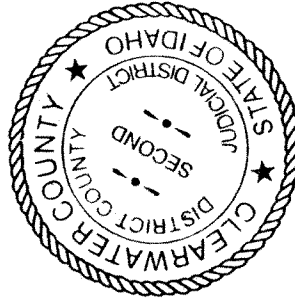
Having considered Petitioner/Defendant's Motion For Extension Of Time In Which To  
File Objections To Clerk's Record and Reporter's Transcript in each of the above-captioned  
matters and all their premises, IT IS HEREBY ORDERED:

The time by which each party must file any objections to the Clerk's Record and  
Reporter's Transcript in any of the above-captioned matters is hereby extended to and including  
September 25, 2007.

DATED this 21<sup>st</sup> day of August, 2007.

  
RON SCHILLING  
Presiding Judge

ORDER



*Shirley R. Zimmerman*  
Deputy Clerk

Overnight Mail  
 Facsimile  
 Hand Delivery  
 U.S. Mail

Overnight Mail  
 Facsimile  
 Hand Delivery  
 U.S. Mail

Overnight Mail  
 Facsimile  
 Hand Delivery  
 U.S. Mail

Joan Fisher  
Oliver Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 W. 6<sup>th</sup> Street, Suite 204  
Moscow, ID 83843

Lois M. Hood - Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orfino, ID 83544

L. Lakmont Anderson  
Deputy Attorney General  
Idaho Attorney General's Office  
Chief, Capital Litigation Unit  
Statehouse Mall, Room 10  
PO Box 83720  
Boise ID 83720-0010

I hereby certify that on the 22<sup>nd</sup> day of August, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, addressed to:

**CERTIFICATE OF SERVICE**

CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
ORANGE, IDAHO

**JOAN M. FISHER**  
*ID Bar No. 2854*  
**OLIVER W. LOEWY**  
*Limited Admittee*  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6<sup>th</sup> Street, Suite 204  
Moscow ID 83843  
Telephone: 208-883-0180  
Facsimile: 208-883-1472

2007 SEP 25 P 2:42  
FILED W02-473  
BY SLS

Attorneys for Petitioner/Appellant Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR CLEARWATER COUNTY**

|                             |   |                                |
|-----------------------------|---|--------------------------------|
| <b>GENE FRANCIS STUART,</b> | ) | <b>Case No. CV2002-00473</b>   |
| <b>Petitioner,</b>          | ) | <b>Supreme Court No. 34200</b> |
|                             | ) |                                |
| <b>v.</b>                   | ) | <b>NOTICE OF AND OBJECTION</b> |
|                             | ) | <b>TO CLERK'S RECORD AND</b>   |
| <b>STATE OF IDAHO,</b>      | ) | <b>REPORTER'S TRANSCRIPT</b>   |
| <b>Respondent.</b>          | ) | <b>ON APPEAL</b>               |
|                             | ) |                                |

**TO: THE PROSECUTING ATTORNEY FOR THE COUNTY OF  
CLEARWATER, STATE OF IDAHO, AND THE ATTORNEY GENERAL  
FOR THE STATE OF IDAHO, AND THE CLERK OF THE DISTRICT  
COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF  
IDAHO.**

The Clerk's Record and Reporter's Transcript were mailed to undersigned counsel on or about July 26, 2007. Pursuant to Idaho Appellate Rule 29 and his state and federal constitutional rights to due process, and by and through counsel, Gene Francis Stuart, objects to the Clerk's Record and Reporter's Transcript.

NOTICE OF AND OBJECTION TO CLERK'S RECORD  
AND REPORTER'S TRANSCRIPT ON APPEAL -1

00000701

**A. The Clerk's Record****1. The Clerk's Record Appears To Include Documents Related To But Not Properly Part Of The Instant Matter.**

Capital postconviction proceedings are civil in nature. *Stuart v. Idaho*, 136 Idaho 490, 494 36 P.3d 1278, 1282 (2001). Idaho Appellate Rule 28(b)(1) enumerates the items which the Clerk's Record in a civil case must automatically include. *Id.* That rule's next subdivision, Idaho Appellate Rule 28(b)(2), enumerates the items which the Clerk's Record in a criminal case must automatically include, with item N of subdivision (b)(2) being devoted to criminal appeals in which the death penalty was imposed. In addition to the items which must be included automatically, Idaho Appellate Rule 28(c) provides that the Clerk's Record must include all other documents of certain types which any party requests be included.

