CASE#: 88-1-00428-1 JUDGMENT# 89-9-2233-2 JUDGE ID:
TITLE: STATE VS MCNEIL
FILED: 03/15/1988 APPEAL FROM LOWER COURT? NO

RESOLUTION: GP DATE: 08/25/1989 GUILTY PLEA
COMPLETION: JODF DATE: 08/25/1989 JUDGMENT/ORDER/DECREE FILED
CASE STATUS: DATE:
ARCHIVED: RESTORE DATE : 04/03/2003
MICROFICHE: 10/23/1994
CONSOLIDT:
NOTE1:
NOTE2:

---------- PARTIES ----------

CONN.	LAST NAME, FIRST MI TITLE	LITIGANTS	ARRAIGNED
PLA01	STATE OF WASHINGTON		
DEF01	MCNEIL, RUSSELL DUANE		03/16/1988
ATP01	HANSEN, HOWARD	1	
ATD01	TAIT, CHRIS	1	
ATD02	BOTHWELL, TOM	1	

---------- SENTENCE INFORMATION ----------

DEF01 MCNEIL, RUSSELL DUANE

DEF. RESOLUTION CODE: GP DATE: 08/25/1989 GUILTY PLEA
TRIAL JUDGE: GAVIN
SENTENCE DATE : 08/25/1989 SENTENCED BY GAVIN
SENTENCING DEFERRED : NO APPEALED TO : DIVISION III DATE APPEALED : 09/22/1989

PRISON SERVED..... X
PRISON SUSPENDED.....
JAIL SERVED.....
JAIL SUSPENDED.....
PROB/COMM. SUPERVISION.....

FINE.....$ 100.00 VC
RESTITUTION.....$ TBD
COURT COSTS.....$ TBD
ATTORNEY FEES.....$
DUE DATE : PAID : NO

---------- CHARGE INFORMATION ----------

DEF01 MCNEIL, RUSSELL DUANE

RS	CNT	RCW/CODE	CHARGE DESCRIPTION	DV	INFO/VIOL. ----DATE----	RESULT --DATE--
		----------	ORIGINAL INFORMATION		03/15/1988	
G	1	9A.32.030	MURDER 1ST DEGREE			
		10.95.020	AGGRAVATED MURDER-1			
G	2	9A.32.030	MURDER 1ST DEGREE			
		10.95.020	AGGRAVATED MURDER-1			
		9A.08.020	LIABILITY FOR ANOTHER'S CONDUCT			

APPEARANCE DOCKET

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
1	03/15/1988	APATIN	APPT OF ATTY FOR INDIGENT DEFENDANT	
		ATD01	TAIT, CHRIS	
		ATD02	BOTHWELL, TOM	
2	03/15/1988	INFO	INFORMATION	
	03/15/1988	PREHRG	(HANSON) CRT SIGNED ORD APPOINTING C TAIT & T BOTHWELL. 88AD 1:50 (MANCE)	
	03/16/1988	ARRAIGN	(HANSON) ARR, TDR 5-2-88. ORD SET BAIL AT $250,000.00 SIGNED. 88AD 1:51 (MANCE)	
3	03/16/1988	ORA	ORDER ON ARRAIGNMENT	
4	03/16/1988	ORSTB	ORDER SETTING BAIL (HANSON)	
		MFILM	324-304	
5	03/16/1988	OAPAT	ORDER APPOINTING ATTORNEY & SETTING RATE OF COMPENSATION	
	03/17/1988	PREHRG	(GAVIN)CRT GRANTED: DEF MOT TO EX-TEND TIME TO FILE INSANITY PLEA, MOT TO ALLOW EX PARTE ORDRS RE PAYMENT OF DEF EXPERTS&MOT FOR PRODUCTION, ORALLY SET TD OF 5-2-88, REQUEST COPIES OF EXIST PSYCH RPTS TO VIEW IN CAMERA, ORD TO BE PRESENTED. 88D3 1:37	
	03/17/1988	PREHRG	(BAUGHER)	
6	03/17/1988	TRCKST	TRIAL CLERK'S SETTING	05-02-1988TD
		ACTION	J-12 9:00 AGR 1ST DEG MURDER/ACC	
		ACTION	AGR 1ST DEG MURDER 2D	
7	03/17/1988	MT	MOTION FOR EXPENDITURE OF PUBLIC FUNDS	
8	03/17/1988	MT	MOTION FOR DISCOVERY	
9	03/17/1988	MT	MOTION RE MORE TIME TO FILE INSANITY PLEA	
10	03/18/1988	LTR	LETTER FROM JUDGE GAVIN	
11	03/18/1988	OR	PRE-TRIAL ORDER (GAVIN)	
		MFILM	324-773	
12	03/23/1988	RQ	REQUEST RE INVESTIGATOR COMPENSATN	
13	04/01/1988	OR	ORDER AUTHORIZING INVESTIGATORY SERVICES FOR DEF&SET RATE OF COMP &REIMBURSEMENT (GAVIN)	
14	04/01/1988	OR	ORDER AUTHORIZING PAYMENT BY YAK CO (GAVIN)	
15	04/12/1988	MT	DEF MOT FOR ORD DIRECT TRANSPORT BY YAK CO SHERIFF AT PUBLIC EXPENSE	
16	04/12/1988	AF	AFF OF COUNSEL IN SUPPT OF MOT TO APPROVE PAYMENT FOR DR HENRY DIXON AT PUBLIC EXPENSE	
17	04/12/1988	OR	ORDER DIRECTING TRANSPORT BY YAK CO SHERIFF AT PUBLIC EXPENSE (GAVIN)	
18	04/12/1988	LTR	LTTR TO SGT COUETTE FROM T BOTHWELL	
	04/12/1988	PREHRG	(GAVIN)CRT G/S ORD OF CONT OF TD TO 7-11-88; G/S ORD EXTEND TIME FOR ENTRY OF INSANITY PLEA; G/S ORD EXTEND TIME RE: DEATH PENALTY,	

APPEARANCE DOCKET

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
			ORALLY SET PRETRIAL MOT FOR 6-20-88, ORD TO BE PRESENTED. 88D3 1:60 (BAUGHER)	
19	04/12/1988	WVSPDT	WAIVER OF SPEEDY TRIAL	
20	04/12/1988	ORCTD	ORD FOR CONTINUANCE OF TRIAL DATE	
21	04/12/1988	MT	MOTION FOR EXTENSION OF TIME IN WHICH TO FILE INSANITY PLEA	
22	04/12/1988	OR	ORDER GRANTING A CONTINUANCE OF TIME IN WHICH TO FILE A PLEA OF INSANITY	
23	04/12/1988	OR	ORDER EXTENDING TIME TO GIVE NOTICE OF SPECIAL SENTENCING PROCEEDING	
24	04/13/1988	TRCKST	TRIAL CLERK'S SETTING	04-13-1988TD
		ACTION	H 9:30 MOTIONS 1 HR	
		ACTION	**********JUDGE GAVIN**********	
25	04/14/1988	TRCKST	TRIAL CLERK'S SETTING	07-11-1988TD
		ACTION	J-12 9:00 AGR 1 DEG MRDR/ACC AGR	
		ACTION	1 DEG MRDR 2D	
		ACTION	*********JUDGE GAVIN**********	
26	04/22/1988	MT	DEF MOT&AFF FOR PI FEES & EXPENSES	
27	04/22/1988	OR	ORDER FOR PAYMENT OF PI FEES & EXPENSES (GAVIN)	
		MFILM	326-693	
28	04/25/1988	TRCKST	TRIAL CLERK'S SETTING	06-20-1988TD
		ACTION	N-J 9:30 PRE TRIAL CONFERENCE 3D	
		ACTION	********JUDGE GAVIN**********	
29	05/03/1988	MT	DEF MOT&AFF FOR ORD APPROV ATTY FEES & EXPENSES	
30	05/03/1988	OR	ORDER AUTHORIZING PAYMENT (GAVIN)	
31	05/06/1988	OR	SCHEDULING ORDER (GAVIN)	
		MFILM	327-208	
32	05/06/1988	MT	DEF MOT FOR ORD DIRECT TRANSPORT BY YAK CO SHERIFF AT PUBLIC EXPENSE	
33	05/06/1988	OR	ORDER DIRECT TRANSPORT BY YAK CO SHERIFF AT PUBLIC EXPENSE (GAVIN)	
34	05/06/1988	LTR	LETTER FROM BOTHWELL TO SGT COUETTE	
35	05/06/1988	MT	DEF MOT&AFF SUPPT DECLARATION FOR PAYMENT OF BILL	
36	05/06/1988	OR	ORDER AUTHORIZING PAYMENT BY YAK CO (GAVIN)	
37	05/17/1988	MT	DEF MOT&AFF FOR ORD APPROV PRIVATE INVESTIGATOR FEES&EXPENSES	
38	05/17/1988	OR	ORDER FOR PAYMENT OF INVEST FEES & EXPENSES (GAVIN)	
39	05/27/1988	NT	NOTICE OF SPECIAL SENTENCING PROCEEDING	
40	06/02/1988	MT	MOTION FOR ADDITIONAL TIME WITHIN WHICH TO FILE PRETRIAL MOTION	
41	06/02/1988	MT	MOTION FOR CONTINUANCE OF TRIAL DATE	
	06/03/1988	PREHRG	(GAVIN)CRT ORALLY GRANTD DEF MOT TO CONT TRIAL DATE, DEF MOT TO EXTEND TIME FOR PRETRIAL MOTIONS, ORDERS	

APPEARANCE DOCKET

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
			TO BE PRESENTED, SEE FILE MINUTES. 88D3 1:120(BAUGHER)	
42	06/03/1988	WVSPDT	WAIVER OF SPEEDY TRIAL	
43	06/03/1988	ORCTD	ORD FOR CONTINUANCE OF TRIAL DATE	
44	06/07/1988	OR	SCHEDULING ORDER (GAVIN)	
45	06/10/1988	MT	MOT&AFF FOR PAYMENT TO ATTY	
46	06/10/1988	OR	ORDER AUTHORIZING PAYMENT TO ATTY (GAVIN)	
47	06/14/1988	TRCKST	TRIAL CLERK'S SETTING - RESET	10-03-1988TD
		ACTION	J12 9:00 AGR MURDER 1ST/ACC AGR	
		ACTION	MURDER 1ST 2 DYS	
		ACTION	**PREASSIGNED TO GAVIN**	
48	06/14/1988	TRCKST	TRIAL CLERK'S SETTING	09-12-88
		ACTION	H 9:00 PRE-TRIAL 7D	
49	06/16/1988	MT	DEF MOT&AFF FOR PAYMENT OF BILL	
50	06/16/1988	OR	ORDER AUTHORIZING PAYMENT BY YAK CO (GAVIN)	
51	06/16/1988	MT	MOT&AFF FOR PAYMENT OF PRIV INVEST FEES&EXPENSES	
52	06/16/1988	OR	ORDER FOR PAYMENT FOR PRIV INVEST FEES&EXPENSES (GAVIN)	
		MFILM	329-1294	
53	07/05/1988	MT	MOT&AFF FOR PAYMENT OF PRIV INVEST FEES&EXPENSES	
54	07/05/1988	OR	ORDER AUTHORIZING PAYMENT (GAVIN)	
		MFILM	331-176	
55	07/12/1988	MT	MOT&AFF FOR PAYMENT OF ATTY & PRIV INVEST FEES & EXPENSES	
56	07/12/1988	OR	ORDER FOR PAYMENT (GAVIN)	
		MFILM	331-586	
57	07/12/1988	STP	STIPULATION RE FILING OF PRETRIAL MOTIONS	
58	07/20/1988	MT	DEF'S MOTION FOR DISMISSAL OF PLAINTIFF'S REQUEST FOR DEATH PENALTY	
59	07/20/1988	OR	ORDER FOR PAYMENT OF PRIV INVEST FEES&EXPENSES (GAVIN)	
		MFILM	332-41	
60	07/20/1988	MT	MOT&AFF FOR PAYMENT OF PRIV INVEST FEES&EXPENSES	
61	08/03/1988	MT	DEF MOT FOR AUTHORIZATION&EXPENDITR OF PUBLIC FUNDS (GAVIN)	
62	08/03/1988	OR	ORDER AUTHORIZING FORENSIC EXPERT& EXPEND PUBLIC FUNDS (GAVIN)	
63	08/05/1988	MT	MOT&AFF FOR PAYMNT OF ATTY & PRIV INVEST FEES&EXPENSES	
64	08/05/1988	OR	ORDER AUTHORIZING PAYMNT OF ATTY FEES&EXPENSES (GAVIN)	
		MFILM	333-52	
65	08/10/1988	MM	MEMORANDUM IN OPPOSITION TO DEF'S MOTION FOR DISMISSAL OF PLAINTIFF'S NOTICE OF INTENT TO SEEK THE DEATH PENALTY	

APPEARANCE DOCKET

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
66	08/22/1988	MT	MOT&AFF FOR PRIV INVES FEES&EXPENSE	
67	08/22/1988	OR	ORDER AUTHORIZING PAYMNT OF PRIV INVEST FEES&EXPENSES	
		MFILM	333-1176	
68	08/22/1988	TRCKST	TRIAL CLERK'S SETTING	09-08-1988TD
		ACTION	NJ 9:00 PRE-TRIAL MOTIONS 7D	
69	09/07/1988	MT	MOT&AFF FOR PAYMNT OF PRIV INVEST FEES&EXPENSES	
70	09/07/1988	OR	ORDER AUTHORIZING PAYMENT OF PRIV INVEST FEES&EXPENSES (GAVIN)	
	09/08/1988	PREHRG	(GAVIN)CRT DENIED DEF MOT TO DISMIS INFO, DENIED DEF MOT TO DISMISS NOTICE OF SPECIAL SENTENCING PRO-CEEDINGS. 88D3 1:19G(BAUGHER)	
71	09/21/1988	ORAU	ORDER AUTHORIZING PAYMNT BY COUNTY (GAVIN)	
72	09/21/1988	MT	MOT&AFF FOR PAYMNT OF PRIV INVEST FEES&EXPENSES	
73	09/22/1988	WVSPDT	WAIVER OF SPEEDY TRIAL	
74	09/22/1988	OR	SCHEDULING ORDER	
	09/22/1988	PREHRG	(GAVIN)CRT CONT HRG TO 9-27 AT 4:30 DEF SIGNED & FILED WAIVER OF TRIAL TIME LIMITS, SCHEDULING ORDER SIGND 88D3 1:21O(BAUGHER)	
	09/27/1988	PREHRG	(GAVIN)CRT CLARIFIED PRIOR RULING, ORDER TO BE PRESENTED. 88D3 1:216 (BAUGHER)	
	09/28/1988	VRPRC	VERBATIM REPORT OF PROCEEDINGS COURT'S ORAL OPINION	
75	09/28/1988	FNFCL	FINDINGS OF FACT&CONCLUSIONS OF LAW STATE'S PROPOSED	
		MFILM	336-16	
76	09/28/1988	OR	STATE'S PROPOSED ORDER DENYING DEF'S MT TO DISMISS STATE OF WASH NT OF SPECIAL PROCEEDING TO SEEK THE DEATH PENALTY	
		MFILM	336-17	
77	09/28/1988	OR	ORDER DENYING DEF'S MT TO DISMISS INFO (ORAL) & TO DISMISS DEATH PENALTY NT (GAVIN)	
		MFILM	336-18	
78	09/28/1988	CRRSP	CORRESPONDENCE FROM THOMAS BOTHWELL TO JUDGE F. JAMES GAVIN	
79	09/28/1988	CRRSP	CORRESPONDENCE FROM CHRISTOPHER TAIT TO JUDGE F. JAMES GAVIN	
	09/28/1988	PREHRG	(GAVIN)CRT SIGNED ORDER RE DEATH PENALTY. 88D3 1:22O(BAUGHER)	
80	09/29/1988	NTDRV	NOTICE OF DISCRETIONARY REVIEW TO SUPREM COURT	
		MFILM	336-353	
81	10/04/1988	AFML	AFFIDAVIT OF MAILING NOTICE OF APPEAL TO ATTORNEY OF RECORD	
82	10/06/1988	MT	MOT&AFF FOR PAYMNT OF ATTY FEES &	

APPEARANCE DOCKET

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
			PRIV INVEST FEES&EXPENSES	
83	10/06/1988	OR	ORDER AUTHORIZING PAYMNT OF ATTY & PRIV INVEST FEES (GAVIN)	
		MFILM	336-540	
84	10/06/1988	MT	MOT&AFF FOR PAYMNT OF ATTY FEES	
85	10/06/1988	OR	ORDER AUTHORIZING PAYMENT OF ATTY FEES (GAVIN)	
		MFILM	336-541	
86	10/13/1988	ORIND	ORDER OF INDIGENCY (GAVIN)	
		MFILM	336-942	
87	10/19/1988	MT	MOT&AFF FOR ORDER FOR PRIV INVEST FEES&EXPENSES	
88	10/19/1988	OR	ORDER AUTHORIZING PAYMENT OF PRIV INVEST FEES&EXPENSES (GAVIN)	
		MFILM	337-269	
89	11/04/1988	MT	MOT&AFF FOR PAYMENT TO ATTY & PRIV INVEST FEES & EXPENSES	
90	11/04/1988	OR	ORDER AUTHORIZING PAYMNT OF ATTY & PRIV INVEST FEES (GAVIN)	
		MFILM	338-287	
91	11/07/1988	LTR	LETTER FROM THE SUPREME COURT	
92	11/07/1988	MT	RULING DENYING MOTONS FOR IDSCRETIONARY REVIEW	
93	11/16/1988	MT	MOT&AFF FOR PAYMENT OF ATTY & PRIV INVEST FEES&EXPENSES	
94	11/16/1988	OR	ORDER AUTHORIZING PAYMNT OF PRIV INVEST FEES&EXPENSES (GAVIN)	
		MFILM	338-1113	
95	12/02/1988	MT	MOT&AFF FOR PAYMENT OF ATTY & PRIV INVEST FEES&EXPENSES	
96	12/02/1988	OR	ORDER AUTHORIZING PAYMENT OF ATTY & PRIV INVEST FEES&EXPENSES (GAVIN)	
		MFILM	339-791	
97	12/20/1988	MT	MOT&AFF FOR PAYMENT OF PRIV INVEST FEES&EXPENSES	
98	12/20/1988	OR	ORDER AUTHORIZING PAYMENT OF PRIV INVEST FEES&EXPENSES (GAVIN)	
		MFILM	340-983	
99	01/05/1989	MT	MOT&AFF FOR PAYMENT OF ATTY FEES	
100	01/05/1989	OR	ORDER AUTHORIZING PAYMNT OF ATTY FEES (GAVIN)	
101	01/12/1989	CP	COPY OF ORDER DENYING MOT TO MOD COMMISSIONERS RULING	
102	01/12/1989	LTR	LETTER FROM JUDGE GAVIN TO COUNSEL	
103	01/20/1989	MT	MOT&AFF FOR PAYMNT ATTY FEES, PRIV INVEST FEES&EXPENSES	
104	01/20/1989	OR	ORDER AUTHORIZING PAYMNT OF PRIV INVEST FEES&EXPENSES (GAVIN)	
		MFILM	342-909	
105	01/20/1989	LTR	LETTER FROM JUDGE GAVIN	
106	01/30/1989	LTR	LETTER FROM JUDGE GAVIN	
107	01/31/1989	WVSPDT	WAIVER OF SPEEDY TRIAL	
108	01/31/1989	MT	MOTION FOR CONTINUANCE OF TRIAL	

APPEARANCE DOCKET

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
	02/03/1989	PREHRG	(GAVIN)CRT GRNTD MOT TO CONT TRIAL, SET NEW MOT SCHEDULE, ORD TO BE PRESENTED. 89D3 1:22(BAUGHER)	
109	02/03/1989	MT	MOT&AFF FOR PAYMENT OF ATTY FEES	
110	02/03/1989	OR	ORDER AUTHORIZING PAYMNT ATTY FEES (GAVIN)	
		MFILM	343-658	
111	02/03/1989	MT	MOT&AFF FOR PAYMNT OF ATTY FEES	
112	02/03/1989	OR	ORDER AUTHORIZING PAYMENT ATTY FEES (GAVIN)	
		MFILM	343-659	
	02/06/1989	PREHRG	(GAVIN)CRT SIGNED SCHEDULING ORDER. 89D3 1:26(BAUGHER)	
	02/06/1989	VRPRC	VERBATIM REPORT OF PROCEEDINGS	
113	02/06/1989	OR	SCHEDULING ORDER	
114	02/16/1989	MT	DEF MOT&AFF FOR ARD APPRV PRIV INV FEES&EXPENSES	
115	02/16/1989	OR	ORDER AUTHORIZING PAYMNT BY YAK CO FOR INVEST FEES&EXPENSES (GAVIN)	
116	02/27/1989	MM	MEMORANDUM 43 3.5 HEARING	
117	02/27/1989	MT	MOTION FOR CHANGE OF VENUE	
118	02/27/1989	AF	AFFIDAVIT IN SUPPORT OF MT FOR CHANGE OF VENUE	
119	02/27/1989	MT	MOTION IN LIMINE REGARDING PHOTOGRAPHS	
120	02/27/1989	OMAD	OMNIBUS APPLICATION BY DEFENDANT	
121	03/03/1989	MT	DEF MOT&AFF FOR ATTY FEES	
122	03/03/1989	OR	ORDER AUTHORIZING PAYMNT BY YAK CO (GAVIN)	
		MFILM	345-584	
123	03/03/1989	MT	MOT&AFF FOR PAYMNT OF ATTY FEES	
124	03/03/1989	OR	ORDER AUTHORIZING PAYMENT BY YAK CO (GAVIN)	
		MFILM	345-585	
125	03/15/1989	MT	MOTION FOR DISCOVERY	
126	03/15/1989	MT	MOTION FOR BILL OF PARTICULARS	
127	03/15/1989	MT	MOTION TO STRIKE ENHANCEMENT OF PENALTY FOR MURDR 1ST DEGREE PURSUANT TO 10.05.020 & TO DISMISS NT OF SPECIAL SENTENCING PROCEEDING	
128	03/20/1989	MT	MOT&AFF FOR ORDER APPROV PRIV INVES FEES&EXPENSES	
129	03/20/1989	OR	ORDER AUTHORIZING PAYMENT BY YAK CO OF PRIV INVEST FEES&EXPENSES(GAVIN)	
		MFILM	346-404	
130	03/20/1989	MM	MEMORANDUM SUPPORTING THE ADMISSIBILITY OF THE DEF'S STATEMENT TO SHERIFF'S DETECTIVES	
131	03/20/1989	MM	MEMORANDUM IN OPPISITION TO DEF'S MT FOR CHANGE OF VENUE	
132	03/27/1989	MM	MEMORANDUM IN OPPOSITION TO DEF MOT FOR A BILL OF PARTICULARS	
133	03/27/1989	MM	MEMORANDUM IN OPPOSITION TO DEF MOT	

APPEARANCE DOCKET

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
			TO STRIKE PRE-MEDITATED FIRST DEGREE MURDER PENALTY & ENHANCEMENT PURSUANT TO RCW & TO DISMISS NT OF SPEICAL SENT PROCEEDING	
134	03/29/1989	OMAD	OMNIBUS APPLICATION BY PLAINTIFF	
135	03/30/1989	NT	NOTICE OF SETTING FOR PRE-TRIAL HRG	
136	03/30/1989	TRCKST	TRIAL CLERK'S SETTING	04-10-1989TD
		ACTION	H 9:30 PRE TRIAL 2D	
137	04/06/1989	MT	MOT&AFF FOR PAYMNT OF ATTY FEES	
138	04/06/1989	OR	ORDER AUTHORIZING PAYMNT BY YAK CO (GAVIN)	
		MFILM	347-634	
	04/10/1989	PREHRG	(GAVIN)S/T, CRT TO LISTEN TO TAPES &REVIEW TRANSCRIPTS IN CAMERA, COUN SEL TO SUBMIT BRIEFS, 3.5 HRG TO BE RENOTED. 89D3 1:73(BAUGHER)	
	04/10/1989	PREHRG	(GAVIN)CRT GRNTD DEF MOT TO RESERVE MOT FOR CHANGE OF VENUE. 89D3 1:73 (BAUGHER)	
	04/10/1989	PREHRG	(GAVIN)CRT PART GRNTD DEF MOT FOR DISCOVERY & SET SCHEDULE FOR PRO- DUCTION OF ADDTL DISCOVERY MATERIAL 89D3 1:73(BAUGHER)	
	04/10/1989	PREHRG	(GAVIN)CRT DENIED DEF MOT FOR BILL OF PARTICULARS. 89D3 1:73(BAUGHER)	
	04/10/1989	PREHRG	(GAVIN)COUNSEL ARGUED DEF MOT TO STRIKE NOTICE OF SPECIAL SENTENCING PROCEEDINGS, ADDTL BRIEFS TO BE SUBMITTED. 89D3 1:73(BAUGHER)	
	04/10/1989	PREHRG	(GAVIN)STATES OMNIBUS QUESTIONS ASKED & ANSWERED. 89D3 1:73 (BAUGHER)	
139	04/10/1989	EXLST	EXHIBIT LIST (IN VAULT)	
140	04/14/1989	MT	DEF MOT&AFF FOR ORD APRV ATTY FEES	
141	04/14/1989	OR	ORDER FOR PAYMNT BY YAK CO (GAVIN)	
		MFILM	348-52	
142	04/19/1989	MT	DEF MOT&AFF FOR ORD APPROV PRIV INVEST FEES	
143	04/19/1989	OR	ORDER AUTHORIZING PAYMNT BY YAK CO (GAVIN)	
		MFILM	348-614	
144	04/28/1989	NTHG	NOTICE OF HEARING	
		ACTION	PRESENTATION OF ORDER ON OMNIBUS	
		ACTION	APPLICATION BY PLAINTIFF	
		ACTION	DAY CERTAIN	
145	05/04/1989	MT	MOT&AFF FOR ORD APPROV ATTY FEES	
146	05/04/1989	OR	ORDER AUTHORIZING PAYMNT BY YAK CO (GAVIN)	
		MFILM	349-444	
147	05/04/1989	MT	MOT&AFF FOR PAYMENT OF BILL	
148	05/04/1989	OR	ORDER AUTHORIZING PAYMNT BY YAK CO (GAVIN)	
		MFILM	349-445	

APPEARANCE DOCKET

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
149	05/09/1989	STLW	STATE'S LIST OF WITNESSES	
150	05/11/1989	MM	MEMORANDUM IN SUPPT OF MOT FOR BILL OF PARTICULARS	
151	05/17/1989	MT	MOT&AFF FOR ORD APPROV PRIV INVEST FEES&EXPENSES	
152	05/17/1989	OR	ORDER AUTHORIZING PAYMNT BY YAK CO (GAVIN)	
		MFILM	350-448	
153	05/19/1989	MM	MEMORANDUM IN OPPOSITION TO MTN FOR BILL OF PARTICULARS	
154	05/26/1989	MM	MEMORANDUM CONCERNING CLOSURE OF 3.5 HEARING	
155	05/30/1989	MT	MOT&AFF FOR ORDER APPROV ATTY FEES	
156	05/30/1989	OR	ORDER AUTHORIZING PAYMNT BY YAK CO (GAVIN)	
		MFILM	351-379	
157	06/06/1989	MT	MOT&AFF FOR ORD APPROV ATTY FEES	
158	06/06/1989	OR	ORDER AUTHORIZING PAYMENT BY YAK CO (GAVIN)	
		MFILM	351-676	
159	06/07/1989	MTAF	MOTION AND AFFIDAVIT FOR DISCOVERY OF EVIDENE IN POSSESSION OF DEFENSE	
160	06/07/1989	NTHG	NOTICE OF PRE-TRIAL HEARING	
161	06/07/1989	MMATH	MEMORANDUM OF AUTHORITIES	
162	06/09/1989	MTAF	MOTION AND AFFIDAVIT OF DISCOVERY	
163	06/09/1989	NT	NOTICE OF SETTING FOR PRE-TRIAL HG (JUDGE GAVIN)	
164	06/12/1989	STLW	STATE'S LIST OF WITNESSES (ADDENDUM TO)	
165	06/16/1989	MT	MOT&AFF FOR ORD APPROV PRIV INVEST FEES&EXPENSES	
166	06/16/1989	OR	ORDER AUTHORIZING PAYMNT BY YAK CO (GAVIN)	
		MFILM	352-315	
167	06/21/1989	RSP	RESPONSE TO MEM	
168	06/30/1989	TRCKST	TRIAL CLERK'S SETTING	07-11-1989TD
		ACTION	H 9:00 MTNS TO BE HRD IN JAIL	
		ACTION	COURTROOM #2 3 D	
169	07/10/1989	MTAF	MOT&AFF FOR ORD APPROV ATTY FEES	
170	07/10/1989	OR	ORDER AUTHORIZING PAYMNT BY YAK CO (GAVIN)	
		MFILM	354-700	
171	07/10/1989	RSP	DEF MCNEILS RESPONSE TO STATES MOT FOR DISCOVERY OF EVIDENCE&ADDTL HANDWRITING EXEMPLAR	
172	07/11/1989	OR	ORDER GRANTING DISCOVERY TO STATE	
173	07/11/1989	OR	ORDER ON OMNIBUS APPL BY PLTF	
	07/11/1989	PREHRG	(GAVIN)CRT SET MOT IN LIMINE FOR 7-19-89,3.5 HRG FOR 7-24-89,TDR 9-5-89,STATE MOT TO OBTAIN ADDTL HANDWRITING EXEMPLAR,GRNTD STATES MOT FOR DISCOVERY RE LETTER, DENID DEF MOT FOR BILL OF PARTICULARS&	

APPEARANCE DOCKET

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
			DEF MOT TO STRIKE DEATH PENALTY, DEF WITNESSS LISTS TO BE FILED,	
	07/11/1989	PREHRG	CRT SIGNED ORD ON OMNIBUS APPLICATION BY PLTF. 89D3 1:128(BAUGHER)	
	07/12/1989	PREHRG	(GAVIN) DEF SIGNED WAIVER OF TRIAL TIME LIMITS, TDR 9-5-89. 89AD 5:7 (BAUGHER)	
173A	07/12/1989	WVSPDT	WAIVER OF SPEEDY TRIAL	
174	07/12/1989	RSP	DEFT'S AMENDED RESPONSE TO PLTF'S OMNIBUS MTNS	
175	07/12/1989	MM	MEMORANDUM	
176	07/19/1989	LTR	LETTER FROM DEF&COUNSEL DECLARATN (ORDERED SEALED BY THE COURT)	
177	07/18/1989	TRCKST	TRIAL CLERK'S SETTING	07-24-89
		ACTION	H 9:00 SUPPRESSION(3.5) 1/2D	
178	07/18/1989	TRCKST	TRIAL CLERK'S SETTING (RESET)	09-05-1989TD
		ACTION	J-12 9:00 AGR 1 DEG MURDER/ACC AGR	
		ACTION	1 DEG MURDER 4 WEEKS	
179	07/19/1989	ORIND	ORDER OF INDIGENCY (GAVIN)	
		MFILM	353-272	
180	07/20/1989	MT	MOT FOR EXPENDITURE OF PUBLIC FUNDS	
181	07/20/1989	OR	ORDER AUTHORIZING EXPENDITURE OF PUBLIC FUNDS (GAVIN)	
		MFILM	353-389	
182	07/20/1989	MTAF	MOT&AFF FOR ORDER APPROV INVEST FEE	
183	07/20/1989	OR	ORDER AUTHORIZING PAYMNT BY YAK CO FOR INVEST FEES (GAVIN)	
		MFILM	353-390	
	07/20/1989	PREHRG	(GAVIN)CRT RULED NO ORAL DICTATION SHALL BE GIVEN DURING HANDWRITING EXEMPLAR. 89D3 1:131(BAUGHER)	
	07/20/1989	PREHRG	(GAVIN)CRT CONDUCTED IN CAMERA VIEW OF VIDEO OF SCENE & PROPOSED PHOTOS HRG CONT TO 7-24-89. 89D3 1:131 (BAUGHER)	
	07/20/1989	PREHRG	(GAVIN)CRT DENIED DEF MOT TO RECONSIDER STATES MOT FOR DISCOVERY. 89D3 1:131(BAUGHER)	
	07/20/1989	PREHRG	(GAVIN)CRT GRANTD DEF MOT TO STAY ORDER RE LETTER UNTIL 8-11-89 AT NOON,CRT SIGNED ORD OF INDIGENCY RE MOT FOR DISCRETIONARY REVIEW. 89D3 1:131(BAUGHER)	
	07/24/1989	PREHRG	(GAVIN)CRT GRNTD DEF&STATES JOINT MOT TO CLOSE 3.5 HRG,DENIED DEF MOT TO CLOSE MOT IN LIMINE,3.5 HRG WAS HELD & CONCLUDED ON 7-26-89. 89D3 1:134(BAUGHER)	
184	07/24/1989	AF	AFFIDAVIT OF HOWARD W HANSAEN (SEALED BY COURT)	
185	07/24/1989	AF	AFFIDAVIT OF CHRISTOPHER TAIT (SEALED BY COURT)	
186	07/24/1989	OR	AMENDED ORDER AUTHORIZING	

APPEARANCE DOCKET

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
			DISCOVERY BY PLTF(GAVIN)	
		MFILM	353-614	
186A	07/24/1989	EXLST	EXHIBIT LIST (IN VAULT)	
	07/25/1989	VRPRC	VERBATIM REPORT OF PROCEEDINGS - (2 VOLUMES - 1 VOLUME WAS SEALED)	
	07/25/1989	SNT	SENT - 2 VOLUMES VERBAT RPT- 1 VOLUME WAS SEALED(TO SUPR COURT) PER TOM BOTHWELL	
187	07/25/1989	INX	INDEX TRANSCRIPT OF CLERK'S PAPERS	
	07/25/1989	TS	TRANSCRIPT OF CLERKS PAPERS(APP)	
	07/25/1989	SNT	SENT INDEX TO ATTORNEYS OF RECORD	
188	07/25/1989	NTDRV	NOTICE OF DISCRETIONARY REVIEW	
		MFILM	353-812	
189	07/25/1989	DSGCKP	DESIGNATION OF CLERK'S PAPERS	
190	07/25/1989	AFML	AFFIDAVIT OF MAILING	
	07/26/1989	PREHRG	(GAVIN)CLOSED 3.5 HRG CONCLUDED, CRT ORDERED RULING SEALED,ORDERS TO BE PRESENTED, CRT SCHEDULED FURTHER HEARINGS. 89D3 1:134 (BAUGHER)	
191	07/26/1989	MT	MOTION FOR ADDTL PEREMPTORY CHALL-ENGES	
192	07/26/1989	MT	MOTION TO EXCLUDE DEATH BECAUSE HANGING IS CRUEL PUNISHMENT	
193	07/26/1989	MT	MOTION TO SEQUESTER JURY	
194	07/26/1989	MT	MOTION FOR JURY VIEW OF DEF HOME	
195	07/26/1989	MT	MOTION TO LIMIT DISCOVERY OF PENALTY PHASE WITNESSES UNTIL COMPLETE OF GUILT PHASE	
196	07/26/1989	DFLW	DEFENDANT'S LIST OF WITNESSES DURING GUILT PHASE	
197	07/26/1989	MT	ADDTL MOTIONS ON BEHALF OF DEF MCNEIL	
198	07/26/1989	WTRC	WITNESS RECORD	
199	07/26/1989	EXLST	EXHIBIT LIST(EXHIBITS SEALED)	
200	07/31/1989	SBDT	SUBPOENA DUCES TECUM	
201	07/31/1989	MT	MOTION TO DISMISS NOTICE OF SPECIAL SENTENCING PROCEEDING FOR LACK OF EVIDENCE	
202	07/31/1989	MT	DEF MOT&AFF FOR AORD APRV ATTY FEES	
203	07/31/1989	OR	ORDER AUTHORIZING PAYMNT BY YAK CO (GAVIN)	
		MFILM	355-132	
204	08/07/1989	CP	COPY RE RULING DENYING MTN FOR DISCRETIONARY REVIEW	
205	08/07/1989	MT	MOTION OF KAPP-TV TO QUASH OR MODIFY SUBPEONA DUCES TECUM	
206	08/07/1989	AF	AFFIDAVIT OF DAVE ETTL	
207	08/07/1989	NTMTDK	NOTE FOR MOTION DOCKET	08-18-89
		ACTION	KAPP-TV'S MTN TO QUASH OR MODIFY	
		ACTION	SUBPEONA DUCES TECUM	
208	08/07/1989	MM	MEMORANDUM	
209	08/08/1989	FNFCL	FINDINGS OF FACT&CONCLUSIONS OF LAW	

APPEARANCE DOCKET

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
			HRG OF MTN FOR HRG CLOSURE(GAVIN)	
		MFILM	355-449	
210	08/08/1989	MT	MOTION FOR AUTHORIZATION & EXPENDI-TURE OF PUBLIC FUNDS & MTN FOR ORD SHORTENING TIME	
211	08/08/1989	ORSGT	ORDER SHORTENING TIME	08-09-89
		ACTION	DEFT'S MTN FOR EXPENDITURE OF	
		ACTION	FUNDS **JUDGE GAVIN**	
212	08/08/1989	AFSR	AFFIDAVIT OF SERVICE	
213	08/08/1989	AFSR	AFFIDAVIT OF SERVICE	
214	08/08/1989	AFSR	AFFIDAVIT OF SERVICE	
215	08/08/1989	AFSR	AFFIDAVIT OF SERVICE	
216	08/08/1989	AFSR	AFFIDAVIT OF SERVICE	
217	08/08/1989	AFSR	AFFIDAVIT OF SERVICE	
218	08/08/1989	AFML	AFFIDAVIT OF MAILING	
219	08/09/1989	MT	MOTION FOR EXPENDITURE OF PUBLIC FUNDS TO HIRE NATL JURY PROJECT	
220	08/09/1989	AF	AFFIDAVIT OF TAIT	
221	08/09/1989	OR	ORDER OF DEFT'S MTN FOR PUBLIC FUNDS (GAVIN)	
		MFILM	355-662	
222	08/09/1989	EXLST	EXHIBIT LIST (RELEASED)	
	08/09/1989	PREHRG	(GAVIN)CRT DENIED KAPP TVS MOT TO QUASH SUBPOENA,G/S ORDER ON DEF MOT FOR PUBLIC FUNDS FOR PRODUC TION OF INFO,ORALLY DENIED DEF MOT FOR PUBLIC FUNDS TO HIRE NATL JURY PROJECT, GRANTD STATES ORAL MOT TO RETAIN LETTER.89D3 1:146(BAUGHER	
223	08/11/1989	MM	MEMORANDUM IN OPPOSITION TO MOT TO EXCLUDE DEATH PENALTY BECAUSE HANG IS CRUEL PUNISHMENT	
224	08/11/1989	MM	MEMORANDUM IN OPPOSITION TO DEF MOT FOR ADDTL PEREMPTORY CHALLENGES	
225	08/14/1989	DFLW	DEFENDANT'S LIST OF WITNESSES (PENALTY PHASE)	
226	08/14/1989	EXLST	EXHIBIT LIST (RELEASED)	
	08/14/1989	PREHRG	(GAVIN)CRT DENIED DEF MOT FOR CHANG OF VENUE. 89D3 1:148(BAUGHER)	
	08/14/1989	PREHRG	(GAVIN)CRT DENIEDDEF RENEWED MOT FOR JURY SURVEY. 89D3 1:148(BAUGHER)	
	08/14/1989	PREHRG	(GAVIN)CRT DENIED DEF MOT FOR ADDTL PEREMPTORY CHALLENGES. 89D3 1:148 (BAUGHER)	
	08/14/1989	PREHRG	(GAVIN)CRT DENIED DEF MOT TO STRIKE DEATH PENALTY. 89D3 1:148(BAUGHER)	
	08/14/1989	PREHRG	(GAVIN)CRT DENIED DEF MOT TO SE-QUESTER JURY. 89D3 1:148(BAUGHER)	
	08/14/1989	PREHRG	(GAVIN)CRT GRNTD DEF MOT FOR WITNES TO BRING MATERIAL DOCUMENTS&EVIDENC W/THEM TO COURT.89D3 1:148(BAUGHER)	
	08/14/1989	PREHRG	(GAVIN)DEF MOT TO PRECLUDE STATE FROM USING PEREMPTORY CHALLENGES TO	

APPEARANCE DOCKET

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
			DISQUALIFY PROSPECTIVE JURORS W/ QUALMS AS TO DEATH PENALTY-PART GRNTD(AS TO SYSTEMATIC EXCLUSN). 89D3 1:148(BAUGHER)	
	08/14/1989	PREHRG	(GAVIN)CRT RESERVED RULING ON DEF MOT TO VIEW DEF HOME. 89D3 1:148 (BAUGHER)	
	08/14/1989	PREHRG	(GAVIN)CRT RESERVED RULING ON DEF MOT FOR STATE TO SET OUT AGGRAV FACTORS. 89D3 1:148(BAUGHER)	
	08/14/1989	PREHRG	(GAVIN)CRET RESERVED RULING ON DEF MOT RE PRIOR CONVICTION.89D3 1:148 (BAUGHER)	
	08/14/1989	PREHRG	(GAVIN)CRT RESERVED RULIN ON DEF MOT RE NON ADJUDICATED EVIDENCE. 89D3 1:148(BAUGHER)	
	08/14/1989	PREHRG	(GAVIN)CRT RESERVED RULING ON DEF ORAL MOT IN LIMINE RE PRIOR ARREST(NO CONVICTION).89D3 1:148 (BAUGHER)	
	08/14/1989	PREHRG	(GAVIN)CRT RESERVED RULING ON DEF ORAL MOT TO PRODUCE EVIDENCE OF PRIOR MISCONDUCT. 89D3 1:148 (BAUGHER)	
227	08/15/1989	MTAF	MOT&AFF FOR ORD APPRV ATTY FEES	
228	08/15/1989	OR	ORDER AUTHORIZING PAYMNT BY YAK CO (GAVIN)	
		MFILM	355-944	
	08/18/1989	PREHRG	(GAVIN)CRT & COUNSEL CONFERRED RE PROPOSED JURY QUESTIONNAIRE,DEF WAIVED OBJECTION TO QUESTIONNAIRE. 89D3 1:149(BAUGHER)	
229	08/18/1989	MT	MOTION FOR VERBATIM RPT OF PROO CEEDINGS AT PUBLIC EXPENSE	
230	08/18/1989	ORAU	ORDER AUTHORIZING RPT OF PROCEEDING AT PUBLIC EXPENSE (GAVIN)	
		MFILM	356-233	
231	08/22/1989	MTAF	MOT&AFF FOR ORDER APPROV ATTY FEES	
232	08/22/1989	OR	ORDER AUTHORIZING PAYMNT BY YAK CO (GAVIN)	
		MFILM	356-333	
233	08/23/1989	STLW	STATE'S LIST OF WITNESSES (2ND ADDENDUM TO)	
234	08/25/1989	EXLST	EXHIBIT LIST(RELEASED)	
235	08/25/1989	PLEG	PLEA OF GUILTY-CTS 1 & 2	
236	08/25/1989	STTDFG	STATEMENT OF DEFENDANT,PLEA GUILTY	
237	08/25/1989	JDSWC	JDGMT & SENT & WARRANT OF COMMITMT (GAVIN)	
		MFILM	356-842	
	08/25/1989	$PACV	PENALTY ASSESSED - CRIME VICTIMS	100.00
238	08/25/1989	ORDRFP	ORD FNGRPRNT & CERT OF ATTESTATION	
		MFILM	356-843	
	08/25/1989	DISPHRG	(GAVIN)CRT GRANTD STATE MOT TO	

APPEARANCE DOCKET

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
			WITHDRAW DEATH PENALTY,PLEA,STATE-MNT,DEF SENT TO 2 TERMS OF LIFE IN PRISON,CONSECUTIVE,J&S,FNGRPRNTS CRT GRNTD STATES MOT TO SEAL EXHIBITS,DENIED DEF MOT FOR CONTACT VISIT. 89D3 1:152(BAUGHER)	
239	09/06/1989	JDSWC	JDGMT & SENT & WARRANT OF COMMITMT AMENDED (GAVIN)	
		MFILM	357-346	
240	09/06/1989	FNFCL	FINDINGS OF FACT&CONCLUSIONS OF LAW (GAVIN)	
		MFILM	357-347	
241	09/06/1989	MTAF	MOT&AFF FOR ORD APPROV ATTY FEES	
242	09/06/1989	OR	ORDER AUTHORIZING PAYMNT BY YAK CO (GAVIN)	
		MFILM	357-348	
	09/06/1989	POSTHRG	(GAVIN) CRT SIGND AMEND JUDGMNT & SENT, FIND & CONCLSNS OF 3.5 HRG. 89D3 1:157 (BAUGHER)	
243	09/22/1989	NTAP	NOTICE OF APPEAL	
		MFILM	358-476	
244	09/22/1989	AFML	AFFIDAVIT OF MAILING	
245	09/22/1989	NACA	NOTICE OF APPEAL TO COURT OF APPEAL	
		MFILM	358-477	
246	09/22/1989	MTAF	MOTION AND AFFIDAVIT FOR ORDER OF INDIGENCY	
246A	09/22/1989	ORIND	ORDER OF INDIGENCY (GAVIN)	
		MFILM	358-478	
247	09/28/1989	MT	DEF MOT&AFF FOR PAYMNT OF BILL	
248	09/28/1989	OR	ORDER AUTHORIZING PAYMNT BY YAK CO (GAVIN)	
		MFILM	358-910	
249	09/28/1989	OR	ORDER AUTHORIZING PAYMNT BY YAK CO (GAVIN)	
		MFILM	358-911	
250	09/29/1989	AFML	AFFIDAVIT OF MAILING NTC OF APPEAL	
251	10/16/1989	DSGCKP	DESIGNATION OF CLERK'S PAPERS	
252	10/24/1989	INX	INDEX TRANSCRIPT OF CLERKS PAPERS	
	10/24/1989	TS	TRANSCRIPT OF CLERKS PAPERS (APP) (TWO VOLUMES)	
	10/24/1989	SNT	SENT INDEX TO ATTORNEYS OF RECORD	
253	11/03/1989	OR	ORDER RELEASING NON-ADMITTED IDENTIFICATIONS (GAVIN)	
		MFILM	361-253	
254	11/14/1989	LTR	LETTER FROM RUSSELL MCNEIL	
	11/27/1989	VRPRC	VERBATIM REPORT OF PROCEEDINGS	
255	12/08/1989	MT	DEF MOT FOR EXPEND OF PUB FUNDS	
256	12/08/1989	OR	ORDER AUTHOR EXPEND OF PUBLIC FUNDS (GAVIN)	
		MFILM	363-518	
	01/04/1990	POSTHRG	(GAVIN)CRT ORALLY GRNTD MOT TO OPEN SEALED PORTIONS OF FILE. 90D3 1:2 (BAUGHER)	

APPEARANCE DOCKET

SUB#	DATE	CODE/ CONN	DESCRIPTION/NAME	SECONDARY
257	01/05/1990	MT	MOTION FOR AUTH OF PUBLIC FUNDS	
258	01/05/1990	OR	ORDER AURTHORIZING EXPENDOF PUBLIC FUNDS (GAVIN)	
		MFILM	365-31	
259	05/21/1990	DSGCKP	DESIGNATION OF CLERK'S PAPERS	
260	11/29/1990	MND	MANDATE	
		MFILM	386-1323	
261	12/31/1990	STPORE	STIP&OR RET EXHBTS UNOPNED DEPOSTNS	
262	06/13/2003	MT	MOTION RE:PRODUCITON OF DOCUMENTS	
263	06/13/2003	NT	NOTICE OF MOTION	

PROCEEDINGS

DATE/TIME	PROCEEDING TYPE LOCATION/OFFICIAL	PROCEEDING STATUS DURATION

END

STATE OF WASHINGTON NO. 88-1-00428-1

vs

RUSSELL DUANE McNEIL

MOTION TO OPEN SEALED PORTION OF FILE

DATE 1-4-90 JUDGE/COMMISSIONER F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

DEFENDANT PRESENT No REPRESENTED BY PROSECUTOR Jeff Sullivan

COURT granted the Herald Republic's oral motion to open the sealed portion of the file.

ARRAIGNMENT ON PROBATION/SENTENCE CONDITION VIOLATION

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

PROSECUTOR COUNSEL APPOINTED/RETAINED

TRUE NAME HEARING DATE BAIL

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT PRESENT REPRESENTED BY PROSECUTOR

COURT

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT PRESENT REPRESENTED BY PROSECUTOR

COURT

ADMISSION TO PROBATION/SENTENCE CONDITION VIOLATION

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT PRESENT REPRESENTED BY PROSECUTOR

PLEA OF

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT PRESENT REPRESENTED BY PROSECUTOR

COURT

MODIFICATION/REVOCATION OF PROBATION/SENTENCE

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT PRESENT REPRESENTED BY PROSECUTOR

MODIFIED REVOKED SENTENCED TO

ORDER SIGNED TO BE PRESENTED FINGERPRINTS

CRIMINAL MINUTE SHEET

STATE OF WASHINGTON

NO. 88-1-00428-1

vs

RUSSELL D McNEIL

PRESENTATION OF AMENDED JUDGMENT AND SENTENCE

DATE 9-6-89 JUDGE/~~COURT COMMISSIONER~~ F James Gavin CLERK Hilary Eilmes

REPORTER Lonna Baugher INTERPRETER

DEFENDANT PRESENT Yes REPRESENTED BY Diana Parker, Chris Tait PROSECUTOR Howard Hanson, Jeffrey Sullivan,

COURT signed Amended Judgment & Sentence, Findings & Conclusions of 3.5 Hearing

ARRAIGNMENT ON PROBATION/SENTENCE CONDITION VIOLATION

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

PROSECUTOR COUNSEL APPOINTED/RETAINED

TRUE NAME HEARING DATE BAIL

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT PRESENT REPRESENTED BY PROSECUTOR

COURT

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT PRESENT REPRESENTED BY PROSECUTOR

COURT

ADMISSION TO PROBATION/SENTENCE CONDITION VIOLATION

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT PRESENT REPRESENTED BY PROSECUTOR

PLEA OF

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT PRESENT REPRESENTED BY PROSECUTOR

COURT

MODIFICATION/REVOCATION OF PROBATION/SENTENCE

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT PRESENT REPRESENTED BY PROSECUTOR

MODIFIED REVOKED SENTENCED TO

ORDER SIGNED TO BE PRESENTED FINGERPRINTS

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN YAKIMA COUNTY

NO. 88-1-00428-1 CAUSE OF ACTION Plea/Sentence Hearing

PLTF/PET STATE OF WASHINGTON DEFT/RESP RUSSELL DUANE McNEIL

vs/and

PLTF/PET'S ATTY Howard Hansen, Jeffrey Sullivan DEFT/RESP'S ATTY Thomas Bothwell, Chris Tait

JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

August 25, 1989

Court convened at 1:58 P.M., both parties being ready, Lonna Baugher reporting. The Court reserved ruling on the State's Motion to Withdraw the Death Penalty. The Defendant orally entered a plea of guilty to Count 1 (Aggravated First Degree Murder) and guilty to Count 2 (Accomplice to Aggravated First Degree Murder). The Statement of Defendant on Plea of Guilty was signed by the defendant. The following people addressed the Court: Marie Nickoloff, William R. Nickoloff and Bruce Gill. Counsel for the Defendant addressed the Court. The Court accepted and approved the plea agreement (withdrawal of death penalty and acceptance of plea). The Court sentenced the defendant to: Count 1 - life in prison without parole; Count 2 - life in prison without parole; to run consecutively. The Judgment and Sentence was signed and fingerprints of the defendant were obtained. The Court granted the State's Motion to Seal the Exhibits to this hearing and denied the Defendant's Motion for a Contact Visit. Court adjourned at 3:45 P.M.

CRIMINAL MINUTE SHEET

STATE OF WASHINGTON NO. 88-1-00428-1

vs ORIGINAL CHARGE _____

RUSSELL DUANE McNEIL

WARRANT/SUMMONS

DATE _____ JUDGE/COURT COMMISSIONER _____ PROSECUTOR _____

REPORTER _____

PRELIMINARY APPEARANCE

DATE _____ JUDGE/COURT COMMISSIONER _____ CLERK _____

REPORTER _____ INTERPRETER _____

DEFENDANT REPRESENTED BY _____ PROSECUTOR _____

_____ APPOINTED. BAIL SET AT _____ RELEASED ON OWN RECOGNIZANCE _____

ARRAIGNMENT SET FOR _____. TRUE NAME _____ ORDER SIGNED.

_____

DATE _____ JUDGE/COURT COMMISSIONER _____ CLERK _____

REPORTER _____ INTERPRETER _____

DEFENDANT PRESENT ____ REPRESENTED BY _____ PROSECUTOR _____

COURT _____

_____

ARRAIGNMENT

DATE _____ JUDGE/COURT COMMISSIONER _____ CLERK _____

REPORTER _____ INTERPRETER _____

PROSECUTOR _____ COUNSEL APPOINTED/RETAINED _____

TRUE NAME _____ TRIAL DATE _____ BAIL _____

PREPARATION OF PROPOSED JURY QUESTIONNAIRE

DATE 8-18-89 JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER _____

DEFENDANT PRESENT Yes REPRESENTED BY T. Bothwell, C. Tait PROSECUTOR H. Hansen, J. Sullivan

COURT and counsel conferred regarding the proposed jury questionnaire. Counsel for the Defenda

and the Defendant waived objection to the proposed jury questionnaire.

_____

DATE _____ JUDGE/COURT COMMISSIONER _____ CLERK _____

REPORTER _____ INTERPRETER _____

DEFENDANT PRESENT ____ REPRESENTED BY _____ PROSECUTOR _____

COURT _____

_____

_____

DATE _____ JUDGE/COURT COMMISSIONER _____ CLERK _____

REPORTER _____ INTERPRETER _____

DEFENDANT PRESENT ____ REPRESENTED BY _____ PROSECUTOR _____

COURT _____

_____

_____

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR YAKIMA COUNTY

NO. 88-1-00428-1 CAUSE OF ACTION PRETRIAL MOTIONS

PLTF/PET STATE OF WASHINGTON DEFT/RESP RUSSELL DUANE McNEIL

vs/and

PLTF/PET'S ATTY Howard Hansen, Jeffrey Sullivan DEFT/RESP'S ATTY Thomas Bothwell, Christopher Tait

JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Camobell

REPORTER Lonna Baugher INTERPRETER

August 14, 1989

Court convened at 9:03 A.M., all parties being ready, Lonna Baugher reporting. Counsel argued Defendant's Motion For Change of Venue. The TV videotapes (exhibits C,D&E) were viewed in open court. Court recessed at 12:15 P.M. and reconvened at 1:58 P.M. Additional arguments of counsel were heard. The Court denied the Defendant's Motion For Change of Venue.

The Court ruled on the following motions:

Defendant's Renewed Motion for Jury Survey - denied;

Defendant's Motion for Additional Peremptory Challenges - denied;

Defendant's Motion to Strike Death Penalty - denied;

Defendant's Motion to Sequester the Jury - denied;

Defendant's Motion for Witnesses to Bring Material Documents and Tangible Evidence With Them to Court - granted;

Defendant's Motion to Preclude State from Using Peremptory Challenges to Disqualify Prospective Jurors With Qualms as to the Death Penalty - partially granted (as to systematic exclusion).

The Court reserved ruling on the following motions:

Defendant's Motion to View Defendant's Home;

Defendant's Motion for State to Set Out Aggravating Factors;

Defendant's Motion Re: Prior Conviction;

Defendant's Motion Re: Non Adjudicated Evidence;

Defendant's Oral Motion In Limine Re: Prior Arrest (no conviction);

Defendant's Oral Motion to Produce Evidence of Prior Misconduct.

The Court orally ordered the Defendant to produce witness summaries and additional addresses by the end of the week. Court adjourned at 5:10 P.M.

EXHIBIT LIST

CUSTODY OR REAL PROPERTY

CAUSE NO. 88-1-00428-1 ACTION MOTION FOR CHANGE OF VENUE

STATE OF WASHINGTON VS. RUSSELL DUANE McNEIL

Howard Hansen, Jeff Sullivan Attorney(s)

Thomas Bothwell, Chris Tait Attorney(s)

JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN DEPT. NO. 3

REPORTER Lonna Baugher CLERK Laurie Campbell

DATE	PLAINTIFF'S EXHIBITS (Description)	ADMITTED	DEFENDANT'S EXHIBITS (Description)	DATE
		X	DEA KIT memo + attachments; KIMA video log; KNDD video log; newspaper copies; Affs of D. Manning, V. Armstrong, B. Phillips, K. McClary, K. Kendrick, J. Roberts, J. Morrison, S. Pennie, B. Clem; and 7-24-89 Aff of C. Tait + attachments excluding police reports.	8-14-89
8-14-89	SEB Certificate of B. Ingham	X		
		X	DEC KAPP-TV video	8-14-89
		X	DED KNDD-TV video	"
		X	DEE KIMA-TV video	"

AUG 14 1989

CRIMINAL MINUTE SHEET

STATE OF WASHINGTON

vs

RUSSELL DUANE McNEIL

NO. 88-1-00428-1

ORIGINAL CHARGE

WARRANT/SUMMONS

DATE JUDGE/COURT COMMISSIONER PROSECUTOR

REPORTER

PRELIMINARY APPEARANCE

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT REPRESENTED BY PROSECUTOR

APPOINTED. BAIL SET AT RELEASED ON OWN RECOGNIZANCE

ARRAIGNMENT SET FOR . TRUE NAME ORDER SIGNED.

KAPP TV's MOTION TO QUASH SUBPOENA

DATE 8-9-89 JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

DEFENDANT PRESENT Yes REPRESENTED BY T. Bothwell, C. Tait PROSECUTOR H. Hansen, J. Sullivan

Mike Shinn for KAPP TV and Dave Thorner for KIMA TV.

COURT orally denied Motion to Quash Subpoena.

ARRAIGNMENT

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

PROSECUTOR COUNSEL APPOINTED/RETAINED

TRUE NAME TRIAL DATE BAIL

DEFENDANT'S MOTION FOR EXPENDITURE OF PUBLIC FUNDS

DATE 8-9-89 JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

DEFENDANT PRESENT Yes REPRESENTED BY T. Bothwell, C. Tait PROSECUTOR H. Hansen, J. Sullivan

COURT granted and signed Order on Defendant's Motion for Public Funds for production of information. The Court orally denied Defendant's Motion for Expenditure to Hire National Jury Project.

STATE'S ORALY MOTION TO RETAIN LETTER

DATE 8-9-89 JUDGE/~~COURT COMMISSIONER~~ F JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

DEFENDANT PRESENT Yes REPRESENTED BY T. Bothwell, C. Tait PROSECUTOR H. Hansen, J. Sullivan

COURT granted the State's oral Motion to Retain the letter. If it is submitted to the crime lab, the report shall be provided to defense counsel on or before 8-21-89 at noon.

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT PRESENT REPRESENTED BY PROSECUTOR

COURT

EXHIBIT LIST

CUSTODY OR REAL PROPERTY _____

CAUSE NO. 88-1-00428-1 ACTION Def Mot To Expand Public Trial

State of Washington VS. Russell A. McNeil

H. Hansen, J. Sullivan Attorney(s) T. Bothwell, C. Fait Attorney(s)

(1) Mike Shinn for KAPP-TV; (2) Dave Thorsen for KIMA-TV

JUDGE/~~COURT COMMISSIONER~~ F. James Gavin DEPT. NO. 3

REPORTER Donna Baugher CLERK Laurie Campbell

DATE	PLAINTIFF'S EXHIBITS (Description)	ADMITTED	DEFENDANT'S EXHIBITS (Description)	DATE
		X	EA Memo from KIMA	8-9-89

FILED
AUG 9 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR YAKIMA COUNTY

NO. 88-1-00428-1 CAUSE OF ACTION 3.5 HEARING (Closed)

PLTF/PET STATE OF WASHINGTON DEFT/RESP RUSSELL DUANE McNEIL

vs/and

PLTF/PET'S ATTY Howard Hansen, Jeff Sullivan DEFT/RESP'S ATTY Thomas Bothwell, Christopher Tait

JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

NON-JURY TRIAL

PLAINTIFF/PETITIONER - WITNESSES SWORN -			DEFENDANT/RESPONDENT - WITNESSES SWORN -		
(7-24) 1 Jerry Hafsos	16		(7-26) 1 Russell Duane McNeil	16	
(7-25) 2 John C. Lewis	17		2	17	
3 Rolland Shaw	18		3	18	
4	19		4	19	
5	20		5	20	
6	21		6	21	
7	22		7	22	
8	23		8	23	
9	24		9	24	
10	25		10	25	
11	26		11	26	
12	27		12	27	
13	28		13	28	
14	29		14	29	
15	30		15	30	

CLERK'S MINUTES

July 24, 1989 - 3.5 Hearing (Closed)

Opening statement of counsel for the State was heard. Counsel for the Defendant reserved opening statement. Sworn testimony for the State was heard. Court adjourned at 4:50 P.M.

July 25, 1989 - (Continuation of 3.5 Hearing, closed)

Court convened at 9:30 A.M., all parties being ready, Lonna Baugher reporting. Sworn testimony for the State continued. Court recessed at 12:00 P.M. and reconvened at 1:32 P.M. Sworn testimony for the State continued. The Court listened to the taped statement of Russell McNeil. The State rested at 4:23 P.M. The Court advised the Defendant of his self incrimination rights. The Court and counsel conferred re: scheduling. The Court scheduled the Motion For Change of Venue for hearing on 8-14-89 at 9:00 A.M. Court adjourned at 5:00 P.M.

July 26, 1989 - (Continuation of 3.5 Hearing, closed)

Court convened at 9:07 A.M., all parties being ready, Lonna Baugher reporting. The Court re-emphasized the Defendant's self incrimination rights. Sworn testimony for the Defendant was heard. The Court refused defense counsel's Offer of Proof Re: threats. Sworn testimony for the Defendant continued. Court recessed at 12:01 P.M. and reconvened at 1:37 P.M. Sworn testimony for the Defendant continued and rested at 1:52 P.M. Closing arguments of counsel were heard. The Court ruled, denying the Defendant's Motion to Suppress the Defendant's Statements. The Court ordered that the ruling be sealed. Findings of Fact, Conclusions of Law and Order to be presented.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR YAKIMA COUNTY

NO. 88-1-00428-1 CAUSE OF ACTION Pre-Trial Motions
(Motion In Limine, 3.5 Hearing)

PLTF/PET STATE OF WASHINGTON DEFT/RESP RUSSELL DUANE McNEIL

vs/and

PLTF/PET'S ATTY Howard Hansen, Jeff Sullivan DEFT/RESP'S ATTY Thomas Bothwell,
Mark Fickes representing Yakima Herald Christopher Tait

JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

July 24, 1989

Court convened at 9:15 A.M., all parties being ready, Lonna Baugher reporting. The Court heard arguments of counsel and granted the Defendant's and State's Joint Motion For Closure of the 3.5 Hearing. The Court denied Defendant McNeil's Motion For Closure of the Motions in Limine. Orders to be presented. The closed 3.5 Hearing commenced.

July 26, 1989

The closed 3.5 Hearing having been held, the Court ordered that the ruling be sealed. The Court and counsel conferred regarding proposed Findings of Fact, Conclusions of Law and Order For 3.5 Hearing Closure. Counsel stipulated that the Motion In Limine should be continued to a later date. The Court orally ordered that the Defendant file their pleadings regarding the Motion for Change of Venue by noon on 8-10-89. The Defendant's additional motions will be heard following the Motion for Change of Venue. The State's responses to thos motions shall be filed by noon on 8-10-89. Court adjourned at 5:15 P.M.

EXHIBIT LIST

CUSTODY OR ___
REAL PROPERTY

CAUSE NO. 88-1-00427-2/88-1-00428-1 ACTION Pre-Trial Motions

STATE OF WASHINGTON VS. HERBERT RICE/RUSSELL DUANE McNEIL

Howard Hansen, Jeff Sullivan
Attorney(s)

Rick Hoffman, Michael Frost/
Thomas Bothwell, Chris Tait
Attorney(s)

JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN DEPT. NO. 3

REPORTER Lonna Baugher CLERK Laurie Campbell

DATE	PLAINTIFF'S EXHIBITS (Description)	ADMITTED	DEFENDANT'S EXHIBITS (Description)	DATE
4-10-89	SE "A" Rice statement transcript	X		
"	SE "B" McNeil statement transcript	X		
"	SE "C1" McNeil statement tape 1	X		
"	SE "C2" McNeil statement tape 2	X		
"	SE "D" Rice statement tape	X		
		X	DE "E" McNeil statement transcript	4-10-89

FILED
APR 10 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

sealed by Court order
to be opened only
by order of Judge Flavin

EXHIBIT LIST

CUSTODY OR REAL PROPERTY

CAUSE NO. 88-1-00428-1 ACTION 3.5 Hearing

STATE OF WASHINGTON VS. RUSSELL DUANE McNEIL

Howard Hansen, Jeff Sullivan Attorney(s) Thomas Bothwell, Chris Tait Attorney(s)

JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN DEPT. NO. 3

REPORTER Lonna Baugher CLERK Laurie Campbell

DATE	PLAINTIFF'S EXHIBITS (Description)	ADMITTED	DEFENDANT'S EXHIBITS (Description)	DATE
7-25-89	SEF Miranda Warnings & Waiver	X		
"	SEG copy of Miranda Card	X		
"	SEH copy of file #83-8-820-5	X		
"	SEI copy of file #86-8-194-9	X		
"	SI J copy of Declination for (McNeil)		(illegible)	
"	SI K copy of Findings & Order Declining		(illegible)	
	for purposes of 3.5 hearing (McNeil) re-admitted B, C1, C2 + E			

EXHIBIT LIST

CUSTODY OR REAL PROPERTY

CAUSE NO. 88-1-00428-1 ACTION Motions In Limine

STATE OF WASHINGTON VS. RUSSELL DUANE McNEIL

Howard Hansen, Jeff Sullivan
Attorney(s)

Thomas Bothwell, Chris Tait
Attorney(s)

JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN DEPT. NO. 3

REPORTER Lonna Baugher CLERK Laurie Campbell

DATE	PLAINTIFF'S EXHIBITS (Description)	ADMITTED	DEFENDANT'S EXHIBITS (Description)	DATE
7-24-89	SI 1 photo			
"	SI 2 photo			
"	SI 3 photo			
"	SI 4 photo			
"	SI 5 photo			
"	SI 6 photo			
"	SI 7 photo			
"	SI 8 photo			
"	SI 9 photo			
"	SI 10 photo			
"	SI 11 photo			
"	SI 12 photo			
"	SI 13 photo			
"	SI 14 photo			
"	SI 15 photo			
"	SI 16 photo			
"	SI 17 photo			
"	SI 18 photo			
"	SI 19 photo			
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"	SI 24 photo			
"	SI 25 photo			
"	SI 26 photo			
"	SI 27 photo			
"	SI 28 photo			
"	SI 29 photo			
"	SI 30 photo			
"	SI 31 photo			
"	SI 32 photo			
"	SI 33 photo			
"	SI 34 photo			
"	SI 35 photo			
"	SI 36 photo			
"	SI 37 photo			
"	SI 38 photo			

EXHIBIT LIST

CUSTODY OR REAL PROPERTY

CAUSE NO. 88-1-00428-1 ACTION Motions in Limine

STATE OF WASHINGTON VS. RUSSELL DUANE McNEIL

Howard Hansen, Jeff Sullivan
Attorney(s)

Thomas Bothwell, Chris Tait
Attorney(s)

JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN DEPT. NO. 3

REPORTER Lonna Baugher CLERK Laurie Campbell

DATE	PLAINTIFF'S EXHIBITS (Description)	ADMITTED	DEFENDANT'S EXHIBITS (Description)	DATE
7-24-89	S1 39 photo			
"	S1 40 photo			
"	S1 41 photo			
"	S1 42 photo			
"	S1 43 photo			
"	S1 44 photo			
"	S1 45 photo			
"	S1 46 photo			
"	S1 47 photo			
"	S1 48 photo			
"	S1 49 photo			
"	S1 50 photo			
"	S1 51 photo			
"	S1 52 photo			
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"	S1 64 photo			
"	S1 65 photo			
"	S1 66 photo			
"	S1 67 photo			
"	S1 68 photo			
"	S1 69 photo			
7-25-89	S1 70 photo			
"	S1 71 photo			
"	S1 72 photo			
"	S1 73 photo			
"	S1 74 photo			
"	S1 75 photo			
"	S1 76 photo			

EXHIBIT LIST

CUSTODY OR REAL PROPERTY _____

CAUSE NO. 88-1-00428-1 ACTION Motions In Limine

STATE OF WASHINGTON VS. RUSSELL DUANE McNEIL

Howard Hansen, Jeff Sullivan
Attorney(s)

Thomas Bothwell, Chris Tait
Attorney(s)

JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN DEPT. NO. 3

REPORTER Lonna Baugher CLERK Laurie Campbell

DATE	PLAINTIFF'S EXHIBITS (Description)	ADMITTED	DEFENDANT'S EXHIBITS (Description)	DATE
7-25-89	S1 77 photo			
"	S1 78 photo			
"	S1 79 photocopy of photo			

CRIMINAL MINUTE SHEET

STATE OF WASHINGTON NO. 88-1-00428-1

vs ORIGINAL CHARGE

RUSSELL DUANE McNEIL

WARRANT/SUMMONS

DATE JUDGE/COURT COMMISSIONER PROSECUTOR

REPORTER

PRELIMINARY APPEARANCE

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT REPRESENTED BY PROSECUTOR

APPOINTED. BAIL SET AT RELEASED ON OWN RECOGNIZANCE

ARRAIGNMENT SET FOR . TRUE NAME ORDER SIGNED.

COURT'S ORAL RULING RE: HANDWRITING EXEMPLAR

DATE 7-20-89 JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

DEFENDANT PRESENT Yes REPRESENTED BY T. Bothwell, C. Tait PROSECUTOR Howard Hansen

COURT orally ruled that no oral dictation shall be given during the administration of the handwriting exemplar.

ARRAIGNMENT

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

PROSECUTOR COUNSEL APPOINTED/RETAINED

TRUE NAME TRIAL DATE BAIL

MOTIONS IN LIMINE

DATE 7-19-89 JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

DEFENDANT PRESENT Yes REPRESENTED BY T. Bothwell, C. Tait PROSECUTOR Howard Hansen

COURT conducted an in camera viewing of the video of the scene and of proposed photos. The hearing was continued to 7-24-89.

DEFENDANT'S MOTION TO RECONSIDER STATE'S MOTION FOR DISCOVERY

DATE 7-19-89 JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

DEFENDANT PRESENT Yes REPRESENTED BY T. Bothwell, C. Tait PROSECUTOR Howard Hansen

COURT denied Defendant's Motion.

DEFENDANT'S MOTION TO STAY ORDER RE: LETTER

DATE 7-19-89 JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

DEFENDANT PRESENT Yes REPRESENTED BY T. Bothwell, C. Tait PROSECUTOR Howard Hansen

COURT granted Defendant's Motion (letter to be provided to the prosecutor on or before 8-11-89 at noon, unless the Supreme Court rules otherwise). The Court ordered a sealed copy of the letter and a sealed copy of the Verbatim Report of Proceedings (in camera hearing) be sent to the Supreme Court. Court signed Order of Indigency Relative to Motion for Discretionary Review.

STATE OF WASHINGTON NO. 89-1-00428-1

vs

RUSSELL DUANE McNEIL

OMNIBUS (4.5)

DATE_____ JUDGE/COURT COMMISSIONER_____ CLERK_____

REPORTER_____ INTERPRETER_____

DEFENDANT PRESENT____ REPRESENTED BY_____ PROSECUTOR_____

SWORN TESTIMONY OF_____

OMNIBUS QUESTIONS HEARD AND ANSWERED_____.

CONFESSION (3.5)/SUPPRESSION (3.6)

DATE_____ JUDGE/COURT COMMISSIONER_____ CLERK_____

REPORTER_____ INTERPRETER_____

DEFENDANT PRESENT____ REPRESENTED BY_____ PROSECUTOR_____

SWORN TESTIMONY OF_____

COURT_____

EXHIBITS_____

WAIVER OF TRIAL TIME LIMITS

DATE 7-12-89 JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER_____

DEFENDANT PRESENT Yes REPRESENTED BY Chris Tait PROSECUTOR Jeff Sullivan

COURT accepted Defendant's Written Waiver of Trial Time Limits, trial set for 9-5-89.

DATE_____ JUDGE/COURT COMMISSIONER_____ CLERK_____

REPORTER_____ INTERPRETER_____

DEFENDANT PRESENT____ REPRESENTED BY_____ PROSECUTOR_____

COURT_____

DATE_____ JUDGE/COURT COMMISSIONER_____ CLERK_____

REPORTER_____ INTERPRETER_____

DEFENDANT PRESENT____ REPRESENTED BY_____ PROSECUTOR_____

COURT_____

DATE_____ JUDGE/COURT COMMISSIONER_____ CLERK_____

REPORTER_____ INTERPRETER_____

DEFENDANT PRESENT____ REPRESENTED BY_____ PROSECUTOR_____

COURT_____

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR YAKIMA COUNTY

NO. 88-1-00427-2 CAUSE OF ACTION Pre-Trial Motions

PLTF/PET STATE OF WASHINGTON DEFT/RESP RUSSELL DUANE McNEIL

vs/and

PLTF/PET'S ATTY Howard Hansen, Jeff Sullivan DEFT/RESP'S ATTY Thomas Bothwell, Chris Tait

Mark Fickes for Yakima Herald Republic

JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

July 11, 1989

Court and counsel conferred regarding scheduling, the following dates were set:

7-19-89 at 9:00 AM - Motions in Limine

7-24-89 at 9:00 AM - 3.5 Hearing

9-5-89 at 9:00 AM - Trial Date (provided a written Waiver of Trial Time Limits is filed)

The following motions were heard:

STATE'S MOTION TO OBTAIN ADDITIONAL HANDWRITING EXEMPLAR - granted, to be produced on or before 7-17-89.

STATE'S MOTION FOR DISCOVERY RE: LETTER - arguments of counsel were heard, (in chambers, the Court, court reporter, defendant and defense counsel had an in camera hearing). The Court granted the motion, letter to be produced on or before 7-19-89 at noon, Order Granting Discovery to the State filed.

DEFENDANT'S MOTION FOR A BILL OF PARTICULARS RE: DEATH PENALTY and DEFENDANT'S MOTION TO STRIKE DEATH PENALTY - denied.

The Court orally ordered the Defendant's Witness List (for guilt phase of trial) be filed by noon on 7-17-89 and the Defendant's Witness List (for penalty phase) be filed by 8-14-89 at 5:00 PM.

The Court signed: Order On Omnibus Application by Plaintiff.

IN THE SUPERIC URT OF THE STATE OF WASHINGTC R YAKIMA COUNTY

NO. 88-1-00427-2/ 88-1-00428-1 CAUSE OF ACTION Pre-Trial Motions

PLTF/PET STATE OF WASHINGTON DEFT/RESP HERBERT RICE, JR./ RUSSELL DUANE McNEIL

vs/and

PLTF/PET'S ATTY Howard Hansen, Jeff Sullivan DEFT/RESP'S ATTY Rick Hoffman, Michael Frost Thomas Bothwell, Chris Tait

JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

NON-JURY TRIAL

PLAINTIFF/PETITIONER		- WITNESSES SWORN -		DEFENDANT/RESPONDENT	
(4-10) 1 Rolland Shaw*	16	1	16		
2	17	2	17		
3	18	3	18		
4	19	4	19		
5	20	5	20		
6	21	6	21		
7	22	7	22		
8	23	8	23		
9	24	9	24		
10	25	10	25		
11	26	11	26		
12	27	12	27		
13	28	13	28		
14	29	14	29		
15	30	15	30		

CLERK'S MINUTES

April 10, 1989 (Pre-Trial Motions)

MOTION TO EXCLUDE PUBLIC FROM 3.5 HEARING - *Sworn testimony for the State heard with regard to the exhibits. The Court will listen to the taped statements and review the transcripts in camera. Counsel to submit briefing with regard to closed hearings. 3.5 Hearing to be re-noted.

DEFENDANTS' MOTIONS TO RESERVE MOTION FOR CHANGE OF VENUE - granted.

DEFENDANTS' MOTIONS FOR DISCOVERY - partially granted. The Court set a schedule for production of additional discovery materials.

DEFENDANTS' MOTIONS IN LIMINE - Not heard.

DEFENDANTS' MOTIONS FOR A BILL OF PARTICULARS - denied.

DEFENDANTS' MOTIONS TO STRIKE NOTICE OF SPECIAL SENTENCING PROCEEDINGS - Additional briefs to be submitted by the defendants by 5/1, responsive briefs from the Prosecutor to be submitted by 5/15 and defendants' reply briefs to be submitted by 5/21.

DEFENDANT RICE'S MOTION TO DISMISS - denied.

STATE'S OMNIBUS APPLICATION - State's omnibus questions asked and answered.

CRIMINAL MINUTE SHEET

STATE OF WASHINGTON NO. 88-1-00428-1

vs ORIGINAL CHARGE

RUSSELL DUANE McNEIL

WARRANT/SUMMONS

DATE JUDGE/COURT COMMISSIONER PROSECUTOR

REPORTER

PRELIMINARY APPEARANCE

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT REPRESENTED BY PROSECUTOR

APPOINTED. BAIL SET AT RELEASED ON OWN RECOGNIZANCE

ARRAIGNMENT SET FOR . TRUE NAME ORDER SIGNED.

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT PRESENT REPRESENTED BY PROSECUTOR

COURT

ARRAIGNMENT

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

PROSECUTOR COUNSEL APPOINTED/RETAINED

TRUE NAME TRIAL DATE BAIL

PRESENTATION OF ORDER RE: DEATH PENALTY

DATE 9-28-88 JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

DEFENDANT PRESENT Yes REPRESENTED BY Chris Tait PROSECUTOR Howard Hansen

COURT signed Order Denying Defendant's Motion to Dismiss Information and to Dismiss Death Penalty Notice.

MOTION FOR CONTINUANCE OF TRIAL

DATE 2-3-89 JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

DEFENDANT PRESENT Yes REPRESENTED BY Chris Tait, Tom Bothwell PROSECUTOR H. Hansen, J. Sullivan

COURT having reviewed the Defendant's written Waiver, heard the defendant's oral waiver of Speedy Trial. The Court granted the Defendant's Motion to Continue Trial Date, set new ~~schedule for pre-trial motions and trial~~ date, ~~order to be presented.~~

PRESENTATION OF SCHEDULING ORDER

DATE 2-6-89 JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

DEFENDANT PRESENT Yes REPRESENTED BY Chris Tait, Tom Bothwell PROSECUTOR H. Hansen, J. Sullivan

COURT clarified pre-trial schedule, Scheduling Order signed.

CRIMINAL MINUTE SHEET

STATE OF WASHINGTON NO. 88-1-00428-1

vs ORIGINAL CHARGE

RUSSELL DUANE McNEIL

WARRANT/SUMMONS

DATE JUDGE/COURT COMMISSIONER PROSECUTOR

REPORTER

PRELIMINARY APPEARANCE

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT REPRESENTED BY PROSECUTOR

APPOINTED. BAIL SET AT RELEASED ON OWN RECOGNIZANCE

ARRAIGNMENT SET FOR . TRUE NAME ORDER SIGNED.

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT PRESENT REPRESENTED BY PROSECUTOR

COURT

ARRAIGNMENT

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

PROSECUTOR COUNSEL APPOINTED/RETAINED

TRUE NAME TRIAL DATE BAIL

DEFENDANT'S MOTION TO DISMISS INFORMATION
~~DEFENDANT'S MOTION TO DISMISS~~ NOTICE OF SPECIAL SENTENCING PROCEEDING

DATE 9-8-88 JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

DEFENDANT PRESENT Yes REPRESENTED BY T. Bothwell; C. Tait PROSECUTOR J. Sullivan; H. Hansen

COURT denied Defendant's Motion to Dismiss Information and denied Defendant's Motion to Dismiss Notice of Special Sentencing Proceeding. Order to be presented.

PRESENTATION OF ORDER RE: DEATH PENALTY

DATE 9-22-88 JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

DEFENDANT PRESENT Yes REPRESENTED BY Chris Tait PROSECUTOR J. Sullivan, H. Hansen

COURT continued hearing to 9-27-88 at 4:30 P.M. The defendant signed and filed Waiver of Trial Time Limits. Notice of Intent to Seek Discretionary Review is to be filed by 9-29-88 at 5:00P.M. ~~Petition to be filed by 10-14-88 at 5:00 P.M. Court signed Scheduling Order.~~

PRESENTATION OF ORDER RE: DEATH PENALTY

DATE 9-27-88 JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

DEFENDANT PRESENT Yes REPRESENTED BY C. Tait, T. Bothwell PROSECUTOR J. Sullivan, H. Hansen

COURT heard arguments of counsel, clarified prior ruling and continued hearing for presentation of order to 9-28-88 at 4:30 P.M.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR YAKIMA COUNTY

NO. 88-1-00428-1 CAUSE OF ACTION MOTIONS

PLTF/PET STATE OF WASHINGTON DEFT/RESP RUSSELL DUANE MCNEIL

vs/and

PLTF/PET'S ATTY H. Hansen, J. Sullivan DEFT/RESP'S ATTY Chris Tait

JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

NON-JURY TRIAL

PLAINTIFF/PETITIONER - WITNESSES SWORN -			DEFENDANT/RESPONDENT
1 No Testimony	16	1	16
2	17	2	17
3	18	3	18
4	19	4	19
5	20	5	20
6	21	6	21
7	22	7	22
8	23	8	23
9	24	9	24
10	25	10	25
11	26	11	26
12	27	12	27
13	28	13	28
14	29	14	29
15	30	15	30

CLERK'S MINUTES

June 3, 1988

DEFENDANT'S MOTION TO CONTINUE TRIAL DATE
DEFENDANT'S MOTION TO EXTEND TIME FOR FILING OF PRETRIAL MOTIONS

The Defendant orally waived his right to a speedy trial. The Court granted the Defendant's Motion for Continuance of Trial Date and granted Defendant's Motion to Extend Time for Filing of Pre-Trial Motions. The revised schedule established by the Court is as follows: Defense motions to be filed by July 29, 1988; State's motions to be filed by August 19, 1988; Defense reply motions to be filed by August 26, 1988. Pre-Trial motions are set for September 12, 1988 at 9:00 A.M. The Court orally set a new trial date of October 3, 1988 at 9:00 A.M. The Court also orally ordered that any evidence brought to the defendant shall first be screened by a security officer. Orders to be presented.

CRIMINAL MINUTE SHEET

STATE OF WASHINGTON NO. 88-1-00428-1

vs ORIGINAL CHARGE

RUSSELL DUANE McNEIL

WARRANT/SUMMONS

DATE JUDGE/COURT COMMISSIONER PROSECUTOR

REPORTER

PRELIMINARY APPEARANCE

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT REPRESENTED BY PROSECUTOR

APPOINTED. BAIL SET AT RELEASED ON OWN RECOGNIZANCE

ARRAIGNMENT SET FOR . TRUE NAME ORDER SIGNED.

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT PRESENT REPRESENTED BY PROSECUTOR

COURT

ARRAIGNMENT

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

PROSECUTOR COUNSEL APPOINTED/RETAINED

TRUE NAME TRIAL DATE BAIL

MOTIONS

DATE 4-12-88 JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER

DEFENDANT PRESENT Yes REPRESENTED BY T. Bothwell; C. Tait PROSECUTOR H. Hansen; J. Sullivan

COURT granted and signed an Order of Continuance of Trial Date to 7-11-88; granted and signed an Order Extending Time for Entry of Insanity Plea; granted and signed Order Extending Time to ~~Give Notice Re: Death Penalty. The Court orally set pre-trial hearings for 6-20-88 at 9:30~~ A.M. (motions and briefs to be filed by 6-13-88, reply briefs by 6-16-88) order to be presented.

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT PRESENT REPRESENTED BY PROSECUTOR

COURT

DATE JUDGE/COURT COMMISSIONER CLERK

REPORTER INTERPRETER

DEFENDANT PRESENT REPRESENTED BY PROSECUTOR

COURT

CRIMINAL MINUTE SHEET

STATE OF WASHINGTON

vs

RUSSELL DUANE McNEIL

NO. 88-1-00428-1

ORIGINAL CHARGE AGGRAVATED 1 DEGREE MURDER/ACCOMP TO AGGRAVATED 1 DEGREE MURDER

WARRANT/SUMMONS

DATE_____ JUDGE/COURT COMMISSIONER_____ PROSECUTOR_____

REPORTER_____

PRELIMINARY APPEARANCE

DATE_____ JUDGE/COURT COMMISSIONER_____ CLERK_____

REPORTER_____ INTERPRETER_____

DEFENDANT REPRESENTED BY_____ PROSECUTOR_____

_____ APPOINTED. BAIL SET AT_____ RELEASED ON OWN RECOGNIZANCE_____

ARRAIGNMENT SET FOR_____. TRUE NAME_____ ORDER SIGNED.

DATE_____ JUDGE/COURT COMMISSIONER_____ CLERK_____

REPORTER_____ INTERPRETER_____

DEFENDANT PRESENT____ REPRESENTED BY_____ PROSECUTOR_____

COURT_____

ARRAIGNMENT

DATE_____ JUDGE/COURT COMMISSIONER_____ CLERK_____

REPORTER_____ INTERPRETER_____

PROSECUTOR_____ COUNSEL APPOINTED/RETAINED_____

TRUE NAME_____ TRIAL DATE_____ BAIL_____

MOTIONS

DATE 3-17-88 JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN CLERK Laurie Campbell

REPORTER Lonna Baugher INTERPRETER_____

DEFENDANT PRESENT Yes REPRESENTED BY C. Tait; T. Bothwell PROSECUTOR H. Hansen; J. Sullivan

COURT granted the Defendant's Motion for Order Extending Time to File Insanity Plea. The time was extended to 4-18-88, any further request for additional time should be made by 4-13-88. ~~The Court granted Def~~endant's Motion for Order Allowing Ex Parte Orders regarding expenditures for defense experts and relieved the prosecutor of his statutory duty to approve those cost bills. The Court granted the Defendant's Motion for Production. The video tape and taped statements are to be duplicated professionally and a copy provided to defense counsel by 3-21-88. These materials are to remain confidential. A trial date of 5-2-88 was orally set by the Court. The Court also requested that defense counsel provide him with copies of existing psychological reports for an in camera viewing.

CRIMINAL MINUTE SHEET

STATE OF WASHINGTON

vs

RUSSELL DUANE MC NEIL

NO. 88-1-00428-1

ORIGINAL CHARGE AGRAVATED 1° MURDER/ACCOMP TO AGRAVATED 1° MURDER

WARRANT/SUMMONS

DATE _____ JUDGE/COURT COMMISSIONER _____ PROSECUTOR _____

REPORTER _____

~~PRELIMINARY APPEARANCE~~ APPOINTMENT OF ATTORNEYS

DATE 3-15-88 JUDGE/~~COURT COMMISSIONER~~ BRUCE P. HANSON CLERK DEBBIE KROON

REPORTER MONICA MANCE INTERPRETER _____

DEFENDANT REPRESENTED BY _____ PROSECUTOR STEVE KELLER

CHRIS TAIT AND TOM BOTHWELL APPOINTED. BAIL SET AT _____ RELEASED ON OWN RECOGNIZANCE _____

ARRAIGNMENT SET FOR _____. TRUE NAME Russell Duane McNeil ORDER SIGNED.

DATE _____ JUDGE/COURT COMMISSIONER _____ CLERK _____

REPORTER _____ INTERPRETER _____

DEFENDANT PRESENT ____ REPRESENTED BY _____ PROSECUTOR _____

COURT _____

ARRAIGNMENT

DATE 3-16-88 JUDGE/~~COURT COMMISSIONER~~ BRUCE P. HANSON CLERK DEBBIE KROON

REPORTER MONICA MANCE INTERPRETER _____

PROSECUTOR MIKE MC CARTHY COUNSEL APPOINTED/RETAINED _____

TRUE NAME RUSSELL DUANE MC NEIL TRIAL DATE 5-2-88 BAIL $250,000.00 ORDER SIGNED.

DATE _____ JUDGE/COURT COMMISSIONER _____ CLERK _____

REPORTER _____ INTERPRETER _____

DEFENDANT PRESENT ____ REPRESENTED BY _____ PROSECUTOR _____

COURT _____

DATE _____ JUDGE/COURT COMMISSIONER _____ CLERK _____

REPORTER _____ INTERPRETER _____

DEFENDANT PRESENT ____ REPRESENTED BY _____ PROSECUTOR _____

COURT _____

DATE _____ JUDGE/COURT COMMISSIONER _____ CLERK _____

REPORTER _____ INTERPRETER _____

DEFENDANT PRESENT ____ REPRESENTED BY _____ PROSECUTOR _____

COURT _____

ORIGINAL

FEB 6 1989

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
YAKIMA COUNTY CLERK
IN AND FOR YAKIMA COUNTY
'89 FEB 6 AM 11 33

STATE OF WASHINGTON)
)
Plaintiff,)
)
vs.) CAUSE NO. 88-1-00428-1
)
RUSSELL DUANE McNEIL,)
)
Defendant.)

STATE OF WASHINGTON)
)
Plaintiff,)
)
vs.) CAUSE NO. 88-1-00427-2
)
HERBERT RICE, JR.,)
)
Defendant.)

MOTION FOR CONTINUANCE

EXCERPT AND COURT'S RULING

BEFORE THE HONORABLE F. JAMES GAVIN
DEPARTMENT NO. 3
FEBRUARY 3, 1989

APPEARANCES:

FOR THE STATE: JEFFREY C. SULLIVAN and
HOWARD W. HANSEN
Prosecuting Attorney's Office
for Yakima County

FOR THE DEFENDANT
RUSSELL McNEIL:

THOMAS BOTHWELL
Prediletto Law Offices
Attorneys at Law
302 North Third Street
Yakima, WA. 98902

AND

CHRISTOPHER TAIT
Attorney at Law
305 North Third Street, Suite 5
Yakima, WA. 98902

FOR THE DEFENDANT
HERBERT RICE, JR:

RICK L. HOFFMAN
Moore & Hoffman
Attorneys at Law
24 North Second Street
Yakima, WA. 98901

MR. McNEIL and MR. RICE WERE PRESENT.

MORNING SESSION

(February 3, 1989)

THE COURT: Mr. Rice, there is a waiver of trial time limits which I have received. It is very similar to the one that Mr. McNeil has filed. Have you had an opportunity to read that?

MR. RICE: Yeah, I have, sir.

THE COURT: Did you read it?

MR. RICE: Yeah, I did.

THE COURT: Was Mr. Hoffman there when you read the --

MR. RICE: Yeah, he read it to me and then I read it again.

THE COURT: Do you have a copy of it?

MR. RICE: Yeah, right here (indicating).

THE COURT: And have you had a copy of it for sometime now?

MR. RICE: To read it?

THE COURT: For a couple of days. Have you had a copy for a couple of days now since this is the 3rd of February?

MR. RICE: He read it to me on Tuesday, I believe, Your Honor, Tuesday. And he read it to me and explained the stuff.

THE COURT: Did you understand it?

MR. RICE: Yes.

THE COURT: Do you understand that by signing this, and if I accept it, it means that your trial date will not be as scheduled? Now, these were set to be tried by the 10th of April, 10th or 12th of April. That that's going to be gone and the trial date will probably be -- depending upon when the U.S. Supreme Court files its opinion, it could be -- I guess it could be clear into 1990 if they have it reheard and go clear into another session and don't file their opinion until sometime in the fall. But it appears that probably it will be filed sometime in June -- if it's filed in June sometime, 120 days thereafter. You are saying that you are agreeing you can have your trial within 120 days thereafter.

Is that your understanding?

MR. RICE: Yeah. In between September the 1st and 15th, Your Honor.

THE COURT: Well, that's not what this -- that's not what this waiver now says. You haven't signed another one so I am asking you about the one you now have. The one you now have says - I will explain it to you - that you will agree that your attorney can file pretrial motions - Well, I have already ordered how those are going to be decided; and we will call these capital motions - within

30 days of the date on which the opinion of the U.S. Supreme Court is filed. The prosecutor would have 15 days thereafter. Then there would be a hearing on pretrial motions within 60 days. And it says, "shall begin on the 60th day." But I think I have discretion in that to set it within those 60 days. And then your trial would then begin 90 days -- It says, "...on the 90th day following the pretrial motions," but they can be tried any time before the 90th day.

What that means is: The U.S. Supreme Court decides those cases; files its opinion; there is 30 days for the filing of motions and then 90 days thereafter to try you. That's 120 days.

So by this you are consenting to having your case heard 120 days after the U.S. Supreme Court files its opinions.

I said an awful lot there. Did you understand it?

MR. RICE: Yeah, somewhat.

THE COURT: Let me say it one more way. The U.S. Supreme Court files its opinions.

MR. RICE: Yes, sir.

THE COURT: One hundred and twenty days thereafter you have to be brought to trial.

MR. RICE: Yeah.

THE COURT: That's what this waiver says.

Do you understand it that way?

MR. RICE: Yes, I understand. That's -- Yeah.

THE COURT: And you agree that that can be done; is that right?

MR. RICE: Yes, sir.

THE COURT: Did anybody force to you do this?

MR. RICE: No, nobody.

THE COURT: Did anybody threaten you to get you to sign this?

MR. RICE: No, sir.

THE COURT: Do you think that I in any way as the judge have made some kind of an order that makes you think that you have to sign this?

MR. RICE: No, sir, I don't.

THE COURT: You can be seated.

I would also come back to Mr. McNeil and ask him a question. Mr. McNeil, do you understand by signing your waiver in this case that you are agreeing that your case can be brought to trial 120 days after the U.S. Supreme Court opinions are filed in these cases?

MR. McNEIL: I understand it completely.

THE COURT: Not these cases, but the cases before them. Do you understand that?

MR. McNEIL: Yes.

THE COURT: Do you think that I have made any kind of

a ruling or any court has made any kind of ruling that's forcing you to sign this waiver?

MR. McNEIL: None.

THE COURT: Because I want to dispel that. I am more than willing to have these cases tried in April. No problem with that. And we will just do it if you want to do so. Do you understand that?

MR. McNEIL: Yes.

THE COURT: Do you still wish to have your signature on this waiver of trial time limits?

MR. McNEIL: Yes, I do.

THE COURT: Did you do so voluntarily?

MR. McNEIL: Yes.

THE COURT: Okay. You can be seated.

I don't think that signing the waiver until September 1 is necessary. We have got these waivers, so I will just decide which case is going to be tried first and we will move it up in the 120-day period.

* * * * * * * * *

THE COURT: All right. My order will be at this time that State v. McNeil will be tried first, State v. Rice will be tried second.

State v. McNeil will be set for motions, capital motions or any other motions that are still pending, within 15 days of the date that the decision is filed by the U.S. Supreme Court in those other cases. The state will have 10 days thereafter to respond to the motions; and they will be heard within five days after the state responds. That's a total of 30 days.

The trial, State v. McNeil, will be held starting on the 60th day after the filing of the U.S. Supreme Court opinions. That will give 30 days between the time the motions have been heard and the time that we will start the trial.

State v. Rice will start within the 120 days, and I guess I will just say on the 120th day following the filing of the opinions by the U.S. Supreme Court. It will still be subject to the same motion times as State vs. McNeil; and the motions will all be heard together just as we have been doing. That's the 15 days, the 10 days and the five days. That will give a period of time of about 90 days between the time of the hearing of the motions in State v. Rice and the time it goes to trial.

If there are no capital motions required -- Well, I

don't know what other motions we have other than capital motions. I will just keep the same time limits no matter what, whether there are capital motions or not. Same limits. Those are within the time limits within the waivers signed by both of these people. I think that's a way to handle it.

So State v. McNeil will be tried first.

MR. TAIT: Does Your Honor still want the confession hearing to --

THE COURT: Yes, I do. The same order I issued before still stands on motions.

MR. TAIT: Fourteen days.

THE COURT: Fourteen days on each one of them; and they will be heard.

Be sure, as I have indicated to you previously, to provide me with copies, as you have been doing, of all motions and documents which are filed so that I can have those read well in advance and be fully prepared to hear the motions.

Anything further?

Mr. Rice's waiver has already been filed with the clerk also?

MR. HOFFMAN: It has, Judge.

THE COURT: Okay. Anything further to do in these two cases?

MR. TAIT: No, Your Honor.

THE COURT: We will recess for 20 minutes or until the next two cases are ready to proceed.

(COURT ADJOURNED.)

FILED

SEP 28 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

ORIGINAL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	)	CAUSE NO. 88-1-00428-1

STATE OF WASHINGTON Plaintiff, vs. HERBERT RICE, JR., Defendant.	)	CAUSE NO. 88-1-00427-2

COURT'S ORAL OPINION

BEFORE THE HONORABLE F. JAMES GAVIN
DEPARTMENT NO. 3
SEPTEMBER 8, 1988

APPEARANCES:

FOR THE STATE: JEFFREY C. SULLIVAN and
HOWARD W. HANSEN
Prosecuting Attorney's Office
for Yakima County

FOR THE DEFENDANT
RUSSELL McNEIL:

THOMAS BOTHWELL
Prediletto Law Offices
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AND

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FOR THE DEFENDANT
HERBERT RICE, JR.:

MICHAEL A. FROST
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AND

RICK L. HOFFMAN
Moore & Hoffman
Attorneys at Law
24 North Second Street
Yakima, WA. 98902

AFTERNOON SESSION

(September 8, 1988)

THE COURT: Good afternoon, counsel.

There is really basically one issue before me in the arguments that have been made whether or not the Eighth Amendment of the United States Constitution and article 1, section 14 of the Washington State Constitution prohibit execution of anyone under the age of 18 as cruel punishment under the state constitution, or cruel and unusual punishment under the federal constitution.

In arriving at a decision of whether or not a person, and I guess it would be someone who is 16 or 17, and in particular in these cases someone who is 17, is subject to capital punishment under the federal and state constitutions, or maybe not under the federal and under the state, I think it is extremely helpful to have reviewed the cases cited from the state of Washington as well as the Thompson case. I cannot, as the prosecution asks, consider that Thompson decided a very limited issue dealing with Mr. Thompson only and anyone who is 15 years of age, or on those particular circumstances, because there are guidelines within the case which I believe are important to the decision in this case.

Equally important is the Washington State Constitution. In the last few years, as pointed out by Mr. Frost, the Supreme Court of the state of Washington has looked to our constitution to decide constitutional issues, recognizing, of course, that the state constitution cannot decrease the rights that individuals have under the federal constitution. The federal constitution affords certain minimum rights, certain rights and standards which we are all compelled to follow. The Washington State Constitution in some instances grants even greater rights to individuals than does the federal constitution as evidenced by search and seizure cases already decided; and although one of those has to some extent been overruled, the state Supreme Court, nevertheless, applies a stricter rule with regard to searches and seizures pursuant to the state constitution than under the federal constitution. And, in fact, when the United States Supreme Court told the Washington State Supreme Court it had decided a case incorrectly under the federal constitution and that a person's rights had not been violated, our Supreme Court said, "Well, we will decide the case strictly upon the Washington State Constitution, and our constitution grants greater individual rights under the circumstances than does the federal constitution. We won't even decide this under the

federal constitution, we will decide it under our own constitution."

It is becoming increasingly important in this state to review the Washington State Constitution. As pointed out by counsel, the Washington State Constitution under article 1, section 14, reads, "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." Really the only difference between the Eighth Amendment to the federal constitution and the state constitution is that Washington prohibits cruel punishment; in other words, cruel punishment cannot be inflicted, and does not refer to cruel and inhuman punishment. Inhuman is not included in the Washington statute.

I attempted to locate a case which might help me in deciding whether or not the state constitution is to be interpreted differently than the federal constitution. About the only indication I could find is a statement contained in the Rupe case, which has been cited by counsel, and State v. Forrester, at 21 Wn.App. 855.

Under State v. Forrester, the test which is to be utilized is:

> "...whether, in view of contemporary standards of elemental decency, punishment is of such disproportionate character to the offense as to shock the general conscience and violate principles of fundamental fairness."

Under Rupe, 108 Wn.2d 734, the court essentially affirmed that position (Rupe was decided in 1987) although a statement is contained therein that the state constitution requires even greater safeguards under the circumstances of that case.

At Page 777, the court in Rupe states:

> "Under the federal constitution, the death penalty may not be imposed arbitrarily and capriciously, and the jury must adhere to the substantive factors state law lays before it."

Then it says our state constitution may require even greater safequards, relying upon State v. Bartholomew, the second case referred to as Bartholomew II. Quoting from Bartholomew II:

> "Where the trial which results in imposition of the death penalty lacks fundamental fairness, the punishment violates article 1, section 14 of the state constitution."

None of these cases were in the context of juveniles, or people under the age of 18, and let's say for purposes of this decision over the age of 15.

To digress just a little, when an argument is made as to one day over 15, or one day over 16, or within one day of 16, to me that means nothing because the Supreme Court has said at age 15 and below, you shall not impose the death penalty. To me that means if 15 years, 364 days, 23 hours, 59 minutes and 59 seconds old, a person is still

15 and you shall not impose it. It is a guideline the Supreme Court of the United States has adopted. It does not make any difference age-wise, according to them.

There is some guidance, however, with regard to article 1, section 14. If there is a violation of fundamental fairness, or if contemporary standards of elemental decency have been violated by imposing the death penalty, then I believe our state Supreme Court would hold, under those circumstances, a violation of article 1, section 14.

That really does not say a whole lot more than is said in Thompson because Thompson -- and I better refer to the case and get the proper language. Thompson recognizes as a very important element to be considered the "evolving standards of decency that mark the progress of a maturing society." I do not believe that is anything other than saying what does society expect under the circumstances? What is decent? If you go beyond the bounds of decency, then that would be cruel punishment.

Keeping that in mind, we should all recognize the Eighth Amendment and article 1, section 14 really contain categorical prohibitions against cruel and inhuman punishment and cruel punishment. I would also quote to counsel from page 4894 of 56 Law Week from the opinion of Justice Stevens. It says:

> "The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the 'evolving standards of decency that mark the progress of a maturing society'."

Which sounds quite similar to the statement contained in Forrester and what I believe our state Supreme Court would rely upon.

The quotation also leads me to believe there is a difference between Justice O'Connor's opinion and that of the plurality insofar as related to the legislature. As Justice O'Connor says: "Let the legislature do it. Send it to the legislature and let them decide what the age limit will be."

Now, Mr. Tait and Mr. Bothwell have pointed out, in response to the argument of Mr. Hansen and Mr. Sullivan, that there are several places where the legislature mentioned in the opinion of the plurality and in the footnotes, and what have you; but I think there is a distinction. The plurality believes the definition of the contours of the category, as referred to by Justice Stevens, are to be provided by judges and not the legislature. They are to be provided by judges, however, relying upon what the legislature has done in certain circumstances; therefore obtaining certain guidelines from

the legislature, guidelines from what juries have done, guidelines from standards of decency within the community.

In deciding these cases, I believe I must look first to the state of Washington. I am a state judge. Our state Supreme Court will undoubtedly be involved in determining this issue, whether in these cases or another, at least sometime in the near future. I look to our constitution first, keeping in mind the federal constitution provides minimum standards, and I must adhere to the decision in Thompson insofar as it sets out those minimum standards; but I feel compelled to look to the state to see what has been accomplished in the state and what guidelines we have in the state of Washington.

One of the critical issues in these cases, at least counsel believe, is with regard to the proceedings that took place prior to these two men being transferred into Superior Court as adults. They were, of course, in Superior Court in the juvenile process through a declination proceeding. That would be a decline of jurisdiction in the juvenile court and being transferred to adult court to be tried as adults.

There is, I believe, a very substantial difference between the Oklahoma statutory scheme and the Washington statutory scheme. In Washington -- Let me get the statute. In Washington, under RCW Chapter 13.40, if a

person is 16 or 17 and there is an allegation of a Class A felony, which we have here, or attempt to commit a Class A felony, a decline hearing is mandatory unless it is waived by the court, the parties and the parties' counsel. In other words, there must be a decline hearing in the state of Washington unless everybody agrees there will not be and all waive the hearing.

Thompson demonstrates the Oklahoma statutory scheme is different. The difference is extremely important and is demonstrated at page 4905 as follows:

> "Under Oklahoma law, anyone who commits a crime when he is under the age of eighteen is defined to be a child, unless he is sixteen or seventeen and has committed murder or certain other specified crimes..."

Now that is much the same as Washington; but then it continues:

> "...in which case he is automatically certified to stand trial as an adult."

So in Oklahoma if you are charged with the crime of murder and you are 16 or 17, you are automatically an adult. You are tried as an adult. In the state of Washington if you are 16 or 17, you are automatically entitled to a hearing where it will be determined whether or not you should be tried as an adult. Part of that process is set out in case law, both state and federal, as

well as RCW 13.40.110.

Under RCW 13.40.110, the court may order a case transferred after a decline hearing for adult criminal prosecution. There must be a finding the declination would be in the best interests of the juvenile or the public; and the court is required to consider relevant reports, facts, opinions, and arguments presented by the parties and their counsel.

Now that seems to sound like almost any other hearing except when you consider what must be considered by the court pursuant to Kent v. United States, which was decided in 1966, and has been elaborated upon by our courts in these hearings. If anyone here looks at the record of the decline hearing, you will know how extensive it was and what all was gone into. They really are quite protective of the rights of an individual with a presumption that that individual can be as a juvenile rehabilitated and treated within the juvenile system unless certain unique circumstances are present.

What is taken into account in some of the factors are as follows: The seriousness of the alleged offense and whether protection of the community necessitates prosecution under the adult system. Protection of the community. Do community standards dictate there should be a transfer to adult court? The degree of premeditation,

willfulness, violence and aggression involved in the alleged offense. Well, for purposes of this hearing, to me that is not as important as some of the other ones. Whether the alleged offense was against persons or property; greater weight being given to offenses against persons especially if injury resulted. The prosecutive merit of the complaint, the desirability of trial and disposition of the entire offense in one court when defendants or associates are adults. That does not apply here. But the next one is sophistication and maturity of the juvenile determined by consideration of his home, environmental situation, emotional attitudes, and pattern of living record and previous history as a juvenile and prospects for adequate protection of the public, and likelihood of reasonable rehabilitation of the juvenile through services and facilities currently available to the juvenile court.

A decision was made in these cases following an extensive hearing and going into the background of these individuals, particularly related to their sophistication and maturity, and also as to consideration of their emotional attitudes, their patterns of living, their environmental situations. It went into the backgrounds of these two individuals very extensively. Only after that hearing was it determined these people would be

transferred to this court, the adult court. They were both about 17, between 17 and 18 at the time of this offense.

The court in Thompson did not decide whether 17-year olds or 16-year olds can receive the death penalty, and chose instead to accept certiorari in two separate cases wherein they will decide that issue. I cannot guess as to why the court did that. I think the court had before it the perfect opprortunity to make the decision: Do we apply the death penalty to juveniles? The court chose not to. One of the critical reasons, at least I consider that they did not do so, is because it was just about universally agreed, or at least the conclusion was that it was almost universally agreed, anyone who is the age of 15 should not receive the death penalty because it is:

> "...generally abhorrent to the conscience of the community."

They were looking at the various legislative enactments, what ages were set for purposes of applying the death penalty, and it seemed to them almost universal throughout the states if you are 15 years of age, you are not going to be executed because you do not have the degree of maturity and sophistication an adult would have. However, it is clear from the opinion they did not decide the issue as to 16- and 17-year olds, and expressly chose

not to do so even after being asked to do so.

At page 4896 of the opinion the court says:

> "When we confine our attention to the 18 States that have expressly established a minimum age in their death-penalty statutes, we find that all of them require that the defendant have attained at least the age of 16 at the time of the capital offense."

To me it was important to them that someone is at least age 16.

An argument has been made that the legislature must set the age and then let the courts act upon that age. But what has happened, in the quote I gave initially at the start of my opinion, is our Supreme Court has said it is up to the judges to make that determination and the U.S. Supreme Court has made the determination for 15-year olds and has decided, no, but did not make the decision as to 16- and 17-year olds. It is up to the courts to render that decision.

I do not feel the Thompson opinion is authority for the proposition or can be argued - well, it can be argued - but it is not authority for the proposition that 16- and 17-year olds should not receive the death penalty for their actions because it would be cruel and inhuman punishment or cruel punishment. I cannot accept that argument. I realize juveniles, people under the age of 18, are essentially presumed not to have the same

culpability as people who are older. I recognize that because the Court recognizes it; however, I believe in looking to Washington, and I am looking to the state of Washington, at what the citizens of this state have determined and what the legislature has determined, that this state feels if, following a proper hearing, a declination hearing, a juvenile has the right sophistication and maturity, they can have such culpability that they can receive the ultimate penalty and that is the death penalty.

The death penalty was reinstated due to a public outcry in the state of Washington. To me that speaks very loudly in the state of Washington. That does not seem to be mentioned in the Thompson opinion whether any of these other states had that happen where the death penalty was thrown out, suddenly it is reactivated because the people get upset, and then the legislature acts on it also.

Another thing that is important to point out is under the juvenile act -- I thought I had a copy of that here. But under the juvenile code one of the things the state has determined - and I made a copy but I forgot to bring it with me - is juveniles should be more answerable for their offenses. There is to be greater protection for the citizenry from criminal behavior. Juveniles are to be more accountable for their criminal behavior. To me that

speaks loudly of what the citizens of this state say. The citizens of this state, through the legislature and through the process of citizen legislation have said, We want the death penalty.

Now, the question becomes: Is it required there be a specific age set out? Does Thompson say that? I do not believe that is what Thompson says. I think the state of Washington has clearly said, We have set out the guidelines. If a person goes through the process from juvenile to adult court and all of the background is looked into and he or she is determined to have the sophistication and maturity to stand trial as an adult, more safeguards have been provided, and he or she is then subject to all of the penalties imposed by the statute which they have violated. The penalties in this case are either life without release or parole, or death, depending upon what a jury decides, if the jury decides guilt of aggravated first degree murder. That, of course, is a big hurdle.

To me, under these circumstances the public has said if you commit the crime, you shall be punished commensurate with the crime. And when the opinion in Thompson says at 4897 - I read part of that to you earlier - it says:

"The road we have traveled during the past four

> decades - in which thousands of juries have tried murder cases - leads to the unambiguous conclusion that the imposition of the death penalty on a 15-year old offender is now generally abhorrent to the conscience of the community."

I can paraphrase and say in light of Forrester, and the other tests as to whether or not the punishment fits the crime, that probably it is now generally abhorrent to the conscience of the community to have two people brutally killed. Although no one has ever said anything about victims in this case and whether or not the rights of victims -- and I don't find anything like that in the Thompson opinion. I think that has something to do with the situation -- our legislature has said, Yes, we are going to protect our citizens and this is the standard way of adopting it. To me that is very important. This is the standard way to adopt it.

Consequently, I believe, No. 1, according to article 1, section 14 of the Washington State Constitution, there is no prohibition against asking for the death penalty in a situation involving 16- and 17-year olds herein limited to 17-year olds because they were 17 at the time. No. 2, I do not believe the Eighth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, prohibits the death penalty in cases involving 16- and 17-year olds. I

look mainly to the state of Washington because I believe Washington has a proper and acceptable procedure. I believe it is distinguishable from the situation in the Oklahoma case. I also look to the federal opinion and I can draw no other conclusion then that when the state asks for and gave notice of the death penalty in this case, it is constitutional.

The motion to have the death penalty aspects of this stricken is denied.

Now, I do not know if counsel have spoken at all about guidelines as to time limits for pretrial motions or anything, if you had an opportunity to do that.

MR. FROST: Yes, Your Honor, I believe we have.

First of all, could the Court order that we be provided with a written copy of the Court's oral opinion in this matter?

THE COURT: So ordered.

(End of oral opinion.)

RECEIVED

'03 JUN 13 PM 1:08

KIM M. EATON
CLERK OF
SUPERIOR COURT
WASHINGTON

FILED

JUN 13 2003

KIM M. EATON, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT
COUNTY OF YAKIMA
STATE OF WASHINGTON

RUSSELL DUANE MCNEIL petitioner, State of Washington respondent	Cause No. 88-1-00428-1 ~~88-8-00089-2~~ Notice of Motion.

Notice is hereby given that the petitioner Russell Duane McNeil will call up for hearing on the next available docket date, to hear this motion for Production of Documents.

Respectfully submitted this 10th day of June 2003.

Russell D. McNeil

RUSSELL DUANE MCNEIL

957470 B, E-08
Clallam Bay Correctioal Center
1830 Eagle Crest Way
Clallam Bay, WA. 98326

SCANNED

263

RECEIVED
'03 JUN 13 AM 9:04
KIM M. EATON
CLERK OF
SUPERIOR COURT
WASHINGTON

FILED
JUN 13 2003
KIM M. EATON, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT
COUNTY OF YAKIMA
STATE OF WASHINGTON

RUSSELL DUANE MCNEIL
petitioner

State of Washington
respondent

Cause No: 88-1-00428-1
88-8-00089-2

MOTION FOR PRODUCTION OF DOCUMENTS.

Comes now petitioner RUSSELL DUANE MCNEIL request that the Clerk of the court, serve uponhim any and all documents concerning Cause No. 88-1-00428-1 / 88-8-00089-2 , for the following reasons:

1. RUSSELL DUANE MCNEIL is the petitioner in the above entitled cause numbers. He is currently confined at the Clallam Bay Correctional Center, located at 1830 Eagle Crest Way. Clallm Bay Washington

2. The petitioner is considering filing a Personal Restraint Petition, and would like copies of any and all documents relevant to his Cause numbers: 88-1-00428 / 88-8-00089-2.

3. He is requesting that the court provide him copies of said documents at no cost to him as he is indigent, and can not afford copies.

CONCLUSION: Pursuant to the **FREEDOM OF DISCLOSER ACT**, the rules **DISCOVERY**, and the RULES OF Appellant Procedure RAP 16.5(L) this Honorable Court should grant this motion and provide the petitioner with any and all copies of said documents.

Issued this 10TH day of June 2003.

Russell D. McNeil
RUSSELL DUANE MCNEIL

957470 B, E-08
Clallam Bay Correctional Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

SCANNED

STATEMENT OF FINANCES

If you cannot afford to pay the filing fee or cannot afford to pay an attourney to help you, fill this out. If you have enough money for these things do not fill out this part of the form.

1. I do(X) do not( ) ask the ~~out~~ COURT to file this without making me pay the filing fee because I am so poor I cannot pay the fee.

2. I have $194.00 in my prison or institution account.

3. I do( ) do not(X) ask the court to appoint a lawer for me because I am so poor I cannot afford to pay a lawer.

4. I am(X) am not( ) employed. My salary or wages amount to $58.28 a month. My employer is INMATE KITCHEN, CLALLAM BAY CORRECTIONAL CENTER

5. Durring the last 12 months, I

Did	Did not	
( )	(X)	get any rent payments. If so, the total amount I received was $_____.
( )	(X)	get an interest. If so, the total amount I received was $_____.
( )	(X)	get any dividends. If so, the total amount I received was $_____.
( )	(X)	get any other money. If so, the amount of money I received was $_____.

( ) (X) have any cash except as said in answer No. 2. If so, the amount of cash I have is $_____.

( ) (X) have any savings accounts or checking accounts. If so, the amount of cash I have is $_____.

( ) (X) own stocks, bonds, or notes. If so their value is $_____.

6. List all real estate and other property or things of value which belongs to you or in which you have an interest. Tell what each item of property is worth and how much you owe on it. Do not list house hold furniture and furnishings and clothing which you or your family need.

7. I am( ) am not(X) married. If I am married, my wife or husband's name and address is

_____

_____

_____

8. All of the persons who need me to support them are listed here.

NAME AND ADDRESS	RELATIONSHIP	AGE
NONE KNOWN		

9. All the bills I owe are listed here.

NAME OF CREDITOR YOU OWE MONEY TO	ADDRESS	AMOUNT
NONE KNOWN		

PLRA IN FORMA PAUPERIS STATUS REPORT
FOR DEFINED PERIOD : 12/01/2002 TO 05/31/2003

DOC : 0000957470 NAME : MCNEIL RUSSELL ADMIT DATE :09/07/1989
DOB : 08/13/1970 ADMIT TIME :00:00

AVERAGE MONTHLY RECEIPTS	20% OF RECEIPTS	AVERAGE SPENDABLE BALANCE	20% OF SPENDABLE
58.28	11.66	249.41	49.88

Spendable $19.88

Yvette Stubbs
Clallam Bay Corrections Center

DECLARATION OF SEVICE.

I RUSSELL DUANE MCNEIL declare under the penalties of perjury in accordance with the laws of the State of Washington that on the following date : 10-June-03 I deposited in the United States Mail. copies of said documents:

(1) NOTICE OF MOTION FOR THE PRODUCTION OF DOCUMENTS,

(2) MOTION FOT PRODUCTION OF DOCUMENTS,

(3) MOTION TO PROCEED IN-FORMA PAUPERIS,

(4) DECLARATION OF SERVICE,

ADDRESSED AS FOLLOWS:

TO: KIM M. EATON
COUNTY CLERK
AND EX-OFFICIO OF SUPERIOR COURT
ROOM 323, COURTHOUSE
YAKIMA, WASHINGTON 98901

FROM: RUSSELL DUANE MCNEIL
957470. B, E-08
CLALLAM BAY CORRECTIONAL CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA. 98326

Issued this 10TH day of June 2003.

Russell D. McNeil

RUSSELL DUANE MCNEIL
957470 B, E-08
CLALLAM BAY CORRECTIONAL CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

VERIFICATION

I, Russell D. McNeil, do hereby declare and affirm under the pains and penalties of perjury pursuant to the laws of the State of Washington in accord with RCW 9A.72.085, and pursuant to the laws of the United States, in accord with title28 USC § 1746, that the foregoing facts presented are true and correct.

So sworn, this 10TH day of June, 2003.

Russell D McNeil

RUSSELL DUANE MCNEIL

957470 B, E 08
Clallam Bay Correctioal Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON
PLANTIFF
(Petitioner)

VS.

RUSSELL D. McNEIL
DEFENDANT
(Respondent)

NO. 88-1-00428-1

STIPULATION & ORDER FOR RETURN OR DESTRUCTION OF EXHIBITS AND/OR UNOPENED DEPOSITIONS

It is hereby stipulated that ninety days after judgment in the above-captioned cause shall become final, or upon judgment becoming final following Appeal, or upon the filing of an Order of Dismissal, or the filing of a Satisfaction of judgment, the Superior Court Clerk is authorized as follows:

RETURN or DESTROY Exhibits and/or all unopened Depositions to respective counsel.

DESTRUCTION & DISPOSAL: If Counsel of Record has not notified the court of desire for return of exhibits, and provided for disposition and costs of transfer of such exhibits, the Clerk will destroy physical exhibits per this stipulation after ninety days.

Attorneys for Plaintiff/Petitioner
(Jeff Sullivan)

Attorneys for Defendant/Respondent
(Chris Tait)

IT IS SO ORDERED THIS 31st DAY OF December, 1990.

JUDGE-~~COMMISSIONER~~

* *

RECEIPTS FOR EXHIBITS AND DEPOSITIONS

Received from YAKIMA COUNTY SUPERIOR COURT CLERK, the following:

(Petitioner's)
Plaintiff's Exhibits No. A-E(from 8-25-89 hearing); B(from 8-14-89 hearing)

Depositions of:

Jeff Sullivan /a
Attorney for Plaintiff (Petitioner) DATE
(Jeff Sullivan)

(Respondent's)
Defendant Exhibits No. A,C-E(from 8-14-89 hearing)

Depostions of:

Chris Tait
Attorney for Defendant (Respondent) DATE
(Chris Tait)

ATTORNEY RE-NOTIFIED BY PHONE _____ DEPUTY _____

261

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

_____ NO. _____

PLANTIFF
(Petitioner)

VS.

_____

DEFENDANT
(Respondent)

STIPULATION & ORDER FOR RETURN OR DESTRUCTION OF EXHIBITS AND/OR UNOPENED DEPOSITIONS

It is hereby stipulated that ninety days after judgment in the above-captioned cause shall become final, or upon judgment becoming final following Appeal, or upon the filing of an Order of Dismissal, or the filing of a Satisfaction of judgment, the Superior Court Clerk is authorized as follows:

RETURN or DESTROY Exhibits and/or all unopened Depositions to respective counsel.

DESTRUCTION & DISPOSAL: If Counsel of Record has not notified the court of desire for return of exhibits, and provided for disposition and costs of transfer of such exhibits, the Clerk will destroy physical exhibits per this stipulation after ninety days.

_____ _____
Attorneys for Plaintiff/Petitioner Attorneys for Defendant/Respondent

IT IS SO ORDERED THIS _____ DAY OF _____, 19_____.

_____
JUDGE-COURT COMMISSIONER

* *

RECEIPTS FOR EXHIBITS AND DEPOSITIONS

Received from YAKIMA COUNTY SUPERIOR COURT CLERK, the following:

(Petitioner's)
Plaintiff's Exhibits No. EA

Depositions of: _____

_____

4-22-91
_____
Attorney for Plaintiff (Petitioner) DATE
(David Thorner)

(Respondent's)
Defendant Exhibits No. _____

Depostions of: _____

_____

_____
Attorney for Defendant (Respondent) DATE

ATTORNEY RE-NOTIFIED BY PHONE _____ DEPUTY _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROLL 385 DOC 323

FILED

NOV 2 0 1990

BETTY McGILLIS
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,
Respondent,
v.
RUSSELL DUANE MCNEIL,
Appellant.

MANDATE

No. 10289-1-III

Yakima County No. 88-1-00428-1

RECEIVED
DEC NOV 20 PM 11 45

The State of Washington to: The Superior Court of the State of Washington

in and for Yakima **County**

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division III**, filed on** October 23**, 19**90**, became the decision terminating review of this court in the above entitled case on** November 23**, 19**90**. The cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.**

Mandate after opinion is filed.

c: Russell D. McNeil
Paul J. Wasson
Howard W. Hansen
The Hon. F. James Gavin
Reporter of Decisions
Department of Corrections
Board of Prison Terms and Paroles

SEAL OF THE COURT OF APPEALS STATE OF WASHINGTON

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Spokane**, this** 28th **day of** November**, 19**90

260

Clerk of the Court of Appeals, State of Washington, Division III

FILED
IN CLERK'S OFFICE
COURT OF APPEALS
STATE OF WASHINGTON - DIVISION III
DATE OCT 23 1990
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RUSSELL DUANE McNEIL, Appellant.	)	No. 10289-1-III Division Three Panel Two Filed OCT 23 1990

GREEN, J.--Russell Duane McNeil pleaded guilty to the aggravated murder of Dorothy Nickoloff and the aggravated murder of Mike Nickoloff as an accomplice. He appeals, contending (1) the record does not support the facts relied upon by the trial court in imposing an exceptional sentence and (2) the second life sentence without parole was excessive. We affirm.

On January 7, 1988, Mr. McNeil, then 17, met another 17-year-old, Herbert (Chief) Rice, Jr., who suggested they steal money from the Nickoloffs by gaining entry to their home and then stabbing them to death. Mr. Rice claimed the crime would be easy because the elderly couple was disabled and lived alone in a rural home. Mr. McNeil drove Mr. Rice to the Nickoloff home on Kays Road in Yakima County; both juveniles were armed with knives. They knocked at the back door and asked Mrs. Nickoloff

if they could use the telephone. She let them in. Mr. McNeil asked for a drink of water while Mr. Rice made a telephone call. As Mrs. Nickoloff finished her dinner in the kitchen, Mr. Rice began to stab Mr. Nickoloff in the living room. Mr. McNeil then grabbed Mrs. Nickoloff and stabbed her to death. They stole two television sets from the house, gave one to a friend for payment on a debt and sold the other for $50.

The juvenile court declined jurisdiction and the State gave notice it intended to seek the death penalty.[1] Shortly before trial, the State agreed to forego the death penalty in exchange for pleas of guilty by Mr. McNeil. The record is ambiguous as to whether the plea agreement included a sentencing recommendation from the State as to the imposition of two consecutive life terms. For the purposes of this appeal, we will assume it did not.

First, Mr. McNeil contends the record reveals no facts were developed during the sentencing hearing supporting the age, particular vulnerability or physical condition of the victims. The entry and acceptance of the plea and the sentencing were conducted at the same hearing. The facts were admitted orally

[1]A notice of discretionary review was filed with the Supreme Court concerning the State's intention to seek the death penalty in a murder case involving a juvenile. The petition for review was denied.

and in writing, under oath, by Mr. McNeil at the hearing. Admitted facts may be the basis for an exceptional sentence. State v. Young, 51 Wn. App. 517, 521, 754 P.2d 147 (1988). Additionally, five exhibits were admitted, including the autopsy report, pictures, a video tape of the scene, a letter written by Mr. McNeil to a girlfriend shortly after the crimes were committed admitting the crimes, and a transcript of an interview with Mr. McNeil by police during their initial investigation. There is ample evidence in the report of proceedings and exhibits to support the factual findings made by the court. There was no error.

Second, Mr. McNeil argues the second consecutive life term without parole is excessive because one cannot serve more than one such term.

The minimum sentence for conviction of aggravated murder is life imprisonment without parole; the maximum sentence is death. RCW 9.94A.310. RCW 9.94A.400(1)(a) provides in part: "Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.120 and . . . any other provision of RCW 9.94A.390." RCW 9.94A.390(2)(b) includes as an aggravating circumstance particular vulnerability due to advanced age, disability, or ill health. Thus, there is both a factual

and a legal basis for imposing consecutive life terms without parole.

Whether the sentence is excessive is reviewed under an abuse of discretion standard. State v. Oxborrow, 106 Wn. 2d 525, 530, 723 P. 2d 1123 (1986). The statutory maximum, death, is the only limit to the court's discretion. Oxborrow, at 533; State v. Creekmore, 55 Wn. App. 852, 865-66, 783 P. 2d 1068 (1989), review denied, 114 Wn. 2d 1020 (1990). Consecutive, multiple life sentences without parole are less severe than death. The question whether two consecutive life sentences is excessive is academic; the sentence is ultimately limited by Mr. McNeil's life span.

Affirmed.

WE CONCUR:

IN THE COURT OF APPEALS
DIVISION III
OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
RUSSELL DUANE MCNEIL,
Appellant.

No. 10289-1-III

STATE OF WASHINGTON,
COUNTY OF SPOKANE. — ss.

I, Joyce J. McCown, Clerk of the Court of Appeals—Division III of the State of Washington, do hereby certify that the attached and foregoing is a full, true and correct copy of the opinion

and the whole thereof, as the same was filed in the above entitled case on the 23rd day of October, 1990, and now appears of record and on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Spokane,

this 28th day of November, 1990.

JOYCE J. McCOWN,
Clerk of the Court of Appeals—Division III, State of Washington.

STATE PRINTING PLANT OLYMPIA, WASHINGTON

-1292-

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON,
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,
Plaintiff,
—vs—
RUSSELL DUANE McNEIL,
Defendant.

NO. 88-1-00428-1

STATE'S DESIGNATION OF CLERK'S PAPERS

TO THE CLERK OF SAID COURT:
Please Prepare a Transcript of the Following:

Sub Number	Title of Document	Date Filed
"A"	Video Tape of Scene	8/25/89
"B"	6 Photographs of Scene & Autopsy	8/25/89
"C"	Autopsy Report of William Brady	8/25/89
"D"	Letter Written by Defendant McNeil	8/25/89
"E"	Tape and Transcript of Defendant's Statement to YSO Detectives	8/25/89
	Findings of Fact and Conclusions of Law and Order Declining Jurisdiction	7/24-26/89

MAY 21 1990
BETTY MCGILLEN
YAKIMA COUNTY CLERK

CERTIFICATE OF TRANSMITTAL

On this day, the undersigned in Yakima, Washington, sent to ~~the attorneys~~ of record for ~~plaintiff~~/defendants a copy of this document by U.S. mail, postage prepaid, or by Attorney's Messenger Service. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

5/21/90
DATE

Peggy James
SIGNED

Howard W. Hanse
Attorney

Dated May 21, 1990

For The State

A-401-88/HWH/plk

259

FILED and Micro filmed
JAN 05 1990
Roll No. 365 31

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'90 JAN 5 PM 3:12 BETTY McBILLEN, YAKIMA COUNTY CLERK
BY ... DEP.
CLERK OF COURT
HINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant	NO: 88-1-00428-1 ORDER AUTHORIZING EXPENDITURE OF PUBLIC FUNDS

THIS MATTER coming on regularly for consideration on Defendant's MOTION FOR AUTHORIZATION AND EXPENDITURE OF PUBLIC FUNDS for the authorization for payment of the fees incurred on behalf of the Defendant herein due and owing to Mr. Raymond Davis of the Quantum Analytical Company, at 1000 8th Avenue, Suite 705, Seattle, WA 98104; and the Court being fully advised in the premises, now, therefore, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

(1) The sum of $701.25 payable to Mr. Raymond Davis, whose address is:

Quantum Analytical Company
1000 8th Avenue, Suite 705
Seattle, WA 98104

258

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DONE IN OPEN COURT THIS 4TH DAY OF ~~DECEMBER~~ JANUARY, 1990, ~~1989~~.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

ORDER AUTHORIZING
EXPENDITURE OF PUBLIC
FUNDS 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
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BETTY McGILLEN
YAKIMA COUNTY CLERK
'90 JAN 5 PM 3 42

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant	NO: 88-1-00428-1 DEFENDANT'S MOTION FOR AUTHORIZATION OF PUBLIC FUNDS

MOTION

COMES NOW CHRISTOPHER TAIT, of attorneys for the above-named Defendant, RUSSELL DUANE McNEIL, and moves this Court for the entry of an order for the authorization and expenditure of public funds to pay a Forensic Expert hired for the purposes of analyzing the crime/lab results in the above-entitled matter.

THIS MOTION is based upon the files and records herein and upon the Affidavit of Counsel, attached hereto and hereby incorporated by reference.

DATED THIS 28 day of December, 1989.

Christopher Tait

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

AFFIDAVIT

STATE OF WASHINGTON)
)ss.
COUNTY OF YAKIMA)

CHRISTOPHER TAIT, being first duly sworn upon oath, deposes and states:

1. I was one of the attorneys appointed by the Court to represent Defendant Russell Duane McNeil.

2. Judge F. James Gavin agreed that the hiring of a Forensic Expert in thsi matter was appropriate and necessary, and further that such expert witness fees should, therefore, be paid by public funds.

3. I have contacted Mr. Raymond Davis of the Quantum Analytical Company, at 1000 8th Avenue, Suite 705, Seattle, WA 98104. Mr. Davis has agreed to perform these necessary services on behalf of the Defendant Russell Duane McNeil. Mr. Davis' hourly rate is $70.00 per hour for pre-trial out-of court time.

4. Attached hereto and incorporated herein by reference is Mr. Raymond Davis' final Statement in the amount of $701.25 for his services provided herein.

DATED this 28 day of December, 1989.

Christopher Tait
CHRISTOPHER TAIT

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1348

SUBSCRIBED AND SWORN to before me this 28 day of December, 1989.

Patricia J. Barbee

NOTARY PUBLIC in and for the State Of Washington, residing at Yakima.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

(206) 621-1264

Quantum
Analytical Laboratory
1000 - 8th Avenue
Seattle, WA. 98104

Christopher Tait
103 South Third Street
Yakima, WA
98901

Date: 21 August 1989

Ref: State v Russell McNeil

Statement

Date	Description of Services	Time	Charges
8/21/89	Services and expenses provided for on the above captioned homicide case in Yakima, County. See attached for specific services rendered.		$701.25

Total Due $701.25

Please make checks payable to: Quantum Labs

Fed. ID No. 91-1204491

STATE VS RUSSELL D. M^NEIL
STATEMENT OF SERVICES/EXPENSES

6/24/88	Call from Investigator to assist in the above captioned homicide case.	
	Service: 1/4 hr	$ 17.50
7/ 8/88	Attorney and investigator to my office to discuss the case. Left off photos and discovery material for my review.	
	Service: 2 1/4 hrs	$175.00
7/22/88	Investigator called to discuss case.	
	Service: 1/4 hr	$ 17.50
7/27/88	Call from Investigator. Spoke with attorney. Requests I return photos.	
	Service: 1/4 hr	$ 17.50
8/ 1/88	Packaged photos and returned them to attorney.	
	Service: 1/2 hr	$ 35.00
	Expenses: Federal Express	$ 33.75
8/ 8/88	Reviewed autopsy reports, log evidence sheets and report from DHSH.	
	Service: 1/2 hr	$ 35.00
8/11/88	Call from investigator. Will call her back.	
8/12/88	Called attorney to discuss my observations of the autopsy reports on the victims. Returned discovery material to attorney.	
	Service: 1/2 hr	$ 35.00
	Expenses: Federal Express	$ 20.00
10/17/88	Called attorney requesting update on case. Currently at State Supreme Court. Hold open.	
	Service: 1/4 hr	$ 17.50
1/13/89	Attorney here to discuss case. Need to review physical evidence at crime lab.	
	Service: 1/2 hr	$ 35.00
7/18/89	Call from attorney to discuss Englerts report.	
	Service: 1/4 hr	$ 17.50
7/21/89	Attorney here to discuss Englerts report and to compare same with previous report.	
	Service: 2 3/4 hrs	$192.50
8/17/89	Attorney here to discuss case.	
	Service: 1/2 hr	$ 35.00
8/21/89	Attorney called to discuss some pertinent physical evidence and requested that I come to Yakima ASAP to view it.	
	Service: 1/4 hr	$ 17.50
	TOTAL:	$701.25

FILED and Micro filmed
DEC 1989
Roll No. 363 518
BETTY McGILLEN, YAKIMA COUNTY CLERK

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'89 DEC 8 PM 3 27
BETTY McGILLEN
YAKIMA COUNTY CLERK
SUPERIOR COURT
WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	
	)	ORDER AUTHORIZING
RUSSELL DUANE McNEIL,	)	EXPENDITURE OF
	)	PUBLIC FUNDS
Defendant	)	

THIS MATTER coming on regularly for consideration on Defendant's Motion For Authorization And Expenditure Of Public Funds for the authorization for payment of the fees and costs incurred on behalf of the Defendant herein due and owing to the individuals as named hereinbelow; and the Court being fully advised in the premises, now, therefore, it is hereby:

ORDERED that the following sums of monies be paid directly to the following individuals by the appropriate Yakima County Office forthwith:

	NAME	AMOUNT DUE
(1)	Ronald D. Ness Zornes & Associates 420 Cline Avenue Port Orchard, WA 98366	$ 17.50

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

(2) Jan Beck $300.00
510 Arctic Building
Seattle, WA 98104

(3) Kevin B. McGovern, Ph.D. $620.00
1225 NW Murray Road, Suite 214
Portland, Oregon 97229

(4) Donald T. Reay, M.D. $200.00
10800 Twelfth Avenue Northwest
Seattle, WA 98177

DONE IN OPEN COURT THIS 7 DAY OF DECEMBER, 1989.

JUDGE/COURT COMMISSIONER

PRESENTED BY:

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECEIVED DEC 8 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

'89 DEC 8 PM 3 27

BETTY McGILLEN
EX OFFICIO CLERK OF
STATE OF WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	)	NO. 88-1-00428-1
vs.	)	
RUSSELL DUANE McNEIL, Defendant	)	DEFEENDANT'S MOTION FOR AUTHORIZATION OF PUBLIC FUNDS

COMES NOW CHRISTOPHER TAIT, of attorneys for the above-named Defendant, RUSSELL DUANE McNEIL, and moves this Court for the entry of an order for the authorization and expenditure of public funds to pay the experts and the costs associated with obtaining certain information from the experts, as hereinbelow stated.

THIS MOTION is based upon the files and records herein and upon the affidavit of Counsel, attached hereto and hereby incorporated by reference.

DATED this 5th day of December, 1989.

Christopher Tait

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

255

STATE OF WASHINGTON)
)ss.
COUNTY OF YAKIMA)

CHRISTOPHER TAIT, being first duly sworn upon oath, deposes and states:

1. I was one of the attorneys appointed by the Court to represent Defendant Russell Duane McNeil. Mr. McNeil has entered his plea and is now serving out his life sentences at Walla Walla Prison.

2. In preparation and in anticipation of Mr. McNeil's case going to trial, we incurred many costs and expenses in preparation for a trial in this matter. A copy of each and every respective statement from certain experts and their statements are attached hereto and incorporated herein.

3. The following expenses remain unpaid and I am therefore respectfully requesting that the following expenses be paid by public funds and that the designated clerk disburse from public funds such sums of monies owing directly to the following individuals at their respective addresses, as follows:

NAME		AMOUNT DUE
(a)	Ronald D. Ness Zornes & Associates 420 Cline Avenue Port Orchard, WA 98366	$ 17.50
(b)	Jan Beck 510 Arctic Building Seattle, WA 98104	$300.00

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1348

(c) Kevin B. McGovern, Ph.D. $620.00
1225 NW Murray Road, Suite 214
Portland, Oregon 97229

(d) Donald T. Reay, M.D. $200.00
10800 Twelfth Avenue Northwest
Seattle, WA 98177

DATED this 5th day of December, 1989.

CHRISTOPHER TAIT

SUBSCRIBED AND SWORN to before me this 5th day of December, 1989.

NOTARY PUBLIC in and for the
State of Washington, residing
At Yakima.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

Ronald D. Hess
420 Cline Avenue
Port Orchard, Wa. 98366

ZORNES & ASSOCIATES
Post Office Box 220
Silverdale, WA 98383-0220
(206) 692-0941

RE: FAX Service to Diana Parker/Chris Tato STATEMENT DATE: August 22, 1989

DATE	DESCRIPTION	HOURS	FEES	EXPENSES
08-15-89	Facsimile Transmission Service:			
	5 pg @ $1.00		5.00	
	10 pg @ .75		7.50	
	10 pg @ .50		5.00	
			TOTAL►	17.50

REMARKS:

TO INSURE PROPER CREDIT, PLEASE RETURN REMITTANCE COPY OF STATEMENT WITH YOUR PAYMENT.

White—Office Yellow—Client Copy Pink—Remittance

JAN BECK
EXAMINER OF QUESTIONED DOCUMENTS
510 ARCTIC BUILDING
SEATTLE, WASHINGTON 98104

TELEPHONE
(206) 623-4141

MEMBER:
AM. SOCIETY OF QUESTIONED DOCUMENT EXAMINERS
AM. ACADEMY OF FORENSIC SCIENCES
NORTHWEST ASS'N OF FORENSIC SCIENTISTS
DIPLOMATE, AM. BOARD OF FORENSIC DOCUMENT EXAMINERS

October27, 1989

STATEMENT

Mr. Christopher Tait
Attorney at Law
230 South Second St.
Yakima, Washington 98901

Re: State vs. Russell McNeil;
Handwriting Examination

Balance: $300.00

KEVIN B. McGOVERN, Ph.D.,
1225 NW Murray Road, Ste 214
Portland, Oregon 97229

Christopher Tate, Attorney at Law
103 South Third Street
Yakima, Washington 98901

DATE	PROFESSIONAL SERVICE	CHARGES	CREDITS	BALANCE
	Preview Materials	240.00		
6-4-89	Travel to Yakima meet with attorneys + Clinical Interview	1440.00		
6-5-89	~~Clinical Interview + meet with attorneys + Travel to Portland~~	1560.00		
Mileage	414 x 21¢	86.94		
	Lodging	56.58		
	Meals	16.00		
6-6-89	Review Clinical file	180.00		
	Correspondence, Long distance calls, misc	65.00		$3645.02
7-10-89	Billed to Atty			
8-4-89	Atty paid		3644.52	-0-
	Charges August 1—thru August 30 1989			
~~Chart review/ consult w/Chris & Atty~~		125.00		
Telephone consultations w/counsel		65.00		
Review chart re: atty Sullivan		65.00		
Telephone consult w/Mr. Sullivan		65.00		
~~Finalize chart rev/prep summary rpt~~ for legal counsel		300.00		$620.00
9/5/89	Billed it			

PLEASE PAY LAST AMOUNT IN THIS COLUMN △

DONALD T. REAY, M.D.
PATHOLOGIST (AP, CP, FP)
10800 TWELFTH AVENUE NORTHWEST
SEATTLE, WASHINGTON 98177

RESIDENCE
362-7936

Christopher Tait
Attorney at Law
The Landmark Building
230 South Second Street, Suite 201
Yakima, WA 98901

STATEMENT

Statement for services in the matter of State v. McNeil:

Consultation - 2hrs @ $100/hr -

TOTAL -- $200.00

FILED

NOV 14 1989

BETTY MCGILLEN
YAKIMA COUNTY CLERK

November , 1989

Honorable Judge F. James Gavin
Yakima County Superior Court
Yakima County Court House
Yakima, wa. 98901

RE: STATE OF WASHINGTON VS. Russell D. McNeil
Yakima County cause No 88-1-00428-1

Dear Mr. Gavin

In the copy I received of the Order of Indigency and order Appointed counsel on Appeal, under section 3, Subsection "A" and "B", states

3. The Defendant, Russell D. McNeil, is entitled to the Following at Public expence:

A. The verbatim report of Proceedings from the entry of plea of guilt, the imposition of Sentence, and the entry of findings, and the entry of the Amended Judgement and sentencing.

B. A copy of the clerks papers from the Proceedings specified in "A" Above.

I would like to get a, Full and in detail, copy of each of the Items named above, of which I am entitled to at Public expence

A copy of this will be sent to the Following

Judge Gavin
Paul J. Wasson II
county clerk

November , 1989

Russell D McNeil
Russell D. McNeil
Defendant

254

November. 10, 1989

Dear Betty

Would you Please
Have This Filed Then sent Back
To me.

Thank you

Russell D. McNeil

Russell D McNeil 95747
PO Box 520 8, F-10
walla walla,
wa.
99362

KENNEWICK
PASCO
RICHLAND

25 USA

Betty McGillen
Yakima county clerk
Yakima county courthouse Rm 323
Yakima wa.
98901

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,

vs. Plaintiff,

RUSSELL DUANE McNEIL
Defendant.

NO. 88-1-00428-1

RELEASING NON-ADMITTED IDENTIFICATIONS

ORDER ~~REDUCING BAIL OR~~ ~~ORDER RELEASING DEFENDANT~~ ~~ON OWN RECOGNIZANCE~~

THIS MATTER having come on for hearing upon the oral motion of the ~~defendant~~ STATE, represented by his court appointed attorney,_____, the State of Washington being represented by the undersigned Deputy Prosecuting Attorney for Yakima County, Washington, and the court being fully advised,

IT IS HEREBY ORDERED:

FILED and Micro filmed
NOV 3 1989
361 220
Roll No.
BETTY McGILLEN, YAKIMA COUNTY CLERK

☐ (1) That the defendant's bail is reduced from $_____ to $_____

_____ (a) To be posted by a bail bondsman

_____ (b) Cash deposited with the Clerk of the Court

_____ (c) Other:_____

_____ (d) Other conditions of release are set out below.

☐ (2) That the defendant be released from custody without bail and upon his own recognizance, during the pendency of this case, until further order of this court, upon the following special conditions:

_____ (a) That the defendant personally report to Mr. Orville Stevens, Room 314-A, Yakima County Courthouse, Yakima, Washington, telephone number 575-4210, on _____ between 11:30 am., and 12:30 p.m., and thereafter as required by Mr. Stevens.

_____ (b) That the defendant shall reside at _____

_____

and not change address or leave Yakima County, without permission of the court.

_____ (c) Contact attorney _____,

phone #_____ upon any release and thereafter

on a weekly basis. _____

_____ (d) Have no contact with _____

_____

_____ (e) Do not drink any alcohol or use any drugs without a prescription.

☒ _____ (f) Other: THAT STATE'S IDENTIFICATIONS 1-79 CONCERNING DEF'S MOTION IN LIMINE AS TO

_____ (g) ~~Other:~~ PHOTO'S TO BE OFFERED AT TRIAL ARE HEREBY RELEASED BACK TO THE STATE.

DONE IN OPEN COURT this 3RD day of NOVEMBER, 1989

JUDGE

Presented by:

ATTORNEY FOR DEFENDANT

Approved as to form:
Howard W Hanse

DEPUTY PROSECUTING ATTORNEY

RECEIVED IDENTIFICATIONS 1-79
Howard W Hanse
11-3-89

253

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

FILED
OCT 24 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

STATE OF WASHINGTON, Plaintiff,	)	
-vs-	)	NO. 88-1-00428-1
RUSSELL DUANE McNEIL, Defendant.	)	(Appeal No. 10289-1-III)

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(Appellant's)

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(*) Not available from file. Appellant's counsel designated "Scheduling Order" filed 6/7/88 in lieu of this document per telephone contact on 10/24/89.

SUPERIOR COURT OF WASHINGTON
COUNTY OF ~~SPOKANE~~ YAKIMA

(Clerk's Date Stamp)

FILED
OCT 13 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

State of Washington,
Petitioner(s)/Plaintiff(s)

vs.

Russell Duane McNeil
Respondent(s)/Defendant(s)

CASE NO. 88-1-00428-1

PRAECIPE FOR CLERK'S PAPERS AND EXHIBITS

TO THE CLERK OF THE COURT:

Please prepare the following documents or exhibits in the order indicated for transmittal to the Court.

Document/ Exhibit Number	Date Filed	Title
~~2~~	~~3-15-88~~	~~Information~~
~~3~~	~~3-16-88~~	~~Order on Arraignment~~
5	3-16-88	Order Appointing Attorney
~~7~~	~~3-17-89~~	~~Motion for Expenditure of Public Funds~~
~~8~~	~~3-17-88~~	~~Motion for Discovery~~
9	3-17-88	Motion re More Time to file plea
~~10~~	~~3-18-88~~	~~Letter from Judge~~
~~11~~	~~3-18-88~~	~~Pre-Trial Order~~
19	4-12-88	Waiver of Speedy Trial
20	4-12-88	Order Continuing Trial
~~21~~	~~4-12-88~~	~~Motion for Extension of Time~~
22	4-12-88	Order Granting Continuance
23	4-12-88	Order Extending Time to Give Notice
~~39~~	~~5-27-88~~	~~Notice of Special Sentencing Proceeding~~
40	6-2-88	Motion For Additional time
41	6-2-88	Motion for Continuance of Trial
~~42~~	~~6-3-88~~	~~Waiver of Speedy Trial~~
	(See continued list on attached page)	

Send a copy of each alphabetical index to each of the parties and prepare a cover sheet, a copy of which is to be sent to each party pursuant to RAP 9.7

Dated: ~~Oct. 12, 1989~~

Address: ~~W. 2521 Longfellow~~ (Street)
~~Spokane,~~ (City) ~~Wa~~ ~~99205~~ (Zip)

Telephone: ~~(509) 328-2064~~

Signature

~~Paul J. Wasson~~
Typed or Printed Name

Attorney for: ~~Defendant McNeil~~

PRAECIPE FOR CLERK'S PAPERS AND EXHIBITS (RAP 9.7)

[ ] CI-09.0100-7/78-WPF
[ ] CR-07.1240-7/78-WPF

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58	7-20-88	Defendant's Motion for Dismissal
65	8-10-88	Memorandum in Opposition
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79	9-28-88	Correspondance from Tait
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106	1-30-89	Letter from Judge Gavin
107	1-31-89	Waiver of Speedy Trial
108	1-31-89	Motion for Continuance
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117	2-27-89	Motion for change of venue
118	2-27-89	Affidavit in Support of Motion for Change of Venue
119	2-27-89	Motion in Limine regarding Photos
120	2-27-89	Defendant Omnibus application
125	3-15-89	Motion for Discovery
126	3-15-89	Motion for Bill of Particulars
127	3-15-89	Motion to Strike Enhancement Penalty
130	3-20-89	Memorandum Supporting Admissibility
131	3-20-89	Memorandum in Opposition
132	3-27-89	Memorandum in Opposition
133	3-27-89	Memorandum in Opposition
134	3-29-89	Plaintiff's Omnibus Application
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161	6-7-89	Memorandum of Authorities
162	6-9-89	Motion and Affidavit for Discovery
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172	7-11-89	Order Granting Discovery to State
173	7-11-89	Order on Omnibus Application
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175	7-12-89	Memorandum
186	7-24-89	Amended Order Authorizing Discovery
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201	7-31-89	Motion to Dismiss Notice
204	8-7-89	Copy of ruling denying discretionary
208	8-7-89	Memorandum
235	8-25-89	Pleas of Guilty
236	8-25-89	Statement of Defendant
237	8-25-89	Judgment, Sentence and Warrant
239	9-6-89	Amended Judgment & Sentence
240	9-6-89	Findings of Fact & Conclusions of Law
243	9-22-89	Notice of Appeal

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

SEP 29 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,
Plaintiff,
-vs
RUSSELL DUANE McNEIL,
Defendant.

NO. 88-1-00428-1

AFFIDAVIT OF MAILING

I, Robbin K. Wadsworth, being first duly sworn on oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of 21 years, not a party of the above-entitled proceedings and competent to be a witness therein.

On the 29th day of September, 1989, I ~~mailed~~ distributed copies of the NOTICE OF APPEAL (filed by Defendant) and NOTICE OF APPEAL (filed by defense counsel) in the above-entitled matter:

TO: Jeffrey Sullivan/Prosecuting Attorney/Courthouse/Yakima WA

Attorney for Plaintiff

TO: Howard Hansen/Deputy Prosecuting Atty/Courthouse/Yakima, WA

Attorney for Plaintiff

TO: _____

Attorney for _____

TO: _____

Attorney for _____

BETTY McGILLEN
Yakima County Clerk

By Robbin K. Wadsworth
Deputy Clerk

SUBSCRIBED AND SWORN TO before me this 29th day of September, 1989.

Patricia A. Kyllonen
NOTARY PUBLIC in and for the State of Washington, residing at Yakima.

250

microfilmed
SEP 28 1989
Roll # 358 911
BETTY M. GILLEN
YAKIMA COUNTY CLERK

'89 SEP 28 PM 10 49
BETTY M. GILLEN
CLERK OF
SUPERIOR COURT
WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY FEES for the period of time from July 25, 1989, to September 6, 1989, filed herein by THOMAS BOTHWELL, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County office forthwith: The sum of $2,549.75 payable to attorney THOMAS BOTHWELL of PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S., 302 North 3rd Street, P.O. Box #2129, Yakima, WA, 98907-2129.

DATED this 26 day of September, 1989.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

'89 SEP 20 AM 10 49

EX OFFICIO CLERK OF SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR ORDER APPROVING ATTORNEY FEES

MOTION

The undersigned attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for the undersigned defense counsel for the period of time from July 25, 1989, through September 6, 1989.

This motion is made and based upon the record and file herein and the below DECLARATION OF COUNSEL.

DATED this 26th day of September, 1989.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

DECLARATION OF COUNSEL

THOMAS BOTHWELL, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause.

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

My compensation has been set as follows: Time spent in court at the rate of $60.00 per hour and out-of-court time at the rate of $50.00 per hour.

Attached hereto and incorporated by reference is my statement of time expended in this cause for the period of time between July 25, 1989, and September 6, 1989.

SIGNED AND DATED at Yakima, Washington, this 26th day of September, 1989.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

STATEMENT

RUSSELL McNEIL

DATE	DESCRIPTION	HOURS
7/25/89	Court hearing.	7.5*
7/25/89	Prepare for hearing; "draft additional motions."	1.0
7/26/89	Draft Motions.	1.5
	Court hearing.	6.75*
8/8/89	Meeting with Diana Parker; draft motions, etc., for hearing for expenditure of public funds, etc. Obtain court order shortening time; service on prosecutor; telephone call to Mike Shinn; call to Mr. Tait's office.	1.5
8/9/89	Court hearing (motion for expenditure of funds).	1.75*
8/10/89	Telephone conference with Chris Tait.	.25
8/14/89	Court hearing.	5.75*
	Meeting with Chris Tait and Diana Parker.	1.0
8/15/89	Research.	1.5
	Meeting with Chris Tait at his office.	2.5
	To court to listen to prior tape transcript.	1.0*
8/16/89	Draft motion for transcript and and copy of clerk's papers.	.5
	Meeting with Chris Tait and Diana Parker.	.75
	Meeting with Jeff Sullivan and Chris Tait, then with Judge Gavin.	2.0

8/18/89	Court hearing.	3.0*
8/22/89	Telephone conference with Chris Tait.	.25
8/23/89	Telephone conference with Jeff Sullivan, telephone call to Chris Tait, and telephone conference with Diana Parker.	.5
8/24/89	Meeting with Jeff Sullivan and Howard Hanson, then with Judge Gavin; meeting with client in jail.	2.5
8/25/89	File review; meeting with Chris; meeting with client.	3.0
8/28/89	Telephone conference with Chris Tait (re: proposed findings).	.25
9/6/89	Court hearing.	.25*
	TOTAL HOURS:	45.00

McNEIL:

	* Total in-court hours: 26.0 hours at $60 per hour:	$1,560.00
	Total out-of-court hours: 19.0 hours at $50 per hour:	950.00
COSTS:	8/14/89 lunch meeting	4.50
	8/14/89 Federal Express (postage costs for two overnight letters)	35.25
	TOTAL:	$2,549.75

/ / /

FILED
and Micro-filmed
SEP 28 1989
Roll No. 358 910
BETTY McGILLEN, YAKIMA COUNTY CLERK

'89 SEP 26 PM 2 43
CLERK OF SUPERIOR COURT
YAKIMA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant.

No. 88-1-00428-1

ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR PAYMENT OF BILL, now, therefore,

IT IS HEREBY ORDERED that the sum of $56.25 be paid forthwith to: LONNA BAUGHER, COURT REPORTER, Yakima County Superior Court, Yakima County Courthouse, Yakima, WA, 98901.

DATED this 22 day of September, 1989.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

RECEIVED
'88 SEP 28 PM 3 48
BY OFFICIAL CLERK OF SUPERIOR COURT

FILED
SEP 28 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR PAYMENT OF BILL

MOTION

COMES NOW THOMAS BOTHWELL and PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S., of attorneys for the above-named Defendant, RUSSELL DUANE McNEIL, and move this Court for an order requiring the court reporter, Ms. Lonna Baugher, to prepare the original and one copy of the Court's Ruling concerning the 3.5 hearing which took place on July 26, 1989.

This motion is made and based upon the record and file herein and the below DECLARATION OF COUNSEL.

DATED this 21st day of September, 1989.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

DECLARATION OF COUNSEL

THOMAS BOTHWELL, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Mr. McNeil is indigent and unable to pay for the expenses of his defense.

At the close of the 3.5 hearing which took place on July 26, 1989, Court Reporter Lonna Baugher was orally requested to prepare a transcript of the Court's Ruling. Ms. Baugher immediately prepared the transcript, but a court order is now needed so that she may be paid for her services which totalled the sum of $56.25. Said billing is for a purpose previously authorized by this Court, and an order should now be entered authorizing payment.

SIGNED AND DATED at Yakima, Washington, this 21st day of September, 1989.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

SEP 22 1989

Roll No. 358 473

MARY McCULLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	
	)	
RUSSELL DUANE McNEIL,	)	ORDER OF INDIGENCY AND
	)	ORDER APPOINTED COUNSEL
Defendant	)	ON APPEAL

THIS MATTER having come on before the Court on the Motion of the Defendant, RUSSELL DUANE McNEIL, and it appearing that the Defendant was previously declared indigent and the Court now finding that the Defendant continues to lack sufficient funds to prosecute this appeal and it further appearing that the Defendant is entitled under applicable law to prosecute his appeal at public expense to the extent defined in this Order, now therefore, it is

ORDERED:

1. The Defendant, RUSSELL DUANE McNEIL, is entitled to counsel for the appeal process wholly at public expense.

2. ~~Louis Daniel Fessler, or his designee, appropriately assigned~~ Paul J. Wasson II, is appointed as counsel for appeal.

3. The Defendant, RUSSELL DUANE McNEIL is entitled to the following at public expense:

246A

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECEIVED

'89 SEP 29 PM 4 38

A. The verbatim report of proceedings from the entry of the plea of guilty, the imposition of sentence, and the entry of findings and the entry of the amended judgment and sentence.

B. A copy of the clerks' papers from the proceedings specified in A. above.

C. Any filing fees required by law.

DATED this 22 day of September, 1989.

JUDGE

Presented by:

CHRISTOPHER TAIT
trial counsel for McNeil

Approved as to form, copy received,
notice of presentation waived:

JEFFREY C. SULLIVAN
Yakima County Prosecuting Attorney

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
SEP 22 1989
'89 SEP 22 PM 1 39
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	
	)	MOTION AND AFFIDAVIT
RUSSELL DUANE McNEIL,	)	FOR ORDER OF INDIGENCY
	)	
Defendant	)	

COMES NOW the Defendant, RUSSELL DUANE McNEIL, by and through his trial counsel, CHRISTOPHER TAIT, and moves the Court for an Order of Indigency in the above matter. This Motion is based upon the files and records herein, and upon the affidavit of counsel attached hereto.

DATED this 22 day of September, 1989.

CHRISTOPHER TAIT
Attorney for Defendant McNeil

246

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

'89 SEP 22 PM 4 39

STATE OF WASHINGTON)
)ss.
COUNTY OF YAKIMA)

CHRISTOPHER TAIT, being first duly sworn upon oath, deposes and states:

I was the lead attorney for the Defendant named herein. I have become familiar with his circumstances and with his financial condition. I represent to the Court that he has no assets, no income, and no hope of obtaining any money. I believe that he is absolutely unable to hire his own attorney, and that counsel must be appointed for him.

DATED this 22 day of September, 1989.

CHRISTOPHER TAIT
Attorney for the Defendant

SUBSCRIBED AND SWORN to before me this 22 day of September, 1989.

NOTARY PUBLIC in and for the State Of Washington, residing at Yakima.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECEIVED

SEP 22 1989

'89 SEP 22 PM 4 39 Roll No. 358 477

EX OFFICIO CLERK OF McNEIL, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	
	)	NOTICE OF APPEAL
RUSSELL DUANE McNEIL,	)	TO DIVISION III,
	)	COURT OF APPEALS
Defendant	)	

TO: CLERK OF THE ABOVE ENTITLED COURT; and
AND TO: STATE OF WASHINGTON, Plaintiff and
AND TO: JEFFREY C. SULLIVAN,
Yakima County Prosecuting Attorney;
AND TO: HOWARD H. HANSEN,
Deputy Prosecuting Attorney

YOU, AND EACH OF YOU, are hereby notified that the Defendant, RUSSELL DUANE McNEIL does hereby appeal to the State of Washington, Court of Appeals, Division III, from the Court's decision and its Amended Judgment and Sentence (Felony) entered by the Superior Court of the State of Washington in and for Yakima County on September 6, 1989, imposing an exceptional sentence of two consecutive terms of life in prison without parole or release.

245

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

'89 SEP 22 PM 4 39

The Defendant is presently in confinement at the Washington State Correction Center, whose address is P.O. BOX 900, Shelton, WA 98594.

DATED this 22 day of September, 1989.

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
SEP 22 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE Superior court of THE STATE of WASHINGTON, IN and for THE COUNTY of YAKIMA.

STATE of WASHINGTON

VS.

Russell McNeil

NO. 88-1-00428-1

Affidavit of Service by Mailing

STATE of WASHINGTON) ss Russell McNeil
COUNTY of MASON)

being over the age of 18, certifies under Penalty of the Perjury laws of the STATE of WASHINGTON THAT ON THIS 19TH day of September, 1989. I mailed a True and correct copy Here of and THE attached Notice of appeal To

Jeffery C. Sullivan, ESQ.
Pros. ATTourney
YAKima COUNTY courtHouse
YAKima, wa
244 98901

Russell McNeil

FILED

SEP 22 1989

Roll No. 358 476 R

JUDY McCULLEN, YAKIMA COUNTY CLERK

IN THE Superior court of
THE STATE of WASHINGTON, IN
and for THE county of YAKIMA

STATE of WASHINGTON, PLAINTIFF VS RUSSELL McNEIL, DEFENDANT	NO. 88-1-00428-1 NOTICE of Appeal

'89 SEP 20 PM 10 31

SUPERIOR COURT
YAKIMA, WASH.

COMES NOW, RUSSELL McNEIL, WHO HEREBY APPEALS THE SENTENCED JUDGEMENT, ENTERED AUGUST 25TH, 1989 IN THE ABOVE CAUSE, IN WHICH HE WAS SENTENCED TO TWO (2) CONSECUTIVE TERMS OF LIFE IN PRISON WITHOUT POSSIBILITY OF PAROLE OR RELEASE.

RESPECTFULLY SUBMITTED,
RUSSELL D. McNEIL

RUSSELL D. McNEIL
SEPT 19TH 1989

243

RECEIVED
'88 SEP 6 AM 10 31
FILED and Micro filmed
SEP 6 1989
Roll No. 357 348
BETTY McGILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	
	)	ORDER AUTHORIZING
RUSSELL DUANE McNEIL,	)	PAYMENT BY YAKIMA
	)	COUNTY
	)	
Defendant	)	

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY AND PRIVATE INVESTIGATOR FEES AND EXPENSES for the month of August, 1989, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

(1) The sum of $ 5,214.25 payable to attorney CHRISTOPHER TAIT, 230 South Second Street, Suite 201, Yakima, WA 98901;

(2) The sum of $ 1,781.25 payable to DIANA G. PARKER, in care of the office of attorney Christopher Tait.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DATED this 6 day of ~~August~~ September, 1989.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

CHRISTOPHER TAIT
Attorney for Defendant McNeil

ORDER AUTHORIZING
PAYMENT BY YAKIMA
COUNTY 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECEIVED
'88 SEP 6 PM 10 31
FILED
SEP 06 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	DEFENDANT'S MOTION
	)	AND SUPPORTING
RUSSELL DUANE McNEIL,	)	DECLARATION FOR
	)	ORDER APPROVING
	)	ATTORNEY FEES
Defendant	)	

MOTION

THE UNDERSIGNED attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for the undersigned defense counsel and private investigator for the month of August,1989.

THIS MOTION is based upon the files and records herein and the DECLARATION OF COUNSEL hereinbelow.

DATED this 31st day of August, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1348

241

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct.

The Undersigned is one of the court-appointed counsel for defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference is my statement of time expended, together with that of our private investigator in this case for the month of August1989.

SIGNED AND DATED at Yakima, Washington, this 31st day of August, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

CHRISTOPHER TAIT AUGUST 31 1989

STATE vs. RUSSELL DUANE McNEIL

Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
7/21/89	Out	Parking Infraction (Seattle) $12.00	*
7/31/89	Out	Conf DP, motions, subpoenas	1.00
8/1/89	Out	Conf TAB, news people, jail visit, review witness	4.00
8/2/89	Out	Review wits, prep for hearing, conf	3.00
8/3/89	Out	Conf TAB, DP, JCS, tele conf S. Court, jail visit, conf RCH & Frost, review letter, prep for Hearing	6.00
8/4/89	Ouit	Conf S. Ct. clerk, DP, TAB, review notes	1.00
8/7/89	Out	Conf DP clerk, TAB, Shinn, Gavin, Loftos, Ford, pleadings review, prep pleadings	4.00
8/9/89	IN	Jury project, Motion & Affidavit	**2.00**
8/9/89	Out	Conf TAB, DP, Conf News, Thorner, Shinn, motions, JCS	5.00
8/10/89	Out	Prep venue, affidavit, contact wits, conf counsel	5.00
8/11/89	Out	Jail visit, venue, affidavits, counsel Motions	5.00
8/14/89	Out	Prep for hearing, conf, counsel & client	2.00
8/14/89	IN	Venue Hrng	**7.00**
8/15/89	Out	Let to client, conf TAB, DP, HWH, questionnaire, conf wits, jail visit	7.00

8/16/89	Out	Jail visit, conf, counsel, questionnaire	4.00
817/89	Out	*290 Miles at 22.5 Cents = **$65.25**	**
8/17/89	Out	Locate witnesses	7.00
8/18/89	Out	Conf DP, TAB, jail conf	3.00
8/18/89	IN	Hearing on questionnaire	**3.00**
8/21/89	Out	Conf DP, TAB, wits, motions	3.00
8/22/89	Out	YSO, Conf DP, TAB, wit summary	5.00
8/23/89	Out	Wits W/JCS, jail visit, conf counsel	7.00
8/24/89	Out	Conf Davis, DP, TAB, jail, JCS, McGovern Wit-statements	9.00
8/25/89	IN	P/G & Sentencing	**2.00**
8/25/89	Out	Jail conf, conf JCS, TAB, HWH, DP,	3.00
8/28/89	Out	Jail visits, letters to witnesses, JCS	2.00

86.00 Out of Court Hours at $50.00 Per Hour	=	**$4,300.00**
14.00 In-Court Hours at $60.00 Per Hour	=	**$ 840.00**
7/21/89 **Travel to Seattle	=	**$ 62.25**
7/21/89 *Parking Infraction	=	**$ 12.00**
TOTAL	=	**$5,214.25**

RECORD OF TIME

DIANA G. PARKER AUGUST 31 1989

STATE vs. RUSSELL DUANE McNEIL

Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
8/16/89	Out	Conf CT, conf TAB, CT, LD Cons DK, jail conf Cl, Conf JCS, HH, JG prepare/deliver questionnaire, Cons KR, N	8.00
8/17/89	Out	LD Cons MV, Conf CT, prepare wits, mats, research re unfiling, conf TAB, call Pros., jail conf cl	6.00
8/18/89	Out	Conf CT, Ct on questionnaire, jail donf cl, conf TAB	8.00
8/21/89	Out	Corres from JL, LDC , RD, Cons D.P., Conf Ct, letter to JMN	3.50
8/22/89	Out	Relocate mit wits, LD Cons R.D, pre-pare	5.00
8/23/89	Out	Conf CT, LD Cons MS, Pros Office, I'V MDL, trip to Wapato, locate MS I'V DJ, Corres exp wits, RE: S, Conf TAB, conf CT	7.00
8/24/89	Out	Review MS, DJ, BS st, Conf Pros, CT wits, LD Cons KM, cons DE, NC, LD Consult K. McGovern, jail conf cl, family calls	10.00
8/25/89	Out	Cons JW, memo to client, prepare plea, etc., CT to plea, jail conf cl, 2 calls from client	8.00
8/27/89	Out	Jail Conf cl, corres Sgt. Betts, Corres, Sgt. Adams< retrieve docs/client	2.50
8/28/89	Out	Conf CT, letter to S. Beck, jail conf cl	3.00

8/29/89	Out	Client call doc storage, filing docs, LD Cons, KM	5.00
8/30/89	Out	Letter to KM, LD CONS KM Re report, final bill matters	1.75
8/31/89	Out	Jail conf cl, LD Corres MDL, cons MS letter to MDL, return mit materials and photos, return cl mats to CH	3.50

71.25 Out-Of-Court Hrs at $25.00 Per Hour= **$1,781.25**

TOTAL $1,781.25

FILED and Micro filmed
SEP 6 1989
Roll No. 357 347
BETTY McGILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant.

NO. 88-1-00428-1

FINDINGS OF FACT AND CONCLUSIONS CONCERNING CrR 3.5 HEARING

THIS MATTER having come on regularly before the above-entitled court upon the motion of the plaintiff herein; the defendant appearing personally and being represented by his attorneys, Christopher Tait and Thomas Bothwell of Yakima, Washington, the court having considered the evidence presented at this CrR 3.5 hearing on July 24, 1989, through July 26, 1989, as well as the files and records herein, and having heard the arguments of counsel, and being fully advised in the premises; the court enters the following:

UNDISPUTED FINDINGS OF FACT

I.

On January 26, 1988, a break in the investigation of the Mike and Dorothy Nickoloff homicides occurred when Sammy Lopez provided Yakima Sheriff's Detectives with information connecting Russell McNeil and Herbert Rice, Jr. to the television sets taken from the Nickoloff home during the homicides.

II.

That information led Sheriff's detectives to the residence at 21 North "G" Street, Toppenish, Washington, where they were looking for the defendant, Russell Duane

McNeil. They arrived at that residence at 10:25 p.m. on January 26, 1988. The officers identified themselves to the defendant's brother and his brother's girlfriend and they were granted permission to enter the home. The defendant was there, he was not asleep, however, he had prepared for bed and had just gone to bed.

The officers identified themselves to Russell Duane McNeil by showing a badge and stating they were from the Yakima Sheriff's Office. The officers asked the defendant to come with them for questioning and he said "Sure." The defendant was not advised of any rights at that time.

The defendant rode to the Toppenish Sheriff's Department substation with Det. Rod Shaw arriving some time before 11:00 o'clock p.m. on January 26, 1988. Det. Hafsos was the last to arrive at the substation and he testified he arrived there at 10:58 p.m.

Upon arrival, Det. Shaw read the defendant his Miranda warnings off a Sheriff's Department issued card. A copy of the card used is admitted into evidence as Exhibit "G" for the purposes of this CrR 3.5 hearing.

The defendant was then read his rights again from a Sheriff's Department issued sheet which is admitted at this CrR 3.5 hearing as Exhibit "F". This was accomplished by reading to the defendant from the sheet each separate right one at a time. The defendant was then asked after each right was read whether he understood the right, the defendant said "Yes", and then was asked to initial it, and the defendant did initial it on the sheet. This procedure

was used through all nine numbered rights, including Right No. 9 with the asterisks which is applicable only to juveniles. No tape recording was made of this advice of rights. Thereafter, the detectives asked a few questions of the defendant. His answers to those questions were, and tended to be incriminating. Officers Hafsos and Shaw then determined the Toppenish substation was not the proper facility to take a complete statement and decided to go to Yakima where they had better facilities. The defendant and the Sheriff's Department officers were at the Toppenish substation approximately ten minutes before leaving for Yakima, Washington.

The defendant rode with Det. Shaw on the trip to Yakima, Washington, driving up Highway 97. Conversation between Det. Shaw and the defendant, in question and answer form, resulted in the defendant further incriminating himself in the Nickoloff homicide investigation. This lead Officer Shaw to decide to go to the Nickoloff residence to conduct more questioning. (The defendant testified he did not remember the discussion with Det. Shaw in the car prior to going to the Nickoloff residence. Therefore, the court did not consider this matter truly disputed by the defendant). No one exited Det. Shaw's vehicle at the Nickoloff residence. The defendant indicated he had been there at the time of the homicides and he showed Det. Shaw where he had parked his vehicle. The defendant first attempted to talk his way out of the situation while discussing the case at the Nickoloff residence. He stated

to Det. Shaw that he had stayed in the car and worked on his stereo while Mr. Rice went into the house.

Det. Shaw and the defendant then traveled to Yakima, Washington, arriving shortly after midnight on January 27, 1988. The defendant was taken to the interview room of the Yakima Sheriff Detective's Office and seated at a desk and chair. The defendant was interviewed by Detectives Hafsos and Shaw. The defendant was again verbally advised of his Miranda warnings for the third time before questioning re-commenced at the Yakima Sheriff's Department in the interview room. This unrecorded interview lasted for approximately one hour.

The formal taped statement given by the defendant started at 1:13 a.m. on January 27, 1988, and concluded at 2:30 a.m., one hour and 17 minutes later. The actual recorded cassette tapes used for this statement were admitted as Exhibits "C-1 and C-2" in this CrR 3.5 hearing. Those tape recordings are in order and nothing has been alleged to be missing, added, or altered concerning the tape recorded statement. A proper chain of evidence has been shown concerning the cassette tapes of the defendant's statement. The transcripts of the taped statements have not been fully finalized with some minor discrepancies in the transcripts to be taken up at a later time.

At the time the above-described statements were taken from the defendant by the Yakima Sheriff's Detectives, the defendant was not under the influence of drugs and/or alcohol. The officers did not mention that the possible

punishments for the crimes being investigated included life imprisonment without parole and the death penalty. There was no definition of legal terms given to the defendant, such as jurisdiction. There was no elaboration concerning the defendant's rights other than the actual reading of his Miranda warnings to him. He was asked if he understood each of the rights, he stated that he did understand them and acknowledged this by initialing each of the individual rights on the sheet admitted as Exhibit "F" in this CrR 3.5 hearing.

The defendant was approximately seventeen years and five months old on January 26 and 27, 1988, at the time of this questioning. He had been living with his brother, Ed, who is three years older than the defendant, on "G" Street in Toppenish, Washington. He had been at this residence for approximately two months. His brother Ed was living with a woman named DeAnn Teacher and her two children. The defendant was allowed to reside with his brother in return for assisting with household duties and babysitting chores. The defendant could come and go as he pleased. He had an automobile which he had worked to pay for. Defendant had been attending Pace Alternative School since coming to live with his brother in Toppenish, Washington, and was in the equivalent of the eleventh grade, which the defendant stated was his proper grade level.

Prior to returning to the Yakima area in October, 1987, the defendant, McNeil, had lived with his father in Sedro Wooley, Washington, since April, 1987, except for

approximately three months during the summer when he worked in a firewood business and lived on his own in a trailer on the job site in the Everett/Marysville, Washington, area. The defendant returned to live with his father when school started and stayed with him and went to school until a dispute with his father over his car caused him to move out and return to Toppenish, Washington, to live with his brother. Russell McNeil did not pay rent or other household bills while at his brother's residence and was occasionally given $10 to $20 spending money by his brother or DeAnn Teacher. The defendant, McNeil, also worked as a ranch hand during 1985 and 1986, and on certain occasions, he was entrusted with the caretaking of the ranch facilities and house for several days, up to a week at a time, although it was a simple job according to the defendant.

Russell McNeil has had at least two previous contacts with the criminal justice system as a juvenile on burglary charges. He also has had two other contacts with the law on traffic offenses which were not detailed during this CrR 3.5 hearing. Court documents concerning the two burglary charges are contained in Exhibits "H" and "I" which were admitted in this CrR 3.5 hearing. During those contacts with the juvenile criminal justice system, the defendant admits that he on at least one occasion was represented by counsel and entered a plea of guilty to a charge of burglary. The defendant was additionally advised of his constitutional rights by arresting officers on at least one of the two burglary arrests, and possibly in both cases. In

any case, it is undisputed that the defendant had previously been represented by an attorney on juvenile second degree burglary charges in which the defendant appeared in court, was arraigned on the charges, had counsel appointed to represent him, entered a plea of guilty and was sentenced on the charge.

III.

The exhibits referred to herein are also incorporated by reference into these undisputed facts.

DISPUTED FACTS

I.

Detectives Hafsos and Shaw both testified in the CrR 3.5 hearing that prior to asking the defendant McNeil any questions at the Toppenish substation, they advised him they were investigating the Nickoloff homicides, and that they believed McNeil was possibly involved or connected to the television sets taken from the Nickoloff residence. The defendant, Russell Duane McNeil, testified he was not told at the beginning of his interrogation at the substation that this concerned the Nickoloff homicides. Instead, he believed it was about some car prowls he had been involved in previously.

II.

Detectives Hafsos and Shaw testified that after starting the questioning at the Toppenish substation and obtaining preliminary incriminating responses from the defendant, they advised the defendant that they were going

to take him to Yakima to continue the statement where they had better facilities.

The defendant testified that this did not happen.

III.

Detectives Hafsos and Shaw testified that the defendant was very direct in his answers to their questioning and answered without hesitation. He was alert, cooperative, and did not appear confused. Detectives further testified the defendant was extremely calm, very "matter of fact", completely detached from the situation, fairly well-spoken, and never asked any questions of the officers. Detective Shaw further testified that the officer's tone of voice did not change throughout the questioning and that he tried to talk in the same tone of voice as the defendant McNeil did.

The defendant McNeil disputes, in some respects, all of these characterizations of his behavior while being questioned by the officers. The defendant also testified that the attitude and tone of voice of the officers were aggressive and led him to believe that he had to answer their questions and had to answer in a certain way. The defendant McNeil stated that the voice of Detective Shaw changed when he took the taped statement in that his voice mellowed out. The defendant McNeil testified that he believed that he was being picked on during the questioning, and that he was scared, nervous and jumpy. The defendant further testified that he was tired throughout the questioning and wanted to go home and go to sleep.

IV.

The defendant McNeil testified that he requested to make a phone call to his Mom at the Toppenish substation and later again at the Detective's Office of the Sheriff's Department in Yakima, Washington. The defendant testified that the officers told him that they were the only ones who could help him when he asked to use the telephone. The defendant also testified that he requested a cigarette which the officers gave him prior to questioning at the Detective's Office of the Sheriff's Department in Yakima. The defendant also stated that in answer to his request to make a phone call the officers also stated that he could not have a phone call until he was under arrest.

Detectives Hafsos and Shaw testified that no request was made for a phone call or a cigarette and no comment was made to the defendant about being able to phone only after being arrested, or that they were the only individuals who could help him. The detectives further testified that the defendant was not given any cigarettes.

V.

The defense suggested through cross-examination of Detective Shaw that at the time of the questioning of the defendant McNeil, the officers were tired, maybe not as sharp as they should be, that they were looking for a lead and once they had found this one, proceeded a little over-exuberantly, and possibly made some mistakes.

Detective Shaw testified he was not tired or exhausted. He did testify that later on at the end of the questioning

that he was tired, but not exhausted, and that it did not affect the manner in which he proceeded.

VI.

The State's evidence as contained in Exhibits "H" and "I" indicated that the defendant was represented by an attorney in both of his burglary cases, one at the age of thirteen, and the other at the age of sixteen. The defendant disputed whether he was ever represented by Sharon Carberry who was the attorney of record in the earlier burglary, including at the time the defendant entered a plea of guilty to the charge and was sentenced.

VII.

The defendant McNeil testified he did not understand his rights in their entirety and that the only reason he answered the officers' questions was he had decided to go along with them. He also thought that he could get an attorney later who could help him out of this situation. The defendant further stated he thought he should go ahead and cooperate and that he felt relieved to be able to talk about this with someone.

The detectives testified that the defendant stated he understood each of his rights on numerous occasions, appeared to understand those rights, was cooperative, and agreed to talk to the officers without qualification.

CONCLUSIONS AS TO DISPUTED FACTS.

I.

The court resolves all disputed facts in favor of the State.

II.

The court must decide on the credibility of witnesses testifying concerning the disputed facts. The court listened to the testimony of the officers and the defendant and observed their demeanor throughout, and also listened to both the officers and the defendant talking in the taped statement taken from the defendant and played at this CrR 3.5 hearing. The court concludes the officers who testified concerning disputed facts are more credible than the defendant's evidence on these disputed issues.

CONCLUSIONS AS TO ADMISSIBILITY

I.

From the time the defendant McNeil was contacted at his residence on "G" Street in Wapato, Washington, and the Sheriff's detectives requested that he come with the officers, the defendant was not free to leave and was in custody for purposes of his interrogation on January 26 and 27, 1988.

II.

The advice of rights given to the defendant on four occasions throughout this questioning was extensive and detailed. The officers followed all rules of interrogation they were required to follow. The defendant was read his rights on more than one occasion, they were clearly presented, and he was asked if he understood, and he said that he did understand, and agreed to waive his rights and talk to the officers.

The issue of declining jurisdiction of a juvenile was clearly presented to the defendant including the advice provided in Exhibits "F" and "G" that were admitted in the CrR 3.5 hearing. The defendant acknowledged that it was read to him and that he stated he understood. The court concludes he understood his rights, including the specific warnings that "the juvenile court could decline jurisdiction in his case, and it could be heard in adult court", and "what he says could be used against him in adult court if the juvenile court decides that you are to be tried as an adult."

There were no promises made or improper influence exerted by the officers to get the defendant to answer questions. The court concludes after observing the officers and the defendant testify about the questioning on January 26 and 27, 1988 in this hearing, and after listening to the tape recorded statement of January 27, 1988, that there was no undue pressure put on the defendant, or any pressure at all while giving his statement. The defendant's voice inflections and the content of his statements do not indicate he was scared, was being forced to answer questions or was so sleepy or tired that he didn't understand. The defendant was not confused and his answers to questions made sense and were not dis-jointed. The defendant also demonstrated that on some occasions he exercised his own will by indicating he did not want to answer some questions or just plain didn't answer.

The court concludes the officers' behavior was not overly aggressive and did not overcome the will of the defendant concerning his decision to answer questions.

IV.

The defendant was approximately seventeen years, five months of age at the time this statement was taken by the police. The defendant's education was such that he was in his proper grade, although in an alternative school. There is nothing in the defendant's education to indicate he did not understand what the officers were doing and saying when they were asking questions about this case.

V.

The defendant has experienced many situations most seventeen year olds have not. The defendant did not always live in a family setting and worked at jobs on which he depended for a substantial part of his living expenses. The defendant, at the age of fifteen or sixteen worked as a ranch hand and was entrusted with taking care of a ranch and home while the owners were away, although it was not clear how great his actual duties were while performing this job. Most recently, the defendant had been living with his brother and was essentially on his own, although not completely independent since his brother and his brother's girlfriend would give him $10 or $20 occasionally to help him out. The defendant owned his own car which he had earned while delivering firewood during the summer of 1987.

The defendant appears to be of average intelligence. The court listened to his taped statement and noted his

manner of answering questions and how he formed sentences in his conversations with police officers and determined that his grammar is quite good. There has been nothing presented by either side to indicate that the defendant had an impaired capacity to understand the warnings given to him, his capacity to understand the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

The court concludes the defendant's statements provided on January 27 and 28, 1988, to Yakima Sheriff's detectives concerning the Nickoloff homicides were given knowingly, voluntarily, after an intelligent waiver of his constitutional rights and are therefore admissible in the trial of this case.

DONE IN OPEN COURT this 6 day of September, 1989.

JUDGE

Presented by:

HOWARD W. HANSEN
Deputy Prosecuting Attorney

HWH1(Q)

SUPERIOR COURT OF THE STATE OF WASHINGTON, COUNTY OF YAKIMA

STATE OF WASHINGTON
Plaintiff,
vs.
RUSSELL DUANE McNEIL,
Defendant,

NO. 88-1-00428-1

AMENDED
JUDGMENT AND SENTENCE
(FELONY)

FILED and Micro filmed
SEP 6 1989
Roll No. 357 346
BETTY McGILLEN, YAKIMA COUNTY CLERK

SID NO.: WA 13912837

89 SEP 4 03

HEARING

1. A sentencing hearing in this case was held: 9/6/89 (Date) DOB 8/13/70 M/F X RACE

2. Present were:
Russell Duane McNeil, Defendant
Chris Tait and Thomas Bothwell, Defendant's Lawyer
Jeffrey C. Sullivan, ~~Deputy~~ Prosecuting Attorney

3. Count(s) _____ have been dismissed by the court.

4. Defendant was asked if there was any legal cause why judgment should not be pronounced, and none was shown.

II. FINDINGS

Based on testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report and case record to date, the court finds:

1. CURRENT OFFENSE(S): The defendant was found guilty on 8/25/89 (Date)
☐ by jury verdict
☒ by plea of guilty
☐ by court trial

Count No.: 1 Crime: AGGRAVATED FIRST DEGREE MURDER
RCW: 9A.32.030(1)/10.95.020(7)(8)(9) Crime Code:
Date of Crime: January 7, 1988 Law Enforcement Incident No. YSO #88-0146R

Count No. 2 Crime: ACCOMPLICE TO AGGRAVATED FIRST DEGREE MURDER
RCW. 9A.32.030(1)/10.95.020(7)(8)&(9) ~~Crime Code~~ 9A.08.020
Date of Crime: January 7, 1988 Law Enforcement Incident No. YSO #88-0146R

Count No _____ Crime:
RCW. _____ Crime Code:
Date of Crime: _____ Law Enforcement Incident No. _____

( ) Count(s) _____ Includes a special verdict/finding for use of a deadly weapon.
( ) Counts _____ Current offenses encompassed the same criminal conduct and count as one crime in determining the offender score.
( ) Additional current offenses are attached in Appendix A.

2. CRIMINAL HISTORY: Prior criminal history used in calculating the offender score (RCW 9.94A.360) is:

CRIME	SENTENCING DATE	ADULT/JUVENILE	CRIME DATE	CRIME TYPE
None Known				

( ) Additional criminal history is attached in Appendix B.

3. OTHER CURRENT CONVICTIONS Under other cause number used to determine offender score.

CRIME	CAUSE NUMBER

SENTENCING DATA:	OFFENDER SCORE	OFFENSE SCORE	RANGE	MAXIMUM TERM
Count No.: I	0	XIV	LIFE WITHOUT PAROLE	
Count No.: II	0	XIV	LIFE WITHOUT PAROLE	
Count No.:				

( ) Additional current offense(s) sentencing information is attached in Appendix C.

5. EXCEPTIONAL SENTENCE: (X) Substantial and compelling reasons exist which justify a sentence (above) ~~(below)~~ the standard range for Count(s) I and II See Appendix D.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the crime(s) of: Count I: AGGRAVATED FIRST DEGREE MURDER
Count II: ACCOMPLICE TO AGGRAVATED FIRST DEGREE MURDER
(SEE APPENDIX "F")

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the conditions set forth below.

1. THE DEFENDANT shall pay the financial obligations as set forth in APPENDIX E. The defendant shall be under the jurisdiction to this court and the Department of Corrections, Community Corrections Office, Yakima, or such other office as may be designated, for up to 10 years for purposes of payment to the financial obligations. During the time payments remain due, the Office may order the defendant to report to a community corrections officer, remain within prescribed geographical boundaries, and/or notify the office of changes in address and employment.
2. OTHER orders and conditions follow on the attached pages of this Judgment.

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MN

RUSSELL DUANE McNEIL | WA 13912837

DEFENDANT'S NAME | SID NUMBER

CONFINEMENT OVER ONE YEAR

1. Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows:

COUNT I ~~Months for Count No.~~ XXXXXXXXXXXX LIFE IN PRISON WITHOUT PAROLE OR RELEASE

COUNT II ~~Months for Count No.~~ XXXXXXXXXXXX LIFE IN PRISON WITHOUT PAROLE OR RELEASE

_____ Months for Count No. _____

_____ Months for Count No. _____

_____ Months for Count No. _____

_____ Months for Count No. _____

( ) The terms in Counts _____ are concurrent for a total term of _____ months

(X) The terms in Counts I and II are consecutive for a total term of two terms of ~~LIFE IN PRISON WITHOUT PAROLE OR RELEASE~~ months.

( ) The sentence herein shall run (concurrently) (consecutively) with the sentence in _____

[X] Defendant shall comply with all the mandatory provisions of RCW 9.94A.120(8b) and as many of those in RCW 9.94A.120(8c) as deemed appropriate by his/her Community Corrections Officer.

CREDIT is given for _____ days served.

The following Appendices are attached to this Judgment and Sentence and are incorporated by reference:

( ) A, Additional Current Offenses.

( ) B, Additional Criminal History

( ) C, Current Offense(s) Sentencing Information.

( ) D, Exceptional Sentencing Findings of Fact and Conclusions.

(X) E, Financial Order.

DATE: September 6, 1989

(JUDGE) ~~JUDGE PRO TEM~~

Presented by:

Deputy Prosecuting Attorney

Approved as to form: only

Attorney for Defendant

THE STATE OF WASHINGTON

To: The Sheriff of Yakima County.

WARRANT OF COMMITMENT

The defendant RUSSELL DUANE McNEIL has been convicted in the Superior Court of the State of Washington of the crime(s) of:

Count 1: AGGRAVATED FIRST DEGREE MURDER

Count II: ACCOMPLICE TO AGGRAVATED FIRST DEGREE MURDER

and the court has ordered that the defendant be punished as set out in the attached Judgment and Sentence.

Defendant shall receive credit for time served as ordered.

YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections.

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

DATE: September 6, 1989

By the Direction of the Honorable

F. JAMES GAVIN

(JUDGE) ~~JUDGE PRO TEM~~

BETTY McGILLEN, Clerk

By _____ Deputy Clerk

SUPERIOR COURT OF THE STATE OF WASHINGTON; COUNTY OF YAKIMA

STATE OF WASHINGTON) Plaintiff,)
vs.) NO. 88-1-00428-1
)
RUSSELL DUANE McNEIL,) FINANCIAL ORDER
) APPENDIX E
Defendant,)
SID NO.: WA 13912837)

THE defendant having been found guilty of a felony, and represented by lawyer CHRIS TAIT and THOMAS BOTHWELL and a Judgment and Sentence being entered; the court finds the following financial obligations have been incurred by the defendant's acts and conviction.

IT IS ORDERED:

1. COSTS AND ASSESSMENTS *
   a. The defendant shall pay to the Yakima County Clerk, Room 323, Yakima County Courthouse, Yakima, Washington 98901, courts costs in the amount of $_____; and victim assessment in the amount of $ 100.00.
   b. These costs shall be paid to the Clerk, address above, in _____days
      ☐ of release.
      ☐ after restitution is paid in full.
   c. ☐ (Check if applicable).
      The defendant shall pay costs as ordered above, in part or in full, from funds held by the_____ who is ordered to apply such funds and make such payments to the Clerk after full payment of the narcotics assessment in Paragraph 4 below has been made from these funds. If there are no funds or all costs and assessments have not been satisfied, the defendant shall pay the same upon legal re-entry into the United States.

   *The amount is to be determined within 120 days.

2. ATTORNEY COST RECOUPMENT
   a. Defendant shall pay to the Yakima County Clerk, address above, $_____ as recoupment for attorney fees
   b. These costs shall be paid to the Clerk, address above, in 120 days of date.
      ☐ of release.
      ☐ after restitution is paid in full.
      ☐ Paragraph 1.c. shall be enforced.

3. RESTITUTION
   a. The defendant shall pay restitution in the amount of $_____.
   b. ☐ (Check if applicable.) The amount of restitution shall be determined by the Prosecuting Attorneys Office within 120 days of this order, and notice given through the Department of Corrections.
   c. MANNER AND PLACE OF PAYMENT. Payment shall be made at the Yakima County Clerk's Office, Room 323, Yakima County Courthouse, Yakima, Washington.

      Restitution shall be paid
      ☐ at the rate of $_____ per month.
      ☒ at a rate to be determined by the Department of Corrections within 30 days of this date.
      Restitution payments shall be completed by _____.

4. NARCOTIC ASSESSMENT
   a. The defendant shall pay a narcotics assessment to the Yakima County Clerk's Office, address above, in the amount of $ _____, for the _____Narcotics Unit.
      ☐ Paragraph 1.c. shall be enforced.
   b. Payments shall be in the amount of $ _____ monthly, and all payments shall be completed by _____.

5. SUPERVISION COSTS
   a. The defendant shall pay supervision costs in an amount to be determined by his community corrections officers if the defendant has been placed on community supervision. Payments are to be made to the Department of Corrections.

6. REPORTING REQUIREMENT
   a. Defendant shall report to the Department of Corrections, 210 N. 2nd Street, Yakima, Wa., within 24 hours of this date or release from total or partial confinement.

DATED September 6, 1989

_____
(JUDGE) ~~(JUDGE PRO TEM)~~

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	)	NO. 88-1-00428-1 APPENDIX "D" FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR EXCEPTIONAL SENTENCE

An exceptional sentence above the standard range should be imposed based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

The victim, Dorothy Nickoloff, was 74 years of age, and the victim, Mike Nickoloff, was 82 years of age at the time of their murders. Mr. Nickoloff required the aid of a walker or wheelchair to get around. Mrs. Nickoloff was small and frail in stature. They lived alone in their rural home in the Parker area of Yakima County, Washington. The Nickoloffs were chosen as a target in this case because the co-defendants knew they would be an easy mark.

CONCLUSIONS OF LAW

I.

Based upon the above stated Findings of Fact, the court concludes that the defendant knew that the victims in this case were particularly vulnerable or incapable of resistance due to advanced age, disability, and ill health.

II.

This aggravating circumstance warrants that the two sentences of life imprisonment without possibility of release or parole should run consecutively.

DATED this 6th day of September, 1989.

J U D G E

Presented by:

HOWARD W. HANSEN
Deputy Prosecuting Attorney

Approved as to form: only

CHRISTOPHER S. TAIT
Attorney for Defendant

THOMAS BOTHWELL
Attorney for Defendant

HWH4(T)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	NO. 88-1-00428-1 APPENDIX "F" FINDING OF AGGRAVATING CIRCUMSTANCES

THIS MATTER having come on for hearing on August 25, 1989, the defendant being personally present and represented by his attorneys, Christopher S. Tait and Thomas Bothwell; defendant having pled guilty to the crime of Aggravated Murder in the First Degree wherein it is alleged that aggravating circumstances existed as set out in RCW 10.95.020(7), (8), (9a) and (9c); now, therefore, the court makes the following Findings based upon the defendant's statements while entering his plea of guilty, as well as the evidence admitted in support of defendant's plea of guilty in this hearing;

COUNT I

That on January 7, 1988, within Yakima County, Washington, the defendant, Russell ~~Dean~~ Duane McNeil, committed the crime of Premeditated Murder in the First Degree wherein

he killed with premeditated intent Dorothy Nickoloff and the following aggravating circumstances existed:

1) The murder of Dorothy Nickoloff was committed for the purpose to conceal the commission of the crime of first degree burglary, and to conceal the identities of the persons committing the crime, and

2) The murder of Dorothy Nickoloff was part of a common scheme or plan in which there was more than one murder victim; and

3) The murder of Dorothy Nickoloff was committed in the course of and in furtherance of the crime of first degree burglary.

COUNT II

That on January 7, 1988, within Yakima County, Washington, the defendant, Russell ~~Dean~~ KANE McNeil, committed the crime of Accomplice to Premeditated Murder in the First Degree wherein Mike Nickoloff was killed by Russell McNeil's co-defendant with premeditated intent, and both the defendant, Russell Duane McNeil, as accomplice, and his co-defendant, as principal, committed this murder with the following aggravating circumstances existing:

1) The murder of Mike Nickoloff was committed for the purpose to conceal the commission of the crime of first degree burglary, and to conceal the identities of the persons committing the crime; and

2) The murder of Mike Nickoloff was part of a common scheme or plan in which there was more than one murder victim; and

3) The murder of Mike Nickoloff was committed in the course of and in furtherance of the crime of first degree burglary.

DATED this 6 day of September, 1989.

JUDGE

Presented by:

HOWARD W. HANSEN
Deputy Prosecuting Attorney

Approved as to form:

CHRISTOPHER S. TAIT
Attorney for Defendant

THOMAS BOTHWELL
Deputy Prosecuting Attorney

HWH4(R)

FILED and Micro filmed

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON AUG 25 1989

IN AND FOR YAKIMA COUNTY

Roll No. 356 843

'89 AUG 25 PM 3 42

BETTY McGILLEN, YAKIMA COUNTY CLERK

STATE OF WASHINGTON,

Plaintiff,

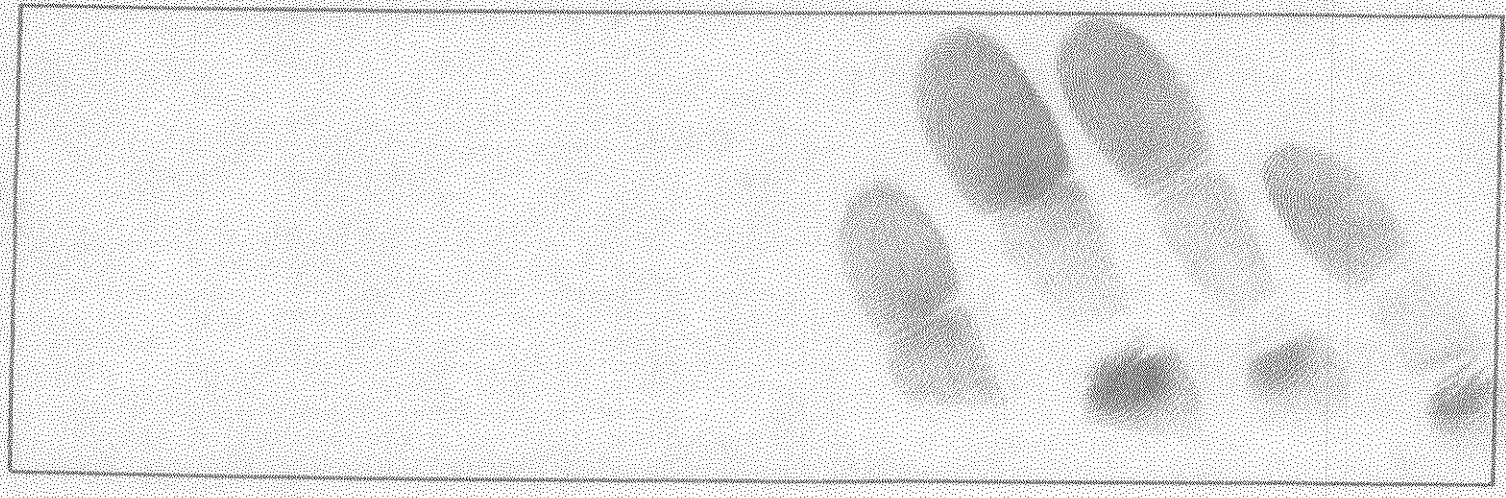
vs.

Russell Duane McNeil

Defendant.

NO. 88-1-00428-1

FINGERPRINTING CERTIFICATE OF ATTESTATION



CERTIFICATE

STATE OF WASHINGTON)
) ss.
County of Yakima)

I, Betty McGillen, Yakima County Clerk and ex-officio Clerk of the Superior Court, hereby attest that the fingerprints appearing on this certificate are the fingerprints of the above-named defendant, and were affixed in open court on

August 25, 1988.

BETTY McGILLEN

By Janice Campbell
Deputy Clerk

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SUPERIOR COURT OF THE STATE OF WASHINGTON, COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff,

vs.

RUSSELL DUANE McNEIL, Defendant,

SID NO.: WA 13912837

NO. 88-1-00428-1

JUDGMENT AND SENTENCE (FELONY)

FILED AUG 25 1989

Roll No. 356 842

BETTY McGILLEN, YAKIMA COUNTY CLERK

89 AUG 25 PM 3:42

1. A sentencing hearing in this case was held: 8/25/89 (Date) DOB: 8/13/70 M/F M RACE: White

2. Present were:
RUSSELL DUANE McNEIL, Defendant
CHRIS TAIT and THOMAS BOTHWELL, Defendant's Lawyer
JEFFREY C. SULLIVAN, Deputy Prosecuting Attorney

EX OFFICIO CLERK OF SUPERIOR COURT STATE OF WASHINGTON

3. Count(s) _____ have been dismissed by the court.

4. Defendant was asked if there was any legal cause why judgment should not be pronounced, and none was shown.

II. FINDINGS

Based on testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report and case record to date, the court finds:

1. CURRENT OFFENSE(S): The defendant was found guilty on 8/25/89 (Date)
☒ by plea of guilty
☐ by court trial

Count No.: I Crime: AGGRAVATED FIRST DEGREE MURDER
RCW: 9A.32.030(1)/10.95.020(7)(8)&(9) Crime Code: _____
Date of Crime: January 7, 1988 Law Enforcement Incident No. YSO/#88-0146R
Count No. II Crime: ACCOMPLICE TO AGGRAVATED FIRST DEGREE MURDER
RCW: 9A.32.030(1)/10.95.020(7)(8)&(9)/ ~~Crime Code:~~ RCW 9A.08.020 Crime Code: _____
Date of Crime: January 7, 1988 Law Enforcement Incident No. YSO/#88-0146R
Count No. _____ Crime: _____
RCW: _____ Crime Code: _____
Date of Crime: _____ Law Enforcement Incident No. _____

( ) Count(s) _____ Includes a special verdict/finding for use of a deadly weapon.
( ) Counts _____ Current offenses encompassed the same criminal conduct and count as one crime in determining the offender score.
( ) Additional current offenses are attached in Appendix A.

2. CRIMINAL HISTORY: Prior criminal history used in calculating the offender score (RCW 9.94A.360) is:

CRIME	SENTENCING DATE	ADULT/JUVENILE	CRIME DATE	CRIME TYPE
None known				

( ) Additional criminal history is attached in Appendix B.

3. OTHER CURRENT CONVICTIONS Under other cause number used to determine offender score.

CRIME	CAUSE NUMBER

SENTENCING DATA:	OFFENDER SCORE	OFFENSE SCORE	RANGE	MAXIMUM TERM
Count No.: I	0	XIV	LIFE WITHOUT PAROLE	
Count No.: II	0	XIV	LIFE WITHOUT PAROLE	
Count No.:				

( ) Additional current offense(s) sentencing information is attached in Appendix C.

5. EXCEPTIONAL SENTENCE: ( ) Substantial and compelling reasons exist which justify a sentence (above) (below) the standard range for Count(s) _____. See Appendix D.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the crime(s) of: Count I: AGGRAVATED FIRST DEGREE MURDER; Count II: ACCOMPLICE TO AGGRAVATED FIRST DEGREE MURDER.

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the conditions set forth below.

1. THE DEFENDANT shall pay the financial obligations as set forth in APPENDIX E. The defendant shall be under the jurisdiction to this court and the Department of Corrections, Community Corrections Office, Yakima, or such other office as may be designated, for up to 10 years for purposes of payment to the financial obligations. During the time payments remain due, the Office may order the defendant to report to a community corrections officer, remain within prescribed geographical boundaries, and/or notify the office of changes in address and employment.
2. OTHER orders and conditions follow on the attached pages of this Judgment.

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RUSSELL DUANE McNEIL — WA 13912837

DEFENDANT'S NAME — SID NUMBER

CONFINEMENT OVER ONE YEAR

1. Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows:

Count I: ~~XXXXXXXXXXXXX~~ LIFE IN PRISON WITHOUT PAROLE OR RELEASE

Count II: ~~XXXXXXXXXXXXX~~ LIFE IN PRISON WITHOUT PAROLE OR RELEASE

_____ Months for Count No. _____

_____ Months for Count No. _____

_____ Months for Count No. _____

_____ Months for Count No. _____

( ) The terms in Counts _____ are concurrent for a total term of _____ months.

(X) The terms in Counts I & II are consecutive for a total of two terms of LIFE IN PRISON WITHOUT PAROLE OR RELEASE

( ) The sentence herein shall run (concurrently) (consecutively) with the sentence in _____

[X] Defendant shall comply with all the mandatory provisions of RCW 9.94A.120(8b) and as many of those in RCW 9.94A.120(8c) as deemed appropriate by his/her Community Corrections Officer.

CREDIT is given for _____ days served.

The following Appendices are attached to this Judgment and Sentence and are incorporated by reference

( ) A, Additional Current Offenses.

( ) B, Additional Criminal History

( ) C, Current Offense(s) Sentencing Information

( ) D, Exceptional Sentencing Findings of Fact and Conclusions.

(X) E, Financial Order.

DATE: August 25, 1989

(JUDGE) ~~JUDGE PRESENT~~

Presented by:

Deputy Prosecuting Attorney

Approved as to form:

Attorney for Defendant

THE STATE OF WASHINGTON — WARRANT OF COMMITMENT

To: The Sheriff of Yakima County.

The defendant RUSSELL DUANE McNEIL has been convicted in the Superior Court of the State of Washington of the crime(s) of:

Count I: AGGRAVATED FIRST DEGREE MURDER;
Count II: ACCOMPLICE TO AGGRAVATED FIRST DEGREE MURDER,

and the court has ordered that the defendant be punished as set out in the attached Judgment and Sentence.

Defendant shall receive credit for time served as ordered.

YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections.

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

DATE: August 25, 1989

By the Direction of the Honorable:

(JUDGE) ~~JUDGE PRESENT~~

BETTY MCGILLEN, Clerk

By: Laurie Campbell, Deputy Clerk

SUPERIOR COURT OF THE STATE OF WASHINGTON; COUNTY OF YAKIMA

STATE OF WASHINGTON) Plaintiff,)
vs.) NO. 88-1-00428-1
)
) FINANCIAL ORDER
RUSSELL DUANE McNEIL,) APPENDIX E
Defendant,)
SID NO.: WA 13912837)

THE defendant having been found guilty of a felony, and represented by lawyers CHRIS TAIT and THOMAS BOTHWELL and a Judgment and Sentence being entered; the court finds the following financial obligations have been incurred by the defendant's acts and conviction.

