

1-16-2014

Elcock v. State Appellant's Brief Dckt. 41195

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PO. Box 14 Boise, ID. 83707

2013 JUL - 8 A 10:51

Appellant

IN THE SUPREME COURT OF THE STATE OF IDAHO

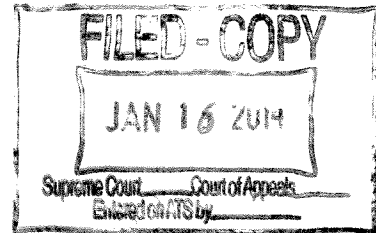
Kenneth Edward Elcock)
)
Appellant,)
)
vs.)
)
State of Idaho)
)
Respondent.)
_____)

Case No. CV-PC-2011-19840

APPELLANT'S BRIEF

211195

Appeal from the District Court of the Fourth Judicial District
for ADA County.
The Honorable Deborah A. Bail, District Judge presiding.



ISSUES PRESENTED ON APPEAL

= Supporting Arguments =

Questions before the court:

- ① Is Kenneth Edward Elcock innocent?
 - A.) Based on this evidence would a reasonable minded jury find Elcock guilty based on these facts & eye witness and victim testimony?
 - B.) Based on a murder confession and a conspiracy to set an innocent man up for murder would a reasonable minded jury convict Elcock?
 - C.) Is [9] Nine eye witnesses enough to draw reasonable doubt in this case?
- ② Is Elcock's plea valid?
 - A.) Was Elcock dragged and forced to plead guilty?
 - B.) Did Elcock knowingly, willing place a guilty plea when evidence was withheld from him?
 - C.) Was all the key evidence in Elcock's case withheld by his attorney along with the state to obtain a conviction.
- ③ Was the court biased in its rulings?
 - A.) Was the court biased because a judicial complaint was filed twice? and is ongoing?
 - B.) Was the court in conflict by the judicial complaints and not granting counsel or even a evidentiary hearing?
 - C.) Is this the reason key evidence in this case was ignored?
 - D.) Is Elcock being a black muslim the reason he's treated unfairly?
- ④ Was Elcock's criminal Attorney ineffective on countless issues along with his Appellant Attorney? "Each claim set forth with Attached Exhibit."
 - A.) Did the court error by ignoring "two full pages" stating claims of ineffective assistance OR was that a blatant attempt to get Elcock's case out the district?
- ⑤ Is the states main objective to block a wrongful conviction claim and don't want to correct it's mistakes if not directed to do so by the court of Appeals?
 - A.) Will a innocent man get a fair day in court OR will a wrongful conviction stand?

The petitioner has submitted eyewitness statements to only prove he is in fact innocent and this court must not ignore these facts. This court has more than enough sufficient reasons to overturn this conviction and order the state of Idaho to refile its original charges against the petitioner or release the petitioner in an adequate amount of time. These facts are being brought forth as statements used as facts by the state to obtain a plea which was withheld from the petitioner see Exhibit's 1-13, they all hold a great deal of facts to proof of the Terrance Lynch Affidavit in all truth. It explains how Elcock was set up for the crime. It states how there is no physical evidence against Elcock. The Gabriel Pejohn Gable statement confirms they had a meeting after the shooting and at that time made up there minds to set up Elcock for the shooting. Shellie Cunningham described what Elcock wore the night the crime took place, he also took apart in setting up Elcock for this crime. DeBreck's statement says he seen Terrance Lynch standing next to the shooter who appeared to be Bradlaus Lynch. Timothy Friel stated he seen the shooter and stated the shooter was wearing a ball cap, white bandanna checkered with black. He stated the shooter wore a blue shiny jersey type shirt. And the man pointed the gun at him as he ran by him and that same man drove off with the gun. He also stated that man was Terrance Lynch because he had seen him earlier in the day wearing the same type of clothing. Lisa M. Sanders stated she seen the gun man as he pointed the gun at Tara Ceolla's face and the black male had on a baby blue do-rag and had a short Afro. She stated he had a blue and white striped shirt. Jennica stated that Jasmine Harris had told her that Langston Cobb fired the gun as she was an eyewitness. A victim that Elcock got sentenced for causing harm to named Michael Barylsk

stated he seen Braedus Lynch as the person who shot the gun. He pointed him out in a photolineup. A victim named Bo Bashale who was shot in the face and leg stated he was shot by Elcock and then when he spoke with the Boise Police he stated he didn't know who shot him after he realized the truth. Amanda Irish stated she received a text message from an eyewitness who stated that Braedus Lynch was the shooter in this case and not Kenneth Elcock. As it states in the Terrence Lynch Affidavit they all met up after the shooting and hatched a plan to blame Elcock because he was so intoxicated he wouldn't know what happen. The facts are not one "eyewitness or victim" stated the person they seen shoot the gun was Elcock nor did anyone describe what Elcock had on in any way, nor was Elcock picked out of any lineup by photo other than those people who conspired to set up Elcock and place the blame on him. For these reasons Elcock could not be the shooter at all. Elcock is in fact innocent and must be granted full relief in this case based on the facts in this case.

The court stated that the petitioner did not bring a claim of ineffective assistance of counsel in his first petition for post-conviction relief but the court is wrong. Elcock placed two whole pages marked Exhibits 14 & 15, which the court won't take into consideration. Elcock is not an attorney and can't argue law as the district court has forced him to do knowing he will fail. The district court was wrong in not giving Elcock counsel and not taking into consideration that Elcock is not an attorney and Elcock did in fact raise a claim of ineffective assistance of counsel.

Affidavit Of
Terrence La'mar Lynch

I am writing this sworn affidavit and do state everything to be correct and true to the best of my knowledge.

I am speaking as an eye witness to the Kenneth Elcock case. Kenneth had been in a relationship with my sister that ended badly and she was having a very tough time with it.

Langston, on the other hand, was very close with our family, like a brother. Kenneth had dropped his son off and started drinking. He was extremely intoxicated when he walked up to the crowd where he was hit on the head with a bottle. There was blood all over his face, he was then handed a gun. Kenneth was given the gun from Langston. Langston admitted that he gave Kenneth the gun. Kenneth never had a black gun or shot one. After everything had taken place, we knew he would not remember what happened, so we all spoke without him and he became the shooter.

I never thought that he would be sent to prison for a lie or that he would get in trouble since he did not commit the crime. I thought that he would get off because he never fired the gun and his finger prints were not on it.

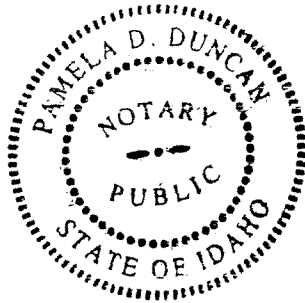
I feel that his son deserves to have his dad, so the whole truth needs to be brought to light. I don't believe that he deserves to be in prison because we made him the fall guy.

I just hope and pray that the truth will help Kenneth gain his freedom. I am deeply sorry and hope by doing the right thing, that he receives a blessings.

T. Lynch 9-17-12
Terrence Lynch

STATE OF IDAHO)
 Ss
County of Ada)

On this 17th day of September, 2012, before me,
a notary public in and for said County and State, personally
appeared Terrence La'mar Lynch, known or identified to me to
be the person whose name is subscribed to the within instrument,
and acknowledged to me that he executed the same, knows the
contents thereof and believes the same to be true.



Pamela D. Duncan
Notary Public for Idaho
Commission Expires: 9-17-2014

~~5/10/06~~
BOISE POLICE DEPARTMENT/ADA COUNTY SHERIFF'S DEPARTMENT
SUPPLEMENTAL REPORT

1. Incident/Topic Homicide		2. Subject/Victim's Name V) Buenrostro, April W		3. RD 49	4. DR No 611-722
5. Location/Address Gale			6. Phone		7. Page 3
8. Date Occurred 04/15/06	9. Time Occurred	10. Route To File		12. Division CID	

He indicated that he had in fact been at a Club at 16th & Grove on the night in question. That he had helped work the door.

He says he didn't know anything about a shooting until the following day when a female friend said something about it. That based on the description she gave him of the suspect he may have said something about the suspect being in the bar. But that he was simply wondering aloud based on the race of the suspect and the make up of the crowd at the Club.

He didn't say he saw or knew a suspect. Or that he had seen or heard the Lynch brothers bragging. Only that he wondered if the suspect could have been in the Club.

04/19/06 I was assigned to contact and interview a subject by the name of Gabe at He is reported to have information related to the shooting.

I called and made arraignments to meet Gabe. Who identified himself as Gabriel Pejohn Gable B/M, Gabe indicated that he has been staying at He has been working for Ikenberry (?sp) Drywall.

He indicated that he was concerned about having to testify or that people knew he had talked to the police. He also indicated that he has pending charges and would like to see if the information he has could help him with those charges.

I explained to him that I could make no promises or deals. That he may have to testify and that the prosecutors can review his information.

Gabe indicated he was awakened about 0400 hrs. Saturday morning by some people coming into the home. That he overheard conversation about what took place.

He named the people he knows to have been involved or to have information as Demetrius Lynch, Terrance Lynch, Brodaus Lynch, Face (who he later identified as Elcock), Shellie Cunningham, and Langston Cobb.

He explained that he woke up and questioned what was wrong that he knew something was wrong because everyone seemed upset. He questioned his sister Jonacca and she told him that Face shot up a party last night. That he shot four people.

Reporting Officer / Serial / Date/Time Det. M Ayotte 348	Supervisor Approving / Serial / Date/Time
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[Handwritten signature]

Exhibit - 3

**Narrative Report
Supplement**

**Boise Police Department
Report Type: Homicide**

DR# **2006 - 611722**

Chgt# Offense/Charge 1 Homicide	Date of This Narrative 4/15/2006
	Date & Time Occurred 4/15/2006 0018
4 Location of Occurrence	

Shellie then started over and said that he, Demi, T.T., Broadaus, and Face were all over at Julius Sr's house in Meridian drinking. He estimated this to be around 9pm. Shellie said they then talked Julius Sr into coming into Boise and drink with them at the club. Shellie said they got to the club around 1145pm-midnight. He said the group was standing near the front door mulling over if they wanted to pay the \$10 cover. That was when Broadaus received a phone call from Antwan Harris. Antwan said he needed their help with Bo.

Shellie said they arrived at the apartment complex and met with Langston who was already there. Shellie sees Langston hand Face a chrome 9mm. Langston told Face to cock it. Face pulled the slide back and ejected a bullet. Shellie said Face approached Bo. Face is yelling, talking about are you mesing with my kids. Face may have hit Bo in the face with the gun. A white female wearing a white jacket with a black hat says "we don't want problems." Several people see the gun and yell and start running into the apartment. Shellie said Face raised the gun and started firing. Shellie thought Face fired 5 or so times. Shellie said that because of where he was standing it appears that Face is firing into a wall.

Shellie said that he was standing about ten feet from Face when he started firing. Demetrius was only a few feet away from Face. Shellie said he saw Demetrius cover his ear near the gun because it was so close. T.T. and Broadaus were behind Face. Langston was still by his own car.

After the shots were fired everyone ran to the Ford Explorer they arrived in except they now had Antwan as well. They all went to the club and drank until 3am or so. Julius Sr. got a ride home from someone else. The group went back to Broadaus' apartment. Several girls arrived at Broadaus' and T.T. and Face went over to their house near Overland and Columbus.

Shellie said around 9am they picked up T.T. and Face. They all drove down to Demetrius' house on Good St. They ate breakfast. They then dropped Antwan off in the area of S. Owyhee. Shellie went back to Broadaus' to get some of his stuff and then went home to

Shellie described what each person was wearing:

- T.T.- Carmello Anthony gear-baby blue and yellow.
- Broadaus- grey tee shirt, black coat and a baseball cap
- Antwan- black hoody sweatshirt with "Los Angeles" on front and Timberland boots
- Shellie- striped "Sean John" long sleeve shirt (couldn't remember anything else)
- Face- NY Yankees hat, dark blue "Southpole" jacket, blue jeans and tennis shoes.

This interview was not intially recorded but after retrieving a recorder it was.

ROUTE TO DET. D. SMITH-CID PERSONS

CONFIDENTIAL

**Narrative Report
Supplement**



**Boise Police Department
Report Type: Homicide**

DR# 2006 - 611722

Chge# 1	Offense/Charge Homicide	Date of This Narrative 4/15/2006
		Date & Time Occurred 4/15/2006 0018
4 Location of Occurrence		

time and was not thinking clearly. However, he assured me that he was now feeling better and ready to view them again. I started by providing him a Photographic Admonition form labled #1 at the top. He read the form and indicated he understood it. I then showed him the provided line-up form of which he pointed to position #5 and stated "that is TT" or Terrence Lynch. He told us again that Terrence "TT" was standing near the shooter. Derrek signed the form and indicated photo #616201 as a person being involved, see attached.

I next provided Derrek a second Photographic Admonition form of which he again signed, labled #2 at the top. I then showed him the provided line-up also labled #2 at the top. Derrek viewed the line-up and then told us the he felt the subject in position #6 looked "very close" to the shooter but that he was not 100% sure. He then indicated his decision on the form as the individual who appears most like the suspect who fired the gun; see attached form. The person in position #6 is Braudus Lynch.

I then provided him with a third Photographic Admonition form which he again read and signed, labled #3 at the top. I next showed him the provided line-up also labled #3 at the top. Derrek viewed the line-up and then indicated he did not recognize anyone in the line-up as being involved. He then signed the form; see attached.

LeBar and I then returned to CID for the next briefing. I turned all three provided photo line-ups over to Detective Smith and karen Gantz.

Admin

N Duggan

510

M Barnett

544

REPORTING OFFICER

ADA #

APPROVED BY

ADA #

**BOISE POLICE DEPARTMENT/ADA COUNTY SHERIFF'S DEPARTMENT
SUPPLEMENTAL REPORT**

Exhibit - 5

1. Incident/Topic Homicide		2. Subject/Victim's Name		3. RD	4. DR No 611-722
5. Location/Address <i>Live about 5000</i>				6. Phone	7. Page 1
8. Date Occurred 04/15/06	9. Time Occurred 0018	10. Route To File		12. Division CID	

04/15/06, 0100hrs., I was called to CID by Sgt. Buzzini in reference to a multiple shooting situation. I arrived at the station and was briefed by Sgt. Buzzini. I began to interview witnesses that were brought from the scene to our location.

I met with the following three persons individually.

Timothy Lyn Friel

WMA, 24yrs.,

Tara Luckow

Jami Michelle Nielsen

0154hrs., I spoke with Timothy Friel. He states that he lives on the second floor apartment across from where the shooting took place. That apartment was apparently on the first floor. Tim said that there was a party going on at Joni's apartment. He went on to say that around 2300hrs., a green ford escort arrived at the complex. It was driven by two black male adults. They apparently could not get through the vehicle parking congestion near Joni's apartment. They asked Joni to have some of the cars moved by their owners. This was done. The two black males were driving a dark green Ford Escort. Tim felt that it was possible that these were the shooters involved as he did see two BMA's standing at the window of the victims apartment. One of the men pointed a gun at the glass and fired several rounds and then heard a click or failure to fire. The gun then was fired some more times. The other man stood near the shooter and observed. Tim described the shooter as a BMA, 504/506, 180lbs, 20's. He was wearing a ball cap, white bandanna checkered with black. He wore a blue shiny jersey type shirt.

Reporting Officer / Serial / Date/Time K. McAllister #373	Supervisor Approving / Serial / Date/Time R. Buzzini #408
--	--

BPD-002a-ADP 1994

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[Handwritten initials]
208

Ada County Sheriff's Department
Boise Police Department

STANDARD STATEMENT FORM

Please Print
Name Tim Friel
Date of Birth _____
Address _____
City/State/Zip _____
Home Phone _____
Work Address _____ Work Phone _____
Student, name of school _____

D.R. No. 611722
Date 4-15-06
Time _____

I was in my apartment with my fiancée Trista Hunter
I was in The Bath room and she was in the Bed room.

She came storming in and said she heard Gun Shots and asked
me if I would look out side.

I went to the balcony with over looks Johnny's mikes app
I saw A Black man wearing A Blue and Yellow or Blue and white
jersey shirt Black or Blue pants A Bandana under a Baseball cap
And A taller Black man dressed in all Black standing out side
the door.

The man in the Jersey started shooting At the window
I saw and heard three shots, I saw them turn like the
wer going to leave.

I ran out side ran towards my trooper and approached
the rear on the drivers side I quickly stop when two
two Black men ran at me to go to their car the man
in the Jersey lifted his hand at me I could clearly see
the siloete of a pistol with the hammer slide full back in
the position whe it is out of ammo

Tim Friel, have read the above statement consisting of 2 pages,
and I know the same to be a true statement as given by me. I have initialed all mistakes noticed by me.

Witnessed By: Tim Friel
(Signature)

Statement By: Tim Friel
(Signature)

1113

BOISE POLICE DEPARTMENT/ADA COUNTY SHERIFF'S DEPARTMENT

SUPPLEMENTAL REPORT

Exhibit - 7

1. Incident/Topic Homicide		2. Subject/Victim's Name Buenrostro, April		3. RD 49	4. DR No 611-722
5. Location/Address			6. Phone		7. Page 5
8. Date Occurred 4-15-06	9. Time Occurred 0018	10. Route To Co. Prosecutor		12. Division CID	

stated he didn't see this but Mike told him later. He stated Mike had told him that the gun didn't go off and that the suspect had apparently racked the slide.

At this point everyone inside the apartment was trying to get away from the door but due to being in a group they were falling over each other. He stated shots were fired and everyone was trying to lay on the floor. He stated he pulled his girlfriend to the floor and stayed there until the shots ended.

He stated he had not been able to see the shooter's face since he was just to the right of the door and the porch light was burned out. He also stated that we needed to speak with his neighbor, Tim Friel that had seen the suspects as they ran away. He provided a cell phone number which we called and arranged for an interview.

At approximately 2012 hrs., Det. Quilter and I began an interview of Tim Friel,

Friel stated he had been in the bathroom when his girlfriend yelled at him to come out because she had heard what she thought were shots. He ran to the balcony and heard two or three shots and then ran down to the parking lot where he stood next to his car that was parked directly across from the victim's apartment.

He observed two black males run past him. One suspect pointed a handgun at him as he ran by. He could see the weapon in silhouette and could see that the slide was locked back. He estimated that he was approximately 5' away from the suspect as he ran past him. He reported that it was too dark to see the suspect's face but could tell that he was a BMA, approximately 5' 8", 180 lbs, wearing a blue or black baseball cap with a white bandana underneath the cap. The cap was canted to the side. He was wearing a blue and white or blue and yellow jersey and baggy jeans. A second suspect was running just slightly behind him. He was described as being approximately 6'-6' 1", 200-220 lbs., dressed in all dark clothing that was more form fitting and not baggy. He observed the suspects run to the east and get into a late model green Ford Escort. The suspect with the gun was the driver. He could not identify either subject but could tell that the passenger was also a BMA.

After the two males ran past him, he ran to the victim's apartment to render aid. He stated he believed the second male he observed run past him was Terrance Lynch because he had seen him earlier in the day wearing the same type clothing.

At approximately 2145 hrs., Det. Quilter and I began a recorded interview of Kalli Nielsen,

Reporting Officer / Serial / Date/Time Det. Greg Morgan 322 4-21-06	Supervisor Approving / Serial / Date/Time Sgt. Mark Barnett 544 4-21-06
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BPD-002a-ADP 1994

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MMJ
197

Exhibit - 8

**Narrative Report
Supplement**

**Boise Police Department
Report Type: Homicide**

DR# 2006 - 611722

Chgs# Offense/Charge 1 Homicide		Date of This Narrative 4/15/2006
		Date & Time Occurred 4/15/2006 0018
4 Location of Occurrence		

NARRATIVE

On 4/15/06 at approximately 0100 hours I received a phone call at my residence from my direct supervisor Sgt. Graham. He advised me that there had been a shooting. He stated there were several victims and many witnesses. He told me to report to the CID annex and assist other detectives with interviews.

Upon my arrival at CID I was quickly briefed on what had occurred. I was asked to help with interviewing witnesses. Below are summaries of my interviews.

I spoke to the following persons:

Phakdymanivong, Randy

Randy told me that he and a female named Amanda Sutton were hanging out at her house when she spoke to Johnny. Johnny invited the both of them over to his house for a party. Randy and Amanda got into her car and drove to Johnny's, stopping and getting drive-thru food first. Upon arriving at the apartment complex they parked. They stayed in the car and ate their food. Randy said when he finished he got out of the car. He was waiting for Amanda when he observed two vehicles pull into the apartment complex parking lot. Randy described the cars as a black Acura Integra 2dr low with black rims and a silver Hyundai Tiburon with a rear spoiler fin. Randy said he watched as many as 10 black males get out of the cars and walk towards Johnny's apartment. Randy and Amanda started to follow them but Randy heard what he thought was the racking of a handgun. Randy told Amanda to get back to the car. They went back to the car and heard numerous gunshots. Randy told Amanda to leave and they did. Randy said they drove away to get away from the males but soon after called 911 and returned to the scene where they spoke to uniformed patrol officers who transported them to CID. Randy said he could not identify the males.

This interview was recorded.

Sanders, Lisa Marie

Lisa told me that she recently moved into apartme. where the shooting occurred. She said she is good friends with resident Mike Barylski. Lisa said tonight they were having friends over and drinking. She said Beauflis "Bo" Bashale was exceptionally drunk and being loud. She said he was primarily outside with two other black males she only knows as "E-man" and John. Lisa said she and Mike were in his bedroom alone when someone said there was going to be a fight. Mike and Lisa left the bedroom and went out into the living room. Lisa said she remembers the shooting occurring and she went to the living room floor. Lisa believed there were two shooters. The one she saw was wearing a baby blue do-rag and had a short afro. He had a blue and white striped shirt. Lisa said she then went to a back bedroom and hid.

This interview was recorded.

Nielsen, Jordyn S

Jordyn told me that she was helping her older sister Jamie babysit several children in Jamie's apartment, MR

Admin			
C LeBar	629	L Graham	378
	ADA #	APPROVED BY	ADA #

178

Please Print

Ada County Sheriff's Department
Boise Police Department

Name Lisa M Sanders

Date of Birth _____

Address _____

City/State/Zip _____

Home Phone _____

Work Address N/A Work Phone N/A

If student, name of school N/A

STANDARD STATEMENT FORM

D.R. No. 611722

Date 4-15-06

Time _____

Michael ~~Patowski~~ ^{Borowski}, Tara Crolla, Johnny White Eagle Anthony & Lisa M Sanders all decided to throw a get together. My friend Beautis & Emanuel & John were upset about a run in w/ T.T (Terrance & Brotis) because of Beautis brother D.J. Bischelli, they believed that he had snitched on his brother. Michael & I had came from the back room to find them yelling about the encounter they had just had w/ T.T & Brotis. Next thing I knew Johnny had said there going to fight (Beautis & Emanuel & John). Then a black man w/ a baby blue d0-bag & baby blue & white striped shirt came through the front door w/ a 9mm gun & pointed it at Tara Crolla's face Michael pushed Tara down and grabbed me so we could go in the back room, my friend John pushed me out of the way and was shot in the leg. I saw the girl who was shot in the head fall to the ground but the shot came from the outside through the window. I believe there were two shooters.

