

8-3-2011

# State v. McKinney Augmentation Record Dckt. 38527

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In the Supreme Court of the State of Idaho

STATE OF IDAHO,  
Plaintiff-Respondent,  
v.  
RANDY LYN MC KINNEY,  
Defendant-Appellant.

ORDER GRANTING MOTION TO  
TAKE JUDICIAL NOTICE AND  
RESET THE BRIEFING SCHEDULE  
Supreme Court Docket No. 38527-2011  
Butte County Docket No. 1981-38

On July 27, 2011, this Court issued an Order Granting Motion to Augment and to Suspend the Briefing Schedule directing the district court clerk to submit certain items requested by counsel for the Appellant to this Court within fourteen days of the date of that Order.

A MOTION REQUESTING THAT THE COURT TAKE JUDICIAL NOTICE AND RESET BRIEFING SCHEDULE was filed by counsel for Appellant on August 1, 2011, requesting this Court take judicial notice of the attached documents that were previously requested in the Motion to Augment and to Suspend the Briefing Schedule filed on July 25, 2011, and to reset the due date for filing of Appellant's Brief. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellant's MOTION TO TAKE JUDICIAL NOTICE be, and hereby is, GRANTED and the augmentation record shall include the documents listed below, copies of which accompanied this Motion:

- 1. Criminal Complaint, file-stamped August 5, 1981;
- 2. Jury Instructions (from a transcript);
- 3. Five Jury Verdict forms, file-stamped 11-12-81;
- 4. Findings of the Court in Considering Death Penalty Under Section 19-2515, Idaho Code, file-stamped March 27, 1982; and
- 5. Judgment of Conviction Death Warrant, file-stamped March 27, 1982.

IT FURTHER IS ORDERED that the due date for filing Appellant's Brief shall be reset and Appellant's Brief shall be filed with this Court on or before thirty-five (35) days of the date of this Order.

ORDER GRANTING MOTION TO TAKE JUDICIAL NOTICE AND RESET THE BRIEFING SCHEDULE - Docket No. 38527-2011

DATED this 31<sup>st</sup> day of August, 2011.

For the Supreme Court

*[Signature]*  
Stephen W. Kenyon, Clerk

cc: Counsel of Record  
District Court Clerk

LAW CLERK

AUGMENTATION RECORD

38527

ORDER GRANTING MOTION TO TAKE JUDICIAL NOTICE AND RESET THE BRIEFING SCHEDULE - Docket No. 38527-2011

# In the Supreme Court of the State of Idaho

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STATE OF IDAHO, )

Plaintiff-Respondent, )

v. )

RANDY LYN MC KINNEY, )

Defendant-Appellant. )

ORDER GRANTING SECOND  
MOTION TO AUGMENT THE  
RECORD

Supreme Court Docket No. 38527-2011  
Butte County Docket No. 1981-38

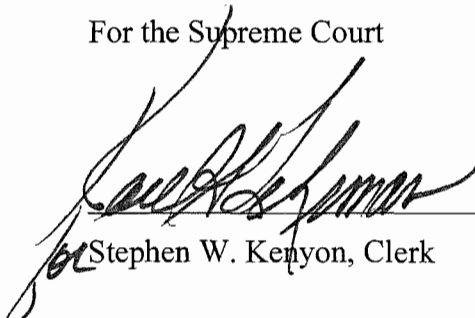
A SECOND MOTION TO AUGMENT THE RECORD was filed by counsel for Appellant on February 28, 2012. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellant's SECOND MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the document listed below, file stamped copies of which accompanied this Motion:

1. Instructions to the Jury from Bonneville County Case Number 3462, file-stamped November 12, 1981.

DATED this 1st day of March, 2012.

For the Supreme Court



\_\_\_\_\_  
Stephen W. Kenyon, Clerk

cc: Counsel of Record

ORDER GRANTING SECOND MOTION TO AUGMENT THE RECORD – Docket No.  
38527-2011

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE-

STATE OF IDAHO,

Plaintiff,

-vs-

RANDY LYNN MCKINNEY,

Defendant.

Case No. 3462

INSTRUCTIONS TO THE JURY

MEMBERS OF THE JURY: I will now give you the final instructions in this case. The preliminary instructions I gave to you at the beginning of the trial are included with these, but I will not again read them to you.

NOV 12 11 33 AM '81  
DISTRICT COURT  
7TH JUDICIAL DISTRICT  
BONNEVILLE COUNTY ID

INSTRUCTION NO. 1

The defendant, Randy Lynn McKinney, is here for trial upon an Information filed in this court, by the Special Prosecuting Attorney of Butte County, Idaho, accusing the defendant with various crimes, Count I - FIRST DEGREE MURDER; Count II - CONSPIRACY TO COMMIT MURDER; Count III - ROBBERY; Count IV - CONSPIRACY TO COMMIT ROBBERY.

The Information alleges the crimes to have been committed as follows:

COUNT I

That the defendant, RANDY LYNN MCKINNEY, on or about the 8th day of April, 1981, at a place located approximately 5 miles north of Arco, Idaho, and 1 mile east of Highway 93 on a county road in the County of Butte, State of Idaho, then and there being did then and there willfully, unlawfully, deliberately and with premeditation and with malice aforethought or at a time when the said defendant was in the perpetration of, or attempting to perpetrate robbery, kill and murder one Robert M. Bishop, Jr., of Blackfoot, Idaho, a human being by shooting said Robert M. Bishop, Jr., in the head with a revolver type handgun and thereby mortally wounding the said Robert M.

Bishop, Jr., from which he died on the 8th day of April, 1981.

COUNT II

That the said defendant, RANDY LYNN McKINNEY, and DOVEY SMALL, on or about the 8th day of April, 1981, in the County of Butte, State of Idaho, did combine and conspire to commit the following crime against the people of the State of Idaho: THE CRIME OF MURDER IN THE FIRST DEGREE.

That it was part of said conspiracy that the said defendant and Dovey Small, co-conspirators, would commit the crime of Murder in the first Degree.

In furtherance of the conspiracy, and to effect the purpose thereof, the defendant and his co-conspirator performed the following overt acts: 1) That the said defendant, RANDY LYNN McKINNEY, and DOVEY SMALL obtained a handgun. 2) They then invited and encouraged one Robert M. Bishop, Jr., to take them in his automobile from Blackfoot, Idaho, to Arco, Idaho, and areas around Arco. 3) They then did invite and encourage Robert M. Bishop, Jr., to take the said RANDY McKINNEY to an isolated place outside of Arco, Idaho. 4) At that time the said RANDY LYNN McKINNEY took a handgun into his possession, either loaded or determined that it was in fact loaded. 5) The said

McKINNEY then did aim the gun and shoot the said Robert M. Bishop, Jr., in the chest. 6) After shooting the victim in the chest the said McKINNEY did then walk toward Robert Bishop, Jr., and aim the gun, from very short range and shoot the said Robert M. Bishop, Jr., four times in the head.

COUNT III

That the said defendant, RANDY LYNN McKINNEY, on or about the 8th day of April, 1981, in the County of Butte, State of Idaho, did feloniously and by means of force or fear, take from the possession, from the person, or from the immediate presence of Robert M. Bishop, Jr., certain personal property, to-wit: a wallet containing money and credit cards, and a jacket belonging to Robert M. Bishop, Jr., and also a 1979 Ford Mustang automobile, the property of Great Western Financial Corporation d/b/a New American Real Estate, all of which was accomplished against the will of said Robert M. Bishop, Jr., in that the said defendant threatened to shoot and shot Robert M. Bishop, Jr., with a handgun.

COUNT IV

The said defendant, RANDY LYNN McKINNEY and DOVEY SMALL, on or about the 8th day of April, 1981, in the County of

Butte, State of Idaho, did combine and conspire to commit the following crime against the people of the State of Idaho: THE CRIME OF ROBBERY.

That it was part of said conspiracy that the said defendant and Dovey Small, co-conspirators, would commit the crime of Robbery in violation of Idaho Law.

In furtherance of conspiracy, and to effect the purpose thereof, the defendant and Dovey Small, co-conspirators, performed the following overt acts: 1) The said defendant and Dovey Small did invite and encourage said Robert M. Bishop, Jr., to take them in an automobile from Blackfoot, Idaho, to Arco, Idaho, and the vicinity of Arco, Idaho; 2) That they did then encourage him to take Randy Lynn McKinney to an isolated area where there were no witnesses; 3) at which time Randy Lynn McKinney did take a handgun into his possession and either load or determine that it was loaded; and 4) did in the furtherance of said conspiracy and in order to complete the robbery, threaten and/or shoot the said Robert M. Bishop, Jr., with said handgun, taking his life and; 5) that he did thereafter take from the possession of and without the consent of the said Robert M. Bishop, Jr., his wallet, his credit cards and money, his jacket and a certain automobile described as a 1979 Ford Mustang, the property of



Great Western Financial Corporation d/b/a New America  
Real Estate; 6) Said defendant and Dovey Small did then  
use the said personal property as their own.

To each Count of this Information the defendant has  
prior to this trial interposed a plea of "not guilty".

These pleas require the State to prove every material  
allegation of any Count before the defendant can be found  
guilty thereof.

PRELIMINARY INSTRUCTION NO. 1a

The Information filed against the defendant is merely an accusation, and should not be considered by you as evidence, or allowed to prejudice you or influence your minds against the defendant. The Information, in this case, is a mere formal charge for the purpose of putting the defendant on trial, constitutes no evidence of his guilt, and no juror shall weigh it as any evidence against the defendant.

PRELIMINARY INSTRUCTION NO. 2

Before you can convict the defendant of any crime charged in any count against him by the Information, you must require the prosecution to prove every material allegation contained in the count beyond a reasonable doubt; and if, after a consideration of all the evidence in the case, you entertain a reasonable doubt of the truth of any one of these material allegations of any count then it is your duty to give the defendant the benefit of such doubt and acquit him as to the crime charged by such count.

PRELIMINARY INSTRUCTION NO. 3

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

PRELIMINARY INSTRUCTION NO. 4

The rule of law, which clothes every person accused of crime with the presumption of innocence, and imposes upon the state the burden of proving his guilt beyond a reasonable doubt, is not intended to aid anyone who is in fact guilty to escape, but is a humane provision of law, intended, so far as human agencies can, to guard against the danger of an innocent persons being unjustly punished.

PRELIMINARY INSTRUCTION NO. 5

It is not necessary that all the facts and circumstances surrounding the testimony and evidence that is given on behalf of the State shall be established beyond a reasonable doubt. It is necessary that all the facts and circumstances in evidence, together, shall establish the defendant's guilt beyond a reasonable doubt.

PRELIMINARY INSTRUCTION NO. 6

Your function as jurors is to determine what the facts are and apply the rules of law that I give to you to the facts as you determine them to be. You will then attempt to reach a conclusion as to the guilt or innocence of the defendant. That conclusion will be your verdict. You will determine what the facts are from all the testimony and the exhibits that are submitted. You are the sole judges, the exclusive judges, of the facts. In that field neither I nor anyone else may invade your province. I shall endeavor to preside impartially and not to express any opinion concerning the facts. On the other hand, and with equal emphasis, I instruct you that you are bound to accept the rules of law that I give you, whether you agree with them or not.

PRELIMINARY INSTRUCTION NO. 7

You must determine which of the witnesses you believe, what portion of their testimony you accept, and what weight you attach to it. At times during the trial I may sustain objections to questions asked without permitting the witness to answer, or, where an answer has been made, I may instruct that it be stricken from the record and that you disregard it and dismiss it from your minds. You may not draw any inference from an unanswered question nor may you consider testimony which has been stricken in reaching your decision. The law requires that your decision be made solely upon the competent evidence before you. Such items as I exclude from your consideration will be excluded because they are not legally admissible in a trial.



PRELIMINARY INSTRUCTION NO. 8

The law does not, however, require you to accept all of the evidence I shall admit, even though it be competent. In determining what evidence you will accept, you must make your own evaluation of the testimony given by each of the witnesses and determine the degree of weight you choose to give to his testimony. The testimony of a witness may fail to conform to the facts as they occurred because he is intentionally telling a falsehood, because his recollection of the event is faulty, because he did not accurately see or hear that about which he testifies, or because he has not expressed himself clearly in giving his testimony. There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs, you determine for yourselves the reliability or unreliability of statements made to you by others.

The same tests that you use in your everyday dealings are the tests which you apply in your deliberations. The interest or lack of interest of any witness in the outcome of this case, the bias or prejudice of a witness, if there be any, the appearance, the manner in which the witness gives his testimony on the stand, the opportunity that the witness had to observe the facts concerning which he testifies, the probability

or improbability of the witness's testimony when viewed in the light of all of the other evidence in the case, are all items to be taken into your consideration in determining the weight, if any, you will assign to that witness's testimony.

PRELIMINARY INSTRUCTION NO. 9

When I have completed these opening instructions to you, the attorneys will have opportunity to make opening statements to you, in which each will outline for you what he expects to prove as his client's case. The purpose of such opening statements is to give you each party's claims so that you will better understand the evidence as it unfolds before you. What is said in such statements is not itself evidence, however.

