DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 South Potomac Street Centennial, Colorado 80112 **Plaintiff(s):** THE PEOPLE OF THE STATE OF COLORADO **Defendant(s):** NATHAN JERARD DUNLAP	▲ **COURT USE ONLY** ▲ Case Number: 93CR2071 Div.: 309

ORDER RE: DEFENDANT'S MOTION FOR RELIEF PURSUANT TO CRIM. P. 35(A), (C), THE U.S. AND COLORADO CONSTITUTIONS, AND OTHER STATUTES AND RULES (DEF-PC33)

THIS MATTER comes on for the Court's ruling on Defendant's Crim. P. 35(c) motion (DEF-PC33). The Court has considered the briefs, memoranda, appendices and attachments. The Court has heard the testimony presented at the hearing of October 15-November 8, 2002; April 7 - May 1, 2003; June 23 - 26, 2003; July 7 - 10, 2003; September 2, 8 and 9, 2003; December 16-19, 2003; January 12-15, 2004; and February 9-11, 2004, as well as all of counsel's arguments. At that hearing, the People were represented by the elected District Attorney, James Peters and his deputies, Eva Wilson, Paul Wolff and John Hower. Defendant was present for all sessions of the hearing and was represented by Philip Cherner, Colleen Scissors and Michael Heher. During some of the latter dates, Mr. Heher participated by telephone. The Court also has considered all applicable law and now is prepared to rule.

In this order, references to the transcript are indicated "*Tr.* (date): (page)." The parties' pleadings are referred to as "*M*" (Defendant's motion); "*Memo*" (Defendant's memorandum); "*RBI*" (People's first reply brief); "*RBII*" (People's second reply brief); and "*Reply*" (Defendant's Reply Brief).

Background

Defendant has repeatedly admitted to killing Sylvia Crowell, Colleen O'Connor, Ben Grant and Margaret Kohlberg at a Chuck-E-Cheese restaurant in Aurora, Colorado on December 14, 1993. The jury also found him guilty of attempting to kill Bobby Stephens and of the related crimes of aggravated robbery, first degree burglary and theft.

Prior to the crime, Defendant told his friends he was planning to go to Chuck-E-Cheese, kill everyone there and take all of the money. After committing the crimes, he told Tracie Lechman, his girlfriend, Joshua Carl Wilson, Anthony Schalk and Charlie Waters about the murders. While in the Colorado Mental Health Institute at Pueblo, he made similar admissions, to staff and others, including Benton Jordan, to whom Defendant placed a collect telephone call.[1] [In this instance, Defendant stated that, because he "loved" Mr. Jordan, he was going to tell him about the events at Chuck-E-Cheese and that he (Defendant) had committed the murders.]

[1] The Court did not permit the People to use the CMHIP admissions at either the guilt phase or the penalty phase.

Defendant also made statements to the media, including a graphic review of the crimes to Paula Woodward of Denver television station KUSA Channel 9. The tape of this statement was admitted at the sentencing hearing.

The trial was held in the Fourth Judicial District, Colorado Springs, after the Court granted Defendant's Motion for Change of Venue. Trial began with two sessions of jury orientation on January 12, 1996. Individual voir dire commenced on January 16, 1996 and continued through January 30, 1996. General voir dire consumed one and one-half days.

Evidence in the guilt phase began on February 5, 1996 and continued through February 26, 1996. On that date, the jury found Defendant guilty of all counts in the Information.

The penalty phase began on February 28, 1996 and concluded on March 7, 1996. On that date, the jury returned verdicts of death as to the four first degree murder convictions. On May 17, 1996, the Court entered judgment on all verdicts and sentenced Defendant to death by lethal injection. The Court entered a sentence of 107 years as to the other guilty verdicts, to be served consecutively to the death sentences.

Defendant commenced a direct appeal to the Colorado Supreme Court. On March 8, 1999, the Supreme Court affirmed the judgment of this Court. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999). The United States Supreme Court denied certiorari. *Dunlap v. Colorado*, 528 U.S. 893 (1999).

Defendant filed a Motion for Reconsideration of Sentence. This Court denied relief. The Colorado Supreme Court affirmed that ruling. *People v. Dunlap*, 36 P.3d 778 (Colo. 2001). The United States Supreme Court again denied certiorari. *Dunlap v. Colorado*, 534 U.S. 1095 (2002).

On August 31, 2000, Defendant filed his Crim. P. 35(c) motion. He filed a memorandum in support thereof (DEF-PC36) on October 23, 2001.

The People filed their initial responsive brief on May 30, 2002 and, as authorized by the Court, a second response on July 10, 2002. Defendant filed his supplemental materials on September 12, 2002.

Additional Considerations

Post-conviction counsel asked the Court to make the entire record of the case, from filing through sentencing and post-conviction, a part of the record of this Crim. P. 35(c) proceeding. The Court granted that motion.

When the Court considers this motion, including the current allegations of ineffective assistance of counsel, it must do so in the context of the circumstances facing trial counsel in 1994-1996.

Almost one year before the trial in this case began, the California murder case involving O. J. Simpson began. It lasted into October, 1996. No one can dispute that the Simpson case received extraordinary media coverage.

Mr. Dunlap's trial counsel were well aware of the public reaction to the Simpson case. On January 31, 1996, during general voir dire, Mr. Lewis said,

> And Steve (Gayle) and I are not the Dream Team, and we don't want to be the Dream Team. We don't want to be put into that box. We are not Mr. Bailey and we are not other lawyers in other cases. And that is not what you're going to see here, and I want all of you to think about that. This will be a question to the whole panel. If you are expecting from us what you saw in California, and if you think that is the way the defense of a case should be presented, tell us now, because that isn't going to happen here. And if that is what is expected, if that is the way you think a case should be defended, and that is the only way you can give your client a fair trial, tell me before I sit down this afternoon."[2] *Tr.* 1/31/96: 127-128.

All of the attorneys, but especially the defense team, were faced with trying a high profile case in the shadow of the Simpson case. The record clearly shows that trial counsel's principal goal was to avoid the death penalty. They undertook that challenging effort at a difficult time in the United States' legal history.

The record also demonstrates counsel's intent from the outset of the trial. Late in general voir dire, Mr. Lewis began discussing Mr. Dunlap's background, and its impact in the case, at *Tr.* 1/31/96: 146. He ended his general voir dire by discussing a "fence" and "mile post" that he equated to direct and circumstantial evidence and the burden of proof, in both the guilt/innocence and the sentencing phase of the trial. He then drew a sketch of a turtle on the middle of another fence. When Juror King stated that the turtle

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[2] At the conclusion of his testimony, Mr. Lewis stated that the O.J. Simpson case did not affect the trial. The record clearly demonstrates that the contrary is true.

"could easily fall off, and he is stuck. He is in a precarious place," Mr. Lewis rejoined: "He could easily fall of and he is stuck. Do you know what else we know about the turtle? He didn't get there by himself." *Tr.* 1/31/96: 147.

Standard of Review

A Crim. P. 35(c) defendant faces a presumption of the validity of the conviction he attacks. He has the burden of establishing his claim by a preponderance of the evidence. *People v. Naranjo*, 840 P.2d 319 (Colo. 1992).

Issues raised by Defendant in his direct appeal cannot be relitigated if those issues were "fully and finally resolved" in an earlier appeal. "Moreover, a defendant is precluded from raising an issue under Crim. P. 35(c) if its review 'would be nothing more than a second appeal.'" *DiPeneda v. Price*, 915 P.2d 1278 (Colo. 1996). This rule has been subject to strict interpretation.[3]

The law of the case doctrine has significance concerning portions of Defendant's motion. Mr. Dunlap challenges several of the Supreme Court's rulings in *People v. Dunlap*, 975 P.2d 723 (Colo. 1999). This Court recognizes that Defendant must raise all issues he may wish to pursue on a later appeal in the instant motion lest he be precluded from raising them on appeal. However, this Court cannot, and will not, review issues that are the law of the case. *People v. Roybal*, 672 P.2d 1003 (Colo. 1983).

With respect to Defendant's assertions of error (as distinguished from ineffective assistance of counsel), the Court must consider the nature of the error. Two types of constitutional error exist: structural error and trial error. The former affects the framework within which the trial proceeded. If structural error exists, automatic reversal is required. *People v. Fry*, ___ P.3d ___, 2004 WL 1432548 (Colo. 2004). The Court finds that none of Defendant's allegations constitute structural error.

Trial errors occur during the presentation of the case to the jury. They require reversal unless the error can be found to be harmless beyond a reasonable doubt. When considering trial errors, the Court must determine whether the guilty verdict and death

[3] *See People v. Close*, 22 P.3d 933 (Colo. App. 2000). Where a Crim. P. 35(c) motion is timely filed and alleges "a significant change in the law, of constitutional magnitude, determined since the defendant's direct appeal was affirmed", a reviewing court can, in its discretion, review matters previously raised on direct appeal.

sentences entered were surely unattributable to the error(s). The Court must look at the trial as a whole and decide whether there is a reasonable probability that Defendant could have been prejudiced by the error(s). *Id.*

In addition, the plain error doctrine is applicable in this case. It is considered when no contemporaneous objection is interposed. "Plain error is grave error that seriously affects the substantial rights of the accused. *Espinoza v. People,* 712 P.2d 476, 478 (Colo. 1985). It is an error that is "both obvious and substantial." *People v. Barker,* 180 Colo.28, 32, 501 P.2d 1041, 1043 (1972). *People v. Stewart*, 55 P.3d 107, 120 (Colo. 2002). A defendant's claim of plain error will not be successful unless he or she demonstrates that, "the error so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction." *People v. Allen*, 78 P.3d 751, 753 (Colo. App. 2001).

The People's Request that the Court "Summarily Deny" Defendant's Claims

The People, citing *People v. Rodriguez*, 914 P.2d 230 (Colo. 1996), urge the Court to deny Defendant's motion on its face. They cite the "second appeal" line of cases. They imply that the claims "are bare and conclusory, without supporting allegations", or are not "legally cognizable" or "were previously resolved." The Court finds that the People's assertions are not well grounded. It is inappropriate to summarily deny Defendant's claims.

In the first instance, this is a capital case. There will be multiple reviews of this Order. Although the legal principles governing capital sentences and other sentences are essentially identical, the Court believes it must honor its obligation to address issues timely brought under Crim. P. 35(c). "Notwithstanding the fact…that a judgment of conviction was affirmed upon appeal, every person convicted of a crime is entitled as a matter of right to make application for post conviction review upon the grounds herein set forth." Crim. P. 35(c)(2). Defendant has set forth issues that warrant a hearing.

Defendant's ineffective assistance of counsel claims are not successive and entitle him to findings and conclusions. *People v. Russell*, 36 P.2d 92 (Colo. App. 2001). The Court will enter other findings of fact and conclusions of law as are appropriate.

The Length of the Hearing and of this Order

The hearing consumed 52 days of court time. This appears to be unprecedented in Colorado.

Although the Court determined that any evidence adduced during the trial would not be presented again at the hearing, it also believes that this is the first capital case in Colorado that has been heard pursuant to the requirements of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §2254. Under that statute, a defendant must fully exhaust all of his federal claims in state court.

> A federal court will not grant a state prisoner's petition for a writ of habeas corpus unless available state-court remedies on the federal constitutional claim have been exhausted. 28 U.S.C. § 2254 (b) (1) (citations omitted). The exhaustion requirement is satisfied only if the petitioner can show that he fairly presented the federal claim at each level of the established state-court system for review. (citations omitted) "Fair presentation" of a claim means that the petitioner "must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." (citations omitted) A federal court will not grant a state prisoner's petition for a writ of habeas corpus unless available state-court remedies on the federal constitutional claim have been exhausted. 28 U.S.C. § 2254(b) (1). *Holloway v. Horn*, 355 F. 3d 707 (3rd Cir. 2004).

Defendant filed a 300 page motion and a 273 page memorandum. The State's two part response totaled 493 pages. Defendant filed a 100 page reply. The Court concludes that it must address all issues raised in the pleadings, except those to which the law of the case doctrine is applicable. As a result, the Court has written this lengthy order.

The Death Penalty

The Colorado Supreme Court has stated the only applicable principle.

> We have recognized that the power to determine the proper punishment for violations of statutes is legislative and not judicial. *People v. Summit,* 183 Colo. 421, 517 P.2d 850 (1974). Whether we individuals who are judges would have voted for the death penalty as voters or legislators is not relevant . . . . Whenever the question was presented to the people directly through an initiative or referendum, or indirectly through their elected representatives, the people have opted to reaffirm their support for the imposition of capital punishment in certain cases. *People v. Davis*, 794 P.2d 159, 171 (Colo. 1990).

In entering this order, the Court has not considered any of its personal views about the death penalty. This Court does not make law. Its duty is to determine the facts and apply the law fairly and impartially.

Waiver of Attorney-Client Privilege

Prior to the evidentiary hearing concerning Defendant's Crim. P. 35(c) motion, the parties filed pleadings concerning the status of Defendant's attorney-client privilege with trial counsel. On April 4, 2002, the Court heard argument and entered its ruling. Since Defendant's motion and this order will be thoroughly reviewed on appeal, the Court enters these findings and order.

Shortly after Defendant was arrested for the Chuck E Cheese homicides, Judge Thomas C. Levi appointed Forrest W. Lewis and Steven Gayle as defense counsel. These two lawyers represented Mr. Dunlap from December, 1993 through May, 1996. Mr. Gayle also represented Defendant in the "Burger King" case, No. 95CR605.

In this proceeding, Defendant sought to maintain a full spectrum of privileges with respect to trial counsel. The Court found that, by filing his Crim. P. 35(c) motion, he had waived the attorney-client privilege. *People v. Russell*, 36 P. 3d 92 (Colo. 2001); *People v. Sickich*, 935 P.2d 70 (Colo. App. 1996). These cases establish settled law in Colorado.

Defendant also contended that the District Attorney could not review any of trial counsel's files unless post-conviction counsel chose to release materials. Colorado's appellate courts have not entered rulings concerning the scope of discovery in these matters. Accordingly, the Court relied on authority from other states to enter its order.

The Court ruled that, as to all matters raised in Defendant's motion, there is a presumptive waiver of any claimed privilege. The Court authorized the defense to submit materials to the Court for an in camera review. Defense counsel were granted full access to the trial file. (In fact, Defendant has consistently indicated that Messrs. Lewis and Gayle could review the file at Mr. Cherner's office on reasonable notice.) And the Court granted Defendant two weeks from April 4, 2002 within which to seek to withdraw any claims in his motion. Defendant did not seek to withdraw any portion of his motion.

In its review of the case law, the Court noted that most other states consider post-conviction proceedings to be civil in nature. Some states have enacted legislation. *See,*

e.g. State v. Buckner, 527 S.E. 2d 307 (N.C. 2000); *Waldrip v. Head*, 532 S.E. 2d 380 (Ga. 2000).

Other states have discussed a limited waiver in the context of a post-conviction motion. New Hampshire has held that an ineffective assistance claim constitutes a limited waiver to the extent relevant to the ineffectiveness claim. *In re Dean*, 711 A.2d 257 (N.H. 1998). In *State v. Whalen*, 563 N.W. 2d 742 (Minn. 1997), the Court held that an ineffective assistance claim establishes an implied waiver as to all circumstances relevant to that issue. And in *State v. Thomas*, 599 A.2d 1171 (Md. 1992), the Court adopted, "the universally accepted rule that the privilege is waived by the client in any proceeding where he or she asserts a claim against counsel of ineffective assistance and those communications, and the opinions based upon them are relevant to the determination of the quality of counsel's performance." 599 A.2d 1171, 1177 - 1178 (Md. 1992).

Even the cases relied on by Defendant did not (and do not) cause the Court to reach a different conclusion. In *Commonwealth v. Chimel*, 738 A. 2d 406 (Pa. 1999), the Court held, "the client's attack on the competence of counsel serves as a waiver of the privilege as to the matter at issue." 738 A.2d 406, 414 (Pa. 1999).

Other cases relied on by the Court are: *Owen v. State*, 773 So. 2d 510 (Fla. 2000); *In re Gray*, 123 Cal. App. 3d 614, 176 Cal. Rptr. 721 (4th App. Dist. 1981); *State v. Krutchen*, 417 P.2d 510 (Ariz. 1966); *In re Gilham*, 704 P.2d 279 (Mont. 1985); *Logston v. State*, 363 N.E. 2d 975 (Ind. 1977); *State v. Click*, 768 So. 2d 417 (Ala. App. 1999); *State v. Bay*, 736 A. 2d 469 (N.J. 1999); *State ex. rel. Rowland v. O'Toole*, 884 S.W. 2d 100 (Mo. App. E. Dist. 1994). The Court also referred to Colorado RPC 1.6 (c).

Accordingly, the Court entered its order finding a full waiver of the attorney-client privilege but a limited waiver with respect to the materials in trial counsel's files.

Defendant's Claims Concerning the Information

Defendant begins these claims by stating that the Information was "jurisdictionally deficient" because they failed to provide him with adequate notice. Generally, these claims are governed by *People v. Russell*, 36 P.3d 92 (Colo. App. 2001).

> An information must provide the defendant with notice of the charges sufficient to permit the preparation of an adequate defense, and it must protect him or her from

> further prosecution for the same offense. If an information fulfills these purposes, it invokes the jurisdiction of the court. (citation omitted) If, however, the information fails to satisfy these requirements, it is substantially defective, and a conviction obtained pursuant to such an information is void. (citation omitted) In determining the sufficiency of a particular charge of an information, a court restricts its examination to the four corners of that charge to ensure that essential elements of a crime are directly alleged or incorporated by specific reference. 36 P.3d 92, 95.

Mr. Dunlap argues that the counts of the information that allege felony murder, first degree burglary and aggravated robbery are deficient because they fail to set forth the elements of the respective predicate offenses. *M*: 6 et. seq. This assertion is without merit. "(O)ne count of an information can incorporate by reference another count by specifying that count or the offense charged therein by name. That is, each count of an information need not enumerate the elements of a predicate offense, but must specifically and clearly incorporate by reference another count which does enumerate the essential elements of the predicate offense." *People v. Rodriguez* 914 P.2d 230, 256 (Colo. 1996).

As in *Rodriguez*, each count in information in this case which Defendant challenges on this ground specifically refers to the predicate offense by name and statutory citation. Mr. Dunlap was adequately advised of the charges against which he was required to defend. *Id*.

Defendant's Contentions about Jury Selection, Including Voir Dire, Alleged Prosecutorial Misconduct and Ineffective Assistance of Counsel

Defendant makes several contentions about jury selection. He states that the Court improperly interpreted the applicable law for capital cases; that various questions by the Court and the prosecution were improper; that a number of prospective jurors who were "death scrupled" were improperly removed from the venire, either by specious prosecution challenges or by improper rulings by the Court; that other venirepersons were permitted to remain on the jury in spite of their pro-death penalty views;[4] that trial counsel did not engage in adequate or suitable voir dire; that trial counsel did not object to these errors; that trial counsel improperly failed to exercise all available peremptory

challenges; and that, as a result, the jury was "skewed" and "organized to convict and return a death sentence." *M*: 62.

Applicable Law and the Voir Dire Procedures

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the United States Supreme Court examined the standards for capital jury selection. There, the trial court began jury selection by stating, "Let's get these conscientious objectors out of the way, without wasting time on them." As a result, a number of venirepersons who expressed at least some indecision about his or her ability to impose a death sentence were removed from the pool without any meaningful effort to determine whether they could follow their oaths and apply the applicable law.

The Supreme Court's oft-cited footnote number nine indicated that, unless a venireperson unambiguously stated that she or he would automatically vote against the imposition of capital punishment, no matter what the trial might reveal, a court could not simply presume that that was his or her position. Thus, the critical issue was whether a prospective juror's attitude toward the death penalty would prevent his or her fair and impartial determination as to guilt (as well as capital punishment). The Court articulated this standard as whether the juror had made it unmistakably clear that he/she would vote against the death penalty regardless of the evidence or could not vote guilty due to their adverse notions of the death penalty. *Id.*

In *Wainwright v. Witt*, 469 U.S. 412 (1984), the Court revisited and clarified the standard by "dispens[ing] with *Witherspoon*'s reference to 'automatic' decision making." *Id.* at 424. The Court recognized that a trial judge's determination of the death (or life) qualification is a difficult task and that no magic combination of words or expressions can help a court make the requisite sensitive, constitutionally-based decisions. Indeed, the Court recognized this challenge and noted that it would be inappropriate to require a

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[4] Post-conviction counsel refer to these jurors as "ADP", or those persons who would automatically choose to impose a death sentence after the penalty phase, irrespective of whether such a penalty was justified by the evidence and applicable law.

detailed set of findings as to each prospective juror. Although the Court reaffirmed *Witherspoon's* disqualification of jurors that automatically vote for capital punishment (or for life without parole), the Court reaffirmed the *Adams v. Texas*, 448 U.S. 38 (1980) standard: would the juror's views would prevent or substantially impair the performance of the juror's duties in accordance with the instructions and his or her oath? A juror's views need not be set forth with unmistakable clarity.

In his papers, Mr. Dunlap asserts that the Court's statements during voir dire demonstrated a "bewildering *Witt/Witherspoon* standard to prospective jurors whose pro-death views prompted challenges by defense counsel. By analogizing this to the actual *Witt/Witherspoon* distinction, the court considered this to be a standard that a pro-death biased juror could meet and still remain on the panel. The court declared that the *Witt* standard was a lesser or easier standard than the *Witherspoon* standard for pro-death biased jurors to meet, so that such prospective jurors could remain in the pool even though they may be excluded under the *Witherspoon* standard." *M*: 64. In turn, Mr. Dunlap cites excerpts of the voir dire of several jurors who post-conviction counsel describes as having been unacceptably pro-death penalty and impaired in their ability to perform their duties in accordance with his or her oath and the applicable law.[5]

The State's first responsive brief reviews the Court's voir dire procedures beginning at *RBI*: 91. Prior to trial, the Court approved the parties' stipulation concerning a questionnaire and directed that it be distributed to all prospective jurors. The venirepersons were called in two large groups for an introduction by the Court in the presence of all attorneys of record, the Defendant and Defendant's investigator. The prospective jurors were instructed to write dates that would be inconvenient for individual voir dire at the top of their questionnaires. The El Paso County District Court's jury commissioner arranged the date on which each juror would report to the courthouse. The parties also agreed that interviews with individuals who set forth apparent hardships

[5] There were a number of jurors, challenged by the prosecution on similar grounds, and permitted by the Court to remain on the panel. The Court's decisions concerning these venirepersons do not directly affect Defendant's constitutional challenges. The defense does not mention, however, that the Court applied the same standards as to both the prosecution's and Defendant's challenges for cause during the in camera and open court voir dire.

would be interviewed individually on the second and third day of the individual voir dire. If any of those individuals with putative hardships were found to be able to serve, a full in camera voir dire followed.

Each prospective juror received a handout, People's Exhibit PC8, that set forth Colorado's four step capital sentencing process, to review before his or her individual voir dire.

The Court utilized the same in-camera voir dire process utilized and upheld by the Supreme Court in *People v. Harlan*. 8 P.3d 48 (Colo. 2000). It dealt with issues of exposure to publicity, hardship, and each juror's views concerning capital punishment. The Court began with a re-introduction of the Defendant, attorneys for both sides, and the defense investigator. Generally, the Court would ask each prospective juror about issues listed in her or his questionnaire that at least ostensibly would require exploration during the individual voir dire. Each party had a period of time to inquire of each juror. If either party requested an additional period of questioning, it generally was granted. Occasionally, the Court would ask questions after the attorneys had completed their voir dire. In such circumstances, the parties were permitted to ask follow-up questions.

In the absence of the parties' stipulation for cause, each juror was asked to step outside of the room and the Court heard the parties' statements concerning hardship, publicity and the juror's views as to the death penalty. Thereafter, the Court determined whether the juror should be excused or should continue as a prospective juror.

The Court did not always adequately articulate its findings concerning the *Witt* standards. The Court attempted to distinguish between those persons who would automatically determine that Defendant should receive either a death sentence or a life sentence and those whose views (or biases) were not disclosed with "unmistakable clarity."[6] The Court was less than completely clear when it drew distinctions between the *Witherspoon* and *Witt* findings. Indeed, the purpose of the voir dire is to enable counsel to determine whether any jurors are possessed of beliefs that would cause them to be biased in such a manner as to prevent the defendant from obtaining a fair and impartial trial. Trial counsel can then utilize the voir dire process to seek removal of those prospective

[6] *See*, *Witt, supra*, at 424.

jurors who cannot impartially weigh the evidence and follow the court's instructions. *People v. Rodriguez*, 914 P.2d 230, 263 (Colo. 1996).

The record of the voir dire clearly demonstrates that the Court never sought to weed out "conscientious objectors" or any other persons who were possessed of any other views, either for or against the death penalty or a life sentence. By adopting the questionnaire, after amendments to meet certain of its concerns, the Court permitted the parties to explore each prospective juror's views in detail. The parties were able to determine whether the venirepersons were able to perform their duties in accordance with their oaths and the applicable law.

In *Morgan v. Illinois*, 504 U.S. 719 (1992), the Supreme Court held that any juror who would not vote for a death sentence under any facts presented by the prosecution and the instructions of law is not fair and impartial and must be removed for cause. Similarly, a person who would automatically vote for a death sentence without considering the aggravation and mitigation as required by the instructions of law is not a fair and impartial juror. "If even one such juror is empanelled and the death sentence is imposed, the State is disentitled to execute the sentence." *Id.* at 729.[7]

Morgan v. Illinois also holds, "jurors--whether they be unalterably in favor of, or opposed to, the death penalty in every case--by definition are ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding." 504 U.S. 719, 735. Thus, when the Court reviews Defendant's claims, it must consider the entirety of the individual's comments. This exercise, occurring some eight years after the events in Colorado Springs, must occur with full realization that the Court was making its decisions contemporaneously with its careful observation of the prospective

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[7] At the conclusion of the hearing, the Court asked the parties to submit their views as to the meaning of "empanelled." The State believes that the empanelled group is limited to the deliberating jurors. Defendant contends that this group includes all jurors who were sworn to try the case, including all alternates. Although either view should limit Defendant's challenge to no more than 22 jurors (One juror was excused within the first day of the trial for a family emergency.), the Court reviews Defendant's position as to all jurors lest a reviewing court find that this Court did not enter orders concerning all of his contentions, especially with respect to ineffective assistance of counsel. The Court concludes that the "empanelled" jurors are all deliberating and alternate jurors.

jurors' demeanor and manner, including the way in which each person responded to the Court, the designated prosecutor and defense counsel.

Of course, the Court cannot recall these things as it enters this order. It makes these rulings recognizing the care with which it considered each person whom the Court and counsel interviewed in individual voir dire.

The Court's duty in a capital case is the same as in other criminal cases. "If the trial court has genuine doubt about the juror's ability to be impartial, it should resolve the doubt by sustaining the challenge and excusing the juror. *People v. Janes*, 942 P.2d 1331, 1334 (Colo. App. 1997). *See also Morrison v. People*, 19 P.3d 668 (Colo. 2000); *People v. Harlan*, 8 P.3d 448, 461 (Colo. 2000); *People v. Russo*, 713 P.2d 356 (Colo. 1986).

Here, as in all death penalty cases, the Court had the opportunity to read all prospective jurors' questionnaires, ask its own questions, and observe each juror.

With this review of the applicable law having been completed, the Court turns to those jurors about whom the defense lodges its constitutional challenges. In doing so, the Court is aware that trial counsel did not exhaust its peremptory challenges. However, Defendant still can raise certain issues concerning inappropriate jury selection decisions in this Crim. P. 35(c) hearing, even though he did not initially "federalize" his claim by exhausting all peremptory challenges. Such an undertaking requires that the Court review the entire transcript of each challenged juror.

Jurors about Whom Mr. Dunlap Objects (as Contained in David Wymore's Notebook, Exhibit PC-R)

In his papers, Defendant makes numerous claims of error concerning jury selection. David Wymore, admitted as an expert in criminal defense and capital litigation, testified about several of those jurors. The Court will first review those claims and the record related to those specified jurors.

Juror Robert Hamilton

Juror Robert Hamilton appeared on January 25, 1996. He was a senior pastor at a Methodist church. The Court began by reviewing his questionnaire's statement that he

opposed the death penalty because it does not deter murder and that only God can make a decision concerning the taking of a human life. Although he did not consider himself "impaired," he could not envision a circumstance in which he could consider capital punishment unless the crime were "so heinous as to be terribly dehumanized" in which case "there might be a possibility." He stated that he would have difficulty in supporting the law of Colorado.[8] Pastor Hamilton clearly was the type of juror who could not perform his duties in accordance with the instructions and his oath. There is no error in the Court's granting of the People's challenge for cause.

Juror Thomas McGinnis

Juror Thomas McGinnis was interviewed on January 22, 1996. He was a student at the University of Colorado at Colorado Springs. The State challenged Mr. McGinnis on hardship and the death penalty. The transcript states that the Court found a cause as to publicity and not hardship. No finding was made as to his views concerning the death penalty. In fact, this juror had no specific knowledge as to the crime that would have sustained a publicity challenge. On the other hand, he had many concerns about his studies, the need to sell his house, and a forthcoming trip to Europe that could have established a hardship challenge.

The proper basis for sustaining the People's challenge was Mr. McGinnis' views concerning the death penalty. Juror McGinnis expressed a concern about his ability to follow the law concerning the penalty phase. Although he could envision circumstances in which he could approve of a death sentence, he would not do so if he found any good in the defendant.[9] In response to the prosecutor's question, he stated that he would consider a death sentence only in a case where a defendant was "100 percent evil." When the Court considers his statements as a whole, it again concludes that he could not apply the law according to the Court's instructions and follow his oath. Mr. McGinnis was substantially impaired with respect to his ability to apply the law and fairly consider a death sentence. The Court again concludes that the People's challenge was well taken.

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[8] This juror asked about the meaning of "substantially impaired." The prosecutor chose not to answer the question and turned to the Court. In turn, the Court advised the Pastor Hamilton that the issue dealt with his "belief system."

Juror Charlotte Anderson

Juror Charlotte Anderson was interviewed on January 22, 1996. She knew of Defendant's role in the companion "Burger King" case, including his 75-year sentence.[10] She was ambivalent, at best, about the death penalty. The State challenged her on the basis of publicity. The Court sustained that challenge.

The defense contends that the State lacks the "standing" to interpose such a challenge, stating that it was "both preposterous and cynical." *M*: 76. However, Defendant cites no law to support his position, and the Court has not located any relevant authority.

Ms. Anderson could not assure the Court that she could apply any of the applicable law in either the guilt or the penalty phase due to publicity. She "believe[d] what she [read] about this case and the Burger King case. She suggested that she probably would be a more appropriate juror in a case about which she had not read anything. Defense counsel's questions about her knowledge of the case drew a response that "it would be hard" to decide the issue of guilt based only on the evidence and not based on pretrial publicity. Additionally, the prosecutor elicited a response that Defendant "probably" would not be here (on trial) if he were not guilty.

Ms. Anderson was also unable to assure the Court that she could follow the applicable law due to her impairment as an automatic life-sentence juror. Moreover, her questionnaire indicated that she could not follow the law concerning the imposition of the death penalty. *Tr*. 1/22/96: 200. At one point, she stated that she would "automatically" vote to impose a life sentence. Shortly thereafter, Ms. Anderson stated that she was not substantially impaired in her ability to vote for a death sentence. She also said that "that would be hard" when defense counsel asked her whether she could fairly deal with the penalty phase, but she would "try" to keep an open mind.

The Court's review of this record demonstrates that Ms. Anderson was subject to a challenge for cause pursuant to Crim. P. 24(b)(1)(X) and C.R.S. §16-10-103(1)(j)

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[9] As will be discussed elsewhere herein, there is no "presumption of life" in Colorado's capital sentencing statute that could validate this view.

(2003), for evincing a biased state of mind towards the Defendant. The Court could properly conclude that Ms. Anderson maintained a bias against Defendant and that she could not render a verdict based solely on the evidence. The Court concludes that the challenge was properly sustained.

Defendant contends that trial counsel was ineffective in his handling of Ms. Anderson's voir dire by failing to adequately develop Ms. Anderson's views concerning capital punishment. In fact, neither Mr. Gayle nor Mr. Wolff could have obtained any more information from her that would have overcome Ms. Anderson's bias. Therefore, there was no violation of the *Strickland v. Washington* performance prong.

Juror Clifford Tompkins

The Court and counsel met with Juror Clifford Tompkins on January 29, 1996. In his Memorandum, Mr. Dunlap states that Mr. Tompkins gave "uninformative and some troubling responses" and that defense counsel "ignored those responses, avoided obtaining the considerable missing information, and asked Tompkins only whether he could be fair and whether he could 'work mitigation into the picture.'" The defense alleges that Mr. Tompkins "indicated a quick readiness to impose death" and that he had "no problem with the death penalty if the facts were accurate." *M*: 49. The entire record reflects that Mr. Dunlap's claims concerning this juror are without merit.

Mr. Tompkins' questionnaire indicated, "if the facts are accurate, I have no problem (with the death penalty)." However, he also stated, "If there's any doubt, the death penalty should not be imposed." *Tr.* 1/29/96: 75. Immediately after the Court discussed that questionnaire entry, the Court reminded Mr. Tompkins, "As you know, the standard in all these matters is beyond a reasonable doubt." When Mr. Tompkins expressed some confusion about beyond a reasonable doubt, the Court explained the legal definition of that standard. Later, he said, "I feel it's a heavy duty, or charge, that you better be well aware of what you're doing before you would agree on a death sentence….

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[10] *See* Arapahoe County District Court Case No. 95CR605. Contrary to the People's position, Ms. Anderson did have at least a pre-conceived notion that Defendant was guilty. She allowed that she "will listen and do whatever is said." *Tr.* 1/22/96: 198.

I'm not against it, but it takes a lot to prove it." *Tr.* 1/29/95: 77.

Mr. Tompkins also clearly stated that he would not impose a penalty without reviewing each of the statutory four steps. When the Court asked Mr. Tompkins whether he would automatically vote for a life sentence without parole without going through the four steps, Mr. Tompkins responded, "I think it would depend on the circumstances that was [*sic*] presented." *Tr.* 1/29/95: 78. When the State delved further into the juror's views concerning capital punishment, Mr. Wolff asked, "Does it strike you it would be a lot harder to vote for a death penalty than it would for a life sentence?" Mr. Tompkins answered, "Honestly, I believe that it would, yes." When Mr. Wolff asked if that's the way it should be, the juror concurred. *Tr.* 1/29/95: 81.

The Court cannot envision a person who could present himself or herself as more open-minded and unbiased than Mr. Tompkins. The defense contends that he was an "ADP" juror or an "extreme burden shifter" because he "had no problem" with capital punishment "if the facts are accurate." Apparently, a person who requires "a lot (of proof)" from the State before he was willing to entertain a death sentence does not meet post-conviction counsel's standards for a "death scrupled juror." The Court disagrees. Mr. Tompkins was not possessed of beliefs that prevented him from being fair and impartial to both the State and Mr. Dunlap with respect to both phases of the case. Mr. Dunlap's objections concerning this juror are not justified.

The Court also finds that Defendant's ineffective assistance of counsel assertion is completely without merit. In post-conviction counsel's view, Mr. Lewis should have taken one statement on Mr. Tompkins' questionnaire, "If the facts are accurate, I have no problem (with the death penalty)" and attempt to make this open-minded juror appear to be "ADP."[11] Therefore, Mr. Lewis' performance did not violate *Strickland v. Washington*'s performance prong.

[11] The Court notes, with interest, that Defendant continually asserts that the Court should not find that any questionnaires exist because of the clerk's destruction of the originals and copies. Here, however, he bases his entire challenge on a statement attributed to the questionnaire. Indeed, the Court has found that the questionnaires were destroyed. In this order, the Court limits its consideration of the "questionnaires" to those statements contained in the transcripts.

Juror Thomas Craddock

Juror Thomas Craddock was interviewed on January 16, 1996 in the group of jurors who had been previously identified as having potential hardships. He was an employee of a Colorado Springs television station by day and a student at night. He stated that he would drop all of his courses for the (then) current term if he were selected as a juror.

The Court and Mr. Craddock had some difficulties in communicating about the relevant issues. At the outset, he stated he "could follow the guidelines. I don't have any predisposition one way or the other." *Tr.* 1/16/96: 104.

He then indicated that he did not fully understand the statutory process in a penalty phase. When defense counsel asked about the concept of "an eye for an eye," Mr. Craddock stated that he "probably made statements to that effect. But, you know, I'm a reasonably open-minded person and it would behoove someone to convince me otherwise I guess." *Tr.* 1/16/96: 110. He also stated that he "probably tended to feel that way," but that he thought that he could honestly and fairly consider and weigh mitigating factors that would (at least in some people) justify a life sentence. *Id.*

The record reflects that Mr. Lewis substantially pursued this topic. When Mr. Craddock was asked what type of things would be mitigating to him, he stated, "I'm not sure. I'm not the one making the case and it would be up to someone to convince me." He also stated that he was not "adamantly opposed" or "adamantly in favor" of the death penalty. *Id.* Toward the end of the defense's voir dire, Mr. Craddock again stated "I don't have any real predisposition one way or the other." *Tr.* 1/16/96: 113.

The prosecution asked only a few questions of Mr. Craddock.

The defense challenged Mr. Craddock for cause based on his views about capital punishment.[12] This juror represents one of the many difficult decisions that faced the Court during the lengthy individual voir dire sessions. The Court noted that he would

[12] During the post-conviction hearing, Mr. Gayle opined that it was below the standard of care for the defense not to exhaust all peremptory challenges because the Court improperly denied one or more of Defendant's challenges for cause. Presumably, Mr. Craddock is one of the jurors about whom Mr. Gayle spoke.

make his penalty decision based solely on the evidence and the law. Nothing in the Court's review of the record causes it to change its finding.

In *People v. Harlan*, 8 P.3d 448, 461 (2000), the Supreme Court held that a trial judge must determine a juror's credibility, demeanor, and sincerity in explaining his state of mind. Moreover, the trial court is afforded broad discretion in determining whether to excuse a juror for actual bias. *Id.* In this instance, although Mr. Craddock evinced several apparently inconsistent views, he impressed the Court as being willing to take his responsibilities seriously and make decisions based only on the evidence and the law as explained by the Court, consistent with his oath. He certainly was not automatically inclined to vote for the death penalty and made no apparent statements indicating that he would shift the burden of persuasion concerning a death sentence from the prosecution to the defense. Therefore, from the totality of the circumstances, the trial court properly concluded that Juror Craddock would properly follow his oath and obey the court's instructions and was properly admitted as a potential juror.

Juror Elias Trujillo

Elias Trujillo was interviewed on January 25, 1996. He was questioned about publicity and his views regarding the death penalty. He had heard the initial coverage about the Chuck E Cheese homicides[13] when they had occurred and had also heard about the change of venue. He gained his knowledge from KOA radio (a Denver 50,000 watt station). He stated that he "just [did not] remember the circumstances." *Tr.* 1/25/96: 17.

The Court then asked the juror whether he understood the four-step process. Mr. Trujillo acknowledged reading the handout (Exhibit PC-8 at the post-conviction hearing). The Court then explained that procedure and when the Court discussed the sentencing phase requirements; it twice reminded the juror of the beyond a reasonable doubt standard. Mr. Trujillo also indicated that he was "neutral" about the death penalty and rejected the concept of "an eye for and eye." *Tr.* 1/25/96: 27.

Neither party challenged Mr. Trujillo concerning his views about the death penalty. However, the defense challenged him concerning his exposure to publicity "in

the interest of a consistent record" because he was a "consistent listener to KOA."[14] However, the actual record of Mr. Trujillo's voir dire demonstrates that he was not contaminated by any exposure to publicity.

Post-conviction counsel alleges that Mr. Trujillo "was subjected to erroneous statements of 'law' from the court, as were a substantial number of sitting and other prospective jurors." (*M*: 174). Mr. Dunlap further contends that the Court violated the requirements of *People v. Tenneson*, 788 P.2d 786 (Colo. 1990). *Tenneson* holds that a constitutionally valid capital punishment statute must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence for the charged defendant than others found guilty of first-degree murder.[15] *Id.* at 790. The Court then held that the sentencing jury must be convinced beyond a reasonable doubt that any mitigating factors do not outweigh the proven statutory aggravating factors. The jury must be so instructed. *Id.* at 796, 799. *See also People v. Martinez*, 22 P.3d 915 (Colo. 2001); *People v. White*, 870 P.2d 424 (Colo. 1994).

Although the defense argues to the contrary, the Court finds that the "handout" provided to all prospective jurors in advance of the individual voir dire, Exhibit PC-8, adequately and accurately set forth Colorado law (as applicable in January 1996). The Court has not located any case law that requires the Court to completely restate each principle of law during the individual voir dire sessions.

Defendant also contends that counsel was ineffective with respect to his inquiry of Mr. Trujillo. The record demonstrates that Mr. Gayle asked probing questions, both with respect to publicity and punishment. The claim of ineffective assistance is not supported as to the performance prong of *Strickland v. Washington*. The Court rejects it.

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[13] Throughout this order, the Court refers to the Chuck E Cheese "homicides" or "murders." Since a jury has found that Defendant is guilty of four killings beyond a reasonable doubt, the use of this terminology is appropriate.

[14] In his motion, Defendant states that the Court denied a defense challenge with respect to Mr. Trujillo. The record does not show that the defense interposed a challenge, at least during the individual voir dire.

[15] The Supreme Court relied on several cases, including *Lowenfield v. Phelps*, 484 U.S. 231 (1988).

Juror Robert Lynch

The Court and counsel met with Juror Robert Lynch on January 25, 1996. The Court began, as it frequently did, by discussing a personal matter with the juror. After reviewing that event, which concerned his brother and occurred in western Michigan, the Court discussed Mr. Lynch's exposure to pretrial publicity. Mr. Lynch acknowledged that he had heard "some people talking about (this case)" at work after the initial orientation session of January 12, 1996. *Tr.* 1/25/96: 67. He stated that he had heard nothing specific and did not recall any details about the crime. He later stated that he recalled hearing and reading about the Chuck E Cheese case in 1993. He then stated that, "you know, they arrested a person. He's guilty or whatever, you know." *Tr.* 1/25/96: 168-169. Upon further inquiry by the Court, Mr. Lynch stated that he could presume that Mr. Dunlap was innocent, consider only the evidence and apply the law as given by the Court.

The Court then began its inquiry about capital punishment by quoting from the juror's questionnaire. Mr. Lynch had written that the death penalty should be carried out in certain cases. He then stated that he did not think it would be "fair" to vote for a death sentence without applying the requisite four-step process. When asked if anything would prevent him from voting for a death sentence, Mr. Lynch replied, "Maybe the, uh, mitigation." *Tr.* 1/25/96: 173. He responded to the balance of the Court's questions by stating that he would neither be prevented nor impaired from voting for either a life or death sentence.

The prosecutor and defense counsel then asked Mr. Lynch questions concerning his exposure to pre-trial publicity. In response to the prosecutor's inquiry about publicity, Mr. Lynch said that Mr. Dunlap "might have done it . . . But I still believe that he probably deserves a fair shake." *Tr.* 1/25/96: 181. He then stated that he could not commit to not being affected by the prior publicity. When defense counsel asked about Mr. Lynch's ability to "(come) into this trial with a completely clean slate," presume Mr. Dunlap innocent, and ask the prosecutor to prove it to me beyond a reasonable doubt, he responded, "I think I could. You know, I believe I could." *Tr.* 1/25/96: 194.

In response to the prosecutor's question about mitigation, Mr. Lynch stated that mitigation could include being raised in a "bad family." He thus appeared attuned to the

type of mitigation case that the defense ultimately presented. He did state that, in the penalty phase, he would be "leaning toward it." *Tr.* 1/25/96: 178. Mr. Peters never asked what "it" meant to Mr. Lynch. The issue was not pursued any further.

Neither attorney obtained any information from Mr. Lynch that indicated anything other than his willingness to adhere to his oath and follow the law as given by the Court. Neither party challenged Mr. Lynch on any grounds.

In the general voir dire, Mr. Lynch stated that he was a subcontractor and felt that he could not give the case his complete and undivided attention because of financial concerns. No other issues were discussed in general voir dire.

As with all other members of the venire, the Court carefully considered the demeanor and presentation of Mr. Lynch. He presented himself as a person who, while minimally aware of the Chuck E Cheese murders, felt strongly that Mr. Dunlap should receive a fair trial. Mr. Gayle's approach to voir dire does not implicate *Strickland v. Washington*'s performance prong because "an attorney's actions during voir dire are considered to be matters of trial strategy," which cannot be the basis of an ineffective assistance claim "unless counsel's decision is . . . so ill-chosen that it permeates the entire trial with obvious unfairness." *Neill v. Gibson*, 278 F.3d 1044, 1055 (10th Cir. 2001).

Juror Richard Price

Mr. Richard Price was interviewed on January 24, 1996. He had been in the military for many years, was previously a witness in a homicide case, and was involved in a court martial during his military career. Although he had heard about the Chuck E Cheese murders when they occurred, he had "completely forgotten" about the case until being summoned for jury duty. *Tr.* 1/24/96: 246. He "absolutely" had no opinion concerning Defendant's guilt or innocence and impressed the Court as being strictly willing to apply the presumption of innocence. *Id.*

With respect to the penalty phase, Mr. Price responded indicated no substantial impairment with respect to either a life or death sentence. During defense voir dire, he stated, "in certain cases that (a death sentence) would be the appropriate way to go. It would have to fall within the parameters of having been completely clearly, you know, proven." *Tr.* 1/24/96: 249. Under those circumstances, he "would have no compunction,

no reservations or hesitation about voting for the death penalty." *Id.* Mr. Price then considered the prospect about being placed on a jury in the penalty phase. He stated that he "would insist on further information. If it were not the case if I were completely satisfied and ready to go (i.e.: if he were not convinced of the propriety of the death penalty), then I would vote for that penalty (a life sentence)." *Tr.* 1/24/96: 250. He stated that he would weigh mitigation (for example, "something perhaps in the Defendant's background that would explain an irrational act, perhaps something along that line"). *Tr.* 1/24/96: 251. The prosecution asked Mr. Price about "an eye for an eye." Mr. Price responded, "That's a hard one. You know, a biblical reference, and so on, but I don't think that that should be taken at face value in every case." *Tr.* 1/24/96: 254.

Neither party set forth any challenges as to Mr. Price. Post-conviction defense counsel now contends that he was an "ADP" juror. The record clearly refutes this idea. Mr. Price was a thoughtful, careful, and dedicated individual who was intent on honoring his oath and following the Court's instructions.[16] Defendant's current arguments concerning Mr. Price are without merit. Further, nothing in the individual or general voir dire demonstrates that trial counsel was constitutionally ineffective.

Juror David Oberosler

David Oberosler's individual voir dire occurred on January 23, 1996. His questionnaire indicated that his work dealt with classified information, thereby making specific inquiries about his job duties inappropriate. The transcript apparently does not indicate the specifics of the Court's advising counsel and the defendant about his clearance. It does, however, contain a reference to that advisement. Defendant's concern about a "secret oath" (as expressed in the hearing) is clearly without merit based on the text of the transcript.

Mr. Oberosler was then questioned regarding his views on the death penalty. Mr. Oberosler's questionnaire indicated his belief that the taking of a human life is "personally repugnant" but that, "in rare cases there is justification for the death penalty."

[16] His voir dire demonstrates the fundamental fallacy of Defendant's contentions concerning voir dire. In essence, the defense believes that any person who, irrespective of the facts, was clearly willing to impose a death sentence, even when she or he also was clearly willing to vote for a life sentence, was "ADP". This notion is clearly contrary to the dictates of *Witt* and its progeny.