On its face, Rule 28(b)(1) is written to apply to original civil actions which do not attack earlier criminal convictions and sentences. The provisions describing documents to be included in the Clerk's Record do not contemplate the inclusion of an entire earlier case file. So, for example, item J of subdivision (b)(1) provides that among the documents to be included is, "A list of all exhibits offered, whether or not admitted.." I.A.R. 28(b)(1) J. The plain meaning of the singular 'list' rather than plural 'lists' is that the exhibits from the postconviction proceeding, not any earlier criminal proceeding, is to be included automatically in the record.

While Mr. Stuart requested, pursuant to Idaho Appellate Rule 28, "that the Clerk's Record include *all* papers filed by each party and *all* orders and minute entries," he did not intend that all exhibits from the underlying criminal proceedings and each earlier postconviction action be included. *Notice of Appeal* (6/4/2007). Rather, in the instant matter he has relied on the Clerk's

Record and Reporter's Transcript from those earlier proceedings, and he is confident that having done so incorporates those papers into this proceeding. Undersigned counsel Oliver Loewy has conferred with opposing counsel L. LaMont Anderson, and Mr. Anderson agrees that to the extent the earlier proceedings need to be relied on in this appeal, the Court may look to those earlier Clerk's Records and Reporter's Transcripts.

## 2. The Clerk's Record

Only those pleadings and documents which directly relate to the proceedings in the court below are properly part of the Clerk's Record on appeal. This is especially clear here where rather than reaching the merits of Mr. Stuart's claims, the Court dismissed the case on procedural grounds unrelated to many of the exhibits. However, counsel has received from the Clerk of the Court not only a bound Clerk's Record for this case, but a variety of documents from earlier proceedings in which Petitioner sought postconviction relief. Petitioner assumes that the unbound documents are intended to be part of the Clerk's Record.

In particular, undersigned counsel received a large box on or about July 26, 2007. It contained four bound volumes, two for District Court Nos. CV2002-00443 & CR1981-8495 and the other two for District Court No. CV2002-00473. Each of these sets purports to be the Clerk's Record for its corresponding case.

The box received in July, 2007, also included these five other sets of documents: (1) a set of binder-clipped documents with a cover sheet stating "Jury Trial Exhibits"; (2) a rubber-banded set of documents with a cover sheet stating "Gene Francis Stuart v. State of Idaho, CR 1981-8495 EVIDENTIARY HEARING -4/6/92" which sheet purports to list the defendant's exhibits from that hearing; (3) a rubber-banded set of documents with a cover sheet stating "Gene Francis



Stuart v. State of Idaho, CR 1981-8495 EVIDENTIARY HEARING -4/6/92" which purports to list the plaintiff's exhibits from that hearing; and (4) & (5) two rubber-banded sets of documents without any notation regarding their identity, though each appears to contain copies of exhibits from a June, 1999, postconviction evidentiary hearing.

Mr. Stuart objects that the Clerk's Record includes what purports to be exhibits, pleadings, and other documents relating to proceedings commenced and concluded prior to those now under consideration. None of these exhibits, pleadings, and other documents were relied on by the parties or the court in the case at bar. To the extent that these documents are intended to be part of the Clerk's Record in this case, Mr. Stuart requests that they be deleted from it. In particular, Mr. Stuart objects to and hereby requests that all documents not properly part of this case pursuant to Idaho Appellate Rule 28(b)(1) be deleted from the Clerk's Record, including but not limited to:

1. The documents appended behind a sheet labeled "Jury Trial Exhibits." Neither party relied on any of these exhibits, nor did the Court in any apparent way. In any event, these items were *not* exhibits at Mr. Stuart's trial but, instead, at his Preliminary Hearing.
2. Exhibits from a postconviction evidentiary hearing conducted in April, 1992, as part of the proceedings held in relation to an earlier postconviction petition.
3. Exhibits from a postconviction evidentiary hearing conducted in June 1999, as part of the proceedings held in relation to an earlier postconviction petition.

