EXHIBIT Q

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2 IN AND FOR THE COUNTY OF MARICOPA

3

4 STATE OF ARIZONA,)
5 Plaintiff,)
6 vs.) No. CR163419
7 SAMUEL VILLEGAS LOPEZ,)
8 Defendant.)

9

10

11

12 Phoenix, Arizona
June 25, 1987

13

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15

16 BEFORE: The Honorable PETER T. D'ANGELO, Judge

17

18

19 REPORTER'S TRANSCRIPT OF PROCEEDINGS

20 SENTENCING

21

22

23

24 Lisa H. Vitoff
Court Reporter

25

Atty Gen

A P P E A R A N C E S

For the Plaintiff:

MR. PAUL AHLER, Deputy County Attorney

For the Defendant:

MR. JOEL BROWN, Deputy Public Defender

P R O C E E D I N G S

(The following proceedings were held in chambers:)

THE COURT: As to CR163419, State of Arizona versus Samuel Villegas Lopez.

MR. AHLER: Paul Ahler for the State.

MR. BROWN: Joel Brown appearing for Mr. Lopez.

THE COURT: At the time of trial the court was concerned over the lack of any evidence presented on behalf of defendant. I believe I so expressed to counsel, either formally or informally. Other than the offer of proof regarding the burglary of the victim's residence some five or six weeks before the incident

1 involved, defendant did not present any evidence.
2 The court is now concerned with the fact
3 that but for the sentence memorandum received just
4 yesterday, the defense failed to present any mitigating
5 circumstances to the court at the hearing, pursuant to
6 A.R.S. 13-703B.
7 If it does not violate any attorney-client
8 privilege, I'd like the defense counsel to state on the
9 record what effort his office made to determine any
10 mitigating circumstances as might have reflected in favor
11 of the defendant.
12 MR. BROWN: Your Honor, after the trial in
13 this matter, our office did hire Dr. Otto Bendheim to go
14 to the jail to examine Mr. Lopez, for the purpose of a
15 presentence matter pursuant to Rule 26.5. Our office
16 paid for that. That was done. I believe that your Honor
17 signed the order initially to have him permitted to enter
18 the jail. There was a subsequent order signed by Judge
19 Patterson because I wanted to make sure that I had a copy
20 of the order, to make sure that the doctor was able to
21 see him.
22 Additionally, I have, last Friday, at the
23 time of the hearing, I told the court that I was having
24 trouble contacting family members. I was able to contact
25 both his mother and his brother, Frank. They were both

1 fully aware of this setting. I told them at the last
2 setting I had asked the court if that was possible that I
3 could contact these people later, I would like the
4 opportunity to present them today.
5 Both people were fully aware of the time,
6 location. I gave them my number. Mr. Lopez, Frank, I
7 spoke to him as recently as yesterday afternoon. He gave
8 me every indication that he would be here today.
9 I can tell you that I talked to his mother.
10 His mother gave me indications that she may not appear,
11 that she was having some sort of problems. I've talked
12 to Mr. Lopez about this. I think Mr. Lopez will tell you
13 he's strongly objected to me subpoenaing those people in,
14 either his mother, his brother or any other persons. I
15 think Mr. Lopez can tell the court that he strongly
16 opposed me actually having those people subpoenaed in.
17 Is that true?
18 THE DEFENDANT: Yes.
19 MR. BROWN: As far as the sentencing
20 memorandum being filed yesterday, I told the court that I
21 was waiting on Friday on Dr. Bendheim's report. I wanted
22 the advantage of his report, even though I had spoken to
23 him before I prepared the memorandum. I did not receive
24 his report until Monday afternoon.
25 MR. AHLER: Could I put one thing on the

record for purposes of the trial, your Honor?

THE COURT: You may.

MR. AHLER: I would like the record to reflect that, as the court's well aware, much of the State's evidence in this case consisted of fingerprints, blood work and a semen analysis done by the Department of Public Safety.

The defense in this case hired their own experts to examine each one of those items. The fingerprints were examined by an expert employed by them. The blood samples were sent off to a lab in California where they were examined by an expert that they hired, as well as the semen sample.

They chose not to call those people. I was not afforded their reports, but it's my assumption that their reports merely would have verified the State's witnesses.

MR. BROWN: Your Honor, that's true.

Just referring to the post-trial matters, we've retained, that was, our office actually did, an expert in California, at the Institute of Forensic Science in Oakland. The blood samples that were produced into evidence were all analyzed, those pertaining to Mr. Lopez and the victim. The semen samples were analyzed. We retained an expert from Tucson, Mr. Chuck Rolf. He

1 was retained at our office's expense to examine the
2 fingerprints that were introduced into evidence. He did
3 come up and examined the prints prior to trial.
4 THE COURT: What other effort has your
5 office made to determine the existence of any mitigating
6 circumstances?
7 MR. BROWN: Your Honor, offhand, those are
8 only ones I thought of.
9 THE COURT: Is the State aware of any
10 mitigating circumstances?
11 MR. AHLER: Absolutely none.
12 MR. BROWN: I could add that not only did
13 Dr. Bendheim examine him as to the matter concerning
14 26.5, he'd also examined him as to his competency that
15 was discussed.
16 THE COURT: I assume that you have made the
17 option not to present Dr. Bendheim's report to the court;
18 is that correct?
19 MR. BROWN: Your Honor, I've made that
20 option.
21 THE COURT: All right. I just wanted to go
22 on the record.
23 MR. BROWN: Additionally, I went to the
24 jail, I think, on Tuesday afternoon. I received the
25 report on Monday afternoon. Mr. Lopez fully examined the

1 report. He's also fully examined the departmental
2 reports in this matter. I fully discussed the results of
3 any type of scientific examinations that were done in
4 this matter with him.
5 THE COURT: Very well. Anything further,
6 Mr. Ahler?
7 MR. AHLER: No, your Honor.
8 THE COURT: Mr. Brown.
9 MR. BROWN: No, your Honor.
10 THE COURT: Thank you. I'll see you in open
11 court. You'll have a copy of the court's special verdict
12 before we proceed with sentencing.
13
14 (Recess.)
15
16 THE COURT: State of Arizona versus Samuel
17 Villegas Lopez, sentencing.
18 MR. AHLER: Paul Ahler for the State.
19 MR. BROWN: Joel Brown appearing for Mr.
20 Lopez.
21 THE COURT: State your true name, please
22 THE DEFENDANT: Sam Villegas Lopez.
23 THE COURT: Date of birth?
24 THE DEFENDANT: 6-30-62.
25 THE COURT: The court is now in receipt of a

1 sentence memorandum setting forth two alleged mitigating
2 circumstances. The court declines to accept same.
3 There having been a determination of guilt
4 by virtue of the verdict of the jury, it's the judgment
5 of the court you are guilty of the crime, Count 1, murder
6 in the first degree; Count 2, kidnapping, Class 2
7 dangerous offense; Count 3, sexual assault, Class 2
8 dangerous offense; Count 5, burglary first degree, Class
9 2 dangerous offense, all committed on or about October
10 19, 1986.
11 Count 1 in violation of A.R.S. 13-1105,
12 1101, 808, 703; Count 2 in violation of A.R.S. 13-1304,
13 1301, 702, 801, 808, 604; Count 3 in violation of A.R.S.
14 13-1406, 1401, 3821, 701, 702, 801, 808, 604; Count 5 in
15 violation of A.R.S. 13-1507, 1508, 1501, 701, 702, 801,
16 808, 604.
17 The court, pursuant to statute returns the
18 following special verdict: Defendant Samuel Villegas
19 Lopez was found guilty by jury verdict on April 27, 1987
20 of Count 1, murder first degree, Class 1 felony, in
21 violation of A.R.S. 13-1105, 1101, 703, 808; Count 2,
22 kidnapping, dangerous, in violation of A.R.S. 13-1304,
23 1301, 702, 801, 808, 604; Count 3, sexual assault,
24 dangerous, in violation of A.R.S. 13-1406, 1401, 3821,
25 701, 702, 801, 808, 604; Count 5, burglary in the first

1 degree, dangerous, in violation of A.R.S. 13-1508, 1507,
2 701, 702, 801, 808 and 604.
3 No motion for new trial was filed.
4 The court now determines beyond a reasonable
5 doubt that the defendant killed and intended to kill the
6 victim herein.
7 The court has not held a hearing pursuant to
8 A.R.S. Section 13-603C to establish restitution, if any,
9 to the immediate family of the victim, as the victim's
10 family did not request restitution in this matter.
11 Restitution for funeral expenses will be imposed.
12 The court did conduct a separate sentencing
13 hearing pursuant to the A.R.S. Section 13-703 B on June
14 19, 1987, at which the prosecution and the defendant were
15 given the opportunity to present evidence and argument as
16 to the adequacy or inadequacy of the evidence to
17 establish the existence of any of the aggravating
18 circumstances as set forth in A.R.S. 13-703F and any
19 mitigating circumstances set forth in A.R.S. 13-703G and
20 any of the mitigating circumstances of any nature
21 whatsoever whether specified in the statute or not.
22 All the material in the presentence report
23 and attachments were disclosed to the attorney for the
24 defendant and to the attorney for the prosecution, the
25 court having determined from examining the report and the

1 attachments that none of the material contained therein
2 was required to be withheld for protection of human life.
3 Aggravating circumstances: Number one, the
4 defendant has not been convicted on another offense in
5 the United States for which under Arizona law a sentence
6 of life imprisonment or death was imposable.
7 Number 2, the defendant has been previously
8 convicted of a felony in the United States involving the
9 use or threat of violence on another person.
10 Number three, in the commission of the
11 offense, the defendant did not knowingly create a grave
12 risk of death to another person or persons in addition to
13 the victim of the offense.
14 Number four, the defendant did not procure
15 the commission of the offense by payment, or promise of
16 payment, of anything of pecuniary value.
17 Number five, the defendant did not commit
18 the offense as consideration for the receipt, or in the
19 expectation of the receipt, of anything pecuniary value.
20 Number six, the defendant committed the
21 offenses in a cruel manner.
22 The evidence established beyond a reasonable
23 doubt that on October 29, 1986, the defendant broke into
24 the home of Estafana Holmes. He raped her, beat her, and
25 then brutally murdered her.

1 The evidence at trial showed there was a
2 tremendous struggle inside the victim's residence. Blood
3 splatter was located on the floor in the kitchen, living
4 room and bathroom. Blood splatter was also observed on
5 the walls in the kitchen and living room. There were
6 pools of blood in the kitchen and the bathroom. Samples
7 of the blood were consistent with the victim's. The
8 pools of blood, reflected in the photographs admitted
9 into evidence, clearly indicate that at one point during
10 the struggle that the victim was standing erect bleeding
11 on to the floor. Undoubtedly she was either fighting the
12 defendant and/or begging for her life. Other signs of
13 struggle inside the residence include a front screen door
14 that was bent inward and a broken window. Evidence
15 indicates the window was broken from the inside out.
16 The victim Estafana Holmes was 59 years old.
17 She was a small woman, approximately five foot two inches
18 tall, weighed 124 pounds. When Mrs. Holmes' body was
19 discovered on the morning of the 29th she was nude from
20 the waist down. The defendant had taken her pajama
21 bottoms and had tied them snugly around her eyes. A
22 white lace scarf had been crammed tightly in her mouth.
23 Doctor Thomas Jarvis testified that Mrs.
24 Holmes had approximately 23 stab wounds in the left
25 breast and upper chest area. Many of these wounds by

1 themselves would have been potentially fatal. Her throat
2 was cut. She had three stab wounds to the lower abdomen.
3 She had three superficial lacerations on her right arm,
4 which were characterized as defensive type wounds. The
5 victim had three lacerations on the scalp and a stab
6 wound to her left cheek. According to Dr. Jarvis these
7 wounds were not fatal, but could have caused a
8 considerable amount of bleeding. Essie Holmes had
9 bruises on her head and left hand. Dr. Jarvis noticed
10 dried blood streaming down her body and bloodstained
11 feet. In his opinion, Mrs. Holmes was at some point
12 either standing or sitting erect. Vaginal swabs taken at
13 the autopsy shows the presence of semen and spermatozoa.
14 According to Dr. Jarvis, none of the wounds were
15 post-mortum.
16 Number seven, the defendant did commit the
17 offense in an especially heinous or depraved manner.
18 The defendant's sexual assault on the
19 victim, whether it occurred before or after death, the
20 securing of the pajama bottom about her eyes, the
21 cramming of the scarf in the victim's mouth, all
22 constitute evidence of the defendant's heinous and
23 depraved mind.
24 Number nine, the defendant did not commit
25 the offense while in the custody of the Department of

1 Corrections, a law enforcement agency or county or city
2 jail. That should be number eight.
3 Number nine, the defendant has not been
4 convicted of one or more other homocides, as described in
5 Section 13-1101, which was committed during the
6 commission of the offense.
7 Number ten, the defendant was an adult at
8 the time of the offense. The victim was not under 15
9 years of age.
10 Mitigating circumstances.
11 Number one, the defendant's capacity to
12 appreciate the wrongfulness of his conduct or to conform
13 his conduct to the requirements of law was not
14 significantly impaired. This mitigating circumstance
15 does not exist.
16 Number two, the defendant was not under
17 unusual or substantial duress. This mitigating
18 circumstance does not exist.
19 Number three, the defendant was one of the
20 individuals who actually committed the offense and was
21 not found guilty by reason of him being legally
22 accountable for the conduct of another under the
23 provisions of Section 13-303. This mitigating
24 circumstance does not exist.
25 Number four, the defendant could have

1 foreseen that his conduct in the course of the commission
2 of the offense for which the defendant was convicted
3 would cause or would create a grave risk of causing death
4 to another person. This mitigating circumstance does not
5 exist.
6 Number five, the defendant's age is not a
7 mitigating factor as he is of mature age.
8 Number 6, no evidence was presented by the
9 defendant at the presentence hearing.
10 Considering the fact that the victim was a
11 59 year old woman, that she was sexually assaulted, that
12 she was brutally beaten and stabbed numerous times, that
13 she had been bound and gagged, that she had her throat
14 cut, this first degree murder stands out above the norm
15 of first degree murders.
16 Conclusion. The court has considered all of
17 the evidence admitted at the trial relating to
18 aggravating or mitigating circumstances, in addition to
19 the testimony presented at the separate sentencing
20 hearing. The prosecution and the defendant have been
21 permitted to rebutt any information received at the
22 hearing, including information presented at the trial,
23 and were given fair opportunity to present argument as to
24 the adequacy of the information to establish the
25 existence of any of the aggravating circumstances listed

1 in A.R.S. Section 13-604 -- 3F and of any mitigating
2 circumstances whether listed in A.R.S. 13-703G or not.
3 The court has found two statutory
4 aggravating circumstances which apply to the defendant,
5 which are that he committed the offense, having been
6 previously convicted of a felony involving the use or
7 threat of violence on another person, and that the
8 offense was committed in an especially cruel, heinous or
9 depraved manner.
10 The court has further found no mitigating
11 circumstances sufficiently substantial to call for
12 leniency.
13 The clerk will file the special verdict.
14 Anything you wish to say in your own behalf,
15 Mr. Lopez?
16 THE DEFENDANT: No, sir.
17 THE COURT: Counsel?
18 MR. BROWN: Your Honor, our position was set
19 forth in the memorandum. We feel that there was
20 substantial evidence that his capacity to appreciate his
21 action was substantially impaired. Additionally, we do
22 not feel the fact that his prior conviction for resisting
23 arrest should be considered as a prior conviction of a
24 crime of violence or threat of violence.
25 THE COURT: Mr. Ahler, you wish to be heard?

1 MR. AHLER: We would ask that the court
2 sentence Mr. Lopez to death for the first degree murder
3 of Essie Holmes and also that the court sentence him to
4 the maximum consecutive sentences on each one of the
5 offenses he was convicted of.
6 THE COURT: Any legal cause why the court
7 cannot proceed with sentence?
8 MR. BROWN: No, your Honor.
9 THE COURT: No legal cause appearing, as
10 punishment for the crime of Count 1, murder first degree,
11 it is ordered you shall suffer the penalty of death, to
12 be inflicted by lethal gas under the supervision of the
13 Department of Corrections. As punishment for Count 2,
14 kidnapping, it is the judgment and sentence of the court
15 you be imprisoned for the aggravated term of 21 years.
16 You're committed to the Department of Corrections, given
17 credit for 231 days of presentence incarceration.
18 Further the order of the court, pursuant to violation of
19 A.R.S. 13-604, that you are not eligible for suspension
20 of commutation of sentence, probation, pardon, parole or
21 release any other basis until two-thirds of the sentence
22 imposed by the court has been served.
23 As punishment for Count 3, it is the
24 judgment and sentence of the court that you be imprisoned
25 for an aggravated term of 21 years. Further the order of

1 the court this sentence shall be served consecutively to
2 the sentence imposed on Count 2. Further, by virtue of
3 the statute violated, it is the order of the court that
4 you're not eligible for suspension or commutation of
5 sentence, probation, pardon, parole or release any other
6 basis until the entire sentence imposed by the court has
7 been served.
8 As punishment for Count 5, it is the
9 judgment and sentence of the court that you beimprisoned
10 for an aggravated term of 21 years. Further the order of
11 the court that this sentence will be served consecutively
12 to that in Count 3. Further, by virtue of the allegation
13 of violation of A.R.S. 13-604, it is the order court that
14 you're not eligible for suspension, commutation of
15 sentence, probation, pardon, parole or release on any
16 other basis until two-thirds of the sentence imposed by
17 the court has been served.
18 The reasons for the aggravated sentence and
19 the consecutive sentence are as set forth in the special
20 verdict.
21 Further, based upon the information
22 contained in the presentence report, the court finds
23 restitution is due Sammy Castillo, 4600 North 14th Place,
24 number 276, 85014, in the sum $2,579.79 reflecting
25 funeral expenses.

In the event that you are released from prison, paroled at some point in the future, the court finds you do or will have the ability to repay same, it is the order of the court you make and pay restitution through the clerk of the court in the total amount of $2,575.79 in regular monthly payments of $25 a month, beginning on the first day of the fourth month following your release from confinement and on the first day of each month thereafter until paid in full.

Further, as to each count, 1, 2, 3 and 5, by virtue of the allegation of violation of A.R.S. 13-808 the court orders you pay an assessment through the clerk of the court in the amount of $100 for each count, total assessment $400, in regular monthly payments of $25 a month, beginning on the first day of the fourth month following your release from confinement and on the first day of each month thereafter until paid in full.

You're also advised that you have the right to appeal from the orders of this court, have a lawyer represent you. If you cannot afford a lawyer, one will be appointed for you. If you cannot afford certified copies of the necessary records and transcripts, they will be provided. If you want to appeal, you must do so within 20 days from this date or you lose your right to appeal. Please sign a copy of your appeal rights.

Have I neglected or omitted anything, gentlemen?

MR. BROWN: Not that I am aware of.

MR. AHLER: No, your Honor.

THE COURT: Thank you.

* * * *

EXHIBIT R

13

GEORGE M. STERLING, JR.
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395
State Bar No. 003105

Attorney for Defendant

JUDITH ALLEN CLERK
BY DEP.
FILED

1990 MAY -2 PM 4:08

HARICOPA COUNTY SHERIFF'S OFFICE

90 APR 24 PM 4:35

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. SAMUEL VILLEGAS LOPEZ, Defendant.	NO. CR 163419 SUBPOENA IN A CRIMINAL ACTION (X) Duces Tecum

ORIGINAL

THE STATE OF ARIZONA TO:

Custodian of Records
Phoenix Union High School Dist.
(Carl Hayden)
~~2526 W. Osborn Road~~ 4502 N. Central
Phoenix, AZ

YOU ARE COMMANDED to appear and give testimony at the the time and place specified below:

BEFORE: The Honorable Peter T. D'Angelo, Judge of the Superior Court.

DATE: Friday, May 11, 1990 at 8:30 a.m.

PLACE: Superior Court Bldg., Central Court Tower, 11th Floor 201 West Jefferson, Phoenix, AZ 85003

YOU ARE ALSO COMMANDED to bring with you and produce: Any and all records, documents, memorandum held, maintained or originated by your Dept. or any agency commission or board under your supervision re: Samuel Villegas Lopez, DOB: 6/30/62 SSN: 527-39-3807

YOU ARE HEREBY NOTIFIED that any failure to obey this Subpoena without adequate excuse may be deemed a contempt of this Court, or may result in civil liability of $100.00 in favor of th defendant if the defendant who was issued the Subpoena is damaged by your non-attendance. A.R.S. § 13-1801-13-1906.

SIGNED AND SEALED THIS DAY: APR 24 1990

JUDITH ALLEN
CLERK

By J. Thomas
Deputy Clerk

#

5/1/90 1137 Served

GEORGE M. STERLING, JR.
Attorney at Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395

13

JUDITH ALLEN

JUDITH ALLEN, CLERK
BY DEP.
FILED

ORIGINAL

90 APR 13 AM 11:13

GEORGE M. STERLING, JR.
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395
State Bar No. 003105

Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

90 APR -9 PM 2:21
MARICOPA COUNTY SHERIFF'S OFFICE

STATE OF ARIZONA, Plaintiff, vs. SAMUEL VILLEGAS LOPEZ, Defendant.	NO. CR 163419 SUBPOENA IN A CRIMINAL ACTION (XX) Duces Tecum

THE STATE OF ARIZONA TO:

Custodian of Records
Peoria School District
6330 W. Thunderbird
Peoria, AZ 85380-0039

YOU ARE COMMANDED to appear and give testimony at the the time and place specified below:

BEFORE: The Honorable Peter T. D'Angelo, Judge of the Superior Court.

DATE: Friday, April 20, 1990 at 1:30 p.m.

PLACE: Superior Court Bldg., Central Court Tower, 11th Floor, 201 West Jefferson, Phx., Az 85003

YOU ARE ALSO COMMANDED to bring with you and produce: Any and all records, documents, memorandum held, maintaind or originated by your Department or any agency commission or board under your supervision re: Samuel Villegas Lopez, DOB: 6/30/62, SSN: 527-39-3897

YOU ARE HEREBY NOTIFIED that any failure to obey this Subpoena without adequate excuse may be deemed a contempt of thi Court, or may result in civil liability of $100.00 in favor of t defendant if the defendant who was issued the Subpoena is damage by your non-attendance. A.R.S. § 13-1801-13-1906.

SIGNED AND SEALED THIS DAY: APR - 9 1990

JUDITH ALLEN, CLERK

CLERK

By
Deputy Clerk

3:20 P.M.
4-10-90
served B.S.

GEORGE M. STERLING, JR.
Attorney at Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395

13

JUDITH ALLEN, CLERK
BY DEP.

ORIGINAL

GEORGE M. STERLING, JR.
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395
State Bar No. 003105

Attorney for Defendant

FILED
90 APR 13 AM 11:18
90 APR 13

Mr. Borane
Accepted

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

RECEIVED
90 APR -9 PM 4:
MARICOPA COUNTY
SHERIFF'S OFFICE
CIVIL

STATE OF ARIZONA, Plaintiff, vs. SAMUEL VILLEGAS LOPEZ, Defendant.	NO. CR 163419 SUBPOENA IN A CRIMINAL ACTION (XX) Duces Tecum

THE STATE OF ARIZONA TO:

Custodian of Records
Arizona Department of Education
1535 West Jefferson
Phoenix, AZ

YOU ARE COMMANDED to appear and give testimony at the the time and place specified below:

BEFORE: The Honorable Peter T. D'Angelo, Judge of the Superior Court.

DATE: Friday, April 20, 1990 at 1:30 p.m.

PLACE: Superior Court Bldg., Central Court Tower, 11th Floor, 201 West Jefferson, Phx., AZ 85003

YOU ARE ALSO COMMANDED to bring with you and produce: Any and all records, documents, memorandum held, maintained or originated by your Department or any agency commission or board under your supervision re: Samuel Villegas Lopez, DOB: 6/30/62, SSN: 527-39-3897

YOU ARE HEREBY NOTIFIED that any failure to obey this Subpoena without adequate excuse may be deemed a contempt of thi Court, or may result in civil liability of $100.00 in favor of t defendant if the defendant who was issued the Subpoena is damage by your non-attendance. A.R.S. § 13-1801-13-1906.

SIGNED AND SEALED THIS DAY: APR - 9 1990

JUDITH ALLEN, CLERK

CLERK

By

Deputy Clerk

GEORGE M. STERLING, JR.
Attorney at Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395

JUDITH ALLEN
FILED 4-13-90
JU BY ALLEN, CLERK DEP
FILED
ORIGINAL

GEORGE M. STERLING, JR.
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395
State Bar No. 003105

Attorney for Defendant

90 APR 18 AM 11:17

4/10 Served for Espada Records Clerk accepted #280

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. SAMUEL VILLEGAS LOPEZ, Defendant.	NO. CR 163419 SUBPOENA IN A CRIMINAL ACTION (XX) Duces Tecum

MARICOPA COUNTY SHERIFF'S OFFICE APR -9 PM 4:

THE STATE OF ARIZONA TO:

Custodian of Records
County Superintendent of Public Instruction
111 So. Third, Rm. #401
Phoenix, AZ 85003

YOU ARE COMMANDED to appear and give testimony at the the time and place specified below:

BEFORE: The Honorable Peter T. D'Angelo, Judge of the Superior Court.

DATE: Friday, April 20, 1990 at 1:30 p.m.

PLACE: Superior Court Bldg., Central Court Tower, 11th Floor, 201 West Jefferson, Phx., Az 85003

YOU ARE ALSO COMMANDED to bring with you and produce: Any and all records, documents, memorandum held, maintained or originated by your Department or any agency commission or board under your supervision re: Samuel Villegas Lopez, DOB: 6/30/62, SSN: 527-39-3897

YOU ARE HEREBY NOTIFIED that any failure to obey this Subpoena without adequate excuse may be deemed a contempt of th Court, or may result in civil liability of $100.00 in favor of defendant if the defendant who was issued the Subpoena is damag by your non-attendance. A.R.S. § 13-1801-13-1906.

SIGNED AND SEALED THIS DAY: APR - 9 1990

JUDITH ALLEN, CLERK

CLERK

By _____
Deputy Clerk

GEORGE M. STERLING, JR.
Attorney at Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395

13

JUDITH ALLEN, CLERK
BY DEP.
FILED
90 APR 13 AM 11:12
ORIGINAL
90 APR 13

GEORGE M. STERLING, JR.
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395
State Bar No. 003105

Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

RECEIVED
MARICOPA COUNTY
SHERIFF'S OFFICE
90 APR -9 PM 4:21

STATE OF ARIZONA, Plaintiff, vs. SAMUEL VILLEGAS LOPEZ, Defendant.	NO. CR 163419 SUBPOENA IN A CRIMINAL ACTION (X) Duces Tecum

THE STATE OF ARIZONA TO:

Custodian of Records
DES Child Protective Services
4020 N. 20th St.
PPhoenix, AZ 85016

YOU ARE COMMANDED to appear and give testimony at the the time and place specified below:

BEFORE: The Honorable Peter T. D'Angelo, Judge of the Superior Court.

DATE: Friday, April 20, 1990 at 1:30 pm.

PLACE: Superior Court Bldg., Central Court Tower, 11th Floor, 201 West Jefferson, Phx., AZ 85003

YOU ARE ALSO COMMANDED to bring with you and produce: Any and all records, documents, memorandum held, maintained or originated by your Department or any agency commission or board under your supervision re: Samuel Villegas Lopez, DOB: 6/30/62, SSN: 527-39-3897

YOU ARE HEREBY NOTIFIED that any failure to obey this Subpoena without adequate excuse may be deemed a contempt of this Court, or may result in civil liability of $100.00 in favor of the defendant if the defendant who was issued the Subpoena is damaged by your non-attendance. A.R.S. § 13-1801-13-1906.

SIGNED AND SEALED THIS DAY: APR - 9 1990

JUDITH ALLEN, CLERK

4/10/90 1100
Served

CLERK

By
Deputy Clerk

GEORGE M. STERLING, JR.
Attorney at Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395

JUDITH ALLEN

FILED 4-13-90

JUDITH ALLEN, CLERK BY ... DEP.

4/10/90

FILED

90 APR 13 AM 11:19

Patti Shizumo accepted

ORIGINAL

GEORGE M. STERLING, JR.
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395
State Bar No. 003105

Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

RECEIVED CIVIL DIVISION 90 APR -9 PM 4:20 MARICOPA COUNTY SHERIFF'S OFFICE

STATE OF ARIZONA, Plaintiff, vs. SAMUEL VILLEGAS LOPEZ, Defendant.	NOCR 163419 SUBPOENA IN A CRIMINAL ACTION (xx) Duces Tecum

THE STATE OF ARIZONA TO:

Custodian of Records
Department of Economic Security
1717 West Jefferson
Phx., AZ 85007

YOU ARE COMMANDED to appear and give testimony at the the time and place specified below:

BEFORE: The Honorable Peter T. D'Angelo, Judge of the Superior Court.