Tr. 1/23/96: 93. In response to the Court's question, he stated that he was "not terribly wild about the death penalty" but that in "really rare" cases, a death sentence "might be applicable." *Tr.* 1/23/96: 94. Mr. Oberosler then stated, "It's just something that you -- it has to be really weighed with a lot of gravity. You just don't take someone's life lightly." *Tr.* 1/23/96: 96. Even though the juror also said, "it might be advantageous to society to eliminate them," he conditioned this remark by noting that, from his own perspective, he would rather be dead than spend the remainder of his life in prison. *Tr.* 1/23/96: 98.

During the hearing, defense expert witnesses expressed concern about Mr. Oberosler's statement, "But when you go out and you kill someone with just like you are snuffing out a rat, you know, then maybe there is a case scenario." *Tr.* 1/23/96: 96. David Wymore used this statement as a basis for his assertion that the defense did not adequately develop *Witt* issues and in implying *Strickland v. Washington* deficient performance. Although Defendant correctly notes that trial counsel asked few questions of Mr. Oberosler; since this juror had some clear reservations about capital punishment, counsel could have, as part of his trial strategy, accepted his reservations as being an indication that he was a favorable juror for the defense.

John Blume considered Mr. Oberosler to be an "automatic death penalty" juror because of his statement about eliminating certain capital defendants. Mr. Blume also discounted any effort by a defense attorney to rely on his or her consideration of affect or other physiological responses. He relies on the printed word (or, at voir dire, the spoken word) as the only basis for determining whether a prospective juror is suitably death-scrupled.

The Court's reading of *Morgan v. Illinois*, 504 U.S. 719 (1992) does not support either Mr. Wymore's or Mr. Blume's interpretation of that case, as applied to Mr. Oberosler and other challenged jurors. *Morgan v. Illinois* dealt with a trial court that appeared to be rigid, inflexible, and unwilling to permit a suitable record. That trial court asked venirepersons if they would "automatically vote against the death penalty, no matter what the facts were." 504 U.S. 719, 723. If a juror responded in the affirmative, he or she would be disqualified.

Morgan's counsel asked the trial court to ask an inverse question, "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" *Id*. The Illinois trial court refused to ask such a question. There, Justice White cited *Witt* and its principal holding:

> [T]he proper standard for determining whether a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views "would prevent or substantially impair the performance of his (or her) duties as a juror in accordance with his instructions and his oath."

Id. at 728. Thus, a defendant facing capital punishment is "entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty." *Id.*

Although *Morgan v. Illinois* does not set forth a mantra or "catechism" for suitable voir dire in a capital case, it mandates that each juror be scrutinized for fairness, not with mere "follow the law" questions, but with inquiries that permit a defendant to intelligently interpose both his "complementary" challenges for cause as well as any appropriate peremptory challenges. Further,

> A reviewing court need not conclude that any such jurors (those who would automatically vote for a death sentence upon a verdict of guilt for a death-eligible offense) actually were empanelled; reversal is required only if there is a sufficient possibility that the trial court failed to identify and remove prospective jurors whose death penalty views render them unqualified under *Witt* . . . [A reviewing court's] task is to ensure that there are affirmative reasons discernible in the record to conclude that the trial court's rulings on the defendant's challenges for cause resulted in a jury that could fairly consider evidence in aggravation and mitigation before imposing a sentence on the defendant.

People v. Harlan, *supra,* at 461-462.

Post-conviction counsel complains that the defense voir dire of Mr. Oberosler was inadequate and that there was "virtually no defense voir dire despite ambiguous and troubling statements . . . He almost certainly was 'ADP,'" based on the state's voir dire after the defense was done. *M*: 65. This argument ties into the testimony of Mr. Blume, who believes that a defense attorney never should consider the demeanor of a juror. Instead, Mr. Blume posits that competent capital defense counsel should seize on every

possibly troubling word and, in essence, attempt to portray otherwise clearly fair and unbiased venire persons into biased, pro-death penalty individuals who should be challenged for cause. Both Mr. Blume and Mr. Wymore would probe each nuance of a juror's responses and attempt to manufacture a basis for exclusion, even when one does not, and perhaps could not, exist.

As previously noted, Mr. Oberosler clearly had no intention of automatically voting for the death penalty and took the responsibility of being a juror in this case very seriously. Far from "optimistically seizing upon (Mr. Oberosler's) isolated word or ambiguous phrase"[17], the totality of Mr. Oberosler's opinions demonstrates that he completely satisfied the requirements of *Wainwright v. Witt.* In fact, the type of probing that Mr. Dunlap proposes could well have caused an open-minded juror to draw offense. Defendant could not have hoped to have a more open-minded juror to serve on this jury.

Juror Vance Clifton

Vance Clifton[18] was interviewed on January 23, 1996. He was a ranch manager with cattle who were about to enter calving season. He stated that he "really didn't pay too much attention" to the Chuck E Cheese murders when they occurred. He had formed no opinion about Defendant's guilt or innocence.

With respect to penalty issues, Mr. Clifton stated that he would not automatically vote to impose capital punishment if Mr. Dunlap were found guilty of first-degree murder. He said he was "mildly in favor" of the death penalty because "in certain cases it is needed." *Tr.* 1/23/96: 239-240. He further indicated that he would "want to know everything you could about (a capital defendant) . . . [b]ecause you are talking about the life or death . . . [and] because that's your job (as a juror) to listen to everything that's brought up in the trial." *Tr.* 1/23/96: 241 (Ms. Wilson's words) He also indicated that he could vote for the death penalty "if you (the prosecution) proved it to me." *Tr.* 1/23/96: 242.

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[17] Indeed, post-conviction counsel and their experts would require their ideally competent capital counsel to do just that: seize on isolated words or ambiguous phrases, while ignoring the manner in which a prospective juror responds to all questions, to create a person who would automatically vote for the death penalty, or was mitigation impaired, when the venireperson did not have any such views.

[18] The transcript refers to Mr. Clifton as "Mr. Clinton."

During the defense voir dire, counsel asked why a murder defendant should be sentenced to life without parole as opposed to the death penalty. Mr. Clifton responded, "Uh, if it wasn't a senseless, you know, if it could be proved that there was any way the person could – I would have to say, you know, if the person, oh, could be rehabilitated or if there was any chance." *Tr.* 1/23/96: 243. Mr. Gayle then noted that the juror was "struggling" with capital punishment issues.

Based on the voir dire and a questionnaire response,[19] Defendant now contends that Mr. Clifton "was clearly challengeable as a burden shifter and as mitigation impaired." *M*: 51. In his memorandum, Mr. Dunlap hypothesizes that Mr. Clifton was a person who would automatically vote for the death penalty.

The Court recognizes that counsel might have asked Mr. Clifton which party would have to present mitigation evidence and whether he would require Defendant to prove anything in a sentencing hearing. Although this could be viewed as desirable, the Court has found no case law or other authority to require such inquiries. Case law mandates a thorough voir dire so that both challenges for cause and peremptory challenges can be utilized in an intelligent manner. There is no requirement as to specific questions counsel must ask or that counsel ignore the juror's mannerisms and his or her apparent grappling with the extraordinary difficult issues facing him or her in the voir dire process. Post-conviction counsel have not established that there was any error in permitting Mr. Clifton to survive individual voir dire or that counsel was deficient in his examination of, and failing to challenge this juror.

Mr. Dunlap also objects to "personalization" with respect to the prosecutor's voir dire of Mr. Clifton and other jurors. He uses this term for circumstances when the prosecutor asked a juror whether he or she could "look Mr. Dunlap in the eye" when a death verdict was read or whether the juror could come into the courtroom and "tell" him that the jury had decided that death was the appropriate sentence, pursuant to Colorado law. In the first portion of the Crim. P. 35(c) hearing, Messrs Wymore and Bloom

[19] Once again, post conviction counsel refers to questionnaire responses when they are helpful to their arguments and either asks that other questionnaire comments of record be ignored. All this occurs in the context of their contention that the Defendant was biased by the inappropriate destruction of the questionnaires by Ms. Kathy Quigley. As noted in this order, *infra*, counsel does not demonstrate any specific prejudice which Mr. Dunlap suffered as a result of Ms. Quigley's actions.

discussed the concept of "personalization." Neither witness offered any authority to support his proposition; Mr. Dunlap's papers do not contain such references; and, in its research, the Court has been unable to locate case law that discusses this concept. The defense argues that, with respect to Mr. Clifton, "there was no basis on the record to conclude that Mr. Clifton was not a burden-shifter with a presumption of death." *M*: 179. As previously noted, the record is devoid of material to create such an inference.

Mr. Clifton demonstrated considerable understanding of his role as a juror, the seriousness of a juror's oath, and his obligation to apply the law fairly and impartially to the facts. The record does not indicate that he was a "burden shifter" or was "mitigation impaired." Counsel's examination did not fall beneath the acceptable standard and cannot be found to have met the *Strickland v. Washington* performance prong.

Juror Stephen Cohen

Steven Cohen's individual voir dire occurred on January 19, 1996. Mr. Cohen is a thoughtful person who recalled the Chuck E Cheese murders generally but had no specific recollection of the events of December 14, 1993. He indicated that he carefully followed the Court's instructions with respect to avoiding any publicity about the case after the Court's orientation session of January 12, 1996.

When asked about capital punishment, Mr. Cohen stated that he "believe[s] in it, but it would be difficult. I would have to think about it real hard to see if anything and all the evidence proved it." *Tr.* 1/19/96: 494. He also indicated that he would apply the four-step process and could vote for either a life sentence or a death sentence.

As post-conviction counsel observed, defense counsel's examination was comparatively brief. Similarly, the prosecution also had few questions for Mr. Cohen. The record does not support post-conviction counsel's assessment that Mr. Cohen had an "initial pro-death penalty eagerness [that would have] led him to automatically impose a death sentence without even going through the four-step process … [thereby causing] him to shift the burden to the defense," *i.e.*, a presumption of death. *M*: 180. The defense attempts to create a biased juror when the record reflects no bias. Mr. Cohen presented himself as a thoughtful juror who, far from being eager to impose capital punishment, wanted to be certain that the requirements for such a penalty had been appropriately

established. Consequently, Mr. Gayle's questions were appropriate and probing. He was not constitutionally ineffective.

Juror Ronald Gallegos

Prospective juror Ronald Gallegos was interviewed on January 24, 1996. The Court began by reviewing his use of Pyrroxate, which he described as a medication for heartburn. He also was the victim of an armed robbery in Manitou Springs, Colorado. When the Court asked him about this crime, he stated that it had been "a long time since I've been through that." Mr. Gallegos indicated that he could separate the circumstances of that case and of Defendant's case. Similarly, he stated that an incident concerning his brother would not affect his ability to be fair and impartial.

Mr. Gallegos had received some misleading information about being excused from the venire when he had not in fact been released. He had had some discussions with his wife about this case (and probably about the Burger King case, although his reference was not completely clear). However, he indicated that he had no working knowledge about the underlying facts of the instant case or any other aspect of Mr. Dunlap's criminal background.

Both parties then questioned Mr. Gallegos regarding his views on the death penalty. The Court asked its standard questions. Mr. Gallegos indicated that he was not disposed to vote automatically for either penalty. During the prosecutor's voir dire, Mr. Gallegos demonstrated some confusion about the fourth step. He indicated that he had strong Christian beliefs and that "God is the creator of all things." *Tr.* 1/24/96: 309. When asked about whether he would base his decision on his religious beliefs, Mr. Gallegos said, "I think, uh, based on the laws that we live by and whatever comes out of this, yeah, I can make a decision on whether it's justified or not on that sense." *Tr.* 1/23/96: 315. When taken in the context of the response to the question immediately preceding this response, and the discussion that the law never tells a juror that he or she must vote for a death sentence, Mr. Gallegos certainly was not eager to impose a death sentence. When the prosecutor asked if he would base his decision on what he heard and not use his religious beliefs as the rationale for his decision, he was equivocal ("Yeah, I think so.")

Id. He then stated that his view of the death penalty was "slightly above neutral." *Id*. Defense counsel did not ask any questions of Mr. Gallegos.

Post-conviction counsel asserts that trial counsel's failure to ask questions of Mr. Gallegos constitutes ineffective assistance of counsel.[20] The defense first notes that the "slightly above neutral"[21] (*Memo*: 49) comment did not draw any questions. Post-conviction counsel also indicates the Mr. Gallegos "gave unqualified assurances that he would impose death whenever he thought it was 'the right thing to do.'" *Id.* The Court certainly cannot conclude that the entire trial was permeated with unfairness as a result of defense counsel's decision not to ask further questions of Mr. Gallegos. Although post-conviction counsel desires to portray Mr. Gallegos as a person who was eager to impose capital punishment, the record does not show such a proclivity.

The issue here appears to be similar to that set forth in *Neill v. Gibson*, 278 F.3d 1044 (10th Cir. 2001). There, the defendant claimed that trial counsel was ineffective because he failed to ask three jurors of they would automatically vote to impose a death sentence if one or more first-degree murder convictions were entered. The Tenth Circuit held, "Generally, "[a]n attorney's actions during voir dire are considered to be matters of trial strategy," which "cannot be the basis" of an ineffective assistance claim "unless counsel's decision is . . . so ill chosen that it permeates the entire trial with obvious unfairness." *Id.* at 1055. *See also Hale v. Gibson,* 227 F.3d, 1298, at 1317-18 (10th Cir. 2000); *Fox v. Ward,* 200 F.3d 1286, 1295 (10th Cir. 2000), *cert. denied,* 531 U.S. 938, (2000); *Nguyen v. Reynolds,* 131 F.3d 1340, 1349 (10th Cir. 1997). Further,

> Lawyers experienced in the trial of capital cases have widely varying views about addressing the delicate balance between the disqualification of jurors whose personal beliefs prevent them from ever imposing the penalty of death under *Witherspoon v. Illinois,* 391 U.S. 510, 520-23 (1968), and those who would automatically recommend that sentence if they found the defendant guilty.

[20] In *Brown v. Jones*, 255 F.3d 1273 (11th Cir. 2001), the Eleventh Circuit found that trial counsel's failure to ask reverse-*Witherspoon* questions failed to satisfy the performance prong of *Strickland v. Washington*, 466 U.S. 688 (1984).

[21] The defense does not include the word "slightly" in its memorandum. This reference does not affect the Court's view of this issue.

Morgan v. Illinois, 504 U.S. 719 (1992); *Neill v. Gibson*, 278 F.3d 1044, 1055 -1055 (10th Cir. 2001). Similarly, the Tenth Circuit has acknowledged the prevailing view that a reviewing court must show deference to trial counsel's tactics unless they can be shown to be unreasonable or prejudicial to the defendant. *Nguyen v. Reynolds*, 131 F.3d 1340, 1349 (10th Cir. 1997). *See also Hughes v. U.S.*, 258 F.3d 453, 457 (6th Cir. 2001).

Post- Conviction counsel and their witnesses posit that the non-questioning of Mr. Gallegos violates both of the *Strickland v. Washington* prongs. The case law suggests that it does not violate the performance prong. Moreover, *Brown v. Jones*, *supra*, suggests that, in a case with facts such as Mr. Dunlap's, the allegedly deficient performance would not produce prejudice.[22]

Juror David Unruh

Juror David Unruh was questioned on individual voir dire on January 22, 1996. He had been the victim of a domestic dispute with his former wife. Additionally, a state patrol officer had referred to him as "stupid" in connection with a cracked windshield. *Tr.* 1/22/96: 37. Although he indicated (apparently in his questionnaire) that he felt that "the system" was unfair, he indicated that his ex-wife's lawyer made him "look like [he] was the guilty party." *Tr.* 1/22/96: 42. A jury found that his ex-wife was not guilty of misdemeanor assault. Mr. Unruh stated that he would not be influenced by these experiences. When asked if he would hold this incident against defense counsel, he stated that he would not and added, "I think it would help me be more fair."[23] *Tr.* 1/22/96: 43.

During the Court's voir dire concerning sentencing, Mr. Unruh indicated that he was not predisposed to either a life sentence or capital punishment. When the prosecution questioned him, Mr. Unruh stated that he would have to "see evidence of that . . . that it

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[22] The Court properly instructed the jury that the sentencing decision must be based on evidence. Jurors are presumed to follow the Court's instructions. There was no demonstration of juror bias. Finally, "the heinous nature of the crime and the absence of any mitigating factors make this a case in which the prosecutor had a strong case for the death penalty." *Brown v. Jones,* 255 F.3d 1273, 1280 (11th Cir. 2001). In the instant case, mitigating factors were presented. As Defendant has demonstrated during the post-conviction hearing, other information could have been presented. Nevertheless, it is clear that, in this case, the prosecution had a strong case for a death sentence.

[23] The Court's review of Mr. Unruh's responses provides information that undermines Defendant's contention about the destruction of the questionnaires. As with other jurors, the Court took the time to review those entries for the benefit of the parties and of the record.

would be appropriate. If - - uh, it was very malicious and the person thought about what they were doing." *Tr.* 1/22/96: 44. In response to the defense voir dire, he stated that he would fairly consider mitigation and factor it into his sentencing decision. *Tr.* 1/22/96: 46.

Post-conviction counsel posits that Mr. Unruh, based on his responses, was a person who would automatically impose the death penalty. Counsel also states that his comments indicated that he was a "burden shifter." The record does not support these contentions.

There is nothing in the voir dire to indicate that Mr. Unruh was predisposed to vote for capital punishment without regard to the evidence presented. He said that the death penalty was "good" in certain situations, such as malicious crimes when the person had thought about what he was doing. The record also demonstrates that he would require the presentation of evidence and understood the People's burden.

As with other prospective jurors, the attorneys in the conference room were able to sit in close proximity to Mr. Unruh and carefully consider his demeanor and credibility. Post-conviction counsel's contentions are without record support.

Juror Michelynn Hollister

The Court and counsel inquired of juror Michelynn Hollister on January 22, 1996.[24] Although she had some vague familiarity with the Chuck E Cheese murders, she did not have any working knowledge of the facts of the case. She had no preconceived opinions about the case.

In her questionnaire, Ms. Hollister stated that, when used correctly, the death penalty is an example that the United States will not tolerate crimes and that it would serve as a deterrent to crime. Ms. Hollister indicated that she was "mildly in favor of the death penalty," but clearly indicated that she would not automatically impose the death penalty. *Tr.* 1/22/96: 266.

Defendant's strongest point concerning Ms. Hollister may be two of her statements. First, she indicated that the death penalty has merit because "there is a lot of

[24] Ms. Hollister was excused during the very early stages of the guilt/innocence phase because of a death in the family.

criminal activity out there and just how bad does a person have to get before it stops?" Tr. 1/22/96: 267. Later, when asked about the jury's important decision, not only for the defendant but also for the People, would she look at everything before making a decision, she stated, non-responsively, "I would think death." *Id.*

On the other hand, Ms. Hollister did not accept the adage of "an eye for an eye." She said, "Talking about this the instance of a person taking of a person taking another person's life doesn't necessarily mean it's any more righteous to take theirs." *Tr.* 1/22/96: 268. Based on her work on a reorganization team for the city utilities water resource department, she recognized the need to "have the bigger picture." She added, "It helps to analyze everything." *Tr.* 1/22/96: 269.

There was minimal defense questioning. This may be because Ms. Hollister reported that she had just lost a co-worker in a job-related accident. Neither party offered any objection to Ms. Hollister.

Post-conviction counsel noted the lack of death penalty questions by Mr. Lewis. The current team states that "She gave several ADP answers to the state and was uncertain of her ability to stray from the eye for an eye principle . . . There was no indication that this juror was anything other than ADP." *M*: 173.

The record certainly does not support the defense's contention about her uncertainty about the eye for an eye concept. Ms. Hollister found that the topic was "very difficult" to discuss, and she was uncomfortable with it. More significantly, Ms. Hollister did not indicate that she automatically would vote for the death penalty as discussed in *Morgan v. Illinois.* 504 U.S. 719 (1992). She was a thoughtful person who struggled with the issues with which she was confronted. She was a person who sought to consider the "big picture" and was not inclined to vote for the death penalty no matter what evidence was presented and what was contained in the instructions of law.

Mr. Wymore testified that Ms. Hollister's voir dire was fraught with "Caldwell errors," referring to *Caldwell v. Mississippi*, 472 U. S. 320 (1985). Apparently, Mr. Wymore objected to the prosecutor's question,

> Do you think because this is obviously the ultimate punishment and a very serious and extremely important decision not just for the Defendant but also for the People who are seeking the death penalty, do you think . . .

> you would want to look at everything that was presented to you in the penalty phase to see how that helps you decide which sentence, death or life, should be imposed? *Tr.* 1/22/96: 267.

Caldwell v. Mississippi stands for the proposition that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-329. Nothing in the prosecutor's questions amounted to "state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court (or with anyone else)." 472 U.S. 320, 330, 332-333.

There is no *Caldwell v. Mississippi* violation in Ms. Hollister's voir dire. There is no ineffective assistance because counsel made his ultimate decisions based on the trial team's evaluation of the "in line" jurors.

Juror Ora Wheeler

Juror Ora Wheeler met with the Court, counsel, and Mr. Dunlap on January 22, 1996. He indicated that he had heard nothing about the Chuck E Cheese murders and that he had no opinion about the case.

Although Mr. Wheeler's questionnaire indicated that he believed in capital punishment, it also indicated that he could honor his obligation to apply the law as it related to a life sentence and the death penalty. *Tr.* 1/22/96: 148-149. More significantly, Mr. Wheeler expressed interest in the type of mitigation that would form the essence of the defense's penalty phase evidence. *Tr.* 1/22/96: 152. Mr. Wheeler impressed defense counsel with his independence as well as his confidence. (He indicated that he respected his opinion as well as those of others. Mr. Gayle stated, "Okay. No doubt about that. I could tell." *Tr.* 1/22/96: 154-155.)

Mr. Wheeler was an open-minded juror who had not made up his mind about any aspect of the case. Post-conviction counsel complains about an inadequate voir dire by the Court and about a failure by trial counsel to exercise a peremptory challenge. However, case law does not support Mr. Dunlap's contention.

In *Oken v. Corcoran*, 220 F.3d 259 (4th Cir. 2000), the Fourth Circuit held that the following four questions were not the sort of "general fairness" and "follow the law" inquiries that were deemed inappropriate in *Morgan v. Illinois*: (1.) Do you have any

strong feelings, one way or the other, with regard to the death penalty? (2.) Do you feel that your attitude, regarding the death penalty, would prevent or substantially impair you from making a fair and impartial decision on whether the Defendant is not guilty or guilty, based on the evidence presented and the Court's instructions as to the law? (3.) Do you feel your attitude, regarding the death penalty, would prevent or substantially impair you from making a fair and impartial decision on whether the Defendant was or was not criminally responsible by reason of insanity, based on the evidence presented and the Court's instructions on the law? (4.) Do you feel that your attitude, regarding the death penalty would prevent or substantially impair you from sentencing the Defendant, based upon the evidence presented and the Court's instructions as to the law which is applicable? *Id.* at 266. *See also U. S. v. Tipton*, 90 F.3d 861 (4th Cir. 1996).

The Court specifically asked reverse-*Witherspoon* questions of each prospective juror. Counsel was permitted to follow up these questions as they deemed appropriate. Further, trial counsel and the Court had the benefit of gauging each prospective juror's responses and affect. As noted, supra, Mr. Blume does not believe that counsel should consider a person's demeanor. The law takes the opposite view. It is essential for counsel to make informed decisions and not simply to attempt to pry some type of damning comment from a person so that a challenge for cause, a peremptory challenge or a ground for appeal may be established. Both the Court and counsel must consider demeanor when making their respective decisions about a prospective juror. *See U. S. v. Chanthadara*, 230 F.3d 1237 (10th Cir. 2000).

Defendant's claims concerning Mr. Wheeler are groundless.

Juror Nancy Miller

The Court, Defendant, and counsel met with juror Nancy Miller on January 24, 1996. Ms. Miller had some instances of domestic violence in her family. Her ex-husband was abusive, with alcohol being the precipitating factor. She believed that "no person has the right to inflict pain on another." *Tr.* 1/24/96: 124.

The Court proceeded to have an extensive discussion with Ms. Miller about the presumption of innocence and the State's burden to prove guilt beyond a reasonable doubt. The Court was concerned about Ms. Miller's ability to be fair and impartial.

Ms. Miller expressed a variety of views about capital punishment. On the one hand, she stated that, prior to attending the juror orientation session, she was strongly in favor of the death penalty. However, when she began to reflect upon the circumstances she personally was facing, she expanded her thoughts about this view. "If I suddenly were rethinking - and I know I am going through that process right now, rethinking a lot of my values about the death sentence and I know I am going through that even now." *Tr.* 1/24/96: 134.

Ms. Miller's questionnaire indicated that she was a Roman Catholic. She did not attribute her difficulty with the issues to her faith. Rather, "it has more to do with the fact that I have very much respect for life itself." *Id.*

Ms. Miller indicated that she did not recall whether she read anything about the case at the time of the murders and that she did not "have a lot of prior knowledge of what all went on." *Tr.* 1/24/96: 140. The defense challenged Ms. Miller for cause for exposure to pretrial publicity. The Court denied that challenge and continues to feel that there is record support for that ruling.

The defense also challenged Ms. Miller for her views on the death penalty. At the time of this voir dire, the Court commented noted that there were many pauses in Ms. Miller's answers "that you don't see sometimes in a transcript." The Court also found that Ms. Miller was a "very careful, thoughtful juror." *Tr.* 1/24/96: 145.

In *Wainwright v. Witt*, the United States Supreme Court noted, "The trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record." *Wainwright v. Witt*, 469 U.S. 412, 429 (1985). The Court also noted that the decisions made by trial judges in capital cases are "difficult."

Once again, the Court did not merely consider the words spoken by the juror. The Court attempted to consider her comments in the context of the case and her presentation as a whole. The Court found that the juror satisfied the *Wainwright v. Witt* standards. The

Court adheres to those findings.[25]

The motion indicates that Defendant's ineffective assistance of counsel claim concerning Ms. Miller is limited to counsel's failure to exhaust all peremptory challenges. The Court has addressed this issue, *infra*. The Court's findings will not be reiterated at this point.

Juror William Stewart

Juror William Stewart was interviewed during the initial "hardship" sessions on January 17, 1996.[26] In his questionnaire, he indicated that he took his wife to doctor's appointments and helped her throughout the day with her personal needs. However, with advance notice, was able to make suitable arrangements, even with the prospect of sequestration.

The Court and counsel turned to issues concerning publicity and the death penalty. Mr. Stewart stated that he had no appreciable knowledge of the Chuck E Cheese murders and had no opinion about Defendant's innocence or guilt. When defense counsel inquired concerning his views about the death penalty, Mr. Stewart (whose questionnaire indicated that, when a murder defendant had been found guilty, "the law should be carried out as mandated") said, "It's my duty to follow the law in such cases." *Tr.* 1/17/96: 140. He also stated that his mind was open to all evidence that was presented. He assured the Court and counsel that he would consider any mitigation that was presented.

Post-conviction counsel refers to Mr. Stewart as "overtly biased," *M*: 185, and as one who would automatically vote for the death penalty. *M*: 186; *Memo*: 69. The record does not support these contentions. During the prosecution's voir dire, Mr. Stewart

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[25] Although the decision concerning Ms. Miller was difficult, the applicable standard is whether the Court "has a *genuine doubt* about the juror's ability to be impartial under such circumstances." If such a doubt exists, the Court should resolve it by sustaining a challenge for cause. *People v. Harlan*, 8 P.3d 448, 460 (Colo. 2000) (emphasis in text) *But see Mu'Min v. Virginia*, 500 U.S. 415 (1991) ("Despite its importance, the adequacy of *voir dire* is not easily subject to appellate review. The trial judge's function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions."). *See also Ristaino v. Ross*, 424 U. S. 589 (1976).

[26] Since Mr. Stewart's hardship issues were resolved, the Court permitted counsel to proceed with their publicity and *Witt*/*Witherspoon* questions.

indicated that he would look for a reason for a murder. "If there was no legitimate reason, then you would go to the next step." *Tr.* 1/17/96: 145. And when asked if he could vote for a death sentence, Mr. Stewart first said, "That's a toughie." *Tr.* 1/17/96: 146. He then stated that he "probably could" vote for capital punishment. *Id.* Similarly, the allegation that Mr. Stewart expressed an opinion of guilt, *Memo*: 69, lacks record support. When the Court asked him if he held such an opinion, he stated, "No, sir. I have no opinion." *Tr.* 1/17/96: 137.

Mr. Dunlap's objections about Mr. Stewart are without merit. Further, his claim that trial counsel's failure to exercise a challenge for cause or a peremptory challenge constitutes ineffective assistance of counsel does not satisfy *Strickland v. Washington*'s performance prong.

Juror Linda Hutton

Ms. Linda Hutton met with the Court, counsel, and Mr. Dunlap on January 19, 1996. When asked as to whether she had had any exposure to publicity or conversations since the orientation session, Ms. Hutton said that co-workers had approached her to talk about the case. She appropriately told co-workers, "I couldn't talk about it." *Tr.* 1/19/96: 350.

She demonstrated more familiarity with the facts of the case than many other El Paso County jurors. She had read about the murders and indicated "all the evidence would say that he is guilty, but if I were to sit on a jury, I would have to dismiss that, and listen to the evidence." *Tr.* 1/19/96: 353. Later, she stated, "I will go in there (start the trial) with a clear mind and listen only to what is presented to me." *Tr.* 1/19/96: 360. These responses meet the standard set forth in relevant case law. *See People v. McCrary*, 199 Colo. 538, 549 P.2d 1320 (1976); *People v. Aravalo*, 725 P.2d 41 (Colo. App. 1986).[27]

When asked about her attitude concerning the death penalty, Ms. Hutton first stated, "I would have to go through the steps. I wouldn't go into the jury room and say,

'This is it.'" *Tr.* 1/19/96: 354. She indicated that she would not automatically vote either for a life sentence or for capital punishment.

Ms. Hutton became somewhat equivocal during counsel's voir dire. She stated, "Honestly, if it was intentional and he knew right from wrong, I don't think that I could say because he had a different childhood that that would make a difference in my mind . . . And that may be wrong, but I'm trying to be honest. I really feel that way." *Tr.* 1/19/96: 366-367. She also indicated a strong belief that the statutory scheme must be followed.

> I think if I knew that I put someone up for the death penalty, I wouldn't go home and party about it, number one, yet I wouldn't go home and hate myself for the rest of my life, saying I never should have done it. I would have a clear conscience because I went by the law . . . It might be hard for me to imagine, but it still could be mitigating circumstances that I don't know anything about . . . I'm not going to go in there with my mind made up. *Tr.* 1/19/96: 369-370.

Trial counsel then challenged Ms. Hutton on the grounds of exposure to publicity and her views concerning the death penalty. The Court already has reviewed the standards concerning a juror's ability to set aside previously obtained information and base her decision solely on the evidence and the law.

With respect to the penalty phase, Ms. Hutton represents another juror who required the Court to consider the person's entire presentation. In response to defense counsel's questions, she acknowledged that she had "a serious doubt" (counsel's words) about her ability to fairly consider mitigation evidence. She indicated that she was not able to imagine what type of mitigating evidence might persuade her. Ms. Hutton also would have to consider the evidence presented to determine what sentence would be appropriate. As noted earlier, she was committed to honoring her oath as a juror and to following the law as presented to the jury.[28]

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[27] In response to defense counsel's questions, she indicated that, when the Court "said it was that particular case, I was shocked." She also said that she followed the Court's instructions to avoid any exposure to media coverage about the case.

[28] The colloquy that followed Ms. Hutton's individual voir dire demonstrated that, although the Court was conscious of the time authorized for voir dire, counsel not directed to terminate his or her examination. The Court was mindful of the time required for a sufficient examination of each juror. To the best of the Court's knowledge, counsel never objected to a lack of sufficient time for the questioning of any prospective juror.

Post-conviction counsel makes several arguments about Ms. Hutton. Counsel describes her as a person who would automatically vote for a death sentence and who would shift the burden of persuasion in the sentencing phase. As part of this argument, counsel reiterates the defense position that Colorado's capital sentencing scheme requires a finding of a presumption of life. *People v. Tenneson*, 788 P.2d 786 (Colo. 1990) does not uphold such a presumption and notes that the statute in effect at the time of the *Tenneson* case did not provide for a presumption of life. *Id.* at 797.[29]

The defense also acknowledges that Ms. Hutton was "clearly instructed" as to the proper law. *M*: 87. Since Ms. Hutton received the same information about the penalty phase procedures as every other juror, one could reasonably presume that post-conviction counsel's arguments about the Court's procedures in advising prospective jurors are not tenable.

Counsel also argues that Ms. Hutton was mitigation impaired, thereby violating *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The Court and trial counsel had substantial discussions about *Eddings* prior to the trial. It appears that post-conviction counsel focuses on the following portion of *Eddings*: "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. *Id.* at 114. [emphasis by the Supreme Court].

The issue under the case law is whether a sentencer will "refuse to consider relevant mitigating evidence." *State v. Barnes*, 948 P.2d 627 (Kan. 1997). In this regard, the sentencer must do more than simply hear the evidence and ignore it. Each juror must listen to the evidence, assign it such weight as she or he deems appropriate, and then take it into account in deciding whether the defendant should receive a death sentence or a sentence to life without parole. *See, e.g. People v. Davis*, 706 N.E. 2d 473 (Ill. 1998). Ms. Hutton stated that, "If it were proven, I don't doubt that I could deal with the death penalty. I feel if I had a doubt in my mind, that I couldn't in good conscience vote for something like that."

[29] The Supreme Court's language about the purported presumption of life is instructive: "To the extent that an instruction embodying a presumption of life imprisonment expresses no more than that before a death sentence can be imposed the jury must be convinced beyond a reasonable doubt that the sentence should be imposed, it correctly expresses the law. *People v. Tenneson*, 788 P.2d 786, 796 -797 (Colo. 1990).

Ms. Hutton was a person who conveyed a strong sense of commitment to the jury system in a capital case. She was approached by co-workers and followed the Court's instructions not to discuss the case with anyone else. Although she had familiarity with the underlying circumstances of the case, she strongly professed her agreement with the requirement that a decision concerning innocence or guilt must be made solely based on the evidence presented at trial. While Ms. Hutton expressed concern about mitigating evidence, she acknowledged that she did not know what would be presented and would entertain and consider mitigation.

Defendant's strongest contention relates to her statement about evidence about a "difficult childhood" (Ms. Hutton's words) and "background and things of that kind" (trial counsel's words). At one point, she stated it would not make a difference. On the other hand, she said that she would "entertain those facts" although she did not "know that I would agree or that if it would stop me (from voting for a death sentence)." Ms. Hutton stated that she would have to consider in her "own mind to see if it (mitigating circumstances) does cause me to believe that a life sentence is appropriate . . . I'm not going to go in there with my mind made up." *Tr.* 1/19/96: 373.

The Court made its decision after considering the juror's entire presentation and its assessment of Ms. Hutton as she appeared at the time of her individual voir dire. In 1996, the Court believed that she satisfied the requirements of *Eddings v. Oklahoma* and *Morgan v. Illinois*. Based on its review of the record, the papers filed by counsel and the testimony at the Crim. P. 35(c) hearing, the Court continues to find her qualification to have been appropriate.

Defendant asserts that the prosecution improperly manipulated Ms. Hutton by permitting her to believe that a presumption of death was appropriate and by suggesting that Ms. Hutton "appear(ed) to be a fair person." *M*: 177-178. As previously noted, there is no presumption of life under Colorado law. In Ms. Hutton's case, there is no indication that she would begin deliberations while operating with a "presumption of death."

The cited transcript does not demonstrate that Ms. Hutton was prepared to shift any burden of proof. Ms. Hutton had read the handout that explained Colorado's four-step sentencing process in capital cases. She stated that she would have to consider mitigation evidence to decide whether a life sentence was appropriate. Post-conviction

counsel attempts to portray this statement as an indication of burden-shifting. The Court does not share counsel's reading of her statements.

Defendant argues that the voir dire utilized by the Court and the prosecution was inappropriate. The only possible basis for this position would arise if Colorado actually recognized a presumption of life. As noted on several previous occasions, the Court does not find this to be the case.

Defendant's claim that trial counsel was constitutionally ineffective with respect to Ms. Hutton is groundless. The parties took a significant amount of time to examine her. At the conclusion of her individual voir dire, the Court admonished counsel about the amount of time they had utilized. Mr. Gayle thoroughly examined her with respect to publicity and the death penalty.

Juror Terrence Aires

Mr. Terrence Aires met with the Court, counsel and Mr. Dunlap on January 18, 1996. He said that he had heard about the Chuck E Cheese robbery and murders, that four people had been killed and "I guess the survivor identified someone, possibly." *Tr.* 1/18/96: 237-238. When asked if he had formed an opinion concerning Mr. Dunlap's guilt or innocence, he responded, "I don't have enough facts." *Tr.* 1/18/96: 238. When asked about publicity by trial counsel, Mr. Aires demonstrated little working knowledge about the underlying facts. In response to the prosecutor, Mr. Aires made a commitment not to consider anything other than the evidence in reaching a verdict during the guilt/innocence phase.

During the defense voir dire, Mr. Aires stated that he could fairly evaluate mitigation evidence. When questioned by the prosecutor, he stated that he could that the death penalty "obviously is the most serious crime [*sic*] the government can impose on someone, but sometimes it is warranted." *Tr.* 1/18/96: 244. When asked by the prosecutor whether he would "seriously and honestly consider both options (a life sentence and the death penalty), Mr. Aires responded, "Yes, I think I would." *Id.*

In response to defense counsel's inquiry, Mr. Aires stated that he could fairly evaluate such mitigation evidence as "personal things about Mr. Dunlap or his environment or even his age, or anything like that." (Mr. Lewis' words). Mr. Aires also

committed to "seriously and honestly consider both options." (again, Mr. Lewis' words) *Tr.* 1/18/96: 243.. When he spoke to the prosecutor, Mr. Aires demonstrated no difficulty with the burden in a capital sentencing hearing. "If you prove your case, I don't feel I would have a problem." *Tr.* 1/18/96: 247.

Post-conviction counsel attempts to use one sentence by Mr. Aires as an indication that he "apparent[ly]" would automatically vote for the death penalty. When the Court asked him if he would automatically vote for a death sentence, Mr. Aires responded, "I'm not sure. I would have to hear the facts of the case." *Tr.* 1/18/96: 239. When the Court again sought the requisite *Morgan v. Illinois* information, Mr. Aires stated, "I'm not sure. Probably it would depend on the reason for a death sentence." *Id.* After further discussion of the process by the Court, Mr. Aires said, "No, I wouldn't. I would have to find out everything, and consider the mitigating." *Tr.* 1/18/96: 241.

When dealing with Mr. Aires, and elsewhere, post-conviction counsel argues that the Court's voir dire was "meaningless" and "provided little if any information." *M*: 174. The meaning of the defense's objection is not readily apparent. Surely, the defense cannot suggest that the Court should be an advocate for one party or the other.[30]

Morgan v. Illinois, 504 U.S. 719 (1992), requires a trial court to "inquire into the prospective jurors' views on capital punishment" if requested by the defense. Here, the Court complied with this requirement, both through a questionnaire and with each individual juror and attempted to do so impartially. Further, questions regarding following the law and being fair may not equate to a determination that, by doing so, a life sentence might result, *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318 (11th Cir.

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[30] Post-conviction counsel also states that the Court, "consistently substituted virtually meaningless assurances by prospective jurors that they would "go through the process before voting for death" in place of a reasoned and proper determination of whether the juror was (automatically inclined to vote for the death penalty), was life-impaired, was mitigation-impaired, or was a burden-shifter at any stage . . . The court avoided inquiry into their ability or willingness to comply with the other critical principles of law noted (in Defendant's Memorandum): was the juror (automatically going to vote for a death sentence) after going through 'the process,' life-impaired, mitigation-impaired, or a burden-shifter . . . This fundamental misapplication of the law by the court skewed the jurors' responses as well as the court's rulings." *M*: 71. Defendant offers no authority for the proposition that the Court was required to ask any specific questions during its voir dire. As noted herein, the Court's research does not reveal any requirement that a trial court ask any specific type of questions or engage in any "mantra" as part of any voir dire it chooses to utilize.

2002), there is no requirement that a court is responsible for asking any specific questions. A defendant must be permitted to ferret out a juror's true views.

A court must make reverse-*Witherspoon* inquiries on request of a defendant. *Riley v. Taylor*, 277 F.3d 261 (3rd Cir. 2001). Moreover, a court must allow such inquiry by defense counsel. *State v. Jaynes*, 549 S.E. 2d 179 (N.C. 2001). However, a trial court itself need not life qualify prospective jurors. *State v. Stojetz*, 705 N.E. 2d 329 (Ohio 1999). "[A] court must control *voir dire* examination, but in doing so it must remain neutral. The court must not proselytize; it must not indicate its views of the 'right' or 'wrong' answers to *voir dire* questioning. The *voir dire* should be probing, extensive, fair and balanced." *State v. Papasavvas*, 751 A.2d 40, 50 (N.J. 2000). The New Jersey Supreme Court also suggested that, where a court properly educates prospective jurors about the relevant capital sentencing scheme and is "extremely open to allowing significant inquiry into a juror's feelings, views, and attitudes about the case, that court does not commit error. *Id.*

The court has a "non-delegable responsibility . . . to ensure that a fair and impartial jury is seated." *Id.* at 511. Although post-conviction counsel repeatedly asserts that the Court's inquiries in this case were no more than "follow the law questions," case law does not support this proposition. *See Oken v. Corcoran*, 220 F.3d 259, 265-266 (4th Cir. 2000); *Lance v. State*, 560 S.E. 2d 663 (Ga. 2002).

Post-conviction counsel argues that trial counsel's failure to ask "life qualifying questions" of Mr. Aires and others constitutes ineffective assistance of counsel. Messrs. Wymore and Blume testified that counsel did not adequately probe the jurors' true views about capital punishment, the burden of proof, and their willingness to consider mitigation evidence. However, under *Strickland v. Washington*'s highly deferential standard of review, this position is without merit.

In *Stanford v. Parker*, 266 F.3d 442 (6th Cir. 2001), the Sixth Circuit noted that, "Stanford's counsel's failure to ask life-qualifying questions during general voir dire did not constitute ineffective assistance of counsel. First, there is no evidence that any

potential jurors were inclined to always sentence a capital defendant to death.[31] Second, nothing in the record indicates that counsel's failure to ask life-qualifying questions led to the empanelment of a partial jury. Third, considering the totality of the evidence, there is no reasonable probability that, even if defense counsel erred, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 455. *See Strickland v. Washington,* 466 U.S. at 695.

Defendant has not satisfied *Strickland v. Washington*'s performance prong with respect to Mr. Aires.

Juror Flora Lucero

Ms. Flora Lucero met with the Court, Mr. Dunlap, and counsel on January 22, 1996. She stated that she had been in favor of the death penalty for "maybe the last 15 or 20 years", *Tr.* 1/22/96: 56. and said that, at the time of her individual voir dire, she was "strongly" in favor of it. *Tr.* 1/22/96: 57. She also indicated that she respected the requirement of considering mitigation evidence and Colorado's weighing process.

During defense counsel's voir dire, Ms. Lucero stated, "I wouldn't just make a decision without thinking deeply on both sides." Tr. 1/22/96: 63. Counsel also asked her for arguments against the death penalty. Ms. Lucero responded, "Well, who are we to take somebody else's life in our hand [*sic*] would be one thing. And I grew up very strong, very strict Catholic. I would have to think about that. Then I would think about, you know, why a slower death in prison, that type of thing." *Id.*

Neither side interposed a challenge against Ms. Lucero. Post-conviction counsel considers Ms. Lucero to be a "grossly impaired" juror and that her response "I would have to consider the steps" should have been an unsatisfactory answer for the Court. *Tr.* 1/22/96: 54. *M*: 72. This latter observation suggests yet another proposed requirement: if a trial court finds that a prospective juror does not answer a question posed by the court (and, perhaps, one of the attorneys) in an appropriate manner, the court must engage in some additional probing inquiry. Once again, the defense offers no authority for this argument.

[31] The Court does not find that absolutely no prospective juror was automatically inclined to impose a death sentence; however, the Court does not find that Mr. Aires was such a juror.

Defendant has not established that Ms. Lucero was anyone other than a suitable juror for this case. Further, since the jurors initially were permitted to go to their homes under strict admonitions and (after entering into deliberation for the guilt phase) were ultimately sequestered (with complete separation of the deliberating and alternating jurors), Defendant has not established any impropriety or prejudice.

Ms. Lucero repeatedly stated that she would carefully consider all of the evidence in the penalty phase. Post-conviction counsel contends that, because she was strongly in favor of the death penalty, she could not possibly be an acceptable juror. When the Court considers the totality of her statements and the sincerity with which she presented during the individual voir dire, it concludes that this assertion, and all of the claims about ineffective assistance of counsel, are without merit.

Post-conviction counsel also suggests that the Court should have excused Ms. Lucero when someone shot her truck during the trial. Since Ms. Lucero indicated that she initially thought Mr. Dunlap was responsible for the shooting, that he was responsible for other crimes against property and that he was associated with gangs, the Court granted trial counsel's request that Ms. Lucero no longer sit as a deliberating juror. However, since the Court did not know who shot Ms. Lucero's truck and because the Court did not want to encourage similar activity that might be trial related, the Court chose to make Ms. Lucero the "last alternate" with an understanding that she never would deliberate. In this way, if the shooting were trial related, any person who tried to influence the jury or otherwise interfere with the fair and orderly administration of justice would not be successful with his or her efforts.

Ms. Lucero had been sharing a ride with another juror prior to this event. The Court asked that she discontinue this practice. Ms. Lucero agreed to comply with this request.

The Court also held in camera hearings with two other jurors, Ms. Pruitt and Mr. Unruh. These two jurors had become aware of the shooting of the truck. All three jurors had been met by the bailiff, Robert Hinshaw. He told the jurors not to discuss this incident with anyone. He provided a full report at the incoming of court.

After the hearing, the defense moved to excuse Ms. Lucero. Since the parties had agreed to permit Ms. Lucero to pursue the incident with law enforcement, the Court

decided to permit the parties to research the law over the long weekend that was approaching.

After receiving more input from counsel, the Court concluded that Ms. Lucero should not be permitted to sit as a deliberating juror. The Court also ruled that, in the event there was a nexus between the event and the trial, Ms. Lucero should not be excused lest any person who wanted to interfere with the trial would feel that he or she would be successful. The defense maintained its request that Ms. Lucero be excused.

By proceeding as it did, the Court believed that it prevented "a reasonable possibility that the verdict was tainted by the introduction of outside information or influences into the jury deliberations." *Wiser v. People*, 732 P.2d 1139, 1143 (Colo. 1987).

A recent case holds that, under these circumstances, the *Wiser* test is inapplicable. In 2002, the Court of Appeals announced its ruling in *People v. Harrison*, 58 P.3d 1103 (Colo. App. 2002). *Harrison* holds:

> First, the trial court must determine whether the extraneous information has a potential for unfair prejudice. If it does, the court then must canvass the jurors to find out whether they had learned of the potentially prejudicial information. Finally, it should examine the exposed jurors--outside the presence of the other jurors--to ascertain how much they know of the extraneous information and what effect, if any, it has had on their ability to decide the case fairly. *People v. Harrison*, 58 P.3d 1103, 1110 (Colo. App. 2002).

People v. Harrison was based, in part, on the Supreme Court's ruling in *Harper v. People*, 817 P.2d 77 (Colo. 1991). Based on its reading of *People v. Harrison*, the Court finds that it erred when it did not inquire of each juror. Since trial counsel did not make such a request or object to the Court's procedure, the plain error test is applicable. Given the totality of the circumstances, the Court can say with fair assurance that the error did not so undermine the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction.

A similar situation arose after the receipt of the verdict for the guilt/innocence phase. That verdict was received on February 26, 1996. On the morning of February 28, 1996, the Court was advised that alternate juror Jennifer Smith "expressed distress about

the fact that she had to continue going; that she used words, if I understand it, that she didn't know how much more she could take of this, that she felt like a prisoner herself." *Tr.* 2/28/96: 4188.