Should the Court deny this objection and request, Mr. Stuart reserves the right to make specific objections and requests regarding each particular document within each of the three categories

NOTICE OF AND OBJECTION TO CLERK'S RECORD  
AND REPORTER'S TRANSCRIPT ON APPEAL -4

00000704

described above. Were those objections and requests small in number, Mr. Stuart would make them now. However, because of their number, enumerating them now, before the Court has had an opportunity to consider whether to strike the general categories of documents from the Clerk's Record would be unduly burdensome on the Court and the parties.

Also, to the extent that the Court denies Petitioner's request to delete these documents from the Clerk's Record, he asks that the Clerk's Record be modified in two ways so that it is accurate. First, a number of the copies of exhibits from the postconviction evidentiary hearings appear to be only partial copies. Specifically, it appears that a number of the same exhibits were admitted into evidence at both the 1992 and 1999 hearings. In the Clerk's Record, however, the front page of each of those exhibits appears as the exhibit in the set of exhibits corresponding to one of the evidentiary hearings, whereas it seems the remaining pages of each of those exhibits appear as the exhibit in the set of exhibits corresponding to the other evidentiary hearing. However, while this is undersigned counsel's best guess as to why copies of multiple exhibits from the postconviction evidentiary hearings are incomplete, it is only a guess. Whether that guess is accurate cannot be determined with certainty from the documents themselves. The Court Clerk has provided no statement clarifying the matter. Second, a number of paper exhibits, noted on the postconviction evidentiary hearings' exhibit lists, are wholly absent from the sets of documents relating to the hearings.

### **3. Documents Missing From The Clerk's Record.**

Petitioner objects that the following documents are missing from the Clerk's Record, and he asks that they be added to it:

- a. Appendices A through M to Petitioner's *Petition For Postconviction Relief*

*And Petition For Writ Of Habeas Corpus.* (12/3/02). Petitioner notes while **Appendices A, B, & C are sealed**, *Order* (6/29/07) there is no indication in the Clerk's Record that the sealed exhibits are part of the Clerk's Record and whether they are being transmitted under seal to the Idaho Supreme Court.

- b. Appendices A through D to Petitioner's *Affidavits In Support Of Petition For Postconviction Relief* (3/19/03). Petitioner notes while **each of these appendices are sealed**, there is no indication in the Clerk's Record that the sealed exhibits are part of the Clerk's Record and whether they are being transmitted under seal to the Idaho Supreme Court.
- c. The Clerk's Record includes some but not all of the declarations filed with the Court on May 22, 2006. During a hearing on that date, Petitioner filed declarations from the following individuals. *See R.T. at 55-6 (5/22/06).* Declarations, from the following declarants, which do not appear in the Clerk's Record: Jim Bigley; Mary Jane Bigley; Gene Lee Dally; Malvin W. Kraft; Sherry Lee Kuhl; Donna Marquette; Delores Nichols ; Virginia Lee Pressler; and Thomas H. Thorn. Petitioner notes while **each of these appendices are sealed**, there is no indication in the Clerk's Record that the sealed exhibits are part of the Clerk's Record and whether they are being transmitted under seal to the Idaho Supreme Court.
- d. Court order granting Oliver Loewy limited admission to practice.
- e. Stipulation (re: sealing certain documents) (6/28/07).

f. Order (re: sealing certain documents) (6/29/07).

4. Miscellaneous.

a. The Clerk's Record is not in chronological order. See Idaho Appellate Rule 28(f).

b. The Clerk's Record does not contain a Table of Contents. Id. at (g).

B. The Reporter's Transcript.

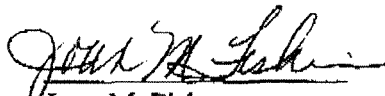
Petitioner objects that transcripts of proceedings held on the following dates are missing from the Reporter's Transcript:

- 1. March 3, 2004. Tape 3656.
- 2. January 6, 2006. Tape C3741.
- 3. March 30, 2006. CD 162.

Petitioner asks that transcriptions of these proceedings be made and included in the Reporter's Transcript.

Dated this 25<sup>th</sup> day of September, 2007.

