

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

In re Richard Dale Stokley, Petitioner.

***** CAPITAL CASE *****
EXECUTION SCHEDULED FOR 10:00 a.m. MST
(1:00 p.m. EDT) ON WEDNESDAY, DECEMBER 5, 2012

PETITION FOR WRIT OF HABEAS CORPUS

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APPENDIX

Amended Order, dated November 27, 2012.....	A-1
Amended Order, dated November 21, 2012.....	A-16
Opinion, <i>Richard Dale Stokley v. Charles L. Ryan</i> , dated September 26, 2011 Ninth Circuit Court of Appeals No. 09-99004	A-36
Memorandum of Decision and Order, dated March 17, 2009 United States District Court	A-50
Opinion, <i>State of Arizona v. Richard Dale Stokley</i> , dated June 27, 1995, Arizona Supreme Court Case No. CR-92-0278-AP.....	A-83
Cochise County Superior Court Special Verdict, dated July 14, 1992	A-117
Dr. McKinzey Declaration, dated January 24, 2000	A-129
Cochise County's Reporter's Transcript of Proceedings, dated June 17, 1992, pp.	A-140
Stokley's Supplemental Sentencing Memorandum, dated June 15, 1992	A-145
Cochise County's Reporter's Transcript of Proceedings, dated March 24, 1992, pp.	A-147
Cochise County's Reporter's Transcript of Proceedings, dated March 20, 1992, pp.....	A-153
Cochise County's Reporter's Transcript of Proceedings, dated March 19, 1992, pp.....	A-161
Cochise County's Reporter's Transcript of Proceedings, dated March 18, 1992, pp.....	A-173
Cochise County's Reporter's Transcript of Proceedings, dated March 17, 1992, pp.....	A-198
Bexar County Hospital Reports For Treatment Dated March 3 through 9, 1982. Filed in Cochise County Superior Court.....	A-201
Stokley Interview, dated August 1, 1991.....	A-205

Stokley Interview, dated July 22, 1991	A-208
Randy Brazeal Interview, dated July 22, 1991	A-220
Medical Records from Sierra Vista Hospital, various dates	A-239
Cochise County's Reporter's Transcript of Proceedings, dated October 17, 1991, pp. 9-12.....	A-269
Cochise County's Reporter's Transcript of Proceedings, dated March 25, 1992, p. 26	A-274
Cochise County's Reporter's Transcript of Proceedings, dated March 26, 1992, pp. 9-12, 25, 69	A-276
Cochise County Superior Court Verdicts, dated July 14, 1992, dated March 27, 1992	A-283
Richard Dale Stokley letter to the Supreme Court of the United States, undated	A-294
Richard Dale Stokley Draft Executed Plea Agreement, dated November 5, 1991	A-298
Motion to Continue, filed October 3, 1991, Cochise County Superior Court	A-304

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NOV 27 2012

FOR PUBLICATION
UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD DALE STOKLEY,

Petitioner - Appellant,

v.

CHARLES L. RYAN,

Respondent - Appellee.

No. 09-99004

D.C. No. 4:98-CV-00332-FRZ

District of Arizona,

Tucson

AMENDED ORDER

Before: THOMAS, Circuit Judge and Capital Case and En Banc Coordinator

The full court has been advised of the petition for rehearing en banc.

Pursuant to the rules applicable to capital cases in which an execution date has been scheduled, a deadline was set by which any judge could request a vote on whether the panel's November 15, 2012 order should be reheard en banc. The panel elected to amend its original order, and the full court was advised of the planned amendment.

A judge requested a vote on whether to hear the panel's order en banc. A majority of the active, non-recused judges eligible to vote on the en banc call did not vote to rehear the panel order en banc. Therefore, the petition for rehearing en banc is DENIED.

No further petitions for panel rehearing or rehearing en banc will be entertained. En banc proceedings with respect to the original order and the amended order are concluded.

The dissents from the denial of rehearing en banc follow this amended order.

FILED

NOV 27 2012

Stokley v. Ryan, No. 09-99004

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

REINHARDT, Circuit Judge, joined by PREGERSON, WARDLAW, W. FLETCHER, FISHER, PAEZ, and BERZON, Circuit Judges, dissenting from the denial of *en banc* rehearing:

This is a death penalty case in which, due to the panel's perceived need to resolve, all-too-hastily, several important issues arising out of the recently-decided case of *Maples v. Thomas*, 132 S. Ct. 912 (2012), the majority, without proper briefing, made a number of serious errors that warrant review by the *en banc* court. So great was its perceived need for speed that the panel was still amending its order and changing its rationale while the *en banc* process was underway. Stokley, the individual whose life was at stake, was afforded little opportunity to explore the issue that the majority of the panel raised *sua sponte*, and then held to be dispositive. Nevertheless, a majority of the court voted to let the panel majority's order stand. As a result of our failure to go *en banc*, an execution which is scheduled for next week will occur, in violation of fundamental constitutional principles, absent intervention by the Supreme Court—the only remaining body that can ensure that Stokley receives his constitutional rights.

The case arises from Stokley's motion for a stay of mandate and for a remand to the district court in light of the Court's recent decision in *Maples*.¹

¹The panel does not contest that this motion is properly raised as a motion to stay the mandate. It had issued a published opinion before *Maples* was decided, but there it addressed an entirely different underlying claim. *Stokley v. Ryan*, 659

Stokley claimed that, like Maples, he had been abandoned by his post-conviction counsel, and that this abandonment constituted adequate cause to excuse his failure to raise on state post-conviction review the claim that, on direct appeal, the Arizona Supreme Court had violated *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The panel does not, in its amended order, contest Stokley's *Maples* claim, except to hold that he suffered no prejudice as a result.

Eddings makes clear that a defendant is entitled to rely on *any* mitigating evidence that might make a fact-finder less likely to impose a death sentence—including evidence that does not have a causal connection to the crime at issue. 445 U.S. at 114-15. The Arizona Supreme Court violated *Eddings* in its decision affirming the death penalty imposed on Stokley, by failing to consider mitigating evidence that did not have a nexus to his crime.² The panel majority excuses the Arizona Supreme Court's violation of *Eddings* as merely harmless error, thus deciding, *sub silentio*, that an *Eddings* error is subject to harmless error analysis. It then holds that Stokley is unable to demonstrate the prejudice necessary to excuse the procedural default of his *Eddings* claim, and on that basis denies his motion for a stay of mandate and for a remand to present his claim,

F.3d 802 (9th Cir. 2011).

²*See, e.g., State v. Stokley*, 898 P.2d 454, 473 (Ariz. 1995) (disregarding evidence of “chaotic and abusive childhood” because Stokley “failed to show how this influenced his behavior on the night of the crimes”).

under *Maples*, that he was abandoned by his attorney—and ultimately the right to a proper review of his capital sentence by the Arizona Supreme Court under standards consistent with the Constitution.³

We err in declining to convene *en banc* to address this capital case, for several reasons. First, we should decide *en banc* the question of whether a court's error under *Eddings* is structural or is subject to harmless error analysis. Second, even if an *Eddings* error were not structural, we should decide *en banc* whether the panel ought to have reached that issue—an issue that was not properly presented to it—or should first have remanded it to the district court. Finally, even if the error were not structural *and* if we were not required to remand as to prejudice, we should have determined whether the state carried its burden of showing that the error was harmless.

Whether a court's error under *Eddings* is structural or is subject to harmless error analysis is an unresolved question of exceptional importance. The circuits are divided on the question; the Fifth Circuit has held that such an error is structural, while other circuits have held the opposite. *Compare Nelson v. Quarterman*, 472 F.3d 287, 314-315 (5th Cir. 2006) (*en banc*), *cert. denied*, 551

³Although the panel here erroneously found no prejudice, it did not rule on the question of cause in its amended order, and a remand, on that question at least, would be necessary.

U.S. 1141 (2007) *with Bryson v. Ward*, 187 F.3d 1193, 1205 (10th Cir. 1999) (collecting cases applying harmless error review). Even our own court's decisions appear divided on this issue. *Compare Williams v. Ryan*, 623 F.3d 1258, 1270-71 (9th Cir. 2010) (conducting no harmless error analysis) *with Landrigan v. Stewart*, 272 F.3d 1221, 1230 & n.9 (9th Cir. 2001). The Supreme Court has previously granted certiorari to address this question, *see Smith v. Texas*, 549 U.S. 948 (2006) (mem.), although it nevertheless eventually declined to address it, *see Smith v. Texas*, 550 U.S. 297, 316 (2007) (Souter, J., concurring). A petition for certiorari raising this precise question is currently pending before the Supreme Court. *See Thaler v. McGowen*, No. 12-82 (U.S. filed July 17, 2012), *available at* 2012 WL 2992072.

The panel's hastily-reached decision, without adequate briefing, that such error is not structural is simply inconsistent with the Supreme Court's precedents regarding the importance, in capital cases, of permitting the fact-finding body to properly weigh all mitigating factors. These precedents require that the fact-finding body give meaningful weight to mitigating factors—a requirement that is as much substantive as it is procedural. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (“[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and *give*

*effect to that evidence in imposing sentence.” (emphasis added)), abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002). Such an error cannot be cured by this court, and particularly, given the deference due to the state court, by this court sitting in habeas review. We should not engage in an independent weighing of these factors, especially when the state court originally did so under a mistaken conception of its legal duty. Such an independent weighing creates the substantial “risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.” Penry, 492 U.S. at 328 (citing Lockett v. Ohio, 438 U.S. 586, 605 (1978)) (remanding for a re-determination of the aggravating and mitigating factors). That risk, as the Supreme Court has held, is “unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.” *Id.* Thus, not only should we go *en banc*, but we should conclude that the error is structural, and that the Arizona Supreme Court should be given the opportunity to apply the proper Constitutional standards.*

Further, even were we to conclude that an *Eddings* violation is not structural, the panel majority’s decision to address the question of prejudice would constitute error. The state made no mention of this question in its opposition to Stokley’s motion for a stay of mandate, and the district court had had no opportunity to consider *Maples* at all. The simplest course would have been to remand, to give

both parties the opportunity to fairly address the issue and to obtain the views of the district court. *See, e.g., Maples*, 132 S. Ct. at 927-28 (remanding for a determination regarding prejudice); *Martinez v. Ryan*, 132 S. Ct. 1309, 1320-21 (2012) (same). The panel, however, did not remand—instead, it addressed the issue of prejudice *sua sponte*, despite the state’s failure to raise it. This is particularly surprising, given that, if an *Eddings* error is not structural, the state bears the burden of demonstrating that the error is harmless. *See Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987) (noting the state’s duty to demonstrate that error is harmless, and holding that “[i]n the absence of such a showing our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid.”).

As it was, the first substantive discussion of prejudice in this case was in the panel majority’s original order denying Stokley’s motion—although prejudice was simply an alternative basis for the order. The principal basis for the majority’s holding was that Stokley had not been abandoned by his counsel, and thus that no cause existed for the procedural default. Stokley’s first opportunity to brief the issue of prejudice was in his petition for *en banc* rehearing, although he was compelled to argue primarily that the panel erred in holding that he had not been abandoned by counsel under *Maples* and that he had not waived the issue of

prejudice. The panel majority paid little heed to Stokley's briefing: a mere two days after his petition for *en banc* rehearing was filed, this court denied it; later that day, the panel majority amended its order—not to reflect Stokley's limited briefing regarding prejudice, but rather to render the issue of prejudice the *sole* basis of its amended order (thus eliminating all discussion of the merits of Stokley's *Maples* claim), while leaving its discussion of prejudice largely unchanged.⁴

Finally, even if the *Eddings* violation in this case were subject to harmless error review, and even if it were appropriate for the panel to reach the issue without a remand to the district court, it is clear that the *Eddings* error in this case was indeed prejudicial. If we are to determine whether there is harmless error here, then the Court's decision in the *Eddings* line of cases must be our guide: the focus of our inquiry ought to be whether there is a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Penry*, 492 U.S. at 328 (citing *Lockett*, 438 U.S. at 605 (1978)). Here, the comity and

⁴The panel's original order was based, in part, on an alleged representation by Stokley's counsel that no remand was necessary on the issue of prejudice. *See* Maj. Op. (Nov. 15, 2012) at 3 n.1 ("Stokley's counsel . . . did not raise any issues that required factual development through the requested evidentiary hearing."). The recording of oral argument clearly conveys counsel's statement to the contrary—that further development of the record was needed because "there has never really been a discussion of prejudice" and Stokley's pleadings regarding the issue were simply "notice pleading." The panel's amended opinion omits the assertion that counsel has waived this issue.

federalism concerns that typically limit our inquiry when we sit in habeas review, *see Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011), suggest that the Arizona Supreme Court should be given an opportunity to re-weigh these factors when that risk is at least substantial, as it is here. This is particularly so given that the Arizona Supreme Court undertakes an independent and *de novo* weighing of aggravating and mitigating factors in its initial review of every capital case (including this one), and thus is uniquely situated to cure this error as well as being already familiar with the facts of this case. *See State v. Stokley*, 898 P.2d at 454.

Here, there clearly is a sufficient risk that the death penalty will be imposed in spite of factors that call for lenity. The Arizona Supreme Court permitted an *Eddings* error to affect its consideration of at least three of the mitigating factors it considered. *See State v. Stokley*, 898 P.2d at 469 (substance abuse), 470 (head injuries and impulse control), 473 (family history and childhood abuse). Although, as the Arizona Supreme Court pointed out, these factors did not have a direct nexus to the crime in question, the court's refusal to grant them weight undoubtedly limited its ability to "express[] its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id.* That this risk exists is particularly likely in light of the fact that Stokley's co-perpetrator—who actually instigated the crime—received a sentence of only 20 years, and has already been released from

prison. The facts of this crime, absent a consideration of Stokley's particular circumstances, thus do not inexorably lead to a finding that the death penalty should have been imposed. Thus, were we to engage in a harmless error analysis, we should hold that Stokley had established the requisite prejudice with respect to his *Maples* claim.⁵

For these reasons, I respectfully dissent.

⁵The more proper body to undertake this analysis, however (if not the Arizona Supreme Court), is the district court. The district court could make this decision on remand with the benefit of a thorough examination of the full record before the state court—examining the evidence and arguments made in support of each aggravating and mitigating factor—as well as with full briefing and argument.

FILED

NOV 27 2012

Stokley v. Ryan, No. 09-99004.

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

W. FLETCHER, Circuit Judge, with whom Judges PREGERSON, REINHARDT, WARDLAW, FISHER, PAEZ, and BERZON join, dissenting from the denial of *en banc* rehearing:

I fully concur in the dissents of Judges Reinhardt and Watford from our failure to take this case *en banc*. I add only the following.

In our haste, we have forgotten our role as an intermediate federal appellate court. We have taken the role of the federal district court, refusing to allow that court to deal in the first instance with Stokley's motion under *Maples v. Thomas*, 132 S. Ct. 912 (2012). And we have taken the role of the Arizona Supreme Court, refusing to allow that court to assess the importance of Stokley's mitigating evidence that was previously disregarded, in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Further, we have allowed a three-judge panel of this court to decide, without briefing from the parties, that *Eddings* error is not structural, despite cases in this circuit to the contrary, *see Williams v. Ryan*, 623 F.3d 1258 (9th Cir. 2010); *Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008), and despite suggestions from the Supreme Court that such error may indeed be structural. *See Smith v. Texas*, 549 U.S. 948 (2006) (mem.); *Smith v. Texas*, 550 U.S. 297, 316 (2007) (Souter, J., concurring); *Thaler v. McGowen*, 2012 WL 2955935 (Nov. 26, 2012) (denying cert. in *McGowen v. Thaler*, 675 F.3d 482 (5th Cir. 2012), in which

Fifth Circuit held that *Eddings* error in jury instruction is structural).

There is no reason for such haste. Stokley has asserted plausible claims under *Maples* and *Eddings*. They may or may not prove to be winning claims. But we should not allow the State of Arizona to kill Stokley before they have been properly considered.

FILED

Stokley v. Ryan, No. 09-99004

NOV 27 2012

WATFORD, Circuit Judge, joined by PREGERSON, WARDLAW, W. FLETCHER, FISHER, PAEZ, BERZON, CHRISTEN, and NGUYEN, Circuit Judges, dissenting from the denial of *en banc* rehearing:

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I do not think there is any question here that the Arizona Supreme Court violated the rule established in *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Assuming, as the panel majority does, that abandonment has been shown under *Maples v. Thomas*, 132 S. Ct. 912 (2012), Stokley has established cause for his procedural default. There are two unresolved questions with respect to prejudice. The first is whether this court must actually decide the merits of the underlying *Eddings* claim or need only find that the claim is substantial, as in *Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012); the second is whether an *Eddings* violation is structural error or is instead subject to harmless error review. These important and unsettled issues should be resolved by the court sitting *en banc*.

FILED

Stokley v. Ryan, No. 09-99004

NOV 27 2012

PREGERSON, Circuit Judge, dissenting from the denial of *en banc* rehearing.

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I concur in the dissents of Judge Reinhardt, Judge Fletcher, and Judge
Watford from our court's refusal to take *Stokley v. Ryan* en banc.

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NOV 21 2012

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD DALE STOKLEY,

Petitioner - Appellant,

v.

CHARLES L. RYAN,

Respondent - Appellee.

No. 09-99004

D.C. No. 4:98-CV-00332-FRZ

District of Arizona,

Tucson

AMENDED ORDER

Before: McKEOWN, PAEZ, and BEA, Circuit Judges.

Richard Dale Stokley, a state prisoner, was sentenced to death in 1992 for the murders of two 13-year-old girls. After pursuing direct review and post-conviction relief in the Arizona state courts, he filed a habeas petition in federal district court, which was denied on March 17, 2009. Stokley's appeal from that decision was denied by this court in *Stokley v. Ryan*, 659 F.3d 802 (9th Cir. 2011). On October 1, 2012, the Supreme Court denied Stokley's petition for certiorari. *Stokley v. Ryan*, No. 11-10249, 2012 WL 1643921 (Oct. 1, 2012). Stokley now asks this court to stay issuance of the mandate on the ground that the Supreme Court's holding in *Maples v. Thomas*, 132 S. Ct. 912 (2012), constitutes an intervening change in the law that could warrant a significant change in result. In

Maples, the Court held that abandonment by post-conviction counsel could provide cause to excuse procedural default of a habeas claim. *Id.* at 927.

Under Federal Rule of Appellate Procedure 41(d)(2)(D), this court “must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.” Fed. R. App. P. 41(d)(2)(D). Nonetheless, this court has the authority to issue a stay in “exceptional circumstances.” *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989), *cert. denied*, 493 U.S. 1076 (1990). To constitute an exceptional circumstance, an intervening change in law must require a significant change in result for the parties. *See Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004) (“[A]n intervening change in the law is an exceptional circumstance that may warrant the amendment of an opinion on remand after denial of a writ of certiorari.”); *Adamson v. Lewis*, 955 F.2d 614, 619-20 (9th Cir. 1992) (en banc) (finding an absence of exceptional circumstances where subsequent Supreme Court authority did not require a significant change in result). The question before us is whether Stokley has presented such an exceptional circumstance.

Stokley asks for a remand to the district court for an evidentiary hearing to determine whether, under *Maples*, he was “abandoned” by his state post-conviction attorney and thus has cause to excuse his procedural default of his underlying

claim that the Arizona Supreme Court failed to consider mitigating evidence in violation of *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982), and *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986). Under *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), Stokley is barred from litigating this procedurally defaulted claim in a federal habeas proceeding unless he can show both cause for the default and actual prejudice resulting from the alleged error. Because Stokley cannot establish prejudice and thus does not meet the exceptional circumstances threshold, we deny his motion to stay the mandate.

We assume without deciding that there was a *Maples* error. But regardless of whether *Maples* provides Stokley cause to excuse his procedural default, Stokley has not made a sufficient showing of actual prejudice. Stokley must establish “not merely that the [alleged error] . . . created a *possibility* of prejudice, but that [it] worked to his *actual* and substantial disadvantage,” infecting the entire proceeding with constitutional error. See *Murray v. Carrier*, 477 U.S. 478, 494 (1986) (citation omitted) (emphasis in original); see also *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (prejudice requires a showing that the error has a “substantial and injurious effect” on the sentence).

Stokley has a colorable claim that the Arizona Supreme Court, when it reviewed evidence of his abusive childhood and his behavior during pre-trial

incarceration, violated the *Eddings* principle that the court must consider, as a matter of law, all relevant mitigating evidence. *See Arizona v. Stokley*, 898 P.2d 454, 473 (Ariz. 1995) (“A difficult family background alone is not a mitigating circumstance. . . . This can be a mitigating circumstance only ‘if a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant’s control.’ . . . Although he may have had a difficult childhood and family life, [Stokley] failed to show how this influenced his behavior on the night of the crimes.”) (citations omitted); *id.* (“Although long-term good behavior during post-sentence incarceration has been recognized as a possible mitigating factor, . . . we, like the trial court, reject it here for pretrial and presentence incarceration.”).

However, on balance, the Arizona Supreme Court’s opinion suggests that the court did weigh and consider all the evidence presented in mitigation at sentencing. *See Stokley*, 898 P.2d at 468 (“Consistent with our obligation in capital cases to independently weigh all potentially mitigating evidence . . . [w]e turn, then, to a consideration of the mitigating factors.”); *id.* at 472 (“As part of our independent review, we will address each alleged mitigating circumstance.”); *id.* at 468 (“The sentencing judge must consider ‘any aspect of the defendant’s character or record and any circumstance of the offense relevant to determining whether the

death penalty should be imposed.’ . . . The sentencing court must, of course, consider all evidence offered in mitigation, but is not required to accept such evidence.” (citations omitted)); *id.* at 465 (“[T]his court independently reviews the entire record for error, . . . considers any mitigating circumstances, and then weighs the aggravating and mitigating circumstances sufficiently substantial to call for leniency.”); *id.* at 473 (“Family history in this case does not warrant mitigation. Defendant was thirty-eight years old at the time of the murders.”). The Arizona Supreme Court carefully discussed all the statutory and non-statutory mitigating factors, step by step, in separate paragraphs in its opinion. *See id.* at 465-74.

However, even assuming the Arizona Supreme Court did commit causal nexus error as to Stokley’s good behavior in jail and his difficult childhood, Stokley cannot demonstrate actual prejudice because he has not shown that the error, if any, had a substantial and injurious impact on the verdict. An error requires reversal only if it “had substantial and injurious effect or influence in determining the . . . verdict.” *Brecht*, 507 U.S. at 623 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); cf. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1408 (2011) (holding in a *Strickland* challenge that the test for prejudice at sentencing in a capital case is “whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and

mitigating circumstances did not warrant death.” (internal quotation marks omitted)).

The Arizona Supreme Court reviewed and discussed each of the aggravating and mitigating factors individually. The court found three statutory aggravating circumstances were proven beyond a reasonable doubt: (1) Stokley was an adult at the time the crimes were committed and the victims were under the age of fifteen; (2) Stokley was convicted of another homicide committed during the commission of the offense; and (3) Stokley committed the offense in an especially heinous, cruel, and depraved manner. 898 P.2d at 465-68. The Arizona Supreme Court’s conclusion that there were no grounds here substantial enough to call for leniency is consistent with the sentencing court’s determination that “even if any or all of the mitigating circumstances existed, ‘balanced against the aggravating circumstances found to exist, they would not be sufficiently substantial to call for leniency.’”¹ *Id.* at 471. And, the sentencing court noted as to Stokley’s childhood

¹ The sentencing court found the following facts beyond a reasonable doubt. Stokley was convicted of murdering two 13-year-old girls over the July 4th weekend in 1991. Stokley is a person of above average intelligence. At the time of the crime, he was 38 years old. Stokley intended that both girls be killed. He killed one of the girls and his co-defendant killed the other. Before the men manually strangled the girls to death, both men had sexual intercourse with the victims. Both bodies “were stomped upon with great force,” and one of the children bore “the clear chevron imprint” from Stokley’s tennis shoes on her chest, (continued...)

that “[t]he evidence, at best, is inconsistent and contradictory.” The Arizona courts considered the mitigation evidence—including good behavior in jail and childhood circumstances— insufficient to warrant leniency. In light of the Arizona courts’ consistent conclusion that leniency was inappropriate, there is no reasonable likelihood that, but for a failure to fully consider Stokley’s family history or his good behavior in jail during pre-trial incarceration, the Arizona courts would have come to a different conclusion. *See Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987) (referencing harmless error in connection with the exclusion of non-statutory mitigating evidence). In sum, because the claimed causal nexus error, if any, did not have a substantial or injurious influence on Stokley’s sentence, Stokley cannot establish prejudice. *Brecht*, 507 U.S. at 630-34.

In light of the high bar that must be met for this court to stay the mandate, Stokley’s motion to stay the mandate is DENIED.

¹(...continued)
shoulder, and neck. Both victims were stabbed in their right eyes with Stokley’s knife, one through to the bony structure of the eye socket. The girls likely were unconscious at the time of the stabbing. The girls’ bodies were dragged to and thrown down a mine shaft.

FILED

Stokley v. Ryan, 09-99004

NOV 21 2012

PAEZ, Circuit Judge, dissenting:

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Maples changed the law. Stokley asks us not for habeas relief, but to stay the mandate in light of this change and remand for full consideration of whether he can overcome procedural default on his colorable *Eddings* and *Skipper* claims that were not raised because Harriette Levitt abandoned him. The *only* analysis we should do here is to determine whether he has made a prima facie case for abandonment under *Maples* to establish cause, and shown that his prejudice argument has some merit in that he does not raise a frivolous claim. His claim that the Arizona Supreme Court committed causal nexus error in declining to consider mitigating evidence is anything but frivolous. It is a constitutional claim and one that this court should not extend itself to decide on the merits before it was briefed or argued by *either* party.

The majority assumes without deciding that there was a *Maples* error. Respectfully, that was the only question before this court. The majority brushes it aside to get to the final end game, but further confuses our law on prejudice and standards for error review in the process. Because I cannot agree with the majority's approach, I strongly dissent.

I first address why *Maples* error exists in this case. Then I turn to the

majority's incorrect and unrestrained analysis of prejudice.

I. Stokley has shown abandonment

Maples is not limited solely to *actual* abandonment. To obtain the remand he requests, Stokley need only make a prima facie showing of abandonment under *Maples* that might constitute cause to overcome procedural default. *See Moorman v. Schriro*, 672 F.3d 644, 647-48 (9th Cir. 2012). Despite the extremely limited briefing on the pending motion, Stokley has made such a prima facie case of abandonment. Moreover, as the majority recognizes, he has a colorable underlying constitutional claim. Our inquiry should end there. I would grant the motion and remand to the district court for determination of cause and prejudice and, if appropriate, the merits of Stokley's constitutional claim.¹

Maples rests squarely on agency principles. 132 S. Ct. at 922-24. To explain how an agency relationship may be actually or constructively severed, the Supreme Court relied on Justice Alito's concurrence in *Holland v. Florida*, 560 U.S. —, 130 S. Ct. 2549 (2010), to distinguish attorney negligence from abandonment.

“Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful

¹ I agree with the majority's assumption that *Maples* may be sufficient to establish the “exceptional circumstance” necessary to justify the exercise of this court's power to stay the mandate following a denial of certiorari.

sense of that word.” 132 S. Ct. at 923 (citing *Holland*, 130 U.S. at 2568 (Alito, J., concurring)). Justice Alito’s concurrence in *Holland* also noted that the agency relationship is constructively severed “particularly so if the litigant’s reasonable efforts to terminate the attorney’s representation have been thwarted by forces wholly beyond the petitioner’s control.” *Holland*, 130 S. Ct. at 2568. Indeed, our court’s precedent—while not finding abandonment—recognizes that *Maples* rests on agency principles and that a serious breach of loyalty can sever the attorney-client relationship in a manner that may constitute constructive abandonment sufficient to establish cause. *See Towery v. Ryan*, 673 F.3d 933, 942-43 (9th Cir. 2012) *cert. denied*, 132 S. Ct. 1738 (2012) (separately analyzing two prongs of actual abandonment or “serious breach of loyalty” and distinguishing *Holland*, which involved violations of fundamental canons of professional responsibility, from *Towery*’s circumstances, which did not).

In light of *Maples*, it is now recognizable that Stokley’s situation in postconviction proceedings was worse than simply “unenviable.” 659 F.3d at 810. Here, the attorney-client relationship was irrevocably broken. Further, the record demonstrates that, once the state was successful in forcing it to be put back together, postconviction counsel Harriette Levitt actively undermined the work of Stokley’s replacement counsel and prevented Stokley from investigating and

raising his own claims. While it has no legal bearing on the present issue, I note at the outset that Harriette Levitt is the same attorney whose conduct was at issue in the Supreme Court's recently-created ineffective assistance of counsel exception to the once settled rule in *Coleman. Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

Whereas the petitioner in *Maples* "in reality . . . had been reduced to pro se status," 132 S. Ct. at 927, Levitt's actions regarding Stokley's attempts to fairly present his claims arguably left him in a situation worse than a pro se petitioner. If there were ever a case for constructive abandonment under *Maples*, this is it.

Levitt filed her first post-conviction petition eight months after being assigned to the case. During these eight months, she initiated no contact with Stokley. The only communication she had with Stokley was a twenty-minute collect phone call he placed to her. Levitt did not conduct any independent investigation during this period, other than a few telephone calls lasting less than a total of two hours. According to Stokley, Levitt did not even receive the trial transcripts until more than six months after her appointment, and after the deadline for filing Stokley's petition had passed.

When Levitt finally filed Stokley's petition, she raised only two claims and wrote only three and a half pages of legal argument. Levitt's billing records indicate that, aside from reviewing Stokley's file and transcript, she spent no more

than ten hours researching and writing his petition for post-conviction relief.

Stokley immediately recognized the inadequacy of the petition and called Levitt to object. Levitt told him that his “trial attorneys didn’t make any mistakes” and that he would “probably be executed in 2 or 3 years.”

Stokley then took every action he could think of to object to Levitt’s continued representation. He wrote a letter to the Superior Court judge, expressing his concerns about the brevity of the petition and Levitt’s lack of interest and diligence. He wrote that he found it “evident that my present appeal has been handled with a lick and a promise, rather than being given the conscientious analysis and preparation which should be applied.” He asked the court to “appoint an attorney who will apply his or her self and try to do a competent job in this matter.” He sent a similar letter to the Arizona Capital Representation Project asking for help. The Superior Court forwarded Stokley’s letter to Levitt but took no other action.

Stokley also filed a complaint with the State Bar of Arizona protesting Levitt’s handling of his case. The Bar overlooked the posture of Stokley’s case and responded that his complaint could be dealt with in *post-trial* proceedings, noting that “[i]f there [was] a judicial determination that the lawyer acted improperly, [the Bar] would review the matter at that time.”

Not surprisingly, the Superior Court denied Levitt's two-claim petition.

Levitt then filed a motion to withdraw as Stokley's counsel, citing the Bar complaint filed against her. She wrote that "[t]here has . . . been a complete breakdown of the attorney-client relationship." The court granted the request and appointed Carla Ryan as replacement counsel.

The state immediately moved to reinstate Levitt as Stokley's counsel. The state argued that the initial petition had already been denied, and so there was "no valid reason for . . . paying yet another defense attorney to review the voluminous record for the first time." The state argued in the alternative for the court to limit the scope of Ryan's representation, arguing that, if replacement counsel were appointed, she should be forbidden to "supplement the already-adjudicated petition in some manner," because Arizona rules "do not allow for any such thing." Notably, however, the Arizona Supreme Court eventually did permit Levitt to file a supplemental Rule 32 petition, specifically allowing her to "raise any issue . . . even though it may not have been included in her first petition for post-conviction relief." The state also objected to Ryan's request for co-counsel in an unprofessionally worded opposition, arguing that Ryan was requesting a "side-kick" to "milk[] this case for all it is worth as a cash cow. . . . Capital litigation is not an unlimited pot-boiler for the enrichment of private attorneys." The Superior

Court ordered Levitt reinstated, over the objections of both Levitt and Stokley.

Ryan was Stokley's attorney for only one month. During that month, she spent much of her time responding to the state's attempt to have her removed as counsel. Ryan also moved for reconsideration of the denial of Stokley's post-conviction petition, and sought to amend the petition. Her proposed amended petition included a list of thirty-one new possible claims for relief. Ryan included a claim regarding the ineffectiveness of Levitt. She argued that "the substance of the Petition is deficient" and noted misstatements of law prejudicial to Stokley. Ryan specifically noted that she had not had an opportunity to do a full investigation, and that "other issues may need to be raised."

After one month, Ryan was removed and Levitt was reinstated. Once reinstated, Levitt actively moved to defend herself and undermine Stokley's case. Levitt systematically argued against the claims raised by Ryan. She noted that some were "already raised," others "relate[d] to strategic decisions by the respective attorneys," others were "contrary to well-established caselaw," and still others were "not supported by the facts of the case." Unexplainably, one of the claims Levitt derided as completely meritless was resurrected as the first of two additional claims in the supplemental Rule 32 petition. Thus, Levitt's petition for review and later supplemental filing suggest an overriding concern with defending

herself from the “attack on the effectiveness of undersigned counsel, all of which is meritless” rather than any loyal advocacy.

After Levitt was reinstated, Stokley wrote a letter to the Arizona Supreme Court asking for the reappointment of Ryan. This request was denied. Stokley then attempted to prepare his own claims and asked Levitt for a copy of the record. Levitt refused to give it to him. By failing to do so, she interfered with Stokley’s attempts to fairly present his claims.

The record shows that (1) both Stokley and his counsel agreed that their relationship had completely broken down; (2) Stokley took numerous steps to try to terminate the relationship and to obtain new counsel; (3) Levitt was reinstated as counsel over Stokley’s and her own objections; (4) Levitt was the subject of a Bar complaint; and (5) after she was reinstated as Stokley’s attorney, Levitt’s primary concern was to defend herself against misconduct charges. She disavowed and undermined the work Ryan had done on Stokley’s behalf, and refused Stokley access to his case file which limited his ability to marshal evidence and raise his own claims. Levitt ultimately came to the point where she was actively working against Stokley.

Stokley did everything in his power to sever his relationship with Levitt. The state vigorously advocated to make sure that Levitt was reinstated as his counsel.

After the state prevailed, Levitt in effect worked in the state's interest rather than in her client's. As Stokley has argued before the district court and in the moving papers here, Levitt "took up the mantle of the prosecutor." It is hard to imagine a clearer case for constructive abandonment.

The touchstone for understanding the Court's decision in *Maples* is Justice Alito's concurrence in *Holland*, which the Court relies upon in explaining the meaning of "abandonment." *Holland*, 130 S.Ct. at 2568. Justice Alito was not describing what happened in Stokley's case. But he might as well have been.

II. Stokley's colorable *Eddings* claim is sufficient prejudice to obtain remand.

Addressing prejudice at this stage is inconsistent with our prior precedent. Nevertheless, I feel compelled to respond to the majority's argument.

The majority first states that, while Stokley's causal nexus claim is colorable, the Arizona Supreme Court committed no actual error. This is incorrect. The majority goes on to assume that, even if the Arizona Supreme Court committed causal nexus error, the error was harmless. I address the second issue first, where the majority conflates structural and harmless error in a manner that confuses our prior case law and, without analysis, potentially closes an open and important

question in the habeas law of our circuit.² Whatever the ultimate outcome in Stokley's case might have been had we remanded, by conflating structural and harmless error the majority creates tension with our prior case law and in my view sets a bad precedent.

Our prior cases have treated *Eddings* error as structural. We have consistently reversed and remanded *Eddings* cases to the Arizona courts for resentencing, without inquiring as to the likelihood of a different sentencing result. *See, e.g., Williams v. Ryan*, 623 F.3d 1258 (9th Cir. 2010); *Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008). If an *Eddings* error is structural, as our cases suggest, prejudice is *per se*.

Citing *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987), the panel concludes that *Eddings* errors are subject to harmless error review under *Brecht v.*

² As I understand it, the Supreme Court has not addressed whether *Eddings* error is structural nor has this court squarely examined the issue. *Compare Landrigan v. Stewart*, 272 F.3d 1221, 1230 & n.9 (9th Cir. 2001) (applying harmless error review to the state court's failure to consider the defendant's alleged intoxication and past history of drug use as a nonstatutory mitigating factor), *adopted by Landrigan v. Schriro*, 501 F.3d 1147, 1147 (9th Cir. 2007) (en banc) (order), *with Williams v. Ryan*, 623 F.3d 1258, 1270-71 (9th Cir. 2010) (granting habeas relief for an *Eddings* violation without conducting a harmless error analysis), *and Styers v. Schriro*, 547 F.3d 1026, 1035-36 (9th Cir. 2008) (same). Other circuits are split on the issue. *Compare Bryson v. Ward*, 187 F.3d 1193, 1205 (10th Cir. 1999) (collecting cases applying harmless error review), *with Nelson v. Quarterman*, 472 F.3d 287, 314 (5th Cir. 2006) (en banc) (declining to apply harmless error review).

Abrahamson, 507 U.S. 619 (1993). Even assuming *Eddings* error is nonstructural, the panel appears to have erred in applying *Brecht* here because the state did not argue harmlessness in this court (until its response to the petition for rehearing), an issue on which the state bears the burden. *See Hitchcock*, 481 U.S. at 399 (“Respondent has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge. In the absence of such a showing our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid.”). As best I can tell, after finding *Eddings* error on habeas review, we have never engaged in harmless error review of the sort engaged in here.

Turning back to the majority’s finding that no *Eddings* violation occurred, I am unpersuaded by the panel’s analysis. Here, the Arizona Supreme Court did precisely what the Eighth Amendment prohibits—it treated mitigating evidence of Stokley’s abusive childhood as nonmitigating as a matter of law merely because it lacked a causal connection to the crime. The state court said:

According to a clinical psychologist, defendant had a chaotic and abusive childhood, never knowing his father and having been raised by various family members. A difficult family background alone is not a mitigating circumstance. *State v. Wallace*, 773 P.2d 983, 986 (1989), *cert. denied*, 494 U.S. 1047 (1990). This can be a mitigating circumstance only “if a defendant can show that something

in that background had an effect or impact on his behavior that was beyond the defendant's control.” *Id.* . . . Although [Stokley] may have had a difficult childhood and family life, he failed to show how this influenced his behavior on the night of the crimes.

State v. Stokley, 898 P.2d 454, 473 (Ariz. 1995) (emphasis added).

This is a clear-cut *Eddings* violation, and the panel majority's failure to recognize it cannot be squared with circuit precedent. We cannot avoid finding an *Eddings* violation, as the panel majority suggests, merely because the Arizona Supreme Court said it considered all mitigating evidence. *See Styers*, 547 F.3d at 1035. When a state court “considers” mitigating evidence, but deems it irrelevant or nonmitigating *as a matter of law* because of the absence of a causal connection to the crime, the court has not considered the evidence in any meaningful sense. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

Unlike the majority I would not reach the issues of either prejudice with respect to procedural default or the merits of the constitutional claim at this stage. When first presented with this claim that the Arizona Supreme Court erred in its review of the death sentence under *Eddings* and *Skipper*, the district court declined to reach the merits because the claim was technically exhausted and procedurally barred. Case 4:98-cv-00332-FRZ, Dkt 70, Order and Opinion on Procedural Status

of Claims at 15-16. *No court* has considered the issue of prejudice—either as to procedural default or to the merits of the constitutional claim—because, prior to *Maples*, there was no cause for the procedural default. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). All that is required for prejudice at this stage is that the claim has some merit. *Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012).

Without the benefit of any briefing or lower court consideration on the issue of prejudice arising from the defaulted *Eddings* and *Skipper* claims, we are not in a position to do what the majority does here. Rather than foreclosing these claims at this stage, I would stay the mandate and remand this case to the district court for the limited purpose of allowing it to determine in the first instance whether cause and prejudice exist, and to consider the merits of the claim if warranted. We would then be in a far better position to review the issue.

For all of the above reasons, I respectfully dissent.

659 F.3d 802, 11 Cal. Daily Op. Serv. 12,269, 2011 Daily Journal D.A.R. 14,560
(Cite as: 659 F.3d 802)

H

United States Court of Appeals,
Ninth Circuit.
Richard Dale STOKLEY, Petitioner–Appellant,
v.
Charles L. RYAN, Respondent–Appellee.

No. 09–99004.
Argued and Submitted March 18, 2011.
Filed Sept. 26, 2011.

Background: Following affirmance of murder conviction and sentence of death, 182 Ariz. 505, 898 P.2d 454, petition for writ of habeas corpus was filed. The United States District Court for the District of Arizona, Frank R. Zapata, Senior District Judge, 2009 WL 728492, denied the petition. Petitioner appealed.

Holdings: The Court of Appeals, McKeown, Circuit Judge, held that:

- (1) assuming petitioner's state petition exhausted the sentencing-phase ineffective assistance claim in his federal petition, review was confined to record before state courts;
- (2) assuming petitioner was not barred from presenting new evidence, the claim would be procedurally barred; and
- (3) sentencing counsel's investigation into mitigating factors did not fall below an objective standard of reasonableness.

Affirmed.

West Headnotes

[1] Habeas Corpus 197 ↩753

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)3 Hearing
197k752 Conduct of Hearing
197k753 k. Reception of evidence;

affidavits; matters considered. Most Cited Cases

Assuming habeas petitioner's state petition exhausted the sentencing-phase ineffective assistance claim in his federal petition, review was confined to the record before the state courts, and, thus, the federal court would not consider petitioner's new evidence from neuropsychologist and other medical experts regarding his alleged organic brain damage at time of murders. U.S.C.A. Const.Amend. 6.

[2] Habeas Corpus 197 ↩338

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)2 Particular Errors and Proceedings
197k332 Criminal Prosecutions
197k338 k. Counsel. Most Cited Cases

Assuming habeas petitioner was not barred from presenting new evidence because his federal ineffective assistance claim was never presented to state courts, the claim would be procedurally barred, under Arizona law, since it was never presented to the state courts. U.S.C.A. Const.Amend. 6; 16A A.R.S. Rules Crim.Proc., Rule 32.2(a)(3).

[3] Habeas Corpus 197 ↩319.1

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions by State Prisoners
197I(D)1 In General
197k319 Exhaustion of State Remedies
197k319.1 k. In general. Most Cited Cases

When a habeas petitioner fails to present a federal claim to the state courts, the claim is unexhausted, and the petitioner must generally return to state court.

659 F.3d 802, 11 Cal. Daily Op. Serv. 12,269, 2011 Daily Journal D.A.R. 14,560
(Cite as: 659 F.3d 802)

[4] Habeas Corpus 197 ↪378

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions
by State Prisoners
197I(D)4 Sufficiency of Presentation of
Issue or Utilization of State Remedy
197k374 Availability and Effective-
ness of State Remedies
197k378 k. Availability at time of
petition. Most Cited Cases

A habeas claim is procedurally defaulted if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.

[5] Habeas Corpus 197 ↪404

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions
by State Prisoners
197I(D)5 Availability of Remedy Despite
Procedural Default or Want of Exhaustion
197k404 k. Cause and prejudice in
general. Most Cited Cases

Habeas Corpus 197 ↪742

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)3 Hearing
197k742 k. Discretion and necessity in
general. Most Cited Cases

Federal habeas review of a procedurally barred claim is precluded unless petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law; to obtain an evidentiary hearing, petitioner must also demonstrate that he diligently attempted to develop the factual basis of his claim in state court. 28 U.S.C.A. § 2254(e)(2).

[6] Criminal Law 110 ↪1602

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)1 In General
110k1600 Counsel
110k1602 k. Right to counsel. Most
Cited Cases
There is no constitutional right to an attorney in state post-conviction proceedings.

[7] Habeas Corpus 197 ↪406

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions
by State Prisoners
197I(D)5 Availability of Remedy Despite
Procedural Default or Want of Exhaustion
197k405 Cause or Excuse
197k406 k. Ineffectiveness or want
of counsel. Most Cited Cases

Habeas Corpus 197 ↪409

197 Habeas Corpus
197I In General
197I(D) Federal Court Review of Petitions
by State Prisoners
197I(D)5 Availability of Remedy Despite
Procedural Default or Want of Exhaustion
197k409 k. Prejudice. Most Cited Cases
In order to meet the cause and prejudice standard for federal habeas review of a procedurally barred claim, petitioner must show that the actions taken by his counsel in post-conviction proceedings and the state rose to the level of an external objective factor causing the procedural default; this is a standard met in only exceptional cases, since any attorney error in post-conviction proceedings is generally attributable to the petitioner himself.

[8] Habeas Corpus 197 ↪843

197 Habeas Corpus

659 F.3d 802, 11 Cal. Daily Op. Serv. 12,269, 2011 Daily Journal D.A.R. 14,560
(Cite as: 659 F.3d 802)

197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review

197k843 k. Discretion of lower court.
Most Cited Cases

The Court of Appeals may overturn the district court's ultimate denial of an evidentiary hearing in a habeas petition only if that denial constituted an abuse of discretion.

[9] Habeas Corpus 197 ↔746

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)3 Hearing
197k745 Criminal Cases

197k746 k. Counsel. Most Cited Cases

To receive an evidentiary hearing in a habeas petition, petitioner must show that he has a colorable claim of ineffective assistance; in other words, petitioner must demonstrate that a hearing could enable him to prove factual allegations that, if true, would entitle him to federal habeas relief. U.S.C.A. Const.Amend. 6.

[10] Habeas Corpus 197 ↔746

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(C) Proceedings
197III(C)3 Hearing
197k745 Criminal Cases

197k746 k. Counsel. Most Cited Cases

To support an evidentiary hearing in habeas proceeding on an ineffective assistance of counsel claim, a habeas petitioner must present a colorable claim that (1) counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

[11] Criminal Law 110 ↔1870

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1870 k. In general. Most Cited Cases

Criminal Law 110 ↔1871

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1871 k. Presumptions and burden of proof in general. Most Cited Cases

In assessing counsel's performance in an ineffective assistance of counsel claim, the Court of Appeals must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance; it takes every effort to eliminate the distorting effects of hindsight, gives the attorneys the benefit of the doubt, and entertains the range of possible reasons counsel may have had for proceeding as they did. U.S.C.A. Const.Amend. 6.

[12] Criminal Law 110 ↔1882

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)1 In General
110k1879 Standard of Effective Assistance in General
110k1882 k. Deficient representation in general. Most Cited Cases

In an ineffective assistance of counsel claim, even under de novo review, the standard applied is a most deferential one; the question is whether counsel's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom. U.S.C.A. Const.Amend. 6.

659 F.3d 802, 11 Cal. Daily Op. Serv. 12,269, 2011 Daily Journal D.A.R. 14,560
(Cite as: 659 F.3d 802)

[13] Criminal Law 110 ↪1960

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)2 Particular Cases and Issues

110k1958 Death Penalty

110k1960 k. Adequacy of investigation of mitigating circumstances. Most Cited Cases

Sentencing counsel's investigation into mitigating factors in capital murder case did not fall below an objective standard of reasonableness, for purposes of ineffective assistance of counsel claim, even though defendant was not evaluated by a neuropsychologist; counsel secured two medical opinions regarding defendant's mental health, psychologist opined that defendant had borderline personality disorder and had difficulties with impulse control and poor judgment, neurologist found defendant's brain was moderately to severely impaired as a result of numerous head injuries, neuropsychological test on defendant did not indicate organic brain damage, and neither the psychologist or neurologist unequivocally stated defendant should be examined by neuropsychologist. U.S.C.A. Const.Amend. 6.

[14] Criminal Law 110 ↪474

110 Criminal Law

110XVII Evidence

110XVII(R) Opinion Evidence

110k468 Subjects of Expert Testimony

110k474 k. Mental condition or capacity. Most Cited Cases

Under Arizona law, an expert witness may not testify specifically as to whether a defendant was or was not acting reflectively at the time of a killing.

*804 Amy Krauss, Law Office of Amy B. Krauss, Cary Sandman (argued), Waterfall, Economidis, Caldwell, Hanshaw & Villmana, P.C., Tucson, AZ; Jon M. Sands, Federal Public Defender's Office, Phoenix, AZ, for the petitioner-appellant.

Thomas C. Horne, Arizona State Attorney General; Jonathan Bass (argued), Assistant Attorney General Criminal Appeals/Capital Litigation Division, for the respondent-appellee.

Appeal from the United States District Court for the District of Arizona, Frank R. Zapata, Senior District Judge, Presiding. D.C. No. 4:98-CV-00332-FRZ.

Before: M. MARGARET McKEOWN, RICHARD A. PAEZ, and CARLOS T. BEA, Circuit Judges.

OPINION

McKEOWN, Circuit Judge:

Richard Dale Stokley was sentenced to death for the murder of two thirteen-year-old girls. Stokley challenges that sentence under 28 U.S.C. § 2254, arguing that he should receive an evidentiary hearing to develop the claim that his trial counsel provided ineffective assistance at sentencing by failing adequately to investigate and present evidence that Stokley suffered from organic brain damage at the time of the murders. Although trial counsel's actions may seem imperfect in hindsight, counsel undertook an extensive investigation into Stokley's mental health, arranged for him to be evaluated by a neuropsychologist, and presented testimony from a psychologist and a neurologist. Under the demanding standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Stokley has not presented a colorable claim that counsel's actions were constitutionally ineffective. We affirm the district court's denial of an evidentiary hearing.

BACKGROUND

On July 7, 1991, Stokley was in Elfrida, Arizona, working as a stuntman in Independence Day celebrations. According to Stokley, he asked Randy Brazeal to drive him to a location where Stokley could bathe. On the way there, they picked up Mandy and Mary, two thirteen-year-old girls Brazeal had met earlier that evening. Stokley and

659 F.3d 802, 11 Cal. Daily Op. Serv. 12,269, 2011 Daily Journal D.A.R. 14,560
(Cite as: 659 F.3d 802)

Brazeal raped, beat, and strangled the girls and dumped their bodies down an abandoned mine shaft.

The next day, Brazeal turned himself in to the police, and Stokley was arrested in a nearby town. Stokley confessed his involvement in the crimes, admitting that he raped one of the girls, choked her to death, and stabbed both victims with his knife. Brazeal pled guilty to second-degree murder and was sentenced to twenty years in prison. Stokley proceeded to trial. A jury convicted him of two counts of first degree murder, one count of sexual conduct with a minor, and two counts of kidnapping.

The state sought the death penalty. At sentencing, Stokley's trial counsel endeavored to establish numerous mitigating factors. Among other things, counsel presented evidence that Stokley had a difficult childhood, that he was plagued with a history of substance abuse, that he was intoxicated at the time of the crimes, and that he had the ability to be rehabilitated. Counsel also placed considerable weight on the argument that Stokley's "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law," Ariz.Rev.Stat. § 13-751(G)(1), was impaired by both a personality disorder and head injuries.

*805 Counsel relied on two medical experts to establish that Stokley did not have the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law at the time of the crime. Dr. Michael Mayron, a neurologist, testified that Stokley "suffered multiple head injuries throughout his life," including a blow to the frontal area of his brain with a car jack and an incident in which he suffered "a left parietal compound depressed skull fracture with left parietal lobe contusion" after being hit with a beer mug. Mayron believed that these injuries caused moderate or severe brain damage and weakened Stokley's ability to control his impulses and emotions.

Dr. Larry Morris, a psychologist, testified that in his opinion Stokley "experience[s] difficulties

with impulse control and poor judgment" and "tends not to study consequences well but responds impulsively instead." More specifically, Morris diagnosed Stokley with borderline personality disorder and explained that the impulsivity associated with that condition, especially as exacerbated by stress and alcohol, "make[s] it difficult for [Stokley] to conform his behavior to ... th[e] law."

In addition, counsel sent Stokley to Dr. John Barbour, who administered at least one neuropsychological test. Barbour's test supplemented a report prepared by Dr. Huntley Hoffman, who evaluated Stokley shortly before the murders. Hoffman found that Stokley "has 'superior' intelligence" and that he did not have brain damage but might suffer from a "mild to moderate deficit" in "short and long term left brain memory."

Under Arizona's procedure at the time, the sentencing judge determined the applicable aggravating and mitigating factors. The judge found three aggravating factors—the victims were minors; Stokley committed multiple homicides; and Stokley committed the crimes in an especially heinous, cruel, or depraved manner. The judge determined that no factors substantially weighed in favor of mitigation and that even if all of the mitigating circumstances existed, "balanced against the aggravating circumstances found to exist, they would not be sufficiently substantial to call for leniency." Regarding Stokley's claim of mental incapacity, the court concluded that Stokley's "capacity to appreciate the wrongfulness of his conduct was not significantly impaired" at the time of the crime. In the sentencing court's view, "[h]aving suffered head injuries and having difficulty with impulse control shed [] little light on [Stokley's] conduct in this case," because the evidence "does not show that [Stokley] acted impulsively, only criminally, with evil motive." The court sentenced Stokley to death.

The Arizona Supreme Court affirmed the death sentence on direct appeal. The court reviewed Stokley's history of head injuries, the mental health evidence, and the testimony of Mayron and Morris

659 F.3d 802, 11 Cal. Daily Op. Serv. 12,269, 2011 Daily Journal D.A.R. 14,560
(Cite as: 659 F.3d 802)

and recognized that, in appropriate circumstances, “[h]ead injuries that lead to behavioral disorders may be considered ... mitigating.” *State v. Stokley*, 182 Ariz. 505, 898 P.2d 454, 470 (1995) (“*Stokley I*”). Although the court gave “more mitigating weight to this element than did the trial court,” it concluded that any “mitigating weight” from *Stokley*’s incapacities “is substantially offset by the fact that [*Stokley*] ... has above average intelligence” and by facts which show that *Stokley* “made a conscious and knowing decision to murder the victims and was fully aware of the wrongfulness of his actions,” “did not exhibit impulsive behavior in the commission of his crimes,” and was able “to control his actions” at the time. *Id.* at 470–71 (quotation marks omitted). In reaching these conclusions, the court noted that *Stokley* *806 discussed killing Mandy and Mary with Brazeal before the murders occurred and that he attempted to cover up the crimes. *See id.* To support its finding of non-impulsiveness, the court also expressly relied on *Stokley*’s “comment to the interrogating [police] officer, ‘I ... choked ‘em ... There was one foot moving though I knew they was brain dead but I was getting scared.... And they just wouldn’t quit. It was terrible.’” *Id.* at 470.

Stokley’s state post-conviction petitions argued, among other things, that trial counsel provided ineffective representation by failing to argue “*Stokley*’s alleged mental incapacity as mitigation for sentencing purposes.” The state post-conviction relief (“PCR”) court rejected this claim on three grounds. It held that the claim was “precluded ... because the Arizona Supreme Court rejected the factual basis of[the] claim on direct appeal.” The PCR court also denied the claim “for lack of sufficient argument” and as “meritless for lack of a showing of prejudice.” On appeal, the state supreme court summarily denied relief.

Stokley then filed a § 2254 petition in the district court, raising a melange of claims. In an initial ruling, the district court held that many of these claims were either procedurally barred or obviously

without merit. It concluded, however, that four claims were both “properly exhausted and appropriate for review on the merits following supplemental briefing.” *Stokley* conceded that three of these four arguments could not survive review under the Antiterrorism and Effective Death Penalty Act (“AEDPA”). *Stokley*’s remaining argument was that his trial counsel “failed to adequately investigate [*Stokley*’s] mental state at the time of the crime and thereby failed to present compelling mitigation evidence at sentencing.” *Stokley* sought an evidentiary hearing on this claim.

Stokley introduced the declarations of four medical experts in support of his request for a hearing. A supplemental declaration from Morris said that “additional neuropsychological testing” was needed to pinpoint *Stokley*’s brain injuries and their behavioral effects, and that he “recommended to Mr. *Stokley*’s lawyers that [organic deficits] be investigated and that consideration be given to having Mr. *Stokley* tested by a neuropsychologist.” Mayron also provided a new declaration, which stated that he “d[id] not recall” being “consulted by Mr. *Stokley*’s attorneys between the time of [his] examination of Mr. *Stokley* and the [sentencing hearing], and [that] if [counsel] had contacted [Mayron, he] would have recommended that Mr. *Stokley* be examined by a qualified neuropsychologist.” The other two declarations used neuropsychological testing to diagnose *Stokley* with organic damage to both his frontal and parietal lobes, asserted that the previously undiscovered frontal lobe injury had severe behavioral effects, and concluded that because of his brain damage, *Stokley* was not in control of his actions at the time of his crimes.

After considering these declarations, the district court denied *Stokley*’s request for an evidentiary hearing. The district court declined to decide whether an evidentiary hearing was precluded by 28 U.S.C. § 2254(e)(2), which bars a hearing “[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings” and the claim relies on neither “a new rule of constitutional law”

659 F.3d 802, 11 Cal. Daily Op. Serv. 12,269, 2011 Daily Journal D.A.R. 14,560
(Cite as: 659 F.3d 802)

nor “a factual predicate that could not have been previously discovered through the exercise of due diligence.” *See Stokley v. Ryan*, No. CV-98-332, 2009 WL 728492, at *22 (D.Ariz. Mar. 17, 2009) (“*Stokley II*”). Instead, after thorough and careful review of Stokley’s petition, the district court held that Stokley had not presented a colorable claim of *807 ineffective assistance of counsel. *See id.* at *22-*30.

Regarding the ineffectiveness prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the district court found “that [trial] counsel undertook a reasonable investigation into [Stokley’s] social, medical, and mental health history,” in part by securing the opinions of Mayron and Morris and the test administered by Barbour. *Stokley II*, 2009 WL 728492, at *25. The district court rejected Stokley’s specific claim that neuropsychological testing was necessary to an adequate presentation of mitigating evidence because “neither Dr. Morris nor Dr. Mayron affirmatively recommended to counsel that [Stokley] be examined only by a neuropsychologist.” *Id.* at *26. The court therefore held that trial counsel “adequately investigated [Stokley’s] mental state” and properly “used the experts ... to argue that [Stokley] was impulsive and that his ability to conform his conduct to the requirements of law was substantially impaired.” *Id.* at *27. The district court also held that Stokley could not prove prejudice from any ineffectiveness on the part of trial counsel. *See id.* at *28-*30. It did, however, issue a certificate of appealability regarding Stokley’s claim of ineffective assistance at sentencing, *see id.* at *30-*31, and Stokley appealed.

Following oral argument in this appeal, the Supreme Court decided *Cullen v. Pinholster*, — U.S. —, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). The Court held that, when a petitioner seeks habeas relief under 28 U.S.C. § 2254(d)(1), federal courts are restricted to the state court record when deciding claims previously adjudicated on the merits by the state courts. In supplemental briefing, the state ar-

gues that *Pinholster* applies to preclude consideration of the declarations Stokley supplied for the first time in federal court. Stokley, by contrast, now contends that his federal claim of ineffective assistance at sentencing is fundamentally new and different from the ineffective assistance claim presented to the state courts in his supplemental petition. If accepted, Stokley’s argument would mean that *Pinholster* does not apply to his federal claim.

We need not determine whether *Pinholster* bars the consideration of Stokley’s new evidence, because the result is the same in either case. If *Pinholster* applies, it directly bars Stokley from receiving the only relief he seeks—a hearing to present new evidence in federal court. And if Stokley is correct that *Pinholster* does not apply because his federal ineffective assistance claim was never presented to the state courts, relief still evades him. Even assuming both that Stokley can show cause and prejudice for his failure to present the claim to the state courts and that he has satisfied the diligence requirement of § 2254(e)(2), Stokley has not presented a colorable claim of ineffective assistance of counsel. The net result is that Stokley is not entitled to an evidentiary hearing even if we may consider the evidence presented for the first time to the district court.

ANALYSIS

I. THE RULE IN *PINHOLSTER*

AEDPA provides that a federal habeas application may be “granted with respect to any claim that was adjudicated on the merits in State court proceedings” if the adjudication of that claim “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). In *Pinholster*, the Supreme Court held that § 2254(d)(1) “requires an examination of the state-court decision at the time it was made” and on *808 the same record. *See* 131 S.Ct. at 1398. As the Court explained, “[i]t would be strange to ask federal courts to analyze whether a state court’s adju-

659 F.3d 802, 11 Cal. Daily Op. Serv. 12,269, 2011 Daily Journal D.A.R. 14,560
(Cite as: 659 F.3d 802)

dication resulted in a decision that unreasonably applied federal law to facts not before the state court.” *Id.* at 1399.

Pinholster also held that this bar on new evidence is coterminous with the scope of § 2254(d). If a petitioner presents a claim that was *not* adjudicated on the merits by the state courts, federal review is not necessarily limited to the state record. *See id.* at 1401. Such is the case, for instance, when a petitioner presents a new and different claim in federal court. *See id.* at 1401 n. 10. In that situation, “the discretion of federal habeas courts to consider new evidence,” *id.* at 1401, is instead cabined by the requirement in § 2254(e)(2) that the petitioner must have attempted “to develop the factual basis of [the] claim in State court.”

The Court in *Pinholster* left at least two questions unresolved. The Court expressly reserved the issue of “where to draw the line between new claims and claims adjudicated on the merits” by the state courts. *Pinholster*, 131 S.Ct. at 1401 n. 10. Put another way, *Pinholster* leaves open the question of how to distinguish between a claim that was exhausted in state court and a claim that is transformed by new evidence into a different and novel contention presented for the first time in federal court. The Court in *Pinholster* also had no occasion to speak to the role that new evidence plays in federal habeas proceedings on those rare occasions when an evidentiary hearing is proper.

These unresolved issues are potentially pertinent to our resolution of this case. In his opening brief, Stokley assumed that his ineffective assistance claim had been fairly presented to the state court even though “[n]one of the facts presented in support of the claim were presented in state court.” Indeed, in the district court, Stokley affirmatively argued that his claim was exhausted, and the state agreed. Stokley also posited that he satisfied the requirements of § 2254(e)(2) and therefore should be permitted to supplement the record.

After *Pinholster*, we requested supplemental

briefing. Not surprisingly, Stokley shifted his position and now argues that his federal petition presented a new claim that had not yet been adjudicated, such that he remains entitled to an evidentiary hearing. Stokley relies on pre-*Pinholster* cases in which we provided a framework for assessing whether a claim is unexhausted because new evidence fundamentally altered the factual underpinnings of the claim. *See, e.g., Beaty v. Stewart*, 303 F.3d 975, 989–90 (9th Cir.2002); *Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir.1999) (citing *Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986)). Stokley argues that, under this framework, the ineffective assistance claim in his federal petition is fundamentally different from the claim he presented to the state courts.

We decline to reach this issue or to decide the antecedent question of whether *Pinholster* impliedly overruled our line of cases interpreting the “fundamentally altered” standard. We do so because Stokley is not entitled to relief if *Pinholster* applies, and he is similarly not entitled to relief even if we construe his federal claim as unexhausted such that we may consider the supplemental evidence he offered to the district court.^{FN1} In addition, although *809 evidentiary hearings were rare even before *Pinholster*, the circuits had been essentially uniform in holding that in the appropriate case new evidence from such a hearing could be considered in determining whether a claim could survive review under § 2254(d). *See Pinholster*, 131 S.Ct. at 1417 (Sotomayor, J., dissenting). It was against this backdrop that Stokley filed his habeas petition and litigated it in the district court. Recognizing that *Pinholster* dramatically changed the aperture for consideration of new evidence, and further recognizing that this is a capital case, we believe it prudent to consider alternative avenues for resolution.

FN1. There is also a third possibility—that *Pinholster* does not apply because one or both of the PCR court's enunciated procedural holdings constitutes an adequate and

independent state bar to relief. *See, e.g., Harris v. Reed*, 489 U.S. 255, 264 n. 10, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) (“[T]he adequate and independent state ground doctrine requires the federal court to honor a state [procedural] holding that is a sufficient basis for the state court’s judgment, even when the state court also relies on federal law.”). Because neither party made this argument on appeal, we assume without deciding that the state courts adjudicated Stokley’s ineffective assistance claim on the merits. *See, e.g., Ocampo v. Vail*, 649 F.3d 1098, 1100 n. 11 (9th Cir.2011) (declining to consider a potential procedural default not raised by the state).