DATE: Friday, April 20, 1990 at 1:30 p.m.

PLACE: Superior Court Bldg., Central Court Tower, 11th Floor, 201 West Jefferson, Phx., AZ 85003

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SIGNED AND SEALED THIS DAY: APR - 9 1990

JUDITH ALLEN, CLERK

CLERK

By _____
Deputy Clerk

GEORGE M. STERLING, JR.
Attorney at Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395

JUDITH ALLEN, CLERK
BY T. Bowen DEP.
FILED 4/10/90

ORIGINAL

GEORGE M. STERLING, JR.
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395
State Bar No. 003105

Attorney for Defendant

90 APR 13 AM 11:13

90 APR 13

Mrs. Wilkins accepted

#280

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

90 APR -9 P 4:22
MARICOPA COUNTY SHERIFF'S OFFICE

STATE OF ARIZONA, Plaintiff, vs. SAMUEL VILLEGAS LOPEZ, Defendant.	NO. CR 163419 SUBPOENA IN A CRIMINAL ACTION (XX) Duces Tecum

THE STATE OF ARIZONA TO:

Custodian of Records
Arizona State Dept. of Health Services
1740 W. Adams
Phx., Az 85007

YOU ARE COMMANDED to appear and give testimony at the the time and place specified below:

BEFORE: The Honorable Peter T. D'Angelo, Judge of the Superior Court.

DATE: Friday, April 20, 1990 at 1:30 p.m.

PLACE: Superior Court Bldg., Central Court Tower, 11th Floor, 201 West Jefferson, Phx., AZ 85003

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SIGNED AND SEALED THIS DAY: APR - 9 1990

JUDITH ALLEN, CLERK

CLERK

By _____
Deputy Clerk

GEORGE M. STERLING, JR.
Attorney at Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395

(13)

JUDITH ALLEN, CLERK
BY DEP.
FILED

ORIGINAL

GEORGE M. STERLING, JR.
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395
State Bar No. 003105

Attorney for Defendant

90 APR 13 AM 11:12

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,

Plaintiff,

vs.

SAMUEL VILLEGAS LOPEZ,

Defendant.

NO. CR 163419

SUBPOENA IN A CRIMINAL ACTION

(XX) Duces Tecum

MARICOPA COUNTY SHERIFF'S OFFICE
90 APR -9 PM 4:21
RECEIVED

300

Custodian of Records
Arizona State Hospital
2500 E. Van Buren
Phx., Az

THE STATE OF ARIZONA TO:

YOU ARE COMMANDED to appear and give testimony at the the time and place specified below:

BEFORE: The Honorable Peter T. D'Angelo, Judge of the Superior Court.

DATE: Friday, April 20, 1990 at 1:30 p.m.

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SIGNED AND SEALED THIS DAY: APR - 9 1990

JUDITH ALLEN, CLERK

CLERK

By

Deputy Clerk

4/10/90 0930 Served

GEORGE M. STERLING, JR.
Attorney at Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395

JUDITH ALLEN
JUDITH ALLEN, CLERK
BY ... DEP.
FILED
90 APR 13 AM 11:12

13

GEORGE M. STERLING, JR.
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395
State Bar No. 003105

Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. SAMUEL VILLEGAS LOPEZ, Defendant.	NO. CR 163419 SUBPOENA IN A CRIMINAL ACTION (XX) Duces Tecum

MARICOPA COUNTY SHERIFF'S OFFICE 90 APR -9 PM 4:2

THE STATE OF ARIZONA TO:

Custodian of Records
Maricopa County Health Department
1825 E. Roosevelt
Phx., AZ 85001

YOU ARE COMMANDED to appear and give testimony at the the time and place specified below:

BEFORE: The Honorable Peter T. D'Angelo, Judge of the Superior Court.

DATE: Friday, April 20, 1990 at 1:30 p.m.

PLACE: Superior Court Bldg., Central Court Tower, 11th Floor, 201 West Jefferson, Phx., AZ 85003

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SIGNED AND SEALED THIS DAY: APR - 9 1990

JUDITH ALLEN, CLERK

CLERK

By _____
Deputy Clerk

4/10/90 1000 Served MPD

GEORGE M. STERLING, JR.
Attorney at Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395

(13)

ORIGINAL

GEORGE M. STERLING, JR.
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395
State Bar No. 003105

Attorney for Defendant

JUDITH ALLEN, CLERK
BY DEP.
FILED

90 APR 13 AM 11:12

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

90 APR -9 PM 4:21
MARICOPA COUNTY SHERIFF'S OFFICE
RECEIVED

STATE OF ARIZONA, Plaintiff, vs. SAMUEL VILLEGAS LOPEZ, Defendant.	NO. CR 163419 SUBPOENA IN A CRIMINAL ACTION (XX) Duces Tecum

1000

THE STATE OF ARIZONA TO:

Custodian of Records
Maricopa County Medical Center
2601 E. Roosevelt
Phx., AZ

YOU ARE COMMANDED to appear and give testimony at the the time and place specified below:

BEFORE: The Honorable Peter T. D'Angelo, Judge of the Superior Court.

DATE: Friday, April 20, 1990 at 1:30 p.m.

PLACE: Superior Court Bldg., Central Court Tower, 11th Floor, 201 West Jefferson, Phx., Az 85003

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SIGNED AND SEALED THIS DAY: APR - 9 1990

JUDITH ALLEN, CLERK

CLERK

By
Deputy Clerk

4/10/90
1000
Secured

GEORGE M. STERLING, JR.
Attorney at Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395

13

GEORGE M. STERLING, JR.
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395
State Bar No. 003105

Attorney for Defendant

JUDITH ALLEN
JUDITH ALLEN, CLERK
By DEP.
FILED
90 APR 13 AM 11:13

ORIGINAL

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. SAMUEL VILLEGAS LOPEZ, Defendant.	NO. CR 163419 SUBPOENA IN A CRIMINAL ACTION (XX) Duces Tecum

MARICOPA COUNTY SHERIFF'S OFFICE
90 APR -9 PM 2:21

THE STATE OF ARIZONA TO:

Custodian of Records
Peoria City Police Department
8315 W. Washington
Peoria, AZ

YOU ARE COMMANDED to appear and give testimony at the the time and place specified below:

BEFORE: The Honorable Peter T. D'Angelo, Judge of the Superior Court.

DATE: Friday, April 20, 1990 at 1:30 p.m.

PLACE: Superior Court Bldg., Central Court Tower, 11th Floor, 201 West Jefferson, Phx., AZ 85003

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SIGNED AND SEALED THIS DAY: APR - 9 1990

JUDITH ALLEN, CLERK

CLERK

By _____
Deputy Clerk

GEORGE M. STERLING, JR.
Attorney at Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395

JUDITH ALLEN

JUDITH ALLEN, CLERK
BY DEP.
FILED

90 APR 13 AM 11:06

ORIGINAL

13

GEORGE M. STERLING, JR.
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395
State Bar No. 003105

Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. SAMUEL VILLEGAS LOPEZ, Defendant.	NO. CR 163419 SUBPOENA IN A CRIMINAL ACTION (xx) Duces Tecum

RECEIVED 90 APR -9 PM 4:20 MARICOPA COUNTY SHERIFF'S OFFICE

Custodian of Records
City of Phoenix Municipal Court
~~412 North Fifth Street~~
Phoenix, AZ

THE STATE OF ARIZONA TO:

YOU ARE COMMANDED to appear and give testimony at the the time and place specified below:

BEFORE: The Honorable Peter T. D'Angelo, Judge of the Superior Court.

DATE: Friday, April 20, 1990 at 1:30 p.m.

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SIGNED AND SEALED THIS DAY: APR - 9 1990

JUDITH ALLEN, CLERK

CLERK

By
Deputy Clerk

4/12/90 0915 -
Samuel
MP

GEORGE M. STERLING, JR.
Attorney at Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395

JUDITH ALLEN, CLERK
BY K. Berry DEP.

ORIGINAL

4/10/90 Richard Ace #280

GEORGE M. STERLING, JR.
1101 West McDowell Road
Phoenix, Arizona
(602) 257-0395
State Bar No. 003105

FILED
90 APR 13 AM 11: 43
90 APR 13

Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

RECEIVED
90 APR -9 PM 4: 22
MARICOPA COUNTY SHERIFF'S OFFICE

STATE OF ARIZONA, Plaintiff, vs. SAMUEL VILLEGAS LOPEZ, Defendant.	NO. CR 163419 SUBPOENA IN A CRIMINAL ACTION (XX) Duces Tecum

Custodian of Records
Department of Public Safety
2102 W. Encanto Blvd.,
Phx., AZ

THE STATE OF ARIZONA TO:

YOU ARE COMMANDED to appear and give testimony at the the time and place specified below:

BEFORE: The Honorable Peter T. D'Angelo, Judge of the Superior Court.

DATE: Friday, April 20, 1990 at 1:30 p.m.

PLACE: Superior Court Bldg., Central Court Tower, 11th Floor, 201 West Jefferson, Phx., AZ 85003

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SIGNED AND SEALED THIS DAY: APR - 9 1990

JUDITH ALLEN, CLERK
CLERK

By
Deputy Clerk

GEORGE M. STERLING, JR.
Attorney at Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395

GEORGE M. STERLING, JR.
ATTORNEY AT LAW

March 30, 1990

Mr. Paul H. Ahler
Deputy County Attorney
101 West Jefferson
Phoenix, Arizona 85003

Re: State of Arizona v. Sammy Lopez, CR-163419

Re: Our agreement/stipulation concerning pre-hearing disclosure of mental health information

Re: Defendant's discovery request under Rule 26.8(b)

Dear Mr. Ahler:

As we have previously agreed, one of the purposes of this letter is to document the stipulation and agreement between myself as attorney for the Defendant Sammy Lopez and yourself on behalf of the state that as a precondition to either party calling a mental health expert, psychologist, or psychiatrist at the 703 resentencing of this Defendant; the party calling such expert witness shall ensure that the adverse party receives a basic report or documentation of such mental health experts findings and diagnosis at least ten days prior to the witness's testimony. If such report or documentation is not timely delivered, the party calling such witness shall either forgo such witness's testimony or stipulate to a continuance or recess of the proceedings in order to provide the adverse party the ten day time period we both acknowledge as being necessary to properly prepare for adequate cross-examination. As of this date I have given you notice that my mental health expert will be Dr. Bayless and you have given me notice that your mental health expert will be Dr. Deen.

In addition to the above, I wish to take this opportunity to specifically request from you certain documentation and records which I understand are available to you but which have not been forthcoming to me or my investigator from certain state agencies. The documentation which I specifically request is: (1) a complete copy of the entire DOC file concerning Sammy Lopez upon each and every one of his prior and current incarcerations - specifically including any medical records and diagnostic testing; (2) a complete copy of the entire MCSO file concerning Sammy Lopez upon each and every one of his prior and current incarcerations - specifically including any medical records and diagnostic testing; (3) the entire juvenile

1101 WEST MCDOWELL ROAD
PHOENIX, ARIZONA 85007

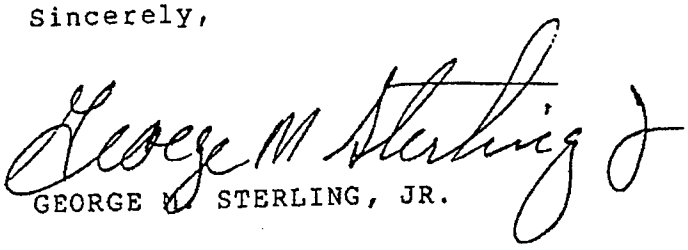
TELEPHONE 602-257-0395

court file concerning any proceedings, adjudications, or incarcerations of the Defendant as a juvenile; (4) any and all records of DES or CPS concerning the Defendant individually or any of his siblings or the Lopez family; (5) the files and records of both the State and County School Boards and Departments of Education, including the Peoria School District Board, concerning the Defendant's elementary school education, any aptitude or evaluation tests results and assignment to any special education classes; (6) any records or files concerning the Defendant maintained by the Arizona State Hospital, Maricopa County Hospital or other governmentally operated medical or mental health facility; and (7) any documents, records, files - specifically including information or intelligence files - generated, maintained, or currently available to the Phoenix Police Department, DPS or other state law enforcement agency concerning Estefana A. Homes, the victim in this case.

I make the above requests upon you under the authority of Rule 26.8(b), Brady v . Maryland, Davis v. Alaska, State v. Fowler and State v. Schreiber.

I do appreciate that my request for documentation and information upon this Defendant is extensive, but we are dealing with life and death and the trial court should make a decision only after a thorough investigation of the Defendant's entire life because we don't know where mitigation may be found.

Sincerely,



GEORGE M. STERLING, JR.

/bc

OFFICE OF THE MARICOPA COUNTY ATTORNEY

ARIZONA TITLE BUILDING
111 WEST MONROE, SUITE 1800
PHOENIX, ARIZONA 85003
(602) 262-3411

RICHARD M. ROMLEY, COUNTY ATTORNEY

JAMES H. KEPPEL, CHIEF DEPUTY

April 5, 1990

Mr. Geroge Sterling
Attorney at Law
1101 W. McDowel Road
Phoenix, Arizona 85007

RE: State v. Samuel V. Lopez
CR 163419

George:

I am in receipt of your letter dated March 30, 1990. In regards to your request for certain documentation and records, I have enclosed a copy of the Department of Corrections records supplied to me on defendant Lopez. They encompass all three incarcerations with the Department of Corrections. As to your remaining request for items 2-7, I do not feel it is the State's responsibility to investigate these areas. I do not have any of the items you requested, nor do I intend to introduce any of the items into evidence at the sentencing hearing pursuant to 13-703. I can understand your need to attempt to find mitigating evidence, but feel that your ability to subpoena these items are just as broad as mine. To date I have discovered no exculpatory evidence involving your client which would be discoverable under either Rule 15 or pursuant to Brady v. Maryland.

Please be advised that I have employed Dr. Dean to review the police reports and any other information connected with defendant Lopez's case. If you intend to use Dr. Bayless in mitigation, I intend at that time to ask permission to have Dr. Dean examine your client. This will undoubtedly necessitate a continuance since I will not be able to give you Dr. Dean's report within the 10 days that we had previously agreed upon.

If you should have any questions concerning this letter, please feel free to contact me.

Sincerely yours,

Paul W. Ahler

Paul W. Ahler
Deputy County Attorney
Chief, Criminal Trial Division

PA:bjb
70

OFFICE OF THE MARICOPA COUNTY ATTORNEY

ARIZONA TITLE BUILDING
111 WEST MONROE, SUITE 1800
PHOENIX, ARIZONA 85003
(602) 262-3411

RICHARD M. ROMLEY, COUNTY ATTORNEY

JAMES H. KEPPEL, CHIEF DEPUTY

April 20, 1990

Mr. George Sterling
1101 W. McDowell Rd.
Phoenix, Arizona 85007

RE: State v. Samuel V. Lopez
CR 163149

George:

Attached are complete copies of the records kept by the Department of of Public Safety reference defendant Samuel Lopez and requested pursuant to your subpoena. These are being sent to you reference the stipulation entered in court on April 20, 1990. If you have any questions, please contact me.

Sincerely,

Paul W. Ahler

Paul W. Ahler
Deputy County Attorney
Chief, Criminal Trial Division

PA:bjb
87

EXHIBIT S

OK FILE

JUDITH ALLEN, CLERK BY DEP. FILED 1990 JUN 19 PM 2:01

GEORGE M. STERLING, JR.
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395
State Bar No. 003105

Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. SAMUEL V. LOPEZ, Defendant.	No. CR 163419 DEFENDANT'S PRESENTENCE MEMORANDUM CHALLENGING A.R.S. SEC. 13-703(F)(6) AS VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION (Assigned to Judge D'Angelo)

In previous proceedings, the prosecution has alleged and this Court has found the single aggravating factor that the Defendant committed the offense charged "in an especially heinous, cruel or depraved manner". See A.R.S. Sec. 13-703(F)(6). The defense does challenge, as a violation of the constitutional proscription of "cruel and unusual punishment" under the Eighth Amendment and the notice requirement of the "Due Process Clause" of the Fourteenth Amendment to the United States Constitution, this Court's summary finding and statutory utilization of such aggravating factor to mandate or justify the imposition of the death penalty on this Defendant.

LEGAL ARGUMENT AND AUTHORITY:

For almost two hundred years, the Federal Government and the vast majority of the several state authorized and

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Phoenix, Arizona 85007
(602) 257-0395

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1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395

utilized capital punishment as a sentencing alternative. Several generations of judges and juries had decided such a sentence, chosen between life and death, utilizing nothing other than their best human judgment and their absolute discretion unfettered by any restrictions. The legislative and judicial experience of the State of Arizona was no different. Under the 1918 initiative of the people, for 54 years Arizona Courts chose between life and death "at the discretion of the jury trying the person charged therewith, or upon a plea of guilty, the Court. . .".

The historical and political justification for such a death-penalty standard - could be and was often expressed as "the broad and unforseeable range of human wickedness and violence required the sentencing authority have absolute discretion in order to fix just punishment fitting the particulars of the crime and the character of the accused". In an era of faith and honor instilled by pillars of the community, the elected judiciary could be trusted with the discretion to do the right thing for society.

But by 1972, the history of the death-penalty in the several states provided a shocking statistical study. Nationally, such entrustment of absolute discretion to do the right thing for society, provided a continuous history of the choice between life and death which the several members of the Supreme Court could describe only as "arbitrary", "capricious", "freekish", and strongly suggestive of

GEORGE M. STERLING, JR.
Attorney at Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395

discrimination on the basis of race, creed or indigency. In its landmark decision of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the United States Supreme Court not only invoked the Eighth Amendments proscription of "cruel and unusual punishment" to condemn the entire history and current majority of states imposition of the death-penalty at the discretion of judge or jury, but also expounded a new federal standard of capital punishment which required that even the exposure or risk of possible death be restricted to the very few of the many convicted of first degree murder and that any discretion of judge or jury exist only to avoid the death-penalty. While the detailed construction of such federal standard is in fact still continuing, in general terms the post 1972 federal capitol punishment concept seeks to accomplish the Furman objectives by requiring (1) each State establish some system or statutory scheme of sufficient precision and exactness to limit death-eligibility to very few convicted murders - an almost arithemitical calculation, coldly and isolated, of specific facts precisely correlating to rigid standards and specification of statute or rule; and (2) any variable, vagueness, or discretion granted to the sentencing authority, no matter how innate or disguised, could only be exercised against the option of death, i.e. consideration of any mitigating factor, mercy, and even sympathy. See Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1973) through Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1988).

GEORGE M. STERLING, JR.
Attorney at Law
1101 West McDowell Road
Phoenix, Arizona 85007
(602) 257-0395

But this new Federal Constitutional standard which excessively limited the availability of the death-penalty by emphasizing a precise and detailed statutory system was not warmly welcomed by State Courts or Legislatures then accustomed to judicial discretion. In the immediate aftermath of Furman, the Arizona legislatures and a number of others sought to re-enact death-penalty statutes valid under the emerging federal standards. In doing so the legislatures, at least in Arizona, faced an imprecedented task of depriving the sentencing authority of any and all discretion in determination of the threshold exposure to or risk of the death-penalty by a statutory scheme of sufficient precision and stricture. The Arizona death-penalty, with its last and catch-all death-penalty qualifier of "especially heinous, cruel, or depraved manner" herein challenged, was adopted by the Arizona legislature in 1973, (Chapter 138, Sec. 5); five years before the Arizona legislature, relying on its experiment in the death-penalty, sought to similarly restrict judicial sentencing - discretion in its 1978 total revision of the criminal code.

Defendant, on the basis of the currently existing Federal Constitutional Standard on capitol punishment, challenges the originally last and still catch-all death-penalty qualifier of the Arizona statute: "Defendant committed the offense in an "especially heinous, cruel, or depraved manner", as impermissibly vague and overbroad both

GEORGE M. STERLING, JR.
Attorney at Law
1101 West McDowell Road
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as written by the legislature and as non-limited by an Arizona Court interpretations. The bases of Defendant's challenge can be summarized as (1) the actual language adopted by the legislature, standing alone fails to communicate or convey any restraint or limitation as to death-eligibility; (2) that such vague and undefying terms did in fact deligate to the very sentencing authority - Arizona trial and Supreme Court jointly imposed death - the very discretion to define and limit its own discretion; (3) that in application, no Arizona authority - other than by sentencing on a case by case basis - has even attempted to limit, restrict, or precisely define such aggravating factor; and (4) in application, such undefined aggravating factor has, as a practical matter, reversed the presumption calculation of Furman in Arizona, in that under such aggravating factor it is not the very few but almost all convicted murders who are death-eligible.

"IN AN ESPECIALLY HEINOUS, CRUEL AND DEPRAVED MANNER" in the context of first degree murder is simply a meaningless amalgamation of words evoking emotion, not fact or reason, from each individual recipient. In Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) the United States Supreme Court held that a death sentence based in part upon a finding that the murder was "especially heinous, atrocious or cruel", could not be sustained consistent with the Eighth Amendment. Maynard reaffirmed the analysis of Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) in which the Supreme Court held that the

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aggravating factor: the offense was "outragiously or wantonly vile, horrible and inhuman", was unconstitutional vague because "[T]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capracious infliction of death. A person of ordinary sensibility would fairly characterize almost every murder as "outragiously or wantonly vile, horrible and inhuman". The Maynard Court held that the "especially heinous, atrocious or cruel" formulation of the Oklahoma statute:

> Gave no more guidance than the "outragiously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey. The State's contention that the addition of the word "especially" somehow guides the jury's discretion, even if the term "heinous" does not, is untennible. To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous" whatever that means, and an ordinary person could honestly believe that every unjustified intentional taking of a human life is "especially heinous".

Under both Godfrey and Maynard, there is little or no question that the statutory language of Arizona's death-penalty in 13-703(F)(6) cannot and does not in and of itself adequately channel, restrict or limit the discretion of the sentencing authority.

While the United States Supreme Court has not as of yet, (Walton) specifically addressed the vagueness of Arizona's "especially heinous, cruel or depraved" factor, the Nineth Circuit Court of Appeals has done so. In Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), the 9th

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Cir. applying Godfrey/Maynard analysis specifically held as to the actual statutory language:

> In Zant v. Stephens, 462 U.S. 862 (1983), the Court cautioned that aggravating circumstances, while intending to direct discretion, could be "so vague that they would fail adequately to channel the sentencing decision patterns of jurys with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur "Id. at 877 (citation omitted). The Court thus instructed States to genuinely narrow the class of persons eligible for the death penalty. Id.; See also California v. Brown, 107 S.Ct. 837, 839 (1987) (Constitution requires that "death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary in unpredictable fashion").
>
> . . .
>
> Thus, the Court has expressly conditioned the use of aggravating circumstances upon the State Court's ability to interpret and apply the statutory guidelines in a narrow and consistent manner. Given that the (F)(6) circumstances composed of terms that are inherently vague, Godfrey, 446 U.S. at 428 ("there is nothing in these few words, standing alone, that implies any inherent restrain on the arbitrary and capricious infliction of the death sentence"), we must decide whether the (F)(6) circumstance has been given a sufficiently narrow construction by the Arizona Supreme Court.
>
> The Arizona Legislature intended that the "especially heinous, cruel, or depraved" aggravating circumstance provide guidance to judges presiding over aggravation - mitigation hearings. Moreover, it surely was not meant to be used as a "catch-all for those first degree murderers where no other aggravating circumstance applies" State v. Gretzler, 135 Ariz. 42, 51, 659 P.2d 1, 10, Cert. denied 461 U.S. 971 (1983) (quoting State v. Ortiz, 131 Ariz. 195, 206, 639 P.2d 1020, 1031 (1981), Cert. denied, 456 U.S. 984 (1982)). It has, however, been used in just this manner.

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> The (F)(6) aggravating circumstance is by far the most frequently invoked circumstance of all of Sec. 13-703's 9 aggravating circumstances. Out of all first degree murder cases where proof of aggravating circumstances was sought, the "especially heinous, cruel or depraved" option was used over 68% more often than the next most commonly used circumstance, and more than 108% more often than any of the remaining circumstances. Although this is not a constitutional violation in and of itself, the popularity of the (F)(6) circumstance appears to be symptomatic of its catch-all function.
>
> Therefore, it is clear that as actually written, the statutory terminology of 13-703(F)(6) "especially heinous, cruel, or depraved" is unacceptably vague overbroad and discretionary under the current federal constitutional considerations in capitol punishment. Of that there is no real question by any Court, even Arizona's.

But under the caveat of both Godfrey and Maynard as recognized in Adamson v. Ricketts, supra; a sufficiently restrictive and limiting interpretation or instruction of such aggravating factor could validate such term under the current federal constitutional considerations. A number of sister States have saved their similar aggravating circumstances by just such limiting and restrictive interpretations, see State (Utah) v. Tuttle, 46 CrL 2087 (1989); State(Conn.) v. Breton, 46 CrL 2365 (1989); People(Colo.) v. Davis, 47 CrL 1195 (1990).

However the Arizona Supreme Court's attempts to define the scope of "especially cruel, heinous or depraved" factor has broadened rather than narrowed it. In fact, other than providing the dictionary's vague and subjective definitions in State v. Knapp, 114 Ariz. 531, 543, 562 P.2d

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704, 716 (1977) which was repeatedly cited, both directly and indirectly thereafter; the Arizona Supreme Court's only effort to provide guidance in this area has been to provide a list of some of the factors that could lead to the finding of an "especially heinous. . ., or depraved" murder, State v. Gretzler, 135 Ariz. 42, 52, 659 P.2d 1, 11 (1983). However the so called Gretzler list:

1. The apparent relishing of the murder by the killer.

2. The infliction of gratuitous violence on the victim.

3. Needless mutilation of the victim.

4. The senselessness of the crime.

5. The helplessness of the victim.

really accentuated the problem. As an attempt to limit or restrict disrection it failed miserably. As stated by the 9th Cir. Court in Adamson:

> Gretzler's attempt to guide the sentencer under (F)(6) has failed, however, in two respects. Although Gretzler reviewed a large number of cases, it did not - nor has any case since - stated what specific factors are necessary for an (F)(6) finding. Moreoever, the Court did not include any instructions to limit future review of the enumerated factors [open ended definition]. As a result Arizona has failed to provide satisfaction of Godfrey's mandate that the aggravating circumstance objectively guide discretion and narrow application of the death penalty.
>
> . . .
>
> Because Gretzler did not limit (F)(6) review to the factors it identified, the Arizona Supreme Court has been free to fashion additional factors, bringing more defendants within the (F)(6) net. For example in the court's Adamson opinion, [citation omitted]

> the court strayed from Gretzler - and all previous cases - regarding a finding of cruelty. Previously, cruelty had focused exclusively on the victim. In Adamson, however the court - without giving any explanation - expanded the cruelty concept to include a component inquiring into the mental state of the defendant. . . This additional consideration has not, however been utilized in all post-Adamson cases. . .
>
> A list of factors regarding what may constitute an especially heinous or depraved murder has similarly grown since Gretzler. . . . Thus, for a finding that a murder was especially heinous and/or depraved the possibilities appear endless.

In addition to that exhaustive comparative analysis undertaken by the 9th Cir. in Adamson, the inconsistency and expansiveness of even the cruelty factor, arguably the most precise, is demonstrated by the "hopscotch" history of the Arizona death-penalty. No "cruelty finding" has been made in numerous murder cases that involve "the needless" infliction of physical pain to the victim. See State v. Wiley, 144 Ariz. 525, 698 P.2d 1244 (1985) (70-year old victim bound and beaten); State v. Hickley, 129 Ariz. 330, 631 P.2d 112 (1981) (victim beaten to death with a tire iron and wooden boards). No cruelty finding was made where the victim suffered a painful, lingering death. See State v. Fierro, 124 Ariz. 182, 603 P.2d 74 (1979) (victim lingered for three days on life support systems); State v. Ferguson, 119 Ariz. 55, 579 P.2d 559 (1977) (gunshot victim left by the side of the road, later died in the hospital). No cruely was found when unusual mental anguish was inflicted on the victim. See State v. Nash, 143 Ariz. 392, 694 P.2d 222 (1985) (victim shot

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during robbery, plead for mercy before being shot twice more); State v. Cookus, 115 Ariz. 99, 563 P.2d 898 (1977) (victim lured into the desert and beaten, defendant's gun misfired six times before he switched guns and shot the victim). Compare State v. Rossi, 146 Ariz. 359, 706 P.2d 371 (1985) (cruely finding upheld where robbery victim plead for life before he was shot). State v. Bracy, 145 Ariz. 520, 703 P.2d 464 (1985) (cruely found where one victim saw another shot first).