Respectfully submitted,



Joan M. Fisher  
Oliver W. Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180

**CERTIFICATE OF SERVICE**

I hereby certify that on the 25<sup>th</sup> day of September, 2007, I caused to be served a true and correct copy of the foregoing document by the United States Postal Service, first class postage affixed, addressed to:

L. LaMont Anderson  
Deputy Attorney General  
Chief, Capital Litigation Unit  
P.O. Box 83720  
Boise ID 83720-0010

U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail

Ms. Lori M. Hood-Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, ID 83544

U.S. Mail  
 Hand Delivery  
 Facsimile  
 Overnight Mail

*Patricia Burdick*

**JOAN M. FISHER**

*ID Bar No. 2854*

**OLIVER W. LOEWY**

*Limited Admittee*

Capital Habeas Unit

Federal Defender Services of Idaho

317 West 6th Street, Suite 204

Moscow ID 83843

Telephone: 208-883-0180

Facsimile: 208-883-1472

DISTRICT COURT  
CLEARWATER COUNTY  
STATE OF IDAHO

2007 SEP 25 P 2:42  
CASE NO. CV2002-473  
BY Ses ETAL

Attorneys for Petitioner/Appellant Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR CLEARWATER COUNTY**

**GENE FRANCIS STUART,**  
Petitioner,

v.

**STATE OF IDAHO,**  
Respondent.

) Case No. CV2002-00473  
) Supreme Court No. 34200  
)

) Notice of Hearing In Re: Settlement  
) Of Clerk's Record  
)

**TO: THE PROSECUTING ATTORNEY FOR THE COUNTY OF  
CLEARWATER, STATE OF IDAHO, AND THE ATTORNEY GENERAL  
FOR THE STATE OF IDAHO, AND THE CLERK OF THE DISTRICT  
COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF  
IDAHO.**

**PLEASE TAKE NOTICE** that pursuant to Idaho Appellate Rules, Rule 29(a), Tuesday,  
October 9, 2007 at 10:00 a.m. P.S.T. is set as the day and time for a hearing on Petitioner's  
Objection To Clerk's Record.

NOTICE OF HEARING IN RE:  
SETTLEMENT OF CLERK'S RECORD -1

Dated this 25<sup>th</sup> day of September, 2007.

Respectfully submitted,



Joan M. Fisher  
Oliver W. Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
208-883-0180

Attorneys for Petitioner/Appellant Gene F. Stuart

NOTICE OF HEARING IN RE:  
SETTLEMENT OF CLERK'S RECORD -2

00000710

**CERTIFICATE OF SERVICE**

I hereby certify that on the 25<sup>th</sup> day of September, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, addressed to:

L. LaMont Anderson  
Deputy Attorney General  
Idaho Attorney General's Office  
Chief, Capital Litigation Unit  
Statehouse Mail, Room 10  
PO Box 83720  
Boise ID 83720-0010

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight Mail

Ms. Lori M. Hood-Gilmore  
Clearwater County Prosecuting Attorney  
P.O. Box 2627  
Orofino, ID 83544

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight Mail

*Julie Dattler*



DISTRICT COURT  
CLEARWATER COUNTY  
IDAHO

2007 OCT 31 P 12:31

CASE NO. CV2002-473

Stg

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

GENE FRANCIS STUART,  
Petitioner,  
  
v.  
  
STATE OF IDAHO,  
Respondent.

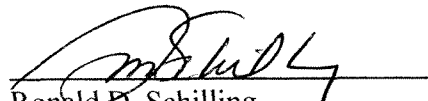
Case No. CV2002-00473

*Nunc Pro Tunc* Order To Seal

Having found good cause during a May 22, 2006, hearing in this matter, the Court hereby orders that:

Petitioner's pleading and attachments entitled *Affidavits In Support Of Petition For Post-Conviction Relief* shall be sealed *nunc pro tunc* to May 22, 2006.

Dated this 25<sup>th</sup> day of October, 2007.