The Court also was advised that alternate juror Sherrie Pruitt "approached Ms. Smith and had some discussion about the Burger King case, and I take it, Ms. Quigley, that this first occurred during sequestration." *Tr.* 2/28/96: 4189.

The Court decided that the initial phase of the sentencing hearing should begin and that issues relating to jurors Ms. Smith and Ms. Pruitt would be considered at the noon recess. The Court then provided initial sentencing hearing instructions to the jury. The People then presented their opening statement for the sentencing hearing.

The Court then declared a recess. The Court and Mr. Lewis noted that Ms. Smith was "in bad shape. She hasn't focused yet." Mr. Lewis also stated that, "She's been crying, actually." *Tr.* 2/28/96: 4268. The Court decided to proceed with the defense's sentencing hearing opening statement and then to address juror issues. Mr. Lewis then made his opening statement. The first penalty phase witness testified.

The Court, Mr. Dunlap, Mr. Gayle, Mr. Peters, Ms. Wilson and Mr. Lee reconvened in the same conference room in which the individual voir dire was held. The Court decided that it should inquire of the alternates about Ms. Pruitt's statements concerning the Burger King case and should determine the issues concerning Ms. Smith.[32]

The Court began its inquiries with Ms. Smith. She stated that the "confinement" was wearing, that she was "loosing control from the confinement. I can't take it. And I have resentment towards him." *Tr.* 2/28/96: 4326.

Ms. Smith also stated that "an alternate mentioned the other day that he had previously robbed a Burger King and was - - I think a 75 year sentence." When the Court

[32] The Court "observe(d) that Ms. Smith has taken no attention to what's going on, in my mind, all this morning. She has been blank-faced. She never even opened her notes." Mr. Gayle also "noticed that at points this morning she was in tears, it appeared to me, and would not look at - - I don't recall if she looked at Ms. Wilson. She would not look at Mr. Lewis and did not appear to be listening." *Transcript* 2/28/96: 4323-4324.

asked who made that statement, Ms. Smith indicated that it was Ms. Pruitt. All of the other alternates were present. She stated that she had not heard any other inappropriate remark by any other juror. *Tr.* 2/28/96: 4328.

The Court decided to excuse Ms. Smith from further jury service. The Court then met with each of the other alternate jurors, starting with Ms. Pruitt.

Ms. Pruitt revealed that she had heard about the Burger King case from her mother who lived in Denver. When asked if she had discussed this with any other person, Ms. Pruitt was evasive. She did state, "I believe it was something to that fact was said even before we were sequestered." *Tr.* 2/28/96: 4344.

Upon agreement of the parties, Ms. Pruitt was excused from further jury service.[33]

The Court interviewed the remaining alternate jurors. Ms. Hutton stated that she had been approached about the case by her fellow employees (prior to sequestration and the jury's entry of its guilty verdict). Those people stated that they believed that Mr. Dunlap was guilty. She informed her work colleagues that she could not discuss the case and that the discussions did not affect her in any way.

Ms. Hutton also stated that, after the jury returned its verdict, there was a discussion, where all jurors were present, that "we were proud of what they (the deliberating jurors) had done and that it was a hard decision and we were proud of them, and I told them that. I said I'm proud of you guys and that I wished I could have been there with them." *Tr.* 2/28/96: 4389. Ms. Hutton stated that she was not speaking for other jurors. "That's the way I feel, and did tell some of the jurors that - - I mean some of them that I'm a little closer with than others - - that I was sorry I couldn't be in there with them, that I was proud of their decision." *Tr.* 2/28/96: 4390. Ms. Hutton also indicated that no one responded to her statement about her being "proud" of the verdict.

Mr. Aires stated that there had been some discussion about the Burger King case in the room where the alternate jurors were awaiting the verdict. Mr. Flanagan suggested that any inappropriate discussions may have occurred between Ms. Smith and Ms. Pruitt.

Mr. Clair had heard the statement about the Burger King case and the 75 year sentence. He stated that he had familiarity with this issue during his individual voir dire.

[33] The Court orally provided the excused jurors with a form of the mandatory discharge instruction.

However, his statement at this time was more specific than the comment he made during the individual voir dire.

Ms. Lucero, whom the Court previously had determined would not deliberate under any circumstances, stated that she had heard discussions about the Burger King case. “One of the jurors said that his sister had a big mouth and had said something about the Burger King incident.” She said that this person was “Terry.” The Court concludes that she was referring to alternate juror Mr. Aires.

Trial counsel made a series of oral motions, each of which must be, and is, found to be timely. These included a motion for a mistrial, a motion to discharge all alternates, a motion to excuse certain of the alternates, a motion to interview all jurors and a motion to maintain sequestration throughout the remainder of the trial.

The Court granted the motion to discharge jurors Smith and Pruitt and denied it as to the remaining jurors. The Court also granted the motion to maintain sequestration throughout the remainder of the trial and directed that the deliberating jurors and alternates remain separated at all times except during the trial itself. The Court denied the remainder of the motions.

“A mistrial is a drastic remedy. The trial court has broad discretion to grant or deny a motion for mistrial . . . . Moreover, a mistrial is warranted only where the prejudice to the defendant cannot be remedied by other means.” *People v. McNeely*, 68 P.3d 540, (Colo. App. 2002).

After a careful review of the situation, the Court recognized that evidence concerning the Burger King case would be received by the jury at the sentencing hearing. Even if some or all of the deliberating jurors heard about the Burger King case before beginning their consideration of the innocence/guilt phase of the trial, any error was harmless beyond a reasonable doubt because of the overwhelming evidence of Mr. Dunlap’s guilt. *People v. Smith*, 77 P.3d 751 (Colo. App. 2003).

However, the Court concludes that, based on the post-trial holding in *People v. Harrison*, 58 P.3d 1103, 1110 (Colo. App. 2002), each juror should have been interviewed to determine whether any juror had been or would have been affected by this information.

After this event, and after Ms. Pruitt was excused, all regular and alternate jurors were separately sequestered. Different bailiffs were assigned to each group to assure that they remained separate except during trial time in the courtroom. Defendant has not demonstrated any prejudice as a result of this procedure.

Juror Jimmie Flanagan

The individual voir dire of Jimmie Flanagan was conducted on January 18, 1996. Mr. Flanagan stated that he had read the handout concerning the four-step sentencing process and stated that he would not automatically vote for a death sentence. He said, "I think we have to follow the steps, and in order." *Tr.* 1/18/96: 484. During defense counsel's voir dire, Mr. Flanagan professed that he "pretty well follow[ed] the law myself", *Tr.* 1/18/96: 485, and that he could do "a fair and good job" (Mr. Gayle's words) and "wait until everything is in to make my final opinion." *Id.*

Trial counsel discussed the scenario where a jury would have heard about the killing of "four innocent people . . . in a horribly intentional and deliberate act during a robbery." He stated that, for some people, "that is enough for them. They don't need to hear anything more about what is the right thing . . . On the other hand, there are other folks who want to hear more, they want to hear about (the age of the young man or how he was brought up or any mental illness or anything like that)." Mr. Flanagan responded,

> Personally, I would want to hear everything. Sometimes there are situations in a person's lifetime that may come back to cause them to do things that wouldn't normally do. I would take them into consideration but I wouldn't let that be the sole purpose of making my decision, but I would put everything together before I made a decision on it. *Tr.* 1/18/96: 486488.

The State noted that, in his questionnaire, Mr. Flanagan felt that the death penalty should be used "in the hardest cases." Mr. Flanagan stated,

> If they deliberate and just know it and plan it and then they go and do it for the fun of it, then, I mean, to be honest with you, mitigating type circumstances and stuff, but I also feel that way about the death penalty if something happens, someone takes a young child, or not necessarily a young child, but an older child, and goes out and rapes her and kills her, I think he deserves -- there is no reason for that. That's what I mean, the harshest. *Tr.* 1/18/96: 488-489.

Mr. Flanagan acknowledged that there are "a lot of things for where definitely people should spend the rest of their life and should never have a chance to get back out there and do anything again, and then there are some that the death penalty should come in for."

Post-conviction counsel portrays Mr. Flanagan as being automatically in favor of the death penalty "and intensely biased in favor of the death penalty when the state questioned him after the defense was done . . . [D]efense counsel neither knew nor attempted to discover his actual biases and views so that intelligent decisions regarding challenges could be made." *Memo*: 56. Counsel also contends that the defense should have excused Mr. Flanagan with a peremptory challenge.

As the Court has previously noted, this type of decision must be based upon more than the isolated words of a juror taken out of context and without regard for the demeanor and presentation of the prospective juror. Mr. Flanagan clearly indicated his intent to require the State to prove the aggravating factors and find, beyond a reasonable doubt, that aggravation was not outweighed by mitigation. He demonstrated an intent to carefully consider mitigation and not simply give lip service to Colorado's statutory procedure.

He did indicate his disgust for individuals who kidnap, rape, and murder children. There were no facts in this case that mirror that scenario. When Mr. Peters asked Mr. Flanagan whether he could vote for a death sentence if the prosecution were to prove, beyond a reasonable doubt, that it was appropriate, Mr. Flanagan responded, "I'm afraid I would have to say yes." This statement is not that of a person who relished the prospect of voting for capital punishment. Post-conviction counsel has not demonstrated that trial counsel failed to satisfy the performance prong of *Strickland v. Washington* with respect to Mr. Flanagan.

Juror Sherri Pruitt

The individual voir dire of Sherri Pruitt occurred on January 19, 1996. She had heard about the Chuck E Cheese murders at the time they occurred, at least in part because her sister lived in the Denver area. She also recalled hearing that the case had been transferred to Colorado Springs.

When the Court conducted its voir dire of Ms. Pruitt, she first stated, "I believe that if all the facts presented in that case proved the guilt without a doubt, then I could agree with imposing the death penalty." *Tr.* 1/19/96: 524. The Court then asked general questions about the distinction between proof beyond a reasonable doubt and proof "without a doubt."

When the Court asked the requisite *Wainwright v. Witt* questions, Ms. Pruitt first indicated that she would not automatically vote for a death sentence. When the Court asked if there were anything that would substantially impair her ability to impose a death sentence, she responded, "The only thing would be if all the facts were not there. If it was not beyond a reasonable doubt." The Court then made several attempts to ask the reverse-*Witherspoon* questions. Ultimately, Ms. Pruitt said that she would not automatically vote for a life sentence.

Defense counsel referred to her questionnaire: "You made it clear in your questionnaire that you understand that the guilt has got to be shown before you would impose a death sentence." She then stated that, if the State proved the intentional murder of four people, "I don't think I would follow very closely someone's background . . . I think that would probably make my mind up." *Tr.* 1/19/96: 531.

During the prosecution's voir dire, Ms. Pruitt stated that, if the prosecution had proven beyond a reasonable doubt that "he committed these murders and these other acts, I do agree with the death penalty. That is what I was saying." *Tr.* 1/19/96: 533.

During this latter stage of the voir dire, the juror's nervousness and discomfort were apparent. Ms. Pruitt stated that she was not familiar with the meaning of mitigation "and that is my own ignorance. It is Friday." She asked for a glass of water. *Tr.* 1/19/96: 535.

At the conclusion of the State's voir dire, the Court again discussed the concepts relating to the statutory procedure. The Court offered each side an additional minute of follow-up questioning. Neither party chose to inquire further of Ms. Pruitt.

The defense challenged Ms. Pruitt for cause on the basis of her views of the death penalty. The Court took a moment to reflect on the entire voir dire and found that she was not substantially impaired.

Post-conviction counsel states that Ms. Pruitt was "overwhelmingly and clearly impaired from considering mitigation after a conviction for first degree murder. She repeatedly said so. She was a burden shifter, *i.e.*, she operated from a presumption of death." *M*: 87. Mr. Dunlap also objects to the Court's statement that it was not entirely sure that Ms. Pruitt was not substantially impaired.

Ms. Pruitt's words alone would suggest that she was substantially impaired with respect to penalty issues. Ms. Pruitt did, at one point, indicate that she would not be persuaded by a defendant's background where the State proved first-degree murder and robbery beyond a reasonable doubt.

The transcript demonstrates that the Court was concerned about Ms. Pruitt's nervousness. Accordingly, the Court inquired further about her understanding and acceptance of the law and her duty to honor her oath as a capital case juror. The question is whether Ms. Pruitt would listen to the evidence, assign it such weight as she deemed appropriate and then take it into account in deciding whether the defendant should receive a death sentence or a sentence to life without parole and whether a she would refuse to consider relevant mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *State v. Barnes*, 948 P.2d 627 (Kan. 1997).

The Court reflected before denying Mr. Dunlap's challenge. The Court's wording of its ruling was not artful. The Court weighed the demeanor and affect of Ms. Pruitt along with all of her answers and authorized her to remain as a prospective juror. The Court cannot, on the basis of the record, conclude that this was an erroneous ruling. Further, the Court was aware of the case law, as set forth, *supra*. *See People v. Janes*, 942 P.2d 1331, 1334 (Colo. App. 1997).

Juror Rex Clair

Juror Rex Clair was interviewed on January 23, 1996. Mr. Clair worked for a private company that provided software maintenance for the United States Air Force. His responses demonstrated that he was a well-spoken person who took his responsibility as a prospective juror seriously.

He first indicated that people in his office had talked about the case and that some of them had stated that Mr. Dunlap was serving time for another crime. "I have no idea if

it's a true statement or not." *Tr*. 12396: 6 Mr. Clair then stated that this discussion would not affect him. "I would be able to weigh the matters that are presented to me in the trial and not hear what other opinions are about the Defendant or the case." *Id*. Mr. Clair indicated that he had no pre-formed opinion about guilt or non-guilt.

In response to the Court's questions, Mr. Clair indicated that he would "probably lean" toward a death sentence for a person found guilty of first-degree murder but "I hope I would be able to listen to any mitigating factors." In response to the prosecutor's voir dire, Mr. Clair stated that he would consider "everything they [the defense] have to offer before making a decision in this case (Mr. Wolff's words)." *Tr*.c1/18/96: 11. When the defense asked if Mr. Clair supported the concept of "an eye for an eye," he indicated that a death sentence would be a fair punishment for a deliberate, intentional murder.

Defense counsel asked several questions about the nature of a life sentence and whether it was a true punishment. Mr. Clair acknowledged that it was a significant consequence. He also stated that he would not "go through the motions" (Mr. Lewis' words) but "I would have to listen to the aggravating and mitigating factors and I would like to believe that I wouldn't hastily jump to a conclusion on someone's sentencing." *Tr*. 1/18/96: 14.

Post-conviction counsel contends that Mr. Clair was a person who would "essentially" automatically vote for the death penalty, "a view that he expressed in many ways," was a "burden-shifter," and "severely mitigation impaired." *Memo*: 70.

A passage in a footnote of Defendant's motion demonstrates how post-conviction counsel reaches this conclusion:

> It is essential that counsel not pretend or presume that a prospective juror's statements are favorable based upon a rose-colored-glasses perspective . . . Numerous prospective jurors gave answers which, viewed with ignorance and in the light most favorable to the state, could indicate a non-ADP or pro-death biased juror . . . Taking such initial statements at face value and without adequate additional inquiry is not effective assistance; it is merely ostrich-like and easier to do than effective assistance. *M*: 64.

As previously noted, Messrs. Wymore and Blume opined that competent and effective capital defense counsel should never consider a prospective juror's demeanor,

difficulty in answering questions or any other aspect of his or her appearance in determining whether the person is acceptable. Instead, counsel should continue to pick at every possible reason to cast the juror as a person who would automatically vote for the death penalty, or who would shift the burden to the defense, or who would not fairly consider mitigation and apply the law according to her or his oath.

The defense does not present any law that conforms to this proposition. The Court's research has not located any supporting authority.

Mr. Clair was a thoughtful person who had previously established opinions. His responses to the Court and counsel, as well as his demeanor and thoughtful responses, persuaded that Court that he was a suitable juror. The Court's review of the record, 7 to 8 years after the voir dire, does not cause it to make a different finding.

Juror Jennifer Smith

The final juror listed in Mr. Wymore's notebook was Jennifer Smith. Her individual voir dire occurred on January 24, 1996. Ms. Smith's father had some legal problems and was given a suspended sentence to the Department of Corrections "with community service." *Tr.* 1/24/96: 204.[34] In addition, her father had been convicted of menacing and received a suspended sentence with community service.[35]

Ms. Smith had been exposed to some publicity about the Chuck E Cheese murders when they occurred. She did not follow the news closely and heard more about the events from friends than from any media outlet.

When defense counsel first asked Ms. Smith about her views concerning capital punishment and a life sentence, she indicated that she would like to know "how Mr. Dunlap feels about that . . . If I'm allowed to ask that." *Tr.* 1/24/96: 213. She wanted to know if Mr. Dunlap felt that a death sentence or a sentence to life without parole would be "more of a punishment . . . just out of curiosity." *Id.* Defense counsel then deflected that question and moved on to the statutory scheme for a jury's decision concerning a life sentence or capital punishment. Ms. Smith stated, "I would say it's fair for them to have

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[34] The Court concludes that Ms. Smith's father received a suspended Department of Corrections sentence with a term of probation. One of the requirements of his probation was the performance of an unspecified number of useful public service hours.

to prove beyond a reasonable doubt." *Tr.* 1/24/96: 214. When Mr. Gayle asked, "All the way through," Ms. Smith replied, "Yes." *Id.*

In response to the prosecutor's question about her personal views about the death penalty, Ms. Smith said, "I'm kind of neutral." *Tr.* 1/24/96: 217. She stated that she felt compassion for Mr. Dunlap but also noted that victims and other people had been hurt by the murders. She felt she could be fair and "so it depends on just what's presented in the case. She then indicated that the death penalty would be "necessary" because:

> I don't think we can keep everybody locked up forever. And then in the other sense I don't think it's quite fair to say it's wrong for killing someone and yet take their life . . . I have a lot of feelings on both sides good and bad so that's why I said I'm kind of neutral with that. *Tr.* 1/24/96: 219.

Neither party challenged Ms. Smith. Post-conviction counsel contends that trial counsel's voir dire of Ms. Smith was inadequate and, as a result, he had insufficient information with which to make an appropriate decision with respect to a cause or peremptory challenge. Mr. Dunlap does not allege anything else about Ms. Smith.

Ms. Smith demonstrated a commitment to fairness in the sentencing process. She had been concerned about the financial impact of jury service in a protracted case but was able to serve after learning that she would receive incremental payment of the $50.00 per day authorized by the statute. Ms. Smith was a fair and impartial juror. She understood her oath and the requirement to apply the law to the facts presented in both phases of the trial.

Post-conviction counsel's arguments concerning Ms. Smith are without merit.

Jurors about whom Mr. Wymore did not Testify

In addition to the jurors who were the subject of Mr. Wymore's testimony, Defendant contends that numerous other jurors were improperly excused, improperly permitted to remain as prospective jurors, were not challenged by trial counsel when a

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[35] The record does not contain information as to whether the crime of which Ms. Smith's father was convicted was a felony or misdemeanor.

proper cause or peremptory challenge should have been lodged, or were the subject of other improper rulings. The Court now turns to those individuals.

Juror Lydia Dean

Juror Lydia Dean was interviewed by the Court, Mr. Dunlap, and counsel on January 16, 1996. In her questionnaire, Ms. Dean had stated, "God is the only one who gives life so [H]e should be the only one to take it away." *Tr.* 1/16/96: 135. When the Court asked her the requisite *Witherspoon*/*Witt* questions, she unequivocally stated that she would automatically vote for a life sentence "No matter what happened (The Court's words)." *Tr. 1/16/96: 136.* She also indicated that there was no circumstance under which she could vote for a death sentence.

Later, in the prosecution's voir dire, Ms. Dean stated that it would be "very, very difficult" to vote for a death sentence. *Tr.* 1/16/96: 139. Ms. Dean represents virtually the reverse of the type of person about whom Defendant complains in his motion. At one point, she essentially said she would try to "follow the law." The record demonstrates that she was substantially impaired with respect to the death penalty.[36]

Mr. Lewis asked Ms. Dean several questions in an effort to rehabilitate her. As noted, her best response was that she would find the task of being a juror in this case to be very difficult. Mr. Lewis' questioning of Ms. Dean did not implicate *Strickland v. Washington*'s performance prong.

Juror William Adams

The individual voir dire of William Adams occurred on January 18, 1996. Sgt. Adams[37] had heard and read about the Chuck E Cheese homicides when they occurred and was aware that Mr. Dunlap was a former Chuck E Cheese employee. He had formed no opinion as to innocence or guilt.

In his questionnaire, Sgt. Adams indicated that he was a strong supporter of the death penalty. During defense voir dire, he stated,

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[36] Once again, Mr. Dunlap's assertions about a "presumption of life" ("[S]he stated that she 'probably' would impose a life sentence after going through the statutory process . . . The law presumes that she should 'probably' impose a life sentence") are not supported by the case law.

[37] Post-conviction counsel appears to be concerned about the reference to "Sergeant" Adams. *Memo*: 47. The transcript clearly reveals Sgt. Adams' employment in the United States Air Force.

> Without any other mitigating factors, that certainly sounds like a case that would qualify for the death penalty to me… [B]ut I am sure that probably there could be certain mitigating situations . . . You mean something like future value to society? I don't know, I couldn't think of any, but I am sure that would be the kind of factor that might mitigate in any given circumstance. *Tr*. 1/18/96: 47.

Sgt. Adams indicated his intent to not prejudge the penalty issue, to be open-minded with respect to other jurors' views, and to apply the statutory scheme for considering the penalty in a capital case.

Aside from another reference to the "presumption of life," post-conviction counsel implies that Sgt. Adams would automatically vote for the death penalty and was "mitigation impaired." Reference also is made to the failure "to discover whether Adams . . . was a burden-shifter, or whether he understood any part of the process."

Sgt. Adams may not have fully understood defense counsel's questions about mitigation. He was not able to articulate a specific mitigating factor, other than retribution, which is neither a statutory nor an *Eddings* mitigator. This does not mean, however, that Sgt. Adams was life-impaired. Indeed, his statement that future value to society might mitigate in any given circumstance demonstrates that he was not inclined to automatically vote for death.

Sgt. Adams is typical of the various jurors whose demeanor may well have affected trial counsel's decision not to challenge for cause. As previously stated herein, the Court finds that competent counsel need not only attempt to develop bases for challenging a venireperson for cause. Counsel must carefully gauge the person to whom she or he is speaking and attempt to discern whether the prospective juror would be fair, impartial and willing to consider the issues developed in the case.

The Court notes that the People excused Sgt. Adams with a peremptory challenge. The Court cannot imagine how defense counsel could be found to be constitutionally ineffective when the State was willing to expend a peremptory challenge on this juror. Defendant's claim, as to Sgt. Adams, approaches the incredible.

Juror Andrew Escobar

The Court, counsel, and Mr. Dunlap met with prospective juror Andrew Escobar on January 16, 1996. Although Mr. Escobar had heard about the murders when they occurred, he did not have any opinion concerning the guilt or innocence of the defendant. Mr. Escobar was very uncomfortable with the voir dire. He was studying to be baptized in the Church of Jesus Christ of Latter Day Saints. He needed a cup of water during the prosecutor's questions.

In his questionnaire, Mr. Escobar stated that he did not "agree with the death penalty at all under any condition because (he believed) only God and Jesus have that right." *Tr.* 1/16/96: 48. He also stated that, "regardless of (his) beliefs in the matter, [he] would follow the law to the best of [his] ability. If, however, the law require[d] of (him) to do something against God's law, then there might be a problem." He also stated, "If it's still in my decision [*sic*], then I would not choose the death penalty." *Tr.* 1/16/96: 62.

The record does not support the defense's contention that the Court "repeatedly misstated the law" to Mr. Escobar, *M*: 78. The Court tried to be patient and thoroughly explain the four-step process to him. And although post-conviction counsel asserts that this approach "most likely would cause a death-scrupled person to feel unable to follow the requirements of the law than the true law would" there are no facts to support this argument. *Id.*

Irrespective of that point, Mr. Escobar demonstrated that he was substantially impaired with respect to sentencing issues. In response to an open-ended question by the prosecution ("When you talk about your feelings are that, you don't agree with the death penalty . . . What do you mean by that?"), he responded,

> Well, like I said, I don't think it's by far any man's right on this earth to condone [*sic*] somebody to death, you know, under any circumstances . . . And, you know, I just don't agree with it . . . It would be, like I said, God or Jesus Christ to make that decision. I would have to be there because it's my duty but, you know, I'm not going to disrespect the law in this regard either. *Tr.* 1/16/96: 54-55.

He also stated that it would be difficult to sit in judgment as to the guilt/innocence phase of the trial.

Defense counsel asked questions to determine the extent to which Mr. Escobar would honor his oath and fairly and impartially apply the law. Counsel noted that the juror had been told not to discuss the case with his family and that he abided by that directive. Mr. Lewis also followed up appropriately about the third step of the statutory process.

The Court asked a series of follow-up questions about Mr. Escobar's religious views. He acknowledged that he would have difficulty in weighing aggravation and mitigation. The Court's determination that Mr. Escobar was not qualified pursuant to *Wainwright v. Witt* was not erroneous.

Mr. Lewis asked a number of questions designed to demonstrate Mr. Escobar's commitment to the rule of law. He did an excellent job of rehabilitation. However, Mr. Escobar could not assure the Court that he could either "sit in judgment of another human being" or make fair decisions, based on the evidence and the instructions of the Court, with respect to the penalty phase. Mr. Lewis' performance was well within the professional standards that existed in 1996. Defendant's claim concerning ineffective assistance of counsel is without merit.

Juror Joanne Mink

Juror Joanne Mink's individual voir dire was the last on January 16, 1996. Ms. Mink had minimal familiarity with the case and no hardship.

Ms. Mink's questionnaire indicated that, because she was a Catholic, she felt that she did not have the right to make a decision concerning capital punishment, "only God does." When the Court asked her about sentencing, she stated, "I would have to be very confident if I was going to put the death sentence on anyone." *Tr.* 1/16/96: 286.

In response to the prosecutor's questions, Ms. Mink stated that she "wouldn't feel right about doing it . . . And I think I would have a problem with, you know, condemning someone to death" irrespective of the evidence. *Tr.* 1/16/96: 290. Ms. Mink also felt that she would have to discuss the death penalty issue with her family priest.[38] Counsel argues that the issue of Ms. Mink's desire to consult with her priest demonstrates inconsistency because Ms. Anderson had spoken to her bishop. The Court indicated that it felt that it was appropriate for Ms. Anderson to ask the "philosophical question" to her

[38] Ms. Mink was told that she could not consult with her priest.

bishop. In fact, Ms. Anderson had asked her priest the philosophical question before her individual voir dire. However, she also was advised that, if she were selected as a juror, "you won't be able to consult with your bishop or anyone else in the church at that point." Ms. Mink wanted to consult her priest thereafter, and, perhaps, during the trial.[39]

There was discussion about Ms. Mink's ability to hold the State to the burden of proof beyond a reasonable doubt. Her statements satisfy the Court that she would have been able to apply the law in the guilt/innocence phase. However, Ms. Mink was substantially impaired with respect to penalty issues.

Mr. Lewis made a thorough effort to rehabilitate Ms. Mink. He was able to persuade her that, irrespective of her views, she should follow the law as provided by the Court. However, her clear mindset was that of a person who could never vote for a death sentence. Mr. Lewis' performance was well within the professional standards of counsel for a defendant who faced the possibility of capital punishment.

Post-conviction counsel contends that the Court relied on questionnaire answers to the benefit of the state and to the detriment of Mr. Dunlap. The Court leaves this contention to any reviewing court.

Juror Rosina Tolka

Rosina Tolka's individual voir dire was held on January 24, 1996. Although she had heard about the Chuck E Cheese events in 1993 and was aware of the change of venue, she was not aware of the underlying facts.

According to the transcript, Ms. Tolka's questionnaire stated that the death penalty "should be enforced if the situation warrants." *Tr.* 1/24/96: 262.[40] However, she did not want to participate in such a decision. "I think I would rather see someone else do it. Yeah. I do believe in it but I don't know if I could -- would want to be a part of it." *Id.* Later during the Court's voir dire, Ms. Tolka became tearful. By inference, she felt that she would have a difficult time living with whatever decision she made as a juror.

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[39] Ms. Anderson knew of Mr. Dunlap's 75-year sentence for the Burger King case. She also was a self-described indecisive person. If the Court had not sustained the prosecutor's challenge, post-conviction counsel undoubtedly would have objected to permitting a person who was as familiar with the case as was Ms. Anderson from continuing as a prospective juror.

[40] The transcript also shows that Ms. Tolka did not appear to understand all aspects of the four-step process. The Court discussed the process with her at length.

The prosecution's voir dire included a statement that the law never requires a juror to vote for the death penalty and that "each juror will always be able to say that life's okay." *Tr.* 1/24/96: 268. After some discussion, Ms. Tolka stated, "I don't know that I could do it in the long run." *Tr.* 1/24/96: 269. Ms. Tolka said she was in favor of the death penalty but was unwilling to be a part of the process by which she would vote for either capital punishment or a life sentence. She could not satisfy the *Witt* standard. The Court then excused Ms. Tolka on the State's death penalty challenge over Mr. Dunlap's objection.

Post-conviction counsel again objects to the Court's description of the four-step process and the "personalization" of Mr. Dunlap, all to his detriment. Among the citations offered by Defendant in this regard is *Adams v. Texas*, 448 U.S. 38 (1980). This pre-*Wainwright v. Witt* case is inapposite to these issues. Although it does hold that *Witherspoon* limits a state's power to exclude certain "death-scrupled" jurors, it also notes that jurors cannot be excluded because of their views about capital punishment on "any broader basis" than inability to follow the law or abide by their oaths." *Adams* at 48. The Texas prosecutors also utilized the then-existing statute to weed out prospective jurors "whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected" irrespective of whether the juror was irreconcilably opposed to capital punishment. *Id.* at 50-51.

Juror Duane Jensen

Duane Jensen's individual voir dire occurred on January 29, 1996. Mr. Jensen had read about the Chuck E Cheese case in the newspapers and thought that Mr. Dunlap "might be guilty." However, as a person trained in the law, he stated, "I think I'd listen to the evidence and I'd decide what I felt was right." *Tr.* 1/24/96: 179.

In his questionnaire, he wrote that he was a committed Christian and that he thought he "would probably not be capable of causing someone to be sentenced to death." He then stated that he would "go through the four steps, but I guess I doubt very sincerely whether or not I could give a death sentence." *Tr.* 1/24/96: 180. In response to a question by the Court, Mr. Jensen stated that his ability to vote for a death sentence was substantially impaired by his values, religion, and belief system.

When speaking with the prosecutor, Mr. Jensen, an alcoholic who had been "dry" for 28 years, said that he had "been forgiven a great deal," and that this would make it difficult for him to vote for a death sentence. *Tr.* 1/24/96: 182. And in response to a question from the defense, Mr. Jensen stated that, if he thought it were appropriate, he could vote for a death sentence but he "probably would not think it was appropriate."

Post-conviction counsel's argument begins with the view that Colorado recognizes a presumption of life. Counsel also objects to the Court's question about Mr. Jensen's having a choice to do "what's right" in the fourth step. A number of jurors were correctly informed that the law never requires a death sentence and honors a jury's decision to impose a life sentence. The terminology here was neither improper nor prejudicial.

The Court found that Mr. Jensen was substantially impaired under *Wainwright v. Witt*. The record supports that finding. Mr. Gayle's examination, although brief, led to an inescapable conclusion that Mr. Jensen was not inclined to fairly consider a death sentence.

Juror William Mills

William Mills' individual voir dire was held on January 17, 1996. His questionnaire expressed an opinion of guilt. He affirmed that view during the Court's voir dire. He stated that he based his opinion on what he had read in the newspaper but that he could set aside his initial views and reach a verdict based solely on the evidence. During the defense voir dire, he recognized that the media "quite often reports things wrong" and had had some "experience" in that regard. *Tr.* 1/24/96: 23.

In his questionnaire, Mr. Mills stated that he could "follow the law" as to a death sentence and a life sentence but that "I would prefer the death penalty." *Tr.* 1/24/96: 13. Mr. Mills also stated that he believed the death penalty is "under used." *Tr.* 1/24/96: 24. He also indicated that he would not automatically vote for a death sentence but would "want to hear all that might have caused it." He also said that "there are a few things I would consider mitigation." *Tr.* 1/24/96: 27. He also stated that he would consider each mitigating factor presented in the instructions of law.

During the prosecutor's voir dire, Mr. Mills acknowledged the complexity of Colorado's four-step process, "but I think it's probably necessary in a case this difficult."

Tr. 1/24/96: 18. He also understood that a death sentence never was required and that if the prosecution did not meet its burden, a life sentence was appropriate.

The post-voir dire discussion focused on the consideration of a juror's responses to leading questions. The Court found that he would not automatically vote for a death sentence and that he was not substantially impaired in his ability to be fair and impartial.[41]

The defense's objection focused on Mr. Gayle's question of whether Mr. Mills would begin with a presumption of death. This is an example of the type of question that Messrs. Wymore and Blume felt were essential in capital litigation. If the Court were to focus on that answer and nothing else, the juror should have been excused. However, Mr. Mills presented himself as a person who was committed to his oath and to the requirement to adhere to the instructions of law that would be given at the end of the trial. Since Defendant exercised a challenge for cause as to Mr. Mills, he does not have a claim of ineffective assistance here.

Juror Kenneth Wilkinson

The individual voir dire of Kenneth Wilkinson occurred on January 22, 1996. Mr. Wilkinson recalled the reporting of the events at Chuck E Cheese based on media reporting but did not have any opinion of guilt or innocence.

Mr. Wilkinson reported that he attended a Quaker church but was not a member. His answers with respect to penalty matters were varied depending, to a great degree, as to who was asking the questions. The Court provisionally qualified him and indicated that the parties could renew their positions, including Defendant's challenge for cause, at general voir dire.

Mr. Wilkinson was brought back for a second round of individual voir dire on January 31, 1996. Once again, his answers varied. The Court continued to observe his

[41] The Court used inappropriate language with respect to Mr. Mills and other jurors. *Wainwright v. Witt* clarifies, and does not loosen the requirements of *Witherspoon v. Illinois*. The Court was required to look at whether a juror would either automatically vote for a death sentence (or a life sentence). If a juror would either automatically vote for one or the other penalty, or if the juror's ability to honor her or his oath and/or honor the instructions of law were substantially impaired, a challenge for cause must be sustained.

demeanor and manner while being questioned. In response to Mr. Gayle's questions, he stated, "probably if convinced after going through the steps I would still support the death penalty." *Tr.* 1/22/96: 30. When asked if four intentional first-degree murders would call for the death penalty, "the judgment would be that that should be a death penalty," Mr. Wilkinson responded affirmatively. However, he also said that, while he could not identify the type of mitigation that would lead him to determine that a life sentence is appropriate, he could do so if it were appropriate.

During general voir dire, Mr. Wilkinson stated that he would not be moved by penalty phase testimony about excessive drinking. He added,

> I do believe that there might be certain circumstances that could weigh in and emotional stability, if all of these things are just piling up on you and you just go crazy a little bit and something happens, that might be a factor as to how you sentence, but you are still responsible for your actions at any given time. *Tr.* 1/22/96: 96.

Despite Defendant's arguments to the contrary, Mr. Wilkinson was not a person who would automatically vote for the death penalty. His responses, demeanor, and affect did not lead the Court to conclude that his ability to apply the requisite legal standards and adhere to his oath were substantially impaired by his views concerning sentencing.

Juror Marvin McClanahan

The Court and counsel inquired of Marvin McClanahan on January 23, 1996. He had heard "a couple of items (about jury selection) on the radio." When the Court mildly remonstrated with Mr. McClanahan about not listening to radio news accounts, he stated, "It kind of hard not to hear the news, sir, if you are listening to the music." *Tr.* 1/23/96: 17. However, he did not recall any facts about the events of December 1993.

During the Court's voir dire concerning penalty issues, Mr. McClanahan stated that he would not automatically vote for a death sentence. When asked if he would automatically vote for a life sentence, he stated, "It's possible. I don't know. I would have to hear all the -- what was happening." *Tr.* 1/23/96: 21. Later, he appeared to clarify his position and indicated that he would not automatically vote for either sentence.

During the defense's voir dire, Mr. McClanahan stated that he could not answer if

a life sentence for a person found guilty of a "premeditated awful murder" would be a fair result. He stated that he saw "nothing wrong" with a death sentence for a premeditated murder. At first glance, he did not seem to be inclined to consider mitigation evidence as described by Mr. Lewis. Shortly thereafter, he stated he "can consider it." *Tr.* 1/23/96: 25. Then, he stated he would not "fairly and honestly" consider such mitigation (Mr. Lewis' words).

The prosecutor posited a situation where a group of jurors was in one "corner" (favoring a life sentence) and another group was in another "corner" (favoring a death sentence). Mr. McClanahan stated that "it would weigh on what you present or whatever on how it was whether I go to that corner or this corner . . . Life or -- ." *Tr.* 1/23/96: 28.

Although he favored the death penalty, Mr. McClanahan affirmed that he would work within "that system" and "follow the rules (Mr. Lee's words)." When the Court informed him that he must follow each and every rule even if he did not agree with or understand some of the rules, Mr. McClanahan stated that it was the law and he could abide by it.

The defense challenged on publicity and penalty grounds. Mr. McClanahan had heard nothing about the facts of the case and had no opinions concerning innocence or guilt. The Court reinforced its order concerning a juror's not being permitted to consider news accounts of the case. There is no evidence that Mr. McClanahan did or would have been improperly influenced. Defendant's penalty challenge relates to *Eddings v. Oklahoma*, 455 U.S. 104 (1982). As previously noted the *Eddings* court held that sentencing jurors may not refuse to consider, as a matter of law, any proffered mitigating factors. After reviewing the transcript, the Court cannot conclude that Mr. McClanahan would have refused to consider the mitigation material that was presented during the sentencing hearing.

Juror Nicole Lavey

The Court and counsel met with Nicole Lavey on January 24, 1996. Ms. Lavey had no knowledge of the Chuck E Cheese murders or of Mr. Dunlap.

The prosecutor asked Ms. Lavey about her general views concerning capital punishment. She stated, "If somebody is capable of murdering another person, then in

turn they should deserve to be killed or they should deserve to die. I mean, it only seems right." *Tr.* 1/24/96: 107. She also stated that she strongly believed in the death penalty. She also stated that, "if . . . there is some big reason why the death penalty shouldn't be carried out, if there is a major reason, then it shouldn't be." *Tr.* 1/24/96: 110. She felt that jurors "could understand each other better and try to decide which way is really right." *Tr.* 1/24/96: 112.

Ms. Lavey also demonstrated an ability to consider mitigation evidence. During the Court's voir dire concerning sentencing, Ms. Lavey stated, "If it's like the first time they have ever done something like that or they have a lot of family or I don't know. There could be reasons why they shouldn't have the death penalty." *Tr.* 1/24/96: 101. She said that fairness required that a juror listen to and consider mitigation evidence. When the defense asked about mitigation, Ms. Lavey stated, "You have got to listen to everything because everything is important. I mean, his background, age, everything has to do with it. So you have to consider all the facts before you can make a decision on something." *Tr.* 1/24/96: 114. She also felt that family issues ("If it's really hard on the family, you know, I understand that would influence me, stuff like that."), *Id.*, were significant and that she would "really weigh and consider (Mr. Gayle's words)" that type of mitigation evidence.

Mr. Gayle objected to the prosecutor's insinuation of personal views about the death penalty. The disputed statement was, "As a prosecutor, it's obvious to you that I look at this case in a certain way." After the objection, Mr. Lee re-phrased his question, "If -- is there any reason why I should be concerned as a prosecutor with having someone like yourself on the jury, anything you can think of?" Ms. Lavey responded, "Well, I'm going to be fair. I mean everybody has a right to a fair trial. He's not guilty unless you guys can prove he's guilty."

During the post-individual voir dire record, the defense asked that Ms. Lavey be excused due to those statements and because she was not qualified under *Wainwright v. Witt* and *People v. Davis*. The prosecution first took no position and then objected

without specifying any reason therefor.[42] Ms. Lavey clearly indicated that she would impartially consider mitigation evidence. She was qualified to serve as a juror. The record does not indicate that she was prejudiced by the prosecutor's question or that the question affected her ability to be impartial.

Defendant also contends that the Court:

> flatly negated the burden of convincing and the presumption of life and reduced the fourth step to a decision by the prospective juror whether she thought a particular sentence was "fair" and "right." It would be a rare prospective juror who would say that they could not vote for a "fair" and "right" sentence. An ADP juror could easily answer that question 'yes' as many did in this case.

M: 91. A trial court has great latitude in deciding what questions should be asked on voir dire. *Mu'Min v. Virginia*, 500 U.S. 415 (1991). Reviewing courts generally do not find fault with the trial court's questions of prospective jurors or the parameters of questions that the court authorizes.

Here, the Court permitted virtually unlimited questioning by trial counsel. The Court also authorized the parties to use the handout that contained a complete explanation of Colorado's four-step process for a sentencing jury. All jurors, including Ms. Lavey, acknowledged reading the handout. The Court's questions cannot be construed as varying from or denigrating the statutory requirements. Post-conviction counsel has not cited any authority for this proposition.

Juror Susan Spano

Susan Spano's individual voir dire occurred on January 25, 1996. She recalled the media coverage of the Chuck E Cheese murders when they occurred but had not heard anything about the case between that time and January 25th.

In her questionnaire, Ms. Spano stated that she believed that the death penalty deterred crime. When the Court asked her if she would automatically vote for a death

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[42] The State's inability to articulate a clear position led to an expanded discussion. Mr. Lee initially acknowledged, "The statement could have been more artfully framed." When Mr. Gayle stated that he objected to the insertion of the prosecutor's personal views, Mr. Lee said, "No objection. We would concur." Mr. Peters then said, "No." The Court asked the prosecution team, "Well, can we get some consensus as to where we're going from this side of the table, please?" When the Court asked who was objecting, Mr. Peters stated that he was. Ultimately, the Court sustained the defense's objection and directed the prosecution to proceed with hypotheticals that did not include personal views.

sentence, she volunteered, “No, I would need to see what the other mitigating circumstances were.” *Tr.* 1/25/96: 120. When the Court explained that mitigation was not a defense, Ms. Spano did not change this position.

When defense counsel asked Ms. Spano if she could “honestly and fairly consider a life sentence without parole as an alternative to the death penalty (Mr. Lewis' words),” she stated, “Depending on the information that's presented, yes.” *Tr.* 1/25/96: 123. She also said “I don't believe that just because you grew up in a certain background that that causes you to commit crimes. I just don't believe that.” *Id.* She also did not commit to considering Mr. Dunlap's age. At the same time, she stated she would go into the sentencing phase with “an open mind (Mr. Lewis' words).” *Tr.* 1/24/96: 124.

In response to the prosecutor's question, Ms. Spano stated that she was “strongly in favor” of capital punishment. Tr. 1/24/96: 125. She also stated that she was prepared to consider all sentencing evidence fairly and weigh it objectively.

The record does not support post-conviction counsel's complaint about *Eddings v. Oklahoma* mitigation. Although Ms. Spano did not possess personal beliefs about age and background, she satisfied the Court that she would follow her oath and apply the law as given to her. Although she was not able to articulate specific areas of mitigation that she would consider, Ms. Spano clearly indicated that she would follow the instructions of the Court and, far from automatically voting for a death sentence, she promised to take “all factors . . . into account . . . just to understand that we're not just boom, he's guilty and this is the penalty.” *Tr.* 1/25/96: 122. The Court's finding of Ms. Spano's being a *Wainwright v. Witt* qualified juror was not erroneous.

Juror Daniel Elwood

The Court, counsel, and Mr. Dunlap met with Daniel Elwood on January 30, 1996. He had been convicted of Driving While Ability Impaired by Alcohol in El Paso County in 1989. At some time after the conviction, he was subjected to a traffic stop because of an allegation that he had not successfully completed a community service requirement of probation. He contested a complaint to revoke probation and was sentenced to three months in the county jail with work release authorized. He stated that he had spoken to a deputy district attorney and presented that person with ten letters

written by people who had performed community service with him. This sentence was imposed by (then) El Paso County Judge Rebecca Bromley. When the Court asked Mr. Elwood if this experience would cause him to be biased against the State, he indicated that it would not.

Mr. Elwood had no familiarity with the factual allegations concerning the case. He held no opinion about Defendant's innocence or guilt.

In his questionnaire, Mr. Elwood had written, "I feel that if the crime was done with no remorse or feeling, the death penalty is a major factor." In response to a defense question, he stated, "I'm a firm believer in an eye for an eye." *Tr.* 1/24/96: 281. He also stated that if, as a member of a jury that had found a defendant guilty of four premeditated murders, he would not have his mind made up as to a sentence. He stated that he would listen to evidence about Defendant's age and background and was willing to apply the law as given by the Court. Defendant's challenge for cause based on *People v. Davis* was denied.

Post-conviction counsel again submits that Mr. Elwood was "mitigation-impaired" and that jurors "cannot simply 'listen to the evidence' and, regardless of whether the evidence presents reasons for a life sentence, reject the mitigating value of it." *M*: 93. This statement appropriately incorporates the rubric of *Eddings v. Oklahoma*.

Mr. Elwood was a man who had a bias against prosecutors because of his own experience in 1992. He stated that he would put this aside. He also presented himself as a person who, irrespective of his beliefs, would apply the law as set forth in the instructions of the Court. He was motivated by fairness: "I wouldn't want anybody to go through what I went through." *Tr.* 1/30/96: 288.

Trial counsel indicated that the Court had tried to "rehabilitate" Mr. Elwood. In fact, the Court had been concerned about Mr. Elwood's personal experience with the justice system. As a result, the Court asked,

> My question is, can you do what is necessary to be a fair juror in this case? You need not accept either the aggravating factors that are proposed or the mitigating factors, but must give them fair consideration. Can you or can you not do that type of thing in this case? *Id.*

Mr. Elwood responded, "Yes." He was concerned that neither party in this case should receive the type of treatment to which he felt he was subjected in his DWAI case.

The Court finds that Mr. Elwood was qualified to serve pursuant to the requirements of *Wainwright v. Witt*, *Morgan v. Illinois,* and *Eddings v. Oklahoma.* Further, defense counsel performed within the professional standards required by *Strickland v. Washington.*

Juror Loantha Callahan

Shortly after meeting with Mr. Elwood, the individual voir dire of Loantha Callahan was held. She suffered from glaucoma but was able to read the handout concerning Colorado's capital sentencing scheme. She was involved in a hit and run accident in Colorado Springs. Nothing about that incident affected her ability to be fair and impartial.

Ms. Callahan had been exposed to the Colorado Springs' media's reporting of the Chuck E Cheese homicides. Her questionnaire indicated that Mr. Dunlap "was fired from Chuck E Cheese and got a gun and went there for revenge." This led her to have an opinion about Defendant's guilt because "he did buy a gun."[43] *Tr.* 1/30/96: 318. Ms. Callahan said that "I'm open-minded that if I would hear the evidence or that, I could change, probably, I mean, I wouldn't say that it was definitely, you know, that way. I'm open to change." *Tr.* 1/30/96: 319.

In her questionnaire, Ms. Callahan also expressed concerns about the justice system's failure to consider victims and that she supported the death penalty. "I am for it . . . and voted for it, if I feel that all of the evidence is so presented." *Tr.* 1/30/96: 320. Later, she said that "There wouldn't be anything" that would prevent her from fairly consider a life sentence. *Tr.* 1/30/96: 321.

During the defense voir dire, Ms. Callahan stated that a manager was one of the victims and that "there wasn't much money in the place, so it couldn't have been robbery." Mr. Gayle asked about her ability to consider only the evidence, she said, "I

[43] Ms. Callahan also had cable television and had seen some reports on cable. She did not identify the specific cable outlet to which she was exposed.

think I would be open-minded for mitigation, anything that would come up that I might could see the other way. Uh-huh." *Tr.* 1/30/96: 325. When the prosecutor asked about her ability to reach a verdict based solely on the evidence, she said, "I think I could do this, yes." *Tr.* 1/30/96: 330.