I, LISA SANDERS, have read the above statement consisting of 1 pages and I know the same to be a true statement as given by me. I have initialed all mistakes noticed by me.

Witnessed By: [Signature] # 382
(Signature)

Statement By: [Signature]
(Signature)

**Narrative Report
Supplement**

**Boise Police Department
Report Type: Homicide**

DR# 2006 - 611722

Chg# Offense/Charge 1 Homicide	Date of This Narrative 4/18/2006
	Date & Time Occurred 4/15/2006 0018
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I asked Jennica if she knew who had fired the gun. She told me that her friend, Jasmine Harris, had told her that Langston Cobb fired the gun. She said that Jasmine most likely got the information from Jordan.

Jennica's cell phone had previously been seized, and a search warrant had been served upon it. Detective Lee Reiber had conducted the forensic analysis on the telephone. He had told me that Jennica had erased all of her text messages. I asked Jennica about this, and she did not have an answer for why Detective Reiber found that on her phone.

Jennica told me that the only people she called that night were a guy named Hennessee who is in the Air Force in Mountain Home, a person named Claudia Davis at and a friend named Rachel Clark at .

Conclusion:
This was the end of my second interview with Jennica.

Admin			
M Brechwald	641	R Winegar	488
REPORTING OFFICER	ADA #	APPROVED BY	ADA #

Exhibit - (1)

BOISE POLICE DEPARTMENT/ADA COUNTY SHERIFF'S DEPARTMENT SUPPLEMENTAL REPORT

1. Incident/Topic Homicide		2. Subject/Victim's Name Buenrostro, April		3. RD 49	4. DR No 611-722
5. Location/Address 205-02 Custody UPS Broken				6. Phone	7. Page 3
8. Date Occurred 4-15-06	9. Time Occurred 0018	10. Route To Co. Prosecutor		12. Division CID	

Exhibit - A

Lynch had testified against him but primarily because T. T. and his family claimed to be gangsters and they didn't want to be involved.

I asked him if he knew who had shot him. He stated a BMA named Face had shot him and the others. He stated there had been an argument outside of the apartment in the parking lot. Shortly, thereafter a group of black males had come walking towards the apartment. He stated they had gone back inside the apartment and that as they were walking inside he saw Face and saw that he had a gun in his hand. He stated Face started shooting into the apartment and he had tackled a female and had laid on top of her during the shooting. He had been struck in his right leg by a bullet.

I asked him if he was sure if Face had been the shooter and he stated he had seen it in his hand just prior to the shots being fired. I asked him if he knew what Face's real name was. He stated he knew that the Lynch's hung out with Felicia Martin who lived in the complex. He stated he thought Face's real name was Julius. I asked him if Face was Julius Lynch. He stated he believed that was correct.

I then met with Det. Quilter who had been interviewing John Anthony. Officer Mike Richmond was in the process of collecting a bullet that had been removed from Anthony's leg. After the bullet was collected, I responded to CID to assist with additional interviews. I found that the other detectives had either or were in the process of completing the interviews of witnesses at the scene.

One of the persons that had been interviewed was the roommate of John Anthony whose name was Michael Barylski. He had been shown a photo lineup that contained Brodaus Lynch. He had identified Lynch as the person with the gun that shot into the apartment.

We considered the possibility that there had been two shooters. Det. Ayotte had been responsible for the crime scene and had the shell casings in his possession. I opened each sealed package and inspected each shell casing at approximately 0515 hrs. I found all of the ammunition to be the same and it appeared that all the primer strikes were the same indicating that only one gun had been fired. (Each shell casing was placed back into it's original package and resealed.) Due to the fact that two shooters had been identified, Det. Quilter and I decided to re-interview Bo Bashale and show him photo lineups.

We later met with Bo Bashale and had him view the three photo lineups that contained

Reporting Officer / Serial / Date/Time Det. Greg Morgan 322 4-21-06	Supervisor Approving / Serial / Date/Time Sgt. Mark Barnett 544 4-21-06
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ML

BOISE POLICE DEPARTMENT/ADA COUNTY SHERIFF'S DEPARTMENT

SUPPLEMENTAL REPORT

Exhibit - 12

1. Incident/Topic Homicide		2. Subject/Victim's Name Buenrostro, April		3. RD 49	4. DR No 611-722
5. Location/Address M... - ...			6. Phone		7. Page 9
8. Date Occurred 4-15-06	9. Time Occurred 0018	10. Route To Co. Prosecutor		12. Division CID	

She stated she had called Brodaus Lynch at approximately 2315 hrs., on 4-15-06, after they had closed the restaurant to tell him that they had closed and she would be ready to go soon. She recalled looking at a clock in the restaurant just before leaving and it was now 2340 hrs. She walked next door to the Balcony Club as is her custom to have a drink while waiting for Brodaus. She had a drink and since he still wasn't there, she had called him again and asked where he was and told him where she was. He told her that he was in Meridian and would come get her shortly. He didn't come as she expected and she called again later. She estimated that he arrived at the Balcony Club around 2345-0100. He was with Face. She identified Face as being the father of one of Brandy Lynch's children. She knew his real first name was Kenneth. I left the room and using the jail booking computer was able to use the parameter field of BMA's named Kenneth and found a booking photo of Kenneth Elcock. I re-entered the room and showed her the photograph and she positively identified Elcock as Face. She stated they had a drink or two together and then went to J. D. and Friends and stayed there until it closed.

Both Terrance and Brodaus Lynch were arrested on an Agents Warrant for probation violations and transported to the Ada Co. Jail.

On 4-18-06 at the morning briefing, a decision was reached to conduct surveillance on known associates of the Lynch's.

Det. Quilter and I contacted Bo Bashale and arranged to meet with him at approximately 1730 hrs., to have him view a photo lineup of Kenneth Elcock. At approximately 1735 hrs., he was shown the lineup after being given the photo lineup admonishment. He viewed the lineup and identified Elcock as being Face but now stated that he had not seen the shooters face but recalled hearing T. T.'s voice after the shooting. I asked him why he had told me at the hospital that Face was the shooter but now was recanting what he had told me. He stated he realized he had said that Face was the shooter but after thinking about the incident he realized he didn't actually see the shooters face since it was dark on the patio and he was inside the apartment.

His wife, Stephanie Elliot, was with him. I asked her if we could speak privately. I asked her if she believed Bashale was afraid of retaliation if he identified Elcock as the shooter. She stated she didn't know, but would talk with him about it after they left and re-contact us. To date, I have not heard from either of them.

After the interviews with Prescott and Phan and having learned that they had seen T. T. and Brodaus's father at the bar with them, we decided to conduct an interview with Julius Wray.

Reporting Officer / Serial / Date/Time Det. Greg Morgan 322 4-21-06	Supervisor Approving / Serial / Date/Time Sgt. Mark Barnett 544 4-21-06
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BPD-002a-ADP 1994

DISTRIBUTION: ORIGINAL - RECORDS, YELLOW - FOLLOW-UP, PINK - CRIME ANALYSIS

M...
-01

2xhibit-13

BOISE POLICE DEPARTMENT/ADA COUNTY SHERIFF'S DEPARTMENT
SUPPLEMENTAL REPORT

1. Date Occurred 04/14/06		2. Time Occurred		3. RD	
4. Date Occurred				6. Phone	
8. Date Occurred 04/14/06		9. Time Occurred		10. Route To Det Smith	
				12. Division CID	

from a girlfriend and that she is friends with Terrence, Broadus and Dimitri who is related to TT and Broadus. Amanda was fearful of getting involved due to the people involved. When I asked Amanda about how Kenneth ended up there, Amanda indicated that he always just shows up. Amanda advised it was like he is always just waiting for her and shows up out of nowhere. She advised that he does not drive and only has seen him with Dimitri as of late. Amanda told us that she knew that the male had a child in Boise.

I explained to Amanda that we would like her consent to search her home looking for any clothing that he left behind or the gun used in the shooting. Amanda advised that she did not know if he brought anything in her home. Amanda agreed and signed consent. Amanda stayed with the search team which consisted of Detective Dustin, Detective Stephenson, and myself. During the search Amanda indicated that she received a text message that indicated that Broadus was the shooter. Amanda showed me the call which was from Tanya at Tanya indicates that Jose a had told her this. Amanda later released her phone to Detective Stephenson. During the search I located a white Denver Nugget hat under some stuffed animals in Amanda's bedroom. The hat was all white with the letters DN on the front in light blue. Amanda indicated the hat was the males. The hat was photographed and collected by Detective Stephenson. This is the only Adult male article of clothing that Amanda had in her residence.

Conclusion: Route to Detective Smith

Reporting Officer / Serial / Date/Time Thorne 60204/15/06	Supervisor Approving / Serial / Date/Time Buzzini
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BPD-002a-ADP 1994

MR

189

Making and Supporting A Proper Claim Of Ineffective Assistance of Counsel:

In order to present a successful ineffective assistance of counsel claim you must be specific as to what occurred and support your claims with admissible evidence. In order to offer sufficient information you should include:

1. A description of what your attorney did wrong.. Some examples include:
 - a. failure to investigate the facts of the case or potential defenses;
 - b. failure to adequately prepare for a hearing or trial;
 - b. failure to call relevant witnesses;
 - c. failure to file a motion (to suppress, to exclude witnesses, to reduce sentence, etc...);
 - d. failure to object to specific evidence;
 - e. failure to request a specific jury instruction;
 - f. failure to raise an issue on appeal.

2. A description of what would have occurred had your attorney performed properly. Some examples include:
 - a. exactly what evidence would have been discovered during a proper investigation;
 - b. exactly what a witness would have testified to had he or she been called;
 - d. what specific issues would have been considered by the district court had they been properly presented;

3. Evidence to support your claims. Some examples include:
 - a. the actual evidence that would have been discovered during a proper investigation;
 - b. an affidavit from yourself describing any discussions you had with counsel regarding the issue;
 - b. an affidavit from the potential witness stating what he or she would have testified to if called;
 - c. evidence supporting your claim regarding any issues not raised.

4. A statement on how the outcome of the proceeding would have been different if your attorney had performed adequately. Some examples include:
 - a. the evidence would have been presented during the trial and would have proven that I did not have the intent to commit this crime...;
 - b. the witnesses' testimony would have been presented during trial and proven that I was not the perpetrator of this crime...;
 - c. the proper legal principle would have been argued and would have resulted in the suppression of the evidence....

Ineffective Assistance Of Counsel Claims

The following is provided as general information regarding ineffective assistance of counsel claims. It is not intended to offer an exhaustive list of possible claims or evidence. Instead, it is designed to give some examples of how to present an adequate record for ineffective assistance claims.

The Standard:

In *Pratt v. State*, 134 Idaho 581, 6 P.3d 831 (2000), the Idaho Supreme Court stated that,

The benchmark for judging a claim of ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *State v. Mathews*, 133 Idaho 300, 306, 986 P.2d 323, 329 (1999), *cert. denied*, 145 L. Ed. 2d 1095, 120 S. Ct. 1190, 2000 WL 198035 (2000) (quoting *Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)). The test for evaluating whether a criminal defendant has received the effective assistance of counsel is two-pronged and requires the petitioner to establish: (1) counsel's conduct was deficient because it fell outside the wide range of professional norms; and (2) the petitioner was prejudiced as a result of that deficient conduct. *Ray v. State*, 133 Idaho 96, 101, 982 P.2d 931, 936 (1999) (citing *Strickland*, 466 U.S. at 687). In assessing the reasonableness of attorney performance, counsel is "presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 986 P.2d at 329-30 (citing *Strickland*, 466 U.S. at 690). In addition, strategic and tactical decisions will not be second guessed or serve as a basis for post-conviction relief under a claim of ineffective assistance of counsel unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review. *Giles v. State*, 125 Idaho 921, 924, 877 P.2d 365, 368 (1994), *cert. denied*, 513 U.S. 1130, 130 L. Ed. 2d 886, 115 S. Ct. 942 (1995).

Id. at 584, 6 P.3d at 834.

The court states the Petitioner asserted his successive petition was do to the "only recent receipt of discovery material".

Elcock is stating and has shown proof that he has shown this court that in fact the "only post mark" that counsel ever gave him pertaining to the discovery is dated 5-2-11. Elcock has shown issues of material fact along with correspondences that he received it on that date, and also stated "hey evidence was withheld or missing". Elcock is also stating he has a copy of an CD of an Idaho State Bar hearing seen in Exhibit - A ^{TIME} was counsel lied under oath and stated he had used the Public Defenders Office Investigators to run down leads Elcock gave him. It is stated by Three witnesses in the case that they were never spoken too and would have taken the stand and told the truth in court. The court is aware of it being stated in written form by Terrence Lynch, Bradus Lynch, and Jehanka Harmon, also part of the record of the first petition as Exhibits, If Elcock would have had the full discovery, Elcock would have done his best to bring fourth every issue. But Elcock has been treated unfairly and not given counsel or his discovery until 5-2-11, so the issue "could'nt" be raised correctly. Elcock fully understands that this court wants him to be the shooter in this, and this court wants to avoid any prejudicativiness at all cost. It's a fact that no person on earth can tell the facts without having all the facts, so without discovery you can't have it brought in the first petition, because Elcock never had the discovery. For this reason this court is wrong in denying full Post-conviction relief. U.S. v. Matus, 905, F.2d 30 (2nd Cir. 1990), Mc Queen v. Swenson, 498 F.2d 207 (8th Cir. 1974), Brady v. Maryland, 373 U.S. 83, 87. (1963).

Elcock states that trial counsel's failure to move to suppress confession was extremely prejudicial and does constitutes ineffective assistance, where the confession is provided

Reply page - 2 -

primary evidence to support the states case. This is true in the Elcock case as the record shows counsel filed no motions to suppression of any evidence. By the law it constitutes ineffective assistance of counsel and requires a remand back to district court seen in, Smith v. Wainwright, 777 F.2d 609 (11th Cir. 1985), U.S. v. Matos, 905, F.2d 30 (2nd Cir. 1990), U.S. v. Dawnport, 986 F.2d 1047 (7th Cir. 1993), Bond vs. U.S., 1 F 3d 631 (7th Cir. 1993)

The New Evidence of Petitioner had attached was evidence that the Idaho State Forensic Lab's employees fabricated said evidence, and it was to show the facts that that office had all the evidence to prove Elcock didn't shoot the gun. It's a fact that the Idaho State crime lab was involved in an ongoing criminal drug case and should have not used any "tainted" evidence by Boise Det. Ayotte and Det. Quilter, and yet all the "tampered" with evidence was used, which is in itself a criminal acts. If any justice is to be given, this court can not allow this criminal conduct to persist and in any part of a conviction pertaining to an innocent man. The fact are relevant because TWO corrupt detectives and countless corrupt members of the Idaho Forensic Lab used "tainted" evidence to obtain a guilty plea, and this court is aware of that, and does not want those members of the legal system to take the stand in open court and tell under oath any more of their criminal acts in public against a black man in a state known for it's white supremacist compounds. Page 195 of the discovery must be entered as evidence along with the whole Idaho State Forensic Lab investigation to show the criminal misconduct and that "Tainted" evidence was used to only coerce Elcock's plea in this wrongful conviction which lead to counsel to be ineffective in Elcock's case. U.S. v. Gray, 878 F.2d 202 (3rd Cir. 1989).

On 8-31-12 Elcock did file a motion to appoint counsel, a motion to take judicial notice of the underlying criminal record and transcript, and his second Affidavit. This court did not respect the law of the claim of ineffective assistance of appellate attorney as claim (1). There are correspondences that are in the form of a Affidavit, where Elcock asked his attorney to please bring up issues and to withdraw his guilty plea or please remove his self from Elcock's case, seen in Exhibits B-C-D. The court still struck Elcock's evidence down because the court already had it's mind made up not to grant Elcock any relief. The aforementioned makes it evident this court is unjust, and wants Elcock to seek justice some place else. claim (2) The violation of Due Process and 6th Amend. by the State of Idaho are clear. Elcock was provided an overworked public defender and has been proven through the National BAR Ass. Even the ADA county jail logg proves Elcock never saw an investigator that worked on his case, because there was no investigation done on Elcock's behalf. Even Mr. Trimming stated the ADA county Public Defenders were under staffed, at the time Elcock's case was pending. The fact's clearly show that the state of Idaho did not uphold Elcock's 6th Amend. Right only because Elcock didn't have the money to defend his self and obtain effective counsel. claim (3) ineffective assistance of counsel by the failure to conduct any pre-trial investigation, coercing defendant to plead guilty, involuntary guilty plea, and failure to disclose and verify pre-sentence investigation information.

Fact (1) It's clear there was not any pre-trial investigation done there are eyewitnesses in the number of "6" and I will quote every name and what they stated to the Boise police. Jennica Higley, stated she seen Langston Cobb fire the gun. Jasmine Harris, stated she seen Langston Cobb fire the gun. Timothy Friel, stated the man who did the shooting pointed a hand gun at him and ran and jumped into a late model Green Ford Escort, and he

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stated ~~the~~ was Terrance Lynch. A victim in the case name Michael Barylski, stated to the Boise Police the man he saw with the gun was Bradlaus Lynch. But this court did sentence Elcock for pointing a gun in his face and it no firing. This court is stating the man who had a gun put in his face and fired-identified the wrong man. Amarah Irish, stated and showed a message from an eyewitness in the form of a text that said Bradlaus Lynch was the shooter. Then you have a Terrance Lynch, stating that him along with everyone else which is his family placed the blame on Elcock because he was too intoxicated to know what happen. Now all these 3 people Terrance Lynch, Bradlaus Lynch, and Larysian Cobb all look alike and Elcock does not, in no way. Elcock is way shorter, has up to 40 to 50 pounds more in weight on him. This court is stating that all "six people" are not telling the truth. There is no physical evidence to place Elcock as the shooter. Counsel took what the state said and deemed them to be facts without doing any investigation. Odlessey could not even give a name of an investigator when asked, because there was none. The court blows off eyewitness and victims statements, because it wrongfully convicted Elcock. Fact(2) Elcock was told by Edward Odlessey and I quote "your young black and somebody died, and the state of Idaho wants to kill you, the best thing I can do is get you a deal, you will do 10 to 15 years, and you can still go home and have a life"! How is that not a involuntary coercing of a plea? I was told in a nut shell if you don't take this deal you will be killed. I'm a 25 year old black man in a room with a older white man telling me I'm be killed by more white people if I don't plea. That along with the medication is how I lost my mind while in the ADJ county jail. Fact(3) The has been aware that Elcock has always stated he never went over any pre-sentence investigation reports at all. Counsel has stated and the record shows this correspondence and I do quote counsel's writing, "My not being present during your
Reply page - 5 -

pre-sentence interview or psychological evaluation is my usual practice". Olessey stated it his usual practice to be ineffective in plain view. Elcock didn't study law and doesn't know the law, but it's counsel's job to protect Elcock and work in his best interest. By not showing up and stating the report was good shows counsel was ineffective and standard fell below the Estanda Rule. But this court does not care that yet again counsel did not disclose information to Elcock along with the discovery. This court still has struck down the law and facts in every respect! Strickland, 466 U.S. at 690, 104 S.Ct. at 2065 and Sanders, 897 F.2d at 196. such conduct is always unreasonable. Id. at 1029., Woodard v. Collins, 898 F.2d 1027 (5th Cir. 1990), US. v. Giardino, 797, F.2d 30 (1st Cir. 1986), Kennedy v. Maggio, 725 F.2d 269 (5th Cir. 1984), United States v. Unger, 665 F.2d 251 (8th Cir. 1981), Thomas v. Lockheart, 738 F.2d 304 (8th Cir. 1984).

On Dec. 3, 2012 Elcock sent in a motion to Amend and ADD New Evidence. Terrance Lynch did recant his previous statement to the court, and did state Elcock did not intend to shoot anyone. Then Lynch stated the "truth", that Elcock had been so intoxicated that they set him up because Elcock broke up and left his sister, not because Elcock treated his ex-girlfriend poorly. So the state was wrong in calling Elcock a "womanizer"! This court does not except a murder confession and a conspiracy to set a man up for murder confession only because, Elcock filed with the Judicial Council seen in Exhibit - E. The facts are Elcock is being treated bias for that reason alone. This court is stating that Amanda Irish, Timothy Friel, Michael Barylski, Jasmine Harris, Jennica Higley, and Terrance Lynch are all "eyewitnesses" and are all lying. That's a bit far fetched for this court to come up with that conclusion. Elcock knows he has "Three strikes" against him already (1) he's a black man who was tossed in a "gang" by the (PSI) reporter, (2) He has placed a judicial claim against this court 5 years ago, (3) This court does not want to except the fact it has sent an innocent man to prison to die. Wright v. Reply page - 6 -

Gramley, 125 F.3d 1033 (7th Cir. 1997), as required by state post-conviction practice, vacated and remanded. Schlup v. Delo, 513 — U.S. —, 130 L Ed. 2d 808, 115 S. Ct. — (1995), Id. Also see McCoy v. Norris, 958 F.Supp. 420 (E.D. Ark. 1996), Clancy v. State of New York, New York Court of claims, claim No. 117154.

On 3-27-13, Elcock did file a motion for commutation of sentence under I.C.R. 33(d) with two Affidavits setting the stage to show the court how Elcock was set up for this crime. Elcock added support letters requesting he be released from custody. The motion was brought in the proper form given by the legal staff at I.M.S.I. The law states that there is no time that this motion can or can't be granted by the district court. The court is waiting on that. Elcock has been asking for counsel for 5 years wanting the proper investigation to be done. Now that there are "six" eyewitness along with two victims stating it was not Elcock does this court still want to see an innocent man sit in prison, knowing he "did not" do this crime. It was stated to Elcock by Private I. Peter M. Smith, That Judge Bail is a stubborn woman and she will give me hell, but Elcock's case is in her chambers. Those words were stated by this court's own Clerk Christopher D. Rich to Investigator Smith, when calling to the status of the Elcock case. After speaking with Terrence Lynch and Lynch stating that Elcock didn't do the crime. That show Elcock is not be treated fair and this court won't grant Elcock any relief. Even though it has "Six" eyewitnesses, A murder confession, A conspiracy to set an innocent man up for murder, and two counsel's that were clearly ineffective. All over the United States there has been people lying and then telling the truth for whatever reason only God knows that, but cases have been over turned, and there's many DNA cases to prove that fact along with recantment cases as well. Smith v. Baldwin, 510 F.3d 1127, 1140 n.9 (9th Cir. 2007).

Elcock's petition for Post-conviction relief is governed by Idaho Rules of Civil Procedure. State v. Yakovinc, 145 Idaho 437, 443, 180 P.3d 476, 482, (2008)
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See also Pizzuto v. State, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). The petitioner has shown a preponderance of evidence which does support every issue in this plea for Post-conviction Relief based on I.C. § 19-4907; Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); Schultz v. State, 153 Idaho 791, 291 P.3d 474, 479 (Ct. App. 2012). Elcock has stated he is not an attorney and needs counsel but this court will not be fair, it has shown that because Elcock has placed a claim against this court. Elcock based issues solely on the facts and affidavits and eye witness testimony. This court is stating by not granting Elcock relief that it rejects "6" eyewitness testimony, A murder confession, And A confession to set A innocent man up for A crime and none of that is genuine issues for relief. This court did state on "page 8" of its Notice of Intent to Dismiss, and Also seen in the law Payne, 146 Idaho at 561, 199 P.3d at 136; Roman, 125 Idaho at 647, 873 P.2d at 901.