Arbitrary and inconsistent results have been reached in numerous cases addressing the factual situations identified in Gretzler: "apparent relishing" of the murder was not found to be heinous in State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983) (defendant bragged that victim had "squealed like a rabbit") and State v. Madsen, 125 Ariz. 346, 609 P.2d 1046 (1980) (defendant practiced crying to fain relief and bragged that it was "easy" to kill somebody for insurance money). Compare State v. Martinez - Villareal, 145 Ariz. 441, 702 P.2d 670 (1985) (heinous and depraved finding based upon defendant's bragging that the killing showed his "machismo"); State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1980) (heinousness finding based on defendant saying "goodbye. . . I hope we never see you again" to victim while leaving the scene). Gratuitous violence and "needless" mutilation have also received inconsistent interpretations. Heinousness was not found in State v. Fierro, supra, where the victim was shot five times. It was also not found in State v. Cookus, supra, where the victim was beaten with rocks and shot six times. Compare State v. Fisher, 141 Ariz. 229, 686 P.2d 750 (1984)

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(heinousness based upon the fact that the killing involved three blows with a hammer); State v. Ceja, 115 Ariz. 413, 565 P.2d 1274 (1977) (heinousness was found where one victim was shot four times, the other six times). Heinousness was also not found in State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981) (victim was strangled and beaten, had lacerations "over the entire body" and had a ligature of twine tied around her neck). Compare State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105 (1983) (heinousness based upon the defendant striking an unsconscious victim). Note that Jeffers was recently reversed by the 9th Cir. Court of Appeals that found that under the circumstances of that case the standards of heinousness and depravity delineated in prior Arizona cases could not be applied in a principled manner to Jeffers. Jeffers v. Ricketts, 832 Fed. 2d 476 (9th Cir. 1987).

The Arizona Supreme Courts insistance in keeping an open ended definition, i.e. deciding on a cases by case basis whether case-specific facts are sufficient to support a finding under (F)(6) and never stating what objective criteria is necessary for an (F)(6) finding or specifically limiting by a general requirement such as "torture"; the Arizona Courts insistance mirrors that of the Oklahoma Courts preceding the United States Supreme Court's decision in Maynard. Thus, the Arizona trial and Supreme Courts ever expanding definition of "especially heinous, cruel, or depraved" cannot seek constitutional solace within the Godfrey/Maynard cavaet. The Arizona Courts, both of which are sentencing courts under the

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statutory scheme, have repeatedly refused to provide the constitutional necessity of a restrictive and limiting interpretation sufficient to "adequately channel the discretion of the trier of fact". Recently the 8th Cir. in Moore v. Clarke, (No. 88-2584, filed May 25, 1990) struck down as unconstitutional that provision of Nebraska's death-penalty statute: "manifested exceptional depravity by ordinary standards of morality and intelligence" because the State Supreme Court had failed to cure the statutory aggravating circumstance's inherent vagueness by a sufficiently restrictive interpretation, despite the Supreme Court of Nebraska's adoption of the Gretzler's "five factor test" in State v. Holtan, 250 N.W. 2nd 876, 880 (1970).

Defendant respectfully submits that under the current standards of federal constitutional considerations on capitol punishment, the statutory aggravating circumstance of 13-703(F)(6): "especially heinous, cruel or depraved" is unconstitutionally overbroad and vague not only as written, applied, but currently interpreted by the Arizona Supreme Court.

RESPECTFULLY SUBMITTED this 19th day of June, 1990.

George M. Sterling Jr.
GEORGE M. STERLING, JR.
Attorney for Defendant

///

///

Copy of the foregoing mailed/delivered this 19th day of June, 1990, to:

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EXHIBIT T

ORIGINAL

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. SAMUEL VILLEGAS LOPEZ, Defendant.	No. CR 163419 DEFENDANT'S POST-HEARING MEMORANDUM CONCERNING AGGRAVATING OR MITIGATING FACTORS UNDER A.R.S. SEC. 13-703 (Assigned to Judge D'Angelo)

Undersigned counsel, as attorney appointed to represent the Defendant upon resentencing respectfully submits to the Court the attached Memorandum of Points and Authorities specifically addressing with appropriate legal citations those critical fact issues developed for the first time at Defendant's resentencing in this matter.

PROSECUTOR'S ALLEGATION OF "ESPECIALLY HEINOUS, CRUEL, OR DEPRAVED", 13-703(f)(6).

The prosecution in the case at bar both by Supreme Court decision and prosecutorial election is limited to a lone allegation of a single but disjunctive aggravating factor: "especially heinous, cruel, or depraved". The prosecution must prove the factual existance of such aggravating factor by proof beyond a reasonable doubt through evidence whose admissibility is governed by the Arizona Rules of Evidence at

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criminal trials, see A.R.S. Sec. 13-703(c).

In this case, for purposes of resentencing, the prosecution has relied solely, but without specification, upon its evidence presented at the Defendant's original trial in this matter in 1987. It is the position of undersigned counsel that's under applicable law the prosecution has failed to carry its burden of proof to the requisite level of beyond a reasonable doubt as to its allegation of "especially heinous, cruel, and depraved" in this case.

At the Defendant's trial the following facts were established without dispute:

1. Effie Holmes was intentionally murdered by the Defendant.

2. Her cause of death were multiple stab wounds at least 23 in number.

3. She had died only after a long and bloody struggle and confrontation throughout her three room apartment.

4. That sometime concurrent with her death she was sexually assaulted vaginally.

5. That her assailant entered her apartment not by the broken window next to the fold-out bed, (the window was broken from the inside to outside).

6. Two small knives, one a two and one half inch paring knife (exh. 69) and a steak knife (exh. 70) were found in the kitchen recently washed of blood residue; either of

which was consistent with the stab wounds in Effie Holmes.

7. Her assailant was in fact wounded to at least some extent prior to or during the confrontation, (analysis of a quarter-sized blood pool left by chance inside the silverware drawer lead to serilogical identification).

8. When her remains were found upon the bed, a lace scarf had been forced into her mouth as a gag and her pajama bottoms were tied about her head apparently as a blindfold.

The sole aggravating factor alleged by the prosecution in this case is, legally, the most troublesome of all aggravating factors adopted by the many states in reinacting their death penalties following Furman v. Georgia, 408 U.S. 238 (1972). The non-legal terminology utilized by the Arizona Legislature has proven to be nothing but a breeder of confusion, discretion, and endless litigation and appeals of death penalties. Repeatedly the Federal Courts, applying an Eighth Amendment Standard, have determined that the words themselves, or similar expressions, are so hopelessly vague and imprecise as to be themselves inadequate to meet the Federal Constitutional Standard required by Furman v. Georgia, supra; see Proffitt v. Florida, 428 U.S. 242 (1976); Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988); and most recently Walton v. Arizona, ____ U.S. ____ (No. 88-7351, filed 6/27/90) and Moore v. Clarke, ____ F.2d ____ (CA No. 8, No. 88-2584, filed 5/25/90). The constitutionality of such aggravating factor therefore, as a matter of Federal Constitution, must be

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determined on the basis of a restricting and limiting interpretation of such phrase adopted by the State's Supreme Court and factually followed by the trial courts, see Proffitt, supra; Godfrey, supra; Maynard, supra; and Walton, supra. Failure of the State Courts to adopt and factually follow such restrictive standards, without exceptions, results in such factor being declared unconstitutional as the Eighth Circuit recently did to the Nebraska Standard of manifested exceptional depravity, Moore v. Clarke, supra.

What then is the restricted and limited judicial interpretation by Arizona Courts of the aggravating factor: "especially heinous, cruel, and depraved" and the required factual substantiation? According to the United States Supreme Court in Walton, supra, this aggravating factor is constitutional because:

> The Arizona Supreme Court stated that "a crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death, ". . . the [Arizona Supreme] Court rejected the State's argument that the six days Powell suffered after being shot constituted cruelty within the meaning of the statute. The Court pointed out that it has limited the cruelty circumstances in prior cases to situations where the suffering of the victim was intended by or foreseeable to the killer.
>
> In Maynard v. Cartwright, we expressed approval of a definition that would limit Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstances to murders involving "some kind of torture or physical abuse", 486 U.S. at 364-365, . . . THE CONSTRUCTION GIVEN BY THE ARIZONA SUPREME COURT TO THE CRUELTY ASPECT OF THE ARIZONA AGGRAVATING CIRCUMSTANCE IS VIRTUALLY

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IDENTICAL TO THE CONSTRUCTION WE APPROVED IN MAYNARD.

> . . .Nor can we fault the State Court's statement that a crime is committed in an especially "depraved" manner when the perpetrator "relishes the murder, evidencing debasement or perversion" or "shows an indifference to the suffering of the victim and evidences a sense of pleasure" in the killing.

See also State v. Adamson, 136 Ariz. 250, 665 P.2d 972 (1983): The Defendant must intend that the victim suffer or reasonably foresee that there will be a substantial likelihood that the victim will suffer as a consequence of the Defendant's acts. Under such a standard it is the Defendant's position that there is no evidence in the case at bar. That there are no acts or omissions of this Defendant, above and beyond those necessary to commit the crimes for which he was convicted by his jury, which can factually support even speculation of "some kind of torture or physical abuse" or a "situation where the suffering of the victim was intended by or foreseeable to the killer". Even the Arizona Supreme Court has noted repeatedly that all first degree murders are heinous, cruel and depraved to some extent, but it is the purpose of this aggravating factor to differentiate between those few cases deserving of the death penalty and those many which are the norm of first degree murders, see State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979).

From the evidence offered by Defendant at the recent hearing, the following undisputed facts are available to this Court in its determination:

1. Every stab wound suffered by Effie Holmes, in

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the opinion of Dr. Keen, an experienced expert and medical examiner, were clearly stab wounds intended to result in her death; there were no "gratuitous injuries" or injuries which he could even suggest as a basis for finding the intentional infliction of pain greater or different than that necessary to accomplish the murder, torture or other physical abuse unrelated to the murder.

2. There was no evidence of any physical restraint of Effie Holmes's arms or legs at any time prior to her death; in fact all forensic evidence of the scene strongly suggested a lengthy and continuing struggle, confrontation, or combat between Effie Holmes and her assailant.

3. That Effie Holmes may well have actively defended herself by striking her assailant, and possibly could have wheeled one of the knives washed;

4. That of all the wounds she received, many of which would have been fatal were clearly directed at vital organs of her body; it was only her slashed throat which would have incapacitated her from further confronting and struggling with her assailant.

5. That there was nothing in the State's proof or any of the evidence he reviewed which suggested that the assailant was aware of any better weapon or intentionally chose the small knife which was the fatal weapon in order to prolong the victim's suffering or ineffeciently effectuate her death.

Under such undisputed evidence, both as presented at

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trial and at this Court's hearing, undersigned counsel respectfully submits there is no evidence which could support even speculation, much less proof beyond a reasonable doubt, that the assailant of Effie Holmes did anything other than murder her as best he could without any expert or military training and using a weapon of opportunity, which was grossly inadequate to assure a swift and painless death of his physical equal who was literally fighting for her life.

As any military training instructor, and especially emphasized by Marine Corp D.Is. the taking of a human life is not like shown on TV. To effeciently - quickly, quietly and painlessly - kill a human being requires either: (1) an efficient weapon specifically designed for the taking of human life; (2) the training and expertise in the use of less efficient weapons; or (3) dumb luck. In the killing of Effie Holmes, this Defendant found himself without any of the three requirements. His weapon, a weapon of opportunity available in the house due to his lack of premeditation and preparation was grossly inefficient and not designed to take a human life like too many of the weapons used by the abjectly poor. But the Defendant had been released from prison less than two weeks before, had no employment, and was in fact living out of the backseat of his friend's car at the time of this crime. The Defendant has never had any weapons training, has never been involved in any military or para military organization simply because he has spent most of his adult life incarcerated. The number of stab wounds inflicted on Effie Holmes and the delay in her actual demise, on the evidence

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before this Court, is attributable solely to her determination in combatting her physically equal assailant whose weapon of opportunity was simply incapable of efficiently effectuating the murder which Defendant intended. See People v. Tuttle, Supra.

In such circumstances Defendant submits that the State has failed to prove the alleged aggravating factor as constitutionally interpreted by the United States Supreme Court by any evidence, much less proof beyond a reasonable doubt.

MITIGATING FACTORS:

DEFENDANT'S DIMINISHED CAPACITY DUE TO PATHOLOGICAL INTOXICATION.

The evidence submitted to this Court as to the mitigating factor of diminished capacity or mental impairment is obviously in conflict. The defense relies upon the original tentative diagnosis (speculated in 1987) authored by Dr. Otto Bendheim as substantially strengthened by his recent introduction and study of other incidences concerning the Defendant. The prosecution disputed Dr. Bendheim's diagnosis by calling Dr. Robert Dean as a contrary expert, despite no board certification and no personal or professional experience with pathological intoxication which he did acknowledge to be a recognized mental defect or disease.

This mitigating factor, in light of the conflict of expert testimony, must be determined by burden of proof.

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Defendant has established this mitigating factor if his evidence, i.e. that the qualifications and testimony of Dr. Otto Bendheim preponderates over that of Dr. Robert Dean; see A.R.S. Sec. 13-703(c). Undersigned counsel respectfully submits that this Court cannot constitutionally or statutorially impose upon this Defendant any higher burden than that ordinarily applied in civil cases which limits the tryer of fact to considerations of the evidence presented in Court through competing witnesses.

Judged upon such burden of proof requirement of preponderance of the evidence, undersigned counsel respectfully submits that Defendant has established this mitigating circumstance. Dr. Otto Bendheim's credentials and expertise in this area are clearly superior to those of Dr. Dean's. The initial basis and the growing evolution of Dr. Bendheim's diagnosis by subsequent revolation to him of other incidences can be contrasted with Dr. Dean's idiosyncratic requirement of absolute consistency of onset and refusal of the defense invitation to personally interview Defendant. When the evidence of the experts, as presented this Court, is weighed (without outside considerations), Defendant's evidence of mental impairment does perponderate.

DEFENDANT OVER HIS PAST INCARCERATION, HAS EVOLVED INTO A MODEL PRISONER:

This Court has a choice as to the sentence to impose on this Defendant. But whatever choice this Court makes it is beyond dispute that Defendant will spend the rest of his natural life in prison. If this Court imposes upon the

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Defendant a consecutive life sentence, the Defendant's earliest parole availability would be after his 87th birthday. If the Court imposes a death sentence, the Defendant will probably live just as long due to the reality that the one aggravating circumstance relied upon by the prosecution is the most troublesome legally and promises endless appeals and post-conviction litigation, each with its separate delay and stay.

In such circumstances this Court could not really consider or even weigh this Defendant's prospect for rehabilitation. But this Court can, and should heavily weigh this Defendant's prospect for adjusting to life time incarceration as compared with the tax payer expense of litigating a death penalty. While this Defendant did not begin his prison career, at 19, as a model prisoner; and overview of the Defendant's incarceration in Arizona Penal Institutions over the last nine years clearly demonstrates continuing progress in his adjustment and compliance with institutional confinement. Both the live testimony of Rick Bailey, as well as the Defendant's recent DOC work reports and progress statements clearly indicate that this Defendant may well now and for the past year be classified as a model inmate and limited burden on the correctional system of this State.

Upon the foregoing, and the Oral Argument which this Court has allowed undersigned counsel to advance on August 3, 1990; it is respectfully requested that this Court sentence this Defendant as required by properly interpreted statute to

life in prison with no possibility of parole for 25 calendar years.

RESPECTFULLY SUBMITTED this 19th day of July, 1990.

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EXHIBIT U

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,

PLAINTIFF,

V.

SAMUEL VILLEGAS LOPEZ,

DEFENDANT.

NO. CR163419

PUBLIC DEFENDER
JAN - 8 1991
APPEALS RECEIVED

PHOENIX, ARIZONA
JULY 13, 1990

BEFORE: THE HONORABLE PETER T. D'ANGELO, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PREPARED ON APPEAL
ORIGINAL
COPY

COLLEEN M. GRUNOW
RPR, CM, CSR

SUPERIOR COURT

1 A P P E A R A N C E S

2

3 FOR THE STATE: MR. PAUL AHLER, DEPUTY COUNTY ATTORNEY

4 FOR THE DEFENDANT: MR. GEORGE STERLING

5

6

7

8 I N D E X

WITNESS:	EXAMINATION BY:	ON PAGE:
PHILLIP E. KEEN	MR. STERLING	8
	MR. AHLER	30
	MR. STERLING	38

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1 P R O C E E D I N G S

2

3 THE COURT: CR163419, STATE OF ARIZONA

4 VERSUS SAMUEL VILLEGAS LOPEZ, PRESENTENCE HEARING.

5 MR. AHLER: PAUL AHLER ON BEHALF OF STATE

6 OF ARIZONA.

7 MR. STERLING: GEORGE STERLING ON BEHALF

8 OF DEFENDANT. YOUR HONOR, THE DEFENDANT IS PRESENT BEFORE

9 THE COURT IN CUSTODY.

10 THE COURT: MAY THE RECORD REFLECT THIS

11 IS THE RESENTENCE HEARING PURSUANT TO MANDATE OF SUPREME

12 COURT IN CR87-0184-88. YOU HAVE A WITNESS YOU WANT TO CALL,

13 SIR?

14 MR. STERLING: YES, YOUR HONOR, IF I

15 COULD. MAYBE WE CAN SHORTEN THIS BY PREPARATORY REMARKS

16 BECAUSE YOU HAVE DISCUSSED THIS MATTER WITH THE COUNTY

17 ATTORNEY AND THIS IS MATTER OF RESENTENCING. MY

18 UNDERSTANDING IS THAT IT IS THE BURDEN OF THE COUNTY

19 ATTORNEY TO DEMONSTRATE AT LEAST ONE AGGRAVATING FACTOR AT

20 THIS POINT IN TIME UNDER THE STATUTE SEVEN -- 13-703.

21 IN DISCUSSIONS WITH MR. AHLER HE HAS INFORMED

22 ME THAT HE INTENDS TO RELY AT THIS HEARING UPON EVIDENCE

23 PRESENTED AT TRIAL IN THE FORM IT WAS PRESENTED AT TRIAL IN

24 ORDER TO SUBSTANTIATE 703(F)6, ESPECIALLY HEINOUS, CRUEL AND

25 DEPRAVED. AND ONCE THEY DO THAT, I HAVE A MOTION, YOUR

1 HONOR.

2 THE COURT: ALL RIGHT. GO AHEAD. THAT

3 YOUR INTENTION, MR. AHLER?

4 MR. AHLER: YES, WE'RE GOING TO RELY ON

5 THE EVIDENCE, BOTH TESTIMONIAL AND PHYSICAL EVIDENCE

6 PRESENTED AT THE TRIAL, TO ESTABLISH THE AGGRAVATING FACTOR

7 UNDER 703(F)6.

8 THE COURT: I MIGHT STATE FOR THE RECORD

9 THAT THE SUPREME COURT HAS APPROVED THOSE FINDINGS ALREADY.

10 MR. STERLING: THAT IS ALSO MY

11 UNDERSTANDING, YOUR HONOR. HOWEVER, THAT RECORD THAT WAS

12 PRESENTED TO THE SUPREME COURT, IF THE COURT WILL RECALL IT,

13 THE ORIGINAL SENTENCING, THE DEFENSE AT THAT SENTENCING DID

14 NOT CHALLENGE THE AGGRAVATING FACTOR WITH ANY EVIDENCE,

15 TESTIMONY OR PHYSICAL EVIDENCE, AND BASICALLY LET IT GO UP

16 ON AN INADEQUATE RECORD.

17 THE COURT: AND YOU'RE ATTEMPTING TO

18 IMPROVE ON THAT RECORD, IS THAT MY UNDERSTANDING?

19 MR. STERLING: YES, YOUR HONOR. IN FACT,

20 AT THIS POINT IN TIME, BASED UPON THE FACTS SUBMITTED BY THE

21 STATE AT THE TRIAL, I WOULD MAKE A MOTION TO THE COURT FOR A

22 DIRECTED VERDICT -- PARDON ME, I AM GOING TO TALK IN TERMS

23 OF TRIAL BECAUSE THE ARIZONA SUPREME COURT HAS PREVIOUSLY

24 RULED THAT THE 703 RESENTENCE HEARING IS, IN ESSENCE, A

25 TRIAL FOR PURPOSES OF DOUBLE JEOPARDY AND PROCEDURALLY, FOR

1 THE PROSECUTION AT LEAST.

2 I WOULD MAKE A MOTION AT THIS TIME FOR

3 DOUBLE -- OR DIRECTED VERDICT ON THE FACT THAT THERE WAS NO

4 EVIDENCE SUBMITTED AT THE ORIGINAL TRIAL INDICATING THAT

5 THIS MURDER ITSELF, THE CRIME OF MURDER WAS ACCOMPLISHED.

6 THERE IS NO EVIDENCE TO SUPPORT AN ADDITIONAL FINDING OF

7 CRUEL, HEINOUS, OR DEPRAVITY, AND CLEARLY NONE TO SHOW THE

8 ESPECIALLY HEINOUS, CRUEL, AND DEPRAVED REQUIRED BY 703(F)6.

9 THE COURT: YOUR RESPONSE?

10 MR. AHLER: YOUR HONOR, THERE WAS MORE

11 THAN ADEQUATE EVIDENCE PRESENTED, IN PARTICULAR, COURT'S

12 SPECIAL VERDICT WHEN IT RENDERED THE DEATH SENTENCE BACK IN

13 1987 CLEARLY OUTLINED THE FACTS WHICH THE COURT RELIED UPON

14 IN RULING ON BOTH CRUELTY AND HEINOUSNESS AND DEPRAVITY.

15 THE ARIZONA SUPREME COURT HAS UPHELD BOTH OF THOSE FINDINGS.

16 THE COURT: WELL, THREE OF THEM.

17 MR. AHLER: CORRECT. AND THE UNITED

18 STATES SUPREME COURT JUST RECENTLY RULED THAT THE FACTORS

19 THAT THE ARIZONA STATE SUPREME COURT UTILIZES IN DETERMINING

20 THAT AGGRAVATING FACTOR ARE CONSTITUTIONALLY SOUND. WE

21 WOULD THEREFORE ASK THAT YOU DENY THIS MOTION.

22 THE COURT: ANYTHING FURTHER?

23 MR. STERLING: THE ONLY REBUTTAL, YOUR

24 HONOR, AS I HAVE POINTED OUT PREVIOUSLY IN CONFERENCE WITH

25 THE COURT, NO ONE AS WE STAND HERE TODAY, CAN TELL US WHAT

1 WENT ON IN THAT APARTMENT. THERE IS NO EVIDENCE. THERE IS
2 ON APPEAL WHAT WAS CHALLENGED WAS THE CONSCIOUSNESS OF THE
3 VICTIM. THAT IS ONE THING I DID HAVE A RECORD ON. AND THE
4 COURT OVERRULED THAT SAYING THAT THERE ARE PHOTOGRAPHS
5 SHOWING VERTICAL BLOOD DRAWINGS OF THE VICTIM TO INDICATE
6 CONSCIOUSNESS DURING THE STRUGGLE. THEIR WORDS, NOT MINE.
7 THAT IS THE BASIS OF OUR MOTION. WHAT WE DO KNOW AND WHAT
8 THE EVIDENCE SHOWS WAS THERE WAS A STRUGGLE INSIDE THAT
9 HOME.
10 THE COURT: A MASSIVE STRUGGLE.
11 MR. STERLING: A MASSIVE, A BRUTAL
12 STRUGGLE, A VINDICTIVE STRUGGLE, A VILE STRUGGLE, AN
13 EXTENDED STRUGGLE, CALL IT WHATEVER YOU WANT. BUT THERE'S
14 NO SHOWING, NO ONE CARVED BONZAI IN HER BACK. NO ONE CUT
15 EFFIE HOLMES IN A MANNER OTHER THAN TO MURDER HER. SHE WAS
16 NEVER BOUND AND TORTURED WITH CIGARETTES. HER GENITALIA WAS
17 NEVER STAPLED LIKE OTHER CASES IN ARIZONA WHERE TORTURING
18 AND DEPRAVITY AND HEINOUSNESS AND CRUELTY HAVE BEEN DEFINED.
19 THE COURT: DIDN'T SHE HAVE SOMETHING
20 STUFFED IN HER MOUTH?
21 MR. STERLING: YES, YOUR HONOR, BUT THAT
22 STUFFING WAS NOT -- STOPPING SOMEONE FROM SCREAMING IS NOT
23 THE KIND OF RESTRAINT, IT IS NOT THE KIND OF IMPRISONMENT
24 AND THE LOCKING UP --
25 THE COURT: ALL RIGHT. YOU WISH TO MAKE

1 ANY FURTHER RECORD SUPPORTING YOUR MOTION FOR DIRECTED
2 VERDICT?
3 MR. STERLING: THAT IS MY RECORD, YOUR
4 HONOR, AT THIS POINT IN TIME FOR THE MOTION.
5 THE COURT: MOTION IS DENIED.
6 MR. STERLING: ALL RIGHT. YOUR HONOR, AT
7 THIS TIME WE WOULD CALL DR. PHILLIP KEEN.
8 THE COURT: COME FORWARD AND GIVE YOUR
9 NAME AND BE SWORN, PLEASE. REMIND ME TO DEAL WITH THESE
10 VARIOUS -- YOU HAVE THREE SEPARATE MOTIONS, I BELIEVE?
11 MR. STERLING: YES, YOUR HONOR, IF I CAN.
12 I THINK IT WILL SAVE COUNSEL SOME TIME. AS TO THE FIRST TWO
13 FOR JURY SENTENCING AND JURY DETERMINATION OF THE
14 AGGRAVATING FACTOR, HE REFERRED TO ARIZONA VERSUS WALTON FEW
15 SECONDS AGO. WHAT DO I SAY? I'M OUTVOTED BY FIVE TO FOUR.
16 BOTH MOTIONS.
17 AS TO THE REMAINING MOTION, I INTEND TO AMPLIFY
18 THAT AND THAT WAS MAINLY A MEMORANDUM ON THE CRUEL, HEINOUS,
19 AND DEPRAVITY, BECAUSE IT IS MY OPINION THAT WALTON IN FACT
20 DID RESTRICT THE INTERPRETATION OF CRUEL, HEINOUSNESS, AND
21 DEPRAVITY.
22 THE COURT: ALL RIGHT. REMIND ME I, WANT
23 TO GET THROUGH THE TESTIMONY, BUT FIRST THING THIS AFTERNOON
24 WE'LL DEAL WITH MOTIONS.
25

1 PHILLIP EARL KEEN, M.D.,
2 CALLED AS A WITNESS HEREIN, HAVING BEEN FIRST DULY SWORN,
3 WAS EXAMINED AND TESTIFIED AS FOLLOWS:
4
5 EXAMINATION
6 BY MR. STERLING:
7 Q. SIR, WOULD YOU STATE YOUR NAME FOR COURT AND
8 COUNSEL?
9 A. PHILLIP EARL KEEN, M.D.
10 Q. AND MR. KEEN, PARDON ME, DR. KEEN, ARE YOU IN
11 FACT A LICENSED MEDICAL PRACTITIONER IN THE STATE OF
12 ARIZONA?
13 A. YES, SIR, I AM.
14 Q. AND ARE YOU CURRENTLY PRACTICING?
15 A. YES.
16 Q. WHAT DO YOU PRACTICE AS?
17 A. I PRACTICE AS A PATHOLOGIST WITH SPECIALTY
18 AREAS OF ANATOMIC CLINICAL AND FORENSIC CLINICAL PATHOLOGY.
19 Q. ARE YOU CURRENTLY EMPLOYED IN THAT SPECIALTY?
20 A. I'M TECHNICALLY SELF-EMPLOYED AS AN INDEPENDENT
21 CONTRACTOR AND I HOLD SEVERAL POSITIONS.
22 Q. AND WHAT ARE THOSE POSITIONS?
23 A. I AM THE MEDICAL EXAMINER FOR YAVAPAI COUNTY.
24 I AM THE LABORATORY DIRECTOR FOR YAVAPAI REGIONAL MEDICAL
25 CENTER IN PRESCOTT AND THE DIRECTOR OF A PRIVATE LABORATORY,

1 BRADSHAW MOUNTAIN DIAGNOSTIC LABORATORY IN PRESCOTT AND
2 CONSULTATION PATHOLOGIST AT THE WHIPPEL V. A. HOSPITAL IN
3 PRESCOTT AND THE LABORATORY DIRECTOR AND PATHOLOGIST FOR THE
4 LEWIS R. PYLE MEMORIAL HOSPITAL IN PAYSON, AND I AM A DEPUTY
5 MEDICAL EXAMINER FOR MARICOPA COUNTY.
6 Q. AND WHEN WE USE THE TERM MEDICAL EXAMINER,
7 WE'RE TALKING ABOUT A CORONER, AM I CORRECT?
8 A. THERE'S A DISTINCTION. THEY HAVE SIMILAR
9 OVERLAPPING DUTIES, BUT A CORONER DOES NOT NECESSARILY
10 REQUIRE ANY MEDICAL TRAINING, WHEREAS MEDICAL EXAMINERS DO
11 REQUIRE BACKGROUND IN MEDICINE.
12 Q. AND SO YOU WERE USED TO DOING AUTOPSIES ON
13 INDIVIDUALS IN ARIZONA WHO HAVE MET DEATH IN UNFORTUNATE
14 CIRCUMSTANCES, BOTH UNEXPLAINED AND HOMICIDES, AM I CORRECT?
15 A. YES.
16 Q. CAN YOU GIVE US AN IDEA OF HOW MANY AUTOPSIES
17 YOU HAVE PERSONALLY PERFORMED IN THE STATE OF ARIZONA?
18 A. I DO PROBABLY OF THE ORDER OF ANYWHERE FROM 75
19 TO 150 A YEAR, AND I HAVE BEEN IN ARIZONA FOR 16 YEARS NOW
20 ALMOST.
21 Q. OKAY. DR. KEEN, AM I ALSO -- WELL, YOU HAVE
22 ALSO FROM TIME TO TIME BEEN CALLED UPON TO REVIEW THE
23 AUTOPSIES AND THE -- FORENSIC FINDINGS OF OTHER PATHOLOGISTS
24 IN THIS STATE, AM I CORRECT?
25 A. THAT IS CORRECT.