Mr. Gayle asked about her about her willingness to fairly entertain mitigation. Ms. Callahan responded, "I could take that into consideration. I don't know. I don't know what to say." *Tr.* 1/30/96: 327. In response to the prosecutor, she said, "I think I could (vote for a death sentence). Yes, I could." *Tr.* 1/30/96: 331.

The defense challenged Ms. Callahan based on exposure to publicity and on her views concerning the death penalty. Post-conviction counsel portrays her as having "a fixed opinion that Mr. Dunlap was guilty." *M*: 93. Her statement that she could consider mitigation leads counsel to conclude that "she was basically already at the penalty phase." *Id.*

The record does not support these contentions. Ms. Callahan, like several prospective jurors, appeared to be nervous and uncomfortable in the unfamiliar (and undoubtedly daunting) atmosphere of the in camera voir dire. She sat at the head of a table, opposite a judge, surrounded by four prosecutors, two defense lawyers, Mr. Dunlap, and the defense investigator.

The defense again contends that the Court attempted to rehabilitate this juror. The Court finds that this and Defendant's other arguments lack record support.

Juror Donald Watkins

Later that day, Donald Watkins appeared for his individual voir dire. Although he worked for Shepard McGraw Hill and was familiar with the Shepard's system for legal research, he had no legal training.

He had heard about the events at Chuck E Cheese from Colorado Springs media coverage. He believed that the murders were "a grudge deal, supposedly or a robbery, both." *Tr.* 1/30/96: 452-453. He opposed gun control and regretted that gun control proponents were using this case to their advantage. As an active supporter of the National Rifle Association, Mr. Watkins said that he "abide[s] by the laws that are in

Colorado right now" irrespective of whether he might vote to change some of them. *Tr.* 1/30/96: 455.

At the time of the murders, and based on the publicity to which he was exposed, Mr. Watkins felt that "this was the man that was caught -- or accused of, I should say, the crime . . . I couldn't honestly tell you now guilty, not guilty, either way, you know. There is [*sic*] too many facts that have slipped my mind."

When the Court discussed the presumption of innocence and burden of proof with him, Mr. Watkins said,

> As a human being, I couldn't go in there saying, okay, what I read in the newspaper is what I'm going to decide his future on, you know. I'd like to put the things behind me and go in there as an impartial juror, innocent until proven guilty. I would try to do that, yes. *Id.*

Later, Mr. Watkins was more determined. When asked if he could vote guilty or not guilty based on the law, he stated, "As a human being, I would have to, yes, definitely." *Tr.* 1/30/96: 456.

In response to the prosecutor's questions, Mr. Watkins said that he would "decide this case based upon what I hear in the courtroom and I won't think about what I heard in the past (Mr. Lee's words)." *Tr.* 1/30/96: 468.

With respect to penalty issues, Mr. Watkins was specific in his desire to apply Colorado's four-step process for capital cases. Although the Court had to explain the process more completely, Mr. Watkins indicated that he would not automatically vote for a death or a life sentence and that he was not substantially impaired with respect to his ability to fairly consider either sentence. In response to the prosecutor's questions concerning mitigation, he acknowledged, "I personally do not see any reason that you can do premeditated murder for whatever, especially that number of people. There would be no reason anybody would take that many lives." He also noted, "There could be things that I don't know that I guess somehow -- I don't know how, could not justify premeditated murder -- but maybe explain it to whether or not the death penalty should not be imposed." *Tr.* 1/30/96: 471-472.

In response to defense counsel's questions about mitigation, Mr. Watkins recognized that the sentencing phase would not involve a "reason he did it, that he, you

know, should be found not guilty. You're presenting facts that might -- basically it's deciding between life and death." He said that he would not simply "go through the motions (Mr. Lewis' words)." "I would listen to the aggravating and mitigating factors.

It would not be easy at any point to condemn anybody to death . . . I'm going to listen to the information presented to me. I'm not going to turn a deaf ear to anything." *Tr.* 1/30/96: 475.

Although Mr. Watkins felt that the death penalty served as a deterrent to crime, that it was a punishment and that the concept of "an eye for an eye" was meritorious, he was sensitive to the task he might be asked to undertake. He believed that life is sacred and that those who would serve as jurors would have to be responsible for what they did. *Tr.* 1/30/96: 477.

Post-conviction counsel again argues that the Court's failure to specify that the fourth step requires a finding that a death sentence must be decided unanimously, beyond a reasonable doubt, "distorted the process and the statements of the prospective juror and also denied Mr. Dunlap's right." *M*: 94. Counsel also argues that Mr. Watkins did no more than commit to "go through the process." Counsel also opines that Mr. Watkins was a person who would automatically vote for the death penalty, "tempered only by his partial and uncertain unwillingness to be talked out of a death sentence, but aggravated by his clear and unrehabilitated inability to consider mitigation." *M*: 97. The transcript does not support any of this argument.

Trial counsel challenged based on publicity. The Court found, "This is a juror who like many others starts where they hear somebody's arrested, that think they got the right guy. He's willing to listen, to be open-minded." The Court's review of the transcript, now more than eight years after the trial, does not require any alteration of those findings.

Juror Craig Ward

Mr. Ward's individual voir dire occurred on January 19, 1996. He had had minimal exposure to the murders.

When he was asked about penalty issues, he told Mr. Gayle that he "would try to follow the law." *Tr.* 1/19/96: 421. He leaned toward a life sentence but would have considered both penalties.

Mr. Dunlap lists "Prospective Juror Ward" on page 265 of his motion, including Craig Ward as a potentially "death scrupled" juror whose excusal could have been a basis for appeal. The Court fails to understand Defendant's contention about Mr. Ward. He was qualified without objection by either side. There is no basis for any objection.

Juror Patricia Sokolik

Defendant asserts that the Court's granting of the State's *Wainwright v. Witt* challenge with respect to Patricia Sokolik (whose individual voir dire occurred on January 22, 1996) was erroneous. Ms. Sokolik had learned of Defendant's 75-year sentence for the Burger King case before she entered the conference room where individual voir dire occurred. However, she stated that she could put that information aside and acknowledged that, for a three to four month trial, "there must be more to it (this case) than what I have heard." *Tr.* 1/22/96: 6.

The transcript contains a reference to Ms. Sokolik's questionnaire. She had written that she was a Roman Catholic and that "the death penalty is in conflict with the church's right to life philosophy . . . [and that she had] some difficulty with the notion of the death penalty." *Tr.* 1/22/96: 7. During the Court's voir dire, Ms. Sokolik indicated that she would automatically vote for a life sentence. Although Mr. Lewis worked to rehabilitate her, Ms. Sokolik told the prosecutor that, "when you get to that fourth step… you are going to vote for a life sentence (Mr. Lee's words)." *Tr.* 1/22/96: 14. Ms. Sokolik's ability to vote for a death sentence clearly was substantially impaired. There was no error in the Court's acceptance of the parties' stipulation or of its *Wainwright v. Witt* determination.

Juror Beverly Nordine

The Court, counsel, and Mr. Dunlap met with Beverly Nordine on January 23, 1996. Ms. Nordine had read and heard media coverage of the Chuck E Cheese murders. Nevertheless, she stated that she would base her verdict solely on the evidence presented in the courtroom. She affirmatively responded when Mr. Gayle asked if Mr. Dunlap should be comfortable with a juror with her mindset.

Despite indicating on her questionnaire that she was "all for the death penalty," when she was asked whether her ability to vote for a death sentence would be substantially impaired, she replied, "maybe pity." *Tr.* 1/23/96: 110-111. She nevertheless stated that she would abide by Colorado's four-step process. When Mr. Gayle pursued her questionnaire response, Ms. Nordine stated that she would not support a death penalty scheme that permitted rapid retribution. She also indicated that she "would probably be swayed by his upbringing, environment. That's what I said before meaning pity." *Tr.* 1/23/96: 116.

When Ms. Wilson spoke with her, Ms. Nordine said that she felt that the death penalty should be used more frequently "and people would think we are serious when we talk about it." *Tr.* 1/23/96: 117. She nevertheless indicated that she would be participatory, would state her views, and "I'm not unreasonable." *Tr.* 1/23/96: 120.

Defendant now contends that Mr. Gayle's examination constituted ineffective assistance of counsel. The record belies this suggestion. Ms. Nordine was a person who was committed to a fair process, was prepared to honor her oath, and follow the Court's instructions. Mr. Gayle's examination did not implicate *Strickland v. Washington*'s performance prong.

Juror Debby Dandrea-Ellis

Debby Dandrea-Ellis' voir dire also occurred on January 23, 1996. The transcript reflects a comment in her questionnaire with respect to the death penalty. "I think maybe if we had stricter laws there might not be as much crime. Something has to change." *Tr.* 1/23/96: 149. However, when she was asked about the four-step process, she stated, "I think I could perform those three steps. I don't think I could decide on a death sentence at all." *Tr.* 1/23/96: 151.

When Mr. Wolff spoke with her, Ms. Dandrea-Ellis repeated her philosophical support for capital punishment, "but to be the actual one that would decide something like that, I would want to pass the buck." *Tr.* 1/23/96: 152. She stated that she "probably" would always vote for a life sentence as opposed to a death sentence. "I could not decide to give anybody the death penalty." *Tr.* 1/23/96: 153. When she spoke with Mr. Lewis, Ms. Dandrea-Ellis said, "I don't think I have the right to judge whether someone lives or

dies. I don't know if anybody does." *Tr.* 1/23/96: 154. She added, "I wouldn't want to be responsible for making that decision. I just wouldn't want to be in that position." *Tr.* 1/23/96: 156.

Mr. Lewis tried to rehabilitate Ms. Dandrea-Ellis without success. She simply would not accept the responsibility for making a death penalty decision. There is no showing that Mr. Lewis' performance was beneath the standard of care.

Juror Majel Billingsley

Majel Billingsley was the last juror interviewed on January 23, 1996. The transcript demonstrates that she did not respond to all questions in her questionnaire. Ms. Billingsley had put question marks in the area of her questionnaire that dealt with capital punishment. When the Court asked its *Witt* questions, she said, "That's pretty serious, isn't it?" *Tr.* 1/23/96: 271. She stated that she could vote for either penalty but that the Ten Commandments prohibits killing. When the Court asked her if, despite her exposure to pre-trial publicity, she could decide the case based only on what was presented in the courtroom and not on whatever she had heard, Ms. Billingsley responded, "Oh, I don't think I could -- I don't think anybody could do a thing like that." *Tr.* 1/23/96: 268.

The Court reminded Ms. Billingsley of the presumption of innocence and the burden of proof. When asked about her ability to start the case "with that idea and make it really work," she responded, "Well, I would try." When the Court asked whether both sides could receive fair consideration from her, Ms. Billingsley stated, "Well, I would have to - - I thin it's little attention as I've paid to the thing at the time that I would have to hear both sides before I could talk about a fair trial before I could really make up my mind."

The Court then stated that Mr. Dunlap need not testify and that his lawyers need to nothing. The Court "promise(d)" her that defense counsel "are going to do something but if they didn't say a thing and these folks did all the talking would you still make them prove the charge beyond a reasonable doubt before you decided anything?" Ms. Billingsley responded, "Well, I guess in all fairness to the Defendant you ought to - - I guess you - - I guess I - - I guess I'd - - well, I would want to hear it if I was on the jury. I wouldn't just want to fold up and go home." She also discussed a "loophole" with the

prosecutor: what if the Defendant did not intend to kill anyone but only sought to rob Chuck E Cheese? Later, she stated she believed that Mr. Dunlap did commit a robbery, “But I think it’s minor compared to the rest of the things.” Then, she stated that she thought she could put aside her opinion of guilt and decide the case based on the evidence.

Ms. Billingsley also had not provided information about her views concerning capital punishment in her questionnaire. When the Court asked her to be specific about her views, she responded in the same garbled manner as she did when speaking with the Court about the presumption of innocence and burden of proof.

Ms. Billingsley was a Presbyterian who adhered to the Ten Commandments.

When Mr. Peters asked Ms. Billingsley to presume she was governor and that a bill to authorize the death penalty was presented to her, she stated she would “pass the buck” and look to the people to vote on the subject. When he asked about her ability to actually vote for a death sentence, Ms. Billingsley equivocated. Later she stated that it would be difficult for the State to convince her “but I think you could.” *Tr.* 1/23/96: 281. Neither party challenged Ms. Billingsley for cause. The defense’s claim of ineffective assistance does not take into account the context of the case.

During the first phase of the Crim. P. 35(c) hearing, defense counsel’s questions acknowledged the strength of the people’s guilt/innocence phase evidence. Defendant’s motion and memorandum, and the testimony presented at the hearing, all note that, in cases where the trial on the merits features evidence that strongly supports the prosecution’s case, great care must be placed on the sentencing phase.

Ms. Billingsley was not the easiest juror with whom to speak. However, she held strong beliefs. Trial counsel asked her if, in deliberations, “Are you going to stick to your guns?” She replied, “Yeah, I guess I’ll stick to my guns . . . . I’ve been told I’m too much that way . . . . People tell me that every day.”

Mr. Gayle then said, “I’ve heard enough.” His position was completely reasonable. Ms. Billingsley stated that it would be “hard” for the prosecutor to convince her that a death sentence would be appropriate. She was precisely the type of juror that defense counsel would at least initially want. Although she had some notion of guilt, she

would not be easily convinced to vote for a death sentence. She also preferred not to make that type of decision. There was no ineffective assistance of counsel with respect to Ms. Billingsley.

Neither party challenged Ms. Billingsley for cause. The defense's claim of ineffective assistance does not take into account the context of the case.

Mr. Dunlap contends that trial counsel's failure to use a challenge for cause with Ms. Billingsley constitutes ineffective assistance of counsel. Nothing in the record supports this contention. Ms. Billingsley did not serve as a deliberating or alternate juror.

Juror Christel Duran

The individual voir dire of Christel Duran occurred on January 24, 1996. Early on, she stated that she did not understand the term "mitigating." The Court explained Colorado's four-step process. Ms. Duran stated that she understood the procedure (and the concept of mitigation).

During the prosecutor's voir dire, Ms. Duran stated that she would not automatically vote for a death sentence. "I would want to be sure that everything is in the proper – not so I won't do anything improper." *Tr.* 1/24/96: 29. When Mr. Lewis asked Ms. Duran about factors that would support a life sentence, she stated that she could not give specific examples. However, she stated, "I would have to heard (*sic*) the whole thing to see if there is anything at all that I felt he would profit by staying in jail rather than getting a life -- death sentence." *Tr.* 1/24/96: 33.

Mr. Lewis objected to Ms. Duran based on *Wainwright v. Witt*. Defendant now contends that Mr. Lewis was constitutionally ineffective. Since there is no specification about the alleged ineffectiveness, in either Defendant's motion or memorandum, the Court cannot find any basis upon which it can find that either prong of *Strickland v. Washington* has been implicated.

Juror Patrick Boone

Defendant interposes an "objection" about Patrick Boone, whose individual voir dire occurred on January 24, 1996. Mr. Boone had a drinking problem. When the Court told Mr. Boone that he could not drink for 8 to 10 weeks, he said, "I don't think I can do that." *Tr.* 1/24/96: 39. Even though he limited his drinking to weekends, he was

concerned that his consumption would be too great. Later, he told Mr. Peters that his drinking had caused him to black out.

In his motion (page 265), Defendant alleges that, while the Court denied a *Witt* challenge, the Court "essentially asks the State to challenge him on other grounds." This grossly distorts the proceedings. Mr. Boone's alcoholism was a clear basis for a challenge for cause. The People wanted to excuse him on that ground after the individual voir dire. The Court treated Mr. Boone as it did every other juror and required him, having satisfied challenges for publicity, hardship and punishment, to return, even though he was "ultimately challengeable." *Tr.* 1/24/96: 55. There was nothing partisan or otherwise improper in this procedure. Indeed, the Court directed Mr. Peters to "take it easy." *Id.* Defendant's objection is groundless.

Juror Helen Donette Sibille

On January 24, 1996, Helen Donnette Sibille met with the Court, counsel, and Defendant. The Court asked her the requisite *Witt* and *Morgan v. Illinois* questions, including whether she would automatically vote for a death sentence without considering the four-step process. She responded, "I was under that you had to consider the mitigated circumstances." The Court responded, "Well, you have to listen to them and to be a fair juror you do need to consider them. And we need to know if you are that kind of person that would do that?" Ms. Sibille was "That's what I am expected to do, yes." *Tr.* 1/24/96: 160.

The Court asked the automatic death penalty question and asked if she would be able to vote for a death sentence "if you thought that it was the right thing to do." Later, Ms. Sibille expressed confusion about the fourth step. The Court explained the entire process. Later, in response to Mr. Peters (and even after reading the handout), she stated, "It was the first time he explained it after (that she understood the process)." *Tr.* 1/24/96: 164.

Ms. Sibille was forthcoming with both attorneys and, although somewhat uncomfortable with the prospect of being involved in the penalty phase process, was

open-minded, fair, and committed to her oath and the law. She specifically was interested in mitigation. Defendant now contends that trial counsel was somehow ineffective, apparently because he did not object to a portion of the Court's explanation of the four-step process. Further, counsel notes that Ms. Sibille was excused with a peremptory challenge. The Court finds that there simply is no basis for Defendant's assertion. Ms. Sibille was a thoughtful and careful person who satisfied the *Wainwright v. Witt* standards. She had had the opportunity to consider the handout before individual voir dire and was advised appropriately. If she had been selected and had served as a deliberating juror, she would have received appropriate jury instructions in the penalty phase. To the extent that Defendant has set forth any articuable claim, it is groundless.

Juror Leslie Kulnar

Leslie Kulnar's individual voir dire occurred on January 25, 1996. The transcript contains quotes from a portion of Ms. Kulnar's questionnaire. "If someone committed a crime like this and killed someone else, they should pay for what they have done. I would expect that I was found guilty of killing someone, I would get the death penalty." *Tr.* 1/25/96: 67. The Court then explained the four-step process to Ms. Kulnar. She expressed some confusion about it. She also stated that, in some cases the death penalty would be appropriate. In other instances, "why should they get off so easy is the way that I -- not that it's easy but that you think maybe it would be better if they did spend the rest of their life in jail." *Tr.* 1/25/96: 70.

Ms. Kulnar stated that she was nervous during the individual voir dire. This was a common circumstance that the Court observed as it considered the demeanor of each juror who appeared for the individual sessions. When Mr. Gayle asked her if she would want to hear and consider mitigation evidence, Ms. Kulnar stated that she did want to consider it. *Tr.* 1/25/96: 77. She told Mr. Wolff that she maintained an open mind.

Post-conviction counsel states that Mr. Gayle was ineffective in his examination. In the memorandum, counsel states that her juror questionnaire was ADP[44] and [s]he told

[44] Once again, post-conviction counsel attempts to use the missing questionnaires to Defendant's advantage when it seems appropriate to do so. The voir dire record contains many examples of the essential parts of the questionnaire. This is another example that supports the Court's finding of the lack of any prejudice.

the prosecutor that a life sentence might be worse than a death penalty, an extremely disturbing answer from a defense perspective. As with the many similarly situation (*sic*) prospective jurors, trial counsel's failure to attempt to develop a challenge for cause was ineffective assistance of counsel. *Memo*: 59. However, Ms. Kulnar's voir dire was extensive. As with many other jurors, she supported the death penalty in principle although she was by no means convinced that it should be applied in this or other cases.

Although Ms. Kulnar's statement that a life sentence might be worse than a death sentence could be disturbing to defense counsel, it also could be viewed as a positive. In any event, Mr. Gayle's examination did not exemplify the type of unprofessional conduct that is required under *Strickland v. Washington*'s performance prong.

Juror Richard Jacquin

Prospective Juror Richard Jacquin was interviewed on January 26, 1996. When the Court asked him about penalty issues, Mr. Jacquin committed to abide by Colorado's four-step process. *Tr.* 1/26/96: 15.[45] "I believe that I'm a fair individual. Taking an oath under God is very important to me. I would try to do the best I could to be fair knowing the circumstances." *Tr.* 1/26/96: 22.

Mr. Lewis' rather brief examination of Mr. Jacquin led post-conviction counsel to allege ineffective assistance of counsel. The Court finds that Mr. Jacquin was exactly the type of juror who would be ideal in a capital murder case. The attorneys and the Court had the opportunity to observe Mr. Jacquin's demeanor in person. Mr. Lewis' decision did not violate *Strickland v. Washington*'s performance prong.

Juror Lee Colburn

Lee Colburn's individual voir dire also occurred on January 26, 1996. His questionnaire stated that if a person is guilty of first-degree murder, he should be executed. In response to the Court's questions, Mr. Colburn stated, "I'm open minded that I can change the reason or what I might say whether a life sentence or a death sentence." *Tr.* 1/26/96: 146. When Mr. Lewis set forth the types of mitigation that would

[45] Mr. Jacquin noted that the handout was not clear. He also stated that, "the end result I would hope that it would be a very sound process." *Tr.* 1/26/96: 19.

be presented during the penalty phase, Mr. Colburn committed to fairly consider those matters.

Once again, the defense implies that Mr. Colburn's questionnaire indicated that he would automatically vote for a death sentence. The record, together with the Court's and trial counsel's ability to consider his demeanor, does not support this suggestion.

Juror Jennifer Weetman

Post-conviction counsel alleges that trial counsel was constitutionally ineffective with respect to Jennifer Weetman. (Individual voir dire on January 29, 1996). However, Ms. Weetman ultimately was excused because of hardship because of her pregnancy. This argument is completely without merit.

Juror Joan Hartzell

Joan Hartzell's individual voir dire occurred on January 29, 1996. Although she stated that she supported the death penalty, and supported the concept of an eye for an eye and a tooth for a tooth, she committed to follow her oath and the Court's instructions. Since Ms. Hartzell's seat was toward the very end of those jurors who had been qualified for general voir dire, she was asked very few questions during the general session. Counsel was not ineffective in his approach toward Ms. Hartzell.

Jurors Cited by Post-Conviction Counsel with Respect to Mr. Dunlap's Claim that Trial Counsel's Failure to Exhaust Peremptory Challenges Constitutes Ineffective Assistance of Counsel

Beginning at page 185 of his motion, Mr. Dunlap asserts that the failure of trial counsel to exhaust all peremptory challenges constituted ineffective assistance of counsel. Before making a legal determination concerning this claim, the Court reviews the jurors whom post-conviction counsel cites as appropriate persons for peremptory challenges.

Several of these jurors have been reviewed *supra*. The Court adopts its findings as if reiterated at this point. The Court will review those jurors who were not previously challenged by Mr. Dunlap in his papers. The Court will review Defendant's claims with

respect to other prospective jurors.

Juror David Kuhn

The individual voir dire of David Kuhn occurred on January 25, 1996. Mr. Kuhn had heard information about the Chuck E Cheese crimes from a Denver radio station and the Colorado Springs media. He had not formed an opinion concerning the guilt or innocence of the defendant. He assured the Court that he would consider only the evidence presented at trial if selected as a juror.

In his questionnaire, Mr. Kuhn stated that the death penalty was appropriate "in some cases." During the Court's voir dire concerning the death penalty, Mr. Kuhn stated that capital punishment was appropriate "in a case where there is absolutely no doubt that the person was guilty." This caused the prosecutor to follow up with respect to the beyond a reasonable doubt standard. Mr. Kuhn indicated, "perhaps I didn't word it correctly then when I was asked the first time." He indicated that he was philosophically "neutral" about the death penalty and felt that its application required a case by case consideration. He said he would vote to retain capital punishment in a plebiscite.

During the defense's voir dire, Mr. Kuhn was asked about the type of mitigation that ultimately was presented. He stated, "Well, if we're talking about someone's life, I think everything should be taken into consideration before any decision is made one way or another."

The Court concludes that Mr. Kuhn was a fair, objective and unbiased juror. Post-conviction counsel argues that trial counsel did nothing to establish that "this seriously pro-death penalty juror was a burden-shifter, *i.e.*, he operated from a presumption of death." The record does not support this contention. The defense's failure to challenge Mr. Kuhn for cause does not meet *Strickland v. Washington*'s performance prong.

Juror Mary Sparks

Mr. Dunlap next argues that the excusal of prospective juror Mary Sparks, whose individual voir dire occurred on January 22, 1996, was constitutionally erroneous. Ms. Sparks clearly was very nervous, as demonstrated by the Court's greeting. She was an educational assistant in Greeley and had just returned to Colorado Springs. Ms. Sparks

was working on a master's degree. This course work required her to be in school with children on a regular basis. She was concerned that serving as a juror would cause problems for her training. She had no appreciable familiarity with the incidents at Chuck E Cheese.

In her questionnaire, Ms. Sparks said that she could follow the law with respect to sentencing but that it would be very difficult (underlining in the questionnaire) to impose the death penalty. She wrote that she would keep an open mind.

When the Court asked her to explain her views, she stated, "I don't know that I could be responsible for taking someone else's life." She stated that she would be substantially impaired in her ability to vote for a death sentence "Because I don't - - being the type of person I am I don't think I could handle the decision - - making a decision."

During the prosecutor's voir dire, she observed that Ms. Sparks had been "a bit tearful" when she spoke to the Court about penalty issues. After a few more questions, the Court asked Ms. Wilson to stop asking questions to permit Ms. Sparks to become more comfortable.

After a few more questions, the parties stipulated that Ms. Sparks should be excused. A juror as nervous as Ms. Sparks can (and should) be excused for cause. *See U.S. v. Reese*, 33 F. 3d 166 (C.A. 2 (N.Y.) 1994; *U.S. v. Quiroz-Hernandez*, 48 F. 3d 858 (C. A. 5 (Tex.) 1995). No error was committed by excusing Ms. Sparks. The performance prong of *Strickland v. Washington* was not implicated or satisfied by counsel's entering into the stipulation. Counsel did not abandon Mr. Dunlap when dealing with Ms. Sparks.

The defense objects to the format of the prosecutor's questions, using the phrase, "Sign up for killing Mr. Dunlap or you can't be on the jury," *M*: 190, in lieu of "personalization." Although counsel correctly quotes the question, the decision to excuse Ms. Sparks was made because of the strain juror service would have caused her. Contrary to counsel's assertion, it was not "entirely likely" that she could have successfully served.

Defendant's Contentions about Prosecutorial Misconduct during Jury Selection

Defendant's brief contains several arguments about the prosecutor's performance in the jury selection process. These include: (1) advancing personal opinions to

prospective jurors; (2) identifying themselves with the community and justice; (3) the rights of "guilty people" to have trials; and (4) that some guilty people plead not guilty.[46] Several cases set forth the law concerning what voir dire is proper. "The only proper purpose of voir dire is to determine the bias or prejudice of a potential juror." *People v. Shipman*, 747 P.2d 1, 2 (Colo. App. 1987). Voir dire that seeks to increase the credibility of a witness is improper. *Id.*

The purpose of the voir dire process is to facilitate the parties' intelligent use of challenges for cause and peremptory challenges and to ensure a fair and impartial jury. *People v. Greenwell*, 830 P.2d 1116 (Colo. App. 1992). Repetitive and argumentative questions are not proper. *King v. State*, 790 So.2d 1253 (Fla. App. 2001). "Questions are not competent when their evident purpose is to have jurors indicate in advance or to commit themselves to certain ideas and views upon final submission of the case to them." *Woodall v. Commonwealth*, 63 S.W.3d 104, 116 (Ky. 2001).

> [V]oir dire, whether in a capital case or in the more usual situation, to be meaningful, must uncover more than "the jurors" bottom line conclusions [to broad questions], which do not in themselves reveal automatically disqualifying biases as to their ability fairly and accurately to decide the case, and, indeed, which do not elucidate the bases for those conclusions.

Dingle v. State, 759 A.2d 819, 826 (Md. 2000).

However, during voir dire, the prosecution is entitled to ask questions about any preconceived notions that prospective jurors have concerning the law. *State v. Golatt*, 81 S.W. 3d 640 (Mo. App. 2002). Defendant's memorandum relies on several cases to support his claim. The first citation, *Harris v. People*, 888 P.2d 259 (Colo. 1995), represents perhaps the most egregious act of prosecutorial misconduct of modern time. In closing argument, the prosecutor compared the defendant to Saddam Hussein. Even under a plain error standard, this comment clearly prevented the defendant from receiving a fair trial. The Supreme Court's language is instructive:

> Among the rights guaranteed to the people of this state, none is more sacred than that of trial by jury. Such right comprehends a fair verdict, free from the influence or poison of evidence which should never have

[46] This argument begins in Defendant's Motion at page 98.

> been admitted, and the admission of which arouses passions and prejudices which tend to destroy the fairness and impartiality of the jury. This right to a fair and impartial jury "is all-inclusive: it embraces every class and type of person. Those for whom we have contempt or even hatred are equally entitled to its benefit. It will be a sad day for our system of government if the time should come when any person, whoever he may be, is deprived of this fundamental safeguard."

Id. at 263-264. None of the prosecutors' statements in voir dire approached the blatant misconduct of the *Harris* prosecutor.

Similarly, in *People v. Jones*, 832 P.2d 1036 (Colo. App. 1991), a prosecutor's closing argument suggesting that a defense theory of the case was "insulting" and "a lie" and that defense challenges to the credibility of prosecution witnesses were "cheap innuendos," typical of defense strategies in criminal cases, required reversal. Such statements are grossly unprofessional and cannot be countenanced in American courtrooms.[47]

The *Jones* court also addressed a prosecutor's expression of his personal belief in the credibility of the State's case and an implication that the case had received a pre-trial approval of the judge. These comments denied the defendant a fair trial. The People's voir dire did not include these types of comment.

People v. Eckert, 919 P.2d 962 (Colo. App. 1996), holds that a prosecutor may not "misstate the evidence . . . appeal to the emotionalism and to the patriotism of the jurors [appeal to or inflame] the passions and prejudices of the jurors . . . [or] express personal beliefs as to a defendant's guilt." *Id.* at 967. Nothing resembling this type of behavior occurred in the individual or general voir dire in this case.

Moreover, there were no comments on Defendant's right to remain silent. References to the right of all persons to have a jury trial, irrespective of whether they are factually guilty or not, did not resemble the comments made in *Perdue v. Commonwealth*, 916 S.W. 2d 148 (Ky. 1995).[48]

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[47] Defendant infers that the prosecutor's "Crazy Horse" reference (in closing argument) exemplifies the nature of the prosecution in this case. The Colorado Supreme Court resolved this issue on direct appeal.
[48] In addition to stating that defendant Perdue did not "fess up", the prosecutor referred to the amount of "time and trouble" occasioned by a not guilty plea and a jury trial. Additional comments referred to the time required to complete post-conviction proceedings.

In *Adams v. People*, 708 P.2d 813 (Colo. App. 1985), a prosecutor disregarded previous court orders and implied that the defendant had a prior criminal conviction. Obviously, that record is irrelevant for the purposes of voir dire and would become relevant only if the defendant elected to testify. The prosecutors' statements here did not include any such implication.

Defendant's reference to *Harding v. People*, 708 P.2d 1354 (Colo. 1985) and *People v. Merrill*, 816 P.2d 958 (Colo. App. 1991) are inapposite to his argument. These cases address the authorized process for a grant of immunity and do not consider the question of prosecutorial misconduct. Likewise, the prosecutors' statements did not implicate the rubric of *People v. Wright*, 511 P.2d 460 (Colo. 1973).[49] The issue of the prosecution "relating itself to justice" allegedly arose in the context of the prosecutor asking a prospective juror what he believed the roles of the various attorneys were. Prospective juror Ms. McCracken stated that defense counsel was required to defend the accused, "to bring up the fact that there may be some doubt as to his guilt . . . I don't know, just to get them off." When asked about the role of the district attorney, she responded, "To provide the evidence. I mean, basically, they are there to bring the person to justice, and they have the evidence, you know, have the police who was on the scene that have the evidence. And he is going to present it to the people."

Mr. Peters then asked Ms. McCracken about her comment about justice: "And you mentioned that the District Attorney has to bring about justice. How do you know that when you present the facts?" Ms. McCracken stated that justice would be served if the prosecution was able to prove the guilt of the defendant beyond a reasonable doubt. There was no improper reference by Mr. Peters in this exchange. Mr. Peters also pointed out that the American plan for justice does not require people who believe they are guilty (or who are factually guilty) to plead guilty. A trial is always available for any person charged with any crime. There were no improper comments by counsel. There was no denigration of the presumption of innocence or burden of proof.[50]

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[49] In *People v.* Wright, in addition to implying that the defendant's decision not to testify denigrated his assertion of self-defense, the prosecutor also vouched for his witnesses and stated, "I want you to believe me. I want you to be the judge of my credibility. I'm an honest man." 511 P.2d 460, 463 (Colo. 1973).

[50] During the general voir dire, prospective juror Ms. McCracken stated that she did not understand why a person should say she or he was not guilty when, in fact, the person was factually guilty. This is the type of exchange that occurs in criminal trial voir dire with some frequency. The colloquy was appropriate.

In his motion, Mr. Dunlap cites Mr. Peters' general voir dire discussion with prospective juror Ms. Paradee concerning the requirement of proof beyond a reasonable doubt. Mr. Dunlap states that the exchange represented "a conscious and well-planned effort to reduce the state's constitutionally-imposed burden of proof." *M*: 98. This argument ignores the Court's reading of certain jury instructions, beginning with the presumption of innocence and the burden of proof, that is reflected in Volume 71, starting at page 63. The Court did so, at the request of Mr. Peters, who had been speaking with prospective juror Ms. Rundle. She had implied that she would not vote to find Defendant guilty in the guilt/innocence phase unless she had no doubt in her mind at all.

Mr. Peters, as do both prosecutors and defense counsel, was attempting to put the concept of reasonable doubt in terms that lay persons could more easily understand. Some attorneys refer to foundations of houses that people are considering purchasing. If there are cracks in the foundation, a person would have a reasonable doubt before signing a real estate contract and a deed of trust. In the case of Ms. Paradee, the issue was the importance of the safety of her children. The discussion occurred in the context of the Court's reading of the basic instructions of criminal law. There was no minimizing of the burden of proof and no impropriety in this facet of the general voir dire.

Further, Ms. Wilson's discussion concerning immunity was not erroneous. Post-conviction counsel considers her discussion with prospective juror Mr. Moreau a form of "bolstering." This claim is not supported by the case law. *See People v. Racheli*, 878 P.2d 46 (Colo. App. 1994). *See also Moore v. Gibson*, 195 F.3d 1152 (10th Cir. 1999).

> Generally, a prosecutor's improper remarks require reversal of a state conviction only if the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (Citation omitted). Alternatively, if the alleged prosecutorial misconduct denied the petitioner a specific constitutional right (rather than the general due process right to a fair trial), a valid habeas corpus claim may be established without proof that the entire trial was rendered fundamentally unfair.

Le v. Mullin 311 F.3d 1002 (10th Cir. 2002). Here, the trial was neither infected with unfairness nor was it rendered fundamentally unfair as a result of the complained-about conduct.

The defense also complains about Ms. Wilson's general voir dire statements about witnesses who had "done very bad things." Counsel cites no authority to support its

claim that this is improper; the Court is not aware of any such case law. There is no error in Ms. Wilson's telling prospective juror Ms. Bond that she needed to listen to testimony from people who had "done very bad things." Interestingly, counsel objected to the prosecutors' telling jurors that they need merely to "listen" and not necessarily "buy off" with respect to mitigation evidence (in individual voir dire). In general voir dire, the prosecution's position that the jurors need at least to listen to testimony from cooperating witnesses also is deemed improper. As noted, the Court disagrees.

The defense objects, again without authority, to Ms. Wilson's general voir dire question to prospective juror Mr. Lynch concerning potential hardship. Mr. Lynch had just started a new business and was concerned about meeting his financial responsibilities. Ms. Wilson responded, "Noting once again that we need good people, is there any way that you could make arrangement?" Mr. Lynch replied, "I thought about that, and I don't think that I would be able to give my undivided attention be here (*sic*), having to worry about my financial responsibilities outside this courtroom." Mr. Lynch did serve on the jury. It is difficult to understand how a juror who told the prosecutor that he did not want to serve, and was nevertheless selected, was somehow improperly maneuvered by the prosecutor.

The defense objects to prosecution comments about circumstantial evidence ("Very few cases and crimes are committed in front of witnesses") and references to a Paul Harvey radio news program and to Ms. Wilson's mother. Mr. Dunlap claims that he suffered unspecified violations of his rights "under the due process, trial by jury and cruel and unusual punishment clauses." *M*: 102. No case law supports these propositions.

Post-conviction counsel objects to the prosecution's discussion about penalty issues in general voir dire. The Court was not surprised when some jurors, after having had time to reflect between his or her individual voir dire session and the general voir dire, had additional concerns about their ability to be fair and impartial, to adhere to their oaths, and to commit to decide the case based on the law.

In his Motion, at page 103, Mr. Dunlap specifically addresses his concerns about prospective jurors Ms. Schemmel and Mr. Ward. The Court will address this issue by first reviewing the individual voir dire of each juror, as was done with other jurors, *supra*.

Juror Elizabeth Schemmel

The individual voir dire of Elizabeth Schemmel was held on January 26, 1996. Ms. Schemmel was, at best, a reluctant juror. She had a time-share vacation in Breckenridge scheduled in February 1996. She was not able to arrange a different time for her Breckenridge condominium and was displeased about the prospect of losing her vacation.[51]

Ms. Schemmel believed that Mr. Dunlap had committed the Chuck E Cheese murders. She allowed as how she "could sit on there and listen and see if was guilty or not . . . Well, I think I could be fair, sit there and listen to both sides and then decide." When the Court reminded her that the defense has no burden to prove anything and that prosecution alone carried the burden, she said, "If you have witnesses that saw this man shoot these other people, that's the only thing I would say."

With respect to penalty issues, Ms. Schemmel indicated that she didn't "want to see anybody's life taken and, uh, therefore I would really want rather he went to jail for the rest of his life but if everybody also believes all the evidence and I think I could do it (vote for a death sentence) but I don't know. I've never been a juror." During the general voir dire, Ms. Schemmel said "There is no way, shape, or form I could see myself being for the death penalty in this case." Neither party pressed Ms. Schemmel with respect to penalty issues and neither objected with respect to publicity, hardship, or the death penalty.

After the general voir dire had completed, the Court, counsel, and Mr. Dunlap had additional discussions with some jurors. Ms. Schemmel was one of those jurors. She had been to a nightclub and had seen some people she recognized. She told them that she might be a juror. "They were talking about Catholics, and Catholics can't give the death penalty." Ms. Schemmel recognized that she should not have engaged in those discussions, but went home, thought about her situation and stated, "It has to be my own decision, and I cannot put him to death."

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[51] The Court asked, "How are you going to feel if we ask you to serve and you lose that -- ?" Ms. Schemmel: "I would feel bad." The Court: "Okay. How does that affect your ability to decide this case fairly to both sides?" Ms. Schemmel: "Well, if I had a job to do, I would do it."

The prosecution attempted to challenge Ms. Schemmel for cause because of her views on the death penalty. The Court declined to permit a renewal of the *Wainwright v. Witt* challenge but excused Ms. Schemmel because she violated the Court's order not to permit any person to approach her to discuss the case. Ms. Schemmel may have been a "death scrupled" juror, but her service was not discontinued because of "egregious, contemptuous, prejudicial misconduct." *M*: 103.

Juror Craig Ward

Craig Ward's individual voir dire occurred on January 18, 1996. Mr. Ward had heard about memorial services for the victims but did not associate Mr. Dunlap with the events at Chuck E Cheese. In response to the Court's questions, he indicated that he would not automatically vote for a life sentence or a death sentence and was not substantially impaired with respect to either option. Although he was a small business owner, he "appreciate[d] the significance of this."

During the defense voir dire, Mr. Ward stated, "looking at it fairly, I'm not sure I would want specifically myself on a jury." He was concerned about his business – "I have a lot going on . . . I might be able to deal with it, but that is not to say that to say that it wouldn't be hard."

With respect to penalty issues, Mr. Ward stated a preference for a life sentence. He did state that he would apply the law and fairly consider both sentencing options. During the prosecutor's voir dire, Mr. Ward said that his views would not "substantially hamper (Mr. Lee's words)" his ability to fairly consider a death sentence, "but . . . it probably would be the hardest decision I would have to make in my life . . . It would be a difficult decision to make, but I think I could vote for the death penalty."

During the general voir dire, Ms. Wilson spoke with prospective juror Mr. Jacquin. She asked, "Do you think you would be able to look at all the facts and be a juror here, hear what the other jurors' opinions were about this evidence, and then make your own decision as to guilty, not guilty life or death? Do you think you could do that?"

A discussion of this type occurred with several prospective jurors. Ms. Wilson asked prospective Mr. Trujillo if, "in the final phase, the penalty phase in the deliberation process you would listen to others, but you would talk to others and try to persuade others

so that there is back and forth, meaningful, very careful process?" After Mr. Trujillo stated that he could do so, Ms. Wilson turned to Mr. Ward. He stated, "after thinking about it, I think that I could not make a decision for the death penalty at this point, and I don't think I would change my mind in terms of other persons' opinions on this matter."

In an in camera session, Ms. Wilson asked why he had voiced his concern in the general voir dire. He stated that he had "been thinking quite a bit. I didn't think it would be fair for me to continue, having said I think I could decide for the death penalty when now I really don't think I could." The Court excused Mr. Ward over Defendant's objection.

The Court had ordered the parties not to reopen penalty phase qualification in general voir dire. However, the cited exchanges occurred in general voir dire. The Court's intent was to make individual voir dire a meaningful opportunity for the attorneys to probe the jurors' exposure to publicity and their views concerning the death penalty. (It also permitted a somewhat private discussion of personal and other hardship issues.) The Court could not control each juror's state of mind and could not prevent jurors from asking to renew the death penalty discussion.

The trial court retains great latitude in conducting voir dire. *Sallahdin v. Gibson*, 275 F.3d 1211 (10th Cir. 2002); *Mu'Min v. Virginia*, 500 U.S. 415 (1991); *Moore v. Gibson*, 195 F.3d 1152 (10th Cir. 1999). The Court concludes that Defendant was not constitutionally prejudiced by these developments.

Juror Frank Guillermo

Frank Guillermo's individual voir dire occurred on January 24, 1996. Mr. Guillermo had suffered a juvenile adjudication and had been sentenced to a boot camp program.

In his questionnaire, Mr. Guillermo stated, " God gave life not death. It isn't another human being's choice to put to death on another human being." During the Court's voir dire, he also indicated that he would automatically vote for a life sentence and would not vote for a death sentence under any circumstances. Similarly, during the defense voir dire, he stated that he could put aside his standards but "I don't see myself

voting for anyone for a death penalty or death sentence I should say." During the prosecution's voir dire, Mr. Guillermo was asked, "No matter what we present to you in aggravation, you're always going to vote for life imprisonment because of your views, isn't that true?" He responded, "To be honest with you, yes."

In his memorandum, Mr. Dunlap argues that the Court's excusal of Mr. Guillermo was erroneous. In addressing the last quote, *supra*, Defendant contends,

> Either his answer was perfectly consistent with Colorado law, making his excusal an obvious violation of Mr. Dunlap's right to trial by impartial jury and rights under the due process and cruel and unusual punishment clauses, or the scenario was another example of the state's successful use of misstatements of the law to manipulate and deceive prospective jurors.

Memo: 89-90.

The People challenged Mr. Guillermo based on *Wainwright v. Witt*. The defense objected. The Court excused Mr. Guillermo because he was not qualified under either Colorado precedent or *Wainwright v. Witt*. There was no manipulation or deception.

Juror Jeffrey Klingensmith

The defense refers to the examination of Jeffrey Klingensmith (January 22, 1996) with respect to the "state's effective use of the 'unlimited discretion/no rules' tactic and of the meaningless 'substantially impaired' inquiry routinely employed by the state and the court." *Memo*: 90.

The Court has reviewed the voir dire. There were no inappropriate "tactics" utilized by the prosecution. The Court asked open-ended questions. At the conclusion of Mr. Klingensmith's voir dire, the Court took some time to consider the totality of the examination and overruled the People's challenge (that was based on *Wainwright v. Witt*). The record, although "cold" and in print, represents the careful approach that the Court attempted to use throughout the voir dire.

Since the State ultimately used a peremptory challenge to excuse Mr. Klingensmith, the defense obviously cannot object to the result.

Juror Sharon Nelson

The defense objects to the Court's granting of the State's challenge for cause with respect to Sharon Nelson (January 25, 1996). She had no familiarity with the circumstances of the Chuck E Cheese murders.

In her questionnaire, Ms. Nelson stated that she did not agree with the death penalty and "that God is the only person who should decide the death of an individual." When the Court asked her if there were any circumstances she could envision under which she would vote for a death sentence, she responded, "No." Later, in response to defense counsel, she stated, "I can't make a decision on the death penalty."

Post-conviction counsel objects to the statement, "[T]he law never requires you to impose a sentence of death. It leaves it totally up to you." Counsel states "this either was a gross misstatement of the law or proof that there was no basis for excusing the juror." Defendant makes a similar argument with respect to other jurors, including Kathryn Thompson (January 25, 1996). He also contends, "The same analysis applies to, *e.g.*, prospective jurors Clark, Cousar, Hamilton, Andres, Lizarraga, Hanover, Nickerson, Dameron." (Volume and page citations omitted) *Memo*: 94.

The defense contends that, when the prosecutor informed the prospective jurors "The law never requires you to impose a sentence of death. It leaves it totally up to you," the jurors were told that they had "unlimited personal discretion."

> Neither the court nor the state attempted to correct what was, under the "unlimited discretion" standard so often used to excuse scrupled prospective jurors, [the] prospective juror's plainly erroneous understanding of "the law" . . . The prospective juror was not told what the law requires, so that she (or he) could not tell the court whether she (or he) could obey her oath to follow that law.

Memo: 94-95.

The Court rejects this argument. First, each juror had been advised at the orientation session about Colorado's four-step process. Second, each juror had received the hand-out concerning Colorado's four-step process. The Court inquired of each juror as to whether he or she had read it. If a juror expressed uncertainty, the Court reviewed the process with him or her. Third, each party had an opportunity to inquire about the

juror's understanding of the process. Each party could determine whether or not the juror would fairly and impartially apply the law and follow the juror's oath.

Additionally, Penalty Phase Instruction No. 24 contains the following language: "Each of you must make your own individual assessment as to whether Nathan Dunlap should be sentenced to death or life imprisonment without the possibility of parole. This entails a profoundly moral evaluation of the defendant's background, character, and crime."[52]

The concept of informing jurors of the role of their individual judgment is supported by the case law. "In order to support the imposition of the death penalty, each juror must be convinced that the mitigating factors, if any, do not weigh more heavily in the balance than the proven statutory aggravating factors." *People v. Tenneson*, *788* P.2d 786, 792 (Colo. 1990). Although this citation relates directly to the third step in Colorado's capital sentencing process, it demonstrates that the disputed questions asked to prospective jurors did not violate any of Mr. Dunlap's rights.

Defendant also contends that there were instances of prosecutorial misconduct during the general voir dire. To the extent that he raised this issue on direct appeal, he has no right to a successive appeal through this proceeding. *People v. Dunlap*, 975 P.2d 723, 757 (Colo. 1999). A defendant "cannot use a proceeding under Rule 35 to re-litigate matters fully and finally resolved in an earlier appeal." *People v. Rodriguez* 914 P.2d 230, 249 (Colo. 1996).

Defendant's citation of *Perdue v. Commonwealth*, *supra*, is inapposite. In *Perdue*, a prosecutor asked questions about a murder for hire scheme. The questions were not based on evidence and "served no purpose other than to unfairly prejudice" the defendant. 916 S.W.2d 148, 163 (Ky. 1995).