II. IF *PINHOLSTER* APPLIES: REVIEW RESTRICTED TO THE STATE RECORD

[1] In this section, we assume that Stokley’s state petition exhausted the sentencing-phase ineffective assistance claim in his federal petition, because the essence of the claim—that counsel provided ineffective assistance at sentencing by failing adequately to investigate and argue Stokley’s mental health as a mitigating factor—remains the same. *Pinholster* therefore applies, with two consequences. Our review is confined to the record before the state courts. *Pinholster*, 131 S.Ct. at 1398. As the Court bluntly put it, “evidence introduced in federal court has no bearing on § 2254(d)(1) review.” *Id.* at 1400. *Pinholster*’s limitation on the consideration of Stokley’s new evidence—the proffered testimony of the neuropsychologist and other medical experts—in federal habeas proceedings also forecloses the possibility of a federal evidentiary hearing, the only relief Stokley currently seeks. If applicable, *Pinholster* therefore requires us to affirm the denial of Stokley’s petition.

III. IF *PINHOLSTER* DOES NOT APPLY: REVIEW OF ALL THE EVIDENCE

[2] We now proceed on the alternate assumption that *Pinholster* does not bar Stokley from presenting new evidence because Stokley’s federal

ineffective assistance of counsel claim was never presented to the state courts. Even considering the new evidence, we conclude that Stokley has not presented a colorable claim of ineffective assistance of counsel. Because this conclusion bars Stokley from receiving an evidentiary hearing, we only briefly acknowledge—and do not decide—the predicate hurdles Stokley would need to overcome for us to consider his claim, namely whether he could show cause and prejudice for his failure to exhaust and whether he satisfied the diligence requirement of § 2254(e)(2).

A. FURTHER PROCEDURAL MATTERS

[3][4] When a petitioner fails to present a federal claim to the state courts, the claim is unexhausted, and the petitioner must generally return to state court. *See, e.g., Quezada v. Scribner*, 611 F.3d 1165, 1168 (9th Cir.2010) (published order). But “[a] claim is procedurally defaulted ‘if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.’ ” *810 *Beatty*, 303 F.3d at 987 (quoting *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)). In this case, assuming that the federal version of Stokley’s ineffective assistance claim was never presented to the state courts, those courts would find the claim procedurally barred because Stokley failed to raise it “in [a] previous collateral proceeding.” *Ariz. R.Crim. P. 32.2(a)(3)*; *see also Stewart v. Smith*, 536 U.S. 856, 859–61, 122 S.Ct. 2578, 153 L.Ed.2d 762 (2002) (holding that Rule 32.2(a)(3) provides an independent and adequate state procedural bar); *Stewart v. Smith*, 202 *Ariz.* 446, 46 P.3d 1067, 1071 (2002) (“The ground of ineffective assistance of counsel cannot be raised repeatedly.”).

[5] Because Stokley’s claim would be procedurally barred, he would satisfy “the technical requirements for exhaustion; there are no state remedies any longer ‘available’ to him.” *Coleman*, 501 U.S. at 732, 111 S.Ct. 2546 (citations omitted).

659 F.3d 802, 11 Cal. Daily Op. Serv. 12,269, 2011 Daily Journal D.A.R. 14,560
(Cite as: 659 F.3d 802)

Federal habeas review of the claim, however, is precluded “unless [Stokley] can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law.” *Id.* at 750, 111 S.Ct. 2546.^{FN2} Since Stokley seeks an evidentiary hearing, he must also demonstrate that he diligently attempted to develop the factual basis of his claim in state court. *See* 28 U.S.C. § 2254(e)(2); *Williams v. Taylor*, 529 U.S. 420, 436–37, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000).^{FN3}

FN2. *Coleman* also includes an exception for situations in which “failure to consider [defaulted] claims will result in a fundamental miscarriage of justice.” 501 U.S. at 750, 111 S.Ct. 2546. Stokley does not contend that this exception applies.

FN3. Stokley does not argue that his claim rests on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court” or that the evidence he presented to the federal court could not have been discovered during his state proceedings. *See* 28 U.S.C. § 2254(e)(2)(A)(i)–(ii).

Stokley argues that the actions of the state and his post-conviction counsel allow him to surmount both of these barriers, and we recognize that, at a minimum, Stokley was placed in an untenable and unenviable situation during the state post-conviction proceedings. Harriette Levitt, Stokley's appointed counsel, filed a cursory PCR petition with the state courts. After Stokley filed complaints against Levitt, Levitt withdrew from the case, and Stokley secured the representation of Carla Ryan, who sought to file a more extensive petition on Stokley's behalf. At the state's urging, however, the PCR court reconsidered its order allowing Levitt to withdraw and reappointed her to represent Stokley for the remainder of the post-conviction proceedings. Shortly after her reappointment, Levitt filed a brief arguing that all of the issues raised by Ryan lacked merit. Upon further reflection and at the express invitation of the state supreme court, Levitt

reconsidered in part and filed a supplemental petition including the claim of ineffective assistance of counsel at sentencing initially advanced by Ryan. The supplemental petition was as vague as Levitt's initial petition, and it failed to comply with Arizona Rule of Criminal Procedure 32.5, which requires petitioners to submit “[a]ffidavits, records, or other evidence currently available to the defendant” in support of claims to post-conviction relief.

[6][7] We also recognize, however, that there is “no constitutional right to an attorney in state post-conviction proceedings.” *Coleman*, 501 U.S. at 752, 111 S.Ct. 2546. Thus, in order to have any hope of meeting the cause and prejudice standard, Stokley must show that the actions taken by Levitt and the state “rose to the level of *811 an external objective factor causing the procedural default.” *Smith v. Baldwin*, 510 F.3d 1127, 1147 (9th Cir.2007) (en banc). This is a standard met in only exceptional cases: “[A]ny attorney error in post-conviction proceedings is generally attributable to the petitioner himself.” *Id.* Nevertheless, because Stokley presented a potentially colorable argument that he meets this standard, we assume without deciding that Stokley can show cause and prejudice for his failure to present his claim to the state courts.^{FN4} We similarly assume that the diligence requirement in § 2254(e)(2) does not prevent Stokley from receiving an evidentiary hearing. *See West v. Ryan*, 608 F.3d 477, 485 (9th Cir.2010) (making the same assumption); *see also Williams*, 529 U.S. at 444, 120 S.Ct. 1479 (suggesting that the standard for satisfying § 2254(e)(2) is similar to the standard necessary to establish cause and prejudice).

FN4. We note that a case pending before the Supreme Court raises issues regarding cause and prejudice claims arising from the actions of post-conviction counsel. *See Maples v. Thomas*, — U.S. —, 131 S.Ct. 1718, 179 L.Ed.2d 644 (2011) (order granting certiorari). Since we do not address the substance of similar claims, we see no need to await the Supreme Court's

decision.

B. THE *STRICKLAND* STANDARD

[8] Proceeding on those assumptions, we review Stokley's request for a hearing. We may overturn the district court's "ultimate denial of an evidentiary hearing" only if that denial constituted an abuse of discretion. *Earp v. Ornoski*, 431 F.3d 1158, 1166 (9th Cir.2005).

[9] To receive an evidentiary hearing, Stokley must show that he has "a colorable claim of ineffective assistance." *Fairbank v. Ayers*, 650 F.3d 1243, 1251 (9th Cir.2011) (internal quotation marks omitted). Stokley must, in other words, demonstrate that "a hearing could enable [him] to prove ... factual allegations" that, "if true, would entitle [him] to federal habeas relief." *Id.* (quoting *Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007)).

[10] Because Stokley's claim is premised on the alleged ineffective assistance of counsel, he must satisfy the two-pronged test in *Strickland*. Specifically, Stokley must present a colorable claim "that (1) 'counsel's representation fell below an objective standard of reasonableness' and (2) there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *West*, 608 F.3d at 485–86 (quoting *Strickland*, 466 U.S. at 687–88, 104 S.Ct. 2052). " 'Surmounting [this] high bar is never an easy task.' " *Harrington v. Richter*, — U.S. —, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011) (quoting *Padilla v. Kentucky*, 599 U.S. —, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010)). Stokley cannot overcome the first hurdle—that "counsel's representation fell below an objective standard of reasonableness." ^{FN5} *Strickland*, 466 U.S. at 687–88, 104 S.Ct. 2052.

FN5. We also note that the PCR court held that Stokley's ineffective assistance claim "is meritless for lack of a showing of prejudice."

C. INEFFECTIVE ASSISTANCE

[11][12] In assessing counsel's performance, we "must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance." *Harrington*, 131 S.Ct. at 787 (internal quotation marks omitted). We take "every effort to eliminate the distorting effects of hindsight," *Earp*, 431 F.3d at 1174 (internal quotation marks omitted), "give the attorneys the *812 benefit of the doubt," and "entertain the range of possible reasons ... counsel may have had for proceeding as they did," *Pinholster*, 131 S.Ct. at 1407 (internal quotation marks and alteration omitted). Thus, "[e]ven under *de novo* review," the standard we apply "is a most deferential one." *Harrington*, 131 S.Ct. at 788. "The question is whether [counsel's] representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Id.* (internal quotation marks omitted).

[13] Stokley's trial counsel undertook an extensive investigation into mitigating factors before sentencing. Most significant to this appeal, counsel secured two medical opinions regarding Stokley's mental health. Morris examined Stokley at counsel's request and diagnosed him with borderline personality disorder. That disorder, Morris told the sentencing court, means that Stokley has "difficulties with impulse control and poor judgment." Morris characterized these difficulties as "severe" and stated that Stokley's borderline personality disorder would lead to "impulsivity" and "outbursts" of anger. He also expressly tied Stokley's impulse control problems to Arizona's mitigation statute by testifying that Stokley was impaired in his "capacity to appreciate the wrongfulness of his conduct ... at the time of the [crime]."

Mayron's neurological examination, meanwhile, demonstrated that Stokley's brain was "moderately to severely impaired" as a result of numerous head injuries. Mayron diagnosed Stokley with "a permanent mild right hemiparesis ^{FN6} and

hemisensory deficit” as well as “permanent post-concussion syndrome memory impairment and disturbance [characterized by] increased difficulty with impulse control.” As this diagnosis suggests, Mayron opined that “[h]ead injuries of [the] severity [of Stokley’s] are invariably related to” problems with “concentration, attention span ..., memory, personality disturbance, mood disturbance, irritability, depression, [and] impulse control disturbance.” Stokley’s “ability to make good judgments,” his “[e]motional control,” and his “ability to plan ahead and to reflect” are all impaired.

FN6. “Hemiparesis” is a medical term used to refer to reduced muscular strength on one side of the body and is frequently associated with damage to the portion of the brain charged with controlling that part of the body.

Counsel also knew that at least two neuropsychological tests had been performed on Stokley at the time of sentencing. Barbour administered one such test at counsel’s behest. Hoffman’s report based on his pre-crime examination of Stokley, meanwhile, found that Stokley’s performance on a neuropsychological test “[d]id not indicate [organic] brain damage.”

This record compels the conclusion that counsel generally undertook “active and capable advocacy” on Stokley’s behalf. *Harrington*, 131 S.Ct. at 791. In particular, both Morris and Mayron testified at sentencing in ways that directly supported Stokley’s case in mitigation. Under Ariz.Rev.Stat. § 13–751(G)(1), a defendant demonstrates the existence of a mitigating circumstance if he proves that his “capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired” at the time of the offense. Morris expressly testified that this mitigating factor was satisfied and told the sentencing court that Stokley had “severe” problems with impulse control.^{FN7} Mayron said that ***813** Stokley had “moderate to severe” brain damage and linked Stokley’s impulsivity to that damage. In

short, counsel oversaw the investigation of Stokley’s mental health from psychological, neurological, and neuropsychological perspectives and elicited testimony that both explicitly and implicitly concluded that Stokley’s mental health satisfied the relevant mitigating factor.

FN7. While Morris did concede that he was “unable to evaluate” Stokley’s state of mind at the time of the crime, this concession stemmed from Stokley’s own statements, not from any failing on counsel’s part.

Stokley nevertheless claims that, despite counsel’s emphasis on his mental health, counsel was required to order an entire battery of neuropsychological tests. We reject this argument. Counsel had no reason to believe that step would be necessary. After examining Stokley, Morris did suggest that Stokley be seen by either a neurologist or a neuropsychologist, and counsel took that advice by sending Stokley to Mayron, a neurologist. Mayron later provided the mirror-image observation that analysis of “[b]ehavioral changes” occurs “by referral to a psychologist or a neuropsychologist.” Although that piece of advice was tendered at the sentencing hearing, counsel had already followed it, too, by having Morris, a psychologist, examine Stokley. In short, neither of the experts counsel hired unequivocally stated that Stokley should be examined by a neuropsychologist—and counsel was under no obligation to seek neuropsychological testing in the absence of any such recommendation. *See Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir.1998) (“[C]ounsel did retain medical experts whom he thought well-qualified. The experts he had retained did not state that they required the services of ... additional experts. There was no need for counsel to seek them out independently.”).

In fact, it is not even clear that further neuropsychological testing would have been to Stokley’s advantage. Hoffman’s report said that a previous neuropsychological examination revealed *no* brain damage.^{FN8} Counsel was therefore in a position

reasonably to conclude that additional neuropsychological testing could undermine Stokley's case rather than aid it.

FN8. Stokley argues that Hoffman misinterpreted the results of the neuropsychological test he administered and that those results were actually, under newer standards, positive for brain damage. But at least one of the experts hired by trial counsel reviewed the Hoffman report without noting any irregularity in Hoffman's conclusions. Hoffman's alleged error thus does not provide a basis for impugning counsel's effectiveness. *See, e.g., Sims v. Brown*, 425 F.3d 560, 585–86 (9th Cir.2005) (“[A]ttorneys are entitled to rely on the opinions of mental health experts, and to impose a duty on them to investigate independently of a request for information from an expert would defeat the whole aim of having experts participate in the investigation.” (internal quotation marks omitted)).

Stokley also argues that, without neuropsychological testing, counsel was unable to demonstrate the link between Stokley's brain injuries and his behavior at the time of the offense. But Mayron's report and testimony at sentencing expressly linked the two; Mayron stated that impulsivity “invariably” followed from the sort of brain injury that he diagnosed. Thus, although Stokley cites our decision in *Caro v. Woodford*, 280 F.3d 1247, 1258 (9th Cir.2002), for the proposition that evidence that “explain[s] the effects [of] physiological defects” on a petitioner's behavior is crucial, counsel put precisely that kind of evidence before the sentencing court. ^{FN9} For that *814 reason, and because counsel could have reasonably believed that additional neuropsychological testing was neither necessary nor advantageous, we hold that counsel's failure to seek such testing did not constitute ineffective assistance.

FN9. We note that this passage occurs in

Caro's discussion of the *prejudice* prong of *Strickland*. Our *ineffectiveness* holding in *Caro* was premised on counsel's failures “to seek out an expert to assess the damage done by [the] poisoning of Caro's brain,” to provide “mental health experts with information needed to develop an accurate profile of the defendant's mental health,” and to present testimony that the petitioner was abused as a child constituted ineffective assistance. *See* 280 F.3d at 1254–55. Stokley's trial counsel committed none of these failings.

Stokley's contention that counsel acted ineffectively by failing to follow up with Mayron is similarly unpersuasive. Mayron now claims that, had he been consulted by counsel after his examination of Stokley and before the sentencing hearing, he “would have recommended that Mr. Stokley be examined by a qualified neuropsychologist.” This statement contradicts Mayron's testimony at sentencing that either a psychologist *or* a neuropsychologist would suffice. More importantly, Mayron does not allege that he actually made this recommendation to counsel, and previous neuropsychological testing of Stokley led to a report that undermined Stokley's case by finding no organic brain damage. We are in no position to say that counsel's failure affirmatively to seek out Mayron's advice amounted to constitutionally ineffective assistance. *See, e.g., Murtishaw v. Woodford*, 255 F.3d 926, 946 (9th Cir.2001) (“[C]ounsel's actions are not deficient just because, through ‘the fabled twenty-twenty vision of hind-sight,’ a better course of action becomes apparent.”) (quoting *Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir.1994) (en banc)); *Babbitt*, 151 F.3d at 1174 (rejecting ineffective assistance “arguments predicated upon showing what defense counsel could have presented, rather than upon whether counsel's actions were reasonable”).

In sum, “[t]his is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the

659 F.3d 802, 11 Cal. Daily Op. Serv. 12,269, 2011 Daily Journal D.A.R. 14,560
(Cite as: 659 F.3d 802)

face.” *Bobby v. Van Hook*, — U.S. —, 130 S.Ct. 13, 19, 175 L.Ed.2d 255 (2009). “It is instead a case, like *Strickland* itself, in which defense counsel’s ‘decision not to seek more’ mitigating evidence from the defendant’s background ‘than was already in hand’ fell ‘well within the range of professionally reasonable judgments.’ ” *Id.* (quoting *Strickland*, 466 U.S. at 699, 104 S.Ct. 2052). Even more importantly, it is a case where counsel pursued the brain damage and mental health strategy. Stokley accordingly has not presented a colorable claim of ineffective assistance of counsel.

CONCLUSION

[14] Regardless of whether *Pinholster* bars consideration of Stokley’s new evidence, Stokley is not entitled to habeas relief. If *Pinholster* applies, it precludes the only relief Stokley seeks, and even if we may consider the evidence Stokley introduced in the district court, Stokley has failed to present a colorable claim of ineffective assistance of counsel. We accordingly **AFFIRM** the district court’s denial of relief.^{FN10}

FN10. We decline Stokley’s request to expand the certificate of appealability to encompass the claim that counsel ineffectively presented a mental state defense at trial. Stokley acknowledges that this precise claim was not included in his state petition. He nonetheless argues that the district court erred by finding the claim to be unexhausted because it is substantively identical to his sentencing-phase ineffective assistance claim. We cannot agree. Stokley contends in his sentencing-phase claim that counsel should have presented evidence to demonstrate that brain damage prevented him from controlling his impulses at the time of the crime. Under Arizona law, however, that type of evidence is inadmissible at trial: “An expert witness may not testify specifically as to whether a defendant was or was not acting reflectively at the time of a killing.” *State v.*

Christensen, 129 Ariz. 32, 628 P.2d 580, 583–84 (1981). The evidence to be weighed when determining whether a different result would have obtained at trial but for counsel’s ineffectiveness is very different from the evidence to be weighed when determining whether a different sentence would have resulted but for counsel’s ineffectiveness. We accordingly conclude that the two claims are undebatably distinct. See *Lopez v. Schriro*, 491 F.3d 1029, 1039–40 (9th Cir.2007).

C.A.9 (Ariz.),2011.

Stokley v. Ryan

659 F.3d 802, 11 Cal. Daily Op. Serv. 12,269, 2011 Daily Journal D.A.R. 14,560

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(Cite as: 2009 WL 728492 (D.Ariz.))

Only the Westlaw citation is currently available.

United States District Court,
D. Arizona.
Richard Dale STOKLEY, Petitioner,
v.
Charles L. RYAN, et al., ^{FN1} Respondents.

^{FN1}. Charles L. Ryan is substituted for Dora B. Schiro, as Acting Director, Arizona Department of Corrections. Fed.R.Civ.P. 25(d)(1).

No. CV-98-332-TUC-FRZ.

March 17, 2009.

West KeySummary
Criminal Law 110  1900

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation
110XXXI(C)2 Particular Cases and Issues
110k1900 k. Competence to Stand Trial;
Sanity Hearing. Most Cited Cases

Criminal Law 110  1912

110 Criminal Law
110XXXI Counsel
110XXXI(C) Adequacy of Representation

110XXXI(C)2 Particular Cases and Issues
110k1908 Raising of Particular Defense or
Contention

110k1912 k. Capacity to Commit Crime;
Insanity or Intoxication. Most Cited Cases
Defense counsel's investigation into murder defendant's
mental state at the time of the offense and his competency
to stand trial was not constitutionally deficient. Defense
counsel obtained an evaluation from a doctor who, just
weeks prior to the offense, had conducted
neuropsychological testing of defendant and found no
evidence of brain damages. Despite this report, counsel
also sought neuropsychological and neurological testing,
and a psychological evaluation from three other doctors.
Months before trial commenced, counsel requested that
defendant be evaluated by both a psychologist and a
neuropsychologist, and the investigation of his mental
health was not limited solely to the issue of competency or
insanity. U.S.C.A. Const.Amend. 6.

MEMORANDUM OF DECISION AND ORDER

FRANK R. ZAPATA, District Judge.

*1 Richard Dale Stokley (Petitioner), a state prisoner
under sentence of death, petitions this Court for a writ of
habeas corpus pursuant to 28 U.S.C. § 2254, alleging that
he was convicted and sentenced in violation of the United
States Constitution. (Dkt.1.) ^{FN2} For the reasons set forth
herein, the Court concludes that Petitioner is not entitled
to habeas relief.

^{FN2}. "Dkt." refers to documents in this Court's
file. As is customary in this District, the Arizona
Supreme Court provided to this Court the
original trial and sentencing transcripts, as well

Slip Copy, 2009 WL 728492 (D.Ariz.)
 (Cite as: 2009 WL 728492 (D.Ariz.))

as certified copies of the various state court records. (Dkt.68.) The Court will utilize the following designations for these materials: "ROA I" refers to the six-volume record on appeal prepared for Petitioner's direct appeal to the Arizona Supreme Court (Case No. CR-92-278-AP); "ROA II" refers to the two-volume record on appeal prepared for Petitioner's petition for review of the denial of post-conviction relief (Case No. CR-97-287-PC); "ROA III" refers to the one-volume record on appeal prepared as a supplemental record for Petitioner's petition for review (Case No. CR-97-287-PC); "RT" refers to the court reporter's transcript.

PROCEDURAL BACKGROUND

In 1992, Petitioner was convicted by a jury of two counts of kidnapping, one count of sexual conduct with a minor under the age of fifteen, and two counts of premeditated first degree murder arising from the deaths of two thirteen-year-old girls in a remote area in southeast Arizona.^{FN3} Cochise County Superior Court Judge Matthew W. Borowiec sentenced Petitioner to death for the murders and to various prison terms for the other counts. On direct appeal, the Arizona Supreme Court affirmed. State v. Stokley, 182 Ariz. 505, 898 P.2d 454 (1995).

^{FN3}. Petitioner's case was severed from that of his twenty-year-old co-defendant, Randy Brazeal, who pled guilty and was sentenced to twenty years in prison. (ROA I at 187.) Brazeal refused to testify at Petitioner's trial. (RT 3/25/92 at 25.)

Following an unsuccessful petition for certiorari to the United States Supreme Court, Stokley v. Arizona, 516 U.S. 1078, 116 S.Ct. 787, 133 L.Ed.2d 737 (1996), Petitioner filed a petition for post-conviction relief (PCR) pursuant to Rule 32 of the Arizona Rules of Criminal Procedure. The petition, prepared by court-appointed counsel Harriett Levitt, raised two claims. Two months later, the PCR court summarily denied relief. Subsequently, Petitioner sought special action relief in the Arizona Supreme Court due to a dispute concerning Levitt's continued appointment as counsel. In June 1997, the Arizona Supreme Court denied Petitioner's request to terminate Levitt's appointment but directed Levitt to file a supplemental PCR petition. That petition, raising six additional claims, was filed in October 1997, and denied by the PCR court in February 1998. On June 25, 1998, the Arizona Supreme Court summarily denied review of the PCR court's rulings.

Petitioner filed a Petition for Writ of Habeas Corpus in this Court on July 14, 1998. He subsequently filed an amended petition and a second amended petition. (Dkts.20, 33.) Respondents filed an answer, limited by the Court's order to issues of exhaustion and procedural default. (Dkt.44.) Procedural briefing concluded in April 2000, after Petitioner filed a traverse, Respondents filed a reply, and Petitioner filed a sur-reply. (Dkts.49, 59, 64.)^{FN4}

^{FN4}. While the procedural status of Petitioner's claims was under advisement, the Ninth Circuit Court of Appeals issued a decision in Smith v. Stewart, 241 F.3d 1191 (9th Cir.2001), which called into question Arizona's doctrine of procedural default. Due to the practice of bifurcating the briefing of procedural and merits issues then employed by the District of Arizona in capital habeas cases, the Court, in the interest of judicial economy, deferred ruling on the procedural status of Petitioner's claims pending further review of Smith. (Dkt.69.) In June 2002,

Slip Copy, 2009 WL 728492 (D.Ariz.)
(Cite as: 2009 WL 728492 (D.Ariz.))

the United States Supreme Court reversed the Ninth Circuit. Stewart v. Smith, 536 U.S. 856, 122 S.Ct. 2578, 153 L.Ed.2d 762 (2002) (per curiam). Contemporaneously, the Court decided Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which found part of Arizona's judge-sentencing scheme unconstitutional. The Court continued to defer ruling in this matter pending a determination of whether Ring applied retroactively to cases on collateral review. In June 2004, the Supreme Court held that Ring was not retroactive. Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004).

In an order filed August 31, 2006, the Court dismissed with prejudice fifteen claims as procedurally defaulted or plainly meritless. (Dkt. 70 at 8-9, 36-37.) The Court directed merits briefing on Petitioner's remaining claims, Claims A-1, C, E, and G (*id.* at 37), which was completed in March 2007 (Dkts. 83, 87, 90). In his opening merits brief, Petitioner concedes as to Claims C, E, and G that he "has not been able to locate any authority as required by 28 U.S.C. § 2254(d), which would hold that the state court's determination of [these] claim[s] was contrary to or an unreasonable application of a decision by the Supreme Court of the United States." (Dkt. 83 at 39.) Accordingly, these claims are summarily denied, and this order addresses the only remaining claim, A-1, which alleges ineffective assistance of counsel (IAC) at sentencing.

DISCUSSION

*2 Petitioner was represented at trial by Robert Arentz and G. Philip Maxey, and at sentencing by Arentz and Jeffrey Siirtola.^{FN5} Petitioner argues that counsel provided constitutionally deficient representation at sentencing by failing to adequately investigate Petitioner's mental state

at the time of the crime. (Dkt. 33 at 19-31.) Specifically, Petitioner faults counsel's failure to obtain a neuropsychological exam after a neurologist determined that Petitioner had organic brain damage. (*Id.* at 23.)

FN5. At the time of their appointment, Arentz served as the Cochise County Public Defender and Maxey was a deputy public defender. By the time of trial, Arentz had transitioned into private practice and Maxey had become the Cochise County Legal Defender, a separate indigent defense agency. (ROA I at 489, 497-98.) Following Petitioner's conviction, Maxey withdrew as counsel and Deputy Public Defender Siirtola was appointed to serve as co-counsel.

I. Factual Background

A. Offense

The Arizona Supreme Court summarized the pertinent facts surrounding the crimes for which Petitioner was convicted:

On the Fourth of July weekend, 1991, two thirteen year old girls, Mary and Mandy, attended a community celebration near Elfrida, Arizona. The thirty-eight year old defendant also attended the festival to work as a stuntman in Old West reenactments.

Mary and Mandy, along with numerous other local children, camped out at the celebration site on July 7. That night co-defendant Randy Brazeal, age twenty, showed up at the campsite. Brazeal had previously dated Mandy's older sister and knew Mandy. During the

Slip Copy, 2009 WL 728492 (D.Ariz.)
 (Cite as: 2009 WL 728492 (D.Ariz.))

evening, Brazeal approached the girls' tent and had a discussion with Mary and Mandy. The girls were also seen standing next to Brazeal's car speaking to Brazeal, who was in the driver's seat, while defendant was in the passenger seat. Around 1:00 a.m. on July 8, 1991, the girls told a friend they were going to the restroom. They never returned.

The next day Brazeal surrendered himself and his car to police in Chandler, Arizona. The hood of the car had semen stains, as well as dents matching the shape of human buttocks. Palm prints on the hood matched Brazeal. The back seat had semen stains matching defendant and also had blood stains. Police found a bloody pair of men's pants in the car.

Meanwhile, defendant called a woman in Elfrida asking her to send someone to pick him up in Benson, Arizona. The woman asked about the missing girls, to which defendant replied, "What girls? I don't know anything about any girls." Police arrested defendant that same day at a Benson truck stop. Police found blood stains on his shoes, and his pants looked as if they had recently been cut off at the knee.

After reading defendant his *Miranda* rights, police questioned defendant at the Benson police station. At first he denied any knowledge of the girls, but after hearing about Brazeal's arrest and being asked about "a particular mine shaft around Gleason," he admitted that he and Brazeal had sexually assaulted the girls. He admitted having sex with "the brown haired girl" (Mandy) and stated that Brazeal had sex with both of them. He also said he and Brazeal had discussed killing the girls, after which defendant choked one and Brazeal strangled the other. He admitted, "I ... choked 'em.... There was one foot moving though I knew they was brain dead but I was getting scared.... They just wouldn't

quit. It was terrible." Defendant also admitted using his knife on both girls. After killing the girls, they dumped the bodies down a mine shaft.

*3 Defendant led the police to the abandoned mine shaft and expressed hope that the trial would not take long so he could "get the needle and get it over with." After explaining how they had moved timbers covering the shaft to dump the bodies, he pointed out where he and Brazeal had burned the girls' clothes.

Police recovered the nude bodies from the muddy mine shaft. Autopsies showed that both girls had been sexually assaulted, strangled (the cause of death), and stabbed in the right eye. The strangulation marks showed repeated efforts to kill, as the grip was relaxed and then tightened again. Both victims suffered internal and external injuries to their necks. Mandy also had stomp marks on her body that matched the soles of defendant's shoes. Evidence was consistent with each victim being killed by a different perpetrator. In particular, Mary's body had a mark on the neck consistent with Brazeal's boot, whereas bruise marks on Mandy matched the soles of defendant's shoes. And more force was used in strangling Mandy than Mary. DNA analysis indicated that both defendants had intercourse with Mandy. Mary's body cavities were filled with mud, making DNA analysis impossible.

Stokley, 182 Ariz. at 512-13, 898 P.2d at 461-62
 (footnote omitted).

In his statement to police, Petitioner said he had not had a bath in about a week and had asked Brazeal to take him to a stock tank where he could clean up. (Dkt. 61, Ex. F at 7.) While en route, they saw the girls walking down the road and picked them up. (*Id.* at 12, 898 P.2d 454.) Petitioner

Slip Copy, 2009 WL 728492 (D.Ariz.)
 (Cite as: 2009 WL 728492 (D.Ariz.))

further stated that Brazeal drove away with the girls after dropping Petitioner at the tank. When he found them nearby after taking his bath Brazeal told him the girls had to be killed because he had sex with them. (*Id.* at 7, 898 P.2d 454.) He also claimed that the evening did not start out as something bad, that he had been drinking heavily and was very drunk, and that it was Brazeal's idea to assault the girls. (*Id.* at 8, 898 P.2d 454.)

B. Relevant Pretrial Proceedings

Prior to trial, defense counsel sought the appointment of psychologist Larry Morris to evaluate Petitioner's mental condition at the time of the offense in order to determine the viability of an insanity defense and for mitigation at sentencing. (ROA I at 214-19.) In support of the motion, counsel detailed Petitioner's "long history of psychological problems," including abandonment by his parents, long-term drug and alcohol abuse, depression, and suicide attempts. (*Id.* at 218-19, 898 P.2d 454.) Counsel also sought the appointment of neuropsychologist John Barbour to determine whether two significant head injuries and long-term alcohol and drug use had damaged Petitioner's brain, affecting his motor skills and behavior. (*Id.* at 223-26, 898 P.2d 454.) Counsel attached to the motion hospital records documenting that in 1982 Petitioner was hit with a beer mug, causing a skull fracture. (*Id.* at 228, 898 P.2d 454.) In both motions, counsel referenced the fact that significant impairment of a defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law at the time of the crime constitutes a mitigating factor. See A.R.S. § 13-703(G)(1).

*4 In a supplemental filing, defense counsel couched his request for experts as necessary to determine whether Petitioner was competent to assist counsel in preparation for trial. (ROA I at 245-55.) The motion provided

additional detail regarding Petitioner's background, including his hospitalization for suicidal ideation in 1978. (*Id.* at 249-50, 898 P.2d 454.) Counsel noted that the hospital report stated that Petitioner:

had a previous hospitalization in 1971 for the same reason. The patient history indicates several suicide attempts and a history of chronic drug abuse. The MMPI was consistent with a diagnosis of psychotic depression. The final diagnosis was personality disorder with differential to include passive-aggressive personality, antisocial personality and a borderline personality.

(*Id.*) Additionally, Petitioner reported at least five suicide attempts since 1978: in 1979, a drug overdose; a deliberate automobile accident in 1980; two attempts with handguns; and, in 1983, Petitioner strapped dynamite around himself. (*Id.* at 250, 898 P.2d 454.) Counsel appended a copy of the 1978 hospital record, which, in addition to describing Petitioner's suicide attempts and drug use, listed as pertinent features of Petitioner's history an unstable childhood, inability to develop close personal relationships, and inability to keep a job for any length of time. (*Id.* at 255, 898 P.2d 454.)

At a September 1991 pretrial hearing, the court granted both motions and directed counsel to prepare orders of transport for Petitioner's psychological and neuropsychological examinations. (RT 9/12/91 at 14.) When the court questioned whether the defense would be using a medical doctor to assess brain damage, counsel explained that he did not yet know which expert was available but the person would be a neuropsychologist, not a neurologist, because "studies have shown this [neuropsychological] kind of examination is much more sophisticated and can pick up things the CAT scan cannot." (*Id.* at 15, 898 P.2d 454.) Approximately one

Slip Copy, 2009 WL 728492 (D.Ariz.)
(Cite as: 2009 WL 728492 (D.Ariz.))

month later, the court signed orders directing that Petitioner be transported to the offices of psychologist Larry Morris and neuropsychologist John Barbour for examinations. (ROA I at 434, 437.) The court subsequently ordered that Petitioner again be transported to Dr. Barbour's office for further evaluation. (*Id.* at 445, 898 P.2d 454.)

C. Presentence Proceedings

Following his conviction, Petitioner identified the following mitigating factors he intended to assert at the aggravation/mitigation hearing:

- 1) The Defendant's lack of any prior felony record.
- 2) The Defendant's cooperation with law enforcement.
- 3) Unequal sentence given to Co-defendant.
- 4) Failure of the State, by its agent, the Cochise County Attorney's Office, to establish guidelines to determine under what circumstances the death penalty will be sought. Such guidelines are necessary for a determination of the proportionality of the imposition of the death sentence.
- *5) Alcohol abuse and intoxication.
- 6) Ability to be rehabilitated.
- 7) Difficulty in early years and prior home life.

- 8) Good behavior while incarcerated.
- 9) Mental condition and behavior disorders.
- 10) Cruelty of the manner of execution.
- 11) Lack of future dangerousness if confined to prison.
- 12) General good character of the Defendant.
- 13) Mercy in sentencing.
- 14) Any other aspect of the Defendant's character, propensities or record, and any of the circumstances of the offense relevant to sentencing.

(ROA I at 1081-84 (citations omitted).) In a separate memorandum, Petitioner expanded on these factors, especially the disparate sentence for co-defendant Brazeal. (*Id.* at 1101-03, 898 P.2d 454.)

I. Presentence report

At a conference prior to the presentence hearing, the court agreed that it would not read the probation department presentence report but would consider an alternative presentence report prepared by Petitioner's sentencing expert, John J. Sloss. (RT 6/15/92 at 7; RT 6/17/92 at 141-42.) Sloss, a former corrections counselor and former member of the Arizona Board of Pardons and Parole,

Slip Copy, 2009 WL 728492 (D.Ariz.)
(Cite as: 2009 WL 728492 (D.Ariz.))

interviewed Petitioner, his defense team, and various friends and family members, and reviewed documents pertaining to Petitioner. (ROA I at 497; Dkt. 61, Ex. G at 1, 12.) Petitioner expressed remorse to Sloss and “repeatedly stated that [the crimes] would have never happened had he not been drinking.” (Dkt. 61, Ex. G at 1.) Sloss’s report included a detailed social history of Petitioner, to which Sloss also testified at the presentence hearing. (*Id.* at 3-7, 898 P.2d 454; RT 6/17/92 at 74-145.)

Sloss appended to his report an evaluation by Dr. Huntley Hoffman, a psychologist who had evaluated Petitioner in June 1991, approximately two weeks prior to the murders. (Dkt. 61, Ex. G at Hoffman Rpt.) Dr. Hoffman had been asked by the Disability Determination Service Administration to assess Petitioner’s allegations of brain injury. Dr. Hoffman’s intelligence testing indicated that Petitioner had a full-scale IQ of 128, in the “superior” range. (*Id.*) Results of organicity testing (Wechsler Memory Scale and Trailmaking) indicated mild to moderate memory deficit but did not indicate brain damage.^{FN6} (*Id.*) Dr. Hoffman opined that Petitioner intellectually “could probably perform any job he is qualified to do.” (*Id.*) However, “[e]motionally, chronic pain, hostility, and possibly a mood disorder, could impair his relationships with co-workers and the public. These symptoms could also limit concentration/attention (no concentration/attention impairment was noted during the test/interview).” (*Id.*)

^{FN6} Dr. Hoffman is identified as a psychologist, not a neuropsychologist, in the report. However, one of Petitioner’s habeas experts states that the Trailmaking Test administered by Dr. Hoffman is a neuropsychological screening test. (Dkt. 49, Ex. 1 at 4-5.)

Dr. Hoffman’s diagnostic impression was as follows:

Richard has “superior” intelligence. There were no indications of right brain damage. Immediate and remote left brain memory was intact. Generally, short and long term left brain memory seemed unimpaired by MSE, but Wechsler Memory Scale results indicated a mild to moderate deficit.

*6 Richard’s history is significant for drug abuse. He currently demonstrates many characteristics of alcoholism. Mood disorder needs to be ruled out. Richard describes poly physical impairments that could limit vocational potential.

(*Id.*) In an addendum dated August 28, 1991, Dr. Hoffman diagnosed Petitioner with alcohol dependence. However, “[e]ven though Richard demonstrated some ‘soft signs’ of short/long term memory impairment, it does not appear significant enough to warrant a DSM-III-R diagnosis.” (*Id.*) He further stated that depressive disorder not otherwise specified and organic personality disorder not otherwise specified needed to be ruled out and noted Petitioner’s “significant history for polysubstance abuse-in full remission since 1980.” (*Id.*)

2. Presentence hearing

The trial court held a four-day presentence aggravation/mitigation hearing in June 1992. The prosecution presented the testimony of the medical examiner, who described the victims’ manner of death for the purpose of proving the “heinous, cruel or depraved” aggravating factor. (RT 6/16/92 at 6-75.) The defense presented the testimony of numerous lay and expert witnesses to establish its proffered mitigating factors.^{FN7}

Slip Copy, 2009 WL 728492 (D.Ariz.)
 (Cite as: 2009 WL 728492 (D.Ariz.))

FN7. Testimony from eight of Petitioner's lay witnesses was presented to the court via deposition transcripts, which were read during the presentence hearing. (RT 6/16/92 at 123-26; RT 6/17/92 at 2-3.)

Social History Witnesses

Two of Petitioner's aunts, Mabel Gentry and Zelma Brause, and his younger half-sister, Barbara Thompson, testified about Petitioner's childhood. (RT 6/16/92 at 76-115; Dkt. 97, Thompson Dep.; Dkt. 97, Brause Dep.) Petitioner was born in San Antonio to a seventeen-year-old mother; he never met his father, whom his mother hardly knew. (RT 6/16/92 at 79, 81-82; Dkt. 97, Brause Dep. at 10, 19.) Thompson testified that Petitioner loved his mother but resented the loss of a "normal" home life when she divorced his stepfather, and that their mother struggled to work and raise two children. (Dkt. 97, Thompson Dep. at 8, 17.) Petitioner was close to his grandparents and spent much of his time living at their house. (RT 6/16/92 at 83; Dkt. 97, Thompson Dep. at 6, 12; Dkt. 97, Brause Dep. at 7.) He also lived with his aunt and uncle, the Gentrys, for approximately six months as a newborn and again in Arizona for about two years beginning when he was fourteen (RT 6/16/92 at 82); Brause testified that Homer Gentry was very strict (Dkt. 97, Brause Dep. at 9). The relatives testified that Petitioner's grandparents and his mother loved him very much. (RT 6/16/92 at 108-09; Dkt. 97, Brause Dep. at 7, 10.) They all noted that Petitioner was a caring person, was helpful and had shown compassion for family members, and at age eighteen married a woman to help care for her children. (RT 6/16/92 at 87-88, 104; Dkt. 97, Thompson Dep. at 19-20; Dkt. 97, Brause Dep. at 14.)

Robert E. Lee Parrish and his wife, who knew Petitioner as a teenager, testified that he was always respectful of

women, never used vulgar language, was not a violent person, and could hold his liquor very well. (Dkt. 97, R. Parrish Dep. at 5, 6-8, I. Parrish Dep. at 6-7.) Newt Maxwell, an occasional employer of Petitioner as a teenager, and his wife stated that Petitioner was non-violent even when drinking. (Dkt. 97, N. Maxwell Dep. at 5, 7-8, R. Maxwell Dep. at 6.) Petitioner's long-time friend Walter Donahue and his wife testified that Petitioner was a hard worker who drank but was never violent. (Dkt. 97, W. Donahue Dep. at 4-5, 6, P. Donahue Dep. at 6.) Mrs. Donahue discussed Petitioner's periodic attempts to quit drinking and stated that he was "always helpful." (Dkt. 97, P. Donahue Dep. at 6, 12.) They both stated that Petitioner was invaluable when their son suffered serious burns. (Id. at 8-10, 898 P.2d 454; Dkt. 97, W. Donahue Dep. at 7-9.)

Sentencing Expert

*7 Petitioner's sentencing expert, John Sloss, also testified at the hearing. (RT 6/17/92 at 74-145.) He relayed that Petitioner dropped out of school in the tenth grade and later obtained a GED; he believed Petitioner had the capability of performing well but was not motivated to do so because of the turmoil of frequently changing schools, not knowing his father, and having a mother who was too busy to spend time with him. (Id. at 84-86, 105, 898 P.2d 454.) Petitioner enlisted in the Army but was honorably discharged due to knee problems. (Id. at 86, 898 P.2d 454.) Sloss described Petitioner's four unsuccessful marriages. (Id. at 87-90, 898 P.2d 454.) Petitioner's work history consisted of only short-term, laborer-type positions, which Sloss surmised was attributable to Petitioner's alcoholism. (Id. at 90-91, 898 P.2d 454.) Finally, Sloss opined that Petitioner was willing to participate in a substance abuse program, was motivated to lead a meaningful life in prison, and should be sentenced to consecutive life sentences in lieu of the death penalty. (Id. at 107, 111, 898 P.2d 454.)

Slip Copy, 2009 WL 728492 (D.Ariz.)
(Cite as: 2009 WL 728492 (D.Ariz.))

Neurological Expert

Michael Mayron, M.D., performed a neurological examination of Petitioner on March 6, 1992, one week before the start of trial, and testified at the presentence hearing. (ROA I at 1087-89; RT 6/17/92 at 9.) According to Dr. Mayron, Petitioner's history and records revealed that he:

has suffered multiple head injuries throughout his life. His first reported head injury was at the age of 3 when the patient was playing with his grandfather and tripped on the sidewalk, striking his skull on the concrete. His grandmother reported to him that he suffered a skull fracture but it is unclear as to the veracity of this. He was then in multiple altercations as a teenager with head injuries occurring in many of these fights. The first very severe head injury that we have documented, though, is in March 04, 1982, when he was struck with a beer mug creating a left parietal compound depressed skull fracture with left parietal lobe contusion. [In] July of 1986 he suffered head injury when trying to get into a moving vehicle. He was reported in the hospital records to have a transient right hemiparesis with left forehead laceration. Approximately 1 and 1/2 years ago the patient suffered head injury from his last wife when struck with a very heavy cast iron frying pan resulting in loss of consciousness.

The patient also provides history that in 1980 [he was] attacked by a gang wherein he was struck with multiple objects with the last one he recalls being struck with a car bumper jack to the frontal area. He was left unconscious on the street and taken in by some people and recovered on his own in another person's home over a period of months. He states that he noticed a change

in his temperament after this 1980 head injury. He has always had a difficult temper but his temper was more quickly triggered after the 1980 head injury and was much more difficult to control. He also states that his memory was very bad for recent events.

*8 The patient is a self admitted alcoholic drinking at least a pint of whiskey a day since adolescence. He also claims to have heavily used marijuana, LSD, mescaline, peyote, psilocybin, heroin, cocaine, crack and methamphetamine.

(ROA I at 1087-88.)

Dr. Mayron's physical examination of Petitioner revealed Petitioner to be alert, oriented, and cooperative. (*Id.* at 1088, 898 P.2d 454 .) Examination of Petitioner's cranial nerves showed them to be completely intact. (*Id.*) However, motor, sensory, and reflex examinations revealed some deficits and impairments. (*Id.*) In his report, Dr. Mayron recorded the following impression of Petitioner:

[h]istory of multiple head injuries with a left depressed skull fracture 2 years after at least a frontal injury from a car jack with the former resulting in a permanent mild right hemiparesis and hemisensory deficit and the former appears to be a permanent post-concussion syndrome memory impairment and disturbance characterized with increased difficulty with impulse control. This would have been worsened by the 1982 head injury that resulted in his right sided deficits.

(*Id.* at 1089, 898 P.2d 454.)

Slip Copy, 2009 WL 728492 (D.Ariz.)
 (Cite as: 2009 WL 728492 (D.Ariz.))

At the presentence hearing, Dr. Mayron reiterated his opinion that the 1982 "beer mug" incident caused a severe injury to the left side of Petitioner's brain-specifically, his parietal lobe-resulting in permanent weakness to the right side of his body. (RT 6/17/92 at 11-12, 14.) In addition, this and other injuries could have impacted Petitioner's ability to understand, interpret, and respond to his environment, resulting in, among other things, a decreased control of impulsive behavior. (*Id.* at 12, 19, 898 P.2d 454.) Dr. Mayron opined that Petitioner's "brain integrity," or anatomic function, was moderately to severely impaired due to previous head injuries, causing impulsive and emotional behavior, irritability, depression, and impaired ability to make good judgments and to plan ahead. (*Id.* at 33-34, 70-74, 898 P.2d 454.) According to Dr. Mayron, "anatomic damage to the brain is almost invariably almost [sic] incapacitating." (*Id.* at 72, 898 P.2d 454.)

Dr. Mayron indicated that long-term drug and alcohol abuse could exacerbate such head injuries by continuing to destroy brain tissue. (*Id.* at 21, 898 P.2d 454.) Further, alcohol's disinhibition of brain function would have a cumulative effect on behavior, so that it would take less alcohol to achieve loss of control of emotions in an individual with brain damage and would exacerbate difficulty with cognitive ability. (*Id.* at 34-35, 898 P.2d 454.)

Dr. Mayron further testified that a person with depression and a personality disorder develops coping mechanisms to adapt to life. (*Id.* at 37, 898 P.2d 454.) A head injury will disturb these mechanisms, magnify the person's misperceptions, and cause the depression to worsen. (*Id.* at 38-39, 898 P.2d 454.) However, Dr. Mayron conceded that Petitioner may have developed other coping mechanisms in the ten years between the injury and the offenses, as evidenced by his lack of any serious criminal record. (*Id.* at 72-73, 898 P.2d 454.)

*9 On cross-examination, Dr. Mayron explained that during a neurological evaluation behavioral changes are assessed "through observation of the patient in the exam room with you or by referral to a psychologist or a neuropsychologist, someone who is trained in doing testing of brain function, which includes behavior." (*Id.* at 65, 898 P.2d 454.) While examining Petitioner, Dr. Mayron did not see anything that indicated behavioral problems resulting from Petitioner's parietal injury and was not asked to refer him to somebody for behavioral testing. (*Id.* at 65-66, 898 P.2d 454.) He further stated that such testing would ordinarily include tests such as the MMPI (Minnesota Multiphasic Personality Inventory). (*Id.* at 66, 898 P.2d 454.)

Psychological Expert

At the request of defense counsel, Dr. Larry Morris examined Petitioner prior to trial pursuant to Rule 11.2 of the Arizona Rules of Criminal Procedure. (RT 9/12/91 at 14.) He prepared a report and testified at the presentence hearing. (Dkt. 61, Ex. G at Morris Rpt.; RT 6/18/92 at 2-71.) In addition to interviewing Petitioner, Dr. Morris administered a battery of tests and reviewed numerous collateral documents, including an MMPI-2 administered by John Barbour, Ph.D., on November 6, 1991. (Dkt. 61, Ex. G at Morris Rpt.)

Petitioner reported to Dr. Morris "[r]ather chaotic childhood experiences, including abuse, neglect and hyperreligiosity." (*Id.*) Petitioner related that his grandmother "was a hell-fire and brimstone preacher," and his grandfather was a "mean man who carried a Forty-Five." (*Id.*) When Petitioner was eleven his mother and stepfather divorced, and they moved into low-income housing. Petitioner reported that his mother had "no time" for him, and he moved back and forth between her and his nearby grandmother. At the age of fourteen, when

Slip Copy, 2009 WL 728492 (D.Ariz.)
 (Cite as: 2009 WL 728492 (D.Ariz.))

Petitioner began experiencing social problems at school and had continuing difficulties with his mother, he was sent to live with his aunt and uncle in Arizona. According to Petitioner, his uncle was an alcoholic and physically abusive. When he was fifteen years old, after a "confrontation" with his uncle, Petitioner was sent back to Texas, where he continued to experience social and academic problems at school, leading to two expulsions.

*10 (*Id.*)

Petitioner's reported psychological problems included suicidal ideation and suicide attempts resulting in hospitalization. Petitioner stated that "he has not been successful in life and does not like the way people, especially women, treat him." (*Id.*) Petitioner's performance on the Attitude Toward Women Scale indicated that he "holds more traditional or conservative rather than egalitarian attitudes toward women." (*Id.*) Petitioner's responses to the Buss-Durkee Hostility Inventory suggested "an above average level of anger and hostility, especially in the areas of suspiciousness and resentment." (*Id.*) Petitioner's responses to the Burt Rape Acceptance Scale suggested "an above average acceptance of rape myths," which has a correlation to "sexually assaultive males." (*Id.*)

Dr. Morris recounted Petitioner's Army discharge, his employment history, consisting of brief stints in unskilled positions, his record of underachievement as a student, and the fact that he had been divorced four times. (*Id.*) According to Petitioner, he had "rather severe interpersonal relationship problems with each of his spouses and/or family members." (*Id.*) Petitioner reported adultery by his second wife, domestic violence from his fourth, and that one wife had an abortion without his consent. (*Id.*)

Dr. Morris's report concluded:

Dr. Morris also noted Petitioner's drug use:

As a youngster Mr. Stokley began to experiment with alcohol and marijuana. At age 15 years he was abusing alcohol and within a few years he was abusing LSD and other hallucinogens. In his 30s Mr. Stokley "got to doing crack and got a \$200 to \$300 habit." When he began to experience physical problems and bouts with paranoia Mr. Stokley "decided to quit and I flushed \$2,000 worth of drugs down the toilet." He continued to abuse alcohol, however, and he reported drinking "to get drunk." While abusing alcohol and other substances he, at times, "hears people telling me bad things, telling me to do bad things." He described the voices as male. Mr. Stokley also reported experiencing "memory losses" for some activities while intoxicated.

This evaluation revealed a 38-year-old man with a childhood history of abuse and neglect. While he appears to have above average intelligence he also has a history of underachievement. He drifted into abusing alcohol and other drugs at an early age and continued abusing alcohol until the present incarceration. While Mr. Stokley has managed, for the most part, to support himself by securing legitimate employment, he exhibits a pattern of vocational instability characterized by numerous but relatively short-term employment experiences.

Mr. Stokley does not appear to be suffering from a psychotic disorder but he has a history of depression and other serious psychological problems. By his own admission he experiences "lots of anger" and his primary coping mechanism is numbing himself through

Slip Copy, 2009 WL 728492 (D.Ariz.)
 (Cite as: 2009 WL 728492 (D.Ariz.))

substance abuse. He displays very poor interpersonal relationship skills and relationships tend to be stressful, troubled and unsatisfying. Mr. Stokley also appears to experience difficulties with impulse control and poor judgment. In this regard, he tends not to study consequences well but responds impulsively instead. This pattern of impulsivity has its roots in childhood and has, unfortunately, become an integral part of Mr. Stokley's personality structure. In legal parlance, he appears to be a reactive rather than reflective type individual. Diagnoses of depression, polysubstance abuse, and borderline personality disorder should be considered.

Although Mr. Stokley appears a seriously dysfunctional individual, it is my opinion that he is competent to stand trial and could participate meaningfully with his attorney in his own behalf.

(*Id.*) With respect to Petitioner's state of mind at the time of the crime, Dr. Morris reported:

When asked to describe his thinking processes during the instant offense, Mr. Stokley stated that he had no clear memory of events associated with the death of the two girls. He reported some details of events leading to contact with the girls and Mr. Randy Brazeal and then being in a car north of Tucson with Mr. Brazeal several hours subsequent to the instant offense. Since he was unable to discuss the details of the offense itself, it was not possible to evaluate his state of mind during the time the two girls were murdered. Since Mr. Stokley reported consuming alcohol prior to the instant offense it appears likely, however, that he was intoxicated during this time period.

*11 (*Id.*) Finally, Dr. Morris suggested that “[d]ue to Mr. Stokley's history of head injuries the possibility of an organic disorder should be addressed by a

neuropsychologist and/or neurologist experienced in these matters.” (*Id.*)

At the presentence hearing, Dr. Morris reiterated much of the information in his report and expanded on some areas. He testified that “abusive and chaotic [childhood] experiences formulated the kind of marginal personality that we see in Mr. Stokley and that the significant dysfunction he experienced is a function of those childhood experiences.” (RT 6/18/92 at 15.) Dr. Morris opined that Petitioner “is an individual who probably doesn't study things very carefully, although he is extremely bright, and figure[s] things out before he acts. He acts and worries about it later.” (*Id.* at 25, 898 P.2d 454.) Dr. Morris emphasized that Petitioner has trouble controlling his emotions and that stress and alcohol exacerbate problems with impulse control and poor judgment. (*Id.* at 28-29, 898 P.2d 454.)

Dr. Morris described borderline personality disorder, testifying that it is “between what we would consider normal personality development and an individual who is psychotic.” (*Id.* at 31, 898 P.2d 454.) Individuals with the disorder “may have a personality but it's very unstable.” (*Id.*) They may experience mood changes in which they are “depressed one minute, and the next minute could be so angry, they could tear the building down and you don't know why.” (*Id.* at 32, 898 P.2d 454.) Individuals with a borderline personality cannot adapt well to what is going on around them. (*Id.*) They are impulsive and have difficulty with anger management. (*Id.* at 33, 898 P.2d 454.) Petitioner's “model” behavior in prison is not inconsistent with Dr. Morris's assessment that he is a “seriously dysfunctional individual” with borderline personality disorder because “some kind of stability ... could occur in a structured prison setting.” (*Id.* at 56-57, 898 P.2d 454.)

Slip Copy, 2009 WL 728492 (D.Ariz.)
 (Cite as: 2009 WL 728492 (D.Ariz.))

On cross-examination, Dr. Morris stated that Petitioner was not legally insane at the time of the murders and that someone with borderline personality disorder would recognize the wrongfulness of his conduct. (*Id.* at 45, 898 P.2d 454.) However, Petitioner's impulsivity makes it difficult for him to conform his behavior to the law. (*Id.* at 65, 898 P.2d 454.) Dr. Morris testified that, on the basis of his history and apparent level of intoxication, Petitioner's capacity to appreciate the wrongfulness of his conduct was significantly impaired at the time of the crime. (*Id.*) Dr. Morris conceded that his opinion about Petitioner's mental state at the time of the crime was based on the pattern of borderline personality disorder, not on any specific facts provided by Petitioner. (*Id.* at 69, 898 P.2d 454.) Although alcohol could exacerbate problems with impulsivity in a "volatile situation" involving teenaged girls, Petitioner's personality disorder also could have had nothing to do with triggering Petitioner's actions at the time of the offense. (*Id.* at 69-71, 898 P.2d 454.)

*12 According to Dr. Morris, the likelihood of a person with a borderline personality "automatically" killing at another's direction would depend on the person's state of mind; anger and frustration would tend to make it more likely. (*Id.* at 46-48, 898 P.2d 454.) Dr. Morris testified that Petitioner's shoeprint on one of the victims and stab wounds to both victims' eyes would be consistent with intense anger. (*Id.* at 48-49, 898 P.2d 454.) He acknowledged that killing to eliminate witnesses and destroying evidence to cover up a crime would demonstrate more thoughtfulness and less impulsivity. (*Id.* at 54-55, 898 P.2d 454.) Dr. Morris further testified that Petitioner demonstrated some features or symptoms of antisocial personality disorder, in which one is more consciously breaking the law. (*Id.* at 66-67, 898 P.2d 454.)

Rebuttal Witnesses

In rebuttal to Petitioner's mitigation presentation, the prosecution called several witnesses. Deborah Chadwick testified that she was married to Petitioner for about seven months in 1986. (*Id.* at 73, 898 P.2d 454.) She stated that Petitioner was physically abusive on numerous occasions, including one incident in which he threatened to kill her and throw her body in a mine shaft. (*Id.* at 74-77, 898 P.2d 454.) Another time, Petitioner grabbed her around the neck and strangled her. (*Id.* at 81, 898 P.2d 454.) She denied getting an abortion without Petitioner's knowledge and testified that he drove her to and from a clinic for the procedure. (*Id.* at 82, 898 P.2d 454.) Another ex-wife, Candace Fuller, testified that she was married to Petitioner for seven months in 1991, but only lived with him for the first two because he became physically abusive. (*Id.* at 89-91, 898 P.2d 454.) During one beating, Petitioner told her he was going to finish her off and put her in a mine shaft. (*Id.* at 103, 898 P.2d 454.)

Finally, Homer Gentry, Petitioner's uncle, testified about the months when as a teenager Petitioner lived with him and his wife in Arizona. (*Id.* at 114-30, 898 P.2d 454.) He denied sending Petitioner back to Texas after a fight, stating that he had told Petitioner from the start that Petitioner was free to go back home if he ever became dissatisfied living with them. (*Id.* at 115-17, 898 P.2d 454.) He denied being an alcoholic but acknowledged whipping Petitioner on occasion, including once with a rope for causing damage to a young tree. (*Id.* at 122-27, 898 P.2d 454.)

Closing Argument

Defense counsel Arentz gave a lengthy closing argument, urging the sentencing judge to find that the proffered mitigating evidence was sufficiently substantial to call for leniency. (RT 6/19/92 at 3-44.) He reminded the court of the necessity to conduct an individualized sentencing and

Slip Copy, 2009 WL 728492 (D.Ariz.)
(Cite as: 2009 WL 728492 (D.Ariz.))

to consider Petitioner's entire life in assessing whether the death penalty was appropriate. (*Id.* at 4, 12, 898 P.2d 454.) Counsel urged the court to consider that Petitioner had no prior felony convictions, had cooperated with law enforcement, was extremely intoxicated at the time of the crime, was capable of rehabilitation, was cared for by both family and friends, expressed remorse, and was generally a good person despite being a highly dysfunctional individual. (*Id.* at 13, 16, 19, 25, 34, 35, 898 P.2d 454.)

*13 Counsel emphasized two other factors—the disproportionate sentence received by co-defendant Brazeal and Petitioner's mental condition and behavioral disorders. (*Id.* at 26-41, 898 P.2d 454.) With regard to the latter, counsel clarified that the court must consider Petitioner's diminished capacity both in the context of his state of mind at the time of the offense, *see* A.R.S. § 13-703(G)(1), and as mitigation evidence generally, irrespective of whether Petitioner's disorder affected his behavior at the time of the incident itself. (*Id.* at 26-27, 898 P.2d 454.) Counsel stressed that Petitioner's dysfunction was evidenced not solely by psychological testing, but by medical testimony from a neurologist indicating that Petitioner's ability to control his impulses and anger were impaired by numerous brain injuries and that these impairments were exacerbated by Petitioner's long-term abuse of alcohol and drugs. (*Id.* at 30, 898 P.2d 454.) He further pointed out that the neurological and psychological reports were consistent and supported one another, especially in view of the fact that Dr. Morris completed his psychological evaluation well before Dr. Mayron conducted his neurological examination. (*Id.* at 28, 898 P.2d 454.) In addition, the 1978 hospital admission report reflected that Petitioner was depressed, suicidal, unable to keep a job, and had an unstable childhood—reinforcing Dr. Morris's evaluation fourteen years later—and other hospital records documented at least two of Petitioner's severe head injuries. (*Id.* at 29-30, 898 P.2d 454.)

In arguing that Dr. Morris's evaluation was significant, counsel reiterated that Petitioner's borderline personality disorder means he is a reactive, not reflective, person. (*Id.* at 31, 898 P.2d 454.) “[Petitioner] has a difficult time controlling emotion. He reacts hostile. He reacts angrily.” (*Id.*) Detailing Petitioner's unstable childhood, counsel explained that this history was consistent with Dr. Morris's borderline personality disorder diagnosis, as was Petitioner's lifestyle, reclusive behavior, transitory employment history, and history of dysfunctional relationships. (*Id.*) Counsel argued:

Now, the importance of this [history] is not only that some of the difficulty in the childhood may have difficulty [sic] and extend some ideas of leniency. The importance is also the consistency of that lifestyle and the childhood with the psychological and neurological evaluations.

A person has difficulty with impulse control and poor judgment and emotion control and anger. Why?

Well, it's not because he woke up that way. It's because of a history. And the court knows the majority of people that come in here on any criminal offenses have problems—poor upbringing, poor childhood, poor education, alcohol and drugs.

If it is extreme enough and if it manifests itself in psychological and neurological disorders, it is something to consider why someone does certain behavior and whether someone should receive a sentence of death.

*14 (*Id.* at 33-34, 898 P.2d 454.)

Slip Copy, 2009 WL 728492 (D.Ariz.)
(Cite as: 2009 WL 728492 (D.Ariz.))

D. Sentencing

1284-87; RT 7/14/92 at 28-34.)

Petitioner was sentenced on July 14, 1992. (RT 7/14/92.)
Prior to sentencing, Petitioner gave the following
statement:

Regarding the second factor, the court found:

I would like to say that I think it's very clever the way I
have been made a scapegoat in this case.

The defendant was found guilty of two murders. Each
conviction of murder in the first degree is an aggravated
circumstance to the other conviction.

I do not deny culpability, but there was no
premeditation on my part.

The evidence established beyond a reasonable doubt
that the defendant himself, with his own hands and feet,
with the force of his own strength against this thirteen
year old child, murdered Mandy Ruth Marie Meyers.
The evidence shows with equal persuasion that the life
of the other child, Mary Raylene Snyder, was similarly
forcefully taken by Randy Ellis Brazeal, a co-defendant
as originally charged.

What I am guilty of is being an irresponsible person for
most of my life, running from responsibility, living in a
fantasy world and it was my irresponsibility on the night
that this incident occurred that involved me in the
incident.

Defendant's statement, given to Sheriff's Detective
Rothrock shortly after his arrest, disclosed the
conspiracy to kill both girls to cover up the sexual
assaults; to escape detection; to eliminate the victims as
witnesses.

There is no words that can express the grief and the
sorrow and the torment I have experienced over this, but
I am just going to leave everything in the hands of God
because that's where it is anyway.

The evidence clearly established that the defendant
engaged in sexual intercourse with Mandy Ruth Marie
Meyers.

That's all I have to say.

(Id. at 4-5, 898 P.2d 454.)

The injuries to the bodies were similar. The deaths were
of like cause. The bodies were thrown into the same
watery mine shaft. It was defendant's shoe prints
stamped in the Meyers child's body. Some of the marks
on the body of the other child may have been from
Brazeal's shoes. From the evidence of the medical
examiner, it appears likely.