1 Q. AND YOU HAVE TESTIFIED, HAVE YOU NOT, IN A
2 NUMBER OF COURTS IN THIS STATE AND THE FEDERAL SYSTEM?
3 A. YES.
4 Q. AND HAVE YOU TESTIFIED AS AN EXPERT IN FORENSIC
5 PATHOLOGY IN THOSE CASES?
6 A. YES, I HAVE.
7 Q. CAN YOU GIVE US AN IDEA OF HOW MANY TIMES YOU
8 HAVE TESTIFIED, AT LEAST IN THE COURTS OF ARIZONA, AS AN
9 EXPERT IN FORENSIC PATHOLOGY?
10 A. WELL, I DON'T KNOW THE NUMBER, BUT SUMMARIZE IT
11 IN PERHAPS A DIFFERENT WAY. EVERY TIME I HAVE TESTIFIED IN
12 THE COURTROOM IN THE STATE OF ARIZONA WITH EXCEPTION OF TWO
13 CIVIL ACTIONS HAS BEEN IN THE MATTER OF FORENSIC PATHOLOGY.
14 AND IT REALLY DEPENDS UPON CASE LOAD. IT'S SOME EVERY YEAR.
15 Q. OKAY. WOULD YOU AGREE WITH ME THAT THAT'S MORE
16 THAN 50 AT LEAST?
17 A. I DON'T EVEN KNOW IT'S BEEN THAT MANY. SEVERAL
18 TIMES. IN MY TOTAL CAREER OUTSIDE THE STATE OF ARIZONA
19 INCLUDING ALL OF THE STATES WHERE I HAVE PRACTICED FORENSIC,
20 IT'S WELL IN EXCESS OF 50.
21 Q. I CONTACTED YOU IN THIS CASE, DID I NOT, AND
22 ASKED YOU TO REVIEW CERTAIN DOCUMENTS AND RENDER AN OPINION
23 ON A VERY LIMITED NATURE IN THIS CASE, IS THAT CORRECT?
24 A. THAT'S CORRECT.
25 Q. I'D LIKE TO SHOW YOU, JUST SET THE BASIS FOR

1 IT, IF I CAN, I'D LIKE TO -- LIKE YOU TO REVIEW EXHIBITS 1
2 THROUGH 6 THAT I HAVE HAD MARKED FOR THIS HEARING. AND ASK
3 YOU IF IN FACT THOSE ARE THE VERY DOCUMENTATION THAT I
4 PROVIDED TO YOU AS A BASIS FOR YOUR EXPERT OPINION IN MY
5 AREA OF INQUIRY.
6 A. YES. THESE ARE THE DOCUMENTS.
7 Q. OKAY.
8 MR. STERLING: YOUR HONOR, FOR THAT
9 PURPOSE AND THAT PURPOSE ALONE AT THIS POINT, I WOULD OFFER
3
10 INTO EVIDENCE EXHIBITS 1 THROUGH 6 AS A BASIS OF HIS EXPERT
11 OPINION THAT HE'S GOING TO OFFER FROM THIS POINT ON.
12 MR. AHLER: COULD WE HAVE THE WITNESS
13 IDENTIFY WHAT THE DOCUMENTS ARE?
14 THE WITNESS: AND ONE SLIGHT CORRECTION
15 BECAUSE I ONLY SAW FIVE DOCUMENTS HERE. THE FIRST DOCUMENT
16 IS THE REPORT OF INVESTIGATION BY THE MEDICAL EXAMINER WHICH
17 IS THE PROTOCOL FROM THE MEDICAL EXAMINER'S OFFICE FROM THE
18 CASE AS IT WAS PERFORMED BY DR. JARVIS. NUMBER TWO IS A
19 TRANSCRIPT OF DR. JARVIS' TESTIMONY AT TRIAL. NUMBER THREE
20 IS A SUMMARY OF THE CITY OF PHOENIX POLICE DEPARTMENT
21 REPORTS RELATIVE TO THE INVESTIGATION OF ESTEFAN HOLMES.
22 NUMBER FOUR IS TWO PAGE INTRODUCTION AND THEN A PHOTO
23 REPRODUCTION OF A KNIFE AND NUMBER FIVE IS SIMILAR, A
24 DIFFERENT KNIFE.
25 Q.(BY MR. STERLING): PARDON ME. I DID MISSPEAK,

1 DR. KEEN. IT IS FIVE DOCUMENTS THAT I PROVIDED YOU. ARE
2 THOSE IN FACT THE FIVE THAT -- THE ACTUAL DOCUMENTS?
3 A. YES, THOSE ARE.
4 MR. AHLER: I HAVE NO OBJECTION.
5 THE COURT: ONE THROUGH FIVE RECEIVED FOR
6 PURPOSES HERE.
7 (THEREUPON, EXHIBITS 1 THROUGH 5 WERE
8 RECEIVED INTO EVIDENCE.)
9 Q.(BY MR. STERLING): NOW, DOCTOR, BEFORE YOU TOOK
10 THE STAND TODAY IN ORDER TO EXPEDITE THIS, I ALSO -- YOU
11 HAVE BEEN -- BACK UP. START WITH THE BASIC QUESTION.
12 TUESDAY, I BELIEVE OF THIS WEEK, PAUL AHLER AND
13 I INTERVIEWED YOU IN SOME DETAIL, AM I CORRECT?
14 A. YES.
15 Q. DURING THAT INTERVIEW YOU SAID THAT THAT WAS
16 SUFFICIENT FOR YOU TO MAKE SOME OPINIONS ON THIS MATTER BUT
17 YOU WOULD LIKE TO LOOK AT THE PHOTOGRAPHS.
18 A. YES.
19 Q. AND AM I CORRECT THAT THIS MORNING YOU HAVE HAD
20 AN OPPORTUNITY TO AT LEAST VERY QUICKLY REVIEW THE
21 PHOTOGRAPHS?
22 A. YES.
23 Q. HAVE THEY HELPED YOU?
24 A. THEY JUST SUBSTANTIATE MY PREVIOUS FINDINGS
25 WITH PERHAPS ONE ADDITIONAL ASSIST.

1 Q. OKAY. FOR THE RECORD WOULD YOU READ TO THE --
2 WOULD YOU TELL THE COURT AND JURY WHICH ONES OF THE
3 ORIGINALLY MARKED PHOTOGRAPHS YOU REVIEWED? PARDON ME, FOR
4 THE RECORD.
5 YOUR HONOR, RATHER THAN REMARK EVERYTHING
6 THAT'S BEEN PREVIOUSLY MARKED, I THOUGHT IT WOULD BE JUST AS
7 EASY TO REFER BACK TO OLD MARKINGS. IS THIS OKAY WITH THE
8 COURT?
9 MR. AHLER: I HAVE NO OBJECTION.
10 THE COURT: FINE. ONE THROUGH FIVE ARE
11 NOT THE ORIGINAL ONE THROUGH FIVE?
12 MR. STERLING: ONE THROUGH FIVE ARE FOR
13 THIS HEARING TODAY.
14 THE COURT: ALL RIGHT. THESE OTHER
15 NUMBERS WILL BE AS PREVIOUSLY NUMBERED DURING THE COURSE OF
16 THE TRIAL.
17 MR. STERLING: IN THE 1987, YES, YOUR
18 HONOR.
19 THE COURT: ALL RIGHT.
20 THE WITNESS: THEN FOR IDENTIFICATION
21 REQUIRE THE CR NUMBER AS WELL AS THE EXHIBIT NUMBER?
22 Q.(BY MR. STERLING): NO, JUST THE EXHIBIT NUMBERS
23 OF THE PHOTOGRAPHS.
24 A. OKAY. EXHIBIT NUMBER 5, 7, 8, 14, 10, 11, AND
25 9.

1 Q. ALL RIGHT. DR. KEEN, YOU ALSO WENT THROUGH ALL
2 THE OTHER PHOTOGRAPHS TO SEE IF THERE WERE ANY OTHER
3 PHOTOGRAPHS THAT DEAL WITH THE POSITIONING OF THE STAB
4 WOUNDS, THE BODY OR ANYTHING LIKE THAT, AM I CORRECT?
5 A. I LOOKED VERY QUICKLY THROUGH MOST OF THEM, NOT
6 EVERY ONE OF THEM, BUT MOST OF THEM. I IGNORED THE ONES
7 THAT WERE RELATING TO THE SCENE. I WAS LOOKING FOR THE ONES
8 RELATING TO THE BODY OF THE DECEASED.
9 Q. NOW, YOU ALSO HAD -- YOU WERE MADE PRIVY TO THE
10 TESTIMONY OF DR. JARVIS AS ORIGINALLY OFFERED?
11 A. YES.
12 Q. IN SUMMARY, WAS THERE ANYTHING THAT YOU FOUND
13 THAT DR. JARVIS TESTIFIED TO IN THE PRECEEDING TRIAL TO
14 WHICH YOU DO NOT AGREE?
15 A. NO.
16 Q. IN OTHER WORDS, EVERY WOUND SUFFERED BY
17 ESTEFANA HOLMES WAS A PREMORTEM WOUND, AM I CORRECT?
18 A. PREMORTEM IS, WE ALSO -- AS I ALSO INDICATED TO
19 BOTH COUNSEL IN THE INTERVIEW, IF I DEFINE MY PREMORTEM AS
20 PERIMORTEM, MEANING THAT THEY ARE IN THIS IMMEDIATE TIME
21 FRAME OF AROUND AND SURROUNDING DEATH, YES. I THINK THAT'S
22 WHAT HE MEANT AS WELL.
23 Q. IN OTHER WORDS, THERE WAS NO WOUND ON THE
24 REMAINS OF EFFIE HOLMES THAT YOU FOUND THAT WERE INFLICTED
25 AFTER DEATH, AFTER SHE CEASED LIVING?

1 A. NOT AT ANY SUBSTANTIAL TIME AFTER DEATH, NO.
2 Q. NOW, DID YOU FIND -- WELL, LET ME GO BACK.
3 THERE WERE A NUMBER OF WOUNDS ON EFFIE HOLMES, AM I CORRECT?
4 A. YES.
5 Q. THE -- I HAVE SEEN THAT NUMBER ESTIMATED
6 ANYWHERE FROM 23 TO 37. DO YOU HAVE A SOLID NUMBER OF
7 WOUNDS ON EFFIE HOLMES?
8 A. NO, I DO NOT.
9 Q. ALL RIGHT. DID DR. JARVIS HAVE A SOLID NUMBER
10 OF WOUNDS?
11 A. I BELIEVE HIS TESTIMONY WAS, AS I RECALL, AT
12 LEAST 23.
13 Q. OKAY. NOW, I SENT YOU THE PICTURES I SENT TO
14 YOU, EXHIBITS 4 AND 5, THOSE ARE IN FACT THE LAST PAGE OF
15 EACH OF THOSE IS A PICTURE OF A GIVEN KNIFE. AM I CORRECT?
16 A. YES.
17 Q. AND DR. JARVIS ORIGINALLY TESTIFIED THAT THOSE
18 KNIVES WERE CONSISTENT WITH THE WOUNDS THAT HE OBSERVED ON
19 EFFIE HOLMES. AM I CORRECT?
20 A. YES.
21 Q. YOU REACHED THE SAME CONCLUSION?
22 A. YES, THEY ARE CONSISTENT WITH THE WEAPON THAT
23 WOULD BE NECESSARY TO INFLICT THE WOUNDS THAT WERE OBSERVED.
24 Q. ALL RIGHT. I'M GOING TO SHOW YOU WHAT WAS
25 MARKED IN THE ORIGINAL PROCEEDINGS AS EXHIBIT 69 AND EXHIBIT

1 70. ASK YOU TO OPEN THOSE AND LOOK AT THE KNIVES AND SEE IF
2 THOSE CONFIRM, IF YOU WERE ABLE TO CONFIRM THAT THOSE ARE
3 CONSISTENT WEAPONS.
4 A. 69 CORRESPONDS TO TODAY'S DOCUMENT, NUMBER 4,
5 AND 70 CORRESPONDS TO DOCUMENT NUMBER FIVE AND THEY ARE
6 CONSISTENT.
7 Q. AND IF I AM CORRECT -- I'M GOING TO SUMMARIZE
8 THIS -- THOSE ARE BOTH EITHER A PARING KNIFE OR SMALL
9 KITCHEN KNIFE, AM I CORRECT?
10 A. YES.
11 Q. ALL RIGHT. THE WOUNDS THAT YOU OBSERVED IN THE
12 PROTOCOL, THE AUTOPSY PROTOCOL, THE TESTIMONY AS WELL AS THE
13 PICTURES, ARE CONSISTENT WITH THOSE INSTRUMENTS, AM I
14 CORRECT?
15 A. YES.
16 Q. NOW, HOW DID ESTEFANA HOLMES DIE? WHAT WAS THE
17 ACTUAL MECHANISM OF HER DEATH, IF YOU CAN TELL US?
18 A. HER MECHANISM OF DEATH IS BLEEDING FROM THE
19 STAB WOUNDS. THE PRECISE PATHOPHYSIOLOGY OF HER DEMISE IS
20 PROBABLY ONE OF CARDIAC TAMPONADE FROM THE BLEEDING AROUND
21 THE HEART WITH PROGRESSIVE -- PROGRESSIVE DIMINUTION IN
22 CARDIAC OUTPUT. BUT SHE HAS MASSIVE BLEEDING RELATED TO THE
23 STAB WOUNDS.
24 Q. NOW, TO EXPLAIN THAT, IT'S -- THE HEART IS IN A
25 SACK, AM I CORRECT?

17

1 A. YES.
2 Q. IT'S A -- ALL RIGHT. AND THE HEART BEATS
3 INSIDE THAT SACK SO THAT THERE IS KINETIC MOVEMENT, AM I
4 CORRECT?
5 A. THAT'S CORRECT.
6 Q. IF YOU FILL THAT SACK WITH FLUID, ANY FLUID,
7 THE HEART IS UNABLE TO EXPAND AND CONTRACT SO AS TO PUMP
8 BLOOD?
9 A. WELL, IT RESTRICTS ITS ABILITY, DEPENDS UPON
10 HOW RAPIDLY FLUID AMBULATES AND HOW MUCH STRETCHING ABILITY
11 IS. YES, AS YOU COMPRESS WITH FLUID OUTSIDE THE HEART, YOU
12 RESTRICT THE ABILITY OF THE HEART CHAMBERS TO FILL WITH
13 FLUID, SO YOU PROGRESSIVELY DECREASE CARDIAC OUTPUT.
14 Q. AND YOU MEAN THE FLOW OF BLOOD?
15 A. FLOW OF BLOOD FROM THE HEART.
16 Q. WITH LACK OF BLOOD THE BRAIN DIES, CORRECT?
17 A. CORRECT.
18 Q. WOULD THAT BE AN INSTANTANEOUS DEATH?
19 A. NO.
20 Q. HOW MUCH TIME ARE WE TALKING ABOUT THAT IT
21 WOULD TAKE A PERSON TO DIE UNDER THAT METHOD, THAT MECHANIC,
22 THAT --
23 A. IT DEPENDS UPON THE RATE AT WHICH THAT FLUID
24 ACCUMULATES. SO THAT IS REALLY A VARIABLE. AND YOU CAN'T
25 SAY WITH ANY GREAT PRECISION X NUMBER OF MINUTES.

1 Q. OKAY. IS THERE ANY INDICATION TO YOU IN ANY OF
2 THE REPORTS YOU HAVE SEEN THAT THERE WAS ANY PERIOD OF TIME
3 IN WHICH THERE WAS A LOSS OF CONSCIOUSNESS WHILE SHE WAS
4 RECEIVING THESE WOUNDS?
5 A. I DON'T SEE --
6 Q. IS THERE ANYTHING YOU SAW --
7 A. I DON'T SEE ANYTHING IN THE REPORT THAT WOULD
8 ALLOW ME TO MAKE A DECISION ONE WAY OR THE OTHER ABOUT
9 CONSCIOUSNESS.
10 Q. WELL, WE DID A LONG ARGUMENT IN THE INTERVIEW
11 ABOUT THIS. THERE IS BLOOD ON A VERTICAL FLOW LINE DOWN
12 EFFIE HOLMES?
13 A. YES. BUT THE THINGS TO INDICATE CONSCIOUSNESS,
14 DEFENSIVE WOUNDS, VERTICAL BLOOD SMEARS, BUT I DON'T HAVE
15 ANYTHING IN THE PROTOCOL THAT INDICATES THE POINT IN TIME TO
16 PINPOINT LOSS OF CONSCIOUSNESS.
17 Q. OKAY. IS THERE ANYTHING THAT YOU FOUND IN THE
18 PROTOCOL OR ANY OF THESE OTHER THINGS THAT I HAVE SHOWN YOU,
19 INCLUDING THE PICTURES, THAT WOULD INDICATE TO YOU ANY TYPE
20 OF A SUBMISSION BY ESTEFANA HOLMES TO A BLOW OF ANY TYPE, A
21 COUP DE GRAS?
22 A. NO.
23 Q. NOW, OF THESE 23, AT LEAST, STAB WOUNDS, COULD
24 YOU DESCRIBE FOR THE COURT WHERE THEY WERE?
25 A. WITH -- YES. WITH TWO EXCEPTIONS, THEY'RE ALL

1 CONCENTRATED IN WHAT I WOULD CONSIDER A POTENTIALLY VITAL
2 AREA. THEY'RE CONCENTRATED IN -- MOST OF THEM IN THE LEFT
3 THORAX INVOLVING LUNG AND HEART ULTIMATELY IN THE DEPTHS OF
4 PENETRATION OR IN THE HEAD AND NECK AREA AND --
5 Q. WE'RE TALKING HERE?
6 A. I'M TALKING, YES, FROM WITHIN THE RIB CAGE
7 UPWARD AND CONCENTRATED TO MOSTLY TO THE LEFT OF THE
8 MIDLINE. THE ONLY OTHER TWO PATTERN OF WOUNDS ARE SOME
9 DEFENSIVE WOUNDS ON THE ULNAR SURFACES OF A FOREARM AND
10 SOMEWHAT CLARIFIED BY A PHOTO TODAY IS THE LOCALIZATION OF
11 THE SUPERFICIAL ABDOMINAL WOUNDS WHICH ARE IN THE VICTIM'S
12 LEFT SIDE BUT ARE VIRTUALLY IN THE SAME PLANE AS THOSE THAT
13 WERE DIRECTED TO THE BREAST, LUNG AND CARDIAC AREA, NAMELY
14 AGAIN TO THE LEFT OF THE MID-LINE BUT FURTHER DOWN IN THE
15 ABDOMEN BUT NOT AS DEEP.
16 Q. IF I CAN LET ME BREAK THOSE INTO THREE GROUPS.
17 ONE IS THE PATTERN HERE.
18 A. OKAY.
19 Q. ONE ARE THE THREE WOUNDS DOWN HERE IN THE
20 ABDOMEN. SAME PLANE. AND THE THIRD GROUP IS THE DEFENSIVE
21 WOUNDS. CORRECT ME IF I'M WRONG, BUT THERE'S TWO WOUNDS
22 ALSO TO THE SCALP, ARE THERE NOT?
5
23 A. WELL, WE HAVE HEAD AND NECK. WE HAVE TWO SCALP
24 WOUNDS AND WE HAVE A CUT THROAT.
25 Q. OKAY. NOW, DEALING WITH THE HEAD WOUND -- LET

20

1 ME BACK UP. LET'S TAKE THEM BY GROUPS. THE FIRST GROUP,
2 THE STAB WOUNDS THAT WERE IN THE UPPER THORACIC LEFT, THOSE
3 WERE PENETRATING WOUNDS, WERE THEY NOT?
4 A. YES, THEY WERE.
5 Q. SEVERAL OF THEM PENETRATED HER LUNGS?
6 A. CORRECT.
7 Q. THOSE WOULD HAVE BEEN FATAL, WOULD THEY NOT?
8 A. UNTREATED OVER TIME, THEY WOULD HAVE ALL HAVE
9 BEEN -- MANY OF THEM WOULD HAVE BEEN FATAL.
10 Q. BUT IF I'M CORRECT, A LUNG WOUND, BLEEDING LUNG
11 WOUND IS A SLOW METHOD OF DEATH, IS IT NOT?
12 A. YES. IN GENERAL.
13 Q. BECAUSE THE LUNG HAS TO FILL WITH BLOOD TO
14 PREVENT OXYGEN. THE LUNG CONTINUES TO FUNCTION UNTIL IT --
15 A. TWO FASHION. YOU EITHER COMPROMISE THE
16 RESPIRATORY RESERVE BY FILLING UP THE AIR SACKS WITH FLUID
17 OR YOU LOSE FLUID SO THAT YOU -- AGAIN THAT'S JUST HAPPENS
18 TO BE THE RECEPTACLE FOR THE LOSS OF BLOOD.
19 Q. BUT THAT FIRST GROUP, THE LUNG WOUNDS, WOULD
20 HAVE BEEN A VERY SLOW DEATH, BUT WOULD HAVE BEEN FATAL, LEFT
21 UNTREATED?
22 A. CORRECT.
23 Q. ALSO IN THAT GROUP THERE ARE THREE WOUNDS THAT
24 PENETRATED -- IT'S NOT THE PERITONEAL, IT'S THE SACK?
25 A. PERICARDIAL.

Q. PERICARDIAL SACK AROUND THE HEART. AND THEY ACTUALLY STAB THE HEART, DID IT NOT?

A. THAT'S CORRECT.

Q. SO THE HEART BEGAN TO BLEED?

A. YES.

Q. INSIDE THAT SACK?

A. YES.

Q. NOT FROM THE INTERIOR CHAMBER, BUT THE MUSCLE THAT WAS THE HEART BEGAN TO BLEED. IS THAT MY UNDERSTANDING?

A. THE DEPTH IS SUCH THAT IT COULD ACTUALLY BE FROM THE INTERIOR CHAMBER, BUT IT WOULDN'T BE A CONTINUOUS FLOW. IT WOULD BE INTERMITTENT RELATIVELY TO THE CONTRACTION AND RELAXATION OF THE MUSCLE OF THE HEART ITSELF.

Q. ALL OF THOSE APPEARED TO BE AN ATTEMPT TO MURDER SOMEONE, DID THEY NOT, TO CAUSE THEM TO DIE?

A. I WOULD INTERPRET THEM SUCH, YES.

Q. DID YOU FIND ANY WOUND AMONG THAT GROUP WHICH WAS NOT FATAL OR AT LEAST APPEARED TO BE AN ATTEMPT AT A FATAL WOUND TO STAB SOMEBODY IN A VITAL AREA?

A. NO. THOSE ARE ALL DIRECTED TOWARDS A VITAL AREA. SOME OF THEM GO DEEPER THAN OTHERS AND SOME OF THEM WERE MORE EFFECTIVE AT ACCOMPLISHING THAT INTENT THAN OTHERS. BUT THEY WERE ALL CLUSTERED IN A POTENTIALLY VITAL

1 LETHAL PATTERN.

2 Q. NOW, HOW ABOUT LET'S MOVE FROM THAT -- NONE OF

3 THOSE WERE GRATUITOUS VIOLENT OR GRATUITOUS WOUNDS THAT

4 IMPRESSED YOU WITH BEING INFLICTED SOLELY TO CAUSE PAIN,

5 WERE THEY?

6 A. NO.

7 Q. WAS THERE ANYTHING ABOUT ANY OF THOSE WOUNDS

8 THAT YOU SAW THAT WOULD CAUSE YOU, AS A TRAINED AND

9 EXPERIENCED PATHOLOGIST, TO SAY SOMEBODY WAS POKING HER WITH

10 A KNIFE, SOMEBODY WAS TAUNTING HER OR ANYTHING LIKE THAT?

11 IS THERE ANYTHING ON THOSE WOUNDS?

12 A. NOTHING TO NECESSARILY SAY THAT, NO.

13 Q. NOW, MOVING -- I WANT TO JUMP AROUND. THIS

14 HEAD AND NECK. THE HEAD WOUNDS WENT ALL THE WAY TO THE

15 SKULL, DID THEY NOT?

16 A. YES.

17 Q. DID THAT ALLOW YOU, AS THE PATHOLOGIST, TO

18 REACH A CONCLUSION THAT WHAT WAS BEING ATTEMPTED AS A

19 STABBING IN THE HEAD BUT THE SKULL WAS PROTECTING THE BRAIN?

20 A. THAT IS ESSENTIALLY CONSISTENT WITH THAT THEY

21 ARE RATHER LARGE, GAPING, CURVED WOUNDS WHICH ARE NOT JUST

22 MERELY FLAT SURFACE CUTS, THEY ARE A CUT AFTER A STAB.

23 Q. IN OTHER WORDS, SOMEBODY IS TRYING TO STAB

24 SOMEBODY THROUGH THE SKULL, THE SKULL --

25 A. WELL, THEY'RE CONSISTENT WITH THAT, YES.

1 Q. OKAY. NOW, THE DEFENSIVE WOUNDS WE HAVE TALKED
2 ABOUT, AND I WANT TO DISCOUNT THOSE FOR NOW. DURING YOUR
3 INTERVIEW WE HAD GREAT DEAL DIFFICULTY WITH THE THREE
4 ABDOMINAL WOUNDS. REMEMBER MR. AHLER ASKING YOU IF THEY
5 WERE STAB WOUNDS AND ME ASKING YOU IF THEY WERE DEFLEXION
6 WOUNDS FROM THE DEFENSIVE CUTS. YOU SAID THIS MORNING THAT
7 ONE OF THE PHOTOGRAPHS HELPED YOU.
8 A. I THINK SO. I THINK THAT THEY ARE AGAIN STAB
9 WOUNDS AND BY THEIR LOCATION BEING ESSENTIALLY IN THE SAME
10 VERTICAL PLANE AND LOCATION FROM THE SAGITAL PLANE OF THE
11 BODY, THEY ARE DISCONSISTENT WITH A LOWER POINT OF IMPACT,
12 PROBABLY INFLICTED BY A RIGHT HANDED PERSON IN ANTERIOR
13 CONFRONTATION.
14 Q. LET'S GO ON. THAT'S MY NEXT QUESTION. WHAT WE
15 HAVE IS WE HAVE A CONFRONTATION BETWEEN TWO PEOPLE. THE
16 PLANE THAT YOU'RE TALKING ABOUT IS THE STAB PLANE FOR RIGHT
17 HANDED PERSON, IS IT NOT?
18 A. YES, IT IS.
19 Q. I AM RIGHT HANDED, AND IF I WERE GOING TO TRY
20 AND KILL YOU WITH A KNIFE, THAT STAB WOUND IS GOING TO BE IN
21 THAT PLANE, AM I CORRECT?
22 A. IN GENERAL, YES.
23 Q. OKAY. AND EVERY ONE OF THESE STAB WOUNDS WAS
24 IN THAT PLANE, AM I CORRECT?
25 A. YES.