IT IS ORDERED:

1. COSTS AND ASSESSMENTS *
   a. The defendant shall pay to the Yakima County Clerk, Room 323, Yakima County Courthouse, Yakima, Washington 98901, courts costs in the amount of $_____; and victim assessment in the amount of $ 100.00
   b. These costs shall be paid to the Clerk, address above, in _____ days
      ☐ of release.
      ☐ after restitution is paid in full.
      the amount is to be determined within 120 days.
   c. ☐ (Check if applicable).
      The defendant shall pay costs as ordered above, in part or in full, from funds held by the _____ who is ordered to apply such funds and make such payments to the Clerk after full payment of the narcotics assessment in Paragraph 4 below nas been made from these funds. If there are no funds or all costs and assessments have not been satisfied, the defendant shall pay the same upon legal re-entry into the United States.

2. ATTORNEY COST RECOUPMENT
   a. Defendant shall pay to the Yakima County Clerk, address above, $_____ as recoupment for attorney fees.
   b. These costs shall be paid to the Clerk, address above, in 120 days of date
      ☐ of release.
      ☐ after restitution is paid in full
      ☐ Paragraph 1.c. shall be enforced.

3. RESTITUTION
   a. The defendant shall pay restitution in the amount of $_____.
   b. ☐ (Check if applicable.) The amount of restitution shall be determined by the Prosecuting Attorneys Office within 120 days of this order, and notice given through the Department of Corrections.
   c. MANNER AND PLACE OF PAYMENT. Payment shall be made at the Yakima County Clerk's Office, Room 323, Yakima County Courthouse, Yakima, Washington.

      Resitution shall be paid
      ☐ at the rate of $_____ per month.
      ☒ at a rate to be determined by the Department of Corrections within 30 days of this date.
      Restitution payments shall be completed by _____.

4. NARCOTIC ASSESSMENT
   a. The defendant shall pay a narcotics assessment to the Yakima County Clerk's Office, address above, in the amount of $ _____, for the _____ Narcotics Unit.
      ☐ Paragraph 1.c. shall be enforced.
   b. Payments shall be in the amount of $ _____ monthly, and all payments shall be completed by _____.

5. SUPERVISION COSTS
   a. The defendant shall pay supervision costs in an amount to be determined by his community corrections officers if the defendant has been placed on community supervision. Payments are to be made to the Department of Corrections.

6. REPORTING REQUIREMENT
   a. Defendant shall report to the Department of Corrections, 210 N. 2nd Street, Yakima, Wa., within 24 hours of this date or release from total or partial confinement.

DATED August 25, 1989

J. James Lust
(JUDGE) ~~(JUDGE PRO TEM)~~

Financial Order

RECEIVED

'89 AUG 25 PM 3 42

BETTY McGILLEN
BY DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	STATEMENT OF
	)	DEFENDANT ON
RUSSELL DUANE McNEIL,	)	PLEA OF GUILTY
	)	
Defendant	)	

FILED

AUG 25 1989

BETTY McGILLEN, YAKIMA COUNTY CLERK

1. My true name is RUSSELL DUANE McNEIL.

2. My age is 19.

3. I went through the 10th grade in school.

4. I have been informed and fully understand that I have the right to representation by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me. My lawyers' names are CHRISTOPHER TAIT and THOMAS BOTHWELL.

5. I have been informed and fully understand that I am charged with the crime of one count of Aggravated First Degree Murder and one count of Accomplice to Aggravated First Degree Murder.

The elements of the Aggravated First Degree Murder crime in Count I are:

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

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with premeditated intent to cause the death of another person, did stab Dorothy Nickoloff, a human being, on or about January 7, 1988, and said premeditated first degree murder

(1) was for the purpose to conceal the commission of a crime, to wit: First Degree Robbery and First Degree Burglary, and to conceal the identity of the persons committing the crime, and

(2) was part of a common scheme or plan in which there was more than one murder victim, and

(3) was committed in the course of, in furtherance of, or in immediate flight from the crime of first degree robbery and first degree burglary

AND

The elements of the Accomplice To Aggravated First Degree Murder crime in Count II are:

did act as an accomplice to Herbert Rice, Jr., who with premeditated intent to cause the death of another person did stab Mike Nickoloff, thereby causing the death of Mike Nickoloff, a human being, on or about January 7, 1988, and said premeditated first degree murder;

(1) was for the purpose to conceal the commission of a crime, to-wit: first degree robbery and first degree burglary, and to conceal the identity of the persons committing the crime, and

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(2) was part of a common scheme or plan in which there was more than one murder victim, and

(3) was committed in the course of, in furtherance of, or in immediate flight from the crime of first degree robbery,

the maximum sentence(s) for both Aggravated First Degree Murder and Accomplice to Aggravated First Degree Murder are as follows:

Any person convicted of the crime of Aggravated First Degree Murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under RCW 10.95.030 shall not have the sentence suspended, deferred, or commuted by any judicial officer and the Board of Prison Terms and Paroles or its successor may not parole such prisioner nor reduce the period of confinement in any manner whatsoever including, but not limited to any sort of good-time calculation. The department of social & health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

The standard range for the crime of Aggravated First Degree Murder and accomplice to Aggravated First Degree Murder is a mandatory penalty of life in prison without possiblity of release or parole.

based upon my criminal history which I understand the Prosecuting Attorney says to be:

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(1) One prior juvenile conviction for second degree burglary.

In addition, I may have to pay restitution, costs, assessments, and recoupment of expenses for defense services provided by the Court. I have been given a copy of the information.

6. I have been informed and fully understand that:

(a) I have the right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed.

(b) I have the right to remain silent before and during trial, and I need not testify against myself.

(c) I have the right at trial to hear and question witnesses who testify against me.

(d) I have the right at trial to have witnesses testify for me. These witnesses can be made to appear at no expense to me.

(e) I am presumed Innocent until the charge is proven beyond a reaonable doubt or I enter a plea of guilty.

(f) I have the right to appeal a determination of guilt after a trial.

(g) If I plead guilty, I give up the rights in Statements 6(a)-(f).

7. I plead guilty to the crime of AGGRAVATED FIRST DEGREE MURDER as charged in the INFORMATION, dated March 15, 1988;

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AND FURTHER;

I plead guilty to the crime of ACCOMPLICE TO AGGRAVATED FIRST DEGREE MURDER, as charged in the INFORMATION, dated March 15, 1988.

8. I make this plea freely and voluntarily.

9. No one has threatened harm of any kind to me or to any other person to cause me to make this plea.

10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.

11. I have been informed and fully understand the Prosecuting Attorney will make the following recommendations to the Court:

The prosecutor will recommend two life sentences, to be served consecutively, without the possibility of parole. In addition, I understand that I may be subpoenaed to testify in the case of State v. Herbert Rice.

12. I have been informed and fully understand that the standard sentencing range is based on the crimes charged and my criminal history includes prior convictions, whether in this State, in Federal Court, or elsewhere. Criminal History also includes convictions or guilty pleas at Juvenile Court that are Felonies and which were committed when I was fifteen years of age or older. Juvenile Convictions count only if I was less than twenty-three years of age at the time I committed these present offenses. I fully understand that if criminal history in addition to that listed in paragraph 5 is discovered, both the standard sentence range

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and the Prosecuting Attorney's recommendation may increase. Even so, I fully understand that my plea of guilty to these charges is binding upon me if accepted by the Court, and I cannot change my mind if additional criminal history is discovered and the standard sentence range and Prosecuting Attorney's recommendation increases.

13. I have been informed and fully understand that the Court does not have to follow anyone's recommendation as to sentence. I have been fully informed and fully understand that the Court must impose a sentence within the standard sentence range unless the Court finds substantial and compelling reasons not to do so. If the Court goes outside the standard sentence range, either I or the State can appeal that sentence. If the sentence is within the standard sentence range, no one can appeal the sentence.

14. The Court has asked me to state briefly in my own words what I did that resulted in my being charged with the crimes in the Information, dated March 15, 1988.

This is my statement.

That on or about January 7, 1988, I was driving my car around the area outside Wapato, Washington with Chief Rice. Chief mentioned that he knew where we could get some money. He said it would be easy. He said they were old people, and that the man couldn't walk very well. He said we could just go in, surprise them, stab them, and take their money. He directed me to the victims' house on Kays Road. I had never been there before, and I did not know the people who lived there. I was armed with a knife, and so was Chief. In the car, he showed me his knife, and asked me if I had mine. I showed it to him. I knew that the

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knives Chief and I had would be used to stab the old people who lived there. Chief and I discussed how we would do this, and we agreed that we would get inside the house by asking to use the telephone. After making the phone call, we would stab the old people and take their money, or whatever we could find to sell. I parked my car in the driveway near a concrete planter, and we went first to the front door, and then to the back door. Mrs. Nickoloff asked us in when Chief told her that we needed to use the phone. Chief made a phone call, and I asked for a drink of water. Mrs. Nickoloff was finishing her supper after Mr. Nickoloff had gone into the living room. While Mrs. Nickoloff was eating, she and I both saw Chief Rice begin to attack Mr. Nickoloff with his knife. She got up from her chair and started to go toward the living room. I grabbed her, and forced her to the floor. While she was pinned to the floor, I stabbed her many times. Chief Rice continued to stab Mr. Nickoloff. I did not stab Mr. Nickoloff. After both Mr. and Mrs. Nickoloff had been stabbed, Chief and I removed two TV sets and put them in my car. We then drove to Wapato, and Chief gave one of them to another person to pay a bill he owed. The other TV was sold by Chief, and I received about $15.00 from that sale. I believe that Chief received about $35.00 from that sale.

I am very sorry that this happened. I feel awful about this. I was 17 when this happened, and I never imagined how awful this would be. I know that I have let down the people who care most about me, and more importantly, I know that I have ruined the lives of two innocent people and all their family. My own life is ruined, as are the lives of many, many people who did nothing wrong. I am very sorry.

15. I have read this statement and fully understand all of the numbered sections above (1-15) and have received a copy of this

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"Statement of Defendant on Plea of Guilty." I have no further questions to ask of the Court.

Russell D Mc Neil
DEFENDANT

Jeffrey C. Sullivan — Chris Tait
PROSECUTING ATTORNEY — DEFENDANTS LAWYERS

and signed by the defendant

The foregoing statement was read to or by the defendant in the presence of both his lawyers and the undersigned judge in open court. The Court finds the defendant's pleas of guilty to be knowingly, intelligently, and voluntarily made, that the court has informed the defendant of the nature of the charges and the consequences of the pleas, that there is a factual basis for the plea, and that the defendant is guilty as charged. The plea of guilty is consistent with the interests of justice and with the prosecuting standards.

DATED this 25th day of August, 1989.

J. James Lawrence
JUDGE

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
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YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,

vs.

Russell Duane McNeil

NO. 88-1-00428-1

ORDERED

☐ PRELIMINARY APPEARANCE

☐ ARRAIGNMENT

☐ APPOINTING ATTORNEY

☒ PLEA OF — GUILTY Cts 1+2

☐ REQUESTING PRESENTENCE INVESTIGATION

On August 25, 1989, Jeff Sullivan + Howard Hanson, Deputy Prosecuting Attorney for Yakima County, Washington, appeared.

PRELIMINARY APPEARANCE:

The Deputy Prosecutor informed the Court and defendant of the charge(s).

☐ The Court finds probable cause to believe the defendant committed the offense.

Defendants true name is: _____

ARRAIGNMENT:

An (Amended) Information (A petition) was filed with the Court charging the defendant with: _____

AUG 25 1989

☐ And was read in open Court in the defendants presence.

☐ Reading was waived by defendant and defense attorney.

Defendants true name is: _____

PETTY McGILLEN, YAKIMA COUNTY CLERK

ATTORNEY:

_____ is ☐ appointed ☐ retained ☐ substituted.

PLEA: Cts 1+2

The defendant appearing in person without (with) counsel T. Bothwell + C. Tait and enters a plea of — guilty. The plea is accepted by the Court.

PRESENTENCE INVESTIGATION:

The Department of Corrections is requested to conduct a Presentence Investigation in this cause in the following form:

☐ Presentence Investigation ☐ Screen for Work Release

☐ Drug/Alcohol Program Availability ☐ Record/Employment Check

IT IS FURTHER ORDERED that the Division of Probation and Parole shall have complete access to all existing police records or information concerning investigations, complaints and dispositions, and all juvenile records and reports, relating to the defendant.

THIS MATTER is continued for the purpose of permitting a completion of such investigation.

DONE IN OPEN COURT this 25th day of August, 1989.

James Hamm

SUPERIOR COURT JUDGE/COURT COMMISSIONER

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EXHIBIT LIST

CUSTODY OR REAL PROPERTY

CAUSE NO. 88-1-00428-1 ACTION

State of Washington VS. Russell Duane McNeil

Howard Hansen, Jeff Sullivan Attorney(s) Thomas Bothwell, Chris Tait Attorney(s)

'89 AUG 25 PM 3 42

JUDGE/~~COURT COMMISSIONER~~ J. James Hazen DEPT. NO. 3

SUPERIOR COURT CLERK

REPORTER Donna Baugher Laurie Campbell

DATE	PLAINTIFF'S EXHIBITS (Description)	ADMITTED	DEFENDANT'S EXHIBITS (Description)	DATE
8-25-89	SE A videotape of scene	X		
"	SE B Polaroids in Envelope	X		
"	SE C copy of autopsy report	X		
"	SE D orig letter + copy of letter	X	(copy of letter subst. orig. now exhibit in St. v. Petersen)	
"	SE E transcript of Def statement	X		
	also admitted for the purposes of this hearing are Exhibits C1 + C2 from the 3.5 Hearing.			
	sealed by order of the Court 8-25-89			

FILED
AUG 25 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

RECEIVED

'89 AUG 23 PM 3 15

FILED
AUG 23 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
EX OFFICIO CLERK OF
IN AND FOR YAKIMA COUNTY
YAKIMA, WASHINGTON

STATE OF WASHINGTON,)
Plaintiff,) No. 88-1-00428-1
vs.) SECOND ADDENDUM TO STATE'S LIST OF WITNESSES
RUSSELL DUANE McNEIL,)
Defendant.)

TO: RUSSELL DUANE McNEIL, defendant, and
TOM BOTHWELL
CHRIS TAIT, attorney for defendant:

You, and each of you, will please take notice that the following is a list of witnesses whom the state expects to call to testify in its behalf at the trial of the above-entitled case:

Billy Dunnigan, Kennewick, WA
Bruce Gill, Wapato, WA
Marlene Nickoloff Gill, Wapato, WA

CERTIFICATE OF TRANSMITTAL

On this day, the undersigned in Yakima, Washington, sent to the attorneys of record in ~~plaintiffs~~/defendants a copy of this document by U.S. mail, postage prepaid, or by Attorney's messenger. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

8/23/89
DATE

Peggy Keller
SIGNED

Howard W. Hanse
Deputy Prosecuting Attorney and
Attorney for Plaintiff

Service accepted and copy received this _____ day of _____, 19____.

Attorney for Defendant

P-33

A-401-88/HWH/plk

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FILED and Micro filmed
AUG 2 1989
Roll No. 356 333
BETTY McGILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

'89 AUG 22 PM 2 17

STATE OF WASHINGTON,)
) BETTY McGILLEN
Plaintiff, EX OFFICIO CLERK NO: 88-1-00428-1
SUPERIOR COURT
YAKIMA COUNTY, WASHINGTON
vs.)
) ORDER AUTHORIZING
RUSSELL DUANE McNEIL,) PAYMENT BY YAKIMA
) COUNTY FOR INVESTIGATORY
Defendant) FEES AND EXPENSES

The Court having considered the DEFENDANT'S MOTION for ORDER APPROVING PRIVATE INVESTIGATOR FEES and EXPENSES and attached Declaration of Counsel, now, therefore,

IT IS HEREBY ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

(1) The sum of $1,820.00 payable to DIANA G. PARKER, in care of the Office of Attorney Christopher Tait.

DATED THIS 21 DAY OF August, 1989.

F. JAMES GAVIN, JUDGE

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

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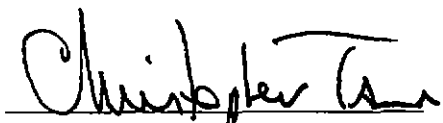
PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys For Defendant McNeil

ORDER AUTHORIZING PAYMENT
BY YAKIMA COUNTY
FOR INVESTIGATORY FEES
AND EXPENSES 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
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BETTY McGILLEN
YAKIMA COUNTY CLERK

'89 AUG 22 PM 2 17

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

SUPERIOR COURT
YAKIMA, WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	DEFENDANT'S MOTION AND
RUSSELL DUANE McNEIL,	)	SUPPORTING DECLARATION
	)	FOR ORDER APPROVING
	)	PRIVATE INVESTIGATOR
Defendant	)	FEES AND EXPENSES

MOTION

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court for the authorization of payment for investigatory services.

THIS MOTION is based upon the record and file herein and the accompanying DECLARATION OF COUNSEL.

DATED THIS 18 DAY OF AUGUST, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
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TELEPHONE (509) 248-1345

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DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Diana G. Parker has been authorized to pursue investigatory services on behalf of the Defendant McNeil. An Order Authorizing Investigatory Services and Setting Rates was entered in the above-entitled cause and signed by the Honorable F. James Gavin approving said investigatory services and authorizing payment of her automobile mileage to be reimbursed at the rate of 22 1/2 cents per mile. Diana G. Parker was further authorized to submit statements, through counsel, on or about the 1st and the 15th day of each month.

Attached hereto and incorporated by reference for approval is the statement of Diana G. Paker for the private investigatory fees and expenses for her services from AUGUST, 1989, to AUGUST 15, 1989, performed by her on behalf of the above-named Defendant, McNeil.

SIGNED AND DATED at Yakima, Washington, this 18 day of AUGUST, 1989.

CHRISTOPHER TAIT
of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
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SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
7/31/89	Out	CONF CT, motions (del, file) copy BG Serve Subpoenas, conf J (B)HW/N Conf KC RE: Sub, Del KBBO	7.00
7/31/89	Out	*26 Miles at 22.5 Cents = **$5.86**	**
8/1/89	Out	Serve Subpoenas, conf CT, Cons KC (KIMA) See KIT (response), review Pros docs jail conf cl	6.50
8/1/89	Out	*10 Miles at 22.5 Cents = **$2.25**	**
8/2/89	Out	Review pol reps, cons D.K. (KRSE), prepare CV publicity, call to D at HR Catalog, HR	4.50
8/3/89	Out	Call from D/HR trip to HR, Conf CT, TAB, jail conf cl, Conf JCS, prepare set for Prosecutor RE: differences	.50
8/4/89	Out	Conf CT prep Pros diff/TAB, jail conf client	4.50
8/7/89	Out	Conf CT, prepare medea mats, locate EW, LD Cons EW, prepare mats for finding mit wits, prep CV mats	5.00
8/8/89	Out	Cons TAB, LD, Cons JF, prepare CV mats, motion/dec/affid, & del subpoenas (6) (Yakima, Wapato, etc), prepare Aff Of Service	6.00
8/8/89	Out	*38 Miles at 22.5 Cents = **$8.55**	**
8/9/89	Out	Locate Exp W. cons DT (KIMA) LD Cons LH (NSP), conf CT, prepare Court	7.50

		RE: MFEPF, pick/up del checks	
8/9/89	**Out**	*14 Miles at 22.5 Cents = **$3.15**	**
8/10/89	Out	Calls to get affidavits, write aff, del and sign	8.00
8/10/89	**Out**	*5 Miles at 22.5 Cents = **$1.13**	**
8/11/89	Out	Affid, prepare C/V packets, duplicated tapes, Conf CT, trip to KNDO, Inst. Press, ct House to HH, JCS, JG	7.50
8/14/89	Out	Prep mit wits list, jail conf client	7.00
8/15/89	Out	Conf CT, Pros, LOC. Dr. K, LD Cons KR, jail conf cl, jry quest., letter to JMN, letter to RM,. Pros Office (3), letter to JB, locate HC, ld JB, TAB, Conf CT, LD Cons RN	8.00

TOTAL HOURS 72.00

72.00 Out-Of-Court Hours at $25.00 Per Hour =$1,800.00

93 Miles at 22.5 Cents Per Mile = $20.93

TOTAL **$1,820.93**

FILED and Micro filmed
AUG 18 1989

Roll No. 356 233

BETTY McGILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

'89 AUG 18 PM 4 52

SUPERIOR COURT CLERK
EX OFFICIO CLERK
YAKIMA, WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant.

No. 88-1-00428-1

ORDER AUTHORIZING VERBATIM REPORT OF PROCEEDINGS AT PUBLIC EXPENSE

THIS MATTER coming on regularly, upon ex parte consideration of Defendant's Motion for Verbatim Report of Proceedings at Public Expense and the Court having considered the same, it is hereby ordered:

Defendant is entitled to the following verbatim reports of proceedings at public expense: That portion of the hearing in Defendant's plea of guilty, in cause No. 83-8-820-5, tape No. 83-122, revolutions 1889-2195, as designated by Defendant's counsel.

It is further ordered that Defendant's counsel is entitled to one copy of the Clerk's Papers in 83-8-820-5, at public expense.

DONE IN OPEN COURT this 18 day of August, 1989.

JUDGE F. JAMES GAVIN

Presented by:

THOMAS BOTHWELL of
Attorneys for Defendant

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

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AUG 18 1989

'89 AUG 18 PM 4 52

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

BY OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE MCNEIL,

Defendant.

No. 88-1-00428-1

MOTION FOR VERBATIM REPORT OF PROCEEDINGS AT PUBLIC EXPENSE

MOTION

Defendant RUSSELL McNEIL, through counsel, moves this Court to order that Defendant is entitled to a verbatim report of proceedings, as described below, at public expense. This Motion is based upon the record and file herein, and the below Declaration of Counsel.

DATED this 16th day of August, 1989.

THOMAS BOTHWELL of
Attorneys for Defendant

DECLARATION

THOMAS BOTHWELL, under penalty of perjury of the laws of the State of washington, hereby certifies and declares that the following is true and correct:

The undersigned, on behalf of the Defendant, is moving this Court to authorize, at public expense, a verbatim report

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

of the following proceedings: The hearing in Defendant's plea of guilty in Yakima County Superior Court, Juvenile Division, cause No. 83-8-820-5. The undersigned have listened to the tape. Having reviewed it, and the Clerk's Papers relative to the Court's accepting the Defendant's plea of guilty to the charge of second-degree burglary, the undersigned asserts that there may indeed be one or more bona fide reasons to challenge the validity of the Defendant's plea.

The distinct "revolutions" of the tape (#83-122) have been noted by the Clerk, Ms. Sharron Garrett, as from 1889 to 2195.

The undersigned submits that a verbatim report of the proceedings is necessary for the court to evaluate the merits of Defendant's Motion in limine, to exclude reference to the prior conviction.

The undersigned also notes that a statutory mitigating factor relative to the death penalty is the Defendant's absence of prior record. (RCW 10.95.060(1)).

SIGNED AND DATED at Yakima, Washington this 16th day of August, 1989.

THOMAS BOTHWELL

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
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'89 AUG 14 PM 3 34

BETTY McBILLEN
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

FILED
and Micro filmed
AUG 14 1989
Roll No. 355 944

BETTY McBILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant.

No. 88-1-00428-1

ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY FEES for the months of May, June and July of 1989 filed herein by THOMAS BOTHWELL, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County office forthwith: The sum of $2,614.62 payable to attorney THOMAS BOTHWELL of PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S., 302 North 3rd Street, P.O. Box #2129, Yakima, WA, 98907-2129.

DATED this 11 day of August, 1989.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

RECEIVED

'89 AUG 14 PM 3 34

EX OFFICIO CLERK OF

FILED

AUG 14 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR ORDER APPROVING ATTORNEY FEES

MOTION

The undersigned attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for the undersigned defense counsel for the months of May, June and July of 1989.

This motion is made and based upon the record and file herein and the below DECLARATION OF COUNSEL.

DATED this 8th day of August, 1989.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

DECLARATION OF COUNSEL

THOMAS BOTHWELL, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause.

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

My compensation has been set as follows: Time spent in court at the rate of $60.00 per hour and out-of-court time at the rate of $50.00 per hour.

Attached hereto and incorporated by reference is my statement of time expended in this cause for the months of May, June and July of 1989.

SIGNED AND DATED at Yakima, Washington, this 8th day of August, 1989.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

TIME SHEET FOR
RUSSELL McNEIL

DATE	DESCRIPTION	HOURS
5/22/89	Telephone calls with Chris Tait; review "defendant's" Memorandum in Opposition to Motion for Bill of Particulars.	0.5
5/30/89	Telephone conference with Chris Tait.	0.25
6/1/89	Meeting with Chris Tait.	1.0
6/7/89	Telephone conference with Howard Hansen.	0.25
6/28/89	Telephone call to Prosecutor Hansen.	0.25
7/3/89	Meeting with Chris Tait.	1.0
7/10/89	Draft Memorandum, prepare for 7/11/89 court hearing.	2.5
7/11/89	Meeting with Chris Tait for 7/11 hearing.	1.0
	Court hearing.	5.5 ✳
	Research re: handwriting examples.	3.0
7/12/89	Continue research re: handwriting examples and discoverability of letter; memo to court; meeting with Chris Tait and client in jail. Amend omnibus response; file papers; review photographs.	6.0
7/17/89	Telephone conference with Chris Tait.	0.5
7/17/89	Research re: pre-trial issues.	2.0
7/18/89	Telephone conference with Chris Tait.	0.5
7/18/89	Additional research.	3.0
7/18/89	Research and draft motions.	2.5
7/19/89	Research; prepare for 7/19 court hearing, draft Notice of Discretionary Review; Indigency Order; Statement of	

	Grounds for Review.	3.25
7/19/89	Court hearing.	2.5 *
7/22/89	Research and drafting for Motion for discretionary review.	5.0
7/24/89	In court: Hearing.	5.75 *
7/24/89	Out of Court: (a) prepared for hearing; (b) draft Affidavit; (c) draft order.	3.0
	TOTAL HOURS:	**49.25**

* Total in-court hours:
13.75 hours at $60 per hour: $ 825.00

Total out-of-court hours:
35.5 hours at $50 per hour: 1,775.00

COSTS: 6/5/89 Breakfast meeting with co-counsel, Chris Tait 14.62

TOTAL: $2,614.62

/ / /

EXHIBIT LIST

CUSTODY OR REAL PROPERTY _____

CAUSE NO. 88-1-00428-1 ACTION MOTION FOR CHANGE OF VENUE

STATE OF WASHINGTON VS. RUSSELL DUANE McNEIL

Howard Hansen, Jeff Sullivan
Attorney(s)

Thomas Bothwell, Chris Tait
Attorney(s)

JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN DEPT. NO. 3

REPORTER Lonna Baugher CLERK Laurie Campbell

DATE	PLAINTIFF'S EXHIBITS (Description)	ADMITTED	DEFENDANT'S EXHIBITS (Description)	DATE
		X	DEA KIT memo + attachments; KIMA video log; KNDO video log; newspaper copies; Affs of D Manning, V. Armstrong, B. Phillips, K. McClary, K. Kendrick, J. Roberts, J. Morrison, D. Pennie, B. Clem and 7-24-89 Aff of C. Tait + attachments excluding police reports.	8-14-89
8-14-89	SEB Certificate of B. Ingham	X		
		X	DEC KAPP-TV video	8-14-89
		X	DED KNDO-TV video	"
		X	DEE KIMA-TV video	"

FILED
AUG 14 1989
BETTY J. MCGILLEN
YAKIMA COUNTY CLERK

9

AUG 14 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	
RUSSELL DUANE McNEIL,	)	DEFENDANT'S LIST
	)	OF PENALTY PHASE
Defendant	)	WITNESSES

TO: STATE OF WASHINGTON, Plaintiff;
AND TO: JEFFREY SULLIVAN, Yakima County Prosecuting Attorney;
AND TO: HOWARD W. HANSEN, Deputy Prosecuting Attorney for Plaintiff;

YOU, AND EACH OF YOU, will please take notice that the following is a list of witnesses whome the Defendant expects to call to testify on behalf of the Defendant, Russell Duane McNeil, at the trial for the above-entitled case:

1) Betty Morehouse — PACE School, P.O. Box 38, Wapato, WA 98951

2) Terry Smith — PACE School, P.O. Box 38, Wapato, WA 98951

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

225

3) Jim Lindie	PACE School P.O. Box 38 Wapato, WA 98951
4) Kathy Hammerburg	PACE School P.O. Box 38 Wapato, WA 98951
5) Mr. & Mrs. Ward Holzheimer	S. Wapato Road Wapato, WA 98951
6) Roy Dodd, Sr.	6221 Grandview Arlington, WA 98223
7) Jim Clements	S. Wapato Road Wapato, WA 98951
8) Dorothy Hudson	Toppenish, WA 98948
9) Ross Darland	300 6th Avenue, S. Kirkland, WA
10) Vikki Darland	300 6th Avenue, S. Kirkland, WA
11) Jean Darland	300 6th Avenue, S. Kirkland, WA
12) Rapolean Grant	502 Victory Way Sunnyside, WA 98944
13) Michelle Charbonneau	P.O. Box 764 Buckley, WA 98321

DEFENDANT'S LIST OF
PENALTY PHASE WITNESSES 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
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TELEPHONE (509) 248-1346

14) Sherry Shaw	Rt. #4, Box 4210 Wapato, WA 98951
15) Sherry Salcedo	Rt. #1, Box 345, Lot A Wapato, WA 98951
16) Debbie Charbonneau	Unknown
17) Delores Bailey	417 W. First Wapato, WA 98951
18) Marilyn DeLozier	Wapato High School Wapato, WA 98951
19) Joy Wilson	40th & Nob Hill, Suite #23 Yakima, WA 98908
20) Johnny Rae Jones	6208 S. Fountain Seattle, WA 98178
21) Cullins Lambier	Seattle, WA
22) Eugene Lofton	1751 18th Ave., S. Seattle, WA 98144
23) Jesse Smith	Seattle, WA
24) Fred Faircloth	Seattle, WA
25) "Horseman"	Seattle, WA
26) Joanne McNeil	3913 S. Angel Place

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
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SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

	Seattle, WA
27) Ervin Ray McNeil	633 Sterling Street Sedro Wooly, WA 98284
28) Ray Jr., McNeil	Yakima, WA
29) Andy Cummins	Mt. Vernon, WA
30) Johnny Cummins	Mt. Vernon, WA
31) Veronica Faircloth	602 N. 3rd St, Apt. #2 Yakima, WA 98901
32) Carol Speck	3913 Angel Place Seattle, WA
33) John Hubbard	14910 Orchard Knob Rd. Dallas, Oregon 97338
34) Wally McNeil	Seattle, WA
35) Don McNeil	Seattle, WA
36) Frances Coles	Box 1263 Kodiak, Alaska 99615
37) Officer Kukola	Yakima County Jail Yakima, WA 98901
38) Officer Bowen	Yakima County Jail Yakima, WA 98901

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
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SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

39) Merry Sturm	1728 Jerome Avenue Yakima, WA 98902
40) Dion Curtis	Rt. 2, Box 22 Ephrata, WA
41) Debby Kenny	2720 Fourth Street Union Gap, WA 98903
42) Mary Dee Teacher	417 W. First Wapato, WA 98951
43) Marion Gomez	Rt. #2, Box 2484 Prosser, WA 99350
44) Norma Betschardt	2670 Utopia Rd. Sedro Wooly, WA 98284
45) Dennis Betschardt	2670 Utopia Rd. Sedro Wooly, WA 98284
46) Sally Scott Simmons	710 Coho Drive Burlington, WA 98233
47) Ed McColley	Mobil Villa Park Granger, WA 98932
48) Ann Selland	616 S. 96th Seattle, WA
49) Walter & Kathryn Curtis	Rt. #2, Box 22 Desert Villa Ephrata, WA

DEFENDANT'S LIST OF
PENALTY PHASE WITNESSES 5

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
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SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

50) David Hastings	Office of Secretary of State P.O. Box 9000 Olympia, WA 98504
51) Ed Descloux	United States Navy San Francisco, CA
52) Harold Conner	208 North Track Rd. Wapato, WA 98951
53) Richard Bauer	Walla Walla Prison P.O. Box 520 Walla Walla, WA 99362
54) Vanessa Smith	United States Army
55) Joseph Carl	Box 2818 Kodiak, Alaska 96615
56) Pastor Larry Bennette	Yakima, WA
57) "Ola" Pender	3325 S. W. 106th Seattle, WA 98146
58) Rose (Kirby) Forner	C/O 4693 Escollonia Ct., S. Seattle, WA 98108
59) Sherry Shaw	Rt. #4, Box 4210 Wapato, WA 98951

DEFENDANT'S LIST OF
PENALTY PHASE WITNESSES 6

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
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TELEPHONE (509) 248-1346

CHRISTOPHER TAIT
Attorney for Defendant McNeil

DEFENDANT'S LIST OF
PENALTY PHASE WITNESSES 7

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
AUG 11 1989
BETTY J. McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	NO. 88-1-00428-1
vs.	MEMORANDUM IN OPPOSITION TO DEFENSE MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES
RUSSELL DUANE McNEIL, Defendant.	

The defense has requested an additional twelve peremptory challenges during jury selection in this case. They cite unfavorable pre-trial publicity as the basis for this request.

State v. Persinger, 62 Wn.2d 362, 365, 382 P.2d 497 (1963) states:

> "The Sixth Amendment of the United States Constitution and the tenth amendment of the Washington Constitution provide that one accused of a crime has the right to a trial by an impartial jury. However, neither constitution requires congress or a state legislature to grant peremptory challenges to an accused. Nor does either constitution provide for any particular method of securing to an accused the right to exercise the peremptory challenges which a legislative body grants him. Holmes v. United States, 134 F.(2d) 125 (1943); Philbrook v. United States, 117 F.(2d) 632 (1941); 31 Am. Jur., Jury Sec. 230. The matter of peremptory challenges rests entirely with the legislature. People v. Kassis, 145 Misc. 493, 259 N.Y.S. 339 (1931); People v. Doran, 246 N.Y. 409, 159 N.E. 379 (1927); 31 Am. Jur., Jury Sec. 230. It is limited only by the necessity of having an impartial jury. 31 Am. Jur., Jury Sec. 230.

> [3] Codefendants are not denied a fair trial by an impartial jury merely because they are required to exercise collectively their peremptory challenges. The law presumes that each juror sworn in a case is impartial and above legal exception, otherwise he would have been challenged for 'cause'. United States v. Marchant & Colson, 25 U.S. 480, 6 L. Ed. 700 (1827). A peremptory challenge is not aimed at the disqualification of a juror. It is exercised upon qualified jurors who have not been excused for 'cause'. People v. Roxborough, 307 Mich. 575, 12 N.W. (2d) 466 (1943); Hall v. United States, 168 F. (2d) 161, 4 A.L.R. (2d) 1193 (1948). In other words, a peremptory challenge is not exercised in the selection of jurors, but in their rejection. People v. Roxborough, supra. It enables a party to say who shall not try him; but not to say who shall be the particular jurors to try him. United States v. Marchant & Colson, supra.
>
> An accused cannot complain if he is tried by an impartial jury. He can demand nothing more. If, from those who remain, an impartial jury is obtained, the constitutional rights of an accused are maintained. People v. Roxborough, supra; Hayes v. Missouri, 120 U.S. 68, 30 L.Ed. 578, 7 S. Ct. 350 (1887)."

The issue of a request for additional peremptory challenges was specifically considered in State v. Kinder, 21 Wn. App. 622, 625, 587 P.2d 551 (1978):

> "The defendant asserts that the denial of his request for an additional peremptory challenge violated his right to trial by an impartial jury, although defendant himself passed the juror for cause. The law presumes that each juror sworn in a case is impartial and above legal exception, otherwise, he would have been challenged for cause. State v. Persinger, 62 Wn.2d 362, 382 P.2d 497 (1963). Both the sixth amendment to the United States Constitution and the tenth amendment to the Washington Constitution

> provide that one accused of a crime is entitled to trial by an impartial jury, but there is no constitutional right to peremptory challenges. State v. Persinger, supra; State v. Nelson, 18 Wn. App. 161, 566 P.2d 1375 (1976).
>
> The number of challenges to be afforded defendants is a procedural matter properly controlled by court rule." Cf. State v. Tharp, 42 Wn.2d 494, 256 P.2d 482 (1953).

State v. Wilson, 16 Wn. App. 348, 356, 555 P.2d 1375 (1976) also considered the issue of a defense request for additional peremptory challenges for exactly the same reason as in our present case, pre-trial publicity. The court stated:

> "The defendant suggests that the extensive pretrial publicity warranted favorable consideration of a request for additional peremptory challenges. There is no constitutional right to peremptory challenges. State v. Persinger, 62 Wn.2d 362, 382 P.2d 497 (1963). Nevertheless, court rule provides a limited number of them. CrR 6.4(e)(1) provides in part:
>
> > In prosecutions for capital offenses the defense and the state may challenge peremptorily twelve jurors each; in prosecution for offenses punishable by imprisonment in a penitentiary six jurors each; . . .
>
> As a matter of actual count, 71 prospective jurors were seated and examined; 13 were challenged peremptorily; 13 (including an alternate who was dismissed prior to the jury's deliberation) were chosen to try the issues; and 45 were excused for one cause or another. In State v. Haga, 13 Wn. App. 630, 536 P.2d 648 (1975), the court held that for purposes of determining the number of peremptory challenges, first-degree murder is not a "capital offense" unless punishable by death. See also State v. Johnston, 83 Wash. 1, 144 P. 944 (1914). At the time of the commission of

these crimes Washington had no valid statutory provision for imposition of the death penalty.

We find no error in the trial court's denial of defendant's request for additional peremptory challenges."

The latest word from our Supreme Court on this issue of the number of peremptory challenges to be allowed the defendant is contained in State v. Anderson, 108 Wn.2d 188, 192, 736 P.2d 661 (1987):

"While the number of peremptory challenges allowed might be subject to change, any amendment of CrR 6.4(e)(1) ought to be through the orderly procedures established by this court, GR 9, and not by case law."

The number of peremptory challenges in capital cases have been set by statute and court rule at 12 challenges. The Washington cases uphold that number and state if the number available is to be changed, it should be accomplished by legislative action, not by the courts.

The defendant can have as many challenges for cause as is necessary in order for the defendant to get an impartial jury. Peremptory challenges are to remove otherwise qualified and impartial jurors without giving any reason or cause. This is not constitutionally required and any privileges allowed in this area is for the legislature to decide. The defense request for additional peremptory challenges should be denied.

DATED this 11th day of August, 1989.

Howard W. Hansen

HOWARD W. HANSEN
Deputy Prosecuting Attorney

CERTIFICATE OF TRANSMITTAL

On this day, the undersigned in Yakima, Washington, sent to the HWH4(Q) record for ~~the~~ ~~mills~~/defendants a copy of this document by U.S. mail, postage prepaid, or by Attorney's Messenger Service. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

8/11/89 Peggy Kelley
DATE SIGNED

FILED
AUG 11 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	NO. 88-1-00428-1 MEMORANDUM IN OPPOSITION TO MOTION TO EXCLUDE DEATH PENALTY BECAUSE HANGING IS CRUEL PUNISHMENT

The question raised by the defense that hanging is cruel punishment has been reviewed by the Washington appellate courts in recent years.

State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981) was the first recent case to consider the matter. The Washington Supreme Court upheld the use of hanging to carry out a death sentence by a vote of 6 to 3 even though the opinion of the court on the hanging issue is contained in several concurring and dissenting opinions and is not contained in the lead opinion of the case.

State v. Rupe, 101 Wn.2d 664, 701, 683 P.2d 571 (1984) cites the Frampton case with approval:

> In State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981), we rejected the argument that death by hanging was unconstitutional."

State v. Campbell, 103 Wn.2d 1, 31, 691 P.2d 929 (1984) cites both of the above cases with approval:

> "We held that imposition of the death penalty is not per se unconstitutional, since both the federal and state consti-

> tutions recognized capital punishment at the time of their adoption. Smith, at 777-78. We further address the issue of cruel punishment in State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981) (rejecting an argument that hanging was unconstitutionally cruel) and in State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984) (rejecting an argument that a choice between hanging and lethal injection was unconstitutionally cruel)."

Finally, the latest ruling by our Washington Supreme Court on this issue was contained in its decision on a personal restraint petition by the defendant, Charles R. Campbell, in State v. Campbell, 112 Wn.2d 186, 192, _____ P.2d _____ (1989):

> "In his pro se supplemental brief, Campbell invites the court to reconsider its decision that execution by hanging does not constitute cruel and unusual punishment under the eighth amendment to the United States Constitution and article 1, section 14 of the Washington State Constitution. See State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981). Since we decided Frampton, at least two other states have upheld statutes providing for execution by hanging. DeShields v. State, 534 A.2d 630 (Del. 1987), cert. denied, 108 S. Ct. 1754 (1988); McKenzie v. Osborne, 195 Mont. 26, 640 P.2d 368 (1981). We decline to reconsider Frampton."

The Washington Supreme Court has had several opportunities recently to consider this defense motion and has consistently and unwaveringly stated that execution by hanging does not constitute cruel and unusual punishment under either the Federal Constitution or the Washington State Constitution. Therefore, the defense motion to

exclude the death penalty aspects of this case because hanging is cruel punishment should be denied.

DATED this 11th day of August, 1989.

Respectfully submitted,

JEFFREY C. SULLIVAN
Prosecuting Attorney

HOWARD W. HANSEN
Deputy Prosecuting Attorney

HWH:sw
HWH4(P)

CERTIFICATE OF TRANSMITTAL

On this day, the undersigned in Yakima, Washington, sent to the attorneys of record for ~~the~~ defendants a copy of this document by U.S. mail, postage prepaid, or by Attorney's Messenger Service. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

8/11/89
DATE

SIGNED

EXHIBIT LIST

CUSTODY OR REAL PROPERTY _____

CAUSE NO. 88-1-00428-1 ACTION Def Mot To Expend Public Funds

State of Washington VS. Russell D. McNeil

H. Hansen, J. Sullivan Attorney(s) T. Bothwell, C. Fait Attorney(s)

(1) Mike Shinn for KAPP-TV; (2) Dave Thorner for KIMA-TV

JUDGE/~~COURT COMMISSIONER~~ F. James Gavin DEPT. NO. 3

REPORTER Donna Baugher CLERK Laurie Campbell

DATE	PLAINTIFF'S EXHIBITS (Description)	ADMITTED	DEFENDANT'S EXHIBITS (Description)	DATE
		X	EA Memo from KIMA	8-9-89

FILED
AUG 9 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

FILED
AUG 9 1989
BETTY McGILLEN, YAKIMA COUNTY CLERK

Roll No. 355 852

State of Washington

VS.

Russell McNeil

NO. 88-1-428-1

ORDER on Defendant's Motion for Public Funds

THIS MATTER HAVING COME ON for hearing before the undersigned judge/ commissioner of the above-entitled court, it is hereby ORDERED THAT :

Yakima County Auditor shall immediately Issue checks payable as follows:

① $450.00 to KNDO
② $ 50.00 to The Wapato Independent
③ $650.00 to KAPP
④ $1100.00 to KIMA for services in Responding to Defendant's subpoenas duces Tecum in support of Motion for Venue change

DONE IN OPEN COURT this 9th day of August, 1989.

Presented by:

Thomas Bithell
Attorney for MR McNeil

JUDGE/~~COURT COMMISSIONER~~

Approved as to form:

Attorney for

Statement of Advertising and Printing for the Month of August 9, 1989.

THE WAPATO INDEPENDENT

P. O. BOX 67

Wapato, Wash. 98951

Superior Court of Yakima

[NAME OF ADVERTISEMENT]

PUBLICATION DAY OF THE MONTH	NUMBER INCHES DISPLAY ADV.	RATE PER INCH	AMOUNT		LINES READERS OR WORDS CLASS ADS	RATE PER LINE	AMOUNT		INCHES DISPLAY CLASS.	RATE PER INCH	AMOUNT		TOTAL	
Copies of file information on Nickoloff case													50	00

1% per month finance charge on past due balance
Accounts due and payable within 30 days after billing.
Annual percentage 12% per annum.

FILED

AUG 9 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	AFFIDAVIT OF
RUSSELL DUANE McNEIL,	)	CHRISTOPHER TAIT
	)	
Defendant	)	

STATE OF WASHINGTON)
)ss.
COUNTY OF YAKIMA)

CHRISTOPHER TAIT, being first duly sworn upon oath, deposes and states:

I am the attorney for the Defendant, Russell Duane McNeil. I make the foregoing affidavit in support of my Motion For Expenditure Of Public funds To Hire National Jury Project.

The National Jury Project is a company in Oakland, California which is in the business of assisting trial lawyers in selecting juries for their cases. One of the particular problems which they often address is jury selection, and change of venue.

I spoke today with Lois Heaney, of that firm. If we are allowed to retain their firm, their work will roughly consist of the following:

230

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

A. thorough review of the publicity generated to date.
B. design of questionnaire
C. public opinion telephone survey of 400 people
D. review of survey results
E. preparation of reports
F. testimony at hearing on venue change

All these steps will be interspersed with conferences with counsel. In so doing, I believe that we will be able to examine the quantitative and qualitative impact of the publicity we have all seen. In particular, we will enable ourselves to "take the temperature" of the community with respect to these alleged crimes. It will cost at least $20,000.00 for this work, and possibly $30,000.00. Some of that cost depends on whether the telephoning is done long distance or locally.

Absent this work, our Motion to Change Venue will be argued in somewhat of a vacuum. We know that much publicity has surrounded this case since before it was filed, but until this work is done and the results are in, we will not have been able to analyze that publicity in any meaningful way. Any decision made without such an analysis will be lacking in the substance and foundation necessary to the due process which we know is required.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

Dated this 9th day of August, 1989.

CHRISTOPHER TAIT
Attorney for McNeil

NOTARY PUBLIC in and for the
State of Washington, residing at
Yakima.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
AUG 9 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON; 89 AUG 9 PM 4 10	
Plaintiff,	NO: 88-1-00428-1
vs.	
RUSSELL DUANE McNEIL,	MOTION FOR EXPENDITURE OF PUBLIC FUNDS TO HIRE NATIONAL JURY PROJECT
Defendant	

Comes now defendant Russell Duane McNeil, by and through his counsel Christopher Tait and Thomas A. Bothwell, and moves the Court for the entry of an Order Allowing the Expenditure of Public Funds in the sum of approximately $30,000.00 to hire personnel from the National Jury Project to conduct a public survey and to analyze the publicity which has been generated to date. This motion is based on the records and files herein, and on the affidavit of counsel, attached hereto and hereby incorporated by reference.

Dated this 9th day of August, 1989.

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

219

FILED
AUG 8 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,) AUG 8 PM 4 06
)
Plaintiff,) NO: 88-1-00428-1
)
vs.)
)
RUSSELL DUANE McNEIL,)
) CERTIFICATE OF
) MAILING
Defendant)
)

I certify that on this 31st day of July, 1989, I caused to be mailed First Class, United States Mail, postage prepaid, a copy of the foregoing, SUBPOENA DUCES TECUM to:

KENE - KZHR Radio
Fort Road
Toppenish, WA 98948

KDNA - Radio
120 Sunnyside Avenue
Granger, WA 98936

Ellensburg Daily Record
Fourth & Main Street
Ellensburg, WA 98926

218

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

Prosser Record Bulletin
613 7th Street
Prosser, WA 98938

Sunnyside News
520 South 7th
Sunnyside, WA 98944

Sunnyside Sun
528 Edison
Sunnyside, WA 98944

Wapato Independent
113 S. Wapato Avenue
Wapato, WA 98951

Toppenish Review
11 East Toppenish Avenue
Toppenish, WA 98948

KREW Radio
638 Decatur
Sunnyside, WA 98944

KIHS - KGTA Radio
Yakima, WA 98902

DIANA G. PARKER

CERTIFICATE OF MAILING 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
AUG 8 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

'89 AUG 8 PM 4 08

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	
RUSSELL DUANE McNEIL,	)	
	)	
	)	
Defendant	)	AFFIDAVIT OF PERSONAL
	)	SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF YAKIMA)

DIANA G. PARKER, being first duly sworn upon oath, deposes and states:

That she is a citizen of the United States, over the age of 21 years and not a party to the above-entitled action, and is competent to act as a witness thereto.

That on the 8th day of August,1989, I did personally serve upon KAREN ROGERS of the Wapato Independent and on behalf of James Flint for the Toppenish Review, at the hour of 11:25 a..m., the SUBPOENA/DUCES TECUM by delivering and leaving with her at 113 South Wapato Avenue, Wapato, Washington 98951.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

217

DATED THIS 8th DAY OF AUGUST, 1989.

DIANA G. PARKER

SUBSCRIBED AND SWORN to before me this 8th day of August, 1989.

NOTARY PUBLIC in and for the State of Washington, residing at Yakima.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
AUG 8 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	
RUSSELL DUANE McNEIL,	)	
	)	
	)	
Defendant	)	AFFIDAVIT OF PERSONAL
	)	SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF YAKIMA)

DIANA G. PARKER, being first duly sworn upon oath, deposes and states:

That she is a citizen of the United States, over the age of 21 years and not a party to the above-entitled action, and is competent to act as a witness thereto.

That on the 8th day of August,1989, I did personally serve upon ELLIOT K. LIEMAN, the General Manager of KNDO-TV, at the hour of 10:58 a..m., the SUBPOENA/DUCES TECUM by delivering and leaving with her at 1608 S. 24th Avenue, Yakima, Washington 98902.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

216

DATED THIS 8th DAY OF AUGUST, 1989.

DIANA G. PARKER

SUBSCRIBED AND SWORN to before me this 8th day of August, 1989.

NOTARY PUBLIC in and for the State of Washington, residing at Yakima.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
AUG 8 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	
RUSSELL DUANE McNEIL,	)	
	)	
	)	
Defendant	)	AFFIDAVIT OF PERSONAL
	)	SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF YAKIMA)

DIANA G. PARKER, being first duly sworn upon oath, deposes and states:

That she is a citizen of the United States, over the age of 21 years and not a party to the above-entitled action, and is competent to act as a witness thereto.

That on the 8th day of August,1989, I did personally serve upon DAVE ETTL, the News Director for KAPP-TV, at the hour of 11:02 a..m., the SUBPOENA/DUCES TECUM by delivering and leaving with him at 1610 S. 24th Avenue Yakima, Washington 98902.

215

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DATED THIS 8th DAY OF AUGUST, 1989.

DIANA G. PARKER

SUBSCRIBED AND SWORN to before me this 8th day of August, 1989.

NOTARY PUBLIC in and for the State of Washington, residing at Yakima.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
AUG 8 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,)
)
Plaintiff,) NO: 88-1-00428-1
)
vs.)
)
RUSSELL DUANE McNEIL,)
)
)
Defendant) AFFIDAVIT OF PERSONAL
) SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF YAKIMA)

DIANA G. PARKER, being first duly sworn upon oath, deposes and states:

That she is a citizen of the United States, over the age of 21 years and not a party to the above-entitled action, and is competent to act as a witness thereto.

That on the 8th day of August,1989, I did personally serve upon KEN MESSER, the Station Manager at KIMA-TV, at the hour of 11:55 a..m., the SUBPOENA/DUCES TECUM by delivering and leaving with him at 2801 Terrace Heights Road, Yakima, Washington 98902.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

214

DATED THIS 8th DAY OF AUGUST, 1989.

DIANA G. PARKER

SUBSCRIBED AND SWORN to before me this 8th day of August, 1989.

NOTARY PUBLIC in and for the State of Washington, residing at Yakima.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
AUG 8 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,)
'89 AUG 8 PM 4 06
Plaintiff,) NO: 88-1-00428-1
EX OFF. SUPER
vs.)
)
RUSSELL DUANE McNEIL,)
)
)
Defendant) AFFIDAVIT OF PERSONAL
) SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF YAKIMA)

DIANA G. PARKER, being first duly sworn upon oath, deposes and states:

That she is a citizen of the United States, over the age of 21 years and not a party to the above-entitled action, and is competent to act as a witness thereto.

That on the 31st day of July, 1989, I did personally serve upon the following individuals at the following locations., the SUBPOENA DUCES TECUM by personally delivering and leaving with him/her the said Subpoena Duces Tecum.

213

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

Diane Ulrich
Program Director
KYVE - TV, Channel #47
1105 S. 15th Avenue
Yakima, WA 98902

Dean De La Rosa
KNDO - TV, Channel #23
1608 S. 24th Avenue
Yakima, WA 98902

Robert Kennedy
KAPP - TV, Channel #35
1610 S. 24th Avenue
Yakima, WA 98902

Candace Hull
KIMA - TV, Channel #29
2801 Terrace Heights Road
Yakima, WA 98902

Eleanor Fasano
Christian Broadcasting, Channel #32
1700 S. 24th Avenue
Yakima, WA 98902

Marvalene Broadhead
KATS - FM, KIT - AM
114 S. 4th Street
Yakima, WA 98901

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

Michael Pursell
KBBO Radio/KRSE
2120 Riverside Road
Yakima, WA 98902

DATED THIS 8th DAY OF AUGUST, 1989.

DIANA G. PARKER

SUBSCRIBED AND SWORN to before me this 8th day of August, 1989.

NOTARY PUBLIC in and for the State of Washington, residing at Yakima.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED

AUG 8 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

'89 AUG 8 PM 4 08

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	
RUSSELL DUANE McNEIL,	)	
	)	
	)	
Defendant	)	AFFIDAVIT OF PERSONAL SERVICE
	)	

STATE OF WASHINGTON)
) ss.
COUNTY OF YAKIMA)

DIANA G. PARKER, being first duly sworn upon oath, deposes and states:

That she is a citizen of the United States, over the age of 21 years and not a party to the above-entitled action, and is competent to act as a witness thereto.

That on the 1st day of August,1989, I did personally serve upon the following individuals at the following locations., the SUBPOENA DUCES TECUM by personally delivering and leaving with him/her the said Subpoena Duces Tecum.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

212

GREG ADAMS
KMWX - Radio - KFFM
North 4th & East Lincoln
Yakima, WA 98901

BOB CHURCH
KUTI/KXDD Radio
706 Butterfield
Yakima, WA 98902

DATED THIS 8th DAY OF AUGUST, 1989.

DIANA G. PARKER

SUBSCRIBED AND SWORN to before me this 8th day of August, 1989.

NOTARY PUBLIC in and for the State of Washington, residing at Yakima.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
AUG 8 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,)
AUG 8 PM 2 45
Plaintiff,) NO: 88-1-00428-1
SUPERIOR COURT
vs.)
)
RUSSELL DUANE McNEIL,)
)
Defendant) ORDER SHORTENING TIME

THE COURT having considered the motion of Defendant RUSSELL MCNEIL for shortening time for a hearing on Motion for Expenditure of Public Funds, now therefore,

IT IS HEREBY ORDERED, and good cause having been shown:

The Motion shall be heard on Wednesday, August 9, 1989 at 1:30 p.m.

DONE IN OPEN COURT THIS 8th DAY OF AUGUST, 1989.

JUDGE F. JAMES GAVIN

PRESENTED BY:

THOMAS BOTHWELL

ORDER SHORTENING TIME 1

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
AUG 8 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

'89 AUG 8 PM 2 45

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	DEFENDANT'S MOTION
RUSSELL DUANE McNEIL,	)	FOR AUTHORIZATION AND
	)	EXPENDITURE OF PUBLIC
	)	FUNDS AND MOTION FOR
Defendant	)	ORDER SHORTENING TIME

COMES NOW CHRISTOPHER TAIT, of attorneys for the above-named Defendant, RUSSELL DUANE McNEIL, and moves this Court for the entry of an order authorizing the expenditure of public funds to pay any and all costs incurred for the reproduction, collection, equipment costs and dubbing of any and all news stories regarding the deaths of Mike Nickoloff and Dorothy Nickoloff and the Defendant Russell Duane McNeil and/or Herbert "Chief" Rice.

THIS MOTION is based upon the files and records herein and upon the Declaration of Counsel, attached hereto and hereby incorporated by reference.

The undersigned further moves this court for an order shortening time because the deadline to produce the materials in this matter is now set for Thursday, August 19, 1989.

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CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DATED THIS 8th DAY OF AUGUST, 1989.

By: [signature]

CHRISTOPHER TAIT
Attorney for Defendant McNeil

DIANA G. PARKER, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is a private investigator hired to assist the above-named defendant's attorneys, and is currently working out of the office Christopher Tait.

The undersigned served the Subpoena Duces Tecum, attached hereto as Exhibit "A" and incorporated herein by reference on KAPP, Channel #35 and its counsel, and other various local radio stations and local television programs.

On August 7, 1989 at approximately 4:15 p.m., a MOTION OF KAPP-TV TO QUASH OR MODIFY SUBPOENA DUCES TECUM was served upon the above-named Defendant's counsel from MICHAEL F. SHINN of the law firm of GAVIN, ROBINSON, KENDRICK, REDMAN & PRATT, INC., P.S., Attorneys At Law. The motion of Kapp-TV to Quash or modify Subpoena Duces Tecum is noted for a hearing on August 18, 1989, at the hour of 1:30 p.m.

The materials requested on the Subpoena Duces Tecum, attached hereto, are absolutely necessary and should be provided to enable the above-named Defendant's counsel to adequately represent him in this matter.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DATED THIS 8th DAY OF JULY, 1988.

DIANA G. PARKER

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	)	NO. 88-1-00428-1
vs.	)	
RUSSELL DUANE MCNEIL, Defendant.	)	SUBPOENA DUCES TECUM

TO: KAPP, Channel 35
AND TO: Counsel

IN THE NAME OF THE STATE OF WASHINGTON, YOU ARE HEREBY COMMANDED TO SURRENDER any and all of the following transcripts and/or tapes of news media coverage of any and all kind and nature regarding the publicity surrounding the deaths of Mike and Dorothy Nickoloff and the Defendant Russell Duane McNeil and/or Herbert "Chief" Rice, now in your possession or under your control, immediately for the defense attorneys' review and presentation to the Honorable F. James Gavin as provided by the Washington Superior Court Civil rules CR45(b), to-wit:

A. Including but not limited to the following:

1. 1/7/88 Death of Mike & Dorothy Nickoloff
2. 1/8/88 - 1/26/88 Investigation of deaths
3. 1/27/88 Arrest of Russell Duane McNeil

EXHIBIT A

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING

4.	3/12/88	Judge to decide if McNeil is to be tried as an adult
5.	3/15/88	Juveniles to be tried as adults
6.	4/13/88	Extension granted
7.	5/28/88	Jeffrey C. Sullivan seeks death penalty
8.	6/4/88	Legal disputes RE: Separate trials
9.	8/19/88	Defense argue death penalty
10.	9/10/88	Case to Supreme Court
11.	1/1/89	Nickoloff case is #2 news story
12.	1/11/89	Supreme Court denies motion RE: Death Penalty
13.	1/28/89	Additional Prosecuting Attorney hired to defend State RE: Complexity of McNeil case
14.	2/4/89	Case is delayed RE: U.S.S. Court
15.	2/7/89	McNeil trial to occur
16.	2/26/89	Two teens up for death penalty
17.	4/11/89	Closed hearing requested
18.	4/21/89	Rice requests bail RE: to see mother
19.	5/27/89	Closed hearing issue discussed
20.	6/26/89	Supreme Court issues juvenile death penalty decision
21.	7/11/89	Judge Gavin rules on various matters; sets trial dates
22.	7/24/89 thru 7/26/89	McNeil 3.5 Hearing

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET

YOU ARE FURTHER COMMANDED to surrender and provide to Counsel a brief summary of statistical data regarding your estimated circulation, subscribers, radio audience, TV viewers, or geographical distribution.

DATED this 31st day of JULY, 1989.

CHRISTOPHER TAIT
Attorney for Defendant McNeil

SUBPOENA DUCES TECUM 3

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET

FILED and Micro filmed
AUG 8 1989
Roll No. 355 449
BETTY McGILLEN, YAKIMA COUNTY CLERK

'89 AUG 8 PM 2 45
CLERK OF SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON HEARING OF MOTION FOR CrR 3.5 HEARING CLOSURE

THIS MATTER coming on regularly for hearing on Defendant's motion for closure of the CrR 3.5 hearing; the Court having considered arguments of counsel for the Plaintiff and Defendant, as well as argument presented by MARK FICKES and VELIKANJE, MOORE & SHORE, INC., P.S., attorneys for the Yakima Herald-Republic[1]; the Court having further considered the AFFIDAVIT OF CHRISTOPHER TAIT and the AFFIDAVIT OF HOWARD W. HANSEN, the Court makes the following,

FINDINGS OF FACT

(1) This case involves charges of aggravated, first-degree murder (two counts) against the Defendant. The State is requesting the death penalty.

(2) This case, and that of the companion co-Defendant, has received a significant amount of pre-trial publicity, in the media, e.g., newspaper, television, radio. Illustrative of the

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1 The Court also inquired of all other representatives of the media or public attending the hearing on motion for closure; no one else requested the opportunity to present views.

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

relative notoriety is an article in the Yakima Herald-Republic, January 1, 1989, issue, reporting that the "Nickoloff Murders" was ranked as number two in "the top 10 local stories of 1988." This case has also received additional publicity following the recent United States Supreme Court decision allowing capital punishment against 17-year-olds, as well as escalating publicity as the trial nears. Trial is scheduled to commence September 5, 1989.

(3) This Court has not yet held a hearing on Defendant's previously-filed motion for change of venue. (Defendant has not yet requested a hearing on said motion.) Based upon the record currently before the Court, this Court is not inclined to change venue. However, the Court has reviewed a transcript of the Defendant's statement which would be the subject of the CrR 3.5 hearing. Also, the affidavits of Mr. Hansen and Mr. Tait (with attachments thereto) summarize other evidence which would be presented at the CrR 3.5 hearing. It appears that most, if not all, of the evidence which would be presented at the CrR 3.5 hearing has not previously been reported.

From the foregoing FINDINGS OF FACT, the Court now makes and enters the following,

CONCLUSIONS OF LAW

1.0 Both the "reasonable likelihood" and "substantial probability" standards are met as follows:

1.1 There is a substantial probability that irreparable damage to Defendant's fair trial will result from conducting the CrR 3.5 hearing in public;

1.2 Defendant has shown a reasonable likelihood of prejudice to his fair trial right, if the CrR 3.5 hearing were open.

1.3 There is a substantial probability that alternatives to closure will not adequately protect the Defendant's right to a fair trial. The alternatives considered include but are not limited to:

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

(a) Changing venue;

(b) Conducting the CrR 3.5 hearing after a jury has been sequestered;

(c) Continuing the trial date so as to possibly separate in time the trial from the publicity arising from the CrR 3.5 hearing; and

(d) Allowing the public to attend the hearing, but entering a "gag" order, intended to restrain dissemination of information by those in attendance.

1.4 There is a substantial probability that closure of the CrR 3.5 hearing will be effective in protecting against harm or prejudice.

2.0 Because Defendant was a juvenile at the time of his statement, the CrR 3.5 hearing is anticipated to include a much more involved and detailed evidentiary presentation than is involved in an adult's CrR 3.5 hearing.

3.0 The various alternatives to closure do not sufficiently guarantee Defendant's right to a fair trial. Closure of the CrR 3.5 hearing is the least restrictive means available. If review of this order is requested, the record should also include this Court's oral ruling.

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

The motion for closure, joined in by the Plaintiff, is granted. This order relates only to the hearing to be conducted pursuant to CrR 3.5. These findings and conclusions relate to the particular evidence to be presented at a CrR 3.5 hearing and the particular facts of this case.

The affidavits of Mr. Howard Hansen, Deputy Prosecuting Attorney, as well as Mr. Christopher Tait, of attorneys for the Defendant, (and attachments thereto) relative to the motion

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for closure shall be sealed. The contents of neither affidavit may be disclosed to the public, subject to further order of this Court.

A determination as to when the record of the CrR 3.5 hearing may be made public shall await further developments in the case, e.g., whether venue will be changed; whether the jury will be sequestered upon the commencement of the trial; and whether the Defendant's statement is determined to be admissible.

DATED this 8 day of August, 1989.

F. JAMES GAVIN, Judge

PRESENTED BY:

THOMAS BOTHWELL
CHRISTOPHER S. TAIT
Of Attorneys for Defendant

APPROVED AS TO FORM; NOTICE OF PRESENTMENT WAIVED:

JEFFREY C. SULLIVAN
HOWARD W. HANSEN
Of Attorneys for Plaintiff

APPROVED AS TO FORM; NOTICE OF PRESENTMENT WAIVED:

MARK E. FICKES
Velikanje, Moore & Shore, Inc., P.S.
Of Attorneys for the Yakima Herald-Republic

/ / /

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Service accepted and copy received of the foregoing

This 7th day of August 1989

Chris Laid / PJB

Attorneys for Defendant

AUG 7 PM 4 12

FILED

AUG 7 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	)	NO. 88-1-00428-1
v.	)	MEMORANDUM OF KAPP-TV IN SUPPORT OF MOTION TO QUASH OR MODIFY SUBPOENA DUCES TECUM
RUSSELL DUANE McNEIL, Defendant.	)	

I

STATEMENT OF FACTS

On or about July 31, 1989, a Subpoena Duces Tecum was served upon KAPP-TV for production of various materials regarding media coverage of the deaths of Mike and Dorothy Nickoloff. (A copy of the Subpoena is attached hereto and incorporated herein by reference). No return date is given on the Subpoena; however, the materials, which cover the span of a year and a half, are requested "immediately." The Subpoena seeks any and all transcripts and/or tapes from January, 1988 to date, concerning the Nickoloffs' deaths, "including but not limited to" certain specific events delineated in the Subpoena.

KAPP-TV is a local television station which operates on a tight budget, and whose employees typically devote in excess of forty hours per week to the business of gathering, editing, and producing the news. The Subpoena would require KAPP-TV employees to search through each day's paperwork for a year and a half to find stories related to this case, and would greatly disrupt the station's work.

There are typically six to ten stories produced each day.

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The script for each story is logged into a looseleaf binder and with each script there is a number for the videotape on which the story appears. Assuming an average of eight stories per day, five days per week, approximately 3,100 stories would have to be reviewed to comply with the Subpoena. Once found in the log book, the videotaped material can be located on the file tapes. However, the videotaped material relating to the present case is scattered across dozens of tapes, each tape being sixty minutes long. KAPP-TV employees would have to scan through dozens of sixty-minute tapes to locate each one or two-minute story.

Once the videotaped story is located, it must be recorded onto another tape. This process of reviewing and copying videotape would tie up one of KAPP-TV's three edit bays and its only photographer, for hours. All of the edit bays, and the photographer, are normally needed to put on the regular KAPP-TV television newscast.

II

DISCUSSION

A. Compliance With the Subpoena Would Interfere With the News Gathering Activities of KAPP-TV, Which Are Protected Under the First Amendment of the Federal Constitution, and Article I, Section 5, of the Washington State Constitution.

Our Federal and State Constitutions grant certain protections designed to encourage and foster the freedom of the press.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

First Amendment, United States Constitution.

> Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

Article I, Section 5, Washington State Constitution.

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Several courts from various jurisdictions have recognized the First Amendment implications and importance of the news gathering process and rights of the press to publish what it chooses, without serving as a resource library for litigants. These courts have established that a reporter's materials such as photographs and videotapes are qualifiedly privileged under the First Amendment guarantees of free press and speech. United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), cert. den. 449 U.S. 1126; Matter of Consumers Union, 495 F.Supp. 582 (S.D.N.Y. 1980); O'Neill v. Oakgrove Constr., 528 N.Y.S.2d 1, 523 N.E.2d 277, 71 N.Y. 2d 521 (1988); People v. Bova, 460 N.Y.S. 2d 230, 118 Misc. 2d 14 (1983); Bell v. City of Des Moines, 412 N.W.2d 585 (1987).[1]

The basis for the qualified constitutional protections afforded the press are that,

> The autonomy of the press would be jeopardized if resort to its resource materials by litigants seeking to utilize the news gathering efforts of journalists for their private purposes, were routinely permitted. Moreover, because journalists typically gather information about accidents, crimes, and other matters of special interest that often give rise to litigation attempts to obtain evidence by subjecting the press to discovery as a non-party would be widespread if not restricted. The practical burdens on time and resources, as well as the consequent diversion of journalistic effort and disruption of news gathering activity would be particularly inimical to the vigor of a free press.

---

[1] To date, the Washington State Supreme Court has indicted only that a common law privilege exists for news reporters where information is gathered from confidential sources. Senear v. Daily Journal American, 97 Wn.2d 148, 641 P.2d 1180 (1982); Clampitt v. Thurston County, 98 Wn.2d 638, 658 P.2d 641 (1983). The privilege applies in criminal proceedings, as well as civil matters. State v. Rinaldo, 102 Wn.2d 749, 689 P.2d 392 (1984).

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> For these reasons, the courts in New York and elsewhere, Federal and State, have recognized a reporter's qualified privilege under the First Amendment guarantee of free press and speech. As formulated by the decisions of these courts, the privilege bars coerced disclosure of resource materials, such as photographs, which are obtained or otherwise generated in the course of news gathering or news preparing activities, unless the moving litigant satisfies a tripartite test. Under the tripartite test, discovery may be ordered only if the litigant demonstrates, clearly and specifically, that the items sought are (1) highly material, (2) critical to the litigant's claim, and (3) not otherwise available. Accordingly, if the material sought is pertinent merely to an ancillary issue in the litigation not essential to the maintenance of the litigant's claim, or obtainable through an alternative source, disclosure may not be compelled.

O'Neill v. Oakgrove Constr., 528 N.Y.S.2d at 3 (citations omitted) (emphasis added).

The constitutional protections apply regardless of whether or not confidential information is sought. Matter of Consumers Union, 495 F.Supp. at 586; United States v. Cuthbertson, 630 F.2d at 147, and regardless whether the case is civil or criminal in nature.

> [A]cceptance of defendants' view that their constitutional interests in a criminal trial preclude the existence of a journalist's privilege in criminal cases would amount to a finding that these interests always prevail over the First Amendment interests underlying that privilege. However, in Nebraska Press Association v. Stuart, 427 U.S. 539, 561, 96 S.Ct. 2791, 2803, 49 L.Ed.2d 683 (1976), the Supreme Court stated that:
>
> > The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other . . . [I]f the authors of these guarantees, fully aware of the potential conflicts between

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> them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do.
>
> A defendant's Sixth Amendment and due process rights certainly are not irrelevant when a journalist's privilege is asserted. But rather than affecting the existence of the qualified privilege, we think that these rights are important factors that must be considered in deciding whether, in the circumstances of an individual case, the privilege must yield to the defendant's need for the information.

Cuthbertson, at 147.

The qualified constitutional protections recognized by these courts should apply in a case such as this where the burden placed upon KAPP-TV to comply with the Subpoena will result in substantial disruption of KAPP-TV's news gathering efforts, and diversion of KAPP-TV resources otherwise needed to gather, produce and edit the news. These effects interfere with KAPP's constitutional freedoms of the press.

Since the constitutional protections afforded the press are of a qualified nature, the question becomes whether the defendant can demonstrate that the evidence sought is necessary to his defense and unobtainable from any less obtrusive source. O'Neill, at 3; Bell v. City of Des Moines, at 587. It is anticipated that the evidence in question is sought for defense purposes pursuant to CrR 5.2(b)(2).

> The court may order a change of venue to any county in the state:
>
> *
>
> *
>
> *
>
> Upon motion of the defendant, supported by affidavit that he believes he cannot receive a fair trial in the county where the action is pending.

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The factors which are to be considered in determining whether a change of venue is appropriate, based upon pretrial publicity, are:

> (1) the inflammatory or noninflammatory nature of the publicity; (2) the degree to which the publicity was circulated throughout the community; (3) the length of time elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the difficulty encountered in the selection of the jury; (5) the familiarity of prospective or trial jurors with the publicity and the resultant effect upon them; (6) the challenges exercised by the defendant in selecting the jury, both peremptory and for cause; (7) the connection of government officials with the release of publicity; (8) the severity of the charge; and (9) the size of the area from which the venire is drawn.

State v. Jeffries, 105 Wn.2d 398, 409, 717 P.2d 722 (1986); State v. Rupe, 101 Wn.2d 664, 675, 683 P.2d 571 (1984); Orland, Washington Practice, § 1606 (1983). The only factor which would require review of KAPP-TV's transcripts or tapes is the first, "the inflammatory or noninflammatory nature of the publicity." The only evidence arguably necessary in this regard is the material broadcast concerning the deaths and the subsequent investigation and arrest of defendants. Tapes of the procedural aspects of the case, which were broadcast and which are strictly factual in nature, would not be necessary for defendant's purposes. Jeffries, at 409.

KAPP-TV requests that the Court quash and/or modify the Subpoena to the extent defendant seeks discovery of transcripts and videotapes which are procedural in nature and unnecessary to show prejudicial pre-trial publicity, KAPP-TV further requests that defendant be required to demonstrate, to the Court's satisfaction, which of the delineated events in the Subpoena are reasonably necessary for defendant's purposes.

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B. KAPP-TV's Motion to Quash or Modify the Subpoena Should Be Granted On the Basis That It Is Unreasonable and Oppressive.

Civil Rule 45(b) provides, in part, that the court may:

> (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

Dave Ettl in his affidavit states that compliance with the Subpoena will constitute a major undertaking on the part of KAPP in terms of man hours and equipment. Compliance will result in disruption of the normal news gathering activities of the station. In order to comply over 3,100 stories will have to be reviewed and videotapes located. The station's only photographer will be diverted from his regular duties and one of three edit bays will be unavailable for regular use while footage is located and recorded. KAPP-TV is not a research library. The station does not have the staff or the funding to be a research library and in light of the burdensome nature of the Suboena, KAPP-TV believes it is unreasonable and opressive and should be quashed.

If the Subpoena is not quashed, it should be limited to material related to the deaths, investigation and subsequent arrest of the defendant. The Subpoena should be further conditioned upon advancement of the reasonable cost of producing the materials, and defendant should be required to provide the videotape for re-recording of the broadcast footage. CR 45(b)(2).

III

CONCLUSION

KAPP-TV urges this Court to quash and/or modify the Subpoena Duces Tecum to the extent it unreasonably interferes with the constitutionally protected news gathering efforts of KAPP. Further, that the defendant should be required to

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demonstrate to the Court' satisfaction which of the enumerated events in the Subpoena are reasonably necessary for defendants' purposes herein. KAPP-TV also urges that to the extent any discovery is permitted, denial of its Motion to Quash or Modify the Subpoena should be conditioned upon the advancement of the reasonable costs of producing the requested materials.

Respectfully submitted this 7th day of August, 1989.

MICHAEL F. SHINN, WSBA 14679,
of GAVIN, ROBINSON, KENDRICK,
REDMAN & PRATT, INC., P.S.,
Attorneys for KAPP-TV

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
	)	
	)	NO. 88-1-00428-1
Plaintiff,	)	
	)	
vs.	)	
	)	
RUSSELL DUANE MCNEIL,	)	SUBPOENA DUCES TECUM
	)	
Defendant .	)	

TO: KAPP, Channel 35
AND TO: Counsel

IN THE NAME OF THE STATE OF WASHINGTON, YOU ARE HEREBY COMMANDED TO SURRENDER any and all of the following transcripts and/or tapes of news media coverage of any and all kind and nature regarding the publicity surrounding the deaths of Mike and Dorothy Nickoloff and the Defendant Russell Duane McNeil and/or Herbert "Chief" Rice, now in your possession or under your control, immediately for the defense attorneys' review and presentation to the Honorable F. James Gavin as provided by the Washington Superior Court Civil rules CR45(b), to-wit:

A. Including but not limited to the following:

1. 1/7/88 Death of Mike & Dorothy Nickoloff
2. 1/8/88 - 1/26/88 Investigation of deaths
3. 1/27/88 Arrest of Russell Duane McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW

4.	3/12/88	Judge to decide if McNeil is to be tried as an adult
5.	3/15/88	Juveniles to be tried as adults
6.	4/13/88	Extension granted
7.	5/28/88	Jeffrey C. Sullivan seeks death penalty
8.	6/4/88	Legal disputes RE: Separate trials
9.	8/19/88	Defense argue death penalty
10.	9/10/88	Case to Supreme Court
11.	1/1/89	Nickoloff case is #2 news story
12.	1/11/89	Supreme Court denies motion RE: Death Penalty
13.	1/28/89	Additional Prosecuting Attorney hired to defend State RE: Complexity of McNeil case
14.	2/4/89	Case is delayed RE: U.S.S. Court
15.	2/7/89	McNeil trial to occur
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18.	4/21/89	Rice requests bail RE: to see mother
19.	5/27/89	Closed hearing issue discussed
20.	6/26/89	Supreme Court issues juvenile death penalty decision
21.	7/11/89	Judge Gavin rules on various matters; sets trial dates
22.	7/24/89 thru 7/26/89	McNeil 3.5 Hearing

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ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET

YOU ARE FURTHER COMMANDED to surrender and provide to Counsel a brief summary of statistical data regarding your estimated circulation, subscribers, radio audience, TV viewers, or geographical distribution.

DATED this 31st day of JULY, 1989.

CHRISTOPHER TAIT
Attorney for Defendant McNeil

SUBPOENA DUCES TECUM 3

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
730 SOUTH SECOND STREET

Service accepted and copy received of the foregoing

This 7th day of August 1989.

Chris Gavin / AJB

Attorneys for Defendant

FILED
AUG 7 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, v. RUSSELL DUANE McNEIL, Defendant.	NO. 88-1-00428-1 NOTE FOR MOTION DOCKET (Before Judge Gavin)

TO: The above named parties and their attorney of record.

The issues of Law in the above entitled cause will be brought on for hearing upon MOTION OF KAPP-TV TO QUASH OR MODIFY SUBPOENA DUCES TECUM on Friday, the 18th day of August, at the hour of 1:30 p.m., or as soon thereafter as the matter may be heard by the Court; and the Clerk will please note the same on the motion docket for hearing on said date.

DATED this 7th day of August, 1989.

MICHAEL F. SHINN, WSBA 14679,
Gavin, Robinson, Kendrick, Redman & Pratt, Inc., P.S.
Attorneys for KAPP-TV

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Service accepted and co[illegible]eceived of the foregoing

This 7th day of August 1989.

Chris Toit / [illegible]

Attorneys for Defendant

FILED

AUG 7 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

'89 AUG 7 PM 4 12

SUPER[illegible]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
v.	)	AFFIDAVIT OF DAVE ETTL
	)	
RUSSELL DUANE McNEIL,	)	
	)	
Defendant.	)	

STATE OF WASHINGTON)
: ss.
County of Yakima)

DAVE ETTL, being first duly sworn upon oath, deposes and states that:

1. I make this Affidavit of my own personal knowledge and I am competent to testify to the matters stated herein.

2. I am the news director for KAPP-TV, Yakima, Washington. I have been with KAPP for approximately five years, and my duties and responsibilities at KAPP include, but are not limited to, managing the news gathering activities of the station's producers, anchors and reporters, hiring and firing employees, inspecting, acquiring and replacing station equipment, and reviewing and providing input with regard to the operating

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budget of the station. I also helped design the station's filing system for story transcripts, and the warehousing of videotapes. As news director, and as a station manager, I am familiar with the duties and responsibilities of each of the station's employees, and the disruption to the news gathering process when even one employee is not engaged in his normal activities. Every employee typically devotes in excess of forty hours per week to the team effort in gathering, editing and producing the news.

3. KAPP-TV has approximately ten employees in the news department. The station usually has employed about five reporters and/or producers, it has one photographer, and approximately four anchors. KAPP broadcasts two news programs daily, five days per week, and there are generally between six to ten stories per day which we produce.

4. I have reviewed the Subpoena Duces Tecum served upon KAPP on or about July 31, 1989, in the above-referenced matter, and I am familiar with the procedure which would be required of the station to comply with the Subpoena. (A copy of the Subpoena is attached hereto and denominated Exhibit "A").

5. Of the KAPP-TV employees, the ones best suited to research our files for the requested stories would be our only photographer, Chuck Fuller, and myself. Our reporters, producers and anchors must be free to gather the news, and handle their assignments. The station photographer and I would be the most likely candidates for researching the logbooks, locating the videotapes, and then arranging for reproduction of the requested footage.

6. In order to comply with the Subpoena, Chuck and I would be forced to search through a year and a half's worth of paperwork. Each story is logged into a loose leaf binder, there being six to ten stories per day, and assuming an average of eight stories per day five days per week, we will have to review approximately 3,100 stories to find those sought pursuant to the

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Subpoena. Listed with each entry in the logbook is the number of the videotape to which it corresponds.

7. The videotapes are each sixty minutes in length. The stories which are requested would be scattered across dozens of these videotapes, each story being one to two minutes long. To find the story on the videotape, it would require one of us to scan through all of the footage, searching for the story related to this case. This process would, of necessity, tie up one of our only three edit bays and, of course, our only photographer and myself, when we would normally be engaged in other news gathering activities, and where all the edit bays are generally necessary for production of the news.

8. Once the stories were located on each of the tapes, we would then have to deliver them to our production staff for reproduction on another tape.

9. It is difficult to estimate the actual time necessary to accomplish this task, since we are first and foremost a news station, and we cannot neglect that function while we search for subpoenaed materials. We are not in the position to tie up equipment or people for hours, or days, at a time, as that necessarily jeopardizes our ability to put on a newscast. I estimate that it would take two full days to complete the process without interruption, if we did not have a newscast to prepare.

10. KAPP has, on occasion, provided copies of broadcast material on a limited basis, making copies of a single story, where it does not jeopardize the station's ability to prepare for each day's newscasts. In such cases, we generally charge $20.00 per story for the service, and we ask that the party requesting the information provide us with a ½-inch tape which we dub at our convenience. Compliance with this Subpoena would constitute a significantly greater investment in time and equipment. For a request such as this, it is my opinion that the sum of $650.00 would be a reasonable estimate for our costs, not including the

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tape. This would include a reasonable charge for labor of $200.00 for the photographer's and my time, estimated to be 20 hours, together with the station's charge of $20.00 per story for approximately 22 stories, or $450.00, for equipment costs and other employee time spent dubbing and reproducing the tapes.

FURTHER, your Affiant saith naught.

DAVE ETTL

SUBSCRIBED AND SWORN TO before me this 11th day of August, 1989.

Notary Public in and for the State of Washington, residing at Yakima.

My Commission expires: Feb. 12, 1993

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
	)	
	)	NO. 88-1-00428-1
Plaintiff,	)	
	)	
vs.	)	
	)	
RUSSELL DUANE MCNEIL,	)	SUBPOENA DUCES TECUM
	)	
Defendant .	)	

TO: KAPP, Channel 35
AND TO: Counsel

IN THE NAME OF THE STATE OF WASHINGTON, YOU ARE HEREBY COMMANDED TO SURRENDER any and all of the following transcripts and/or tapes of news media coverage of any and all kind and nature regarding the publicity surrounding the deaths of Mike and Dorothy Nickoloff and the Defendant Russell Duane McNeil and/or Herbert "Chief" Rice, now in your possession or under your control, immediately for the defense attorneys' review and presentation to the Honorable F. James Gavin as provided by the Washington Superior Court Civil rules CR45(b), to-wit:

A. Including but not limited to the following:

1. 1/7/88 Death of Mike & Dorothy Nickoloff
2. 1/8/88 - 1/26/88 Investigation of deaths
3. 1/27/88 Arrest of Russell Duane McNeil

EXHIBIT A

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
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4.	3/12/88	Judge to decide if McNeil is to be tried as an adult
5.	3/15/88	Juveniles to be tried as adults
6.	4/13/88	Extension granted
7.	5/28/88	Jeffrey C. Sullivan seeks death penalty
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22.	7/24/89 thru 7/26/89	McNeil 3.5 Hearing

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SUITE 20

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DATED this 31st day of JULY, 1989.

CHRISTOPHER TAIT
Attorney for Defendant McNeil

SUBPOENA DUCES TECUM 3

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET

Service accepted and copy received of the foregoing

This 7th day of August 1989

Chris Tait / RJB

Attorneys for Defendant

FILED

AUG 7 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, v. RUSSELL DUANE McNEIL, Defendant.	NO. 88-1-00428-1 MOTION OF KAPP-TV TO QUASH OR MODIFY SUBPOENA DUCES TECUM

COMES NOW KAPP-TV and moves the Court for an Order to Quash or Modify that certain Subpoena Duces Tecum dated July 31, 1989, and directed to KAPP-TV for production of various materials regarding media coverage of the deaths of Mike and Dorothy Nickoloff.

This Motion is based upon the First Amendment of the United States Constitution, Article I, Section 5 of the Washington State Constitution, Civil Rule 45(b), and supported by the attached Memorandum of Points and Authorities, and the Affidavit of Dave Ettl

DATED this 7th day of August, 1989.

MICHAEL F. SHINN, WSBA 14679,
of GAVIN, ROBINSON, KENDRICK,
REDMAN & PRATT, INC., P.S.,
Attorneys for KAPP-TV

LAW OFFICES OF
GAVIN, ROBINSON, KENDRICK, REDMAN
& PRATT, INC., P.S.
120 NORTH NACHES AVENUE
P. O. BOX 2249
YAKIMA, WASHINGTON 98907
TELEPHONE (509) 453-9131

205

C. J. MERRITT
CLERK

STEVEN P. HELGESON
DEPUTY CLERK

(206) 753-5080

The Supreme Court

State of Washington

Sixth Floor Highways-Licenses Building
12th and Washington Street
Mail Stop AV-11
Olympia, WA 98504-0511

89 AUG 7 PM 1 20

SUPE

FILED
AUG 7 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

August 4, 1989

Prediletto, Halpin, Cannon,
Scharnikow & Bothwell
Mr. Thomas Bothwell
P. O. Box 2129
Yakima, Washington 98907

Honorable Jeffrey Sullivan
Yakima County Courthouse
Mr. Howard Hansen, Deputy
329 County Courthouse
Yakima, Washington 98901

Tait & Torok
Mr. Christopher Tait
103 S. Third Street
Yakima, Washington 98901

Re: Supreme Court No. 56328-4 - State v. Russell Duane McNeil
Yakima County No. 88-1-00428-1

Counsel:

Enclosed please find Ruling Denying Motion for Discretionary Review, signed by the Supreme Court Commissioner on August 4, 1989, in the above entitled cause.

Sincerely,

C. J. MERRITT
Supreme Court Clerk

BJH: tt

cc: Hon. Betty McGillen, Clerk
Yakima County Superior Court

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RUSSELL DUANE McNEIL, Petitioner.	)	NO. 56328-4 RULING DENYING MOTION FOR DISCRETIONARY REVIEW

Russell Duane McNeil has been charged by the Yakima County Prosecuting Attorney with two counts of aggravated first degree murder, each with an attendant notice of intent to seek the death penalty. On July 24, 1989, the trial court entered a discovery order requiring Mr. McNeil's counsel to produce to the prosecution a letter in counsel's possession which was purportedly written by Mr. McNeil to a young woman. Mr. McNeil now moves for discretionary review of this discovery order. Trial is presently set to begin on September 5, 1989.

Mr. McNeil advances several arguments why the trial court erred in requiring production of this letter. Although those arguments are summarized generally in Mr. McNeil's pleadings to this court, a detailed explanation of his factual and legal theories has been presented only at an in camera hearing held before the trial court. I have read the sealed record of that

193/170

hearing, and have considered all of counsel's arguments, but find no basis for granting discretionary review.

Counsel first argues that the letter is simply not discoverable under CrR 4.7(b)(2)(x), because the defense has no plans to introduce the document at trial. This rule, however, allows the trial court to require inspection of any "physical or documentary evidence in defendant's possession; . . ." Unlike other discovery rules, e.g., CrR 4.7(g), this rule does not predicate discovery on the defendant's intent to use the evidence at trial. Although Mr. McNeil suggests that the judicial "gloss" given CrR 4.7(b)(2)(x) requires such a limitation, he cites no authority for this proposition and none has been found.

Nor has Mr. McNeil provided persuasive authority for his arguments that, under the "unique circumstances" of this case, the letter should be protected from discovery under the attorney-client privilege or the work product doctrine. To be protected as privileged communications, information or objects acquired by an attorney must have been communicated or delivered to the attorney by the client, and not merely obtained by the attorney while acting in that capacity for the client. State ex rel. Sowers v. Olwell, 64 Wn. 2d 828, 394 P. 2d 681 (1964). Here, the letter was delivered to the young woman to whom it was addressed, and only through a rather circuitous route made its way to counsel. There is no basis for concluding that this young woman or others who handled the letter acted merely as agents or a conduit for Mr. McNeil in his communication with counsel.

Similarly, counsel has provided no persuasive support for his contention that the letter represents work product protected from disclosure by CrR 4.7(f)(1). Even taking into account counsel's in camera representations and argument, there is simply nothing about this letter which qualifies as "opinions, theories or conclusions. . . ." Id. The possibility that a particular piece of evidence may lead counsel to entertain certain opinions, theories or conclusions about the case cannot somehow make the evidence a product of counsel's work to be protected from discovery, even if counsel may have had some hand in eliciting the evidence.

Finally, Mr. McNeil claims that requiring disclosure of this letter would violate his constitutional right against involuntary self-incrimination. There is no merit to this contention. A confession is involuntary in the constitutional sense only if it is the product of governmental coercion. Colorado v. Connelly, 479 U.S. 157, 93 L. Ed. 2d 473, 107 S. Ct. 515 (1986). Here, no allegation has been made that any government officer caused Mr. McNeil to write the letter. The possibility that some other sort of compulsion may have impelled Mr. McNeil is irrelevant under Connelly.

Mr. McNeil suggests that, since he (through his attorney) is now again in possession of the letter, the case is no different from one in which a defendant is compelled to give up incriminating documents which have never left his possession. He thus would find the compulsion forbidden by the Constitution in the prosecution's

use of the discovery process to obtain the letter. This court rejected a strikingly similar argument in State v. Grove, 65 Wn. 2d 525, 398 P. 2d 170 (1965). There, defense counsel had obtained a letter written from jail by the defendant to his wife. The State learned of the letter and obtained a court order requiring counsel to produce it. In reviewing the propriety of this order, this court first held that the letter was not a privileged communication between husband and wife, because the defendant gave it unsealed to a jail guard to be censored in accordance with jail procedures before being sent to the wife. The court then rejected the defendant's argument that court-ordered production of the letter violated the defendant's constitutional rights:

> Counsel's argument seems to be that defendant's right to counsel, to communicate with counsel, and to abstain from testifying against himself, have been violated. . . . In fact, the letter, under the circumstances herein, involves no communication between attorney and client. What is involved is an effort to withhold evidence that was incriminating to the defendant.

Grove, at 528. While the court's reasoning might have been more fully explained, the court's conclusion is quite clear: "there was no violation of the privilege against self-incrimination. . . ." Id., at 529.

This conclusion finds support in the oft-stated notion that "[a] party is privileged from producing the evidence but not from its production." Johnson v. United States, 228 U. S. 457, 458, 57 L. Ed. 919, 33 S. Ct. 572 (1913). In Johnson the Court concluded that "[i]f the documentary confession comes to a third hand

alio intuitu, as this did, the use of it in court does not compel the defendant to be a witness against himself." Id., at 459. The Court has employed like reasoning to reject an argument that production of a defendant's own records from the possession of her accountant violated the Fifth Amendment. Couch v. United States, 409 U.S. 322, 34 L. Ed. 2d 548, 93 S. Ct. 611 (1973). The Court explained that in such a case "the ingredient of personal compulsion against an accused is lacking." Id., at 329. Similarly, in a later case the defendants had obtained the documents in question from their accountants and shortly thereafter transferred them to their attorneys. The Court held that the defendants' Fifth Amendment privilege was not violated by compelled production:

> The fact that the attorneys are agents of the taxpayers does not change this result. Couch held as much, since the accountant there was also the taxpayer's agent, . . .
> . . .
> "It is extortion of information from the accused himself that offends our sense of justice." Couch v. United States, supra at 328. Agent or no, the lawyer is not the taxpayer. The taxpayer is the "accused," and nothing is being extracted from him.

Fisher v. United States, 425 U.S. 391, 397-988, 48 L. Ed. 2d 39, 96 S. Ct. 1569 (1976).

Apparently the Supreme Court's most recent relevant pronouncement is in United States v. Doe, 465 U.S. 605, 79 L. Ed. 2d 552, 104 S.Ct. 1237 (1984). There, the Court said:

> If the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged.

Doe, at 612 n. 10. The Court also concluded that "[t]he fact that the records are in respondent's possession is irrelevant to the determination of whether the creation of the records was compelled." Id., at 612. See also Andresen v. Maryland, 427 U.S. 463, 49 L. Ed. 2d 627, 96 S. Ct. 2737 (1976); Doe v. United States, 487 U.S. ___, 101 L. Ed. 2d 184, 108 S. Ct. ___ (1988).

Taken together, these cases support the trial court's decision here. The letter is no longer in Mr. McNeil's possession. Since he was not compelled by the State to write the letter, or to send it to the young woman, the Fifth Amendment provides no protection against its disclosure.

In sum, Mr. McNeil has provided no persuasive basis for granting discretionary review under the criteria of RAP 2.3(b). Accordingly, his motion for discretionary review is denied.

Dated at Olympia, Washington, August 4, 1989.

COMMISSIONER

FILED
JUL 31 1989
MICRO NO: 355
BETTY McGILLEN

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	
	)	ORDER AUTHORIZING
RUSSELL DUANE McNEIL,	)	PAYMENT BY YAKIMA
	)	COUNTY
	)	
Defendant	)	

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY AND PRIVATE INVESTIGATOR FEES AND EXPENSES for the month of July, 1989, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

(1) The sum of $4850.60 payable to attorney CHRISTOPHER TAIT, 230 South Second Street, Suite 201, Yakima, WA 98901;

(2) The sum of $1,443.75 payable to DIANA G. PARKER, in care of the office of attorney Christopher Tait.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DATED this 31 day of July, 1989.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

CHRISTOPHER TAIT
Attorney for Defendant McNeil

ORDER AUTHORIZING
PAYMENT BY YAKIMA
COUNTY 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
JUL 31 1989
BETTY McGILLEN

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	DEFENDANT'S MOTION
	)	AND SUPPORTING
RUSSELL DUANE McNEIL,	)	DECLARATION FOR
	)	ORDER APPROVING
	)	ATTORNEY FEES
Defendant	)	

MOTION

THE UNDERSIGNED attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for the undersigned defense counsel and private investigator for the month of July,1989.

THIS MOTION is based upon the files and records herein and the DECLARATION OF COUNSEL hereinbelow.

DATED this 31st day of July, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

202

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct.

The Undersigned is one of the court-appointed counsel for defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference is my statement of time expended, together with that of our private investigator in this case for the month of July, 1989.

SIGNED AND DATED at Yakima, Washington, this 31st day of July, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
7/17/89	Out	Review wits list, read JL docs, Letter to JL, letter to client, conf CT, Conf CT (HH)	4.50
7/18/89	Out	Review T.B. docs, conf CT, jail Conf cl (HWE), trip to locate BS, JL	5.00
7/19/89	Out	Court (CT, TAB, DP), see evidence, Jail conf cl, review autopsy report	6.50
7/20/89	Out	Prepare mateials for CT (RD) prepare Photo/Objection materials< call to Mrs. C, LD Cons RE: DSHS gap, letter to DK RE: R.M., conf CT	6.00
7/21/89	Out	Prepare CH V materials, tiral prep, copies, Her Rep	4.00
7/24/89	Out	Court (3.5 Hearing, etc)	8.00
7/25/89	Out	Court (3.5 Hearing, etc)	9.00
7/26/89	Out	Court (3.5 Hearing, etc)	8.00
7/27/89	Out	Call YSO, Conf CT, prepare Scheduling, Review KR Motions	3.75
7/28/89	Out	Conf Ct, jail conf cl, letter to JMN Letter to RMN, prepare subpoena RE: publicity	3.00
		TOTAL HOURS	57.75

57.75 Out-Of-Court hrs. at $25.00 Per Hour = **$1,443.75**

RECORD OF TIME

CHRISTOPHER TAIT — July 31, 1989

STATE vs. RUSSELL DUANE McNEIL

Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
7/3/89	Out	Conf DP, review motions, jail	2.00
7/5/89	Out	DP motions	1.00
7/10/89	Out	Conf all counsel, review pleadings	2.00
7/11/89	In	Argument on motions	6.00
7/11/89	Out	Conf TAB, DP	2.00
7/12/89	In	Court Appearance	1.00
7/12/89	Out	Review Motions, draft waiver, jail Conf cl, conf TAB, DP	5.00
7/13/89	Out	Conf Fickes, DP, jail visit, review motions	4.00
7/14/89	Out	Conf Ross, DP, motions,	1.00
7/17/89	Out	Conf counsel, HWH, TAB, DP) review memos	2.50
7/18/89	Out	Handwriting exemplar, jail visit, Wapato, Davis, Hoffman, repts of Englert	6.00
7/18/89	Out	*46 miles at 22.5 Cents = **$10.35**	*
7/19/89	In	Motions on photo evidence,	3.00
7/19/89	Out	Jail visit, conf DP, TAB, draft declaration, conf clerk,	5.00
7/20/89	Out	Conf counsel, DP, review motions	2.00

7/21/89	Out	Travel to Seattle, conf DAVIS, REAY, BECK, work on motions	10.00
7/21/89	Out	*290 Miles at 22.5 Cents = **$65.25**	*
7/24/89	In	3.5 hrng.	6.00
7/24/89	Out	Prepare affidavit, conf TAB, DP, Review motions	3.00
7/25/89	In	3.5 Hrng	7..00
7/25/89	OUt	Conf client, review reports, conf TAB, motions	3.00
7/26/89	In	3.5 Hrng	7.00
7/26/89	Out	Conf cl, TAB, DP, JCS, motions	3.00
7/27/89	Out	Research, conf counsel, motion and declaration	3.00
7/28/89	Out	Conf JCS, motions, jail conf cl, Conf DP, review subpoena	5.00

Time Out-- 59.50 x $50 = $2,975.00
Time In--- 30 x $60 = $1,800.00
Travel 336miles x 22.5= $ 75.60
$4,850.60

FILED
JUL 31 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

89 JUL 31 AM 10 37

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	MOTION TO DISMISS
	)	NOTICE OF SPECIAL
RUSSELL DUANE McNEIL,	)	SENTENCING PROCEEDING
	)	FOR INSUFFICIENCY OF
	)	THE EVIDENCE
Defendant	)	

Comes now defendant Russell Duane McNeil, by and through his counsel Christopher Tait and Thomas A. Bothwell, and moves the court for the entry of an order dismissing the NOTICE OF SPECIAL SENTENCING PROCEEDING for insufficiency of the evidence. This motion is based on the records and files herein, and on the declaration of counsel, attached hereto and hereby incorporated by reference.

DATED this 27th day of July, 1989.

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	DECLARATION OF
RUSSELL DUANE McNEIL,	)	COUNSEL TAIT
	)	
Defendant	)	

CHRISTOPHER TAIT, under the penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned counsel for defendant Russell Duane McNeil, declares to the court that on July 11, 1989, in open court, Jeffrey C. Sullivan, who is the Prosecuting Attorney for Yakima County, stated that if this case proceeds into a penalty phase, he will call no witnesses, and would offer in aggravation only the certified copies of juvenile court records showing that defendant was convicted of second degree burglary in December of 1983, when he was 13 years old.

DATED at Yakima, Washington, this 27th day of July, 1989.

Christopher Tait

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
JUL 31 1989
BETTY MCGILLEN
YAKIMA COUNTY CLERK

'89 JUL 31 AM 10 42

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	)	NO. 88-1-00428-1
vs.	)	
RUSSELL DUANE MCNEIL, Defendant .	)	SUBPOENA DUCES TECUM

TO:
AND TO:

IN THE NAME OF THE STATE OF WASHINGTON, YOU ARE HEREBY COMMANDED TO SURRENDER any and all of the following transcripts and/or tapes of news media coverage of any and all kind and nature regarding the publicity surrounding the deaths of Mike and Dorothy Nickoloff and the Defendant Russell Duane McNeil and/or Herbert "Chief" Rice, now in your possession or under your control, immediately for the defense attorneys' review and presentation to the Honorable F. James Gavin as provided by the Washington Superior Court Civil rules CR45(b), to-wit:

A. Including but not limited to the following:

1. 1/7/88 Death of Mike & Dorothy Nickoloff
2. 1/8/88 - 1/26/88 Investigation of deaths
3. 1/27/88 Arrest of Russell Duane McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
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YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

200

4.	3/12/88	Judge to decide if McNeil is to be tried as an adult
5.	3/15/88	Juveniles to be tried as adults
6.	4/13/88	Extension granted
7.	5/28/88	Jeffrey C. Sullivan seeks death penalty
8.	6/4/88	Legal disputes RE: Separate trials
9.	8/19/88	Defense argue death penalty
10.	9/10/88	Case to Supreme Court
11.	1/1/89	Nickoloff case is #2 news story
12.	1/11/89	Supreme Court denies motion RE: Death Penalty
13.	1/28/89	Additional Prosecuting Attorney hired to defend State RE: Complexity of McNeil case
14.	2/4/89	Case is delayed RE: U.S.S. Court
15.	2/7/89	McNeil trial to occur
16.	2/26/89	Two teens up for death penalty
17.	4/11/89	Closed hearing requested
18.	4/21/89	Rice requests bail RE: to see mother
19.	5/27/89	Closed hearing issue discussed
20.	6/26/89	Supreme Court issues juvenile death penalty decision
21.	7/11/89	Judge Gavin rules on various matters; sets trial dates
22.	7/24/89 thru 7/26/89	McNeil 3.5 Hearing

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

YOU ARE FURTHER COMMANDED to surrender and provide to Counsel a brief summary of statistical data regarding your estimated circulation, subscribers, radio audience, TV viewers, or geographical distribution.

DATED this 31st day of JULY, 1989.

CHRISTOPHER TAIT
Attorney for Defendant McNeil

SUBPOENA DUCES TECUM 3

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

EXHIBIT LIST

CUSTODY OR REAL PROPERTY

CAUSE NO. 88-1-00428-1 ACTION 3.5 Hearing

STATE OF WASHINGTON VS. RUSSELL DUANE McNEIL

Howard Hansen, Jeff Sullivan
Attorney(s)

Thomas Bothwell, Chris Tait
Attorney(s)

JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN DEPT. NO. 3

REPORTER Lonna Baugher CLERK Laurie Campbell

DATE	PLAINTIFF'S EXHIBITS (Description)	ADMITTED	DEFENDANT'S EXHIBITS (Description)	DATE
7-25-89	SEF Miranda Warning Waiver	X		
"	SEG copy of Miranda Card	X		
"	SEH copy of file #83-8-820-5	X		
"	SEI copy of file #86-8-194-9	X		
"	SIJ copy of recitation sheet (McNeil)		(illegible)	
"	SIK copy of Indigent Defendant Declining		(illegible)	
	for purposes of 3.5 hearing (McNeil) re-admitted B, C1, C2 + E			

FILED
JUL 26 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

In the Superior Court of the State of Washington
for Yakima County
WITNESS RECORD

No. 88-1-428-1

State of WA vs. Russell Mayo

Plaintiff Defendant

STATE OF WASHINGTON, COUNTY OF YAKIMA. } ss.

'88 JUL 26 PM 5 22

DEPUTY

We, the Witnesses in the above entitled cause, do solemnly swear that the distance coming to and returning from said Court to our place of residence by the most usual route of travel is the number of miles set opposite our names.

Subscribed and sworn to before me this 26 day of July, 1989.

Dept 3

Please Print Name Above Signature

BETTY McGILLEN, Clerk

Sharon Kirk Deputy Clerk

C-11

Signature of Witness	Address	Month of July 1989	No. Days Attend.	No. Miles Traveled	Total Amount Due
Bill Gillespie Bill Gillespie	1728 Jerome Ave Yakima, Wa 98902 Juvenile Dept	Plf. X Def.	1	0	10 —
~~Bill Gillespie~~	Does not get Paid per J. Sullivan	Plf. Def. 7-31-89			
		Plf. Def.			
		Plf. Def.			
		Plf. Def.			
		Plf. Def.			
		Plf. Def.			
		Plf. Def.			
		Plf. Def.			
	FILED JUL 26 1989 BETTY McGILLEN YAKIMA COUNTY CLERK	Plf. Def.			
		Plf. Def.			
		Plf. Def.			
		Plf. Def.			
		Plf. Def.			
		Plf. Def.			
		Plf. Def.			
		Plf. Def.			
		Plf. Def.			
		Plf. Def.			

CERTIFICATE OF TRANSMITTAL
I hereby certify that ~~I have~~ delivered a copy of this to the attorneys for the plaintiff/~~plaintiffs by mail, postage prepaid, or by attorney's messenger service~~. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
Yakima, WA. July 26, 1989.
Date
Thomas Bothwell /sb

FILED
JUL 26 1989
BETTY McGILLEM
YAKIMA COUNTY CLERK

89 JUL 26 PM 1:04

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 ADDITIONAL MOTIONS ON BEHALF OF DEFENDANT McNEIL

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and here makes the following additional motions:

(1) Requiring all State's witnesses to bring with them, contemporaneous with their testifying, all documents and other tangible things relating to this case.

(2) Precluding the use of peremptory challenges by the prosecutor relative to prospective jurors who express qualms about the death penalty.

(3) Requiring the prosecutor, pre-trial, to specify any and all aggravating factors which the prosecution contends are involved in this case and ordering, in limine, that the prosecutor may only argue and otherwise present to the jury those aggravating factors or factor which this Court determines are admissible.

(4) Motion in limine to exclude any reference whatsoever to Defendant's prior conviction(s).

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

(5) Motion in limine to bar any reference whatsoever to Defendant's non-adjudicated prior criminal history.

DATED this 26th day of July, 1989.

THOMAS BOTHWELL
Of Attorneys for Defendant

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

'88 JUL 28 AM 8 03

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

SUPERIOR

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	
RUSSELL DUANE McNEIL,	)	DEFENDANT'S LIST
	)	OF WITNESSES DURING
Defendant	)	GUILT PHASE

1. Raymond Davis
Quantum Analytical
1000 8th Avenue, Suite 705
Seattle, Wa 98104
(206) 621-1264

2. Dr. Don Reay
King County Medical Examiner's Office
Harborview Hospital
Seattle, WA 98111
(206) 223-3232

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

JUL 26 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	MOTION TO LIMIT
RUSSELL DUANE McNEIL,	)	DISCOVERY OF
	)	PENALTY PHASE
Defendant	)	WITNESSES UNTIL
	)	AFTER COMPLETION
	)	OF GUILT PHASE

Comes now defendant Rusell Duane McNeil, by and through his counsel Christopher Tait and Thomas A. Bothwell, and moves the court for the entry of an order delaying the discovery of his penalty phase witnesses until after the completion of the guilt phase on the grounds that discovery before that time will result in the delivery of incriminating information to the Prosecuting Attorney which will be used against this defendant in the guilt phase;

DATED this 26th day of July, 1989.

CHRISTOPHER TAIT
Attorney for Defenant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
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FILED

JUL 26 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

'89 JUL 26 AM 8 01

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	
RUSSELL DUANE McNEIL,	)	MOTION FOR JURY
	)	VIEW OF DEFENDANT'S
Defendant	)	HOME

Comes now Defendant Russell Duane McNeil, by and through his counsel Christopher Tait and Thomas A. Bothwell, and moves the court for the entry of an order permitting the jury, during the penalty phase, to travel to and to view the former home of the defendant on South Wapato Road near Yost Road in Yakima County;

DATED this 26th day of July, 1989.

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
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JUL 26 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

'89 JUL 26 AM 9 01

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	
RUSSELL DUANE McNEIL,	)	MOTION TO
	)	SEQUESTER JURY
Defendant	)	

Comes now Defendant Russell Duane McNeil, by and through his counsel Christopher Tait and Thomas A. Bothwell, and moves the court for the entry of an order sequestering the jury from the time the jury is sworn until their verdict is announced in open court;

DATED this 26th day of July, 1989.

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
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JUL 26 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	
RUSSELL DUANE McNEIL,	)	MOTION TO EXCLUDE
	)	DEATH BECAUSE HANGING
Defendant	)	IS CRUEL PUNISHMENT

Comes now defendant Russell Duane McNeil, by and through his counsel Christopher Tait and Thomas A. Bothwell, and moves the court for the entry of an order excluding death as an alternative at the penalty phase on the grounds that hanging is constitutionally impermissible because it is cruel punishment;

DATED this 26th day of July, 1989.

Christopher Tait

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
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JUL 26 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	
RUSSELL DUANE McNEIL,	)	MOTION FOR ADDITIONAL
	)	PEREMPTORY CHALLENGES
Defendant	)	

Comes now defendant Russell Duane McNeil, by and through his counsel Christopher Tait and Thomas A. Bothwell, and moves the court for the entry of an order granting him and additional twelve (12) peremptory challenges during jury selection, on the grounds that unfavorable pre-trial publicity has and will make selection of an impartial jury impossible with only twelve (12) peremptory challenges.

DATED this 26th day of July, 1989.

CHRISTOPHER TAIT
Attorney for Defendant

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
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230 SOUTH SECOND STREET
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YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

JUL 25 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,
Plaintiff,
-vs
RUSSELL DUANE McNEIL,
Defendant.

NO. 88-1-00428-1

AFFIDAVIT OF MAILING

I, Robbin K. Wadsworth, being first duly sworn on oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of 21 years, not a party of the above-entitled proceedings and competent to be a witness therein.

On the 25th day of July, 1989, I mailed copies of the Notice of Discretionary Review to Supreme Court, Index of Appellant's Transcript of Clerk's Papers on Appeal and copy of letter sent to Supreme Court Clk upon transfer of documents in the above-entitled matter:

TO: Thomas Bothwell/302 N. 3rd St./Yakima, WA 98901
(Excluding Ntc of Discretionary Review)
Attorney for Defendant

TO: Christopher Tait/103 S. 3rd St./Yakima, WA 98901
(Excluding Ntc of Discretionary Review)
Attorney for Defendant

TO: Jeffrey Sullivan/Prosecuting Atty's Office/Courthouse/Yakima, WA
Attorney for Plaintiff

TO: Howard Hansen/Prosecuting Atty's Office/Courthouse/Yakima, WA
Attorney for Plaintiff

BETTY McGILLEN
Yakima County Clerk

By Robbin K. Wadsworth
Deputy Clerk

SUBSCRIBED AND SWORN TO before me this 25th day of July, 1989.

Patricia A. Kyllonen
NOTARY PUBLIC in and for the State of Washington, residing at Yakima.

9

JUL 25 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

'89 JUL 25 AM 10 49

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DESIGNATION OF CLERK'S PAPERS

TO: TRANSCRIPT CLERK OF THE ABOVE-ENTITLED COURT; and

TO: STATE OF WASHINGTON, Plaintiff, and JEFFREY C. SULLIVAN and HOWARD W. HANSEN, YAKIMA COUNTY PROSECUTOR'S OFFICE, Of Attorneys for Plaintiff:

Please prepare for transmittal to the Supreme Court of Washington, the clerk's papers and exhibits listed below. If you have any questions or if any of the exhibits are too cumbersome and subject to RAP 9.8(b), please contact the undersigned.

DATED this 25th day of July, 1989.

THOMAS BOTHWELL
Attorney for Defendant/Appellant

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
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189

CLERK'S PAPERS

DOCUMENT SUB. NO.	FILING DATE	NAME OF DOCUMENT
None	07/18 or 07/19/89	Affidavit of Christopher S. Tait with attached letter, under seal.

CERTIFICATE OF PERSONAL SERVICE

THOMAS BOTHWELL, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that, on this 25th day of July, 1989, I personally served a true and correct copy of the foregoing DESIGNATION OF CLERK'S PAPERS in this cause upon:

MR. JEFFREY C. SULLIVAN, Prosecuting Attorney, and
MR. HOWARD W. HANSEN, Deputy Prosecuting Attorney
329 Yakima County Courthouse
Yakima, WA, 98901

SIGNED, DATED AND SERVED at Yakima, Washington, this 25th day of July, 1989.

THOMAS BOTHWELL

/ / /

LAW OFFICES OF
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SCHARNIKOW & BOTHWELL, P.S.
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FILED
and Micro filmed
JUL 25 1989
Roll No. 353 812
BETTY McGILLEN, YAKIMA COUNTY CLERK

'89 JUL 25 AM 10 49

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 NOTICE OF DISCRETIONARY REVIEW TO SUPREME COURT

TO: CLERK OF THE ABOVE-ENTITLED COURT; and

TO: STATE OF WASHINGTON, Plaintiff, and JEFFREY C. SULLIVAN, Prosecuting Attorney, and HOWARD W. HANSEN, Deputy Prosecuting Attorney, Of Attorneys for Plaintiff:

NOTICE IS HEREBY GIVEN that RUSSELL DUANE McNEIL, the above-named Defendant, seeks review by the designated appellate court of the orders requiring counsel for the Defendant Russell McNeil to provide to the prosecutor a letter allegedly written by said Defendant, said letter being in the possession of Defendant's attorney. Said orders were entered on July 11 and 24, 1989.

DATED this 24th day of July, 1989.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

NAMES AND ADDRESSES OF ATTORNEYS FOR THE PARTIES:

FOR THE DEFENDANT:

THOMAS BOTHWELL
Prediletto, Halpin, Cannon,
Scharnikow & Bothwell, P.S.
302 North Third Street
P.O. Box #2129
Yakima, WA, 98907-2129
Telephone: 509/248-1900

CHRISTOPHER S. TAIT
230 South Second Street
Yakima, WA, 98901
Telephone: 509/248-1346

FOR THE PLAINTIFF:

JEFFREY C. SULLIVAN
Prosecuting Attorney
329 Yakima County Courthouse
Yakima, WA, 98901
Telephone: 509/575-4141

HOWARD W. HANSEN
Deputy Prosecuting Attorney
329 Yakima County Courthouse
Yakima, WA, 98901
Telephone: 509/575-4141

DEFENDANT:

RUSSELL DUANE McNEIL
Yakima County Jail
111 North Front Street
Yakima, WA, 98901

/ / /

LAW OFFICES OF
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SCHARNIKOW & BOTHWELL, P.S.
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YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	)	
-vs-	)	NO. 88-1-00428-1
RUSSELL DUANE McNEIL, Defendant.	)	(Appeal No. _____)

I N D E X

(Appellant's)

	Page
AFFIDAVIT OF CHRISTOPHER S. TAIT with attached letter (filed 7/19/89)	3 *
DESIGNATION OF CLERK'S PAPERS	1-2

(*) **This document has been sealed by order of Judge Gavin. To be opened only by Judge Gavin or the Supreme Court.**

JUL 25 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

EXHIBIT LIST

CUSTODY OR REAL PROPERTY

CAUSE NO. 88-1-00428-1 ACTION Motions In Limine

STATE OF WASHINGTON VS. RUSSELL DUANE McNEIL

Howard Hansen, Jeff Sullivan Attorney(s)

Thomas Bothwell, Chris Tait Attorney(s)

JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN DEPT. NO. 3

REPORTER Lonna Baugher CLERK Laurie Campbell

DATE	PLAINTIFF'S EXHIBITS (Description)	ADMITTED	DEFENDANT'S EXHIBITS (Description)	DATE
7-24-89	SI 1 photo			
"	SI 2 photo			
"	SI 3 photo			
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"	SI 38 photo			

EXHIBIT LIST

CUSTODY OR REAL PROPERTY

CAUSE NO. 88-1-00428-1 ACTION Motions in Limine

STATE OF WASHINGTON VS. RUSSELL DUANE McNEIL

Howard Hansen, Jeff Sullivan Attorney(s)

Thomas Bothwell, Chris Tait Attorney(s)

JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN DEPT. NO. 3

REPORTER Lonna Baugher CLERK Laurie Campbell

DATE	PLAINTIFF'S EXHIBITS (Description)	ADMITTED	DEFENDANT'S EXHIBITS (Description)	DATE
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"	S1 75 photo			
"	S1 76 photo			

EXHIBIT LIST

CUSTODY OR _____
REAL PROPERTY

CAUSE NO. 88-1-00428-1 ACTION Motions In Limine

STATE OF WASHINGTON VS. RUSSELL DUANE McNEIL

Howard Hansen, Jeff Sullivan
Attorney(s)

Thomas Bothwell, Chris Tait
Attorney(s)

JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN DEPT. NO. 3

REPORTER Lonna Baugher CLERK Laurie Cambell

DATE	PLAINTIFF'S EXHIBITS (Description)	ADMITTED	DEFENDANT'S EXHIBITS (Description)	DATE
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"	S1 78 photo			
"	S1 79 photocopy of photo			

FILED and Micro filmed
JUL 24 1989
Roll No. 353 614
BETTY McGILLEN, YAKIMA COUNTY CLERK
'88 JUL 24 AM 11 54

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant.

No. 88-1-00428-1

AMENDED ORDER AUTHORIZING DISCOVERY BY PLAINTIFF

THIS MATTER coming on regularly for hearing and the Court having considered the record and file herein, including the following: [PLAINTIFF'S] MOTION AND AFFIDAVIT FOR DISCOVERY OF EVIDENCE IN THE POSSESSION OF THE DEFENSE; [PLAINTIFF'S] MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION FOR DISCOVERY; the affidavit of Deputy Prosecutor Howard Hansen in support of Plaintiff's motion; DEFENDANT RUSSELL McNEIL'S RESPONSE TO THE STATE'S MOTION FOR DISCOVERY OF EVIDENCE; as well as in camera testimony and argument July 11, 1989, and additional argument July 19, 1989, now, therefore, it is hereby ORDERED as follows:

(1) Authorizing discovery by Plaintiff with respect to the document in question , and requiring Defendant McNeil's counsel to produce the said document, would violate neither attorney-client privilege, attorney work product immunity from discovery, nor Defendant's constitutional protection right against self-incrimination as provided for under the state and federal constitutions. Plaintiff's right to discover said document is provided for by CrR 4.7(b)(2)(x).

LAW OFFICES OF
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TEL. 248-1900 AREA CODE 509

(2) Defendant has demonstrated and represented to this Court his intent to seek review of the Court's order entered July 11, 1989, with respect to said document.

(3) The deadline by which said document must be disclosed to the Plaintiff is extended to August 11, 1989, at noon, unless stayed by the appellate court.

(4) The verbatim report of the July 11, 1989, in camera proceedings shall be sealed, subject to the right of review by an appellate tribunal. Said verbatim report of proceedings shall be transmitted to the Supreme Court for consideration of Defendant's motion for discretionary review of this order.

(5) A copy of the document which is the subject of this discovery order has been placed under seal, and shall be transmitted to the appellate tribunal by the Clerk of this Court, for consideration of Defendant's motion for discretionary review of this order.

(6) Unless a stay order is entered by an appellate court prior to August 11, 1989, at noon, Defendant's counsel shall immediately thereafter produce the original of the document (further referenced in the July 11, 1989, order) to the prosecutor's office. At that time, counsel for Defendant McNeil shall also provide a copy of said document to counsel for Defendant Rice in Cause No. 88-1-00427-2. Neither the prosecutor's office nor counsel for Mr. Rice may disclose the contents of said document pending court order as to the admissibility of said document.

(7) The verbatim report of the July 19, 1989, proceedings relative to Plaintiff's motion for discovery shall also be transmitted by the Clerk of this Court for consideration of Defendant's motion for review of this order.

(8) The trial of Defendant Russell McNeil is scheduled to commence September 5, 1989. ~~Subject to any~~ unless stayed by the appellate court, ~~stay~~ order, ~~neither pre-trial, nor trial proceedings shall be continued~~

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nor stayed as a result of Defendant McNeil's motion for discretionary review of this order.

DATED this 24th day of July, 1989.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

THOMAS BOTHWELL
CHRISTOPHER S. TAIT
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
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YAKIMA, WASHINGTON 98907-2129
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FILED
JUL 24 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	
	)	
RUSSELL DUANE McNEIL,	)	
	)	AFFIDAVIT OF
Defendant	)	CHRISTOPHER TAIT
	)	
	)	

STATE OF WASHINGTON)
)ss.
COUNTY OF YAKIMA)

My name is Christopher Tait. I am lead counsel for Russell D. McNeil, who is the defendant in this case.

This affidavit is made in support of my Motion to Close the 3.5 Hearing, and my Motion to Change Venue.

The evidence will show that on or about January 27, 1988, my client was taken into custody by detectives of the Yakima County Sheriff's Department.

Within minutes of his arrest, the evidence will show that the defendant began answering questions about these homocides. He admitted being in the house when the victims were killed. He admitted driving to their house with Herbert Rice, who is charged

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ATTORNEY AND COUNSELOR AT LAW
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with the same crimes in a companion case. He admitted knowing that Herbert Rice was armed with a knife before their arrival at the victims' home. He admitted stabbing one of the victims with a knife which he had in his possession. He described the location of the victims' bodies. He described items of personal property which were removed from the victims' house.

The evidence will show that certain answers given by this defendant matched other items of physical evidence. This will be offered by the prosecution as proof of the defendant's involvement, as if only the perpetrator of the crime could have known certain facts.

The statement given by defendant will be offered as a "full confession" by this defendant. Since Herbert Rice is not involved in this hearing, the public will be forced to speculate about the content of any statement given by Mr. Rice. Some may conclude that Mr. McNeil is more culpable than Mr. Rice, simply because the content of his statement is publicized first. This speculation, occurring only a month before trial, will be very damaging to this defendant.

This case was identified by readers of the Yakima Herald Republic as the number two news story of 1988. Attached hereto and hereby incorporated by reference is a copy of that article.

Attached hereto and hereby incorporated by reference are copies of narrative reports written by Deputies Hafsos and Shaw concerning their arrest of and interrogation of Russell McNeil. I expect their testimony at this 3.5 Hearing to be consistent with their reports. Particular attention is drawn to the report of Deputy Shaw, and the manner in which he asked Russell McNeil if he had murdered Mrs. Nickoloff.

CHRISTOPHER TAIT
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This case has been the subject of massive pre-trial publicity. More publicity is expected before the trial begins. Attached hereto and hereby incorporated by reference are copies of a few articles about this case. In addition to the publicity generated by the media, there are rumors and stories circulating throughout the community which are EXTREMELY inflammatory. These rumors have little or no connection to the facts of this case. However, their importance lies in their falsity, and in their SPECTACULAR quality. Even if only a few members of our community have heard these rumors, their impact is devastating. If these rumors become more widespread, or if a new wave of publicity attends this hearing, the result is worse yet.

This affiant is mindful of the high cost of changing venue, and of the Constitutional provisions which keep our courts open. It is against that backdrop that your affiant respectfully advises the Court that it is my sincere belief that venue should be changed, and that this hearing should be closed.

DATED this 24th day of July, 1989.

CHRISTOPHER TAIT
Attorney for Russell McNeil

SUBSCRIBED AND SWORN to before me this 24th day of July, 1989.

NOTARY PUBLIC in and for the State
Of Washington, residing at Yakima.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
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#AFSOS

Supplement to Case #88-0146
Homicide ------January 7th, 1988
Mike & Dorothy Nickoloff
Lt. Jerry Hafsos
January 26th, 1988

This officer was advised by Detective Rod Shaw of information he had received from Deputy Warwick, that might relate to the Nickoloff homicide. Contact with the informant was scheduled for 1300hrs., this date. See Detective Shaws report for details.
At approx. 1500hrs., this date, this officer was advised that a Sammy Lopez had some additional information and that Detective Shaw was making contact. At this time, Mr. Lopez gave Det. Shaw a 13" black & white t.v. that he stated was given to him by Chief Rice and another subject named Russ, last name unknown. See Detective Shaws report for details.
This officer and Det. Shaw proceded to the Gill residence for identification on the television. She is the Nickoloff's daughter. See Det. Shaws report for details.
Information received from Lopez at approx. 1800hrs., revealed that the subject identified as Russ might have attended the Pace Alternative School in Wapato.
At approx. 1800hrs., this officer and Detective Shaw contacted Mr. Erickson at the school who advised that with the description and first name given to him, the subject we were looking for could be a Russell McNeil, age 17 who lived at 21 North 'G' Street, in Toppenish. See Det. Shaw's report for additional information concerning this contact.

At approx. 1745hrs., Det. Shaw contacted this officer and advised that Sammy Lopez had called and advised that he had located the other television. Contact was made with Lopez and he directed us to his residence where a 13" color television was located. The brand was a JC Penney's. In checking the television, no identification with the Nickoloff's name or social security number could be found. The serial number on the back of the television was #50101884, and model number is #658-2093. See Detective Shaws report for additional regarding the television's and where they were located.
This officer when checking the back of the television observed a small clip on the antenna screw. It appeared that the antenna was pulled from the set, and in doing so ripped away from the antenna lead.
At approx. 1800hrs., this officer and Det. Shaw made contact at the Will & Marie Nickoloff residence for the purpose of identifying the two televisions. See Det. Shaws report regarding this information.
At approx. 1830hrs., this officer called and talked to the supervisor at Park Side Nursing home and inquired about Mike Nickoloff's stay. She advised that if patients come into the home with televisions, that they are documented with putting the persons name on them with tape and writing down identification numbers on their admittence forms. In this case the records reflect that a remote control was identified and that the model number of the television, a 13" JC Penney was documented as #658-2093.
At this time Detective Shaw and myself were at the scene of the homicide and the remote control and the television antenna were located in the bedroom where the JC Penney television was located. The antenna lead was missing a small clip and the one located on the back of the television appears to be from the lead. The remote has a tape on the side with the name Nickoloff. Both these items were entered into evidence, by Detective Shaw.
At approx. 2200hrs., these officers were notified that activity was detected at 21 North "G" Street, in Toppenish.

(15)

Case #88-0146
Homicide----Nickoloff
Lt. Jerry Hafsos
January 26th, 1988

1/27 1:40PM

At approx. 2240hrs. 10:40 PM, contact was made at 21 North 'G' Street, Toppenish. Det. Shaw and myself knocked and the door was opened by a male subject who later was identified as Ed McNeil, brother to Russell McNeil. We were advised that Russ was home and in bed in the rear of the house. Ed went and advised Russ that the Sheriff's Dept. wanted to ask him some questions. Russ got dressed and he was advised that we would be going to the Toppenish Sub-Station for a interview. He agreed to go along with these officer's and was transported by Detective Shaw.

At the Toppenish Sub-Station Detective Shaw read Russell McNeil his Miranda Warnings and Russ advised he understood them and agreed to talk to us. The Miranda Warnings were witnessed by Deputy John Lewis. The time of Miranda was 2258, January 26th, 1988. See attached to Det. Shaws report.
This officer talked to Russ and he advised that he was with Chief when the televisions were picked-up and disposed of. At this time this officer advised all parties that this interview would continue in Yakima at the Sheriff's Dept.
At approx. 2310hrs., Detective Rod Shaw transported Russ McNeil to the Sheriff's Dept., in Yakima. While enroute to Yakima, McNeil took Det. Shaw to the Nickoloff residence. See Det. Shaw's report.
Upon arriving at the Sheriff's Dept., Russ McNeil was taken to the Detective Division, interview room. Again Detective Shaw read McNeil his Miranda Warnings, and McNeil stated that he understood them. The interview that followed has Russ McNeil and Chief Rice as being involved in the Homicide. See Det. Shaws report for items discussed.
Russell McNeil was very cooperative and gave his consent to search his bedroom at 21 North 'G' in Toppenish. He also advised that we could take his vehicle that was used the night of the incident. He advised that this vehicle was parked on the north side of the residence and that it was being worked on. Russell also stated that a toolbox belonging to his brother Ed was located in the trunk area, and that to make sure to remove and give to his brother. Russell described his vehicle as a red Plym. Horizon.
A consent to Search was obtained from Russell McNeil and from the renter of the property, Mary Teacher, both of which live at 21 North 'G', in Toppenish.
After a statement was obtained from McNeil, this officer along with Detective Shaw made contact at 21 North 'G' in Toppenish and several items of clothing and the above described vehicle were picked-up and entered as evidence. See the attached evidence forms submitted by Detective Shaw.

1/27 AM

At approx. 0400hrs., January 27th, 1988, this officer along with Detective Shaw, Sgt. M. James and Sgt. C. Gonzales made contact at the Herb Rice residence which is located on Highway #97, approx. ½ mile south of Progressive.
Detective Shaw knocked on the front door, and approx. 1-minute, a male subject came to the door and Detective Shaw identified himself and this person known to Det. Shaw was identified as Herb Rice Sr. Mr. Rice invited these officers into his house and Det. Shaw asked if Chief was home and Mr. Rice answered in the afirmative. Mr. Rice advised he would advise his son that we would like to talk to him. Approx. 20 seconds later a male subject came into the living room

Supplement to Case #88-0146
Homicide-------January 7th, 1988
Mike & Dorothy Nickoloff
Lt. Jerry Hafsos
January 26th & 27th, 1988

who was identified as Chief Rice. This officer read Rice his Miranda Warnings and advised him that we would like to talk to him downtown. Rice stated to his father something about burglaries. After his Miranda Warnings were read to him, Chief was advised that we would like to search his bedroom and he agreed and signed a consent to search. This was witnessed by Sgt. James. At this time Chief Rice was given a pair of pants, shirt and pair of shoes and he was transported to the Sheriff's Department in Yakima for a interview. At 0446 hrs., this officer read him his Miranda Warnings again and he advised he understood and initialed by each. This was witnessed by this officer. During the interview of Chief Rice, Detective Rod Shaw and myself were present. During this statement, Chief Rice got up from his chair and demonstrated how he killed Mr. Nickoloff. Chief advised that he was standing behind Mr. Nickoloff as he turned around and asked what he was doing and raised his hands. At this point Chief advised that he stabbed Mr. Nickoloff in the face area and chest area, repeatedly. Chief raised his hand and demonstrated this action toward Detective Shaw and after stabbing him in the chest and face area, Chief made a slicing action across the throat area, advising he did this to Mr. Nickoloff For additional information concerning this interview read Detective Shaw's report and the statements from Chief Rice and Russell McNeil.

Both McNeil and Rice were booked into the Juvenile facility for INV-Homicide. This was done by Deputy B. Camarata.

Lt. Jerry Hafsos

Jerry Hafsos

4-1-88, 1500hrs.
Homicide--Nickoloff
Case #88-0146
Lt. J. Hafsos

Per Prosecutor Sullivans request this officer contacted the Washington State Toxicology Lab in Seattle, Scan-742-3536, and found that they do not have the equipment to determine the level of LSD in blood samples. They advised that the University of Utah might have that capability and contact was made with a technician at that location, Ph. 801-581-5117, and she advised that this process has not been implemented as of this date. She advised that this process is expected on line sometime in July or August, 1988. This person also advised that when this process is available, that it will detect LSD in the blood up to 72hrs., after consumption.

Jerry Hafsos

Copy sent to Prosecutor 4/4/88.
Jerry Hafsos

©to DOUIS

SHAW

1126

HAFSOS ALSO CALLED THE TOPPENISH PD AND REQUESTED A UNIT DRIVE BY 21 N. "G" STREET TO ASCERTAIN IF ANYONE WAS HOME. APPROXIMATELY 20 MINUTES LATER, WE WERE ADVISED THAT SOMEONE WAS NOW IN THAT RESIDENCE.

THE COLOR TV SET RECOVERED AT THE LOPEZ RESIDENCE BORE A BROKEN WIRE AT THE BACK OF THE SET. HAFSOS RETRIEVED A TV ANTENNA WITH A BROKEN WIRE FROM MR. NICKOLOFF'S BEDROOM WHICH IS THE SOUTHERN MOST BEDROOM IN THE HOUSE. THE FOLLOWING ITEMS WERE REMOVED FROM THE CRIME SCENE AND PLACED INTO EVIDENCE:

1. TV ANTENNA WITH BROKEN WIRE
2. JC PENNEY REMOTE CONTROL SENDING UNIT
3. JC PENNEY STATEMENT BEARING THE NICKOLOFF ACCOUNT NUMBER
4. A CHECK REGISTER BEARING AN ACCOUNTING OF CHECK NUMBER #240
5. CHECK NUMBER #240, MADE OUT TO PENNEYS IN THE AMOUNT OF $269

AFTER I PLACED THE ABOVE ITEMS IN THE TRUNK OF MY VEHICLE, WE SECURED THE HOUSE AND DETAILED THE ADDRESS IN TOPPENISH, 21 N. "G" STREET. AFTER KNOCKING ON THE DOOR AND RECEIVING A QUICK RESPONSE, WE IDENTIFIED OURSELVES TO THE ANSWERING PARTY. WE ASKED IF RUSS WAS HOME AND RECEIVED AN ANSWER IN THE AFFIRMATIVE. ED, WHO WAS THE ANSWERING PARTY AND IS THE BROTHER OF RUSS, SAID HE WAS IN THE BEDROOM . WE FOLLOWED ED TO THE BEDROOM WHERE WE ASKED HIM TO GET DRESSED AND COME TO THE TOPPENISH SUB-STATION FOR AN INTERVIEW. HE AGREED TO DO THIS AND PRESENTED NO PROBLEM TO HAFSOS OR ME. I TRANSPORTED RUSS McNEIL TO THE SUB-STATION, FOLLOWED BY HAFSOS IN HIS VEHICLE. DEPUTY JOHN LEWIS, WHO HAD BEEN IN THE AREA, ACCOMPANIED US TO THE STATION.

UPON ENTERING THE SUB-STATION, I ASKED FOR AND RECEIVED THE FOLLOWING INFORMATION:

RUSSELL DUANE McNEIL DOB 8-13-70
21 N. "G" STREET, TOPPENISH
STUDENT, PACE SCHOOL IN WAPATO

Miranda #

WITH DEPUTY LEWIS PRESENT, I READ McNEIL HIS RIGHTS. HE SAID HE UNDERSTOOD THEM FULLY. I FILLED OUT A MIRANDA AND WAIVER OF RIGHTS FORM AND REVIEWED EACH ITEM LISTED, LINE BY LINE, WITH McNEIL. McNEIL SAID HE UNDERSTOOD HIS RIGHTS AND SIGNED THE FORM IN ADDITION TO INITIALS PLACED IN NINE DIFFERENT LOCATIONS ON THE FORM. THIS WAS WITNESSED BY DEPUTY LEWIS AND ME. (2258 HOURS).

LT. HAFSOS BEGAN THE INTERVIEW BY TELLING McNEIL WE WERE INVESTIGATING THE HOMICIDES OF MIKE & DOROTHY NICKOLOFF AND WE HAD INFORMATION HE WAS INVOLVED. I TOLD HIM WE HAD A WITNESS WHO PLACED HIM IN THE COMPANY OF "CHIEF" RICE AT A TIME RICE WAS TRYING TO UNLOAD TWO TELEVISION SETS. HAFSOS ASKED HIM IF HE KNEW RICE AND McNEIL SAID YES. HAFSOS THEN ASKED HIM IF HE WAS WITH RICE DURING THE TIME RICE HAD THE SETS AT THE LOPEZ RESIDENCE. AFTER A PAUSE, McNEIL SAID, "YES, I WAS THERE". WITH THAT, HAFSOS ADVISED McNEIL WE WOULD CONTINUE THE INTERVIEW IN YAKIMA.

1/26

McNEIL WAS PLACED IN MY VEHICLE, UNCUFFED, AND WE BEGAN THE DRIVE TO YAKIMA. AT A POINT BETWEEN TOPPENISH AND WAPATO, WE BEGAN TO DISCUSS THE NICKOLOFF CASE. I ADVISED McNEIL OF THE SERIOUSNESS OF THIS MATTER AND THE FACT IT WOULD BE SOLVED SHORTLY. McNEIL INTERRUPTED ME IN MID-SENTENCE AND SAID:

"I STAYED IN THE CAR."

WHEN I SAID, "AT THE NICKOLOFF RESIDENCE?", MCNEIL REPLIED,

"YES"

I ASKED McNEIL IF HE COULD DESCRIBE THE NICKOLOFF RESIDENCE. HE REPLIED,

"THERE ARE BUSHES IN FRONT AND STEPS YOU GO UP TO GET TO THE DOOR."

AT A POINT NEAR WAPATO, I ASKED McNEIL WHAT TYPE OF DRIVEWAY SURFACE WAS THERE. HE SAID,

"THERE WAS SNOW ON THE GROUND.....IT WAS SNOWING."

AT THAT POINT, I DECIDED TO MAKE A DETOUR TO THE NICKOLOFF RESIDENCE AND I ADVISED HAFSOS OF THE SAME. AS I PULLED INTO THE NICKOLOFF DRIVEWAY, I ASKED MCNEIL IF THIS WAS THE HOUSE. HE REPLIED,

"YEAH"

I ASKED HIM WHERE HE PARKED HIS VEHICLE AND HE POINTED OVER HIS LEFT SHOULDER AND SAID,

"BACK THERE.....BY THAT CONCRETE THING.....THE FRONT OF THE CAR

I BACKED MY VEHICLE AND ASKED McNEIL TO INDICATE THE APPROXIMATE LOCATION. HE SAID,

"THE FRONT OF THE CAR WAS EVEN WITH THAT CONCRETE THING."

I ASKED McNEIL IF HE GOT OUT OF THE CAR AND HE SAID,

"I JUST WENT TO THE FRONT DOOR, THEN GOT BACK IN MY CAR."

I ASKED McNEIL WHAT RICE DID WHEN HE (McNEIL) GOT BACK INTO HIS CAR. HE SAID,

"HE WENT AROUND BACK."

I ASKED McNEIL IF HE SAW ANYTHING WHILE HE WAS IN HIS CAR. HE REPLIED,

"NO, I WAS LOOKING DOWN."

WHEN I QUESTIONED THE MEANING OF THAT RESPONSE, McNEIL SAID:

"I WAS WORKING ON MY STEREO.....THE WIRES WERE LOOSE."

I ASKED McNEIL IF HE ENTERED THE DRIVEWAY WITH THE VEHICLE LIGHTS ON OR OFF. HE SAID,

"OFF" (HIS TAPED STATEMENT RESPONSE: "LIGHTS WERE ON")

I SPOKE BRIEFLY TO LT. HAFSOS THEN HEARD HIM ADVISE McNEIL THAT WE WERE INTERESTED IN JUST THE TRUTH. MCNEIL ACKNOWLEDGED THAT WITH A NOD OF THE HEAD AND

"YEAH"

AS WE LEFT THE NICKOLOFF DRIVEWAY, I ASKED McNEIL IF THIS WAS THE DIRECTION HE LEFT THE NICKOLOFF RESIDENCE ON THE NIGHT OF 1-7-88 (MEANING EASTBOUND ON KAYS). McNEIL DID NOT RESPOND VERBALLY BUT NODDED HIS HEAD. AT THE STOP SIGN ON KAYS AT LATERAL B, I ASKED McNEIL IF HE TURNED OR CONTINUED STRAIGHT ON KAYS. HE SAID,

"STRAIGHT"

APPROACHING THE STOP SIGN ON KAYS AT LATERAL A, I ASKED McNEIL IF HE TURNED OR CONTINUED STRAIGHT. HE REPLIED,

"TURNED RIGHT.....DOWN TO KILES.....TURNED AGAIN TOWARDS WAPATO."

I ASKED McNEIL IF ANYTHING HAD BEEN THROWN OUT OF THE CAR AT A POINT BETWEEN THE NICKLOFF'S RESIDENCE AND LATERAL A. HE SHOOK HIS HEAD, INDICATING NO. I PROCEEDED NORTH ON LATERAL A AND CONTINUED TALING ABOUT THE HOMICIDES INCLUDING THE FACT I DID NOT BELIEVE HE STAYED IN THE CAR. McNEIL BEGAN TO TALK AND THE FOLLOWING TOOK PLACE:

Q. YOU DIDN'T GET BACK IN THE CAR, DID YOU?
A. (PAUSE).....I WENT TO THE BACK DOOR TOO

Q. YOU WENT INTO THE HOUSE WITH CHIEF?
A. YEAH

Q. WHO DID THE OLD MAN?
A. NO RESPONSE

Q. WHO DID THE WOMAN?
A. NO RESPONSE

man

FOR A REASON STILL UNKNOWN TO ME, I SAID, "YOU DID THE WOMAN, DIDN'T YOU?" WITH THAT, McNEIL TURNED QUICKLY AND STARED AT ME. EYEBALL TO EYEBALL, I SAID AGAIN, "YOU DID THE WOMAN, DIDN'T YOU." McNEIL TURNED HIS HEAD, LOOKED DOWN AND SAID,

"I DID THE WOMAN."

ADDITIONAL QUESTIONS ASKED WERE AS FOLLOWS:

Q. YOU KILLED MRS. NICKOLOFF?
A. YEAH, I DID THE WOMAN, HE DID THE MAN.

Q. HOW DID YOU KILL HER?
A. I STABBED HER

Q. WHERE?
A. IN THE KITCHEN

Q. WHO KILLED THE MAN?
A. CHIEF DID

Q. HOW DID HE KILL HIM?
A. WITH A KNIFE

Q. A BIG KNIFE?
A. A BIG POCKET KNIFE

Q. WHERE DID CHIEF KILL HIM?
A. IN THE LIVING ROOM.....IN THE CHAIR.....HE WAS WATCHING TV

Q. WHAT WAS MRS. NICKOLOFF DOING?
A. EATING

Miranda 2

UPON ARRIVING AT YSO, McNEIL WAS TAKEN TO THE DETECTIVE INTERVIEW ROOM WHERE I READ HIM HIS RIGHTS. McNEIL SAID HE UNDERSTOOD THEM. LT. HAFSOS AND I BEGAN TO INTERVIEW McNEIL PRIOR TO TAKING A TAPED STATEMENT. IN THE INTERVIEW, McNEIL SAID HE SAW RICE NEAR THE JACKPOT STATION ON HWY 97, PICKED HIM UP AND THEY BEGAN TO CRUISE THE AREA. AFTER CRUISING FOR THE NEXT ONETO ONE AND A HALF HOURSAND, AFTER STOPPING AT SEVERAL DIFFERENT LOCATIONS, RICE TOLD McNEIL, "I KNOW WHERE WE CAN MAKE SOME MONEY." RICE DIRECTED HIM TO THE NICKOLOFF RESIDENCE. WHILE ENROUTE, RICE MADE THE FOLLOWING COMMENTS AS TOLD TO US BY McNEIL:

"I'VE VISITED NEXT DOOR."
"WE'LL TAKE THEM BY SURPRISE."
"WE'LL GO IN AND TAKE WHATEVER."

McNEIL SAID BOTH OF THEM WENT TO THE FRONT DOOR AND, RECEIVING NO ANSWER, PROCEEDED TO THE BACK DOOR. McNEIL SAID HE KNOCKED ON THE DOOR AND CHIEF DID THE TALKING WHICH INCLUDED THE REQUEST TO USE THE PHONE. THE DOOR HAD BEEN OPENED BY MRS. NICKOLOFF WHO DIRECTED CHIEF TO THE PHONE IN THE KITCHEN. AT THAT TIME, McNEIL SAID HE ASKED TO USE THE BATHROOM. MRS. NICKOLOFF DIRECTED HIM TO THE BATHROOM WHILE CHIEF MADE USE OF THE PHONE. McNEIL SAID HE WALKED PAST MR. NICKOLOFF WHO WAS SEATED, WATCHING TV.

(he was in the kitchen)

McNEIL, WHO HAD WALKED THROUGH THE KITCHEN AND THE LIVING ROOM TO GET TO THE BATHROOM, RETURNED TO THE KITCHEN AND ASKED FOR A GLASS OF WATER. MRS. NICKOLOFF, WHO WAS EATING AT THE TIME, POINTED TO THE CUPBOARD CONTAINING THE GLASSES. McNEIL SAID HE DRANK THE GLASS OF WATER WHILE MRS. NICKOLOFF CONTINUED EATING. McNEIL THEN APPROACHED CHIEF WHO WAS STANDING IN THE LIVING ROOM TALKING TO MR. NICKOLOFF. McNEIL RETURNED TO THE KITCHEN AND ASKED FOR A SECOND GLASS OF WATER. AFTER FINISHING THAT, HE TURNED AND LOOKED TOWARD THE LIVING ROOM. HE SAW CHIEF HOLDING A KNIFE IN HIS RIGHT HAND WHICH WAS AT HIS SIDE. McNEIL SAID MRS. NICKOLOFF MUST HAVE SEEN THE KNIFE AT THE SAME TIME BECAUSE SHE STOOD UP AND YELLED SOMETHING. McNEIL SAID HE GRABBED HER BY THE NECK, THEN FORCED HER TO THE FLOOR. HE PLACED HIS KNEE ON HER TO HOLD HER DOWN, THEN PROCEEDED TO STAB HER WITH A KNIFE HE REMOVED FROM HIS JACKET POCKET. AT THE SAME TIME, HE COULD HEAR WHAT HE ASSUMED TO BE "STABBING SOUNDS" COMING FROM THE LIVING ROOM. JUST PRIOR TO THAT SOUND, HE HEARD CHIEF YELL SOMETHING ALTHOUGH HE IS NOT SURE WHAT. AT FIRST, HE THOUGHT IT WAS CHIEF YELLING, "DIE!" BUT HE IS NOT SURE IF THAT WAS THE WORD USED. McNEIL SAID HE THOUGHT HE STABBED MRS. NICKOLOFF "ABOUT 25 TIMES" AND SHE STOPPED YELLING "AFTER THE THIRD STAB." WHEN ASKED TO DESCRIBE HER POSITION ON THE FLOOR, McNEIL SAID SHE WAS FACE DOWN WITH HER HEAD AGAINST A WALL. McNEIL SAID HE USE A "CASE" NIFE AND THAT ALL THE STAB WOUNDS WERE TO THE BACK, NONE TO THE CHEST.

McNEIL SAID CHIEF CAME INTO THE DOORWAY DIVIDING THE KITCHEN/ DINING ROOM AND SAID, "COME ON." BOTH WALKED THROUGH THE LIVING ROOM AND PAST MR. NICKOLOFF. BOTH LOOKED INTO THE SOUTH (MR. NICKOLOFF'S) BEDROOM, THEN THE MIDDLE BEDROOM. McNEIL SAID HE RETURNED TO THE SOUTH BEDROOM WHERE HE BEGAN TO REMOVE A COLOR TV SET. AT THE SAME TIME HE COULD HEAR CHIEF GOING THROUGH SOME PAPERS AND DRAWERS IN THE OPPOSITE CORNER OF THE BEDROOM. CHIEF PROCEEDED TO THE MIDDLE BEDROOM WHERE HE REMOVED A SMALL TV SET FROM A CABINET IN THE NORTHWEST CORNER OF THE ROOM. McNEIL SAID HE CARRIED THE TV FROM THE SOUTH BEDROOM TO THE MIDDLE BEDROOM AT WHICH POINT HE BEGAN TO OPEN THE CABINET DOORS. ABOUT THIS TIME, "CHIEF CAME IN AND GOT ME AND WE LEFT." BOTH EXITED THE BACK DOOR AND PROCEEDED TO McNEIL'S VEHICLE. McNEIL SAID HE SAW A SMALL TV IN THE BACK SET. THE SET HE REMOVED FROM THE SOUTH BEDROOM AND CARRIED OUT THE BACK DOOR WAS ALSO PLACED IN THE BACK SEAT. McNEIL SAID HE BACKED OUT OF THE DRIVEWAY AND PROCEEDED EAST ON KAYS TO LATERAL A, THEN SOUTH TO KILES KORNER, THEN EAST ON W. WAPATO ROAD. DURING THIS PERIOD OF TIME, CHIEF TOLD McNEIL, "DON'T SAY ANYTHING TO ANYONE."

McNEIL SAID THEY DROVE TO A RESIDENCE, HE REFUSED TO NAME THE LOCATION OR THE OWNER, WHERE THEY CLEANED UP. PRIOR TO THIS, CHIEF HAD REMOVED THE SHIRT HE WAS WEARING AND PLACED IT ON THE FLOORBOARD, PASSENGER SIDE, OF THE CAR. McNEIL SAID BOTH OF THEM HAD A LARGE AMOUNT OF BLOOD ON THEIR HANDS AND THEY USED TO KITCHEN SINK AT THE ABOVE LOCATION TO CLEAN UP. ACCORDING TO McNEIL, NEITHER HE OR CHIEF WORE GLOVES DURING THE ATTACKS.

McNEIL SAID THEY DROVE TO THE SAMMY LOPEZ RESIDENCE WHERE THEY TOLD HIM THEY HAD TWO TV'S FOR SALE. LOPEZ ACCOMPANIED THEM TO AN UNKNOWN LOCATION WHERE THE SET WAS SOLD FOR $50, $40 IN CASH AND $10 WORTH OF MARIJUANA. McNEIL SAID HE WAS GIVEN ABOUT $15 BY CHIEF AFTER THE MONEY HAD BEEN HANDED TO CHIEF BY LOPEZ. McNEIL THEN DROVE LOPEZ BACK TO HIS RESIDENCE, DROPPED CHIEF OFF AT HIS ON HWY 97, THEN PROCEEDED HOME.

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A TAPED STATEMENT WAS TAKEN AND THE INTERVIEW CONCLUDED AT THE TIME NOTED ON THE TAPE. LT. HAFSOS OBTAINED A CONSENT TO SEARCH FROM McNEIL. THIS CONSENT WAS LIMITED TO WEARING APPAREL AND ITEMS THEREIN AND IS SO NOTED ON THE CONSENT FORM. TENNIS SHOES, TWO JACKETS (ONE WITH THE POSSIBLE WEAPON), LEVIS AND A CAP WERE TAKEN AND PLACED INTO EVIDENCE. PHOTOS OF THE BEDROOM AND ARTICLES RETRIEVED WERE TAKEN. THESE ITEMS WERE PLACED IN THE TRUNK OF MY VEHICLE AND TRANSPORTED TO THE YSO EVIDENCE ROOM. REFER TO THE EVIDENCE LOGS FOR ALL ITEMS COLLECTED, RECOVERED, PACKAGED AND BAGGED. A VEHICLE SUPPOSEDLY DRIVEN BY McNEIL WAS IMPOUNDED AND TAKEN TO THE CREST BUILDING IN YAKIMA.

DET. R. SHAW

END OF McNEIL SUPPLEMENT

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50 cents ... a daily part of

7/12/89

Death penalty filing upheld

Judge says prosecutor acted properly in Nickoloff murder case

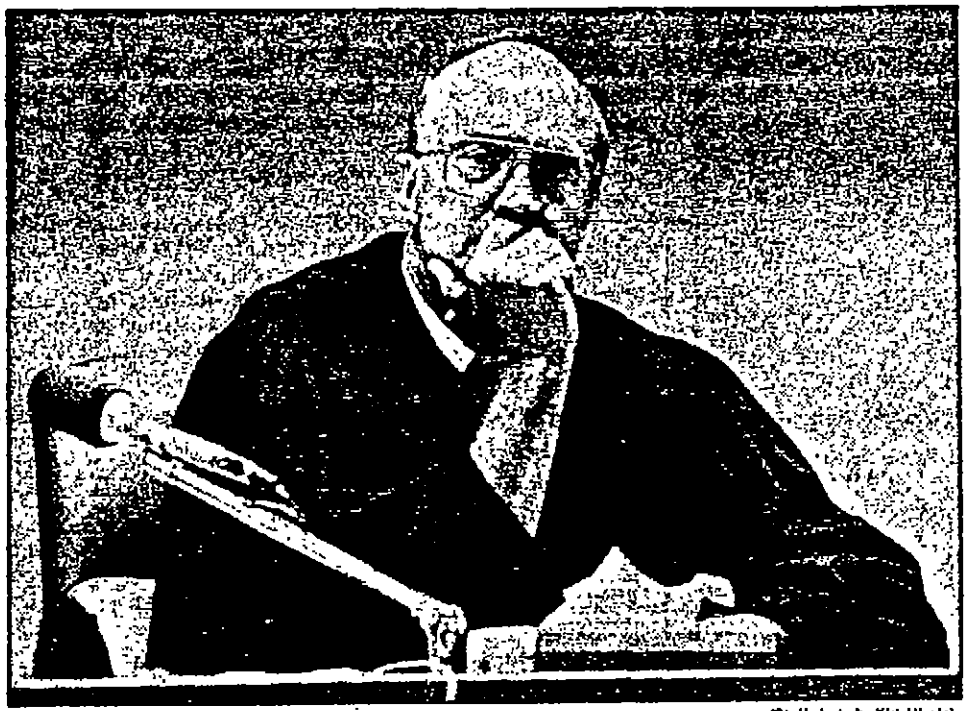
By GARY E. NELSON
Of the Herald-Republic

Yakima County Prosecutor Jeff Sullivan acted properly, the trial judge ruled Tuesday, when he decided to seek the death penalty against two young men accused of aggravated first-degree murder in the stabbing deaths of an elderly Parker couple.

Attorneys for defendants Russell McNeil and Herbert Rice had argued that Sullivan should be ordered to explain why he is seeking the penalty for the first time since he was first elected prosecutor in 1974. But Yakima County Superior Court Judge F. James Gavin ruled that Sullivan properly asked defense attorneys to present mitigating factors before he made the decision, and need not defend his reasoning.

Rice and McNeil are accused of stabbing Mike and Dorothy Nickoloff to death in the couple's rural Parker farmhouse in January [illegible]. The cases against them are the county's first capital cases since 1938.

McNeil's trial is now scheduled to begin Sept. 5, with Rice's trial to follow beginning Oct. 23. Both will offer defenses generally denying the charges, and will not offer affirmative defenses, such as insanity or self-defense, their attorneys said.



(Staff photo by Kirk Hirota)

Yakima County Superior Court Judge F. James Gavin listens Tuesday to a variety of motions preceding the Nickoloff murder trial.

The defendants, both of whom will turn 19 next month, were 17 when the murders they are charged with occurred. Their trials were postponed indefinitely earlier this year while the U.S. Supreme Court decided whether the Constitution protects from execution defendants who were juveniles when their crimes were committed.

The high court ruled last month that the constitution does not bar such executions.

Gavin, who will preside over the two trials, heard a variety of motions Monday and scheduled later hearings on other matters in the complex cases.

Gavin postponed until July 24 a ruling on defense requests to bar the press and public from a pretrial evidence-suppression hearing. The hearing is to decide whether taped statements the defendants made to police after their arrests may be used as evidence during their trials.

Prosecutors and attorneys for Rice said they would not object to holding the hearing after a jury is selected for that trial, which would remove any need to close the hearing.

But Chris Tait, attorney for McNeil, objected to holding the hearing after jury selection, arguing that would restrict his questioning of potential jurors.

Court rulings on the question of open or closed pretrial hearings have attempted to balance the right of the public to an open justice system with the right of a defendant to a fair trial, both of which are protected by the Constitution.

Also Monday, Gavin agreed to order McNeil's attorneys to turn over a letter the defendant wrote to his girlfriend while in jail after his arrest. The letter was later given to Tait's office by McNeil's mother, prosecutors said.

After a highly unusual closed-door session

(See NICKOLOFF, Page 2A)

(Staff photos by Kirk Hirota)

Yakima County Prosecutor Jeff Sullivan, left, and deputy prosecutor Howard Hansen confer during Tuesday's court session.

Nickoloff/ from Page 1A

with only Tait, an associate and Tait's co-counsel Tom Bothwell present, Gavin ruled Tait must turn over the letter. Tait and Bothwell had asked for the private meeting to explain to Gavin why the letter was protected by attorney-client privilege from disclosure to prosecutors.

Tait and Bothwell said they may ask the state Court of Appeals to review Gavin's ruling.

In their challenge to Sullivan's capital punishment decision, defense attorneys argued that it is unclear why Sullivan picked this case to seek the death penalty. Sullivan has never before sought the penalty since he was elected prosecutor in 1974.

"He has had several opportunities, defense attorneys argued, including several cases of aggravated first-degree murder, the only crime that can result in the death penalty under state law.

"We've had people coming up with machine guns, and mowing down strangers, killing one and maiming another," Bothwell said. "No death penalty was filed in that case. In fact, aggravated first-degree murder was not even charged in that case."

Deputy prosecutor Howard Hansen said a case in Pierce County that resulted in a similar challenge led to the Supreme Court upholding that prosecutor's choice, after the prosecutor was ordered to take the witness stand and defend it. Another case, in which a special penalty was thrown out, resulted from an overly rigid selection procedure, Hansen said.

Gavin ruled that Sullivan, like the Pierce County prosecutor, gave defense attorneys an opportunity to present evidence of mitigating circumstances affecting their clients before he decided to seek the death penalty.

Michael Frost, defense attorney for Herbert Rice, listens during Tuesday's courtroom session in the Nickoloff murder case.

That opportunity, the state Supreme Court said, provided the "safety valve" to prevent arbitrary application of the death penalty. Gavin agreed, and said Sullivan need not justify his decision further.

7/20/89

Letter ruling in Nickoloff case will be appealed

By GARY E. NELSON
Of the Herald-Republic

Attorneys for capital murder defendant ussell Duane McNeil will ask the state ıpreme Court to let them keep from pro- ecu a letter McNeil wrote to his rlf after his arrest.

Prosecutors want the letter, saying it is vidence in the case and should be turned ver to them.

McNeil's attorneys, who were given the tter by a relative of McNeil, say it is pro- ected by attorney-client privilege.

McNeil is scheduled to stand trial Sept. 5 for the murders of elderly Parker residents Mike and Dorothy Nickoloff, who were found stabbed to death in their Parker farmhouse in January 1988. Co-defendant Herbert "Chief" Rice will face a separate trial scheduled to begin Oct. 23.

Yakima County Prosecuting Attorney Jeff Sullivan is seeking the death penalty against both defendants, who were 17 when the murders occurred. Both will turn 19 next month.

Judge F. James Gavin said during a pretrial hearing in Yakima County Superior Court on Wednesday that he wants the case to proceed as rapidly as possible. But the matter of the letter could delay that process.

Attorneys Chris Tait and Tom Bothwell explained to Gavin last week why they believe the letter should remain in their hands in an unusual session closed to the public and even to prosecutors.

After that explanation, however, Gavin ruled they must turn over the letter to prosecutors, and gave them until noon Wednesday to do so.

In court Wednesday, Tait and Bothwell told Gavin they will appeal his ruling to the Supreme Court, and asked him to stay his order until that is accomplished.

"If the contents of this letter are ever disclosed, irreparable, irretrievable damage will be done to the defense case," Bothwell told Gavin.

Deputy prosecutor Howard Hansen objected to delaying the trial, and told Gavin that if a stay is ordered, the Supreme Court should do it.

Gavin agreed, saying he is convinced his ruling was correct. Instead of a stay, Gavin postponed the effective date of his order requiring the defense to produce the letter until noon, Aug. 11.

Attorneys mull closed hearing

Taped statements of Nickoloff murder suspects at issue

By MARK WALKER
Of the Herald-Republic

Yakima County Prosecutor Jeff Sullivan has issued a written opinion contending that closing a hearing regarding statements made by murder defendants Herbert Rice Jr. and Russell McNeil is probably the right thing to do under existing state law.

Sullivan's opinion released Friday cites case law in Washington that allows judges to close pre-trial hearings when it is shown that disclosure of information about a case could severely hamper a defendant's right to a fair trial.

The opinion was written after attorneys suggested to Judge F. James Gavin that recorded statements taken from Rice and McNeil following their arrests in connection with the January 1987 stabbing deaths of Mike and Dorothy Nickoloff of Parker could be prejudicial if reported and severely hamper efforts to seat an impartial jury.

The two defendants, both age 17 when they were arrested, are charged with aggravated first-degree murder and could face the death penalty if convicted.

Defense attorneys have indicated they want to close a hearing where taped statements from the defendants could be played, although neither side has filed a formal motion asking the hearing be closed to the public.

Defense attorneys have said the tapes are so sensational that their disclosure would virtually rule out the chances of a fair trial.

"If the court can find there is a substantial risk in receiving a fair trial, then I believe the court can close the hearing," Sullivan said after issuing his opinion on the closure issue.

Rick Hoffman, one of two attorneys representing Rice, said he doesn't think the tape needs to be played to decide the admissibility of the statements.

"But if the court decides the tapes must be played, then we would join in asking the hearing be closed," Hoffman said.

Sullivan said that he believes the hearing could be open to reporters if they agree beforehand to report only that information attorneys and the judge agree can be disseminated.

"We have been able to work out such agreements in the past and if the media makes a request, I would be willing to work with the media," Sullivan said.

A trial date for Rice and McNeil has not been set pending the outcome of a case before the U.S. Supreme Court regarding the application of the death penalty to defendants who are convicted of committing murder when they were juveniles.

Gavin has ruled that McNeil's trial start 60 days after that decision has been rendered.

The Supreme Court decision on the juvenile death penalty is expected to be issued late this summer or early next fall.

Ollie Humphrey, a centenarian whose life has paralleled and been intertwined with Washington's life as a state, recalls the past with his daughter, Margaret O'Neill, 63, of Scottsdale, Ariz. Humphrey was a cattle rancher and wheat farmer near Tieton for 75 years.

May 27, 1989

Death penalty upheld for young killers

By AARON EPSTEIN
Knight-Ridder

WASHINGTON — The Supreme Court, finding no "national consensus" against the execution of juveniles or mentally retarded killers, ruled 5-4 Monday that states may execute murderers who committed their crimes while 16 or 17 years old or who have the mental capacity of a child.

However, the justices softened the impact on mentally retarded killers by requiring that judges and juries, in considering life-or-death sentences, weigh evidence of a defendant's mental retardation and childhood abuse.

With Justice Sandra Day O'Connor casting the pivotal votes, the high court declared that state capital punishment laws demonstrate that American society continues to approve of executing inmates who were under 18 when they committed murder or who are mentally retarded.

Therefore, the court majority concluded, such applications of capital punishment do not violate the Eighth Amendment ban on punishments that are both cruel and unusual.

The majority's ruling apparently would not change unless virtually all states with capital punishment laws provide exemptions for such offenders.

Top court deals blow to business — 7A
Supreme Court hot ticket as abortion ruling looms — 9B

Dissenters William J. Brennan Jr., Thurgood Marshall, Harry A. Blackmun and John Paul Stevens attacked the majority opinion for, in effect, leaving the issue up to political majorities in state legislatures.

Brennan charged that the majority ignored studies showing that juveniles generally are immature and lack the degree of criminal responsibility that justifies capital punishment.

He also denounced the majority for finding no significance in the host of laws in which minors are treated differently than adults, or in the fact that juvenile executions are rare here and that other nations increasingly reject them as inhumane.

Monday's death penalty decisions highlighted a flurry of rulings and orders issued as the justices approached the anticipated end Thursday of their 1988-89 term.

A decision is eagerly awaited in the Supreme Court's most closely watched case in years, a Missouri dispute in which the court's 1973 decision legalizing abortion is under attack.

The court must either announce a decision or schedule the case to be reargued during its next term, which begins in October.

The ruling on capital punishment for juveniles was a sharp setback for national and international religious, legal and human rights organizations, which have argued for years that the execution of juvenile offenders violates contemporary standards of decency.

Henry Schwarzschild, director of the ACLU's anti-capital punishment project, called it "medieval and barbaric for a civilized society to solve society's problems by hanging children, for God's sake, or mentally retarded people who are not fully responsible for their acts."

But the decision pleased conservatives, police, prosecutors and state officials, who contend that all juveniles guilty of brutal homicides should not automatically be kept off Death Row.

Kentucky Attorney General Fred Cowan said the court was simply reflecting the demand of Americans, confronted by high crime rates, "to hold youths who are mature enough

(See COURT, Page 7A)

Ruling clears way for trial of two in Nickoloff murders

Compiled from staff and news service reports

The aggravated first-degree murder trial of Russell Duane McNeil will start in Yakima County Superior Court in late August or early September, followed by that of co-defendant Herbert "Chief" Rice, after Monday's U.S. Supreme Court ruling upholding the death penalty for defendants who committed crimes at ages 16 or 17.

RICE

Jeff Sullivan, Yakima County prosecuting attorney, is seeking the death penalty against Rice and McNeil, who are accused of killing elderly Parker residents Mike and Dorothy Nickoloff in January 1987. Both defendants were 17 when the crimes were committed.

The trials had been delayed pending Monday's ruling, but Yakima County Superior Court Judge F. James Gavin ruled earlier that the trials would begin within 60 days of the high court's decision.

Neither Sullivan nor Chris Tait, one of McNeil's attorneys, was surprised by the ruling.

Sullivan had expressed concern that the court might send the issue back to state legislatures, based on a concurring opinion Justice Sandra Day O'Connor issued in a related case last year. In that case, the court threw out the death penalty in the case of a defendant who was 15 when the crime was committed.

In her concurrence in that case, O'Connor said state death penalty statutes must set a minimum age for execution before a juvenile defendant can be tried as an adult and sentenced to die. She also wrote, however, that a state need not set a specific age limit if there was no clear national consensus against executing defendants of that age.

Washington's death-penalty law sets no minimum age, and Sullivan said he had feared the court might send the question of 16- and 17-year-old defendants back to state lawmakers.

In her concurrence Monday, O'Connor said that all three states that have set a minimum age for execution have done so at 16, and a fourth is contemplating that limit, leading her to see a national consensus against executing 15-year-olds. No such consensus exists for 17-year-olds, she said.

(See NICKOLOFF MURDERS, Page 7A)

Decision affects 3 youths in state

The Associated Press

At least three young men accused of killing elderly victims in Washington state will be affected by a U.S. Supreme Court ruling yesterday that said states may execute juveniles who committed their crimes at ages 16 and 17, prosecutors said.

Yakima County Prosecutor Jeff Sullivan and Dan Clem, Kitsap County prosecuting attorney, said they anticipated the decision.

The 5-4 ruling said the death penalty for older juvenile killers does not violate the Constitution's ban on "cruel and unusual punishment."

Sullivan is seeking the death penalty against Russell McNeill and Herbert Rice.

McNeill and Rice were 17 when they allegedly stabbed an elderly Yakima Valley couple to death in January 1988 in a robbery that netted two television sets.

Both teens were charged with aggravated first-degree murder. McNeill's trial is scheduled to start in August and Rice will go on trial 60 days later.

Their trials had been delayed pending today's Supreme Court decision.

Clem recently filed notice that he will seek the death penalty against Michael Furman, who was 17 when he allegedly killed an 85-year-old Port Orchard woman in April. Furman's trial is scheduled for September.

AP/1987

Herbert Rice

Clem said he was "not surprised" by the high court's ruling, but anticipated a bigger majority in favor of executing older juveniles.

Teresa McMahill of the Washington Coalition to Abolish the Death Penalty in Seattle said the court's ruling was disturbing, especially in light of its decision last year that executing 15-year-olds was unconstitutional.

"The court is out of step with evolving standards of decency," she said. "Juries are not sentencing juveniles to death at any great rate."

Death sentences for juveniles probably will not increase in the wake of the ruling, she said.

While the public generally supports the death penalty, "when you refine the question to include juveniles and the mentally retarded, there is a dramatic change," she said, "and people don't support it."

Northwest

Prosecutors expected ruling on executing teens

By The Associated Press

Prosecutors in Washington counties where teen-agers face possible death sentences said they anticipated Monday's U.S. Supreme Court ruling that states may execute juveniles who commit crimes at ages 16 and 17.

At least three young men accused of killing elderly victims in Washington state will be affected by the high court's 5-4 ruling, which said the death penalty for older juvenile killers does not violate the U.S. Constitution's ban on "cruel and unusual punishment."

The cases involve defendants who were 17 when they allegedly committed their crimes.

Meanwhile, groups opposed to the death penalty said the Supreme Court's split ruling flies in the face of public sentiment against executing teen-agers and mentally ill defendants.

In Yakima County, Prosecutor Jeff Sullivan has asked for the death penalty against two 18-year-olds accused of aggravated first-degree murder. Dan Clem, Kitsap County prosecuting attorney, also has asked that an 18-year-old be sentenced to death upon conviction.

Both Sullivan and Clem said they anticipated the court's ruling, which involved Kentucky and Missouri murders committed by teen-age boys. Both said the younger the defendant, the harder it is to convince a jury the death penalty is appropriate.

"Clearly, if somebody is mentally ill or very young, that is a factor that would be considered by prosecutor and jury," Sullivan said. "The younger they are, the more difficult it is" to gain a death sentence.

Sullivan is seeking the death penalty against Russell McNeil and Herbert Rice, both 18, who were 17 when they allegedly stabbed an elderly Yakima Valley couple to death in January 1988 in a robbery that netted two television sets. Killed were Mike and Dorothy Nickoloff.

Both teens were charged with aggravated first-degree murder. McNeil's trial is scheduled to start in August and Rice will go on trial 60 days later.

Their trials had been delayed pending Monday's Supreme Court decision.

Clem recently filed notice that he will seek the death penalty against Michael Furman, who was 17 when he allegedly killed an 85-year-old Port Orchard woman in April. Furman had gone door to door seeking odd jobs, and allegedly killed the woman after an argument.

Furman's trial is scheduled for September.

The court's ruling goes against public opinion, claimed an opponent of the death penalty.

Teresa McMahill of the Washington Coalition to Abolish the Death Penalty in Seattle said the court's ruling was disturbing, especially in light of its decision last year that executing 15-year-olds was unconstitutional.

"The court is out of step with evolving standards of decency," she said. "Juries are not sentencing juveniles to death at any great rate."

Death sentencings of juveniles probably will not increase in the wake of the court's ruling, she said.

While the public generally supports the death penalty, "when you refine the question to include juveniles and the mentally retarded, there is a dramatic change and people don't support it," she said.

Sullivan said prosecuting attorneys feared the Supreme Court would instruct states to refer the issue to their Legislatures.

ANNUAL '89

NICKOLOFFS

More than a year has passed since elderly Parker residents Mike and Dorothy Nickoloff were viciously stabbed to death in their rural farmhouse, and still the case has generated more questions than answers.

By GARY E. NELSON
Of the Herald-Republic

Firefighters and sheriff's detectives summoned to the couple's home at Kays Road and Lateral B last Jan. 7 found a horrifying scene. The bodies had been stabbed so many times that investigators at first thought the murder weapon was a shotgun.

County Coroner Leonard Birkinbine said the scene was the worst he had ever encountered.

Autopsy reports later revealed Dorothy Nickoloff had been stabbed more than 75 times. Her husband had wounds to his hands indicating he had tried to ward off the blows.

Other details are still sketchy. Yakima County Superior Court Judge F. James Gavin ordered the official court file in the case sealed to prevent publicity from jeopardizing the trial.

Neighbors and relatives of the Nickoloffs must wait several more months for the answers to questions that may, after all, be unanswerable:

Why were two harmless, frail people so brutally murdered?

Were the murder suspects involved with illegal drugs?

Why were two television sets missing from the couple's home? Was robbery the motive, or only an afterthought to provide a reason, however flimsy, for what was fundamentally an irrational crime?

How could two 17-year-old youths possibly commit such an atrocity? And if they did, what punishment should they receive?

Even the question of punishment is unresolved, and will remain so until the U.S. Supreme Court rules this spring in two cases expected to decide whether it is constitutional to execute defendants who were under 18 years old when they committed their crimes.

The case against Herbert "Chief" Rice and Russell Duane McNeil is on hold until after that ruling is handed down. The two young men, both 18 now, could see their 19th birthdays come and go before facing trial.

Both were born in August.

They were arrested last January, two weeks after the Jan. 7 murders, and have been in jail ever since. Each is charged with aggravated first-degree murder, the only crime in Washington punishable by death.

The only other penalty possible for aggravated first-degree murder is life in prison without possibility of parole.

Yakima County Prosecuting Attorney Jeff Sullivan decided last summer to seek the death penalty if Rice and McNeil are convicted. But defense attorneys challenged the constitutionality of applying that penalty to juveniles, arguing that to do so would constitute cruel and unusual punishment, which is prohibited under the Eighth Amendment to the Constitution.

The case was postponed while defense attorneys asked the state Supreme Court to rule on the issue. It refused to do so.

At that point, it appeared the case would proceed without waiting for the U.S. Supreme Court to rule. But only last month, Gavin granted defense requests to delay the trial until after the ruling.

The high court ruled last year that it is unconstitutional to execute juveniles under the age of 16, but is now considering two cases which would decide the issue for all persons up to age 18.

Still unresolved is the question of whether Rice and McNeil can receive a fair trial in Yakima County. Gavin will rule on that issue before the trials begin. The defendants will be tried separately, McNeil first, Gavin has decided.

McNeil's trial will begin within 60 days of the high court ruling, Rice's within 120 days. That means the first trial likely will begin in August, and the second in October.

3/15/89

Local News

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Pair to be tried as adults in

By GARY E. NELSON
Of the Herald-Republic

The two 17-year-olds accused of brutally stabbing an elderly Parker couple will be tried as adults for the crimes, a Yakima County Superior Court Judge ruled Monday.

Judge Walter Stauffacher told a crowded courtroom that the case meets all seven of the applicable criteria necessary to shift jurisdiction to adult court. In particular, Stauffacher cited the brutality of the crime and the maturity of the defendants in announcing his ruling.

Herbert A. "Chief" Rice and Russell Duane McNeil, both 17, are charged with aggravated first-degree murder for the slayings.

Mike and Dorothy Nickoloff, both elderly and in ill health, were found dead in their home Jan. 7. Both had been stabbed repeatedly.

The criteria fall into four groups, Stauffacher said: the nature of the offense; the judicial proceedings involved; the individual involved; and the protection of the public and potential for rehabilitating the individual.

In court Monday, Stauffacher cited autopsy results that showed Dorothy Nickoloff was stabbed 75 to 85 separate times. Mike Nickoloff's wounds were such that a detective on the scene thought at first the man had been hit with a shotgun blast, Stauffacher said.

"The fury and the frenzy that is demonstrated through the autopsy reports indicate that it has to be the product of either a psychopathic or sociopathic individual," he said.

The crime involved both people and property, Stauffacher said, noting that two television sets were missing from the Nickoloff home. And evidence gathered by detectives establishes probable cause to proceed to trial.

McNeil and Rice are mature, living in-

Sammy Davis Jr., center, takes a drink from Dean Martin, left,

Building has seen much of Granger's past 7A
Grandview reconsiders water honor code 7A
More local news 12A

Nickoloff murders

dependent of their parents and supporting themselves, Stauffacher said. Both will turn 3 in August of this year, and Stauffacher noted that their birthdays are just two days apart.

Stauffacher said he saw no possibility that the two could be rehabilitated in the juvenile detention system.

If convicted as juveniles, Rice and McNeil could be held in custody only until they turn 21, and could be eligible for a minimum-security facility in their home community after serving 60 percent of the sentence.

If convicted of aggravated first-degree murder as adults, they could face the death penalty or life in prison without possibility of parole.

Each will be arraigned on two counts of aggravated murder this week. When that happens, Prosecuting Attorney Jeff Sullivan will have 30 days to decide whether to seek the death penalty in the case.

In the meantime, Rice is being held on $300,000 bail, McNeil on $250,000. Sullivan asked Stauffacher to order the two held without bail, but the judge elected to maintain the bail amounts originally set in the case.

He did, however, order that bail could be posted only in cash or in the form of a bail bond.

4-11-89

(Staff photos by Roy Musitelli)

Defense attorneys Michael Frost and Chris Tait confer Monday during a pretrial hearing in Yakima County Superior Court in the Nickoloff murder case.

Closed hearing asked in double-murder case

Defense argues taped statements could jeopardize election of jury

By GARY E. NELSON
Of the Herald-Republic

A Superior Court judge will decide soon whether to exclude the press and public from a pretrial hearing in the capital case of Russell Duane McNeil and Herbert "Chief" Rice.

Judge F. James Gavin heard motions in the double-murder case Monday, including requests from defense attorneys to close a hearing that will determine whether to admit into evidence recorded statements the defendants made to police when they were arrested.

Rice and McNeil are charged with aggravated first-degree murder for the stabbing deaths of Mike and Dorothy Nickoloff, an elderly Parker couple, in January 1988. They both could face the death penalty if convicted.

The crime carries only two penalties under state law: death, or life in prison without possibility of parole.

Also Monday, attorneys for Rice and McNeil revealed what their clients' defenses will be when the men go to trial later this year.

Superior Court Judge F. James Gavin listens to pretrial motions Monday. Defense attorneys want the press and public to be excluded from a pretrial hearing in the double-murder case.

McNeil will be tried first, then Rice.

The trials have been delayed until after the U.S. Supreme Court rules in two cases that involve the constitutionality of executing defendants who were juveniles when they committed their crimes. Rice and McNeil both were 17 when the Nickoloffs were killed.

The high court ruling is expected in June, and the first trial is scheduled to start within 60 days thereafter.

Defense attorneys told Gavin on Monday that tape recordings of statements the defendants made to police are so sensational that they would jeopardize their clients' ability to receive a fair trial if the details were publicized in advance.

Prosecutors want to play the tapes in court so Gavin can decide whether to admit the statements into evidence during trial.

"It seems to me that there is only one significant effect of that procedure, and that is to generate prejudicial pretrial publicity," said

(See TRIAL, Page 2A)

Trial/from Page 1A

Michael Frost, a Seattle attorney representing Rice. "I would submit that there is a real possibility of poisoning the well of prospective jurors in Yakima County."

Frost suggested that the evidentiary hearing be held after a jury is selected for the trial, which would allow the court to order jurors not to read or listen to news reports.

Chris Tait, attorney for McNeil, said, "There is material in these statements that is highly inflammatory and would captivate the attention of anyone who hears it."

Deputy Prosecutor Howard Hansen said the reason for holding the hearing this far in advance of the trial was to reduce any effect of publicity on the selection of an impartial jury. Jeff Sullivan, Yakima County prosecuting attorney, said the prosecution also would like to avoid publicity of the hearing, but noted that courts have ruled the press and public have a right to open courtrooms.

Sullivan suggested a meeting be held with news media representatives, who would be asked to agree not to report the proceedings until after jury selection was complete. That procedure has worked in the past, he said.

Gavin said he will listen to the tapes to determine whether they pose a significant threat to a fair trial, and asked attorneys in the case to prepare briefs outlining previous court rulings on closed court hearings. No date was set for a subsequent hearing on the matter.

Later in Monday's all-day court hearing, defense attorneys revealed the defenses their clients will rely on during their trials.

Tait said McNeil will deny that the murders were premeditated, a claim the prosecution must prove to convict the two of first-degree murder.

In addition, Tait said, his client will deny striking any fatal blows to either victim.

Police and autopsy reports indicated the Nickoloffs were repeatedly stabbed, Mrs. Nickoloff as many as 75 times.

McNeil will not claim insanity or incompetence to stand trial, Tait said, and will not rely on alibi.

Frost said Rice will present a defense of "general denial," which he said will force the prosecution to prove each element of the crime charged. Rice also will not claim insanity or incompetence to stand trial, and will not rely on alibi, Frost said.

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Nickoloff murder

Plea to cut bail to allow visit to ill mom denied

By GARY NELSON
Of the Herald-Republic

Herbert "Chief" Rice Jr. asked a judge Thursday to reduce his bail so he could visit his dying mother, but the request by the capital murder defendant was denied.

Rice, 18, is charged, along with Russell Duane McNeil, in the January 1988 slayings of Mike and Dorothy Nickoloff, an elderly Parker couple who were stabbed to death in their rural farmhouse. The two defendants face the death penalty if convicted, and if the U.S. Supreme Court upholds the constitutionality of executing defendants who were juveniles when they commmitted their crimes.

Rice and McNeil both were 17 when the murders occurred. Their trials have been delayed until after the high court ruling, expected in June.

Rice's attorney, Rick Hoffman, told Yakima County Superior Court Judge F. James Gavin on Thursday that his client's mother is dying in a hospital near Spokane. The young man's grandmother, who lives in Prosser, is in declining health, Hoffman said.

"Mr. Rice would like to be able to see her before that option is forever closed," Hoffman said.

He also said Rice has changed since his arrest.

"This young man that stands before you now is a different person than the one who was arrested more than a year ago," Hoffman said.

Rice has family and friends who will provide him a support network, a place to live and a job, Hoffman told the judge. They also will require conditions of him beyond those the judge might impose if he were released, Hoffman said.

Hoffman asked that Rice's bail be reduced from $300,000 to $100,000, which he said Rice's family might be able to meet. Bail rules allow defendants to post a precentage of the amount in cash or put up property to be released on bond.

"I haven't seen my mother since I was a kid, 8 years old," Rice told the judge.

"It's not easy standing here in front of you," he continued. "I don't know my mom real well, and my grandma, she kind of raised me for a little while, and I'm real close to her," Rice said.

State law says no defendant in a capital case may be released at all unless conditions are imposed that reasonably assure he will show up for trial, the release will not substantially interfere with the administration of justice, and he will not pose an unreasonable risk to the community.

Deputy Prosecutor Howard Hansen said the prosecution is uncomfortable with any bail at all for Rice, preferring he be held without bail.

"I believe that it is just a situation that the assurances that are needed in a case like this just aren't there," Hansen said.

In denying Rice's motion, Gavin said a capital case is like no other.

He said he had received a number of letters from supporters of Rice, asking him to grant the motion.

"Many of them are quite compelling," Gavin said.

He observed that bail rules address the procedures for defendants, but do not address the rights of crime victims or their families. Gavin also noted that Rice himself might be at risk if he were released.

"There is still a substantial risk of interfering with the administration of justice," Gavin said, and a real danger Rice might flee.

The death penalty, he said, "is a very strong reason for not wishing to show up."

— his decision to ... pro-
lead of media-rich Puget Sound, and an ap-
of attention to the west side, where he is
to have image and name-fam[illegible]rity pro-

Yakima County GOP chairman, said he does
orrison will run for the Senate. However, Hall
nks any negative image Morrison may have

State Sen. Irv Newhouse, R-Mabton, a longtime friend and colleague of Morrison, said he told the Zillah Republican he didn't want to k[illegible] what his decision would be. Newhouse, too, said he [illegible] Morrison probably would not run.

(See MORRISON, Page 2A)

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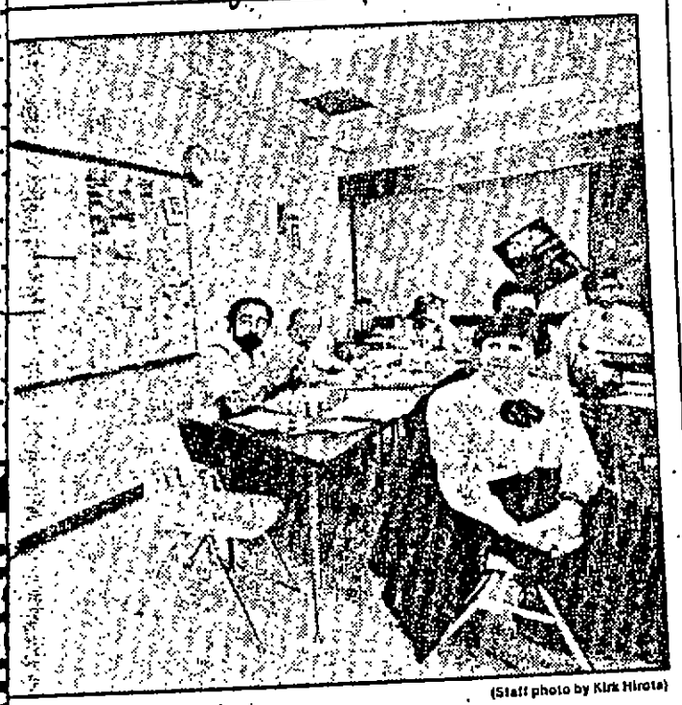

(Staff photo by Kirk Hirota)

a Spanish-language video about AIDS and its prevention dur-

ates about AIDS

complished solely through physician referral to protect identities.

A physician's assistant in addition to her AIDS education efforts, Hargis said that reaching the gay population in Central Washington is particularly hard because of the region's social and political makeup.

Gays are unwilling to publicly assemble in Yakima because of the fear of being ostracized.

"We have a significant gay population in the Yakima Valley," Hargis said. "Winning their trust is difficult, however, because of the fear of exposure and what that would mean in an area like this."

Nonetheless, Hargis said outreach efforts are paying off.

In many areas of the country, the spreading of AIDS among homosexual males has dramatically declined, a

(See EDUCATION, Page 2A)

Elderly couple killed

By JOE DUNCAN
Of the Herald-Republic

PARKER — An elderly married couple were killed Thursday evening in their Kays Road home in what authorities said appeared to be a burglary.

Mike and Dorothy Nickoloff were found dead shortly before 7 p.m. by relatives who stopped by to check on the couple, authorities said. Yakima County Coroner Leonard Birkinbine estimated the shootings occurred about 5 p.m.

Firefighters from Parker were called to the scene at 7:04 p.m. and were soon followed by police.

Birkinbine and detectives from the Yakima County Sheriff's Department remained late Thursday at the Nickoloffs' home just west of Lateral B on Kays Road. One detective said it would be several hours before the the police investigation progressed to where the bodies could be removed.

Sheriff Doug Blair and Birkinbine said it appeared the victims died from gunshot wounds. However, the causes of death in suspected homicides typically aren't established officially until autopsies are completed.

A neighbor, who asked not to be named, said Nickoloff was in his 80s and his wife was in her 70s. The couple had lived in the home for at least 40 years, the neighbor said.

"Why would anybody come in and just shoot them down? They didn't have anything of great value," the neighbor said. "It was just an ordinary house."

Nickoloff was a retired orchardist, the neighbor added.

...ersary marked

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New AIDS virus turns up in U.S. — 3C

SPECIAL SECTIONS

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Teens held in couple's slaying

Compiled from Herald-Republic staff reports

Authorities say a reward fund started by concerned citizens prompted a tip that led to the arrest of two Toppenish youths Wednesday in connection with the slaying of an elderly Parker couple earlier this month.

The two 17-year-olds being held for questioning in the Jan. 7 stabbing deaths of Mike and Dorothy Nickoloff are expected to make their first court appearance Friday.

They were arrested by Yakima County Sheriff's detectives early Wednesday and are being held without bail at the county juvenile detention center. Their names were not released.

Yakima County Prosecutor Jeff Sullivan said he is directing Deputy Prosecutor Bob Northcott to ask the court to remand the youths to Superior Court, where they would be treated as adults.

Sheriff Doug Blair announced the arrests Wednesday morning, saying a citizen's tip and detectives' investigation led authorities to the two youths.

Both were arrested at their respective family homes outside Toppenish, Blair said.

The sheriff later confirmed that two knives have been confiscated in connection with the arrests, including one discovered Tuesday at an unspecified site in the Lower Valley.

The other knife was seized when the youths were arrested.

Blair said detectives believe burglary was the motive for the slayings. The bodies were discovered by relatives inside the couple's home on Kays Road just west of Lateral B.

Two television sets authorities believe belonged to the Nickoloffs were discovered and seized as evidence, Blair said.

Mike Nickoloff, 82, was a retired orchardist. Both he and his wife, Dorothy, 74, had what appeared to be defensive stab wounds, indicating they had fought with the assailant.

Each was stabbed more than 12 times. Burglary is the only known motive for the slayings, Blair said.

Under state law, the youths arrested Wednesday can be held for three days from the time of arrest, then must appear in court or be released.

Northcott said he was awaiting written reports before he could schedule a court hearing. The pair likely will appear for arraignment in juvenile court Friday morning, he said.

Sullivan said he wants the case remanded to adult court because of the boys' age and the nature of the crimes.

It was not known Wednesday if the boys are employed, enrolled in school or both.

Reports of the arrests were greeted with relief in the close-knit, rural farming neighborhood that was shocked by the brutality of the killings.

"I'm so damn happy I'm crying," said Ed Simond Wednesday after learning that the reward he had been helping collect since Jan. 11 was a main factor in breaking the case.

Simond had been pruning his pears with three orchard workers and had arrived back in

(See ARRESTS, Page 2A)

SHERIFF DOUG BLAIR
. . . citizen's tip helped

Arrests/from Page 1A

the house just as Blair called. Simond was elated.

"I hope this means we've spent the reward money," he said.

Sheriff's Lt. Ron Ward later was asked if the reward had anything to do with the arrests. "It had everything to do with it," he said, adding that an update story on the reward in Monday's Yakima Herald-Republic got someone's attention.

The Parker Bridge Road orchardist had known the Nickoloffs, who were originally from Bulgaria, all his life.

Simond and three other longtime friends of the Nickoloff family initially guaranteed a $1,000 minimum. Union Gap Branch of Seafirst and Wapato Branch of Rainier National banks reported Wednesday the Nickoloff Reward Fund had grown to around $1,855.

"Farmers out here are generally very close. I think it has been difficult for everyone out here in the country," said Marlene Gill, a daughter of the murdered couple.

Gill said deputies had kept in touch with family members during the three-week investigation. On Monday evening, deputies indicated they had an important break in the probe, she said.

Gill declined to elaborate on what deputies told the family, but did say she was unaware of any ties between her parents and the two youths arrested.

The family was gratified to receive support in the form of letters, gifts, phone calls and the creation of the reward fund by neighbors, she said.

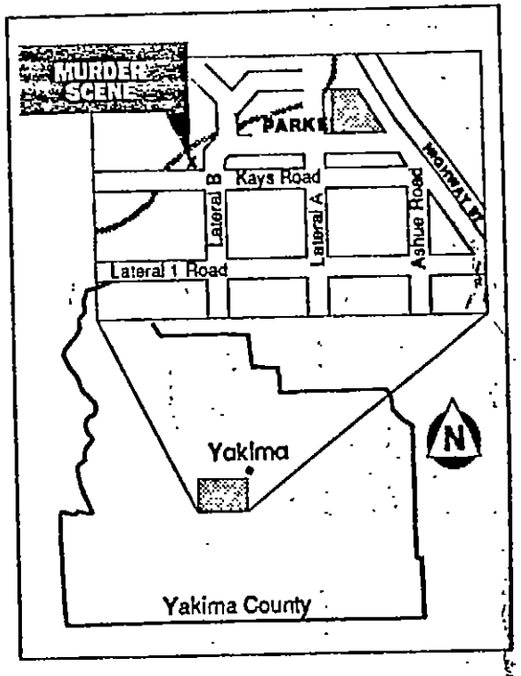
For some of those neighbors, the arrests won't signal a clear end to the tragedy.

"I thought I would be greatly relieved. But there are so many questions left unanswered," said Aileen Beddoe, whose family had lived near the Nickoloffs for decades.

They were a quiet, but friendly, couple who had operated their orchard for decades before retiring, she said.

"Yes, I'm relieved, but we will never totally recover," she said.

Said Wapato resident Jerry Wilson: "A lot of people have been sitting, watching TV with guns at their side. I think this will relieve a lot of people."



Two other rewards totaling some $3,500 have been raised for information leading to arrest and conviction in a brutal assault on Wapato High School teacher Coleman Burke last summer. Faculty members put up $1,000. Wilson and Bob Orozco started a reward drive that raised around $2,500.

Orozco said the latter sum also can be collected for information leading to conviction in the Dec. 1 murder of Joe Gonzalez, 40, of Wapato. The bludgeoned body of Gonzalez, an official of the Department of Social and Health Services office, was found Dec. 2 in a vacant lot in northeast Yakima.

Washington to preside over the communization of Central America."

His proposal sets the stage for a major congressional battle next week that the administration argues will make or break the contra rebel

Wright told reporters on Capitol Hill.

The administration once considered seeking as much as $270 million for the contras, but reduced the figure to what it considered politically feasible. White House

fighters, there is little chance the Sandinistas will bargain se ly," Reagan said, adding that cess at the negotiating table de on keeping the contra rebel alive.

Group charges civil right violated in probe by FBI

WASHINGTON (AP) — A New York-based legal group charged Wednesday that the FBI violated the civil rights of hundreds of people in conducting a six-year investigation into organizations opposed to U.S. policies in Central America.

The FBI acknowledged that it had conducted an investigation into the Committee in Support of the People of El Salvador, or CISPES, but maintained that it was looking into "alleged criminal activity rather than the motives and beliefs of those being investigated."

And in an interview late Wednesday, Justice Department spokesman Pat Korten contended that the Center for Constitutional Rights, which has had the FBI documents for nearly two months, released the papers Wednesday because "they are attempting to influence the contra aid vote in the U.S. Congress."

"This has little, if anything, to do with the FBI and has a lot to do with their attempt to influence the Congress," Korten added.

The Center for Constitutional Rights, founded in 1966 to provide "legal support to progressive movements," obtained 1,320 pages from FBI files through the Freedom of Information Act. Many of the pages contained blacked-out sentences or paragraphs, and the center said the documents represent only about a third of the government's files.

Among the organizations named in the FBI files were the Southern Christian Leadership Conference in Atlanta; the Maryknoll Sisters in Chicago; the United Steel Workers Union, the United Auto Workers Union and the National Education Association, all in Cleveland; Walker Methodist Community Church in Minneapolis; and the Women's Rape Crisis Center in Norfolk, Va.

Margaret Ratner, an attorney with the center who has studied the documents, said the FBI began its investigation in 1981 to determine if any members of CISPES, a group working to end U.S. intervention in Central America, were foreign agents.

The FBI's field offices fou evidence to back up that clair said, so the focus of the investi was turned into a "fo Intelligence-terrorism" in "even though no basis for su listed."

"The new category allow FBI to utilize 'special techn that are considered illegal wh plied to domestic investiga she said.

The FBI got its authority t duct the probe from an exe order signed by President Rea December 1981 that allow bureau and the CIA to watch even if they are not suspe breaking the law or acting on of a foreign power, Ratner sai

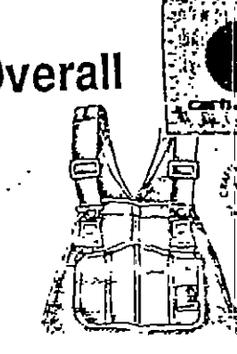
Ratner said the center is co ing filing a lawsuit to stop t from conducting similar inv tions in the future.

Carhartt

Brown Duck Bib Overall

Built better than it has to be.

- Heavy duty 100% cotton Brown Duck
- Wind resistant and snag proof
- Extra strong, triple-stitched main seams



GNP/from Page 1A

combination."

What concerned economists was a 3.8 percent drop in consumer spending in the final three months of the year, blamed primarily on a drop in auto sales following brisk demand in

quarter and increased 3.4 percent for the entire year, compared with a price gain of 2.7 percent for all of 1986.

Presidential spokesman Marlin Fitzwater said "the economy con-

Fake fat/from Page 1A

enough information for an appraisal, but the agency will look at the substance to determine whether it presents any regulatory, or in particular, safety issues."

The biggest drawback of

discovery," Shapiro said.

Researchers found that disintegrating protein into mist-like particles could "fool the tongue" by giving the smooth, creamy sensation of fat, he said.

1-19-88

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ciation.
DeLong

DeLong also mounted a spirited defense of the apple commission's radio advertising onslaught last summer.

workers who couldn't find employment as bearing out his arguments.

(See APPLE, Page 2A)

Body discovered; county homicide toll rises to five

By CRAIG TROIANELLO
Of the Herald-Republic

SUNNYSIDE — Only three weeks into the new year, Yakima County's homicide rate climbed to five Monday with the discovery of a farm worker's body at a ranch about two miles west of Sunnyside.

The victim, who has not been positively identified, was found sprawled just outside a small house on the Newhouse Ranch off Concord Drive.

An autopsy is expected to be conducted today, but death is believed to have been caused by stab wounds to the lower abdomen, said Sheriff Doug Blair.

Blair said several knives, including one with blood on it, were recovered inside the house. However, testing will be required to determine if the blood is human because a chicken was apparently slaughtered in the house, Blair said.

The victim, a Hispanic male, is believed to have been in his late 20s or early 30s. His body, clad in long gray pants and a short-sleeved dress shirt, was found at about 8:30 a.m. by Steve Newhouse, whose family operates the large ranch, deputies said.

Judging from its frozen condition, the body probably had been there for several hours, said Lt. Bob Regimbal.

Blood found inside the house tends to indicate the man's wounds were inflicted inside the residence, although there are no witnesses nor suspects in the case, Blair said.

Deputies think others might have been living at the house and police were expected to question several people late Monday afternoon, Blair said.

The small house where the murder occurred is located amid grape fields and is surrounded by a multitude of orchard ladders and bins of cut fruit wood.

Al Newhouse said the victim had picked grapes at Newhouse's ranch several months ago, but was not working for the ranch at the time of his death.

The murder becomes the second such case Yakima County sheriff's deputies have had to deal with this year.

Deputies are still trying to piece together clues in the stabbing deaths of Mike and Dorothy Nickoloff, retired orchardists whose bodies were discovered Jan. 7 inside their Parker home. Both had been stabbed repeatedly. Deputies say little was taken from the house except one or possibly two televisions.

During the weekend, search and rescue personnel were scheduled to comb for possible evidence in the orchards surrounding the couple's home on Kays Road, Blair said.

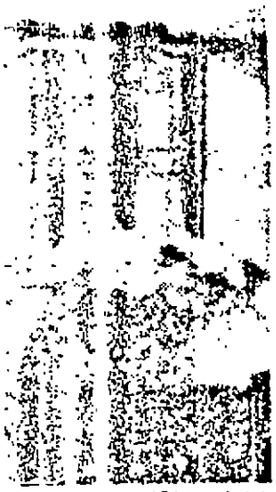
As of Monday, Yakima police had not made any arrests in the murder of Arturo Vargas. The 25-year-old Mexican national died of a single gunshot to the chest on Jan. 9. That shooting took place about 10 p.m. in the 300 block of East Spruce Street.

In the single murder case this year that has resulted in an arrest, Pedro Damacio Salgado remains held under $50,000 bail at Yakima County jail.

The 27-year-old Sunnyside resident is charged with first-degree manslaughter in the death of Jose Galvan, 43, also of Sunnyside. Galvan died of a single stab wound to the heart at the Allstate Apartments on Jan. 10.

Countywide, murders averaged about two a month last year for a total of 24 deaths, Blair said.

Sixteen of those deaths occurred in unincorporated areas of the county; the rest occurred within various city limits.



(AP Laserphoto)

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will make the proposal a public issue to expose what he called defects in the plan, point out the accomplishments of the city under its present form of government, and get out the vote on March 15.

After the meeting, Matthews said he welcomed the committee's entry into the campaign, because it will generate debate. The group, he said, represents only one side of the issue.

"It's the chamber of commerce gang," Matthews said. "So?"

found to search for additional clues and to the Sunnyside area to attempt to locate friends or family of the deceased, said sheriff's Lt. Jerry Hafsos.

The victim, believed to have been in his late 20s or early 30s, was found on the ground just outside the door of a small house on the Newhouse Ranch at Concord Drive west of Sunnyside.

Al Newhouse identified the man as a former grape picker who had worked elsewhere for the past several months.

Deputies said there are no suspects in the case, which is the fifth murder committed in Yakima County this year.

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Williams, Weber, A.I.A as architects for the $500,000 sports complex, and gave the superintendent the authority to employ a financial consultant and bond counsel for the sale of bonds, contingent upon passage of February's bond issue.

• Rejected a request from the Democratic caucus to waive the rental fee for use of the high school multipurpose room March 8.

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Youth still critical

A young West Valley man remained unconscious and in critical condition Tuesday following his injury last week in a two-car collision at the intersection of Wide Hollow Road and South 96th Avenue.

After the Friday accident Sandy W. Martin, 18, was admitted to Yakima Valley Memorial Hospital, suffering from possible head and internal injuries, authorities reported

Search fails to yield clues

PARKER — Yakima County sheriff's deputies say no new evidence turned up during a search of the orchard and other property surrounding the home of Mike and Dorothy Nickoloff, the elderly couple stabbed to death Jan. 7.

Yakima County search-and-rescue personnel combed the area during the weekend in an attempt to find new clues in the brutal slayings that shocked this rural community.

Crime experts from around the state are helping analyze what happened at the residence, said sheriff's Lt. Jerry Hafsos.

The bodies of the couple were discovered at their Kays Road home by relatives. The 83-year-old retired orchardist and his 75-year-old wife had been stabbed repeatedly and a small amount of property was reported taken from their home.

So far there are no suspects in the case, Hafsos said.

1/20/88

1/20/88

American way of life. Through the Tullises' generous contribution, a scholarship program will become available for student employees of the CWU library."

Under terms of a unitrust, donors give property to the CWU Foundation, at the same time retaining the right to receive income for a period of years. Larry Lium, CWU director of university relations and development, explained: "For the Tullises, it proved to be the best way to contribute to the university now, as well as to provide for their future."

Isabel Tullis worked as a librarian during the 1940s at what was then the Central Washington College of Education in Ellensburg. She established the reference section at the collegiate library during her tenure.

While they spent the majority of their working lives in Portland, Ore., the Tullises traveled to participating in Central's new Senior Ventures program for senior citizens, they decided to make a contribution to the institution she had served 40 years ago. She said: "We decided that what we had worked hard for is going to education."

"We saw how Central had progressed since Isabel was a librarian here, and it looked good," Roy explained. "Central has a good program, and it educates the normal run of people — those who need a good education, but perhaps can't afford to go to Harvard. These folks can get started this way (at Central)."

Education is of supreme importance for the couple. She was a public school teacher with two master's degrees —in English literature and library science — who came from Ohio in 1941 to work as a cataloging librarian at Central. He was a Hoosier who moved to Washington and made a career hauling motor freight. They met and married in Ellensburg in 1944.

Police hoping for vital clues to help solve violent crimes

By CHARLIE LAMB
Herald-Republic correspondent

WAPATO — Lt. Jerry Hafsos of Yakima County Sheriff's detectives division says he is waiting for that one telephone call — one that could unlock the mystery surrounding several of Yakima Valley's cruelest crimes of violence in recent years.

The call, or calls — which detectives pledge to receive in strictest confidence — could also unlock all, or part, of $4,440 in reward money that friends of the victims have deposited so far in Wapato and Union Gap banks in connection with the crimes.

"The Nickoloff Reward Fund" — latest to be posted — was started Jan. 14, a week after Mik: Nickoloff, 82, and his wife, Dorothy, 74, retired fruit-ranching couple, were found dead from multiple stab wounds in their home on Kays Road near Parker.

One of the Nickoloffs' friends and neighbors who started the fund said Friday it is "above $1,300 and climbing as feeling out here continues to run high." Accounts of Nickoloff Reward Fund are open in Union Gap Branch, Seafirst Bank, 2514 Main St., Union Gap, 98903, and Rainier National Bank, 302 W. First St., Wapato, 98951.

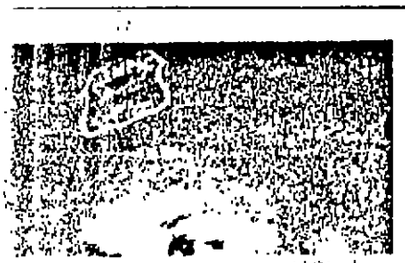
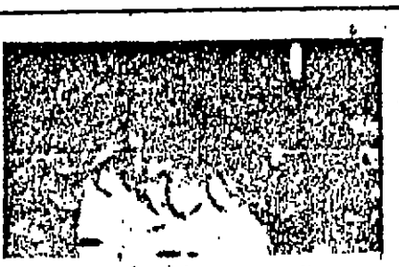
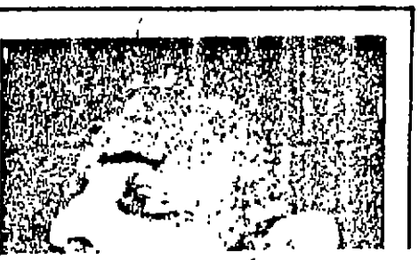
Two other reward funds totaling about $3,140 are posted in Central Valley Bank, Wapato, for information leading to a conviction in an unprovoked assault last summer on Wapato High School teacher Coleman Burke in the school parking lot. Faculty members put up $1,000, and a separate fund started by Bob Orozco and Jerry Wilson now exceeds $2,200.

Orozco said the latter fund is flexible and also offered for information leading to arrest and conviction of the murderer or murderers of Joe Gonzalez, 40, of Wapato, an employee of the Department of Social and Health Services in Yakima. His body, with a massive head wound, was found Dec. 2 in a lot on East D Street, Yakima.

Sheriff's department numbers to call are 575-4211, detectives; 575-4080, or 1-800-572-0490.

"Call us if you think you have related information — something you saw or heard — and let us decide if it's connected. We're also interested in any rumors going around on the cases," Hafsos said.