In his special verdict, the sentencing judge found three
aggravating factors: (1) Petitioner was an adult (38 years
old) at the time of the offenses, and the victims were under
fifteen years of age; (2) Petitioner committed multiple
homicides; and (3) Petitioner committed the offenses in an
especially heinous, cruel, or depraved manner. (ROA I at

Slip Copy, 2009 WL 728492 (D.Ariz.)
(Cite as: 2009 WL 728492 (D.Ariz.))

The defendant contributed to the death of one child just as surely as he killed the other. He was the elder, perhaps even the brighter. Even to be influenced by the younger perpetrator lessens neither the crime nor the conviction. Just as he is responsible for the death of Mandy Ruth Marie Meyers, so is he responsible for the killing of Mary Raylene Snyder, and for the manner of her death. The defendant was found guilty of the murder in the first degree of Mary Raylene Snyder though the killing was at the hands of Randy Ellis Brazeal. The jury so found.

*15 (ROA I at 1285.)

Regarding the especially heinous, cruel, or depraved aggravating factor, the court found:

These elements are in the disjunctive. An act may have the qualities of more than one. Only one need be found to meet this circumstance.

Defining the standards of any of these elements is [sic] not been an easy task. The cases are replete with example, both for those that demonstrate the standards, and those that fall short. The facts of this case were compared to those contained in the case law of this state.

The Elements of Especially Heinous or Depraved

The terms, "heinous" and depraved" focus on the defendant's mental state and attitude as reflected by his words and actions.

The defendant had a knife. Both victims were stabbed, Mandy Ruth Marie Meyers through the right eye to the bony socket, and Mary Raylene Snyder in the vicinity of her right eye. The stabbings were acts of gratuitous violence which, surely, could not have been calculated to lead to death.

The stomping of the bodies, apparently after unconsciousness when the struggle for life had ceased, were acts of unnecessary and gratuitous violence, designed to still the unconscious bodies and assuage the killers' discomfort from the reflexes of death.

The stabbings and stompings of the bodies were mutilations.

Though the sexual conduct crimes committed with these young girls are serious crimes, the killings were senseless and the victims were helpless. These young lives were snuffed out, as insects, merely to eliminate them as witnesses.

The manner of killing and disposition of the bodies demonstrate an obdurate disregard for human life and human remains.

The Element of Cruelty

The victims were alive for some minutes from the start of the fatal assaults. They experienced great physical pain and mental anguish as they fought to free themselves. There were frequent repositioning of the hands of the killers on the throats of the victims, and the reasserting of the pressure until they were unconscious. Medical evidence cannot establish the moment of

Slip Copy, 2009 WL 728492 (D.Ariz.)
(Cite as: 2009 WL 728492 (D.Ariz.))

cessation of consciousness, when, supposedly, physical pain ceases, but did show that death was not instantaneous.

It was a cruel death for both victims, considering the extent of physical injuries to the bodies, much of which must have been experienced while conscious.

The defendant entered into an agreement with Brazeal to kill both girls. The method of killing and manner of death, including the stomping on the bodies, are remarkably similar considering they were done at night in the desert. The killings were simultaneous though the deaths may not have been. The defendant, just as surely as he did with Mandy Ruth Marie Meyers, intended the killing of Mary Raylene Snyder. The elements of these aggravating circumstances apply to the defendant equally as to both murders.

(Id. at 1286-87, 898 P.2d 454 (citations omitted).)

The sentencing judge then considered all of the mitigation factors urged by Petitioner, but determined that none were sufficiently substantial to call for leniency. *(Id. at 1288-91, 898 P.2d 454.)* Regarding Petitioner's lack of a prior felony record, the court found that Petitioner "has a history of arrests and misdemeanor convictions, from driving while intoxicated to assaults and domestic violence." *(Id. at 1288, 898 P.2d 454.)* Because Petitioner's "professed law abiding qualities are illusory," the court found that his lack of a prior felony conviction was not a mitigating circumstance. *(Id.)*

*16 As for Petitioner's cooperation with law enforcement, the court noted:

The defendant gave a statement to a sheriff's detective implicating himself and Randy Ellis Brazeal. The statement discloses denials of the whereabouts of the two girls, a concocted story, deception, and evasion. Only after significant information known to the sheriff's office was disclosed, specifically a mine shaft around Gleeson, did defendant admit to the killings. Even then, he attempted to mitigate his own involvement and blame Brazeal.

The statement did not disclose the entire truth. In light of that already known by law enforcement authorities, and the manner and quality of defendant's statement, his words and actions can hardly be considered cooperation with law enforcement.

(Id. at 1288-89, 898 P.2d 454.) Because "the words and actions of defendant in assisting law enforcement officers were designed to shift responsibility and to reduce his culpability in light of the inextricability of his position," the court found that these were not mitigating circumstances. *(Id. at 1289, 898 P.2d 454.)*

The court further rejected the unequal sentence given to Petitioner's co-defendant, Randy Brazeal, as a mitigating circumstance. *(Id.)* The court explained:

The co-defendant, Randy Ellis Brazeal, received a twenty year sentence on his plea to second degree murder. The state was awaiting the results of DNA testing. Brazeal's lawyers insisted on a speedy trial pursuant to the Rule 8, Rules of Criminal Procedure. The results of the tests would not have been available until long past the speedy trial deadline for Brazeal.

The disparity in the charges and therefore the possible

Slip Copy, 2009 WL 728492 (D.Ariz.)
(Cite as: 2009 WL 728492 (D.Ariz.))

sentences for the two defendants is a direct result of the disparity in the available evidence at the time each could have gone to trial. Lacking DNA evidence for the Brazeal case, the state elected to enter into a plea agreement.

(*Id.*)

As for Petitioner's alcohol abuse and intoxication, the court noted:

Defendant has a long history of alcohol abuse. On the night in question, he claims to have drunk heavily. The statement given to Detective Rothrock of the Cochise County Sheriff's Office displayed substantial recall and detail, and a sufficient understanding of the events at the time of the murders and his own complicity and responsibility.

(*Id.*) Therefore, the court found beyond a reasonable doubt that "at the time of the killing, the defendant's capacity to appreciate the wrongfulness of his conduct was not significantly impaired. Alcohol abuse over an extended period of defendant's life, and his drinking at the time of the killings are not mitigating circumstances under the facts of this case." (*Id.* at 1289-90, 898 P.2d 454.)

The court also found that Petitioner's "claimed difficulties in his early years and the conditions of his early home life are not mitigating circumstances" because "[t]he evidence, at best, is inconsistent and contradictory"; the court noted "little evidence" of physical abuse by his elders. (*Id.* at 1290, 898 P.2d 454.) As for Petitioner's mental condition and behavior disorders, the court noted:

*17 The defendant claims a chaotic childhood and a dysfunctional family, which included abuse, neglect and hyperreligiosity; an abuse of drugs at a young age; a history of psychological problems involving suicidal ideation and depression; and having experienced serious head injuries. A psychologist testified that he has difficulty with impulse control and has poor judgment.

FINDING: This court finds nothing unusual about the myriad of problems presented by defendant except in their inclusiveness. Character or personality disorders to the extent demonstrated by the evidence in this case are not mitigating factors. Having suffered head injuries and having difficulty with impulse control sheds little light on defendant's conduct in this case. The evidence does not show defendant acted impulsively, only criminally, with evil motive. This court finds the defendant's mental condition and alleged behavior disorders are not mitigating circumstances.

(*Id.* at 1290-91, 898 P.2d 454.)

The court further found insufficient evidence to support Petitioner's claim of good character as a mitigating circumstance. (*Id.* at 1291, 898 P.2d 454.) Rather, "[e]vidence presented on the separate sentencing hearing as to good character was effectively impeached by testimony of defendant's actions with regard to two former wives." (*Id.*) Furthermore, Petitioner's claim of "[g]ood behavior belies the other claimed mitigating circumstances" of alcohol abuse, a history of violence, difficulty in his early years, a dysfunctional family, difficulty with impulse control, and an abusive background. (*Id.*) The court summarily rejected Petitioner's good behavior while incarcerated and lack of future dangerousness while confined to prison as mitigating circumstances. (*Id.* at 1291, 898 P.2d 454.)

Slip Copy, 2009 WL 728492 (D.Ariz.)
(Cite as: 2009 WL 728492 (D.Ariz.))

Finally, the court stated that it was “unable to glean any mitigating circumstances not suggested by [Petitioner’s] counsel.” (*Id.*) In conclusion, the sentencing judge determined that even if any or all of Petitioner’s claimed mitigating circumstances were found to exist, “balanced against the aggravating circumstances found to exist, they would not be sufficiently substantial to call for leniency.” (*Id.* at 1292, 898 P.2d 454.)

E. Direct Appeal

On appeal, the Arizona Supreme Court conducted its statutorily-required independent review of Petitioner’s capital sentences. *Stokley*, 182 Ariz. at 516, 898 P.2d at 465. After determining that the evidence supported the trial court’s findings as to the aggravating factors, the court addressed each of Petitioner’s claimed mitigating factors.

The court first assessed Petitioner’s claim that, under A.R.S. § 13-703(G)(1), his capacity to appreciate the wrongfulness of his conduct was impaired on the basis of alcohol consumption, head injuries, and mental disorders. *Id.* at 520-22, 898 P.2d at 469-71. Regarding Petitioner’s alcohol use, the court stated:

Voluntary intoxication may be mitigating if the defendant proves by a preponderance of the evidence that his “capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, but not so impaired as to constitute a defense to prosecution.”

*18 There was evidence that defendant and co-defendant consumed alcohol on the day of the murders. James Robinson, who was present at the campsite the night of the crimes, testified that defendant

consumed beer and whiskey that night, but that he was not so drunk that he could not maneuver himself. Roy Waters, age fifteen, testified that he saw defendant drinking beer in the afternoon and that he appeared drunk. Cory Rutherford, age thirteen, testified that he observed defendant drinking out of a bottle. Various witnesses testified that co-defendant Brazeal was drinking and appeared intoxicated, more so than defendant. At approximately 12:30 a.m. on the morning of the murders, defendant, accompanied by Brazeal, purchased a six-pack of Budweiser and a pint of Jim Beam. The morning after the campout, the owner of the site where the girls camped found an empty quart bottle of whiskey, an empty half pint bottle of whiskey, and an empty package of Budweiser, but these items were never tied to defendant. Based entirely on defendant’s self-reported consumption and self-reported blackout on the night of the crimes, a clinical psychologist opined that defendant’s capacity to appreciate the wrongfulness of his conduct was significantly impaired at the time of the incident.

However, there is much evidence showing defendant was not significantly impaired by alcohol at the time of the murders and did not suffer a blackout at the time of the crimes. Defendant disposed of the bodies and burned the clothing of the victims, thus showing that he knew the conduct was wrongful. He was able to accurately guide the officers back to the crime scene. Defendant also had substantial recall of the events and attempted to cover up the crimes, causing the trial court to find that defendant’s capacity to appreciate wrongfulness was not substantially impaired. “[S]tacked against the testimony offered in mitigation by defendant is the evidence that defendant *did know* that his ... conduct was wrongful.”

We agree with the trial court that defendant failed to show that he was significantly impaired during the time

Slip Copy, 2009 WL 728492 (D.Ariz.)
(Cite as: 2009 WL 728492 (D.Ariz.))

of the crimes so as to meet the statutory mitigation requirements.

Id. at 520-521, 898 P.2d at 469-70 (alteration in original) (citations and footnote omitted).

As for Petitioner's head injuries, the court further found:

Head injuries that lead to behavioral disorders may be considered a mitigating circumstance. Evidence indicates that defendant suffered three head injuries since 1982. A neurologist who reviewed the medical records testified that defendant had suffered a compound depressed skull fracture, underwent surgery, and suffered permanent damage in 1982 from being hit with a heavy beer mug. In 1986, he struck his head on the pavement after jumping onto the hood of his wife's moving vehicle. About a year before the murders, he suffered a severe head injury when another wife hit him with a cast iron skillet. Other head injuries alleged by defendant were uncorroborated.

*19 According to the neurologist, such injuries "could impair his ability to understand his environment, to interpret it correctly and to respond correctly to it," potentially manifesting in decreased control of impulsive behavior and decreased cognitive ability. Alcohol use increases any lack of control. The neurologist concluded that defendant's brain "integrity" was moderately to severely impaired due to previous brain or head injuries, resulting in impulsive behavior. A clinical psychologist said that defendant suffers from an inability to control impulse and that this problem is exacerbated by alcohol.

The trial court found: "Having suffered head injuries

and having difficulty with impulse control sheds little light on defendant's conduct in this case. The evidence does not show defendant acted impulsively, only criminally, with evil motive." While we give more mitigating weight to this element than did the trial court, it is substantially offset by the fact that defendant's test results showed that he has above average intelligence (an I.Q. of 128), and the facts show that he did not exhibit impulsive behavior in the commission of the crimes. Defendant appreciated the wrongfulness of his conduct, as evidenced the next day by his comment to the interrogating officer, "I ... choked 'em.... There was one foot moving though I knew they was brain dead but I was getting scared.... And they just wouldn't quit. It was terrible." His prior head injuries do not show that defendant was unable to conform or appreciate the wrongfulness of his conduct.

Id. at 521, 898 P.2d at 470 (citations omitted).

The Arizona Supreme Court also addressed Petitioner's mental disorders:

While a patient at a Texas hospital in 1971, defendant was diagnosed with a passive-aggressive personality. In 1978, he was re-admitted to the same hospital for psychotic depression. Defendant reported feeling suicidal, along with a fear that he might harm someone else. The final diagnosis of the second hospitalization was that defendant suffered from a personality disorder with differential to include passive-aggressive personality, antisocial personality, and borderline personality.

In a proceeding to determine defendant's competency to stand trial, a clinical psychologist found that defendant "does not appear to be suffering from any psychotic

Slip Copy, 2009 WL 728492 (D.Ariz.)
 (Cite as: 2009 WL 728492 (D.Ariz.))

disorder but he has a history of depression and other serious psychological problems,” including a pattern of impulsivity. Defendant also claimed to have attempted suicide twice. The psychologist testified that defendant suffered from a borderline personality disorder and depression. He concluded that defendant is a “seriously dysfunctional individual.”

Character or personality disorders alone are generally not sufficient to find that defendant was significantly impaired. A mental disease or psychological defect usually must exist before significant impairment is found.

Despite this evidence, “[t]his case does not involve the same level of mental disease or psychological defects considered in other cases in which the § 13-703(G)(1) mitigating circumstance was found to exist.” Defendant failed to show that his ability to control his actions was substantially impaired; his actions showed that he appreciated the wrongfulness of his conduct. Evidence showed that defendant was familiar with the mine shaft and discussed killing the girls with Brazeal. Defendant sexually assaulted Mandy, choked her and stomped on her body, and agreed that Mary should also be killed. Defendant then attempted to cover up the crimes by dumping the bodies in the mine shaft and burning the girls' clothes. “The record reveals that defendant made a conscious and knowing decision to murder the victim[s] and was fully aware of the wrongfulness of his actions.” This evidence fails to meet the statutory burden by a preponderance of the evidence.

*20 *Id.* at 521-22, 898 P.2d at 470-71 (citations omitted).^{FN8}

FN8. Petitioner raised for the first time on appeal

the additional statutory mitigating circumstances of relatively minor participation and no reasonable foreseeability that conduct would create grave risk of death to another, both of which the Arizona Supreme Court rejected. *Stokley*, 182 Ariz. at 522, 898 P.2d at 417 (citing A.R.S. § 13-703(G)(3) & (4)).

The Arizona Supreme Court also independently reviewed the eleven nonstatutory mitigating circumstances discussed in the trial court's special verdict and determined that Petitioner failed to prove nine of them. *Id.* at 522-24, 898 P.2d at 471-73. The court found that Petitioner's lack of prior felony record was a nonstatutory mitigating circumstance, but that its weight was substantially reduced by his other past problems with the law. *Id.* at 523, 898 P.2d at 472. The court also found that Petitioner's “documented mental disorders are entitled to some weight as nonstatutory mitigation.” *Id.* at 524, 898 P.2d at 473.^{FN9} The Arizona Supreme Court concluded:

FN9. Petitioner raised for the first time on appeal the additional nonstatutory mitigating circumstances of felony murder instruction, remorse, and lack of evidence showing that he actually killed or intended to kill Mary, all of which the Arizona Supreme Court rejected. *Stokley*, 182 Ariz. at 524-24, 898 P.2d at 473-74.

There are three statutory aggravating circumstances. There are no statutory mitigating circumstances. We have considered the nonstatutory mitigating factors of lack of prior felony record and his mental condition and behavior disorders. We find the mitigation, at best, minimal. Certainly, there is no mitigating evidence sufficiently substantial to call for leniency. *Id.* at 525, 898 P.2d 454, 898 P.2d at 474.

Slip Copy, 2009 WL 728492 (D.Ariz.)
 (Cite as: 2009 WL 728492 (D.Ariz.))

II. IAC Standard of Review

To prevail on an IAC claim, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The performance inquiry is whether counsel's assistance was reasonable considering all of the circumstances. Id. at 688-89. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " Id. at 689.

A petitioner must affirmatively prove prejudice. Id. at 693. To demonstrate prejudice, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. The Strickland Court explained that "[w]hen a defendant challenges a death sentence ... the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695. In Wiggins v. Smith, the Court further noted that "[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); see also Mayfield v. Woodford, 270 F.3d 915, 928 (9th Cir.2001) (en banc). The "totality of the available evidence" includes "both that adduced at trial, and the evidence adduced" in subsequent proceedings. Wiggins, 539 U.S. at 536 (quoting Williams v. Taylor, 529 U.S. 362, 397-98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

*21 In order to assess and reweigh the aggravation and mitigation, this Court must consider the relevant provisions of Arizona's death penalty statute. Under A.R.S. § 13-703(G), mitigating circumstances are any factors "relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense." Mitigation evidence can be presented regardless of admissibility and need only be proven by a preponderance; the burden is on the defendant to prove mitigation. A.R.S. § 13-703(C); State v. Harding, 137 Ariz. 278, 670 P.2d 383 (Ariz.1983). The court shall impose a sentence of death if it finds at least one aggravating circumstance and "that there are no mitigating circumstances sufficiently substantial to call for leniency." A.R.S. § 13-703(E).

The Arizona courts assess whether mitigating factors are proven and consider "the quality and strength of those factors." State v. Newell, 212 Ariz. 389, 405, 132 P.3d 833, 849 (2006). Mitigating evidence must be considered regardless of whether there is a "nexus" between the mitigating factor and the crime, but the lack of a causal connection may be considered in assessing the weight of the evidence. Id.; State v. Hampton, 213 Ariz. 167, 185, 140 P.3d 950, 968 (2006) (finding horrendous childhood less weighty and not sufficiently substantial to call for leniency, in part, because not tied to the offense). When the experts indicate that a defendant "knew right from wrong and could not establish a causal nexus between the mitigating factors and [the] crime," the Arizona courts may accord evidence of abusive childhood, personality disorders, and substance abuse limited value. State v. Johnson, 212 Ariz. 425, 440, 133 P.3d 735, 750 (2006).

III. Analysis

Petitioner asserts that trial counsel failed to adequately

Slip Copy, 2009 WL 728492 (D.Ariz.)
 (Cite as: 2009 WL 728492 (D.Ariz.))

prepare or investigate Petitioner's mental state and that this deficiency resulted in a failure to present compelling mitigating evidence at sentencing. (Dkt. 33 at 19.)

Petitioner raised this claim in his supplemental state PCR petition but proffered no evidence in support. (ROA III at 6-7.) Rather, he stated summarily, "An evidentiary hearing is warranted on this issue, at which time evidence will be presented in mitigation of Petitioner's sentence." (*Id.* at 7, 133 P.3d 735.) In denying relief, the PCR court stated:

Claim B, alleging ineffective representation for failure to adequately argue Stokley's alleged mental incapacity as mitigation for sentencing purposes, is precluded under Rule 32.2(a)(2) and A.R.S. § 13-4232(A)(2) because the Arizona Supreme Court rejected the factual basis of this claim on direct appeal. Moreover, Stokle offers nothings ecific nor material concerning his mental condition that was not before this Court at sentencing or considered when the appellate court conducted its independent review. Thus, this claim is also precluded for lack of sufficient argument, and it is meritless for lack of a showing of prejudice. Strickland, 466 U.S. at 690-93.

*22 (*Id.* at 54-55, 133 P.3d 735.)

A. Evidentiary Development

In its August 31, 2006 order regarding the procedural status of Petitioner's claims, the Court directed Petitioner to specifically identify in his merits memorandum the facts or evidence "sought to be discovered, expanded or presented at an evidentiary hearing." (Dkt. 70 at 37.) Petitioner argues that a federal evidentiary hearing is necessary to establish his claim but provides only brief

references to the type of evidence that would be presented. He asserts at the start of the prejudice discussion in his merits brief that a "complete social history is needed before the door is closed on the evaluation of Petitioner's mental/neurological condition." (Dkt. 83 at 25-26.) Presumably, Petitioner seeks a hearing to present such evidence as well as the new expert evidence he has developed and appended to his briefs in these proceedings. (*Id.* at 35, 133 P.3d 735.) It is also apparent, from review of his briefs, that Petitioner's request for development is focused on establishing prejudice arising from counsel's allegedly deficient performance. (*See, e.g.*, Dkt. 90 at 4 ("Petitioner presented a colorable claim that his counsel had performed deficiently at his sentencing and he asked for an opportunity to present *evidence of prejudice* at a hearing.") (emphasis added).) Nowhere does Petitioner assert that evidentiary development is necessary to establish deficient performance.

The Antiterrorism and Effective Death Penalty Act imposed new limitations on the right of a habeas petitioner to develop facts in federal court. *See* 28 U.S.C. § 2254(e)(2). Development is precluded, absent narrow exceptions, if the failure to develop a claim is due to a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Williams v. Taylor, 529 U.S. 420, 432, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000). The parties focus in their briefs on the issue of diligence. However, as discussed next, Petitioner has failed to allege facts that, if true, would entitle him to relief. Therefore, he is not entitled to an evidentiary hearing, *see Townsend*, 372 U.S. at 312-13, and the Court need not analyze whether Petitioner failed to diligently develop his claim in state court.

B. New Evidence

Petitioner proffers declarations from four experts,

Slip Copy, 2009 WL 728492 (D.Ariz.)
 (Cite as: 2009 WL 728492 (D.Ariz.))

including Drs. Mayron and Morris. (Dkt. 49, Ex. 1; Dkt. 64, Exs. 1-3.) Dr. Mayron states that he does "not recall" whether he was consulted by Petitioner's counsel between the March 1992 examination and his testimony in June 1992. "If they had contacted me, I would have recommended that Mr. Stokley be examined by a qualified neuropsychologist." (Dkt. 64, Ex. 2 at 2.) In Dr. Mayron's opinion, "neuropsychological testing is a critical component in the evaluation of Mr. Stokley's mental state on or about the time of the offense." (*Id.* at 3.) Dr. Morris similarly declares that he recommended to counsel that Petitioner be examined "by a qualified neuropsychologist" to consider the effect of Petitioner's brain injury. (Dkt. 64, Ex. 1 at 3.)

*23 Recent testing by Dr. R.K. McKinzey, a neuropsychologist, confirms Dr. Mayron's finding of left brain injury. (Dkt. 49, Ex. 1 at 7.) His testing also revealed, for the first time, frontal lobe damage to Petitioner's brain. (*Id.*) According to Dr. McKinzey, "frontal lobe brain deficits, such as those evident in Mr. Stokley, are and have long been associated with impulsivity, impaired judgment, disinhibition, and sometimes uncontrollable outbursts of aggression or rage grossly out of proportion to any precipitating psycho-social stressor." (*Id.* at 9.) Furthermore, Petitioner's frontal lobe deficits "have resulted in character traits of organic origin which cause Mr. Stokley to act reflexively rather than reflectively." (*Id.* at 10.) In Dr. McKinzey's opinion, because Petitioner had previously expressed no interest in sexually molesting children and intended only to take a bath on the night of the offense, Petitioner's ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law must have been significantly impaired because "the circumstances giving rise to the offense mirror the type of unplanned, over-reactive and highly explosive episodes associated with Mr. Stokley's frontal lobe damage." (*Id.*)

Petitioner also provides a declaration from a new psychologist, Dr. Todd Flynn. (Dkt.64, Ex. 3.) He confirms Dr. Morris's diagnosis of Borderline Personality Disorder (based primarily on Petitioner's depression, suicidal ideation, and inability to maintain personal relationships and employment), but criticizes Dr. Morris for failing to take into account the possibility that Petitioner's conduct at the time of the offense was significantly caused by an organic brain dysfunction. (*Id.* at 2, 4-6.) Dr. Flynn also observes that Dr. Mayron's examination did not reveal Petitioner's frontal lobe damage and asserts that "neither Dr. Morris nor Dr. Mayron were able to establish the link between Mr. Stokley's brain damage and the nature of his participation in the offense." (*Id.* at 2-3.) In his opinion, "neuropsychological testing was requisite to the understanding of the organic brain dysfunction affecting Mr. Stokley at the time of the instant offense." (*Id.* at 2.) Dr. Flynn concludes:

Overall, it remains my opinion that clinically significant organic deficits affecting the frontal lobes of his brain, were active at the time of the current offenses and are likely to have had an impact on his participation in the offenses, especially in terms of his control of impulses, angry emotions and aggressive behavior. In addition, I conclude that these organic deficits furnish the most powerful reason to believe that Mr. Stokley was likely to have been significantly impaired at the time of the offenses in his ability to conform his conduct to the requirements of the law. These deficits, either alone, but especially in combination with the Borderline Personality Disorder have the potential to have impaired Mr. Stokley's functioning on or about the time of the offense to the point at which he was unable to conform his behavior to the requirements of the law.

*24 (*Id.* at 7.)

Slip Copy, 2009 WL 728492 (D.Ariz.)
 (Cite as: 2009 WL 728492 (D.Ariz.))

C. Performance Prong

In denying relief on Petitioner's IAC claim, the PCR court ruled only that Petitioner had failed to establish prejudice; it did not reach the issue of whether counsel's performance was deficient. (ROA III at 54-55.) Because the state court did not reach this prong of the *Strickland* analysis, the Court reviews this portion of the claim de novo. Rompilla v. Beard, 545 U.S. 374, 390, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). Habeas counsel have not requested any specific evidentiary development to establish deficient performance and have proffered only expert declarations in support of this claim; they have not provided declarations from any of Petitioner's trial and sentencing attorneys or from Petitioner himself to shed light on counsel's decisions with regard to the mental health investigation.

Petitioner alleges that defense counsel "undertook a very limited investigation into Petitioner's health and mental state during the time of the offense." (Dkt. 33 at 20.) He characterizes counsel's pretrial investigation as based solely on whether Petitioner was competent to stand trial. (*Id.*) He further argues that Dr. Morris's psychological evaluation was incomplete without "a competently performed neuropsychological examination to assess (i) whether the Petitioner had brain damage and more important (ii) the specific effects of such brain damage on his cognition and behavior." (*Id.* at 20-21.) Petitioner also asserts that counsel referred him to a neuropsychologist for testing, "but the testing was never completed. Instead counsel for Petitioner had him examined by a neurologist, Dr. Michael Mayron." (*Id.* at 21.) In turn, Dr. Mayron opined that Petitioner had a severe brain injury, but counsel failed to obtain neuropsychological testing to determine how this damage impacted Petitioner's cognition and functioning. (*Id.*) According to Petitioner, this constitutes deficient performance because Dr. Mayron testified that he was not competent to perform

neuropsychological testing or to specifically address the effects of Petitioner's brain damage on his behavior. (*Id.* at 21; Dkt. 83 at 20.) In addition, defense counsel never interviewed Dr. Mayron prior to sentencing; had he done so, Petitioner argues, Dr. Mayron would have recommended neuropsychological testing to "pinpoint more clearly the effects of the brain injury." (Dkt. 33 at 22; Dkt. 83 at 20.)

To evaluate the performance of counsel for Sixth Amendment purposes, the relevant perspective is at the time of sentencing, not afterwards when it is apparent that counsel did not succeed in avoiding the death penalty. Petitioner has focused on what "defense counsel could have presented, rather than upon whether counsel's actions were reasonable." Turner v. Calderon, 281 F.3d 851, 877 (9th Cir.2002). After reviewing the entirety of the state court record, as well as Petitioner's proffered new evidence, the Court concludes that Petitioner is unable to show that defense counsel's performance was constitutionally deficient.

*25 First, the Court rejects Petitioner's unsubstantiated assertion that counsel "undertook a very limited investigation" into his health and mental state at the time of the offense and limited the defense investigation to whether Petitioner was competent to stand trial. (Dkt. 33 at 20.) The Court finds that counsel undertook a reasonable investigation into Petitioner's social, medical, and mental health history. They enlisted a mitigation investigator who obtained a significant amount of background information about Petitioner's upbringing, education, relationships, and military and work history. Counsel also spoke with numerous family members and friends and gathered significant documentation of serious head injuries and prior hospitalizations for suicidal ideation. (ROA I at 228, 255.) They obtained an evaluation from Dr. Hoffman, who, just weeks prior to the offense, had conducted neuropsychological testing of

Slip Copy, 2009 WL 728492 (D.Ariz.)
(Cite as: 2009 WL 728492 (D.Ariz.))

Petitioner and found no evidence of brain damage. Despite this report, counsel sought neuropsychological and neurological testing from Drs. Barbour and Maynor and a psychological evaluation from Dr. Morris. Petitioner has not alleged that counsel failed to discover and provide to the experts additional significant medical history or that the experts required additional information to form reliable opinions.

More significantly, months before trial commenced, counsel requested that Petitioner be evaluated by both a psychologist and a neuropsychologist under Rule 11 of the Arizona Rules of Criminal Procedure.^{FN10} In both motions, counsel emphasized the requirement in a capital-eligible case to investigate potential mitigation evidence. Counsel referenced Arizona's capital sentencing statute, including the provision under A.R.S. § 13-703(G) (1) identifying as a mitigating factor significant impairment to a defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. (ROA I at 217, 224.) In their request for a psychologist, counsel stated they were not requesting an examination to determine Petitioner's competency, but rather his state of mind at the time of the incident. (*Id.* at 216.) In the request for a neuropsychologist, counsel reiterated that it is "a significant factor at trial *and sentencing* to determine the Defendant's state of mind." (*Id.* at 224 (emphasis added).)

FN10. At the time of Petitioner's prosecution, Rule 11 provided:

At any time after an information is filed or indictment returned, any party may move for an examination to determine whether a defendant is competent to stand trial, or to investigate his mental condition at the time of the offense. The motion shall state the facts upon which the mental examination is sought.

Ariz. R.Crim. P. 11.2 (West 1987).

It was only after the trial court questioned whether Petitioner's alleged suicidal ideation, drug abuse, psychotic depression, and personality disorders provided a basis under Rule 11 for the requested examinations that counsel noticed insanity as a defense and alleged that Petitioner was not competent to assist in his defense. (RT 9/6/91 at 7-8; RT 9/12/91 at 3-6.) It is evident from the record that counsel understood the necessity of evaluating Petitioner's mental state at the time of the crime in anticipation of sentencing and re-framed the issue in terms of competency and an insanity defense to facilitate the court's appointment of experts. The fact that counsel's investigation of Petitioner's mental health was not limited solely to the issues of competency or insanity is confirmed by the following colloquy between defense counsel and Dr. Morris at the presentence hearing:

*26 Q When you were contacted to do an evaluation in this case, you were asked to do more than look into the legal state of insanity; is that correct?

A That's correct.

Q What other things were you requested?

A Again, looking at the overall personality characteristics and, you know, how that might relate to the instant offense.

Q Were you asked to determine, for example, whether there was any mental disorders, whether they amounted

Slip Copy, 2009 WL 728492 (D.Ariz.)
(Cite as: 2009 WL 728492 (D.Ariz.))

to insanity or not?

A That's correct.

Q Were you asked to look at the childhood of the defendant?

A Yes, I was.

Q Were you asked to make a diagnosis of this defendant?

A I don't think there was a specific question about making a formal diagnosis, but generally, you know, what seems to be, if there is anything wrong with this individual, what are the general categories.

Q Were you asked to determine competency?

A Yes, I was.

Q Were you asked to make a determination under *State v. Christensen* and state reactive versus reflective?

A Yes.

Q Were you asked to prepare and consider this case for a possible sentencing hearing?

A Yes.

(RT 6/18/92 at 62-63.) Petitioner's summary assertion that counsel undertook a limited investigation into Petitioner's state of mind at the time of the offense is refuted by the record.

Second, Petitioner has failed to address, much less proffer evidence to counter, the clear implication in the record that Petitioner was in fact seen by a neuropsychologist, Dr. John Barbour. Petitioner states only that he "was referred to a neuropsychologist for testing, but the testing was never completed. Instead counsel had Petitioner examined by a neurologist, Dr. Michael Mayron." (Dkt. 83 at 19.) As detailed in the factual background above, Petitioner's motion for a neuropsychological examination was granted by the trial court. (RT 9/12/91 at 14.) Petitioner requested the appointment of Dr. Barbour, and the Court subsequently signed orders directing that Petitioner be transported to Dr. Barbour's office on October 22 and November 6, 1991. (ROA I at 223, 437, 445.) Most tellingly, Dr. Morris states in his report that he reviewed an MMPI-2 profile administered to Petitioner by Dr. Barbour on November 6, 1991. (Dkt. 61, Ex. G at Morris Rpt.) This is the same type of testing that Dr. Mayron, during the presentence hearing, stated would be helpful to determine the behavioral impact of brain injury. (RT 6/17/92 at 66.) Petitioner bears the burden to establish deficient performance, and he has proffered nothing from either defense counsel or Dr. Barbour to substantiate his claim that neuropsychological testing was authorized but not completed. ^{FN11} To the contrary, the Court finds on this record that such testing was in fact undertaken by Dr. Barbour, at least with respect to an MMPI.

^{FN11} The Court notes that Petitioner has not claimed that his trial and sentencing attorneys were unavailable or unwilling to be interviewed for these proceedings.

Slip Copy, 2009 WL 728492 (D.Ariz.)
 (Cite as: 2009 WL 728492 (D.Ariz.))

Third, even if neuropsychological testing had not been undertaken, Petitioner's claim fails because the state court record reveals that neither Dr. Morris nor Dr. Mayron affirmatively recommended to counsel that Petitioner be examined only by a neuropsychologist. Dr. Morris states in a declaration prepared for these habeas proceedings that he had recommended to counsel that Petitioner be examined "by a qualified neuropsychologist." (Dkt. 64, Ex. 1 at 3.) In his pretrial report, however, Dr. Morris stated that the "possibility of an organic disorder should be addressed by a neuropsychologist *and/or neurologist* experienced in these matters." (Dkt. 61, Ex. G at Morris Rpt. (emphasis added).) Defense counsel subsequently consulted with a neurologist, and Dr. Mayron determined that Petitioner suffered from a parietal brain injury that affected his impulse control. (ROA I at 1089.) Although Dr. Mayron asserts now that he would have advised counsel to obtain neuropsychological testing if counsel had asked (Dkt. 64, Ex. 2 at 2), his report did not contain such a recommendation (ROA I at 1087-89). Counsel followed Dr. Morris's advice and hired a neurologist, Dr. Mayron, who did not recommend that his results be reviewed by a neuropsychologist or that Petitioner be subjected to further testing. Petitioner does not claim that either of his experts were unqualified. Therefore, counsel's failure to recognize that further testing could have been helpful in assessing Petitioner's mental state at the time of the offense does not constitute deficient performance. See Harris v. Vasquez, 949 F.2d 1497, 1525 (9th Cir.1990) ("It is certainly within the wide range of professionally competent assistance for an attorney to rely on properly selected experts.") (internal quotation omitted); see also Coleman v. Calderon, 150 F.3d 1105, 1115 (9th Cir.) (stating that "in the absence of a specific request, counsel does not have a duty to gather background information which an expert needs"), *rev'd on other grounds*, 525 U.S. 141, 119 S.Ct. 500, 142 L.Ed.2d 521 (1998).

*27 Petitioner's reliance on *Caro v. Calderon* is misplaced. In *Caro*, the petitioner had been examined by four experts prior to trial, including a medical doctor, psychologist, and psychiatrist; none indicated that Caro suffered from a mental impairment severe enough to constitute legal insanity or diminished capacity. *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir.1999). However, counsel failed to inform these experts that Caro had been exposed to an extraordinary amount of pesticides and suffered severe abuse as a child; consequently, no expert testified as to the neurological effects of the chemical exposure on Caro's brain. *Id.* As set forth above, counsel in this case provided the experts with Petitioner's psychological and medical history; Dr. Mayron testified to Petitioner's brain injury, which resulted in Petitioner being impulsive and having an impaired ability to make good judgments; and Dr. Morris similarly testified to the effect of Petitioner's borderline personality disorder on his ability to conform his conduct and appreciate the difference between right and wrong. Unlike in *Caro*, there is no allegation here that counsel failed to provide his experts with significant information that would have affected their professional opinions.

Petitioner's reliance on *Bean v. Calderon* is equally unavailing. In *Bean*, the petitioner was examined by a psychiatrist and a psychologist, who both "strongly recommended further neuropsychological testing to elucidate the impact of organic brain damage on Bean's cognitive functioning." *Bean v. Calderon*, 163 F.3d 1073, 1078 (9th Cir.1998). Here, counsel obtained testing by a neuropsychologist (Dr. Barbour) and, in response to Dr. Morris's recommendation to enlist neuropsychological or neurological testing, retained the services of a neurologist. Thus, in contrast to *Bean*, defense counsel did not fail to follow explicit recommendations from their experts.

In sum, Petitioner has not shown that the performance of his trial counsel fell below the constitutional standard set

Slip Copy, 2009 WL 728492 (D.Ariz.)
 (Cite as: 2009 WL 728492 (D.Ariz.))

forth in *Strickland*. Counsel adequately investigated Petitioner's mental state and used the experts they had enlisted to argue that Petitioner was impulsive and that his ability to conform his conduct to the requirements of law was substantially impaired. The fact that Petitioner's habeas counsel have been able to obtain additional experts to further support this theory does not establish ineffectiveness.

Moreover, the question here is not whether Petitioner's actions at the time of the crime were compelled by brain injury or psychological disorder. Rather, the issue is whether, in light of all the circumstances at the time, defense counsel failed to meet professional standards of reasonableness by not pursuing an additional neuropsychological examination.

That other witnesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel. As we have noted before, “[i]n retrospect, one may always identify shortcomings,” but perfection is not the standard of effective assistance.

*28 *Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir.1995) (quoting *Cape v. Francis*, 741 F.2d 1287, 1302 (11th Cir.1984)). Here, counsel made a significant effort, based on a reasonable investigation, to capably present to the sentencing judge a sympathetic portrait of Petitioner and to focus the judge's attention on reasons to spare Petitioner's life.

D. Prejudice Prong

Even assuming deficient performance and entitlement to factual development, the Court also concludes that Petitioner is not entitled to relief because he cannot establish prejudice in light of the record as developed in state court and his newly proffered expert evidence.

Petitioner argues in his amended petition that, absent a neuropsychological evaluation, “no expert who testified was capable of rendering a full and complete explanation of the Petitioner's behavior at the time of the instant offense.” (Dkt. 33 at 24.) He asserts that with “full and complete testing” counsel could have presented the following:

- (a) Petitioner suffers from Borderline Personality Disorder (BPD). BPD is not (despite its nomenclature) a mere personality disorder; as for instance anti-social personality disorder. BPD is a psychological disorder.... As a result of this mental disease, over which the Petitioner lacked any control, he suffered from an explosive impulsive aggressive episode at the time of the offense.
- (b) A symptom of BPD is impulsive, self-damaging behavior, including various forms of intense intoxication.... The evidence shows that Petitioner was extremely intoxicated at the time of the subject offense ... [which] would have made Petitioner more susceptible to a BPD rage episode like that which occurred at the time of the instant offense.
- (c) Studies of individuals with BPD reflect that it has among its predominant causes, a neglectful and abusive childhood environment. The Petitioner's actions at the time of the instant offense were a product of a mental disease and disorder, that has its root causes in a chaotic, and abusive early environment....

Slip Copy, 2009 WL 728492 (D.Ariz.)
(Cite as: 2009 WL 728492 (D.Ariz.))

(d) By age 15, the Petitioner was already showing signs of BPD, and the diagnosis (along with its precipitating chaotic family environmental causes) was confirmed in the Petitioner's early psychiatric hospitalization records which pre-date the offense by more than 20 years....

(e) Compounding Petitioner's mental disability in the years preceding the instant offense, he suffered from severe head injuries.... These injuries have resulted in permanent damage to the parietal portion of Petitioner's brain....

(f) Prior to the instant offense, the record demonstrates no criminal record on the Petitioner's part, other than some minor alcohol related offenses, and several occurrences of marital domestic violence; both of which can conclusively be linked to his brain damage and BPD....

(*Id.* at 24-26.) As set forth in the detailed background section, counsel made all of these points either in their presentence memoranda, during the presentence hearing, or in argument to the sentencing judge.

*29 Likewise, Petitioner's new experts have not provided significant new information that was not presented at sentencing. Dr. Flynn's diagnosis of borderline personality disorder is entirely consistent with that of Dr. Morris, as is his opinion that Petitioner's ability to conform his behavior to the requirements of the law was likely impaired at the time of the offense. Dr. Morris testified that Petitioner has trouble controlling his emotions, that stress and alcohol exacerbate problems with impulse control and poor judgment, and that Petitioner is a reactive type of individual. (RT 6/18/92 at 28-29.) Based on Petitioner's history and apparent level of intoxication, Dr. Morris

opined that Petitioner's capacity to appreciate the wrongfulness of his conduct was significantly impaired at the time of the crime. (RT 6/18/92 at 65.) He further opined that Petitioner's impulsivity, derived from his personality disorder, "makes it difficult for him to conform his behavior to the law." (*Id.*) The only significant difference between the opinions of Drs. Flynn and Morris is that Dr. Flynn believes Petitioner's impairment at the time of the crime was likely based on a combination of his personality disorder and organic brain deficits. Instead of eliciting similar testimony from Dr. Morris, defense counsel instead had Dr. Morris testify solely to the effects of Petitioner's personality disorder and enlisted Dr. Mayron to testify to Petitioner's impulsive behavior and impaired brain integrity resulting from his organic deficits.

Petitioner has provided new evidence of frontal lobe damage in addition to the parietal lobe injury discovered by Dr. Mayron. However, Dr. McKinzey's assessment of how this damage impacted Petitioner's behavior at the time of the offense does not differ significantly from that of Dr. Mayron. He states that frontal lobe deficits "have long been associated with impulsivity, impaired judgment, disinhibition, and sometimes uncontrollable outbursts of aggression" and "have resulted in character traits of organic origin which cause Mr. Stokley to act reflexively rather than reflectively." (Dkt. 49, Ex. 1 at 7.) During the presentence hearing, Dr. Mayron testified that Petitioner's parietal lobe injuries could have impacted his ability to understand, interpret, and respond to his environment, resulting in a decreased control of impulsive behavior. (RT 6/17/92 at 12, 19.) He further explained that Petitioner's head injuries caused impulsive and emotional behavior, irritability, depression, and impaired ability to make good judgments and to plan ahead. (*Id.* at 33-34.) Thus, the new doctors' opinions substantively encompass the totality of those offered by Drs. Morris and Maynor—that Petitioner's brain and personality deficits affected his behavior, severely impairing his ability to control and appreciate the wrongfulness of his conduct.

Slip Copy, 2009 WL 728492 (D.Ariz.)
 (Cite as: 2009 WL 728492 (D.Ariz.))

Moreover, the Court discounts any expert assertion regarding Petitioner's state of mind at the time of the offense. Petitioner told Dr. Morris prior to trial that he had "no clear memory of events associated with the death of the two girls." (Dkt. 61, Ex. G at Morris Rpt.) Because Petitioner was unable to discuss the details of the offense itself, Dr. Morris stated that "it was not possible to evaluate his state of mind." (*Id.*) A review of the declarations from Petitioner's new experts reveals no new details from Petitioner about the offense. Dr. McKinzey's conclusion that Petitioner would not have been involved in the offenses but for his mental impairments is based solely on his determination that Petitioner had never expressed interest in sexually molesting children and his statement to investigators that he intended only to take a bath on the night of the offense. (Dkt. 49, Ex. 1 at 10.) Likewise, Dr. Flynn's opinion that Petitioner's frontal lobe deficits likely affected Petitioner's impulse control, emotions, and aggressive impulses at the time of the offense is based on his consideration of the "literature on the link between organic frontal lobe dysfunction and aggression" and the general circumstances surrounding the offense. (Dkt. 64, Ex. 3 at 3.) In essence, the opinions of the new experts accord with those offered by the experts at sentencing; they all theorize that Petitioner's ability to conform or appreciate the wrongfulness of his conduct was significantly impaired at the time of the offense.

*30 Moreover, the sentencing court found, in rejecting Petitioner's claim that his ability to control his conduct was significantly impaired by a combination of psychological and neuropsychological conditions, that "having difficulty with impulse control sheds little light on defendant's conduct in this case." (ROA I at 1290-91.) On appeal, the Arizona Supreme Court also considered Petitioner's head injuries and resulting behavioral disorders. While that court "gave more mitigating weight to this element than did the trial court," the court declined

to find it sufficiently substantial to call for leniency in view of Petitioner's above average intelligence and because "the facts show that he did not exhibit impulsive behavior in the commission of the offense." Stokley, 182 Ariz. at 521, 898 P.2d at 470. In addition, the appellate court reasoned that Petitioner appreciated the wrongfulness of his conduct, as evidenced by his statement to an investigator: "I ... choked 'em.... There was one foot moving though I knew they was brain dead but I was getting scared.... And they just wouldn't quit. It was terrible." *Id.* Consequently, the court concluded that Petitioner's "prior head injuries do not show that defendant was unable to conform or appreciate the wrongfulness of his conduct." *Id.*

After sexually assaulting at least one of the thirteen-year-old victims, Petitioner strangled her with his hands, stomped on her with his feet, and stabbed her in the eye with his knife. The evidence established that the victims struggled against their attackers, and Petitioner's statement to police revealed witness elimination as one of his motives in killing the girls. There is little question that the young, vulnerable victims suffered before their senseless deaths and that the killings were heinous and depraved. Given the similarity between the expert evidence presented by counsel at sentencing and that proffered now by habeas counsel, together with the state court's findings concerning the lack of impulsivity in the commission of the crimes and the strength of the aggravating factors, this Court concludes there is no reasonable probability that additional evidence of brain damage and its effect on Petitioner's ability to control his impulsive behavior would have resulted in a different sentence. *See Babbitt v. Calderon*, 151 F.3d 1170, 1176 (9th Cir.1998) (finding no prejudice when there is no materially new evidence that was not before the sentencer). Accordingly, Petitioner is not entitled to federal habeas relief.

Slip Copy, 2009 WL 728492 (D.Ariz.)
 (Cite as: 2009 WL 728492 (D.Ariz.))

CERTIFICATE OF APPEALABILITY

In the event Petitioner appeals from this Court's judgment, and in the interests of conserving scarce Criminal Justice Act funds that might be consumed drafting an application for a certificate of appealability to this Court, the Court on its own initiative has evaluated the claims within the Amended Petition for suitability for the issuance of a certificate of appealability. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d at 864-65.

*31 Rule 22(b) of the Federal Rules of Appellate Procedure provides that when an appeal is taken by a petitioner, the district judge who rendered the judgment "shall" either issue a certificate of appealability (COA) or state the reasons why such a certificate should not issue. Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n. 4, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

The Court finds that reasonable jurists could debate its resolution of Claim A-1. Therefore, the Court grants a certificate of appealability as to this claim. For the reasons stated in this order, as well as the Court's order of August 31, 2006 (Dkt.70), the Court declines to issue a certificate of appealability for Petitioner's remaining claims and procedural issues.

CONCLUSION

For the reasons set forth above, Petitioner is not entitled to habeas relief. The Court further finds that evidentiary development is neither warranted nor required.

Accordingly,

IT IS HEREBY ORDERED that Petitioner's Second Amended Petition for Writ of Habeas Corpus (Dkt.33) is **DENIED**. The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that the stay of execution entered on July 15, 1998 (Dkt.2) is **VACATED**.

IT IS FURTHER ORDERED granting a Certificate of Appealability as to the following issue:

Whether counsel rendered ineffective assistance at sentencing by failing to investigate and present evidence concerning Petitioner's mental state at the time of the offense.

IT IS FURTHER ORDERED that the Clerk of Court send a courtesy copy of this Order to Rachelle M. Resnick, Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, Arizona 85007-3329.

D.Ariz.,2009.
 Stokley v. Ryan

Slip Copy, 2009 WL 728492 (D.Ariz.)
(Cite as: 2009 WL 728492 (D.Ariz.))

Slip Copy, 2009 WL 728492 (D.Ariz.)

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898 P.2d 454
182 Ariz. 505, 898 P.2d 454
(Cite as: 182 Ariz. 505, 898 P.2d 454)

Page 1

Supreme Court of Arizona, In Banc.
STATE of Arizona, Appellee,
v.
Richard Dale STOKLEY, Appellant.
No. CR-92-0278-AP.

June 27, 1995.

Defendant was convicted in the Superior Court, Cochise County, No. CR-91-00284A, Matthew W. Borowiec, J., of two counts of first-degree murder, two counts of kidnapping, and one count of sexual conduct with minor under the age of 15, and he was sentenced to death. On appeal, the Supreme Court, Moeller, V.C.J., held that: (1) pretrial publicity did not warrant change of venue; (2) autopsy photographs of victims were admissible; (3) death penalty statute was not unconstitutional; (4) in addition to two other aggravating circumstances under death penalty statute, murders were especially heinous, cruel, and depraved; (5) defendant failed to show, as mitigating circumstances, that his ability to control his actions was significantly impaired by alcohol, prior head injuries or mental disorders; and (6) nonstatutory mitigating circumstances, to extent shown, did not warrant overturning death sentence.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⇌ 1150

110 Criminal Law

110XXIV Review

110XXIV(N) Discretion of Lower Court

110k1150 k. Change of Venue. Most Cited

Cases

Trial court's ruling on motion for change of venue based on pretrial publicity is discretionary decision and will not be overturned absent abuse of discretion and prejudice to defendant. 17 A.R.S. Rules Crim.Proc., Rule 10.3, subd. b.

[2] Criminal Law 110 ⇌ 126(1)

110 Criminal Law

110IX Venue

110IX(B) Change of Venue

110k123 Grounds for Change

110k126 Local Prejudice

110k126(1) k. In General. Most Cited

Cases

With respect to motion for change of venue, two step inquiry for pretrial publicity asks whether publicity pervaded court proceedings to extent that prejudice can be presumed, and if not, then whether defendant showed actual prejudice among members of jury, with defendant having burden of showing prejudice. 17 A.R.S. Rules Crim.Proc., Rule 10.3, subd. b.

[3] Criminal Law 110 ⇌ 134(1)

110 Criminal Law

110IX Venue

110IX(B) Change of Venue

110k129 Application

110k134 Affidavits and Other Proofs

110k134(1) k. In General. Most Cited

Cases

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ER - 125

For court to presume prejudice based on pretrial publicity, defendant must show pretrial publicity so outrageous that it promises to turn trial into mockery of justice or mere formality. 17 A.R.S. Rules Crim.Proc., Rule 10.3, subd. b.

repeatedly warned to avoid media coverage of trial. 17 A.R.S. Rules Crim.Proc., Rule 10.3, subd. b.

[4] Criminal Law 110 ↪ 1134.8

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)2 Matters or Evidence Considered
110k1134.8 k. Jurisdiction and Venue. Most

Cited Cases

(Formerly 110k1134(2))

In reviewing claim of error in denying motion for change of venue based on pretrial publicity, court reviews entire record to reach conclusion on presumed prejudice, without regard to answers given in voir dire. 17 A.R.S. Rules Crim.Proc., Rule 10.3, subd. b.

[5] Criminal Law 110 ↪ 134(1)

110 Criminal Law
110IX Venue
110IX(B) Change of Venue
110k129 Application
110k134 Affidavits and Other Proofs
110k134(1) k. In General. Most Cited

Cases

Widespread media coverage, age and popularity of minor victims, and impact murders had in area, including petition drives and fundraisers for victims' families, did not provide basis to presume prejudice from pretrial publicity so as to warrant change of venue in capital murder prosecution; while most prospective jurors had heard about case, voir dire on publicity issue was thorough, anyone who had signed "no plea bargain" petition was subject to further voir dire, jurors who could not be fair or impartial were dismissed, and empaneled jury was

[6] Criminal Law 110 ↪ 126(1)

110 Criminal Law
110IX Venue
110IX(B) Change of Venue
110k123 Grounds for Change
110k126 Local Prejudice
110k126(1) k. In General. Most Cited

Cases

For venue purposes, relevant inquiry for actual prejudice from pretrial publicity is effect of publicity on objectivity of jurors, not fact of publicity itself. 17 A.R.S. Rules Crim.Proc., Rule 10.3, subd. b.

[7] Criminal Law 110 ↪ 1035(5)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1035 Proceedings at Trial in General
110k1035(5) k. Competency of Jurors and Challenges. Most Cited Cases

Issue of whether death-qualified jurors were biased and not drawn from fair cross-section of community would normally be waived where counsel for capital murder defendant made no objection on that basis, absent contention of fundamental error.

[8] Criminal Law 110 ↪ 1035(5)

110 Criminal Law
110XXIV Review

110XXIV(E) Presentation and Reservation in
Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1035 Proceedings at Trial in General

110k1035(5) k. Competency of Jurors and

Challenges. Most Cited Cases

Death-qualified jury, as selected by asking panelists whether they had conscientious or religious objections to death penalty that would prevent them from voting for first degree murder conviction, was not fundamental error, despite defendant's contention that death-qualified juries were pro-prosecution and thus biased, and that death-qualified jury was not drawn from fair cross-section of community.

[9] Criminal Law 110 ↪ 1036.1(6)

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in
Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1036 Evidence

110k1036.1 In General

110k1036.1(3) Particular Evidence

110k1036.1(6) k. Documentary

Evidence. Most Cited Cases

Absent fundamental error, admission of photograph exhibits cannot be raised on appeal if no objections were made at trial.

[10] Criminal Law 110 ↪ 1030(1)

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in
Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1030 Necessity of Objections in

General

110k1030(1) k. In General. Most Cited

Cases

Supreme Court will find fundamental error only when it goes to foundation of case, takes from defendant a right essential to defense, or is of such magnitude that it cannot be said it is possible for defendant to have had fair trial.

[11] Criminal Law 110 ↪ 438(7)

110 Criminal Law

110XVII Evidence

110XVII(P) Documentary Evidence

110k431 Private Writings and Publications

110k438 Photographs and Other Pictures

110k438(7) k. Photographs Arousing

Passion or Prejudice; Gruesomeness. Most Cited Cases

Even if inflammatory, probative value of autopsy photographs of murder and sexual assault victims outweighed any prejudicial effect in capital murder trial; photographs showed manner of killing and identity of killer, particularly photos showing stomp marks on victim's body matching shoes worn by defendant, photos were introduced during testimony of forensic pathologist who conducted autopsies, and, although exhibits showed skin discoloration, abrasions, stomp and bruise marks, and cuts to victims' right eyes, they were not gruesome enough to be inflammatory. 17A A.R.S. Rules of Evid., Rules 401, 403.

[12] Criminal Law 110 ↪ 438(1)

110 Criminal Law

110XVII Evidence

110XVII(P) Documentary Evidence

110k431 Private Writings and Publications

110k438 Photographs and Other Pictures

110k438(1) k. In General. Most Cited

Cases

898 P.2d 454
182 Ariz. 505, 898 P.2d 454
(Cite as: 182 Ariz. 505, 898 P.2d 454)

Page 4

(Formerly 110k798(.5), 203k308(4))

Criminal Law 110 ↪438(7)

110 Criminal Law

110XVII Evidence

110XVII(P) Documentary Evidence

110k431 Private Writings and Publications

110k438 Photographs and Other Pictures

110k438(7) k. Photographs Arousing

Passion or Prejudice; Gruesomeness. Most Cited Cases
Admission of photographs requires three-part inquiry, regarding relevance, tendency to inflame jury, and probative value versus potential to cause unfair prejudice. 17A A.R.S. Rules of Evid., Rules 401, 403.

[13] Criminal Law 110 ↪438(1)

110 Criminal Law

110XVII Evidence

110XVII(P) Documentary Evidence

110k431 Private Writings and Publications

110k438 Photographs and Other Pictures

110k438(1) k. In General. Most Cited

Cases

Photographs are relevant if they aid jury in understanding issue. 17A A.R.S. Rules of Evid., Rule 401.

[14] Criminal Law 110 ↪798(.6)

110 Criminal Law

110XX Trial

110XX(G) Instructions: Necessity, Requisites, and Sufficiency

110k798 Manner of Arriving at Verdict

110k798(.6) k. Several Counts or Offenses.

Most Cited Cases

Homicide 203 ↪1377

203 Homicide

203XII Instructions

203XII(B) Sufficiency

203k1374 Grade, Degree or Classification of Offense

203k1377 k. First Degree, Capital, or Aggravated Murder. Most Cited Cases
(Formerly 203k308(4), 203k289)

Homicide 203 ↪1409

203 Homicide

203XII Instructions

203XII(B) Sufficiency

203k1408 Killing in Commission of or with Intent to Commit Other Unlawful Act

203k1409 k. In General. Most Cited Cases
(Formerly 203k308(4), 203k289)

Even assuming jury was instructed on felony murder, no error would be presented in instructing jury on both premeditated murder and felony murder, despite capital defendant's contention that, because of instructions, verdicts on murder counts may not have been unanimous.

[15] Jury 230 ↪24

230 Jury

230II Right to Trial by Jury

230k20 Criminal Prosecutions

230k24 k. Assessment of Punishment. Most Cited Cases

With respect to death penalty, there is no constitutional right to have jury determine aggravating or mitigating

898 P.2d 454
182 Ariz. 505, 898 P.2d 454
(Cite as: 182 Ariz. 505, 898 P.2d 454)

Page 5

circumstances. A.R.S. § 13-703.

[16] Sentencing and Punishment 350H ↻1771

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1771 k. Degree of Proof. Most Cited

Cases

(Formerly 203k358(1))
Requiring capital murder defendants to prove any mitigating circumstances by preponderance of evidence is constitutional. A.R.S. § 13-703.

[17] Sentencing and Punishment 350H ↻1771

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1771 k. Degree of Proof. Most Cited

Cases

(Formerly 110k1208.1(6))
Although state must prove aggravating circumstances beyond reasonable doubt for death penalty purposes, court is not required to find beyond reasonable doubt that aggravating circumstances outweigh mitigating circumstances. A.R.S. § 13-703.

[18] Sentencing and Punishment 350H ↻1625

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision

350Hk1625 k. Aggravating or Mitigating Circumstances. Most Cited Cases

(Formerly 110k1206.1(2))

Alleged lack of objective standards for determining whether aggravating circumstances outweighed mitigating circumstances did not invalidate death penalty statute. A.R.S. § 13-703.

[19] Sentencing and Punishment 350H ↻1648

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General

350Hk1648 k. Matters Relating to Racial or Other Prejudice. Most Cited Cases
(Formerly 110k1208.1(4.1))

With respect to application of death penalty, defendant alleging discrimination must prove decision maker in his case acted with discriminatory purpose. A.R.S. § 13-703.

[20] Sentencing and Punishment 350H ↻1648

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General

350Hk1648 k. Matters Relating to Racial or Other Prejudice. Most Cited Cases
(Formerly 203k356)

Absent evidence that capital murder defendant's economic status or gender contributed to his sentence or biased sentencing process, defendant could not challenge his death sentence based on his contention that poor, male defendants were discriminated against in application of death penalty. A.R.S. § 13-703.

[21] Sentencing and Punishment 350H ↻1612

898 P.2d 454
182 Ariz. 505, 898 P.2d 454
(Cite as: 182 Ariz. 505, 898 P.2d 454)

Page 6

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1612 k. Death Penalty as Cruel or Unusual Punishment. Most Cited Cases
(Formerly 110k1213.8(8))

Sentencing and Punishment 350H ↪1616

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1613 Requirements for Imposition
350Hk1616 k. Avoidance of Arbitrariness or Capriciousness. Most Cited Cases
(Formerly 110k1213.8(8))
Death penalty is not cruel and unusual so long as it is not imposed in arbitrary and capricious manner. U.S.C.A. Const.Amend. 8; A.R.S. § 13-703.

[22] Sentencing and Punishment 350H ↪1610

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1610 k. In General. Most Cited Cases
(Formerly 203k356)
Death penalty is not imposed arbitrarily and irrationally, but rather Arizona death penalty statute narrowly defines death-eligible persons as those convicted of first degree murder, where state has proven one or more statutory aggravating factors beyond reasonable doubt. U.S.C.A. Const.Amend. 8; A.R.S. § 13-703.

[23] Sentencing and Punishment 350H ↪1788(6)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) k. Proportionality. Most Cited Cases
(Formerly 110k1134(3))
Supreme Court does not conduct proportionality reviews in capital punishment cases. A.R.S. § 13-703.

[24] Sentencing and Punishment 350H ↪1625

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision
350Hk1625 k. Aggravating or Mitigating Circumstances. Most Cited Cases
(Formerly 203k351)
The especially heinous, cruel, or depraved aggravating circumstance under death penalty statute is constitutional. A.R.S. § 13-703, subd. F, par. 6.

[25] Sentencing and Punishment 350H ↪1788(5)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(5) k. Scope of Review. Most Cited Cases
(Formerly 110k1134(3), 110k1134(2))
When death sentence is imposed, Supreme Court independently reviews entire record for error, determines whether aggravating circumstances have been proved beyond reasonable doubt, considers any mitigating

898 P.2d 454
182 Ariz. 505, 898 P.2d 454
(Cite as: 182 Ariz. 505, 898 P.2d 454)

Page 7

circumstances, and then weighs aggravating and mitigating circumstances in deciding whether there were mitigating circumstances sufficiently substantial to call for leniency. A.R.S. § 13-703.

[26] Sentencing and Punishment 350H ↪1652

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1652 k. Aggravating Circumstances in General. Most Cited Cases
(Formerly 110k1208.1(6))
To make defendant death eligible, state must prove beyond reasonable doubt at least one statutory aggravating circumstance. A.R.S. § 13-703, subd. E.

[27] Sentencing and Punishment 350H ↪1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 203k357(11))
Heinous, cruel, or depraved circumstance is phrased in the disjunctive in death penalty statute, so if any one of the three factors is found, circumstance is satisfied. A.R.S. § 13-703, subd. F, par. 6.

[28] Sentencing and Punishment 350H ↪1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or

Atrocity. Most Cited Cases
(Formerly 203k357(11))

For purposes of heinous, cruel, or depraved aggravating circumstance under death penalty statute, cruelty focuses on victim and is found where there has been infliction of pain and suffering in wanton, insensitive, or vindictive manner. A.R.S. § 13-703, subd. F, par. 6.

[29] Sentencing and Punishment 350H ↪1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 203k357(11))
For purposes of heinous, cruel, or depraved circumstance under death penalty statute, crime is especially cruel when defendant inflicts mental anguish or physical abuse before victim's death. A.R.S. § 13-703, subd. F, par. 6.

[30] Sentencing and Punishment 350H ↪1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 203k357(11))
For purposes of applying heinous, cruel, or depraved circumstance under death penalty statute, mental anguish results especially if victim experiences significant uncertainty as to ultimate fate. A.R.S. § 13-703, subd. F, par. 6.