  
Ronald D. Schilling  
Idaho District Court Judge

CERTIFICATE OF MAILING/DELIVERY

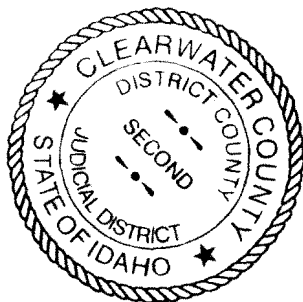
I, Sue K. Summerton, Deputy Clerk of the above entitled Court, hereby certify that a true and correct copy of the Nunc Pro Tunc Order to Seal, was delivered or mailed, postage prepaid, this 5<sup>th</sup> day of November, 2007, to the following:

Lori Gilmore  
Deputy Prosecuting Attorney  
Courthouse Mail  
Orofino, ID 83544

L. LaMont Anderson  
Deputy Attorney General  
P.O. Box 83720  
Boise, ID 83720-0010

Oliver W. Loewy  
Capital habeas Unit  
Federal Defender Services of Idaho  
317 West 6h Street, Suite 204  
Moscow, ID 83843

ROBIN CHRISTENSEN, Clerk



By:

Sue K. Summerton  
Deputy Clerk

**JOAN M. FISHER**

*ID Bar No. 2854*

**OLIVER W. LOEWY**

*Limited Admittee*

Capital Habeas Unit

Federal Defender Services of Idaho

317 West 6<sup>th</sup> Street, Suite 204

Moscow ID 83843

Telephone: 208-883-0180

Facsimile: 208-883-1472

RODIA CHRISTENSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2007 DEC 21 A 8: 04

CASE NO. CV2002-473

BY Sec DEPUTY

Attorney for Petitioner Gene F. Stuart

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

**GENE FRANCIS STUART,**  
Petitioner,

Case No. CV2002-00473  
Supreme Court No. 34200

v.

**STATE OF IDAHO,**  
Respondent.

STIPULATION REGARDING  
CORRECTION OF CLERK'S  
RECORD

Petitioner and Respondent stipulate as follows:

1. The following documents should be added to the Clerk's record:
  - a. Appendices A through M to Petitioner's *Petition For Postconviction Relief And Petition For Writ Of Habeas Corpus* (filed 12/3/02). The parties note that **Appendices A, B, & C are sealed** and should be transmitted under seal to the Supreme Court. *Order* (filed 7/2/07).

STIPULATION REGARDING CORRECTION  
OF CLERK'S RECORD -1

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- b. Appendices A through D to Petitioner's *Affidavits In Support Of Petition For Postconviction Relief* (filed 3/19/03). C.R. 57. The parties stipulate that a Page labeled "Appendix D" page shall be placed immediately preceding the last affidavit attached to and referenced in the pleading. The parties also note that, during proceedings conducted May 22, 2006, **the Court ordered that the pleading and its four attached affidavits be sealed.** R.T. at 49-50 (May 22, 2006). A written order to the same effect was filed October 31, 2007. *Nunc Pro Tunc Order to Seal* (10/31/07) at 1. The pleading and attached affidavits should, therefore, be transmitted under seal to the Supreme Court.
- c. Declarations and/or affidavits filed with the Court at the close of the May 22, 2006, hearing from the following individuals:

Jim Bigley (4/19/06);

Mary Jane Bigley (4/19/06);

Rosemary Connelly (11/19/02);

Gene Lee Dally (5/2/06);

Daniel Heagy (4/19/06);

Debra K. Johnson (9/17/05);

Malvin W. Kraft (5/19/06);

Sharie Lee Kuhl nee Toavs (3/28/03);

Michael Lowe (5/25/06);

Donna Marquette (3/1/06);

Robert Daniel McDowell (11/30/05);  
Delores Mary Nichols (11/19/02);  
Claudia J. Petrie (9/22/05);  
Virginia Lee Pressler (11/27/02);  
Doug Seeger (12/1/05);  
Coby L. Smith (10/21/04);  
Susan Kathleen Stuart (2/12/03);  
Thomas H. Thorn (5/18/06);  
Sherry Wald (9/17/05); and  
Esther Ziemann (4/17/06).

The parties also note that **of these statements, the following are sealed and should, therefore, be transmitted under seal to the Supreme Court** (*Order*, filed 7/2/07):

Jim Bigley (4/19/06),  
Mary Jane Bigley (4/19/06),  
Rose Mary Connelly (11/19/02),  
Gene Lee Dally (5/2/06),  
Malvin W. Kraft (5/19/06),  
Sharie Lee Kuhl nee Toavs (3/28/03),  
Donna Marquette (3/1/06),  
Delores Mary Nichols (11/19/02),  
Virginia Lee Presler (11/27/02),

Susan Kathleen Stuart (2/12/03), and

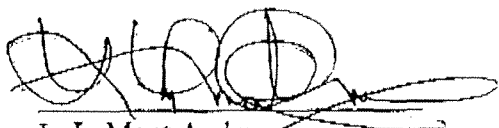
Thomas H. Thorn (5/18/06).