ANALYSIS

With all do respect for the law, Elcock's facts do govern Idaho Code § 19-4903, All Elcock's facts came from new evidence. If this court was fair all issues of this case would have properly been addressed years ago. Elcock is not an attorney and this court has been bias in making him file motions to try and save his life. This court is bullying Elcock because he can not pay to defend himself properly. Elcock is not to blame for being innocent. Elcock found out he didn't do the crime when he received the affidavit from Lynch. Elcock is not to blame for the ADA County staff dragging him every day. Elcock is not to blame for his criminal counsel and appellant counsel not doing there jobs. The facts are the state of Idaho aided in the conspiracy to let an innocent man die in prison. Elcock had no discovery when he came to I.D.O.C. that shows Elcock never received it from mr. Odlessey until the date of 5-2-11, and Elcock was sent to prison JAN. 2007. This court is hell bent on taking the words of A man who was clearly high on psychotropic medication.
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The 9th Cir. court has overturned cases where a petitioner was taken advantage of and this court is well aware of that, also see *United States v. Justin*, 434 F.2d 526, 531 (1) (Cir. 1970), There must be a full hearing on record. see *Lynch v. Overholser*, 369 U.S. 705, 82 S. Ct. 1063, 8 L. Ed. 2d 211 (1962). Related in nature see, *State v. Cobb*, 1979, 100 Idaho 116, 594 P.2d 154. states allegations of a defendant's being under the influence of prescribed drugs which affected his ability to make a knowing guilty plea. It's a genuine issue of material fact a Idaho court upheld that ruling, and Elcock must not be denied his right to equal protection under the law. This court has broken the law as it states. This court also stated and I quote the sentencing transcripts page 59 lines 18-22; Elcock has been diagnosed since the time of event as suffering from major depression with psychotic features and also with personality disorder, which is schizo-type and antisocial. The court stated Elcock was not in his right state of mind when the court accepted and sentenced a intoxicated man to die. How can this court deem the words of a man under the influence of prescribed drugs a fact, when the law in Idaho states it affects the ability to make a knowing guilty plea.

Elcock has asserted several "ineffective Assistance of counsel" claims and this court's only argument is it should have been raised in the first petition. Elcock is not an attorney and never had the discovery provided to him until 5-2-11. How can any sufficient issues be raised without that documentation? This court has been bias in making an uneducated man argue law to save his life. That shows this court has it out for Elcock, and does not care that, this court sent an innocent man to die in prison for a shooting it knows he didn't do. It's only because Elcock is a black man trapped in a white supremacist state known for it's compounds, or Elcock placed a Judicial complaint against this court, or this court wants anybody innocent or not to die for this crime because it happen in the state?

Elcock vs. State

Case No. CV PC 2011-19840

EXHIBIT "1"

EXHIBIT "1"

RE: Clarification of Attorney Work File / Discovery

To: Edward B. Odyssey (Attorney at Law),

I'm in receipt of your letter dated Tuesday, February 22, 2011, regarding my request of your working file and the discovery of my case No: CR-FE-2006-0000782 or CASE No: H0600782 for the sole purposes of filing a Federal Habeas Corpus Petition. You stated in your letter, that all relevant discovery was provided to me earlier. Can you please give me some type of clarification as to when it was sent to me, or please send me a copy of something I signed stating I received a copy of these documents, or anything stating I was provided with that information. Can you please let me know what date I was supposed to receive these documents. If I'm not asking to much please note the date and manner it was provided to me or my Appellant Attorney letting me know it was sent through the mail, or given by hand. In closing, I would like to thank you for taking the time to read and address my concern in this matter.

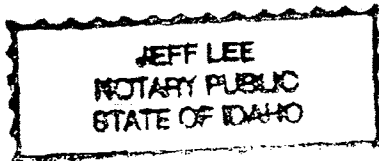
SWORN Affidavit

Dated this 12th day of April, 2011

x Kenneth Elcock
Kenneth E. Elcock

Subscribed and sworn AND AFFIRMED to before me this 12th day of April, 2011.

(SEAL)



x Jeff Lee
Notary Public for Idaho
Commission Expires: 9/1/2011

OFFICE OF THE ADA COUNTY PUBLIC DEFENDER
CHIEF PUBLIC DEFENDER

Alan E. Trimming

CHIEF DEPUTY

August H. Cahill

Exhibit-2

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CIVIL DIVISION
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Ann L. Cosh
Kimberly J. Simmons
Ransom Bailey
Brian C. Marx
Danica M. Comstock

Wednesday, April 27, 2011

Re: Copies, CR-FE-2006-0000782

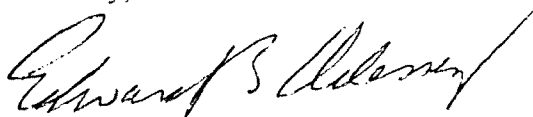
Mr. Kenneth E. Elcock, #83841
C/o ICC, Unit K
PO Box 70010
Boise ID 83707

Dear Mr. Elcock:

I will not provide to you what you characterize as my "working file."

Although discovery was provided to you earlier, enclosed is an additional copy of the discovery in your case.

Sincerely,



EDWARD B. ODESSEY
Attorney at Law

EBO:jp

EXHIBIT "1" p. 2 of 4

B.E.: Correspondence

Kenneth E. Elcock # 83841
 I.C.C. Pod W-13-B
 P.O. Box 70010
 Boise, ID. 83707

To: Edward B. Odlessey, (Attorney at law)

This is Kenneth Edward Elcock, I'm sending A sworn Affidavit stating the following. I wanted to state thank you for sending me my discovery dated 5-2-11. I have been read over every last document that you sent me for the first time dated 5-2-11, and I am stating that the following documents that I will be requesting ARE truly missing from the written discovery I received on the date of 5-2-11.

1.) Ballistic reports and findings

2.) All photos of the jackets recovered from the victims

3.) Diagrams or photos of the projectile entering and exiting the victims of the lead investigator's theory.

4.) These are just some of the documents that are missing from the written discovery I received on the date of 5-2-11.

I Also Need You To Answer the following Questions Please.

1.) I also need the name and address of the lead investigator you hired to do your investigation if any?

2.) I need the names of any and all witnesses you personally, or your investigator interviewed in the time the case was pending, along with the dates and times you and your investigator logged if any?

3.) I also need to know are there all the documents you have and all you received in my case, sent to me on the date of 5-2-11

4.) If you do not have or never had any of these documents I need to

affidavit - 1(04)2
 EXHIBIT "1" p. 3 of 4

know that as well. Also can you please answer those questions in a very simple form, so I may have a full understanding please, thank you very much MR. Edward B. Odessey.

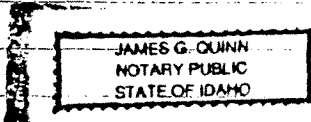
In closing I would like to sincerely thank you for even taking the time to read and for also addressing my concerns. Thanks again for your time MR. Odessey.

SWORN AFFIDAVIT

Dated this MAY day of 5TH, 2011.

X Kenneth E. Elcock
Kenneth Edward Elcock

Subscribed and sworn and affirmed to before me this 6TH day of May, 20



(SEAL)

X James G. Quinn
Notary Public for Idaho
Commission Expires: 9/10/13

Affidavit - 2 (of) 2

EXHIBIT "J" p. 4 of 4

Elcock vs. State

Case No. CV PC 2011-19840

ATTACHMENT "A"

I'm writing this
part up that follows
this page (The 8
claims we decided
upon)

ATTACHMENT "A"

ATTACHMENT "A"

ATTACHMENT "A"

Claims for Relief

Claim One

Ineffective Assistance of Appellate Attorneys:

Failure to Raise Stronger Issues than a "Dead-Bang" Looser

Mr. Elcock's Appellate Attorneys, Molly Huskey, Sara Thomas and Eric R. Lichtenen, were constitutionally ineffective representing him on Direct Appeal of the judgment and sentences. As a result, this violated Mr. Elcock's "right to counsel" and "due process of law" clauses, as guaranteed by the 6th and 14th Amendments of the U.S. Constitution, and, via the 14th Amendment "due process of law" clause, in violation of "right to counsel" and "due process" clause, Art. I, Sec. 13 of the Idaho State Constitution. See: Strickland v. Washington, 466 U.S. 668 (1984) among others.

a. Supporting Facts:

1. Mr. Elcock's Appellate Attorney's presented an issue on appeal regarding "excessive sentence", a dead-bang looser, for it's impossible for a district court to abuse its discretion in sentencing Mr. Elcock when he could have received consecutive sentences and life without parole due to the murder conviction.
2. Appellate attorney's failed to present more stronger issues on appeal based upon the Trial Transcripts reflecting issues that are set forth more fully in the preceding Claims set forth below, which, some are

only issues which may be presented on Direct Appeal opposed to a post-conviction relief proceeding.

3. Appellate counsel's only issue they chose to argue on Mr. Elcock's appeal was the issue of excessive sentence which is and has been for years nothing but a "dead-bang loser" and counsel willingly knows this

4. It is my understanding the standard protocol that is done at the State Appellate Public Defenders office (SAPPD) is that upon the SAPPD office receiving a copy of the Notice of Appeal, they will review it and the case history from the Idaho Repository and if necessary will amend the Notice of Appeal to include any further Transcripts and Clerk's Records to be prepared.

5. Upon a final review of the Clerk's Record and Reporter's Transcripts the SAPPD will assign the case to an Deputy State Appellate Public Defender (DSAPPD) to handle the case and Briefing. Mr. Elcock's appeal was assigned to DSAPPD Erik R. Lehtinen and Elcock was notified of such.

6. Mr. Elcock had received a copy of the Appellate's Brief from DSAPPD Lehtinen and then wrote a letter on or about 2/24/2008 that was notarized. In this letter Mr. Elcock addressed several issues with DSAPPD Lehtinen of which one major issue was that counsel had

ATTACHMENT "A"

stated in the Brief that Mr. Elcock "was content with having a life sentence," Mr. Elcock informed Counsel that he never had told him this and further had informed Appellate Counsel that he had filed a motion to withdraw his guilty plea and he was informed "by the court's it has to be dismissed without prejudice and must and should be raised in [his] ongoing Appeal," and asked Counsel to take care of the matter in respects to this letter. A copy of this letter is attached hereto as EXHIBIT "1", and by this reference incorporated herein as if restated in its entirety.

7. As a result of Mr. Elcock's letter to Appellate Counsel, we received a reply from Mr. Lehtinen in which he stated that, "in most cases where the defendant has plead guilty, the only things I can argue are that the sentence is excessive and/or that the district court erred in denying a Rule 35 motion. Obviously, the former argument is the argument I made in your case." A copy of this letter is attached hereto as EXHIBIT "2", and by this reference incorporated herein as if restated in its entirety.

8. Upon further investigation the National Legal Aid & Defender Association had published a report titled "An Assessment of the Idaho State Appellate Public Defender's Office" June 2007, www.nlada.org which consisted of several issues that pertain to my level of representation on Appeal.

ATTACHMENT "D"

7. Upon a review of just one (1) Deputy State Appellate Public Defender, Justin Curtis, and the number of Appeals he handled from January 2009 - January 2010, he had assigned to him a total of approximately 55 Appeals, 46 were Direct Appeals from the Judgment/Sentence, 4 were Rule 35 Appeals, and 5 were Post-Conviction Relief Appeals. Of these 55 Appeals 36 of them excessive sentence was briefed (65%) of which 34 received a standard "boilerplate" per curiam opinion was issued (62%).

8. This demonstrates that the SAPD Office assigned 125% more appeals to a DSAPD beyond ABA/NAC standards, (See SAPD NADA 2007 Report www.nadaa.org, pp. 12-15, footnotes: 42, 46). Counsel in my Appeal has admitted he argued "excessive sentence" and states he is "truly sorry that I could not have been more helpful to you throughout this appeals process." (EXHIBIT "2"),

9. DSAPD had the Clerk's Record and Reporter's Transcript to review prior to formulating any issues for the appeal. As such, knowing that excessive sentence is a "dead-bung-looser" counsel should have combed the record and transcripts for other issues considering Mr. Elcock's sentencing hearing for he was not given the opportunity to

rebut the Presentence Investigation Report, and that the record should reflect that when the district court inquired to Trial Counsel about the PSI he had replied "Yes it was a good report". At no time was Mr. Elcock allowed to rebut it let alone read the PSI prior to the sentencing hearing in order to aid Trial Counsel with correct facts and those that needed corrected or alternatively a Motion to Strike be filed regarding statements contained in the PSI.

10. It is Mr. Elcock's understanding that ~~any~~ matters concerning the Presentence Investigation Report are matters for direct appeal and ~~not~~ post-conviction relief. Therefore, by DSAPD Lehtinen not presenting the issue regarding Mr. Elcock not being asked if he read and reviewed the PSI, request for corrections ect. it prejudiced him. This issue at the minimum if presented would have vacated Mr. Elcock's sentences.

11. Based upon the foregoing and the following Claims that are presented Mr. Elcock will develop this claim more fully upon the Court appointing conflict-free counsel, and has established that Appellate Counsel prejudiced him by not arguing issues more stronger than a "dead-bans" loser excessive sentence issue.

ATTACHMENT "A"

5

b. Supporting Cases:

1. Strickland v. Washington, 466 U.S. 668, 687-88 (1984)

Two-part test applies to challenges of appellate counsel ineffective claims. See: U.S. v. Birtle, 792 F.2d 846 (9th Cir. 1986).

2. Douglas v. California, 372 U.S. 353, 355-56 (1963);

Evitts v. Lucey, 469 U.S. 387, 396-97 (1985).

Holding the right of an indigent criminal defendant to the assistance of counsel in his first appeal. And the right to counsel means the right to effective counsel.

3. U.S. v. Clark, 115 F.3d 388 (10th Cir. 1995)

Appellate counsel's failure to raise a dead-bang winner constitutes ineffective assistance and establishes "cause" for failure to raise the error.

4. High v. Phay, 519 F.2d 109 (9th Cir. 1975)

Ineffective assistance where attorney filed a four page brief.

5. Gray v. Greer, 800 F.2d 644 (7th Cir. 1986)

Petitioner's claim of ineffective assistance of appellate counsel required review of the trial record by district court.

6. Delgado v. Lewis, 168 F.3d 1118, 1153 (9th Cir. 1999)

The district court properly held under Strickland, Delgado did not need to show prejudice because the failure of his counsel to raise arguable

issues in the appellate brief creates a presumption of prejudice.

See also Helgado v. Lewis, 181 F.3d 1087 (9th Cir. 1999).

Claim Two

Due Process:

Deprivation of Counsel and Necessary Services:

Mr. Elcock was deprived effective and qualified counsel and the required necessary services to conduct a proper investigation into the case. As a result, this violated Mr. Elcock's rights to due process, right to counsel clauses of the 5th, 6th and 14th Amendments to the United States Constitution, and, via the 14th Amendment "due process" clause, violated his rights to due process and right to counsel clause, Article I, Section 13 of the Idaho State Constitution. See: Gideon v. Wainwright, 372 U.S. 335 (1963); Alke v. Oklahoma, 470 U.S. 65 (1985), among others.

Supporting Facts:

1. The district court had appointed Edward Odessy and Larry Smith from the Ada County Public Defenders office. Mr. Elcock's first meeting with Counsel was after his first court appearance.

2. At Elcock's first meeting it was with only Mr. Odessy at the Ada County Jail. Odessy explained to me that I needed to tell him the truth as to what had happened so he could properly represent me in my case. The facts I set forth in my "Affidavit in Support of Kenneth E. Elcock" that I signed on February 11, 2011 is what I told him and is attached hereto as Exhibit "3", and by this reference incorporated herein as if restated in its entirety.

ATTACHMENT "A" - 3

3. Mr Oddey also at my first meeting did not have any of my discovery but explained to me that he would go over it with me and see what we could do.

4. After my first meeting with Oddey he would come to visit me, inquire how I was doing and about my medication. At no time did Oddey or Smith ever bring me any of the discovery documents to include; 1) forensic reports; 2) Police Reports. The only thing he did bring for me to view was DVD of myself and that was all. Mr. Oddey in one conversation with me at a meeting he had told me he had alot of paper work and he would send someone over to read it to me. This never occurred regarding my discovery documents.

5. I was facing a capital murder charge which I could get the death penalty and the level of representation I received was below 6th Amendment Standards.

6. To support this claim more fully in 2007 the National Legal Aid Defenders Association ("NLADA") had conducted an investigation into the Ada County Public Defenders office and in January 2010 issued its findings. A copy of this report can be found at

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www.mynlada.org/content/idaho_____report, and by this reference incorporated herein as if restated in its entirety.

7. Within the NADDA Report it proved that prior to and during 2007 that Counsel's workloads exceeded the American Bar Association's vocational standards and that the Ada County Public Defender Office did not have a Capital Unit in the Office. Alan Trimming, was quoted that; "He described the number of murder cases as 'unprecedented,' leaving him unable to provide caseload relief to attorneys in capital cases until the approach trial." (See report pp. 26-27.) It was only after the NADDA had done their investigation that Alan Trimming had informed them that due to conducting their audit that by Jan. 2008 he had established a 3-Attorney murder-only case unit. These attorney's were promoted from the misdemeanor unit. (See report p. 28.)

8. The NADDA also have demonstrated the lack of necessary services regarding adequate support staff and resources for capital representation. One example that was pointed out was they do not have in-house mitigation experts. Nor do they have anyone in-house who is available to screen clients for the presence of mental and/or psychological disorders or impairments. (See report pp. 26-27.)

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9. I was further deprived necessary services by having at least one investigator from the Ada County Public Defenders Office to come and review the discovery documents they had received from the state in order to verify the truth to these documents.

10. Again, the NADH had reported that one attorney "stated his active felony caseload is "so demanding" that it's difficult to do capital work," and that "the office is over-extended handling its murder caseload". (See report pp. 26-27.)

11. As to Ada County Public Defenders Office providing investigative services the NADH found that due to the volume of case loads affects investigation as well. "It was found that there simply not enough resources to comply with national standards related to investigator services". The office at the time of the 2007 audit had one (1) Chief Investigator and supervised Four (4) investigators for 35 lawyers". It took the NADH's audit to get Trimming to add two (2) more investigators in Jan. 2009. (See Report p. 29.)

12. It was found that there were "simply not enough resources to comply with national standards related to investigator services. It was found that in Dec. 2007, the Unit had 10 pending murder cases. ABA Standards

ATTACHMENT "A" - 11

for Criminal Justice, Providing Defense Services (3rd Ed., 1992).
Standard 5-1.4 was not met in my case. The representation plan did not
provide for investigative services, and facilities needed for an effective defense
on my case. See: <http://www.abnet.org/crimjust/standards/providingdefense.pdf>.

B. One Investigator in the Ada County Public Defender's office
with law enforcement experience said that "the system here is obviously
skewed against the defense." (See NARDA Report, p. 30.)

b. Supporting Cases:

1. Gideon v. Wainwright, 372 U.S. 335 (1963).

Establishing that the 6th and 14th Amendments require states to provide counsel for all those who have been charged with criminal wrongdoing by the state and are unable to afford private counsel, and the state of Idaho was required to ensure that defense counsel for indigent persons has the tools to engage actively and meaningfully in the adversarial process so that their decisions, judgments and punishments are rendered fairly and accurately.

2. Ake v. Oklahoma, 470 U.S. 68, 76-77 (1985)

Holding that the Court has long recognized that when a state brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. ... Meaningful access to justice has been the consistent theme of [cases]. We recognize long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process.

3. State v. Olin, 103 Idaho 391, 394, 648 P.2d 203, 206-07 (1982)

Requires that a defendant show that the necessary services are in the interest of justice when reviewed in light of all circumstances

and measured against the standard of fundamental fairness embodied in the Due Process Clause.

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Claim Three

Ineffective Assistance of Trial Counsel:

Failure To Conduct Pretrial Investigation:

Mr. Elcock was denied effective assistance of counsel in order to conduct a meaningful and reasonable pretrial investigation. As a result, this violated Mr. Elcock's right to effective assistance of counsel as guaranteed by the 6th and 14th Amendments "right to counsel" and "due process" clauses of the United States Constitution, and, via the 14th Amendment due process clause, violated his right to counsel and due process clause, Art. I, Sec 13, of the Idaho State Constitution. See: *Strickland v. Washington*, 466 U.S. 668 (1984), among others.

a. Supporting Facts:

1. The "Supporting Facts" set forth in "Claim Two" is hereby incorporated herein as if restated in its entirety.
2. During my pretrial proceedings up to my October 11, 2006 Plea Hearing Mr. Elcock's trial attorney's, Ed Odessy and Larry Smith never provided any of the discovery documents that the state had disclosed in order that he could fully aid them in his defense.
3. Throughout this time-frame he had continually had requested counsel to provide them but never did.
4. Mr. Elcock after his sentence was imposed continued his efforts in attempting to get the discovery documents. Finally, Mr. Elcock on

May 2, 2011, had for the first time received a copy of the Discovery Documents, Mr. Elcock upon receiving these documents made a carefull review of them and discovered numerous things that were within them that had he received them prior to his guilty plea hearing would have insisted in going to trial.

5. Mr. Elcock supports this claim further with the "Affidavit of Facts In Support of Successive Post-Conviction Petition," that was done on October 12, 2011, and is attached hereto as Exhibit "4" and by this reference incorporated herein as if restated in its entirety.

6. Additionally, Mr. Elcock on April 25, 2011 had written a letter to former SAPD Erik R. Lehtinen, informing him that Ed Odessy had given the working file over to him and that he wanted a copy of it. Mr. Lehtinen replied on May 17, 2011, shortly after Elcock had received the discovery documents from Odessy, explaining that "I never receive discovery materials, investigative reports, or any correspondence or notes from trial counsel. Thus, if these are items you seek, I suggest you renew your request to the Ada County Public Defenders, as they should probably still have those items." A copy of this May 17, 2011 letter is attached hereto as Exhibit "5", and by this reference incorporated herein as if restated in its entirety.

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7. The American Bar Association (ABA) Criminal Justice Standards and Capital Guidelines at 10.7A that Counsel at every stage is duty-bound to thoroughly and independently investigate guilt/innocence and penalty phase issues. Mr. Elcock's attorneys failed to conduct a thorough and independent investigation.

8. Not once did trial attorneys or their investigator go over the discovery documents with him to insure that the forensic evidence was correct. Upon Mr. Elcock obtaining the discovery documents he had discovered numerous inaccuracies such as, no forensic tests done on the gun, no GSR tests done on him but they had taken his clothing, false statements contained within the discovery.

9. Mr. Elcock reserves the right to supplement this Claim's Supporting Facts more fully upon the appointment of conflict free counsel in these proceedings.

b. Supporting Cases:

1. Strickland v. Washington, 466 U.S. 668, 691 (1984).

Counsel has a duty to make reasonable investigations or to make reasonable decision that makes particular investigations unnecessary.