The prosecutor's statements about immunized testimony were not erroneous. There were no personal opinions about Defendant's guilt. The prosecutor's case in chief

[52] Although Defendant sets forth several objections to Penalty Phase Instruction No. 24, he does not object to these two sentences.

included several witnesses who accepted plea agreements for lesser sentences in return for their testimony. The dual purposes of voir dire are to enable a court in selecting an impartial jury and to assist counsel in exercising peremptory challenges. *People v. Greenwell*, 830 P.2d 1126 (Colo. App. 1992).

The general voir dire about which Defendant objects (*M*: 100; *Memo*: 99-103) occurred in the context of the type of evidence that jurors would expect in a first-degree murder trial. There had been discussion of circumstantial evidence. During a general discussion of immunity, the prosecutor asked why a district attorney might offer one person a disposition to a lesser offense. "That way it is not just the District Attorney's office making that very important and very thought-out difficult decision, but in the end the Judge decides who is the lesser person and what they get as well as the District Attorney making that decision." Following this statement, the prosecutor discussed the credibility of witnesses and the importance of a juror's ability to consider credibility issues.

Counsel may educate a juror about the trial process. *People v. Lefebre*, 5 P.3d 295 (Colo. 2000). Counsel also may discuss credibility issues to determine whether a prospective juror is able and willing to assess the believability of various witnesses. If a prosecutor were to ask questions that attempt to have the jury give greater credence to certain testimony, those questions would be improper. *People v. Shipman*, 747 P.2d 1 (Colo. App. 1987). The discussion by the prosecutor, as cited by post-conviction counsel, does not run afoul of the aforementioned principles.

Post-conviction counsel also argues that the prosecution committed misconduct when *Wainwright v. Witt* issues were addressed in general voir dire. The Court had entered an order that all such matters were to be discussed during the individual voir dire and they were not to be re-opened during general voir dire. The Supreme Court addressed this issue in the direct appeal in the context of the law of the case doctrine. *People v. Dunlap*, 975 P.2d 723, 758 (Colo. 1999). The Supreme Court also noted that, "The prosecution did not raise the issue in an intentional effort to disregard the agreed-upon procedure of discussing such matters in camera. *Id.* The Court therefore concludes

that this issue has been fully decided by the Supreme Court. Defendant is not authorized to re-litigate this issue in this Crim. P. 35(c) proceeding.

Defendant's Contentions of Ineffective Assistance of Counsel during Jury Selection

Throughout his papers, Mr. Dunlap asserts that trial counsel was constitutionally ineffective during both the individual and general voir dire. He makes this argument throughout his discussion of the numerous jurors whom he claims either should not have been permitted to survive the voir dire process because they would automatically vote for the death penalty, or were "mitigation impaired" or were "burden shifters" or as to those who were allegedly improperly excused because they were "death scrupled" but who satisfied the requirements of *Wainwright v. Witt*.

During its review of the voir dire of the various venirepersons, the Court has noted post-conviction counsel's and the defense experts' position that a competent death penalty trial attorney should not consider or rely on the affect or manner of the prospective jurors. Both Messrs. Wymore and Blume were emphatic in this regard. The Court also has noted that the case law specifically requires a trial court to carefully consider the jurors' demeanor. *People v. Harlan*, 8 P.3d 448 (Colo. 2000). Nothing in Defendant's papers or the testimony can change this requirement.

On pages 264-266 of his motion, Defendant alleges that trial counsel were ineffective with respect to other prospective jurors. The first of those persons, **Julie McClellan,** met with the Court, counsel and Mr. Dunlap on January 17, 1996. She had expressed concerns about her ability to find child care coverage for a lengthy trial. However, she also stated that she strongly opposed the death penalty.

Mr. Lewis asked several questions in an attempt to rehabilitate her. He tried to obtain her commitment to be fair to both the State and Mr. Dunlap. Her responses clearly demonstrated that she was substantially impaired with respect to capital punishment. Mr. Lewis' performance fit well within the standard of competent counsel defending a client facing the death penalty. There was no breach of *Strickland v. Washington*'s performance prong.

The Court has discussed the jurors' statements at length *supra*. Those findings will not be repeated and are incorporated at this time.

In the defense's reply brief, post-conviction counsel states, "The state's heavy reliance on the 'lengthy questionnaires' is manifestly improper. There are no such questionnaires." *Reply*: 53. Although the questionnaires obviously existed at one time, their destruction required the Court to find that they do not exist. The Court's findings in this order should not be construed as a deviation from the Court's in-court ruling. The defense correctly asserts that the questionnaires should have been preserved. Information contained in the questionnaires that is not available from any other source cannot be considered.

As previously noted, during its individual voir dire, the Court referred to the questionnaires with a significant number of jurors. Attorneys for both Mr. Dunlap and the People also made such references. Defendant's demand that the Court not consider any reference to the questionnaires is without merit. The Court rejects it consistent with the limitations set forth herein.[53]

Further, the case law does not support Defendant's contentions. In *State v. Widdison*, 28 P.3d 1278 (Utah 2001), the trial court gave counsel unfettered opportunities to discuss the jurors' views and possible biases during voir dire. The Utah Supreme Court found that it had an adequate record with which to review issues concerning jury selection.[54] Similarly, the California Supreme Court made a similar ruling in a capital case. *See People v. Ayala*, 6 P.3d 193 (Cal. 2000)[55]; *People v. Heard*, 75 P.3d 53 (Cal. 2003)

In *People v. Blankenship*, 30 P.3d 698 (Colo. App. 2000), the Court of Appeals utilized a harmless error standard when reviewing the destruction of juror questionnaires.

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[53] This ruling does not take into consideration the Supreme Court's holding in *People v. Rodriguez*, 914 P.2d 230, 259-260 (Colo. 1996). In *Rodriguez*, the Supreme Court held that a defendant who makes claims that involve questionnaires has the duty, as a part of designating the record, to assure that an appellate court receives all portions of the record. To the extent that this ruling remains valid, and the Court concludes that it does, Defendant's assertion has no force. However, the statute in effect at the time of the *Rodriguez* appeal did not require the Court to preserve questionnaires. In 1989, the General Assembly amended the statute to require the preservation of juror questionnaires. Section 13-71-115(2) CRS. As discussed elsewhere in this order, Defendant has not demonstrated prejudice because of the destruction of the questionnaires.

[54] In *Widdison*, the trial court actually ordered the destruction of the questionnaires.

This Court presided during the trial and has reviewed the transcripts of the voir dire. The Court concludes that the erroneous destruction of the questionnaires has not impaired Defendant's opportunity to obtain a fair review of the jury selection in this case.

Obviously, that destruction did not affect trial counsel's ability to conduct voir dire. Messrs. Wymore's and Blume's testimony demonstrates that this Court's ability to rule surely is not hampered by this error.

At the hearing, Mr. Lewis testified that the trial defense team had put together data regarding prospective jurors. The team had driven by the houses of several of them. It obtained "statistical information" about the jurors. Mr. Lewis stated that the questionnaires were important because they might permit some jurors to be more open, more up front in writing. They gave the defense team a profile concerning the jurors. The team was looking for such things as sloppy writing, possible compulsivity (by the use of block letters) and whether a person was in a hurry. (Did the person skip over some questions?) With respect to the defense team's review of the questionnaires, Mr. Lewis said, "Everything had two sides." The team hoped to find jurors whose children had been in trouble. Those people could be sympathetic to Mr. Dunlap. At the same time, those jurors could relate to Carol Dunlap (who Mr. Lewis would portray badly). They hoped to find people who had an understanding interest in juvenile violence. There could be a "strange, disruptive juror" who would be an obstacle to a unanimous penalty phase verdict.

Mr. Lewis recognized that the defense would have to address issues created by *Wainwright v. Witt*. They hoped to find individuals who "communicated well subliminally." These jurors would be *Witt* qualified but might not be highly disposed to the death penalty. Other people of interest would be independent thinkers who do not necessarily bow to governmental authority.

The defense team had a scoring system, with a one to ten scale, for the venire. Mr. Armistead was present throughout the individual voir dire. Although the team wanted to eliminate all jurors who would automatically vote for the death penalty, the team decided not to exercise all possible challenges for cause (that would be based solely

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[55] As in this case, some form of the questionnaires of the empanelled jurors was available. However, this Court has found that all of the questionnaires were destroyed.

on each juror's responses to questions by the Court or either attorney). The team observed each juror's reaction to the Court, the defense team, the prosecutors, and to Mr. Dunlap.

The defense team was not concerned about the "personalization" about which post-conviction counsel has objected. They were interested in the juror's visible response to questions such as, "Could you come back into the courtroom, look the defendant in the eye and return a death sentence?" Would the juror look at Mr. Dunlap, or at the table, or at the Court?

Mr. Lewis disagreed with Messrs. Wymore's and Blume's view that demeanor was either misleading or inconsequential. He tried to "read" each prospective juror. Although he occasionally may have "misread" certain persons, he felt that this was an important part of his job as lead counsel.

The defense team's goal was to find the best jury possible to save Mr. Dunlap's life. Some of their efforts might have compromised an appeal. Although this "sacrifice" was not common practice, the team wanted to do what it could to win the case (by obtaining a life sentence) in Colorado Springs. "I want a jury – I want to win today."

The defense did accept some jurors to whom they had objected during individual voir dire because the team re-evaluated all prospective jurors after the general voir dire.[56]

Mr. Lewis was not concerned about exhausting all of the team's peremptory challenges or appellate issues. He did not believe that challenges for cause that were denied would be the basis for a successful appeal. He did not choose to use the tenth alternate seat for the challenges that would preserve this issue for direct appeal. By accepting the jury as constituted, he believed he controlled the jury selection process. He could then use the defense's peremptory challenges against jurors who would enter the jury box as a result of the People's challenges.[57]

The Court concludes that Mr. Lewis had a sound strategic reason for his approach to voir dire. Post-conviction counsel has argued that there was a lack of vigorous

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[56] The Court permitted the parties to use a full day for general voir dire. After an evening when they could review all of the information obtained in both individual and general voir dire, the Court proceeded with all peremptory challenges, using the "strike method" on the following day.

examination of a number of jurors. This contention is based, in large part, on Messrs. Blume's and Wymore's opinions that a person's demeanor and affect should be given short shrift in favor of seeking every possible nuance that will make a person appear, on paper, to be one who would automatically vote for the death penalty, or who was a "burden shifter" or who was mitigation impaired. The case law, as cited *supra*, supports Mr. Lewis' opinion rather than those of the (post-conviction) defense experts. In fact, Mr. Lewis' decision about accepting the jury as constituted early in jury selection did serve to put the prosecution on the defensive.

There is a split of opinion about the "in-line" jurors. The trial defense team, which was present and, along with the Court and the prosecutors, able to observe the demeanor and manner of all prospective jurors, felt that the "in-line" jurors would not help the defense reach its goal of a life sentence. The fact that the selected jurors returned a death sentence does not mean that the trial team's strategy was fallacious.

The Court has received four opinions that the failure to exhaust all peremptory challenges failed to satisfy the *Strickland v. Washington* performance prong. Apparently, Messrs. Wymore, Blume, Root, and Gayle believe that there was an available strategy to utilize the tenth alternate seat as the place to accomplish this task, thereby preserving the issue of the Court's rulings on challenges for cause for direct appeal.

The Court has considered this issue carefully. In this post-conviction proceeding, the prosecution has chosen to present only one expert witness, Mr. Lewis, who was solely responsible for this decision. During his testimony, Mr. Gayle stated that his opinion, "which was not given lightly," was to the contrary.

The Court notes that the defense now has this opportunity to ask the Colorado Supreme Court to review the issue of jury selection. At the same time, the Court cannot know how this sequence of events will play out if this case ever reaches federal habeas corpus.

The Court concludes that Mr. Lewis had a valid reason for his approach to jury selection. Although the better practice generally requires the exhaustion of all

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[57] Mr. Lewis testified that he was aware of all legal principles to which Messrs. Gayle, Wymore, and Blume referred. Those rubrics did not "drive (his) decisions."

peremptory challenges, the Court cannot find that this decision fell beneath the standard of care for capital litigation counsel in this particular case. Under the circumstances of this case, including the specific facts (four assassinations of total innocents; the attempt to murder a fifth person; Defendant's total lack of remorse; the substantial strength of the prosecution's guilt/innocence phase case; Defendant's pattern of ever-increasing violence in his various robberies, both as a juvenile and as an adult), and in light of the strong presumption of competent assistance that must be accorded to trial counsel, this decision did not fall below an objective standard of reasonableness.

Under the totality of the circumstances, Mr. Lewis' performance did not fall outside the range of professionally competent counsel. "Generally, '[a]n attorney's actions during voir dire are considered to be matters of trial strategy,' which 'cannot be the basis' of an ineffective assistance claim 'unless counsel's decision is . . . so ill chosen that it permeates the entire trial with obvious unfairness.'" *Neill v. Gibson*, 278 F.3d 1044, 1055 (10th Cir. 2001) (citing *Nguyen v. Reynolds,* 131 F.3d 1340, 1349 (10th Cir. 1997).

Other courts have held that the failure to exhaust peremptory challenges does not violate *Strickland v. Washington*'s performance prong. *See Booth-El v. Nuth*, 140 F. Supp.2d 495 (D. Md. 2001), *aff'd in part, rev'd in part on other grounds*, 288 F.3d 571 (4th Cir. 2001); *Stevens v. State*, 770 N.E. 2d 739 (Ind. 2002).

Even if the Court were to find that Defendant had established *Strickland v. Washington*'s performance prong, it cannot conclude that the prejudice prong has been satisfied. As previously noted, Defendant would now have the opportunity to challenge the entire jury selection process. However, Defendant has not shown that there is a reasonable probability that, but for this decision, the jury's sentence would have been different. To establish the prejudice prong, Defendant "must show '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.'" *Id*. (citing *Strickland v. Washington*).

Defendant makes additional assertions of ineffective assistance of counsel in the voir dire process. In some instances, Mr. Dunlap states or implies that trial counsel

should have made a greater effort to rehabilitate those jurors who were subject to *Wainwright v. Witt* challenges by the State because of their opposition to capital punishment. The case law does not support Defendant.

In *Crawford v. State*, 867 So. 2d 196 (Miss. 2003), the Mississippi Supreme Court held,

> it is not ineffective assistance for counsel to fail to attempt rehabilitation of jurors when those jurors make it unmistakably clear that they could either not vote for the death penalty or that their attitude towards the death penalty would prevent them from making an impartial decision as to defendant's guilt.

(citing *Smith v. Black,* 904 F.2d 950, 978-79 (5th Cir. 1990)).

As previously noted, Messrs. Wymore and Blume testified that defense counsel were not sufficiently aggressive in their voir dire. The Court already has addressed the need to consider a person's affect and emotional response and not just the words the person has spoken. *See Griffin v. State*, 866 So. 2d 1 (Fla. 2003), *rehearing denied*[58] (with respect to the thoroughness of voir dire questioning); *State v. Braden*, 785 N.E. 2d 439 (Ohio 2003).

The Court notes that *Strickland v. Washington* requires Defendant to demonstrate actual prejudice with respect to any ineffective assistance of counsel claim. *See Head v. Carr*, 544 S. E. 2d 409 (Ga. 2001); *Fults v. State*, 548 S.E. 2d 315 (Ga. 2001). The Court will not presume any prejudice because counsel did not engage in the aggressive approach that was proffered as essential by the defense experts.

Defendant's Allegations of Ineffective Assistance of Counsel during the Guilt/Innocence Phase

Terri Harrington, Esq.

Defendant contends that trial counsel was ineffective because he failed to object to the testimony of Terri Harrington. Ms. Harrington, an attorney with 14 years' experience (as of the date of the trial), was the attorney for Mr. Dunlap's girlfriend,

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[58] *Griffin* also illustrates the prevailing view about the types of challenges Defendant asserts in this case. Mr. Dunlap seeks to find nuances in a number of jurors' responses that will lead to an ineffective assistance of counsel finding. The case law does not support his views.

Tracie Lechman. The People called Ms. Harrington during their guilt/innocence phase case in chief.

Ms. Harrington testified about the advice she had given to Ms. Lechman, the charges filed against her client and the concept of transferring a case from juvenile to adult court. Ms. Lechman's case was transferred.

As Ms. Lechman's case progressed, Ms. Harrington entered into plea discussions with the District Attorney. Ms. Harrington explained the negotiations, the charge to which Ms. Lechman pled guilty, the possible consequences for that plea and the terms of the plea agreement. At the time of the trial, Ms. Lechman had not been sentenced.

Defendant argues that her testimony violated CRE 608 and 404. However, when the testimony strayed into these areas, Mr. Gayle objected. The objection was sustained and the jury was instructed to disregard the testimony. *Tr*. 2/8/96: 1044.
He also contends that Ms. Harrington's testimony about her advice to her client, the case filings, her desires concerning Ms. Lechman's litigation and urging her client to tell the truth were irrelevant, hearsay and inappropriate opinion testimony and served only to bolster Ms. Lechman.

The People cite *People v. Racheli*, 878 P.2d 46 (Colo. App. 1994). This case is relevant with respect to Ms. Lechman's testimony. It is not helpful with respect to that of Ms. Harrington. However, Defendant's cases are inapposite. Specifically, the seminal case of *People v. Koon*, 713 P.2d 310 (Colo. App. 1985) and its progeny stand for the proposition that a witness may not opine as to the truthfulness of another witness' specific statements. As previously noted, the Court sustained Mr. Gayle's objection on just this point.

Although she was not admitted as an expert (and therefore did not receive the gloss that other witnesses, admitted as experts, arguably could have received in the jury's eyes), Ms. Harrington's testimony was limited to the historical facts of what occurred leading up to Ms. Lechman's testimony.

The Court has not been able to locate any specific law on this subject. This evidence was offered in the guilt/innocence phase, and was not related to any statutory aggravating factor or any rebuttal of a mitigator. Even if the failure to object was beneath

professional standards, the Court cannot conclude that there is a reasonable probability that, but for this error, the result of the guilt phase would have been any different. As the Supreme Court has found (and as this Court has continually observed), the guilt/innocence evidence against Mr. Dunlap was overwhelming.

Post-conviction counsel also argues that "it was not a viable tactic to allow any and all evidence, no matter how prejudicial or aggravating, to be admitted because of a judgment that the evidence of guilt was overwhelming." *Memo*: 224. Although counsel may have strong feelings in this regard, the Court must not attempt to second-guess counsel eight years after the trial. Defendant's contention is without merit.

Failure to Impeach Timothy Litwinsky

Defendant asserts that trial counsel was ineffective because he did not impeach witness Timothy Litwinsky. This allegation is completely without merit.

The motion contends that there was "available evidence that, in fact, Mr. Litwinsky was himself 'running off at the mouth' calling Mr. (Clinton) Baskall a snitch. This evidence would have negated the supposed beneficent motivation on Mr. Litwinsky's part, leaving only his desire to benefit himself." *M*: 213. [59]

In fact, Mr. Gayle's cross-examination demonstrated that Mr. Litwinsky had a fundamental motivation to protect himself. Counsel noted that Mr. Litwinsky was aware of a pending prison sentence for his convictions of first degree burglary and aggravated robbery and that he sought out Deputy Rainey and District Attorney's Investigator Bryan Bevis for that purpose. Mr. Litwinsky was seeking incarceration in New England because he was from Boston, Massachusetts. Counsel also impeached Mr. Litwinsky when he noted that the witness had no friends in Colorado and that his girlfriend was the victim of his crimes.

Mr. Gayle's performance was anything but deficient in his cross-examination of Mr. Litwinsky.

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[59] During his testimony, Mr. Litwinsky stated that he was providing information to Deputy Rainey because Mr. Baskall was a friend and that Mr. Litwinsky wanted to help him. He also testified about his fear that both he and Mr. Baskall would be harmed because of their testimony against Defendant. Both Messrs. Litwinsky and Baskall were convicted felons and were sentenced to prison terms.

"Racist Comments" by Will Mickelson

Post-conviction counsel also allege that trial counsel was ineffective for failing to disclose that Will Mickelson, the manager of the Chuck E Cheese restaurant, had made racist statements at the time Mr. Mickelson terminated Defendant from his job. The State accurately notes that this type of evidence would have been of no assistance to Mr. Dunlap.

The Court cannot conceive of a good reason to utilize such evidence. As the State notes, the evidence would have supplied another motive for Defendant to have committed the murders. Although there has been evidence about this incident presented at this hearing, the People have acknowledged its existence. *RBII*: 157-158. Therefore, the Court presumes that it exists.

The Court has not found specific law on this point. However, the Indiana Supreme Court entered an analogous finding in *Ben-Yisrayl v. State*, 729 N.E. 2d 102 (Ind. 2000). In any event, counsel's decision was reasonable, and subject to the deferential requirements of *Strickland v. Washington*.

Off the Record Conversations

Mr. Dunlap alleges ineffective assistance of counsel and improper conduct by the Court with respect to certain off the record conversations in August, 1995. He also objects to other off the record conferences when counsel for the People and for the defense were present. He also objects to certain proceedings when he, himself, was not present.

Defendant's 300 page motion, 273 page memorandum and 103 page reply are devoid of any authority to support these contentions. Post-conviction counsel speculate that the subsequent records are not complete. Counsel also suggest, without any evidence, that the prosecution threatened the Court or engaged in other, unspecified unethical activity.

The case law that the Court has been able to locate does not support Defendant's contentions. *See People v. Wolfe*, 9 P.3d 1137 (Colo. App. 1999); *People v. Rodriguez*, 914 P.2d 230, 300-302; *U.S. v. Ellzey*, 874 F.2d 324 (10th Cir. 1989); *State v. Mecier*, 488

A.2d 737 (Vt. 1984); *U.S. v. Haber*, 251 F.3d 881 (10th Cir. 2001); *State v. Brown*, 552 S.E. 2d 390 (W. Va. 2001).

Generally, the rubric of these and other cases is that Defendant must present evidence to demonstrate actual prejudice. Speculation, conjecture or surmise is not a sufficient basis to find reversible error. Here, Defendant has not presented any evidence in support of his contention.

At the hearing, Mr. Lewis testified, "I don't think we had any off-the-record discussions of a substantive nature." *Tr.* 12/19/03: 87. He also stated that no matter was not made of record when it should have been recorded. *Tr.* 12/19/03: 88.

The Court finds that neither error nor the performance prong of *Strickland v. Washington* has been proven. Defendant's contentions with respect to this aspect of the record are without merit.

Opening Statement: Guilt/Innocence Phase

Mr. Dunlap asserts that trial counsel's opening statement at the guilt/innocence phase was constitutionally ineffective. His primary theme is that counsel did not honor the promises he made to the jury, thereby causing a loss of credibility.

Indeed, Mr. Gayle did state that Charles Gonzalez would testify and that there would be ballistic evidence. Counsel then provided what turned out to be foreshadowing of penalty phase evidence by telling the jury about "what the circumstances were and a little bit about him and his background." *Tr.* 2/5/96: 87.

When the Court considers claims of ineffective assistance of counsel with respect to an opening statement, the following factors must be considered: "(1) the nature and extent of the promises made in opening statement, (2) any strategic justifications for the subsequent decision not to produce the evidence, (3) the explanation provided the jury for the failure to produce the evidence, (4) the presentation of other evidence supporting the promised theory, and generally, (5) the impact upon the defense at trial and upon the jury. *Dobson v. United* States, 815 A.2d 748, 756 (D.C. 2003); *Edwards v. United States*, 767 A. 2d 241 (D.C. 2001). Of course, the claim also must be measured against the *Strickland v. Washington* standards.

The Supreme Court has found that the evidence of Defendant's guilt was "overwhelming." *People v. Dunlap*, 975 P.2d 723, 765 (Colo. 1999). Therefore, when the Court entertains this argument, it must find that the complained-of error was so substantial as to have a substantial effect on the outcome of the trial.

When Mr. Gayle testified during this post-conviction proceeding, neither side examined him about his strategy with respect to his opening statement. The Court has no direct evidence to decide this issue. As with all of his claims, Defendant has the burden of proof.

In *Edwards*, trial counsel promised to present evidence about the mental condition of his wife (which counsel referred to as a schizoaffective disorder and as "paranoid . . . suffering from delusions and she was aggressive." *Edwards v. United States*, 767 A.2d 241, 249, fn. 8.).

At a post-conviction hearing, trial counsel acknowledged that he did not have an expert who was ready to testify to these claims. Counsel also was aware that he could not present such evidence unless Ms. Edwards waived her doctor-patient privilege.

Under the second *Strickland v. Washington* prong, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment in a criminal proceeding if the error had no effect on the judgment." *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066 (1984).

Post-conviction counsel assert that trial counsel should either have produced evidence of an alternate suspect or not have mentioned it at all. The Court agrees that an attorney's credibility is essential in any jury trial, and is even more important in capital litigation. As noted, the opening statement went beyond references to Charles Gonzalez and events that occurred outside of Chuck E Cheese. Mr. Gayle recognized the substantial impact of Defendant's numerous confessions and began to lay the groundwork for the jury's consideration of Defendant's background.

In this case, the Court cannot find that any reference to an alternate suspect "destroyed" counsel's credibility. Each juror had met with counsel and Defendant during individual voir dire. The jurors who survived that process were part of the general voir dire that lasted for a full day. Defense counsel comported themselves in a dignified and professional manner. As noted elsewhere in this order, this trial took place in the shadow

of the O. J. Simpson trial. Counsel made suitable and appropriate efforts to distance themselves from the tactics that had been the focus of intense media coverage in 1995.[60]

Post-conviction counsel refers to the references to Defendant's background in both the guilt/innocence and penalty phase opening statements as "cry[ing] wolf." *M*: 130. Even if the Court were to assume that trial counsel's statements failed to meet the requisite professional standards for capital litigation defense attorneys in 1996[61], the prejudice prong is not satisfied. When the Court considers the totality of the evidence and the strategy that Defendant essentially forced upon his attorneys by his actions during and after the crime and during his confinement, it cannot conclude that counsel committed error.

Testimony of Detective Phyllis Jacqueline Gallo

Deputy Sheriff Jackie Gallo testified on February 20, 1996. Deputy Gallo worked in the Arapahoe County Jail's Special Intervention Unit during Defendant's early days there.

She testified that, on February 14, 1995, a Mr. Johnson told her, "I think you'd better . . . keep an eye on Mr. Dunlap." *Tr*. 2/20/96: 3116. Deputy Gallo noticed that Defendant appeared to be "pretty hyperactive . . . . He was running around, just not touching base in one are for very long." *Tr*. 2/20/96: 3116-3117.

Mr. Johnson[62] informed her that Defendant "had confessed his sins in his room." *Id*. Deputy Gallo then made contact with Defendant. She told him that she had noticed a change in his behavior. Defendant then said, "I did it. I did the Chuck E Cheese murders." Defendant then "grinned and stood up and laughed out loud." *Tr*. 2/20/96: 3120.

Defendant continued to "bounce around" and was "getting more antsy." *Id*. Deputy Gallo "thought maybe he was trying to set me up" to be taken to the mental

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[60] The Court takes judicial notice of the fact that Mr. Simpson was acquitted of First Degree Murder in his criminal trial. Since this Court presided in this case starting in January, 1995, it is aware of the basis for the concerns that trial counsel expressed with respect to the Simpson case. The Court finds that counsel's approach in the trial necessarily was influenced by the external, but very real impact of one of the most celebrated criminal cases in the United States during the relevant time frames.

[61] The Court does not reach such a conclusion under *Strickland v. Washington*'s performance prong.

[62] The transcript refers to a "Mr. Jackson." The context suggests that Deputy Gallo actually was referring to Mr. Johnson.

health or behavioral control area in the medical unit. Then she thought that he was going through a religious experience.

Later, Deputy Gallo escorted Defendant to a booking cell. Defendant asked for his Bible and to hug Deputy Gallo. She informed him that "We can only give mental hugs." *Tr.* 2/20/96: 3122.

Defendant limits his objection to the discussion of "setting up" and its implication with respect to malingering. Since Defendant did not present the mental health defense, malingering was not an issue at trial. Thus, Defendant's concern about a foundation for Deputy Gallo's testimony is not well taken.

Defendant's Memorandum citations are inapposite. For example, *Johnson v. State*, 495 N.W. 2d 528 (Iowa App. 1992) held that trial counsel was ineffective for failing to object to the type of opinion testimony that was barred in Colorado in *People v. Koon*, 724 P.2d 1367 (Colo. App. 1986). *State v. Allen*, 853 P.2d 625 (Idaho App. 1993) stands for the same proposition.

When viewed in the entire context of Deputy Gallo's testimony, the claimed need for an objection is without merit.

Issues Concerning Miguel Kirkpatrick

Defendant contends that Mr. Lewis' prior representation of Miguel Kirkpatrick created a conflict that could not be waived. He also asserts that trial counsel did not adequately advise Jeffrey Pagliuca, independent counsel appointed pursuant to *Rodriguez v. District Court*, 719 P.2d 699 (Colo. 1986), about the Court's concerns about any additional delay in the trial, set for January, 1996.

Additionally, Mr. Lewis visited Mr. Kirkpatrick in the Boulder County Jail. At that time, Mr. Kirkpatrick gave Mr. Lewis a letter from Mr. Dunlap. Mr. Lewis gave the letter to Mr. Kirkpatrick's successor counsel, Craig Truman. Mr. Truman, in turn, gave the letter to the District Attorney's office.

The ICON record reveals the following information. In Case No. 94CR1883, which contains charges of Second Degree Kidnapping, Aggravated Robbery, First Degree Burglary, Conspiracy to commit the aforementioned crimes, Theft, Menacing and Mandatory Sentencing counts, Mr. Lewis represented Mr. Kirkpatrick during the case's

early stages. On November 29, 1994, Mr. Lewis was granted leave to withdraw. Judge Bieda appointed Mr. Truman to represent Mr. Kirkpatrick on December 9, 1994.[63]

In Case No. 95CR1059, Mr. Kirkpatrick faced multiple counts of Second Degree Kidnapping, Aggravated Robbery, and Mandatory Sentencing. As of June 13, 1995, Mr. Truman represented Mr. Kirkpatrick. Similar charges were filed in Case No. 95CR1071. Mr. Truman appeared with Mr. Kirkpatrick, after bindover, on June 13, 1995. Case No. 95CR1073 was in the same posture on June 13, 1995. Defendant faced similar charges in Case No. 95CR1081. Mr. Truman made his first appearance with Mr. Kirkpatrick on the same date.

Ultimately, Mr. Kirkpatrick and the People entered into a plea agreement. Defendant entered guilty pleas in Cases No. 95CR1081 and 94CR1883. The other cases were dismissed. The Court sentenced Mr. Kirkpatrick to a total of 55 years in Case No. 94CR1883 and 55 years in Case No. 95CR1081. The two terms ran concurrently with each other.[64]

The People raised the issue of a potential conflict and requested that the Court appoint *Rodriguez* counsel by motion on December 19, 1995. The Court appointed Mr. Pagliuca on December 19, 1995. On January 10, 1996, Mr. Pagliuca reported that there was no actual conflict, that the Colorado Rules of Professional Conduct had eliminated the concept of an appearance of impropriety and that Defendant had executed a written waiver of any potential conflict.

The transcript of the January 10, 1996 hearing reveals that the Court and Mr. Dunlap engaged in a lengthy and thorough discussion about the conflict issues and Mr. Dunlap's stated desire to waive any conflict. At one point, he said, "I don't have no problem with them representing me because they represented somebody else. Now, if I go to trial and everything and they start doing some outlandish stuff, you know what I'm saying, then I'm going to have some problems with that." *Tr.* 1/10/96: 18. The Court then told Mr. Dunlap, "The law says that if you waive this right to assert this kind of issue

[63] The People's response brief indicates that Mr. Lewis represented Mr. Kirkpatrick from August 29 through November 29, 1994. ICON does not contain county court minutes. The parties did not dispute this at trial. Therefore, the Court concludes that these dates are accurate.

now, there are other things you can raise later on. You can raise other issues." *Tr.* 1/10/96: 19. Mr. Dunlap then stated, "I waive all of our *Rodriguez* issues. That's the term you all use all the time. I waive that. I have no argument with these issues." *Id.*

The Court made detailed findings of fact and conclusions of law at *Tr.* 1/10/96: 23-25 and determined that Defendant had fully and freely waived any *Rodriguez* issues.

Defendant now contends that Mr. Pagliuca was not advised of the Court's comments on August 1, 1995. Mr. Peters informed the Court about the possible conflict. The Court stated,

> if it's a question of whether this litigation can proceed because to put Mr. Dunlap in the untenable situation of having to choose certain waivers as opposed to keeping his attorneys, that this witness is a problem, maybe I have to address it in that context . . . . So I will not allow a situation to arise in a limited witness area
>
> where somehow one or two witnesses out of a score or hundred or whatever it is will prevent this trial from moving forward in an appropriate time frame. Whatever I have to do, **and it will be as narrow as it can be**, **Mr. Peters, in terms of any ruling, whatever I have to do to stop that from happening I will do.**
> Whatever the remedy has to be, it will be . . . .
> There's a trial set January 16, it's going, and whatever I have to do, that's going to happen. *Tr.* 8/1/95: 8, 14-15. (emphasis added)

Mr. Peters then asked, "Before we move ahead, what's the court saying, is the court saying that we cannot call Mr. Kirkpatrick?" The court asked, "Did you hear what I said?" Mr. Peters: "Apparently not."

> The Court: "I said I would rule as narrowly as I could. I'm not making a finding. **It's possible that that's a ruling if that's the narrowest ruling, but I'm not doing that** . . . . If it's a problem (that Messrs. Lewis and/or Gayle represented) one or two witnesses that is holding this thing up, then I've got to determine what the proper remedy is and if there is a way to insulate these gentlemen on this and still allow Mr. Dunlap to retain these lawyers, I'll certainly do that.
> But if it comes down to the point, Mr. Peters, where I perceive after careful analysis that allowing this to go forward presents a real risk of reversible error, you bet I might have to enter that order after consideration. I'm not doing that at this point." *Tr.* 8/1/95: 15-16 (emphasis added)

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[64] In his testimony, Mr. Lewis stated that he had represented Mr. Kirkpatrick in other jurisdictions. Mr. Lewis represented him in those cases for several months. *Tr.* 1/13/04: 105.

Although Mr. Peters pressed the Court to enter a ruling, the Court repeatedly declined to do so and repeatedly indicated that it would enter an order that was narrowly tailored to address all relevant points of law.

Defendant contends that the Court's statements were in "strong and certain terms . . . that it would likely not allow Mr. Kirkpatrick to testify at all rather than force a change of attorneys at that late date, due to the inherent delays such a result would cause." *M*: 215. He also suggests that the delay in resolving this issue created an even greater prospect that Defendant's waiver was not fully informed and, therefore, not voluntary.[65]

Mr. Pagliuca was the first witness at the Crim. P. 35(c) hearing. He was admitted as an expert in the defense of the criminally accused. He testified about the extensive conversations he had had with Mr. Dunlap.

Since Mr. Kirkpatrick had waived any conflict involving Mr. Lewis, Mr. Pagliuca stated that there was no "actual conflict . . . that would prevent a lawyer from representing someone else effectively." *Tr.* 10/16/02: 17.

After completing his investigation, Mr. Pagliuca determined that there was no other "potential" conflict that would prohibit Mr. Lewis from representing Mr. Dunlap. Thus, Mr. Dunlap's waiver addressed "the potential of a problem." *Tr.* 10/16/02: 19.

Mr. Pagliuca had not been informed of the Court's comments of August 1, 1995. After reviewing the transcript, Mr. Pagliuca believed that, "the court was strongly inclined to not allow this potential conflict to result in new counsel being appointed on the case and was leaning toward excluding the witness to accomplish that." *Tr.* 10/16/02: 22. Neither the prosecution nor trial counsel had informed Mr. Pagliuca of the August 1, 1995 proceedings.

Mr. Pagliuca considered this information "significant." If he had known about it, he would have "more thoroughly discussed Mr. Dunlap's option of refusing to sign any waiver and simply asserting his right to counsel of choice and then I suppose letting the chips fall where they may." *Tr.* 10/16/02: 23. At the same time, he acknowledged that he

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[65] Another potential conflict existed because Mr. Gayle had represented Stacy Gentry, an endorsed prosecution witness. However, Stacy Gentry never testified. Mr. Pagliuca also discussed a potential joint defense agreement between Mr. Dunlap and Tracie Lechman, who was represented by Terri Harrington. However, no joint defense agreement was ever executed.

did not know what was or was not significant to the Court. *Tr.* 10/16/02: 30. He also did not ask trial counsel whether there was any chance that Mr. Kirkpatrick would not testify. He always presumed that Mr. Kirkpatrick would testify.

Mr. Pagliuca testified that, in the absence of an actual conflict, a risk of reversible error still could exist. He acknowledged that perceived and imputed conflicts create lower risks of reversal than do actual conflicts. He stated that he did not find either perceived or imputed conflicts. Mr. Pagliuca also stated that he probably would have discussed the potential of Mr. Kirkpatrick's not being permitted to testify, "because it would flow naturally in this conversation." *Tr.* 10/16/02: 33.

He also talked about some of the factors he reviewed with Mr. Dunlap: the need for competent counsel; the plusses and minuses of a continuance for a length of time ("That could cut either way."); the significance of the witness in the case; how strongly he was bonded to his current lawyers; and the extent of his current lawyers' preparation. Mr. Peters' questions also drew an admission that Mr. Dunlap's penchant for talking about his crimes to other inmates, attempting to escape and threatening other witnesses would militate against a further delay in the trial.[66]

Mr. Pagliuca met with Defendant for several hours (which he described as an "underinclusive" total). Mr. Pagliuca said that Defendant fully participated in the conversations, that he appeared to understand the discussion and that he participated appropriately.

Mr. Pagliuca also expressed concern as to why he was not told about the Court's comments. He opined that this failure implicated *Strickland v. Washington*'s performance prong. Although Defendant would have sacrificed a great deal by asking that the Court find the existence of a conflict, he actually gave up the chance to exploit Mr. Lewis' previous representation of Mr. Kirkpatrick at trial. At the same time, Mr. Lewis had information about Mr. Kirkpatrick that could have inured to Defendant's benefit.

In January, 1996, the Court applied the balancing test set forth in *Rodriguez v. District Court*, 719 P.2d 699 (Colo. 1986). The Court considered Mr. Dunlap's stated

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[66] Of course, critical witnesses for the People could have become unavailable. Evidence could have denigrated or been lost.

preference that Messrs. Lewis and Gayle remain as his attorneys. The Court found that Mr. Kirkpatrick had waived his right to maintain the confidentiality of his communications with Mr. Lewis. The Court concluded that the conflicts were not insurmountable and that the public interest in maintaining the integrity of the judicial process, including fair and balanced proceedings, was not disserved by permitting Mr. Lewis to remain as trial counsel. As in *Rodriguez*, Defendant's preference persuaded that Court that "the balance weigh[ed] heavily in favor of the [Defendant's] preference for continued representation by [trial counsel]." *Rodriguez v. District Court*, 719 P.2d 699, 708 (Colo. 1986).

The propriety of the Court's 1996 decision is not affected by Mr. Pagliuca's testimony. Although Mr. Pagliuca stated that he would have focused more on the possibility that Mr. Kirkpatrick might not have been permitted to testify, his candid testimony that Mr. Lewis' continued presence provided some benefit to Defendant cannot be ignored.

The Court also disagrees with Defendant's assertion that it used "strong and certain terms" that indicated that Mr. Kirkpatrick most likely would not be permitted to testify if the conflict became manifest. This Court strives to avoid injecting itself into litigation. The Court repeatedly said that, if forced to enter a ruling, it would do so on the narrowest basis possible. The record of this case demonstrates that the Court consistently followed this approach. Therefore, Defendant's argument is without merit.[67]

Defendant's final issue, concerning "defense counsel's production of evidence used against Mr. Dunlap, *M*: 298, was elucidated at the hearing. After Mr. Lewis had withdrawn from representing Mr. Kirkpatrick, he visited his former client in the Boulder County Jail. Mr. Kirkpatrick was a significant witness for the People. He had been one of Defendant's cellmates in the Arapahoe County Jail. Defendant had made incriminating statements to Mr. Kirkpatrick. In addition, Defendant and Mr. Kirkpatrick had attempted to escape from the jail. This attempted escape was important because it rebutted the

statutory mitigator that Defendant was not a continuing threat to society (the so-called "future dangerous" mitigator).

Mr. Lewis' testimony also revealed some curious details. At one point, he considered calling Mr. Kirkpatrick as a defense penalty phase witness. Since both Mr. Dunlap and Mr. Kirkpatrick had been "victim[s] of the system", *Tr.* 12/19/03: 35, this "powerful prosecution witness", *Id.* might have been helpful. However, Mr. Lewis rejected this approach because Mr. Kirkpatrick would have presented damaging testimony about Mr. Dunlap's lack of remorse.[68]

During cross-examination, Mr. Cherner asked Mr. Lewis about *People v. Blalock*, 197 Colo. 320, 592 P.2d 406 (1979). He noted that the Supreme Court strongly disapproved of a defense attorney representing a client charged with sexually assaulting a woman with whom that defense attorney had had an intimate relationship. Post-conviction counsel thus suggested that Mr. Lewis' "dual representation" created a conflict that could not be waived.

The Court finds that this argument is without merit. First, the *Blalock* case dealt with an attorney who all but extorted his client to stay on the case. Second, if an attorney has had an intimate relationship with a victim of a crime, that relationship, in and of itself, serves as a disqualifier. Finally, the thoroughly unprofessional manner in which that attorney approached the defense of the case has no relationship whatsoever to the professional approaches taken by Messrs. Lewis and Gayle and the investigative team.

Mr. Kirkpatrick presented additional problems for the defense, problems that were created exclusively by Mr. Dunlap. Defendant had written two letters to Mr. Kirkpatrick. In at least one of them, Mr. Dunlap urged Mr. Kirkpatrick to "change his story." The text of one of the letters, Exhibit PC77-A, Bates No. 20149, includes this language: "You got to tell my investigator, when he comes, and the judge when you appear in court, that you

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[67] On December 19, 2003, Mr. Lewis testified that he interpreted the Court's comments as indicating that Mr. Kirkpatrick probably would be permitted to testify. *Tr.* 12/19/03: 26, 31. Mr. Lewis acknowledged that he did not share the Court's comments of August 1, 1995 with Mr. Pagliuca.

[68] Indeed, Defendant's Exhibit PC-CCCCC demonstrates that the defense team was aware of the real danger Mr. Kirkpatrick presented to Mr. Dunlap. In addition to the lack of remorse, Mr. Dunlap made

lied about what you said so you could get a deal and since you thought I was trying to snitch on you about the alleged escape."

Mr. Lewis recognized the problem created by Mr. Dunlap's request.[69] He was concerned, not only about its impact on Defendant, but upon the entire defense team's credibility. He understood that the jury could consider his former representation of Mr. Kirkpatrick as creating a "conduit" that would give the appearance of the defense team's attempt to improperly obtain information from Mr. Kirkpatrick. If this had occurred, the jury might have concluded that the defense team had crossed a line of propriety, thus creating an untenable inference against Mr. Dunlap. In addition, his serving as a courier would run the risk of being involved in the dissemination of contraband.

Mr. Lewis then was confronted with an ethical dilemma. He was given a letter from Mr. Kirkpatrick to his client. He had to decide what to do with it. He elected to send it to Mr. Truman, Mr. Kirkpatrick's attorney of record. He had no other option because the letter constituted potential evidence.

Post-conviction counsel now allege that Mr. Lewis' transmittal of the letter to Mr. Truman was ineffective assistance of counsel.

Neither party has presented any authority in this regard. In *Commonwealth v. Stenach*, 514 A.2d 114, 119 (Pa. Super. 1986), the court held, "We join the overwhelming majority of states which hold that physical evidence of crime in the possession of a criminal defense attorney is not subject to a privilege but must be delivered to the prosecution."

The Maryland Court of Appeals provides a detailed review of a related matter in *Rubin v. State*, 602 A.2d 677 (Md. 1992). *Rubin* also provides a useful framework for the Court's analysis. *See* 602 A.2d 677, 686-687. Generally, an attorney cannot retain physical evidence related to a crime. And where, as here, the letters were not correspondence between Mr. Dunlap and one of his attorneys, no attorney-client privilege attached.

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threatening statements to Mr. Kirkpatrick. Thus, the defense team decided it had to get Mr. Kirkpatrick "on and off" the witness stand as quickly as possible.

The Court concludes that Mr. Lewis' acted within the mandate of his professional responsibility and cannot constitute ineffective assistance of counsel.

To the extent that other issues must be resolved, the Court cites the following authorities. In *Daniels v. State*, 17 P.3d 75 (Alaska App. 2001), the court reviewed cases from a number of other states and federal circuits. Mr. Daniels' attorney actually accused his former client of the subject homicide. The court found that no confidences were breached (albeit Mr. Daniels' counsel represented his former client approximately 10 years earlier) and that, where the former client did not state an objection, the court did not have to disqualify Mr. Daniels' attorney.

Wisconsin has a privilege statute that is similar to Colorado's. *Wis. Stat.* §905.03. The key issue was the nature of the privileged information and the presence or absence of the former client's waiver. *State v. Meeks*, 666 N.W. 2d 859 (Wis. 2003). If the former client consents, a waiver can be upheld.[70]

U.S. v. Lussier, 71 F.3d 456 (2nd Cir. 1995) recognized that, "When a defense attorney cross-examines a former client who is a witness against the defendant, a conflict of interest may exist; absent a waiver from the former client, the attorney cannot inquire into privileged matters." 71 F.3d 456, 462. However, if a former client receives appropriate, independent advice and elects to waive the privilege, and if the defendant then on trial knowingly, voluntarily and intelligently waives his or her right to conflict-free counsel, trial courts generally can find that waiver has been established.

Post-conviction counsel also argues that Mr. Lewis was derelict in his duty to Mr. Dunlap because he was not present during Mr. Kirkpatrick's testimony. Mr. Lewis stated that this was a conscious decision on his part. As previously noted, he did not want to create any appearance that Mr. Kirkpatrick, a convicted violent felon and a former client, would have given improper information to the defense team.

Mr. Lewis' explanation is rational. Defendant has not presented any law in support of the specific circumstances here. Since the People's guilt/innocence phase evidence was substantial, trial counsel's decision was reasonable.

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[69] This is but one example of the enormous challenges the trial team faced. "It seemed that time was not on Mr. Dunlap's side in the sense that we had been unable to stop the counterproductive actions on his own part" *Tr.* 12/18/03: 203.
[70] *Meeks* arose in the context of a competency evaluation.

Detective Dan Dailey's Testimony

Defendant contends that a portion of Detective Dailey's testimony that dealt with victim services issues was inappropriate and that trial counsel should have objected. The testimony is found at *Tr*. 2/12/96: 1508-1511.

Detective Dailey's primary focus in this regard was discussions with Mr. Kohlberg and the disposition of Marge Kohlberg's body. The People's cited case, *Payne v. Tennessee*, 501 U.S. 808 (1991) is inapposite. *Payne* permits victim impact evidence in the sentencing phase of a capital case. However, *People v. Jensen*, 55 P. 3d 135 (Colo. App. 2001) is more relevant. "Prosecutors are allowed to present crime victims as real persons who suffered real injuries. 55 P.3d 135, 140.

Detective Dailey's testimony was unemotional and related to matters that are within the ken of the average person. The Court finds that trial counsel's failure to object does not implicate *Strickland v. Washington*'s performance prong.

Defendant's Claims Concerning Jury Instructions in the Guilt-Innocent Phase

When a Defendant objects to an instruction, the constitutional standard of harmless error is preserved. For the court to grant relief under the harmless error standard it must find that any error was harmless beyond a reasonable doubt. For instructions that were not objected to at trial, the court will apply a plain error standard of review. Thus, for the Court to grant relief, it must find, with assurance, that the error so undermined the fundamental fairness of the trial itself as to cast doubt on the reliability of the verdict. *See People v. Hanson*, 928 P.2d 776 (Colo. App. 1996; *People v. Fisher*, 9 P.3d 1189 (Colo. App. 2000). Mr. Dunlap objected only to Guilt Phase Instruction No. 12.Therefore the Court will apply a plain error standard in this review except with respect to that instruction.