If Central Washington University had a Yakima campus, would you study there for a four-year degree? 1/25/88

By BECKY COCHRAN
Herald-Republic correspondent

GRANGER — School officials have decided to call a halt to their pursuit of students receiving an education out of district, after learning about new regulations dealing with the problem.

During a special session Monday, Superintendent Larry Simonsen told school board directors he recently learned of regulations that allow certain seniors an automatic release from the resident district if they already have been attending another school and show a "hardship."

In addition, students who have been attending out-of-district schools with the knowledge of any school board member or the superintendent may be exempt from returning to the home district, Simonsen said.

Last summer a survey identified about 80 Granger-resident students as attending school in Sunnyside, Zillah and Toppenish schools. The loss costs Granger School District an estimated $210,000 in state funds, an amount nearly equal to the district's last levy of $225,000.

Simonsen said hearing each challenge to residency in court would cost the district a substantial amount of money without any guarantee of a return.

"In view of what we have learned and the animosity, or perhaps I should say the tensions, it creates within the district and between local school districts, the key question is do you want to persist and proceed with this or drop it?" Simonsen asked board members.

Board member Larry Sizer said he felt it would be better to drop
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Crime experts seek evidence in killings

PARKER — Crime experts from around the state are continuing to comb for evidence at the Kays Road farmhouse where an elderly couple was killed last week.

So far, the investigation into the violent stabbing deaths of Dorothy and Mike Nickoloff has not focused on a suspect or suspects, said Ron Ward, chief criminal deputy with the Yakima County Sheriff's Department.

Instead, experts in fingerprinting, psychology, blood splattering and other sciences are continuing to search the house for potential evidence, Ward said.

The bodies of the 83-year-old retired orchardist and his 75-year-old wife were found Thursday evening by a visiting son and daughter-in-law. Both had been repeatedly stabbed. Dorothy Nickoloff suffered more than a dozen stab wounds to the back. Their bodies were found in the kitchen and living room. Deputies say there were no signs of forced entry at the house located just west of Lateral B.

Public hearing set on budget requests

By ROBERT SILER
Herald-Republic correspondent

ELLENSBURG — Kittitas County commissioners Tuesday backed away from their previous refusal to fund a Superior Court emergency budget request, and agreed to hold a public hearing Jan. 26 to consider several amendments to the 1987 budget.

The court, which exhausted its budget last week, is seeking an additional $13,210 to pay fees for witnesses, jurors and public defenders. Commissioners turned down an $18,000 emergency request from the court and the juvenile services department in December.

emergency budget requests. "We look for (officials) in 1988 to make prudent expenditures in all categories," the commissioner said. "We recognize that sometimes (costs) are beyond control . . . but we have to address expenditures at all levels."

Lumaco said the county's 1 percent share of the state sales tax for September and October was one of the largest collections he could recall in 19 years as a commissioner.

In other business:

• Meeting as the county board of health, commissioners approved personal health and miscellaneous

Nutrition

Judy Kirby will help people on

In vital B&O tax

1-29-88

Jubilant Gardner celebrates ruling

OLYMPIA (AP) — Washington Gov. Booth Gardner, ecstatic over a state Supreme Court ruling that lifts the threat of "catastrophic" state tax refunds, cried Thursday, "I'm declaring a state holiday!"

The jubilant governor, who had called the potential $700 million tax liability "a dark cloud hanging over Olympia," celebrated at a news conference held minutes after the court unanimously let the state off the hook.

Waving a copy of the 20-page court opinion, Gardner said he sees "no financial impact at all on the supplemental budget" now being debated in the Legislature.

Now lawmakers can get on with

(See GARDNER, Page 2A)

BOOTH GARDNER
. . . 'dark cloud' dissipates

By JOHN WHITE
Associated Press

OLYMPIA — A Washington State Supreme Court decision Thursday let the state off the hook for possibly hundreds of millions of dollars in tax refunds to state businesses, state officials said.

In a unanimous decision, the state high court said Washington is not required to pay refunds as a result of a U.S. Supreme Court decision declaring portions of the state's business tax unconstitutional.

The state court said that refunds are not required by law or by the state's constitution and that remedies contained in a 1967 law enacted by the state Legislature were sufficient.

The decision removed the posssibility the state might have to pay refunds of up to $700 million, an action that could have wrecked the state's economic position and required sharp tax increases, Gov. Booth Gardner had warned.

Attorneys for the 71 business firms that filed the suit said they were sur-

Teens may be tried

By MARK WALKER
Of the Herald-Republic

Prosecutors said Thursday they will seek aggravated first-degree murder charges against two Lower Valley youths arrested in connection with the Jan. 7 stabbing deaths of Mike and Dorothy Nickoloff.

Herbert A. "Chief" Rice and Russell Duane McNeil, both 17, appeared in Yakima County Juvenile Court Thursday morning and were informed they were being held for questioning in the Nickoloff deaths, and that the state will ask they be treated as adults.

Bail for each youth was set at $100,000, despite arguments from Deputy Prosecutor Bob Northcott, who said authorities believe they represent a threat to the community and should be held without bail.

Rice and McNeil were arrested early Wednesday following what Yakima County Sheriff Doug Blair called a citizen's tip.

The two youths appeared before Judge Stephen Brown dressed in T-shirts, pants and slip-on shoes, the standard clothing issued to those being held at the county's juvenile detention center in Yakima.

Northcott told the judge that the boys have made statements about the Nickoloff killings and that authorities have seized a variety of evidence, including two television sets taken from the Parker couple's home and two knives.

Based on Northcott's report, Brown ruled there was probable cause to continue holding the youths pending further investigation.

Northcott said the prosecutor's office intends to have Rice and McNeil treated as adults.

That requires the court conduct what is known as a dechnation hearing to decide whether the youths should be treated as adults or as juveniles.

Until that hearing is conducted and a determination is made, no arraignment will take place.

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prised and disappointed.

"We thought we had a very strong case for getting refunds back to 1980. It is surprising the court not only denied us relief for that period or for any period," said Frank Dinces of the Seattle law firm of Bogle & Gates.

Dinces said it's almost certain there will be an appeal to the U.S. Supreme Court. "We will file an appeal within 30 days and the U.S. Supreme Court will most likely tell us on the first Monday in December whether it will hear the appeal," he said.

Still, the decision brought an almost audible sigh of relief in Olympia where Gov. Booth Gardner walked into a news conference waving a copy of the opinion he said headed off potentially "catastrophic" tax refunds.

"I'm declaring a state holiday!" Gardner declared.

The governor said he sees "no financial impact at all on the sup-

(See TAX CASE, Page 2A)

KEVIN COE
. . . convictions dropped

two Coe verdicts

By BILL MERTENA
Associated Press

OLYMPIA — Frederick H. Ke Coe, convicted as Spokane's So Hill rapist, could be free from pri in less than four years follow Thursday's decision by the Supre Court to overturn two of his th rape convictions.

Spokane Prosecutor Donald Brockett, who prosecuted Coe, cal the court's decision "a tragedy the community" while a rape cr network supervisor said the cou decision was hard for rape victim accept.

Before the court ruled, Coe been facing a life sentence plus years. He is in the State Penitenti at Walla Walla.

Three of the court's nine justi joined Justice James M. Dolliver plurality opinion which held t testimony of two of the victims w improperly admitted at Coe's sec

(See COE, Page 2A)

ed as adults in killings

A Yakima attorney who appeared on the youths' behalf, Dan Lorello, said he will likely ask the court to delay the hearing until he can have the youths evaluated by mental health professionals.

Court rules require that a declination hearing be conducted within 14 days of arrest unless the court grants a continuance.

If Lorello is successful in his desire to have the boys evaluated, the declination hearing could be several weeks away.

Conviction for aggravated first-degree murder as an adult is punishable by death, or by life in prison without any chance of parole.

A youth convicted of that crime in juvenile court could be held in a state facility for juveniles until age 21, at which time they must be released.

Northcott said Rice and McNeil have had minor brushes with the law before, but neither has ever been charged with a serious crime.

(See APPEAR, Page 2A)

A contrast in dispositions

By CRAIG TROIANELLO
and CHARLES LAMB
Of the Herald-Republic

A sharp contrast in personalities emerged Thursday in descriptions of two Lower Yakima Valley teens held on suspicion of murdering an elderly Parker couple.

Russell Duane McNeil, 17, is described as an average, well-mannered high school junior who attended classes quietly and without incident until days before his arrest on Wednesday. Teachers and students at PACE, an alternative four-year Wapato school, expressed shock at his arrest.

"Staff reaction is one of disbelief. Because, I think, by and large we've enjoyed working with Russ, he's been cooperative," said PACE

(See YOUTHS, Page 2A)

Senate panel passes omnibus AIDS bill

Compiled from staff and news service reports

OLYMPIA — A Senate committee joined

Sponsored by Sen. Cliff Bailey, the educ tion committee bill would leave the bulk decisions concerning AIDS education un

...very interested in the problems created by ...B&O (business and occupation) tax itself, as ...relates to a tax on gross income and its ...incentive to business," he said.

Gardner had a relieved grin on his face when ...strode to his press conference table, bran...ishing the court opinion. The court unanimously ...ejected a business demand for tax refunds ...in last August, we believe the credit ...takes care of the future (liability)."

He referred to legislation that eliminated the high court's objections. The pricetag was $42 million in this biennium.

Gardner said he suspects the plaintiffs will appeal Thursday's ruling to the U.S. Supreme Court.

1A

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...afforded retroactive ...ordered full refunds, ...aged in interstate ...ld pay no portion of ...he tax burdern," Ut...

...hat the business firm ...at denial of refunds ...equal protection by ...classes of taxpayers, ...fund is based on the ...of the B & O tax ...ate commerce and all

...that argument, Utter ...and federal law in the ...cates that argument

Court/ from Page 1A

If they are remanded to Superior Court and arraigned on a charge of aggravated first-degree murder, the prosecutor's office then has 30 days to decide whether to seek the death penalty.

Thursday's court hearing lasted about 20 minutes.

The two youths, seated next to each another, displayed little emotion during the proceedings and occasionally conferred with Lorello.

Both have thin mustaches trimmed in identical fashion.

The slender McNeil fidgeted and appeared nervous, exchanging several glances with the stockier Rice.

The two are being kept apart in separate areas of the detention center.

Youths/ from Page 1A

principal Dennis Erickson. "He's a quiet boy, very polite, one who had very few problems and was at least a good average student."

On the other hand, Herbert A. "Chief" Rice, also 17, is remembered as a discipline problem who was suspended for fighting before dropping out of Wapato High School in March 1986.

"Chief, as they called him, was a nice-looking, healthy young man. He had size (about 5 feet 10 inches and 145 pounds) and ability that would have allowed him to be a heck of an athlete," said Wapato High School Principal Leroy Werkhoven.

"But he was typical of the poor discipline type that doesn't deal with school expectations at all."

Werkhoven said Rice's portfolio showed a fight on the schoolgrounds Sept. 2; 1985, other fights and unexcused absences, before he dropped out of school after being kicked off a school bus March 20, 1986, for fighting.

Both youths are being held at Yakima County Juvenile Detention Center under $100,000 bail set Thursday after prosecutors announced they will seek aggravated first-degree murder charges against the two. Both were arrested for investigation in the Jan. 7 stabbing deaths of Mike and Dorothy Nickoloff. The couple died of multiple stab wounds suffered during what sheriff's deputies term a burglary at the elderly couple's rural farm home on Kays Road west of Wapato.

During a court appearance Thursday, Deputy Prosecutor Bob Northcott said McNeil and Rice have had minor brushes with the law before, but neither has ever been charged with a serious crime.

Erickson said McNeil would have been the last person he'd have suspected. McNeil, a junior, had a very good attendance record and few discipline problems in his three years at PACE.

However, since early January, he had missed four days. But, according to Erickson, he acted perfectly normal after the murder date, with no hint of stress or worry. School records show he attended school the day of the murders, which occurred about 6 or 7 p.m. But he was absent the day before and day after the killings.

He was in school Monday, less than two days before his arrest.

Thursday's Triple Choice winner: 138

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By DAVI
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Washington A President Tom H: a number of el-m apple prices dur- ing the rest of the 1987-88 marketing season.

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American way of life. Through the Tullises' generous contribution, a scholarship program will become available for student employees of the CWU library."

Under terms of a unitrust, donors give property to the CWU Foundation, at the same time retaining the right to receive income for a period of years. Larry Lium, CWU director of university relations and development, explained: "For the Tullises, it proved to be the best way to contribute to the university now, as well as to provide for their future."

Isabel Tullis worked as a librarian during the 1940s at what was then the Central Washington College of Education in Ellensburg. She established the reference section at the collegiate library during her tenure.

While they spent the majority of their working lives in Portland, Ore., the Tullises traveled to ... participating in Central's new Senior Ventures program for senior citizens, they decided to make a contribution to the institution she had served 40 years ago. She said: "We decided that what we had worked hard for is going to education."

"We saw how Central had progressed since Isabel was a librarian here, and it looked good," Roy explained. "Central has a good program, and it educates the normal run of people — those who need a good education, but perhaps can't afford to go to Harvard. These folks can get started this way (at Central)."

Education is of supreme importance for the couple. She was a public school teacher with two master's degrees —in English literature and library science — who came from Ohio in 1941 to work as a cataloging librarian at Central. He was a Hoosier who moved to Washington and made a career hauling motor freight. They met and married in Ellensburg in 1944.

Police hoping for vital clues to help solve violent crimes

By CHARLIE LAMB
Herald-Republic correspondent

WAPATO — Lt. Jerry Hafsos of Yakima County Sheriff's detectives division says he is waiting for that one telephone call — one that could unlock the mystery surrounding several of Yakima Valley's cruelest crimes of violence in recent years.

The call, or calls — which detectives pledge to receive in strictest confidence — could also unlock all, or part, of $4,440 in reward money that friends of the victims have deposited so far in Wapato and Union Gap banks in connection with the crimes.

"The Nickoloff Reward Fund" — latest to be posted — was started Jan. 14, a week after Mike Nickoloff, 82, and his wife, Dorothy, 74, retired fruit-ranching couple, were found dead from multiple stab wounds in their home on Kays Road near Parker.

One of the Nickoloffs' friends and neighbors who started the fund said Friday it is "above $1,300 and climbing as feeling out here continues to run high." Accounts of Nickoloff Reward Fund are open in Union Gap Branch, Seafirst Bank, 2514 Main St., Union Gap, 98903, and Rainier National Bank, 302 W. First St., Wapato, 98951.

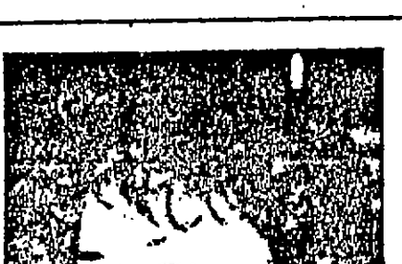
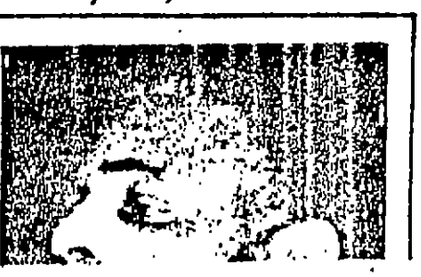
Two other reward funds totaling about $3,140 are posted in Central Valley Bank, Wapato, for information leading to a conviction in an unprovoked assault last summer on Wapato High School teacher Coleman Burke in the school parking lot. Faculty members put up $1,000, and a separate fund started by Bob Orozco and Jerry Wilson now exceeds $2,200.

Orozco said the latter fund is flexible and also offered for information leading to arrest and conviction of the murderer or murderers of Joe Gonzalez, 40, of Wapato, an employee of the Department of Social and Health Services in Yakima. His body, with a massive head wound, was found Dec. 2 in a lot on East D Street, Yakima.

Sheriff's department numbers to call are 575-4211, detectives; 575-4080, or 1-800-572-0490.

"Call us if you think you have related information — something you saw or heard — and let us decide if it's connected. We're also interested in any rumors going around on the cases," Hafsos said.

If Central Washington University had a Yakima campus, would you study there for a four-year degree? 1/25/88

Friends of slain couple

By CHARLES LAMB
Herald-Republic correspondent

PARKER — Public outrage over the Jan. 7 murders of Parker pioneers Mike and Dorothy Nickoloff began to be expressed Thursday through contributions to a reward for information that could identify the guilty person or persons and bring them to justice.

Friends of the retired fruit-growing couple established the "Nickoloff Reward Fund" at Rainier Bank in Wapato and SeaFirst Bank in Union Gap. The fund started with a guaranteed $1,000 minimum.

Fund spokesmen placed no ceiling on the amount, explaining that the higher the reward, the better chance of solving the murders.

Information, no matter how seemingly trivial, should be given the Yakima County Sheriff's Department's detective division by calling 575-4080, 575-4122, or 1-800-572-0490. Information will be kept confidential.

Announcement of the reward followed the funeral Wednesday for Mike Nickoloff, 82, and Dorothy Nickoloff, 74.

The funeral was attended by more than 500 mourners, including many members of other Bulgarian immigrant families of Yakima Valley. Many who came to America in the 1920s, the same time when the Nickoloffs arrived, observed a traditional Bulgarian plum wine-sipping ritual at graveside in the bitter cold in Tahoma Cemetery.

The bodies of the husband and wife were discovered in their home on Kays Road at 7 p.m. Jan. 7 by a son and a daughter-in-law. Both had multiple stab wounds in their upper torsos. Authorities said Mike Nickoloff, who had recently returned home from a nursing home, was found in his wheelchair in the living room with hand wounds that he might have received in trying to fight off an attacker. Dorothy Nickoloff's body was in the kitchen.

The modest home is still cordoned off and in sheriff's custody as investigators comb the interior for clues. Sheriff's Lt. Jerry Hafsos said two televisions are believed to be missing.

The Nickoloff reward fund is one of three established by citizens of Wapato and Parker in recent months in the wake of violent crimes that included three homicides and the brutal beating of another man.

Two of the funds were started after Wapato High School teacher Coleman Burke was attacked and seriously injured at night in the school parking lot.

A fund headed by Bob Orozco and Jerry Wilson has reached $2,140, and $1,000 fund was raised by school faculty members.

Orozco said Thursday the Burke attackers have not been apprehended and the $2,140 fund also has been made applicable leading to the app viction of the sla popular Wapato zalez, 40.

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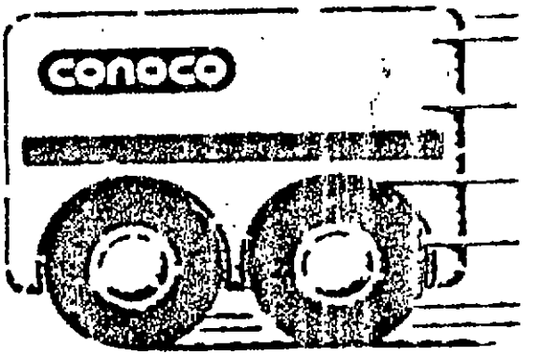

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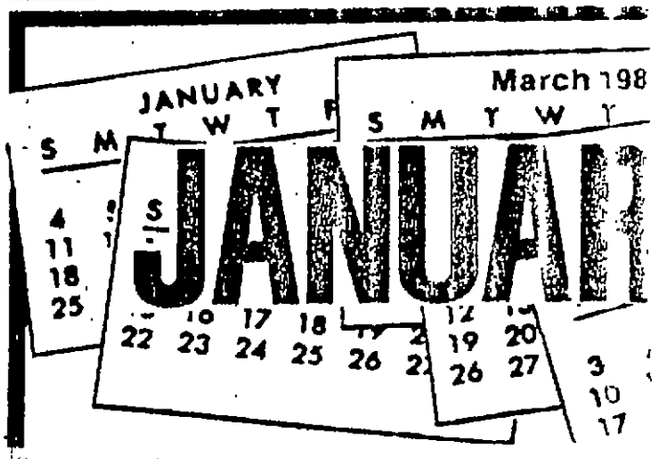

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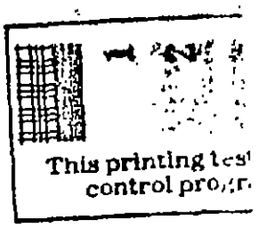
made applicable for information leading to the apprehension and conviction of the slayer or slayers of popular Wapato resident Joe Gonzalez, 40.

Gonzalez, an employee of the state Department of Social and Health Services in Yakima and a former employee of Rainier Bank in Wapato, was reported missing Dec. 1. The man's body, with massive head injuries, was discovered Dec. 2 in the 900 block of East D Street in Yakima. His billfold was found in a dumpster near Yakima Mall.



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Local News

Yakima Herald-Republic a daily part of your life.

Saturday, February 6, 1988—3A

Reward offered in Lower Valley assault

By CHARLES LAMB
Herald-Republic correspondent

ZILLAH — A robbery and brutal assault Sunday on pioneer grocers Paul and Freda Lions in their Liberty Store east of here has prompted a minimum $1,000 reward offer for information leading to arrest and conviction of the two assailants.

A committee of Lower Yakima Valley friends of the victims Friday opened a "Paul and Freda Lions reward account" in Zillah Branch, Rainier National Bank, P.O. Box 657, Zillah 98953. A spokesman said contributions are being accepted at other Rainier banks, forwardable to the Zillah bank.

Yakima County sheriff's detectives said the crime occurred at 1:30 p.m. as the couple prepared to lock up their Liberty Market on Van Belle Road east of Zillah so Lions, 72, could watch the Super Bowl.

Two men described as Hispanics in their 20s and wearing blue jeans entered the store, and asked Lions the location of two small grocery items. Then, without warning, one of the men began beating Lions on the head with a third item — a can of juice.

Officers said Mrs. Lions, 69, remembers throwing something at her husband's attacker after he had knocked Lions to the floor and begun kicking him. The other intruder is reported to have struck Mrs. Lions behind the head several times with his fist, knocking her down.

Relatives said Mrs. Lions pointed to the cash register and told the men to take the money. The relatives said the intruders stopped assaulting the couple, took an undisclosed amount of cash, knocked Mrs. Lions down again and left.

The victims were treated in Sunnyside Valley Hospital, both for bruises and Lions for a lacerated hand. However, Mrs. Lions was taken to Yakima Valley Memorial Hospital Tuesday following a seizure and was still hospitalized Friday.

The Lionses — who have operated their store for 49 years — were robbed Dec. 23, 1982, and Lions received a skull fracture and jaw injuries when he was hit with a jug of anti-freeze. Relatives said his hand may have been cut Sunday trying to ward off the assailant's blows from his earlier injuries.

The injured couple heard a vehicle drive away at high speed after the Sunday robbery. A sheriff's detective Friday described a suspect vehicle as "a 1968 or '69 Chevy El Camino pickup, metallic blue with brown primer spots on the front and Crager mag wheels on the rear."

The Lions Reward Fund — the latest of several established in the Yakima Valley in recent months involving violent crimes — specifies that if information leading to convictions comes from more than one source, money will be divided equally among informants. The offer will expire in a year, unless the case is still investigated.

Two suspects in the Jan. 7 murders of Mike and Dorothy Nickoloff of Parker were arrested Jan. 27 after some $1,800 was raised in a reward fund similar to that now started in the Lions assault and robbery case.

Two other reward amounts totaling almost $3,500 were raised after Wapato High School teacher Coleman Burke was brutally beaten last summer. Faculty members raised $1,000 and some $2,400 was raised in a fund started by Bob Orozco and Jerry Wilson of Wapato.

Orozco said the latter fund is flexible, in that it can be given for information leading to an arrest and conviction in the Dec. 1 murder of Joe Gonzalez, 40, of Wapato. The body of the Department of Social & Health Services worker was found in a northeast Yakima vacant lot Dec. 2.

Around the valley

3/17/88

Trial set for pair accused of slaying elderly couple

Two 17-year-olds accused of killing an elderly Parker couple were arraigned Wednesday in Yakima County Superior Court on aggravated first-degree murder charges.

Herbert A. "Chief" Rice and Russell Duane McNeil each are charged with one count of aggravated first-degree murder and one count of accomplice to aggravated first-degree murder for the brutal stabbing deaths of Mike and Dorothy Nickoloff Jan. 7. Their trial has been scheduled for May 2.

There are only two possible sentences for a person convicted of aggravated first-degree murder: life in prison without possibility of parole, or death. The prosecution has 30 days in which to ask for the death penalty in the case.

The defendants have 10 days to decide whether to file pleas of innocent by reason of insanity. A hearing has been scheduled today to hear defense requests to extend that 10-day period.

Rice is being held in the county jail on $300,000 bail, and McNeil on $250,000.

The court has appointed four public defenders in the case. Chris Tait and Tom Bothwell will defend Rice, and Susan Hahn and Mike Schwab will represent McNeil.

Eight escape house fire

Eight people escaped without injury from an early morning fire that destroyed a home on West Birchfield Road Wednesday.

Terrace Heights Fire Chief Stan Hankins said smoke awakened Junior and Joyce Wilkey, their three sons, Mrs. Wilkey's sister and two other guests about 4 a.m. Although the three-bedroom home had only one door, all eight people were able to get out safely, Hankins said.

All eight suffered mild smoke inhalation, and one was treated at the scene with oxygen, Hankins said.

Firefighters responded at 4:09 a.m. to find the house at 4006 W. Birchfield Road fully ablaze. The 17 firefighters were able to suppress the fire within 20 minutes, but were unable to save the dwelling, which was a total loss.

Damage to the structure and the contents was estimated at $28,000, Hankins said. Both were insured.

The residents, who escaped wearing only nightclothes, were given temporary shelter at a local motel by the American Red Cross, Hankins said.

A fire investigator was summoned to the scene,

3/25/88 Herald

Group to offer rewards for crime information

By CHARLES LAMB
Herald-Republic correspondent

TOPPENISH — A group of concerned Toppenish citizens outraged over a crime epidemic in their city are organizing a bounty system.

An non-profit organization, Toppenish Against Crime, is being formed to raise money to be posted as rewards for information leading to arrest and conviction of lawbreakers.

"It's the only way private citizens can fight back," said Bob Bell, businessman and a TAC organizer.

Bell said TAC is against citizens taking the law into their own hands, noting that many frustrated crime victims around town have armed themselves.

Bell and Toppenish Chamber of Commerce President Dave Foster see TAC's reward system as a way citizens can help Toppenish police get a better grip on local crime. They said Police Chief Jim Andrews was approached on the idea and responded favorably.

"We'll sit down with the chief and work out a list of offenses, with a proposed range of reward money involving each."

Both organizers feel the system should offer an incentive for people to come forward with information needed to solve a crime and might also discourage potential lawbreakers.

"I would like it to be a permanent ongoing thing," said Bell, manager of PureGro Growers fertilizer firm. "TAC isn't something to belong to, but a contributory program."

Foster said the group plans to arrange for the Toppenish Livestock and Rodeo Association, which sponsors the Toppenish Pow Wow celebration, to receive contributions. "It has a non-profit status so contributions could be tax-deductible.

"We'll get everything in place, set up a bank account and ask people to contribute. They'll get a receipt for tax purposes.

"Also, tips or information on crimes will be confidential and, when rewards are given, recipients will be anonymous."

An instance of vandalism at the Toppenish Public Library on March 7 was the catalyst for forming TAC. A lawn hose was stuck in the book return slot and turned on shortly after 6 p.m. closing.

The running water caused $2,500 damage to flooring. No books were damaged. A similar water hose prank occurred earlier at a Hispanic Ministries chapel.

In recent weeks, three learning computers and several video casette recorders valued at $6,400 were stolen from special education rooms at Kirkwood Elementary School.

One firm was hit so often the owner lost his insurance and it cost him $10,000 to insure with another firm.

Bell's PureGro headquarters on Washington Street has been burglarized and vandalized countless time in 11 years. "One visit, vandals broke nine windows. We found 36 big rocks inside that had been thrown so hard they caved in wall paneling across the room," Bell said.

"After our office windows were fitted with heavy steel security mesh, vandals returned one night and smashed dashboard instruments on our trucks.

"Who's doing it, and why, we don't know," Bell said. "But juveniles or adults, we want them. We'll take any sized contribution."

3/25/89
Herald

3/26/89

Yakima Herald-Republic

Crime and punishment: Death for teens?

By GARY E. NELSON
Of the Herald-Republic

When Mike and Dorothy Nickoloff, age 82 and 74 respectively, were found stabbed to death in January 1988, two television sets were missing from their rural farmhouse.

Peter Jacobson, a Thurston County farmer, was 84 when he was hacked to death with an ax in his rural home near Olympia. His assailants got away with $3 and a watch. The year was 1931.

In both cases, teen-agers were arrested and charged with murder.

Russell Duane McNeil and Herbert "Chief" Rice are still awaiting trial for the Nickoloff killings. If they are convicted, prosecutors will ask for the death penalty.

Both were 17 when the murders took place.

Walter Dubuc was 16 when he helped a 30-year-old accomplice murder Peter Jacobson in July 1931. He was hanged for the crime the following April at the state penitentiary in Walla Walla.

Dubuc, one of only two juveniles executed in Washington since statehood, was from Yakima.

William "Kid" White was hanged in 1906, although his exact age is unclear. He may have been 18 when he killed a Seattle bartender during a holdup.

The governor in 1932 turned a deaf ear to the pleas of 6,000 people who signed a petition asking that Dubuc's sentence be commuted to life in prison.

On Monday, the U.S. Supreme Court will hear arguments in two cases that involve men on death row who were juveniles when they committed their crimes. The ruling in those cases, expected by June, will clear the way for Rice and McNeil to stand trial, and could remove the specter of death from that proceeding.

The high court last year ruled it unconstitutional to execute an Oklahoma youth who was 15 when he committed murder. The divided ruling left open the question of executing 16- and 17-year-olds, but the justices agreed to decide that question this year.

When news of the Nickoloff slayings broke last year, reaction from the community was swift and emotional, but when two 17-year-old boys were arrested and charged with the murders, disbelief set in.

To many, the age of the suspects reflected a society undergoing disturbing changes as the 21st century approaches. A society where neglected and abused children grow up to prey on their fellow citizens, where younger and younger offenders commit ever more cold-blooded crimes.

That perception is wrapped up in the arguments for and against executing juveniles. A key concept in the debate is something called "the

(See DEATH PENALTY, Page 7A)

INSIDE

Two murders, two juveniles — and two sides to the issue of death sentences for teens. A look at the cases that the court will take up Monday.

— Page 7A

veniles, two sides

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he told a psychiatrist in 1986.
ll get special treatment and

you can go on for a long time before you can die, and I'm going to get that time."

Missouri this January executed its first inmate since 1965.

Stanford's attorneys, in addition to the broader arguments, contend that because Kentucky lacked the intensive treatment program needed to rehabilitate him, the death penalty should be precluded for him in particular.

"I get the impression that he would have been a career criminal anyway," said prosecutor Ernest Jasmin. "The earlier the age the individual begins to participate in criminal activity, the greater likelihood there is that he will remain basically a career criminal. Stanford basically fits the profile. ... The likelihood of turning him around is going to be slim and none."

Stanford came from Louisville's low-income West End, his surroundings modest but hardly desperate. He apparently never knew his father; his mother, a hospital therapist, worked long hours. Until he was 6, he lived mostly with his near-invalid grandmother. By age 12, he was a drug addict. He was in and out of juvenile court, juvenile-home placements and programs for young offenders.

Stanford and his mother "tolerated one another while Kevin was at home," said one report by the state Cabinet for Human Resources. He quit school after ninth grade and fathered a child out of wedlock at 17.

"The fact that an individual might have come from a poor background or a one-parent household does not forgive him for committing a crime," Jasmin said. "It's not an excuse, as far as I'm concerned."

On Jan. 7, 1981, Baerbel Poore, 20, was alone at a Cheker Oil station next to Stanford's apartment, working nights to support an infant daughter. Stanford and two other teens decided to rob the station.

Stanford and David Buchanan, 18, sexually abused and terrorized Poore in the bathroom while 15-year-old Troy Johnson waited out in a car. Stanford then forced Poore into her car and drove with her to a wooded area, followed by the other two. Stanford gave her a last cigarette, then shot her twice in the head.

The take from the robbery was 300 cartons of cigarettes, $143.07, two gallons of gasoline and a gas can. The trio were arrested within the week as police investigated cigarette-peddling around the neighborhood.

Johnson's case remained in juvenile court and he testified against Stanford and Buchanan, who were tried together in August 1982. Buchanan did not face the death penalty because he wasn't the triggerman; he was sentenced to life.

Prison guards testified at the trial that Stanford boasted to cellmates of raping and killing Poore. His lawyers contended that was the false bravado of an adolescent, further proof of immaturity that made a death sentence wrong.

Throughout the trial, Stanford had "a smirk on his face" and would whisper taunts at him, Jasmin said. Robert Poore, the victim's father, said Stanford "stood there and laughed at me and Ingrid in the courtroom."

Poore, a truck driver, said he would be at the Supreme Court on Monday along with his daughter Mona Mills and Baerbel's 9-year-old daughter. His wife Ingrid died of cancer in October 1987.

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Two deaths, two ju

Court to hear arguments on death penalty for juveniles

EDITOR'S NOTE — The U.S. Supreme Court on Monday will hear arguments on two cases it will use to consider whether execution for murder committed by someone under age 18 is cruel and unusual punishment proscribed by the Constitution. This story takes a look at those two cases.

By KAREN BALL
and CHARLES WOLFE
Associated Press

As a child, Heath Wilkins liked to set fires and break into houses looking for knives and money. He plotted to poison his mother when he was 10, and at 16 he stabbed a convenience store clerk to death as she begged for her life.

Kevin Stanford plunged into crime at age 9. He was a drug addict at 12, and was arrested for robbery, burglary, assault, attempted rape and other crimes by 17. That's when he raped, robbed and murdered a gas station attendant.

Stanford and Wilkins are two of two dozen U.S. death row inmates sentenced for crimes committed before they were 18. After a splintered ruling last year, the Supreme Court picked their cases to determine if executing such youthful offenders is cruel and unusual in violation of the Constitution.

The court, which split 5-3 in throwing out a death penalty for an Oklahoma killer who committed his crime at age 15, will hear arguments Monday.

Wilkins is on Missouri's death row. State Attorney General William Webster will contend that society's "evolving standards of decency" permit execution of 16- and 17-year-olds. Most of the 37 states that allow capital punishment permit execution of those who commit murder at age 16.

Kentucky, where Stanford has spent nearly seven years awaiting execution, will argue that age, while a mitigating circumstance, should not automatically preclude a death sentence if it fits the crime. A brief by Assistant Attorney General David Smith urges the court to stick to its position that all capital cases should be considered individually, without blanket exemptions.

Death penalty opponents and attorneys for Stanford and Wilkins argue that society has always presumed juveniles to be immature and irresponsible, and has restricted their rights and responsibilities in such areas as drinking, voting and military service. They also say execution is no deterrent to crime.

To teen-agers, death is "kind of glamorous, it's 'Rambo,' it's kind of sexy. It attracts them like the flame attracts the moth," Victor Streib told Missouri lawmakers recently when he testified in support of a measure to make 18 the minimum age for executions. He was co-counsel for William Wayne Thompson of Oklahoma, whose case the Supreme Court split on last year.

Four justices said the death penal-

Death penalty/ from Page 1A

evolving standards of decency" in American society.

Supporters say the death penalty should apply to juveniles when it fits the crime. They point to changes in sentencing laws they say reflect the growing number of juveniles being convicted of violent crimes.

State and federal laws have been changed in recent years to make it easier to try juveniles in adult courts. In some states, like Oklahoma, 16- and 17-year-olds are automatically considered adults when they are charged with a crime such as murder, rape or kidnapping for ransom.

In Washington, the juvenile court must waive jurisdiction before any defendant under 18 can face trial in adult court.

The recognition that juvenile criminals are increasingly violent and remorseless, committing very adult crimes, is an example of evolving standards, supporters argue. Three Supreme Court justices made that argument when they dissented from last spring's decision.

Opponents of executing juveniles say the law already treats minors as less responsible members of society for a number of purposes. Juveniles cannot legally vote, drink, serve in the military, own property, sign contracts or buy a handgun, they note.

Adolescents, they argue, are much less likely to consider the consequences before they act. Teen-agers also have a tendency to see themselves as immortal, nullifying any deterrent effect the death penalty might have on an adult.

Chris Tait, one of McNeil's attorneys, says he knows of no state that has ever debated the question of executing juveniles. That issue was prominent in the Supreme Court's ruling last spring that overturned the death penalty for the Oklahoma defendant, he pointed out.

Four justices said that society's evolving standards of decency precluded executing criminals who were under 16 when they committed their crimes. A fifth justice, Sandra Day O'Connor, said she could not agree that no 15-year-old should be executed, but voted to overturn the death penalty in the Oklahoma case because that state's Legislature had never set a minimum age.

Oklahoma law provides for juvenile courts to waive jurisdiction when a defendant is under 16, but O'Connor said there was no evidence that lawmakers realized they were making 15-year-olds eligible for death when they created that law.

Tait and his co-counsel, Tom Bothwell, say the same thing is true in Washington.

"If you're going to do it to juveniles, then your death penalty statute should specifically say it's OK to do it to juveniles," Bothwell said.

Tait said he believes recent public opinion polls showing overwhelming support for the death penalty in Washington were influenced by the recent execution of serial killer Ted Bundy.

Bundy was "an absolutely unique situation," Tait said. "And I think he evoked a very emotional response from Americans."

To equate Bundy, who may have killed more than 100 people, with two teen-agers accused of killing two people, is dangerous, Tait argued.

"I think it would be a terrible mistake to equate Ted Bundy with these two kids up in the jail," he said. "They're just not the same.

"I doubt that we'll see another case like Ted Bundy in 50 years."

Public support for the death penalty also reflects a fear of the rising crime rate and frustration with a criminal justice system seen as ineffective, Tait said.

The danger, he said, is the assumption that killing criminals will solve the problem.

"For us to say that we support the death penalty because it will solve our problems is ridiculous," Tait said.

"You could kill these two kids, and that's not going to make the syringes disappear from Naches Avenue. That's not going to affect the murder rate."

4/13/88

Judge orders dog killed for calf attack 5A
Sunnyside's last ambulance firm closes 5A
Snokist to build new CA warehouse in Naches 5A

Murder case extension granted

Decisions on insanity pleas, death penalty due in late May

By GARY E. NELSON
Of the Herald-Republic

Prosecutors and defense attorneys will have until late May to decide key elements of the case against two Toppenish youths accused of the brutal slaying of an elderly Parker couple, and the case may not go to trial until next fall.

At the request of both sides in the case, Yakima County Superior Court Judge F. James Gavin Tuesday extended until May 20, the deadline for defense attorneys to decide whether to file insanity pleas, and until May 27 for Yakima County Prosecutor Jeff Sullivan to decide whether to seek the death penalty.

Herbert "Chief" Rice Jr. and Russell Duane McNeil, both 17, are charged with one count each of aggravated first-degree murder and accomplice to aggravated first-degree murder for the slayings of Mike and Dorothy Nickoloff. The elderly couple was repeatedly stabbed in their rural Parker home during a burglary in January.

Rice and McNeil will be tried as adults in the case. Aggravated first-degree murder carries either the death penalty or life in prison without possibility of parole.

In court Tuesday, defense attorneys told Gavin they needed more time to complete psychiatric evaluations of the two defendants. Results of those evaluations will be provided to Sullivan who use them to decide whether to seek the death penalty in the case.

Under law, the prosecutor has 30 days from the date charges are filed to make that decision. The initial 30-day period expires Friday.

Also Tuesday, Gavin set a new trial date for July 11, and scheduled hearings on pre-trial motions for June 20 and 21. Defense attorneys in the case had suggested to Gavin, however, that it may be September before they are ready to proceed with a trial.

The delays require the defendants to waive their rights to a speedy trial, which in Washington is defined as 60 days from the date they are charged. In court, Gavin questioned Rice and McNeil directly to make sure each understood the waiver he signed.

MAY 28, 1988

Death sought in Nickoloff case

By GARY E. NELSON
Of the Herald-Republic

Prosecutors will seek the death penalty for Herbert "Chief" Rice and Russell Duane McNeil, charged with aggravated murder in the brutal stabbing deaths of Mike and Dorothy Nickoloff on Jan. 28.

Yakima County Prosecutor Jeff Sullivan announced the decision Friday, the deadline set by Superior Court Judge F. James Gavin.

The decision marks the first time the death penalty has been sought in Yakima County since the Legislature passed the aggravated first-degree murder law in 1981. Aggravated murder carries only two possible penalties: death, or life in prison without possibility of parole.

Sullivan would not discuss the decision Friday. A written statement issued by his office said he felt his comments could jeopardize the defendants' right to a fair trial.

Defense attorneys also declined to comment Friday.

Before making his decision, Sullivan was provided the results of psychiatric evaluations of Rice and McNeil submitted by their defense attorneys. Defense attorneys had until last Friday to file pleas of innocent by reason of insanity, but chose not to do so.

Rice and McNeil, both 17, were ordered tried in adult court after a March court hearing. Both will turn 18 in August.

Mike and Dorothy Nickoloff, elderly and in ill health, were found dead in their rural Parker home the night of Jan. 28. Both had been brutally stabbed, Mrs. Nickoloff more than 75 times. Two television sets were missing from the home.

The brutality of the crime stunned the rural farming community.

As Stauffacher said in ruling that the pair be tried as adults, "The fury and the frenzy that is demonstrated

(See DEATH PENALTY, Page 2A)

May 28, 1988

Death penalty/ from 1A

through the autopsy reports indicate that it has to be the product of either a psychopathic or sociopathic individual."

Sheriff's detectives arrested Rice and McNeil a few days after the killings, acting on what they said was a citizen's tip.

The next court action in the case is scheduled for June 20 and 21, when Gavin will hear pre-trial motions. Trial is set to begin July 11, but defense attorneys have said they do not believe they will be ready to proceed to trial until the fall.

Before a defendant can be sentenced to death, the jury must first vote to convict, then take a separate vote on the sentence.

Gottex Swimwear
Corday's
Women's Clothier
5 N. Front St.

GAZEBO NAILS
Manicures
Pedicures
Facials
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Friday's Daily Game winner: 190

6/4/88

Local New

Yakima Herald-Republic a daily part of your life.

Legal disputes to delay trial in Nickoloff case

By GARY E. NELSON.
Of the Herald-Republic

Herbert A. "Chief" Rice Jr. and Russell Duane McNeil may be tried separately for the murders of Mike and Dorothy Nickoloff, and the trials now are not set to begin until October.

Yakima County Superior Court Judge F. James Gavin heard motions in the case Friday, including a prosecution request to remove one of the defense attorneys because his former law partner is related to the Nickoloff family by marriage.

During the court proceedings Friday, defense attorney Chris Tait pointed out that the defendants were charged separately in the case, and, unless prosecutors move to consolidate the charges, must be tried separately. Tait said Yakima County Prosecutor Jeff Sullivan told him he does not intend to ask for consolidation.

Sullivan said that decision is not final, and he still could ask that the defendants be tried together. That will depend, he said, on whether of Hoffman's former law partner Bob Rowley, Sullivan said. Also, Rowley and Nickoloff are business partners, he added.

"At the time of Mr. Hoffman's appointment, he (Rowley) was also Mr. Hoffman's partner," Sullivan said.

He stressed that Hoffman is a qualified attorney and would certainly do a good job of representing Rice. The concern, Sullivan said, is that in death penalty cases, even the appearance of a conflict has been used as grounds to appeal a verdict or delay a trial.

Sullivan cited a case now before the state Supreme Court in which defense attorneys in a capital murder case moved to disqualify the entire Clark County Prosecuting Attorney's Office because the prosecuting attorney had represented the defendant in the case 10 years before while working as a public defender. The prosecuting attorney was not trying the case.

The trial judge denied the motion, Sullivan said, but defense attorneys asked the Supreme Court to rule on the matter and the court agreed to

Friday, Aug 19, 1988

Defense lawyers question use of death penalty for juveniles

By GARY E. NELSON
Of the Herald-Republic

Defense attorneys for two young men accused of brutally killing an elderly Parker couple have challenged the constitutionality of applying the death penalty to juveniles, a question that the U.S. Supreme Court also has agreed to decide.

The young men, Herbert A. "Chief" Rice Jr. and Russell Duane McNeil, each are charged with one count of aggravated first-degree murder and accomplice to first-degree murder for the slayings of Mike and Dorothy Nickoloff. The victims, who were stabbed repeatedly, were found in their rural farmhouse Jan. 7.

Yakima County Prosecuting Attorney Jeff Sullivan has formally announced he will seek the death penalty if the two are convicted. Rice and McNeil were 17 when the crime occurred.

Since the murders, the U.S. Supreme Court overturned a death sentence against an Oklahoma youth who was 15 at the time of the crime. The court, in a 5-3 decision, found the death penalty constituted "cruel and unusual punishment" under the Eighth Amendment to the Constitution when applied to persons under 16.

While the high court did not address the question of juveniles 16-18 years old, it has agreed to hear two more death-penalty cases, one involving a 16-year-old and one challenging the death penalty for anyone under 18.

Attorneys for Rice and McNeil have asked Yakima County Superior Court Judge F. James Gavin to dismiss the death penalty in the Nickoloff case using the same arguments presented to the Supreme Court.

In documents filed with the court, attorneys for McNeil argue that, if it is unconstitutional to execute a 15-year-old, the same reasoning applies to any minor defendant.

Attorneys Susan Hahn and Rick Hoffman argue that Washington law clearly treats juveniles differently than adults, citing age limits for drinking alcohol, buying tobacco, gambling, marrying and filing a lawsuit.

In the time since the documents were filed, Hahn has withdrawn from the case because she was appointed Superior Court commissioner. On Thursday, Gavin appointed Seattle defense attorney Michael Frost to replace Hahn on Rice's defense team.

Of the 50 states, 18 set a minimum age for the death penalty, Hahn and Hoffman note. Of those, 12 require a defendant to be 18 before the death penalty may be imposed; the rest say 16.

In Washington, only two people under 18 are known to have been executed.

One was 18 when he was hanged in 1906, but is believed to have been 17 at the time of the crime. The other was hanged in 1932 at age 17.

If no juveniles have been executed in the last half-century, the attorneys argue, it is either because juveniles do not commit aggravated first-degree murder — the only capital crime in Washington — or prosecutors and juries have refused to execute juvenile offenders.

If juveniles do not commit capital crimes, the argument continues, then the death penalty cannot deter other juveniles from committing similar crimes.

If prosecutors and juries refuse to impose the penalty, Hahn and Hoffman argue, "We may surmise that the people of the state of Washington find execution of a juvenile offender to be cruel and abhorrent, uncivilized and barbaric."

Chris Tait and Tom Bothwell, attorneys for McNeil, present similar arguments, also based on the Supreme Court decision in Thompson vs. Oklahoma. They specifically cite a concurring opinion filed by Justice Sandra Day O'Connor, in which she discusses the separate procedure under Oklahoma law for treating a juvenile as an adult.

Washington also has such a procedure, under which the court considers a list of criteria to decide if the defendant was acting as an adult and should be tried in adult court.

Sullivan and Deputy Prosecutor Howard Hansen, in documents rebutting the defense claims, argue that procedure is an adequate safeguard against cruel and unusual punishment. If the case involved a defendant under 16, an argument could be made, the prosecutors note, because the procedure for trying a juvenile as an adult applies specifically to 16- and 17-year-olds.

O'Connor's concurring opinion, however, notes that the Oklahoma Legislature adopted a death penalty without setting a minimum age, and separately established the procedure for trying a juvenile as an adult. In Oklahoma, that procedure can apply to a 25-year-old.

9/9/88
Herald

Court to say if teens face death penalty

By PETER R. MENZIES
Of the Herald-Republic

The state Supreme Court will determine whether two young men accused of brutally killing an elderly Parker couple last January are subject to the death penalty.

Yakima County Superior Court Judge James Gavin ruled Thursday that the state can seek the death penalty for accused murderers Herbert A. "Chief" Rice Jr. and Russell Duane McNeil, but defense attorneys said they would ask the state Supreme Court to review Gavin's ruling.

"With two juveniles, this isn't a death penalty case," said Mike Frost, a Seattle attorney appointed to represent Rice.

If the state's highest court declines to review Gavin's decision, the trial of the two youngsters will go forward with the jury able to impose the death penalty.

Rice and McNeil were both 17 when they allegedly killed Dorothy and Mike Nickoloff in their Parker home.

Attorneys representing the state and the defendants agreed the trial will begin 90 days after the Supreme Court has either decided not to review Gavin's decision or after it has ruled on whether the death penalty can be applied against the two young men.

Rice and McNeil are both charged with one count of aggravated first-degree murder and accomplice to first-degree murder for the Jan. 7 slayings of the Nickoloffs. The victims were stabbed repeatedly in their rural home, investigators say.

In Washington state, a jury can only impose the death penalty in instances where the defendants have been convicted of aggravated first-degree murder.

Gavin's Thursday ruling was in response to a defense motion challenging the constitutionality of applying the death penalty to juveniles.

In arguing against capital punishment, defense attorneys cited a recent U.S. Supreme Court decision

(See DEATH PENALTY, Page 2A)

A firefighter tries to bring a spot

Death sentence for drug-related killings approved

Compiled from news service reports

WASHINGTON — The House of Representatives approved Thursday an amendment to an omnibus anti-drug bill that would allow federal juries to impose the death sentence on people convicted of committing murder during a drug-related crime.

Nearly all the Republicans in the House voted for the proposal, which supporters say reflects increasing public outrage about drug-related violence. Half the Democrats also voted for the measure. The final vote was 299-111.

The amendment, which now goes to the Senate, would permit the execution of a person who is convicted of both a drug felony and murder.

Although 37 states currently allow the death penalty for the most extreme felonies, it can be imposed in the death penalty issue will likely be given greater attention in the presidential campaign.

Gov. Michael S. Dukakis has long opposed the death penalty in Massachusetts, saying it is not a deterrent to crime. Vice President George Bush has already announced his support for the measure.

Washington state's House delegation was split almost down the middle Wednesday.

Democrat Norm Dicks and Republicans Rod Chandler and Sid Morrison voted for the amendment.

Voting against the death penalty amendment were Democrats Don Bonker, Mike Lowry and Tom Foley and Republican John Miller.

Democrat Al Swift was listed as not voting on the measure.

The House also voted 335-87 fo

Death penalty/from Page 1A

that overturned a death sentence imposed on a 15-year-old Oklahoma boy.

In that ruling, the high court said the death penalty constituted "cruel and unusual punishment" when applied to 15-year-olds.

The Supreme Court has not specifically addressed the death penalty and its use against 16- and 17-year-olds, but it has agreed to hear two cases involving youngsters of those ages.

"It is cruel and unusual punishment to seek the death penalty for juveniles," Frost said in Gavin's courtroom Thursday.

In addition, defense attorneys argued that state law treats juveniles differently than adults, citing age limits for buying alcohol, gambling, getting married and filing lawsuits.

But Yakima County Prosecutor Jeff Sullivan contended that the Oklahoma ruling applies only to 15-year-olds, not to older juveniles.

Furthermore, Sullivan and deputy prosecutor Howard Hanson argued that it was determined in earlier court proceedings that Rice and McNeil will be tried as adults, and therefore are subject to the death penalty.

"We're talking about 17-and-a-half-year-olds who are already functioning as adults," Hanson said.

In issuing his ruling, Gavin said neither the U.S. Constitution nor the state constitution prohibit seeking the death penalty for 17-year-olds.

"I can draw no other conclusion than that it is constitutional," Gavin said.

In addition, Gavin cited a 1981 state law bringing the death penalty back.

"The death penalty was reinstated after a public outcry. That to me speaks loudly," Gavin said.

Only two people under 18 are known to have been executed in Washington state. One was executed in 1906; the other was hanged in 1932. Both were believed to have been 17 when they committed their crimes.

MEADOWBROOK MALL
Huggi Bears
End Of Summer Sale!

Nov 20, 1988

THE KILLING SEASON CONTINUES

County's death toll at all-time high of 25

By CRAIG TROIANELLO
Of the Herald-Republic

The new year was just seven days old when the bodies of retired orchardists Mike and Dorothy Nickoloff were found in their rural Parker home.

One veteran Yakima County sheriff's deputy called it the most brutal murder scene he had ever encountered. Both the husband — an 82-year-old invalid unable to move about without the aid of a walker — and his 75-year-old wife had been stabbed dozens of times. Taken from the couple's home: a pair of television sets.

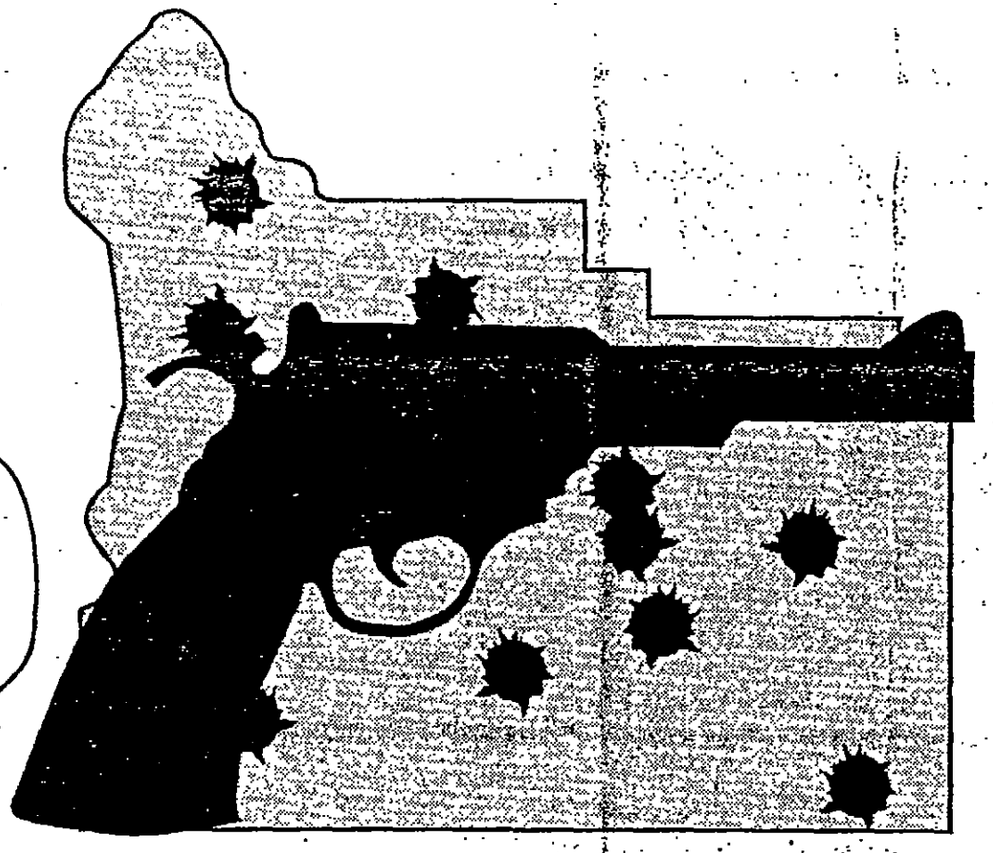
The Nickoloff slayings did more than horrify a close-knit farming community. In a particularly gruesome manner it marked the start of the worst killing season on record in Yakima County. To date this year, 25 men and women and one child have died of gunshots, knifings or physical assaults.

The killings have strained law enforcement budgets and sown new fears in an area already worried about the prevalent trafficking of cocaine and heroin.

Police say there's no single reason for the increase. Illegal drugs have obviously played a role, but probably no more than in past years, according to police.

Instead, the majority of slayings have resulted from friends killing friends, spouses killing spouses, relatives killing relatives. Few, if any, of the killings are believed to have occurred at random.

"When you talk about (reasons for) these homicides there is no easy answer. You're talking about people's emotions and motivations and things of that type. To try to prevent homicides of that nature is pretty difficult," said Capt. Don Blesio of the Yakima police department.



Yakima police have faced 11 homicides this year. Nine of those cases are considered solved. Police consider a case solved if a person is arrested or a warrant is issued.

Outside Yakima city limits, most homicides are investigated by the Yakima County Sheriff's Department. This year, sheriff's detectives have been confronted with 10 killings. Five are considered solved.

"The vast majority of these victims knew the suspect," said Lt. Jerry Hafsos.

Here is what's known about the victims:

• The biggest single group of victims were men in their 20s. Twenty of the 26 victims were adult men and 13 were between the ages of 20 and 29. Five homicide victims were women. One was a 2-year-old who died after an assault in August.

• Guns were responsible for most of the deaths. Fourteen victims died of bullet wounds. Six were stabbed to death. Five died in the course of a physical assault. Deputies don't know what caused the death of an unidentified woman whose skeletal remains were found in February near the Yakima River in the Parker area.

• Eleven of the victims were Hispanic. Ten were white. Four were American Indian. No such identification is available for the remains of the woman found near Parker.

If there is a common link between most homicides it's probably alcohol, Hafsos said.

(See KILLINGS, Page 2A)

Larry Kuhns: An intense and complex man

By PETER R. MENZIES
Of the Herald-Republic

Larry Kuhns — war hero, real estate agent, car salesman, golfer, racquetball player — was a talker. Capital T.

And he did a lot of his talking in the Triangle room of the Yakima YMCA.

"Most guys go to the Y for a pickup game. He came for a pickup conversation," said one Y member. "He'd be there when you came in and he'd be there when you left.

"He was always emphatic in what he said, always right. On the Monday before the election, he told us if we didn't vote Republican, the world would go to hell. ... Larry didn't need to know your name to talk to you."

Said another Y member: "Everybody down there knew him because he was so talkative."

Kuhns uttered his last words 10 days ago.

His body — along with those of his wife of 11 years, Ingrid, and 24-year-old David Byrd — was found spattered with blood less than a block from the YMCA about 11 p.m. on that Thursday night. All had been shot in the head.

The three of them, who were regulars at the Y and occasionally played a game of cutthroat racquetball together, had all been at the health club earlier that day.

Larry Kuhns had reserved a racquetball court for 6:30 that night.

LARRY KUHNS
... forceful, talkative

And if that night at the Y was like most nights at the Y, Byrd would have been somewhere on the second floor looking for a racquetball game, and Mrs. Kuhns would have been doing Nautilus weights or playing racquetball with somebody.

But what events preceded the shooting that day have not been disclosed by Yakima police.

The police have yet to comp[lete] their investigation and have not

(See KUHNS, Page 2A)

INSIDE: Top 1988 stories in the world, nation and state 2-3C
Obituaries 4C
More local news 5C

Jan 1, 1989

C

# of ups and downs

(Staff file photo)

...e was rated the top story of 1988.

...o was sentenced to spend 12 years ...prison for his role in operating ...at a judge called "a sewer system ...our society."

...That sentencing brought a virtual ...d to a drug-dealing conspiracy ...e involving 17 conspirators, all of ...om have been convicted or plead- ...guilty and been sentenced.

...he case against the conspirators ...s built on recordings of nearly ...0 telephone calls to and from

HOW YOU VOTED

The ranking of the top 10 local stories of 1988 selected by Herald-Republic readers were tabulated in a weighted poll.

Readers picked the stories they deemed the top 10 for 1988 from a list of 25 compiled by newspaper editors. A total of 119 responses were received. Each reader's No. 1 pick received 10 points, with the second choice getting nine points, and so on down to the 10th pick, which received 1 point. Responses that were not ordered numerically by the respondent received one point for each vote.

1. Holly Nelson	737
2. Nickoloff murders	608
3. Blodgett/Stackhouse	542
4. War on Drugs	527
5. Ralph Vickers	393
6. Mr Car/Mr. Truck	239
7. Redmon Bridge fire	238
8. Sohappy release	226
9. Maid O'Clover hostages	217
10. Hanford N Reactor	209
11. Double murder/suicide	204
12. SunDome	201
13. White Swan mill closure	195
14. Legalization/immigration	180
15. Jail overcrowding	166
16. Water enhancement	147
17. Stockmen's Cafe	125
18. Basketball champs	120
19. Falls Creek fire	102
20. Apple harvest	96
21. Port districts	61
22. Fixed horse race	58
23. City charter change	51
24. Plum Creek-Roslyn	37
25. Sunnyside port	1

6. In what was regarded as the biggest drug bust of the year, federal agents concluded a one-year investigation into drug trafficking by employees of Mr. Car-Mr. Truck, and arrested four people for their involvement in a lucrative cocaine distribution organization. Drug transactions apparently took place when drug customers would take a "demonstration ride" in one of the vehicles at either the Yakima or Union Gap car lots.

After Holly emerged from the nine-hour procedure, surge[illegible] pronounced the potentially life[illegible]ing operation a success.

But over the next four months, Holly's condition would swing from good to grave, and back again, as her body struggled to reject her new liver.

At one point, Holly and her mother returned to Yakima for several weeks, hoping the family would be able to resume a more normal life, at least for awhile.

Eventually it became clear that Holly was not improving and would need to undergo a second transplant operation.

In mid-August, Holly and her mother returned to the Chicago hospital to wait for a second liver to become available. A week later, 9-month old Holly died.

But Holly's story, which was closely followed by the local television stations as well as the newspaper, also raised questions about the propriety of focusing so much attention on the fate of one infant.

One respondent to the poll, for example, called the extensive coverage "ill-advised," suggesting the community's energy and resources might have been better spent on other needs.

2. Readers' second pick for top story of 1988 was the Nickoloff murders, perhaps the most shocking homicides in a year that saw more homicides — 27 — than ever in Yakima County's history.

On Jan. 7, Mike Nicholoff, an 83-year-old retired orchardist, and his 75-year-old wife, Dorothy, were stabbed in the Parker home they had lived in for more than 40 years.

Both victims had been stabbed more than a dozen times, and the brutality and senselessness of the murders left the community shocked and led to a surge in gun sales countywide.

Nearly three weeks after the grisly crime occurred, two teen-agers — Herbert "Chief" Rice and Russell McNeil — were arrested and charged with aggravated first-degree murder.

Now, the two 17-year-olds await trial.

When that begins will depend on the state Supreme Court, which has been asked by the suspects' attorneys to determine whether the state can seek the death penalty for the juveniles.

Jeff Sullivan, Yakima County prosecutor, says the state's highest court will decide whether to tackle that issue on Jan. 10. If the court denies the request, the trial is scheduled to begin within 90 days in Yakima County Superior Court.

BARBARA BLODGETT
. . . gives birth in coma

3. Third on readers' lists were events surrounding the June 30 accident that killed 19-year-old Nicole Valenzuela and plunged her cousin, Barbara Blodgett, into a coma.

Complicating the tragedy was the uncertain fate not only of the 24-year-old woman, but that of the infant she carried in her womb.

In the meanwhile, Byron Stackhouse, the driver of the vehicle that hit the Blodgetts' jeep, was accused of vehicular assault and vehicular homicide.

During the October trial, a deeply shaken Stackhouse testified that he had imbibed six double Black Velvets and Pepsis before getting in his Jeep Cherokee on the evening of the accident.

A blood-alcohol test revealed an intoxication level of 0.22, well beyond the legal limit.

But in a verdict that perplexed deputy prosecutor Mike McCarthy and angered relatives of the dead teen-ager, the jury acquitted Stackhouse of the homicide charge, finding him guilty of the assault charge.

The Blodgett story took another turn on Dec. 9 when a still comatose Barbara Blodgett, with the aid of physicians, gave birth to a healthy 8-pound boy, later named Simon Alan.

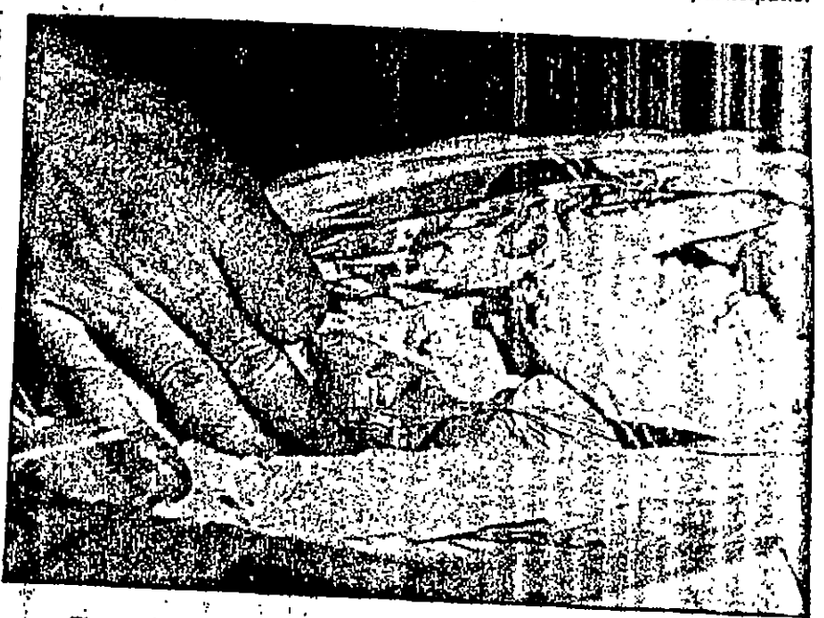
And more recently, the Blodgett family has said Barbara, although

[illegible] Drugs, along with the co[illegible] tywide surge in criminal act[illegible] caused by rampant drug use, pro[illegible] ted the local governments to app[illegible] a drug czar.

Frank Glaspey III is now head up the Countywide Coalition for [illegible] War on Drugs.

5. Fifth in the reader surv[illegible] was the tale of Ralp[illegible] Vickers, who only two wee[illegible]

Ralph, left, and Sherrie Vickers, sho[illegible] found guilty of drug conspiracy cha[illegible] 17 people sentenced for participatio[illegible]



Three of the top 10 stories of 1988 were related to drugs. Readers said th[illegible] ed by a neighborhood angry about the drug invasion, was an importan[illegible] made national news and brought Senate hopeful Slade Gorton, at righ[illegible] Yakima.

1/11/89
Herald Republic

State: No ruling on juvenile executions

By GARY E. NELSON
Of the Herald-Republic

The state Supreme Court has refused to rule on the constitutionality of executing juveniles, clearing the way for Herbert Rice and Russell McNeil to face trial for the killings of an elderly Parker couple.

The U.S. Supreme Court still could ban sentencing juveniles to death when it rules on two related cases this year, but those decisions are not expected before Rice and McNeil's trial in Yakima County.

During its motions calendar Tuesday morning, the state Supreme Court refused to change a Supreme Court commissioner's Nov. 4 ruling denying discretionary review of the case.

Herbert "Chief" Rice and Russell Duane McNeil are charged with aggravated first-degree murder for the stabbing deaths of Mike and Dorothy Nickoloff Jan. 7, 1988. Both Rice and McNeil, now 18, were 17 when the slayings occurred.

The victims, both elderly and in ill health, were found dead in their Parker farmhouse. Both had been repeatedly stabbed, Mrs. Nickoloff as many as 75 times. Two television sets were missing from the home.

Rice and McNeil are being tried as adults in the case, and Yakima County Prosecutor Jeff Sullivan is seeking the death penalty. Aggravated first-degree murder carries only two possible penalties in Washington: death, or life in prison without possibility of parole. It is the state's only capital crime.

Defense attorneys asked Yakima County Superior Court Judge F. James Gavin in August to dismiss the death penalty from the case, arguing that executing juveniles amounts to cruel and unusual punishment, which is forbidden by the U.S. Constitution.

Gavin refused, saying neither the state constitution nor the U.S. Constitution forbids executing juveniles.

Defense attorneys appealed his ruling to the state Supreme Court, effectively halting proceedings in the

(See COURT, Page 2A)

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case until the matter was resolved. The court is not required to hear such matters.

On Nov. 4, the court's commissioner denied discretionary review, and the defense appealed that ruling, asking the full court to overrule its commissioner. Tuesday's action denied that request as well.

As soon as the court's written order arrives in the Yakima County Clerk's Office, trial must begin within 90 days. If the order arrives next Monday, the case would go to trial no later than April 17, according to Chris Tait, attorney for McNeil.

Tait said he was not surprised by the court's decision. But, he said, the U.S. Supreme Court could make the trial of Rice and McNeil an exercise in futility.

Since the Nickoloff murders, the high court has overturned the death sentence of an Oklahoma youth who was 15 at the time of his crime. In a 5-3 decision, the court found applying the death penalty to juveniles under 16 amounts to "cruel and unusual punishment," which is forbidden by the Eighth Amendment to the Constitution.

That ruling did not address the question of juveniles 16 to 18 years old, but the high court almost immediately agreed to hear two more death-penalty cases, one involving a 16-year-old defendant and one challenging the death penalty for anyone under 18.

If the court extends its reasoning to defendants under 18, that could nullify the death penalty for Rice and McNeil, but probably not before they go to trial.

"That's the sad piece of our (state) Supreme Court making this decision," Tait said. "That we could go to trial and face the death penalty, and two to three months later, learn that we shouldn't have done that."

There is little chance that the high court's ruling will come down before the trial begins, and even less chance the trial will be delayed past April, Tait said.

"The last word that we had from Judge Gavin was that nothing and nobody would delay this trial," he said.

Several key issues remain before the trial can begin, however. Those include expected defense motions for change of venue and the question of whether Rice and McNeil will be tried together or separately, and if so, who should face trial first.

The case is the first capital case in Yakima County since the state brought back the death penalty in 1981.

The state has executed only two people who were known to be under 18 when they committed their crimes. One was executed in 1908; the other was hanged in 1932. Both were 17 when the crimes were committed.

Jan 28, 1989

Overwhelmed prosecutor to get new deputy

By KATE MYRA
Of the Herald-Republic

The Yakima County commissioners once again narrowly diverted disaster in the law and justice system by agreeing Friday to hire another deputy prosecuting attorney.

The commissioners agreed to the new position after Prosecuting Attorney Jeff Sullivan threatened to start dismissing cases and not file any new criminal cases.

"I wish it wouldn't come to this," he told the commissioners.

Sullivan said his staff simply cannot handle the growing felony case load. He said his deputies are being forced to plea bargain cases that should go to trial just to keep their heads above water.

In a letter outlining the burden on his staff, Sullivan said his office filed 2,100 felony cases last year.

"That works out to 300 per deputy, not counting appeals and violations of sentencing conditions. If we do not get help immediately, I will have no choice but to stop filing criminal cases. The deputies simply can no longer handle any new cases," he wrote.

Sullivan said his office has already filed 162 new felony charges this year.

Sullivan's request is for a total of three new deputy prosecutors — two for criminal cases and one for civil matters — and another secretary. The estimated cost of the additional staff is $150,000 a year.

The commissioners agreed to consider the other positions next month when they have the final year-end budget figures for 1988.

Sullivan said one of the new prosecutors will be hired to take over Howard Hansen's criminal caseload. Hansen is the prosecuting attorney in the first-degree murder trials of Herbert A. "Chief" Rice and Russell Duane McNeil, who are charged with brutally killing an elderly Parker couple.

The county will seek the death penalty for Rice and McNeil and Sullivan said Hansen needs to spend all of his time preparing for the April 12 trial.

Sullivan also informed the commissioners he plans to move the Support Enforcement Division out of the courthouse to relieve the overcrowding in his office. He said he will have to rent space for the 10-member division outside the courthouse.

He will then move his civil deputies into the Support Enforcement Division's offices on the second floor of the courthouse.

The Support Enforcement Division is responsible for determining paternity and enforcing court-ordered support payments. Sullivan said the state will pay the office rent for the division.

Sullivan said he currently has four attorneys sharing two offices and a receptionist sitting at a small, cardboard table in the waiting room.

Feb 7, 1989

Motion's denial lets trial schedule stand in Nickoloff killings

By PETER R. MENZIES
Of the Herald-Republic

Herbert "Chief" Rice has had a change of mind.

After the teen-ager accused of murdering Mike and Dorothy Nickoloff agreed Friday morning to waive his rights to a speedy trial and delay his day in court until after the U.S. Supreme Court rules on whether 17-year-olds can be put to death, Rice apparently changed his mind later that day.

"After talking to Mr. Rice last Friday, it was clear he wasn't ready to waive his right to a speedy trial," Rice's attorney, Mike Frost, said Monday morning. "He just simply changed his mind."

In proceedings in Yakima County Superior Court Monday, Rice attempted to convince Gavin that he unknowingly agreed to waive his speedy trial rights last week, and therefore, was entitled to go on trial April 10, as previously scheduled.

If Gavin accepted the Rice motion, the youth would have gone on trial before Russell McNeil, who on Friday had agreed to delay his trial until after the Supreme Court ruling, expected in June.

But after hearing arguments for about an hour, Gavin denied Rice's request, effectively leaving the Nickoloff murder case exactly where it was four days ago.

"I'm going to keep the (trial) schedule the way it is," Gavin said.

As it now stands, McNeil and Rice are being tried separately, with McNeil's trial scheduled to begin within 60 days after the Supreme Court has ruled on the legality of capital punishment for 17-year-olds. Rice's trial will begin within about 120 days after the same ruling.

That means McNeil's trial should begin in August or September with Rice's getting under way in October or November.

The two teen-agers, accused of the aggravated murder of the Nickoloffs in their Parker home on Jan. 7, 1988, were arrested later that month and have been in Yakima County jail since.

The two defendants, who were 17 at the time the crime was committed, will be tried as adults, and Yakima County Prosecutor Jeff Sullivan is seeking the death penalty against them.

That has led to delays in the scheduling of the trial, as defense attorneys asked the state Supreme Court to take up the question of the constitutionality of the death penalty for 17-year-olds.

The state's highest court declined to review the issue, clearing the way for a trial to begin in April.

But on Friday, all parties agreed to delay the trial until after the Supreme Court has ruled on two cases that hinge on whether 17-year-olds can be executed.

During that hearing, Sullivan agreed to the delay, saying that it makes financial sense to await the Supreme Court ruling.

"Potentially, we could waste two weeks of trial time (by going to trial before the ruling)," Sullivan said Monday.

That's because in a case where the death penalty is sought, a week of trial time is spent on jury selection and another week is given to determining, once a defendant is convicted of aggravated murder, whether the suspect is executed or given life in prison without parole. The only penalties for aggravated first-degree murder in Washington are death or life in prison without parole.

2/9/89

Murder trials delayed

By DAVID LESTER
Of the Herald-Republic

Herbert "Chief" Rice and Russell McNeil will not stand trial for aggravated first-degree murder until after the United States Supreme Court decides whether 17-year-olds can be put to death.

RICE

Yakima County Superior Court Judge F. James Gavin granted defense motions for continuances Friday and decided McNeil will go on trial first, probably in August.

The issue of a change of venue because of pre-trial publicity about the case will be taken up when McNeil goes on trial.

The U.S. Supreme Court has agreed to decide the issue of the constitutionality of the death penalty for juveniles between 16 and 18 years of age. A decision is expected in June.

Rice and McNeil are accused of the January 1987 stabbing deaths of Mike and Dorothy Nickoloff. The elderly couple were killed in their Parker home. Each was stabbed numerous times, Mrs. Nickoloff suffering 75 wounds. Two television sets were missing from the house.

Rice and McNeil, 17 years old at the time, are being tried as adults. Yakima County Prosecutor Jeff Sullivan is seeking the death penalty. The only penalties for aggravated first-degree murder in Washington state are death or life in prison without the possibility of parole.

Constitutionality of the death penalty for juveniles has caused delays in the case. The Washington Supreme Court refused to rule on the constitutionality of executing juveniles last month.

Scheduling trials for Rice and McNeil was further complicated when the U.S. Supreme Court agreed to hear two cases also involving teenagers.

If the pair were to be sentenced to death and the nation's high court later banned such sentences for juveniles, the trials would have to be repeated.

Attorney Chris Tait, representing McNeil, said his client would prefer to be tried first for a number of reasons, some of which Tait said he would not disclose.

"We would prefer to go first. It is Rusty's desire to get this going and get it done and find out what will happen to him," Tait said.

In any event, Tait said he will seek to move the trial to another location.

Gavin ruled McNeil's trial will start 60 days after the U.S. Supreme Court opinion is filed. The time period will include 30 days to take care of motions and the trial to begin after another 30 days have passed.

He said motions in Rice's trial will be handled at the same time as those of McNeil and his trial will begin 120 days after the high court opinion is filed.

The schedule would place Rice's trial in October.

MCKINNEY, DAVID	IN THE MILITARY	01/10/89	3A-4
MCLACHLAN, DIANNA	DEP [illegible] ANNUAL MEETING	01/17/89	5XU-1
MCLACHLAN, LAMONT	[illegible]	01/17/89	5XU-1
MCLAIN, PAM	BRIAN BRADBURY AT TERR HGTS ELEM SCH SUBMITTED NAME "ENDEAVOR" FOR NASA CONTEST	01/03/89	5XU-1
MCLAUGHLIN, BOB	[illegible] HIGH SCH DROP OUT RATE 34%--OFFICIALS DISPUTE REPORT	01/17/89	1A-1
MCLAUGHLIN, BOB	10-[illegible] MACH SCH PRINCIPAL, BOB MCLAUGHLIN, W/STAY--UNION'S REQUEST REJECTED	01/07/89	1A-1
MCLAUGHLIN, BOB	[illegible] RIVALS RALLY TO SAVE DAVIS BAND DREAM TRIP TO DISNEY WORLD	03/02/89	3A-1
MCLAUGHLIN, BOB	[illegible] POP--DAVIS HIGH SCH BAND ON THEIR WAY TO DISNEY WORLD	03/12/89	1C-3
MCLAUGHLIN, ROBERT	[illegible] TO BE DONE TO SPOT POTENTIAL SCH DROPOUTS SAYS GOVERNOR'S TASK FORCE	03/15/89	3A-1
MCLEAN, SHEELA	[illegible] ENVIRONMENTAL GROUPS CLAIM TIMBER SUPPLIES WERE ILLEGALLY OVERCUT	01/20/89	3A-1
MCLEAN, WES	[illegible] ANDERSON HAS BEEN NAMED CHAIRMAN OF 1989 WALKAMERICA, MARCH OF DIMES	01/24/89	3A-5
MCLELLAN, WALTER	DECEASED	02/10/89	5D-6
MCLENDON, TINA	IN THE MILITARY	03/07/89	11A-3
MCMAINS, DARLENE	WHAT IF? LETTER BY DARLENE MCMAINS	01/17/89	9XU-1
MCMANIGAL, JULIE	1P-JULIE MCMANIGAL ENGAGED TO DR FRANK COLUNGA	01/25/89	8A-4
MCMANUS, PATRICK	PATRICK CRICKMORE & PATRICK MCMANUS CHOSE PROSSER REVITALIZATION AS THESIS PROJ	01/29/89	2E-3
MCMASTER, RICHARD	[illegible] DOZEN DRIVERS RECEIVE DRIVING AWARDS	01/26/89	1C-4
MCMULKIN, KAY A	1P-KAY A MCMULKIN ENGAGED TO ERNEST GASSELING	02/15/89	7B-6
MCMURRY, CLINTON	DECEASED	02/19/89	2E-3
MCMURRY, CLINTON	DEATH NOTICE	01/15/89	11A-1
MCMURRY, CLINTON	DECEASED	01/15/89	11A-1
MCMURRY, CLINTON	DECEASED	01/17/89	11A-4
MCNAMARA, SAMANTHA	DECEASED	01/19/89	6C-5
MCNAMARA, SAMATHA	DEATH NOTICE	03/08/89	4D-3
MCNEIL ISLAND	WASH STATE TO FACE PRISON SPACE CRUNCH BY NEXT YEAR	03/03/89	4D-1
MCNEIL, RUSSELL	1CPD/6POS--1988-YEAR OF UPS & DOWNS--READERS PICK HOLLY NELSON AS TOP STORY 1988	02/20/89	3A-1
MCNEIL, RUSSELL	STATE SUPREME COURT HAS REFUSED TO RULE ON JUVENILE EXECUTIONS--RICE & MCNEIL	01/01/89	1C-1
MCNEIL, RUSSELL	YAK CNTY COMM AGREE TO HIRE ANOTHER DEPUTY PROSECUTING ATTORNEY	01/11/89	1A-6
MCNEIL, RUSSELL	1P-H RICE & R MCNEIL MURDER TRIAL DELAYED--COURT MUST DECIDE ON DEATH PENALTY	01/28/89	3A-5
MCNEIL, RUSSELL	MOTION'S DENIAL LETS TRIAL SCHEDULE STAND IN NICKOLOFF KILLINGS	02/04/89	3A-1
MCNEIL, RUSSELL	SEQUEL -- THE MURDER OF MIKE & DOROTHY NICKOLOFF--2 TEENS UP FOR DEATH PENALTY?	02/07/89	3A-1
MCNEIL, RUSSELL	CRIME AND PUNISHMENT--DEATH FOR TEEN?--RUSSELL MCNEIL & HERBERT "CHIEF" RICE	02/26/89	3DD-4
MCNEILL, BERTHA B	1P-DECEASED	03/26/89	1A-1
MCNEILL, BERTHA B	DEATH NOTICE	02/03/89	3D-3
MCNETT, JAMES	WASH STATE PATROL TROOPER JAMES MCNETT WAS INJURED WHEN HIS CAR ROLLED OFF I-90	02/08/89	5D-1
MCNEW, PETER	HIROTA PO--PUPPETS LEND A PAW AND CARS AT LINCE INTERMEDIATE SCH IN SELAH	01/27/89	8A-1
MCPHERSON, GREG	WASH STATE APPLE INDUSTRY CONTEMPLATING LAWSUIT AGAINST 60 MINUTES-RESOURCE DEF	03/01/89	5A-1
MCPHERSON, GREG	ORGANIC APPLES POSSIBLE, BUT NOT EASY, EXPERTS SAY	03/25/89	1A-2
MCRAE, BUD	1P--BUD MCRAE SEES HIMSELF AS MISSIONARY--PRACTICES LIFE OF CARING/GIVING	03/25/89	3A-5
MCRAE, BUD W	1P-LORI DIANE HAYNES ENGAGED TO BUD W MCRAE	01/10/89	5XL-1
MCSHELLEY, DEAN	HIROTA PO--AMERICAN RED CROSS "IT'S COOK TO DONATE BLOOD" DRIVE	02/26/89	2E-1
MCSWAIN, FRANK	SHELLEY BRINCEFIELD ENGAGED TO FRANK MCSWAIN	01/15/89	3B-1
MEAD'S, VIKING VILL	STORES TO SWITCH TO NEW FORMAT -- RED APPLE MARKETS	01/22/89	2B-1
MEADE, LYNN	1P-LYNN MEADE ENGAGED TO FRANK SAHLEM	02/01/89	6B-1
MEADOR, STELLA	COMMON SENSE LETTER BY STELLA MEADOR	02/12/89	2C-1
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MEADOWCROFT, WARREN	WARREN MEADOWCROFT & GENE MCINTIRE EYE S'SIDE PORT COMMISSION POST	02/01/89	8A-2
MEADOWCROFT, WARREN	4 PEOPLE APPLY FOR POSITION ON S'SIDE PORT COMMISSION	02/02/89	1B-6
MEADOWCROFT, WARREN	PORT CANDIDATE INTERVIEWS SET FOR SATURDAY--DICK GOLOB RESIGNED	02/18/89	3A-4
MEADOWS, ADAM	ARNOLD LEE MARTIN NEW COMMISSIONER FOR S'SIDE PORT DIST	02/24/89	5A-4
MEADOWS, CATHY	IN THE MILITARY	02/26/89	1A-5
MEADOWS, GARY	PUBLIC SERVICE LETTER BY CATHY MEADOWS	01/31/89	9XU-1
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REILLY, GINNY	1P--REILLY & MALONEY RETURN TO YAK FOR BENEFIT CONCERT FOR YAK FOLKLIFE FESTIVAL	05/05/89	4B-2
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RENTZ, KARINA	HUMAN RIGHTS SCHOLARSHIP ANNOUNCES TWO SPECIAL PAT HAAS MEMORIAL GRANTS THIS YR	05/09/89	9A-2
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Rice

May 1989

McNeil
1988

[illegible]

[illegible]

[illegible]

[illegible]

April 1989

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MCCORMICK, BETH	NACHES VOTERS TO CHOOSE TODAY ON 2-YEAR MAINTENANCE-OPERATION LEVY	05/16/89	6A-1
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MCCORMICK, BETH	WIXSON PARK GAZEBO DEDICATED AS SELAH CELEBRATES TOWN SPIRIT	05/21/89	1C-5
MCCORMICK, BETH	1P--NACHES VALLEY 5TH GRADERS GIVE CLOSE-UP LOOK AT MOTHER NATURE--WHITE PASS	05/22/89	6A-1
MCCORMICK, BETH	1P--STUDENT TUTORS--HIGH SCH KIDS WORK W/1ST GRADERS IN CO-OP WHOLE LANGUAGE PRO	05/23/89	5XU-1
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Rice

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[illegible]	[illegible]	[illegible]	[illegible]
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MEAD'S, VIKING VILL	STORES TO SWITCH TO NEW FORMAT -- RED APPLE MARKETS	03/25/89	3A-5
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McNeil
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RECLAMATION BUREAU	MARCH WAS THE FOURTH [illegible] ON RECORD IN YAKIMA--1.71 INCHES OF PRECIPITATION	04/04/89	1A-1
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RECLAMATION BUREAU	[illegible] NOTE--IRRIGATION DIST ISSUES DEBRIS DUMPING WARNING	04/11/89	6A-1
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[illegible]			
[illegible]			

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Rice

Dorothy
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MCCORMICK, BETH	NACHES VOTERS TO CHOOSE TODAY ON 2-YEAR MAINTENANCE-OPERATION LEVY	05/16/89	6A-1
MCCORMICK, BETH	NACHES SCH BOARD LEARNED THAT EMERG FUNDS ARE AVAILABLE FOR SEPTIC/WATER SRVC	05/16/89	6A-4
MCCORMICK, BETH	WIXSON PARK GAZEBO DEDICATED AS SELAH CELEBRATES TOWN SPIRIT	05/21/89	1C-5
MCCORMICK, BETH	1P--NACHES VALLEY 5TH GRADERS GIVE CLOSE-UP LOOK AT MOTHER NATURE--WHITE PASS	05/22/89	6A-1
MCCORMICK, BETH	1P--STUDENT TUTORS--HIGH SCH KIDS WORK W/1ST GRADERS IN CO-OP WHOLE LANGUAGE PRO	05/23/89	5XU-1
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[illegible]	[illegible]	[illegible]	10C-3
[illegible]	[illegible]	[illegible]	3A-1
[illegible]	[illegible]	[illegible]	1A-1
[illegible]	[illegible]	[illegible]	1D-1
[illegible]	[illegible]	[illegible]	1D-1
[illegible]	[illegible]	[illegible]	5F-2
[illegible]	[illegible]	[illegible]	3A-2
[illegible]	[illegible]	[illegible]	3A-2
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]

8861

ON TRACK--APPLE CUP RACE-YAK SPEEDWAY

KEY WORD	TEXT	DATE	SECTION PAGE
REYNOLDS, FRANCIS	HAVE AN INVENTION? INVENTORS FAIR MAY BE WHAT YOU NEED	03/15/89	8B-1
REYNOLDS, GARY	STATE QUARTER HORSE MEETING SCHEDULED	01/03/89	3A-5
REYNOLDS, JEFFREY	LATE NOTICE LETTER BY JEFFREY REYNOLDS	03/19/89	6F-2
REYNOLDS, MARY H	DEATH NOTICE	02/13/89	7A-1
REYNOSO, JUAN	VIDAL TORRES ESCAMILLA SENTENCED TO 3 YEARS IN PRISON -- DRUG BUST--MR CAR/TRUCK	02/17/89	3A-2
RHEA, DAVE	1P-CHERYL STEPHEN ENGAGED TO DAVE RHEA	03/12/89	2E-1
RICE, DICK	HIROTA PO--DICK RICE (YHR PRODUCTION MGR) IS THIS WEEK'S FIRST PERSON--RETIRING	01/22/89	1B-1
RICE, DICK	1P--YHR PRODUCTION MANAGER, DICK RICE, RETIRES AFTER 37 1/2 YEARS OF SERVICE	02/01/89	3A-3
RICE, GLENN	2P/CHART--SALARIES: WHO MAKES WHAT AT CITY HALL--LIST OF MGMNT & THEIR SALARIES	01/03/89	1A-1
RICE, GLENN	RED TAPE DELAYS SUMMER OPENING OF FRANKLIN & WASHINGTON POOLS	01/13/89	3A-1
RICE, GLENN	ACE HARDWARE IS ON AGENDA FOR TODAY'S "TOUR OF INDUSTRY"	01/19/89	3B-6
RICE, HERBERT	TOPO/6POS--1988-YEAR OF UPS & DOWNS--READERS PICK HOLLY NELSON AS TOP STORY 1988	01/01/89	1C-1
RICE, HERBERT	STATE SUPREME COURT HAS REFUSED TO RULE ON JUVENILE EXECUTIONS--RICE & MCNEIL	01/11/89	1A-6
RICE, HERBERT	YAK CNTY COMM AGREE TO HIRE ANOTHER DEPUTY PROSECUTING ATTORNEY	01/28/89	3A-5
RICE, HERBERT	1P-H RICE & R MCNEIL MURDER TRIAL DELAYED--COURT MUST DECIDE ON DEATH PENALTY	02/04/89	3A-1
RICE, HERBERT	MOTION'S DENIAL LETS TRIAL SCHEDULE STAND IN NICKOLOFF KILLINGS	02/07/89	3A-1
RICE, HERBERT	SEQUEL -- THE MURDER OF MIKE & DOROTHY NICKOLOFF--2 TEENS UP FOR DEATH PENALTY?	02/26/89	3DD-4
RICE, HERBERT	CRIME AND PUNISHMENT--DEATH FOR TEEN?--RUSSELL MCNEIL & HERBERT "CHIEF" RICE	03/26/89	1A-1
RICE, JERRY	SCOGGINS COLUMN--EVERYWHERE YOU LOOK -- RACISM	01/31/89	1B-1
RICE, JILL	1P-JILL RICE ENGAGED TO KEVIN WERTENBERGER	03/12/89	2E-3
RICE, KEITH	IN THE MILITARY	03/14/89	7XL-1
RICHARDS, ELWYN W	DEATH NOTICE	02/04/89	6C-1
RICHARDS, ELWYN W	1P-DECEASED	02/05/89	8C-4
RICHARDSON, BOB	THE LOCKSMITHS LETTER BY BOB RICHARDSON	03/27/89	10A-4
RICHARDSON, DENNIS	YMCA HONORS RETIREES, RE-ELECTS BOARD MEMBERS	03/14/89	6XL-5
RICHARDSON, DENNIS	1P--TOM LABISSONIERE ELECTED PRESIDENT OF ST E'S COMMUNITY HEALTH FOUNDATION	03/31/89	9A-1
RICHARDSON, LEO	HIROTA CPO--LEO RICHARDSON & JOHN BURNHAM FISHING IN THE YAKIMA RIVER CANYON	01/03/89	1A-1
RICHARTZ, DEBORAH	1P-DEBORAH RICHARTZ MARRIES STEVEN CATRON	03/19/89	2E-3
RICHEY, LARRY	JOHN BIRCH LETTER BY LARRY RICHEY	01/24/89	8A-3
RICHEY, LARRY	ON ETHIOPIA LETTER BY LARRY RICHEY	02/27/89	10A-4
RICHEY, LAWRENCE	FED APPEALS COURT STRIKES DOWN GAG ORDER FOR RICHEY CO-DEFENDANT--EARL SCHOOFF	02/10/89	7A-2
RICHEY, LAWRENCE	FED APPEALS COURT STRIKES DOWN GAG ORDER FOR RICHEY CO-DEFENDANT--EARL SCHOOFF	02/10/89	7A-2
RICHMOND, GURNEY	1P-MR & MRS GURNEY RICHMOND MARK 50TH WEDDING ANNIVERSARY	02/19/89	3E-1
RICHMOND, TERESE	GOV GARDNER APPOINTED TERESE RICHMOND AS REP--SOLVE PROBLEMS W/YAK RIVER BASIN	03/31/89	9A-1
RICK, JOANNE COMINS	OFFICIAL SAYS HANFORD W/NEVER RETURN TO A PRISTINE CONDITION	03/24/89	3C-2
RICKEY, BENJAMIN	BENJAMIN RICKEY NAMED STUDENT OF THE MONTH BY WEST VALLEY KIWANIS CLUB	02/23/89	3XL-1
RIDDLE, WENDY	HIROTA PO--VALLEY MUSICAL COMEDY COMPANY PRESENTED "THE SOUND OF MUSIC"--S'SIDE	03/15/89	8A-1
RIDGE	TALKS BREAK DOWN BETWEEN LOGGERS, ENVIRONMENTALISTS -- PLUM CREEK TIMBER	02/14/89	6A-5
RIDGE	TALKS BREAK DOWN BETWEEN LOGGERS, ENVIRONMENTALISTS -- PLUM CREEK TIMBER	02/14/89	6A-5
RIDOUT, F WAYNE	DEATH NOTICE	[illegible]	6C-1
RIDOUT, REV F WAYNE	1P-DECEASED	[illegible]	6C-2
RIDOUT, REV F WAYNE	1P-DECEASED	[illegible]	7C-3
RIEBE WELL DRILLING	HIROTA PO--SOIL SAMPLES TAKEN IN S'SIDE TO TEST FOR CONTAMINATION	[illegible]	1B-2
RIEL, PAUL	HIROTA PO--TRAFFIC SIGNALS ARE BEING PUT UP AT TIETON/72ND & NOB HILL/72ND AVES	[illegible]	6A-1
RIEL, ROGER	1P-SUSAN KAUTZMAN MARRIES ROGER RIEL	[illegible]	2E-1
[illegible], CAL	KENTWOOD HIGH SCH DRUG POLICY NOT FOR YAKIMA	[illegible]	1B-1
[illegible], CAL	DRUG INFORMATION BOOKLET OFFERED BY YAK SCH DIST "SAFE" PROG	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	3E-1
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]

Jan-Mar 1989

Rice

FILED
JUL 24 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

'89 JUL 24 PM 5 01

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL McNEIL, Defendant.	NO. 88-1-00428-1 AFFIDAVIT OF HOWARD W. HANSEN

STATE OF WASHINGTON)
: ss.
County of Yakima)

HOWARD W. HANSEN, being first duly sworn on oath, deposes and says:

Your affiant is a duly appointed Deputy Prosecuting Attorney for Yakima County, Washington, and is familiar with the facts and circumstances of this case.

The defense in this case has made a motion for closure of the pre-trial hearings in this case on the grounds that the ensuing pre-trial publicity may jeopardize the defendant's right to a fair trial in Yakima County, Washington.

The evidence to be presented at the CrR 3.5 hearing in this case will include the tape recorded statement of the defendant given to the Yakima County Sheriff's Department Detectives, a transcript of that statement, and the testimony of these detectives

describing the circumstances surrounding the taking of the statement.

The defendant in this case is charged with two counts of Capital Murder involving the stabbing deaths of Mike and Dorothy Nickoloff on January 7, 1988. These murders were extraordinarily brutal homicides of an elderly couple which occurred at their rural home. These homicides have been reported in the news media, but the details and surrounding circumstances of the actual homicides have not been substantially released to the general public.

The defendant's statement concerning these crimes is not a short admission or denial of his involvement. Instead, it is a lengthy statement detailing his activities before, during, and after the homicides for which he is charged.

Since the information released to the public concerning these homicides has been limited, the nature and substance of what the defendant has stated to the police will be of great interest to the general public. The defendant's statement is detailed and graphic to the point that it is almost certain that, if released to the public, it will not be treated by either the news media or the general public in a normal or uneventful fashion.

Additionally, the trial in this case is set for September 5, 1989, and other pre-trial hearings in this case will begin to occur on a more frequent and regular basis as we approach this trial date. The State believes that the combination of this heightened interest in the case and the particularly explicit details of the defendant's statement will present a substantial probability of

prejudice that the defendant could not receive a fair trial in Yakima County, Washington.

Howard W. Hamer

SUBSCRIBED AND SWORN to before me this 24th day of July, 1989.

Ronald L. Zilke
NOTARY PUBLIC in and for the State of Washington, residing at Yakima.
My commission expires: 7-1-90.

HWH1(N)

Filed and Micro filmed
JUL 20 1989
Roll No. 353 390
BETTY McGILLEN, YAKIMA COUNTY CLERK

'89 JUL 20 PM 3 55
SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	)	NO: 88-1-00428-1
vs.	)	
RUSSELL DUANE McNEIL, Defendant	)	ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY FOR INVESTIGATORY FEES AND EXPENSES

THE COURT having considered the Motion for Order Approving Private Investigator Fees and Expenses and attached Declaration of Counsel, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

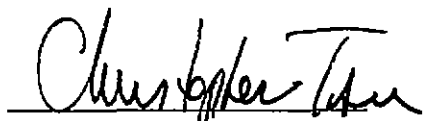
(1) The sum of $1,043.75 payable to DIANA G. PARKER, in care of the office of Attorney Christopher Tait.

DATED THIS 19 DAY OF JULY, 1989

F. JAMES GAVIN, JUDGE

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED

JUL 20 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

'89 JUL 20 P0 8 55

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	DEFENDANT'S MOTION AND
RUSSELL DUANE McNEIL,	)	SUPPORTING DECLARATION
	)	FOR ORDER APPROVING
	)	PRIVATE INVESTIGATOR
Defendant	)	FEES AND EXPENSES

MOTION

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court for the authorization of payment for investigatory services.

THIS MOTION is based upon the record and file herein and the accompanying DECLARATION OF COUNSEL.

DATED THIS 18 DAY OF JULY, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Diana G. Parker has been authorized to pursue investigatory services on behalf of the Defendant McNeil. An Order Authorizing Investigatory Services and Setting Rates was entered in the above-entitled cause and signed by the Honorable F. James Gavin approving said investigatory services and authorizing payment of her automobile mileage to be reimbursed at the rate of 22 1/2 cents per mile. Diana G. Parker was further authorized to submit statements, through counsel, on or about the 1st and the 15th day of each month.

Attached hereto and incorporated by reference for approval is the statement of Diana G. Paker for the private investigatory fees and expenses for her services from JULY 1, 1989, to JULY 15, 1989, performed by her on behalf of the above-named Defendant, McNeil.

SIGNED AND DATED at Yakima, Washington, this 18 day of JULY, 1989.

CHRISTOPHER TAIT
of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1345

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
7/3/89	Out	prep C/V materials, cl call, conf CT Newspaper	5.00
7/5/89	Out	Conf CT, jail conf cl, review mats for 3/11-13; prepare cl materials, LD Cons D.K., cl call	4.25
7/6/89	Out	LD Cons Oly, call to JL re DP, locate BS, (LD Cons MD) letter to Dr. B., LD Cons VS, Letter to VS, Cons CH (get materials for cl) deliver same.	6.00
7/7/89	Out	Call H Rep re pub, LD Cons Dr. K. Corres R. Shaw LD Cons DC (Mo), locate BS jail conf cl, collect publicity (C.V.) call from C.V. DP	5.75
7/10/89	Out	Conf CT, call from cl, letter to cl, prepare trial materials	4.00
7/11/89	Out	Court 3, Conf Ct., Conf TAB	6.00
7/12/89	Out	Prep scheduling, prepare letter re seeking news/media (jail conf CT, DP, TAB)	4.00
7/13/89	Out	Jail conf (DP CT) review HH docs review (V.S.) docs	4.00
7/14/89	Out	Prepare materials, for C.V. letter to SS, deadlines memo, Schedule, Conf Ct.	2.75
		TOTAL HOURS	41.75

41.75 Out-Of-Court Hrs. at $25.00 Per Hour = **$1,043.75**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant

NO: 88-1-00428-1

ORDER AUTHORIZING EXPENDITURE OF PUBLIC FUNDS

Indexed and Micro filmed
JUL 20 1989
353 389
Roll No.
BETTY McGILLEN, YAKIMA COUNTY CLERK

THIS MATTER coming on regularly for consideration on Defendant's MOTION FOR AUTHORIZATION AND EXPENDITURE OF PUBLIC FUNDS for the authorization for payment of the fees incurred on behalf of the Defendant herein due and owing to Dr. Kevin B. McGovern, Ph. D., in the sum of $3,645.02 for services performed on June 4, 5, and 6 of 1989; and the Court being fully advised in the premises, now, therefore, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

(1) The sum of $3,645.02 payable to KEVIN B. McGOVERN, Ph. D., whose address is:

1225 NW Murray Road, Suite 214
Portland, Oregon 97229

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DONE IN OPEN COURT THIS 19 DAY OF JULY, 1989.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

ORDER AUTHORIZING
EXPENDITURE OF PUBLIC
FUNDS 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 243-1346

FILED

JUL 20 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant	NO: 88-1-00428-1 DEFENDANT'S MOTION FOR AUTHORIZATION AND EXPENDITURE OF PUBLIC FUNDS

COMES NOW CHRISTOPHER TAIT, of attorneys for the above-named Defendant, RUSSELL DUANE McNEIL, and moves this Court for the entry of an order authorizing the expenditure of public funds to pay KEVIN B. McGOVERN, Ph.D., whose address is 1225 NW Murray Road, Suite 214, Portland, Oregon 97229, for his services provided on behalf of the Defendant herein on June 4, 5, and 6, of 1989.

THIS MOTION is based upon the files and records herein and upon the Affidavit of Counsel, attached hereto and hereby incorporated by reference.

DATED THIS 18 DAY OF JULY, 1989.

Christopher Tait

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

180

STATE OF WASHINGTON)
)ss.
COUNTY OF YAKIMA)

CHRISTOPHER TAIT, being first duly sworn upon oath, deposes and states:

1. I am one of the attorneys appointed by the Court to represent Defendant Russell Duane McNeil.

2. The matter of the hiring of a clinical psychologist on behalf of the defendant herein has previously been authorized and approved by Judge F. James Gavin. The statement attached hereto and incorporated herein by reference from Dr. Kevin McGovern, Ph. D., for services provided for and on behalf of Russell McNeil on June 4, 5, and 6 of 1989, was both appropriate and necessary, and therefore Dr. McGovern's fees in the sum of $3,645.02 should be paid by public funds.

DATED THIS 18 DAY OF JULY, 1988.

Christopher Tait
CHRISTOPHER TAIT

SUBSCRIBED AND SWORN to before me this 18 day of July, 1989.

Patricia J Barbee
NOTARY PUBLIC in and for the State of Washington, residing at Yakima.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

KEVIN B. McGOVERN, Ph.D.,
1225 NW Murray Road, Ste 214
Portland, Oregon 97229

Christopher Tate, Attorney at Law
103 South Third Street
Yakima, Washington 98901

DATE	PROFESSIONAL SERVICE	CHARGES	CREDITS	BALANCE
	Preview Materials	240.00		
6-4-89	Travel to Yakima meet with attorneys + Clinical Interview	1440.00		
6-5-89	Clinical Interview + meet with attorneys + Travel to Portland	1560.00		
Mileage	414 x 21¢	86.94		
	Lodging	56.58		
	Meals	16.00		
6-6-89	Review Clinical file	180.00		
	Correspondence, Long distance calls, misc	65.00		
				$3645.02

PLEASE PAY LAST AMOUNT IN THIS COLUMN ◇

FILED
and Micro filmed
JUL 19 1989
Roll No. 353 272
BETTY McGILLEN, YAKIMA COUNTY CLERK

'88 JUL 19 PM 1 39

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 ORDER OF INDIGENCY RELATIVE TO MOTION FOR DISCRETIONARY REVIEW

THIS MATTER having come on regularly and the Court, having reviewed the record and file herein and being fully advised in the premises, now finds that the Defendant lacks sufficient funds to prosecute an appeal herein and applicable law grants unto the Defendant a right to review at public expense to the extent defined by this order, now, therefore,

IT IS HEREBY ORDERED as follows:

(1) The above-named Defendant, RUSSELL DUANE McNEIL, is entitled to counsel for discretionary review wholly at public expense.

(2) THOMAS BOTHWELL and PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S., and CHRISTOPHER S. TAIT are appointed as counsel for review.

(3) RUSSELL DUANE McNEIL is entitled to the following at public expense:

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

(a) Those portions of the Verbatim Reports of Proceedings reasonably necessary for review as follows:

(1) In camera proceedings and Court's ruling of July 11, 1989; and

(2) Additional proceedings as requested by counsel for Defendant McNeil.

(b) A copy of the following Clerk's Papers: As designated on behalf of Defendant McNeil through counsel and in conjunction with motion for discretionary review of the court's order requiring production of alleged letter of Defendant McNeil in possession of his attorney;

(c) Preparation of original documents to be reproduced by the Clerk as provided in RAP 14.3(b); and

(d) Reproduction of briefs and other papers on review which are reproduced by the Clerk of the appellate court.

DATED this 19 day of July, 1989.

JUDGE/COURT COMMISSIONER

PRESENTED BY:

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

Mailed: 7/14/89

FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

JUL 18 1989

IN AND FOR YAKIMA COUNTY

BETTY McGILLEN
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,
Plaintiff

vs

No. 88 1 428 1
RESET

McNEIL, Russell
Defendant

THE ABOVE ENTITLED CASE has been set for trial

TUESDAY	9/5/89	9:00 a.m.
(Day)	**(Date)**	**(Time)**

Non-Jury _____ **Jury** 12 TRIAL **No. Days** 4 weeks

TYPE OF ACTION AGR. 1° MURDER/ACC. AGR. 1° MURDER

JEFFREY SULLIVAN HOWARD HANSEN	CHRISTOPHER TAIT THOMAS BOTHWELL
Attorney for Plaintiff(s)	**Attorney for Defendant(s)**

PRE-ASSIGNED TO
JUDGE GAVIN

SUPERIOR COURT ADMINISTRATOR

COPY RECEIVED BY _____ **DATE** _____

178

Mailed: 7/14/89

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,
Plaintiff

vs

No. 88 1 428 1
RESET

McNEIL, Russell
Defendant

THE ABOVE ENTITLED CASE has been set for trial

MONDAY	7/24/89	9:00 a.m.
(Day)	(Date)	(Time)

Non-Jury HEARING Jury _____ No. Days _____

TYPE OF ACTION 3.5 HEARING

JEFFREY SULLIVAN
HOWARD HANSEN
Attorney for Plaintiff(s)

CHRISTOPHER TAIT
THOMAS BOTHWELL
Attorney for Defendant(s)

PRE-ASSIGNED
JUDGE GAVIN

SUPERIOR COURT ADMINISTRATOR

COPY RECEIVED BY _____ DATE _____

177

SUB

NUMBER

176

MISSING

JSM007 CHANGE DOCKET YAKIMA SUPERIOR 02-24-04 13:01 30 OF 47
CASE#: 88-1-00426-1 JUDGMENT# 89-9-2233-2 JUDGE ID:
TITLE: STATE VS MCNEIL
NOTE1:
NOTE2:

STATUS: ACT DATE:

SUB#	DATE	CODE	DESCRIPTION/NAME	SECONDARY
176	07 19 1989	LTR	LETTER FROM DEF&COUNSEL DECLARATN (ORDERED SEALED BY THE COURT)	
177	07 18 1989	TRCKST	TRIAL CLERK'S SETTING	07-24-89
		ACTION	H 9:00 SUPPRESSION(3.5) 1/2D	
178	07 18 1989	TRCKST	TRIAL CLERK'S SETTING (RESET)	09-05-1989TD
		ACTION	J-12 9:00 AGR 1 DEG MURDER/ACC AGR	
		ACTION	1 DEG MURDER 4 WEEKS	
179	07 19 1989	ORIND	ORDER OF INDIGENCY (GAVIN)	
		MFILM	353-272	
180	07 20 1989	MT	MOT FOR EXPENDITURE OF PUBLIC FUNDS	
181	07 20 1989	OR	ORDER AUTHORIZING EXPENDITURE OF PUBLIC FUNDS (GAVIN)	
		MFILM	353-389	
182	07 20 1989	MTAF	MOT&AFF FOR ORDER APPROV INVEST FEE	
183	07 20 1989	OR	ORDER AUTHORIZING PAYMNT BY YAK CO	

? F1=Help Enter=Process F3=Ins F7=Bwd F8=Fwd PA1=Cancel
4-9 A Sess-1 206.194.129.5 FTCP1301 DOC» 8/2

FILED
JUL 12 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

'89 JUL 12 AM 11 28

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 MEMORANDUM OF DEFENDANT McNEIL RE: MOTION FOR ADDITIONAL HANDWRITING EXEMPLAR

COMES NOW the above-named Defendant, RUSSELL McNEIL, through counsel, with this memorandum relative to Plaintiff's motion for an additional handwriting exemplar.

Defendant acknowledges the relatively established authority of the court to order a defendant to provide a handwriting exemplar. See, e.g., Schmerber v. California, 384 U.S. 757 (1966); Gilbert v. California, 388 U.S. 263 (1967). However, neither of those United States Supreme Court cases nor most other authorities consider the mechanics of a particular handwriting exemplar, and particularly some of the proposals being made by the Plaintiff in the instant case.

We understand Co-Defendant Rice is citing to this Court the case of United States v. Campbell, 732 F.2d 1017 (1st Cir. 1984). Defendant McNeil joins in citing Campbell to this Court. The Campbell decision, we respectfully submit, is most well reasoned relative to considering the "testimonial" features involved when a defendant is called upon to, for example, write or print down words which have only been orally spoken to him by the State's representative.

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
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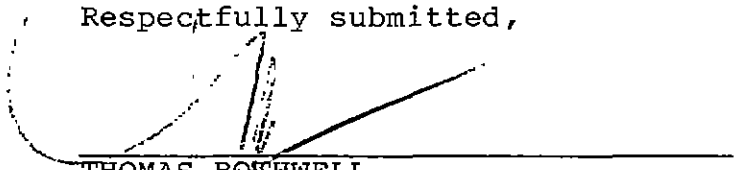
Defendant McNeil renews his request to this Court to deny Plaintiff's motion on the basis that the State has already been afforded an adequate opportunity to obtain an exemplar. However, if this Court is inclined to allow another opportunity to the State, Defendant McNeil asks this Court to restrict the exemplar as provided for in United States v. Campbell.

DATED this 12th day of July, 1989.

Respectfully submitted,



THOMAS BOTHWELL
CHRISTOPHER S. TAIT
Of Attorneys for Defendant McNeil

/ / /

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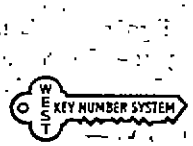
selection guidelines, but they might perfectly well have been made in exactly the same way and with exactly the same results in the absence of the ten-year rule, especially in light of the "seniority" factor in the guidelines.[5] Our review of the record discloses only two references to possible applications of the ten-year rule. George Austermann stated that the rule "played a part in protecting some people from being declared surplus." He did not indicate whether this would have affected the layoff chances of any black employees. John Burgarella named one particular employee with more than ten years of exempt seniority whom he would have laid off but for the ten-year rule; he refused, however, to state that the employee would likely have been laid off in place of any member of the plaintiff class. On the other hand, at least seven managers (including John Rutter and John Gignac, testifying with respect to three of the four named plaintiffs) stated that the ten-year rule had no impact at all on their layoff decisions. On this evidence, we think the district court was correct in finding that the plaintiffs failed to make a sufficient showing to support a presumption of causation with respect to the named plaintiffs and the class generally. Thus, because plaintiffs made out no prima facie case, neither the burden of showing a manifest business necessity for the ten-year rule, nor that of disproving causation with respect to individual class members, ever shifted to defendant.

The judgment for defendant on the individual and class action claims is affirmed.



5. The underlying seniority system, as distinguished from Personnel Policy 250A, was not challenged as discriminatory. Although the district court did not specifically find that the system was protected under 42 U.S.C. § 2000e-2(h), it apparently assumed this was the case when it found the layoff selection guidelines to be nondiscriminatory.

UNITED STATES of America, Plaintiff, Appellee,

v.

Alvin R. CAMPBELL, Defendant, Appellant.

No. 83-1222.

United States Court of Appeals, First Circuit.

Argued March 8, 1984.

Decided April 26, 1984.

Opinion on Rehearing June 7, 1984.

Defendant was convicted before the United States District Court for the District of Massachusetts, A. David Mazzone, J., on a six-count indictment, five involving firearms and one cocaine, and he appealed. The Court of Appeals, Bailey Aldrich, Senior Circuit Judge, held that: (1) probable cause existed for issuance of warrant for search of defendant's apartment for "cocaine" but not for firearms, although firearms might be admissible if discovered during course of legitimate search for cocaine, and (2) order requiring defendant to comply with Government's proposed dictation procedure, which went beyond handwriting exemplars and which would have shown defendant's choice of spelling, invaded defendant's Fifth Amendment rights.

Vacated and remanded.

1. Drugs and Narcotics ⇐188

Where confidential informant identified photograph of defendant and had been seen on occasions to enter defendant's premises, and where informant's name and address were known to police and he had no known motive to lie, received no inducement and came forth on his own, sufficient independent "substantial basis" existed for crediting informant's account that he had seen cocaine and cocaine paraphernalia in defendant's apartment, and thus probable

cause existed for issuance of warrant for search of defendant's apartment for cocaine.

2. Drugs and Narcotics ⇐188

In view of past history indicating a continuing business, information provided by confidential informant, who told drug officer that he had been in defendant's apartment in July, August and September and had seen cocaine and various cocaine paraphernalia, and stated that defendant had offered to front cocaine to him for sale and later payment, was not too stale when it came to assessing probable cause for possession of cocaine in November.

3. Searches and Seizures ⇐3.3(3)

Where hitherto unknown informant had said that some other individual, known only to him, had given him a casing at undisclosed date allegedly coming from rifle in defendant's possession and where named informant stated that defendant carried a 25 automatic in 1980 and confidential informant asserted that he still had it at some undisclosed date, no probable cause existed to search defendant's apartment for firearms.

4. Criminal Law ⇐394.4(10)

Although probable cause did not exist to search defendant's apartment for firearms, firearms and silencers found during course of legitimate search for cocaine might be admissible.

5. Drugs and Narcotics ⇐123

In view of amount of equipment discovered in defendant's apartment, still with cocaine residue present, jury could reasonably conclude that defendant was conducting ongoing business and that more substantial amounts of cocaine had been present within reasonable time of discovery, and thus jury could convict defendant of intent to sell cocaine other than found residue if it concluded that he had further cocaine for sale within reasonable time of date stated in indictment.

6. Indictment and Information ⇐87(7)

Where time of offense is not important, it may be alleged generally and "on or about" permits reasonable variance in dates.

7. Criminal Law ⇐393(1), 721(4)

Where Government did not limit its demand to handwriting exemplars as such but sought compliance with its court-approved proposed dictation procedure, and where only difference between dictation and being shown words to write was to discover defendant's choice of spelling, allowing Government to show that defendant violated court order to furnish handwriting exemplars and permitting Government to argue jury's right to draw unfavorable inferences violated defendant's Fifth Amendment right to avoid compelled testimonial of self-incrimination; disagreeing with *U.S. v. Pheaster*, 544 F.2d 353. U.S.C.A. Const. Amend. 5.

8. Criminal Law ⇐1171.5

Any self-asserted reason defendant might give would not offset court's order and inferences court charged could be drawn from defendant's noncompliance with demand for handwriting exemplars and Government's proposed dictation procedure, which would have permitted discovery of defendant's choice of spelling, since order invaded his Fifth Amendment rights, and thus no protest by him or cross-examination bringing out essentially why he refused to comply could cure consequence of permitting adverse comment on his exercise of his rights. U.S.C.A. Const. Amend. 5.

Richard M. Egbert, Boston, Mass., by appointment of the Court, for appellant.

William C. Bryson, Atty., Dept. of Justice, Washington, D.C., with whom William F. Weld, U.S. Atty., Boston, Mass., and Patrick M. Walsh, Sp. Atty., U.S. Dept. of Justice, Boston, Mass., were on brief, for appellee.

Before COFFIN, ALDRICH and BOWNES, Circuit Judges.

BAILEY ALDRICH, Senior Circuit Judge.

Defendant Campbell, not a stranger to this court,[1] or to a number of others, was convicted on a six count indictment, five involving firearms, and one cocaine. On this appeal he raises three principal complaints; one, to the denials of his motion to suppress; two, alleging inadequacy of the evidence as to cocaine, and three, challenging the court's admission of evidence of his refusal to execute handwriting exemplars. Other claims we have noted, but do not find to require comment.

Most of the evidence was obtained in a search of Campbell's apartment pursuant to a warrant issued for "cocaine" and "a 30 calibre carbine assault rifle and a 25 calibre auto pistol." The search discovered various cocaine paraphernalia, including scales, cutting and other equipment, and approximately 1,000 glassine envelopes, but no cocaine except measurable residue attached to the equipment. Also discovered, concealed in various receptacles, were four firearm silencers, unregistered, in violation of 26 U.S.C. § 5861(d), and three rifles and two handguns, some or all of which were also concealed.

We deal first with the motion to suppress with respect to cocaine. The basis of the warrant had been an affidavit by drug officer Manzi. This, in turn, was based upon statements to him by a Chester Smolenski, and a confidential informant, hereafter CI. Smolenski had had no previous connection with the police as an informant except, apparently, to have reported to the state police in June 1980, that defendant, with whom he had allegedly been previously associated, had assaulted and robbed him. Smolenski informed Manzi in August, 1982 that he had dealt in cocaine with defendant until their falling out in 1980, and that since then he feared for his life. Other than this, Smolenski figured only in the firearms aspect of Manzi's affidavit.

[1, 2] CI spoke with Manzi on several occasions in the fall of 1982, telling him he had been in defendant's apartment in July, August, and September, and had seen cocaine and various cocaine paraphernalia, and that defendant had offered to front cocaine to CI for sale and later payment. In support of his reliability, the affidavit noted that CI had identified a photograph of the defendant, and had been seen on occasions to enter defendant's premises. His name and address were known to the police; he had no known motive to lie, received no inducement, and came forth on his own. Judging the total circumstances, *Illinois v. Gates*, 1983, 462 U.S. 213, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527, and the deference due the magistrate's findings, *United States v. Ventresca*, 1965, 380 U.S. 102, 107–09, 85 S.Ct. 741, 745–46, 13 L.Ed.2d 684, although the question may be close, we find these factors, cumulatively, to furnish a sufficient independent "substantial basis" for crediting CI's account. *Illinois v. Gates*, ante, 103 S.Ct. at 2327–31 *United States v. Harris*, 1971, 403 U.S. 573, 581, 91 S.Ct. 2075, 2080, 29 L.Ed.2d 723. In substitution for a track record of reliability is the fact that he was not a professional informant, but a private citizen with no known criminal record or other criminal contacts, who came forward on his own. Under such circumstances the informant's story may be more easily accepted, and we believe the magistrate justified in doing so here. *See Gates*, ante, 103 S.Ct. at 2329; *United States v. Burke*, 2 Cir., 1975, 517 F.2d 377, 379–81; *United States v. Mark Polus*, 1 Cir., 1975, 516 F.2d 1290, *cert. denied*, 423 U.S. 895, 96 S.Ct. 195, 46 L.Ed.2d 127. Nor was the information too stale when it came to assessing probable cause for possession of cocaine in November, in view of the past history indicating a continuing business. *See United States v. Hershenow*, 1 Cir., 1982, 680 F.2d 847, 853; *United States v. DiMuro*, 1 Cir., 1976, 540 F.2d 503, 515–56.

1. *Campbell v. United States*, 1 Cir., 1962, 303 F.2d 747, *rev'd*, 373 U.S. 487, 83 S.Ct. 1356, 10 L.Ed.2d 501.

[3] The situation with regard to firearms is much more troubling. According to Smolenski, defendant robbed and assaulted him in June 1980, using a 357 magnum revolver and a 25 calibre automatic pistol. At that time defendant "always carried a gun." At some undisclosed date a certain CII, a confidential informant to Smolenski, gave Smolenski "two empty shell casings, one from a 30 calibre carbine, the other, a 30 calibre auto." We assume, from reading the affidavit as a whole, as well as from the fact that the court is unaware of automatics between 25 and 32 calibre, that the second "30" was a typo for 25. CII told Smolenski, again without date, that these weapons were in defendant's possession, and that defendant was planning to kill Smolenski with one of them. The affidavit concluded,

> "Due to the afore-mentioned facts, information and circumstances previously mentioned in the affidavit and due to the nature of criminal activity and the continuing pattern of Campbell's criminal activity, there is probable cause to believe that the items previously mentioned in this affidavit will be likely to remain in Campbell's possession or in his bedroom in connection with his unlawful criminal activity and personal criminal history."

The "personal criminal history" consisted of numerous criminal convictions, the last in 1970 on a gun charge, and the assertion he had robbed Smolenski in 1980, and was engaged in the cocaine business.

Nothing was known to the police about CII, and there would seem, even in the totality of the circumstances, no substantial basis for accepting his hearsay on hearsay. Shell casings could come from anywhere. One could not find probable cause that defendant was presently in possession of a 30 calibre rifle on the basis that a hitherto unknown informant had said that some other individual, known only to him, had given him a casing, at some undisclosed date, allegedly coming from such a rifle in defendant's possession. While we would accept Smolenski's statement that defendant carried a 25 automatic in 1980, we could not regard this, and CII's assertion that he still had it at some undisclosed date, sufficient cause to believe it would be found in defendant's apartment in November 1982. If such minor matters can constitute probable cause for a firearms search warrant, any individual with a criminal record involving firearms, and acceptable probable cause with respect to cocaine, can be searched for arms at any time. The government cites no authority for such a broad proposition, and we must hold that the court erred in concluding that there was probable cause to search for firearms. *Cf. United States v. Harris*, ante, 403 U.S. at 582, 91 S.Ct. at 2081 (criminal reputation, standing alone, insufficient to establish probable cause.).

[4] This does not mean that the firearms must necessarily be suppressed. If the district court should conclude on remand that the police discovered the, or some of the, firearms and silencers during the course of a legitimate search for cocaine, then these items might be admissible. *See, e.g., United States v. Winston*, E.D.Mich., 1974, 373 F.Supp. 1005; *aff'd*, 6 Cir., 1975, 516 F.2d 902; 2 W. LaFave, *Search and Seizure* § 4.11 (1978). We express no final opinion on this question, however, because it was not addressed, either factually or legally, by the district court or the parties.

[5, 6] Defendant next challenges the sufficiency of the evidence with respect to his conviction for cocaine. The indictment charged possession with intent to distribute "on or about" November 23. During its deliberation the jury requested instructions, and was told that it could convict defendant of intent to sell cocaine other than the found residue if it concluded that he had had further cocaine for sale within a reasonable time of the date stated in the indictment. As to this we find no error. Where the time of an offense is not important, it may be alleged generally, and "on or about" permits a reasonable variance in dates. *See United States v. Nunez*, 1 Cir., 1981, 668 F.2d 10, 11–12; *United States v. Antonelli*, 1 Cir., 1971, 439 F.2d 1068, 1070. In view of the amount of equipment discovered, still with residue present, it would be reasonable for the jury to conclude that defendant was conducting an ongoing business, and that more substantial amounts of cocaine had been present within a reasonable time of the discovery.

There was, however, prejudicial error with regard to the cocaine conviction. The court allowed the government to show that defendant violated the court's order to furnish handwriting exemplars. From this

the government was permitted to argue the jury's right to draw unfavorable inferences. Defendant challenges this as violating his Fifth Amendment right to avoid compelled testimonial self-incrimination, magnified by permitting comment thereon. At first blush there might appear to be no possible merit in this complaint, it being well settled that handwriting is a matter of physical characteristics which may be demanded without infringing constitutional rights. *See United States v. Euge*, 1980, 444 U.S. 707, 713, 100 S.Ct. 874, 879, 63 L.Ed.2d 141. Indeed, it is the stock in trade of handwriting experts that some characteristics are so personally entrenched that disguise is almost impossible. *See* Harrison. Suspect Documents, (1958) 292, 349–51. In *Gilbert v. California*, 1967, 388 U.S. 263, at 266–67, 87 S.Ct. 1951, at 1953–54, 18 L.Ed.2d 1178, the Court said, in holding that handwriting exemplars constitute "real or physical evidence" not within the Fifth Amendment privilege protecting communications,

> "One's voice and handwriting are, of course, means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication within the cover of the privilege. *A mere handwriting exemplar, in contrast to the content of what is written,* like the voice or body itself, is an identifying physical characteristic outside its protection. *United States v. Wade, supra,* [388 U.S. 218] at 222–223 [87 S.Ct. 1926 at 1929–1930, 18 L.Ed.2d 1149]. No claim is made that the content of the exemplar was testimonial or communicative matter." (Emphasis suppl.)

[7] The government here, however, did not limit its demand to handwriting exemplars as such. When the agent stated the words he wished written down, defendant replied that he wanted to see what he was to write, rather than take dictation. When the agent refused, defendant's counsel asked whether the agent would permit counsel to write out what defendant was to write, but this, too, was rejected on the ground—which was the fact—that the court had approved the government's proposed dictation procedure. Defendant refused to comply, even though the court held him in contempt.

The only difference we see between dictation and being shown the words to write would be to discover defendant's choice of spelling. Asked by us why this was not testimonial content as distinguished from a "mere exemplar," the government's only response was to cite *United States v. Pheaster*, 9 Cir., 1976, 544 F.2d 353, *cert. denied*, 429 U.S. 1099, 97 S.Ct. 1118, 51 L.Ed.2d 546, where, at 372, the court said, in reply to the defendant's claim that taking dictation might disclose that he misspelled words,

> "Like spelling, penmanship is acquired by learning. The manner of spelling a word is *no less* an 'identifying characteristic' than the manner of crossing a 't' or looping an 'o'. All may tend to identify a defendant as the author of a writing without involving the content or message of what is written." (Emphasis suppl.)

The *Pheaster* court got off on the wrong foot. Basic penmanship, of course, is learned, but to say that the ultimate handwriting is an intellectual process of learning, as distinguished from physical form, is simply not so. The distinction is what caused the Court, ante, to exempt compelled handwriting from the Fifth Amendment. We agree that spelling may be an identifying characteristic *no less* than handwriting idiosyncrasies. The trouble is, from the standpoint of the Fifth Amendment, that it may be something more. When he writes a dictated word, the writer is saying, "This is how I spell it,"—a testimonial message in addition to a physical display. If a defendant misspelled a common word, and the document sought to be attributed to him misspelled it the same way, could it be thought that the government would not, quite properly, *United States v. Russell*, 3 Cir., 1983, 704 F.2d 86, 91, argue that there was a message? Indeed, the *Pheaster* court said exactly that, "The manner of spelling a word is ... an 'identifying characteristic.'" and then drew the wrong conclusion. Not surprisingly, the court cited no authority for its position.

This might be tested another way; could the defendant be put on the stand and given a spelling test? Obviously, compelled answers would be testimonial, or communicative. Yet that is precisely what the government proposed. At the same time, it did not deny that it had a probation file containing defendant's handwriting, both recent and old. We are not surprised that he suspected the government of wanting something other than handwriting.

[8] Alternatively, the government claims that defendant, through cross-examination of the agent, was permitted to bring out essentially why he refused to comply. We do not think so, but much less could we think a jury of laymen would find any self-asserted reason defendant might give would offset the court's order and the inference the court charged could be drawn from non-compliance. The order invaded defendant's Fifth Amendment rights, and no protest by him could cure the consequence of permitting adverse comment upon his exercising them.

The government, properly, does not contend that, if error, it was harmless. Defendant was not the only occupant of the apartment, and in this case the inferences drawn from his refusal could have helped establish possession of the cocaine. Quite apart from this, portraying defendant as one who deliberately disobeys a court order because he fears the consequences of obedience, could not help but be prejudicial.

The convictions on all counts, the order denying the motion to suppress the firearms, and the order for contempt, are vacated, and the case is remanded for further proceedings consistent herewith.

On Rehearing

ALDRICH, *Senior Circuit Judge.* On petition for rehearing the government has been prompted to cite an FBI regulation, and advance reasons why, from the standpoint of obtaining accurate handwriting exemplars, there may be proper advantages in dictation over a written request; e.g., speed and surprise, to reduce conscious manipulation. We accept this, but add that it should have been said before. We remain of opinion, however, that spelling is an intellectual process as distinguished from the pure physical habit or characteristics that make handwriting demandable, and are surprised at the government's persistence in arguing otherwise. Requiring an intellectual process, however subtly, over objection, is a clear violation of the Fifth Amendment.

Nor will we accept the government's undertaking not to rely upon misspelling comparisons. Even if no mention were made of it, a jury could well notice a duplication of mistakes. On the new trial we will permit the use of dictated exemplars, but only on the basis that, if any misspelling occurs, the jury be instructed—whether in fact true or not—that the government dictated the spelling, and that no inference is to be drawn therefrom. If defendant refuses to comply even on this basis, comment on the refusal shall be permitted.

The petition for rehearing is otherwise denied.

Donna SWEENEY, et al., Plaintiffs, Appellees,

v.

Joseph J. MURRAY, Defendant, Appellee.

Margaret Heckler, etc., Defendant, Appellant.

Donna SWEENEY, et al., Plaintiffs, Appellees,

v.

Joseph J. MURRAY, Defendant, Appellant.

Nos. 83-1738, 83-1739.

United States Court of Appeals, First Circuit.

Argued March 7, 1984.

Decided April 27, 1984.

The Secretary of Health and Human Services and the Director of the Rhode Island Department of Social and Rehabilitative Services appealed from a decision of the United States District Court for the District of Rhode Island, Francis J. Boyle, Chief Judge, granting summary judgment to a class which consisted of former AFDC recipients whose benefits were terminated for a specified period of time following receipt of lump-sum income in a month in which they had no earned income. The Court of Appeals, Coffin, Circuit Judge, held that the rule providing that when an AFDC family receives a payment of nonre-

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT McNEIL'S AMENDED RESPONSE TO PLAINTIFF'S OMNIBUS MOTIONS

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, amending his response to Plaintiff's omnibus motions as follows:

Defendant states the general nature of his defense as follows:

The defense enters a general denial to the charges and offers no affirmative defenses to any of the elements of the crimes charged.

DATED this 12th day of July, 1989.

THOMAS BOTHWELL
CHRISTOPHER S. TAIT
Of Attorneys for Defendant McNeil

/ / /

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant	NO: 88-1-00428-1 WAIVER OF TRIAL TIME LIMITS

My name is Russell McNeil. I am currently being held in the Yakima County Jail. I am charged with one count of aggravated first degree murder, and one count of being an accomplice to aggravated first degree murder. The prosecutor has requested the death penalty for both crimes. My attorneys are Chris Tait and Tom Bothwell.

I was 17 years old on January 7, 1988, which is the date on which these crimes were allegedly committed. I turned 18 on August 15, 1988.

By order entered March 15, 1988, the Juvenile Court in Yakima County declined jurisdiction in my case, and I was remanded to adult court.

I was arrested on January 27, 1988, and have been in custody ever since that date.

My attorneys filed and argued a motion to dismiss the death penalty notice because juveniles are not elgible to receive the death penalty in Washington. That motion was denied. We filed a Petition for Discretionary Review, asking the Supreme Court of Washington to rule on that issue before trial, but that Petition was

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SUPERIOR COURT

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denied. We then continued this case until the United States Supreme Court handed down its ruling on the Constitutionality of the death penalty for juveniles. That opinion was reviewed by my lawyers for the first time on June 26, 1989. A scheduling order was entered, with my consent, which provided that my case would go to trial 60 days after the U.S. Supreme Court opinion was issued. That 60 day period ends on August 25, 1989.

I am now asking that my trial begin on September 5, 1989. I consent to that trial date, even though it is a few days beyond August 25, 1989. I sign this waiver freely and voluntarily. I have reviewed it with my attorney. No threats or pressure or coercion of any kind has been used to obtain my signature on this document. I know what I am doing, and I ask the Court to approve this waiver.

DATED this 12 day of July, 1989.

Russell D McNeil
RUSSELL MCNEIL

Christopher Tait
CHRISTOPHER TAIT
ATTORNEY FOR MCNEIL

James Lust Approved
Judge 7/12/89

WAIVER OF TRIAL
TIME LIMITS 2

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant.

NO. 88-1-00428-1

ORDER ON OMNIBUS APPLICATION BY PLAINTIFF

THIS MATTER having come on for hearing on April 10, 1989, with the defendant present and represented by his attorneys CHRIS TAIT and TOM BOTHWELL, and the State of Washington being represented by JEFFREY C. SULLIVAN, Yakima County Prosecuting Attorney and HOWARD W. HANSEN, Deputy Prosecuting Attorney for Yakima County, and the Court having heard the Omnibus Application of the State pursuant to CrR 3.5 and CrR 4.5 and the defense responses provided to these requests, and the Court having considered the arguments of counsel; now, therefore, the court hereby finds and orders as follows:

"0. The 3.5 hearing in this case shall recommence after the trial court has reviewed the taped statement of the defendant, in camera, and the parties have submitted authorities to the trial court on the issue of whether this shall be an open hearing.

1. The defense denies that Russell McNeil struck any fatal blows to either victim, denies he killed either victim, denies the murders were premeditated, and states that no defense of diminished capacity will be raised by the defense.

2. The defense will not rely on an alibi.

3. The defense will not rely on a defense of insanity.

7. The defendant agrees to and shall provide

a handwriting exemplar to the Yakima Sheriff's Department using the standard forms used for taking such samples as long as defense counsel is present at the time of the taking of the exemplar and it is non-testimonial in nature.

8. The defendant will not claim incompetency to stand trial.

4 and 9. The defense shall provide the State a list of their witnesses, their addresses, and a written report of their oral or written statements and the results of any of their scientific tests, experiments, or comparisons to be offered as evidence in this case, all by July 1, 1989.

10. The defense states it presently does not have any physical or documentary evidence in their possession.

All of the requests of the State's Omnibus Application are continuing requests throughout all of these proceedings so that whenever additional information or evidence covered by this application becomes known to the defense, they have a continuing duty to disclose such information or evidence immediately to the Court and to the Yakima County Prosecuting Attorney's Office.

DATED this 11 day of July, 1989.

JUDGE

Presented by:

HOWARD W. HANSEN
Deputy Prosecuting Attorney

Approved as to form, copy received, notice of presentation waived:

THOMAS BOTHWELL

CHRIS TAIT
Attorneys for Defendant

HWH3(G)

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JUL 11 1989
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YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
RUSSELL DUANE McNEIL,
Defendant.

NO. 88-1-00428-1

ORDER GRANTING DISCOVERY TO THE STATE

THIS MATTER having come on regularly before the above-entitled court upon the motion of the plaintiff herein; the defendant appearing personally and being represented by his attorneys CHRISTOPHER TAIT and THOMAS BOTHWELL of Yakima, Washington; the court having considered the evidence presented on this motion, as well as the files and records herein, and having heard the arguments of counsel, and being fully advised in the premises; and the Court having found that the letter hereinafter described is evidence in this case and subject to discovery by the State of Washington; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defense in this case shall turn over to the ~~Yakima County Sheriff's Department, Detectives within days of this date~~ Mr. Sullivan or Mr. Hanson his deputy by noon July 19, 1989 the letter currently in its possession that was originally written and mailed by the defendant Russell Duane McNeil to Melonie Sequeido, and thereafter passed from Melonie Sequeido to Veronica Martinez to JoAnne McNeil and

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sometime during the summer of 1988 was given to an employee of the Tait Law Firm by JoAnne McNeil, the mother of the defendant.

DONE IN OPEN COURT this 11 day of July 1989.

F. JAMES GAVIN, JUDGE

Presented by:

HOWARD W. HANSEN
Deputy Prosecuting Attorney

Approved as to form, copy received:

CHRISTOPHER TAIT

THOMAS BOTHWELL
Attorneys for Defendant

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EX OFFICIO
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S RUSSELL McNEIL'S RESPONSE TO THE STATE'S MOTIONS FOR DISCOVERY OF EVIDENCE AND ADDITIONAL HANDWRITING EXEMPLAR

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and responds as follows to the motions of the Plaintiff, State of Washington, for (1) Discovery of evidence in possession of the defense; and (2) Additional handwriting exemplar.

I. DISCOVERY OF EVIDENCE IN POSSESSION OF THE DEFENSE

The Defendant asserts two bases, as reasons why the State's motion should be denied: (1) Attorney-client privilege; and (2) Attorney work product.

The parameters of the attorney-client privilege are summarized by Professor Tegland in 5A Washington Practice, §170-175 (1989). The statutory basis for the attorney-client privilege is RCW 5.60.060(2).

The privilege extends to both oral and written communications. Victor v. Fanning Starkey Co., 4 Wn.App 920 (1971). The

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privilege should be distinguished from the "work product" rule restricting pre-trial access to papers and other tangible evidence in the possession of an attorney.

RCW 5.60.060(2) says nothing about confidentiality, but our appellate courts have interpreted the privilege as barring evidence of communications only when the communications were intended as confidential.

It is generally held that the privilege belongs to the client, and that the privilege may be asserted by either the client or the client's attorney on behalf of the client.

As Professor Tegland notes:

> Although the statute defining the attorney-client privilege contains no exceptions, the courts have for years held that the privilege does not protect communications in furtherance of a crime or fraud.

5A Washington Practice, §173. For example, in State v. Olwell, 64 Wn.2d 828 (1964), our Supreme Court described a procedure whereby an attorney could be compelled to provide to the prosecution an alleged murder weapon. Although the State in the case at bar cites Olwell, it should be distinguished. Professor Tegland also notes the general rule that: "The exception does not apply to communications after the crime or fraud is executed. These communications remain privileged." Supra, §173, citing Hartness v. Brown, 21 Wash. 655 (1899).

The attorney-client relationship binding defense counsel and Mr. McNeil in the instant case constrains counsel from fully responding to the factual allegations, on the record. This Court may desire to proceed in camera for further consideration of this matter. However, defense counsel asserts in good faith that the

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asserted evidence should be held to be within the attorney-client privilege and free from or not subject to the motion for discovery.

II. WORK PRODUCT

CrR 4.5 authorizes a limited scope to the right of the State to compel examination or discovery of work product. The alleged evidence should be held as not within the scope of CrR 4.5. As noted above, the work product basis for resisting this motion for discovery is distinct from the attorney-client privilege, as described by Professor Tegland:

> Pretrial discovery is, of course, subject to the attorney-client privilege, but the discovery rules go on to add other refinements and restrictions peculiar to this discovery process. The rules restricting pretrial access to a lawyer's work have generated case law wholly separate from the cases interpreting the attorney-client privilege.

5A Washington Practice, §175.

Defense counsel asserts that the requested documents are within the scope of protected attorney-client work product.

III. MOTION FOR ADDITIONAL HANDWRITING EXEMPLAR

Defendant McNeil objects to any further handwriting exemplars. He has already provided, in good faith, the handwriting exemplar as previously required. There is no

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authority for requiring Defendant McNeil to undergo another examination.

DATED this 10th day of July, 1989.

Respectfully submitted,

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

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FILED
and Micro filmed
JUL 10 1989
Roll No. 354 709
BETTY McGILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	
	)	ORDER AUTHORIZING
RUSSELL DUANE McNEIL,	)	PAYMENT BY
	)	YAKIMA COUNTY
Defendant	)	

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY FEES AND EXPENSES for the month of APRIL, 1989, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County office forthwith: The sum of 512.50 payable to attorney CHRISTOPHER TAIT, 230 South Second Street, Suite 201, Yakima, WA 98901; and the sum of $600.00 to DIANA G. PARKER, in care of the offices of attorney CHRISTOPHER TAIT, at the above address.

DATED this 9 day of JULY, 1989.

F. JAMES GAVIN, JUDGE

ORDER AUTHORIZING
PAYMENT BY YAKIMA COUNTY 1

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1345

FILED
JUL 10 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

'89 JUL 10 AM 11 25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	DEFENDANT'S MOTION
	)	AND SUPPORTING
RUSSELL DUANE McNEIL,	)	DECLARATION FOR
	)	ORDER APPROVING
	)	ATTORNEY FEES
Defendant	)	

MOTION

THE UNDERSIGNED attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for the undersigned defense counsel and private investigator for the month of June,1989.

THIS MOTION is based upon the files and records herein and the DECLARATION OF COUNSEL hereinbelow.

DATED this 5 day of July, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
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230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct.

The Undersigned is one of the court-appointed counsel for defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference is my statement of time expended, together with that of our private investigator in this case for the month of June, 1989.

SIGNED AND DATED at Yakima, Washington, this 5th day of July, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

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ATTORNEY AND COUNSELOR AT LAW
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RECORD OF TIME

CHRISTOPHER TAIT — JUNE 30, 1989

STATE vs. RUSSELL DUANE McNEIL

Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
6/1/89	Out	Conf TAB, review briefing, Conf DP	2.00
6/2/89	Out	Conf CT, review photos, corresp. HH	1.00
6/5/89	Out	Conf DP	.25
6/9/89	Out	Conf DP, review Pros Docs	1.00
6/12/89	Out	Conf Dr, Conf DP	2.50
6/13/89	Out	Conf Dr, Conf DP	2.00
6/26/89	Out	Review Opinion USS	.50
6/29/89	Out	Conf DP, TAB	1.00

TOTAL HOURS = 10.25

10.25 Out-Of-Court Hrs at $50.00 Per Hour = **$512.50**

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
6/16/89	Out	Prepare mit materials, conf VF	2.00
6/19/89	Out	Letter to DR, call re USS (3)	1.00
6/20/89	Out	LD Cons JM	.50
6/22/89	Out	Review TAB docs, letter to cl, leter to RM	3.00
6/23/89	Out	LD Cons KB, call to Bd Comm.	.75
6/26/89	Out	Jail conf cl	1.00
6/27/89	Out	LD Cons RB, call to SK, letter to JMN review corres DK, LD cons RB re WW	3.50
6/28/89	Out	Conf VF, call jail, conf VF, cl conf	2.75
6/29/89	Out	Conf CT, client letter, calls to TV, etc Jail conf cl (DP/CT)	3.50
6/30/89	Out	Call press, news, etc., prepare C/V materials, conf CT, letter to SS, jail conf (DP/CT), LD Cons RB, call H. Rep	6.00
		TOTAL HOURS	24.00

24.00 Out-Of-Court Hrs. at $25.00 Per Hour = $600.00

Mailed: 6/29/89

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

JUN 30 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,
Plaintiff

vs

No. 88 1 428 1

McNEIL, Russell
Defendant

THE ABOVE ENTITLED CASE has been set for trial

TUESDAY	7/11/89	9:00 a.m.
(Day)	(Date)	(Time)

Non-Jury HEARING Jury _____ No. Days 3

TYPE OF ACTION MOTIONS
TO BE HEARD IN JAIL COURTROOM #2

HOWARD HANSEN — Attorney for Plaintiff(s)

CHRISTOPHER TAIT
THOMAS BOTHWELL — Attorney for Defendant(s)

PRE-ASSIGNED TO:
JUDGE GAVIN

SUPERIOR COURT ADMINISTRATOR

COPY RECEIVED BY _____ DATE _____

168

Jeff Sullivan, Howard Hansen, Chris Tait, Rick Hoffman & Mike Frost

CERTIFICATE OF TRANSMITTAL

I hereby certify that we sent a copy of this to the attorneys for the plaintiff/defendants by mail, postage prepaid, ~~or~~ by attorneys messenger service. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Yakima, WA. June 21, 1989.
Date

Sherri Dahlin

FILED
JUN 21 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

PM 4 05

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S RUSSELL McNEIL'S RESPONSE TO THE PROSECUTOR'S MEMORANDUM IN OPPOSITION TO MOTION FOR BILL OF PARTICULARS

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and responds as follows, to the Prosecutor's MEMORANDUM IN OPPOSITION TO MOTION FOR BILL OF PARTICULARS.

With all due respect, the Defendant must suggest that the Prosecutor seems to have missed the point of the defense effort by way of defense motions. The defense is basically moving this Court alternatively: First, the Defendant is asking the Court to compel the Prosecutor to explain and identify if his office has any standards or criteria by which his office determines whether to file a special notice, requesting the death penalty. Secondly, we are asking that the Prosecutor indicate what those standards or criteria are, if any he has. Thirdly, we are asking for information relative to those criteria, as applied in this particular case. Lastly, or in the alternative, we are asking that the special notice and request for death penalty be dismissed in the event the Prosecutor's response to these previously, just-stated motions is deemed inadequate or insufficient.

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The MEMORANDUM IN OPPOSITION TO MOTION FOR BILL OF PARTICULARS cites various authorities, none of which are dispositive. There are absolutely no Washington state cases holding that the defense does not have a right to the information it is requesting by way of the instant motions. In fact, on information and belief, it is alleged by the defense that there have been numerous Superior Court proceedings involving requested death penalties in which the Prosecutor has been required to provide the very type of information requested now by Defendant McNeil.

The Prosecutor's Memorandum includes the following statement:

> "The defense also cites several Washington cases as authority that the trial court may review the pre-trial actions of the Prosecuting Attorney and, therefore, invites the trial court in this case to do so in some unspecified manner.

Prosecutor's Memorandum, page 4.

The defense has specified a manner by which this information can be provided. There are numerous ways in which the information can be provided. The prosecutor is improperly resisting all manner of disclosure.

The Prosecutor's Memorandum includes the following additional statement:

> In the present case, there are no agreed upon facts or circumstances concerning any aspect of this trial that the State is aware of. The State invites the defense to reveal what facts they believe are agreed upon or undisputed in this case which could form the basis of a pre-trial court ruling to strike the death penalty aspects of this case.

Prosecutor's Memorandum, page 5.

With all due respect, Defendant McNeil through the undersigned must indicate he has absolutely no understanding of the

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point of this paragraph of the Prosecutor's Memorandum. The defense respectfully resists any assertion that there must be some quantum of agreed upon facts or stipulation before the Prosecutor should be compelled to provide the information requested by way of the defense motions. The Defendant is at a loss to understand what facts the Prosecutor thinks must be present in order for him to be required to reveal the information requested by the defense.

In further support of this motion, the defense offers the recent case from the United States District Court, Central District of Illinois, United States of America ex rel. Charles Silagy v. Howard Peters, III, et al., copy attached, wherein the court finds the Illinois statute unconstitutional in part because of the lack of more specific guidelines relative to prosecutorial discretion. We respectfully submit that the Washington statute has this same vice, particularly if the Court will not grant the defense motions herein.

DATED this 21st day of June, 1989.

Respectfully submitted,

William L. Hadley

FOR: THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

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AO 450 (Rev. 5/85) Judgment in a Civil Case

FILED

APR 2 3 1989

JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

United States District Court

CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,
ex rel. CHARLES SILAGY

V.

HOWARD PETERS, III, et al

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 88-2390

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT A WRIT OF HABEAS CORPUS ISSUE IN THIS CASE VACATING THE PETITIONER'S SENTENCE OF DEATH. THE STATE HAS 120 DAYS TO RESENTENCE THE PETITIONER, OR HE SHALL BE RELEASED. COURT'S OWN MOTION, THE EXECUTION OF THIS ORDER IS STAYED PENDING APPEAL BY THE PARTIES.

APRIL 29, 1989

Date

JOHN M. WATERS

Clerk

Karen Wynn

(By) Deputy Clerk

(44)

FILED
APR 2 . 1989
JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, ex rel. CHARLES SILAGY,

Petitioner,

vs.

HOWARD PETERS, III, and NEIL HARTIGAN,

Respondents.

No. 88-2390

FINAL ORDER

This is a habeas corpus proceeding under 28 U.S.C. § 2254. For the reasons stated in this order, the writ will issue directing that the petitioner be resentenced within 120 days.

BACKGROUND

In the late hours of February 13 and the early hours of February 14, 1980, in Vermilion County, Illinois, two women were brutally beaten and murdered. The petitioner, Charles Silagy, was prosecuted for the murders and convicted. There is no doubt that Silagy killed the two women.

In his voluntary confession to the police, Silagy described what he did to the first victim:

> [S]he ...got a little rowdy with me, and I slapped her glasses off of her face, and...she said somethin' else, and I reached up with my left hand and grabbed her by the throat and started choking her. My truck done a spin-around, and killed itself, and I...shut it off and started chokin' her...some more, and kept chokin' her and...a car come up from the south, and so I acted like we was makin' out, and the car was...all clear, and I commenced chokin' her with my left hand, and...then I decided I didn't have enough room, or somethin'...in the truck...so I...fought with the door for a little bit, and I got it open from the outside, and...because it will not open from

(43)

the inside. Had to crank the window down...and all this time I still got ahold of her throat. And chokin' her. And so I throwed her out on the ground and...I got outta the truck, and I started a-stompin' on her and jumpin' up and down, and on her head, and...then I drug her across the road, and she was still breathin', so I...took out my pocket knife and opened it and pulled her coat and blouse away, and stabbed her approximately five or six times in the chest...on the...left...left-hand side...and...then I left her lay there....

Record at C-386.

He also told how he killed the second victim:

[S]o I reached down and...picked her up and...started to pick her up, and she turned a table over, and...I tried to...take her to the door, and she wouldn't let go of that table, and finally I got her broke loose from the table, and I throwed her over toward the TV, which was back to the east, which the door is to the northwest..from where we were originally. And...I, uh...throwed her down, and her head hit the coffee table, and I went over, and...kicked her a couple o' times in the head, and then I proceeded to go to a...drawer, to where the silverware...the big knives and butcher knives and utensils were kept at...it was separate from the spoons and forks and things like that. And...picked me out a knife that I knew would...not bend, and...I went back over and snatched her blouse on the left side and yanked it back, and...stabbed her...four times continuously in the chest.

Record at C-387.

In the sentencing stage of the case,[1] Silagy elected to proceed

---

[1] Ill. Rev. Stat. ch 38, ¶ 9-1(d) says in pertinent part:

> Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in subsection (b) and to consider any aggravating or mitigating factors as indicated in subsection (c). The proceeding shall be conducted:
>
> 1. before the jury that determined the defendant's guilt; or . . . .

The consideration of the factors under subsection (b) is the first phase in which the question whether the case is one in which the death penalty may be imposed is decided. The consideration of the factors under subsection (c) is the second phase in which the question shall the death penalty be imposed is decided.

pro se. Silagy told the jury during the first phase, where it was determined that his offense was one to which the death penalty could apply:

> As you have been instructed, there is two different verdicts. I instruct the jury to apply themselves and think back to your verdict that was rendered yesterday. Take all those items into your mind studying them very closely. Upon examing [sic] those items, do not hinder, do not look at me for sympathy because I don't want it. I ask you to look at it from my standpoint. There is two victims in this crime; they can not ask for sympathy because they are dead. Thank you.

Record at 906.

In the second phase, to determine whether the death penalty should be imposed, Silagy addressed the jury and said:

> I would like to make a statement at this time. Ladies and Gentlemen of the jury, I'm sitting here today. I have voluntarily come up here and sat on this stand to tell you that I did, without any hesitation, stab and kill and stomp Cheryl Block; stomp and stab Anne Budde-Waters. I do not want sympathy from any one of you. Any decision that you would bring back would not be held against you in any form or fashion by anyone in this Courtroom or any of my relations, nor by myself. Also, as has been submitted by the Defense, I mean, excuse me, the prosecution, three documents that have been processed through the legal process. All of those three items I've served some time for. Probation on one. On number two I took a plea bargain; got one to three years in the Illinois State Department of Corrections. I was placed in a maximum security penitentiary; released four months and twenty-eight days later. I was convicted on the second case which I received six to ten years. Went to the Appellate Court; got time cut, which they gave me three years, four months, and ten days. So I am well aware of the fact what lays in front of me. I have no desire to sit in no man's penitentiary. That's not a cop-out, and that's not a plea. What I am asking the jury is do not feel sympathy, feel empathy. If you can wear these 11's right now, do so.
>
> My next statement, I will say this: I do want the death penalty; and I will go to any lengths to have it served upon me. I took two lives through my

> own foolishness, not nobody else's fault. Mine. I paid twice before. I am willing to pay the price now, and no hesitation. I will further state that under provisions within the law which will be instructed by the Judge, he will tell you some of the things that can be and would be given upon me. I assume, Your Honor, that would be correct?

Record at 979-81.

The jury granted Silagy's request and returned verdicts finding unanimously that an aggravating factor existed warranting imposition of the death penalty and that no mitigating factor existed to preclude imposition of that penalty. The trial judge entered judgment on the verdicts and sentenced the petitioner to be executed.

The petitioner sought to overturn the judgment in the Supreme Court of Illinois but his conviction was affirmed. People v. Silagy, 101 Ill.2d 137 (1984). The petitioner also sought post-conviction relief in the trial court without success, and the post-conviction judgment was affirmed by the Supreme Court of Illinois. People v. Silagy, 116 Ill.2d 357 (1987).

On November 7, 1988, the petitioner sought habeas corpus in this court to overturn his conviction. Silagy makes five main contentions in support of his petition that center on the following occurrences during the trial proceedings:

1. The psychiatrists who were appointed by the court to examine Silagy and to assist him with his defense of insanity were not professionally competent. Silagy argues that the physicians, in making their diagnoses, relied on false information given to them by Silagy and reached professionally unacceptable opinions about the petitioner's psychiatric state. As a result, Silagy's rights to due

process, to equal protection, and to effective assistance of counsel were abridged.

2. The clerk of the state court jury commission arbitrarily excluded from the jury venire all persons seventy years of age and older. That practice, Silagy argues, deprived him of a jury venire made up of a fair cross section of the community, taking away his Sixth Amendment rights and his Fourteenth Amendment due process rights.

3. Juror misconduct deprived him of his due process rights and his Sixth Amendment right to a jury trial.

4. The trial court committed constitutional error by permitting Silagy to represent himself in the sentencing phase of the trial. The trial judge made no determination, the petitioner asserts, of his mental competency to refuse the assistance of counsel and to elect not to offer any evidence in mitigation in the sentencing proceeding. This resulted in a loss of the petitioner's Fourteenth Amendment due process rights and his Eighth Amendment right to be free from cruel and unusual punishment.

5. The prosecution did not give notice that the psychiatrists' testimony would be relied upon by the State to support a finding of an aggravating circumstance to warrant the death penalty. The petitioner's statements to the psychiatrists were introduced in evidence against the him. The petitioner says that these occurrences violated his Fourteenth Amendment rights to due process and his right against self-incrimination under the Fifth Amendment.

The petitioner raises two further claims. The first concerns Illinois' abandonment of electrocution as a means of execution and

the second deals with erroneous testimony that the two victims were siblings.

Finally, the petitioner attacks the constitutionality of the Illinois death penalty statute. He argues that it vests unrestricted discretion in the prosecutor to seek the death penalty and lacks basic notice requirements that result in Eighth and Fourteenth Amendment violations.

RIGHT TO COMPETENT PSYCHIATRIST

Prior to trial, in anticipation of raising an insanity defense, the petitioner moved for the appointment of psychiatrists. The trial court ordered Drs. Daniel Pugh and Arthur Traugott of the Carle Clinic in Urbana to examine Silagy to determine whether he "lacked a substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law as a result of mental disorder or mental defect at the time of the offenses charged in this case." (Record at C-53.) The parties agree that the doctors relied, in formulating their diagnoses, to some extent on statements made by Silagy that were later found to be false. The petitioner now argues that because the court-appointed psychiatrists accepted Silagy's uncorroborated and false accounts of his experiences in Viet Nam, they were incompetent. As a result of that incompetency, the petitioner says, there is a great risk that the issue of his sanity was inaccurately resolved.

The petitioner relies upon the Supreme Court's decision in Ake v. Oklahoma, 470 U.S. 68 (1985). In Ake, the Court held that:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent

> psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to chose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right.

Id. at 83 (emphasis added).

The petitioner argues that "because the diagnoses of Drs. Pugh and Traugott are now known to have rested on false facts, and because their methodologies were seriously flawed, especially because they failed to corroborate the statements of exposure to extreme violence that were made by an arguably insane defendant, the assistance they rendered here cannot be said to have been competent within the contemplation of Ake." (Petitioner's Memorandum, p. 31.) The petitioner argues that the standard for determining whether the psychiatrist is competent is the same standard adopted by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), reh'g denied, 467 U.S. 1267, for determining whether a petitioner was denied effective assistance of counsel. The court rejects this argument.

Ake requires only that "the indigent defendant have access to a competent psychiatrist . . . ." Ake at 83. Ake does not require that the psychiatrist's evaluation be flawless. The trial judge appointed three board-certified, experienced, praciticing psychiatrists to assist the petitioner in preparing his defense. Accordingly, the court finds that the requirements of Ake have been met. The court holds that Ake merely requires that to be

"competent," the psychiatrist appointed by the court must be experienced and board certified. To interpret Ake as the petitioner suggests would involve resolving what amounts to a medical malpractice claim in this collateral attack on the state court judgment.

This ground for habeas corpus relief is without merit.

FAIR CROSS SECTION

The parties agree that contrary to Ill. Rev. Stat., ch. 78, ¶ 4 (1979), the civil servant responsible for assembling jury venires in Vermilion County excluded from jury service all persons who were seventy years of age or older. (See Scharlau Affidavit, Exhibit VB.) The petitioner argues that because of this systematic exclusion he was denied his constitutional rights under the Sixth and Fourteenth Amendments to have a jury selected from a fair cross section of the community. Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979).

In Taylor, the Supreme Court held that the Sixth and Fourteenth Amendments require that the jury venire be drawn from a fair cross section of the community. Id. at 530, 538. In Duren v. Missouri, the Supreme Court set forth what a defendant must show to establish a prima facie violation of the fair cross section requirement. The Court held that:

> [T]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which jurys are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to the systematic exclusion of the group in the jury-selection process.

439 U.S. at 364.

The petitioner argues that he has established a prima facie

cross section violation under Duren. The only point of contention is whether the group excluded by the jury clerk is a "distinctive" group within the meaninthe Duren test. In support of that position, the petitioner introduced the testimony of a social scientist during the evidentiary hearing before this court. The court did not find that testimony persuasive.

The court accepts that the petitioner has satisifed parts two and three of the Duren test. The court, however, does not agree that the excluded group is a "distinctive" group for Duren purposes. People age seventy and above do not, based on age alone, constitute an "identifiable" segment that plays a major role in the community. Taylor, 419 U.S. at 530. While the elderly have much to offer in terms of life experience and exposure that make their contribution to all aspects of life, including jury service, invaluable, they cannot be classified as an identifiable segment on age alone. They are not a distinct group for Duren purposes. What is it that distinguishes people who are seventy years old and older from people who are sixty-nine or sixty or fifty-five for that matter? No evidence was offered to suggest that there is some common thread of shared experience or political, social or religious viewpoint that binds this group together to make it distinct from any other age group. The systematic exclusion of citizens seventy years old and older was in violation of Illinois law but it did not violate the fair cross section requirements of the Constitution. Accordingly, the court holds that the group excluded was not distinctive for Duren purposes and as a result the petitioner has failed to raise a proper cross section violation.

Moreover, even if the court found that the group excluded in this case was distinctive for Duren purposes, the Supreme Court's recent decision in Teague v. Lane, No. 87-5259 slip op. (U.S. Feb. 22, 1989), bars this court from applying that finding to overturn the petitioner's conviction.

In Teague, the plurality decision written by Justice O'Connor held that "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions we have articulated." Id. at 25-26. In Teague, the plurality adopted Justice Harlan's exceptions to the general rule of non-retroactivity for cases on collateral review.

> First, a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law--making authority to prescribe." Mackey, 401 U.S., at 692. Second, a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of order of liberty.'" (Citation omitted.)

Id. at 16. Under Teague the court must first look at the proposed constitutional rule to determine if it falls within one of Justice Harlan's two exceptions. If it does, then the new constitutional rule of criminal procedure may be recognized on collateral review. Otherwise, the court must refuse to create new constitutional rules of criminal procedure on collateral review.

The petitioner argues that Teague does not apply since he is not asking the court to create a new constitutional rule. The petitioner maintains that the rule to be applied in this case is the rule adopted in Taylor and Duren, and that all he is asking the

court to do is apply an old rule and hold that the group of citizens seventy years and older constitute a "distinctive group." The court does not agree. Taylor and Duren establish that distinctive groups cannot be excluded from jury venires. The Court has not defined what constitutes a distinctive group. In fact, the Court left it to the states to determine what constitutes a distinctive group. See Duren at 370; Taylor at 538. Accordingly, for this court to decide that the group comprised of persons seventy years and older is a distinctive group for Duren purposes, would be to announce a new constitutional rule. Furthermore, the rule would not fall within the two exceptions described by Justice Harlan and adopted by the Supreme Court in Teague. This ground for habeas corpus relief, therefore, fails.

JUROR MISCONDUCT

Silagy claims that his constitutional rights were violated when (1) the trial court failed to replace a sleeping juror, (2) the jury considered off-the-record evidence in the form of media coverage and one juror's personal input, and (3) the jury, in reaching its sentencing verdict, considered off-the-record, inaccurate information regarding possible punishments Silagy might receive.

(1)

Silagy argues that his rights to due process and to a fair trial were violated when the trial court failed to replace a juror who dozed off "a couple of times" during the presentation of testimony.

The Illinois Supreme Court addressed this claim.

> After all of the testimony had been received, the defendant's counsel requested that one of the

jurors be removed by the court and replaced by one of the three alternate jurors. Defense counsel stated that she and "other individuals in the Courtroom" had observed the juror periodically dozing during the trial. She claimed that the juror "was about falling or leaning against the juror seated next to him." The trial court stated that it had seen "no evidence as stated by Defense Counsel." When asked why she had not previously called the juror's alleged inattentiveness to the court's and the prosecutor's attention, defense counsel acknowledged that she should have objected earlier.

Despite its expressed belief that the tardiness of the claim raised a question as to the sincerity of the request, the court examined the juror. The juror stated that he may have nodded once or twice for a period of seconds, but could not say that he fell asleep at any time during the course of the trial. He further stated that he did not think he had missed any of the testimony. The defendant's attorney did not question the juror and offered no evidence that the juror had fallen asleep. The court denied the motion to dismiss the juror.

The defendant now argues that he was denied the right to be tried by a jury of 12 competent persons who consider all of the evidence presented. He cites United States v. Cameron (3d Cir. 1972), 464 F.2d 333, and United States v. Smith (5th Cir. 1977), 550 F.2d 277, in arguing that the juror should have been replaced. In both of those cases it was said that a juror who cannot remain awake during much of a trial is unable to perform his duty. Here, not only was it not shown that the challenged juror slept regularly during the trial, but the trial court found that the evidence was insufficient to prove that he was asleep at any time. On this issue there was only the defense counsel's allegation and the juror's own testimony that he had not missed any of the testimony. Despite her claim that others had seen the juror sleeping, the defense counsel did not present any testimony to support her claim. It cannot be said that the trial court abused discretion in denying the motion. Too, if the defendant or his attorney did see the juror sleeping, there was a duty to call it to the attention ofthe court at that time. (United States v. Carter (10th Cir. 1970), 433 F.2d 874, 876.) The failure to do so resulted in a waiver of the point. People v. Nachowicz, (1930), 340 Ill. 480; People v. Shockey (1966), 66 Ill. App.2d 245.

People v. Silagy, 101 Ill.2d 147, 170-71 (1984).

The Illinois Supreme Court subsequently refused to readdress the issue on post-conviction review, finding that such review was barred by res judicata because the issue had been raised and disposed of on direct appeal. People v. Silagy, 116 Ill.2d 357, 367 (1987).

This court is bound by the factual determinations of the Illinois Supreme Court unless the record shows that there is no basis for such determinations. Sumner v. Mata, 449 U.S. 539, 547 (1981); United States ex rel. Cosey v. Wolff, 682 F.2d 691, 693 (7th Cir. 1982). The record shows ample basis for the Illinois Supreme Court's conclusion that the trial court did not abuse its discretion in denying Silagy's motion to dismiss the juror.

(2)

The petitioner also alleges that the jury considered off-the-record evidence in the form of media coverage and one juror's personal input. In disposing of his petition for post-conviction relief, the Illinois Supreme Court addressed this claim. That court stated:

> Because the actual effect of the complained-of conduct on the minds of the jurors cannot be proved, this court has held that "the standard to be applied is whether the 'conduct involved "such a probability that prejudice will result that it is [to be] deemed inherently lacking in due process."'" (People v. Holmes (1978), 69 Ill.2d 507, 514, quoting Estes v. Texas (1965), 381 U.S. 532, 542-43, 14 L.Ed.2d 543, 550, 85 S. Ct. 1628, 1633; People v. Tobe (1971), 49 Ill.2d 538, 544.) We consider that the juror's affidavit concerning jurors' alleged discussion of news reports did not demonstrate that the jury deliberations were so affected as to deprive the defendant of due process. Assertions of exposure to media coverage do not of themselves demonstrate prejudice to a defendant. (People v. Lieberman (1986), 149 Ill. App.3d 1052, 1057.) Considering the record before us, we cannot say the judge's denial of an evidentiary hearing on this claim was manifestly

erroneous. (People v. Griffin (1985), 109 Ill.2d 293, 303 ; People v. Bracey (1972), 51 Ill.2d 514.) If a juror did comment to other jurors that the defendant was a bad person, it must, however, be presumed, absent a showing to the contrary, that they jury followed the court's instructions in reaching a verdict. Too, the defendant confessed before the jury that he had killed the two women; his mother had testified that she and the defendant's sister had been raped by the defendant. We can be certain that the juror's remark, if made, did not affect the jury's appraisal of the defendant's character.

People v. Silagy, 116 Ill.2d 357, 366-67 (1987).

Again, because there is ample basis in the record, the court finds itself bound to accept the factual findings of the Illinois Supreme Court.

(3)

Finally, Silagy argues that the jury's sentencing verdict was affected by consideration of off-the-record, inaccurate information regarding the punishment he would receive if the jury did or did not impose the death penalty. Silagy claims that the jury discussed that if sentenced to life imprisonment he would serve only five to seven years in prison. If the jury imposed the death penalty, on the other hand, he would never be executed but would remain incarcerated for longer than seven years.

In the post-conviction case, the Illinois Supreme Court found that this claim was also properly dismissed on the ground that "affidavits or testimony to show 'the motive, method, or process by which the jury reached its verdict' is not admissible." People v. Silagy, 116 Ill.2d at 367 (citations omitted).

Federal Rule of Evidence 606(b) also supports that position.

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the

> jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

The discussions about the number of years Silagy would actually serve if he were sentenced to life imprisonment rather than being sentenced to death were not based on extraneous matter but were rather based on a juror's erroneous ideas. The jurors were talking about whether or not the death penalty would be justified in this case. The fact that they discussed what they thought the actual result would be were Silagy sentenced to life imprisonment rather than execution, does not invalidate the proceeding.

Accordingly, this ground for habeas relief is denied.

WAIVER OF COUNSEL AND MITIGATING EVIDENCE AT CAPITAL SENTENCING PROCEEDING

1. Silagy alleges that he was not mentally competent either to waive his constitutional right to counsel or to represent himself at the sentencing proceeding or to decide not to offer mitigating evidence at the sentencing proceeding.

With respect to his waiver of counsel at the sentencing proceeding, the Illinois Supreme Court determined that Silagy was competent. Responding to Silagy's suggestion that the extreme stress resulting from the trial might have triggered anxiety neurosis so that he was not competent to make an intelligent waiver

of counsel, the Illinois Supreme Court stated:

> Immediately after the defendant had been found guilty of the offenses charged, he asked that he be allowed to proceed without counsel. The court allowed the defendant to reconsider his request overnight. The following day he again made the request and the court questioned the defendant. This examination included:
>
> > "THE COURT: Do you think you understand the severity of this, and do you understand what you are doing? Do you think you understand what the actual circumstances are?
> >
> > THE DEFENDANT: Yes, sir.
> >
> > THE COURT: You've thought about this for some time, have you?
> >
> > THE DEFENDANT: Yes.
> >
> > THE COURT: Have you discussed this with your attorney, that this is what you want to do?
> >
> > THE DEFENDANT: Yes, I have very thoroughly.
> >
> > THE COURT: And you feel this is the way you want to proceed?
> >
> > THE DEFENDANT: Yes, sir.
> >
> > THE COURT: Does Counsel have anything else that they think that this defendant should be apprised of?
> >
> > COUNSEL: No, your Honor."

It was explained to the defendant that his attorneys would continue to sit at the counsel table and advise him as to how to proceed, but that all decisions would be made by him and that his attorneys would not address the court without the defendant's consent. The defendant's request to proceed without counsel was "due to the fact that their ethics of law, I would not ask them to go against their work. It was my decision to carry out what will happen." The defendant then stated that his decision was made freely and voluntarily without threats, promises, or coercion. The court made this finding:

> "[t]hat the Defendant is a responsible person who is under no mental disability and who

is knowingly, intelligently, and understandingly, electing to proceed in his defense as he suggested. The court further finds that the Defendant understands the nature of the charges for which he's been convicted, the seriousness of the possible penalties in the case, and has freely and voluntarily undertaken to act as his own attorney with assistance from his Counsel who are present at all times whenever he requested that Counsel for any assistance from them.

Do you have any objections to that statement, Mr. Silagy?

THE DEFENDANT: No, Your Honor.

THE COURT: That is a true statement?

THE DEFENDANT: It is a true statement.

THE COURT: At this time the Court will rule that the Defendant has a right to proceed as he has requested representing himself with his attorneys advising him in any respect he wishes. And the attorneys can participate and perform all the usual functions as Defense Counsel as requested by the defendant or not participate as directed by the Defendant from time to time."

People v. Silagy, 101 Ill.2d 157, 176-78 (1984). In disposing of a related claim, the Illinois Supreme Court stated further:

> It is clear that the sixth amendment to the Constitution of the United States (U.S. Const., amend. VI) provides for the right of self-representation in criminal proceedings. (Faretta v. California (1975), 422 U.S. 806, 45 L.Ed.2d 562, 95 S. Ct. 2525; see also, Ill. Const. 1970, art. I, sec. 8.) The "'right of a defendant to represent himself, when his choice is intelligently made, is as basic and fundamental as his right to be represented by counsel.'" (People v. Nelson (1971), 47 Ill.2d 570, 574; People v. Bush (1965), 32 Ill.2d 484, 487.). . . . Although a court may consider his decision unwise, if it is freely, knowingly and intelligently made, that decision must be accepted out of "that respect for the individual which is the lifeblood of the law." Illinois v. Allen (1970), 397 U.S. 337, 350-51, 25 L.Ed.2d 353, 363, 90 S. Ct. 1057, 1064 (Brennan, J., concurring).

> The record shows that the trial court fully informed the defendant of the relevant substantive and procedural law involved. The defendant was informed of the possible sentencing alternatives. His decision was made after consultation with his attorneys. He was obviously aware of the possibility of being sentenced to death, since that was the punishment he requested. The record is clear that Silagy's decision to discharge his counsel was knowingly and intelligently made.
>
> There is no suggestion that the defendant was suffering any impairment of reasoning ability at the time of his waiver of counsel. He showed understanding of the law, asked intelligent questions, and did not demonstrate any of the symptoms which he said had accompanied the disturbed episodes that he described. Dr. Ziporyn, who testified for the defendant, reported that he understood the nature of the charge and could cooperate with his attorney. The jury had found he was not insane at the time of the murders. The defendant's attorneys did not advise the trial court of any indication of an inability of the defendant to make a rational decision concerning the discharge of counsel, as the attorneys would have had a duty to do. The reasons the defendant expressed for discharging his attorneys and desiring a sentence of death were not irrational (he feared their ethical duty prevented them from carrying out his wishes to be given a death sentence, and he wished to be sentenced to death because of feelings of guilt and remorse, a desire to spare his parents from further agony because of his conduct, his dread of confinement in the penitentiary, and a desire to die with grace and dignity). There simply is no showing that Silagy was suffering under a reactive psychosis at trial or was otherwise mentally incapable of making an intelligent waiver of counsel. We note, too, that even Dr. Ziporyn testified that the defendant did not suffer a loss of intellectual function during his periods of disturbance.

Id. at 179-81.

This court is bound by the factual determinations of the Illinois Supreme Court unless the record shows that there is no basis for such determinations. Sumner v. Mata, 449 U.S. 539, 547 (1981); United States ex rel. Cosey v. Wolff, 682 F.2d 691, 693 (7th Cir. 1982). The record shows ample basis for the Illinois Supreme

Court's conclusion that Silagy's competence to waive counsel at the sentencing proceeding was made knowingly and intelligently.

Because it has been determined that Silagy's waiver of counsel was knowingly and intelligently made, it follows that his waiver of mitigating evidence at the sentencing proceeding was also knowingly and intelligently made.

The petitioner now argues that there were various alternatives by which all available mitigating evidence could have been presented to his sentencing jury. He suggests that: stand-by counsel could have argued mitigating evidence; the court could have called its own witnesses; the court could have appointed a special counsel to present mitigating evidence; or the court could have admitted a presentence investigation report into evidence. Adopting one of these alternatives, Silagy says, would have allowed the sentencing jury to perform its constitutionally mandated function of assuring that the penalty of death is appropriate and individualized.

Silagy argues that any of these alternatives would have coalesced perfectly with the law in this jurisdiction and cites United States v. Taylor, 569 F.2d 448, 452 (7th Cir.), cert. denied, 435 U.S. 952 (1978), for the proposition that:

> [F]aretta holds that an accused has a constitutional right to dispense with the assistance of counsel and to conduct his defense personally. It does not inevitably follow, however, that this right of self-representation comprehends any correlative right to preclude the trial court from appointing counsel and authorizing him to participate in the trial over the accused's objection in order to protect the public interest in the fairness and integrity of the proceedings. (Footnote omitted.)

The facts of Taylor, however, are readily distinguishable from those in the present case. In Taylor the court appointed standby counsel

to assist a pro se defendant at trial who had previously indicated that he felt unqualified to put on his own defense. Id. at 451. It was only after the defendant stated, and it became clear, that he would take no part in the proceedings, that the trial court lifted its initial ban on appointed counsel's participation. It was following the recitation of these facts that the Taylor court made the above quoted statement. In the present case, however, Silagy never indicated that he believed himself to be unqualified, and rather than refusing to participate in the sentencing proceeding, he dismissed counsel so as to be able to participate.

More importantly, the court finds that the petitioner's argument that the court should have employed alternative means to present mitigating evidence collides squarely with the reasoning of Faretta v. California, 422 U.S. 806 (1974). In Faretta, the Supreme Court observed initially that there existed a "nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." Id. at 817. Faretta also noted that the structure of the Sixth Amendment supports the right of self-representation: This amendment "does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Id. at 819.

The Supreme Court was aware that in most criminal cases defendants could present a better defense with the help of counsel than without it. The Court, however, explicitly refused to allow this fact to undercut a defendant's right to proceed pro se.

> The right to defend is personal. The defendant, not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law." (Citation omitted.) (Brennan, J., concurring.)

Id. at 834.

Under Faretta and its progeny, exercise of the Sixth Amendment right to self-representation is unqualified before the trial begins. Faretta at 818-21; United States v. Brown, 744 F.2d 905, 908 (2nd Cir.), cert. denied, 469 U.S. 1089 (1984). Once the trial is in progress, the judge may curtail the right upon finding that the legitimate interests of the defendant are outweighed by potential disruption of the proceedings already in progress. United States v. Brown, 744 F.2d at 908; United States v. Wesley, 798 F.2d 1155, 1155 (8th Cir. 1986). There are no allegations and the record contains no evidence that Silagy's presentation to the sentencing jury was in any way disruptive of the proceedings.

Additionally, the Seventh Circuit has rejected the notion that the court should intervene if it becomes apparent that the pro se litigant is unable to defend himself. In United States v. Moya-Gomez, 860 F.2d 706, 741 (1988), the court adopted the reasoning of the Sixth Circuit in McDowell, 814 F.2d at 251:

> The only thing that was "unfair" about McDowell's trial was that he did not represent himself very well . . . . However, as the Supreme Court stated in Faretta, "whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" (Citation omitted.) We think this logic applies equally to preclude the

> instant "fair trial" claim. The district court accorded McDowell his full constitutional rights at trial. (Citation omitted.)

Based on the foregoing, this claim also fails.

CONSIDERATION OF PSYCHIATRIC TESTIMONY IN PHASE TWO OF CAPITAL SENTENCING PROCEEDING

The petitioner alleges that neither he nor his attorneys were informed that the psychiatric testimony used at trial to rebut the defense of insanity would be used by the State in phase two of the capital sentencing proceeding as aggravating factors to be weighed in determining whether the death penalty should be imposed. This denied, Silagy says, his Fifth Amendment right not to incriminate himself and his Sixth Amendment right to the effective assistance of counsel. In support of his position, the petitioner relies on the Supreme Court's decision in Estelle v. Smith, 451 U.S. 454 (1981). In Estelle v. Smith, the Court considered whether:

> [T]he admission of [a psychiatrist's] testimony at the penalty phase violated respondent's Fifth Amendment privilege against compelled self-incrimination because respondent was not advised before the pretrial psychiatric examination that he had a right to remain silent and any statement he made could be used against him at a sentencing proceeding.

Id. at 461. The Court held that the Fifth Amendment privilege against self-incrimination applied to the unwarned statements that the respondent made to the court-appointed psychiatrist. Id. at 463.

The petitioner acknowledges that the holding in Estelle v. Smith "was limited to the situation where the criminal defendant neither initiated a psychiatric evaluation nor introduced any psychiatric evidence at trial. Estelle v. Smith, 451 U.S. at 468."

(Page 131, Petitioner's Memorandum in Support of Petition for Writ of Habeas Corpus.) Nonetheless, he argues that subsequent cases have held that "the fact that the defense requested the examination does not obviate the necessity for giving the Miranda warnings where the defense did not request . . . an examination on the question of future dangerousness." Battie v. Estelle, 655 F.2d 692, 702 (5th Cir. 1981); Accord Booker v. Wainwright, 703 F.2d 1251, 1256 (11th Cir.), cert. denied, 464 U.S. 922 (1983). See Petitioner's Memorandum, p. 131.[2]

Both Estelle v. Smith and Battie v. Estelle arose under the Texas death penalty statute that requires the jury to assess the defendant's future dangerousness. Estelle v. Smith, 415 U.S. at 457-58. In Texas, because the state must prove future dangerousness beyond a reasonable doubt in a death penalty proceeding, the involuntary, unwarned statements to the court-appointed psychiatrist violate the Fifth Amendment. But in Illinois, future dangerousness is not an element of the state's case for the availability of death as a penalty. Ill. Rev. Stat. ch. 38, ¶ 9-1(b). In Silagy's case the jury did not consider the psychiatrists' testimony in deciding whether death was an applicable punishment.

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[2] Booker is completely distinguishable since in that case the prosecutor used the psychiatric evidence as impeachment of Booker's statements during the penalty phase of the trial. The Booker court held that "even assuming Booker's statements would not have been admissible in the state's case, there is no constitutional prohibition against using the information for impeachment purposes." Booker, 703 F.2d at 1258.

Finally, and what is determinative on this issue, the court notes that "volunteered statements . . . are not barred by the Fifth Amendment . . . ." Estelle v. Smith, 451 U.S. at 469. Silagy voluntarily allowed the psychiatrists' testimony to be considered at the death penalty hearing. Record at 919. Accordingly, the court concludes, based on the above discussion, that the petitioner's Fifth Amendment rights were not violated by the use of the psychiatrists' testimony at the death penalty hearing.

With regard to the petitioner's Sixth Amendment claim, the court notes that it was never presented to the Illinois courts. The petitioner has not shown cause and prejudice for that procedural default. See Wainwright v. Sykes, 433 U.S. 72 (1977).

Accordingly, this ground also fails.

ADDITIONAL CLAIMS

The petitioner also advances two additional grounds for habeas relief which have no merit but should be mentioned. First, at the time Silagy asked to be given the death penalty, the method of execution in Illinois was by electrocution. Subsequent to Silagy's sentencing, the method of execution was changed to lethal injection. The petitioner claims that lethal injection is a cruel and unusual punishment. There is nothing in the record that supports that contention. The Eighth Amendment does not guarantee a convicted defendant the right to select the method by which punishment will be inflicted.

Second, the petitioner says that erroneous information was put before the jury that the victims were sisters. The source of that erroneous fact seems to be Silagy's confession in which he referred

to the victims as sisters. This claim of error was never presented to the state court and there is no support in the record that there was cause for that default or that the petitioner was prejudiced by reference to the victims as sisters. See Wainwright v. Sykes, 433 U.S. 72 (1977).

Both these claims fail.

CONSTITUTIONALITY OF ILLINOIS STATUTE

The Illinois death penalty statute provides that the sentence of death may be considered only "where requested by the State." Ill. Rev. Stat. ch. 38, § 9-1(d) (1979). This means that only where the local state's attorney asks the court to consider imposition of the death penalty will the court hold a sentencing proceeding in which that penalty may be imposed. Four Justices of the Illinois Supreme Court have joined in writing that the statute violates the provisions of the Eighth Amendment to the federal Constitution. People ex rel. Carey v. Cousins, 77 Ill.2d 531 (1979) (Ryan, J., Goldenhirsh, C.J., and Clark, J. dissenting), cert. denied, 445 U.S. 953 (1980); People v. Lewis, 88 Ill.2d 129 (1981) (Simon, J. dissenting), cert. denied, 109 S. Ct. 83 (1988). Those dissents constitute an articulate and persuasive statement of the basis for holding the Illinois statute unconstitutional under the Eighth Amendment. The dissents contain an exhaustive discussion of the controlling United States Supreme Court precedents. This court cannot improve upon those statements and discussions and therefore embraces and adopts them as its own. Justice Ryan points up specifically how the Illinois statute allows arbitrary and capricious imposition of the death penalty.

> The risk of arbitrary and capricious action under section 9-1(d) is most vividly demonstrated by

the case of People v. Greer, Docket No. 51214, which was only recently argued before this court. In that case the prosecutor requested the penalty hearing, and the death penalty was imposed upon the defendant. At oral argument before this court, the Attorney General confessed error and stated that this is not a case in which the death penalty should be imposed. Furthermore, this court was informed in oral argument that the State's Attorney who had prosecuted the case is no longer in office and that his successor agrees with the Attorney General. Greer's case clearly shows that because of the lack of adequate guidelines the decision to request or not to request a penalty hearing will, to a great degree, depend upon the whim of the individual prosecutor. Without legislatively enacted guidelines, the differences in prosecutors, though they be sincere in their beliefs, will inevitably lead to arbitrary and capricious action. Fortunately, this court is in a position to correct an unauthorized imposition of the death penalty. However, the statute may well be rendered arbitrary and capricious in its application by the fact that many prosecutors, in the exercise of unguided discretion, will not request a penalty hearing, whereas other prosecutors, faced with the same set of facts, will request such a hearing, and the death penalty may be imposed.

> In Gregg v. Georgia, Mr. Justice Stewart stated: "Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner***.
>
> ***
>
> Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (Emphasis added.) (Gregg v. Georgia (1976), 428 U.S. 153, 188-89, 49 L.Ed.2d 859, 883, 96 S. Ct. 2909, 2932.)

Our statute contains no directions or guidelines to minimize the risk of wholly arbitrary and capricious action by the prosecutor in either requesting a sentencing hearing or in not requesting a sentencing hearing. The vague belief of the majority that the State's Attorney will not request such a hearing unless he believes that there will be evidence which

> will persuade a jury that the requisite elements for a death sentence exist is meaningless. Such belief, although the prosecutor may be sincere, will not "minimize the risk of wholly arbitrary and capricious action" unless the exercise of discretion by the prosecutor is aided, directed and limited by guidelines prescribed by the legislature.

People v. Cousins, 77 Ill.2d 531, 558-69 (1979) (Ryan, J., dissenting), cert. denied, 445 U.S. 953 (1980).

The lack of an adequate notice provision in the statute as to when the death penalty will be sought is also a constitutional defect. It affects the defendant's right to effective counsel as well as his right to basic due process. The prosecutor may withhold the decision to seek the death penalty until after a finding of guilt has been returned. Ill. Rev. Stat. ch. 38, ¶ 9-1(d) (1979). A lawyer and a defendant need to know as soon as possible whether the death penalty will be sought. That knowledge affects their decisions on what type of defense will be made, what plea bargaining can be done, and whether a jury trial should be waived. See People ex rel. Carey v. Cousins, 77 Ill.2d 531, 560-61 (1979) (Ryan, J. dissenting).

In summary, none of the claims raised as grounds for habeas relief has merit, with the exception of the one challenging the constitutionality of the Illinois death penalty statute. For the reasons stated in this order, that claim has merit and the statute violates the precepts of the Eighth and Fourteenth Amendments to the United States Constitution.

IT IS ORDERED that a writ of habeas corpus issue in this case vacating the petitioner's sentence of death. The State has 120 days

to resentence the petitioner, or he shall be released.[3]

On the court's own motion, the execution of this order is stayed pending appeal by the parties.

ENTER this 29th day of April, 1989.

Harold A. Baker

HAROLD A. BAKER

CHIEF UNITED STATES DISTRICT JUDGE

[3]For similar relief see North Carolina v. Pearce, 395 U.S. 711, 714, 89 S. Ct. 2072, 2074, 23 L.Ed.2d 565 (1969).

FILED and Micro filmed

JUN 16 1989

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	ORDER AUTHORIZING
RUSSELL DUANE McNEIL,	)	PAYMENT BY YAKIMA
	)	COUNTY FOR INVESTIGATORY
Defendant	)	FEES AND EXPENSES

The Court having considered the DEFENDANT'S MOTION for ORDER APPROVING PRIVATE INVESTIGATOR FEES and EXPENSES and attached Declaration of Counsel, now, therefore,

IT IS HEREBY ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

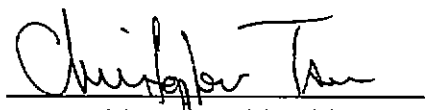
(1) The sum of ~~$658.75~~ $668.75 payable to DIANA G. PARKER, in care of the Office of Attorney Christopher Tait.

DATED THIS 15th DAY OF JUNE, 1989.

F. JAMES GAVIN, JUDGE

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys For Defendant McNeil

ORDER AUTHORIZING PAYMENT
BY YAKIMA COUNTY
FOR INVESTIGATORY FEES
AND EXPENSES 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

'89 JUN 16 PM 4 31

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	DEFENDANT'S MOTION AND
RUSSELL DUANE McNEIL,	)	SUPPORTING DECLARATION
	)	FOR ORDER APPROVING
	)	PRIVATE INVESTIGATOR
Defendant	)	FEES AND EXPENSES

MOTION

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court for the authorization of payment for investigatory services.

THIS MOTION is based upon the record and file herein and the accompanying DECLARATION OF COUNSEL.

DATED THIS 15th DAY OF JUNE, 1989.

Christopher Tait

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

FILED
JUN 16 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

165

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Diana G. Parker has been authorized to pursue investigatory services on behalf of the Defendant McNeil. An Order Authorizing Investigatory Services and Setting Rates was entered in the above-entitled cause and signed by the Honorable F. James Gavin approving said investigatory services and authorizing payment of her automobile mileage to be reimbursed at the rate of 22 1/2 cents per mile. Diana G. Parker was further authorized to submit statements, through counsel, on or about the 1st and the 15th day of each month.

Attached hereto and incorporated by reference for approval is the statement of Diana G. Paker for the private investigatory fees and expenses for her services from JUNE1, 1989, to JUNE 15, 1989, performed by her on behalf of the above-named Defendant, McNeil.

SIGNED AND DATED at Yakima, Washington, this 15 day of JUNE, 1989.

CHRISTOPHER TAIT
of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
6/1/89	Out	Conf CT, call from cl, review JCS docs re letter	2.50
6/2/89	Out	Review photos, corres from HH Conf CT	1.00
6/4/89	Out	Conf CT	.50
6/6/89	Out	Jail conf cl (DP), letter to JM	1.00
6/7/89	Out	Prepare RB (list)	2.00
6/9/89	Out	Conf CT, docs from Pros Atty, Jail cl	3.00
6/12/89	Out	Jail conf cl, conf CT/DK, review docs HH	5.00
6/13/89	Out	Jail conf cl, Conf DK, prepare docs, review w DK, Conf CT, Conf VF	5.00
6/14/89	Out	Conf CT, prepare report of DK prepare mit materials	4.75
6/15/89	Out	Jail conf cl, letter to SM RE: CPS	2.00

26.75 Out-of-Court Hrs at $25.00 Per Hour = $668.75
TOTAL = **$668.75**

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
JUN 12 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

'89 JUN 12 AM 11 57

STATE OF WASHINGTON, Plaintiff,	)	No. 88-1-00428-1 FIRST ADDENDUM TO STATE'S LIST OF WITNESSES
vs.	)	
RUSSELL DUANE McNEIL,	)	
Defendant.	)	

TO: RUSSELL DUANE McNEIL, defendant, and
TOM BOTHWELL
CHRIS TAIT, attorney for defendant:

You, and each of you, will please take notice that the following is a list of witnesses whom the state expects to call to testify in its behalf at the trial of the above-entitled case:

MELONIE SARA SEQUEIDO	Parker, WA
DAWN JORDEN	Parker, WA

Howard W. Hanson
Deputy Prosecuting Attorney and
Attorney for Plaintiff

Service accepted and copy received this _____ day of _____, 19____.

_____
Attorney for Defendant

P-33

A/401/88 HWH sw

164

JUN 1 E 1989

SUPERIOR COURT

FILED

JUN 9 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,

RECEIVED

Plaintiff,

NO. 88-1-00428-1

'89 JUN 9 AM 10 28

vs.

NOTICE OF SETTING FOR PRE-TRIAL HEARING

BETTY McGILLEN
CLERK OF
SUPERIOR COURT

RUSSELL DUANE McNEIL

Defendant.

TO: RUSSELL DUANE McNEIL, Defendant

CHRIS TAIT and THOMAS BOTHWELL, Attorney for Defendant

THE YAKIMA COUNTY COURT ADMINISTRATOR:

The issues of law and fact in the above-entitled cause under

- ☐ CrR 3.5 Confession Hearing
- ☐ CrR 4.3 Joinder Hearing
- ☐ CrR 4.4 Severance Hearing
- ☐ CrR 4.5 Omnibus Hearing
- ☐ RCW 9.94A.110 Sentencing Hearing
- ☐ RCW 9.94A.140 Restitution Hearing
- ☒ Other: MOTION AND ORDER FOR DISCOVERY Pursuant to CrR 4.7(b)(2)(vii)

before the Honorable F.James Gavin;
is hereby requested to be set for hearing ~~upon the criminal department docket~~.

Estimated time required for hearing is .....TWO (2).....hour (s)

Howard W Hansen

Deputy Prosecuting Attorney
Jeffrey C. Sullivan
Prosecuting Attorney
Room 329, Courthouse
Yakima, WA 98901
(509) 575-4141

Distribution:
Original: Clerk
cc: PA Office — Yellow
Court Administrator — Pink
Defense Attorney(s) — Goldenrod
Chris Tait and Tom Bothwell

CERTIFICATE OF TRANSMITTAL

On this day, the undersigned in Yakima, Washington, sent to the attorneys of record for plaintiffs/defendants a copy of this document by [illegible] postage prepaid, or by Attorney's Messenger [illegible] certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

6-9-89 Mary Wachter
DATE SIGNED

163

FILED
JUN 9 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

'89 JUN 9 AM 10 29

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant.

NO. 88-1-00428-1

PLAINTIFF'S MOTION AND AFFIDAVIT FOR ORDER OF DISCOVERY

COMES NOW the State of Washington, plaintiff in the above-entitled action, by and through its undersigned Deputy Prosecuting Attorney in and for Yakima County, and moves the court for an Order of Discovery pursuant to Washington State Superior Court Criminal Rule 4.7(b)(2)(vii). The State specifically requests that the above-named defendant provide a second handwriting exemplar using the same standard forms previously used in this case which are provided by the Washington State Patrol for general use by law enforcement. The only special request concerning this exemplar is that it be completed entirely in printed form without any cursive handwriting since all the notes to be analyzed were printed.

DATED this 9TH day of June, 1989.

Howard W Hansen

HOWARD W. HANSEN
Deputy Prosecuting Attorney

162

STATE OF WASHINGTON)
) ss.
County of Yakima)

The undersigned, being first duly sworn on oath, deposes and states:

I am a duly appointed, qualified, and acting Deputy Prosecuting Attorney for Yakima County, Washington, and am familiar with the above-entitled case.

The State of Washington has previously requested by its Omnibus Application dated March 29, 1989, that the defendant in this case provide a handwriting exemplar.

That request was based upon information provided by defense attorney Chris Tait, that there may be written correspondence between Russell Duane McNeil and Herbert Rice Jr. hidden in the Yakima County Juvenile Detention Facility that were written and passed between the two co-defendants while they were being held at that location.

Yakima County Sheriff's detectives went to the Yakima County Juvenile Detention Facility and found several hand printed notes hidden behind a drinking fountain at that facility that both defendant's would have had access to. The contents of those notes also indicated that they were written by the co-defendants in this case. Mr. Tait and a representative from his office were present at the time these notes were discovered and seized. The subject notes are now in evidence with the Yakima Sheriff's Department.

At the time the State's Omnibus application was heard, the trial court ordered that the exemplars be completed by

both defendants using the standard handwriting exemplar form used by local law enforcement. Both defendant's substantially cooperated in that procedure, but provided mostly cursive handwriting samples since the form normally requests long handwriting.

The handwriting exemplars produced by both defendants Russell Duane McNeil and Herbert Rice Jr. were sent to the Washington State Crime Laboratory for analysis. Both exemplars were recently returned by the crime lab with the request that additional printed exemplars be provided for further analysis. The letter received from the Washington State Patrol crime lab is attached hereto and made a part of my affidavit.

Your affiant personally talked to Mr. Billy Dunagan, Supervisor of the handwriting analysis unit at the crime lab on the telephone concerning the type of printed exemplar the crime lab believes would be needed in order to conduct a thorough analysis. Mr. Dunagan stated that if the standard exemplar previously used was again used but everything was printed instead of written in cursive handwriting (long hand) that that should be sufficient if the forms were fully completed.

Your affiant therefore requests that the court order a second, entirely printed exemplar be completed by both co-defendants as described above.

Howard W. Hansen

HOWARD W. HANSEN
Deputy Prosecuting Attorney

SUBSCRIBED AND SWORN to before me this 9th day of June, 1989.

NOTARY PUBLIC in and for the State of Washington, residing in Yakima.
My Commission Expires: 11/1/92

HWH4(H)

STATE OF WASHINGTON
WASHINGTON STATE PATROL
2nd Floor Public Safety Bldg. [illegible] 3rd Avenue • Seattle, Washington [illegible] • (206) 464-7070 • [illegible]

FORENSIC DOCUMENT LABORATORY REPORT

Agency: Yakima Sheriff's Dept. Laboratory No 789-423

County Case No. 88-0146

TO: Det. Rod Shaw

SUBJECTS: RICE, Herbert A. Jr.
MC NEIL, Russell D.

REPORT: The following documents have been examined:

1 - Six (6) handprinted notes, 2 on 6x9 note book paper the rest on torn scraps of paper.

2 - Exemplars of subject RICE'S writing dated 04-25-89.

3 - Exemplars of subject MC NEIL'S writing dated 04-25-89.

RESULTS: Neither RICE nor MC NEIL can be identified or eliminated as the writer(s) of the questioned notes, based on their exemplar writing. There exists both similarities and differences between their known writing on the exemplars and the questioned writing on the notes. Additional known writing (handprinting), both collected and requested from both subjects may help in reaching a positive conclusion.

All submitted documents are being returned with this report.

06-05-89

Billy J. Dunagan, Manager/Examiner

FILED
JUN 07 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
RUSSELL DUANE McNEIL,
Defendant.

'89 JUN 7 PM 3 15
BETTY McGILLEN
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASH.

NO. 88-1-00428-1

MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION FOR DISCOVERY

The landmark Washington case on the issue of pre-trial discovery is State v. Boehme, 71 Wn.2d 621, 632, 430 P.2d 527 (1967):

> [1] At this point, we momentarily pause to observe that the rules of discovery are designed to enhance the search for truth in both civil and criminal litigation. And, except where the exchange of information is not otherwise clearly impeded by constitutional limitations or statutory inhibitions, the route of discovery should ordinarily be considered somewhat in the nature of a 2-way street, with the trial court regulating traffic over the rough areas in a manner which will insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage. State v. Robinson, 61 Wn.2d 107, 377 P.2d 248 (1962); State v. Gilman, 63 Wn.2d 7, 385 P.2d 369 (1963); State v. Peele, 67 Wn.2d 893, 410 P.2d 599 (1966).

Our Washington appellate courts have considered cases in which the defense has attempted to withhold discovery of evidence in their possession which could be incriminating against their clients.

In State v. Grove, 65 Wn.2d 525, 528, 398 P.2d 170 (1965), the defense attempted to withhold discovery of a letter written by the defendant to his wife. The

Prosecuting Attorney obtained the letter from the defense by court order, but the defense on appeal, argued the court's order violated the spousal confidential communications privilege and the attorney-client privilege. The appellate court quickly disposed of the two "privilege" arguments and then went on to say:

> "What is involved is an effort to withhold evidence that was incriminating to the defendant.
>
> The appellant makes an argument that the order for production of the letter was prohibited discovery. This state has long recognized the inherent power of the trial court to grant discovery. State v. Gilman, 63 Wn.2d 7, 385 P.2d 369 (1963). This inherent power, based on trial administration, is not limited to that which benefits the defendant. This point has been recognized by Justice Traynor, speaking for the California Supreme Court:
>
> > '. . . Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits. To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts. . . . [Quoting from People v. Riser, 47 Cal.2d 566, 586, 305 P.2d 1,13.] Similarly, absent the privilege against self-

> incrimination or other privileges provided by law, the defendant in a criminal case has no valid interest in denying the prosecution access to evidence that can throw light on issues in the case. . . .' Jones v. Superior Court of Nevada Cy., 22 Cal. Rptr. 879, 372 P.2d 919 (1962).
>
> Since there was no violation of the privilege against self-incrimination and no violation of the attorney-client privilege, the trial court was well within its power in ordering counsel, an officer of the court, to produce the letter."

The State notes that there are no privilege arguments under the facts of our present case. The letter was sent to a girlfriend, not a wife, and the letter was handed to an agent of Russell McNeil's attorney by the defendant's mother, a third party, not a defendant in this case and not represented by the Tait Law Office

The Washington courts have also held that even if the evidence was obtained through the attorney-client relationship (which is not true in this case as stated above), the evidence is still discoverable by the State. State ex rel. Sowers v. Olwell, 64 Wn.2d 828, 833, 394 P.2d 681 (1964) is a case where the defendant physically gave his defense attorney a murder weapon involved in the actual case the defense attorney represented the defendant. Even though the court found the evidence was obtained through the attorney-client relationship, the court still ordered that the defense had to turn over the evidence:

"[3] We do not, however, by so holding, mean to imply that evidence can be permanently withheld by the attorney under the claim of the attorney-client privilege. Here, we must consider the balancing process between the attorney-client privilege and the public interest in criminal investigation. We are in agreement that the attorney-client privilege is applicable to the knife held by appellant, but do not agree that the privilege warrants the attorney, as an officer of the court, from withholding it after being properly requested to produce the same. The attorney should not be a depository for criminal evidence (such as a knife, other weapons, stolen property, etc.), which in itself has little, if any, material value for the purposes of aiding counsel in the preparation of the defense of his client's case. Such evidence given the attorney during legal consultation for information purposes and used by the attorney in preparing the defense of his client's case, whether or not the case ever goes to trial, could clearly be withheld for a reasonable period of time. It follows that the attorney, after a reasonable period, should, as an officer of the court, on his own motion turn the same over to the prosecution."

Based upon the above-cited authorities, the State submits that there is no valid basis for the defense in this case to refuse to immediately turn over the subject letter.

Respectfully submitted this 31st day of May, 1989.

HOWARD W. HANSEN
Deputy Prosecuting Attorney
Attorney for Plaintiff
State of Washington

HWH4(F)

FILED
JUN 07 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, '89 JUN 7 PM 3 15

Plaintiff, NO. 88-1-00428-1

vs.

RUSSELL DUANE McNEIL

NOTICE OF SETTING FOR PRE-TRIAL HEARING

Defendant.

TO: RUSSELL DUANE McNEIL, Defendant

CHRISTOPHER TAIT/TOM BOTHWELL, Attorney for Defendant

THE YAKIMA COUNTY COURT ADMINISTRATOR:

The issues of law and fact in the above-entitled cause under

- ☐ CrR 3.5 Confession Hearing
- ☐ CrR 4.3 Joinder Hearing
- ☐ CrR 4.4 Severance Hearing
- ☐ CrR 4.5 Omnibus Hearing
- ☐ RCW 9.94A.110 Sentencing Hearing
- ☐ RCW 9.94A.140 Restitution Hearing
- ☒ Other Motion for Discovery of Evidence In The Possession of the Defense

is hereby requested to be set for hearing ~~upon the criminal department~~ on Judge James Gavin's docket.

Estimated time required for hearing is .....½ day..... ~~hour(s)~~

Date: June 7, 1989

Howard W Hanse

Deputy Prosecuting Attorney
Jeffrey C. Sullivan
Prosecuting Attorney
Room 329, Courthouse
Yakima, WA 98901
(509) 575-4141

Distribution:
Original: Clerk
cc: PA Office — Yellow
Court Administrator — Pink
Defense Attorney(s) — Goldenrod
1) Christopher Tait
2) Tom Bothwell

160

FILED
JUN 07 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

RECEIVED
'89 JUN 7 PM 3 15
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	NO. 88-1-00428-1 MOTION AND AFFIDAVIT FOR DISCOVERY OF EVIDENCE IN THE POSSESSION OF THE DEFENSE

COMES NOW the State of Washington, by and through the Yakima County Prosecuting Attorney, JEFFREY C. SULLIVAN, and HOWARD W. HANSEN, Deputy Prosecuting Attorney for Yakima County, and moves the court for an Order Directing the defense attorneys for Russell Duane McNeil to turn over evidence in their possession concerning this case to the Yakima County Sheriff's Department, to-wit: A letter which discussed the Nickoloff homicides written by the defendant McNeil and mailed to Melonie Sequeido, which was thereafter passed from Melonie Sequeido to Veronica Martinez, aunt of the defendant; and then from Veronica Martinez to JoAnne McNeil, mother of the defendant; and then from JoAnne McNeil to Diana Parker, assistant to Chris Tait, defense attorney for Russell Duane McNeil. The delivery of this letter to the Tait Law Firm is believed to have occurred during the summer of 1988.

This motion is based upon files and records herein, as well as the attached affidavit.

Howard W Hansen

HOWARD W. HANSEN
Deputy Prosecuting Attorney

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STATE OF WASHINGTON)
: ss.
County of Yakima)

The undersigned, being first duly sworn on oath, deposes and states:

I am a duly appointed, qualified, and acting Deputy Prosecuting Attorney for Yakima County, Washington, and am familiar with the above-entitled case.

The Prosecuting Attorney's Office received information in mid-March 1989, from a Wapato High School counselor that the defendant Russell Duane McNeil had been contacting a former girlfriend, Melonie Sequeido by phone and letter. It was related that Ms. Sequeido was disturbed by these contacts and discussed the situation with her high school counselor. Ms. Sequeido told the counselor some of the letters and conversations she had with the defendant McNeil involved specific information about the Nickoloff homicides.

Det. Rod Shaw of the Yakima Sheriff's Department contacted the former girlfriend and interviewed her concerning these contacts. He took a statement from Melonie Sequeido and her girlfriend who also saw some of the correspondence from the defendant McNeil. Detective Shaw additionally filed a supplemental report concerning this follow-up investigation. Copies of both the statements and the supplemental report have been provided to the defense.

Melonie Sequeido stated to Det. Shaw that she had given one of the letters received from Russell McNeil to the defendant's aunt, Veronica Martinez, who wanted to read it and show it to the defendant's mother, JoAnne McNeil.

Det. Shaw has thereafter submitted to this office a written report of May 5, 1989, in which he states he has made contact with Veronica Martinez and JoAnne McNeil who both verify that they did receive the subject letter as described by Melonie Sequeido. JoAnne McNeil also informed Det. Shaw that she gave the letter to Diana Parker of the Chris Tait Law Firm during the summer of 1988.

Prosecuting Attorney Jeffrey C. Sullivan, upon receiving this information, made a verbal request of the defense attorney Chris Tait, to turn over the letter to the authorities and/or reveal the contents of the letter to the Prosecuting Attorney's Office. Mr. Tait's Law Office has not honored the Prosecuting Attorney's request to this date.