[31] Sentencing and Punishment 350H ↪1684

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(D) Factors Related to Offense

350Hk1684 k. Vileness, Heinousness, or

Atrocity. Most Cited Cases

(Formerly 203k357(11))

Evidence that at least some of victims' injuries occurred while victims were conscious was sufficient for finding of cruelty under death penalty statute's aggravating circumstance provisions; cause of death for both girls was asphyxia due to manual strangulation, forensic pathologist testified victim of strangulation is generally conscious for few minutes and that death usually takes twelve to fifteen minutes, and victims' injuries were consistent with struggle and occurred while victims were alive or shortly after death. A.R.S. § 13-703, subd. F, par. 6.

[32] Sentencing and Punishment 350H ↪1684

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(D) Factors Related to Offense

350Hk1684 k. Vileness, Heinousness, or

Atrocity. Most Cited Cases

(Formerly 203k357(11))

Under death penalty statute's aggravating circumstance provisions, heinousness and depravity focus on defendant's mental state and attitude as reflected by his words or actions. A.R.S. § 13-703, subd. F, par. 6.

[33] Sentencing and Punishment 350H ↪1684

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(D) Factors Related to Offense

350Hk1684 k. Vileness, Heinousness, or

Atrocity. Most Cited Cases

(Formerly 203k357(11))

In determining whether crime is "especially heinous or

depraved" within meaning of death penalty statute, court looks to apparent relishing of the murder, infliction of gratuitous violence on victim beyond murderous act itself, mutilation of victim's body, senselessness of the crime, and helplessness of victim. A.R.S. § 13-703, subd. F, par. 6.

[34] Sentencing and Punishment 350H ↪1684

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(D) Factors Related to Offense

350Hk1684 k. Vileness, Heinousness, or

Atrocity. Most Cited Cases

(Formerly 203k357(11))

In determining whether crime is especially heinous or depraved within meaning of death penalty statute, senselessness of the crime and helplessness of victim are usually less probative of defendant's state of mind that are apparent relishing of murder, infliction of gratuitous violence on victim beyond murderous act itself, or mutilation of victim's body. A.R.S. § 13-703, subd. F, par. 6.

[35] Sentencing and Punishment 350H ↪1684

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(D) Factors Related to Offense

350Hk1684 k. Vileness, Heinousness, or

Atrocity. Most Cited Cases

(Formerly 203k357(11))

Sentencing and Punishment 350H ↪1733

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(F) Factors Related to Status of Victim
350Hk1733 k. Witnesses. Most Cited Cases
(Formerly 203k357(11), 203k357(8))

Witness elimination is given some weight in finding "especially heinous or depraved" aggravating circumstance under death penalty statute, but witness elimination factor only applies if victim witnessed another crime and was killed to prevent testimony about that crime, statement by defendant or other evidence of his state of mind shows witness elimination was motive, or some extraordinary circumstances show murder was motivated by desire to eliminate witnesses. A.R.S. § 13-703, subd. F, par. 6.

[36] Sentencing and Punishment 350H ↻1684

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(D) Factors Related to Offense

350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 203k357(11))

Murders of two thirteen-year old girls were especially heinous and depraved within meaning of death penalty statute, where girls were driven to remote rural area in middle of night, sexually assaulted, stabbed, stomped, stripped, strangled, and thrown down mine shaft, they were defenseless against attacks and suffered from gratuitous violence and needless mutilation, and defendant's statement to police revealed motivation to eliminate girls as witnesses. A.R.S. § 13-703, subd. F, par. 6.

[37] Sentencing and Punishment 350H ↻300

350H Sentencing and Punishment

350HIII Sentencing Proceedings in General

350HIII(E) Presentence Report

350Hk300 k. Use and Effect of Report. Most

Cited Cases

(Formerly 110k986.4(1))

Generally, presentence report may be considered on matters of mitigation if it contains information favorable to capital murder defendant. 17 A.R.S. Rules Crim.Proc., Rule 26.4.

[38] Criminal Law 110 ↻1134.23

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)2 Matters or Evidence Considered

110k1134.23 k. Sentencing. Most Cited

Cases

(Formerly 110k1134(2))

Sentencing and Punishment 350H ↻1746

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(G) Proceedings

350HVIII(G)1 In General

350Hk1746 k. Other Discovery and

Disclosure. Most Cited Cases

(Formerly 203k358(1))

Sentencing and Punishment 350H ↻1788(5)

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(G) Proceedings

350HVIII(G)4 Determination and Disposition

350Hk1788 Review of Death Sentence

350Hk1788(5) k. Scope of Review. Most

Cited Cases

With respect to sentencing in capital murder case,

Supreme Court did not approve of practice of withholding information from trial court and then presenting it to appellate court, where presentence report was sealed by stipulation of parties in trial court and defense counsel asked trial court not to read it, arguing that any mitigating evidence contained in presentence report could be adequately covered by other exhibits and defense witnesses, but, at request of defendant's appellate counsel, Supreme Court would examine and consider presentence report, consistent with Court's obligation in capital cases to independently weigh all potentially mitigating evidence. A.R.S. § 13-703.

[39] Sentencing and Punishment 350H ↻1746

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)1 In General
350Hk1746 k. Other Discovery and Disclosure. Most Cited Cases
(Formerly 203k358(1))

With respect to sentencing in capital murder cases, counsel are encouraged to present all arguably mitigating evidence to trial court and not to hold some back for appeal, and, if counsel are concerned that there is detrimental information in presentence report that would only be appropriate to consider on noncapital counts, one possible solution would be to proceed to sentencing on capital counts first, although even without such precautions, trial judges know that they are limited on capital counts to statutory aggravating factors properly admitted and proved beyond reasonable doubt. A.R.S. § 13-703, subd. C.

[40] Sentencing and Punishment 350H ↻1656

350H Sentencing and Punishment
350HVIII The Death Penalty

350HVIII(C) Factors Affecting Imposition in General

350Hk1656 k. Factors Extrinsic to Statute or Guideline in General. Most Cited Cases
(Formerly 110k1208.1(6), 110k1208.1(5))

Sentencing and Punishment 350H ↻1771

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1771 k. Degree of Proof. Most Cited Cases
(Formerly 110k1208.1(6))

On capital counts, trial courts are limited to statutory aggravating factors properly admitted and proved beyond reasonable doubt, and they may not consider other evidence as aggravating. A.R.S. § 13-703, subd. C.

[41] Sentencing and Punishment 350H ↻1665

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1665 k. In General. Most Cited Cases
(Formerly 110k1208.1(6))

Sentencing and Punishment 350H ↻1702

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1702 k. Offender's Character in General. Most Cited Cases
(Formerly 110k1208.1(6))

Sentencing and Punishment 350H ↔1704

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(E) Factors Related to Offender

350Hk1703 Other Offenses, Charges,

Misconduct

350Hk1704 k. In General. Most Cited Cases

(Formerly 110k1208.1(6))

Sentencing judge must consider any aspect of defendant's character or record and any circumstance of offense relevant to determining whether death penalty should be imposed. A.R.S. § 13-703.

[42] Sentencing and Punishment 350H ↔1771

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(G) Proceedings

350HVIII(G)2 Evidence

350Hk1771 k. Degree of Proof. Most Cited

Cases

(Formerly 110k1208.1(6))

For purposes of capital sentencing, defendant must prove mitigating factors by preponderance of evidence. A.R.S. § 13-703.

[43] Sentencing and Punishment 350H ↔1757

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(G) Proceedings

350HVIII(G)2 Evidence

350Hk1755 Admissibility

350Hk1757 k. Evidence in Mitigation in

General. Most Cited Cases

(Formerly 110k1208.1(6), 110k1208.1(5))

For capital sentencing purposes, sentencing court must

consider all evidence offered in mitigation, but is not required to accept such evidence. A.R.S. § 13-703.

[44] Sentencing and Punishment 350H ↔1709

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(E) Factors Related to Offender

350Hk1709 k. Mental Illness or Disorder. Most

Cited Cases

(Formerly 110k1208.1(5))

Under death penalty statute, mitigating circumstance of capacity to appreciate wrongfulness of conduct or to conform conduct to requirements of law is disjunctive factor, so that proof of incapacity as to either ability to appreciate or conform establishes mitigating circumstance. A.R.S. § 13-703, subd. G, par. 1.

[45] Sentencing and Punishment 350H ↔1712

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(E) Factors Related to Offender

350Hk1712 k. Intoxication or Drug Impairment

at Time of Offense. Most Cited Cases

(Formerly 110k1208.1(5))

Voluntary intoxication may be mitigating circumstance under death penalty statute if defendant proves by preponderance of evidence that his capacity to appreciate wrongfulness of his conduct or to conform his conduct to requirements of law was significantly impaired, but not so impaired as to constitute defense to prosecution. A.R.S. § 13-703, subd. G, par. 1.

[46] Sentencing and Punishment 350H ↔1772

350H Sentencing and Punishment

350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited

Cases

(Formerly 203k358(1))
Capital murder defendant failed to show, as mitigating factor for sentencing purposes, that he was significantly impaired by alcohol so as to be unable to appreciate wrongfulness or to conform conduct, despite clinical psychologist's testimony of impaired capacity, based solely on defendant's self-reported consumption and self-reported blackout on night of crimes; defendant disposed of bodies and burned victim's clothing, he was able to accurately guide officers back to crime scene, and he had substantial recall of events and attempted to cover up crimes. A.R.S. § 13-703, subd. G, par. 1.

[47] Sentencing and Punishment 350H ↩1709

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1709 k. Mental Illness or Disorder. Most

Cited Cases

(Formerly 110k1208.1(5))
Head injuries that lead to behavioral disorders may be considered mitigating circumstance for death penalty purposes. A.R.S. § 13-703.

[48] Sentencing and Punishment 350H ↩1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited

Cases

(Formerly 203k357(4))

Capital murder defendant's prior head injuries did not show that he was unable to conform or appreciate wrongfulness of his conduct, for purposes of mitigation, despite evidence that head injuries caused impulsive behavior, since this evidence was substantially offset by fact that defendant's test results showed above average intelligence, and he did not exhibit impulsive behavior in commission of crimes, but rather he appreciated wrongfulness of his conduct, as evidenced by his statement to police. A.R.S. § 13-703, subd. G, par. 1.

[49] Sentencing and Punishment 350H ↩1709

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1709 k. Mental Illness or Disorder. Most

Cited Cases

(Formerly 203k357(4))
Evidence of defendant's mental disorders, including testimony of history of depression and other serious psychological problems, pattern of impulsivity, and suicide attempts, was insufficient to show, as mitigating factor under death penalty statute, that defendant's ability to control his actions was substantially impaired, since defendant's actions showed that he appreciated wrongfulness of his conduct, and that he made conscious and knowing decision to murder victims. A.R.S. § 13-703, subd. G, par. 1.

[50] Sentencing and Punishment 350H ↩1709

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1709 k. Mental Illness or Disorder. Most

Cited Cases

(Formerly 110k1208.1(5))
For purposes of finding mitigating circumstance under

death penalty statute, character or personality disorders alone are generally not sufficient to find that defendant was significantly impaired, and mental disease or psychological defect usually must exist before significant impairment is found. A.R.S. § 13-703, subd. G, par. 1.

[51] Sentencing and Punishment 350H ↻1681

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1681 k. Killing While Committing Other Offense or in Course of Criminal Conduct. Most Cited Cases
(Formerly 203k357(12))

Sentencing and Punishment 350H ↻1683

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1683 k. More Than One Killing in Same Transaction or Scheme. Most Cited Cases
(Formerly 203k357(12))
Capital murder defendant's allegedly minor participation in co-defendant's crimes was not mitigating factor that sentencing court was required to take into consideration in deciding whether to impose death penalty, based on defendant's contention that jury's guilty verdict could have been based upon felony murder theory; jury was not instructed on felony murder, jury found defendant guilty of two counts of first degree premeditated murder, and defendant killed one victim and intended that second victim be killed. A.R.S. § 13-703, subd. G, par. 3.

[52] Sentencing and Punishment 350H ↻1670

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1670 k. Intent of Offender. Most Cited

Cases

(Formerly 203k357(3))
Capital murder defendant's contention that there did not appear to be any plan at beginning of episode to cause harm or fatal injury to victims did not support finding, as mitigating factor for sentencing purposes, of no reasonable foreseeability that conduct would create grave risk of death, absent any facts or evidence supporting defendant's theory; after abducting two teenage girls from campsite, defendant and second man sexually assaulted and killed them. A.R.S. § 13-703, subd. G, par. 4.

[53] Sentencing and Punishment 350H ↻1709

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1709 k. Mental Illness or Disorder. Most Cited Cases
(Formerly 110k1208.1(5))

Sentencing and Punishment 350H ↻1711

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1711 k. Substance Abuse and Addiction. Most Cited Cases
(Formerly 110k1208.1(5))

If impairment does not rise to level of statutory mitigating circumstance, trial court in death penalty case should still consider whether such impairment constitutes nonstatutory mitigation, when viewed in light of defendant's alleged history of alcohol and drug abuse.

[54] Sentencing and Punishment 350H ↪1711

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(E) Factors Related to Offender

350Hk1711 k. Substance Abuse and Addiction.

Most Cited Cases

(Formerly 203k357(4))

Capital murder defendant failed to prove historic alcohol or drug use was nonstatutory mitigating factor, for purposes of sentencing him for murders of two teenage girls; various relatives and acquaintances testified that defendant was alcoholic and that he considered himself to be one, clinical psychologist agreed with that assessment, defendant claimed to have consumed at least pint of whiskey every day and to have used various illicit drugs in past, and he had prior alcohol related arrests. A.R.S. § 13-703.

[55] Sentencing and Punishment 350H ↪1708

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(E) Factors Related to Offender

350Hk1703 Other Offenses, Charges,

Misconduct

350Hk1708 k. Lack of Significant Prior

Record. Most Cited Cases

(Formerly 110k1208.1(5))

Lack of prior felony convictions may constitute nonstatutory mitigating circumstance in death penalty sentencing. A.R.S. § 13-703.

[56] Sentencing and Punishment 350H ↪1708

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(E) Factors Related to Offender

350Hk1703 Other Offenses, Charges,
Misconduct

350Hk1708 k. Lack of Significant Prior
Record. Most Cited Cases

(Formerly 110k1208.1(5))

In death penalty cases, arrests or misdemeanor convictions may be considered when lack of felony convictions is advanced as mitigating factor. A.R.S. § 13-703.

[57] Sentencing and Punishment 350H ↪1708

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(E) Factors Related to Offender

350Hk1703 Other Offenses, Charges,

Misconduct

350Hk1708 k. Lack of Significant Prior
Record. Most Cited Cases

(Formerly 110k1208.1(5))

Thirty-eight year old defendant's lack of felony record was nonstatutory mitigating circumstance for purposes of sentencing in death penalty case, but weight to be given it was substantially reduced by his other past problems with law; defendant had history of misdemeanor arrests and offenses, including conviction for disorderly conduct, two arrests for public drunkenness, and arrests for assaults on two former wives. A.R.S. § 13-703.

[58] Sentencing and Punishment 350H ↪1719

350H Sentencing and Punishment

350HVIII The Death Penalty

350HVIII(E) Factors Related to Offender

350Hk1719 k. Assistance to Authorities and
Cooperation. Most Cited Cases

(Formerly 203k357(4))

Capital murder defendant's cooperation with police was not mitigating circumstance, for purposes of sentencing him for murders of two teenage girls, where his

cooperation followed initial denial of any knowledge of girls, and he confessed only after hearing that co-defendant had been arrested. A.R.S. § 13-703.

[59] Sentencing and Punishment 350H ↻1655

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1655 k. Sentence or Disposition of Co-Participant or Codefendant. Most Cited Cases
(Formerly 110k983)

Although sentences of co-defendants may be considered in mitigation for death penalty sentencing purposes, difference in sentences may not be considered in mitigation where difference is result of appropriate plea bargaining. A.R.S. § 13-703.

[60] Sentencing and Punishment 350H ↻1655

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1655 k. Sentence or Disposition of Co-Participant or Codefendant. Most Cited Cases
(Formerly 110k983)

Sentencing and Punishment 350H ↻1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, Heinousness, or Atrocity. Most Cited Cases
(Formerly 110k983)

Although sentences of co-defendants may be considered in mitigation for death penalty sentencing purposes, even unexplained disparity has little significance where the first degree murder is found especially cruel, heinous, or depraved. A.R.S. § 13-703.

[61] Sentencing and Punishment 350H ↻1655

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1655 k. Sentence or Disposition of Co-Participant or Codefendant. Most Cited Cases
(Formerly 110k983)

Co-defendant's twenty year sentence was not mitigating circumstance for purpose of sentencing capital murder defendant for murders of two teenage girls; where sentence negotiated by co-defendant was result of disparity of evidence at time of co-defendant's trial, causing state to enter into plea agreement, and co-defendant was twenty years old, whereas defendant was thirty-eight. A.R.S. § 13-703.

[62] Sentencing and Punishment 350H ↻1653

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1653 k. Mitigating Circumstances in General. Most Cited Cases
(Formerly 110k1208.1(5))

Claimed right to leniency in context of alleged harshness and disproportionality of death penalty was not mitigating circumstance. A.R.S. § 13-703.

[63] Sentencing and Punishment 350H ↻1718

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1718 k. Remorse and Actual or Potential
Rehabilitation. Most Cited Cases
(Formerly 203k357(4))

Prospect for rehabilitation was not mitigating circumstance for purpose of sentencing capital murder defendant, despite testimony of criminal justice consultant that defendant had potential for rehabilitation; after long history of alcohol abuse and tumultuous behavior, defendant showed no evidence of ability to rehabilitate. A.R.S. § 13-703.

[64] Sentencing and Punishment 350H ↻1716

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1716 k. Childhood or Familial
Background. Most Cited Cases
(Formerly 203k357(4))

Capital murder defendant's family history did not warrant mitigation in death penalty sentencing, since defendant was thirty-eight years old at time of murders, and, although he may have had difficult childhood and family life, he failed to show how this influenced his behavior on night of crimes; according to clinical psychologist, defendant had chaotic and abusive childhood, never knowing his father and having been raised by various family members. A.R.S. § 13-703.

[65] Sentencing and Punishment 350H ↻1716

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender

350Hk1716 k. Childhood or Familial
Background. Most Cited Cases
(Formerly 110k1208.1(5))

Difficult family background alone is not mitigating circumstance in death penalty sentencing, and it can be mitigating circumstance only if defendant can show that something in that background had effect or impact on his behavior that was beyond his control. A.R.S. § 13-703.

[66] Sentencing and Punishment 350H ↻1716

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1716 k. Childhood or Familial
Background. Most Cited Cases
(Formerly 110k1208.1(5))

Adult offenders have more difficult burden in showing difficult family background as mitigating circumstance in death penalty sentencing, because of greater degree of personal responsibility for their actions. A.R.S. § 13-703.

[67] Sentencing and Punishment 350H ↻1709

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1709 k. Mental Illness or Disorder. Most
Cited Cases
(Formerly 203k357(4))

Murder defendant's documented mental disorders were entitled to some weight as nonstatutory mitigation, for purposes of death penalty sentencing. A.R.S. § 13-703.

[68] Sentencing and Punishment 350H ↻1772

350H Sentencing and Punishment

898 P.2d 454
182 Ariz. 505, 898 P.2d 454
(Cite as: 182 Ariz. 505, 898 P.2d 454)

Page 17

350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited

Cases

(Formerly 203k358(1))
For death penalty sentencing purposes, murder defendant failed to prove good character as mitigating factor by preponderance of evidence, where two former wives of defendant testified that defendant had physically abused them, threatened them with death, and threatened that their bodies would be thrown down mine shaft. A.R.S. § 13-703.

[69] Sentencing and Punishment 350H ↪1721

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1721 k. Other Matters Related to Offender. Most Cited Cases
(Formerly 203k357(4))

Murder defendant's good behavior during pretrial and presentence incarceration was not mitigating factor for death penalty sentencing purposes. A.R.S. § 13-703.

[70] Sentencing and Punishment 350H ↪1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited

Cases

(Formerly 203k358(1))
Although murder defendant presented some evidence that he would no longer be dangerous if confined to prison for life, as mitigating factor for death penalty sentencing purposes, he failed to prove it by preponderance of

evidence, particularly in view of his history of violence and threats of violence and his actions in case. A.R.S. § 13-703.

[71] Sentencing and Punishment 350H ↪1772

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited

Cases

(Formerly 203k358(1))
Although remorse may be considered in mitigation in death penalty cases, murder defendant failed to prove by preponderance of evidence that he was remorseful; criminal justice consultant testified that defendant had feelings of remorse, and defendant stated to court prior to sentencing that he had been made scapegoat, that he did not deny culpability but that there was no premeditation on his part, that he was guilty of being irresponsible person for most of his life, and that no words could express his sorrow and torment. A.R.S. § 13-703.

[72] Sentencing and Punishment 350H ↪1683

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1683 k. More Than One Killing in Same Transaction or Scheme. Most Cited Cases
(Formerly 203k357(12))

Sentencing and Punishment 350H ↪1772

350H Sentencing and Punishment
350HVIII The Death Penalty

350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 k. Sufficiency. Most Cited

Cases

(Formerly 203k357(3))

Evidence showed that defendant personally killed first victim and, at the least, intended that second victim be killed, and thus defendant did not establish, as mitigating circumstance for capital sentencing purposes, lack of evidence showing that he actually killed or intended to kill second victim; evidence, including his own statement to police, proved that defendant and co-defendant agreed that girls had to be killed, and defendant acknowledged agreement to kill girls and admitted stabbing both. A.R.S. § 13-703.

****460 *511** Grant Woods, Atty. Gen. by Paul J. McMurdie, Chief Counsel, Crim. Appeals Section, Phoenix, Eric J. Olsson, Tucson, for appellee.

****461 *512** Ivan S. Abrams, Douglas, for appellant.

OPINION

MOELLER, Vice Chief Justice.

JURISDICTION

This is a capital case in which we review Richard Stokley's convictions for two counts of first degree murder, two counts of kidnapping, and one count of sexual conduct with a minor under the age of fifteen. We also review the two death sentences imposed on the murder counts. Appeal to this court is automatic. Ariz.R.Crim.P. 31.2(b). We have jurisdiction pursuant to Ariz.Rev.Stat. Ann. (A.R.S.) §§ 13-4031 (1989) and 13-4033 (1989 and Supp.1994). We affirm the convictions and sentences.

FACTS AND PROCEDURAL HISTORY

On the Fourth of July weekend, 1991, two thirteen year old girls, Mary and Mandy,^{FNI} attended a community celebration near Elfrida, Arizona. The thirty-eight year old defendant also attended the festival to work as a stuntman in Old West reenactments.

^{FNI}. We do not use the victims' last names in this published opinion.

Mary and Mandy, along with numerous other local children, camped out at the celebration site on July 7. That night co-defendant Randy Brazeal, age twenty, showed up at the campsite. Brazeal had previously dated Mandy's older sister and knew Mandy. During the evening, Brazeal approached the girls' tent and had a discussion with Mary and Mandy. The girls were also seen standing next to Brazeal's car speaking to Brazeal, who was in the driver's seat, while defendant was in the passenger seat. Around 1:00 a.m. on July 8, 1991, the girls told a friend they were going to the restroom. They never returned.

The next day Brazeal surrendered himself and his car to police in Chandler, Arizona. The hood of the car had semen stains, as well as dents matching the shape of human buttocks. Palm prints on the hood matched Brazeal. The back seat had semen stains matching defendant and also had blood stains. Police found a bloody pair of men's pants in the car.

Meanwhile, defendant called a woman in Elfrida asking her to send someone to pick him up in Benson, Arizona. The woman asked about the missing girls, to which defendant replied, "What girls? I don't know anything about any girls." Police arrested defendant that same day at a Benson truck stop. Police found blood stains on his shoes, and his pants looked as if they had recently been cut

off at the knee.

After reading defendant his *Miranda* rights, police questioned defendant at the Benson police station. At first he denied any knowledge of the girls, but after hearing about Brazeal's arrest and being asked about "a particular mine shaft around Gleason," he admitted that he and Brazeal had sexually assaulted the girls. He admitted having sex with "the brown haired girl" (Mandy) and stated that Brazeal had sex with both of them. He also said he and Brazeal had discussed killing the girls, after which defendant choked one and Brazeal strangled the other. He admitted, "I ... choked 'em.... There was one foot moving though I knew they was brain dead but I was getting scared.... They just wouldn't quit. It was terrible." Defendant also admitted using his knife on both girls. After killing the girls, they dumped the bodies down a mine shaft.

Defendant led the police to the abandoned mine shaft and expressed hope that the trial would not take long so he could "get the needle and get it over with." After explaining how they had moved timbers covering the shaft to dump the bodies, he pointed out where he and Brazeal had burned the girls' clothes.

Police recovered the nude bodies from the muddy mine shaft. Autopsies showed that both girls had been sexually assaulted, strangled (the cause of death), and stabbed in the right eye. The strangulation marks showed repeated efforts to kill, as the grip was relaxed and then tightened again. Both victims suffered internal and external injuries to their necks. Mandy also had stomp marks on her body that matched the soles of defendant's**462 *513 shoes. Evidence was consistent with each victim being killed by a different perpetrator. In particular, Mary's body had a mark on the neck consistent with Brazeal's boot, whereas bruise marks on Mandy matched the soles of defendant's shoes. And more force was used in strangling Mandy than Mary. DNA analysis indicated that both defendants had

intercourse with Mandy. Mary's body cavities were filled with mud, making DNA analysis impossible.

The jury found defendant guilty of two counts of kidnapping, one count of sexual conduct with a minor under the age of fifteen (Mandy), and two counts of premeditated first degree murder. It acquitted him on two counts of sexual assault (Mary and Mandy) and one count of sexual conduct with a minor under the age of fifteen (Mary). Defendant and the state stipulated to sentences on the noncapital offenses. The trial court accepted the stipulation and sentenced accordingly.

Following a sentencing hearing on the capital counts, the trial court rendered a detailed, twelve-page special verdict. The trial court found that the facts established beyond a reasonable doubt that (1) both adults engaged in sex with the girls, (2) the defendants agreed to kill both girls, (3) defendant intentionally killed Mandy, (4) Brazeal intentionally killed Mary, (5) both Mary and Mandy suffered great physical pain and mental anguish during strangulation, (6) defendant admitted choking both victims, (7) both bodies were stomped, with that of Mandy bearing the imprint of defendant's sneaker, (8) defendant stabbed both girls, Mandy through the right eye and Mary in the vicinity of the right eye, and (9) although alcohol was involved, defendant had sufficient recall and understanding of the events the next day.

The trial court found three statutory aggravating circumstances for both murders: (1) victim under age fifteen (A.R.S. § 13-703(F)(9) (amended 1993)); (2) multiple homicides (A.R.S. § 13-703(F)(8) (1989)); and (3) especially heinous, cruel or depraved (A.R.S. § 13-703(F)(6) (1989)). The court rejected all the claimed mitigating circumstances offered by defendant, including law abiding past, cooperation with police, alcohol use, prior head injuries, and co-defendant Brazeal's twenty-year sentence. The trial court also expressly stated that it was unable to find any other mitigating

circumstances not expressly offered by defense counsel. The court sentenced defendant to death for both murders.

reach a conclusion on presumed prejudice, we review the entire record, without regard **463 *514 to the answers given in voir dire. Id. at 565, 858 P.2d at 1168.

TRIAL ISSUES

I. Change of Venue

Several months before trial, defendant made a motion for change of venue because of pretrial publicity, which the trial court denied, expressly granting leave to renew the motion. Defendant did not renew the motion. Appellate counsel urges us to hold that failure to change venue constituted fundamental error.

[1][2] A trial court's ruling on a motion for change of venue based on pretrial publicity is a discretionary decision and will not be overturned absent an abuse of discretion and prejudice to the defendant. State v. Salazar, 173 Ariz. 399, 406, 844 P.2d 566, 573 (1992), cert. denied, 509 U.S. 912, 113 S.Ct. 3017, 125 L.Ed.2d 707 (1993). There is a two-step inquiry for pretrial publicity: (1) did the publicity pervade the court proceedings to the extent that prejudice can be presumed?; if not, then (2) did defendant show actual prejudice among members of the jury? The defendant has the burden of showing prejudice. State v. Bible, 175 Ariz. 549, 564, 566, 858 P.2d 1152, 1167, 1169 (1993), cert. denied, 511 U.S. 1046, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994); Ariz.R.Crim.P. 10.3(b). Because defendant made no effort to show actual prejudice of the jury at the time of trial and because our examination of the voir dire fails to show such prejudice, we consider whether the pretrial motion demonstrated a situation in which prejudice should be presumed.

[3][4] For a court to presume prejudice, defendant must show "pretrial publicity so outrageous that it promises to turn the trial into a mockery of justice or a mere formality." Bible, 175 Ariz. at 563, 858 P.2d at 1166. To

[5] Defendant cites the widespread media coverage of the incident and the trial, the age and popularity of the victims, and the impact the murders had in southern Arizona, including petition drives and fundraisers for the victims' families, as precluding the possibility of obtaining a fair and impartial jury. He submitted to the trial court a copy of a flyer for a fundraiser for the victims' funeral expenses, numerous newspaper articles, and petitions signed by hundreds of area residents requesting that a plea agreement not be given. The newspaper articles generally discussed facts of the incident, arrest, pretrial proceedings, and the plea agreement of co-defendant Brazeal. Defendant fails to show how these articles, the petitions, and the flyer resulted in a trial that was "utterly corrupted." Id. (quoting Murphy v. Florida, 421 U.S. 794, 798, 95 S.Ct. 2031, 2035, 44 L.Ed.2d 589 (1975)).

[6] It would be strange to presume prejudice in a case in which the record negates actual prejudice. The relevant inquiry for actual prejudice is the effect of the publicity on the objectivity of the jurors, not the fact of the publicity itself. Bible, 175 Ariz. at 566, 858 P.2d at 1169. Defendant did not show that the jurors had "formed preconceived notions concerning the defendant's guilt and that they [could not] lay those notions aside." State v. Chaney, 141 Ariz. 295, 302, 686 P.2d 1265, 1272 (1984).

Although almost all of the prospective jurors had heard about the case, the voir dire by both the judge and defense counsel thoroughly probed the issue of publicity. There was extensive voir dire, both collectively and individually. The judge also asked specifically if any of the panel members had signed the "no plea bargain" petition. Anyone who had was subject to further voir dire. Only those prospective jurors that indicated that they could set aside the publicity and decide the case on the evidence

presented remained on the jury panel. Jurors who could not be fair or impartial were dismissed. See State v. Atwood, 171 Ariz. 576, 632, 832 P.2d 593, 649 (1992), cert. denied, 506 U.S. 1084, 113 S.Ct. 1058, 122 L.Ed.2d 364 (1993). The empaneled jury was repeatedly warned to avoid media coverage of the trial. There is no basis on which to presume prejudice.

II. Death Qualifying Potential Jurors

During voir dire the panelists were asked whether they had conscientious or religious objections to the death penalty that would prevent them from voting for a first degree murder conviction. Only one panelist raised her hand; she faced further inquiry by the court and stated that it would not influence her decision on whether defendant was guilty. No prospective jurors were excused because of their views on capital punishment.

[7][8] Defendant argues that death-qualified juries are pro-prosecution and therefore biased and that a death-qualified jury is not drawn from a fair cross-section of the community. Because defense counsel made no objection on this basis, the issue would normally be waived. State v. Herrera, 176 Ariz. 9, 15, 859 P.2d 119, 125, cert. denied, 510 U.S. 966, 114 S.Ct. 446, 126 L.Ed.2d 379 (1993). However, defendant appears to be arguing that death qualification of a jury is fundamental error.

There is no error, fundamental or otherwise. Defendant acknowledges that accepting his argument would require changing both state and federal case law. See Wainwright v. Witt, 469 U.S. 412, 424 n. 5, 105 S.Ct. 844, 852 n. 5, 83 L.Ed.2d 841 (1985); Salazar, 173 Ariz. at 411, 844 P.2d at 578.

III. Photographs of the Victims

The trial court admitted into evidence five autopsy photographs of the victims. Defendant made no objections at trial. Defendant argues on appeal that admission of these exhibits was fundamental error.

[9][10] Absent fundamental error, the admission of the exhibits cannot be raised on appeal if no objections were made at trial. State v. Harding, 137 Ariz. 278, 291, 670 P.2d 383, 396 (1983), cert. denied, 465 U.S. 1013, 104 S.Ct. 1017, 79 L.Ed.2d 246 (1984); see State v. Wilczynski, 111 Ariz. 533, 535, 534 P.2d 738, 740, cert. denied, 423 U.S. 873, 96 S.Ct. 141, 46 L.Ed.2d 104 (1975). We will **464 *515 find fundamental error only "when it goes to the foundation of the case, takes from a defendant a right essential to the defense, or is of such magnitude that it cannot be said it is possible for the defendant to have had a fair trial." State v. Cornell, 179 Ariz. 314, 329, 878 P.2d 1352, 1367 (1994).

[11] Exhibit 36 is a photograph of the right side of Mandy's face, showing a laceration below the right eye and what appear to be stomp marks below the cheek. Exhibit 37 shows a tennis shoe stomp mark on Mandy's torso. Exhibit 38 shows a stomp mark on her left shoulder, along with a portion of her chin and cheek. Exhibit 39 shows bruise marks below the neck and around the chin of Mandy. Exhibit 40 includes the lower face, neck, and shoulder area of Mary and shows bruises and abrasions around the neck and chin area.

[12][13] The admission of photographs requires a three-part inquiry: (1) relevance; (2) tendency to incite passion or inflame the jury; and (3) probative value versus potential to cause unfair prejudice. State v. Amaya-Ruiz, 166 Ariz. 152, 170, 800 P.2d 1260, 1278 (1990), cert. denied, 500 U.S. 929, 111 S.Ct. 2044, 114 L.Ed.2d 129 (1991); see Ariz.R.Evid. 401-03. The photographs are relevant if they aid the jury in understanding an issue.

Ariz.R.Evid. 401; *State v. Moorman*, 154 Ariz. 578, 586, 744 P.2d 679, 687 (1987). These photographs show the manner of killing and the identity of the killer, particularly those photos showing stomp marks that match the shoes worn by defendant. They were introduced during the testimony of the forensic pathologist who conducted the autopsies. Although these exhibits show discoloration of the skin, abrasions, stomp and bruise marks, and cuts to the victims' right eyes, they are not gruesome enough to be inflammatory. "Such photographs cannot be deemed sufficiently gruesome to inflame the jurors because 'the crime committed was so atrocious that photographs could add little to the repugnance felt by anyone who heard the testimony.'" *State v. Lopez*, 174 Ariz. 131, 139, 847 P.2d 1078, 1086 (1992) (citation omitted), *cert. denied*, 510 U.S. 894, 114 S.Ct. 258, 126 L.Ed.2d 210 (1993). Even if inflammatory, the probative value of the photos outweighs any prejudicial effect. See *Ariz.R.Evid.* 403; *State v. Chapple*, 135 Ariz. 281, 288-90, 660 P.2d 1208, 1215-17 (1983); *State v. Steele*, 120 Ariz. 462, 464, 586 P.2d 1274, 1276 (1978).

The trial court did not abuse its discretion in admitting the photographs, *Lopez*, 174 Ariz. at 139, 847 P.2d at 1086, and certainly did not commit fundamental error.

IV. Verdict

[14] Defendant contends that the jury was instructed on both premeditated murder and felony murder and, therefore, the verdicts of the murder counts may not have been unanimous. Defendant's argument is fundamentally flawed. Contrary to his assertion, the jury was not instructed on felony murder. The jury unanimously found defendant guilty of two premeditated murders.

But even if defendant's factual predicate were correct, no error would be presented. *Schad v. Arizona*, 501 U.S. 624, 645, 111 S.Ct. 2491, 2504, 115 L.Ed.2d 555 (1991); *State*

v. Lopez, 163 Ariz. 108, 111, 786 P.2d 959, 962 (1990); *State v. Libberton*, 141 Ariz. 132, 136, 685 P.2d 1284, 1288 (1984). "First degree murder is only one crime regardless of whether it occurs as premeditated or felony murder and the defendant is not entitled to a verdict on the precise manner in which the act was committed." *State v. Gillies*, 135 Ariz. 500, 510, 662 P.2d 1007, 1017 (1983).

SENTENCING ISSUES

I. Constitutionality of Arizona's Death Penalty Statute

Defendant makes several arguments that we have recently rejected and now deal with summarily.

[15] A. There is no constitutional right to have a jury determine aggravating or mitigating circumstances. *Walton v. Arizona*, 497 U.S. 639, 647-49, 110 S.Ct. 3047, 3054-55, 111 L.Ed.2d 511 (1990); *State v. Apelt*, 176 Ariz. 369, 373, 861 P.2d 654, 658 (1993), *cert. denied*, 513 U.S. 834, 115 S.Ct. 113, 130 L.Ed.2d 59 (1994).

**465 *516 [16] B. Requiring defendants to prove any mitigating circumstances by a preponderance of the evidence is constitutional. *Walton*, 497 U.S. at 649-51, 110 S.Ct. at 3055-56.

[17] C. Although the state must prove aggravating circumstances beyond a reasonable doubt, *State v. Herrera*, 174 Ariz. 387, 397, 850 P.2d 100, 110 (1993), the court is not required to find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. *State v. Walton*, 159 Ariz. 571, 584, 769 P.2d 1017, 1030 (1989), *aff'd*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); *cf. Franklin v. Lynaugh*, 487 U.S. 164, 179, 108 S.Ct. 2320, 2330, 101 L.Ed.2d 155 (1988) ("[W]e have never held that a specific method

for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.”).

[18] D. Defendant contends that there is a lack of objective standards for determining whether aggravating circumstances outweigh mitigating circumstances. This argument has been rejected. Salazar, 173 Ariz. at 411, 844 P.2d at 578; State v. Correll, 148 Ariz. 468, 484, 715 P.2d 721, 737 (1986).

[19][20] E. Defendant argues that poor, male defendants are discriminated against in the application of the death penalty. A defendant alleging discrimination must prove “the decisionmaker [] in his case acted with discriminatory purpose.” McCleskey v. Kemp, 481 U.S. 279, 292, 107 S.Ct. 1756, 1767, 95 L.Ed.2d 262 (1987). Defendant offers no evidence that his economic status or gender contributed to his sentence or biased the sentencing process. See Jeffers v. Lewis, 38 F.3d 411, 419 (9th Cir.1994), cert. denied, 514 U.S. 1071, 115 S.Ct. 1709, 131 L.Ed.2d 570 (1995); see also State v. White, 168 Ariz. 500, 513, 815 P.2d 869, 882 (1991) (death penalty statute is gender neutral), cert. denied, 502 U.S. 1105, 112 S.Ct. 1199, 117 L.Ed.2d 439 (1992). Absent evidence of purposeful discrimination, this argument has been rejected. Apelt, 176 Ariz. at 373, 861 P.2d at 658.

[21][22] F. The death penalty is not cruel and unusual if it is not imposed in an arbitrary and capricious manner. Gregg v. Georgia, 428 U.S. 153, 195, 96 S.Ct. 2909, 2935-36, 49 L.Ed.2d 859 (1976); State v. Blazak, 131 Ariz. 598, 601, 643 P.2d 694, 697, cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982). Although defendant argues that the death penalty is imposed arbitrarily and irrationally in Arizona, that argument has been rejected by this court. Salazar, 173 Ariz. at 411, 844 P.2d at 578. The death penalty statute narrowly defines death-eligible persons as those convicted of first degree murder, where the state has proven one or more statutory

aggravating factors beyond a reasonable doubt. State v. Greenway, 170 Ariz. 155, 164, 823 P.2d 22, 31 (1991).

[23] G. This court does not conduct proportionality reviews. Salazar, 173 Ariz. at 416, 844 P.2d at 583.

[24] H. The especially heinous, cruel, or depraved aggravating circumstance (A.R.S. § 13-703(F)(6)) is constitutional. Walton, 497 U.S. at 655, 110 S.Ct. at 3058.

II. Independent Review

[25] When a death sentence is imposed in Arizona, this court independently reviews the entire record for error, determines whether the aggravating circumstances have been proved beyond a reasonable doubt, considers any mitigating circumstances, and then weighs the aggravating and mitigating circumstances in deciding whether there are mitigating circumstances sufficiently substantial to call for leniency. State v. Brewer, 170 Ariz. 486, 500, 826 P.2d 783, 797, cert. denied, 506 U.S. 872, 113 S.Ct. 206, 121 L.Ed.2d 147 (1992).

III. Aggravating Factors

[26] To make a defendant death eligible, the state must prove beyond a reasonable doubt at least one statutory aggravating circumstance. A.R.S. § 13-703(E) (1989) (amended 1993); Brewer, 170 Ariz. at 500, 826 P.2d at 797. In this case, the trial court found that the state proved three aggravating circumstances:

**466 *517 A. Defendant was an adult at the time the crimes were committed and the victims were under the age of fifteen. A.R.S. § 13-703(F)(9) (1989) (amended 1993).

B. Defendant has been convicted of one or more other homicides which were committed during the commission of the offense. A.R.S. § 13-703(F)(8) (1989).

C. Defendant committed the offense in an especially heinous, cruel, or depraved manner.

A.R.S. § 13-703(F)(6) (1989).

The first two aggravators are not challenged on appeal. Our review of the record confirms that they were proved beyond a reasonable doubt. See State v. Kiles, 175 Ariz. 358, 369 n. 5, 857 P.2d 1212, 1223 n. 5 (1993), cert. denied, 510 U.S. 1058, 114 S.Ct. 724, 126 L.Ed.2d 688 (1994); see Greenway, 170 Ariz. at 167-68, 823 P.2d at 34-35 (explaining that the (F)(8) aggravating factor applies to multiple murders); State v. Gallegos, 178 Ariz. 1, 15, 870 P.2d 1097, 1111, cert. denied, 513 U.S. 934, 115 S.Ct. 330, 130 L.Ed.2d 289 (1994) (finding (F)(9) aggravating circumstance). We turn, then, to the third aggravating circumstance, which is challenged on appeal.

A. Especially Heinous, Cruel, or Depraved

1. Especially Cruel

[27][28][29][30] The heinous, cruel, or depraved circumstance is phrased in the disjunctive, so if any one of the three factors is found, the circumstance is satisfied. Brewer, 170 Ariz. at 501, 826 P.2d at 798. Cruelty focuses on the victim and is found where there has been an infliction of pain and suffering in a wanton, insensitive, or vindictive manner. Correll, 148 Ariz. at 480, 715 P.2d at 733. A crime is especially cruel when the defendant

“inflicts mental anguish or physical abuse before the victim's death.” Walton, 159 Ariz. at 586, 769 P.2d at 1032. Mental anguish results “especially if a victim experiences significant uncertainty as to the ultimate fate.” Brewer, 170 Ariz. at 501, 826 P.2d at 798.

[31] The trial court found cruelty, noting:

The victims were alive for some minutes from the start of the fatal assaults. They experienced great physical pain and mental anguish as they fought to free themselves. There [was] frequent repositioning of the hands of the killers on the throats of the victims, and the reasserting of the pressure until they were unconscious. Medical evidence cannot establish the moment of cessation of consciousness, when, supposedly, physical pain ceases, but did show that death was not instantaneous.

It was a cruel death for both victims, considering the extent of physical injuries to the bodies, much of which must have been experienced while conscious.

The defendant entered into an agreement with Brazeal to kill both girls.... The defendant, just as surely as he did with Mandy ..., intended the killing of Mary.... The elements of these aggravating circumstances apply to the defendant as to both murders.

The forensic pathologist who conducted the autopsies testified that the cause of death for both girls was asphyxia due to manual strangulation. The pathologist testified that a victim of strangulation is generally conscious for a few minutes and that death usually takes twelve to fifteen minutes. There was evidence of repetitive gripping of Mary's neck. The abrasions on Mandy's neck were consistent with fingernail scratches. Both suffered injuries, including bruises, abrasions, and stab wounds near or in

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the right eye that occurred while still alive or shortly after death. Both victims also suffered hemorrhaging in the vaginal area, consistent with sexual activity before death. The stomp marks on Mandy's body, face, and neck were caused while the victim was alive or shortly after death. Mandy also suffered a complete fracture of the cranium and laceration of the skull. Both victims had injuries indicative of a struggle. The evidence showed that at least some of the injuries occurred while the victims were conscious, sufficient for a finding of cruelty under A.R.S. § 13-703(F)(6). See *Kiles*, 175 Ariz. at 371, 857 P.2d at 1225. "It is clear that [defendant] knew or should have known that his actions would cause suffering." **467*518 *State v. Runningeagle*, 176 Ariz. 59, 65, 859 P.2d 169, 175, cert. denied, 510 U.S. 1015, 114 S.Ct. 609, 126 L.Ed.2d 574 (1993).

2. Especially Heinous or Depraved

[32][33][34][35] Heinousness and depravity "focus on the defendant's mental state and attitude as reflected by his words or actions." *Brewer*, 170 Ariz. at 502, 826 P.2d at 799. We look for the following circumstances in determining whether a crime is especially heinous or depraved: (1) apparent relishing of the murder; (2) infliction of gratuitous violence on the victim beyond the murderous act itself; (3) mutilation of the victim's body; (4) senselessness of the crime; and (5) helplessness of the victim. *State v. Gretzler*, 135 Ariz. 42, 51-52, 659 P.2d 1, 10-11, cert. denied, 461 U.S. 971, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983); see also *State v. Barreras*, 181 Ariz. 516, 522, 892 P.2d 852, 858 (1995). The last two factors are usually less probative of defendant's state of mind than the first three factors. *Barreras*, 181 Ariz. at 522, 892 P.2d at 858; *State v. King*, 180 Ariz. 268, 287, 883 P.2d 1024, 1043 (1994) ("[O]nly under limited circumstances will the senselessness of a murder or helplessness of the victim ... lead to [finding heinousness or depravity]."). Witness elimination is also given some weight in finding the circumstance. *State v. Ross*, 180 Ariz. 598, 606, 886 P.2d 1354, 1362 (1994). However,

the witness elimination factor only applies if: 1) the victim witnessed another crime and was killed to prevent testimony about that crime, 2) a statement by the defendant or other evidence of his state of mind shows witness elimination was a motive, or 3) some extraordinary circumstances show the murder was motivated by a desire to eliminate witnesses.

Barreras, 181 Ariz. at 523, 892 P.2d at 859.

[36] The trial court found that the stabbings to the eyes of the victims and stompings were acts of gratuitous violence and mutilations, that the killings were senseless, that the victims were helpless, and that defendant was motivated by a desire to eliminate witnesses—the "young lives were snuffed out, as insects, merely to eliminate them as witnesses." In particular, the trial court noted in its special verdict that both victims were stabbed in the right eye—"gratuitous violence which, surely, could not have been calculated to lead to death." The stab wound to Mandy's eye penetrated to the bone, causing the eyeball to completely collapse. The eyelid was not punctured, leading the forensic examiner to conclude that Mandy was most likely unconscious during the stabbing. The court also found the stomping to be "unnecessary and gratuitous violence, designed to still the unconscious bodies and assuage the killers' discomfort from the reflexes of death." The court concluded, "The manner of killing and disposition of the bodies demonstrate an obdurate disregard for human life and human remains."

"The killing of a helpless child is senseless and demonstrates a disregard for human life satisfying two of the five *Gretzler* factors." *State v. Stanley*, 167 Ariz. 519, 528, 809 P.2d 944, 953, cert. denied, 502 U.S. 1014, 112 S.Ct. 660, 116 L.Ed.2d 751 (1991); see also *Kiles*, 175 Ariz. at 373, 857 P.2d at 1227 ("The killing of two helpless children is senseless and demonstrates a total

disregard for human life ... and is also evidence of a 'shockingly evil state of mind.' ") (citations omitted). The two teenage girls were driven to a remote rural area in the middle of the night, sexually assaulted, stabbed, stomped, stripped, strangled, and thrown down a mine shaft. They were defenseless against the attacks, *see Kiles, 175 Ariz. at 373, 857 P.2d at 1227*, and suffered from gratuitous violence and needless mutilation.

In addition, defendant's statement to police revealed a motivation to eliminate the girls as witnesses. Defendant stated that his co-defendant proposed that the girls be killed because co-defendant had sexually assaulted them. The following dialogue occurred after defendant described the agreement to kill the girls:

Defendant: He [Brazeal] said I'm gonna have to kill them. I said, "Why?" He said, "Well, I fucked this one and I fucked that one and they're gonna rat and they're gonna get you too."

....

****468 *519** Detective: What happened then, after that, after Randy told you that he wanted to kill them?

Defendant: He grabbed one and I had to grab the other one ... and I choked 'em.

Detective: Okay, you choked both of them?

Defendant: No. I didn't choke both of them. I got one and he got the other one ... And they wouldn't quit. It was terrible.

Detective: Okay, is that when you used the knife?

Defendant: Yup.

This dialogue shows witness elimination as a motivation, satisfying one of the three witness elimination factors. We have reviewed the entire record and affirm the findings of the trial court regarding the especially heinous and depraved nature of these crimes.

IV. The Presentence Report

[37] Before referring to the specifics of the statutory and nonstatutory mitigating circumstances, we wish to comment on the presentence report in this case. Generally, the presentence report, prepared pursuant to Rule 26.4, Ariz.R.Crim.P., may be considered on matters of mitigation if it contains information favorable to the defendant. *State v. Scott, 177 Ariz. 131, 145, 865 P.2d 792, 806 (1993), cert. denied, 513 U.S. 842, 115 S.Ct. 129, 130 L.Ed.2d 73 (1994); State v. Rumsey, 136 Ariz. 166, 171, 665 P.2d 48, 53 (1983), aff'd, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984)*. However, in this case, by stipulation of the parties in the trial court, the presentence report was sealed and defense counsel asked the trial court not to read it. In urging this procedure in the trial court, defendant's trial counsel argued that any mitigating evidence contained in the presentence report "can be adequately covered" by other exhibits and defense witnesses. Thus, pursuant to the stipulation and at the express request of defendant, the trial judge did not read the presentence report.

[38][39][40] At oral argument, however, defendant's appellate counsel urged us to review the presentence report. We do not approve of the practice of withholding information from the trial court and then presenting it to the appellate court. Counsel are encouraged to present all

arguably mitigating evidence to the trial court and not to hold some back for appeal. If counsel is concerned that there is detrimental information in the presentence report that would only be appropriate to consider on the noncapital counts, one possible solution would be to proceed to sentencing on the capital counts first. Even without such precautions, however, trial judges know that, on the capital counts, they are limited to statutory aggravating factors properly admitted and proved beyond a reasonable doubt. A.R.S. § 13-703(C) (Supp.1994); *see Runsey*, 136 Ariz. at 172, 665 P.2d at 54. They may not consider other evidence as aggravating. *See State v. Beaty*, 158 Ariz. 232, 246, 762 P.2d 519, 533 (1988) (judge presumed to apply proper standard), *cert. denied*, 491 U.S. 910, 109 S.Ct. 3200, 105 L.Ed.2d 708 (1989).

Consistent with our obligation in capital cases to independently weigh all potentially mitigating evidence, and pursuant to the request of defendant, we have examined and considered the presentence report that was withheld from the trial judge. Nothing in it persuades us that the trial court erred in imposing the death sentence. We turn, then, to a consideration of the mitigating factors.

V. Statutory Mitigating Circumstances

[41][42][43] The sentencing judge must consider "any aspect of the defendant's character or record and any circumstance of the offense relevant to determining whether the death penalty should be imposed." *Kiles*, 175 Ariz. at 373, 857 P.2d at 1227 (internal quotations omitted). A defendant must prove mitigating factors by a preponderance of the evidence. *Greenway*, 170 Ariz. at 168, 823 P.2d at 35. The sentencing court must, of course, consider all evidence offered in mitigation, but is not required to accept such evidence. *State v. Ramirez*, 178 Ariz. 116, 131, 871 P.2d 237, 252, *cert. denied*, 513 U.S. 968, 115 S.Ct. 435, 130 L.Ed.2d 347 (1994).

Defendant raised only one statutory mitigating circumstance at sentencing:

****469 *520 A.** Capacity to appreciate wrongfulness of conduct. A.R.S. § 13-703(G)(1) (1989).

On appeal, he raises additional statutory mitigating circumstances:

B. Relatively minor participation. A.R.S. § 13-703(G)(3) (1989).

C. No reasonable foreseeability that conduct would create grave risk of death to another. A.R.S. § 13-703(G)(4) (1989).

We address each in turn.

A. Capacity to Appreciate Wrongfulness of Conduct or to Conform Conduct to Requirements of the Law

[44] Defendant argues that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired for three reasons: alcohol consumption, earlier head injuries, and mental disorders. This factor is disjunctive, "so that proof of incapacity as to either ability to appreciate or conform establishes the mitigating circumstance." *State v. Wood*, 180 Ariz. 53, 70, 881 P.2d 1158, 1175 (1994).

1. Alcohol

[45] Defendant argues that heavy consumption of alcohol seriously undermined "his ability to appreciate the

stupidity and illegality of his conduct.” Opening Brief at 37. Voluntary intoxication may be mitigating if the defendant proves by a preponderance of the evidence that his “capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, but not so impaired as to constitute a defense to prosecution.” A.R.S. § 13-703(G)(1); see also Atwood, 171 Ariz. at 650-51, 832 P.2d at 667-68.

[46] There was evidence that defendant and co-defendant consumed alcohol on the day of the murders. James Robinson, who was present at the campsite the night of the crimes, testified that defendant consumed beer and whiskey that night, but that he was not so drunk that he could not maneuver himself. Roy Waters, age fifteen, testified that he saw defendant drinking beer in the afternoon and that he appeared drunk. Cory Rutherford, age thirteen, testified that he observed defendant drinking out of a bottle. Various witnesses testified that co-defendant Brazeal was drinking and appeared intoxicated, more so than defendant. At approximately 12:30 a.m. on the morning of the murders, defendant, accompanied by Brazeal, purchased a six-pack of Budweiser and a pint of Jim Beam. The morning after the campout, the owner of the site where the girls camped found an empty quart bottle of whiskey, an empty half pint bottle of whiskey, and an empty package of Budweiser, but these items were never tied to defendant. Based entirely on defendant’s self-reported consumption and self-reported blackout on the night of the crimes, a clinical psychologist opined that defendant’s capacity to appreciate the wrongfulness of his conduct was significantly impaired at the time of the incident.

However, there is much evidence showing defendant was not significantly impaired by alcohol at the time of the murders and did not suffer a blackout at the time of the crimes. Defendant disposed of the bodies and burned the clothing of the victims, thus showing that he knew the conduct was wrongful. See Gallegos, 178 Ariz. at 17, 870

P.2d at 1113; Atwood, 171 Ariz. at 651, 832 P.2d at 668. He was able to accurately guide the officers back to the crime scene. Defendant also had substantial recall of the events,^{FN2} see State v. Herrera, 176 Ariz. 21, 33, 859 P.2d 131, 143, cert. denied, 510 U.S. 951, 114 S.Ct. 398, 126 L.Ed.2d 346 (1993), and attempted to cover up the crimes, see Salazar, 173 Ariz. at 413, 844 P.2d at 580, causing the trial court to find that defendant’s capacity to appreciate wrongfulness was not substantially impaired. **470*521 State v. Cook, 170 Ariz. 40, 64, 821 P.2d 731, 755 (1991), cert. denied, 506 U.S. 846, 113 S.Ct. 137, 121 L.Ed.2d 90 (1992). “[S]tacked against the testimony offered in mitigation by defendant is the evidence that defendant *did know* that his ... conduct was wrongful.” Atwood, 171 Ariz. at 651, 832 P.2d at 668.

FN2. For example, during the initial interview, defendant corrected the chronology of events:

Detective: So, okay, you guys killed the girls and burned their clothes, threw them down the mine shaft.

Defendant: Killed them. Threw them down the mine shaft. Burned their clothes.

We agree with the trial court that defendant failed to show that he was significantly impaired during the time of the crimes so as to meet the statutory mitigation requirements.

2. Head Injuries

[47][48] Head injuries that lead to behavioral disorders may be considered a mitigating circumstance. See State v. Rockwell, 161 Ariz. 5, 15, 775 P.2d 1069, 1079 (1989). Evidence indicates that defendant suffered three head injuries since 1982. A neurologist who reviewed the

medical records testified that defendant had suffered a compound depressed skull fracture, underwent surgery, and suffered permanent damage in 1982 from being hit with a heavy beer mug. In 1986, he struck his head on the pavement after jumping onto the hood of his wife's moving vehicle. About a year before the murders, he suffered a severe head injury when another wife hit him with a cast iron skillet. Other head injuries alleged by defendant were uncorroborated.

According to the neurologist, such injuries "could impair his ability to understand his environment, to interpret it correctly and to respond correctly to it," potentially manifesting in decreased control of impulsive behavior and decreased cognitive ability. Alcohol use increases any lack of control. The neurologist concluded that defendant's brain "integrity" was moderately to severely impaired due to previous brain or head injuries, resulting in impulsive behavior. A clinical psychologist said that defendant suffers from an inability to control impulse and that this problem is exacerbated by alcohol.

The trial court found: "Having suffered head injuries and having difficulty with impulse control sheds little light on defendant's conduct in this case. The evidence does not show defendant acted impulsively, only criminally, with evil motive." While we give more mitigating weight to this element than did the trial court, it is substantially offset by the fact that defendant's test results showed that he has above average intelligence (an I.Q. of 128), and the facts show that he did not exhibit impulsive behavior in the commission of the crimes. See Brewer, 170 Ariz. at 505-06, 826 P.2d at 802-03. Defendant appreciated the wrongfulness of his conduct, id. at 506, 826 P.2d at 803, as evidenced the next day by his comment to the interrogating officer, "I ... choked 'em.... There was one foot moving though I knew they was brain dead but I was getting scared.... And they just wouldn't quit. It was terrible." His prior head injuries do not show that defendant was unable to conform or appreciate the wrongfulness of his conduct.

3. Mental Disorders

[49] While a patient at a Texas hospital in 1971, defendant was diagnosed with a passive-aggressive personality. In 1978, he was re-admitted to the same hospital for psychotic depression. Defendant reported feeling suicidal, along with a fear that he might harm someone else. The final diagnosis of the second hospitalization was that defendant suffered from a personality disorder with differential to include passive-aggressive personality, antisocial personality, and borderline personality.

In a proceeding to determine defendant's competency to stand trial, a clinical psychologist found that defendant "does not appear to be suffering from any psychotic disorder but he has a history of depression and other serious psychological problems," including a pattern of impulsivity. Defendant's Trial Exhibit 24. Defendant also claimed to have attempted suicide twice. The psychologist testified that defendant suffered from a borderline personality disorder and depression. He concluded that defendant is a "seriously dysfunctional individual."

[50] Character or personality disorders alone are generally not sufficient to find that defendant was significantly impaired. Apelt, 176 Ariz. at 377, 861 P.2d at 662. A mental disease or psychological defect usually must **471 *522 exist before significant impairment is found. *Id.*

Despite this evidence, "[t]his case does not involve the same level of mental disease or psychological defects considered in other cases in which the § 13-703(G)(1) mitigating circumstance was found to exist." Brewer, 170 Ariz. at 505, 826 P.2d at 802. Defendant failed to show that his ability to control his actions was substantially impaired; his actions showed that he appreciated the wrongfulness of his conduct. Evidence showed that

defendant was familiar with the mine shaft and discussed killing the girls with Brazeal. Defendant sexually assaulted Mandy, choked her and stomped on her body, and agreed that Mary should also be killed. Defendant then attempted to cover up the crimes by dumping the bodies in the mine shaft and burning the girls' clothes. "The record reveals that defendant made a conscious and knowing decision to murder the victim[s] and was fully aware of the wrongfulness of his actions." *Id.* at 506, 826 P.2d at 803. This evidence fails to meet the statutory burden by a preponderance of the evidence.

B. Relatively Minor Participation

[51] Defendant raises this argument for the first time on appeal. According to A.R.S. 13-703(G)(3), mitigation exists where the defendant shows that he was "legally accountable for the conduct of another ..., but his participation was relatively minor, although not so minor as to constitute a defense to prosecution." The argument consists of one sentence in the brief: "Given the overwhelming possibility that the jury's guilty verdict was based upon the felony murder theory, this factor should have been considered in mitigation." Opening Brief at 37. However, as we have previously noted, the trial court did not instruct the jury on felony murder. The jury found defendant guilty of two counts of first degree premeditated murder. Defendant brutally killed Mandy and intended that Mary be killed. His actions were substantial; we therefore reject this argument. See Herrera, 176 Ariz. at 20, 859 P.2d at 130.

C. No Reasonable Foreseeability that Conduct Would Create Grave Risk of Death to Another

[52] In an attempt to come within the ambit of A.R.S. § 13-703(G)(4), defendant argues for the first time on appeal that "[a]t the time this episode first began, it does not appear that any plan existed to cause harm or fatal

injury to the victims." Opening Brief at 38. He cites no facts or evidence to support this argument. After a review of the entire record, we also find no facts or evidence to support this statutory mitigating circumstance. See State v. Greenawalt, 128 Ariz. 150, 173, 624 P.2d 828, 851, cert. denied, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981).

VI. Nonstatutory Mitigating Circumstances

Nonstatutory mitigating factors raised at trial and discussed in the special verdict were:

1. historic substance abuse;
2. lack of prior felony record;
3. cooperation with police;
4. co-defendant Brazeal's twenty-year sentence;
5. leniency in sentencing;
6. ability to be rehabilitated;
7. difficulty in early years and prior home life;
8. mental condition and behavior disorders;
9. good character of defendant;

10. good behavior while incarcerated; and
11. lack of future dangerousness if confined to prison.

The trial court rejected all of these. The trial court also stated, "[T]his court is unable to glean any mitigating circumstances not suggested by [defendant's] counsel." In conclusion, the trial court found that even if any or all of the mitigating circumstances existed, "balanced against the aggravating circumstances found to exist, they would not be sufficiently substantial to call for leniency."

Additional nonstatutory mitigating circumstances raised on appeal are:

12. felony murder theory;
- **472 *523 13. remorse; and
14. lack of evidence showing that defendant actually killed or intended to kill Mary.

As part of our independent review, we will address each alleged mitigating circumstance.

1. Historic Substance Abuse

[53][54] If impairment does not rise to the level of a statutory mitigating circumstance, the trial court should still consider whether such impairment constitutes nonstatutory mitigation, when viewed in light of defendant's alleged history of alcohol and drug abuse. Gallegos, 178 Ariz. at 17, 870 P.2d at 1113. Various relatives and acquaintances testified that defendant was an

alcoholic and that he considered himself to be one. A clinical psychologist agreed with that assessment. Other acquaintances testified that they had seen defendant drunk before. Defendant claims to have consumed at least a pint of whiskey every day and to have used various illicit drugs in the past. In 1977, he was arrested twice for drunkenness; the cases were dismissed. Defendant was convicted of driving while intoxicated in 1986 and 1989. He was arrested in 1991 for driving under the influence of alcohol and the case was dismissed.

As we have recommended in past cases, the trial judge here was very thorough in considering the statutory and nonstatutory mitigating circumstances. Gallegos, 178 Ariz. at 22-23, 870 P.2d at 1118-19. With respect to the item of historic substance abuse, the trial court stated in its special verdict, "Alcohol abuse over an extended period of defendant's life, and his drinking at the time of the killings are not mitigating circumstances under the facts of this case." We have reviewed the entire record and agree with the trial court that defendant has failed to prove his alcohol or drug use is a nonstatutory mitigating factor.

2. Lack of Prior Felony Record

[55][56] Lack of prior felony convictions may constitute a nonstatutory mitigating circumstance. Scott, 177 Ariz. at 144, 865 P.2d at 805. However, "arrests or misdemeanor convictions may be considered when lack of felony convictions 'is advanced as a mitigating factor.'" Id. at 145, 865 P.2d at 806 (quoting State v. Rossi, 171 Ariz. 276, 279, 830 P.2d 797, 800, cert. denied, 506 U.S. 1003, 113 S.Ct. 610, 121 L.Ed.2d 544 (1992)).