PRELIMINARY INSTRUCTION NO. 10

At times during the trial, objection may be made to the introduction of evidence, or motions concerning applicable law or procedure may be made. Arguments in connection with such objections are sometimes made out of the jury's presence. Any ruling upon such objections or motions will be based solely upon the law. You must not infer from any such ruling or from anything I say during the course of the trial that I hold any views for or against either side of this case.

PRELIMINARY INSTRUCTION NO. 11

Evidence may be either direct or circumstantial. It is direct evidence if it proves a fact, without an inference, and which in itself, if true, conclusively establishes that fact. It is circumstantial evidence if it proves facts from which an inference of the existence of another fact may be drawn.

An inference of fact is one which may logically and reasonably be drawn from another fact or group of facts established by the evidence.

The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

INSTRUCTION NO. 12

MEMBERS OF THE JURY, it is my duty to instruct you in the law that applies to this case, and you must follow the law as I state it to you in all of my instructions to you.

As jurors, it is your exclusive duty to decide all questions of fact submitted to you. In performing this duty, you must not be influenced by pity for a defendant or by passion or prejudice against him. You must not infer guilt because the defendant has been arrested for this offense, or because a charge has been filed against him, or because he has been brought to trial; none of these facts is evidence of his guilt.

In determining whether the defendant is guilty or not guilty, you must be governed solely by the evidence received in this trial and the law as stated to you by the Court. You must not be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.

In case any of you have received information, or what purports to be information concerning the facts, from any other source than the evidence admitted by the Court at this trial, you are instructed to exclude such information from all consideration.

Both the State of Idaho and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be.

INSTRUCTION NO. 13

It is not within your province to concern yourselves with the question of penalty or punishment. That feature of the case is solely for the Court.

Your duty as jurors is solely to determine the guilt or innocence of the accused, and upon ~~that~~ <sup>those</sup> questions and ~~that~~ <sup>those</sup> questions alone, you as jurors are to vote and return your verdict.

INSTRUCTION NO. 14

In every crime or public offense, there must exist a union or joint operation of act and intent, or criminal negligence.

The intent with which an act is committed is but a mental state of the party committing it, and direct proof of such intent is not required, but the intent is generally derived from and established by the attending facts and circumstances, and the conduct of the defendant, as shown by the evidence.

The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused.



INSTRUCTION NO. 15

All persons are capable of committing crimes, except those belonging to the following classes:

Persons who committed the act or made the omission charged under an ignorance or mistake of fact which disproves any criminal intent;

Persons who committed the act charged without being conscious thereof;

Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or criminal negligence.

INSTRUCTION NO. 16

No act committed by a person while in a state of voluntary intoxication from alcohol and/or drugs is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, state of mind, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, state of mind or intent with which he committed the act.

INSTRUCTION NO. 17

In this case you will be governed by the following definitions, among others which appear elsewhere in these instructions:

FELONIOUSLY: The word "feloniously" is used in accusations which charge the commission of a felony. It means that the act was done without justification or excuse.

KNOWINGLY: The word "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of the penal code. It does not require any knowledge of the unlawfulness of such act or omission.

UNLAWFULLY: Contrary to law or unauthorized by law.

WILFULLY: The word "wilfully" when applied to the intent with which an act is done, implies simply a purpose or willingness to commit the act referred to. It does not require any intent to violate the law, or to injure another, or to acquire any advantage.

INSTRUCTION NO. 18

Each count charges a separate and distinct offense. You must decide each count separately on the evidence and the law applicable to it, uninfluenced by your decision as to any other count. The defendant may be convicted or acquitted of the offenses charged in each count. Your finding as to each count must be stated in a separate verdict.

INSTRUCTION NO. 19

Murder is the unlawful killing of a human being with malice aforethought.

Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to kill a human being. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. An abandoned and malignant heart is a condition of heart and mind having no regard for social and moral obligations. Malice is implied when the killing results from an act involving a high degree of probability that it will result in death, which act is done for a base, antisocial purpose and with a wanton disregard for human life.

Malice aforethought does not necessarily imply a pre-existing hatred or enmity toward the person killed.

"Aforethought" does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act.

INSTRUCTION NO. 20

There are two degrees of Murder: First and Second,  
Murder perpetrated by any kind of wilful, deliberate and  
premeditated killing is of the first degree.

Murder committed in the perpetration of, or attempt to  
perpetrate, robbery is of the first degree.

For purposes of this case all other kinds of Murder are of  
the second degree.

INSTRUCTION NO. 21

All murder which is perpetrated by any kind of wilful, deliberate and premeditated killing is murder of the first degree.

The word "deliberate" means formed or arrived at or determined upon a result of careful thought and weighing of considerations for and against the proposed course of action. The word "premeditated" means considered beforehand.

If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. A cold calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not

such deliberation and premeditation as will fix an unlawful killing as murder in the first degree. To constitute a wilful, deliberate and premeditated killing, the slayer must weigh and consider the question of killing, decide to kill, and wilfully kill.



INSTRUCTION NO. 22

The crime of Robbery is the taking of personal property in the possession of another, from his person or immediate presence and against his will, accomplished by means of force or fear.

INSTRUCTION NO. 23

Involuntary manslaughter is the unlawful killing of a human being without malice aforethought and without an intent to kill.

In order to prove the commission of the crime of involuntary manslaughter, each of the following elements must be proved:

- 1. That a human being was killed, and
- 2. That the killing was unlawful.

A killing is unlawful within the meaning of this instruction if it occurred by the operation of any firearm in a reckless, careless or negligent manner which produces death.

"Negligent" imports a want of such attention to the nature of probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.

INSTRUCTION NO. 24

Criminal conspiracy is a crime where two or more persons combine or conspire to commit any crime prescribed by the laws of Idaho, and one or more of such persons does any act to further the object of the combination or conspiracy.

INSTRUCTION NO. 20

The persons concerned in the commission of a crime who are regarded by law as principals in the crime thus committed and equally guilty thereof include:

1. Those who directly and actively commit the act constituting the crime or;
2. Those who, with knowledge of the unlawful purpose of the one who does directly and actively commit the crime, and with criminal intent aid and abet in its commission or;
3. Those who, whether present or not at the commission of the crime, advise and encourage its commission.

INSTRUCTION NO. 26

In this case, to warrant a verdict of guilty under Count I of the crime of First Degree Murder by wilful, deliberate and premeditated killing, you must find from the evidence, beyond a reasonable doubt, that: either

Part A

1. The defendant, Randy Lynn McKinney;
2. In Butte County, Idaho, on or about April 8, 1981;
3. With malice aforethought, wilfully, deliberately, and with premeditation, unlawfully and intentionally killed Robert M. Bishop, Jr., a human being, by shooting and wounding with a firearm, and by such wounding, directly causing the death of Robert M. Bishop, Jr.

or

Part B

1. That Dovey Small;
2. In Butte County, Idaho, on or about April 8, 1981;
3. With malice aforethought, wilfully, deliberately, and with premeditation, unlawfully and intentionally killed Robert M. Bishop, Jr., a human being, by shooting and wounding with a firearm, and by such wounding, directly causing the death of Robert M. Bishop, Jr.;

4. That the defendant, Randy Lynn McKinney, with knowledge of Dovey Small's unlawful purpose and intention to murder Robert M. Bishop, Jr., either:

a. then and there, with criminal intent, aided and abetted the commission of the murder of Robert M. Bishop, Jr. by Dovey Small; or

b. whether or not present at the commission of the crime, advised and encouraged Dovey Small to commit the murder of Robert M. Bishop, Jr.

Part A contains the essential elements or material allegations of First Degree Murder, by wilful, deliberate and premeditated murder, allegedly committed directly by Randy Lynn McKinney, in Count I, and the State of Idaho is required to prove each of these essential elements beyond a reasonable doubt.

Part B contains the essential elements or material allegations of First Degree Murder, by wilful, deliberate and premeditated murder, allegedly committed directly by Dovey Small, and aided and abetted or advised and encouraged by Randy Lynn McKinney, in Count I and the State is required to prove each of these essential elements beyond a reasonable doubt.

INSTRUCTION NO. 21

In this case, to warrant a verdict of guilty under Count I of the crime of First Degree Murder by perpetrating, or attempting to perpetrate, Robbery, you must find from the evidence, beyond a reasonable doubt, that:

1. The defendant, Randy Lynn McKinney;
2. In Butte County, Idaho, or or about April 8, 1981;
3. In the perpetration of, or attempt to perpetrate Robbery, intentionally or accidentally shot and wounded with a firearm, and by such wounding, directly caused the death of Robert M. Bishop, Jr.

These are essential elements or material allegations of such crime charged in Count I, and the State of Idaho is required to prove each of these elements beyond a reasonable doubt.

INSTRUCTION NO. 28

In this case, to warrant a verdict of guilty of the crime of Second Degree Murder, you must find from the evidence, beyond a reasonable doubt, that

1. In Butte County, Idaho, on or about April 8, 1981;
2. Randy Lynn McKinney, unlawfully, with malice aforethought;
3. Intentionally shot and wounded Robert M. Bishop, Jr.;
4. That Robert M. Bishop, Jr., thereupon died as a direct result of such wounding.

These are the essential elements or material allegations of the lesser crime charged in Count I, and the State of Idaho is required to prove each of these elements beyond a reasonable doubt.



INSTRUCTION NO. 29

In this case, to warrant a verdict of guilty under Count I of the crime of Involuntary Manslaughter, you must find from the evidence, beyond a reasonable doubt, that:

1. Defendant, Randy Lynn McKinney;
2. In Butte County, Idaho, on or about April 8, 1981;
3. Without malice aforethought, unintentionally in the operation of a firearm in a reckless, careless, or negligent manner, shot and killed Robert M. Bishop, Jr.

These are the essential elements or material allegations of such <sup>crime</sup> charged in Count I, and the State of Idaho is required to prove each of these elements beyond a reasonable doubt.

INSTRUCTION NO. 30

In this case, to warrant a verdict of guilty of Conspiracy to commit First Degree Murder, Count II, you must find from the evidence, beyond a reasonable doubt:

1. Randy Lynn McKinney and Dovey Small intentionally agreed to commit the crime of First Degree Murder of Robert M. Bishop, Jr. in Idaho.
2. That Randy Lynn McKinney and Dovey Small had the specific intent to commit the crime of First Degree Murder of Robert M. Bishop, Jr.
3. That during the existence of the agreement either Randy Lynn McKinney or Dovey Small committed in this state one of the following overt acts to effect the First Degree Murder of Robert M. Bishop, Jr.:
  - a. Randy Lynn McKinney or Dovey Small invited and encouraged Robert M. Bishop, Jr. to take them in his automobile from Blackfoot, Idaho, to Arco, Idaho, and areas around Arco.
  - b. Randy Lynn McKinney or Dovey Small invited and encouraged Robert M. Bishop, Jr., to take Randy McKinney to an isolated place outside of Arco, Idaho.

c. At that time the said Randy Lynn McKinney took a loaded handgun into his possession.

d. The said Randy Lynn McKinney aimed the gun and shot Robert M. Bishop, Jr., in the chest.

e. The said Randy Lynn McKinney or Dovey Small aimed the gun and shot Robert M. Bishop, Jr., in the head.

4. The agreement existed and any overt acts committed took place on or about April 8, 1981.

These are the essential elements or material allegations of the crime charged in Count II, and the State of Idaho is required to prove each of these elements beyond a reasonable doubt.

INSTRUCTION NO. 31

In this case, to warrant a verdict of guilty of the crime of Robbery, Count III, you must find from the evidence, beyond a reasonable doubt, that

1. On or about April 8, 1981, in Butte County, Idaho;
2. Robert M. Bishop Jr. had possession of certain personal property, to-wit: a wallet, containing credit cards, or a jacket, or a 1979 Ford Mustang automobile;
3. Randy Lynn McKinney took some of said property from the person, or immediate presence, of Robert M. Bishop Jr., and against his will;
4. Randy Lynn McKinney accomplished the taking by force or fear, and with the intent permanently to deprive Robert M. Bishop Jr. of the property.

These are the essential elements or material allegations of the crime charged in Count III, and the State of Idaho is required to prove each of these elements beyond a reasonable doubt.

INSTRUCTION NO. 3<sup>r</sup>

In this case, to warrant a verdict of guilty of the crime of Conspiracy to commit Robbery, Count IV, you must find from the evidence, beyond a reasonable doubt, that

1. Randy Lynn McKinney and Dovey Small intentionally agreed to commit the crime of Robbery in Idaho;
2. Randy Lynn McKinney and Dovey Small had the specific intent to commit such crime;
3. That during the existence of the agreement either Randy Lynn McKinney or Dovey Small committed in this state one of the following overt acts in furtherance of the Robbery of Robert M. Bishop, Jr.:
  - (a) Randy Lynn McKinney or Dovey Small invited and encouraged Robert M. Bishop, Jr., to take them in an automobile from Blackfoot, Idaho, to Arco, Idaho and the vicinity of Arco, Idaho.
  - (b) Randy Lynn McKinney or Dovey Small then encouraged Robert M. Bishop, Jr., to take Randy Lynn McKinney to an isolated area where there were no witnesses.
  - (c) At that time the said Randy Lynn McKinney took a loaded handgun into his possession.

(d) To complete the robbery Randy Lynn McKinney threatened or shot Robert M. Bishop, Jr., with the handgun.

(e) Randy Lynn McKinney, thereafter, took from the possession of and without the consent of Robert M. Bishop, Jr., his wallet, or his credit cards, or his jacket, or a 1979 Ford Mustang automobile.