The Prosecuting Attorney's Office has therefore filed the above motion with the court requesting that an order be entered directing the defense to turn over said letter in its entirety to the Yakima Sheriff's Department as it is clearly relevant evidence in this case.

Howard W Hansen
HOWARD W. HANSEN

SUBSCRIBED AND SWORN to before me this 7 day of June, 1989.

Robert R. Whitesell
NOTARY PUBLIC in and for the State of Washington, residing at Yakima.
8/23/92

HWH4(E)

FILED
and Micro filmed
JUN 1989
Roll No. 351 676
BETTY McGILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant

NO. 88-1-00428-1

ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY FEES AND EXPENSES for the month of APRIL, 1989, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County office forthwith: The sum of $912.50 payable to attorney CHRISTOPHER TAIT, 230 South Second Street, Suite 201, Yakima, WA 98901; and the sum of $600.00 to DIANA G. PARKER, in care of the offices of attorney CHRISTOPHER TAIT, at the above address.

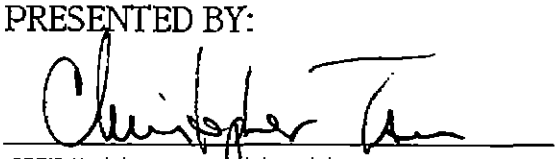
DATED this 6 day of JUNE, 1989.

F. JAMES GAVIN, JUDGE

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

158

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

ORDER AUTHORIZING
PAYMENT BY YAKIMA COUNTY 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

'89 JUN 6 PM 2 58

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	DEFENDANT'S MOTION
	)	AND SUPPORTING
RUSSELL DUANE McNEIL,	)	DECLARATION FOR
	)	ORDER APPROVING
	)	ATTORNEY FEES
Defendant	)	

MOTION

THE UNDERSIGNED attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for the undersigned defense counsel and private investigator for the month of May, 1989.

THIS MOTION is based upon the files and records herein and the DECLARATION OF COUNSEL hereinbelow.

DATED this 6th day of June, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

JUN 1989

BETTY McGILLEN

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct.

The Undersigned is one of the court-appointed counsel for defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference is my statement of time expended, together with that of our private investigator in this case for the month of May, 1989.

SIGNED AND DATED at Yakima, Washington, this 6 day of June, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

CHRISTOPHER TAIT — May 31, 1989

STATE vs. RUSSELL DUANE McNEIL

Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
5/2/89	Out	McNeil Briefing	2.00
5/3/89	Out	McNeil Briefing	3.00
5/4/89	Out	McNeil Briefing	2.00
5/18/89	Out	Jail conf, review correspondence, Conf DP	2.50
5/19/89	Out	Jail conf, locate wit, conf DP	2.50
5/23/89	Out	Jail visit, conf DP, visit with MS review MS reports	3.50
5/25/89	Out	Jail visit, review correspondence, Conf DP	2.50
5/30/89	Out	Conf DP, review letters	.25
		18.25 Out-Of-Court Hrs at $50.00 Per Hour	$912.50

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
5/17/89	Out	LD Cons Dr. K, trip to I'V TC, call to SC, locate JD (call to ASO, call to locate Y's B's).	3.00
5/18/89	Out	Jail conf cl, review corres (FMN) conf CT, 2 LD Cons RMN, call from RMN, Conf VF	4.00
5/19/89	Out	Jail conf cl, locate wi, conf ct	2.75
5/23/89	Out	Jail conf cl, locate (SD), conf MS Conf CT, review MFBP	4.00
5/25/89	Out	Review mit mats (letters) jail conf cl, conf CT, locate MS(sister), LD Cons Wap HS	4.25
5/26/89	Out	Cl call, jail conf cl	1.50
5/30/89	Out	Conf CT, conf JMN	.75
5/31/89	Out	Letter to NYU, call to CS, jail conf cl, conf CT, client call, jail RE $$	3.75

24.00 Out-of-Court Hrs at $25.00 Per Hour = $600.00
TOTAL = $600.00

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MAY 30 1989
Roll No. 351 379
BETTY McGILLEN, YAKIMA COUNTY CLERK

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EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant.

No. 88-1-00428-1

ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY FEES for the month of April 1989 filed herein by THOMAS BOTHWELL, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County office forthwith: The sum of $619.50 payable to attorney THOMAS BOTHWELL of PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S., 302 North 3rd Street, P.O. Box #2129, Yakima, WA, 98907-2129.

DATED this 30 day of May, 1989.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

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BY DEPUTY CLERK
SUPERIOR COURT
YAKIMA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR ORDER APPROVING ATTORNEY FEES

MOTION

The undersigned attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for the undersigned defense counsel for the month of April, 1989.

This motion is made and based upon the record and file herein and the below DECLARATION OF COUNSEL.

DATED this 16th day of May, 1989.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

DECLARATION OF COUNSEL

THOMAS BOTHWELL, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause.

155

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

My compensation has been set as follows: Time spent in court at the rate of $60.00 per hour and out-of-court time at the rate of $50.00 per hour.

Attached hereto and incorporated by reference is my statement of time expended in this cause for the month of April 1989.

SIGNED AND DATED at Yakima, Washington, this 16th day of May, 1989.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
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YAKIMA, WASHINGTON 98907-2129
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RUSSEL McNEIL

DATE	DESCRIPTION	HOURS
4/4/89	Review "defense" packet addendum received 4/3 from Howard W. Hanson.	1.0
4/9/89	File review.	1.5
4/10/89	Court hearing.	4.5*
4/10/89	Meeting with client and Deputy Prosecutor.	1.0
4/12/89	Telephone conference with client.	.5
4/25/89	Meeting with Chris Tait.	1.0
4/27/89	Telephone conference with Chris Tait.	.25
5/5/89	Telephone conference with Chris Tait; then review of Memorandum.	.75
5/9/89	Meeting with Chris Tait re: Memorandum.	.25
	TOTAL HOURS:	10.75

*	IN-COURT HOURS: 4.5 hours at $60 per hour:	$ 270.00
	OUT-OF-COURT HOURS: 6.25 hours at $50 per hour	312.50

COSTS:

2/13/89	American Bar Association, Capital Case Sentencing publication	22.50
5/3/89	U.S. District Court Clerk, copy of case decision	14.50
	TOTAL	$ 619.50

FILED
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YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

'89 MAY 26 PM 1 27

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	NO. 88-1-00428-1 MEMORANDUM CONCERNING CLOSURE OF 3.5 HEARING

The State has requested that a 3.5 hearing be conducted in this case pursuant to court rule. The defense has objected to the 3.5 hearing being held in open court arguing the publicity from such a hearing would jeopardize the defendant's ability to receive a fair trial.

The case of State v. Coe, 101 Wn.2d 364, 375, 679 P.2d 353 (1984) makes it clear that the trial court cannot control the dissemination of information legitimately revealed in open court as a way to avoid the release of potentially prejudicial information to the public prior to trial:

> "The language of the Washington Constitution absolutely forbids prior restraints against the publication or broadcast of constitutionally protected speech under the facts of this case, since the information sought to be restrained was lawfully obtained, true, and a matter of public record by virtue of having been previously admitted into evidence and presented in open court."

There are two Washington State Supreme Court cases which deal specifically with the issue of closure of a pre-trial suppression hearing similar to our present case. In each of those cases our Supreme Court specifically followed the federal precedent established in Gannett Company v. DePasquale, 443 U.S. 368, 61

L.Ed.2d 608, 99 S. Ct. 2998 (1978). In that case, the U.S. Supreme Court allowed closure of a 3.5-type hearing when the trial judge properly balanced the rights of the press and public to an open hearing against the defendant's right to a fair trial and found that an open hearing possessed a reasonable probability of prejudice to the defendant. Since the denial of access to the public was only temporary and the public would later be able to review what had occurred in the closed proceeding, the defendant's interests prevailed in the balancing test.

The case of Federated Publications v. Kurtz, 94 Wn.2d 51, 55, 615 P.2d 440 (1980) quoted from the DePasquale case at Page 55:

> "This Court has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial. E.g., Sheppard v. Maxwell, 384 U.S. 333 [16 L.Ed.2d 600, 86 S. Ct. 1507 (1966); Irwin v. Dowd, 366 U.S. 717 [6 L.Ed.2d 751, 81 S. Ct. 1639 (1961); Marshall v. United States, 360 U.S. 310 [3 L.Ed.2d 1250, 79 S. Ct. 1171 (1959)]. Cf. Estes v. Texas, 381 U.S. 532 [14 L.Ed.2d 543, 85 S. Ct. 1628 (1965)]. To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. Sheppard v. Maxwell, supra. And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary. DePasquale, at 378.
>
> Among the kinds of pretrial publicity posing a threat to a fair trial, the court stated, is publicity concerning pretrial suppression hearings:
>
> Publicity concerning pretrial suppression hearings such as the one involved in the present case poses special risks of unfairness. The whole purpose of such hearings is to screen out unreliable or illegally obtained evidence and insure that this

> evidence does not become known to the jury. Cf. Jackson v. Denno, 378 U.S. 368 [12 L.Ed.2d 908, 84 S. Ct. 1774, 1 A.L.R.3d 1205 (1964)]. Publicity concerning the proceedings at a pretrial hearing, however, could influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial.
>
> The danger of publicity concerning pretrial suppression hearings is particularly acute, because it may be difficult to measure with any degree of certainty the effects of such publicity on the fairness of the trial. After the commencement of the trial itself, inadmissible prejudicial information about a defendant can be kept from a jury by a variety of means. When such information is publicized during a pretrial proceeding, however, it may never be altogether kept from potential jurors. Closure of pretrial proceedings is often one of the most effective methods that a trial judge can employ to attempt to insure that the fairness of a trial will not be jeopardized by the dissemination of such information throughout the community before the trial itself has even begun. Cf. Rideau v. Louisiana, 373 U.S. 723 [10 L.Ed.2d 663, 83 S. Ct. 1417 (1963)]. DePasquale, at 378-79.
>
> While the court recognized, at the least, a "strong societal interest" in open judicial proceedings, DePasquale, at 383, it concluded that society's interest in the case was outweighed by the reasonable probability of prejudice to the defendants. DePasquale at 393."

Our Supreme Court then went on to point out in the Kurtz case that even though our Federal and State Constitutions are analogous on the defendants' rights to a fair trial at issue here, the Washington State Constitution, Article I, Section 10, which states:

> "Section 10 - ADMINISTRATION OF JUSTICE. Justice in all cases shall be administered openly, and without unnecessary delay"

provides a specific public right to access to court proceedings which is unlike the Sixth Amendment to the Federal Constitution which confers only an individual right to the accused for a public trial:

> ". . . , this section provides a textual basis for recognizing a right of public access to court proceedings. We have given explicit recognition to the provision: 'This separate, clear and specific provision entitles the public, and as noted above the press is part of that public, to openly administered justice'. Cohen v. Everett City Council, 85 Wn.2d 385, 388, 535 P.2d 801 (1975). Moreover, by its terms it is not limited to trials but includes all judicial proceedings." At Page 59.

Our Supreme Court then detailed how these competing constitutional rights will be balanced at page 62:

> "Some of the principles suggested by Mr. Justice Powell, concurring in DePasquale, seem to us to provide workable guidelines under the state constitution for balancing the competing interests in suppression hearing closure questions. These guidelines include:
>
> 1. The accused must make some showing of likelihood of jeopardy to his constitutional rights from an open proceeding. In the present case, the defense motion, joined in by the prosecution, clearly raised the issue.
>
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure. The number of objections, however, and the time necessary to present them must be subject to the trial court's inherent power to control the proceedings. Moreover, the court should not be obliged to delay proceedings, since one of the purposes of pretrial proceedings is to expedite the entire matter and to give counsel adequate

> time to prepare for trial in light of the outcome of the suppression hearing.
>
> . . .
>
> 3. The objector must demonstrate that there are available practical alternatives to closure which would protect defendant's rights.
>
> . . .
>
> 4. The court must weigh the competing interests of the defendant and the public.
>
> . . .
>
> 5. The order must be no broader in its application or duration than necessary to serve its purpose, which in this case was to protect the accused's right to a fair trial while preserving the public's right to open proceedings.
>
> . . .
>
> In conclusion, we think the above standards afford trial courts a realistic opportunity to strike a balance between these two interests which are protected by our state constitution."

The case of Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37, 640 P.2d 716 (1982) clarified the Kurtz decision by defining the burden of persuasion for the different types of competing interests on the closure issue. The Court found that the defendant's "right to a fair trial" received the greatest latitude in obtaining closure of a pre-trial hearing while other advocates with lesser interests would have a more difficult time obtaining closure:

> "Because we believe that closure to protect the defendant's right to a fair trial should be treated somewhat differently from closure based entirely on the protection of other interests, we will expand upon the framework adopted in Kurtz to cover such motions.

IV.

[3] Each time restrictions on access to criminal hearings or the records from hearings are sought, courts must follow these steps:

1. The proponent of closure and/or sealing must make some showing of the need therefor. Kurtz, at 62. In demonstrating that need, the movant should state the interests or rights which give rise to that need as specifically as possible without endangering those interests.

The quantum of need which would justify restrictions on access differs depending on whether a defendant's Sixth Amendment right to a fair trial would be threatened. When closure and/or sealing is sought to protect that interest, only a 'likelihood of jeopardy' must be shown. Kurtz, at 62. See Gannett Co. v. DePasquale, 443 U.S. 368, 400, 61 L.Ed.2d 608, 99 S. Ct. 2898 (1979) (Powell, J., concurring). However, since important constitutional interests would be threatened by restricting public access (Cohen; Richmond, at 988-90), a higher threshold will be required before court proceedings will be closed to protect other interests. If closure and/or sealing is sought to further any right or interest besides the defendant's right to a fair trial, a 'serious and imminent threat to some other important interest' must be shown.

The burden of persuading the court that access must be restricted to prevent a serious and imminent threat to an important interest shall be on the proponent unless closure is sought to protect the accused's fair trial right. Because courts are presumptively open, the burden of justification should rest on the parties seeking to infringe the public's right. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558-59, 569-70, 49 L.Ed.2d 683, 96 S. Ct. 2791 (1976). From a practical standpoint, the proponents will often be in the

best position to inform the court of the facts which give rise to the alleged need for closure or sealing.

. . .

2. 'Anyone present when the closure [and/or sealing] motion is made must be given an opportunity to object to the [suggested restriction].' Kurtz, at 62.

For this opportunity to have meaning, the proponent must have stated the grounds for the motion with reasonable specificity, consistent with the protection of the right sought to be protected. At a minimum, potential objectors should have sufficient information to be able to appreciate the damages which would result from free access to the proceeding and/or records. This knowledge would enable the potential objector to better evaluate whether or not to object and on what grounds to base its opposition.

3. The court, the proponents and the objectors should carefully analyze whether the requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened. See Kurtz, at 63-64. If limitations on access are requested to protect the defendant's right to a fair trial, the objectors carry the burden of suggesting effective alternatives. If the endangered interests do not include the defendant's Sixth Amendment rights, that burden rests with the proponents.

4. 'The court must weigh the competing interests of the defendant and the public', Kurtz, at 64, and consider the alternative methods suggested. Its consideration of these issues should be articulated in its findings and conclusions, which should be as specific as possible rather than conclusory. See People v. Jones, 47 N.Y.2d 409, 415, 391 N.E.2d 1335, 418 N.Y.S.2d 359 (1979).

> 5. 'The order must be no broader in its application or duration than necessary to serve its purpose . . .' Kurtz, at 64. If the order involves sealing of records, it shall apply for a specific time period with a burden on the proponent to come before the court at a time specified to justify continued sealing."

This appears to be the current state of the law on closure for pre-trial hearings in the State of Washington. More recent federal cases appear to strengthen the public's right to access at least as to some types of pre-trial hearings even when the defendant requests closure to protect his right to a fair trial.

In the Riverside County, California case of Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 92 L.Ed.2d 1, 106 S. Ct. 2735 (1986), our U.S. Supreme Court found that the public's First Amendment right of access to criminal proceedings applied to a preliminary hearing under California law. Justice Burger then proceeded to redefine the burden of persuasion for closure in that type of case even if the defendant is asserting that an open hearing would impact his right to obtain a fair trial:

> "Since a qualified First Amendment right of access attaches to preliminary hearings in California under Cal Penal Code Ann #858, et seq. (West 1985), the proceedings cannot be closed unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest'. Press-Enterprise 1, supra, at 510, 78 L.Ed.2d 629, 104 S. Ct. 819. See also Globe Newspaper, supra, at 606-607, 73 L.Ed.2d 248, 102 S. Ct. 2613. If the interest asserted is the right of the accused to a fair trial, the preliminary hearing shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the

> defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights. See Press-Enterprise I, supra; Richmond Newspapers, supra, at 581, 65 L.Ed.2d 973, 100 S. Ct. 2814.

Justice Stevens' dissenting opinion in that case aptly describes the state of the law which our trial court must now attempt to apply in the present case:

> "The presence of a legitimate reason for closure in this case requires an affirmance. The constitutionally grounded fair trial interests of the accused if he is bound over for trial, and the reputational interests of the accused if he is not, provide a substantial reason for delaying access to the transcript for at least the short time before trial. By taking its own verbal formulation seriously, the Court reverses--without comment or explanation or any attempt at reconciliation--the holding in Gannett that a 'reasonable probability of prejudice' is enough to overcome the First Amendment right of access to a preliminary proceeding. It is unfortunate that the Court neglects this opportunity to fit the result in this case into the body of precedent dealing with access rights generally. I fear that today's decision will simply further unsettle the law in this area."

The burden of persuasion for the proponents of closure of a pre-trial hearing appears to have been increased from a "likelihood of prejudice" to a "substantial probability of prejudice" even when they argue that the defendants' "right to a fair trial" is at stake. This is at least true in the trial-like context of a California preliminary hearing as described in the Press-Enterprise II case.

. . .

Arguably, the DePasquale standard which has been adopted by our Washington appellate courts for 3.5-type hearings would still have the lesser standard of "likelihood of prejudice" since the ruling is preliminary in nature, effective for only a short period of time, and potentially has serious consequences if inadmissible evidence is revealed to the public prior to trial.

Respectfully submitted this 26th day of May, 1989.

JEFFREY C. SULLIVAN
Prosecuting Attorney

Howard W Hansen

HOWARD W. HANSEN
Deputy Prosecuting Attorney
Attorneys for Plaintiff
State of Washington

HWH4(A)

CERTIFICATE OF TRANSMITTAL

On this day, the undersigned in Yakima, Washington, sent to the attorneys of record for ~~plaintiffs~~/defendants a copy of this document by U.S. mail, postage prepaid, or by Attorney's Messenger Service. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

5/26/89
DATE

Peggy Kellen
SIGNED

SR

FILED
MAY 19 1989

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

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STATE OF WASHINGTON,
Plaintiff,
vs.
RUSSELL DUANE McNEIL,
Defendant.

NO. 88-1-00428-1

MEMORANDUM IN OPPOSITION TO MOTION FOR BILL OF PARTICULARS

The defense has filed a Memorandum in Support of Motion for Bill of Particulars wherein they state the issue is whether the Notice of Special Sentencing Proceeding should be stricken. They then ask six questions dealing with the Prosecuting Attorney's decision to file the death penalty notice. Noticeably absent from the defense memorandum is any specific facts arising from this case and how those facts may apply to the questions asked by the defense. Apparently, the defense hopes the Court will do this for them. The State, therefore, has great difficulty replying to the specifics of the defense memorandum when it is not clear what is being argued and how it applies to the present case.

The defense attacks the Prosecuting Attorney's decision to file the Notice of Special Proceeding. The defense further alleges that Washington's death penalty statutes are unconstitutional in that the Prosecuting Attorney's discretion in seeking the death penalty is not adequately directed and restrained.

The constitutionality of the Prosecutor's discretion to seek the death penalty under Washington law has been reviewed and upheld

several times by the Washington State Supreme Court. State v. Dictado, 102 Wn.2d 277, 297, 687 P.2d 172 (1984) states:

> "Defendant also argues that the statute violates equal protection by giving the prosecutor unfettered discretion to charge either of two crimes (capital or noncapital aggravated murder), although either charge would necessarily be based on the same evidence. He further asserts this gives the prosecutor unconstitutional power to decide a defendant's sentence.
>
> [14] It has long been the rule in Washington that equal protection is violated when two statutes declare the same acts to be crimes, but penalize more severely under one statute than the other. State v. Sherman, 98 Wn.2d 53, 653 P.2d 612 (1982); State v. Zornes, 78 Wn.2d 9, 475 P.2d 109 (1970). There is no equal protection issue, however, when the requirements of proof and the State's ability to meet them are the considerations guiding the prosecutor's discretion. State v. Canady, 69 Wn.2d 886, 421 P.2d 347 (1966).
>
> Under RCW 10.95.040(1) the prosecutor must file a notice of a special sentencing proceeding to determine whether the death penalty is to be imposed 'when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency'. The prosecutor's discretion to seek or not seek the death penalty depends on an evaluation of the evidence of mitigating circumstances. This evaluation must determine if sufficient evidence exists to convince a jury beyond a reasonable doubt that there are not sufficient mitigating circumstances. See RCW 10.95.060(4).
>
> Although the exercise of prosecutorial discretion under the sentencing structure of RCW 10.95 is not strictly analogous to the exercise of discretion involved in the charging function, the principle is similar. The prosecutor does not determine the sentence; the prosecutor merely determines whether sufficient evidence exists to take the issue of mitigation to the jury. This type of discretion does not violate equal protection. See State v. Sherman, supra."

State v. Campbell, 103 Wn.2d 1, 25, 691 P.2d 929 (1984) reaches the same conclusion:

> "In State v. Rupe, 101 Wn.2d 664, 699, 683 P.2d 571 (1984) and State v. Dictado, 102 Wn.2d 277, 687 P.2d 172 (1984), we held the discretion given a prosecutor to seek the death penalty was constitutional. We reaffirm this position, finding no merit in defendant's arguments.
>
> We dispose of defendant's three arguments under the following analysis: First, equal protection of the laws is denied when a prosecutor is permitted to seek varying degrees of punishment when proving identical criminal elements. State v. Zornes, 78 Wn.2d 9, 21, 475 P.2d 109 (1970). However, 'no constitutional defect exists when the crimes which the prosecutor has discretion to charge have different elements'. State v. Wanrow, 91 Wn.2d 301, 312, 588 P.2d 1320 (1978). Before the prosecutor may seek the death penalty, he must have 'reason to believe that there are not sufficient mitigating circumstances to merit leniency'. RCW 10.95.040(1). Similarly, the jury must be 'convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency'. RCW 10.95.060(4). Absent a unanimous finding, life imprisonment is imposed. RCW 10.95.080(2). There is no equal protection violation here, because a sentence of death requires consideration of an additional factor beyond that for a sentence for life imprisonment--namely, an absence of mitigating circumstances.
>
> Second, '[t]he separation of powers principle requires that the delegation of legislative power to the executive be accomplished along with standards which guide and restrain the exercise of the delegated authority'. State ex rel. Schillberg v. Cascade Dist. Court, 94 Wn.2d 772, 781, 621 P.2d 115 (1980). 'The decision to prosecute must be based on the prosecutor's ability to meet the proof required by the statute.' State v. Lee, 87 Wn.2d 932, 934, 558 P.2d 236 (1976). RCW

> 10.95.040 properly sets out a legislative standard to guide prosecutors. '[T]he grant of discretion to prosecutors does not result in a standardless death penalty statute'. State v. Rupe, at 700.
>
> Moreover, the prosecutor's discretion to seek the death penalty does not usurp the judicial function to sentence. See, e.g., RCW 10.95.160-.170; Honore v. State Bd. of Prison Terms & Paroles, 77 Wn.2d 697, 700, 466 P.2d 505 (1970). In a sense the prosecutor participates in the sentencing process by choosing to request a special sentencing proceeding. But the prosecutor can neither impose the sentence nor require that it be imposed. People ex rel. Carey v. Cousins, 77 Ill.2d 531, 397 N.E.2d 809 (1979). In Dictado, we observed that the prosecutor's discretion in this regard is similar to his discretion in charging a crime: 'The prosecutor does not determine the sentence; the prosecutor merely determines whether sufficient evidence exists to take the issue of mitigation to the jury'. Dictado, at 298. The sentencing jury or the judge determines whether the statutory conditions to impose the death penalty are met. RCW 10.95.050(2), .060(4), .080. Moreover, automatic review by the Supreme Court again insures that sentencing remains a judicial function. RCW 10.95.100, .130."

The defense also cites several Washington cases as authority that the trial court may review the pre-trial actions of the Prosecuting Attorney and, therefore, invites the trial court in this case to do so in some unspecified manner.

The case of State v. Knapstad, 107 Wn.2d 346, 394, 729 P.2d 48 (1986) cited by the defense clearly has no application to our current case. That decision involved the court dismissing a case pre-trial when all the facts of the case were undisputed and stipulated to and the court found as a matter of law a prima facie

case could not be made. That decision also clearly stated that this procedure is inappropriate if there are any contested facts:

> "Further, it is obvious that, in a case like the instant cases where dismissal is requested because of the claimed insufficiency of the evidence of guilt, it cannot be ordered unless the Commonwealth agrees to join in the affidavit procedure or in a stipulation of the facts. A pre-trial order or judgment of dismissal for the claimed insufficiency of the Commonwealth's evidence cannot be sustained in any case where the Commonwealth failed or refused to stipulate that the appellate record contains a statement of all the Commonwealth's contemplated evidence."

In the present case, there are no agreed upon facts or circumstances concerning any aspect of this trial that the State is aware of. The State invites the defense to reveal what facts they believe are agreed upon or undisputed in this case which could form the basis of a pre-trial court ruling to strike the death penalty aspects of this case.

The remaining authorities listed by the defense are simply cited to the trial court but not applied to the facts of our case. State v. Dictado, supra, (which also cites State v. Zornes, 78 Wn.2d 9, 475 P.2d 109 (1970)), is a case that upholds the Prosecuting Attorney's discretion to seek the death penalty under our current statutory scheme.

State v. Pettitt, 93 Wn.2d 288, 609 P.2d 1364 (1980) is a case concerning Washington State's former habitual criminal statute which holds that the Prosecuting Attorney cannot have a blanket policy of filing habitual criminal proceedings in every technically eligible case, but must exercise prosecutorial discretion in reaching the decision to file. That holding clearly has no application to the present case.

State v. Judge, 100 Wn.2d 706, 713, 675 P.2d 219 (1984) is a case that would now be considered a vehicular homicide case involving an intoxicated driver-defendant in which the defendant argued on appeal that the Prosecuting Attorney's decision to file charges against her, but not against another occupant of her car who had purchased the alcohol the group had consumed, was a denial of her equal protection rights. The Court states:

> "Prosecutors are vested with wide discretion in determining whether to charge suspects with criminal offenses. Bordenkircher v. Hayes, 434 U.S. 357, 365, 54 L.Ed.2d 604, 98 S. Ct. 663, reh'g denied, 435 U.S. 918, 55 L.Ed.2d 511, 98 S. Ct. 1477 (1978); State v. Pettitt, 93 Wn.2d 288, 294, 609 P.2d 1364 (1980). Exercise of this discretion involves consideration of factors such as the public interest as well as the strength of the case which could be proven. United States v. Lovasco, 431 U.S. 783, 794, 52 L.Ed.2d 752, 97 S. Ct. 2044 (1977); Pettitt, at 295. The exercise of a prosecutor's discretion by charging some but not others guilty of the same crime does not violate the equal protection clause of U.S. Const. amend. 14 or Const. art. 1 Sec. 12 so long as the selection was not 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification'. Oyler v. Boles, 368 U.S. 448, 456, 7 L.Ed.2d 446, 82 S. Ct. 501 (1962), quoted in Bordenkircher. Accord, State v. Jacobsen, 78 Wn.2d 491, 498-99, 477 P.2d 1 (1970)."

In re Harris, 111 Wn.2d 691, 692, 763 P.2d 823 (1988) was also cited by the defense in its memorandum. It is a Personal Restraint Petition case in which our Supreme Court considered whether the Pierce County Prosecuting Attorney's office policy in aggravated murder cases is an abuse of discretion. Their policy is to always seek the death penalty unless the defense supplies evidence of mitigating circumstances to the State.

The defense attempted to analogize their capital case to previous Washington appellate court decisions concerning habitual criminal proceedings:

> "Petitioner would liken this policy to the one we found invalid in State v. Pettitt, 93 Wn.2d 288, 295, 609 P.2d 1364 (1980); see also State v. Rowe, 93 Wn.2d 277, 609 P.2d 1348 (1980); State v. Gilcrist, 91 Wn.2d 932, 558 P.2d 236 (1976).
>
> [1] The prosecutor in Pettitt had an automatic policy of filing habitual criminal charges against all defendants with three or more prior felonies. He testified he "could imagine no situation which would provide for an exception to the mandatory policy." State v. Pettitt, supra at 296. The Pierce County Prosecuting Attorney, by contrast, will consider any mitigating factors the defendant brings to his attention. The availability of this "escape valve" makes the Pierce County policy more akin to the habitual criminal charging policy we upheld in Rowe than to the inflexible absolute policy challenged in Pettitt.

Our Supreme Court explicity approved the Pierce County action to file death penalty notices in all cases where the defense does not notify the Prosecuting Attorney's Office of mitigating circumstances. They also made it very clear that there is a significant difference between the filing of a death penalty notice in a premeditated First Degree Murder case and a decision to file an habitual criminal proceeding under former Washington law. They stated at page 693:

> "There is, moreover, a significant distinction between the death penalty charging decision at issue here and the decision whether to file habitual criminal charges. Pertinent factors the prosecutor may consider in making the latter decision include the nature of the defendant's present and prior convictions, the amount

> of time between them, and the State's ability to prove the existence and validity of the prior convictions. State v. Lee, supra at 935; State v. Nixon, 10 Wn. App. 355, 356-57, 517 P.2d 212 (1973). These are, in the main, matters of public record to which the prosecutor has ready access.
>
> A prosecutor who charges a defendant with aggravated first degree murder, by contrast, must make the more subjective determination of whether there is 'reason to believe that there are not sufficient mitigating circumstances to merit leniency.' RCW 10.95.040; see also State v. Campbell, 103 Wn.2d 1, 25, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094 (1985). Although some statutory mitigating factors involve objective facts the prosecutor can readily ascertain (see, e.g., RCW 10.95.070(1) (lack of criminal history)), most are in the nature of explanations or excuses related to the crime itself. RCW 10.95.040(2) (extreme mental disturbance), (3) (consent of victim), (4) (minor participation as an accomplice), (5) (duress), and (6) (mentally impaired capacity). As with criminal defenses generally, these tend to be matters about which the defendant and his attorney will have more knowledge than the State. Additionally, although the State will at trial bear the burden of proving there are insufficient mitigating circumstances to merit leniency, State v. Rupe, 101 Wn.2d 664, 701, 683 P.2d 571 (1984), it cannot attempt to rebut on any particular point unless the defendant first presents evidence on it. State v. Bartholomew, 101 Wn.2d 631, 642-43, 683 P.2d 1079 (1984). The Pierce County charging policy makes sense in light of this evidentiary principle. (Emphasis ours).

CONCLUSION

The constitutionality of our death penalty statutes and specifically the constitutionality of the Prosecuting Attorney's decision to seek the death penalty have been previously challenged in our appellate courts and always have been upheld as constitutional by the Washington State Supreme Court.

On the issue of the Prosecuting Attorney's actual decision to file the death penalty notice, the Yakima County Prosecuting Attorney specifically requested from the defense any evidence of mitigating circumstances as part of his decision-making process. In fact, the deadline for the filing of the Notice of Special Proceedings was delayed for approximately 30 days by mutual agreement of the parties in order to allow the defense additional time to provide the State with just such information if they discovered it during their pre-trial investigations and decided to release such information to the State. (See the attached Order marked as Exhibit "A" which was entered and filed in this case previously). No such information was provided.

Our Supreme Court has previously upheld a Pierce County procedure wherein a Death Penalty Notice is always filed in all aggravated First Degree Murder cases in which the defense does not provide the Prosecuting Attorney with any evidence of mitigating circumstances. See In re Harris, supra.

The defense has not established any allegation of abuse of prosecutorial discretion in this case or have they provided any authority for a pre-trial review of the Prosecuting Attorney's decision to seek the death penalty in this case.

The State respectfully submits that the Motion for Bill of Particulars in this case should be denied.

DATED this 19th day of May, 1989.

Howard W. Hansen

HOWARD W. HANSEN
Deputy Prosecuting Attorney

HWH3(O)

FILED
APR 12 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

RECEIVED
'88 APR 12 PM 4 20
CLERK OF SUPERIOR COURT YAKIMA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	)	NO. 88-1-00428-1
vs.	)	
RUSSELL DAUNE McNEIL, Defendant.	)	ORDER EXTENDING TIME TO GIVE NOTICE OF SPECIAL SENTENCING PROCEEDING

THIS MATTER having come on before the above-entitled court on April 12, 1988, on the joint motion of the State represented by JEFFREY C. SULLIVAN, Prosecuting Attorney for Yakima County, Washington, the defendant, RUSSELL DUANE McNEIL, and the attorneys for defendant, CHRIS TAIT and THOMAS BOTHWELL; the defendant present and represented by the above-named attorneys, and the State of Washington represented by Jeffrey C. Sullivan, Prosecuting Attorney for Yakima County, Washington, and Howard W. Hansen, Deputy Prosecuting Attorney for Yakima County, Washington; the court finding that the defendant, Russell Duane McNeil, was arraigned on March 16, 1988, on the charge of Aggravated First Degree Murder as defined by RCW 10.95.020 and therefore the Prosecuting Attorney must file and serve upon the defendant or his attorney a written notice of a special sentencing proceeding if the Prosecuting Attorney wishes to seek the death penalty, within thirty days of that date

EXHIBIT "A"

22

which in this case is April 15, 1988, unless the court extends the period of filing and service of notice for good cause shown; and all parties, including the defendant personally having jointly moved the court to extend the period for filing and service of the notice of special sentencing proceeding in this case in order to allow the defense to complete their evaluations of their client by experts, currently scheduled to be completed by May 20, 1988, so that they will thereafter be able to submit additional information to the State which may affect their decision to seek the death penalty in this case; and the court finding that this is good cause for extending the period of time in which to give the death penalty notice, and the court being fully advised in the premises; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the period of time for filing and service of the notice of special sentencing proceeding in this case shall be extended from April 15, 1988 to May 27, 1988.

DATED this 12 day of April, 1988.

JUDGE

Presented by, approved
as to form and for entry:

JEFFREY C. SULLIVAN
Prosecuting Attorney

CHRIS TAIT
Attorney for Defendant

THOMAS BOTHWELL
Attorney for Defendant

RUSSELL DUANE McNEIL
Defendant

HWH1(C)

STATE OF WASHINGTON, County of Yakima ss.
I, Betty McGillen, Clerk of the above entitled Court, do hereby certify that the foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of said Court this 18 day of May 82
BETTY McGILLEN
By Laurie Campbell

FILED
and Micro filmed
MAY 17 1989
Roll No. [illegible] 448
BETTY McGILLEN, YAKIMA COUNTY CLERK

RECEIVED
'89 MAY 17 PM 3:33
BETTY McGILLEN
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
Plaintiff,	)	NO: 88-1-00428-1
vs.	)	
RUSSELL DUANE McNEIL,	)	ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY FOR INVESTIGATORY FEES AND EXPENSES
Defendant	)	

The Court having considered the DEFENDANT'S MOTION for ORDER APPROVING PRIVATE INVESTIGATOR FEES and EXPENSES and attached Declaration of Counsel, now, therefore,

IT IS HEREBY ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

(1) The sum of $765.43 payable to DIANA G. PARKER, in care of the Office of Attorney Christopher Tait.

DATED THIS 17 DAY OF MAY, 1989.

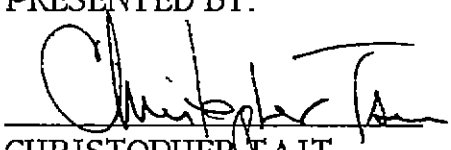
F. JAMES GAVIN, JUDGE

ORDER AUTHORIZING PAYMENT
BY YAKIMA COUNTY
FOR INVESTIGATORY FEES
AND EXPENSES 1

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

152

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys For Defendant McNeil

ORDER AUTHORIZING PAYMENT
BY YAKIMA COUNTY
FOR INVESTIGATORY FEES
AND EXPENSES 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA WASHINGTON 98901
TELEPHONE (509) 248-1346

MAY 17 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

RECEIVED

'89 MAY 17 PM 3 33
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	DEFENDANT'S MOTION AND
RUSSELL DUANE McNEIL,	)	SUPPORTING DECLARATION
	)	FOR ORDER APPROVING
	)	PRIVATE INVESTIGATOR
Defendant	)	FEES AND EXPENSES

MOTION

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court for the authorization of payment for investigatory services.

THIS MOTION is based upon the record and file herein and the accompanying DECLARATION OF COUNSEL.

DATED THIS 17 DAY OF MAY, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Diana G. Parker has been authorized to pursue investigatory services on behalf of the Defendant McNeil. An Order Authorizing Investigatory Services and Setting Rates was entered in the above-entitled cause and signed by the Honorable F. James Gavin approving said investigatory services and authorizing payment of her automobile mileage to be reimbursed at the rate of 22 1/2 cents per mile. Diana G. Parker was further authorized to submit statements, through counsel, on or about the 1st and the 15th day of each month.

Attached hereto and incorporated by reference for approval is the statement of Diana G. Paker for the private investigatory fees and expenses for her services from MAY 1, 1989, to MAY 15, 1989, performed by her on behalf of the above-named Defendant, McNeil.

SIGNED AND DATED at Yakima, Washington, this 17 day of MAY, 1989.

CHRISTOPHER TAIT
of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
5/2/89	Out	Conf CT, research	1.00
5/3/89	Out	Conf CT, jail conf cl, research	3.00
5/4/89	Out	Cl call, jail conf cl, call to RS/ call VF, call VF, call CT, call YSO, call VF	4.25
5/5/89	Out	Conf CT, research, TAB	2.75
5/8/89	Out	Conf CT, Pros Atty, research (Jennifer) complete stats re changing, LD Cons D/K review Shaw docs	3.00
5/9/89	Out	LD call JMN, client call, locate wit Conf CT	3.00
5/10/89	Out	Shaw paper review, I'V SC, I'V SD, TAB, 3 calls to JV, jail conf cl, locate JC re JD	4.50
5/10/89	*	13 Miles at 22.5 Cents = **$2.93**	*
5/11/89	Out	Conf CT, locate wit, letter to J.M., call to JV, call to MR re JD trip to SC, jail call cl, Conf VF	4.25
5/12/89	Out	Conf CT, locate JD, I'V JC (jail) call to CC re JC, LDC (WS re JB) review MS docs.	4.75

30.50 Out of Court Hrs at $25.00 Per Hour	$762.50
13 Miles at 22.5 Cents Per Mile	$ 2.93
TOTAL	**$765.43**

FILED
MAY 11 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	MEMORANDUM IN
	)	SUPPORT OF MOTION
RUSSELL DUANE McNEIL,	)	FOR BILL OF PARTICULARS
	)	
Defendant	)	

ISSUES

SHOULD THE NOTICE OF SPECIAL SENTENCING PROCEEDING BE STRICKEN?

1. When the NOTICE OF SPECIAL SENTENCING PROCEEDING was filed on May 27, 1988, did the Prosecuting Attorney have reason to believe that there were not sufficient mitigating circumstances to merit leniency?

2. Is a pre-trial inquiry into that prosecutorial decision proper?

3. Is the post-conviction proportionality review contemplated by RCW 10.95.100, 10.95.120 and related statutes enough to protect the rights of Russell McNeil? Is it enough for the Prosecutor to now tell the trial judge that we need not now concern ourselves with this matter, because direct review by the

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TELEPHONE (509) 248-1346

Supreme Court of Washington following a conviction will somehow tell us all we need to know about prosecutorial discretion and proportionality?

4. If this Court does NOT inquire into the decision made by the Prosecuting Attorney BEFORE the trial, how will appellate courts later review prosecutorial discretion? What record will have been made? What record exists in those cases in which the same Prosecuting Attorney did NOT file a NOTICE OF SPECIAL SENTENCING PROCEEDING? Is proportionality review possible without a record?

5. Does the Constitution require that the laws and procedures which authorize hangings provide explicit standards for those who apply them?

6. What remedy exists when a Prosecutor abuses his discretion-either by filing the NOTICE in the face of overwhelming mitigation evidence, or by not filing the NOTICE in the absence of any mitigation?

POINTS AND AUTHORITIES

Trial courts have inherent power to dismiss a criminal prosecution before trial for lack of sufficient evidence. State v. Knapstad, 107 Wn. 2nd. 346 (1986), CrR 8.3 (b).

Trial courts also have inherent power to review the charging decisions and policies of Prosecuting Attorneys. State v. Pettitt, 93 Wn. 2nd 288, (1980), In Re Harris, 111 Wn. 2nd. (1988), State v. Dictado, 102 Wn. 2nd. 277 (1984), State v. Zornes, 78 Wn. 2nd. 9, (1970) and State v. Judge, 100 Wn. 2nd. 706 (1984).

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It is clear from the record in Harris, supra, that the Prosecuting Attorney in Pierce County had a death penalty charging policy, and that our Supreme Court knew what the Pierce County charging policy was. Numerous references are made throughout the opinion to the policy itself, and the way in which it worked.

Faced with a Motion for a Bill of Particulars aimed at disclosure of the Yakima County charging policy, the Prosecuting Attorney now resists that Motion, telling the Court that post-conviction review will tell us all we need to know about proportionality.

To date, no party to this lawsuit knows what the Yakima County charging policy is, if there is one.

We do know that Yakima County has not seen a capital case in over 50 years, and that since being elected in 1974, this Prosecuting Attorney has never before filed a Notice of Special Sentencing Proceeding. He has filed 34 cases alleging murder in the first degree since January 1. 1981. See Exhibit C.

We know that in the cases of State v. Kester, and State v. Kincaid, 103 Wn. 2nd. 304 (1985) this Prosecuting Attorney filed charges against each man alleging "aggravated first degree murder." See Exhibits A, B, D, and E.

We do not know why Notice of Special Sentencing Proceedings were filed in Kester or Kincaid. Similarly, we do not know what objective criteria, if any, were considered by this Prosecuting Attorney in deciding not to file Notices in either of those cases. We do not know what the charging policy was, if

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there was one, in 1982 when verdicts were entered in Kester and Kincaid.

While RCW 10.95.070 lists examples of factors which a jury may consider as it votes for life or death, the statute does not define a "mitigating factor." As a result of this statutory omission, prosecutors have no statutory guidance as they evaluate evidence, or as they choose to seek the death penalty. Similarly, the term "reason to believe" has never been defined, either by statute or by decision.

If a State seeks to authorize capital punishment the Constitution requires that the state "tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey vs. Georgia, 446 U.S. 420, 428, 100 S. Ct. 1759, 1764, 64 L. Ed. 2d 398 (1980).

1. The Discretionary Authority Granted the Prosecutor by Washington's Capital Punishment State Violates Constitutional Standards in that It does Not Set Forth Clear and Objective Standards that Provide Specific and Detailed Guidelines which Direct and restrain the Prosecutor's Exercise of Discretion in seeking the Death Penalty.

Laws and procedures "must provide explicit standards for those who apply them." Grayned vs. City of Rockford, 408 U.S. 104, 109, 92 S. Ct. 2294, 2299, 33 L. Ed. 2d 222 (1972); Papachristou vs. City of Jacksonville, 405, U.S. 156, 92 S. Ct. 839, 843, 31, L. Ed. 2d 110 (1972). A law which delegates basic policy decisions to policemen, prosecutors, judges, and juries, "for resolution on an ad hoc and subjective basis, with the attendant

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dangers of arbitrary and discriminatory application" violates th Fourteenth Amendement and denies a defendant his constitutional rights. Grayned vs. Rockford, 92 S. Ct. at 2299. Where there are no statutory standards governing the exercise of discretion, the statutory "scheme permits and encourages arbitrary and discriminatory enforcement." Papachristou vs. Jacksonville, 405 U.S. at 170.

A statute which delegates and grants the prosecutor the discretionary authority to determine whether a defendant will be subject to the death penalty must set forth clear and objective standards that provide specific and detailed guidelines which direct and restrain the prosecutor's exercise of discretion so as to minimize the risk of arbitrary and capricious action. Godfrey vs. Georgia, supra; Gregg vs. Georgia, 428 U.S. 325, 96 S. Ct. 3301, 49 L. Ed. 2d 929 (1976); Proffitt vs. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976); Furman vs. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

CONCLUSION

The Washington statutory scheme is Constitutionally defective in that it impermissibly delegates to the Prosecuting Attorney the discretionary power to seek the death penalty, without prior notice to any party.

Instead of providing the equal protection guaranteed by the Federal and State Constitutions, the Washington statute invites disparate treatment.

Important terminology remains undefined.

Different prosecutors exercise discretion in different ways.

Without a record, proportionality review on appeal is no more than an empty promise.

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TELEPHONE (509) 248-1346

The citizens of Yakima County-even those who are not old enough to vote for a Prosecuting Attorney, but who are old enough to be hanged for their crimes-deserve to discover how and when their Prosecuting Attorney decides to seek the death penalty.

The Motion for Bill of Particulars should be granted.

DATED this 8th day of MAY, 1989.

Respectfully submitted,

CHRISTOPHER TAIT
Attorney for Defendant McNeil

THOMAS A. BOTHWELL
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
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YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

COPY RECEIVED
AUG 16 '84
ANDERSON, LEDGERWOOD & ANDERSON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. BENJAMIN JAMES HARRIS, III, Defendant.	NO. 84-1-01190-6 NOTICE OF SPECIAL SENTENCING PROCEEDING TO DETERMINE WHETHER THE DEATH PENALTY SHOULD BE IMPOSED

TO: BENJAMIN JAMES HARRIS, III, DEFENDANT ABOVE NAMED,

YOU WILL TAKE NOTICE AS FOLLOWS:

I.

That you are charged by an amended information filed in this court with the crime of Aggravated Murder in the First Degree as defined in RCW 9A.32.030(1)(a) and RCW 10.95.020(5).

II.

That the Prosecuting Attorney of Pierce County, Washington, hereby gives notice of his intention to request a special proceeding pursuant to RCW 10.95.040 to determine whether or not the death penalty should be imposed upon the defendant, BENJAMIN JAMES HARRIS, III, pursuant to RCW 10.95.020 and RCW 10.95.030(2).

EXHIBIT "A"

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402
Telephone: 593-4211

III.

That the Prosecuting Attorney for Pierce County, Washington, has reason to believe that one or more aggravating circumstances was present at the commission of the aforesaid Murder in the First Degree and intends to prove the presence of such circumstances in a special sentencing proceeding pursuant to statute.

IV.

That the aggravating circumstances referred to herein are as follows:

(1) The defendant, Benjamin James Harris, III, solicited another person to commit the murder and had paid or had agreed to pay money or other thing of value for committing the murder.

V.

That further, there is reason to believe that there are not sufficient mitigating circumstances to merit leniency. The prosecution may open the sentencing phase only with the defendant's criminal record and evidence which would have been admissible at the guilt phase of the trial. Presentation of mitigating circumstances is the responsibility of the defendant. See State v. Bartholomew, 101 Wn.2d 631, 643, ____ P.2d ____ (1984). No mitigating circumstances have been brought to the attention of this office.

DATED at Tacoma, Washington, this 14th day of August, 1984.

WILLIAM H. GRIFFITH
Prosecuting Attorney

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402
Telephone: 593-4211

In the Superior Court of the State of Washington
In and for Yakima County

STATE OF WASHINGTON,
Plaintiff

vs.

BRYAN N. KESTER

Defendant

No. 82-1-00641-1

VERDICT FORM E

FILED
DEC 21 1982
CLERK
YAKIMA COUNTY CLERK

We, the Jury in the case of the State of Washington, Plaintiff, against BRYAN N. KESTER, Defendant,

find the Defendant guilty of Second Degree Manslaughter

Foreman

sc-21

46

EXHIBIT "B"

In the Superior Court of the State of Washington
In and for Yakima County

STATE OF WASHINGTON,
Plaintiff

vs.

BRYAN N. KESTER

Defendant

No. 82-1-00641-1

VERDICT FORM D

DEC 21 1982
BETTY A. GILLE
YAKIMA COUNTY CLERK

We, the Jury in the case of the State of Washington, Plaintiff, against

BRYAN N. KESTER ,Defendant,

find the Defendant guilty of First Degree Manslaughter

Foreman

sc-21

45

In the Superior Court of the State of Washington
In and for Yakima County

DEC 21 1982

YAKIMA COUNTY CLERK

STATE OF WASHINGTON,
Plaintiff

vs.

BRYAN N. KESTER

Defendant

No. 82-1-00641-1

VERDICT FORM F

We, the Jury in the case of the State of Washington, Plaintiff, against .....

BRYAN N. KESTER

.....,Defendant,

find the Defendant NOT guilty .....

.....

.....

Foreman

sc-21

47

In the Superior Court of the State of Washington
In and for Yakima County

FILED
DEC 21 1982
CATHY KELLEY
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,
Plaintiff

vs.

BRYAN N. KESTER

Defendant

No. 82-1-00641-1

VERDICT FORM C

We, the Jury in the case of the State of Washington, Plaintiff, against .....

BRYAN N. KESTER ....., Defendant,

find the Defendant ..... guilty of Second Degree Murder .....

.....

.....
Foreman

sc-21

44

In the Superior Court of the State of Washington
In and for Yakima County

DEC 21 1982
CITY OF YAKIMA
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,
Plaintiff

vs.

BRYAN N. KESTER,

Defendant

No. 82-1-00641-1

VERDICT FORM B

We, the Jury in the case of the State of Washington, Plaintiff, against .....

BRYAN N. KESTER ,Defendant,

find the Defendant ..... guilty of First Degree Felony Murder .....

.....

.....
Foreman

sc-21

43

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 82-1-00641-1
	)	
vs.	)	
	)	SPECIAL VERDICT FORM
BRYAN N. KESTER,	)	
	)	
Defendant.	)	

We, the jury, return a special verdict by answering as follows:

Did the defendant commit the murder to conceal the commission of the crime of first degree rape or first degree burglary or attempted first degree robbery, or to protect or conceal the identity of the defendant in committing the crime?;

ANSWER: Yes (Yes or No)

or

Was the murder committed in the course of, in furtherance of, or in immediate flight from the crime of rape in the first degree?;

ANSWER: Yes (Yes or No)

or

Was the murder committed in the course of, in furtherance of, or in immediate flight from the crime of burglary in the first degree?

ANSWER: Yes (Yes or No)

Paul E. Berg
FOREMAN

Filed for Record 12-21-82
and microfilmed on Roll
No. 235 1092
BETTY McGILLEN, County Clerk

RECEIVED
DEC 14 PM '82
BETTY McGILLEN
YAKIMA COUNTY CLERK

42

In the Superior Court of the State of Washington
In and for Yakima County

Filed for Record 12-21-82
and microfilmed on Roll
No. 225 1091
BETTY McGILLEN, County Clerk

STATE OF WASHINGTON,
Plaintiff
vs.
BRYAN N. KESTER,
Defendant

No. 82-1-00641-1

VERDICT FORM A

RECEIVED
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BETTY McGILLEN
EX-OFFICIO CLERK
SUPERIOR COURT
YAKIMA, WASHINGTON

We, the Jury in the case of the State of Washington, Plaintiff, against BRYAN N. KESTER Defendant,

find the Defendant guilty of Premeditated First Degree Murder

Foreman

sc-21

41

PERIOR COURT CRIMINAL CASES - 1982

IME	NO ACCUSED	CONVICTED	PLED GUILTY	As Charged	Lesser	JURY TRIAL	As Charged	Lesser	COURT	As Charged	Lesser	ACQUITTED	DISMISSED	DEFERRED PROSE	PENDING
MALICIOUS MISCHIEF, 1° . . .	11	5	5	5										1	5
MALICIOUS MISCHIEF, 1° Accomplice	1		1		1										0
MALICIOUS MISCHIEF, 2° . . .	15	3	7	2	5								6	1	1
MALICIOUS MISCHIEF, 2° Accomplice	1	1	1	1											0
MALICIOUS MISCHIEF, 3° . . .		6													
MALICIOUS PROSECUTION . . .	1														1
MANSLAUGHTER, 1°	1		1		1										0
MANSLAUGHTER, 2°		1													
MURDER, 1°, Aggravated . . .	2	2				3	2	1							0
MURDER, 2°	9	2	2	1	1								2		5
NEGLIGENT HOMICIDE	4	3	3	3											1
NON-SUPPORT, Criminal . . .	4														4
POSSESSION STOLEN PROPERTY, 1°	6	4	4	4									1		1
POSSESSION STOLEN PROPERTY, 2°	32	21	18	11	7								5		9
POSSESSION STOLEN PROPERTY, 3°	1	6	1	1											0

SUPERIOR COURT CRIMINAL CASES - 1981

EXHIBIT "C"

ME	NO ACCUSED	CONVICTED	PLED GUILTY	As Charged	Lesser	JURY TRIAL	As Charged	Lesser	COURT	As Charged	Lesser	ACQUITTED	DISMISSED	DEFERRED PROSE	PENDING
IT AND RUN - Felony	7	5	6	5	1										1
NCEST	5	1	1	1									1	1	2
NDECENT LIBERTIES	9	4	5	4	1										4
IDNAPPING, 1°	4		1		1								1		2
IDNAPPING, 2°	2	1	1		1								1		0
EGEND DRUG - Delivery	7	2	2	2										2	3
EGEND DRUG - Possession	5	1	1	1											4
ALICIOUS MISCHIEF, 1°	3		2		2										1
ALICIOUS MISCHIEF, 2°	12	3	6	3	3										6
ALICIOUS MISCHIEF, 3°	1	5											1		0
ANSLAUGHTER, 1°		1													0
ANSLAUGHTER, 2°	3	1													3
RDER, 1°	3		1		1										2
RDER, 2°	4	1	1		1	1		1				1			1
GLIGENT HOMICIDE	7	4	3	3											4
STRUCTING A PUBLIC SERVANT		2													0
FERING TO PRACTICE/ SIGNATING ONESELF AS A GISTERED NURSE WITHOUT LICENSE	1	1	1	1											0

EXHIBIT "C"

EXHIBIT "C"

SUPERIOR COURT CRIMINAL CASES - 1983

E	NO ACCUSED	CONVICTED	PLED GUILTY	As Charged	Lesser	JURY TRIAL	As Charged	Lesser	COURT	As Charged	Lesser	ACQUITTED	DISMISSED	DEFERRED PROSE	PENDING
ME, Possess During Closed Season	6	3	3	3											3
T AND RUN (Felony) . . .	3	2	1	1					1	1					1
CEST, 1°	10	4	5	4	1										5
CEST, 2°	6	2	1	1									1	2	2
DECENT LIBERTIES	25	10	11	9	2								2	1	11
DNAPPING, 2°	2												2		0
GEND DRUG, Possession . .	2	1											1		1
TTERY TICKET, Altering or Forging . . .	1														1
LICIOUS MISCHIEF, 1° . .	8	1	6	1	5										2
LICIOUS MISCHIEF, 2° . .	15	6	4	2	2								3		8
LICIOUS MISCHIEF, 3° . .		13													
LICIOUS PROSECUTION . . .	1	1	1	1											0
NSLAUGHTER, 1°	1	3										1			0
NSLAUGHTER, 2°	1														1
EDICAID FRAUD	1	1	1	1											0
URDER, 1°.	3					1			1						2
URDER, 1° Attempted . . .	1														1
URDER, 2°	3	1	2	1	1										1

SUPERIOR COURT CRIMINAL CASES - 1984

	NO ACCUSED	CONVICTED	PLED GUILTY	As Charged	Lesser	JURY TRIAL	As Charged	Lesser	COURT	As Charged	Lesser	ACQUITTED	DISMISSED	DEFERRED PROSE	PENDING
LICIOUS MISCHIEF, 1° . .	4	1	2		2								1		1
LICIOUS MISCHIEF, 2° . .	12	7	6	1	5								1		5
LICIOUS MISCHIEF, 2° Accomplice	3		1		1								2		0
LICIOUS MISCHIEF, 3° . .	2	8				1	1								1
LICIOUS MISCHIEF, 3° Accomplice		1													--
NSLAUGHTER, 1°		1													--
NSLAUGHTER, 2°		1													--
RDER, 1°	2					1		1							1
RDER, 1° Accomplice . .		1													--
RDER, 2°	7	1	2		2	1	1								4
ELIGENT DRIVING		2													--
STRUCTING A PUBLIC SERVANT		1													--
SSESSION OF STOLEN PROPERTY, 1°	11	3	4	3	1								3		4
SSESSION OF STOLEN PROPERTY, 2°	51	30	32	23	9								7		12
SSESSION OF STOLEN PROPERTY, 2° Accomplice	1	1											1		0
SSESSION OF STOLEN PROPERTY, 3°	3	11											3		0

SUPERIOR COURT CRIMINAL CASES - 1985

E	NO ACCUSED	CONVICTED	PLED GUILTY	As Charged	Lesser	JURY TRIAL	As Charged	Lesser	COURT	As Charged	Lesser	ACQUITTED	DISMISSED	DEFERRED PROSECUTION	PENDING
IDNAPING, 1°	5												1		4
IDNAPING, 1° Attempted .	1												1		0
IDNAPING, 2°	2												1		1
IDNAPING, 2° Attempted .	1		1		1										0
EGEND DRUG, Possession . .	1	3											1		0
EGEND DRUG, Possession with Intent to Deliver .	6												3		3
OTTERY FRAUD	3													1	2
ALICIOUS MISCHIEF, 1° . .	9	2	4	2	2								1		4
ALICIOUS MISCHIEF, 2° . .	7	2	4	2	2								2		1
ALICIOUS MISCHIEF, 3° . .		4													--
ANSLAUGHTER, 2°		1													--
URDER, 1°	4		2		2										2
URDER, 1° Aggravated . .	1														1
URDER, 2°	4	1													4
BSTRUCTING A PUBLIC SERVANT		1													--
BTAIN SIGNATURE BY DECEPTION	1														1
OSSESSION OF STOLEN PROPERTY, 1°	12	2	5	2	3								4	1	2
POSSESSION OF STOLEN PROPERTY, 1° Attempted .		1													--

SUPERIOR COURT CRIMINAL CASES - 1986

	NO ACCUSED	CONVICTED	PLED GUILTY	As Charged	Lesser	JURY TRIAL	As Charged	Lesser	COURT	As Charged	Lesser	ACQUITTED	DISMISSED	DEFERRED PROSECUTION	PENDING
TERY FRAUD	1														1
ICIOUS HARASSMENT	1	1	1	1											0
ICIOUS MISCHIEF, 1° . . .	8	4	6	3	3								1	1	0
ICIOUS MISCHIEF, 1° ccomplice	1	1	1	1											0
ICIOUS MISCHIEF, 2° . . .	21	12	10	7	3								3	3	5
ICIOUS MISCHIEF, 2° ccomplice		1													--
LICIOUS MISCHIEF, 3° . . .		3													--
NSLAUGHTER, 1°		1													--
NSLAUGHTER, 2°		1													--
RDER, 1°	6		1		1										5
RDER, 2°	7	2	3	1	2										4
SCURING ID OF A MACHINE . .	1														1
STRUCTING/INTIMIDATING A PUBLIC SERVANT	1														1
BTAIN HOTEL, RESTAURANT, LODGING, HOUSE ACCOMMODA-TIONS BY FRAUD	1														1
PERATING ILLEGAL WRECKING BUSINESS	1														1
OSSESSION OF ALTERED VIN . .	1														1
POSSESSION OF STOLEN PROPERTY, 1°.	14	7	10	7	3								1		3

SUPERIOR COURT CRIMINAL CASES - 1987

E	NO ACCUSED	CONVICTED	PLED GUILTY	As Charged	Lesser	JURY TRIAL	As Charged	Lesser	COURT	As Charged	Lesser	ACQUITTED [By Insanity]	DISMISSED	DEFERRED PROSECUTION	PENDING
RGERY	149	84	83	82	1				1	1			14	2	49
RGERY, Accomplice	3												1		2
T AND RUN (Misdemeanor)		1													--
T AND RUN (Felony)	8	4	5	4	1								1		2
EST, 1°	9	2	5	2	3	1		1				1	1		1
EST, 2°	10	8	3	3		1	1						1	1	4
DECENT LIBERTIES	32	17	13	10	3								2		17
DNAPING, 1°	5	2	3	2	1										2
DNAPING, 2°		1													--
GEND DRUG, Possession	1	1											1		0
LICIOUS MISCHIEF, 1°	1												1		0
LICIOUS MISCHIEF, 2°	20	6	8	3	5							1	4	1	6
LICIOUS MISCHIEF, 2° Accomplice	1	1	1	1											0
LICIOUS MISCHIEF, 3°	2	5	1	1											1
NSLAUGHTER, 1°	1		1		1										0
NSLAUGHTER, 2°		1													--
RDER, 1°	3														3
RDER, 1° Accomplice	1														1
RDER, 2°	5	2	1	1		1	1								3
GLIGENT DRIVING	1	2											1		0

MONTHLY REPORT
January 1 thru Dec. 31, 88

FELONIES

CRIME	NO. ACCUSED	CONVICTED	PLED GUILTY	As Charged	Lesser	JURY TRIAL	As Charged	Lesser	COURT	As Charged	Lesser	ACQUITTED (By Insanity)	DISMISSED	DEFERRED PROSECUTION	PENDING
LEGEND DRUG, Delivery															
LEGEND DRUG, Possession		2													1
LEGEND DRUG, Poss. w. Intent to Deliver	2	1	1	1									1		0
LOTTERY FRAUD															
LOTTERY PRIZE - Submit False Claim															
LARCENY THEFT - [illegible]	1														1
MALICIOUS HARASSMENT															
MALICIOUS MISCHIEF, 1°	4	3	2	2									2		0
MALICIOUS MISCHIEF, 1° ACC.															
MALICIOUS MISCHIEF, 2°	21	6	10	6	4								6		5
MALICIOUS MISCHIEF, 2° ACC.															
MALICIOUS MISCHIEF, 3°		6													1
MALICIOUS MISCHIEF, 3° ACC.															
MALICIOUS PROSECUTION															
MANSLAUGHTER, 1°	1											1			0
MANSLAUGHTER, 2°	1	3	1	1											0
MEDICAID FRAUD															
MURDER, 1°	11		5		5	2		2							4
MANSLAUGHTER, 2° ACC		1													1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff,
vs.
WILLIAM FLOYD KINCAID,
Defendant.

INFORMATION

82 1 00390 1

COUNT I

Comes now JEFFREY C. SULLIVAN, Prosecuting Attorney of Yakima County, Washington, and by this Information accuses WILLIAM FLOYD KINCAID of the crime of AGGRAVATED FIRST DEGREE MURDER - RCW 9A.32.030(1)(a) and RCW 10.95.020 CLASS A FELONY: Life Imprisonment Without Parole committed as follows:

He, the said WILLIAM FLOYD KINCAID, in the County of Yakima, State of Washington, on or about June 14, 1982, with premeditated intent to cause the death of another person, did shoot Charla Lynn Kincaid, thereby causing the death of Charla Lynn Kincaid, a human being, on or about June 14, 1982, and said premeditated First Degree Murder resulted in the death of more than one victim, namely, Charla Lynn Kincaid and Debra Denise Kruse as the result of a single act of the defendant, William Floyd Kincaid;

EXHIBIT D

contrary to the statutes in such case made and provided, a ...inst the peace and dignity of the State of Washington.

COUNT II

Comes now JEFFREY C. SULLIVAN, Prosecuting Attorney of Yakima County, Washington, and by this information further accuses WILLIAM FLOYD KINCAID of the crime of

AGGRAVATED FIRST DEGREE MURDER - RCW 9A.32.030(1)(a) and RCW 10.95.020

CLASS A FELONY: Life Imprisonment Without Parole

committed as follows:

He, the said WILLIAM FLOYD KINCAID, in the County of Yakima, State of Washington, on or about June 14, 1982, with premeditated intent to cause the death of another person, did shoot Debra Denise Kruse, thereby causing the death of Debra Denise Kruse, a human being, on or about June 14, 1982, and said premeditated First Degree Murder resulted in the death of more than one victim, namely, Debra Denise Kruse and Charla Lynn Kincaid as the result of a single act of the defendant, William Floyd Kincaid;

contrary to the statutes in such case made and provided, and against the peace and dignity of the State of Washington.

Dated at Yakima, Washington, this 17th day of June, 1982.

Jeffrey C. Sullivan
Prosecuting Attorney for Yakima County, Washington

STATE OF WASHINGTON)
County of Yakima) ss.

JEFFREY C. SULLIVAN, being first duly sworn, on oath deposes and says:

That he is the Prosecuting Attorney of Yakima County, Washington, and signed the foregoing Information in his official capacity; that he has read said Information, knows the contents thereof, and the same are true.

Jeffrey C. Sullivan

Subscribed and sworn to before me this 17th day of June, 1982.

Clerk of the Superior Court, Yakima County, Washington

By Deputy Clerk

P-7b

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON Plaintiff,

vs.

BRIAN N. KESTER

Defendant.

INFORMATION

82 1 00641 1

Comes now ROBERT N. HACKETT, JR., DEPUTY, Prosecuting Attorney of Yakima County, Washington, and by this Information accuses BRIAN N. KESTER of the crime of AGGRAVATED FIRST DEGREE MURDER - RCW 9A.32.030(1) & 10.95.020(7) CLASS A FELONY: Life Imprisonment Without Parole committed as follows:

He, the said BRIAN N. KESTER, in the County of Yakima, State of Washington, on or about the 30th day of September, 1982, with premeditated intent to cause the death of another person, did shoot Barbara A. Van Vleck, thereby causing the death of Barbara A. Van Vleck, a human being, on or about September 30, 1982, and said premeditated First Degree Murder was for the purpose to conceal the commission of a crime, to-wit: Attempted First Degree Rape, and to conceal the identity of the person committing the crime;

FILED
OCT 4 1982
BETTY McGILLEN, County Clerk

contrary to the statutes in such case made and provided, and against the peace and dignity of the State of Washington.

Dated at Yakima, Washington, this 4th day of OCTOBER 1982

Robert N. Hackett, Jr.
DEPUTY Prosecuting Attorney for Yakima County, Washington

County of Yakima
STATE OF WASHINGTON } ss.

ROBERT N. HACKETT, JR. being first duly sworn, on oath deposes and says:

That he is DEPUTY Prosecuting Attorney of Yakima County, State of Washington, and signed the foregoing Information in his official capacity; that he has read said Information, knows the contents thereof, and the same are true.

Robert N. Hackett, Jr.

Subscribed and sworn to before me this 4th day of OCTOBER 1982

Clerk of the Superior Court, Yakima County, Washington

By Judy Groeney
Deputy Clerk

P-7

EXHIBIT "E"

In the Superior Court of the State of Washington
In and for Yakima County

FILED
MAR 8 1982
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,
Plaintiff

vs.

WILLIAM FLOYD KINCAID

Defendant

No. 82-1-00396-0

VERDICT FORM D - Count II

We, the Jury in the case of the State of Washington, Plaintiff, against .....

WILLIAM FLOYD KINCAID ,Defendant,

find the Defendant..... guilty of 2° Manslaughter - Debra Kruse

.....

.....
Foreman

sc-21

53

EXHIBIT "F"

In the Superior Court of the State of Washington
In and for Yakima County

FILED
DEC 8 1982
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,
Plaintiff

vs.

WILLIAM FLOYD KINCAID

Defendant

No. 82-1-00396-0

VERDICT FORM C - Count II

We, the Jury in the case of the State of Washington, Plaintiff, against .....

WILLIAM FLOYD KINCAID ,Defendant,

find the Defendant..... guilty of 1° Manslaughter - Debra Kruse

.....

.....
Foreman

sc-21

52

In the Superior Court of the State of Washington
In and for Yakima County

STATE OF WASHINGTON,
Plaintiff

vs.

WILLIAM FLOYD KINCAID

Defendant

No. 82-1-00396-0

FILED
DEC 8 1982
YAKIMA COUNTY CLERK

VERDICT FORM A

We, the Jury in the case of the State of Washington, Plaintiff, against

WILLIAM FLOYD KINCAID, Defendant,

find the Defendant guilty of 1° Murder - Debra Kruse

Foreman

sc-21

51

In the Superior Court of the State of Washington
In and for Yakima County

FILED
DEC 8 1982
BETTY H. GILLEN
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,
Plaintiff

vs.

WILLIAM FLOYD KINCAID

Defendant

No. 82-1-00396-0

VERDICT FORM C - Count I

We, the Jury in the case of the State of Washington, Plaintiff, against

WILLIAM FLOYD KINCAID ,Defendant,

find the Defendant guilty of 1° Manslaughter - Charla Kincaid

Foreman

sc-21

49

In the Superior Court of the State of Washington
In and for Yakima County

FILED

DEC 8 1982

COUNTY CLERK
YAKIMA COUNTY, WASH.

STATE OF WASHINGTON,
Plaintiff

vs.

WILLIAM FLOYD KINCAID

Defendant

No. 82-1-00396-0

VERDICT FORM D

We, the Jury in the case of the State of Washington, Plaintiff, against

WILLIAM FLOYD KINCAID ,Defendant,

find the Defendant NOT guilty - Charla Kincaid

Foreman

sc-21

50

In the Superior Court of the State of Washington
In and for Yakima County

FILED

DEC 8 1982

BETTY M. BILLEN
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,
Plaintiff

vs.

WILLIAM FLOYD KINCAID

Defendant

No. 82-1-00396-0

VERDICT FORM E - Count II

We, the Jury in the case of the State of Washington, Plaintiff, against

WILLIAM FLOYD KINCAID ,Defendant,

find the Defendant NOT guilty - Debra Kruse

Foreman

sc-21

54

In the Superior Court of the State of Washington
In and for Yakima County

FILED
DEC 8 1982
[illegible]
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,
Plaintiff

vs.

WILLIAM FLOYD KINCAID

Defendant

No. 82-1-00396-0

VERDICT FORM B - Count I

We, the Jury in the case of the State of Washington, Plaintiff, against

WILLIAM FLOYD KINCAID, Defendant,

find the Defendant guilty of 2° Murder - Charla Kincaid

Foreman

sc-21

48

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	)	NO. 82-1-00396-0
vs.	)	SPECIAL VERDICT FORM
WILLIAM FLOYD KINCAID, Defendant.	)	

We, the jury, return a special verdict by answering as follows:

Was there more than one victim and were the murders part of a common scheme or plan, or the result of a single act of the defendant?

ANSWER: Yes (Yes or No)

FOREMAN

Filed for record 12-8-82
and Micro filmed on Roll
No. 235 330
BETTY McGILLEN, County Clerk

In the Superior Court of the State of Washington
In and for Yakima County

RECEIVED
DEC 8 6 11 PM '82
BETTY McGILLEN
EX-OFFICIO CLERK
OF SUPERIOR COURT
YAKIMA, WASHINGTON

STATE OF WASHINGTON,
Plaintiff

vs.

WILLIAM FLOYD KINCAID

Defendant

No. 82-1-00396-0

VERDICT FORM B - Count II

Filed for record 12-8-82
and Micro filmed on Roll
No. 235 329
BETTY McGILLEN, County Clerk

We, the Jury in the case of the State of Washington, Plaintiff, against

WILLIAM FLOYD KINCAID, Defendant,

find the Defendant guilty of 2° Murder - Debra Kruse

Foreman

sc-21

46

In the Superior Court of the State of Washington
In and for Yakima County

RECEIVED
DEC 8 6 11 PM '87
BETTY McGILLEN
EX-OFFICIO CLERK
OF SUPERIOR COURT
YAKIMA, WASHINGTON

STATE OF WASHINGTON,
Plaintiff

vs.

WILLIAM FLOYD KINCAID

Defendant

No. 82-1-00396-0

VERDICT FORM A- Count I

Filed for record 12-8-82
and Micro filmed on Roll
No. 235 328
BETTY McGILLEN, County Clerk

We, the Jury in the case of the State of Washington, Plaintiff, against

WILLIAM FLOYD KINCAID, Defendant,

find the Defendant guilty of 1° Murder - Charla Kincaid

Carl McLean
Foreman

sc-21

45

I. AGGRAVATED MURDER, DEATH PENALTY.

A. Procedure:

Only the Prosecuting Attorney, or in his absence the Chief Deputy or Chief Criminal Deputy, or his assistant, may file Aggravated Murder charges.

B. Aggravated Murder in the First Degree:

Aggravated murder shall be filed when the Prosecuting Attorney, or in his absence the Chief Deputy or Criminal Deputy, is satisfied to a high degree of certainty that:

1. substantial evidence exists to establish that the homicide was in fact premeditated; and,

2. substantial evidence exists to establish the aggravating factor.

If it is decided that the aggravating factor shall be filed, it will be filed at the same time as the first degree murder charge.

C. Notice of Special Death Penalty Sentencing Proceedings

1. Procedure:

In aggravated murder cases, the assigned deputy under the direction of the Chief Deputy shall compile available information for review by the Prosecutor. In the absence of the Prosecutor, the decision may be made by the Chief Deputy.

2. Decision to File: Notice of special (death penalty) sentencing proceedings shall be filed in accordance with RCW 10.95.040 when the Prosecuting Attorney has personally decided that there is not sufficient evidence of mitigation to warrant leniency and that, therefore, the death penalty option should be given a jury.

Pierce Co. Charging Standards by Griffies - Not effective after January 1987

II. PROSECUTOR'S DEATH PENALTY DECISION PROCEDURES

A. Files

1. When Created: Whenever it is decided that aggravated murder in the first degree charges are to be filed, two files shall be created. One file is for the Prosecutor and the other for the Chief Deputy.

2. Contents: The contents of the files shall be prepared and gathered by the Chief Deputy. The following shall be placed in the files:

Aggravated Murder - Death Penalty Report: A report containing the following information in summary form:

a. Case Status
b. Factual Statement
c. Case Problems and Solutions
d. Aggravating Factors and Any Proof Problems
e. Mitigating Factors Existing Under 10.95.040(1)
f. Other Mitigating Factors
g. Prior Convictions

h. Significant Statements From The Police Report Defense Input: The Chief Deputy shall request defense counsel to immediately submit material. The deputy shall keep a record of any verbal communications with defense counsel as well as any written correspondence.

B. Decision Making Process

1. Conference: The Prosecutor may consult with the Chief, and assigned deputy in a group meeting.

2. Record: The final decision of the Prosecutor shall be reported in a written document and, if deemed appropriate, the notice of special sentencing proceeding shall be filed.

III. MURDER IN THE FIRST DEGREE - 9A.32.030

1. Premeditated Murder in the First Degree - 9A.32.030.

   a. Premeditated homicide cases in which no statutory aggravating factor is found, shall be filed as murder in the first degree if sufficient admissible evidence of "premeditation" (See 9A.32.020) exists to take that issue to the jury.

2. Reckless Disregard - Murder in the First Degree - 9A.32.030(b)

   Reckless disregard-murder cases shall be filed where the evidence discloses that the criminal action was not directed at any one individual, e.g., car bombing, firing into a crowd.

3. Felony Murder in the First Degree 9A.32.030(c)

   a. Felony murder in the first degree shall be charged if sufficient admissible evidence exists to take to the jury the question of whether the death was caused in the course of or in the furtherance of the requisite felony or in immediate flight therefrom, and no evidence of a premeditated intent to kill exists.

   b. Requisite felonies:

IV. MURDER IN THE SECOND DEGREE - 9A.34.050

1. All intentional homicides other than those covered above shall be charged as murder in the second degree.

2. Felony Murder in the Second Degree

   a. Felony murder in the second degree shall be charged if sufficient admissible evidence exists to take to the jury the question of whether the death was caused in the course of or in the furtherance of the requisite felony or in immediate flight therefrom.

Felony murder in the second degree, based on an assault theory, shall be filed where the assault was committed with a weapon or where a clear indication of intent to assault (as opposed to engaging in a mutual fight) is evident.

Felony murder in the second degree, based on an assault, is the appropriate charge in deaths of children caused by abuse.

V. MANSLAUGHTER - 9A.32.060 and 9A.32.070

Non-intentional homicide resulting from the operation of a motor vehicle shall be charged as Vehicular Homicide (46.61.520). The issue of the defendant's actual knowledge of the risk of death is a question to be put to the jury.

Where the decedent is a quick unborn fetus (1000 grams etc.) and an intentional wound is inflicted on the mother, manslaughter in the first degree shall be charged. Note: No intent to kill the fetus need be shown.

VI. WHERE DOUBT EXISTS AS TO DEGREE

Cases where a question exists as to the proper degree to be charged should be resolved by filing the higher degree and including a notification to the trial deputy to consider an amendment if such is justified by the facts as developed during trial preparation. It should not be assumed that cases will be reduced in degree upon a plea of guilty.

VII. INITIAL FILING - NUMBER OF COUNTS

One count for each murder in the first or second degree shall be filed in the information. One count normally should be filed for each other crime up to the number of counts necessary for the defendant's offender score to reach the "9 or more category". For example, six (6) counts of manslaughter in the second degree (separate and distinct criminal conduct) would be the maximum number of counts filed. The additional counts after the first one are counted as prior convictions or 2 offender points and the "9 or more category" is reached if 6 counts are alleged. RCW 9.94A.400.

In the event of a trial each victim must be named in a separate count to insure restitution to the next of kin.

A. Sexual Assualt Homicides:

Homicides involving sexual assaults normally shall be handled in conjunction with the special assault unit.

Homicides where the only or key witnesses are children (under age 10) will be handled in conjunction with the special assault unit.

VIII. DISPOSITION

A. CHARGE REDUCTION

1. Degree

a. A defendant will normally be expected to plead guilty to the degree charged or to go to trial. The correction of errors in the initial charging decision or the development of proof problems which were not apparent at filing are the only factors which may normally be considered in determining whether a reduction to a lesser degree will be offered. Caseload pressure or the expense of prosecution may not be considered.

The sentence a defendant will receive under the determinate sentence range is not the basis for reduction by this office. If such reduction is contemplated, approval will be obtained from the Prosecuting Attorney, or, in his absence, the Chief Deputy or Chief Deputy and approved in a conference with the defendant's attorney, plaintiff's attorney and presiding judge. The exception policy shall be followed before any reduction is considered. All reductions shall be discussed with the victim's next of kin before being concluded. The exception policy shall be followed before a dismissal of counts is offered.

b. A charge of aggravated murder or murder in the first degree shall not be reduced without the prior personal approval of the Prosecuting Attorney.

c. The Prosecuting Attorney, the Chief Criminal Deputy, or his designee shall be notified of all proposed reductions prior to the time the reduction is offered.

2. Dismissal of Counts

a. Normally counts representing separate homicides will not be dismissed in return for a plea of guilty to other counts.

b. On approval of the Prosecuting Attorney or Chief Criminal Deputy, counts of manslaughter representing separate deaths arising from a single act or omission may be combined into one count alleging the death of each victim if the defendant indicates a willingness to plead guilty to such a count.

B. SENTENCE RECOMMENDATION

A determinate sentence within the presumptive sentencing range shall be recommended. Recommendations outside the specific range shall be made only pursuant to the exception policy. The requests of the next of kin of the victim shall always be considered and may justify an exception.

An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years. Total confinement may not be modified. RCW 9.94A.120(4).

[SEE D14 - D23 for AGGRAVATED MURDER IN THE FIRST DEGREE]

D1
RCW 9A.32.030(1)(a) (No Bail)
MURDER IN THE FIRST DEGREE

with premeditated intent to cause the death of another person, did ***, thereby causing the death of ***, a human being, on or about the *** day of ***, 198***, contrary to RCW 9A.32.030(1)(a),

D2
RCW 9A.32.030(1)(b) (No Bail)
MURDER IN THE FIRST DEGREE (RECKLESS CONDUCT)

under circumstances manifesting an extreme indifference to human life, engage in conduct which created a grave risk of death, thereby causing the death of ***, a human being, on or about the *** day of ***, 198***, contrary to RCW 9A.32.030(1)(b),

D3
RCW 9A.32.030(1)(c) (No Bail)
MURDER IN THE FIRST DEGREE (FELONY MURDER)

while committing or attempting to commit the crime of ***, and in the course of or furtherance of said crime or in immediate flight therefrom, did ***, a human being, not a participant in such crime, thereby causing the death of ***, on or about the *** day of ***, 198***, contrary to RCW 9A.32.030(1)(c),

D4
RCW 9A.32.050(1)(a) (Class A - $10,000)
MURDER IN THE SECOND DEGREE (INTENTIONALLY)

with intent to cause the death of another person, did ***, a human being, thereby causing the death of ***, on or about the *** day of ***, 198***, contrary to RCW 9A.32.050(1)(a),

D5
RCW 9A.32.050(1)(b) (Class A - $10,000)
MURDER IN THE SECOND DEGREE (FELONY MURDER)

while committing or attempting to commit the crime of ***, and in the course of or furtherance of said crime or in immediate flight therefrom, did ***, a human being, not a participant in such crime, thereby causing the death of ***, on or about the *** day of ***, 198***, contrary to RCW 9A.32.050(1)(b),

D6
RCW 9A.32.060(1)(a) (Class B - $5,000)
MANSLAUGHTER IN THE FIRST DEGREE (RECKLESS)

, thereby recklessly causing the death of ***, a human being, on or about the *** day of ***, 198, contrary to RCW 9A.32.060(1)(a),

D7
RCW 9A.32.060(1)(b) (Class B - $5,000)
MANSLAUGHTER IN THE FIRST DEGREE (QUICK FETUS)

intentionally and unlawfully kill an unborn quick child by inflicting an injury upon ***, the mother of said child, contrary to RCW 9A.32.060(1)(b),

D8
RCW 9A.32.070(1) (Class C - $2,500)
MANSLAUGHTER IN THE SECOND DEGREE

with criminal negligence ***, did cause the death of ***, a human being, on or about the *** day of ***, 198***, contrary to RCW 9A.32.070(1),

[Changed from Negligent Homicide to Vehicular Homicide on July 1, 1983]

D9
RCW 46.61.520 (Class B - $2,500)
VEHICULAR HOMICIDE (DWI/RECKLESS/WITH DISREGARD)

operate a motor vehicle while under the influence of or affected by intoxicating liquor and/or drugs, or in a reckless manner, or with disregard for the safety of others, and while so operating said vehicle did cause injuries to ***, who died on or about ***, 198***, as a proximate result of the injuries received, contrary to RCW 46.61.520,

D10
RCW 46.61.520 (Class B - $2,500)
VEHICULAR HOMICIDE (DWI)

operate a motor vehicle while under the influence of or affected by intoxicating liquor and/or drugs, and while so operating said vehicle did cause injuries to ***, who died on or about ***, 198***, as a proximate result of the injuries received, contrary to RCW 46.61.520,

D11
RCW 46.61.520 (Class B - $2,500)
VEHICULAR HOMICIDE (RECKLESS MANNER)

operate a motor vehicle in a reckless manner, and while so operating said vehicle did cause injuries to ***, who died on or about ***, 198***, as a proximate result of the injuries received, contrary to RCW 46.61.520,

D12
RCW 46.61.520 (Class B - $2,500)
VEHICULAR HOMICIDE (WITH DISREGARD)

operate a motor vehicle with disregard for the safety of others, and while so operating said vehicle did cause injuries to ***, who died on or about ***, 198***, as a proximate result of the injuries received, contrary to RCW 46.61.520,

D13
RCW 46.61.520 (Class B - $2,500)
VEHICULAR HOMICIDE (RECKLESS MANNER/WITH DISREGARD)

operate a motor vehicle in a reckless manner, or with disregard for the safety of others, and while so operating said vehicle did cause injuries to ***, who died on or about ***, 198***, as a proximate result of the injuries received, contrary to RCW 46.61.520,

NOTE RE: AGGRAVATED MURDER:
STATE v. DIXON states charge in the conjunctive and prove in the disjunctive

D14
RCW 9A.32.030(1)(a) and 10.95.020(1) (No Bail)
AGGRAVATED MURDER IN THE FIRST DEGREE

with premeditated intent to cause the death of another person did cause the death of ***, a human being, who died on or about the *** day of ***, 19***, and
That further aggravated circumstances exist, to-wit: that the victim was a law enforcement officer, corrections officer, or fire fighter who was performing h*** official duties at the time of the act resulting in death, and the victim was known or reasonably should have been known by the defendant to be such at the time of the killing, contrary to RCW 9A.32.030(1)(a) and 10.95.020(1),

D15
RCW 9A.32.030(1)(a) and 10.95.020(2) (No Bail)
AGGRAVATED MURDER IN THE FIRST DEGREE

with premeditated intent to cause the death of another person did cause the death of ***, a human being, who died on or about the *** day of ***, 19***, and
That further aggravated circumstances exist, to-wit: that at the time of the act resulting in the death, the defendant was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes, contrary to RCW 9A.32.030(1)(a) and 10.95.020(2),

D16
RCW 9A.32.030(1)(a) and 10.95.020(3) (No Bail)
AGGRAVATED MURDER IN THE FIRST DEGREE

with premeditated intent to cause the death of another person did cause the death of ***, a human being, who died on or about the *** day of ***, 19***, and

That further aggravated circumstances exist, to-wit: that at the time of the act resulting in the death, the defendant was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony, contrary to RCW 9A.32.030(1)(a) and 10.95.020(3),

D17
RCW 9A.32.030(1)(a) and 10.95.020(4) (No Bail)
AGGRAVATED MURDER IN THE FIRST DEGREE

with premeditated intent to cause the death of another person did cause the death of ***, a human being, who died on or about the *** day of ***, 19***, and

That further aggravated circumstances exist, to-wit: that the defendant committed the murder pursuant to an agreement that ***he would receive money or any other thing of value for committing the murder, contrary to RCW 9A.32.030(1)(a) and 10.95.020(4),

D18
RCW 9A.32.030(1)(a) and 10.95.020(5) (No Bail)
AGGRAVATED MURDER IN THE FIRST DEGREE

with premeditated intent to cause the death of another person did cause the death of ***, a human being, who died on or about the *** day of ***, 19***, and

That further aggravated circumstances exist, to-wit: that the defendant solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder, contrary to RCW 9A.32.030(1)(a) and 10.95.020(5),

D19
RCW 9A.32.030(1)(a) and 10.95.020(6)(a)(b) (No Bail)
AGGRAVATED MURDER IN THE FIRST DEGREE

with premeditated intent to cause the death of another person did cause the death of ***, a human being, who died on or about the *** day of ***, 19***, and

That further aggravated circumstances exist, to-wit: that the victim was a judge, juror or former juror, prospective, current, or former witness in an adjudicative proceeding, prosecuting attorney, deputy prosecuting attorney, defense attorney, a member of the board of prison terms and paroles, or a probation or parole officer, and the murder was related to the exercise of official duties performed or to be performed by the victim, contrary to RCW 9A.32.030(1)(a) and 10.95.020(6)(a)(b),

D20
RCW 9A.32.030(1)(a) and 10.95.020(7) (No Bail)
AGGRAVATED MURDER IN THE FIRST DEGREE

with premeditated intent to cause the death of another person did cause the death of ***, a human being, who died on or about the *** day of ***, 19***, and

That further aggravated circumstances exist, to-wit: that the defendant committed the murder to conceal the commission of a crime and to protect or conceal the identity of any person committing a crime, contrary to RCW 9A.32.030(1)(a) and 10.95.020(7),

D21
RCW 9A.32.030(1)(a) and 10.95.020(8) (No Bail)
AGGRAVATED MURDER IN THE FIRST DEGREE

with premeditated intent to cause the death of another person did cause the death of ***, a human being, who died on or about the *** day of ***, 19***, and

That further aggravated circumstances exist, to-wit: that there was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the defendant, contrary to RCW 9A.32.030(1)(a) and 10.95.020(8),

D22
RCW 9A.32.030(1)(a) and 10.95.020(9) (No Bail)
AGGRAVATED MURDER IN THE FIRST DEGREE

with premeditated intent to cause the death of another person did cause the death of ***, a human being, who died on or about the *** day of ***, 19***, and

That further aggravated circumstances exist, to-wit: that the murder was committed in the course of, in furtherance of, and in immediate flight from the crime of ***, contrary to RCW 9A.32.030(1)(a) and 10.95.020(9),

D23
RCW 9A.32.030(1)(a) and 10.95.020(10) (No Bail)
AGGRAVATED MURDER IN THE FIRST DEGREE

with premeditated intent to cause the death of another person did cause the death of ***, a human being, who died on or about the *** day of ***, 19***, and

That further aggravated circumstances exist, to-wit: that the victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research or reporting activities of the victim, contrary to RCW 9A.32.030(1)(a) and 10.95.020(10),

CERTIFICATE OF TRANSMITTAL

On this day, the undersigned in Yakima, Washington, sent to the attorneys of record for plaintiff/defendants a copy of this document by U.S. mail, postage prepaid, or by Attorney's messenger. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

5/5/89 Sharon Dahl
DATE SIGNED

FILED
MAY 9 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

RECEIVED
'89 MAY 9 AM 10 00
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA COUNTY, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,)
Plaintiff,) No. 88-1-00428-1
vs.) STATE'S LIST OF WITNESSES
RUSSELL DUANE McNEIL,)
Defendant.)

TO: RUSSELL DUANE McNEIL, defendant, and
TOM BOTHWELL/CHRIS TAIT, attorneys for defendant:

You, and each of you, will please take notice that the following is a list of witnesses whom the state expects to call to testify in its behalf at the trial of the above-entitled case:

DR. WILLIAM BRADY		Portland, OR
LEEJA CASTILLEJA		Brownstown, WA
PATRINA COLWASH		Wapato, WA
NOEL DION CURTIS		Wapato, WA
RON ENGLERT		West Linn, OR
GILBERT GONZALES, JR.		Wapato, WA
ERNEST LILLY		Wapato, WA
SAMMY LOPEZ		Wapato, WA
MARIE NICKOLOFF		Wapato, WA
WILLIAM NICKOLOFF		Wapato, WA
DEL PRICE	Washington State Patrol	Kennewick, WA
MS. BILLY SANCHEZ		Wapato, WA
CARL SCHIBIG	Wapato Fire/Police Dept.	Wapato, WA
LT. JERRY HAFSOS	Yakima Sheriff's Office	Yakima, WA
DEPUTY CLAY KENNEDY	Yakima Sheriff's Office	Yakima, WA
DEPUTY JOHN LEWIS	Yakima Sheriff's Office	Yakima, WA
DET. KIM RICHARDSON	Yakima Sheriff's Office	Yakima, WA
DET. ROSE ROBERSON	Yakima Sheriff's Office	Yakima, WA
DET. ROD SHAW	Yakima Sheriff's Office	Yakima, WA

Howard W Hansen
Deputy Prosecuting Attorney and
Attorney for Plaintiff

Service accepted and copy received this _____ day of _____, 19____.

_____
Attorney for Defendant

P.33

A/401/88 HWH sw

149

FILED
and Micro filmed
MAY 4 1989
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

BETTY McGILLEN
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	ORDER AUTHORIZING
RUSSELL DUANE McNEIL,	)	PAYMENT BY YAKIMA COUNTY
	)	
Defendant	)	

The Court having considered the DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR PAYMENT OF BILL, now, therefore,

IT IS HEREBY ORDERED that the $64.72 billing be paid forthwith to: CHRISTOPHER TAIT, 230 South Second Street, Yakima, WA 98901.

DATED THIS 3 DAY OF MAY, 1989.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

CHRISTOPHER TAIT
Of Attorneys For Defendant McNeil

ORDER AUTHORIZING PAYMENT
BY YAKIMA COUNTY 1

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

148

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MAY 4 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK
'89 MAY 4 AM 11 22
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	
	)	DEFENDANT'S MOTION AND
	)	SUPPORTING DECLARATION
	)	FOR PAYMENT OF BILL
	)	
RUSSELL DUANE McNEIL,	)	
	)	
Defendant	)	

MOTION

THE UNDERSIGNED attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving the costs incurred in preparation of the defense of the above-named Defendant, which were incurred for copying costs.

THIS MOTION is based upon the file and record herein and the below DECLARATION OF COUNSEL.

DATED this 3rd day of May, 1989.

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

147

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court- appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference are the Statements for copying costs incurred in the preparation of the defense of RUSSELL DUANE MC NEIL, from the INSTANT PRESS, INC., in the sum of $20.91 and the YAKIMA BINDERY in the sum of $43.81 for a total reimbursement due to me of $64.72. I am respectfully requesting that this sum be reimbursed to me from the appropriate funds of Yakima County.

SIGNED AND DATED at Yakima, Washington, this 34 day of MAY, 1989.

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

statement

INSTANT PRESS, INC.
110 N. 2ND STREET
YAKIMA, WA 98901
457-6195

DATE 4/28/1989
ACCOUNT NUMBER TAICHRYAWA

DATE 4/28/1989
ACCOUNT NUMBER TAICHRYAWA

All balances due on the 10th of the month following invoice date

To insure proper credit please check those items being paid in the "✓" column and return this portion of the statement with your payment.

CHRISTOPHER TAIT
103 S. THIRD STREET

YAKIMA WA 98901

PAGE NO. 1

REFERENCE	DATE	CODE	DESCRIPTION	AMOUNT	BALANCE	REFERENCE	CODE	AMOUNT
16021	4/11/1989	17410		20.91	20.91	16021		20.91

CODES C-CR MEMO D-DR MEMO P-PAYMENT I-INVOICE A-DISCOUNT ALLOWED F-FINANCE CHARGE

PLEASE PAY 20.91

TOTAL 20.91

30 DAYS 60 DAYS 90 DAYS 120 DAYS

INSTANT PRESS, INC.

Yakima Bindery
and printing co.
310 EAST CHESTNUT
Stationery - Art & Engineering Supplies - Copy Service
PHONE (509) 453-7115 YAKIMA, WASHINGTON 98901

ACCOUNT NO.
316760

AMOUNT ENCLOSED $_____

TO INSURE PROPER CREDIT PLEASE RETURN UPPER PORTION WITH YOUR REMITTANCE

DIANA G. PARKER
230 SO. 2ND ST. SUITE 201
YAKIMA WA 98901

TERMS: Net 10TH. If not paid by the 27th of month following purchase, balance subject to a FINANCE CHARGE of 1.00% per month (which is an ANNUAL PERCENTAGE RATE of 12.00%), **$1.00 minimum**, applied after deducting current payments and/or credits appearing on this statement.

DATE	INVOICE NO.	DIVISION	CREDITS	CHARGES
04/27/89		BEGINNING BALANCE		0.00
04/08/89	R52393	REPRO		43.81

STATUS OF ACCOUNT

CURRENT	30 - 60 DAYS	60 - 90 DAYS	90 - 120 DAYS	120 DAYS & OVER	INTEREST	ENDING BALANCE
43.81	0.00	0.00	0.00	0.00	0.00	43.81

NOTICE: SEE OTHER SIDE FOR IMPORTANT INFORMATION
CHARGES, PAYMENTS AFTER 27th ON NEXT MONTH'S STATEMENT

RETAIN THIS PORTION FOR YOUR RECORDS

FILED and Micro filmed
MAY 4 1989
Roll No. 444
BETTY McGILLEN, YAKIMA COUNTY CLERK

RECEIVED
'89 MAY 4 AM 11 22
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	
	)	ORDER AUTHORIZING
RUSSELL DUANE McNEIL,	)	PAYMENT BY
	)	YAKIMA COUNTY
Defendant	)	

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY FEES AND EXPENSES for the month of APRIL, 1989, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County office forthwith: The sum of 1,172.50 payable to attorney CHRISTOPHER TAIT, 230 South Second Street, Suite 201, Yakima, WA 98901; and the sum of 693.75 to DIANA G. PARKER, in care of the offices of attorney CHRISTOPHER TAIT, at the above address.

DATED this 3rd day of MAY, 1989.

F. JAMES GAVIN, JUDGE

ORDER AUTHORIZING
PAYMENT BY YAKIMA COUNTY 1

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

PRESENTED BY:

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

ORDER AUTHORIZING
PAYMENT BY YAKIMA COUNTY 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

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MAY 4 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

'89 MAY 1 PM 12

BETTY McGILLEN
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASH.

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	DEFENDANT'S MOTION
	)	AND SUPPORTING
RUSSELL DUANE McNEIL,	)	DECLARATION FOR
	)	ORDER APPROVING
	)	ATTORNEY FEES
Defendant	)	

MOTION

THE UNDERSIGNED attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for the undersigned defense counsel and private investigator for the month of April,1989.

THIS MOTION is based upon the files and records herein and the DECLARATION OF COUNSEL hereinbelow.

DATED this 3rd day of MAY, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct.

The Undersigned is one of the court-appointed counsel for defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference is my statement of time expended, together with that of our private investigator in this case for the month of April, 1989.

SIGNED AND DATED at Yakima, Washington, this 3rd day of May, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
4/17/89	Out	Call PA, jail conf cl, conf CT research, call from JB re JR	4.00
4/18/89	Out	LD Cons K R re D/B, Conf JB	1.00
4/19/89	Out	Conf - CT, call to TAB, LD Cons WAPA LD Cons S. Ct, research re Pros Stds, TAB	5.00
4/20/89	Out	Conf VF, call to ct admin, research re: 3.5 hrng.	1.00
4/21/89	Out	Review CK bail file, jail conf cl	1.50
4/24/89	Out	Conf CT, LD AR (CT) Research RE: Harris, Pros ofice (review docs, copy)	4.25
4/25/89	Out	YSO, Pros atty, jail conf cl, conf CT re HWE, LD Cons LB, jail conf cl w/ Shaw, conf CT	5.50
4/26/89	Out	Conf CT, review docs	1.50
4/27/89	Out	Conf CT, call Shaw, Chief S., call from Licu J.	2.50
4/28/89	Out	Conf CT, letter to JM, letter to SM, review SL docs	1.50

27.75 Out of Court Hrs at $25.00 Per Hour = $693.75

TOTAL= $693.75

RECORD OF TIME

CHRISTOPHER TAIT — APRIL 28, 1989

STATE vs. RUSSELL DUANE McNEIL

Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
4/3/89	Out	Conf DP, HWH, review statements jail visit	2.50
4/6/89	Out	Jail conf, conf TAB, DP	2.00
4/10/89	In	Pre-trial	6.00
4/10/89	Out	(Conf DP, TAB, MF, RH)	2.00
4/11/89	Out	Conf DP, review file	.50
4/12/89	Out	Conf DP, TAB, review motions, let to client, jail visit, scheduling order	2.50
4/13/89	Out	I'V JH, MS, Conf DP,	4.00
4/17/89	Out	Review pleading, research	1.00
4/19/89	Out	Conf DP, Call TAB	.50
4/25/89	Out	Conf DP, re HWE	.50
4/26/89	Out	Conf DP	.25
4/27/89	Out	Conf DP, Shaw	.25
4/28/89	Out	Conf DP	.25

16.25 Out-of-Court Hrs at $50.00 Per Hour=		$ 812.50
6.00 In-Court Hrs at $60.00 Per Hour	=	$ 360.00
TOTAL	=	**$1,172.50**

FILED

APR 28 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

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'89 APR 28 PM 5 03

BETTY McGILLEN
EX OFFICIO CLERK OF
YAKIMA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	NO. 88-1-00428-1 NOTE FOR HEARING

TO: THOMAS BOTHWELL and CHRIS TAIT, Attorney for Defendant; and
TO: Court Administrator of the above-entitled court:

The Court Administrator is requested to assign a hearing date and notify counsel thereof.

Nature of case: Presentation of Order on Omnibus Application by Plaintiff
Date when last pleading served: N/A
Is jury demanded? No
Estimated time for hearing: 1/2 hour

The names, addresses and telephone numbers of the attorneys or of parties appearing in person are:

HOWARD W. HANSEN
Deputy Prosecuting Attorney
Room 329 - County Courthouse
Yakima, Washington 98901
(509) 575-4141

THOMAS BOTHWELL
Attorney for Defendant
302 North 3rd Street
Yakima, WA 98901
(509) 248-1900

CHRIS TAIT
Attorney for Defendant
230 So. 2nd St., Suite 201
Yakima, WA 98901
(509) 248-1346

DATED this 25 day of April, 1989.

Howard W Hansen

HOWARD W. HANSEN
Deputy Prosecuting Attorney
Attorney for Plaintiff

FILED

MAY 2 1989

144

FILED
and Micro filmed
APR 10 1989
Roll No. 340 614 SK
BETTY McGILLEN, YAKIMA COUNTY CLERK
89 APR 10 PM 3 07

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant	NO: 88-1-00428-1 ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY FOR INVESTIGATORY FEES AND EXPENSES

The Court having considered the DEFENDANT'S MOTION for ORDER APPROVING PRIVATE INVESTIGATOR FEES and EXPENSES and attached Declaration of Counsel, now, therefore,

IT IS HEREBY ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

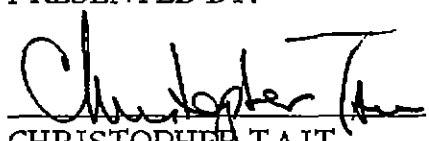
(1) The sum of $1,424.88 payable to DIANA G. PARKER, in care of the Office of Attorney Christopher Tait.

DATED THIS 18th DAY OF APRIL, 1989.

F. JAMES GAVIN, JUDGE

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys For Defendant McNeil

ORDER AUTHORIZING PAYMENT
BY YAKIMA COUNTY
FOR INVESTIGATORY FEES
AND EXPENSES 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
APR 19 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	DEFENDANT'S MOTION AND
RUSSELL DUANE McNEIL,	)	SUPPORTING DECLARATION
	)	FOR ORDER APPROVING
	)	PRIVATE INVESTIGATOR
Defendant	)	FEES AND EXPENSES

MOTION

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court for the authorization of payment for investigatory services.

THIS MOTION is based upon the record and file herein and the accompanying DECLARATION OF COUNSEL.

DATED THIS 18 DAY OF APRIL, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Diana G. Parker has been authorized to pursue investigatory services on behalf of the Defendant McNeil. An Order Authorizing Investigatory Services and Setting Rates was entered in the above-entitled cause and signed by the Honorable F. James Gavin approving said investigatory services and authorizing payment of her automobile mileage to be reimbursed at the rate of 22 1/2 cents per mile. Diana G. Parker was further authorized to submit statements, through counsel, on or about the 1st and the 15th day of each month.

Attached hereto and incorporated by reference for approval is the statement of Diana G. Paker for the private investigatory fees and expenses for her services from APRIL 1, 1989, to APRIL 15, 1989, performed by her on behalf of the above-named Defendant, McNeil.

SIGNED AND DATED at Yakima, Washington, this 18 day of APRIL, 1989.

CHRISTOPHER TAIT
of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
4/3/89	Out	Conf CT, jail conf cl, review cl st jail conf cl, review MS statement	4.25
4/4/89	Out	Review CR/St, Review RM statement Conf CT, letter to Oly/DH	5.75
4/5/89	Out	Computer prep (CR st), LD Cons RB/WW	6.75
4/6/89	Out	Jail conf cl, conf ct, computer prep (RMN)	7.00
4/7/89	Out	Statement prep, trip to CM, trip to 1P	7.00
4/8/89	Out	Statement Summary, trip to YB, research 3.5 hrng.,	3.50
4/9/89	Out	Client clothes, jail	1.00
4/10/89	Out	3.5, other	6.00
4/11/89	Out	Conf Ct, research, library, copies jail conf cl	3.00
4/12/89	Out	Jail conf DP, CT & CL, letter to cl	2.00
4/13/89	Out	LD Cons SM, LD Cons G S review Frost materials, letter to SS/W Trip to locate wit (JH) I'V S/M	5.50
4/13/89	Our	*55 Miles at 22.5 Cents = **$12.38**	*
4/14/89	Out	Conf Ct, review TAB order mats LD Wapato (TS), Conf Det S, Conf CT, jail conf DP/Cl	4.75

56.50 Out of Court Hrs at $25.00 Per Hour = $1,412.50
55 Miles at 22.5 Cents Per Mile = $ 12.38
TOTAL = **$1,424.88**

and Micro filmed
APR 1 1989
Roll No.
BETTY McGILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY FEES for the month of March 1989 filed herein by THOMAS BOTHWELL, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County office forthwith: The sum of $300.00 payable to attorney THOMAS BOTHWELL of PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S., 302 North 3rd Street, P.O. Box #2129, Yakima, WA, 98907-2129.

DATED this 4 day of April, 1989.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

FILED
APR 12 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

'89 APR 12 AM 10 41

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR ORDER APPROVING ATTORNEY FEES

MOTION

The undersigned attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for the undersigned defense counsel for the month of March, 1989.

This motion is made and based upon the record and file herein and the below DECLARATION OF COUNSEL.

DATED this 5th day of April, 1989.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

DECLARATION OF COUNSEL

THOMAS BOTHWELL, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause.

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

My compensation has been set as follows: Time spent in court at the rate of $60.00 per hour and out-of-court time at the rate of $50.00 per hour.

Attached hereto and incorporated by reference is my statement of time expended in this cause for the month of March 1989.

SIGNED AND DATED at Yakima, Washington, this 5th day of April, 1989.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

TIME SHEET FOR

RUSSELL McNEIL

DATE	DESCRIPTION	HOURS
3/1/89	Review pre-trial motions.	0.25
3/14/89	Research, memo to Chris Tait and Diana Parker.	0.5
3/15/89	Telephone conference with Chris Tait; review motions in State v. Rice; draft new motions for Mr. McNeil; deliver to court; confer with Mr. Hanson and Mr. Sullivan.	1.0
3/17/89	Meeting with client and also Chris and Diane.	1.5
3/20/89	Meeting with Chris Tait and Diane Parker.	1.5
3/22/89	Telephone conference with Chris Tait.	0.25
3/28/89	Meeting with Chris Tait.	1.0
	TOTAL HOURS:	**6.0**

McNEIL:

* Total in-court hours: 0.0 hours at $60 per hour:	$ -00-
Total out-of-court hours: 6.0 hours at $50 per hour:	300.00
TOTAL:	$ 300.00

/ / /

EXHIBIT LIST

CUSTODY OR ___
REAL PROPERTY

CAUSE NO. 88-1-00427-2/88-1-00428-1 ACTION Pre-Trial Motions

STATE OF WASHINGTON VS. HERBERT RICE/RUSSELL DUANE McNEIL

Howard Hansen, Jeff Sullivan
Attorney(s)

Rick Hoffman, Michael Frost/
Thomas Bothwell, Chris Tait
Attorney(s)

JUDGE/~~COURT COMMISSIONER~~ F. JAMES GAVIN DEPT. NO. 3

REPORTER Lonna Baugher CLERK Laurie Campbell

DATE	PLAINTIFF'S EXHIBITS (Description)	ADMITTED	DEFENDANT'S EXHIBITS (Description)	DATE
4-10-89	SE "A" Rice statement transcript	X		
"	SE "B" McNeil statement transcript	X		
"	SE "C1" McNeil statement tape 1	X		
"	SE "C2" McNeil statement tape 2	X		
"	SE "D" Rice statement tape	X		
		X	DE "E" McNeil statement transcript	4-10-89

FILED
APR 10 1989
BETTY MCGILLEN
YAKIMA COUNTY CLERK

sealed by Court order
to be opened only
by order of Judge Gavin

FILED and Micro filmed
APR 1989
Roll No. 347 634
89 APR 6 PM
BETTY McGILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant

NO. 88-1-00428-1

ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY FEES AND EXPENSES for the month of March, 1989, it is hereby:

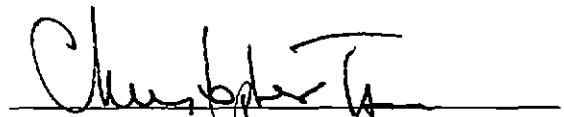
ORDERED that the following be paid by the appropriate Yakima County office forthwith: The sum of ~~$2690.98~~ 2702.68 payable to attorney CHRISTOPHER TAIT, 230 South Second Street, Suite 201, Yakima, WA 98901; and the sum of $1,543.75 to DIANA G. PARKER, in care of the offices of attorney CHRISTOPHER TAIT, at the above address.

DATED this 4th day of APRIL, 1989.

F. JAMES GAVIN, JUDGE

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

ORDER AUTHORIZING
PAYMENT BY YAKIMA COUNTY 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
APR 6 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	NO: 88-1-00428-1
vs.	DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR ORDER APPROVING ATTORNEY FEES
RUSSELL DUANE McNEIL, Defendant	

MOTION

THE UNDERSIGNED attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for the undersigned defense counsel and private investigator for the month of March, 1989.

THIS MOTION is based upon the files and records herein and the DECLARATION OF COUNSEL hereinbelow.

DATED this 4 day of April, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

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DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct.

The Undersigned is one of the court-appointed counsel for defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference is my statement of time expended, together with that of our private investigator in this case for the month of March, 1989.

SIGNED AND DATED at Yakima, Washington, this 4 day of April, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
3-16-89	Out	Conf Ct, call to WS, calls from Pers Calls to JCS, jail conf cl, LD Corres Dr. K., Conf DK, jail conf St, jail conf cl, LD Cons MS	6.00
3-17-89	Out	JV/eui, conf CT, LD Cons CC, locate M/JN, jail conf cl, TAB, LD Cons Dr. K, review docs	6.00
3-18-89	Out	Jail conf cl, trip to I'V wits jail conf	5.00
3-20-89	Out	Conf CT, LD/Cons LB, prepare notes prepare plan, LD cons ST, TAB, jail conf cl, I'V LB	8.00
3-21-89	Out	Conf Ct, I'V CL, locate JL, cons DB, jail conf cl.	4.75
3/22/89	Out	Prepare/locate ch/v materials, LD Cons TJ re RM, jail conf cl, LD Cons CS re JM, letter to JM	3.50
3-23-89	Out	Jail conf cl, conf Ct, chk c/records on DDE, LD Cons I'V LE, prepare mit materials, LE, locate ND	4.25
3-24-89	Out	I'V N/Rc, see DR re p.t., review cl record, jail conf cl	3.25
3-27-89	Out	Jail conf TS, cl call VF, NMN, locate JD, Cons GN re news, LD cons Aly, LD Cons Aly/Archives conf RS re WD, LD cons TM re WD, conf JMN Cores C. Walters	6.50
3-28-89	Out	Jail conf cl, conf CT, cons J Mc, review HH docs I'V BJ re HJ, library research	4.00

3-29-89	Out	Jail conf c.l, trip to B/L re SM, statement prep, conf Ct	3.75
3-30-89	Out	Conf Ct, letter TAB, LD cons DK, LD, JM re Dk, statement prep get cl materials/deliver-jail	3.00
3-31-89	Out	Statement prep, review 3.5 materials, LD cons R.B./WW; LD Cons Oly (T.S.)	3.75

61.75 Out-of-Court Hrs at $25.00 Per Hour = $1,543.75

TOTAL $1,543.75

RECORD OF TIME

CHRISTOPHER TAIT — March 31, 1989

STATE vs. RUSSELL DUANE McNEIL

Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
3-1-89	Out	Conf DP, jail conf	3.00
3-3-89	Out	Conf DP re chronology	1.00
3-6-89	Out	Jail conf cl, conf DP	2.00
3-7-89	Out	Jail conf, conf DP, review photos, chrono	4.00
3-8-89	Out	Conf DP, review reports	2.00
3-9-89	Out	TAB, jail conf cle	3.00
3-13-89	Out	Interview wit, conf DP	1.00
3-14-89	Out	Conf DP, travel SS I'V witness	3.00
3-15-89	Out	Conf DP, jail visit, locate wit	3.00
3-16-89	Out	Jail visit, conf JCS, DP	4.00
3-17-89	Out	Jail visit, conf TAB, DP, review rpts	2.00
3-18-89	Out	Jail visit, interview wit	4.00
3-18-89	Out	*42 Miles at 22.5 cents = **$9.45**	*
3-20-89	Out	Conf DP, TAB, jail visit, visit wit in Wapato review records conf Cyr	3.00
3-21-89	Out	*52 Miles at 22.5 cents = **$11.70**	*
3-21-89	Out	Interview 2- C.	3.50
3-22-89	Out	Conf DP PT	.50
3-23-89	Out	Conf DP	.50
3-23-89	Out	*8 Miles at 22.5 cents = **$1.80**	*
3-24-89	Out	Conf DP jail visit	2.00
3-27-89	Out	Jail visit, wit locate DN wit conf DP	4.00
3-28-89	Out	Jail visit, conf DP,Statement prep	3.00
3-29-89	Out	Long jail visit, conf DP	4.00
3-29-89	Out	*21 Miles at 22.5 cents = **$4.73**	*
3-30-89	Out	Conf DP, HWH, TAB	1.00

53.5 Out of Court Hrs t $50.00 Per Hour = $2,675.00

~~71~~ 123 Miles at 22.5 Cents Per Mile = $ ~~15.98~~ 27.68

TOTAL ~~$2,690.98~~ 2,702.68

Mailed: 3/28/89

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

FILED

MAR 30 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,

Plaintiff

vs

No. 88 1 428 1

McNEIL, Russell

Defendant

THE ABOVE ENTITLED CASE has been set for trial

MONDAY	4/10/89	9:30 a.m.
(Day)	**(Date)**	**(Time)**

Non-Jury HEARING **Jury** _____ **No. Days** 2

TYPE OF ACTION PRE TRIAL JUDGE GAVIN

HOWARD HANSEN	THOMAS BOTHWELL CHRISTOPHER TAIT
Attorney for Plaintiff(s)	**Attorney for Defendant(s)**

SUPERIOR COURT ADMINISTRATOR

COPY RECEIVED BY _____ **DATE** _____

136

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.

NO. 88-1-00428-1

NOTICE OF SETTING FOR PRE-TRIAL HEARING

TO: Russell D. McNeil, Defendant

Tom Bothwell and Chris Tate, Attorney for Defendant

THE YAKIMA COUNTY COURT ADMINISTRATOR:

The issues of law and fact in the above-entitled cause under

- ☒ CrR 3.5 Confession Hearing
- ☐ CrR 4.3 Joinder Hearing
- ☐ CrR 4.4 Severance Hearing
- ☒ CrR 4.5 Omnibus Hearing
- ☐ RCW 9.94A.110 Sentencing Hearing
- ☐ RCW 9.94A.140 Restitution Hearing
- ☒ Other Motions filed with Court

is hereby requested to be set for hearing upon the criminal department docket.

Estimated time required for hearing is .April 10, 1989 at 9:30 a.m. .....hour (s) in Judge Gavin's Courtroom.

/s/ Howard W. Hansen

Deputy Prosecuting Attorney Howard W. Hansen
Jeffrey C. Sullivan
Prosecuting Attorney
Room 329, Courthouse
Yakima, WA 98901
(509) 575-4141

Distribution:
Original: Clerk
cc: PA Office — Yellow
Court Administrator — Pink
Defense Attorney(s) — Goldenrod

FILED
MAR 30 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

135

52

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR YAKIMA COUNTY

MAR 29 1989

BETTY McCULLEN
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,
Plaintiff,

vs.

RUSSELL DUANE McNEIL,
Defendant.

No. 88-1-00428-1

OMNIBUS
APPLICATION
BY PLAINTIFF

RECEIVED

Date 3/29/89

MOTION BY PLAINTIFF

THE PLAINTIFF MAKES THE APPLICATION OR MOTIONS CHECKED BELOW

'89 MAR 29 PM 2 03

X 0. FOR A HEARING UNDER RULE 3.5. HEARING SET FOR _____ Court Administrator

X 1. Defendant to state the general nature of his defense. (Describe) Deny premeditation. Defendant did not kill either or strike any blows responsible for deaths will be supplemented as court orders

JJB 4/10/89

X 2. Defendant to state whether or not he will rely on an alibi and, if so, to furnish a list of his alibi witnesses and their addresses.
Will Rely on ____ Will not rely on X
Attorney for Defendant

X 3. Defendant to state whether or not he will rely on a defense of insanity at the time of the offense.
Will rely on ____ Will not rely on X
Attorney for Defendant — Judge

X 4. Defendant to furnish results of scientific tests, experiments or comparisons and the names of persons who conducted the tests.
Agreed to ____ Not Agreed to ____ Granted ____ Denied ____
Attorney for Defendant — Judge

____ 5. Defendant to appear in a lineup.
Agreed to ____ Not agreed to ____ Granted ____ Denied ____
Attorney for Defendant — Judge

____ 6. Defendant to permit taking samples of blood, hair and other materials of his body which involve no unreasonable intrusion thereof.
Agreed to ____ Not agreed to ____ Granted ____ Denied ____
Attorney for Defendant — Judge

X 7. Defendant to provide samples of his handwriting.
Agreed to X Not agreed to ____ with defense counsel present JJB 4/10/89 Granted ____ Denied ____
Attorney for Defendant — Judge

X 8. Defendant to state whether there is any claim of incompetency to stand trial.
Claimed ____ Not claimed X Hearing set for ____
Attorney for Defendant — Judge

X 9. For discovery of the names and addresses of defendant's witnesses and their oral and/or written statements. (Mandatory)

X 10. For discovery of all physical or documentary evidence in defendant's possession, and for inspection thereof.
Agreed to ____ Not agreed to ____ Granted ____ Denied ____
Attorney for Defendant — Judge

____ 11. Defendant to state whether his prior convictions will be stipulated or need to be proved.
Stipulated ____ Need to be proved ____
Attorney for Defendant

____ 12. Defendant to state whether he will stipulate to the continuous chain of custody of evidence from acquisition to trial.
Agreed to ____ Not agreed to ____
Attorney for Defendant

____ 13. Additional Motions:

Howard W Hansen
Deputy Prosecuting Attorney

Copy Received (Date) _____ Defense Attorney

Indicated items agreed to. _____ Defense Attorney

It is so ordered this _____ day of _____, 19 89.

INST. OF COURT: _____ JUDGE

NOTE: DEF. ATTY.: RETURN WHITE & CANARY SHEETS TO PROS. ATTY. OFFICE UPON COMPLETION.

WHITE—COURT FILE
CANARY—PROSEC. COPY
PINK—DEFENSE ATTY.

P-56

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FILED

MAR 27 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	NO. 88-1-00428-1
vs. RUSSELL DUANE McNEIL, Defendant.	MEMORANDUM IN OPPOSITION TO DEFENSE MOTION TO STRIKE PRE-MEDITATED FIRST DEGREE MURDER PENALTY AND ENHANCEMENT PURSUANT TO RCW 10.95.020 AND TO DISMISS NOTICE OF SPECIAL SENTENCING PROCEEDING

I. ISSUE

The defense argues that the separate statutory provisions of RCW 10.95 concerning capital punishment and aggravated first degree murder have been repealed by the passage of the Sentence Reform Act of 1981 by the Washington State legislature.

The defense in this case has not filed a memorandum on this issue. Since it appears to be the same motion as filed in the companion case of State v. Rice, Yakima County Cause No. 88-1-00427-2, the State submits its same memorandum in opposition to this defense motion.

ARGUMENT

The defense appears to reach this conclusion by asserting that there is no crime of aggravated murder under Washington law. They cite the cases of State v. Kincaid, 103 Wn.2d 304, 692 P.2d 823 (1985) and State v. Irizarry, 111 Wn.2d 591, 763 P.2d 432 (1988) as authority for that proposition. The defense has to conveniently overlook the

fact that RCW 9.94.320 lists aggravated murder as a crime under the Sentence Reform Act and RCW 9.94A.310 specifically gives it a seriousness level of XIV and a standard range sentence of life without parole or death as provided in RCW 10.95 in order to reach its conclusion. Everything else stated and argued by the defense in their memorandum on this issue is premised on this unsubstantiated assertion.

The cited cases do not establish what the defense contends. The Kincaid case is really a jury instruction case on the issue of whether each alleged aggravating circumstance provided in RCW 10.95 must be listed as an element of the crime charged when presented to the jury or whether special verdict instructions should be given concerning the aggravating factors. The Washington Supreme Court stated in its opinion at page 312:

> "Conceptually the crime is premeditated murder in the first degree with aggravating circumstances. Commonly, however, the crime is often referred to by the courts and others as `aggravated first degree murder'. This is understandable from a historical point of view because, as previously noted, at one stage in the development of the law in this regard, Initiative 316 did establish it as a separate RCW Title 9A crime; in fact, State v. Green, 91 Wn.2d 431, 439, 588 P.2d 1370 (1979), in discussing the initiative, referred to it as `a distinct and separate crime'. Since the present procedural statute, RCW 10.95.020, carries over the term `aggravated first degree murder' into RCW Title 10, the criminal procedure title, we perceive nothing inappropriate about continuing to refer to the crime as `aggravated first degree murder', `aggravated murder in the first degree' or simply as `aggravated murder'. Nor is it our

> intention to hold herein that referring to this crime in instructions as the crime of 'aggravated murder in the first degree', and including any alleged aggravating circumstances as an element of the offense, would be error. While the manner in which the trial court structured its instructions to the jury in this case may conceptually be the preferred manner, it is not the only way that a jury may be properly instructed on the matter."

This case hardly establishes that the crime of aggravated first degree murder does not exist. In fact, the case states that references to the crime as aggravated murder are understandable and proper even though conceptually it is more accurate to refer to the crime as premeditated first degree murder with aggravating circumstances. The Irizarry case merely cites the Kincaid case as standing for that same proposition. In fact, the Irizarry case seems to stand for just the opposite position put forward by the defense when it states at page 593:

> "The statute defining aggravated first degree murder is equally clear; that crime is premeditated murder in the first degree (not murder by extreme indifference or felony murder) accompanied by the presence of one or more of the statutory aggravating circumstances listed in the criminal procedure title of the code (RCW 10.95.020)."

CONCLUSION

The crime of pre-meditated first degree murder with aggravating circumstances does presently exist. It has been directly and properly incorporated into the Sentencing Reform Act of 1981 and there is no valid basis for striking

the provisions of RCW 10.95 as requested by the defense in this case.

DATED this 24th day of March, 1989.

Respectfully submitted,

JEFFREY C. SULLIVAN
Prosecuting Attorney

HOWARD W. HANSEN
Deputy Prosecuting Attorney

HWH2(X)

CERTIFICATE OF TRANSMITTAL

On this day, the undersigned in Yakima, Washington, sent to the attorneys of record [illegible]/defendants a copy of this document by [illegible] postage prepaid, or by Attorney's messenger [illegible] certify under penalty of perjury under the [illegible] the State of Washington that the foregoing is true and correct.

3-24-89
DATE

SIGNED

FILED
MAR 27 1989
BETTY McCULLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSEL DUANE McNEIL, Defendant.	NO. 88-1-00428-1 MEMORANDUM IN OPPOSITION TO DEFENSE MOTION FOR A BILL OF PARTICULARS

ISSUES

Defendant requests that the trial court order the State specify in a Bill of Particulars what evidence it intends to rely on to prove 1) premeditation of the murders in this case, 2) that the murders were done for the purpose of concealing the commission of a crime and the identity of those committing the crimes, and 3) that the murders were part of a common scheme or plan.

ARGUMENT

CrR 2.1 governs the application of a Bill of Particulars in a Superior Court criminal case:

> "(a) Use of Indictment or Information. The initial pleading by the State shall be an indictment or an information in all criminal proceedings filed by the prosecuting attorney.
>
> (b) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the prosecuting attorney. Allegations made in one count may be incorporated by reference in another count. It may be alleged that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

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> indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.
>
> . . .
>
> (d) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within 10 days after arraignment or at such later time as the court may permit.
>
> (e) Amendment. The court may permit any information or bill of particulars to be amended at any time before verdict or finding of substantial rights of the defendant are not prejudiced.
>
> . . . ."

The State has followed the statutory language of the applicable statutes in charging the defendants with capital murder in these cases. Additionally, the State has provided the defense with copies of all the written reports and statements obtained in the investigation of these cases and the defense has reasonable access to all physical evidence held concerning this case, so that the defense has detailed knowledge of all of the evidence that the State has to support the allegations made in these cases.

The case of State v. Dictado, 102 Wn.2d 277, 285, 687 P.2d 172 (1984), is cited by the defense as supporting their request for a Bill of Particulars. In that case, the defendant was charged with non-capital aggravated murder alleging as an aggravating factor that multiple victims were killed as part of a common scheme, plan,

or single act of the defendant. The defendant complained that even though charged with aggravated murder, he was made to defend gambling allegations introduced to establish the aggravating factor. The Appellate Court upheld the denial of his request for a Bill of Particulars. The Appellate Court stated:

> "What is important to defendant is whether adequate notice was given of the State's theory of the nexus between the killings. We find adequate notice."

Continuing at page 286:

> "Defendant further complains that the lack of notice and the vagueness of the charges in the information entitled him to a bill of particulars. A technically proper information may be subject to a timely motion for a more definite statement if it is vague as to the specifics of the crime committed. State v. Bonds, 98 Wn.2d 1, 653 P.2d 1024 (1982); see CrR 2.1(e). A bill of particulars should be granted when it will aid defendant in preparing his case. State v. Devine, 84 Wn.2d 467, 527 P.2d 72 (1974). A ruling on a motion for particulars is discretionary with the trial court. State v. Devine, supra. Having found no lack of notice, we find no abuse of discretion in this case. Nothing in the record indicates what information, beyond that already provided, the State could have furnished to give additional notice of the charges."

State v. Devine, 84 Wn.2d 467, 471, 527 P.2d 72 (1974), also cited by the defense, once again reiterates the purpose of the Bill of Particulars is to assure adequate notice of the nature of the charges to the defense and to avoid any defense surprises at the time of trial:

> "It cannot be contended here that the defendant was unfairly surprised by the prosecution's evidentiary presentation. Indeed, the defense had apparently anticipated such a departure from the

> bill of particulars as it immediately offered a memorandum of authorities in support of its motion to limit the evidence to the bill of particulars. In our opinion, the information supplemented by the bill of particulars amply informed the appellant of the nature of the charges against him. If error, the minute departures from the bill of particulars in this instance were harmless."

State v. Brown, 45 Wn. App. 571, 578, 726 P.2d 60 (1986), is another recent case where the defendant alleged error when the trial court denied a motion for a bill of particulars. The Appellate Court disagreed with the defendant's contention that they had insufficient information to defend the State's allegation in that case. The State had accused the defendant of conspiracy to commit theft by a "rip and tease" operation in which people were duped into believing they were paying for sexual acts from a saleswoman, only to find out that they would receive nothing for their money and would be forced to leave the premises under threat of violence:

> "Admittedly, the information and affidavit do not allege specifics of the agreement to conspire. However, the State may prove an illegal agreement giving rise to a conspiracy by circumstantial evidence, often by overt acts alone. State v. Gallagher, 15 Wn. App. 267, 277, 549 P.2d 499 (1976).
>
> > No formal agreement between the parties is essential to the information of the conspiracy, for the agreement may be shown 'if there be concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose.'
>
> Gallagher, at 277, quoting Marino v. United States, 91 F.2d 691, 694, 113 A.L.R. 975 (9th Cir. 1937). Since the State was not required to prove the specifics of the

> agreement in order to prove conspiracy, the trial court did not abuse its discretion in denying the motion for a bill of partiulars."

Washington case law specifically has held that using statutory language to charge a crime is adequate notice to the defendant and that a Bill of Particulars is not appropriate if the request is merely for evidentiary purposes. State v. Bates, 52 Wn.2d 207, 210, 324 P.2d 810 (1958) states:

> "[1] It is sufficient, in charging a crime, to follow the language of the statute, where such crime is there defined and the language used is adequate to apprise the accused with reasonable certainty of the nature of the accusation. State v. Olsen, 43 Wn.2d 726, 263 P.2d 824; State v. Moser, 41 Wn.2d 29, 246 P.2d 1101; State v. Forler, 38 Wn.2d 39, 227 P.2d 727. But an information may be so vague as to be subject to a motion for a bill of particulars, or it may be so vague as to fail to state any crime whatsoever. State ex rel. Clark v. Hogan, 49 Wn.2d 457, 303 P.2d 290.
>
> [2] If the information charges a crime (and here there can be no question that it does), an information will be considered sufficient when the facts constituting the crime are so stated that a man of common understanding can determine therefrom the offense with which he is charged. State v. Ternan, 32 Wn.2d 584, 203 P.2d 342, and cases cited therein.
>
> [3,4] The portions of the information which the appellant thinks are too vague are taken from the language of the statute. They are commonly understood words, and we can think of none which would convey the nature of the charge better. Nor has the appellant suggested in what way the information could be improved without setting forth the evidence in detail. This the state is not called upon to do. The objection to the information is not well taken." (Emphasis ours).

See also In re Richard, 75 Wn.2d 208, 449 P.2d 809 (1969).

State v. Mesaros, 62 Wn.2d 579, 583, 384 P.2d 372 (1963), upheld a trial court's decision to deny a motion for a Bill of Particulars when the request was purely evidentiary in nature. The court stated:

> "The appellant was arraigned December 19, 1961, at which time his counsel stated to the court that they were ready to plead, but that he was going to request a bill of particulars as to one item in the information, namely, the make and caliber of the pistol alleged to have been used in the crime charged. The court denied the request, stating that this was purely evidentiary, but granted counsel permission to file the motion.
>
> . . . ."

Continuing at page 585:

> "The furnishing of a bill of particulars to a defendant is a matter within the discretion of the trial court, and will be disturbed by this court only on a showing of an abuse of discretion." Citing cases.

CONCLUSION

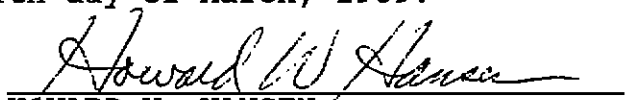
Defendant's motion for a Bill of Particulars is not appropriate since they are not requesting information needed to understand the nature of the charges against them as alleged in the information filed by the State of Washington.

The aggravated murder charges are clear and straight forward, alleged in the appropriate statutory language, which need not be improved upon in order for the defendant to understand the charges against him. The defense has been provided copies of all the investigative materials in this case and has reasonable access to the actual evidence presently in the custody of the State which may be presented in the State's case against the defendant.

The defendant has made no showing of confusion or inability to address the allegations of the information in this case while preparing their defense. In actuality, the defense is inappropriately requesting the court require the State to reveal the specific evidence it intends to present on specific identified issues in this case. That is clearly inappropriate. The questions themselves, presented by the defense, reveal that they clearly understand the issues of the case at this time. The defense either has or has access to all of the investigative and evidentiary materials the State has in its possession which the State may use in order to present its case.

The defendants are not entitled to anything more. They are particularly not entitled to the State's intended method of actually proving the allegations of the information which has been clearly drafted in statutory language and which is obviously understood by the defense.

Respectfully submitted this 24th day of March, 1989.



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HWH3(B)

FILED
MAR 20 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant.

NO. 88-1-00428-1

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR CHANGE OF VENUE

ISSUE

The defendant has requested a change of venue in this case stating that the defense will show at the appropriate pre-trial hearing that the defendant cannot receive a fair trial in Yakima County, Washington.

ARGUMENT

There are numerous Washington appellate cases that consider this issue. They all begin their analysis with an almost standard recitation of the law in this area. State v. Toennis, 52 Wn. App. 176, 182, 758 P.2d 539 (Aug. 1988) is a most recent Washington case which does this:

> "A motion for change of venue in a criminal case is directed to the sound discretion of the trial court, and its decision will not be disturbed on appeal absent a 'convincing showing of an abuse of discretion.' (Citations omitted.) State v. Stiltner, 80 Wn.2d 47, 52, 491 P.2d 1043 (1971). It is error for a trial court to deny a motion for change of venue where the conclusion is inescapable that a change of venue is necessary to guarantee a defendant's right to a fair trial by an unbiased jury. Stiltner, 80 Wn.2d at 53. A denial of due process may be found even without an affirmative showing of actual prejudice. When the circumstances show a probability of prejudice, the trial is deemed to be inherently lacking in due process.

(1)

Stiltner, 80 Wn.2d at 54.

> The mere fact that jurors may know about a case is not the central issue. In Patton v. Yount, 467 U.S. 1025, 1035, 81 L.Ed.2d 847, 104 S. Ct. 2885, 2891 (1984), the United States Supreme Court said that the fact that a great majority of veniremen knew about the case is irrelevant:
>
> > The relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant.
>
> In determining whether a motion for change of venue should be granted because of pretrial publicity, trial courts should be guided by the following factors in determining whether due process will be afforded:
>
> > (1) the inflammatory or noninflammatory nature of the publicity; (2) the degree to which the publicity was circulated throughout the community; (3) the length of time elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the difficulty encountered in the selection of the jury; (5) the familiarity of prospective or trial jurors with the publicity and the resultant effect upon them; (6) the challenges exercised by the defendant in selecting the jury, both peremptory and for cause; (7) the connection of government officials with the release of publicity; (8) the size of the area from which the venire is drawn.
>
> State v. Jeffries, 105 Wn.2d 398, 409, 717 P.2d 722, cert. denied, 107 S. Ct. 328 (1986).

State v. Laureano, 101 P.2d 745, 757, 682 P.2d 889 (1984) addresses the issue of when the trial court may make its decision on change of venue when it states:

> "The trial court may postpone its decision on a motion for change of venue until after

(12)

the voir dire examination of prospective jurors. See Crudup, 11 Wn. App. at 589."

Almost all the appellate cases reviewing this issue direct their written opinion to the application of the above listed factors. This must almost of necessity involve a review of the actual voir dire of the jurors called and selected to serve in order to see if pre-trial publicity or other concerns affected their ability to be fair and impartial jurors.

The State submits that the pre-trial progression of this case thus far has been very factual and relatively non-inflammatory so that no obvious basis to grant a Motion for Change of Venue presently exists based upon what has happened in this case thus far. The State argues that consideration of this issue should await the actual voir dire of perspective jurors at the time of trial in each of these cases.

DATED this 20TH day of March, 1989.

Respectfully submitted,

JEFFREY C. SULLIVAN
Prosecuting Attorney

HOWARD W. HANSEN
Deputy Prosecuting Attorney

HWH2(N)

(31)

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MAR 2 0 1989
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YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	NO. 88-1-00428-1 MEMORANDUM SUPPORTING THE ADMISSIBILITY OF THE DEFENDANT'S STATEMENT TO SHERIFF'S DETECTIVES

I. FACTS

Mike and Dorothy Nickoloff were an elderly couple, 82 and 74 years of age respectively, who were retired and lived alone in their single family dwelling in rural Yakima County. In the early evening of January 7, 1988, Mike and Dorothy Nickoloff were both brutally murdered in their home, the result of each receiving multiple knife stab wounds. Two portable television sets were taken from the house at the time of the murders.

The Yakima Sheriff's Department continued to investigate these homicides and follow-up on the many leads provided to the authorities. On January 25, 1988, Det. Shaw of the Sheriff's Department contacted an individual who told the detective that he had been approached by an individual named Chief Rice approximately two or three days before the Nickoloff homicides. Mr. Rice had asked this individual to assist him in a burglary on Kays Road. Rice had told this individual that Rice had previously been at the house he wanted to burglarize when his vehicle had broken down and he

had gone there for assistance. Rice told this individual that two old people live there, one having a walker and wheelchair to get around, that there was a freezer at the front of the house, and that the back door was left open. This individual told Det. Shaw that he refused Rice's request to participate in the burglary, but was recontacted by Rice two days after the homicides. During this contact, Rice was accompanied by a white male individual named "Russ" and they were attempting to sell two portable television sets, one set was black and white and one set was color.

The informant initially told Det. Shaw that Rice and his companion left with both of the television sets. On January 26, 1988, this same individual recontacted Det. Shaw at approximately 1500 hours and turned over a black and white portable television set to the officer stating it came from Rice and was given to the informant to pay off a debt Rice owed him. The informant was directed to attempt to gain additional information concerning the two individuals and the television sets. The informant was recontacted later that afternoon and provided detectives with the additional information that the suspect "Russ" went to Pace Alternative School and had lots of pimples on his face. Contact at the Pace School revealed that the only person with that first name and description was a Russell McNeil.

Detectives once again contacted the informant at approximately 7:45 that evening and at that time the second television set which was a color portable unit was turned

over to the detectives. The informant at that time stated to the detectives that he had been with "Rice" and "Russ" when they had sold the second television set to a third party. The two television sets were shown to members of the Nickoloff family and were identified as the televisions coming from their parents' home.

Detectives contacted Russell McNeil at his home in Toppenish, Washington, that evening and the defendant agreed to go with the officers to the Toppenish substation for an interview.

Upon entering the substation, the defendant, Russell Duane McNeil, told the detectives his name, date of birth, address, and that he was a student at the Pace School in Wapato, Washington. Mr. McNeil was then verbally given his Miranda warnings, which he stated he understood fully and executed a written waiver agreeing to talk to the detectives at 2258 hours on January 26, 1988.

After the defendant McNeil admitted he knew Chief Rice and was with Rice when they were trying to sell the television sets, the interview was adjourned to be recommenced at the Yakima Sheriff's Department in Yakima, Washington. Det. Shaw continued to talk to the defendant McNeil about the homicides on the trip up to Yakima and detoured to the nearby crime scene once McNeil began talking about the actual crimes. Once they arrived at the Nickoloff house and while remaining in the police vehicle, McNeil verified that this was the the location of the crimes and

discussed their movements and actions at the crime scene, initially minimizing his own participation in the crimes. After they had left the Nickoloff residence and were headed towards Yakima, McNeil finally admitted his participation in the homicides with Chief Rice.

Upon arriving at the Yakima Sheriff's Department Detectives interview room, defendant McNeil was again read his Miranda warnings, McNeil stated he understood, and a verbal interview took place. Thereafter, a taped statement was taken going over the entire incident. This taped statement also included another advice of rights during the recorded statement in which the defendant once again acknowledged he understood his rights and agreed to waive those rights and talk to the detectives voluntarily.

ARGUMENT

The case of State v. Prater, 77 Wn.2d 526, 463 P.2d 640 (1970) is an early Washington case which notes the movement of our courts away from the non-adversarial parens patriae approach to juvenile criminal offenses to the approach dictated by the United States Supreme Court case In re Gault, 387 U.S. 1, 18 L.Ed.2d 527, 87 S. Ct. 1428 (1967) in which juveniles were also granted their constitutional rights against self-incrimination and for court-appointed lawyers to assist them as contained in Miranda v. Arizona, 384 U. S. 436, 16 L.Ed.2d 694, 86 S. Ct. 1602 (1966).

The Washington Supreme Court stated at page 533:

> "The Constitution requires that a juvenile be be advised of his rights and that he be warned

> of the possible consequences of an admission . . . ."

The Court then detailed at page 534 that an officer

> "must make sure that a juvenile understands their Miranda warning. If there is not an intelligent waiver of his constitutional rights, the juvenile's answers should not be used against him. Whether there is such a waiver depends on a number of factors such as the age, intelligence and experience of the juvenile. Whether a proper warning is given and whether there is an intelligent waiver is a factual matter for the court to decide in each case."

See also State v. Barriault, 20 Wn. App. 419, 423, 581 P.2d 1365 (1978).

The case of Dutil v. State, 93 Wn.2d 84, 88, 6060 P.2d 269 (1980) formally acknowledged the federal standard known as the "totality of the circumstances" test in determining whether a juvenile's Fifth and Sixth Amendment rights have been protected.

> "This totality of the circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits - indeed, it mandates - inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. See North Carolina v. Butler, [441 U.S. 369, 60 L.Ed.2d 286, 99 S. Ct. 1755 (1979)].
>
> Courts repeatedly must deal with these issues of waiver with regard to a broad variety of constitutional rights. There is no reason to assume that such courts - especially juvenile courts, with their special expertise in this area - will

> be unable to apply the totality of the circumstances analysis so as to take into account those special concerns that are present when young persons, often with limited experience and education and with immature judgment are involved. Where the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to taken this into account in making a waiver determination. At the same time,that approach refrains from imposing rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive prior record who knowingly and intelligently waives his Fifth Amendment rights and voluntarily consents to interrogation."

The Dutil opinion further recognized at page 93 that waiver by older juveniles should be viewed much like an adult waiver:

> "The legislature apparently recognized that a youngster nearing the age of majority is more likely to have the ability to comprehend advice given him about his rights. This is particularly true, of course, where he has had previous experience in the juvenile court. As with adults, the question whether his waiver was intelligent becomes one of fact rather than one of presumption."

See also State v. Fagundes, 26 Wn. App. 477, 482, 614 P.2d 198 (1980). State v. Jones, 95 Wn.2d 616, 625, 628 P.2d 472 (1981).

State v. Wolfer, 39 Wn. App. 287, 290, 693 P.2d 154 (1984) provides a restatement of what the court should consider in addressing the issue of whether a confession is voluntary:

> "The voluntariness of a confession or admission is determined by examining the totality of the circumstances. See Davis v. North Carolina, 384 U.S.

> 737, 741-42, 16 L.Ed.2d 895, 86 S. Ct. 1761 (1966); State v. Fagundes, 26 Wn. App. 477, 482, 614 P.2d 198, 625 P.2d 179 (1980). The test is if the defendant's will to resist was so overborne as to bring about a confession not freely self-determined. Rogers v. Richmond, 365 U.S. 534, 544, 5 L.Ed.2d 760, 81 S. Ct. 735 (1961); State v. Gilcrist, 91 Wn.2d 603, 607, 590 P.2d 809 (1979). Although it is the State's burden to prove voluntariness, it need only do so by a preponderance of the evidence. State v. Braun, 82 Wn.2d 157, 162, 509 P.2d 742 (1973); State v. Davis, 34 Wn. App. 546, 550, 662 P.2d 78 (1983). Moreover, a trial court's determination that a confession was voluntary is binding on appeal when there is substantial evidence from which the trial court could find voluntariness by a preponderance of the evidence. State v. Vannoy, 25 Wn. App. 464, 467, 610 P.2d 380 (1980)."

See also, State v. Mark, 34 Wn. App. 349, 351, 661 P.2d 157 (1983).

The Washington case of State v. Rupe, 101 Wn.2d 664, 679, 683 P.2d 571 (1984) attempts to summarize some of the factors to be considered in viewing the "totality of the circumstances":

> "To be voluntary, a confession must be the produce of a rational intellect and a free will. Mincey v. Arizona, 437 U.S. 385, 398, 57 L.Ed.2d 290, 98 S. Ct. 2408 (1978). In determining voluntariness, the Court evaluates 'all the circumstances of the interrogation'. Mincey, at 401. The Court has considered the physical condition of the defendant (Mincey, defendant wounded and in great pain); his mental abilities (Davis v. North Carolina, 384 U.S. 737, 16 L.Ed.2d 895, 86 S. Ct. 176 (1966) (low intelligence)); and the conduct of the police (Spano v. New York, 360 U.S. 315, 3 L.Ed.2d 1265, 79 S. Ct. 1202 (1959) (police used close friend to interrogate; informed defendant that friend would lose job if no confession)); (Davis, police isolated defendant for 16 days with minimal

food).

> Viewing the totality of the circumstances, we condluce that defendant's confession was voluntary. The police tactics employed were neither overly zealous nor coercive."

Lastly, the case of State v. Terrovona, 105 Wn.2d 632, 646, 716 P.2d 295 (1986) demonstrates that a valid waiver can not only be revealed by express waivers (which we certainly have numerous examples of in this case), but also by implied waiver contained in the facts of the custodial interrogation:

> "A valid waiver may be expressly made by a suspect or implied from the facts of a custodial interrogation. As held in State v. Adams, 76 Wn.2d 650, 671, 458 P.2d 558 (1969), rev'd on other grounds, 403 U.S. 947, 29 L.Ed.2d 855, 91 S. Ct. 2273 (1971):
>
> > The Supreme Court has not required an express statement by the accused for an effective waiver, but rather has forbidden the presumption that an intelligent waiver was made simply from the fact that a statement was eventually extricated from the accused after he was warned of his rights. Some additional showing is required that the inherently coercive atmosphere of custodial interrogation has not disabled the accused from making a free and rational choice.
>
> Implied waiver has been found where the record reveals that a defendant understood his rights and volunteered information after reaching such understanding. Waiver has also been inferred where the record shows that a a defendant's answers were freely and voluntarily made without duress, promise or threat and with a full understanding of his constitutional rights."

CONCLUSION

Under the facts and circumstances presented in this memorandum and to be presented in the 3.5 hearing to be held

in this case, the State submits the defendant's Miranda rights have been fully protected, the State has met its burden to show the defendant knowingly, voluntarily, and intelligently waived his Miranda rights, and therefore the statements obtained from the defendant are admissible against him in the trial of this case.

DATED this 20th day of March, 1989.

Respectfully submitted,

JEFFREY C. SULLIVAN
Prosecuting Attorney

HOWARD W. HANSEN
Deputy Prosecuting Attorney

HWH2(I)

Micro filmed
MAR 20 1989
Roll No. 346 402
BETTY McGILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	
	)	ORDER AUTHORIZING
RUSSELL DUANE McNEIL,	)	PAYMENT BY YAKIMA
	)	COUNTY FOR INVESTIGATORY
Defendant	)	FEES AND EXPENSES

The Court having considered the DEFENDANT'S MOTION for ORDER APPROVING PRIVATE INVESTIGATOR FEES and EXPENSES and attached Declaration of Counsel, now, therefore,

IT IS HEREBY ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

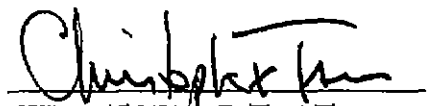
(1) The sum of $1,097.63 payable to DIANA G. PARKER, in care of the Office of Attorney Christopher Tait.

DATED THIS 20 DAY OF MARCH, 1989.

F. JAMES GAVIN, JUDGE

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys For Defendant McNeil

ORDER AUTHORIZING PAYMENT
BY YAKIMA COUNTY
FOR INVESTIGATORY FEES
AND EXPENSES 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
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YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

MAR 20 1989
BETTY MCGILLEN
89 MAR 20 PM 1 36

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	DEFENDANT'S MOTION AND
RUSSELL DUANE McNEIL,	)	SUPPORTING DECLARATION
	)	FOR ORDER APPROVING
	)	PRIVATE INVESTIGATOR
Defendant	)	FEES AND EXPENSES

MOTION

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court for the authorization of payment for investigatory services.

THIS MOTION is based upon the record and file herein and the accompanying DECLARATION OF COUNSEL.

DATED THIS 16 DAY OF MARCH, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Diana G. Parker has been authorized to pursue investigatory services on behalf of the Defendant McNeil. An Order Authorizing Investigatory Services and Setting Rates was entered in the above-entitled cause and signed by the Honorable F. James Gavin approving said investigatory services and authorizing payment of her automobile mileage to be reimbursed at the rate of 22 1/2 cents per mile. Diana G. Parker was further authorized to submit statements, through counsel, on or about the 1st and the 15th day of each month.

Attached hereto and incorporated by reference for approval is the statement of Diana G. Paker for the private investigatory fees and expenses for her services from MARCH 1, 1989, to MARCH 15, 1989, performed by her on behalf of the above-named Defendant, McNeil.

SIGNED AND DATED at Yakima, Washington, this 16 day of MARCH, 1989.

CHRISTOPHER TAIT
of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
3/1/89	Out	Conf CT letter to TW, long jail conf cl	4.00
3/2/89	Out	Prepare cl materials, letter to JL letter to SM, letter to JMN, client letter & deliver	4.00
3/3/89	Out	Prepare chrono, conf Ct	2.50
3/6/89	Out	Call to S. Ct Re AH, jail conf cl prepare mit materials	3.75
3/7/89	Out	Mit copies, trip to court Rep prep client materials for conf, letter re MC to NY, Call Dr. B Re CN, jail conf cl (photos review) Cons Pro (YVC)	5.00
3/8/89	Out	Conf CT re CRC, letter to EL, locate BG, PN, Mrs> T, LD cons, SWPD, call to VF< call from VF	6.00
3/9/89	Out	Call to KF re GED, jail conf cl, conf Cl, Conf CT, prepare docs for TAB	3.50
3/10/89	Out	Jail Conf cl	1.50
3/13/89	Out	Conf CT, locat BJ, locate DL, call to MR, IV SJ, call to Mr re DY, locate PJ, call to BL (L.D.)	4.25
3/14/89	Out	Conf CT, trip to JV/MR; LD cons, NP re RM, trip to SS to seee DY, review material from NC, LDMMC	5.00

3/14/89	Out	*45 Miles at 22.5 cents = **$10.13**	*
3/15/89	Out	Conf Ct, jail conf (JS), LD Cons Det/SW locate wit, see wit MS	4.00

$43.50 Out-Of-Court Hrs at $25.00 Per Hour = $1,087.50
45 Miles at 22.5 Cents Per Mile = $ 10.13
TOTAL $1,097.63

MAR 15 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 MOTION TO STRIKE ENHANCEMENT OF PENALTY FOR MURDER FIRST DEGREE PURSUANT TO 10.95.020 AND TO DISMISS NOTICE OF SPECIAL SENTENCING PROCEEDING

(1) Relief Sought. The Defendant Russell Duane McNeil, by and through his attorneys, Chris Tait and Thomas Bothwell, moves the Court for an order striking the enhancement of the penalty for first-degree murder pursuant to RCW 10.95.020, and for an order dismissing the notice of special sentencing proceedings filed herein.

(2). Basis. This motion is based upon the pleadings and papers filed herein, and evidence to be presented at a hearing in connection with this motion.

(3) Grounds. The enhancement provisions of first-degree murder, RCW 10.95.020, have been repealed by the Sentencing Reform Act of 1981. Due to the enhancement provisions repeal by implication, there is no basis for imposition of such.

DATED this 15 day of March, 1989.

Chris Tait
Attorney for Defendant

Thomas Bothwell
Attorney for Defendant

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

RECEIVED
MAR 16 1988
PROS. ATTY.
YAKIMA COUNTY, WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

'88 MAR 15 PM 1 29
MAR 15 1988
BETTY MCGILLEN
YAKIMA COUNTY CLERK

STATE OF WASHINGTON, Plaintiff,	No. 88-1-00428-1
vs.	MOTION FOR BILL OF PARTICULARS
RUSSEL DUANE MCNEIL, Defendant.	

1. Relief Sought. The defendant, Russell Duane McNeil, by and through his attorneys, Chris Tait and Thomas Bothwell, move the Court for an order directing the State of Washington to provide the defense with a bill of particulars specifying the following information:

(a) The specific evidence it relies upon to support the allegation that the deaths of Dorothy and Mike Nickoloff in this case were premeditated;

(b) The particular facts upon which the State relies to support its allegation that the deaths of Dorothy and Mike Nickoloff were caused for the purpose of concealing the commission of a crime and to conceal the identities of the persons committing the crimes;

(c) The particular facts upon which the State relies to support its allegation that the deaths of Dorothy and Mike Nickoloff were part of a common scheme or plan.

2. Basis. This motion is based upon the pleadings and papers filed herein; CrR 2.1(d) and the following cases: State v. Dictado, 102 Wn.2d 277, 687, P.2d 172 (1984); State v. Devine, 84 Wn.2d 467, 527 P.2d 72 (1974).

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LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

DATED this 15 day of March, 1989.

Chris Tait
Attorney for Defendant

Thomas Bothwell
Attorney for Defendant

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
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RECEIVED
MAR 15 1985
PROS. ATTY.
YAKIMA COUNTY, WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

85 MAR 15 PM 2:29

MAR 15 1985

BETTY MORGAN
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant.

No. 88-1-00428-1

MOTION FOR DISCOVERY

(1) Relief Sought. The defendant, Russell Duane McNeil, by and through his attorneys, Chris Tait and Thomas Bothwell, respectfully makes the following motions and requests that this Court enter an Order requiring the State to disclose the following material and information within the knowledge, possession, or control of the Prosecutor's Office or the Yakima County Sheriff's Office, its employees or agents:

1. For the State to disclose whether the State will rely upon the prior acts, statements, or convictions of the defendant to show intent, motive, knowledge, common scheme, or plan to identify; CrR 4.5(h), and, if so, to identify such acts or convictions.

2. For any records of the Prosecutor concerning prior criminal convictions of the defendant, co-defendant, or persons whom the State intends to call as witnesses at any hearing or trial.

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

3. Any and all electronic surveillance of the defendant's premises or conversations to which the defendant was a party and any record thereof; CrR 4.7(a)(2)(i).

4. For the State to indicate the relationship, if any, of all State's witnesses to the prosecuting authority.

5. For the State to indicate whether or not an informer is involved in this case and whether he/she will be called as a witness; and to state the name and address of the informer or claim the privilege; CrR 4.5(h).

6. For any and all information or material in possession of the State which tends to negate the defendant's guilt as to the offense charged or mitigate punishment; CrR 4.7(a)(3).

7. For the State to disclose lineups and photo montages in this case; CrR 4.7(a)(3).

8. For the State to disclose any and all information and material regarding any search and/or seizure relating to this case; the time, date, location, and name of individual or place searched and the material sought or seized.

9. For the State to specify the time, date, and location of the defendant's arrest, and all statements or reports made with respect to the arrest of the defendant; CrR 4.7(c)(1).

10. For the State to preserve: (a) Rough investigatory notes or investigating law

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SCHARNIKOW & BOTHWELL, P.S.
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YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

enforcement officers; (b) Tapes of radio and telephonic communication relating to this cause.

11. For a Subpoena Duces Tecum directing the Sheriff to conduct an NCIC check for prior convictions of all witnesses the State intends to call at any hearing or trial.

(2) Basis. This motion is based upon the pleadings and papers filed herein and the court rules referred to above.

DATED this 15 day of March, 1989.

Chris Tait
Attorney for Defendant

Thomas Bothwell
ATtorneys for Defendant

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

FILED
and Micro filmed
MAR 3 1989
Roll No. 245 595
BETTY McGILLEN, YAKIMA COUNTY CLERK

'89 MAR 3 PM 4 26

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	
	)	ORDER AUTHORIZING
RUSSELL DUANE McNEIL,	)	PAYMENT BY YAKIMA
	)	COUNTY
	)	
Defendant	)	

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY AND PRIVATE INVESTIGATOR FEES AND EXPENSES for the month of February, 1989, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

(1) The sum of $2,239.75 payable to attorney CHRISTOPHER TAIT, 230 South Second Street, Suite 201, Yakima, WA 98901;

(2) The sum of $787.50 payable to DIANA G. PARKER, in care of the office of attorney Christopher Tait.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

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DATED this 3rd day of MARCH, 1989.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

CHRISTOPHER TAIT
Attorney for Defendant McNeil

ORDER AUTHORIZING
PAYMENT BY YAKIMA
COUNTY 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

MAR .. 1989
BETTY McGILLEN
YAKIMA COUNTY CLER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	DEFENDANT'S MOTION
	)	AND SUPPORTING
RUSSELL DUANE McNEIL,	)	DECLARATION FOR
	)	ORDER APPROVING
	)	ATTORNEY FEES
Defendant	)	

MOTION

THE UNDERSIGNED attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for the undersigned defense counsel and private investigator for the month of February, 1989.

THIS MOTION is based upon the files and records herein and the DECLARATION OF COUNSEL hereinbelow.

DATED this 30 day of March, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct.

The Undersigned is one of the court-appointed counsel for defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference is my statement of time expended, together with that of our private investigator in this case for the month of February, 1989.

SIGNED AND DATED at Yakima, Washington, this 30 day of March, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

CHRISTOPHER TAIT — February 28, 1989

STATE vs. RUSSELL DUANE McNEIL

Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
2/1/89	Out	Prep motion & Affidavit; Conf Counsel	2.50
2/2/89	Out	Conf all counsel, client jail, consult Counsel	2.50
2/3/89	In	Motions	2.50
2/3/89	Out	Conf client, RLA, JCS	2.00
2/6/89	In	Motions	1.50
2/6/89	Out	Conf DP, TAB, Client	3.00
2/8/89	Out	Interview wit, conf DP	1.50
2/10/89	Out	Conf Rig, DP, TAB, Prepare Motion & Affidavit	4.00
2/13/89	Out	Argue Motion, conf Rigdon, prep order, presentation	4.00
2/15/89	Out	I'V 2 wits, (Harrah, Wapato, Yakima) Conf TAB, DP	4.50
2/15/89	Out	*62 Miles at 22.5 cents = $13.95	*
2/16/89	Out	Conf DP, conf jail, consult Ross, review record, interview wit	3.00
2/17/89	Out	Conf DP, venue motion	1.00
2/22/89	Out	Conf DP, wit S, TAB	2.50
2/23/89	Out	Conf wit S. & DC	2.00

2/27/89	Out	Motions, conf DP JCS, TAB, jail RLH, Ross	2.50
2/28/89	Out	Conf jail, DP I'V wits	4.50
2/28/89	Out	48 Miles at 22.5 cents = **$10.80**	*

39.50 Out-Of-Court Hrs at $50.00 Per Hour = **$1,975.00**
4.00 In-Court Hrs at $60.00 Per Hour = **240.00**
110 Miles at 22.5 Cents Per Mile = **24.75**

TOTAL =**$ 2,239.75**

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
2/16/89	Out	Conf CT, research ch V, jail conf cl (CP CT)	4.00
2/17/89	Out	Letter to TW, jail conf cl, research ch V, conf CT	2.00
2/21/89	Out	Letter to LJ Pro, corres from JL, letter from JMC, letter dkr	2.00
2/22/89	Out	Prepare chrono, conf CT, LD Cons SS Chart materials, lett to JL	2.50
2/23/89	Out	LD con Dr.G, IV (SB, CD), conf VF, CT	4.00
2/24/89	Out	Jail conf cl, CPS prep, prep SB, CD I'V, see VA re CB	5.00
2/27/89	Out	Motion research, ch V pub locate BTA, jail conf cl, conf CT	6.00
2/28/89	Out	Jail conf cl, letter to JMN, video review, LD Cons SB, CPS prep/	6.00

31.50 Out-Of-Court Hrs at $25.00 Per Hour = $787.50
TOTAL = $787.50

FILED
and Micro filmed
MAR 3 1989
Roll No. 345 5941
BETTY McGILLEN, YAKIMA COUNTY CLERK

'89 MAR 3 PM 4 25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY FEES for the month of February 1989 filed herein by THOMAS BOTHWELL, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County office forthwith: The sum of $950.00 payable to attorney THOMAS BOTHWELL of PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S., 302 North 3rd Street, P.O. Box #2129, Yakima, WA, 98907-2129.

DATED this 3 day of March, 1989.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

89 MAR 6 PM 4 25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR ORDER APPROVING ATTORNEY FEES

MOTION

The undersigned attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for the undersigned defense counsel for the month of February 1989.

This motion is made and based upon the record and file herein and the below DECLARATION OF COUNSEL.

DATED this 3rd day of March, 1989.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

DECLARATION OF COUNSEL

THOMAS BOTHWELL, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause.

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

Attached hereto and incorporated by reference is my statement of time expended in this cause for the month of February 1989.

SIGNED AND DATED at Yakima, Washington, this 3rd day of March, 1989.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

TIME SHEET FOR
RUSSELL McNEIL

DATE	DESCRIPTION	HOURS
2/1/89	Research	0.5
2/1/89	Telephone conference with Chris Tait	0.25
2/2/89	Meeting with Chris Tait	1.0
2/2/89	Telephone conference with Chris Tait	0.25
2/3/89	Meeting with Chris Tait	1.0
2/3/89	Telephone call to U.S. Supreme Court Clerk	0.25
2/3/89	Court hearing ***	1.75***
2/3/89	Telephone conference with Chris Tait	0.5
2/5/89	Research	2.0
2/6/89	Court hearing ***	0.75***
2/6/89	Meeting with Chris Tait	1.0
2/9/89	Meeting with Chris Tait	1.0
2/13/89	Meeting with Judge Gavin (with Chris Tait)	0.5
2/15/89	Telephone conference with Chris Tait	0.5
2/17/89	Telephone calls (2) to U.S. Supreme Court; telephone call to Chris Tait; letter to Judge Gavin	0.5
2/21/89	Telephone conference with Chris Tait	0.25
2/22/89	Research (CrR 3.5 issues)	1.0
2/22/89	Meeting with Chris Tait re: pre-trial motions	2.0
2/24/89	Drafting motions, memoranda, legal research, confer with Chris Tait	3.25
2/27/89	Telephone conference with Chris Tait	0.25
	TOTAL HOURS:	18.50

***TOTAL IN-COURT HOURS: 2.5 hours at $60.00 per hour:	$ 150.00
TOTAL OUT-OF-COURT HOURS: 16.0 hours at $50.00 per hour:	800.00
TOTAL:	$ 950.00

/ / /

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

FILED
FEB 27 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,
Plaintiff,
vs.
Russell McNeil,
Defendant.

No. 88-1-00428-1

OMNIBUS
APPLICATION
BY DEFENDANT

MOTION BY DEFENDANT DATED 2/24/89

THE DEFENDANT MAKES THE APPLICATION OR MOTIONS CHECKED BELOW

____ 1. To suppress physical evidence in plaintiff's possession because of (1) illigal search, (2) illegal arrest.
HEARING SET FOR _____ Granted ____ Denied ____
JUDGE

XX 2. For hearing under Rule 3.5
HEARING SET FOR _____ Granted ____ Denied ____
JUDGE

____ 3. To suppress evidence of the identification of the defendant
HEARING SET FOR _____ Granted ____ Denied ____
JUDGE

____ 4. To dismiss for failure of the indictment (or information) to state an offense. Granted ____ Denied ____
JUDGE

____ 5. To sever defendant's case and for separate trial.
Agreed to ____ Not agreed to ____
Attorney for Plaintiff
Granted ____ Denied ____
JUDGE

____ 6. To sever counts and for a separate trial.
Agreed to ____ Not agreed to ____
Attorney for Plaintiff
Granted ____ Denied ____
JUDGE

____ 7 To make more definite and certain.
Agreed to ____ Not agreed to ____
Attorney for Plaintiff
Granted ____ Denied ____
JUDGE

XX *8. For discovery of all oral, written or recorded statements made by defendant to investigating officers or to third parties and in the possession of the plaintiff.

XX *9. For discovery of the names and addresses of plaintiff's witnesses and their statements.

XX *10. To inspect physical or documentary evidence in plaintiff's possession.

____ 11. To take the deposition of witnesses.
List names _____
Granted ____ Denied ____
JUDGE

____ 12. To secure the appearance of a witness at trial or hearing.
Granted ____ Denied ____
JUDGE

____ 13 To inquire into the conditions of pretrial release.
Affirmed ____
Modified to _____
Granted ____ Denied ____
JUDGE

XX 14. To require the prosecution to state: (a) If there was an informer involved: Yes ____ No ____
(b) Whether he will be called as a witness at the trial: Yes ____ No ____
(c) To state the name and address of the informer or claim the privilege.
Privilege claimed ____
Not claimed ____
Attorney for Plaintiff
Granted ____ Denied ____
JUDGE

XX *15. To disclose evidence in plaintiff's possession, favorable to defendant on the issue of guilt.
Do Have ____ Do Not Have ____

XX 16. To disclose whether it will rely on prior acts or convictions of a similar nature for proof of knowledge or intent.
Will rely on ____
Will not rely on ____
Attorney for Plaintiff
Granted ____ Denied ____
JUDGE

XX *17. To advise whether any expert witness will be called, and if so, to supply his name, qualifications, nature of testimony, and copy of his report.

XX *18. To supply any reports or tests of physical or mental examinations in the control of the prosecution.
Do Have ____ Do Not Have ____

XX *19. To supply any reports or tests of scientific tests, experiments, or comparisons and other reports to experts in the control of the prosecution, pertaining to this case.
Do Have ____ Do Not Have ____

XX *20. To permit inspection and copying of any books, papers, documents, photographs or tangible objects which the prosecution—(a) Obtained from or belong to the defendant, or (b) Which will be used at the hearing or trial.
Do Have ____ Do Not Have ____

____ *21. To supply any information known concerning a prior conviction of persons whom the prosecution intends to call as witnesses at the hearing or trial.
Do Have ____ Do Not Have ____

____ *22. To inform the defendant of any information he has indicating entrapment of the defendant.
Do Have ____ Do Not Have ____

____ 23. Additional rulings: _____

Copy Received (Date) _____
Prosecuting Attorney

Indicated Items agreed to: _____
Prosecuting Attorney

Presented by: _____
Attorney for Defendant

It is so ordered this _____ day of _____, 19 ____.

Instructions: _____
JUDGE

*Items with asterisk are required to be produced under Rule 4.7 and no agreement or Order is required.

NOTE: Prosecuting Attorney: RETURN WHITE & CANARY SHEETS TO DEFENSE ATTORNEY OFFICE UPON COMPLETION.

WHITE—COURT FILE CANARY—DEFENSE COPY PINK—PROSECUTOR'S COPY

120

SC-50

FILED
FEB 27 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

'89 FEB 27 PM 1 39
SUPERIOR

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S MOTION IN LIMINE REGARDING PHOTOGRAPHS

COMES NOW RUSSELL DUANE McNEIL, the above-named Defendant, through counsel, and moves this Court for the following orders:

Excluding the introduction of photographs or videotape of the deceaseds and the autopsies, or placing limits upon the introduction of such photographs or videotape, on the grounds that the same are cumulative, irrelevant, prejudicial and inflammatory.

This motion is made and based upon the record and file herein.

The undersigned request leave of court to present argument with respect to this motion.

Although the most common local practice is for the State to wait until trial for virtually ad hoc rulings with respect to admissibility of photographs, the undersigned respectfully submit that the interests of judicial economy warrant pre-trial orders in

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

limine in this case considering the gravity of the charges plus the unusually large quantity of photographs available.

DATED this 24th day of February, 1989.

Respectfully submitted,

THOMAS BOTHWELL

CHRISTOPHER TAIT
Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

FILED

FEB 27 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	DEFENDANT'S AFFIDAVIT IN
	)	SUPPORT OF MOTION FOR
RUSSELL DUANE McNEIL,	)	CHANGE OF VENUE
	)	
Defendant	)	

STATE OF WASHINGTON)
)ss.
COUNTY OF YAKIMA)

RUSSELL DUANE McNEIL, being first duly sworn, upon oath deposes and states:

I am the Defendant herein. I submit this affidavit, as required by Court Rule (CrR 5.2), in support of my motion for change of venue.

I believe I cannot receive a fair trial in Yakima County.

DATED THIS 27 DAY OF February, 1989.

Russell D mc Neil
RUSSELL DUANE McNEIL

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

118

SUBSCRIBED AND SWORN to before me this 27 day of February, 1989.

NOTARY PUBLIC in and for the State of Washington, residing at Yakima.

DEFENDANT'S AFFIDAVIT IN SUPPORT OF MOTION FOR CHANGE OF VENUE 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
FEB 27 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	DEFENDANT'S MOTION FOR
RUSSELL DUANE McNEIL,	)	CHANGE OF VENUE
	)	
Defendant	)	

DEFENDANT RUSSELL DUANE McNEIL, through counsel, moves this Court for a change of venue.

This motion, pursuant to CrR 5.2, is based upon the record and file herein, including the accompanying affidavit of defendant.

DATED this 27 day of February, 1989.

CHRISTOPHER TAIT
Attorney for Defendant,
Russell Duane McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
FEB 27 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

'89 FEB 27 PM 4 39

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S MEMORANDUM RE 3.5 HEARING

COMES NOW the above-named Defendant, through counsel, offering this memorandum relative to the 3.5 hearing.

INTRODUCTION

The underlying premises of this memorandum are that the State intends to offer one or more statements of the Defendant RUSSELL DUANE McNEIL in evidence, allegedly given by Defendant while in "custodial interrogation" as that term is employed in the case law (Miranda and its progeny). It is the undersigned counsel's understanding that the State acknowledges it must show that the Defendant manifested in some way an intent to waive his "Miranda rights" and that the waiver was fully, knowingly and intelligently made.

/ / /

116

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PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
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YAKIMA, WASHINGTON 98907-2129
TEL. 248-1990 AREA CODE 509

LEGAL STANDARDS

Custodial interrogation imposes a heavy burden on the State to show that a defendant's waiver of his Miranda rights was "an intentional relinquishment or abandonment or a known right or privilege."

> Inculpatory statements taken from a suspect during custodial interrogation are presumed to be inherently compelled even after proper Miranda warnings have been given.

Ferguson, 13 Washington Practice, Section 2915 (1984).

Defendant McNeil was a 17-year-old juvenile when the alleged statements were given.

> Whether a juvenile has knowingly and voluntarily waived his Miranda rights is determined by a "totality-of-the-circumstances" approach. Fare v. Michael C., 442 U.S. 707, 725, 61 L.Ed.2d 197, 99 S.Ct 2560 (1979); Dutil v. State, 93 Wn.2d 84, 606 P.2d 269 (1980); State v. Luoma, 88 Wn.2d 28, 558 P.2d 756 (1977).
>
> The totality approach permits - indeed, it mandates - inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

State v. Jones, 95 Wn.2d 616, 625, 628 P.2d 472 (1981), quoting from Fare v. Michael C., 442 U.S. 707, 725 (1979).

/ / /

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PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
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YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

CONCLUSION

The undersigned asks this Court to grant leave for further legal argument upon the submission of evidence at the CrR 3.5 hearing.

DATED this 24th day of February, 1989.

Respectfully submitted,

THOMAS BOTHWELL

CHRISTOPHER TRAIT
Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

FILED

FEB 16 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	ORDER AUTHORIZING
RUSSELL DUANE McNEIL,	)	PAYMENT BY YAKIMA
	)	COUNTY FOR INVESTIGATORY
Defendant	)	FEES AND EXPENSES

The Court having considered the DEFENDANT'S MOTION for ORDER APPROVING PRIVATE INVESTIGATOR FEES and EXPENSES and attached Declaration of Counsel, now, therefore,

IT IS HEREBY ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

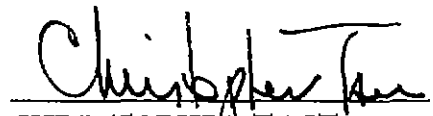
(1) The sum of $1,350.00 payable to DIANA G. PARKER, in care of the Office of Attorney Christopher Tait.

DATED THIS 16 DAY OF FEBRUARY, 1989.

F. JAMES GAVIN, JUDGE

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys For Defendant McNeil

ORDER AUTHORIZING PAYMENT
BY YAKIMA COUNTY
FOR INVESTIGATORY FEES
AND EXPENSES 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

'89 FEB 16 PM 4 20

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	DEFENDANT'S MOTION AND
RUSSELL DUANE McNEIL,	)	SUPPORTING DECLARATION
	)	FOR ORDER APPROVING
	)	PRIVATE INVESTIGATOR
Defendant	)	FEES AND EXPENSES

MOTION

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court for the authorization of payment for investigatory services.

THIS MOTION is based upon the record and file herein and the accompanying DECLARATION OF COUNSEL.

DATED THIS 16 DAY OF FEBRUARY, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Diana G. Parker has been authorized to pursue investigatory services on behalf of the Defendant McNeil. An Order Authorizing Investigatory Services and Setting Rates was entered in the above-entitled cause and signed by the Honorable F. James Gavin approving said investigatory services and authorizing payment of her automobile mileage to be reimbursed at the rate of 22 1/2 cents per mile. Diana G. Parker was further authorized to submit statements, through counsel, on or about the 1st and the 15th day of each month.

Attached hereto and incorporated by reference for approval is the statement of Diana G. Paker for the private investigatory fees and expenses for her services from FEBRUARY1, 1989, to FEBRUARY 15, 1989, performed by her on behalf of the above-named Defendant, McNeil.

SIGNED AND DATED at Yakima, Washington, this 16 day of FEBRUARY, 1989.

CHRISTOPHER TAIT
of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
2/1/89	Out	Conf CT, locate JL, LD Cons DF of RS, Conf VF, re motion, LD Cons Dr O RE RM, LD Cons D.F., Jail conf cl, conf VF, review CPS	5.00
2/2/89	Out	Library ref, call chief S, conf CT (CT/MF) LD Cons MV, LD Cons Dr JD, jail conf cl	3.75
2/3/89	Out	Jail conf cl, review CPS docs, court assest, Conf VF, telep conf cl, re waiver, Conf CT, conf TAB	5.00
2/4/89	Out	Research RE waiver, conf CT	2.00
2/6/89	Out	Conf CT, motion prep assist, CT on Waiver (CR) conf Cl, letter to SM (CPS), locate SS, LD Cons DF at Dept R. Conf VF, review CPS, letter to Dr. G. letter to BM	6.00
2/7/89	Out	prep Ch on CPS, Cons KF Re SS, LD Const Nil JP, cal PD, Conf KF re ed, Cons KF re SS, see DK (UG) Cons SSI (T)	4.00
2/8/89	Out	Letter to GM(C), Conf CT, LD Cons YM re AB, LS, Conf VF, prepare CPS chart letter to SL	4.00
2/9/89	Out	Conf cl, conf CT, jail conf cl, letter/rel to RMN, conf VF, call to CS	3.00
2/10/89	Out	Letter to Dr. H, letter to JCD, jail conf cl, letter to DO RE FOF, letter to JCD, LD Cons SS re CPS	5.00

2/11/89	Out	Prepare summary re status of invest research	2.50
2/13/89	Out	Conf Ct, sel JG re Motion, Dr. B. LD Cons MDL, (locate CD, SB), cl conf LD Cons BP, LD Cons SB	4.75
2/14/89	Out	Travel to see L/st, Conf VF, letter to JG, re R, jail conf cl, tript to JV, conf CT	4.00
2/15/89	Out	Conf CT, travel to vally to see wits	5.00

54.00 Out-Of-Court Hrs at $25.00 Per Hour = $1,350.00

TOTAL #1,350.00

FILED

FEB 6 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	)	NO: 88-1-00428-1
vs.	)	
RUSSELL DUANE McNEIL, Defendant	)	SCHEDULING ORDER

THIS MATTER coming on regularly for hearing, and the Court having considered the arguments of counsel, the written waiver of trial time limits signed by Defendant, and the records and files herein, therefore, it is hereby ORDERED as follows:

1. All non-capital motions shall be served and filed by defense counsel before 5:00 P.M. on February 27, 1989.

2. The Prosecuting Attorney shall file and serve his responsive non-capital motions and briefs before 5:00 P.M. on March 14, 1989.

3. A pre-trial hearing on non-capital issues shall be held no later than March 27, 1989.

4. Capital motions shall be served and filed before 5:00 P.M. on the 15th day following the filing of the U.S. Supreme Court opinion in Wilkins v. Missouri, et al.

RECEIVED

MAR 30 1989

SUPERIOR COURT

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

5. The Prosecuting Attorney shall serve and file his responsive motions and briefs before 5:00 P.M. on the 25th day following the filing of the opinion in the U.S. Supreme Court.

6. A pre-trial hearing on capital issues shall be held no later than the 30th day following the filing of the opinion in the U.S. Supreme Court.

7. The trial of this case shall begin no later than the 60th day following the filing of the opinion in the U.S. Supreme Court.

8. If the U. S. Supreme Court does NOT issue an opinion in the case of Wilkins v. Missouri, et al at the end of the current term, then the trial of this case shall begin no later than the ~~120th~~ 60th day following the end of the current U.S. Supreme Court term.

9. The case of State v. McNeil shall proceed to trial before the case of State v. Rice.

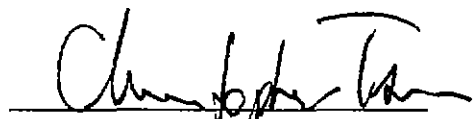
DATED THIS 6 DAY OF FEBRUARY, 1989.

F. JAMES GAVIN, JUDGE

SCHEDULING ORDER2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

Approved; Notice of
Presentation waived:

Of Attorneys for Plaintiff

SCHEDULING ORDER3

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

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FEB 3 1989
Roll No. 343 659
BETTY McGILLEN, YAKIMA COUNTY CLERK

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FILED
IN OFFICE CLERK OF
SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON,
Plaintiff,
vs.
RUSSELL DUANE McNEIL,
Defendant.

No. 88-1-00428-1

ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY FEES for the months of December 1988 and January 1989 filed herein by THOMAS BOTHWELL, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County office forthwith: The sum of $574.27 payable to attorney THOMAS BOTHWELL of PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S., 302 North 3rd Street, P.O. Box #2129, Yakima, WA, 98907-2129.

DATED this 2 day of February, 1989.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

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FEB 3 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

'89 FEB 3 PM 2 36

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR ORDER APPROVING ATTORNEY FEES

MOTION

The undersigned attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for the undersigned defense counsel for the months of December 1988 and January 1989.

This motion is made and based upon the record and file herein and the below DECLARATION OF COUNSEL.

DATED this 2nd day of February, 1989.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

DECLARATION OF COUNSEL

THOMAS BOTHWELL, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference is my statement of time expended in this cause for the months of December 1988 and January 1989.

SIGNED AND DATED at Yakima, Washington, this 2nd day of February, 1989.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

TIME SHEET FOR
RUSSELL McNEIL

DATE	DESCRIPTION	HOURS
12/7	Research; letter to attorney A. Ressler.	0.5
12/7	Telephone call to U. S. Supreme Court re High and Wilkens, letter to attorneys for defendants.	0.25
1/4	Initial interview of PRP materials received from Mr. Raber.	0.5
1/5	Telephone call to U. S. Supreme Court re: death penalty cases pending there; memo to Christ Tait, Mike Frost & Rick Hoffman.	0.5
1/6	Telephone conference with C8 regarding McNeil.	0.5
1/6	Review 1/11 letter from Judge Gavin; file review.	1.0
1/17	Meeting with Christ Tait.	1.0
1/20	Review correspondence; letter to prospective mitigation witness; Memo to Chris Tait; telephone call to Dr. McGovern's office.	0.75
1/20	Research.	0.5
1/23	Meeting with client.	1.5
1/23	Telephone call to Dr. McGovern's office.	0.25
1/24	Telphone conference with Chris Tait.	0.25
	Meeting wtih Chris Tait.	1.0
1/25	Call to Chris Tait's Office.	0.25
1/25	Conference call to Frost and Hoffman; then telephone conference with Chris Tait.	0.5

1/25	Telephone call to U. S. Supreme Court clerk.	0.25
1/25	Telephone to Rick Hoffman.	0.25
1/26	Telephone conference with Chris Tait.	0.25
1/27	Telphone conferen with Chris Tait.	0.25
1/30	Telephone conference with Chris Tait.	0.25
	TOTAL HOURS:	10.5

TOTAL IN-COURT HOURS: Ø.Ø hours
at $6Ø.ØØ per hour: $ -Ø-

TOTAL OUT-OF-COURT HOURS: 1Ø.5 hours
at $5Ø.ØØ per hour: 525.ØØ

COSTS:

12/2Ø/88: Luncheon meeting with co-counsel, $14.75

1/6/89: Browne & Ressler, copying and collating costs, Personal Restraint Petition, $34.52

TOTAL COSTS: 49.27

TOTAL: $ 574.27

/ / /

and Micro filmed
FEB 3 1989
Roll No. 343 658
BETTY McGILLEN, YAKIMA COUNTY CLERK

'89 FEB 3 PM 2 36

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant

NO. 88-1-00428-1

ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY FEES AND EXPENSES for the month of January, 1989, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County office forthwith: The sum of $2,217.50 payable to attorney CHRISTOPHER TAIT, 230 South Second Street, Suite 201, Yakima, WA 98901; and the sum of $962.55 to DIANA G. PARKER, in care of the offices of attorney CHRISTOPHER TAIT, at the above address.

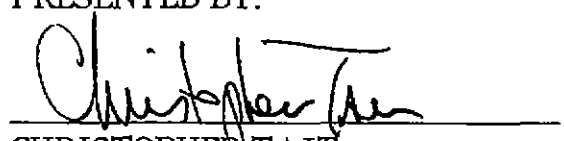
DATED this 2nd day of February, 1989.

E. JAMES GAVIN, JUDGE

ORDER AUTHORIZING
PAYMENT BY YAKIMA COUNTY 1

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

ORDER AUTHORIZING
PAYMENT BY YAKIMA COUNTY 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1345

SR

FILED
FEB 3 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

'89 FEB 3 PM 2 36

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	DEFENDANT'S MOTION
	)	AND SUPPORTING
RUSSELL DUANE McNEIL,	)	DECLARATION FOR
	)	ORDER APPROVING
Defendant	)	ATTORNEY FEES

MOTION

THE UNDERSGINED attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees afor the undersigned defense counsel and private investigator for the month of January, 1989.

THIS MOTION is based upon the files and records herein and the DECLARATION OF COUNSEL hereinbelow.

DATED this 1st day of February, 1989.

Christopher Tait

CHRISOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1345

109

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed counsel for defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference is my statement of time expended, together with that of our private investigator in this case for the month of January, 1989.

SIGNED AND DATED at Yakima, Washington, this 1st day of February, 1989.

CHRISOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1
JAN. 31, 1989

DATE	IN/OUT	McNeil Activity	TIME
1/16/89	Out	Jail conf cl, prepare summary Conf CT	2.00
1/18/89	Out	Conf Ct, LD locate JR, KB, Ct Trip, LD Cons Spok, (KB)	2.50
1/20/89	Out	Conf CT, Conf TAB, locate R, jail I'V JR, jail conf cl, LD Cons Dr. K.	3.50
1/23/89	Out	Conf CT, LD Cons KR, Conf Ct, prepare written summary, re-search re WGF	4.00
1/24/89	Out	Conf CT, corresp from TAB, review Neilly, LD Cons SM re CPS, trip to relocate WDM, corres from D.K., Re Opp, jail conf cl	5.00
1/25/89	Out	Conf CT, LD Cons JMc, letter to EL, locate JL (STE, M, NV), LD Cons RH, jail conf cl, photo prep	3.75
1/26/89	Out	Conf CT, locate RK, LD RH, cons JL, Trip to locate wit (Wap), jail conf cl, letter to JMC	5.00
1/26/89	Out	*28 Miles at 22.5 cents = **$6.30**	*
1/27/89	Out	Letter to RM, conf CT, TAB, RH, locate R by VA, Cons BH Re AGN	4.00
1/30/89	Out	I'V (Ct, JL, DP) review CPS, conf CT, Letter from JMN, (2) jail conf cl, re-view c. docs, prepare Chrono for CPS, CONF VF	5.00
1/31/89	Out	Locate SS LD Cons Personnel, LD Cons,	3.50

LD Cons YM for SS, LD Cons JLM,
Conf CT, prepare mit materials

38.25 Out-Of-Court Hrs at $25.00 Per Hour =	$956.25
28 Miles at 22.5 Cents Per Mile =	$ 6.30
TOTAL	**$962.55**

RECORD OF TIME

CHRISTOPHER TAIT — JANUARY 31, 1989

STATE vs. RUSSELL DUANE McNEIL

Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
1/3/89	Out	Conf Jail, DP, file review	1.00
1/4/89	Out	Interview wit, file	1.00
1/5/89	Out	Let to client, file review	1.00
1/6/89	Out	Conf DP, TAB, jail, letter	4.00
1/9/89	Out	Conf DP, jail	1.00
1/10.89	Out	Conf TAB, DP, RH, Oly, jail conf cl	3.00
1/11/89	Out	Conf GAVIN, TAB, DP, motions	1.00
1/12/89	Out	Conf DP	.50
1/13/89	Out	Conf Reay & Davis (Seattle)	9.00
1/13/89	Out	*300 Miles at 22.5 cents = **$67.50**	*
1/17/89	Out	Conf TAB, DP	1.50
1/18/89	Out	Conf DP	.50
1/20/89	Out	Conf DP, Conf TAB, jail conf cl	3.00
1/23/89	Out	Conf TAB, DP, motions	3.00
1/24/89	Out	Conf TAB, JCS, DP, Client jail	2.00
1/25/89	Out	Conf call, Conf RH, TAB, JCS, DP	3.50
1/26/89	Out	Conf DP	.50
1/27/89	Out	Jail conf cl, conf TAB	2.00

1/30/89	Out	Conf DP, motion prep, cons MF, RH	4.50
1/31/89	Out	Conf TAB, conf DP	1.00

43.00 Out-Of-Court Hrs at $50.00 Per Hour =	$2,150.00
300 Miles at 22.5 Cents Per Mile =	$ 67.50
TOTAL	$2,217.50

FILED

JAN 31 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

FILED 1989

89 JAN 31 PM 4:55

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	MOTION FOR CONTINUANCE
RUSSELL DUANE McNEIL,	)	OF TRIAL DATE
	)	
Defendant	)	

COMES NOW DEFENDANT, RUSSELL DUANE McNEIL, by and through his counsel Christopher Tait, and moves the court for the entry of an order granting a continuance of the trial date until September 5, 1989.

THIS MOTION is based upon the files and records herein, and upon the affidavit of Defendant's Counsel, attached hereto.

DATED THIS 30 DAY OF JANUARY, 1989.

CHRISTOPHER TAIT
Attorney for Defendant

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

108

STATE OF WASHINGTON)
)ss.
COUNTY OF YAKIMA)

CHRISTOPHER TAIT, being first duly sworn upon oath, deposes and states:

I am lead counsel for defendant Russell Duane McNeil.

Trial of this case is currently scheduled for April 10 or April 12, 1989, if defendant McNeil is ordered to stand trial before defendant Rice. Defense pre-trial motions are now due on February 13, 1989. Responsive motions and/or briefs from the Prosecuting Attorney are due on February 27, 1989. Pre-trial hearings are now scheduled to begin on March 13, 1989.

On the same day that the United States Supreme Court issued its opinion in OKLAHOMA V. THOMPSON, it accepted certiorari in WILKINS V. MISSOURI, HIGH V. ZANT, AND STANDFORD V. KENTUCKY. Those cases, or two of them, are scheduled for oral orgument in that court in March of 1989, and written opinions will be issed by that court before its summer recess, probably in June of 1989. Attorney Bothwell has communicated with the Clerk of Court, and obtained that docketing information.

While it is impossible to predict the rulings of the United States Supreme Court, it can easily and logically be argued that the rulings in those cases could eliminate execution as a method of punishment for juveniles, irrespective of the crimes for which they are convicted.

Trying either of these cases in April and May of 1989 may well be a waste of time, and a catastrophic waste of money. IF a verdict of guilty of murder in the first degree, with one aggravating circumstance was returned by a jury in either of these cases, the entire penalty phase may be unnecessary. Jury

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selection would be much more easily accomplished if the death penalty was not an issue. Many pre-trial motions would not be necessary. Other pre-trial motions might be viewed differently by this Court if execution of these juveniles was impossible.

I have reviewed this matter with every attorney involved in either of these cases, and have not heard any objection.

I do not believe that any party to this case will be harmed in any way by a continuance.

I have reviewed this matter at some length with my client, and he has agreed to a continuance until September of 1989. He has signed the WAIVER which accompanies this motion and affidavit.

In light of these facts, it is respectfully submitted that the trial date in this case should be continued until September 5, 1989, and that the deadlines for filing of motions and briefs should be extended to conform to the new trial date.

DATED this 30th day of January, 1989.

Christopher Tait

CHRISTOPHER TAIT

SUBSCRIBED AND SWORN to before me this 30 day of January, 1989.

Patricia J. Barbee

NOTARY PUBLIC in and for the State Of Washington, residing at Yakima.

MOTION FOR CONTINUANCE
OF TRIAL DATE3

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED

JAN 31 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	WAIVER OF TRIAL
RUSSELL DUANE McNEIL,	)	TIME LIMITS
	)	
Defendant	)	

My name is Russell McNeil. I am currently being held in the Yakima County Jail. I am charged with one count of aggravated first degree murder, and one count of being an accomplice to aggravated first degree murder. The prosecutor has requested the death penalty for both crimes. My attorneys are Chris Tait and Tom Bothwell.

I was 17 years old on January 7, 1988, which is the date on which these crimes were allegedly committed. I turned 18 on August 13, 1988.

By order entered March 15, 1988, the Juvenile Court in Yakima County declined jurisdiction in my case, and I was remanded to adult court.

I was arrested on January 27, 1988, and have been in custody ever since that date.

My attorneys filed and argued a motion to dismiss the death penalty notice because juveniles are not elgible to receive the death penalty in Washington. That motion was denied. That ruling was appealed to the Supreme Court of Washington, wich declined to hear this case before trial. I have been advised by my

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ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
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YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

107

attorneys that there are at this time two cases before the United States Supreme Court which might yield opinions ruling on the elegibility of juveniles for execution. I understand that we cannot predict the rulings of the United States Supreme Court. I understand that a continuance ruling means that I must wait longer in the Yakima County Jail to go to trial. I believe it is better for me to wait, hoping for a ruling from the United States Supreme Court which is favorable to me. I have been advised of the schedule found below, and I agree to that timetable. I know and understand that I could demand a jury trial at this time. I give up the right to be tried at this time. I consent to the timetable below. I do so knowingly, voluntarily, and of my own free will. I have reviewed this document with my attorney.

(1) Defendant shall file his pre-trial motions, together with supporting affidavits and briefs, within 30 days of the date on which the opinion of the U.S. Supreme Court is filed.

(2) The Prosecuting Attorney shall file his responsive briefs, affidavits, and materials no later than 15 days after he is served with defendant's pre-trial motions.

(3) The hearing on pre-trial motions shall begin on the 60th day following the filing of pre-trial motions.

(4) The trial in this case shall begin on the 90th day following the filing of pre-trial motions.

WAIVER OF TRIAL
TIME LIMITS 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DATED this 30TH day of January, 1989.

Russell D McNeil

RUSSELL McNEIL

Christopher Tait

CHRISTOPHER TAIT
ATTORNEY FOR McNEIL

WAIVER OF TRIAL
TIME LIMITS 3

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

Superior Court of the State of Washington
for the County of Yakima

FILED
JAN 30 1989
Yakima, Washington
98901

BETTY McGILLEN
YAKIMA COUNTY CLERK

Judge F. James Gavin
Department No. 3

Judge's Chambers

January 11, 1989

Mr. Jeffrey C. Sullivan
Yakima County Prosecuting Attorney
Yakima County Courthouse
128 North Second Street
Yakima, Washington 98901

Mr. Howard W. Hansen
Deputy Prosecuting Attorney
Yakima County Courthouse
128 North Second Street
Yakima, Washington 98901

Mr. Michael A. Frost
Attorney at Law
Market Place Two Building
Suite 200
2001 Western Avenue
Seattle, Washington 98121

Mr. Thomas Bothwell
PREDILETTO LAW OFFICES
Attorneys at Law
302 North Third Street
Yakima, Washington 98901

Mr. Christopher S. Tait
Attorney at Law
230 South Second Street
Yakima, Washington 98901

Mr. Rick L. Hoffman
MOORE, HOFFMAN & ROWLEY
Attorneys at Law
24 North Second Street
Yakima, Washington 98902

RE: STATE OF WASHINGTON, vs. RUSSELL DUANE McNEIL,
Yakima County Cause No. 88-1-00428-1
AND STATE OF WASHINGTON, vs. HERBERT RICE, JR.,
Yakima County Cause No. 88-1-00427-2

Dear Counsel:

As you know, on January 10, 1989, the Supreme Court affirmed the decision of their court commissioner, denying the motions for discretionary review. Pursuant to Order dated September 22, 1988, I ordered all pretrial motions, together with affidavits and briefs, be filed by the defendants' within 30 days of the date the Supreme Court Opinion is filed in the Yakima County Clerk's office. The prosecutor then has 15 days to file responsive briefs and affidavits. The hearing on the pretrial motions is to be held no later than the sixtieth day following the date on which the Supreme Court's Opinion is filed with the Yakima County Clerk. The trials are to begin no later than the ninetieth day following the date the Opinion is filed.

I suggest counsel file pretrial motions well within the 30 day (45 day) periods, so they can be heard, not on the sixtieth day, but preferably well in advance. Because the trials must be set within ninety days of the date of filing, as much time between the Court's ruling on motions and the trial date as is possible, is necessary.

The Supreme Court decision was filed at the Clerk's office today, Thursday, January 12, 1989. The first day is excluded, but the last day is included. The thirtieth day would be February 13, because the 11th is a Saturday; the forty-fifth day would be February 27, because the 26th is a Sunday; the sixtieth day would be March 13, and the ninetieth day would be April 12.

Barring any lawful and good cause reasons, any continuances or changes will not be allowed.

Be sure to send copies of all motions, affidavits, or other documents to me. I also must know the amount of time counsel feels will be required for the argument of the motions.

Very truly yours,

F. JAMES GAVIN

FJG/ecw

cc: Pauline A. Enriquez,
Superior Court Administrator
Betty McGillen,
Yakima County Clerk

Superior Court of the State of Washington
for the County of Yakima

Judge F. James Gavin
Department No. 3

Judge's Chambers

Yakima, Washington
98901

January 20, 1989

FILED
JAN 20 1989
BETTY MCGILLEN
YAKIMA COUNTY CLERK

Mr. Jeffrey C. Sullivan
Mr. Howard Hansen
Yakima County Prosecuting
Attorney's Office
Yakima County Courthouse
Yakima, Washington 98901

Mr. Thomas A. Bothwell
Prediletto, Halpin, Cannon
& Scharnikow, P.S.
302 N. Third Street
Yakima, Washington
98901

Mr. Christopher Tait
Attorney at Law
103 S. Third Avenue
Yakima, Washington
98901

Mr. Michael A. Frost
Attorney at Law
Market Place Two Ste. 200
2001 Western Avenue
Seattle, Washington

Mr. Rick Hoffman
Moore, Hoffman & Rowley
24 N. Second Street
Yakima, Washington
98901

Re: State of Washington v. Russell D. McNeil - 88-1-428-1
State of Washington v. Herbert Rice, Jr. - 88-1-427-2

Dear Counsel:

It is of paramount importance that a decision be made concerning the order in which these cases will be tried. Any such motion(s) are not subject to my previous order and should be noted and argued as quickly as possible. If I have not received a motion(s) concerning order of trial before February 1, 1989, I will, on my own motion, set a date for a hearing.

Very truly yours,

F. JAMES GAVIN

FJG/cp
cc: Pauline Enriquez

Filed and Micro filmed
JAN 20 1989
Roll No. 342 909
BETTY McGILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	)	NO: 88-1-00428-1
vs.	)	
RUSSELL DUANE McNEIL, Defendant	)	ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY FOR INVESTIGATORY FEES AND EXPENSES

The Court having considered the DEFENDANT'S MOTION for ORDER APPROVING PRIVATE INVESTIGATOR FEES and EXPENSES and attached Declaration of Counsel, now, therefore,

IT IS HEREBY ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

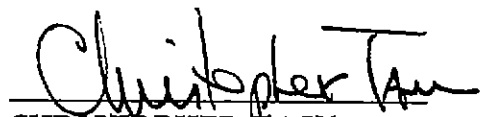
(1) The sum of $1,112.50 payable to DIANA G. PARKER, in care of the Office of Attorney Christopher Tait.

DATED THIS 20 DAY OF JANUARY, 1989.

F. JAMES GAVIN, JUDGE

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys For Defendant McNeil

ORDER AUTHORIZING PAYMENT
BY YAKIMA COUNTY
FOR INVESTIGATORY FEES
AND EXPENSES 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1345

'89 JAN 20 PM 4 08

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	DEFENDANT'S MOTION AND
RUSSELL DUANE McNEIL,	)	SUPPORTING DECLARATION
	)	FOR ORDER APPROVING
	)	PRIVATE INVESTIGATOR
Defendant	)	FEES AND EXPENSES

MOTION

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court for the authorization of payment for investigatory services.

THIS MOTION is based upon the record and file herein and the accompanying DECLARATION OF COUNSEL.

DATED THIS 20 DAY OF JANUARY, 1989.

CHRISTOPHER TAIT
Of Attorneys for Defendant
McNeil

FILED
JAN 29 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
330 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Diana G. Parker has been authorized to pursue investigatory services on behalf of the Defendant McNeil. An Order Authorizing Investigatory Services and Setting Rates was entered in the above-entitled cause and signed by the Honorable F. James Gavin approving said investigatory services and authorizing payment of her automobile mileage to be reimbursed at the rate of 22 1/2 cents per mile. Diana G. Parker was further authorized to submit statements, through counsel, on or about the 1st and the 15th day of each month.

Attached hereto and incorporated by reference for approval is the statement of Diana G. Paker for the private investigatory fees and expenses for her services from JANUARY 1, 1989, to JANUARY 15, 1989, performed by her on behalf of the above-named Defendant, McNeil.

SIGNED AND DATED at Yakima, Washington, this 20 day of JANUARY, 1989.

Christopher Tait

CHRISTOPHER TAIT
of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
1/3/89	Out	L Cons D at HR, locate JB, locate DK, LD Cons MD re BS letter to WB	5.00
1/4/89	Out	Research HR, copies del, TAB, LD Cons Oly JK, Review TAB corres, research library RE: DP, letter to DSHS, Oly JH	5.00
1/5/89	Out	Conf PA reN, research re agg, long jail conf cl, letter prep for cl.	4.00
1/6/89	Out	Letter prep for cl, copies, letter to CS, LD Cons Oly SH, jail conf cl	3.50
1/9/89	Out	Jail conf cl, conf CT, jail conf cl, LD Cons S Ct.	4.00
1/10/89	Out	Conf Ct, research re motions, LD Oly S Ct, jail conf cl, conf VF, LD Cons RM, letter to JMN	6.00
1/11/89	Out	Prep letter to CT, TAB, analyze invest status to date, research trip to JV, locate wit TRE, prepare mot/index	6.00
1/12/89	Out	Jail conf, I'V ST, research JV rec	3.50
1/13/89	Out	Cons JW, Cons Ch S, I'V wit DK, locate M, Cons MR trip to UG, Cons BH re M, LD cons AS, locate RF, LD E'b re study, jail re cl, conf Ct, locate Wts	7.50

44.50 Out-Of-Court Hrs at $25.00 Per Hour = $1,112.50

TOTAL = $1,112.50

Superior Court of the State of Washington
for the County of Yakima

Judge F. James Gavin
Department No. 3

Judge's Chambers

JAN Yakima, Washington 98901
YAKIMA COUNTY CLERK

January 11, 1989

Mr. Jeffrey C. Sullivan
Yakima County Prosecuting Attorney
Yakima County Courthouse
128 North Second Street
Yakima, Washington 98901

Mr. Howard W. Hansen
Deputy Prosecuting Attorney
Yakima County Courthouse
128 North Second Street
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Mr. Michael A. Frost
Attorney at Law
Market Place Two Building
Suite 200
2001 Western Avenue
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PREDILETTO LAW OFFICES
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Attorney at Law
230 South Second Street
Yakima, Washington 98901

Mr. Rick L. Hoffman
MOORE, HOFFMAN & ROWLEY
Attorneys at Law
24 North Second Street
Yakima, Washington 98902

RE: STATE OF WASHINGTON, vs. RUSSELL DUANE McNEIL,
Yakima County Cause No. 88-1-00428-1
AND STATE OF WASHINGTON, vs. HERBERT RICE, JR.,
Yakima County Cause No. 88-1-00427-2

Dear Counsel:

As you know, on January 10, 1989, the Supreme Court affirmed the decision of their court commissioner, denying the motions for discretionary review. Pursuant to Order dated September 22, 1988, I ordered all pretrial motions, together with affidavits and briefs, be filed by the defendants' within 30 days of the date the Supreme Court Opinion is filed in the Yakima County Clerk's office. The prosecutor then has 15 days to file responsive briefs and affidavits. The hearing on the pretrial motions is to be held no later than the sixtieth day following the date on which the Supreme Court's Opinion is filed with the Yakima County Clerk. The trials are to begin no later than the ninetieth day following the date the Opinion is filed.

I suggest counsel file pretrial motions well within the 30 day (45 day) periods, so they can be heard, not on the sixtieth day, but preferably well in advance. Because the trials must be set within ninety days of the date of filing, as much time between the Court's ruling on motions and the trial date as is possible, is necessary.

The Supreme Court decision was filed at the Clerk's office today, Thursday, January 12, 1989. The first day is excluded, but the last day is included. The thirtieth day would be February 13, because the 11th is a Saturday; the forty-fifth day would be February 27, because the 26th is a Sunday; the sixtieth day would be March 13, and the ninetieth day would be April 12.

Barring any lawful and good cause reasons, any continuances or changes will not be allowed.

Be sure to send copies of all motions, affidavits, or other documents to me. I also must know the amount of time counsel feels will be required for the argument of the motions.

Very truly yours,

F. JAMES GAVIN

FJG/ecw

cc: Pauline A. Enriquez,
Superior Court Administrator
Betty McGillen,
Yakima County Clerk

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RUSSELL DUANE MCNEIL,

Petitioner.

No. 55592-3

ORDER DENYING MOTION TO MODIFY COMMISSIONER'S RULING

88-1-428-1

This matter came on before the Court on its January 10, 1989, Motion Calendar on Petitioner's Motion to Modify Commissioner's Ruling. The Court having considered the motion and the files herein;

Now, therefore, it is hereby

ORDERED:

That Petitioner's Motion to Modify Commissioner's Ruling is denied.

DATED at Olympia, Washington this 10th day of January, 1989.

/Keith Callow

CHIEF JUSTICE

FILED

JAN 1 - 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

FILED

JAN 5 1989

BETTY McGILLEN
YAKIMA COUNTY CLERK

'89 JAN 5 PM 2 29

BETTY McGILLEN
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant.

No. 88-1-00428-1

ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY FEES AND EXPENSES for the month of December, 1988, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County office forthwith: The sum of $2,556.76 payable to attorney CHRISTOPHER S. TAIT, 230 South 2nd Street, Yakima, WA, 98901; and the sum of $612.50 payable to DIANA PARKER, in care of the offices of attorney CHRISTOPHER S. TAIT, at the above address.

DATED this 4 day of January, 1989.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

CHRISTOPHER S. TAIT
Of Attorneys for Defendant McNeil

/ / /

100

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

RECEIVED

'89 JAN 5 PM 2 29

BETTY McGILLEN
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA WASHINGTON

FILED
JAN 5 1989
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR ORDER APPROVING ATTORNEY FEES

MOTION

The undersigned attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for the undersigned defense counsel and private investigator for the month of December, 1988.

This motion is made and based upon the record and file herein and the below DECLARATION OF COUNSEL.

DATED this 4th day of January, 1989.

CHRISTOPHER S. TAIT
Of Attorneys for Defendant McNeil

DECLARATION OF COUNSEL

CHRISTOPHER S. TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference is my statement of time expended, together with that of our private investigator, in this case for the month of December, 1988.

SIGNED AND DATED at Yakima, Washington, this 4th day of January, 1989.

CHRISTOPHER S. TAIT
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

RECORD OF TIME

CHRISTOPHER TAIT — December 31, 1988

STATE vs. RUSSELL DUANE McNEIL

Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
12/1/88	Out	Jail conf, conf RLH, DP	4.00
12/5/88	Out	Jail conf, DP, locate wits	4.00
12/6/88	Out	Jail conf, locate wit, DP	4.00
12/7/88	Out	Motions, conf DP	4.00
12/9/88	Out	Jail conf, DP, TAB	4.00
12/12/88	Out	Locate wit, interview wit, DP	6.00
12/13/88	Out	Conf DP, motions	2.00
12/14/88	Out	Conf TAB, DP	2.00
12/15/88	Out	Jail conf cl, conf DP, TAB	3.00
12/16/88	Out	Jail conf cl, DP	2.00
12/19/88	Out	Jail conf, DP, TAB	2.00
12/20/88	Out	Preparing Motions	1.00
12/22/88	Out	Jail conf/prepare, review	1.00
12/27/88	Out	Conf DP, locate wits	6.00
12/27/88	Out	*30 Miles at 22.5 cents = $6.76	*
12/29/88	Out	LD Cons expert	3.00
12/30/88	Out	Conf DP, locate wits, I'V	3.00

51.00 Out-Of-Court Hrs at $50.00 Per Hour = $2,550.00

30 Miles at 22.5 Cents Per Mile = 6.76

TOTAL = $2,556.76

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
12/16/88	Out	LD Cons, Cons M Mc, Cons DVR, RE: JM, Conf CT, jail conf cl.	4.00
12/19/88	Out	Jail Conf cl, conf CT, prepare cl materials, copy/deliver	2.00
12/20/88	Out	Jail conf cl, read let/discuss JF, Copy TB materials/deliver	3.00
12/22/88	Out	Jail conf cl, prepare/deliver materials	1.50
12/27/88	Out	Locate wits(Wap, B.,etc) Cons E & CB (Cons W, Cons LN) Conf CT	4.00
12/28/88	Out	Jail conf cl, letter to JMN, letter to Cl, review ch/ materials	3.00
12/29/88	Out	Jail conf cl, prepare mit materials	3.00
12/30/88	Out	Locate wits, i'v wits, I'v wits, conf Ct, prep ch/ materials	4.00

24.50 Out-Of-Court Hrs at $25.00 Per Hour = $612.50
TOTAL = $612.50

Filed and Micro filmed
DEC 20 1988
Roll No. 340 983
BETTY McGILLEN, YAKIMA COUNTY CLERK

88 DEC 20 PM 3 42

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	ORDER AUTHORIZING
RUSSELL DUANE McNEIL,	)	PAYMENT BY YAKIMA
	)	COUNTY FOR INVESTIGATORY
Defendant	)	FEES AND EXPENSES

The Court having considered the DEFENDANT'S MOTION for ORDER APPROVING PRIVATE INVESTIGATOR FEES and EXPENSES and attached Declaration of Counsel, now, therefore,

IT IS HEREBY ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

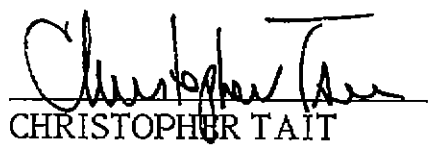
(1) The sum of $1,294.25 payable to DIANA G. PARKER, in care of the Office of Attorney Christopher Tait.