[57] Although defendant has no prior felony conviction, he also does not have a law abiding past. He has a history of misdemeanor arrests and offenses including a conviction for disorderly conduct in 1973, two arrests for public drunkenness in 1977, and arrests for assaults on

two former wives, one in 1978 and the other in 1986. Unlike the trial court, in our independent reweighing, we conclude that this thirty-eight year old defendant's lack of a felony record is a nonstatutory mitigating circumstance, but the weight to be given it is substantially reduced by his other past problems with the law. *See Scott*, 177 Ariz. at 144-45, 865 P.2d at 805-06; *Cook*, 170 Ariz. at 63 n. 12, 821 P.2d at 754 n. 12.

3. Cooperation with Police

[58] Defendant's cooperation with police followed an initial denial of any knowledge of the girls. He only confessed after hearing that co-defendant had been arrested. This does not constitute a mitigating circumstance. *State v. Spencer*, 176 Ariz. 36, 45, 859 P.2d 146, 155 (1993), cert. denied, 510 U.S. 1050, 114 S.Ct. 705, 126 L.Ed.2d 671 (1994); *Atwood*, 171 Ariz. at 653, 832 P.2d at 670.

4. Disparity of Co-defendant's Sentence

[59][60][61] Although sentences of co-defendants may be considered in mitigation, *Cook*, 170 Ariz. at 65, 821 P.2d at 756; *State v. Watson*, 129 Ariz. 60, 64, 628 P.2d 943, 947 (1981), where the difference in sentences is a result of appropriate plea bargaining, it may not be considered in mitigation. *State v. Gillies*, 142 Ariz. 564, 571, 691 P.2d 655, 662 (1984), cert. denied, 470 U.S. 1059, 105 S.Ct. 1775, 84 L.Ed.2d 834 (1985). "[I]t is not mere disparity between the two sentences that is significant, but, rather, unexplained disparity." *State v. Schurz*, 176 Ariz. 46, 57, 859 P.2d 156, 167, cert. denied, 510 U.S. 1026, 114 S.Ct. 640, 126 L.Ed.2d 598 (1993). Where the first degree murder is found especially cruel, heinous, or depraved, "even unexplained disparity has little significance." **473 *524 *Id.* The sentence negotiated by co-defendant was the result of a disparity of evidence at the time of co-defendant's trial, causing the state to enter into a plea

agreement. In addition, it must be remembered that co-defendant was twenty years old. *But see Walton*, 159 Ariz. at 589, 769 P.2d at 1035 (affirming death sentence of twenty year old defendant). Defendant was thirty-eight.

5. Leniency in Sentencing

[62] The trial court correctly held that "the claimed right to leniency in the context of the alleged harshness and disproportionality of the death penalty is not a mitigating circumstance." Special Verdict at 8.

6. Prospect for Rehabilitation

[63] Although a criminal justice consultant testified that defendant has the potential for rehabilitation, the trial court found such prospects slim. We agree with the trial court. After a long history of alcohol abuse and tumultuous behavior, defendant showed no evidence of ability to rehabilitate. *See Atwood*, 171 Ariz. at 654, 832 P.2d at 671 ("[D]efendant's interest in rehabilitation was insufficient to call for leniency when compared to the harm caused by his conduct and his continued threat to the public peace.").

7. Family History

[64][65][66] According to a clinical psychologist, defendant had a chaotic and abusive childhood, never knowing his father and having been raised by various family members. A difficult family background alone is not a mitigating circumstance. *State v. Wallace*, 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989), cert. denied, 494 U.S. 1047, 110 S.Ct. 1513, 108 L.Ed.2d 649 (1990). This can be a mitigating circumstance only "if a defendant can show that something in that background had an effect or impact on his behavior that was beyond the defendant's

control." *Id.* Adult offenders have a more difficult burden because of the "greater degree of personal responsibility for their actions." Gretzler, 135 Ariz. at 58, 659 P.2d at 17.

Family history in this case does not warrant mitigation. Defendant was thirty-eight years old at the time of the murders. Although he may have had a difficult childhood and family life, he failed to show how this influenced his behavior on the night of the crimes. *See White, 168 Ariz. at 513, 815 P.2d at 882.*

8. Mental Condition and Behavior Disorders

[67] Although this element was rejected by the trial court, we conclude, pursuant to our independent review, that defendant's documented mental disorders are entitled to some weight as nonstatutory mitigation. *See discussion supra part V(A)(3) (statutory mitigation).*

9. Good Character of Defendant

[68] To impeach this alleged mitigating circumstance, the state called two former wives of defendant. Both testified that defendant had physically abused them, threatened them with death, and threatened that their bodies would be thrown down a mine shaft. Defendant failed to prove good character by a preponderance of the evidence.

10. Good Behavior while Incarcerated

[69] Although long-term good behavior during post-sentence incarceration has been recognized as a possible mitigating factor, Watson, 129 Ariz. at 63-64, 628 P.2d at 946-47, we, like the trial court, reject it here for pretrial and presentence incarceration. *See State v.*

Lopez, 175 Ariz. 407, 416, 857 P.2d 1261, 1270 (1993) ("[D]efendant would be expected to behave himself in county jail while awaiting [sentencing]."), *cert. denied, 511 U.S. 1046, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994).*

11. Lack of Future Dangerousness if Confined to Prison

[70] Although defendant presented some evidence that he would no longer be dangerous if confined to prison for life, we find that he fails to prove this by a preponderance of the evidence, particularly in view of his history of violence and threats of violence and his actions in this case.

12. Felony Murder Instruction

Defendant claims that a felony murder instruction was given and that this should be considered in mitigation. *See supra part V(B) (statutory mitigation).* However, there was no felony murder instruction.

**474 *525 13. Remorse

[71] Although remorse may be considered in mitigation, Brewer, 170 Ariz. at 507, 826 P.2d at 804; State v. Tittle, 147 Ariz. 339, 344, 710 P.2d 449, 454 (1985), defendant failed to prove by a preponderance of the evidence that he was remorseful. A criminal justice consultant testified that defendant had feelings of remorse. In addition, during defendant's statement to the court prior to sentencing, defendant stated,

I think it's very clever the way I have been made a scapegoat in this case. I do not deny culpability, but there was no premeditation on my part. What I am

guilty of is being an irresponsible person for most of my life, running from responsibility, living in a fantasy world and it was my irresponsibility on the night that this incident occurred that involved me in the incident. There is no words that can express the grief and the sorrow and the torment I have experienced over this, but I am just going to leave everything in the hands of God because that's where it is anyway.

record for fundamental error and found none. The convictions and sentences are affirmed.

Stanley G. Feldman, Chief Justice

Defendant's statement and the testimony of the consultant were inadequate to prove the mitigating circumstance by a preponderance of the evidence.

Robert J. Corcoran, Justice

14. Lack of Evidence Showing that Defendant Actually Killed or Intended to Kill Mary

[72] Although defendant claims that there was insufficient evidence to show that he killed or intended to kill Mary, the evidence, including his own statement to police, proves that he and Brazeal agreed that the girls must be killed. In his statement to the detective, defendant acknowledged the agreement to kill the girls and admitted stabbing both girls. Clearly, he was an active participant in the killing of both girls. The jury, in its guilty verdict, and the trial court, in its special verdict, so found. After a review of the entire record, we agree that defendant personally killed Mandy and, at the least, intended that Mary be killed.

Thomas A. Zlaket, Justice

Frederick J. Martone, Justice

Ariz., 1995.
State v. Stokley
182 Ariz. 505, 898 P.2d 454

CONCLUSION

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There are three statutory aggravating circumstances. There are no statutory mitigating circumstances. We have considered the nonstatutory mitigating factors of lack of prior felony record and his mental condition and behavior disorders. We find the mitigation, at best, minimal. Certainly, there is no mitigating evidence sufficiently substantial to call for leniency. We have searched the

SUPERIOR COURT OF THE STATE OF ARIZONA, COUNTY OF COCHISE

STATE OF ARIZONA vs. RICHARD DALE STOKLEY

No. CR 91-284A

SPECIAL VERDICT

The defendant, RICHARD DALE STOKLEY, on the 27th day of March, 1992, in this court, by a jury of his peers, was found guilty of the crimes of:

Kidnapping Mary Raylene Snyder, a child under the age of fifteen years, with the intent to inflict death, physical injury or a sexual offense on her or to otherwise aid in the commission of a felony, as alleged in Count I of the indictment;

Kidnapping Mandy Ruth Marie Meyers, a child under the age of fifteen years, with the intent to inflict death, physical injury or a sexual offense on her or to otherwise aid in the commission of a felony, as alleged in Count II of the indictment;

Sexual conduct with a minor by engaging in sexual intercourse with a minor, Mandy Ruth Marie Meyers, a child under the age of fourteen years, not his spouse, as alleged in Count VI of the indictment;

Murder in the first degree of Mary Raylene Snyder, a child under the age of fifteen years, as alleged in Count VII of the indictment; and

Murder in the first degree of Mandy Ruth Marie Meyers, a child under the age of fifteen years, as alleged in Count VIII of the indictment;

all committed in this county on or about the 8th day of July, 1991.

This court has considered the testimony and evidence presented at trial and the separate sentencing hearing, and the memoranda, exhibits, and arguments of counsel. A presentence report was prepared, but on request of counsel for the defendant, it was not read; its contents remain unknown to this court.

ER - 159

A stipulation which was made and entered into by opposing counsel and presented to the court on the special sentencing hearing on the fifteen day of June, 1992, relates to the non-capital offenses: the two counts of kidnapping, and the sexual conduct with a minor under the age of fourteen years. It was accepted by this court.

The stipulation provides that the defendant shall receive aggravated sentences of imprisonment of twenty-two years on each of the kidnapping convictions, and the aggravated sentence of imprisonment of twenty-five years on the conviction of sexual conduct with a minor under the age of fourteen years.

The sentences are to be served consecutively, that is, the sentence on the kidnapping conviction of Count II of the indictment shall not begin until the sentence on the kidnapping conviction of Count I has been completed. Likewise, the sentence on the sexual conduct conviction shall not begin until the sentences on the two kidnapping convictions have been served. If life sentences are imposed on the murder convictions, the stipulated terms for the non-capital crimes shall follow upon the sentences imposed.

Pursuant to this stipulation, each day of the total of sixty-nine years must be served before the defendant would be eligible for pardon, parole, or work furlough, or release on any other basis.

In support of the stipulated aggravated terms of sentence, this court considered the facts of this case found to exist beyond a reasonable doubt, as set forth hereinbelow, and has determined that the aggravated terms and consecutive treatment are warranted.

A further condition of the stipulation is that no family member of the victims shall give testimony or speak at any pre-sentence hearing or address the court at sentencing.

With regard to the capital offenses, as required by law, this court has taken into account the aggravating and mitigating circumstances presented, and has made certain findings in regard to same. Pursuant to the provisions of Arizona Revised Statutes, § 13-703D, this court now returns this special verdict.

THE FACTS ESTABLISHED BEYOND A REASONABLE DOUBT

The facts deemed essential to this examination of the alleged aggravating and mitigating circumstances, found to exist beyond a reasonable doubt, are as follows:

Mary Raylene Snyder and Mandy Ruth Marie Meyers were both thirteen years of age on the Independence Day weekend of 1991. They both died in the early morning hours of July 8 of that year in a remote area of Cochise County, near Courtland, at the hands of two adult males, defendant Richard Dale Stokley and Randy Ellis Brazeal. The bodies were dragged to and thrown in a watery mine shaft.

Defendant Stokley was thirty-eight years of age at that time. He is a person of above average intelligence.

Prior to the killings, both adults had engaged in sexual intercourse with the girls. The defendant and Brazeal, fearing repercussions from their sexual conduct with these children, agreed to kill them. Defendant Stokley murdered Mandy Ruth Marie Meyers, and Randy Ellis Brazeal murdered Mary Rayleen Snyder. It was defendant's intent to kill Mandy Ruth Marie Meyers, and that Mary Raylene Snyder be killed.

Both victims died of asphyxia due to manual strangulation. They were choked to death, the Meyers girl by defendant Stokley, and the Snyder girl by Brazeal.

From the first grasping of the throats to their last conscious gasp of air, both of these young victims must have realized their imminent fate. They suffered great physical pain as the capillaries of their eyes, throats and lungs burst, and great mental anguish as their youthful sense of immortality shattered.

The killers, as their hands grew tired, released and reasserted their grips while the young bodies struggled to live. The girls' fingernails gouged at their own throats in an effort to free themselves. In those several minutes while conscious they struggled for life, and after, their bodies moved involuntarily, to the consternation of their killers.

In his statement to the sheriff's office, the defendant stated, "...I...choked 'em...There was one foot moving though I knew they was brain dead

but I was getting scared." Referring to the bodies moving after the choking, he said, "And they just wouldn't quit. It was terrible."

Both bodies were stomped upon with great force, notably the Meyers child, bearing the clear chevron imprint from defendant's tennis shoes on her chest, shoulder and neck.

The victims were stabbed by defendant with his knife. The Meyers child was stabbed through the right eye to the bony structure of the eye socket. The Snyder girl was stabbed in the vicinity of the right eye. It is likely both girls were unconscious at the time of this stabbing.

The defendant and Brazeal for some time prior to planning the murders had been drinking alcoholic beverages. The defendant's statement to the sheriff's detective indicates a sufficient recall and understanding of the events at the time of the killings. Defendant's capacity to appreciate the wrongfulness of his conduct was not significantly impaired.

AGGRAVATING CIRCUMSTANCES

The state alleges the existence of three aggravating circumstances:

THE FIRST: The defendant was an adult at the time the offense was committed and the victim was under fifteen years of age. A.R.S., § 13-703, F.9.;

THE SECOND: The defendant has been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense. A.R.S., § 13-703, F.8.; and

THE THIRD: The defendant committed the offense in an especially heinous, cruel or depraved manner. A.R.S., § 13-703, F.6.

1. THE DEFENDANT WAS AN ADULT AT THE TIME THE OFFENSE WAS COMMITTED AND THE VICTIM WAS UNDER FIFTEEN YEARS OF AGE.

The defendant was an adult, of the age of 38 years, and the victims, Mary Raylene Snyder and Mandy Ruth Marie Meyers, were both just thirteen years of age.

FINDING: This court finds the aggravating circumstance described in paragraph numbered 9, subsection F., of § 13-703 exists as to both murder convictions.

2. THE DEFENDANT HAS BEEN CONVICTED OF ONE OR MORE OTHER HOMICIDES, AS DEFINED IN § 13-1101, WHICH WERE COMMITTED DURING THE COMMISSION OF THE OFFENSE.

The defendant was found guilty of two murders. Each conviction of murder in the first degree is an aggravating circumstance to the other conviction.

The evidence established beyond a reasonable doubt that the defendant himself, with his own hands and feet, with the force of his own strength against this thirteen year old child, murdered Mandy Ruth Marie Meyers. The evidence shows with equal persuasion that the life of the other child, Mary Raylene Snyder, was similarly forcefully taken by Randy Ellis Brazeal, a co-defendant as originally charged.

Defendant's statement, given to Sheriff's Detective Rothrock shortly after his arrest, disclosed the conspiracy to kill both girls to cover up the sexual assaults; to escape detection; to eliminate the victims as witnesses.

The evidence clearly established that the defendant engaged in sexual intercourse with Mandy Ruth Marie Meyers.

The injuries to the bodies were similar. The deaths were of like cause. The bodies were thrown into the same watery mine shaft. It was defendant's shoe prints stamped in the Meyers child's body. Some of the marks on the body of the other child may have been from Brazeal's shoes. From the evidence of the medical examiner, it appears likely.

The defendant contributed to the death of one child just as surely as he killed the other. He was the elder, perhaps even the brighter. Even to be influenced by the younger perpetrator lessens neither the crime nor the conviction. Just as he is responsible for the death of Mandy Ruth Marie Meyers, so is he responsible for the killing of Mary Raylene Snyder, and for the manner of her death. The defendant was found guilty of the murder in the first degree of Mary Raylene Snyder though the killing was at the hands of Randy Ellis Brazeal. The jury so found.

FINDING: The defendant was convicted of another homicide, as defined in § 13-1101, which was committed during the commission of the offense. This applies to the murder of Mandy Ruth Marie Meyers aggravated by the murder of Mary Raylene Snyder, and to the murder of Mary Raylene Snyder aggravated by the murder of Mandy Ruth Marie Meyers. This court finds the aggravating circumstance described in paragraph numbered 8, subsection F., of § 13-703 exists as to both murders.

3. THE DEFENDANT COMMITTED THE OFFENSE IN AN ESPECIALLY HEINOUS, CRUEL OR DEPRAVED MANNER.

These elements are in the disjunctive. An act may have the qualities of more than one. Only one need be found to meet this circumstance.

Defining the standards of any of these elements is not been an easy task. The cases are replete with example, both for those that demonstrate the standards, and those that fall short. The facts of this case were compared to those contained in the case law of this state.

The Elements of Especially Heinous or Depraved

The terms, "heinous" and "depraved" focus on the defendant's mental state and attitude as reflected by his words and actions. *State v. Brewer*, Supreme Court No. CR-88-0308-AP, opinion file January 28, 1992; *State v. Wallace*, 151 Ariz. 362, 367, 728 P.2d 232, 237 (1986).

The defendant had a knife. Both victims were stabbed, Mandy Ruth Marie Meyers through the right eye to the bony socket, and Mary Raylene Snyder in the vicinity of her right eye. The stabbings were acts of gratuitous violence which, surely, could not have been calculated to lead to death.

The stomping of the bodies, apparently after unconsciousness when the struggle for life had ceased, were acts of unnecessary and gratuitous violence, designed to still the unconscious bodies and assuage the killers' discomfort from the reflexes of death.

The stabbings and stomping of the bodies were mutilations.

Though the sexual conduct crimes committed with these young girls are serious crimes, the killings were senseless and the victims were helpless. These young lives were snuffed out, as insects, merely to eliminate them as witnesses.

The manner of killing and disposition of the bodies demonstrate an obdurate disregard for human life and human remains.

The Element of Cruelty

The victims were alive for some minutes from the start of the fatal assaults. They experienced great physical pain and mental anguish as they fought to free themselves. There were frequent repositioning of the hands of the killers on the throats of the victims, and the reasserting of the pressure until they were unconscious. Medical evidence cannot establish the moment of cessation of consciousness, when, supposedly, physical pain ceases, but did show that death was not instantaneous.

It was a cruel death for both victims, considering the extent of physical injuries to the bodies, much of which must have been experienced while conscious.

The defendant entered into an agreement with Brazeal to kill both girls. The method of killing and manner of death, including the stomping on the bodies, are remarkably similar considering they were done at night in the desert. The killings were simultaneous though the deaths may not have been. The defendant, just as surely as he did with Mandy Ruth Marie Meyers, intended the killing of Mary Raylene Snyder. The elements of these aggravating circumstance apply to the defendant equally as to both murders.

FINDING: This court finds the murders were committed in an especially heinous, cruel, and depraved manner. The aggravating circumstances described in paragraph numbered 8, subsection F., of § 13-703, exist as to both murders.

MITIGATING CIRCUMSTANCES

The defendant has enumerated the following mitigating circumstances.

1. LENIENCY IN SENTENCING

This alleged mitigating circumstance appears to renew the claim long since resolved by the appellate courts of this state and country, that the death penalty is cruel and unusual punishment. The defendant makes a claim for leniency as a mitigating factor. Rather, leniency may be the result of inquiry in the evaluation of mitigating circumstances and not a mitigating circumstance in itself.

FINDING: This court finds that the claimed right to leniency in the context of the alleged harshness and disproportionality of the death penalty is not a mitigating circumstance.

2. THE DEFENDANT'S LACK OF PRIOR FELONY RECORD

The defendant has no prior felony conviction. He has a history of arrests and misdemeanor convictions, from driving while intoxicated to assaults and domestic violence. Defendant's professed law abiding qualities are illusory.

FINDING: In the context of his personal history, the lack of a prior felony conviction is not a mitigating circumstance.

3. THE DEFENDANT'S COOPERATION WITH LAW ENFORCEMENT

The defendant gave a statement to a sheriff's detective implicating himself and Randy Ellis Brazeal. The statement discloses denials of the whereabouts of the two girls, a concocted story, deception, and evasion. Only after significant information known to the sheriff's office was disclosed, specifically a mine shaft around Gleeson, did defendant admit to the killings. Even then, he attempted to mitigate his own involvement and blame Brazeal.

The statement did not disclose the entire truth. In light of that already known by law enforcement authorities, and the manner and quality of defendant's

statement, his words and actions can hardly be considered cooperation with law enforcement.

FINDING: This court finds that the words and actions of defendant in assisting law enforcement officers were designed to shift responsibility and to reduce his culpability in light of the inextricability of his position. The defendant's actions and statements before and after his arrest are not mitigating circumstances.

4. UNEQUAL SENTENCE GIVEN THE CO-DEFENDANT

The co-defendant, Randy Ellis Brazeal, received a twenty year sentence on his plea to second degree murder. The state was awaiting the results of DNA testing. Brazeal's lawyers insisted on a speedy trial pursuant to the Rule 8, Rules of Criminal Procedure. The results of the tests would not have been available until long past the speedy trial deadline for Brazeal.

The disparity in the charges and therefore the possible sentences for the two defendants is a direct result of the disparity in the available evidence at the time each could have gone to trial. Lacking DNA evidence for the Brazeal case, the state elected to enter into a plea agreement.

This court notes without inferring what may yet occur, that Brazeal now seeks relief before this court on a Rule 32 Petition, and a delayed appeal. The issue of Brazeal's sentence may not yet be settled.

FINDING: Under the circumstances of this case, the unequal sentence issue is not a mitigating circumstance.

5. ALCOHOL ABUSE AND INTOXICATION

Defendant has a long history of alcohol abuse. On the night in question, he claims to have drunk heavily. The statement given to Detective Rothrock of the Cochise County Sheriff's Office displayed substantial recall and detail, and a sufficient understanding of the events at the time of the murders and his own complicity and responsibility.

FINDING: This court finds beyond a reasonable doubt that at the time of the killing, the defendant's capacity to appreciate the wrongfulness of his conduct was not significantly impaired. Alcohol abuse over an extended

period of defendant's life, and his drinking at the time of the killings are not mitigating circumstances under the facts of this case.

6. ABILITY TO BE REHABILITATED

The defendant claims he can be rehabilitated and will not be dangerous while incarcerated. This position suggests that incarceration in and of itself is a mitigating circumstance. This court finds nothing unique in the proposition that while confined in prison the defendant will seek and is amenable to rehabilitation and would be less of a danger to persons outside the prison system.

FINDING: Considering defendant's pattern of living and history of violent behavior, there is no reasonable expectation of rehabilitation. The defendant's claimed ability to be rehabilitated is not a mitigating circumstance.

7. DIFFICULTY IN EARLY YEARS AND PRIOR HOME LIFE

The defendant seeks to attribute his problems on his early years and prior home life. The evidence, at best, is inconsistent and contradictory. He claims physical abuse at the hands of his elders, yet there was little evidence of this. He claims being fatherless, and at times motherless, bears some responsibility for his conduct. This court finds nothing unique, especially impairing, or significant in these claims.

FINDING: The defendant's claimed difficulties in his early years and the conditions of his early home life are not mitigating circumstances.

8. MENTAL CONDITION AND BEHAVIOR DISORDERS

The defendant claims a chaotic childhood and a dysfunctional family, which included abuse, neglect and hyperreligiosity; an abuse of drugs at a young age; a history of psychological problems involving suicidal ideation and depression; and having experienced serious head injuries. A psychologist testified that he has difficulty with impulse control and has poor judgment.

FINDING: This court finds nothing unusual about the myriad of problems presented by defendant except in their inclusiveness. Character or personality disorders to the extent demonstrated by the evidence in this case are not mitigating factors. Having suffered head injuries and having

difficulty with impulse control sheds little light on defendant's conduct in this case. The evidence does not show defendant acted impulsively, only criminally, with evil motive. This court finds the defendant's mental condition and alleged behavior disorders are not mitigating circumstances.

9. GOOD CHARACTER OF THE DEFENDANT

The defendant cites good character as a mitigating factor in the face of alcohol abuse, a history of violence, difficulty in early years, a dysfunctional family, difficulty with impulse control, and an abusive background. Good behavior belies the other claimed mitigating circumstances.

Evidence presented on the separate sentencing hearing as to good character was effectively impeached by testimony of defendant's actions with regard to two former wives.

FINDING: This court finds there is insufficient evidence of good character, and therefore, this is not a mitigating circumstance.

10. GOOD BEHAVIOR WHILE INCARCERATED

The defendant claims good behavior while incarcerated.

FINDING: This court finds this not to be a mitigating factor.

11. LACK OF FUTURE DANGEROUSNESS IF CONFINED TO PRISON

Certainly, while confined, defendant will be less dangerous to persons not in prison.

FINDING: This court finds, however, this not a mitigating circumstance.

12. OTHER MITIGATING CIRCUMSTANCES

Considering the testimony of defendant's character, propensities and record, and how he lived and worked and related to other people, this court is unable to glean any mitigating circumstances not suggested by his counsel.

FINDING NO: There are no mitigating circumstances known to this court.

ADDITIONAL FINDINGS AND CONCLUSIONS

Additionally, this court finds:

1. The aggravating circumstances cited and as above enumerated have been established beyond a reasonable doubt.

2. No mitigating circumstances sufficiently substantial to call for leniency, by a preponderance of the evidence.

3. Considering the claimed mitigating circumstances, even if this court had found any or all of them to exist, balanced against the aggravating circumstances found to exist, they would not be sufficiently substantial to call for leniency.

4. Each of the aggravating circumstances described above within subparagraphs 6, 8 and 9 of A.R.S. § 13-703F., and each of the separate aggravating circumstances within subparagraph 6, standing alone, is sufficient to mandate the death penalty.

5. These were not felony-murder deaths. No Enmund/McDaniel findings need be made. This court nevertheless finds beyond a reasonable doubt that the defendant killed Mandy Ruth Marie Meyers and intended the killing of Mary Raylene Snyder, and the defendant contemplated the use of force in the killing of both victims and force was used.

DONE IN OPEN COURT this 14th day of July, 1992.

MATTHEW W. BOROWIEC, JUDGE

ER - 170

DECLARATION OF R.K. MCKINZEY, Ph.D.

I, Dr. R.K. McKinzey declare as follows:

1. I am a psychologist licensed to practice in the state of California. I obtained my Ph.D. in clinical psychology from St. Johns University in 1983. From 1988 to present I have been engaged in the practice of clinical psychology, assessment and therapy, including the neuropsychological assessment of adults and children. I am a member of the American Psychological Association and the National Academy of Neuropsychologists. I have been qualified as an expert witness in the California Superior Courts of Alameda, Contra Costa, Fresno, Humboldt, Lake, Los Angeles, Marin, Mendocino, Monterey, San Francisco, San Joaquin, San Mateo, Santa Clara, Solano, and Tulare Counties as well as military courts-martial. In addition, I am listed as a qualified medical examiner by the counties of Alameda and Marin, California. From 1990 through 1997 I served on the faculty (part-time) of the Center for Psychological Studies teaching Neuropsychological Anatomy and Assessment. I have published in the areas of forensic neuropsychology and the use of the Luria-Nebraska Neuropsychological Battery.

2. At the request of counsel for Richard Stokley, I met with and examined Richard Stokley on April 22, 1999, at the Arizona State Prison in Florence, Arizona, for approximately 5 hours. The purpose of my examination was to identify and rule

out general and specific cognitive deficits, including lateralization and localization of brain impairments, through standard scientifically-accepted tests. In addition to the testing, I conducted a clinical interview with Mr. Stokley about his personal history and current emotional state.

3. Prior to my examination of Mr. Stokley, I reviewed certain records related to Mr. Stokley's arrest, conviction and death sentence for the 1991 murder of two young teenage girls, including: The Arizona Supreme Court opinion; the statements given to police by Mr. Stokley and the co-defendant Brazeal; the reports of the medical examiner, Dr. Flores; the pre-sentencing report, which included the arrest and conviction record of Mr. Stokley; Mr. Stokley's school, medical and psychological records; summaries of witness testimony related to Mr. Stokley's social history; the testimony of Dr. Mayron concerning his neurological examination of Mr. Stokley in 1992; and a brief videotape of Mr. Stokley's fund-raising activities taken just prior to the subject offense, at the Elfrida, Arizona July 4th, 1991 weekend celebration.

HEAD INJURIES, SUBSTANCE ABUSE AND ORGANIC BRAIN DYSFUNCTION

4. There are a wide range of factors – both biological and environmental – that place an individual at risk for neurological impairments. The effects of such impairments (i.e., brain dysfunction) include cognitive impairments and behavioral disturbances that are permanent in nature and affect every major sphere of

functioning. Among the known causes of brain dysfunction are head injuries and trauma, as well as abuse of toxic substances, such as alcohol and drugs.

5. In Mr. Stokley's case, the medical records and related history reflect a potential for organic impairment that is staggering. Medical reports from the Bexar, Texas County Hospital document Mr. Stokley's 1982 skull-fracturing head injury which resulted in surgery and a bore hole of his left parietal skull. Medical reports from the Sierra Vista, Arizona hospital document Mr. Stokley's right-sided paralysis following a head injury in 1986, when he was thrown from a moving vehicle. Previous history contained in the file records list: A 1955 frontal head blow with loss of consciousness(LOC); a head trauma in 1964 to the back of the head from a brick; a 1972 head trauma occipitally from an iron skillet; a 1978 motorcycle accident with a posterior blow to the head; a 1980 frontal blow from a car jack with LOC; a 1984 rock climbing fall with LOC; and a 1990 head trauma from a cast-iron frying pan with LOC. Mr. Stokley reports that he suffered his last loss of consciousness injury just a short time before the offense; the mother of one of the victims helped clean up the related wound to his head. In addition to the above, at my request, Dr. Todd Flynn, who conducted a psychological evaluation of Mr. Stokley near the time of my evaluation, documented a history of no less than 27 frontal head blows, many with some loss of consciousness.

///

6. In addition to the head trauma, Mr. Stokley's history includes long-standing addiction to alcohol and significant exposure to mind altering drugs, further increasing his risk for permanent neurological impairment and brain dysfunction. Mr. Stokley's personal report of his exposure to toxic levels of such substance are corroborated by his prior misdemeanor criminal arrest history record throughout the 1980's and early 90's, as well as the 1978 psychiatric hospitalization reports from Bexar County, Texas documenting Mr. Stokley's serious chronic abuse of alcohol and drugs. These psychiatric records and later examination reports include episodes of substance-induced auditory hallucinations, alcohol related blackouts, and related LOC.

7. Mr. Stokley is thus at considerable risk for permanent neurological impairment and brain dysfunction.¹

PRIOR TESTING AND EXAMINATION

8. Prior to my examination, and before the subject criminal offense, Mr. Stokley was examined by Dr. Huntley Hoffman. Dr. Hoffman administered a Trailmaking Test (a neuropsychological screening test) in which the results of Trails

¹There are also genetic and prenatal components of neurological impairment. Mr. Stokley reported that his biological mother had frequent fits of rage with loss of control, but whether or not the mother's behavior had a neurological component is currently unknown.

A was positive for brain damage.² In addition, Dr. Hoffman reported Wechsler Memory Scale-Russell's Revision scores showing a severe verbal memory loss.³

WAIS-R scores were reported as:

WAIS-R Scores:⁴

	IQ Score	SS
Verbal IQ:	127	15
Performance IQ:	119	14
Full Scale IQ:	128	15

Verbal Subtests	Scaled Score	SS	Performance Subtests	Scaled Score	SS
Information	15	15	Picture Completion	10	10
Digital Span	14	15	Picture Arrangement	17	17
Vocabulary	16	16	Block Design	13	13
Arithmetic	11	11	Object Assembly	13	13
Comprehension	14	14	Digital Symbol	7	7
Similarities	14	14			

At my request, Dr. Flynn administered a series of neuropsychological tests on 4/20/99. A Raven Standard Matrices (a highly spatially-loaded IQ test) yielded a valid score of 82. WAIS-III scores were:

²Dr. Hoffman erroneously reported these results to be within normal limits. However, Trails A was positive, according to norms that had just become available in 1991 (Heaton, 1991), with scores of: TA=37" (SS=7, t=38), & TB=71" (SS=9, t=48).

³These were normed according to Russell (1988). Although Figure Memory is within normal limits, Verbal Memory, both Immediate and Delayed, are in the Severe range. The 71% Retained score is in the Mild to Moderate range.

⁴Dr. Hoffman presumably mistakenly reports this test as WISC-R. All t-scores are within normal limits.

WAIS-III Scores:

	IQ Score
Verbal IQ:	117
Performance IQ:	100
Full Scale IQ:	110

Verbal	Age	Performance	Age
Information	15	Picture Completion	10
Digital Span	9	Picture Arrangement	8
Vocabulary	14	Block Design	13
Arithmetic	11	Object Assembly	10
Comprehension	13	Digital Symbol	7
MR	13		

9. The Memory Assessment Scale profile⁵ yielded a Global Memory Scale standard score of 114, significantly lower than the 1991 IQ scores.⁶ The Visual Memory score (126) is significantly higher than both Verbal Memory (96) and Short Term Memory (100). The low Verbal Memory score is primarily due to difficulty with Immediate Memory of paragraphs. While Delayed Verbal memory is unimpaired, there is a striking difference between Immediate and Delayed Visual Memory.

10. Mr. Stokley was administered a neurological exam by Dr. Michael S. Mayron in 1992. Based upon his review of the documented medical history and hospital record, as well as his physical examination of Mr. Stokley, Dr. Mayron testified that Mr. Stokley suffered a severe injury to the left side of his brain which

⁵Using age and education norms.

⁶Technical note: The GMS cannot be compared to WAIS-III scores.

caused permanent moderate to severe brain damage. Dr. Mayron's testimony was limited in clarifying the behavior and cognitive effects of this injury due to the lack of neuropsychological testing.

TEST RESULTS

11. In addition to the testing done at my request by Dr. Flynn (the Wechsler Adult Intelligence Scale [WAIS-III], Raven Standard Matrices [RSM], and Memory Assessment Scale [MAS]), I administered the Luria-Nebraska Neuropsychological Battery (LNNB) and the Test of Malingered Memory (TOMM). These tests are designed to assess brain-behavior functioning and identify specific areas of the brain where organic damage has been sustained.

12. The Luria-Nebraska Neuropsychological Battery profile is valid and positive for serious brain damage, and clearly demonstrates the results of the coup to the left hemisphere of the brain and contracoup to the right hemisphere. A third pattern of LNNB scores demonstrates damage to the frontal lobe portion of the brain. These frontal deficits primarily appear in change of set, sequencing, and concentration tasks, which produce confusion and perseveration. The rest of the left hemisphere is intact, with speech, academics and abstraction unimpaired. Two of Mr. Stokley's right fingers are sensitive only to gross pressure. He also reports his leg and foot have areas that are dead to touch. The pattern of bilateral damage is

consistent with the Raven and MAS scores.⁷

13. In any testing of this kind it is important to address possible malingering. The TOMM and the RSM were both negative for malingering.⁸ Mr. Stokley took the tests very seriously, applying himself to the tasks at hand and making every effort to do well. His performance was consistent with the history and testing, further ruling out malingering.

14. The types of neurological trauma described above, particularly the repeated head trauma, were more than capable of producing the types of permanent organic impairments as evidenced during the neuropsychological testing. The psychological and medical literature is replete with studies which demonstrate that repeated traumas of this nature will produce permanent brain impairments like those seen in Mr. Stokley.

EFFECTS OF TRAUMATIC FRONTAL LOBE BRAIN INJURY

15. The records documenting Mr. Stokley's symptomology over the decades strongly suggest that his disabilities are both organic and psychiatric: I comment

⁷The test results include normal IQ scores: Such IQ tests cannot be used to rule out brain injury. Many brain injury survivors maintain an IQ near their pre-morbid levels. This is because IQ tests lack the comprehensive cross-section of brain function tasks needed to demonstrate Mr. Stokley's brain injuries. Furthermore, we lack evidence of his IQ test results prior to his suffering the traumatic head and toxic injuries, although Mr. Stokley's 1964 school records reflect a 95 percentile ranking on his cumulative standard test scores. Were Mr. Stokley's IQ scores significantly higher prior to his injuries, his current test scores might demonstrate brain injury, but they are lacking and accordingly no reliable conclusion can be drawn from the existing IQ test scores.

⁸The TOMM was given at the beginning of the battery, giving it 98% accuracy. The LNNB malingering formula's as heavy weighting of left hemisphere tactile strip items produced a false positive.

here primarily on the organic deficits. It is my understanding that Dr. Flynn is continuing to evaluate Mr. Stokley and that he will integrate my findings in order to fully express an opinion with respect to how Mr. Stokley's organic and psychiatric impairments *together* affected his behavior at the time of the offense. My ultimate opinions in this case therefore await completion of Dr. Flynn's evaluation and findings.

16. However, I can say several definitive things about the nature of Mr. Stokley's brain injuries and how such injuries have been documented to affect human judgment and behavior. Numerous psychological studies confirm that frontal lobe brain deficits, such as those evident in Mr. Stokley, are and have long been associated with impulsivity, impaired judgment, disinhibition, and sometimes uncontrollable outbursts of aggression or rage grossly out of proportion to any precipitating psycho-social stressor.⁹

17. Mr. Stokley's pre-offense behavior is all consistent with the organic deficits evident from my examination of Mr. Stokley. This behavior includes: sudden

⁹e.g., Pincus, J. (1993). Neurologist's role in understanding violence. Archives of Neurology, 50 (8), 867-871.

Heinrichs, R.W. (1989). Frontal cerebral lesions and violent incidents in chronic neuropsychiatric patients. Biological Psychiatry, 25, 174-178.

Kandel, E., & Freed, D. (1989). Frontal-lobe dysfunction and antisocial behavior: a review. Journal of Clinical Psychology, 45, 404-413.

Bryant, E.T., Scott, M.L., Golden, C.J., & Tori, C.D. (1984). Neuropsychological deficits, learning disability, and violent behavior. Journal of Counseling and Clinical Psychology, 52, 323-324.

Rosenbaum, A., & Hoge, S.K. (1989). Head injury and marital aggression. American Journal of Psychiatry, 146, 1048-1051.

Rosenbaum, A., Hoge, S.K., Adelman, S.A., Warnken, W.J., Fletcher, K.E., & Kane, R.L. (1994). Head injury in partner-abusive men. Journal of Consulting and Clinical Psychology, 62 (6), 1187-1193.

aggressive outbursts described by his ex-spouses; affective instability; abuse of alcohol; poor social judgment; and his self-described problem controlling violent impulses. These behavior patterns are confirmed in records that date back to 1978, and continue thereafter.

18. Clearly, these frontal lobe deficits have resulted in character traits of organic origin which cause Mr. Stokley to act reflexively rather than reflectively. Such deficits negate the mental state of premeditation and deliberation necessary to prove the elements of first degree murder. Further, such deficits can swiftly diminish mental capacity, significantly impairing a person's ability to appreciate the wrongfulness of their conduct or to conform their conduct to the requirements of the law, as defined in A.R.S. § 13-703(G)(1). It is my opinion, based upon the brain dysfunction alone (even without consideration of Mr. Stokley's other psychiatric impairments) that at the time of the offense, he acted without premeditation, and was significantly impaired in his ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. The facts specific to the offense reflect that Mr. Stokley had no expressed interest in sexually molesting children on the night of the offense or otherwise; his sole motivation, as explained by both Mr. Stokley and his co-defendant was to take a bath in a water tank located in a remote rural area. The circumstances giving rise to the offense mirror the type of unplanned, over-reactive and highly explosive episodes associated with Mr. Stokley's frontal lobe damage.

19. Finally, it is my opinion that a full understanding of Mr. Stokley's brain injuries is critical to an accurate and reliable understanding of why and how Mr. Stokley became involved in the instant offenses, and is critical to the presentation of factors that weigh into mitigating the sentence.

I declare that the above is true and correct to the best of my knowledge and that this Declaration was executed this 24 day of January, 2000.

R.K. McKinzy, Ph.D.
Dr. R.K. McKinzey

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA,)
)
Plaintiff,)
)
vs.) No. CR91-00284A
)
RICHARD DALE STOKLEY,) Pre-sentence Hearing
)
Defendant.)
)
)
)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES: Mr. Vincent Festa
DEPUTY COUNTY ATTORNEY
For the State

Mr. Robert Arentz
Attorney at Law
Mr. Jeffrey Siirtola
DEPUTY PUBLIC DEFENDER
For the Defendant

Be it remember that on the 17th day of June,
1992, the above-entitled matter came on for hearing
before The Honorable Matthew W. Borowiec, Judge of
the Superior Court, Division I.



1 I do not have documentation at
2 my fingertips to answer you a definite yes or
3 no. However, based on my experience, which does
4 include reading of neurological textbooks, specialty
5 textbooks in head injury, and my practice experience,
6 the answer is yes.

7 You see both simultaneously.

8 Q Okay. The tests that you did in
9 terms of the examination that you have recorded
10 on the second page of your report, you have some
11 objective -- you use a pin that you use, you use a
12 little hammer you described to get some reflex action.

13 A I use a big hammer.

14 Q A big hammer.

15 The other, the behavioral aspects --
16 is there an objective way to test those?

17 A Oh -- objective -- humm -- it's
18 difficult with the word "objective."

19 Q When you take that big hammer
20 and you tap somebody on the knee, you see their
21 knee jerk. That's to me objective. We can see
22 their knee jerk.

23 A Right.

24 Q How do you assess behavioral
25 changes?

1 A Behavioral changes really is
2 through observation of the patient in the exam
3 room with you or by referral to a psychologist
4 or a neuropsychologist, someone who is trained
5 in doing testing of brain function, which includes
6 behavior.

7 Q Would it be -- in a case like this,
8 the patient reports to you these behavioral changes?

9 A No. These are observed by you, the
10 examiner, and if you are the psychologist or
11 neuropsychologist doing the testing, then the
12 patient's responses to certain questions like the
13 famous ink blot test.

14 Q The Rorschach?

15 A The Rorschach. That is one of many.
16 The patient's response to that -- he may not know it,
17 but he is giving you an insight into his behavior,
18 his personality, his cognition.

19 Q Did you do any of that?

20 A No, I did not do any of that.
21 That is not within the realm of my specialty
22 other than to observe the patient's behavior and
23 his response to me and to document that if I feel
24 it's significant.

25 Q Did you see anything in his behavior

1 during the course of the examination that would
2 indicate that there were behavioral problems
3 resulting from the parietal injury?

4 A Not during my examination.

5 Q And again, you weren't asked to
6 do or refer him to somebody else to do the Rorschach
7 or some other tests like that strictly for
8 personality or behavioral aspects?

9 A That's correct.

10 Q Besides that, I notice that on
11 your report it's a diplomate of the American
12 Board of Psychiatry and Neurology.

13 Besides that Rorschach test,
14 what other kinds of tests would you normally
15 ask a psychiatrist or a testing psychologist
16 to perform to make those behavioral determinations?

17 A I would tell them to do the
18 whole battery because since I trained in doing
19 those tests, which was in my neurological
20 internship, they have added a few more.

21 I would ask certainly for an MMPI,
22 which I believe you are familiar with, and a
23 Halstead Reitan. Those last two names are famous
24 coming from Tucson and they are very well known
25 for head injury.

ER - 1356

COMMITTING OFFENSES

Because this case consisted of a jury trial and the Court heard all of the testimony, I will only give a brief summary of the details of the case. All of the offenses for which Mr. Stokley was convicted occurred on the evening of July 8, 1991. On this evening the Cochise County Sheriff's Department was notified by the mothers of the two victims that they were missing. The offense occurred in Elfrida, Arizona where the two girls, both age thirteen, were camping out in a tent located near a local gas station. Witnesses informed the sheriff's deputies that the two victims had been seen talking to Mr. Brazeal at approximately 1:30 a.m. near the tent site. Shortly afterwards, the two girls left the tent to go to the bathroom. This was the last time they were seen alive. Earlier that evening the girls had been observed talking to Mr. Brazeal and Mr. Stokley. Witnesses described Mr. Brazeal as being "real drunk" and Mr. Stokley as a "little drunk".

According to Mr. Brazeal, he and Mr. Stokley left the gas station with the two victims after the girls waved them down and asked to go riding with them. Mr. Brazeal knew one of the victim's because he had previously dated her sister. Mr. Brazeal has claimed that Mr. Stokley told him where to drive after they picked up the two girls. A short while later, per Mr. Brazeal's statement, Mr. Stokley left Mr. Brazeal in the front seat and the girls in the back seat of the car while he went to a nearby water tank to take a shower. When Mr. Stokley returned, he threw his clothes in the front seat of the car and he got in the back of the car with the girls and began harassing them by grabbing and touching them. Mr. Brazeal claims that then Mr. Stokley pulled out a knife and told him that he should keep his mouth shut or he would do to him what he was going to do to the girls. Mr. Brazeal also claims that Mr. Stokley then took the keys to the car and stated that nobody was going anywhere after the girls asked to be taken home. Mr. Brazeal stated that Mr. Stokley began taking the girl's clothes off and that they were fighting back. He said that Mr. Stokley then struck the girls and stabbed one of the girls in the eye. He pulled the other girl out of the car and threw her on the hood of the car where he ripped off her clothing, had sex with her, and forced her to perform oral sex on him. According to Mr. Brazeal, Mr. Stokley then choked her, stabbed her in both of her eyes, and then threw her on the ground before attacking the second girl. Mr. Brazeal then stated that once he finished attacking and killing the second child, Mr. Stokley told him to get out of the car and help him dump the bodies in the mine shaft.

Mr. Brazeal stated that while the two girls were being raped and murdered, he sat in the car and smoked a cigarette. He claimed that he was too scared to do anything to stop Mr. Stokley and that he did not have sex with either victim nor did he assault or kill either victim. Mr. Brazeal claims that after they had disposed of the bodies, Mr. Stokley made him drive north to Tucson and then Picacho Peak. He said they stopped in Picacho Peak and he left Mr. Stokley and drove to Chandler where he called first his sister and then his father. Meanwhile Mr. Stokley called a friend in Cochise County and asked to be picked up near Tucson because Mr. Brazeal had left him stranded.

Mr. Stokley's version of the events differs greatly from that of Mr. Brazeal. Mr. Stokley admits his participation in the crimes, but stated that Mr. Brazeal was equally involved in the sexual molestation and murders. He stated that when he returned from his bath, Mr. Brazeal had already raped the victims and that it was Mr. Brazeal's idea to kill the victims because they were going to tell on him. Mr. Stokley stated that Mr. Brazeal grabbed one of the girls and he grabbed the other one and that they each killed the respective victims and then threw the bodies down the mine shaft. The police investigation showed that there were prints of one of the victim's buttock on the hood of the car and a right hand and left finger prints were found on the sides of the buttock's print. The latent prints were found to belong to Mr. Brazeal not to Mr. Stokley. Once both Mr. Brazeal and Mr. Stokley were arrested, it was Mr. Stokley not Mr. Brazeal who helped law enforcement officers locate the bodies of the victims. Furthermore, a Hypnosis Evaluation was completed on Mr. Stokley by Jerry R. Day, a licensed psychologist. (See attached report.) This evaluation indicates that Mr. Stokley is telling the truth regarding his and Mr. Brazeal's involvement in the current offenses.

Mr. Stokley showed emotion when discussing his feelings about the murder. He stated that the murders were not premeditated. He stated that he did not understand why he became involved in it or how it happened. Although he remembered parts of that evening, there are still parts that are very cloudy in his memory. He also stated that the murders have been a cause of a great amount of torment for him and that he sincerely apologizes to the victim's families.

PRIOR CRIMINAL HISTORY

These offenses represent the first time that Mr. Stokley has been convicted of felony offenses. Although he has had a history of problems with the law, they primarily centered on his drinking and various domestic disputes. He has never before been convicted of felonies.

SOCIAL HISTORY

Mr. Stokley was born on September 9, 1952 in San Antonio, Texas. Mr. Stokley never knew his birth father and this bothered him for many years particularly during the time he was a teenager. He was delivered by his maternal grandmother at home. His mother married his stepfather, Mr. Stokley, when he was two years old. His stepfather was in the Air Force at the time, but after discharge worked as a television repairman. Mr. Stokley has a half-sister from his mother's marriage to Mr. Stokley senior. His mother subsequently divorced his stepfather when Mr. Stokley was approximately

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA,)
)
Plaintiff,)
)
vs.) No. CR91-00284A
)
RICHARD DALE STOKLEY,) Volume IX
)
Defendant.)
)

REPORTER'S TRANSCRIPT OF PROCEEDINGS (ON APPEAL)
Volume IX

APPEARANCES: Mr. Chris Roll
Mr. Vincent Festa
DEPUTY COUNTY ATTORNEYS
For the State

Mr. G. Philip Maxey
DEPUTY LEGAL DEFENDER
Mr. Robert Arentz
Attorney at Law
For the Defendant

Be it remembered that on the 24th day of
March, 1992, the above-entitled matter came on for
hearing before The Honorable Matthew W. Borowiec,
Judge of the Superior Court, Division I.

ER - 1945.12

MERLE RHODES BRIEFER
COURT REPORTER
COCHISE COUNTY, DIVISION I
DRAWER C7
BISBEE, ARIZONA
439.5471

1 DNA bands that this dark heavy concentration
2 of DNA is undoubtedly the DNA matching Stokley.

3 Q Now, if we could kind of summarize
4 here as to the top two items here on this chart,
5 which is state's exhibit 83.

6 It's indicated you have matched
7 Stokley with all five probes on both 200A and
8 200B; is that correct?

9 A That's correct.

10 Q And that was a strong match with
11 lots of DNA and very consistent?

12 A That's correct.

13 Q And then you also indicated there
14 was a match for two probes for Brazeal with two
15 of those samples also?

16 A There were two very faint bands with
17 two probes that matched Brazeal.

18 Q Okay. Now, are your results then
19 consistent with the results you would expect if
20 that semen stain was a deposit made up primarily
21 of Stokley's semen with a small trace of Randy
22 Brazeal's semen?

23 Are your results consistent with
24 what you would expect if you tested a sample like
25 that?

ER - 1945.13

1 A Yes, they are.

2 Q Let's go on to the next items here
3 if we could.

4 And I believe your next autorad
5 will assist us. That should be state's exhibit 78.

6 A 78, correct.

7 Q Now, again, on this, we are looking
8 at in lanes basically 4, 5, and 6 from the left,
9 we are looking at 9-15, which is the blood sample
10 from Mandy Meyers, T198A, which is the blood sample
11 from Randy Brazeal, and T199A, which is the blood
12 sample from Richard Stokley; is that correct?

13 A That's correct.

14 Q Okay. And can you tell us what we
15 see in the next lanes over to the right?

16 A Okay. The first lane to consider
17 is this one marked 9-10AM. That's the male fraction
18 from the vaginal swab from Mandy Meyers.

19 Q That's the third item listed here
20 on state's exhibit 83?

21 A Yes. In that we see a number of
22 bands -- not just one or two bands -- indicating
23 we may have a mixture of DNA from more than one
24 individual in this sample.

25 And also in this particular sample,

ER - 1945.14

1 which matches Randy Brazeal.

2 Q Again, are these results
3 consistent with what you would expect if
4 you had some cells from the victim, Mandy
5 Meyers, some DNA from her, along with a large
6 amount of DNA from the semen of Stokley and
7 a small amount of semen of Brazeal mixed together?

8 Would you expect to find a result
9 like you have gotten here in lane 9-10AM?

10 A Yes. This result is consistent
11 with seeing a combination of DNA from these
12 three individuals. It doesn't mean it's not
13 possible that there could be other three individuals
14 in the words that in combination might have DNA
15 like this, but it is consistent with these three
16 individuals and would be an unlikely circumstance
17 that any other three individuals just by chance
18 could match all these bands in this situation.

19 Q Would you like to go ahead and
20 show us the next autorad, if you would.

21 No -- wait there -- would you go
22 ahead and put that back up.

23 A Would you like me to talk about
24 the other sample?

25 Q That's right. We also have 206F,

ER - 1945.15

1 the vaginal swab there from Mandy Meyers, the
2 9-10A, the male fraction.

3 A Okay. This is another probing with
4 MSl, the vaginal swab is this lane, male fraction,
5 and again, we can see Meyers's DNA bands which
6 are there and there, and we can see Stokley's
7 bands, and you can see Brazeal's very faint lower
8 band here that matches his lower band. The upper
9 band would be -- because it's faint and so close
10 to the victim's, it would be here if we could see
11 it, but the larger band from the victim's DNA would
12 cover it.

13 So again, I could still conclude that
14 this band pattern is consistent with a combination
15 of DNA from all three of these individuals.

16 Q With respect to the mixed stain from
17 Brazeal's underwear, 206F, SS1 --

18 A Yes. Again, we can see the DNA
19 from Meyers, the bands that line up, and you can
20 see Brazeal's lower band which is that one.

21 His upper band again is very close
22 to this large band from Meyers. I don't know if
23 you can really distinguish it there projected on
24 the screen.

25 Q Let's go to your next autorad.

ER - 1945.16

1 is that correct?

2 A That's correct.

3 Q We have not shown those?

4 A That's correct.

5 Q Now, you have got 9-10A, the
6 male fraction of the vaginal swab from Mandy
7 Meyers.

8 Can you tell us what your results
9 are and why you have indicated them as such?

10 A Okay. The results are with all
11 five probes that the patterns I detected on the
12 autorads were consistent with a combination of
13 DNA from Meyers, Brazeal and Stokley.

14 Q And that the bands' intensity
15 indicated there was much greater quantity of
16 DNA consistent with Stokley than with Brazeal?

17 A The bands were more intense, those
18 with Stokley's than the bands from Brazeal.

19 Q And for 206F, SS1, that mixed semen
20 and bloodstain came from the underwear of Brazeal?

21 A Again, with all five probes, the
22 band patterns detected were consistent with a
23 combination of DNA from both Brazeal and Meyers.

24 Q And there is another item here,
25 206F, BS2, which is a bloodstain from Brazeal's

ER - 1945.17

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA,)
)
Plaintiff,)
)
vs.) No. CR91-00284A
)
RICHARD DALE STOKLEY,) Volume VIII
)
Defendant.)
)
)
)
)

REPORTER'S TRANSCRIPT OF PROCEEDINGS (ON APPEAL)
Volume VIII

APPEARANCES: Mr. Chris Roll
Mr. Vincent Festa
DEPUTY COUNTY ATTORNEYS
For the State

Mr. G. Philip Maxey
DEPUTY LEGAL DEFENDER
Mr. Robert Arentz
Attorney at Law
For the Defendant

Be it remembered that on the 20th day of
March, 1992, the above-entitled matter came on for
hearing before The Honorable Matthew W. Borowiec,
Judge of the Superior Court, Division I.

ER - 1945.18

MERLE RHODES BRIEFER
COURT REPORTER
COCHISE COUNTY, DIVISION I
DRAWER CT
BISBEE, ARIZONA

1 impressions from Mr. Brazeal in comparison to
2 the latents you had previously lifted?

3 A I took the latents and compared
4 the individual points of identification in the
5 latents to the inked fingerprints of both subjects,
6 Mr. Brazeal and Mr. Stokley, and tried to come up
7 with a match.

8 Q Were you able to match any of
9 the latents prints you took from the hood of
10 the car to Mr. Brazeal?

11 A Yes, I was.

12 Q Approximately how many were you
13 able to identify?

14 A Approximately 15 latents.

15 Q Did you go through the same
16 process with the inked impressions from Mr. Stokley?

17 A Yes, I did.

18 Q Were you able to match Mr. Stokley's
19 palmprints or fingerprints to any of the latent
20 lifts you had taken off of the hood of the car?

21 A No, I wasn't.

22 Q Do you have a recollection of
23 where Mr. Brazeal's prints would have appeared
24 in connection with state's exhibit 50?

25 A Yes, I do. There were many

ER - 1945.19

1 identifications to Mr. Brazeal. I matched his
2 prints all around the vehicle on all sides and
3 also specifically in areas right in here and right
4 in here.

5 Q Let me ask you if you take this
6 grease pencil and circle the area, not around
7 the hood, because that's pretty self-explanatory,
8 but for the record, show where these other identifiable
9 prints of Mr. Brazeal were.

10 You have circled two areas there.
11 One is approximately in the lower half in the middle
12 of the hood?

13 A Yes.

14 Q That would be the half closest
15 to the windshield?

16 A Yes.

17 Q And in the upper portion of the
18 exhibit, which would be the front portion of the
19 hood, again another area where you identified these
20 prints?

21 A This area here was identified and
22 also this area here, latents were identified.

23 Q Latents, plural?

24 A In this area, I believe there was
25 more than one. In this area here, I believe there

ER - 1945.20

1 was one.

2 Q Let's label this area as A, if
3 you would, and let's talk about what prints you
4 found of Mr. Brazeal there.

5 Q Could you identify them for us
6 as to which hand and which finger.

7 A In this area right here, I was
8 able to identify the left hand or fingers of
9 Mr. Brazeal and they were also identified as
10 such where they were pointing in this direction.

11 Q Why don't you indicate with an
12 arrow for us in the approximate area of the
13 circle A which direction the fingers you identified
14 would have been pointing.

15 Q That was of the left hand?

16 A Yes, left hand.

17 Q Do you know -- let's identify
18 the other area as B.

19 A Okay.

20 Q And you indicated earlier in
21 your testimony you found several latents in
22 that area?

23 A Yes, I did.

24 Q Will you tell us what hand you
25 could identify those two from Mr. Brazeal?

ER - 1945.21

1 A Yes. I identified the right hand
2 or fingers to Mr. Brazeal in this area here in
3 the direction which would be pointing this way.

4 Q Why don't you indicate that.

5 A In that general direction.

6 Q Let me show you what has been
7 marked now in evidence, I believe, state's
8 exhibit 51 which you said is a blow-up.

9 Could you show us the approximate
10 area on that of A and B.

11 A This area up here would be A.

12 Q Circle that again and make it with an A.
13 Where is B? All right.

14 Now, an identifiable area here,
15 I guess, I should -- for purposes of what I am
16 talking about, indicate on the diagram that area
17 right there. Okay?

18 A Okay.

19 Q Did you examine that area?

20 A Yes, I did. That whole darkened
21 area is a result of my fingerprint powder.

22 Q I assume that's much larger than
23 a finger?

24 A Yes, it is.

25 Q After you developed that, did

ER - 1945.22

1 you attempt to lift that off of there? I
2 don't see any of those squares.

3 A No. I did not.
4 I left it there and photographed it.

5 Q After you observed this, did
6 you have in your mind an opinion as to what
7 you were looking at there?

8 A Yes, I did.

9 Q What was that?

10 A In my opinion, I thought it
11 was a human buttocks print.

12 Q Can you tell us why you were
13 of that opinion?

14 A Generally because of the shape
15 of it. Also within the area itself, you could
16 see pore structure which makes me believe it was
17 a skin contact.

18 Also after I processed this print
19 at the lab, I attempted to place other buttocks
20 prints on it and to process it and see if I
21 could come up with similar results, which I did.

22 Q You actually had some people --

23 A I had some unwilling volunteers.'

24 Q You then developed it?

25 A Yes.

ER - 1945.23

1 A Yes.

2 Q The one on the right is the
3 stabbing that was actually very severe?

4 A Yes.

5 Q When we look at the stabbing
6 injury to Mandy Meyers, that injury likely
7 occurred when someone was either unconscious
8 or dead?

9 A Yes.

10 Q And for that reason or --
11 the reason for that is that it's very difficult
12 for someone to put an object, especially a sharp
13 object, into someone's eyes without a natural
14 reaction, blinking or moving.

15 A Yes.

16 Q And these were a straight-in
17 stab?

18 A Yes.

19 Q Then we would say if she was
20 unconscious during this time, that she would
21 not have known the injury or that injury was
22 occurring?

23 A That's possible.

24 Q Now, the injury applied to the
25 neck itself -- not only was the pattern of an

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COCHISE COUNTY, DIVISION I
DRAWER CT
BISBEE, ARIZONA
432-5471

ER - 1945.24

1 object different, but there was more force
2 applied and more pressure applied that caused
3 more extensive injuries?

4 A Yes.

5 Q If you were to look at that along
6 with the patterns established with the cut marks
7 and the pattern established with the objects,
8 could you say those injuries could have been
9 caused by two different assailants?

10 A That's possible.

11 Q There may be a different methodology
12 used by the assailants, different strengths,
13 different pressure put on each girl; is that right?

14 A Yes.

15 Q Because of the nature of your
16 profession, you really have to recreate from
17 nothing more than -- especially in this kind of
18 case -- than your scientific expertise and your
19 experience; is that right?

20 A Yes.

21 Q All you could tell this jury
22 is that there is a possibility that there are
23 two assailants based on two different patterns;
24 is that right?

25 A It's possible. /

ER - 1945.25

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432-5471

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA,)
)
Plaintiff,)
)
vs.) No. CR91-00284A
)
RICHARD DALE STOKLEY,) Volume VII
)
Defendant.)
)

REPORTER'S TRANSCRIPT OF PROCEEDINGS (ON APPEAL)

APPEARANCES: Mr. Chris Roll
Mr. Vincent Festa
DEPUTY COUNTY ATTORNEYS
For the State

Mr. G. Philip Maxey
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Mr. Robert Arentz
Attorney at Law
For the Defendant

Be it remembered that on the 19th day of March,
1992, the above-entitled matter came on for hearing
before The Honorable Matthew W. Borowiec, Judge of
the Superior Court, Division I.

1 A Yes.

2 Q Please return to your seat.

3 Thank you.

4 Where you have marked those "X's"
5 could you tell us which person was closer to the
6 driver's side door?

7 Was it Mandy or Mary?

8 A I don't remember.

9 Q Okay. Do you recall any kind of
10 conversation going on?

11 A There was a conversation, but I
12 didn't hear.

13 Q Can you tell us who the conversation
14 was going on between?

15 A Randy and both of the girls.

16 Q All right. Do you have any idea what
17 time this would have been?

18 A A little bit after dark.

19 Q Now, earlier, you filled out a
20 statement to law enforcement officers.

21 Do you recall making a statement?

22 A Yes.

23 Q You had a time in that statement.

24 Do you remember what time you wrote
25 in there?

ER - 1945.27

1 A Outside of town.

2 Q Were you there in Elfrida back in
3 July of 1991?

4 A Yes, I was.

5 Q Did you attend a Fourth of July
6 celebration that occurred in the town?

7 A Yes, I did.

8 Q Were you at the -- at the site
9 of that celebration on the evening of Sunday,
10 the 7th of July?

11 A Yes, I was.

12 Q What were you doing there
13 at the celebration that night?

14 A Having fun.

15 Q Did you have any plans for the
16 evening?

17 A No, I didn't.

18 Q Did you ultimately become involved
19 in a campout and sleep-over at the site of the
20 festivities?

21 A Yes, I did.

22 Q Were there some other kids
23 about your age or younger than you that were
24 there also?

25 A Yes.

ER - 1945.28

1 Q Can you name those people for us?
2 A Violet, Cory, Ali, Violet's brother,
3 and sister.
4 Q Violet James?
5 A Yes.
6 Q Would Cory be Cory Rutherford?
7 A Yes.
8 Q Would Ali be Ali Pace?
9 A Yes.
10 Q Was Mary Snyder there?
11 A Yes.
12 Q How about Mandy Meyers?
13 A Yes.
14 Q Did you know Mandy Meyers and
15 Mary Snyder?
16 A Yes, I did.
17 Q How long had you known Mary Snyder?
18 A About a year.
19 Q And how long had you known Mandy
20 Meyers?
21 A Same, a year.
22 Q Now, during that evening --
23 well, ultimately, where did you end up sleeping
24 that evening?
25 A In the teepee.