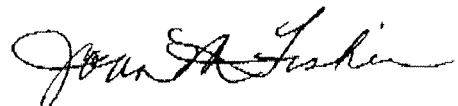
- d. *Stipulation* (re: sealing documents) (filed 6/28/07). **This *Stipulation* is sealed in this Court, and it should be transmitted under seal to the Supreme Court.**
  - e. *Order* (re: sealing certain documents) (filed 6/28/07). **This *Order* is sealed in this Court, and it should be transmitted under seal to the Supreme Court.**
  - f. *Nunc Pro Tunc Order To Seal* (re: sealing a pleading and attachments) (filed 10/31/07).
2. The pagination of the Index to the Clerk's Record requires correction from approximately page 60 forward.
  3. The Clerk's Record does not contain a chronological table of contents. Pursuant to Idaho Appellate Rule 28(g), each volume of the Clerk's Record "shall contain a chronological table of contents of the documents included in the entire record[.]" I.A.R. 28(g). A chronological table of contents should be added.
  4. The Clerk of Court should substitute computer printed 8 ½ x 11 photograph pages provided by Petitioner's counsel for the xerox copies of the two photographs at C.R. 370-71 in the three copies of the Clerk's Record filed with the Clerk of the Supreme Court pursuant to Idaho Appellate Rule 29(b). Petitioner's counsel shall also provide the Clerk of Court with five additional sets of these pages, and the Clerk should forward these to

the Supreme Court for its use while reviewing this case.

Dated this 12 day of December, 2007.

Respectfully submitted,

  
L. LaMont Anderson

  
Joan M. Fisher  
Oliver W. Loewy  
Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

I certify that on the 20<sup>th</sup> day of December, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, first class postage prepaid where applicable, addressed to:

Lawrence G. Wasden  
Idaho Attorney General

L. LaMont Anderson  
Deputy Attorney General  
Capital Litigation Unit  
P.O. Box 83720  
Boise, Idaho 83720-0010

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight Mail

Julie D. D. D.



ELSON G. OLSEN  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2008 JAN -2 P 1:55

CASE NO. CV02-473

BY SKS DEPUTY

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

|                             |   |                                |
|-----------------------------|---|--------------------------------|
| <b>GENE FRANCIS STUART,</b> | ) | <b>Case No. CV2002-00473</b>   |
| <b>Petitioner,</b>          | ) | <b>Supreme Court No. 34200</b> |
|                             | ) |                                |
|                             | ) |                                |
| <b>v.</b>                   | ) | <b>ORDER REGARDING</b>         |
|                             | ) | <b>CORRECTION OF CLERK'S</b>   |
| <b>STATE OF IDAHO,</b>      | ) | <b>RECORD</b>                  |
| <b>Respondent.</b>          | ) |                                |
| _____                       | ) |                                |

The Court, having conducted a hearing on Petitioner's objections to the Clerk's Record and Reporter's Transcript on Appeal and having reviewed the *Stipulation Regarding Correction of Clerk's Record* submitted by the parties in this matter, hereby orders that:

1. The following documents shall be added to the Clerk's record:
  - a. Appendices A through M to Petitioner's *Petition For Postconviction Relief And Petition For Writ Of Habeas Corpus* (filed 12/3/02). **Appendices A, B, & C are sealed and shall be transmitted under seal to the Supreme Court.** See *Order* (filed 7/2/07).
  - b. Appendices A through D to Petitioner's *Affidavits In Support Of Petition For Postconviction Relief* (filed 3/19/03). C.R. 57. An "Appendix D"

00000720

page shall be placed immediately preceding the last affidavit. The Court previously ordered that the pleading and its four attached affidavits be sealed. **Therefore, the pleading and attached affidavits shall be transmitted under seal to the Supreme Court.**

c. Declarations and/or affidavits filed with the Court at the close of the May 22, 2006, hearing from the following individuals:

Jim Bigley (4/19/06);

Mary Jane Bigley (4/19/06);