DATED THIS 20 DAY OF DECEMBER, 1988.

F. JAMES GAVIN, JUDGE

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys For Defendant McNeil

ORDER AUTHORIZING PAYMENT
BY YAKIMA COUNTY
FOR INVESTIGATORY FEES
AND EXPENSES 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
DEC 20 1988

RECEIVED

BETTY McGILLEN
YAKIMA COUNTY CLERK

'88 DEC 20 PM 3 43

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

SUPERIOR COURT
YAKIMA, WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	DEFENDANT'S MOTION AND
RUSSELL DUANE McNEIL,	)	SUPPORTING DECLARATION
	)	FOR ORDER APPROVING
	)	PRIVATE INVESTIGATOR
Defendant	)	FEES AND EXPENSES

MOTION

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court for the authorization of payment for investigatory services.

THIS MOTION is based upon the record and file herein and the accompanying DECLARATION OF COUNSEL.

DATED THIS 20 DAY OF DECEMBER, 1988.

Christopher Tait

CHRISTOPHER TAIT
Of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

97

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Diana G. Parker has been authorized to pursue investigatory services on behalf of the Defendant McNeil. An Order Authorizing Investigatory Services and Setting Rates was entered in the above-entitled cause and signed by the Honorable F. James Gavin approving said investigatory services and authorizing payment of her automobile mileage to be reimbursed at the rate of 22 1/2 cents per mile. Diana G. Parker was further authorized to submit statements, through counsel, on or about the 1st and the 15th day of each month.

Attached hereto and incorporated by reference for approval is the statement of Diana G. Paker for the private investigatory fees and expenses for her services from December 1, 1988, to December 15, 1988, performed by her on behalf of the above-named Defendant, McNeil.

SIGNED AND DATED at Yakima, Washington, this 20 day of DECEMBER, 1988.

CHRISTOPHER TAIT
of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
THE LANDMARK BUILDING
230 SOUTH SECOND STREET
SUITE 201
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
12/1/88	Out	Conf CT, Conf RH, Jail conf, proparation client materials, LD Cons BN	5.75
12/2/88	Out	LD Cons K Mc, LD Cons Dr. G, Research RE Osteo, LD Cons BM, jail conf, review dif st. Conf Ct (phone)	6.50
12/5/88	Out	Conf CT, LD Cons K Mc, Conf VF, jail conf cl, prepare mit materials, research	4.00
12/6/88	Out	Conf CT, jail conf cl, review cl st in detail, review statement (LC, LC, BS)	3.50
12/7/88	Out	Letter to JMN, locate wits, locate EL, JJ, Ld Cons M McG. LD Cons BG	5.00
12/8/88	Out	Conf SH, prepare mit materials, research re men (JMD), LD Cons JJ	4.75
12/9/88	Out	LD Cons RC, Conf CT, locate CC, Write letter to CC, record notes Re RC/Conf Ct, (2) jail conf CL & FT	5.00
12/12/88	Out	Conf Ct, locate wits (travel to U. G. etc), I'V SB, RW	3.00
12/12/88	Out	*30 Miles at 22.5 cents = **$6.75**	*
12/13/88	Out	Locate wits (NM, CC) LD Cons EL (sed), LD /Cons JL, LD Cons Mrs L, Type/record VR, notes from I'V	4.00

12/14/88	Out	Cl phone conf, RE: FT, Conf CT, Consult library Ref re JF, for cl, Cons CPS, (M MG) locate WJ, LD Cons CALA 2, Jail Conf CL	6.00
12/15/88	Out	Jail conf cl, read TAB Corres, letter to JF, letter to JMN, LD Cons MMG, Prepare soc serv materials for mit, Conf CT	4.00

51.50 Out-Of-Court Hrs at $25.00 Per Hour = $1,287.50
30 Miles at 22.5 Cents Per Mile = $ 6.75
TOTAL $1,294.25

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Roll No. 339 791
BETTY McGILLEN, YAKIMA COUNTY CLERK

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BETTY GILLEN
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY AND PRIVATE INVESTIGATOR FEES AND EXPENSES for the month of November, 1988, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County office forthwith:

(1) The sum of $2,872.23 payable to attorney CHRISTOPHER S. TAIT, 233 South Third Avenue (Second Floor), Yakima, WA, 98901;

(2) The sum of $1,350.00 payable to attorneys THOMAS BOTHWELL and PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S., 302 North Third Street, P.O. Box #2129, Yakima, WA, 98907; and

(3) The sum of $1,087.50 payable to DIANA PARKER, in

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

care of the offices of attorney Christopher S. Tait.

DATED this 1 day of December, 1988.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

FILED
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YAKIMA COUNTY CLERK

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BETTY McGILLEN
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-ØØ428-1 DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR ORDER APPROVING ATTORNEY AND PRIVATE INVESTIGATOR FEES AND EXPENSES

MOTION

The undersigned attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for defense counsel, and private investigator fees and expenses, for the month of November, 1988.

This motion is made and based upon the record and file herein and the below DECLARATION OF COUNSEL.

DATED this 1st day of December, 1988.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

DECLARATION OF COUNSEL

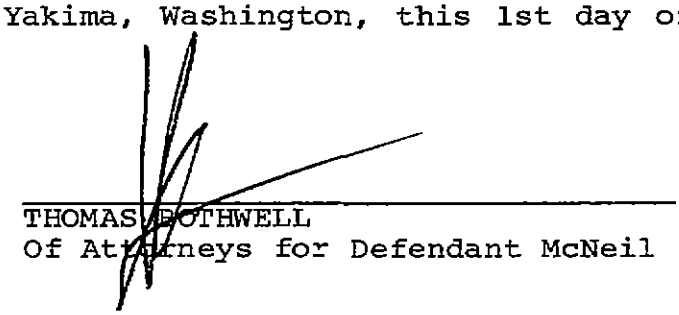
THOMAS BOTHWELL, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference are statements of counsel and our private investigator for the month of November, 1988.

SIGNED AND DATED at Yakima, Washington, this 1st day of December, 1988.



THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

RECORD OF TIME

CHRISTOPHER TAIT — NOVEMBER 30, 1988

STATE vs. RUSSELL DUANE McNEIL

Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
11/1/88	Out	I'V	1.00
11/2/88	Out	I'V, conf DP	1.00
11/3/88	Out	Conf TAB, DP, S. CT.	1.00
11/4/88	Out	Conf TAB, JCS, RLH, DP jail visit, research	3.00
11/7/88	Out	Conf TAB, review S. Ct order Conf DP research	4.00
11/8/88	Out	Prep objection (letter to counsel Conf TAB, RLH, research	4.00
11/9/88	Out	Conf TAB, DP, file review	2.00
11/10/88	Out	Conf Frost, TAB, RLH, motions	1.50
11/14/88	Out	Jail conf DP motions	2.00
11/15/88	Out	Jail conf wit DP, TAB, morions	4.00
11/16/88	Out	Travel (Sky), research, conf Frost	9.50
11/16/88	Out	*305 Miles at 22.5 cents = **$68.63**	*
11/17/88	Out	Conf DP, TAB	2.00
11/18/88	Out	Travel/UG I'V	3.00
11/18/88	Out	*8 Miles at 22.5 cents = **$1.80**	*
11/21/88	Out	Conf JCS, DP, review cases	1.00
11/22/88	Out	Conf jail, TAB, Frost, motions, UG	3.00
11/22/88	Out	*8 Miles at 22.5 cents = **$1.80**	*
11/23/88	Out	Research Barh., motions	3.00
11/28/88	Out	Conf HWH, TAB, JCS, DP, jail Review cases	4.00
11/29/88	Out	Conf jail motions	4.00
11/30/88	Out	Conf DP, I'V, jail conf	3.00

56.00 Out-Of-Court Hrs at $50.00 Per Hour=	$2,800.00
321 Miles at 22.5 Cents Per Mile =	$ 72.23
TOTAL	**$2,872.23**

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 NORTH THIRD STREET
POST OFFICE BOX 2129
YAKIMA, WASHINGTON 98907-2129

L. E. PREDILETTO
WILLIAM L. HALPIN
GOMER L. CANNON
WM. T. SCHARNIKOW
THOMAS BOTHWELL

TELEPHONE
AREA CODE 509
248-1900

S T A T E M E N T
November 1988 Legal Services Rendered

ATTORNEY: THOMAS BOTHWELL and PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S.

RE: STATE OF WASHINGTON v. RUSSELL DUANE McNEIL, Yakima County Cause No. 88-1-00428-1

Date:	Description:	Time:
11/03/88	Conference with Chris Tait	1.50
11/04/88	Conference with Chris Tait	1.25
11/07/88	Conference with Chris Tait and research	3.25
11/08/88	Conference with Chris Tait and research	2.75
11/10/88	Conference with Mike Frost, Chris Tait; motions	1.5
11/13/88	Research	6.0
11/15/88	Conference with Chris Tait and research	3.0
11/17/88	Conference with Diana Parker and Chris Tait	2.0
11/22/88	Conference with Chris Tait	2.5
11/23/88	Telephone conversation with Mike Frost	.5
11/28/88	Meeting with Chris Tait; research	2.75

TOTAL IN-COURT HOURS: Ø.Ø hours at $6Ø.ØØ per hour:	$ -Ø-
TOTAL OUT-OF-COURT HOURS: 27.Ø hours at $5Ø.ØØ per hour:	1,35Ø.ØØ
TOTAL:	$1,35Ø.ØØ

/ / /

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
11/16/88	Out	Research RE: Comm, DP, Pros D, jail conf, research in YPD record, trip to locate wits (Sky)	8.00
11/17/88	Out	Conf client, LD Cons OlyTS, legal research, photo work/retrieval, locate f.w.	4.00
11/18/88	Out	Trip to locate wits (R), jail conf cl Conf HN at DVR, research, Re; Rupe, Poos dis, etc.	3.50
11/21/88	Out	Conf CT, calls to locate wits, prepare client materials & send research, I'V H.C. for mit, cons SR	4.00
11/22/88	Out	Conf CT, locate wits, photo long jail conf client, trip to I'V wits, prepare photo materials, trip to locate R., cons SK re: NR	6.00
11/23/88	Out	Research, cons BH, prepare dic chart re: B.P., conf CT	3.00
11/28/88	Out	Conf CT, long jail conf cl, conf VF, I'V RMN, prpare BP material	5.00
11/29/88	Out	Long Jail conf, Conf CT, research in DPM stats check, review & trial prep.	6.00
11/30/88	Out	Jail conf cl, write client letter, prepare mit materials, conf CT, locate CD, SB, NM client maintenance	4.00

43.50 HRS at $25.00 Per Hour = $1,087.50
TOTAL = $1.087.50

FILED
and Micro filmed
NOV 16 1988
Roll No. 338 1113
BETTY McGILLEN, YAKIMA COUNTY CLERK

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BETTY ... CLERK
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	ORDER AUTHORIZING
RUSSELL DUANE McNEIL,	)	PAYMENT BY YAKIMA
	)	COUNTY FOR INVESTIGATORY
Defendant	)	FEES AND EXPENSES

The Court having considered the DEFENDANT'S MOTION for ORDER APPROVING PRIVATE INVESTIGATOR FEES and EXPENSES and attached Declaration of Counsel, now, therefore,

IT IS HEREBY ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

(1) The sum of $1,325.00 payable to DIANA G. PARKER, in care of the Office of Attorney Christopher Tait.

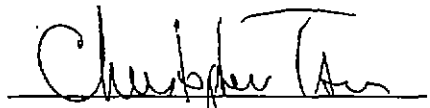
DATED THIS 16 DAY OF NOVEMBER 1988.

F. JAMES GAVIN, JUDGE

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

94

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys For Defendant McNeil

ORDER AUTHORIZING PAYMENT
BY YAKIMA COUNTY
FOR INVESTIGATORY FEES
AND EXPENSES 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

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YAKIMA ... TON

FILED
NOV 16 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	
	)	DEFENDANT'S MOTION AND
	)	SUPPORTING DECLARATION
	)	FOR ORDER APPROVING
	)	ATTORNEY AND PRIVATE
RUSSELL DUANE McNEIL,	)	INVESTIGATOR FEES AND
	)	EXPENSES
	)	
Defendant	)	

MOTION

THE UNDERSIGNED attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for defense counsel, and private investigator fees and expenses, for the month of November 1988.

THIS MOTION is based upon the file and record herein and the below DECLARATION OF COUNSEL.

DATED this 16 day of November, 1988.

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

93

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court- appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference are statements of counsel and our private investigator for the month of November, 1988.

SIGNED AND DATED at Yakima, Washington, this 16 day of November, 1988.

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
11/1/88	Out	Conf VR, jail conf cl, conf CT	3.00
11/2/88	Out	Index biogs, purchase materials review K. Ross docs, locate HC, conf VS, ed conf HN, jail conf cl, review RK Materials	5.00
11/3/88	Out	Write cl letter, letter JMN, prepare ed materials, conf VS, D, FV, deliver ed materials, Conf CT RE NR, locate LC, P to I'V re TP	6.00
11/4/88	Out	Conf MG, LD Cons NB, KB, LD Cons OLY, review materials jail conf cl cl (CT & DP), conf MG, conf VF, Conf VS (Sat)	6.75
11/7/88	Out	Conf CT, Conf VS, jail conf cl, prepare mit biogs, gather wit names to locate, LD Cons AT re FF, prepare MN Materials.	4.00
11/8/88	Out	Prepare mit materials, locate (JJ,JS) letter toJMN, letter to CS, locate (FF) LD Cons BM, Catalogue photos, conf CT, Client maint.	5.25
11/9/88	Out	Conf CT, read letter re Objection prepare biog/Witness profiles, index materials for trial	4.00
11/10/88	Out	LD Cons BP, order iats for client, LD consult, jail conf cl, document preparation, delivery, return	6.50
11/11/88	Out	TAB, Conf CT, prepare mit biogs,	3.00

		photographs	
11/14/88	Out	Long jail conf cl, conf VF, LD Cons OLY, Conf Teacher, Conf CT	4.00
11/15/88	Out	Jail conf cl, Conf/travel teacher, photo retrieval (CM) conf VF Research re motions, review DP materials for cites, conf CT	5.50

53.00 HRS at $25.00 Per Hour = $1,325.00

TOTAL = $1,325.00

FILED
NOV 7 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

THE SUPREME COURT OF WASHINGTON

FILED
NOV 4 PM 11:59
SUPREME COURT
STATE OF WASHINGTON

58-1-428-7

STATE OF WASHINGTON, Respondent, v. HERBERT RICE, JR., Petitioner.	NO. 55591-5
STATE OF WASHINGTON, Respondent, v. RUSSELL D. McNEIL, Petitioner.	RULING DENYING MOTIONS FOR DISCRETIONARY REVIEW NO. 55592-3

FILED
NOV 7 1988
CLERK OF
SUPREME COURT
STATE OF WASHINGTON

Russell McNeil and Herbert Rice, Jr. each stand charged in Yakima County Superior Court with one count of aggravated first degree murder and a second count of acting as an accomplice to aggravated first degree murder. The State has also given notice to both defendants of its intent to seek the death penalty. Each was about 17 1/2 years old when the crimes—the murder of an elderly couple—occurred.

Rice and McNeil each moved for dismissal of the notice of intent to seek the death penalty, contending, among other arguments, that the state and federal constitutional protections

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against cruel and unusual punishment prohibit imposition of the death penalty for a crime committed by a minor. The trial court denied these motions. Rice and McNeil now move for direct discretionary review, seeking an interlocutory decision by this court on that constitutional question.

The rules governing when interlocutory review is appropriate are quite strict:

> [D]iscretionary review will be accepted only:
> (1) If the superior court has committed an obvious error which would render further proceedings useless; or
> (2) If the superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act; or
> (3) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court.

RAP 2.3(b). None of these criteria is met here.[1]

In Thompson v. Oklahoma, ___ U.S. ___, 101 L. Ed. 2d 702, 108 S. Ct. 2687 (1988), the Supreme Court recently disapproved of imposition of the death penalty on a person who was under 16 when he committed his crime. A plurality of the Justices concluded that the death penalty for such a defendant would constitute cruel and unusual punishment. In a concurring opinion necessary to the Court's decision, however, Justice

[1]Petitioner McNeil suggests that discretionary review might be appropriate under the standards of RAP 2.3(d). That rule, however, concerns only review of Superior Court appellate decisions in cases originating in a court of limited jurisdiction. It has no applicability here.

O'Connor declined to reach the Eighth Amendment question. Although she expressed concern that application of the death penalty for a crime committed by a 15-year-old would be of "very dubious constitutionality," she rested her decision instead on the lack of legislative consideration of the question, as evidenced by the absence of a minimum age in the Oklahoma capital punishment statute.

Petitioners have argued ably that the considerations relied upon by the Court in Thompson should apply to a 17-year-old with equal force as to a 15-year-old. Given the method of analysis which the Court employs on Eighth Amendment issues, however, it is far from clear whether either the plurality or Justice O'Connor would extend their reasoning to preclude capital punishment for any crime committed by a person under 18. Indeed, two cases which apparently will answer that question will be heard by the Supreme Court this term. High v. Zant, No. 87-5666, and Wilkens v. Missouri, No. 87-6026. On balance, and based upon my own study of the opinions in Thompson, I am unable to conclude that the trial court here committed obvious or probable error in denying the motion to dismiss on Eighth Amendment grounds.

Petitioners also argue ably that imposing the death penalty for crimes committed by minors would violate the state constitution's prohibition against "cruel punishment," Const. art. 1, § 14, even if it would not violate the Eighth Amendment.

This is, no doubt, a clear possibility. Petitioners correctly note that the analytical framework for such an inquiry is supplied by State v. Gunwall, 106 Wn. 2d 54, 720 P. 2d 808 (1986). I believe this court would consider itself better served, however, if it has the benefit of the Supreme Court's Eighth Amendment conclusion before addressing (if necessary) the state constitutional provision. As noted above, cases presently before the Supreme Court will likely provide that guidance. Perhaps most importantly, the limited authority that presently exists construing Const. art. 1, § 14 provides no direct support for petitioners' proposed result on the specific death penalty issue presented. On the state constitutional question as well, therefore, I cannot conclude that the trial court's decision was obvious or probable error.

Finally, I am mindful that the pretrial and trial of capital cases is a lengthy, arduous, and expensive proposition. Defendants and the State therefore often share an interest in securing interlocutory decisions on issues that may determine the availability of the death penalty. Nonetheless, interlocutory review inevitably delays the conclusion of trial court proceedings and frequently simply permits several piecemeal appeals in the same case. Since either of these results is undesirable, discretionary review is only sparingly afforded. The applicable criteria, set out in RAP 2.3(b) and quoted above, are not met here.

The motions for discretionary review are denied.

DATED at Olympia, Washington, November 4, 1988.

COMMISSIONER

REGINALD N. SHRIVER
CLERK

STEVEN P. HELGESON
DEPUTY CLERK

(206) 753-5080

The Supreme Court

State of Washington

Sixth Floor Highways-Licenses Building
12th and Washington Street
Mail Stop AV-11
Olympia, WA 98504-0511

FILED
NOV 7 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

November 4, 1988

Dobbs, Moore & Kirkevold
Mr. Rickey Hoffman
24 N. Second Street
Yakima, Washington 98901

Honorable Jeffrey Sullivan
Yakima County Prosecutor
Mr. Howard Hansen, Deputy
329 County Courthouse
Yakima, Washington 98901

Prediletto, Halpin, Cannon & Scharnikow, P.S.
Mr. Thomas Bothwell
P.O. Box 2129
Yakima, Washington 98907

Tait & Torok
Mr. Christopher Tait
103 S. Third Street
Yakima, Washington 98901

Re: Supreme Court No. 55591-5 - State v. Herbert Rice, Jr.
Supreme Court No. 55592-3 - State v. Russell Duane McNeil
Yakima County Nos. 881004272 & 881004281

Counsel:

Counsel:

Enclosed please find Ruling Denying Motion for Discretionary Review, signed by the Supreme Court Clerk on November 4, 1988, in the above entitled cause.

Very truly yours,

Steven P. Helgeson

STEVEN P. HELGESON
Deputy Clerk

SPH:tt

cc: Hon. Betty McGillen, Clerk
Yakima County Superior Court

91

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EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

NOV 4 1988

Bill No. 338 287

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant.

No. 88-1-00428-1

ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY AND PRIVATE INVESTIGATOR FEES AND EXPENSES for the month of October, 1988, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County office forthwith:

(1) The sum of $2,934.38 payable to attorney CHRISTOPHER S. TAIT, 103 South Third Avenue, Yakima, WA, 98901;

(2) The sum of $1,562.50 payable to attorneys THOMAS BOTHWELL and PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S., 302 North Third Street, P.O. Box #2129, Yakima, WA, 98907; and

(3) The sum of $1,244.25 payable to DIANA PARKER, in

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

care of the office of attorney Christopher S. Tait.

DATED this 4 day of November, 1988.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

BETTY McGILLEN
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

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BETTY McGILLEN
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

FILED
NOV 4 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR ORDER APPROVING ATTORNEY AND PRIVATE INVESTIGATOR FEES AND EXPENSES

MOTION

The undersigned attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for defense counsel, and private investigator fees and expenses, for the month of October, 1988.

This motion is made and based upon the record and file herein and the below DECLARATION OF COUNSEL.

DATED this 4th day of November, 1988.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

DECLARATION OF COUNSEL

THOMAS BOTHWELL, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference are statements of counsel and our private investigator for the month of October, 1988.

SIGNED AND DATED at Yakima, Washington, this 4th day of November, 1988.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

S T A T E M E N T
October 1988 Legal Services Rendered

ATTORNEY: THOMAS BOTHWELL and PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S.

RE: STATE OF WASHINGTON v. RUSSELL DUANE McNEIL, Yakima County Cause No. 88-1-ØØ428-1

Date:	Description:	Time:
1Ø/7/88	Meeting with Chris Tait	1.ØØ
1Ø/8/88	Research	2.25
1Ø/7/88	Research for Motion for Discretionary Review	5.75
1Ø/1Ø/88	Conference with Chris Tait	1.25
1Ø/11/88	Phone conference with Rick Hoffman	.25
1Ø/12/88	Drafting Motion and Statement of Grounds for Direct Review	9.25
1Ø/13/88	Phone call to office from Olympia regarding preparation of Motion	.5
1Ø/14/88	Phone conference with Mike Frost	.25
1Ø/14/88	Final draft of Motion for Discretionary Review; cover letter to Clerk; arrangements for filing in Olympia	5.25
1Ø/19/88	Review Co-Defendant Rice's Motion for Discretionary Review; letter to Mike Frost; phone conversation with Mike Frost's office	.5

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

10/25/88	Conference with Chris Tait	1.0
10/27/88	Review State's Response to Motion for Discretionary Review	.5

COSTS:

10/12-13/88	Photocopying of approximately 1000 pages (Motion for Discretionary Review; Statement of Grounds for Direct Review; all attachments) at 10 cents per page	$ 100.00
10/14/88	Barry Brammer, mileage expenses at 22.5 cents per mile for round-trip (Yakima to Olympia) for filing Motion for Discretionary Review	75.00

R E C A P I T U L A T I O N

TOTAL IN-COURT HOURS: 0.0 hours at $60.00 per hour:	$ -0-
TOTAL OUT-OF-COURT HOURS: 27.75 hours at $50.00 per hour:	1,387.50
TOTAL COSTS	175.00
TOTAL:	$1,562.50

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

RECORD OF TIME

CHRISTOPHER TAIT — OCTOBER 31, 1988

STATE vs. RUSSELL DUANE McNEIL

Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
10/3/88	Out	Conf DP, IV	2.50
10/4/88	Out	Conf DP, IV	2.00
10/5/88	Out	Jail Conf, DP, IVA	1.50
10/7/88	Out	Conf DP, IV, review	1.50
10/10/88	Out	Conf, TAB, jail, research	5.00
10/10/88	Out	* 280 Miles at 22.5 cents = **$63.00** *	
10/11/88	Out	Research (Seattle)	9.00
10/12/88	Out	Research, motions, conf RLHA	5.00
10/13/88	Out	Research (Harrah)	6.00
10/13/88	Out	*45 Miles at 22.5 cents = **$10.13** *	
10/14/88	Out	Conf TAB, RLHA	3.00
10/17/88	Out	Review mit, record, DP	2.00
10/18/88	Out	Review Record	1.00
10/20/88	Out	Conf DP, jail	1.00
10/24/88	Out	Conf DP, LE, jail	2.00
10/25/88	Out	Conf DP, RLH, TAB, review record	3.00
10/26/88	Out	Review mitigation	2.50
10/27/88	Out	Read Statements	2.00

10/28/88	Out	Conf DP, LE, review record	2.00
10/31/88	Out	Travel, Harrah, Conf wit, DP	6.00
10/31/88	Out	*50 Miles at 22.5 cents = **$11.25**	*

57.00 Out-Of-Court Hrs at $50.00 Per Hour	=	$2,850.00
375.00 Miles at 22.5 Cents Per Mile	=	$ 84.38
TOTAL	=	**$2,934.38**

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
10/17/88	Out	Review Fitz materials, jail conf cl client study/tasks, contact wits (NB) cons BM, LD, Cons school, LD V of W re: MG, conf VF	6.75
10/18/88	Out	Cons JW, conf VF, LDC, KR, locate wit NB, LD, Cons KR, jail conf cl, photog./prints taken, developed, reviewed.	5.75
10/19/88	Out	I'V wits Wapato (TS, S, KH), photog, locate wit (PM) I'V mit wit, jail conf CT,	6.00
10/19/88	Out	*30 miles at 22.5 cents = **6.75**	*
1/20/88	Out	Jail conf (JS), jail cl, conf VF, conf CT, locate RD, prepare mit materials< cons RE: ed mats/client	4.25
10.21/88	Out	Locate witts (N.C, SR) Conf CT, JS	3.00
10/24/88	Out	Jail conf cl, LD cons TS, PACE, conf VF, research RE: A1 & Motion	2.50
10/25/88	Out	LD Cons PACE, Conf VF, prepare materials SON, NM, WJ visit, Yak Her Cons WC Re: client ed	5.00
10/26/88	Out	Prepare mit materials biogs, conf CT, locate DP	3.50
10/27/88	Out	I'V KB, PL, LW, locate DP, locate RD, Cons WC, jail conf cl	3.75
10/28/88	Out	Cons WC, Re ed LD Cons, Mrs C RE: RD, DC, locate RD, DC, Conf CT	4.00

10/31/88	Out	Review photos, locate wits (DS, LC) Harrah, Wapato, etc., I'V (PD) Conf CT, conf VF, wrtie letter to JMN	5.00

49.50 HRS at $25.00 Per Hour	=	$1,237.50
30 Miles at 22.5 Cents Per Mile	=	6.75
TOTAL	=	**$1,244.25**

FILED
and Micro filmed
OCT 19 1988
Roll No. 337 269
BETTY McGILLEN, YAKIMA COUNTY CLERK

RECEIVED

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BETTY McGILLEN
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA COUNTY, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	ORDER AUTHORIZING
RUSSELL DUANE McNEIL,	)	PAYMENT BY YAKIMA
	)	COUNTY FOR INVESTIGATORY
Defendant	)	FEES AND EXPENSES

The Court having considered the DEFENDANT'S MOTION for ORDER APPROVING PRIVATE INVESTIGATOR FEES and EXPENSES and attached Declaration of Counsel, now, therefore,

IT IS HEREBY ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

(1) The sum of $1,056.25 payable to DIANA G. PARKER, in care of the Office of Attorney Christopher Tait.

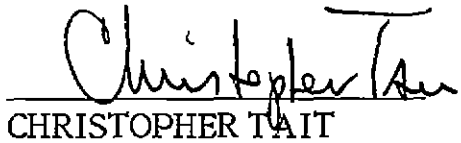
DATED THIS 19 DAY OF OCTOBER, 1988.

F. JAMES GAVIN, JUDGE

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

88

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys For Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED

OCT 19 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

'88 OCT 19 PM 2

BETTY McGILLEN
EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	
	)	DEFENDANT'S MOTION AND
RUSSELL DUANE McNEIL,	)	SUPPORTING DECLARATION
	)	FOR ORDER APPROVING
	)	PRIVATE INVESTIGATOR
Defendant	)	FEES AND EXPENSES

MOTION

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court for the authorization of payment for investigatory services.

THIS MOTION is based upon the record and file herein and the accompanying DECLARATION OF COUNSEL.

DATED THIS 19 DAY OF OCTOBER, 1988.

Christopher Tait

CHRISTOPHER TAIT
Of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

87

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Diana G. Parker has been authorized to pursue investigatory services on behalf of the Defendant McNeil. An Order Authorizing Investigatory Services and Setting Rates was entered in the above-entitled cause and signed by the Honorable F. James Gavin approving said investigatory services and authorizing payment of her automobile mileage to be reimbursed at the rate of 22 1/2 cents per mile. Diana G. Parker was further authorized to submit statements, through counsel, on or about the 1st and the 15th day of each month.

Attached hereto and incorporated by reference for approval is the statement of Diana G. Paker for the private investigatory fees and expenses for her services from October 1, 1988, to October 15, 1988, performed by her on behalf of the above-named Defendant, McNeil.

SIGNED AND DATED at Yakima, Washington, this 19 day of OCTOBER, 1988.

Christopher Tait

CHRISTOPHER TAIT
of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
10/3/88	Out	Conf CT, prepare mit materials locate DR., jail conf cl, LD Cons MSG RE: photos, review ed transcritps, chart same	5.50
10/4/88	Out	Conf CT, prepare mit materials LD Cons CPS, Topp/Sea	3.00
10/5/88	Out	Conf CT, jail conf cl	2.00
10/6/88	Out	Conf FG, letter Re client, jail conf client, review decline stats, prepare decline materials	4.25
10/7/88	Out	Letter to JM, conf DC, prepare housing record, conf B M RE: ed. materials for client	3.00
10/10/88	Out	LD Cons WB, conf Ct, check records for SJ, investigate SJ details, cthse, pul conf, SJ, locate wits	5.50
10/11/88	Out	Locate wits (JK, SR,) jail conf cl, cons LP, conf VF	3.75
10/12/88	Out	Doc retrieval/delivery (motion), locate wits (JB, JD) research RE DP, conf client< conf Ct	6.00
10/13/88	Out	Conf Ct, jail con JS, locate wits (Harrah), Cons DOC, US Gov empl RE (LN, S/RS) motion prep tasks, copies jail conf (JC) interview wits	6.00
10/14/88	Out	Jail conf cl, TAB, read materials (trial prep), conf Ct	3.25

42.25 HRS at $25.00 Per Hour =		$1,056.25
TOTAL	=	**$1,056.25**

FILED
and Micro filmed
OCT 13 1988
Roll No. 336 942
BETTY McGILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant	NO: 88-1-00428-1 ORDER OF INDIGENCY

THIS MATTER having come on regularly for presentation, the Court finding that the Defendant lacks sufficient funds to prosecute an appeal herein, and applicable law grants Defendant a right to review at public expense to the extent defined by this order, now, therefore,

IT IS HEREBY ORDERED, as follows:

1. RUSSELL DUANE MCNEIL is entitled to counsel for discretionary review wholly at public expense.

2. CHRISTOPHER TAIT and THOMAS BOTHWELL are appointed as counsel for review. Appointed counsel may be assisted by court appointed private investigators.

3. RUSSELL DUANE MCNEIL is entitled to the following at public expense:

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

86

a. Those portions of the verbatim report of proceedings reasonably necessary for review as follows:

1) Argument on Motion to Strike Notice to Seek the Death Penalty.
2) Additional proceedings as required.

b. A copy of the following clerks papers:

1) Any necessary to present the argument regarding motion to strike death penalty notice.

c. Preparation of original documents to be reproduced by the clerk as provided in Rule 14.3(b).

d. Reproduction of briefs and other papers on review which are reproduced by the clerk of the appellate court.

DATED this 13 day of October, 1988.

JUDGE

Presented by:

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1348

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FILED
and Micro Filmed
OCT 6 1988
Roll No. 336 541 M
... McGILLEN YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY FEES AND EXPENSES for the months of August and September of 1988, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County office forthwith: The sum of $1,827.50 payable to attorneys THOMAS BOTHWELL and PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S., 302 North Third Street, P.O. Box #2129, Yakima, WA, 98907.

DATED this 6 day of October, 1988.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

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FILED
OCT 6 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant.

No. 88-1-00428-1

DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR ORDER APPROVING ATTORNEY FEES

MOTION

The undersigned attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for the undersigned defense counsel for the months of August and September of 1988.

This motion is made and based upon the record and file herein and the below DECLARATION OF COUNSEL.

DATED this 6th day of October, 1988.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

DECLARATION OF COUNSEL

THOMAS BOTHWELL, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference is my statement of time expended in this case for the months of August and September of 1988.

SIGNED AND DATED at Yakima, Washington, this 6th day of October, 1988.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 NORTH THIRD STREET
POST OFFICE BOX 2129
YAKIMA, WASHINGTON 98907-2129

L. E. PREDILETTO
WILLIAM L. HALPIN
GOMER L. CANNON
WM. T. SCHARNIKOW
THOMAS BOTHWELL

TELEPHONE
AREA CODE 509
248-1900

S T A T E M E N T
August and September 1988 Legal Services Rendered

ATTORNEY: THOMAS BOTHWELL and PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S.

RE: STATE OF WASHINGTON v. RUSSELL DUANE McNEIL, Yakima County Cause No. 88-1-00428-1

Date:	Description:	Time:
8/11/88	Research	3.5
8/18/88	Telephone conversation with Chris Tait	.75
8/18/88	Telephone conversation with Mike Frost and Rick Hoffman	.5
9/05/88	Research	3.5
9/06/88	Telephone conversation with Chris Tait	.25
9/06/88	File review; prepare for 9/19/88 hearing	5.0
9/07/88	Telephone conversation with Rick Hoffman	.25
9/07/88	Research regarding discretionary/ interlocutory appeal	3.5
9/07/88	Telephone conversation with Howard Hansen, prosecutor	1.0
9/08/88	File review	1.5
9/08/88	Meeting with Chris Tait	1.0

Date:	Description:	Time:
9/Ø8/88	COURT HEARING	4.Ø
9/Ø8/88	Meeting with Messrs. Frost and Hoffman, then Sullivan and Hansen	1.25
9/Ø8/88	Telephone conversation with Chris Tait	.25
9/Ø9/88	File review; research; memos to file	2.Ø
9/12/88	Meeting with Chris Tait	1.Ø
9/15/88	Research	2.25
9/19/88	Telephone conversation with Chris Tait	.5
9/21/88	Meeting with Chris Tait; review proposed Findings of Fact, etc.; letter to Judge Gavin	1.Ø
9/26/88	Meeting with client; file review; research regarding discretionary review	2.75
	TOTAL IN-COURT HOURS: 4.Ø hours at $6Ø.ØØ per hour:	$ 24Ø.ØØ
	TOTAL OUT-OF-COURT HOURS: 31.75 hours at $5Ø.ØØ per hour:	1,587.5Ø
	TOTAL:	$1,827.5Ø

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McMILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	
	)	ORDER AUTHORIZING
RUSSELL DUANE McNEIL,	)	PAYMENT BY YAKIMA
	)	COUNTY
	)	
Defendant	)	

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY AND PRIVATE INVESTIGATOR FEES AND EXPENSES for the month of September, 1988, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

(1) The sum of ~~$2,050.00~~ $2100 payable to attorney CHRISTOPHER TAIT, 103 South Third Street, Yakima, WA 98901;

(2) The sum of $841.25 payable to DIANA G. PARKER, in care of the office of attorney Christopher Tait.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DATED this 6 day of October, 1988.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

CHRISTOPHER TAIT
Attorney for Defendant McNeil

ORDER AUTHORIZING
PAYMENT BY YAKIMA
COUNTY 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1345

FILED
OCT 6 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant	NO. 88-1-00428-1 DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR ORDER APPROVING ATTORNEY AND PRIVATE INVESTIGATOR FEES AND EXPENSES

MOTION

THE UNDERSIGNED attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for defense counsel, and private investigator fees and expenses, for the month of September, 1988.

THIS MOTION is based upon the file and record herein and the below DECLARATION OF COUNSEL.

DATED this 6th day of October, 1988.

Christopher Tait

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1345

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court- appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference are statements of counsel and our private investigator for the month of September, 1988.

SIGNED AND DATED at Yakima, Washington, this 6 day of October, 1988.

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

CHRISTOPHER TAIT — September 30, 1988

STATE vs. RUSSELL DUANE McNEIL

Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
9/1/88	Out	Conf DP, review new materials	2.00
9/2/88	Out	Conf CSS, review new materials	2.00
9/6/88	Out	Prepare for pre-trial, review records	2.00
9/7/88	Out	Conf DP, review records, prepare motions	2.00
9/8/88	IN	Conf TAB, DP, Court	**8.00**
9/9/88	Out	Conf DP, prepare file material	2.00
9/12/88	Out	Conf DP, TAB	1.00
9/14/88	Out	Review for Petition for review, Conf DP, research	2.00
9/16/88	Out	Conf DP, review records	1.00
9/19/88	IN	Court	**1.00**
9/19/88	Out	Prepare Pleadings, review Memo	3.00
9/20/88	Out	Research, review, conf DP	2.00
9/21/88	Out	Review for pre-trial; Conf TAB Prepare Scheduling Order	2.00
9/22/88	IN	Court	**1.00**
9/22/88	Out	Conf cl, review records, conf DP	3.00
9/23/88	Out	Review materials (educational)	1.00
9/26/88	Out	Conf DP, review records	1.00

9/27/88	Out	Conf DP, LD Consult, motion review	2.00
9/28/88	Out	Conf DP, review Order denying	2.00

CT 30 ~~29~~.00 Out-Of-Court Hrs at $50.00 Per Hour = $1500.00 CT ~~$1,450~~.00

10.00 In-Court Hrs at $60.00 Per Hour = $ 600.00

TOTAL = ~~$2,050~~.00

2100.00 CT

TAIT

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL 9/30/88
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
9/16/88	Out	LD Cons KM, review crim records, Research RE: declaration	4.00
9/21/88	Out	Conf VF, Cons MB	1.50
9/21/88	Out	Conf CT, jail conf cl, locate mit wit D.H., cons OAC RE declination stats	2.00
9/22/88	Out	Conf CT, jail conf cl, JCS, JG, copies, research	2.25
9/23/88	Out	Locate wits (Dr H, SS, NB), research RE: CPS/SSI materials. Locate edu wits/records.	4.15
9/26/88	Out	LD Cons DSHS, Conf CT, review CPS records, jail conf cl., LD Cons DSHS, research SSI data	5.00
9/27/88	Out	LD cons SM, LD Cons CPS, research DSHS records, LD Cons RG, Conf CT, Conf SSI	4.00
9/28/88	Out	Conf CT, Conf VF, prepare wit biogs, review record RE: R/JM, Cons CPSS.	3.00
9/29/88	Out	Conf VF, Conf CT, prepare mit materials, charts	2.25
9/30/88	Out	Conf CT, prepare wit biogs, jail conf cl, cthouse RE: reg. Cons YSOS, Jail conf cl, cthouse.	5.50

33.65 HRS at $25.00 Per Hour = $841.25

TOTAL = $841.25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, -vs- RUSSELL D. McNEIL, Defendant.	NO. 88-1-00428-1 AFFIDAVIT OF MAILING

I, Robbin K. Wadsworth, being first duly sworn on oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of 21 years, not a party of the above-entitled proceedings and competent to be a witness therein.

On the 4th day of October, 1988, I mailed copies of the NOTICE FOR DISCRETIONARY REVIEW TO SUPREME COURT

in the above-entitled matter:

TO: Howard Hansen/Prosecuting Attorney's Office/Courthouse/Yakima, WA 98901
Attorney for Plaintiff

TO:
Attorney for

TO:
Attorney for

TO:
Attorney for

FILED
OCT 4 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

BETTY McGILLEN
Yakima County Clerk
By Robbin K. Wadsworth
Deputy Clerk

SUBSCRIBED AND SWORN TO before me this 4th day of October, 1988.

Patricia A. Kjellgren
NOTARY PUBLIC in and for the State of Washington, residing at Yakima.

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YAKIMA COUNTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff,	No. 88-1-00428-1
vs.	**NOTICE FOR DISCRETIONARY REVIEW TO SUPREME COURT**
RUSSELL D. McNEIL, Defendant.	

Russell McNeil, Defendant above-named, seeks review by the designated appellate court of the Order Denying Defendant's Motion to Dismiss State of Washington's Notice of Special Proceeding to Seek the Death Penalty, entered September 27, 1988.

DATED this 29th day of September, 1988.

THOMAS BOTHWELL
Prediletto, Halpin, Cannon,
Scharnikow & Bothwell
Co-Counsel for Defendant.

CHRISTOPHER TAIT
Co-Counsel for Defendant.

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

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Names and addresses of attorneys for the parties:

For the Defendant:

THOMAS BOTHWELL of
Prediletto, Halpin, Cannon
Scharnikow & Bothwell
P.O. Box 2129
Yakima, WA 98907
(509)248-1900

CHRISTOPHER TAIT
103 South Third Street
Yakima, WA 98901
(509) 248-1346

For the Plaintiff:

Jeffery Sullivan, Prosecutor
Howard Hansen, Deputy
Yakima County Courthouse,
128 North Second Street
Yakima, WA 98901
(509)575-4141

Defendant:
Russell D. McNeil
c/o Yakima County Jail
Yakima, WA 98901

LAW OFFICES OF
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SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
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CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW

103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE [509] 248-1345

FILED
SEP 28 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

September 22, 1988

The Honorable F. James Gavin
Yakima County Superior Court
Yakima County Courthouse
Yakima, Washington 98901

88-1-428-1

Re: State v. McNeil

Dear Judge Gavin:

Counsel were advised yesterday at about 3:00 P.M. that this matter was set for 1:30 P.M. today. Pleadings were served by the Prosecutor at 4:55 P.M. yesterday. Mr. Bothwell is in Seattle. I have office appointments set for this afternoon which I can reschedule if necessary.

The Court Administrator has not had time to note the matter for hearing. All these arrangements have been made by telephone.

Defense counsel will NOT approve the pleadings prepared by the prosecution. Defense counsel WILL present proposed pleadings, but not today.

I respectfully submit that today's hearing should be stricken, and this case should be renoted for Monday, September 26, 1988. I will appear today only to object to improper notice, and improper service.

Please call me if I may be of further assistance.

Thank you for taking the time to listen to our scheduling problems.

Sincerely,

CHRISTOPHER TAIT
CT:pb
cc: Jeff Sullivan
Tom Bothwell
Rick Hoffman
Mike Frost

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FILED
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BETTY McGILLEN
YAKIMA COUNTY CLERK

LAW OFFICES OF
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SCHARNIKOW & BOTHWELL, P.S.
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YAKIMA, WASHINGTON 98907-2129
AREA CODE 509
248-1900

L. S. PREDILETTO
WILLIAM L. HALPIN
GOMER L. CANNON
WM. T. SCHARNIKOW
THOMAS BOTHWELL

'88 OCT 28 PM 5 20

September 21, 1988

THE HONORABLE F. JAMES GAVIN
Yakima County Superior Court
Yakima County Courthouse
Yakima, WA 98901

RE: STATE v. RUSSELL McNEIL
No. 88-1-00428-1

Dear Judge Gavin:

If you recall, at the last hearing in this case, the State represented to Your Honor that it would have a proposed order to present to the Court by last Friday. Since approximately the middle of last week, defense counsel have repeatedly inquired of the State as to when an order would be proposed. Today, Wednesday, at approximately 5:05 p.m., I had the opportunity to review for the first time the proposed FINDINGS OF FACT AND CONCLUSIONS OF LAW which were delivered to the office of co-counsel Chris Tait apparently approximately 20 minutes earlier. I understand the Prosecutor's Office is now proposing that we have the proposed orders considered by you tomorrow, Thursday.

I ask that the proposed Findings and Conclusions not be considered by Your Honor on Thursday. I am out of town on Thursday and Friday. I ask that we schedule a hearing any time Monday, September 26. It may be that after further reflection and an opportunity to review the proposed Findings and Conclusions, counsel for Mr. McNeil will not find it necessary to propose alternative Findings, Conclusions and Order. However, frankly, after having had this very limited opportunity to review the papers proposed by the State, I have substantial concerns as to their appropriateness.

I realize the Court wants to get this case moving. I hope my request that we have our hearing on Monday rather than tomorrow is taken with the understanding that the State has waited all this time and after last Friday to finally get something proposed, and hopefully waiting two more days can be accommodated.

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Thank you for your consideration.

Respectfully,

THOMAS BOTHWELL

TB:sld

cc: Jeff Sullivan
Chris Tait

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BETTY McGILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	NO. 88-1-00428-1 ORDER DENYING DEFENDANT'S MOTION TO DISMISS INFORMATION (ORAL) AND TO DISMISS DEATH PENALTY NOTICE

THIS MATTER having come on before the undersigned Judge on Defendant's motion to dismiss the information for failure to state a crime and to dismiss the State's notice of intention to seek the death penalty because it does not adequately apprise him of the charges, is constitutionally defective, was not timely filed, the applicable statute does not allow execution of an accessory and it violates state and federal constitutional guarantees against cruel and unusual punishment; defendant being personally present and also represented by Christopher Tait and Thomas Bothwell; the State being represented by Jeffrey C. Sullivan, Yakima County Prosecuting Attorney, and Howard W. Hansen, Yakima County Deputy Prosecuting Attorney; and the Court having considered the following:

1. Defendant Russell McNeil's Motion for Dismissal of Plaintiff's Request for Death Penalty (written) and to dismiss the information for failure to state a crime (oral),

2. All attachments to defendant's above-mentioned motion,

3. State's Memorandum in Opposition to Defendant's Motion for Dismissal of Plaintiff's Notice of Intent to Seek the Death Penalty.

4. All authorities cited in the above memoranda in general and specifically Thompson vs. Oklahoma, ____U.S.____, 56 L.W. 4892 (June 29, 1988),

5. Yakima County Superior Court Juvenile Court file No. 88-8-00089-2.

6. Legislative and judicial history of Washington death penalty provisions, and,

7. Arguments of counsel.

IT IS HEREBY ORDERED:

1. The information properly alleges first degree aggravated murder.

2. The notice of special sentencing proceeding adequately apprises defendant of the charges against him and the underlying information is not constitutionally defective.

3. The filing of the death penalty notice was timely.

4. Defendant's motion to dismiss the notice of special sentencing proceeding for the reason that the applicable statute does not specify a person may be executed for being an accomplice is denied.

5. Defendant's motion to strike the notice of special sentencing proceeding for the reason that it violates the Eighth Amendment to the United States Constitution and/or Article I, § 14 of the Washington State Constitution as constituting cruel and unusual punishment because a 17-year-old is involved is denied for the reasons stated in the Court's oral opinion dated September 8, 1988, which oral opinion is attached hereto and specifically made a part of this order by reference.

//

//

//

DATED this 28 day of September, 1988.

JUDGE F. JAMES GAVIN

Christopher Tait,
Attorney for Defendant

Thomas Bothwell,
Attorney for Defendant

Jeffrey C. Sullivan
Attorney for State

Howard W. Hansen
Deputy Prosecutor
Attorney for State

AFTERNOON SESSION

(September 8, 1988)

THE COURT: Good afternoon, counsel.

There is really basically one issue before me in the arguments that have been made whether or not the Eighth Amendment of the United States Constitution and article 1, section 14 of the Washington State Constitution prohibit execution of anyone under the age of 18 as cruel punishment under the state constitution, or cruel and unusual punishment under the federal constitution.

In arriving at a decision of whether or not a person, and I guess it would be someone who is 16 or 17, and in particular in these cases someone who is 17, is subject to capital punishment under the federal and state constitutions, or maybe not under the federal and under the state, I think it is extremely helpful to have reviewed the cases cited from the state of Washington as well as the Thompson case. I cannot, as the prosecution asks, consider that Thompson decided a very limited issue dealing with Mr. Thompson only and anyone who is 15 years of age, or on those particular circumstances, because there are guidelines within the case which I believe are important to the decision in this case.

Equally important is the Washington State Constitution. In the last few years, as pointed out by Mr. Frost, the Supreme Court of the state of Washington has looked to our constitution to decide constitutional issues, recognizing, of course, that the state constitution cannot decrease the rights that individuals have under the federal constitution. The federal constitution affords certain minimum rights, certain rights and standards which we are all compelled to follow. The Washington State Constitution in some instances grants even greater rights to individuals than does the federal constitution as evidenced by search and seizure cases already decided; and although one of those has to some extent been overruled, the state Supreme Court, nevertheless, applies a stricter rule with regard to searches and seizures pursuant to the state constitution than under the federal constitution. And, in fact, when the United States Supreme Court told the Washington State Supreme Court it had decided a case incorrectly under the federal constitution and that a person's rights had not been violated, our Supreme Court said, "Well, we will decide the case strictly upon the Washington State Constitution, and our constitution grants greater individual rights under the circumstances than does the federal constitution. We won't even decide this under the

federal constitution, we will decide it under our own constitution."

It is becoming increasingly important in this state to review the Washington State Constitution. As pointed out by counsel, the Washington State Constitution under article 1, section 14, reads, "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." Really the only difference between the Eighth Amendment to the federal constitution and the state constitution is that Washington prohibits cruel punishment; in other words, cruel punishment cannot be inflicted, and does not refer to cruel and inhuman punishment. Inhuman is not included in the Washington statute.

I attempted to locate a case which might help me in deciding whether or not the state constitution is to be interpreted differently than the federal constitution. About the only indication I could find is a statement contained in the Rupe case, which has been cited by counsel, and State v. Forrester, at 21 Wn.App. 855.

Under State v. Forrester, the test which is to be utilized is:

> "...whether, in view of contemporary standards of elemental decency, punishment is of such disproportionate character to the offense as to shock the general conscience and violate principles of fundamental fairness."

Under Rupe, 108 Wn.2d 734, the court essentially affirmed that position (Rupe was decided in 1987) although a statement is contained therein that the state constitution requires even greater safeguards under the circumstances of that case.

At Page 777, the court in Rupe states:

> "Under the federal constitution, the death penalty may not be imposed arbitrarily and capriciously, and the jury must adhere to the substantive factors state law lays before it."

Then it says our state constitution may require even greater safequards, relying upon State v. Bartholomew, the second case referred to as Bartholomew II. Quoting from Bartholomew II:

> "Where the trial which results in imposition of the death penalty lacks fundamental fairness, the punishment violates article 1, section 14 of the state constitution."

None of these cases were in the context of juveniles, or people under the age of 18, and let's say for purposes of this decision over the age of 15.

To digress just a little, when an argument is made as to one day over 15, or one day over 16, or within one day of 16, to me that means nothing because the Supreme Court has said at age 15 and below, you shall not impose the death penalty. To me that means if 15 years, 364 days, 23 hours, 59 minutes and 59 seconds old, a person is still

15 and you shall not impose it. It is a guideline the Supreme Court of the United States has adopted. It does not make any difference age-wise, according to them.

There is some guidance, however, with regard to article 1, section 14. If there is a violation of fundamental fairness, or if contemporary standards of elemental decency have been violated by imposing the death penalty, then I believe our state Supreme Court would hold, under those circumstances, a violation of article 1, section 14.

That really does not say a whole lot more than is said in Thompson because Thompson -- and I better refer to the case and get the proper language. Thompson recognizes as a very important element to be considered the "evolving standards of decency that mark the progress of a maturing society." I do not believe that is anything other than saying what does society expect under the circumstances? What is decent? If you go beyond the bounds of decency, then that would be cruel punishment.

Keeping that in mind, we should all recognize the Eighth Amendment and article 1, section 14 really contain categorical prohibitions against cruel and inhuman punishment and cruel punishment. I would also quote to counsel from page 4894 of 56 Law Week from the opinion of Justice Stevens. It says:

> "The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the 'evolving standards of decency that mark the progress of a maturing society'."

Which sounds quite similar to the statement contained in Forrester and what I believe our state Supreme Court would rely upon.

The quotation also leads me to believe there is a difference between Justice O'Connor's opinion and that of the plurality insofar as related to the legislature. As Justice O'Connor says: "Let the legislature do it. Send it to the legislature and let them decide what the age limit will be."

Now, Mr. Tait and Mr. Bothwell have pointed out, in response to the argument of Mr. Hansen and Mr. Sullivan, that there are several places where the legislature (10) mentioned in the opinion of the plurality and in the footnotes, and what have you; but I think there is a distinction. The plurality believes the definition of the contours of the category, as referred to by Justice Stevens, are to be provided by judges and not the legislature. They are to be provided by judges, however, relying upon what the legislature has done in certain circumstances; therefore obtaining certain guidelines from

the legislature, guidelines from what juries have done, guidelines from standards of decency within the community.

In deciding these cases, I believe I must look first to the state of Washington. I am a state judge. Our state Supreme Court will undoubtedly be involved in determining this issue, whether in these cases or another, at least sometime in the near future. I look to our constitution first, keeping in mind the federal constitution provides minimum standards, and I must adhere to the decision in Thompson insofar as it sets out those minimum standards; but I feel compelled to look to the state to see what has been accomplished in the state and what guidelines we have in the state of Washington.

One of the critical issues in these cases, at least counsel believe, is with regard to the proceedings that took place prior to these two men being transferred into Superior Court as adults. They were, of course, in Superior Court in the juvenile process through a declination proceeding. That would be a decline of jurisdiction in the juvenile court and being transferred to adult court to be tried as adults.

There is, I believe, a very substantial difference between the Oklahoma statutory scheme and the Washington statutory scheme. In Washington -- Let me get the statute. In Washington, under RCW Chapter 13.40, if a

person is 16 or 17 and there is an allegation of a Class A felony, which we have here, or attempt to commit a Class A felony, a decline hearing is mandatory unless it is waived by the court, the parties and the parties' counsel. In other words, there must be a decline hearing in the state of Washington unless everybody agrees there will not be and all waive the hearing.

Thompson demonstrates the Oklahoma statutory scheme is different. The difference is extremely important and is demonstrated at page 4905 as follows:

> "Under Oklahoma law, anyone who commits a crime when he is under the age of eighteen is defined to be a child, unless he is sixteen or seventeen and has committed murder or certain other specified crimes..."

Now that is much the same as Washington; but then it continues:

> "...in which case he is automatically certified to stand trial as an adult."

So in Oklahoma if you are charged with the crime of murder and you are 16 or 17, you are automatically an adult. You are tried as an adult. In the state of Washington if you are 16 or 17, you are automatically entitled to a hearing where it will be determined whether or not you should be tried as an adult. Part of that process is set out in case law, both state and federal, as

well as RCW 13.40.110.

Under RCW 13.40.110, the court may order a case transferred after a decline hearing for adult criminal prosecution. There must be a finding the declination would be in the best interests of the juvenile or the public; and the court is required to consider relevant reports, facts, opinions, and arguments presented by the parties and their counsel.

Now that seems to sound like almost any other hearing except when you consider what must be considered by the court pursuant to Kent v. United States, which was decided in 1966, and has been elaborated upon by our courts in these hearings. If anyone here looks at the record of the decline hearing, you will know how extensive it was and what all was gone into. They really are quite protective of the rights of an individual with a presumption that that individual can be as a juvenile rehabilitated and treated within the juvenile system unless certain unique circumstances are present.

What is taken into account in some of the factors ~~are~~ is as follows: The seriousness of the alleged offense and whether protection of the community necessitates prosecution under the adult system. Protection of the community. Do community standards dictate there should be a transfer to adult court? The degree of premeditation,

willfulness, violence and aggression involved in the alleged offense. Well, for purposes of this hearing, to me that is not as important as some of the other ones. Whether the alleged offense was against persons or property; greater weight being given to offenses against persons especially if injury resulted. The prosecutive merit of the complaint, the desirability of trial and disposition of the entire offense in one court when defendants or associates are adults. That does not apply here. But the next one is sophistication and maturity of the juvenile determined by consideration of his home, environmental situation, emotional attitudes, and pattern of living, record and previous history as a juvenile and prospects for adequate protection of the public, and likelihood of reasonable rehabilitation of the juvenile through services and facilities currently available to the juvenile court.

A decision was made in these cases following an extensive hearing and going into the background of these individuals, particularly related to their sophistication and maturity, and also as to consideration of their emotional attitudes, their patterns of living, their environmental situations. It went into the backgrounds of these two individuals very extensively. Only after that hearing was it determined these people would be

transferred to this court, the adult court. They were both about 17, between 17 and 18 at the time of this offense.

The court in Thompson did not decide whether 17-year olds or 16-year olds can receive the death penalty, and chose instead to accept certiorari in two separate cases wherein they will decide that issue. I cannot guess as to why the court did that. I think the court had before it the perfect opprortunity to make the decision: Do we apply the death penalty to juveniles? The court chose not to. One of the critical reasons, at least I consider that they did not do so, is because it was just about universally agreed, or at least the conclusion was that it was almost universally agreed, anyone who is the age of 15 should not receive the death penalty because it is:

> "...generally abhorrent to the conscience of the community."

They were looking at the various legislative enactments, what ages were set for purposes of applying the death penalty, and it seemed to them almost universal throughout the states if you are 15 years of age, you are not going to be executed because you do not have the degree of maturity and sophistication an adult would have. However, it is clear from the opinion they did not decide the issue as to 16- and 17-year olds, and expressly chose

not to do so even after being asked to do so.

At page 4896 of the opinion the court says:

> "When we confine our attention to the 18 States that have expressly established a minimum age in their death-penalty statutes, we find that all of them require that the defendant have attained at least the age of 16 at the time of the capital offense."

To me it was important to them that someone is at least age 16.

An argument has been made that the legislature must set the age and then let the courts act upon that age. But what has happened, in the quote I gave initially at the start of my opinion, is our Supreme Court has said it is up to the judges to make that determination and the U.S. Supreme Court has made the determination for 15-year olds and has decided, no, but did not make the decision as to 16- and 17-year olds. It is up to the courts to render that decision.

I do not feel the Thompson opinion is authority for the proposition or can be argued - well, it can be argued - but it is not authority for the proposition that 16- and 17-year olds should not receive the death penalty for their actions because it would be cruel and inhuman punishment or cruel punishment. I cannot accept that argument. I realize juveniles, people under the age of 18, are essentially presumed not to have the same

culpability as people who are older. I recognize that because the Court recognizes it; however, I believe in looking to Washington, and I am looking to the state of Washington, at what the citizens of this state have determined and what the legislature has determined, that this state feels if, following a proper hearing, a declination hearing, a juvenile has the right sophistication and maturity, they can have such culpability that they can receive the ultimate penalty and that is the death penalty.

The death penalty was reinstated due to a public outcry in the state of Washington. To me that speaks very loudly in the state of Washington. That does not seem to be mentioned in the Thompson opinion whether any of these other states had that happen where the death penalty was thrown out, suddenly it is reactivated because the people get upset, and then the legislature acts on it also.

Another thing that is important to point out is under the juvenile act -- I thought I had a copy of that here. But under the juvenile code one of the things the state has determined - and I made a copy but I forgot to bring it with me - is juveniles should be more answerable for their offenses. There is to be greater protection for the citizenry from criminal behavior. Juveniles are to be more accountable for their criminal behavior. To me that

speaks loudly of what the citizens of this state say. The citizens of this state, through the legislature and through the process of citizen legislation have said, We want the death penalty.

Now, the question becomes: Is it required there be a specific age set out? Does Thompson say that? I do not believe that is what Thompson says. I think the state of Washington has clearly said, We have set out the guidelines. If a person goes through the process from juvenile to adult court and all of the background is looked into and he or she is determined to have the sophistication and maturity to stand trial as an adult, more safeguards have been provided, and he or she is then subject to all of the penalties imposed by the statute which they have violated. The penalties in this case are either life without release or parole, or death, depending upon what a jury decides, if the jury decides guilt of aggravated first degree murder. That, of course, is a big hurdle.

To me, under these circumstances the public has said if you commit the crime, you shall be punished commensurate with the crime. And when the opinion in Thompson says at 4897 - I read part of that to you earlier - it says:

"The road we have traveled during the past four

> decades - in which thousands of juries have tried murder cases - leads to the unambiguous conclusion that the imposition of the death penalty on a 15-year old offender is now generally abhorrent to the conscience of the community."

I can paraphrase and say in light of Forrester, and the other tests as to whether or not the punishment fits the crime, that probably it is now generally abhorrent to the conscience of the community to have two people brutally killed. Although no one has ever said anything about victims in this case and whether or not the rights of victims -- and I don't find anything like that in the Thompson opinion. I think that has something to do with the situation -- our legislature has said, Yes, we are going to protect our citizens and this is the standard way of adopting it. To me that is very important. This is the standard way to adopt it.

Consequently, I believe, No. 1, according to article 1, section 14 of the Washington State Constitution, there is no prohibition against asking for the death penalty in a situation involving 16- and 17-year olds herein limited to 17-year olds because they were 17 at the time. No. 2, I do not believe the Eighth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, prohibits the death penalty in cases involving 16- and 17-year olds. I

look mainly to the state of Washington because I believe Washington has a proper and acceptable procedure. I believe it is distinguishable from the situation in the Oklahoma case. I also look to the federal opinion and I can draw no other conclusion then that when the state asks for and gave notice of the death penalty in this case, it is constitutional.

The motion to have the death penalty aspects of this stricken is denied.

Now, I do not know if counsel have spoken at all about guidelines as to time limits for pretrial motions or anything, if you had an opportunity to do that.

MR. FROST: Yes, Your Honor, I believe we have.

First of all, could the Court order that we be provided with a written copy of the Court's oral opinion in this matter?

THE COURT: So ordered.

(End of oral opinion.)

FILED and Micro filmed
SEP 28 1988
Roll No. 336 17 M
BETTY McGILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant.

NO. 88-1-00428-1

State's Proposed

ORDER DENYING DEFENDANT'S MOTION TO DISMISS STATE OF WASHINGTON'S NOTICE OF SPECIAL PROCEEDING TO SEEK THE DEATH PENALTY

THIS MATTER having come on before the above-entitled court on September 8, 1988, upon the motion of the defendant herein; the defendant present and represented by Christopher S. Tait and Thomas Bothwell, the State of Washington being represented by Jeffrey C. Sullivan, Prosecuting Attorney and Howard W. Hansen, Deputy Prosecuting Attorney for Yakima County; the court having previously entered Findings of Fact and Conclusions of Law herein, and being fully advised in the premises; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion made by the defendant herein to dismiss the State of Washington's Notice of Special Sentencing Proceeding to seek the death penalty is hereby denied.

FILED and Micro filmed
SEP 28 1988
Roll No.
BETTY McGILLEN, YAKIMA COUNTY CLERK

DONE IN OPEN COURT this _____ day of September, 1988.

_____
J U D G E

Presented by:

JEFFREY C. SULLIVAN
Prosecuting Attorney

HOWARD W. HANSEN
Deputy Prosecuting Attorney

Approved as to Form:

_____
CHRISTOPHER TAIT
Attorney for Defendant

_____
THOMAS BOTHWELL
Attorney for Defendant

HWH1(C)

FILED and Micro filmed
SEP 28 1988
Roll No. 336 16
BETTY McGILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	NO. 88-1-00428-1 State's Proposed FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER having come on before the above-entitled court for hearing on September 8, 1988, on the defense Motion for Dismissal of Plaintiff's Notice of Intent to Seek the Death Penalty; that the defendant was present and represented by his attorneys Chris Tait and Tom Bothwell; the State of Washington being represented by Jeffrey C. Sullivan, Prosecuting Attorney for Yakima County, Washington and by Howard W. Hansen, Deputy Prosecuting Attorney for Yakima County, Washington, and the court having considered the memorandums submitted on this issue in this case as well as previous records made in this case and having heard the arguments of counsel and being fully advised in the premises, the court now makes and enters the following:

FINDINGS OF FACT

I.

Michael and Dorothy Nickoloff were an elderly couple, 82 and 74 years of age respectfully, who were retired and lived alone in their single family dwelling in rural Yakima County. In the early evening of January 7, 1988, Mike and Dorothy Nickoloff were both brutally murdered in their home, the result of each receiving multiple knife stab wounds. Property was removed from

the house at the time of the murders. The Yakima Sheriff's Department investigation of these crimes led to the recovery of the stolen property involved in this case and traced the stolen property to the two co-defendants Russell McNeil and Herbert Rice, Jr. As a result of this Yakima Sheriff's Department investigation, Herbert Rice Jr., and Russell Duane McNeil were each charged with two counts of Aggravated First Degree Murder, one count as a principal and one count as an accomplice to the other co-defendant. Notice that the Prosecuting Attorney would seek the death penalty in each case was also given. Both defendants were approximately 17 and 1/2 years of age at the time these crimes were committed.

II.

The State of Washington re-instituted the death penalty in 1981 as a result of the passage of a referendum by the people of the State of Washington after Washington's previous death penalty statute had been found to be unconstitutional.

III.

The legislative intent and purpose of the Juvenile Justice Act of 1977 was to make juveniles more accountable for their criminal behavior and to provide greater protection for the citizenry from criminal behavior. See RCW 13.40.010 which is attached hereto and made a part of these findings.

IV.

A declination hearing was conducted in this case on March 11, 1988, under the provisions of RCW 13.40.110 wherein the defendants Herbert Rice, Jr. and Russell Duane McNeil were

transferred for prosecution in adult court. See attached Findings of Fact and Conclusions of Law and Order of Declination which are hereby made a part of these findings.

V.

The people of the State of Washington have also recently demonstrated through the passage by our State Legislature of various crime victims statutes that the rights of the victims of crime and their survivors shall be protected. See the attached RCW 7.69 which is hereby made a part of these findings which includes the legislative intent that victim's rights be protected as vigorously as that of criminal defendants.

Based upon the above Findings of Fact and the court's oral ruling the court now makes and enters the following:

CONCLUSIONS OF LAW

I.

The above-entitled court has jurisdiction over the subject matter and of the defendant herein.

II.

The Washington State Constitution is not constrained by the Federal Supreme Court's interpretation of the 8th and 14th Amendments to the United States Constitution, in the interpretation of our state's due process and cruel punishment clauses. The Washington Supreme Court has interpreted Article 1 Section 14 of our Constitution to provide broader protection. State v. Bartholomew, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984).

III.

The principles stated in Thompson v. Oklahoma, _____ U.S. ____, 56 LW. 4292, 43 CRrim. LAW Rptr. 3175 dated June 29, 1988, are important and provide an approach to the determination of this case. The Thompson case does not, however, require that a minimum age be set by the legislature in order for juveniles of 16 or 17 years of age to be eligible for the death penalty.

The specific ruling in Thompson is limited to 15 year olds or younger not being eligible for capital punishment since the court only found that the necessary consensus for determination of cruel and unusual punishment exist for that age group.

The Thompson case tells us the categorical prohibition of cruel and unusual punishment has been purposefully left undefined by the framers of our federal constitution so that future generations of judges can decide what is cruel and unusual punishment taking into consideration "evolving standards of decency that mark the progress of a maturing society."

IV.

The Washington test is ". . . whether, in view of contemporary standards of elemental decency, punishment is of such disproportionate character to the offense as to shock the general conscious and violate principles of fundamental fairness." State v. Forrester, 21 Wn. App. 855, 870, 587 P.2d 179 (1978).

V.

The declination procedure of a 17 year old juvenile under Washington Law is consistent with the principles of the Thompson case in that it operates from the premise that juveniles are presumed to be less culpable than adults. Further, in order to treat a 17 year old juvenile as an adult, the court must determine, utilizing the "Kent" criteria, that the individual has the proper maturity, and that the alleged criminal acts sufficiently raise issues of public safety and concern that the juvenile system cannot properly deal with, so that the juvenile defendant must be treated as an adult.

The record in this case clearly supports the court's previous Order Declining jurisdiction in this case.

VI.

The passage by the Washington State Legislature of the Juvenile Justice Act of 1977, the re-inactment of the death penalty in this State in 1981 mandated by referendum of the people, and the Victim's Rights Act passed by the Washington State Legislature in 1985 all show that our developing community standard in the area of capital punishment for juveniles is not toward limiting the application of the death penalty for 17 year old juveniles.

VII.

There is no constitutional prohibition against asking for the death penalty in the case of a 17 year old juvenile defendant since Washington Law has sufficient procedures to protect the rights of the accused.

DATED this _____ day of September, 1988.

_____
J U D G E

Presented by:

JEFFREY C. SULLIVAN
Prosecuting Attorney

HOWARD W. HANSEN
Deputy Prosecuting Attorney

Approved as to form; copy
received; notice of presentation
waived:

_____
CHRIS TAIT
Attorney for defendant, Russell McNeil

_____
THOMAS BOTHWELL
Attorney for defendant Russell McNeil

HWH1(A)

File for Record 3-15-88
and Microfilmed on Roll
No. 324 175
BETTY McGILLEN, County Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

(JUVENILE COURT)

STATE OF WASHINGTON, Plaintiff,	)	NO. 88-8-00089-2
vs.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER DECLINING JURISDICTION
RUSSELL DUANE McNEIL, Defendant.	)	

THIS MATTER having come on before the above-entitled court for hearing on March 11, 1980, on whether or not the Juvenile Court should decline jurisdiction over the above-named defendant; that the defendant was present and represented by his attorney, Dan Lorello; and the State of Washington being represented by Howard W. Hansen, Deputy Prosecuting Attorney for Yakima County, Washington; testimony and evidence having been presented and received, and the court being fully advised in the premises, the court now makes and enters the following:

FINDINGS OF FACT

I.

The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

The defendant, Russell Duane McNeil, has been charged with two counts of Aggravated First Degree Murder, one as a principal and one

as an Accomplice to his co-defendant, Herbert Rice, Jr. Each charge is the most serious type of criminal offense possible under Washington law.

The victims of these crimes, Mike Nickoloff and Dorothy Nickoloff, were an elderly couple, 82 and 74 years of age respectively, who were living alone in their single family home in rural Yakima county. Mr. Nickoloff was quite disabled in that he required a walker in order to move around. Both victims were essentially defenseless to the crimes committed against them. The murder of these two individuals occurred in the early evening of January 7, 1988, in the victims' home as part of a robbery in which property was removed from their home. Since these alleged acts involve crimes against persons and property while situated in their home, they are the most serious type of breach of community safety.

II.

Whether the alleged offenses were committed in an aggressive, violent, premeditated or willful manner.

Autopsy reports, and the testimony of Sheriff deputies at the declination hearing both indicate without question that the victims both met a most aggressive and violent death. Both victims died as a result of multiple stab wounds and both appeared to have received defensive wounds to their hands and arms as they were being attacked. Mr. Nickoloff was killed as he sat in his chair in the living room of their home receiving stab wounds to the face, neck and chest. Mrs. Dorothy Nickoloff was killed in the kitchen of their home receiving numerous stab wounds to the back as she lay on the floor. Both

victims received so many stab wounds that it is not possible to determine the actual number of wounds received by each individual. This indicates a sociopathic or psychopathic disorder by the perpetrator, whoever III. may be. WOS

The alleged offense was against persons or against property.

The victims, Mike and Dorothy Nickoloff, were killed as a result of multiple stab wounds and property, that is, two television sets were taken from their home as part of this crime. The property taken has since been recovered and directly traced back to the two co-defendants in this case.

IV.

WOS The Prosecutive ~~prospective~~ merit of the complaint whether there is evidence on which a grand jury may be expected to return an indictment.

The information in this case accuses each defendant of murdering one victim himself and acting as an accomplice to the other murder by his co-defendant. The crimes were discovered very shortly after their occurrence so that the Yakima County Sheriff's Department was able to adequately preserve available evidence. The property stolen from the victims' house during these crimes has been recovered and has been directly traced back to the two co-defendants. Both defendants have given the police statements implicating themselves in the crimes. The allegations of these cases therefore appear to be highly meritorious.

V.

The desirability of trial and disposition of the offense in one court when the juvenile's associates in the alleged offense are adults.

This criteria appears not be appropriate as both co-defendants charged in this matter are juvenile and are both facing declination hearing at this time.

VI.

Sophistication and maturity of the juvenile considering his home environment, emotional attitude and pattern of living.

Russell McNeil was born on August 15, 1970, and is approximately 17 and a half years of age. He has lived with one of his parents until approximately November of 1987. At that time, he began living with his 20 year old brother in Wapato, Washington, and was attending Pace Alternative High School. There is no evidence that indicates Russell McNeil suffers from any type of mental retardation.

Mr. McNeil has worked as a ranch hand and in a firewood business for at least the last two years. Mr. McNeil's living situation was independent and as an adult while working in the firewood splitting forest camp and was considered a mature, dependable worker when he worked as a ranch hand. Mr. McNeil's employers, teachers, and associates all consider him to be a mature individual with a good deal of sophistication and who is articulate and in control of himself.

VII.

Previous juvenile criminal history.

Russell McNeil has previously been convicted of Second Degree Burglary in Juvenile Court and has had one diversion agreement. Mr. McNeil's previous criminal history is not considered remarkable.

VIII.

Prospects for adequate protection of the public and adequacy of the Juvenile Court system in this case.

The standard range for First Degree Murder in Juvenile Court for Russell McNeil as a 17 and a half year old is 180 to 224 weeks of confinement. Juvenile Court only has jurisdiction over an individual until age 21. Therefore the maximum period of supervision will be approximately 160 weeks of confinement. Additionally, it appears theoretically possible that after serving 60% of this sentence and assuming that the defendant has no problems while in the juvenile institution, he could be considered for some kind of a community residential placement for the last year of his confinement. Clearly, under either one of these possibilities, the time of confinement of the defendant is grossly insufficient considering the interests of protecting the public given the very serious nature of the crimes charged. There is insufficient time for rehabilitation and the Court concurs.

Based upon the above findings of fact, the court now makes and enters the following:

CONCLUSIONS OF LAW

I.

The above entitled court has jurisdiction of the subject matter and of the juvenile.

II.

Declination of Juvenile Court jurisdiction over this juvenile is in the best interest of the public.

III.

An Order Permanently Declining Juvenile Court Jurisdiction and Transferring the Juvenile For Adult Criminal Prosecution should be entered.

Based upon the above Findings of Fact and Conclusions of Law;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that juvenile jurisdiction over Russell Duane McNeil is permanently declined and the defendant shall be immediately transferred to the Yakima County Jail for incarceration until further adult proceedings in Yakima County Superior Court. Bail shall be maintained in the amount of ~~$300,000.00~~ $250,000.00 until further proceedings in adult court if appropriate.

DONE this 15th day of March, 1988.

JUDGE WALTER A. STAUFFACHER

Presented by:

HOWARD W. HANSEN
Deputy Prosecuting Attorney

A:HWH(B).BAK

STATE OF WASHINGTON, County of Yakima ss.
I, Betty McGillen, Clerk of the above entitled Court, do hereby certify that the foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of said Court this 10th day of Sept, 1988
BETTY McGILLEN, Clerk
Deputy

13.40.450 Chapters 13.04 and 13.40 RCW as exclusive authority for adjudication and disposition of juvenile offenders.

1977 ex.s. c 291: "(1) There is appropriated for the period July 1, 1978, to June 30, 1979, from the general fund nine hundred eighty-three thousand six hundred dollars to be allocated to counties for the cost of operating diversion units as required by this chapter.

(2) The secretary shall administer the funds and shall promulgate, pursuant to chapter 34.04 RCW, rules establishing a planning process and standards which meet the intent of this chapter. The secretary shall also monitor and evaluate, against established standards, all programs and services funded by this appropriation.

(3) The total sum shall be allocated by the secretary to the counties. Diversion units funded by this section shall be administered and operated separately from the court: *Provided*, That counties of classes other than AA and A may request for an exemption from this requirement. The secretary may grant such exemption if it is clearly demonstrated that resources do not exist nor can be established in such county to operate diversion units separately from the court.

(4) In meeting the requirements of this chapter, there shall be a maintenance of effort whereby counties shall exhaust existing resources prior to the utilization of funds appropriated by this section.

(5) It is the intent of the legislature that these funds shall be the maximum amount necessary to meet the requirement of this chapter for the stated period. Courts shall be required to provide diversion programs and services to the extent made possible by available sources. In addressing diverted youths, a resource priority continuum shall be developed whereby the highest priority in resource allocation shall be given to diverted youths who have inflicted bodily harm while the lowest priority shall be given to diverting youths who have committed victimless crimes or minor property offenses." [1977 ex.s. c 291 § 79.]

Effective dates——Severability——1977 ex.s. c 291: See notes following RCW 13.04.005.

Health and dental examination and care for juveniles in detention facility——Consent: RCW 13.04.047.

Juvenile may be both dependent and an offender: RCW 13.04.300.

Treatment of juvenile offenders: RCW 74.14A.030, 74.14A.040.

13.40.010 Short title——Legislative intent——Chapter purpose. (1) This chapter shall be known and cited as the Juvenile Justice Act of 1977.

(2) It is the intent of the legislature that a system capable of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders, as defined by this chapter, be established. It is the further intent of the legislature that youth, in turn, be held accountable for their offenses and that both communities and the juvenile courts carry out their functions consistent with this intent. To effectuate these policies, it shall be the purpose of this chapter to:

(a) Protect the citizenry from criminal behavior;

(b) Provide for determining whether accused juveniles have committed offenses as defined by this chapter;

(c) Make the juvenile offender accountable for his or her criminal behavior;

(d) Provide for punishment commensurate with the age, crime, and criminal history of the juvenile offender;

(e) Provide due process for juveniles alleged to have committed an offense;

(f) Provide necessary treatment, supervision, and custody for juvenile offenders;

(g) Provide for the handling of juvenile offenders by communities whenever consistent with public safety;

(h) Provide for restitution to victims of crime;

(i) Develop effective standards and goals for the operation, funding, and evaluation of all components of the juvenile justice system and related services at the state and local levels; and

(j) Provide for a clear policy to determine what types of offenders shall receive punishment, treatment, or both, and to determine the jurisdictional limitations of the courts, institutions, and community services. [1977 ex.s. c 291 § 55.]

Effective dates——Severability——1977 ex.s. c 291: See notes following RCW 13.04.005.

13.40.020 Definitions. For the purposes of this chapter:

(1) "Serious offender" means a person fifteen years of age or older who has committed an offense which if committed by an adult would be:

(a) A class A felony, or an attempt to commit a class A felony;

(b) Manslaughter in the first degree or rape in the second degree; or

(c) Assault in the second degree, extortion in the first degree, indecent liberties, kidnapping in the second degree, robbery in the second degree, burglary in the second degree, or statutory rape in the second degree, where such offenses include the infliction of bodily harm upon another or where during the commission of or immediate withdrawal from such an offense the perpetrator is armed with a deadly weapon or firearm as defined in RCW 9A.04.110;

(2) "Community service" means compulsory service, without compensation, performed for the benefit of the community by the offender as punishment for committing an offense;

(3) "Community supervision" means an order of disposition by the court of an adjudicated youth. A community supervision order for a single offense may be for a period of up to one year and include one or more of the following:

(a) A fine, not to exceed one hundred dollars;

(b) Community service not to exceed one hundred fifty hours of service;

(c) Attendance of information classes;

(d) Counseling; or

(e) Such other services to the extent funds are available for such services, conditions, or limitations as the court may require which may not include confinement;

(4) "Confinement" means physical custody by the department of social and health services in a facility operated by or pursuant to a contract with the state, or physical custody in a facility operated by or pursuant to a contract with any county. Confinement of less than thirty-one days imposed as part of a disposition or modification order may be served consecutively or intermittently, in the discretion of the court;

(5) "Court", when used without further qualification, means the juvenile court judge(s) or commissioner(s);

(6) "Criminal history" includes all criminal complaints against the respondent for which, prior to the commission of a current offense:

(a) The allegations were found correct by a court. If a respondent is convicted of two or more charges arising out of the same course of conduct, only the highest charge from among these shall count as an offense for the purposes of this chapter; or

7.68.900 Effective date——1973 1st ex.s. c 122. This chapter shall take effect on July 1, 1974. [1973 1st ex.s. c 122 § 17.]

Funding required: "This bill shall not take effect until the funds necessary for its implementation have been specifically appropriated by the legislature and such appropriation itself has become law. It is the intention of the legislature that if the governor shall veto this section or any item thereof, none of the provisions of this bill shall take effect." [1973 1st ex.s. c 122 § 21.]

7.68.905 Severability——Construction——1977 ex.s. c 302. (1) If any provision of this chapter, or its application to any person or circumstance is held invalid, the remainder of the chapter, or the application of the provision to other persons or circumstances, is not affected.

(2) Subsection (1) of this section shall be effective retroactively to July 1, 1974. [1977 ex.s. c 302 § 12.]

7.68.910 Section captions. Section captions as used in this act do not constitute any part of the law. [1973 1st ex.s. c 122 § 20.]

7.68.915 Savings——Statute of limitations——1982 1st ex.s. c 8. Nothing in *this act affects or impairs any right to benefits existing prior to **the effective date of this act. For injuries occurring on and after July 1, 1981, and before **the effective date of this act, the statute of limitations for filing claims under this chapter shall begin to run on **the effective date of this act. [1982 1st ex.s. c 8 § 3.]

Reviser's note: *(1) "This act" [1982 1st ex.s. c 8] consists of RCW 2.56.035 and 7.68.915, amendments to RCW 7.68.035, 7.68.070, 9.92-.060, 9.95.210, and several uncodified sections.

**(2) For "the effective date of this act," see note following RCW 7.68.035.

Effective dates——Intent——Reports——1982 1st ex.s. c 8: See notes following RCW 7.68.035

Chapter 7.69
CRIME VICTIMS, SURVIVORS, AND WITNESSES

Sections

7.69.010 Intent.
7.69.020 Definitions.
7.69.030 Rights of victims, survivors, and witnesses.
7.69.040 Representation of incapacitated or incompetent victim.
7.69.050 Construction of chapter——Other remedies or defenses.

7.69.010 Intent. In recognition of the severe and detrimental impact of crime on victims, survivors of victims, and witnesses of crime and the civic and moral duty of victims, survivors of victims, and witnesses of crimes to fully and voluntarily cooperate with law enforcement and prosecutorial agencies, and in further recognition of the continuing importance of such citizen cooperation to state and local law enforcement efforts and the general effectiveness and well-being of the criminal justice system of this state, the legislature declares its intent, in this chapter, to grant to the victims of crime and the survivors of such victims a significant role in the criminal justice system. The legislature further intends to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity; and that the rights extended in this chapter to victims, survivors of victims, and witnesses of crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants. [1985 c 443 § 1; 1981 c 145 § 1.]

Severability——1985 c 443: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1985 c 443 § 27.]

Effective date——1985 c 443: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect on July 1, 1985." [1985 c 443 § 28.]

7.69.020 Definitions. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Crime" means an act punishable as a felony, gross misdemeanor, or misdemeanor under the laws of this state or equivalent federal or local law.

(2) "Survivor" or "survivors" of a victim of crime means a spouse, child, parent, legal guardian, sibling, or grandparent. If there is more than one survivor of a victim of crime, one survivor shall be designated by the prosecutor to represent all survivors for purposes of providing the notice to survivors required by this chapter.

(3) "Victim" means a person against whom a crime has been committed or the representative of a person against whom a crime has been committed.

(4) "Victim impact statement" means a statement submitted to the court by the victim or a survivor, individually or with the assistance of the prosecuting attorney if assistance is requested by the victim or survivor, which may include but is not limited to information assessing the financial, medical, social, and psychological impact of the offense upon the victim or survivors.

(5) "Witness" means a person who has been or is expected to be summoned to testify for the prosecution in a criminal action, or who by reason of having relevant information is subject to call or likely to be called as a witness for the prosecution, whether or not an action or proceeding has been commenced. [1985 c 443 § 2; 1981 c 145 § 2.]

Severability——Effective date——1985 c 443: See notes following RCW 7.69.010.

7.69.030 Rights of victims, survivors, and witnesses. There shall be a reasonable effort made to ensure that victims, survivors of victims, and witnesses of crimes have the following rights:

(1) To be informed by local law enforcement agencies or the prosecuting attorney of the final disposition of the case in which the victim, survivor, or witness is involved;

(2) To be notified by the party who issued the subpoena that a court proceeding to which they have been subpoenaed will not occur as scheduled, in order to save the person an unnecessary trip to court;

(3) To receive protection from harm and threats of harm arising out of cooperation with law enforcement

and prosecution efforts, and to be provided with information as to the level of protection available;

(4) To be informed of the procedure to be followed to apply for and receive any witness fees to which they are entitled;

(5) To be provided, whenever practical, a secure waiting area during court proceedings that does not require them to be in close proximity to defendants and families or friends of defendants;

(6) To have any stolen or other personal property expeditiously returned by law enforcement agencies or the superior court when no longer needed as evidence. When feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis, and property of which ownership is disputed, shall be photographed and returned to the owner within ten days of being taken;

(7) To be provided with appropriate employer intercession services to ensure that employers of victims, survivors of victims, and witnesses of crime will cooperate with the criminal justice process in order to minimize an employee's loss of pay and other benefits resulting from court appearance;

(8) To access to immediate medical assistance and not to be detained for an unreasonable length of time by a law enforcement agency before having such assistance administered. However, an employee of the law enforcement agency may, if necessary, accompany the person to a medical facility to question the person about the criminal incident if the questioning does not hinder the administration of medical assistance;

(9) With respect to victims and survivors of victims, to be physically present in court during trial, or if subpoenaed to testify, to be scheduled as early as practical in the proceedings in order to be physically present during trial after testifying and not to be excluded solely because they have testified;

(10) With respect to victims and survivors of victims, to be informed by the prosecuting attorney of the date, time, and place of the trial and of the sentencing hearing for felony convictions upon request by a victim or survivor;

(11) To submit a victim impact statement or report to the court, with the assistance of the prosecuting attorney if requested, which shall be included in all presentence reports and permanently included in the files and records accompanying the offender committed to the custody of a state agency or institution;

(12) With respect to victims and survivors of victims, to present a statement personally or by representation, at the sentencing hearing for felony convictions; and

(13) With respect to victims and survivors of victims, to entry of an order of restitution by the court in all felony cases, even when the offender is sentenced to confinement, unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment. [1985 c 443 § 3; 1981 c 145 § 3.]

Severability——Effective date——1985 c 443: See notes following RCW 7.69.010.

Child victims and witnesses, additional rights: Chapter 7.69A RCW.

7.69.040 Representation of incapacitated or incompetent victim. For purposes of this chapter, a victim who is incapacitated or otherwise incompetent shall be represented by a parent or present legal guardian, or if none exists, by a representative designated by the prosecuting attorney without court appointment or legal guardianship proceedings. Any victim may designate another person as the victim's representative for purposes of the rights enumerated in RCW 7.69.030. [1985 c 443 § 4.]

Severability——Effective date——1985 c 443: See notes following RCW 7.69.010.

7.69.050 Construction of chapter——Other remedies or defenses. Nothing contained in this chapter may be construed to provide grounds for error in favor of a criminal defendant in a criminal proceeding, nor may anything in this chapter be construed to grant a new cause of action or remedy against the state, its political subdivisions, law enforcement agencies, or prosecuting attorneys. The failure of a person to make a reasonable effort to ensure that victims, survivors, and witnesses under this chapter have the rights enumerated in RCW 7.69.030 shall not result in civil liability against that person. This chapter does not limit other civil remedies or defenses of the offender or the victim or survivors of the victim. [1985 c 443 § 5.]

Severability——Effective date——1985 c 443: See notes following RCW 7.69.010.

Chapter 7.69A
CHILD VICTIMS AND WITNESSES

Sections

7.69A.010 Legislative intent.
7.69A.020 Definitions.
7.69A.030 Rights of child victims and witnesses.
7.69A.040 Liability for failure to notify or assure child's rights.

7.69A.010 Legislative intent. The legislature recognizes that it is important that child victims and child witnesses of crime cooperate with law enforcement and prosecutorial agencies and that their assistance contributes to state and local enforcement efforts and the general effectiveness of the criminal justice system of this state. Therefore, it is the intent of the legislature by means of this chapter, to insure that all child victims and witnesses of crime are treated with the sensitivity, courtesy, and special care that must be afforded to each child victim of crime and that their rights be protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protection afforded the adult victim, witness, or criminal defendant. [1985 c 394 § 1.]

Reviser's note: "This chapter" has been substituted for "this act" in this section.

7.69A.020 Definitions. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

FILED

SEP 22 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant	NO: 88-1-00428-1 SCHEDULING ORDER

THIS MATTER coming on regularly for hearing, and the Court having considered the arguments of counsel, the written waiver of trial time limits signed by Defendant, and the record and file herein, therefore, it is hereby ORDERED as follows:

(1) Defendant shall file his NOTICE OF INTENT TO SEEK DISCRETIONARY REVIEW by 5:00 P.M. on September 29, 1988.

(2) Defendant shall file his PETITION FOR DISCRETIONARY REVIEW by 5:00 P.M. on Oct. 14, 1988.

(3) Defendant shall file his pre-trial motions, together with supporting affidavits and briefs, within 30 days of the date on which the opinion of the Washington Supreme Court is filed in the office of the Yakima County Clerk.

(4) The Prosecuting Attorney shall file his responsive briefs, affidavits, and materials no later than 15 days after he is served with defendant's pre-trial motions.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

74

(5) The hearing on pre-trial motions shall be held no later than the ~~begin on the~~ 60th day following the date on which the opinion of the Washington Supreme Court is filed in the office of the Yakima County Clerk.

(6) The trial in this case shall begin no later than the ~~on the~~ 90th day following the date on which the opinion of the Washington Supreme Court is filed in the office of the Yakima County Clerk.

DATED this 22 day of September, 1988.

JUDGE F. JAMES GAVIN

PRESENTED BY:

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

SCHEDULING ORDER 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

APPROVED AS TO FORM AND
CONTENT AND NOTICE OF
PRESENTATION WAIVED:

_____

JEFFREY C. SULLIVAN
Attorney for Plaintiff

SCHEDULING ORDER 3

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1345

FILED

SEP 22 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

'88 SEP 22 PM 3 16

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	WAIVER OF TRIAL
RUSSELL DUANE McNEIL,	)	TIME LIMITS
	)	
Defendant	)	

My name is Russell McNeil. I am currently being held in the Yakima County Jail. I am charged with one count of aggravated first degree murder, and one count of being an accomplice to aggravated first degree murder. The prosecutor has requested the death penalty for both crimes. My attorneys are Chris Tait and Tom Bothwell.

I was 17 years old on January 7, 1988, which is the date on which these crimes were allegedly committed. I turned 18 on August 13, 1988.

By order entered March 15, 1988, the Juvenile Court in Yakima County declined jurisdiction in my case, and I was remanded to adult court.

I was arrested on January 27, 1988, and have been in custody ever since that date.

My attorneys filed and argued a motion to dismiss the death penalty notice because juveniles are not elgible to receive the death penalty in Washington. That motion was denied. We are now going to file an appeal of that ruling to the Washington Supreme Court. I know that process will be lengthy, and that we

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

73

cannot say right now exactly how long that appeal process will take. I know that it may take about one year, or possibly even longer. I know that I will remain in the Yakima County Jail while that appeal is prosecuted. I have been advised of the schedule found below, and I agree to that timetable. I know and understand that I could demand a jury trial at this time. I give up the right to be tried at this time. I consent to the timetable below. I do so knowingly, voluntarily, and of my own free will. I have reviewed this document with my attorney.

(1) Defendant shall file his NOTICE OF INTENT TO SEEK DISCRETIONARY REVIEW by 5:00 P.M. on September 29, 1988.

(2) Defendant shall file his PETITION FOR DISCRETIONARY REVIEW by 5:00 P.M. on October 14, 1988.

(3) Defendant shall file his pre-trial motions, together with supporting affidavits and briefs, within 30 days of the date on which the opinion of the Washington Supreme Court is filed in the office of the Yakima County Clerk.

(4) The Prosecuting Attorney shall file his responsive briefs, affidavits, and materials no later than 15 days after he is served with defendant's pre-trial motions.

(5) The hearing on pre-trial motions shall begin on the 60th day following the date on which the opinion of theWashington Supreme Court is filed in the office of the Yakima County Clerk.

(6) The trial in this case shall begin on the 90th day following the date on which the opinion of the Washington Supreme Court is filed in the office of the Yakima County Clerk.

WAIVER OF TRIAL
TIME LIMITS 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1345

DATED this 22 day of September, 1988.

Russell D McNeil
RUSSELL MCNEIL

Christopher Tait
CHRISTOPHER TAIT
ATTORNEY FOR MCNEIL

J. James Gavin
Judge
approved this 22 Day of September, 1988.

WAIVER OF TRIAL
TIME LIMITS 3

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED

SEP 21 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	DEFENDANT'S MOTION AND
RUSSELL DUANE McNEIL,	)	SUPPORTING DECLARATION
	)	FOR ORDER APPROVING
	)	PRIVATE INVESTIGATOR
Defendant	)	FEES AND EXPENSES

MOTION

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court for the authorization of payment for investigatory services.

THIS MOTION is based upon the record and file herein and the accompanying DECLARATION OF COUNSEL.

DATED THIS 16 DAY OF SEPTEMBER, 1988.

Christopher Tait

CHRISTOPHER TAIT
Of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

72

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Diana G. Parker has been authorized to pursue investigatory services on behalf of the Defendant McNeil. An Order Authorizing Investigatory Services and Setting Rates was entered in the above-entitled cause and signed by the Honorable F. James Gavin approving said investigatory services and authorizing payment of her automobile mileage to be reimbursed at the rate of 22 1/2 cents per mile. Diana G. Parker was further authorized to submit statements, through counsel, on or about the 1st and the 15th day of each month.

Attached hereto and incorporated by reference for approval is the statement of Diana G. Paker for the private investigatory fees and expenses for her services from September 1, 1988, to September 15, 1988, performed by her on behalf of the above-named Defendant, McNeil.

SIGNED AND DATED at Yakima, Washington, this 16 day of SEPTEMBER, 1988.

Christopher Tait

CHRISTOPHER TAIT
of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
8/31/88	Out	(Addenda) I'v Wits (Harrah, Wapato) LD Cons SS, Conf CT	1.00
8/31/88	Out	*41 miles at 22.5 cents = **$9.23**	*
9/1/88	Out	LD Dan H. review new materials	5.00
9/2/88	Out	Conf CS, copy materials for cl, jail conf cl, cons YSO, read new material for mitigation, contact wits to I'V	5.25
9/6/88	Out	Jail conf cl, long conf MG, read med materials, conf CT, prepare wit biog.	3.50
9/7/88	Out	LD Cons KD, purchase trial clothes, Conf CT, cons, del motions, lib. jail conf c., LD cons re photos	6.00
9/8/88	Out	Trial preparation; document retreival, Jail conf cl, review materials	3.50
9/9/88	Out	Conf CT, prepare biogs	1.00
9/12/88	Out	LD Cons re dec stats, LD Cons JB, conf CT	1.00
9/13/88	Out	Conf Dr., jail conf cl, LD cons hospital Re med records, LD cons KM, LD cons RG, review surg. report	4.00
9/14/88	Out	Conf VM, Conf VR, re medical, write	

		request copy corres to KM, RG	2.00
9/15/88	Out	Conf CT, LD Cons KM, prepare biog, Contact mit wits, review surg. materials, review YSO statements, Cons PACE.	4.25
		36.50 HRS at $25.00 Per Hour =	$912.50
		41 Miles at 22.5 Cents Per Mile =	$ 9.23
		TOTAL	**$921.73**

FILED
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SEP 21 1988
Roll No.
BETTY McGILLEN, YAKIMA COUNTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	ORDER AUTHORIZING
RUSSELL DUANE McNEIL,	)	PAYMENT BY YAKIMA
	)	COUNTY FOR INVESTIGATORY
Defendant	)	FEES AND EXPENSES

The Court having considered the DEFENDANT'S MOTION for ORDER APPROVING PRIVATE INVESTIGATOR FEES and EXPENSES and attached Declaration of Counsel, now, therefore,

IT IS HEREBY ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

(1) The sum of $921.73 payable to DIANA G. PARKER, in care of the Office of Attorney Christopher Tait.

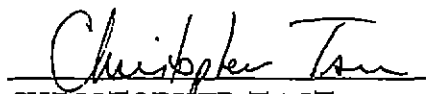
DATED THIS 19th DAY OF SEPTEMBER, 1988.

F. JAMES GAVIN, JUDGE

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

71

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys For Defendant McNeil

ORDER AUTHORIZING PAYMENT
BY YAKIMA COUNTY
FOR INVESTIGATORY FEES
AND EXPENSES 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1345

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BETTY McGILLEN, YAKIMA COUNTY CLERK

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'88 SEP 7 PM 1 28

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

COURT
YAKI HINGTON

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant	NO. 88-1-00428-1 ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY AND PRIVATE INVESTIGATOR FEES AND EXPENSES for the month of August, 1988, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

(1) The sum of $1,175.00 payable to attorney CHRISTOPHER TAIT, 103 South Third Street, Yakima, WA 98901;

(2) The sum of $1,484.38 payable to DIANA G. PARKER, in care of the office of attorney Christopher Tait.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

70

DATED this 7 day of September, 1988.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

CHRISTOPHER TAIT
Attorney for Defendant McNeil

ORDER AUTHORIZING
PAYMENT BY YAKIMA
COUNTY 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
SEP 07 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	)	NO. 88-1-00428-1
vs.	)	DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR ORDER APPROVING ATTORNEY AND PRIVATE INVESTIGATOR FEES AND EXPENSES
RUSSELL DUANE McNEIL, Defendant	)	

MOTION

THE UNDERSIGNED attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for defense counsel, and private investigator fees and expenses, for the month of August, 1988.

THIS MOTION is based upon the file and record herein and the below DECLARATION OF COUNSEL.

DATED this 6 day of September, 1988.

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

69

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court- appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference are statements of counsel and our private investigator for the month of August, 1988.

SIGNED AND DATED at Yakima, Washington, this 6 day of September, 1988.

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
8/16/88	Out	Conf CT, prepare wit I'V list, Jail Conf Cl, LD Const (CG, OCT Admin for research materials LD Cons (L Sprout, T Smith)	5.25
8/17/88	Out	Conf CT, library, conf VF, RMN, LD MS, Cons C. C., jail conf VF	4.00
8/18/88	Out	Review new materials, locate witness (DC, MC), jail conf cl, I'V Wit (DC), Conf CT	7.00
8/18/88	Out	*6 miles at 22.5 cents = **$1.35**	*
8/22/88	Out	Jail conf cl, prepare Biog's., LD Cons E McC, conf CT	3.25
8/23/88	Out	LD cons, DM, prepare Biog's, research, conf VF, cons C.C., Re: Stats< jail conf cl, conf CT	5.00
8/24/88	Out	Locate wits (Wapato) (TC, KM, DN) LD Cons DB, review chronology/events, prepare Biog's., materials, Conf CT, Cons SB, CMH	6.00
8/24/88	Out	*31.5 miles at 22.5 cents =**$70.86**	*
8/25/88	Out	LD DSHS, CPS, LD B, review ed records, LD SWHS, locate wits (DP, JS) prepare Biog's., Conf CT	5.25
8/26/88	Out	(2) LD Cons DSHS, AG, jail conf cl, Cons CC Research, Conf CT, VF	4.75

8/29/88	Out	Jail conf cl., read ed records, conf CT, Conf VF, review cthouse records, research RE: foster placements	6.00
8/30/88	Out	Conf CT, Cons CC, prepare Biog's, research for DP hearing, locate mitigation wits, write letters to RB, CC, copies, etc	5.00
8/31/88	Out	Conf CT, Conf PB, jail conf cl, prepare trial notebook materials, Biog's., research on DP stats, Correspondence prepared, locate ed WITS (JL, GB)	4.50

56.00 HRS at $25.00 Per Hour = $1,400.00
37.50 Miles at 22.5 Cents Per mile = $ 84.38

TOTAL = **$1,484.38**

RECORD OF TIME

CHRISTOPHER TAIT — August 31, 1988

STATE vs. RUSSELL DUANE McNEIL

Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
8/1/88	Out	Jail Conf Client, Conf DP	2.00
8/2/88	Out	Jail Conf Client (JW)	2.00
8/3/88	Out	Jail Conf Client; I'V witness	3.00
8/4/88	Out	Conf DP	.50
8/5/88	Out	Conf DP (Motions)	.50
8/8/88	Out	Office Cons VF	2.00
8/9/99	Out	Conf DP (Motions)	1.00
8/11/88	Out	Conf DP	1.00
8/12/88	Out	Conf DP, LD, Conf RD	1.00
8/15/88	Out	Conf DP Review discovery material	2.00
8/16/88	Out	Conf PP. Jail Conf (client) Review witness statement	2.00
8/18/88	Out	Conf TAB, RH, JCS, DP; review McG materials	3.00
8/23/88	Out	Conf DP	1.00
8/25/88	Out	Review Educational material Conf DP	1.00
8/26/88	Out	Conf DP	.50
8/29/88	Out	Conf DP; review educational records	1.00

23.50 HRS at $50.00 Per Hour =	$1,175.00
TOTAL =	**$1,175.00**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

FILED
AUG 22 1988
BETTY McCULLEM

STATE OF WASHINGTON,
Plaintiff

vs

No. 88 1 428 1
RESET

McNEIL, Russell
Defendant

THE ABOVE ENTITLED CASE has been set for trial

THURSDAY	9/8/88	9:00 a.m.
(Day)	(Date)	(Time)

Non-Jury HEARING Jury _____ No. Days 7

TYPE OF ACTION PRE-TRIAL MOTIONS

JEFFREY SULLIVAN HOWARD HANSEN	THOMAS BOTHWELL CHRISTOPHER TAIT
Attorney for Plaintiff(s)	Attorney for Defendant(s)

PRE-ASSIGNED TO
JUDGE GAVIN

SUPERIOR COURT ADMINISTRATOR

COPY RECEIVED BY _____ DATE _____

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FILED
AUG 22 1988
BETTY McGILLEN
YAKIMA COUNTY
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Roll No.
BETTY McGILLEN, YAKIMA COUNTY CLERK
YAKIMA COUNTY COURT
WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	ORDER AUTHORIZING
RUSSELL DUANE McNEIL,	)	PAYMENT BY YAKIMA
	)	COUNTY FOR INVESTIGATORY
Defendant	)	FEES AND EXPENSES

The Court having considered the DEFENDANT'S MOTION for ORDER APPROVING PRIVATE INVESTIGATOR FEES and EXPENSES and attached Declaration of Counsel, now, therefore,

IT IS HEREBY ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

(1) The sum of $1,524.38 payable to DIANA G. PARKER, in care of the Office of Attorney Christopher Tait.

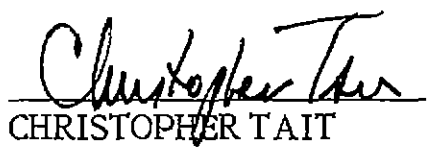
DATED THIS 22 DAY OF AUGUST, 1988.

F. JAMES GAVIN, JUDGE

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

67

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys For Defendant McNeil

ORDER AUTHORIZING PAYMENT
BY YAKIMA COUNTY
FOR INVESTIGATORY FEES
AND EXPENSES 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
AUG 22 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	DEFENDANT'S MOTION AND
RUSSELL DUANE McNEIL,	)	SUPPORTING DECLARATION
	)	FOR ORDER APPROVING
	)	PRIVATE INVESTIGATOR
Defendant	)	FEES AND EXPENSES

MOTION

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court for the authorization of payment for investigatory services.

THIS MOTION is based upon the record and file herein and the accompanying DECLARATION OF COUNSEL.

DATED THIS 16 DAY OF AUGUST, 1988.

CHRISTOPHER TAIT
Of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Diana G. Parker has been authorized to pursue investigatory services on behalf of the Defendant McNeil. An Order Authorizing Investigatory Services and Setting Rates was entered in the above-entitled cause and signed by the Honorable F. James Gavin approving said investigatory services and authorizing payment of her automobile mileage to be reimbursed at the rate of 22 1/2 cents per mile. Diana G. Parker was further authorized to submit statements, through counsel, on or about the 1st and the 15th day of each month.

Attached hereto and incorporated by reference for approval is the statement of Diana G. Paker for the private investigatory fees and expenses for her services from August 1, 1988, to August 15, 1988, performed by her on behalf of the above-named Defendant, McNeil.

SIGNED AND DATED at Yakima, Washington, this 16 day of AUGUST, 1988.

Christopher Tait

CHRISTOPHER TAIT
of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER — August 15, 1988

STATE vs. RUSSELL DUANE McNEIL

Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
8/1/88	Out	Jail Conf Client, Conf LD BM, Conf CT	2.00
8/2/88	Out	Retrieve photos, evidence records, I LD Conf DSHS, I'V Witness, (Parker, Wapato) (MJJ, HD, MS, DJ)	6.00
8/2/88	Out	*25 miles at 22.5 cents = $5.63	*
8/3/88	Out	Jail Conf Cl, I'V Wits (Topp), Conf VF, LD I'V wits (JD, RG), prepare materials for client review	7.00
8/4/88	Out	Conf CT, jail Conf Cl, LD I'V wits (GH) prepare mitigation profile materials< Conf CT	6.25
8/5/88	Out	LD, Cons, Seattle PD, jail conf cl LD conf JMN, prepare biog. materials Conf CT, conf JW, review SSI records	6.00
8/6/88	Out	Jail conf cl, write/type summary reports	4.00
8/8/88	Out	Yak Herald, review SSI records, prepare chart, jail conf cl, Office cons VF	6.00
8/9/88	Out	Conf Ct, Conf VFD, LD Cons (EL) try to locate Seattle wits, jail conf cl, prepare history materials	4.75
8/10/88	Out	Conf VF, LD Cons (MG, JH, Wap HS) Prepare mitigation witness statements	

		LD, I'V (NM) JCS trip, jail conf cl, LD cons WJH	5.50
8/11/88	Out	Conf CT, review client ed/records prepare mitigation materials, LD Cons (BS, DH, SSPD) jail conf client conf CT, read forensic material, LD Cons R.D.	6.25
8/12/88	Out	Conf CT, I'V BM, LD Conf CT, RD, prepare material for Disc., MT, LD Cons ocadmin, jail conf cl,	5.00
8/15/88	out	Conf CT, jail conf cl, review/compile records, contact wits to interview, const LJ, jail conf	2.00

60.75 HRS at $25.00 per Hour = $1,518.75
25 Miles at 22.5 Cents per Mile= 5.63

TOTAL = **$1,524.38**

FILED
AUG 10 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

'88 AUG 10 PM 3 08

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant.

NO. 88-1-00428-1

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR DISMISSAL OF PLAINTIFF'S NOTICE OF INTENT TO SEEK THE DEATH PENALTY

FACTS

Mike and Dorothy Nickoloff were an elderly couple, 82 and 74 years of age respectively, who were retired and lived alone in their single family dwelling in rural Yakima County. In the early evening of January 7, 1988, Mike and Dorothy Nickoloff were both brutally murdered in their home, the result of each receiving multiple knife stab wounds. Property was removed from the house at the time of the murders. Yakima Sheriff's Department investigation of these crimes recovered the stolen property involved in this case and traced the stolen property to the two co-defendants Russell McNeil and Herbert Rice, Jr. Both co-defendants gave the police statements concerning their involvement in the crimes. Both defendants were approximately 17 1/2 years of age at the times these crimes were committed.

ARGUMENT

The defense requests the court to declare that the Washington State Death Penalty Statutes are unconstitutional as applied to juvenile offenders.

The constitutionality of the Washington State Death Penalty Statutes have been reviewed on numerous occasions since enacted in its latest form in 1981. In each case, the Washington State Supreme Court has upheld its constitutionality from the numerous methods of attack, with some qualifications concerning the penalty phase of the trial. The following Washington Supreme Court cases address the various attacks on the constitutionality of the Death Penalty Statutes and with those qualifications referred to above, uphold their validity:

State v. Bartholomew, I
98 Wn.2d 173, 654 P.2d 1170 (1982)

State v. Bartholomew, II
101 Wn.2d 631, 683 P.2d 1079 (1984)

State v. Rupe
101 Wn.2d 664, 683 P.2d 571 (1984)

State v. Dictado
102 Wn.2d 277, 607 P.2d 172 (1984)

State v. Campbell
103 Wn.2d 1, 691 P.2d 929 (1984)

State v. Jeffries
105 Wn.2d 398, 717 P.2d 722 (1986)

State v. Mak
105 Wn.2d 692, 718 P.2d 407 (1986)

State v. Harris
106 Wn.2d 784, 725 P.2d 975 (1986)

The State has not detailed the holdings in the above cases since the defense in the present case has not mounted any

related arguments presented in those cases in its motion to dismiss the death penalty aspects of this case. Instead, the defense argues that the most recent federal Supreme Court case of Thompson v. Oklahoma, _____ U.S. _____, 56 LW. 4892, 43 Crim. Law Rptr. 3175, dated June 29, 1988, provides a new approach for the Washington courts to declare our death penalty statute unconstitutional for all juveniles, that is, individuals less than eighteen years of age.

In the Thompson case the defendant was fifteen years old at the time he participated in a murder for which he was found guilty and sentenced to death under Oklahoma state law.

Justice Stevens in the opening of his opinion briefly discussed the basis of review of the Federal Supreme Court on the issue of whether the death penalty is cruel and unusual punishment for a fifteen year old defendant:

> The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the 'evolving standards of decency that mark the progress of a maturing society.' Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) (Warren, C. J.). In performing that task the Court has reviewed the work product of state legislatures and sentencing juries, and has carefully considered the reasons why a civilized society may accept or reject the death penalty in certain types of cases.

Justice Stevens is careful to limit his analysis to that of a fifteen year old when he states in subsection (III) of his Opinion:

> "The line between childhood and adulthood is drawn in different ways by various States. There is, however, complete or near unanimity among all 50 States and the District of Columbia in treating a person under 16 years of age as anything but a 'child'
>
> . . .
>
> All of this legislation is consistent with the experience of mankind, as well as the long history of our law that the normal fifteen year old is not prepared to assume the full responsibilities of an adult."

Justice Steven's plurality opinion then points out that of the fifty states and the District of Columbia, fourteen states do not authorize capital punishment at all, nineteen states (including Washington) have capital punishment but do not specify a minimum age to impose such punishment, and of the eighteen remaining states which have established minimum ages, twelve states appear to have set the minimum age at eighteen and the remaining six at either sixteen or seventeen years of age.

Justice Stevens' decision seems to be based mostly upon the court's belief that, in general, juveniles are less culpable than adults who commit similar crimes. As the court stated in subsection IV of its opinion:

> "It is generally agreed 'that punishment should be directly related to the personal culpability of the criminal defendant'." California v. Brown, U. S. _____, _____ (1987) (O'Connor, J., concurring). There is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults. We stressed this difference in explaining the importance of treating the defendant's youth as a mitigating factor in capital cases:
>
> > 'But youth is more than a chronological fact. It is a time and condition of life when a person may

> be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particulary 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. Bellotti v. Baird, 443 U.S. 622, 635 (1979)." Eddings v. Oklahoma, 455 U.S., at 115-116 (footnotes omitted).

To add further emphasis to the special mitigating force of youth, Justice Powell quoted the following passage from the 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders:

> 'Adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.'

The State submits that Justice Stevens argument against the deterence value of capital punishment for juveniles is less persuasive and seems to be a simple statement of his personal belief on the subject.

Once again, it should be reiterated that the court strictly limited its decision to defendants less than sixteen years of age. This was emphasized by the court's closing comments when it states in subsection VI of its opinion:

> "Petitioner's counsel and various amici curiae have asked us to 'draw a line' that would prohibit the execution of any person who was under the age of 18 at the time of the offense. Our task today, however, is to decide the case before us; we do so by concluding that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense."

The occurring opinion of Justice Sandra Day O'Connor also agreed that capital punishment under the facts of this case is cruel and unusual punishment i.e. for a juvenile under 16 years of age. Justice O'Connors' concurring opinion appears to be based upon her concern that the State of Okalahoma (and by inference, all states who do not have a set minimum age to be capital punishment eligible) may not have given its capital punishment scheme proper consideration concerning establishment of a minimum age that juvenile defendants are eligible for the death penalty.

The State submits that the analysis of the plurality opinion and the concurring opinion in the Thompson case are not applicable to the facts of our case under the Washington Death Penalty statutes and Washington Juvenile Code.

The actual written text of the plurality opinion limits its analysis and decision to those defendants who are less than 16 years of age at the time they commit their crime. The entire thrust of this opinion rests on the discernable difference in culpability between 15 year olds and adults for the same criminal act based upon perceived standards of decency in American society. Commonsense dictates that that discernable difference fades into obscurity as an individual approaches the age of 18.

It should be noted parenthetically that no party to this case has attacked the constitutionality of capital punishment for adults, particularly 18 year old adults, under Washington State Law.

Further, Washington State's Juvenile Code and its declination procedure specifically address the concerns of the plurality opinion that juveniles should not be treated the same as adults because of their lack of maturity and development particularly when dealing with a 17 year old juvenile as in our case. This concern is addressed by the Juvenile Court in the declination process, when the court considers the "Kent criteria" on determining whether the defendant functions as an adult and can be best dealt with as an adult in the criminal justice system.

The Washington Juvenile Code also addresses Justice O'Connor's concern that due consideration be given for the setting of a minimum age to be eligible for capital punishment. First, we should be reminded that our Juvenile Code, RCW 13.40 known as the Juvenile Justice Act of 1977 was passed with the specific purpose of making juveniles more accountable for their crimes. RCW 13.40.010 states the legislative purpose of the act:

> "(1) This chapter shall be known and cited as the Juvenile Justice Act of 1977.
>
> (2) It is the intent of the legislature that a system capable of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders, as defined by this chapter, be established. It is the further intent of the legislature that youth, in turn, be held accountable for their offenses and that both communities and the juvenile courts carry out their functions consis-

> tent with this intent. To effectuate these policies, it shall be the purpose of this chapter to:
>
> (a) Protect the citizenry from criminal behavior;
>
> (b) Provide for determining whether accused juveniles have committed offenses as defined by this chapter;
>
> (c) Make the juvenile offender accountable for his or her criminal behavior;
>
> (d) Provide for punishment commensurate with the age, crime, and criminal history of the juvenile offender;
>
> (e) Provide due process for juveniles alleged to have committed an offense;
>
> (f) Provide necessary treatment, supervision, and custody for juvenile offenders;
>
> (g) Provide for the handling of juvenile offenders by communities whenever consistent with public safety;
>
> (h) Provide for restitution to victims of crime;
>
> (i) Develop effective standards and goals for the operation, funding, and evaluation of all components of the juvenile justice system and related services at the state and local levels; and
>
> (j) Provide for a clear policy to determine what types of offenders shall receive punishment, treatment, or both, and to determine the jurisdictional limitations of the courts, institutions, and community services. [1977 ex.s. c 291 Sec. 55.]

The declination procedure contained in RCW 13.40.110 specifically requires a declination hearing unless waived by all parties for 16 or 17 year olds who are alleged to have committed or attempted to commit a Class A felony. Although not couched in

terms of a minimum age to be eligible for capital punishment, the issue of when a defendant must be formally considered for adult prosecution for Class A felony has been set at 16 years of age.

The State submits that if the defendants in this case were less than 16 years of age, we may face the same concern expressed by Justice Sandra Day O'Connor's concurring opinion since our declination process also does not specifically address what treatment should be given to individuals less than 16 years of age for Class A felonies. Our declination procedure for such individuals is optional for Class A felonies so that the argument could be made that our legislature also has not adequately addressed the issue of capital punishment eligibility for those offenders less than 16 years of age.

But, our declination procedure does show that our legislature has properly considered the eligibilty of 16 and 17 year olds for such crimes and has stated that they must be considered for declination and treatment as adults.

Consistent with that approach is the fact that Justice O'Connor's opinion did not call into question the Oklahoma procedures for declination of 16 and 17 year olds subject to capital punishment, but only for those less than 16 years old who were not specifically considered in their juvenile declination procedure.

The State therefore argues that she has not indicated that she would register the same concerns for 16 and 17 year olds under Oklahoma law, and by inference, under our declination procedures. And, in fact, it suggests that she would allow such

a procedure since the legislature has clearly considered the matter and has made 16 and 17 year olds eligible for capital punishment under appropriate circumstances.

CONCLUSION

It is therefore respectfully requested that the court uphold the Washington State Laws for capital punishment as it applies to juveniles under the facts alleged in the present case.

DATED this 10 day of August, 1988.

Respectfully submitted,

JEFFREY C. SULLIVAN
Prosecuting Attorney

Howard W. Hansen

HOWARD W. HANSEN
Deputy Prosecuting Attorney

HWH1(C)

Filed and Micro filmed
AUG 05 1988
Roll No. 333 52
BETTY McGILLEN, YAKIMA COUNTY CLERK

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'88 AUG 5 PM 12 11
BETTY McGILLEN
CLERK OF
COURT
YAKIMA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY AND PRIVATE INVESTIGATOR FEES AND EXPENSES for the month of July, 1988, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County office forthwith:

(1) The sum of $4,665.00 payable to attorney CHRISTOPHER S. TAIT, 103 South Third Avenue, Yakima, WA, 98901;

(2) The sum of $2,003.04 payable to attorneys THOMAS BOTHWELL and PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S., 302 North Third Street, P.O. Box #2129, Yakima, WA, 98907; and

(3) The sum of $1,156.25 payable to DIANA PARKER, in

/ / /

64

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

care of the office of attorney Christopher S. Tait.

DATED this 23 day of August, 1988.

E. JAMES GAVIN, JUDGE

PRESENTED BY:

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

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FILED
AUG 05 1988
BETTY McGILLEN, YAKIMA COUNTY CLERK

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'88 AUG 5 PM 12 12
BETTY McGILLEN
CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR ORDER APPROVING ATTORNEY AND PRIVATE INVESTIGATOR FEES AND EXPENSES

MOTION

The undersigned attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for defense counsel, and private investigator fees and expenses, for the month of July, 1988.

This motion is made and based upon the record and file herein and the below DECLARATION OF COUNSEL.

DATED this 29th day of July, 1988.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

DECLARATION OF COUNSEL

THOMAS BOTHWELL, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference are statements of counsel and our private investigator for the month of July, 1988.

SIGNED AND DATED at Yakima, Washington, this 29th day of July, 1988.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

S T A T E M E N T
July 1988 Legal Services Rendered

ATTORNEY: THOMAS BOTHWELL and PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S.

RE: STATE OF WASHINGTON v. RUSSELL DUANE McNEIL, Yakima County Cause No. 88-1-ØØ428-1

Date:	Description:	Time:
7/1/88	Telephone conversation with Chris Tait	.5
7/2/88	Research; memo to Chris Tait	.75
7/5/88	Telephone conversation with Chris Tait	.25
7/11/88	Two telephone conversations with Susan Hahn	.75
7/11/88	Research	3.5
7/12/88	Telephone calls (to attorneys in Thompson v. Oklahoma) and to U.S. Supreme Court and University of Washington Law Library	.5
7/12/88	Research	2.Ø
7/12/88	Telephone conversation with Chris Tait	.5
7/13/88	Telephone calls to U.S. Supreme Court Clerk and to Southern Poverty Law Center (Alabama) and to attorneys for other juvenile death penalty cases (Missouri and Georgia) and to University of Washington Law Library	1.25

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

Date:	Description:	Time:
7/13/88	Telephone conversation with Mike Mello [University of Vermont (High v. Kemp)] and Dick Burr, NAACP Legal Defense Fund	.5
7/13/88	Meeting with Dianna Parker and Chris Tait, then Chris Tait	3.Ø
7/16/88	Review memos re Thompson, etc.	2.25
7/18/88	Draft and research for memorandum	4.25
7/19/88	Draft memorandum	5.Ø
7/2Ø/88	Draft memorandum; meeting with Chris Tait	8.5
7/21/88	File review; telephone conversation with Susan Hahn; review motions filed by Defendant Rice	1.25
7/27/88	Meeting with Chris Tait and Dianna Parker	1.5
7/27/88	Telephone conversation with Susan Hahn	.25
7/29/88	File review	.25
	COSTS:	
	Photocopying costs (approximately 1,5ØØ pages at 1Ø cents per page):	15Ø.ØØ
	FAX machine services	15.54
		$165.54
	TOTAL IN-COURT HOURS: Ø.Ø hours at $6Ø.ØØ per hour:	$ -Ø-
	TOTAL OUT-OF-COURT HOURS: 36.75 hours at $5Ø.ØØ per hour:	1,837.5Ø
	TOTAL:	$2,ØØ3.Ø4

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2120
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

RECORD OF TIME

CHRISTOPHER TAIT JULY 31, 1988
STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
7/1/88	Out	Jail conf, Conf	2.00
7/5/88	Out	Conf McG, jail conf,	5.00
7/6/88	Out	Travel Whitstran	4.00
7/6/88	Out	*100 miles at 22.5 cents = **22.50**	*
7/7/88	Out	Conf SLH, research, conf JCS, TAB, DP	6.00
7/8/88	Out	Travel to Seattle, conf Davis, locate witness	8.00
7/8/88	Out	300 miles at 22.5 cents =**67.50**	*
7/11/88	Out	Conf SLH, Ford, motions, jail conf, conf JCS	6.00
7/12/88	Out	Conf SLH, jail conf motions, stipulation	6.00
7/13/88	Out	Conf TAB, SLH, motions	6.00
7/14/88	Out	Jail conf, conf TAB, motions	6.00
7/18/88	Out	(2) conf, jail conf, Joy DP, Schreiner	5.00
7/19/88	Out	Long jail conf (family) motions	6.00
7/20/88	Out	Jail conf, conf family, motions	4.00
7/21/88	Out	Jail conf, conf family, motions	4.00
7/22/88	Out	Jail conf, motions	4.00

7/25/88	Out	Long jail conf, conf VF	4.00
7/26/88	Out	Jail conf, conf TAB, family	5.50
7/27/88	Out	Conf Davis, TAB, Ross, JCS, DP Jail conf, research	6.00
7/28/88	Out	Conf DP, jail conf Cl, review chronology	4.00

TOTAL Out-Of-Court Hours: 91.50 HOURS
At $50.00 Per Hour = $4,575.00
400 miles at 22.5 cents per mile = 90.00
TOTAL **$4,665.00**

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL July 31, 1988
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
7/18/88	Out	Review TAB reports, cont YSO, Conf JMN, VF, locate (DK, H. Park Witnesses) retrieve DSHS documents, I'V H.P. Witness, Granger LL	5.50
7/21/88	Out	Conf CT, Conf JMN, LD cons., M. McG, jail conf client, LD cons CS, LD, LD, BM, prepare mitigation materials	7.00
7/22/88	Out	2-conf JMN, conf CT, Conf DK, LD, telephone DSHS, LD, Cons CPS, LD, R. Davis, I'V D K, LD, M. DeL., Cons Betty Morehouse, LD R. Davis	6.50
7/25/88	Out	Conf CT, jail conf Cl, Conf Veronica, review reports, jail conf client, prepare mitigation materials from history background	6.25
7/26/88	Out	Conf CT, Conf D. Kenny, TAB, prepare material, jail conf, client, conf VF, cons L.P.	5.50
7/27/88	Out	Jail Conf Cl, conf LD, R. Davis, Conf VF, Conf CT, TAB, prepare mitigation materials, review notes, police reports	6.50
7/28/88	Out	Conf CT, jail conf Cl, Cons LD, D.K., prepare evidence chronology record, record evidence on tape for chronology. Prepare witness notes for JM	7.00
7/29/88	Out	Conf VF, prepare mitigation record	1.00
7/30/88	Out	Jail conf client	1.00
		46.25 HRS at $25.00 Per Hour =	$1,156.25

AUG 03 1988
MCGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	ORDER AUTHORIZING
RUSSELL DUANE McNEIL,	)	FORENSIC EXPERT AND
	)	EXPENDITURE OF
	)	PUBLIC FUNDS
Defendant	)	

THIS MATTER coming on regularly for consideration on Defendant's MOTION FOR AUTHORIZATION AND EXPENDITURE OF PUBLIC FUNDS for the authorization of a Forensic Expert Witness herein, and the Court being fully advised in the premises, now, therefore, it is hereby:

ORDERED that Mr. RAYMOND DAVIS of the Quantum Analytical Company, at 1000 8th Avenue, Suite 705, Seattle, WA 98104, be and he is hereby authoized to serve as the forensic expert witness on behalf of Defendant, RUSSELL DUANE McNEIL, and he shall further serve under the direction of and in conjunction with counsel for the above named Defendant, and that upon approved submission of statements as provided for herein, he shall be paid at county expense at his authorized hourly, pre-trial out-of-court rate of $70.00 per hour.

DONE IN OPEN COURT THIS 30 DAY OF JUNE, 1988.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

F. JAMES GAVIN, JUDGE

PRESENTED BY:

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

ORDER AUTHORIZING
FORENSIC EXPERT AND
EXPENDITURE OF PUBLIC FUNDS 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

AUG 03 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

'88 AUG 3 PM 1 12

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	NO: 88-1-00428-1
vs.	
RUSSELL DUANE McNEIL, Defendant	DEFENDANT'S MOTION FOR AUTHORIZATION AND EXPENDITURE OF PUBLIC FUNDS

COMES NOW CHRISTOPHER TAIT, of attorneys for the above-named Defendant, RUSSELL DUANE McNEIL, and moves this Court for the entry of an order for the authorization and expenditure of public funds to hire a Forensic Expert for the purposes of analayzing the crime/lab results in the above-entitled matter.

THIS MOTION is based upon the files and records herein and upon the Affidavit of Counsel, attached hereto and hereby incorporated by reference.

DATED THIS 30 DAY OF JUNE, 1988.

CHRISTOPHER TAIT
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

61

STATE OF WASHINGTON)
)ss.
COUNTY OF YAKIMA)

CHRISTOPHER TAIT, being first duly sworn upon oath, deposes and states:

1. I am one of the attorneys appointed by the Court to represent Defendant Russell Duane McNeil.

2. I have previously met in Judge F. James Gavin's chamber regarding the issue of the confusion and the high level of medical terminology, which will need expert clarification in regard to the crime/lab reports on the evidence taken at the scene of the crime for which the Defendant herein is accused of committing. I requested his advice on the issuance of hiring a Forensic Expert Witness for the purposes of clarification and proper defense of the Defendant herein. Judge F. James Gavin agreed that the hiring of a Forensic Expert in this matter was appropriate and necessary, and further that such expert witness fees should, therefore, be paid by public funds.

3. I have contacted Mr. Raymond Davis of the Quantum Analytical Company, at 1000 8th Avenue, Suite 705, Seattle, WA 98104. Mr. Davis has agreed to perform these necessary services on behalf of the Defendant, Russell Duane McNeil. Mr. Davis' hourly rate is $70.00 per hour for pre-trial out-of court time.

DATED THIS 30 DAY OF JUNE, 1988.

Christopher Tait

CHRISTOPHER TAIT

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1345

SUBSCRIBED AND SWORN to before me this 30 day of June, 1988.

Patricia J. Barbee

NOTARY PUBLIC in and for the State of Washington, residing at Yakima.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED

JUL 20 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

'88 JUL 20 P[illegible]

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	DEFENDANT'S MOTION AND
RUSSELL DUANE McNEIL,	)	SUPPORTING DECLARATION
	)	FOR ORDER APPROVING
	)	PRIVATE INVESTIGATOR
Defendant	)	FEES AND EXPENSES

MOTION

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court for the authorization of payment for investigatory services.

THIS MOTION is based upon the record and file herein and the accompanying DECLARATION OF COUNSEL.

DATED THIS 20 DAY OF ~~JUNE~~ July, 1988.

Christopher Tait

CHRISTOPHER TAIT
Of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Diana G. Parker has been authorized to pursue investigatory services on behalf of the Defendant McNeil. An Order Authorizing Investigatory Services and Setting Rates was entered in the above-entitled cause and signed by the Honorable F. James Gavin approving said investigatory services and authorizing payment of her automobile mileage to be reimbursed at the rate of 22 1/2 cents per mile. Diana G. Parker was further authorized to submit statements, through counsel, on or about the 1st and the 15th day of each month.

Attached hereto and incorporated by reference for approval is the statement of Diana G. Paker for the private investigatory fees and expenses for her services from July 1, 1988, to July 15, 1988, performed by her on behalf of the above-named Defendant, McNeil.

SIGNED AND DATED at Yakima, Washington, this 20 day of July, 1988.

CHRISTOPHER TAIT
of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
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RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
7/1/88	Out	Conf JMN, prepare materials for Forensic Expert, jail Conference	3.00
7/5/88	Out	Conf Dr. McG, Conf CT, jail conf, Research RE: D.P., Prepare materials, Photocopies for Forensic	5.50
7/6/88	Out	Conf F. Weadon on R. N, Conf CT, review record for W. Info, cons SH, cons Dr. McG, I'V Carl S., I'V Wit (MG in Whitstram)	8.50
7/7/88	Out	Conf SH, Cons G. Jones, Prepare materials for R.D., Cons SH, Conf YPD, Conf R.M.	7.00
7/8/88	Out	To Seattle (Forensic Expert)	8.00
7/11/88	Out	Conf CT, jail Conf, Cons SH, review USS Ap, read report of BS, DC, LC, LD, TF, read materials	6.00
7/12/88	Out	Conf CT, conf SH, jail conference, review client statement, long jail conf	5.00
7/13/88	Out	Conf CT, prepare trial materials, locate mitigaiont witness, conf CT, TAB, LD, Wapato HS.	6.25
7/14/88	Out	LD Cons RD, jail conf, prepare mitigation materials, conf CT	4.00
7/15/88	Out	Conf CT, locate fact/mitgation wits, prepare chronology, reconcile statements, review materials,	7.00

60.25 HRS at $25.00 Per Hour = $1,506.25
TOTAL = $1,506.25

FILED
and Micro filmed
JUL 20 1988
Roll No. 332 41
BETTY McGILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	NO. 88-1-00428-1
VS.	
RUSSELL DUANE McNEIL, Defendant	ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY FOR INVESTIGATORY FEES AND EXPENSES

The Court having considered the DEFENDANT'S MOTION for ORDER APPROVING PRIVATE INVESTIGATOR FEES and EXPENSES and attached Declaration of Counsel, now, therefore,

IT IS HEREBY ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

(1) The sum of $1,506.25 payable to DIANA G. PARKER, in care of the Office of Attorney Christopher Tait.

DATED THIS 20 DAY OF JULY, 1988.

F. JAMES GAVIN, JUDGE

CHRISTOPHER TAIT
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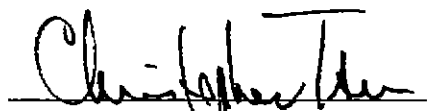
PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys For Defendant McNeil

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SR

Copy received 7/20/88 J. Sullivan

FILED

JUL 20 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S RUSSELL McNEIL'S MOTION FOR DISMISSAL OF PLAINTIFF'S REQUEST FOR DEATH PENALTY

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court to dismiss the Plaintiff's request for the death penalty.

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant asks this Court to declare that it is unconstitutional and otherwise illegal to impose the death penalty upon a juvenile offender, particularly in the absence of express statutory authorization of the death penalty for juvenile offenders. (Defendant Russell McNeil was 17 years old at the time of the crimes alleged herein.)

Most of the legal principles upon which Defendant's motion is based were enunciated by the plurality and concurring opinions in the very recent decision of the United States Supreme Court, Thompson v. Oklahoma, _____ U.S. _____, 56 L.W. 4892

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(June 29, 1988, copy appended). Thompson specifically holds that no 15-year-old offender may receive the death penalty.

The day following its decision in Thompson, the United States Supreme Court granted certiorari in two cases presenting the following issues, respectively:

> Does execution of accused under age of 18 at time of the offense violate evolving standards of decency, and is it cruel and unusual punishment under Eighth and Fourteenth Amendments?
>
> Does infliction of death penalty on person who is 16 at time crime was committed constitute cruel and unusual punishment prohibited by Eighth and Fourteenth Amendments?

High v. Zant, 43 CrL 4084 (No. 87-5666); Wilkens v. Missouri, 43 CrL 4084 (No. 87-6026). (Summaries of grants of certiorari appended hereto.)

There are several other appendices to this memorandum, including briefs submitted to the U.S. Supreme Court by the parties and amici in Thompson, as well as portions of the Petition for Certiorari in Wilkens, plus a law review article cited several times in the Thompson decision: Streib, "Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen," 36 Ok.L.Rev. 613 (1983) and two other articles by Professor Streib. Defendant McNeil offers these materials, frankly, because they most articulately present his various arguments. Defendant asks this Court to consider these materials and to give him the benefit of the arguments presented therein, which may be summarized as follows:

(1) The execution of a youth who was under the age of eighteen at the time of the offense would violate evolving standards of decency.

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(a) In most states (including Washington) and for most purposes, age eighteen marks the boundary between childhood and adult responsibilities.

(b) The reasons for the boundary line: Adolescents lack the maturity, experience, moral judgment and sophistication of adults. Child development experts agree that adolescence is a transitional period in which young people are still developing the cognitive ability, judgment and fully formed identity or character of adults.

(c) The reasons for treating juveniles differently from adults apply with special force here: The developmental differences between adolescents and adults diminish the state's interest in inflicting the death penalty on minors.

(i) The death penalty does not deter youths from committing capital offenses.

(ii) Retribution is not a legitimate penological purpose with respect to adolescents.

(2) Executing juvenile offenders violates the Eighth and Fourteenth Amendments to the United States Constitution, particularly in the absence of the legislation expressly authorizing capital punishment for juveniles.

ARGUMENT

I. THE REASONING IN THOMPSON APPLIES WITH EQUAL FORCE TO 17-YEAR-OLDS.

In deciding whether the age of the defendant Thompson - specifically the fact that he was 15 years old at the time of his offense - was "a sufficient reason for denying the state the power to sentence him to death," the U.S. Supreme Court plurality adhered to the following analysis:

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> "[W]e first review relevant legislative enactments, then refer to jury determinations, and finally explain why these indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty.

Thompson v. Oklahoma, supra, 56 LW at 4894 (footnotes omitted).

(1) Legislative Enactments:

The Thompson plurality first summarizes the numerous examples in law illustrating that "the experience of mankind, as well as the long history of our law, recognize that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults." Id, at 4894.

The court notes, for example, that Oklahoma recognizes this distinction in numerous statutes, e.g., forbidding minors the right to vote, sit on a jury, marry without parental consent, or purchase alcohol or cigarettes.

Similarly, the State of Washington has numerous statutes recognizing basic distinctions between minors and adults. Attaining the age of 18 in our state is the express statutory condition precedent to such rights or privileges as: voting (RCW 26.28.015); marrying without either parental consent or court approval (RCW 26.04.010 and 26.28.215); drafting a Last Will (RCW 11.12.010); authorizing an abortion (RCW 9.02.070); purchasing "erotic" material (RCW 9.68.080); owning a motor vehicle (RCW 46.12.250); suing (or being sued) without a guardian ad litem (RCW 26.28.015); becoming a notary public (RCW 42.44.020) or securing occupations such as insurance adjustor (RCW 48.17.380); or even for such acts as entering into a contract to play baseball (RCW 67.04.090); donating blood (RCW 70.01.020); obtaining a license or permit to discharge fireworks (RCW 70.77.255); authorizing an

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autopsy (RCW 68.50.101) or adopting a child (RCW 26.33.140). See also, generally, RCW 26.28.010, which specifies 18 as the age of majority.

Continuing its review of the legislation, Thompson cites the Oklahoma statutory juvenile justice system, including a specific statute providing that 16- or 17-year-olds charged with murder and other serious felonies shall be considered as adults, and other statutes providing a special "certification" procedure whereby the juvenile system may determine that a person less than 16 may be tried as an adult for such crimes as murder. Id, at 4893-4894.

Washington, too, has legislatively created a distinct juvenile justice system, RCW 13.40, including a declination procedure whereby juvenile court may transfer a juvenile for adult criminal prosecution, RCW 13.34.110. Washington's declination statute authorizes transfer if the juvenile is 16 or 17 and the alleged crime is a Class A felony or an attempt to commit a Class A felony, or if the juvenile is 17 and the alleged crime is second-degree assault, kidnapping, rape or robbery, or first-degree extortion, or indecent liberties. RCW 13.40.110(a) and (b).

The plurality in Thompson cites those various age-distinguishing statutes for the proposition that "[a]ll of this legislation is consistent with the experience of mankind, as well as the history of the law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult." Id, at 4895 (footnote omitted). Because these statutes, including the multitude here in Washington, draw the line at 18 years, rather than somewhere between 15 and 17, it should similarly be said that the legislation, experiences of mankind, and long history of the law recognize that 17-year-olds are similarly not prepared to assume the full responsibilities of an adult.

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After further reviewing the common tradition of American legislatures to "draw the line," the Thompson plurality cites additional numerous organizations - national and international - as well as other countries, as follows:

> The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by leading members of the Western European community. Thus, the American Bar Association and the American Law Institute have formally expressed their opposition to the death penalty for juveniles. Although the death penalty has not been entirely abolished in New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.

Id, at 4903 (footnotes omitted). None of these organizations or countries draw the line between 15- and 17-year olds: all either abolish the death penalty completely or draw the line at 18.

Summarizing the types of legislative enactments considered by the Thompson plurality: The legislation taken as a whole offers no meaningful basis for drawing the line somewhere between 15- and 17-year-olds. Rather, this legislative analysis supports prohibiting the death penalty against any juvenile offender.

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(2) Jury Determinations:

"The second societal factor the court has examined in determining the acceptability of capital punishment to the American sensibility is the behavior of juries." Thompson, supra, 56 LW at 4896-7.

For its review of the incidence of execution of persons who were under the age of 16, the Thompson court relies heavily upon the research of Professor Streib. Id, at 4897. (Articles attached.)

No juveniles have been executed in the State of Washington pursuant to RCW 10.95, the current death penalty statute (enacted in 1981). According to the undersigneds' research, only two jvuenile offenders have been executed by this State (in the years 1906 and 1932).

Thompson's plurality reviews the statistics and concludes that the five persons who were 16-year-old offenders in the United States sentenced to death between 1982 and 1986 "received sentences that are 'cruel and unusual in the same way that being struck by lightning is cruel and unusual.'" Id, at 4897, quoting Furman v. Georgia, 408 U.S. 239, 309 (Stewart, J., concurring). The statistics (attached) concerning the incidence of death penalty for any-aged juveniles are no less compelling towards the conclusion that such sentences for 17-year-olds as well are cruel and unusual in the same way as being struck by lightning.

(3) Whether "such a young person is...capable of acting with the degree of culpability that can justify the ultimate penalty." Thompson, at 4894.

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In making its judgment on this third issue, the Thompson plurality states:

> [W]e first ask whether the juvenile's culpability should be measured by the same standards as that of an adult, and then consider whether the application of the death penalty to this class of offenders "measurably contributes" to the societal purposes that are served by the death penalty.

Thompson, supra, at 4897, citing Enmund v. Florida, 458 U.S. 782, 798 (1982).

Thompson's analyis of these criteria is found in Part V of the plurality's decision. 56 LW at 4897-98. Also, appended to this memorandum are two amicae briefs submitted to the Supreme Court in Thompson, one by the National Legal Aid and Defender Association, et al., the other by The American Society for Adolescent Psychiatry, et al.

The Thompson plurality acknowledged that the petitioner and various amici curiae had asked the court "to 'draw the line' that would prohibit the execution of any person who was under the age of 18 at the time of the offense." Id, at 4898. For the time being, the court simply concluded that:

> [W]e are not persuaded that the imposition of the death penalty for offenses committed by persons under 16 years of age has made, or can be expected to make, any measurable contribution to the goals that capital punishment is intended to achieve. It is, therefore, "nothing more than the purposeless or needless imposition of pain and suffering," Coker v. Georgia, 433 U.S. [584] at 592, and thus an unconstitutional punishment.

Thompson, 56 LW at 4898 [(footnoting Gregg v. Georgia, 428 U.S. 153, 186 (1976) ("the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering") (joint opinion of Stewart, Powell and Stevens, J.J.)].

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None of the sources cited by the Thompson plurality or by the amici make any meaningful distinction between 15- and 17-year-olds for purposes of these criteria, e.g., retribution and deterrence. In summary then: When the court reaches the issue which was reserved in Thompson, but which is now before it (in the two cases for which certiorari has been granted), it should hold, and this court should now hold, that the imposition of the death penalty for offenses committed by 17-year-olds as well is "nothing more than the purposeless and needless imposition of pain and suffering" and thus an unconstitutional punishment.

II. THE CONCURRING OPINION IN THOMPSON OFFERS ADDITIONAL SUPPORT FOR DEFENDANT'S REQUEST FOR RELIEF.

Justice O'Connor's concurring opinion in Thompson provides additional support for the relief requested by Defendant herein, particularly as it focuses upon the failure of the state's legislature to expressly authorize the death penalty for the juvenile in question.

First, Justice O'Connor observes that:

> Under the Eighth Amendment, the death penalty has been treated differently from all other punishments...
>
> The restrictions that we have required under the Eighth Amendment affect both legislatures and the sentencing authorities for decisions in individual cases.

Thompson, supra, 56 LW at 4903.

The Justice then turns to the particular vice of the Oklahoma statutory scheme:

> The case before us today raises some of the same concerns that have led us to erect barriers to the imposition of capital punishment in other contexts. Oklahoma has enacted a statute that authorizes capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that

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> penalty. The State has also, but quite separately, provided that 15-year-old murder defendants may be treated as adults in some circumstances. Because it proceeded in this manner, there is a considerable risk that the Oklahoma legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility.
>
> ...
>
> [T]he Oklahoma statutes have presented this Court with a result that is of very dubious constitutionality, and they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty. In this unique situation, I am prepared to conclude that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution.

Id, at 4904.

Justice O'Connor then concludes by explaining her reason for not immediately addressing whether the death penalty may be imposed upon any offender less than 18 (not just under 16):

> By leaving open for now the broader Eighth Amendment question that both the plurality and the dissent would resolve, the approach I take allows the ultimate moral issue at stake in the constitutional question to be addressed in the first instance by those best suited to do so, the people's elected representatives.

Id.

Washington's statutory scheme suffers the same vices described by Justice O'Connor in relation to those of Oklahoma. Washington, like Oklahoma, has enacted a statute that authorizes

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capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that penalty. Washington, like Oklahoma, has also, but quite separately, provided that 17-year-old murder defendants may be treated as adults in some circumstances. As a result, as Justice O'Connor said of Oklahoma, it may be said that "there is considerable risk that the [Washington] legislature either did not realize that its actions would have the effect of rendering [17]-year-old defendants either death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility." It is therefore similarly appropriate to refuse the Plaintiff herein the right to to pursue the death penalty against Defendant McNeil or any other juvenile offender until "the ultimate moral issue [has been] addressed in the first instance by those best suited to do so, the people's elected representatives," our state legislature.

CONCLUSION

It is therefore respectfully requested that the Court strike the Plaintiff's request to impose the death penalty upon this seventeen-year-old Defendant.

DATED this 20th day of July, 1988.

Respectfully submitted,

THOMAS BOTHWELL

CHRISTOPHER S. TAIT
Attorneys for Defendant

/ / /

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APPENDICES

A. Thompson v. Oklahoma, 56 LW 4892

B. Brief of Petitioner, Thompson v. Oklahoma

C. Reply Brief of Petitioner, Thompson v.Oklahoma

D. Amici Curiae Brief of The National Legal Aid and Defender Association, et al., Thompson v. Oklahoma

E. Amici Curiae Brief of the American Society for Adolescent Psychiatry, et al., Thompson v. Oklahoma

F. Strieb, "Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen," 36 Ok.L.Rev 613 (1983)

G. Brief of Petitioner, Wilkens v. Missouri

H. Strieb, "Death Penalty for Juveniles: Past Present and Future" (1985)

I. Strieb, "Persons on Death Row as of December 1985 for Crimes Committed While Under Age Eighteen" (1986)

J. Summary of Issues Presented, Granting Certiorari by the United States Supreme Court, High v. Zant and Wilkens v. Missouri, 43 CrL 4084 (July 6, 1988)

/ / /

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I think there is no justification in law for treating this single type of suit differently, I dissent.

ROY T. ENGLERT JR., Assistant to the Solicitor General (CHARLES FRIED, Sol. Gen., JAMES M. SPEARS, Act'g Asst. Atty. Gen., THOMAS W. MERRILL, Dpty. Sol. Gen., WILLIAM KANTER, and HOWARD S. SCHER, Justice Dept. attys., on the briefs) for federal petitioners/respondents; THOMAS A. BARNICO, Massachusetts Assistant Attorney General (JAMES M. SHANON, Atty. Gen. and WILLIAM L. PARDEE, Asst. Atty. Gen., on the briefs) for state respondent/petitioner.

No. 86-6169

WILLIAM WAYNE THOMPSON, PETITIONER *v.* OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

Syllabus

No. 86-6169. Argued November 9, 1987—Decided June 29, 1988

Petitioner, when he was 15 years old, actively participated in a brutal murder. Because petitioner was a "child" as a matter of Oklahoma law, the District Attorney filed a statutory petition seeking to have him tried as an adult, which the trial court granted. He was then convicted and sentenced to death, and the Court of Criminal Appeals of Oklahoma affirmed.

Held: The judgment is vacated and the case is remanded.

724 P. 2d 780, vacated and remanded.

JUSTICE STEVENS, joined by JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN, concluded that the "cruel and unusual punishment" prohibition of the Eighth Amendment, made applicable to the States by the Fourteenth Amendment, prohibits the execution of a person who was under 16 years of age at the time of his or her offense.

(a) In determining whether the categorical Eighth Amendment prohibition applies, this Court must be guided by the "evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles*, 356 U. S. 86, 101, and, in so doing, must review relevant legislative enactments and jury determinations and consider the reasons why a civilized society may accept or reject the death penalty for a person less than 16 years old at the time of the crime.

(b) Relevant state statutes—particularly those of the 18 States that have expressly considered the question of a minimum age for imposition of the death penalty, and have uniformly required that the defendant have attained at least the age of 16 at the time of the capital offense—support the conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense. That conclusion is also consistent with the views expressed by respected professional organizations, by other nations that share the Anglo-American heritage, and by the leading members of the Western European Community.

(c) The behavior of juries—as evidenced by statistics demonstrating that, although between 18 and 20 persons under the age of 16 were executed during the first half of the 20th century, no such execution has taken place since 1948 despite the fact that thousands of murder cases were tried during that period, and that only 5 of the 1,393 persons sentenced to death for willful homicide during the years 1982 through 1986 were less than 16 at the time of the offense—leads to the unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community.

(d) The juvenile's reduced culpability, and the fact that the application of the death penalty to this class of offenders does not measurably contribute to the essential purposes underlying the penalty, also support the conclusion that the imposition of the penalty on persons under the age of 16 constitutes unconstitutional punishment. This Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult, since inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. *Cf. Bellotti* v. *Baird*, 443 U. S.

622: *Eddings* v. *Oklahoma*, 455 U. S. 104. Given this lesser culpability, as well as the teenager's capacity for growth and society's fiduciary obligations to its children, the retributive purpose underlying the death penalty is simply inapplicable to the execution of a 15-year-old offender. Moreover, the deterrence rationale for the penalty is equally unacceptable with respect to such offenders, since statistics demonstrate that the vast majority of persons arrested for willful homicide are over 16 at the time of the offense, since the likelihood that the teenage offender has made the kind of cold-blooded cost-benefit analysis that attaches any weight to the possibility of execution is virtually nonexistent, and since it is fanciful to believe that a 15-year-old would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century.

JUSTICE O'CONNOR concluded that:

1. Although a national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist, this conclusion should not unnecessarily be adopted as a matter of constitutional law without better evidence than is before the Court. The fact that the 18 legislatures that have expressly considered the question have set the minimum age for capital punishment at 16 or above, coupled with the fact that 14 other States have rejected capital punishment completely, suggests the existence of a consensus. However, the Federal Government and 19 States have authorized capital punishment without setting any minimum age, and have also provided for some 15-year-olds to be prosecuted as adults. These laws appear to render 15-year-olds death eligible, and thus pose a real obstacle to finding a consensus. Moreover, although the execution and sentencing statistics before the Court support the inference of a consensus, they are not dispositive because they do not indicate how many juries have been asked to impose the death penalty on juvenile offenders or how many times prosecutors have exercised their discretion to refrain from seeking the penalty. Furthermore, granting the premise that adolescents are generally less blameworthy than adults who commit similar crimes, it does not necessarily follow that all 15-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment. Nor is there evidence that 15-year-olds as a class are inherently incapable of being deterred from major crimes by the prospect of the death penalty. Thus, there is the danger that any inference of a societal consensus drawn from the evidence in this case might be mistaken. Rather than rely on its inevitably subjective judgment about the best age at which to draw a line forbidding capital punishment, this Court should if possible await the express judgments of additional legislatures.

2. Petitioner's sentence must be set aside on the ground that—whereas the Eighth Amendment requires special care and deliberation in decisions that may lead to the imposition of the death penalty—there is considerable risk that, in enacting a statute authorizing capital punishment for murder without setting any minimum age, and in separately providing that juvenile defendants may be treated as adults in some circumstances, the Oklahoma Legislature either did not realize that its actions would effectively render 15-year-olds death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of a particular minimum age. Because the available evidence suggests a national consensus forbidding the imposition of capital punishment for crimes committed before the age of 16, petitioner and others whose crimes were committed before that age may not be executed executed pursuant to a capital punishment statute that specifies no minimum age.

STEVENS, J., announced the judgment of the Court and delivered an opinion in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment. SCALIA, J., filed a dissenting opinion opinion, in which REHNQUIST, C. J., and WHITE, J., joined. KENNEDY, J., took no part in the consideration or decision of the case.

JUSTICE STEVENS announced the judgment of the Court, and delivered an opinion in which JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join.

Petitioner was convicted of first-degree murder and sentenced to death. The principal question presented is whether the execution of that sentence would violate the constitutional prohibition against the infliction of "cruel and unusual punishments"[1] because petitioner was only 15 years old at the time of his offense.

I

Because there is no claim that the punishment would be excessive if the crime had been committed by an adult, only a brief statement of facts is necessary. In concert with three older persons, petitioner actively participated in the brutal murder of his former brother-in-law in the early morning hours of January 23, 1983. The evidence disclosed that the victim had been shot twice, and that his throat, chest, and abdomen had been cut. He also had multiple bruises and a broken leg. His body had been chained to a concrete block and thrown into a river where it remained for almost four weeks. Each of the four participants was tried separately and each was sentenced to death.

Because petitioner was a "child" as a matter of Oklahoma law,[2] the district attorney filed a statutory petition, see 10 Okla. Stat. Ann. § 1112(b) (1987), seeking an order finding "that said child is competent and had the mental capacity to know and appreciate the wrongfulness of his [conduct]." App. 4. After a hearing, the trial court concluded "that there are virtually no *reasonable* prospects for rehabilitation of William Wayne Thompson within the juvenile system and that William Wayne Thompson should be held accountable for his acts as if he were an adult and should be certified to stand trial as an adult." App. 8 (emphasis in original).

At the guilt phase of petitioner's trial, the prosecutor introduced three color photographs showing the condition of the victim's body when it was removed from the river. Although the Court of Criminal Appeals held that the use of two of those photographs was error,[3] it concluded that the error was harmless because the evidence of petitioner's guilt was so convincing. However, the prosecutor had also used the photographs in his closing argument during the penalty phase. The Court of Criminal Appeals did not consider whether this display was proper.

At the penalty phase of the trial, the prosecutor asked the jury to find two aggravating circumstances: that the murder was especially heinous, atrocious, or cruel; and that there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. The jury found the first, but not the second, and fixed petitioner's punishment at death.

The Court of Criminal Appeals affirmed the conviction and sentence, 724 P. 2d 780 (1986), citing its earlier opinion in *Eddings* v. *State*, 616 P. 2d 1159 (1980), rev'd on other grounds, 455 U. S. 104 (1982), for the proposition that "once a minor is certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult." 724 P. 2d, at 784. We granted certiorari to consider whether a sentence of death is cruel and unusual punishment for a crime committed by a 15-year-old child, as well as whether

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[1] The Eighth Amendment provides:
"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U. S. Const., Amdt. 8.
This proscription must be observed by the States as well as the Federal Government. See, *e. g.*, *Robinson* v. *California*, 370 U. S. 660 (1962).

[2] Title 10 Okla. Stat. Ann. § 1101(1) (1987) provides:
"'Child' means any person under eighteen (18) years of age, except for any person sixteen (16) or seventeen (17) years of age who is charged with murder, kidnapping for purposes of extortion, robbery with a dangerous weapon, rape in the first degree, use of a firearm or other offensive weapon while committing a felony, arson in the first degree, burglary with explosives, shooting with intent to kill, manslaughter in the first degree, or nonconsensual sodomy."

[3] "The other two color photographs . . . were gruesome. Admitting them into evidence served no purpose other than to inflame the jury. We do not understand why an experienced prosecutor would risk reversal of the whole case by introducing such ghastly, color photographs with so little probative value. We fail to see how they could possibly assist the jury in the determination of defendant's guilt. The trial court's admission of these two photographs was error." *Thompson* v. *State*, 724 P. 2d 780, 782–783 (Okl. Cr. 1986).

photographic evidence that a state court deems erroneously admitted but harmless at the guilt phase, nevertheless violates a capital defendant's constitutional rights by virtue of its being considered at the penalty phase. —— U. S. —— (1987).

II

The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the "evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion) (Warren, C. J.).[4] In performing that task the Court has reviewed the work product of state legislatures and sentencing juries,[5] and has carefully considered the reasons why a civilized society may accept or reject the death penalty in certain types of cases. Thus, in confronting the question whether the youth of the defendant—more specifically, the fact that he was less than 16 years old at the time of his offense—is a sufficient reason for denying the state the power to sentence him to death, we first review relevant legislative enactments,[6] then refer to jury determinations,[7] and finally explain why these indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty.[8]

III

Justice Powell has repeatedly reminded us of the importance of "the experience of mankind, as well as the long history of our law, recognizing that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office." *Goss* v. *Lopez*, 419 U. S. 565, 590–591 (1975) (Powell, J., dissenting).[9] Oklahoma recognizes this basic distinction in a number of its statutes. Thus, a minor is not eligible to vote,[10] to sit on a jury,[11] to marry without parental consent,[12] or to purchase alcohol[13] or cigarettes.[14] Like all other States, Oklahoma has developed a juvenile justice system in which most offenders under the age of 18 are not held criminally responsible. Its statutes do provide, however, that a 16- or 17-year-old charged with murder and other serious felonies shall be considered an adult.[15] Other than the special certification procedure that was used to authorize petitioner's trial in this case "as an adult," apparently there are no Oklahoma statutes, either civil or criminal, that treat a person under 16 years of age as anything but a "child."

The line between childhood and adulthood is drawn in different ways by various States. There is, however, complete or near unanimity among all 50 States and the District of Columbia[16] in treating a person under 16 as a minor for several important purposes. In no State may a 15-year-old vote or serve on a jury.[17] Further, in all but one State a 15-year-old may not drive without parental consent,[18] and in all but four

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[4] That Eighth Amendment jurisprudence must reflect "evolving standards of decency" was settled early this century in the case of *Weems* v. *United States*, 217 U. S. 349 (1910). The Court held that a sentence of 15 years of hard enchained labor, plus deprivation of various civil rights and perpetual state surveillance, constituted "cruel and unusual punishment" under the Philippines' (then under United States control) Bill of Rights. Premising its opinion on the synonymity of the Philippine and United States "cruel and unusual punishment" clauses, the Court wrote:

"Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gives it birth.

. . . . . .

"The [cruel and unusual punishment clause] in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.*, at 373–374, 378.

See also *Ollman* v. *Evans*, 750 F. 2d 970, 995–996 (CADC 1984) (en banc) (Bork, J., concurring):

"Judges given stewardship of a constitutional provision . . . whose core is known but whose outer reach and contours are ill-defined, face the never-ending task of discerning the meaning of the provision from one case to the next. There would be little need for judges—and certainly no office for a philosophy of judging—if the boundaries of every constitutional provision were self-evident. They are not. . . . It is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application.

. . . . . .

"We must never hesitate to apply old values to new circumstances . . . . The important thing, the ultimate constitutional consideration, is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty."

[5] See *e. g.*, *Woodson* v. *North Carolina*, 428 U. S. 280, 293 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.); *Coker* v. *Georgia*, 433 U. S. 584, 593–597 (1977) (plurality opinion) (WHITE, J.); *Enmund* v. *Florida*, 458 U. S. 782, 789–796 (1982); *id.*, at 814 (legislative and jury statistics important in Eighth Amendment adjudication) (O'CONNOR, J., dissenting).

[6] See *Furman* v. *Georgia*, 408 U. S. 238, 277–279 (1972) (Court must look to objective signs of how today's society views a particular punishment) (BRENNAN, J., concurring); *Enmund* v. *Florida*, 458 U. S., at 789–798.

[7] Our capital punishment jurisprudence has consistently recognized that contemporary standards, as reflected by the actions of legislatures and juries, provide an important measure of whether the death penalty is "cruel and unusual." Part of the rationale for this index of constitutional value lies in the very language of the construed clause: whether an action is "unusual" depends, in common usage, upon the frequency of its occurrence or the magnitude of its acceptance.

The focus on the acceptability and regularity of the death penalty's imposition in certain kinds of cases—that is, whether imposing the sanction in such cases comports with contemporary standards of decency as reflected by legislative enactments and jury sentences—is connected to the insistence that statutes permitting its imposition channel the sentencing process toward nonarbitary results. For both a statutory scheme that fails to guide jury discretion in a meaningful way, and a pattern of legislative enactments or jury sentences revealing a lack of interest on the part of the public in sentencing certain people to death, indicate that contemporary morality is not really ready to permit the regular imposition of the harshest of sanctions in such cases.

[8] Thus, in explaining our conclusion that the death penalty may not be imposed for the crime of raping an adult woman, JUSTICE WHITE stated:

"The Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Coker* v. *Georgia*, 433 U. S., at 597.

[9] See also *New Jersey* v. *T. L. O.*, 469 U. S. 325, 350, n. 2 (1985) (Powell, J., concurring); *Burger* v. *Kemp*, —— U. S. —— (1987) (Powell, J., dissenting).

[10] Okla. Const. Art. 3, § 1 (1981).

[11] 38 Okla. Stat. Ann. § 28 (Supp. 1988) & Okla. Const. Art. 3, § 1 (1981).

[12] 43 Okla. Stat. Ann. § 3 (1979).

[13] 21 Okla. Stat. Ann. § 1215 (1983).

[14] 21 Okla. Stat. Ann. § 1241 (Supp. 1988). Additionally, minors may not patronize bingo parlors or pool halls unless accompanied by an adult, 21 Okla. Stat. Ann. §§ 995.13 & 1103 (1983), pawn property, 59 Okla. Stat. Ann. § 1511(c)(1) (Supp. 1988), consent to services by health professionals for most medical care, unless married or otherwise emancipated, 63 Okla. Stat. Ann. §§ 2602 (1984) & 2601(a) (1988), or operate or work at a shooting gallery, 63 Okla. Stat. Ann. § 703 (1984), and may disaffirm any contract, except for "necessaries," 15 Okla. Stat. Ann. §§ 19 & 20 (1983).

[15] See n. 2, *supra*; cf. *Craig* v. *Boren*, 429 U. S. 190, 197 (1976).

[16] Henceforth, the opinion will refer to the 50 States *and* the District of Columbia as "States," for sake of simplicity.

[17] See Appendices A and B, *infra*.

[18] See Appendix C, *infra*.

States a 15-year-old may not marry without parental consent.[31] Additionally, in those States that have legislated on the subject, no one under age 16 may purchase pornographic materials (50 States),[32] and in most States that have some form of legalized gambling, minors are not permitted to participate without parental consent (42 States).[33] Most relevant, however, is the fact that all States have enacted legislation designating the maximum age for juvenile court jurisdiction at no less than 16.[34] All of this legislation is consistent with the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult.[35]

Most state legislatures have not expressly confronted the question of establishing a minimum age for imposition of the death penalty.[36] In 14 States, capital punishment is not authorized at all,[37] and in 19 others capital punishment is authorized but no minimum age is expressly stated in the death penalty statute.[38] One might argue on the basis of this body

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[31] See Appendix D, *infra*.

[32] See Appendix E, *infra*.

[33] See Appendix F, *infra*.

[34] S. Davis, Rights of Juveniles: The Juvenile Justice System, App. B (1987). Thus, every State has adopted "a rebuttable presumption" that a person under 16 "is not mature and responsible enough to be punished as an adult," no matter how minor the offense may be. *Post*, at 1 (dissenting opinion).

[35] The law must often adjust the manner in which it affords rights to those whose status renders them unable to exercise choice freely and rationally. Children, the insane, and those who are irreversibly ill with loss of brain function, for instance, all retain "rights," to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principals in mind. See Garvey, Freedom and Choice in Constitutional Law, 94 Harv. L. Rev. 1756 (1981). It is in this way that paternalism bears a beneficent face, paternalism in the sense of a caring, nurturing parent making decisions on behalf of a child who is not quite ready to take on the fully rational and considered task of shaping his or her own life. The assemblage of statutes in the text above, from both Oklahoma and other states, reflects this basic assumption that our society makes about children as a class; we assume that they do not yet act as adults do, and thus we act in their interest by restricting certain choices that we feel they are not yet ready to make with full benefit of the costs and benefits attending such decisions. It would be ironic if these assumptions that we so readily make about children as a class—about their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives—were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for purposes of inflicting capital punishment. Thus, informing the judgment of the Court today is the virtue of consistency, for the very assumptions we make about our children when we legislate on their behalf tells us that it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent, who may be deterred by the harshest of sanctions and toward whom society may legitimately take a retributive stance. As we have observed, "Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*." *Schall* v. *Martin*, 467 U. S. 253, 265 (1984); see also *May* v. *Anderson*, 345 U. S. 528, 536 (1953) (Frankfurter, J., concurring) ("Children have a very special place in life which law should reflect. Legal theories . . . lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children"); *Ginsberg* v. *New York*, 390 U. S. 629, 649–650 (1968) (Stewart, J., concurring) ("[A]t least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise . . . that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults"); *Parham* v. *J. R.*, 442 U. S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions").

[36] Almost every State, and the federal government, has set a minimum age at which juveniles accused of committing serious crimes can be waived from juvenile court into criminal court. See S. Davis, *supra*, n. 22; 18 U. S. C. § 5032. The dissent's focus on the presence of these waiver ages in jurisdictions that retain the death penalty but that have not expressly set a minimum age for the death sentence, see *post*, at 7–10, distorts what is truly at issue in this case. Consider the following example: The States of Michigan, Oregon, and Virginia have all determined that a 15-year-old *may be waived from juvenile to criminal court* when charged with first-degree murder. See Mich. Comp. Laws Ann. § 712A.4(1) (Supp. 1987); Or. Rev. Stat. § 419.533(1)(a)–(b), (3) (1987); Va. Code Ann. § 16.1–269(A) (1982). However, in Michigan, that 15-year-old may not be executed—because the State has abolished the death penalty—in Oregon, that 15-year-old may not be executed—because the State has expressly set a minimum age of 18 for executions—and in Virginia that 15-year-old may be executed—because the State has a death penalty and has not expressly addressed the issue of minimum age for execution. That these three States have all set a 15-year-old waiver floor for first-degree murder tells us that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), *but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders.* As a matter of fact, many States in the Union have waiver ages below 16, including many of the States that have either abolished the death penalty or that have set an express minimum age for the death penalty at 16 or higher. See S. Davis, *supra*, n. 22. In sum, we believe that the more appropriate measures for determining how the States view the issue of minimum age for the death penalty are those discussed in the text and in n. 29, *infra*.

[37] Alaska (Territory of Alaska, Session Laws, 1957, Ch. 132, H. B. 99, 23rd Sess.; an Act abolishing the death penalty for the commission of any crime; see Alaska Code Crim. Proc. § 12.55.015, "Authorized sentences" do not include the death penalty; § 12.55.125, "Sentences for imprisonment for felonies" do not include the death penalty (1987)); District of Columbia (*United States* v. *Lee*, 489 F. 2d 1242, 1246–1247 (CADC 1973), death penalty unconstitutional in light of *Furman* v. *Georgia*, 408 U. S. 238 (1972); see D. C. Code § 22–2404, penalty for first-degree murder does not include death (1981)); Hawaii (Territory of Hawaii, Regular Session Laws, 1957, Act 232, H. B. 706, 28th Leg.; an Act relating to the abolishment of capital punishment; see 37 Hawaii Rev. Stat., § 706–606, sentence for offense of murder does not include death penalty (Repl. 1985)); Iowa (Acts and Joint Resolutions Passed at the Regular Session of the 61st General Assembly of the State of Iowa, 1965, Ch. 435, Death Penalty Abolished, H. F. 8; see 37 Iowa Code Ann., § 902.1, penalties for Class A felonies do not include death (Supp. 1987)); Kansas (*State* v. *Randol*, 513 P. 2d 248, 256 (Kan. 1973), death penalty unconstitutional after *Furman* v. *Georgia*, *supra*; death penalty still on books at Kan. Stat. Ann., Tit. 40, §§ 22–4001–22–4014 (1981); but see Tit. 34, § 21–3401, first-degree murder is a Class A felony, and Tit. 45, § 21–4501(a), sentence for a Class A felony does not include death penalty); Maine (Public Laws of the State of Maine, 1887, Ch. 133, An Act to abolish the death penalty; see Maine Rev. Stat. Ann. Tit. 51, § 1251, and Tit. 47, § 1152, authorized sentences for murder do not include death penalty (1983 & Supp. 1987)); Massachusetts (*Commonwealth* v. *Colon-Cruz*, 470 N. E. 2d 116 (Mass. 1984), death penalty statute violates state constitution; death penalty law still on books, 279 Ann. Laws of Mass. §§ 57–71 (Supp. 1987)); Michigan (Mich. Comp. Laws Ann., Const. Art. 4, § 46, "No law shall be enacted providing for the penalty of death" (1985); see 45 Mich. Comp. Laws Ann. § 750.316, no death penalty provided for first-degree murder (Supp. 1987)); Minnesota (General Laws of the State of Minnesota, passed during the 37th Sess. of the State Leg., Ch. 387, H. F. No. 2, providing for life imprisonment and not death as sentence (1911); see 5 Minn. Stat. Ann. § 609.10, sentences available do not include death penalty, and § 609.185, sentence for first-degree murder is life imprisonment (1987)); New York (*People* v. *Smith*, 63 N. Y. 2d 41, 479 N. Y. S. 2d 706, 720–726, 468 N. E. 2d 879 (Ct. App. 1984), mandatory death penalty for first-degree murder while serving a sentence of life imprisonment unconstitutional after *Woodson* v. *North Carolina*, 428 U. S. 280 (1972), thus invalidating remainder of New York's death penalty statute; death penalty still on books at Consol. Laws of New York Ann., § 60.06, providing for death penalty for first-degree murder); North Dakota (12–50 N. Dak. Century Code Ann., "The Death Sentence and Execution Thereof," repealed by S. L. 1973, Ch. 116, § 41, effective July 1, 1975 (Repl. 1985)); Rhode Island (*State* v. *Cline*, 397 A. 2d 1309 (R. I. 1979), mandatory death penalty for any prisoner unconstitutional after *Woodson* v. *North Carolina*, *supra*; see General Laws of Rhode Island, § 11–23–2, penalties for murder do not include death (Supp. 1987)); West Virginia (West Virginia Code, § 61–11–2, "Capital punishment abolished" (Repl. 1984)); Wisconsin (General Acts passed by the Legislature of Wisconsin, Ch. 103, "An act to provide for the punishment of murder in the first degree, and to abolish the penalty of death" (1853); see Wisc. Stat. Ann. Crim. Code, §§ 939.50(3)(a) & 940.01, first-degree murder is a Class A felony, and the penalty for such felonies is life imprisonment).

[38] Alabama (see Ala. Code §§ 13A–5–39–13A–5–59 & 13A–6–2 (Repl. 1982 & Supp. 1987)); Arizona (see Ariz. Rev. Stat. Ann. Crim. Code §§ 13–

of legislation that there is no chronological age at which the imposition of the death penalty is unconstitutional and that our current standards of decency would still tolerate the execution of 10-year-old children.[27] We think it self-evident that such an argument is unacceptable; indeed, no such argument has been advanced in this case.[28] If, therefore, we accept the premise that some offenders are simply too young to be put to death, it is reasonable to put this group of statutes to one side because they do not focus on the question of where the chronological age line should be drawn.[29] When we confine our attention to the 18 States that have expressly established a minimum age in their death-penalty statutes, we find that all of them require that the defendant have attained at least the age of 16 at the time of the capital offense.[30]

The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.[31] Thus, the American Bar Association[32] and the American Law Institute[33] have formally expressed their opposition to the death penalty for juveniles. Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandanavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.[34]

IV

The second societal factor the Court has examined in determining the acceptability of capital punishment to the American sensibility is the behavior of juries. In fact, the infrequent and haphazard handing out of death sentences by

703–13–706 & 13–1105 (1978 & Supp. 1987)); Arkansas (see Ark. Code Ann. §§ 5–4–104(b) & 5–4–601–5–4–617 & 5–10–101 & 5–51–201 (1987 & Supp. 1987)); Delaware (see 11 Del. Code Ann. §§ 636 & 4209 (Repl. 1979 & Supp. 1986)); Florida (see Fla. Stat. Ann. §§ 775.082 & 782.04(1) & 921.141 (1985 & 1986 & Supp. 1987)); Idaho (see Idaho Code §§ 18–4001–18–4004 & 19–2515 (1987)); Louisiana (see La. Rev. Stat. Ann. §§ 14:30 & 14:113 (1986); La. Code Crim. Proc. Art. 905 *et seq.* (1984 & Supp. 1987)); Mississippi (see Miss. Code Ann. §§ 97–3–21 & 97–7–67 & 99–19–101–99–19–107 (Supp. 1987)); Missouri (see Mo. Ann. Stat. §§ 565.020 & 565.030–565.040 (Supp. 1987)); Montana (see Mont. Code Ann. §§ 45–5–102 & 46–18–301–46–18–310 (1987)); Oklahoma (see 21 Okla. Stat. §§ 701.10–701.15 (1983 & Supp. 1988)); Pennsylvania (see Pa. Cons. Stat. Ann., Tit. 18, § 1102(a); Tit. 42, § 9711 (1982 & 1983 & Supp. 1987)); South Carolina (see S. C. Code Ann. §16–3–10 & 16–3–20 (1985 & Supp. 1986)); South Dakota (see S. D. Codified Laws Ann. §§ 22–16–4 & 22–16–12 & 23A–27A–1–23A–27A–41 (1979 & Supp. 1987)); Utah (see Utah Code Ann. §§ 76–3–206–76–3–207 (Repl. 1978 & Supp. 1987)); Vermont (see 13 Vt. Stat. Ann. §§ 2303 & 2403 & 7101–7107 (1974 & Supp. 1987)); Virginia (see Va. Code Ann. §§ 18.2–31 & 19.2–264.2–19.2–264.5 (Repl. 1983 & Supp. 1987)); Washington (see Wash. Rev. Code §§ 10.95.010–10.95.900 (Supp. 1987)); Wyoming (see Wyo. Stat. §§ 6.2–101–6.2–103 (1983)).

[27] It is reported that a 10-year-old black child was hanged in Louisiana in 1855 and a Cherokee Indian child of the same age was hanged in Arkansas in 1885. See Streib, Death Penalty for Children: The American Experience With Capital Punishment for Crimes Committed While Under Age Eighteen, 36 Okla. L. Rev. 613, 619–620 (1983).

[28] See Tr. of Oral Arg. 31 (respondent suggests a minimum age of 14); *post*, at 14 (dissent agrees that some line exists); *post*, at 1 (concurrence similarly agrees).

[29] One might argue, of course, that petitioner's execution "could theoretically be imposed" in 19 States, see *post*, at 6 (dissenting opinion), just as execution was *permissible* above the age of 7 in Blackstone's time. *Ibid.* This argument would, though, first have to acknowledge that the execution would be *impermissible* in 32 States. Additionally, 2 of the 19 States that retain a death penalty without setting a minimum age simply do not sentence people to death any more. Neither South Dakota nor Vermont has imposed a death sentence since our landmark decision in *Furman* v. *Georgia*, *supra*. See Greenberg, Capital Punishment as a System, 91 Yale L. J. 908, 929–936 (1982); NAACP Legal Defense and Educational Fund, Inc., Death Row, U. S. A. (1980–1987). (Vermont is frequently counted as a 15th State without a death penalty, since its capital punishment scheme fails to guide jury discretion, see 13 Vt. Stat. Ann. §§ 7101–7107 (1974), and has not been amended since our decision in *Furman* v. *Georgia*, *supra*, holding similar statutes unconstitutional. South Dakota's statute does provide for jury consideration of aggravating and mitigating factors. See 23A–27A S. D. Codified Laws Ann. (1979 & Supp. 1987)). Thus, if one were to shift the focus from those States that have expressly dealt with the issue of minimum age and toward a general comparison of States whose statutes, facially, would and would not permit petitioner's execution, one would have to acknowledge a 2:1 ratio of States in which it is not even "theoretically" possible that Thompson's execution could occur.

[30] California (Cal. Penal Code § 190.5 (Supp. 1987)) (age 18); Colorado (Col. Rev. Stat. § 16.11–103(1)(a) (Repl. 1986)) (age 18); Connecticut (Conn. Gen. Stat. Ann. § 53a–46a(g)(1) (1985)) (age 18); Georgia (Ga. Code Ann. § 17–9–3 (1982)) (age 17); Illinois (38 Ill. Ann. Stat. § 9–1(b) (Supp. 1987)) (age 18); Indiana (Ind. Code Ann. § 35–50–2–3 (Supp. 1987)) (age 16); Kentucky (Ky. Rev. Stat. Ann. § 640.040(1) (1987)) (age 16); Maryland (27 Md. Code § 412(f) (Supp. 1987)) (age 18); Nebraska (Nebr. Rev. Stat. § 28–105.01 (Supp. 1985)) (age 18); Nevada (Nev. Rev. Stat. § 176.025 (1986)) (age 16); New Hampshire (N. H. Rev. Stat. Ann. § 630.5(XIII) (prohibiting execution of one who was a minor at time of crime) (Supp. 1987)) (§ 21–B:1 indicates that age 18 is age of majority, while § 630:1(v) provides that no one under age 17 shall be held culpable of a capital offense); New Jersey (N. J. Stat. Ann. §§ 2A:4A–22(a) & 2C:11–3g (Supp. 1987)) (age 18); New Mexico (N. M. Stat. Ann. §§ 28–6–1(A) & 31–18–14(A) (Repl. 1987)) (age 18); North Carolina (N. C. Gen. Stat. § 14–17 (Supp. 1987)) (age 17, except death penalty still valid for anyone who commits first-degree murder while serving prison sentence for prior murder or while on escape from such sentence); Ohio (Ohio Rev. Code Ann. § 2929.02(A) (1984)) (age 18); Oregon (Ore. Rev. Stat. §§ 161.620 & 419.476(1) (1987)) (age 18); Tennessee (Tenn. Code Ann. §§ 37–1–102(3),(4) & 37–1–103 & 37–1–124(a)(1) (Repl. 1984)) (age 18); Texas (Tex. Penal Code Ann. § 8.07(d) (Supp. 1988)) (age 17).

In addition, the Senate recently passed a bill authorizing the death penalty for certain drug-related killings, with the caveat that "[a] sentence of death shall not be carried out upon a person who is under 18 years of age at the time the crime was committed." Cong. Rec. S7580 (June 10, 1988).

[31] We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual. See *Trop* v. *Dulles*, 356 U. S., at 102, and n. 35; *Coker* v. *Georgia*, 433 U. S., at 596, n. 10; *Enmund* v. *Florida*, 458 U. S., at 796–797, n. 22.

[32] "*Be It Resolved*, That the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committed while under the age of eighteen (18)." American Bar Association, Summary of Action of the House of Delegates 17 (1983 Annual Meeting).

[33] "Civilized societies will not tolerate the spectacle of execution of children . . . ." American Law Institute, Model Penal Code § 210.6 commentary at 133 (Official Draft and Revised Comments 1980).

[34] All information regarding foreign death penalty laws is drawn from Brief for Amnesty International as *Amicus Curiae* A–1—A–9, and from Death Penalty in Various Countries, prepared by members of the staff of the Law Library of the Library of Congress, January 22, 1988 (on file with the Supreme Court Clerk). See also Children and Young Persons Act 1933, 23 Geo 5 c 12, § 53(1), as amended by the Murder (Abolition of Death Penalty) Act 1965, §§ 1(5) & 4 (abolishing death penalty for juvenile offenders in United Kingdom), reprinted in 6 Halsbury's Statutes 55–56 (4th ed. 1985); Crimes Act 1961 § 16, in 1 Reprinted Statutes of New Zealand 650–651 (1979). In addition, three major human rights treaties explicitly prohibit juvenile death penalties. Article 6(5) of the International Covenant on Civil and Political Rights, Annex to G. A. Res. 2200, 21 U. N. GAOR Res. Supp. (No. 16) 53, U. N. Doc. A/6316 (1966) (signed but not ratified by the United States), reprinted in 6 International Legal Material 368, 370 (1970); Article 4(5) of the American Convention on Human Rights, O. A. S. Official Records, OEA/Ser.K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2 (1970) (signed but not ratified by the United States), reprinted in 9 International Legal Material 673, 676 (1970); Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U. S. T. 3516, 3560, T. I. A. S. No. 3365, 75 U. N. T. S. 287 (ratified by the United States).

capital juries was a prime factor underlying our judgment in *Furman* v. *Georgia*, 408 U. S. 238 (1972), that the death penalty, as then administered in unguided fashion, was unconstitutional.[35]

While it is not known precisely how many persons have been executed during the 20th century for crimes committed under the age of 16, a scholar has recently compiled a table revealing this number to be between 18 and 20.[36] All of these occurred during the first half of the century, with the last such execution taking place apparently in 1948.[37] In the following year this Court observed that this "whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions . . . ." *Williams* v. *New York*, 337 U. S. 241, 247 (1949). The road we have traveled during the past four decades—in which thousands of juries have tried murder cases—leads to the unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community.

Department of Justice statistics indicate that during the years 1982 through 1986 an average of over 16,000 persons were arrested for willful criminal homicide (murder and nonnegligent manslaughter) each year. Of that group of 82,094 persons, 1,393 were sentenced to death. Only five of them, including the petitioner in this case, were less than 16 years old at the time of the offense.[38] Statistics of this kind can, of course, be interpreted in different ways,[39] but they do suggest that these five young offenders have received sentences that are "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman* v. *Georgia*, 408 U. S., at 309 (Stewart, J., concurring).

V

"Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty" on one such as petitioner who committed a heinous murder when he was only 15 years old. *Enmund* v. *Florida*, 458 U. S., at 797.[40] In making that judgment, we first ask whether the juvenile's culpability should be measured by the same standard as that of an adult, and then consider whether the application of the death penalty to this class of offenders "measurably contributes" to the social purposes that are served by the death penalty. *Id.*, at 798.

It is generally agreed "that punishment should be directly related to the personal culpability of the criminal defendant." *California* v. *Brown*, —— U. S. ——, —— (1987) (O'CONNOR, J., concurring). There is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults. We stressed this difference in explaining the importance of treating the defendant's youth as a mitigating factor in capital cases:

> "But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. *Bellotti* v. *Baird*, 443 U. S. 622, 635 (1979)." *Eddings* v. *Oklahoma*, 455 U. S., at 115–116 (footnotes omitted).

To add further emphasis to the special mitigating force of youth, Justice Powell quoted the following passage from the 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders:

> "Adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." *Id.*, at 115.

Thus, the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.[41] The basis for this conclusion is too obvious to require extended explanation.[42] Inexperience, less education, and less

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[35] See *Furman* v. *Georgia*, 408 U. S., at 249 (rarity of a sentence leads to an inference of its arbitrary imposition) (Douglas, J., concurring); *id.*, at 274–277 (Eighth Amendment prevents arbitrary death sentences; rarity of death sentences results in an inference of arbitrariness) (BRENNAN, J., concurring); *id.*, at 299–300 (BRENNAN, J., concurring); *id.*, at 312 (rarity of imposition indicates arbitrariness; "A penalty with such negligible returns to the State would be patently excessive" and therefore violate the Eighth Amendment) (WHITE, J., concurring); *id.*, at 314 (WHITE, J., concurring); see also *Enmund* v. *Florida*, 458 U. S., at 794–796 (few juries sentence defendants to death who neither killed nor intended to kill).

[36] V. Streib, Death Penalty for Juveniles 190–208 (1987) (compiling information regarding all executions in this country from 1620 through 1986 for crimes committed while under age 18; uncertainty between 18 and 20 because of two persons executed who may have been either 15 or 16 at time of crime).

[37] Professor Streib reports that the last execution of a person for a crime committed under age 16 was on January 9, 1948, when Louisiana executed Irvin Mattio, 15 at the time of his crime. *Id.*, at 197.

[38] See United States Department of Justice, Uniform Crime Reports: Crime in the United States 174 (1986); *id.*, at 174 (1985); *id.*, at 172 (1984); *id.*, at 179 (1983); *id.*, at 176 (1982); United States Department of Justice, Bureau of Justice Statistics Bulletin: Capital Punishment, 1986, 4; *id.*, at 5 (1985); United States Department of Justice, Bureau of Justice Statistics: Capital Punishment 1984, 6; V. Streib, *supra*, n. 36, at 168–169.

[39] For example, one might observe that of the 80,233 people arrested for willful criminal homicide who were over the age of 16, 1,388, or 1.7%, received the death sentence, while 5 of the 1,861, or 0.3%, of those under 16 who were arrested for willful criminal homicide received the death penalty.

[40] That the task of interpreting the great, sweeping clauses of the Constitution ultimately falls to us has been for some time an accepted principle of American jurisprudence. See *Marbury* v. *Madison*, 5 U. S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is"). With the Eighth Amendment, whose broad, vague terms do not yield to a mechanical parsing, the method is no different. See, *e. g.*, *Furman* v. *Georgia*, 408 U. S., at 268–269 (BRENNAN, J., concurring); *Coker* v. *Georgia*, 433 U. S., at 598 ("We have the abiding conviction" that the death penalty is an excessive penalty for rape).

[41] "The conception of criminal responsibility with which the Juvenile Court operates also provides supporting rationale for its role in crime prevention. The basic philosophy concerning this is that criminal responsibility is absent in the case of misbehaving children. . . . But, what does it mean to say that a child has no criminal responsibility? . . . One thing about this does seem clearly implied, . . . and that is an absence of the basis for adult criminal accountability—the exercise of an unfettered free will." S. Fox, The Juvenile Court: Its Context, Problems and Opportunities 11–12 (1967) (publication of the President's Commission on Law Enforcement and Administration of Justice).

[42] A report on a professional evaluation of 14 juveniles condemned to death in the United States, which was accepted for presentation to the American Academy of Child and Adolescent Psychiatry, concluded:

"Adolescence is well recognized as a time of great physiological and psychological stress. Our data indicate that, above and beyond these maturational stresses, homicidal adolescents must cope with *brain dysfunction*, cognitive limitations, and severe psychopathology. Moreover, they must

intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.[45]

"The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." *Gregg* v. *Georgia*, 428 U. S. 153, 183 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). In *Gregg* we concluded that as "an expression of society's moral outrage at particularly offensive conduct," retribution was not "inconsistent with our respect for the dignity of men." *Ibid.*[46] Given the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children, this conclusion is simply inapplicable to the execution of a 15-year-old offender.

For such a young offender, the deterrence rationale is equally unacceptable.[47] The Department of Justice statistics indicate that about 98 percent of the arrests for willful homicide involved persons who were over 16 at the time of the offense.[48] Thus, excluding younger persons from the class that is eligible for the death penalty will not diminish the deterrent value of capital punishment for the vast majority of potential offenders. And even with respect to those under 16 years of age, it is obvious that the potential deterrent value of the death sentence is insignificant for two reasons. The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent. And, even if one posits such a cold-blooded calculation by a 15-year-old, it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century. In short, we are not persuaded that the imposition of the death penalty for offenses committed by persons under 16 years of age has made, or can be expected to make, any measurable contribution to the goals that capital punishment is intended to achieve. It is, therefore, "nothing more than the purposeless and needless imposition of pain and suffering," *Coker* v. *Georgia*, 433 U. S., at 592, and thus an unconstitutional punishment.[49]

VI

Petitioner's counsel and various *amici curiae* have asked us to "draw a line" that would prohibit the execution of any person who was under the age of 18 at the time of the offense. Our task today, however, is to decide the case before us; we do so by concluding that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense.[50]

The judgment of the Court of Criminal Appeals is vacated and the case is remanded with instructions to enter an appropriate order vacating petitioner's death sentence.

It is so ordered.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

APPENDICES

Appendix A—Right to Vote

The United States Constitution, Amendment 26, requires States to permit 18-year-olds to vote. No State has lowered its voting age below 18. The following chart assembles the various provisions from state constitutions and statutes that provide an 18-year-old voting age.

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function in families that are not merely nonsupportive but also violent and brutally abusive. These findings raise questions about the American tradition of considering adolescents to be as responsible as adults for their offenses and of sentencing them to death." Lewis, Pincus, Bard, Richardson, Prichep, Feldman & Yeager, Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States 11 (1987).

[45] See n. 23, *supra*; see also, *e. g.*, E. Erikson, Childhood and Society 261–263 (2d ed. 1963) ("In their search for a new sense of continuity and sameness, adolescents have to refight many of the battles of earlier years, even though to do so they must artificially appoint perfectly well-meaning people to play the roles of adversaries"); E. Erikson, Identity: Youth and Crisis 128–135 (1968) (discussing adolescence as a period of "identity confusion," during which youths are "preoccupied with what they appear to be in the eyes of others as compared with what they feel they are"); Gordon, The Tattered Cloak of Immortality, in Adolescence and Death 16, 27 (C. Corr & J. McNeil eds. 1986) ("Risk-taking with body safety is common in the adolescent years, though sky diving, car racing, excessive use of drugs and alcholic beverages, and other similar activities may not be directly perceived as a kind of flirting with death. In fact, in many ways, this is counterphobic behavior—a challenge to death wherein each survival of risk is a victory over death"); Kastenbaum, Time and Death in Adolescence, in The Meaning of Death 99, 104 (H. Feifel ed. 1959) ("The adolescent lives in an intense present; 'now' is so real to him that past and future seem pallid by comparison. Everything that is important and valuable in life lies either in the immediate life situation or in the rather close future"); Kohlberg, The Development of Children's Orientations Toward a Moral Order, in 6 Vita humana 11, 30 (1963) (studies reveal that "large groups of moral concepts and ways of thought only attain meaning at successively advanced ages and require the extensive background of social experience and cognitive growth represented by the age factor"); Miller, Adolescent Suicide: Etiology and Treatment, in Adolescent Psychiatry 227, 329 (S. Feinstein, J. Looney, A. Schwartzberg & A. Sorosky eds. 1981) (many adolescents possess a "profound conviction of their own omnipotence and immortality. Thus many adolescents may appear to be attempting suicide, but they do not really believe that death will occur"); V. Streib, *supra*, n. 36, at 3–20, 184–189 ("The difference that separates children from adults for most purposes of the law is children's immature, undeveloped ability to reason in an adultlike manner").

[46] We have invalidated death sentences when this significant justification was absent. See *Enmund* v. *Florida*, 458 U. S., at 800–801 (death penalty for one who neither kills nor intends to kill "does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts"); *Ford* v. *Wainwright*, —— U. S. —— (1986) (unconstitutional to execute someone when he is insane, in large part because retributive value is so low).

[47] Although we have held that a legislature may base a capital punishment scheme on the goal of deterrence, some members of the Court have expressed doubts about whether fear of death actually deters crimes in certain instances. See *Lockett* v. *Ohio*, 438 U. S. 586, 624–628 (1978) (deterrence argument unavailable for one who neither kills nor intends to kill; "doubtful" that prospect of death penalty would deter "individuals from becoming involved in ventures in which death may unintentionally result") (WHITE, J., concurring in the judgment); *Spaziano* v. *Florida*, 468 U. S. 447, 480 (1984) (because of invalidation of mandatory death penalty laws and additional procedural requirements to death penalty laws in which the jury's discretion must be carefully guided, deterrence rationale now rather weak support for capital punishment) (STEVENS, J., dissenting); *Enmund* v. *Florida*, 458 U. S., at 798–800 (unlikely that prospect of death penalty will deter one who neither kills nor intends to kill) (WHITE, J.); *Furman* v. *Georgia*, 408 U. S., at 301–302 (unverifiable that the death penalty deters more effectively than life imprisonment) (BRENNAN, J., concurring); *id.*, at 345–354, and nn. 124–125 (deterrence rationale unsupported by the evidence) (MARSHALL, J., concurring).

[48] See United States Department of Justice, Uniform Crime Reports, *supra*, n. 38 (80,233 of 82,094, or 97.7%).

[49] See also *Gregg* v. *Georgia*, 428 U. S. 153, 183 (1976) ("the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering") (joint opinion of Stewart, Powell, and STEVENS, JJ.).

[50] Given the Court's disposition of the principal issue, it is unnecessary to resolve the second question presented, namely, whether photographic evidence that a state court deems erroneously admitted but harmless at the guilt phase, nevertheless violates a capital defendant's constitutional rights by virtue of its being considered at the penalty phase.

AL [No provisions beyond reference to U. S. Const., Amdt. 26]
AK Alaska Const., Art. V, § 1 (1980)
AZ Ariz. Rev. Stat. § 16–121 (Supp. 1987)
AR Ark. Stat. Ann. § 7–8–401 (1987)
CA Cal. Const., Art. 2, § 2 (1983)
CO Colo. Rev. Stat. § 1–2–101 (Repl. 1980)
CT Conn. Const., Amdt. Art. 9 (1985); Conn. Gen. Stat. § 9–12 (Supp. 1988)
DL Del. Code Ann. tit. 15, § 1701 (Repl. 1981)
DC D. C. Code Ann. § 1–1311(b)(1) (Repl. 1987)
FL Fla. Stat. Ann. § 97.041 (1982)
GA Ga. Code Ann. § 21–2–219 (1986)
HI Haw. Rev. Stat. tit. 2, § 11–12 (Repl. 1985)
ID Idaho Code § 34–402 (Supp. 1988)
IL Ill. Stat. Ann. ch. 46, ¶ 3–1 (Supp. 1988)
IN Ind. Code Ann. § 3–7–1–1 (Supp. 1987)
IA Iowa Code Ann. § 47–4 (Supp. 1988)
KS Kan. Const., Art. 5, § 1 (1978)
KY Ky. Const. § 145 (Repl. 1979)
LA La. Const., Art. 1, § 10 (1977); La. Rev. Stat. Ann. § 18:101 (1979)
ME Me. Rev. Stat. Ann. tit. 21A, § 111(2) (Supp. 1987)
MD Md. Ann. Code art. 33, § 3–4(b)(2) (Repl. 1986)
MA Mass. Gen. Laws Ann. ch. 51, § 1 (Supp. 1988)
MI Mich. Comp. Laws Ann. § 168.492 (Supp. 1988)
MN Minn. Stat. Ann. § 201.014 (Supp. 1988)
MS Miss. Const., Art. 12, § 241 (Supp. 1987)
MO Mo. Const., Art. VIII, § 2 (Supp. 1988)
MT Mont. Const., Art. IV, § 2 (1987); Mont. Code Ann. § 13–1–11 (1987)
NE Neb. Const., Art. 6, § 1 (1986–1987); Neb. Rev. Stat. § 32–223 (1984)
NV Nev. Rev. Stat. § 293.485 (Supp. 1987)
NH N. H. Const., Pt. 1, Art. 11 (Supp. 1987)
NJ N. J. Const., Art. 2, ¶ 3 (Supp. 1988)
NM [No provisions beyond reference to U. S. Const., Amdt. 26]
NY N. Y. Elec. Law § 5–102 (1978)
NC N. C. Gen. Stat. § 163–55 (1987)
ND N. D. Const., Art. II, § 1 (Repl. 1981)
OH Ohio Const., Art. V, § 1 (1979); Ohio Rev. Code Ann. §§ 3503.01 & 3503.011 (1982)
OK Okla. Const., Art. III, § 1 (1981)
OR Or. Const., Art. II, § 2 (1987)
PA Pa. Stat. Ann. tit. 25, § 2811 (1988)
RI R. I. Gen. Laws § 17–1–3 (Supp. 1987)
SC S. C. Code Ann. § 7–5–610 (Supp. 1987)
SD S. D. Const., Art. VII, § 2 (1978); S. D. Codified Laws Ann. § 12–3–1 (1982)
TN Tenn. Code Ann. § 2–2–102 (Repl. 1985)
TX Tex. Elec. Code Ann. § 11.002 (Supp. 1988)
UT Utah Code Ann. § 20–1–17 (Repl. 1984)
VT Vt. Stat. Ann. tit. 17, § 2121 (1982)
VA Va. Const., Art. II, § 1 (Repl. 1987)
WA Wash. Const., Art. VI, § 1, Amdt. 63 (Supp. 1988)
WV W. Va. Code § 3–1–3 (Repl. 1987)
WI Wis. Const., Art. 3, § 1 (Supp. 1987); Wis. Stat. Ann. §§ 6.02 & 6.05 (1986)
WY Wyo. Stat. § 22–1–102(k) (Supp. 1987)

* * *

Appendix B—Right to Serve on a Jury

In no State may anyone below the age of 18 serve on a jury. The following chart assembles the various state provisions relating to minimum age for jury service.

AL Ala. Code § 12–16–60(a)(1) (Repl. 1986)
AK Alaska Stat. § 09.20.010(a)(3) (Supp. 1987)
AZ Ariz. Rev. Stat. Ann. § 21–301(D) (Supp. 1987)
AR Ark. Stat. Ann. § 16–301–101 (1987)
CA Cal. Civ. Proc. § 198(a)(1) (Supp. 1988)
CO Colo. Rev. Stat. § 13–71–109(2)(a) (Repl. 1987)
CT Conn. Gen. Stat. § 51–217 (Supp. 1988)
DL Del. Code Ann. tit. 10, § 4506(b)(1) (Supp. 1986)
DC D. C. Code Ann. § 11–1906(b)(1)(C) (Supp. 1987)
FL Fla. Stat. Ann. § 40.01 (Supp. 1988)
GA Ga. Code Ann. § 15–12–40 (Supp. 1987)
HI Haw. Rev. Stat. § 612–4 (Repl. 1985)
ID Idaho Code § 2–209(2)(a) (Supp. 1988)
IL Ill. Stat. Ann. ch. 78, ¶ 2 (Supp. 1988)
IN Ind. Code Ann. § 33–4–5–2 (Supp. 1988)
IA Iowa Code Ann. § 607A.4(1)(a) (1988)
KS Kan. Stat. Ann. § 43–156 (1986)
KY Ky. Rev. Stat. Ann. § 29A.080(2)(a) (Supp. 1987)
LA La. Code Crim. Proc. Ann. art. 401(a)(2) (Supp. 1988)
ME Me. Rev. Stat. Ann. tit. 14, § 1211 (Supp. 1987)
MD Md. Cts. & Jud. Proc. Code Ann. § 8–104 (Repl. 1984)
MA Mass. Gen. Laws Ann. ch. 234, § 1 (Supp. 1988)
MI Mich. Comp. Laws Ann. § 600.1307a(1)(a) (Supp. 1988)
MN Minn. Stat. Ann. § 593.41(2)(2) (1988)
MS Miss. Code Ann. § 13–5–1 (1972)
MO Mo. Stat. Ann. § 494.010 (Supp. 1988)
MT Mont. Code Ann. § 3–15–301 (1987)
NE Neb. Rev. Stat. § 25–1601 (1985)
NV Nev. Rev. Stat. § 6.010 (1986)
NH N. H. Rev. Stat. Ann. § 500–A:3 (Repl. 1983)
NJ N. J. Stat. Ann. § 9–17B–1 (Supp. 1988)
NM N. M. Stat. Ann. § 38–5–1 (Repl. 1987)
NY N. Y. Jud. Law § 510(2) (Supp. 1988)
NC N. C. Gen. Stat. § 9–3 (1986)
ND N. D. Cent. Code § 27–09.1–08(2)(b) (Supp. 1987)
OH Ohio Rev. Code Ann. § 2313.42 (1984)
OK Okla. Stat. Ann. tit. 38, § 28 (Supp. 1988)
OR Or. Rev. Stat. § 10.030(2)(c) (1987)
PA Pa. Stat. Ann. tit. 42, § 4521 (Supp. 1988)
RI R. I. Gen. Laws § 9–9–1 (1985)
SC S. C. Code Ann. § 14–7–130 (Supp. 1987)
SD S. D. Codified Laws Ann. § 16–13–10 (1987)
TN Tenn. Code Ann. § 22–1–101(1) (Supp. 1987)
TX Tex. Gov't Code Ann. § 62.102 (1987)
UT Utah Code Ann. § 78–46–7(1)(b) (Repl. 1987)
VT Vt. Stat. Ann.—Administrative Orders and Rules: Qualification, List, Selection and Summoning of All Jurors—Rule 25 (1986)
VA Va. Code Ann. § 8.01–337 (Supp. 1988)
WA Wash. Rev. Code Ann. § 2.36.070 (1988)
WV W. Va. Code § 52–1–8(b)(1) (Supp. 1988)
WI Wis. Stat. Ann. § 756.01 (1981)
WY Wyo. Stat. § 1–11–101 (Supp. 1987)

* * *

Appendix C—Right to Drive Without Parental Consent

Most States have various provisions regulating driving age, from learner's permits through driver's licenses. In all States but one, 15-year-olds either may not drive, or may drive only with parental consent or accompaniment.

AL Ala. Code § 32–6–7(1) (Repl. 1983)
AK Alaska Stat. § 28.15.071 (Supp. 1987)
AZ Ariz. Rev. Stat. Ann. § 28–413(A)(1) (Supp. 1987)
AR Ark. Stat. Ann. § 27–16–604(a)(1) (1987)
CA Cal. Veh. Code § 12507 (1987)
CO Colo. Rev. Stat. § 42–2–107(1) (Repl. 1984)
CT Conn. Gen. Stat. § 14–36 (1987)

DL Del. Code Ann. tit. 21, §2707 (Repl. 1985)
DC D. C. Code Ann. §40–301 (1981)
FL Fla. Stat. Ann. §322.09 (Supp. 1988)
GA Ga. Code Ann. §40–5–26 (1985)
HI Haw. Rev. Stat. §286–112 (Repl. 1985)
ID Idaho Code §49–313 (Supp. 1987)
IL Ill. Stat. Ann. ch. 95½, ¶6–103 (Supp. 1988)
IN Ind. Code Ann. §9–1–4–32 (1979)
IA Iowa Code Ann. §321.177 (1985 & Supp. 1988)
KS Kan. Stat. Ann. §8–237 (1982)
KY Ky. Rev. Stat. Ann. §186.470 (Repl. 1982)
LA La. Rev. Stat. Ann. §32:407 (Supp. 1988)
ME Me. Rev. Stat. Ann. tit. 29, §585 (Supp. 1987)
MD Md. Transp. Code Ann. §16–103 (Repl. 1987)
MA Mass. Gen. Laws Ann. ch. 90, §8 (1985 & Supp. 1988)
MI Mich. Comp. Laws Ann. §257.308 (Supp. 1988)
MN Minn. Stat. Ann. §171.04 (1986)
MS Miss. Code Ann. §63–1–23 (Supp. 1987)
MO Mo. Stat. Ann. §302.060 (Supp. 1988)
MT Mont. Code Ann. §61–5–105 (1987) (15-year-olds may drive without parental consent if they pass a driver's education course)
NE Neb. Rev. Stat. §60–407 (1984)
NV Nev. Rev. Stat. §483.250 (1986)
NH N. H. Rev. Stat. Ann. §263:17 (Supp. 1987)
NJ N. J. Stat. Ann. §39:3–10 (Supp. 1988)
NM N. M. Stat. Ann. §66–5–11 (Repl. 1984)
NY N. Y. Veh. & Traf. Law §502 (1986)
NC N. C. Gen. Stat. §20–11 (1983)
ND N. D. Cent. Code §39–06–08 (Repl. 1987)
OH Ohio Rev. Code Ann. §4507.07 (Supp. 1987)
OK Okla. Stat. Ann. tit. 47, §6–107 (1988)
OR Or. Rev. Stat. §807.060 (1987)
PA Pa. Stat. Ann. tit. 75, §1503 (1977)
RI R. I. Gen. Laws §31–10–3 (Supp. 1987)
SC S. C. Code Ann. §56–1–100 (1976)
SD S. D. Codified Laws Ann. §32–12–6 (1984)
TN Tenn. Code Ann. §55–7–104 (Supp. 1987)
TX Tex. Rev. Civ. Stat. Ann. art. 6687b(4) (Supp. 1988)
UT Utah Code Ann. §41–2–109 (Supp. 1987)
VT Vt. Stat. Ann. tit. 23, §607 (Repl. 1987)
VA Va. Code Ann. §46.1–357 (Supp. 1988)
WA Wash. Rev. Code Ann. §46.20.031 (1987)
WV W. Va. Code §17B–2–3 (Repl. 1986)
WI Wis. Stat. Ann. §343.15 (1971 & Supp. 1987)
WY Wyo. Stat. §31–7–112 (Supp. 1987)

* * *

Appendix D—Right to Marry Without Parental Consent

In all States but four, 15-year-olds may not marry without parental consent.