ER - 1945.29

1 A Yes.

2 Q What did he tell you?

3 A Not to be throwing rocks because
4 they might hit little kids.

5 Q Is that the only time you talked
6 with Stokley?

7 A Yes.

8 Q Did you ever talk with Randy Brazeal?

9 A Yes.

10 Q At some point in time were the
11 boys separated from the girls for sleeping
12 arrangements?

13 A Yes.

14 Q Were you a part of that?

15 A No.

16 Q Where were you at at that time?

17 A I was in the teepee.

18 Q You were already laying down?

19 A Yes.

20 Q So you didn't see what happened
21 during that separation of the boys from the girls?

22 A No.

23 Q Did anyone come into the teepee
24 while you were there -- Randy Brazeal or Richard
25 Stokley?

ER - 1945.30

1 A Randy did.

2 Q And do you have any idea what time
3 that was?

4 A No.

5 Q Was it early or late in the evening?

6 A It was late.

7 Q Was it before or after the boys
8 had been separated from the girls?

9 A It was after.

10 Q What happened when he came into
11 the teepee?

12 A He was talking about the vagina
13 of a woman, Randy was.

14 Q Was that the term he used?

15 A No.

16 Q What term did he use?

17 A Pussy.

18 Q Do you recall what type of
19 statements he was making?

20 A He was asking our age and name
21 and he was saying: I like pussy. Don't be
22 scared to like it.

23 Q Who was present at that time,
24 other than yourself and Randy Brazeal?

25 A It was Mindy, Cory, Ali --

ER - 1945.31

1 who was left there in the tent?

2 A Violet, Mary and Mandy.

3 Q You went to the teepee then; is
4 that right?

5 A Yes.

6 Q Did you have any more conversation
7 with Randy that evening?

8 A Yes.

9 Q What was that?

10 A He asked us our age and then he said
11 that he liked pussy.

12 Q Where did that happen?

13 A In the teepee.

14 Q That was after you had been
15 moved from the tent?

16 A Yes.

17 Q Did you have any conversation with
18 Richard Stokley during that period of time?

19 A No.

20 Q Did you have any conversation
21 with him prior to -- on that evening prior to
22 your moving from the tent to the teepee?

23 A No.

24 Q How was Randy Brazeal acting when you --
25 like when he talked to you that evening?

ER - 1945.32

1 Q What kind of car did he pull up in?

2 A I don't remember. It was after dark.

3 Q What did he do when he got there?

4 A Well at first, he just stayed in
5 the car. And then after a while, he got out,
6 started talking to J.R. and Stokley.

7 Q Where were they talking at?

8 A At the tables.

9 Q What were they doing? Were they
10 doing any drinking?

11 A Randy Brazeal -- I saw he had some
12 kind of alcohol. I don't remember what it was.

13 Q How about Richard Stokley? Was he
14 drinking?

15 A I don't recall.

16 Q Were either of them acting
17 unusual or -- at that time?

18 A Well, Randy Brazeal was saying
19 something to my cousin. And after we had changed
20 tents to go to sleep in, Randy came in there and
21 started talking real explicit about things.

22 Q What did he say?

23 A He was saying how he liked pussy,
24 stuff like that. I couldn't understand a lot
25 of his words because he was drunk.

ER - 1945.33

1 Q Did you ever see Mary or Mandy leave
2 the area where they were eating watermelon and
3 go off to talk to one of those individuals?

4 A I take that back. Randy was in the
5 car at the time because I remember Mandy and Mary
6 went to talk to them at the car.

7 Q Were you in a position you could hear
8 anything going on?

9 A No.

10 Q Can you describe for me how long
11 the conversation might have been?

12 A It was only for about a minute or two.

13 Q Who did it seem to be between?

14 A It seemed between Mandy and Randy.

15 MR. MAXEY: Thank you. Nothing further.

16 THE COURT: Redirect?

17 MR. ROLL: No further questions, Your Honor.

18 THE COURT: Mr. Pace, you may step down.

19 You are excused. You are free to go.

20 Counsel, we are close to the recess.

21 Let's recess for ten minutes.

22 The admonitions previously given
23 still apply, ladies and gentlemen.

24

25

(Recess taken.)

ER - 1945.34

1 Q Do you know who that was?

2 A Randy.

3 Q How do you know it was Randy?

4 A Because Mary told me, because I
5 didn't know who it was.

6 Q Did Mary know Randy?

7 A Yeah.

8 Q Did Mandy know Randy?

9 A Yes.

10 Q Do you know how Mandy knew Randy?

11 A Yes.

12 Q How was that?

13 A Randy had gone out with Mandy's
14 older sister.

15 Q What is her name?

16 A Nikki.

17 Q Nikki Meyers?

18 A Yes.

19 Q What kind -- what happened when he
20 came to the tent?

21 A He was talking to them and then
22 he left.

23 Q Did he come inside the tent?

24 A No.

25 Q How did he talk to them?

ER - 1945.35

1 A He stuck his head under the tent
2 door.
3 Q And who talked with him?
4 A Mandy and Mary.
5 Q Did you talk to him?
6 A No.
7 Q Do you know what was said?
8 A No.
9 Q Could you understand what was
10 being said?
11 A No.
12 Q How long between that conversation
13 was it before Mandy and Mary decided to go to the
14 restroom?
15 A Maybe about an hour.
16 Q Quite some time?
17 A Yes.
18 Q Was there any particular topic
19 of conversation between the three of you from
20 that time when he talked to them until the time
21 they went to the restroom?
22 A I would rather not say.
23 Q Do you consider it personal?
24 A Yes.
25 Q Who was involved in that conversation?

ER - 1945.36

1 A Mandy, Mary and I.

2 Q Were you talking about boys,
3 things like that?

4 Was any particular boy's name
5 mentioned in that conversation?

6 A No.

7 Q Anything else other than that type
8 of conversation?

9 A No.

10 Q Now, you stated that when they
11 indicated they were going to the restroom, did
12 they tell you anything other than they were going
13 to go to the restroom?

14 A No.

15 Q Were you already laying down at
16 that time?

17 A Yes.

18 Q How long was it before you dozed off?
19 You said you went to sleep?

20 A Yes.

21 Q How long did that take?

22 A About ten minutes.

23 Q And before you went to sleep,
24 they had not returned?

25 A No.

ER - 1945.37

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA,)
)
Plaintiff,)
)
vs.)
)
RICHARD DALE STOKLEY,)
)
Defendant.)
_____)

No. CR91-00284(A)

Volume VI

REPORTER'S TRANSCRIPT OF PROCEEDINGS (ON APPEAL)

APPEARANCES: Mr. Chris Roll
Mr. Vincent Festa
DEPUTY COUNTY ATTORNEYS
For the State

Mr. Philip Maxey
LEGAL DEFENDER
Mr. Robert Arentz
Attorney at Law
For the Defendant

COPY

Be it remembered that on the 18th day of March,
1992, the above-entitled matter came on for hearing
before The Honorable Matthew W. Borowiec, Judge of
the Superior Court, Division I.

1 And a little past there, we would be turning up a
2 little trail towards the mine.

3 Q Did you drive toward the area of
4 the mine shaft?

5 A He warned me I would have to look out
6 for cows. They would come out and hit you. And
7 the mine was located by a water tank that was up there.

8 And as I continued on, I saw the cows.
9 I saw the water tank and drive through the cattle
10 pens up toward the mine.

11 Q Did he describe that area before
12 you went into it?

13 A Yes, he did.

14 Q Was his description accurate?

15 A Yes, it was.

16 Q Once you got to the area of the
17 mine shaft, did you have any communications with
18 Richard Stokley?

19 A Once I drove through the pens, I
20 could see that the mine shaft to the left was
21 covered with material.

22 As we -- I started going by there to
23 make sure I had plenty of room for everyone to get out.

24 He told me: Stop. It's right there --
25 onto our left. Noticing left, I stopped. That's

ER - 1945.45

1 hundred yards past that when this conversation was
2 taking place, as we were driving.

3 I stopped, got out of the car and
4 informed Detective Rothrock that is where he'd
5 pointed out they were burned.

6 Q Did you then, all of you, continue
7 on to the site of the mine shaft?

8 A Yes, we did then.

9 Q After they were done at the mine
10 shaft, you transported Richard Stokley back to the
11 site where the clothes were burned?

12 A Yes, we did.

13 Q Had he described the layout of
14 that area prior to your driving up into it?

15 A Yes. The conversation led again
16 to exactly where they would be so I wouldn't run
17 into the fire or whatever to destroy anything that
18 was there.

19 And he'd described the ring of rocks
20 and basically exact location. As we pulled up, as
21 we did, he pointed out, that was the ring of rocks
22 around the fire.

23 Q Would it be fair to say he was
24 being cooperative in giving you these directions?

25 A He was very cooperative.

ER - 1945.46

1 After that we called out members
2 of the Cochise County Search and Rescue team which
3 came to the scene. And at that time -- they have
4 people trained in this. They did descend into the
5 hole and they did, once they got down to the water,
6 they did find one body.

7 Q Do you have any recollection of
8 the approximate time that that happened?

9 A If I had to say, it would be
10 somewhere around 5:00 or 6:00 o'clock -- late in
11 the evening -- getting to be late in the evening.

12 Q Was that body recovered from that
13 mine shaft?

14 A Yes, it was.

15 Q Was that body identified as the body
16 of Mandy Ruth Marie Meyers?

17 A As Mandy Meyers. I don't know the
18 other names.

19 Q Okay. It was identified as the body
20 of Mandy Meyers?

21 A That's correct.

22 Q After that, what happened to that
23 body?

24 A It was transported by the ambulance
25 out of Douglas to the mortuary in Sierra Vista --

ER - 1945.47

1 have it in here, but I'm trying to recall. It
2 was close to midnight or somewhere thereabouts
3 when they arrived at the scene.

4 Q And what type of activity did they
5 undertake to locate the last body?

6 A Well, there was about two or three
7 hours there of preparation to go down into this --
8 briefings, making sure all their equipment was
9 working, getting everything set out exactly to where
10 they wanted it.

11 When they finally did go down, it was
12 about 3:00 o'clock in the morning, I would think, when
13 they finally got down. They had a diver who was
14 going under; another diver which would be a backup
15 diver, to go down to the edge of the water but would
16 not go under; and a third diver on top as a backup for
17 anything happening with these two.

18 They went down, stayed about 15 minutes,
19 and came up, and had not located the body. Then after
20 a short rest, they went back down. And at 3:29 in the
21 morning, the signal was sent up that they had found
22 the other body.

23 Q Was that body removed from the mine
24 shaft?

25 A Yes, it was removed. It came up

ER - 1945.48

1 about 4:25 in the morning.

2 Q Was that body identified as the
3 body of Mary Rayleene Snyder?

4 A Yes, it was.

5 Q And what happened to her body?

6 A Her body was also transported to
7 the medical examiner's office, the morgue, in
8 Sierra Vista by the ambulance service out of Douglas.

9 Q Did you examine those bodies for
10 injuries at the time?

11 A Basically, a visual examination
12 of both bodies.

13 Q With respect to the first body --
14 that of Mandy Meyers -- did you observe any obvious
15 injuries?

16 A There was scrapes. And one of
17 the legs seemed to be very distorted, like it
18 was broken. There was scrapes on it.

19 Basically, what I was looking for --
20 because Dr. Flores also came to the scene -- the
21 medical examiner -- I was looking for stab wounds.
22 Okay?

23 I had not been told where they
24 were stabbed at but that they had been stabbed.
25 And I was looking for a stab wound. And I did not

ER - 1945.49

1 JAMES M. ROBINSON,
2 called as a witness by the state, having been first
3 duly sworn, testified on his oath, as follows:
4

5 DIRECT EXAMINATION
6

7 BY MR. FESTA:

8 Q Thank you. Would you state your
9 full name, please.

10 A James Robinson.

11 Q Mr. Robinson, where do you live?

12 A At the present, outside of Double
13 Adobe.

14 Q Here in Cochise County?

15 A Yes, it is.

16 Q Were you present in Elfrida on the
17 weekend of the Fourth of July of 1991?

18 A Yes, I was.

19 Q Could you briefly tell us what
20 you were doing in Elfrida on that weekend?

21 A There was a celebration of sorts
22 behind the Best Yet service station and I was
23 putting on some stunt shoes and gunfight shows
24 as a stunt man.

25 Q Is that something you have done in the past?

ER - 1945.50

1 A Yes. I have been a professional
2 stunt man since 1954.

3 Q Were you staying in Elfrida?

4 A We were camping behind the Best
5 Yet service station during the celebration.

6 Q Are you familiar with an individual
7 by the name of Richard Dale Stokley?

8 A Yes, I am.

9 Q How long have you known Mr. Stokley?

10 A Since 1984.

11 Q Do you see Mr. Stokley present
12 in the courtroom today?

13 A Yes, sir.

14 Q Would you point him out and
15 describe his clothing for us.

16 A Right there. He's got on kind of a
17 brownish/maroonish sports jacket with a tie.

18 Q With the other two gentlemen on
19 each side of him?

20 A Yes.

21 MR. FESTA: May the record reflect the
22 witness has identified the defendant, Your Honor?

23 THE COURT: Yes.

24 Q (By Mr. Festa): How did you meet
25 Mr. Stokley?

ER - 1945.51

1 A We were doing some stunt instruction
2 around Tombstone at the Triangle T Ranch outside of
3 Benson, Arizona.

4 Q You met him in connection with
5 doing stunts?

6 A Yes.

7 Q Was he present in Elfrida on that
8 Fourth of July weekend, 1991?

9 A Yes. We were working together
10 doing stunt shows.

11 Q Previously, what did those stunt
12 shows involve?

13 A Western comedy, 1880's comedy,
14 gunfights, mock hangings and a lot of water fights --
15 just fun for everybody.

16 Q Would you describe for us how
17 Mr. Stokley appeared on the weekend of the Fourth
18 of July of 1991.

19 A How he appeared?

20 Q Yes.

21 A You mean his clothing or what, sir?

22 Q Clothing.

23 A He was dressed old west style in
24 the 1880's.

25 Q You see him in the courtroom?

ER - 1945.52

1 A Yes.

2 Q How is his appearance different
3 than that?

4 A A beard, longer hair. He may have
5 been a little heavier at that time. He has lost
6 some weight.

7 Q I would like to direct your attention
8 to the evening of the 7th of July at approximately
9 10:00.

10 You indicated you had been staying
11 there by the Best Yet service station.

12 A Yes.

13 Q Did you stay there on the evening of
14 the 7th?

15 A Yes.

16 Q Quickly describe where were you staying.

17 A VisionQuest loaned a teepee to the
18 celebration and I was camping in the teepee.

19 Q Were there other accomodations by
20 the Best Yet service station; in other words, were
21 there other tents, other people staying around there?

22 A Yes. There was other tents there.

23 Q How many other ones, do you recall?

24 A There was some kind of a structure,
25 part tent, and there was another tent, and overhangs

ER - 1945.53

1 where people had some kind of booth set up for a
2 swap meet type deal.

3 Q And Mr. Stokley -- had he
4 stayed in that teepee with you?

5 A Yes, he did.

6 Q Was he present in the late evening
7 hours of the 7th of July?

8 A Yes, he was.

9 Q Where did you see him?

10 A We finished the shows that day,
11 and I think we had a couple of cold beers and
12 he was wanting to clean up. He borrowed some
13 soap and a towel from me to go clean up.

14 Q Approximately what time would you
15 say that was in the evening?

16 A When he borrowed the items?
17 It was somewhere around 9:30, 10:00, somewhere.
18 I can't remember exactly.

19 Q Did you in fact kind of become
20 a chaperone for some younger people that were
21 also staying in the teepee, in the tents you have
22 described?

23 A Just for four of the younger people.

24 Q Tell us how that came about.

25 A One teenage girl -- I can't remember

ER - 1945.54

1 her last name -- her first name, I think, is
2 Violet -- asked if I would go across the street,
3 meet her parents, because the four of them --
4 she and three younger ones -- two brothers and
5 another younger sister with her -- they was
6 wanting to camp out. And they needed permission
7 to make sure there was an older person with them --
8 asked me to go across the street to meet her parents
9 to show there was an older person with them.

10 Q Did you do that?

11 A Yes.

12 Q You agreed to be the older
13 person?

14 A Yes.

15 Q Did it come that other people
16 also decided to camp out?

17 A I didn't know where they had
18 permission from. It seemed out of them four
19 kids, there was a whole passel of them.

20 Q Did there come a time in that
21 evening where you had to try to physically
22 separate the young people by sex, basically;
23 in other words, girls and boys -- to calm them
24 down, get them to go to bed?

25 A Yes, sir. There was.

ER - 1945.55

1 young girls to start. Then they kept raising a
2 little bit of chaos, yeah. I took them out of the
3 tent, told them to bed down with the little kids.

4 Q Mr. Stokley helped you with that?

5 A Yes, he did.

6 Q Do you recall a time when a new
7 model Ford sedan came to the area that you were in?

8 A Yes, I do.

9 Q And can you tell us approximately
10 what time that would have been?

11 A Right around 10:00, I think, maybe
12 a few minutes before. It could have been a few
13 minutes after. I can't remember exactly.

14 Q Was the defendant there when that
15 car came?

16 A Yes.

17 Q What happened after that car arrived?
18 Did Mr. Stokley go over to the vehicle?

19 A Yes. He went over to the vehicle
20 and got in the vehicle and sat with the person inside
21 for a considerable length of time.

22 Q Did there come a time when you
23 observed Mr. Stokley and the other person outside
24 that vehicle?

25 A After awhile they got outside of

ER - 1945.56

1 the car, in front of the grill. They were
2 carrying on a conversation, doing a little drinking.

3 Q You saw them drinking alcohol?

4 A Yes. I can't remember whether
5 Stokley hollered at me to come over and join
6 them or if I walked over and started talking.
7 I can't remember exactly, but I know I did join
8 them. I had a beer or two with them at that time.

9 Q Was it dark enough that the car had
10 its lights on?

11 A Yes.

12 Q Did it honk?

13 A I can't remember that. It pulled
14 in and the engine turned off.

15 Q How much time elapsed before Mr.
16 Stokley went over to the vehicle?

17 A Probably one minute at the most.

18 Q When you went over to the vehicle
19 to have the drink with Mr. Stokley and the driver,
20 were you introduced to the driver at that time?

21 A Yes.

22 Q Who introduced you?

23 A Mr. Stokley introduced me to him.

24 Q Would you describe that person.

25 A He was young, 19 or 20 years old,

ER - 1945.57

1 tall, about 6', maybe a little less.

2 Q And the vehicle?

3 A It was a new model Ford.

4 Q What was the color?

5 A It was a light color. I couldn't
6 tell exactly what color. I knew it was white or
7 real pale blue.

8 Q And Mr. Stokley introduced you
9 to this person as whom?

10 Who did he say he was introducing
11 you to?

12 A He introduced him as Randy Brazeal
13 and said he was the son of the new owner of the
14 Longhorn Saloon and Restaurant. I didn't know who
15 that was. I hadn't been around there for a long time.

16 Q You had a drink with the defendant
17 and Mr. Brazeal?

18 A Yes, I did.

19 Q And how long did you stay there?

20 A We stood and talked for somewhere
21 between half hour to an hour.

22 Q Just to put it in context, did the
23 separation of the boys and girls take place after
24 the car pulled up, after Mr. Stokley had gotten
25 out, or did it take place before that?

ER - 1945.58

1 A The separation took place before
2 the car pulled up, I believe.

3 Q Now, what were the -- what were
4 you drinking?

5 A I had a sip or two of whiskey with
6 them and a couple of beers with them.

7 Q Was Mr. Stokley also drinking?

8 A Yes.

9 Q What was he drinking?

10 A Same thing.

11 Q How about the person introduced
12 to you as Randy Brazeal?

13 A He was drinking the same thing.

14 Q Did there come a time when you left
15 the car, left Mr. Brazeal and Mr. Stokley there?

16 A They left after a little while,
17 and I tried -- I figured, well, I would lay down,
18 get some rest. I think I had been laid down one,
19 two minutes when some kids came, wanted a knife to
20 cut up a watermelon. I cut up the watermelon.
21 They came back as I was finishing up the watermelon.

22 Q Brazeal and Stokley got into the
23 car?

24 A Yes.

25 Q They returned again?

ER - 1945.59

1 A Yes, I believe he did.

2 Q And do you recall that being
3 Mr. Brazeal or Mr. Stokley?

4 A That was Brazeal who asked.

5 Q Were you able to tell him who
6 they were?

7 A Just first names. That's all
8 I knew them was first name basis.

9 Q After you told Mr. Brazeal who
10 was in the tent, do you recall him making any
11 comment to you and Mr. Stokley at that time?

12 A Yes -- something about one of the
13 little girls running around town screwing everybody
14 in town.

15 Q Were you aware of the ages of these
16 girls at the time?

17 A Yes.

18 Q Did you make any response to
19 Mr. Brazeal?

20 A Yes. I think something like:
21 That's awful young to be doing something like that.
22 That's kind of hard to believe.

23 Q Do you recall at some point in
24 time going over at the request of one of the girls
25 and taking glasses and a pair of tennis shoes?

ER - 1945.60

1 A Yes. One of the girls -- I heard
2 some commotion in the tent, and I think Stokley
3 went over with me at that time to make them settle
4 down. And one of the girls wanted her glasses. She
5 was afraid she would roll over them in her sleep.
6 I took them and her tennis shoes, put them on the
7 picnic table in front of the tent.

8 Q Mr. Stokley was with you?

9 A Yes. He was aware of that.

10 Q After the conversations you have
11 related to us with Mr. Brazeal, did there come a
12 time when you observed Mr. Brazeal in the tent
13 occupied by the three girls?

14 A Mr. Stokley and I was standing in
15 front of the car talking, and Brazeal said he was
16 going to go for a walk around the block, and Stokley
17 and I were standing there talking about horses and
18 stunts or something, and I looked up, seen a flashlight
19 flashing inside the girls' tent. The light flashed
20 on Brazeal's face and I hollered at him to "get the
21 hell out of the tent."

22 Q Did he get out?

23 A Yes.

24 Q Did he come back over to the car?

25 A He came back over and then he wanted

ER - 1945.61

1 to check the other kids out in the teepee. And
2 I followed him over to the teepee and grabbed him
3 by the belt and Stokley was with me at that time and
4 we did pull Brazeal back out of the teepee.

5 Q He went over to the tent -- the
6 teepee, which was occupied by the boys?

7 A Yes, the boys and the other little
8 bitty kids.

9 Q Did you ever -- when he was in the
10 tent, did you hear him say anything to any of the
11 people in the tent, the three girls in the tent?

12 A No. I couldn't hear any of the
13 conversation.

14 Q How about in the teepee, did you
15 ever hear any conversation there?

16 A No, I stopped him just inside
17 the flap of the teepee.

18 Q Did this take place after you
19 had laid down and gotten back up to cut the
20 watermelon, after Mr. Stokley and Mr. Brazeal had
21 left and come back in the car?

22 A Yes. They'd left, come back and
23 that's when that incident happened, after they came
24 back.

25 Q You have indicated previously in

ER - 1945.62

1 A I believe I can determine.

2 Q In your opinion, Brazeal was
3 intoxicated?

4 A Yes.

5 Q You say that -- was it after
6 the time that you were talking to Brazeal and
7 Richard Stokley that Brazeal and Stokley drove
8 away and then drove back; is that right?

9 A Yes.

10 Q How long were they gone?

11 A I never even thought about it --
12 probably 20, 30 minutes.

13 Q What time would you say we are at
14 at this point when they came back?

15 A I think it was in the 10:00 o'clock
16 hour, somewhere in there. I can't remember exactly.

17 Q You saw them drinking when they
18 came back; isn't that true?

19 A Yes.

20 Q At this time, they were drinking
21 whiskey?

22 A They were drinking whiskey before.

23 Q Along with the beer earlier?

24 A I stated I had a couple of sips
25 of whiskey and some beers with them.

ER - 1945.63

1 Q Do you remember what kind of
2 whiskey?

3 A No, I don't.

4 Q Do you remember the size of
5 the bottle?

6 A The first one was a small bottle,
7 a half-pint or a pint -- the large one -- I don't
8 know what they do in these liters -- probably
9 a fifth.

10 Q There were two separate bottles of
11 whiskey?

12 A Yes, there was.

13 Q Was there a time at some time
14 when the children were going to sleep that they
15 were separated according to sex primarily except
16 for the one girl that stayed in the teepee?

17 Do you recall that occurring?

18 A Yes.

19 Q Who did that?

20 A Stokley and I both separated them.

21 Q Did Brazeal have any part in that?

22 A No.

23 Q After that occurred, there was
24 some conversation with Brazeal, is that right,
25 about the girls?

ER - 1945.64

1 A Yes.

2 Q He wanted to know their names?

3 A It seemed to me that was the
4 drift of the conversation.

5 Like I said before, I only knew
6 the first names, that was it.

7 Q Do you remember which girls it
8 was that he wanted to know the names of?

9 A The three sleeping in the tent
10 by themselves.

11 Q That would be Violet, Mary,
12 and Mandy?

13 A Yes, sir.

14 Q Did you give their names?

15 A I don't know if I gave him
16 the names of Stokley. I know he knew the names
17 through the conversation, but I can't remember
18 exactly who it was told him the names.

19 Q He made some comment at that
20 time to you about one of the girls running
21 around and screwing everyone in town?

22 A Yes, sir.

23 Q That surprised you, didn't it?

24 A Yes.

25 Q It seemed to be an inappropriate

ER - 1945.65

1 I looked at my watch was 12:30.

2 Q How did you leave?

3 A I went to get in my car. It
4 wouldn't start. The gentleman I was talking to,
5 Charles Brooks -- his truck was parked over here
6 a little further over.

7 Q "Over here" would be to the --

8 A Closer to the bathroom of the
9 gas station, yes.

10 And I went to my car. My car
11 wouldn't start. I had to get out of my car.
12 I stopped him about here in the street and asked
13 him to give me a ride home. My car wouldn't start.

14 Q While you were there in that area,
15 were you aware of where your daughter was?

16 A Yes.

17 Q Where was she?

18 A She was in the teepee.

19 Q Were you aware there were other
20 children in the area?

21 A Yes.

22 Q Did you know them?

23 A Yes.

24 Q Did you know Mandy Meyers and
25 Mary Snyder at that time?

ER - 1945.66

1 A Yes, I did.

2 Q Did you ever see them out
3 running around with the other children?

4 A All the kids had been up until
5 about 11:30. My daughter was tired. She went
6 into the teepee. All the other kids were in the
7 tent making noise, giggling, laughing. After that,
8 the kids stayed in the tent. I did see two of the
9 girls get up and go to the bathroom. That was
10 Mandy and Mary. They went to the bathroom. I
11 heard them say something. They never came close
12 to the car. They went back to the tent.

13 When I left, both tents were pretty
14 quiet. My daughter was asleep and I left.

15 Q When you left in Mr. Brooks's truck,
16 the Ford was still parked there?

17 A Yes.

18 Q That's the last time you were
19 there in the area of the Best Yet service station
20 on the evening of the 7th or the morning of the 8th
21 of July?

22 A Yes.

23 MR. FESTA: I am going to move for the
24 admission of state's exhibit 49.

25 MR. MAXEY: No objection.

ER - 1945.67

1 THE COURT: May be admitted.

2 MR. FESTA: I have nothing further.

3 THE COURT: Cross-examination?
4

5 CROSS-EXAMINATION
6

7 BY MR. MAXEY:

8 Q You can return to your seat.

9 You mentioned you saw the car
10 come back and recognized Richard in the car?

11 A Yes.

12 Q This would have been coming back
13 from the short run that the car had made to the
14 liquor store?

15 A Yes.

16 Q And the individual, Richard, you
17 have identified -- do you recall whether he was
18 in the passenger's or the driver's seat?

19 A Passenger's seat.

20 Q You mentioned there was a young
21 man driving?

22 A Right.

23 Q Do you know who it was?

24 A I know now, but I didn't know
25 at the time.

ER - 1945.68

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA,)
)
Plaintiff,)
)
vs.) No. CR91-00284(A)
)
RICHARD DALE STOKLEY,) Volume V
)
Defendant.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS (ON APPEAL)

APPEARANCES: Mr. Chris Roll
Mr. Vincent Festa
DEPUTY COUNTY ATTORNEYS
For the State

Mr. Philip Maxey
LEGAL DEFENDER
Mr. Robert Arentz
Attorney at Law
For the Defendant

Be it remembered that on the 17th day of March,
1992, the above-entitled matter came on for hearing
before The Honorable Matthew W. Borowiec, Judge of
the Superior Court, Division I.

ER - 1945.69

MERLE RHODES BRIEFER
COURT REPORTER
COCHISE COUNTY, DIVISION I
DRAWER CT
DISBEE, ARIZONA
438-5471

1 A Yes, sir.

2 Q And they were sealed with your name
3 and initials, evidence number and case number; is that
4 correct?

5 A Yes, sir.

6 Q Now, after you received all of these
7 items you had taken from defendant Stokley, did you
8 provide some clothing for him to wear?

9 A Yes, sir. He was furnished with a jail
10 issue type coverall uniform.

11 Q And what happened at that point in time?

12 A I then requested that an officer
13 transport Mr. Stokley out to the area of the mine shaft
14 so he could point out that location to us.

15 Q Did the defendant Stokley agree to
16 lead you to the location of the bodies?

17 A Yes, he did.

18 Q Which officer was assigned to transport
19 Defendant Stokley?

20 A That was Deputy Bruce Fuller.

21 Q With the Cochise County Sheriff's
22 Department?

23 A Yes, sir.

24 Q Did anyone else ride in the car with
25 Deputy Fuller and Richard Stokley?

ER - 1945.70

1 Deputy Fuller who had Stokley with him?

2 A Yes, sir.

3 Q What happens when you get to that
4 area?

5 A To the mine shaft itself, sir?

6 Q That's correct.

7 A We pulled in. We opened the back
8 door of the patrol car, and Lieutenant Kellogg
9 was there and he spoke to Mr. Stokley, asked him
10 if Mr. Stokley had waived his Miranda rights. He
11 spoke to Mr. Stokley and Mr. Stokley then pointed
12 out to us where they had crossed the fence; there is
13 a small barbed wire fence around the mine shaft;
14 indicated which pieces of lumber had been moved,
15 indicated the location where they had made an opening
16 through the lumber to drop the bodies through, and
17 he also pointed out an area of the ground where he
18 stated was the actual site where the girls had been
19 killed.

20 Q What was that area of ground like?

21 A It was a small flat area within short
22 proximity to the mine shaft. It's on the edge of a
23 berm or hillside surrounded by some brush.

24 Q What is the ground like in that area?

25 A Exactly where the mine shaft is in,

ER - 1945.71

03 03 82

44 16 35
STOKLEY RICHARD
09/09/52 4M HEG
03/83

450 MEDICAL DRIVE
SAN ANTONIO, TEXAS 78284



EXAMINATION C-spine, skull
Series Chest

EXAMINATION WILL NOT BE DONE IF PERTINENT CLINICAL INFORMATION AND TENTATIVE DIAGNOSIS NOT PROVIDED BELOW

Blunt head trauma

[Signature]
X (REQUESTING PHYSICIAN'S SIGNATURE) CODE #:

SERVICE (PLEASE INDICATE)	HOSPITAL	<input checked="" type="checkbox"/> VCH	<input type="checkbox"/> RBG	<input type="checkbox"/> IN PATIENT
	PATIENT	<input type="checkbox"/> PREGNANT	<input type="checkbox"/> PORTABLE	<input type="checkbox"/> AMBULATORY
DATA PREPARED BY	REQUEST	<input type="checkbox"/> REQUIRE 02	<input type="checkbox"/> STAT REPORT	<input type="checkbox"/> WHEEL CHAIR
	TRANSPORTATION	<input type="checkbox"/> DIABETIC	<input checked="" type="checkbox"/> STRETCHER	
	OTHER:			

RADIOLOGY DEPARTMENT ONLY		QUANTITY	CHARGE CODE	CATEGORY	SITE	A.G.R.	PATHOLOGY
DATE: 3-3-82	TIME: 2130	1	465200	E			
DATE, LOC. AND TYPE:	PREVIOUS EXAM	1	465208	E			
7x17	9 1/2 x 9 1/2	1	461261				
2 8x10	4 10x12						
11x14	1 14x14						
14x17							
14x36							
CC. OF	INJ. AT						
<i>[Signature]</i> TECHNOLOGIST SIGNATURE							

RADIOLOGY REPORT

STOKLEY, RICHARD

CHEST: No significant abnormalities are noted.

SKULL: Multiple views demonstrate a depressed skull fracture involving the left parietal bone superiorly. The length of the depressed fragment is approximately 3 1/2 cm. The amount of depression is approximately 12 mm. from the inner table of the depressed fragment to the inner table of the normal overlying calvarium. There is soft tissue swelling and irregularity over the area of the depressed fragment. The remainder of the calvarium is intact. Visualized sinuses including frontal, sphenoidal and maxillary antra are well aerated.

IMPRESSION: Depressed skull fracture involving superior portion of the left parietal bone.

C-SPINE: Three views demonstrate straightening of normal lordosis secondary to positioning. Lateral view demonstrates no significant abnormalities of C1 through C6. C7 is less than optimally visualized along its inferior extent. The open mouth view is suboptimal.

IMPRESSION: Essentially normal C-spine within the limits of the examination.

T. Pirtle, M.D./lg
3-03-82
3-04-82

G. Coggs, M.D.

[Signature]

ER - 2061

M.D.
RADIOLOGY RESIDENT

M.D.
RADIOLOGIST

MEDICAL RECORDS

CHART ORDER #
IF OF
810 850

PATIENT'S NAME	HOSPITAL NUMBER	ADMIT DATE	DISCHARGE DATE	OPERATION DATE
STOKLEY, RICHARD	44 16 35			3-04-82

TENDING STAFF: Willis Brown, M.D.

SURGEON: Brooks Mullen, M.D.

ASSIST: Lee Ansell, M.D.

PREOPERATIVE DIAGNOSIS: Left parietal compound depressed skull fracture.

POSTOPERATIVE DIAGNOSIS: Same.

OPERATIVE PROCEDURE: Debridement and closure of left parietal compound depressed skull fracture.

ANESTHESIA: General endotracheal.

DESCRIPTION OF PROCEDURE: The patient was induced on adequate general endotracheal anesthesia and the left side of the scalp was shaved, prepped, and draped in the usual sterile fashion. The laceration overlying the skull fracture was then extended in two directions and the wound edges retracted with self-retaining retractors. Hemostasis was obtained with electrocautery. The pericranium was then stripped away from the margins of the depressed skull fracture and a single burr hole was placed with the Hudson brace. A Leksell's rongeur was then used to elevate the fragments of fracture which were discarded. The edges of the fracture were then debrided further with rongeur. The dura was intact. The wound was irrigated copiously with Bacitracin and normal saline and the scalp was closed with #3-0 nylon.

Lee Ansell, M.D.

D: 4-30-82

T: 5-04-82

BMT/jh

Neurosurgery

ER - 2062

Signature

CHART ORDER
I.P. O.P.
O.S. SURG.
300

PATIENT'S NAME	HOSPITAL NUMBER	ADMIT DATE	DISCHARGE DATE	OPERATION DATE
STOKELY, RICHARD	44 16 35	3-04-82	3-09-82	

HISTORY OF PRESENT ILLNESS: Mr. Stokely is a 29-year-old white male, hit in the left parietal occipital area with a heavy beer mug, once, with no other injuries noted. The patient was stunned but had no loss of consciousness noted. He states that his left upper extremity immediately felt numb and apart from him. His chest complaint upon arrival was numbness of the right forearm and hand, especially the little and ring finger.

PAST HISTORY: Includes a history of scoliosis. He wears a shoe lift. History of congenital dislocation of the left knee. Negative for drugs, hypertension, diabetes, kidneys, or lung disease. No known allergies, no medications on a routine basis.

SOCIAL HISTORY: The patient smokes one pack of cigarettes per day x 18 years, drinks approximately three drinks of alcohol per night.

FAMILY HISTORY: Noncontributory.

PHYSICAL EXAMINATION: Blood pressure was 110/68; pulse 96; respirations 20. The patient was a thin, alert, oriented white male, rubbing his right forearm and hand. Head and neck examination revealed a 3 cm. scalp laceration of the left parietal occipital area, with no apparent cerebrospinal fluid leak and no active bleed. Fracture not digitalized. Eyes showed no gaze preference. Pupils were 2.5 mm. and equal. Pupils were equal, round, reactive to light. Extraocular movements were intact. Discs were sharp. No nystagmus was noted. Tympanic membranes were intact. Negative battle sign. Nose, mouth, and throat were normal. Neck was supple with full range of motion. Chest showed normal AP dimension. Lungs were clear to auscultation. The heart showed a regular rate and rhythm with normal S-1 and S-2. No S-3 or S-4 or murmurs noted. Abdomen showed bowel sounds to be active at the abdomen was nontender without masses or organomegaly. Extremities were atraumatic. The right upper extremity's strength was 5/5 with full range of motion. Sensation and vibratory was intact. Sharp and dull was intact but with hesitancy over the ulnar distribution of the hand. Decreased sensory input from the small and ring finger in the ulnar distribution of the right hand, light touch decreased in the ulnar, forearm, and hand. Neurologically the patient was alert and oriented to person, place, and time and had clear speech. Motor was 5/5. Sensory was intact with the exception as above in the left upper extremity, decreased sensation in the small and ring fingers in the ulnar distribution of the left hand. Cerebellar function was intact with the exception of the right FN dyspraxia. Deep tendon reflexes were 2+ and equal throughout.

LABORATORY DATA: A skull film showed a depressed skull fracture in the left parieto-occipital area. Cervical spine was normal. Chest x-ray was clear. Assessment was depressed skull fracture with parietal lobe contusion, left. Plan was to obtain CT scan, admission routine labs, and take patient to the Operating Room. Admission laboratory values are as follows: CBC showed a white cell count of 15; red cells of 5.33; hemoglobin of 16.5 and hematocrit of 48.8. Differential showed 39 segs, 49 stabs, 10 lymphocytes, and 2 monocytes. Platelets were adequate. Prothrombin time was 11 and partial thromboplastin time was 31. SMA-6 showed a sodium of 140; potassium 3.6; chloride 109; CO2 24; glucose 84; BUN 10. Urinalysis showed the urine to be clear and yellow with a specific gravity of 1.016; pH of 5; negative for glucose, negative for ketones, and negative for proteins.

HOSPITAL COURSE: The patient was taken to the Operating Room on 3-04-82. The preoperative diagnosis was a depressed left parietal skull fracture. The postoperative diagnosis was the same. The procedure was debridement of the left parietal compound depressed skull fracture. Surgeons were Dr. Mullen and Ancell, staff was Dr. Brown. The patient tolerated the procedure very well and was taken in stable condition to the Recovery Room. His postoperative course has been without complication. He has undergone occupational therapy.

(Continued)

ER - 2063

Signature _____

CHART ORF
IP QP
OS SURG
300 530

BEXAR COUNTY HOSPITAL DISTRICT
4502 MEDICAL DRIVE
SAN ANTONIO, TEXAS 78284

NARRATIVE REPORT

PATIENT'S NAME	HOSPITAL NUMBER	ADMIT DATE	DISCHARGE DATE	OPERATION DATE
STOKELY, RICHARD	44 16 35	3-04-82	3-09-82	

the time of discharge (3-09-82) there were no unresolved problems.

DISPOSITION: The patient will be seen in followup in the Outpatient Neurosurgery Clinic at the Brady/Green Community Health Center one week from this Friday.

DISCHARGE MEDICATIONS: None.

The patient is being discharged to the care of himself and his family. The patient has been given routine instructions about care of skin wound and nutrition.

Gerald E. Baker, D.D.S.

D: 3-09-82

T: 3-15-82

BMT/jh

Neurosurgery

ER - 2064

Signature

CHART ORDER
I.P. O.P.
D.S. SURG
300 530

This is a follow up interview with Mr. Richard Stokley conducted on August 1, 1991. The time is 0930, and we're in the Cochise County Jail, attorney visiting room. Okay, go ahead.

A: In the first place I wasn't in possession of my knife. I remember about while we were down there by the Tee Pee drinking, he had some cans of coke, and you know sometimes you pull the tab and they don't open?

Q: Right, and you have to use a screwdriver or knife.

A: And he asked for my knife, and when he asked for the knife I was drinking, I'd already been drinking, I'd forgot all about it. He's the one that had the damn knife.

Q: Oh, he borrowed your knife and never gave it back to you?

A: That's right. Cause he had to open a coke.

Q: Well, are you saying that you didn't do any of the stabbing?

A: No.

Q: You didn't?

A: No.

Q: Are you saying now that he stabbed the girl in the eye?

A: Yes.

Q: Okay. Tell me again, in light of what I just told you what Brazael said, how did the thing go down once you had taken your bath and came back to the car? How did it?

A: Okay, like I told you the first time, I was up there in that big concrete stock tank and I don't know why you didn't find that soap cause it was there. He dropped me off there and he left. And when I got done taking a bath in that tank, I couldn't get out cause I was too drunk. And I tried and I tried and finally I just forced my way out, I guess, you know, and dragged myself off and I put on my clothes and I waited and I waited, and I kept thinking well I guess he just took off and left me. I do not know how long I waited because I was drunk. And it was dark I could not see my watch. So I set there.

Q: How long, approximatley?

A: Probably a half hour, I don't know.

Q: How did you meet up with him again?

A: I was fixing to go - well, I was fixing to go to sleep and I didn't like all them people around there. I wanted to go to the bathroom there in the gas station and they kept going in little

ER - 2072

groups back and forth, back and forth and then he came driving by and he saw me and he pulled in there and he had a bottle of whiskey and he was drinking some with some coke. And anyway, well he offered me some. I sat there and I was drinking it straight.

Q: Now we're still in Elfrida at the time, right?

A: Right. By the Tee Pee. And anyway we're setting there and I'm drinking the whiskey straight. I should know better than that cause I cannot drink whiskey. And, anyway I asked him if he would take me up there so I could, I thought that tank would be full of water it used to be all the time, and I asked him to take me up there so I could go swim in it and take a bath. And I had a little piece of soap. Soap is in that tank.

Q: In the tank?

A: It is in that tank. I remember dropping it in the water and I couldn't find it.

Q: Okay, that water is green in that tank.

A: I know it is, but that soap is in there.

Q: Its dissolved by now. You're talking about the inner portion of the tank or the outter rim? There's a rim around ...

A: Naw, I went over the whole, inside the whole thing.

Q: There's only about yea much water in there now.

A: Well, see the ground level is higher outside of it than the floor of the tank is inside. It is deep. I mean its deeper.

Q: Okay.

A: And, anyway, ah, I was getting pretty doggone drunk by then.

Q: You took the bottle with you while you took the bath, right?

A: We had, we went and got another bottle. The first one didn't last too long cause I was, glug, glug, glug, glug. We went and got another bottle and a six pack of beer. We went back over there and then I asked, I said, "Man, I ain't had a bath in about four or five days. I need to clean up." I had no place to live or take a bath.

Q: Yeah, you had just moved out of the trailer?

A: Yeah, yeah, no, not the day before. It was ah,

Q: On the third of July, I believe. That's what the guy told us.

ER - 2073

A: This didn't happen on the 4th.

Q: No, no, I know that. It happened on the 8th.

A: Naw, he's crazy. He went and called the law ^{Said} that I beat him up and I never touched him.

Q: Okay, that's a side issue. That's not important.

A: Well, I know it, but that's another reason I was upset too.

Q: What happened after you - how did you meet back up with Randy? After you took that bath in the stock tank near Gleeson? Near the old jailhouse.

A: Okay, like I said, I waited and I waited and I waited. He never come and I'd have to walk all the way back to Elfrida, and that's about twelve miles. So I started walking and I walked quite a ways, I don't remember exactly where.

Q: On the dirt road?

A: Yeah. I was having trouble walking. And I came upon the car.

Q: Right, where was it parked?

A: Right in the road. And anyway, ah, I got in the car.

Q: Where were the girls?

A: They were in the back. He was in the car having sex with one of em.

Q: In the backseat or in the frontseat?

A: And I started thinking, "My God, what's going on here?" And then, the other one was out back. I forgot she was outside, I forgot she was outside.

Q: Doing what?

A: Saying, "Randy, Randy."

Q: And I said, "What's going on?" And then he heard me and he got out of the car. And we, I was drunk, I don't know everything, but we got in the car, we started down the road, we got down the road - I don't even know where he was going, and we got over there close to where this happened. When we got close to it, ah, he stopped the car and he got out. "I gotta talk to ya." We got out, went behind the car. "What do you want?" He said, we gotta kill em. I said, "We ain't killing nobody." I said, "What are you talking about?" "Well, I gotta think." Went and got back in the car. He pulled up that road that went up to that, where the mining is.

ER - 2074

1 ROTHROCK How you doing, Richard?

2 STOKLEY WELL I'M NOT SO (INAUDIBLE) GOING ON AND (INAUDIBLE) CUFF'S LOOSE just a little bit.

3 ROTHROCK LET'S TAKE A LOOK AT THESE CUFFS. You are Richard Stokley, right?

4

5 STOKLEY Yes, sir. I am.

6 ROTHROCK Okay. Why don't you stand up a minute here, Richard, and I can get to these things a little bit easier here. Bend forward a little bit. THERE YOU GO...

7

8 STOKLEY (NOTHING SAID)

9 ROTHROCK We'll go ahead and take these off here right now, okay?

10 STOKLEY (INAUDIBLE) I DON'T KNOW WHY THEY ALL ADRESSED ^{ME} like that.

11 ROTHROCK Richard, go ahead and have a seat there. Okay. Richard, my name is Rothrock. I'm a Detective Sergeant with the Cochise County Sheriff's Department. Okay. And the reason you're here ... is we'd like to talk about Mary Snyder and Mandy Meyers... and Randy Brazeal.

12

13

14 STOKLEY WELL... I SEE...

15 I didn't know anything about that. Randy Brazeal came by and had a bottle of whiskey and he wanted to go drive up, drive up the canyon and drink it. And WE (INAUDIBLE)

16 and listened to the radio and we drank most of it and I had already drank a beer. Went and got another bottle. Went up there and I guess I got drunk. Next thing I know, I woke up this morning AND WE'RE NORTH OF

17 Tucson. I said, where in the hell are you going? He said, I'm just cruising. And ah...I told him, you better turn this damn car around...

18

19

20 ROTHROCK Okay. Richard, let's, let's hold up a minute here okay. Um... tell you what... LET'S NOT GET INTO the whole story here.

21

22 STOKLEY Right. WELL

23 ROTHROCK Okay. Before we do that, I'm, I'm legally required to advise you of your rights, okay?

24 STOKLEY OKAY No problem.

25 ROTHROCK Okay. You have the right to remain silent. You understand that don't you? (pause) Yes or no?

26

ER - 2083

2021
Copy No. 1
BY CCSO AB910 EXHIBIT NO 52

1 STOKLEY (yells) Yes!

2 ROTHROCK Okay. Anything you say can and will be used against you in a court of law.

3

4 STOKLEY I understand.

5 ROTHROCK Okay. You have the right to talk to a lawyer and have him present with you while you are being questioned. You understand that?

6

7 STOKLEY Right. Am I under arrest?

8 ROTHROCK Well, right now you're being detained here, okay.

9 STOKLEY What charge?

10 ROTHROCK Well, we're not real sure right now, but let's wait and see what we get into here. Okay? If you can not afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish. You understand that?

11

12 STOKLEY Yes.

13 ROTHROCK You can decide at any time to exercise these rights and not answer any questions or make any statements. You understand that?

14

15 STOKLEY INAUDIBLE

16 ROTHROCK Okay. Now...what we're concerned about here, Richard, is two ~~MISSING~~ ~~innocent~~ girls.

17

18 STOKLEY I understand that may have cause for concern, but what does it have to do with me?

19 ROTHROCK Well, we understand that the last time they were seen was with you and Randy.

20

21 STOKLEY Well, the last time I saw them, they were in Elfrida.

22 ROTHROCK Okay. When ^{DID} ~~was~~ you last SEE THEM, Richard?

23 STOKLEY Well, I COULD SORT OF (INAUDIBLE) we had a big to-do over the weekend THERE FOR the 4th of July. And last night we had a OH.. COOKIN' barbeque and everybody pitched in. We played volleyball and...ah...we, we sat there and ATE and then I just left AROUND (INAUDIBLE) and there was a whole bunch of kids there and they were, they were, they wanted to camp out and the two girls you, you named

ER - 2084

20.21
Copy No. 1
REC BY CCSG AG910 DM

1 STOKLEY there ah...were among them.

2 ROTHROCK Did you know these girls then, Mandy and Mary?

3 STOKLEY I...I know the one named Mary.

4 ROTHROCK Okay.

5 STOKLEY I know her mother.

6 ROTHROCK Do you know...

7 STOKLEY And the other one, I'm not sure which...which kid she is.

8 ROTHROCK Okay. What time was this last night when this party broke up and everybody and those kids wanted to camp out?

9 STOKLEY Probably...well, they were already camping out.

10 ROTHROCK Okay.

11 STOKLEY

12 (INAUDIBLE) MATS AND TARPS, THEY ALL GOT
(INAUDIBLE) 12 * 12 THEY ALL GOT bed rools and all. AND IT
STARTED RAINING. WE GOT some of them go into a tent and
some of them go into a teepee. BIG (INAUDIBLE) teepee
over there. And ah... WELL
 14 the time it was about twelve...twelve, twelve-thirty.

15 ROTHROCK So, we're talking like around midnight?

16 STOKLEY Yes. SOMETHING LIKE THAT.
~~Somehere in there.~~

17 ROTHROCK And where was this at in Elfrida?

18 STOKLEY It was right on the highway behind the gas station. They got kind of a community park there, you know, tables...and they have a...swap meet there on weekends.

19 ROTHROCK Huh-hum.

20 STOKLEY And over this weekend, in order to help out, ah...I, I been involved with Tombstone Vigilantes and ah...I've done some (INAUDIBLE) films and stuff like that. And I got a couple of guys to help and we ah...went around ah...well, we went down to the high school and they had a soft ball game and went down and asked ARRESTED THE BALL... the pitchers and HAND CUFFED THEM TOGETHER ON THE MOUND and ah...over three days, myself and three other guys raised a little over three hundred dollars FOR CHARITY AND DONATED IT TO A CHARITY. charity. And ah... (INAUDIBLE)

(INAUDIBLE SECTION)

ER - 2085

20.21
 Copy No. 1
A8910 AM
 BY CCSO

1 ROTHROCK Okay. You said something earlier about ah...you and Randy went drinking.

2

3 STOKLEY Yeah. Ah...he, he wasn't drinking as much as me. Ah... I
HAD.. AH.. AH... WHAT SIZE BOTTLE a liter I guess. WHISKEY
4 Ah... (WANDIBLE) RIDIN' AROUND (WANDIBLE) ANOTHER BOTTLE And ah...
of course, I went and got another bottle...a smaller one but...
5 a pint.

6 ROTHROCK Huh-hum.

7 STOKLEY And we...just went out on a country road driving around you know
and THESE WEREN'T NA
8 little girls WITH US.

9 ROTHROCK Okay, the last time you saw these two girls then is when you left the park?

10 STOKLEY Back there in Elfrida, yeah.

11 ROTHROCK Okay. And Randy and you left the park together?

12 STOKLEY Yeah.

13 ROTHROCK Did you see the girls when you left? Did you see who they were with?

14

15 STOKLEY Nah. they were supposed to be in a tent going to sleep.

16 ROTHROCK Okay. So you thought they had gone to sleep before you left the park?

17 STOKLEY Yeah. They should.

18 ROTHROCK Okay. And you never saw them the rest of the night?

19 STOKLEY Nah...I NEVER recollect it. Like I said ah...
20 I don't know what the hell he was doing but I... IT'S
CUMBERSING TO SAY BUT I guess I kind of got too drunk,
21 passed out, went to sleep.

22 ROTHROCK Do you have any idea what time it was when you passed out?

23 STOKLEY FUCK NO, I TELL YA, I GET PRETTY FUZZY WHEN I'M DRINK.
I was drinking straight whiskey on top of a bunch of beers.
24 But, I woke up this morning about ah...eight-thirty, nine
o'clock and I was in Tucson and I said, where in the hell are
you going? Ah, I'm just cruising. I said, well I'm supposed
25 to be somewhere at two o'clock. I said, you better turn this
thing around. And he didn't like that idea, you know. And he
26 pulled into a place, AND I wanted to get a coke
WENT IN

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1
A8910 DM

ER - 2086

1 and ah...some chips, you know. And when I come back out, he was gone. So I
 started hitchhiking back.

2 ROTHROCK Do you REMEMBER WHERE THIS WAS NORTH^{of} in Tucson?

3 STOKLEY Yeah. PICACHO PEAK.

4 ROTHROCK Okay. Like where the Dairy Queen is at and all that in there?

5 STOKLEY Yeah, that's exactly where it was. The Stuckey's or whatever
 6 it is.

7 ROTHROCK What, what kind of car was Randy driving?

8 STOKLEY A LTD, his father's car.

9 ROTHROCK Okay.

10 STOKLEY White one. PRETTY NEW.

11 ROTHROCK Did you ever see anything unusual about the car?

12 STOKLEY Well, like what?

13 ROTHROCK Well, I don't know. Like maybe a girl's purse in it or some-
 14 thing or...

15 STOKLEY No.

16 ROTHROCK No? Okay. Richard, let me fill you in on a little bit here,
 okay? Randy's in custody. Okay? And he's told us all about
 the killing of the two girls.

17 STOKLEY Killing?

18 ROTHROCK Yeah, you heard me. The killing of the two girls. Okay?
 19 Now, you can come straight with me now or, or you can play hard
 ball. And the choice is your's.

20 STOKLEY (pause) Okay.

21 ROTHROCK You want to TELL ME ABOUT IT?

22 STOKLEY WHAT'S TO TELL? I don't even, I don't
 23 understand.

24 ROTHROCK You don't understand about murder?

25 STOKLEY Not from me.

26 ROTHROCK Okay. How about from Randy?

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20.21
 Copy No. 1
 RFL BY CCSO AB910 QM

ER - 2087

1 STOKLEY I, I don't know.

2 ROTHROCK You don't know? Okay. I don't suppose you know anything about
3 a mine shaft around Gleeson?

4 STOKLEY Yeah. I do.

5 ROTHROCK Okay. Do you want to tell me about a particular mine shaft
6 around Gleeson?

7 STOKLEY WELL... IT'S FULL OF WATER.

8 ROTHROCK Okay. Is that where the girls are?

9 STOKLEY DU-HUM (VERY FAINT)

10 ROTHROCK Okay. Can you show us which shaft this is?

11 STOKLEY Yes.

12 ROTHROCK Okay. Are you willing to go out there and show us which one it
13 is?

14 STOKLEY Why not.

15 ROTHROCK Okay. Before we do that, ah, Richard...you want to tell me what
16 happened to lead up to all this?

17 STOKLEY That's what I don't understand, you know. I'm not ah...I've
18 been in more Goddamn trouble this year than I've ever been in
19 my life. And most of it's bullshit. This is it. I'm dead,
20 aint I?

21 ROTHROCK I don't know, Richard.

22 STOKLEY Well, I feel like, ^{F...AH} you know, I was still waiting to die for a
23 long time anyway. My life does IT HAVE A WHOLE LOT OF MEANING.

24 ROTHROCK Well, why don't you tell me about it and maybe get it off your
25 chest.

26 STOKLEY Well, I don't, I don't understand it. I'm telling you the
27 truth. I'm not a bad person.

28 ROTHROCK Huh-hum.

29 STOKLEY I mean...I don't think I am. I...maybe I'm crazy...I don't know.
30 There have been times in my life where I just ~~was~~ ^{was} a failure...
31 and I know how to deal with it.

32 ROTHROCK Huh-hum.

ER - 2088

20.21

Copy 1/10

RF: ISO

1
AB910 DM

1 STOKLEY I don't understand this.

2 ROTHROCK Well...there are times, you said you were drinking ^{LAST NIGHT?} yesterday?

3 STOKLEY REALLY DRINKIN'

4 ROTHROCK Okay. There are times, you know, when some people start drinking and, and things happen and before they know it, they, you know, it's out of control and rather than looking at what they're going to do, they're looking back at what they did, and they, and they say to themselves, you know, Jesus Christ, why did I do that.

5

6

7

8 STOKLEY Yeah. ~~I know~~. Well, JUST TAKE ME AND kill ~~me~~ me. I don't care anymore.

9 ROTHROCK Well, do you want to tell me what happened last night with the girls, Richard?

10

11 STOKLEY That Goddamn kid he...I HADN'T HAD A BATH for a week. I REAL...I, I WANTED A BATH wanted to go up there to the stock pens and THE BIG CONCRETE ONE ^{TANK} to take a bath. I went up there to get my, he said, I'll be back in a while. And ah...I got in the tank and the water level was down about like that. It wasn't real...

12

13

14

15 ROTHROCK What, about three feet or so?

16 STOKLEY No. Well...almost...and I stepped PRETT HIGH (INAUDIBLE) and when i got in there, I was going to take a bath anyway. ^{AND} I couldn't get out because I was pretty drunk. And I finally got out and DONE THAT, ON THE CONCRETE. GOT OUT, PUT MY CLOTHES ON, WELL I WAITED AND WAITED AND WAITED AND NOBODY COME Well, I guess I got to walk and I took off. I got over the hill and (INAUDIBLE) Goddamn CARAYIN' ON and ah... I walked up there and said, what the hell's going on? Get in the car! I get in the car. I drove a little ways. He said, get, get out FOR ^{I LIKE} to talk to you. I GOT OUT OF THE CAR AND HE SAID HE WOULD ^{I'M GONNA} kill them. I said, why HE SAID, WELT I FUCKED THIS ONE AND I FUCKED THAT ONE AND THEY'RE GONNA RAT! and they're going to get you too. And I said, well what are they going to get me for, I didn't do it? Well...I don't know MAYBE THAT'S WHERE THE (INAUDIBLE) DRINK

17

18

19

20

21

22

23

24

25 and the (INAUDIBLE) DISSEMINATION IS RESTRICTED TO CRIMINAL JUSTICE AGENCIES AND OTHER NON-CJ AGENCIES ONLY. SECONDARY DISSEMINATION TO UNAUTHORIZED AGENCIES IS PROHIBITED BY PRIVACY AND SECURITY LAWS.

26 ROTHROCK Where were the girls then?

ER - 2089

20.21
Copy No. 1
REL BY CCSO A8910 (AM)

1 STOKLEY In the, in the car.

2 ROTHROCK Were they ah...listening to this conversation|

3 STOKLEY No.

4 ROTHROCK What were they doing?

5 STOKLEY Sitting there.

6 ROTHROCK Had they been drinking too?

7 STOKLEY No.

8 ROTHROCK Okay. So what happened...^{NEXT}

9 STOKLEY This didn't start out...like ah... SOMETHIN' BAD

10 ROTHROCK Huh-hum.

11 STOKLEY And I wasn't going to ^{VIOLATE} bother them myself, BUT THE BOY--
 12 AH... I DON'T KNOW MAN. (INAUDIBLE)

13 ROTHROCK This is all RANDY'S IDEA?

14 STOKLEY Yes. And I, I, I don't have any reason to tell you...a lie.
 15 Yes, It was. Yes, I was drinking very heavily and yes, I
 16 allowed myself to...I don't know. That's what I don't under-
 stand.

17 ROTHROCK Okay. Whose knife was it, Richard?

18 STOKLEY AH... MINE.

19 ROTHROCK Your's? Okay. Where is the knife now?

20 STOKLEY I don't know. I don't have it.

21 ROTHROCK Okay. Were you wearing the clothes you have on now?

22 STOKLEY Yup.

23 ROTHROCK Okay. So you said it was Randy's idea?

24 STOKLEY Yes. It was.

25 ROTHROCK Okay. What happened then, ^{AGENCIES AND AUTHORIZED PERSONNEL} after that, after Randy told you
 26 that he wanted to kill them? <sup>SECONDARY DISSEMINATION TO UNAUTHORIZED AGEN-
 CIES IS PROHIBITED BY PRIVACY AND SECURITY LAWS.</sup>

ER - 2090

20.21
 Copy No. 1

REL BY CCSO A8910 DM

1 STOKLEY He grabbed one and I had to grab the other one.

2 ROTHROCK Okay. So...

3 STOKLEY I've never done nothing like that before AND I... CHOKED
 4 'EM... THERE WAS ONE FOOT MOVING THOUGH I KNOW THEY
WAS BRAIN DEAD but I was
 5 getting scared.

6 ROTHROCK Huh-hum.

7 STOKLEY Real scared.

8 ROTHROCK Okay. You choked both of them?

9 STOKLEY No. I didn't choke both of them. I GOT ONE AND HE
WAS BRAIN DEAD

10 ROTHROCK Okay.

11 STOKLEY And THEY just wouldn't quit. It ^{WAS} terrible.

12 ROTHROCK Okay. Is that when he used ^{THE} a knife?

13 STOKLEY Yup.

14 ROTHROCK Okay.

15 STOKLEY They were dead. I mean, it wasn't torture. They were dead.

16 ROTHROCK Huh-hum.

17 STOKLEY but they WOULDN'T QUIT MOVIN'
 18 I mean like + REALLY, THEY WERE BRAIN DEAD.

19 ROTHROCK Okay.

20 STOKLEY And ah...we burned their clothes.

21 ROTHROCK Do you know where you burned the clothes at?

22 STOKLEY Yup.

23 ROTHROCK Can you show us where that is also?

24 STOKLEY Yup.

25 ROTHROCK Okay. Can you tell me about where this happened HERE
 where you killed the girls at?

26 STOKLEY In Courtland.

20.21
 Copy No. _____
 REL BY CCSO Ag910 Qm

ER - 2091

1 ROTHROCK In Courtland?

2 STOKLEY Yes.

3 ROTHROCK Okay. So, okay. you guys killed the girls and you burned
4 their clothes, threw them down the mine shaft...

5 STOKLEY Killed them. Threw them down the mine shaft. Burned their
6 clothes.

7 ROTHROCK Okay. Burned their clothes after you guys threw them down the
8 mine shaft. Okay. What happened after that?

9 STOKLEY He takes off driving and I probably passed out like I said.
10 And ah... I DIDN'T KNOW WHERE THE HELL WE WAS GOIN'.
11 I didn't even think about it. TIL I WOKE UP
12 AND HE'S way the hell up there. So, I said,
13 where in the hell are you going? Oh, I'm just cruising. And I
14 said, well you better turn this damn car around and go back
15 south. And he didn't want to do ~~that~~ and his dad HE KEEPS
16 A BANK BAG in the car ... WITH
17 MONEY AND AN ~~item~~ he had produced ONE FROM
18 SOMEWHERE, UNDER THE SEAT, IN THE TRUNK, I DON'T
19 KNOW

20 ROTHROCK Produced what, Richard? I'm sorry.

21 STOKLEY Those zippered bank bags they keep money in for a business.

22 ROTHROCK Huh-hum.

23 STOKLEY And he pulled out somebody's check and he looked at that and
24 he said, who in the hell is that. And I said, what in the hell
25 you got there? Ah, my dad keeps money in the car, you know.
26 I'm a rich kid. And he reaches in there and pulls out some
money and told me to go in and get a Goddamn coke and some chips
and I said, not out of that, you know. That aint right. He,
he is probably looking for that money right now. THREW IT
BACK I went in there TO GET. I WAS GONNA
get it with my own money. And, they didn't have LIKE
bottles or cans, and they only had, they had like ah...a Dairy
Queen. you know

ROTHROCK Like a fountain?

STOKLEY YEAH so, I didn't know what to get and I went back out and the
car was gone. There was another car already sitting there.

ROTHROCK This was at...

STOKLEY Picacho Peak.

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ER - 2092

20.21
Copy No. 1
REL BY CCSO A8910 CM

1 ROTHROCK Picacho Peak.

2 STOKLEY So, I turned around and walked back DOWN THE HIGHWAY
 3 I just about had it. He stole NAD HEAT STROKE UP THERE, MAN
 4 DIDN'T HAVE NO WATER TO CARRY, YOU KNOW AND (GIBSON)
 You can sure tell the difference when you get about twenty miles
 this side of Tucson.