Instruction No. 1 and Related Issues

Mr. Dunlap's first contention, that Instruction No.1 in the guilt-innocence phase violated the dictates of *Adams v. Texas*, 448 U.S. 38, (1980), is erroneous. *Adams* addresses the *Witherspoon v. Illinois*, 391 U.S. 510, (1968) standard for jury selection in a capital case. It does not discuss appropriate jury instructions in the first phase of such a case.

Mr. Dunlap contends that, during the guilt phase, it was error to inform the jury that the issue of punishment should not enter into the jurors' consideration at any time. If the Court had informed the jury that, if it were to find him guilty of First Degree Murder, it would have to proceed to a penalty phase. He undoubtedly would have stated that the instruction had "poisoned the well" with respect to his presumption of innocence. His cited case of *Adams v. Texas*, 448 U.S. 38 (1980), is completely inapposite.

Adams deals strictly with voir dire and does not have any precedental value with respect to jury instructions. There simply was no error in giving an instruction that focused the jury on the issue of the substantive charges and directed the fact finders not to consider punishment.

Furthermore, the Court was required to inform the jury that penalty issues could not be considered in the first phase of the case. If it had not done so, the jury would have been left in the position of considering issues that were totally extraneous to the question of whether the People had proven guilt beyond a reasonable doubt. Additionally, the Defendant cites no law that accurately supports his assertion. Therefore, his argument is without merit.

In his reply, Defendant also asserts that Instruction No. 1 created a constructive amendment to the Information. "A constructive amendment occurs when an essential element of the charged offense is changed, thereby altering the substance of the charging document." *People v. Foster*, 971 P.2d 1082 (Colo. App. 1998). "A variance rises to the level of a constructive amendment 'if the evidence presented at the trial, together with the jury instructions, raises the possibility that the defendant was convicted of an offense other that that charged in the indictment.'" *U. S. v. Wright*, 932 F.2d 868 (10th Cir. 1991). Here, Instruction No. 1 does nothing to vary the information in this case to the point of broadening the offenses charged.

Defendant suggests that the Colorado Supreme Court's decision in *People v. Griego*, 19 P.3d 1 (Colo. 2001), is limited to the United States Constitution. Since Colorado's Constitution has been said to grant greater or more extensive rights to a defendant than does the United States Constitution (*See, e.g., People v. Marcy*, 628 P.2d 69 (Colo. 1981)), he contends that this Court should not apply *Griego* to the determination of this motion. At the same time, federal interpretations of the United

States Constitution are helpful in interpreting similar provisions in the Colorado Constitution. *People v. Whalin*, 885 P.2d 293 (Colo. App. 1994).

Recent appellate cases indicate that Defendant's contention concerning *Griego* is inaccurate. *See People v. Auman*, 67 P.3d 741 (Colo. App. 2002); *People v. Brown*, 70 P. 3d 489, (Colo. App. 2002); *People v. Davalos*, 30 P.3d 841 (Colo. App. 2001); *People v. Baenziger*, ___ P.3d ___, 2004 WL 439924 (Colo. App. 2004). The Court declines to find that Defendant is entitled to any greater protection concerning jury instructions under the Colorado Constitution than under the United States Constitution.

Instruction No. 2 and Related Issues

Mr. Dunlap next contends that *People v. Lowe*, 660 P.2d 1261 (Colo. 1983), requires a finding that Instruction Number 2 (the charging instruction) was erroneous because it stated that First Degree Murder After Deliberation includes the crimes of felony murder. *Lowe* addresses the Due Process clauses of the federal and state constitutions and applies the rule of lenity to prohibit a person from being convicted of and sentenced twice for the same crime. Indeed, "dual convictions and concurrent sentences" for the same crime cannot be left intact. However, the *Lowe* court simply directed that the trial court prepare an amended mittimus indicating a single conviction and sentence the defendant accordingly.

The People concede that the wording of Instruction No. 2 was "technically incorrect" (*RBI*: 34) because Murder in the First Degree – After Deliberation does not "include" the crime of Murder in the First Degree – Felony Murder. Although the State is correct in its characterization, this instruction could not have caused harm to Defendant.

Furthermore, Defendant's cited cases do not support his claim of error. *People v. Freeman*, 668 P.2d 1371 (Colo. 1983), holds that a court's failure to properly instruct a jury with respect to the essential elements of an offense constitutes plain error. The *Freeman* trial court improperly defined culpable mental states, in contravention of the statute then in effect. "The instructions were thereby fundamentally flawed because they permitted a verdict of guilty to be returned upon a lesser degree of culpability than is required by the statute. *Id.* at 1383. The same result occurred in the other cases cited by Defendant. *M*: 3.

Defendant's reliance on *Rumley v. People*, 149 Colo. 132, 368 P.2d 197 (Colo. 1962) and the other cases in that string is also misplaced. *Rumley* holds that the instructions must be fact-based. In any trial, the instructions "should be applicable to the facts, and should present the law applicable to the particular facts proved. *Id.* at 138. Pursuant to *Ellis v. People*, 114 Colo. 334, 164 P.2d 733 (1945), Instructions 2 and 13 permitted the jury to comprehend the legal principles applicable to the murder charges.

Instructions No. 5 and 6

Issues relating to Instruction No. 5 were discussed in this Court's ruling in the predicate felony, Case No. 95CR605. Once again, the second paragraph of COLJI-Civ. 3:7 (as it then existed) was omitted.

In this case, the Court amplified Instruction No. 1 to advise the jury not to consider any statements of a witness or attorney where an objection was sustained. When that admonition and the language of Instruction No. 5 are considered in the context of the instructions as a whole, no finding of impropriety can be made.

Defendant's contentions about Instruction No. 6 are also without merit. He cites *People v. Ayala*, 770 P.2d 1265 (Colo. 1989). *Ayala* is a preliminary hearing case that discussed the quantum of evidence necessary to establish probable cause. "Presumption and inferences may be drawn *only from facts established,* and presumption may not rest on presumption or inference on inference*." Id.* at 1268 (emphasis in original). Here, Instructions 5 and 6 do not deviate from that precept.

The Court did not include the language contained in COLJI-Crim. 4:13. As it noted in 95CR605, the better practice is to include such language. However, nothing in Defendant's papers demonstrates any prejudicial error in the instructions as given.

Furthermore, the stock language of "reason and common sense" contained in Instruction No. 4 does not violate Defendant's right to have a verdict based on proof beyond a reasonable doubt. This instruction specifically required the prosecution to prove the existence of each of the elements of each charged offense beyond a reasonable doubt. In addition, any trial may include "facts" that are not true. The jury's task is to determine which evidence, if any, it believes and which, if any, it does not. A search for the truth in the evidence is not at all inconsistent with requiring the jury to decide whether the

prosecution, as the sole bearer of the burden of proof, has met its burden beyond a reasonable doubt. Therefore, the Defendant's contention is without merit.

Instruction No. 12 and Related Issues

It is important to again note that the defense objected to Instruction No. 12. As a result, the harmless error standard discussed above will be applied.

Defendant contends that Instruction No. 12 (note-taking) "allowed the jurors to consider notes taken by other jurors in making their own decisions" *M*: 14. Defendant cites cases from other jurisdictions and claims that "the court clearly intended that … prohibited things [should] occur." *Id.* His authority is not persuasive. *People v. Dennis*, 950 P.2d 1035 (Cal. 1998), only holds that a trial court has no *sua sponte* duty to give the jury instructions regarding the use of jurors notes. *People v. Hues*, 704 N.E. 2d 546 (N.Y. 1998) provides a useful review of the fact that note-taking was, at one time, not approved because the high illiteracy rate would cause illiterate jurors to rely on the notes of literate jurors and discusses the benefits of note-taking in protracted and difficult trials. However, the type of limitations in Instruction No. 12 were generally approved.

In *State v. Waddell*, 661 N.E. 2d 1043 (Ohio 1996), the Ohio supreme court specifically approved of note-taking subject to the type of cautions given in Instruction No. 12. Similarly, *Price v. State*, 887 S.W. 2d 949 (Tex. Crim. App. 1994), recognized the benefits of juror note-taking with appropriate guidance from the court and, if requested, suitable voir dire by counsel. Furthermore, other courts have found that note-taking by jurors is appropriate. *See Coates v. State*, 855 So.2d 223 (Fla. Dist. Ct. App. 2003); *State v. Hendricks*, 787 A.2d 1270 (Vt. 2001); *Smith v. State*, 773 P.2d 139 (Wyo. 1989).

In Colorado, note-taking was approved even before the current jury reform project had begun. *See People v. Ellinger*, 754 P.2d 396 (Colo. App. 1987). Therefore, there was no error either in permitting juror note-taking or in the instruction given to the jury concerning their notes. Defendant's assertion of prejudice simply is not supported by the law or the evidence. *See also Hanson v. State*, 72 P.3d 40 (Okla. Crim. App. 2003). Even if this review disclosed error, it surely was harmless beyond a reasonable doubt.

Instruction No. 13

Defendant asserts that Instruction No. 13 is "patently erroneous" because it "prevent[s] any notion that the jurors might have considered an instruction on one offense to relate to any other offense or instruction." *M*: 14. He does not make a showing that there was any plain error in this instruction. Further, *People v. Hanson*, 928 P.2d 776 (Colo. App. 1996), is controlling precedent. His assertion is without merit.

Instruction No. 14

Mr. Dunlap objects to Instruction No. 14 (First Degree Murder After Deliberation) on the grounds that the instruction does not specify a victim. He claims that the Court effected a constructive amendment to the Information by its failure to instruct the jury as to each of the murder victims. In essence, Defendant believes that it was necessary to provide separate instructions with each victim's name contained in a separate and individual instruction. Case law does not support his contention.

People v. Simmons, 973 P.2d 627 (Colo. App. 1998), holds that the failure to include one of two or more victims' names in an elemental instruction does not, in and of itself, create error. In *Simmons*, the prosecutor's closing argument, together with the general nature of a felony menacing instruction, caused the Court of Appeals to conclude that "it is impossible to determine whether the jury unanimously agreed as to a particular victim*.*" *Id.* at 630.

However, in *Thomas v. People*, 803 P.2d 144 (Colo. 1990), the Colorado Supreme Court held that "when the evidence does not present a reasonable likelihood that jurors may disagree on which acts the defendant committed, the prosecution need not designate a particular instance." In *People v. Rivera,* 56 P.3d 1155 (Colo. App. 2001), the Court of Appeals stated:

> "[w]hen evidence of many acts is presented, any one of which could constitute the offense charged, and there is a reasonable likelihood that jurors may disagree on the act the defendant committed, the trial court must take one of two actions to ensure jury unanimity. The court must either require the prosecution to elect the transaction on which it relies for conviction, or instruct the jury that to convict the defendant it must unanimously agree that the defendant committed the same act or committed all the acts included within the period charged." *Id.* at 1159-1160.

In this case, the evidence clearly indicated that Defendant went to Chuck E Cheese intending to commit murder and robbery. He hid in the bathroom until all patrons had left the restaurant. He then methodically assassinated each of the four murder victims and attempted to kill Mr. Stephens. There is no reasonable likelihood that the jury disagreed on which act Mr. Dunlap committed when he shot each of the victims.

In addition, Instruction No. 13 and the individualized jury instructions concerning First Degree Murder, the verdict forms specified a victim by name, thereby giving the jury clear directions concerning all of the murder counts. The jury was adequately informed of its duty to consider the evidence about the shootings of each victim separately and distinctly. Therefore, the Court cannot find, with assurance, that the form of Instruction No. 14 so undermined the fundamental fairness of the trial itself as to cast doubt on the verdicts.

Instruction No. 15

Defendant contends that Instruction No. 15 (a lesser included offense of Second Degree Murder) violates the holdings of *Beck v. Alabama*, 447 U.S. 625 (1980). He argues that, since the Court required the People to prove "a non-existent, negative culpable mental state element," he was denied his rights to due process of law and a trial by jury.

Beck v. Alabama holds that, in a capital case, the jury must be instructed that it may consider a lesser included offense. The jury cannot consider a death sentence unless it is first given the option to find the defendant guilty of a lesser offense. Furthermore, in *U.S. v. McVeigh*, 153 F.3d 1166 (10th Cir.1998), the court noted that, since the sentencing jury was not required to impose a death sentence upon a guilty verdict but could sentence the defendant to a lesser sentence, *Beck v. Alabama* was inapposite. *Id.* at 1197. If there were no evidence that would support an instruction as to a lesser included offense, a court would not be required to instruct the jury as to that lesser offense. *See Young v. State*, 12 P.3d 20 (Okla. Crim. App. 2000); *People v. Griffith*, 58 P. 3d 1111 (Colo. App. 2002); *People v. Ramirez*, 18 P.3d 822 (Colo. App. 2000).

In a non-capital case, with evidence of such a magnitude, the Court might have acted properly if it had not given a lesser included offense. In this case, the Court followed precedent by providing a lesser included offense of Second Degree Murder. The

instruction properly followed the statute, C.R.S. §18-3-103, as it existed at the time of the offense and the trial in this case.

Defendant also asserts that Instruction No. 15 violates the holding in *People v. Bachicha*, 940 P.2d 965 (Colo. App. 1996), because it "improperly coerced the jurors by requiring the jurors to unanimously find the accused not guilty of the greater charge before it could consider the lesser offense." *M*: 17. *People v. Bachicha* does not apply to the circumstances of the case. The *Bachicha* court faced a trial court's improper instruction that, in essence, directed the jury to determine acquittal unanimously.

Instruction No. 15 tracks the pattern in COLJI-Crim. 38:06. It told the jury that, if they were not unanimously satisfied, beyond a reasonable doubt, of Defendant's **guilt** with respect to Murder in the First Degree, it could convict him of a lesser offense if it determined that he was guilty of Murder in the Second Degree beyond a reasonable doubt. There was no explicit or implicit coercion of the jury in Instruction No. 15.[71]

Instruction No. 16

Defendant next argues that Instruction No. 16 is erroneous because "the underlying felony in a felony murder charge is a lesser included offense . . . [and] Instruction No. 16 failed to set forth any of the essential elements of the underlying felonies." *M*: 17. Defendant's cited case, *People v. Bartowsheski*, 661 P.2d 235 (Colo. 1983), does not support his position.

> "[A]lthough a separate judgment of conviction for robbery may not simultaneously exist with a judgment of conviction for first degree murder predicated upon the killing of the robbery victim, there is no such impediment to the entry of both a judgment of conviction for first degree murder based upon the killing of another after deliberation and a separate judgment of conviction for the robbery of the same victim." *Id.* at 246-247.

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[71] The same findings are appropriate for the conviction of Criminal Attempt to Commit Murder in the First Degree. Although there is no such offense as Criminal Attempt to Commit Felony Murder, as set forth in Instruction No. 19, the law in this regard developed after the trial. The People correctly note that *People v. Meyer*, 952 P.2d 774 (Colo. App. 1997) resolved this issue. The Court cannot find, with assurance, that this inappropriate instruction so surely undermined the fundamental fairness of the trial so as to cast doubt on the reliability of the verdict. Thus, Defendant's arguments with respect to Instruction No. 19 (*M*: 20; *RB*: 13-14) are without merit. The Court will discuss the impact of *Ring v. Arizona*, 536 U.S. 584 (2002), *infra.* At this point, it is sufficient to state that Defendant suffered no increased "social opprobrium" because of the attempted felony murder conviction and was not prejudiced either in the guilt or penalty phase because of it.

Although *Bartowsheski* holds that a predicate felony is a lesser included offense of felony murder, Defendant's convictions of felony murder were merged into his convictions for Murder in the First Degree After Deliberation. The Court therefore maximized his convictions as required by *People v. Jones*, 990 P.2d 1098 (Colo. App. 1999), and did not
deny Defendant any of his rights to due process of law or trial by jury.

Defendant correctly asserts that Instruction No. 16 should have referred to Instruction No. 23 (elements of robbery) and Instruction No. 20 (elements of First Degree Burglary). However, established policy in Colorado is that the jury instructions must be considered together, as a whole, and not in isolation. Instruction No. 1 told the jury, "No single rule describes all the law which must be applied. Therefore, the rules must be considered together as a whole." As a result, defendant's contention is without merit.

Defendant also was not subjected to the prospect of a non-unanimous finding. The jury found Defendant guilty of all of the non-murder offenses charged, including Aggravated Robbery, First Degree Burglary, First Degree Assault and Theft. The jury found Defendant guilty of each of those felonies, which became predicate felonies for Felony Murder. Therefore, the jury unanimously found all essential elements of that crime.

Instruction No. 17

Mr. Dunlap argues that Instruction No. 17 should have specified the culpable mental state element of "after deliberation" and as a result the jury was "directed to return a guilty verdict without unanimously concluding that the accused had acted 'after deliberation.'" *M*: 19. He again argues that the failure to list a specific victim was erroneous and constitutes a constructive amendment to the Information. The Court rejects the constructive amendment contention for the same reasons as set forth *supra*.

Defendant suggests that, by proving Murder in the First Degree – After Deliberation, the prosecution necessarily proved Criminal Attempt to Commit First Degree Murder, citing *People v. Harlan*, 8 P.3d 448 (Colo. 2000). *M*: 18. The *Harlan* case has a substantially different factual basis than does the instant case. In *Harlan*, a single murder victim, Rhonda Maloney, was the subject of more than one attempt on her

life, with the final act being fatal. The Supreme Court applied the "strict elements" test to find that Mr. Harlan's acts constituted a lesser included offense.

Here, Mr. Dunlap four people and attempted to kill a fifth. Therefore, the Supreme Court's holding in *Harlan*[72] is inapposite.

Although the People's Response (*RBI*: 43) is technically accurate, and its logic is approved by this Court, a better practice would have been to clarify the requisite *mens rea* by providing an appropriate predicate instruction concerning the two attempted murder counts. As they were presented, the instructions did not follow the format utilized by the Court in Instructions 20 and 23 (with Instruction 25). However, the Court cannot conclude, with assurance, that the form of Instruction No. 17 so undermined the fundamental fairness of the trial itself as to cast doubt on the verdicts.

Instruction No. 18

Defendant makes an argument similar to those he made with Instruction No. 17 with respect to Instruction No. 18. The Court again concludes that a better practice would have been to provide a predicate instruction with the elements of Second Degree Murder. However, Instruction No. 15 contains the elements of Second Degree Murder. Therefore, the fundamental fairness of the trial was not affected by the format utilized in Instruction No. 18.

Instruction No. 20

Mr. Dunlap raises several objections to Instruction No. 20 (First Degree Burglary). One argument is also addressed in his papers with respect to Instruction No. 23 (Aggravated Robbery) and Instruction No. 24 (Theft), and, inferentially, with respect to Instruction No. 25 (Robbery, as a definitional instruction with respect to Instructions No. 20 and 23). This issue relates to the culpable mental state of "knowingly" and the

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[72] "We find that the attempted murder charge, as alleged in the information, is a lesser included offense of the murder charge under the "strict elements" test set forth most recently in *People v. Leske,* 957 P.2d 1030, 1036 (Colo.1998). Therefore, the defendant is not subject to punishment imposed for the attempted murder conviction in addition to that imposed for the murder conviction. Because the charging documents did not identify the attempted murder of Maloney as distinct from a lesser included offense of the murder of Maloney, we vacate the forty-eight year sentence imposed by the trial court for the attempted first degree murder of Maloney." *Harlan*, 8 P.3d 448, 478.

elements to which it applies. *M*: 23; 28; 29.C.R.S. §18-1-503(4) is dispositive. "When a statute defining an offense prescribes as an element thereof a specified culpable mental state, that mental state is deemed to apply to every element of the offense unless an intent to limit its application is clear." *See*
People v. Trevino, 826 P. 2d 399 (Colo. App. 1991)[73].

Defendant cites *Cooper v. People*, 973 P.2d 1234 (Colo. 1999), to support his assertion that the jury was not "adequately instructed on the issue of the timing of the forming of the intent to commit an ulterior crime . . . [and that] the instruction improperly combined the two quite different elements of entry and remaining on premises." *M*: 23.

In *Cooper*, the Supreme Court reviewed the evolution of the First Degree Burglary statute and held that the intent to commit a crime must "coexist with the initial point of unlawful entry or remaining." *Cooper*, 973 P.2d 1234, 1240. The Court also held that the statute's amendment was designed "to address situations in which the defendant lawfully entered a premise, but subsequently remained after his presence was no longer lawful." *Id.* at 1241.

The Court of Appeals resolved this issue in *People v. Ramirez*, 18 P.3d 822 (Colo. App. 2000), where it held that the Supreme Court did not "invalidate or correct a pattern jury instruction . . . *Cooper* did not expressly hold that giving the pattern burglary instruction alone, without [an] erroneous additional instruction, would have amounted to error" *Id.* at 826, but addressed a specific supplemental jury instruction. Here, the Court used the pattern jury instruction appropriately. Even if there was error, the Court cannot conclude, with assurance, that the form of Instruction No. 20 so undermined the fundamental fairness of the trial itself as to cast doubt on the verdicts.

Defendant also claims that the location of description of the subject building or occupied structure was an "omitted . . . essential element." There was but one building or

[73] The later Supreme Court decision in *Gorman v. People*, 19 P.3d 662 (Colo. 2000), is inapposite. *Gorman* addressed the Contributing to the Delinquency of a Minor statute, C.R.S. §18-6-701, which did not include a culpable mental state. The three instructions at issue here all contained the culpable mental state of "knowingly." Also, the instant case is unlike the scenario set forth in *People v. Bornman*, 953 P.2d 952 (Colo. App. 1997), in that the defense here was one of identification. Defendant did not contend that his exercise of control over money was authorized or that, in some way, he was authorized to shoot the Chuck E Cheese victims.

occupied structure at issue in this case. The Court has not been able to find any case law that supports Defendant's contention.

Defendant also argues that Instruction No. 20 was erroneous because it tracked the statutory language "the defendant or another participant in the crime." He asserts that the Information does not contain the "another participant" language and that "the State was relieved of its burden of proving the charged offense . . . [and] benefited by this inappropriate addition of an alternative element." *M*: 23. He fails to cite authority for this claim and, as previously noted, *supra*, there is no constructive amendment to the Information. Therefore, no plain error has been demonstrated.

Defendant asserts that the definition of deadly weapon was not included in Instruction No. 20. However, it was included in Instruction No. 27.[74] Therefore, the jury was appropriate apprised.[75]

Instruction No. 27

Mr. Dunlap argues that Instruction No. 27 was deficient because the Court's definition of a "firearm"[76] did not include "which in the manner it is used or intended to be used is capable of producing death or serious bodily injury." *M*: 23. He claims that this omission somehow relieved the State of its burden of proving all elements beyond a reasonable doubt.

If the deadly weapon at issue had been a golf club or some other animate or inanimate object, Defendant's point would be well taken. However, the evidence indicated that Defendant used a handgun. Therefore, any error did not so affect the fundamental fairness of the trial as to cast doubt on the reliability of the verdicts.

Instructions No. 20 and 27

Defendant's objections to the omissions of the definitions of "thing of value" and "occupied structure," the use of the predicate offense of "robbery," the elements of assault or felony menacing, identity of the person "allegedly menaced or assaulted"

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[74] Although Defendant contends that Instruction No. 27 was not supplied to the jury, it is part of the official record of this case and its reading is included in the record. Defendant has not shown any error in this regard.

[75] As with other findings concerning definitions or terms allegedly omitted from an instruction, the Court relies on its prior finding that all of the instructions must be considered together, as a whole.

(*M*: 25), and the “nonsense” of the definition of “unlawfully enters or remains.” All of these claims are based on a purported confusion of the jury, inappropriate use of stock instructions and “pretending that words mean nothing or that they mean something different than what they say can accomplish any desired result . . . [t]he court thus violated its obligation to adequately instruct the jurors on all legal issues presented in the case, whether asked to do so or not.” *M*: 25-26.

In support of this contention, Defendant cites *People v. Vialpando*, 809 P.2d 1082 (Colo. App. 1990). There, the Court of Appeals found that:

> “[t]he judge made numerous statements during trial, evidencing his irritation and intolerance of defense questioning. These included statements in the presence of the jury which called into question the defense's trial tactics, as well as several unnecessary comments and other disruptive remarks . . . [t]he record reveals other instances in which the court seriously curtailed the defendant's right to object to testimony or argument. The court interrupted defense counsel on numerous occasions during voir dire without an objection by the prosecution and in instances where defense counsel's questioning does not appear in any way to be improper.” *Id.* at 1084-1085.

It is important that this Court not be drawn into the fray as it considers a Crim. P. 35(c) motion. The Court does not believe it acted as the *Vialpando* trial court did. Therefore, the Court finds no such error.

Defendant’s other principal citation, *People v. Archuletta*, 191 Colo. 482, 554 P.2d 307 (1976), also is inapposite. Defendant has not set forth any prejudicial omissions or re-writes of any jury instructions.

Instruction No. 28

Defendant next asserts that Instruction No. 28 was erroneous because it contained the following language: “A crime is committed when the defendant has committed a voluntary act prohibited by law accompanied by a culpable mental state.” *M:* 30. The Defendant also objects to the definition of specific intent: “A person acts intentionally’ or ‘with intent when his conscious objective is to cause the specific result proscribed by the statute defining the offense. It is immaterial whether or not the result actually occurred.”

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[76] “Firearm” means any handgun, automatic, revolver, pistol, rifle, shotgun or other instrument or device capable or intended to be capable of discharging bullets, cartridges, or other explosive charges.”

As a result, he asserts that the jury was "affirmatively prevented . . . from considering the fact that no one was killed, maimed or wounded as evidence that the accused did not have that intent for purposes of the aggravated robbery charge. That evidence was extremely probative and exculpatory." *M:* 31.

The instruction was taken directly from the C.R.S. §18-1-501 (5). The General Assembly is authorized to establish the statutory elements of criminal offenses, including the *mens rea*. *See People v. Ledman*, 622 P.2d 534 (Colo. 1981). Further, the Supreme Court has repeatedly upheld instructions phrased in the language of the statute. *Blincoe v. People*, 494 P.2d 1285 (Colo. 1972). *See also People v. Silva*, 987 P.2d 909 (Colo. App. 1999); *People v. Trujillo*, 686 P.2d 1364 (Colo. App. 1984); *People v. Hayward*, 55 P.3d 803 (Colo. App. 2002). Therefore. the Court finds that the statutory definition adequately informed the jury of the People's burden with respect to all aspects of the requisite culpable mental state. The Court cannot impose a greater or different burden on the State.

Defendant also argues that "the jurors were not permitted to consider the fact the [*sic*] Mr. Stephens did not die as evidence that there was no intent to kill or deliberation." *M*: 31. However, the jurors were in no way prevented from engaging in such a thought process. Furthermore, the evidence clearly indicates that Mr. Dunlap entered Chuck E Cheese for the purpose of killing employees and taking money from the business. Therefore, the instruction was not erroneous.

Verdict Forms

Defendant next presents arguments about the propriety of the verdict forms. He reiterates his argument that the jury was inaccurately told that he was charged with, and ultimately convicted of, eight separate and distinct crimes of murder. He then asserts that "[t]his undoubtedly weighed heavily in the jurors' decisions as to sentencing, as non-statutory aggravating circumstances or otherwise." *M*: 31. He did not present any evidence at the hearing to support this speculation.

Defendant once again cites *People v. Lowe*, 660 P.2d 1261 (Colo. 1983), in much the same way as he did with respect to Instruction No. 2. The Court rejects this argument for the same reasons as set forth in its findings about that instruction, *supra*.

Defendant also argues that the verdict forms' interrogatories omitted any instruction concerning a burden of proof on the state. In the precursor case, No.

95CR605, the Court found that this omission violated the requirements of *Apprendi v. New Jersey,* 530 U.S. 466 (2000). The most recent opinion of the Colorado Court of Appeals holds that *Apprendi* is not to be accorded retroactivity in collateral review proceedings. *People v. Bradbury*, 68 P.3d 494 (Colo. App. 2002).[77] Accordingly, the Court must enter a contrary ruling to that entered in its opinion in the "Burger King" case. The lack of specific direction to the jury in the interrogatories did not violate Defendant's right to require the People to prove the relevant sentence enhancers unanimously and beyond a reasonable doubt. Furthermore, even if there was error in the interrogatories, the Court cannot find that their form so undermined the fundamental fairness of the trial itself as to cast doubt on the verdicts.

Defendant also posits that the form of interrogatories "required at least a majority of the jurors to conclude beyond a reasonable doubt that the accused 'did not use a deadly weapon' and 'did not cause serious bodily injury.'" *M*: 32. This claim appears to be based on the same *Apprendi* logic and must be rejected by the Court for the same reasons as set forth, *supra*.

Defendant claims that the verdict forms "were coercive and violated C.R.S.§16-11-309[78] . . . because there was no way for a juror to find in Mr. Dunlap's favor unless s/he affirmatively decided that the accused had not used a deadly weapon and affirmatively decided that he did not cause serious bodily injury." *Id*. However, he does not set forth any precedent to support his contention nor specifies any other basis for this argument. Therefore, the court finds that there was no error.

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[77] Interestingly, the *Bradbury* decision is derived, in large part, from *Teague v. Lane*, 489 U.S. 288 (1989), the case upon which Mr. Wymore and post-conviction counsel placed great emphasis during the first phase of this Crim. P. 35(c) hearing. The Court of Appeals found that *Apprendi*'s rubric is procedural and not substantive. Thus, *Apprendi* relates to "the process by which offenders are brought to justice." *People v. Bradbury*, 68 P.3d 439 (Colo. App. 2002), *citing Whisler v. State*, 36 P.3d 290 (Kan. 2001) which, in turn, cites *Miranda v. Arizona*, 384 U.S. 436 (1966). *See also Schriro v. Summerlin*, ___ U.S. ___, 2004 WL 1402732 (2004); *People v. Hall*, 87 P.3d 210 (Colo. App. 2003).

[78] Now C.R.S. §18-1.3-406 (effective October 1, 2002).

Defendant also argues that the Court's finding of mandatory aggravation, as set forth in Counts 15 and 16, bring about an illegal sentence as to other crimes for which the jury made findings concerning the violent crime statute. Count 17 also alleged crimes of violence and resulted in the jury's determination of violent crime as to First Degree Burglary and Aggravated Robbery. The Court made a scrivening error in its preparation of the mittimus. However, this error does not affect any of Defendant's constitutional rights and does not affect the propriety of the sentences for those crimes.

Defendant next contends that the Court was "inappropriately affected by the massive amount of improper 'victim impact' statements at the sentencing hearing and by the State's reliance on Mr. Dunlap's assertion of his right to remain silent." *M*: 33. The Court entered its sentences based on the seriousness of the crimes, Defendant's juvenile adjudication history and his conviction in Case No. 95CR605. Therefore, the court was not inappropriately affected.

The Court does find that the lead prosecutor inappropriately spoke directly to Defendant during the sentencing hearing. Various lay persons also directed their comments to Mr. Dunlap and not to the Court. This was improper but was a matter of form and not of substance.

Defendant also alleges that the record concerning the counts for which Defendant was sentenced is unclear. He thus asserts, without any authority, that his rights under the state and federal due process and double jeopardy clauses were violated. Although the Court previously has noted the scrivening error in the mittimus, both the verdict forms and the mittimus clearly indicate the crimes for which Defendant was sentenced and the sentences imposed. Therefore, Mr. Dunlap's claims are without merit.

Defendant's Claims Concerning Jury Instructions in the Penalty Phase

Initially, the Court notes that Defendant objected to "every word" in each of the penalty phase jury instructions. *Tr.* 3/6/96: 5593. Therefore, constitutional error was preserved and a harmless error analysis will be applied.

The preparation of the penalty phase jury instructions was challenging because, in general, there are no "stock" instructions in COLJI-Crim. As is customary in all criminal cases, the People prepared the initial drafts of the penalty phase instructions. The Court

spent a considerable period of time reviewing the drafts and ordered certain changes. The trial defense team had the opportunity to participate in lengthy conferences and to propose amendments to draft instructions and to present any instructions it deemed appropriate.

Instruction Nos. 15 and 18

Defendant argues that Penalty Phase Instructions No. 15 and 18 constituted a directed verdict against him, thereby denying him of his right to require the prosecution to prove the aggravator set forth in C.R.S. §16-11-103 (5)(b) ("the 5(b) aggravator") to the jury beyond a reasonable doubt. He contends that the Court did not follow the requirements of *People v. White*, 870 P.2d 424 (Colo. 1994).

Instruction No. 15 set forth the first step in Colorado's death penalty scheme. The jury was instructed to consider whether the prosecution has established beyond a reasonable doubt that one or more of the following aggravating factors are present . . . (a) The defendant was previously convicted in this state of a class 2 felony involving violence to wit: 2nd Degree Kidnapping of a person who was also the victim of a robbery committed by the defendant and during which, or in the immediate flight therefrom, the defendant used, or possessed and threatened the use of, a deadly weapon as alleged in case 95CR605 in Arapahoe County Colorado.

Instruction No. 18 informed the jury that Murder in the First Degree is a Class One Felony; Attempted Murder in the First Degree is a Class Two Felony; Second Degree Kidnapping where the person kidnapped is a victim of a robbery is a Class Two Felony; a crime involving violence includes second degree kidnapping in which the defendant used or possessed and threatened the use of a deadly weapon against a victim of a robbery.

People v. White, *Id.*, refers to *People v. Borrego*, 774 P.2d 854 (Colo. 1989), and holds that a trial court has "broad discretion" to admit relevant evidence in the penalty phase. The Court exercised that discretion in admitting Investigator Meskis' testimony. The Court rejected the People's request to admit the testimony of Christine Contreras, the victim in the Burger King case, because of concerns of undue prejudice. The Court followed the *Borrego* ruling by "exclud[ing] the factual circumstance evidence, but

allowed the prosecution to introduce evidence proving the existence of prior class one, two, or three felonies." *Id.* at 855.

Defendant also argues that the Court "specifically delineated" the identity of the person whose death was caused by the aggravated robbery. He contends that the instruction failed to specify the name of the victim(s). He cites *People v. Chavez*, 952 P.2d 828 (Colo. App. 1997). The *Chavez* case, which holds that the "last act" in a series of criminal acts, controls with respect to the statute of limitations, is inapposite. The rationale in *Chavez* is limited to the fact that the Information was filed within the statutory timeframe.

Defendant argues that the Court failed to identify the person whose death formed the basis for the aggravator. However, the jury was informed that the instructions "must be considered together as a whole" and Instruction No. 2 told the jurors that they must give individual consideration concerning sentencing with respect to each named victim. Furthermore, the verdict forms clearly delineated each victim and required the jury to make a unanimous, beyond a reasonable doubt determination concerning the 5(b) aggravator. Therefore, the Defendant's argument is without merit.

Defendant also contends that the People improperly relied on Defendant's convictions for burglary and aggravated robbery, in violation of C.R.S. §16-11-103(g). However, Instruction No. 15 uses the language, "the defendant committed a class three felony, to wit, Aggravated Robbery . . . First Degree Burglary, and in the course of or in furtherance of such or immediate flight therefrom the defendant intentionally caused the death of a person other than one of the participants." In addition, Instruction No. 15 instructs the jury to "presume that each aggravating factor(s) does not exist unless you unanimously agree that it has been proven beyond a reasonable doubt. The burden of proof is upon the prosecution to prove to your satisfaction beyond a reasonable doubt the existence of one or more of the aggravating factor(s) listed in these instructions."

As previously noted, the Court instructed the jury as to each victim throughout the instructions. Thus, when considering the instructions together as a whole, together with the written verdict forms, there was no error in the contested language.

Defendant alleges, without authority, that he was prejudiced by the Court listing six aggravating factors in the penalty phase instructions which were not alleged by the People in a pretrial disclosure. At the time of the trial, Colo. R. Crim. P. 32.1 did not exist. The existing case law indicates that this issue is statutory. *See e.g. State v. Joseph*, 653 N. E. 2d 285 (Ohio 1995); *State v. McCrary*, 478 A.2d 339 (N.J. 1984); *State v.* Kleypas, 40 P.3d 139 (Kan 2001). Colorado's statute, in existence at the time of the trial, was C.R.S. §16-11-103 (c).

The Court cannot find that there was any error in this procedure. Although it might have been preferable for the State to have set forth all aggravators in writing before trial, Defendant was fully on notice as to the aggravation against which he had to defend. The Court is confident, beyond a reasonable doubt, that the lack of specification was not error and, if erroneous, did not lead to the sentencing verdict. *Griego*, 19 P.3d 1 (2001).

Defendant's allegations about the Court's application of *People v. Saathoff*, 790 P.2d 804 (Colo. 1990), was resolved by the Supreme Court. *People v. Dunlap*, 975 P.2d 723, 737-743 (Colo. 1999). The Court finds that this ruling constitutes the law of the case and is bound thereby.

Instruction No. 14

Defendant asserts that Instruction No. 14 erroneously and prejudicially states that "[i]f one or more jurors *finds that life imprisonment is the appropriate penalty*, then *the result is a sentence of life imprisonment*." *M*: 35 (emphasis in original). Defendant then contends that the jurors need not "find" anything. He states that the instruction should have been limited to requiring the State to prove one or more aggravating factor(s) beyond a reasonable doubt.[79]

Neither party has provided the Court with any authority in this regard. However, the Colorado Supreme Court has held that a capital sentencing jury is "the sole arbiter of whether a sentence of death should be imposed upon the defendant." *People v. Drake*, 748 P.2d 1237, 1257 (Colo. 1988). The concept of a jury's "findings" has been recognized elsewhere. *See State v. Whitfield*, 107 S.W. 3d 253 (Mo. 2003). This argument is an exercise in semantics and is not the basis for any finding of constitutional error.

Instruction No. 24

Defendant refers to Instruction 24 as "a false and prejudicial 'only-other' alternative to the pro-death decision . . . [u]nder this instruction, the juror [*sic*] was prohibited from voting for a life sentence unless they were first affirmatively convinced that it was the appropriate sentence" (*M*: 35) by instructing the jury that "[b]efore imposing a death sentence, you must unanimously be convinced beyond a reasonable doubt that death is the appropriate penalty for the defendant. This involves a process in which you must apply your reasoned judgment in deciding *whether the situation calls for life imprisonment* or requires the imposition of the death penalty, in light of the totality of the circumstances present." *Id.* (emphasis in original).

The language of Instruction No. 24 simply does not comport with this contention. The jurors were unambiguously told that they must be unanimously convinced beyond a reasonable doubt that death was the appropriate penalty. They also could have been unanimously convinced that life was the appropriate sentence. Finally, if they were not unanimous with respect to a death sentence, a life sentence would be imposed.

Once again, Mr. Dunlap relies on his contention that *People v. Tenneson*, 788 P.2d 786 (Colo. 1990), requires a presumption of life. The Court has repeatedly found that the law does not call for such a presumption. However, it should be noted that Instruction No. 15 required the jurors to "presume that each aggravating factor does not exist unless you unanimously agree that it has been proven beyond a reasonable doubt. The burden of proof is upon the prosecution to prove to your satisfaction beyond a reasonable doubt the existence of one or more of the aggravating factor(s) listed in these instructions."

The instructions were not contradictory and they were not confusing. Defendant's cited cases are inapposite. *People v. Jolly*, 742 P.2d 891 (Colo. 1987), dealt with an instruction that essentially relieved the People of their burden of proof as to an element of

[79] Interestingly, Defendant relies on the now overruled case of *Walton v. Arizona*, 497 U.S. 639(1990). Of course, the holding that sentencing jurors must be properly instructed concerning all aspects of the sentencing process remains valid.

an offense. *Barnes v. People*, 735 P.2d 869 (Colo. 1987), addressed an instruction that created a mandatory presumption that the defendant was driving under the influence of alcohol. In *Evans v. People*, 706 P.2d 795 (Colo. 1985), an instruction erroneously \ suggested that the jury could ignore certain police conduct. In the context of an entrapment defense, the instruction relieved the prosecution of its burden of proof. In *People v. Loger*, 188 Colo., 535 P.2d 210 (1975), and *People v. Morant*, 179 Colo. 287, 499 P.2d 1173 (1972), the Supreme Court found that an instruction that contained the language, "'involuntary killing . . . shall be deemed and adjudged murder'" was internally contradictory and confusing in the context of other instructions. No such situation occurred in this case.

Mr. Dunlap also expresses a semantic concern about the word "convinced."[80] At the conclusion of Instruction No. 24, the jurors were informed that, at the end of their deliberations in step four, they could have three possible results: if they were unanimously convinced beyond a reasonable doubt that death was the appropriate sentence, they shall return a verdict imposing a death sentence; if they were unanimously convinced (of course, without a requirement beyond a reasonable doubt) that life imprisonment was appropriate, they shall return a verdict of life imprisonment. If, however, a unanimous determination was not achieved, the foreperson shall so indicate on the verdict form. The Court then would impose a life sentence.

In *People v. White*, 870 P. 2d 424, 456 (Colo. 1994), the court held that "a capital sentencer, in order to deliver a certain and reliable sentence, must be convinced beyond a reasonable doubt that any mitigating factors do not outweigh proven statutory aggravating factors." This requirement was set forth in an attempt to minimize a death sentence that is imposed arbitrarily, capriciously, or in a wanton or freakish manner. *See also People v. Harlan*, 8 P.3d 448, 483 (Colo. 2000).[81] Furthermore, Instruction No. 24

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[80] *Webster's Third International Dictionary* (1971), 499, includes this definition of "convince": "to bring or cause to have belief, acceptance, or conviction." "Convinced" means, "having or feeling strong belief or conviction . . . . CERTAIN; SURE."

[81] The People also cite *Harlan* for the (implied) proposition that the approved instructions therein constitute controlling law in this case. The *Harlan* appendix is not precedent for any case other than *Harlan*. That appendix is the law of the case for that case only.

and the verdict forms accurately set forth the requirements of Colorado law as it existed in 1996 (C.R.S. §16-11-103(2)) .

Defendant contends that Instruction No. 24 violated the requirements of *People v. Tenneson*, 788 P.2d 786 (Colo. 1990), because it does not inform the jury that the fourth step is "separate and independent." Mr. Dunlap believes that the second paragraph of Instruction No. 24 tells the jury that the fourth step is dependent on the first three steps:

> "This fourth step of your deliberations as to the appropriate penalty regarding the first degree murder for each victim should be based on the considerations you have previously made during the first three steps of your deliberations as outlined in these instructions. Before imposing a death sentence, you must unanimously be convinced beyond a reasonable doubt that death is the appropriate penalty for the defendant."

If the Court (and the jury) read these sentences in isolation, Mr. Dunlap's claim would require a different analysis than that entered herein. However, the instruction continues, "**[r]egardless of the findings you have made in steps one, two and three**, you do not have to return a verdict of death. There is never a requirement that you must impose a death sentence in any situation." (emphasis added) Therefore, this instruction clearly sets forth the requirement of an independent fourth step.

The People adequately address the remainder of Defendant's contentions concerning Instruction No. 24 in the Reply Brief at pp. 56-65.

Defendant also objects to the "free-floating burden" in the third and fourth steps of Colorado's capital sentencing procedure. His argument is appropriately set forth so that he can preserve his issues for both the Colorado Supreme Court's review of this case and any federal habeas corpus action he may choose to pursue if the Supreme Court ultimately re-affirms his death sentence. However, the Supreme Court's opinion on direct appeal is controlling as to these issues. Since he has preserved his claims, the Court now

defers to the Colorado Supreme Court for its consideration of them.[82]

Defendant also argues that the first and last paragraphs of Instruction No. 23 contain language that is "flatly incorrect, inconsistent and manifestly confusing." *M*: 46. Defendant objects to the word "believe" in the same manner as he did when objecting to the term "convinced." The disputed language clearly told the jury that, if one or more juror(s) found that any mitigating factor outweighed the aggravating factor(s) the jury had previously found to exist, a life sentence would result. The instruction contained no language that shifted any burden. Therefore the Court concludes that this argument is without merit.

Defendant again objects to "the illogical and unworkable 'burdenless burden' standard" of *People v. White*, 870 P.2d 424 (Colo. 1994). The relevant statute provided that there be no burden with respect to mitigation. Virtually all of Defendant's arguments were indeed decided in *White*.[83] The Court finds that Defendant must take this argument to the Colorado Supreme Court.

Additionally, there is no "obvious" "inconsistency of paragraph one with paragraph two." *M*: *46*. Instruction No. 23 contained no language that was not clear to persons with common understanding and intellects.

Defendant next makes an argument that is akin to one complaining about a lack of unanimity. Instruction No. 14 directed the jurors to determine, as to each victim, whether the prosecution had proven the existence of at least one specified aggravating factor beyond a reasonable doubt. Even when viewed in isolation, the language of Instruction

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[82] Defendant initially referred to *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and later relied on *Ring v. Arizona*, 536 U.S. 584 (2002). *Ring* requires a jury, and not a judge or judges, to find the existence of any aggravating circumstance (other than prior convictions) necessary for the imposition of the death penalty. This Court will not extend the *Ring* analysis beyond that stated in the United States Supreme Court's opinion. *See People v. Davis*, 793 N.E. 2d 552 (Ill. 2002); *Oken v. State*, 835 A.2d 1105 (Md. 2003). Additionally, Defendant's argument about ex post facto, retroactivity and cruel and unusual punishment, with respect to a "presumption of life" is without merit. The *Tenneson* Court accepted the trial court's use of the instruction but found it was not advisable to give such an instruction. *See also Schriro v. Summerlin*, ___ U.S. ___, 2004 WL 1402732 (2004).

[83] Although *People v. Harlan*, 8 P.3d 448 (Colo. 2000) contains language that reaffirms *People v. White*, that reference is in the appendix. Since the Supreme Court has held that the appendix cannot be cited as precedent, the Court will not consider it here.

No. 14 is not susceptible to the type of confusion Defendant claims. Furthermore, Instruction No. 15 makes the requirement completely clear:

> "You shall presume that each aggravating factor(s) does not exist unless you unanimously agree that it has been proven beyond a reasonable doubt. The burden of proof is upon the prosecution to prove to your satisfaction beyond a reasonable doubt the existence of one or more of the aggravating factor(s) listed in these instructions."

In addition, *Boyde v. California*, 494 U.S. 370 (1990), directs the Court to determine whether there is a "reasonable likelihood" that the jury was misled by the complained-of instruction[84] in a way which prevents consideration of constitutionally relevant evidence. In this regard, "constitutionally relevant evidence" includes all mitigating evidence. *Robertson v. Cockrell*, 325 F.3d 243 (5th Cir. 2003). *See also Johnston v. Luebbers*, 288 F.3d 1048 (8th Cir. 2002). *Boyde* also holds that "[a] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Boyde,* 494 U.S. 370 (1990), citing *Boyd v. United States*, 271 U.S. 104 (1926). *See also People v. Lee*, ___ P.3d ___, 2003 WL 22208357 (Colo. App. 2003). Therefore, Defendant's argument fails both on the basis of settled precedent and under any reasonable argument of semantic confusion.

Even if there was error in any of Instructions No. 14, 15, 23 and/or 24, the Court is confident, beyond a reasonable doubt, that the result attained in the penalty phase was surely unattributable to this alleged error. While it is true that the jury was required to conduct its penalty phase deliberations in accordance with the instructions, the Court finds, beyond a reasonable doubt, that the language in these instructions comported with Colorado law as it existed in 1996 and was understandable to the lay jurors selected to hear the case. *People v. Griego*, 19 P.3d 1 (Colo. 2001).

Instruction No. 13

Defendant next objects to Instruction No. 13. The Court continued with its practice of permitting jurors to take notes during the penalty phase as they had done in the guilt/innocence phase. The Court has discussed this issue, *supra*, but would add that

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[84] This standard is applicable if the instruction is neither "ambiguous" or "clearly erroneous." *Murtishaw v. Woodford*, 255 F.3d 926 (9th Cir. 1991).