AL Ala. Code §30–1–5 (Repl. 1983)
AK Alaska Stat. §25.05.171 (1983) (judge may permit minor to marry without parental consent, even in the face of parental opposition, in certain circumstances)
AZ Ariz. Rev. Stat. Ann. §25–102(A) (1976)
AR Ark. Stat. Ann. §9–11–102 (1987)
CA Cal. Civ. Code §4101 (1983)
CO Colo. Rev. Stat. §14–2–106(1)(a)(I) (Repl. 1987)
CT Conn. Gen. Stat. §46b–30 (1986)
DL Del. Code Ann. tit. 13, §123 (Repl. 1981)
DC D. C. Code Ann. §30–111 (1981)
FL Fla. Stat. Ann. §741.04 (1986)
GA Ga. Code Ann. §19–3–37 (1982)
HI Haw. Rev. Stat. §572–2 (Repl. 1985)
ID Idaho Code §32–202 (1988)
IL Ill. Stat. Ann. ch. 40, ¶203(1) (Supp. 1988)
IN Ind. Code Ann. §31–7–1–6 (Supp. 1988)
IA Iowa Code Ann. §595.2 (1981 & Supp. 1988)
KS Kan. Stat. Ann. §23–106 (1981)
KY Ky. Rev. Stat. Ann. §402.210 (1983)
LA La. Civ. Code Ann. art. 87 (Supp. 1988) (minors not legally prohibited from marrying, even without parental consent, but marriage ceremony required); La. Rev. Stat. Ann. §9:211 (Supp. 1988) (official may not perform marriage ceremony in which a minor is a party without parental consent; comments to Civ. Code Ann. art. 87 suggest that such a marriage is valid but that official may face sanctions)
ME Me. Rev. Stat. Ann. tit. 19, §62 (Supp. 1987)
MD Md. Fam. Law Code Ann. §2–301 (1984) (either party under 16 may marry without parental consent if "the woman to be married . . . is pregnant or has given birth to a child")
MA Mass. Gen. Laws Ann. ch. 207, §7 (1988)
MI Mich. Comp. Laws Ann. §551.103 (1988)
MN Minn. Stat. Ann. §517.02 (Supp. 1988)
MS Miss. Code Ann. §93–1–5(d) (Supp. 1987) (female may marry at 15 without parental consent)
MO Mo. Stat. Ann. §451.090 (1986)
MT Mont. Code Ann. §40–1–202 (1987)
NE Neb. Rev. Stat. §42–105 (1984)
NV Nev. Rev. Stat. §122.020 (1986)
NH N. H. Rev. Stat. Ann. §457:5 (1983)
NJ N. J. Stat. Ann. §9:17 B–1 (Supp. 1988)
NM N. M. Stat. Ann. §40–1–6 (Repl. 1986)
NY N. Y. Dom. Rel. Law §15 (1988)
NC N. C. Gen. Stat. §51–2 (Supp. 1987)
ND N. D. Cent. Code §14–03–02 (1981)
OH Ohio Rev. Code Ann. §3101.01 (Supp. 1987)
OK Okla. Stat. Ann. tit. 43, §3 (1979)
OR Or. Rev. Stat. §106.060 (1987)
PA Pa. Stat. Ann. tit. 48, §1–5 (Supp. 1988)
RI R. I. Gen. Laws §15–2–11 (1981)
SC S. C. Code Ann. §20–1–250 (1985)
SD S. D. Codified Laws Ann. §25–1–9 (1984)
TN Tenn. Code Ann. §36–3–106 (Supp. 1987)
TX Tex. Fam. Code Ann. §1.51 (Supp. 1988)
UT Utah Code Ann. §30–1–9 (Repl. 1984)
VT Vt. Stat. Ann. tit. 18, §5142 (Repl. 1987)
VA Va. Code Ann. §20–48 (Repl. 1983)
WA Wash. Rev. Code Ann. §26.04.210 (1986)
WV W. Va. Code §48–1–1 (Repl. 1986)
WI Wis. Stat. Ann. §765.02 (1981 & Supp. 1987)
WY Wyo. Stat. §20–1–102 (1987)

* * *

Appendix E—Right to Purchase Pornographic Materials

No minor may purchase pornography in the 50 States that have legislation dealing with obscenity.

AL Ala. Code §13A–12–170(1) (Supp. 1987)
AK [No legislation]
AZ Ariz. Rev. Stat. Ann. §13–3506 (Supp. 1987)
AR Ark. Stat. Ann. §§5–68–501 & 5–68–502 (1987)
CA Cal. Penal Code §313.1 (Supp. 1988)
CO Colo. Rev. Stat. §18–7–502 (Repl. 1986)
CT Conn. Gen. Stat. §53a–196 (1985)
DL Del. Code Ann. tit. 11, §1361(b) (Repl. 1987)
DC D. C. Code Ann. §22–2001(b) (1981)
FL Fla. Stat. Ann. §847.012 (1976)
GA Ga. Code Ann. §16–12–103 (1984)
HI Haw. Rev. Stat. §712–1215 (Repl. 1985)

ID Idaho Code § 18–1513 (1987)
IL Ill. Stat. Ann. ch. 38, ¶ 11–21 (1979)
IN Ind. Code Ann. § 35–49–3–3 (1986)
IA Iowa Code Ann. § 728.2 (1979)
KS Kan. Stat. Ann. § 21–4301a (Supp. 1987)
KY Ky. Rev. Stat. Ann. § 531–030 (1984)
LA La. Rev. Stat. Ann. § 14:91.11 (1986)
ME Me. Rev. Stat. Ann. tit. 17, § 2911 (1983 & Supp. 1987)
MD Md. Ann. Code art. 27, § 419 (Supp. 1987)
MA Mass. Gen. Laws Ann. ch. 272, § 28 (Supp. 1988)
MI Mich. Comp. Laws Ann. § 750.142 (Supp. 1988)
MN Minn. Stat. Ann. § 617.293 (1987)
MS Miss. Code Ann. § 97–5–27 (Supp. 1987)
MO Mo. Stat. Ann. § 573.040 (1979)
MT Mont. Code Ann. § 45–8–201 (1987)
NE Neb. Rev. Stat. § 28–808 (1985)
NV Nev. Rev. Stat. § 201.265 (1986)
NH N. H. Rev. Stat. Ann. § 571–B:2 (Repl. 1986)
NJ N. J. Stat. Ann. § 2C:34–2–3 (1982 & Supp. 1988)
NM N. M. Stat. Ann. § 30–37–2 (Repl. 1980)
NY N. Y. Penal Law § 235.21 (1980)
NC N. C. Gen. Stat. § 19–13 (1983)
ND N. D. Cent. Code § 12.1–27.1–03 (Repl. 1985)
OH Ohio Rev. Code Ann. § 2907.31 (1986)
OK Okla. Stat. Ann. tit. 21, § 1040.8 (Supp. 1988)
OR Or. Rev. Stat. § 167.065 (1987)
PA Pa. Stat. Ann. tit. 18, § 5903 (1983)
RI R. I. Gen. Laws § 11–31–10 (Supp. 1987)
SC S. C. Code Ann. § 16–15–385 (1987)
SD S. D. Codified Laws Ann. § 22–24–28 (1988)
TN Tenn. Code Ann. § 39–6–1132 (Repl. 1982)
TX Tex. Penal Code Ann. § 43.24 (1974)
UT Utah Code Ann. § 76–10–1206 (Repl. 1978)
VT Vt. Stat. Ann. tit. 13, § 2802 (Repl. 1974)
VA Va. Code Ann. § 18.2–391 (Repl. 1988)
WA Wash. Rev. Code Ann. § 9.68.060 (1988)
WV W. Va. Code § 61–8A–2 (Repl. 1984)
WI Wis. Stat. Ann. § 944.21 (1982)
WY Wyo. Stat. § 6–4–302 (1983)

* * *

Appendix F—Right to Participate in Legalized Gambling Without Parental Consent

In 39 of the 48 States in which some form of legalized gambling is permitted, minors are absolutely prohibited from participating in some or all forms of such gambling. In three States parental consent vitiates such prohibition; in six States, no age restrictions are expressed in the statutory provisions authorizing gambling.

AL Ala. Code § 11–65–44 (Repl. 1985)
AK Alaska Stat. § 43.35.040(a)(1) (1983)
AZ Ariz. Rev. Stat. Ann. § 5–112(E) (Supp. 1987)
AR Ark. Stat. Ann. § 23–110–405(c) (Supp. 1987)
CA Cal. Penal Code § 326.5(e) (Supp. 1988)
CO Colo. Rev. Stat. § 24–35–214(1)(c) (Repl. 1982)
CT Conn. Gen. Stat. § 7–186a (Supp. 1988)
DL Del. Code Ann. tit. 29, § 4810(a) (Repl. 1983)
DC D. C. Code Ann. § 2–2534 (Supp. 1987)
FL Fla. Stat. Ann. § 849.093(9)(a) (Supp. 1988)
GA Ga. Code Ann. § 16–12–58 (1984)
HI Haw. Rev. Stat. § 712–1231 (Repl. 1985)
ID Idaho Code § 67–7415 (Supp. 1988)
IL Ill. Stat. Ann. ch. 120, ¶ 1102(a) (1988)
IN [Gambling not permitted by statute]
IA Iowa Code Ann. § 233.1(2)(c) (Supp. 1988)
KS Kan. Stat. Ann. § 79–4706(m) (1984)
KY [No age restrictions]
LA La. Rev. Stat. Ann. § 14:92(A)(4) (1986)
ME Me. Rev. Stat. Ann. tit. 17, § 319 (1983)
MD [No age restrictions]
MA Mass. Gen. Laws Ann. ch. 128A, § 10 (1981)
MI Mich. Comp. Laws Ann. § 432.110a(a) (Supp. 1988)
MN [No age restrictions]
MS Miss. Code Ann. § 97–33–21 (1972)
MO Mo. Stat. Ann. § 313.280 (Supp. 1988)
MT Mont. Code Ann. § 23–5–506 (1987)
NE Neb. Rev. Stat. § 9–250 (1987)
NV Nev. Rev. Stat. § 463.350 (1986)
NH N. H. Rev. Stat. Ann. §§ 287–A:4 & 287–E:7(III) & 287–E:21(v) (Repl. 1987)
NJ N. J. Stat. Ann. § 9:17B–1 (Supp. 1988)
NM [No age restrictions]
NY N. Y. Tax Law § 1610 (1987)
NC [No age restrictions]
ND N. D. Cent. Code § 53–06.1–07.1 (Supp. 1987)
OH Ohio Rev. Code Ann. § 3770.07 (Supp. 1987)
OK Okla. Stat. Ann. tit. 21, § 995.13 (1983) (permitted with parental consent)
OR Or. Rev. Stat. § 163.575(1)(c) (1987)
PA Pa. Stat. Ann. tit. 10, § 305 (Supp. 1988) (permitted with parental consent)
RI R. I. Gen. Laws § 11–19–32(*l*) (Supp. 1987)
SC [Gambling not permitted by statute]
SD S. D. Codified Laws Ann. § 42–7A–32 (Supp. 1988)
TN Tenn. Code Ann. § 39–6–609(f) (Supp. 1987)
TX Tex. Rev. Civ. Stat. Ann. art. 179d, § 17 (Supp. 1988) (permitted with parental consent)
UT [Gambling not permitted by statute]
VT Vt. Stat. Ann. tit. 31, § 674(J) (Repl. 1986)
VA [No age restrictions]
WA Wash. Rev. Code Ann. § 67.70.120 (Supp. 1988)
WV W. Va. Code § 19–23–9(e) (Supp. 1988)
WI Wis. Stat. Ann. § 163.51(13) (1974)
WY Wyo. Stat. § 11–25–109(c) (Supp. 1987)

(Appendices assembled with the assistance of the Brief for the National Legal Aid and Defender Association, the National Association of Criminal Defense Lawyers, and the American Jewish Committee as *Amici Curiae*.)

JUSTICE O'CONNOR, concurring in the judgment.

The plurality and dissent agree on two fundamental propositions: that there is some age below which a juvenile's crimes can never be constitutionally punished by death, and that our precedents require us to locate this age in light of the "'evolving standards of decency that mark the progress of a maturing society.'" See *ante*, at 3 (quoting *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (opinion of Warren, C. J.)); *ante*, at 10–11; *post*, at 7, 13. See also, *e. g.*, *McCleskey* v. *Kemp*, 481 U. S. ——, —— (1987). I accept both principles. The disagreements between the plurality and the dissent rest on their different evaluations of the evidence available to us about the relevant social consensus. Although I believe that a national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist, I am reluctant to adopt this conclusion as a matter of constitutional law without better evidence than we now possess. Because I conclude that the sentence in this case can and should be set aside on narrower grounds than those adopted by the plurality, and because the grounds on which I rest should allow us to face the more general question when better evidence is available, I concur only in the judgment of the Court.

I

Both the plurality and the dissent look initially to the decisions of American legislatures for signs of a national consensus about the minimum age at which a juvenile's crimes may lead to capital punishment. Although I agree with the dissent's contention, *post*, at 7, that these decisions should provide the most reliable signs of a society-wide consensus on this issue, I cannot agree with the dissent's interpretation of the evidence.

The most salient statistic that bears on this case is that every single American legislature that has expressly set a minimum age for capital punishment has set that age at 16 or above. See *ante*, at 12, and n. 30. When one adds these 18 States to the 14 that have rejected capital punishment completely, see *ante*, at 8–9, and n. 25, it appears that almost two-thirds of the state legislatures have definitely concluded that no 15-year-old should be exposed to the threat of execution. See also *ante*, at 11–12, n. 29 (pointing out that an additional two States with death penalty statutes on their books seem to have abandoned capital punishment in practice). Where such a large majority of the state legislatures have unambiguously outlawed capital punishment for 15-year-olds, and where no legislature in this country has affirmatively and unequivocally endorsed such a practice, strong counterevidence would be required to persuade me that a national consensus against this practice does not exist.

The dissent argues that it has found such counterevidence in the laws of the 19 States that authorize capital punishment without setting any statutory minimum age. If we could be sure that each of these 19 state legislatures had deliberately chosen to authorize capital punishment for crimes committed at the age of 15, one could hardly suppose that there is a settled national consensus opposing such a practice. In fact, however, the statistics relied on by the dissent may be quite misleading. When a legislature provides for some 15-year-olds to be processed through the adult criminal justice system, and capital punishment is available for adults in that jurisdiction, the death penalty becomes at least theoretically applicable to such defendants. This is how petitioner was rendered death-eligible, and the same possibility appears to exist in 18 other States. See *post*, at 3–6; *ante*, at 10, n. 26. As the plurality points out, however, it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that it would be appropriate to impose capital punishment on 15-year-olds (or on even younger defendants who may be tried as adults in some jurisdictions). See *ante*, at 9, n. 24.

There are many reasons, having nothing whatsoever to do with capital punishment, that might motivate a legislature to provide as a general matter for some 15-year-olds to be channeled into the adult criminal justice process. The length or conditions of confinement available in the juvenile system, for example, might be considered inappropriate for serious crimes or for some recidivists. Similarly, a state legislature might conclude that very dangerous individuals, whatever their age, should not be confined in the same facility with more vulnerable juvenile offenders. Such reasons would suggest nothing about the appropriateness of capital punishment for 15-year-olds. The absence of any such implication is illustrated by the very States that the dissent cites as evidence of a trend toward lowering the age at which juveniles may be punished as adults. See *post*, at 9. New York, which recently adopted legislation allowing juveniles as young as 13 to be tried as adults, does not authorize capital punishment under any circumstances. In New Jersey, which now permits some 14-year-olds to be tried as adults, the minimum age for capital punishment is 18. In both cases, therefore, the decisions to lower the age at which some juveniles may be treated as adults must have been based on reasons quite separate from the legislatures' views about the minimum age at which a crime should render a juvenile eligible for the death penalty.

Nor have we been shown evidence that other legislatures directly considered the fact that the interaction between their capital punishment statutes and their juvenile offender statutes could in theory lead to executions for crimes committed before the age of 16. The very real possibility that this result was not considered is illustrated by the recent federal legislation, cited by the dissent, which lowers to 15 the age at which a defendant may be tried as an adult. See *post*, at 7–8 (discussing Comprehensive Crime Control Act of 1984, Pub. L. 98–473, 98 Stat. 2149). Because a number of federal statutes have long provided for capital punishment, see *post*, at 8, n. 1, this legislation appears to imply that 15-year-olds may now be rendered death-eligible under federal law. The dissent does not point to any legislative history suggesting that Congress considered this implication when it enacted the Comprehensive Crime Control Act. The apparent absence of such legislative history is especially striking in light of the fact that the United States has agreed by treaty to set a minimum age of 18 for capital punishment in certain circumstances. See Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, [1955] 6 U. S. T. 3516, 3560, T. I. A. S. No. 3365 (rules pertaining to military occupation); *ante*, at 14, n. 34; see also *ibid.* (citing two other international agreements, signed but not ratified by the United States, prohibiting capital punishment for juveniles). Perhaps even more striking is the fact that the United States Senate recently passed a bill authorizing capital punishment for certain drug offenses, but prohibiting application of this penalty to persons below the age of 18 at the time of the crime. 134 Cong. Rec. S7579, S7580 (June 10, 1988). Whatever other implications the ratification of Article 68 of the Geneva Convention may have, and whatever effects the Senate's recent action may eventually have, both tend to undercut any assumption that the Comprehensive Crime Control Act signals a decision by Congress to authorize the death penalty for some 15-year-old felons.

Thus, there is no indication that any legislative body in this country has rendered a considered judgment approving the imposition of capital punishment on juveniles who were below the age of 16 at the time of the offense. It nonetheless is true, although I think the dissent has overstated its significance, that the Federal Government and 19 States have adopted statutes that appear to have the legal effect of rendering some of these juveniles death-eligible. That fact is a real obstacle in the way of concluding that a national consensus forbids this practice. It is appropriate, therefore, to examine other evidence that might indicate whether or not these statutes are inconsistent with settled notions of decency in our society.

In previous cases, we have examined execution statistics, as well as data about jury determinations, in an effort to discern whether the application of capital punishment to certain classes of defendants has been so aberrational that it can be considered unacceptable in our society. See, *e. g.*, *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion); *Enmund* v. *Florida*, 458 U. S. 782, 794–796 (1982); *id.*, at 818–819 (O'CONNOR, J., dissenting). In this case, the plurality emphasizes that four decades have gone by since the last execution of a defendant who was younger than 16 at the time of the offense, and that only 5 out of 1,393 death sentences

during a recent 5-year period involved such defendants. *Ante*, at 14–16. Like the statistics about the behavior of legislatures, these execution and sentencing statistics support the inference of a national consensus opposing the death penalty for 15-year-olds, but they are not dispositive.

A variety of factors, having little or nothing to do with any individual's blameworthiness, may cause some groups in our population to commit capital crimes at a much lower rate than other groups. The statistics relied on by the plurality, moreover, do not indicate how many juries have been asked to impose the death penalty for crimes committed below the age of 16, or how many times prosecutors have exercised their discretion to refrain from seeking the death penalty in cases where the statutory prerequisites might have been proved. Without such data, raw execution and sentencing statistics cannot allow us reliably to infer that juries are or would be significantly more reluctant to impose the death penalty on 15-year-olds than on similarly situated older defendants.

Nor, finally, do I believe that this case can be resolved through the kind of disproportionality analysis employed in Part V of the plurality opinion. I agree that "proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness." *Enmund*, *supra*, at 825 (O'CONNOR, J., dissenting); see also *Tison* v. *Arizona*, 481 U. S. —— (1987). Granting the plurality's other premise—that adolescents are generally less blameworthy than adults who commit similar crimes—it does not necessarily follow that all 15-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment. Nor has the plurality educed evidence demonstrating that 15-year-olds as a class are inherently incapable of being deterred from major crimes by the prospect of the death penalty.

Legislatures recognize the relative immaturity of adolescents, and we have often permitted them to define age-based classes that take account of this qualitative difference between juveniles and adults. See, *e. g.*, *Hazelwood School District* v. *Kuhlmeier*, 484 U. S. —— (1988); *Schall* v. *Martin*, 467 U. S. 253 (1984); *McKeiver* v. *Pennsylvania*, 403 U. S. 528 (1971); *Ginsberg* v. *New York*, 390 U. S. 629 (1968). But compare *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 74–75 (1976) (unconstitutional for a legislature to presume that all minors are incapable of providing informed consent to abortion), and *Bellotti* v. *Baird*, 443 U. S. 622, 654 (1979) (STEVENS, J., joined by BRENNAN, MARSHALL, and BLACKMUN, JJ., concurring in judgment) (same), with *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 469, n. 12 (1983) (O'CONNOR, J., dissenting) (parental notification requirements may be constitutional). The special qualitative characteristics of juveniles that justify legislatures in treating them differently from adults for many other purposes are also relevant to Eighth Amendment proportionality analysis. These characteristics, however, vary widely among different individuals of the same age, and I would not substitute our inevitably subjective judgment about the best age at which to draw a line in the capital punishment context for the judgments of the nation's legislatures. Cf. *Enmund*, *supra*, at 826, and n. 42 (O'CONNOR, J., dissenting).

The history of the death penalty instructs that there is danger in inferring a settled societal consensus from statistics like those relied on in this case. In 1846, Michigan became the first State to abolish the death penalty for all crimes except treason, and Rhode Island soon thereafter became the first jurisdiction to abolish capital punishment completely. F. Zimring & G. Hawkins, Capital Punishment and the American Agenda 28 (1986). In succeeding decades, other American States continued the trend towards abolition, especially during the years just before and during World War I. *Id.*, at 28–29. Later, and particularly after World War II, there ensued a steady and dramatic decline in executions—both in absolute terms and in relation to the number of homicides occurring in the country. W. Bowers, Legal Homicide 26–28 (1984). In the 1950's and 1960's, more States abolished or radically restricted capital punishment, and executions ceased completely for several years beginning in 1968. H. Bedau, The Death Penalty in America 23, 25 (3d ed. 1982).

In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus. Indeed, counsel urged the Court to conclude "that the number of cases in which the death penalty is imposed, as compared with the number of cases in which it is statutorily available, reflects a general revulsion toward the penalty that would lead to its repeal if only it were more generally and widely enforced." *Furman* v. *Georgia*, 408 U. S. 238, 386 (1972) (Burger, C. J., dissenting). We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.

The step that the plurality would take today is much narrower in scope, but it could conceivably reflect an error similar to the one we were urged to make in *Furman*. The day may come when we must decide whether a legislature may deliberately and unequivocally resolve upon a policy authorizing capital punishment for crimes committed at the age of 15. In that event, we shall have to decide the Eighth Amendment issue that divides the plurality and the dissent in this case, and we shall have to evaluate the evidence of societal standards of decency that is available to us at that time. In my view, however, we need not and should not decide the question today.

II

Under the Eighth Amendment, the death penalty has been treated differently from all other punishments. See, *e. g.*, *California* v. *Ramos*, 463 U. S. 992, 998–999, and n. 9 (1983). Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality.

The restrictions that we have required under the Eighth Amendment affect both legislatures and the sentencing authorities responsible for decisions in individual cases. Neither automatic death sentences for certain crimes, for example, nor statutes committing the sentencing decision to the unguided discretion of judges or juries, have been upheld. See, *e. g.*, *Woodson* v. *North Carolina*, 428 U. S. 280 (1976); *Roberts* v. *Louisiana*, 428 U. S. 325 (1976); *Gregg* v. *Georgia*, 428 U. S. 153, 188–189 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.) (discussing *Furman* v. *Georgia*, *supra*). We have rejected both legislative restrictions on the mitigating evidence that a sentencing authority may consider, *e. g.*, *Lockett* v. *Ohio*, 438 U. S. 586 (1978); *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and the lack of sufficiently precise re-

strictions on the aggravating circumstances that may be considered, *e. g.*, *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). As a practical matter we have virtually required that the death penalty be imposed only when a guilty verdict has been followed by separate trial-like sentencing proceedings, and we have extended many of the procedural restrictions applicable during criminal trials into these proceedings. See, *e. g.*, *Gardner* v. *Florida*, 430 U. S. 349 (1977); *Estelle* v. *Smith*, 451 U. S. 454 (1981); *Bullington* v. *Missouri*, 451 U. S. 430 (1981). Legislatures have been forbidden to authorize capital punishment for certain crimes. *Coker* v. *Georgia*, 433 U. S. 584 (1977); *Enmund* v. *Florida*, 458 U. S. 782 (1982); see also *Ford* v. *Wainwright*, 477 U. S. 399 (1986) (Eighth Amendment forbids the execution of insane prisoners). Constitutional scrutiny in this area has been more searching than in the review of noncapital sentences. See *Enmund* v. *Florida*, *supra*, at 815, n. 27 (O'CONNOR, J., dissenting); *Rummel* v. *Estelle*, 445 U. S. 263, 272 (1980).

The case before us today raises some of the same concerns that have led us to erect barriers to the imposition of capital punishment in other contexts. Oklahoma has enacted a statute that authorizes capital punishment for murder, without setting any minimum age at which the commission of murder may lead to the imposition of that penalty. The State has also, but quite separately, provided that 15-year-old murder defendants may be treated as adults in some circumstances. Because it proceeded in this manner, there is a considerable risk that the Oklahoma legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility. Were it clear that no national consensus forbids the imposition of capital punishment for crimes committed before the age of 16, the implicit nature of the Oklahoma legislature's decision would not be constitutionally problematic. In the peculiar circumstances we face today, however, the Oklahoma statutes have presented this Court with a result that is of very dubious constitutionality, and they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty. In this unique situation, I am prepared to conclude that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution.*

The conclusion I have reached in this unusual case is itself unusual. I believe, however, that it is in keeping with the principles that have guided us in other Eighth Amendment cases. It is also supported by the familiar principle—applied in different ways in different contexts—according to which we should avoid unnecessary, or unnecessarily broad, constitutional adjudication. See generally, *e. g.*, *Ashwander* v. *TVA*, 297 U. S. 288, 341–356 (1936) (Brandeis, J., concurring). The narrow conclusion I have reached in this case is consistent with the underlying rationale for that principle, which was articulated many years ago by Justice Jackson: "We are not final because we are infallible, but we are infallible only because we are final." *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (opinion concurring in result); see also *Califano* v. *Yamasaki*, 442 U. S. 682, 692–693 (1979). By leaving open for now the broader Eighth Amendment question that both the plurality and the dissent would resolve, the approach I take allows the ultimate moral issue at stake in the constitutional question to be addressed in the first instance by those best suited to do so, the people's elected representatives.

For the reasons stated in this opinion, I agree that petitioner's death sentence should be vacated, and I therefore concur in the judgment of the Court.

JUSTICE SCALIA, with whom CHIEF JUSTICE REHNQUIST and JUSTICE WHITE join, dissenting.

If the issue before us today were whether an automatic death penalty for conviction of certain crimes could be extended to individuals younger than 16 when they commit the crimes, thereby preventing individualized consideration of their maturity and moral responsibility, I would accept the plurality's conclusion that such a practice is opposed by a national consensus, sufficiently uniform and of sufficiently long standing, to render it cruel and usual punishment within the meaning of the Eighth Amendment. We have already decided as much, and more, in *Lockett* v. *Ohio*, 438 U. S. 586 (1978). I might even agree with the plurality's conclusion if the question were whether a person under 16 when he commits a crime can be deprived of the benefit of a rebuttable presumption that he is not mature and responsible enough to be punished as an adult. The question posed here, however, is radically different from both of these. It is whether there is a national consensus that no criminal so much as one day under 16, after individuated consideration of his circumstances, including the overcoming of a presumption that he should not be tried as an adult, can possibly be deemed mature and responsible enough to be punished with death for any crime. Because there seems to me no plausible basis for answering this last question in the affirmative, I respectfully dissent.

I

I begin by restating the facts since I think that a fuller account of William Wayne Thompson's participation in the murder, and of his certification to stand trial as an adult, is helpful in understanding the case. The evidence at trial left no doubt that on the night of January 22–23, 1983, Thompson brutally and with premeditation murdered his former brother-in-law, Charles Keene, the motive evidently being, at least in part, Keene's physical abuse of Thompson's sister. As Thompson left his mother's house that evening, in the company of three older friends, he explained to his girl friend that "we're going to kill Charles." Several hours later, early in the morning of January 23, a neighbor, Malcolm "Possum" Brown was awakened by the sound of a gunshot on his front porch. Someone pounded on his front door shouting: "Possum, open the door, let me in. They're going to kill me." Brown telephoned the police, and then opened the front door to see a man on his knees attempting to repel blows with his

*Contrary to the dissent's suggestion, the conclusion I have reached in this case does not imply that I would reach a similar conclusion in cases involving "those of extremely low intelligence, or those over 75, or any number of other appealing groups as to which the existence of a national consensus regarding capital punishment may be in doubt . . . because they are not specifically named in the capital statutes." See *post*, at 20. In this case, there is significant affirmative evidence of a national consensus forbidding the execution of defendants who were below the age of 16 at the time of the offense. The evidence includes 18 state statutes setting a minimum age of 16 or more, and it is such evidence—not the mere failure of Oklahoma to specify a minimum age or the "appealing" nature of the group to which petitioner belongs—that leaves me unwilling to conclude that petitioner may constitutionally be executed. Cases in which similarly persuasive evidence was lacking would in my view not be analogous to the case before us today. The dissent is mistaken both when it reads into my discussion a contrary implication and when it suggests that there are ulterior reasons behind the implication it has incorrectly drawn.

arms and hands. There were four other men on the porch. One was holding a gun and stood apart, while the other three were hitting and kicking the kneeling man, who never attempted to hit back. One of them was beating the victim with an object twelve to eighteen inches in length. The police called back to see if the disturbance was still going on, and while Brown spoke with them on the telephone the men took the victim away in a car.

Several hours after they had left Thompson's mother's house, Thompson and his three companions returned. Thompson's girlfriend helped him take off his boots, and heard him say, "we killed him. I shot him in the head and cut his throat and threw him in the river." Subsequently, the former wife of one of Thompson's accomplices heard Thompson tell his mother that "he killed him. Charles was dead and Vicki didn't have to worry about him anymore." During the days following the murder Thompson made other admissions. One witness testified that she asked Thompson the source of some hair adhering to a pair of boots he was carrying. He replied that was where he had kicked Charles Keene in the head. Thompson also told her that he had cut Charles' throat and chest and had shot him in the head. Another witness testified that when she told Thompson that a friend had seen Keene dancing in a local bar, Thompson remarked that that would be hard to do with a bullet in his head. Ultimately, one of Thompson's codefendants admitted that after Keene had been shot twice in the head Thompson had cut Keene "so the fish could eat his body." Thompson and a codefendant had then thrown the body into the Washita River, with a chain and blocks attached so that it would not be found. On February 18, 1983, the body was recovered. The Chief Medical Examiner of Oklahoma concluded that the victim had been beaten, shot twice, and that his throat, chest, and abdomen had been cut.

On February 18, 1983, the State of Oklahoma filed an information and arrest warrant for Thompson, and on February 22 the State began proceedings to allow Thompson to be tried as an adult. Under Oklahoma law, anyone who commits a crime when he is under the age of eighteen is defined to be a child, unless he is sixteen or seventeen and has committed murder or certain other specified crimes, in which case he is automatically certified to stand trial as an adult. Okla. Stat., Tit. 10, §§ 1101, 1104.2 (Supp. 1987). In addition, under the statute the State invoked in the present case, juveniles may be certified to stand trial as adults if: (1) the State can establish the "prosecutive merit" of the case, and (2) the court certifies, after considering six factors, that there are no reasonable prospects for rehabilitation of the child within the juvenile system. Okla. Stat., Tit. 10, § 1112(b) (1981).

At a hearing on March 29, 1983, the District Court found probable cause to believe that the defendant had committed first degree murder and thus concluded that the case had prosecutive merit. A second hearing was therefore held on April 21, 1983, to determine whether Thompson was amenable to the juvenile system, or whether he should be certified to stand trial as an adult. A clinical pyschologist who had examined Thompson testified at the second hearing that in her opinion Thompson understood the difference between right and wrong but had an antisocial personality that could not be modified by the juvenile justice system. The pyschologist testified that Thompson believed that because of his age he was beyond any severe penalty of the law, and accordingly did not believe there would be any severe repercussions from his behavior. Numerous other witnesses testified about Thompson's prior abusive behavior. Mary Robinson, an employee of the Oklahoma juvenile justice system, testified about her contacts with Thompson during several of his previous arrests, which included arrests for assault and battery in August 1980; assault and battery in October 1981; attempted burglary in May 1982; assault and battery with a knife in July 1982; and assault with a deadly weapon in February 1983. She testified that Thompson had been provided with all the counseling the State's Department of Human Services had available, and that none of the counseling or placements seemed to improve his behavior. She recommended that he be certified to stand trial as an adult. On the basis of the foregoing testimony, the District Court filed a written order certifying Thompson to stand trial as an adult. That was appealed and ultimately affirmed by the Oklahoma Court of Criminal Appeals.

Thompson was tried in the District Court of Grady County between December 4 and December 9, 1983. During the guilt phase of the trial, the prosecutor introduced three color photographs showing the condition of the victim's body when it was removed from the river. The jury found Thompson guilty of first degree murder. At the sentencing phase of the trial, the jury agreed with the prosecution on the existence of one aggravating circumstance, that the murder was "especially heinous, atrocious, or cruel." As required by our decision in *Eddings* v. *Oklahoma*, 455 U. S. 104, 115–117 (1982), the defense was permitted to argue to the jury the youthfulness of the defendant as a mitigating factor. The jury recommended that the death penalty be imposed, and the trial judge, accordingly, sentenced Thompson to death. Thompson appealed, and his conviction and capital sentence were affirmed. Standing by its earlier decision in *Eddings* v. *State*, 616 P. 2d 1159, 1166–1167 (1980), rev'd on other grounds, 455 U. S. 104 (1982), the Oklahoma Court of Criminal Appeals held that "once a minor is certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult." *Thompson* v. *State*, 724 P. 2d 780, 784 (1986). It also held that admission of two of the three photographs was error in the guilt phase of the proceeding, because their prejudicial effect outweighed their probative value; but found that error harmless in light of the overwhelming evidence of Thompson's guilt. It held that their prejudicial effect did not outweigh their probative value in the sentencing phase, and that they were therefore properly admitted, since they demonstrated the brutality of the crime. Thompson petitioned for certiorari with respect to both sentencing issues, and we granted review. 479 U. S. —— (1987).

II

A

As the foregoing history of this case demonstrates, William Wayne Thompson is not a juvenile caught up in a legislative scheme that unthinkingly lumped him together with adults for purposes of determining that death was an appropriate penalty for him, and for his crime. To the contrary, Oklahoma first gave careful consideration to whether, in light of his young age, he should be subjected to the normal criminal system at all. That question having been answered affirmatively, a jury then considered whether, despite his young age, his maturity and moral responsibility were sufficiently developed to justify the sentence of death. In upsetting this particularized judgment on the basis of a constitutional absolute, the plurality pronounces it to be a fundamental principle of our society that no one who is as little as one day short of his 16th birthday can have sufficient maturity and moral responsibility to be subjected to capital punishment for any crime. As a sociological and moral conclusion that is implausible; and it is doubly implausible as an interpretation of the United States Constitution.

The text of the Eighth Amendment, made applicable to the states by the Fourteenth, prohibits the imposition of "cruel and unusual punishments." The plurality does not attempt to maintain that this was originally understood to prohibit capital punishment for crimes committed by persons under the age of 16; the evidence is unusually clear and unequivocal *that it was not.* The age at which juveniles could be subjected to capital punishment was explicitly addressed in Blackstone's Commentaries on the Laws of England, published in 1769 and widely accepted at the time the Eighth Amendment was adopted as an accurate description of the common law. According to Blackstone, not only was 15 above the age (viz., 7) at which capital punishment could theoretically be imposed; it was even above the age (14) up to which there was a rebuttable presumption of incapacity to commit a capital (or any other) felony. 4 W. Blackstone, Commentaries 23–24 (1769). See also M. Hale, Pleas of the Crown 22 (1736) (describing the age of absolute incapacity as 12 and the age of presumptive incapacity as 14); Kean, The History of the Criminal Liability of Children, 53 L.Q. Rev. 364, 369–370 (1937); Streib, Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While under Age Eighteen, 36 Okla. L. Rev. 613, 614–615 (1983) (hereinafter Streib, Death Penalty for Children). The historical practice in this country conformed with the common-law understanding that 15-year-olds were not categorically immune from commission of capital crimes. One scholar has documented 22 executions, between 1642 and 1899, for crimes committed under the age of 16. See Streib, Death Penalty for Children 619.

Necessarily, therefore, the plurality seeks to rest its holding on the conclusion that Thompson's punishment as an adult is contrary to the "evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion) (Warren, C. J.). *Ante*, at 3. Of course the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own views. To avoid this danger we have, when making such an assessment in prior cases, looked for objective signs of how today's society views a particular punishment. *Furman* v. *Georgia*, 408 U. S. 238, 277–279 (1972) (BRENNAN, J., concurring). See also *Woodson* v. *North Carolina*, 428 U. S. 280, 293 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.); *Coker* v. *Georgia*, 433 U. S. 584, 593–597 (1977); *Enmund* v. *Florida*, 458 U. S. 782, 788–789 (1982). The most reliable objective signs consist of the legislation that the society has enacted. It will rarely if ever be the case that the members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives.

It is thus significant that, only four years ago, in the Comprehensive Crime Control Act of 1984, Pub. L. 98–473, 98 Stat. 2149, Congress expressly addressed the effect of youth upon the imposition of criminal punishment, and changed the law in precisely the opposite direction from that which the plurality's perceived evolution in social attitudes would suggest: It lowered from 16 to 15 the age at which a juvenile's case can, "in the interest of justice," be transferred from juvenile court to federal District Court, enabling him to be tried and punished as an adult. 18 U. S. C. § 5032 (1982 ed., Supp. IV). This legislation was passed in light of Justice Department testimony that many juvenile delinquents were "cynical, street-wise, repeat offenders, indistinguishable, except for their age, from their adult criminal counterparts," Hearings on S. 829 before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 98th Cong., 1st Sess., 551 (1983), and that in 1979 alone juveniles under the age of fifteen, *i. e.* almost a year *younger* than Thompson, had committed a total of 206 homicides nationwide, more than 1,000 forcible rapes, 10,000 robberies and 10,000 aggravated assaults. *Id.*, at 554. Since there are federal death-penalty statutes[1] which have not been determined to be unconstitutional, adoption of this new legislation could at least *theoretically result in the imposition of the death penalty* upon a 15-year-old. There is, to be sure, no reason to believe that the Members of Congress had the death penalty specifically in mind; but that does not alter the reality of what federal law now on its face permits. Moreover, if it is appropriate to go behind the face of the statutes to the subjective intentions of those who enacted them, it would be strange to find the consensus regarding criminal liability of juveniles to be moving in the direction the plurality perceives for capital punishment, while moving in precisely the opposite direction for all other penalties.[2]

Turning to legislation at the state level, one observes the same trend of *lowering* rather than raising the age of juvenile *criminal liability.*[3] As for the state *status quo* with respect

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[1] See 10 U. S. C. § 906a (peacetime espionage); 10 U. S. C. § 918 (murder while member of Armed Forces); 18 U. S. C. §§ 32, 33, and 34 (1982 ed. and Supp. IV) (destruction of aircraft, motor vehicles, or related facilities resulting in death); 18 U. S. C. § 115(b)(3) (1982 ed., Supp. IV) (retaliatory murder of member of immediate family of law enforcement officials) (by cross reference to 18 U. S. C. § 1111); 18 U. S. C. § 351 (1982 ed. and Supp. IV) (murder of Member of Congress, important executive official, or Supreme Court Justice) (by cross reference to 18 U. S. C. § 1111); 18 U. S. C. § 794 (espionage); 18 U. S. C. § 844(f) (1982 ed., Supp. IV) (destruction of government property resulting in death); 18 U. S. C. § 1111 (1982 ed. and Supp. IV) (first degree murder within federal jurisdiction); 18 U. S. C. § 1716 (mailing of injurious articles with intent to kill resulting in death); 18 U. S. C. § 1751 (assassination or kidnapping resulting in death of President or Vice President) (by cross reference to 18 U. S. C. § 1111); 18 U. S. C. § 1992 (willful wrecking of train resulting in death); 18 U. S. C. § 2113 (bank robbery-related murder or kidnapping); 18 U. S. C. § 2381 (treason); 49 U. S. C. App. §§ 1472 and 1473 (death resulting from aircraft hijacking).

[2] The concurrence disputes the significance of Congress' lowering of the federal waiver age by pointing to a recently approved Senate bill that would set a minimum age of 18 before capital punishment could be imposed for certain narcotics related offenses. This bill has not, however, been passed by the House of Representatives and signed into law by the President. Even if it eventually were, it would not result in the setting of a minimum age of 18 for any of the other federal death penalty statutes set forth in n. 1, *supra*. It would simply reflect a judgment by Congress that the death penalty is inappropriate for juvenile narcotics offenders. That would have minimal relevance to the question of consensus at issue here, which is not whether criminal offenders under 16 can be executed for *all* crimes, but whether they can be executed for *any* crimes. For the same reason, there is no significance to the concurrence's observation that the Federal Government has by Treaty agreed to a minimum death penalty age in certain very limited circumstances.

[3] Compare S. Davis, Rights of Juveniles, App. B-1 to B-26 (1987) with S. Davis, Rights of Juveniles 233–249 (1974). Idaho has twice lowered its waiver age, most recently from 15 to 14; Idaho Code § 16–1806 (Supp. 1988); Illinois has added as excluded offenses: murder, criminal sexual assault, armed robbery with a firearm, and possession of a deadly weapon in a school committed by child 15 or older; Ill. Ann. Stat. ch. 37, § 805–4(6) (Supp. 1988); Indiana has lowered its waiver age to 14 where aggravating circumstances are present, and it has made waiver mandatory where child is 10 or older and has been charged with murder; Ind. Code §§ 31–6–2–4(b)-(e) (Supp. 1987); Kentucky has established a waiver age of 14 for juveniles charged with capital offenses or Class A or B felonies; Ky. Rev. Stat. §§ 635.020(2)-(4), 640.010 (Supp. 1988); Minnesota has made waiver mandatory for offenses committed by children 14 years or older who were previously certified for criminal prosecution and convicted of the offense or a lesser included offense; Minn. Stat. §§ 260.125 subd. 1, 3, and 3a (1986); and Montana has lowered its waiver age from 16 to 12 for children charged with sexual intercourse without consent, deliberate homicide, mitigated deliberate homicide, or attempted deliberate homicide or attempted mitigated deliberate homicide; Mont. Code Ann. § 41–5–206(1)(a) (1987); New York recently amended its law to allow certain 13-, 14- and 15-year-olds to be tried and punished as adults. N. Y. Crim. Proc. Law § 190.71 (McKinney

to the death penalty in particular: The plurality chooses to "confine [its] attention" to the fact that all 18 of the States that establish a minimum age for capital punishment have chosen at least 16. *Ante*, at 11. But it is beyond me why an accurate analysis would not include within the computation the larger number of States (19) that have determined that no minimum age for capital punishment is appropriate, leaving that to be governed by their general rules for the age at which juveniles can be criminally responsible. A survey of state laws shows, in other words, that a majority of the States for which the issue exists (the rest do not have capital punishment) are of the view that death is not different insofar as the age of juvenile criminal responsibility is concerned. And the latter age, while presumed to be 16 in all the States, see *ante*, at 7, can, in virtually all the States, be less than 16 when individuated consideration of the particular case warrants it. Thus, what Oklahoma has done here is precisely what the majority of capital-punishment States would do.

When the Federal Government, and almost 40% of the States, including a majority of the States that include capital punishment as a permissible sanction, allow for the imposition of the death penalty on any juvenile who has been tried as an adult, which category can include juveniles under 16 at the time of the offense, it is obviously impossible for the plurality to rely upon any evolved societal consensus discernible in legislation—or at least discernible in the legislation of *this* society, which is assuredly all that is relevant.[4] Thus, the plurality falls back upon what it promises will be an examination of "the behavior of juries." *Ante*, at 13. It turns out not to be that, perhaps because of the inconvenient fact that no fewer than 5 murderers who committed their crimes under the age of 16 were sentenced to death, in five different States, between the years 1984 and 1986. V. Streib, Death Penalty for Juveniles 168–169 (1987). Instead, the plurality examines the statistics on capital executions, which are of course substantially lower than those for capital sentences because of various factors, most notably the exercise of executive clemency. See Streib, Death Penalty for Children 619. Those statistics show, unsurprisingly, that capital punishment for persons who committed crimes under the age of 16 is rare. We are not discussing whether the Constitution requires such procedures as will continue to cause it to be rare, but whether the Constitution prohibits it entirely. The plurality takes it to be persuasive evidence that social attitudes have changed to embrace such a prohibition—changed so clearly and permanently as to be irrevocably enshrined in the Constitution—that in this century all of the 18 to 20 executions of persons below 16 when they committed crimes occurred before 1948.

Even assuming that the execution rather than the sentencing statistics are the pertinent data, and further assuming that a four-decade trend is adequate to justify calling a constitutional halt to what may well be a pendulum-swing in social attitudes, the statistics are frail support for the existence of the *relevant* trend. There are many reasons that adequately account for the drop in excecutions other than the premise of general agreement that no 15-year-old murderer should ever be executed. Foremost among them, of course, was a reduction in public support for capital punishment in general. Of the 14 States (including the District of Columbia) that currently have no death penalty statute, 11 have acquired that status since 1950. V. Streib, Death Penalty for Juveniles 42, Table 3–1. That reduction in willingness to impose capital punishment (which may reasonably be presumed to have been felt even in those States that did not entirely abolish it), combined with the modern trend, constitutionalized in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), towards individualized sentencing determinations rather than automatic death sentences for certain crimes, reduced the total number of executions nationwide from an average of 1,272 per decade in the first half of the century to 254 per decade since then. See V. Streib, Death Penalty for Juveniles 56, Table 4–1. A society less ready to impose the death penalty, and entirely unwilling to impose it without individualized consideration, will of course pronounce death for a crime committed by a person under 16 very rarely. There is no absolutely no basis, however, for attributing that phenomonen to a modern consensus that such an execution should never occur—any more than it would have been accurate to discern such a consensus in 1927 when, despite a level of total executions almost five times higher than that of the post-1950 period, there had been no execution for crime committed by juveniles under the age of 16 for almost 17 years. That that did not reflect a new societal absolute was demonstrated by the fact that in approximately the next 17 years there were 10 such executions. *Id.*, at 191–208.

In sum, the statistics of executions demonstrate nothing except the fact that our society has always agreed that executions of 15-year-old criminals should be rare, and in more modern times has agreed that they (like all other executions) should be even rarer still. There is no rational basis for discerning in that a societal judgment that no one so much as a day under 16 can *ever* be mature and morally responsible enough to deserve that penalty; and there is no justification except our own predeliction for converting a statistical rarity of occurrence into an absolute constitutional ban. One must surely fear that, now that the Court has taken the first step of requiring individualized consideration in capital cases, today's decision begins a second stage of converting into constitutional rules the general results of that individuation. One could readily run the same statistical argument with respect to other classes of defendants. Between 1930 and 1955, for example, 30 women were executed in the United States. Only 3 were executed between then and 1986—and none in the 22-year period between 1962 and 1984. Proportionately, the drop is as impressive as that which the plurality points to in 15-year-old executions. (From 30 in 25 years to 3 in the next 31 years, versus from 18 in 50 years to potentially 1—the present defendant—in the next 40 years.) Surely the conclusion is not that it is unconstitutional to impose capital punishment upon a woman.[5]

1982); and New Jersey lowered its waiver age from 16 to 14 for certain aggravated offenses; N. J. Stat. Ann. § 2A:4A-26 (West 1987).

[4] The plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries, *ante*, at 12–13, and n. 32, is totally inappropriate as a means of establishing the fundamental beliefs of this nation. That 40% of our States do not rule out capital punishment for 15-year-old felons is determinative of the question before us here, even if that position contradicts the uniform view of the rest of the world. We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so "implicit in the concept of ordered liberty" that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. See *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937) (Cardozo, J.). But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.

[5] I leave to a footnote my discussion of the plurality's reliance upon the

If one believes that the data the plurality relies upon are effective to establish, with the requisite degree of certainty, a constitutional consensus in this society that no person can ever be executed for a crime committed under the age of 16, it is difficult to see why the same judgment should not extend to crimes committed under the age of 17, or of 18. The frequency of such executions shows an almost equivalent drop in recent years. *Id.*, at 191–208; and of the 18 States that have enacted age limits upon capital punishment, only 3 have selected the age of 16, only 4 the age of 17, and all the rest the age of 18, *ante*, at 11, n. 29. It seems plain to me, in other words, that there is no clear line here, which suggests that the plurality is inappropriately acting in a legislative rather than a judicial capacity. Doubtless at some age a line does exist—as it has always existed in the common law, see *supra*, at 6—below which a juvenile can *never* be considered fully responsible for murder. The evidence that the views of our society, so steadfast and so uniform that they have become part of the agreed-upon laws that we live by, regard that absolute age to be 16 is nonexistent.

B

Having avoided any attempt to justify its holding on the basis of the original understanding of what was "cruel and unusual punishment," and having utterly failed in justifying its holding on the basis of "evolving standards of decency" evidenced by "the work product of state legislatures and sentencing juries," *ante*, at 4, the plurality proceeds, in Part V of the opinion, to set forth its views regarding the desirability of ever imposing capital punishment for a murder committed by a 15-year-old. That discussion begins with the recitation of propositions upon which there is "broad agreement" within our society, namely, that "punishment should be directly related to the personal culpability of the criminal defendant," and that "adolescents as a class are less mature and responsible than adults." *Ante*, at 15. It soon proceeds, however, to the conclusion that "[g]iven the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children," none of the rationales for the death penalty can apply to the execution of a 15-year-old criminal, so that it is "'nothing more than the purposeless and needless imposition of pain and suffering.'" *Ante*, at 19, quoting *Coker* v. *Georgia*, 433 U. S., at 592. On this, as we have seen, there is assuredly not general agreement. Nonetheless, the plurality would make it one of the fundamental laws governing our society solely because they have an "'abiding conviction'" that it is so, *ante*, at 15, n. 37, quoting *Coker* v. *Georgia*, *supra*, at 598.

This is in accord with the proposition set out at the beginning of the plurality's discussion in Part V, that "'[a]lthough the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty.'" *Ante*, at 15, quoting *Enmund* v. *Florida*, 458 U. S., at 797. I reject that proposition in the sense intended here. It is assuredly "for us ultimately to judge" what the Eighth Amendment permits, but that means it is for us to judge whether certain punishments are forbidden because, despite what the current society thinks, they were forbidden under the original understanding of "cruel and unusual," compare *Brown* v. *Board of Education*, 347 U. S. 483 (1954); or because they come within current understanding of what is "cruel and unusual," because of the "evolving standards of decency" *of our national society*; but not because they are out of accord with the perceptions of decency, or of penology, or of mercy, entertained—or strongly entertained, or even held as an "abiding conviction"—by a majority of the small and unrepresentative segment of our society that sits on this Court. On its face, the phrase "cruel *and unusual* punishments" limits the evolving standards appropriate for our consideration to those entertained by the society rather than those dictated by our personal consciences.

Because I think the views of this Court on the policy questions discussed in Part V of the plurality opinion to be irrelevant, I make no attempt to refute them. It suffices to say that there is another point of view, suggested in the following passage written by our esteemed former colleague Justice Powell, whose views the plurality several times invokes for support, *ante*, at 5, 16:

> "Minors who become embroiled with the law range from the very young up to those on the brink of majority. Some of the older minors become fully "street-wise," hardened criminals, deserving no greater consideration than that properly accorded all persons suspected of crime." *Fare* v. *Michael C.*, 442 U. S. 707, 734, n. 4 (1979) (Powell, J., dissenting).

The view that it is possible for a 15-year-old to come within this category uncontestably prevailed when the Eighth and Fourteenth Amendments were adopted, and, judging from the actions of the society's democratically elected representatives, still persuades a substantial segment of the people whose "evolving standards of decency" we have been appointed to discern rather than decree. It is not necessary, as the plurality's opinion suggests, that "we [be] persuaded," *ante*, at 19, of the correctness of the people's views.

III

If I understand JUSTICE O'CONNOR's separate concurrence correctly, it agrees (1) that we have no constitutional authority to set aside this death penalty unless we can find it contrary to a firm national consensus that persons younger than 16 at the time of their crime cannot be executed, and (2) that we cannot make such a finding. It does not, however, reach the seemingly inevitable conclusion that (3) we therefore have no constitutional authority to set aside this death penalty. Rather, it proceeds (in Part II) to state that since (a) we have treated the death penalty "differently from all other punishments," *ante*, at 8, imposing special procedural and substantive protections not required in other contexts, and (b) although we cannot actually *find* any national consensus forbidding execution for crimes committed under 16, there may *perhaps* be such a consensus, therefore (c) the Oklahoma statutes plainly authorizing the present execution by treating 15-year-old felons (after individuated findings) as adults, and authorizing execution of adults, are not adequate, and what is needed is a statute explicitly stating that "15-year-olds can be guilty of capital crimes."

First, of course, I do not agree with (b)—that there is any

---

fact that in most or all States, juveniles under 16 cannot vote, sit on a jury, marry without parental consent, participate in organized gambling, patronize pool halls, pawn property, or purchase alcohol, pornographic materials, or cigarettes. *Ante*, at 6–7, and nn. 10–14. Our cases sensibly suggest that constitutional rules relating to the maturity of minors must be drawn with an eye to the decision for which the maturity is relevant. See *Fare* v. *Michael C.*, 442 U. S. 707, 725–727 (1979) (totality of the circumstances test for juvenile waiver of Fifth Amendment rights permits evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him); *Bellotti* v. *Baird*, 443 U. S. 622, 634–637, 642 (1979) (abortion decision differs in important ways from other decisions that may be made during minority). It is surely constitutional for a State to believe that the degree of maturity that is necessary fully to appreciate the pros and cons of smoking cigarettes, or even of marrying, may be somewhat greater than the degree necessary fully to appreciate the pros and cons of brutally killing a human being.

doubt about the nonexistence of a national consensus. The concurrence produces the doubt only by arbitrarily refusing to believe that what the laws of the Federal Government and 19 States clearly provide for represents a "considered judgment." *Ante*, at 5. Second, I do not see how (c) follows from (b)—how the problem of doubt about whether what the Oklahoma laws permit is contrary to a firm national consensus and therefore unconstitutional is solved by making *absolutely sure* that the citizens of Oklahoma really want to take this unconstitutional action. And finally, I do not see how the procedural and substantive protections referred to in (a) provide any precedent for what is done in (c). Those special protections for capital cases, such as the prohibition of unguided discretion, *Gregg* v. *Georgia*, 428 U. S. 153, 176–196 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.) and the prohibition of automatic death sentences for certain crimes, *Woodson* v. *North Carolina*, 428 U. S. 280, 289–301 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.), were not drawn from a hat, but were thought to be (once again) what a national consensus required. I am unaware of any national consensus, and the concurrence does not suggest the existence of any, that the death penalty for felons under 16 can only be imposed by a single statute that explicitly addresses that subject. Thus, part (c) of the concurrence's argument, its conclusion, could be replaced with almost anything. There is no more basis for imposing the particular procedural protection it announces than there is for imposing a requirement that the death penalty for felons under 16 be adopted by a two-thirds vote of each house of the State Legislature, or by referendum, or by bills printed in 10-point type. I am also left in some doubt whether this new requirement will be lifted (since its supposed rationale would disappear) when enough States have complied with it to render the nonexistence of a national consensus against such executions no longer doubtful; or only when enough States have done so to demonstrate that there is a national consensus in favor of such executions; or never.

It could not possibly be the concurrence's concern that this death sentence is a fluke—a punishment not really contemplated by Oklahoma law but produced as an accidental result of its interlocking statutes governing capital punishment and the age for treating juveniles as adults. The statutes, and their consequences, are quite clear. The present case, moreover, is of such prominence that it has received extensive coverage not only in the Oklahoma press but nationally. It would not even have been necessary for the Oklahoma legislature to act in order to remedy the miscarriage of its intent, if that is what this sentence was. The Governor of Oklahoma, who can certainly recognize a frustration of the will of the citizens of Oklahoma more readily than we, would certainly have used his pardon power if there was some mistake here. What the concurrence proposes is obviously designed to nullify rather than effectuate the will of the people of Oklahoma, even though the concurrence cannot find that will to be unconstitutional.

What the concurrence proposes is also designed, of course, to make it more difficult for all States to enact legislation resulting in capital punishment for murderers under 16 when they committed their crimes. It is difficult to pass a law saying explicitly "15-year-olds can be executed," just as it would be difficult to pass a law saying explicitly "blind people can be executed," or "white-haired grandmothers can be executed," or "mothers of two-year-olds can be executed." But I know of no authority whatever for our specifying the precise form that state legislation must take, as opposed to its constitutionally required content. We have in the past studiously avoided that sort of interference in the States' legislative processes, the heart of their sovereignty. Placing restraints upon the manner in which the States make their laws, in order to give 15-year-old criminals special protection against capital punishment, may well be a good idea, as perhaps is the abolition of capital punishment entirely. It is not, however, an idea it is ours to impose. Thus, while the concurrence purports to be adopting an approach more respectful of States' rights than the plurality, in principle it seems to me much more disdainful. It says to those jurisdictions that have laws like Oklahoma's: We cannot really say that what you are doing is contrary to national consensus and therefore unconstitutional, but since we are not entirely sure you must in the future legislate in the manner that we say.

In my view the concurrence also does not fulfill its promise of arriving at a more "narrow conclusion" than the plurality, and avoiding an "unnecessarily broad" constitutional holding. *Ante*, at 10. To the contrary, I think it hoists on to the deck of our Eighth Amendment jurisprudence the loose cannon of a brand new principle. If the concurrence's view were adopted, henceforth a finding of national consensus would no longer be required to invalidate state action in the area of capital punishment. All that would be needed is uncertainty regarding the existence of a national consensus, whereupon various protective requirements could be imposed, even to the point of specifying the process of legislation. If 15-year-olds must be explicitly named in capital statutes, why not those of extremely low intelligence, or those over 75, or any number of other appealing groups as to which the existence of a national consensus regarding capital punishment may be in doubt for the same reason the concurrence finds it in doubt here, *viz.*, because they are not specifically named in the capital statutes? Moreover, the motto that "death is different" would no longer mean that the firm view of our society demands that it be treated differently in certain identifiable respects, but rather that this Court can attach to it whatever limitations seem appropriate. I reject that approach, and would prefer to it even the misdescription of what constitutes a national consensus favored by the plurality. The concurrence's approach is a solomonic solution to the problem of how to prevent execution in the present case while at the same time not holding that the execution of those under 16 when they commit murder is categorically unconstitutional. Solomon, however, was not subject to the constitutional constraints of the judicial department of a national government in a federal, democratic system.

IV

Since I find Thompson's age inadequate grounds for reversal of his sentence, I must reach the question whether the Constitution was violated by permitting the jury to consider in the sentencing stage the color photographs of Charles Keene's body. Thompson contends that this rendered his sentencing proceeding so unfair as to deny him due process of law.

The photographs in question, showing gunshot wounds in the head and chest, and knife slashes in the throat, chest and abdomen, were certainly probative of the aggravating circumstance that the crime was "especially heinous, atrocious, or cruel. The only issue, therefore, is whether they were unduly inflammatory. We have never before held that the excessively inflammatory character of concededly relevant evidence can form the basis for a constitutional attack, and I would decline to do so in this case. If there is a point at which inflammatoriness so plainly exceeds evidentiary worth as to violate the federal Constitution, it has not been reached here. The balancing of relevance and prejudice is generally a state evidentiary issue, which we do not sit to review.

Lisenba v. *California*, 314 U. S. 219, 227–228 (1941).

For the foregoing reasons, I respectfully dissent from the judgment of the Court.

HARRY F. TEPKER JR., Norman, Okla. (KEVIN W. SAUNDERS and VICTOR L. STREIB, on the briefs) for petitioner; DAVID W. LEE, Oklahoma Assistant Attorney General (ROBERT H. HENRY, Atty. Gen., WILLIAM H. LUKER, SUSAN STEWART DICKERSON, SANDRA D. HOWARD, and M. CAROLINE EMERSON, Asst. Attys. Gen., on the briefs) for respondent.

B

No. 86-6169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM WAYNE THOMPSON, *Petitioner,*

v.

STATE OF OKLAHOMA, *Respondent.*

On Writ Of Certiorari To The Court Of Criminal Appeals
Of The State Of Oklahoma

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I

In a capital case against a sixteen year old defendant, the trial court admitted into evidence two gruesome photographs of the murder victim. The Court of Appeals stated that admitting the "ghastly, color" photographs into evidence was error that served no purpose other than to inflame the jury, but found that the error was harmless because evidence of the defendant's guilt was so strong. The first question presented is:

May the admission of inflammatory evidence in a capital case against a sixteen year old defendant be deemed harmless error merely because of strong evidence of guilt, when such evidence also prejudices the defendant's right to fair, full jury consideration of all mitigating circumstances—including age—during death penalty deliberations?

II

The second question presented is:

Whether the infliction of the death penalty on an individual who was a child of fifteen at the time of the crime constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution of the United States?

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals is published as *Thompson* v. *State* at 724 P.2d 780. The opinion is reproduced in the Joint Appendix.

Although there is no formal or reported trial court opinion, the Judgment and Sentence on Conviction filed in the District Court of Grady County is set forth in the Joint Appendix. [JA 34-35, R. 512]

Also, set forth in the Joint Appendix is the Certification Order, in which the District Court of Grady County decided to hold petitioner accountable as if he were an adult under 10 Okla. Stat. § 1112 [JA 5-8], and the Order of the Oklahoma Court of Criminal Appeals Affirming Certification. [JA 32-33, R. 510-11].

JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 U.S.C. § 1257(3). The opinion of the Court of Criminal Appeals was entered on August 29, 1986. The Court of Criminal Appeals denied a timely petition for rehearing on September 24, 1986. On November 18, 1986, Mr. Justice White entered an order extending the time for petitioning for a writ of certiorari up to and including December 23, 1986. This Court granted the petition for writ of certiorari on February 23, 1987.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const., Amend. XIV (excerpt):

> "No State shall . . . deprive any person of life . . . without due process of law . . ."

STATEMENT OF CASE

William Wayne Thompson was convicted and sentenced to die for a murder committed while he was still fifteen years of age and a child under the laws of Oklahoma.

Certification Proceedings

In 10 Okla. Stat. § 1101, the term "child" is defined as "any person under the age of eighteen (18) years, except any person sixteen (16) or seventeen (17) years of age who is charged with murder" and certain other specified offenses.[1] A person who is sixteen or seventeen and who is charged with murder is automatically considered to be adult, unless the person successfully moves to be certified as a child. 10 Okla. Stat. § 1104.2. This "automatic" certification was *not* the basis for trying the defendant in this case in criminal court.

In this case, the trial court decided to hold Wayne Thompson accountable in criminal proceedings "as if he were an adult" under a separate statute. 10 Okla. Stat. § 1112(b). This statute allows a child of any age who is charged with an offense that would be a felony if committed by an adult to be tried in criminal court, if (i) the state can establish "the prosecutive merit" of the case, and (ii) if the court certifies "that such child shall be held accountable for its [sic] acts as if he were an adult." This certification may occur only after the court has examined whether there are "prospects for reasonable rehabilitation of the child within the juvenile system."

The state initiated a proceeding pursuant to 10 Okla. Stat. § 1112(b). Petition for Delinquency and Accountability, Case No. JFJ-83-12. [JA 3-4][2] The petition asked, in part, that the District Court find that the boy was "competent and had the mental capacity to know and appreciate the wrongfulness of his . . . act." [JA 4].

After a hearing on whether the case had prosecutive merit on March 29, 1983, the District Court found probable cause to believe that the defendant had committed first degree murder.

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[1] Pertinent statutes, including 10 Okla. Stat. § 1101, are included in Appendix A to this brief.

[2] References to the Record on Appeal are designated [R. ____]. Citations to the transcript of the petitioner's trial are designated [Tr. ____]. References to the Joint Appendix are [JA ____].

On April 21, 1983, the District Court held an "amenability" hearing. On the same day as this hearing, the District Court filed a Certification Order. [JA 5-8] The court found:

(i) The boy was accused of "a very serious offense to the community" that had been "committed in an aggressive, violent, premeditated and willful manner." [JA 5]

(ii) The alleged offense was against a person. [JA 5]

(iii) The boy did not have a high I.Q., but he "knows right from wrong and understands the consequences of his actions and . . . he just doesn't care." The boy "has the sophistication and maturity necessary to understand and appreciate the wrongful nature of his actions." [JA 6]

(iv) The boy's record included nine prior arrests. He had previously received counseling and had once been adjudicated a delinquent child, before being placed on probation. [JA 6]

(v) "This juvenile is not amenable to any rehabilitation efforts as long as he remains in the juvenile justice system." This finding was based, in part, on testimony of witnesses from the Oklahoma Department of Human Services, who "could offer no possible placement within the Department with any services that hold out any reasonable prospect for rehabilitation of this juvenile." [JA 6-7]

(vi) The offense did not occur while the juvenile was escaping from an institution for delinquent children. [JA 7]

On the basis of these findings, the trial court decided that William Wayne Thompson should be held accountable for his acts "as if he were an adult." *Id.*

Trial

Wayne Thompson was tried between December 4 and December 9, 1983 in the District Court of Grady County, Oklahoma for the murder of Charles Keene. [JA 1-2]

A. Evidence Of Motive

The only apparent motive for Keene's murder, according to evidence presented by both prosecution and defense, was the

Thompson-Mann family's anger over Keene's repeated abuse of his former wife, Vicky Keene, sister of defendants Anthony Mann and Wayne Thompson.

On the afternoon of January 22, Anthony Mann, Danny Mann, and Vicky Keene visited Charles Keene at his former wife's trailer in order "to talk some sense into Charles." In Mrs. Keene's words, they were "trying to talk him into leaving . . . [to] get out of our lives." They had no success. [Tr. 588-89, 715] According to testimony of Mrs. Keene and Danny Mann, Charles Keene was "messed up" from paint sniffing. [Tr. 588, 716] When Vicky Keene asked Charles Keene for her car keys so that he could not take her car away, [Tr. 589] Charles said the keys were in the car.

While Mrs. Keene looked, in Danny Mann's words, "we said 'Charles, you're going to give us the keys or we're going to get them from you.' So we started kind of easing forward toward him . . ." [Tr. 717] Keene grabbed a knife, which Anthony Mann knocked from his hand. [Tr. 717] The two men grabbed Keene, held and searched him, took the car keys and were leaving when Keene again picked up the knife and tried to stab Danny Mann. [Tr. 717] Mrs. Keene observed her brothers running out of the trailer. She also saw Keene, butcher knife in hand, before he closed the trailer door. [Tr. 589-90] The Manns and Mrs. Keene then reported the incident to the local sheriff, but they were told that nothing could be done. [Tr. 590]

The trailer incident was one of many episodes in a violent and tragic matrimonial conflict between the Keenes. The two were married for seven years, but had been divorced approximately two years before Keene's death. When called as a prosecution witness at the defendant's trial, Mrs. Keene stated that being married to and living with Charles was a nightmare. [Tr. 610] Despite the divorce and despite her wishes, he often stayed in his ex-wife's home.[3] When she "would call the law out there[,] they wouldn't do nothing" about Keene's presence. [Tr. 591; *see also* Tr. 622-23] Mrs. Keene said that Keene had beaten her many times [Tr. 611] and had shot at her. [Tr. 611][4]

[3] Mrs. Keene admitted that she deliberately had a child by her ex-husband. She stated that she wanted a child, but that she felt fearful if she had a child by another man. [Tr. 591]

Mrs. Keene supported her family without Keene's help [Tr. 601, 610]; he had not worked for the last three or four years prior to his death. [Tr. 610] Aggravating the conflict, Keene had taken their six year old child to Texas. She moved to Texas to try to get the child back. [Tr. 613]

Wayne Thompson did not testify at his trial, but the record suggests additional reasons for his rage at Keene. According to the report of Dr. Helen Klein, a clinical psychologist who testified for the prosecution, the boy "described Charles Keene, his deceased brother-in-law, as an 'unemployed glue sniffer,' who 'beat up on me all the time . . . when I was younger he kicked me.'" [R.488] Keene also started the boy "sniffing" paint. [Tr. 612, 694-95]

B. The Murder Of Charles Keene

On the evening of January 22, Anthony Mann (age twenty-seven), Richard Jones (age twenty-four), Bobby Joe Glass (age nineteen) and Thompson left the home of Dorothy Thompson, the boy's mother. [Tr. 631-32] Before leaving, Thompson told his girl friend that "we're going to kill Charles." [Tr. 685]

In the early morning of January 23, Malcolm "Possum" Brown and his wife, Lucille, were awakened in their home by the sound of a gunshot. [Tr. 469, 484, 494] Then, someone pounded on their front door shouting: "Possum, open the door, let me in. They're going to kill me." [Tr. 469, 494] Brown went to the front door, looked out, and saw four men beating another man. [Tr. 471, 474] Brown also heard one of the assailants say, "[t]his is for the way you treated our sister." [Tr. 475-76] While

[4] As a result, Anthony Mann had given her his gun for her protection. After the incident on the afternoon of January 22, she bought shells for the gun. [Tr. 600] The gun and shells were used that night to kill Keene.

Brown spoke with police on the telphone, the men took the victim away in a car. [Tr. 477, 498]

Several hours after leaving home, Thompson and the three men returned to Dorothy Thompson's house. [Tr. 686] The boy was wet from the chest down. He was visibly shaken and was crying. [Tr. 568, 686-87] Charlotte Mann, the former wife of Anthony Mann, observed him at this time. The boy's mother was hugging him and trying to calm him. In Mann's words, "he told Dorothy [his mother] that he killed him. Charles was dead and Vicky didn't have to worry about him anymore." [Tr. 568] He told his girl friend that they had killed Keene and thrown his body into the river. [Tr. 687-88] Later, apparently after the boy had changed clothes, he was still upset and crying. [Tr. 511-12]

At trial, the prosecution introduced evidence of other fragmentary accounts of the crime. [Tr. 508-512, 521-25, 567-68, 574-76, 634-35] According to Mann's statements to his ex-wife, Charlotte, "they went . . . to Vicky's house and got Charles and they went in and told him to pack his suitcase[,] that they were taking him to the highway because he was leaving. . . . Charles left with them and they ended up at Possum Brown's house and Charles got out and ran and they chased him . . ." [Tr. 574; *see also* Tr. 522] The gun went off during Keene's attempt to escape, but Keene was not shot at the Browns'. [Tr. 522, 574-75] After the beating described by the Browns, the four took Keene to another location on the Washita River. [Tr. 574-75] There, Keene was shot twice—once by Thompson, once by Glass. [Tr. 521-22, 574-75] Afterwards, according to Glass' admissions, Thompson cut Keene "so the fish could eat his body." [Tr. 521] Jones and Thompson then threw Keene's body into the river. [Tr. 522]

C. Photographs And Medical Evidence

Dr. Fred Jordon, chief medical examiner for Oklahoma, testified that the victim had been beaten, shot twice and that his throat, chest and abdomen had been cut. [Tr. 661-62, 667-69]

In addition to the medical examiner's testimony, the court overruled defense objections and allowed introduction of two

color photographs of the victim's remains, which had been in the Washita River for almost one month. [Tr. 627-30] Indeed, during the prosecution's opening statement, the district attorney gave the jury a preview of what they would see:

> You're going to see photographs and you're going to see pictures of the entire recovery scene. You're going to see Charles Keene as he's pulled out of that river. He's covered with mud. You're going to see the officers and Dr. Crowell who was the initial medical examiner there on the shore of the Washita. He'll tell you . . . [t]hat Charles Keene had what appeared to be a larva type substance, maggots, larva coming out of his body.

[Tr. 362]

D. Penalty Phase

In the sentencing phase, the State sought a death penalty based on two alleged aggravating circumstances:

> (1) "The murder was especially heinous, atrocious or cruel"; and
>
> (2) "The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." [JA 12, R. 88]

1. Prosecutor's Use Of Photographs

In an opening statement during the penalty phase, the prosecuting attorney said that the State would rely upon evidence introduced during the guilt phase to show that the murder was especially heinous, atrocious and cruel. [Tr. 774-75] Thus, the color photographs of the victim's remains were also presented to the jury during the penalty phase of trial.

Since the jury had not requested to see the photographs while deliberating on guilt, the prosecutor complained in closing argument during the penalty phase:

> [T]here is something in this case that I want to tell you in the very beginning, I did not show you the photographs, you did not ask that the photographs of Charles Keene, the physical evidence be produced to you upstairs in the jury

room in the first phase of this trial. I didn't, but you've got to ask for these exhibits to have them brought up to that jury room.

[Tr. 848] Later, the prosecutor placed the photographs on the podium in front of the jury and for five or ten minutes waved them in front of the jurors. [Tr. 857] The judge overruled the defense counsel's objection, but warned the prosecutor to stop waving the pictures in front of the jury. After a detailed and graphic description of the crime with the aid of the inflammatory photographs, the prosecutor closed: "Its not the sixteen year old, folks, that can do that." [Tr. 865]

2. State's Evidence And Argument To Show Probability Of Future Acts Of Violence

In its attempt to show that the boy would commit more violent acts, the state relied on evidence of his reputation in the community, his arrest record, his failure in one juvenile rehabilitation program, and the opinion of Dr. Helen Klein, a clinical psychologist. After summarizing the boy's arrest record, Klein characterized him as "physically aggressive" and "a bully, an anti-social person." [Tr. 780] She expressed her view that the boy "will . . . become a hardened criminal" and "will become more violent" if he just goes to prison. [Tr. 783-84][5]

A far different description of the boy had emerged from Dr. Klein's psychological report, which was apparently used by the District Court during certification proceedings. [JA 6, 7] The trial judge attached it to his sentencing report. [R. 487-91]

> During the initial stage of the interview, he attempted to portray himself as macho, tough and cavalier. This facade

[5] Apparently, Dr. Klein's pessimism was based, at least in part, on her assessment of Oklahoma prisons. On cross-examination, Dr. Klein responded to defense counsel's suggestion that "every modern prison" gives psychological help to inmates. She responded: "I'd have to know how you define a modern prison. I know that in the State of Oklahoma there is very little psychological services available, or psychiatric for that matter." [Tr. 784]

> tended to dissipate as his anxiety abated.
>
> * * *
>
> Wayne is the sixth of eight children, his father is a truck driver and his mother a housewife. Wayne said he was in special education classes and had entered the 10th grade before dropping out of school in the fall of 1982. Wayne said he had sniffed paint for approximately seven months last year, but quit of his own volition.
>
> * * *
>
> Individuals who obtain MMPI [Minnesota Multiphasic Personality Inventory] profiles similar to Wayne's typically are described as hyperactive, restless and indecisive, and as persons who may keep people at a distance (emotional alienation) and show poor social judgment. A profile such as that obtained by Wayne must be interpreted with caution as it suggests the possible effect of a response set which may have led to exaggeration or distortion of his current status. Such a profile reveals the possible presence of a desire to appear independent of social ties and to "fake bad," i.e., to exaggerate symptomatology.
>
> Rorschach test data support the MMPI data in that test results are indicative of a person whose entire focus is external. He is excitable, hostile, and is responsive to the external world to the extent he cannot organize his inner experience. He has a stereotypical, concrete view of the world and demonstrates little ability to organize or to conceptualize his experience beyond that. Wayne does not have enough ego to handle or to control his impulses and therefore tends to act them out.

[R. 487-91]

E. Jury Instructions

While deliberating over whether the defendant was guilty, the jury had sent the judge a note which asked: "Has the Defendant been certified as an adult?" The trial court answered "[y]es," without distinguishing between the question asked by the jury—whether the boy had "been certified as an adult"—and the actual certification order, which provided only that he should be held accountable "*as if* he were an adult." (Emphasis supplied) [JA 16]

In the penalty phase, after the jury was instructed that it could not fix the defendant's punishment at death unless it first found that one or more aggravating factors was present, [JA 22] the trial judge discussed mitigating circumstances. Instruction No. 7 stated:

> Mitigating circumstances are those which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case.

[JA 23] Instruction No. 8 then reminded the jury that "[e]vidence has been offered as to . . . [t]he existence of youthfulness of the defendant." [JA 24] The trial court's jury instructions during the penalty phase did not state that the defendant's age was a mitigating factor.

After the jury started deliberations in the penalty phase, it sent a question to the trial judge: "Please define mitigating." The answer of the judge was: "You have your instructions, please continue deliberation." [JA 28, Tr. 866] Later, the jury sent a second note asking whether defendant would be eligible for parole if sentenced to life imprisonment. The judge answered: "That is an executive decision, not judicial. You have your instructions." [JA 29, Tr. 866-67]

F. The Death Sentence

The jury fixed defendant's sentence at death on the basis of a single aggravating circumstance—that the crime was "especially heinous, atrocious or cruel." The jury was unpersuaded by the prosecutor's arguments that the boy could not be rehabilitated. It declined to accept the prosecutor's additional claim that the boy would commit violent criminal acts in the future. [JA 30, Tr. 870]

Order Of The Court Of Criminal Appeals Affirming Certification

The Court of Criminal Appeals affirmed the certification of this boy to stand trial as if he were an adult on January 13, over one month after his conviction and death sentence. [JA 32-33]

The Judgment Of The Court Of Criminal Appeals Of Oklahoma

The Court of Criminal Appeals affirmed the judgment and sentence. The admission of the "ghastly, color photographs with so little probative value" was found to be harmless error because evidence of the boy's guilt was "so strong." 724 P.2d at 782-83.

The Court of Criminal Appeals briefly addressed the defendant's argument "that the execution of William Wayne Thompson, who was fifteen at the time of the offense, would constitute cruel and/or unusual punishment." *Id.* at 784. The entirety of the appellate court's discussion of this important and complex issue is as follows:

> The same arguments now made by appellant were made by appellate counsel in *Eddings* v. *State*, 616 P.2d 1159 (Okl. Cr. 1980). This Court, unanimously rejecting the arguments, found that imposition of the death penalty on a minor certified to stand trial as an adult constitutes neither cruel nor unusual punishment. . . .
>
> The United States Supreme Court granted certiorari on the issue, . . . but then decided the case on another ground. *Eddings* v. *Oklahoma*[.] Upon reconsideration of the issue, we reaffirm our previous holding that once a minor is certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult.

Id. (citations omitted).

SUMMARY OF ARGUMENT

I

Although the traditions of Anglo-American jurisprudence allow capital punishment in many cases, imposing the death sentence for a crime committed by a fifteen year old boy, a child under state law, violates the Eighth and Fourteenth Amendments.

Condemning a child or adolescent to death serves no legitimate penological purpose. No evidence suggests that the remote prospect of a death sentence for a child or adolescent is

a greater deterrent than long-term imprisonment. Even an improbable death penalty may attract a few self-destructive or death-defying juveniles to commit capital crimes. Furthermore, imprisonment is more than adequate retribution and incapacitation for the crime of a fifteen year old. Of course, a sentence of death also denies a child or adolescent the right to life, the chance to grow, and all possibility of rehabilitation.

The death penalty for a fifteen year old violates contemporary standards of decency. Juvenile executions have always been rare. In part, this fact reflects the long-standing view that children must be treated and judged differently. The explanations for this special treatment are many and persuasive. Children are less mature, more impulsive, and more self-destructive. The harshest punishments are not appropriate for transgressing children and adolescents, whose crimes are often the result of victimization, abuse, and neglect. And so, even criminal law reflects the understanding that "'[c]hildren have a very special place in life.'" *Eddings* v. *Oklahoma*, 455 U.S. 104, 116 n. 12 (1982) (quoting *May* v. *Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring)). The law is tenacious in its belief that children and adolescents are less responsible for their actions and in its hope that offending children will be rehabilitated. This Court has held consistently that even youthful offenders who commit capital crimes deserve the special consideration required by this tradition.

An increasing number of states have established minimum ages for imposition of capital punishment. No state that has decided to establish an explicit minimum age by statute has selected an age younger than sixteen. Likewise, contemporary jury sentencing patterns reflect an extreme reluctance to sentence children to death, even when authorized by law. To paraphrase Justice Stewart, in this era death sentences for juveniles are cruel and unusual in the same way that being struck by lightning is cruel and unusual. *Furman* v. *Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

The State of Oklahoma, however, is uncommonly reluctant to respect these principles when an adolescent is accused of an

intentional homicide and a prosecuting attorney asks for the death penalty. Oklahoma neither prohibits the capital punishment of children below a certain age nor establishes procedures to assure that the "relevant mitigating factor" of youth, *Eddings*, 455 U.S. at 116, is carefully considered prior to a death sentence.

Oklahoma's disregard of children's "very special place" in a death penalty scheme is tragically evident in the instant case. First, the court certifying Wayne Thompson to stand trial as if he were an adult did not assess his moral guilt in light of the mitigating factor of age. The emphasis in the certification process was on the seriousness of the allegations, the boy's sanity, and the capabilities of Oklahoma's juvenile system, not the boy's character and personal culpability for the murder. Second, the reliability of the jury's decision to sentence the boy to die was undermined by illegitimate prosecutorial tactics designed to distract the jury from its duty to consider carefully the mitigating factor of youth, and by jury instructions that failed to inform the jury that youth was a mitigating factor of great weight. Indeed, the jury was instructed erroneously that the boy had been certified to *be* an adult and that the jurors were free to decide for themselves what might be considered as a mitigating factor.

In sum, this Court has consistently adhered to the principle that the age of the defendant "bear[s] directly on the fundamental justice of imposing capital punishment." *Skipper* v. *South Carolina*, ___ U.S. ___, 106 S.Ct. 1669, 1676 (1986) (Powell, J., joined by Burger, C.J. and Rehnquist, J., concurring). Because Oklahoma continues to disregard this elemental principle of justice for the young, this Court must vacate the death sentence in this case.

II

By placing extraordinary emphasis upon gruesome photographs of the victim during the sentencing phase of the boy's trial, the prosecutor so riveted the jury's attention to the method of the murder and the effects of post-mortem decay

that he effectively distracted the jury from giving fair, full consideration to the youth and the character of the boy. As a result, there is a great and intolerable danger that the death sentence was imposed without "constitutionally indispensable," "particularized consideration," *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976), of the boy's youth, character and record.

Although the Oklahoma Court of Criminal Appeals was required by statute to decide whether the death sentence was the result of passion or prejudice, the court did not even consider the effect of inflammatory, gruesome photographs of the murder victim's remains used repeatedly by the prosecutor during the sentencing phase. The appellate court condemned the prosecutor's actions and held that the trial court's decision to allow the inflammatory evidence was error. Still, the appellate court upheld the defendant's conviction and death sentence, without considering how the error clearly prejudiced the boy's right to a reliable sentencing determination.

III

As this case demonstrates, the tradition of special treatment of child offenders can be difficult to maintain. Juries influenced by emotion, improper prosecutorial conduct, and the intrinsically appalling nature of murder occasionally fail to give fair, full consideration to the mitigating factor of age. This Court must protect even children who have committed capital crimes from a death penalty all too easily and yet freakishly imposed.

ARGUMENT

I

THE EXECUTION OF A PERSON WHO WAS A CHILD OF FIFTEEN AT THE TIME OF THE CRIME IS CRUEL AND UNUSUAL PUNISHMENT.

Wayne Thompson's death sentence offends the Eighth and Fourteenth Amendments because his execution would be cruel and unusual punishment. There are broad and narrow grounds

for this conclusion, but the common feature of petitioner's Eighth Amendment arguments is his youth.

First, the death sentence was imposed for a crime committed when the boy was fifteen years of age. The death sentence is unconstitutional for this reason alone. As the Court has explained, a punishment is cruel and unusual if:

(i) "[I]t . . . makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering," *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion of White, J.); or

(ii) The punishment "is grossly out of proportion to the severity of the crime," *id.*, or the individual's personal, "moral guilt" for that crime, *Enmund* v. *Florida*, 458 U.S. 782, 800 (1982).

The application of the Eighth Amendment ultimately requires this Court to render its own judgment, *id.* at 797, but its decision "should be informed by objective factors to the maximum possible extent." *Id.* at 788 (quoting *Coker*, 433 U.S. at 592 (plurality opinion of White, J.)). Thus, when this Court examines whether a punishment is excessive or harsh in light of society's "evolving standards of decency," *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), it looks to such factors as history and precedent, legislative judgments, international opinion and juries' sentencing decisions. *Enmund*, 458 U.S. at 788.

Wayne Thompson's death sentence also offends the Eighth Amendment on narrower grounds. When examining whether punishment of a particular individual violates the Eighth Amendment, this Court insists that a death sentence be based on a careful assessment of moral guilt. "While the States generally have wide discretion in deciding how much retribution to exact in a given case, the death penalty, 'unique in its severity and irrevocability,' . . . requires the State to inquire into the relevant facets of 'the character and record of the individual offender.'" *Tison* v. *Arizona*, ___ U.S. ___, 55 U.S.L.W.

4496, 4499 (Apr. 21, 1987) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 187 (1976) and *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976)). Oklahoma did not fulfill this constitutional duty to assess carefully moral guilt in light of mitigating factors, particularly the boy's youth.

A. Condemnation Of Children Makes No Measurable Contribution to Legitimate Goals Of Punishment.

"There must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death." *Spaziano* v. *Florida*, 468 U.S. 447, 460 n.7 (1984). In general, the state may punish offenders to achieve one or more of four objectives:

> (1) [T]o rehabilitate the offender; (2) to incapacitate him from committing offenses in the future; (3) to deter others from committing offenses; or (4) to assuage the victim's or the community's desire for revenge or retribution.

Spaziano v. *Florida*, 468 U.S. at 477-78 (Stevens, J., dissenting). *See also, e.g., Gregg* v. *Georgia*, 428 U.S. at 183 (Stewart, J., plurality opinion).

1. Retribution Is Not A Valid Penological Goal For The Execution Of Children And Adolescents.

As this Court stated in *Spaziano* v. *Florida*, 468 U.S. 447, 462 (1984): "[R]etribution clearly plays a more prominent role in a capital case." Retribution is a legitimate goal of the state because there is a societal need for "particularly offensive conduct" to be met with the punishment that it "deserves." *Gregg* v. *Georgia*, 428 U.S. at 183 (plurality opinion). "The instinct for retribution is part of the nature of man." *Furman* v. *Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring). However, retribution justifies an execution only if a defendant's culpability is of the highest degree. "[I]n the final analysis, capital punishment rests on not a legal but an ethical judgment—an assessment of what we called in *Enmund* the 'moral guilt' of the defendant." *Spaziano* v. *Florida*, 468 U.S. at 481 (Stevens, J., dissenting) (citing *Enmund*, 458 U.S. at 800-01). *See also Tison* v. *Arizona*, 55 U.S.L.W. at 4499-50.

Although the execution of an adult for retribution is constitutionally permissible, this justification for the death penalty loses all legitimacy when the object of capital punishment is a child or adolescent. Juveniles do not "deserve" the harshest punishments in the same way that mature, responsible adults might. Those who kill are not held personally responsible for murder unless they are deemed to have the capacity to function as moral beings, who can evaluate their behavior in light of socially accepted values. Only those who are deemed to act out of a fully developed moral awareness, and who choose to act at odds with morality, are deemed "deserving" of the full measure of punishment allowed by law. *See Enmund*, 458 U.S. at 800-01.

Adolescents are not yet fully operational moral beings even though the capacity to form moral standards to guide behavior begins to emerge in adolescence. "[L]arge groups of moral concepts and ways of thought only attain meaning at successively advanced ages and require the extensive background of social experience and cognitive growth represented by the age factor." Kohlberg, *The Development of Children's Orientations Toward a Moral Order*, 6 Vita humana 11, 30 (1963). While struggling to establish their own identity, adolescents are still significantly dependent upon their parents for support and approval. E. Erickson, *Childhood and Society* 261-63 (2d ed. 1963). *See generally* E. Erickson, *Identity: Youth and Crisis* (1968); P. Mussen, J. Conger & J. Kagan, *Child Development and Personality* (5th ed. 1979). Like younger children, adolescents are so profoundly dependent upon their parents and families to define morally appropriate boundaries for their behavior, D. Offer & J. Offer, *From teenage to young manhood: A psychological study* (1975), that they cannot be regarded as morally culpable for homicidal behavior to the same degree as adults. Adolescents are also susceptible to the suggestions of others—particularly peers. E. Erickson, *Childhood and Society* 261-63 (2d ed. 1963). Adolescence is a

period characterized by impulsive, thoughtless behavior often evoked by strong emotion. Indeed, the only psychological evidence in the record—prepared by the state's witness, Dr. Helen Klein—portrays Wayne Thompson as "hyperactive," "restless," "desir[ing] to appear independent of social ties and to 'fake bad,'" "responsive to the external world," unable "to organize his inner experience," and lacking "ego . . . to control his impulses." [R. 487-91] This portrait of a troubled boy could be that of many other adolescents. It is also far different than the image drawn by the prosecutor, who was so intent on denying the reality and meaning of Wayne Thompson's youth.

Thus, the emerging ability of adolescents to act out of a fully developed moral awareness is continually under assault. Adolescents' crimes are more often the products of powerful desires to please others or of sudden strong impulses; these crimes are less likely to be the result of coldly deliberate, thoughtful decisions to violate the known moral precepts of society.[6] For these reasons, adolescents do not deserve death as punishment: They simply are not personally responsible for their homicidal behavior in the sense that *Enmund* and *Tison* require. Children and adolescents by their nature deserve understanding and treatment—or at least the chance to grow—rather than the revenge of an outraged society anxious to "kill them back."

2. The Remote Possibility Of Dying For A Crime Is Not Likely To Deter A Young Offender, If The More Likely Prospect Of Long Term Imprisonment Has Already Failed As A Deterrent.

As this Court indicated in *Gregg* v. *Georgia*, evidence that the prospect of capital punishment deters capital crimes is

[6] On the characteristics and background of homicidal adolescents, see generally Cornell, Benedek & Benedek, *Characteristics of Adolescents Charged with Homocide: Review of 72 Cases*, 5 Behavioral Sciences & the Law 11 (1987); C. Keith (ed.), *The Aggressive Adolescent: Clinical Perspectives* (1984); M. Rutter & H. Giller, *Juvenile Delinquency: Trends and Perspectives* (1983).

inconclusive. Writing for the plurality, Justice Stewart found "no convincing empirical evidence either supporting or refuting this view." 428 U.S. at 185. Nevertheless, he wrote:

> We may . . . assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.

Id. at 185-86 (Stewart, J., plurality opinion). Of course, deterrence is logical, but logic only works for those cold, calculating individuals who do not act out of passion or impulse. Adolescents are particularly unlikely to fit this category. They are going through "the period of great instability which the crisis of adolescence produces." *Haley* v. *Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion). Juveniles "generally are less mature and responsible than adults." *Eddings* v. *Oklahoma*, 455 U.S. at 115-16 (footnote omitted). Adolescents tend to "live for today" with little thought of the future consequences of their actions. *See, e.g.*, Kastenbaum, "Time and Death in Adolescence," in *The Meaning of Death* 99 (H. Feifel ed. 1959). "'[A]dolescents may have less capacity to control their conduct and to think in long range terms than adults.'" *Eddings*, 455 U.S. at 115 n. 11 (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 7 (1978)). Adolescents are in a developmental stage when defiance of danger and death is often not controlled by a sense of mortality. The young are attracted to—not deterred from—flirtations with death because of an immature feeling of omnipotence. Fredlund, *Children and Death from the School Setting Viewpoint*, 47 J. School Health 533 (1977); Miller, "Adolescent Suicide: Etiology and Treatment," in 9 *Adolescent Psychiatry* 327 (S. Feinstein, J. Looney, A. Schwartzberg & A. Sorosky eds. 1981). One of the problems with juvenile behavior is not that the juveniles are cold, calculating and careful in these judgments; it is that they have no judgment at

all, *Parham* v. *J.R.*, 442 U.S. 584, 603 (1979), at least in the sense of considering the consequence of their behavior and deciding to proceed nevertheless. Irwin & Millstein, *Biopsychological Correlates of Risk-Taking Behaviors during Adolescence*, 7 J. of Adolescent Health Care 82S (Nov. 1986 Supp.). This absence of judgment derives from the adolescents' limited experience and lack of ability to calculate future consequences. The results are often tragic: Alcohol and drug abuse, reckless driving, sexual experimentation, and other self-destructive conduct. *Id.* "[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti* v. *Baird*, 443 U.S. 622, 635 (1979) (plurality opinion).

This generally accepted view of typical adolescent behavior leads to the conclusion that juveniles do not commonly engage in any "cold calculus that precedes the decision to act." *Gregg* v. *Georgia*, 428 U.S. at 186 (Stewart, J., plurality opinion). Thus, this Court's premises underlying an assumed general deterrence of the death penalty do not apply in any reasonable manner to adolescents.

3. The Capacity Of The Young For Change, Growth And Rehabilitation Makes The Death Penalty Particularly Harsh And Inappropriate.

The death penalty totally rejects the one sentencing goal normally thought most appropriate for young offenders—rehabilitation. *See, e.g.*, *People* v. *Hiemel*, 49 A.D.2d 769, 770, 372 N.Y.S.2d 730, 731 (1975). Execution abandons and denies the promise of adolescence—that the impulsive, antisocial acts of teenagers will naturally moderate as they become adults. Killing children and adolescents for their crimes offends the fundamental premises of juvenile justice:

> [I]ncorrigibility is inconsistent with youth; . . . it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life.

Workman v. *Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968).

Likewise, the goal of incapacitation or specific deterrence does not justify capital punishment of juvenile offenders. Unlike deterrence and retribution, "incapacitation has never been embraced as a sufficient justification for the death penalty." *Spaziano* v. *Florida*, 468 U.S. at 461. Long-term imprisonment of young offenders affords society comparable protection against their possible future crimes.

Juvenile murderers tend to be model prisoners and have very low rates of recidivism when released. D. Hamperian, *The Violent Few* 52 (1978); T. Sellin, *The Death Penalty* 102-20 (1982). *Cf.* Vitello, *Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since Kent* v. *United States*, 26 DePaul L.Rev. 23, 32-34 (1976).

Moreover, as adolescents grow into adults, they generally leave behind criminality. F. Zimring, "Background Paper," in Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 37 (1978). Crime statistics reveal that as people move from the turbulence of adolescence to the calmer period of the early twenties, they commit fewer crimes, whether or not they are apprehended or participated in a rehabilitation program. *See* Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Assessing the Relationship of Adult Criminal Careers to Juvenile Careers: A Summary* 4 (1982); President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 55-56 (1967). *Cf.* Federal Bureau of Investigation, U.S. Dept. of Justice, *Crime in the United States: 1978* 194-96 (1979); Zimring, "American Youth Violence: Issues and Trends" in *Crime and Justice: An Annual Review of Research* 67 (Morris & Tonry eds. 1979) (rates of many kinds of criminality peak in mid-adolescence).

The character development which continues to take place during adolescence, until eighteen years of age, can very well overcome features of an antisocial personality that appear during adolescence. For this reason, the diagnosis of Antisocial

Personality Disorder cannot be made until a person has reached eighteen years of age.

> Since [the typical childhood signs of Antisocial Personality Disorder] may terminate spontaneously . . . , a diagnosis of Antisocial Personality Disorder should not be made in children; it is reserved for adults (18 or over), who have had time to show the full longitudinal pattern.

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 319 (3d ed. 1980). *See also* Wilson & Herrnstein, *Crime and Human Nature* 144-45 (1985).

B. Condemning Any Fifteen Year Old Child To Death Violates Contemporary Standards Of Decency.

The meaning of the Eighth Amendment's prohibition of cruel and unusual punishment must be drawn "from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U.S. at 101 (plurality opinion). *See also Robinson* v. *California*, 370 U.S. 660, 666 (1962). The application of this test requires that the Court look to objective factors such as history, legislative judgments, international opinion, and juries' sentencing decisions. *Enmund* v. *Florida*, 458 U.S. at 788-89.

1. Special Treatment Of Children And Adolescents Is An Important Part Of American Traditions Of Justice.

"Children have a very special place in life which law should reflect." *May* v. *Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring) *quoted in Eddings* v. *Oklahoma*, 455 U.S. at 116 n. 12. Examples of society's decision to treat children differently include limitations on youths' right to vote, contract, sue or be sued, dispose of property by will, marry, accept employment, purchase liquor, and drive vehicles. F. Zimring, *The Changing Legal World of Adolescence* (1982).[7]

[7] A collection of pertinent examples of Oklahoma statutes that disable juveniles from certain activities—including driving, purchasing cigarettes, resorting to pool halls or bingo parlors—is included in Appendix A to this brief.

The dominant traditions of American law provide that people generally are not fully responsible until age eighteen. This age is the most common age of majority established in American law for noncriminal purposes. For similar reasons, the Twenty-Sixth Amendment establishes the right to vote at age eighteen. It is an irony—or even an irrationality—that children and adolescents are universally considered too immature to judge the criminal responsibility of accused defendants, and thus cannot serve on juries, but they may be subjected to the supreme liability of death for their supposed "responsibility."

That juveniles are less mature and less responsible than adults is a fact that has historically been recognized by this Court. *Bellotti* v. *Baird*, 443 U.S. at 635 (plurality opinion). "Children, by definition, are not assumed to have the capacity to take care of themselves." *Schall* v. *Martin*, 467 U.S. 253, 265 (1984). As a result, the actions of adolescents "cannot be judged by the more exacting standards of maturity." *Haley* v. *Ohio*, 332 U.S. at 599 (plurality opinion).

The development of separate juvenile justice systems in every state manifested a rejection of harsh, adult punishment for the unlawful acts of children. *See Eddings*, 455 U.S. at 116 n. 12; *In Re Gault*, 387 U.S. 1, 15-16 (1967). However, the perception that youths should not be subjected to the harshest punishments was an informal premise of Anglo-American criminal justice well before the development of separate juvenile justice systems. Although statutes did not always explicitly give younger offenders benefit of more lenient punishments, the young did receive *de facto* benefits, such as shorter sentences, special incarceration facilities, community-based sanctions or outright commutation of criminal sentences. *See, e.g.*, Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 Stan. L.Rev. 1187 (1970). All states now set the jurisdictional age limit for their juvenile courts no lower than age sixteen. S. Davis, *Rights of Juveniles: The Juvenile Justice System* app. B (2d ed. 1986).

This Court has explained the reasons for the law's lenient treatment of child offenders in *Eddings*.

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.
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> * * *
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> "Adolescents everywhere, from every walk of life, are often dangerous to themselves and to others." The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 41 (1967) "[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults." . . . Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978).

455 U.S. at 115-16 & n. 11 (footnote omitted).

Special treatment of juvenile offenders is also a reflection of the belief that the young must have time and opportunity to grow—and to escape from the disadvantages, deprivations and abuse that may account for their behavior. This special treatment derives from a prevalent, compassionate and decent sense that government must be restrained from adding undue punishment to whatever pain and handicaps have already been inflicted by fate and circumstance. This sense of restraint parallels the "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California* v. *Brown*, ___ U.S. ___, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring). *See also Eddings*, 455 U.S. at 115 n. 11 ("[Y]outh crime as such is not exclusively the offender's fault.") (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 7 (1978)).

2. The Execution Of Juveniles Violates Contemporary Standards Of Decency As Reflected In Legislative Attitudes.

Protection for juveniles under death penalty statutes has increased dramatically in the past quarter century. A 1962 Associated Press survey of legal possibilities in criminal proceedings involving children showed a much harsher legal environment. *New York Times*, Jan. 7, 1962, at 81, col. 1. Of forty-one death penalty states at that time, the minimum age for the death penalty was age seven in sixteen states, age eight in three states, age ten in three states, and ages twelve to eighteen in nineteen states.

The situation today is quite different. Currently, fifteen of thirty-six states retaining the death penalty expressly exclude youths under sixteen, seventeen or eighteen from their death penalty statutes. (Appendix B) Of these fifteen, eleven states establish a minimum age of eighteen; three states set an age seventeen limit, while one state has selected sixteen years as a minimum. No state that expressly establishes a minimum age in death penalty statutes uses an age minimum below sixteen. (Appendix B)

Since 1981, seven states have legislated minimum ages specifically for their death penalty statutes—and all selected age eighteen: Ohio (1981), Nebraska (1982), Tennessee (1984), Colorado (1985), Oregon (1985), New Jersey (1986), and Maryland (1987). Currently, several other states are considering raising the minimum age. *Should A Child Who Kills Be Killed?*, Washington Post Nat'l. Ed., Apr. 13, 1987, at 31.

Twelve other states establish a minimum age limit through either their juvenile court waiver statutes or their statutes giving concurrent or exclusive jurisdiction to criminal court for capital murders committed by offenders of a certain age or older. (Appendix B) Only this year, the Indiana legislature decided to raise their minimum age from ten to sixteen. (Appendix B) The death penalty statutes in an additional six states expressly require the sentencing body to consider, as a mitigating factor, the youth of the offender. (Appendix B)

Another fifteen jurisdictions completely prohibit the death penalty for all offenders.

Thus, forty-eight of fifty-one jurisdictions either prohibit the death penalty for all offenders (including juveniles), establish a minimum age between 16 and 18, prohibit any criminal court jurisdiction over juveniles ages 12 to 16, or require by statute juries and judges to consider youth as a factor mitigating against the death penalty.

Only three states have no legislative provisions for either establishing a minimum age for the death penalty or requiring that youthful age be considered a mitigating factor in the death sentencing decision. Only one of these three states, Oklahoma, currently has any prisoners under a death sentence for a crime committed under age eighteen.

3. An Emerging Consensus Of International Law And Opinion Rejects Juvenile Executions.

Human rights treaties are the most authoritative source of customary international law on the question of juvenile executions. Three major human rights treaties explicitly prohibit juvenile death penalties. Article 6(5) of the International Covenant on Civil and Political Rights, Annex to G.A. Res. 2200, 21 U.N. GAOR Res. Supp. (No. 16) 53, U.N. Doc. A/6316 (1966); Article 4(5) of the American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI/1.1, Doc. 65 Rev. 1 Corr. 1 (1970); and Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. Each of these treaties prohibits the death penalty for crimes committed below the minimum age of eighteen. Hartman, *"Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 Cin. L.Rev. 655 (1983) [hereinafter Hartman, *International Norms*].

The United States Government has ratified the Geneva Convention, and has signed but not yet ratified the other two conventions. However, a United Nations General Assembly

Resolution recognized that Article 6 of the International Covenant constitutes a "minimum standard" for all Member States, not only ratifying states. Hartman, *International Norms*, *supra* at 681 n. 94. This resolution was supported by the United States Government. *Id.*

Further evidence of state practice appears in the national laws of over eighty nations, including almost all western European nations. These countries have either abolished the death penalty completely or have forbidden it for certain offenses and certain offenders, such as children and adolescents. Over forty nations which retain the death penalty have statutory provisions exempting youth from capital punishment. Hartman, *International Norms*, *supra* at 666 n. 44. *See also* Amnesty International, *The Death Penalty* (1979). Since 1979 there have been more than 11,000 executions in over eighty countries, but only eight executions (0.07%) were for crimes committed while under age eighteen. Amnesty International, *The United States of America: The Death Penalty* (Feb. 1987). Three were in the United States, two in Pakistan, and one each in Bangladesh, Rwanda and Barbados. *Id.* There were also undocumented reports of juvenile executions in Iran. *Id.*

Recently, the Inter-American Commission on Human Rights (IACHR) for the Organization of American States (O.A.S.) condemned two juvenile executions in the United States in 1986. O.A.S. IACHR, Res. No. 3/87, Case No. 9647 (United States) (Mar. 27, 1987), OEA/Ser. L./V/II, 69, Doc. 17 (1987).

> The Commission finds that in the member states of the O.A.S. there is recognized a norm of *jus cogens* which prohibits the State execution of children. This norm is accepted by all the States of the inter-American system, including the United States.

Id. at para 56. The IACHR agreed with the United States that "there does not now exist a norm of customary international law establishing 18 to be the minimum age for imposition of the death penalty," *id.* at para 60, but also stated:

> [I]n light of the increasing numbers of States which are ratifying the American Convention on Human Rights and the United Nations Covenant on Political and Civil Rights, and modifying their domestic legislation in conformity with these instruments, the norm [of 18 years] is emerging.

Id.

4. Jury Sentencing Patterns Reflect Popular Reluctance To Sentence Juveniles To Death.

In the years 1982 to 1985, 1,103 death sentences were imposed by juries throughout the United States. Only twenty-nine (2.6%) of these death sentences were imposed on individuals for crimes committed while under the age of eighteen. Jury sentencing practices for fifteen year old offenders are even more striking. Of the 1,103 death sentences imposed from 1982 through 1985, only four (0.4%) have been for crimes committed when the convicted individual was age fifteen or younger. (Appendix G) During this same four year period, 1.8% (1,084 of 60,789) of adults arrested for criminal homicide in the United States received the death sentence, a small portion. A microscopically small portion, only 0.6% (29 out of 5,239), of juveniles (younger than eighteen) arrested for criminal homicide received the death penalty.

Moreover, while the number of juvenile death sentences appears to be declining in recent years, the number of adult death sentences has remained fairly constant at a rate of 250 to 300 per year. (Appendix G) The decline is revealed by the changing populations on death row. As Appendix E indicates, thirty-eight (2.9%) of the 1,289 persons on death row on December 31, 1983, were under juvenile death sentences. During the next three years and three months the total death row population increased by 585 persons but the number of juveniles actually decreased by six. On March 31, 1987, only thirty-two (1.7%) of the 1,874 persons on death row had committed their crimes while under age eighteen. (Appendix F) The drop from thirty-eight to thirty-two juveniles on death row is a 16% decrease in just over three years, a period in which there was a

47% increase (from 1,251 to 1,842) in the adult death row population.[8]

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[8] Jury sentencing patterns appear to reflect public opinion. According to a number of scientific surveys, public opinion opposes execution of juvenile offenders, although it quite strongly supports capital punishment in general. This pattern has existed for some time. In November 1936, a survey showed 61% in favor of capital punishment. 54% opposed the execution of offenders under the age of 21. H. Cantril, *Public Opinion: 1935-1946* (1951). In February 1965, a similar pattern was found by the Gallup Poll: 45% favored capital punishment, but only 23% favored death sentences for persons under the age of twenty-one. Erskine, *The Polls: Capital Punishment*, 34 Pub. Opinion Q. 290 (1970), *cited in* Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 Stan. L.Rev. 1245, 1250 (1974).

A university research center conducted a telephone poll throughout Georgia in the fall of 1986. Of the 917 Georgians interviewed, 75% favored capital punishment, but only 26% favored death sentences for crimes committed under age eighteen. Thomas & Hutcheson, Georgia Residents' Attitudes Toward the Death Penalty, the Disposition of Juvenile Offenders, and Related Issues (December 1986) (unpublished report prepared for the Clearinghouse on Georgia Prisons and Jails by the Center for Public and Urban Research, Georgia State University).

A telephone survey of 509 respondents was conducted across the entire state of Connecticut in May, 1986, with similar results. While 68% favored capital punishment in general, only 31% favored it for crimes committed while under age eighteen. Tuckel & Greenberg, Capital Punishment in Connecticut (May 1986) (unpublished report prepared for the Archdiocese of Hartford by The Analysis Group, Inc., New Haven, Connecticut).

If public opinion is an objective indicator of society's standards of decency, then it is clear that the moral consensus supporting capital punishment in general does not extend to the execution of children and adolescents.

C. Execution Of *This* Person For A Crime Committed At Age Fifteen Would Be Cruel And Unusual Punishment Because The Oklahoma Courts Failed To Give Careful, Particularized Consideration To The Character And Background Of The Accused Boy.

Although the Constitution does not deny government the power to take the lives of those who have committed the most serious of crimes, the supreme law of the land does require care, restraint, fairness and decency in the infliction of the most severe of punishments. The death penalty is special and unique--qualitatively different from all other governmental powers. *Spaziano* v. *Florida*, 468 U.S. at 468-69 (Stevens, J., dissenting). It is irrevocable: Mistakes cannot be rectified. In a case upholding defendants' convictions and death sentences, Justice Robert Jackson alluded to the law's traditional reluctance and restraint:

> When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance.

Stein v. *New York*, 346 U.S. 156, 196 (1953). There is even greater reason for giving the condemned the benefit of all doubts when the condemned was a fifteen year old boy at the time of the crime.

Even if this Court rules that imposing a death sentence on an adolescent is not invariably cruel and unusual punishment, the execution of Wayne Thompson would still violate the Eighth Amendment on narrow grounds: The courts of Oklahoma failed to assess adequately the fundamental justice of the death penalty in this case because the courts did not give careful, particularized consideration to the boy's youth and moral culpability as required by the Constitution.

Throughout this case, the logic of the Oklahoma courts has been simple. The boy was certified to stand trial as if he were an adult. If he may be tried as if he were an adult, he may be punished as if he were an adult. If adults may be put to death, he may be put to death. This logic, of course, would be equally

applicable to any child certified to stand trial as if he or she were an adult, whether the child was, for example, nine, twelve or, as the boy in this case, fifteen.

This abstract syllogism ignored the command of the Eighth Amendment that a death sentence must "reflect a reasoned moral response to the defendant's background, character and crime." *California* v. *Brown*, 107 S.Ct. at 841 (O'Connor, J., concurring); yet, it is the only articulated basis for the decision of the Court of Criminal Appeals that the execution of the defendant would not be cruel and unusual punishment. 724 P.2d at 784. Tragically, the appellate court's cursory analysis does illustrate how the trial court arrived at the decision to sentence the defendant to death. Oklahoma courts never reviewed this case in light of this Court's insistence that age bears directly on the fundamental justice of the death penalty. *Skipper* v. *South Carolina*, ___ U.S. ___, 106 S.Ct. 1669, 1676 (1986) (Powell J., joined by Burger, C.J. and Rehnquist, J., concurring). *See also Eddings* v. *Oklahoma*, 455 U.S. 104 (1982).

1. The Trial Court Decided To Hold Defendant Accountable Not Because He Was An Adult, But As If He Were An Adult. The Trial Court's Certification, However, Is Not Constitutionally Sufficient Consideration Of Age As A Mitigating Factor.

When the jury experienced some uncertainty or confusion about Wayne Thompson's youth, they asked: "Has the Defendant been certified as an adult?" The trial court answered simply, "yes." This answer was incorrect. It misled the jury into believing that the issue of the defendant's adulthood, his maturity, and his personal culpability had already been determined. Yet, as a matter of Oklahoma law, the defendant had not been adjudged to be an adult. He was "certified" to stand trial "as if he were an adult." 10 Okla. Stat. § 1112(b).

More to the point, during certification proceedings, the boy had not been adjudged to be as responsible or as morally culpable as an adult. Instead, the trial court decided, first, that

he was old enough to appreciate the wrongfulness of his actions and, second, that the prospects for rehabilitation within the juvenile system were low. [JA 5-8] Indeed, the "amenability" inquiry required by 10 Okla. Stat. § 1112(b) is more a prediction about the capacities of Oklahoma's juvenile justice system than it is an assessment of the defendant's moral guilt. The trial judge who certified the defendant wrote:

> The witnesses from the Department of Human Services could offer no possible placement within the Department with any services that hold out any reasonable prospect for rehabilitation of this juvenile. The best the Department could do for this juvenile would be to warehouse him until he was 18.

[JA 7] Although such considerations are relevant to a decision whether to waive juvenile court jurisdiction, as the Court of Criminal Appeals held in Eddings' case, *In the Matter of M.E.*, 584 P.2d 1340, 1346 (Okla. Cr. 1978), *cert. denied*, 436 U.S. 921 (1978), such predictions do not bear directly on the fundamental justice of the death penalty.

The issues of his emotional maturity, his personal moral culpability for the murder, and the propriety of the death penalty were not before the court at the time of certification. Having determined that the boy passed Oklahoma's test of sanity and that the murder was premeditated, the certifying court did not examine the boy's personal culpability or "moral guilt," *Enmund* v. *Florida*, 458 U.S. at 801, for the murder of Charles Keene. The court explored *none* of the issues constitutionally relevant to the personal culpability of this fifteen year old child: What actions were attributable solely to the boy? Why did he participate in the killing? What influence did others, including co-perpetrators and family, have on his participation in the killing? And did he appreciate the wrongfulness of killing Charles Keene (rather than simply the wrongfulness of killing in general)? Plainly, the decision to try the boy in adult criminal court was not—and was not intended to be—a judgment on his moral culpability for purposes of inflicting the supreme penalty. *See Tison* v. *Arizona*, *supra*.

2. The Trial Judge Failed To Instruct The Jury That It Must Consider Defendant's Youth As A Relevant Mitigating Factor Of Great Weight.

Despite the warning of this Court in *Eddings* v. *Oklahoma* that "the chronological age of a minor is itself a relevant mitigating factor of great weight," 455 U.S. at 116, Oklahoma has not changed its statutes to include age as a mitigating factor. Moreover, it has not even developed the practice of requiring the jury to consider youth as a mitigating factor.

In this case, the trial court instructed the jury, erroneously, that the boy was an adult. The trial judge failed to instruct the jury that his youth *must* be considered in mitigation. Worse, the instructions indicated that the jury need *not* consider youth as mitigating: *"The determination of what are mitigating circumstances is for you as jurors to resolve* under the facts and circumstances of this case." [JA 23] (emphasis added)[9]

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[9] In addition, from the outset of the trial, the prosecutor, with the tacit approval of the trial judge, discouraged consideration of the boy's youth. Throughout the jury selection process the prosecutor treated the defendant's youth as a factor that should not be considered. He was not always careful to specify that age was irrelevant only to the issue of guilt. Repeatedly the prosecutor asked jurors about this issue: "I'm asking you to think right now about your objectivity in regard to Mr. Thompson's age if it's going to be something that is going to interfere with your deliberation in this case." [Tr. 63] Asking every juror the age of his or her children, the prosecutor sent a message that the jury should not be sympathetic to the boy, and that they might be if their children were as young as he. [Tr. 80] Over and over, in front of the whole venire, the prosecutor asked these questions and made these comments. *See* Tr. 88, 91-92, 100, 103, 106-07, 223-25, 234-35, 265-66, 277-78. At one point the judge actively joined in this questioning. *See* Tr. 205. Through this process, the jurors were conditioned to believe that they should not consider the youthfulness of Wayne Thompson. Even though defense counsel emphasized the boy's youth throughout the jury selection process and the trial, the defense did not disrupt this conditioning process. Defense counsel did not object to the prosecutor's voir dire. Under these circumstances the jury could reasonably have believed that the

In effect, the jury was misinformed that it had complete discretion as to what factors are mitigating. The trial judge did state that evidence had been offered with regard to petitioner's youth as a mitigating factor. [JA 24] However, even with such a reminder, the trial court's instructions were poor compliance with the ruling of *Eddings* that youth is a relevant mitigating factor of great weight. In an apparent effort to resolve its confusion, the jury returned a question asking the judge to define "mitigating." The judge's response was short and unhelpful: "You have your instructions, please continue deliberation." Supplemental Instruction No. 12. [JA 28]

Having been told by the prosecutor, with the apparent approval of the court, that the boy's youth should not "interfere with [the jurors' deliberations] in this case," [Tr. 63] and having been told incorrectly by the court that the boy had been "certified as an adult," the jury reasonably could have believed under the court's instructions that it was their duty, in "determin[ing] . . . what are mitigating circumstances," to reject youth as a mitigating circumstance. *Cf. Sandstrom* v. *Montana*, 442 U.S. 510, 518 n. 7 (1979).

3: The Eighth Amendment Requires That A Sentencing Court Give Careful, Particularized Consideration To The Character And Background Of The Defendant In Order To Assess The Fundamental Justice Of The Death Penalty. This Principle Mandates That No Child Be Sentenced To Die Unless The Sentencing Court Finds That The Child Is Morally Culpable To The Same Degree As An Adult And That The Child Is Beyond All Hope Of Rehabilitation.

The unique characteristics of capital punishment demand procedural safeguards in the "particularized consideration of relevant aspects of the character and record of each convicted defendant." *Woodson* v. *North Carolina*, 428 U.S. at 303 (plurality opinion). Ultimately, the infliction of death can only be understood as a community's judgment "that an individual has lost his moral entitlement to live." *Spaziano*, 468 U.S. at 469 (Stevens, J., dissenting). When applied to a child of fifteen years, a death sentence must be understood as a decision that the condemned has lost his moral entitlement to grow. The deliberate killing of a human being by the state "is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice." *Furman* v. *Georgia*, 408 U.S. at 306 (Stewart, J., concurring).

Even the decisions of state courts that uphold juvenile executions, if due process is strictly observed, discuss the need for great care in reviewing such cases. This judicially-imposed restraint prevails because, in the words of the Mississippi Supreme Court, it is "deeply disturbing that the life of a youth should be taken in punishment for his crime." *Tokman* v. *State*, 435 So.2d 664, 672 (Miss. 1983), *cert. denied*, 467 U.S. 1256 (1984) (youth's death sentence upheld because of several aggravating circumstances and no mitigating circumstances in addition to age).

The factor of youth must trigger a heightened scrutiny of both the sentencing process and the fundamental justice of the penalty in a particular case. Oklahoma is almost alone in its insistence that there is nothing special about a capital case in which a juvenile is certified to stand trial as though he were an adult.

In *Commonwealth* v. *Green*, 151 A.2d 241 (Pa. 1959), the Supreme Court of Pennsylvania held that age alone did not justify life imprisonment rather than a death sentence. However, in language that is most instructive in evaluating Oklahoma's treatment of the defendant in this case, the court also stated:

> [The defendant's] age [of fifteen] is an important factor in determining the appropriateness of [a death penalty imposed for murder] and should impose upon the sentencing court the duty to be ultra-vigilant in its inquiry into the make-up of the convicted murderer. That youthful age is

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prosecutor's directions were those that must be followed. *See Plunkett* v. *Estelle*, 709 F.2d 1001, 1009-10 (5th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

an important factor is graphically illustrated by the fact, that so far as our research can ascertain, no person under the age of 16 years and only one person under the age of 19 years has ever suffered the death penalty in this Commonwealth.

* * *

To what extent, if any did the court below measure the understanding and judgment of this 15 year old boy? . . . Beyond his age, the manner of the crime and his I.Q. rating the court below—unless the record contains grave omissions—knew nothing and made no inquiries to determine the background of this boy or what made him "tick." To the possible argument that [the defendant] could have but did not present such evidence, the answer is clear: when a court sits in judgment to determine whether a 15 year old boy who has committed an atrocious crime shall die in the electric chair it is the duty of the court to inquire and to exhaust every avenue of information that would inform it of the type of individual represented by that boy. Both the criminal act and the criminal himself must be thoroughly, completely and exhaustively examined before a court can exercise a sound discretion in determining the appropriate penalty.

* * *

It is manifest from this record that two factors only led to the imposition of the death penalty—the manner of the murder and the placation of . . . the public plaint. The court below in determining the appropriate penalty considered the criminal act, but not the criminal himself and in so doing committed an abuse of discretion.

151 A.2d at 246-47 (emphasis deleted).

In the case at bar, as in *Green*, and despite *Eddings*, the state seeks to inflict death on a boy for a crime committed at age fifteen, even though: (i) there is utterly nothing in the record to suggest that the death sentence is based on the individual characteristics and background of the defendant; (ii) the sole basis for the death sentence appears to be the jury's horror at the manner of the killing (without regard to extenuating motives); and, most important, (iii) the verdict and judgments of the Oklahoma courts in this case reflect a will to inflict death

just as if the crime had been committed by an adult, without any meaningful assurance that jury, trial court or appellate court looked at this child defendant in a way different than an adult accused of murder. The collective judgment of the Oklahoma courts does not come to grips with two basic principles: First, youth bears directly on the fundamental justice of the death penalty, *Skipper* v. *South Carolina*, 106 S.Ct. at 1676 (Powell, J., concurring); and second, that the youth of the defendant requires more careful and sensitive consideration of the defendant's prospects for rehabilitation.[10]

This Court should insist that no child or adolescent should be sentenced to die unless a jury finds—beyond reasonable doubt—that the child is "both culpable and responsible in the superlative degree," *Ridge* v. *State*, 229 P. 649, 650 (Okl. Cr. 1924), "absolutely incorrigible," *State* v. *Telsee*, 425 So.2d 1251, 1258 (La. 1983), and a continuing threat to society.[11] This test would make it clear that, in such cases as this, the sentence of death cannot rest merely on the nature of the crime—however brutal. It must also fit the character and "moral guilt" of the

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[10] *Cf. State* v. *Valencia*, 132 Ariz. 248, 645 P.2d 239, 242 (1982) ("the age of the defendant, 16 at the time of both crimes, is 'sufficiently substantial' to call for life imprisonment instead of death."); *State* v. *Maloney*, 105 Ariz. 348, 464 P.2d 793, 803 (1970) ("[W]e feel compelled . . . because defendant was only 15 years of age at the time he killed, to also carefully examine the propriety of the ultimate penalty here. . . ."), *cert. denied*, 400 U.S. 841 (1970); *State* v. *Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977) (sixteen year old's death sentence reduced to life because of his age and background); *People* v. *Davis*, 29 Cal.3d 814, 633 P.2d 186 (1981) (life imprisonment without parole should not be imposed on offenders below the age of eighteen); *State* v. *Telsee*, 425 So.2d 1251, 1258 (La. 1983) (forty year imprisonment for rape was unconstitutionally excessive, absent a finding that a seventeen year old was "absolutely incorrigible").

[11] Despite strenuous efforts by the prosecuting attorney in this case, the jury did not find that the defendant would commit more violent acts. [JA 30] Thus, the execution of *this* defendant cannot be justified as necessary for incapacitation or specific deterrence.

defendant as carefully assessed through an indisputably reliable sentencing proceeding. *See Zant* v. *Stephens*, 462 U.S. 862, 888 (1983); *Woodson* v. *North Carolina*, *supra*.

This is an offense by a juvenile—acting with three adults, including an older brother—who wrongly believed that he should take the law into his own hands by murdering the man who had been beating his sister.[12]

As the prosecuting attorney argued without irony or appreciation of *Eddings'* nearly identical language, the defendant on trial "was not a normal sixteen year old." *Eddings* v. *Oklahoma*, 455 U.S. at 116; *compare id. with* the prosecutor's closing argument at Tr. 865. Like Eddings, Thompson was a juvenile who experienced serious emotional and behavioral problems. Even Dr. Klein's handwritten psychological report refers to the defendant's history of substance abuse and to past beatings of the defendant perpetrated by the victim-to-be. Dr. Klein's report also provides a good description of the defendant's immaturity as reflected in the fact that "Wayne does not have enough ego to handle or to control his impulses. . . ." [R. 491]

Like Eddings, Thompson was abused. Indeed, in this case, the defendant suffered from a habit of paint sniffing induced by the man the defendant later killed, from beatings at the hands of the same man, and from the emotional turmoil of violent family conflict caused in part by the same man. When assessing the fundamental justice of the death sentence, it must not be forgotten that the defendant's crime was against a family member in a dispute arising from extended, tragic, violent family conflict.[13]

[12] The record reflects the likelihood that the Thompson-Mann family's anger played an important role in the murder. A child or adolescent who kills a family member may be responding, consciously or unconsciously, to perceived family wishes. Sargent, *Children Who Kill: A Family Conspiracy*, 7 Social Work 35 (1962).

The state of Oklahoma used evidence of defendant's background—and particularly the psychological report—only to conclude that he knew the difference between right and wrong—or that he should have known. On this basis, the state court concluded that the defendant should be tried as if he were an adult. The state then bootstrapped from this decision to waive juvenile jurisdiction to the conclusion that he ought to die for the crime of murder. 724 P.2d at 784. This conclusion denies the relevance of age and the youth's vulnerability to these circumstances, and thus ignores the weight of precedent, tradition, and considerations of justice. It virtually repeats Oklahoma's error in *Eddings*, in which the Oklahoma Court of Criminal Appeals "considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability." 455 U.S. at 113.

The imposition of the death penalty cannot, on the facts of this case, be allowed to stand. Even if the Court does not decide that imposition of the death penalty against a person who was fifteen years old at the time of his offense is unconstitutional per se, this particular death sentence must be struck down as a violation of the Eighth Amendment.

[13] Thompson was guilty of murder in the first degree, but his crime was not of the type that has prompted recent national concern about juvenile violence. *See, e.g., Eddings* v. *Oklahoma*, 455 U.S. at 116, citing National Advisory Committee on Criminal Justice Standards and Goals, *Task Force Report on Juvenile Justice and Delinquency Prevention* 3 (1976). The record is clear that Thompson's crime was not of "the most reprehensible classes of homicide known to the law," as defined in *Ridge* v. *State*, 229 P.2d at 650, when "one takes the life of another against whom he has no grievance, for the purpose of robbery, rape, or personal gain." And yet the jury, influenced by gruesome photographs that a zealous prosecutor used skillfully, condemned Thompson to death on the basis of one finding—that the crime was especially heinous, cruel or atrocious.

II

THE RELIABILITY OF THE SENTENCING PROCESS IN THIS CASE WAS UNDERMINED BY THE ADMISSION OF HIGHLY INFLAMMATORY EVIDENCE THAT PREJUDICED THE DEFENDANT'S RIGHT TO FAIR, FULL JURY CONSIDERATION OF ALL MITIGATING CIRCUMSTANCES, INCLUDING AGE.

A. The Prosecution Deliberately Used Inflammatory Evidence And Arguments To Convince The Jury Not To Weigh Defendant's Age As A Mitigating Circumstance.

In this case, the trial court admitted evidence described by the Oklahoma Court of Criminal Appeals as "gruesome," "ghastly," and "of little probative value." 724 P.2d at 782-83. The evidence at issue, admitted over the objection of trial counsel, consisted of two color photographs of the victim's body. The photographs were taken after the recovery of the body from the Washita River, where it had been for almost one month. 724 P.2d at 782. The appellate court had particularly harsh words for the prosecutor who offered the evidence: "We do not understand why an experienced prosecutor would risk reversal of the whole case by introducing such ghastly, color photographs with so little probative value." *Id.* Of course, the Court of Criminal Appeals did understand that "[a]dmitting them into evidence served no purpose other than to inflame the jury." *Id.* Nevertheless, the court upheld the judgment and sentence. The admission of the prejudicial evidence was deemed harmless error because evidence of the boy's guilt was strong. *Id.* at 783.

The appellate court did not state specifically that it would have been error to admit the photographs in the penalty phase of the trial, but such a conclusion is clearly warranted. Under Oklahoma law, the same rules apply to the admissibility of evidence in the sentencing phase of a trial as in the guilt phase. 12 Okla. Stat. §2103. "In cases where the photographs in question depict a gruesome scene, the trial court must consider whether the probative value of the particular photograph outweighs the prejudice potentially accompanying its admission

. . ." *Cooper* v. *State*, 661 P.2d 905, 907 (Okl.Cr. 1983). The court already made an extremely strong finding as to prejudice and found little probative value with regard to guilt.

This unequivocal finding of prejudice must carry over to the penalty phase. Furthermore, the balance between probativeness and prejudice should remain the same. Admittedly, certain information may be probative for the penalty phase that would not be probative in the guilt phase. In particular, since one of Oklahoma's statutory aggravating circumstances for invoking the death penalty is that "[t]he murder was especially heinous, atrocious, or cruel," evidence speaking to that factor would be probative in the penalty phase. In this case, however, there was already evidence, in the form of defendant's statements to two witnesses and the medical examiner's report, that fully addressed the question of the manner of the killing. *See State* v. *Poe*, 441 P.2d 512 (Utah 1968) (abuse of discretion to admit color slides of autopsy when all facts already presented by medical and lay testimony). Even if the photographs of the victim's remains were minimally probative, they were merely cumulative. "[W]hen the photos are merely cumulative . . ., that fact must enter into the probative/prejudice balance." *Tobler* v. *State*, 688 P.2d 350, 356 (Okl.Cr. 1984).

The admission of the photographs, even in the penalty phase, was error. Indeed, these gruesome, inflammatory photographs were even more prejudicial in relation to capital sentencing procedure. These gruesome photographs concentrated the attention of the jury on the effects of post-mortem decomposition rather than the circumstances of the murder. Here, the photographs depicted not only the effect of the killing but also the effect of almost one month's immersion in the Washita River. No juror could help but have his or her attention diverted from the real issue of the defendant's moral guilt.

The error was compounded by the prosecutor's remarks during the penalty phase. His conduct and tactics were not subtle. In closing argument, the prosecutor used the inflammatory evidence to distract the jury from what he described as "the problem": "[W]hat to do with a guilty person who has

killed somebody else that is sixteen years old." [Tr 849] The admission of the prejudicial evidence and the repeated emphasis on that evidence, coupled with the prosecutor's remarks, made it extremely unlikely that the jury treated petitioner's youth as a mitigating factor of great weight. Not only were the gruesome photographs likely to distract the jury's attention from any mitigating circumstances, the prosecutor specifically used the photographs in an attempt to prevent the jury from considering petitioner's youth in mitigation. The prosecutor repeatedly tried to deny the defendant's youth by arguing that he was an adolescent only in years. *Id.* After using the inflammatory photographs, photographs that "served no purpose other than to inflame the jury," 724 P.2d at 782, during a detailed and graphic description of the crime, the prosecutor climaxed his argument: "Its not the sixteen year old, folks, that can do that." [Tr. 865]

The prosecutor's comments were an obvious and successful attempt to subvert this Court's command that the age "of a minor is itself a relevant mitigating factor of great weight." *Eddings*, 455 U.S. at 116. The jury recommended the death sentence on the sole basis of one statutory aggravating factor—that the murder was especially heinous, cruel and atrocious. [Tr. 870] The admission of the photographs "served no purpose other than to inflame the jury." 724 P.2d at 782. Thus, it was far more likely that the jury would decide to inflict death despite defendant's age. Moreover, even with this inflammatory evidence, the jury had great difficulty in reaching its conclusion that the aggravating circumstance was present, as shown by the jury's request for further instruction on mitigation and on the availability of parole if the death penalty were not imposed. *See* Supplemental Instructions Nos. 12 and 13. [JA at 28-29] In this context, while any error with regard to guilt or innocence may have been harmless, the error in the penalty phase was not harmless.

B. Trial Court Errors Prejudicing Jury Deliberations Over The Death Penalty Are Constitutional Errors. They Cannot Be Disregarded As Merely Harmless.

Imposition of the death penalty is excessive, severe, cruel and unusual if it is not based on a careful moral inquiry into the

culpability of the accused. The punishment must not only fit the crime, it must fit the accused. *See Lockett* v. *Ohio*, 438 U.S. 586 (1978); *Woodson* v. *North Carolina*, *supra*; *Roberts* v. *Louisiana*, 431 U.S. 633, 637 (1977). The jury's role in assessing the fairness of the most severe of penalties requires full, fair, careful consideration of all mitigating circumstances—without passion or prejudice.

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. This emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence. As this Court observed in *Eddings*, the common law has struggled with the problem of developing a capital punishment system that is "sensible to the uniqueness of the individual." . . . *Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. *Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion.*

California v. *Brown*, 107 S.Ct. at 841 (O'Connor, J., concurring) (emphasis added). This Court has stressed that the "'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.'" *Zant* v. *Stephens*, 462 U.S. at 888 (quoting *Lockett* v. *Ohio*, 438 U.S. at 604 (plurality opinion of Burger, C.J.)).

This Court must not rely on some speculative possibility that the jury might still have decided to sentence a fifteen year old defendant to die without the prejudicial evidence. Such a conclusion would be particularly unwarranted in this case, where the jury had difficulty in imposing the death penalty despite the prejudicial evidence.

If this Court views this case as a whole, the totality of the trial court's constitutional errors in this case—its improper jury instructions, its tolerance of the prosecutor's warning to jurors not to let the boy's youth "interfere" with deliberations,

its admission of inflammatory evidence, and its tolerance for the prosecutor's use of the photographs—undermined the reliability of the sentencing procedure. *Caldwell* v. *Mississippi*, 472 U.S. ___, 105 S.Ct. 2633 (1985). Though these errors rendered the sentencing phase of the trial fundamentally unfair, contrary to the state's brief in opposition to the writ of certiorari, the proper test is not "fundamental unfairness." *Caldwell* demonstrates the significance—and the constitutional character—of the errors in this case. Indeed, *Caldwell* is applicable here for the same reasons articulated by this Court when it distinguished the case from *Darden* v. *Wainwright*, ___ U.S. ___, 106 S.Ct. 2464 (1986).

The constitutional errors in this case, like the prosecutor's comments in *Caldwell*, involved evidence, arguments and instructions that created an "intolerable danger" that the jury would misconceive its duty and the law. *Caldwell*, 106 S.Ct. at 2641. Especially in light of the trial court's responsibility for the errors, the prejudicial evidence as used by the prosecutor combined with the erroneous instructions greatly increased the chance that these errors would affect sentencing. Finally, the trial judge's erroneous instruction during the guilt phase of trial that defendant was certified as an adult naturally misled the jury not only as to the facts, but also into believing that its role was far less important than it was. After all, if the defendant was a bona fide, "certified" adult by prior state decision *and* the jury could decide for itself "what is mitigating," the jury could not help but believe that its responsibility for weighing age in a more careful and sensitive way was reduced—even preempted by a prior certification. *Compare Caldwell*, 105 S.Ct. 2641-42 *with Darden*, 106 S.Ct. at 2473 n. 15.

As this Court stated in *Zant* v. *Stephens:*

> "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977). Thus, although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error.

462 U.S. at 885. In this case, the deliberations of the Court of Criminal Appeals did nothing to ensure the reliability of the sentencing procedure. The appellate court was required to decide "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor." 21 Okla. Stat. § 701.13. Though the court did discuss the manner in which the defendant committed this murder, on this critical issue of prejudice and passion, the court did not even consider the effect of the photographs which it had already described as inflammatory and prejudicial.[14]

The cry for retribution against Wayne Thompson was the result of inflamed passions, not a careful assessment of moral guilt. However, the proud tradition of this nation and this Court is to resist excessive passion and to pursue a more reasoned justice under law. Moreover, this tradition is deeply rooted in the framers' hopes for the Bill of Rights. In a letter to Jefferson in Paris, Madison expressed doubts whether the "parchment barriers" of declared rights would be effective in a republic. Jefferson replied that Madison overlooked the legal check that a bill of rights would place in an independent judiciary, which, Jefferson continued, would be unaffected by "the *'civium ardor prava jubentium'*"—a phrase from Horace, "the frenzy of . . . fellow citizens bidding what is wrong." Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *reprinted in Thomas Jefferson: Writings* 942, 943 (M. Petersen ed. 1984); Horace, *Odes* III, 3:1 (C. Bennett trans. 1939). No phrase could better illuminate the need for the judiciary to restrain inflamed cries for the execution of children and adolescents.

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[14] At a minimum, the Oklahoma Court of Criminal Appeals must be required to rule on the error involved in the admission of the photographs with regard to the penalty phase. While that court held that the error was harmless with regard to the determination of guilt, it made no holding on the harm caused with regard to the imposition of the death penalty.

III.

TO VINDICATE AMERICAN TRADITIONS OF SPECIAL TREATMENT OF JUVENILE OFFENDERS, THIS COURT MUST PREVENT THE EXECUTION OF PERSONS FOR CRIMES COMMITTED BELOW A SPECIFIED AGE.

Plainly, the issues respecting the admission of prejudicial evidence, along with the other constitutional errors, such as the jury instructions, provide this Court with narrow grounds for reversing the judgment below. However, these facts also illustrate the inadequacy of current protections for juveniles in capital cases.

The case at bar is an excellent example of how the youth of an offender can be lost in the complex, emotional sentencing stage of a capital case. Despite this Court's requirement that chronological age be given great weight as a mitigating factor, present procedures provide no assurance that the state courts will respect this requirement. To justify a retributive death sentence, the prosecution must provoke rage. Although the Court has insisted that careful considerations must be given to youth as a mitigating factor, *see Eddings*, rage, by its nature, makes rational, sensitive, careful assessment of extenuating and mitigating factors difficult if not impossible. "[W]hen a life is at stake, emotionalism often infects the conduct of the trial itself." *State* v. *Maloney*, 105 Ariz. 348, 464 P.2d 793, 803 (1970) (reversing death sentence of fifteen year old convicted of murder.).

At a minimum, this Court should reaffirm and clarify *Eddings* to insist that juries be clearly instructed that youth is a mitigating factor of great weight *and* that an adolescent shall not be condemned to death unless aggravating circumstances plainly outweigh the undeniable, critical mitigating factor of youth. And yet, mere reaffirmation of *Eddings* seems an inadequate response to Oklahoma's continuing disregard for the principles of *Eddings* that the young must be judged more carefully and perhaps punished less harshly than adults. This case illuminates the need for a better standard to protect this

nation's traditions of decent restraint in the punishment of the young.

The only effective means of preventing juvenile executions that are prompted by a prosecutor-induced rage and inadequate state appellate court review—in defiance of this Court's rulings—is an enforceable principle of restraint, such as a minimum age. *See, e.g.*, Greenberg, *Capital Punishment as a System*, 91 Yale L.J. 908 (1982); Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 Ind. L.J. 757 (1986).

When fundamental values such as those secured by the Bill of Rights are at stake, one of the principal challenges of constitutional interpretation is to develop rules that do not "leave the utmost latitude for evasion." *The Federalist No. 84* at 580 (A. Hamilton) (J. Cooke ed. 1961). Although the judicial role is limited by the principles of federalism and democracy, *Gregg* v. *Georgia*, 428 U.S. 153, 174-76 (1976) (opinion of Stewart, Powell and Stevens, J.J.), there is special need and justification for judicial intervention in a case such as this.

First, the prohibition against cruel and unusual punishments cannot be interpreted without careful regard for this nation's traditions and sense of decency. A principle restricting the execution of children and adolescents is rooted in this nation's traditions of juvenile justice and its traditions of decent restraint in the assessment of moral guilt of children. Similar humane traditions accounted for the Eighth Amendment in the first place. *See generally* Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 Buff. L.Rev. 783 (1975). The Eighth Amendment is one of a few constitutional provisions that seem explicitly to mandate an ongoing search for evolving principles of humanity and decency. *Weems* v. *United States*, 217 U.S. 349, 378 (1910); *Gregg* v. *Georgia*, 428 U.S. at 173 (plurality opinion of Stewart, Powell, and Stevens, J.J.); J. Ely, *Democracy and Distrust* 13-14 (1980). The framers adopted the provision over objections that it was "too indefinite," although even opponents admitted

that "the clause expressed a great deal of humanity." 7 Annals of Cong. 754 (1789) (remarks of Representatives Smith and Livermore), *discussed in Weems* v. *United States*, 217 U.S. at 368-69 and *Furman* v. *Georgia*, 408 U.S. at 243-45, 262-63.

Second, the search for principles of humanity and decency to illuminate the meaning of the Eighth Amendment must be, at least in part, a judicial search. When the Eighth Amendment was proposed as part of the Bill of Rights, it was hoped that "independent tribunals of justice [would] consider themselves in a peculiar manner the guardians of those rights." Address of James Madison to the U.S. House of Representatives (June 8, 1789), *reprinted in* 5 *The Writings of James Madison* 385 (G. Hunt ed. 1904). This nation maintains a distinctive tradition that our courts have special responsibility for reviewing the procedures by which government uses criminal process and legal punishments to enforce the law.

Finally, this special judicial role is designed to protect the role of reason and integrity in government's use of criminal process to enforce law. The courts' "essential quality is detachment, founded on independence." *Gregg* v. *Georgia*, 428 U.S. at 175 (opinion of Stewart, Powell and Stevens, J.J.) (quoting *Dennis* v. *United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring)). This truth not only restrains the courts; it must guide them.

The ban on cruel and unusual punishments implicates not only legislative policy; it is a rule of procedure limiting the means by which government may enforce the law. If our traditions justify special protections for children, they justify effective special protections. In this context, a principle of decent restraint—a minimum age for the application of the death penalty—is not merely a matter of policy. It is a fundamental matter of justice to the individual as defined by our traditions and our sense of humanity.

> It took no violent stretching of democratic theory to suppose an expectation on the part of the people that, in employing the criminal sanction, the political branches would abide the judge's sense of what was mete and decent in the way of procedure, just as they abided the discretion of the jury. And, if the supposition concerning popular expectations should prove wrong, then the justification of that judicial function was that criminal procedure . . . raised questions of elemental justice to the individual, not of social policy.

A. Bickel, *The Supreme Court and the Idea of Progress* 32 (1970).

Tragically, past efforts of this Court to ensure respect for the nation's traditions in regard to youthful offenders, *Eddings*, have been disregarded by at least one "state['s] courts . . . charged with the front-line responsibility for the enforcement of constitutional rights." *Gideon* v. *Wainwright*, 372 U.S. 335, 351 (1963) (Harlan, J., concurring). Such disregard "in the long run will do disservice to the federal system." *Id.* Indeed, executions of children and adolescents in the absence of any moral consensus favoring such punishment will erode respect for law and for the retributive goals of capital punishment. "Civilized societies will not tolerate the spectacle of execution of children." American Law Institute, Model Penal Code § 210.6 commentary at 133 (Official Draft and Revised Comments 1980). In this case, a principle of decent restraint will protect our children and adolescents from tragic mistakes caused by the unpredictable effects of rage. It will also protect the nation's traditions of justice for the young.

CONCLUSION

Petitioner respectfully requests that this Court reverse the judgment of the Oklahoma Court of Criminal Appeals insofar as it affirmed the death sentence in this case, vacate the death sentence, and grant such other relief as it deems appropriate.

Respectfully submitted,

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APPENDIX A

Pertinent Oklahoma Statutes Respecting Definition of "Child" And Trial Of Children As Adults

10 Okla. Stat. § 1101

When used in this title, unless the context otherwise requires:

1. "Child" means any person under eighteen (18) years of age, except for any person sixteen (16) or seventeen (17) years of age who is charged with murder, kidnapping for purposes of extortion, robbery with a dangerous weapon, rape in the first degree, use of a firearm or other offensive weapon while committing a felony, arson in the first degree, burglary with explosives, shooting with intent to kill, manslaughter in the first degree, or nonconsensual sodomy.

Amended by Laws 1982, c. 312, § 13, operative Oct. 1, 1982; Laws 1984, c. 120, § 1, emerg. eff. April 10, 1984.

10 Okla. Stat. § 1104.2

A. Any person sixteen (16) or seventeen (17) years of age who is charged with murder, kidnapping for purposes of extortion, robbery with a dangerous weapon, rape in the second degree, use of firearm or other offensive weapon while committing a felony, arson in the first degree, burglary with explosives, shooting with intent to kill, manslaughter in the first degree, or nonconsensual sodomy, shall be considered as an adult. Upon the arrest and detention, such sixteen- or seventeen-year-old accused shall have all the statutory and constitutional rights and protections of an adult accused of a crime, but shall be detained in a jail cell or ward entirely separate from prisoners who are eighteen (18) years of age or over.

B. Upon the filing of an information against such accused person, a warrant shall be issued which shall set forth the rights of the accused person, and the rights of the parents,

guardian or next friend of the accused person to be present at he preliminary hearing, to have an attorney present and to nake application for certification of such accused person as a hild to the juvenile division of the district court. The warrant hall be personally served together with a certified copy of the nformation on the accused person and on the parents, guardan or next friend of the accused person.

C. The accused person shall file a motion for certification as child before the start of the criminal preliminary hearing. Jpon the filing of such motion, the complete juvenile record of he accused shall be made available to the district attorney and he accused person.

At the conclusion of the state's case at the criminal preliminry hearing, the accused person may offer evidence to support he motion for certification as a child.

The court shall rule on the certification motion of the accused erson before ruling on whether to bind the accused over for rial. When ruling on the certification motion of the accused erson, the court shall give consideration to the following uidelines, listed in order of importance:

1. Whether the alleged offense was committed in an ggressive, violent, premeditated or willful manner;

2. Whether the offense was against persons or property, reater weight being given for retaining the accused person ithin the adult criminal system for offenses against persons, pecially if personal injury resulted;

3. The record and past history of the accused person, cluding previous contacts with law enforcement agencies and venile or criminal courts, prior periods of probation and mmitments to juvenile institutions; and

4. The prospects for adequate protection of the public if the cused person is processed through the juvenile system.

The court, in its decision on the certification motion of the cused person, need not detail responses to each of the above

considerations, but shall state that the court has considered each of the guidelines in reaching its decision.

D. Upon completion of the criminal preliminary hearing, if the accused person is certified as a child to the juvenile division of the district court, then all adult court records relative to the accused person and this charge shall be expunged and any mention of the accused person shall be removed from public record.

Laws 1978, c. 231, § 1, eff. Oct. 1, 1978; Laws 1979, c. 257, § 2. [Subsequently Amended by Laws 1985, c. 278, § 1, eff. Nov. 1, 1985; Laws 1986, c. 179, § 2, eff. Nov. 1, 1986]

10 Okla. Stat. § 1112

(a) Except as otherwise provided, a child who is charged with having violated any state statute or municipal ordinance other than those enumerated in Section 1104.2 of this title, shall not be tried in a criminal action but in a juvenile proceeding. If, during the pendency of a criminal or quasi-criminal charge against any person, it shall be ascertained that the person was a child at the time of committing the alleged offense, the district court or municipal court shall transfer the case, together with all the papers, documents and testimony connected therewith, to the juvenile division of the district court. The division making such transfer shall order the child to be taken forthwith to the place of detention designated by the juvenile division, to that division itself, or release such child to the custody of some suitable person to be brought before the juvenile division. However, nothing in this act shall be construed to prevent the exercise of concurrent jurisdiction by another division of the district court or by municipal courts in cases involving children wherein the child is charged with the violation of a state or municipal traffic law or ordinance.

(b) Except as otherwise provided by law, if a child is charged with delinquency as a result of an offense which would be a felony if committed by an adult, the court on its own motion or at the request of the district attorney shall conduct a

preliminary hearing to determine whether or not there is prosecutive merit to the complaint. If the court finds that prosecutive merit exists, it shall continue the hearing for a sufficient period of time to conduct an investigation and further hearing to determine the prospects for reasonable rehabilitation of the child if he should be found to have committed the alleged act or omission.

Consideration shall be given to:

1. The seriousness of the alleged offense to the community, and whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;

2. Whether the offense was against persons or property, greater weight being given to offenses against persons especially if personal injury resulted;

3. The sophistication and maturity of the juvenile and his capability of distinguishing right from wrong as determined by consideration of his psychological evaluation, home, environmental situation, emotional attitude and pattern of living;

4. The record and previous history of the juvenile, including previous contacts with community agencies, law enforcement agencies, schools, juvenile courts and other jurisdictions, prior periods of probation or prior commitments to juvenile institutions;

5. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile if he is found to have committed the alleged offense, by the use of procedures and facilities currently available to the juvenile court; and

6. Whether the offense occurred while the juvenile was escaping or in an escape status from an institution for delinquent children.

After such investigation and hearing, the court may in its discretion proceed with the juvenile proceeding, or it shall state its reasons in writing and shall certify that such child shall

be held accountable for its acts as if he were an adult and shall be held for proper criminal proceedings for the specific offense charged, by any other division of the court which would have trial jurisdiction of such offense if committed by an adult. The juvenile proceeding shall not be dismissed until the criminal proceeding has commenced and if no criminal proceeding has commenced within thirty (30) days of the date of such certification, unless stayed pending appeal, the court shall proceed with the juvenile proceeding and the certification shall lapse.

If not included in the original summons, notice of a hearing to consider whether a child should be certified for trial as an adult shall be given to all persons who are required to be served with a summons at the commencement of a juvenile proceeding, but publication in a newspaper when the address of a person is unknown is not required. The purpose of the hearing shall be clearly stated in the notice.

(c) Prior to the entry of any order of adjudication, any child in custody shall have the same right to be released upon bail as would an adult under the same circumstances.

(d) Any child who has been certified to stand trial as an adult pursuant to any certification procedure provided by law and is subsequently convicted of the alleged offense or against whom the imposition of judgment and sentencing has been deferred shall be tried as an adult in all subsequent criminal prosecutions, and shall not be subject to the jurisdiction of the juvenile court in any further proceedings.

(e) An order either certifying a person as a child pursuant to subsection (b) of this section or denying such certification shall be a final order, appealable when entered.

Laws 1968, c. 282, § 112, eff. Jan. 13, 1969; Laws 1973, c. 227, § 1, emerg. eff. May 24, 1973; Laws 1974, c. 35, § 1; Laws 1974, c. 272, § 2, emerg. eff. May 29, 1974; Laws 1977, c. 79, § 2; Laws 1978, c. 231, § 2, eff. Oct. 1, 1978; Laws 1979, c. 257, § 4; Laws 1981, c. 141, § 1.

PERTINENT OKLAHOMA STATUTES RESPECTING FIRST DEGREE MURDER AND DEATH PENALTY

21 Okla. Stat. § 701.7

A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

C. A person commits murder in the first degree when the death of a child results from the injuring, torturing, maiming or using of unreasonable force by said person upon the child pursuant to Section 843 of this title.

Amended by Laws 1982, c. 279, § 1, operative Oct. 1, 1982. Approved May 21, 1982. Emergency. Section 2 of Laws 1982, c. 279 provides for an operative date.

21 Okla. Stat. § 701.9

A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

Laws 1976, 1st Ex.Sess., c. 1, § 3, eff. July 24, 1976.

21 Okla. Stat. § 701.10

Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation.

If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Laws 1976, 1st Ex.Sess., c. 1, § 4, eff. July 24, 1976.

21 Okla. Stat. § 701.11

In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding on one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

Laws 1976, 1st Ex.Sess., c. 1, § 5, eff. July 24, 1976.

21 Okla. Stat. § 701.12

Aggravating circumstances shall be:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

2. The defendant knowingly created a great risk of death to more than one person;

3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

4. The murder was especially heinous, atrocious, or cruel;

5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;

7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or

8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty.

Laws 1976, 1st Ex.Sess., c. 1, § 6, eff. July 24, 1976; Laws 1981, c. 147, § 1, emerg. eff. May 8, 1981.

21 Okla. Stat. § 701.13 [as it existed at time of petitioner's crime and trial]

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title

and docket number of the case, the name of the defendant and the name and address of the attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or

2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

Laws 1976, 1st Ex.Sess., c. 1, § 7, eff. July 24, 1976.

21 Okla. Stat. § 701.13 [as amended in 1985]

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The court reporter of the trial court shall prepare all transcripts necessary for appeal within six (6) months of the imposition of the sentence.

The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 701.12 of this title.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court. The defendant shall have one hundred twenty (120) days from the date of receipt by the court of the record, transcript notice, and report provided for

in subsection A of this section, in which to submit a brief. The state shall have sixty (60) days from the date of filing of the defendant's brief to file a reply brief. The defendant may file a reply brief within a time period established by the court, however the receipt of the reply brief, the hearing of oral arguments, and the rendering of a decision by the court all shall be concluded within one (1) year after the date of the filing of the reply brief. If the defendant or the state fails to submit their respective briefs within the period prescribed by law, the defendant or the state shall transmit a written statement of explanation to the Presiding Judge of the Court of Criminal Appeals who shall have the authority to grant an extension of the time to submit briefs, based upon a showing of just cause. Failure to submit briefs in the required time may be punishable as indirect contempt of court.

E. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or

2. Set the sentence aside and remand the case for resentencing by the trial court.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

G. If the court reporter of the trial court fails to complete preparation of the transcripts necessary for appeal within the six-month period required by the provisions of subsection A of this section, the court reporter shall transmit a written statement of explanation of such failure to the Chief Justice of the Oklahoma Supreme Court, the Presiding Judge of the Court of Criminal Appeals, and the Administrative Director of the Courts. The Court of Criminal Appeals shall have the authority to grant an extension of the time for filing the transcripts,

based upon a showing of just cause. Failure to complete the transcripts in the required time may be punishable as indirect contempt of court and except for just cause shown may result in revocation of the license of the court reporter.

Amended by Laws 1985, c. 265, § 1, emerg. eff. July 16, 1985.

Section 2 of Laws 1985, c. 265 provides for severability.

Pertinent Citations To Oklahoma Statutes Establishing Minimum Ages For Adult Rights And Privileges

AGE 16:

Work in Hazardous Occupation (40 Okla. Stat. § 72).
Drive without Parental Consent (47 Okla. Stat. § 6-107).
Stop Attending School (70 Okla. Stat. § 10-105).

AGE 18:

Vote in Elections (Constitution of Oklahoma, Art. 3, sec. 1).
Contract (15 Okla. Stat. § 11).
General Age of Majority (15 Okla. Stat. § 13).
Play Bingo (21 Okla. Stat. § 995.13).
Resort to Pool Halls (21 Okla. Stat. § 1103).
Purchase Cigarettes (21 Okla. Stat. § 1241).
Serve on Juries (38 Okla. Stat. § 18 and § 28).
Marry without Parental Consent (43 Okla. Stat. § 3).
Pawn Property (59 Okla. Stat. § 1511).
Consent to Medical Care (63 Okla. Stat. § 2602).

AGE 21:

Purchase or Consume Beer (37 Okla. Stat. § 241).
Purchase or Consume Liquor (37 Okla. Stat. § 537).

APPENDIX B

PERTINENT STATE STATUTES RESPECTING STATUS OF YOUTH IN DEATH PENALTY STATES

Minimum Age Of Offender Required By Thirty-Six Capital Punishment Jurisdictions

Age at Offense	Total	Jurisdiction
18:	11	California (Cal. Penal Code § 190.5; (Supp. 1985))
		Colorado (Col. Rev. Stat. § 16.11-103 (1985))
		Connecticut (Conn. Gen. Stat. Ann. § 53a-46a(h) (1985))
		Illinois (Ill. Ann. Stat. ch. 38, § 9-1(b) (Supp. 1985))
		Maryland (Md. Code art. 27, Sec. 412(d) (as amended, April 13, 1987))
		Nebraska (Nebr. Rev. Stat. § 28-105.01 (Supp. 1984))
		New Jersey (N.J. Stat. Ann. § 2C: 11-3f (Supp. 1986))
		New Mexico (N.M. Stat. Ann. § 31-18-14(A) (Repl. 1981))
		Ohio (Ohio Rev. Code Ann. § 2929.02(E) (Page 1984))
		Oregon (Ore. Rev. Stat. 161.615 (1985))
		Tennessee (Tenn. Code Ann. § 37-1-134(1) (1984))

Age at Offense	Total	Jurisdiction
17:	3	Georgia (Ga. Code Ann. § 17-9-3 (1982))
		New Hampshire (N.H. Rev. Stat. Ann. § 630.5(ix) (1986))
		Texas (Tex. Penal Code Ann. § 8.07(d) (Vernon Supp. 1987))
16:	2	Indiana (Ind. Code Ann. sec. 31-6-2-4 (signed by Governor on Apr. 6, 1987))
		Nevada (Nev. Rev. Stat. § 176.025 (1979))
15:	2	Louisiana (La. Rev. Stat. Ann. § 13:1570(A)(5) (1983))
		Virginia (Va. Code Ann. § 16.1-269(A) (1982))
14:	7	Alabama (Ala. Code § 12-15-34(a) (1977))
		Arkansas (Ark. Stat. Ann. § 41-617(2) (Supp. 1985))
		Idaho (Idaho Code § 16-1806A(1) (Supp. 1986))
		Kentucky (Ky. Rev. Stat. Ann. § 208E.070(2) (1980))
		Missouri (Mo. Ann. Stat. § 211.071 (Vernon Supp. 1985))
		North Carolina (N.C. Gen. Stat. § 7A-608 (1981))
		Utah (Utah Code Ann. § 78-3a-25(1) (Supp. 1983))
13:	1	Mississippi (Miss. Code Ann. § 43-21-151 (1985))
12:	1	Montana (Mont. Code Ann. § 41-5-206(1)(a) (1985))

Age at Offense	Total	Jurisdiction
No Minimum:	9	Arizona (Ariz. Rev. Stat. Ann. § 13-703(G)(5) (Supp. 1985))
		Delaware (11 Del. Code Ann. § 4209(c) (Repl. 1979))
		Florida (Fla. Stat. Ann. § 921.141(6)(g) (West Supp. 1984))
		Oklahoma (21 Okla. Stat. § 701.01 (West 1983))
		Pennsylvania (Pa. Code Ann. § 6355(e) (1985))
		South Carolina (S.C. Code Ann. § 16-3-20(c)(b)(7) (1985))
		South Dakota (S.D. Codified Laws Ann. 23A-27A-1 (Supp. 1984)).
		Washington (Wash. Rev. Code § 10.95.070(7) (Supp. 1986))
		Wyoming (Wyo. Stat. § 6.2-102(j)(vii) (Repl. 1983))

Minimum Statutory Age For Any Criminal Court Jurisdiction
(12 states)

AGE SIXTEEN:

INDIANA: Ind. Code Ann. § 31-6-2-4 (H.B. 1022, 1987).

AGE FIFTEEN:

LOUISIANA: La. Rev. Stat. Ann. § 13:1570(a)(5) (1983).
VIRGINIA: Va. Code Ann. § 16.1-269(A) (1982).

AGE FOURTEEN:

ALABAMA: Ala. Code § 12-15-34(A) (1977).
ARKANSAS: Ark. Stat. Ann. § 41-617(2) (Supp. 1985).
IDAHO: Idaho Code § 16-1806A(1) (Supp. 1986).
KENTUCKY: Ky. Rev. Stat. Ann. § 208E.070(2) (1980).
MISSOURI: Mo. Ann. Stat. § 211.071 (Supp. 1985).
NORTH CAROLINA: N.C. Gen. Stat. § 7A-608 (1986).
UTAH: Utah Code Ann. § 78-3a-25(1) (Supp. 1985).

AGE THIRTEEN:

MISSISSIPPI: Miss. Code Ann. § 43-21-151 (1985).

AGE TWELVE:

MONTANA: Mont. Code Ann. § 41-5-206(1)(a) (1985).

Statutes Specifically Listing Age Of Offender As Mitigating Factor

(27 states)

ALABAMA: Ala. Code § 13A-5-51(7) (1982).
ARIZONA: Ariz. Rev. Stat. Ann. § 13-703G.5 (Supp. 1986).
ARKANSAS: Ark. Stat. Ann. § 41-1304(4) (Repl. 1977).
CALIFORNIA: Cal. Penal Code § 190.05(h)(9) (Supp. 1987).
COLORADO: Colo. Rev. Stat. § 16-11-103(5)(a) (Supp. 1985).
FLORIDA: Fla. Stat. Ann. § 921.141(6)(g) (Supp. 1985).
INDIANA: Ind. Code Ann. § 35-50-2-9(c)(7) (H.B. 1022, 1987).
KENTUCKY: Ky. Rev. Stat. § 532.025(2)(b)(8) (1984).
LOUISIANA: La. Code Crim. Proc. Ann. art. 905.5(f) (1984).
MARYLAND: Md. Code art. 27, § 413(g)(5) (Supp. 1986).
MISSISSIPPI: Miss. Code Ann. § 99-19-101(6)(g) (Supp. 1986).
MISSOURI: Mo. Rev. Stat. § 565.032(3)(7) (Supp. 1987).
MONTANA: Mont. Code Ann. § 46-18-304(7) (1984).
NEBRASKA: Nebr. Rev. Stat. § 29-2523(2)(d) (1985).
NEVADA: Nev. Rev. Stat. § 200.035(6) (1985).
NEW HAMPSHIRE: N.H. Rev. Stat. Ann. § 630.5(II)(b)(5) (1986).
NEW JERSEY: N.J. Stat. Ann. § 2C:11-3(c)(5)(c) (Supp. 1986).
NEW MEXICO: N.M. Stat. Ann. § 31-20A-6(I) (Supp. 1986).
NORTH CAROLINA: N.C. Gen. Stat. § 15A-2000(f)(7) (1983).
OHIO: Ohio Rev. Code Ann. § 2929.04(B)(4) (1982).
PENNSYLVANIA: Pa. Cons. Stat. Ann. art. 42, § 9711(e)(4) (1982).
SOUTH CAROLINA: S.C. Code Ann. § 16-3-20(c)(b)(7 & 9) (1985).
TENNESSEE: Tenn. Code Ann. § 39-2-203(j)(7) (Repl. 1982).
UTAH: Utah Code Ann. § 76-3-207(2)(c) (Supp. 1983).
VIRGINIA: Va. Code § 19.2-264.4(B)(v) (Repl. 1983).
WASHINGTON: Wash. Rev. Code § 10.95.070(7) (Supp. 1987).
WYOMING: Wyo. Stat. § 6-2-102(j)(vii) (Repl. 1983).

APPENDIX C

JUVENILE AND TOTAL EXECUTIONS IN THE UNITED STATES, BY DECADE, 1900 TO PRESENT

Current as of March 31, 1987

Decade	Total Executions	Juvenile Executions	Percentage
1900-09	1,192	23	1.9%
1910-19	1,089	24	2.3%
1920-29	1,169	27	2.3%
1930-39	1,670	41	2.5%
1940-49	1,288	53	4.1%
1950-59	716	16	2.2%
1960-69	191	3	1.6%
1970-79	3	0	0%
1980-87	67	3	4.5%
Totals:	7,355	190	2.6%

Sources of data: W. Bowers, Legal Homicide 54 (1984); NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. 1 (Mar. 1, 1987); Streib, "The Eighth Amendment and Capital Punishment of Juveniles," 34 Cleve. St. L. Rev. 363, 380 (1986).

APPENDIX D

DEATH SENTENCES FOR JUVENILE OFFENDERS, JANUARY 1, 1982, THROUGH MARCH 31, 1987

Year	Offender's Name	Age at Crime	Race	State	Current Status
1982	Barrow, Lee Roy	17	W	TX	reversed in 1985
	Cannon, Joseph J.	17	W	TX	now on death row
	Carter, Robert A.	17	B	TX	now on death row
	Garrett, Johnny F.	17	W	TX	now on death row
	Johnson, Lawrence	17	B	MD	reversed twice but resentenced to death in 1983 and 1984.
	Lashley, Frederick	17	B	MO	now on death row
	Legare, Andrew	17	W	GA	reversed in 1983; resentenced to death in 1984; reversed in 1986.
	Stanford, Kevin	17	B	KY	now on death row
	Stokes, Freddie	17	B	NC	reversed in 1982; resentenced to death in 1983; reversed in 1987.
	Thompson, Jay	17	W	IN	reversed in 1986
	Trimble, James	17	W	MD	now on death row
1983	Bey, Marko	17	B	NJ	now on death row
	Cannaday, Attina	16	W	MS	reversed in 1984
	Harris, Curtis P.	17	B	TX	reversed in 1986
	Harvey, Frederick	16	B	NV	reversed in 1984
	Hughes, Kevin	16	B	PA	now on death row
	Johnson, Lawrence	17	B	MD	reversed in 1983 but resentenced to death in 1984
	Lynn, Frederick	16	B	AL	reversed in 1985 but resentenced to death in 1986
	Mhoon, James	16	B	MS	reversed in 1985
	Stokes, Freddie	17	B	NC	reversed in 1987

Year	Offender's Name	Age at Crime	Race	State	Current Status
1984	Aulisio, Joseph	15	W	PA	now on death row
	Brown, Leon	15	B	NC	now on death row
	Johnson, Lawrence	17	B	MD	now on death row
	Legare, Andrew	17	W	GA	*reversed in 1986*
	Patton, Keith	17	B	IN	now on death row
	Thompson, W. W.	15	W	OK	now on death row
1985	Livingston, Jesse	17	B	FL	now on death row
	Morgan, James	16	W	FL	now on death row
	Ward, Ronald	15	B	AR	now on death row
1986	Comeaux, Adam	17	B	LA	now on death row
	Cooper, Paula R.	15	B	IN	now on death row
	LeCroy, Cleo	17	W	FL	now on death row
	Lynn, Frederick	16	B	AL	now on death row
	Sellers, Sean	16	W	OK	now on death row
	Wilkins, Heath	16	W	MO	now on death row
	Williams, Alexander	17	B	BA	now on death row
1987	[none reported]				

APPENDIX E

THIRTY-EIGHT PERSONS ON DEATH ROW AS OF DECEMBER 31, 1983, FOR CRIMES COMMITTED WHILE UNDER AGE EIGHTEEN

State	*Prisoner*	Age at Time of Offense	Sex	Race
Alabama	Davis, Timothy	17	male	white
	Jackson, Carnel	16	male	black
	Lynn, Frederick	17	male	black
Florida	Magill, Paul	17	male	white
	Morgan, James	16	male	white
	Peavy, Robert	17	male	black
Georgia	Bruger, Christopher	17	male	white
	Buttrum, Janice	17	female	white
	High, Jose	16	male	black
	Legare, Andrew	17	male	white
Indiana	Thompson, Jay	17	male	white
Kentucky	Ice, Todd	15	male	white
	Stanford, Kevin	17	male	black
Louisiana	Prejean, Dalton	17	male	black
Maryland	Johnson, Lawrence	17	male	black
	Trimble, James	17	male	white
Mississippi	Cannady, Attina	16	female	white
	Jones, Larry	17	male	black
	Mhoon, James	16	male	black
	Tokman, George	17	male	white
Missouri	Lashley, Frederick	17	male	black
Nevada	Harvey, Frederick	16	male	unkwn.
New Jersey	Bey, Marko	17	male	black
N. Carolina	Oliver, John	14	male	black
	Stokes, Freddie Lee	17	male	black
Oklahoma	Eddings, Monty	16	male	white

State	Prisoner	Age at Time of Offense	Sex	Race
Pennsylvania	Hughes, Kevin	16	male	black
S. Carolina	Roach, James Terry	17	male	white
Texas	Barrow, Lee Roy	17	male	white
	Battie, Billy	17	male	unkwn.
	Burns, Victor Renay	17	male	black
	Cannon, Joseph John	17	male	white
	Carter, Robert A.	17	male	black
	Garrett, Johnny F.	17	male	white
	Graham, Gary L.	17	male	black
	Harris, Curtis Paul	17	male	black
	Pinkerton, Jay K.	17	male	white
	Rumbaugh, Charles	17	male	white

*Sources of data: NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. (Dec. 20, 1983); Brief for Petitioner at 19a app. E, Eddings v. Oklahoma, 455 U.S. 104 (1982); Streib, "The Eighth Amendment and Capital Punishment of Juveniles," 34 Cleve. St. L. Rev. 363, 385 (1986).

APPENDIX F

THIRTY-TWO PERSONS ON DEATH ROW AS OF MARCH 31, 1987, FOR CRIMES COMMITTED WHILE UNDER AGE EIGHTEEN

State	Prisoner	Age at Time of Offense	Sex	Race
Alabama	Davis, Timothy	17	male	white
	Jackson, Cornel	16	male	black
	Lynn, Frederick	17	male	black
Arkansas	Ward, Donald	15	male	black
Florida	LeCroy, Cleo	17	male	white
	Livingston, Jesse	17	male	black
	Magill, Paul	17	male	white
	Morgan, James A.	16	male	white
Georgia	Burger, Christopher	17	male	white
	Buttrum, Janice	17	female	white
	Williams, Alexander	17	male	black
Indiana	Cooper, Paula R.	15	female	black
	Patton, Keith	17	male	black
Kentucky	Stanford, Kevin	17	male	black
Louisiana	Comeaux, Adam	17	male	black
	Prejean, Dalton	17	male	black
Maryland	Johnson, Lawrence	17	male	black
	Trimble, James	17	male	white
Mississippi	Jones, Larry	17	male	black
	Tokman, George	17	male	white
Missouri	Lashley, Frederick	16	male	black
	Wilkins, Heath	16	male	white
New Jersey.	Bey, Marko	17	male	black
N. Carolina	Brown, Leon	15	male	black
Oklahoma	Sellers, Sean	16	male	white
	Thompson, W. Wayne	15	male	white
Pennsylvania	Aulisio, Joseph	15	male	white
	Hughes, Kevin	16	male	black
Texas	Cannon, Joseph John	17	male	white
	Carter, Robert A.	17	male	black
	Garrett, Johnny F.	17	male	white
	Graham, Gary L.	17	male	black

*Sources of data: NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. (Dec. 20, 1983); Brief for Petitioner at 19a app. E, Eddings, v. Oklahoma, 455 U.S. 104 (1982); Streib, "The Eighth Amendment and Capital Punishment of Juveniles," 34 Cleve. St. L. Rev. 363 (1986).

APPENDIX G

ARRESTS AND DEATH SENTENCES FOR WILLFUL CRIMINAL HOMICIDE, BY AGE GROUPS, 1982-1985

All Ages

Year	Total Arrests	Total Death Sentences
1982	18,511	281
1983	18,064	259
1984	13,676	280
1985	15,777	(280 est.)*
TOTAL	66,028	1,103

Under Age 16

Year	Total Arrests	% of Arrests For All Ages	Total Death Sentences	% of Sentences For All Ages
1982	417	2.2%	0	0.0%
1983	368	2.0%	0	0.0%
1984	294	2.1%	3	1.1%
1985	381	2.4%	1	0.4%
TOTAL	1,460	2.2%	4	0.4%

Under Age 18

Year	Total Arrests	% of Arrests For All Ages	Total Death Sentences	% of Sentences For All Ages
1982	1,579	8.5%	11	3.9%
1983	1,345	7.4%	9	3.5%
1984	1,004	7.3%	6	2.1%
1985	1,311	8.3%	3	1.1%
TOTAL	5,239	7.9%	29	2.6%

*estimated (exact data unavailable)

Sources of data: UNITED STATES DEPARTMENT OF JUSTICE, CAPITAL PUNISHMENT 1984 6 (1986); UNITED STATES DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 174 (1985); *id.* at 172 (1984); *id.* at 179 (1983); *id.* at 176 (1982); and Appendix D.

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No. 86-6169

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

William Wayne Thompson, Petitioner,

v.

State of Oklahoma, Respondent.

On Writ Of Certiorari To The Court Of Criminal Appeals
Of The State Of Oklahoma

REPLY BRIEF OF PETITIONER

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Reply Brief of Petitioner

Introduction

The traditions of American jurisprudence that children and adolescents are to be judged more carefully and treated less harshly than adults are ignored by the Brief of Respondent Oklahoma almost as completely as by the trial and appellate courts in proceedings below.[1] Over sixty percent of American jurisdictions-- thirty-three jurisdictions encompassing over 70% of the American population-- refuse to countenance the execution of anyone for a crime committed at age fifteen or younger.[2] No State that has decided to adopt an express statutory minimum age for imposing a death penalty has ever selected an age below sixteen years.[3] No State has executed any person for a crime committed at age fifteen or younger in almost forty years.[4]

The basic power of the States to execute convicted murderers

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[1]Certainly, the arguments of Oklahoma reflect the attitude of the Oklahoma Court of Criminal Appeals, which devoted all of two short paragraphs to the issue of the boy's youth. Only one sentence of the appellate court's opinion in this case was devoted to a "reconsideration" of whether a death sentence imposed on a juvenile violated the Eighth Amendment. Thompson v. State, 724 P.2d 780, 784 [J.A. 36, 41].

[2]As of 1985, the eighteen jurisdictions that prohibit a death sentence for anyone younger than eighteen, seventeen or sixteen (See Appendices A and B to this Brief) and the fifteen jurisdictions that do not have any death penalty included an estimated 71.9% of the total United States population. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 22 (1987).

[3]See Appendix A to this Brief.

[4]The last execution of a person for a crime committed at age fifteen was on January 9, 1948 when Louisiana executed Irvin Mattio. V. Streib, Death Penalty for Juveniles 197 (1987).

is not at stake in this case. This case focuses on a small category of death penalty cases and only one aspect of the death penalty issue: State execution of children and adolescents is freakishly rare and inconsistent with the dominant traditions of America's criminal and juvenile jurisprudence. To divert attention from these facts, the State of Oklahoma contends that Petitioner's claims under the Eighth and Fourteenth Amendments would deprive the States of their general responsibility for defining substantive standards of criminal law. Brief of Respondent Oklahoma at 52-65. Unless the presence of any constitutional limitation on the death penalty process is a similar interference with the whole of the States' legitimate, broad powers in this area, Oklahoma's argument is false.

Citing Jackson v. Virginia, 443 U.S. 307 (1979), Oklahoma argues in favor of a rule it believes to be pertinent: A state court's finding that a person is criminally responsible should be upheld, unless, under applicable state law and upon review of the record in a light most favorable to the prosecution, a rational fact finder could not have found the defendant guilty beyond reasonable doubt. Brief of Respondent Oklahoma at 64. Oklahoma emphasizes that its procedures were constitutionally adequate to conclude that the boy ought to be punished for his intentional act of murder. Brief of Respondent Oklahoma at 58. Oklahoma's argument is that the State has applied a proper rule of criminal responsibility-- whether the accused had mental capacity to distinguish between right and wrong. Id. at 60.

Petitioner concedes all this: Petitioner does not challenge Oklahoma's decision to hold him accountable under the State's criminal laws as if he were an adult. This case presents no question about whether Oklahoma was correct in its decision that the boy was guilty. The issue is not whether the boy will be held accountable for his crime. If this Court holds in favor of Petitioner's claims, there is no doubt that the boy will be punished-- and punished severely-- with a life imprisonment sentence. The question is whether he should suffer the extreme penalty of death. See Amici Curiae Brief of Child Welfare League of America et. al. at 33-41. Oklahoma's defense of judicial deference to state court judgments regarding criminal responsibility has virtually nothing to do with the issues of this case.

If Oklahoma meant to go one step further and to argue that standards for reviewing a death sentence ought to be identical to standards for reviewing a State's finding of criminal accountability, Oklahoma ignores fundamental constitutional limitations on the death penalty process.

Oklahoma is repeating its argument, expressed and rejected in Eddings v. Oklahoma, 455 U.S. 104 (1982), that the only factors that could justify reducing a sentence of death-- as a matter of constitutional law-- are those "which would tend to support a legal excuse from criminal liability." Id. at 113. In other words, in Respondent's view, if a defendant is guilty of intentional murder, and if that defendant knows the difference

between right and wrong, the death penalty is constitutionally appropriate in the absence of some legal excuse. Brief of Respondent Oklahoma at 64-65.

If this is Oklahoma's position, it is extreme. It concedes little to the well-established principle that

> [B]ecause there is a qualitative difference between death and any other form of punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

Zant v. Stephens, 462 U.S. 862, 884 (1983), quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Oklahoma's analysis concedes nothing to the legal fact that the boy was a child under the laws of Oklahoma, and it concedes little to the special difficulties of a case in which the State seeks to decide whether a child "has lost his moral entitlement to live." Spaziano v. Florida, 468 U.S. 447, 469 (1984) (Stevens, J., dissenting).

I. Oklahoma's argument before this Court would, if adopted, undermine well-established traditions that youth bears on the fundamental justice of the death penalty.

Despite this Court's affirmation that youth is a "relevant mitigating factor of great weight," Eddings v. Oklahoma, 455 U.S. at 116, Oklahoma's brief before this Court makes virtually no effort to demonstrate that the boy's youth was carefully and sensitively considered by jury, trial judge or appellate court. Oklahoma's argument before this Court mirrors the reality that Oklahoma courts never reviewed this case in light of this Court's insistence that youth bears directly on the fundamental justice

of the death penalty. Skipper v. South Carolina, ___ U.S. ___, 106 S.Ct. 1669, 1676 (1986) (concurring opinion of Powell, J., Burger, C.J., and Rehnquist, J.). The State's arguments before this Court are only an attempt to rationalize Oklahoma's uncommon willingness to impose a death penalty despite the youth of the offender.

A. Oklahoma's argument, if adopted, would undermine Eddings v. Oklahoma by legitimating unbridled jury discretion without adequate guidance that "youth is a relevant mitigating factor of great weight."

Oklahoma makes only one begrudging concession to the tradition that youthful offenders might not deserve to be treated in the same way as adults. It recognizes the "procedural requirement of allowing a murderer to introduce evidence of his or her age as a mitigating factor." Brief of Respondent Oklahoma at 34. In Oklahoma's view, as long as the accused is not foreclosed from introducing evidence and argument regarding age and other mitigating circumstances, the jury and the state courts have virtually unrestricted discretion to sentence a child to death. Id. at 35.

Oklahoma's toleration of unrestricted jury choice violates constitutional principles that limit the death penalty process. "[A] jury's discretion to impose the death sentence must be 'suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" Booth v. Maryland, ___ U.S. ___, 107 S.Ct. 2529, 2532 (1987) quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, J., Powell, J., and Stevens, J.). States who seek to put criminals to death "must

channel the sentencer's discretion by `clear and objective standards' that provide `specific and detailed guidance,'" to the jury. Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion of Stewart, J., Blackmun, J., Powell, J. and Stevens, J) (citations omitted). The need for precision and objectivity "is particularly acute" when the responsibility of a child or adolescent is at issue. Burger v. Kemp, ___ U.S. ___, 107 S.Ct. 3114, 3141 (1987) (Powell, J., dissenting).[5] "The Constitution requires that a capital sentencing system reflect this difference in criminal responsibility between children and adults." Id.

When responding to the prospect of a minimum death penalty age, Oklahoma says that it favors a case-by-case assessment of youth as a mitigating circumstance. Yet the State offers virtually no assurance that consideration of this "relevant mitigating circumstance" was meaningful, adequate or reliable as the jury deliberated in this matter of the boy's life and death.

Respondent Oklahoma makes no effort to deny: (i) The trial court failed to explain to the jury that youth is a relevant mitigating factor of great weight; (ii) The trial court misled the jury as to the boy's status as a child under the laws of Oklahoma; (iii) The prosecutor tried to condition the jury into believing that the boy's youth should not "interfere" with its deliberations; (iv) The trial court did nothing to require the

[5] "A specific inquiry including `age, actual maturity, family environment, education, emotional and mental stability, and ... prior record' is particularly relevant" when a state seeks to impose a death sentence on a juvenile. Burger v. Kemp, 107 S.Ct. at 3140 (Powell, J., dissenting).

jury to weigh the boy's youth against aggravating factors, and instructed the jury instead that "the determination of what are mitigating circumstances is for you as jurors to resolve"; and (v) The jury exhibited confusion about the meaning of "mitigating" circumstances.

Oklahoma's inability to show how the boy's age affected the proceedings below in any way is significant. In this case, the jury had no "substantive guidelines [to] allow[] the sentencer to make rational, objective distinctions between the egocentric homocidal conduct of a juvenile murder, and the homocidal conduct of an adult murderer." Ellison, "State Execution of Juveniles: Defining `Youth' as a Mitigating Factor for Imposing a Sentence of Less Than Death," 11 Law and Psych. Rev. 1, 36-37 (1987).

If the factor of youth is to be given proper weight in capital sentencing decisions, the jury (or other sentencing authority) must be, first, informed of the importance of youth as a mitigating circumstance, and, second, directed to give the youth factor great weight in sentencing deliberations. Only such safeguards in a young offender's case can meet the "corresponding[ly]... [greater] need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. at 305.

B. A minimum chronological age would protect the tradition that young offenders must be judged differently and treated less harshly than adults who commit the same offenses.

Oklahoma contends that the justice of the death penalty must be assessed on a case-by-case basis, without any minimum chronological limit. Such a minimum age would, in Respondent's view, prevent the states from making careful, individualized judgments. Oklahoma argues that young offenders as a group are too diverse in their levels of emotional and moral maturity to permit an age-based line to be drawn between those who should be exempt from the death penalty and those who should not.

Oklahoma ignores crucial facts known and consistently accepted by this Court about young people. While human beings are still adolescents, they share common emotional and intellectual features which distinguish them as a class from adults. Because children and adolescents are fundamentally different than adults, American jurisprudential traditions treat the young differently-- as a class.[6] Unless these traditions are

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[6]As the American Bar Association as Amicus Curiae wrote:

> Our society recognizes that minors are less mature, less experienced, less able to exercise good judgment and self-restraint, more susceptible to environmental influence (both positive and negative), and as a result, less responsible and less culpable in a moral sense than adults.

Brief of Amicus Curiae American Bar Association at 3. See also Brief of American Society for Adoloscent Psychiatry and American Orthopsychiatric Association As Amici Curiae at 3-8; Brief of Child Welfare League of America et. al. as Amici Curiae at 28-32 and 43-53; Brief of National Legal Aid and Defender Association et. al as Amici Curiae at 5-21.

to be ignored, the well-known, widely-accepted differences between adolescents and adults compel the conclusion that the death penalty is a cruel and unusual punishment for youthful offenders.[7]

Of course, it is true that young people grow in different ways and at different rates. Still, Oklahoma is not really arguing that it seeks the death of only the most mature and the most responsible of youthful offenders. On the contrary, in the case at bar, Oklahoma takes a position consistent with its argument in Eddings v. Oklahoma, in which Counsel for Respondent

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[7]Respondent and its Amici suggest that drawing an age-based line is "wholly arbitrary," despite the fact that half of the death penalty states have drawn minimum lines that bar death sentences for fifteen-year-olds. See Appendices A and B to this brief.

An age-based line would not be arbitrary. A minimum chronological age, such as eighteen years, would serve a purpose. An age limit would protect the explicit constitutional value against cruel and unusual punishment. This value must be understood and interpreted in light of this nation's traditions, which, in this case, require a decent restraint in the judgments and punishments of the young.

This Court has found it proper to draw lines to protect constitutional values in other contexts. For example, in the first amendment context, the federal courts searched for "qualitative formula[e], hard, difficult to evade" in defense of expressive liberty. Letter from Learned Hand to Zechariah Chafee, Jr., (Jan. 2, 1921), reprinted in Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan. L. Rev. 719, 769 app. (1975). See also, e.g., Ballew v. Georgia, 435 U.S. 223 (1978) (line drawn between five-person and six-person juries for purposes of unanimity requirement); Baldwin v. New York, 399 U.S. 66 (1970) (line drawn between imprisonment for more than six months and imprisonment for less than six months in determining right to jury trial); Bloom v. Illinois, 391 U.S. 194 (1968) (drawing line between criminal contempts which must be tried to jury and those when need not be so tried, based on states' line drawing for similarly punished crimes).

explicitly defended the position that emotional maturity is not essential to warrant certification of a juvenile to stand trial as an adult and that a State "should [not] be required to show that a killer is emotionally mature, because probably he is not going to be." Transcript of Oral Argument, Eddings v. Oklahoma, supra, at 41. Rather, Oklahoma argues, the horrifying nature of a crime is enough to justify a death sentence imposed on any adolescent who knew the difference between right and wrong. Brief of Respondent Oklahoma at 65-67. Oklahoma's insistence that some brutal crimes can only be punished by death, id. at 67, belies the State's plea that it now wants the freedom to administer a system "sensible to the uniqueness of the individual." Eddings v. Oklahoma, 455 U.S. at 110.

It is undeniably true, as the Respondent contends, "that this class of [young murderers is] capable of committing horrifying crimes." Brief of Respondent Oklahoma at 65. Without any question, "young murderers are capable of acts of incredible viciousness and cruelty." Id. at 66.

Yet, despite these truths, it must be denied-- again and again-- that these facts amount to a complete and adequate justification for the death penalty in any particular case or class of cases. The brutality of a crime-- even extreme brutality-- is not a sufficient index to moral guilt. The horrible character of all-too-many murders obscures the reality that those "who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems,

may be less culpable than defendants who have no such excuse." California v. Brown, ___ U.S. ___, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring). This Court requires that juries or other sentencing authorities must give attention not only to the manner of the crime, but also to the responsibility of the criminal. See, e.g. Sumner v. Shuman, ___ U.S. ___, 107 S.Ct. 2716, 2722-23 & n. 5 (1987). When analysis does focus on the moral responsibility of adolescents-- even those guilty of the most brutal crimes-- the retributive justice of a death sentence against a child or adolescent is almost impossible to see.

> Adolescents who commit murder typically suffer from a variety of serious disturbances which inhibit their natural growth and development. [T]hese disturbances, acting in combination, exacerbate the already existing vulnerabilities of youth and place an adolescent at extreme risk for seriously violent behavior.

Brief of American Society for Adolescent Psychiatry and the American Orthopsychiatric Association as Amicus Curiae at 9. Careful study of those young men and women condemned to death while still children or adolescents reveals the tragic patterns that led to their individual fates. These tragic factors tend to lessen moral guilt. These condemned human beings are not innocents, but before the brutal nature of their crimes is used to obscure their humanity, this Court must remember that they are also victims: They are victims of chaotic family backgrounds; they have suffered extreme physical and sexual abuse; they have been witnesses to or victims of "sustained, repetitive" and extraordinarily brutal intrafamily violence; some suffered

express or implicit family pressure to kill; often they were afflicted with severe cognitive limitations, physiological damage increasing impulsivity and volatility, and psychiatric disorders. Id. Under such circumstances, despite Oklahoma's arguments to the contrary, state judicial systems are not justified in believing that the brutality of the crimes "are themselves so grievous... that the only adequate response may be the penalty of death." Brief of Respondent Oklahoma at 67, quoting Gregg v. Georgia, 428 U.S. at 184.

Even when horrifyingly brutal crimes are the focus for inquiry, Respondent Oklahoma assumes a burden of proof it cannot carry. While it is true that Petitioner cannot rely on clear-cut precedents to justify a minimum chronological age, Oklahoma cannot rely on any precedent to argue-- as it does-- that in this undefined class of particularly brutal murders, youth, chronological age and emotional immaturity are of no special relevance to the fundamental questions of moral guilt, personal responsibility and retributive justice.[8] As Justice Powell

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[8]Oklahoma cites Rumbaugh v. Procunier, 753 F.2d 395 (5th Cir. 1983), cert. denied sub. nom. Rumbaugh v. McCotter, 473 U.S. 919 (1985) for the proposition that "a seventeen-year-old person... did not lack the requisite mental competence to waive his right to further judicial review of his [death] sentence." The State infers from Rumbaugh that "[i]f a young person can be found to be able ... to choose to stop further appeals of his death sentence..., certainly a state judicial system should be able to find that certain juveniles should... receive the death sentence...." Brief of Respondent Oklahoma at 43-44.

Oklahoma misstates the Rumbaugh decision. The condemned man, Rumbaugh, was approximately twenty-five years old at the time he waived further appeals rights, although he had been seventeen years and ten months old at the time of his crime. V.

wrote:

> Where a capital defendant's chronological immaturity is compounded by "serious emotional problems, ... a neglectful, sometimes even violent, family background, ... [and] mental and emotional development ... at a level several years below his chronological age," ... the relevance of this information to the defendant's culpability and thus to the sentencing body, is particularly acute. The Constitution requires that a capital sentencing system reflect this difference in criminal responsibility between children and adults.

Burger v. Kemp, 107 S.Ct. at 3140 (Powell, J., dissenting).

Yet, in some cases, the brutal nature of the crime-- or perhaps the inflammatory nature of the evidence-- will often be enough to prevent "a reasoned moral response to the defendant's background, character and crime," Sumner v. Shuman, 107 S.Ct. at 2723 n. 5; California v. Brown, 107 S.Ct. at 841 (O'Connor, J., concurring). In such tragic cases, "mere sympathy or emotion," id., will all too frequently govern the outcome of the sentencing proceeding. When the facts respecting moral guilt of condemned children and adolescents are collected, as they have been by Amici American Society for Adolescent Psychiatry and American Orthopsychiatric Association, there is good reason to condemn the sensitivity, the objectivity, the fairness and the justice of a case-by-case assessment of youth as mitigating circumstance-- particularly when the crimes are the most horrifying. When a murder is particularly brutal, the reality is that the undeniable tradition of more careful, more sensitive consideration of

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Streib, Death Penalty for Juveniles 121-25 (1987).

youthful offenders[9] cannot be vindicated except by means of a minimum chronological age.[10]

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[9]The Brief Amici Curiae of Kentucky et. al. argues that the Petitioner's statistics do not sustain the contention that state criminal courts are reluctant to condemn the young to death.

It is true that Petitioner's statistics are not refined in some of the respects identified by Respondent's Amici. However, they are completely adequate to verify the reluctance of the criminal system to impose death sentences on the young. Many of the factors that were not measured in petitioner's statistics still reflect the criminal justice system's reluctance to impose death sentences on children and adolescents: If an adolescent murderer escapes a death sentence because state courts refused to waive juvenile jurisdiction or because the prosecutor never requested a capital sentence or because a prosecutor accepted a plea bargain or even because a state refuses to inflict a penalty of death on anyone, the important point is that the adolescent murderer was not sentenced to die. Thus, Amici cannot deny the reality that criminal justice systems only rarely condemn the young to death.

Kentucky's Amici Brief provides no numbers at all to refute the statistics of petitioner. Indeed, when Kentucky asserts the existence of a contrary trend-- that there is an increasing trend towards more juvenile executions-- it provides no data whatever.

[10]The Amici Curiae Brief of Kentucky et. al. condemns the rigidity of any "bright line" chronological age limit on the States' ability to condemn adolescents to death. However, there is not even a consensus on this point among the nineteen states signing the Amici brief.

(1) Only one of the nineteen states joining the brief currently has anyone under a sentence of death for a crime committed at age fifteen or younger. That one state, North Carolina, recently amended its death penalty statute to prohibit the death penalty for crimes committed by individuals under age seventeen (with minor exceptions). See Appendix A.

(2) Two other states joining the Amici Brief (Connecticut and New Mexico) have minimum ages of eighteen in their statutes.

(3) The primary author of the Amici Brief, the state of Kentucky, has recently enacted a minimum age of sixteen.

(4) The state of Kansas has no death penalty at all.

Thus, it is plain that the personal opinions of the

II. The reliability of the death sentencing process was undermined by the admission of prejudicial, inflammatory photographs.

The Respondent failed to notify this Court of Jones v. State, 738 P.2d 525 (Okla. Cr. 1987), a case involving the same murder that led to Petitioner's death sentence.[11] In Jones, the Oklahoma Court of Criminal Appeals overturned the conviction and death sentence of one of the Petitioner's adult co-defendants. The appellate court also reaffirmed its strong condemnation of the trial court's admission of gruesome color photographs depicting the victim's decomposing remains.

Despite the clear findings of the Court of Criminal Appeals in the opinion below in the case at bar and in its opinion in Jones, the State insists that the color photographs of the victim's decomposing body had probative value and were not inflammatory so that their admission at trial did not render the trial fundamentally unfair. Brief of Respondent Oklahoma at 90-91, 94-95. In reality, the State asks this Court to substitute its own judgment on state evidentiary questions for the judgment of the Court of Criminal Appeals, which reaffirmed its judgment in Jones.

A trial court abuses its discretion when it admits

Attorneys General for these five states are not shared by the legislatures of their states or by the people of their States.

[11]The opinion was decided on May 22, 1987. It was not published until the June 6, 1987 issue of the Oklahoma Bar Journal, 58 O.B.J. 1592, after filing of the Petitioner's Brief, but two months before Respondent's Brief was filed.

> gruesome photographs, and the probative value of such photographs is substantially outweighed by potential prejudice to the accused.
>
> Our examination of these two color photographs leads us to conclude that their minimal probative force, in light of their cumulative nature, was substantially outweighed by the danger of unfair prejudice.... The two photographs depicted the body of Keene, which had been submerged for nearly a month, and was obviously in a state of decomposition. In State's Exhibit 10, the body is shown covered with algae and slime, a factor which added to its gruesomeness, and lessened its probative value as the algae partially covered the wounds. State's Exhibit No. 11, which also revealed Keene's algae covered body, depicted the body in an advanced state of decomposition as evidenced by the condition of the skin and hair, portions of which were missing. These two photographs added virtually nothing to the State's submission of proof, and served no other purpose than to inflame the jury. See Thompson v. State, 724 P.2d 780, 782 (Okl.Cr.1986).

738 P.2d 528 (citations omitted).[12]

In light of the appellate court's discussion of the photographs' admission in Thompson and Jones, the constitutional issue in the instant case is clarified. Petitioner need not-- and does not-- ask this Court to begin the difficult task of establishing constitutional standards for deciding what evidence is too gruesome and what evidence is not. When state courts find that inflammatory evidence has been erroneously admitted, state courts are obligated to recognize and remedy not only prejudice

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[12]The Court also found that the trial prosecutor in the Jones and Thompson cases, who appeared personally before the Court of Criminal Appeals to argue Jones, engaged in various forms of serious and prejudicial prosecutorial misconduct. Jones, 738 P.2d at 528-531. "[A] prosecutor is strictly prohibited from using arguments calculated to inflame the passions and prejudices of the jury." Id. at 529.

to guilt-innocence deliberations, but also the prejudice to an accused's federal rights to a fair and reliable death sentencing procedure. Thus, the mistakes of the trial court may have related to state evidentiary problems initially, but they proved to be fundamental and constitutional in their effect in this case.

Oklahoma insists that the erroneous introduction of the photographs is harmless, because "evidence in this case was strong." Brief of Respondent Oklahoma at 94 (quoting Thompson v. State, 724 P.2d 780, 783 (Okla. Crim. App. 1986).

Unlike the argument of Respondent's Brief before this Court, the Court of Criminal Appeals was focusing on whether the photographs affected deliberations over guilt and innocence. Respondent's Brief now asserts that the inflammatory photos did not prejudice the jury's determination that the murder was "especially heinous, atrocious, or cruel"-- although the Oklahoma Court of Criminal Appeals did not consider this point.

In other words, Oklahoma offers a new analysis that was not offered by the Court of Appeals: Because there is substantial evidence of serious physical abuse, the existence of a statutory aggravating circumstance is clear and the boy could be sentenced to death.

Respondent's analysis misses a step. Even assuming that the jury would have found an aggravating circumstance without the

photographs,[13] the jury is also required by Oklahoma's death penalty statutes to weigh the aggravating circumstances against the mitigating circumstances. 21 Okla.Stat. §§701.10, 701.11. Cartwright v. Maynard, 822 F.2d 1477, 1480 (10th Cir. 1987) (in Oklahoma, "the sentencer must balance all... statutory aggravating circumstances with all... mitigating circumstances.")

Oklahoma's analysis fails to come to grips with the fact that the inflammatory evidence could-- and probably did-- affect

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[13]Even this assumption is mistaken.

The boy's eligibility for a death sentence is supported by only one aggravating circumstance-- that the murder was "especially heinous, atrocious or cruel." The jury's reactions to the crime, not to the boy, are the only articulated basis of the sentence.

The introduction of these inflammatory photographs calculated to inflame the jury, Thompson v. State, 724 P.2d at 782, along with the prosecutor's repeated, improper use of those photographs, injected powerfully emotional but legally irrelevant considerations into the jury's deliberations over the character of the killing. By riveting the jury's attention on the effects of the crime-- the decomposing remains-- the prosecutor distracted the jury from its real function of deciding whether the manner of this particular crime was "especially heinous, atrocious or cruel." The jury's physical and emotional revulsion at the spectacle of decomposing remains may have led the jury to apply the statutory standard improperly. Cf. Godfrey v. Georgia, 446 U.S. 420 (1980) (jury's deliberations must be channeled by clear and objective standards); Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987) (Oklahoma's use of "especially heinous, atrocious or cruel" aggravating standard is unconstitutionally overbroad, because objective standards to guide jury did not exist).

In short, Respondent's theories notwithstanding, if the photographs had not been misused, the jury might have decided that the killing was not so "especially heinous, atrocious or cruel" as to establish this aggravating circumstance beyond reasonable doubt. Even if a finding of this aggravating circumstance was theoretically possible, it was not logically inevitable or legally mandatory-- in light of all circumstances.

the jury's weighting of the single aggravating circumstance and all mitigating circumstances. The prosecutor deliberately used these inflammatory photographs to alter the jury's "balancing" of the aggravating and mitigating factors. Despite defense counsel's objections, the trial court allowed the prosecutor's inflammatory tactics, except for a mild warning not to wave the photographs in front of the jury. Under these circumstances, the emotional impact of the photographs on the jury's "balancing" and on its ultimate decision must be presumed.[14]

This Court cannot affirm the death sentence in this case without turning its back on established principle that "the sentence imposed... should reflect a reasoned, moral response to the defendant's background, character and crime rather than mere sympathy or emotion." California v. Brown, 107 S.Ct. at 841

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[14]Respondent tries to minimize the impact of the photographs on the sentencing process by citing the jury's refusal to find that the boy would probably commit violent criminal acts again. Respondent claims that this aspect of the jury's verdict shows that it was not acting "irresponsibly." Brief of Respondent Oklahoma at 95.

The prosecutor introduced the photographs because he wanted the jurors to confront the spectacle of decomposing remains. The prosecutor wanted the jury to be revolted at the sight of the photographs. And he wanted that revulsion to drive the jury toward one, and perhaps two aggravating circumstances and a death sentence. That he was only partially successful-- the jury cited only one aggravating circumstance and returned a death sentence--does not negate the presence of unconstitutional emotion and prejudice.

Indeed, the split verdict on the prosecution's bill of particulars suggests that the inflammatory photographs had great impact when the jury placed such overriding significance on the presence of the single aggravating circumstance in its final decision to impose a sentence of death.

(O'Connor, J., concurring). See also, e.g., Sumner v. Shuman, 107 S.Ct. 2723 n. 5; Gardner v. Florida, 430 U.S. 349, 358 (1977) (Any death sentence must "be, and appear to be, based on reason rather than caprice or emotion."); Booth v. Maryland, ___ U.S. ___, 107 S.Ct. 2529, 2536 (1987) (same); Zant v. Stephens, 462 U.S. at 885 (same). The photographs-- and the prosecutors' use of the photographs-- posed a clearer, more serious danger to the fairness and reliability of the sentencing process than the victim impact statements which the Court found to be unconstitutionally admitted for jury consideration in Booth v. Maryland. Oklahoma's attempt to put a boy to death for a crime committed while he was still a child of fifteen years makes the following principles all the more pertinent:

> [A] jury must make an "individualized determination" of whether the defendant in question should be executed, based on "the character of the individual and the circumstances of the crime."... [E]vidence [considered during sentencing must have] some bearing on the defendant's "personal responsibility and moral guilt." To do otherwise would create the risk that a death sentence will be based on considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process."

107 S.Ct. at 2533.

Moreover, these victim impact photographs were more serious violations of the accused's rights to a fair sentencing proceeding than Maryland's victim impact statements in Booth for reasons suggested by Justice White and Justice Scalia, dissenting. Justice White emphasized that Maryland's legislature made a specific judgment "the jury should have the

testimony of the victim's family in order to assist it in weighing the degree of harm that the defendant has caused and the corresponding degree of punishment that should be inflicted." This legislative decision, Justice White argued, "was entitled to particular deference." 107 S.Ct. at 2539. In this case, by contrast, Oklahoma's legislative and judicial judgments clearly indicate that the jury should not have had the inflammatory photographs of decomposing remains before them. Respondent cannot argue that this Court should defer to Oklahoma's judgments about sentencing process, because Oklahoma's procedural and evidence law was violated, as held by the Court of Criminal Appeals.

Moreover, Respondent Oklahoma does not and cannot claim that jury examination of these photographs was pertinent to the jury's duty to assess the boy's "personal responsibility." 107 S.Ct. 2542 (Scalia, J., dissenting). The emotional and physical reaction to viewing decomposing remains cannot be reasonably compared to Maryland's deliberate effort "to lay before the sentencing authority the full reality of human suffering" caused by a murder. Id.

The Oklahoma Court of Criminal Appeals has already found that the photographs "added virtually nothing to the State's submission of proof," Jones, supra, 738 P.2d at 528, and that "[a]dmitting them into evidence served no purpose other than to inflame the jury." Thompson v. State, 724 P.2d at 782. Thus, it is hard to imagine how Oklahoma can now evade the lessons of

Booth v. Maryland. By deliberately riveting the jury's attention on a decomposing body, the prosecutor-- aided by the decisions of the trial court-- created an "intolerable danger," Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633, 2641 (1985), that the jury would be "distract[ed] from its constitutionally required task-- determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." Booth, 107 S.Ct. at 2535.

Conclusion

Petitioner respectfully requests that this Court reverse the judgment of the Oklahoma Court of Criminal Appeals insofar as it affirmed the death sentence in this case, vacate the death sentence and grant such other relief as it deems appropriate.

Respectfully submitted,

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Appendix A

States Establishing A Minimum Age For Death Sentences By Express Statutes

Age 18:	Age 17:	Age 16:
California	Georgia	Kentucky (1986)[2]
Colorado (1985)	New Hampshire	Nevada
Connecticut	North Carolina (1987)[1]	
Illinois	Texas	
Maryland (1987)		
Nebraska (1982)		
New Jersey (1986)		
New Mexico		
Ohio (1981)		
Oregon (1985)		
Tennessee (1984)		

Dates of statutory enactment noted for all states establishing minimum limits since 1981.

Statute citations were compiled in Appendix B of the Brief of Petitioner previously filed in this case. The following notes correct and update Appendix B of the Brief of Petitioner:

[1]North Carolina amended its statutes to establish a minimum age for the death penalty, except for prisoners who kill after a prior conviction for murder. N.C. Gen. Stat. §14-17 (House Bill 541, July 29, 1987).

[2]Ky. Rev. Stat. Ann. §640.040 (1986).

Appendix B

States With An Implied Minimum Age For Death Sentences Based On An Express Minimum Age For Adult Court Jurisdiction

Age 16:	Age 15:	Age 14:
Indiana (1987)[1]	Louisiana Virginia	Alabama Arkansas Idaho Missouri Utah

Age 13:	Age 12:
Mississippi	Montana

Statute citations were compiled in Appendix B of the Brief of Petitioner previously filed in this case. The following notes correct and update Appendix B of the Brief of Petitioner:

[1]Ind. Code Ann. §31-6-2-4 (H.B. 1022 1987) (minimum age sixteen for general criminal court jurisdiction, but legislative debate centered on the proper minimum age for imposing death sentences).

NOTE: Since the death penalty cannot be imposed by juvenile courts, a statute with an express minimum age for adult court jurisdiction has the effect of setting a minimum chronological age for capital punishment. It is clear from the legislative history of many of these statutes that the effect on the death penalty was not explicitly considered when these statutes were enacted. V. Streib, Death Penalty for Juveniles 43-45 (1987). As noted, Indiana is an exception to this generalization.

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No. 86-6169

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

WILLIAM WAYNE THOMPSON,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE [1]

The National Legal Aid and Defender Association (NLADA) is a non-profit organization with a membership of approximately 4,700 attorneys and organizations. NLADA's primary purpose is to assist in providing effective legal services to persons unable to retain counsel in criminal and civil proceedings.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a nation-wide

[1] *Amici curiae* have obtained the written consent of the parties to file this brief, as indicated by the consent letters previously filed with the Court.

membership of over 4,000 lawyers. It is concerned with the protection of individual rights and the improvement of criminal law practice and procedures.

The American Jewish Committee (AJC) is an organization of some 50,000 members which was founded in 1906, primarily to protect the civil and religious rights of Jews. AJC, however, has also been deeply committed to assuring liberty and justice for all Americans.

SUMMARY OF ARGUMENT

Amici begin with the assumption—accepted by the State of Oklahoma in *Eddings v. Oklahoma*, 455 U.S. 104 (1982)—that there is *some* age below which execution becomes cruel and unusual punishment. This brief addresses the question invited by such an assumption: At what age does our culture set the line? *Amici*'s answer is age 18. Throughout our legal system, we recognize age 18 as the dividing line between adult responsibilities and childhood. That is the only principled line here as well.

In most states and for most purposes, minority status —defined as lower than age 18—confers a host of legal disabilities. Minors are treated differently because minors *are* different: The diverse legal disabilities are bottomed on the common sense and empirically supportable notion that minors lack maturity, judgment, impulse control and experience. Finally, exemption of minors from capital punishment will not detract from the penological justifications for the death penalty. Exclusion of minors from the death penalty would not abate the deterrent force of the penalty for other minors, since adolescents are less likely to commit the sort of coldly calculated crimes that the death penalty may be expected to deter. Exemption of minors from execution would not dilute deterrence for adults, because adults would most likely not identify with condemned minors. Juvenile executions also are so rare that preclusion of such executions can have little impact on the deterrence of the population at large. Jury be-

havior demonstrates that execution of minors would not materially advance the interest in retribution: Juries, the representatives of the community whose outrage is being expressed by death sentences, seldom vote to condemn minors.

ARGUMENT

THE EXECUTION OF A YOUTH WHO WAS UNDER THE AGE OF EIGHTEEN AT THE TIME OF THE OFFENSE WOULD VIOLATE EVOLVING STANDARDS OF DECENCY

The cruel and unusual punishments clause of the eighth amendment, made binding upon the states through the fourteenth amendment, prohibits punishments that violate "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958), as those standards are revealed by history and tradition, legislative enactments, and actual jury verdicts. *Tison v. Arizona*, 55 U.S.L.W. 4496, 4499 (U.S. April 21, 1987); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977). The execution of a youth for an offense committed when he was under age 18 violates contemporary norms and is therefore unconstitutional.

When it last argued to the Court that minors may be put to death, the State of Oklahoma conceded that "it would be cruel and unusual punishment to impose the death penalty on an individual who was ten years old .... [T]hat by itself would be enough to convince anybody, including this Court, that a ten-year-old person under no circumstances should receive the death penalty." Transcript of Oral Argument (November 2, 1981) at 28, *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The age of ten was not hypothetical. The youngest children known to have been executed in the United States were two ten-year-olds: A Black child, whose name has been lost to history and who was hanged in Louisiana in 1855, and

James Arcene, a Cherokee Indian child hanged in Arkansas in 1885.[2]

Today, we intuitively recoil at the thought of putting a ten-year-old child to death. This reaction reflects a century-old evolution both in the law and in the culture within which the law evolves, an evolution towards recognition of a special concern for young people. The vexing question then becomes: At what age does this special concern for young people give way to an insistence that they pay the ultimate price for their acts?