1 Q. EVERY ONE OF THESE STAB WOUNDS THAT YOU SAW
2 LOOKED LIKE IT WAS AN ATTEMPT TO MURDER SOMEBODY, TO
3 COMPLETE A MURDER. AM I CORRECT?
4 A. I WOULD INTERPRET IT AS SUCH, YES.
5 Q. DID YOU SEE ANYTHING ON THE AUTOPSY, THE
6 PROTOCOL, PHOTOGRAPHS OR ANYTHING, INDICATING ANYTHING OTHER
7 THAN REPEATED STABBINGS TO CAUSE SOMEONE TO DIE?
8 A. CONFINING OUR QUESTION TO STABS, BECAUSE OF A
9 COUPLE OF BRUISES AND --
10 Q. YES. LET'S TALK ABOUT STAB WOUNDS.
11 A. NO.
12 Q. IN OTHER WORDS, WHAT WAS HAPPENING IS SOMEBODY
13 IS BASICALLY TRYING TO KILL SOMEONE.
14 A. I THINK SO, YES.
15 Q. IS THERE ANYTHING THAT INDICATES TO YOU THAT
16 SHE WASN'T STABBED AT A TIME IN ORDER THAT SHE SUFFER?
17 A. THE ONLY THINGS THAT ARE UNRELATED TO STABBINGS
18 THAT I'M ABLE TO DOCUMENT REALLY FROM THE REVIEW OF THIS IS
19 THERE'S BRUISING ON THE DORSUM OF THE HAND, WHICH IS
20 CONSISTENT WITH A BLOW, AND THEN THERE'S THE GAGGING, THE
21 TRAUMA OF THE MOUTH RELATED PROBABLY TO THE GAGGING, AND THE
22 BINDING OF THE GARMENT AROUND THE HEAD AREA.
23 THOSE ARE NOT STABS, PER SE, AND THEY ARE NOT
24 NECESSARILY IN AND OF THEMSELVES INDIVIDUALLY INTERPRETABLE
25 AS BEING INTENDED TO BE LETHAL.

1 Q. I'M SORRY. I INTEND TO GET TO THE CONTUSIONS.
2 BUT RIGHT NOW I'M TALKING ABOUT STAB WOUNDS.
3 A. STAB WOUNDS ARE ALL CONSISTENT WITH BEING A
4 LETHAL EFFORT.
5 Q. RIGHT. AND THERE'S NO SHOWING OF ANY BREAK IN
6 TIME SO THAT, FOR EXAMPLE, SOMEBODY SITS BACK AND SAYS, NOW
7 GO GURGLE AND TAKE TIME TO DIE. AM I CORRECT?
8 A. I DIDN'T SEE THINGS OF THAT, NO.
9 Q. IN FACT, ONE OF THE TAIL MARKS OF THIS CASE IS
10 A SLASHED THROAT, AM I CORRECT?
11 A. YES.
12 Q. AM I WRONG THAT FROM PEOPLE WHO ARE
13 UNDEREDUCATED AND HAVEN'T EVER BEEN IN MILITARY TRAINING OR,
14 YOU KNOW, SURVIVAL, THING LIKE THAT, WOULD YOU -- PEOPLE CUT
15 PEOPLE'S THROATS TO KILL THEM, AM I CORRECT?
16 A. THAT'S A FAVORITE TARGET AREA, YES.
17 Q. AND WHEN PEOPLE SLASH SOMEBODY'S THROAT, ISN'T
18 IT THEIR INTENT THAT THAT BE AN IMMEDIATE DEATH?
19 MR. AHLER: OBJECTION, CALLS FOR
20 SPECULATION.
21 THE COURT: SUSTAINED.
22 MR. STERLING: YOUR HONOR, I WOULD
23 REQUEST TO BE ABLE TO PROCEED WITH MY QUESTIONING WITHOUT
24 INTERRUPTIONS. I BELIEVE 703 ALLOWS ME TO OFFER ANY
25 EVIDENCE WHATSOEVER WITHOUT REGARD TO ITS ADMISSIBILITY OF

1 EVIDENCE UNDER THE ARIZONA RULES OF EVIDENCE.
2 THE COURT: I THINK YOU'RE RIGHT. GO
3 AHEAD.
4 Q.(BY MR. STERLING): DOCTOR, WOULD YOU AGREE --
5 THE COURT: EXCEPT FOR THE FACT THAT
6 YOU'RE DOING ALL THE TESTIFYING.
7 MR. STERLING: PARDON --
8 Q.(BY MR. STERLING): DOCTOR, IS A SLASHED THROAT,
9 DOES THAT INDICATE TO -- WHAT DOES THAT INDICATE TO A
10 PATHOLOGIST?
11 A. IT'S JUST A VITAL AREA THAT IS CUT AND
12 DEPENDING ON WHAT IS CUT, WILL LEAD TO LOSS OF BLOOD AND
13 LOSS OF LIFE. BUT YOUR PREVIOUS QUESTION FOR TIMING, I
14 DON'T KNOW -- I CAN'T REALLY ANSWER THAT.
15 Q. NO ONE COULD ANSWER AS TO WHAT TIME AND WHAT,
16 WHICH POSITION GOT STABBED FIRST, COULD YOU?
17 A. WELL, THAT'S A DIFFERENT ISSUE. LET ME CLARIFY
18 MY RESPONSE. YOU'RE TALKING ABOUT WANTING THEM TO HAVE
19 IMMEDIATE DEATH. I CAN'T RENDER AN OPINION ON THE IMMEDIATE
20 DEATH INTENT OF THE CUT THROAT. TO THE OTHER QUESTION, NO.
21 THEY'RE ALL WITHIN A SHORT PERIOD OF TIME.
22 Q. OKAY. HOW -- PARDON ME, HOW SHORT A PERIOD OF
23 TIME ARE WE TALKING ABOUT THE SAME ASSAULT?
24 A. ASSUMING THAT WE DON'T COME IN WAVES, AND I
25 THINK THERE'S NOTHING IN THE PROTOCOL TO SUGGEST THAT WE

1 WILL, FOR EXAMPLE, ATTACK THE HEAD FOR A WHILE AND COME BACK
2 AND ATTACK THE CHEST FOR A WHILE AND COME BACK AND ATTACK
3 THE THROAT FOR A WHILE. IF IT'S ALL REALLY WITHIN THE SAME
4 TIME FRAME, THE TIME FRAME IS PROBABLY OF AN ORDER OF SOME
5 MINUTES, SOME FEW MINUTES UP TO A VERY SHORT PERIOD OF
6 MINUTES. AND I SAY BY THAT MAYBE THREE TO 15 MINUTES OR SO.
7 Q. WELL, THAT WAS MY QUESTION TO YOU, DOCTOR. YOU
8 SAID YOU SAW NOTHING IN THE PROTOCOL. I GAVE YOU THE
9 PROTOCOL, DR. JARVIS'S TESTIMONY, THE DRS AND ANYTHING. DID
10 YOU SEE ANYTHING IN ANYTHING I GAVE YOU THAT WOULD SUGGEST
11 ANY KIND OF AN ATTACK IN WAVES?
12 A. NO, I DIDN'T. I DIDN'T FIND ANYTHING TO SAY
13 THAT.
14 Q. NOW, I WANT TO TALK ABOUT THE CONTUSIONS. THE
15 REMAINS OF EFFIE HOLMES HAD CONTUSIONS ON HER LIP, AM I
16 CORRECT?
17 A. YES.
18 Q. AND AM I CORRECT THAT YOU ATTRIBUTE THOSE
19 CONTUSIONS TO THE GAGGING OR THE THING BEING FORCED IN HER
20 MOUTH?
21 A. I THINK THAT IT'S CONSISTENT WITH THAT, NOT
22 HAVING A PARTICULAR PHOTOGRAPH THAT SPECIFICALLY DOCUMENTS
23 THAT, I WOULD ATTRIBUTE IT TO THAT. THAT'S A COMMON KIND OF
24 INJURY WITH THAT EVENT.
25 Q. CAN YOU TELL US WHETHER THE GAGGING OCCURRED

1 PRIOR TO HER BEING STABBED OR AFTER HER BEING STABBED, FROM
2 WHAT YOU SEE IN FRONT OF YOU IS EVERYTHING WE HAVE GOT?
3 A. IT CALLS FOR SPECULATION. I THINK SPECULATION
4 TO IMPLY THAT IT WAS EARLY. THERE'S NO NEED FOR IT TO BE
5 LATE.
6 Q. WHY?
7 A. IF YOU'RE GOING TO BE CUTTING INTO -- IF WE
8 HAVE ACCOMPLISHED EVERY ATTACK IN HERE, INCLUDING THE CUT
9 THROAT, THERE'S NO NEED TO GAG.
10 Q. HOW ABOUT IF I TAKE AWAY THE CUT THROAT. IF I
11 ASSUME, IF I SPECULATE THE CUT THROAT WAS THE LAST INJURY,
12 DOES THAT --
13 A. THEN YOU COULD PUT THE GAG IN AT ANY POINT YOU
14 WISH.
15 Q. DID YOU FIND ANY EVIDENCE THAT THE HANDS WERE
16 EVER TIED OR HER FEET WERE EVER TIED OR THAT SHE WAS
17 RESTRAINED OR BOUND OTHERWISE?
18 A. NOT SECURELY BOUND IN ANY WAY, NO.
19 Q. OKAY. NOW, I HAVE TALKED ABOUT ALL THE
20 INJURIES SAVE ONE AND THAT IS A CONTUSION UPON HER, THE
21 DORSAL SIDE OF HER HAND. AM I CORRECT?
22 A. THAT'S CORRECT.
23 Q. WOULD THAT CONTUSION THAT YOU FOUND, WOULD THAT
24 HAVE BEEN CONSISTENT WITH HER FIGHTING BACK, I MEAN OTHER
25 THAN THE DEFENSIVE WOUNDS WE HAVE TALKED ABOUT?

1 A. IT COULD HAVE BEEN.

2 Q. IN OTHER WORDS, SHE COULD HAVE PUNCHED SOMEBODY

3 OR PUNCH SOMEBODY THAT WAS ATTACKING HER?

4 A. COULD HAVE ATTEMPTED TO, YES.

5 Q. NOW, YOU HEARD THE COURT'S STATEMENTS AND MY

6 OPENING STATEMENTS, THE SUPREME COURT HAS -- AND THE

7 PROSECUTION HAS ALWAYS ARGUED THAT THERE WAS A EXTENDED

8 STRUGGLE IN THAT HOUSE. MEANING ONE PERSON AGAINST ANOTHER

9 PERSON FACE-TO-FACE. ARE YOUR FINDINGS, ALL YOUR FINDINGS

10 CONSISTENT WITH THAT?

11 A. YES, THEY ARE.

12 Q. WOULD A CONFRONTATIONAL STRUGGLE ACCOUNT FOR

13 THE STAB WOUNDS AND THE WOUNDS YOU SEE ON EFFIE HOLMES BODY?

14 A. YES.

15 Q. IF THE OTHER PARTY WAS ARMED WITH A KNIFE?

16 A. YES.

17 Q. IS THERE ANYTHING YOU FOUND IN GOING OVER THIS

18 ENTIRE THING WHICH YOU WOULD SAY SUPPORTS EVEN SPECULATION

19 OF SOMEBODY INFLICTING GRATUITOUS VIOLENCE, IN OTHER WORDS,

20 WANTING TO HURT HER OR CAUSE HER PAIN OTHER THAN SIMPLY TO

21 EFFECTUATE A MURDER?

22 A. I DON'T THINK SO.

23 Q. DID YOU FIND ANYTHING THAT INDICATED TO YOU IN

24 ANY FORM OF TORTURE?

25 A. NOT IN THE WAY I DEFINE TORTURE.

1 Q. WELL, PARDON ME. THE PROBLEM -- I DIDN'T
2 FINISH THE QUESTION, I APOLOGIZE, DOCTOR. IF I'M TALKING
3 ABOUT OTHER THAN, APART FROM THE VIOLENCE DONE TO A HUMAN
4 BODY TO CAUSE DEATH, AND DEFINE TORTURE AS ANY OTHER
5 INFLICTION OF TRAUMA OR PAIN, DID YOU FIND ANYTHING IN ANY
6 OF THIS EVIDENCE TO INDICATE TO YOU ANY ACTION BY ANY PERSON
7 THAT WOULD HAVE CAUSED THIS WOMAN PAIN AND TORTURE IN HER
8 LAST MINUTES OTHER THAN THAT THAT WAS NECESSARY TO KILL HER
9 WITH A KNIFE, THOSE TWO SHORT KNIVES THAT I HAVE SHOWN YOU?
10 A. I THINK THERE'S ONLY ONE AND THAT HAS -- THAT
11 RELATES TO THE SEXUAL ASSAULT ASPECT OF THIS CASE.
12 Q. THAT'S ALL THAT THERE IS THERE. NOTHING ABOUT
13 THE WEAPON?
14 A. NOTHING ABOUT THE WEAPONRY.
15 MR. STERLING: I HAVE NOTHING FURTHER OF
16 THIS WITNESS, YOUR HONOR.
17 THE COURT: CROSS-EXAMINE.
18
19 CROSS-EXAMINATION
20 BY MR. AHLER:
21
22 Q. GAGGING A PERSON, PLACING A GAG INSIDE THEIR
23 MOUTH, TIGHTLY COMPACTED AND THEN STABBING THEM 30 TIMES,
24 DOESN'T THAT MEET YOUR DEFINITION OF TORTURE?
25 A. I USUALLY THINK OF MY DEFINITION OF TORTURE

1 USUALLY RELATES TO JUST INFLICTING PAIN, STRICTLY ONLY AS
2 PAIN. THE CLASSIC STEREOTYPE OF THE TORTURE IS TO INFLICT
3 THE INJURY IN SUCH A WAY THAT YOU CAN INTERRUPT AT ANY POINT
4 AND TIME AND GO BACK AND RESUME IT. AND THIS IS SORT OF TO
5 MY INTERPRETATION OF THIS CASE; IT'S A LITTLE DIFFERENT THAN
6 THAT KIND OF DEFINITION.
7 Q. ESSIE HOLMES HAD A NUMBER OF WOUNDS ON HER BODY
8 THAT WERE NOT NECESSARILY FATAL, CORRECT?
9 A. THAT'S CORRECT.
10 Q. IN FACT, SHE HAD NUMEROUS BRUISES ABOUT HER
11 FACE IN ADDITION TO THOSE THAT WERE ON HER LIPS?
12 A. THAT'S CORRECT.
13 Q. IN FACT, IF YOU WILL REVIEW EXHIBIT 1, WHICH IS
14 DR. JARVIS'S PROTOCOL ON PAGE TWO, HE INDICATES, DOES HE
15 NOT, THAT THERE ARE SEVERE CONTUSIONS OF THE FACE
16 BILATERALLY INVOLVING THE MALAR PROMINENCES.
17 A. YES.
18 Q. WHERE WOULD THOSE CONTUSIONS BE?
19 A. ACROSS THE CHEEK AREA.
20 Q. CONSISTENT WITH HAVING BEEN STRUCK, BEAT UP,
21 HIT IN THE FACE, CORRECT?
22 A. OR MAYBE THE PROCESS OF PUTTING THE LIGATURE,
23 THE CLOTHING AND GAG IN PLACE. IN THE PHOTOGRAPHS, FOR
24 EXAMPLE, THERE IS A BLUE GARMENT THAT'S BOUND AROUND THE
25 FACE THAT'S JUST IN THAT EXACT AREA. SO IT COULD BE EITHER.

1 BUT TO BE PRECISE IN YOUR ANSWER TO YOUR
2 QUESTION, YES, IT IS CONSISTENT WITH A BLOW OF WHATEVER
3 NATURE TO THAT AREA. IT'S A BLUNT FORCE BLOW TO THAT AREA.
4 Q. YOU INDICATED, I BELIEVE, THAT THERE WAS -- YOU
5 DIDN'T SEE ANY EVIDENCE OF ANY TYPE OF RESTRAINTS. THERE
6 WAS IN FACT A GARMENT THAT WAS WRAPPED --
7 A. AROUND THE HEAD.
8 Q. -- AROUND THE HEAD.
9 A. THAT'S CORRECT.
10 Q. YOU WOULD CONSIDER THAT AS BEING BOUND IN SOME
11 MANNER, WOULD YOU NOT?
12 A. YES, BINDING THE HEAD AREA.
13 Q. NOW, YOU IDENTIFIED A NUMBER OF INJURY PATTERNS
14 ON EFFIE HOLMES THAT WERE CONSISTENT WITH HER HAVING FOUGHT
15 AGAINST THE ATTACKER, CORRECT?
16 A. YES.
17 Q. AND AMONG THOSE WERE THREE SUPERFICIAL STAB
18 WOUNDS TO THE RIGHT FOREARM?
19 A. YES.
20 Q. THOSE WOUNDS WERE NOT NECESSARILY IN YOUR
21 OPINION INTENDED TO CAUSE DEATH, WERE THEY?
22 A. THEY PROBABLY WEREN'T EVEN INTENDED TO STRIKE
23 THAT TARGET BECAUSE OF THE VERY NATURE OF WHERE THEY ARE.
24 THE ARM BECAME INTERPOSED BETWEEN A PRESUMED INTENDED TARGET
25 AND THE WEAPON. BUT THEY WOULD NOT -- THEY WOULD NOT

1 NORMALLY MAKE ANYONE THINK THAT THEY WOULD CAUSE DEATH OF
2 THEMSELVES.
3 Q. DR. JARVIS FOUND VERTICAL BLOOD STREAMING DOWN
4 THE FRONT OF EFFIE HOLMES, CORRECT?
5 A. THAT'S CORRECT.
6 Q. HE ALSO FOUND BLOOD SPLATTER ON THE DORSAL PART
7 OF HER FOOT, FEET, WHICH IS THE FRONT PART, CORRECT?
8 A. TOP OF THE FOOT, YES.
9 Q. THOSE FINDINGS WOULD BE TOTALLY CONSISTENT WITH
10 ESSIE HOLMES HAVING BEEN VERTICAL AND RESISTING THIS
11 ATTACKER, CORRECT?
12 A. CORRECT.
13 Q. LET ME REFER YOUR ATTENTION, A PHOTOGRAPH THAT
14 WAS MARKED AS EXHIBIT NO. 33 AT TRIAL AND WHICH DEPICTS A
15 NUMBER AND SERIES OF BLOOD DROPPINGINGS THAT WERE FOUND IN
16 THE KITCHEN OF THE APARTMENT.
17 A. OKAY.
18 Q. THAT EVIDENCE WOULD BE CONSISTENT WITH EFFIE
19 HOLMES STANDING AND FIGHTING OFF HER ATTACKER WHILE IN THE
20 KITCHEN AREA OF THAT RESIDENCE, CORRECT?
21 A. THAT IS CORRECT.
22 Q. IN FACT, THE BLOOD DROPPINGS ON THE FLOOR THAT
23 ARE DEPICTED IN THAT PHOTOGRAPH ARE QUITE CONSIDERABLE,
24 WOULDN'T YOU AGREE?
25 A. THEY'RE CONSIDERABLE BUT TO THE POINT OF

1 VERTICALITY, THE BLOOD ON THE STOVE IS PROBABLY MORE
2 TELLING, BECAUSE IT IMPLIES AT LEAST A MINIMUM HEIGHT OF
3 THAT HEIGHT.
4 Q. IN OTHER WORDS, THAT SOME PART OF HER BODY WAS
5 IN FACT HIGHER THAN THAT PORTION OF THE STOVE?
6 A. YES.
7 Q. AND THERE IS DEPICTED IN THIS PHOTOGRAPH, IS
8 THERE NOT, BLOOD ON THE STOVE PORTION?
9 A. YES.
10 Q. LET ME SHOW YOU ALSO PHOTOGRAPH THAT WAS
11 PREVIOUSLY MARKED AS EXHIBIT 31 DURING THE TRIAL, WHICH
12 DEPICTS BLOOD DROPPINGS THAT WERE FOUND IN THE BATHROOM AREA
13 OF THE APARTMENT.
14 WOULD YOU ALSO AGREE WITH ME, DR. KEEN, THAT
15 THE EVIDENCE DEPICTED IN THAT PHOTOGRAPH IS CONSISTENT WITH
16 EFFIE HOLMES HAVING STOOD VERTICALLY AND POSSIBLY FOUGHT THE
17 ATTACKER IN THE BATHROOM PORTION OF HER APARTMENT?
18 A. IT'S CONSISTENT WITH THAT, YES.
19 Q. THERE WAS ALSO EVIDENCE PRESENTED DURING THE
20 TRIAL THAT THERE WAS BLOOD FOUND ON THE CHAIR WHICH IS
21 DEPICTED IN THAT PHOTOGRAPH. THAT ALSO WOULD BE CONSISTENT
22 WITH ESSIE HOLMES BEING VERTICAL AND FIGHTING HER ATTACKER?
23 A. YES.
24 Q. WOULDN'T YOU AGREE WITH ME, DR. KEEN, THAT THE
25 AMOUNT OF FORCE USED IN THIS CASE WAS EXCESSIVE IN TERMS OF

1 WHAT WAS ACTUALLY NEEDED TO KILL THIS WOMAN?
2 A. YES.
3 Q. IN FACT, YOU IDENTIFIED THREE SPECIFIC AREAS,
4 DID YOU NOT, WHICH IN AND OF THEMSELVES WOULD HAVE CAUSED
5 HER DEATH?
6 A. YES, GIVEN LACK OR ABSENCE OF TREATMENT AND
7 SUFFICIENT SHORT PERIOD OF TIME, THERE WERE THREE SEPARATE
8 GROUPS OF WOUNDS THAT COULD HAVE BEEN FATAL IN AND OF
9 THEMSELVES.
10 Q. AND ONE AREA THAT YOU IDENTIFIED WERE THE STAB
11 WOUNDS TO THE LUNG AREA?
12 A. CORRECT.
13 Q. AND HOW MANY INDIVIDUAL STAB WOUNDS WERE THERE
14 TO EFFIE HOLMES LUNG?
15 A. REFERRING TO TODAY'S EXHIBIT 1, WHICH IS DR.
16 JARVIS REPORT OF INVESTIGATION AND PROTOCOL, HE DEPICTS 12
17 IN THE LEFT UPPER LOBE, THREE IN THE LEFT LOWER LOBE, FOR
18 TOTAL OF 15.
19 Q. WOULD IT BE YOUR OPINION THAT EACH OF THOSE
20 WOUNDS INDEPENDENTLY OR TOGETHER WOULD HAVE CAUSED HER
21 DEATH?
22 A. I DON'T KNOW IF I CAN SAY EACH ONE OF THEM, BUT
23 CERTAINLY COMBINATIONS OF ANY OF THESE OR CERTAINLY ALL OF
24 THEM TOGETHER WOULD HAVE CAUSED HER DEATH.
25 Q. THE SECOND AREA THAT YOU IDENTIFIED WOULD HAVE

1 BEEN A NUMBER OF STAB WOUNDS TO THE HEART AREA, INCLUDING
2 THE HEART ITSELF, AND I BELIEVE AN ARTERY GOING INTO THE
3 HEART?
4 A. YES. ACTUALLY GOING IN IN TERMS OF BLOOD FLOW
5 THAT'S ACTUALLY LEAVING, BUT, YES.
6 Q. AND HOW MANY STAB WOUNDS WERE IDENTIFIED AS
7 GOING IN TO THAT AREA?
8 A. THREE.
9 Q. AND IS IT YOUR OPINION THAT THOSE THREE WOUNDS
10 EITHER INDIVIDUALLY OR TOGETHER WOULD HAVE CAUSED ESSIE
11 HOLMES' DEATH, IRRESPECTIVE OF THE OTHER INJURIES SHE
12 SUSTAINED?
13 A. THAT IS CORRECT.
14 Q. AND I BELIEVE THE THIRD AREA YOU IDENTIFIED
15 WOULD BE THE CUT THROAT THAT SHE HAD?
16 A. THAT'S CORRECT.
17 Q. THAT WOUND WOULD HAVE IN AND OF ITSELF CAUSED
18 HER DEATH?
19 A. YES.
20 Q. NOW, IN ADDITION TO THOSE WOUNDS, ESSIE HOLMES
21 HAD, I BELIEVE, AT LEAST THREE TO FOUR STAB WOUNDS TO HER
22 HEAD, IS THAT CORRECT?
23 A. YES. SOMETHING OF THAT NATURE, YES.
24 Q. DOES THE REPORTS THAT YOU INDICATE YOU READ
25 INDICATE WHETHER SHE HAD A STAB WOUND TO THE CHEEK?

1 A. YES.
2 Q. WAS THAT A SUPERFICIAL TYPE WOUND AND HOW DEEP
3 WAS THAT?
4 A. LET'S QUANTITATE SO I DON'T RELY ON MEMORY.
5 VERY QUICKLY I DON'T SEE THE DEPTH OF THAT ONE IN THERE,
6 ALTHOUGH IT CERTAINLY IS ENUMERATED SEPARATELY ON THE
7 ABNORMAL FINDINGS LISTED. APPROXIMATELY THREE-EIGHTHS INCH
8 LENGTH BUT I DON'T SEE THE DEPTH OF IT.
9 Q. HOW MANY WOUNDS TOTAL DID SHE HAVE, STAB WOUNDS
10 DID SHE HAVE TO THE HEAD AREA THAT YOU CAN DETERMINE?
11 A. THERE ARE AT LEAST THREE DOCUMENTED HERE, THREE
12 MAJOR ONES AT LEAST AND MAYBE SOME OTHER MINOR ONES HERE.
13 Q. IN ADDITION TO THOSE THREE, I BELIEVE DR.
14 JARVIS COUNTED APPROXIMATELY 23 STAB WOUNDS TO THE LEFT
15 CHEST AREA?
16 A. YES.
17 Q. IN ADDITION TO THOSE WOUNDS, HE DOCUMENTED AT
18 LEAST THREE MORE STAB WOUNDS TO THE LOWER LEFT ABDOMEN?
19 A. THAT'S CORRECT.
20 Q. THE THREE STAB WOUNDS TO THE LOWER LEFT ABDOMEN
21 WERE SUPERFICIAL IN NATURE, CORRECT?
22 A. YES.
23 Q. AND WOULD NOT HAVE CAUSED HER DEATH?
24 A. THAT'S CORRECT.
25 Q. IT'S YOUR OPINION THAT ASSUMING THAT THESE

1 WOUNDS WERE ALL INFLICTED OVER THE RELATIVELY SAME PERIOD OF
2 TIME, THAT ESSIE HOLMES WOULD HAVE LIVED APPROXIMATELY THREE
3 TO 15 MINUTES?
4 A. I THINK SOMEWHERE IN THAT RANGE, YES.
5 MR. AHLER: I HAVE NO FURTHER QUESTIONS
6 THE COURT: REDIRECT?
7
8 REDIRECT EXAMINATION
9 BY MR. STERLING:
10
11 Q. DR. KEEN, I'M GOING TO PLACE YOU IN A SITUATION
12 HYPOTHETICAL, IF I CAN, WHERE YOU HAVE A BAYONETTE AND I
13 HAVE A BAYONETTE AND WE'RE ON OPPOSITE SIDES. IF YOU PUT
14 YOUR BAYONETTE INTO THE LEFT LOWER LOBE OF MY LUNG, AM I
15 GOING TO KILL YOU?
16 A. WITH A BAYONETTE? BAYONETTES ARE USUALLY
17 AFFIXED TO SOMETHING WHICH PUTS IT A LITTLE BIT LONGER THAN
18 ARM'S LENGTH.
19 Q. THE POINT I'M TRYING TO MAKE, DOCTOR -- LET ME
20 BACK YOU UP. MR. AHLER ASKED YOU ABOUT ALL THESE WOUNDS
21 BEING FATAL. YOU CAN FATALLY WOUND ME AND I CAN DO A LOT OF
22 DAMAGE TO YOU BEFORE I DIE, CAN'T I, AND BEFORE I LOSE
23 CONSCIOUSNESS?
24 A. THAT IS POSSIBLE, YES.
25 Q. ALL RIGHT. ONE OF THE MOST FAMOUS OF THOSE IS