2. Williams v. Taylor, 529 U.S. 362 (2000);

Wiggins v. Smith, 539 U.S. 510, 522 (2003).

American Bar Association Standards used as a guide in assessing whether attorney's failure to investigate was reasonable.

3. United States v. Mooney, 497 F.3d 397, 404 (4th Cir. 2007).

Counsel in criminal cases are charged with the responsibility of conducting appropriate investigations, both factual and legal, to determine if matters of defense can be developed.

4. Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993).

A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial, see also: Richardson v. United States, 379 F.3d 485, 488 (7th Cir. 2004).

C. Montgomery v. Petersen, 846 F.2d 407 (7th Cir. 1988).

"Nonstrategic decision not to investigate is inadequate performance."

Claim Four

Ineffective Assistance of Trial Counsel:

Guilty Pleas Coerced

Mr. Elcock's guilty pleas were the result of unconstitutional coercion due to counsel's ineffectiveness. As a result, this violated Mr. Elcock's right to effective assistance of counsel as guaranteed by the 6th and 14th Amendments "right to counsel" and "due process" clauses of the United States Constitution, and, via the 14th Amendment due process clause, violated his "right to counsel and due process" clause, Art. 1, Sec. 13, of the Idaho State Constitution. See: Strickland v. Washington, 466 U.S. 668 (1984), Marchibroda v. United States, 368 U.S. 487 (1962), Mabry v. Johnson, 467 U.S. 504 (1984), Boykin v. Alabama, 395 U.S. 238 (1969), among others.

Claim Five

Ineffective Assistance of Trial Counsel:

Guilty Plea Ineffectiveness

Mr. Elcock's guilty pleas were unknown and involuntary for they were the product of ineffective assistance of counsel for failing to conduct a meaningful investigation and consultation with Mr. Elcock about possible defenses to the crimes, with the discovery. As a result, this violated Mr. Elcock's right to effective assistance of trial counsel as guaranteed by the 6th and 14th Amendments "right to counsel" and "due process" clauses of the United States Constitution, and, via the 14th Amendment "due process" clause, violated his "right to counsel" and "due process" clause, Art. 1, Sec. 13, of the Idaho State Constitution. See: Strickland v. Washington, 466 U.S. 668 (1984), Hill v. Lockhart, 474 U.S. 52 (1985), among others.

a. Supporting Facts:

1. The "Supporting Facts" set forth in Claims 2 and 3 is hereby

incorporated herein as if restated in its entirety.

2. To support Claim Four, Mr. Elcock had a meeting with counsel, Ed Adness, prior to the October 11, 2006 guilty plea hearing to discuss a plea offer.

3. Counsel at this meeting and stated, "You're young, you're black, you're in Idaho, and somebody died. The State is looking at the death penalty. The best thing I can do for you is get you a deal. Plead guilty and you will get 10-15 years and get out and still have a life."

4. On the day of the plea hearing, Oct. 11, 2006, Counsel had spoke with Mr. Elcock approximately 2 min. prior to the hearing and explained to him that when the Judge asked him questions to "say yes mam, no mam and everything will be fine."

4. To support Claim Five, Mr. Elcock set forth facts in Claims Two and Three that demonstrate that his trial attorney's failed to conduct a meaningful pre trial investigation and that he was deprived effective and qualified counsel as the 6th and 14th Amend. requires.

5. At the guilty plea hearing, the District Court conducted an examination of Mr. Elcock regarding his guilty plea. To support this,

attached hereto as EXHIBIT "6", a copy of the October 11, 2006 Plea Hearing that was conducted by the District Court, and by this reference incorporated herein as if restated in its entirety.

6. After careful review of the guilty plea hearing transcript, EXHIBIT "6", Mr. Elcock has discovered that his guilty plea was not knowing nor voluntary due to the plea colloquy that the district court did, and that he didn't receive reasonably effective assistance of counsel in connection with the decision to plead guilty due to his attorney's failure to disclose the vital discovery documents to Mr. Elcock and verify the statements and evidence within them, and conduct their own independent investigation.

7. Additionally, the district court failed to ask all of the required questions in order to ensure it was knowing and voluntary. This is based upon a careful review of the Idaho Criminal Rules Appendix H Guilty Plea Advisory Form. A copy of this form is attached hereto as EXHIBIT "7", and by this reference incorporated herein as if restated in its entirety.

8. Upon review of the October 11, 2006 Guilty Plea Hearing transcripts, Exhibit "6", and comparing it to the Guilty Plea Advisory Form, EXHIBIT "7", the first six questions only questions 1, 2, 5 and 6

were asked. As to the Questions Regarding Plea No's 1-43 that are required to be asked by the district court only questions 2 (Tr. p. 4, Ln. 17-18), 3 (Tr. p. 4, Ln. 14-16), 4 (Tr. p. 4, Ln. 19-23), 7 and 8 (Tr. pp. 9-11, Ln. 13-18, 1-2), 15 (Tr. p. 8, Ln. 3-5), 16 (Tr. p. 11, Ln. 11-25, p. 13, Ln. 6-14), and 19 (Tr. p. 9, Ln. 5-12) were asked. Of the first six questions on pp. 1-2 of of Exhibit "6" 80% were ask. As for the other forty-three (43) questions (Exhibit "6", pp. 2-7) only eight were asked and answered which is only 18% of them.

9. The one question that is most important to Mr. Elcock's claim of his plea not being knowing or intelligent is question No. 19 which states:

"Your attorney can get various items from the prosecutor relating to your case. This may include police reports, witness statements, tape recordings, photographs, reports of scientific testing, ect. This is called discovery. Have you reviewed the evidence provided to your attorney during discovery?"

See. EXHIBIT "6", p. 5

10. The district court's questions that may come even close to the above-referenced question No. 19 is when the district court asked:

Q. Did you talk to the police about what happened in this case?

A. Yes.

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Q. Did you make statements to them?

A. Yes

Q. Have you looked at those statements and comments with your attorneys?

A. Yes

(EXHIBIT "6", 10/11/2006, Tr, p. 9, Ln. 5-12.)

The above-referenced questioning by the district court using the words "statements and comments" is too general of a question therefore vague and ambiguous as to whether Mr. Elcock had a full and fair opportunity in reviewing the discovery documents. Had the district court properly asked Mr. Elcock the questions as set forth in EXHIBIT "7" his answers to question 19 would have been "NO", along with question 23 being "No" and the district court would be required to stop the proceedings and conduct an inquiry with Mr. Elcock's attorney's as to why they had not provided him with the discovery documents and then not accept Mr. Elcock's guilty plea for the reasons set forth above.

11. Viewing the record and the supporting facts set forth in Claim 2, 3 and this Claim Mr. Elcock did not receive reasonably effective assistance of counsel in connection with his decision to plead guilty, because the pleas

did not then represent an informed choice. It is clear that counsel did not channel their investigation on the basis of an informed professional assessment of Elcock's potential defenses. They simply failed for no apparent reason related to Elcock's case to investigate the facts which made them so ineffective that his guilty pleas were not knowing and voluntary entered. For these reasons the district court must vacate Mr. Elcock's guilty pleas

12. Mr. Elcock reserves the right to supplement this claim upon the appointment of conflict-free counsel.

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b. Supporting Cases:

1. Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

Two part test applies to challenges to guilty pleas based on ineffective assistance of counsel.

2. Marchbroda v. United States, 368 U.S. 487 (1962).

A guilty plea if induced by promises or threats which deprives it of the character of a voluntary act is void.

3. Mabry v. Johnson, 467 U.S. 504 (1984).

It is only when the consensual character of the plea is called into question that the validity of a guilty plea may be impaired.

4. Boykin v. Alabama, 395 U.S. 238 (1969).

A trial judge should not accept a guilty plea unless he has determined that such a plea was voluntary and knowing.

5. Smith v. Mahoney, 611 F.3d 978, 989 (9th Cir. 2010), cert. denied 131 S.Ct. 461 (2010).

Claim that counsel advised defendant to plead guilty without investigating the facts surrounding the crime constitutes ineffective assistance of counsel.

6. U.S. v. Estrada, 849 F.2d 1304, 1306 (10th Cir. 1988)

Noting that "coercion by the accused's counsel can render a plea involuntary."

7. Hill v. Lockhart, 474 U.S. 52 (1985).

Trial Counsel's failure to investigate or discover potentially exculpatory evidence; the determination whether the error "prejudiced the defendant by causing him to plead guilty rather than going to trial will depend on the likelihood that discovery of the evidence could have led counsel to change his recommendation as to the plea.

8. United States v. Kauffman, 109 F.3d 186, 191 (3d Cir. 1997).

In the context of a claim that counsel failed to conduct an adequate investigation prior to the entry of a guilty plea, prejudice is demonstrated by showing that the defendant would have insisted on going to trial instead of pleading guilty.

Claim Six

Ineffective Assistance of Sentencing Counsel:

Failure To Disclose and Verify PSI

Mr. Elcock was denied effective assistance of counsel at sentencing for failing to review the Presentence Report (PSI) with him to ensure it was correct. As a result, this violated Mr. Elcock's right to effective assistance of counsel as guaranteed by the 6th and 14th Amendments "right to counsel" and "due process" clauses of the United States Constitution, and via the 14th Amendment "due process" clause, violated his "right to counsel" and "due process" clause, Art. 1, Sec. 13, of the Idaho State Constitution. See: Strickland v. Washington, 466 U.S. 668 (1984), among others.

a. Supporting Facts:

1. After Mr. Elcock's guilty plea hearing the Court ordered that a Presentence Investigation Report be done and submitted to the Court as well as the Prosecution and Defense Counsel for review prior to the January 11, 2007, Sentencing Hearing.

2. Prior to the sentencing hearing Mr. Elcock's Trial Attorneys, Ed Oddey and Larry Smith, never provided a copy of the PSI to him to review, nor did they personally come and visit him at the Ada County Jail and read and review it with him to ensure there were no errors or statements that may need to be corrected at the January 11, 2007 Sentencing Hearing or file a motion to Strike

portions of the PSI. At this point and time Mr. Elcock does not, nor never has, know the contents of the PSI.

3. At the January 11, 2007, Sentencing hearing the Court had acknowledged that it had received and reviewed a number of presentence materials that were submitted in the case, and took up the matter of changes or corrections to the presentence materials by both the State and Mr. Elcock's attorney Ed. Odessey. (1/11/2007, Tr., pp. 2-3, ln. 19-25, 1-9.) Mr. Odessey stated no.

4. Not once did the district court ask Mr. Elcock if he had an opportunity to read the PSI and if it was correct. To support this attached hereto is a copy of the January 11, 2007, Sentencing Hearing Transcript as EXHIBIT "8", and by this reference incorporated herein.

5. As a result of Mr. Elcock's Trial attorney's he was not given full disclosure to the contents of the presentence report so that he could verify the statements contained therein which prejudiced Mr. Elcock.

6. Mr. Elcock reserves the right to supplement this Claim upon the appointment of conflict-free counsel.

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b. Supporting Cases:

1. Strickland v. Washington, 466 U.S. 668, 688 (1984).

Trial Counsel is ineffective when counsel's deficient performance prejudiced petitioner in failing to conduct a proper investigation into all mitigating facts that were presented for sentencing.

2. Williams v. Taylor, 529 U.S. 362 (2000).

Trial counsel's failure to fulfill his obligation to conduct a thorough review and investigation into the mitigating facts were sufficiently prejudicial to have affected the outcome of sentencing.

3. Wiggins v. Smith, 539 U.S. 510, 524 (2003)

Counsel found to be ineffective in failing to conduct proper investigation of mitigating evidence.

4. United States v. Rone, 743 F.2d 1169, 1173 n.2 (7th Cir. 1984)

Misrepresentation by attorney to court that he had reviewed presentence report with client prior to sentencing casts doubt on counsel's competence and may constitute ineffective assistance of counsel.

5. U.S. v. Sustaita, 1 F.3d 950 (9th Cir. 1993).

Sentencing judge's failure to determine whether defendant had read presentence report or discussed it with counsel, as required by Rules of Criminal Procedure,

was prejudicial error requiring remand for resentencing; defense counsel made no specific objection to any fact in presentence report, and defendant could not have tried to contradict report's factual findings that were contained therein for she had not been given opportunity to read it or discuss it.

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Attachment "A"

Exhibit "1"

EXHIBIT "1"

EXHIBIT "1"

to be allowed to be withdrawn.² (If you want to withdraw your plea, you have to have Mr. Odyssey make a motion in the district court under Idaho Criminal Rule 33(c) or, because such a motion is most likely untimely, you need to file a petition for post-conviction relief asserting that your plea was not knowingly, intelligently, and voluntarily entered.)

In most cases where the defendant has pled guilty, the only things I can argue are that the sentence is excessive and/or that the district court erred in denying a Rule 35 motion. Obviously, the former argument is the argument I made in your case. My feeling was that this was the best argument I could make under the circumstances.

In arguing the excessiveness of your sentence, I did not feel like I could realistically challenge the indeterminate portion of that sentence. There were two reasons for this. First, until very recently, the Court of Appeals has refused to even consider the indeterminate portion of a sentence. (That changed recently, but even now, the Court of Appeals assumes that the defendant will spend the indeterminate portion of his sentence on parole.) Second, based on some of Mr. Odyssey's comments while he was giving his sentencing recommendation, I did not feel like we could realistically ask for a reduction in the indeterminate portion of your sentence. For example, he acknowledged that you would be "going to prison for a significant number of years"; for some reason, he stated that your case "cries out for" and "demands" punishment, and, later, that you "must be punished and punished severely"; he acknowledged that you "may not get out"; and he ultimately asked for a "substantial number of years indeterminate."

I am truly sorry that I could not have been more helpful to you throughout this appeals process. If you have any questions, please don't hesitate to call.

Sincerely,



ERIK R. LEHTINEN

Deputy State Appellate Public Defender

ERL/mrg

² I'm afraid that the Supreme Court's order was somewhat misleading. It should not have implied that the issue of the withdrawal of your plea can be raised in this appeal; it should have simply indicated that, to the extent that such a claim is preserved, it can be raised in this appeal.

Exhibit 4

Elcock vs. State

Case No. CV PC 2011-19840

Attachment "A"

Exhibit "2"

EXHIBIT "2"

EXHIBIT "2"

Exhibit K

2-24-08

To: ERIC R. Lehtinen

Hi this is Kenneth Elcock. I have ~~read~~^{reviewed} the brief that you have filed. And first and foremost I would like to thank you for looking into my case a little better. But in the brief you stated that I was content with having a life sentence. And I never told you that I was content in having this life sentence. As you have read and found to be true the state has mislead my whole case. They have no proof at all to hold up this second degree murder charge. I have been sentenced for the wrong crime. The crime that was committed was nothing more than reckless-homicide with is nothing more than manslaughter at the most. I want and need the court's to see the wrong ^{doing} in this case. This is ~~what~~^{what} I want done I want the second degree murder charge to be dropped to a lesser charge. Because there ~~is~~^{was} and is no finding of any express of malice what so ever to give me this charge. When based on the facts given in ~~my~~^{my} case false and statements and people embellished the truth to make things seem harsh and that was not the case and can not be proven at all. The ~~state~~^{state} has

no grounds to uphold these second degree conviction.
 you have even pointed out some of the perine facts that
 I have been trying to show you to have what I need
 done in my case. So I don't want to ask for lesser
 time or anything of that sort. I don't want any plea
 with a life sentence. I want this second degree murder
 charge ~~lowered~~ ^{lowered} to manslaughter and resentence or I need
 to withdraw my guilty plea on everything. I have
 filed already a withdraw of guilty plea, and was told
 by the court's it has to be dismissed ~~with out prejudice and~~ ^{with out prejudice and} ~~and~~ ~~be raised~~
 must and should be raised in my on going appeal. So
 that is what I need done in my case Mr. Lehtinen.
 So please help me unvail the facts in my case. I
~~am~~ ^{am} sending a notarized copy of this letter to you and
 I have a second for my own personal records. In
 closing I would like to thank you from the bottom
 of my heart for helping me and taking a interest
 in my concern's in my case. ~~for~~ your's Truly Kenneth Elcock
 please get back to me as soon as you can.

my address
 Kenneth Edward Elcock # 83841

Sincerely, Kenneth Elcock



PO Box 51
 Boise, ID. 83707

State of ID
 County of AD
 subscribed and sworn
 to before me Feb.
 26th 2008.

X signature Kenneth Elcock

X DATE 10-26-08

L. Pfeifer
 notary public
 comm. exp 05/11/2012

ELCOCK vs. STATE

Case No. CV PC 2011-19840

ATTACHMENT "A"

Exhibit "3"

EXHIBIT "3"

EXHIBIT "3"

Kenneth E. Elcock # 83841

--C.C. W-13-B

P.O. Box 70010

Boise, Idaho. 83707

In The Supreme Court OF The State OF Idaho

Kenneth E. Elcock
Petitioner, Appellant

vs.

STATE OF Idaho
Wengler, Warden
Respondent,

CASE NO: 38177-2010

Affidavit IN support OF
Kenneth E. Elcock

STATE OF Idaho } ss
County of ADA. }

Kenneth E. Elcock being first duly sworn on oath, deposes and says;

I went to Wells Fargo's Bank to cash a check on April the 14th, 2006 at about 4 o'clock p.m. I left the bank and went and picked up my son Kenneth JR. to take him to play baseball at the PARK on sunset in Boise. Then I went and took a shower, and I go dressed to go to a After Party At JD & Friends later on that night. I then went to drop off my son, with his mother Brandy S. Lynch. I received a ride from her brother's. I then stopped and got A bottle of E & J Brandy and a case of beer from the store across from where my sons mother was living at the time. I started to drink in the car after I walked my son upstairs. I went back down to the car, and the guys I got a ride with where my sons uncles, The brother's of my son's mother. They wanted to go to these fathers house before going down town to drop me off at the after party, By that time about a half of gallon of brandy was already drank. So we stopped to get two more cases of beer. About 10:30 or 11:00 p.m. we got back in the car and went downtown. At that time my phone was ringing, but I didn't pick it up at all. I turned my phone off, we stopped at some girls house to pick up some money up for Terrance. As we arrived at the after party, they where charging \$10.00, as A cover charge. I spoke to the guy at the door and went into the After Party, and went to the bar and started to take shots of Hennessy and bought another beer. Then I looked to my left and seen Terrance at the bar, he bought me another shot. Then his brother Bradys came in and spoke with Terrance as I was talking to a female. After that they walked up to me as, I was dancing with the female, and said we had to go. I laughed and turned back to the female and kept dancing. Then they starting to tell me that my sons life was at risk. They stated that A group of men were trying to break into the house. They stated that something was going to happen to my child, so I got into the car with them and left the bar. I was very drunk at that time all, I was thinking is I have to save my childs life. The next thing I know we pulled up to some apartments, and everyone got out of the car and ran different ways. I had no clue on where I was and where everyone ran off too. I got out of the car and walked around to were I heard people yelling and screaming as I started to get close I seen A dark color car pull up. I seen two men jump out and run over, as I walked up. I said "whats up". At that time I was struck in the face with A bottle, by a large black man in the eye. I backed up because I could not see, and I could feel myself begin to bleed. I looked to my left

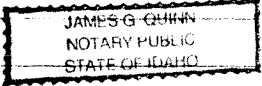
and Larayston was putting a gun in my hand and yelling something, I turned and fired some shots. Then he grab the gun back and ran, my friend Demi pulled my arm and said come on let's go, then I got back into the car with the other guys I came with, and they drove back downtown. I got back in the After Party and went to the restroom and cleaned my face and my eye up. Then I started to drink some more. I woke up the next day at some girls house I didn't know, and that's when I was told that the shots I fired had hit someone. So I then went to make sure my son was alright at his mothers house. Then I left there and went to the house I was locked up at a few days later. I was thinking right before I was arrested, what went wrong, I did not know what to do, I am so very sorry.

FURTHER my AFFIANT SAYETH NOT.

X Kenneth E. Elcock
Kenneth E. Elcock, AFFIANT PROSE

Subscribed AND SWORN AND AFFIRMED to me before me this 11th day of Feb., 2011.

James J. Quinn
Notary Public for Idaho
my commission Expires 9/10/13



- SEAL -

Certificate of Mailing

I hereby certify that on the 11th day of Feb., 2011, I mailed a true and correct copy of Affidavit IN Support Kenneth E. Elcock via the prison mail system for processing to the United States mail system, postage prepaid, addressed to:

Lawrence G. Wasden
Deputy Attorney General
Criminal Division
P.O. Box 83720
Boise, ID. 83720-0010

Affidavit IN support - 2

ELCOCK vs. State

Case No. CV PC 2011-19840

Attachment "A"

Exhibit "4"

EXHIBIT "4"

EXHIBIT "4"

Affidavit OF Facts IN Support OF Successive Post-Conviction Petition

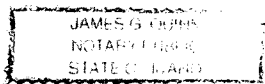
State OF Idaho } ss
County OF ADA)

I Kenneth Edward Elcock, being first duly sworn on oath, deposes and says: My counsel's performance was deficient and did fall way below the Strickland vs. Washington standard. Counsel indeed did not do his job. Counsel did withhold the written discovery in my case. I did not receive my written discovery until the date of 5-2-11. I was sentenced to prison on 1-11-07. I was never made aware that crucial key evidence was available to me at any stage in my criminal proceeding. Only because counsel withholding these documents from me, this crucial key evidence that the state could not use against me would have changed the whole out come of the case. I would have insisted on A jury trial that without a doubt would have resulted in a different out come. The crucial key evidence was tainted by two Boise Police Department members, and would not hold up in any court of law. This was all part of the written discovery, I did not receive until 5-2-11. The Idaho State Crime Lab was also aware of this, and did state in writing that it was part of the discovery. Counsel also tried to mislead the Idaho State Bar at a hearing held on the date of 5-27-10. Counsel told many lies to the members of the Idaho State Bar only to mislead the BAR members away from the truth while counsel was under oath. I do have written as well as Audio evidence to support these claims which I have brought to the Idaho State Bar's attention, as well as this court in this case. Further this affidavit sayeth not.

X Kenneth Elcock
Kenneth Edward Elcock

Subscribed and sworn and affirmed to before me this 12th day of Oct., 2011

(- seal -)



X James G. Quinn

Notary Public For Idaho

My Commission Expires: 9-10-2013

Elcock vs State

Case No. CV PC 2011-198 40

Attachment "A"

Exhibit "5"

EXHIBIT "5"

Exhibit "5"



STATE OF IDAHO

OFFICE OF THE STATE APPELLATE PUBLIC DEFENDER

May 17, 2011

Kenneth Edward Elcock
INMATE # 83841
ICC
PO Box 70010
Boise ID 83707

RE: Docket No. 33861

Dear Mr. Elcock:

I am in receipt of your letter of April 25, 2011 clarifying your previous request for documentation. Unfortunately, I am still unable to assist you in this regard.

First, I don't know why your trial counsel (Ed Odessey, if I recall correctly) would have told you that he turned his working file over to me, as that is not true. In fact, with the exception of death penalty cases, our office *never* receives trial counsel's files. As a consequence, I never receive discovery materials, investigative reports, or any correspondence or notes from trial counsel. Thus, if these are the items you seek, I suggest you renew your request to the Ada County Public Defenders, as they should probably still have those items.