This question was presented in *Eddings v. Oklahoma*, 455 U.S. 105 (1982), but the Court did not reach the constitutionality of inflicting the death penalty on juveniles. *Id.* at 110 n.5. Instead, the Court remanded Eddings' death sentence to the Oklahoma courts with instructions to "consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances." *Id.* at 117. *Eddings* held that "youth must be considered a relevant mitigating factor." *Id.* at 115. *Amici* submit that the individualized consideration of the defendant's age required by *Eddings* is insufficient to prevent the imposition of death sentences which are cruel and unusual under contemporary standards.[3] The facts

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[2] Streib, *Death Penalty for Children: The American Experience With Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 Okla. L. Rev. 613, 619-20 (1983). Estimates of the youngest person put to death in this century vary. One commentator opined that "since 1900, the youngest has been 13-year-old Fortune Ferguson, Jr., electrocuted at the Florida State Prison on April 27, 1927." *Id.* at 620. Another writer argued that George Stinney, executed at age 14 by South Carolina in 1944, was the youngest person put to death in this century. Bruck, *Executing Teen Killers Again: The 14-Year-Old Who, in Many Ways, Was Too Small for the Chair*, Washington Post, Sept. 15, 1985, at D1.

[3] In *Eddings*, the death sentence was reinstated by the trial judge following remand from this Court. *Eddings v. State*, 688 P.2d 342, 343 (Okla. Crim. App. 1984), *cert. denied*, 470 U.S. 1051 (1985). The Oklahoma Court of Criminal Appeals modified the sentence to life imprisonment. *Id.*

of the case before the Court starkly illustrate the need to draw a line between childhood and adulthood that reflects our shared notions of responsibility and culpability.

Amici will demonstrate that the eighth and fourteenth amendments require that a person be eighteen years or older at the time of the offense to be subject to the death penalty.[4] Drawing the line at any given age should be "informed by objective factors to the maximum possible extent." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). In this case the line is easier to identify than most: Throughout our legal system, we recognize age eighteen as the dividing line between adult responsibility and childhood.

A. In Most States and for Most Purposes, Age Eighteen Marks the Boundary Between Childhood and Adult Responsibilities

The "law has generally regarded minors as having a lesser capability for making important decisions," *Carey v. Population Services International*, 431 U.S. 678, 693 n.15 (1977), and "recognizes a host of distinctions between the rights and duties of children and those of adults." *New Jersey v. T.L.O.*, 469 U.S. 325, 350 n.2 (1985) (Powell, J., concurring). Because of these distinctions, the Court has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *New York v. Ferber*, 458 U.S. 747, 757 (1982). The "State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel

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[4] The relevant age should, of course, be age at the time of the offense rather than age at the time of trial. *See, e.g.*, Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards, Standards Relating to Transfer Between Courts, Commentary to Standard 1.1, at 15 (1980).

where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent." *H. L. v. Matheson*, 450 U.S. 398, 421-22 (1981) (Stevens, J., concurring) (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 102 (1976) (Stevens, J., dissenting)); *see also Danforth*, 428 U.S. at 95 & n.2 (White, J., dissenting). The "experience of mankind, as well as the long history of our law, recogniz[es] that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office." *Goss v. Lopez*, 419 U.S. 565, 590-91 (1975) (Powell, J., dissenting) (emphasis in original).

In Oklahoma, a minor—defined as a person under age 18 unless otherwise provided by statute—[5] cannot vote;[6] cannot sit on a jury;[7] cannot marry without permission of a parent or guardian;[8] cannot possess alcohol;[9] cannot purchase cigarettes;[10] cannot patronize bingo par-

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[5] Okla. Stat. Ann. tit. 15, § 13 (West 1983). Prior to 1972, Oklahoma defined the commencement of civil majority as age 18 for females and age 21 for males; females were held criminally responsible as adults at age 18 and males at age 16. *Craig v. Boren*, 429 U.S. 190, 197 (1976). In 1972, age 18 was established as the age of majority for males and females for civil and criminal purposes. *Id.*

[6] Okla. Const. art. 3, § 1.

[7] Okla. Stat. Ann. tit. 38, § 28 (West Supp. 1987).

[8] Okla. Stat. Ann. tit. 43, § 3 (West 1979) (age 18).

[9] Okla. Stat. Ann. tit. 21, § 1215 (West 1983) (age 21).

[10] Okla. Stat. Ann. tit. 21, § 1241 (West Supp. 1987) (age 18).

lors [11] or pool halls; [12] cannot pawn property; [13] cannot consent to services by health professionals for most medical care, unless he is married or otherwise emancipated; [14] cannot donate blood without parental permission; [15] may disaffirm any contract, except for "necessaries"; [16] and may not operate or work at a shooting gallery.[17] The Oklahoma delinquency statutes define "child" as "any person under the age of eighteen." [18]

Oklahoma is not unique; minority status universally confers a host of disabilities.[19] Eighteen years is the line selected by Congress and the states in their enactment and ratification of the twenty-sixth amendment to the Constitution, governing voting age. Following extensive

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[11] Okla. Stat. Ann. tit. 21, § 995.13 (West 1983) (age 18).

[12] Okla. Stat. Ann. tit. 21, § 1103 (West 1983) (age 18).

[13] Okla. Stat. Ann. tit. 59, § 1511 (West Supp. 1987) (age 18).

[14] Okla. Stat. Ann. tit. 62, § 2602 (West 1984) (age 18 unless in Armed Services).

[15] Okla. Stat. Ann. tit. 63, § 2152 (West 1983) (age 18).

[16] Okla. Stat. Ann. tit. 15, §§ 19, 20 (West 1983) (age 18).

[17] Okla. Stat. Ann. tit. 63, § 703 (West 1984) (age 21).

[18] Okla. Stat. Ann. tit. 10, § 1101 (West 1987).

[19] *See generally* Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 Ind. L.J. 757, 775-80 (1986); United States Department of Health and Human Services, The Legal Status of Adolescents 1980 (1981). These legal disabilities are not without exceptions. The "emancipation" of a minor—by, for example, marriage or enlistment in the armed services—may free him from the legal disabilities prior to the actual date of his majority. *See, e.g.*, Cal. Civ. Code Ann. § 62 (West 1954 & Supp. 1986); Utah Code Ann. § 15-2-1 (Supp. 1986). However, parental consent is required for minors to marry, *see* Appendix C, or to enlist in the military. 50 U.S.C. § 454 app. (c) (1981). The "mature minor" notion also permits a child to consent to medical treatment if he is capable of appreciating its nature and consequences. *See, e.g.*, Ark. Stat. Ann. § 82-363(g) (1976 & Supp. 1986). Few jurisdictions recognize this concept, however.

hearings,[20] both state and federal legislatures agreed to give constitutional significance to age 18 as the time when young people should first be permitted to participate in the most basic civic responsibility of adults in our democracy. Eighteen also is the minimum age at which a citizen may be drafted into the armed services as well as the minimum age at which a person may enlist without parental consent. 50 U.S.C. app. § 454(a), (c) (1981).

In most states and for most purposes, a "minor" means one below age 18:

- Forty-four jurisdictions set age 18 as the age of majority; two jurisdictions set the age at 21, three at 19, and two do not set a uniform age of majority. *See* Appendix A.
- Forty-three jurisdictions require jurors to be 18 years or older, while three require jurors to be at least 19 years and five require jurors to be at least 21. *See* Appendix B.
- In fifty jurisdictions, both parties must be at least 18 years old to marry without parental consent. In one jurisdiction, both parties must be at least 21 years old. *See* Appendix C.
- Thirty-seven jurisdictions establish 18 (unless the minor is emancipated) as the age of consent for all forms of non-emergency medical treatment; one jurisdiction puts the age at 17, one jurisdiction puts the age at 16, one sets the age at 15, one jurisdiction puts the age at 14, two permit treatment if the minor is able to understand the decision, and eight jurisdictions have no legislation in this area. *See* Appendix D.

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[20] *See Lowering the Voting Age to 18: Hearings Before the Subcomm. on Constitutional Amendments of the Sen. Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970); S. Rep. No. 92-26, 92d Cong., 1st Sess. (1971); H.R. Rep. No. 92-37, 92d Cong., 1st Sess. (1971).

- Thirty-three jurisdictions require a person to be 18 to receive a driver's license without parental consent; four jurisdictions set the age at 17, while fourteen set it at 16. *See* Appendix E.
- In forty jurisdictions, a person must be at least 18 to purchase pornographic materials; six jurisdictions set the age at 17, two jurisdictions set it at 16, one sets it at 19, one has simply outlawed obscenity by statute, and one jurisdiction has no legislation in this area. *See* Appendix F.
- Of the thirty-nine jurisdictions which permit gambling, thirty-one set the minimum age at 18, four set it at 21, one sets it at 19, one at 17, and two at 16. *See* Appendix G.
- Of the twenty-three jurisdictions which set a minimum age for admission to pool halls, nineteen jurisdictions put the age at 18, two set the age at 16, while one jurisdiction puts the age at 21, and one puts it at 19. *See* Appendix H.
- Of the thirty-one jurisdictions which set a minimum age for the right to pawn property, or to sell to junk or precious metals dealers, twenty-eight set the age at 18, while three set the age at 16. *See* Appendix I.
- In twenty-five jurisdictions, a person must be at least 18 years old to work in a hazardous occupation. One jurisdiction puts the age at 17, twenty-two jurisdictions set the age at 16, and three put it at 14. *See* Appendix J.
- Many localities have juvenile curfew ordinances.[21] The "most common upper age limit"

[21] A 1957 study revealed that more than 50% of all cities with populations of greater than 100,000 had juvenile curfew ordinances on the books. Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, 107 U. Pa. L. Rev. 66, 66-68 & n.5 (1958). A more recent commentator observed that "thousands of cities" have had such ordinances for "a long time." F. Zimring, *The Changing Legal World of Adolescence* 13 (1982). The District of Columbia is the most recent jurisdiction to consider such an ordi-

is 18. Comment, *Juvenile Curfew Ordinances and the Constitution*, 76 Mich. L. Rev. 109, 140 (1977).

Contemporary attitudes toward minors are reflected further in the development of juvenile justice systems. "Juvenile courts exist because Americans admit to a fundamental difference between children and adults." Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards, Standards Relating to Transfer Between Courts 1 (1980). Every state has a comprehensive juvenile court system, *Kent v. United States*, 383 U.S. 541, 554 n.19 (1966), the principal purpose of which is to rehabilitate [22] and the premise of which is that minors are not fully responsible for their offenses and therefore should be treated more benignly than their adult counterparts. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 551-52 (1971) (White, J., concurring); Institute of Judicial Administration/American Bar Association, Juvenile Standards, Standards Relating to Transfer

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nance; the proposed D.C. law would set the age at 18. LaFraniere, *Minors' Entertainment Curfew Sought in D.C.*, Washington Post, May 6, 1987, at C1.

[22] To be sure, the "fond and idealistic hopes of the juvenile court proponents and early reformers of three generations ago have not been realized." *McKeiver v. Pennsylvania*, 403 U.S. 528, 543-44 (1971); *see also In re Winship*, 397 U.S. 358 (1970). But the disappointments have turned more on "the availability of resources, on the interest and commitment of the public, on the willingness to learn, and on understanding as to cause and effect," *McKeiver*, 403 U.S. at 547, rather than on fundamental flaws in the juvenile court philosophy. The Court's cases, such as *McKeiver* and *Winship*, confirm that virtually none of "[t]he serious critics of the juvenile court experiment . . . question the initial decision that adolescents ought to be handled in a legal process separate from adults. The battle is over the treatment of adolescents within the separate process." Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 Wis. L. Rev. 7, 8; *see also* President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 9 (1967) (quoted in *McKeiver v. Pennsylvania*, 403 U.S. 528, 546 n.6 (1971)).

Between Courts 1 (1980); *The Juvenile Court and Serious Offenders*, 35 Juv. & Family Ct. J. (Preamble) (Summer 1984). In particular, the legislation establishing juvenile court jurisdiction supports the proposition that age 18 is the relevant cut-off point between childhood and adult responsibilities. Thirty-seven states and the District of Columbia designate 18 years as the appropriate maximum age for juvenile court jurisdiction; one state sets the age at 19, eight set the age at 17, and four set the age at 16. S. Davis, *Rights of Juveniles: The Juvenile Justice System*, App. B (1986); *accord* National Institute for Juvenile Justice and Delinquency, U.S. Department of Justice, Major Issues in Juvenile Justice Information and Training, Youth in Adult Courts: Between Two Worlds 44, 86 n.2 (1982). Most model standards reflect the judgment of the vast majority of jurisdictions which set age 18 as the boundary of juvenile courts.[23] The Institute of Judicial Administration and the American Bar Association, for example, proposed that the "eighteenth birthday should define an adult for the purposes of court jurisdiction" because the "eighteenth birth-

[23] United States Department of Health, Education and Welfare, Welfare Administration, Children's Bureau, Standards For Juvenile and Family Courts 36 (1966) ("Successful experience in these courts over many years has established the soundness of this age level [18 years] of Jurisdiction"); National Conference of Commissioners on Uniform State Laws, Uniform Juvenile Court Act of 1968, Section 2.1(i) (1979) (18 years); United States Department of Justice, National Institute for Juvenile Justice and Delinquency Prevention, Working Papers of the National Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention, Jurisdiction—Delinquency, Vol. IV, at 10-11 (1977) (18 years); Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards, Standards Relating to Transfer Between Courts, Standard § 1.1A and Commentary (1980) (18 years); Institute of Judicial Administration/American Bar Association, Juvenile Justice Standards, Standards Relating to Juvenile Delinquency and Sanctions, Standard 2.1 and Commentary (1980) (18 years); Twentieth Century Fund Task Force on Sentencing Policy toward Young Offenders, *Confronting Youth Crime* 9 (1978) (18 years).

day signals the achievement of majority for many legal purposes. The twenty-sixth amendment to the United States Constitution establishes a constitutional right to vote in federal elections at that age. This near consensus among the states and the federal government argues compellingly that juvenile court jurisdiction should end at eighteen." Standards Relating to Transfer Between Courts, *supra*, Commentary to Standard 1.1A.[24]

The limitation of eligibility for the death penalty to those eighteen years or older at the time of the offense is supported by the American Bar Association, the American Law Institute's Model Penal Code and the National Commission on Reform of Federal Criminal Laws. The ABA passed a resolution in 1983 opposing "the imposi-

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[24] We recognize that while every state and the District of Columbia has a juvenile justice system, most jurisdictions also have mechanisms permitting transfer of otherwise juvenile cases into the adult criminal justice system. At least three states—New York, Nebraska and Arkansas—do not provide for waiver of jurisdiction. S. Davis, *supra* at 4-1. Moreover, the broad consensus of the 38 jurisdictions that recognize age 18 as the general limit to juvenile court jurisdiction demonstrates that our society recognizes age 18 as a crucial watershed in an individual's development. Whatever courts may be chosen to *try* a juvenile under 18 charged with murder by operation of transfer provisions, our evolving standards of decency forbid execution of such an offender.

This conclusion is consistent with the rationale underlying transfer provisions: namely, there are certain juveniles who will require punishment or treatment beyond the age of eighteen, the jurisdictional limitations for most juvenile courts. By permitting transfer of these juveniles to the adult system, these courts gain jurisdiction to ensure that the penal system will have sufficient time both to exact the necessary punishment and to attempt rehabilitation. Furthermore, the decision to transfer a juvenile into the adult court system does not turn on questions of individualization and criminal responsibility, both constitutionally indispensable in deciding whether to impose the death penalty. Transfer and capital sentencing simply ask different questions. Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. Crim. L. & Criminology 1471, 1499-1501 (1983).

tion of capital punishment upon any person for any offense committed while under the age of eighteen." *See* American Bar Association Report No. 117A, approved August 1983; *see also* Streib, *The Eighth Amendment and Capital Punishment of Juveniles*, 34 Clev. St. L. Rev. 363, 388 (1987). This resolution is especially significant because it is the first time in its history that the ABA has taken a formal position on any aspect of capital punishment. The American Law Institute's Model Penal Code has, since 1962, contained a recommendation that the death penalty not be imposed on offenders below age eighteen. *See* American Law Institute, Model Penal Code § 210.6(1)(d) (Proposed Official Draft 1962). This view was reaffirmed by revisers of the Code in 1980, despite suggestions that the age be lowered or that youth merely be considered as a mitigating circumstance. *See* American Law Institute, Model Penal Code § 210.6, Comment at 133 (Official Draft and Revised Comments 1980). The National Commission on Reform of Federal Criminal Laws also took the position that 18 ought to be the minimum age. *See* National Commission on Reform of Federal Criminal Laws, Final Report of the New Federal Code § 3603 (1971).

The domestic legislative evidence that age 18 is the appropriate boundary between juvenile and adult responsibility coincides with international law. Although incomplete, "[t]he available evidence of contemporary state practice in the application of the death penalty seems to establish a remarkably consistent adherence to the prohibition on execution of juvenile offenders in all regions and political systems." Hartman, *"Unusual Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. Cin. L. Rev. 655, 666 (1983). Of the 164 countries for which data were available, 122 imposed the death penalty. Significantly, of these 122 countries, 45 had statutory provisions recognizing youth as exempt from the death pen-

alty: 29 nations set the *minimum* age at 18, one sets the age at 21, three at 20, five at 16, and five prohibited the execution of "minors" while two others prohibited the execution of "young people." *Id.* at 666-67 n.44. The significance of these figures is not so much that nations set a minimum age, but that two-thirds of those which did set the age at 18. Equally significant, of 81 nations which were reported to have actually executed persons in the period between 1973 and 1982, only two states officially reported executions of juveniles. *Id.* Out of the thousands of executions recorded by Amnesty International throughout the world between January 1980 and May 1986, only eight in four countries were reported to have been of persons who were under age 18 at the time of the crime; three of these eight executions occurred in the United States. *See* Amnesty International, *United States of America: The Death Penalty* 74 (1987).[25] An earlier study in 1965 found that out of 95 countries reporting, 61 set age 18 as the *minimum* age for capital punishment. *See* Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. Crim. L., Criminology, & P.S. 397, 398-404 (1965). Reports of the Secretary General of the United Nations confirm that "the great majority of Member States report never condemning to death persons under 18 years of age." *See* United Nations, Economic and Social Council, Report of the Secretary General, *Capital Punishment* 17 (1973). It is telling that the 36 condemned juveniles on America's death row could not have been sentenced to death if they had been convicted in the Soviet Union, China, Iran, Iraq, or South Africa.

The policy of the United States has also reflected these international norms. In 1977, the United States became

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[25] Even if executions of juveniles abroad are underreported, these numbers remain compelling: A nation's unwillingness to admit execution of minors is itself evidence of a norm against that practice.

a signatory to two international human rights treaties that prohibit execution for crimes committed before age 18. The International Covenant on Civil and Political Rights, which has been ratified by 81 nations and signed by another nine nations, provides that death "shall not be imposed for crimes committed by persons below eighteen years." *See* Multilateral Treaties Deposited With the Secretary General of the U.N., at 124, U.N. Doc. ST/LEG/Ser.E/3 (1985). Similarly, the American Convention on Human Rights, ratified by 19 American nations and signed by an additional three countries, provides that capital punishment "shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age." *See* Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/11.65, Doc. 6, at 63 (July 1, 1985). President Carter signed both treaties in 1977. The Senate has not yet ratified either covenant. Based on the policies embedded in these treaties and other materials, the Inter-American Commission on Human Rights recently found an emerging—although not yet extant—norm of customary international law establishing 18 to be the minimum age for imposition of the death penalty. *See* Resolution N, Inter-American Commission on Human Rights, Organization of American States, OEA/Ser.L/V/11.69, Doc. 17, at 38 (March 27, 1987).

The laws and policies discussed in this section reflect an almost universal judgment that adolescents ought to be treated differently than adults. There generally are no exceptions to that judgment. Public officials do not consider requests by especially mature adolescents to allow them to vote, serve as jurors, or drink alcoholic beverages. As a society, we treat those under age 18 as categorically different from adults.[26] These lines reflect clear distinc-

[26] If there is any other arguable contender to age 18, it must be age 21. In 1984 Congress overwhelmingly passed the National Minimum Drinking Age Act withholding federal highway funds

tions between children and adults, distinctions that require this Court to draw the line at age 18 for the imposition of the death penalty.

B. The Reasons for the Boundary Line: Adolescents Lack the Maturity, Experience, Moral Judgment and Sophistication of Adults

The various legal disabilities discussed above are bottomed on the common sense and empirically supportable assumption that minors lack the maturity, experience, sophistication and judgment necessary to make important decisions. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. Rev. 605, 644-50. That assumption is what these legal disabilities are all about: "Children, by definition, are not

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from states that failed to raise their drinking age to 21. The House of Representatives agreed to the measure by unanimous consent. *See* 130 Cong. Rec. H7220-H7223 (daily ed. June 27, 1984); 130 Cong. Rec. H5395-H5407 (daily ed. June 7, 1984). The focus of the Senate debate was whether teenagers should be singled out for special treatment. 129 Cong. Rec. S8243 (daily ed. June 26, 1984) (remarks of Sen. Chafee); *id.* at S8246 (remarks of Sen. Byrd); *id.* at S8231 (remarks of Sen. Exon); *id.* at S8209 (remarks of Sen. Lautenberg); *id.* at S8212 (remarks of Sen. Pell); *id.* at S8214 (remarks of Sen. Specter); *id.* at S8237-38 (remarks of Sen. Durenberger); *id.* at S8210; 20 Weekly Comp., Pres. Doc. 1036 (July 17, 1984).

We recognize that the constitutionality of this legislation is a matter presently under plenary consideration by the Court in *South Dakota v. Dole*, 107 S. Ct. 869 (1987) (order granting certiorari). The outcome of *Dole* will not affect our point here: The ultimate validity or invalidity of the statute does not minimize the importance of the congressional recognition that teenagers are particularly vulnerable to exercising poor judgment and need special protections. Further, no party to the *Dole* litigation seems to dispute that teenagers need special protections. Brief of Petitioner at 19, 62, 68; Brief of *Amici Curiae*, National Beer Wholesalers' Association and 46 State Beer, Wine and Distilled Spirits Associations in Support of Petitioner, at 17, *South Dakota v. Dole*, No. 86-260.

assumed to have the capacity to take care of themselves." *Schall v. Martin*, 467 U.S. 253, 265 (1984). For example, in *Oregon v. Mitchell*, the states sought to "justify exclusion of 18- to 21-year-olds from the voting rolls solely on the basis of the states' interests in promoting intelligent and responsible exercise of the franchise." 400 U.S. 112, 243 (1970) (Brennan, White & Marshall, JJ., dissenting).

The Court has long "assume[d] that juvenile offenders constitutionally may be treated differently from adults," *Bellotti v. Baird*, 443 U.S. 622, 635 (1979), and has long recognized that "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." *Eddings*, 455 U.S. at 116 n.12 (quoting *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring)). The Court has often expressed the rationale underlying this distinction, explaining that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti*, 443 U.S. at 635; *see also H. L. v. Matheson*, 450 U.S. 398, 409-11 (1981).

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.

Eddings, 455 U.S. at 115-16 (footnote omitted); *see also Skipper v. South Carolina*, 106 S. Ct. 1669, 1675 (1986) (Powell, J., concurring); *New York v. Ferber*, 458 U.S. at 776 (Brennan & Marshall, JJ., concurring) (noting

"the particular vulnerability of children"); *Parham v. J.R.*, 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions"); *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) ("a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees") (footnote omitted).

> [A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.

Eddings, 455 U.S. at 116 n.11 (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 7 (1978)); *see also Skipper v. South Carolina*, 106 S. Ct. at 1675 (Powell, J., concurring); *Haley v. Ohio*, 332 U.S. 596, 599 (1948); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962).

"[A]s any parent knows, children at certain ages are inclined to test the outer boundaries of acceptable conduct . . . ." *T.L.O.*, 469 U.S. at 352 (Blackmun, J., concurring). The Court has recognized the "period of great instability which the crisis of adolescence produces." *Haley*, 332 U.S. at 599.

During the "crisis of adolescence" noted in *Haley*, minors are less mature in their ability to make sound judgments and are less able to control their conduct and to recognize the consequences of their acts. Adolescence

is a time[27] when young persons frequently are struggling to arrive at a definition of their own identity; adolescents are particularly likely to rebel against adult authority and to seek affirmation by their peers. E. Erickson, *Childhood and Society* 261-63 (2d ed. 1963). The teen years are "a period of experiment, risktaking and bravado. Some criminal activity is part of the patterns of almost all youth subcultures." Twentieth Century Fund Task Force, *supra*, at 3. The adolescent's intellectual capability to consider and to choose from the realm of possibilities in a comprehensive fashion emerges only in late adolescence and early adulthood. E. Peel, *The Nature of Adolescent Judgment* 153 (1971). Moral character is to a large degree a product of the maturation process. Kohlberg, *Development of Moral Character and Moral Ideology*, in *Review of Child Development Research* 383, 409 (M. Hoffman & L. Hoffman eds. 1964); Rest, Davison & Robbins, *Age Trends in Judging Moral Issues*, 49 Child Development 263 (1978). The ability to make moral judgments depends, at least in part, on broader factors of social experience. Most adolescents simply do not have the breadth and depth of experience which are essential to making sound judgments and to understanding the long-range consequences of their decisions.

Many adolescents possess a "profound conviction of their own omnipotence and immortality. Thus many adolescents may appear to be attempting suicide, but they do not really believe that death will occur." Miller, *Adolescent Suicide: Etiology and Treatment*, in *Adolescent Psychiatry* 327, 329 (S. Feinstein, J. Looney, A. Schwartzberg & A. Sorosky eds. 1981); *see also* Hostler, *The Develop-*

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[27] Adolescence lasts roughly from age 12 to age 19. Gordon, *The Tattered Cloak of Immortality*, in *Adolescence and Death* 12, 17-19 (C. Coor & J. McNeil eds. 1986).

ment of the Child's Concept of Death, in *The Child and Death* 19 (O. Sahler ed. 1978).[28]

For this reason, threatening a child with death does not have the same impact as threatening an adult with death. "[I]mmature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences . . . ." *Bellotti*, 443 U.S. at 640-41. Adolescents live for the moment, for "an intense present," with little thought of the future consequences of their actions. Kasterbaum, *Time and Death in Adolescence*, in *The Meaning of Death* 99, 104 (H. Feifel ed. 1959). The defiant attitudes and risk-taking behaviors of some adolescents are related to their "developmental state of defiance about danger and death." Fredlund, *Children and Death from the School Setting*, 47 J. School Health 533, 535 (1977). They typically have not learned to accept the finality of death. Hostler, *The Development of the Child's Concept of Death*, in *The Child and Death* (O. Sahler ed. 1978). Adolescents tend to view death as a remote possibility; old people die, not teenagers. "Risk-taking with body safety is common in the adolescent years, through sky diving, car racing, excessive use of drugs and alcoholic beverages." Gordon, *supra*, at 27. Such "chance games" are played by adolescents "out of their own sense of omnipotence." Miller, *supra*, at 329.

Further, most adolescents grow up. "For most adolescents, age alone is the cure of criminality." F. Zimring, *Background Paper*, in Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *supra*, at 37; J. Wilson & R. Herrnstein, *Crime and*

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[28] This may help explain a recent rash of teenage suicides that has focused national attention on the issue. *See, e.g.*, 2 *Illinois Suicides Similar to New Jersey Teen-Agers*, Washington Post, March 14, 1987, at A3. Suicide is the third leading cause of death among teenagers. Adler & Dolcini, *Psychological Issues and Abortion for Adolescents*, in *Adolescent Abortion* 84 (G. Melton ed. 1986).

Human Nature 144 (1985). Youth is a "time of intense and unfulfilled passions, leading to crimes for goods and pleasures that older people either crave less or can enjoy legally." *Id.* at 145. Simply stated, an adult is likely to have a lower propensity for crime than a youngster because the adult is older. "Age, like gender, resists explanation because it is so robust a variable. *None of the correlates of age, such as employment, peers, or family circumstances, explains crime as well as age itself.*" *Id.* (footnotes and reference omitted) (emphasis added).[29]

The legislative judgment, nearly universal among the states, that society should treat adolescents and adults differently, and the developmental differences upon which that judgment is based, compel the conclusion that adolescents should be spared from the death penalty, at least until they reach age 18.

C. The Reasons for Treating Children Differently From Adults Apply With Special Force Here: The Developmental Differences Between Adolescents and Adults Diminish the State's Interest in Inflicting the Death Penalty on Minors

The "Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Coker*, 433 U.S. at 597; *accord Enmund*, 458 U.S. at 797; *Gregg v. Georgia*, 428 U.S. 153, 182-83 (1976). This independent judgment is

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[29] Statistics suggest that as people move from the turbulence of adolescence to the calmer period of the early twenties, they commit fewer crimes, whether or not they were apprehended or participated in a rehabilitation program. *See* Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice, Assessing the Relationship of Adult Criminal Careers to Juvenile Careers: A Summary 4 (1982); *cf.* Federal Bureau of Investigation, U.S. Dept. of Justice, Crime in the United States: 1978, 194-96 (1979); Zimring, *American Youth Violence: Issues and Trends*, in *Crime and Justice: An Annual Review of Research* 67 (N. Morris & M. Tonry eds. 1979) (rates of many kinds of criminality peak in mid-adolescence).

informed by the twin penological justifications for the death penalty: general deterrence and retribution. *Tison v. Arizona*, 55 U.S.L.W. at 4499-500; *Skipper v. South Carolina*, 106 S. Ct. at 1675-76 (Powell, J., concurring); *Enmund*, 458 U.S. at 798-99; *Gregg*, 428 U.S. at 183-87. Preclusion of juvenile executions would undermine neither of these goals.

1. *General Deterrence*

The "death penalty has little deterrent force against defendants who have reduced capacity for considered choice." *Skipper*, 106 S. Ct. at 1675 (Powell, J., concurring). The death penalty may be expected to deter only those who engage in a "cold calculus that precedes the decision to act," those who "carefully contemplate[]" their crimes. *Gregg*, 428 U.S. at 186; *see also Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting); W. Bowers, *Legal Homicide* 272 (1984). "The socialization processes, which include the internalization of a society's moral norms and prohibitions, undoubtedly play a role in general deterrence." Gale, *Retribution, Punishment, and Death*, 18 U.C. Davis L. Rev. 973, 995 (1985) (footnote omitted).

Amici have demonstrated above that with adolescents the socialization process is as yet incomplete; for this reason, capital punishment will not likely deter other minors from committing crimes. Adolescents are less likely than adults to calculate rationally; this, indeed, is the premise underlying the states' guardianship and protection of minors. It is unlikely that cold, rational calculation is involved when juveniles commit crimes. *See* C. Bartollas, *Juvenile Delinquency* 102 (1985). Our culture assumes for countless other purposes that minors, prior to acting, do not engage in the sort of responsible risk-benefit analysis that lies at the core of the deterrence theory. And when adolescents do calculate, the fear of death will not be given its fair measure. Adolescents have not learned to accept death's finality.

Moreover, execution of minors will fail to deter the general population from committing crimes. Potential murderers are most likely to be deterred by the execution of one with whom the potential killer can identify; put another way, execution of a person who is particularly distinguishable from the general population will not serve to deter members of the general population. *Cf.* A. Goldstein, *The Insanity Defense* 13 (1967); Liebman & Shephard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 Geo. L.J. 757, 813-17 (1978). Nor will exclusion of minors from execution abate the deterrent force of the death penalty for adults. Finally, because juvenile executions are so rare, their preclusion would have little impact on the deterrence of the population at large. *See generally* Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. Crim. L. & Criminology 1471, 1510-13 (1983).

2. *Retribution*

In addition to deterrence, the Court has said that retribution—the expression of society's outrage at particularly offensive conduct—remains a legitimate penological goal of capital punishment. *Spaziano v. Florida*, 468 U.S. 447, 461-62 (1984); *Enmund*, 458 U.S. at 800-01; *Gregg*, 428 U.S. at 183. But such outrage is tempered when the defendant is an adolescent: *Juries*, the representatives of the community whose outrage is being expressed by death sentences, seldom vote to condemn teenagers.

The *actual practice* of sentencing minors to die, and of actually executing them, has declined to a remarkably low level. As of December, 1983, only thirty-eight (2.9%) of the 1,289 persons on death row were under age eighteen at the time of their crimes.[30] By July of 1986, the

[30] Streib, *supra*, 34 Clev. St. L. Rev. at 384. We assume that all of these cases involved jury sentences of death. Although four states exclude the jury from the capital sentencing process, *Spaziano*, 468

number had dropped from thirty-eight to thirty-two, while the population of death row had increased by 500. Streib, *supra*, 34 Clev. St. L. Rev. at 384. Thus, while the death row population grew by 42% (from 1,250 to 1,770), the juvenile death-row population decreased by 16%.

Even more strikingly, only seven new juveniles were added to the death row population from December 1983 to March 1986. Approximately 700 total death sentences were imposed during this period. *Id.* Accordingly, juveniles accounted for only 1% of the death sentences meted out during this two and one-half year period.

Review of intentional homicide data dramatically underscores the fact that juries impose capital sentences on juveniles at a significantly lower rate than on adults. Approximately 9.2% of intentional homicides from 1973 through 1983 were committed by persons under eighteen. *Id.*[31] In stark contrast to this 9.2% commission rate, only 2% to 3% of all capital sentences imposed over this period were imposed on juveniles. *Id.* at 387.

Most importantly, data compiled through March of 1987 establish that the juvenile capital-sentencing rate has leveled off at a dramatically low level. Over the last five years, those under age eighteen have been sentenced to death as follows: 1982—11; 1983—9; 1984—6; 1985—3; 1986—7. During this same period, the annual death-sentencing rate for adults has been approximately

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U.S. at 463-64 n.9, none of these states contributed to the present population of juvenile death row. The three states permitting judges to impose death notwithstanding a jury's recommendation of life imprisonment—Alabama, Florida and Indiana—account for seven juvenile death sentences. It is not known whether the juries in these cases recommended life or death.

[31] However, it is the 18 to 24 "age group—beyond the jurisdiction of almost all juvenile courts—that has the highest arrest rate for crimes of violence." President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 56 (1967).

300 per year.[32] Juvenile death sentences are so rare that they are cruel and unusual "in the same way that being struck by lightning is cruel and unusual." *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

Some courts, upholding the constitutionality of executing minors, have focused upon legislative enactments in concluding that such executions do not offend our society's evolving standards of decency.[33] However, statutes

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[32] Few death sentences translates into still fewer actual executions. A 20-year national moratorium on executing minors ended when Charles Rumbaugh was executed in 1985. Rumbaugh was 17 years old at the time of the crime. Rumbaugh, however, as an *adult* and after a full evidentiary hearing on his competency to waive further legal action to save his life, volunteered for execution. *Rumbaugh v. Procunier*, 753 F.2d 395 (5th Cir.), *cert. denied*, 473 U.S. 919 (1985). Early in 1986, Terry Roach became the first nonconsensual execution of a juvenile since 1964; Roach, however, did not allege in his first federal habeas corpus proceeding that execution of a juvenile *per se* violates the Constitution. *Roach v. Martin*, 757 F.2d 1463 (4th Cir.), *cert. denied*, 106 S. Ct. 185 (1985). Similarly, Jay Pinkerton, executed later in 1986, apparently raised the claim in a successor habeas petition. Thus, of the 70 people executed in the post-*Furman* era, only three were under the age of 18 at the time of their crime, and one of the three volunteered for execution. Further, Rumbaugh and Pinkerton—who were seventeen years old at the time of their offenses—were executed in Texas, where the maximum juvenile court age is 17. Tex. Penal Code Ann. § 8.07(d) (Vernon Supp. 1987).

[33] *See, e.g., Prejean v. Blackburn*, 743 F.2d 1091, 1098-99 (5th Cir. 1984), *modified on other grounds*, 765 F.2d 482 (5th Cir. 1985), *petition for cert. filed*, No. 85-5609; *Trimble v. State*, 300 Md. 387, 478 A.2d 1143, 1158-64 (Md. 1984), *cert. denied*, 469 U.S. 1230 (1985). In fact, legislative responses support age 18 as the minimum age for execution eligibility. As discussed *infra*, legislation places a variety of limitations upon minors, restrictions which evince a consensus that minors are less mature and responsible than adults.

As to capital punishment specifically, the legislative message is more mixed but still supportive of the notion that if an age must be chosen—and surely it must—then eighteen is the only principled

are not determinative, particularly since they have led to only a miniscule number of death sentences or executions. Death penalty legislation alone cannot reveal society's evolving standards of decency.

In the decade and a half since *Furman v. Georgia*, almost every current Justice has written or joined in opinions that look to the pattern of *jury* verdicts in sup-

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line. Of the fifteen states that establish a minimum age for capital punishment, eleven set it at eighteen, three set it at seventeen, and one sets it at sixteen.

Further, the most recent legislative activity has been in the direction of setting 18 as the minimum age. Nebraska in 1982 set 18 as its minimum age for execution; Colorado and Oregon did so in 1985; New Jersey did so in 1986. Neb. Rev. Stat. § 28-105.01 (1985); Colo. Rev. Stat. § 16-11-103 (1986); Or. Rev. Stat. § 161-620 (1985); N.J. Stat. Ann. § 2C: 11-3f (West 1986) (L. 1985, ch. 478, § 1, approved Jan. 17, 1986). In April 1987, Maryland became the latest state to set 18 as the minimum age for capital punishment. Barnes & Schmidt, *Schaefer Praises Session As "Unusually Successful,"* Washington Post, April 14, 1987, at A7. The Governor was "struck by the fact that the decisive Senate votes came not from the newly-elected members of that Chamber, but from Senate veterans who had opposed an exemption for minors in previous years." Letter from William Schaefer to Clayton Mitchell, Speaker, Maryland House of Delegates, April 7, 1987, at 1 (reproduced at Appendix K). The Maryland House of Delegates, in putting the age at 18, reversed the Maryland Judiciary Committee, which had set the age at 16. Barnes, *Death Penalty Exemption Advances*, Washington Post, April 11, 1987, at B4. The 1987 session of the Georgia General Assembly considered such a measure. Shipp, *Restricting Use of Death Penalty is Long Overdue*, Atlanta Journal—Constitution, January 4, 1987, at 1D. The New Hampshire legislature recently re-codified and therefore reaffirmed its exemption of minors from capital punishment. HB 106, Laws 1986, ch. 82:1 (effective Jan. 1, 1987) (codified as N.H. Rev. Stat. Ann. § 630:5 (IX) to (XIII) (1986 Supp.)).

Finally, the recently proposed federal death penalty legislation was amended to provide that a sentence of death may not be imposed upon a person who was less than 18 years old at the time of the offense. *Establishing Constitutional Procedures for the Imposition of Capital Punishment: Report of the Committee on the Judiciary*, 99th Cong., 2d Sess. 30 (1986).

port of a conclusion about the death penalty's constitutionality, either generally or for particular crimes.[34]

[34] Members of the Court have reasoned that the "jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved," *Enmund*, 458 U.S. at 795 (White, Brennan, Marshall, Blackmun & Stevens, JJ.) (quoting *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (Stewart, Powell & Stevens, JJ.)); that "it is thus important to look at the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried." *Coker*, 433 U.S. at 596 (White, Stewart, Blackmun & Stevens, JJ.). In *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976), a plurality consisting of Justices Stewart, Powell and Stevens cited jury refusal to convict in mandatory capital cases to support its conclusion that the mandatory statutes did not reflect evolving standards of decency. In *Lockett v. Ohio*, 438 U.S. 586, 625 (1978), Justice White wrote, in concurrence, that the death penalty could not be used if the defendant did not intend the death of the victim, even though at the time "approximately half of the states [had] not legislatively foreclosed the possibility of imposing the death penalty upon those who did not intend to cause death"; the reasoning of Justice White's concurrence in *Lockett* was endorsed by the Court in *Enmund v. Florida*, with both the majority, *see* 458 U.S. at 795, and the dissent, *see id.* at 818-20 (O'Connor, J., joined by Burger, C.J., Powell & Rehnquist, JJ.), analyzing the behavior of capital juries. The majority in *Enmund* relied on statistics showing that despite these statutes, defendants in this category rarely were executed. Justice Brennan, in *Furman*, also relied on the gap between legislative authorization of capital punishment and the number of death penalties actually inflicted:

> When an unusually severe punishment is authorized for widescale application but not, because of society's refusal, inflicted save in a few instances, the inference is compelling that there is a deep-seated reluctance to inflict it.

Furman v. Georgia, 408 U.S. 238, 300 (1972) (Brennan, J., concurring). In *Coker v. Georgia*, 433 U.S. at 596, a plurality consisting of Justices Stewart, White, Blackmun and Stevens cited *Gregg*'s observation that the "jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved." Justice Powell concurred in this reasoning insofar as it supported "the view that ordinarily death is a disproportionate punishment for the crime of raping an adult woman." *Coker*, 433 U.S. at 601.

Thus, the Court, while considering legislative judgments as one measure of society's evolving standards of decency, still looks beyond those judgments to learn whether they are accurate. There is a good reason to do so:

> Each lawmaker confronts capital punishment abstractly. No life depends on her vote. Legislative response tells us the degree to which we are willing to have laws permitting execution, but sentencing and execution tell us the degree to which we are willing to carry them out. A statute, furthermore, is static. It remains until changed. As public opinion shifts, older statutes become less reliable indicators of current values. Forces influence legislators that do not affect jurors. A legislator may believe, for example, that death penalty proponents in his constituency are more likely than its opponents to be single-issue voters or are more likely to organize against him, if he opposes capital punishment, than will opponents if he supports it. A constituency's willingness to vote based on a single issue and its degree of organization likely influence a lawmaker's decision and may skew the degree to which the pattern of legislation reflects community sentiment. Of course, legislative action may accurately reflect community sentiment on the acceptability of the death penalty, either generally or in classes of cases. But without a pattern of jury response, we cannot know whether this is true or whether, instead, various political factors have combined to obscure the community view. The jury, "because it is so directly involved," is needed to avoid guessing wrong.

Gillers, *Deciding Who Dies*, 129 U. Pa. L. Rev. 1, 72-73 (1980) (footnotes omitted).

It is no accident that even in an era in which the public perceives a significant increase in juvenile crime, juries almost never vote to execute teenagers. Lay jurors, given the task of expressing the common sense judgment of the community, recognize that adolescents are developmentally distinct from adults, that adolescents grow up,

and that young people are uniquely rehabilitable. Juries recognize that it is unrealistic and inhumane to treat young offenders as if they have fully mature judgment and control.

Or perhaps juries intuit that the philosophical premises of retribution fail when applied to minors. The morality of the anger that fuels the desire for retribution is based on the killer's violation of the social compact. Society has entrusted its citizens with rights, one of which is freedom, and the murderer has grossly abused that freedom. W. Berns, *For Capital Punishment* 155 (1979). The fallacy of this retributive argument as it applies to minors is precisely that we do *not* entrust minors with such freedom.[35] As discussed above, states do not trust their minors to vote, sit on juries or engage in a wide variety of adult activities.

The inequity of the death penalty for minors is perhaps best captured by a vignette described in S. Gettinger, *Sentenced to Die* (1979). The mother of a condemned 15-year-old was asked by prison officials for parental consent to emergency treatment for her son, should he need it. The mother observed: "Now, isn't that ironic? . . . He's old enough to be put to death, but he's not old enough to get an aspirin without our consent." *Id.* at 150.

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[35] John Stuart Mill's *On Liberty* set forth, in 1859, the classic antipaternalist position. J.S. Mill, *On Liberty* (Penguin Classics 2d ed. 1986). Mill's logic is utilitarian and argues for the absolute prohibition of state paternalism. Yet Mill found it "hardly necessary to say that [his] doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood." *Id.* at 69.

CONCLUSION

The Court should hold that execution of those who were younger than age 18 at the time of their offense violates the eighth and fourteenth amendments.

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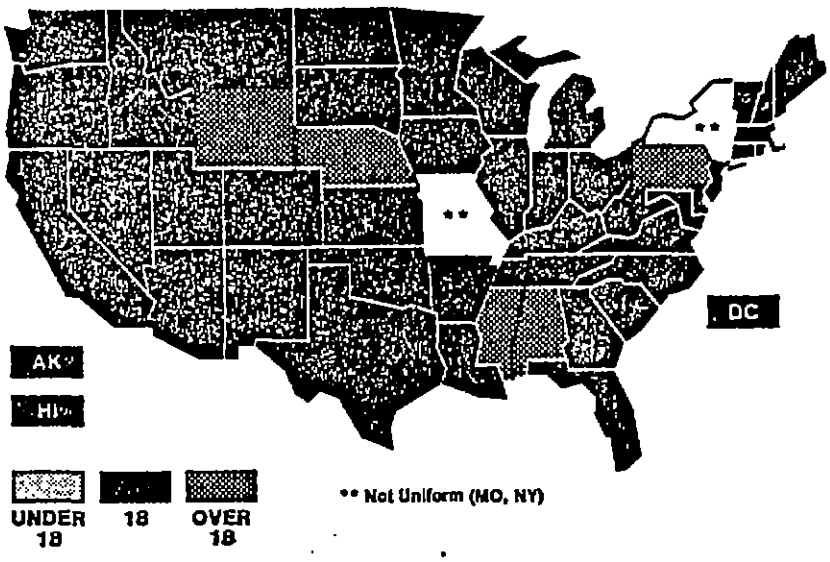
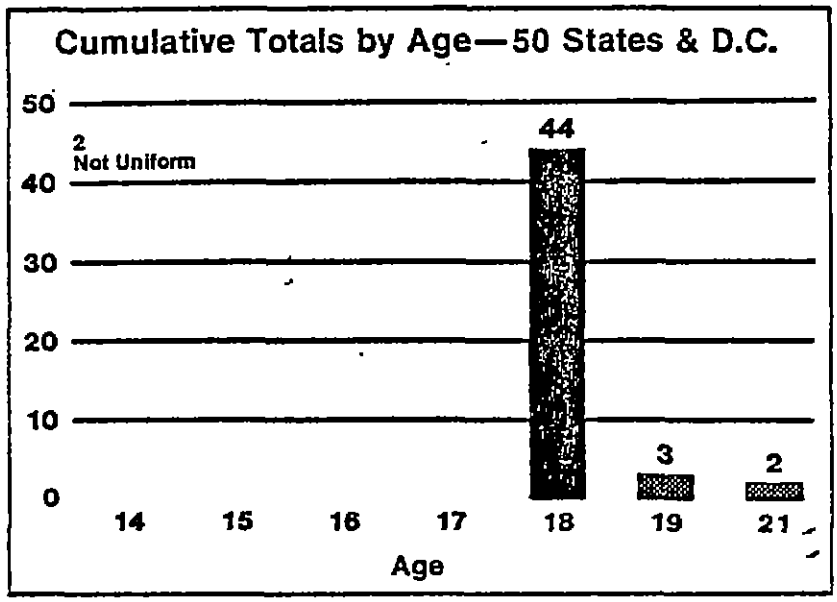
Date: May 14, 1987

APPENDICES

APPENDIX A

Age of Majority





AGE OF MAJORITY *

State	Age	Citation
AL	19	Ala. Code § 26-1-1 (1986)
AK	18	Alaska Stat. § 25.20.010 (1983)
AZ	18	Ariz. Rev. Stat. Ann. § 1-215 (1974)
AR	18	Ark. Stat. Ann. § 57-103 (1985)
CA	18	Cal. Civil Code § 25.1 (West 1982)
CO	18	Colo. Rev. Stat. § 13-22-101 (1974)
CT	18	Conn. Gen. Stat. § 1-1d (Supp. 1986)
DL	18	Del. Code Ann. tit. 1, § 701 (1975)
DC	18	D.C. Code Ann. § 30-401 (1981)
FL	18	Fla. Stat. Ann. § 743.07 (West 1986)
GA	18	Ga. Code Ann. § 39-1-1 (1982)
HI	18	Haw. Rev. Stat. § 577-1 (1976)
ID	18	Idaho Code § 32-101 (1983)
IL	18	Ill. Ann. Stat. ch. 110½ para. 11-1 (Smith-Hurd Supp. 1986)
IN	18	Ind. Code Ann. § 34-1-67-1 (Burns Supp. 1980)
IA	18	Iowa Code Ann. § 599.1 (West 1981)
KS	18	Kan. Stat. Ann. § 38-101 (1986)
KY	18	Ky. Rev. Stat. Ann. § 2.015 (Michie/Bobbs-Merrill 1985)
LA	18	La. Civ. Code Ann. art. 37 (West 1987)
ME	18	Me. Rev. Stat. Ann. tit. 1, § 72 (1979)
MD	18	Md. Ann. Code art. 1, § 24 (1981)
MA	18	Mass. Gen. Laws Ann. ch. 4, § 7 Cl. fifty-first (West 1986)
MI	18	Mich. Comp. Laws Ann. § 722.52 (West Supp. 1986)
MN	18	Minn. Stat. Ann. § 645.451 (West Supp. 1987)
MS	21	Miss. Code Ann. § 1-3-27 (1972)
MO	—	Not Uniform
MT	18	Mont. Code Ann. § 41-1-101 (1985)
NE	19	Neb. Rev. Stat. § 38-101 (1984)

* Counsel gratefully acknowledges the valuable assistance of Janice Mitnick, Margaret McCandless, Stephan Geisler, Robert Taylor, Michael Ollen, Jonathan Graves and James Lee Buck in the preparation of the Appendices to this brief.

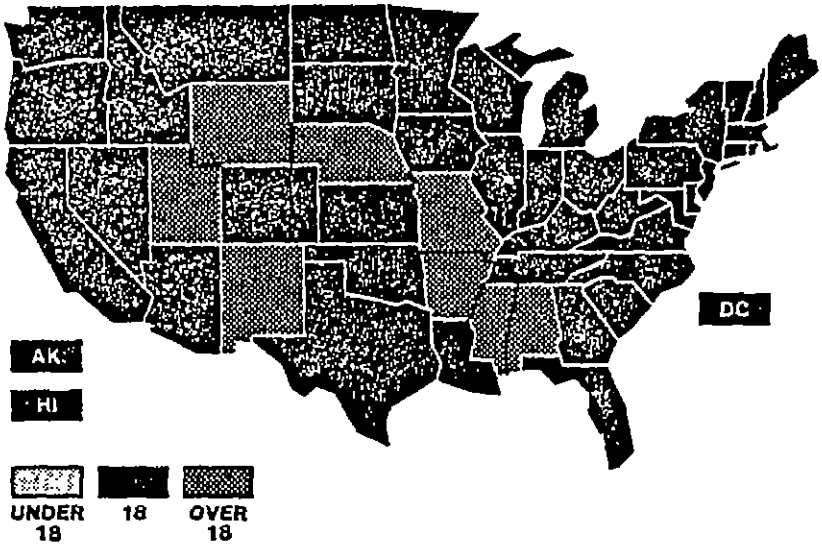
State	Age	Citation
NV	18	Nev. Rev. Stat. § 129.010 (1957)
NH	18	N.H. Rev. Stat. Ann. 21:44 (1985)
NJ	18	N.J. Stat. Ann. § 9:17 B-3 (West 1976)
NM	18	N.M. Stat. Ann. § 28-6-1 (1983)
NY	—	Not Uniform
NC	18	N.C. Gen. Stat. § 48A-2 (1984)
ND	18	N.D. Cent. Code § 14-10-01 (1981)
OH	18	Ohio Rev. Code Ann. § 3109.01 (Baldwin 1983)
OK	18	Okla. Stat. Ann. tit. 15, § 13 (West 1983)
OR	18	Or. Rev. Stat. § 109-510 (1985)
PA	21	Pa. Stat. Ann. tit. 1-6, § 1991 (Purdon 1986)
RI	18	R.I. Gen. Laws § 15-12-1 (1981)
SC	18	S.C. Const. art. XVII, § 14
SD	18	S.D. Codified Laws Ann. § 26-1-1 (1984)
TN	18	Tenn. Code Ann. § 1-3-105 (1985)
TX	18	Tex. Fam. Code Ann. § 11.01(1) (Vernon 1986)
UT	18	Utah Code Ann. § 15-2-1 (1986)
VT	18	Vt. Stat. Ann. tit. 1, § 173 (1985)
VA	18	Va. Code Ann. § 1-13.42 (1979)
WA	18	Wash. Rev. Code Ann. § 26.28.010 (1986)
WV	18	W. Va. Code § 2-2-10 (1979)
WI	18	Wis. Stat. Ann. § 990.01 (West 1985)
WY	19	Wyo. Stat. § 14-1-101 (1986)

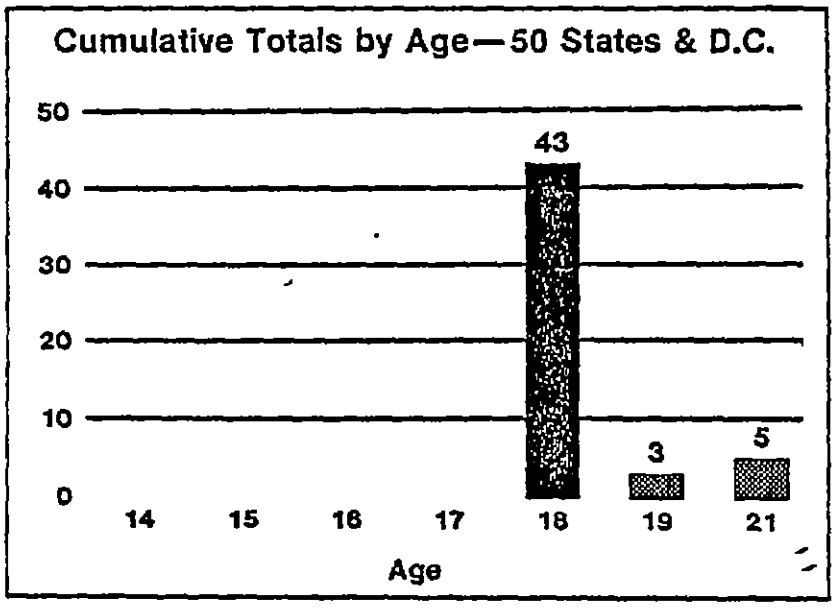
Totals (50 States and D.C.)

Age	18	19	21	Not Uniform
Number	44	3	2	2

APPENDIX B

Right to Serve on Jury





RIGHT TO SERVE ON JURY

State	Age	Citation
AL	19	Ala. Code § 12-16-60 (1986)
AK	18	Alaska Stat. § 09.20.010 (1983)
AZ	18	Ariz. Rev. Stat. Ann. § 21-301 (1975)
AR	21	Ark. Stat. Ann. § 39-101 (Supp. 1985)
CA	18	Cal. Civ. Proc. § 198 (West 1982)
CO	18	Colo. Rev. Stat. § 13-71-106 (Supp. 1986)
CT	18	Conn. Gen. Stat. § 51-217 (1985)
DL	18	Del. Code Ann. tit. 10, § 4504 (Supp. 1984)
DC	18	D.C. Code Ann. § 11-1901 (1981)
FL	18	Fla. Stat. Ann. § 40.01 (West Supp. 1987)
GA	18	Ga. Code Ann. § 15-12-60 (1985)
HI	18	Haw. Rev. Stat. § 612-4 (1976)
ID	18	Idaho Code § 2-209 (Supp. 1986)
IL	18	Ill. Stat. Ann. ch. 78, para. 2 (Smith-Hurd 1987)
IN	18	Ind. Code Ann. § 35-1-15-11 (Burns 1979)
IA	18	Iowa Code Ann. § 607.2 (West Supp. 1986)
KS	18	Kan. Stat. Ann. § 43-156 (1986)
KY	18	Ky. Rev. Stat. Ann. § 29A.080 (Michie/Bobbs-Merrill 1985)
LA	18	La. Code Crim. Proc. Ann. art. 401 (West 1987)
ME	18	Me. Rev. Stat. Ann. tit. 14, § 1211 (Supp. 1986)
MD	18	Md. Cts. & Jud. Proc. Code Ann. § 8-104 (1984)
MA	18	Mass. Gen. Laws Ann. ch. 234, § 1 (West 1986); ch. 51, § 1 (West 1975)
MI	18	Mich. Comp. Laws Ann. § 600.1304 (West 1981)
MN	18	Minn. Stat. Ann. § 593.41 (West 1987)
MS	21	Miss. Code Ann. § 13-5-1 (1972)
MO	21	Mo. Stat. Ann. § 494.010 (Vernon Supp. 1987)
MT	18	Mont. Code Ann. § 3-15-301 (1985)
NE	19	Neb. Rev. Stat. § 25-1601 (1985)
NV	18	Nev. Rev. Stat. § 6.010 (1957)
NH	18	N.H. Rev. Stat. Ann. §§ 500-A:1 to 500-A:2 (1983)

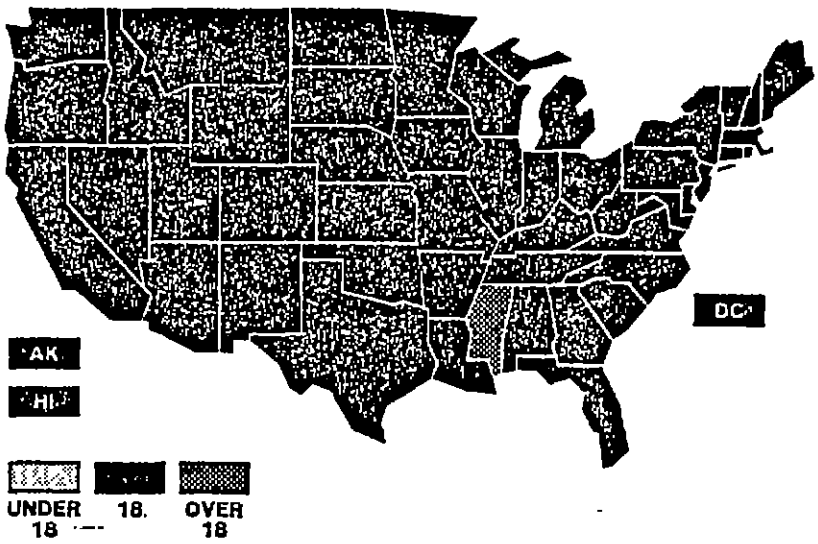
State	Age	Citation
NJ	18	N.J. Stat. Ann. § 9-17B-1 (West Supp. 1986)
NM	21	N.M. Stat. Ann. § 38-5-1 (1978)
NY	18	N.Y. Jud. Law § 510 (McKinney Supp. 1987)
NC	18	N.C. Gen. Stat. § 9-3 (1986)
ND	18	N.D. Cent. Code § 27-09.1-08 (Supp. 1985)
OH	18	Ohio Rev. Code Ann. § 2313.42 (Baldwin 1984)
OK	18	Okla. Stat. Ann. tit. 38, § 28 (West Supp. 1987)
OR	18	Or. Rev. Stat. § 10.030(c) (1985)
PA	18	Pa. Stat. Ann. tit. 42, § 4521 (Purdon 1981)
RI	18	R.I. Gen. Laws § 9-9-1 (Supp. 1984)
SC	18	S.C. Code Ann. § 14-7-140 (Law. Co-op. Supp. 1986)
SD	18	S.D. Codified Laws Ann. § 16-13-10 (1986)
TN	18	Tenn. Code Ann. § 22-1-101 (1980)
TX	18	Tex. Gov't Code Ann. § 62.102 (Vernon 1987)
UT	21	Utah Code Ann. § 78-46-8 (1977)
VT	18	Vt. Stat. Ann.—Administrative Orders and Rules: Qualification List, Selection and Summoning of All Jurors—Rule 25 (1986)
VA	18	Va. Code Ann. § 8.01-337 (1984)
WA	18	Wash. Rev. Code Ann. § 2.36.070 (Supp. 1987)
WV	18	W. Va. Code § 52-1-8 (Supp. 1986)
WI	18	Wis. Stat. Ann. § 756.01 (West 1981)
WY	19	Wyo. Stat. § 1-11-101 (West Supp. 1986)

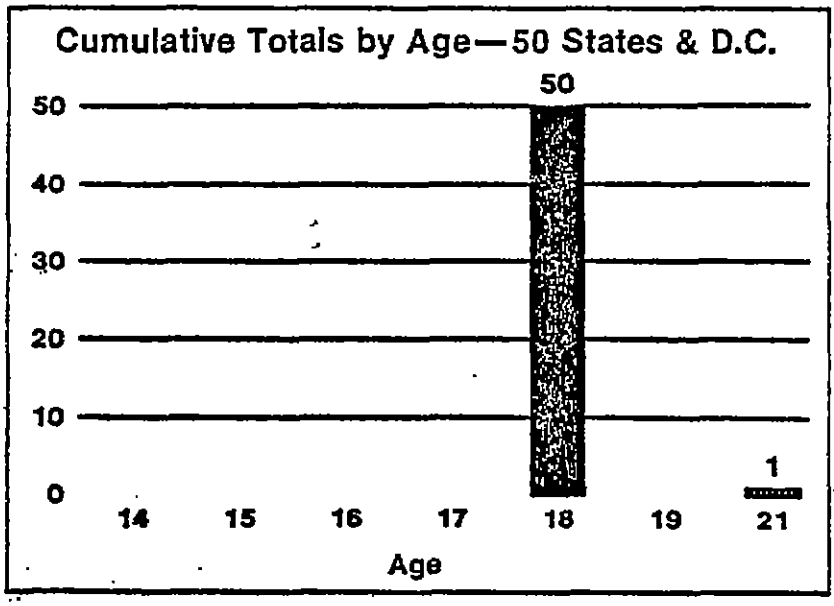
Totals (50 States and D.C.)

Age	18	19	21
Number	43	3	5

APPENDIX C

Right to Marry Without Parental Consent





RIGHT TO MARRY WITHOUT PARENTAL CONSENT

State	Age	Citation
AL	18	Ala. Code § 30-1-5 (1983)
AK	18	Alaska Stat. § 25.05.171 (1983)
AZ	18	Ariz. Rev. Stat. Ann. § 25-102 (1976)
AR	18	Ark. Stat. Ann. § 55-102 (Supp. 1985)
CA	18	Cal. Civ. Code § 4101 (West 1983)
CO	18	Colo. Rev. Stat. § 14-2-106 (Supp. 1986)
CT	18	Conn. Gen. Stat. § 46b-30 (1986)
DL	18	Del. Code Ann. tit. 13, § 123 (1981)
DC	18	D.C. Code Ann. § 30-111 (1981)
FL	18	Fla. Stat. Ann. § 741.04 (1986)
GA	18	Ga. Code Ann. § 19-3-37 (1982)
HI	18	Haw. Rev. Stat. § 572-2 (1976)
ID	18	Idaho Code § 32-202 (1963)
IL	18	Ill. Ann. Stat. ch. 40, para. 203 (Smith-Hurd Supp. 1986)
IN	18	Ind. Code Ann. § 31-7-1-6 (Burns Supp. 1986)
IA	18	Iowa Code Ann. § 595.2 (West 1981)
KS	18	Kan. Stat. Ann. § 23-106 (1981)
KY	18	Ky. Rev. Stat. Ann. § 402.210 (Michie/Bobbs-Merrill 1984)
LA	18	La. Civ. Code Ann. art. 97 (West 1952)
ME	18	Me. Rev. Stat. Ann. tit. 19, § 62 (1981)
MD	18	Md. Fam. Law Code Ann. § 2-301 (1984)
MA	18	Mass. Gen. Laws Ann. ch. 207, § 7 (West Supp. 1986)
MI	18	Mich. Comp. Laws Ann. § 551.103 (West Supp. 1986)
MN	18	Minn. Stat. Ann. § 517.02 (West Supp. 1987)
MS	21	Miss. Code Ann. § 93-1-5(d) (Supp. 1986)
MO	18	Mo. Ann. Stat. § 451.090 (Vernon 1986)
MT	18	Mont. Code Ann. § 40-1-202 (1985)
NE	18	Neb. Rev. Stat. § 42-105 (1984)
NV	18	Nev. Rev. Stat. § 122.020 (1957)
NH	18	N.H. Rev. Stat. Ann. § 457:5 (1983)
NJ	18	N.J. Stat. Ann. § 9:17 B-1 (West Supp. 1986)
NM	18	N.M. Stat. Ann. § 40-1-6 (1986)
NY	18	N.Y. Dom. Rel. Law § 15 (McKinney Supp. 1987)

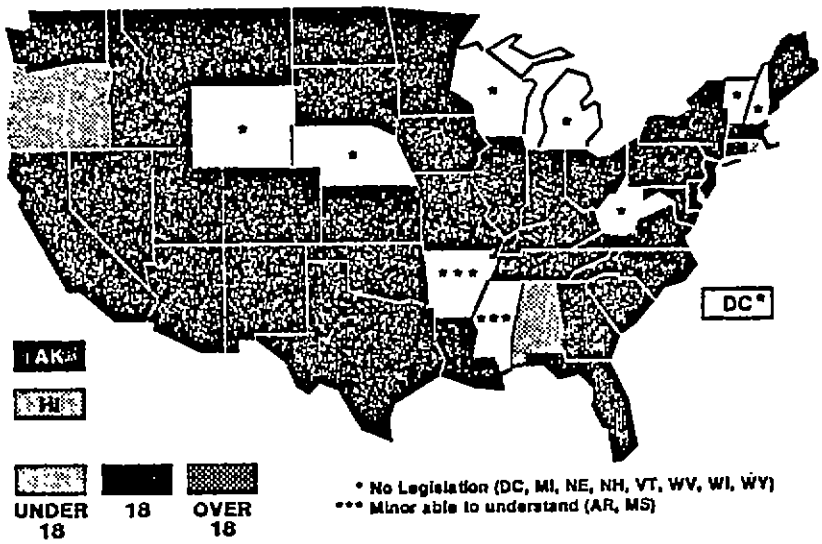
State	Age	Citation
NC	18	N.C. Gen. Stat. § 51-2 (1984)
ND	18	N.D. Cent. Code § 14-03-02 (1981)
OH	18	Ohio Rev. Code Ann. § 3101.01 (Baldwin 1983)
OK	18	Okla. Stat. Ann. tit. 43, § 3 (West 1979)
OR	18	Or. Rev. Stat. § 106.060 (1985)
PA	18	Pa. Stat. Ann. tit. 48, § 1-5 (Purdon Supp. 1986)
RI	18	R.I. Gen. Laws § 15-2-11 (1981)
SC	18	S.C. Code Ann. § 20-1-250 (Law. Co-op. 1985)
SD	18	S.D. Codified Laws Ann. § 25-1-9 (1984)
TN	18	Tenn. Code Ann. § 36-3-106 (1984)
TX	18	Tex. Fam. Code Ann. § 1.51 (Vernon 1987)
UT	18	Utah Code Ann. § 30-1-9 (1984)
VT	18	Vt. Stat. Ann. tit. 18, § 5142 (Supp. 1986)
VA	18	Va. Code Ann. § 20-49 (1983)
WA	18	Wash. Rev. Code Ann. § 26.04.210 (1986)
WV	18	W. Va. Code § 48-1-1 (1986)
WI	18	Wis. Stat. Ann. § 765.02 (West 1981)
WY	18	Wyo. Stat. § 20-1-102 (1977)

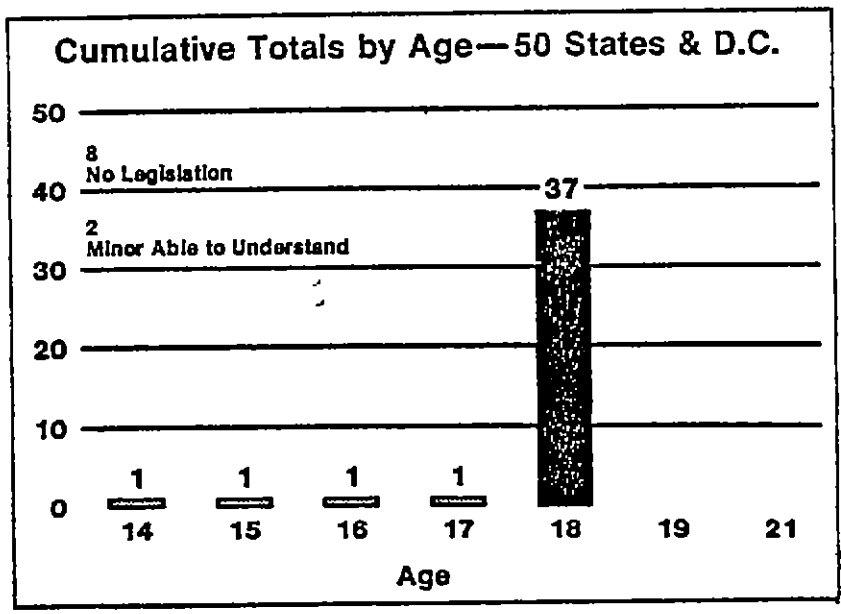
Totals (50 States and D.C.)

Age	18	21
Number	50	1

APPENDIX D

Consent to All Forms of Medical Treatment





CONSENT TO ALL FORMS OF MEDICAL TREATMENT

State	Age	Citation
AL	14	Ala. Code § 22-8-4 (1984)
AK	18	Alaska Stat. § 09.65.100 (1983)
AZ	18	Ariz. Rev. Stat. Ann. § 44-132 (1967)
AR	*	Ark. Stat. Ann. § 82-363 (Supp. 1986)
CA	18	Cal. Civ. Code § 25.8 (West 1982)
CO	18	Colo. Rev. Stat. § 13-22-103 (Supp. 1986)
CT	18	Conn. Gen. Stat. Ann. § 46b-150d (1986)
DL	18	Del. Code Ann. tit. 13, § 707 (1981)
DC	—	No Legislation
FL	18	Fla. Stat. Ann. § 743.064 (West 1986)
GA	18	Ga. Code Ann. § 31-9-2 (1985)
HI	17	Haw. Rev. Stat. § 577A-2 (1976)
ID	18	Idaho Code § 39-3801 (1985)
IL	18	Ill. Ann. Stat. ch. 111, para. 4501 (Smith-Hurd 1978)
IN	18	Ind. Code Ann. § 16-8-3-1 (Burns 1973)
IA	18	Iowa Code Ann. § 147.137 (West Supp. 1986)
KS	18	Kan. Stat. Ann. § 38-122 (1986)
KY	18	Ky. Rev. Stat. Ann. § 216B.400 (Michie/Bobbs-Merrill 1982)
LA	18	La. Rev. Stat. Ann. § 40:1095 (West 1977)
ME	18	Me. Rev. Stat. Ann. tit. 32, § 3292 (Supp. 1986)
MD	18	Md. Health-Gen. Code Ann. § 20-102 (1982)
MA	18	Mass. Gen. Laws Ann. ch. 112, § 12F (West 1983)
MI	—	No Legislation
MN	18	Minn. Stat. Ann. § 144.341 (West 1987)
MS	*	Miss. Code Ann. § 41-41-3 (Supp. 1986)
MO	18	Mo. Ann. Stat. § 431.061 (Vernon Supp. 1987)
MT	18	Mont. Code Ann. § 41-1-402 (1985)
NE	—	No Legislation
NV	18	Nev. Rev. Stat. § 129-030 (1957)
NH	—	No Legislation
NJ	18	N.J. Stat. Ann. § 9:17B-1 (West Supp. 1986)
NM	18	N.M. Stat. Ann. § 24-10-1 (1986)

* Minor able to understand

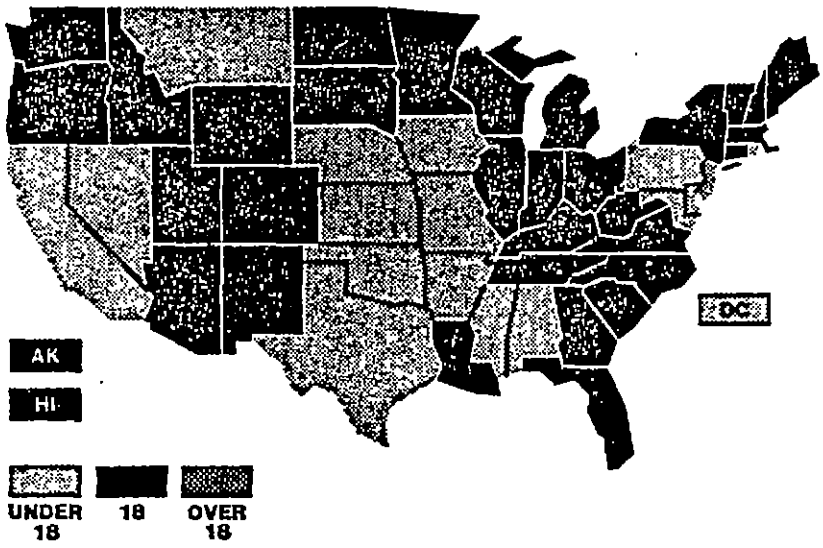
State	Age	Citation
NY	18	N.Y. Pub. Health Law § 2504 (McKinney 1985)
NC	18	N.C. Gen. Stat. § 90-21.1 (1985)
ND	18	N.D. Cent. Code § 14-10-17.1 (1981)
OH	18	Ohio Rev. Code Ann. § 2317.54 (Baldwin 1984)
OK	18	Okla. Stat. Ann. tit. 63, § 2602 (West 1984)
OR	15	Or. Rev. Stat. § 109.640 (1985)
PA	18	Pa. Stat. Ann. tit. 35, § 10101 (Purdon 1977)
RI	16	R.I. Gen. Laws § 23-4.6-1 (1985)
SC	18	S.C. Code Ann. § 20-7-280 (Law. Co-op. 1985)
SD	18	S.D. Codified Laws Ann. § 20-9-4.2 (Supp. 1986)
TN	18	Tenn. Code Ann. §§ 63-6-220 to 63-6-223 (1985)
TX	18	Tex. Fam. Code Ann. § 35.03 (1986)
UT	18	Utah Code Ann. § 78-14-5 (1977)
VT	—	No Legislation
VA	18	Va. Code Ann. § 54-325.2 (1982)
WA	18	Wash. Rev. Code Ann. § 26.28.015 (1986)
WV	—	No Legislation
WI	—	No Legislation
WY	—	No Legislation

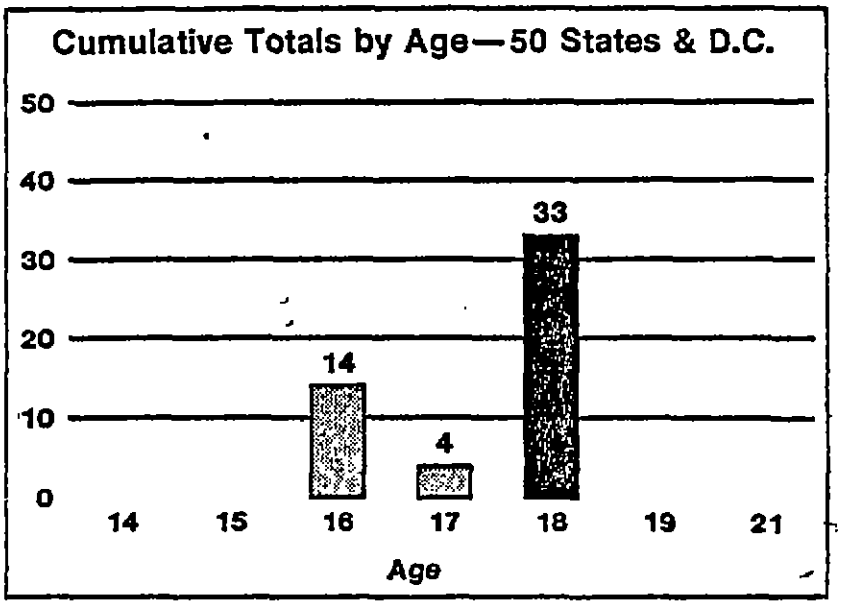
Totals (50 States and D.C.)

Age	14	15	16	17	18	Minor Able to Understand	No Legislation
Number	1	1	1	1	37	2	8

APPENDIX E

Driving Without Parental Consent



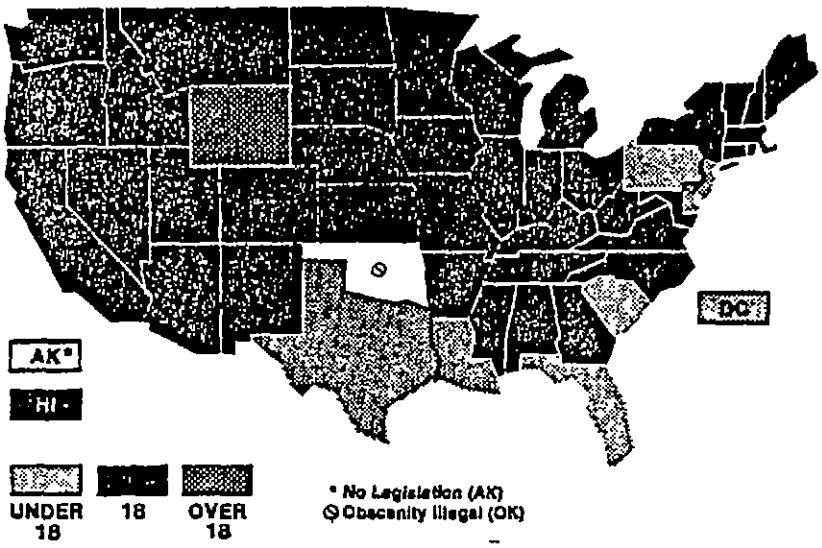


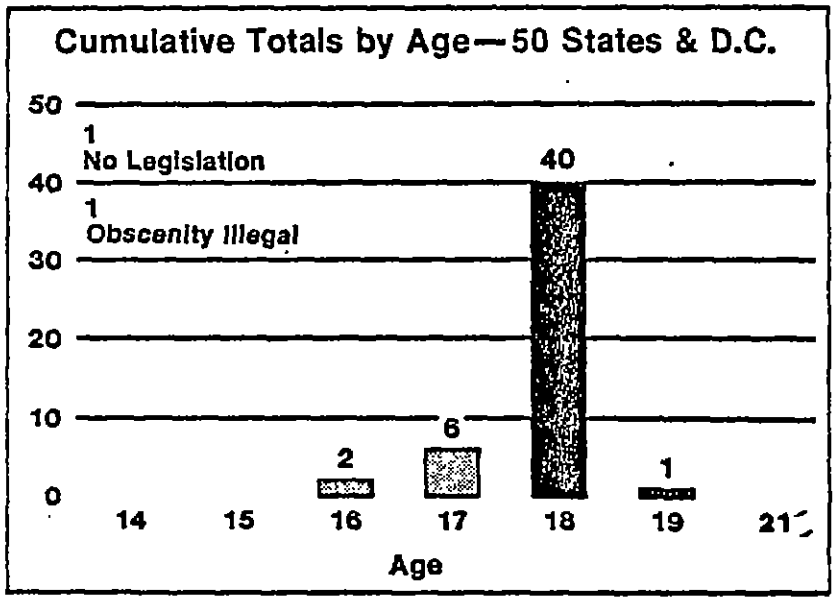
DRIVING WITHOUT PARENTAL CONSENT

State	Age	Citation
AL	16	Ala. Code § 32-6-7 (1983)
AK	18	Alaska Stat. § 28.15.071 (1984)
AZ	18	Ariz. Rev. Stat. Ann. § 28-417 (1976)
AR	16	Ark. Stat. Ann. § 75-309 (1979)
CA	16	Cal. Veh. Code § 12507 (West Supp. 1987)
CO	18	Colo. Rev. Stat. § 42-2-107 (1984)
CT	18	Conn. Gen. Stat. § 14-36 (Supp. 1986)
DL	16	Del. Code Ann. tit. 21, § 2707 (Supp. 1984)
DC	16	D.C. Code Ann. § 40-301 (1981)
FL	18	Fla. Stat. Ann. § 322.09 (West Supp. 1987)
GA	18	Ga. Code Ann. § 40-5-26 (1985)
HI	18	Haw. Rev. Stat. § 286.112 (1985)
ID	18	Idaho Code § 49-313 (1980)
IL	18	Ill. Ann. Stat. ch. 95½, para. 6-103 (Smith-Hurd Supp. 1986)
IN	18	Ind. Code Ann. § 9-1-4-32 (Burns 1980)
IA	16	Iowa Code Ann. § 321.177 (West Supp. 1986)
KS	16	Kan. Stat. Ann. § 8-237 (1982)
KY	18	Ky. Rev. Stat. Ann. § 186.470 (Michie/Bobbs-Merrill Supp. 1986)
LA	18	La. Rev. Stat. Ann. § 32:407 (West Supp. 1987)
ME	18	Me. Rev. Stat. Ann. tit. 29, § 585 (Supp. 1986)
MD	16	Md. Transp. Code Ann. § 16-103 (1984)
MA	18	Mass. Gen. Laws Ann. ch. 90, § 8 (West Supp. 1986)
MI	18	Mich. Comp. Laws Ann. § 257.308 (West Supp. 1986)
MN	18	Minn. Stat. Ann. § 171.04 (West 1986)
MS	17	Miss. Code Ann. § 63-1-23 (Supp. 1986)
MO	16	Mo. Ann. Stat. § 302.060 (Vernon Supp. 1987)
MT	16	Mont. Code Ann. § 61-5-105 (1985)
NE	16	Neb. Rev. Stat. § 60-407 (1984)
NV	16	Nev. Rev. Stat. § 483.250 (1983)
NH	18	N.H. Rev. Stat. Ann. § 263:17 (1982)
NJ	17	N.J. Stat. Ann. § 39:3-10 (West 1973)
NM	18	N.M. Stat. Ann. § 66-5-11 (1984)
NY	18	N.Y. Veh. & Traf. Law § 502 (McKinney 1986)

APPENDIX F

Right to Purchase Pornographic Materials





RIGHT TO PURCHASE PORNOGRAPHIC MATERIALS

State	Age	Citation
AL	18	Ala. Code § 13A-12-170 (1982)
AK	—	No Legislation
AZ	18	Ariz. Rev. Stat. Ann. § 13-3506 (1978)
AR	18	Ark. Stat. Ann. § 41-3582 (1977)
CA	18	Cal. Penal Code § 313.1 (West Supp. 1987)
CO	18	Colo. Rev. Stat. §§ 18-7-501 to 18-7-502 (1986)
CT	18	Conn. Gen. Stat. § 53a-196 (1985)
DL	17	Del. Code Ann. tit. 11, § 1361 (Supp. 1984)
DC	17	D.C. Code Ann. § 22-2001 (1981)
FL	17	Fla. Stat. Ann. § 847.012 (West Supp. 1987)
GA	18	Ga. Code Ann. § 16-12-103 (1984)
HI	18	Haw. Rev. Stat. § 712-1215 (1976)
ID	18	Idaho Code § 18-1513 (1979)
IL	18	Ill. Ann. Stat. ch. 38, para. 11-21 (Smith-Hurd 1979)
IN	18	Ind. Code Ann. § 35-30-11.1-1 (Burns 1979)
IA	18	Iowa Code Ann. § 728.2 (West 1979)
KS	18	Kan. Stat. Ann. § 21-4301a (1986)
KY	18	Ky. Rev. Stat. Ann. § 531-030 (Michie/Bobbs-Merrill 1985)
LA	17	La. Rev. Stat. Ann. § 14:91.11 (West 1986)
ME	18	Me. Rev. Stat. Ann. tit. 17, § 2911 (Supp. 1986)
MD	18	Md. Ann. Code art. 27, § 419 (Supp. 1985)
MA	18	Mass. Gen. Laws Ann. ch. 272, § 28 (West 1979)
MI	18	Mich. Comp. Laws Ann. § 750.142 (West Supp. 1986)
MN	18	Minn. Stat. Ann. § 617.293 (West 1987)
MS	18	Miss. Code Ann. § 97-5-27 (Supp. 1986)
MO	18	Mo. Ann. Stat. § 573.040 (Vernon 1979)
MT	18	Mont. Code Ann. § 45-8-201 (1985)
NE	18	Neb. Rev. Stat. § 28-808 (1985)
NV	18	Nev. Rev. Stat. Ann. § 201.265 (Michie 1957)
NH	18	N.H. Rev. Stat. Ann. § 571-B:2 (1986)
NJ	16	N.J. Stat. Ann. § 2C:24-4 (West 1982)
NM	18	N.M. Stat. Ann. §§ 30-37-1 to 30-37-2 (1984)
NY	18	N.Y. Penal Law § 235.21 (McKinney 1980)

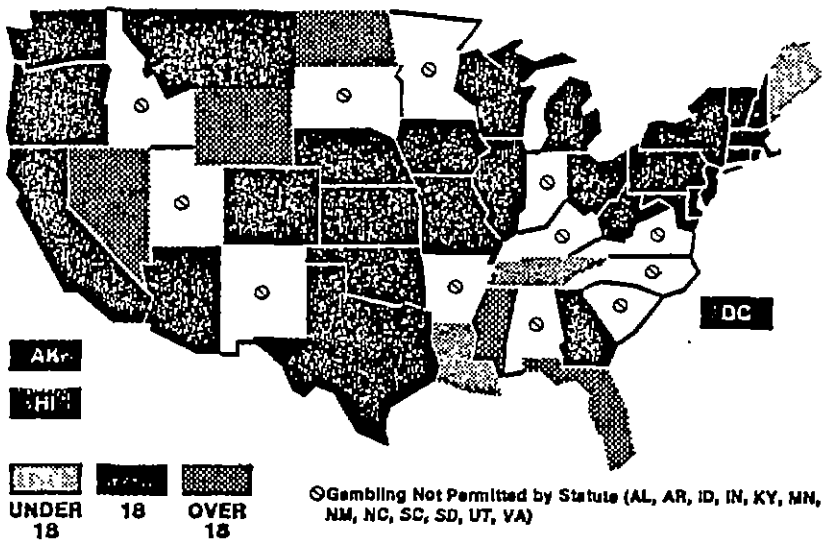
State	Age	Citation
NC	18	N.C. Gen. Stat. § 19-12 (1983)
ND	18	N.D. Cent. Code § 12.1-27.1-03 (1985)
OH	18	Ohio Rev. Code Ann. § 2907.31 (Baldwin 1986)
OK	—	Okla. Stat. Ann. tit. 21, § 1040.8 (West Supp. 1987) [Obscenity Illegal]
OR	18	Or. Rev. Stat. §§ 167.060 *et seq.* (1983)
PA	17	Pa. Stat. Ann. tit. 18, § 5903 (Purdon 1983)
RI	18	R.I. Gen. Laws § 11-31-10 (1981)
SC	16	S.C. Code Ann. § 16-15-370 (Law. Co-op. 1977)
SD	18	S.D. Codified Laws Ann. § 22-24-28 (1979)
TN	18	Tenn. Code Ann. §§ 39-6-1131 to 39-6-1132 (1982)
TX	17	Tex. Penal Code Ann. § 43.24 (Vernon 1974)
UT	18	Utah Code Ann. § 76-10-1206 (1978)
VT	18	Vt. Stat. Ann. tit. 13, §§ 2801 to 2802 (1974)
VA	18	Va. Code Ann. § 18.2-391 (1982)
WA	18	Wash. Rev. Code Ann. §§ 9.68.050 to 9.68.060 (1977)
WV	18	W. Va. Code §§ 61-8A-1 to 61-8A-2 (1984)
WI	18	Wis. Stat. Ann. § 944.21 (West 1982)
WY	19	Wyo. Stat. § 6-4-302 (1983) and § 8-1-102 (1986)

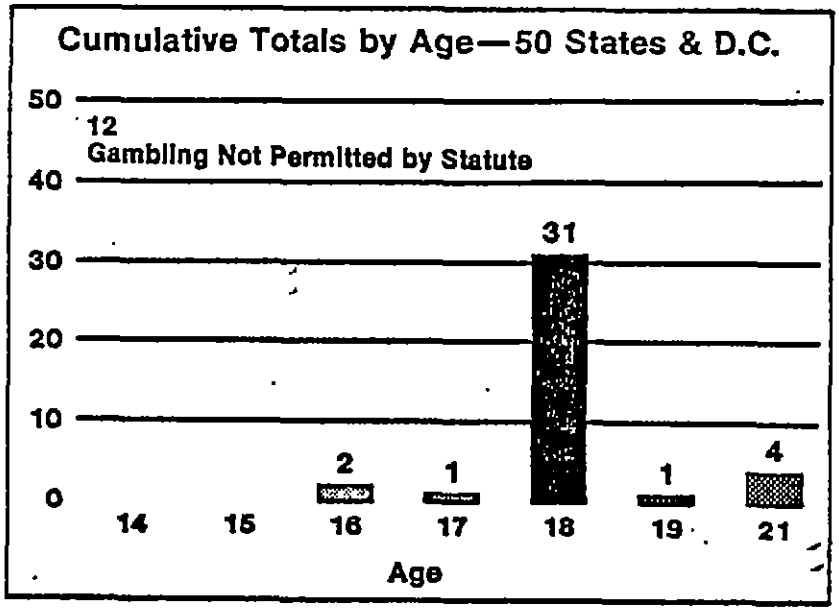
Totals (50 States and D.C.)

Age	16	17	18	19	Obscenity Illegal	No Legislation
Number	2	6	40	1	1	1

APPENDIX G

Right to Participate in Legalized Gambling





RIGHT TO PARTICIPATE IN LEGALIZED GAMBLING

State	Age	Citation
AL	—	Gambling Not Permitted by Statute
AK	18	Alaska Stat. § 43.35.040 (1983)
AZ	18	Ariz. Rev. Stat. Ann. § 5-112 (1974)
AR	—	Gambling Not Permitted by Statute
CA	18	Cal. Penal Code § 326.5 (West Supp. 1987)
CO	18	Colo. Rev. Stat. § 24-35-214 (1982)
CT	18	Conn. Gen. Stat. § 7-186a (Supp. 1986)
DL	18	Del. Code Ann. tit. 29, § 4810 (1983)
DC	18	D.C. Code Ann. § 2-2534 (1981)
FL	21	Fla. Stat. Ann. § 849.093 (West Supp. 1987)
GA	18	Ga. Code Ann. § 16-12-58 (1984)
HI	18	Haw. Rev. Stat. § 712-1231 (1976)
ID	—	Gambling Not Permitted by Statute
IL	18	Ill. Ann. Stat. ch. 120, para. 1102 (Smith-Hurd Supp. 1986)
IN	—	Gambling Not Permitted by Statute
IA	18	Iowa Code Ann. § 233.1 (West 1985)
KS	18	Kan. Stat. Ann. § 79-4706 (Supp. 1984)
KY	—	Gambling Not Permitted by Statute
LA	17	La. Rev. Stat. Ann. § 14:92 (West 1986)
ME	16	Me. Rev. Stat. Ann. tit. 17, § 319 (1983)
MD	18	Md. Ann. Code art. 9, § 124 (1984)
MA	18	Mass. Gen. Laws Ann. ch. 128A, § 10 (West 1974)
MI	18	Mich. Comp. Laws Ann. § 18.969(110a) (West 1986)
MN	—	Gambling Not Permitted by Statute
MS	21	Miss. Code Ann. § 97-33-21 (1972)
MO	18	Mo. Ann. Stat. § 313.280 (Vernon 1987)
MT	18	Mont. Code Ann. § 23-5-506 (1985)
NE	18	Neb. Rev. Stat. § 9-150 (Supp. 1984)
NV	21	Nev. Rev. Stat. § 463.350 (1985)
NH	18	N.H. Rev. Stat. Ann. § 287:2 (1978)
NJ	18	N.J. Stat. Ann. § 9:17B-1 (West Supp. 1986)
NM	—	Gambling Not Permitted by Statute
NY	18	N.Y. Tax Law § 1610 (McKinney 1987)
NC	—	Gambling Not Permitted by Statute

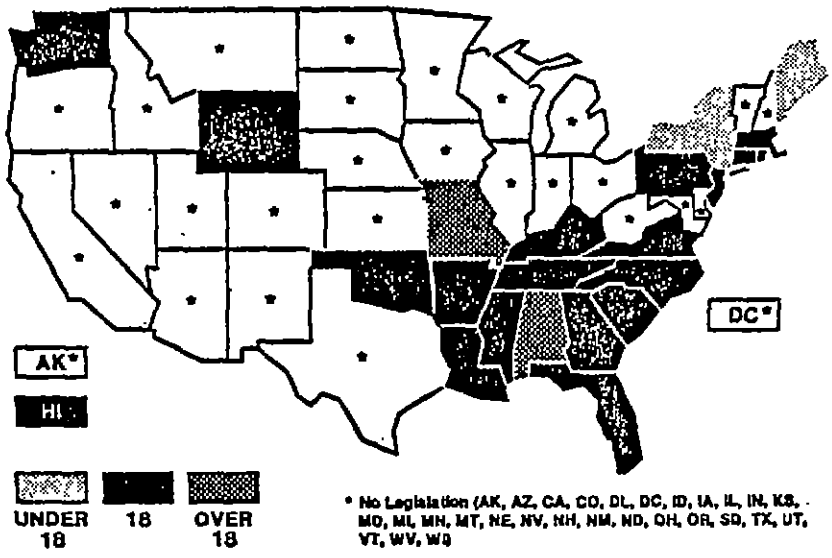
State	Age	Citation
ND	21	N.D. Cent. Code § 53-06.1-07.1 (Supp. 1985)
OH	18	Ohio Rev. Code Ann. § 3770.07 (Baldwin 1983)
OK	18	Okla. Stat. Ann. tit. 21, § 995.13 (West 1983)
OR	18	Or. Rev. Stat. § 163.575 (1985)
PA	18	Pa. Stat. Ann. tit. 10, § 305 (Purdon Supp. 1986)
RI	18	R.I. Gen. Laws § 11-19-32 (Supp. 1986)
SC	—	Gambling Not Permitted by Statute
SD	—	Gambling Not Permitted by Statute
TN	16	Tenn. Code Ann. § 39-6-609(f) (Supp. 1986)
TX	18	Tex. Rev. Civ. Stat. Ann. art. 179d, § 17 (Vernon Supp. 1987)
UT	—	Gambling Not Permitted by Statute
VT	18	Vt. Stat. Ann. tit. 31, § 674(J) (Supp. 1985)
VA	—	Gambling Not Permitted by Statute
WA	18	Wash. Rev. Code Ann. § 67.70.120 (1985)
WV	18	W. Va. Code § 19-23-9 (1986)
WI	18	Wis. Stat. Ann. § 163.51 (West 1974)
WY	19	Wyo. Stat. § 11-25-109 (1986)

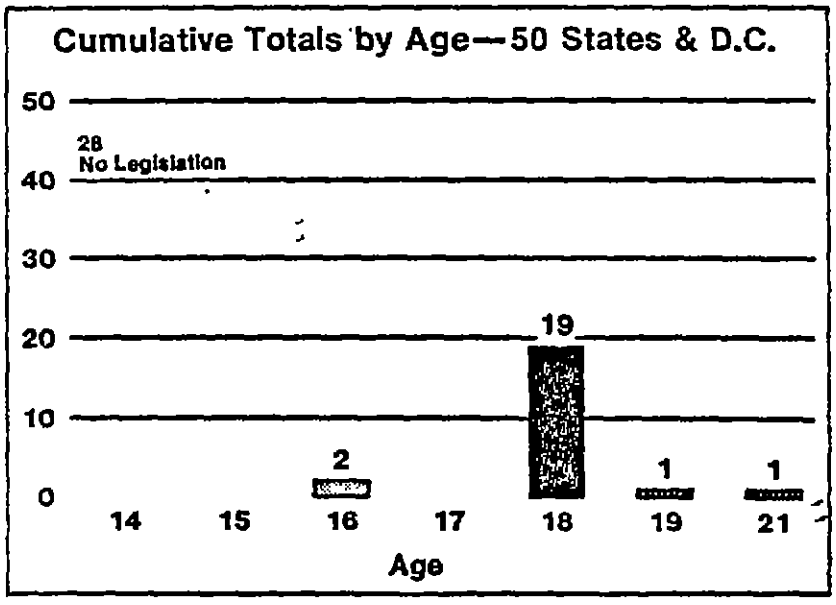
Totals (50 States and D.C.)

Age	16	17	18	19	21	Gambling Not Permitted
Number	2	1	31	1	4	12

APPENDIX H

Right to Patronize Pool Halls





RIGHT TO PATRONIZE POOL HALLS

State	Age	Citation
AL	19	Ala. Code § 34-6-9 (1985)
AK	—	No Legislation
AZ	—	No Legislation
AR	18	Ark. Stat. Ann. § 41-2461 (1977)
CA	—	No Legislation
CO	—	No Legislation
CT	18	Conn. Gen. Stat. § 53-281 (1985)
DL	—	No Legislation
DC	—	No Legislation
FL	18	Fla. Stat. Ann. § 849.04 (West 1976) [Minor may not play where betting allowed]
GA	18	Ga. Code Ann. § 43-8-10 (1984) [Minors may not enter premises if alcohol sold]
HI	18	Haw. Rev. Stat. § 445-54 (1985)
ID	—	No Legislation
IL	—	No Legislation
IN	—	No Legislation
IA	—	No Legislation
KS	—	No Legislation
KY	18	Ky. Rev. Stat. Ann. § 436.320 (Michie/Bobbs-Merrill 1985)
LA	18	La. Rev. Stat. Ann. § 26:88 (West Supp. 1986)
ME	16	Me. Rev. Stat. Ann. tit. 26, § 773 (1974)
MD	—	No Legislation
MA	18	Mass. Gen. Laws Ann. ch. 140, § 179 (West 1974)
MI	—	No Legislation
MN	—	No Legislation
MS	18	Miss. Code Ann. § 97-5-11 (Supp. 1986)
MO	21	Mo. Ann. Stat. § 318.090 (Vernon 1963)
MT	—	No Legislation
NE	—	No Legislation
NV	—	No Legislation
NH	—	No Legislation
NJ	18	N.J. Stat. Ann. § 34:2-21.17 (West Supp. 1986)
NM	—	No Legislation
NY	16	N.Y. Gen. Bus. Law § 465 (McKinney 1984)

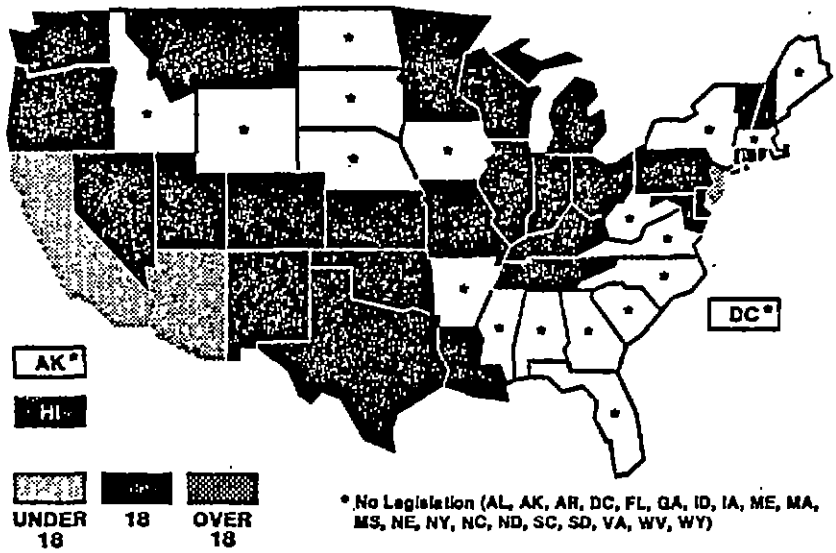
State	Age	Citation
NC	18	N.C. Gen. Stat. § 14-317 (1986) [Minors may not enter premises where alcohol sold]
ND	—	No Legislation
OH	—	No Legislation
OK	18	Okla. Stat. Ann. tit. 21, § 1103 (West Supp. 1983)
OR	—	No Legislation
PA	18	Pa. Stat. Ann. tit. 18, § 7105 (Purdon 1983)
RI	18	R.I. Gen. Laws § 5-2-13 (1976)
SC	18	S.C. Code Ann. § 20-7-350 (1985)
SD	—	No Legislation
TN	18	Tenn. Code Ann. § 39-4-419 (Supp. 1986)
TX	—	No Legislation
UT	—	No Legislation
VT	—	No Legislation
VA	18	Va. Code Ann. § 40.1-100 (1986)
WA	18	Wash. Rev. Code Ann. § 26.28.080 (1986)
WV	—	No Legislation
WI	—	No Legislation
WY	18	Wyo. Stat. § 33-6-108(b) (1986)

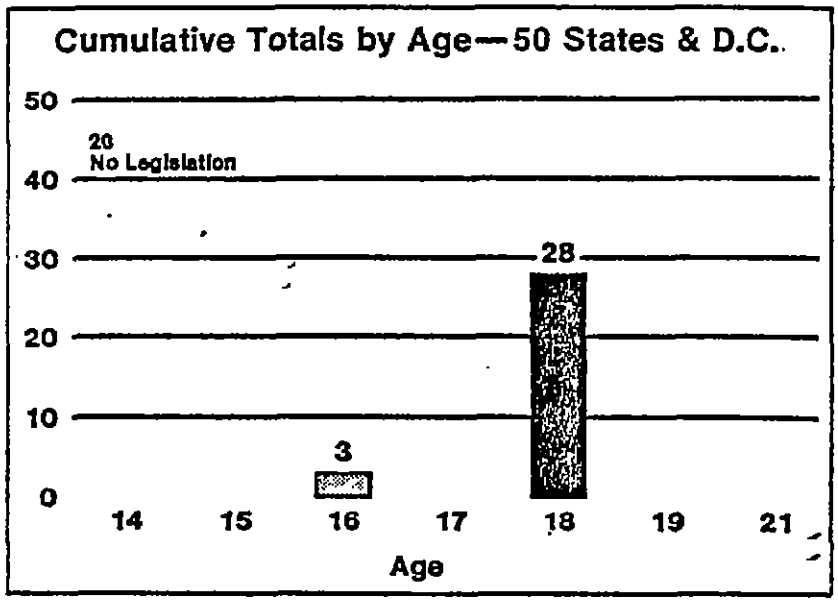
Totals (50 States and D.C.)

Age	16	18	19	21	No Legislation
Number	2	19	1	1	28

APPENDIX I

Right to Pawn Property or to Sell to Junk or Precious Metals Dealers





RIGHT TO PAWN PROPERTY OR TO SELL TO JUNK OR PRECIOUS METALS DEALERS

State	Age	Citation
AL	—	No Legislation
AK	—	No Legislation
AZ	16	Ariz. Rev. Stat. Ann. § 44-1627 (Supp. 1986)
AR	—	No Legislation
CA	16	Cal. Fin. Code § 21207 (West 1981)
CO	18	Colo. Rev. Stat. § 12-56-104 (1985)
CT	18	Conn. Gen. Stat. § 21-47 (1985)
DL	18	Del. Code Ann. tit. 24, § 2312 (1981)
DC	—	No Legislation
FL	—	No Legislation
GA	—	No Legislation
HI	18	Haw. Rev. Stat. § 445-133 (1985)
ID	—	No Legislation
IL	18	Ill. Ann. Stat. ch. 23, para. 2366 (Smith-Hurd 1968)
IN	18	Ind. Code Ann. § 28-7-5-36 (Burns 1973)
IA	—	No Legislation
KS	18	Kan. Stat. Ann. § 16-717 (1981)
KY	18	Ky. Rev. Stat. Ann. § 226.030 (Michie/Bobbs-Merrill 1982)
LA	18	La. Rev. Stat. Ann. § 37:1764 (West Supp. 1987)
ME	—	No Legislation
MD	18	Md. Code Ann. art. 56, § 424 (1983)
MA	—	No Legislation
MI	18	Mich. Comp. Laws Ann. § 750.137 (West Supp. 1986)
MN	18	Minn. Stat. Ann. § 609.81 (West Supp. 1987)
MS	—	No Legislation
MO	18	Mo. Ann. Stat. § 568.070 (Vernon 1979)
MT	18	Mont. Code Ann. § 45-5-623 (1985)
NE	—	No Legislation
NV	18	Nev. Rev. Stat. § 647.140 (1985)
NH	18	N.H. Rev. Stat. Ann. § 398:2 (1983)
NJ	16	N.J. Stat. Ann. § 45:22-31 (West 1978)
NM	18	N.M. Stat. Ann. § 56-12-14 (1986)
NY	—	No Legislation

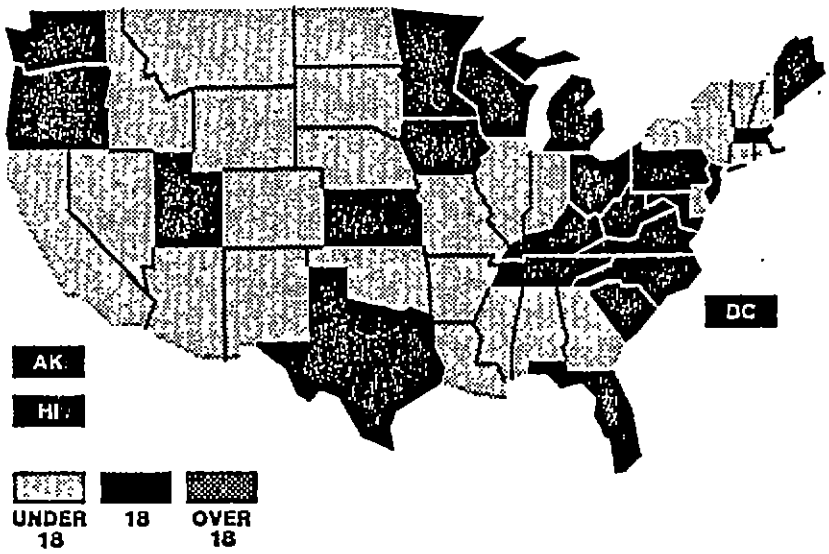
State	Age	Citation
NC	—	No Legislation
ND	—	No Legislation
OH	18	Ohio Rev. Code Ann. § 4727.10 (Baldwin 1984)
OK	18	Okla. Stat. Ann. tit. 59, § 1511 (West Supp. 1987)
OR	18	Or. Rev. Stat. § 726.270 (1985)
PA	18	Pa. Stat. Ann. tit. 63, § 281-29 (Purdon Supp. 1986)
RI	18	R.I. Gen. Laws § 19-26-12 (1982)
SC	—	No Legislation
SD	—	No Legislation
TN	18	Tenn. Code Ann. § 45-6-110 (1980)
TX	18	Tex. Rev. Civ. Stat. Ann. art. 5069-51.16 (Vernon 1987)
UT	18	Utah Code Ann. § 10-8-39 (1986)
VT	18	Vt. Stat. Ann. tit. 9, § 3870 (1984)
VA	—	No Legislation
WA	18	Wash. Rev. Code Ann. § 19.60.066 (Supp. 1987)
WV	—	No Legislation
WI	18	Wis. Stat. Ann. § 943.35 (West 1982)
WY	—	No Legislation

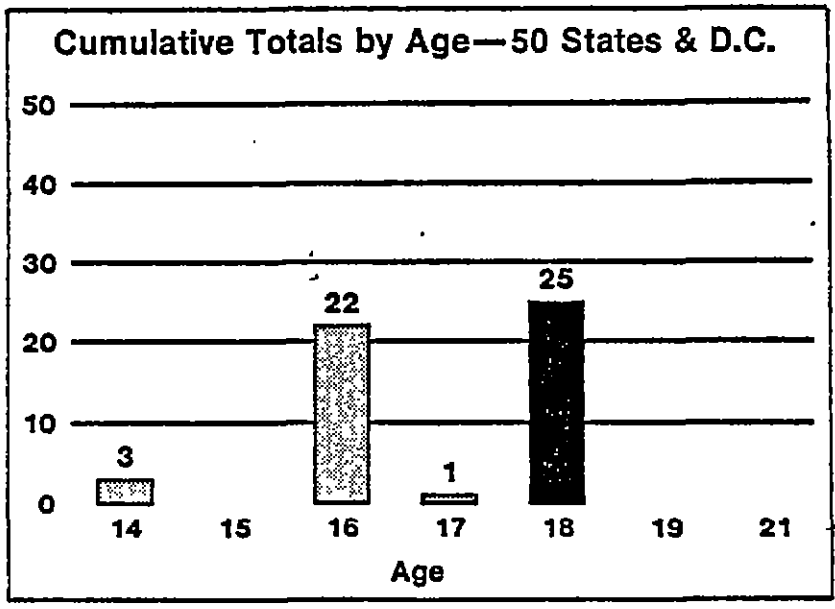
Totals (50 States and D.C.)

Age	16	18	No Legislation
Number	3	28	20

APPENDIX J

Right to Work in Hazardous Occupations





RIGHT TO WORK IN HAZARDOUS OCCUPATIONS

State	Age	Citation
AL	16	Ala. Code § 25-8-2 (1986)
AK	18	Alaska Stat. § 23.10.350 (1984)
AZ	16	Ariz. Const. art. 18, § 2
AR	16	Ark. Stat. Ann. § 81.702 (Supp. 1985)
CA	16	Cal. Lab. Code § 1292 (West Supp. 1987)
CO	14	Colo. Rev. Stat. § 8-12-110 (1986)
CT	16	Conn. Gen. Stat. § 31-24 (1987)
DL	16	Del. Code Ann. tit. 19, § 512 (1979)
DC	18	D.C. Code Ann. § 36-505 (1981)
FL	18	Fla. Stat. Ann. § 450.061 (West Supp. 1987)
GA	16	Ga. Code Ann. § 39-2-2 (1982)
HI	18	Haw. Rev. Stat. § 390-3 (1985)
ID	14	Idaho Code § 44-1301 (1977)
IL	16	Ill. Ann. Stat. ch. 48, para. 31.1 (Smith-Hurd 1986)
IN	17	Ind. Code Ann. § 20-8.1-4-24 (Burns 1975)
IA	18	Iowa Code Ann. § 92.8 (West 1984)
KS	18	Kan. Stat. Ann. § 38-602 (1986)
KY	18	Ky. Rev. Stat. Ann. § 339.230 (Michie/Bobbs-Merrill Supp. 1986)
LA	16	La. Rev. Stat. Ann. § 23:163 (West 1985)
ME	18	Me. Rev. Stat. Ann. tit. 26, § 772 (Supp. 1986)
MD	18	Md. Code Ann. art. 100, § 11 (1985)
MA	18	Mass. Gen. Laws. Ann. ch. 149, § 62 (West 1982)
MI	18	Mich. Comp. Laws Ann. § 409.103 (West 1985)
MN	18	Minn. Stat. Ann. § 181A.04 (West Supp. 1987)
MS	14	Miss. Code Ann. § 71-1-17 (1972)
MO	16	Mo. Ann. Stat. § 292.040 (Vernon 1965)
MT	16	Mont. Code Ann. § 41-2-101 (1985)
NE	16	Neb. Rev. Stat. § 48-313 (1984)
NV	16	Nev. Rev. Stat. § 609.190 (1973)
NH	16	N.H. Rev. Stat. Ann. § 276-A:4 (1978)
NJ	18	N.J. Stat. Ann. § 34:2-21.17 (West Supp. 1986)
NM	16	N.M. Stat. Ann. § 50-6-4 (1978)
NY	16	N.Y. Lab. Law § 133 (McKinney 1986)
NC	18	N.C. Gen. Stat. § 95-25.5 (1985)

State	Age	Citation
ND	16	N.D. Cent. Code § 34-07-16 (Supp. 1985)
OH	18	Ohio Rev. Code Ann. § 4109.05 (Baldwin 1983)
OK	16	Okla. Stat. Ann. tit. 40, § 72 (West 1986)
OR	18	Or. Rev. Stat. § 653.330 (1985)
PA	18	Pa. Stat. Ann. tit. 43, § 44 (Purdon Supp. 1986)
RI	16	R.I. Gen. Laws § 28-3-10 (1986)
SC	18	S.C. Code Ann. § 41-13-20 (1986)
SD	16	S.D. Codified Laws Ann. § 60-12-3 (1978)
TN	18	Tenn. Code Ann. § 50-5-104 (1983)
TX	18	Tex. Rev. Civ. Stat. Ann. art. 5181.1 (Vernon 1987)
UT	18	Utah Code Ann. § 34-23-2 (1974)
VT	16	Vt. Stat. Ann. tit. 21, § 437 (1978)
VA	18	Va. Code Ann. § 40.1-100 (1986)
WA	18	Wash. Rev. Code Ann. § 26.28.070 (1986)
WV	18	W. Va. Code § 21-6-2 (1985)
WI	18	Wis. Stat. Ann. § 103.65 (West 1974)
WY	16	Wyo. Stat. § 27-6-112 (1983)

Totals (50 States and D.C.)

Age	14	16	17	18
Number	3	22	1	25

APPENDIX K

STATE OF MARYLAND
OFFICE OF THE GOVERNOR

[SEAL]

WILLIAM DONALD SCHAEFER IN REPLY REFER TO: GO-02
GOVERNOR

April 7, 1987

Honorable R. Clayton Mitchell, Speaker
Maryland House of Delegates
Room 101, State House
Annapolis, Maryland 21401

Dear Speaker Mitchell:

The matter of exempting minors from the death penalty will come before you in the form of Senate Bill 598. When it does, I hope you will treat it favorably.

The measure bears impressive credentials. It is the first bill of its kind to pass the Senate. I was struck by the fact that the decisive Senate votes came not from newly-elected members of that Chamber, but from Senate veterans who had opposed an exemption for minors in previous years.

The bill also has the support of the principal spokespeople of all of the State's major religious faiths. This impressive coming together of our State's religious leadership may be unprecedented.

I believe it is for the good of the children of our State to establish a minimum age for the imposition of the death penalty, indeed, as have most other states and most other nations. Maryland law itself currently recognizes that age can be considered a mitigating factor at the sentencing phase of a capital trial.

I must, however, express my concern with the Amendments placed on the bill by the Judiciary Committee.

These Amendments would change the application of the death penalty exemption from under 18 to under 16. Eighteen years of age is recognized by international agreements to which the United States is signatory as the appropriate age for which the death penalty for capital crimes should be considered. Indeed, nine other states in our country set a minimum of 18 for the imposition of the death penalty. This is a significantly larger number of states than those which recognize any other minimum age cutoff.

As a State, we also distinguish the actions of children from the actions of adults. In the area of contracts, motor vehicles and voting, we recognize that juveniles are not fully responsible for their actions. Society as a whole shares responsibility for the actions of its children.

I have not come to this position quickly or lightly. Families and friends of murder victims have intense and legitimate needs, most often overlooked by the criminal justice process. Although we have made tremendous efforts as a State to help victims to no longer be dominated by their tragic loss, much more needs to be done. However, I do not believe that the execution of convicted juveniles can contribute to us fulfilling our obligation to crime's victims.

It is my sincere hope that you will work to return Senate Bill 598 to the same posture as it was first read in the House of Delegates, and act favorably on our legislation.

Thank you very much for allowing me to express my views to you on this important issue. I know that this issue is an important personal decision for all of us to make.

Sincerely,

/s/ Don Schaefer
Governor

cc: Members of the
House of Delegates

E

No. 86-6169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM WAYNE THOMPSON,

Petitioner,

—v.—

STATE OF OKLAHOMA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRIEF OF THE AMERICAN SOCIETY FOR ADOLESCENT PSYCHIATRY AND THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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May 15, 1987

Question Presented for Review

1. Is the execution of an individual who was under the age of 18 at the time he or she committed a capital offense cruel and unusual punishment in violation of the Eighth Amendment?

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INTEREST OF *AMICI CURIAE*

The American Society for Adolescent Psychiatry and the American Orthopsychiatric Association file this brief as *amici curiae* in support of petitioner by written consent of all parties, pursuant to Rule 36.2 of the Rules of this Court. The parties' letters of consent are on file with the Clerk.

The American Society for Adolescent Psychiatry ("ASAP") (Doris S. Soghor, M.D., President) was founded in 1967 and today has approximately 1400 members. ASAP provides a national forum for adolescent psychiatry and promotes the exchange of psychiatric knowledge about adolescents. Since its founding, ASAP has supported research on the normal development, as well as the psychopathology and treatment, of adolescents, helped to broaden knowledge and understanding of the various factors that may influence adolescent development and substantially improved the psychiatric community's ability to recognize and diagnose psychiatric problems common in adolescents. One half of ASAP's members are child psychiatrists, while the remaining number are general psychiatrists and psychoanalysts who maintain an active professional interest in adolescents. Its members work with adolescents in hospitals, schools and psychiatric clinics around the country as well as within the nation's juvenile court system.

The American Orthopsychiatric Association ("Ortho") (Bert Pepper, M.D., President) was established in 1924 and has traditionally been concerned with the problems, causes, treatment and prevention of psychiatric disturbances. It is an organization comprised of more than 10,000 members representing a variety of mental health-related professions — psychiatry, psychology, psychiatric nursing, social work, education and the law — including experts in adolescent development. With its broad-based membership, Ortho has consistently helped to shape public policy in the mental health and human development field from varying professional perspectives.

Amici sponsor a wide array of educational programs for their members and other mental health professionals. In addition each *amicus* publishes a scientific journal.

Amici are organizations with extensive background and experience in adolescent development. This brief is intended to

provide the Court with relevant data that will enable it to judge the critical issue herein effectively, fairly and with greater knowledge of adolescents' developmental capabilities. Adolescents are developmentally different from adults. Accordingly, *amici* strongly urge the Court to spare adolescents the imposition of capital punishment.

SUMMARY OF ARGUMENT

The law has historically recognized that adolescents differ intellectually and emotionally from adults, and therefore deserve to be judged and treated differently. This view is confirmed by a vast body of clinical research and literature. Psychiatrists and psychologists have demonstrated that adolescents have not yet developed many of the psychological, cognitive, and emotional characteristics of mature adults. Adolescents tend to be less mature, more impulsive, and less capable of controlling their conduct and thinking in terms of long-range consequences. Adolescence is a stage of human development in which one's character and moral judgment are incomplete and still undergoing formation. An adolescent's character structure is more flexible than an adult's and remains open to major modifications. (Point I)

Adolescents who commit capital offenses typically suffer from a variety of serious disturbances which inhibit their natural development. They come from chaotic families, have been exposed to extreme violence, suffer severe cognitive limitations, and frequently have long-standing psychiatric problems. These factors tend to exacerbate the existing vulnerabilities of youth and place an adolescent at extreme risk for seriously violent behavior. The findings of a recently completed study of persons on death row who committed capital offenses in their adolescence are consistent with this general understanding about youthful offenders. William Wayne Thompson, petitioner herein, who was one of the subjects of that study, exhibited the characteristics typical of this distinct subgroup. (Point II)

The Eighth Amendment forbids the infliction of cruel and unusual punishment. Punishment is inherently cruel if it is excessive. It is excessive if it is disproportionate or fails to make any measurable contribution to acceptable goals of punishment. As applied to adolescents, capital punishment is both disproportionate and makes no measurable contribution to acceptable goals of punishment. It is disproportionate as applied to youthful offenders because youths are less culpable than adults for their offensive acts given their incomplete psychological and emotional development. The death penalty is also contrary to the only legitimate aims of punishing the young: rehabilitation and treatment. Finally, in light of contemporary human understanding about adolescents generally and adolescents who commit capital offenses in particular, the death penalty as applied to adolescents is contrary to contemporary standards of decency. Execution of adolescents is therefore inherently cruel in violation of the Eighth Amendment. (Point III)

ARGUMENT

I

PSYCHIATRISTS, PSYCHOLOGISTS AND OTHER CHILD DEVELOPMENT EXPERTS RECOGNIZE THAT ADOLESCENCE IS A TRANSITIONAL PERIOD BETWEEN CHILDHOOD AND ADULTHOOD IN WHICH YOUNG PEOPLE ARE STILL DEVELOPING THE COGNITIVE ABILITY, JUDGMENT AND FULLY FORMED IDENTITY OR CHARACTER OF ADULTS

The law has always recognized that adolescents differ intellectually and emotionally from adults, and therefore deserve to be judged and treated differently.[1] As this Court said:

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years,

[1] Examples of this different treatment include limitations on youths' right to vote, contract, serve as jurors, purchase liquor, marry, drive motor vehicles, enlist in the armed services, or accept employment. *See generally* F. Zimring, *The Changing Legal World of Adolescence* (1982).

> generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults.

Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982), *quoting Bellotti v. Baird*, 443 U.S. 622, 635 (1979). This view is confirmed by a vast body of clinical research and literature.[2]

Psychiatrists, psychologists and other child development experts have demonstrated that adolescents are at a stage of development in which they lack the cognitive ability,[3] judgment and fully-formed identity or character of adults. "[A]dolescence is the transitional period between childhood and adulthood. It begins with the biological events of puberty and continues through a complex series of psychological and sociocultural events and influences to the establishment of an independently functioning person."[4]

An adolescent's intellectual growth is incomplete and his or her reasoning skills and logic are immature. From a cognitive perspective, adolescents are in the process of moving from "concrete operational thought" to "formal operational thought."[5] An adolescent begins to consider the possible as well as the actual.[6] These new cognitive skills develop continuously and "most adolescents cannot be shown to have reached the stage of formal reasoning by the end of high school."[7] Formal, abstract reasoning is a complex ability that is influenced by training and experience.[8] Therefore, although adolescents begin to acquire a broader awareness, they lack the judgment necessary to choose carefully among various possibilities and to appreciate the future consequences of their actions.

Behaviorally, the effects of an adolescent's developing cognitive ability include increased impulsiveness, experimentation, and risk-taking. An adolescent's newly forming capacity to reason abstractly, coupled with his or her "fascination with the possible," results in a desire to explore various behaviors.[9] However, because of an adolescent's limited experience and lack of ability to assess future consequences, he or she is unable to conceptualize realistically the potential negative outcomes of certain actions. This difficulty contributes to a young person's feelings of invulnerability to personal risk.[10] Hence adolescents often engage in alcohol and drug use/abuse, sexual experimentation, reckless use of motor vehicles, and other potentially destructive behaviors.[11]

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[2] *See, e.g.*, Brunstetter & Silver, *Normal Adolescent Development*, in 2 *Comprehensive Textbook of Psychiatry* 1608 (H. Kaplan & B. Sadock 4th ed. 1985); Hamburg & Wortman, *Adolescent Development and Psychopathology*, in 2 *Psychiatry* ch. 4 (J. Cavenar ed. 1985); *Handbook of Clinical Child Psychology* (C. Walker & M. Roberts eds. 1983); M. Lewis, *Clinical Aspects of Child Development* (2d ed. 1982); S. Ambron, *Child Development* (3d ed. 1981); P. Mussen, J. Conger & J. Kagan, *Child Development and Personality* (5th ed. 1979); M. Rutter, *Changing Youth in a Changing Society* (1979); Graham & Rutter, *Adolescent disorders*, in *Child Psychiatry: Modern Approaches* 407 (M. Rutter & L. Hersov eds. 1977).

[3] Cognition refers to the processes involved in perception, memory, reasoning, reflection, and insight. P. Mussen, J. Conger & J. Kagan, *supra* note 2, at 233-34.

[4] Brunstetter & Silver, *supra* note 2, at 1608. The period of adolescence encompasses approximately ages 11 to 18. *See generally* Hamburg & Wortman, *supra* note 2, at 5-8.

[5] Cognitive capacity develops in a sequence of stages. Jean Piaget is credited with documenting this growth and providing the terminology for these stages. *(Footnote Continued)*

See B. Inhelder & J. Piaget, *The Growth of Logical Thinking from Childhood to Adolescence* (1958); H. Ginsburg & S. Offer, *Piaget's theory of intellectual development* (1969).

[6] *See, e.g.*, S. Ambron, *supra* note 2, at 432-33.

[7] Brunstetter & Silver, *supra* note 2, at 1608.

[8] *Id.*

[9] Irwin & Millstein, *Biopsychosocial Correlates of Risk-Taking Behaviors*, J. Adolescent Health Care, Vol. 7, No. 6S, 82S, 87S (November 1986 Supplement).

[10] *Id.* at 87S.

[11] *Id.* at 82S.

Furthermore, researchers studying adolescent suicide have documented that adolescents tend not to appreciate fully the possibility, and finality, of death.[12] If they consider death at all, it is viewed as something that happens to elderly people, not teenagers. Many adolescents who attempt suicide may not really believe that death will occur. In fact, they may view a suicide attempt as nothing more than a form of running away, without any consideration of their own mortality.[13]

Adolescent cognitive development is also characterized by a high degree of egocentrism. An adolescent "assumes that other people are as obsessed with his behavior and appearance as he is himself. It is this belief that others are preoccupied with his appearance and behavior that constitutes the egocentrism of the adolescent."[14]

Moreover, adolescents come to regard themselves, and their own feelings, as particularly special and unique. This belief further contributes to an adolescent's lack of understanding regarding death. An adolescent's sense of specialness becomes a conviction of his or her immortality.[15] Adolescent egocentrism thus results in a general impairment of adolescent judgment.

Adolescence is also a period during which youths struggle to develop a certain measure of independence and personal identity or character.[16] An adolescent engages in this developmental task in a number of ways,[17] such as trying out various roles, separating from his or her parents, and seeking affirmation from a peer group. Throughout this process, adolescents remain emotionally dependent on other people.[18] They are vulnerable to influences from both parents and peers, and are less capable of independent, self-directed action than adults. The character structure of adolescents, though developing, remains in flux and does not represent the final level of maturity found in adults. Adolescents are by nature capable of significant and spontaneous change.[19]

Normal adolescence is no longer considered necessarily a time of extreme emotional turmoil.[20] Adolescence is, however, generally characterized by emotionality rather than rationality.

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[12] Sheras, *Suicide in Adolescents*, in *Handbook of Clinical Child Psychology* 759, 769-70 (C. Walker & M. Roberts eds. 1983).

Adolescent suicide and suicide pacts among teenagers have become a growing national concern. *See, e.g.*, Barron, *Suicide Rates of Teenagers: Are Their Lives Harder to Live?*, N.Y. Times, April 15, 1987, § C, at 1, col. 5. Suicide is reported to be the third leading cause of death for teenagers. Sheras, *supra* at 769.

[13] Sheras, *supra* note 12, at 769.

[14] Elkind, *Egocentrism in Adolescence*, 38 Child Development 1025, 1029-30 (1967) (emphasis in original deleted).

[15] *Id.* at 1030-31.

[16] *See generally* E. Erikson, *Identity: Youth and Crisis* (1968); E. Erikson, *Childhood and Society* (1963); P. Mussen, J. Conger & J. Kagan, *supra* note 2.

[17] It is understandable that many adolescents must struggle to develop a personal identity. In addition to the changes adolescents experience in how they think, they also undergo vast physiological and hormonal changes. Adolescents are faced with rapid increases in height, changing bodily dimensions, and physical and psychological changes related to sexual maturation. All of these changes threaten an adolescent's sense of self. *See* M. Lewis, *supra*, note 2, at 263-66.

[18] "[T]he transition from childhood into adolescence is marked more by a trading of dependency on parents for dependency on peers rather than straightforward and unidimensional growth in autonomy." Steinberg & Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 Child Development 841, 848 (1986).

[19] For example, young people can later overcome features of an antisocial personality that appear during adolescence. For this reason the diagnosis of Antisocial Personality cannot be applied until an individual has reached 18 years of age. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 319 (3d ed. 1980).

[20] *See, e.g.*, M. Rutter, *supra* note 2, at 235-38; Rutter, Graham, Chadwick & Yule, *Adolescent Turmoil: Fact or Fiction?*, 17 J. Child Psychology & Psychiatry 35 (1976); D. Offer & J. Offer, *From teenage to young manhood: a psychological study* (1975).

Daniel Offer's work has suggested that adolescents who experience the greatest inner turmoil are of lower socioeconomic status, and come from families with overt marital conflicts and a history of mental illness. See D. Offer, *The Psychological World of the Teenager (1969)*.

Adolescents tend to show a special intensity of feeling and tend to seek out emotional experience. Moreover, it has been demonstrated consistently that "adolescents experience a greater fluctuation of mood than adults."[21]

Finally, adolescents lack the capacity for mature, principled moral judgment which is characteristic of normal adult thought. Moral judgment emerges through the maturation process as a result of cognitive and emotional growth and an adolescent's interaction with his or her environment. An adolescent lacks a fully formed value system against which to evaluate his or her behavior and decisions. "[L]arge groups of moral concepts and ways of thought only attain meaning at successively advanced ages and require the extensive background of social experience and cognitive growth. . . ."[22]

Adolescents must undergo an array of significant changes prior to adulthood. Before these many developmental tasks are achieved, adolescents are vulnerable in a variety of ways. They have difficulty appreciating the future consequences of their acts, generally lack mature judgment, are easily influenced by family members and peers and often engage in experimentation and risk-taking. Adolescents tend to be guided by emotions rather than reason. Furthermore, adolescents lack a fully formed identity or character, and generally do not have the capacity for principled moral judgment.

Adolescence is a critical developmental stage through which young persons must pass prior to entering adulthood. The clinical literature confirms what we all generally know and what the law has always recognized — adolescents are not adults. Adolescents are less capable and less responsible than adults, and more in need of protection and support.

[21] Hamburg & Wortman, *supra* note 2, at 11.

[22] Kohlberg, *The Development of Children's Orientations Toward a Moral Order*, 6 Vita humana 11, 30 (1963). *See also* Kohlberg & Gilligan, *The Adolescent as a Philosopher: The Discovery of the Self in a Postconventional World*, Daedalus 1051 (Fall 1971); Kohlberg, *Development of Moral Character and Moral Ideology*, in *Review of Child Development Research* 383, 402 (M. Hoffman & L. Hoffman, eds. 1964).

II

ADOLESCENTS WHO COMMIT MURDER SUFFER FROM SERIOUS PSYCHOLOGICAL AND FAMILY DISTURBANCES WHICH EXACERBATE THE ALREADY EXISTING VULNERABILITIES OF YOUTH

Adolescents who commit murder typically suffer from a variety of serious disturbances which inhibit their natural growth and development. It is well established that these disturbances, acting in combination, exacerbate the already existing vulnerabilities of youth and place an adolescent at extreme risk for seriously violent behavior.[23]

Psychiatrists and psychologists have learned that adolescents who commit murder frequently come from families that are extremely chaotic and fail to provide the necessary support and direction for their children.[24] Under some circumstances, especially those in which an adolescent kills family members, he or she may actually be responding to family pressure or implicit messages to do so.[25] Furthermore, adolescents who commit murder almost invariably have a family background that includes extreme physical abuse and intrafamily violence. Many homicidal adolescents have also been sexually abused.[26]

[23] *See generally* Cornell, Benedek & Benedek, *Characteristics of Adolescents Charged with Homicide: Review of 72 Cases*, Behavioral Sciences & the Law Vol. 5, No. 1, at 11 (1987); Cornell, Benedek & Benedek, *Juvenile Homicide: Prior Adjustment and a Proposed Typology* (paper presented at the American Psychiatric Association Annual Meeting, Washington, D.C.) (1986); *The Aggressive Adolescent: Clinical Perspectives* (C. Keith ed. 1984); M. Rutter & H. Giller, *Juvenile Delinquency: Trends and Perspectives* (1983).

[24] *See, e.g.*, Haizlip, Corder & Ball, *The Adolescent Murderer*, in *The Aggressive Adolescent: Clinical Perspectives* 126, 129-34 (C. Keith ed. 1984); M. Rutter & H. Giller, *supra* note 23, at 180-91; Corder, Ball, Haizlip, Rollins & Beaumont, *Adolescent Parricide: A Comparison with Other Adolescent Murder*, 133 Am. J. Psychiatry 957 (1976).

[25] *See, e.g.*, Duncan & Duncan, *Murder in the Family: A Study of Some Homicidal Adolescents*, 127 Am. J. Psychiatry 74 (1971); Sargent, *Children Who Kill—A Family Conspiracy?*, 7 Social Work 35 (1962).

[26] *See, e.g.*, Haizlip, Corder & Ball, *supra* note 24, at 130-34; Straus, *Domestic Violence and Homicide Antecedents*, Bull. N.Y. Acad. Med., Vol. 62, No. 5,

(Footnote Continued)

These young people then are often victims of, and witnesses to, significant violence during their childhood and adolescence. The violence is often sustained, repetitive, and characterized by extraordinary brutality and sadism.[27] Their family environment is one in which violence is portrayed as the ultimate problem-solver. The use of physical aggression is considered an acceptable way of dealing with others.[28]

This systematic exposure to violence affects a young person in a number of ways. First, violence becomes a style of behavior against which a child or adolescent is apt to model his or her own behavior. Second, the persistent abuse engenders deep-seated feelings of rage which are often acted upon against other people.[29] Finally, a child who is physically battered can suffer significant trauma to the brain which results in increased impulsivity and volatility.[30]

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at 446 (1986); Straus, *Family Training in Crime and Violence*, in *Crime and the Family* 164 (A. Lincoln & M. Straus eds. 1985).

[27] *See, e.g.*, Lewis, Shanok, Pincus & Glaser, *Violent Juvenile Deliquents: Psychiatric, Neurological, Psychological, and Abuse Factors*, 18 J. Am. Acad. Child Psychiatry 307, 315-18 (1979); Sendi & Blomgren, *A Comparative Study of Predictive Criteria in the Predisposition of Homicidal Adolescents*, 132 Am. J. Psychiatry 423 (1975).

[28] *See, e.g.*, Straus, *Family Training in Crime and Violence*, *supra* note 26, at 182-84; Lewis, Shanok, Grant & Ritvo, *Homicidally Aggressive Young Children: Neuropsychiatric and Experiential Correlates*, 140 Am. J. Psychiatry 148 (1983).

[29] *See, e.g.*, Straus, *Family Training in Crime and Violence*, *supra* note 26, at 182-84; Halzlip, Corder & Ball, *supra* note 24, at 130; Lewis, Shanok, Grant & Ritvo, *supra* note 28, at 152-53; Paperny & Deisher, *Maltreatment of Adolescents: The Relationship to a Predisposition Toward Violent Behavior and Delinquency*, Adolescence, Vol. 18, No. 71, at 499 (Fall 1983); Silver, Dublin & Lourie, *Does Violence Breed Violence? Contributions from a Study of the Child Abuse Syndrome*, 126 Am. J. Psychiatry 404, 409 (1969); *see also* M. Wolfgang & F. Ferracuti, *The Subculture of Violence: Towards an Integrated Theory in Criminology* 160 (1967) ("[A]ggression is a learned response, socially facilitated and integrated. . . . ").

[30] *See, e.g.*, Lewis, May, Jackson, Aaronson, Restifo, Serra & Simos, *Biopsychosocial Characteristics of Children Who Later Murder: A Prospective Study*, 142 Am. J. Psychiatry 1161, 1165-66 (1985); Lewis, Shanok, Grant & Ritvo, *supra* note 28, at 152-53; Lewis, Shanok, Pincus & Glaser, *supra* note 27, at 314; Bender, *Children and Adolescents Who Have Killed*, 116 Am. J. Psychiatry 510 (1959).

Adolescents who commit murder also frequently have severe cognitive limitations. They tend to be intellectually immature and educationally deficient. These adolescents have significant impairments in judgment and are unable to perceive the consequences of their actions. These cognitive limitations are often linked to learning disabilities and neurological damage. Homicidal aggression in adolescents is also strongly associated with psychiatric problems.[31]

Together, these factors — exposure to violence, cognitive limitations, and psychiatric problems — exacerbate the already existing vulnerabilities of normal adolescence. Added to a normal adolescent's generally limited ability to appreciate the consequences of his or her actions and to take into account societal values in choosing a course of action, an adolescent who kills is handicapped further by impairment in cognitive ability. Added to a normal adolescent's susceptibility to the influence of family members and peers, an adolescent who kills is surrounded by an atmosphere of violence, in which the norm not only tolerates but encourages violence and trivializes its consequences. And finally, added to the emotionality and egocentrism of adolescence, an adolescent who kills is often afflicted with neuropsychiatric disorders which further heighten already intensified emotions and which can create serious misperceptions concerning the relationship between himself or herself and the external world.

A. A Study of Juveniles on Death Row Confirms Their Seriously Impaired Development

In the only clinical study of individuals on death row in the United States who committed capital offenses when they were under the age of 18, researchers have found that as a group these persons suffer from the neuropsychiatric, psychoeducational and family disturbances generally characteristic of adolescents who commit homicide (the "Study").[32]

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[31] *See, e.g.*, Lewis, Shanok, Pincus & Glaser, *supra* note 27, at 313-18.

[32] Lewis, Pincus, Bard, Richardson, Feldman, Prichep & Yeager, *Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States* (Paper accepted for presentation at the 34th Annual Meeting of the American Academy of Child and Adolescent Psychiatry, October 1987). (Appendix) (References followed by "A" are to the Appendix).

(Footnote Continued)

The 14 subjects of this interdisciplinary study consisted of all adolescents sentenced to death in four states. They were selected for the study solely on the basis of their age at the time of the capital offense. They are therefore reasonably believed to be representative of the adolescent offender death row population as a whole. (3A)

The subjects were given comprehensive psychiatric, psychological, neurological, educational and electroencephalographic examinations. The psychiatric examination consisted of a thorough interview covering topics such as medical history, history of neuropsychiatric symptoms, and family and social history, including history of physical and sexual abuse. Careful mental status examinations[33] were performed. Detailed neurological histories were obtained by a psychiatrist and a neurologist. These histories included difficulties surrounding birth, head injury, illnesses or drug overdoses known to affect the central nervous system, loss of consciousness, fainting, blackouts or other lapses, seizures, and symptoms suggestive of psychomotor epilepsy. Additionally, any historical evidence of central nervous system trauma was corroborated through physical examinations, record reviews, and specialized tests such as the electroencephalogram. Finally, a standard neurological examination was conducted and a battery of psychological, neuropsychological, and educational tests was administered. (3A-6A)

The Study found serious and wide-ranging disturbances in *all* of the subjects. All 14 suffered head injuries during childhood, nine of which were severe enough to result in hospitalization, indentation of the cranium, or loss of consciousness. Furthermore, the neurological and electroencephalographic data revealed that nine had serious neurological abnormalities, including evidence of localized brain injury, a history of grand mal seizures,[34] major neurological abnormalities such as abnormal head circumference, and symptoms or electroencephalographic findings suggestive of a previously undiagnosed seizure disorder. (6A)

The Study also found that seven of the subjects were psychotic at the time of their evaluations and/or had been so diagnosed in earlier childhood. An additional four subjects displayed histories consistent with severe mood disorders. The three remaining subjects suffered from disturbed thinking, characterized by periodic paranoia. Thus, all 14 exhibited psychiatric disturbances. Seven suffered from psychiatric disturbances that first appeared in early or middle childhood. In all cases, psychopathology[35] antedated the crimes for which the subjects were sentenced to death. (6A-7A)

The psychoeducational testing done in this Study further indicates that at least nine of the subjects experienced significant brain impairment and lacked the ability to formulate abstract concepts. Moreover, 12 subjects had I.Q. scores below 90.[36] The Study concludes that the majority of these individuals have serious deficiencies in abstract reasoning and function well below the expected levels for their ages. (7A)

The Study reveals that these adolescents offenders had been repeatedly and brutally physically and sexually abused, often by more than one family member. Furthermore, alcoholism, drug

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The authors of the Study are: Dorothy Otnow Lewis, M.D., Professor of Psychiatry, New York University School of Medicine, Clinical Professor of Psychiatry, Yale University Child Study Center; Jonathan H. Pincus, M.D., Professor and Chairman of the Department of Neurology, Georgetown University; Barbara Bard, Ph.D., Professor of Special Education, Central Connecticut State University; Ellis Richardson, Ph.D., Research Associate Professor of Psychiatry, New York University School of Medicine; Marilyn Feldman, M.A. in Psychology; Leslie Prichep, Ph.D., Associate Professor of Psychiatry, New York University School of Medicine; and Catherine Yeager, M.A., Research Assistant, Department of Psychiatry, New York University School of Medicine.

[33] The mental status examination is a cross-sectional inventory of a patient's current behavior, symptoms, sensorium, and cognitive faculties. *See* Ginsberg, *Psychiatric History and Mental Status Examination*, in 1 *Comprehensive Textbook of Psychiatry* 487 (H. Kaplan & B. Sadock 4th ed. 1985).

[34] Grand mal seizures are "characterized by loss of consciousness and tonic spasm of the musculature, usually followed by repetitive clonic jerking." Stedman's Medical Dictionary 475 (5th ed. 1982).

[35] Psychopathology refers to "disordered psychologic and behavioral functioning (as in a mental disease)." Webster's Third New International Dictionary 1833 (1968).

[36] An I.Q. score of 100 is considered average. A person with an I.Q. score below 90 falls into the bottom twenty-five percent of other individuals of the same age in the United States. *See* D. Wechsler, *The Wechsler Intelligence Scale for Children—Revised* 25 (1974); D. Wechsler, *The Wechsler Adult Intelligence Scale—Revised Manual* 27 (1980).

abuse, psychiatric treatment and psychiatric hospitalization were prevalent in the histories of their parents. (8A)

The Study concludes that individuals condemned to death in the United States for crimes committed in their youth are multi-handicapped. They generally have suffered serious central nervous system injuries, have suffered since early childhood from psychotic symptoms, and have been physically and sexually abused. These significant disturbances inhibit natural development, exacerbate the existing vulnerabilities of youth, and contribute to the violent behavior demonstrated by these adolescents. (8A)

The central nervous system injuries that these adolescents have experienced may contribute to their emotional instability, impulsivity, and difficulty in controlling aggressive behavior. Also, this type of brain injury may make these adolescents more vulnerable to the disorganizing effects of alcohol and drugs. The Study concludes that the severe cognitive impairment characteristic of these adolescents further compromises their ability to make mature judgments and to act in accordance with them. (8A-9A)

Furthermore, the physical and sexual abuse experienced by these adolescents contributes to their crimes. First, the multiple batterings suffered by these adolescents sometimes actually caused brain injury which would result in increased impulsivity. Second, the severe parental violence that they experienced functions as a model for their behavior. Third, the extreme, irrational brutality to which these adolescents are exposed engenders rage which is displaced onto other individuals in their environment. (9A)

Finally, the Study suggests that the multiple disturbances which contributed to the violent behavior that these adolescents displayed also contributed to the harshness of the sentences they received. According to the Study, these adolescents uniformly try to hide evidence of their cognitive deficits and psychotic symptomatology. (9A-10A) Similarly, they try to conceal or minimize their parents' brutality towards them, due to feelings of shame. (10A) It is ironic that the very factors which could function as mitigating circumstances instead remain hidden at the time of the sentencing. It is noteworthy that much of the clinical information revealed in this Study had apparently not been previously uncovered during the course of each individual adolescent's case.

The Study reports that of these 14 subjects "in only 5 cases were pretrial psychiatric or psychological examinations of any kind performed." (8A) "These 5 evaluations tended to be perfunctory and gave inaccurate and inadequate portrayals of the adolescents' neuropsychiatric and cognitive status." (10A) Only once was significant neuropsychiatric impairment reported. (8A) The Study states that the data obtained was only revealed in the course of lengthy, detailed, and comprehensive medical and psychological evaluations of the kind that simply are unavailable to adolescents charged with offenses punishable by death. (10A)

B. Petitioner Was a Subject of the Study and *Exhibited the Same Serious Disabilities*

Petitioner William Wayne Thompson was one of the subjects of the Study. He is typical in many ways of other homicidal adolescents, and exemplifies the psychological, educational and family disturbances found in the adolescents on death row as a group.

The only psychiatric or psychological evidence presented at petitioner's trial came from a clinical psychologist, Helen Klein, who was hired by the prosecution. Dr. Klein met with petitioner twice and produced a four and one-half page handwritten report. She then testified at the sentencing phase of petitioner's trial. Dr. Klein's testimony was cursory and speculative, and not tied to the information in her report. The gist of her testimony was that petitioner is an uncaring person who is incapable of change. She described petitioner as "an antisocial personality." (Tr. at 793.)[37] As noted earlier, the standard diagnostic tool for mental disorders used by psychiatrists and psychologists requires that the diagnosis of Antisocial Personality Disorder should not be made for individuals under the age of 18.[38]

Even Dr. Klein's limited report refers to serious disturbances in petitioner's background and makeup. Her repeated statements that petitioner "cannot organize his inner experience," that "[h]e

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[37] References preceded by "Tr." are to the trial transcript. References preceded by "R." are to the Record.

[38] *See supra* note 19.

Cf. Ford v. Wainwright, 106 S.Ct. 2595, 2605 n.3 (1986) ("The adequacy of the factfinding procedures is further called into question by the cursory nature of the underlying psychiatric examination itself.")

has a stereotypical, concrete view of the world and demonstrates little ability to organize or to conceptualize his experience," that "his inner experience is barren and disorganized," and that his drawings are "primitive and undifferentiated" are suggestive of cognitive limitations and other difficulties in thinking. (R. at 490-91, 489.) In addition, Dr. Klein states both in her report and in testimony that petitioner is educationally well below average. (R. at 489; Tr. at 789.) She concludes that the results of the psychological tests "indicate a person with limited capabilities." (Tr. at 789.) Furthermore, Dr. Klein's report provides a description of petitioner's general immaturity in its references to his restlessness, difficulty in controlling his impulses, and lack of social judgment. (R. at 490-91.) Finally, Dr. Klein's report briefly mentions that petitioner had abused drugs ("sniffed paint") and that he had been beaten by his brother-in-law, Charles Keene. (R. at 488.) There is no evidence in the record that Dr. Klein followed up in these critical areas. The record, however, contains testimony from Vicky Lynn Keene, Charles Keene's ex-wife, describing Charles' extreme brutality toward her, petitioner, and others. (Tr. at 611-16.) Also, Ms. Keene's testimony points out that Charles Keene introduced petitioner to drug abuse. (Tr. at 612.)

Thus, petitioner has been exposed to a constellation of psychological and environmental disturbances which have impeded his natural growth and development. He suffers from serious cognitive and intellectual limitations, educational deficiencies, and immature judgment. Furthermore, petitioner has been a victim of and witness to extreme abuse, which included his brother-in-law's brutality. He is thus typical of the subgroup of adolescents who commit capital offenses.

III

THE EXECUTION OF AN INDIVIDUAL WHO WAS AN ADOLESCENT AT THE TIME OF THE CAPITAL OFFENSE IS EXCESSIVE IN VIOLATION OF THE EIGHTH AMENDMENT

The Eighth Amendment, which applies to the states through the Fourteenth Amendment, forbids the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. A punishment is "cruel and unusual" if it is excessive. It is excessive if it is disproportionate to the crime or if it makes no measurable contribution to acceptable goals of punishment. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). A punishment is also impermissible if it offends society's "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). *Enmund v. Florida*, 458 U.S. 782 (1982).

Although the Court has determined that the death penalty is not inherently cruel in violation of the Eighth Amendment, *Gregg v. Georgia*, 428 U.S. 153, it has recognized the extraordinary nature of the punishment:

> [E]very Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.

Spaziano v. Florida, 468 U.S. 447 (1984) (Stevens, Brennan and Marshall, JJ., concurring in part and dissenting in part) (collecting cases); *see also California v. Ramos*, 463 U.S. 992, 998-99 at n.9 (1983) (collecting cases). Indeed,

> [d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (footnote omitted).

The question raised herein is whether death is *ever* an appropriate punishment for a youthful offender, an issue that was raised but left unresolved in *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The answer to this question must be no. The fundamental differences between adolescence and adulthood, distinctions

universally recognized by the medical and social sciences, as well as the law, make this irrevocable form of punishment both excessive as applied to youths and offensive to contemporary standards of decency.

Execution is disproportionate because adolescents tend to lack that which adults are presumed to possess: the ability to make sound judgments on their own behalf. Moreover, adolescents who commit capital offenses typically suffer from a variety of natural and environmental disabilities which further diminish their culpability for their acts. The penalty of death is too severe a punishment for persons who have not yet lived long enough to learn how to control their impulses, appreciate fully the consequences of their offensive acts, or come to understand how to contend with a hostile environment.

In addition, the death penalty, as applied to adolescents, makes no contribution to acceptable goals of punishment. In *Gregg v. Georgia*, 428 U.S. at 183, this Court recognized that the death penalty serves "two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." Whatever the deterrent effect of capital punishment on adults, the impulsiveness of youth, coupled with an adolescent's general lack of appreciation for the finality of death, seriously undermines whatever deterrent effect the death penalty might have on them. Retribution is objectionable because adolescent offenders are not as responsible as adults for their acts. Retribution is also contrary to the legitimate purposes of punishing the young. Unlike adults, for whom punishment is primarily a punitive sanction, punishment of youthful offenders is intended to be rehabilitative.

In light of all that is known about adolescent development generally and the abnormal development of homicidal adolescents in particular, inflicting the death penalty on young offenders is also offensive to "contemporary standards of decency." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Executing adolescents—who lack the cognitive ability, judgment and fully formed character of adults—fails to accord with "the dignity of man" which is the "basic concept underlying the Eighth Amendment," *Trop v. Dulles*, 356 U.S. at 100.

A. Capital Punishment Is Excessive As Applied to Adolescents Because It Is Disproportionate

A form of punishment is disproportionate, hence excessive under the Eighth Amendment, if it is greater than the offender deserves. *Coker v. Georgia*, 433 U.S. at 592. In determining whether the death penalty is disproportionate as applied to adolescents, this Court must consider whether adolescents should be equated with adults with respect to their eligibility for this ultimate sanction. Because adolescents are not expected to conform their behavior to adult standards, it is inappropriate to inflict on them a form of punishment intended only for society's most serious and incorrigible offenders.[39]

The fact that a separate system of criminal justice has evolved for adolescents is ample evidence that the death penalty, as applied to adolescents, is disproportionate.

> The very existence of a dual criminal justice system is evidence of a two-fold societal judgment that children do not bear the same degree of responsibility for their antisocial behavior as adults and therefore should not be subject to the harsh penalties of criminal trial and penal incarceration; and juvenile delinquents are, by virtue of their youth, responsive to rehabilitative treatment.[40]

Inherent in the law are the basic beliefs that (i) youths should not be punished as severely as adults because they are not as culpable as adults for their offenses; and (ii) youths by nature are receptive to treatment and rehabilitation.

The disparate treatment of youth in the law is amply supported by the clinical evidence about adolescent development. As described in Point I, adolescents are still growing socially and psychologically.

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[39] Thus, even though adolescents may be legitimately convicted and punished for homicidal acts in appropriate circumstances, their incomplete development should preclude them from eligibility for punishment by death. *See Enmund v. Florida*, 458 U.S. 782 (propriety of death penalty dependent upon degree of culpability of offender).

[40] S. Fox, *The Juvenile Court: Its Context, Problems and Opportunities* 11-13 (1967).

> [A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents have less capacity to control their conduct and to think in long-range terms than adults.[41]

Thus, execution must be regarded as a disproportionate form of punishment as applied to adolescents. Their diminished responsibility for their acts justifies the added measure of tolerance that exists in the law. Their ability to adjust and improve as they mature further demonstrates the inappropriateness of inflicting on adolescents the ultimate punitive sanction of death.

B. Capital Punishment Is Excessive As Applied to Adolescents Because It Serves No Legitimate Penological Purpose

The death penalty *per se* is not constitutionally excessive because it is thought to make a measurable contribution to two acceptable goals of punishment: deterrence and retribution. *Gregg v. Georgia*, 428 U.S. at 183. Because neither goal can be achieved by inflicting the death penalty on youthful offenders, its application to them is excessive.

1. The Death Penalty Does Not Deter Adolescents From Committing Capital Offenses

In commenting upon the lack of empirical evidence to support or rebut the theory that capital punishment has a deterrent effect, Justice Stewart observed:

> We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.

[41] *Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime* 47 (1978). ("*Task Force*").

Gregg v. Georgia, 428 U.S. at 185-86 (Stewart, J. plurality opinion). In light of what is known today about adolescent development generally and the development of adolescents who commit homicide in particular, adolescents are unlikely to engage in a meaningful "cold calculus that precedes the decision" to commit a capital offense in which "the possible penalty of death" enters into their decision-making process.

As described above, adolescents generally are more impulsive and less able to appreciate the consequences of their acts than adults. Adolescents also tend to lack a fully developed appreciation of death and its finality. Moreover, while adolescents may be capable of rational decision-making in some areas with the guidance and support of adults, this capacity is significantly lessened when they are placed under highly stressful circumstances.[42]

Such circumstances are abundant with respect to homicidal adolescents. These adolescents typically grow up in a chaotic family environment, are exposed to violence and abuse throughout their childhood, and tend to be impeded in their natural development by the adults upon whom they must rely for protection and support. They also suffer from cognitive limitations which further impair their ability to make sound judgments. These factors are particularly damaging during adolescence because it is at this stage of development that human beings are especially vulnerable and awkward. While adolescents may look like and possess many of the physical attributes of adults, they do not yet think or behave like adults. The violent nature of adolescents

[42] In sum, although some youths' involvement in delinquency may be related to cost-benefit decisions and to a rational process, other explanations better explain the delinquent behavior of most youths. With the vast majority of youngsters, delinquent behavior arises without much forethought as they interact with their environment. With still other youths, compulsive behavior, the influence of alcohol or drugs, or intense emotional reaction to a situation seem to lead them to bypass any rational process.

C. Bartollas, *Juvenile Delinquency* 102 (1985); *see also* P. Hahn, *The Juvenile Offender and the Law* 40-57 (2d ed. 1978) (free will and rational choice not among various behavioral theories explaining the causes of delinquency).

who kill is a predictable consequence of the combination of (i) their incomplete human development which has been further hindered by an unstable and violent childhood, and (ii) the rapid physical changes which they are undergoing.

It is thus demonstrably wrong to conclude that the death penalty deters adolescents who commit capital offenses. Adolescents generally do not to engage in any "cold calculus" that would factor in the possibility of a death sentence before they act homicidally. Emotionality, coupled with a pronounced inability to appreciate or be affected by the knowledge of the consequences of their actions, lead adolescents to commit capital offenses. Free will and rational calculation are generally absent in these circumstances.

2. Retribution Is Not a Legitimate Penological Purpose With Respect to Adolescents

The penological goal of retribution has two components: (1) the desire that offenders suffer the punishment they deserve, and (2) the desire for vengeance. *See Gregg v. Georgia*, 428 U.S. at 183-184. Whether these concerns are satisfied is contingent upon the degree of the offender's responsibility for the offense. In *Enmund v. Florida*, 458 U.S. 782, this Court observed:

> As for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund's culpability — what Enmund's intentions, expectations, and actions were. American criminal law has long considered a defendant's intention — and therefore his moral guilt — to be critical to "the degree of [his] criminal culpability."

Id. at 800 (citations omitted). Thus, "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 55 U.S.L.W. 4496, 4499 (U.S. April 21, 1987).

Adolescents, like adults, should pay for their crimes. However, "[t]he juvenile justice system, while holding minors responsible for their misconduct . . . acknowledges that the level of juvenile responsibility is lower than for adults."[43] It is thus excessive to inflict the penalty of death on adolescents.

Neither of the concerns of retribution is satisfied by executing youthful offenders. The punishment of death is too severe because adolescents are not as responsible as adults. In addition, the disparate legal treatment of adolescents is ample evidence that society is less vengeful with respect to youthful offenders.

Retribution is also contrary to the principal legitimate purpose of punishing the young: rehabilitation. Traditional methods of punishing youthful offenders are based upon a presumption that young persons are more amenable to positive change than adults. In fact, this presumption is well-documented. Consequently, the finality and irrevocability of the death penalty makes such punishment manifestly inappropriate for adolescents.

a. Adolescents Are Less Responsible Than Adults For Their Offensive Acts

Adolescents are developmentally different from adults in ways that diminish their level of responsibility for their actions. Point I documents the inexperience, impulsiveness and emotionality of youth. Adolescents have a greater tendency than adults to act in disregard of the potentially serious and harmful consequences of their acts. Even when they are aware of such consequences, adolescents are more prone than adults to act in spite of them.

> [T]he American adolescent, struggling with the biological and psychological pressures of youth, seeks status and reassurance in the company of his peers. Rebellion against parental authority and restrictions is combined with pressure to conform to the expectations of other adolescents. The teen years are a period of experiment, risk taking and bravado. Some criminal activity is part of the patterns of almost all youth subcultures.[44]

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[43] *Task Force* at 47.

[44] *Id.* at 3.

This Court has taken note of these developmental distinctions, observing that "minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443 U.S. at 635. *See Gallegos v. Colorado*, 370 U.S. 49, 54 (1962). This fundamental concept of youth forms the basis for state laws which commonly prohibit minors from possessing alcohol in public, from voting, from sitting on a jury, and from marrying without parental consent.[45]

> [T]he experience of mankind, as well as the long history of our law, recogniz[es] that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office.

Goss v. Lopez, 419 U.S. 565, 590-91 (1975) (Powell, J., dissenting) (emphasis in original). It also justifies disparate treatment for adolescents under the First,[46] Fourth,[47] and Fourteenth[48] Amendments.

[45] For example, in Oklahoma, minors — defined as persons under the age of 18 unless otherwise provided by statute, Okla. Stat. Ann. tit. 15, § 13 (West 1983) — are barred from engaging in any of these activities. *See* respectively, Okla. Stat. Ann. tit. 21, § 1215 (West 1983) (21 years of age); U.S. Const. amend. XXVI (18 years of age); Okla. Stat. Ann. tit. 38, § 28 (West Supp. 1987) (18 years of age); Okla. Stat. Ann. tit. 43, § 3 (West 1983) (18 years of age).

[46] *E.g.*, *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (state law forbidding sale of sexually explicit but non-obscene material to persons under 17 years of age does not violate First Amendment because "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults,'") (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

[47] *E.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (schoolchild's Fourth Amendment right against unreasonable search and seizure and his legitimate expectation of privacy must give way to school's legitimate need to maintain appropriate educational environment).

[48] *E.g.*, *Schall v. Martin*, 467 U.S. 253 (1984) (state law authorizing preventative detention of accused juvenile delinquents does not violate their Fourteenth Amendment rights if serious risk of subsequent crime exists, because,

(Footnote Continued)

This same concept of youth also warrants less severe punishment. *See supra* at 19-20.

Furthermore, as shown in Point II, adolescents who commit capital offenses are even less responsible for their acts than adolescents generally. Such adolescents tend to lack the support and protection ordinarily provided youths by parents and other family members. In addition, their families are frequently violent and abusive. These factors are further aggravated by psychiatric problems from which homicidal adolescents frequently suffer.

As a result of these factors, the natural maturation process is seriously inhibited. The emotional growth and development of adolescents who are homicidal is, in effect, stunted. The Study appended hereto confirms this general understanding.

The death penalty is thus too severe a punishment for adolescent offenders. Because an adolescent has not yet fully developed emotionally and psychologically, and because an adolescent who commits a capital offense tends to be even more developmentally limited, the execution of such an individual is by definition a greater punishment than he deserves.

b. Vengeance Is Antithetical to the Lawful Treatment of Adolescents

Society's moral obligation to protect its young is indisputable. As Justice Frankfurter observed in *May v. Anderson*, 345 U.S.

although juveniles' liberty interest is strong under Fourteenth Amendment, juveniles, unlike adults, require some form of custody).

Notably, in *Schall* the Court observed:

> Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae* interest in preserving and promoting the welfare of the child."

Id., at 265, *quoting Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

528, 536 (1953) (concurring opinion): "Children have a very special place in life which law should reflect. Legal theories . . . lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." Youth and its inherent characteristics — immaturity, vulnerability, inexperience and dependency — place the concept of revenge at odds with the lawful treatment of the young. Thus,

> [t]he spectacle of our society seeking legal vengeance through execution of a child raises fundamental questions about the nature of children's moral responsibility for their actions and about society's moral responsibility to protect and nurture children.[48]

As described *supra* at 24, youths are defined as less responsible for their acts by state legislatures and the courts. In addition to a host of both legislatively and judicially imposed restraints on the rights and liberties of adolescents, both state and federal laws provide distinct rules and procedures for the prosecution of youths. Under both state and federal law, many acts which constitute crimes if committed by adults instead constitute acts of "juvenile delinquency" if committed by adolescents. *See, e.g., State In Interest of D.B.S.*, 137 N.J. Super. 371, 349 A.2d 105 (1975).

Society's responsibility to protect and nurture the young is also well supported by legal precedent. This obligation is perhaps best reflected in the Court's long-standing recognition of the guiding role parents play in the upbringing of children.[49] In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that although a state's interest in compulsory education for its children is indeed strong, it must give way to parents' "traditional interest" in raising children. *Id.* at 214. Similarly, when it comes to deciding whether a child is to be committed to a state mental hospital, the Court has stated that it is up to the parents to decide, notwithstanding the child's clear "liberty interest" not to be confined without due process.

> *The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions . . . Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.*

Parham v. J.R., 442 U.S. 584, 602-603 (1979) (emphasis supplied).

Vengeance cannot therefore serve as a legitimate penological goal with respect to adolescents — even adolescents who commit capital offenses. The diminished culpability of adolescents, coupled with society's obligation to protect the young, warrants a measure of constitutionally imposed tolerance sufficient to bar their execution.

c. Retribution Is Contrary to Rehabilitation, the Principal Legitimate Goal of Punishing Adolescents

Retribution is contrary to rehabilitation, which is the primary goal of punishing the young. *E.g., In the Matter of the Appeal in Maricopa County, Juvenile Action No. J-84536-S*, 126 Ariz. 546, 617 P.2d 54, 56 (1979) ("the most deeply rooted concept in juvenile court philosophy is that the purpose of the system is to rehabilitate and not to punish"); *Rust v. Alaska*, 582 P.2d 134 (Alaska 1978) (express purpose of juvenile jurisdiction is rehabilitation rather than punishment). The reason for this objective is not hard to discern: "[I]ncorrigibility is inconsistent with youth . . . it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life." *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968).

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[48] Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 Okla. L. Rev. 613, 637 (1983).

[49] Constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts, supra*, at 166.

The existence of a juvenile justice system under both state and federal law which treats youthful offenders more leniently than adults demonstrates the importance society places on the goal of rehabilitation with respect to adolescents.[31] For example, the purpose of the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 (West 1985), "is to be helpful and rehabilitative rather than punitive . . ." *United States v. Hill*, 538 F.2d 1072, 1074 (4th Cir. 1976). Under the Act, "a juvenile is accorded preferential and protective handling not available to adults accused of committing crimes." *United States v. Frasquillo-Zomosa*, 626 F.2d 99, 101 (9th Cir.), *cert. denied*, 449 U.S. 987 (1980).

Greater tolerance respecting youthful offenders is justified by reason of their heightened capacity for behavior modification. As described *supra* at 7, adolescents are generally more receptive and responsive to rehabilitative treatment. More specifically, "juvenile murderers tend to be model prisoners and exhibit a very low rate of recidivism when released."[32] Putting adolescents to death is therefore without any legitimate penological justification.

C. The Execution of Adolescents Is Unconstitutional in Light of Contemporary Human Knowledge About Adolescents Generally and Adolescents Who Commit Capital Offenses in Particular

Eighth Amendment analysis is dynamic. Whether the infliction of a particular punishment is inherently cruel is subject to periodic review, which must give due consideration to "contemporary human knowledge." *Robinson v. California*, 370 U.S. 660, 666 (1962). Contemporary human knowledge respecting adolescent development generally and the nature of adolescents who commit capital offenses in particular indicates that the ultimate sanction of death is an inappropriate form of punishment for such persons for the reasons described herein.

[31] *See generally* A. Platt, *The Child Savers: The Invention of Delinquency* (2d ed. 1977); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 Stan. L. Rev. 1187 (1970); Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104 (1909)

[32] Streib, *The Eighth Amendment and Capital Punishment of Juveniles*, 34 Cleve. St. L. Rev. 363, 395 (1987) (citing Vitiello, *Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since Kent v. United States*, 28 De Paul L. Rev. 23, 32-34 (1976)); D. Hamparian, R. Schuster, S. Dinitz & J. Conrad, *The Violent Few* 52 (1978); T. Sellin, *The Penalty of Death* 102-20 (1982).

The developmental differences between adolescents and adults are alone sufficient to justify a constitutional ban on the execution of youths. It is offensive to "contemporary standards of decency" to commit to death individuals who, because of their lack of maturity, exist in the law as persons who are incapable of making legally binding decisions in certain matters and who are often accorded disparate treatment for acts which would be regarded as criminal if they were adults. The reason for these distinctions is clear: Youths "cannot be judged by the more exacting standards of maturity." *Haley v. Ohio*, 332 U.S. 596, 599 (1948). These same distinctions justify a degree of leniency in the manner in which adolescents who commit capital offenses are punished. The ultimate punitive sanction of death is just too harsh.

However, the analysis need not end there. As shown in Point II, youths who commit capital offenses typically suffer from a variety of serious natural and environmental disabilities. In addition to exhibiting all of the attributes which make youths vulnerable by nature, adolescents who kill are deficient intellectually, emotionally, psychologically and frequently neurologically. Their impairment is aggravated by parents or legal guardians who fail to provide much needed support at a critical stage in their lives, and indeed, who typically provide negative influences. The individuals on death row who were minors when they committed capital offenses exhibit these deficiencies.[33] Indeed, petitioner Wayne Thompson is typical of the group.

The execution of persons who commit homicide in their youth is therefore far more offensive as actually applied than it is in the abstract as applied to the universe of adolescents. The commission of a homicide by an adolescent is a reflection of a multitude of serious and complex problems from which the adolescent suffers. Such youths almost invariably have been deprived of a stable,

[33] It is thus no response to these considerations that all these factors are considerations that can be introduced as mitigating evidence at the penalty phase of a capital trial under *Lockett v. Ohio*, 438 U.S. 586 (1978), and its progeny. Clearly *Lockett* was an insufficient check inasmuch as these individuals were sentenced to death despite their substantial impairment.

healthy environment in which to develop. Nor could they rely upon adults to exercise rational judgment on their behalf. Most significantly, however, the law has provided them little practical recourse. Adolescents who commit homicide are legally subject to the will of and reliant upon adults who typically contribute substantially to the adolescents' impairment.

The most fundamental concepts of fairness are thus implicated by the execution of persons who have committed homicide in their adolescence. They lack not only the maturity necessary to be accorded the full panoply of civil rights and liberties afforded adults, but also the protective support and guidance from responsible adults who are legally authorized to impose their will upon them. The death penalty should not therefore be inflicted on adolescents because it is both offensive and excessive as applied to them.

CONCLUSION

The execution of adolescents is inherently cruel and unusual in violation of the Eighth Amendment, and consequently, petitioner's death sentence should be vacated.

Respectfully submitted,

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APPENDIX

APPENDIX

NEUROPSYCHIATRIC, PSYCHOEDUCATIONAL AND FAMILY CHARACTERISTICS OF 14 JUVENILES CONDEMNED TO DEATH IN THE UNITED STATES

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The purpose of this paper is twofold: 1) to describe the biopsychosocial characteristics of 14 juveniles sentenced to death in the United States, and 2) to explore the implications of these findings for imposition of the death penalty on juveniles.

THE LITERATURE

The execution of juveniles in America dates back to the 17th century when, in 1642, a child was executed for the crime of bestiality (1). Since then, there have been a total of 272 juveniles executed in the United States (2). These include 3 executions in 1985-1986 of boys condemned as juveniles but executed after they reached majority. Thus, the recent tendency has been to execute young adults for crimes committed as juveniles, thereby avoiding the actual execution of children. During the time of the evaluations conducted for this study, the number of juveniles awaiting death rose from 33 to 37.

United States law permitting the execution of juveniles is based on English common law. Although the death penalty for juveniles was abolished in England in 1908, histories of English law recount numerous cases from 1708 onward of children condemned to death (3, 4, 5). According to a 19th century account of the history of the town of Lynn, "In 1708 . . . two children were hanged here for felony, one eleven, and the other but seven years of age; which, if true, must indicate very early and shocking depravity in the sufferers, as well as unusual and excessive rigour on the parts of the majestrates in the infliction of capital punishment." (6) There is evidence to suggest, however, that although many children were sentenced to death in England in the 19th century, most of these sentences were commuted (7). Nevertheless, children did hang, and for crimes far less serious than murder. Blackstone, in his Commentaries on the Laws of England (8), commented on the treatment of juveniles: "If it appear to the court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death." Blackstone went on to cite cases of boys 9 and 10 years old who had killed companions and were hanged because their behaviors indicated a sense of guilt. In the first instance, the child hid himself after the murder; in the second instance, the child hid

the body of the victim. Thus, both children were considered to have been aware of the wrongfulness of their acts and therefore candidates for execution.

United States law regarding the responsibility of children has rested heavily on the commentaries of English jurists such as Blackstone. However, modifications based on case law have occurred. For example, in the case of *State v. Doherty* (9), where a child of approximately 13 years of age had killed her father, the judge instructed the jury to assume that a child under 14 years could not "discern between right and wrong unless it were proven otherwise." Similarly, in the case of *State v. Aaron* (10), in which an 11 year old slave was accused of murdering a younger child, the 11 year old's conviction and sentence of death were overturned by the Supreme Court of New Jersey. This decision was based on the grounds that the conviction was obtained by means of a pressured confession, and that the presumption of innocence had not been refuted by "strong and irresistible evidence that he had sufficient discernment to distinguish good from evil".

On the other hand, the outcome was quite different in the case of *Godfrey v. State* (11), in which a slave of approximately 11 years hacked a 4 year old to death, then, covered with blood, blamed the act on imaginary Indians. The child was sentenced to death. In spite of clear evidence of infantile reasoning he was executed. A review of the 14 leading cases of criminal responsibility of children in the United States in the 19th century revealed that only 2 children, both slaves, were actually executed. (6) As for the recent past, to quote Streib, "79% (33/42) of the children executed since 1945 were black." (7)

Clearly, there is a tradition in this country of holding juveniles responsible for their acts and meting out punishments as though the children were adults. Above the age of 7 years, children have been assumed to be able to discern between good and evil, the basic legal criterion for adjudicating culpability. Modern concepts regarding the juvenile's cognitive development, his capacity to make mature judgments and his ability to maintain adequate impulse controls have not been major considerations in the establishment of United States law regarding the execution of juveniles.

In fact, to date, little or nothing is known about the mental condition and cognitive capacities of juveniles sentenced to death, except what can be gleaned from popular accounts in newspapers and trial transcripts. Thus, we do know only from newspaper accounts that of the 3 juveniles executed in the 1980's one was retarded and another had spent time in a mental hospital (13, 14). Given the dearth of information regarding the biopsychosocial status of juveniles condemned to death, we welcomed the opportunity to conduct comprehensive psychiatric, neurological, neuropsychological, and educational assessments of approximately 40% of the juveniles currently awaiting execution in the United States.

METHOD

SUBJECTS

Our subjects were 14 boys, each of whom had been sentenced to death for capital offenses committed before reaching his 18th birthday. These 14 comprised all the juveniles sentenced to death in each of 4 different states in which the execution of minors is permissible by statute. Subjects were chosen because of their youth and not because of any known psychopathology, and can be presumed to be representative of the juvenile death row population. Ages at the time of their offenses ranged from 15 years 10 months to 17 years 10 months (mean 16 years 6 months). Their ages at the time of evaluation ranged from 17 years 10 months to 29 years 2 months (mean 22 years 3 months). There were 6 Black subjects, 7 White subjects and 1 Hispanic subject.

DIAGNOSTIC EVALUATION

The diagnostic evaluation consisted of psychiatric, neurological, psychological, neuropsychological, educational and electroencephalographic examinations.

The psychiatric examination consisted of a semistructured interview based on an expanded version of the Bellevue Adolescent Interview Schedule (B.A.I.S.). This schedule, consisting of

160 questions, was devised because no existing diagnostic instrument for children or adults dealt adequately with topics such as medical history, history of neuropsychiatric symptoms (*e.g.*, lapses, headaches, memory impairment, metamorphopsias, deja vu), characteristics of temper, or history of physical abuse. A pretesting of this instrument prior to its use in this study revealed that data obtained was appreciably more comprehensive than that obtained after a routine 2 week evaluation on an adolescent inpatient teaching service. In this study, the psychiatric evaluation was conducted by a psychiatrist and required from 4 to 6 hours to administer.

Although a detailed description of B.A.I.S. is beyond the scope of this report, suffice it to note that in addition to exploring psychodynamic factors and performing careful mental status evaluations, the psychiatrist obtained detailed medical, family and social histories. Detailed neurological histories were obtained by the psychiatrist and the neurologist including histories of perinatal difficulties, head injury, illnesses or drug overdoses known to affect the CNS, loss of consciousness, fainting, blackouts or other lapses, seizures, and psychomotor epileptic symptoms. Whenever histories of CNS insults were obtained, attempts were made to corroborate them through physical examination (e.g. scars, neurological signs), record reviews, and specialized tests (e.g., EEG).

Standard neurological examinations were performed on 12 of the 14 subjects (in 2 cases, scheduling precluded a neurological examination). The neurological examination consisted of measurement of head circumference; evaluation of cranial nerves; and tests of motor, sensory and reflex functions. Tests of coordination included quantification of numbers of alternating palm strikes in 10 seconds and numbers of finger taps in 10 seconds. Presence or absence of choreiform movements were determined by having the subject extend his arms and fingers in front of him and above his head for 5 seconds. All subjects were asked to skip after the examiner demonstrated the required pattern of movement. The neurologist also performed a mental status examination which included tests of orientation, and memory for digits forward and backward. Calculation skills were assessed by four serial subtractions of 7's starting from 100. Because of its importance in previous studies (15), and because of the subjectivity of the assessment of this particular symptom, both clinicians assessed the presence or absence of paranoid ideation. In only 1 case did their rating differ, and, in that case, the subject was coded as not having paranoid symptoms.

Certain other issues were covered by both the psychiatrist and the neurologist independently. For instance, both tried to ascertain whether a child had been the victim of abuse or had been witness to extreme family violence. A subject was considered to have been physically abused if he had been punched, beaten with a stick, board, pipe, or belt buckle; or had been beaten with a belt or a switch other than on the buttocks. A subject was also considered to have been physically abused if he had been deliberately cut, burned, or thrown down stairs or across a room. A subject was not considered to have been physically abused if he had been struck only with an open hand or beaten with the leather part of a belt or with a switch only on the buttocks.

A subject was considered to have been sexually abused if, as a child, older persons had fondled his genitals or penetrated his anus. Sexual abuse was also considered to have occurred if the child had been forced to perform sexual acts on an older person of either sex.

In addition to the neurological examination, all subjects had a neurometric quantitative electroencephalogram (QEEG) performed. Unfortunately, in 4 cases interference from metal structures and electronic equipment within the prisons distorted the data. However, QEEG data on 10 of the 14 subjects was obtained. For purposes of this phase of the study, 2 minutes of artifact free QEEG data were analyzed visually in order to determine the existence of sharp waves and/or actual seizure activity. More detailed analysis of the data will be reported subsequently.

Psychological testing consisted of the administration of the Weschler Adult Intelligence Scale-Revised (16), the Bender-Gestalt Test (17), and Rorschach Test (18), the Draw-A-Person Test (19), and the Halstead-Reitan Battery of Neuropsychological Tests (20).

Educational testing consisted of the administration of the Woodcock-Johnson Psycho-Educational Battery (21) and the "Mini-Screen" subtest from the Test of Adolescent Language (22), the "Story" subtest from the Test of Written Language (23), and a speech screening test.

FINDINGS

To provide the reader with a sense of the types of crimes committed by these subjects, Table 1 presents a list of offenses for which each subject was convicted.

Table 2 presents evidence of central nervous system trauma. All of the 14 subjects suffered head injuries during childhood, 9 of which were severe enough to result in hospitalization, indentation of the cranium and/or loss of consciousness. For example, one subject was hit by a truck at age 14 years that fractured his skull, and he was hospitalized for 11 months. Another fell off the roof of a house and lost consciousness at age 10, had a serious motorcycle accident at age 15, and had palpable scars bilaterally in the occipital region.

Still another subject was hit by a car at age 6 and hospitalized for approximately 6 months, and subsequently fell from a roof onto his chin in later childhood. These head injuries were confirmed by scars in the occipital region and on the chin. Thus, significant injury to the central nervous system was prevalent in this group of condemned juveniles.

Table 3 illustrates the neurological and electroencephalographic findings. In 9 cases serious neurological abnormalities were documented including evidence of focal brain injury (subjects 1, 13), major neurological abnormalities such as abnormal head circumference or a positive Babinski sign (subjects 5, 10, 12), a history of grand mal seizures (subject 6), and symptoms or electroencephalographic findings strongly suggestive of a previously undiagnosed seizure disorder (subjects 2, 7, 8).

Table 4 illustrates the severe psychopathology characteristic of the 14 juveniles. As can be seen, 7 of the subjects were psychotic at the time of their evaluations and/or had been so diagnosed in earlier childhood (subjects 1, 2, 3, 6, 9, 12, 14). An additional 4 subjects had histories consistent with diagnoses of severe mood disorders (subjects 5, 7, 10, 11). The 3 remaining subjects experienced periodic paranoid ideation at which times they often assaulted their perceived enemies. It is noteworthy that 7 of the subjects suffered from psychiatric disturbances that were first manifested in early or middle childhood. For example, one was so behaviorally disturbed he required special classes since 1st grade; another had multiple psychiatric evaluations and was treated with a variety of medications since age 6; and another attempted suicide at 11 years of age.

Table 5 presents data from selected subtests of the psychoeducational test batteries. This table illustrates that only 2 subjects had I.Q. scores above 90. One subject scored in the 60's, 5 in the 70's, and the remaining 6 in the 80's. Of particular importance was the finding that 9 subjects made more than 50 errors on the categories subtest of the Halstead-Reitan Battery of Neuropsychological Tests, which is a test of the ability to formulate abstract concepts. A score of more than 50 errors is considered to be indicative of brain dysfunction. Within this group of 9, 7 subjects also scored within the impaired range on the tactile performance test, another indicator of significant brain dysfunction.

Examination of the reading comprehension subtest scores of the Woodcock-Johnson Psycho-Educational Battery indicates that only 3 juveniles were reading at grade level and 9 were reading 4 or more years below their expected grade for their age. In fact, 3 subjects did not learn to read until their incarceration on Death Row. Another indication of deficits in abstract reasoning was their scores on the concept formation subtest of the Woodcock-Johnson. Indeed, 7 of the 14 scored below the fifth grade level on this test, and of these, 4 were functioning at a first or second grade level. Thus, several measures indicated that the majority of subjects in this sample had severe deficiencies in abstract reasoning and were functioning far below the expected levels for their ages.

As shown in Table 6, 12 of the subjects had been brutally physically abused, often by more than one family member. In addition, 5 more of the subjects had been sodomized by older male relatives, 3 for extended periods of time during childhood. In fact, 4 of these children had been sodomized by more than 1 individual. Therefore, not only did older family members, parents in particular, fail to protect these adolescents, but they also often used the subjects to vent their rages and to satisfy their sexual appetites. Alcoholism, drug abuse, psychiatric treatment, and psychiatric hospitalization were prevalent in the histories of the parents of these subjects.

Of note, in only 5 cases were pretrial psychiatric or psychological examinations of any kind performed. These tended to be brief and perfunctory and only once reported the existence of significant neuropsychiatric impairment. In that case the boy was diagnosed by one psychiatrist as schizophrenic and by another as suffering from an organic psychosis.

DISCUSSION

Our data indicate that juveniles condemned to death in the United States are multiply handicapped. They tend to have suffered serious injuries to the central nervous system, to have suffered since early childhood from a multiplicity of psychotic symptoms, and to have been physically and sexually abused. In 6 cases alcohol or drugs definitely contributed to uncontrolled behaviors and in 2 other cases alcohol and drugs were probable contributors.

In what ways do these factors contribute to their violent behavior? First, the kind of diffuse central nervous system injury that they sustain contributes to their emotional lability, impulsivity, and difficulty in controlling aggressive behaviors. Such brain injured youngsters are also especially vulnerable to the disorganizing effects of alcohol and drugs.

The most prevalent psychotic symptom experienced by these youngsters is episodic paranoid ideation. This symptom is probably a result of the combination of brain injury, violent parental behavior, and at times, the genetic vulnerability inherent in being the child of one or two psychotic parents. Whatever the causes, these youngsters, as a result of paranoid misperceptions and a pervasive sense of being endangered, lash out readily at real and imagined threats. In this way, offenses that start out as simple robberies or burglaries escalate into homicidal acts.

The severe cognitive impairment characteristic of these juveniles further compromises their ability to make mature judgments and act in accordance with them. These juveniles are, rather, bound by immediate stimuli and tend to act before they think. They are also easily influenced by those around them and sometimes take literally statements that are intended simply as expressions of exasperation (e.g., "Somebody ought to kill that guy"). It is not unusual for such children to act out the conscious or unconscious homicidal wishes of parental figures, older siblings, or older peers (24).

Physical and sexual abuse contribute to these juveniles' violence in several ways. First, the abuse itself is frequently characterized by multiple batterings to the child's head. These children are thrown to the floor, slammed against walls, thrown down stairs, and even kicked in the head. Thus, the impulsivity secondary to brain injury may often be the direct result of these batterings. Second, parental violence functions as a model for behavior. Whether one describes this phenomenon as "identification with the aggressor" or as modeling is irrelevant. Children imitate what they see. Finally, the kind of irrational brutality to which they have been exposed and subjected engenders rage, rage that is rarely expressed toward the child's battering parents or caretakers. More often, it is displaced onto other individuals in the child's environment.

It is likely that some of the very vulnerabilities that contributed to the condemned juveniles' violence also contributed indirectly to the harshness of the sentences they received. Theoretically, all of the vulnerabilities described, neurological impairment, psychiatric illness, cognitive deficits, and parental abusiveness are mitigating factors that, coupled with the juveniles' age, would argue against the imposition of the death sentence. Unfortunately, such cognitively handicapped juveniles have no idea of the existence of these vulnerabilities, much less of their relevance to

issues of mitigation. In fact, they almost uniformly try to hide evidence of cognitive deficits and psychotic symptomatology. They would prefer to be considered bad to being considered sick or retarded. They frequently tell examiners "I'm not crazy" or "I'm not a retard."

Similarly, these juveniles are ashamed of their parents' brutality toward them and try to conceal it or minimize it. Only painstaking, lengthy interviews, inquiring in detail about injuries, inquiring about the origin of visible scars, and asking about "scars I can't see" are likely to reveal the extent to which these juveniles themselves have been victimized. Even the most harsh abuse is often interpreted by the juvenile as punishment that was deserved and therefore to be hidden. Suffice it to say that a history of sexual abuse is even more likely to be concealed. Thus, these juveniles systematically conceal those factors in their lives most likely to mitigate against a sentence of death. It is, therefore, up to the adults in their families to make sure that factors relevant to the juveniles' defense are introduced at sentencing. Unfortunately, in the case of homicidal children, the very adults who should be assisting in their children's defense are not only inadequate to this task by virtue of their own psychopathology, but also have a vested interest in concealing the parental misconduct that would constitute mitigating circumstances. In fact, we have found that in several capital cases family members have cooperated with the prosecution, have testified against their own children, or have urged the judge to impose a death sentence.

Conceivably, the juveniles' lawyers might be relied upon to unearth and make use of the kinds of clinical data described in this paper. Such was not the case. The time and expertise required to document this quality of clinical information was not available.

Indeed, of these 14 subjects only 5 received pretrial evaluations of any kind. These 5 evaluations tended to be perfunctory and gave inaccurate and inadequate portrayals of the adolescents' neuropsychiatric and cognitive status.

Furthermore, the attorneys' alliances were often divided between the juveniles and their families. In fact, on several occasions, our clinical team was requested by attorneys to conceal or minimize information regarding parental physical and sexual abuse in order to spare the family any embarrassment. Thus, some of the very factors that led to the juveniles' aggression in the first place also contributed to an inadequate defense during the sentencing portion of their trials.

In short, factors such as brain damage, paranoid ideation, physical abuse and sexual abuse, all of which would have been relevant to issues of mitigation, were overlooked or deliberately concealed in the cases of these 14 condemned juveniles.

Adolescence is well recognized to be a time of great physiological and psychological stresses. Normal adolescents are distinguished from adults by their intensity and volatility of feelings, their poor tolerance of anxiety, their lack of awareness of the effects of their actions, their failure of self-criticism, and their difficulty appreciating the feelings of others (25). Our data indicate that, above and beyond these maturational stresses, homicidal adolescents must cope with brain dysfunctions, cognitive limitations, and severe psychopathology. Moreover, they must function in families that are not merely nonsupportive but also violent and brutally abusive. These findings raise questions about the American tradition of considering adolescents to be as responsible as adults for their offenses and of sentencing them to death.

TABLES

Table 1. Offenses of 14 Juveniles Condemned to Death

	Subject	*Offense*
**	1	Raped and murdered young woman.
*	2	Shot and killed subject's attorney's sister, then attempted to rape her.
	3	In the company of a 14-year old accomplice, shot and killed man in the course of a burglary.
	4	In the course of a robbery of a convenience store, shot and killed female clerk.
	5	During a robbery with one other person, shot and killed convenience store clerk.
	6	Raped, stabbed, and strangled a 76-year old nun.
**	7	During a spree of six robberies in one week, shot and killed male grocery store customer.
*	8	In the company of others, bludgeoned male victim with tire jack while stealing car.
*	9	Shot female convenience store clerk in the course of a robbery. The woman died five weeks later.
	10	Abducted, raped, then shot and killed female convenience store clerk.
*	11	Stabbed female victim 60 times, bit her breast, and pushed his hand into her vagina.
	12	Participated with a gang in the robbery and murder of a business man.
*	13	In the company of others, shot and killed relative.
*	14	Shot and killed mother and stepfather.

* Subject was under the influence of alcohol or drugs at the time of the offense.

** Subject may have been under the influence of alcohol or drugs at the time of the offense.

Table 2. Head Injuries of 14 Juveniles Condemned to Death

	Nature of Traumata	*Objective Indicators*
Subject 1	Automobile accident at age 12 (L.O.C.).* Repeated blows to the head from father in infancy	Deep indentation of cranium behind right ear.
Subject 2	Hit by truck at age 4, fractured skull, comatose for days.	Hospitalized 11 months.
Subject 3	Fall from tree at age 11 (L.O.C.).* Severe blow to head at age 13.	*Multiple scars on head.*
Subject 4	Shot in right temple at age 16. Mother broke plate over subject's head during childhood.	Indentation in right temporal area. Many scars on face.
Subject 5	Blow to head at age 8 with amnesia lasting approximately 2 weeks.	No documentation.
Subject 6	Fall from roof at age 10 (L.O.C.).* Motorcycle accident at age 15 (ran into car).	Scar in right occipital region. Scar in left occipital region.

Table 2. Head Injuries of 14 Juveniles Condemned to Death (Continued)

	Nature of Traumata	*Objective Indicators*
Subject 7	Car accident at age 10 (L.O.C.).* Hit in head with board during early childhood (tried to intervene when parents were fighting).	Indentation of forehead.
Subject 8	Fall from bunk bed at age 7. Serious bicycle accident in later childhood.	Indentation of cranium in center of forehead. Multiple facial scars.
Subject 9	Motorcycle accident in adolescence; uncertain severity. Multiple L.O.C.* secondary to blows to head.	No documentation (Scar on right cheek—questionable etiology).
Subject 10	Fall from bed onto face as infant. Car accident with head injury. Fell down flight of stairs early childhood.	Deviated septum from first accident. Scars on chin and upper lip.
Subject 11	Car accident in early childhood (possible L.O.C.).* Motorcycle accident at age 17 years (hit branch, fell off backwards).	No documentation

Table 2. Head Injuries of 14 Juveniles Condemned to Death (Continued)

	Nature of Traumata	*Objective Indicators*
Subject 12	Hit by car at age 6 (L.O.C.).* Fall from roof onto chin in later childhood.	Hospitalized 6 months for first accident. Scar in occipital area. Numerous facial scars.
Subject 13	Fall from tree at age 7 (possibly hit head). Bicycle ran into car at age 13; knocked dizzy. Kicked in head by brother-in-law middle childhood.	Prominent bump right forehead. Scar left of left ear.
Subject 14	Bicycle accident at age 10; fell in ditch. Severe bicycle accident at approximately age 12 (L.O.C.)* Broke nose and was told he "cracked skull".	Surgery required to repair nose. Multiple facial scars.

* L.O.C. = Loss of consciousness.

Table 3. Neurological Signs and Symptoms of 14 Juveniles Condemned to Death

Subject	*Subject Symptoms of Neurological Dysfunction*	*Objective Evidence of Neurological Dysfunction*
1	Lapses of fully conscious awareness. Frequent severe headaches.	Evidence of diffuse cerebral dysfunction (e.g., multiple "soft signs") and suggestion of focal damage (e.g., extinguishes left visual field). EEG-increased slow waves right temporal & bilateral parieto-occipital regions, possible sharp waves.
2	Dizzy episodes with falling and confusion. Multiple psychomotor symptoms (e.g., macropsia, peculiar tastes, multiple deja vu).	Neurologist suspects seizures. EEG did not function.
3	Bizarre, sometimes violent behaviors for which memory is impaired. Visual distortions. Multiple deja vu.	Neurological exam was not performed. EEG—sharp waves especially in the left temporal region.

Table 3. Neurological Signs and Symptoms of 14 Juveniles Condemned to Death (Continued)

Subject	*Subject Symptoms of Neurological Dysfunction*	*Objective Evidence of Neurological Dysfunction*
4	Lapses of full conscious awareness. Episodes of unresponsiveness with inability to comprehend. Migraine-type headaches.	Normal neurological exam. EEG—abnormal diffuse, excessive alpha activity; bilateral temporal sharp waves.
5	Severe headaches.	Right positive Babinski sign. EEG did not function.
6	History of grand mal seizures with urinary incontinence. Olfactory hallucinations. Impaired memory for behaviors.	Mild, left sided weakness. Bilateral unsustained clonus. EEG did not function.
7	Multiple psychomotor symptoms (e.g., micropsia, deja vu, olfactory hallucinations).	Hyperactive deep tendon reflexes. EEG—severe abnormalities in left temporal and right frontal regions.
8	Occasional dizziness. Occasional lapses of fully conscious awareness.	Neurological exam not performed. EEG—abnormal sharp waves throughout record, especially left temporal area; suggests epileptiform disorder.

Table 3. Neurological Signs and Symptoms of 14 Juveniles Condemned to Death (Continued)

Subject	*Subject Symptoms of Neurological Dysfunction*	*Objective Evidence of Neurological Dysfunction*
9	Dizzy episodes.	Saccadic eye movements, "Little other evidence of neurological dysfunction." EEG—possible sharp waves.
10	Hypergraphia Micropsia. Possible episodic lapses.	Unsustained ankle clonus bilaterally; multiple "soft" signs; suggestion of seizures. EEG—slightly abnormal; equivocal sharp waves in temporal and central regions.
11	Lapses of fully conscious awareness. Dizzy spells. Brief lapses of awareness, multiple psychomotor symptoms, e.g., olfactory hallucinations, micropsia, memory impairment.	Multiple "soft signs". EEG—equivocal sharp waves in right parietal and posterior temporal regions.
12	Severe headaches. Impaired memory for behaviors.	Macrocephaly. EEG did not function.

Table 3. Neurological Signs and Symptoms of 14 Juveniles Condemned to Death (Continued)

Subject	*Subject Symptoms of Neurological Dysfunction*	*Objective Evidence of Neurological Dysfunction*
13	Lapses of awareness. Impaired memory for behaviors. Frequent deja vu.	Left ankle clonus; poor rapid alternating movements on left; "evidence of right hemisphere dysfunction." EEG - diffusely abnormal.
14	Lapses of fully conscious awareness. Multiple psychomotor symptoms (e.g., metamorphopsias, frequent deja vu, dreamlike states, impaired memory for behaviors).	Normal neurological exam. EEG - possible sharp activity.

Table 4. Psychiatric Characteristics of 14 Juveniles Condemned to Death

Subject	*Recent Psychiatric Signs and Symptoms*	*Childhood Indicators of Psychopathology*
1	Paranoid ideation. Occasional command hallucinations. Rambling, illogical.	Severe emotional and behaviorial problems since kindergarten. Required special classes since 1st grade.
2	Periods of grandiosity, racing thoughts, insomnia. Episodically paranoid. Past suicide attempts.	Psychiatrically hospitalized and diagnosed "organic psychosis" at age 15 years.
3	Auditory hallucinations. Paranoid episodes that provoke retaliation.	
4	Considered excessively guarded, possibly paranoid, by 2 independent examiners.	

Table 4. Psychiatric Characteristics of 14 Juveniles Condemned to Death (Continued)

Subject	*Recent Psychiatric Signs and Symptoms*	*Childhood Indicators of Psychopathology*
5	Severely depressed and suicidal at time of interview (Beck's Depression score = 28). Episodes of racing thoughts and insomnia for 2-3 days.	Recurrent depressions since childhood. Suicide attempt at age 11 years.
6	Auditory and visual hallucinations during interview. Paranoid ideation. Diagnosed schizophrenic in prison.	Visual and auditory hallucinations beginning at approximately age 9.
7	Auditory hallucinations of an insulting nature. Manic episodes and 6-7 depressive episodes.	Psychiatric symptoms of questionable nature requiring psychiatric evaluation at age 8 years.
8	Paranoid ideation resulting in retaliation for imagined insults. Paranoia exacerbated by alcohol.	

Table 4. Psychiatric Characteristics of 14 Juveniles Condemned to Death (Continued)

Subject	*Recent Psychiatric Signs and Symptoms*	*Childhood Indicators of Psychopathology*
9	Pervasive paranoid ideation. Possible auditory hallucinations. At times, incoherent during interview. Inappropriate affect.	
10	Suggestion of bipolar mood disorder with insomnia, racing thoughts, hypergraphia, hyperactivity.	Psychiatric treatment at age 12 for exposing himself and compulsion to touch women's breasts.
11	Frequent paranoid misperceptions resulting in fights. One episode of auditory hallucinations. Depressive and euphoric periods.	Depressive symptomatology since early childhood.
12	Rambling, illogical, delusional, paranoid, inappropriate smiling (paranoid schizophrenic).	Severe emotional problems and multiple psychiatric evaluations and treatments since 6 years of age.

Table 4. Psychiatric Characteristics of 14 Juveniles Condemned to Death (Continued)

Subject	*Recent Psychiatric Signs and Symptoms*	*Childhood Indicators of Psychopathology*
13	Suggestion of paranoid ideation (e.g., must keep back to the wall even before entering prison).	Drug abuse since 8 years of age. Alcohol abuse since 10 years of age.
14	Floridly psychotic. Visual and auditory hallucinations. Bizarre behaviors (e.g. drinking blood daily, sticking tacks in head). Suicidal ideation.	Auditory hallucinations starting at 6 years of age.

Table 5. Neuropsychiatric and Psychoeducational Scores of 14 Juveniles Condemned to Death

	WAIS-R I.Q.			Halstead-Reitan			Woodcock-Johnson		
Subject	Verbal	Performance	Full Scale	Categories (errors)	Tactile Performance (minutes)	Impairment Index	Reading Comprehension (grade equiv.)	Calculation (grade equiv.)	Concept Formation
1	67	63	64	113*	37.0**	1.0***	2.3	3.0	1.0+
2	85	84	85	57*	9.4	0.4	7.6	3.3	5.8+
3	76	82	77	57*	10.8	0.7***	6.6	7.5	1.0+
4	75	76	74	96*	23.3**	0.7***	5.8	7.5	2.2+
5	88	88	86	90*	9.5	0.6	12.9	5.0	12.8
6	80	87	82	93*	27.3**	0.9***	10.6	6.6	8.6
7	84	71	77	93*	25.0**	0.7***	5.6	5.0	4.6+
8	75	85	77	66*	18.6**	0.7***	8.6	5.3	3.0+
9	84	85	83	38	21.6**	0.7***	8.6	8.0	5.8+
10	112	99	106	15	8.4	0.1	12.9	12.9	7.1+
11	68	91	81	23	12.7	0.4	1.1	6.6	3.6+
12	71	77	73	91*	15.6**	0.5	2.0	2.6	1.0+
13	86	94	88	11	6.4	0	9.5	6.2	10.8
14	115	125	121	19	8.9	0	12.9	12.9	19.9

* Greater than 50 errors on the categories test is indicative of significant brain dysfunction.
** Greater than 15 minutes on the Tactile Performance test is indicative of significant brain dysfunction.
*** An overall impairment index of 0.7 or greater is indicative of brain damage.
\+ Subject functions significantly below his appropriate grade level in concept formation.

Table 6. Evidence of Physical and Sexual Abuse, Family Violence, and Family Psychiatric Illness of 14 Juveniles Condemned to Death

	Physical Abuse	*Sexual Abuse*	*Family Violence & Psychiatric Illness*
1	Beaten by father, mother, stepfather, with switches, cords, belts, etc. causing cuts and bleeding. Blows to head.	Stepfather may have sexually abused sister.	Father and stepfather beat mother. Father alcoholic. Mother alcoholic and drug abuser.
2	Beaten with belt buckle and hit in head with hammer by stepfather. Made to kneel on rice.	Sodomized by step-father and grand-father throughout childhood and adolescence.	Stepfather assaulted mother. Mother psychiatrically hospitalized and alcoholic.
3	Placed in children's shelter in early childhood.		Mother threw objects at father. Mother takes medicine for her nerves.
4	Whipped all over body with belts and switches by stepfather. Mother broke plate over subject's head.		Violence between mother and stepfather.

Table 6. Evidence of Physical and Sexual Abuse, Family Violence, and Family Psychiatric Illness of 14 Juveniles Condemned to Death (Continued)

	Physical Abuse	*Sexual Abuse*	*Family Violence & Psychiatric Illness*
5	Punched around by father. Beaten on legs and buttocks by mother.		Father injured mother and was also violent with others. Several schizophrenic paternal relatives.
6	Stepfather sat subject on lighted burner of stove. Father punched subject with fists.	Sodomized by stepfather and his friends. Possible sexual abuse by mother and brother.	Father beat mother during pregnancy with subject and afterward. Mother had several "nervous breakdowns."
7	Father hit subject in head with board, punched him in face and broke front teeth, and beat subject all over body.		Parents fought violently with each other (one time hit subject in head by accident). Mother had multiple psychiatric hospitalizations and seizures.

Table 6. Evidence of Physical and Sexual Abuse, Family Violence, and Family Psychiatric Illness of 14 Juveniles Condemned to Death (Continued)

	Physical Abuse	*Sexual Abuse*	*Family Violence & Psychiatric Illness*
8	Beaten by father with extension cords, bullwhips, and 2x4 boards.		Hitting fights between parents. Father possibly alcoholic.
9	Beaten by stepfather all over body with extension cords and belts.		Siblings beat up stepfather for his treatment of subject.
10	None	None	None
11	Beaten by mother, father, grandmother.	Sodomized by uncle and male cousin from ages 5-11 years. Sexually abused by older female cousin at age 4 years.	Parents assaulted each other. Father alcoholic with Delerium Tremens and psychotic. Mother and father take pills for nerves.

Table 6. Evidence of Physical and Sexual Abuse, Family Violence, and Family Psychiatric Illness of 14 Juveniles Condemned to Death (Continued)

	Physical Abuse	*Sexual Abuse*	*Family Violence & Psychiatric Illness*
12	Beaten with extension cords by father and mother, sometimes beaten in the face.		Father and mother alcoholic. Mother suffers from depression.
13	Beaten and stomped by older brother. Whipped with sticks by mother. Kicked in head by brother-in-law.	Sodomized by older cousin once in early childhood. Attempted sexual assault by brother-in-law.	Extreme violence using weapons by several family members.
14	Beaten in infancy by father. Beaten by mother with ropes, shoes, belts, etc. Beaten with switches by grandfather.	Sodomized by family member when age 8. Sodomized by family friend in early childhood. Possible sexual abuse by female daycare worker.	Extreme violence; Stepfather preferred "hunting men" to animals; Stepfather cut another man; Brutality to animals. Father drug abuser. Mother takes medication for nerves.

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DEATH PENALTY FOR CHILDREN: THE AMERICAN EXPERIENCE WITH CAPITAL PUNISHMENT FOR CRIMES COMMITTED WHILE UNDER AGE EIGHTEEN

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Within the seamless web of the law and the empirical reality of capital punishment, what role does the youth of the offender play? If it is assumed that "children have a very special place in life which law should reflect,"[1] does it necessarily follow that "civilized societies will not tolerate the spectacle of execution of children?"[2]

Fueled by eight recent executions[3] and by the presence of more than twelve hundred persons on death row awaiting execution,[4] the debate about capital punishment continues with renewed vigor. The debate embraces such issues as the historical evolution of capital punishment, the legal process involved, the characteristics of the executed offenders, the nature of their offenses, and the criminological purposes served by "a punishment . . . unique in its severity and irrevocability."[5] This article examines these issues as applied to very young offenders lawfully executed in the United States for crimes they committed while under age eighteen.

In the early 1980s, capital punishment of children is reemerging as an issue of great national importance,[6] sufficient even to capture the

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1. *In re* Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

2. MODEL PENAL CODE § 210.6 commentary at 133 (Official Draft and Revised Comments 1980).

3. Gary Gilmore, Utah, Jan. 17, 1977; John Spenkelink, Florida, May 25, 1979; Jesse Bishop, Nevada, Oct. 22, 1979; Steven Judy, Indiana, Mar. 9, 1981; Frank Coppola, Virginia, Aug. 10, 1982; Charles Brooks, Jr., Texas, Dec. 7, 1982; John Louis Evans III, Alabama, Apr. 22, 1983; and Jimmy Lee Gray, Mississippi, Sept. 2, 1983.

4. As of Aug. 20, 1983, 1,230 persons were on death row awaiting execution. NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., DEATH ROW, U.S.A. 1 (Aug. 20, 1983).

5. Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion).

6. For the purpose of this article, the term "children" means all persons under the age of eighteen. Capital punishment of children refers to sentencing to death or executing a person for a crime committed by that person at an age of less than eighteen years. It is beyond the scope of this article to explore the various ages at which persons are considered children or adults for purposes of voting, driving, contracting, working, etc. For particularly insightful analysis of some of these issues, see F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE (1982);

attention of the United States Supreme Court and the American Bar Association.[7] The reappearance of capital punishment for crimes committed by persons under age eighteen is primarily the product of two trends. One trend is an increasing willingness to subject persons under the maximum juvenile court jurisdictional age limit to criminal prosecution, either through direct prosecution of the child in criminal court[8] or through initial juvenile court jurisdiction being transferred in waiver proceedings to criminal court.[9] The other trend is the return to reliance upon capital punishment in the criminal justice system.[10] The combined effect of these trends is an increased exposure of children to the possibility of capital punishment for their misdeeds.

Historical Background of Capital Punishment for Children

The United States inherited the bulk of its criminal law, including the tradition of capital punishment, primarily from England but also from other European countries. A fundamental premise of this criminal jurisprudence was then and is now that persons under age seven were conclusively presumed to be incapable of entertaining criminal intent and thus could not have criminal liability imposed upon them.[11] For persons from age seven to age fourteen, the presumption of inability to entertain criminal intent was rebuttable, and if rebutted, such a person could be convicted of a crime and be sentenced to death.[12] No such presumption applied to persons age fourteen or over. This view of children's liability in the criminal justice system was accepted by the United States Supreme Court in *In re Gault*[13]: "At common law,

Ilatey, *The Rights of Adolescents*, 31 WM. & MARY L. REV. 363 (1982). Eighteen is chosen as the crucial age in this analysis because a large majority of jurisdictions use that age as the cutoff for juvenile court jurisdiction.

7. *See* Eddings v. Oklahoma, 455 U.S. 104 (1982). At its Annual Meeting in Atlanta, Ga., in August, 1983, the American Bar Association adopted the following resolution: "Be it resolved that the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committed while under the age of eighteen (18)." Juvenile Justice Letter No. 9 from Alaire Bretz Rieffel, Section of Criminal Justice, ABA, to Members of the Juvenile Justice Committee of the Criminal Justice Section, ABA (Aug. 11, 1983).