(f) Randy Lynn McKinney or Dovey Small then used the said personal property as their own.

4. The agreement existed and any overt acts committed took place on or about April 8, 1981.

These are the essential elements or material allegations of the crime charged in Count IV, and the State of Idaho is required to prove each of these elements beyond a reasonable doubt.

INSTRUCTION 33

In Count I, the defendant is charged with being guilty of First Degree Murder:

- (1) By committing Murder by wilful, deliberate and premeditated killing; and
- (2) by committing Murder in the perpetration of, or attempt to perpetrate, Robbery.

You will first determine whether or not defendant is guilty beyond a reasonable doubt of either or both of the First Degree Murder charges. Form of verdict for First Degree Murder committed by wilful, deliberate and premeditated killing states in part "Guilty of First Degree Murder by wilful, deliberate and premeditated killing." Form of verdict for First Degree Murder committed in the perpetration of, or attempt to perpetrate, Robbery states in part "Guilty of First Degree Murder in the perpetration, or attempt to perpetrate, Robbery."

If you do not find the defendant guilty of First Degree Murder, you will then determine whether or not he is guilty beyond a reasonable doubt of Second Degree Murder.

If you do not find the defendant guilty of Second Degree Murder, you will then determine whether or not he is guilty beyond a reasonable doubt of Involuntary Manslaughter.

If you do not find the defendant guilty of Involuntary Man-  
slaughter, you will then find him not guilty as charged in Count I.



INSTRUCTION NO. 34

A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.

You are not bound to accept an expert opinion as conclusive, but should give it the weight to which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

INSTRUCTION NO. 35

1. On or about the 28th day of May, 1981, the Court entered an Order releasing Dovey Small from custody as a witness, providing that her oral deposition first be taken on June 6, 1981.
2. The oral deposition of Dovey Small was taken by the State of Idaho pursuant to the Order of the Court on June 6, 1981.
3. This Court has determined that Dovey Small is not available to be a witness at this trial by reason a sickness or infirmity. The Court has ordered that the deposition may be used by the State or the defendant.
4. Portions of that deposition have been read into the record by the State on direct examination and by the defendant on cross-examination.

INSTRUCTION NO. 36

You may only consider the testimony of witness Tana Hampton for the purpose of determining whether Denise Garner made the statements attributed by the witness to Denise Garner.

You may not consider the testimony of Tana Hampton for truth of the facts asserted in the statements purportedly overheard by Denise Garner.

INSTRUCTION NO. 31

You may not consider the testimony of Casey Wheelless as to any statements made to him by Dovey Small on the trips between the Denise Garner home and the Jackie Wheelless home unless you first find from other independent evidence that a conspiracy existed between Dovey Small and Randy Lynn McKinney to rob or murder Robert M. Bishop, Jr.

INSTRUCTION NO. 37a

You must not consider any testimony by Casey Wheelless as proof  
that Randy Lynn McKinney was wanted by the authorities.

INSTRUCTION NO. 38

Where the State seeks to prove guilt by circumstantial evidence, that circumstantial evidence must not only be consistent with guilt, it must also be inconsistent with any reasonable theory of innocence.

INSTRUCTION NO. 39

If the Court has repeated any rule, direction or idea, or stated the same in varying ways, no emphasis was intended and you must not draw any inference therefrom. You are not to single out any certain sentence or any individual point or instruction and ignore the others. You are to consider all the instructions as a whole and are to regard each in the light of all the others.

The order in which the instructions are presented to you has no significance as to their relative importance.

INSTRUCTION NO. 40

Arguments of the attorneys are proper for you to consider as an aid to you in recalling and analyzing the evidence, and in applying to the evidence the law as given you by the Court, and in determining reasonable inferences which may be drawn from such evidence; but such arguments are not evidence, and are not to be considered by you as such, and are proper matter to consider only in so far as the attorneys keep within the evidence admitted upon the trial, and the instructions of the Court.



INSTRUCTION NO. 41

In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous. Your verdict must represent the considered judgment of each juror.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

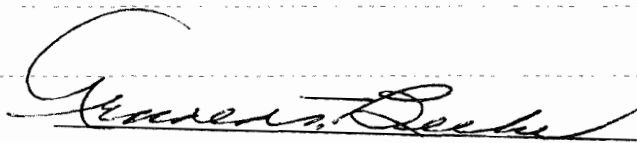
You are not partisans. You are judges -- judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

INSTRUCTION NO. 47

Upon retiring to the jury room you will select one of your members as foreman.

Suitable forms of verdict for any conclusion you may reach on each of the ~~two~~<sup>four</sup> counts are submitted to you with the Court's instructions. When you arrive at your verdicts, the foreman will sign them, and you will return them into open court.

DATED this 12<sup>th</sup> day of December, 1981.



DISTRICT JUDGE

# In the Supreme Court of the State of Idaho

STATE OF IDAHO, )  
 )  
 Plaintiff-Respondent, )  
 )  
 v. )  
 )  
 RANDY LYN MC KINNEY, )  
 )  
 Defendant-Appellant. )

ORDER GRANTING MOTION TO  
TAKE JUDICIAL NOTICE AND  
RESET THE BRIEFING SCHEDULE

Supreme Court Docket No. 38527-2011  
Butte County Docket No. 1981-38

On July 27, 2011, this Court issued an Order Granting Motion to Augment and to Suspend the Briefing Schedule directing the district court clerk to submit certain items requested by counsel for the Appellant to this Court within fourteen days of the date of that Order.

A MOTION REQUESTING THAT THE COURT TAKE JUDICIAL NOTICE AND RESET BRIEFING SCHEDULE was filed by counsel for Appellant on August 1, 2011, requesting this Court take judicial notice of the attached documents that were previously requested in the Motion to Augment and to Suspend the Briefing Schedule filed on July 25, 2011, and to reset the due date for filing of Appellant's Brief. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellant's MOTION TO TAKE JUDICIAL NOTICE be, and hereby is, GRANTED and the augmentation record shall include the documents listed below, copies of which accompanied this Motion:

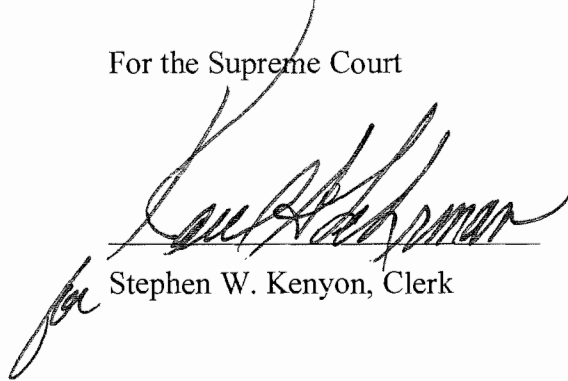
1. Criminal Complaint, file-stamped August 5, 1981;
2. Jury Instructions (from a transcript);
3. Five Jury Verdict forms, file-stamped 11-12-81;
4. Findings of the Court in Considering Death Penalty Under Section 19-2515, Idaho Code, file-stamped March 27, 1982; and
5. Judgment of Conviction Death Warrant, file-stamped March 27, 1982.

IT FURTHER IS ORDERED that the due date for filing Appellant's Brief shall be reset and Appellant's Brief shall be filed with this Court on or before thirty-five (35) days of the date of this Order.

ORDER GRANTING MOTION TO TAKE JUDICIAL NOTICE AND RESET THE BRIEFING SCHEDULE – Docket No. 38527-2011

DATED this 3<sup>rd</sup> day of August, 2011.

For the Supreme Court

A handwritten signature in cursive script, appearing to read "Stephen W. Kenyon", is written over a horizontal line. To the left of the signature, there is a small, handwritten mark that looks like "jw".

Stephen W. Kenyon, Clerk

cc: Counsel of Record  
District Court Clerk

ORDER GRANTING MOTION TO TAKE JUDICIAL NOTICE AND RESET THE BRIEFING  
SCHEDULE – Docket No. 38527-2011

Thomas E. Moss  
 Special Prosecuting Attorney  
 for Butte County  
 75 E. Judicial Street  
 Blackfoot, ID 83221  
 Phone: (208) 785-1940

FILED  
 8-5-81  
 By \_\_\_\_\_

DISTRICT COURT  
 THE JUDICIAL DISTRICT OF  
 CONNELLVILLE COUNTY, ID  
 OCT 23 3 02 PM '81

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BUTTE

MAGISTRATE'S DIVISION

STATE OF IDAHO,	)	Case No. <u>FC-81-38</u>
	)	
Plaintiff,	)	CRIMINAL COMPLAINT
	)	
vs.	)	
	)	
RANDY LYNN McKINNEY and	)	
DOVEY SMALL,	)	
	)	
Defendants.	)	

STATE OF IDAHO )  
 : ss.  
 County of Butte )

**RONNIE**  
 RONALD HINDS personally appeared before me this 5th day  
 of August, 1981, who, being sworn, complains and says:

COUNT I

That the defendant, RANDY LYNN McKINNEY, on or about the 8th day of April, 1981, at a place located approximately 5 miles north of Arco, Idaho and 1 mile east of Highway 93 on a county road in the County of Butte, State of Idaho, then and there being did then and there wilfully, unlawfully, deliberately and with premeditation and with malice aforethought or at a time when the said defendant was in the perpetration of, or attempting to perpetrate robbery, kill and murder one Robert M. Bishop, Jr. of Blackfoot, Idaho, a human being, by shooting said Robert M. Bishop, Jr. in the head with a revolver type handgun and thereby mortally wounding the said Robert M. Bishop, Jr. from which he died on the 8th day of April, 1981, in violation of Sections 18-4001 and 18-4003(a) and (d) of the Idaho Code.

Count I, Part 2

That at the time of the commission of the aforesaid crime, the said defendant, RANDY LYNN McKINNEY, carried, displayed, used, threatened or attempted to use a firearm while committing the aforesaid crime, in violation of Idaho Code 18-2520.

19-

COUNT II

That the said defendant, DOVEY SMALL, on or about the 8th day of April, 1981, in the County of Butte, State of Idaho, then and there being, did then and there aid and abet RANDY LYNN McKINNEY in the commission of the crime of murder in the first degree in that she did advise and encourage the said RANDY LYNN McKINNEY to wilfully,

unlawfully, deliberately, with premeditation and with malice aforethought, kill and murder Robert M. Bishop, Jr., a human being, or that she did advise and encourage the said RANDY LYNN McKINNEY to rob the said Robert M. Bishop, Jr., and that the said RANDY LYNN McKINNEY, acting on said advice and encouragement, did wilfully, unlawfully, deliberately and with premeditation and with malice aforethought, or at a time when the said RANDY LYNN McKINNEY was in the perpetration of, or attempting to perpetrate robbery, kill and murder one Robert M. Bishop, Jr. of Blackfoot, Idaho, a human being, by shooting said Robert M. Bishop, Jr. in the head with a revolver type handgun and thereby mortally wounding the said Robert M. Bishop, Jr. from which he died on the 8th day of April, 1981, in violation of Sections 18-4001 and 18-4003(a) and (d) of the Idaho Code.

#### COUNT III

That the said defendants, RANDY LYNN McKINNEY and DOVEY SMALL, on or about the 8th day of April, 1981, in the County of Butte, State of Idaho, did combine and conspire to commit the following crime against the people of the State of Idaho: THE CRIME OF MURDER IN THE FIRST DEGREE. That it was part of said conspiracy that the said defendants and co-conspirators would commit the crime of Murder in the First Degree in violation of Idaho Code Sections 18-4001 and 18-4003 (a) and (d).

In furtherance of the conspiracy, and to affect the purpose thereof, the defendants and co-conspirators performed the following overt acts: That the said defendants RANDY LYNN McKINNEY and DOVEY SMALL obtained a handgun. They then invited and encouraged one Robert M. Bishop, Jr. to take them in his automobile from Blackfoot, Idaho, to Arco, Idaho and areas around Arco. They then did invite and encourage Robert M. Bishop, Jr. to take the said Randy McKinney to an isolated place outside of Arco, Idaho at which time the said Randy Lynn McKinney took a handgun into his possession, either loaded or determined that it was in fact loaded, that he did aim the gun and shoot the said Robert M. Bishop, Jr. in the chest, that he did then walk toward Robert Bishop and aim the gun, from very short range and shoot the said Robert M. Bishop, Jr. four times in the head. *I.C. 18-1701.*

#### COUNT IV

That the said defendant, RANDY LYNN McKINNEY, on or about the 8th day of April, 1981, in the County of Butte, State of Idaho, did feloniously and by means of force or fear, take from the possession, from the person, or from the immediate presence of Robert M. Bishop, Jr. certain personal property, to-wit: a wallet containing money and credit cards, and a jacket belonging to Robert M. Bishop, Jr. and also a 1979 Ford Mustang automobile, the property of Great Western Financial Corporation d/b/a New America Real Estate, all of which was accomplished against the will of said Robert M. Bishop, Jr. in that the said defendant threatened to shoot and shot Robert M. Bishop, Jr. with a handgun. *I.C. 18-6501*

#### Count IV, Part 2

That at the time of the commission of the aforesaid crime, the said defendant, RANDY LYNN McKINNEY, carried, displayed, used, threatened or attempted to use a firearm while committing the aforesaid crime, in violation of Idaho Code 18-2520

*19 2520*

COUNT V

That the said defendant, DOVEY SMALL, on or about the 8th day of April, 1981, in the County of Butte, State of Idaho, did feloniously aid and abet the commission of the crime of ROBBERY by encouraging and advising RANDY LYNN McKINNEY who, in conformity with said encouragement and advice, feloniously and by means of force or fear, take from the possession, from the person, or from the immediate presence of Robert M. Bishop, Jr. certain personal property, to-wit: a wallet containing money and credit cards, and a jacket belonging to Robert M. Bishop, Jr. and also a 1979 Ford Mustang automobile, the property of Great Western Financial Corporation d/b/a New America Real Estate, all of which was accomplished against the will of said Robert M. Bishop, Jr. in that the said defendant threatened to shoot and shot Robert M. Bishop, Jr. with a handgun. *T.C. 18-6501*


COUNT VI

That the said defendants, RANDY LYNN McKINNEY and DOVEY SMALL, on or about the 8th day of April, 1981, in the County of Butte, State of Idaho, did combine and conspire to commit the following crime against the people of the State of Idaho: THE CRIME OF ROBBERY.