Second, as noted in my previous letter, our records reflect that we sent you the transcript and record in your case. This would have included the Clerk's Record (which would have consisted of most of the filings in your case, or at least those that were relevant to the issue(s) raise on appeal) and the Reporter's Transcript (which would have consisted of the hearing transcripts that were relevant to your appeal, such as the change of plea and sentencing hearing transcripts). If you are looking for items not contained within the transcript and record that we sent you, we probably never received those items because they probably were not relevant to the issue(s) raised on appeal.

Once again, I am very sorry that I could not be of more assistance to you.
I wish you the best of luck in the future.

If you have any questions, please don't hesitate to call.

Sincerely,

A handwritten signature in black ink, appearing to read "Erik R. Lehtinen". The signature is fluid and cursive, with a large, sweeping flourish at the end.

ERIK R. LEHTINEN
Deputy State Appellate Public Defender

ERL/eas

E/cock vs. State

Case No. CV PC 2011-19840

Attachment "A"

Exhibit "6"

EXHIBIT "6"

EXHIBIT "6"

CONCLUSION

Therefore, appellant respectfully requests that this court [what court should do].

The Petitioner Kenneth Edward Elcock is contesting his guilt in this matter. The district court has blatantly ignored [9] nine key eyewitnesses who clearly proves Elcock was not the shooter in this case. The Petitioner nonetheless argues that he should have been granted a new trial or an evidentiary hearing on all issues and the district court has erred in that fact of law. The petitioner argues that the state does not want Elcock's case on display in open court, because it will end up very costly for the state for sending a innocent man to prison for life. The petitioner asserts he has not been treated fairly because he is a black muslim and treated purely bias. The petitioner Kenneth Edward Elcock is asking that the judgement reached in this case is the plea and sentence be vacated ~~at~~ and this court grant relief and direct the district court to conduct a new trial or an evidentiary hearing. The petitioner ask that this specific of this be granted in all fairness of the law that is in this case

Respectfully submitted this 2nd day of July, 2013.

Kenneth Elcock
Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 2nd day of July, 2013, I mailed a true and correct copy of the APPELLANT'S BRIEF via prison mail system for processing to the United States mail system, postage prepaid, addressed to:

Deputy Attorney General
Criminal Division
P.O. Box 83720
Boise, ID 83720-0010


Appellant

1

BOISE, IDAHO

Wednesday, October 11, 2006, 2:05 p.m.

THE COURT: State versus Kenneth Elcock. Are we ready to proceed on that, or are we having difficulties again?

MR. BERECZ: Ready to proceed, Judge.

MR. ODESSEY: Ready to proceed, Your Honor.

MR. BERECZ: Your Honor, Monty Berez for the State. I'm tendering to the court an Amended Information to be filed pursuant to plea agreement.

THE COURT: All right. Why don't you tell me about your plea agreement. Have you reached a plea agreement, then?

MR. ODESSEY: Your Honor, Ed Odessey here with Lawrence Smith on behalf of Kenneth Elcock, who is present in custody.

Judge, the plea agreement is essentially that the Amended Information which changes a number of the charges from the original filing with the court would be having guilty pleas entered into by Mr. Elcock as to each of the counts alleged on the Amended Information.

The parties are free to argue the case

2

in the court at the time of sentencing.

THE COURT: All right. So he would plead guilty to each count in the Amended Information, and both sides are free to argue for whatever they see fit?

MR. ODESSEY: That's correct, Your Honor.

MR. BERECZ: That's correct, Your Honor.

THE COURT: All right.

MR. BERECZ: Your Honor, the essential changes, there is some language changes, but essentially what we are doing is changing the first count from first-degree murder to second-degree murder, and we are dropping the enhancement for the use of a firearm.

THE COURT: All right.

Mr. Elcock, is that what you want to do?

THE DEFENDANT: Yes, ma'am.

THE COURT: Is there anything else you are expecting that I haven't heard about?

THE DEFENDANT: No.

THE COURT: So this is the entire agreement?

THE DEFENDANT: Yes.

THE COURT: I have questions first for your counsel, and then I have questions for you all.

3

THE DEFENDANT: Okay.

THE COURT: Did you get all the discovery in the case?

MR. ODESSEY: Yes, Your Honor.

THE COURT: Have you had a chance to review it fully with your client?

MR. ODESSEY: Yes, Your Honor.

THE COURT: Were you able to advise him fully of his rights and defenses?

MR. ODESSEY: Mr. Smith and I have done that. Yes, Your Honor.

THE COURT: Have you talked to him about the possible consequences of pleading guilty to the Amended Information?

MR. ODESSEY: We have done so on many occasions, yes, ma'am.

THE COURT: Is there any reason why we should not go forward?

MR. ODESSEY: None that I'm aware of.

THE COURT: Do you have any problem, as you sit here, with the defendant's competency?

MR. ODESSEY: No questions about competence at all. He is fragile but more than fully competent to proceed.

THE COURT: So in your professional opinion,

4

having looked at the State's case and your case, is this a good course of action for your client to take?

MR. ODESSEY: It is.

THE COURT: If you will stand, Mr. Elcock, the clerk will swear you in.

KENNETH EDWARD ELCOCK,
the defendant herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY THE COURT:

Q. Would you state your full name for the record?

A. **Kenneth Edward Elcock.**

Q. How old are you, Mr. Elcock?

A. **Twenty-six.**

Q. What's your educational background?

A. **I didn't finish high school.**

Q. Do you have a GED or high school equivalency?

A. **No.**

Q. What do you do to make a living?

A. **I was working at a construction site.**

1 Q. So you normally do construction work?

2 A. Yes.

3 Q. Now, you understand what you are
4 charged with in this case originally; correct?

5 A. Yes.

6 Q. And you know what the State has to
7 prove to prove the original charges that were made
8 against you?

9 A. Yes.

10 Q. Now, you've gotten a copy of the
11 Amended Information?

12 A. Yes.

13 Q. And have you had a chance to read
14 through it?

15 A. Yes.

16 Q. Do you understand the charges in the
17 Amended Information?

18 A. Yes, ma'am.

19 Q. Do you consent to the filing of the
20 Amended Information?

21 A. Yes.

22 Q. And you understand that if you plead
23 guilty to the charge in the Amended Information,
24 that you could be sentenced up to a maximum of
25 life in prison on the charge of murder in the

1 prove that you, on or about the date alleged, in
2 this county, did willfully, unlawfully,
3 deliberately with malice aforethought but without
4 pre-meditation kill April Buenrostro?

5 A. Yes.

6 Q. And you understand that they would also
7 have to prove beyond a reasonable doubt if this
8 case went to trial the elements of aggravated
9 battery on each charge, which means that they
10 would have to prove on or about the date alleged,
11 in this county, that you unlawfully and
12 intentionally caused bodily harm by committing a
13 battery with the use of a deadly weapon?

14 A. Yes.

15 Q. Now, you also understand that they
16 would have to prove beyond a reasonable doubt that
17 you, on or about the date alleged, in Ada County,
18 did also unlawfully and with the apparent ability,
19 attempt to commit a violent injury upon the person
20 of another with a deadly weapon?

21 A. Yes.

22 Q. For the aggravated assault?

23 A. Yes.

24 Q. Did anybody promise you that I would be
25 easy on you if you would plead guilty to the

1 second degree?

2 A. Yes. Yes, ma'am.

3 Q. And you understand that the maximum
4 possible penalties for the offenses of aggravated
5 battery which are charged in Counts 2, 3, and 4,
6 are 15 years in prison and a \$50,000 fine?

7 A. Yes.

8 Q. And the charge of aggravated assault
9 carries a maximum possible penalty of five years
10 in prison and a \$5,000 fine?

11 A. Yes.

12 Q. Okay. Now, you understand what the
13 State would have to prove to prove a charge of
14 murder in the second degree?

15 A. Yes.

16 Q. And you understand what the State has
17 to prove to prove the charge of aggravated battery
18 to be true?

19 A. Yes, ma'am.

20 Q. And you understand what they have to
21 prove to prove the charge of aggravated assault to
22 be true?

23 A. Yes.

24 Q. And you understand that to prove a
25 second-degree murder, the State would have to

1 charges in the Amended Information?

2 A. No.

3 Q. Did anybody make any promises to you I
4 did not hear about?

5 A. No, ma'am.

6 Q. Has anybody intimidated you or
7 threatened you, or anyone close to you, to make
8 you plead guilty?

9 A. No.

10 Q. Has anyone offered you a reward or
11 incentive to make you plead guilty to the charges
12 in the Amended Information?

13 A. No, ma'am.

14 Q. Are you pleading guilty even though you
15 think you are innocent?

16 A. No.

17 Q. Now, the way it works is this: If I
18 accept your plea, I will order a presentence
19 report. That would show me a lot of background
20 information about you, including your past record.

21 A past record's a big factor in
22 deciding what the sentence ought to be. And you
23 are aware of that?

24 A. Yes.

25 Q. Are you on probation or parole?

1 A. **No, ma'am.**
 2 Q. Did you make confessions or admissions
 3 to the police in this case?
 4 A. **I don't understand.**
 5 Q. Did you talk to the police about what
 6 happened in this case?
 7 A. **Yes.**
 8 Q. Did you make statements to them?
 9 A. **Yes.**
 10 Q. Have you looked at those statements and
 11 comments with your attorneys?
 12 A. **Yes.**
 13 Q. I don't -- one of the things that
 14 happens is if you plead guilty to the charge, you
 15 will not be able to file any motions to suppress
 16 those statements that you might have made, and
 17 those will be in the Information that I receive.
 18 A. **Yes.**
 19 Q. Are you addicted or accustomed to the
 20 use of alcohol or drugs?
 21 A. **No.**
 22 Q. Are you under the influence of anything
 23 at all today, including any medication?
 24 A. **Just medication that I receive at the**
 25 **jail.**

1 right?
 2 A. **Yes.**
 3 Q. When did you decide to plead guilty?
 4 A. **I think it was August or July.**
 5 Q. So you have been thinking about it for
 6 a while?
 7 A. **Yes.**
 8 Q. Have you had enough time to think about
 9 it?
 10 A. **Yes, ma'am.**
 11 Q. Have you had enough time to talk to
 12 your lawyers?
 13 A. **Yes.**
 14 Q. When you talked to your lawyers, did
 15 you tell them what happened, from your standpoint?
 16 A. **Yes.**
 17 Q. Did they tell you to your satisfaction
 18 what your rights and defenses are?
 19 A. **Yes.**
 20 Q. Did they talk to you about the
 21 consequences of pleading guilty?
 22 A. **Yes.**
 23 Q. Are you satisfied with your attorney's
 24 representation?
 25 A. **Yes, ma'am.**

1 Q. How does that medication affect you?
 2 A. **It helps me with my depression.**
 3 Q. When you are taking that medication,
 4 does it interfere with your ability to understand
 5 what people are telling you?
 6 A. **No, ma'am.**
 7 Q. Are you able to do what you would
 8 normally do in a day?
 9 A. **Yes.**
 10 Q. You can watch television or read or do
 11 whatever you would normally do in a day when you
 12 take those medications?
 13 A. **Yes, ma'am.**
 14 Q. Are you having any trouble
 15 understanding what's going on?
 16 A. **No.**
 17 Q. Have you had any trouble understanding
 18 your lawyer?
 19 A. **No.**
 20 Q. Now, you are receiving treatment for
 21 depression currently?
 22 A. **Yes.**
 23 Q. And that's through the jail?
 24 A. **Yes.**
 25 Q. Okay. The medications are working all

1 Q. And you realize that if you do plead
 2 guilty, you are going to give up your
 3 constitutional right to trial by jury, your right
 4 to confront and cross-examine the witnesses
 5 against you, and you will also give up the
 6 privilege against self-incrimination?
 7 A. **Yes.**
 8 Q. And you understand also that it's to
 9 each of the charges you plead guilty to, you will
 10 give up your legal and factual defenses to that
 11 charge, and you will be saying the charge is true;
 12 and you are aware of that?
 13 A. **Yes.**
 14 Q. So no one's forced you or pressured
 15 into this plea, or coerced you?
 16 A. **No, ma'am.**
 17 Q. And you understand once you plead
 18 guilty, it is too late to plead not guilty?
 19 A. **Yes.**
 20 Q. These are felonies. If a person keeps
 21 putting felonies on their record, at some point
 22 they can be sentenced under a persistent violator
 23 or habitual offender law. It isn't something that
 24 happens now. It is some something that could
 25 happen down the road.

1 When it happens, it does bring very
2 serious consequences, because most states increase
3 the penalties when somebody has prior offenses,
4 and you realize that?

5 A. Yes.

6 Q. Do you have any questions you want to
7 ask your lawyer before we go any further?

8 A. No.

9 Q. You are satisfied with counsel's advice
10 in this case?

11 A. Yes.

12 Q. Any questions at all you want to ask
13 them or take up?

14 A. No, ma'am.

15 Q. And you do want to plead guilty?

16 A. Yes.

17 Q. And you are pleading guilty freely and
18 voluntarily?

19 A. Yes.

20 Q. Well, let's talk about first the murder
21 in the second degree. Why don't you just tell me
22 what happened.

23 A. **I shot through a window at people
24 having a party.**

25 Q. This happened on April 15, 2006?

1 A. Yes, ma'am.

2 Q. And it happened in Ada County?

3 A. Yes.

4 Q. And so what were you thinking when you
5 shot through the window?

6 A. **I was just trying -- I didn't
7 intentionally mean to hurt anybody. I was trying
8 to scare people.**

9 Q. You knew that there were a lot of
10 people on the other side of the window?

11 A. Yes.

12 Q. And you realized that if you shot
13 through the window, you might hit one of those
14 people?

15 A. Yes.

16 Q. So you weren't mad at a particular
17 person, but you were mad at the people there?

18 A. Yes.

19 Q. So did you willfully, unlawfully,
20 deliberately with malice aforethought, kill
21 April Buenrostro?

22 MR. ODESSEY: He didn't know her, Judge.
23 She just happened to be a person who happened
24 fortuitously -- very unfortuitous way to be
25 present at the time the shots were fired.

1 THE COURT: Right.

2 Q. BY THE COURT: And you knew the room
3 was crowded, and you shot multiple times into the
4 room?

5 A. Yes, ma'am.

6 Q. And you also in that shooting shot
7 John Anthony?

8 A. Yes, ma'am.

9 Q. And Brodaus Lynch? I'm not saying his
10 name right.

11 MR. BERECZ: That's correct.

12 THE DEFENDANT: Yes, ma'am.

13 Q. BY THE COURT: And you also shot
14 Carmen Becerra?

15 A. Yes, ma'am.

16 Q. And what was the situation of Michael
17 Barylski?

18 A. **I don't recall the situation exactly.
19 I was very intoxicated that night.**

20 MR. BERECZ: Your Honor, I can give the
21 factual basis as to Count 5.

22 THE COURT: Okay. We will talk about that
23 in a minute.

24 Q. BY THE COURT: Now, you understand in
25 Idaho that intoxication is not a defense, but it

1 can be considered as it relates to the ability to
2 form intent?

3 A. Yes, ma'am.

4 Q. You and your attorneys have discussed
5 that?

6 A. Yes.

7 Q. It is your desire to plead guilty to
8 the charges of second degree murder in Count 1?

9 A. Yes.

10 Q. And aggravated battery in Counts 2, 3,
11 and 4?

12 A. Yes.

13 Q. And aggravated assault in Count 5?

14 A. Yes, ma'am.

15 Q. So you did not know these people
16 personally; you were just shooting through the
17 windows?

18 A. Yes.

19 MR. ODESSEY: He knew some of them, Judge.
20 Mr. Bashale is a person he was acquainted with.
21 He was a person who was a primary person who
22 helped set the stage, if you will, not for
23 criminal conduct Mr. Elcock engaged therein, but
24 setting the stage for what happened thereafter.

25 THE COURT: I would like to hear the State's

1 factual basis at this time.

2 MR. BERECZ: Your Honor, this occurred
3 shortly after midnight on April 15, 2006, at the
4 Whispering Pine apartments complex.

5 Mr. Barylski and Mr. Anthony have an
6 apartment there, and they were having a party.
7 One of the people at the party was Beaufris
8 Bashale. There was some other people there.

9 At some point during the
10 evening-nighttime, a dispute arose between
11 Mr. Bashale, perhaps, and maybe some other members
12 of the apartment who were occupants of a nearby
13 apartment who were related to Mr. Elcock.

14 These female occupants called the bar
15 where Mr. Elcock was, saying, "Hey, there is
16 trouble going on," I'm paraphrasing, but
17 basically, "Get down here and help take care of it
18 and help us out."

19 Mr. Elcock and his friend jumped in
20 their car, went to the Whispering Pines,
21 approached the apartment. As Mr. Elcock
22 approached the apartment, he had a handgun that he
23 obtained from somebody in the crowd.

24 I will go to Count 5 first,
25 Mr. Barylski. As he approached the apartment,

1 there was arguing in the parking lot.
2 Mr. Barylski came to the window and the door,
3 looked out his apartment door and the window, and
4 Mr. Elcock raised the gun, cocked it, pulled the
5 trigger, and it misfired. It didn't go off.

6 Mr. Barylski then yelled, "He's got a
7 gun," ran into the apartment trying to get people
8 down, at which point Mr. Elcock then fired
9 multiple times through the plate glass window, and
10 bullet marks seemed to go down the window with a
11 9-millimeter handgun.

12 Ultimately, John Anthony was hit in the
13 leg, Carmen Becerra was hit in the leg, Beaufris
14 Bashale was hit in the leg, and April Buenrostro,
15 who was sitting on a couch there, I believe
16 watching TV with some people, was hit in the head
17 and in the abdomen, and in the side.

18 It was ultimately from being hit in the
19 side and abdomen and the chest. That was the
20 injuries from which she died.

21 Subsequently, Mr. Elcock, through
22 investigation, was ultimately identified and then
23 confessed his role and his shooting to Boise
24 detectives.

25 THE COURT: That was after he was

1 Mirandized?

2 MR. BERECZ: Yes.

3 THE COURT: That information was provided to
4 the defense, I take it.

5 MR. BERECZ: Correct, Your Honor.

6 THE COURT: Is there anything else you
7 wanted to say, Mr. Elcock?

8 THE DEFENDANT: No, ma'am.

9 THE COURT: So all of these charges are
10 true?

11 THE DEFENDANT: Yes.

12 THE COURT: Do you want me to accept your
13 pleas to them?

14 THE DEFENDANT: Yes, ma'am.

15 THE COURT: It is your desire to plead
16 guilty at this time?

17 THE DEFENDANT: Yes.

18 THE COURT: All right, what you and the
19 State have told me does constitute a factual basis
20 for pleas to the Amended Information in Counts 1,
21 2, 3, and 4, and Count 5.

22 It does appear to me that you do
23 understand the nature of the offense and the
24 consequences of pleading guilty, and it appears to
25 me that your plea is freely and voluntarily made,

1 so I will accept your plea.

2 I will have the clerk enter it, and I
3 will set a time for disposition. Obviously, we
4 are going to have to put together a presentence
5 report that involves quite a few people, so it
6 seems to me that we will probably have to set this
7 out just a little bit so we can get all that done.

8 I could set this for December 11th, if
9 that's available for counsel.

10 MR. BERECZ: It would be fine with the
11 State. I will defer to the defense.

12 MR. ODESSEY: December 11, Your Honor?

13 THE COURT: Um-hmm.

14 MR. ODESSEY: That's fine, Your Honor.

15 THE COURT: I will set it for December 11th
16 at 9:30. The bailiff will hand you your copy of
17 the presentence questionnaire. I do always get
18 the police reports in the case and other
19 information, so if you do want me to consider
20 anything that you have, feel free to provide the
21 information to the presentence investigator.

22 You also have an opportunity, if you
23 wish, to put on evidence at the time of the
24 sentencing hearing, but it's usually a good idea
25 not to neglect the presentence report.

1 Is there anything else we need to take
2 up?

3 MR. ODESSEY: No, Your Honor.

4 MR. BERECZ: No, Your Honor.

5 (The proceedings then concluded.)

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Elcock vs. State

Case No. CV PC 2011-19840

Attachment "A"

Exhibit "7"

EXHIBIT "7"

EXHIBIT "7"

GUILTY PLEA ADVISORY

Defendant's Name: _____

Date: _____

Case Number: _____

Nature of Charge(s):

Minimum & Maximum Possible Penalty:

**STATEMENT OF RIGHTS & EXPLANATION OF WAIVERS BY PLEA OF GUILTY
(PLEASE INITIAL EACH RESPONSE)**

1. You have the right to remain silent. You do not have to say anything about the crime(s) you are accused of committing. If you elected to have a trial, the state could not call you as a witness or ask you any questions. However, anything you do say can be used as evidence against you in court.

I understand that by pleading guilty I am waiving my right to remain silent before and during trial. _____.

2. The waiver of your right to remain silent only applies to your plea of guilty to the crime(s) in this case. Even after pleading guilty, you will still have the right to refuse to answer any question or to provide any information that might tend to show you committed some other crime(s). You can also refuse to answer or provide any information that might tend to increase the punishment for the crime(s) to which you are pleading guilty.

I understand that by pleading guilty to the crime(s) in this case, I still have the right to remain silent with respect to any other crime(s) and with respect to answering questions or providing information that may increase my sentence. _____.

3. You have the right to be represented by an attorney. If you want an attorney and cannot pay for one, you can ask the judge for an attorney who will be paid by the county.
4. You are presumed to be innocent. You would be found guilty if: 1) you plead guilty in front of the judge, or 2) you are found guilty at a jury trial.

I understand that by pleading guilty I am waiving my right to be presumed innocent. _____.

5. You have the right to a speedy and public jury trial. A jury trial is a court hearing to determine whether you are guilty or not guilty of the charge(s) brought against you. In a jury trial, you have the right to present evidence in your defense and to testify in your own defense. The state must convince each and every one of the jurors of your guilt beyond a reasonable doubt.

I understand that by pleading guilty I am waiving my right to a speedy and public jury trial. _____.

6. You have the right to confront the witnesses against you. This occurs during a jury trial where the state must prove its case by calling witnesses to testify under oath in front of you, the jury, and your attorney. Your attorney could then cross-examine (question) each witness. You could also call your own witnesses of your choosing to testify concerning your guilt or innocence. If you do not have the funds to bring those witnesses to court, the state will pay the cost of bringing your witnesses to court.

I understand that by pleading guilty I am waiving my right to confront the witnesses against me, an present witnesses and evidence in my defense.

_____.

QUESTIONS REGARDING PLEA

(Please answer every question. If you do not understand a question consult your attorney before answering.)

PLEASE CIRCLE ONE

1. Do you read and write the English language? **YES NO**
If not, have you been provided with an interpreter to help you fill out this form? **YES NO**

2. What is your age? _____.

3. What is your true and legal name?

_____.

4. What was the highest grade you completed? _____.

If you did not complete high school, have you received either a general education diploma or high school equivalency diploma?

YES NO

5. Are you currently under the care of a mental health professional? YES NO

6. Have you ever been diagnosed with a mental health disorder? YES NO

If so, what was the diagnosis and when was it made?