1 A LUNG WOUND, ISN'T IT?
2 A. YES.
3 Q. IN OTHER WORDS I CAN BE STABBED A NUMBER OF
4 TIMES IN MY LUNG, IN ONE OF THE LUNGS, AND THAT IS NOT GOING
5 TO CAUSE ME TO LOSE CONSCIOUSNESS, IS IT, NOT NECESSARILY?
6 A. NOT NECESSARILY.
7 Q. AND IT'S NOT GOING TO CAUSE ME TO LOSE A GREAT
8 DEAL OF MY BODILY STRENGTH IMMEDIATELY, IS IT?
9 A. NO.
10 Q. IN OTHER WORDS I COULD STILL STAB YOU, COULDN'T
11 I?
12 A. YES.
13 Q. ALL RIGHT. HOW ABOUT A STAB WOUND TO THE --
14 YOU HAVE GOT TO HELP ME -- WITH THE SACK, THE AIR SPACE?
15 A. THE SACK IS OF NO CONSEQUENCE. IT'S WHAT'S IN
16 THE SACK.
17 Q. I'M STABBED VERY MUCH LIKE ESSIE HOLMES. THREE
18 TIMES, ONE OF WHICH CUTS MY HEART. AM I GOING TO LOSE
19 CONSCIOUSNESS IMMEDIATELY?
20 A. THAT'S A VERY PROBLEMATICAL ISSUE BECAUSE YOU
21 CAN HAVE ALMOST NO CONSEQUENCES FROM THE STAB WOUND TO A
22 HEART, IN WHICH PEOPLE CAN GO ON OR YOU CAN HAVE IMMEDIATE
23 ARRHYTHMIA INDUCED BECAUSE IT DEPENDS REALLY UPON THE
24 ANATOMY OF WHERE THAT STAB WOUND GOES AND THEN, NUMBER ONE;
25 AND THEN, NUMBER TWO, HOW MUCH OF AN OPENING IS LEFT IN THAT

1 STAB WOUND WHEN THE STABBING INSTRUMENT IS REMOVED.
2 Q. IF THEY HAVE AN IMMEDIATE ARRHYTHMIA THAT WOULD
3 CAUSE THE BODY -- THEY WILL LOSE CONSCIOUSNESS, WON'T THEY?
4 A. VERY QUICKLY.
5 Q. AND IF THEY DON'T, THEY DON'T LOSE
6 CONSCIOUSNESS, THEY DON'T LOSE STRENGTH, DO THEY?
7 A. NO.
8 Q. NOT IMMEDIATELY?
9 A. NOT NECESSARY.
10 Q. IS THERE ANY WOUND TO ESSIE HOLMES THAT REMAINS
11 THAT YOU SAW IN ANY OF THESE THINGS THAT WOULD HAVE CAUSED
12 HER TO LOSE IMMEDIATE CONSCIOUSNESS OR TO STOP FIGHTING,
13 STOP RESISTING, STOP MOVING AROUND AND STANDING UP STRAIGHT,
14 OTHER THAN THE CUT THROAT?
15 A. THAT'S THE MOST DEFINITIVE ONE. I THINK THAT'S
16 IT.
17 Q. RIGHT. IN OTHER WORDS, EVERY OTHER WOUND THAT
18 MR. AHLER ASKED YOU ABOUT, HE WANTS TO SIT HERE AND COUNT
19 STAB WOUNDS. NONE OF THOSE WOULD HAVE GUARANTEED STOPPED
20 THAT WOMAN FROM RESISTING IF YOUR INTENT WAS TO MURDER,
21 WOULD THEY?
22 A. WITH ONE POSSIBLE EXCEPTION AND THAT BEING THE
23 TOTAL NATURE OF HOW MUCH OF A BLOW IS PERCEIVED IN THE
24 VICTIM FROM THE TEMPORAL WOUNDS THERE, WHERE WE HAVE THE BIG
25 DEEP GASHES OF THE HEAD. IF THERE IS SUFFICIENT BRUISING

1 WITH THAT AND THERE'S SOME EVIDENCE OF CONTUSION IN THE
2 MARGINS OF THOSE WOUNDS, IF THERE'S SUFFICIENT BRUISING WITH
3 THAT, YOU MIGHT IN FACT LOSE SOME CONSCIOUSNESS FROM THOSE
4 BLOWS. BUT OTHER THAN THAT, FROM VASCULAR PHENOMENA RELATED
5 TO STABBING, JUST THE CUT THROAT.
6 Q. IN OTHER WORDS EVEN, TAKE AWAY THE CONTUSION ON
7 THE HEAD, TAKE AWAY THE CUT THROAT. HER ASSAILANT COULD
8 HAVE CONTINUED TO STAB HER FOR ANOTHER TEN TO 15 MINUTES IN
9 THE SAME AREA, COULDN'T HE HAVE, BEFORE SHE WOULD WOULD HAVE
10 LOST CONSCIOUSNESS OR LOST STRENGTH TO RESIST, IF WE'RE
11 TALKING ABOUT LEFT HEART?
12 A. WELL, IT BECOMES -- I'D LIKE TO DIVIDE THAT IN
13 TWO PLACES. I'LL AGREE WITH YOU ON CONSCIOUSNESS. I DON'T
14 KNOW HOW MUCH I'LL AGREE WITH YOU ON STRENGTH. BECAUSE THAT
15 HAS A LOT OF EMOTIONAL OVERLAY AND I MIGHT DECIDE WHEN I
16 EVEN SEE MY OWN BLOOD FROM THAT, LOSE MY STRENGTH.
17 Q. MAYBE I'M GOING TO BE A LITTLE DRAMATIC. BUT
18 IF YOU'RE FACING SOMEONE WHO IS WILLING TO FIGHT FOR THEIR
19 LIFE, AND THEY'RE CONSCIOUS, THEY'RE GOING TO FIGHT YOU,
20 AREN'T THEY?
21 A. TILL THE END.
22 Q. THE EVIDENCE THAT YOU HAVE SEEN, IS THERE
23 ANYTHING TO INDICATE TO THIS: THAT WHAT ESSIE HOLMES DID
24 ANYTHING OTHER THAN FIGHT FOR HER LIFE AND FIGHT TO THE
25 BITTER END AND FIGHT AS STRONGLY AS ANYBODY YOU HAVE SEEN?

1 A. I DON'T THINK SO.
2 Q. AND IF YOU WERE THE PERSON THAT WAS GOING TO
3 MURDER THAT PERSON, YOU'RE GOING TO HAVE TO KEEP STABBING
4 HER UNTIL YOU DECAPACITATE HER, AREN'T YOU?
5 A. SOME WAY, YES.
6 Q. AND THAT'S WHAT THIS SHOWS. IT SHOWS SOMEBODY
7 CONTINUED TO STAB THAT WOMAN UNTIL SHE DIED, RIGHT?
8 A. I THINK SO.
9 Q. THERE'S NOTHING IN THERE ABOUT TORTURE.
10 THERE'S NOTHING IN THERE ABOUT GRATUITOUS WOUNDS, IS THERE?
11 A. I DON'T THINK SO.
12 Q. IS THERE ANYTHING IN THERE THAT TO YOU AS A
13 PATHOLOGIST SAYS HEINOUSNESS, OTHER THAN THE MURDER, OTHER
14 THAN THE KILLING OF THE HUMAN BEING?
15 MR. AHLER: JUDGE, I AM GOING TO OBJECT.
16 I REALIZE DEFENSE CAN DO A LOT OF THINGS IN THESE HEARINGS,
17 BUT I DON'T THINK HE'S ALLOWED TO HAVE WITNESSES MAKE LEGAL
18 DETERMINATIONS AS TO WHAT'S HEINOUS, WHAT'S CRUEL, AND
19 WHAT'S DEPRAVED. I THINK THAT'S FOR THE COURT TO DECIDE AND
20 NOT FOR MR. STERLING OR THIS WITNESS.
21 THE COURT: I AGREE.
22 MR. STERLING: MAY I RESPOND, YOUR HONOR?
23 THE COURT: YOU MAY.
24 MR. STERLING: THE ARIZONA SUPREME COURT,
25 IN DEFINING CRUELNESS, HEINOUSNESS, DEPRAVITY RESORTS TO

1 WORDS OF COMMON KNOWLEDGE. THEY CITE WEBSTER'S FIRST
2 COLLEGIATE DICTIONARY, WEBSTER'S FOURTH COLLEGIATE
3 DICTIONARY. THAT IS HOW THEY HAVE DEFINED THESE TERMS AND
4 THAT IS HOW THEY HAVE APPLIED THESE TERMS. AND HERE IS A
5 MAN WITH HIS MEDICAL DETERMINATION AND EVERYTHING WHO DEALS
6 WITH EXACTLY THAT. AND HE HAS AS MUCH RIGHT TO DEFINE THOSE
7 TERMS IN THIS COURT FOR YOUR CONSIDERATION AS DOES THE
8 SUPREME COURT WHEN THEY SAY THAT OUR SOURCE IS GOING TO BE
9 THE WEBSTER'S DICTIONARY.
10 THE COURT: HOW DO I KNOW WHAT HIS
11 DEFINITION COMPLIES WITH WEBSTER'S DICTIONARY?
12 MR. STERLING: SUPREME COURT'S DOESN'T,
13 YOUR HONOR.
14 THE COURT: HOW DO I KNOW THAT HIS
15 DEFINITION -- THE WITNESS'S DEFINITION COMPLIES WITH THE
16 WEBSTER'S DICTIONARY?
17 Q.(BY MR. STERLING): LET ME BACK IT OFF AND ASK
18 THE WITNESS, YOUR HONOR. DR. KEEN, HOW WOULD YOU DEFINE THE
19 WORD "DEPRAVITY"?
20 A. I THINK I'D LIKE TO, BEFORE I RESPOND TO THAT,
21 I'D LIKE TO RESPOND TO THE PRECEEDING EXCHANGE HERE. I
22 DON'T, AS A MATTER OF COURSE, CHARACTERIZE NORMALLY THE
23 WOUNDS THAT I OBSERVE WITH THOSE KINDS OF ADJECTIVES, AND I
24 DO VIEW THOSE AS LEGAL TERMS AND NOT AS ANATOMIC OR
25 PATHOLOGY TERMS. SO I -- I USUALLY DON'T EVEN RENDER

1 OPINIONS IN TERMS OF DEPRAVITY AND --
2 Q. HEINOUSNESS?
3 A. HEINOUSNESS. I REALIZE IT'S A TECHNICAL
4 QUESTION OF THE LAW, AND IT'S NOT REALLY THE EXPERTISE THAT
5 I WISH TO COMMENT UPON; I JUST DON'T CARE TO. CHARACTERIZE
6 THEM AS OBJECTIVELY AS I CAN, AS QUANTITATIVELY AS I CAN,
7 AND THEN I CAN GO AWAY FROM THE SCENE AND SAY THAT WAS BAD
8 OR THAT WAS EXTREMELY BAD, BUT I DON'T GO MUCH FURTHER THAN
9 THAT.
10 Q. OKAY. I APPRECIATE. I WILL WITHDRAW THE
11 QUESTION, YOUR HONOR, OF THE WITNESS.
12 ONE FINAL QUESTION, DR. KEEN: I'M GOING SHOW
13 YOU EXHIBIT NUMBER 70 -- PARDON ME, EXHIBIT NUMBER 69. I'M
14 GOING ASK YOU TO PUT YOURSELF IN THE POSITION OF A -- THAT
15 IS A LETHAL WEAPON, IS IT NOT?
16 A. I WOULD TERM IT SUCH, YES.
17 Q. BUT IS IT A QUESTION OF HOW LETHAL, IS IT A
18 QUESTION OF HOW MUCH I KNOW ABOUT IT, HOW GOOD I AM, HOW
19 EXPERIENCED IN WHAT I'M DOING?
20 A. OR WHAT I'M TRYING TO DO WITH IT?
21 Q. IF I GAVE YOU AN INDIVIDUAL THAT HAD NEVER HAD
22 ANY MILITARY TRAINING, SURVIVALIST TRAINING, WHO HAD DROPPED
23 OUT OF THE TENTH GRADE IN HIGH SCHOOL, WHO IN FACT ACCESS
24 EVEN TO TV IS LIMITED, WHO WOULD YOU EXPECT HIM TO BE ABLE
25 TO USE THAT WEAPON TO KILL A HUMAN BEING WITH ONE, TWO, OR

1 EVEN THREE BLOWS?

2 A. I DON'T KNOW THAT I HAVE AN OPINION IN THAT

3 REGARD. I DON'T KNOW WHERE THAT FOLLOWS.

4 Q. DO YOU AGREE WITH ME THAT THE MANNER OF

5 DEATH -- THE HUMAN BODY IS TOUGH TO KILL, IS IT NOT, IF IT

6 DOESN'T WANT TO DIE?

7 A. IN GENERAL.

8 Q. AND IT DOES TAKE A CERTAIN AMOUNT OF EXPERTISE

9 BY ANOTHER HUMAN BEING TO KILL A HUMAN BEING, DOES IT NOT,

10 EFFICIENTLY?

11 A. OR FORTUITOUS PLACEMENT.

12 Q. ALL RIGHT. AND YOU CAN -- WE CAN TEACH PEOPLE

13 HOW TO KILL PEOPLE EFFICIENTLY EVEN WITH A KNIFE THAT SHORT,

14 CAN YOU NOT?

15 A. OH, YES.

16 Q. BUT IT DOES TAKE TEACHING LIKE SEAL TRAINING OR

17 MARINE CORPS TRAINING, THINGS LIKE THAT?

18 A. OR STREET FIGHTING.

19 Q. OR STREET TRAINING. OKAY. AND THERE ARE MORE

20 EFFICIENT WEAPONS TO END A HUMAN LIFE THAN A KNIFE WITH A

21 THREE AND A HALF INCH BLADE, IS THERE NOT?

22 A. YES.

23 Q. AK47 DOES A LOT BETTER JOB FROM A LOT GREATER

24 DISTANCE, DOESN'T IT?

25 A. I WOULD AGREE.

1 Q. DID YOU SEE ANYTHING IN THE POLICE REPORTS OR
2 ANYTHING ELSE THAT WE HAVE DEALT WITH THAT INDICATED TO YOU
3 THAT THAT WEAPON, AN INEFFICIENT WEAPON, WAS CHOSEN WHEREAS
4 THERE WAS A MORE EFFICIENT WEAPON AVAILABLE?
5 DID YOU SEE ANYTHING IN THE REPORT OR ANYTHING
6 IN THE MANNER OF DEATH OR ANYTHING IN THE AUTOPSY OF EFFIE
7 HOLMES WHICH INDICATED TO YOU IN ANY WAY, SHAPE, OR FORM
8 THAT HER ASSAILANT CHOSE THAT KNIFE OR THAT INEFFICIENT
9 METHOD OF KILLING HER VOLUNTARILY OR INTELLIGENTLY CHOOSING
10 AGAINST A MORE EFFICIENT AND AVAILABLE METHOD OF DEATH?
11 A. NOT THAT COMES TO MY ATTENTION.
12 MR. STERLING: THANK YOU. I HAVE NOTHING
13 FURTHER OF THIS WITNESS, YOUR HONOR.
14 THE COURT: ALL RIGHT. THANK YOU, SIR.
15 YOU MAY STEP DOWN. WATCH YOUR STEP, PLEASE. MAY THIS
16 WITNESS BE EXCUSED?
17 MR. STERLING: THIS WITNESS MAY BE
18 EXCUSED.
19 THE COURT: MR. AHLER?
20 MR. AHLER: YES.
21 THE COURT: YOU'RE EXCUSED, SIR. I HAVE
22 A VERY BRIEF TELEPHONIC MOTION AT 1:30. WE'LL START UP AS
23 SOON AS I GET THROUGH WITH THAT. STAND IN RECESS.
24
25

EXHIBIT V

FILED
8-3-90 10:45am
JUDITH ALLEN Clerk
By A. M. Schneider
Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA Plaintiff, vs. SAMUEL VILLEGAS LOPEZ, Defendant.	CR-163419 SPECIAL VERDICT

Defendant Samuel Villegas Lopez was found guilty by a jury verdict on April 17, 1987 of Count I, Murder in the First Degree, a Class 1 Felony, in violation of A.R.S. 13-1105, 1101, 703 and 808; Count II, Kidnapping, Dangerous, in violation of A.R.S. 13-1304, 1301, 702, 801, 808 and 604; Count III, Sexual Assault, Dangerous, in violation of A.R.S. 13-1406, 1401, 3821, 701, 702, 801, 808 and 604; Count V, Burglary in the First Degree, Dangerous, in violation of A.R.S. 13-1508, 1507, 701, 702, 801, 808 and 604.

No motion for new trial was filed.

The Court now determines beyond a reasonable doubt that the Defendant killed and intended to kill the victim herein.

The Court has not held a hearing pursuant to A.R.S. 13-603(C) to establish restitution, if any, to the immediate family of the victim as the victim's family did not request restitution in this matter. Restitution for funeral expenses will be imposed.

On June 25, 1987, the Court imposed a sentence of death against the Defendant on Count I, Murder in the First Degree, based upon the Special Verdict rendered June 25, 1987.

Because of the sentence of death, an automatic appeal was filed with the Arizona Supreme Court. On January 16, 1990, the Arizona Supreme Court affirmed all of the convictions but remanded for resentencing on the Murder Count only. (State v. Lopez), 163 AZ 101,786, P.2d 959 (AZ 1990).

The Arizona Supreme Court specifically held in State v.Lopez, supra, that the State had met its burden of proof that the death of Essie Holmes was committed in a cruel, heinous and depraved manner, pursuant to A.R.S. 13-703 (F)(6).

Pursuant to the mandate of the Arizona Supreme Court, a new presentence report was obtained bearing the date of April 12, 1990.

On July 13, 1990, the Court conducted a new, separate sentencing hearing pursuant to A.R.S. 13-703 (B), at which the prosecution and Defendant were given the opportunity to present evidence and argument as to the adequacy or inadequacy of the evidence to establish the existence of any of the aggravating circumstances as set forth in A.R.S. 13-703 (F) and any of the mitigating circumstances set forth in A.R.S. 13-703 (G) and any of the mitigating circumstances of any nature whatsoever whether specified in the statute or not. All the material in the presentence reports and attachments were disclosed to the attorney

for the Defendant and to the attorney for the prosecution, the Court having determined from examining the report and the attachments that none of the material contained therein was required to be withheld for the protection of human life. In addition, the Court has considered all testimony and materials and evidence received at the time of the hearing on July 13, 1990.

Aggravating Circumstances.

1. The Defendant has not been convicted on another offense in the United States for which under Arizona Law a sentence of life imprisonment or death was imposable.

2. Based upon the opinion of the Arizona Supreme Court in State v. Lopez, supra, the Defendant was not previously convicted on a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense, the Defendant did not knowingly create a grave risk of death to another person or persons in addition to the victim of the offense.

4. The Defendant did not procure the commission of the offense by payment, or promise of payment, or anything of pecuniary value.

5. The Defendant did not commit the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

6. The Defendant committed the offense in a especially cruel manner. PTD

The evidence established beyond a reasonable doubt that on

October 29, 1986, the Defendant broke into the home of Estafana Holmes. He raped her, beat her, and then brutally murdered her.

The evidence at trial showed that there was a tremendous struggle inside the victim's residence. Blood splatter was located on the floor in the kitchen, living room and bathroom. Blood splatter was also observed on the walls in the kitchen and the bathroom. Samples of the blood were consistent with the victims. The pools of blood, reflected in the photographs admitted into evidence, clearly indicate that at one point during the struggle, the victim was standing erect bleeding onto the floor. Undoubtedly she was either fighting the Defendant and/or begging for her life. Other signs of struggle inside the residence include a front screen door that was bent inward and a broken window. Evidence indicates that the window was broken from the inside out.

The victim, Estafana Holmes, was fifty-nine years old. She was a small woman. She was approximately five (5) feet two (2) inches tall and weighed 124 pounds. When Ms. Holmes body was discovered on the morning of the 29th, she was nude from the waist down. The Defendant had taken her pajama bottoms and had tied them snugly around her eyes. A white lace scarf had been crammed tightly into her mouth.

Dr. Thomas Jarvis testified that Ms. Holmes had approximately 23 stab wounds in the left breast and upper chest area. Many of these wounds would have by themselves been potentially fatal. Her

throat was cut. She had three superficial lacerations on her right arm which were characterized as defensive type wounds. The victim had three lacerations on her scalp and a stab wound to her left cheek. According to Dr. Jarvis these wounds were not fatal, but would have caused a considerable amount of bleeding. Essie Holmes had bruises on her head and left hand. Dr. Jarvis noticed dried blood streaming down her body and bloodstained feet. In his opinion, Ms. Holmes was at some point either standing or sitting erect. Vaginal swabs taken at the autopsy showed the presence of semen and spermatoza. According to Dr. Jarvis none of the wounds were post-mortem.

7. The Defendant did commit the offense in an especially heinous or depraved manner.

The Defendant's sexual assault of the victim, whether it occurred before or after death, the securing of the pajama bottoms about her eyes, the cramming of a scarf in the victim's mouth, all constitute evidence of the Defendants heinous and depraved mind.

8. The Defendant did not commit the offense while in the custody of the Department of Corrections, a law enforcement agency or county or city jail.

9. The Defendant has not been convicted of one or more other homicides, as defined in Section 13-1101, which were committed during the commission of the offense.

10. The Defendant was an adult at the time the offense was committed, but the victim was not under 15 years of age.

11. The murdered individual was not an on duty peace officer who was killed in the course of performing his or her official duties.

Mitigating Circumstances.

1. Evidence was presented at the hearing on July 13, 1990 by way of direct testimony and video taped testimony concerning the Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. Testimony was presented on behalf of the Defendant that he possibly suffered from a condition known as "pathological intoxication." Said testimony did not rise to any level of medical certainty, but rather was based upon a "hypothesis" or "speculation." The State presented evidence to rebut the "hypothesis" and "speculation", and the Court specifically finds that the Defendant failed to meet his burden of proof of establishing this mitigating factor by a preponderance of the evidence. Thus, this mitigating circumstance does not exist.

2. The Defendant was not under unusual and substantial duress. This mitigating circumstance does not exist.

3. The Defendant was one of the individuals who actually committed the offense and was not found guilty by reason of being legally accountable for the conduct of another under the provisions of section 13-303. This mitigating circumstance does not exist.

4. The Defendant could have foreseen that his conduct in the course of the commission of the offense for which the Defendant was convicted would cause or would create a grave risk of causing death to another person. This mitigating circumstance does not exist.

5. The Defendant's age is not a mitigating factor, as he is of mature age.

Considering the fact that the victim was a 59 year old woman, that she was sexually assaulted, that she was brutally beaten and stabbed numerous times, that she had been bound and gagged, that she had her throat cut, this first degree murder stands out above the norm of first degree murders.

6. Additionally, the Court received evidence in the form of testimony from a Maricopa County Detention Officer that to his knowledge, since the Defendant had been transferred from the Department of Corrections to the Maricopa County Jail, Defendant had been a "model prisoner." Given the fact that Defendant was scheduled to be resentenced on the charge of First Degree Murder, one would expect the Defendant to be a "model prisoner." Exhibit 14 received at the hearing on July 13, 1990,is a compilation of Defendant's prison record on previous convictions. Exhibit 14 belies the Defendant's contention. The Court specifically finds that the Defendant has failed to establish this mitigating circumstance by a preponderance of the evidence. Thus, this mitigating circumstance does not exist.

7. Additionally, the Court received testimony at the hearing on July 13, 1990 from Dr. Phillip Keene, a Pathologist from Yavapai County, tending to contradict the testimony of Dr. Thomas Jarvis received at the time of trial. The Court specifically finds that the testimony of Dr. Keene is at best speculation and fails to establish any mitigating factor. Thus, this mitigating circumstance does not exist.

Conclusion.

The Court has considered all the evidence admitted at the trial relating to aggravating or mitigating circumstances in addition to the testimony presented at the separate sentencing hearing. The prosecution and the Defendant have been permitted to rebutt any information received at the hearing, including information presented at the trial, and were given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the aggravating circumstances listed in A.R.S. 13-603(F) and of any mitigating circumstances whether listed in A.R.S. 13-703(G) or not. The Court has found one statutory aggravating circumtance which applies to the Defendant which is that he committed the offense in an especially cruel, heinous or depraved manner. The Court has further found no mitigating circumstances sufficiently

substantial to call for leniency.

DATED this 3 day of August, 1990.

Judge of the Superior Court
Maricopa County

COPY of the foregoing
mailed/delivered this
3 day of August
1990.

Paul Ahler
Deputy County Attorney

George Sterling
Defense Attorney

EXHIBIT W

8-5888-

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

COPY

STATE OF ARIZONA, Plaintiff, vs. GEORGE VILLEGAS LOPEZ, Defendant.	No. CR152231

Phoenix, Arizona
April 25, 1986

BEFORE: The Honorable PETER T. D'ANGELO, Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION FOR NEW TRIAL

PRESENTENCE HEARING

Lisa H. Vitoff
Court Reporter

SUPERIOR COURT

1 A P P E A R A N C E S

2

3 For the Plaintiff:

4 MR. JOHN BIRKEMEIER, Deputy County Attorney

5 For the Defendant:

6 MR. THOMAS C. FOSTER, Attorney at Law

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13 I N D E X

14

WITNESS:	EXAMINATION:	PAGE NO.:
REA, Mitchell	direct	12
	cross	19
LOPEZ, Frank	direct	24
	cross	28
	redirect	29
LOPEZ, Joanna	direct	31

15 16 17 18 19 20 21 22 23 24 25

VILLEGAS, Concha	direct	34
	cross	36
LOPEZ, George	direct	38
	cross	41

EXHIBITS:	DESCRIPTION:	PAGE NO.:
No. 1	DR supplement Jose	14
No. 2	DR supplement Tracy	15
Nos. 3, 4, 5, 6,8	photographs	16
Nos. 7, 9, 10	photographs	18

SUPERIOR COURT

1 P R O C E E D I N G S

2

3

4

5 (The following proceedings were held in open court:)

6

7

8 THE COURT: State of Arizona versus George

9 Villegas Lopez, date and time set for hearing motions for

10 new trial and presentence hearing pursuant to A.R.S.

11 13-703B.

12 State your appearances, please.

13 MR. BIRKEMEIER: John Birkemeier appearing

14 for the State.

15 MR. FOSTER: Tom C Foster with the

16 defendant.

17 THE COURT: All right, motion for new trial.

18 MR. FOSTER: Your Honor, on behalf of the

19 defendant I filed a motion asking this court to grant the

20 defendant a new trial in this matter. I have cited in my

21 memorandum several points upon which this motion is

22 based.

23 The first is that, your Honor, that I feel

24 that the verdict was contrary to the law and the weight

25 of the evidence.

1 Your Honor, the jury convicted the defendant
2 of first degree murder and they were given the
3 alternative whether to find premeditation or whether it
4 was committed in the process of while committing a
5 felony.
6 Your Honor, I submit that, number one, there
7 was absolutely no evidence presented by the State that in
8 any way this could be considered a premeditated act.
9 There was evidence presented by the State as to events
10 that occured after the death of the victim, that being he
11 was placed in the trunk of his automobile, he being tied
12 hand and foot, thrown into a canal and his car being
13 torched, but these events occurred, according to the
14 evidence, not only from the State, as far as they can
15 determine, but their own witness, the medical examiner,
16 indicated that the victim had to be dead by the time
17 these events occurred. There was no water in his lungs,
18 for instance, there was nothing to show that he died in
19 any other manner other than from either the stabbings or
20 the blows to the head.
21 They say that when Mr. Lopez was on the
22 stand he indicated that he wasn't sure whether the
23 defendant was dead or not when he put him in the trunk,
24 and so they say to the court, well, he may have been
25 alive and therefore all of these events that occurred

1 after the fight may have occurred while he was still
2 alive.
3 I don't believe that we can base a serious
4 conviction such as this on may haves. I think all of the
5 evidence points to the fact, number one, that the victim
6 was dead prior to entry into the canal; and secondly, I
7 think there's an absolute absence of any evidence with
8 regard to premeditation.
9 Therefore, the jury must have found that the
10 defendant was guilty of first degree murder by reason of
11 the felony murder rule, or that the murder was committed
12 in the commission of a felony.
13 However, again, the felony was robbery. It
14 is necessary by the very definition of robbery that the
15 property sought by the aggressor be taken from the
16 individual while threatening or forcing this individual
17 to part with his property.
18 This would be akin to somebody coming along
19 and finding a corpse and relieving the corpse of his
20 wallet or his change or jewelry or whatever. That
21 certainly is a theft but -- and it is not a robbery, it
22 cannot be a robbery, and the indictment accuses the
23 defendant of robbery, not of theft.
24 I therefore believe, your Honor, that the
25 jury, in finding the defendant guilty of first degree

1 murder, was contrary to, number one, the evidence and the
2 law, in that there was absolutely no premeditation shown,
3 nor was there any robbery shown.
4 I think all of the evidence points to the
5 fact that once the property of the victim, that being the
6 wallet and the car, were taken by the two individuals
7 involved, the victim had already expired and could not be
8 taken against his will at that time.
9 Obviously, if he had been alive he wouldn't
10 have permitted them to do so or wouldn't have willed them
11 to do this. He was not alive and therefore did not have
12 the capacity to resist the taking of these items.
13 The second point, your Honor, is that I
14 believe the jury was guilty of misconduct. We were in
15 this court for approximately two weeks, and there was
16 some 60-odd items of evidence presented and accepted by
17 this court as evidence and presented to the jury for
18 their consideration. The jury was out approximately 40
19 minutes.
20 I firmly believe that they really didn't
21 have even time to hardly vote on a foreman, much less to
22 consider the seriousness of these crimes that the
23 defendant was accused of. And the amount of testimony
24 that came forth in a two-week trial and 60-odd items of
25 evidence, they just simply did not have the time with

1 which I believe that it is necessary to consider this
2 particular serious offense.
3 The State has countered with a case that
4 simply says that a jury that comes back in, I forgot what
5 it was, an hour or so, the amount of time does not
6 matter.
7 However, your Honor, the case that the State
8 is referring to, number one, the charges were robbery and
9 escape, and number two, the trial was two days long, and
10 there was no mention in the case of the amount of
11 evidence or the volume of evidence presented to this
12 jury.
13 I believe, your Honor, that this jury went
14 out Thursday afternoon after two weeks of being here in
15 the court, and it was a quarter to four, I just, I just
16 believe that they may not, would not have wanted to come
17 back on a Friday or some other time, and this is just too
18 deadly serious a crime to allow a jury to simply sit
19 there for 45 minutes and dictate the life of an
20 individual such as Mr. Lopez, your Honor.
21 I believe that because of the seriousness,
22 because of the length of trial, because of the number of
23 items offered to the jury, they could not have possibly
24 given their fair consideration to this case.
25 For that reason I urge this court to grant

1 him a new trial.