That it was part of said conspiracy that the said defendants and co-conspirators would commit the crime of Robbery in violation of Idaho Code Section 18-6501.

Overt act. In furtherance of the conspiracy, and to affect the purpose thereof, the defendants and co-conspirators performed the following overt acts: The said defendants did invite and encourage said Robert M. Bishop, Jr. to take them in an automobile from Blackfoot, Idaho to Arco, Idaho and the vicinity of Arco, Idaho, that they did then encourage him to take Randy Lynn McKinney to an isolated area where there were no other witnesses at which time the said Randy Lynn McKinney did take a handgun into his possession and either load or determine that it was loaded and did in the furtherance of said conspiracy and in order to complete the robbery, threaten and/or shoot the said Robert M. Bishop, Jr. with said handgun, taking his life and that he did thereafter take from the possession of and without the consent of the said Robert M. Bishop, Jr. his wallet, his credit cards and money, his jacket and a certain automobile described as a 1979 Ford Mustang, the property of Great Western Financial Corporation d/b/a New America Real Estate. Said defendants did then use the said personal property as their own. *T.C. 18-6501*

All of which is contrary to the form, force and effect of the statutes above cited, and against the peace and dignity of the People of the State of Idaho; WHEREFORE complainant requests a Warrant of Arrest be issued for the persons of: RANDY LYNN McKINNEY and DOVEY SMALL, and that they may be dealt with according to law.

  
RONALD HINDS  
*RONNIE*

SUBSCRIBED AND SWORN to before me this 5th day of August, 1981.

  
Magistrate

1 THE COURT: The instructions to the jury. Ladies  
2 and gentlemen, I am going to give you now the final instruc-  
3 tions in this case. The preliminary instructions I gave  
4 you at the beginning of the trial are included with these,  
5 but I will not again read those to you. Preliminary instruc-  
6 tions were 1, 1A, through 11.

7 "Instruction No. 12."

8 "Members of the Jury, it is my duty to instruct you  
9 in the law as it applies to this case, and you must follow  
10 the law as I state it to you in all of my instructions to  
11 you.

12 "As jurors, it is your exclusive duty to decide all  
13 questions of fact submitted to you. In performing this  
14 duty, you must not be influenced by pity for a defendant  
15 or by passion or prejudice against him. You must not infer  
16 guilt because the defendant has been arrested for this offense,  
17 or because a charge has been filed against him, or because  
18 he has been brought to trial; none of these facts is evidence  
19 of his guilt.

20 "In determining whether the defendant is guilty or  
21 not guilty, you must be governed solely by the evidence  
22 received in this trial and the law as stated to you by the  
23 Court. You must not be governed by mere sentiment, conjec-  
24 ture, sympathy, passion, prejudice, public opinion or public  
25 feeling.



1 "In case any of you have received information, or  
2 what purports to be information concerning the facts, from  
3 any other source than the evidence admitted by the Court  
4 at this trial, you are instructed to exclude such infor-  
5 mation from all consideration.

6 "Both the State of Idaho and the defendant have the  
7 right to expect that you will conscientiously consider and  
8 weigh the evidence and apply the law of the case, and that  
9 you will reach a just verdict regardless of what the conse-  
10 quences of such verdict may be."

11  
12 "It is not within your province to concern yourselves  
13 with the question of penalty or punishment. That feature  
14 of the case is solely for the Court.

15 "Your duty as jurors is solely to determine the guilt  
16 or innocence of the accused, and upon those questions and  
17 those questions alone, you as jurors are to vote and return  
18 your verdicts."

19  
20 "In every crime or public offense, there must exist  
21 a union or joint operation of act and intent, or criminal  
22 negligence.

23 "The intent with which an act is committed is but  
24 a mental state of the party committing it, and direct proof  
25 of such intent is not required, but the intent is generally

1 derived from and established by the attending facts and circum-  
2 stances, and the conduct of the defendant, as shown by the  
3 evidence.

4 "The intent or intention is manifested by the circum-  
5 stances connected with the offense, and the sound mind and  
6 discretion of the accused."

7  
8 "All persons are capable of committing crimes, except  
9 those belonging to the following classes:

10 "Persons who committed the act or made the omission  
11 charged under an ignorance or mistake of fact which disproves  
12 any criminal intent.

13 "Persons who committed the act charged without being  
14 conscious thereof;

15 "Persons who committed the act or made the omission  
16 charged through misfortune or by accident, when it appears  
17 that there was no evil design, intention, or criminal negli-  
18 gence."

19  
20 "No act committed by a person while in a state of  
21 voluntary intoxication from alcohol and/or drugs is less  
22 criminal by reason of his having been in such condition.  
23 But whenever the actual existence of any particular purpose,  
24 state of mind or intent is a necessary element to constitute  
25 any particular species or degree of crime, the jury may

1 take into consideration the fact the accused was intoxicated  
2 at the time, in determining the purpose, state of mind or  
3 intent with which he committed the act."

4  
5 "In this case you will be governed by the following  
6 definitions, among others which appear elsewhere in these  
7 instructions:

8 "Feloniously: The word 'feloniously' is used in  
9 accusations which charge the commission of a felony. It  
10 means that the act was done without justification or excuse.

11 "Knowingly: The word 'knowingly' imports only a  
12 knowledge that the facts exist which bring the act or omission  
13 within the provisions of the penal code. It does not require  
14 any knowledge of the unlawfulness of such act or omission.

15 "Unlawfully: Contrary to law or unauthorized by  
16 law.

17 "Wilfully: The word 'wilfully' when applied to the  
18 intent with which an act is done, implies simply a purpose  
19 or willingness to commit the act referred to. It does not  
20 require any intent to violate the law, or to injury another,  
21 or to acquire any advantage."

22  
23 "Each count charges a separate and distinct offense.  
24 You must decide each count separately on the evidence and  
25 the law applicable to it, uninfluenced by your decision

1 as to any other count. The defendant may be convicted or  
2 acquitted of the offenses charged in each count. Your find-  
3 ing as to each count must be stated in a separate verdict."  
4

5 "Murder is the unlawful killing of a human being  
6 with malice aforethought.

7 "Such malice may be express or implied. It is express  
8 when there is manifested a deliberate intention unlawfully  
9 to kill a human being. It is implied when no considerable  
10 provocation appears, or when the circumstances attending  
11 the killing show as abandoned and malignant heart. An aban-  
12 doned and malignant heart is a condition of heart and mind  
13 having no regard for social or moral obligations. Malice  
14 is implied when the killing results from an act involving  
15 a high degree of probability that it will result in death,  
16 which act is done for a base, antisocial purpose and with  
17 a wanton disregard for human life.

18 "Malice aforethought does not necessarily imply a  
19 pre-existing hatred or enmity toward the person killed.

20 "'Aforethought' does not imply deliberation or the  
21 lapse of considerable time. It only means that the required  
22 mental state must precede rather than follow the act."  
23

24 "There are two degrees of Murder: First and Second.

25 "Murder perpetrated by any kind of wilful, deliberate

1 and premeditated killing is of the first degree.

2 "Murder committed in the perpetration of, or attempt  
3 to perpetrate, robbery is of the first degree.

4 "For purposes of this case, all other kinds of Murder  
5 are of the second degree."

6  
7 "All murder which is perpetrated by any kind of wilful,  
8 deliberate and premeditated killing is murder of the first  
9 degree.

10 "The word 'deliberate' means formed or arrived at  
11 or determined upon a result of careful thought and weigh-  
12 ing of considerations for or against the proposed course  
13 of action. The word 'premeditated' means considered before-  
14 hand.

15 "If you find that the killing was preceded and accom-  
16 panied by a clear, deliberate intent on the part of the  
17 defendant to kill, which was the result of deliberation  
18 and premeditation, so that it must have been formed upon  
19 pre-existing reflection and not under a sudden heat of passion  
20 or other condition precluding the idea of deliberation,  
21 it is murder of the first degree.

22 "The law does not undertake to measure in units of  
23 time the length of the period during which the thought must  
24 be pondered before it can ripen into an intent to kill which  
25 is truly deliberate and premeditated. The time will vary

1 with different individuals and under varying circumstances.  
2 The true test is not the duration of time, but rather the  
3 extent of the reflection. A cold, calculated judgment and  
4 decision may be arrived at in a short period of time, but  
5 a mere unconsidered and rash impulse, even though it includes  
6 an intent to kill, is not such deliberation and premeditation  
7 as will fix an unlawful killing as murder in the first degree.  
8 To constitute a wilful, deliberate and premeditated killing,  
9 the slayer must weigh and consider the question of killing,  
10 decide to kill, and wilfully kill."

11

12 "The crime of Robbery is the taking of personal pro-  
13 perty in the possession of another, from his person or imme-  
14 diate presence, and against his will, accomplished by means  
15 of force or fear."

16

17 "Involuntary manslaughter is the unlawful killing  
18 of a human being without malice aforethought and without  
19 an intent to kill.

20 "In order to prove the commission of the crime of  
21 involuntary manslaughter, each of the following elements  
22 must be proved:

23 "1. That a human being was killed, and

24 "2. That the killing was unlawful.

25 "A killing is unlawful within the meaning of this

1 instruction if it occurred by the operation of any firearm  
2 in a reckless, careless or negligent manner which produces  
3 death.

4 "Negligent' imports a want of such attention to  
5 the nature of probable consequences of the act or omission  
6 as a prudent man ordinarily bestows in acting in his own  
7 concerns."

8

9 "Criminal conspiracy is a crime where two or more  
10 persons combine or conspire to commit any crime prescribed  
11 by the laws of the State of Idaho, and one or more of such  
12 persons does any act to further the object of the combination  
13 or conspiracy."

14

15 "The persons concerned in the commission of a crime  
16 who are regarded by law as principals in the crime thus  
17 committed and equally guilty thereof include:

18 "1. Those who directly and actively commit the act  
19 constituting the crime or;

20 "2. Those who, with knowledge of the unlawful pur-  
21 pose of the one who does directly and actively commit the  
22 crime, and with criminal intent, aid and abet in its commission,  
23 or;

24 "3. Those who, whether present or not at the com-  
25 mission of the crime, advise and encourage its commission."

1 "In this case, to warrant a verdict of guilty under  
2 Count I of the crime of First Degree Murder by wilful, deli-  
3 berate and premeditated killing, you must find from the  
4 evidence, beyond a reasonable doubt, that: either

5 "Part A

6 "1. The defendant, Randy Lynn McKinney;

7 "2. In Butte County, Idaho, on or about April 8,  
8 1981;

9 "3. With malice aforethought, wilfully, deliberately  
10 and with premeditation, unlawfully and intentionally killed  
11 Robert M. Bishop, Jr., a human being, by shooting and wound-  
12 ing with a firearm, and by such wounding, directly causing  
13 the death of Robert M. Bishop, Jr.

14 or

15 "Part B

16 "1. That Dovey Small;

17 "2. In Butte County, Idaho, on or about April 8,  
18 1981;

19 "3. With malice aforethought, wilfully, deliberately,  
20 and with premeditation, unlawfully and intentionally killed  
21 Robert M. Bishop, Jr., a human being, by shooting and wound-  
22 ing with a firearm, and by such wounding, directly causing  
23 the death of Robert M. Bishop, Jr.;

24 "4. That the defendant, Randy Lynn McKinney, with  
25 knowledge of Dovey Small's unlawful purpose and intention



1 to murder Robert M. Bishop, Jr., either, then and there,  
2 "a. with criminal intent, aided and abetted the  
3 commission of the murder of Robert M. Bishop, Jr., by Dovey  
4 Small; or

5 "b. whether or not present at the commission of  
6 the crime, advised and encouraged Dovey Small to commit  
7 the murder of Robert M. Bishop, Jr.

8 "Part A contains the essential elements or material  
9 allegations of First Degree Murder, by wilful, deliberate  
10 and premeditated murder, allegedly committed directly by  
11 Randy Lynn McKinney, in Count I, and the State of Idaho  
12 is required to prove each of these essential elements beyond  
13 a reasonable doubt.