7. Are you currently prescribed any medication? YES NO

If so, have you taken your prescription medication during the past 24 hours? YES NO

8. In the last 24 hours, have you taken any medications or drugs, or drank any alcoholic beverages which you believe affect your ability to make a reasoned and informed decision in this case? YES NO

9. Is there any other reason that you would be unable to make a reasoned and informed decision in this case? YES NO

10. Is your guilty plea the result of a plea agreement? YES NO

If so, what are the terms of that plea agreement?
(If available, a written plea agreement should be attached hereto as "Addendum 'A'")

11. There are two types of plea agreements. Please initial the one paragraph below which describes the type of plea you are entering:

a. I understand that my plea agreement is a binding plea agreement. This means that if the district court does not impose the specific sentence as recommended by both parties, I will be allowed to withdraw my plea of guilty and proceed to a jury trial. _____

b. I understand that my plea agreement is a non-binding plea agreement. This means that the

court is not bound by the agreement or any sentencing recommendations, and may impose any sentence authorized by law, including the maximum sentence stated above. Because the court is not bound by the agreement, if the district court chooses not to follow the agreement, I will not have the right to withdraw my guilty plea. _____.

12. As a term of your plea agreement, are you pleading guilty to more than one crime? **YES NO**

If so, do you understand that your sentences for each crime could be ordered to be served either concurrently (at the same time) or consecutively (one after the other)? **YES NO**

13. Is this a conditional guilty plea in which you are reserving your right to appeal any pre-trial issues? **YES NO**

If so, what issue are you reserving the right to appeal?

14. Have you waived your right to appeal your judgment of conviction and sentence as part of your plea agreement? **YES NO**

15. Have any other promises been made to you which have influenced your decision to plead guilty? **YES NO**

If so, what are those promises?

16. Do you feel you have had sufficient time to discuss your case with your attorney? **YES NO**

17. Have you told your attorney everything you know about the crime? **YES NO**

18. Is there anything you have requested your attorney to do that has not been done? **YES NO**

If yes, please explain. _____

19. Your attorney can get various items from the prosecutor relating to your case. This may include police reports, witness statements, tape recordings, photographs, reports of scientific testing, etc. This is called discovery. Have you reviewed the evidence provided to your attorney during discovery? **YES NO**

20. Have you told your attorney about any witnesses who would show your innocence? **YES NO**

21. Do you understand that by pleading guilty you will waive any defenses, both factual and legal, that you believe you may have in this case? **YES NO**

22. Are there any motions or other requests for relief that you believe should still be filed in this case? **YES NO**

If so, what motions or requests? _____

23. Do you understand that if you enter an unconditional guilty plea in this case you will not be able to challenge any rulings that came before the guilty plea including:
1) any searches or seizures that occurred in your case,
2) any issues concerning the method or manner of your arrest, and 3) any issues about any statements you may have made to law enforcement? **YES NO**

24. Do you understand that when you plead guilty, you are admitting the truth of each and every allegation contained in the charge(s) to which you plead guilty? **YES NO**

25. Are you currently on probation or parole? **YES NO**

If so, do you understand that a plea of guilty in this case could be the basis of a violation of that probation or parole? **YES NO**

26. Are you aware that if you are not a citizen of the United States, the entry of a plea or making of factual admissions could have consequences of deportation or removal, inability to obtain legal status in the United States, or denial of an application for United States citizenship? **YES NO**
27. Do you know whether the crime to which you will plead guilty would require you to register as a sex offender? (I.C. § 18-8304) **YES NO**
28. Are you aware that if you plead guilty you may be required to pay restitution to the victims in this case? (I.C. §19-5304) **YES NO**
29. Have you agreed to pay restitution to any other party as a condition of your plea agreement? **YES NO**
 If so, to whom? _____

30. Is there a mandatory driver's license suspension as a result of a guilty plea in this case? **YES NO**
 If so, for how long must your license be suspended? _____
31. Are you pleading guilty to a crime for which a mandatory domestic violence, substance abuse, or psychosexual evaluation is required? (I.C. §§ 18-918(7)(a),-8005(9),-8317) **YES NO**
32. Are you pleading guilty to a crime for which you may be required to pay the costs of prosecution and investigation? (I.C. § 37-2732A(K)) **YES NO**
33. Are you pleading guilty to a crime for which you will be required to submit a DNA sample to the state? (I.C. § 19-5506) **YES NO**
34. Are you pleading guilty to a crime for which the court could impose a fine for a crime of violence of up to \$5,000, payable to the victim of the crime? (I.C. § 19-5307) **YES NO**
35. Do you understand that if you plead guilty to a felony, during the period of your sentence, you will lose your right to vote in Idaho? (Id. CONST. art. 6, § 3) **YES NO**

- | | | |
|---|-----|----|
| 36. Do you understand that if you plead guilty to a felony, during the period of your sentence, you will lose your right to hold public office in Idaho? (ID. CONST. art. 6, § 3) | YES | NO |
| 37. Do you understand that if you plead guilty to a felony, during the period of your sentence, you will lose your right to perform jury service in Idaho? (ID. CONST. art. 6, § 3) | YES | NO |
| 38. Do you understand that if you plead guilty to a felony you will lose your right to purchase, possess, or carry firearms? (I.C. § 18-310) | YES | NO |
| 39. Do you understand that no one, including your attorney, can force you to plead guilty in this case? | YES | NO |
| 40. Are you entering your plea freely and voluntarily? | YES | NO |
| 41. Are you pleading guilty because you did commit the acts alleged in the information or indictment? | YES | NO |
| 42. If you were provided with an interpreter to help you fill out this form, have you had any trouble understanding your interpreter? | YES | NO |
| 43. Have you had any trouble answering any of the questions in this form which you could not resolve by discussing the issue with your attorney? | YES | NO |

I have answered the questions on pages 1-7 of this Guilty Plea Advisory form truthfully, understand all of the questions and answers herein, have discussed each question and answer with my attorney, and have completed this form freely and voluntarily. Furthermore, no one has threatened me to do so.

Dated this _____ day of _____, 20__.

DEFENDANT

I hereby acknowledge that I have discussed, in detail, the foregoing questions and answers with my client.

DEFENDANT'S ATTORNEY

Elcock vs. State

Case No. CV PC 2011-19840

Attachment "A"

Exhibit "8"

EXHIBIT "8"

EXHIBIT "8"

BOISE, IDAHO

Thursday, January 11, 2007, 9:40 a.m.

THE COURT: All right, I will take up the case of State of Idaho versus Kenneth Elcock.

Is the State ready to proceed?

MR. BANDY: Yes, Your Honor.

THE COURT: Is the defense?

MR. ODESSEY: Yes, Your Honor.

THE COURT: All right. This case came before the district court for arraignment. When the defendant was arraigned, he was advised of the nature of the charges against him, and also of his rights.

He was advised that he could plead not guilty, that if he did so, he would be entitled to a speedy and public trial by jury, he could confront and cross-examine the witnesses against him, he could put on evidence if he wanted to, and he could exercise the privilege against self-incrimination.

He was told that he would give up those rights, along with his defenses, if he pled guilty.

He did subsequently enter a guilty plea

to the charges -- all charges in the Amended Information.

This was pursuant to a plea bargain agreement, in which it was agreed that he would plead guilty to all charges in the Amended Information, and then each side would be free to argue for whatever sentence they felt was appropriate.

It was a valid plea. There had previously been some questions about competence to proceed. Those questions were answered, that the defendant was competent to proceed and assist his attorneys.

The plea was valid. There was a factual basis for it. It appeared that the defendant did understand the nature of each offense and the consequences of pleading guilty, and, therefore, I did accept the pleas.

I have received and reviewed a number of presentence materials that were submitted in this case, and I will take up first changes or corrections to the presentence materials by the State.

Any changes or corrections?

MR. BANDY: No, Your Honor.

THE COURT: Changes or corrections by the defense?

MR. ODESSEY: Judge, no corrections. I just want to be sure that the addendums include the most recent ones supplied by defense counsel, a copy of which have been provided to the State, just in the last couple of days, Your Honor, from Vonell Elcock was a handwritten -- that's with one given to you this morning, I believe.

THE COURT: Right.

MR. ODESSEY: His sister. There is also the Reverend Ernest Dawkins, is one of them, and there's behind that one, we had one from Shawn Elcock, one of Kenneth's sisters, and additionally behind that was Shikera Elcock, another sister, and I just want to make sure those are part of the presentence materials that travel with the volume of material that's on file already.

THE COURT: They are, and they will.

MR. ODESSEY: Thank you, Your Honor.

THE COURT: All right, will there be testimony today?

MR. BEREZCZ: There will be a victim impact statement, Judge.

THE COURT: All right, please proceed.

MR. BEREZCZ: Your Honor, if I could introduce to the court Carmen Becerra. Can she give her statement sitting here at counsel table?

THE COURT: Sure, that's fine with me.

MR. BEREZCZ: Your Honor, Carmen Bicerra is one of the named victims and was also the best friend.

THE COURT: Right. Okay.

MS. BICERRA: The first statement I have is from April's cousin. It's not what I wrote, but she asked me to read it for her.

It says, "Dear honorable judge, I'm a 15-year-old girl who is still trying to get through the tough pain of losing someone so close. She was more than a best friend or a cousin. She was a sister to me.

"She had a beautiful spirit, a joy for life, and just a true blessing to be around. We spent so much time of our childhood together, and we were looking forward to the next phase of our lives.

"The day of the shooting, we had just gotten off the phone moments before we had our usual girl talk. Even though we were in different states, we spoke several times a day, and we wrote

1 each other often.

2 "April was a big part of my life. She
3 was like my other half. We were planning my
4 quinceanera, and she was so selfless that she
5 wanted to make sure I looked beautiful for that
6 special event.

7 "It was very painful to go through it
8 with the party without her there. April had big
9 plans. She wanted to go to beauty school. She
10 loved drawing and writing poetry, and she was
11 truly inspirational.

12 "I often remember the time we spent
13 together. She would also want to give everyone
14 her makeovers and beauty tips. She would always
15 drag me shopping and would give me -- and would
16 give anything -- and I would give anything to shop
17 with her one last time.

18 "But all this came to an end because of
19 a stranger with no reason to cut short a life that
20 so tragically affected everyone close to her. Her
21 life was just beginning.

22 "We had plans for our lives. This
23 brings back painful memories for me, because even
24 though I want to remember all of the wonderful
25 moments we shared, I am often faced with the

1 reality that April is no longer here. We can't go
2 shopping. She won't go to school with me. We
3 can't ever do any of the things that teenagers do.

4 "All I have is her letters, her poems,
5 her pictures, and the wonderful times and memories
6 we had together.

7 "This has been very confusing for me
8 and extremely painful. I don't understand how
9 anyone could be so careless and thoughtless. I'm
10 still going through the grieving process, and I
11 have been going to counseling since this has
12 happened.

13 "But I'm still left with the pain from
14 the memory of my cousin. I didn't know this guy,
15 and neither did April. He got to live through his
16 teenage years, but she didn't. She hasn't given
17 -- he hasn't even shown any remorse for her loss.
18 He has no idea how important and significant she
19 was to me and our family.

20 "In an effort to let go, my family has
21 taken down her pictures, her poems from my room,
22 but she will always be in my heart.

23 And as I get older, I will always
24 struggle with the idea that she will always be 14.
25 Even if he spent the rest of his life in jail,

1 April isn't coming back. But he should be
2 responsible for his actions and be left to think
3 about what he did for the rest of his life. Thank
4 you for taking the time and listening to this
5 letter. Jessica Buenrostro"

6 And this is my statement. On April
7 15th at 12 o'clock, I thought I was waking up from
8 the worst nightmare I had ever had, only to
9 realize it wasn't a nightmare. My best friend was
10 dying in front of me, and there is nothing I could
11 do.

12 I haven't been able to get over this.
13 I don't think I ever will. Her death has been so
14 tragic and so unfair. She was only 14. It all
15 could have been prevented. It was just careless.

16 April will never have her life back.
17 She will never have -- she will never do anything
18 again. She will never have kids. She will never
19 graduate. Her parents will never get to see her
20 do any of those things.

21 She was my best friend. We spent every
22 day together. I was always going to her house or
23 she was going to mine. We spent hours getting
24 ready together. I will never have that again, and
25 it hurts because I know that I will never, ever,

1 get to spend any time with her or anything. She's
2 gone forever, and I can't have her back.

3 I'm going to counseling. I go once a
4 week. It's hard. I'm still scared a lot of the
5 times. I can't watch movies sometimes because of
6 the shooting. It scares me.

7 "I feel like I have been robbed of my
8 life. Like I don't think the same way. I never
9 thought that day when I got out of school and I
10 was planning on hanging out with my best friend,
11 that I stopped somewhere and my life would be
12 changed forever.

13 I never thought that. It's unreal. I
14 can't even believe it now. I can't sleep. I have
15 nightmares. I miss her. Part of me is missing.
16 When she passed away, a part of me went with her.
17 She can't ever experience anything again.

18 This has been the worst thing that's
19 ever happened to me, and it probably -- nothing
20 will probably never happen to me again. I was
21 shot in my leg. I had my best friend lay on the
22 floor in front of me dying, and I couldn't do
23 anything about it. I was helpless.

24 "I always have the image in my head. I
25 always have her just laying there, you know. It's

1 hard.

2 It's hard for me to realize how lucky I
3 am, because I have my parents, my parents have me,
4 and she will never, Cathy, she will never see her
5 daughter again. It's hard. Thank you.

6 MR. BERECZ: Your Honor, we also have Cathy
7 Buenrostro, the victim's mother, who would like to
8 address the court.

9 THE COURT: Okay.

10 MR. BERECZ: Your Honor, prior to her
11 addressing the court, I have eight photographs,
12 family photographs that they brought in that we
13 would like to show the court. It's actually their
14 photographs. We have scanned them into our
15 computer, if we could get them back, and I could
16 supplement with copies.

17 THE COURT: Sure, that's fine. I think we
18 should give back the photos.

19 MR. BERECZ: I have shown them to defense.
20 I also have a hand-drawn photograph from her
21 brother.

22 THE COURT: Okay.

23 MS. BUENROSTRO: Your Honor, if you don't
24 mind if I could make my statement, I have a couple
25 statements, actually, but I would like to make one

1 to Mr. Elcock this morning.

2 Yesterday me and April's dad was here
3 going over the PSI. We were in here for three
4 hours. We didn't get through it all. But there
5 was one thing that stuck in my mind. Even last
6 night, he wrote in there when -- one of the
7 statements he said -- my understanding, you have a
8 child yourself.

9 He said since you have been locked up
10 you haven't seen him because you don't want him to
11 see you that way.

12 Well, Your Honor, let me tell you, you
13 are a very blessed person to have a child, being a
14 parent. I think any parents are blessed to have
15 their child, and whether you are locked up for ten
16 years, or 20 years, or life, you will be able to
17 know what's going on with your child.

18 You will be able, even if it's over the
19 phone or see pictures, to tell them, "Merry
20 Christmas," "Happy New Year's," "Happy birthday."

21 You deprived me of my daughter because
22 of your selfish actions. You deprived me of my
23 daughter's life. Her birthday, you know where I
24 spent that? I sat on the side of her grave,
25 crying. I was thinking, what did I do wrong? And

1 I didn't. I know I didn't do no wrong. I just
2 wanted you to know, I hope you realize how blessed
3 you are to have a child. Be thankful you have
4 that child, because that's something I will never
5 have. My child has been taken away from me.

6 And, Your Honor, I don't know if you
7 had time to read my statement that I submitted, I
8 would like to add to that. It's mentioned in
9 there, it's so hard, there is no words that can
10 bring my child back, no words.

11 My family and my friends asked me, my
12 close friend asked me sometimes, you know -- I'm
13 sorry, but you know, what can you say to somebody
14 that's -- it's not going to bring my daughter
15 back.

16 Me, I am speaking for myself being a
17 mother. I don't know if you are a mother, but you
18 carry that child inside you for nine months, you
19 feel the movement of the baby, and then your
20 baby's born, you know.

21 You see this miracle come out, and
22 April's middle name was Faith because there was
23 some complications, and she almost didn't live,
24 but she lived through faith.

25 You watch your child grow, and you

1 watch them crawl, walk, teach them how to talk.
2 You are there when they fall down. And then there
3 comes a point where they go to school and they
4 want to venture out, and sometimes you want to put
5 them in a little glass container, but you can't.

6 You have to trust and let them grow to
7 learn to grow to become an adult in the society.
8 Those are the chances you take. And Mr. Elcock
9 deprived me of that.

10 I asked myself many times, and I know
11 it's not something -- why I let her go spend the
12 night over at her friend's that night, why, you
13 know, maybe I could have said no. We don't know
14 what's going to happen in the world as a parent.
15 We can't always say, "No, you can't do that."

16 But, you know, April is my baby. She
17 was my baby girl. She had a bigger heart every
18 day that I wake up. You are sitting at the dinner
19 table or in the morning, you take them to school,
20 and you go, she is not there. You look at the
21 dinner table. There is that empty chair.

22 You know, every day, despite that, it's
23 more and more real. I'm not going to be able to
24 say "Merry Christmas," "Happy birthday." She
25 loved to write poetry. She loved to draw. The

1 weekend this happened her sisters came, and I told
2 her sisters, "You need to pack all her stuff up,
3 because I don't have the strength."

4 We are reading some of her poems, and
5 there is this one. I just wanted to share it with
6 you, Your Honor, and those here in the court
7 today, that this is so what kind of relationship
8 my daughter had with me and her parents.

9 I would like to read. "This is
10 dedicated to my daddy and mommy. You are my one
11 and only parents, and you will be to the end. We
12 aren't only soul mates. We are the best of
13 friends. So when you are feeling sad, lonely, or
14 confused, just call on me, and I will be there to
15 help you pull -- to help pull you out of there.

16 "You have always been true to me, and
17 that's why I love you. I wrote this to thank for
18 loving me back, so thank you for being you. We
19 will always be friends until the very end. Wiping
20 all your tears away, being your best friend, I
21 will smile when you smile, I will feel the pain
22 you do. If you cry a single tear, I promise, I
23 will cry, too.

24 "One more thing, I'd like to thank you
25 both for always being there in my trials and

1 tribulations. No matter how far apart, I know we
2 will always be together in spirit and love. Love
3 always, your angel, April."

4 Your Honor, that's all I have left of
5 my baby, is words. That's from poems, memories,
6 but that's all. It's something I will never
7 accept. I will have to learn my whole life to
8 cope with her loss, the hope that she's gone. I
9 won't ever see her.

10 You know, my friends ask me sometimes,
11 "Cathy, how can you do this? How can you handle
12 this?"

13 The pain is -- like today, to describe
14 the pain, it's like when you have a candle, and
15 the flame is on top and it's burning, and if you
16 rub your pain across it and you feel the burning
17 sensation, that's the burning inside.

18 Her loss burns inside of me, and not
19 just every other day, but on a daily basis. The
20 only thing I can ask is that I have hope, and I
21 prayed that it's deeply considered that Mr. Elcock
22 is not given an opportunity ever again to be able
23 to do what he did to my family on April 14th,
24 because it's so devastating.

25 I would not wish any family to ever go

1 through what my family has, and they have to go
2 through the rest of their life. And I just hope
3 it's really deeply considered, that he is never
4 given an opportunity to do to somebody else's
5 child or someone else. Thank you.

6 MR. BERCZ: Your Honor, I believe that's
7 all the victim impact statements.

8 THE COURT: Testimony by the defense?

9 MR. ODESSEY: None, Your Honor.

10 THE COURT: All right, I will hear the
11 State's recommendation.

12 MR. BANDY: Thank you, Your Honor.

13 Your Honor, I want to start this by
14 telling a little story that Ernesto, April's dad,
15 shared with us yesterday. You notice that he is
16 in a wheel chair. This is not the first time they
17 have been the victim of gun violence.

18 That happened to Ernesto when he was
19 visiting his family in Mexico. It was an
20 unprovoked attack. His brother ended up dying in
21 the attack, and he was shot two times, causing him
22 to be paralyzed for the last 15 years.

23 So you take that family that has
24 suffered so greatly, trying to raise a family with
25 one of the family, one of the parents being in his

1 situation, being incapacitated to a certain
2 extent, trying to raise a family, and look from
3 the photos, you can see that they have done a
4 remarkable job.

5 Now, Judge, I wanted to tell you that
6 just to give some context, but I think that more
7 importantly, I'm going to be asking you today to
8 impose a fixed life sentence on Mr. Elcock.

9 Now, I understand this is a Murder II,
10 second degree murder, along with aggravated
11 batteries and aggravated assault, but if there is
12 one case that could and would send a message both
13 to Mr. Elcock and to the community, this is the
14 case.

15 Not only is this a senseless and
16 heinous crime that resulted in the death of April
17 Buenrostro at an age of 14 years old, but this
18 should be viewed as a glimpse of our community and
19 how it's changing.

20 The Buenrostro family is so giving and
21 so caring, and Carmen Becerra as well, they all
22 want to give Mr. Elcock some credit, and to say
23 his careless and thoughtlessness is what led to
24 this crime.

25 This is not an act of carelessness or

17

1 thoughtlessness. This is an intentional act by
2 Mr. Elcock to seriously harm or kill someone, and
3 I will tell you, Judge, that is evidenced not so
4 much by April's death but by the aggravated
5 assault on Mike Barylski.

6 Mr. Mike Barylski, Mr. Elcock

7 approached him standing there and pulled the
8 trigger. But for the divine intervention,
9 whatever the cause, maybe mechanical malfunction,
10 failure to cock it, Mr. Elcock's knowledge, lack
11 of knowledge about the operation of the gun, Mike
12 Barylski should not be with us today.

13 At that point --

14 THE COURT: May I ask you a question? I
15 don't want to throw you off your stride.

16 MR. BANDY: Yes, ma'am.

17 THE COURT: There were two people who played
18 a significant role in this case, Langston Cobb,
19 who gave the defendant the gun that he used when
20 he arrived at the apartment complex, and Raymond
21 **OWSLEY**, who yelled out when the defendant did not
22 successfully kill Mr. Barylski, cocked it.

23 Have those two people been prosecuted
24 as accessories in this offense?

25 MR. BANDY: They have not yet. We wanted to

18

1 get through with this process first, and Mr.
2 **OWSLEY'S** got other serious problems right now, but
3 we are looking into those.

4 THE COURT: I think the fact that after he
5 saw someone stick a gun in somebody else's face
6 and fire it and then yelled instructions on how to
7 shoot better, I would strongly urge the Ada County
8 Prosecuting Attorney's office to pursue charges
9 against both Mr. **OWSLEY** and Langston Cobb, because
10 Langston Cobb had the gun that was used in this
11 case, and he handed it to the defendant, and if he
12 had not done so, April Buenrostro would be alive
13 today. So there are people who made some bad
14 choices besides just this defendant.

15 MR. BANDY: I appreciate that, Judge, and we
16 are looking into that. I can tell you there was
17 some conflicting information whether or not
18 Langston handed the gun or Mr. Elcock took it from
19 him, but despite those facts -- and we do intend
20 to pursue them in some way.

21 That point where he takes that gun,
22 tries to shoot Mike Barylski in the face, at any
23 point from then on he could have stopped his
24 actions. They characterize it or they want to
25 believe that as a careless and thoughtless act.