2 I do believe, your Honor, that the court

3 erred in allowing, number one, evidence from the stand to

4 be shown to the jury, photographs of Jose Lopez, the

5 brother of the defendant. The purpose of that photograph

6 or those photographs were to show the lack of bruises or

7 blood or cuts or scrapes, et cetera, on Jose Lopez, which

8 I do not believe was material to this particular case,

9 and particularly at the time in the trial that they were

10 submitted to the jury.

11 There had been no evidence whatsoever at

12 that time that anyone else was involved in this, other

13 than this defendant, and also the court allowed blood

14 samples of Jose to be submitted to the jury, the purpose

15 being to show that whatever blood samples were found were

16 those of the defendant and -- I mean of the victim and

17 could not have been of any other persons involved.

18 I don't believe that is proper for the court

19 to allow evidence concerning other persons, who were not

20 on trial in this matter, to be submitted to the jury.

21 Lastly, your Honor, I believe that the court

22 on my motion should have dismissed that portion of the

23 information or the complaint which alleged premeditation.

24 At the point in time I made that, the State had rested

25 their case, they had absolutely presented no evidence

1 whatsoever as to premeditation.
2 I believe at that point in time, although
3 the cases say that once it is submitted to the jury they
4 do not need to find one or the other, I believe that to
5 give them, without any evidence whatsoever of
6 premeditation, to allow them to choose between
7 premeditation and felony murder, I believe, is error.
8 For those reasons I would request the court
9 grant this defendant a new trial. Thank you.
10 THE COURT: Mr. Birkemeier.
11 MR. BIRKEMEIER: I'd like to briefly respond
12 if I may, your Honor.
13 Regarding defense counsel's first point, the
14 robbery, death occurred over an apparent half hour, 20
15 minute to half hour period of time, was consistent with
16 the death being in the course of committing the robbery.
17 It's clear from the appearance of the victim, Macario
18 Suarez, that he defended his life as best he could, he
19 made every effort, it appeared, to defend himself.
20 The death of Mr. Suarez occured at some
21 point between the initiation and extended through the
22 defendant's flight from the robbery. I think it's in the
23 course of the committing and is consistent with being a
24 death in defense of his property and in defense of a
25 robbery.

1 Secondly, the length of time that the jury
2 deliberated is addressed in the State v. Burrell case
3 that I cited, I think the line applies here that the
4 court stated shortness of time alone taken by the jury in
5 reaching a verdict may not be used as a basis for a new
6 trial.
7 Finally, defense counsel claims that
8 physical evidence with regard to Jose Lopez' appearance
9 and the blood samples was improperly admitted. I would,
10 in addition to my response to the motion, I want to point
11 out to the court, in his opening statements Mr. Foster
12 indicated that the defendant, he, George Lopez, and his
13 brother Jose were involved in the incident, that the
14 incident was not planned, and that, quote, the defendants
15 were trying to defend themselves. That brought into
16 question the extent of Jose Lopez' involvment, the extent
17 of which George Lopez may have been attempting to defend
18 Jose. Therefore, the physical appearance of Jose was an
19 issue with regard to that possible self-defense or
20 defense of a third party.
21 In addition, the admission of the blood
22 samples was, again, necessary to distinguish and
23 establish the sources of the various blood items that
24 were recovered from the different locations, the location
25 at 2500 West Polk, the items thrown in the garbage can

1 out on Fifty-fifth Avenue, as well as the items on the
2 clothing and the shoes of the defendants, George and Jose
3 Lopez.
4 For the reasons I've set forth, I'd ask that
5 the motion for new trial be denied.
6 THE COURT: Do you have copy of the Burrell
7 case?
8 MR. BIRKEMEIER: Burrell, I'm sorry, I don't
9 have Burrell.
10 THE COURT: Do you wish to reply, Mr.
11 Foster?
12 MR. FOSTER: Only, your Honor, that if I
13 mentioned in my opening statements something about
14 defense of third parties, number one, the court
15 instructed the jury that comments of counsel are not
16 evidence, and secondly, the court give gave no
17 instruction to the jury with regard to defense of third
18 parties as a self-defense. I have nothing further.
19 THE COURT: Motion for new trial is denied.
20 Presentence hearing pursuant to A.R.S.
21 13-703B.
22 MR. BIRKEMEIER: Would you like me to
23 proceed?
24 THE COURT: Do you want to rest on your
25 memorandum or would you like to be heard?

where is it?

SUPERIOR COURT

1 MR. BIRKEMEIER: I'd like to present some
2 evidence, briefly, with Detective Rea, then I would also
3 have some additional information to provide. I would
4 first call Detective Rea.
5
6
7 MITCHELL REA,
8 called as a witness herein, having been first duly sworn,
9 was examined and testified as follows:
10
11
12 DIRECT EXAMINATION
13
14 BY MR. BIRKEMEIER:
15 Q Tell the court again your full name, please?
16 A Mitchell Rea.
17 Q You're a detective with the Phoenix Police
18 Department?
19 A That's correct.
20 Q You've been the primary investigating
21 officer in this case; is that correct?
22 A That's correct.
23 Q Did you have occasion in the course of your
24 investigation to have contact with an individual
25 identified to you as Jose Lopez?

1 A Yes, I did.
2 Q Did you conduct an interview with him?
3 A Yes.
4 Q Was that interview conducted on about
5 October 7, 1985?
6 A Yes, it was.
7 Q Was that conducted at 620 West Washington?
8 A That's correct, main police station.
9 Q Did you prepare a departmental report on the
10 basis of the interview that was conducted with him?
11 A Yes, I did.
12 Q Referring now to the exhibit in front of
13 you, marked for identification Exhibit 1, do you
14 recognize tnat document?
15 A Yes, I do.
16 Q Is that a true and accurate copy of the
17 departmental report you prepared?
18 A Yes. This is the supplement to the
19 departmental report that was authored by me regarding the
20 interview with Jose Lopez on October 7, 1985.
21 Q Does that supplement accurately reflect the
22 interview that you conducted?
23 A Yes, it does.
24 Q Is there anything in that interview that you
25 recall that's not recorded in your supplement, any

1 statements Jose Lopez made to you?

2 A No.

3 MR. BIRKEMEIER: Your Honor, at this time

4 I'd ask admission of Exhibit 1.

5 MR. FOSTER: I have no objection.

6 THE COURT: Exhibit 1 is received.

7 Q BY MR. BIRKEMEIER: Did you have contact in

8 the course of your investigation with individuals

9 identified to you as Brenda and Tracy Fulkerson?

10 A Yes, I did.

11 Q Did you, in the course of that contact, have

12 occasion to conduct a taped interview of Tracy Fulkerson?

13 A Yes, I did.

14 Q Was that contact with her on the day of the

15 taped interview, as well as a transcript of the taped

16 interview reduced to writing and prepared in the form of

17 a departmental supplement?

18 A Yes, it was.

19 Q Did that interview, taped interview occur on

20 or about October 19th, 1985?

21 A That's correct.

22 Q Did that occur at 620 West Washington?

23 A Yes.

24 Q Referring to the item in front of you,

25 Exhibit 2, do you recognize the document?

1 A Yes.
2 Q Is that a true and accurate copy of the
3 supplemental report that you prepared?
4 A Yes, it is.
5 Q With regard to your taped interview, have
6 you reviewed the transcript included therein to compare
7 it to the tape to determine the accuracy of the
8 transcript?
9 A At the time that this was transcribed, I
10 personally listened to the tape and wrote out longhand
11 verbatim the information on the tape, then submitted it
12 to a typist who typed it. After it was typed it was
13 returned to me and I again played the tape and listened
14 to it as I read the transcription to verify that it was
15 accurate.
16 Q Is that an accurate transcript?
17 A Yes, it is.
18 MR. BIRKEMEIER: Your Honor, I'd ask the
19 admission of Exhibit 2.
20 MR. FOSTER: No objection.
21 THE COURT: Exhibit 2 is received.
22 Q BY MR. BIRKEMEIER: You testified at trial,
23 did you not, Detective Rea, that you went to the location
24 on 67th Avenue where the body was recovered?
25 A That's correct.

1 Q You also attended the autopsy of Macario
2 Suarez?
3 A Yes.
4 Q Referring to photos marked for
5 identification three, four, five and eight, do you
6 recognize -- excuse me, three, four, five, six and eight,
7 do you recognize those photos?
8 A Yes.
9 Q Were those photos taken of the victim
10 Macario Suarez at the location where the body was
11 recovered from the canal?
12 A Yes, they were.
13 Q Do those photos truly and accurately show
14 portions of the body of Macario Suarez as it appeared at
15 the time the body was recovered from the canal?
16 A Yes, they do.
17 MR. BIRKEMEIER: Your Honor, I'd ask the
18 admission of three, four, five, six and eight.
19 MR. FOSTER: Your Honor, my only objection
20 to these is that they are repetitive of those that were
21 entered into evidence.
22 THE COURT: Objection's overruled. Three,
23 four, five, six and eight are received.
24 Q BY MR. BIRKEMEIER: You've indicated you
25 also attended the autopsy of Mr. Suarez; is that correct?

1 A That's correct.
2 Q Referring to photos marked for
3 identification, seven, nine and ten, do you recognize
4 what's shown in those photos?
5 A Yes.
6 Q Do you recognize it to be the body of
7 Macario Suarez, or portions thereof?
8 A Yes. These were photographs that were taken
9 of Macario Suarez prior to or during the autopsy at the
10 medical examiner's office.
11 Q Do seven and nine accurately show the
12 appearance of portions of the left arm or head of Macario
13 Suarez at the time just prior to the commencement of the
14 autopsy?
15 A That's correct.
16 Q Referring to photo Exhibit 10, was that
17 photo taken during course of the autopsy?
18 A Yes, it was.
19 Q Can you describe -- does that photo
20 accurately show the appearance of Mr. Suarez at the time,
21 during the course of the autopsy, when his head had been
22 partially shaved?
23 A Yes.
24 MR. BIRKEMEIER: Your Honor, I'd ask the
25 admission of seven, nine and ten.

1 MR. FOSTER: Again, your Honor, being
2 repetitive of those entered into evidence at the trial.
3 THE COURT: I don't believe we saw anything
4 like that.
5 MR. BIRKEMEIER: No, your Honor.
6 THE COURT: Objection's overruled seven,
7 nine, ten are received.
8 Q BY MR. BIRKEMEIER: Can you describe for the
9 court the particular circumstance that was being
10 conducted at the autopsy, when the photo marked ten was
11 taken, the one with the head shaved?
12 A Doctor Shaw, the acting medical examiner,
13 shaved a portion of his scalp, of Macario Suarez' scalp,
14 in order to reveal some trauma that was on his head above
15 his hairline.
16 Q Was the skin on the back of the skull peeled
17 back at the time -- let me show you Exhibit 10, refresh
18 your memory on that.
19 Was the skin on the back of his skull peeled
20 back?
21 A Yes, it was.
22 Q Was that done by the medical examiner in the
23 course of conducting the autopsy?
24 A Yes.
25 Q That was not the condition of the body when

1 it was recovered from the canal, was it?
2 A No.
3 Q That peeled back skin?
4 A No.
5 Q The blunt instrument blows do show the
6 condition of the body as it appeared or as it was when
7 recovered from the canal, the trauma to the frontal
8 portion of the skull?
9 A Yes, on the other two photographs.
10 Q Except for the shaved skin areas?
11 A Correct, that would be the difference.
12 MR. BIRKEMEIER: I have nothing further,
13 your Honor.
14 THE COURT: Cross examination.
15
16
17 CROSS EXAMINATION
18
19 BY MR. FOSTER:
20 Q Officer Rea, Exhibit 1 is your departmental
21 report with regard to your interview with Jose Lopez.
22 During all of this, did he not contend -- let me ask you
23 first, when he made the statements that he made, was
24 George present?
25 A No.

1 Q They were separated when they made each of
2 their statements, were they not?
3 A That's correct.
4 Q Were either of them told the statements, the
5 exact statements made by the other?
6 A No.
7 Q In his statements, did not Jose say or claim
8 that Macario Suarez had the knife to begin with?
9 A No. What he said to begin with is that a
10 fight started. Farther on in the interview he had say at
11 one point that Macario Suarez had a knife and was
12 charging towards George with it.
13 Q Specifically, refer you to the last
14 paragraph of Exhibit 1, did not in that Jose claim that
15 Macario Suarez had the knife?
16 A Yes. He stated: I don't know, I think he
17 had a knife.
18 Q Did he also not claim that there was a fight
19 between his brother George and the victim, that's what
20 precipitated this event?
21 A Well, the way he stated was a fight broke
22 out between the three of them.
23 Q Did he anywhere in his statement indicate to
24 you that he intended to rob the victim?
25 A No, he did not.

1 Q Did he not in his interview indicate to you
2 that he, in fact, hit the victim with the jack handle?
3 A He admitted to hitting the victim one time
4 in the head with a jack handle.
5 Q Then did he not say in his statement that he
6 stabbed the victim?
7 A No. He said he did not stab him. He said
5 8 that while they were wrestling around on the ground, his
9 leg may or knee may have hit the victim's arm forcing the
10 or driving this knife of the victim into the body of the
11 victim.
12 Q Didn't he at first say, I don't know who
13 stabbed who, we were both in the fight?
14 A Right.
15 Q When he asked -- when you asked him why he,
16 they tied the victim and put him in the canal, did he
17 say: We didn't know what to do, we just panicked?
18 A That's correct.
19 Q You also noted in your report that Jose had
20 scratches on his arms and two scabs on his face, did you
21 not?
22 A Yes, he did.
23 Q In your interview with Tracy Fulkerson, she
24 indicated to you that she had a conversation with Jose,
25 both before and after this incident; is that not correct?

1 A That's true.
2 Q Did she indicate to you whether or not in
3 these conversations Jose implicated, in any way, his
4 brother George, either before the incident or after the
5 incident?
6 A The information before the incident was a
7 statement to her by Joe or Jose, as to something that he
8 planned to do.
9 Q That Jose planned, that he planned to do,
10 not we planned to do?
11 A Correct.
12 Q After the event, did he ever say, according
13 to Tracy, that George did any of the physical violence
14 that occurred to the victim?
15 A I would have to look at the supplement
16 again.
17 Q And you also interviewed George Lopez;
18 correct?
19 A Yes.
20 Q Again, he and his brother were separated at
21 the time of this interview?
22 A That's correct.
23 Q Was it not also his contention that a fight
24 broke out and this was what started the problem, started
25 the action, started the event that occurred?

1 FRANK LOPEZ,
2 called as a witness herein, having been first duly sworn,
3 was examined and testified as follows:
4
5 THE COURT: Take the seat, pull the
6 microphone up, turn the switch on.
7
8
9 DIRECT EXAMINATION
10
11 BY MR. FOSTER:
12 Q State your name, please?
13 A Frank V Lopez.
14 Q How old are you Frank?
15 A 29.
16 Q Are you related to Jose and George Lopez?
17 A Yes, sir, I am.
18 Q Are you their brother?
19 A Yes, sir.
20 Q I take it you've known them all of their
21 lives; is that correct?
22 A Yes, sir.
23 Q At one point in time, Frank, both George and
24 Jose came to your house in the evening, driving a vehicle
25 that wasn't theirs, and had a conversation with you; is

1 that correct?

2 A Yes, sir.

3 Q Was George involved in that conversation at

4 all?

5 A No, sir, he wasn't.

6 Q Did he say anything other than hello, how

7 are you, anything about the car or any event that

8 occurred just before they got there?

9 A No, sir, he didn't.

10 Q How did he appear, was he upset, nervous,

11 appear happy, laughing?

12 A No, sir, he wasn't. He was more or less

13 like upset about something, you know, something like

14 that.

15 Q Did George ask you for any advice or help?

16 A No, sir, he didn't.

17 Q Before this evening, did George live at your

18 house for a period of time?

19 A Well, yeah, he did at the time.

20 Q How long -- when did George live with you?

21 A I can't really say, it's been a while

22 already.

23 Q How long, whenever he lived with you, how

24 long did he live with you?

25 A Oh, more, maybe a year, year and a half at

1 the most.

2 Q Why did he live with you?

3 A Well, he liked, you know, being around the

4 kids, around us, me and my wife, you know. We got along

5 real good together.

6 Q Did Jose live with you at that time too?

7 A Yes, they did, both of them did.

8 Q During that period of time that George lived

9 with you, was there any trouble, was there any fights,

10 was there any thievery, was there any kind of problems

11 that you and your family encountered because of George?

12 A No, sir, none at all.

13 Q How would you describe George with regards

14 to his temperament, to his -- the way he handles himself?

15 A Well, more or less when he got mad or

16 something he's always kept it to himself. He's gotten

17 over it, but he's never done nothing before, not that I

18 know of.

19 Q Has he ever told you that he either did or

6 20 intended to go out and steal or hurt anybody?

21 A No, sir, he hasn't.

22 Q Frank, as I understand it, your family isn't

23 real, real close; is that correct?

24 A That's true, we're not that close.

25 Q Yet, while he was in your home, you cannot

1 tell this court of any incidents that you feel might be a
2 defect in George's character or anything of that nature?
3 A No, sir.
4 Q Do you think, from what you know of George,
5 that he is capable of preplanning and in fact mortally
6 injuring somebody?
7 A No, sir, he's not.
8 Q With thinking about it first?
9 A No, I don't think so. He's never done
10 anything like that before.
11 Q From what you know of George and Jose, who
12 was the leader of the two of them?
13 A Well, I would have to say Joe, he's a lot
14 stronger minded, more or less.
15 Q Physically, how do they compare?
16 A Well, they don't really, to be honest.
17 Q Is one bigger or smaller?
18 A Yeah, Joe is bigger than he is.
19 Q Is Joe older also?
20 A Yes, sir.
21 MR. FOSTER: I have no further questions.
22 THE COURT: Cross examination.
23 MR. BIRKEMEIER: Just a couple.
24
25

1 kicked him out, that wasn't because of a fight or
2 something that he had done wrong or anything, was it?
3 A No, sir, it wasn't.
4 Q It was purely economics, he wasn't working,
5 you couldn't afford to feed your family and him too?
6 A Right.
7 Q When he was living with you and when he was
8 working, did he contribute money?
9 A Yes, sir, he did.
10 MR. FOSTER: I have no further questions.
11 THE COURT: Thank you, you may step down.
12 THE COURT: Call your next witness.
13 MR. FOSTER: Joanna Lopez.
14
15
16 JOANNA LOPEZ,
17 called as a witness herein, having been first duly sworn,
18 was examined and testified as follows:
19
20 THE COURT: Take a seat, please, pull the
21 microphone up, turn the switch on.
22
23
24
25

1 stopped living with you?

2 A He started living with us for a year and a

3 half and was going on two.

4 Q Do you remember when it started?

5 A Well, he was 16, and we had thrown him a

6 party when he was going to be 18, that's around that

7 time. I don't remember when.

8 Q You have children, do you not?

9 A Uh-huh, yes, I do.

10 Q Were they there living in the same house as

11 you and your husband and George and Jose?

12 A Uh-huh.

13 Q During that period of time, Mrs. Lopez, did

14 you observe George do anything that you would consider

15 either illegal or mean or underhanded?

16 A No.

17 Q Did you ever observe George to possess any

18 sort of weapons, knives, guns, clubs, anything of that

19 nature?

20 A No.

21 Q Did you ever see him physically get into a

22 fight with anybody?

23 A Huh-uh, no.

24 Q Can you describe for the court what George's

25 attitude normally is and how he handles stress and

1 problems and that sort of thing?

2 A I've never seen George cause any problems or

3 trouble. He's always been real quiet, good with us.

4 Q While he was living with you, Mrs. Lopez,

5 did he help out at all around the house?

6 A Oh, yes, he helped a lot.

7 Q With what type of things would he do?

8 A Well, he did a lot of -- when I came from

9 work he helped -- did the housework a lot for me, took

10 care of my kids, things like that, the yard.

11 MR. FOSTER: I have no further questions.

12 THE COURT: Cross examination.

13 MR. BIRKEMEIER: I have no questions, your

14 Honor.

15 THE COURT: Thank you, ma'am, step down,

16 watch your step, please.

17 MR. FOSTER: Mrs. Villegas, please.

18

19

20 CONCHA VILLEGAS,

21 called as a witness herein, having been first duly sworn,

22 was examined and testified as follows:

23

24 THE COURT: Take this seat, please, pull the

25 microphone up and turn the switch on.

1 DIRECT EXAMINATION

2

3 BY MR. FOSTER:

4 Q State your full name, please?

5 A Concha Villegas.

6 Q Mrs. Villegas, you're George's mother; is

7 that correct.

8 A Yes, sir.

9 Q You're also Joe's mother?

10 A Yes, sir.

11 Q How many other sons have you had?

12 A I got eight boys altogether.

13 Q Eight boys, no girls?

14 A No girls.

15 Q Would you just briefly describe to the court

16 what type of atmosphere or surroundings that George grew

17 up in when he was a young boy, small?

18 A He's a good boy. He always used to mind me

19 and work at the house with each of us. His school, which

20 when he drop out he stayed home and did my house, I go to

21 work, and make supper for me. He was a good boy. He's

22 always a good boy, he mind me real good.

23 Q Did George get into any trouble, that you

24 knew, any big trouble when he was little boy?

25 A No, sir.

1 Q Growing up?
2 A No, sir.
3 Q Did you see him in any real hard fights with
4 any of the neighbors?
5 A No, sir.
6 Q Any boys he ran around with?
7 A No.
8 Q When Joe and George were growing up, did
9 they kind of pal together, run around together?
10 A Yes, they always together, since they were,
11 you know, babies.
12 Q Who was the leader between the two of them?
13 A Joe, I think.
14 Q Did George kind of look up to Joe a little
15 bit?
16 A Sometimes, and sometimes no because he's
17 quieter than Joe.
18 Q Did George ever steal anything from you,
19 from the house, that you knew about?
20 A No, sir.
21 Q George left home when he was about 16 --
22 A Yes, sir.
23 Q -- is that right?
24 Do you know why -- or was there any reason
25 other than just want to go, get out in the world?

1 A Well, he, he had got out of the house
2 because he drop out of school. So, I told him he have to
3 look for a job. So, then he, he was -- take off to my
4 daughter-in-law house and he stayed there. He was living
5 with them.
6 Q Mrs. Villegas, do you, from what you know
7 about George and seeing him grow up, do you think he's a
8 mean person?
9 A No, sir. I think my baby's not a mean
10 person, no, not to me. I don't see George hurt nobody.
11 Q Never seen him hurt anybody?
12 A No, sir.
13 MR. FOSTER: I have no further questions.
14 THE COURT: Cross examination.
15 MR. BIRKEMEIER: Just a couple, if I may,
16 your Honor.
17
18
19 CROSS EXAMINATION
20
21 BY MR. BIRKEMEIER:
22 Q When was it that he lived with you?
23 A Since he was a baby. When he was 18 he take
24 off with my daughter-in-law.
25 Q When he was 18 was the last time he lived

1 with you?

2 A Yes, sir, uh-huh.

3 Q With this incident occurring in 1985, do you

4 know where he was living at the time, just prior to that?

5 A 1985?

6 Q In October of 1985, when this incident

7 occurred, just before that, do you know where he was

8 living?

9 A Was with my daughter-in-law.

10 Q You're saying with Frank's family?

11 A Uh-huh.

12 Q You're saying he lived there in October of

13 '85?

14 A Yes.

15 Q Do you recall Frank's statements a little

16 bit ago -- were you here in the court a few minutes ago

17 when Frank testified?

18 A Yes.

19 Q He kicked him out about a year before that?

20 A Well, yeah. Then he was with me too, you

21 know, he went to the house too and stayed there.

22 MR. BIRKEMEIER: I have nothing further,

23 your Honor.

24 THE COURT: Redirect.

25 MR. FOSTER: Nothing further, your Honor.

1 THE COURT: Thank you. You may step down,
2 watch your step, please.
3 MR. FOSTER: Call the defendant, your Honor.
4
5
6 GEORGE VILLEGAS LOPEZ,
7 called as a witness herein, having been first duly sworn,
8 was examined and testified as follows:
9
10
11 DIRECT EXAMINATION
12
13 BY MR. FOSTER:
14 Q State your name, please?
15 A George Villegas Lopez.
16 Q George, I don't want to go through the whole
17 trial again, as we did before, but do you know in the
18 trial some evidence came out that the victim, Macario
19 Suarez, was tied hand and foot and put in a canal.
20 You were there when that happened, weren't
21 you?
22 A Yes.
23 Q You helped do some of this stuff, correct?
24 A Yes.
25 Q Did you have any belief that he was still

1 alive when any of these things happened after the fight?
2 A I think he was dead by then.
3 Q Did you, when you helped tie him up or
4 helped throw him in the canal, do any of that stuff, did
5 you believe there was any life left in this person at
6 that time?
7 A No, I didn't.
8 Q So, you didn't intend to hurt or do anything
9 to this individual, when those things happened, is that
10 right, when he was tied and put in the canal, you weren't
11 trying to finish him off?
12 A Oh, no.
13 Q Or do anything like that?
14 A No.
15 Q George, there has been a lot of testimony
16 back and forth about a fight that occurred that evening,
17 and that you and your brother were involved in it.
18 Did you have any idea, before you went to
19 that vacant lot on Polk, that there was going to be any
20 kind of trouble whatsoever?
21 A No.
22 Q Did you, in your mind, or with your brother,
23 plan to create any problems or trouble with the victim?
24 A No.
25 Q Did you ever discuss with your brother or

1 have in your mind any idea of taking anything that
2 belonged to the victim without his consent or permission?
3 A No.
4 Q Once the fight started, George, once the
5 action started, do you think, after you've had time to
6 think about it and reflect on it, do you think that there
7 was anything that you could have done to stop, in the
8 midst of it, or stop the fight or stop your brother or
9 stop the victim, in any way to have stopped what finally
10 happened after the fight got started?
11 A No, it happened too fast.
12 Q Today, George, if you could do something to
13 change what happened, would you be willing to do that?
14 A Yeah, yes, I would.
15 Q How do you feel about what happened that
16 night, what are your inner feelings about what happened
17 to this person?
18 A I feel real bad about it.
19 Q Did you have any anger for him or any desire
20 to have anything that he had?
21 A No.
22 Q Are you truthfully sorry for whatever you
23 did or whatever part you took in this event?
24 A Yes, I am.
25 MR. FOSTER: I have no further questions.

1 THE COURT: Cross examination.

2

3

4 CROSS EXAMINATION

5

6 BY MR. BIRKEMEIER:

7 Q A couple if I may, your Honor.

8 Do you recall your testimony at trial, that

9 you testified you didn't know if the victim was alive or

10 not when you threw him in the canal?

11 A Well, I figured he was.

12 Q You figured he was alive?

13 A He was dead.

14 Q But you didn't know -- do you recall your

15 testimony that you didn't know whether or not he was

16 alive?

17 A Yeah.

18 Q You still threw him in the canal?

19 A Yeah.

20 Q How many minutes was that after the stabbing

21 and the beating had occured at 2500 West Polk?

22 A About five minutes.

23 Q You understand that was a distance, from

24 2500 West Polk down to 35th and Durango, a distance of,

25 what, two or three miles, three miles at least?