Defendant has not suggested that this case was infested with the problems set forth in *People v. Willcoxon*, 80 P.3d 817 (Colo. App. 2002). The Court reiterates its findings with respect to the guilt/innocence phase and makes them its findings and order with respect to the penalty phase.

Instruction No. 1 and Related Issues

In his arguments concerning penalty phase jury instructions, Mr. Dunlap substantially repeats his arguments concerning penalty phase Instructions Numbers 1 and 17. The Court made findings and conclusions about these arguments in the guilt/innocence phase, *supra*, and now incorporates those findings and conclusions with respect to the penalty phase.

Instruction No. 2

His argument about penalty phase Instruction No. 2 and *People v. Lowe*, 660 P.2d 1261 (Colo. 1983), is substantially similar to that made with respect to the correlative instruction in the guilt/innocence phase. The Court incorporates its findings and conclusions, *supra*, with respect to that instruction. Contrary to Defendant's assertion, the jurors were not led to believe "that the law considered Mr. Dunlap to have committed eight first degree murders, four more than the law actually recognized." *M*: 52.Although the Court agrees with Defendant that the Supreme Court did not resolve this issue in *Harlan*, 8 P.3d 448 (2000), because the appendix is not controlling precedent, Defendant's argument is nothing more than conjecture.

Defendant again quotes only a portion of Instruction No. 2. In addition to the merger language the instruction states: "[t]herefore, you must make a total of four determinations as to the sentence to be imposed on guilty verdicts [*sic*] regarding First Degree Murder After Deliberation for each of the four victims." The jury was instructed in plain, understandable English. *People v. Crawford*, 515 P.2d 631 (Colo. 1973). Further, the law presumes that the jury understood the instructions. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

Instruction No. 17

Mr. Dunlap sets forth several objections concerning Instruction No. 17. These issues have been discussed, *supra*, with respect to the instructions given in the

guilt/innocence phase. The Court incorporates those findings and its order as if fully set forth at this point.

Instruction No. 19

Defendant contends that Instruction No. 19 "was incorrect" *M*: 54, because it precluded the consideration of mitigation. The instruction stated that the jury could not consider any of the circumstances or facts that occurred after the death of the four victims. A defendant's conduct sometime after the murders is not appropriate in the context of statutory aggravating factors. *People v. White*, 870 P. 2d 445,448 (Colo. 1994).

The instruction was carefully worded to avoid the problem. Instruction No. 19 told the jury that "[s]uch circumstances cannot be considered by you in determining whether the prosecution has proven beyond a reasonable doubt that the aggravating factor(s) exists." The jury was prohibited from considering activities after the victims'
death with respect to mitigation or with respect to the fourth step. Therefore, Defendant's contention is without merit.

Instruction No. 18

Defendant adds additional objections to Instruction No. 18 because the Court "directed a verdict against Mr. Dunlap on that element of the statutory aggravating factor." *M*: 55. He cites no supporting authority.

The People correctly assert that Instruction No. 18 was definitional. The Court could have given an instruction that contained the verbatim language of C.R.S. §16-11-309 (now C.R.S. §18-1.3-406) . However, this would have entailed the presentation of a substantial amount of extraneous material and would not have assisted the jury in its task. Furthermore, Instruction No. 18 required the State to prove the 5(b) aggravating factor beyond a reasonable doubt. Only the State was required to present evidence concerning this factor.

Defendant also attacks Instructions No. 15, 18 and 19 with respect to the 5(b) aggravating factor. He contends that there was insufficient evidence and improper prosecutorial arguments. Mr. Dunlap begins by suggesting that there was no "actual

conviction." However, this is merely an attempt to relitigate the Supreme Court's holding in *People v. White*, 870 P. 2d 445,448 (Colo. 1994).

His argument concerning "two separate and distinct" "convictions" for first degree murder has been addressed, *supra*. The People also correctly note that the language in Instruction No. 15 (subparagraph (a)) provided the jury with appropriate, statutorily-based guidance.

Additionally, the Instruction did not have to identify each victim once again in the body of Instruction No. 15. The instruction's opening paragraph states: "The aggravating factors alleged by the prosecution as to each murder victim, **MARGARET KOHLBERG, SYLVIA CROWELL, COLLEEN O'CONNOR and BEN GRANT ARE:"** (emphasis in original). Furthermore, the instruction concludes with the following language:

> "(1) If you unanimously agree as to the existence of one or more of the above listed aggravating factors **pertaining to one or more murder victim** beyond a reasonable doubt, then you shall continue your
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> deliberations by going on to the second step of your deliberations. (2) If any one or more of you believe that none of the aggravating factors has been proven beyond a reasonable doubt **as to any of the four murder victims**, then you shall enter a sentence of life imprisonment (and the foreperson shall sign the appropriate verdict forms)." (emphasis added)

The verdict forms, which were read to the jurors prior to their beginning their deliberations, clearly delineated the requirement that each aggravating factor be considered with respect to each of the deceased.

Mr. Dunlap next contends that the Court violated the requirements of *Apprendi v. New* Jersey, 530 U.S. 466 (2000) by failing to submit certain "missing elements" of some of the aggravating factors. He does not specify which of the aggravating factors were inadequately defined. The parties have not supplied the Court with sufficient information to enter a ruling on this matter.

Mr. Dunlap also contends that six aggravating factors, not disclosed by the People in pretrial pleadings, were submitted to the jury. In his memorandum, he suggests that the Court somehow engaged in "*sua sponte*" drafting and instructing of aggravating factors.

In fact, the Court did not engage in this behavior. The record is devoid of any support for Defendant's contention.[85] Therefore, Defendant was given all of the process to which he was due. His arguments are without merit.

Defendant next objects to the manner by which the Court dealt with the aggravating circumstances introduced by the People, pursuant to *People v. Saathoff*, 790 P.2d 804 (Colo. 1990). The Colorado Supreme Court has addressed this issue in its direct appeal opinion. The Supreme Court's ruling is the law of the case and is binding on this Court.

The Defendant next asserts that the People introduced insufficient evidence to establish the (5) (b) aggravating factor for each victim. He contends that the juror's findings as to this aggravator demonstrate that "the jurors were acting as a result of passion, prejudice and arbitrariness, not in accordance with the constitutions, law and their obligations as sworn jurors." *M*: 55.

The Supreme Court has made findings concerning the statutory factors that would require the death sentences to be vacated. As a result, the Court limited the People's presentation of evidence to Investigator Meskis' testimony and Exhibit 800 (the mittimus in Case No. 95CR605), specifically to limit the amount of available prejudicial and potentially inflammatory evidence arising from the Burger King case. In fact, the mittimus alone would have been sufficient to prove the 5(b) aggravating factor. As noted elsewhere herein, the Court's redaction of the sentence from the mittimus was done to provide Defendant with further protection from additional inflammatory evidence.[86]

The prosecutors did not misstate evidence in their closing arguments. Instruction No. 18 did not direct a verdict against Defendant. The jury was required to determine whether the People had presented sufficient evidence to prove the 5(b) aggravating factor beyond a reasonable doubt. (This Paragraph makes no sense….starts with closing arguments then goes to Instruction No. 18 to jury's burden – put in the missing step)

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[85] Defendant also contends that trial counsel was constitutionally ineffective because they failed to object to Instruction No. 15. However, defense counsel had lodged an objection to each and every word in the penalty phase instructions. Although the Colorado Supreme Court disapproved of this form of continuing objection, it recognized the validity of continuing objections when entering its ruling on direct appeal.

[86] Mr. Lewis testified that he sought to avoid introduction of the 75 year sentence because of his belief that the jury had developed a level of respect for the Court. Without making such a finding, the Court does note that a 75 year sentence for any defendant represents a judge's determination that the offenses for which the defendant is being sentenced, together with his background, character and potential for rehabilitation, as well as specific and general deterrence and basic fairness, requires substantial containment.

The instructions were consistent with the People's pre-trial disclosures, as required by statute. The People were permitted to offer each aggravating factor with respect to each victim and Defendant was on notice that the People were prosecuting him for each of the Chuck E Cheese murders. His post-conviction argument infers that he believed the sentencing hearing would address the four murders as a single event. The People did not over-charge him in this regard but did give him all of the information necessary to prepare his defense.

Mr. Dunlap also argues that he was convicted of First Degree Burglary and Aggravated Robbery after he killed Ms. Kohlberg, Ms. O'Connor, Ms. Crowell and Mr. Grant. The Court is not certain about his logic, but finds that all of his actions, from the time he began his criminal acts in Chuck E Cheese until he completed them, are part of a total course of criminal conduct. The Court concludes that Instructions No. 15, 18 and 19 were not misleading and did not relieve the People of any statutorily-mandated proof.

Defendant again asserts that Instruction No. 15 was deficient because it failed to specify the identity of the victim of the aggravated robbery which formed the basis of each of the four statutory aggravating factors pursuant to C.R.S. §16-11-103(5)(g). His cited case, *People v. Chavez*, 952 P.2d 828 (Colo. App. 1997), is inapposite. *Chavez* simply holds that the People must prove each element of each offense they allege in a charging document.

The Court provided one instruction with respect to the 5(g) aggravating factor and delineated that factor in the verdict forms as to each victim. Defendant's claim is without merit.

Defendant's assertion that the Court instructed the jury with respect to six aggravating factors that had not been disclosed also is untenable. The actual C.R.S. §16-11-103 (5)(a) and (i) factors were described as to each victim. Defendant should not have been surprised, and certainly was not prejudiced, by this approach.

Defendant's assertions concerning the instructions about the *People v. Saathoff*, 790 P.2d 804 (Colo. 1990), nonstatutory aggravation were addressed by the Supreme Court in his direct appeal. *People v. Dunlap*, 975 P.2d 723 (Colo. 1999). The Court is bound by the Supreme Court's ruling. Although Defendant contends that the Court's decision not to discuss this evidence in greater detail, the evidence, as set forth in

Instruction No. 22, was "radical error", *M*: 62, this decision was in keeping with the Court's intention not to be a partisan and to try to craft instructions that provide guidance without invading the jury's province.

Miscellaneous Claims

Information rather than Indictment

Mr. Dunlap next objects to the fact that this case was commenced by information rather than indictment. In *Losavio v. Robb*, 195 Colo. 533, 579 P.2d 1152 (1978), the court held that "[i]n Colorado, there is no constitutional guarantee of a grand jury indictment." In a footnote, the Supreme Court noted:

> "[a]lthough Colo. Const. Art. II, Sec. 8 provides for indictments in felony cases, it specifically allows the legislature to abrogate this requirement by including the words '(u)nless otherwise provided by law.' Of course, the Fifth Amendment to the United States Constitution contains a guarantee of a grand jury indictment for certain crimes. Since this guarantee has not been selectively incorporated by the Due Process Clause of the Fourteenth Amendment, it is not applicable to the states. Hurtado v. California, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232. See Beck v. Washington, 369 U.S. 541, 82 S. Ct. 955, 8 L.Ed.2d 98 (states can completely dispense with grand juries if they choose to do so)." *Id* at 536-537. *See also People v. Rodriguez*, 914 P.2d 230, 257 (Colo. 1996).

Furthermore, the Court is unaware of any United States Supreme Court case that requires an individual facing a capital murder charge to be charged by indictment rather than by information. Therefore, Mr. Dunlap's claim in this regard fails.

Biased Sentencing Scheme

Defendant also claims that Colorado's capital sentencing scheme for instructions concerning mitigation is "biased." *M*: 132. (*See also M*: 224 "Straw Man list of mitigating factors, and *infra*). Here, Defendant contends that the state's arguments against mitigators that were not argued by the defense permitted the prosecution to engage in "presumptive rebuttal of non-existent mitigation." As a result, he asserts that the prosecution "transform[ed] rebuttal of the straw men into aggravation, and make [*sic*] Mr. Dunlap's mitigation seem less by comparison, when Mr. Dunlap was not allowed to obtain an instruction on any mitigating factor unless he affirmatively presented evidence." *Id*.

As the People observe, the Supreme Court resolved this issue in its direct appeal order. *People v. Dunlap*, 975 P.2d 723, 737-743. Therefore, Defendant is precluded from reasserting this issue in this Crim. P. 35(c) hearing. *See also People v. Rodriguez*, 914 P.2d 230, 249 (Colo. 1996).

Polygraph Issues

Defendant raises the issue of Joshua Carl Wilson's being found to be deceptive during three polygraph examinations. He asserts that this constituted a violation of Mr. Wilson's plea agreement and that trial counsel should have sought to elicit this information at trial. However, in order to present this material, counsel would have been required to gain admittance of the results of the polygraph examinations as evidence. The parties have stipulated that the testimony of Dr. Charles Honts and Ms. Gina Morelli, presented in Mr. Dunlap's Crim. P. 35(c) hearing in Case No. 95CR605, is "admissible at the evidentiary hearing [in this case], for the same purposes and to the same extent that they were admitted during the course of [Case No. 95CR605]."
DEF PC-59) The Court heard that testimony and has received and reviewed the attachments to DEF-PC59.

In its direct appeal ruling in this case, the Supreme Court held that polygraph evidence is per se inadmissible in a criminal trial. *People v. Dunlap*, 975 P.2d 723, 756 (Colo. 1999). The Court also noted that Mr. Dunlap did not present any evidence to the contrary at either the trial or direct appeal.

The parties' stipulation means that Defendant has presented evidence in this Crim. P. 35(c) hearing. Since he has done so, the Court will enter a ruling consistent with its order in 95CR605.

As the court noted in 95CR605, Dr. Honts was a thoughtful witness. However, he has had limited success in other courts across the United States. Dr. Honts testified that polygraph evidence is admissible in New Mexico. A different form of polygraph questioning was used in a case to which he referred, *United States v. Galbreth*, 908 F. Supp. 877 (D.N.M. 1995). New Mexico is one of the very few jurisdictions to permit a party to introduce polygraph evidence in a criminal trial.[87]

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[87] The Ninth Circuit disagreed with the United States District Court's ruling in *U. S. v. Cordoba*, 194 F. 3d 1053 (9th Cir. 1999), affirming the California District Court's ruling, 991 F. Supp. 1199 (C.D. Cal. 1998).

Under *People v. Shreck*, 22 P.3d 68 (Colo. 2001), a court must consider whether proffered testimony is reliable and relevant. For the purposes of this analysis, the Court will assume that Mr. Dunlap's desire to impeach Mr. Wilson affords some level of relevance for this case.[88] The Court also finds that Dr. Honts is qualified to testify about polygraphy, based on his experience, training and research pursuant to C.R.E. 702. A *Shreck* analysis requires a consideration of reliability. Although polygraph examinations have been subject to "testing" and peer review, Dr. Honts implied that many people in the criminal justice community continue to have an unfavorable view of polygraph examinations. In a survey conducted by Dr. Honts and Dr. Susan Amato, 62 percent of Ph.D.s and M.D.s "who are interested in psychophysiology" felt that polygraphs are "a useful scientific tool" while 30 percent do not. This hardly supports any level of general acceptance in a relevant scientific community. More significantly, there is no known error rate that can be ascribed to polygraphy. There is a great deal of interpretation of a subject's response to questions, looking at a variety of physiological responses to the stress of the moment.

Indeed, polygraphs are used outside of the courtroom in a variety of settings. There is no evidence about the relationship of polygraphs to "more established modes of scientific analysis." *Id.* There is insufficient evidence available to the Court with respect to the frequency and type of error generated by polygraphs. As noted, in a few states, polygraphs have been admitted to support the proposition that Defendant sets forth in this case.

The Court finds that the evidence presented in this case, by stipulation, does not support a finding that polygraph evidence would have been, or would be admissible in Colorado. The Court will not engage in a C.R.E. 403 analysis. The Court declines to modify the Supreme Court's ruling on the direct appeal of this case.

Both the trial and appellate courts applied the standards enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Other courts have followed the rubric of the Colorado Supreme Court and the 9th Circuit: *U. S. v. Sherlin*, 67 F.3d 1208 (6th Cir.1995); *State v. Porter*, 698 A.2d 739 (Conn. 1997). Even states that are less rigid generally disapprove of polygraph evidence. *See, e.g. State v. Wright*, 471 S.E. 2d 700 (S.C. 1996).

[88] In Case 95CR605, the People stated that Mr. Wilson's purportedly untruthful answers related only to the Chuck-E-Cheese case. In the Burger King case, the Court did not rely on such a representation. One could argue that such a statement is a judicial admission in this case. Once again, the Court does not rely on this representation, but notes it for the purpose of its *Shreck* analysis.

Lack of Contemporaneous Objection: *Saathoff* Evidence

Mr. Dunlap claims that the Court erred, and trial counsel was ineffective, because the Court did not provide a contemporaneous instruction concerning "the permissible purposes for which the State's preemptive rebuttal evidence could be used." *M*: 215. He cites *Stull v. People*, 140 Colo. 278, 344 P.2d 455 (1959); *People v. Spoto*, 795 P.2d 1314 (Colo. 1990); *People v. Garner*, 806 P.2d 366 (Colo. 1991); *People v. Scheidt*, 182 Colo. 374, 513 P.2d 446 (1973). These cases were decided before the enactment of §16-10-301 CRS.

In *People v. Underwood*, 53 P. 3d 765 (Colo. App. 2002), the Court of Appeals found that the trial court's failure to give a limiting instruction did not constitute plain error. The *Underwood* case dealt with sexual assault and incest charges. The evidence was presented in the People's case-in-chief.

In its review of Defendant's direct appeal, the Supreme Court found harmless error as to the manner by which the Court admitted this evidence. Since appellate counsel did not raise this issue, the Supreme Court did not discuss the need for a contemporaneous instruction.

The parties have not presented any authority concerning the need for a contemporaneous instruction in a penalty phase hearing. The statute in existence at the time of this case did not require the Court to give the jury a contemporaneous instruction.

> All admissible evidence presented by either the prosecuting attorney or the defendant that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant, including any evidence presented in the guilt phase of the trial, and any matters relating to any of the aggravating or mitigating factors enumerated in subsections (4) and (5) of this section may be presented. Any such evidence which the court deems to have probative value may be received, as long as each party is given an opportunity to rebut such evidence. §16-11-103 CRS .

The Court has not located any authority that mandates a contemporaneous instruction for this type of evidence. The Supreme Court found that the evidence was admissible for the selection phase of the jury's deliberations.

Arguments of this type have not been found to be meritorious. *See, e.g. Waterhouse v. State*, 790 So.2d 1176 (Fla. 2001); *Taylor v. Commonwealth*, 63 S.W.3d

151 (Ky. 2001). In *Gaskin v. State*, 737 So.2d 509 (Fla. 1999), the Florida Supreme Court focused on *Strickland v. Washington*'s prejudice prong and found that the defendant did not show that the outcome of the sentencing hearing would have been different had counsel sought and obtained a limiting instruction. The same standard is applicable here. Furthermore, Mr. Dunlap has presented no evidence or authority to suggest that a contemporaneous limiting instruction would have caused the jury to arrive at a different sentence.

Defendant also asserts that the Court's "radical" change of mind concerning the limited purposes for which the *Saathoff* evidence could be used was error. *Memo*: 227. He relies on *Gardner v. Florida*, 430 U.S. 349 (1977). In that case, the Supreme Court held that the defendant was denied due process of law when a portion of a report was withheld from him and his counsel. In *Simmons v. South Carolina*, 512 U.S. 154 (1994), the Supreme Court also held because the sentencing jury was not informed that a life sentence in South Carolina meant that the defendant could not be paroled the defendant was denied due process due to the prosecution's reliance on future dangerousness, thus leading to a "grievous misconception." *Id.* As a result, Mr. Simmons' death sentence was vacated.

Here, Defendant contends that the Court deviated from its ruling that the evidence concerning the juvenile adjudications could only be used for a limited purpose. Similarly, he contends that the Court did not maintain its position with respect to the uncharged robberies and that the absence of a limiting instruction caused him prejudice. Finally, he states that trial counsel's failure to cross-examine the witnesses about these limited areas constituted ineffective assistance of counsel. He then states that "an enormous amount of extraordinarily prejudicial and inadmissible evidence [was] introduced without any objection or testing." *Memo*: 228.

Since the Supreme Court has found that the penalty phase instructions "clearly . . . [informed] the jury that it could not consider any evidence regarding mitigating facts as aggravation or in support of the death penalty []." *People v. Dunlap*, 975 P.2d 723, 743 (Colo. 1999), the *Strickland v. Washington*'s performance prong has not been established.

Defense counsel's failure to object does not meet the first *Strickland v. Washington* prong. Counsel was not ineffective for failing to request a contemporaneous instruction.

Nose Lineup[89]

Defendant raises the same objection to the "identification" of Mr. Dunlap by Christine Contreras (now Ms. Gonzalez) as he did in the predicate "Burger King" case (No. 95CR605). The Court reiterates its findings and conclusions from that case as its order in this case.

Defendant states that Ms. Contreras' "identification" at trial was unreliable. He notes that she recognized him based on his nose, "…after she had failed to identify him for almost two years, and after being repeatedly exposed to in-court as well as through various media reports…." Mr. Dunlap contends that her in-court statement was "…so unduly suggestive as to render her in-court identification unconstitutionally unreliable…." *OB (95CR605)*: 92

After the Chuck-E-Cheese murders, Ms. Contreras was presented photographs of Mr. Dunlap. On three occasions, she could not identify him as the Burger King robber.

On January 10, 2001, Ms. Contreras was shown a "nose line-up". After a defense investigator gave her a standard photographic lineup admonition, she was shown six pictures of African-American noses. She was unable to identify any of the noses as that of the robber. Mr. Dunlap's picture was in position number five.

Ms. Contreras was not familiar with Mr. Dunlap before the Burger King robbery (although they may have worked together). Immediately after the robbery, she spoke with Officer King and described only the nose area of the robber. She had a quick look at the robber (perhaps a handful of seconds). Ms. Contreras testified that, upon being confronted by the robber, her instinct was not to look at him lest she provoke more problems.

At the preliminary hearing, Ms. Contreras testified that the robber was tall and wearing sunglasses. She also stated that, "the only thing I could see was his nose and his cheeks (and that the robber was African-American)." Vol. 3: 106 (Case No. 95CR605).

[89] Certain references to Case No. 95CR605 (the "Burger King case") include "OB" (opening brief) and "R" (response).

Ms. Contreras did not identify Mr. Dunlap at the preliminary hearing. However, in August, 1995, she apparently met with Deputy District Attorney John Hower and Investigator Karen Meskis. She then indicated that she had recognized Mr. Dunlap's nose at the preliminary hearing and that she could identify Mr. Dunlap based on his nose.

Ms. Contreras described the robber's nose as wide at the tip and nostrils. She was unable to provide any further description of the robber's face. She also indicated that the robber was an African-American male, wearing a dark cap with an unspecified logo, dark sunglasses, black jeans, a black jacket and gloves.

At trial, Ms. Contreras testified that she recognized Defendant because of his photograph in the newspaper. She then stated that she recalled the preliminary hearing testimony and that "his nose looked familiar." Vol. 31: 102. (Case No. 95CR605). She then pointed out the Defendant as having that similar nose.

The record does not indicate that any law enforcement agency had any involvement with Ms. Contreras' viewing of the newspaper photograph. Defendant does not contend that the People failed to provide discovery concerning Ms. Contrereas' meeting with Investigator Meskis. The Court may properly consider these factors. *See People v. Martinez*, 734 P.2d 126 (Colo. App. 1986).

The defense now contends that Ms. Contreras' "nose identification" at trial was improper and should have been suppressed. Therefore, the Court must determine if the first time in-court "identification" was impermissibly suggestive.[90]

In *People v. Monroe*, 925 P.2d 767 (Colo. 1996), the Supreme Court held that first time in-court identifications are not unduly suggestive *per se*. The jury may properly consider the identification, "if it does not stem from a constitutionally defective identification procedure, under the totality of the circumstances." 925 P.2d at 771.

In his opening brief, Mr. Dunlap contends that "(a) one-on-one show up at a preliminary hearing is undoubtedly suggestive." *OB (95CR605)*: 94. Although this may be true, the law established in *Monroe* does not mandate relief for the Defendant.

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[90] Since the in-court "identification" was the first time Ms. Contreras had recognized the Defendant, counsel could not have filed a motion to suppress identification before that time.

The Supreme Court recently refined this body of law in *Bernal v. People*, 44 P.3d 184 (Colo. 2002). There, a photographic array was found to be impermissibly suggestive. The Supreme Court recognized the traditional grounds for review of various forms of lineups: "Suggestive lineups are disapproved because they increase the likelihood of misidentification and have, in the past, too often brought about the conviction of the innocent." 44 P.3d 184, 190. However, none of the factors in *Bernal* are applicable here. Ms. Contreras' observation was not tainted by a "controlling and overriding characteristic of . . . witnesses' identification of the robber." 44 P.3d 184, 193. There was no emphasis on race or ethnicity. Ms. Contreras simply stated that she was persuaded that she recognized Mr. Dunlap because of his nose.

The People correctly assert that the jury was given a full explication of the circumstances of Ms. Contreras' prior inability to identify Mr. Dunlap. Under the totality of the circumstances disclosed to the Court, Ms. Contreras' first time trial statement concerning Mr. Dunlap's nose was not based on an unconstitutionally impermissibly suggestive pretrial procedure. It should not have been suppressed at trial.

Ronald Sena conducted the "nose line-up". He has been a private investigator since 1998. After retiring as the chief investigator for the Denver Police Department, he attended law school and graduated from the University of Denver College of Law.

Mr. Sena acknowledged that the procedure he employed with Ms. Contreras was the first "nose-lineup" he had performed in his career and it was, at best, only the second of which he was aware. Neither he, nor any other witness, provided any evidence on the efficacy of "nose lineups". The Court has not received any legal authority from either party concerning this procedure.

The statement by Ms. Contreras was not an identification. She stated that she recognized Mr. Dunlap's nose. The jury properly received this information and was authorized to use it in any manner it deemed appropriate.

Defendant has not offered any legal basis for relief with respect to the "nose identification".

"Straw Man List" of Mitigating Factors

Mr. Dunlap also objects to the Court's providing a "Straw Man List of Mitigating Factors." The State's reference to the appendix issue in *People v. Harlan*, 8 P. 3d 448

(Colo. 2000), is stricken because the Supreme Court held that those issues do not have precedental value.

However, the State correctly notes that the Colorado Supreme Court addressed this issue in its direct review of this case. *People v. Dunlap*, 975 P.2d 723, 737-743. This ruling is binding on this Court. No further findings or order is required.

Juvenile Adjudications

Mr. Dunlap also attempts to collaterally challenge his juvenile adjudications in Cases No. 89JV1503 and 89JV1505.[91] He contends that "the adjudications were illegally obtained and their use against Mr. Dunlap violated his rights under the due process and cruel and unusual punishment clauses of the U. S. and Colorado Constitutions, C.R.S. §19-2-708 and C.R.J.P. 3(b)." *M*: 254.

He cites *Johnson v. Mississippi*, 486 U. S. 578 (1988). In *Johnson*, the prosecution introduced a record of an invalid conviction and Johnson's confinement therefore and nothing more. "In Mississippi's sentencing hearing following petitioner's conviction for murder, however, the prosecutor did not introduce any evidence concerning the alleged assault itself; the only evidence relating to the assault consisted of a document establishing that petitioner had been convicted of that offense in 1963. *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988).

The facts here have no relationship to *Johnson v. Mississippi*. Indeed, the existence of juvenile adjudications, *qua* adjudications, cannot be introduced as substantive evidence in Colorado. *See People v. D'Apice*, 735 P.2d 882 (Colo. App. 1986); *People v. Armand*, 873 P.2d 7 (Colo. App. 1993).

The State engages in a lengthy discussion about Defendant's being time-barred pursuant to §16-5-402(1) CRS and the ruling in *People v. Russell*, 36 P.3d 92 (Colo. App. 2001). The Court need not make findings in this regard because the adjudications themselves were never introduced into evidence.

In his reply, Defendant asserts that his objection is grounded in the law of evidence. *Reply*: 81. He urges that the State's reference to juvenile probation officer

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[91] This Court presided at the CRJP 3 hearings for Defendant at each for each of those adjudications. Defendant, as a juvenile, was represented by counsel and completed written Advisement of Rights forms.

Johnny Montecalvo's testimony that Defendant had suffered an adjudication for aggravated robbery, without referring to the elements of the offense, was "significant." *Id*.

Mr. Dunlap also asserts that the State "affirmatively use(d)" his assertion of his Fifth Amendment privilege during his meeting with probation officer Montecalvo. This testimony occurred in a *Jackson-Denno* hearing prior to Mr. Montecalvo's testimony in the penalty phase.

The Court conducted that hearing prior to the presentation of evidence at the sentencing phase. The Court found that Defendant's statements to Probation Officer Johnny Montecalvo were constitutionally voluntary. However, the parties did not then re-litigate the propriety of the adjudications.

The current arguments are circuitous. On the one hand, the People allege that §16-5-402(2) CRS. bar Defendant's claim. In his reply brief, Defendant states that, since the statute in existence at the time of the trial did not specifically address juvenile adjudications, he cannot be time barred from presenting this claim.

The Court has reviewed Mr. Montecalvo's testimony of February 29, 1996. During an in camera hearing, Mr. Montecalvo identified People's Exhibits 909, 910 and 911. In the presence of the jury, he discussed "a robbery of a cleaners and a robbery of a hair salon." *Tr*. 2/29/96: 4561. Mr. Montecalvo also indicated that Mr. Dunlap "provide[d] . . . a typewritten version as who what occurred, in the course of those robberies." *Tr*. 2/29/96: 4562. This was the substance of Mr. Montecalvo's testimony.

During the Crim. P. 35(c) hearing, Jonathan Willett, admitted as an expert criminal defense attorney, testified about the pleas in Defendant's juvenile cases. He noted the lack of initials in the CRJP 3 advisement form, that the Court did not discuss the specific rights surrendered Mr. Dunlap at the time of his pleas. He also felt that the Court should have provided more thorough definitions of certain terms at the juvenile delinquency providency hearing.[92]

[92] Defendant contends that *People v. Pickering*, 725 P.2d 5 (Colo. App. 1985) supports this contention. In *Pickering*, the Court of Appeals reversed an aggravated robbery conviction because the jury never was given a definition of the *mens rea*, or culpable mental state, of "knowingly".

Other courts have considered the use of juvenile adjudications in capital litigation. However, these decisions deal with specific statutory provisions. *See, e.g. Commonwealth v. Baker*, 614 A.2d 663 (Pa. 1992); *Henyard v. State*, 689 So. 2nd 239 (Fla. 1996); *Ex Parte Carroll*, 852 So. 2nd 821 (Ala. 2001).

The Supreme Court has held that, when considering a defendant's guilty plea, a trial court must be satisfied that the defendant "understands the nature of the crime charged." *People v. Gorniak*, 197 Colo. 289, 593 P.2d 349 (1979). The Court also held that the use of the phrase "with specific intent" was a sufficiently clear explanation. 593 P.2d 349, 351.[93]

The record demonstrates that the Court took time to discuss the Defendant's juvenile pleas with some detail and that Defendant understood the nature of his pleas, the elements of the offenses and the consequences of those pleas. Further, Mr. Willett (who, as he was in the previous Crim. P. 35(c) hearing, was highly impressive and persuasive) testified that he was not aware that the Court had not authorized the use of the actual adjudications at the penalty phase. He stated that, if the jury did not receive evidence of the actual adjudication, there was no prejudice.

The Court granted Defendant a continuing objection to Mr. Montecalvo's testimony. Therefore, the Court must engage in a constitutional harmless error analysis.

First, there was no reference to any adjudication. Second, the mere reference to a probation officer and supervision, without more, cannot be found to be erroneous. Defendant cites no authority in this regard.

Colorado has not specifically addressed this issue. Other states have held that the facts underlying juvenile adjudications are admissible with respect to a capital defendant's character and such statutory considerations as future dangerousness. *See Commonwealth v. Baker*, 614 A.2d 663 (Pa. 1992); *Ice v. Commonwealth*, 667 S.W. 2d 671 (Ky. 1984); *People v. Lewis*, 26 Cal. 4th 334, 28 P.3d 110 (Cal. 2001); *Saylor v. State*, 765 N.E. 2d 535 (Ind. 2002).[94]

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[93] The Supreme Court also has held that aggravated robbery is a crime that is "understandable by persons of ordinary intelligence." *Lacy v. People*, 775 P.2d 1 (Colo. 1989).

[94] Several other states permit the prosecution to offer proof of the actual juvenile adjudications as substantive evidence in support of a death sentence. Since Colorado clearly does not support this proposition, the Court has not considered those cases.

The Court concludes that Colorado's capital sentencing statute, as it existed from December, 1993 – March, 1996, authorized the use of the facts of the juvenile adjudications.

The transcript shows that all of the disputed testimony occurred outside the presence of the jury (the sentencers) and was not admitted for any substantive purpose. Defendant (who was a juvenile when he was supervised by Mr. Montecalvo) had prepared an application for probation on a typewriter. The details of the offenses to which Defendant had pled guilty were included in the application. Mr. Montecalvo knew nothing else about the application.

After his conviction in the Burger King case, Defendant completed a similar application. He did not discuss the details of the offense on the advice of his attorney (Mr. Gayle).

When Mr. Montecalvo testified before the jury, he identified himself as an ISP (Intensive Supervision of Probation) officer. However, he was asked only as to whether he had had any contact with Mr. Dunlap in November, 1999. After answering that question affirmatively, Mr. Montecalvo's testimony was limited to establishing a foundation for People's Exhibit 909, the application for probation.

Defendant's invocation of his right to remain silent was discussed only in the in camera hearing. Exhibit 909 was prepared, at least in part, outside of the Probation Department's offices. The Court found that all of Defendant's statements were constitutionally voluntary. *See People v. Dracon*, 884 P.2d 712 (Colo. 1994).

Defendant was not prejudiced by the reference about his declining to speak about the Burger King allegations in any way. Defendant cannot establish either of the *Strickland v. Washington* prongs.

Defendant cites *United States v. Mitchell*, 526 U.S. 314 (1999). This case is inapposite to the issues he raises. Neither the Court nor the sentencers utilized Defendant's silence in their decision. Although the Burger King case was used as a statutory aggravating factor to enhance Defendant's penalty (*See U.S. v. Warren*, 338 F.3d 258 (3rd Cir.) 2003), Defendant's silence was not used as a negative inference during the penalty phase. His claim is without merit.

The Court concludes that there was no error in the admission of the factual background of Defendant's juvenile criminal activity. The Court is confident beyond a reasonable doubt that, if there were any error, such error did not contribute to the jury's sentencing decision. It surely was unattributable to the sentencing decision because the jury never received any information about the actual adjudications.

Right to be Present

Defendant alleges that he was denied his right to be present at the proceedings on certain occasions. He also objects to certain off the record conferences. Some of his objections are specific; others are general.

The Court begins this analysis by considering the relevant case law. Defendant cites *Luu v. People*, 841 P.2d 271 (Colo. 1992). The *Luu* case addressed the question of whether a non-English speaking person was denied his right to be present for closing arguments (which certainly are a critical stage of the proceedings) without his Vietnamese interpreter. Defense counsel waived the presence of the interpreter.

The Supreme Court adopted the standard enunciated in *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246 (1991). "[A]llegations of denial of the right to be present at trial are scrutinized under the harmless error doctrine." *Luu v. People* 841 P.2d 271, 274 (Colo.,1992). Since the *Luu* trial court instructed the jury about the absence of an interpreter, the Supreme Court found that any error was harmless.

The People cite a more recent decision. In *People v. Grace*, 55 P.3d 165 (Colo. App. 2001), the Court of Appeals addressed the issue of whether a defendant must be present when a trial court considers questions from a deliberating jury. The Court recognized that a communication between the court and the jury during deliberations is a critical stage of the proceedings. Applying the harmless error standard, the Court concluded that, if the trial court properly responded to the jury's question, the error was harmless beyond a reasonable doubt.

Defendant alleges:

> The court and defense counsel extensively argued and negotiated on the critical factual and legal issue of where the trial would be held, without Mr. Dunlap's presence or knowledge. In fact, a principal issue of concern at that hearing was whether Mr. Dunlap should ever be told what was happening in his case. The state argued that Mr. Dunlap should be present. *M*: 260

(The brief continues to discuss ineffective assistance of counsel issues, suggesting that defense counsel "agreed" to proceed without Defendant being present.)

The manner in which the defense presents this issue establishes its lack of merit. If one were to simply read the argument, without considering the record, one would be led to believe that a trial court was engaged in some kind of plot to deprive a defendant of his fundamental rights. In one breath, counsel suggests that there was "extensive argu(ment) and negotia(tion)" about the change of venue. Read in isolation, one could conclude that the Court was engaging in a nefarious ex parte communication.

The November 8, 1995 session began at 10:32 A.M.[95] Defendant was present. At that point, the Court granted Defendant's Motion No. 1 for change of venue. The Court found that the pretrial publicity was "massive and . . . pervasive in this area." *Tr.* 11/8/95: 5. The Court concluded that Defendant could not receive a fair trial in Arapahoe County and determined that venue must be changed.

At that point, the Court had anticipated that a preferred approach would be to bring in a jury from another jurisdiction, house them in a nearby hotel, and send them back to their homes for the weekends. Both parties desired this approach.

The Court was unable to make arrangements to transport jurors from another county to Arapahoe County. This was discussed on the record.

On November 9, 1995, the discussion during which Defendant was not present was resolved in a total of ten transcript pages. Defendant was given a full opportunity to present his personal views, as well as to hear the positions of counsel. Much of the discussion dealt with reasons why either Larimer County or El Paso County should the chosen venue.

After careful deliberation, the Court decided to try the case in the Fourth Judicial District, El Paso County. The results of jury selection demonstrate that, as to the reason for the change of venue, excessive pre-trial publicity, any error in Defendant's brief absence was harmless beyond a reasonable doubt.

[95] The transcript suggests that the starting time was 10:32 P.M. Since the Court began by saying, "Good morning, ladies and gentlemen," *Tr.* 11/8/95: 3, the reporter's time entry clearly is erroneous.

First, Defendant was fully apprised of all aspects of the decisional process. The Court set forth its thinking, on the record, in exhaustive detail.

Second, the venire in Colorado Springs demonstrated minimal knowledge of the Chuck E Cheese murders. The Court made further findings when Defendant sought a second change of venue.

Defendant has presented no evidence to suggest that he suffered any harm in this regard. If the time encompassing ten pages of transcript is a critical stage of the proceedings, this Court determines that any error was harmless beyond a reasonable doubt.

"Monkey Business"

Defendant objects to a parlor game, referred to as "Monkey Business", in which several members of the prosecution team engaged after the trial. He suggests that the use of the "monkey business" label and the questions (in the game) clearly demonstrate an inappropriate racial component to the state's decisions and motivation in this case . . . . The prosecution argued that Mr. Dunlap was a racist and that racism motivated him to shoot whites. This hypocrisy by itself constitutes a violation of the due process of cruel and unusual punishment clauses." *M*: 269.

Defendant claims that the title of the game was "obviously racist." *M*: 270. In a colloquy with counsel during the "Burger King" case's post-conviction hearing, the Court inquired as to whether a former presidential candidate's indiscretions on a boat with the name "Monkey Business" was a indication of that man's obvious racism.

Recent events which the Court cannot ignore raise similar questions. A headline in a local newspaper's sports page referred to "monkey business" during the 2002 World Series. Should the Court interpret this reference as an indication that the newspaper, the headline writer, the article's author, the team using a monkey (either as a mascot or for a promotion) and/or Major League Baseball is obviously racist?

In his memorandum, Mr. Dunlap asserts that the People's initial closing argument included "racial and ethnic considerations." *M*: 272. In that argument, the prosecutor did make an unwise and inappropriate reference to "normal white middle class" people, as well as "immigrants." *Tr.* 3/7/96: 5712.

The People refer to *People v. Harlan*, 8 P.3d 448, 500 (Colo. 2000). The Supreme Court cites *Graham v. Collins*, 506 U.S. 461 (1993) in stating, “Racial prejudice is the "paradigmatic capricious and irrational sentencing factor." Indeed, any case prosecuted because of racial bias, and/or any sentence, including a death penalty that is in any way associated with racial animus is an affront to the fundamental principles that distinguish the United States from all other countries.

Defendant has offered no factual support for his claim that the prosecution or the decision to seek capital punishment, was racially motivated. Early in the proceedings, the People were required to provide information about historical data concerning (then) District Attorney Robert R. Gallagher, Jr.’s decision to seek the death penalty in other cases. The produced materials demonstrated that the death penalty was sought infrequently in the Eighteenth Judicial District and that individuals who faced capital prosecutions were of differing races.

The post-trial “trivia” game was inappropriate. Indeed, the notion of “trivia” in the context of this case is demeaning, not only to Mr. Dunlap, but to the victims, their families, and every person who labored for many years to assure fundamental fairness.[96] This event diminished the judicial process, irrespective of the reason for the participants’ engaging in it. Nevertheless, the Court cannot find that either the game or the term “Monkey Business” reflects anything other than a lack of sound post-trial judgment. There is nothing in the record to indicate any improper racial motivation on behalf of any person connected with the prosecution.

Biased Judge

Mr. Dunlap asserts that this Court lacked fairness and impartiality on two specific grounds. First, he states that he should not have been denied access to the addresses of prospective jurors. Defense counsel objected to this order, entered on January 19, 1996. Therefore, the constitutional harmless error analysis must be applied.

Unquestionably, if the defense team itself had been denied access to this information, an error of constitutional magnitude would have occurred. In fact, the only

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[96] “Trivia” is defined as “of little worth or importance: insignificant, flimsy, minor, slight.” *Webster’s Third New International Dictionary, Unabridged*, 1971.

portion of the questionnaires denied directly to Mr. Dunlap was the addresses of the jurors.

Prior to the trial, the People presented the Court with a motion, pursuant to a protective order, concerning Defendant's alleged efforts to escape from the Arapahoe County Detention Facility. The Court also was aware of the allegations of Defendant's pre-trial threats to other persons.

Under the totality of the information available at the time, the Court did not feel that Defendant was prejudiced in any way by the Court's order (as requested by the People). His attorneys and investigators continued to have full access to all materials that were provided to the Court and the prosecution.

Defendant has not, and cannot demonstrate that the order depriving him (personally) of the jurors' addresses affected his substantial rights in any way. In his reply, Defendant is limited to a generalized complaint. "Both sides" had access to the questionnaires. The Court is confident beyond a reasonable doubt that, if there were any error, it did not contribute to his guilty verdict. *See Bernal v. People*, 44 P.3d 184 (Colo. 2002).

Defendant also complains that the Court and its Colorado Springs staff engaged in inappropriate "active involvement" with the victims and families of victims violated his federal and state constitutional rights. This issue was discussed at an earlier hearing in this matter. This allegation requires a brief explication.

When the Court changed venue to Colorado Springs, the Fourth Judicial District Administrator's office assigned Robert Hinshaw (then a retired bailiff) as full time staff. Kathy Quigley, a clerk's office employee, was assigned to work on data entry on a part-time basis. Although there were offers of other help from administration, there was not a great deal of follow-up. The Court was left with the responsibility to address the sequestration of the jurors, including locating a suitable hotel for them.

The Court was aware of this situation before the conclusion of jury selection. The Court and Mr. Hinshaw toured several hotels to determine which facility would be most

appropriate for sequestration. It quickly became apparent that the jurors would be housed on the south side of Colorado Springs.

With this knowledge, the Court inquired of the victims and families as to whether they desired to stay overnight in Colorado Springs. The Court then made several recommendations of facilities that were not on the Court's list of proposed hotels for jurors. The Court made a similar offer to the Dunlap family (although no one was present from Defendant's family at that particular time).

The jury was sequestered at the Sheraton Hotel on the south side of Colorado Springs from a time just before they began to deliberate until the conclusion of the trial. Unfortunately, a national Tae Kwon Do tournament took over the Sheraton Hotel during the penalty phase of the trial.

The Court was required to make additional arrangements to permit the jurors to remain sequestered. After discussion with counsel about the problem (but not the location of the jurors – hence, one or more of the off the record discussions about which Defendant complains elsewhere), the jurors moved to the Le Baron Hotel on Bijou Street in Colorado Springs. The Court had been residing at the Le Baron since the beginning of the trial.

The Court did ask for the introduction of the victims' families at the beginning of the trial. The Defendant and the families had waited for a considerable period of time before getting to trial. The Court felt that both the Defendant (and his family, had they appeared then or at any time before testimony) and the victims' families were entitled to this sense of courtesy.

The Cruel and Unusual Punishment clause of the United States Constitution was originally designed to proscribe physically barbarous punishment. It has, however, evolved to embody, "broad and idealistic concepts of dignity, civilized standards, humanity, and decency" with respect to penal measures. *Estelle v. Gamble*, 429 U.S. 97 (1986).

Here, Defendant has not been subjected to any unfair treatment. He was offered the same considerations as were the victims and their families. The Court established a structure for the supervision of the jury during the period of sequestration.

A discussion of judicial bias is contained in *Alley v. Bell*, 307 F.3d 380 (6th Cir. 2002). The 6th Circuit cited *Liteky v. United States,* 510 U.S. 540 (1994) in holding, "the standard for deciding judicial bias claims; in that case, the Court explained that "the pejorative connotation of the terms 'bias' and 'prejudice' demands that they be applied only to judicial predispositions that go beyond what is normal and acceptable. 307 F.3d 380, 386 (6th Cir. 2002). Another court has held that there must be a finding of "a deep seated favoritism or antagonism that would make fair judgment impossible." *U. S. v. Diaz*, 176 F.3d 52 (2nd Cir. 1999).[97]

It is difficult for the trial judge, sitting as a post-conviction review judge, to consider these types of questions. The Court does not fault Defendant for raising them. However, it is the duty of an appellate court to determine whether these matters warrant the relief that Defendant seeks.

Lying in Wait Aggravator

Defendant contends that there was insufficient evidence to support the "lying in wait" aggravator.[98] He states that, "it would expand the factor's scope enormously, and would thus violate the due process and cruel and unusual punishment clauses. Every murder in which the victim did not in advance expect the culprit to kill them (*sic*) would be included."

In the Supreme Court's independent review of this case, the Court found, "In support of the subsection (5)(f) aggravator regarding an offense committed while lying in wait, the People established that Dunlap hid in the bathroom prior to committing the Chuck E Cheese's murders." *People v. Dunlap*, 975 P.2d 723, 764 (1999). The People argue that this finding resolves the issue. The Court believes that some further findings are necessary.

Colorado case law, other than the Supreme Court's decision in this case, does not discuss the "lying in wait" aggravator in detail. However, other jurisdictions provide some guidance. In *People v. Laws*, 15 Cal. Rptr. 2d 668 (Cal. App. 3 Dist. 1993), the

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[97] *See also U. S. v. Gordon*, 61 F.3d 263 (C. A. 4 (Md.) 1995. "(P)artiality" requires an apparent disposition toward a party that is "wrongful or inappropriate." *U.S. v. Gordon*, 61 F.3d 263, 267 (4th Cir. 1995).

[98] At the time of the murders, this aggravator was located at §16-11-103(5)(f) CRS.

court noted, “The act of lying in wait with secret purpose in order to gain advantage and take a victim unawares is particularly repugnant and of aggravated character so as to justify harsher punishment when the lying in wait results in murder, even if the waiting and watching were not done with the intent to kill or injure.” 15 Cal. Rptr. 2d 668, 673 (Cal. App. 3 Dist. 1993).

In *Davis v. State*, 477 N.E. 2d 899 (Ind. 1985), the Indiana Supreme Court noted, “A murder by lying in wait is a murder by ambush. It is a killing while launching a forceful attack from concealment upon an unsuspecting victim.” *Davis v. State*, 477 N.E.2d 889, 901 (Ind.,1985). In *Davis*, the defendant attacked the victim after a confrontation and not from concealment. This distinction is appropriate in this case.