19

1 Mr. Elcock would like the court to believe this is
2 out of concern for his children.

3 He never went to the apartment where
4 his children were. He went straight to the
5 apartment of someone unknown to him. Mike
6 Barylski was trying to calm the situation down.
7 What does he get? He gets a shot to his head
8 that, luckily for him, misfired.

9 We take from that fact a clearly
10 intentional act to end someone's life, and then we
11 go to just a series of cowardly acts.

12 Mr. Elcock essentially was trying to
13 shoot people in the back as they ran from him.
14 This is like the most inhumane, inconsiderate,
15 heartless display of a malignant and, you know,
16 deadly heart I have ever seen.

17 You can tell from the photos in the PSI
18 that this was a deliberate attempt to get as many
19 people, and he even said it in his own statement.
20 Now he says he was trying to scare as many people
21 as he could.

22 But what other possible intent could
23 you have after you try to shoot someone in the
24 face by emptying ten rounds into an apartment
25 crowded with people?

20

1 You know, Judge, not only does the
2 seriousness of the crime beg a life sentence, and
3 the clearly indicated motive and intent that
4 Mr. Elcock had to seriously harm or kill someone,
5 but his prior record suggests that he is not
6 amenable to rehabilitation.

7 He's had -- ever since he was a
8 juvenile, beginning back in the mid-1990s, he has
9 been in and out of institutions. He has since
10 spent time in juvenile detention facilities, where
11 you would assume that with the restorative model
12 of juvenile justice, that he is getting
13 programming and help to help this behavior stop,
14 when it's still a time where he is influenceable.
15 He is still forming his ability to act as an
16 adult.

17 Well, he didn't get the message. He
18 got more opportunity. He spent more time in
19 custody. It's been, you know, one long stream of
20 crime interrupted by brief stays at his parents, a
21 brief stay here in Idaho.

22 He has shown that he has not been able
23 to maintain a job. His longest job was in
24 magazine sales for approximately five months.

25 He is 28 years old. He has no GED, has

1 no occupation. He has no ability to get out and
 2 become a productive citizen.

3 He has also shown a lack of
 4 rehabilitation in his conduct with police and law
 5 enforcement in the past. Real telling in the
 6 police report was the fight in Manitou Park, where
 7 he is actively resisting officer's commands, right
 8 in the face of authority, where they are actively
 9 yelling at him.

10 He is scoffing at them. He is ignoring
 11 them. He is continuing this fight over whatever
 12 the issue was. He knows what the issue was then.
 13 He knows what the issue is now. Mr. Elcock would
 14 like the court to believe it was over his
 15 children. I don't believe that for a second.

16 Judge, there are other reasons why
 17 Mr. Elcock deserves a life sentence without the
 18 opportunity to have parole, and I want to address
 19 his emerging mental difficulties.

20 Now, ordinarily I could see where that
 21 would be considered a mitigating circumstance, but
 22 that did not have anything to do with his intent
 23 to kill in this case.

24 In fact, I would ask the court to treat
 25 that as an aggravating circumstance, in that what

1 we are going to ask Mr. Elcock to do is
 2 rehabilitate himself, to accept treatment and
 3 help, and to maintain his medications.

4 Well, through his past behavior he has
 5 never shown any ability to follow through with
 6 anything. He clearly now is indicating that he is
 7 still hearing voices with the -- despite the
 8 medications.

9 Despite Dr. Beaver's statement that
 10 there weren't any problems in the jail, he was in
 11 a solitary cell the whole time. The only reason
 12 that Mr. Elcock was able to maintain his behavior
 13 was because of that fact.

14 There was no hope, based on the
 15 indications by Dr. Beaver, his past criminal
 16 history and his past behavior, that he can be out
 17 in the community and maintain his own medications
 18 and make the right decisions, to not allow this to
 19 happen again. The correctional setting is the
 20 best place for him.

21 In reviewing the considerations in
 22 sentencing, Judge, although this appears to me
 23 Mr. Elcock's crime of this serious violence, it
 24 has been a recurring pattern in his life, whether
 25 it be fighting, whether it be dealing drugs as a

1 juvenile. The undue risk to the community is
 2 incredibly high.

3 If he is willing to go to this measure,
 4 he has reached the top. He is at the pinnacle,
 5 and he has gone from just threatening to kill
 6 somebody to -- he has tried to kill somebody.

7 Correctional treatment, again, the best
 8 alternative for him, he needs to be in a confined
 9 setting, forced to take his medications to prevent
 10 him from being a risk to others, and even himself.
 11 Any lesser sentence would depreciate the
 12 seriousness of this crime.

13 Not only did he take a blossoming
 14 14-year-old girl's life, but he tried to take
 15 other lives. But for sheer luck, Carmen Becerra
 16 could have been that person, Mike Barylski could
 17 have been that person, or Beaufis Bashale.

18 Which one of those, if any, was he
 19 trying to get? Only Mr. Elcock will know that.
 20 But the wanton disregard for human life, firing
 21 over and over and over into a crowded apartment
 22 shows a lot about Mr. Elcock's ability to be
 23 rehabilitated.

24 It is the appropriate punishment for
 25 him. It will deter him and prevent him from

1 having the opportunity, as Mrs. Buenrostro says,
 2 to do this to another family: To have him put
 3 someone else and some other family in this
 4 situation where they have got grief for the rest
 5 of their lives.

6 He has shown no ability to be reformed,
 7 no ability to accept the help and treatment that's
 8 been given him, and we have no assurance that if
 9 he were allowed to get out in the community, he
 10 would not immediately resume this kind of conduct
 11 which is the pinnacle of violence.

12 I think general deterrence in this
 13 case, Judge, is very important. I think we do
 14 need to send a message to the community that you
 15 cannot solve your problems or your assumed
 16 disagreements or your concern over your children
 17 with a gun. You certainly don't shoot ten rounds
 18 into a crowded apartment.

19 People need to know that Boise is not
 20 going to tolerate solving your problems with a
 21 gun, and we have seen an increase in the past
 22 several years with the use of guns, and it's only
 23 getting worse. At some point we have got to take
 24 a stand. The court should do it today.

25 He is a multiple offender. This is his

1 third felony conviction. You know, it's not just
2 one, it's several victims -- terrible, terrible
3 conduct.

4 Now, if you look at the mitigation
5 side, was it harmful or pre-meditated conduct?
6 Yes, it was. Now, if he initially thought he was
7 going to go there to scare people, that all
8 changed when he pulled the trigger, pointing at
9 Mike Barylski's place.

10 That also changed when he started
11 shooting people as they were trying to run from
12 him. Each successive shot shows clear and
13 distinct evidence of premeditation by Mr. Elcock
14 trying to hurt somebody.

15 Mike Barylski's victim impact statement
16 was right on point. Mr. Elcock wants the court to
17 believe this is out of concern for his kids, but
18 Barylski says, you know, again by a miracle his
19 kids weren't home that night sitting in front of
20 that big screen large projection TV where the
21 bullet holes rained down on April Buenrostro and
22 the victims of this crime.

23 This is clearly evidence of harmful and
24 premeditated acts. He knew the potential harm.
25 He knew at the time, and he pulled -- when he

1 pulled the trigger the first time that it was
2 likely to be harmful. In fact, when it misfired,
3 he knew he had to do something to make it harmful,
4 to carry out what he intended to do.

5 There was no strong provocation in this
6 case. And he indicates that he gets a call about
7 his children who live in another apartment, and
8 does he go there to check on the safety of the
9 children? No.

10 He goes immediately to an apartment
11 with the intent to fight, the intent to confront,
12 and whether Langston Cobb played a pivotal role in
13 giving him the gun or he took the gun, there was
14 still time for Mr. Elcock to stop his behavior and
15 not take someone's life.

16 There is no excuse for this conduct.
17 Just knowing that a 14-year-old girl died is bad
18 enough, but the manner in which she died, there is
19 no excuse. There is no provocation, motivation,
20 or justification. There is nothing in this case
21 that would support that point of view.

22 The victims, April, and Mike Barylski.
23 April, of course, didn't know Elcock. She had
24 been there all of ten minutes, and it's very hard
25 to hear Kathy Buenrostro say she blames herself,

1 had she not allowed her to spend the night.
2 That's something she's going to have to live with
3 forever, and she shouldn't have to do that. This
4 is not their fault.

5 The only person who shares
6 responsibility in this case is Kenneth Elcock and
7 those around him.

8 Mike Barylski didn't know who Kenneth
9 Elcock was. He was trying to diffuse the
10 situation, telling him, pleading with him, "We
11 don't want my problems here," and what does he get
12 for it? He gets a gun in his face and someone
13 pulling the trigger. You can tell from his victim
14 impact statement he's been deeply affected by
15 this.

16 There is no way to ever compensate
17 April's family for this loss, nor the other
18 victims for their change in life circumstances.

19 Carmen, 16 years old, being forced to
20 reevaluate her life and live with this day after
21 day and losing a best friend. There is no
22 compensation that can equal that.

23 The only thing we can do is protect the
24 community, protect other potential victims from
25 Mr. Elcock, and never allow him to do this again.

1 He has a long history of criminal
2 behavior, and this is the only way we can be
3 assured that it won't happen again. I would ask
4 that you give Mr. Elcock a fixed life sentence.

5 We have restitution figures,
6 Your Honor. I think Mr. Berez has those. If you
7 would like to hear those now, we could offer them
8 to you and explain what they entail.

9 We would also like you to consider any
10 fine that you considered imposing, make it under
11 the 19 code section, where it be paid to the
12 victim, a victim of violent crime.

13 Beyond this, Judge, I'd leave the
14 underlying sentences for the additional charges in
15 your discretion, but I would ask that you consider
16 that.

17 MR. BEREZ: Your Honor, in talking with the
18 family, they recognize, given the sentence we are
19 asking for it, that it's a long shot that they
20 will ever see a penny, but nonetheless, if I could
21 give you the restitution figure and the breakdown,
22 the total figure is \$26,460.99.

23 Now, a large majority of that, again, I
24 have also spoken with Cathy Buenrostro,
25 recognizing that the court might not order all of

this, but she, due to the grief and the suffering, wasn't able to work for sometime, and then they ended up actually moving out of the area, and she took a lesser-paying job. So that request entails \$15,000 -- \$15,283 in lost wages.

Then the remaining amounts are to Saint Alphonsus, Ada County paramedics, and Victim's Comp. That makes up the difference between the 26 -- that's roughly \$11,000 more, and that includes various medical procedures, and also does for Victim's Comp include funeral expenses.

THE COURT: Okay.

Counsel for the defense?

MR. ODESSEY: Thank you, Judge.

Your Honor, first I want to address the restitution question, and I apologize for my voice, Your Honor, I'm still struggling with a cold, but I will do my best. If you need me to repeat anything, I will be more than happy to do so.

Judge, I'm not here to be insensitive or indifferent to the loss the Buenrostros suffered. That's not my point. But as the court appointed me as counsel for Mr. Elcock, I think it's important to consider the restitution

question at the outset, what the restitution statute considers.

Clearly under 19-5304, Your Honor, the State under Provision E, Sub I, directly **INVATRICKED** a person or entity who suffers economic loss or injury as the result of the defendant's criminal conduct and shall also include the immediate family of a minor and the immediate family of the actual victim in homicide cases.

She qualifies under that criteria, Your Honor, but it's somewhat inconsistent for the State to be seeking a fixed life term with the expectation, practical expectation, of zero cents of ever being paid and yet asking Your Honor to issue an order.

19-5304, Sub 2, Your Honor, says that unless the court determines that an order of restitution would be inappropriate or undesirable, or be found guilty of any crime, and then it goes on to address the economic loss.

It's our position, Your Honor, on behalf of Mr. Elcock that I appreciate that the grieving process is immense and awful, but I just don't feel that \$15,000 is appropriate. I don't

1 think that's a desirable order for the court to 2 enter.

3 The medical costs, they have already 4 written those off on '06, those hospital expenses 5 and paramedic expenses. They never expect, 6 frankly, any return on the costs of their services 7 and, clearly, Mr. Elcock is not in a position or 8 is going to be in a position, given the number of 9 years he will serve in the penitentiary, whatever 10 Your Honor finally determines in this case.

11 They have already written those off as 12 losses, and the truth of it, Judge, as you know, 13 these emergency care-types of expenses are 14 basically paid by other premium payers and 15 taxpayers, that those are the folks that pick up 16 those costs in some way.

17 So it's our position, Your Honor, under 18 19-5304, Sub 2, that in order -- an order of 19 restitution would be undesirable in this matter, 20 and we urge you not to enter more.

21 Your Honor, this is a case that as in 22 all death cases, it's a tragedy. It's awful. And 23 the ultimate responsibility with that is with 24 Kenneth Elcock, there is no question about that, 25 and my remarks are made with that in mind.

1 Kenneth Elcock is the person who pulled 2 the trigger. Kenneth Elcock is the person 3 responsible for the injuries suffered by the 4 people who were shot, and Mr. Barylski who was 5 scared. Anything I say does not delete that 6 bare-bones essential fact.

7 Having said that, Your Honor, I think 8 the more complete picture, because under 19-2521, 9 the court shall consider the nature of the 10 circumstances of the crime, and the history, 11 character, and condition of the defendant.

12 And those are the things that I'm 13 urging Your Honor to carefully consider in 14 fashioning your sentence today, Your Honor.

15 The classic four considerations of 16 sentencing are protecting society, and I strongly 17 disagree with counsel's suggestion that a fixed 18 life term is necessary in this case. It is not.

19 What you have before you, Your Honor, 20 is a 26-year-old man, Your Honor who, as 21 Dr. Beaver's thorough evaluation details, 22 Your Honor, can be in a community with certain 23 conditions, and these conditions, of course, would 24 apply down the line.

25 These conditions would, of course,

1 include zero alcohol and a proper medication
2 regimen being pursued and adhered to.

3 Now, those things are problematic. I'm
4 not here today, Judge, asking you to place
5 Mr. Elcock on probation. Obviously, he is going
6 to prison. He is going to prison for a
7 significant number of years. And if Your Honor
8 allows him to meet a consideration for release on
9 parole at some later date, he will be under
10 supervision for a long number of years.

11 So those bare-bones requirements to
12 protect society are there. When you look at his
13 criminal history, Judge -- and I take issue with
14 counsel's characterization that he has really
15 demonstrated violence. Your presentence
16 investigator realizes that he doesn't.

17 In fact, what the presentence
18 investigation shows, that a fighting charge was
19 never filed against him when he was with yet
20 another member of the Lynch family, and the
21 battery charge that counsel referred to was an
22 event where Mr. Elcock interceded himself with a
23 Donna -- just a moment, Judge -- a Donna Smith who
24 was getting punched in the face by her brother
25 Keith, and that brother Keith is the one that

1 Mr. Elcock engaged in a battery with.

2 When the police responded to the
3 situation in Manitou Park, it's correct that
4 Mr. Elcock did not immediately release. And the
5 batteries between Keith Smith and Kenneth Elcock
6 continued, and that was wrong.

7 But this was not a battery initiated by
8 Kenneth Elcock. This was an engagement by Kenneth
9 Elcock interceding on behalf of a Donna Smith who
10 was getting punched in the face by Keith, and
11 Kenneth thought that to be wrong.

12 That's the violence he has. What you
13 have from his record from juvenile court, adult
14 court, is a person who, generally speaking, has
15 not been an institutional problem, or to others.

16 Now, I'm not here to tell you he hasn't
17 been a headache to the Ada County Jail, but it's
18 not to the guards or staff. It's because he's in
19 a jail setting, and he, Mr. Elcock, suffers from a
20 mental health condition that oftentimes isn't
21 diagnosed until the age he is, in his middle 20s.

22 And the court's well familiar with
23 Dr. Estess, whose notes -- this is a very good
24 PSI, Judge, and very important, and I'm happy for
25 that, and the point of Dr. Beaver's report being

1 included, Your Honor, was not as a mitigator
2 per se, but just to inform the board of
3 corrections as to Mr. Elcock's circumstances so as
4 it may hopefully help him during his conditions of
5 confinement. That's the reason.

6 But Mr. Elcock is injurious to himself,
7 not others. He was suicidal to himself, not
8 threatening others, and there were suicide
9 attempts in that jail, Your Honor, as you may
10 recall from these materials.

11 I met Mr. Elcock very shortly after his
12 arrest in April, and after my first visit with
13 him, he immediately plummeted in his affect. He
14 was so depressed to the point of being all but
15 catatonic. He was that profoundly affected. And
16 I believe that's because he's recognizing the
17 seriousness of his wrongful conduct and the harm
18 he caused.

19 He was in a very, very bad way, and he
20 stayed that way for a very long time until the
21 very serious psychotropic medications that are
22 documented in these materials took effect, and
23 there were very serious medications tried before
24 they got to the current mix that is being
25 administered.

1 But we are talking about the major
2 drugs, Judge, and Dr. Estess doesn't do that
3 willy-nilly. Dr. Estess had to be persuaded.

4 This is a case, Judge, that cries out
5 for punishment because of what Mr. Elcock did.
6 What he is individually responsible for demands
7 it.

8 When I ask Your Honor to impose a
9 sentence in this case, I'm asking Your Honor to
10 consider that prong of the sentencing
11 considerations, most importantly in this case,
12 because I will be asking Your Honor to impose a
13 fixed term of 15 years.

14 This is a very long sentence for
15 Mr. Elcock, Judge, in that the prior
16 incarcerations were seven and eight months,
17 Your Honor. They were one year imposed, but they
18 were early good time.

19 Again, Judge, good institutional
20 behavior, and good-time credit given. He served
21 one time seven months, and one time eight months.

22 In 15 years Mr. Elcock is going to be
23 in his 40s, Your Honor and, of course, he may not
24 get out. There is no question about that. That's
25 ultimately up to the Parole Commission. It's

1 going to depend on how he performs in the
2 institution, and it's going to depend on what kind
3 of parole release plan he makes, and that's why we
4 thought it was so important to have those family
5 letters attached, Your Honor, because that is his
6 connection in this world.

7 We know statistically, Your Honor, that
8 males in their 40s, basically it's a dropoff in
9 testosterone, get a lot less aggressive. And this
10 very aggressive act that Mr. Elcock is responsible
11 for, Judge, is an aberration, very serious. I'm
12 not here to say it isn't, Your Honor, but it is
13 not in his general character.

14 And for the wrong he committed back in
15 the middle part of April last year, he must be
16 punished and punished severely.

17 But Mr. Elcock would be deterred in the
18 future, Your Honor, because he knows. He is a
19 human being with compassion. He is a person who
20 empathizes, who as the victim's family noted in
21 the presentence investigator's comments, that he
22 appreciates to some extent -- he doesn't really
23 appreciate it because he hasn't suffered the loss
24 of his child, but he has a child. So he can
25 imagine what kind of pain that would be.

1 Judge, this is a case that factually is
2 -- it's such an -- it's such a strange combination
3 of factors that bring us here today.

4 Mr. Elcock was running around the
5 country in a van, unloading in various locations,
6 and he's selling magazine subscriptions. Of all
7 people that Mr. Elcock connects with in Boise,
8 Idaho, is Brandi Lynch.

9 Brandi Lynch is a sister, as the
10 presentence investigator accurately points out, of
11 the Lynch family which are replete with their own
12 issues in the 4th Judicial District in this
13 criminal courthouse.

14 He has a child with that person. He is
15 here for a period of time back in '01, and things
16 don't go well, not surprisingly.

17 He leaves, returns to his family,
18 Mr. Elcock's family lives in the eastern part of
19 the country. He comes back about a month before
20 this event, Judge, and the only reason he comes
21 back is not Brandi Lynch, but Ken Junior.

22 He has a job. He's working. He is
23 working hard, working full-time, trying to help
24 provide for his son, because Kenneth Elcock, as
25 you may have gathered from the family letters,

1 contributes. Really is a family-oriented person.
2 That's his background. He comes from a hard
3 scrabble circumstance, but there is a lot of love
4 from the family he grew up with. He is the only
5 boy, a bunch of sisters, but they all love each
6 other.

7 By all accounts -- I have spent some is
8 time with his mother, as has Dr. Beaver,
9 researching the history, that this is a person who
10 was really a pretty sweet child, a pretty sweet
11 child with a gentle disposition, and the only
12 reason that Kenneth Elcock came out West in March
13 of '06 was to be near to and to provide for Ken
14 Junior.

15 And this event, Judge, happened on a
16 Friday night after work. They got paid, and they
17 he did a very stupid thing and got drunk. That's
18 the choice. A bad choice. They got drunk.

19 Then they get a call from the person
20 who's the babysitter that gets to Brodaus and
21 Terrence Lynch, who are with Mr. Elcock, and they
22 are going to respond to this Whispering Pines
23 apartment complex without the intent to do
24 anything but protect that child. This is no other
25 intent there, Judge.

1 Now, I think they should have called
2 the police. I think there are other ways to
3 address that presenting issue, Your Honor, no
4 question about that.

5 But our collective experience in this
6 courthouse is that oftentimes when people consume
7 any significant quantities of alcohol, one of the
8 first things to go is their judgment.

9 So he and his brother-in-laws go over
10 to this place with Shelley Cunningham and Julius
11 **SURRAY**, the father of these Lynch boys, and they
12 go over there not to do anything great, Judge.
13 They are there to confront somebody and maybe get
14 into a fist fight.

15 The circumstances now in the early part
16 of the 21st century are such that everybody seems
17 to have a cell phone. Everybody is talking to
18 somebody else, who is talking to somebody else,
19 and independently rolls up, Langston Cobb and
20 Ray OWSLEY, also known as Ray Ray.

21 Ray Ray -- let's take a pause here,
22 Judge, because Kenneth Elcock really didn't know
23 those people. He had been in their company once
24 or twice before. They were not his friends.
25 Kenneth Elcock did not cause them to be there.

intent

1 Let's be clear about that.
 2 The Lynches Mr. Elcock spent time with,
 3 and a good influence, they were not. Those are
 4 the people he knew because he had fathered a child
 5 with their sister Brandi, but he, Kenneth Elcock,
 6 did not know and was not friends with Langston
 7 Cobb or Ray Ray, Ray OWSLEY.

8 Brodaus, I think it was Brodaus, maybe
 9 it was Terrence, I don't know, it's a little hazy
 10 to me, Judge, but somebody called them. They
 11 responded independently. They roll up there, and
 12 counsel still says, I'm not sure if he,
 13 Mr. Elcock, took the gun or was given the gun, and
 14 I'm here to tell the court that that was an
 15 ongoing discussion from the beginning of the case,
 16 because it is significant, as Your Honor observes.

17 And I'm going to take a minute, if I
 18 can, Judge, I'm going to play about three minutes
 19 of a tape here, not very long. I have spent, I
 20 don't know, how many hours. You get the benefit
 21 of my having culled through it.

22 But it's the Langston Cobb interview,
 23 and this was done April 27, as you gathered, maybe
 24 from the police reports. Langston Cobb left the
 25 area immediately after because, well, obviously,

1 something very, very bad happened, and he had some
 2 complicity in it, he and Ray OWSLEY both.