5 ROTHROCK Okay.

6 STOKLEY And by the way, the guy in a Blazer ^{W HO} just dropped me off HE
 7 JUST PICKED ME UP HITCH HIKING (INAUDIBLE)
 8 I walked all the way from about 29th through all that construc-
 tion, can't HITCH HIKE, CAN'T GET A RIDE
 9 (INAUDIBLE)
 about a half a mile the other side of the Triple T. Just before
 you get where it says State Prison, Don't Pick Up Hitchhikers.
 And a guy that just got off work over there, worked at the power
 10 plant, I've never met him before in my life, he comes around
 and I had a little sign that I made with a piece of paper that
 11 said Benson. That's what I put down on top of the TRUCK
 12 REAL He waasa nice guy. And ah...he stopped to pick me up.
 in Sierra Vista and went out of his way because he lives
 13 the truck stop where I was supposed to meet Eddie Gibson.

14 ROTHROCK Eddie Dixon's a friend of your's?

15 STOKLEY Eddie Gibson.

16 ROTHROCK Gibson, I'm sorry. He's a friend of your's?

17 STOKLEY Well, he was supposed to bring another guy to Benson to pick up
 18 this, this (?) CAN or something today. ^AI was
 supposed to go with him and go help this guy move from Tombstone
 19 to Elfrida and to come get this big TENT
 And ah, so I called from Tucson and asked him whether or not
 20 they were still coming up here. And they said yes. And I said,
 well, I got, got to hitchhike. I'll be there as soon as I can.

21 ROTHROCK Okay. Let me ask you a couple quick questions here, Richard.
 Ah, you said that Randy told you that he had sex with the girls?

22 STOKLEY Right.

23 ROTHROCK With Both girls?

24 STOKLEY RIGHT

25 ROTHROCK Did you have the impression this was voluntary on their part?

26

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ER - 2093

20.21
 Copy No. AB910 CM
 REL BY CCSO

1 STOKLEY No. Not ^{from} with his attitude. No.

2 ROTHROCK Okay.

3 STOKLEY He said, I, I screwed the ^{1EM} girls... now we got to kill them.

4 ROTHROCK Okay. So you think he raped ^{1EM} her?

5 STOKLEY Well...yeah.

6 ROTHROCK Okay. So...let's see if I understand this right. You guys left the park alone. And you went to take a bath. And when you met back up with him, he had the girls with him then?

7

8

9 STOKLEY No. When we was going up there they were walking down the road and I said, what are they doing? And he stopped and told them to get in the car.

10

11 ROTHROCK Okay. So, he picked, you were with him when he picked them up on the road?

12 STOKLEY Right. I was wondering why they were walking down the road when they were supposed to be over going to sleep.

13

14 ROTHROCK Where was this that they were walking down the road at?

15 STOKLEY Down Triple 6.

16 ROTHROCK Do you know whereabouts on Triple 6?

17 STOKLEY Well, I... AH... maybe approximately ^{but} ~~but~~ I...I was drinking man.

18 ROTHROCK Was it in town?

19 STOKLEY Yeah.

20 ROTHROCK Okay. Did you ever have sex with any of the, either of the girls?

21

22 STOKLEY Yeah. One.

23 ROTHROCK Okay. Do you know which one that was?

24 STOKLEY I don't even know their names.

25 ROTHROCK The blonde haired ^{one} or the brown haired ^{one}?

26 STOKLEY Brown.

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ER - 2094

2021
Copy No. 1
REL BY CCSO A8910 QM

Bigfoot
Richard Dale Steele

1 RAFFETY I'm Detective Mike Raffety. I'm with the Cochise County Sheriff's
2 Department Detective Division. Ah, we're in Sierra Vista.
3 Right now I'm interviewing Randy Ellis Brazeal. Randy would
4 you spell your last name for name.
5 BRAZEAL B R A Z E A L.
6 RAFFETY Okay. And your middle name is spelled...
7 BRAZEAL E L L I S.
8 RAFFETY Okay. Randy um...you had been advised of your Miranda Warnings
9 as we call them or rights. Do you understand those?
10 BRAZEAL Yes, sir.
11 RAFFETY Are you still willing to talk to me?
12 BRAZEAL Yes, sir.
13 RAFFETY What I'd like to do just for the...the record is just ah...
14 read those again, okay. You have the right to remain silent.
15 Anything you say can and will be used against you in a court of
16 law. You have the right to talk to a lawyer and have him
17 present with you while you're being questioned. If you can not
18 afford to hire a lawyer, one will be appointed to represent you
19 before any questioning, if you wish. You can decide at any
20 time to exercise these rights and not answer questions or make
21 any statements. Okay. Do you understand these rights I've just
22 explained to you?
23 BRAZEAL Yes, sir.
24 RAFFETY Okay. Having these rights in mind, do you wish to go ahead and
25 talk to us now?
26 BRAZEAL Yes, sir.
27 RAFFETY Okay. Randy, if you get hungry, like I said earlier...let me
28 know. I understand you haven't eaten for awhile and...just say
29 something. What I'd like you to do though is to go back...when
30 did you and Bigfoot first get together?
31 BRAZEAL It was around eleven thirty, a quarter to twelve. I was heading
32 back towards the house. I'd seen him standing over by the gas
33 station. He waved me down. So I pulled over and he wanted me
34 to take him to, so he could bathe. And ah...I agreed to go take
35 him so he could go get bathed. So he got his shampoo and his
36 clothes and everything. We left. And we seen two young ladies
37 ah...out in front of the gas station. *LOT (JET)*

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ER - 2098

20.21
Copy No. 1-1-
A8910 CM
TEL BY CC30

EXHIBIT NO. 51

1 RAFFETY Can you tell me who the girls are?

2 BRAZEAL Mandy. I know Mandy. I don't know the other one.

3 RAFFETY Where do you know Mandy from?

4 BRAZEAL I used to date her sister and I know her mom. I work with her mom.

5 RAFFETY What's her sister's name?

6 BRAZEAL Micki.

7 RAFFETY Micki?

8 BRAZEAL Yes, sir.

9 RAFFETY You don't know her last name?

10 BRAZEAL Myers I believe.

11 RAFFETY Myers. Go on with your story.

12 BRAZEAL Yes, sir. Okay. We seen those two right out in front of the gas station and they waved us down and asked if they go riding with us...until you know, when, while Bigfoot went and ah... bathed. So I agreed, you know. They hopped into the back seat and we left and...we went down into Gleeson up in the mountains. Bigfoot showed us the place where he wanted us to go. So we stopped on the gravel road and Bigfoot got out. I stayed in the front seat in the passenger or in the drivers side. The girls sat in the back while Bigfoot went and took his little shower or whatever. And then ah...

13 RAFFETY Describe to me, what does Bigfoot look like, the best you can.

14 BRAZEAL Ah, he's...about six, five. He's close to 280. Has a real thick black and gray beard. Real bushy hair. Wears a black hat all the time.

15 RAFFETY What's his real name, do you know?

16 BRAZEAL Richard.

17 RAFFETY You don't know his last name?

18 BRAZEAL No, sir.

19 RAFFETY How long have you actually known Richard?

20 BRAZEAL About a month and a half.

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20.21
Copy No. 1
REL BY CCRD A8910 CM

ER - 2099

1 RAFFETY Go on with your story.

2 BRAZEAL Okay. And then we let Richard out to go and ah...take his
3 shower...while me and the girls would sit there and talk.
4 He came back and ah...he threw his clothes up in the front seat
5 and then he got in the back seat with the girls.

6 RAFFETY What was he wearing?

7 BRAZEAL Brown pants. A brown shirt or suede pants and a brown shirt.
8 Ah..he got back in the back seat with Melissa and the other
9 girl. He started harassing them. Grabbing them. And ah...I
10 asked him...you know...to leave them alone. To chill out. And
11 he, his remark was, he turned around with his knife and told me
12 if I, to keep my mouth shut, that he was going to do me like he
13 was fixing to do them girls.

14 RAFFETY Did they hear that?

15 BRAZEAL Yes, sir. Okay?

16 RAFFETY What, describe this knife?

17 BRAZEAL It was buck...it was just like a little buck knife. It had
18 three or four blades in it. And the longest blade was about
19 six inches I would guess. Ah, it was brown. Ah...it was a
20 brown and silver. And ah...he ah...told me to keep my mouth
21 shut and stay out of it. And ah...

22 RAFFETY Had he been drinking pretty heavy, you mentioned earlier...

23 BRAZEAL Bigfoot? Yes, yes.

24 RAFFETY How much had he had to drink?

25 BRAZEAL A lot. Well, he took the liter with him when he went to go take
26 his shower. Ah...he drank the rest of his liter and came back
and got his pint that he had in the front seat.

RAFFETY What was the liter? What kind of booze are we talking about?

BRAZEAL Jim Beam.

RAFFETY Okay. What was the pint?

BRAZEAL It was Jim Beam too, whiskey. Ah...he was back there grabbing
the girls, harassing them. Ah...

RAFFETY When you say grabbing, what do you mean?

BRAZEAL Grabbing...their private ~~possessions~~

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ER - 2100

-3-

10.21

Copy No. 1

REL BY CC30 Argon DM

1 RAFFETY We're, we're all big guys here. When you say, grabbing their
tits or...

2 BRAZEAL Yeah.

3 RAFFETY Okay.

4 BRAZEAL Their tits and their butts and their...

5 RAFFETY Did they still have clothes on at that time?

6 BRAZEAL Yes, sir, they did.

7 RAFFETY Okay. Go ahead.

8 BRAZEAL Okay. Ah...they said, I want to go home, take me back home,
9 Randy. And Bigfoot, Richard, reached over the top of the front
10 seat and pulled the keys out of the ignition and said, they're
not going no damn where. He said, for them to do exactly what
11 he says or he's going to kill them. Okay.

12 RAFFETY How old are the two girls, do you have any idea?

13 BRAZEAL Thirteen. I believe both of them were thirteen years old.

14 RAFFETY Okay.

15 BRAZEAL So just to do what he said and then he wouldn't kill him. Or
16 do what he said. Yeah, so...I sit there and then he grabbed
17 ah...the other little girl, the blonde headed little girl and
ripped her ah...she had a bathing suit top on. He ripped it
18 off her, pulled her pants down. Ah...why....Mandy's on the
other side. Richard had his knife out at that time so they
wouldn't go anywhere.

19 RAFFETY Did they try to go anywhere?

20 BRAZEAL Yes, sir.

21 RAFFETY What happened when they tried?

22 BRAZEAL He started slapping them with his ah...back of his hand and, and
closing his hand and hitting them in the forehead and he was
slapping them around. Ah...

23 RAFFETY Were they crying?

24 BRAZEAL Yes, sir. Ah...there was nothing I could do, you know. Ah...
25 he got, he just got real angry. He just flipped out. Stabbed
26 one of the girls in the eye so they wouldn't go anywhere. Ah,
laid her in the back seat.

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ER - 2101

20.21
Copy No. _____

-4-

REL BY CCO

As910 Qm

1 BRAZEAL the other one out. Took her on the front of the hood. Threw
2 her up on the top of the hood. Ripped off all her clothes and
3 had sex with her and made her...ah...lick his crotch and
4 everything.

5 BRAZEAL Forced them to, forced her to give him head.

6 BRAZEAL Suck on his penis?

7 BRAZEAL Yes, yes, sir. Ah...he got finished with her. He choked her.
8 Stabbed her in the eyes, both of her eyes. Um...I, I was still
9 sitting in the front seat of the car. He came back around, he
10 threw the girl that he had just had sex with off the hood onto
11 the ground, walked back around, got back in the car and sex with
12 the girl he had stabbed first. In the back seat.

13 BRAZEAL Was she alive or dead or do you know?

14 BRAZEAL She was still alive. She was still in the back seat moaning.
15 And ah...he pulled her, he had sex with her. Pulled her out of
16 the back seat and laid her down on the gravel and started
17 kicking her and was choking her. Ah...he was jumping on her
18 chest. He was jumping on the back of her head and was kicking
19 her. He just repeatedly kicked them ah...picked them up, threw
20 them down, choked them.

21 BRAZEAL Now you're talking about both girls now?

22 BRAZEAL Yes, sir. He was going back and forth. They were both moaning
23 real loud. And he kept screaming, die.

24 BRAZEAL Okay. But as far as you know, neither one of them were dead at
25 this point?

26 BRAZEAL No, sir.

27 BRAZEAL How many times, the first girl that he stabbed once in the eye,
28 now, did he only stab her just the once?

29 BRAZEAL He stabbed her...he stabbed both of the girls once in both eyes.

30 BRAZEAL Okay. So both eyes have been stabbed on both girls?

31 BRAZEAL Yes, sir.

32 BRAZEAL How long was the blade that he used when he stabbed them?

33 BRAZEAL About six inches.

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ER - 2102

-5-

20.21

Copy No.

REL BY CCRD

1
AB910 Cm

1 RAFFETY Were they dead at that time?

2 BRAZEAL Yes, sir they were.

3 RAFFETY They were dead?

4 BRAZEAL Yes, sir.

5 RAFFETY Do you know what time they actually died?

6 BRAZEAL (pause)

7 RAFFETY Was it after he kicked them a lot or...

8 BRAZEAL Yes, sir. It was after he'd, he just....stomped on them over and over again.

9

10 RAFFETY Did, at any point, did ah...did he stab them again do you know?

11 BRAZEAL No, sir. I don't believe so. I believe the only time he stabbed them was in their eyes.

12 RAFFETY Do you remember what he did with his knife after he stabbed them?

13 BRAZEAL He went and washed it off and stuck it back in his pocket.

14 RAFFETY Now is this before he dragged them over to the...

15 BRAZEAL This was after.

16 RAFFETY After?

17 BRAZEAL Yes, sir.

18 RAFFETY So he still had the knife with him up to that point?

19 BRAZEAL Yes, sir.

20 RAFFETY Then what happened?

21 BRAZEAL Okay. He said get in the car so...I headed over to the drivers side of the car. He threw me the keys over the hood and said okay, get in the car and drive.

22

23 RAFFETY Now this is your dad's car?

24 BRAZEAL Yes, sir. Okay. So we got out on, out on the gravel road where we left and went to Tombstone to get gas in Tombstone, at, at Tombstone, so...I said where are we going. He said just drive. So I drove for about thirty-five, forty minutes and I asked him again, where are we going. He said, "Just drive, don't worry."

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ER - 2104

20.21
 Copy No. 1
 -7- AB910 DM
 REL BY CCSO

1 BRAZEAL about where we're going, just drive. So...we drove and we drove
2 and we got about ten or fifteen miles outside ah, Tucson and he
3 decided he wanted a Coke and some chips and use the bathroom.
4 So he told me to come in with him. Said, okay. So I took the
5 keys out of the ignition. We both got out of the car and was
6 walking up there. He walked...was walking a little bit faster
7 than I was so I turned around and ran back and got in the car
8 and locked the doors and left and went straight to Chandler.

9 BRAZEAL Okay. Now this is somewhere in Tucson? Do you know exactly
10 where?

11 BRAZEAL No, sir. I just know it's like ten or fifteen miles past
12 Tucson. And the gas station was off on to the right but that's
13 where I....left him, just got back into the car and locked the
14 doors and left.

15 BRAZEAL Do you have any idea where he went from there?

16 BRAZEAL No, sir. I don't.

17 BRAZEAL Does he have a car?

18 BRAZEAL Yes, sir.

19 BRAZEAL Where was the car last night, do you have any idea?

20 BRAZEAL Last night it was at the, that gas station. That's where I
21 picked him up at...in Elfrida.

22 BRAZEAL What was going on when you picked the girls up? Were they just
23 standing along side the road?

24 BRAZEAL Yes, sir.

25 BRAZEAL Was there anything else going on in the area or anything?

26 BRAZEAL No. They had, they're having a big swap meet out there, swap
meet.

27 BRAZEAL Swap meet?

28 BRAZEAL Yes, sir.

29 BRAZEAL Oh, s w a p, swap.

30 BRAZEAL Yes, sir.

31 BRAZEAL Okay.

32 BRAZEAL And then they had a bunch of kids out there that pinched, pitch

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2021
Copy No. _____

REL BY CCSO _____

ER - 2105

1 BRAZEAL Yes, sir.

2 RAFFETY When did you first get the idea that he was interested in having sex with these girls?

3 BRAZEAL I...I didn't know anything until he got back in the back seat with those girls and started harassing them. He didn't, he never gave any signs or anything before then.

5 RAFFETY How old is Bigfoot, do you have any idea?

6 BRAZEAL I believe he's 38.

7 RAFFETY Well, when you picked these two girls up, they're 13 years old, you know the one was 13, right?

8 BRAZEAL Yes, sir.

9 RAFFETY What was the ah...the reason for picking them up at that point?

10 BRAZEAL They was just sitting there and they wanted to go for a little ride. I mean, they've gone with me before. My ex-girlfriend's little sister. And that was no...big thing.

11 RAFFETY Was she kind of a good head, what I mean is got along with people pretty good, like to drink, like to party a little bit?

12 BRAZEAL Well she got a long with everybody. She didn't drink. She got along with everybody. She was a nice girl.

13 RAFFETY Did Bigfoot...when did he first start to get bossy and pushy, as you described it?

14 BRAZEAL After he had took his shower. After he took his liter and went and took his little...little bath and he went over there and I guess he drank all that liter because he came, he didn't come back with the bottle. He left with one, didn't come back with one. I guess he drank all that while he was over bathing. He was gone a good twenty-five, thirty minutes...bathing.

15 RAFFETY What did you do, in the meantime while he was over bathing, were you talking to the girls?

16 BRAZEAL Yes, sir. I was sitting in the front and they were sitting in the back and we were just talking.

17 RAFFETY What did you talk about?

18 BRAZEAL Just asked, she asked me when was the next day I was going to work and if Micki was working....you know, that night, her sister. I told her yes.

ER - 2108

-11-

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2021
Copy No.

REL BY CSCO

AS910 CM

1 RAFFETY Were you dating the sister?

2 BRAZEAL No, sir. I, we broke up about a week ago...but we were dating
3 for two or three weeks. But we were kind of, sort of seeing
each other still.

4 RAFFETY But you, nothing definate?

5 BRAZEAL No, sir.

6 RAFFETY Okay. Let me, let me get down...they found something that was
7 burned. Did you guys burn anything or...

8 BRAZEAL Bigfoot burned their, Bigfoot burned their clothes.

9 RAFFETY When was this?

10 BRAZEAL This was...right before he threw them in the shaft...he cut them
11 off with his knife. Took all of them and stuck them in the...
back floor board of my car.

12 RAFFETY Okay. Where did you actually burn the clothing then?

13 BRAZEAL Ah...ah...I guess um...I guess it was about a half mile, mile
14 away from where he threw them in that, that mine or whatever,
that shaft.

15 RAFFETY Now this is important now. Earlier you said you didn't stop
anywhere. Explain to me when and how this happened.

16 BRAZEAL Ah...I...I just gotten...cleaned off the top of my head then.

17 RAFFETY Tell me now, that's what I want to know.

18 BRAZEAL Okay. He did all that. He...got a thing of, a big weed and he
19 tried to cover up his footprints and everything that was out
there. Okay. And he, we got, went back to the car. He threw
20 me the car keys across the hood and told me to get into the car
After he'd torn off the ladies clothes. And he put them in the
21 back floor board of my car and he said drive. So we backed out
ah...pulled out on the road and said where do you want me to go
22 He goes we have to go down and find a place to burn these
clothes. I said okay, just show me where a place, and we'll
23 stop. So...we got on down the road a little ways and he turned
me to turn right. So I turned right and we stopped and he got
24 out of the car. I stayed in the car. And he burned those
clothes. And then he stuck sticks on top of them trying to get
25 them to burn more. Then we left, went to Tombstone and got gas

26 RAFFETY Did they burn up pretty good or not?

ER - 2109

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20.21
Copy No. 1
REL BY 6630 AR910/EM

1 RAFFETY Um...when he took the one girl to the front of the car.
2 BRAZEAL Yes, sir.
3 RAFFETY We'll call her girl number one because we don't have a name for
her, alright? She was still clothed at that point?
4 BRAZEAL Ah, he had already ripped off her bathing suit top.
5 RAFFETY Okay. He had ripped off her bathing suit?
6 BRAZEAL Yes, sir.
7 RAFFETY She had on, what did she have left on then?
8 BRAZEAL Ah, she had her blue ah...windbreaker jacket on and her white
9 little skirt.
10 RAFFETY Okay. What did he do, rip it off and it came right off without
pulling her jacket or anything?
11 BRAZEAL Yes, sir, he just ripped it right off her.
12 RAFFETY What was it, kind of just a frontal piece or...
13 BRAZEAL Yes, sir. It was just a little skimpy...
14 RAFFETY Was it a bikini top?
15 BRAZEAL Yes, sir.
16 RAFFETY Oh, okay. And he pulled that off?
17 BRAZEAL Yes, sir.
18 RAFFETY Okay. And he took around to the front of the car?
19 BRAZEAL Yes, sir.
20 RAFFETY What kind of car were you driving?
21 BRAZEAL A Crown Victoria, LTD.
22 RAFFETY What year?
23 BRAZEAL Eighty eight.
24 RAFFETY Okay. And he put her on the hood of the car?
25 BRAZEAL Yes, sir.

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ER - 2111

20.21
Copy No. 1

-14-

REL BY CC30 A890 QM

1 RAFFETY Okay. Describe again and what he did. (pause) Which hand did he have his knife in?

2 BRAZEAL His left.

3 RAFFETY His left.

4 BRAZEAL Because he was using his right hand to pull all her stuff off and slap her around a little bit.

5 RAFFETY Then what did he do? Go through that again.

6 BRAZEAL ^{He pulled her ER - M/S} Okay. He picked her up, put her on top of the hood, leaned her back. Pulled her panties off and...

7 RAFFETY Does she still have her skirt on?

8 BRAZEAL I believe he just lifted it up, off. Yeah, I believe he just lifted it up. He just pulled her panties off and threw her, her jacket back and leaned her back against the car and she kept trying to sit up and he kept pushing her back. And then... he was trying to have sex with her, I believe it was he was trying to have sex with her but it wouldn't work so...he got...

9 RAFFETY Why wouldn't it work, do you know, can you tell me?

10 BRAZEAL He...

11 RAFFETY Was he hard on?

12 BRAZEAL Yes, sir. He just couldn't get it in her. So...that made him a lot, that made him...mad, you know, even more mad than what he was.

13 RAFFETY Now was she stabbed now?

14 BRAZEAL At that point...no.

15 RAFFETY Okay.

16 BRAZEAL Then, then after he got mad with her...he stabbed her and pulled her off the car. Then went back to the back seat where...

17 RAFFETY At what point did he try to get her to, to...suck on him or whatever?

18 BRAZEAL After he couldn't get his...his penis in her.

19 RAFFETY Now, did she do what he wanted?

20 BRAZEAL Yes, sir.

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ER - 2112

20.21
Copy No. 1

-15-

REL BY CCCO AB910 CM

1 RAFFETY What was she doing at the time?

2 BRAZEAL Well she started doing that and she kept stopping and saying
3 she didn't want to do it and he kept yelling, do what I say.

4 RAFFETY You're shaking your head.

5 BRAZEAL It was just...

6 RAFFETY I know it's hard.

7 BRAZEAL There was a bunch of screaming and hollering and stuff up there
8 man, you know, it's...

9 RAFFETY At what point did he actually stab her?

10 BRAZEAL After she had...gave him...sucked his penis and he had gotten
11 finished with her, he, he'd got her to suck his penis, then he
12 tried...to screw her again. He couldn't do it so he got even
13 mad, hit her, then stabbed her in the eyes, I believe that's
14 the way he was doing it.

15 RAFFETY Okay. Now, I know this is difficult but...did he hold her head
16 down or how did he actually stab her?

17 BRAZEAL Grab, grab...half way the back and the front of her head and
18 just grabbed it and just poked her in the eyes with it.

19 RAFFETY Did you see where he poked her in the eyes?

20 BRAZEAL No, sir. It was still dark outside and all the lights were off
21 but they were sitting kind of close to the windshield where I
22 could see really...

23 RAFFETY Could you see blood at that point?

24 BRAZEAL On that girl, no. I could see the blood...you know...a little
25 bit off the girl in the back because I had, you know...was
26 lighting a cigarette up and I could see blood just, just...
like tears out of the corner of her eyes.

RAFFETY Now this is the girl in the front?

BRAZEAL This is the girl that was in the back seat that he stabbed
first.

RAFFETY Who was lighting a cigarette?

BRAZEAL I was. But I could see with the lighter what she looked like
from where I was sitting. I was kind of sitting kaddy-corner
in the seat.

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ER - 2113

20.21
Copy No. 1
A8917 DM
REL BY OCSO

1 RAFFETY Okay. Was she screaming? Was she saying anything to you? Or
 2 what was she saying?

3 BRAZEAL She was saying, Oh, God, why me?

4 RAFFETY Okay. Now go back, I'm going to start, when you first got there
 5 you said he went with [unclear] in and came back.

6 BRAZEAL Yes, sir.

7 RAFFETY I mean, did he do anything before? Did he say anything to you?
 8 Go through that again carefully. Picture in your mind exactly
 9 what you're telling me. He's walking back and then just go
 10 through that again.

11 BRAZEAL Walking back from taking his bath?

12 RAFFETY Huh-hum.

13 BRAZEAL Okay. He walked back up to the car. He opened the front
 14 passenger door and threw his clothes...in the front seat. Shut
 15 the passenger door. Got in the back seat with the girls. Made
 16 them scoot over and he got in the back seat with the girls.
 17 Then he proceeded to...to grab the girls.

18 RAFFETY Okay. Then what, go through it again, what happened?

19 BRAZEAL Ah...He proceeded to grab them...all over.

20 RAFFETY Now were they dressed still at this time or did he undress them?

21 BRAZEAL Yes, sir. They were still dressed when he first started feeling
 22 on them. They were still dressed. They were saying stop.
 23 I asked him to chill out and then he turned around, with his
 24 knife, and told me to stay out of it or he was going to do me
 25 like he was fixing to do them girls.

26 RAFFETY Now, was that the first time you saw his knife or did you see
 it? IT? MR-

BRAZEAL That was the first time I'd seen it because he turned around
 and he had it...pointing it towards me.

RAFFETY How far away were you at that time?

BRAZEAL About a foot. And he just turned around and told me if I didn'
 do this, he was going to do me like he was fixing to do them
 girls. So I just sit there.

RAFFETY Go ahead with (MSA) your story.

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ER - 2114

-17-
 20.21
 Copy No. 1
 REL BY CCSO AB910 [Signature]

1 BRAZEAL Okay. Ah...he ripped that one, girl number one's top off her, bikini top off, that was the first thing he did with her. He
2 just pulled it off...of her. Ah...fooled around with Mandy,
3 just grabbed her a little bit. Ah, they were screaming, I want
4 to go home, I want to go home. So...Richard leaned over the
5 seat, grabbed the keys out of the ignition and said nobody's
6 going no ~~damn~~ where. You do what I say.
7 BRAZEAL *down here*
8 Nobody's going any Goddamn where, I think that's what he said.
9 BRAZEAL Nobody's going any Goddamn where, I think that's what he said.
10 BRAZEAL Okay.
11 BRAZEAL You do what I say...or I'm going to kill you. Okay. He got all
12 that done. He got mad at Mandy because she was the one, she was
13 the one really screaming in the back seat. He grabbed her, she
14 was the first one he stabbed...in the eyes. Left her laying in
15 the back seat.
16 BRAZEAL This is important, when he stabbed her in the eyes, how did he
17 grab her? Did you see?
18 BRAZEAL She was laying, leaning back against the car door. The...the
19 back car door on the drivers side. She was leaning back up
20 against that.
21 BRAZEAL What hand was he holding the knife in?
22 BRAZEAL He was holding it in his left hand because he was using his
23 right hand...doing most of the work. Yeah.
24 BRAZEAL Did he grab her, describe how he stabbed her.
25 BRAZEAL Yes, sir. Well, he just grabbed her by the, on the top, you
26 know, half way in the back of her head and just...reached up
there and poked her twice in the eyes, once in each eye and then
left her there and she bowled over and she laid down in the
seat while he pulled that girl number one out of the girl and
put her on the hood.
BRAZEAL What were you doing when he was stabbing Mandy?
BRAZEAL Sitting in the front seat.
BRAZEAL Can you tell me why you didn't run?
BRAZEAL Because there was no where to run. I didn't know where I was.
It was pitch dark outside. I didn't know where to go.
BRAZEAL Can you tell me what time you thought it was? What was the time

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ER - 2115

-18-

20.21
Copy No. 1

REL BY CC30 AB910 (PM)

1 BRAZEAL Okay. We got out there...about twelve or a little after twelve.
2 He was gone until about a quarter to one, I guess it was. And
3 then he came back and that's when it all started I guess...
(side one of the tape stops here)

4 RAFFETY Misc / [unclear] (Tape) side two. We haven't said anything.
I just flipped the tape over, is that correct?

5 BRAZEAL Yes, sir.

6 RAFFETY Okay. Now...go back to where you were going.

7 BRAZEAL Okay. It was about a quarter to one, ten to one, whenever
8 Richard got back from taking his bath. That was about, around
the time that it all started...

9 RAFFETY Now, let me ask you...

10 BRAZEAL ...and it lasted for a couple, two or three, four hours.

11 RAFFETY What was the darkness like that night? Was it a full moon or
12 a partial moon? Was it...

13 BRAZEAL No, sir. I believe it was cloudy outside. I mean it was pitch
14 dark out there.

15 RAFFETY It was dark dark?

16 BRAZEAL Yes, sir.. It was...there was clouds in the sky but there was
17 still just low light from the sky. But you could...they weren't
18 that far away from me that you couldn't see what they were doing

19 RAFFETY Misc I know this is difficult for you
but I also know the details are important at this time. Okay?
20 Let's go back and you said, you drove...and ah...do you remember
21 what route you actually took when you left...this location
22 where the girls were killed?

23 BRAZEAL I remember we backed up and we drove down the road.

24 RAFFETY Were you on a dirt road?

25 BRAZEAL Yes, sir. Gravel road.

26 RAFFETY Do you know the name of that road?

27 BRAZEAL No, sir. It was out by Gleeson.

28 RAFFETY By Gleeson.

29 BRAZEAL Yes, sir.

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ER - 2116

-19-

20.21
Copy No. 1

REL BY OCSO AB910 QM

SIERRA VISTA COMMUNITY HOSPITAL

11/4/86

Medical Record Number 67-707		Business Account Number 649711		Social Security Number 452-84-3619		
PATIENT NAME (Last, First, Initial) STOKLEY, RICHARD DALE			BIRTHDATE 09-09-52(33)	SEX 1 Male <input checked="" type="checkbox"/> 2 Female <input type="checkbox"/> 0 Unkno		
ADDRESS (no. street, City, State) P.O. BOX 1 TOMBSTONE, AZ		ZIP 85638	PHONE	RACE 1 White <input checked="" type="checkbox"/> 2 Black <input type="checkbox"/> 3 Oriental <input type="checkbox"/> 4 Am Ind <input type="checkbox"/> 5 Hispanic <input type="checkbox"/> 6 Other <input type="checkbox"/> 7 Unknown <input type="checkbox"/>		
Health Insurance No.		PAYOR CODE: 1 Medicare <input type="checkbox"/> 2 Other <input type="checkbox"/> 3 AHCCS/Medicaid <input type="checkbox"/> 4 Title V <input type="checkbox"/> 5 Other Gov <input type="checkbox"/> 6 WC (ICA) <input type="checkbox"/> 7 BC/BS <input type="checkbox"/> 8 IS <input type="checkbox"/> 9 Self Pay <input checked="" type="checkbox"/>		ADMIT DATE 07-13-86	HOUR A.M. 2145 P.M.	
ADMIT SOURCE 1 Physician Ref <input type="checkbox"/> 2 Clinic <input type="checkbox"/> 3 HMO/AHCCCS <input type="checkbox"/> 4 Hospital <input type="checkbox"/> 5 SNIF <input type="checkbox"/> 6 AHCF <input type="checkbox"/> 7 ER <input checked="" type="checkbox"/> 8 COURT <input type="checkbox"/> 11 NORMAL NB <input type="checkbox"/> 12 PREMATURE NB <input type="checkbox"/> 13 SICK NB <input type="checkbox"/> 14 EXTRAMURAL NB <input type="checkbox"/>			NAME OF INSURANCE CO. CASH		ADMISSION TYPE 1 Emergency <input checked="" type="checkbox"/> 2 Urgent <input type="checkbox"/> 3 Elective <input type="checkbox"/> 4 Newborn <input type="checkbox"/>	
NAME & ADDRESS OF EMPLOYER NONE						
NEXT OF KIN (Relationship) ADDRESS STOKLEY, DEBORAH S. (SPOUSE) SAP				PHONE NUMBER SAP		
Has Patient Previously been Treated Here? No <input checked="" type="checkbox"/> Yes <input type="checkbox"/> (Inpatient, Outpatient or Emergency Room)			Under what Name?		Date if Known	
Admitting Physician & Number DONNA M. FULTON, M.D. #12294		Room 211	Bed A	SERVICE CODE 10 GENERAL MEDICINE <input checked="" type="checkbox"/> 40 GENERAL SURGERY <input type="checkbox"/> 70 GYNECOLOGY <input type="checkbox"/> 75 AB <input type="checkbox"/> 76 OB NOT DEL. <input type="checkbox"/> 77 OB DEL <input type="checkbox"/> 80 NEWBORN <input type="checkbox"/>		
DISCHARGE DATE 7/15/86	HOUR 1105 A.M. P.M.	LENGTH OF STAY 2	DISCHARGE STATUS: 1 HOME <input checked="" type="checkbox"/> 2 OTHER HOSPITAL <input type="checkbox"/> 3 SNIF <input type="checkbox"/> 4 ICF <input type="checkbox"/> 5 OTHER INST. <input type="checkbox"/> 6 HOME HEALTH <input type="checkbox"/> 7 AMA <input type="checkbox"/> 20 EXPIRED <input type="checkbox"/> 30 STILL IN <input type="checkbox"/> 42 OP <input type="checkbox"/>			
Attending Physician & Number D. FULTON, MD.			CONSULTANTS W. MCCORMICK, D.O.			

ADMITTING DIAGNOSIS:
Questionable Right Leg Paralysis

DISCHARGE DIAGNOSES		CODE
PRINCIPAL DIAGNOSIS QUESTIONABLE TRANSIENT PARALYSIS		781.4
OTHER DIAGNOSES 1. Intoxication		305.00
2. Fracture, Distal Phalanx, Ring Finger Left		816.00
3. MVA		E818
4.		
5.		

PROCEDURES	Date	Surgeon	CODE
PRINCIPAL PROCEDURE			
OTHER PROCEDURES			
1.			
2.			
3.			

"I certify that the identification of the principal and secondary diagnoses and the procedures performed is accurate and complete to the best of my knowledge. (Notice: Intentional misrepresentation, concealment may, in the case of a Medicare beneficiary, be punishable by imprisonment, fine, or civil penalty.)"

DRG _____

ER - 2139.2

[Signature]

Signature - Attending Physician

MRN	67-707	ACCT#	649711	DOB	2-8-3619	ADMIT DATE	7-13-86	TIME AM	PM	ERPHYS#	DRIVER'S LICENSE ID#	
PT NAME	STOKLEY, Richard Dale		DOB	9-9-53	AGE	33	SEX	M	MS	REL TO IN	RELIG	NATIONALITY
MAILING ADDRESS	PO Box 1		CITY	Tombstone		STATE			ZIP CODE			
STREET ADDRESS	None		PT. HOME PHONE			MESSAGE PHONE	457-3124					
EMPLOYER	None		ADDRESS			CITY	STATE	ZIP CODE	EMP PHONE			
INSURED NAME	SAA		LAST	FIRST	MI	EMP NAME		EMP PHONE				
INS CO NAME PRIMARY	CASH		ID#			GROUP#	INS CODE	EFF DATE	IC#	ASSIGN#	Y	OTHER COV
INSURED NAME			LAST	FIRST	MI	EMP NAME		EMP PHONE				
INS CO NAME SECONDARY			ID#			GROUP#	INS CODE	EFF DATE	ASSIGNED Y			
RESP PTY NAME	SELF		FIRST	MI	REL TO PT		SS#	PHONE				
ADDRESS			CITY		STATE	ZIP	EMPLOYER NAME					
EMPLOYER ADDRESS			CITY		STATE	ZIP	EMPLOYERS PHONE					
ADMIT PHYS#	ATTEND PHYS		ROOM#	PT TYPE	PAYOR CODE	CLERK						
FAMILY DOCTOR	NOTIFIED	A M	ARRIVED	A M	BROUGHT BY	WALK	CAR					
DOCTOR	NOTIFIED	P M	ARRIVED	P M	SELF	SVPD	AMB	SHERIFF	RELATIVE	DPS	OTHER	
ALLERGENS	PCN				LAST TETANUS	IMP	CONDITION ON ADMISSION	GOOD	FAIR	POOR	CRITICAL	
CHIEF COMPLAINTS	received via ambulance - pt on back board cervical collar in place. laceration l. side of head. (most of it was capped - alcohol in blood. unable to move @ leg. very little movement l. side.											
HISTORY	Intoxicated pt brought in by Tombstone ambulance to ER by MVA. It was attempting to get into a moving vehicle, fell off hit @ shoulder and head, rolled down hill. It was found supine and unable to give any history.											
EXAMINATION	2° intoxicated state. P.E. - 4+ ERO4 very hard for patient to cooperate & warn. (1) forehead lac. (2) leg deformity over pretibial region. (3) arm/leg flacid. (4) diminished weak but has some grasp. (5) leg motion not tested 2° deformity. No sensation to pinprick below nipple's but level not reliable.											
ATTENDING PHYSICIAN'S ORDERS	(1) CBC, U/A, B.A. - 0.21 (2) fall finger deformed. (2) cross table lateral - nl obliques - nl. (3) leg - nl (3) Rev of exam - pt "drunk" wearing off - beginning to move more easily, beginning to look less neurologic & simply more intoxicated. admit for observation.											
DIAGNOSIS	MVA, intoxication, questionable paralysis											
DISCHARGE CONDITION	SATISFACTORY	GOOD	FAIR	POOR	CRITICAL							

TEMP	PULSE	RESP	R/P	WT	OD
	100	14	138/R		OS
TIME	TEMP	PULSE	RESP	HT	
SKULL	FLAT UPRIGHT ABDOMEN				
KNEE	CERVICAL SPIN				
ANKLE	LUMBAR SPINE				
OTHER	l. leg (calc) AP + lateral				

TIME ORDERED	X	TESTS	TIME RECEIVED
	X	CBC	
	X	U/A	
		B/S	
		LYTES	
		AMYLASE	
		BUN	
		ABG	
		EKG	
		GRAM STAIN	
		CULTURE & SENSITIVITY	
		ENZYMES	
		T & C UNITS	
		CREATINE	
	X	Blood Alcohol	

ER - 2139.3

DISPOSITION TIME 9:45

HOME	EXPIRES IN E
AMA	DOA
X ADMITTED	DOA with CF
RECHECK	
TRANSFERRED TO:	

PHYSICIAN'S SIGNATURE
D. Nelson



300 El Camino Real
Sierra Vista, AZ 85635

DISCHARGE PLAN

67-707 649711
STOKLEY, RICHARD DALE
452-84-3619 M 33
FULTON 12294 DOB 9-9-52
07-13-86
CASH

INSTRUCTIONS

PATIENT/FAMILY UNDERSTANDING

- Follow-up appointment with DR. McCormick ~~on~~ if you ^{have} weakness in leg, or pain with fir
Office phone # 458-0650 ✓
Hospital phone # 458-4641
- Diet as tolerated
- Activity use a cane with walking
- Medications Reason for taking Directions Time Schedule Last dose Understanding
 - none ordered
 -
 -
 -
 -

Any questions regarding drug side effects or reactions should be referred to your doctor or Pharmacist.

Assessment:

Subjective "I feel pretty (R) sore... all over."

Do you need help at home? No.

Do you need to talk to the Dietician, Pharmacist or Social Worker before you leave the hospital? Social Worker talked 2 patient (Sharon Lake.)

Do you know what to do if you have a recurrence of your symptoms? Call Dr. McCormick

Objective: Color good. Skin warm/dry. Difficulty in walking - limps on (R) leg.

Does not respond to painful stimuli on (R) leg. Splint on (R) 4th finger

Describe all wounds, bruises, abrasions.

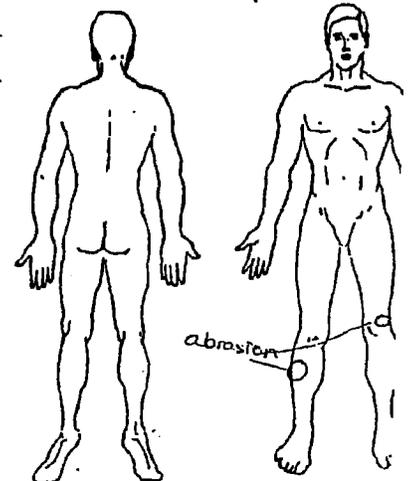
2" abrasion on (R) knee 1" abrasion on (L) knee

- Yes No Personal belongings returned
- Yes No Valuables
- Yes No Meds from home
- Yes No Special discharge sheet, ie. cast care, eye care, head sheet
- Yes No Normal Bowel, bladder function

Signature of nurse C. Wilson RN

Signature of patient/family X. Richard Stokley

Date/time 7-15-86 1034



STOKLEY, RICHARD DALE

#06-77-07

ADMITTED: 7/13/86

DISCHARGED: 7/15/86

BRIEF HISTORY: Mr. Stokley is a 33 year old gentleman who came to the emergency room on the night of admission in a quite intoxicated state, making a physical examination very difficult. However, the patient appeared to have a flaccid paralysis of the right arm and leg and possibly some dysfunction of the left arm. He had a deformity of the left leg and major trauma was suspected. Patient underwent some initial studies in the emergency room including a crosstable lateral and an entire cervical spine series. Despite what appeared to be a cord contusion, the patient did not demonstrate any cord impingement or cervical fractures.

Over the next several hours he was observed in the emergency room and he continued to have some dysfunction of the right leg and right arm movement. For that reason he was hospitalized for evaluation and further observation.

Consultation was obtained with Dr. McCormick who felt initially that he might have some paralysis of the right lower extremity and suggested a CT of that extremity and a CT of the lumbar spine.

HOSPITAL COURSE: Patient was further observed over the next day and AP & lateral spines, left tibia and fibula x-rays, as well as fingers and AP pelvis studies were done. Patient showed no major problems in any of these x-rays. As he awoke from his intoxication he began to move, albeit in an affected manner. However he demonstrated full range of motion and ability to bear weight on the right leg.

He was sent home with a cane and was told to followup for his fractured finger with Dr. McCormick.

FINAL DIAGNOSIS:

1. Questionable transient paralysis.
2. Fracture of the base of the distal phalanx of the ring finger on the left.
3. Intoxication.

DMF/mc

D & T 7/24/86



DONNA M. FULTON, M.D.

ER - 2139.5

DISCHARGE SUMMARY

STOKLEY, RICHARD DALE

#6-77-07

ADMITTED: 7/13/86

HISTORY OF PRESENT ILLNESS: Mr. Stokley is a 33-year-old gentleman who came into the ER by ambulance who was intoxicated and had injured himself after trying to get into a moving vehicle. The patient fell off the moving car, hit his left shoulder and head, and rolled down a hill. He was found supine and was unable to give any history secondary to his intoxicated state.

No further history was available at that time to include past medical, social, or family history. However, it was quite obvious that the patient was a smoker, since he came to the ER with an unlit cigarette stuck in his mouth as a means of pacification by the ambulance technicians.

PHYSICAL EXAMINATION: 4+ ETOH making it very hard to evaluate the patient and for him to cooperate with the examination.

GENERAL DESCRIPTION: Left forehead showed a laceration, left leg deformity was quite obvious over the pretibial region. The right arm and leg was flacid and the left arm and hand weak, but had some grasp. The left tall finger was deformed. Left leg motion was not tested secondary to deformity. There was no sensation to pin prick below the nipples, but the level was unreliable.

LABORATORY: CBC within normal limits. Ua normal. Blood alcohol was .21. X-rays of the cervical spine were completely within normal limits, including obliques. Left leg was normal and there was no bony deformity.

The patient was observed in the ER for a couple of hours and he began moving his upper extremities and his left leg. At no time, however, did he move his right leg, except to attempt to contract his quads when asked. Rectal examination was done to assure no abnormality and this was normal. It was decided that the patient would be hospitalized and observed because the right leg was not moving.

IMPRESSION:

1. QUESTIONABLE RIGHT LEG PARALYSIS. 2. MVA WITH MULTIPLE SOFT TISSUE INJURIES, INCLUDING FRACTURE OF THE LEFT TALL FINGER.

PLAN: Please see physicians orders.

df/nln

D 7/15/86

T 7/15/86


Donna Fulton, M. D.

ER - 2139.6

HISTORY AND PHYSICAL

STOKLEY, RICHARD DALE

#6-77-07

ADMITTED: 7/13/86

DATE: 7/14/86

TO: DR. FULTON

FROM: DR. MCCORMICK

HISTORY: This is a 33-year-old male with a history of ethyl alcohol intoxication last night and was apparently knocked down by a moving automobile.

History related is that the patient and his wife had been having marital problems for some time. He alleges that she coerced him into giving her the keys to the car, then she jumped in the car, locked the doors and starting taking off. This occurred in Tombstone. He was intoxicated at the time, jumped onto the front fender, hanging onto the windshield wipers of the car. She apparently accelerated two to three blocks off of Allen Street toward the highway, made a corner and in doing so he was thrown from the automobile, rolling down an embankment. He states that the automobile ran over his right hand, injuring his right ring finger. He landed on his right shoulder and possibly hit his head severely. He does not recall being knocked unconscious, but has had a history of previous head injury. His leg apparently has been "dead" all night long, his right leg is unable to be voluntarily moved.

His blood alcohol level was .21 last evening. He has a Foley in place and he is passing gas. He has had no bowel movement and he feels like his right foot is cold. He admits to drinking a case of beer Saturday night and drinks beer all week long and occasionally other drinks. He has been treated in the past for alcoholism. He does not think that this is an abuse problem, he thinks it is primarily a problem with his marital status. He denies any meds or allergies to foods or medications.

PHYSICAL EXAMINATION:

HEENT: Within normal limits. There are abrasions about the head. There is an old defect to the posterior left parietal area of his skull where he had a previously depressed skull fracture and had the fragments removed. At that time he stated that he had some paralysis of his right lower extremity and right upper extremity, but this has mostly dissipated. His eyes are PERRLA.

NECK: Moves without lymphadenopathy, increased size of thyroid or pain on motion. There is no tenderness to direct palpation. There is some slight tenderness over the lower T and upper L spine. Otherwise, there is no significant injury to his back.

CHEST: Good expansion without rales, rhonchi, or wheezing.

HEART:

ABDOMEN: Soft, without masses or tenderness. Bowel sounds are present.

RECTAL: Normal as done by Dr. Fulton.

EXTREMITIES: Both upper extremities have multiple abrasions. There is a fracture of the right ring finger of the distal phalanx which I have splinted and straightened. His right should has good range of motion, but painful and his DTRs of both upper extremities are within normal limits as

continued.....

ER - 2139.7

CONSULTATION

STOKLEY, RICHARD DALE

#

ADMITTED: 7/13/86

PAGE TWO

are pulses. Primary injury to his upper extremity was the right shoulder and right ring finger. The left lower extremity is normal to motion, DTRs and pulses. The pulses to the right lower extremity are normal, slightly decreased posterior tibial compared to the left. His patellar reflex on the right is absent. His Achilles reflex on the right shows slow reaction compared to the left. He was able to move his right toes, but in extreme hesitant type motion. Once put in dorsiflexion his great toe can be held there, sustained by him approximately 3+. He is unable to move his right knee in extension, but does have a slight quivering of the quadriceps on the right side when asked to do the activity. There is some tenderness to the right groin area, and no evidence of any severe contusion about the right hip.

X-RAYS: Appear to be within normal limits with the exception of the fracture of the right ring finger.

IMPRESSION: MULTIPLE TRAUMA, MOTOR VEHICLE ACCIDENT. ACUTE ETHYL ALCOHOL INTOXICATION. PARALYSIS RIGHT LOWER EXTREMITY, ETIOLOGY UNKNOWN. OLD HEAD INJURY WITH BONE REMOVED.

RECOMMENDATIONS: CT scan. Possible CT scan of his lumbar spine. Will get an AP of his pelvis. I will discuss this case with you.

WM/nln
D 7/14/86
T 7/14/86


WILLIAM MCCORMICK, D.O.

ER - 2139.8

CONSULTATION



300 El Camino Real
Sierra Vista, AZ 85635

11-17-86
FELTON 12294 008 9-1-86
07-13-86

**DOCTOR'S
PROGRESS RECORD** CASH

Atokley, Richard

Date/Time	Record progress of case, complications, change in diagnosis, condition on discharge, instructions to patient
7/13/86	see ER sheet for admit notes. H&P will be dictated at time of DIC since ≤ 24 stay expected - Jensen
7/14/86	Still complaining can't feel or move @ leg - I don't know what to make of it. Dr McCormick to help out. Jensen
7/14	33 y.o. male, h/o of STOH intoxication. Last night attempted to enter a moving vehicle & was knocked down & fell down on embankment. Unable to move legs initially. Now "leg is dead". STOH @ 20% last night. Dr. Boles in ER - passing gas but no B.M. (what felt like)
	Pm & Sec hr: ① Manual Problems, altercation with wife, left night who attempted to "take his car she jumped on. The front & side, when was thrown off." ② STOH - Advice beer per sat & drinks beer all week also for alcoholism. ③ Meds - ④ College -



300 El Camino Real
Sierra Vista, AZ 85635

7-9-86
FD-302 (Rev. 12-13-84) DUB 9-9-82
07-13-86
CASH

DOCTOR'S PROGRESS RECORD

Date/Time	Record progress of case, complications, change in diagnosis, condition on discharge, instructions to patient
7/14	<p>At head of leg no acute pathology</p> <p>① Major Power slowly recovering</p> <p>② will follow with surgery</p> <p><i>[Signature]</i></p>
7/15/86.	<p>Neuro dict.</p> <p>② leg movement still not clinically normal, but pt bears weight on it when forced. Believe pts problem is functional but will have re-exam per Dr McL. again today.</p> <p><i>[Signature]</i></p>
7/15	<p>Review of At leg pathology</p> <p>achilles more thick & swollen</p> <p>At still absent. Still no sensation of leg but starting to walk.</p> <p>Drip: Resolving Paralysis of leg</p> <p>Can I recommend DC to OR would like to see pt in the OR</p> <p><i>[Signature]</i></p>

SIERRA VISTA COMMUNITY HOSPITAL

300 El Camino Real • Sierra Vista, AZ 85635

PHYSICIAN'S ORDERS

Stohley Kichas

<input checked="" type="checkbox"/> AS ORDERED	<input checked="" type="checkbox"/> CHECK EACH ORDER TO BE FILLED BY PHARMACY	TIME AND DATE OF ORDER A.M. <input type="checkbox"/> 7, 1386 P.M. <input type="checkbox"/>	ALLERGIES:	STAT <input type="checkbox"/>	APPROVED EQUIVALENTS MAY BE DISPENSED UNLESS CHECKED HERE <input type="checkbox"/>	CODE NO.
		Admit to Intensive				
		Dx: Questionable paralytic				
		R/O known ^{benign} spinal type				
		(c negative spine films)				
		Antitoxication				
		and pain				
		Vitals \bar{g} 4°				
		Diet - \bar{g} 10 cal				
		I.V. heparin - done in ER				
DATE	TIME	NURSE'S SIGNATURE		PHYSICIAN SIGNATURE		
				<i>[Signature]</i>		204

<input checked="" type="checkbox"/> OFF EACH ORDER AS TRANSCRIBED	<input checked="" type="checkbox"/> CHECK EACH ORDER TO BE FILLED BY PHARMACY	TIME AND DATE OF ORDER A.M. <input type="checkbox"/> P.M. <input type="checkbox"/> 11	ALLERGIES:	STAT <input type="checkbox"/>	APPROVED EQUIVALENTS MAY BE DISPENSED UNLESS CHECKED HERE <input type="checkbox"/>	CODE NO.
		Transfer to DD.				
		Neuro \bar{g} 4°				
		activity c/ assist				
		C/S Dr McCormick in AM				
		to sp evaluate @ 2 nd finger				
		fracture				
DATE	TIME	NURSE'S SIGNATURE		PHYSICIAN SIGNATURE		
7/13/86	2:50	<i>[Signature]</i>		<i>[Signature]</i>		204

<input checked="" type="checkbox"/> OFF EACH ORDER AS TRANSCRIBED	<input checked="" type="checkbox"/> CHECK EACH ORDER TO BE FILLED BY PHARMACY	TIME AND DATE OF ORDER A.M. <input type="checkbox"/> 7, 14, 86 P.M. <input type="checkbox"/>	ALLERGIES:	STAT <input type="checkbox"/>	APPROVED EQUIVALENTS MAY BE DISPENSED UNLESS CHECKED HERE <input type="checkbox"/>	CODE NO.
		Dr McCormick to see re: (R) leg				
		and @ hand (finger fx).				
		<i>[Signature]</i>				
		<i>[Signature]</i>				
DATE	TIME	NURSE'S SIGNATURE		PHYSICIAN SIGNATURE		
7/14/86	12:20	<i>[Signature]</i>		<i>[Signature]</i>		

ER - 2139.12

SIERRA VISTA COMMUNITY HOSPITAL

300 El Camino Real • Sierra Vista, AZ 85635

PHYSICIAN'S ORDERS

✓ AS TRANSCRIBED	CHECK ✓ EACH ORDER TO BE FILLED BY PHARMACY	TIME AND DATE OF ORDER	ALLERGIES:	STAT <input type="checkbox"/>	APPROVED EQUIVALENTS MAY BE DISPENSED UNLESS CHECKED HERE <input type="checkbox"/>	CODE NO.
		A.M. <input type="checkbox"/> P.M. <input checked="" type="checkbox"/> 7/15/86		<input type="checkbox"/>	<input type="checkbox"/>	
<p>After P.T. sees have them call me and provide pt crutches for preparation for DIC.</p>						
		7/15/86	09:30	A.M. <input type="checkbox"/> P.M. <input checked="" type="checkbox"/>	Chris Wilson <i>ew</i> x	<i>J. Wilson</i>
		DATE	TIME		NURSE'S SIGNATURE	PHYSICIAN SIGNATURE
		A.M. <input type="checkbox"/> P.M. <input checked="" type="checkbox"/> 7/15/86		<input type="checkbox"/>	<input type="checkbox"/>	
<p>① Discharge p getting cane ② follow up to Dr. McCormick for fx fx finger any generalized weakness in leg. T.O. Dr. Fulton / m. Hinkle <i>ew</i></p>						
		7/15/86	09:45	A.M. <input type="checkbox"/> P.M. <input checked="" type="checkbox"/>	Chris Wilson <i>ew</i> x	<i>J. Wilson</i>
		DATE	TIME		NURSE'S SIGNATURE	PHYSICIAN SIGNATURE
		A.M. <input type="checkbox"/> P.M. <input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>	
		DATE	TIME		NURSE'S SIGNATURE	PHYSICIAN SIGNATURE

STOKLEY, RICHARD DALE
 452-64-3619
 FULTON 12294 008 9-9-52
 N 33

STOKLEY, RICHARD DALE
 452-64-3619
 FULTON 12294 008 9-9-52
 N 33

STOKLEY, RICHARD DALE
 452-64-3619
 FULTON 12294 008 9-9-52
 N 33

ER - 2139.14



SIERRA VISTA COMMUNITY HOSPITAL
300 EL CAMINO REAL
SIERRA VISTA, ARIZONA 85635
802-458-4641 EXT. 409
QUERY FLORES, M.D., MEDICAL LAB DIRECTOR

Stokley Richard D
age 33 ER # 49711
Dr Fulton

TIME COLLECTED 7:19 45 A.M.	COLLECTED BY ER STAFF	DATE COLLECTED 7/13	ORDER COMMENTS
<input checked="" type="checkbox"/> ROUTINE	<input type="checkbox"/> URGENT	<input checked="" type="checkbox"/> STAT	<input type="checkbox"/> PRE-OP
TEST REQUIRED	NORMAL	RESULTS	
Blood Alcohol		0.21 gm% / 10	
COMMENTS			
SPECIMEN SENT OUT			

RECEIVED
1986 JUL 14 AM 7:50

MISCELLANEOUS - LAB
MEDICAL RECORDS

TIME REPORTED 2:30 A.M. P.M.
DATE REPORTED 7/13/86
TECH SIGNATURE [Signature]

Form #408-17-35



SIERRA VISTA COMMUNITY HOSPITAL LAB
300 EL CAMINO REAL
SIERRA VISTA, AZ 85635
802-458-4641, EXT. 760
QUERY FLORES, M.D., Med. Lab. Director

Stokley Richard D
age 33 ER # 49711
Dr Fulton

TIME COLLECTED 7:19 45 A.M.	COLLECTED BY ER STAFF	DATE COLLECTED 7/13/86	TIME RECEIVED	DATE RECEIVED
<input checked="" type="checkbox"/> ROUTINE	<input type="checkbox"/> TODAY	<input checked="" type="checkbox"/> STAT	<input type="checkbox"/> PRE-OP	
TEST REQUESTED	RESULTS	TEST REQUESTED	RESULTS	
URINALYSIS (With Microscopic)		MICROSCOPIC EXAM:		
COLOR	STRAW	CASTS / LPF	00	
APPEARANCE	Clear	WBC / HPF	00	
SPECIFIC GRAVITY	1.002	RBC / HPF	00	
pH	5.0	EPITHELIAL CELLS	TRACE	
PROTEIN	00	BACTERIA	00	
GLUCOSE	00	CRYSTALS	0000	
KETONES	00	MUCUS	0000	
OCCULT BLOOD	00	AMORPHOUS	0000	
BILIRUBIN	00	YEAST	0000	
UROBILINOGEN	Normal	TRICHOMONAS	0000	
NITRITE	00	UR. PREGNANCY TEST		

TEST REQUESTED	RESULTS
OCCULT BLOOD	
OVA & PARASITES	

RECEIVED
1986 JUL 14 AM 7:49

URINALYSIS
MEDICAL RECORDS

TIME REPORTED 2:035 A.M. P.M.
DATE REPORTED 7/13/86
TECH SIGNATURE [Signature]

Form # 406-20-86

- CBC
- DIFFERENTIAL
- OTH
- ROUTINE
- STAT
- TODAY
- PRE-OP
- ABC
- Hgb
- INDICES
- BLEEDING PROF.
- Hct
- WBC

TEST	NORMAL VALUES	TEST	RESULTS
WBC	M 7.8 ± 3 F 7.8 ± 3	SED RATE	M 0-10 mm/hr F 0-20 mm/hr
RBC	M 5.4 ± 0.7 F 4.9 ± 0.6	RETIC CNT.	0.5-1.5%
Hgb	M 15.0 ± 2 F 14.0 ± 2	PLATELET CNT.	150,000 - 400,000/mm ³
Hct	M 47 ± 5 F 42 ± 5	PLAT. EST.	ADD
MCV	M 87 ± 7 F 90 ± 9		
MCH	M 29 ± 2 F 29 ± 2		
MCHC	M 35 ± 2 F 35 ± 2		

DIFFERENTIAL:

BANDS	PT	PATIENT	SEC
SEGS	CONTROL		
LYMPH	PTT	PATIENT	SEC
ATYP. LYM.		CONTROL	SEC
MONO	FIBRINOGEN	> 100% ACTIVITY	
MORPHOL. COMMENTS	BLEEDING TIME	2.0-9.5 MIN	

Stokley Richard D
age 33 ER # 49711
Dr Fulton

RECEIVED
1986 JUL 14 AM

HEMATOLOGY

Normal

Sierra Vista Community Hospital (LAB)
300 El Camino Real
Sierra Vista, Arizona 85635
(802) 458-4641, Ext. 409
Query Flores, M.D., Med. Lab Director

TIME COLLECTED 7:19 45 A.M.
DATE REPORTED 7/13/86
TECH SIGNATURE [Signature]

ER - 2139.15

X-RAY NO. 86-8452

SIERRA VISTA COMMUNITY HOSPITAL
Sierra Vista, Arizona

DATE 7-14-86 X

HOSPITAL NO. 06-77-07

NAME STOKLEY, RICHARD DALE ROOM 204A AGE 33 DR. FULTON/MCCORMICK

CLINICAL DIAGNOSIS: MVA

HEAD CT: 10 mm contiguous transaxial slices were made from the base of the skull through the vertex without contrast enhancement.

The bony structures at the base of the skull are within normal limits. There are no high or low density posterior fossa abnormalities. The 4th ventricle is in a normal position. There is no shift of supratentorial midline structures. The ventricular system and basilar cisterns are normal. There are no abnormal extracerebral fluid collections. There are no high or low density supratentorial parenchymal abnormalities. There are no abnormal extracerebral fluid collections.

There is a large defect in the left superior parietal region from previous surgery. A calcified dural plaque is visible superiorly.

IMPRESSION: STATUS POST BURR HOLE IN LEFT SUPERIOR PARIETAL REGION. OTHERWISE NORMAL.

SIW/sd
D 7-15-86
T 7-16-86

SIW

STEVEN I. WALSH, M. D.
RADIOLOGIST

X-RAY NO. 86-8452

SIERRA VISTA COMMUNITY HOSPITAL
Sierra Vista, Arizona

DATE 7-14-86 X

HOSPITAL NO. 06-77-07

NAME STOKELY, RICHARD DALE ROOM 204A AGE 33 DR. FULTON/MCCORMICK

CLINICAL DIAGNOSIS: MVA

PELVIS: A single AP view of the pelvis was made. The bony pelvis is intact. Bony ossification and architecture are normal. The sacroiliac joints appear normal. The joint spaces in the hips are normal.

IMPRESSION: NORMAL.

SIW/sd
D 7-15-86
T 7-16-86

SIW

ER - 2139.16

STEVEN I. WALSH, M. D.
RADIOLOGIST

X-RAY NO. 86--8452 SIERRA VISTA COMMUNITY HOSPITAL DATE 7-14-86 X
Sierra Vista, Arizona
HOSPITAL NO. 06-77-07
NAME STOKLEY, RICHARD DALE ROOM 204A AGE 33 DR. FULTON/MCCORMICK

CLINICAL DIAGNOSIS: MVA

LUMBAR CT: Contiguous 4 mm slices were made from the body of S1 to the bottom of T12.

L5-S1: The S1 nerve roots appear normal in their lateral recesses and as they merge with the thecal sac. The thecal sac and bony central canal are normal. There is no abnormality of the L5-S1 intervertebral disc. The L5 nerve root canals and exiting L5 nerve roots appear normal. Minor-to-moderate degenerative changes in the interfacetal joints are present.

L4-5: The L5 nerve roots appear normal in the lateral recesses and as they merge with the thecal sac. The thecal sac and bony central canal are normal. There is moderate diffuse bulging of the L4-5 intervertebral disc without compromise of neural structures. The L4 nerve root canals and exiting L4 nerve roots are normal. Minor degenerative changes are present in the interfacetal joints.

L3-4: The L4 nerve roots appear normal in their lateral recesses and as they merge with the thecal sac. The bony central canal and thecal sac are within normal limits. There is moderate diffuse bulging of the L3-4 intervertebral disc without significant compromise of neural structures. The L3 nerve root canals and exiting L3 nerve roots appear normal.