14 "Part B contains the essential elements or material  
15 allegations of First Degree Murder, by wilful, deliberate  
16 and premeditated murder, allegedly committed directly by  
17 Dovey Small, and aided and abetted or advised and encouraged  
18 by Randy Lynn McKinney, in Count I and the State is required  
19 to prove each of these essential elements beyond a reasonable  
20 doubt."

21  
22 "In this case, to warrant a verdict of guilty under  
23 Count I of the crime of First Degree Murder by perpetrating,  
24 or attempting to perpetrate, Robbery, you must find from  
25 the evidence, beyond a reasonable doubt, that:

1           "1. The defendant, Randy Lynn McKinney;

2           "2. In Butte County, Idaho, on or about April 8,  
3 1981;

4           "3. In the perpetration of, or attempt to perpe-  
5 trate Robbery, intentionally or accidentally shot and wounded  
6 with a firearm, and by such wounding, directly caused the  
7 death of Robert M. Bishop, Jr.

8           "These are the essential elements or material alle-  
9 gations of such crime charged in Count I, and the State  
10 of Idaho is required to prove each of these elements beyond  
11 a reasonable doubt."

12

13           "In this case, to warrant a verdict of guilty of  
14 the crime of Second Degree Murder, you must find from the  
15 evidence, beyond a reasonable doubt, that:

16           "1. In Butte County, Idaho, on or about April 8,  
17 1981;

18           "2. Randy Lynn McKinney, unlawfully, and with malice  
19 aforethought;

20           "3. Intentionally shot and wounded Robert M. Bishop,  
21 Jr.;

22           "4. That Robert M. Bishop, Jr., thereupon died as  
23 a direct result of such wounding.

24           "These are the essential elements or material alle-  
25 gations of the lesser crime charged in Count I, and the

1 State of Idaho is required to prove each of these elements  
2 beyond a reasonable doubt."

3

4 "In this case, to warrant a verdict of guilty under  
5 Count I of the crime of Involuntary Manslaughter, you must  
6 find from the evidence, beyond a reasonable doubt, that:

7 "1. Defendant, Randy Lynn McKinney;

8 "2. In Butte County, Idaho, on or about April 8,  
9 1981;

10 "3. Without malice aforethought, unintentionally  
11 in the operation of a firearm in a reckless, careless, or  
12 negligent manner, shot and killed Robert M. Bishop, Jr.

13 "These are the essential elements or material alle-  
14 gations of such lesser crime charged in Count I, and the  
15 State of Idaho is required to prove each of these elements  
16 beyond a reasonable doubt."

17

18 "In this case, to warrant a verdict of guilty of  
19 Conspiracy to commit First Degree Murder, Count II, you  
20 must find from the evidence, beyond a reasonable doubt:

21 "1. Randy Lynn McKinney and Dovey Small intentionally  
22 agreed to commit the crime of First Degree Murder of Robert  
23 M. Bishop, Jr., in Idaho.

24 "2. That Randy Lynn McKinney and Dovey Small had  
25 the specific intent to commit the crime of First Degree

1 Murder of Robert M. Bishop, Jr.

2 "3. That during the existence of the agreement either  
3 Randy Lynn McKinney or Dovey Small committed in this state  
4 one of the following overt acts to effect the First Degree  
5 Murder of Robert M. Bishop, Jr.:

6 "a. Randy Lynn McKinney or Dovey Small invited and  
7 encouraged Robert M. Bishop, Jr., to take them in his auto-  
8 mobile from Blackfoot, Idaho, to Arco, Idaho, and areas  
9 around Arco.

10 "b. Randy Lynn McKinney or Dovey Small invited and  
11 encouraged Robert M. Bishop, Jr., to take Randy McKinney  
12 to an isolated place outside of Arco, Idaho.

13 "c. At that time the said Randy Lynn McKinney took  
14 a loaded handgun into his possession.

15 "d. The said Randy Lynn McKinney aimed the gun and  
16 shot Robert M. Bishop, Jr., in the chest.

17 "e. The said Randy Lynn McKinney or Dovey Small  
18 aimed the gun and shot Robert M. Bishop, Jr., in the head.

19 "4. The agreement existed and any overt acts committed  
20 took place on or about April 8, 1981.

21 "These are the essential elements or material alle-  
22 gations of the crime charted in Count II, and the State  
23 of Idaho is required to prove each of these elements beyond  
24 a reasonable doubt."

25

1 "In this case, to warrant a verdict of guilty of  
2 the crime of Robbery, Count III, you must find from the  
3 evidence, beyond a reasonable doubt, that

4 "1. On or about April 8, 1981, in Butte County,  
5 Idaho;

6 "Robert M. Bishop, Jr., had possession of certain  
7 personal property, to-wit: a wallet, containing credit  
8 cards, or a jacket, or a 1979 Ford Mustang automobile;

9 "3. Randy Lynn McKinney took some of said property  
10 from the person, or immediate presence, or Robert M. Bishop,  
11 Jr., and against his will;

12 "4. Randy Lynn McKinney accomplished the taking  
13 by force or fear and with the intent permanently to deprive  
14 Robert M. Bishop, Jr., of the property.

15 "These are the essential elements or material alle-  
16 gations of the crime charged in Count III, and the State  
17 of Idaho is required to prove each of these elements beyond  
18 a reasonable doubt."

19  
20 "In this case, to warrant a verdict of guilty of  
21 the crime of Conspiracy to commit Robbery, Count IV, you  
22 must find from the evidence, beyond a reasonable doubt,  
23 that:

24 "1. Randy Lynn McKinney and Dovey Small intentionally  
25 agreed to commit the crime of Robbery in Idaho;

1           "2. Randy Lynn McKinney and Dovey Small had the  
2 specific intent to commit such crime;

3           "3. That during the existence of the agreement either  
4 Randy Lynn McKinney or Dovey Small committed in this state  
5 ono of the following overt acts in furtherance of the Robbery  
6 of Robert M. Bishop, Jr.:

7           "(a) Randy Lynn McKinney or Dovey Small invited  
8 and encouraged Robert M. Bishop, Jr., to take them in an  
9 automobile from Blackfoot, Idaho, to Arco, Idaho, and the  
10 vicinity of Arco, Idaho.

11           "(b) Randy Lynn McKinney or Dovey Small then encour-  
12 aged Robert M. Bishop, Jr., to take Randy Lynn McKinney  
13 to an isolated area where there were no witnesses.

14           "(c) At that time, the said Randy Lynn McKinney  
15 took a loaded handgun into his possession.

16           "(d) To complete the robbery, Randy Lynn McKinney  
17 threatened or shot Robert M. Bishop, Jr., with the handgun.

18           "(e) Randy Lynn McKinney, thereafter, took from  
19 the possession of and without the consent of Robert M. Bishop  
20 Jr., his wallet, or his credit cards, or his jacket, or  
21 a 1979 Ford Mustang automobile.

22           "(f) Randy Lynn McKinney or Dovey Small then used  
23 the said personal property as their own.

24           "4. The agreement existed and any overt acts com-  
25 mitted took place on or about April 8, 1981.

1 may be used by the State or the defendant.

2 "Portions of that deposition have been read into  
3 the record by the State on direct examination and by the  
4 defendant on cross-examination."

5  
6 "You may only consider the testimony of witness Tana  
7 Hampton for the purpose of determining whether Denise Garner  
8 made the statements attributed by the witness to Denise  
9 Garner.

10 "You may not consider the testimony of Tana Hampton  
11 for the truth of the facts asserted in the statements pur-  
12 portedly overheard by Denise Garner."

13  
14 "You may not consider the testimony of Casey Wheelless  
15 as to any statements made to him by Dovey Small on the trips  
16 between the Denise Garner home and the Jackie Wheelless home  
17 unless you first find from other independent evidence that  
18 a conspiracy existed between Dovey Small and Randy Lynn  
19 McKinney to rob or murder Robert M. Bishop, Jr."

20  
21 "Where the State seeks to prove guilt by circum-  
22 stantial evidence, that circumstantial evidence must not  
23 only be consistent with guilt, it must also be inconsistent  
24 with any reasonable theory of innocence.

25

1            "If the Court has repeated any rule, direction or  
2 idea, or stated the same in varying ways, no emphasis was  
3 intended and you must not draw any inference therefrom.  
4 You are not to single out any certain sentence or any indi-  
5 vidual point or instruction and ignore the others. You  
6 are to consider all the instructions as a whole and are  
7 to regard each in the light of all the others.

8            "The order in which the instructions are presented  
9 to you has no significance as to their relative importance."

10  
11           "Arguments of the attorneys are proper for you to  
12 consider as an aid to you in recalling and analyzing evi-  
13 dence, and in applying to the evidence the law as given  
14 you by the Court, and in determining reasonable inferences  
15 which may be drawn from such evidence; but such arguments  
16 are not evidence, and are not to be considered by you as  
17 such, and are proper matter to consider only insofar as  
18 the attorneys keep within the evidence admitted upon the  
19 trial, and the instructions of the Court."

20  
21           "In order to return a verdict, it is necessary that  
22 each juror agree thereto. Your verdict must be unanimous.  
23 Your verdict must represent the considered judgment of each  
24 juror.

25           "It is your duty, as jurors, to consult with one



1 another and to deliberate with a view to reaching an agree-  
2 ment, if you can do so without violence to individual judg-  
3 ment. Each of you must decide the case for yourself, but  
4 do so only after an impartial consideration of the evidence  
5 with your fellow jurors. In the course of your deliber-  
6 ations, do not hesitate to reexamine your own views and  
7 change your opinion if convinced it is erroneous. But  
8 do not surrender your honest conviction as to the weight  
9 or effect of evidence solely because of the opinion of your  
10 fellow jurors, or for the mere purpose of returning a verdict.

11 "You are not partisans. You are judges -- judges  
12 of the facts. Your sole interest is to ascertain the truth  
13 from the evidence in the case."

14  
15 THE COURT: There will be one final instruction after  
16 the arguments of counsel.

17 Mr. Moss.

18 MR. MOSS: Ladies and gentlemen -- may it please  
19 the Court and counsel.

20 THE COURT: Mr. Moss.

21 MR. MOSS: Ladies and gentlemen, at this point in  
22 the trial, the State has the opportunity and obligation  
23 to give what's called an opening summation where I will  
24 review the facts that I think the State has established  
25 that have proved the charges the State has alleged against

1 this defendant. After my opening summation, Mr. Carlson  
2 will have an opportunity to give his final summation. Then  
3 I will be allowed a rebuttal opportunity following that.

4 Now, first let me say to you at this time, on behalf  
5 of myself and Mr. Kennedy, our sincere appreciation for  
6 the services you have rendered here. You have been atten-  
7 tive. You have paid attention. And I feel confident that  
8 you have given this case a very honest consideration.

9 I also would like to thank the Court for his cour-  
10 tesies and patience in the course of this trial. And, Mr.  
11 Carlson, Mr. Carlson has done a valiant job for his client,  
12 and throughout the proceeding, he has proved himself to  
13 be a gentleman and a very worthy advocate, and we appre-  
14 ciate that.

15 Now, at the beginning of the case, and while you  
16 were being called as jurors, a lot of questions were asked  
17 about the burden the State had, and it became apparent very  
18 early that the State had the burden of proving the defen-  
19 dant's guilty beyond reasonable doubt. The State has the  
20 burden of proving the material elements of the crimes charged  
21 beyond a reasonable doubt. And that's really what we're  
22 talking about, isn't it, the material elements.

23 In an effort to assist in evaluating what those material  
24 elements are, I was late into the night last night making  
25 some little charts here so if my printing looks shaky, I

1 off-the-record discussion was had.)

2 THE COURT: Now, the Court has submitted Preliminary  
3 Instruction No. 1 to counsel. I understand that counsel  
4 are willing to stipulate to waive the reading of the Infor-  
5 mation and the statement of the plea, and in lieu thereof  
6 have the Court give as Preliminary Instruction, Instruction  
7 No. 1, is that correct?

8 MR. CARLSON: Your Honor, on behalf of Randy McKinney;  
9 I have discussed this matter with him. We are willing to  
10 waive the reading of the Information and have the Court give  
11 what it has indicated would be Instruction No. 1.

12 THE COURT: Thank you, sir. The State?

13 MR. KENNEDY: The State would agree with that.

14 THE COURT: Very well.

15 Ladies and gentlemen of the jury, at this time, the  
16 Court is going to give you some preliminary instruction in  
17 this case. Thereafter, we will take a short recess for some  
18 legal matters that concern the Court alone, and then when  
19 we reconvene, we will proceed with the opening statements,  
20 and thereafter, the adducing of testimony.

21 "Instruction No. 1. The defendant, Randy Lynn  
22 McKinney, is here for trial upon an Information filed  
23 in this court, by the Special Prosecuting Attorney  
24 of Butte County, Idaho, accusing the defendant with  
25 various crimes, Count I - First Degree Murder;

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Count II - Conspiracy to Commit Murder; Count III - Robbery; Count IV - Conspiracy to Commit Robbery.

"The Information alleges the crimes to have been committed as follows:

COUNT I

"That the defendant, Randy Lynn McKinney, on or about the 8th day of April, 1981, at a place located approximately 5 miles north of Arco, Idaho, and 1 mile east of Highway 93 on a county road in the County of Butte, State of Idaho, then and there being, did then and there willfully, unlawfully, deliberately and with premeditation and with malice aforethought or at a time when the said defendant was in the perpetration of, or attempting to perpetrate robbery, kill and murder one Robert M. Bishop, Jr., of Blackfoot, Idaho, a human being, by shooting said Robert M. Bishop, Jr., in the head with a revolver type handgun and thereby mortally wounding the said Robert M. Bishop, Jr., from which he died on the 8th day of April, 1981."