Rosemary Connelly (11/19/02);

Gene Lee Dally (5/2/06);

Daniel Heagy (4/19/06);

Debra K. Johnson (9/17/05);

Malvin W. Kraft (5/19/06);

Sharie Lee Kuhl nee Toavs (3/28/03);

Michael Lowe (5/25/06);

Donna Marquette (3/1/06);

Robert Daniel McDowell (11/30/05);

Delores Mary Nichols (11/19/02);

Claudia J. Petrie (9/22/05);

Virginia Lee Pressler (11/27/02);

Doug Seeger (12/1/05);

Coby L. Smith (10/21/04);  
Susan Kathleen Stuart (2/12/03);  
Thomas H. Thorn (5/18/06);  
Sherry Wald (9/17/05); and  
Esther Ziemann (4/17/06).

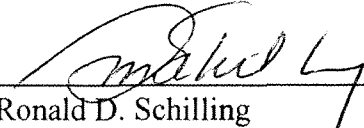
**Of these statements, the following are sealed and shall, therefore, be transmitted under seal to the Supreme Court (see *Order* (filed 7/2/07):**

Jim Bigley (4/19/06),  
Mary Jane Bigley (4/19/06),  
Rosemary Connally (11/19/02),  
Gene Lee Dally (5/2/06),  
Marvin W. Kraft (5/19/06),  
Share Lee Kuhl nee Toavs (3/28/03),  
Donna Marquette (3/1/06),  
Delores Mary Nichols (11/19/02),  
Virginia Lee Presler (11/27/02),  
Susan Kathleen Stuart (2/12/03), and  
Thomas H. Thorn (5/18/06).

- d. *Stipulation* (re: sealing documents) (filed under seal 6/28/07). **This *Stipulation* is sealed in this Court, and therefore it shall be transmitted under seal to the Supreme Court.**

- e. *Order* (re: sealing certain documents) (filed 6/28/07). **This *Order* is sealed in this Court, and therefore it shall be transmitted under seal to the Supreme Court.**
- f. *Nunc Pro Tunc Order To Seal* (re: sealing a pleading and attachments) (filed 10/31/07) This *Order* was filed for clarification after the Notice of Appeal and shall be included in the Clerk's Record.
2. The pagination of the Index to the Clerk's Record shall be corrected (from approximately page 60 forward).
3. A chronological table of contents shall be added to each volume of the Clerk's Record.
4. The three copies of the Clerk's Record forwarded to the Supreme Court shall contain computer printed 8 ½ x 11 photograph pages rather than the xerox copies currently at C.R. 370-71. Petitioner's counsel shall provide those photograph pages. As well, Petitioner's counsel shall provide the Clerk of Court with five additional sets of these photograph pages, and the Clerk shall forward these to the Supreme Court for its use while reviewing this case.

Dated this 26<sup>th</sup> day of December, 2007.

  
\_\_\_\_\_  
Ronald D. Schilling  
Idaho District Court Judge

ORDER REGARDING CORRECTION  
OF CLERK'S RECORD

**CERTIFICATE OF SERVICE**

I certify that on the 3<sup>rd</sup> day of January 2008 ~~December, 2007~~, I caused to be served a true and correct copy of the foregoing document by the method indicated below, first class postage prepaid where applicable, addressed to:

Lawrence G. Wasden  
Idaho Attorney General

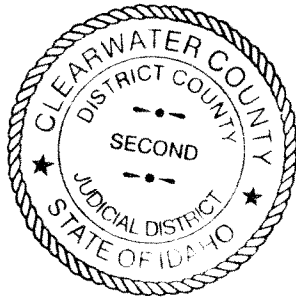
L. LaMont Anderson  
Deputy Attorney General  
Capital Litigation Unit  
P.O. Box 83720  
Boise, Idaho 83720-0010

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight Mail

Joan M. Fisher  
Oliver W. Loewy  
Capital Habeas Unit  
Federal Defender Services of Idaho  
317 West 6<sup>th</sup> Street, Suite 204  
Moscow ID 83843

- U.S. Mail
- Hand Delivery
- Facsimile
- Overnight Mail

*Carrie Bird, Clerk*



*See K. Summerton*  
\_\_\_\_\_  
*Deputy*