3 But Langston Cobb eventually was
 4 interviewed by Ada County detectives here in Ada
 5 County on 27 April.

6 I'm going to play this tape for a
 7 couple of reasons, Your Honor. The couple of
 8 reasons are, one, this is going to tell you he
 9 gave them the gun unequivocally, and the detective
 10 with whom Langston Cobb is interviewed with is a
 11 detective who has -- and I'm not sure if this is
 12 going -- I don't want to play it forever, but the
 13 three minutes before this, he says, "We have our
 14 history together," the detective and Mr. Cobb,
 15 because he knows Langston Cobb from other law
 16 enforcement contacts.

17 That's why that particular detective,
 18 as opposed to the other main detectives in this
 19 case, was selected to visit with Mr. Cobb, because
 20 he had a pre-existing rapport with Mr. Cobb and
 21 was able to speak candidly with him.

22 He details through that interview what
 23 he said. The other thing I want, Your Honor --
 24 and there is a hum, unfortunately, that goes along
 25 with this interview. I ask you to try to screen

1 out the audio component, Your Honor -- you also
 2 get a sense of the street language that your
 3 presentence investigator talks about, and it's
 4 true.

5 When I reviewed Mr. Elcock's DVD
 6 interview, there is a difference in the respectful
 7 differential loving tone he had with his mother
 8 and some of the other talks he had. That's kinds
 9 of the posing of these people, Judge, at that age.

10 I don't approve of it, it is what it
 11 is, and Mr. Cobb in this interview, Judge, I think
 12 is going to give you a bit of flavor of that.

13 He, Mr. Langston Cobb, is going to tell
 14 you that he handed the gun to Face, Mr. Elcock's
 15 street name, if you will -- a lot of people only
 16 knew him as that -- and Mr. Langston Cobb will
 17 tell you, I "was trying to be a bad ass," and was
 18 telling the defendant, Ray Owsley, "You have to
 19 cock the hammer back," two times, "You got to cock
 20 the hammer back."

21 And then, eventually, the part that you
 22 won't hear, Judge, it's about half an hour later
 23 in the interview, Langston took the gun from Ray's
 24 car. Ray was always known to pack, always to
 25 bring a gun with him, his posing, Your Honor.

1 Tough guy.

2 And then there is later attempt to sell
 3 the gun, which didn't happen, and I think the gun
 4 was actually recovered, but there was attempted
 5 sales to get rid of it, but the important thing
 6 here, Your Honor, is we have cell phones,
 7 unconnected to Mr. Elcock personally, causing --
 8 bringing Langston Cobb and Ray OWSLEY. Ray Owsley
 9 always packs a gun.

10 Langston Cobb takes it upon himself to
 11 take the gun from Ray and give it to
 12 Mr. Elcock, who is drunk as a skunk, angry and
 13 upset, because he is a family man concerned about
 14 protecting his son.

15 With that preface, Judge, if I can, I
 16 just want to hit the "play" without screwing it
 17 up. If we could have the lights down, please.

18 (DVD played.)
 19 MR. ODESSEY: Thank you. Some of that is
 20 hard to understand between the hum and the
 21 language, but the gist of it is, that there is no
 22 question but Langston Cobb transferred the gun to
 23 Mr. Elcock and that Mr. Elcock was egged on, not
 24 only by that act but, "You have to cock it, you
 25 have to cock it," twice said by Mr. Ray OWSLEY,

1 because that's how they got the gun.

2 The truth of it is, Judge, that was the
3 first time Kenneth Elcock ever fired a gun and had
4 tragic consequences.

5 The interview of Mr. Elcock,
6 Your Honor, as alluded to by the detective -- it's
7 a lengthy interview, Judge. It goes on for many
8 hours, and a lot of it is unproductive in many
9 respects, and finally Detective McAllister goes
10 in, gets the goods, if you will, gets Mr. Elcock
11 to confess.

12 And I want to be real clear to the
13 court why it is I think it took so long. It took
14 so long because Kenneth Elcock never denied his
15 personal responsibility in this case, Judge.

16 The reason it took so long is because
17 of the obvious conflicted divided loyalties he
18 has. He knows he is going to prison. He knows
19 he ultimately is responsible for somebody's death,
20 because the word was out on the street.

21 This happened on the late evening,
22 early morning April 14-15, and Mr. Elcock's
23 arrested a few days later, Your Honor, so the news
24 media has already been splashing it about, and the
25 word, as you can well imagine, spreads like

1 wildfire as to some of the ultimate consequences
2 of these shots being fired at the Whispering Pines
3 apartment complex.

4 Mr. Elcock is arrested, and Mr. Elcock
5 is brought to the interview room. Mr. Elcock
6 makes certain requests of the inquiring
7 detectives. "Could I talk to my mother?" "Can I
8 get single-celled," and underneath that is the
9 obvious fact.

10 He says, "I don't want to be a snitch,"
11 because he's basically telling, detailing the
12 others with him Your Honor, Lynches, his
13 brothers-in-law, uncles to his son, and knowing
14 that his son is going to be left into the
15 community with those persons, although I think one
16 or both of those persons are maybe temporarily in
17 the Idaho State Correctional Institution, but they
18 will be getting out.

19 And of course, the mother, Brandi,
20 sister of Terrence and Brodaus, is still out of
21 custody and always has been. She has some
22 skirmishes with the law, but nothing as serious as
23 some of the others.

24 Mr. Kenneth Elcock is very concerned
25 about the welfare and well-being of his son,

1 should he speak ill of his marrying into the
2 family. Of course, unbeknownst to him, both
3 Brodaus and Terrence Lynch gave up Mr. Elcock
4 without any significant hesitation, Judge, and
5 they lay him out pretty clearly on the DVD
6 interviews that we have had an opportunity to
7 review in largely saving themselves and tossing
8 him quickly away.

9 At the end of the interview when
10 Mr. Elcock does give it up, Your Honor, does
11 confess, he says that, yes, he was shooting at the
12 window and the door, and as your presence
13 investigator correctly notes, what else could you
14 expect, even though in Mr. Elcock's statement at
15 the time he had no intent to harm those people
16 behind the window and the door.

17 The detective then says, "Why has it
18 been so hard, took so long to talk about it?"

19 Mr. Elcock's response at two hours 18
20 minutes into the second tape, says, "It's hard for
21 me to deal with. I know it was wrong."

22 We are left with the DVD interview,
23 Your Honor. Mr. Elcock, left alone in the room,
24 handwriting an apology to April's family, and
25 that's how that interview concludes.

1 And that interview was on the 19th of
2 April, Your Honor, immediately upon Mr. Elcock's
3 being brought into custody.

4 Judge, the presentence investigator did
5 a very good job in this case. These cases are
6 always difficult, and this case, perhaps more so
7 than some others I have seen, but she correctly
8 notes that Mr. Elcock, on Page 10, says he never
9 fired a gun before, and I think to her credit,
10 gives -- tells you kind of what I have told you,
11 why is he so adamant, the top of Page 11, that he
12 was innocent, because at the outset of the
13 interview that was his position, not being allowed
14 to see his son, being referred to as a snitch.

15 Mr. Elcock decided to finally do the
16 right thing. Further, he repeatedly was who
17 stated he was the one who fired the gun. He shot
18 the people, and no one else.

19 At that point he was trying to lay the
20 blame on Langston Cobb, who gave him the Cobb gun,
21 or someone else saying, "Cock it" and no one else.
22 He understands full well, Your Honor, that what
23 he, Ken Elcock, did, caused the harm.

24 That is helpful, I hope, to Your Honor
25 in your sentencing decision today, Judge, in that

1 this is a person who demonstrates insight and
 2 acknowledgement of his wrongful conduct, and the
 3 pain he caused. In some ways, I don't think he
 4 can ever fully comprehend, Your Honor, but he does
 5 have human compassion.

6 He knows he has caused a great deal of
 7 harm to a great number of families.

8 I think it is helpful for housing
 9 reasons and for this court's insight today,
 10 because I know the Lynches have been in many
 11 courts on this fifth floor, Judge, and I'm not
 12 sure how many of them have crossed your door,
 13 because I know a lot of them have been down the
 14 hall in Judge Williamson's courtroom, I have seen
 15 them, and I think Judge McLaughlin had them. But
 16 madam clerk can run up a pretty impressive series
 17 of entries on their felony record, and just some
 18 of the highlights on Page 16 show you that Brodaus
 19 Lynch was on a second rider.

20 Julius is another brother who was with
 21 Brodaus when he was on absconding status on
 22 probation in Judge Williamson's court. They were
 23 dealing significant marijuana over in Missouri,
 24 and TT, or Terrence, whose got a robbery charge --
 25 Shelley Cunningham, who was with them at the time,

1 left the bar, went to the Whispering Pines
 2 apartment complex.

3 He just got off parole in March of '06
 4 for a crime of violence, aggravated assault.

5 Mr. Bashale's brother is looking at a
 6 -- going back to court on his old robbery charge.
 7 Julius Ray, the father of Terrence and Brodaus
 8 Lynch, who also was present, he has his own felony
 9 record, has been in prison, and of course, Ray
 10 OWSLEY, his own aggravated assault, crimes of
 11 violence, retained jurisdiction issues.

12 The court -- in this report at the time
 13 it was prepared, Mr. Cobb had misdemeanors, for
 14 the most part.

15 So Mr. Elcock now before you, Judge,
 16 clearly was not so good in selecting his
 17 acquaintances. They say you don't pick your
 18 family. He married into a family, if you will,
 19 and then chose, perhaps regretfully now in
 20 hindsight, to associate with the mother of his
 21 child's brothers, who did not help him in any way.

22 But again, Judge, Mr. Kenneth Elcock
 23 has to take responsibility for what he did, and he
 24 did that early on at the time of his arrest, and
 25 certainly stands ready today to take whatever

1 consequences Your Honor deems appropriate.

2 Judge, I want to talk about one thing
 3 that's referred to in the materials and is
 4 attributed -- the presentence investigator talks
 5 about some of these statements made by --
 6 attributed statements to Mr. Elcock after-the-fact
 7 that show what I would call a callous disregard
 8 for his conduct, and those statements go back,
 9 Judge, to Page 154, and that was statements --
 10 their source, if you will, is Brodaus Lynch.

11 Part of Mr. Brodaus Lynch's commentary
 12 to the detectives regarding statements attributed
 13 to Kenneth Elcock after the event -- and I'm
 14 looking at Page 154 on the lower right-hand corner
 15 of the discovery pagination of the police
 16 materials, Your Honor, and on Page 155 -- again,
 17 this comes from Brodaus Lynch as the source
 18 material.

19 Langston Cobb had a gun that was taken
 20 from him -- and was right there, Your Honor, and
 21 that's flat wrong. You heard unequivocally from
 22 Mr. Cobb himself he is the one who gave it to him.

23 There was some confusion at the outset,
 24 but when you carefully review the materials, I
 25 think there is no question but Mr. Elcock did not

1 know Mr. Cobb very well and certainly did not take
 2 the firearm from Mr. Cobb but was presented that
 3 firearm from Mr. Cobb, and he did take it, and he
 4 did hold it, and he did shoot it.

5 So Mr. Brodaus Lynch is incorrect in
 6 saying Langston had a gun that Face took from him.

7 He also immediately, right there in the
 8 middle of Page 155, said, "Face usually wanted to
 9 hit someone" as a sort of blackmail. There was no
 10 pistol whipping, no hitting of the face.

11 Again, Judge, just flat wrong. I'm not
 12 sure what Brodaus Lynch is creating this fix
 13 about. He has done this a lot in his involvement
 14 with law enforcement, but it is simply not true.

15 And likewise, the next page, again a statement
 16 that says the source material being Brodaus Lynch.

17 That when he, Brodaus, talked to Face
 18 about what happened, he asked him why, and Face
 19 responded by saying, "I don't give a" --
 20 something, profane, and he shouldn't have been at
 21 the place. That was not said, either.

22 That's just another flat wrong
 23 statement attributed or an act attributed by
 24 Brodaus Lynch to Kenneth Elcock.

25 Quite the opposite, Judge. Mr. Elcock

1 knew pretty quickly, as drunk as he was, that he
2 had committed a very serious, serious act with
3 harmful awful consequences of his doing,
4 ultimately.

5 I think it also is helpful to the court
6 to understand April's mother as well, that when
7 Mr. Elcock was asked what his thoughts regarding
8 sentencing were, had either one of the victims
9 been his son, he replied a lengthy prison sentence
10 similar to what he anticipates receiving.

11 And that says it, Judge. This is a
12 person who needs punishment. This is a person who
13 did a very wrong thing. But this is not a person
14 who the court should abandon forevermore.

15 This is a person who, if you give him a
16 15-year fixed term, is 20 times more lengthy than
17 anything he's ever served. It's going to be very
18 hard time, Judge, not only because of his mental
19 health circumstances, but hopefully, they will
20 agree with Dr. Estess' ongoing recommendation in
21 terms of treatment and medications.

22 But because of the Lynches out there,
23 the fact that he, Kenneth Elcock, knows Ken Junior
24 is in this community and he is never going to
25 raise that child, not in any day-to-day active

1 way, he knows that, but at age 40, the
2 testosterone level drops off, Mr. Elcock will be
3 much older and hopefully much wiser, and he
4 expects that he will and he does have a family
5 waiting for him across the country.

6 I'm asking Your Honor for a 15-year
7 fixed term, and obviously, that to be followed by
8 substantial number of years indeterminate.

9 THE COURT: Mr. Elcock, your comments?

10 THE DEFENDANT: I would just like to
11 apologize to the family. I can't imagine the type
12 of pain that you all are feeling, but I'm very
13 sorry for what I have done. Thank you.

14 THE COURT: We will take a ten-minute
15 recess, and then we will resume.

16 (Recess taken.)

17 THE COURT: Is there a legal cause why
18 judgment and sentence should not be pronounced?

19 MR. BANDY: No, Your Honor.

20 MR. ODESSEY: None known by the defense,
21 Your Honor.

22 THE COURT: First I want to say to the
23 Buenrostros, I did read everything that you filed.
24 I have looked at your pictures. Your daughter was
25 a very lovely young woman, and you have my deepest

1 sympathies on your loss.

2 There is nothing anybody else can say
3 to somebody who's had to experience a loss of a
4 child. But your daughter looks like a lovely
5 person, and I hope over time the memories of all
6 the wonderful things that she said and did will be
7 a comfort to you, because I know that there's
8 nothing the court can do that will bring her to
9 you in this life.

10 I just hope that as time passes, you
11 will have those good memories of good times
12 together to give you comfort, because I know that
13 she would want those memories to be a comfort to
14 you.

*Can't imply what you don't know
Judge made action much statement*

15 And I don't want to keep your pictures,
16 because they are very nice, and so I'm going to
17 give them back to the bailiff, and he will bring
18 them to you.

19 This case presents some very serious
20 considerations for the court. The primary
21 overriding goal of every sentence is to protect
22 society, and this case brings up some very
23 significant and critical issues with respect to
24 some of the ways in which that's done.

25 In order to protect society, a court

1 considers the deterrence of a particular
2 defendant. The court considers the deterrence of
3 others. The court considers rehabilitation. But
4 the court also considers the imposition of a
5 penalty for wrongful acts deliberately done.

6 This terrible evening started out with
7 an argument with a man named Bo Bashale, who was
8 angry at Terrence Lynch for what he thought was
9 Terrence Lynch's actions in turning in his brother
10 and causing his brother to serve prison time.

11 He went to the apartment where he
12 thought Terrence Lynch was located and started
13 banging on the door. The mother of the
14 defendant's son was there. She contacted her
15 brothers.

16 Everyone was in the bar drinking. They
17 drove over to the apartment complex to, as they
18 put it, deal with the man, scare or fight him.

19 Langston Cobb met the group of men
20 outside, gave the defendant a 9-millimeter
21 handgun. There was an argument outside the
22 apartment.

23 The defendant pointed the gun at
24 point-blank range in Michael Barylski's face,
25 pulled the trigger, and it did not fire.

very important

1 Another person who was there, Raymond
2 OWSLEY, who shouted repeatedly, "Cock the gun,
3 cock the gun." The defendant cocked the gun, and
4 then he shot repeatedly, over and over again, into
5 an apartment full of people who were there for a
6 party.

7 He shot and killed April Buenrostro,
8 who had made no wrong choices and whose family had
9 made no wrong choices but had the great misfortune
10 to be there when the defendant was deliberately --
11 was showing a deliberate, utter disregard for the
12 lives of others.

13 After this shooting, the defendant runs
14 away with his friends, who talk about how he
15 shouldn't talk about what had happened, "Loose
16 lips sink ships."

17 Several days later, the defendant's
18 located. He does express remorse. But as I look
19 at this picture, it's extremely serious.

20 Clearly, the defendant bears the
21 overwhelming guilt and culpability for what
22 occurred, but others also share some culpability
23 for that, and I do strongly urge and encourage the
24 Ada County Prosecuting Attorney's office to pursue
25 charges as accessory on Langdon Cobb -- Langston

1 Cobb, who gave the gun to the defendant and
2 Raymond OWSLEY, who urged him repeatedly to cock
3 it; in that short time gave him the information he
4 needed to take the life of April Buenrostro, who
5 had done him no harm.

6 To say this is because somebody was
7 threatening the life of his child is simply
8 overstating the fact. I do not know where one can
9 realistically come to that conclusion. A man
10 banged on the door of this apartment where this
11 defendant's son was and then went away.

12 And what the defendant and his friends
13 do is go to a different apartment to confront that
14 person, and it's very clear that the confrontation
15 is meant more in the way of revenge than in the
16 way of preventing any ongoing harm, since there
17 was no ongoing incident by the time they arrived.

18 It is of considerable concern to this
19 court that the defendant has surrounded himself
20 with so many people who are described as being in
21 the process of becoming gang members, and I do
22 think that its effect is worthy of consideration,
23 that although the defendant appears to be
24 associated with the gang, Gangster Disciples, the
25 gang people that say -- do not say he is a

1 documented member of that gang, but it is of
2 concern that there are threads throughout this
3 file of -- this sort of disregard for human life
4 that other areas in our state are experiencing as
5 a result of increased gang presence, and it's
6 certainly something -- is something that is of
7 concern.

8 The defendant does not have a prior
9 record of this level of seriousness, certainly.
10 He has a record out of both Virginia and New York.
11 Some of it is indicative of serious involvement
12 with drugs.

13 He had a conviction for possession with
14 intent to deliver out of Virginia. He had a
15 conspiracy conviction. He has spent time, even
16 when he was relatively young, spending both a year
17 in prison in Virginia and a year at Rikers Island.

18 His -- he has been diagnosed since the
19 time of this event as suffering from major
20 depression with psychotic features and also with
21 personality disorder, which is schiso-type
22 and antisocial.

23 In terms of mitigating factors, I do
24 think that there are three mitigating factors that
25 seem to me to carry some weight. One is his age.

1 The other is the fact that he was not the source
2 of the gun, and the other is the fact that he has
3 shown remorse in this action.

4 But those mitigating factors have to be
5 weighed also against the cold facts of this case,
6 and the cold hard facts of this case is, as soon
7 as he was handed the gun, he pointed it
8 point-blank in the face of Mike Barylski and
9 pointed the trigger, and Mike Barylski would
10 certainly be dead if he had known how to operate
11 the gun at that point.

12 He then proceeds to shoot into an
13 apartment through the glass door and the glass
14 windows that he knows is full of people,

15 Well, April Buenrostro had never done
16 him any harm, didn't know anything about him,
17 didn't know anything about this conflict.

18 I think that it is critical of the
19 court to not appreciate the seriousness of this
20 particular offense. A group of people with
21 serious criminal records who come armed and
22 looking for trouble and hand a gun to a man who
23 not only tries to kill a man out in front of the
24 apartment but shoots into an occupied, crowded
25 residence full of people he has no quarrel with a

2 I think it is absolutely essential that
 3 the court send a message to people who want to
 4 engage in gang-type behavior, whether they are
 5 members of gangs or not, that Boise will not be a
 6 friendly place for you. That you can expect that
 7 in Boise if someone's hurt, you are going to pay
 8 heavy consequences, and if someone dies, you are
 9 going to pay extremely heavy consequences.

10 I think it is very essential that the
 11 court send a serious message that Idaho takes this
 12 problem seriously, that Boise takes this
 13 seriously. This unwelcome behavior will be
 14 clamped down on to the maximum extent possible. I
 15 think that's critical.

16 I do think that the court needs to
 17 weigh all of the factors in sentencing. It's the
 18 obligation of the court to balance each of those
 19 factors, but I think this is an extraordinarily
 20 serious case, and it warrants a heavy penalty.

21 I have considered whether the State's
 22 recommendation is the most reasonable approach,
 23 but I think it has some deficiencies. I think
 24 that there are some benefits, even in very lengthy
 25 sentences, to giving people some incentive to

1 conform their conduct and to try to improve.

2 And I also think, as I said, that there
 3 are other people whose role in this case, while
 4 not at the level of culpability of the defendant,
 5 are significant players, and the court has to
 6 weigh the fact that it's very likely that without
 7 this group of people wanting to engage in hostile
 8 and aggressive acts, that it's not clear that it
 9 would have escalated to the level it escalated
 10 when the defendant and his friends arrived at the
 11 -- back at the apartment complex.

12 So I think there does need to be heavy
 13 consequences. I think they need to be very
 14 significant. I think deterrence of others is a
 15 critical and important factor in this case.

16 I think that it's absolutely essential
 for the protection of society and also as a
 recognition that the penalty for taking a young
 life of someone who had done no one any harm needs
 to be heavy.

I think the penalty aspect in this case
 is also a valid and important concern. There
 needs to be a penalty when someone does the
 ultimate wrong of depriving someone else of life
 and leaving her family to deal with the sorrow of

1 her loss.

2 I don't think anyone can look at
 3 anything the Buenrostros did. I don't think there
 4 is any choice they could have made that was
 5 different, because they weren't the people making
 6 the wrong choices that night.

7 The people that were making the wrong
 8 choices that night were the defendant and his
 9 friends, including people who are yelling at the
 10 defendant to cock the gun repeatedly, and who
 11 obviously encouraged a person who's drunk, so I do
 12 think that a heavy penalty is warranted.

13 In this case as to Counts 2, 3, and 4,
 14 each of the aggravated batteries, firing randomly
 15 into an occupied residence and shooting people,
 16 warrants the most serious penalty for aggravated
 17 battery, and so with respect to each of those
 18 charges, the court is imposing the maximum
 19 sentence of 15 years each.

20 With respect to the aggravated assault,
 21 which is among to most serious aggravated assaults
 22 that the court has seen, the court will impose the
 23 maximum penalty of five years. Each of those
 24 counts will be concurrent.

25 As to the offense of murder in the

1 second degree, this is the result of what the law
 2 describes as an abandoned and malignant heart, to
 3 recklessly shoot into an occupied dwelling and to
 4 kill a person that the person has no quarrel with,
 5 and therefore, the court is imposing as the
 6 maximum sentence the ceiling of the offense, of
 7 life in prison with a fixed and determinate term
 8 of 40 years.

9 You do have 42 days in which to appeal.

10 MR. ODESSEY: I didn't hear you. What was
 11 the number, fixed number?

12 THE COURT: Maximum sentence is life. The
 13 minimum term that must be served is 40 years.
 14 Court will recess.

15 (Proceedings concluded.)

16 -oooOooo-