COUNT II

"That the said defendant, Randy Lynn McKinney, and Dovey Small, on or about the 8th day of April, 1981, in the County of Butte, State of Idaho, did combine and conspire to commit the following crime against the people of the State of Idaho: The Crime of

1 Murder in the First Degree. That it was part of said  
2 conspiracy that the said defendant and Dovey Small,  
3 co-conspirators, would commit the crime of Murder  
4 in the First Degree."

5 "In furtherance of the conspiracy, and to effect  
6 the purpose thereof, the defendant and his co-  
7 conspirator performed the following overt acts: 1)  
8 The said defendant, Randy Lynn McKinney, and Dovey  
9 Small obtained a handgun. 2) They then invited and  
10 encouraged one Robert M. Bishop, Jr., to take them  
11 in his automobile from Blackfoot, Idaho, to Arco,  
12 Idaho, and areas around Arco. 3) They then did invite  
13 and encourage Robert M. Bishop, Jr., to take said  
14 Randy McKinney to an isolated place outside of Arco,  
15 Idaho. 4) At that time the said Randy Lynn McKinney  
16 took a handgun into his possession, either loaded  
17 or determined that it was in fact loaded. 5) The  
18 said Randy Lynn McKinney then did aim the gun and  
19 shoot the said Robert M. Bishop, Jr., in the chest.  
20 6) After shooting the victim in the chest, the said  
21 McKinney did then walk toward Robert Bishop, Jr.,  
22 and aim the gun, from a very short range, and shoot  
23 the said Robert M. Bishop, Jr., four times in the  
24 head."  
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COUNT III

"That the said defendant, Randy Lynn McKinney, on or about the 8th day of April, 1981, in the County of Butte, State of Idaho, did feloniously and by means of force or fear, take from the possession, from the person or from the immediate presence of Robert M. Bishop, Jr., certain personal property, to-wit: a wallet containing money and credit cards, and a jacket belonging to Robert M. Bishop, Jr., and also a 1979 Ford Mustang automobile, the property of Great Western Financial Corporation d/b/a New American Real Estate, all of which was accomplished against the will of said Robert M. Bishop, Jr., in that the said defendant threatened to shoot and shot Robert M. Bishop, Jr., with a handgun."

COUNT IV

"The said defendant, Randy Lynn McKinney, and Dovey Small, on or about the 8th day of April, 1981, in the County of Butte, State of Idaho, did combine and conspire to commit the following crime against the people of the State of Idaho: The Crime of Robbery. That it was part of said conspiracy that the said defendant and Dovey Small, co-conspirator, would commit the crime of robbery in violation of Idaho Law."

"In furtherance of the conspiracy and to effect

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the purpose thereof, the defendant and Dovey Small, co-conspirators, performed the following overt acts: 1) The said defendant and Dovey Small did invite and encourage said Robert M. Bishop, Jr., to take them in an automobile from Blackfoot, Idaho, to Arco, Idaho, and the vicinity of Arco, Idaho; 2) That they did encourage him to take Randy Lynn McKinney and Randy Lynn McKinney did take a handgun into his possession and either load or determine that it was loaded..." --

THE COURT: I think there is a typographical error here, excuse me.

(Short pause.)

THE COURT: Yes. I will pick up the paragraph that was partially read to you and complete it.

COUNT IV

"The said defendant, Randy Lynn McKinney, and Dovey Small, on or about the 8th day of April, 1981, in the County of Butte, State of Idaho, did combine and conspire to commit the following crime against the people of the State of Idaho: The Crime of Robbery. That it was part of said conspiracy that the said defendant and Dovey Small, co-conspirators, would commit the crime of robbery in violation of Idaho Law."

1            "In furtherance of conspiracy, and to effect  
2            the purpose thereof, the defendant and Dovey Small,  
3            co-conspirators, performed the following overt acts:  
4            1) The said defendant and Dovey Small did invite  
5            and encourage said Robert M. Bishop, Jr., to take  
6            them in an automobile from Blackfoot, Idaho, to Arco,  
7            Idaho, and the vicinity of Arco, Idaho; 2) That they  
8            did then encourage him to take Randy Lynn McKinney,  
9            and Randy Lynn McKinney did take a handgun into his  
10           possession and either load or determine that it was  
11           loaded; and 3) Did in the furtherance of said con-  
12           spiracy, and in order to complete the robbery, threat-  
13           ened and/or shoot the said Robert M. Bishop, Jr.,  
14           with said handgun, taking his life; 4) That he did  
15           thereafter take from the possession of, and without  
16           the consent of the said Robert M. Bishop, Jr., his  
17           wallet, his credit cards and money, his jacket, and  
18           a certain automobile described as a 1979 Ford Mustang,  
19           the property of Great Western Financial Corporation  
20           d/b/a New America Real Estate; 5) The said defendant  
21           and Dovey Small did then use the said personal pro-  
22           perty as their own."

23           "Now, to each count of this Information, the  
24           defendant has, prior to this trial, interposed a plea  
25           of 'not guilty.'"



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"These pleas require the State to prove every material allegation of any Count before the defendant can be found guilty thereof."

"Preliminary Instruction No. 1(a): The Information filed against the defendant is merely an accusation, and should not be considered by you as evidence, or allowed to prejudice you or influence your minds against the defendant. The Information, in this case, is a mere formal charge for the purpose of putting the defendant on trial, constitutes no evidence of his guilt, and no juror shall weigh it as any evidence against the defendant."

"Preliminary Instruction No. 2: Before you can convict the defendant of any crime charged in any count against him by the Information, you must require the prosecution to prove every material allegation contained in the Information beyond a reasonable doubt; and if, after a consideration of all of the evidence in the case, you entertain a reasonable doubt of the truth of any one of these material allegations of any count then it is your duty to give the defendant the benefit of such doubt and acquit him."

"Preliminary Instruction No. 3: A defendant in a criminal action is presumed to be innocent until

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the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything related to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

"Preliminary Instruction No. 4: The rule of law, which clothes every person accused of crime with the presumption of innocence, and imposes upon the state the burden of proving his guilt beyond a reasonable doubt, is not intended to aid anyone who is in fact guilty to escape, but is a humane provision of law, intended, so far as human agencies can, to guard against the danger of an innocent person being unjustly punished."

"Preliminary Instruction No. 5: It is not necessary that all the facts and circumstances surrounding

1 the testimony and the evidence that is given on behalf  
2 of the State shall be established beyond a reasonable  
3 doubt. It is necessary that all the facts and circum-  
4 stances in evidence, together, shall establish the  
5 defendant's guilt beyond a reasonable doubt."

6 "Preliminary Instruction No. 6: Your function  
7 as jurors is to determine what the facts are and  
8 apply the rules of law that I give you to the facts  
9 as you determine them to be. You will then attempt  
10 to reach a conclusion as to the guilt or innocence  
11 of the defendant. That conclusion will be your ver-  
12 dict. You will determine what the facts are from  
13 all the testimony and the exhibits that are submitted.  
14 You are the sole judges, the exclusive judges, of  
15 the facts. In that field neither I nor anyone else  
16 may invade your province. I shall endeavor to pre-  
17 side impartially and not to express my opinion con-  
18 cerning the facts. On the other hand, and with equal  
19 emphasis, I instruct you that you are bound to accept  
20 the rules of law that I give you, whether you agree  
21 with them or not."

22 "Preliminary Instruction No. 7: You must deter-  
23 mine which of the witnesses you believe, what portion  
24 of their testimony you accept, and what weight you  
25 attach to it. At times during the trial I may sustain

1 objections to questions asked without permitting  
2 the witness to answer, or, where an answer has been  
3 made, I may instruct that it be stricken from the  
4 record and that you disregard it and dismiss it from  
5 your minds. You may not draw any inference from  
6 an unanswered question nor may you consider testi-  
7 mony which has been stricken in reaching your decision.  
8 The law requires that your decision be made solely  
9 upon the competent evidence before you. Such items  
10 as I exclude from your consideration will be excluded  
11 because they are not legally admissible in a trial."  
12 "Preliminary Instruction No. 8: The law does  
13 not, however, require you to accept all the evidence  
14 I shall admit, even though it be competent. In deter-  
15 mining what evidence you will accept, you must make  
16 your own evaluation of the testimony given by each  
17 of the witnesses and determine the degree of weight  
18 you choose to give to that witness's testimony. The  
19 testimony of a witness may fail to conform to the  
20 facts as they occurred because the witness is inten-  
21 tionally telling a falsehood, or because the witness's  
22 recollection of the event is faulty, or because the  
23 witness did not accurately see or hear that about  
24 which the witness testifies, or because the witness  
25 has not expressed himself clearly in giving the

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testimony. There is no magic formula by which one may evaluate testimony. You bring with you into this courtroom all of the experience and background of your lives. In your everyday affairs, you determine for yourselves the reliability or unreliability of statements made to you by others.

"The same tests that you use in your everyday dealings are the tests which you apply in your deliberations. The interest or lack of interest of any witness in the outcome of this case, the bias or prejudice of a witness, if there be any, the appearance, the manner in which the witness gives his testimony on the stand, the opportunity that the witness had to observe the facts concerning which he testifies, the probability or improbability of the witness's testimony when viewed in the light of all of the other evidence in the case, are all items to be taken into your consideration in determining the weight, if any, you will assign to that witness's testimony."

"Preliminary Instruction No. 9: When I have completed these opening instructions to you, the attorneys will have opportunity to make opening statements to you, in which each will outline for you what he expects to prove as his client's case. The purpose of such opening statements is to give you

1 each party's claims so that you will better under-  
2 stand the evidence as it unfolds before you. What  
3 is said in such statements is not itself evidence,  
4 however."

5 "Preliminary Instruction No. 10: At times during  
6 the trial, objection may be made to the introduction  
7 of evidence, or motions concerning applicable law  
8 or procedure may be made. Arguments in connection  
9 with such objections are sometimes made out of the  
10 jury's presence. Any ruling upon such objections  
11 or motions will be based solely upon the law. You  
12 must not infer from any such ruling or from anything  
13 I say during the course of the trial that I hold  
14 any views for or against either side of this case."

15 "Preliminary Instruction No. 11: Evidence may  
16 be either direct or circumstantial. It is direct  
17 evidence if it proves a fact, without an inference,  
18 and which in itself, if true, conclusively establishes  
19 that fact. It is circumstantial evidence if it proves  
20 facts from which an inference of the existence of  
21 another fact may be drawn.

22 "An inference of fact is one which may logically  
23 and reasonably be drawn from another fact or group  
24 of facts established by the evidence.

25 "The law makes no distinction between direct

1 and circumstantial evidence as to the degree of proof  
2 required; each is accepted as a reasonable method  
3 of proof and each is respected for such convincing  
4 force as it may carry."

5 THE COURT: Now, ladies and gentlemen of the jury,  
6 as I informed you, there was a matter for the Court alone.  
7 And I am going to excuse you for approximately ten minutes.  
8 I am going to remind you to heed the admonition that you  
9 must not discuss this case with any person or among your-  
10 selves. You must not form or express any opinion concerning  
11 this case. You may now pass from the courtroom, please.

12 If you will remain seated while the jury leaves the  
13 courtroom.

14 (WHEREUPON, at 10:31 o'clock a.m., the jury left  
15 the courtroom, and the following proceedings were had and  
16 entered of record, to-wit:)

17 THE COURT: Now, counsel, there was a matter which  
18 came up concerning the presence of particular witnesses.  
19 We'll start with the premises that witnesses have been ex-  
20 cluded, and I believe there was an exception, was there  
21 not, already on the part of the defendant's witnesses, is  
22 that correct, Mr. Carlson?

23 MR. CARLSON: Yes, sir.

24 THE COURT: Or was there --

25 MR. CARLSON: I believe Mr. Hinds is present as


DISTRICT COURT  
7TH JUDICIAL DISTRICT  
BONNEVILLE COUNTY ID

Nov 12 11 33 AM '81

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

STATE OF IDAHO,	)	
	)	
Plaintiff,	)	Case # 3462
	)	
-vs-	)	
	)	VERDICT OF THE JURY
RANDY LYNN MCKINNEY,	)	
	)	COUNT I
Defendant.	)	

WE, THE JURY, find the defendant Guilty of First Degree  
Murder by wilful, deliberate and premeditated killing.

  
\_\_\_\_\_  
FOREMAN



DISTRICT COURT  
7TH JUDICIAL DISTRICT  
BONNEVILLE COUNTY ID

Nov 12 11 33 AM '81

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

STATE OF IDAHO,	)	
	)	
Plaintiff,	)	Case No. 3462
	)	
-vs-	)	VERDICT OF THE JURY
	)	
RANDY LYNN MCKINNEY,	)	COUNT I
	)	
Defendant.	)	

WE, THE JURY, find the defendant Guilty of First Degree  
Murder in the perpetration, or attempt to perpetrate, Robbery.