8. *See, e.g.*, N.J. FAM. CT. ACT § 712(a)(ii), N.J. STAT. ANN. § 2A:4A (West Supp. 1981); N.Y. PENAL LAW §§ 10.00 (18), 30.00 (McKinney Supp. 1982); N.Y. CRIM. PROC. LAW §§ 180.75, 190.71, 210.43, 220.10(5)(g) (McKinney 1982).

9. *See, e.g.*, Kent v. United States, 383 U.S. 541 (1966).

10. Gregg v. Georgia, 428 U.S. 153 (1976) (holding that capital punishment statutes are not inherently unconstitutional). Since *Gregg*, more than two-thirds of the states have adopted new capital punishment statutes. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1980, at 3 (1981).

11. 4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 23-24 (1792); 1 M. HALE, PLEAS OF THE CROWN 25-28 (1682).

12. 4 BLACKSTONE, *supra* note 11, at 23-24; 1 HALE, *supra* note 11, at 25-28.

13. 387 U.S. 1 (1967)

children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory to punishment like adult offenders."[14]

Considerable debate has centered on the issue of whether children were actually executed after being sentenced to death. Much of the debate seems to be confused by the use of relatively vague terms such as "children" and "adolescents," and by infrequent reporting of the age of the offender on the date of the crime or the execution. The term "adolescent" has rarely been used in a legal sense even though it is a regular part of the vocabulary of the social sciences.[15] Despite this confusing "linguistic discontinuity,"[16] the conventional historical view is that in England "[a]dolescents as well as children could be—and actually were—sentenced to death and even executed."[17]

As for the younger members of this group, the English law's bark was apparently much worse than its bite. Knell studied the official records for the years 1801 to 1836 for the Old Bailey,[18] a major criminal court in London. In 103 cases, children under age fourteen were sentenced to death but none were ever executed.

The same dichotomy between sentencing and execution carried over to colonial America and the early United States. In the early nineteenth century, "courts were extremely hesitant to sentence a child under fourteen to death."[19] As for actually carrying out the death sentence, Platt and Diamond[20] found: "[O]nly two children under fourteen were judicially executed between the years 1806 and 1882. In both cases, the defendants were Negro slaves and, in one case, the victim was the son of a white property owner."[21] At least some trial courts were convinced that the reluctance to execute younger children was universal. A criminal trial judge observed in 1823: "The lowest period, that judgment of death has been inflicted upon an infant in the United States, has never extended below sixteen years, or at least after a careful

14. *Id.* at 16.

15. ZIMRING, *supra* note 6, at xi-xiii.

16. *Id.* at xii.

17. 1 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750: THE MOVEMENT FOR REFORM 1750-1833 11 (1948).

18. Knell, *Capital Punishment: Its Administration in Relation to Juvenile Offenders in the Nineteenth Century and Its Possible Administration in the Eighteenth*, 5 BRIT. J. CRIMINOLOGY 198, 199 (1965).

19. Platt & Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CALIF. L. REV. 1227, 1246 (1966). *See also* A. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 211-12 (2d ed. 1977).

20. Platt & Diamond, *supra* note 19.

21. *Id.* at 1246-47 (referring to Godfrey v. State, 31 Ala. 323 (1858), and State v. Guild, 10 N.J.L. 163 (1828)).

search none could be found, and it is presumed none can be found."[22] Courts that sentenced younger offenders to death apparently believed that commutation of their sentences was likely.[23]

Recent research suggests that these scholars and courts were seriously misinformed.[24] Seven children were executed prior to 1800 and 95 prior to 1900, the youngest aged ten years. It is likely that courts today are no better informed.

Impact of the Juvenile Justice System, 1899 to 1930

During this period in the United States, the juvenile justice system began to emerge.[25] The United States Supreme Court provided the conventional explanation:

> The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. . . . The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive.[26]

Mid-nineteenth-century reformers focused primarily upon modifying the harshness of the correctional phase of the criminal justice system.[27] The best-known reforms were the houses of refuge established in various cities by reformers anxious to separate youthful offenders from adult criminals.[28] The success of these reforms was limited by the continuing criminal court jurisdiction over those youthful offenders. This led reformers to believe that a separate legal system for juveniles was needed.

Following Illinois' lead in 1899, a number of states enacted juvenile court legislation patterned on the statutes of Illinois and other pioneer states. By 1925 almost all states had such legislation;[29] the federal government joined the trend in 1938.[30] The appearance of the juvenile justice system can be seen as a codification of the previous unofficial and implicit policy of giving special treatment to young offenders.[31] For the purpose of this article, the premise is accepted that a juvenile justice system should not punish the juvenile offender but must treat and rehabilitate him.[32] Adoption of this premise requires rejection of the death penalty for juvenile offenders. During the early era of juvenile justice (1900-1930), however, seventy-seven persons were executed for crimes committed while under age eighteen.[33] None were sentenced to death directly by juvenile courts but were condemned by adult criminal courts.

22. People v. Teller, 1 WHEELER CRIMINAL LAW CASES 231, 233 (N.Y. City Ct. 1823).

23. W. SMITHERS, EXECUTIVE CLEMENCY IN PENNSYLVANIA (1909); Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 301 (1962).

24. *See infra* note 45 and Table 9.

25. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

26. *In re* Gault, 387 U.S. 1, 15-16 (1967).

27. S. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM (2d ed. 1981).

28. Mennel, *Origins of the Juvenile Court: Changing Perspectives on the Legal Rights of Juvenile Delinquents*, 18 CRIME & DELINQUENCY 68 (1972). Some commentators suggest that the reformers were in fact motivated by a desire to gain greater control over children through punitive policies disguised as rehabilitation. PLATT, *supra* note 19; Fox, *supra* note 25, at 1188-89.

29. V. STREIB, JUVENILE JUSTICE IN AMERICA 5-7 (1978).

Prosecution of Children in Criminal Court

In most jurisdictions today, delinquent acts are defined as acts in violation of state or federal law, local ordinance, or an order of the juvenile court.[34] Generally, this definition encompasses acts that would be crimes if committed by an adult. This broad category includes murder and other capital crimes unless they are specifically excluded from the jurisdiction of the juvenile court. The essentially criminal nature of these delinquent acts means that the cases could fall within the jurisdiction of criminal court, as has been recognized by the Supreme Court in *Gault*:

> [T]he fact of the matter is that there is little or no assurance . . . that a juvenile apprehended and interrogated by the police or even by the Juvenile Court itself will remain outside of the reach of adult courts as a consequence of the offense for which he has been taken into custody. In Arizona, as in other States, provision is made for Juvenile Courts to relinquish or waive jurisdiction to the ordinary criminal courts.[35]

In 1975 the Supreme Court noted in passing that "an overwhelming majority of jurisdictions permits transfer in certain instances."[36]

The Supreme Court's first direct consideration of juvenile justice

30. Ruperti, *Juvenile Criminal Proceedings in Federal Courts*, 18 LOY. L. REV. 133, 139 (1971-72).

31. STREIB, *supra* note 29, at 5-13.

32. This premise was uniformly incorporated into juvenile statutes and was explicitly recognized by the Supreme Court: "The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive." *In re* Gault, 387 U.S. 1, 15-16 (1967).

33. See *infra* note 45 and Table 9.

34. DAVIS, *supra* note 27, at 2-12.

35. *In re* Gault, 387 U.S. 1, 50-51 (1967).

36. Breed v. Jones, 421 U.S. 519, 535 (1975).

issues, in *Kent v. United States* in 1966,[37] was a review of the procedures by which a juvenile court could and should waive jurisdiction over a juvenile offender in order to transfer the case to adult criminal court. The significance of such transfer is apparent from the facts in *Kent*: 16-year-old Morris A. Kent, Jr., was transferred from juvenile to criminal court, convicted of six felonies, and sentenced to a total of thirty to ninety years in prison.[38] For many jurisdictions, the transfer from juvenile to criminal court can trigger the possibility of the death penalty.[39]

A person under the age limit for juvenile court jurisdiction will nevertheless be tried in criminal court if the offense charged has been expressly excluded from the jurisdiction of juvenile court.[40] Typically, only the most serious crimes such as murder, rape, and robbery are excluded. Some states expressly exclude capital offenses from juvenile court jurisdiction,[41] leaving only criminal court jurisdiction over such offenses.

Finally, some states give the prosecuting attorney discretion to decide in which court the case should be filed.[42] If the prosecutor files a juvenile petition, the case proceeds in juvenile court; if a criminal information is filed or a grand jury indictment is obtained, the case proceeds in criminal court.

Each of these three alternatives lodges the choice of court in a different primary decision-maker. The traditional court waiver alternative leaves the decision up to the judiciary—specifically the juvenile court judge. In the second alternative, the legislature has made the original and preemptive decision to place certain cases exclusively in criminal court. The prosecutor is the decision-maker as to the choice of court in the third alternative. Whichever means is followed, an offender under the juvenile court age limit is subjected to the full authority of the criminal court, typically including the power to impose capital punishment for certain crimes.

Characteristics of Executed Children

Of the 14,029 known legal executions in American history,[43] 287 of them have been for crimes committed by persons under the age of eighteen.[44] Ninety-five of these executions occurred prior to the advent of the juvenile justice system (pre-1900) and 192 occurred after 1900. The first such execution was in 1642 in Massachusetts; the most recent was in 1964 in Texas.[45]

Table 1 indicates the age of these executed children at the time of the offense as accurately as can be determined from the available information. The youngest were age ten at the time of the offense, with a total of thirty-nine children executed for committing crimes while age fifteen or younger. The two 10-year-olds were an unnamed black

Table 1

Pre-1900 and Post-1900 Executions
for Crimes Committed While Under Age Eighteen
According to Age When Crime Committed

Age When Crime Committed	1642 to 1899	1900 to Present	Totals
Unknown	4(4%)	1(1%)	5(2%)
10	2(2%)	0(0%)	2(1%)
11	1(1%)	0(0%)	1(0%)
12	4(4%)	0(0%)	4(1%)
13	4(4%)	1(1%)	5(2%)
14	3(3%)	2(1%)	5(2%)
15	8(8%)	9(5%)	17(6%)
16	22(23%)	30(16%)	52(18%)
17	47(49%)	149(78%)	196(68%)
Totals:	95(100%)	192(100%)	287(100%)

37. 383 U.S. 541 (1966).
38. *Id.* at 550.
39. ZIMRING, *supra* note 6, at xii:

> In some jurisdictions, the question of whether a 16-year-old accused of murder will stay in juvenile court, or be tried in the criminal courts for a capital crime, will depend on an individual judge assessing whether that 16-year-old is "mature" and "sophisticated." If he is found to be "sophisticated," his reward can be eligibility for the electric chair.

40. DAVIS, *supra* note 27, at 2-15 to 2-17.
41. *See, e.g.*, N.C. GEN. STAT. § 7A-608 (Repl. 1981).
42. DAVIS, *supra* note 27, at 2-17 to 2-19.
43. The figure 14,029 was provided by Watt Espy, Capital Punishment Research Project, University of Alabama School of Law. Letter with data from Watt Espy to Victor Streib (Apr. 28, 1983). Espy has verified these 14,029 executions through newspaper reports, official documents, and other sources over his many years of research on this project.
44. *Id.* The 14,029 case files were examined to identify the 287 cases discussed in this article. The other primary source of data was Teeters & Zibulka, *Executions Under State Authority—An Inventory*, in W. BOWERS, EXECUTIONS IN AMERICA 200 (1974). For some of the older cases, the information is fairly sketchy; however, this is clearly the most complete and accurate data on capital punishment for young offenders available.
45. The data presented in this section are the most up-to-date and accurate available from this ongoing research. These data and their analyses supersede previously presented papers from earlier stages of this research, including: Streib & L. Sametz, "Killing Kids for Justice: Capital Punishment for Young Offenders" (Nov. 1982) (Annual Meeting of the American Society of Criminology, Toronto, Ontario, Canada); Streib, "Capital Punishment for Juveniles in the Criminal Justice System" (June 1982) (Annual Meeting of the Law and Society Association, Toronto, Ontario, Canada); Streib, "Death Penalty for Children: State Execution for Crimes Committed While Under Age Eighteen" (Mar. 1982) (Annual Meeting of the Academy of Criminal Justice Sciences; Louisville, Kentucky) (all available from the author).

child, hanged at Alexandria, Louisiana, in September of 1855,[46] and James Arome, a Cherokee Indian child hanged at Fort Smith, Arkansas, on June 25, 1885.[47] Since 1900, the youngest has been 13-year-old Fortune Ferguson, Jr., electrocuted at the Florida State Prison on April 27, 1927.[48] The unmistakable conclusion to be drawn from these data is that, in more recent times, capital punishment has been almost exclusively reserved for older children; approximately two-thirds (22/35) of the executions of those age fifteen or younger occurred prior to 1900. Since 1900, 93% of child executions were for crimes committed by persons aged sixteen or seventeen.

The race of the offender has long been a glaring issue in capital punishment.[49] Race also seems to be an important factor in the execution of children. Table 2 indicates the race of the 287 executed children. Not surprisingly, about two-thirds of the children executed during this 340-year period were black. This would seem not to be just a century-old history of casually executing slaves. The overrepresentation of black children in this population of executed children has increased

Table 2

Pre-1900 and Post-1900 Executions
for Crimes Committed While Under Age 18 According
to Race of the Executed Offender

Race of Executed Offender	1642 to 1899	1900 to Present	Totals
American Indian	9(9%)	1(1%)	10(3%)
Chinese	0(0%)	3(2%)	3(1%)
Hispanic	2(2%)	5(3%)	7(2%)
Black	44(46%)	135(70%)	179(62%)
White*	25(26%)	34(18%)	59(21%)
Unknown	15(16%)	14(7%)	29(10%)
Totals	95(100%)	192(100%)	287(100%)

*Some persons categorized as white, particularly in early recordkeeping, may actually have been Hispanic.

46. QUINEY, THE GALLOWS, THE PRISON AND THE POOR HOUSE 49-50 (1856) (located in library of Watt Espy, Capital Punishment Research Project, University of Alabama).

47. G. HUBLEY, LAW WEST OF FORT SMITH 218 (1968); Galveston Daily News, June 27, 1885.

48. *See generally* Ferguson v. State, 90 Fla. 105, 105 So. 840 (1925), *cert. dismissed*, 273 U.S. 663 (1927) (no federal question presented).

49. For a general discussion, see Furman v. Georgia, 408 U.S. 238, 250-57 (1972) (Douglas, J., concurring).

dramatically since 1900. Nor has the racial factor disappeared recently; 79% (33/42) of the children executed since 1945 were black.

The treatment of black children should be compared to that of female children. Of these 287 children executed, seven were female, all black or Indian. The last female child executed was 17-year-old Caroline Shipp, hanged near Dallas, North Carolina, on January 22, 1892, for the murder of her infant son.[50]

Capital punishment is imposed only for capital crime, but this category of crime has changed frequently over the past three centuries. Table 3 presents the data on the kinds of capital crimes committed by executed children. The overwhelming majority of executions (80%) were for murder. Thirty-one executions were for rape and eleven were for attempted rape; all forty-two of these children were black. The last child execution occurred in Texas in 1964 for the crime of rape.[51] Curiously, two of the earliest executions of children were for sodomy with animals.[52]

Table 3

Pre-1900 and Post-1900 Executions
for Crimes Committed While Under Age 18 According
To Offense

Offense	1642 to 1899	1900 to Present	Totals
Unknown	1(1%)	5(3%)	6(2%)
Sodomy/Animals	2(2%)	0(0%)	2(1%)
Arson	3(3%)	0(0%)	3(1%)
Spy	1(1%)	0(0%)	1(0%)
Robbery	1(1%)	3(2%)	4(1%)
Assault	2(2%)	9(5%)	11(4%)
Rape	4(4%)	27(14%)	31(11%)
Murder	81(84%)	148(77%)	229(80%)
Totals	95(100%)	192(100%)	287(100%)

50. Williams & Dover, *The Last Woman to be Hanged*, in THE STATE, Feb. 1980, at 25; Louisville Courier-Journal, Jan. 23, 1892.

51. *See generally* Echols v. State, 370 S.W.2d 892 (Tex. Crim. App. 1963) (affirming conviction and death sentence for James Andrew Echols, executed May 7, 1964); Houston Post, May 7, 1964.

52. N. TEETERS & J. HEDBLOM, . . . HANG BY THE NECK: THE LEGAL USE OF SCAFFOLD AND NOOSE, GIBBET, STAKE AND FIRING-SQUAD FROM COLONIAL TIMES TO THE PRESENT 111 (1967).

Executions of children have been much more common in some regions of the United States than in others,[53] as is illustrated by Table 4. The South region has accounted for 62% of the total (178/287), with the South-Atlantic division of that region providing about two-thirds of those 178. The other three regions have executed from 8% to 16%, respectively, of the total nationwide.

(text continued on p. 624)

53. The four regions and nine divisions used as the basis for these analyses are those established by the United States Bureau of the Census.

Table 4

Nationwide Executions for Crimes Committed While Under Age Eighteen According to Race of Offender, Crime and Time Period, Listed By Census Region and Division

Census Region and Division	Race of Offender			Crime			Time Period		Totals
	Black	White	Other	Murder	Rape	Other	Pre-1900	Post-1900	
Northeast Region:									
New England Div.	2	5	6	8	0	5	9	4	13
Middle Atlantic Div.	12	11	9	29	0	3	9	23	32
Region Totals	14	16	15	37	0	8	18	27	45
North Central Region:									
East No. Central Div.	8	15	1	24	0	0	8	16	24
West No. Central Div.	4	5	2	11	0	0	8	3	11
Region Totals	12	20	3	35	0	0	16	19	35
South Region:									
South Atlantic Div.	101	3	5	77	18	14	24	85	109
East So. Central Div.	31	8	1	31	8	1	14	26	40
West So. Central Div.	21	3	5	21	5	3	9	20	29
Region Totals	153	14	11	129	31	18	47	131	178
West Region:									
Mountain Div.	0	4	6	10	0	0	6	4	10
Pacific Div.	0	4	10	14	0	0	3	11	14
Region Totals	0	8	16	24	0	0	9	15	24
Other Federal	0	1	4	4	0	1	5	0	5
Nationwide Totals	179	59	49	229	31	27	95	192	287

Tables 5, 6, 7, and 8 provide the state-by-state breakdown of these 287 executions. Within the Northeast region, New York accounts for one-half of the total (22/45) for this nine-state region. In the six New England states, only thirteen children have been executed. Certain states have also provided the bulk of the cases for the North-Central region. For example, Ohio is responsible for 79% (19/24) of the executions of children within the five-state East North-Central division. Missouri's total of seven is 64% of the eleven within the seven-state West North-Central division. Table 7 reveals the same pattern, with Arizona and California far outpacing their sister states within the two divisions of the West region.

(text continued on p. 630)

Table 5

Northeast Region Executions for Crimes Committed While Under Age Eighteen According to Race of Offender, Crime and Time Period, Listed By Census Division and State

Census Division And State	Race of Offender			Crime			Time Period		Totals
	Black	White	Other	Murder	Rape	Other	Pre-1900	Post-1900	
New England Division:									
Connecticut	1	1	2	4	0	0	2	2	4
Maine	0	0	0	0	0	0	0	0	0
Massachusetts	1	3	4	3	0	5	6	2	8
New Hampshire	0	0	0	0	0	0	0	0	0
Rhode Island	0	0	0	0	0	0	0	0	0
Vermont	0	1	0	1	0	0	1	0	1
Division Totals	2	5	6	8	0	5	9	4	13
Middle Atlantic Division:									
New Jersey	4	1	0	4	0	1	3	2	5
New York	8	8	6	20	0	2	4	18	22
Pennsylvania	0	2	3	5	0	0	2	3	5
Division Totals	12	11	9	29	0	3	9	23	32
Region Totals	14	16	15	37	0	8	18	27	45

Table 6

North Central Region Executions for Crimes Committed While Under Age Eighteen According to Race of Offender, Crime and Time Period, Listed By Census Division and State

Census Division And State	Race of Offender			Crime			Time Period		Totals
	Black	White	Other	Murder	Rape	Other	Pre-1900	Post-1900	
East North Central Division:									
Illinois	0	2	0	2	0	0	0	2	2
Indiana	2	1	0	3	0	0	2	1	3
Michigan	0	0	0	0	0	0	0	0	0
Ohio	6	12	1	19	0	0	6	13	19
Wisconsin	0	0	0	0	0	0	0	0	0
Division Totals	8	15	1	24	0	0	8	16	24
West North Central Division:									
Iowa	0	1	0	1	0	0	1	0	1
Kansas	0	0	0	0	0	0	0	0	0
Minnesota	0	2	0	2	0	0	2	0	2
Missouri	4	1	2	7	0	0	5	2	7
Nebraska	0	1	0	1	0	0	0	1	1
North Dakota	0	0	0	0	0	0	0	0	0
South Dakota	0	0	0	0	0	0	0	0	0
Division Totals	4	5	2	11	0	0	8	3	11
Region Totals	12	20	3	35	0	0	16	19	35

Table 7

West Region Executions for Crimes Committed While Under Age Eighteen According to Race of Offender, Crime and Time Period, Listed By Census Division and State

Census Division And State	Race of Offender			Crime			Time Period		Totals
	Black	White	Other	Murder	Rape	Other	Pre-1900	Post-1900	
Mountain Division:									
Arizona	0	2	4	6	0	0	3	3	6
Colorado	0	0	0	0	0	0	0	0	0
Idaho	0	0	0	0	0	0	0	0	0
Montana	0	1	0	1	0	0	1	0	1
Nevada	0	0	1	1	0	0	0	1	1
New Mexico	0	0	1	1	0	0	1	0	1
Utah	0	1	0	1	0	0	1	1	1
Wyoming	0	0	0	0	0	0	0	0	0
Division Totals	0	4	6	10	0	0	6	4	10
Pacific Division:									
Alaska	0	0	0	0	0	0	0	0	0
California	0	3	7	10	0	0	2	8	10
Hawaii	0	0	0	0	0	0	0	0	0
Oregon	0	0	1	1	0	0	0	1	1
Washington	0	1	2	3	0	0	1	2	3
Division Totals	0	4	10	14	0	0	3	11	14
Region Totals	0	8	16	24	0	0	9	15	24

Table 8

South Region Executions for Crimes Committed While Under Age Eighteen According to Race of Offender, Crime and Time Period, Listed By Census Division and State

Census Division And State	Race of Offender			Crime			Time Period		Totals
	Black	White	Other	Murder	Rape	Other	Pre-1900	Post-1900	
South Atlantic Division:									
Delaware	2	0	0	2	0	0	2	0	2
District of Columbia	0	0	0	0	0	0	0	0	0
Florida	11	1	0	8	3	1	0	12	12
Georgia	37	1	1	28	6	5	6	33	39
Maryland	7	0	0	6	0	1	4	3	7
North Carolina	14	1	3	14	2	2	2	16	18
South Carolina	10	0	0	7	2	1	3	7	10
Virginia	19	0	0	11	4	4	5	14	19
West Virginia	1	0	1	1	1	0	2	0	2
Division Totals	101	3	5	77	18	14	24	85	109
East South Central Division:									
Alabama	11	1	0	8	3	1	4	8	12
Kentucky	8	1	0	5	4	0	4	5	9
Mississippi	6	0	1	7	0	0	1	6	7
Tennessee	6	6	0	11	1	0	5	7	12
Division Totals	31	8	1	31	8	1	14	26	40
West South Central Division:									
Arkansas	4	1	2	6	0	1	2	5	7
Louisiana	4	0	1	3	1	1	3	2	5
Oklahoma	0	0	0	0	0	0	0	0	0
Texas	13	2	2	12	4	1	4	13	17
Division Totals	21	3	5	21	5	3	9	20	29
Region Totals	153	14	11	129	31	18	47	131	178

This pattern of single-state dominance of the divisions is not as strong for the South region. Although Georgia leads the South region (as well as all jurisdictions nationwide) with forty executions, it accounts for only 36% of the total for the nine-state South-Atlantic division. This is because other states also have executed many children, such as nineteen in Virginia, eighteen in North Carolina, and twelve in Florida. Within the four-state East South-Central division, the leaders are Tennessee with thirteen and Alabama with twelve. Texas with seventeen leads the four-state West South-Central division.

The regional theme is important within the categories of the race of the offender and the crime involved. Nationwide, 62% of the children executed have been black; outside of the South region, 24% have been black. Within the seventeen-state South region, 86% have been black; within the South region's South-Atlantic division (nine states), 93% have been black. For four of these states, 100% of the children executed have been black.[54]

The South region has been more willing than other regions to impose capital punishment for crimes other than murder. Nationwide, 80% of the executions have been for the crime of murder. Within the South region, the figure is 72%; outside, 92%. One striking example is that all forty-two of the child executions for rape or attempted rape have occurred in the South region.

Table 9 presents these data broken down by the decade in which

Table 9

Executions For Crimes Committed While Under Age 18 By Time Period

Time Period	Executions	Time Period	Executions
1642-1699	2	1900-1909	23
1700-1799	5	1910-1919	26
1800-1809	0	1920-1929	28
1810-1819	1	1930-1939	44
1820-1829	2	1940-1949	50
1830-1839	3	1950-1959	17
1840-1849	4	1960-1969	4
1850-1859	7	1970-1979	0
1860-1869	13	1980-present	0
1870-1879	14		
1880-1889	22		
1890-1899	22		
1642-1899	95	1900-present	192

54. Delaware, Maryland, South Carolina, and Virginia.

the execution occurred. The peak periods for executions of children were the 1930s and 1940s. Almost half of all of the post-1900 executions took place during those twenty years.

For a variety of reasons, all executions ceased in the 1960s and did not begin again until 1977. No children have been executed since 1964, but approximately twenty persons have been sentenced to death and await execution for crimes committed while under age eighteen. Included are Todd Ice of Kentucky, who was only fifteen years old at the time his crime was committed, and Tina Canadea of Mississippi, who was only sixteen at the time of her crime.

Recent Legal Developments in Capital Punishment of Children

More than three-fourths of the nations of the world (73 of 93 reporting countries) have set age eighteen as the minimum age for execution.[55] The United Nations endorsed this position in 1976.[56] Another indication of the present global attitude is the recent condemnation of the death penalty by Pope John Paul II.[57] Contrast this benevolent international attitude with the current "get tough" attitude toward violent juvenile offenders that seems to be sweeping legislatures and the judiciary in the United States.[58] As for public acceptance of the death penalty as an appropriate legal reaction to serious crime, polls in the United States indicate that about two-thirds of those questioned favor the death penalty.[59]

The primary constitutional barrier to imposition of the death penalty has been the eighth amendment to the United States Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[60] The general

55. Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 397, 398-404, 410 (1965).

56. International Covenant on Civil and Political Rights, *entered into force* March 23, 1976, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 49, 52, U.N. Doc. A/63/6 (1967) art. 6(5).

57. N.Y. Times, Jan. 16, 1983, at 5, col. 2.

58. *See, e.g.*, P. STRASBURG, VIOLENT DELINQUENTS (1978); TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME (1978); Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal,"* 65 MINN. L. REV. 167 (1980); Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515 (1978).

59. "Since the late 1960s, according to every available measure, the American public has professed support for capital punishment by a majority of more than two to one." THE DEATH PENALTY IN AMERICA 65 (H. Bedau 3d ed. 1982); Washington Post, June 26, 1981, at A-19, col. 1 (66% favor death penalty); TIME, June 1, 1981, at 13, col. 3 (63% favor death penalty).

60. In addition to the eighth amendment, of peripheral interest is that the twenty-sixth amendment to the United States Constitution sets age eighteen as the dividing line for adult voting rights. Also, it should be noted that the Supreme Court has never regarded age as a suspect class under the equal protection clause of the fourteenth amendment to the Constitution.

purposes of the cruel and unusual punishment clauses were set forth by the Supreme Court in 1977:

> First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such. We have recognized the last limitation as one to be applied sparingly.[61] [Citations omitted.]

The constitutionality of the death penalty seems to have been presumed by the United States Supreme Court for a century.[62] Welcomed by some[63] and harshly criticized by others[64] is the Court's apparent willingness in the past decade to reevaluate this premise of constitutionality. In 1972 the Court held in *Furman v. Georgia*[65] that the death penalty was unconstitutional as applied in those particular cases, but it did not decide whether it is unconstitutional for all crimes and under all circumstances. This lingering question was answered by the Court in 1976 in *Gregg v. Georgia*[66] in which a majority found that the death

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976). *See also* Vance v. Bradley, 440 U.S. 93, 96-97 (1979).

61. Ingraham v. Wright, 430 U.S. 651, 667 (1977).

62. The several concurring opinions acknowledge, as they must, that until today capital punishment was accepted and assumed as not unconstitutional *per se* under the Eighth Amendment or the Fourteenth Amendment. This is either the flat or the implicit holding of a unanimous Court in *Wilkerson v. Utah*, 99 U.S. 130, 134-135, in 1879; of a unanimous Court in *In re Kemmler*, 136 U.S. 436, 447, in 1890; of the Court in *Weems v. United States*, 217 U.S. 349, in 1910; of all those members of the Court—a majority, who addressed the issue in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463-464, 471-472, in 1947; of Mr. Chief Justice Warren, speaking for himself and three others (Justices Black, Douglas, and Whittaker) in *Trop v. Dulles*, 356 U.S. 86, 99, in 1958; in the denial of certiorari in *Rudolph v. Alabama*, 375 U.S. 889, in 1963 (where, however, Justices Douglas, Brennan, and Goldberg would have heard argument with respect to the imposition of the ultimate penalty on a convicted rapist who had "neither taken nor endangered human life"); and of Mr. Justice Black in *McGautha v. California*, 402 U.S. 183, 226, decided only last Term on May 3, 1971.

Furman v. Georgia, 408 U.S. 238, 407-08 (Blackmun, J., dissenting).

> Perhaps enough has been said to demonstrate the unswerving position that this Court has taken in opinions spanning the last hundred years. On virtually every occasion that any opinion has touched on the question of the constitutionality of the death penalty, it has been asserted affirmatively, or tacitly assumed, that the Constitution does not prohibit the penalty. No Justice of the court, until today, has dissented from this consistent reading of the Constitution.

Id. at 428 (Powell, J., dissenting).

63. *See* H. BEDAU, THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT 75-90 (1977).

64. *See* R. BERGER, DEATH PENALTIES (1982).

65. 408 U.S. 238 (1972).

66. 428 U.S. 153, 169 (1976) (plurality opinion by Stewart); *Id.* at 226 (White, J., concurring). *Accord*, Jurek v. Texas, 428 U.S. 262 (1976), Profitt v. Florida, 428 U.S. 242 (1976).

penalty does not per se violate the eighth amendment. In 1976[67] and 1977,[68] the Court struck down statutes incorporating mandatory death sentences, and the Court rejected the death penalty for rape cases in 1977.[69] The next year in *Lockett v. Ohio*,[70] the Court expressly required that all aspects of the offender's character and record be considered before imposing the death penalty. The meticulous treatment given these cases stems from the Court's unarguable premise that "death as a punishment is unique in its severity and irrevocability."[71]

It seems well-established in the 1980s that the sentencing decision must take into account the age of a particularly young offender: "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer. . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death."[72] In *Lockett* the Ohio death penalty statute was overruled partly because "consideration of defendant's . . . age, would generally not be permitted, as such, to affect the sentencing decision."[73] The youth of the offender as an appropriate mitigating factor was also mentioned in passing by the Supreme Court in *Gregg v. Georgia*,[74] *Jurek v. Texas*,[75] *Roberts v. Louisiana*,[76] and *Bell v. Ohio*.[77]

The most recent Supreme Court consideration of this issue is *Eddings v. Oklahoma*.[78] The Court had granted certiorari[79] on only one question:

67. Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

68. Roberts v. Louisiana, 431 U.S. 633 (1977).

69. Coker v. Georgia, 433 U.S. 584 (1977).

70. 438 U.S. 586 (1978). *Accord*, Bell v. Ohio, 438 U.S. 637 (1978).

71. Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion of Stewart, J.).

72. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original).

73. *Id.* at 608.

74. "Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth, . . .)?" Gregg v. Georgia, 428 U.S. 153, 197 (1976) (plurality opinion by Stewart).

75. "It [the jury] could further look to the age of the defendant, . . ." Jurek v. Texas, 428 U.S. 262, 273 (1976), *quoting with approval* Jurek v. Texas, 522 S.W.2d 934, 940 (Tex. Cr. App. 1975).

76. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender. . . [is an example of a mitigating fact] which might attend the killing of a peace officer and which [is] considered relevant in other jurisdictions.

Roberts v. Louisiana, 431 U.S. 633, 636-37 (1977).

77. In Bell v. Ohio, 438 U.S. 637 (1978), the offender was a 16-year-old boy sentenced to death for murder. At the sentencing hearing, Bell's attorney had argued that "Bell's minority established mental deficiency as a matter of law; . . . [Y]outh, the fact that he cooperated with the police, and the lack of proof that he had participated in the actual killing strongly supported an argument for a penalty less than death in this case." *Id.* at 641.

78. Eddings v. Oklahoma, 455 U.S. 104 (1982)

79. *Id., cert. granted*, 450 U.S. 1040 (1981).

"Whether the infliction of the death penalty on a child who was sixteen at the time of the crime constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments of the Constitution of the United States."[80] When the briefs were filed and the case argued before the Court, however, the petitioner inserted an additional question for the Court: "Whether the Court should address the plain error committed by the trial court when it refused to consider relevant mitigating evidence in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978)."[81] It was this second, "'11th-hour' claim"[82] that garnered the five votes necessary for reversing the imposition of the death penalty on Monty Lee Eddings and remanding the case for sentencing consistent with *Lockett*.[83]

Chief Justice Burger made passing reference to the original issue—the constitutionality of imposing the death penalty on children:

> [O]ur only authority is to decide whether [sentences] are constitutional under the Eighth Amendment. The Court stops far short of suggesting that there is any constitutional proscription against imposition of the death penalty on a person who was under age 18 when the murder was committed. . . . Because the sentencing proceedings in this case were in no sense inconsistent with *Lockett v. Ohio* [citation omitted], I would decide the sole issue on which we granted certiorari, and affirm the judgment.[84]

Thus, four members of the Court (Chief Justice Burger and Justices Blackmun, Rehnquist, and White) have indicated that they see no constitutional bar to the imposition of the death penalty on a person who committed murder when age sixteen.

The majority in *Eddings* left much more doubt as to where they stand, simply restating that the "chronological age of a minor is itself a relevant mitigating factor of great weight."[85] In her separate concurring opinion,[86] Justice O'Connor succinctly stated her view of the majority's holding: 'I, however, do not read the Court's opinion either as altering this Court's opinions establishing the constitutionality of the death penalty or as deciding the issue of whether the Constitution permits imposition of the death penalty on an individual who committed a murder at age 16."[87] The constitutional question is thus left in limbo. Despite strong opposition,[88] the Court seems poised on the brink of

80. Brief for Petitioner at I, Eddings v. Oklahoma, 455 U.S. 104 (1982).
81. *Id.*
82. Eddings v. Oklahoma, 455 U.S. 104, 120 (1982) (Burger, C.J., dissenting).
83. *Id.* at 117.
84. *Id.* at 128 (Burger, C.J., dissenting).
85. *Id.* at 116.
86. *Id.* at 117 (O'Connor, J., concurring).
87. *Id.* at 119.
88. *See, e.g.*, Gwin, *The Death Penalty: Cruel and Unusual Punishment When Imposed on Juveniles*, 45 KY. BENCH & BAR 16 (Apr. 1981).

finding no constitutional prohibition to capital punishment for crimes committed by minors.

After *Furman v. Georgia*, the response of the state legislatures can be seen as "[t]he most marked indication of society's endorsement of the death penalty for murder."[89] Even though the Model Penal Code[90] expressly rejects the death penalty for offenders under eighteen, a strong majority of the states that have enacted new death penalty statutes would permit it. Of the thirty-nine presumptively valid death penalty statutes now in existence, only eight prohibit execution of offenders whose crimes were committed while under age sixteen,[91] seventeen,[92] or eighteen.[93] Nineteen other statutes have expressly designated the offender's youth as a mitigating factor.[94] The remainder do not specify particular mitigating circumstances but do not rule out the youth of the offender. The proposed federal statute would follow the majority by expressly requiring that the age of the offender be considered as a mitigating but not a prohibitive factor.[95]

State appellate courts have necessarily faced this question with much more frequency than have federal courts. No clear pattern can be derived from these decisions; a substantial number of courts have come down on both sides of the issue, some approving the death penalty for young offenders,[96] and others rejecting or strongly criticizing it.[97] Note,

89. Gregg v. Georgia, 428 U.S. 153, 179 (1976).
90. MODEL PENAL CODE § 210.6(1)(d) (Proposed Official Draft 1962).
91. NEV. REV. STAT. § 176.025 (1979).
92. TEX. PENAL CODE ANN. § 8.07(d) (Vernon Supp. 1982).
93. CAL. PENAL CODE § 190.5 (West Supp. 1982); COLO. REV. STAT. § 16-11-103(5)(a) (1973); GEN. STAT. ANN. § 53a-46a(f)(1) (West Supp. 1982); ILL. ANN. STAT. ch. 38, § 9-1(b) (Smith-Hurd Supp. 1982); OHIO REV. CODE ANN. § 2929.02(A) (Page 1982); TENN. CODE ANN. § 37-234(a)(1) (Supp. 1982).
94. ALA. CODE § 13A-5-51 (1975); ARIZ. REV. STAT. ANN. § 13-703G.5 (Supp. 1982); ARK. STAT. ANN. § 41-1304(4) (Repl. 1977); FLA. STAT. ANN. § 921.141(6)(g) (West Supp. 1982); KY. REV. STAT. § 532.025(2)(b)(5) (Supp. 1982); LA. CODE CRIM. PROC. ANN. art. 905.5(f) (Supp. 1982); MD. CRIM. LAW CODE ANN. § 413(g)(5) (Repl. 1982); MISS. CODE ANN. § 99-19-101(6)(g) (Supp. 1982); MO. REV. STAT. § 565.012(3)(7) (Supp. 1980); MONT. CODE ANN. § 46-18-304(7) (Supp. 1982); NEB. REV. STAT. § 29-2523(2)(d) (Reissue 1979); N.H. REV. STAT. ANN. § 630:5 II(b)(5) (Supp. 1979); N.M. STAT. ANN. § 31-20A-6 I (Repl. 1981); N.C. GEN. STAT. § 15A-2000(f)(7) (Supp. 1981); 42 PA. CONS. STAT. ANN. § 9711(e)(4) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C)(b)(7) (Supp. 1982); UTAH CODE ANN. § 76-3-207(2)(e) (Supp. 1982); VA. CODE § 18.2-264.4(B)(v) (Repl. 1983); WYO. STAT. § 6-2-102(j)(vii) (Repl. 1983).
95. S. 114, 97th Cong., 1st Sess., 127 CONG. REC. 5,162 (1981), § (f) (defendant youthful age of crime).
96. *See, e.g.*, State v. Valencia, 124 Ariz. 139, 602 P.2d 807, 809 (1979) (remanded for resentencing on other grounds); High v. State, 247 Ga. 289, 276 S.E.2d 5 (1981); State v. Prejean, 379 So. 2d 240 (La. 1979); State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979).
97. *See, e.g.*, Bracewell v. State, 401 So. 2d 124, 125 (Ala. Cr. App. 1980): ("[W]e would likewise direct the trial court to carefully reconsider the imposition of the death sentence where the mitigating circumstances weigh heavily in the appellant's favor, i.e., her young age and the presence of the husband, her senior by several years."); Vasil v. State, 374 So. 2d 465 (Fla. 1979) (court reduced 15-year-old's death sentence), *cert. denied*, 446 U.S. 967 (1980); Coleman

however, that the express language of *Eddings*,[98] *Lockett*,[99] and other cases require that age be considered as a mitigating factor, at least if the defendant proffers such evidence.

Criminological Purposes Served by Executing Children

From the foregoing discussion, it seems reasonable to conclude that capital punishment for children has been common enough during the past 340 years to warrant attention. Even though the youthfulness of offenders has probably always been considered, and now must be specifically taken into account as a mitigating factor, the choice must still be made between execution and a long term, usually life, in prison. What factors unique to such cases should be considered?

A number of policies and presumptions underlie the continuing debate over the appropriateness of capital punishment for crimes by adults. Perhaps the most complete list has been provided by Justice Thurgood Marshall: "There are six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy."[100] Each should be considered in the context of crimes committed by persons under age eighteen.

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v. State, 378 So. 2d 640, 650 (Miss. 1979) (Court reduced the death sentence of a 16-year-old. "Only after being fired upon did the 16-year-old shoot. Again, Coleman had the opportunity to shoot [the victim's wife], who was an eyewitness, but did not."); State v. Stewart, 197 Neb. 497, 524-25, 250 N.W.2d 849, 865-66 (1977) (Court reduced death sentence of a 16-year-old. "The issue is not whether his age 'excuses' the murder. Obviously it does not, and defendant has been convicted of premeditated murder. . . . After weighing the aggravating and mitigating circumstances in this case we conclude that the defendant's age at the time of the crime and the absence of any significant criminal record mitigate strongly against the imposition of the death penalty upon Rodney Stewart; and that the public will be served and justice done by sentencing him to a term of life imprisonment.").

98. Eddings v. Oklahoma, 455 U.S. 104, 116 (1982).

99. Lockett v. Ohio, 438 U.S. 586, 604, 608 (1978).

100. Furman v. Georgia, 408 U.S. 238, 342 (1972) (Marshall, J., concurring). Amnesty International summarizes the arguments as follows:

> The retentionist argument is often based upon the following points:
>
> 1. For particularly reprehensible offences, death is the only fitting and adequate punishment.
> 2. The death penalty acts as a deterrent.
> 3. Those who commit certain grave offences must be put to death for the protection of society at large.
>
> Among the main arguments put forward by the abolitionists are:
>
> 1. The death penalty is irreversible. Decided upon according to fallible processes of law by fallible human beings, it can be—and actually has been—inflicted upon people innocent of any crime.
> 2. There is lack of convincing evidence that the death penalty has any more power to deter than—say—a long period of imprisonment. Its deterrent effect on rational offenders is highly questionable; it is even more so in the case of offenders who are mentally-ill, or who are impelled by violent political motives.
> 3. Execution by whatever means and for whatever offence is a cruel, inhuman and degrading punishment.

AMNESTY INTERNATIONAL, THE DEATH PENALTY: AMNESTY INTERNATIONAL REPORT 3 (1979).

101. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 43-44 (1968).

102. "This function [retribution] may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." Gregg v. Georgia, 428 U.S. 153, 183 (1976) (opinion of Stewart, J.).

103. On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.

Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

104. It is argued that retribution can be discounted because that, after all, is what the Eighth Amendment seeks to eliminate. There is no authority suggesting that the Eighth Amendment was intended to purge the law of its retributive elements, and the Court has consistently assumed that retribution is a legitimate dimension of the punishment of crimes. . . . It would be reading a great deal into the Eighth Amendment to hold that the punishments authorized by legislatures cannot constitutionally reflect a retributive purpose.

Id. at 394-95 (Burger, C.J., dissenting).

105. *Id.* at 342-45 (Marshall, J., concurring).

106. *See, e.g.*, T. SELLIN, CAPITAL PUNISHMENT (1967); Bailey, *A Multivariate Cross-Sectional Analysis of the Deterrent Effect of the Death Penalty*, 64 SOC'Y & SOCIAL RESEARCH 183 (1980); Bailey, *The Deterrent Effect of the Death Penalty for Murder in California*, 52 S. CAL. L. REV. 743 (1979); Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich*

The goal of societal retribution or legal vengeance achieved through execution of a child seems difficult to justify. However, capital punishment can be characterized as an understandable expression of societal outrage at particular crimes.[101] In this sense, Justice Stewart referred favorably to a retributive purpose in *Gregg v. Georgia*[102] and in *Furman v. Georgia*.[103] Chief Justice Burger has also approved this justification.[104] In contrast, Justice Marshall has argued persuasively that the eighth amendment precludes retribution for its own sake.[105]

Even if the execution of an adult solely for revenge is constitutionally permissible, this justification of capital punishment is less appealing when the object of righteous vengeance is a child. The spectacle of our society seeking legal vengeance through execution of a child raises fundamental questions about the nature of children's moral responsibility for their actions and about society's moral responsibility to protect and nurture children.

Probably the most complex issue is whether capital punishment is more effective than life imprisonment as a deterrent to crime. This key issue has been the subject of extensive research,[106] but no consistent

conclusions have been drawn by members of the Supreme Court.[107] When applied to children, the key issues are adolescents' perception of death and whether that perception acts as a more significant deterrent to criminal acts than life imprisonment.

Even less is known about death as a deterrent for adolescents than is known about death as a deterrent for adults. Many social scientists would agree that adolescents live for today with little thought of the future consequences of their actions.[108] The defiant attitudes and risk-taking behaviors of some adolescents are probably related to their "developmental stage of defiance about danger and death."[109] Some

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on the Deterrent Effect of Capital Punishment, 85 YALE L.J. 170 (1975); Bedau, *Deterrence and the Death Penalty: A Reconsideration*, 61 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 539 (1970); Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187 (1975); Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975); Glaser, *Capital Punishment—Deterrent or Stimulus to Murder? Our Unexamined Deaths and Penalties*, 10 U. TOL. L. REV. 317 (1979); Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 YALE L.J. 359 (1976).

107. *Compare* the view of Justice Stewart:

> Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.

Gregg v. Georgia, 428 U.S. 153, 185-86 (1976) *with* that of Justice Brennan:

> In short, whatever the speculative validity of the assumption that the threat of death is a superior deterrent, there is no reason to believe that as currently administered the punishment of death is necessary to deter the commission of capital crimes. Whatever might be the case were all or substantially all eligible criminals quickly put to death, unverifiable possibilities are an insufficient basis upon which to conclude that the threat of death today has any greater deterrent efficacy than the threat of imprisonment.

Furman v. Georgia, 408 U.S. 238, 302 (1972) (Brennan, J., concurring), *and with* Justice Marshall's perspective:

> Despite the fact that abolitionists have not proved nondeterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that capital punishment is not necessary as a deterrent to crime in our society. That is all that they must do. We would shirk our judicial responsibilities if we failed to accept the presently existing statistics and demanded more proof. It may be that we now possess all the proof that anyone could ever hope to assemble on the subject. . . .
>
> In light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect.

Id. at 353-54 (1972) (Marshall, J., concurring).

108. Kastenbaum, *Time and Death in Adolescence*, in THE MEANING OF DEATH 99 (H. Feifel ed. 1959).

109. Fredlund, *Children and Death from the School Setting Viewpoint*, 47 J. SCHOOL HEALTH 533 (1977).

adolescents may play games of chance with death from a feeling of omnipotence.[110] They typically have not learned to accept the finality of death.[111] Adolescents tend to view death as a remote possibility; old people die, not teenagers. Consider, for example, teenagers' propensity to flirt with death through reckless driving, ingestion of dangerous drugs, and other similar "death-defying" behavior.

The meager research on this issue suggests the conclusion that threatening a child with death probably does not have the same impact as threatening an adult with death. Even if some percentage of adults are deterred by the death penalty, the deterrent effect tends to lose much of its power when imposed upon an adolescent.

No one can deny that execution of a child will prevent repetitive criminal acts by that particular child. The death penalty does, however, seem an unnecessarily harsh solution to the problem of recidivism. Not only are murderers "extremely unlikely to commit other crimes either in prison or upon their release,"[112] but irreversibly abandoning all hope of the reform of a child is squarely in opposition to the fundamental premises of juvenile justice and comparable socio-legal systems. While the specific deterrence argument may be somewhat persuasive in the case of the 45-year-old habitual criminal, it is singularly inappropriate and defeatist when applied to the 16-year-old child.

Using capital punishment as leverage to encourage guilty pleas and confessions seems not only a questionable justification for this ultimate sanction but also unnecessary in a child's case. The threat of life imprisonment for an adolescent who has fifty to sixty years yet to live is so overwhelming that it should provide whatever leverage the government might need.

The potential fifty to sixty years of life in prison also gives rise to an economic argument—that it is simply an enormous and unjustifiable financial burden on society to support life imprisonment instead of executing youthful offenders. Given the extraordinarily high cost of capital trials and appeals, as well as the cost of maintaining death row and of performing executions, it would seem reasonable to conclude that "there can be no doubt that it costs more to execute a man than to keep him in prison for life."[113]

Finally, the issue of using capital punishment for eugenic purposes or to improve the human race seems unworthy of serious considera-

110. Miller, *Adolescent Suicide: Etiology and Treatment*, in 9 ADOLESCENT PSYCHIATRY 327 (S. Feinstein, J. Looney, A. Schwartzberg, & A. Sorosky eds. 1981).

111. R. LONETTO, CHILDREN'S CONCEPTIONS OF DEATH 134-41 (1980); Hostler, *The Development of the Child's Concept of Death*, in THE CHILD AND DEATH (O. Sahler ed. 1978).

112. Furman v. Georgia, 408 U.S. 238, 355 (1972) (Marshall J., concurring).

113. *Id.* at 358.

tion."[114] In any event, the less severe alternatives of sterilization and/
life imprisonment would seem to be required by the Constitution.

This brief consideration of the purposes served by capital punishme
for children is inconclusive at best, as is such a consideration vis-à-vi
adults. Most of the justifications for capital punishment of adults lo
whatever persuasiveness they have when applied to the case of
offender under age eighteen.

Conclusion

The 287 executions for crimes committed by persons under a
eighteen comprise only 2% of the total of 14,029 executions in o
history. The concept of capital punishment for children seems surpris
in a country that so dotes upon its children. If early reforms of t
criminal justice system were intended to benefit children by minimiz
the harshness of criminal sentences, why is it that capital punishme
of children was allowed to continue? How can the 192 executions
children since the inception of the socio-legal experiment in juven
justice be explained?

If the phenomenon ended there, perhaps the execution of childr
would be cast aside as just another odd chapter in American histor
But the reemergence of capital punishment in the past few years,
complete with placing children on death row, makes it clear that th
issue is of current as well as historical importance.

Few state capital punishment statutes prohibit executions of childre
and the Supreme Court has come perilously close to removing an
supposed constitutional barriers. The present state of the law is that
the youth of the offender must be considered as a mitigating factor
by the sentencing authority. That and other mitigating factors can be
overcome by aggravating factors, though, resulting in capital punishm
for a child even in the 1980s.

114. [T]his Nation has never formally professed eugenic goals, and the history of the
world does not look kindly on them. If eugenics is one of our purposes, then
the legislatures should say so forthrightly and design procedures to serve this goal.
Until such time, I can only conclude, as has virtually everyone else who has looked
at the problem, that capital punishment cannot be defended on the basis of any
eugenic purposes.

Id. at 357.

115. For example, even Chief Justice Burger has recognized that sentencing procedures should
not create "the risk that the death penalty will be imposed in spite of factors which may call
for a less severe penalty. When the choice is between life and death, that risk is unacceptable
and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett v.
Ohio, 438 U.S. 586, 605 (1978). Whether sterilization would be a constitutionally acceptable
"less severe penalty" is in doubt. See Skinner v. Oklahoma, 316 U.S. 535 (1942).

The notion of a governmental agency imposing the death penalty upon a child through its judicial system raises the deepest questions about the demands of justice versus the special nature of childhood. A handful of states have formed a minority position that rejects capital punishment for children. Other jurisdictions will be considering new capital punishment statutes or amendments to present capital punishment statutes, and they should give strong consideration to this minority position. As the Supreme Court continues to review challenges to the constitutionality of capital punishment, the issue of the age of the offender should be given special consideration. Even if the eighth amendment does not inherently proscribe death as a punishment for particularly aggravated murder by mature adults, the unique legal, psychological, and social status of persons under age eighteen should be incorporated into this area of constitutional interpretation. The response to this article's opening question should be that the United States counts itself among "civilized societies [which] will not tolerate the spectacle of execution of children."[116]

116. MODEL PENAL CODE § 210.6, commentary at 133 (Official Draft and Revised Comments 1980).

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IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

HEATH A. WILKINS,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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Question Presented 2.: If a criminal defendant in a capital murder case is found competent to stand trial, does the due process clause of the Fifth Amendment require a separate determination or heightened test of competency before that criminal defendant may waive his constitutional rights to counsel and to a jury trial in order to seek the death penalty?

Question Presented 3.: Whether the infliction of the death penalty on Petitioner Wilkins constitutes excessive and disproportionate punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States in light of the overwhelming mitigating circumstances in his case?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

NO. _____

HEATH A. WILKINS,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

Heath A. Wilkins, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Missouri, in the case styled "State of Missouri v. Heath A. Wilkins, No. 68393".

LIST OF PARTIES

The petitioner, Heath A. Wilkins, appears through Lew A. Kollias, and Nancy A. McKerrow, Office of State Public Defender, 209B East Green Meadows Road, Columbia, Missouri 65203-3698.

Respondent, State of Missouri, appears by the Honorable William Webster, Attorney General of Missouri, P. O. Box 899, Jefferson City, Missouri 65102. Janet Thompson and Nancy A. McKerrow, Assistant Public Defenders, 209B East Green Meadows Road, Columbia, Missouri 65102, appeared in the proceedings before the Missouri Supreme Court, No. 68393.

OPINION BELOW

The opinion of the Supreme Court of the State of Missouri, in the case styled "State of Missouri v. Heath A. Wilkins, No. 68393," the case for which certiorari is being sought, was filed on September 15, 1987, appears at 736 S.W.2d 409 (Mo. banc 1987).

and may be found in the Appendix at pages 1-13. Counsel for Petitioner timely filed a Motion for Rehearing, which was denied on October 13, 1987. Thereafter, on October 13, 1987, the Missouri Supreme Court set Petitioner's death penalty execution date at December 17, 1987 (App. 22).

JURISDICTION

On September 15, 1987, an opinion rendered by the Supreme Court of Missouri affirmed the Petitioner's judgment and conviction for Capital Murder and his sentence of death (App. 1-13). Counsel for Petitioner timely filed a Motion for Rehearing, which was denied on October 13, 1987 (App. 21). On October 13, 1987, the Missouri Supreme Court set petitioner's execution date for December 17, 1987 (App. 22). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) (1987).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

This case also involves the following provisions of the statutes of the State of Missouri, which are set forth in the Appendix: Mo Rev Stat. Sections 552.020, 552.030, and 565.020 (1986)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the infliction of the death penalty on a child who was sixteen at the time of the crime constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution of the United States?

2. If a criminal defendant in a capital murder case is found competent to stand trial, does the due process clause of the Fifth Amendment require a separate determination or heightened test of competency before that criminal defendant may waive his constitutional rights to counsel and to a jury trial in order to seek the death penalty?

3. Whether the infliction of the death penalty on Petitioner Wilkins constitutes excessive and disproportionate punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States in light of the overwhelming mitigating circumstances in his case?

STATEMENT OF THE CASE

On May 9, 1986, in the Circuit Court of Clay County, Missouri, appellant entered a plea of guilty to the charge of first degree murder, Mo. Rev. Stat. Section 565.020.1 (Cum. Supp. 1984). On June 27, 1986, appellant was sentenced to death.

Appellant was sixteen-years old on July 27, 1985 when, in the late evening hours, he and Patrick ("Bo") Stevens entered Linda's Liquors in Avondale, Clay County, Missouri, and robbed it. In the course of the robbery appellant stabbed the clerk, Nancy Allen, who died from her wounds. Appellant was arrested fourteen days later and, after being certified to stand trial as an adult, was charged by information with first degree murder.

Appellant initially pleaded not guilty by reason of mental disease or defect and he was ordered to undergo a psychiatric examination pursuant to Mo. Rev. Stat. Sections 552.020 and 552.030 (1986). Appellant was evaluated a second time, at the request of the defense.

A competency hearing was held on April 16, 1986 during which two witnesses, Drs. Mandracchia and Logan, testified. Steven Mandracchia is a clinical psychologist for the State of Missouri. He testified that based upon his evaluation of petitioner he did not believe that petitioner was suffering from any mental disease or defect as defined by Chapter 552 of the Revised Statutes of the State of Missouri. Mandracchia further opined that appellant was competent to proceed, and finally, that appellant was competent to make the decision to plead guilty and to seek the death penalty. When he interviewed petitioner in November, 1985, Mandracchia was unaware of petitioner's desire to plead guilty.

Dr. William S. Logan is a psychiatrist and director of law and psychiatry at the Menninger Foundation. Logan testified that he had not reached a definite conclusion as to petitioner's competence to proceed. According to Logan:

> he (petitioner) has a fairly good cognitive and rational understanding of what court procedures are about, but there are some emotional things involved that could interfere with his decision making process at certain critical points.

Logan testified about petitioner's history of mental illness which began, according to Logan, "at the age of 5 or 6, if not before", and the kind of treatment necessary if any improvement in petitioner's mental health was to be made.

The trial court found petitioner competent "to proceed" and immediately thereafter petitioner informed the court that he wished to discharge his attorney and proceed pro se for the express purpose of seeking the death penalty.

On April 23, 1986, the trial court accepted petitioner's waiver of counsel, but ordered counsel to remain available for consultation. Petitioner then informed the court that he wanted to plead guilty. The trial court explained petitioner's rights to him, described death by lethal gas, and urged petitioner to change his mind.

On May 9, 1986 petitioner's guilty plea was accepted. Before accepting the plea the trial court stated that it had found petitioner competent on April 16, 1986 and then asked petitioner if he felt he was competent. Petitioner responded that he was.

On June 27, 1986 a sentencing hearing was held. After presentation of evidence, during which petitioner successfully objected to testimony which may have indicated the existence of mitigating factors, petitioner requested and received the death penalty.

Proceeding pro se, petitioner took none of the prescribed steps to appeal his guilty plea and death penalty. The Missouri Supreme Court requested the State Public Defender to enter the case as amicus curiae and to brief and argue the case.

After argument, the Court ordered petitioner examined by the Department of Mental Health of Missouri to determine his competency to waive counsel on appeal. Based upon the report it received from Dr. S.D. Parwatikar, which stated in pertinent part that petitioner "suffers from an impairment of reasoning which prevents him from imparting information without judging his actions, he is not competent to waive his constitutional rights and represent himself in front of the court," the Missouri Supreme Court set aside the submission and appointed counsel to represent petitioner.

On appeal, petitioner's appointed counsel raised four issues (Appendix 42-54).

In an opinion filed on September 15, 1987, the Missouri Supreme Court, in a 4-3 decision, rejected each of petitioner's claims of error and affirmed the death sentence.

REASONS TO GRANT THE WRIT

I. THE IMPOSITION OF A DEATH SENTENCE FOR AN OFFENSE COMMITTED BY A CHILD BELOW THE AGE OF EIGHTEEN CONSTITUTES CRUEL

AND UNUSUAL PUNISHMENT.

This Court has never directly decided whether it is unconstitutional to apply the death penalty to a juvenile offender.[1] In Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the Court granted certiorari to resolve that issue, but decided the case on other grounds and the juvenile issue was expressly not decided. Nonetheless, Justice Powell, writing for the Eddings court, recognized that:

> Youth is more than a chronological fact. It is a time and condition in life when a person may be most susceptible to influence and to psychological damage. Our history is replete with law and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.

455 U.S. at 115-116. Since minors lack the ability, through experience, perspective, and judgment to recognize and avoid choices and decisions detrimental to them, it has long been recognized that "juvenile offenders constitutionally may be treated differently from adults." Belotti v. Baird, 443 U.S. 622, 635, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979), reh'g. denied, 444 U.S. 887 (1979).

Reflecting the distinct attitude held by society toward the juvenile offender, every state now has a comprehensive juvenile court system, see, Kent v. United States, 383 U.S. 541, 544 n. 19, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966), and Missouri is no exception See: Mo. Rev. Stat. Chapters 210 and 211 (1986). Further, by enacting, in 1950, the Federal Youth Corrections Act, 18 U.S.C. Sections 5005-5026 (1982), the federal government recognized the need "to provide a better method of treating young offenders . . . in that vulnerable age bracket, to rehabilitate them and restore normal behavior patterns." Dorszynski v. United States, 418 U.S. 424, 432-33, 94 S.Ct. 3042, 41 L.Ed.2d 855 (1974). Reflecting this general attitude, the express purpose of

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[1] That issue is presently before the Court in Thompson v. Oklahoma, No. 86-6169, cert. granted, 107 S.Ct. 1284-85 (1987).

the Missouri Juvenile Code is

> to facilitate the care, protection and discipline of children who come within the jurisdiction of the juvenile court. This chapter shall be liberally construed, therefore, to the end that each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control, preferably in his own home, as will conduce to the child's welfare and the best interests of the state and that when such child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which should have been given him by them.

Mo. Rev. Stat. Section 211.011 (1986). Thus, the legislature has recognized that, in cases involving juvenile offenders, the emphasis must be placed on the welfare of the juvenile and not on traditional notions of punishment and retribution that are the hallmark of adult offender cases.

Contemporary legislation also reflects the societal perception that a juvenile offender presents a distinct case from an adult offender. Ten states which have capital punishment statutes expressly prohibit the application of those statutes to juveniles.[2] Six of these states[3] set the minimum age for the imposition of the death penalty at 18; three[4] use 17 as the minimum, and one[5] sets 16 as the cutoff point.

Eleven other states, including Missouri, recognize the distinction between juvenile and adult offenders by giving exclusive original jurisdiction to the juvenile court, and they establish a minimum age at which juvenile court jurisdiction may be waived and the cause transferred to adult criminal court. In

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[2] Cal. Penal Code Section 190.5 (Supp. 1985); Conn. Gen. Stat. Ann. Section 53a-46a(f)(1) (Supp. 1982); Ga. Code Ann. Section 17-9-3 (1982); Ill. Ann. Stat. Ch. 38 Section 9-1(b) (Supp. 1985); Neb. Rev. Stat. Section 28-105.01 (1982); Nev. Rev. Stat. Section 176.025 (1979); N.H. Rev. Stat. Section 630:5(II)(b)(5) (Supp. 1981); Ohio Rev. Code Ann. Section 2929.02(E) (1984); Tenn. Code Ann. Section 37-1-134(1) (1984); Tex. Penal Code Ann. Section 8.07(d) (Supp. 1985).

[3] California, Connecticut, Illinois, Nebraska, Ohio and Tennessee.

[4] Georgia, New Hampshire and Texas.

[5] Nevada.

Missouri, as in four other states,[6] that age has been set at 14. Mo. Rev. Stat. Section 211.071 (1986). Further, in Missouri, as in many other states, the age of the offender is specifically designated as a mitigating circumstance in the capital punishment statute. Mo. Rev. Stat Section 565.032 (1986).

Societal concern for the imposition of the death penalty on juvenile offenders and the concomitant recognition that the process involves extraordinary considerations is reflected in the decreasing numbers, over the last fifty years, of instances in which capital sentences are imposed and executed against juvenile offenders; see Teeters-Zibulka, "Executions Under State Authority: 1864-1967", R.W. Bowers, Legal Homicide (1984).[7] Appendix 59-65, V. Streib, Death Penalty for Juveniles: Past, Present and Future (1985), and Appendix 66-71, V. Streib, Persons on Death Row as of December 1985 for Crimes Committed While Under Age Eighteen (1986). As the American Law Institute has stated, "civilized societies will not tolerate the spectacle of execution of children, and this opinion is confirmed by the American experience in punishing youthful offenders." ALI, Model Penal Code, Section 210.6 Comment, 133 (Official Draft & Revised Comments, 1980).

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[6] Ala. Code Section 12-15-34(a) (1977); Ky. Rev. Stat. Ann. Section 208F.070(2) (1980); N.J. Stat. Section 2A:4A-26 (Supp. 1984); and Utah Code Ann. Section 78-3a-25(1) (Supp. 1983).

[7] The date presented therein indicates the following:

Executions of Young People in the U.S. By Date, Race & Age at Execution: 1864-1967

	16B	16W	17B	17W	18B	18W	19B	19W	Totals
1864-1939	4	1	16	6	31	8	20	21	114
1940-49	3	1	11	2	17	0	15	6	58
1950-54	0	0	2	0	2	0	3	2	14
1955-59	0	0	2	0	3	2	1	1	9
1960-67	0	0	1	0	0	0	1	0	2
	10	3	32	8	53	10	51	30	197

The state of Missouri has indicated, time and again, its paternalistic attitude toward juveniles. For example, one who is unmarried and sixteen years old, as was petitioner when he committed the offense, cannot vote, Mo. Rev Stat. Section 115.133 (1986), cannot sit on a jury, Mo. Rev. Stat. Section 494.010 (1986), cannot buy or possess alcoholic beverages, Mo. Rev. Stat. Section 311.325 (1986), cannot enter into a contract, Mo. Rev. Stat. Section 431.055 (1986), and cannot sue or be sued, Mo. Rev. Stat. Section 507.110 (1986). It is thus not only incongruous but completely inconsistent that one who is treated as a minor and is protected in all other realms should be treated as an adult for this purpose alone and be executed as an adult.

Petitioner finally asserts that the imposition of the death penalty in this case, where petitioner was only sixteen-years old when the murder occurred, violates the fundamental precepts of international law

In Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), this Court stressed, as it had in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), in which the Court found the death penalty for the rape of an adult woman to be grossly disproportionate and excessive, that, to the greatest extent possible, all objective criteria is helpful and should be utilized in making the proportionality determination. 458 U.S. at 788. The Enmund court went on to note, "Accordingly, the court looked to the historical development of the punishment at issue, legislative judgment, international opinion, and the sentencing decisions juries have made before bringing its own judgment to bear on the matter." 458 U.S. at 788-789 (emphasis supplied). Further, "'[T]he climate of international opinion concerning the acceptability of a particular punishment' is an additional consideration which is 'not irrelevant.'" 458 U.S. at 796 n. 22, quoting Coker, 433 U.S. at 596 n. 10.

Article I of the American Declaration for the Rights and Duties of Man, adopted at the Ninth International Conference of American States in 1948,[8] guarantees all people the right to life; Article VII provides that protection, care, and aid be specially afforded to children, and Article XXVI prohibits the imposition of cruel, infamous, or unusual punishment upon an offender. These guarantees can be read to prohibit the imposition of the death penalty upon a juvenile.

Over 80 nations have either completely abolished the death penalty or have forbidden its application to certain offenses and to certain offenders, including juveniles. Hartman, "Unusual Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty", 52 U of Cinn. L. Rev. 655, 666 n. 44 (1983). Recent data indicates that 41 nations which have retained the death penalty have statutory provisions exempting youth from its imposition, five of those countries being member states of the Organization of American States. Id. The available data indicates that "[T]he great majority of Member States [of the United Nations] report never condemning to death persons under 18 years of age." U.S. Economic & Social Counsel, Report of the Secretary General on Capital Punishment at 17. U.N. DOC. E/5242 (1973).

Notably, in the international community, at least three instruments regarding human rights prohibit the imposition of the death penalty on juvenile offenders. Article 4(5) of the American Convention on Human Rights, O.A.S. Official Records, OEA/Ser. K/XVI.1.1, DOC 65 Rev. 1 Corr.1 (1970), provides that "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age . . . ." Article 6(5) of the International Covenant on Civil and Political

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[8] The Declaration is legally binding on the United States as a member of the Organization of American States. Case 2141 (1981), International Commission on Human Rights.

Rights, Annex to G.A. Res. 2200, 21 U.S. GAIR Res. Supp. (No. 16), at 53, U.S. DOC A/6316 (1966), states that "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age . . . ." Finally, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 68, 6 U.S.T. 3516, T.I.A.S. No. 3365 Section 75 U.N.I.S. 287, provides, in part, that "In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offense."

Furthermore, in the United States itself, the American Law Institute, in the Model Penal Code, has recommended a bar to the execution of offenders who committed the subject crime while under 18 years of age. ALI Model Penal Code Section 210.6(1)(d) (Proposed Official Draft, 1962); Section 210.6, Comment, 133 (Official Draft & Revised Comments 1980). Finally, in 1983, the American Bar Association passed a resolution opposing the "imposition of capital punishment upon any person for any offense committed while under the age of 18". ABA Report No. 117A, approved August 1983.

Petitioner asserts that, under the "evolving standards of decency that mark the progress of a maturing society" Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958), the execution of one who was still a juvenile, here, sixteen years of age, when the offense was committed, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. This Court should grant certiorari to the Missouri Supreme Court in order to review this issue, or hold this petition in abeyance pending resolution of this issue.

2. THE MISSOURI SUPREME COURT HAS DECIDED THAT THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION DO NOT REQUIRE A SEPARATE DETERMINATION OR HEIGHTENED TEST OF

COMPETENCY BEFORE A CRIMINAL DEFENDANT MAY WAIVE HIS CONSTITUTIONAL RIGHTS TO COUNSEL AND TO A JURY TRIAL SO LONG AS THAT DEFENDANT HAS BEEN FOUND COMPETENT TO STAND TRIAL. THAT DECISION CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT, FEDERAL COURTS OF APPEAL, AND THIS COURT'S DECISION IN WESTBROOK V. ARIZONA.

Petitioner submits that the Missouri Supreme Court's opinion, wherein it denies petitioner's assertion that "a heightened test of competency" was required in his case, conflicts with this Court's decision in Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966) (per curiam), and decisions of other courts, both state and federal, which have decided this issue.

In denying this point, the Missouri Supreme Court held that:

> Counsel urge that there should be a heightened test of competency in this case. Although an incompetent, as a juvenile, may be impaired by his limited cognitive and social capacities, [citation omitted] Judge McFarland could not have been more unbiased, reasonable and fair in his consideration of competency. Any finding of competency necessarily entails the ability to waive certain rights beginning with the very first strains of Miranda. Id. at 961 (juveniles may validly waive both self-incrimination and right to counsel privileges). Moreover, and analogous to the threshold question of competency to stand trial, Missouri law presumes competency, as all persons are presumed to be free of mental disease or defect which would exclude their responsibility for their conduct. Section 551.030.7, RSMo Supp. 1984. The point is denied.

Appendix at 6.

In Westbrook, this Court reversed a first degree murder conviction where the death penalty had been imposed because, although there had been a hearing on the issue of the defendant's competency to stand trial, there had been no hearing or inquiry into the issue of his "competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense." Id. 384 U.S. at 151 Lower courts have reached conflicting decisions on what the decision in Westbrook requires

At least four courts have concluded that Westbrook indicates that the standard for competency to waive the right to counsel is higher than the standard for competency to stand trial. United States v. McDowell, 814 F.2d 245, 250 (6th Cir. (1987); Pickens v. State, 292 N.W.2d 601 (Wis. 1980); United States ex rel. Konigsberg v. Vincent, 526 F.2d 131, 133 (2d Cir. 1975), cert. denied, 426 U.S. 937 (1976); State v. Kolocotronis, 73 Wash. 2d 92, 101, 436 P.2d 774 (1968). However, two courts have rejected such an interpretation finding either that formulating a separate, higher competency standard would prove unworkable, People v. Reason, 37 N.Y.2d 351, 354, 334 N.E.2d 572, 372 N.Y.S.2d 614 (1975), or, that a defendant's competence to act as his own lawyer is irrelevant so long as he has the mental capacity to realize the probable risks and consequences of self-representation. Curry v. Superior Court, 75 Cal. App. 3d 221, 226-227, 141 Cal. Rptr. 884, 887 (1977). One other court expressly declined to decide the issue but recognized that a separate hearing, based on a higher standard, may be required. Goode v. Wainwright, 704 F.2d 593, 597 (11th Cir. 1983), rev'd. on other grounds, 464 U.S. 78 (1984).

Likewise, lower courts have split on the issue of whether Westbrook mandates a higher standard of competency in cases where the issue is the defendant's right to waive trial by jury and to plead guilty. In Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973), the Ninth Circuit, relying on Westbrook, held that a higher standard of competency is required to waive constitutional rights than is required to stand trial. Id. at 213. The Sieling court held that the standard used should "require a court to assess a defendant's competency with specific reference to the gravity of the decisions with which the defendant is faced." Id. at 215. One other circuit has expressly adopted the reasoning of the Sieling court. United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976) ("the level of awareness and comprehension necessary

for a valid waiver of constitutional rights differs from the level necessary to stand trial." Id. at 726 n. 30), as have two state courts. See, State v. Jones, 664 P.2d 1216, 1219 (Wash. 1983) (en banc); State v. Cameron, 704 P.2d 1355, 1357 (Ariz. App. 1985);

Other circuits have rejected Sieling, at least in cases where the defendant is represented by counsel. See e.g., United States v. Harlan, 480 F.2d 515 (6th Cir.), cert. denied, 414 U.S. 1006 (1973); Malinauskas v. United States, 505 F.2d 649 (5th Cir. 1974); United States ex rel McGough v Hewitt, 528 F.2d 339, 342 n. 2 (3d Cir. 1975); Allard v. Helgemoe, 572 F.2d 1, 5 (1st Cir. 1978), cert. denied, 439 U.S. 858 (1978); United States ex rel Heral v. Franzen, 667 F.2d 633 (7th Cir. 1981).

Petitioner would urge this Court to grant the petition in order to settle this question. Petitioner submits that the reasoning of the Ninth Circuit, that a higher standard of competency is required to waive constitutional rights than is necessary to stand trial, should be adopted.

Even if this Court rejects the Ninth Circuit's reasoning for most criminal defendants, petitioner contends that the separate determination and heightened standard of competency are required in those cases, such as this, where the State seeks to impose the ultimate punishment. In capital cases, the competency standard enunciated by this Court in Rees v. Peyton, 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966) is appropriate and should be applied. Rees involved a defendant convicted of murder and sentenced to death. Although the defendant had cooperated with counsel during trial and appeal, after those efforts were unsuccessful he instructed his attorney to abandon the attempt for certiorari review and to forego further legal proceedings. Petitioner, like the defendant in Rees, is asserting his "right" to demand his own execution by foregoing legal proceedings. In essence, petitioner's decision to forego further proceedings was

brought to fruition on April 29, 1986 when the trial court allowed him to waive counsel and proceed pro se. In Rees, it was established that, as a matter of due process, a prisoner cannot be permitted to refuse the assistance of counsel and terminate legal proceedings without an adequate hearing to determine his ability to rationally make such a choice. The standard enunciated in Rees is as follows:

> Whether the defendant has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or whether he is suffering from mental disease, disorder or defect which may substantially affect his capacity in the premises.

Id., 334 U.S. at 314.

This Court has repeatedly recognized that the death penalty is unique in its finality, and therefore, enhanced due process protections are required. See, e.g. Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1, 117-118 (1982) (O'Connor, J. concurring); Beck v Alabama, 447 U.S. 264, 272, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S.Ct. 2954 57 L.Ed.2d 973 (1978); see also, State v. Bibb, 702 S.W.2d 462 (Mo. banc 1985); see generally: Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S.Cal.L.Rev. 1143 (1980).

An element of the procedural protections American jurisprudence provides those charged with crimes is the allocation of the risk of erroneous decisions. In cases involving the death penalty, the State imposes upon itself the "beyond a reasonable doubt standard" even at the punishment stage of the proceedings, Mo. Rev. Stat. Section 565.030 (1986), because when the State seeks to impose the ultimate punishment, it must be as certain as is humanly possible that no mistakes are made. Bullington v Missouri, 451 U.S. 430, 441, 446, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981); Addington v. Texas, 441 U.S. 418, 423-24, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). Such heightened due process is lacking in petitioner's case.

The trial court made no finding on the issue of petitioner's competence to waive his constitutional right to counsel and to a trial by jury. Neither the finding of competency to stand trial nor the guilty plea proceedings held in petitioner's case adequately resolved the question of his competency to waive his constitutional right to counsel or his right to a jury trial. His competency to make such waivers was not the issue at the April 16, 1987 competency hearing,[9] and the trial court never made a finding on that issue. Further, the numerous colloquies preceding the acceptance of petitioner's waiver of counsel and guilty plea cannot suffice to resolve the issue since they consisted of no more than the usual inquiries concerning voluntariness, lack of coercion and understanding of the consequences, and did not extend into the area of petitioner's mental competency at all. Under Rees and Westbrook, it is simply not enough that petitioner was found competent to stand trial. The standard for finding a defendant competent to stand trial in Missouri is less rigorous than is required for a finding that a defendant possesses the mental/emotional ability to make a knowing and voluntary waiver of constitutional rights. Such a heightened standard is critically important here, where the State seeks to impose the ultimate punishment.

Petitioner asserts that the procedure used, and the evidence adduced, by the trial court to determine his competency in this case was inadequate to ensure against error. The finding of competency in this case was made without specific reference to the gravity of the decisions petitioner was making. When it became known to the trial court that more was at stake here than

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[9] At the competency hearing, Dr. Mandracchia offered his opinion that petitioner was competent to make the decision to plead guilty and seek the death penalty. However, when Mandracchia evaluated petitioner in November, 1985, he was unaware that petitioner would waive his right to counsel and plead guilty. Dr. Logan, who was aware of petitioner's desire to waive his right to counsel and plead guilty, did not reach a definite conclusion concerning petitioner's competency.

petitioner's "capacity to understand the proceedings against him or to assist in his own defense",[10] a separate inquiry was necessary, and without it, the risk of error is simply too great to be countenanced. The risk that an erroneous decision may have been made in this case becomes clear when the information available to the trial court is set out:

> - there were two mental evaluations performed, one based on a one and one half hour interview, the other on a five hour interview;
>
> - one doctor offered his opinion that petitioner was competent not only to stand trial, but also to seek the death penalty, even though he was unaware that that was petitioner's intent at the time of the interview;
>
> - the other doctor refused to state a definite opinion as to petitioner's competency;
>
> - petitioner has a long history of mental illness including suicidal and homicidal tendencies, drug abuse, and a family history of mental illness; and finally,
>
> - petitioner has consistently made determined efforts to guarantee himself the death penalty.

The trial court's action of permitting petitioner to waive his constitutional rights to counsel and his right to a jury trial without a separate determination of petitioner's competency to do so was a denial of petitioner's right to due process. The Missouri Supreme Court's opinion which ratifies that action is in conflict with this Court's decisions in Westbrook v. Arizona, supra and Rees v. Peyton, supra, and the decisions of other federal and state courts which have considered this issue.

The Missouri Supreme Court's disposition of this issue is particularly distressing in light of the findings of Dr. S.D. Parwatikar. Dr. Parwatikar evaluated petitioner pursuant to the Missouri Supreme Court's October 3, 1986 Order (Appendix at 24). According to Parwatikar's report of December 29, 1986 (Appendix 35-40), petitioner was evaluated to determine his competence to waive his right to counsel. Parwatikar concluded that petitioner

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[10] Mo. Rev. Stats., Section 552.020 (1986)

is "not competent to waive his constitutional rights and represent himself in front of the court". Petitioner submits that it is anomalous for the Missouri Supreme Court to find that petitioner is currently incompetent to represent himself on appeal while at the same time finding that on April 23, 1986 petitioner was competent to waive his right to counsel and that on May 9, 1986 petitioner was competent to waive his right to a jury trial. This Court should grant certiorari to the Missouri Supreme Court in order to settle this issue.

3. THE INFLICTION OF THE DEATH PENALTY ON PETITIONER WILKINS WOULD CONSTITUTE EXCESSIVE AND DISPROPORTIONATE PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN LIGHT OF THE OVERWHELMING MITIGATING CIRCUMSTANCES IN HIS CASE.

The Eighth Amendment's prohibition against cruel and unusual punishment has long been recognized to include as "a precept of justice that punishment for crime should be graduated and proportioned to the offense." Weems v. United States, 217 U.S. 349, 367 (1910). The proportionality of a particular punishment may be considered not only in the abstract, for example, where the Court considered the propriety of the death penalty for the rape of an adult female, Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), but also in the particular where the Court is asked to determine the propriety of death as a penalty to be applied to a specific defendant for a specific crime. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976), reh'g. denied, 429 U.S. 875 (1976). This Court has on several occasions entertained claims that a particular death sentence was excessive or disproportionate, see, e.g., Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 2991 n. 40, 49 L.Ed.2d 944 (1976); Bell v. Ohio, 438 U.S. 637, 98 S.Ct. 2977, 2981 n. , 57 L.Ed.2d 1278 (1978); Lockett v. Ohio, 438 U.S. 586,

98 S.Ct. 2954, 2967 n. 16, 57 L.Ed.2d 973 (1978), but has never been required to decide those claims.

Petitioner presented uncontroverted evidence of at least three factors which, considered together, overwhelmingly mitigate his crime.

First, there is evidence in the record that petitioner has a long-term history of mental illness, which may be genetically based, and which impaired his ability to appreciate the wrongfulness of his conduct and his capacity to conform his conduct to the requirements of law.

Second, the murder was committed while petitioner, who has a history of drug and alcohol abuse, was under the influence of illicit drugs, specifically LSD, a known hallucinogen, which he had ingested at least three times on July 27, 1985, the last being within four hours of the murder. Petitioner had also ingested quantities of alcohol in the period immediately preceding the murder. Petitioner's ability to appreciate the wrongfulness of his conduct and his capacity to conform his conduct to the requirements of law was thus substantially impaired.

Finally, petitioner was only sixteen-years old when he committed the offense.

Petitioner has a long-term history of mental illness, which, according to Dr. Logan manifested itself at least by age five. Sherry Wilkins, petitioner's mother, was the daughter of an alcoholic father and she apparently physically abused petitioner when he was a child. Petitioner's only sibling, Jerrod, suffered severe emotional and mental problems and was ultimately diagnosed as schizophrenic. During petitioner's own psychiatric and psychological evaluations and treatment it was suggested, on at least one occasion, that petitioner's emotional and mental problems have some genetic basis.

Petitioner has been involved in the juvenile justice system since the age of eight. In 1979, he began a series of placements and psychiatric evaluations that continued until 1985. Among the institutions that dealt with petitioner are Tri-County Mental Health Center, Western Missouri Mental Health Center, Butterfield Youth Services, and the Crittenden Center. Petitioner's history as set forth in his records from these institutions shows that he has demonstrated extreme psychoses, manifested by a long-term pattern of suicide attempts. These suicide attempts, petitioner asserts, have culminated in this last, state-aided, attempt to commit suicide.[11] Dr. Logan stated that, on several occasions, anti-psychotic medication was prescribed for petitioner which he would not take. Petitioner himself, in the course of the evaluations by the doctor, described his mental state and resulting conduct on the night in question as "automatic" and like a "machine", thus raising the inference that his conscious, reasoning mind had ceased to function at the time of the occurrence. Dr. Logan further indicated that petitioner was a very disturbed boy on the night in question. Petitioner asserts that, because of his mental illness, he lacked the capacity to conform his conduct to the requirements of law.

Also in evidence and uncontested is petitioner's substantial history of drug and alcohol abuse, as well as his use, on the night in question, of both alcohol and LSD, a known hallucinogenic drug. It is uncontested that petitioner first began to use illicit drugs at approximately age five and that his drug and alcohol use increased practically unabated, extending from the use of marijuana to stronger hallucinogenic drugs such

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[11] Psychologists have recognized, as a typical response of one who wishes to commit suicide, the "suicide-homicide" phenomenon. Under this phenomenon, the desire to commit suicide is effectuated by means of the commission of a homicide that carries with it the likelihood that the death penalty will be imposed. See G. R. Blazer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J. of Crim. Law & Criminology 600 (1983).

as LSD, which was his preferred drug. Petitioner has consistently maintained that, on July 27, 1985, he had had at least three "hits" of acid. Further, during that evening, he had been drinking fairly heavily and had again used LSD; taking the last "hit" of LSD within four hours of the murder. Petitioner asserts that, given his history of drug abuse and, more particularly, his abuse of both alcohol and LSD on the night of July 27, 1985, his ability to conform his conduct to the requirements of law was substantially impaired.

Finally, petitioner notes that, on July 27, 1985, he was a boy of only sixteen years of age. As an adolescent, he was

> more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault, offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.

Eddings v. Oklahoma, 455 U.S. 104, 116 n. 11, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978). Furthermore, the ability of a boy of 16 years to think in moral terms and to engage in moral judgments has not yet fully developed, as it generally has in people of more advanced years. Rest, Davidson & Robbins, Age Trends in Judging Moral Issues, 49 Child Development 263 (1978); Kohlberg, Development of Moral Character and Moral Ideology, in Hoffman & Hoffman, Review of Child Development Research, 404-405 (1964). Petitioner thus asserts that the death penalty was inappropriately imposed and is disproportionate and excessive given petitioner's age and his concomitant lack of capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of

law.[12]

It should also be noted that the existence of these mitigating factors may not have been fully considered by the trial court in assessing death as the appropriate punishment in this case. At the sentencing hearing petitioner had no interest in presenting mitigating evidence and, in fact, objected to testimony which may have provided mitigating evidence. The trial court sustained each of petitioner's objections. This Court should grant certiorari to establish that the death penalty is disproportionate and excessive punishment considering petitioner's age, his cognitive-emotional disorder, and his extensive drug use.

CONCLUSION

For the reasons set forth in the Petition, petitioner respectfully submits that the Court should issue a writ of certiorari to the Missouri Supreme Court in order to review the issues raised herein.

Respectfully submitted,

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[12] Three justices of the Missouri Supreme Court agreed that punishing petitioner with death would be disproportionate and excessive. See, Appendix at 1-13, State v. Wilkins, 736 S.W.2d 400, 418 (Donnelly, J. dissenting).

DEATH PENALTY FOR JUVENILES:

PAST, PRESENT AND FUTURE

by

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EXHIBIT C

Death sentences and actual executions of persons for crimes committed while under age eighteen are rare but persistent phenomena which have spanned 343 years of American history. They began in Plymouth Colony, Massachusetts, in 1642 and have continued through 1985. Our past practice of executing juveniles reveals surprising facts and policies. Our current practice is no less surprising, absent a presumption that attitudes and policies should have changed after three and one-half centuries. The future seems fairly promising and may provide one small victory for opponents of the death penalty in their dark and dreary war against killing human beings to achieve governmental goals of justice.

Past Executions of Juveniles:

The most current list of verified executions of persons for crimes committed while under age eighteen establishes the total at 271 such persons. The first was Thomas Graunger, age sixteen or seventeen, who was executed in 1642 in Plymouth Colony, Massachusetts, for buggery of cattle. The last, as of this writing, was Charles Rumbaugh, age seventeen at the time of his robbery and murder of a jeweler, executed at age twenty-eight in Huntsville, Texas, on September 11, 1985.

The range of ages at the time of their crimes is from age seventeen down to age ten. The youngest ever at the time of his crime was James Arcene, executed by the federal government in Arkansas on June 26, 1885, for a crime committed when he was only ten years old. In this century, credit for executing the youngest offenders seems to be a contest between Florida and South Carolina. On April 27, 1927, Florida executed Fortune Ferguson, Jr., for a crime he committed when he was only thirteen or fourteen although he had reached age sixteen before being executed. South Carolina executed George Junius Stinney, Jr., on June 16, 1944, for a crime he committed at age fourteen and he was still only fourteen when executed.

Only nine of these 271 executed juveniles were females. Their ages ranged from twelve through seventeen. Beginning in 1786, the last execution of a juvenile girl was in 1912. However, as the appended list indicates, a juvenile girl currently awaits her execution on Georgia's death row.

The races of the offenders and victims in these 271 cases are quite predictable. Of the 271 offenders, 70% were black and 24% were white. For the victims of their crimes, 7% were black and 90% were white. The crimes were primarily murder (81%) but 15% were executed for rape and even a few were executed for attempted rape and attempted robbery.

Present Death Sentences for Juveniles:

As of October 1, 1985, a total of 1,590 persons are under a sentence of death and are imprisoned on the death rows of thirty-two states. Of this total death row population, thirty-two persons are on the death rows of sixteen states for crimes committed while under the age of eighteen. Although under the typical age limit for juvenile court when they committed their

crimes, some of them have been on death row for seven to ten years and are now in their mid-twenties. All thirty-two were convicted and sentenced to death for the crime of murder. The age, sex and race characteristics of these thirty-two persons are as follows:

Age at Time of Offense	Sex of Prisoner	Race of Prisoner
age 15 = 4	male = 31	white = 16
age 16 = 6	female = 1	black = 16
age 17 = 22	total = 32	total = 32
total = 32		

For the names of the thirty-two presently condemned juveniles and some information about their crimes and sentences, see the list appended to this report.

Future Perspective on the Death Penalty for Juveniles:

The total of thirty-two persons now on death row for crimes committed while under age eighteen is lower than at any time in recent history. In December, 1983, thirty-seven of the 1,289 persons then on death row (2.9%) had been under age eighteen at the time of their crimes. In December, 1984, the number was thirty-three of the 1,464 persons then on death row (2.3%). In October, 1985, the number has fallen to thirty-two of the 1,590 persons now on death row (2.0%).

Thus, even though the total death row population continues to grow by about 175 persons each year, the juvenile death row population continues to shrink. In 1984, only three such juveniles were sentenced to death (Rushing in Louisiana, Brown in North Carolina and Thompson in Oklahoma). For the first ten months of 1985, only two juveniles have been sentenced to death (Ward in Arkansas and Morgan in Florida). Generally, this steady decline in juvenile death sentences stems from the reluctance of prosecutors to bring capital cases and of juries to return capital sentences against juveniles. A large majority of capital punishment states still legally authorize such juvenile death penalties but the system seems more and more unwilling to impose them.

The practice of actually executing such juveniles has similarly declined to almost nil. However, the execution in Texas of Charles Rumbaugh on September 11, 1985, reminds us that the practice has not yet disappeared. Rumbaugh had been only seventeen years old at the time of his crime but had reached the age of twenty-eight when he was finally executed, having spent almost ten years on death row in Texas.

Several state legislatures are being asked to amend their death penalty statutes to establish a minimum for age at time of the crime. The American Bar Association, a fairly conservative organization which has never opposed the death penalty per se, has adopted an official policy opposing the death penalty for crimes committed while under age eighteen. Public opinion surveys as to attitudes about the death penalty continue to find

overwhelming support for it in general but majority opposition to the death penalty for crimes committed while under age eighteen.

Death penalty states are ripe for legislative lobbying and litigative argument opposing the death penalty for juveniles. The practice is disappearing even without changes in the law and the law makers can jump on the bandwagon. Even if the prospects are dismal for convincing them to stop killing our adult brothers and sisters in the name of justice, they seem willing to listen to reasons why they should stop killing our children.

APPENDIX: JUVENILES CURRENTLY ON DEATH ROW

ALABAMA:

Davis, Timothy: 17 at crime; white male; raped and murdered a sixty-year-old woman in a small town grocery store.

Jackson, Carnel: 16 at crime; black male; robbed and abducted Mr. and Mrs. Tucker, raped Mrs. Tucker and murdered them with shotgun; convicted and sentenced to death in November, 1981

Lynn, Frederick: 16 at crime; black male; burglarized and murdered sixty-one-year-old widow in February, 1981; originally convicted and sentenced to death but new sentence currently pending.

ARKANSAS:

Ward, Ronald: 15 years and six months at crime; black male; killed three white persons, twelve-year old male, seventy-two-year-old female and seventy-six-year-old female, also raping one of the females, in April 1985; convicted of murder and sentenced to death on September 20, 1985.

FLORIDA:

Magill, Paul: 17 years and 10 months at crime; white male; kidnapped, raped and murdered twenty-five-year-old store clerk in December, 1976; tried, convicted and originally sentenced to death in March, 1977; sentenced vacated but resentenced to death in 1981. On death row for over eight years.

Morgan, James: 16 at crime; white male; sexually assaulted and murdered a sixty-six-year-old widow in 1977; convicted and originally sentenced to death in 1978; sentenced reversed twice but again sentenced to death on June 7, 1985.

overwhelming support for it in general but majority opposition to the death penalty for crimes committed while under age eighteen.

Death penalty states are ripe for legislative lobbying and litigative argument opposing the death penalty for juveniles. The practice is disappearing even without changes in the law and the law makers can jump on the bandwagon. Even if the prospects are dismal for convincing them to stop killing our adult brothers and sisters in the name of justice, they seem willing to listen to reasons why they should stop killing our children.

APPENDIX: JUVENILES CURRENTLY ON DEATH ROW

ALABAMA:

Davis, Timothy: 17 at crime; white male; raped and murdered a sixty-year-old woman in a small town grocery store.

Jackson, Carnel: 16 at crime; black male; robbed and abducted Mr. and Mrs. Tucker, raped Mrs. Tucker and murdered them with shotgun; convicted and sentenced to death in November, 1981

Lynn, Frederick: 16 at crime; black male; burglarized and murdered sixty-one-year-old widow in February, 1981; originally convicted and sentenced to death but new sentence currently pending.

ARKANSAS:

Ward, Ronald: 15 years and six months at crime; black male; killed three white persons, twelve-year old male, seventy-two-year-old female and seventy-six-year-old female, also raping one of the females, in April 1985; convicted of murder and sentenced to death on September 20, 1985.

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Legare, Andrew: 17 at crime; white male; escaped from Youth Development Center and burglarized and killed handicapped man in May 1977; convicted and originally sentenced to death; sentence reversed but resentenced to death.

INDIANA:

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KENTUCKY:

Stanford, Kevin: 17 at crime; black male; robbed, kidnapped, raped and murdered a young white woman; convicted and sentenced to death in August, 1982.

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Prejean, Dalton: 17 at crime; black male; shot and killed state trooper in July, 1977; convicted and sentenced to death in May, 1978. On death row for seven years.

Rushing, David: 17 at crime; white male; robbed and murdered cab driver; convicted and sentenced to death on testimony of accomplice.

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Trimble, James: 17 years and 8 months at crime; white male; raped, beat and killed a young white woman in July, 1981; convicted and sentenced to death in March, 1982.

MISSISSIPPI:

Jones, Larry: 17 at crime; black male; robbery of retail store with two co-felons during which owner (WM in 70s) was killed on Dec. 2, 1974; convicted and sentenced to death in March 1975 but reversed on appeal; retried in December 1977 and again sentenced to death; sentence reversed by federal district court and affirmed by Fifth Circuit in September 1984; retrial uncertain.

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I

PERSONS ON DEATH ROW AS OF DECEMBER 1985 FOR CRIMES COMMITTED WHILE UNDER AGE EIGHTEEN

by

Victor L. Streib
Cleveland-Marshall College of Law
Cleveland State University
Cleveland, Ohio 441_5
(216) 687-2311

Prepared for distribution to research colleagues and for use in ongoing litigation.

January 1986

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Victor L. Streib
1986

EXHIBIT D

As of December 20, 1985, a total of thirty-two persons are on death row for crimes committed while under age eighteen. This total of thirty-two condemned persons under the typical juvenile court age is less than at any time in recent history. In December, 1983, thirty-seven of the 1,289 persons then on death row (2.9%) had been under age eighteen at the time of their crimes. In December, 1984, the number was thirty-three of the 1,464 persons then on death row (2.3%). In December, 1985, the number has fallen to thirty-two of the 1,642 persons now on death row (1.9%).

Thus, even though the total death row population continues to grow by about 175 persons each year, the juvenile death row population continues to shrink. In 1984, only three such juveniles were sentenced to death (Rushing in Louisiana, Brown in North Carolina and Thompson in Oklahoma). Similarly, only three juveniles were sentenced to death in 1985 (Ward in Arkansas, and Livingston and Morgan in Florida). Generally, this steady decline in juvenile death sentences stems mostly from the reluctance of prosecutors to bring capital cases and of juries to return capital sentences against juveniles. A large majority of capital punishment states still legally authorize such juvenile death penalties but the criminal justice system seems more and more unwilling to impose them.

The practice of actually executing such juveniles has similarly declined to almost nil. However, the execution in Texas of Charles Rumbaugh on September 11, 1985, reminds us that the practice has not yet disappeared. Rumbaugh had been only seventeen years old at the time of his crime but had reached the age of twenty-eight when he was finally executed, having spent almost ten years on death row in Texas. South Carolina has scheduled the execution of James Terry Roach for January 10, 1986. Like Rumbaugh, Roach was only seventeen at the time of his crime.

As of December 20, 1985, a total of 1,642 persons are under a sentence of death and are imprisoned on the death rows of thirty-two states. Of this total death row population, thirty-two persons are on the death rows of sixteen states for crimes committed while under the age of eighteen. Although under the typical age limit for juvenile court when they committed their crimes, some of them have been on death row for seven to nine years and are now in their late twenties. All thirty-two were convicted and sentenced to death for the crime of murder. The age, sex and race characteristics of these thirty-two persons are as follows:

Age at Time of Offense	Sex of Prisoner	Race of Prisoner
age 15 = 4	male = 31	white = 16
age 16 = 5	female = 1	black = 16
age 17 = 23	total = 32	total = 32
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Morgan, James: 16 at crime; white male; sexually assaulted and murdered a sixty-six-year-old widow in 1977; convicted and originally sentenced to death in 1978; sentenced reversed twice but again sentenced to death on June 7, 1985.

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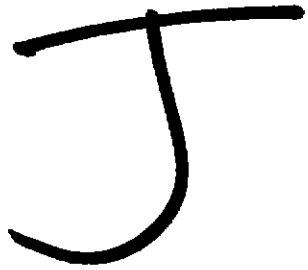


REVIEW GRANTED

On June 30, 1988, the court granted certiorari in the following 5000 Series cases:

87-5666 HIGH v. ZANT

Capital punishment — Age of accused.

Ruling below (*High v. Kemp*, CA 11, 819 F2d 988, 41 CrL 2221 (1987)):

Imposition of capital sentence under Georgia death penalty statute, which permits imposition of death penalty on defendants 17 years of age and older, on defendant who was 17 years old at time crime was committed does not violate Eighth and Fourteenth Amendment's prohibition against cruel and unusual punishment.

Question presented: Does execution of accused under age of 18 at time of offense violate evolving standards of decency, and is it cruel and unusual punishment under Eighth and Fourteenth Amendment?

Petition for certiorari filed 10/9/87, by Michael C. Garrett, of Augusta, Ga., and Bradley S. Stetler, of Burlington, Vt.

87-6026 WILKINS v. MISSOURI

Capital punishment — Age of accused.

Ruling below (Mo SupCt, 736 SW2d 409, 42 CrL 2033 (1987)):

Missouri death penalty statute does not violate Eighth and Fourteenth Amendment's prohibition against cruel and unusual punishment; record indicates that trial judge clearly considered all mitigating factors, including fact that defendant was 16 years old at time crime was committed, before he imposed death sentence.

Question presented: Does infliction of death penalty on person who is 16 at time crime was committed constitute cruel and unusual punishment prohibited by Eighth and Fourteenth Amendments?

Petition for certiorari filed 12/8/87, by Lew A. Kollias, of Columbia, Mo., and Nancy A. McKerrow.

FILED
JUL 12 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

RECEIVED
'88 JUL 12 PM 4 53

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant	NO: 88-1-00428-1 STIPULATION RE: FILING OF PRETRIAL MOTIONS

COME NOW the attorneys for Defendant RUSSELL DUANE McNEIL, CHRISTOPHER TAIT and THOMAS BOTHWELL, and Prosecuting Attorney, JEFFREY SULLIVAN, and stipulate as follows:

Following discussions between the parties concerning some of the pretrial motions which would be filed, the prosecution and the defense hereby agree as evidenced by their signatures hereto that it is in the best interest of justice that the hearing on pretrial motions be disposed of on two separate occasions. The parties agree that the motions concerning constitutionality of the death penalty and the 3.5 hearing should be conducted before the rest of the motions which will inevitably be filed. The reason for this agreement is that it is possible that the disposition of this first set of motions will considerably effect the number and types of motions which are subsequently filed.

All parties therefore agree that the 3.5 hearing and the hearing on the motions concerning the constitutionality of the death penalty shall be conducted at the same time at the earliest convenience of the Court. The parties agree that the Defendant's

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

57

motions and points and authorities in these two areas shall be filed and delivered to the prosecutor no later than Wednesday, July 20, 1988 at 5:00 p.m. The prosecuting attorney shall have until Monday, August 1, 1988 at 5:00 p.m. to respond. After hearing on these matters the Court shall set a new briefing schedule for filing remaining defense motions which shall be not less than three weeks from the time of the dispositon of this first group of motions.

DATED THIS 12 DAY OF JULY, 1988.

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

JEFFREY SULLIVAN
Prosecuting Attorney

Approved this 12 day of July, 1988.

JUDGE F. JAMES GAVIN with the understanding that I will be out of state from July 23 until August 15, 1988.

STIPULATION RE: FILING
OF PRETRIAL MOTIONS 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED
and Micro filmed
JUL 12 1988
Roll No. 331 586
BETTY McGILLEN, YAKIMA COUNTY CLERK

88 JUL 12 AM 9 10

CLERK OF COURT WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY AND PRIVATE INVESTIGATOR FEES AND EXPENSES, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County office forthwith:

(1) The sum of $4773.98 payable to attorney CHRISTOPHER S. TAIT, 103 South Third Avenue, Yakima, WA, 98901;

(2) The sum of ~~$387.50~~ $587.50 payable to attorneys THOMAS BOTHWELL and PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S., 302 North Third Street, P.O. Box #2129, Yakima, WA, 98907; and

~~(3) The sum of $_____ payable to DIANA PARKER, in~~

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

56

~~care of the office of attorney Christopher S. Tait.~~

DATED this 1 day of July, 1988.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

CHRISTOPHER S. TAIT
Of Attorneys for Defendant McNeil

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

RECORD OF TIME

CHRISTOPHER TAIT **JUNE 30, 1988**

STATE vs. RUSSELL DUANE McNEIL

Yakima County Superior Court Cause No: 88-1-00428-1

'88 JUL 12 AM 9 09

DATE	IN/OUT	McNeil Activity	TIME
6/1/88	Out	Prep Motions< Review JMN Letter	6.00
6/2/88	Out	Travel to Wapato & Harrah, Jail Conference	6.00
6/3/88	In	Court hearing-continuance & Additional Time	2.00
6/3/88	Out	Jail Conference client	1.00
6/6/88	Out	Conf TAB, jail conf, present order Prepare order, motions	5.50
6/7/88	Out	Travel Topp, Lat "A", I'V TC, Ed, Conf Jail, PC to jail, motions	6.00
6.8.88	Out	Motions, Office Conf JMN	6.00
6/9/88	Out	Visit Russ' ranch, conf jail, Reviewed JMN letter, Motions	4.00
6/10/88	Out	Long jail conf	1.50
6/11/88	Out	Jail Conf, Office cons. DP	.50
6/13/88	Out	Conf, Judge, YSD, DP, motions Research	4.00
6/14/88	Out	Travel Ranch W/TAB & DP	4.00
6/14/88	Out	*40 miles at 22.5 cents = **$9.00**	*
6/15/88	Out	Motions, Research	3.00
6/16/88	Out	Jail conf, review, motions	4.00

6/20/88	Out	Reviews crime lab reports Motions	4.00
6/21/88	Out	Travel Coulee City/I'V witness	8.00
6/22/88	Out	Jail conf, I'V Jeff B., review lab reports, Motions	4.00
6/22/88	Out	*311 Miles at 22.5 cents = **$69.98**	*
6/23/88	Out	Conf DP	1.00
6/24/88	Out	Conf DP, I'V witness (Harrah, Wapato, Topp.) arrange meeting W/ Judge Gavin, Telephone Conf W/TAB RE: Lab & Forensic Expert	6.00
6/27/88	Out	Conf JG, Conf TAB, DP, Jail Conf Cl, Motions	5.00
6/28/88	Out	Conf DP I'V Wits (Harrah, Wapato) Review Video W/client	4.00
6/29/88	Out	Jail Conf Cl, Conf DP, Motions	4.00
6/30/88	Out	(2) jail conf Client, Conf DP RE: Forensic Expert	4.00

TOTAL Out-Of-Court Hours: 91.50 HOURS at $50.00 PER HOUR =	$4,575.00
TOTAL In-Court Hours: 2.00 HOURS at $60.00 PER HOUR =	$ 120.00
*351 miles at 22.5 cents per mile =	$ 78.98
TOTAL	$4,773.98

SR

FILED

JUL 12 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

FILED

'88 JUL 12 AM 9 10

CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR ORDER APPROVING ATTORNEY AND PRIVATE INVESTIGATOR FEES AND EXPENSES

MOTION

The undersigned attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for defense counsel, and private investigator fees and expenses, for the month of June, 1988.

This motion is made and based upon the record and file herein and the below DECLARATION OF COUNSEL.

DATED this 1st day of July, 1988.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

DECLARATION OF COUNSEL

THOMAS BOTHWELL, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

SS

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference are statements of counsel and our private investigator for the month of June, 1988.

SIGNED AND DATED at Yakima, Washington, this 1st day of July, 1988.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

S T A T E M E N T
June 1988 Legal Services Rendered

ATTORNEY: THOMAS BOTHWELL and PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S.

RE: STATE OF WASHINGTON v. RUSSELL DUANE McNEIL, Yakima County Cause No. 88-1-00428-1

Date:	Description:	Time:
6/6/88	Meeting with Chris Tait and Dianna Parker	2.0
6/7/88	Research	1.0
6/8/88	Research	.5
6/13/88	Telephone conversation with Chris Tait	.25
6/14	TO RANCH w/ CT + D.P	4.0
6/27/88	Meeting with Chris Tait	.75
6/27/88	Meeting with Chris Tait and Dianna Parker	1.0
6/29/88	File review	2.25

TOTAL IN-COURT HOURS: 0.0 hours at $60.00 per hour: $ -0-

TOTAL OUT-OF-COURT HOURS: 7.75 hours at $50.00 per hour: ~~387.50~~ 587.50

TOTAL: $ ~~387.50~~ 587.50

/ /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

FILED and Micro filmed
JUL 5 1988
Roll No. 331 176
BETTY McGILLEN, YAKIMA COUNTY CLERK

RECEIVED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant

NO: 88-1-00428-1

ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY FOR INVESTIGATORY FEES AND EXPENSES

The Court having considered the DEFENDANT'S MOTION for ORDER APPROVING PRIVATE INVESTIGATOR FEES and EXPENSES and attached Declaration of Counsel, now, therefore,

IT IS HEREBY ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

(1) The sum of $1,633.65 payable to DIANA G. PARKER, in care of the Office of Attorney Christopher Tait.

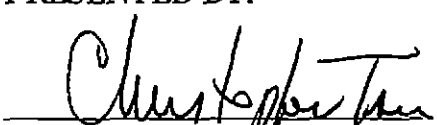
DATED THIS 30 DAY OF JUNE, 1988.

F. JAMES GAVIN, JUDGE

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

54

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys For Defendant McNeil

ORDER AUTHORIZING PAYMENT
BY YAKIMA COUNTY
FOR INVESTIGATORY FEES
AND EXPENSES 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
6/16/88	Out	YSO, Conf CT, review history background, (McN residences) Conf JMN	5.00
6/17/88	Out	Conf CT. Prepare from background materials RE: residences, cons KM, cons DE	2.00
6/20/88	Out	JCS materials, jail conf cl, cons CS, Conf JMN, review evidence/lab reports	6.00
6/21/88	Out	Locate & I'V witnesses, Basin (D.C., B.S.	8.00
6/22/88	Out	Conf CT, jail conf Cli, I'V witnesses, (Wapato) D.E., I'V Witness J. Brown. Cons D.T.	6.50
6/22/88	Out	*21 miles at 22.5 cents = **$4.73**	*
6/23/88	Out	(3) conf JMN, cons Crime Lab, RE Evidence reports, locate W (HC, OP, MS MG) jail conf client, review history and background	6.00
6/24/88	Out	Cons crime la report, conf CT, I'V Witnesses (Wapato, Harrah, LC, Locate DS, NA, MC, Cons Katy Ross, TF, Philosophy Lab Reports,	6.00
6/24/88	Out	*41 miles at 22.5 cents = **$9.23**	*
6/27/88	Out	Conf CT, TAB, cons JG, purchase Prepare photo/evidence log, conf JMN	7.00

6/28/88	Out	Conf CT, prepare evidence log, I'V witness (harrah) locate CR, (mother) I'V D. Longee, jail conf, & review video	7.00
6/28/88	Out	*32 miles at 22.5 cents = **$7.20**	*
6/29/88	Out	Jail conf client, research media, prepare evidence materials, locate mitigation W (MS, H.C., cons B. Hittle)	3.00
6/30/88	Out	Conf CT, jail conf Cl, Conf JMN, cons Forensic Expert, research RE: Client Profile, review reports	8.00

64.50 HRS at $25.00 Per Hour = $1,612.50
94 Miles at 22.5 Cents Per Mile = $ 21.15
TOTAL = $1,633.65

FILED

JUL 5 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

'88 JUL 5 PM 12 37

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	DEFENDANT'S MOTION AND
RUSSELL DUANE McNEIL,	)	SUPPORTING DECLARATION
	)	FOR ORDER APPROVING
	)	PRIVATE INVESTIGATOR
Defendant	)	FEES AND EXPENSES

MOTION

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court for the authorization of payment for investigatory services.

THIS MOTION is based upon the record and file herein and the accompanying DECLARATION OF COUNSEL.

DATED THIS 30 DAY OF JUNE, 1988.

CHRISTOPHER TAIT
Of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Diana G. Parker has been authorized to pursue investigatory services on behalf of the Defendant McNeil. An Order Authorizing Investigatory Services and Setting Rates was entered in the above-entitled cause and signed by the Honorable F. James Gavin approving said investigatory services and authorizing payment of her automobile mileage to be reimbursed at the rate of 22 1/2 cents per mile. Diana G. Parker was further authorized to submit statements, through counsel, on or about the 1st and the 15th day of each month.

Attached hereto and incorporated by reference for approval is the statement of Diana G. Paker for the private investigatory fees and expenses for her services from June 16, 1988 to June 30, 1988, performed by her on behalf of the above-named Defendant, McNeil.

SIGNED AND DATED at Yakima, Washington, this 30 day of June 1988.

Christopher Tait

CHRISTOPHER TAIT
of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
6/16/88	Out	YSO, Conf CT, review history background, (McN residences) Conf JMN	5.00
6/17/88	Out	Conf CT. Prepare from background materials RE: residences, cons KM, cons DE	2.00
6/20/88	Out	JCS materials, jail conf cl, cons CS, Conf JMN, review evidence/lab reports	6.00
6/21/88	Out	Locate & I'V witnesses, Basin (D.C., B.S.	8.00
6/22/88	Out	Conf CT, jail conf Cli, I'V witnesses, (Wapato) D.E., I'V Witness J. Brown. Cons D.T.	6.50
6/22/88	Out	*21 miles at 22.5 cents = **$4.73**	*
6/23/88	Out	(3) conf JMN, cons Crime Lab, RE Evidence reports, locate W (HC, OP, MS MG) jail conf client, review history and background	6.00
6/24/88	Out	Cons crime la report, conf CT, I'V Witnesses (Wapato, Harrah, LC, Locate DS, NA, MC, Cons Katy Ross, TF, Philosophy Lab Reports,	6.00
6/24/88	Out	*41 miles at 22.5 cents = **$9.23**	*
6/27/88	Out	Conf CT, TAB, cons JG, purchase Prepare photo/evidence log, conf JMN	7.00

6/28/88	Out	Conf CT, prepare evidence log, I'V witness (harrah) locate CR, (mother) I'V D. Longee, jail conf, & review video	7.00
6/28/88	Out	*32 miles at 22.5 cents = **$7.20**	*
6/29/88	Out	Jail conf client, research media, prepare evidence materials, locate mitigation W (MS, H.C., cons B. Hittle)	3.00
6/30/88	Out	Conf CT, jail conf Cl, Conf JMN, cons Forensic Expert, research RE: Client Profile, review reports	8.00

64.50 HRS at $25.00 Per Hour = $1,612.50
94 Miles at 22.5 Cents Per Mile = $ 21.15
TOTAL = $1,633.65

FILED
and Micro filmed
JUN 16 1988
Roll No. 329 1294
BETTY McGILLEN, YAKIMA COUNTY CLERK

RECEIVED
'88 JUN 16 PM 4 02
BETTY McGILLEN
EX OFFICIO CLERK OF
THE SUPERIOR COURT
YAKIMA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	NO: 88-1-00428-1
vs.	
RUSSELL DUANE McNEIL, Defendant	ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY FOR INVESTIGATORY FEES AND EXPENSES

THE COURT having considered the Motion for Order Approving Private Investigator Fees and Expenses and attached Declaration of Counsel, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

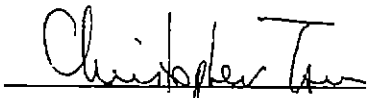
(1) The sum of $1,977.80 payable to DIANA G. PARKER, in care of the office of Attorney Christopher Tait.

DATED THIS 16 DAY OF June, 1988.

F. JAMES GAVIN, JUDGE

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248 1345

FILED
JUN 16 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

'88 JUN 16 PM 4 02
CLERK OF
COURT
WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO> 88-1-00428-1
	)	
vs.	)	
	)	
RUSSELL DUANE McNEIL,	)	DEFENDANT'S MOTION AND
	)	SUPPORTING DECLARATION
Defendant	)	FOR ORDER APPROVING
	)	PRIVATE INVESTIGATOR
	)	FEES AND EXPENSES

MOTION

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court for the authorization of payment for investigatory services. This Motion is made and based upon the record and file herein and the accompanying DECLARATION OF COUNSEL.

DATED THIS 15 DAY OF JUNE, 1988.

Christopher Tait

CHRISTOPHER TAIT
Of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct.:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Diana G. Parker has been authorized to pursue investigatory services on behalf of the Defendant McNeil. An Order Authorizing Investigatory Services and Setting Rates was entered in the above-entitled cause and signed by the Honorable F. James Gavin approving said investigatory services and authorizing payment of her automobile mileage to be reimbursed at the rate of 22 1/2 cents per mile. Diana G. Parker was further authorized to submit statements, through counsel, on or about the 1st and the 15th day of each month.

Attached hereto and incorporated by reference for approval is the statement of Diana G. Parker for the private investigatory fees and expenses for her services from June 1, 1988 to June 14, 1988, performed by her on behalf of the above-named Defendant, McNeil.

SIGNED AND DATED at Yakima, Washington, this 15 day of June, 1988.

Christopher Tait

CHRISTOPHER TAIT
Of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
5/28/88	Out	Jail conf client	1.00
5/31/88	Out	Conf CT, (3) conf JMN, trace R. McN, cons. SSA, cons SH	8.00
6/1/88	Out	Conf Ct, Conf JMN, read JMN, client history, cons (H. T, USS RE Thompson I'V NU Cons VH, Invest. (PLP info)	9.00
6/2/88	Out	Jail conf ct, conf Chief S., jail, cons, Erickson (Pace) cons, NH) NH I'V TC, LC	8.00
6/2/88	Out	*51 miles at 22.5 cents = **$11.48**	*
6/3/88	Out	Jail conf cl, conf JMN, VF, Conf Ct, I'V wit, jail	5.00
6/6/88	Out	(2) Conf JMN, review documents for background , cons SH, conf CT, TAB, jail conf cl, cons D. Erickson	8.00
6/7/88	Out	Prepare I'V schedule, cons, SSI, conf CT, jail conf CT, I'V Wits ED, TC, Helen	7.00
6/8/88	Out	Review test, read prior publicity, conf JMN, conf CT, background search, conf JMN	7.00
6/9/88	Out	Conf CT, (to Ranch), review evidence log, photos, client statement of facts	6.00
6/10/88	Out	Jail conf cl, jailer, Parker & return, conf Ct, review photos, jail conf	7.00
6/10/88	Out	*17 miles at 22.5 cents = **$3.83**	*

6/11/88	Out	Jail conf Cl	.50
6/13/88	Out	YSO, review reports, Yak Herald, Inves, conf. Ct, read psych report, cons LM.	6.00
6/14/88	Out	Conf CT, TAB, travel Topp, jail conf Cl, invest LM, YSO jail conf L.F., YPC	6.00

78.50 HRS at $25.00 Per hour =	$1,962.50
68 Miles at 22.5 Cents Per Mile =	15.30
TOTAL =	$1,977.80

FILED
JUN 1 1988
BETTY McGILLEN
YAKIMA COUNTY CLK

RECEIVED
88 JUN 16 PM 4 02
YAKIMA COUNTY CLERK OF SUPERIOR COURT WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant	NO: 88-1-00428-1 ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR PAYMENT OF BILL, now, therefore,

IT IS HEREBY ORDERED that the $3,505.49 billing be paid forthwith to: KEVIN B. MCGOVERN, Ph.D., 1225 N.W. Murray Road, Suite 214, Portland, OR 97229. (In name of Chris Tait to be forwarded to Dr. McGovern)

DATED THIS 16 DAY OF JUNE, 1988.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

CHRISTOPHER TAIT
Of Attorneys For Defendant McNeil

ORDER AUTHORIZING PAYMENT
BY YAKIMA COUNTY 1

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECEIVED

'88 JUN 16 PM 4 02

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

CLERK OF COURT
YAKIMA, WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	
RUSSELL DUANE McNEIL,	)	DEFENDANT'S MOTION AND
	)	SUPPORTING DECLARATION
Defendant	)	FOR PAYMENT OF BILL

COMES NOW CHIRSTOPHER TAIT, one of Defendant's court-appointed attorneys herein, and moves this Court for an order authorizing payment of the bill of KEVIN B. MCGOVERN, M.D., (a copy of which is attached hereto) be paid forthwith by the appropriate Yakima County Agency.

THIS MOTION is based upon the files and records herein, and upon the attached DECLARATION OF COUNSEL.

DATED this 16 day of June, 1988.

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

FILED
JUN 16 1988
BETTY McGILLEN
YAKIMA COUNTY CLK

DEFENDANT'S MOTION AND
SUPPORTING DECLARATION
FOR PAYMENT OF BILL 1

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Mr McNeil is indigent and unable to pay for the expenses of his defense.

The $3,505.49 billing of KEVIN B. MCGOVERN, M.D., is for a purpose previously authorized by this Court. The attached current billing is for services rendered by KEVIN B. MCGOVERN from April 28, 1988 through June 9, 1988, and consists of records review, initial evaluations, legal reports and costs.

SIGNED AND DATED at Yakima, Washington, this 14 day of June, 1988.

Christopher Tait

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

DEFENDANT'S MOTION AND
SUPPORTING DECLARATION
FOR PAYMENT OF BILL 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

NAME CHRIS TATE
TOM BOTHWELL ATTY'S
for Russell McNeil

FILE

ADDRESS

EMPLOYER

TEL. NO.

RESP.

REF. BY

DATE

S.S.#

KEVIN B. MCGOVERN
1225 NW Murray Rd.
Suite 214
Portland, OR 97229
(503) 644-6600

RE: Russell McNeil

DATE	PROFESSIONAL SERVICE	CHARGES	CREDITS	BALANCE
	Travel Expenses	156.00		156.00
	Mileage 60 x 21¢ =	12.60		168.60
	Hotel	47.69		216.29
	Parking	7.00		223.29
4-28-88	Review Clinical			
	Materials 1 hr	120.00		343.29
5-2-88	Travel to Yakima			
	Meetings with Attys,			
	Review Clinical Materials			
	Clincial Interviews			
	12 hrs.	1440.00		1783.29
5-3-88	Meetings with Attys			
	Clinical Interviews			
	Travel to Portland			
	10 hrs	1250.00		3033.29
5-2-88	Lunch	11.20		3044.49
5-14-88	Review Files: McNeil			
	Psy. test Results			
	2.5 hrs	300.00		3344.49
	Telephone Consultation			
	with Legal Counsel,			
	Computorized Test Scoring			
	and Sundry	100.00		3444.49
6-9-88	Review Psy. Test			
	Results .5 hr	60.00		3504.49

PLEASE PAY LAST AMOUNT IN THIS COLUMN ▲

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

FILED

JUN 14 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,

Plaintiff

vs

No. 88 1 428 1

McNEIL, Russell

Defendant

THE ABOVE ENTITLED CASE has been set for trial

MONDAY	9/12/88	9:00 a.m.
(Day)	(Date)	(Time)

Non-Jury HEARING Jury _____ No. Days 7

TYPE OF ACTION PRE-TRIAL HEARING

JEFFREY SULLIVAN
HOWARD HANSEN
Attorney for Plaintiff(s)

THOMAS BOTHWELL
CHRIS TAIT
Attorney for Defendant(s)

PRE-ASSIGNED TO
JUDGE GAVIN

SUPERIOR COURT ADMINISTRATOR

COPY RECEIVED BY _____ DATE _____

FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

JUN 14 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,
Plaintiff

vs

No. 88 1 428 1
RESET

McNEIL, Russell
Defendant

THE ABOVE ENTITLED CASE has been set for trial

MONDAY	10/3/88	9:00 a.m.
(Day)	(Date)	(Time)

Non-Jury _____ Jury 12 TRIAL No. Days _____

TYPE OF ACTION AGR. 1° MURDER/ACC. AGR. 1° MURDER

JEFFREY SULLIVAN HOWARD HANSEN	CHRIS TAIT THOMAS BOTHWELL
Attorney for Plaintiff(s)	Attorney for Defendant(s)

PRE-ASSIGNED TO
JUDGE GAVIN

SUPERIOR COURT ADMINISTRATOR

COPY RECEIVED BY _____ DATE _____

47

RECEIVED

'88 JUN 8 PM 3 14

BY: BETTY M. GILLEN
CLERK OF
YAKIMA COUNTY COURT
WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant.

No. 88-1-00428-1

ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR PAYMENT OF BILL, now, therefore,

IT IS HEREBY ORDERED that the $200.00 billing be paid forthwith to: HENRY H. DIXON, JR., M.D., 2250 N.W. Flanders Street, Suite #103, Portland, OR, 97210.

DATED this 6 day of June, 1988.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

JUN 10 1988

BETTY M. GILLEN
YAKIMA COUNTY CLERK

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

RECEIVED

'88 JUN 8 PM 3 14

EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR PAYMENT OF BILL

JUN 10 1988

BETTY McCULLEN
YAKIMA COUNTY CLERK

MOTION

COMES NOW THOMAS BOTHWELL and PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S., of attorneys for the above-named Defendant, RUSSELL DUANE McNEIL, and moves this Court for an order that the bill of HENRY H. DIXON, JR., M.D., (a copy of which is attached hereto) be paid forthwith by the appropriate Yakima County agency.

This motion is made and based upon the record and file herein and the below DECLARATION OF COUNSEL.

DATED this 8th day of June, 1988.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

DECLARATION OF COUNSEL

THOMAS BOTHWELL, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Mr. McNeil is indigent and unable to pay for the expenses of his defense.

The $200.00 billing of HENRY H. DIXON, JR., M.D., is for a purpose previously authorized by this Court. The attached current billing is for services rendered by Dr. Dixon on May 12, 1988, and consists of an initial evaluation of Mr. McNeil.

SIGNED AND DATED at Yakima, Washington, this 8th day of June, 1988.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

Henry H. Dixon, Jr., M.D.
2250 N.W. Flanders
Suite 103
Portland OR 97210
541 26 7802

May 31 88

Thomas Bothwell, Attorney
P.O. Box 2129
Yakima WA 98907

Acct #: 586X1
Professional services for Russell McNeil

DATE	PLACE	CPT	DESCRIPTION	CHARGES	CREDITS
Apr 30 88			Statement Sent		
Apr 30 88			Balance Forward 600.00		
May 12 88	3	90801	Initial Evaluation	200.00	
May 23 88			Resp Person Pay		600.00

6-6-88

Past due:	30 DAYS	60 DAYS	90 DAYS	120 DAYS	BALANCE
	0.00	0.00	0.00	0.00	200.00

Questions? Call 227-1787 between 9:30-5:00, Mon & Thurs ONLY

Henry H. Dixon, Jr., M.D.
2250 N.W. Flanders
Suite 103
Portland OR 97210
541 26 7802

May 31 88

Thomas Bothwell, Attorney
P.O. Box 2129
Yakima WA 98907

Acct #: 586X1
Professional services for Russell McNeil

DATE	PLACE	CPT	DESCRIPTION	CHARGES	CREDITS
Apr 30 88			Statement Sent		
Apr 30 88			Balance Forward 600.00		
May 12 88	3	90801	Initial Evaluation	200.00	
May 23 88			Resp Person Pay		600.00

6-6-88

Past due:	30 DAYS	60 DAYS	90 DAYS	120 DAYS	BALANCE
	0.00	0.00	0.00	0.00	200.00

Questions? Call 227-1787 between 9:30-5:00, Mon & Thurs ONLY

FILED

JUN 7 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	SCHEDULING ORDER
RUSSELL DUANE McNEIL,	)	
	)	
Defendant	)	

THIS MATTER coming on regularly for heraring, and the Court having considered the arguments of counsel, the written waiver of trial time limits signed by Defendant, and the record and file herein, therefore, it is hereby ORDERED as follows:

(1) The previously scheduled trial date of July 11, 1988, at 9:30 a.m., is hereby stricken and this cause is set for trial on Monday, October 3, 1988, at 9:30 a.m.

(2) The deadline by which the Defendant, through counsel, must file all pre-trial motions is July 29, 1988, at the hour of 5:00 p.m.

(3) The deadline by which the Plaintiff must respond to Defendant's pre-trial motions is August 19, 1988, at the hour of 5:00 p.m.

(4) The deadline by which the Defendant, through counsel, must file his reply motions and/or memorandum is August 26, 1988, at the hour of 5:00 p.m.

(5) A pre-trial hearing will be held beginning on September 12, 1988, at the hour of 9:00 a.m., and it is further

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248 1346

44

ORDERED, ADJUDGED, AND DECREED that if defense counsel wish to give any evidentiary material to the defendant in jail, they must first allow the jail administrator or his designee to screen said materials. If the jail administrator of his designee has any objection to said materials being shown to defendant, then the Court shall examine said materials in camera and issue such orders as are necessary and appropriate. No evidentiary matters shall be delivered to defendant for overnight review.

DATED THIS 6 DAY OF JUNE, 1988.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

Approved; Notice of
Presentment waived:

Of Attorneys for Plaintiff

SCHEDULING ORDER2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

SUB

NUMBER

43

MISSING

```
ISM007   CHANGE DOCKET              YAKIMA SUPERIOR  02-24-04 13:01   8 OF  47
 CASE#: 88-1-00428-1            JUDGMENT# 89-9-2233-2              JUDGE ID:
 TITLE: STATE VS MCNEIL
 NOTE1:
 NOTE2:
                                                      STATUS: ACT    DATE:
 SUB#     DATE         CODE     DESCRIPTION/NAME                    SECONDARY
                                TIME FOR PRETRIAL MOTIONS, ORDERS
                                TO BE PRESENTED, SEE FILE MINUTES.
                                88D3 1:120(BAUGHER)
 42       06 03 1988 WVSPDT     WAIVER OF SPEEDY TRIAL
 43       06 02 1988 ORCTD      ORD FOR CONTINUANCE OF TRIAL DATE
 44       06 07 1988 OR         SCHEDULING ORDER (GAVIN)
 45       06 10 1988 MT         MOT&AFF FOR PAYMENT TO ATTY
 46       06 10 1988 OP         ORDER AUTHORIZING PAYMENT TO ATTY
                                (GAVIN)
 47       06 14 1988 TRCKST     TRIAL CLERK'S SETTING - RESET       10-03-1988TD
                     ACTION     J12 9:00 AGR MURDER 1ST/ACC AGR
                     ACTION     MURDER 1ST 2 DYS
                     ACTION     **PREASSIGNED TO GAVIN**
 48       06 14 1988 TRCKST     TRIAL CLERK'S SETTING               09-12-88
                     ACTION     H 9:00 PRE-TRIAL 7D

 ?                          F1=Help Enter=Process F3=Ins F7=Bwd F8=Fwd PA1=Cancel
 4-8.              A Sess-1    206.194.129.5          FTCP1301 DOC»    23/2
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FILED
JUN 3 1988
BETTY McCULLEN
YAKIMA COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

'88 JUN 3 PM 2 49

STATE OF WASHINGTON,

Plaintiff,

v.

Russell McNeil

Defendant(s).

No. 88-1-00428-1

WAIVER OF TRIAL TIME LIMITS

I, Russell McNeil, a defendant in this case, acknowledge that I have been fully advised by my attorney of the trial time limits of Criminal Rule 3.3, as amended.

I was arrested on this case on 1-27-88.

I understand that I have a right to trial within the time noted in Criminal Rule 3.3, as amended, and I give up that right and consent to a trial date of 10-3-88.

DATED: 6-3-88

Russell D McNeil
Defendant

Approved:

J. James Gavin
Judge

Defendant's Lawyer

RECEIVED
JUN 3 1988
SUPERIOR COURT

WAIVER OF TRIAL TIME LIMITS

42

FILED

JUN 2 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant	NO: 88-1-00428-1 MOTION FOR CONTINUANCE OF TRIAL DATE

COMES NOW DEFENDANT, RUSSELL DUANE McNEIL, by and through his counsel Christopher Tait, and moves the court for the entry of an order granting a continuance of the trial date now scheduled for July 11, 1988.

THIS MOTION is based upon the files and records herein, and upon the affidavit of Defendant's Counsel, attached hereto.

DATED THIS 2nd DAY OF JUNE, 1988.

Christopher Tait

CHRISTOPHER TAIT
Attorney for Defendant

MOTION FOR CONTINUANCE
OF TRIAL DATE1

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

STATE OF WASHINGTON)
)ss.
COUNTY OF YAKIMA)

CHRISTOPHER TAIT, being first duly sworn upon oath, deposes and states:

I am one of the co-counsel appointed to represent the above-named Defendant.

My co-counsel, Thomas A. Bothwell, is out of Yakima on vacation, and is not scheduled to return until the evening of June 6, 1988.

On Friday, May 27, 1988, the Prosecuting Attorney for Yakima County filed a notice which indicated his intent to seek the death penalty in this case, and also in the case of State v. Rice.

Until that date, none of the attorneys involved in this case knew whether we were actually involved in a death penalty case. I met with Mr. Sullivan personally on Thursday, May 26, 1988, and he indicated to me at that time that he had not made a final decision regarding the death notice.

We now have 6 business days before the deadline set by the Court for filing of pre-trial motions. That is simply not enough time. My review of similar cases in this jurisdiction, and in other states, shows that the preparation and argument of pre-trial motions is one of the most important aspects of the case. Some authorities recommend filing as many as 55 motions before trial. his will obviously necessitate continuing the pre-trial date of June 20, 1988.

It is therefore respectfully requested that the Court extend the trial date currently set on July 11, 1988.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1345

DATED this 2nd day of June, 1988.

Christopher Tait
CHRISTOPHER TAIT

SUBSCRIBED AND SWORN to before me this 2nd day of June, 1988.

Patricia J. Barbee
NOTARY PUBLIC in and for the State of Washington, residing at Yakima.

MOTION FOR CONTINUANCE
OF TRIAL DATE3

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED

JUN 2 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	MOTION FOR ADDITIONAL
RUSSELL DUANE McNEIL,	)	TIME WITHIN WHICH TO FILE
	)	PRE-TRIAL MOTIONS
Defendant	)	

COMES NOW DEFENDANT, RUSSELL DUANE McNEIL, by and through his counsel Christopher Tait, and moves the court for the entry of an order granting additional time within which to file pre-trial motions.

THIS MOTION is based upon the files and records herein, and upon the affidavit of Defendant's Counsel, attached hereto.

DATED THIS 2nd DAY OF JUNE, 1988.

Christopher Tait
CHRISTOPHER TAIT

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

40

Attorney for Defendant

STATE OF WASHINGTON)
)ss.
COUNTY OF YAKIMA)

CHRISTOPHER TAIT, being first duly sworn upon oath, deposes and states:

I am one of the co-counsel appointed to represent the above-named Defendant.

My co-counsel, Thomas A. Bothwell, is out of Yakima on vacation, and is not scheduled to return until the evening of June 6, 1988.

On Friday, May 27, 1988, the Prosecuting Attorney for Yakima County filed a notice which indicated his intent to seek the death penalty in this case, and also in the case of State v. Rice.

Until that date, none of the attorneys involved in this case knew whether we were actually involved in a death penalty case. I met with Mr. Sullivan personally on Thursday, May 26, 1988, and he indicated to me at that time that he had not made a final decision regarding the death notice.

We now have 6 business days before the deadline set by the Court for filing of pre-trial motions. That is simply not enough time. My review of similar cases in this jurisdiction, and in other states, shows that the preparation and argument of pre-trial motions is one of the most important aspects of the case. Some authorities recommend filing as many as 55 motions before trial.

It is therefore respectfully requested that the Court extend the deadline currently set on June 13, 1988 to July 29, 1988. This will obviously necessitate continuing the pre-trial date of June 20, 1988, and the trial date of July 11, 1988. I am filing a motion to continue the trial date along with this motion.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DATED this 2nd day of June, 1988.

Christopher Tait
CHRISTOPHER TAIT

SUBSCRIBED AND SWORN to before me this 2nd day of June, 1988.

Patricia J. Barbee
NOTARY PUBLIC in and for the State of Washington, residing at Yakima.

MOTION FOR ADDITIONAL TIME WITHIN WHICH TO FILE PRE-TRIAL MOTIONS 3

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

Se

FILED

MAY 27 1988

BETTY McGILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF YAKIMA

88 MAY 27 PM 12:44

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	NO. 88-1-00428-1 NOTICE OF SPECIAL SENTENCING PROCEEDING

I, JEFFREY C. SULLIVAN, duly elected Prosecuting Attorney for Yakima County, Washington, do hereby give notice to the defendant RUSSELL DUANE McNEIL, of my intent to invoke the special sentencing proceeding to determine whether or not the death penalty should be imposed since I believe that there are not sufficient mitigating circumstances to merit leniency.

DATED this 27th day of May, 1988.

JEFFREY C. SULLIVAN
Prosecuting Attorney

Notice accepted and
copy received:

CHRIS TAIT
Attorney for Defendant

FILED
MAY 17 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

REGEI

'88 MAY 17 AM 11 45

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

COURT
YAKI WASHINGTO

STATE OF WASHINGTON, Plaintiff,	NO: 88-1-00428-1
vs.	
RUSSELL DUANE McNEIL, Defendant	ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY FOR INVESTIGATORY FEES AND EXPENSES

THE COURT having considered the Motion for Order Approving Private Investigator Fees and Expenses and attached Declaration of Counsel, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

(1) The sum of $2,120.15 payable to DIANA G. PARKER, in care of the office of Attorney Christopher Tait.

DATED THIS 17 DAY OF May, 1988.

F. JAMES GAVIN, JUDGE

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

38

SR

FILED
MAY 17 1988
BETTY MORGAN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	
	)	
RUSSELL DUANE McNEIL,	)	DEFENDANT'S MOTION AND
	)	SUPPORTING DECLARATION
Defendant	)	FOR ORDER APPROVING
	)	PRIVATE INVESTIGATOR
	)	FEES AND EXPENSES

MOTION

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court for the authorization of payment for investigatory services. This Motion is made and based upon the record and file herein and the accompanying DECLARATION OF COUNSEL.

DATED THIS 17 DAY OF MAY, 1988.

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct.:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Diana G. Parker has been authorized to pursue investigatory services on behalf of the Defendant McNeil. An Order Authorizing Investigatory Services and Setting Rates was entered in the above-entitled cause and signed by the Honorable F. James Gavin approving said investigatory services and authorizing payment of her automobile mileage to be reimbursed at the rate of 22 1/2 cents per mile. Diana G. Parker was further authorized to submit statements, through counsel, on or about the 1st and the 15th day of each month.

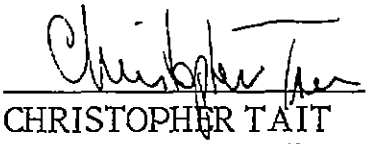
Attached hereto and incorporated by reference for approval is the statement of Diana G. Parker for the private investigatory fees and expenses for her services from May 1, 1988 to May 15, 1988, performed by her on behalf of the above-named Defendant, McNeil.

SIGNED AND DATED at Yakima, Washington, this 17th day of May, 1988.

CHRISTOPHER TAIT
Of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1348

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
5/2/88	Out	To Airport, to Wapato w/Dr McG, to Topp w/CT DrMcG, Conf w/CT, Conf w/drMcG, Review tape review statements; transport Dr Conf DrMcG & CT	10.50
5/3/88	Out	Conf CT; Conf DS,; Conf MDL; Cons SM; Conf JM; Conf MDL Conf DT; Conf CT,DRMcG	8.25
5/4/88	Out	Conf CT; jail conf Cl, I'V wits Wapato, Harrah, Conf Mr. Ep; TS; I'V Wits (DS, I'V Wit (ES)	9.50
5/4/88	----	*34 miles at 22.5 cents = **$7.65**	*
5/5/88	Out	Conf TAB;Conf K. Ham; Conf JMc Conf CT; research/ 1 d WLTS, SSide, Topp, Harrah, Conf Erickson, (2) Cons LP, review Statements/record, I'V Ed D, DT	8.00
5/6/88	Out	Conf JMc, Conf CT; I'V est, record Statements SL, DC Conf V. Arm, Con P, I'V A Mc, Conf MD, Cons Pace, Cont Kit Sheriff Office	7.50
5/9/88	Out	I'V Wits (DC, BS) Basin area,	9.00
5/10/88	Out	Conf CT, review tape, I"V wits, Wap M. DeL, M. Ch, V. Arm, (2) jail conf cl, ent	9.00
5/11/88	Out	Conf CT, TAB, Conf JMc, Cons LP, Conf MDL, review background for cl letter to JCS	8.00

5/12/88	Out	Conf CT; conf JMc, I'V Wits, Harrah LC, PC	8.00
5/13/88	Out	Conf CT, jail conf Cl (2) Conf JMc, Prepare backgrd material for social History, Conf w/McG & CT	6.75
			84.50
		84.50 HRS at $25.00 Per Hour =	$2,112.50
		34 Miles at 22.5 cents per mile =	7.65
		TOTAL	$2,120.15

RECEIVED

'88 MAY 6 AM 10 49

CLERK OF COURT YAKIMA, WASHINGTON

FILED

MAY 6 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant.

No. 88-1-00428-1

ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR PAYMENT OF BILL, now, therefore,

IT IS HEREBY ORDERED that the $600.00 billing be paid forthwith to: Tom Bothwell, Attorney for forwarding to HENRY H. DIXON, JR., M.D., 2250 N.W. Flanders Street, Suite #103, Portland, OR, 97210.

DATED this 5 day of May, 1988.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

RECEIVED

'88 MAY 6 AM 10 49

CLERK OF COURT
WASHINGTON

FILED

MAY 6 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR PAYMENT OF BILL

MOTION

COMES NOW THOMAS BOTHWELL and PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S., of attorneys for the above-named Defendant, RUSSELL DUANE McNEIL, and moves this Court for an order that the bill of HENRY H. DIXON, JR., M.D., (a copy of which is attached hereto) be paid forthwith by the appropriate Yakima County agency.

This motion is made and based upon the record and file herein and the below DECLARATION OF COUNSEL.

DATED this 4th day of May, 1988.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

35

DECLARATION OF COUNSEL

THOMAS BOTHWELL, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Mr. McNeil is indigent and unable to pay for the expenses of his defense.

The $600.00 billing of HENRY H. DIXON, JR., M.D., is for a purpose previously authorized by this Court. The attached current billing is for services rendered by Dr. Dixon from April 5 through April 13, 1988, and consists of records review, initial evaluation and legal report.

SIGNED AND DATED at Yakima, Washington, this 4th day of May, 1988.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

Henry H. Dixon, Jr., M.D.
2250 N.W. Flanders
Suite 103
Portland OR 97210
541 26 7802

RECEIVED
5-3-88

Apr 30 88

Thomas Bothwell, Attorney
P.O. Box 2129
Yakima WA 98907

Acct #: 586X1
Professional services for Russell McNeil

DATE	PLACE	CPT	DESCRIPTION	CHARGES	CREDITS
Apr 5 88	3	perhr	Review of Records	200.00	
Apr 13 88	3	90801	Initial Evaluation	250.00	
Apr 13 88	3	90889	Report/Legal	150.00	

Past due:	30 DAYS	60 DAYS	90 DAYS	120 DAYS	BALANCE
	0.00	0.00	0.00	0.00	600.00

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 NORTH THIRD STREET
POST OFFICE BOX 2129
YAKIMA, WASHINGTON 98907-2129

L. E. PREDILETTO
WILLIAM L. HALPIN
GOMER L. CANNON
WM. T. SCHARNIKOW
THOMAS BOTHWELL

TELEPHONE
AREA CODE 509
248-1900

'88 MAY 2 AM 10 40

HAND-DELIVERED

FILED
MAY 6 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

May 3, 1988

SERGEANT BRIDGETTE COUETTE
Sergeant in Charge of Transportation
Yakima County Jail
111 North Front Street
Yakima, WA 98901

RE: PRISONER: RUSSELL McNEIL

Dear Sgt. Couette:

I am writing to confirm that arrangements can again be made to transport Mr. McNeil to the Portland office of Dr. Dixon for a 10:30 a.m. appointment on Thursday, May 12. By previous correspondence, I have given you Dr. Dixon's address and phone number.

I hereby ask you to designate below, if you would confirm that arrangements can and will be made to transport Mr. McNeil to Dr. Dixon's office for an appointment to commence at 10:30 a.m. on Thursday, May 12. We would estimate that Dr. Dixon would be done with Mr. McNeil within four hours thereafter.

Thank you for your continued consideration.

Respectfully,

THOMAS BOTHWELL

TB:sld

cc: Chris Tait

APPROVED:

Brigitte Couette
SGT. BRIDGETTE COUETTE
Yakima County Jail

FILED
MAY 6 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

'88 MAY 6 AM 10:40

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL DUANE McNEIL,

Defendant.

No. 88-1-00428-1

ORDER DIRECTING TRANSPORTATION BY YAKIMA COUNTY SHERIFF AT PUBLIC EXPENSE

THIS MATTER coming on regularly for hearing this day upon DEFENDANT'S MOTION FOR ORDER DIRECTING TRANSPORTATION BY YAKIMA COUNTY SHERIFF AT PUBLIC EXPENSE, to the Portland, Oregon, offices of Dr. Henry H. Dixon, Jr., for psychiatric evaluation, and the Court being fully advised in the premises, now, therefore,

IT IS HEREBY ORDERED that the Yakima County Sheriff shall transport the Defendant, RUSSELL DUANE McNEIL, to and from the Portland, Oregon, offices of Dr. Henry H. Dixon, Jr., at such times as shall be arranged by counsel, with the advice and consent of the Yakima County Sheriff's Office.

DATED this 5 day of May, 1988.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

FILED
MAY 6 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

'88 MAY 6 AM 10 45

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S MOTION FOR ORDER DIRECTING TRANSPORTATION BY YAKIMA COUNTY SHERIFF AT PUBLIC EXPENSE

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court for the entry of an order directing the Yakima County Sheriff to transport Defendant McNeil to the Portland, Oregon, office of Dr. Henry H. Dixon, Jr., for psychiatric examination, at the time, place and manner described by the accompanying letter of counsel, Thomas Bothwell.

This motion is made and based upon the record and file herein.

DATED this 3rd day of May, 1988.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

SR

Indexed and Micro filmed
MAY 6 1988
Roll No. 327 208
BETTY McGILLEN, YAKIMA COUNTY CLERK

FILED
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CLERK OF
SUPT
WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-ØØ428-1 SCHEDULING ORDER

THIS MATTER coming on regularly for hearing, and the Court having considered the arguments of counsel, waiver of time limits by Defendant, and the record and file herein, therefore, it is hereby ORDERED as follows:

(1) The previously scheduled trial date of May 2, 1988, should be and hereby is stricken and this cause is set for trial on July 11, 1988, at 9:30 a.m.

(2) The deadline by which the Defendant, through counsel, may indicate a defense by reason of insanity is extended to May 20, 1988.

(3) The deadline by which the prosecutor's office may give notice of intent to request the death penalty against this Defendant is extended to May 27, 1988.

(4) The deadline by which Defendant, through counsel, may submit information to the prosecutor, to be considered by the prosecutor relative to the decision to request the death penalty, is May 20, 1988.

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

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SR

(5) A pre-trial hearing is scheduled for June 20-21, 1988.

(6) Pre-trial motions and documents in support thereof should be filed on or by June 13, 1988. Responses thereto should be filed on or by June 16, 1988.

DATED this 3 day of ~~April~~ May, 1988.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

APPROVED; NOTICE OF PRESENTMENT WAIVED:

Of Attorneys for Plaintiff

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

FILED
MAY 3 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY AND PRIVATE INVESTIGATOR FEES AND EXPENSES, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County office forthwith:

(1) The sum of $2,960.00 payable to attorney CHRISTOPHER S. TAIT, 103 South Third Avenue, Yakima, WA, 98901;

(2) The sum of $1,052.50 payable to attorneys THOMAS BOTHWELL and PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S., 302 North Third Street, P.O. Box #2129, Yakima, WA, 98907; and

(3) The sum of $2,089.85 payable to DIANA PARKER, in

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

30

care of the office of attorney Christopher S. Tait.

DATED this 2 day of May, 1988.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

FILED
MAY 3 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S MOTION AND SUPPORTING DECLARATION FOR ORDER APPROVING ATTORNEY AND PRIVATE INVESTIGATOR FEES AND EXPENSES

MOTION

The undersigned attorney for the above-named Defendant, RUSSELL DUANE McNEIL, moves this Court for an order approving attorney's fees for defense counsel, and private investigator fees and expenses, for the month of April, 1988.

This motion is made and based upon the record and file herein and the below DECLARATION OF COUNSEL.

DATED this 2nd day of April, 1988.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

DECLARATION OF COUNSEL

THOMAS BOTHWELL, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause.

Attached hereto and incorporated by reference are statements of counsel and our private investigator for the month of April, 1988.

SIGNED AND DATED at Yakima, Washington, this 2nd day of April, 1988.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 NORTH THIRD STREET
POST OFFICE BOX 2129
YAKIMA, WASHINGTON 98907-2129

TELEPHONE
AREA CODE 509
248-1900

L. E. PREDILETTO
WILLIAM L. HALPIN
GOMER L. CANNON
WM. T. SCHARNIKOW
THOMAS BOTHWELL

88 MAY 3 PM 3 30

CLERK OF
COURT
WASHINGTON

S T A T E M E N T
April 1988 Legal Services Rendered

ATTORNEY: THOMAS BOTHWELL and PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S.

RE: STATE OF WASHINGTON v. RUSSELL DUANE McNEIL, Yakima County Cause No. 88-1-ØØ428-1

Date:	Description:	Time:
4/2/88	Conversation with Sheriff Doug Blair; confirmed travel arrangements	.25
4/4/88	Phone call to Sgt. Couette regarding transportation	.25
4/4/88	Phone call to Dr. Dixon's office; phone call from Judge Gavin; re-call Dr. Dixon's office	.5
4/4/88	Letter to Sgt. Couette	.25
4/4/88	Telephone conversation with Susan Hahn	.25
4/4/88	Meeting with client (to & from jail)	1.Ø
4/5/88	Telephone conversation with Dianna Parker	.25
4/8/88	To jail, to meet and discuss case with Sgt. Couette	.5
4/11/88	COURT: Ex-parte meeting with Judge Gavin	.5
4/11/88	Telephone conversation with Chris Tait	.25

Date:	Description:	Time:
4/11/88	Telephone call to Dr. Dixon's office, confirming 4/13/88 visit with client	.25
4/12/88	Hand-deliver note to Sgt. Couette (copy of court order)	.25
4/12/88	Telephone call to Dr. Dixon	.25
4/12/88	Meeting with Chris Tait and Dianna Parker	1.25
4/12/88	COURT: Hearing (waiver of speedy trial; extension of time re insanity defense and prosecutor's notice of request for death penalty)	1.Ø
4/12/88	Meeting with client (at jail)	.5
4/13/88	Memo to file (re conversations with experts)	.25
4/13/88	File review	2.Ø
4/13/88	Meeting with Chris Tait, Dianna Parker, Susan Hahn	1.25
4/13/88	Letter to Dr. McGovern	.25
4/13/88	Memo to file (re meeting with Chris Tait, Dianna Parker, Susan Hahn)	.25
4/15/88	Conversation with Wes Raber	.5
4/2Ø/88	Telephone conversation with Chris Tait	.25
4/2Ø/88	Telephone conference call with Chris Tait and Dr. Dixon	.5
4/21/88	Confirming motel and travel arrangements for Dr. McGovern; letter to Dr. McGovern	.25

Date:	Description:	Time:
4/22-23/88	Meetings with Chris Tait	3.Ø
4/26/88	Research	4.25
4/28/88	Telephone call to Dr. Dixon's office; letter to Dr. Dixon; letter to Dr. McGovern	.75
	TOTAL IN-COURT HOURS: 1.5 hours at $6Ø.ØØ per hour:	$ 9Ø.ØØ
	TOTAL OUT-OF-COURT HOURS: 19.25 hours at $5Ø.ØØ per hour:	962.5Ø
	TOTAL:	$1,Ø52.5Ø

/ /

RECORD OF TIME

CHRISTOPHER TAIT — APRIL 29, 1988

STATE vs. RUSSELL DUANE McNEIL

Yakima County Superior Court Cause No. 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
4/11/88	Out	YSO, jail conf w/client; review Statements	2.50
4/12/88	In	Pre-trial Motions	1.00
4/12/88	Out	Record jail conf; review records Conf w/Dr. B./Conf with TAB (2) jail conf w/client	2.00
4/13/88	Out	Interview witnesses; review file	9.00
4/14/88	Out	Conf w/counsel	3.50
4/15/88	Out	Conf SHL, JCS, TAB, DP; conf wit LP (3)	3.50
4/18/88	Out	Conf JCS, DP; jail conf client w/DP Review new statements	5.00
4/19/88	Out	Travel to Topp, interview wits; Conf DP; review reports, tape of Rice	5.50
4/20/88	Out	Conf Dixon, TAB, SLH, DP, review tape of Rice Statements of LC; RE: Sickenberger; review Rice Tape again.	5.00
4/21/88	Out	Conf w/DP; review new reports; Conf w/Gavin; see video; YSO; review reports (new & old)	4.00
4/21/88	Out	Conf w/TAB; review statements; Conf w/JM	4.00

4/26/88	Out	Jail conf; Conf w/JM; review reports; Tape of LC	4.00
4/27/88	Out	Interview wits - Travel to Topp. & Wapato	4.00
4/28/88	Out	Jail Conf; conf w/SLH, RH; review car photos	2.50
4/29/88	Out	Jail Conf; review photos	3.50

TOTAL IN-COURT HOURS: 1.00
at $60.00 per hour = 60.00
TOTAL OUT-OF-COURT HOURS: 58.00
at $50.00 per hour = 2,900.00

TOTAL $2,960.00

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL April 30 1988
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
4/15/88	Out	LD Conf CS, (2) Conf Aff T. LD MD., CONF w/CT CONF w/VF, Conf w/SH & recorded LP Notes	7.50
4/16/99	Out	Conf w/VA, (2) Conf w/CT	1.00
4/18/88	Out	Conf w/BH, Review Statements, Conf w/DE, research criminal record (RJ) YSO, Conf w/CT, JS, Jail Conf w/client	7.75
4/19/88	Out	Review Tape, Review New Statements	1.00
4/19/88	Out	Conf w/DE, Conf wML, SJ & BH, Conf w/CT, Interviewed Witnesses	7.00
4/20/88	Out	Conf w/CT conf w/JM, review tapes, Conf w/JM, telec. CT, TAB, Dr. D., review tapes	8.00
4/21/88	Out	Conf w/CT, review video, I'V witness, Conf JM, telephone Conf BZ Licenses, Liquor Cont Bd, school, background, checks, conf CT, Govern, jail conf w/ client	8.00
4/22/88	Out	I'v KH, cont YSO, review record, Investigate check of crim records, Conf w/VF, conf w/JM, LD, conf w/Dan H, Conf LKS, background research, cons Harr GS	6.75
4/25/88	Out	Conf w/CT, review DP materials for investigative tools, I'V wit's (TC, NC) Review statements	8.00
4/25/88	Mileage	*12 miles at 22.5 cents = **$2.70**	*
4/26/88	Out	Review tape recordings YSO,	

		Conf JMN (all afternoon), conf CT, Conf w/VF	6.50
4./27/88	Out	Review tapes, take notes, cons YPD Conf w/CT, Cons CS, cons MD, Conf w/VF	6.50
4/27/88	Mileage	*54 miles at 22.5 cents = **$12.15**	*
4/28/88	Out	Conf CT (2) jail conf w/client, YSO Conf VF, Conf CT, Cons McC, Conf w/R MN, review photos	8.00
4/29/88	Out	Conf CT, Conf JMcN, Cons MDL, jail conf w/client	7.00

83.00 HRS at $25.00 Per Hour =	$2,075.00
66 Miles at 22.5 cents per mile =	14.85
TOTAL	$2,089.85

mailed: 4-22-88 SR

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

'88 APR 25 AM 8 50

APR 25 1988

YAKIMA COUNTY CLERK

STATE OF WASHINGTON,

Plaintiff

vs

No. 88 1 00428 1

McNEIL, Russell

Defendant

THE ABOVE ENTITLED CASE has been set for trial

MONDAY	JUNE 20, 1988	9:30 a.m.
(Day)	(Date)	(Time)

Non-Jury HEARING Jury _____ No. Days 3 DAYS

TYPE OF ACTION PRE TRIAL CONFERENCE - JDG. GAVIN

JEFFREY SULLIVAN HOWARD HANSEN	THOMAS BOTHWELL CHRIS TAIT
Attorney for Plaintiff(s)	Attorney for Defendant(s)

SUPERIOR COURT ADMINISTRATOR

COPY RECEIVED BY _____ DATE _____

28

FILED and Micro filmed
APR 22 1988
Roll No. 326 693
BETTY McGILLEN, YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	)	NO: 88-1-00428-1
vs.	)	
RUSSELL DUANE McNEIL,	)	
Defendant	)	ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY FOR INVESTIGATORY FEES AND EXPENSES

THE COURT having considered the Motion for Order Approving Private Investigator Fees and Expenses and attached Declaration of Counsel, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County Office forthwith:

(1) The sum of $2,556.21 payable to DIANA G. PARKER, in care of the office of attorney Christopher Tait.

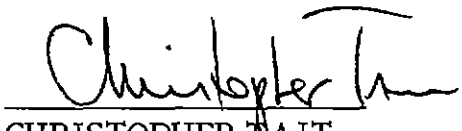
DATED THIS 29th DAY OF APRIL, 1988.

F. JAMES GAVIN, JUDGE

ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY FOR INVESTIGATORY FEES AND EXPENSES 1

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

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FILED

APR 22 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

REC'D

'88 APR 22 PM 3 36

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO 88-1-00428-1
	)	
vs.	)	
	)	
RUSSELL DUANE McNEIL,	)	DEFENDANT'S MOTION AND
	)	SUPPORTING DECLARATION
Defendant	)	FOR ORDER APPROVING
	)	PRIVATE INVESTIGATOR
	)	FEES AND EXPENSES

MOTION

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court for the authroization of payment for investigatory services. This Motion is made and based upon the record and file herein and the accompanying DECLARATION OF COUNSEL.

DATED THIS 19 DAY OF APRIL, 1988.

Christopher Tait

CHRISTOPHER TAIT
Of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct.:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause. Diana G. Parker has been authorized to pursue investigatory services on behalf of the Defendant McNeil. An Order Authorizing Investigatory Services and Setting Rates was entered in the above-entitled cause and signed by the Honorable F. James Gavin approving said investigatory services and authorizing payment of her automobile mileage to be reimbursed at the rate of 22 1/2 cents per mile. Diana G. Parker was further authorized to submit statements, through counsel, on or about the 1st and the 15th day of each month.

Attached hereto and incorporated by reference for approval is the statement of Diana G. Parker for the private investigatory fees and expenses for her services from April 1, 1988 to April 14, 1988, performed by her on behalf of the above-named Defendant, McNeil.

SIGNED AND DATED at Yakima, WAshington, this 19 day of April, 1988.

CHRISTOPHER TAIT
Of Attorneys for Defendant
McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

4/11/88	OUT	YSO, Conf CJT, Jail ConfW/Client Review Statements	7.50
4/12/88	OUT	Record Jail Conf, Review Records Conf W/Dr. B./ Conf TB, CT, Court (2) Jail Conf W/Client, Conf W/CT	10.00
4/13/88	OUT	Conf CT, Conf DR. W., Conf CT, SH, TB, Conf W/DT	9.00
4/14/88	Mileage	Travel to Lower Valley Areas *55 Miles at 22.5 Cents = **$12.38**	
4/14/88	OUT	Conf CT, Jail Conf W/Client, Review Statements, prepare Materials, Catalogue Materials	6.75

100.25 HRS. At $25.00 Per Hour = $2,531.23
111 Miles at 22.5 Cents Per Mile = $ 24.98

TOTAL = $2,556.21

RECORD OF TIME

DIANA PARKER STATE vs. RUSSELL DUANE McNEIL April 14, 1988
Yakima County Superior Court Cause No: 88-1-00428-1

DATE	IN/OUT	McNeil Activity	TIME
3/30/88	OUT	Conf V. F.; contact Wash. App Defenders Conf K. Ross, review tape recording	7.50
3/31/88	OUT	Review tape recording, reports Conf TLC, (2) Jail conf. client; tape conf, newspaper research	7.50
4/1/88	OUT	Review Statements, chart data, Conf JG, TAB, Jail conf. W/client	6.75
4/2/88	OUT	Conf PB, review statements, confirm new info, read police reports	4.00
4/3/88	Mileage	*56 miles at 22.5 cents = **$12.60** Jail conf. W/client	4.75
4/4/88	OUT	Conf. TB, Conf KN, review record, YSO, Pros. Atty. Office Conf. CT, read new materials	7.00
4/5/88	OUT	Interview JF, Conf W/client, Interview SR (2) trips YSO	7.00
4/6/88	OUT	Prepare materials, jail conf W/client, review statements	6.50
4/7/88	OUT	LD Conf RMN, LD Conf CA, Conf Dr. H, Conf DR, Conf PA Jail Conf W/Client, Conf W/VH, Conf W/SH	9.50
4/8/88	OUT	Conf W/TB, Document retrieval, Review files, prepare materials, Jail Conf W/Client, Contact LD Readers	6.50

SB

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

APR 14 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,
Plaintiff

vs

No. 88 1 428 1
RESET

McNEIL, Russell
Defendant

THE ABOVE ENTITLED CASE has been set for trial

MONDAY	7/11/88	9:00 a.m.
(Day)	(Date)	(Time)

Non-Jury _____ Jury 12 TRIAL No. Days 2

TYPE OF ACTION AGR. 1° MRDR/ACC. AGR. 1° MRDR.

HOWARD HANSEN
Attorney for Plaintiff(s)

CHRISTOPHER TAIT
THOMAS BOTHWELL
Attorney for Defendant(s)

PRE-ASSIGNED TO:
JUDGE GAVIN

SUPERIOR COURT ADMINISTRATOR

'88 APR 14 PM 4 59

COPY RECEIVED BY _____ DATE _____

25

MAILED: 4-1[redacted]88

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

APR 19 198[illegible]

BETTY McGILLE[illegible]

STATE OF WASHINGTON,

Plaintiff

vs

No. 88 1 00428 1

McNEIL, RUSSELL

Defendant

THE ABOVE ENTITLED CASE has been set for trial

WEDNESDAY	4-13-88	9:30 a.m.
(Day)	(Date)	(Time)

Non-Jury HEARING Jury _____ No. Days 1 HOUR

TYPE OF ACTION MOTIONS - JDG. GAVIN

JEFFREY C. SULLIVAN HOWARD HANSEN	THOMAS BOTHWELL CHRIS TAIT
Attorney for Plaintiff(s)	Attorney for Defendant(s)

SUPERIOR COURT ADMINISTRATOR

COPY RECEIVED BY _____ DATE _____

24

SK

FILED

APR 12 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

RECEIVED

'88 APR 12 PM 4 30

CLERK OF SUPERIOR COURT
YAKIMA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff,	)	NO. 88-1-00428-1
vs.	)	
RUSSELL DAUNE McNEIL, Defendant.	)	ORDER EXTENDING TIME TO GIVE NOTICE OF SPECIAL SENTENCING PROCEEDING

THIS MATTER having come on before the above-entitled court on April 12, 1988, on the joint motion of the State represented by JEFFREY C. SULLIVAN, Prosecuting Attorney for Yakima County, Washington, the defendant, RUSSELL DUANE McNEIL, and the attorneys for defendant, CHRIS TAIT and THOMAS BOTHWELL; the defendant present and represented by the above-named attorneys, and the State of Washington represented by Jeffrey C. Sullivan, Prosecuting Attorney for Yakima County, Washington, and Howard W. Hansen, Deputy Prosecuting Attorney for Yakima County, Washington; the court finding that the defendant, Russell Duane McNeil, was arraigned on March 16, 1988, on the charge of Aggravated First Degree Murder as defined by RCW 10.95.020 and therefore the Prosecuting Attorney must file and serve upon the defendant or his attorney a written notice of a special sentencing proceeding if the Prosecuting Attorney wishes to seek the death penalty, within thirty days of that date

2 2

SK

which in this case is April 15, 1988, unless the court extends the period of filing and service of notice for good cause shown; and all parties, including the defendant personally having jointly moved the court to extend the period for filing and service of the notice of special sentencing proceeding in this case in order to allow the defense to complete their evaluations of their client by experts, currently scheduled to be completed by May 20, 1988, so that they will thereafter be able to submit additional information to the State which may affect their decision to seek the death penalty in this case; and the court finding that this is good cause for extending the period of time in which to give the death penalty notice, and the court being fully advised in the premises; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the period of time for filing and service of the notice of special sentencing proceeding in this case shall be extended from April 15, 1988 to May 27, 1988.

DATED this 12 day of April, 1988.

J. James Shon
JUDGE

Presented by, approved
as to form and for entry:

Jeffrey C. Sullivan
JEFFREY C. SULLIVAN
Prosecuting Attorney

CHRIS TAIT
Attorney for Defendant

THOMAS BOTHWELL
Attorney for Defendant

RUSSELL DUANE McNEIL
Defendant

HWH1(C)

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FILED and Micro-filmed

APR 12 1988

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BETTY McGILLEN, YAKIMA COUNTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	ORDER GRANTING A
	)	CONTINUANCE OF TIME
RUSSELL DUANE McNEIL,	)	IN WHICH TO FILE A
	)	PLEA OF INSANITY
	)	
Defendant	)	

THIS MATTER having come on regularly for hearing before the Honorable F. James Gavin upon the motion of the Defendant's request for a ~~30-day~~ continuance of the time in which to file Defendant's Plea of Insanity; The Defendant Russell Duane McNeil, being represented by Co-counsel CHRISTOPHER TAIT and THOMAS BOTHWELL; the Court having considered the affidavit of Defendant's counsel and the Court being familiar with the files and records herein and further being fully advised in the premises; it is hereby:

ORDERED that the Defendant's request for ~~a 30-day~~ an extension of the time in which to file a Plea of Insanity is hereby granted and he shall be granted until the 20th day of May, 1988, in which to file a Plea of Insanity with the above-entitled court.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

22

SR

DONE IN OPEN COURT THIS 12 DAY OF APRIL, 1988.

JUDGE F. JAMES GAVIN

PRESENTED BY:

CHRISTOPHER TAIT
Of Attorneys for
Defendant McNeil

THOMAS BOTHWELL
Of Attorneys for
Defendant McNeil

ORDER GRANTING A CONTINUANCE OF TIME IN WHICH TO FILE A PLEA OF INSANITY 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248 1346

SR

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YAKIMA COUNTY CLERK

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CLERK OF
YAKIMA COURT
WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant	NO. 88-1-00428-1 MOTION FOR EXTENSION OF TIME IN WHICH TO FILE INSANITY PLEA

COMES NOW Defendant Russell Duane McNeil, by and through his counsel CHRISTOPHER TAIT and THOMAS BOTHWELL, and moves this Court for the extension of time in which to file a plea of insanity in this matter.

THIS MOTION is based upon the records and file herein and the accompanying DECLARATION OF COUNSEL.

DATED THIS 12 DAY OF APRIL, 1988.

Christopher Tait
CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

21

SR

DECLARATION OF COUNSEL

CHRISTOPHER TAIT, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and ccorrect:

The undersigned is one of the court-appointed attorneys for Defendant Russell Duane McNeil in the above-captioned cause.

Expert psychiatric evaluations on behalf of this Defendant are necessary for his full and adequate representation. Such psychiatric evaluations have not yet been fully performed and we have no written reports of any such final diagnosis and/or evaluations. We will not have any such written reports and or evaluations completed by the deadline of April 18, 1988, now set for entering a plea of insanity.

We are asking this Court to enter an order granting a 30-day extension of the time period required by law within which to enter a plea of insanity.

SIGNED AND DATED at Yakima, Washington, this 12 day of April, 1988.

CHRISTOPHER TAIT
Of Attorneys for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

SR

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YAKIMA COUNTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

EX... CLERK OF
S... COURT
YAKIM... WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 88-1-00428-1
	)	
vs.	)	MOTION AND ORDER
	)	FOR CONTINUANCE
RUSSELL DUANE McNEIL,	)	OF TRIAL DATE
	)	
	)	
Defendant	)	

COMES NOW Defendant Russell Duane McNeil, by and through his counsel CHRISTOPHER TAIT and THOMAS BOTHWELL, and moves this Court for an order continuing the trial date of the above-entitled cause to a later date. This motion is based upon the files herein, and for the following reasons:

Expert psychiatric evaluations on behalf of this Defendant are necessary for his full and adequate representation. Such evaluations and/or written reports of any findings have not yet been completed. Additional time is necessary to complete such evaluations.

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MOTION AND ORDER
FOR CONTINUANCE
OF TRIAL DATE 1

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

20

FINDINGS

The Defendant has shown good cause for a continuance in that:

Expert psychiatric evaluations on behalf of this Defendant are necessary for his full and adequate representation. Such evaluations and/or written reports of any findings have not yet been completed

A continuance is required in the due administration of justice and the Defendant will not be substantially prejudiced in the presentation of his defense.

ORDER

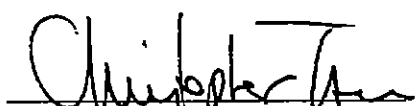
IT IS ORDERED that this case presently set for trial on May 2, 1988, is continued to July 11, 1988 at 9:30

JUDGE F. JAMES GAVIN

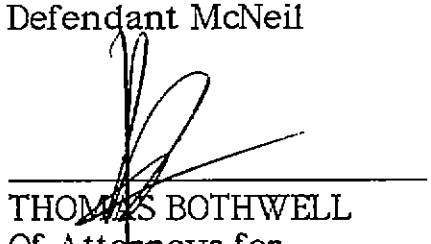
MOTION AND ORDER
FOR CONTINUANCE
OF TRIAL DATE 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

PRESENTED BY:



CHRISTOPHER TAIT
Of Attorneys for
Defendant McNeil



THOMAS BOTHWELL
Of Attorneys for
Defendant McNeil

MOTION AND ORDER
FOR CONTINUANCE
OF TRIAL DATE 3

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED

APR 12 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

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'88 APR 12 P3

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF YAKIMA

STATE OF WASHINGTON,
Plaintiff,

vs.

RUSSELL DUANE McNEIL,
Defendant

NO. 88-1-00428

WAIVER OF 60/90 DAY RULE

I am fully aware that I have a right to be tried within 60 days from my first court appearance if I am presently incarcerated; and to be tried within 90 days of said time if I have been released on bail or upon my personal recognizance.

I hereby waive, or give up, said right to be tried within 60 or 90 days, and freely and voluntarily consent to be tried in this cause at a time beyond said limits.

DATED THIS 12 DAY OF APRIL, 1988.

Approved and
Trial is set for
July 11, 1988 at 9:30 am.
J. James Lust
4/12/88

Russell D McNeil
DEFENDANT/RUSSELL DUANE McNEIL

Christopher Tait
CHRISTOPHER TAIT
Attorney for Defendant

THOMAS BOTHWELL
Attorney for Defendant

WAIVER 60/90 DAY RULE

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APR 14 '88
SUPERIOR COURT

TAIT AND TOROK
Attorneys and Counselors at Law
103 South Third Street
Yakima, Washington 98901
(509) 248-1346

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 NORTH THIRD STREET
POST OFFICE BOX 2129
YAKIMA, WASHINGTON 98907-2129

L. E. PREDILETTO
WILLIAM L. HALPIN
GOMER L. CANNON
WM. T. SCHARNIKOW
THOMAS BOTHWELL

TELEPHONE
AREA CODE 509
248-1900

FILED
APR 1 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

April 4, 1988

SERGEANT BRIDGETTE COUETTE
Sergeant in Charge of Transportation
Yakima County Jail
111 North Front Street
Yakima, WA 98901

RE: PRISONER: RUSSELL McNEIL

Dear Sgt. Couette:

I am writing to confirm that arrangements can be made to transport Mr. McNeil to the Portland office of Dr. Dixon for a 10:00 a.m. appointment on Wednesday, April 13. By previous correspondence, I have given you Dr. Dixon's address and phone number.

I hereby ask you to designate below, if you would confirm that arrangements can and will be made to transport Mr. McNeil to Dr. Dixon's office for an appointment to commence at 10:00 a.m. on Wednesday, April 13. We would estimate that Dr. Dixon would be done with Mr. McNeil within four hours thereafter.

Thank you for your continued consideration.

Respectfully,

THOMAS BOTHWELL

TB:sld
cc: Chris Tait

APPROVED:

SGT. BRIDGETTE COUETTE
Yakima County Jail

FILED

APR 1 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

RECD.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 ORDER DIRECTING TRANSPORTATION BY YAKIMA COUNTY SHERIFF AT PUBLIC EXPENSE

THIS MATTER coming on regularly for hearing this day upon DEFENDANT'S MOTION FOR ORDER DIRECTING TRANSPORTATION BY YAKIMA COUNTY SHERIFF AT PUBLIC EXPENSE, to the Portland, Oregon, offices of Dr. Henry H. Dixon, Jr., for psychiatric evaluation, and the Court being fully advised in the premises, now, therefore,

IT IS HEREBY ORDERED that the Yakima County Sheriff shall transport the Defendant, RUSSELL DUANE McNEIL, to and from the Portland, Oregon, offices of Dr. Henry H. Dixon, Jr., at such times as shall be arranged by counsel, with the advice and consent of the Yakima County Sheriff's Office.

DATED this 11 day of ~~March~~ April, 1988.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

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BETTY McGILLEN
CLERK OF
SUPERIOR COURT
YAKIMA COUNTY, WASHINGTON

FILED

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BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DECLARATION OF COUNSEL IN SUPPORT OF MOTION TO APPROVE PAYMENT FOR DR. HENRY DIXON AT PUBLIC EXPENSE

THOMAS BOTHWELL, under penalty of perjury of the laws of the State of Washington, hereby certifies and declares that the following is true and correct:

The undersigned is one of the attorneys appointed to represent the above-named Defendant.

By separate motion, we are asking this Court to authorize the transportation of Defendant, Russell Duane McNeil, to Portland, Oregon, to enable the Defendant's evaluation by Dr. Henry H. Dixon, Jr.

Dr. Dixon's Curriculum Vitae are appended hereto.

The purposes of the requested examination by Dr. Dixon include evaluation of Defendant, and viability of defense of insanity, and assessment of "mitigating factors" to possibly present to the office of the prosecutor for consideration prior to the decision by the prosecution as to whether the death penalty will be requested, as well as preparing for possible "penalty phase" of trial.

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

With respect to the approximate cost of the evaluation/ report and estimation of additional fees: Dr. Dixon's fees are appended hereto. The doctor has indicated that his decision as to what further evaluation would be appropriate could only be made after the scheduled April 5 visit. At this point, we have no idea of whether the doctor would be called to testify.

SIGNED AND DATED at Yakima, Washington, this 30th day of March, 1988.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

HENRY H. DIXON, JR., M.D., Physician
JAMES PETROSKE, M.D., Physician
SANDRA J. MCALLISTER, R.N., N.P.
Practice Limited to Psychiatry
2250 N.W. Flanders, Suite 103
Portland, OR 97210
(503) 227-1787

received
3-24-88

March 22, 1988

Tom Bothwell
Attorney at Law
302 N. 3rd
Yakima, WA 98901

Dear Mr. Bothwell:

Enclosed please find Dr. Dixon's Curriculum Vitae as you requested.

His fees are as follows: $125.00 per hour for psychiatric eval.
$100.00 per hour for read & review materials
$150.00 for report

If you have any further questions, please do not hesitate to call.

Sincerely,

Marion Ohrtman

Marion Ohrtman
Office Manager

Ecnlosure

HENRY H. DIXON, JR., M.D., F.A.P.A.
Physician

Diplomate in Psychiatry

Practice Limited to Psychiatry

2250 N.W. Flanders, Suite 103
Portland, Oregon 97210

Telephone (503) 227-1787

CURRICULUM VITAE

Date of Birth: September 2, 1928
Birthplace: St. Louis, Missouri

Secondary School:
Parkrose High School, Portland, Oregon
Graduated 1946

Pre-Medical Education:
University of Oregon, Eugene, Oregon
Degree, B.S., 1953

Medical Education:
University of Oregon Medical School, Portland, Oregon
Degree, M.D., 1955

Hospital Internship:
Sacred Heart General Hospital, Eugene, Oregon
July 1, 1955 to June 30, 1956

Licensures:
State of Oregon, License Number 5351, (1956)

Military Service:
U.S. Army, active service, June 4, 1946 to November 10, 1947, Commanding Officer, 149th Psychiatric K.O. Detachment (Reserve Army Psychiatric Team)
Status: Honorable Discharge, January 1966

Graduate Training: (Residencies or Fellowships)
Oregon State Hospital, Psychiatric Resident, July 1, 1956 to July 1, 1957
New Jersey Neuropsychiatric Institute, Princeton, N.J., July 1957 to January 1958

University of Oklahoma Medical School, Oklahoma City, Chief Resident Psychiatrist, January 1958 to July 1959.
Post-Graduate Center for Psychotherapy, New York City (this training coincided with the period spent at New Jersey Neuropsychiatric Institute)

Assistantships:
Research Assistant in Constitutional Medicine, 1954-55, under Dr. William Sheldon
Marion County Psychiatric Services for Children, Consultant Psychiatrist, 1956-57
Klamath Mental Health Clinic, Klamath Falls, 1959-64

Directorships:
Clackamas County Mental Health Clinic, Administrative Director, 1958-71

Teaching Appointments:
University of Oregon Medical School, Department of Psychiatry, Clinical Instructor, September 1958-64
U.C.L.A., Assistant Professor of Psychiatry, 1972-73

Memberships: (Hospital Staffs)
Holladay Park Hospital, 1959-present (Chief of Psychiatric Staff, 1968-70)
Cedar Hills Psychiatric Hospital, 1972-present (Chief of Staff, 1973-74, and 1978-79)
St. Vincent Hospital, 1973-present
Dwyer Memorial Hospital, 1973-present
Willamette Falls Hospital, 1973
Providence Hospital, 1974-present

Memberships - Medical and Professional Societies:
American Psychiatric Association
Oregon Psychiatric Association
Oregon District Branch of APA (Secretary, 1963-64)
Oregon Neuropsychiatric Society (President, 1962-63)
North Pacific Branch of Neurology and Psychiatry
Portland Academy of Psychiatry (President, 1971)
Oregon Medical Association
Multnomah County Medical Society
Clackamas County Medical Society
Portland Psychiatrists in Private Practice
The Portland Academy of Medicine
The Academy of Psychosomatic Medicine
Oregon Association of Clinic Directors (Vice President, Board of Directors, 1960-61)

Mental Health Association of Oregon (Member, Board of Directors, 1962-64)
American Physicians Society for Physiologic Tension Control (Secretary-Treasurer, 1973-74)

Certification:
Diplomate, American Board of Psychiatry and Neurology, 1962
Fellow, American Board of Psychiatry and Neurology, 1969

Present Practice:
Full time private practice, Portland, Oregon

Current Research Interests:
Application of Biofeedback techniques in treatment of tension and migraine headaches, and hypertension
Theoretical applications of meditation and alpha Biofeedback phenomena (Participant in cultural exchange in India, October through December, 1973)
Forensic Psychiatry

Publications:
"Tension Fatigue States", with H.H. Dixon, H.A. Dickel, J.G. Shanklin, Clinical Medicine, Vol. VI, No. 9, September 1959.

"Clinical and Electromyographic Appraisal of Aminophenyl-pyridon", with H.H. Dixon, H.A. Dickel, J.G. Shanklin, Northwest Medicine, No. 277-79, March 1961.

"A Clinical, Double-blind Comparison of Librium, Meprobamate, and Phenobarbital", with H.H. Dixon, H.A. Dickel, J.G. Shanklin, Psychosomatics, Vol. III, 129-133, March-April,1962.

"Anxiety States as an Interference Phenomenon", with H.H. Dixon, H.A. Dickel, M.G. Shanklin.

"Treatment of the Tense, Anxious, Working Patient", with H.H. Dixon, H.A. Dickel, J.G. Shanklin, GP, 27, No. 4 (136-139), April, 1963.

"Anxious Patients Who Must Continue to Work", with H.H. Dixon, H.A. Dickel, J.G. Shanklin, Management of Anxiety for the General Practitioner, Rickles, N. and Charles Thomas, ed., Springfield, 1963, Chapter 6.

"The Brain Injured Child in a Clinical Population: A Statistical Description". Exceptional Child, Vol. 30, No. 6, February, 1964.

Papers and Presentations:

"Treatment of a Case of Dysphonia". Read at the regional meeting of the APA, Little Rock, Arkansas, 1958 (unpublished).

"Electroencephalographic Abnormalities in Behavior Disorders of Adolescents". Read at the meeting of the North Pacific Society of Neurology and Psychiatry, 1965.

"Anectine Aversion in the Treatment of Alcoholism", Oregon District Branch, APA, 1970.

"Intercultural Scientific Exchange in Biofeedback".

Wellness Conference Presentation of Biofeedback Perspectives, March 23-30, 1979.

Biofeedback Applications in Stress Disorders, 1978 and 1979.

References:

William W. Thompson, M.D.
2250 N.W. Flanders, #103
Portland, OR 97210

James Petroske, M.D.
2250 N.W. Flanders, #103
Portland, OR 97210

Richard H. Phillips, M.D.
4800 S.W. Macadam, #310
Portland, OR 97201

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BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 DEFENDANT'S MOTION FOR ORDER DIRECTING TRANSPORTATION BY YAKIMA COUNTY SHERIFF AT PUBLIC EXPENSE

COMES NOW the above-named Defendant, RUSSELL DUANE McNEIL, by and through his attorneys, and moves this Court for the entry of an order directing the Yakima County Sheriff to transport Defendant McNeil to the Portland, Oregon, office of Dr. Henry H. Dixon, Jr., for psychiatric examination, at the time, place and manner described by the accompanying letter of counsel, Thomas Bothwell.

This motion is made and based upon the record and file herein.

DATED this 29th day of March, 1988.

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 NORTH THIRD STREET
POST OFFICE BOX 2129
YAKIMA, WASHINGTON 98907-2129

TELEPHONE
AREA CODE 509
248-1900

L. E. PREDILETTO
WILLIAM L. HALPIN
GOMER L. CANNON
WM. T. SCHARNIKOW
THOMAS BOTHWELL

March 29, 1988

SERGEANT BRIDGETTE COUETTE
Sergeant in Charge of Transportation
Yakima County Jail
111 North Front Street
Yakima, WA 98901

RE: PRISONER: RUSSELL McNEIL

Dear Sgt. Couette:

I am offering this letter to you in order to confirm the arrangements which we have discussed, for transporting Mr. McNeil to Portland for an April 5 visit to the psychiatrist. Then, I am asking you to signify your approval and acknowledgment of receipt of this request for arrangements by initialling in the lower left-hand corner of the second page of this letter. Then I in turn will present the original of this letter, with your initialled approval, to the Honorable Judge F. James Gavin as part of my motion for an order approving the transportation of Mr. McNeil for said purpose.

Here are the arrangements which I have made with the doctor's office: Russell McNeil is scheduled to see Dr. Henry H. Dixon, Jr., commencing at approximately noon on Tuesday, April 5, 1988. The doctor's business office and telephone number are: 2250 N.W. Flanders Street, Suite #103, Portland, Oregon, 97210; telephone: (503) 227-1787. The doctor's office has requested that Mr. McNeil arrive by approximately 11:30 a.m. He will then have various tests administered and the psychiatrist expects to personally meet with Mr. McNeil from approximately 1:30 p.m. to 3:30 p.m. Therefore, we would expect Dr. Dixon to be done with Mr. McNeil, such that he may be returned to Yakima, probably at approximately 4:00 p.m. that day. Thus, for sure, your officers should count on having Mr. McNeil at the doctor's office from at least 11:45 a.m. through approximately 4:00 p.m. on Tuesday, April 5.

By separate note to you, I will give you the traffic directions to Dr. Dixon's office. The doctor's office has also invited your deputies to telephone his office in the event further directions are necessary.

In your and my telephone conversation, you indicated that with this amount of advance notice prior to April 5, you expected arrangements could and would be made to transport Mr. McNeil for this purpose. I am hereby asking you to confirm this now by initialling below, thereby signifying that arrangements to transport Mr. McNeil for this purpose and to the place and at the times specified will be made, assuming Judge Gavin so orders.

Thank you for your continued consideration.

Respectfully,

THOMAS BOTHWELL

TB:sld

cc: Chris Tait
Russell McNeil

APPROVED:

Sgt. Bridgette Couette

SGT. BRIDGETTE COUETTE
Yakima County Jail

FILED

APR 1 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

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EX OFF CLERK OF
SUP COURT
YAKIMA WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 ORDER AUTHORIZING PAYMENT BY YAKIMA COUNTY

The Court having considered the MOTION FOR ORDER APPROVING ATTORNEY AND PRIVATE INVESTIGATOR FEES AND EXPENSES, it is hereby:

ORDERED that the following be paid by the appropriate Yakima County office forthwith:

(1) The sum of $3,455.00 payable to attorney CHRISTOPHER S. TAIT, 103 South Third Avenue, Yakima, WA, 98901;

(2) The sum of $1,327.50 payable to attorneys THOMAS BOTHWELL and PREDILETTO, HALPIN, CANNON, SCHARNIKOW & BOTHWELL, P.S., 302 North Third Street, P.O. Box #2129, Yakima, WA, 98907; and

(3) The sum of $881.25 payable to DIANA PARKER, in care

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

of the office of attorney Christopher S. Tait.

DATED this 30 day of March, 1988.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

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APR - 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

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EX OFFICIO CLERK OF
SUPERIOR COURT
YAKIMA, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL, Defendant.	No. 88-1-00428-1 ORDER AUTHORIZING INVESTIGATORY SERVICES FOR DEFENDANT RUSSELL DUANE McNEIL, AND SETTING RATE OF COMPENSATION AND REIMBURSEMENT

THIS MATTER coming on regularly for consideration on Defendant's ex parte submission of his MOTION FOR PAYMENT OF INVESTIGATORY SERVICES for Defendant, and the Court having previously found this Defendant indigent, it is hereby:

ORDERED that DIANA PARKER is hereby authorized to perform investigatory services under the direction of, and in conjunction with, counsel for the above-named Defendant, RUSSELL DUANE McNEIL, in this cause; and that upon approved submission of statements as provided for herein, she shall be paid at county expense.

Said investigator shall be compensated at the rate of Twenty-Five Dollars ($25.00) per hour. Her automobile mileage shall be reimbursed at the rate of 22-1/2 cents per mile. She is authorized to submit statements, through counsel, on or about the

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
502 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

1st and 15th days of each month.

DATED this 30 day of March, 1988.

F. JAMES GAVIN, JUDGE

PRESENTED BY:

THOMAS BOTHWELL
Of Attorneys for Defendant McNeil

/ / /

LAW OFFICES OF
PREDILETTO, HALPIN, CANNON,
SCHARNIKOW & BOTHWELL, P.S.
302 N. 3RD ST., P. O. BOX 2129
YAKIMA, WASHINGTON 98907-2129
TEL. 248-1900 AREA CODE 509

Re: McNeil

J.J.G.
$0.225/mile

CAN INVESTIGATOR BE PAID ~~$0.25/mile~~ FOR TRAVEL, IN ADDITION TO HOURLY RATE OF $25.00/hr ?

.225 ok H. James Gwin

FILED
MAR 23 1988

and Micro filmed
MAR 18 1988
Roll No. 324 773
BETTY McGILLEN, YAKIMA COUNTY CL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	PRE-TRIAL ORDER
RUSSELL DUANE McNEIL,	)	
	)	
Defendant	)	

This matter having come on regularly for hearing this 17th day of MARCH, 1988, the State of Washington being represented by Prosecuting Attorney Jeffrey C. Sullivan and Deputy Prosecuting Attorney Howard W. Hansen, and the defendant being personally present and being represented by counsel Christopher Tait and Thomas Bothwell, the Court having heard argument of all counsel and being fully advised in the premises, it is now, therefore,

ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. EXTENSION OF TIME WITHIN WHICH TO FILE INSANITY PLEA: The defendant is granted until 5:00 P.M. on April 18, 1988 to file a plea of insanity. Any request for extension of this date shall be filed by 5:00 P.M. on April 13, 1988, together with an affidavit setting forth good cause why a further extension should be granted.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

2. EXPENDITURE OF PUBLIC FUNDS: Counsel for the defendant shall be allowed to approach the Court, in camera and ex parte, to obtain Court approval to hire psychiatrists, clinical psychologists, and/or other expert witnesses at public expense. Specific Cost Bills and/or Vouchers shall be provided to the Court concerning each witness being hired. The Prosecuting Attorney is hereby relieved of his responsibility to approve all Cost Bills in writing. Defense Counsel shall specifically advise the Court of the cost incurred for each witness, including travel time and Court time. If the defendant is to be transported to a location outside the County Jail, then defense counsel shall first consult with the Sheriff concerning transport arrangements.

3. DISCOVERY: All documents, materials, reports, videotapes, cassette tapes, statements, photographs, autopsy reports, forensic reports, and every other thing currently in the possession of the Plaintiff, or the Yakima Sheriff's Department, shall be delivered forthwith to defense counsel, except those materials already delivered to previous counsel. All counsel are hereby ordered NOT to make any of those materials public. Videotapes and cassette tapes shall be delivered to defense counsel by 5:00 P.M. on March 21, 1988.

DONE IN OPEN COURT THIS 18 DAY OF MARCH, 1988.

JUDGE/COURT COMMISSIONER

PRESENTED BY:

PRE-TRIAL ORDER 2

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

CHRISTOPHER TAIT
Attorney for Defendant McNeil

THOMAS BOTHWELL
Attorney for Defendant McNeil

APPROVED AS TO FORM AND CONTENT; AND NOTICE OF PRESENTATION WAIVED:

JEFFREY C. SULLIVAN
Prosecuting Attorney

APPROVED AS TO FORM AND CONTENT; AND NOTICE OF PRESENTATION WAIVED:

HOWARD W. HANSEN
Deputy Prosecuting Attorney

PRE-TRIAL ORDER 3

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH *THIRD STREET*
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

Superior Court of the State of Washington
for the County of Yakima

FILED
MAR 18 1988

Judge F. James Gavin
Department No. 3

Judge's Chambers

Yakima, Washington
98901

March 17, 1988

Mr. Jeffrey C. Sullivan
Yakima County Prosecuting Atty.
Yakima County Courthouse
Yakima, Washington
98901

Ms. Susan L. Hahn
Schwab, Kurtz & Hurley
413 N. Second Street
Yakima, Washington
98901

Mr. Howard Hansen
Deputy Prosecuting Attorney
Yakima County Courthouse
Yakima, Washington
98901

Mr. Christopher S. Tait
Attorney at Law
103 S. Third Street
Yakima, Washington
98901

Mr. Thomas A. Bothwell
Prediletto, Halpin, Cannon
& Scharnikow, P.S.
302 N. Third Street
Yakima, Washington
98901

Mr. Kenneth W. Raber
Kirschenmann, Devine, Fortier
& Raber, Inc., P.S.
303 E. "D" St., Suite 3
Yakima, Washington
98901

RE: State of Washington vs. Herbert Rice & Russell McNeil
Yakima County Cause Nos. 88-1-00427-2/88-1-00428-1

Dear Counsel:

Mr. Tait and Ms. Hahn provided me with the documents requested in this morning's hearing for my in camera review. After reviewing those documents, I am convinced my earlier order concerning payment of experts (two for each defendant) was appropriate.

I see no reason to change my mind. The original of this letter will be filed in the Rice file and a copy in the McNeil file.

Very truly yours,

F. JAMES GAVIN

FJG/cp

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FILED
MAR 17 1988
BETTY McCULLOH
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. RUSSELL DUANE McNEIL. Defendant	NO. 88-1-00428-1 MOTION FOR ADDITIONAL TIME WITHIN WHICH TO FILE INSANITY PLEA

COMES NOW Defendant RUSSELL DUANE McNEIL, by and thorough his counsel, CHRISTOPHER TAIT and THOMAS BOTHWELL, and moves the Court for the entry of an order allowing additional time within which to file a plea of insanity pursuant to RCW 9A.12.

DATED THIS 16 DAY OF MARCH, 1988.

CHRISTOPHER TAIT
Attorney for Defendant, McNeil

THOMAS BOTHWELL
Attorney for Defendant, McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

FILED

MAR 17 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

'88 MAR 17 AM 11 24

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	
Plaintiff,	NO: 88-1-00428-1
vs.	
RUSSELL DUANE McNEIL,	MOTION FOR DISCOVERY
Defendant	

COMES NOW Defendant Russell Duane McNeil, by and through his counsel CHRISTOPHER TAIT and THOMAS BOTHWELL, and moves the Court for discovery of all police reports, photographs, tape recordings, video tapes, statements, forensic reports, autopsy reports, and any other matters, or documents, bearing on this case in the possession of the prosecuting attorney, and/or the Yakima County Sheriff's Department, and specifically for a copy of the tape of the statement(s) of Defendant RUSSELL DUANE McNEIL.

DATED THIS 16th DAY OF MARCH, 1988.

Christopher Tait

CHRISTOPHER TAIT
Attorney for Defendant McNeil

THOMAS BOTHWELL
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

8

SC

FILED

MAR 17 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO: 88-1-00428-1
	)	
vs.	)	
	)	MOTION FOR
RUSSELL DUANE McNEIL,	)	EXPENDITURE OF
	)	PUBLIC FUNDS
Defendant	)	

COMES NOW Defendant Russell Duane McNeil, by and through his counsel CHRISTOPHER TAIT and THOMAS BOTHWELL, and moves the Court for the entry issuance of ex parte orders for the expenditure of public funds to hire Psychiatrists, and/or Psychologists, and other defense experts.

THIS MOTION is based upon the files and records herein and upon the Affidavit of Counsel, attached hereto and hereby incorporated by reference.

DATED THIS 16 DAY OF MARCH, 1988.

CHRISTOPHER TAIT
Attorney for Defendant McNeil

THOMAS BOTHWELL
Attorney for Defendant McNeil

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

7

STATE OF WASHINGTON)
)ss.
COUNTY OF YAKIMA)

CHRISTOPHER TAIT, being first duly sworn upon oath, deposes and states:

1. I am one of the attorneys appointed by the Court to represent Defendant Russell Duane McNeil.

2. Following a hearing conducted by the Yakima County Juvenile Court, jurisdiction was declined in that Court and Mr. McNeil was remanded to this Court, wherein he is charged with two (2) counts of aggravated murder in the first degree.

3. I have spoken with Prosecuting Attorney, Jeffrey C. Sullivan, and it is apparent to me from those conversations that Mr. Sullivan is seriously considering requesting the death penalty in this case.

4. I have requested by motion that counsel be allowed to communicate with the Court, in camera and ex parte, concerning the expenditure of public funds to hire forensic experts. This request is being made to allow defense counsel to employ various strategies without revealing the same to the Prosecuting Attorney until we are required to do so by Court Rule or by Court Order. If we were retained Counsel in this matter, we would not be required to reveal our strategies, or the identity of our experts, until such time as those experts were identified as witnesses. This is true, not only according to long standing local custom, but also according to RCW 5.60.060 (2) and State vs. Jones, 99 Wn 2d, 735, 554 P. 2d 1216 (1983).

I, therefore, request that Mr. McNeil be afforded the same opportunities and advantages he would enjoy if his Counsel were retained.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1346

5. I have made a discovery motion, asking that a number of materials be delivered pursuant to CrR 4.7, including but not limited to a copy of the tape of the statement allegedly given by Mr. McNeil after he was taken into custody.

DATED THIS 16 DAY OF MARCH, 1988.

Christopher Tait

CHRISTOPHER TAIT

SUBSCRIBED AND SWORN to before me this 16th day of March, 1988.

Patricia J Barbee

NOTARY PUBLIC in and for the State of Washington, residing at Yakima.

CHRISTOPHER TAIT
ATTORNEY AND COUNSELOR AT LAW
103 SOUTH THIRD STREET
YAKIMA, WASHINGTON 98901
TELEPHONE (509) 248-1345

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

FILED

MAR 17 1988

BETTY McGILLEN
YAKIMA COUNTY CLERK

STATE OF WASHINGTON,
Plaintiff

vs

No. 88 1 428 1

McNEIL, Russell
Defendant

THE ABOVE ENTITLED CASE has been set for trial

MONDAY	5/2/88	9:00 a.m.
(Day)	(Date)	(Time)

Non-Jury _____ Jury 12 TRIAL No. Days 2

TYPE OF ACTION AGR. 1° MURDER/ACC. AGR. 1° MURDER

HOWARD HANSEN	CHRISTOPHER TAIT THOMAS BOTHWELL
Attorney for Plaintiff(s)	Attorney for Defendant(s)

PRE-ASSIGNED TO:
JUDGE GAVIN

SUPERIOR COURT ADMINISTRATOR

COPY RECEIVED BY _____ DATE _____

FILED
1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

RUSSELL McNEIL,

Defendant.

NO. 88-1-428-1

ORDER APPOINTING COUNSEL AND SETTING RATE OF COMPENSATION

THIS MATTER having come before the court at the time of arraignment of the above named defendant, and the court finding that said defendant is indigent and cannot afford to pay for the cost of his legal representation or for the cost of his defense, it is hereby

ORDERED, ADJUDGED AND DECREED that CHRISTOPHER TAIT of 103 South 3rd Street, Yakima, and THOMAS BOTHWELL of 302 North 3rd Street, Yakima, are hereby appointed to represent the defendant at county expense. Said attorneys shall be compensated at a rate of $50.00 per hour for out-of-court time spent on the case and $60.00 per hour for all work handled in court. The appointed attorneys shall keep a specific and accurate accounting of their time and shall submit their time statements to the court on a monthly basis.

DATED this 16th day of March, 1988.

Bruce D. Hanson
JUDGE

SCHWAB, KURTZ & HURLEY
ATTORNEYS AT LAW
411 NORTH SECOND STREET
YAKIMA, WASHINGTON 98901
(509) 248-4282

Presented by:

SUSAN L. HAHN, Administrator
of the Yakima County Public
Defender Program

SCHWAB, KURTZ & HURLEY
ATTORNEYS AT LAW
411 NORTH SECOND STREET
YAKIMA, WASHINGTON 98901
(509) 248-4282

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,

vs. Plaintiff,

RUSSELL DUANE McNEIL

Defendant.

NO. 88-1-00428-1

ORDER ~~REDUCING~~ SETTING BAIL OR ORDER RELEASING DEFENDANT ON OWN RECOGNIZANCE

THIS MATTER having come on for hearing upon the oral motion of the defendant, represented by his court appointed attorney, DANIEL LORELLO, the State of Washington being represented by the undersigned Deputy Prosecuting Attorney for Yakima County, Washington, and the court being fully advised,

IT IS HEREBY ORDERED:

XX (1) That the defendant's bail is ~~reduced from~~ set at $ ~~NO BAIL~~ $250,000 BPH ~~DO NOT RELEASE WITHOUT~~ ~~US COURT ORDER~~,

_____ (a) To be posted by a bail bondsman

_____ (b) Cash deposited with the Clerk of the Court

_____ (c) Other: _____

X (d) Other conditions of release are set out below.

☐ (2) That the defendant be released from custody without bail and upon his own recognizance, during the pendency of this case, until further order of this court, upon the following special conditions:

_____ (a) That the defendant personally report to Mr. Orville Stevens, Room 314-A, Yakima County Courthouse, Yakima, Washington, telephone number 575-4210, on _____ between 11:30 am., and 12:30 p.m., and thereafter as required by Mr. Stevens.

X (b) That the defendant shall reside at _____

and not change address or leave Yakima County, without permission of the court.

_____ (c) Contact attorney _____,

phone # _____ upon any release and thereafter

on a weekly basis. _____

_____ (d) Have no contact with _____

_____ (e) Do not drink any alcohol or use any drugs without a prescription.

_____ (f) Other: _____

_____ (g) Other: _____

DONE IN OPEN COURT this 16th day of MARCH, 1988.

Bruce P. Hanson
JUDGE

Presented by:

_____
ATTORNEY FOR DEFENDANT

Approved as to form:

Howard W. Hanson
DEPUTY PROSECUTING ATTORNEY

A-401-88/mw/HWH

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,
vs.
Russell McNeil

NO. 88-1-428-1

ORDER:
- ☐ PRELIMINARY APPEARANCE
- ☒ ARRAIGNMENT
- ☐ APPOINTING ATTORNEY
- ☐ PLEA OF GUILTY
- ☐ REQUESTING PRESENTENCE INVESTIGATION

On MARCH 16, 1988, Howard Hansen, Deputy Prosecuting Attorney for Yakima County, Washington, appeared.

FILED
MAR 16 1988
BETTY McGILLEN
YAKIMA COUNTY, WASH.

PRELIMINARY APPEARANCE:

The Deputy Prosecutor informed the Court and defendant of the charge(s).

☐ The Court finds probable cause to believe the defendant committed the offense.

Defendants true name is: _____

ARRAIGNMENT:

An ~~(Amended)~~ Information ~~(A petition)~~ was filed with the Court charging the defendant with: 1° Aggr. Murder/Assc 1° Aggr Murder

☒ And was read in open Court in the defendants presence.

☐ Reading was waived by defendant and defense attorney.

Defendants true name is: Russell Duane McNeil

ATTORNEY:

_____ is ☐ appointed ☐ retained ☐ substituted.

PLEA:

The defendant appearing in person without/with counsel _____ and enters a plea of _____ guilty. The plea is accepted by the Court.

PRESENTENCE INVESTIGATION:

The Department of Corrections is requested to conduct a Presentence Investigation in this cause in the following form:

- ☐ Presentence Investigation
- ☐ Screen for Work Release
- ☐ Drug/Alcohol Program Availability
- ☐ Record/Employment Check

IT IS FURTHER ORDERED that the Division of Probation and Parole shall have complete access to all existing police records or information concerning investigations, complaints and dispositions, and all juvenile records and reports, relating to the defendant.

THIS MATTER is continued for the purpose of permitting a completion of such investigation.

DONE IN OPEN COURT this 16th day of MARCH, 1988.

Bruce P. Thomas
SUPERIOR COURT JUDGE/COURT COMMISSIONER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

FILED
MAR 15 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

STATE OF WASHINGTON
Plaintiff,
vs.
RUSSELL DUANE McNEIL
Defendant(s).

INFORMATION

'88 MAR 15 PM 4 59

No. 88-1-00428-1

To: RUSSELL DUANE McNEIL

By this information (Count I of II), the prosecuting attorney accuses you of the crime of:

AGGRAVATED FIRST DEGREE MURDER - RCW 9A.32.030(1)/10.95.020(7)(8)&(9)

The maximum penalty is: Class: A FELONY: LIFE IMPRISONMENT WITHOUT PAROLE

In that you on or about JANUARY 7, 1988 (date) in Yakima County, Washington,

with premeditated intent to cause the death of another person, did stab Dorothy Nickoloff, a human being, on or about January 7, 1988, and said premeditated first degree murder

(1) was for the purpose to conceal the commission of a crime, to-wit: first degree robbery and first degree burglary, and to conceal the identity of the persons committing the crime, and

(2) was part of a common scheme or plan in which there was more than one murder victim, and

(3) was committed in the course of, in furtherance of, or in immediate flight from the crime of first degree robbery and first degree burglary,

OR

while committing and attempting to commit the crime of first degree robbery and first degree burglary, and in the course of and furtherance of said crime and in the immediate flight therefrom, did stab Dorothy Nickoloff, a human being, not a participant in such crime, thereby causing the death of Dorothy Nickoloff, on or about January 7, 1988;

Dated: March 15, 1988

A-401-88/mw/HWH

YSO #88-0146R

JEFFREY C. SULLIVAN
Prosecuting Attorney

By Howard W. Hanse

Deputy Prosecuting Attorney
Rm. 329 Yakima County Courthouse
Yakima, Washington 98901
(509) 575-4141

2

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

STATE OF WASHINGTON

Plaintiff,

vs.

INFORMATION

RUSSELL DUANE McNEIL

No. 88-1-00428-1

Defendant(s).

To: RUSSELL DUANE McNEIL

By this information (Count II of II), the prosecuting attorney accuses you of the crime of:

ACCOMPLICE TO AGGRAVATED FIRST DEGREE MURDER - RCW 9A.32.030(1)/10.95.020(7)(8)&(9)/9A.08.020

The maximum penalty is: Class: A FELONY: LIFE IMPRISONMENT WITHOUT PAROLE

In that you on or about January 7, 1988 (date) in Yakima County, Washington,

did act as an accomplice to Herbert Rice, Jr., who with premeditated intent to cause the death of another person did stab Mike Nickoloff, thereby causing the death of Mike Nickoloff, a human being, on or about January 7, 1988, and said premeditated first degree murder;

(1) was for the purpose to conceal the commission of a crime, to-wit: first degree robbery and first degree burglary, and to conceal the identity of the persons committing the crime, and

(2) was part of a common scheme or plan in which there was more than one murder victim, and

(3) was committed in the course of, in furtherance of, or in immediate flight from the crime of first degree robbery and first degree burglary,

OR

while committing and attempting to commit the crime of first degree robbery and first degree burglary, and in the course of and furtherance of said crime and in the immediate flight therefrom, did act as an accomplice to Herbert Rice, Jr. who did stab Mike Nickoloff, a human being, not a participant in such crime, thereby causing the death of Mike Nickoloff, on or about January 7, 1988.

Dated: March 15, 1988

JEFFREY C. SULLIVAN
Prosecuting Attorney

By Howard A. Hansen

Deputy Prosecuting Attorney
Rm. 329 Yakima County Courthouse
Yakima, Washington 98901
(509) 575-4141

SR

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,

vs.

Russell McNeil

NO 88 1 00428 11

FILED
MAR 15 1988
BETTY McGILLEN
YAKIMA COUNTY CLERK

ORDER:

[ ] PRELIMINARY APPEARANCE
[ ] ARRAIGNMENT
[X] APPOINTING ATTORNEY
[ ] PLEA OF _____ GUILTY
[ ] REQUESTING PRESENTENCE INVESTIGATION

On MARCH 15, 19 88, Stane Keller, Deputy Prosecuting Attorney for Yakima County, Washington, appeared.

PRELIMINARY APPEARANCE:

The Deputy Prosecutor informed the Court and defendant of the charge(s).

[ ] The Court finds probable cause to believe the defendant committed the offense.

Defendants true name is: _____

ARRAIGNMENT:

An (Amended) Information (A petition) was filed with the Court charging the defendant with: _____

[ ] And was read in open Court in the defendants presence.

[ ] Reading was waived by defendant and defense attorney.

Defendants true name is: _____

ATTORNEY: Chris Tait & Tom Bothwell is [X] appointed [ ] retained [ ] substituted.

PLEA:

The defendant appearing in person without/with counsel _____ and enters a plea of _____ guilty. The plea is accepted by the Court.

PRESENTENCE INVESTIGATION:

The Department of Corrections is requested to conduct a Presentence Investigation in this cause in the following form:

[ ] Presentence Investigation
[ ] Screen for Work Release
[ ] Drug/Alcohol Program Availability
[ ] Record/Employment Check

IT IS FURTHER ORDERED that the Division of Probation and Parole shall have complete access to all existing police records or information concerning investigations, complaints and dispositions, and all juvenile records and reports, relating to the defendant.

THIS MATTER is continued for the purpose of permitting a completion of such investigation.

DONE IN OPEN COURT this 15 day of MARCH, 1988.

Bruce P. Hanna
SUPERIOR COURT JUDGE/COURT COMMISSIONER