CONTINUED

RADIOLOGIST

M. D.

X-RAY NO. 86-8452 SIERRA VISTA COMMUNITY HOSPITAL DATE 7-14-86 X
Sierra Vista, Arizona
HOSPITAL NO. 06-77-07
NAME STOKLEY, RICHARD DALE ROOM 204A AGE 33 DR. FULTON/MCCORMICK

LUMBAR CT - CONTINUED - PAGE TWO

There are minor degenerative changes in the interfacetal joints.

L2-3: The L3 nerve roots appear normal in the lateral recesses and as they merge with the thecal sac. The central canal and thecal sac are normal. There is mild diffuse bulging of the L2-3 intervertebral disc without compromise of neural structures. The L2 nerve root canals and exiting L2 nerve roots appear normal.

L1-2: The thecal sac and bony central canal are normal. There is no significant abnormality of the L1-2 intervertebral disc. The L1 nerve root canals and exiting L1 nerve roots are normal.

IMPRESSION: MILD-TO-MODERATE DIFFUSE BULGING OF THE L2-3, L3-4 AND L4-5 INTERVERTEBRAL DISCS. NO COMPROMISE OF NEURAL STRUCTURES.
MILD-TO-MODERATE INTERFACETAL JOINT DEGENERATIVE CHANGES.

SIW/sd
D 7-15-86
T 7-16-86

SIW ER - 2139.17

STEVEN I. WALSH,
RADIOLOGIST M. D.

X-RAY NO. 86-8452

SIERRA VISTA COMMUNITY HOSPITAL
Sierra Vista, Arizona

DATE 7-14-86

HOSPITAL NO. 06-77-07

NAME STOKLEY, RICHARD DALE ROOM 204A AGE 33 DR. FULTON

CLINICAL DAIGNOSIS: MVA

AP PELVIS: Degenerative changes are noted at the L4-5 intervertebral disc level. No fractures or dislocations are seen. No evidence of a pelvic hematoma is detected.

DPK/sd
D 7-14-86
T 7-15-86

OK

DAVID P. KLEIN, M. D.
RADIOLOGIST

X-RAY NO. 86-

SIERRA VISTA COMMUNITY HOSPITAL
Sierra Vista, Arizona

DATE 7-13-86

HOSPITAL NO. _____

NAME STOKLEY, RICHARD DALE ROOM ER AGE 33 DR. FULTON

CLINICAL DIAGNOSIS: NOT STATED

FINGERS: There appears to be a fracture through the base of the distal phalanx of the ring finger. The distal fracture fragment is somewhat displaced dorsally and there is dorsal angulation at the fracture site. No other significant abnormality is seen.

DPK/sd
D 7-14-86
T 7-15-86-

ER - 2139.18

OK

DAVID P. KLEIN, M. D.
RADIOLOGIST

X-RAY NO. 86-

SIERRA VISTA COMMUNITY HOSPITAL
Sierra Vista, Arizona

DATE 7-13-86

HOSPITAL NO. _____

NAME STOKLEY, RICHARD DALE ROOM ER AGE 33 DR. FULTON

CLINICAL DIAGNOSIS: NOT STATED

LEFT TIBIA AND FIBULA: The distal left tibia and fibula are not visualized on this examination. No acute bony abnormality is seen. Mild bony irregularity is noted within the region of the anterior tibial tuberosity, most likely secondary to previous trauma.

IMPRESSION: NO ACUTE BONY ABNORMALITY IS SEEN.

DPK/sd
D 7-14-86
T 7-15-86

OK
DAVID P. KLEIN, M. D.
RADIOLOGIST

X-RAY NO. 86-

SIERRA VISTA COMMUNITY HOSPITAL
Sierra Vista, Arizona

DATE 7-13-86

HOSPITAL NO. _____

NAME STOKLEY, RICHARD DALE ROOM ER AGE 33 DR. FULTON

CLINICAL DIAGNOSIS: NOT STATED

AP AND LATERAL LUMBAR SPINE: Degenerative changes are present within the lumbar spine, as manifested by loss of intervertebral disc space height at L4-5 and degenerative bony spurring at this level. No definite fractures or subluxations are seen. Degenerative changes are also noted about both S-I joints.

IMPRESSION: DEGENERATIVE JOINT DISEASE AT L4-5 AND OSTEOARTHRITIS INVOLVING BOTH SACROILIAC JOINTS. NO ACUTE BONY ABNORMALITY IS SEEN.

DPK/sd
D 7-14-86
T 7-15-86

ER - 2139.19

OK
DAVID P. KLEIN, M. D.
RADIOLOGIST

SIERRA VISTA COMMUNITY HOSPITAL
Sierra Vista, Arizona

X-RAY NO. 86-

DATE 7-13-86

HOSPITAL NO. _____

NAME STOKLEY, RICHARD DALE ROOM ER AGE 33 DR. FULTON

CLINICAL DIAGNOSIS: NOT STATED

THORACIC SPINE: Degenerative changes are present within the thoracic spine. No fractures or subluxations are seen. The prevertebral soft tissues appear intact.

IMPRESSION: NO ACUTE BONY ABNORMALITY.

DPK/sd
D 7-14-86
T 7-15-86

OK

DAVID P. KLEIN, M. I.
RADIOLOGIST

SIERRA VISTA COMMUNITY HOSPITAL
Sierra Vista, Arizona

X-RAY NO. 86-

DATE 7-13-86

HOSPITAL NO. _____

NAME STOKLEY, RICHARD DALE ROOM ER AGE 33 DR. FULTON

CLINICAL DIAGNOSIS: NOT STATED

CERVICAL SPINE: No fractures or subluxations are seen. The prevertebral soft tissues appear normal. Bony destructive process is not detected.

IMPRESSION: NO ACUTE ABNORMALITY.

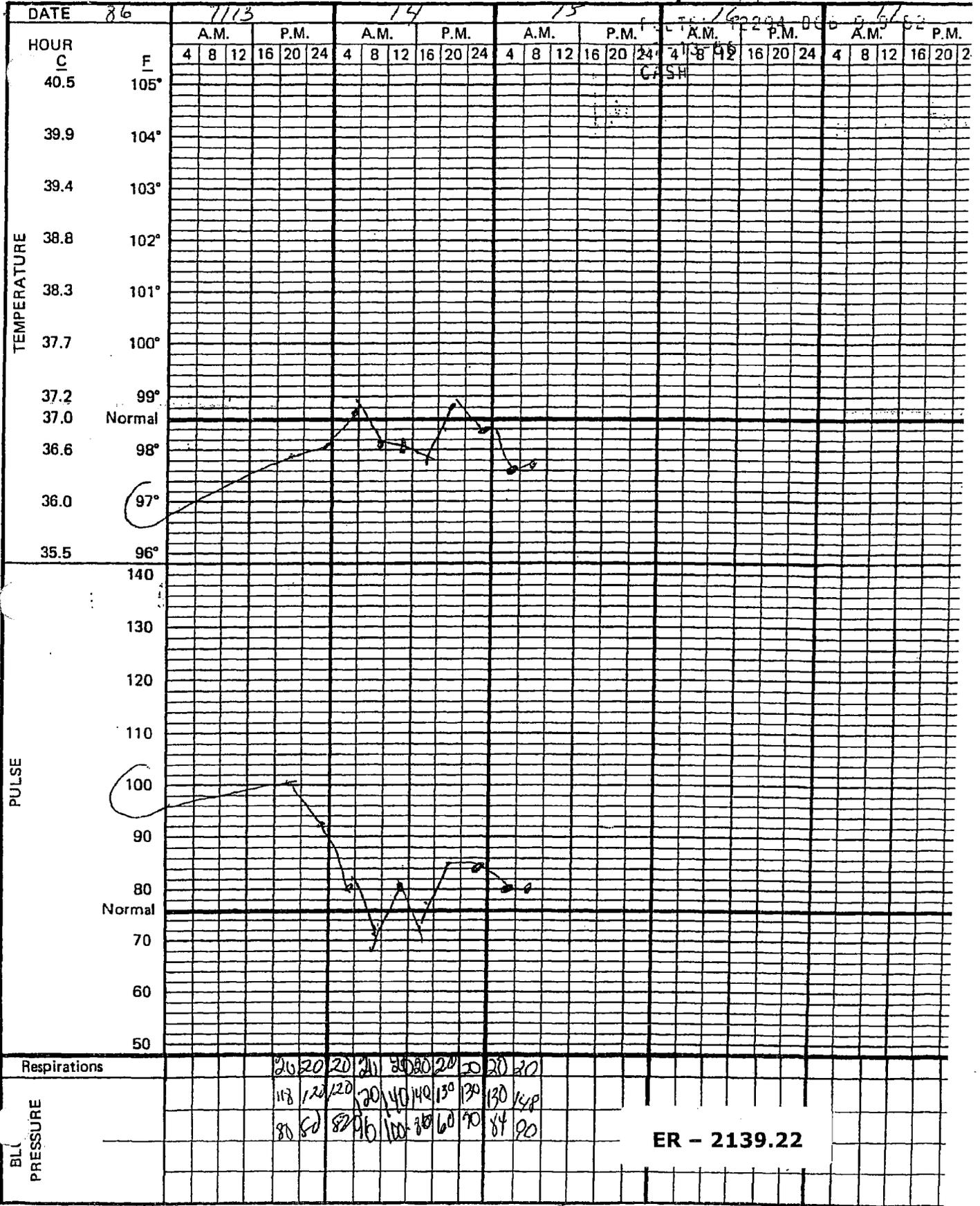
DPK/sd
D 7-14-86
T 7-15-86

ER - 2139.20

OK

DAVID P. KLEIN, M. D.
RADIOLOGIST

GRAPHIC CHART



ER - 2139.22

13 14 15 16 17 Stopley

Sierra Vista Community Hospital

FLOW SHEET

452-...
 FULLT... 2294 1109 9-9-52
 07-13-86

		DATE 19 86															
		7/13				14				CASH 5				16			
I & O		11-7	7-3	3-11	Total	11-7	7-3	3-11	Total	11-7	7-3	3-11	Total	11-7	7-3	3-11	Total
Intake	Oral							1505	✓	✓							
	IV																
	Hyper Al																
	Inter lipids																
	Other																
	Total																
Output	Irrig. Out																
	Irrig. In																
	Urine Foley			1150		750	550	✓	DC								
	Urine Voided						1550										
	Emesis																
	Levine																
	Other																
	Total																
	BM							0/0									
Bath	Self																
	Assist																
	Complete																
Activity	Amb																
	ABR turned																
	Amb w Ass't.																
	Chair																
	Other																
Diet	Well																
	Fair							200									
	Poor							100%	100%								
Sleep	Well																
	Fair																
	Poor																
HS Care																	
Enema with results																	
ER - 2139.23																	
Daily Weight																	



300 El Camino Real
Sierra Vista, AZ 85635

ADMISSION DATA BASE

Date: 7-13-86
Time: 2200
Room: 204A
Admit: Home Office ER
Prior Admission Date: _____

WIKKEY
67-867

Mode of admission: Ambulatory Wheelchair Stretcher
Accompanied by: FR
Religious preference (optional): _____
Clergyman/phone: PRST
Personal effects - list valuables:

NONE

Person giving information: patient other _____

Sent home Kept Safe

Signature of person taking valuables home: _____

ADL:
Dentures Complete Partial
Glasses Contacts
Hearing aid Prosthesis
Cane/walker Bedridden Wheelchair
Blind Foley
Deaf Aphasia
Temperature 97.9 (PB) (R) (AX)
Pulse - Apical _____ Radial 100
Respirations 20
BP - R _____ L 118/80
Height 6'6"
Weight - actual _____ Approximate 220

Instructions

- Nurse call system
- Phone usage
- Bed & TV control
- Visiting hours
- Desire of restriction of visitors
- Meal times
- Smoking policy
- Lobby/waiting room
- Electrical appliances

Relationship

FR

Signature of person obtaining information: _____

R. Castro

PERTINENT MEDICAL INFORMATION:

Drugs: Medications NKDA
Food & other NKFA

Diagnosis: Current _____
Coexisting _____

Medications currently being taken at home: none

Past medical history: none

Past surgical history: depressed skull fx 81.

Reason for this hospitalization (use patient's own words): fell off a car today, hit knees and feet on pavement

DISCHARGE PLAN

Do you anticipate changes in your living conditions after discharge? Yes No
In what area?:
Wound care _____
Transportation _____
Help at home with ADL _____
Mobilization _____
Food preparation _____
Medications _____
Treatments _____
Supplies _____
Previous HHC: When _____ What Agency _____
Chronically ill: _____ Terminally ill _____
Comments: Domestic Problems

SOCIAL (check if applies)

Patient lives with: Spouse _____ Adult child _____ Alone _____ Nursing home _____
Primary care person: Self _____ Spouse _____ Adult child _____ Other care givers at home: _____
Name of nursing home _____
Available family: Dora Stokley
Name _____ Phone number _____
Name _____ Phone number _____
Comments: _____

PSYCHOLOGICAL (check if applies)

Uncooperative _____ Forgetful _____
Withdrawn _____ Irritable _____
Angry Restless _____
Anxious _____ Hysterical _____
Depressed Orientation to:
Person _____
Place _____
Time _____
Listless _____
Stuporous _____
Comatose _____
History of mental disorder _____
Comments: Domestic Problems

NUTRITION (check if applies)

Special diet _____ Underweight _____
Recent weight change _____ Needs help with eating _____
Recent appetite change _____ Time last food intake _____
Heavy ETOH consumption 26/day Time last liquid intake _____
Overweight _____
Comments: _____

ER - 2139.27

HEENT (check if applies)

Headache	___	Cataracts: Left	___
Sinus problems	___	Right	___
Nasal congestion	___	Glaucoma	___
Epistaxis	___	Vision loss: OS	___
Problems chewing	___	OD	___
Sores or ulcers in mouth	___	OU	___
" " problems	___	Eye discharge: Left	___
" " discharge	___	Right	___
Hearing loss: Left	___	Pupils reactive: Left	___
Right	___	Right	___
Syncope	___	Artificial eye	___
Vertigo	___		___

Comments: hx of depressed skull fx @ 1+

RESPIRATORY (check if applies)

Dyspnea	___	H/O frequent URI	___
Pain	___	Asthma	___
SOB	___	Emphysema	___
Rales	___	Smoker	___
Stridor	___	# of packs per day	___
Rhonchi	___	O2 therapy at home	___
Wheezing	___	# liters	___
Cyanosis	___	Tracheostomy	___
Cough:	___	Lung sounds:	___
Productive	___	Left	___
Unproductive	___	Right	___

Comments: no hx

GASTROINTESTINAL (check if applies)

Nausea	___	Blood in stool	___
Vomiting	___	Abdominal pain	___
Diarrhea	___	Ostomy	___
Constipation	___	Last bowel movement	___
Anorexia	___	Abdominal distention	___
Heartburn	___	Ascites	___
Ulcers	___	Laxative use	___
" " hernia	___	Bowel sounds	___
" " hagia	___		___

Comments: no hx, liver palpable 2" below ribs.

CARDIOVASCULAR (check if applies)

History of: HBP	___	Pedal pulse present:	___
CVA	___	Left	___
Cardiac disease	___	Right	___
MI	___	Heart sounds:	___
Edema	___	Irregular	___
Pacemaker	___	Distant	___
Palpitations	___	Murmur	___
Chest pain	___	Other	___
Phlebitis	___	Blood transfusion	___
Pulmonary emboli	___	Date	___
Neck vein distention	___	Reaction	___
(when flat in bed)	___		___

Comments: no hx

NEURO MUSCULAR (check if applies)

History of:	___	Physical impairment:	___
Tremor	___		___
Dizziness	___	Pain/arthritis of joints and	___
Seizure	___	bones: location	___
Ataxia	___		___
Paralysis	___	Moves all extremities	___
Numbness	___	Equal grips:	___
Weakness	___	Left	___
	___	Right	___

Comments: @ side weakness since trading this pm.

Transfer problems to Care Plan.
Objective note: Multiple abrasions, weakness @ U/LF. Para.

Assessment: _____

ER - 2139.28

Signature of RN: [Signature]

ENDOCRINE (check if applies)

History of:	___	Polyuria	___
Diabetes	___	Polydypsia	___
Thyroid	___	Polyphagia	___
Cancer	___	Recent changes in voice	___
Steroid therapy	___		___
Chemotherapy	___		___
Comments:	<u>no hx</u>		___

GENITOURINARY (check if applies)

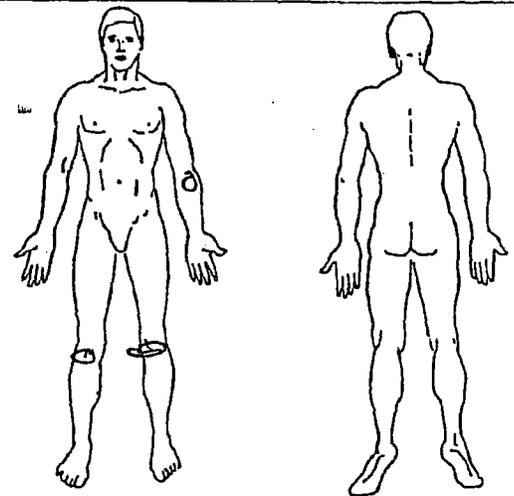
Dysuria	___	Female	___
Frequency	___	Vaginal discharge	___
Incontinence	___	Menopausal	___
Burning on urination	___	Birth control method	___
Nocturia	___	Last breast exam	___
Hematuria	___	Last pap smear	___
Urinary retention	___	LMP	___
Difficulty initiating	___	Regular cycle	___
stream	___	Male	___
Foley:	___	Prostate problem	___
last changed	___	Penile discharge	___
Comments:	<u>no hx</u>		___

INTEGUMENT (check if applies)

Skin:	___	Reddened areas:	___
Warm	___	Feet	___
Cool	___	Heels	___
Dry	___	Ankle	___
Cyanotic	___	Elbows	___
Flushed	___	Sacrum	___
Pale	___	Hips	___
Other	___	Shoulders	___
Rashes	___	Other	___
Diaphoretic	___	Decubiti:	___
Skin turgor:	___	Feet	___
Good	___	Ankle	___
Fair	___	Sacrum	___
Poor	___	Hip	___
	___	Other	___

Mark all bruises, abrasions, lacerations, decubiti & wounds on diagram below.

Comments: _____



Pediatrics (check if applies)

Does child understand reason for hospitalization:	Yes <input type="checkbox"/> No <input type="checkbox"/>	Food dislikes:	___
Breast fed	___	Diapers	___
Bottle:	___	Potty trained	___
Formula	___	Word for BM:	___
Frequency	___	Word for urination:	___
Feed self	___		___
Food likes:	___		___

NURSES PROGRESS NOTES

DATE	TIME	
7-13-86	2200	33 y/o male admitted to 204A via cart c/o "can't feel (R) arm or leg barely move 'em too." Alert, oriented ETOH smell on pt. Multiple abrasions noted on extremities to BSD, draining cl yellow urine. Hep lock patent (R) hand. (R) ring finger nail, pulled up from bed, hematoma noted under nail. Neuro's reveal (R) arm + leg weakness but movement noted. Pt states numbness in both legs. Regular diet served, tol well. <u>for</u>
7-14-86	0555	S - "I can't move my (R) leg at all or feel anything!" O - Improvement obtained c/ (R) toe, pinkish. (R) fingers dilated & unable to grasp. Firm grasp (L) hand & moves (L) leg. Only upon request. Voluntary patient. Anxious, sleep hollow & wmo. Checks & smacking, using (L) hand c/ difficulty. Hep lock site - redness/ swelling. A - Continuing (R) sided numbness/paralysis. P - Re-expt. Nurse plans. <u>(J. Lindholm RN)</u>
7-14-86	0705	S - "I'm still unable to move my (R) leg at all or feel anything." O - Cont. to have improvement on right side. No response to pinkish. Appears most anxious to have my continuing complaints on (L) side. Grip strong (L) hand; moves (L) leg. Only. Appears anxious - has been awake most of night & awakens whenever anyone enters room. Asks for help continuously, unresponsive to nursing requests, checks and @ times. A - Neuro's appear to let the name. Unresponsive. P - Re-expt. Nurse plans. <u>(J. Lindholm RN)</u>
7-14-86	0915	"I just can't move my leg at all." O: Color good. Skin warm and dry. Respirations even and unlabored. (R) hand grasps equal strong (L) hand grasp strong. Refuses to use (R) hand due to pain in (R) 4th finger. States that he can't move (R) leg. Cap refill, temp of both lower extremities good. Unaware of painful stimuli to (R) leg. PERL. 300cc of water instilled into bladder and Foley removed. Voided 350cc quickly. A: (R) leg weakness. P: Monitor closely. - C. Lee

ER - 2139.29

DATE	TIME	
7/14	1800	S. "I can't move my leg very well and my shoulder R is so sore" O: Awake alert pleasant and cooperative. Color pink skin warm and dry. Respirations easy and unlabored. Pulse difficult to verify. Abdomen soft nondistended & (+) BS 14 quadrants. No peripheral edema Splint to R 4th finger in place. New ↓ unable to raise R leg off bed when assisted to raise leg under to hold stiles has numbness feet like leg has no volume in it. Feet warm to touch (+) pp able to slightly wiggle toes & pump ankles
	1930	O: Pt DC hepatic well per self refused to have another one put in. Care placed to Dr. Fulton orders obtained. Neuro checks remain same as 1600 assessment. Above O forehead abrasion quarter sized no drainage & coarsen
7/15/80	0030	#2 S: "I still can't move my R leg very well and my R shoulder + this finger is sore" "I'm hungry - could I have a sandwich" O: alert oriented, skin warm, dry color good flesh tone respirations even & unlabored. abd soft nondistended, resident gs. splint in place to R ring finger per orders - neuro ck - PEARL - grasp good on R weaker on L - unable to raise R leg off bed alone - can move toes a little (R foot) feet warm to touch - capillary refill good A: Rt. sided weakness P: cont. per care plan - food given - M meals R
	0400	O: asleep - awakened for neuro ck - no change remains the same as described @ 0030 - has slept most of night - M meals R
7-15-80	7+000	#25 "I can walk, but I'm not fast" O: Color good. Skin warm and dry. Respirations even and unlabored. PERL Refuses to allow staff to check hand grasps due to pain in index fingers. Splint remains on 4th (R) finger. Non-responsive to painful stimuli of R leg. CST to lower extremities good. Ambulating in room, limping on R leg. A: Pain in index fingers bilaterally. Altered ambulation P: Assist & ambulation. — Chris Wilson RN
	1105	O: Ambulating & cane's difficulty. Discharge instructions given and verbalizes understanding. Discharged via wheelchair, accompanied by friend. K — Chris Wilson

ER - 2139.30

Roll
10/30/71

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA,)
)
Plaintiff,)
)
vs.) No. CR91-00284(B)
)
RANDY ELLIS BRAZEAL,) Plea Agreement
)
Defendant.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES: Mr. Alan K. Polley
COUNTY ATTORNEY
Mr. Chris M. Roll
DEPUTY COUNTY ATTORNEY
For the State

Mr. Perry L. Hicks
Attorney at Law
Mr. James Conlogue
Attorney at Law
HICKS & CONLOGUE
125 Naco Highway
Bisbee, Arizona 85603
For the Defendant

Be it remembered that on the 17th day of
October, 1991, the above-entitled matter came on for
hearing before The Honorable Matthew W. Borowiec,
Judge of the Superior Court, Division I.

MERLE RHODES BRIEFER
COURT REPORTER
COCHISE COUNTY, DIVISION I
DRAWER CT
DISOEE, ARIZONA
432-5471

1 your record will show a conviction of these two
2 class 1 felonies, regardless of what the ultimate
3 disposition of this case may be.

4 DEFENDANT BRAZEAL: Yes, sir.

5 THE COURT: All right.

6 Counsel, what are the facts of this
7 case -- and you are going to have to explain to the
8 court why I should accept the plea.

9 MR. HICKS: On or about the 8th of July of
10 1991, Randy Brazeal, under circumstances manifesting
11 an extreme indifference to human life, recklessly
12 engaged in a course of conduct that created a grave
13 risk of death both to Mandy Meyers and Mary Snyder
14 and thereby was a cause of their deaths.

15 Your Honor, basically, Randy was, on
16 that night, at a campground in Elfrida, Arizona,
17 where these girls were.

18 He was drinking alcohol and encouraging,
19 at least not discouraging, another person named Richard
20 Stokely, who was with him, to drink alcohol.

21 He was providing some Jim Beam whiskey
22 to Richard Stokely and drove Stokely to buy Jim Beam
23 whiskey and beer at a nearby tavern.

24 Randy knew or should have known that
25 Richard Stokely was a violent person when intoxicated.

MERLE RHODES BRIEFER
COURT REPORTER
COCHISE COUNTY, DIVISION I
DRAWER CT
DISDDE, ARIZONA
432-5471

1 By providing Richard Stokely with alcohol, by
2 encouraging his intoxication, Randy was encouraging
3 a difficult situation.

4 He agreed to take Richard Stokely
5 to take a bath. Richard Stokely is a transient.
6 He took baths near the Gleeson area. Randy encouraged
7 Mary Snyder and Mandy Meyers to travel with him at a
8 late hour, approximately 1:00 o'clock in the morning,
9 to go with Richard Stokely to this deserted desert
10 area when Richard Stokely was in an inebriated and
11 potentially violent condition and was a principal
12 cause of the girls being in this deserted area.

13 Your Honor, Randy engaged in a course
14 of conduct while Richard Stokely was taking a bath --
15 while Richard Stokely was away taking a bath, Randy
16 engaged in a course of conduct that, when Richard
17 Stokely came upon that course of conduct, Richard
18 Stokely was sexually aroused, did rape and murder
19 the girls.

20 Randy's engaging in the course of
21 conduct leading up to Richard Stokely's rape and
22 murder of the girls was a reckless cause of conduct.
23 Randy's having the girls out there was a reckless
24 course of conduct and manifested an extreme
25 indifference to human life, created a grave risk

MERLE RHODES BRIEFER
COURT REPORTER
COCHISE COUNTY, DIVISION I
DRAWER CT
DISDEE, ARIZONA
432-5471

1 of death to the two girls.

2 Randy did cause the death of the two
3 girls although he did not intentionally murder the
4 two girls.

5 Your Honor, when things began to go
6 bad, Randy did not engage in a course of conduct
7 which perhaps could have saved the girls, which once
8 again kept them in the situation they were in.

9 And therefore, Your Honor, Randy,
10 on July 8th of 1991, placed these girls in a position
11 that, under circumstances that manifested an extreme
12 indifference to their lives, recklessly engaged in a
13 course of conduct that created a grave risk of death
14 and did cause their deaths.

15 And to that, we enter pleas of
16 guilty to each of those charges, Your Honor.

17 The court should accept this plea
18 of guilty for many reasons.

19 One is in fact, Randy is guilty of
20 those two crimes. He is not guilty of a further crime.
21 And a trial in this matter, given the nature of these
22 deaths, given the situation that we are in, could
23 result in Randy's being convicted of a greater crime
24 than which he did not commit.

25 On the other hand, Randy did place

1 these girls in a situation where they shouldn't
2 have been.

3 And therefore, Your Honor, it is
4 in the interests of justice that Randy be convicted
5 and punished with this sentence, which is more years
6 than Randy has lived.

7 And Your Honor, I would ask the
8 court to accept the plea and accept the sentence.

9 Your Honor, I know as much about this
10 case as most but a few. I would tell the court that
11 I believe this plea is in the interests of justice
12 for both sides and that I do believe honestly that
13 this plea is a plea which does reach what we are
14 trying to do in this case, hopefully, which is to
15 reach something that is just.

16 THE COURT: Mr. Polley, do you have something
17 to add to that statement of facts?

18 MR. POLLEY: No, nothing to the factual basis.

19 THE COURT: All right.

20 MR. POLLEY: With the court's permission,
21 I would like to address the reasonableness of
22 the proposed settlement.

23 THE COURT: Very well, please.

24 MR. POLLEY: Your Honor, three of the four
25 birth parents of Mandy Meyers and Mary Snyder plus

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA,)
)
Plaintiff,)
)
vs.) CR9.1-00284A
)
RICHARD DALE STOKLEY,)
)
Defendant.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS (ON APPEAL)
Volume X

APPEARANCES: Mr. Chris Roll
Mr. Vincent Festa
DEPUTY COUNTY ATTORNEYS
For the State

Mr. G. Philip Maxey
DEPUTY LEGAL DEFENDER
Mr. Robert Arentz
Attorney at Law
For the Defendant

Be it remembered that on the 25th day of
March, 1992, the above-entitled matter came on for
hearing before The Honorable Matthew W. Borowiec,
Judge of the Superior Court, Division I.

1 on that, on his willingness to answer?

2 MR. MAXEY: No.

3 THE COURT: Mr. Roll?

4 MR. ROLL: No, Your Honor.

5 THE COURT: You may step down.

6 Call your next witness, counsel.

7 MR. MAXEY: Thank you, Your Honor.

8 If I may wait a moment for Mr.

9 Brazeal to exit the courtroom.

10 THE COURT: Yes, certainly.

11 MR. MAXEY: The defense would call Clint King.

12

13 CLINT KING,

14 called as a witness by the defense, having been first

15 duly sworn, testified on his oath, as follows:

16

17 DIRECT EXAMINATION

18

19 BY MR. MAXEY:

20 Q Would you please state your full name.

21 A Clint King.

22 Q Where do you live?

23 A Elfrida, Arizona.

24 Q Do you have a specific address

25 in Elfrida?

1 you don't stomp a person without intending to
2 cause the result of death. You don't strangle
3 a person, reassess as Dr. Flores says several
4 times during the struggle, without intending to
5 cause the death of that person.

6 The act itself is an intentional
7 act of strangulation.

8 Stabbing -- you don't stab someone
9 when you are killing them -- you don't stab someone
10 without intending that the result occur that the
11 stab wound is inflicted. Those are all intentional
12 acts.

13 You will hear the definition of
14 knowingly. That is a lesser mental state. It is
15 easier to prove by the state. It takes less
16 evidence of intentional conduct.

17 I am not going to talk about that,
18 and also intoxication is no defense to that because
19 the evidence we are talking about here today is
20 evidence of intentional acts and nothing else.

21 You have heard the evidence that's
22 been presented, and I will talk about that a little
23 bit more. All right?

24 The rest of the chart deals with
25 accomplice -- let me read to you the accomplice

1 instruction you will receive:

2 A person may be guilty of an
3 offense committed by such person's own conduct
4 or by the conduct of another for which such person
5 is criminally accountable.

6 A person is criminally accountable
7 for the conduct of another if the person is an
8 accomplice of such person in the commission of
9 an offense.

10 "Accomplice" means a person who,
11 with intent to promote or facilitate the commission
12 of an offense:

13 1) Solicits or commands another
14 person to commit the offense; or

15 2) Aids, counsels, agrees to aid or
16 attempts to aid another person in planning or
17 committing premeditated murder.

18 And the third is: Provides the
19 means or opportunity to another person to commit
20 premeditated murder.

21 We will be talking about the accomplice
22 statute and the accomplice definition with respect
23 to first-degree murder and perhaps with respect
24 to some of the other charges. All right?

25 First-degree murder. What do we

1 know about how these girls died? We know that
2 two little 13-year-old girls, Mandy Meyers, and
3 Mary Snyder, were taken to the Gleeson area by
4 Richard Stokley and Randy Brazeal. We know that
5 ultimately they ended up at the area of the mine
6 shaft indicated on state's exhibit 53 and that there
7 they were killed and their nude bodies were dumped
8 into the mine shaft.

9 How did they die? From Richard
10 Stokley's statement that you heard at the
11 beginning of the trial, you heard that both
12 were stabbed by himself. He stabbed both of
13 the girls -- he also, you heard that from Lieutenant
14 Gene Kellogg who testified Richard Stokley told him
15 he stabbed both of the girls.

16 So both of the girls were stabbed,
17 and you heard from Dr. Flores and Dr. Keen that
18 those stab wounds were in the right eye.

19 You know that Richard Stokley choked
20 one of the girls because he said that in his
21 statement. He said: I choked one and he choked
22 the other. That's in his statement several times.

23 We will go over that.

24 We know from Richard Stokley's
25 statement, what we can believe of it, is that he,

1 at least choked one of these girls, and according
2 to him, Randy Brazeal choked the other.

3 The girls died by strangulation.
4 That is confirmed by Dr. Flores and Dr. Keen --
5 that the girls died from asphyxia due to strangulation.

6 The autopsies also indicated that
7 both girls were stabbed -- stab wounds in the right
8 eye.

9 We also know that during this process
10 of the killing of the girls, that stomp marks were
11 left on the body of Mandy Meyers, and we have heard
12 about the shoes taken from Richard Stokley, and we
13 have heard at least three people -- Flores, Keen,
14 Bridgemon, all testify about their comparisons of
15 those shoes with the stomp marks found on the body
16 of Mandy Meyers.

17 And all of those individuals testified
18 that is a match. Those are consistent. Those stomp
19 marks are consistent with being made by that tennis
20 shoe.

21 You have looked at the shoes yourself.
22 You have looked at the photographs of the stomp
23 marks. There is no question those stomp marks
24 were made by Richard Stokley wearing the tennis
25 shoes introduced in evidence.

1 for premeditation and intent apply to the death
2 of Mary Snyder.

3 What -- we can infer from Stokley's
4 statement if we give it the best light possible,
5 that Randy Brazeal killed Mary Snyder. Randy
6 Brazeal killed Mary Snyder while Richard Stokley
7 killed Mandy Meyers.

8 The state submits to you that, even
9 if you take Stokley's statement in its best light
10 he is guilty as an accomplice of the acts of Randy
11 Brazeal if indeed Randy Brazeal killed Mary Snyder.

12 If Randy Brazeal did not kill Mary
13 Snyder, there is only one other person who could
14 have. That's Richard Stokley.

15 In that case, he would be a principal.

16 But giving his statement the most
17 credence we can, he is guilty of being an accomplice
18 to first-degree murder.

19 Let's look at it. Did he aid,
20 counsel, agree to aid or attempt to aid another
21 person in the planning or committing premeditated
22 murder? They planned it together. Yes, he aided
23 and assisted in planning the murder.

24 Did he aid and assist in committing
25 the murder? Yes. If one of them grabbed one of

1 the presence of the jury.)

2

3 THE COURT: Okay. Mr. Arentz, you may

4 proceed.

5 MR. ARENTZ: Thank you, Your Honor.

6 Let me try to continue where I

7 was going. I am not going to be very much longer.

8 Premeditation and reflection --

9 in this case you have to look at if it did exist

10 at all, it existed with Randy Brazeal. He is the

11 one that told Richard Stokley he had to kill them.

12 We have to kill them. You don't have any talk,

13 no conversation, no agreement, nothing at all

14 but Richard Stokley having sex with one of the

15 girls, Mandy Meyers, and killing Mandy Meyers.

16 What does that mean? That means

17 Richard Stokley is guilty of second-degree murder

18 of Mandy Meyers, intentionally, knowingly killing

19 a human being.

20 What does that mean? That means

21 Richard Stokley is guilty of the sexual offenses

22 involving Mandy Meyers.

23 Does that mean he is guilty of

24 crimes that were committed before he came to the

25 car? No. Does that mean he is guilty of thoughts

III

In the Superior Court

IN THE COUNTY OF COCHISE
STATE OF ARIZONA

STATE OF ARIZONA	Plaintiff
vs	
RICHARD DALE STOKLEY,	Defendant

CASE NO. CR91-00284A
VERDICT

We, the Jury, duly impaneled and sworn in the above entitled action, upon our oaths do find the Defendant, RICHARD DALE STOKLEY, not guilty of the crime of committing sexual assault by engaging in sexual intercourse or oral sexual contact with Mary Rayleene Snyder, a child under the age of fifteen years, not his spouse and without her consent, on or about the 8th day of July, 1991.

[Handwritten Signature] 1051

In the Superior Court

IV

IN THE COUNTY OF COCHISE
STATE OF ARIZONA

FILED
JUL 17 1991

STATE OF ARIZONA	Plaintiff
vs.	
RICHARD DALE STOKLEY,	Defendant

CASE NO. CR91-00284A
VERDICT

We, the Jury, duly impaneled and sworn in the above entitled action, upon our oaths do find the Defendant, RICHARD DALE STOKLEY, not guilty of the crime of committing sexual assault by engaging in sexual intercourse or oral sexual contact with Mandy Ruth Marie Meyers, a child under the age of fifteen years, not his spouse and without her consent, on or about the 8th day of July, 1991.

[Signature] 105
FACERAN

In the Superior Court

IN THE COUNTY OF COCHISE
STATE OF ARIZONA

FILED
JUL 17 1991

STATE OF ARIZONA

Plaintiff

vs

RICHARD DALE STOKLEY,

Defendant

egm

CASE NO. CR91-00284A

VERDICT

We, the Jury, duly impaneled and sworn in the above entitled action, upon our oaths do find the Defendant, RICHARD DALE STOKLEY, not guilty of the crime of committing sexual conduct with a minor by engaging in sexual intercourse or oral sexual contact with Mary Rayleene Snyder, a child under the age of fourteen years, not his spouse, on or about the 8th day of July, 1991.

[Signature]

Foreman.

165

In the Superior Court

IN THE COUNTY OF COCHISE
STATE OF ARIZONA

STATE OF ARIZONA

Plaintiff

vs

RICHARD DALE STOKLEY,

Defendant

CASE NO. CR91-00234A

VERDICT

We, the Jury, duly impaneled and sworn in the above entitled action, upon our oaths do find the Defendant, RICHARD DALE STOKLEY, not guilty of the crime of kidnapping Mary Rayleene Snyder, a child under the age of fifteen years, with the intent to inflict death, physical injury or a sexual offense on her or to otherwise aid in the commission of a felony, on or about the 8th day of July, 1991.

Foreman. 10/6/91

In the Superior Court

IN THE COUNTY OF COCHISE
STATE OF ARIZONA

STATE OF ARIZONA

Plaintiff

vs.

RICHARD DALE STOKLEY,

Defendant

CASE NO. CR91-00284A

VERDICT

We, the Jury, duly impaneled and sworn in the above entitled action, upon our oaths do find the Defendant, RICHARD DALE STOKLEY, not guilty of the crime of kidnapping Mandy Ruth Macie Meyers, a child under the age of fifteen years, with the intent to inflict death, physical injury or a sexual offense on her or to otherwise aid in the commission of a felony, on or about the 8th day of July, 1991.

Foreman. *10/23*

In the Superior Court

IN THE COUNTY OF COCHISE
STATE OF ARIZONA

STATE OF ARIZONA

Plaintiff

vs.

RICHARD DALE STOKLEY,

Defendant

CASE NO. CR91-00234A

VERDICT

We, the Jury, duly impaneled and sworn in the above entitled action, upon our oaths do find the Defendant, RICHARD DALE STOKLEY, not guilty of the crime of committing sexual conduct with a minor by engaging in sexual intercourse or oral sexual contact with Mandy Ruth Marie Meyers, a child under the age of fourteen years, not his spouse, on or about the 8th day of July, 1991.

Foreman. 10/6/7

In the Superior Court

IN THE COUNTY OF COCHISE
STATE OF ARIZONA

STATE OF ARIZONA

Plaintiff

vs.

RICHARD DALE STOKLEY,

Defendant

CASE NO. CR91-00284A

VERDICT

We, the Jury, duly impaneled and sworn in the above entitled action, upon our oaths do find the Defendant , RICHARD DALE STOKLEY, not guilty of the crime of committing first degree murder of Mary Rayleene Snyder, a child under the age of fifteen years, on or about the 8th day of July, 1991.

Foreman. 10/6/91

In the Superior Court

IN THE COUNTY OF COCHISE
STATE OF ARIZONA

STATE OF ARIZONA	Plaintiff
vs.	
RICHARD DALE STOKLEY,	Defendant

CASE NO. CR91-00284A

VERDICT

We, the Jury, duly impaneled and sworn in the above entitled action, upon our oaths do find the Defendant , RICHARD DALE STOKLEY, not guilty of the crime of committing first degree murder of Mandy Ruth Marie Myers, a child under the age of fifteen years, on or about the 8th day of July, 1991.

Foreman. 1090

OFFICIAL CUSTODIAN OF MARRIAGE RECORDS
County Clerk's Office
County of Crittenden
State of Arkansas

Name of Groom Bandy E. Brazzell Age 40
Address Horseshoe Lane, Ar
Name of Bride Berri Laine Swanner Age 42
Address Horseshoe Lane, Ar
Date of Marriage MARCH 9, 2012
By Whom Married Vincent Adam Cupples
Recorded in Volume 101 of Marriage Certificates at Page 303

I, Ruth Trent, County Clerk of the County of Crittenden, State of Arkansas, do hereby certify that the above is a true Abstract of the Marriage recorded in my office.

WITNESS my hand and Official Seal this 30th day of November 2012
Ruth Trent

RUTH TRENT, County Clerk

Richard Brown D.C.

To The United States Supreme Court,

A DECLARATION AND PLEA FROM A CONDEMNED MAN IN ARIZONA

Ladies and Gentlemen, Your Honours,

My name is Richard Dale Stokley, and I am under an active Death Warrant in Arizona, scheduled for execution on 5th December, 2012, at 10 a.m. And I need your help.

My experience with criminal law began in 1991-2, with two appointed trial attorneys who resented "being paid only \$40 an hour", to represent me, something they did very poorly. Then, a different attorney for the Direct Appeal. I now know that he only did a ho-hum job. Once, as I waited while he was on another phone line, his secretary warned me about him. He withdrew after that appeal. I'd been naive, thinking all lawyers ethical, professional, and having integrity.

I knew of the AEDPA's Tolling Provision, and I'd always heard that the courts give much weight to the actions of a prudent man, sometimes even in his ignorance. So, I resolved to always prudently take care of my business, and not be assuming. I was without counsel and between actions, so I pressured the court to appoint counsel for my Rule 32 Petition (PCR).

That was when I first encountered Harriette Levitt. I wish that you could know how many poor wretches like me there are whom she has given such dismal "representation", over the years. It's like she has made a travesty of the law, for many of us who had to depend on her for legal help. I mean dozens, and maybe hundreds of us.

When I finally managed to get her on the phone—after much effort—she told me that there were "no issues" that could be raised from my case, that appeals wouldn't last long, and that I'd be executed in 2-3 years. She had not even read my case files! And when I saw what she was and was not doing with my Rule 32 petition (which I knew was so crucial), and her haughty indifference, I knew that she had no business anywhere near a capital case. With my life hanging in the balance, I began writing everyone I could think of, pleading my cause in letters. I also filed a bar complaint. I am held MASTER of my cause, and Levitt would not have meaningful communication with me, nor much at all. She would not listen to anything I said, nor did we ever meet once, though only about an hour apart. So, trying to be prudent and pay attention to my cause was not easy, nor was being responsible, or "mastery".

But after the bar complaint, Levitt asked the court to let her withdraw. It was granted, and Carla Ryan was appointed. She is a fighter, whom the Attorney General doesn't like because she makes them work, and still beats them. What ensued was more like a circus than a court case (it's documented, very well). I could only watch and wonder.

The Attorney General wanted Levitt on my case, not Ryan, and the judge gave in. It was plain who ran that show. But I was "MASTER OF MY CAUSE"? I was saddled with Levitt through outside interference. She was never my agent, and there was no "relationship". I was just an abstract concept to her.

And there broke out a three-way squabble, with the Attorney General, Harriette Levitt, and Carla Ryan as the players. Levitt took documents filed in my name, in my case—by herself—and used them to defend herself from "attack", even going so far as to litigate against some few issues which Ryan had tried to raise before the judge switched back to Levitt. Do you see the "circus" I mentioned? It's all documented. Abandonment? What else could you call it?

Keeping in mind my resolve to be prudent, and knowing that I am held "master of my cause", I have pondered how I was meant to exercise said "mastery". I had the Attorney General, the Court, and Levitt all acting against me and for themselves. So, how was I to give the state courts the opportunity to address the issues that any lawyer worth their salt would easily have raised from my case? Everything that I attempted was razed, not raised. At one point, I asked Levitt for my case files, so that I might help myself. She refused. Everything I tried was stifled. "Mastery"?

And now, I have completed the standard appeals process (state and federal). They're all exhausted, and we are down to the motions and those petitions one files and then hangs on with bated breath, waiting and hoping (11th hour stuff).

You have now read part of what I've experienced for the past 20+ years. I've described it truthfully, if only briefly. One must ask the question: Is this really how the criminal justice system is supposed to work? If it is, then shame on the whole kit-and-kaboodle. But I think it's not, and I realize and appreciate how you folks on the Court have lately made efforts toward cleaning up the faults in the system. And I THANK YOU for that, from my heart, and as a fellow American.

This state plans to kill me, and soon. But this whole affair reeks— from the "trial" right on up through to the present. I am still trying to be a prudent man, and trying to save my own life. I know that I'm not irredeemable. I'm not done, yet. But the Prudence and Mastery thing, how does one attain Mastery of a situation when that situation is controlled by others, as mine has been? I cannot fathom it. What else could I possibly have done, back there, at that most crucial (Rule 32-PCR) time? I am poorly educated, and I'm surely no lawyer. Is there anything to do? I need help. Please.

I Thank You for your attention.

Respectfully,

Richard Dale Stokley

To the United States Supreme Court,

A Declaration and Plea from a Condemned Man in Arizona

Ladies and Gentleman, Your Honours,

My Name is Richard Dale Stokley, and I am under an active Death Warrant in Arizona, scheduled for execution on 5th December, 2012, at 10 a.m. And I need your help.

My experience with criminal law began in 1991-2, with two appointed trial attorneys who resented “being paid only \$40 an hour,” to represent me, something they did very poorly. Then, a different attorney for the Direct Appeal. I now know that he only did a ho-hum job. Once, as I waited while he was on another phone line, his secretary warned me about him. He withdrew after that appeal. I’d been naive, thinking all lawyers ethical, professional, and having integrity.

I know of the AEDPA’s Tolling Provision, and I’d always heard that the courts give much weight to the actions of a prudent man, sometimes even in his ignorance. So, I resolved to always prudently take care of my business, and not be assuming. I was without counsel and between actions, so I pressured the court to appoint counsel for my Rule 32 Petition (PCR).

That was when I first encountered Harriette Levitt. I wish that you could know how many poor wretches like me there are whom she has given such dismal “representation,” over the years. It’s like she has made a travesty of the law, for many of us who had to depend on her for legal help. I mean dozens, and maybe hundreds of us.

When I finally managed to get her on the phone –after much effort – she told me that there were “no issues” that could be raised from my case, that appeals wouldn’t last long, and that I’d be executed in 2-3 years. She had not even read my case files! And when I saw what she was and was not doing with my Rule 32 petition (which I know was so crucial), and her haughty indifference, I knew that she has no business anywhere near a capital case. With my life hanging in the balance, I began writing everyone I could think of, pleading my cause in letters. I also filed a bar complaint. I am held master of my cause, and Levitt would not have meaningful communication with me, nor much at all. She would not listen to anything I said, nor did we ever meet once, though only about an hour apart. So, trying to be prudent and pay attention to my cause was not easy, nor was being responsible, or “mastery”.

But after the bar complaint, Levitt asked the court to let her withdraw. It was granted, and Carla Ryan was appointed. She is a fighter, whom the Attorney General doesn’t like because she makes them work, and still beats them. What ensued was more like a circus than a court case (it’s documented, very well). I could only watch and wonder.

The Attorney General wanted Levitt on my case, not Ryan, and the judge gave in. It was plain who ran that show. But I was “master of my cause”? I was saddled with Levitt through outside interference. She was never my agent, and there was no “relationship”. I was just an abstract concept to her.

And there broke out a three-way squabble, with the Attorney General, Harriette Levitt, and Carla Ryan as the players. Levitt took documents filed in my name, in my case—by herself—and used them to defend herself from “attack”, even going so far as to litigate against some few issues which Ryan had tried to raise before the judge switched back to Levitt. Do you see the “circus” I mentioned” It’s all documented. Abandonment? What else could you call it?

Keeping in mind my resolve to be prudent, and knowing that I am held “master of my cause”, I have pondered how I was meant to exercise said “mastery”. I had the Attorney General, the Court, and Levitt all acting against me and for themselves. So, how was I to give the State Courts the opportunity to address the issues that any lawyer worth their salt would easily have raised from my case? Everything that I attempted was razed, not raised. At one point, I asked Levitt for my case files, so that I might help myself. She refused. Everything I tried was stifled. “Mastery”?

And now, I have completed the standard appeals process (State and Federal). They’re all exhausted, and we are down to the motions and those petitions one files and then hangs on with bated breath, waiting and hoping (11th hour stuff).

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This State plans to kill me, and soon. But this whole affair reeks—from the “trial” right on up through the present. I am still trying to be a prudent man, and trying to save my own life. I know that I’m not irredeemable. I’m not done, yet. But the prudence and mastery thing, how does one attain mastery of a situation when that situation is controlled by others, as mine has been? I cannot fathom it. What else could I possibly have done, back there, at that most crucial (Rule32–PCR) time? I am poorly educated, and I’m surely no lawyer. Is there anything to do? I need help. Please.

I thank you for your attention.

Respectfully,

Richard Dale Stokley

SUPERIOR COURT OF ARIZONA

COUNTY OF COCHISE

STATE OF ARIZONA,)	
)	
Plaintiff,)	No. CR91-00284A
)	
-vs-)	
)	
RICHARD DALE STOKLEY,)	PLEA AGREEMENT
)	
Defendant.)	

The State of Arizona and Defendant hereby agrees to the following disposition of this case:

Plea: The Defendant agrees to plead guilty to all counts in the Indictment as follows:

COUNT I: On or about the 8th day of July, 1991, RICHARD DALE STOKLEY, kidnapped Mary Rayleene Snyder, a child under the age of fifteen (15) years with the intent to inflict death, physical injury or sexual offense on her or to otherwise aid in the commission of a felony, in violation of A.R.S. §§13-1304(A)(3), 13-1301, 13-604.01, and 13-801, a class 2 felony.

FACTUAL BASIS: On July 8, 1991, RICHARD DALE STOKLEY knowingly restrained Mary Rayleene Snyder, a child under the age of fifteen years, with the intent to inflict upon the victim a sexual offense and cause her death. He did this by refusing to allow her to leave a remote area near Gleeson, in Cochise County, Arizona, for the purpose of inflicting upon Mary Rayleene Snyder a sexual assault, thereby committing the offense of kidnapping.

COUNT II: On or about the 8th day of July, 1991, RICHARD DALE STOKLEY, kidnapped Mandy Ruth Marie Meyers, a child under the age of fifteen (15) years, with the intent to inflict death, physical injury or a sexual offense on her or to otherwise aid in the commission of a felony, in violation of A.R.S. §§13-1304(A)(3), 13-1301, 13-604.01, and 13-801, a class 2 felony.

FACTUAL BASIS: On July 8, 1991, RICHARD DALE STOKLEY, knowingly restrained Mandy Ruth Marie Meyers, a child under the age of

fiteen years, with the intent to aid RANDY BRAZEAL in the commis-
sion of an offense enumerated in A.R.S. §13-1304. He did this by
accompanying RANDY BRAZEAL and the victims in a vehicle driven by
RANDY BRAZEAL to a remote area near Gleeson, in Cochise County,
Arizona, knowing of the intention of RANDY BRAZEAL to inflict
death upon both victims, to include Mandy Ruth Marie Meyers,
thereby committing the offense of kidnapping.

COUNT III: That on or about the 8th day of July, 1991,
RICHARD DALE STOKLEY committed sexual assault by engaging in
sexual intercourse or oral sexual contact with Mary Rayleene
Snyder, a child under the age of fifteen (15) years, not his
spouse and without her consent, in violation of A.R.S. §§13-
1406(A), 13-1401, 13-604.01, and 13-801, a class 2 felony.

FACTUAL BASIS: On July 8, 1991, RICHARD DALE STOKLEY, sexually
assaulted Mary Rayleene Snyder, by intentionally engaging in
sexual intercourse with her, a child under the age of fifteen
years, not his spouse, and without her consent. Specifically,
the accused penetrated the vulva of the victim with his penis;
the act occurring in a remote area near Gleeson, in Cochise
County, Arizona.

COUNT IV: On or about the 8th day of July, 1991, RICHARD
DALE STOKLEY committed sexual assault by engaging in sexual
intercourse or oral sexual contact with Mandy Ruth Marie Meyers,
a child under the age of fifteen (15) years, not his spouse and
without her consent, in violation of A.R.S. §§13-1406(A), 13-
1401, 13-604.01, and 13-801, a class 2 felony.

FACTUAL BASIS: On July 8, 1991, RICHARD DALE STOKLEY, aided and
abetted the commission of a sexual assault against Mandy Ruth
Marie Meyers by providing the opportunity for RANDY BRAZEAL to
engage in sexual intercourse with Mandy Ruth Marie Meyers, a
child under the age of fiteen years, not his spouse nor the

spouse of RANDY BRAZEAL, and without her consent. RICHARD DALE STOKLEY knowingly provided the opportunity for RANDY BRAZEAL to penetrate the vulva of Mandy Ruth Marie Meyers with his penis and without her consent. He did this by restraining Mary Rayleene Snyder through a separate sexual assault timed so as to prevent her coming to the assistance of her friend, Mandy Ruth Marie Meyers. The sexual assault occurred while in a remote area near Gleeson, in Cochise County, Arizona.

COUNT V: On or about the 8th day of July, 1991, RICHARD DALE STOKLEY committed sexual conduct with a minor by engaging in sexual intercourse or oral sexual contact with Mary Rayleene Snyder, a child under the age of fourteen (14) years, not his spouse, in violation of A.R.S. §§13-1405(A), 13-1401, 13-604.01, and 13-801, a class 2 felony.

FACTUAL BASIS: On July 8, 1991, RICHARD DALE STOKLEY committed sexual conduct with a minor by intentionally engaging in sexual intercourse with Mary Rayleene Snyder, a minor under the age of fourteen years and not his spouse. He placed his penis inside the vulva of the minor in a remote area near Gleeson, in Cochise County, Arizona.

COUNT VI: On or about the 8th day of July, 1991, RICHARD DALE STOKLEY committed sexual conduct with a minor by engaging in sexual intercourse or oral sexual contact with Mandy Ruth Marie Meyers, a child under the age of fourteen (14) years, not his spouse, in violation of A.R.S. §§13-1405(A), 13-14-1, 13-604.01, and 13-801, a class 2 felony.

FACTUAL BASIS: On July 8, 1991, RICHARD DALE STOKLEY aided and abetted RANDY BRAZEAL in the commission of the offense of sexual conduct with a minor by providing an opportunity for RANDY BRAZEAL to engage in sexual intercourse with Mandy Ruth Marie Meyers, a child under the age of fourteen years and not his spouse. His simultaneous sexual assault on the other minor facilitated

RANDY BRAZEAL'S commission of this offense. This incident occurred near Gleeson, in Cochise County, Arizona.

COUNT VII: On or about the 8th day of July, 1991, RICHARD DALE STOKLEY committed first degree murder on Mary Rayleene Snyder, a child under the age of fifteen (15) years, in violation of A.R.S. §§13-1105, 13-1101, 13-703, and 13-801, a class 1 felony.

FACTUAL BASIS: On July 8, 1991, RICHARD DALE STOKLEY aided and abetted RANDY BRAZEAL in the first degree murder of Mary Rayleene Snyder, a child under the age of fifteen years. He acted as an accessory by killing Mandy Ruth Marie Meyers to conceal the earlier offenses and his identity. In those actions, RICHARD DALE STOKLEY encouraged RANDY BRAZEAL to intentionally and with premeditation murder Mary Rayleene Snyder and cast her body into a mineshaft/well for the purpose of concealing their crimes. This act was committed outside of Gleeson, Arizona, within the confines of Cochise County.

COUNT VIII: On or about the 8th day of July, 1991, RICHARD DALE STOKLEY committed first degree murder of Mandy Ruth Marie Meyers, a child under the age of fifteen (15) years, in violation of A.R.S. §§13-1105, 13-1101, 13-703 and 13-801, a class 1 felony.

FACTUAL BASIS: On July 8, 1991, RICHARD DALE STOKLEY murdered with premeditation in the first degree, Mandy Ruth Marie Meyers, a child under the age of fifteen years, by intending that his conduct would cause the death of the minor. RICHARD DALE STOKLEY strangled Mandy Ruth Marie Meyers to death using his hands by choking her around her throat until dead. He then concealed his crime by disposing of her body in a nearby well/mineshaft.

Terms: On the following understandings, terms and conditions:

COUNT I

Mitigated: 12 yrs. Presumptive: 17 yrs. Aggravated: 22 yrs.

COUNT II

Mitigated: 12 yrs. Presumptive: 17 yrs. Aggravated: 22 yrs.

COUNT III

Mitigated: 15yrs. Presumptive: 20 yrs. Aggravated: 25 yrs.

COUNT IV

Mitigated: 15 yrs. Presumptive: 20 yrs. Aggravated: 25 yrs.

COUNT V

Mitigated: 15 yrs. Presumptive: 20 yrs. Aggravated: 25 yrs.

COUNT VI

Mitigated: 15 yrs. Presumptive: 20 yrs. Aggravated: 25 yrs.

COUNT VII

Life imprisonment without possibility of release until completion of thirty-five (35) years.

COUNT VIII

Life imprisonment without possibility of release until completion of thirty-five (35) years.

1. That the Defendant will receive a sentence no less than one hundred sixty-four (164) years of imprisonment without possibility of release on any basis until completion of the full one hundred sixty-four (164) years as defined in A.R.S. §13-105. He may also be ordered to pay a fine in any amount up to \$900,000.00 plus a 40% surcharge. Any sentence of imprisonment arising from Counts V and VI will be served concurrently to the one hundred sixty-four (164) year sentence of imprisonment.

2. Special Sentencing Provisions:

a. Defendant, in accordance with A.R.S. Section 13-808, must pay \$800.00 to the Victim Compensation Fund through the Office of the Clerk of the Superior Court.

b. The Defendant agrees to make restitution for compensable

losses to the victims' families caused by the Defendant's actions. RICHARD DALE STOKLEY also agrees to pay restitution to the victims in the amount of \$15,000.00. Defendant understands that the Court may order any portion of any fine imposed payable to the victims as additional restitution.

c. This Plea Agreement in no way affects any civil forfeiture proceedings which are now filed or which may be filed pursuant to A.R.S. Section 13-4301, et seq.

d. Defendant will not attempt to or have any contact, either oral or written, with any member of the victims' families.

3. That the following charges are dismissed with prejudice, or if not yet filed, shall not be brought against the defendant:

None.

4. That this agreement, unless rejected or withdrawn, serves to amend the complaint, indictment, or information to charge the offense to which the defendant pleads, without the filing of any additional pleading. If the plea is rejected or withdrawn, the original charges are automatically reinstated.

5. If the defendant is charged with a felony, that he hereby gives up his right to a preliminary hearing or other probable cause determination on the charges to which he pleads. In the event the court rejects the plea, or the defendant withdraws the plea, the defendant hereby gives up his right to a preliminary hearing or other probable cause determination on the original charges.

6. Unless this plea is rejected or withdrawn, that the defendant hereby gives up any and all motions, defenses, objections or requests which he has made or raised, or could assert hereafter, to the court's entry of judgment against him and imposition of a sentence upon him consistent with this agreement.

7. That if after accepting this agreement the court concludes that any of its provisions regarding the sentence or the term and conditions or probation are inappropriate, it can reject the plea, giving the defendant an opportunity to withdraw the plea.

I have read and understand the above. I have discussed the case and my constitutional rights with my lawyer, I understand that by pleading (guilty) I will be giving up my right to a trial by jury, to confront, cross-examine, and compel the attendance of

witnesses, and my privilege against self-incrimination. I agree to enter my plea as indicated above on the terms and conditions set forth herein.

November 5, 1991
DATE

Richard Stokley
DEFENDANT

I have discussed this case with my client in detail and advised him of his constitutional rights and all possible defenses. I believe that the plea and disposition set forth herein are appropriate under the facts of this case. I concur in the entry of the plea as indicated above and on the terms and conditions set forth herein.

November 5, 1991
DATE

Robert J. [unclear]
DEFENSE COUNSEL

November 5, 1991
DATE

[Signature]
DEFENSE COUNSEL

I have reviewed this matter and concur that the plea and disposition set forth herein are appropriate and are in the interests of justice.

DATE

PROSECUTOR

HICKS & CONLOGUE, P. C.
ATTORNEYS AT LAW
POST OFFICE BOX 4550
125 NACO HIGHWAY
BISBEE, ARIZONA 85603
TELEPHONE (602) 432-5305

RECEIVED
OCT 03 1991
COCHISE COUNTY
PUBLIC DEFENDER'S OFFICE
FILED

OCT -2 PM 4:41
JAMES H. YOUNG
CLERK OF THE COURT

1 Attorney For Defendant RANDY BRAZEAL
2 PERRY L. HICKS
3 State Bar No. 007965

4 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
5 IN AND FOR THE COUNTY OF COCHISE

6
7 STATE OF ARIZONA,)
8 Plaintiff,) No. CR91-00284B
9 vs.) MOTION TO CONTINUE
10 RANDY BRAZEAL,) TRIAL
11 Defendant.) (Oral Argument Requested)

12 COMES NOW, the Defendant RANDY BRAZEAL, by and through
13 counsel undersigned, and respectfully moves this Court, pursuant
14 to Rule 8.5, Arizona Rules of Criminal Procedure, for a contin-
15 uance of the trial presently set for October 22nd, 1991. This
16 Motion is based upon the following:

17 1. Pursuant to the State's September 6, 1991 Notice of
18 Status of Forensic Investigations, DNA analysis of blood and
19 semen samples will not be available until late November, 1991.
20 This evidence may prove to be exculpatory as to this defendant
21 and given the seriousness of the crimes charged, it is extremely
22 vital to the defendant that he have available at the time of
23 trial, all evidence of every kind and nature that tends to prove
24 his innocence.

25 2. State and defense counsel are still in the process of
26

COPY OF ORIGINAL

1 conducting witness interviews. In light of the fact that the
2 majority of the tremendous number of witnesses (in excess of
3 75 have been disclosed) involved in this matter have refused to
4 submit to interviews without the presence of the County
5 Attorney, these interviews are subject to the availability of the
6 prosecutor and has resulted in a delay in the investigation and
7 defense preparation process.

8 3. The nature of this case is extremely serious in view
9 of the fact that the State believes there may be factors involved
10 in this case which have a potential to be so aggravating, that it
11 is seeking a sentence of death. As such, it is imperative that
12 each of these factors be thoroughly investigated. Additional
13 time is needed to conduct these investigations.

14 4. Disclosure is still being exchanged among the parties.

15 5. This is a first degree murder case in which the State
16 intends to seek the death penalty and is therefore an extraordi-
17 nary matter as contemplated by Rule 8.5, Arizona Rules of Crimi-
18 nal Procedure.

19 6. In addition to preparing the defense in this matter,
20 counsel for RANDY BRAZEAL has been placed in a position where he
21 must investigate and defend against a myriad of accusations from
22 a co-defendant. In essence preparing for a sub-trial to be held
23 within the framework of the main trial.

24 7. The extraordinary nature of this case, the number of
25 witnesses involved and the kind and nature of the evidence
26 generated require the assistance of additional time to adequate-

ly prepare this matter for trial.

DATED this 2nd day of October, 1991.

HICKS & CONLOGUE, P.C.

By: *J. Conlogue* for
PERRY L. HICKS
Attorney for RANDY BRAZEAL

CERTIFICATE

Counsel undersigned affirms to the Court that this application for a continuance is not made for the purpose of interposing or delay but is made in explicitly in good faith. The interests of justice will not be burdened or hampered by any delay in the trial of this matter.

J. Conlogue for
PERRY L. HICKS
Attorney for Defendant BRAZEAL

Copy of the foregoing mailed/delivered this 2nd day of October, 1991, to:

Hon. Matthew W. Borowiec
Judge of the Superior Court

Chris Roll, Esq.
Deputy Cochise County Attorney

HICKS & CONLOGUE, P.C.
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