W. E. Hill

FOREMAN

DISTRICT COURT  
7TH JUDICIAL DISTRICT  
BONNEVILLE COUNTY ID

NOV 12 11 33AM '81

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

STATE OF IDAHO,	)	
	)	
Plaintiff,	)	Case No. 3462
	)	
-vs-	)	VERDICT OF THE JURY
	)	
RANDY LYNN MCKINNEY,	)	COUNT II
	)	
Defendant.	)	
	)	

WE, THE JURY, find the defendant Guilty of Conspiracy  
to Commit Murder.

*Ole E. Hill*

FOREMAN

DISTRICT COURT  
7TH JUDICIAL DISTRICT  
BONNEVILLE COUNTY ID

Nov 12 11 33 AM '81

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

STATE OF IDAHO,	)	
	)	
Plaintiff,	)	Case No. 3462
	)	
-vs-	)	VERDICT OF THE JURY
	)	
RANDY LYNN MCKINNEY,	)	COUNT III
	)	
Defendant.	)	
	)	

WE, THE JURY, find the defendant Guilty of Robbery.



FOREMAN

DISTRICT COURT  
7TH JUDICIAL DISTRICT  
BONNEVILLE COUNTY ID

Nov 12 11 33 AM '81

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

STATE OF IDAHO, )

Plaintiff, )

-vs- )

RANDY LYNN MCKINNEY, )

Defendant. )  
\_\_\_\_\_ )

Case No. 3462

VERDICT OF THE JURY

COUNT IV

WE, THE JURY, find the defendant Guilty of Conspiracy to  
Commit Robbery.

*Dale E. Hill*

FOREMAN

APR 27 19 27 1972

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

STATE OF IDAHO, )  
 )  
 Plaintiff, )  
 )  
 -vs- )  
 )  
 RANDY LYNN MC KINNEY, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

Case No. 3462  
FINDINGS OF THE COURT IN  
CONSIDERING DEATH PENALTY  
UNDER SECTION 19-2515,  
IDAHO CODE

THE COURT MAKES THE FOLLOWING FINDINGS:

1. Conviction

The above defendant was found guilty of murder of the first degree by a jury. Defendant was, and now is, represented by William G. Carlson, Esq., court-appointed counsel.

Idaho Code 13-4004 provides every person guilty of murder of the first degree shall be punished by death or imprisonment for life, subject to the provision of Idaho Code 19-2515.

Idaho Code 19-2515 provides that a death sentence shall not be imposed unless the court finds, beyond a reasonable doubt, at least one of the statute's enumerated aggravating circumstances; and, if so found, the court shall impose a death sentence unless the court finds mitigating circumstances that outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

The defendant was also found guilty of jury verdict of conspiracy to commit murder, conspiracy to commit robbery and

robbery; all as to the murder victim.

## 2. Presentence Report

A presentence report was prepared by order of the court and a copy delivered to defendant's counsel at least seven days prior to sentencing hearing pursuant to I.C. 19-2515, and the Idaho Criminal Rules. At the sentencing hearing, upon motion of the defendant, the defendant's version of the criminal act and his explanation for the act which emanated from the presentence interview with the defendant, were stricken as being violative of the fifth amendment rights of defendant, as were the attached psychiatric and psychological reports. See, Estelle v. Smith, 68 L Ed 2d 359, (1981). The presentence report, as so modified was ordered filed for consideration by the court. The defendant objected to police reports and witness statements attached to the presentence report; the court denied the Motion. Upon reconsideration, and for the reason that such matters should not be considered in sentencing in a capital case, the same having been ordered stricken and to be disregarded.

## 3. Sentencing Hearings

A sentencing hearing was held Friday, March 5, 1982, for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. The court adjourned the hearing to Tuesday, March 9, 1982, and on such date the matter was further heard and submitted for the findings of the court in considering the death penalty. Two reasons for continuing the hearing were: (1) to afford the state the opportunity to furnish further foundation for admittance of offered exhibits, and (2) for the defendant to prepare for argument as to the statutory aggravating circumstances upon which the state announced it was relying.

4. Facts and Arguments found in  
Aggravation and Statutory  
Aggravating Circumstance found  
Under Section 19-2515, Idaho Code

The defendant and Dovey Small were lovers, they left Bullhead, Arizona and hitchhiked into California to visit with various of the defendant's relatives. From California they hitchhiked with their destination being somewhere in Oregon where the defendant would obtain employment working in the woods. They planned to stop in Blackfoot, Idaho, where Dovey Small's two sisters lived. In their hitchhiking toward Blackfoot, Idaho, they had with them clothing, little money and equipment for outdoor sleeping. They more or less lived off the land and several kind persons with whom they caught rides bought them something to eat. The defendant had a .22 revolver; he planned on going big time -- no more penny-ante. They reached Malad, Idaho, and stayed in a motel for two nights. During the evening of April 7, 1981, when they arrived in Blackfoot, Idaho, the plans of the defendant and Dovey were discussed and a basic plan was conceived whereby Dovey and Randy would hitchhike on to Montana. Pursuant thereto, Ada Mangum, a sister of Dovey, contacted Robert M. Bishop, Jr., who had a motor vehicle to lend assistance to Dovey and Randy on their way hitchhiking from some point along Interstate Highway I-15; perhaps from a point out of Idaho Falls. The next morning it was expected that Robert M. Bishop, Jr., would appear. The thought of killing Mr. Bishop had already entered defendant's mind. It was determined to be advisable for them to go to Montana by way of Arco and the highway which leads up through Salmon, Idaho and into Montana, because jobs might be more readily available in that area of Montana which is primarily agricultural and ranching.

Mr. Bishop, Ada Mangum, the defendant and Dovey proceeded toward Arco. They stopped on the way at a bar near Atomic City, called Sam's Place, where they drank some beer and played some pool. Either before departing that morning and prior to arriving at Arco, or perhaps, both, there was passed around among them a marijuana cigarette. The parties went on through Arco to a town called Moore about seven miles north of Arco. There they went to a club called the Antlers Club and again drank some beer and played some pool. Because Dovey hoped to collect some money owed her by Jacquelyn Wheelless and because Ada wanted to visit a friend who lived in Arco, Denise Garner, they proceeded to a home in Arco where Denise Garner lived with her two children and a boyfriend, Casey Wheelless. Casey Wheelless was the son of Jacquelyn Wheelless. He told them Jacquelyn was living in a trailer home a few miles out of Arco toward Butte City. The group decided to go to Jacquelyn's home. Casey was to accompany them to show them where the residence was. On the way Dovey and Ada rode with Casey Wheelless in his vehicle and Robert Bishop and the defendant followed in Bishop's vehicle. On the way the Wheelless vehicle stopped, Dovey went back and conferred with Randy momentarily, and Randy gave Dovey the .22 revolver. Dovey returned to the Wheelless car. The vehicles proceeded and on the way Dovey stuck her arm out the window and shot the .22 revolver once. At the Jackie Wheelless residence Dovey was unsuccessful in collecting her money and there was an argument concerning Dovey's right to be paid. Mr. Bishop favored the position that Dovey was entitled to her money. The parties then returned to the residence of Denise Garner where they all went in for a few minutes. Dovey and Randy spent the time in the kitchen with Casey Wheelless. Dovey told Casey Wheelless that he "owed her one" and tried to get Casey Wheelless to kill Mr. Bishop so that she and the defendant could



take the Bishop vehicle and Bishop's credit cards and be on their way. Wheelless declined to have anything to do with it. Defendant and Dovey then inquired of Wheelless where they might find a remote spot in the desert where they could kill Bishop and cover up or burn his body. Ada called the Antlers Club and talked with the manager-bartender, Roy Helderman, and asked him whether he would buy her a beer if she brought him some business. The group left Arco and proceeded to the Antlers Club where Dovey, the defendant and Ada exited the car. The defendant and Dovey held a brief conversation near the vehicle. Ada waited for Dovey nearer the Club's entrance beyond earshot. Ada and Dovey then proceeded into the bar. The defendant and Mr. Bishop did not come in. Dovey and Ada engaged in a pool game with two men and each drank part of a beer.

Defendant and Mr. Bishop drove to an old gravel pit where they prepared for target practice. Defendant shot Mr. Bishop through the arm, the chest and into the backbone. Thereafter, defendant approached and in execution style placed four bullets into the brain of Mr. Bishop. Minutes after defendant had departed with Mr. Bishop, he appeared just inside the door of the bar and summoned the women to leave. They immediately proceeded out of the bar. The absence of Mr. Bishop and the presence of his car suggested a question propounded by one or the other of the women as to Mr. Bishop's whereabouts. Randy replied "I killed him. I shot him once in the stomach and five times in the head." Disbelief was expressed and Randy said he would show them. Thereupon Randy drove the vehicle to the old gravel pit situated a few miles away and stopped the car. The women observed Mr. Bishop lying on the ground. With defendant driving, the party of three then proceeded in Mr. Bishop's car toward Blackfoot.

As Dovey sat upon Mr. Bishop's jacket (which was on the console between the two passenger seats in the front of the vehicle) she examined Mr. Bishop's wallet. The defendant and Dovey cautioned Ada not to say anything about the matter. Ada was let out at her trailer home in the Blackfoot area. Dovey and the defendant proceeded to Pocatello where they used one of Bishop's credit cards to buy gasoline. The defendant forged Bishop's name on the purchase slip. Dovey had left her dog with Ada's daughter. A call was made to Ada advising her that they were returning to pick up the dog. In the meantime, Ada had communicated to friends what had occurred and the police were informed. Police responded by proceeding to the Mangum residence.

Dovey and the defendant arrived from Pocatello and proceeded to a bowling alley near Ada Mangum's trailer home. They phoned Ada's home, inquiring of noticed police activity there, and advised of their presence at the bowling alley. This information was relayed to the police and custody of the defendant resulted.

These facts proven at trial compel this court's finding, hereby made, that beyond a reasonable doubt defendant in the perpetration of the robbery of Robert M. Bishop, Jr., inflicted mortal gun shot wounds accompanied with a specific intent to cause the death of Robert M. Bishop, Jr., a human being. This conduct is encompassed by aggravating circumstance, Idaho Code 19-2515(f) (7), which is found beyond a reasonable doubt.

Defendant's argument against the aggravating circumstance found was that defendant's trial testimony to the effect that his part of the shooting was accidental and that Dovey Small administered the coup de grace should be believed.

In this, it is argued that the time period required by

pathology opinion between the first shot to the body and the four shots to the head, when considered with the travel time involved, was longer than the defendant's absence from the bar as estimated by the witnesses.

Defendant's first version (to the police April 9, 1981) was that Dovey's and his dog playfully bit his heel and caused the gun to discharge killing Bishop; that his next recollection was going back to the bar to get the women, telling them what happened; and at their suggestion, going back to see if Bishop was alive; trying to lift Bishop; leaving because of being scared. Ex. S at trial; Ex. F at sentencing hearing.

Defendant's version at trial was that he accidentally shot Bishop, returned to the bar for the women and went back to the scene where Dovey Small took the gun and pumped five shots into Bishop.

Defendant's version at trial concerning the shooting was a pure fabrication.

The argued discrepancy between witness estimates of time interval of defendant's absence from the bar, 15 to 30 minutes, vis a vis pathology evidence and opinion as to the time interval between the first shot and the four head shots has basic problems. The evidence of the absence interval is strictly estimation. The pathology evidence and opinion can be satisfied by 5 to 10 minutes. The round trip travel distance by road is 5 to 7½ miles depending upon the chosen route. There is no necessary discrepancy.

The import of what the jury found is irrelevant to the court's findings as to the statutory aggravating circumstances. I.C. 19-2515 directs court findings to be made upon evidence. The jury verdict simply triggers consideration of the death penalty.

For what it is worth:

The different methods charged in Count I of the Information as to committing murder of the first degree: (1) wilfull, deliberate and premeditated murder; and (2) felony murder, resulted in jury verdicts of guilty as to both methods of committing the murder. The court's instructions as to the elements of the crimes, murder of the first degree, and robbery, and the guilty verdicts thereon, reveal that the jury found beyond a reasonable doubt, the defendant planned to rob and kill and did rob and kill Robert M. Bishop, Jr. In addition, the jury found defendant guilty of conspiracy to commit murder of the first degree and guilty of conspiracy to commit robbery; these as to the victim, Robert M. Bishop, Jr.

Aggravating circumstance, Standard 7, which has been found by the court in this case beyond a reasonable doubt is a standard which is specifically or objectively measureable. See Godfrey vs. Georgia, 64 L. Ed. 2d 398, 403 n.2(1980); also see Gregg vs. Georgia, 49 L. Ed. 2d 859, (1976), for similarity of the aggravating standard applied and crime involved.

In addition to Standard 7 the State argued the applicability of Standard 6. "By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life." I.C. 19-2515(f)(6).

Standard 6 is said to reach the cold-blooded, pitiless slayer. Osborn, 631, P. 2d at 201. In Osborn the Idaho Supreme Court stated Standard 6 overlapped with the statutory aggravating circumstances of I.C. 19-2515 (f)(2), (f)(3), (f)(5). By parity of reasoning Standard 6 could well overlap with Standard 7. In this, it can be said that one who plans to and does murder to rob the victim has exhibited an utter disregard for human life.