1 A Yeah.
2 Q How long did it take you to get down there?
3 A About five minutes.
4 Q Do you recall testifying at trial that after
5 the body was put in the trunk you drove around for a
6 little bit before going down there?
7 A I don't know if I said that.
8 Q From the time the body was put in the
9 canal -- from the time the body was put in the trunk,
10 what did you do?
11 A After it was put in or what?
12 Q When the body was put in the trunk of the
13 car at 2500 West Polk, what did you do?
14 A Got in the car.
15 Q Where did you go?
16 A To a canal.
17 Q Who made the decision to go to the canal?
18 A I don't know, could be my brother, could
19 have been Joe.
20 Q Could it have been you?
21 A Could have been, but it wasn't.
22 Q When did you make the decision to throw the
23 body in the canal?
24 A Right away.
25 Q When you were still up on Polk?

1 A Yeah.
2 Q Who made that decision?
3 A I just told you, could have been my brother
4 Joe.
5 Q Could have been you?
6 A Could have, but I don't think it was.
7 Q Do you remember the specific conversation
8 that occurred when the decision was made to throw the
9 body in the canal?
10 A Not word for word.
11 Q What do you recall about that conversation?
12 A Well, we had to do something, couldn't just
13 leave him right there in that field.
14 Q Why couldn't you leave him right there in
15 that field?
16 A I don't know.
17 Q Do you recall Detective Lott's testimony at
18 trial, that after the fight, you told Detective Lott in
19 the course of the interview, that you put the victim in
20 the trunk and drove around for about ten minutes, and
21 then you told Detective Lott, this being his testimony at
22 trial, that you stated it was your idea to take the
23 victim and throw him in the canal?
24 A Well, I didn't say that.
25 Q You're changing your story now, is that it?

1 A I didn't change nothing.
2 Q You testified at trial, did you not, that
3 you never gave a thought or it never crossed your mind to
4 do anything in the way of getting medical help or police
5 aid for that victim; isn't that correct?
6 A Yeah, that's correct.
7 Q Never crossed your mind to help that victim,
8 did it?
9 A I could have, but it was too late.
10 Q When was it too late?
11 A I don't know.
12 MR. BIRKEMEIER: Nothing further, your
13 Honor.
14 THE COURT: Redirect.
15 MR. FOSTER: No, your Honor, I have nothing
16 further.
17 THE COURT: Thank you, you may step down,
18 please.
19 MR. FOSTER: I have no further witnesses.
20 THE COURT: Do you wish to make a statement,
21 Mr. Birkemeier?
22 MR. BIRKEMEIER: Yes, your Honor. I've
23 submitted the memorandum, that was delivered Wednesday to
24 Mr. Foster, basically citing two aggravating
25 circumstances: Pecuniary gain and cruel, heinous or

1 depraved nature of the killing.

2 I believe that the pecuniary gain

3 aggravating circumstance is established, without

4 question, with the taking of the car and the wallet from

5 the victim.

6 With regard to that second circumstance, I'd

7 indicated the depravity aspect of the aggravating

8 circumstance being the one that applied in this case.

9 I cited a couple of cases. I cited the

10 Harding case there, and in addition to that, at this

11 time, I would cite to the court, the case of State versus

12 Michael Correll, a January the 28th, 1986 case from the

13 Arizona Supreme Court. In that one, at page 24 of the

14 slip opinion, they deal with State v. Gressor and review

15 again the five factors that indicate heinousness and

16 depravity.

17 They indicate they are relishing the murder

18 by the killer; infliction of gratuitous violence; third,

19 mutilation of the victim's body; fourth, the

20 senselessness of the crime; finally, helplessness of the

21 victim.

22 neither of The court states absent additional factors

23 these last two factors alone ordinarily lead to a finding

24 of heinousness or depravity.

25 Now, I believe that the evidence clearly

1 establishes that this killing was a senseless killing,
2 that the victim was helpless from some point on the
3 ground there with the multiple then fatal wounds he'd
4 received in the course of the stabbing and the beating.
5 The additional circumstance, I submit to the
6 court, that exists is the infliction of gratuitous
7 violence on the victim beyond the murderous act itself.
8 I submit to the court, it's taking the body,
9 tying it up and dumping it in the canal, after the
10 multiple fatal wounds rendered the helpless victim
11 virtually dead. I believe that depravity is then
12 established, your Honor, with those particular
13 circumstances.
14 I don't believe that the other elements, the
15 relishing of the murder or mutilation of the victim's
16 body is necessarily established in this case, but I
17 submit to the court, gratuitous violence on the victim is
18 the aggravating circumstance for the depravity.
19 The other question that maybe in the court's
20 mind, that I would see, is the question, well, Jose Lopez
21 pled out, why then a death penalty in this case, and --
22 THE COURT: I asked that question, I asked
23 the question.
24 MR. BIRKEMEIER: I would cite to the court,
25 State versus Gillies, there are two Gillies. The second

1 Gillies is 691 P2d 6 --

2 THE COURT: I need the Arizona cite.

3 MR. BIRKEMEIER: 142 Arizona 564, follows

4 the first one of 135 Arizona 500.

5 The first one was remanded for reweighing of

6 aggravation and mitigation.

7 In the second one, the court noted that in

8 that case the codefendant of Gillies, by the name of

9 Logan, pled out. That in that case, codefendant

10 Gillies -- Logan was sentenced to live imprisonment.

11 And the court's response in paragraph -- or

12 in Headnote 27 was the appellant argues that Logan was

13 more culpable than he, as such it was improper to

14 sentence, improper to sentence Logan to life and him to

15 death. The court goes on, we disagree, both men accused

16 each other of wielding the rock, both men had the intent

17 to kill Suzanne Rossetti. The question is not whether

18 Logan should also have been executed but whether

19 execution of Gillies is lawful and appropriate.

20 I think that's the question here. The

21 question is, is the execution, the order of execution of

22 this man lawful and appropriate, not what was done with

23 Jose Lopez.

24 In this case, in the case here, I would

25 advise the court that Jose Lopez and this defendant were

1 both offered the plea of no death penalty. Jose Lopez
2 proceeded to exercise the option of avoiding the risk at
3 trial.
4 In this case, George Lopez, apparently, felt
5 that he, rather than deal with what the State offered,
6 would take the risk of what the judge and the jury might
7 decide. I believe that's proper then for the court to
8 impose the death penalty here.
9 In Gillies, Headnote 26, referring to
10 Logan's plea agreement, in that case, the court noted the
11 appellant Gillies was offered a similar opportunity, and
12 the court goes on to state, any resulting inequity
10
13 between the two sentences is a consequence induced by our
14 plea bargaining system.
15 I think that Mr. Lopez, for whatever reason,
16 has exercised an option of going to trial, despite the
17 risk of a death penalty. I think that he has placed
18 himself in the position of saying, if you, jury, decide
19 I'm guilty of first degree murder, if you, judge, decide
20 I have committed the aggravating circumstance, murder, I
21 am then willing to take the consequences of that. He has
22 exercised his option.
23 I would therefore ask this court further to
24 make the finding, under Edmund v. Florida, that this
25 defendant had the intent to commit murder, and then to

1 make the finding that there were aggravating
2 circumstances, no mitigating circumstances. As a result
3 of the two aggravating circumstances, the death penalty
4 should be imposed.
5 THE COURT: Mr. Foster.
6 MR. FOSTER: Thank you, your Honor. Your
7 Honor, I intend to submit to the court a presentence
8 memorandum also, but I briefly would respond to Mr.
9 Birkemeier.
10 As to the two aggravating circumstances, the
11 first one is pecuniary. The State has proven that a car
12 and a wallet were taken from, were taken after a person
13 was deceased, and it was also shown that George Lopez did
14 not benefit from either of these items. The wallet was
15 thrown into a garbage can, the car was, by person or
16 persons unknown, torched, and that George Lopez received
17 absolutely no pecuniary gain from this.
18 There has been no evidence to show that the
19 reason for the fight or the reason for the death was the
20 expectation of any pecuniary gain, and there is
21 absolutely was no pecuniary gain.
22 As to the depravity of the action, there
23 were -- there was a fight, there were going to be
24 numerous bruises, abrasions, stab wounds, hits, et cetera
25 when there's a fight. There wasn't any gun involved.

1 One shot situation.

2 That is what the court, I think, must

3 consider, not what happened after the victim was

4 deceased. Whatever happened after the victim was

5 deceased, I do not believe should be considered in

6 determining whether or not there are aggravating

7 circumstances. The question of depravity is the question

8 of what a defendant does to his victim, victim, before

9 the victim is deceased, not after the victim is deceased.

10 As to mitigating circumstances, the State

11 contends that the age of the defendant is not in

12 mitigation. He's 19 years old. I don't know what other

13 age that they, the State, would consider mitigating.

14 Under 19 years old, they won't allow him to drink, but

15 they don't feel that this is a mitigating circumstance to

16 take his life. I believe, your Honor, that it is a

17 mitigating circumstance.

18 And as to the inappropriateness of the

19 sentences between he and his brother, I believe, your

20 Honor, you can remember the testimony fairly well, that

21 it's really not clear as to whether one or both

22 contributed to this, or at least that they both

23 contributed to it.

24 George Lopez exercised not his option, his

25 right to go to trial, his right to have his side of the

1 story presented to a jury and the State to prove their
2 point.
3 They gave him a decision between 25 years in
4 prison and a possibility that this court might find some
5 aggravating circumstances. I don't believe that he
6 should be punished for going to trial.
7 Now, I don't -- if the court finds that
8 there are aggravating circumstances enough to put this
9 man to death, fine, but I don't believe that the fact
10 that he comes before this court, before this jury and
11 presents the evidence from his side of it, that he should
12 in any way be punished or dealt with other than anybody
13 else.
14 And the court certainly is aware of and has
15 available to it the presentence report for Jose Lopez. I
16 have not personally read it yet myself, but I believe
17 that the court can see from that, that probably Jose had
18 no other choice but to accept this plea agreement.
19 Whereas I believe, and it was a decision
20 made between George and myself, but I don't believe that
21 he was trying to slip through the cracks of the system or
22 to beat the system, but to present as fairly and as
23 accurately as possible his side of the story.
24 I believe that when the court reviews the
25 evidence in this, it will show that there was absolutely

1 no premeditation on his part, there was absolutely no
2 evidence whatsoever that this event occurred for
3 pecuniary gain, at least in the mind of this defendant,
4 and that the court should take into consideration the
5 defendant's age.
6 THE COURT: All right, thank you. Ordered
11
7 affirming the sentencing date of 8:30 o'clock a.m., May
8 2nd. Court will stand in recess.
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EXHIBIT X

EXHIBIT 2

STATE OF ARIZONA - C RTMENT

NORMAN L. HELBER, CHIEF PROBATION OFFICER

P.O.: DAVID K. WILCOX PRIMARY LANG: ENGLISH

FILED 10:45 JUDITH ALLEN, Clerk Deputy

NAME SAMUEL VILLEGAS LOPEZ
RESIDENCE 2840 West Fillmore
Phoenix, AZ ZIP 85009
PHONE 233-2107 MESSAGE PHONE None
AKA OR MAIDEN None
ID MARKS None
EMPLOYER/ADDRESS/PHONE Unemployed

OCCUPATION Laborer EDUCATION 10A
MARITAL Single RELIGION Catholic

RACE Mex SEX M HT 5'7"
EYES Bro HAIR Blk WT 150
DOB 06-30-62/06-16-62 AGE 27
CITIZEN OF USA
BIRTHPLACE Phoenix, AZ
DRIVER'S LIC. NO. Unknown
S.S. NO. 527-39-3897/529-27-2928
FBI NO. 723 247 W5
BOOKING NO. 890309/203863
CHILDREN 0

OCT 03 1990
APPEALS RECEIVED

CURRENT OFFENSE

CAUSE NO. CR163419 OFFENSE DATE 10-29-86 NCIC 0949D
CHARGE Count I: Murder in the First Degree, a Class 1 Felony
A.R.S. NOS. 13-1105, 1101, 812, 703, 1406, 1507, 1508, 903

DATE OF ARREST 11-04-86 ARRESTING AGENCY PHPD
DATE INCAR. 11-04-86 REL. DATE REL. STATUS Jail
DAYS IN JAIL THIS ARREST 1,262 REMAND JUVENILE COURT/DATE--NO

DEFENSE COUNSEL George Sterling, Ct. Appt. PROSECUTOR Paul Ahler
GUILT BY/DATE Jury/04-27-87 SENTENCING JUDGE PETER T. D'ANGELO
DATE OF SENTENCE 04-20-90
CODEF/DISPOS None

CRIMINAL HISTORY

NO. CONVICTIONS: FEL 2 MISD 2 JUV 1
NO. INCARCERATIONS: PRISON 2 JAIL
ESCAPE OTHER
NO. SUPERVISIONS: PROB PAROLE 2

WARRANTS OUTSTANDING

CASE NO.	CHARGE	STATE

OTHER:

GENERAL INFORMATION

NARCOTICS/ALCOHOL HISTORY PA-Alcohol/PU-Marijuana/PU-Toxic Vapors: Paint, Glue
TREATMENT/PROGRAMS None

MILITARY HISTORY NOT APPLICABLE
BRANCH TYPE DISCH.
ENTRY DATE DISCH. DATE

SPOUSE/RELATIVES/CHILDREN

NAME	RELATION	AGE	ADDRESS	PHONE
Concha Lopez	Mother	60	2840 W. Fillmore, Phoenix, AZ	233-2107

1400u/04-12-90/da

THE STATE OF ARIZONA
Plaintiff

vs.

SAMUEL VILLEGAS LOPEZ
Defendant

CAUSE NO. CR163419

HONORABLE PETER T. D'ANGELO

CRIMINAL DIVISION 15

SUPERIOR COURT

PRESENTENCE INVESTIGATION

PRESENT OFFENSE:

The following information is taken from Phoenix Police Departmental Report #86-144475:

On October 29, 1986, Phoenix Police Officers were asked to check on the welfare of Estefana Holmes at 2822 West Polk in Phoenix. Ms. Holmes had not reported for work on that day, and it was the first day she had missed work in eight years. Officers arrived at the residence at approximately 11:00 a.m. and found the body of Ms. Holmes on a sofa bed within the residence. There were signs of an extensive struggle within the apartment, including bloodstains in the living room/bedroom areas, the kitchen, on the walls, and in the bathroom.

After an initial investigation, the victim's body was removed to the office of the Maricopa County Medical Examiner. An examination of the body found that the victim had been blindfolded by her blue pajama bottoms, gagged by a white lace scarf, which was found embedded in her mouth, had been stabbed approximately twenty-six times, twenty-three of which were found in the left breast and upper chest area, and had had her throat cut. She had also been sexually assaulted. The investigation also indicated several lacerations on the victim's head and contusions on her face, left hand, and left index finger. Stab wounds were also found on the victim's right forearm near her elbow, consistent with a defensive position. Dried blood was found on the victim's abdomen and feet.

The investigation continued and the defendant, Samuel Lopez, became a suspect. On November 3, 1986, Mr. Lopez was arrested after it was reported to police that he had sexually assaulted a nineteen-year-old woman, who he had previously dated. According to the victim, Mr. Lopez dragged her to the rear alley of 2825 West Melvin and forced her into a vehicle in which the defendant had been living. The defendant allegedly sexually assaulted the victim, but she was able to flee and call police. Officers arrived and took the defendant into custody for that offense. As officers investigated further, the defendant's fingerprints and palm print were found in the home of Estefana Holmes. Mr. Lopez was then booked into the Maricopa County Jail for the instant offense.

SAMUEL VILLEGAS LOPEZ
Defendant

CAUSE NO. CR163419

RELATED OFFENSES/STIPULATIONS:

On November 14, 1986, the defendant was indicted on charges of count I, murder in the first degree, a class 1 felony; count II, kidnapping, a class 2 felony; counts III and IV, sexual assault, class 2 felonies; and count V, burglary in the first degree, a class 2 felony. On April 27, 1987, a jury found the defendant guilty of count I, count II, count III, and count V of the original indictment. The defendant was found not guilty of count IV of that indictment. Sentencing in this matter occurred on June 25, 1987, in the Courtroom of the Honorable Peter T. D'Angelo.

On January 16, 1990, the Supreme Court of the State of Arizona ordered that the defendant be resentenced for count I of the original indictment. The Supreme Court upheld the sentences in counts II, III, and V and the defendant is currently serving a term of incarceration with the Arizona Department of Corrections on those counts.

DEFENDANT'S STATEMENT:

The defendant indicated he is not guilty of this offense. He related he was in the area of the victim's home on October 28, 1986, as he was in a park in the residential neighborhood, watching other individuals play basketball. He also indicated that he had been drinking and smoking marijuana on that day but was not intoxicated. According to the defendant, he had never burglarized the home of the victim and is unable to give an explanation as to why his fingerprints and palm print were found in her residence. Mr. Lopez further indicated that he had not committed any burglaries in the neighborhood since being released from prison prior to this incident.

Mr. Lopez also indicated that he is aware the jury has found him guilty and he is to be resentenced in this matter. He is requesting that the Court sentence him to a term of imprisonment rather than the death penalty, as he is already serving consecutive time for the convictions on the other counts involved in this offense and he will, most likely, die in prison before his sentences are completed. Mr. Lopez also indicated that the relatives of the victim, who have written letters to the Court, do not really know him and may, if asked, recommend imprisonment rather than the death penalty.

STATEMENT OF VICTIMS:

The following information is taken from information contained in a previous presentence report.

Sammy Castillo, the son of the victim, stated he will always have a sense of loss and that he can never forgive the defendant. According to Mr. Castillo, nothing the State can do can replace his mother or

make up for his loss, but he does recommend that the Court sentence the defendant to the maximum possible penalty. He stated that the defendant's actions permanently damaged those closest to the victim. He expressed the horror and trauma he has experienced, especially after seeing the photograph of his mother. He has been experiencing nightmares and has had to see a therapist. He is taking antidepressant medication. Mr. Castillo also lost his job after the death of his mother. He expressed feelings of helplessness, anger, depression, and thoughts of self-destruction. He hopes that his life can someday be put back in order.

Bertha Anderson, the victim's sister-in-law, indicated that she and the victim were like sisters. She hoped the Court would consider how good a person Estefana Holmes was. She stated Ms. Holmes did not have a mean bone in her body and never hurt anyone. She recommended the defendant receive the death penalty. According to Ms. Anderson, the manner in which Ms. Holmes died was cruel and she was forced to fight hard for her life. She stated that there must be justice for the victim. Ms. Anderson also indicated that she is taking tranquilizers and had to be taken to the hospital after learning of Ms. Holmes's death. She also requested that the Court consider how much the entire family has suffered as a result of the defendant's actions.

A number of individuals had previously submitted letters regarding sentencing in this matter to the Adult Probation Department. Those letters are enclosed and sealed in an envelope and attached to this report.

STATEMENT OF INTERESTED PARTIES:

George Sterling, Esq., the defendant's Court-appointed attorney in this case, indicated that he would file a sentencing memorandum with the Court.

Paul Ahler, the deputy county attorney assigned to this case, indicated that he will make a statement to the Court during a presentence hearing.

A previous presentence report indicated that Phoenix Police Detective Butler recommended the death penalty in this case based on the manner in which the victim was made to suffer before she was murdered. According to the officer, at the very least, the defendant should be removed from society forever.

ARREST HISTORY:

JUVENILE:

The following information is taken from a previous presentence report dated May 20, 1987:

SAMUEL VILLEGAS LOPEZ
Defendant

CAUSE NO. CR163419

ARREST DATE	PLACE OF ARREST	CRIME/DISPOSITION
05-21-79	Phoenix, AZ	Curfew violation, 2 counts/Placed on probation on 10-18-79.
05-30-79	Phoenix, AZ	Runaway, 3 counts/Probation.
06-18-79	Phoenix, AZ	Curfew/Adjusted (counseled and warned).
10-26-79	Phoenix, AZ	Burglary in the 3rd degree, theft/Case was terminated and closed and the defendant released from probation on 02-21-80.

ADULT:

The following information was obtained from records provided by the Federal Bureau of Investigation, the Phoenix Police Department, the Maricopa County Sheriff's Office, the Arizona Department of Corrections, and a previous presentence report dated May 20, 1987:

ARREST DATE	PLACE OF ARREST	CRIME/DISPOSITION
10-17-80	Phoenix, AZ	Misconduct involving a weapon, disorderly conduct/No disposition noted.
02-21-81	Phoenix, AZ	Aggravated assault/No charges filed.
03-08-81	Phoenix, AZ	Shoplifting/No disposition noted.
03-20-81	Phoenix, AZ	Burglary/The defendant entered into a plea agreement under cause number CR118499 but, before sentencing, was arrested for several other burglaries. The cause number was eventually dismissed when the defendant entered into a plea agreement in cause number CR121406.
05-29-81	Phoenix, AZ	Burglary and theft/Defendant was charged in cause number CR121952, later dismissed as part of a plea agreement in cause number CR121406.
06-06-81	Phoenix, AZ	Armed robbery/Charges dismissed.
06-12-81	Phoenix, AZ	Burglary/Defendant was charged under cause number CR121952. This cause was dismissed per a plea agreement in cause number CR121406.

SAMUEL VILLEGAS LOPEZ
Defendant

CAUSE NO. CR163419

06-16-81	Phoenix, AZ	Burglary/The defendant was indicted in cause number CR122183 for this offense. This cause was dismissed per plea agreement.
07-12-81	Phoenix, AZ	Burglary/Maricopa County cause number CR121406, the defendant entered into a plea agreement to burglary in the 2nd degree, a class 3 felony. The defendant was sentenced to the Arizona Department of Corrections for a period of 3.75 years on 11-05-81.
12-22-83	Phoenix, AZ	Shoplifting/Guilty plea, 6 days Maricopa County Jail on 03-27-84.
05-23-84	Phoenix, AZ	Possession of liquor in a park/No disposition noted.
12-15-84	Phoenix, AZ	Criminal trespassing, disorderly conduct/ Guilty plea to trespassing charge, sentenced to 3 days Maricopa County Jail on 12-16-84.
07-25-85	Phoenix, AZ	Loitering in a park/No disposition noted.
08-24-85	Phoenix, AZ	Inhaling toxic substances, aggravated assault, escape in the 2nd degree, resisting arrest/Guilty plea to resisting arrest in cause number CR151615, the offense was designated a felony and the defendant sentenced to 1.5 years with the State Department of Corrections.
07-16-86	Phoenix, AZ	Burglary/No disposition noted.
11-03-86	Phoenix, AZ	Murder in the 1st degree, kidnapping, sexual assault, and burglary/The instant and related offenses.

SOCIAL HISTORY: Unless otherwise noted, the following information was provided by the defendant:

Family: The defendant is one of eight male children born to his natural parents, Arcadio and Concha Lopez. The defendant's father abandoned the family when the defendant was approximately eight years of age and he has had no contact with him since that time. The defendant's natural mother raised all eight children in the family through various periods of employment. The

family did suffer great financial hardship after the abandonment of the family by the defendant's natural father. Several of the defendant's siblings have been involved in violations of the law and have been imprisoned.

Education: Mr. Lopez attended primary school at Murphy No. 3 in Phoenix through 1975. He completed the tenth grade at Carl Hayden High School while attending from 1976 through 1978. He received some vocational training during his first term of imprisonment but has never completed his G.E.D.

A Word Recognition Aptitude Test administered to the defendant indicates a reading ability above the sixth grade level.

Employment: Prior to his incarceration, the defendant was a laborer for the City of Phoenix and for several local corporations. He has not worked since 1984 due to several periods of imprisonment.

Substance Use: The defendant indicated he drinks alcohol occasionally and that it "cools me down." He indicated he needs no professional help for alcohol abuse. Mr. Lopez also indicated that he has experimented with marijuana in the past and did use toxic vapors, including paint and glue, beginning in 1975 and lasting until his incarceration in 1986. According to the defendant, he would only inhale toxic vapors when he did not have money for beer or marijuana. Mr. Lopez indicated that his use of toxic substances was sporadic enough that he did not suffer long-lasting mental or physical impairments. The defendant further indicated that he has never been dependent on any drug.

Health: The defendant suffered a severely lacerated finger from a lawn mower accident in the early 1980's. He suffers no lasting effects from that injury and is not under a doctor's care or taking any medication.

Mental Health: Mr. Lopez underwent psychological evaluations while he was incarcerated in the Department of Corrections and in early June of 1987 at the request of his public defender. An evaluation performed by Dr. Otto L. Bendheim was provided to this writer by the defense attorney, George Sterling, and is attached to this report for the Court's review.

FINANCIAL STATUS AND EVALUATION:

When the defendant was originally sentenced in this matter, he was ordered to pay restitution totaling $2,575.79 to Mr. Sammy Castillo, the son of the victim. That restitution was apparently ordered for funeral expenses. As the status of that loss has not changed, this officer would recommend that that restitution amount be reordered.

SAMUEL VILLEGAS LOPEZ
Defendant

CAUSE NO. CR163419

The probation officer has considered the following factors in determining the manner of payment:

1. Defendant's age: twenty-seven.
2. Defendant's income: no income at present.
3. Defendant's expenses: no expenses at present.
4. Defendant's assets: no assets at present.
5. Defendant's education: sufficient for employment.
6. Defendant's obligation to support dependents: none.
7. Defendant's employment history: sporadic employment history.
8. Defendant's prospects for employment: poor prospects due to incarceration.
9. Others: The loss suffered by the victim's son.

Based on the above, it is recommended the defendant pay restitution through the Clerk of the Court per the attached restitution ledger sheet.

DISCUSSION AND EVALUATION:

Currently before the Court for sentencing is a twenty-seven-year-old male who was twenty-four years of age when found guilty by jury of the instant offense. The defendant verbalizes his innocence in this case but guilt must be assumed due to his conviction by that jury.

The victim, Estefana Holmes, was brutally murdered. The autopsy performed by the county medical examiner indicated stab wounds totaling at least twenty-six, including some stab wounds that would be consistent with the victim raising her arms in defense of her own life. She was blindfolded, gagged, and sexually assaulted. The pain and terror she must have experienced is difficult to comprehend but seems evident due to the fact that blood was splattered on her feet, indicating that she was standing for at least part of the time during the assault. It is apparent that her death was not immediate and the fact that she suffered greatly at the hands of the defendant certainly has affected her family and acquaintances.

In reviewing the defendant's criminal history, this officer finds that his criminal activity started with status offenses as a juvenile and progressed to more serious crimes in his adult years. The defendant has been imprisoned for previous felony offenses of a property-related nature and has also been arrested for assaultive crimes, on one occasion a resisting arrest charge leading to a felony conviction and imprisonment. There is no indication, however, that the defendant was involved in serious assaultive conduct prior to taking the life of the victim, although his apprehension occurred while he was being investigated for another sexual assault involving assaultive conduct. In assuming the defendant's

guilt, it is apparent that the defendant inflicted much pain and suffering upon the victim prior to her death.

A review of a psychological report submitted by Dr. Otto Bendheim involving the defendant, and completed several months after his involvement in this offense, indicates an individual of normal intelligence who does not appear to be suffering from serious psychological or psychiatric problems. Dr. Bendheim does indicate that the defendant could have been intoxicated on the evening of the offense, a situation which could have resulted in more aggressive behavior than would be normal for him. However, the defendant himself indicated in 1987, while filling out a presentence questionnaire, that his use of alcohol was sporadic and of a social nature and not abusive. He also indicated at that time that he did not feel he needed assistance in overcoming an alcohol problem. Additionally, there is little to indicate that the defendant's use of either drugs or toxic vapors has affected him greatly. If the use of those substances had been widespread and debilitating the defendant most likely would not have tested out during the psychological process as being of normal intelligence.

Considering all of the circumstances in this case, this officer can only draw one conclusion, a conclusion that the defendant knowingly and viciously caused the victim great fear and pain as she was being assaulted before her death. The vast number of stab wounds on various parts of her body and the laceration of the throat indicate a cruel and vicious individual committed this offense. Such an act must be punished, taking into account the most serious nature of the offense and its effect.

These factors were considered in making the sentencing recommendation:

1. The defendant's relatively mature age at the time of this offense.
2. The apparent agony suffered by the victim due to the excessive number of stab wounds.
3. The age of the victim as compared to the age of the defendant.
4. The defendant's prior record which has become progressively more serious since his juvenile involvement in the criminal justice system.
5. The emotional distress suffered by the victim's family and acquaintances.
6. This officer's belief that the defendant poses the most serious of threats to the community.

RECOMMENDATION:

It is respectfully recommended that the defendant be sentenced as prescribed by law.

SAMUEL VILLEGAS LOPEZ
Defendant

CAUSE NO. CR163419

It is further recommended the defendant pay restitution per the attached restitution ledger sheet.

The defendant has served 1,262 days of presentence incarceration.

Respectfully submitted,

By: _____
David K. Wilcox
Deputy Adult Probation Officer
262-3985

I have reviewed and considered the probation officer's report.

Judge: _____

Date: 7/23/90

DKW:da:1400u
April 12, 1990