The court believes that the procedure employed in the sentencing decision is not a mere counting process of "X" number of aggravating circumstances and "Y" number of mitigating circumstances, but a reasoned judgment weighing the facts of a case meeting an aggravating standard against mitigating circumstances to determine whether imposition of death penalty is mandated by law. State v. Dixon, 283 So.2d 1, 10 (Fla. 1973); Osborn, 631 P. 2d at 208, (Bistline, J. concurring).

It is gleaned, perhaps to the contrary, the Idaho Supreme Court is of the view that all statutory aggravating circumstances found will go into the valuation process whereby the statutory aggravating circumstance or circumstances are balanced against mitigating circumstance or circumstances found; that an erroneously found statutory aggravating circumstance or overlapping statutory aggravating circumstance could upset the balancing process. To avoid any such potential problem, and for the further reasons aforementioned, this court rejects Standard 6. Osborn, 631 P.2d at 198 and at 210-211, Bistline, J. concurring).

#### 5. Facts and Argument Found in Mitigation

In mitigation the defendant's counsel raised several broad categories of factors that are properly considered as mitigating circumstances, to wit: the youth of the defendant; the defendant's background and environment (as indicators of personality and character); the defendant's degree of culpability for the crime committed; and the defendant's potential for rehabilitation. Specific facts and premises were argued in support of these mitigating circumstances.

- (a) Historical facts brought into scope, aside the facts and circumstances of the crime.

The defendant, a male caucasian, was born November 8, 1961. He is unmarried. He may be the father of a child Diana Allen, age 3, and is the father of Julie McKinney, mothered by Dovey Small, and born in November 1981. The defendant lived with a

young woman for periods of time over a three year span. A child was born to the woman during this relationship.

His mother, Karen Ponting, is age 38. His father, James Ponting, is age 38. He has one brother and two sisters.

Defendant was born and raised in California. He completed the 11th grade, and has experience in welding, painting, auto mechanics and tree service.

He describes his interests and activities as girls, drawing, riding motorcycles, watching television and reading western fiction. In the past he has been associated with a motorcycle group called the "Vagos."

The defendant had confrontations with Dovey Small's former paramour in winning her over. The confrontations, in Bullhead, Arizona, occurred approximately three months before the defendant came to Idaho and included fights, drawn and pointed guns and threats.

His mother describes him as mellow and easy going, and close to his parents and siblings. She also characterizes him as easily led by females. His aunt characterizes him as one who readily takes blame for conduct of others.

Defendant describes himself as a social drinker with no alcohol related problems. Defendant speaks of having used a variety of illicit drugs, and having no dependency on them.

Dr. Gary Paine, Ph. D. Licensed Psychologist, testified to the effect that defendant has no gigantic disorders, but diagnosed him as having an "inadequate personality", a vague diagnostic category which has a variety of features associated with it, such as:

1. Inadequate impulse control over anger and feelings;
2. Tendency to do things for the pleasure of others, rather than self; and
3. A poor perception of self; a lack of life goals.

4. Mood confusion, not knowing how he feels from one situation to the next.

The doctor describes defendant intellectually as in the dull-normal range (a low-average I.Q. score of 82); age-wise in late adolescence; and as having the characteristics of being impulsive, certainly a follower, and likely to lead only those less adequate or capable. The doctor had tested the defendant twice in June, 1981 and determined that he was responsible for his actions.

Defendant's only criminal record is as shown on the presentence report; a juvenile felony proceeding involving burglary, grand theft and receiving or withholding stolen property, for which defendant was on probation for about a year and a half.

The defendant's specific urgings as presented at the sentencing hearing are that the defendant:

1. is a young man, only nineteen years old, that he is not a hardened criminal;
2. has had little or no involvement with the criminal justice system;
3. has not previously engaged in conduct endangering persons or lives, conduct during his nineteen years does not show that he deserves to die;
4. is quiet, kind and gentle and does not have a vicious personality, that he is weak not vicious;
5. is a follower not a leader, that he was led by a woman whom he thought he loved, Dovey Small;
6. is easily taken advantage of by others;
7. has some drug and/or alcohol problems;
8. committed his crimes because of impulsive behavior;
9. did not have the intent to kill at the time of the robbery; and
10. was lying when he made inculpatory statements in letters and in post-trial conversations because of a desire to protect Dovey Small.

The specific urgings are to an extent interrelated and many of them bear on the general mitigating issues of youth, background and environment, culpability and rehabilitation potential. For that reason the following discussion and findings must necessarily deal with the urgings in a somewhat composite manner.

Defense counsel urges the youth of the defendant as a mitigating factor. This court is of the opinion that age standing alone has very little import in mitigation where the defendant is not a minor. See Richmond v. Arizona, 54 L.Ed. 2d 34 (1977). In Idaho the defendant is responsible for his crime as an adult. I.C. 18-216(1); Compare Wolf v. State, 99 Idaho 476 (1978).

The defendant is now twenty years old. He was nineteen when he conspired, robbed and murdered. Compare Jurek v. Texas, 49 L.Ed. 2d 929 (1976) (defendant 22 years old at time of the crime; death sentence affirmed).

The presentence report, in part through the defendant's own statements, shows that the defendant has experience in matters of life, such as: use of street drugs at the age of twelve; association with a motorcycle group and tattooing of his body at the age of fourteen; felonious criminal activity at the age of fifteen; and a live-in relationship with a young woman producing a child by the age of seventeen. The court considers these matters as factors which weigh against evidence proffered in mitigation as to the defendant's inexperience, and easy-going character. The court finds that the defendant is a "street-wise" nineteen-year-old whose own statements show a pattern of criminal behavior beginning at the age of twelve, though his only formal criminal record prior to this time shows only one contact with the justice system.



It is urged that the defendant has not previously engaged in person or life-threatening conduct. Except for the present murder and report of threatening gunplay in the record this appears to be true. However, standing as a bare assertion with the noted exceptions, the court finds nothing remarkable about this fact which entitles it to weight in mitigation.

Urgings of counsel direct attention to contended attributes of the defendant such as a claimed characteristic of being easily led by women. The only evidence proffered in support of this claim is the general testimony of the defendant's mother. No specific examples to illustrate or support this averred characteristic are found in the record, testimony or sentencing information.

The defendant tells of being interested in girls and his history reflects an ordinary affinity toward the opposite sex. The sentencing report indicates that the defendant lived with a young woman for periods of time over a three-year span. To the court this does not show domination by women, but rather a male attraction for the female sex.

While Karen Ponting's characterization may have been true of the defendant at some time when the defendant was in his early teens, it is not supported as to his later teenage years.

The court finds as to any influence Dovey Small may have exerted, defendant was no less than an equal conspirator, and as aforesaid, was the killer.

Defense counsel has urged the defendant's impulsiveness in mitigation, seeking to tie it to the inability to decide what actions to take before acting. This urging strangely conflicts with the defendant's mellow and easy-going character attributed to him by his mother. However, Dr. Gary Payne testified that one of the defendant's minor character defects is an inadequate impulse control over anger and feelings.

The doctor stated that this impulsiveness, as compared to most peoples', means that the defendant is less likely to think about the limits of a particular course of action. That is, that the defendant would not be as likely to be concerned about difficulties that might follow from engaging in certain behavior as would most people, whether the consequences be legal, financial, personal or otherwise.

The defendant's handwritten letter to Dovey Small, dated June 28, 1981, weighs against the claimed characteristic of impulsiveness (with the meaning given it by defense counsel) in committing the instant crime. The defendant stated that he will be up for life imprisonment should someone try to break up him and Dovey once he is out on parole. This at least shows that the defendant has contemplated and considered future violence against persons, and tends to negate the claim that the past violent acts of the defendant stemmed from an inability to decide what action to take, rather than from a considered decision to act though without regard to the consequences. The court finds that any impulsive tendencies of the defendant are not remarkable.

Defense counsel argues that the defendant's degree of culpability is mitigated by his use of alcohol and/or drugs. The evidence fails to establish any substantial degree of impairment of the defendant on the day of the crimes, April 8, 1981. To the contrary, the information available to the court shows, and the court finds, that the defendant had a good memory concerning many of the details of that day's events (disregarding the obviously perjurious version of the killing defendant gave at his trial) dispelling any inference of intoxication or impairment.

Defense counsel additionally urges that the defendant is not a vicious individual, supporting that conclusion with the premises that he was led by Dovey Small and acted on impulse. The court's prior discussion concluding that the defendant was neither led

by a woman nor acted on impulse, combined with the court's finding as to the facts of the commission of the robbery and murder, dispel both the premises and thus the conclusion urged by counsel.

The defense argument seeks to dispel post-trial admissions made to the effect that the defendant in fact fired all of the shots into Bishop. Suffice to say, the post-trial statements of the defendant simply disclose his intent to rob and specific intent to murder Bishop were deliberated, premeditated and performed; all as the court has heretofore found from the evidence at trial.

Other versions by defendant appear in two separate conversations between Dovey's attorney and defendant which took place after defendant's trial and occurred in preparation for Dovey's trial. Exs. A and B at sentencing hearing. Therein defendant tells of shooting Bishop in the body, then of his execution-style shooting four bullets into the head. Ex. B, P. 20; Ex. A, P. 2. Variouslly: defendant states he didn't think of killing Bishop until they arrived at the scene of the murder (Ex. A, P. 3; Ex. B, P. 14. The thought occurred on the way (Ex. B, P. 15); and he was thinking about it at the time he and Dovey and Casey Wheelless talked in the kitchen at Arco - his mind wasn't made up - he didn't know for sure he was going to do it (Ex. A, P. 4).

The mitigating circumstances urged, variously evaluated and found or rejected, having been considered, do not outweigh the gravity of the statutory aggravating circumstance found.

6. Reasons Why Death Penalty  
Was Imposed.

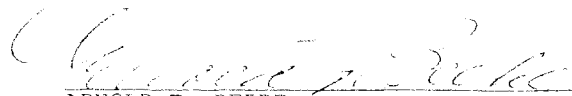
The court found in written findings the statutory aggravating standard, I.C. 19-2515(f)(7), "The murder was one defined as murder in the first degree by Section 18-4003, Idaho Code, subsection ... (d) ..., and it was accomplished with specific intent

to cause the death of a human being".

The court found the mitigating circumstances in the record set forth and considered, in writing, do not outweigh the gravity of the statutory aggravating circumstance found so as to make unjust the imposition of the death penalty.

In the premises, and perforce I.C. 19-2515(b), it is the duty of the court to impose a death sentence.

DATED and DONE this 26<sup>th</sup> day of March, 1982.

  
\_\_\_\_\_  
ARNOLD T. BEEBE  
District Judge

Mar 27 10 28 '82

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

STATE OF IDAHO,	)	
Plaintiff,	)	
	)	CASE NO.
vs	)	
	)	JUDGMENT OF CONVICTION
RANDY LYNN McKINNEY,	)	
Defendant.	)	Death Warrant
	)	

This being the time fixed by the Court for pronouncing sentences upon the defendant, the Court directed notation of the presence of Randy McKinney, defendant, William G. Carlson, attorney for defendant, and Thomas E. Moss, special prosecutor for Butte County, in open court.

The defendant was duly informed as follows:

1. Of the information filed against the defendant for crimes of Murder in the First Degree, Count I; Conspiracy to Commit Murder, Count II; Robbery, Count III; and Conspiracy to Commit Robbery, Count IV.
2. Of the defendant's conviction, by verdicts of the jury of guilty, on each of the four counts.

The Court, then, after these convictions, ordered a pre-sentence investigation, and convened sentencing hearings for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offenses, in accordance with 19-2513 of the Idaho Code, and Rule 33.1 of the Idaho Criminal Rules; and the Court having entered written findings setting forth the statutory aggravating circumstance found, and the mitigating circumstances considered; and the Court having

found that the mitigating circumstances found do not outweigh the aggravating circumstances found so as to make unjust the imposition of the death penalty; and the Court having found no legal cause or reason why judgment and sentence should not be pronounced against the defendant at this time; does render its judgment of conviction, as follows:

Count I -- Murder of the First Degree

It is adjudged the defendant is guilty of Murder of the First Degree, and of the possession and use of a firearm in the commission of the crime, and that he be sentenced to be punished by death by the Idaho State Board of Correction, in a manner prescribed by law, on May 25, 1982.

Count II -- Conspiracy to Commit Murder

It is adjudged the defendant is guilty of Conspiracy to Commit Murder, and that he be sentenced to the custody of the Idaho State Board of Correction for an indeterminate term of not to exceed 30 years.

Count III -- Robbery

It is adjudged the defendant is guilty of Robbery, and the possession and use of a firearm in the commission of the crime, and that he be sentenced to the custody of the Idaho State Board of Correction for a fixed term of the rest of his natural life; and for the use of a firearm in the robbery, a term of not to exceed 15 years to run consecutive to such fixed term of life.

Count IV -- Conspiracy to Commit Robbery

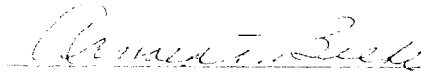
It is adjudged the defendant is guilty of Conspiracy to Commit Robbery, and that he be sentenced to the custody of the Idaho State Board of Correction for an indeterminate

term of not to exceed 30 years.

All sentences not expressly provided to be consecutive shall run concurrently.

Defendant is remanded to custody to be delivered to the Idaho State Board of Correction in execution of these sentences.

DATED this 27th day of March, 1982.



ARNOLD T. BEEBE  
District Judge