North Carolina refers to this aggravator. “Murder perpetrated by lying in wait "refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim." *State v. Allison,* 298 N.C. 135, 147, 257 S.E.2d 417, 425 (1979). The assassin need not be concealed, nor need the victim be unaware of his presence. ‘If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait.’” *Id.* at 148, 257 S.E.2d at 425. *State v. Leroux* , 390 S.E.2d 314, 320 (N.C.,1990).

Here, Defendant went to the Chuck E Cheese restaurant with murder on his mind. He ate a meal and played some video games. The victims might or might not have known of his presence. One or more may have been acquainted with him. Nevertheless, Mr. Dunlap went into the men’s room and waited until the last customer had left the restaurant. Only then did he exit the restroom and, without warning, begin his killing spree.

The Court finds that, under any rational examination of the evidence, a reasonable jury would conclude that Mr. Dunlap did indeed lie in wait before perpetrating the murders. There is no unreasonable “expansion” of the “lying in wait” aggravator. Defendant’s contention is without merit.

Response to Jury's Question

Mr. Dunlap asserts that the Court erred in its response to the jury's guilt/innocence phase question about felony murder. The jury asked for "clarification/guidance" about felony murder. (*Tr.* 2/26/96:3956)

The record reflects that the Court met in chambers with counsel for both parties consulted with the Court concerning the proper response for the jury's interrogatory. After the Court shared its initial thoughts, both the prosecution and the defense requested modifications to the proposed response. The Court found that both parties offered valid and appropriate additions.

The Court the provided this instruction: "Ladies and gentlemen, Felony Murder is defined in Instruction No. 16. As part of that, you may refer to Instructions No. 20, 25, 27 and 28. Remember that you must consider all of the instructions together, as a whole. You also have received all of the evidence concerning these matters which you may consider in reaching a verdict. And finally, that in all communications, the juror should list their juror number. (*sic*)." (*Tr.*2/26/96: 3957). Both parties approved of this instruction.

Defendant contends that the instruction "merely referred the jurors back to the very same instructions which the jurors had just informed the court were confusing or inadequate. This violated the principles and holding of *Leonardo v. People*, 728 P.2d 1252 (Colo. 1986)." *M*: 275.

The Court first notes that, in *Leonardo*, the trial court crafted an instruction without consulting counsel or informing the defendant. That trial judge's response was, "Ladies and Gentlemen: You must reach your verdict applying the words as you find them in the instructions." 728 P.2d 1252, 1254 (Colo. 1986).

The Supreme Court has adopted *ABA Standards for Criminal Justice*, Standard 15-4.3(a) (2nd ed. 1980). That standard authorizes a trial court to respond to an interrogatory of this type by directing (the jury's) attention to some portion of the original instructions." 728 P.2d 1252, 1255 (Colo. 1986). *See also People v. Fell*, 832 P.2d 1015 (Colo. App. 1991). This was the course chosen by this Court.

The record further demonstrates the lack of merit in Defendant's argument. The People correctly state the law concerning the relevant procedure. Active participation in the preparation of a response to a jury question, or express agreement with it, bars the participant from arguing that the response constitutes error. *People v. White,* 64 P.3d 864 (Colo. App. 2002) (citing *People v. Bielecki,* 964 P.2d 598 (Colo. App. 1998)). *People v. Rivers*, 70 P.3d 531, 534 (Colo. App. 2002).

Additionally, the referred-to instructions provided the jury with a virtual primer on the issue of felony murder. The Court cannot read the minds of the jurors or divine the reason for their interrogatory. The Court chose the most conservative possible choice, by utilizing the original instructions and providing an additional "roadmap" for the jury as it pursued its duties in this case. Defendant has not demonstrated any error with respect to the Court's response to the jury's interrogatory.

Sentencing Hearing

Mr. Dunlap complains about his sentencing hearing of May 17, 1996. He specifically objects to the statements of members of the victims' families, Will Mickelson, "an unnamed member of the courtroom audience; "Mr. Stake", Tiffany Gunning, Dennis O'Connor, and Sandy Rogers. *M*: 278-280.

During the course of the formal sentencing hearing, one of the victims' family members engaged in inappropriate conversation directly to Mr. Dunlap. The Court had advised counsel and those present at the hearing that victim allocution statements were to be made only to the Court. *Tr*. 97: 36. In at least one instance,[99] this requirement was disregarded. The statements of Donald Crowell served only to inflame an already difficult and tense hearing. In retrospect, the Court probably should have set forth its requirements more clearly, perhaps in the form of a written order and should have denied the victims' family members the opportunity to use a podium where each person could face Defendant. The Court's original plan, that would have required the allocution to occur from counsel table, may have produced a less difficult result.

[99] A young child, Heather Cromer, also made comments during the sentencing hearing. Mr. Dunlap does not specifically object to her statements.

Pursuant to Article II, §16(a) of the Colorado Constitution, and §24-4.1-301 et. seq. CRS, crime victims enjoy the right to be present and to address the Court at "critical stages" of the criminal justice process, including sentencing hearings.[100]

Defendant's statements at the sentencing hearings had nothing to do with his actual sentence. First, pursuant to §16-11-103 CRS (as it was codified in May, 1996), the jury was the sentencing body. The Court found, pursuant to §16-11-103(2)(c) CRS, that the verdict of the jury was not clearly erroneous as contrary to the weight of the evidence. Second, as with all other sentencing hearings, except for the statutorily mandated provisions for the death sentence, the Court entered sentences for the underlying felonies. In doing so, the Court considered the four factors set forth in §18-1-102.5 CRS.

If Mr. Dunlap's death sentence is reversed, the Court could grant him a further reconsideration hearing, at which time the issue of rehabilitation may be addressed. The Court was required to consider specific deterrence, general deterrence and fairness when imposing the sentences for the underlying felonies. Further, certain sentences were required to be served consecutively, pursuant to §16-11-309 CRS.[101]

The Court will not reiterate findings made earlier in this order. The Supreme Court has found that "the horror of the crime itself that looms large in our calculus . . . . Dunlap killed four people and seriously wounded a fifth. He did it without provocation or cause, but rather with a brutal contempt for human life." *People v. Dunlap* 975 P.2d 723, 765 (Colo. 1999). These factors were a significant part of the Court's consideration as it entered its sentences for the underlying offenses.

Nothing that Mr. Dunlap said or did in the May 17, 1996 hearing affected the Court's sentence. In fact, his outburst represented the only time that he was anything other than respectful to the Court, opposing counsel and the jury during the entire period of January, 1995 through May, 1996.

Mr. Dunlap's arguments concerning the sentencing hearing are without merit.

Third Way Center and Savio House Records

Defendant argues that the subpoenas duces tecum directed to Savio House and Third Way Center violated Crim. P. 16, 17 and the Supreme Court's holding in

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[100] With respect to Class One Felonies, §24-4.1-302.5(1)(g) CRS is controlling.
[101] This section now is found at §18-1.3-406 CRS (2002).

Richardson v. District Court, 632 P.2d 595 (Colo. 1981). First, the Court cannot find any Rule 17 violation. The subpoenas satisfied all procedural requirements.

Richardson holds that Crim. P. 16 (II) (c) does not authorize a trial court to grant prosecution motions for pretrial discovery of statements to non-expert defense witnesses. The case notes that Crim. P. 16 was drafted to carefully limit the amount of material an accused is required to disclose to the prosecution.

The People respond by stating that the Court did not release "a substantial portion of those records." *RBI*: 265.[102] The parties also dispute the circumstances of the endorsement of Thomas Moore, a caseworker at Arapahoe County Department of Social Services.

The record shows that the Court released one document, "a clinical or social study . . . . It relates to a date of February 3, 1989, which I find to be probative to the issues raised vis-à-vis the adjudication issue and those times raised by Mr. Peters." *Tr.* 2/27/96: 4045. At the conclusion of this ruling, the defense, which had continually objected to any release of the Third Way and Savio House records, persisted in those objections.

The People state that the defense has not indicated how the People utilized the single document that was released. *RBI*: 266. In his reply, Mr. Dunlap argues, "The defense endorsed Mr. Moore only because the state subpoenaed the evidence and threatened to raise the issues itself." *Reply*: 103.

The Court has reviewed the record. Arguments about this issue are found in *Tr.* 2/25/96. The defense's indication of its reasons for subpoenaing Thomas Moore, a caseworker for the Arapahoe County Department of Social Services, are found at pp. 3765-3766.

The record reflects that the Court did not agree with the bulk of the People's argument. It also contains testimony of Mr. Moore (*Tr.* 3/4/96: 5261 – 5293). Although Mr. Dunlap, through counsel, argued that he subpoenaed Mr. Moore solely to protect

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[102] The People's statutory citation is inaccurate. The release occurred pursuant to §19-1-119 CRS, not to the (non-existent) statute to which the People refer, §19-1-199 CRS.

itself against the subpoenaed materials, his testimony fit neatly into the dysfunctional family portion of the mitigation case.[103]

The Court finds that Defendant's argument is overreaching. The Court's limited release of a single document did not produce any testimony in the penalty phase.[104] Neither Mr. Moore nor any other witness was asked any questions about the document. Since Mr. Dunlap objected to the production of any Savio House or Third Way Center documents, the matter was preserved for appeal. The Court must apply the constitutional harmless error standard. the court is confident beyond a reasonable doubt that, if there were any error, it did not contribute to the jury's sentencing decision. It surely was unattributable to this evidence.

Failure to Object: Deputy Gallo

Defendant also argues that trial counsel should have objected to Deputy Gallo's testimony about his behavior in the jail. She testified that she thought his "bouncing around" and other changed behavior were indicia of Defendant's desire to be taken to the mental health area or behavioral control which has rubber rooms. "I thought he was trying to set me up for that kind of a scenario, because I knew that he was scheduled for court pretty soon."

During this post-conviction proceeding, the Court, over defense objection, received Deputy Gallo's testimony be received pursuant to §16-8-109 and CRE 701. In his Memorandum in Support of his motion, Defendant argues that Deputy Gallo's comments were irrelevant and "extremely prejudicial if left alone, as they were." *Memo*: 214. However, counsel's citations deal with prohibited testimony that alleged victims were telling the truth about specific events. Colorado has held such testimony inadmissible. *People v. Koon*, 724 P.2d 1367 (Colo. 1986).

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[103] There were references to dependency and neglect cases and delinquency cases in cross-examination. The defense did not ask any redirect examination in this regard. Post-conviction counsel focuses solely on the subpoena issue and does not object to Mr. Moore's testimony.

[104] It is interesting to note that one claim in the People's initial Notice of Cross-Appeal states that the Court was too restrictive with respect to its release of Third Way and Savio House records. This issue was not discussed in the Supreme Court's direct appeal ruling. The Court does not know why the Supreme Court did not address this matter.

However, Colorado law holds that decisions as to whether to object to testimony and evidence generally fall within the ambit of trial strategy. *See People v. Bossert*, 722 P.2d 998 (Colo. 1986); *Davis v. People*, 871 P.2d 769 (Colo. 1994). As the People correctly note, Defendant has not demonstrated that counsel's decision not to object was professionally unreasonable. *RB II*: 103.

Failure to Impeach: Ray Willett

Defendant claims that trial counsel's decisions concerning witness Ray Willett constituted ineffective assistance of counsel. He testified in the penalty phase during the State's rebuttal case. Mr. Willett testified that Carol and Jerry Dunlap were highly active parents and that the school district welcomed their (uncharacteristic) participation. This evidence was relevant in the context of Defendant's penalty phase evidence of mistreatment by the Dunlaps.

Mr. Willet's views concerning Defendant's apparent lack of fear of Jerry Dunlap also was relevant with respect to Defendant's claims of abuse. His testimony that Defendant was bright and had the ability to succeed also was pertinent.

Post-conviction counsel argue that trial counsel should have impeached Mr. Willett with respect to Carol and Jerry Dunlap's inconsistent treatment of Defendant when compared to his siblings. This allegation assumes facts not in evidence. Although Mr. Willett was the guidance counselor for all three Dunlap children, the Court has not received any information to indicate that Mr. Willett was aware of such disparate treatment.[105]

Trial counsel asked Mr. Willett about whether he was aware of Jerry Dunlap's alleged abuse of Defendant. Mr. Willett did not know about this but acknowledged that Defendant "was not one to volunteer any information about his family." *Tr*. 3/5/96: 5533. Mr. Willett also was not aware of the sexual abuse perpetrated on Adenia (Dunlap, Defendant's sister[106]) by Jerry Dunlap. Mr. Lewis also elicited testimony about the reporting requirement for child abuse. And he was able to have Mr. Willett acknowledge

[105] Mr. Willett did testify that Ms. Dunlap had some more contact with him concerning Garland Dunlap than she did with respect to either of the other Dunlap children.

that he was "just not sure what went on behind closed doors in the Dunlap house." *Tr.* 3/5/96: 5537.

This information was relevant to Mr. Lewis' argument that no one could get meaningful information from the Dunlap household. In closing argument, he sought to open as many "windows" as he could. Carol Dunlap's behavior throughout the pretrial and trial periods exemplified these problems. Mr. Lewis' examination of Mr. Willett during the penalty phase did not fall beneath acceptable professional norms. The Court finds that the examination was appropriate and helpful to the defense's mitigation case.

Failure to Object/Impeach: Wayne McCasland

The People also presented the testimony of Wayne McCasland during their penalty phase rebuttal case. He testified that he was a partner with Defendant in the sale of cocaine and that sales occurred on a daily basis.

Defense counsel objected when Ms. Wilson attempted to elicit information about threats Defendant may have made with respect toward unspecified individuals. The Court sustained this objection. At a recorded bench conference, Ms. Wilson stated that the People were introducing this evidence to rebut Adenia Dunlap's testimony as well as the lack of future dangerousness and the lack of dysfunctionality. The examination ended with a reference to Mr. McCasland's and Mr. Dunlap's ability to support themselves with money from drug sales.

Post-conviction counsel argues that, under the Supreme Court's ruling, a limiting instruction was "essential." Since the State conceded that this was *Saathoff* rebuttal testimony, it would have been appropriate to include this testimony in Instruction No. 22. However, the People cite the Supreme Court's ruling in *People v. Dunlap*, 975 P.2d 723, 741-742. The evidence was relevant with respect to Defendant's character and background.

> We have concluded that the proper inquiry demanded for admission of such evidence at step four is whether the evidence is relevant to any of the categories listed in section 16-11-103(1)(b),

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[106] At the time of the trial, Adenia Dunlap was married and testified under the name of Adenia Ashlock. She subsequently remarried. During the post-conviction hearing, she testified under the name of Adenia Edwards.

> including the "character, history, and background of the defendant." § 16-11-103(1)(b) . . . . At step four, the jury was entitled to consider this evidence, in conjunction with all of the other evidence offered by the People and by Dunlap, in its life or death decision concerning this particular death-eligible defendant . . . . Thus, we conclude that all of the aggravating circumstance evidence was relevant, was not overly prejudicial, and was therefore properly admissible for purposes of the jury's deliberations at step four. *People v. Dunlap*, 975 P.2d 723, 742 (Colo. 1999).

As with all other aspects of the Supreme Court's opinion, this holding is binding on this Court. Defendant's contention is without merit.

Failure to Impeach other Witnesses

Mr. Dunlap makes further allegations of ineffective assistance with respect to trial counsel's failure to cross-examine (and impeach) other witnesses, including Brandon O'Neill, Tim Litwinsky and Will Michelson. With respect to Mr. O'Neill, Defendant states that counsel should have demonstrated that the witness had lied to the police on prior occasions "in order to help himself." *Memo*: 219. Mr. Maes had prior inconsistent statements and felony convictions. Mr. Litwinsky had made "contradictory statements about his motivation." *Id.*

Post conviction counsel cites numerous cases in support of these contentions. There is a common principle in all of these cases: "To establish prejudice from counsel's failure to investigate a potential witness, a petitioner must show that the witness would have testified and that their testimony 'would have probably changed the outcome of the trial.'" *Hadley v. Groose*, 97 F.3d 1131, 1135 (8th Cir. 1996).

In *State v. Wells*, 804 S. W. 2d 746 (Mo. 1991), the defendant had asked his trial attorney to obtain a letter which reputedly said that another person was guilty and the defendant was not guilty. At the post-conviction hearing, trial counsel testified that she did not believe that such a letter existed. Investigation demonstrated that the letter actually existed. The ineffectiveness of counsel's performance and the prejudice visited upon the defendant were manifest.[107]

In *U.S. v. Wolf*, 787 F.2d 1094 (7th Cir. 1986), trial counsel was "totally incompetent" because of his "*policy* of never objecting to improper questions. (This) is forensic suicide. It shifts the main responsibility for the defense from defense counsel to the judge. It

[107] *But see State v. Boyce*, 913 S.W. 2d 425 (Mo. App. E.D. 1996). Not every failure to cross-examine a witness is ineffective assistance of counsel.

would make no sense in a case like this where the prosecutor was intent on bringing in extraneous and at times unfounded charges in order to blacken the defendant's character. The failure to object to any of the improper cross- examination . . . is incomprehensible." *U.S. v. Wolf*, 787 F.2d 1094, 1099 (7th Cir. 1986).

Trial counsel did not demonstrate an aversion to cross-examination. Both Messrs. Lewis and Gayle picked their spots and, where appropriate, engaged in rigorous cross-examination. As the People observe, Mr. Lewis was aware of Mr. O'Neill's alleged false reporting and succeeded in obtaining an order from this Court to permit examination pursuant to CRE 608. He chose not to do so. The testimony adduced at the hearing demonstrates that Mr. Lewis considered all aspects of the defense and made a reasonable strategic decision.

Steven Maes also testified during the penalty phase. He stated that, while he and Defendant were in the Arapahoe County Jail, Defendant asked the Sheriff's Department for a change of cells so that he and Mr. Maes could be cellmates. Defendant told Mr. Maes that, because Mr. Maes' cell had a loose window, he could attempt to escape from the jail.

Ultimately, Mr. Maes was erroneously transported from the Arapahoe County Jail to another jail. When he returned, he was placed in another cell. By this time, Miguel Kirkpatrick was Mr. Dunlap's cellmate. Mr. Maes observed Defendant and Mr. Kirkpatrick tearing off a leg of a metal desk. He observed Defendant attempting to sharpen the metal leg. He then saw Mr. Dunlap scrape the window ledge in his cell. Defendant told Mr. Maes that he wanted to escape, "'cause he had too much time hanging over his head." *Tr.* 3/1/96: 5058-5059. Mr. Maes also discussed Defendant's statements about the Chuck E Cheese murders, that Defendant had no remorse for his victims and that he committed the crimes because he had been fired, and that he hoped for a chance to make a movie about them.

Defendant contends that there can be no acceptable tactical reason for failing to cross-examine Mr. Maes. He notes that counsel could have pointed out Mr. Maes' prior inconsistent statements. However, a form of this evidence was adduced on direct

examination.[108]

Mr. Maes was revealed as a convicted felon for an aggravated robbery, pled down to conspiracy to commit simple robbery. The jury had an adequate opportunity to consider his credibility as a convicted felon.

Trial counsel's strategy was not aimed at issues of future dangerousness. They focused their mitigation case on Defendant's upbringing, including Defendant's having witnessed Jerry Dunlap sexually assault Adenia Dunlap, the abuse he suffered and his fear of that abuse. The determination not to cross-examine Mr. Maes is a reasonable strategic decision.

Defendant's cited case of *Driscoll v. Delo*, 71 F.3d 701 (8th Cir. 1995) relates to an eyewitness to a murder whose testimony "took on such remarkable detail and clarity over time." Another inmate's statement, "I told [the investigators] anything they wanted to hear--I just wanted to tell them something. So they--I mean, virtually I told them anything they wanted to hear just so they would leave me alone and because I knew I had to go back to population with regular inmates." 71 F.3d 701, 710 - 711 (8th Cir. 1995). However, the first inmate's testimony was viewed as offsetting the second's, thereby leading to constitutional prejudice. Such a situation does not exist here.

In *Nixon v. Newsome*, 888 F. 2d 112 (11th Cir. 1989), trial counsel was deemed ineffective because she failed to impeach a key witness in a murder case with inconsistent testimony given at the trial of another defendant. These were "crucial discrepancies" of the trial's "star witness." The same situation does not exist here. The evidence does not establish that trial counsel failed to satisfy *Strickland v. Washington*'s performance prong in this regard.

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[108] Post-conviction counsel also assert that the trial investigative team interviewed Mr. Maes on two occasions and that he gave conflicting information. This information was not adduced during the post-conviction proceedings. Therefore, the Court cannot make findings about it. Counsel also allege that Mr. Maes told the investigators (in the second interview) that Defendant did not tell him any reason for the shooting. Once again, there is no evidence to support this contention. The Court rejects it. The Court makes a similar finding with respect to Mr. Maes' alleged guilty plea to Rioting in a Detention Facility. With the exception of the felony conviction, the People requested that Defendant provide about the two interviews. RBII: 152. The Court does not know if this request was honored.

Failure to Object to Prosecutor's Reference to Dr. Barkhorn

Mr. Dunlap asserts that trial counsel's failure to object to the prosecutor's reference to Dr. Rebecca Barkhorn, during the cross-examination of Adenia Ashlock, (nee Dunlap), constitutes ineffective assistance of counsel. Ms. Ashlock's testimony occurred on March 4, 1996.

Ms. Ashlock's testimony included information that her natural father was Rufus Rochelle, III and that Defendant's natural father's first name is Jerome. Ms. Ashlock had never met Defendant's natural father.[109] She also testified about Carol Dunlap's bipolar disorder, and stated that Carol Dunlap's first formal diagnosis was in Colorado in 1985 or 1986. She discussed Carol Dunlap's symptoms, hospitalizations and medications. Ms. Ashlock also described the impact of Carol Dunlap's behavior on Defendant.

Ms. Ashlock provided graphic testimony about Jerry Dunlap's abuse of Defendant. She told the jury about her sexual abuse at the hands of Jerry Dunlap. She spoke of Defendant's witnessing one event of sexual abuse and Jerry Dunlap's subsequent increasing physical abuse of Defendant.

During her cross-examination of Ms. Ashlock, Ms. Wilson asked, "I think you've previously described to a Dr. Barkhorn how your brother would start the teasing, I think as you called it. He would start teasing people." Ms. Ashlock responded, "When he was younger, he did have a problem with that, and he-- he teases. He did have a problem with that. But as he got older and into high school, it was more of a different situation. He wasn't teasing anybody anymore." *Tr*. 3/4/96: 5235-5236.

The brief reference to an otherwise unidentified Dr. Barkhorn could not possibly have prejudiced Defendant.

Post-conviction counsel also asserts that Ms. Ashlock's statements were hearsay. The State responds that the disputed testimony was a prior inconsistent statement. They note that, immediately prior to the quoted material, *supra*, Ms. Ashlock had testified, "There wasn't a great number of abundance of him getting into fights. It came down to somebody picking on him, and they wouldn't leave him alone, and then he had to

physically defend himself." When Ms. Wilson asked if Defendant was the instigator, Ms. Ashlock responded, "Not all the time, no."

The People's contention is valid. Ms. Ashlock's statement concerning Dr. Barkhorn qualifies as a prior inconsistent statement. CRE 801(d)(I)(A); *People v. Trujillo*, 49 P.3d 316 (Colo. 2002); *People v. Allee*, 77 P.3d 831 (Colo. App. 2003). It was not hearsay. The failure to object was reasonable strategy and demonstrates that trial counsel had a good grasp of this evidentiary concept.

Defendant has not demonstrated that trial counsel's conduct fell beneath *Strickland v. Washington*'s performance requirement.

During the Crim. P. 35(c) hearing, the Court learned of the prosecution's interview of Dr. Barkhorn prior to the penalty phase. Defendant now contends that trial counsel's authorization of such an interview was ineffective assistance of counsel. He cites *Lanari v. People*, 827 P.2d 495 (Colo. 1992). *Linari* does establish a privilege for Defendant's statements to a psychiatrist. The privilege is waived when the statements are disclosed to third parties. *Linari* does not relate to the proposition that defense counsel's decision to permit the interview constituted ineffective assistance of counsel.

The People's second response brief appropriately demonstrates that Defendant's authorities are inapposite. *Hutchinson v. People*, 742 P.2d 875 (Colo. 1987) and *Perez v. People*, 745 P.2d 650 (Colo. 1987) involve the prosecution's securing direct testimony from an expert retained by the defense. In *People v. Young*, 716 N.E. 2d 312 (Ill. App. 3d 1999), trial counsel was found to be ineffective because she or he elicited prior consistent statements from a witness adverse to the defendant. Obviously, such conduct fell below any objectively reasonable standard of professional conduct.

In *Ex parte Welborn*, 785 S.W. 2d 391 (Tex. Cr. App. 1990), trial counsel was found to be confused as to applicable law. His questions demonstrated that he believed

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[109] During Carol Dunlap's penalty phase testimony, the jury learned that Defendant's natural father is Jerome Lang. She also testified that she never told Mr. Dunlap the identity of his natural father. *Tr.* 3/5/96: 5413-5414.

his client was being tried as a principal and not as "a party." He also failed to voir dire with respect to applicable law and failed to interview a key witness. This case has no relevancy to the disputed interview.

In *People v. Dalessandro*, 419 N.W. 2d 609 (Mich. App. 1988), defense counsel called the mother of a child abuse victim to testify. By doing so, counsel permitted the witness to be impeached "by the only incriminating evidence against defendant." 419 N.W. 2d 609, 613 (Mich. App. 1988). Once again, this case is irrelevant with respect to the issue raised by post-conviction counsel.

People's Penalty Phase Opening Statement

Defendant contends that the People's sentencing phase opening statement constituted misconduct. He cites *Archina v. People*, 135 Colo. 8, 307 P.2d 1083 (1957) and *Henwood v. People*, 57 Colo. 544, 143 P. 373 (1914).

In *Archina v. People*, the prosecutor's opening statement referred to four homicides. The evidence supported two murders. The prosecutor did not offer any evidence to support the allegation that the defendant killed two other people.
The *Henwood* court held that an opening statement "should not be argumentative, and the district attorney should always be careful not to include statements relative to testimony not competent to prove any issue in the case." *Henwood v. People*, 57 Colo. 544, 553, 143 P. 373, 377 (1914).

At the outset, the Court notes that, contrary to the State's contention, Defendant did not specifically raise these issues in his direct appeal. *See People v. Dunlap*, 975 P.2d 723, 759-763 (Colo. 1999).

The Court also notes that it specifically instructed the jury that the penalty phase opening statements were not evidence. *Tr.* 2/28/96: 4234.

A review of the State's complete penalty phase opening statement reveals that the prosecutor began by reviewing the evidence, established in the guilt/innocence phase, that would be used to support 24 of the 28 statutory aggravators upon which the state relied.

The prosecutor then turned to other evidence that would be offered in the penalty phase. She stated that the murders "were not an aberration, they were the result of a

continuing pattern of criminal conduct that was escalating in severity and escalating in frequency over a number of years." *Tr*. 2/28/96: 4259. Ms. Wilson then referred to the facts of other aggravated robberies that the defendant had committed, both as a juvenile and (with respect to the Burger King case) as an adult. She referred to "the bragging, the glee, the exultation that he took in those crimes . . . that is an essential part of who he is and what he is to ever be able to simply correct by putting a ski mask over your face." *Tr*. 2/28/96: 4261.

At the end of her opening statement, Ms. Wilson said, "A death sentence is the only sentence that silences that greed, that revenge and that enjoyment of fame that sentences them, and it would sentence him and it would silence him." *Tr*. 2/28/96: 4266.

Generally, opening statements provide counsel with an opportunity to inform the jury about the nature of the evidence that will be presented. Although counsel is afforded some latitude, certain statements are so prejudicial as to warrant reversal. In *Conahan v. State*, 844 So. 2d 629 (Fla. 2003), the prosecutor's opening statement included references to evidence about which the court had not yet ruled. The Florida Supreme Court found the trial court's authorization of this portion of the opening statement to be harmless error.

In *People v. Davenport*, 906 P.2d 1068 (Cal. 1995), the California Supreme Court held, "remarks made in an opening statement cannot be charged as misconduct unless the evidence referred to by the prosecutor was so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted." 906 P.2d 1068, 1093 (Cal. 1995).

In *Lucas v. State*, 555 S.E. 2d 440 (Ga. 2001), the prosecution referred to comments by victims. The Georgia Supreme Court found these references to be harmless beyond a reasonable doubt.

In *State v. Reynolds*, 687 N.E. 2d 1358 (Ohio 1998), the prosecutor's opening statement included the following: "And *I tell you* that the evidence in this case will prove beyond a reasonable doubt that the aggravating circumstances do outweigh the mitigating factors." (Emphasis added.) 687 N.E. 2d 1358, 1370 (Ohio 1998). The Ohio Supreme Court referred to this as "permissible argument." Although this Court, and all Colorado

courts, would find that "argument" is inappropriate in an opening statement, Ms. Wilson's similar statement also would be harmless beyond a reasonable doubt. Since the State had proven a vast number of aggravating factors in the guilt phase, her comment did not undermine the fundamental fairness of the sentencing hearing.

Finally, in *State v. Simmons*, 955 S.W. 2d 752 (Mo. 1997), a prosecutor's reference to the defendant's monetary gain motive was not impermissible provided that he planned in good faith to introduce evidence to support the proposition.

Opening statements "are more restrictive than closing arguments in permitting argument, analogies, and hyperbole." *People v. Hernandez* 829 P.2d 394, 396 (Colo. App. 1991). Here, counsel's statement did not unfairly taint the proceeding. The jury had heard evidence of Mr. Dunlap's repeated statements, including braggadocio, during the guilt/innocence phase. The comments surely did not solely produce the jury's death verdicts.

The Court also concludes that Mr. Lewis' failure to object did not fall beneath the standard of professional care for capital defense counsel. Accordingly, Defendant has not satisfied the performance prong of *Strickland v. Washington*.

Stipulation to Gang Evidence

Defendant alleges that trial counsel was ineffective because they stipulated to his gang affiliation. He suggests that there was no evidence to support this proposition. However, there was competent evidence concerning the "UNC", a group that was at least tantamount to, if not an actual gang.

Defendant suggests that he was portrayed as "one of thousands of disgusting, violent, cold blooded gangsters who roam the streets, seeking to inflict pain on other people and that it was impossible for the jurors to have any understanding of those people." *Memo*: 196.

This contention takes a portion of the penalty phase evidence out of context. The trial team sought to portray Defendant as a youngster who was subjected to physical abuse, who witnessed Jerry Dunlap sexually assault Adenia Dunlap and whose mother's mental health caused her to alternatively mistreat and then abandon Defendant. The end

result of this was that Defendant found a form of "family" in the UNC, a group with whom the average juror would have no sense of identification.

He also objects to Aurora Police Department Sgt. Genaro's testimony related to street gangs. The Court has read the transcript, *Tr.* 2/25/96: 4453-4473. Sgt. Genaro began by discussing Defendant's aggravated robbery of United Cleaners. His testimony then turned to certain aspects of gang graffiti, including an upside-down "A."[110]

In his cross-examination, Mr. Lewis obtained Sgt. Genaro's concession that not all upside-down "A's" are written by gang members. He also obtained testimony that was consistent with his theory of mitigation, that "for some people the gang is their status . . . (and) their security . . . (and) their defense . . . (and) is more or less their family." *Tr.* 2/25/96: 4468. Sgt. Genaro also testified about the term "wannabe."

The defense suggests that this testimony was inappropriate opinion testimony, under both CRE 701 and 702. Sgt. Genaro was not offered nor admitted as an expert. Therefore, CRE 702 is inapposite.

The Colorado Supreme Court has recently addressed this issue. "(W)here, as here, an officer's testimony is based not only on her perceptions and observations of the crime scene, but also on her specialized training or education, she must be properly qualified as an expert before offering testimony that amounts to expert testimony." *People v. Stewart* 55 P.3d 107, 124 (Colo. 2002).

Since Officer Genaro testified about gang-related activity, and not only the crime at United Cleaners, the admission of this testimony was error.[111] Because trial counsel did not object, the Court applies a plain error analysis. And since defense counsel used Sgt. Genaro's testimony as part of his theory of mitigation, the Court concludes, with full assurance, that the error did not undermine the fundamental fairness of the sentencing hearing as to cast serious doubt on the reliability of the jury's sentencing decision.

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[110] Sgt. Genaro stated that the upside-down "A" "memorializes a fallen gang member . . . (and) indicate(s) that the person is now dead." *Tr.* 2/27/96: 4466.

[111] The Court recognizes that this opinion was released more than six years after the trial and that this ruling is being applied retroactively. The Supreme Court also has addressed this issue: "The adoption of a rule of evidence in the context of a case and its application to that case may be permissible. Colo. Const. art. VI, § 21; *Beazell v. Ohio,* 269 U.S. 167, 46 S. Ct. 68, 70 L .Ed. 216 (1925) (retroactive changes in evidentiary rules are not *ex post facto* laws unless harsh or oppressive)." *W.C.L. v. People* 685 P.2d 176, 183 (Colo. 1984).

Officer Jeff Brown's Testimony

Defendant contends that Officer Jeff Brown's testimony contained inadmissible hearsay. Mr. Lewis did object on hearsay and CRE 613 grounds. The Court overruled his objections as to witnesses who had testified and sustained it as to those who had not testified. Later, Officer Brown testified as to a radio transmission concerning the Papa Nick's robbery.

Aside from these brief references, Officer Brown's testimony dealt with the investigatory activity that occurred immediately after the Papa Nick's robbery. He also discussed the proximity of Papa Nick's with respect to Chuck E Cheese and the Skippers restaurant. He did not locate any evidence.

The Court cannot find any instances of error. Since post-conviction counsel acknowledges the presence of a continuing objection, there is no basis for any claim of ineffective assistance of counsel.

Detective Robert Hinkle's Testimony

Aurora Detective Robert Hinkle testified about his investigation of robberies at United Cleaners and Mane Hair Station. When Detective Hinkle began to testify about Mr. Dunlap's involvement in those robberies, based on statements of Stella Moya, Rocky Martinez, Torano Stewart, Forrest Martin, Romales Stewart, Dennis Atkins and "a sister, either Ann or Stella Moya" (*Tr.* 2/29/96:4625-4626), Mr. Lewis objected. The Court sustained his objection before he could even state "hearsay." The Court instructed the jury to disregard the question and the answer.

Defendant contends that Detective Hinkle's statement about Ms. Moya's appearing to be fearful was "hearsay and pure prejudicial speculation." *M*: 218. The record does not support this contention. Even if there were a record basis for this claim, Mr. Lewis' testimony about his strategy provides a more than adequate reason for his failure to object.

Testimony of other Penalty Phase Witnesses

Defendant objects to the failure of counsel to object to certain testimony of Tu Yon Kim, Michael Thomas, Isaiah Thomas, Robert Arnold, Regina Hairston and Barry Levine. As with all aspects of Defendant's ineffective assistance claim, the Court begins

by noting that it must grant trial counsel's decisions great deference and decide whether, under the totality of the circumstances, the decisions not to object were objectively unreasonable.

The direct examination of Tu Yon Kim presented a UNC member who "got high, or, you know, drunk a lot." He smoked marijuana. He did not recall Defendant's smoking marijuana.

Mr. Kim was a co-participant in the Oriental Star aggravated robbery. He participated to get money to buy more marijuana. He did not know why Mr. Dunlap participated.

Mr. Kim was granted use immunity with respect to the Oriental Star crime. He had other offenses as a juvenile which were disclosed to the jury.

On cross-examination, Mr. Kim acknowledged that Tony Schalk was the "main man" in the UNC. Mr. Lewis' questions demonstrated that this witness was "getting high" every day by smoking marijuana. He also drank alcohol and used "acid once in a while." *Tr.*: 2/29/96: 4698.

Mr. Lewis also bolstered his theme that the UNC was a form of family by asking whether Defendant sought out the UNC. Mr. Kim acknowledged that this was true. When the Skippers robbery was planned, Mr. Schalk was present.

Mr. Kim had said that Defendant carried a gun at the Oriental Star robbery. On cross-examination, he contradicted himself. He stated that he never saw Defendant carry a gun. He then admitted lying to Detective Petrucelli.

In light of the totality of the cross-examination, post-conviction counsel's objection that Mr. Lewis attempted to obtain sympathy for Mr. Kim is without merit. Defendant has not established the *Strickland v. Washington* performance prong.

Michael Thomas' testimony consumes approximately 5 pages of transcript. On direct examination, Mr. Lee asked if he recalled "a particular evening in November of 1993 when something unusual and terrifying occurred at your home?" *Tr.* 2/29/96: 4716-4717. Mr. Thomas described a shooting into his house.

The jury clearly would have understood the unusual and terrifying circumstances of a shooting into a house where Mr. Thomas lived with his wife and two children. The

question was objectionable. However, the failure to object was not unreasonable or prejudicial. *Vargas v. Gunn*, 67 F.3d 310 (C.A. 9 (9th Cir. 1995). There is no reasonable probability that the sentencing decision would have been different had counsel objected. The failure to object was not objectively unreasonable. *See Bullock v. Carver*, 297 F.3d 1036 (10th Cir. 2002).

On direct examination, Isaiah Thomas, the target of Defendant's attempted drive-by shooting, was portrayed as a person ready to fight at almost any provocation. He and Defendant did fight at a Burger King restaurant.

Later, Mr. Dunlap fired shots at Isaiah Thomas while Mr. Thomas was at Christopher Selectman's apartment building.

Mr. Thomas was convinced that Defendant committed the drive-by shooting at the Thomas residence. On cross-examination, he admitted that he believed that Tony Schalk "showed Nathan where to go." *Tr.*: 2/29/96: 4747 (Mr. Lewis' question). He also acknowledged that Mr. Selectman, at age 17, was a convicted murder who was serving a life sentence. This led to redirect examination that revealed that Mr. Selectman's victim was a drug dealer.

Mr. Thomas lived in a world where many of his acquaintances and friends carried guns. He and Defendant had two fights.

The evidence that the "Bloods" street gang "dominated" the Park Hill area was not irrelevant to Defendant's theory of mitigation. The testimony about Mr. Selectman's crime would only cause the jury to question the credibility of Mr. Thomas.

Post-conviction counsel's various objections about these witnesses[112] do not satisfy either the performance or the prejudice prong. Defendant's memorandum cites a variety of cases that are fact-specific and not persuasive. For example, in *State v. Caraballo*, 750 A.2d 177 (N. J. Super. A.D. 2000), reversal was required because an attempt to admit an out-of-court statement as refreshed recollection was "a mere façade." The witness at issue was not cooperating. His hearsay statement deprived the defendant of his right of confrontation.

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[112] The Court finds that Defendant's objections concerning the testimony of Mr. Arnold, Ms. Hairston and Mr. Levene are of a similar nature and are equally without merit.

Defendant cites several cases. In *Gordon v. State*, 469 So. 2d 795 (Fla. App. 4 Dist. 1985), defense counsel clearly was ineffective when he permitted a juror to remain on the panel when she had heard about the case, had discussed it with her friends and was biased. The failure to object to hearsay does not appear to be the principal basis for the reversal.

In *U.S. v. Wolf*, 787 F.2d 1094 (C A. 7 (Ind.) 1986), the omitted hearsay objection related to a central issue in the case. More significantly, the *Wolf* case deals with a defense attorney who "seems to have been paying no attention to the trial." 787 F.2d 1094, 1100.

In *State v. Nolan*, 605 N.E. 2d 480 (Ohio App. 5 Dist. 1992), "trial counsel's performance herein markedly fell below an objective standard of reasonable representation and because of this ineffective demonstration, prejudice indeed arose therefrom. 605 N.E.2d 480, 486. The trial court found that counsel

> failed completely in his duty to raise the fundamental--the rudimentary--objections to improper impeachment evidence; improper prior bad acts evidence; improper character evidence; improper opinion evidence; and improper actions by the prosecutor. . . . (A)ppellant's defense was 'hoisted with one's own petard' by trial counsel's ineffective representation, specifically admitting improper impeachment evidence against his own witness (Robert Nolan) and by pursuing appellant's KKK "involvement *Id*.

Trial counsel's performance never approached descended to this lack of professionalism.

Mr. Dunlap claims that Robert Arnold's brief reference to a telephone call from the Aurora Police Department, during which he learned that some money, checks and pieces of paper "which said Skippers on them" had been recovered was hearsay. Mr. Arnold testified about the details of an aggravated robbery at the Skippers restaurant where he had worked. The information was of minimal consequence.

He complains about the manner in which Mr. Lewis objected to cross-examination. The objection was "outside the scope" (of direct examination). Mr. Lewis' complete objection was "that's a little bit beyond the scope of direct examination." The Court overruled the scope objection.

Mr. Dunlap's assertion lacks any merit. The specific verbiage of an objection did not affect the ruling.

His current concern about the People's cross-examination of Regina Hairston also is not persuasive. The defense had called Ms. Hairston to demonstrate Carol Dunlap's inappropriate treatment of Defendant. While working at the Environmental Protection Agency, she had introduced Defendant as her "drug dealing son." Ms. Hairston felt that this was inappropriate conduct.

The State tried to suggest that, if Defendant were actually a drug dealer, Ms. Dunlap could be construed as trying to stop him from engaging in this activity. Ms. Hairston maintained her view that the introduction was inappropriate.

At the time of the trial, the Court viewed this examination as, at best, curious. The Court's review of the transcript does not change this assessment. If anything, this examination weakened the People's overall penalty phase case. Trial counsel were not ineffective in their decision not to object to this line of questioning.

Barry Levene's Testimony

Mr. Dunlap objects to Barry Levene's cross-examination testimony about Jerry Dunlap. On direct, Mr. Lewis elicited information concerning Carol Dunlap's discussions about Jerry Dunlap's abusive behavior. As a result of this testimony, Jerry Dunlap's character was placed at issue.

The Court first again that the rules of admissibility in the penalty phase of a capital case are viewed more broadly than in other litigation. Since Mr. Lewis had pursued Jerry Dunlap's behavior during direct examination, the State appropriately reviewed Mr. Levene's contacts with Jerry Dunlap.

The cross-examination reaffirmed the direct testimony about physical abuse of Defendant. Further, the cross-examination dealt with Mr. Levene's perceptions about Jerry Dunlap's "concerns" about his children. Mr. Levene testified that Jerry Dunlap had "told me" about his "concern[] about his kids and what was happening to them." *Tr.* 3/5/96: 5385.[113] Mr. Lewis was able to utilize the cross-examination to solicit information that Carol Dunlap was upset because one of Defendant's out-of-home placements (either Savio House or Third Way Center) was "forcing her and Jerry Dunlap

[113] The quoted material was Mr. Lee's question.

to go into counseling."[114] *Tr.* 3/5/96: 5409. She was "upset" because of her concern that the counselors would learn about Jerry Dunlap's abusive behavior and would be required to report that information to law enforcement. These same counselors' responsibility was to help Defendant. The complete scope of Mr. Levene's testimony demonstrates that counsel was not ineffective with respect to that witness.

Investigator Karen Meskis' Testimony

Defendant next addresses certain issues that relate to Investigator Karen Meskis' testimony during the sentencing trial. Her testimony focused on the Burger King case.

Trial counsel argued that no evidence about the Burger King case should be presented but that, if the Burger King conviction was admissible as statutory aggravation, the Court should limit the evidence to the fact of the conviction and nothing else. The record demonstrates that the Court was concerned that testimony by Christine Contreras and Edward Pinkney would be overly prejudicial to Mr. Dunlap. The parties argued about the impact of *People v. Borrego*, 779 P.2d 854 (Colo. 1989). After considering *Borrego*, the Court elected to permit Investigator Meskis' testimony.

This issue was thoroughly considered at the time of the trial. Trial counsel's failure to object with respect to her testimony concerning Mr. Pinkney's "identification" of Mr. Dunlap is without merit for the reasons set forth in the People's response brief. *R.B. II*: 117.

Similarly, Investigator Meskis' statements about the mittimus, if erroneous, were harmless because the mittimus was admitted into evidence.

During the post-conviction hearing, Mr. Lewis testified that he chose not to ask about Defendant's 75 year sentence in the Burger King case. He was concerned about the jury's interpretation of that lengthy sentence. He believed that the jury would believe that it would demonstrate the Court's concern about Defendant's future dangerousness. The Court concludes that Mr. Lewis' decision is within the wide range of acceptable performance by competent capital defense attorneys.

[114] The quoted material was Mr. Lewis' question.

Brandon O'Neill's Testimony

Defendant also alleges that Brandon O'Neill had given false statements about a theft. In addition, Mr. O'Neill had been granted use immunity immediately before he testified.

Mr. Lee made an offer of proof about Mr. O'Neill's testimony. He had been a participant in the Papa Nick's robbery and was the driver of the automobile from which Defendant attempted the drive-by shooting of the Isaiah Thomas residence. Mr. Lee then discussed Mr. Lewis' intent to delve into Mr. O'Neill's alleged theft of "custom wheels." Mr. Lewis proposed to proceed pursuant to CRE 608(b). The Court agreed that Mr. Lewis could engage in that examination because, in a penalty phase, Mr. O'Neill's truthfulness should be fully explored.

Mr. O'Neill testified as indicated. However, Mr. Lewis decided not to cross-examine him. Defendant now asserts that this failure to examine and impeach constitutes ineffective assistance of counsel.

At the hearing, Mr. Lewis recalled that Mr. O'Neill "talked about a couple of the robberies, not all of them, and he had more information that was very detrimental to our case, and I put him in the same category of witnesses that we'd rather not see at all, but if we were going to see them and hear from them, less is more." *Tr.* 12/19/03: 118-119. Mr. Cherner did not cross-examine on this issue.

Mr. Lewis' explanation is perplexing. During the in limine hearing, he performed creditably and properly set up the impeachment. However, he chose not to examine. The record does not indicate that Mr. O'Neill would have offered more damaging testimony if Mr. Lewis had asked him a few questions about the theft and his alleged false reporting.

The People cite *U.S. v. Rodriguez-Ramirez*, 777 F.2d 454 (9th Cir. 1985). There, an attorney's failure to cross-examine was found to be "thoroughly groundless." The 9th Circuit found that this decision was within the range of appropriate trial strategy and that at least two of the issues that were ripe for examination were resolved earlier in the trial.

Although the Court finds Mr. Lewis' decision to have a dubious basis (In fact, the offer of proof was limited and Mr. O'Neill's testimony was kept within the parameters of the offer.), case law does not support Defendant's claim. *See People v. Norman*, 703 P.2d

1261 (Colo. 1985); *People v. Rios*, 43 P.3d 726 (Colo. 2001). *And see Moore v. Marr*, 254 F.3d 1235 (10th Cir. 2001):

> Although counsel's failure to impeach a key prosecution witness is potentially the kind of representation that falls "outside the wide range of professionally competent assistance," *Strickland,* 466 U.S. at 690, 104 S. Ct. 2052, we need not examine that issue because we hold Moore has failed to demonstrate prejudice from his counsel's omissions and thus has failed to establish he was denied effective assistance of counsel." 254 F.3d 1235, 1241.

(The 10th Circuit noted the "overwhelming evidence" presented against defendant Moore, leaving the court to find a lack of prejudice, thus rendering the lack of impeachment not constitutionally ineffective.)

Defendant cites *Smith v. Wainwright*, 741 F.2d 1248 (11th Cir. 1984). There, the omitted testimony was crucial. It arguably would have shown that the defendant was "framed." It also could have demonstrated that a co-defendant sought to avoid the electric chair by giving false testimony. However, the 11th Circuit remanded the matter for an evidentiary hearing. And in *People v. Salgado*, 635 N.E. 2d 1367 (Ill. App. 2 Dist., 1994), the court noted, "Ineffective assistance is most likely to be found when several, rather than isolated, errors are made by a defense attorney and when the evidence in the case is closely balanced. 635 N.E. 2d 1367, 1371 (citations omitted).

The Court recognizes that one of the principal ineffective assistance of counsel arguments addresses trial counsel's failure to introduce evidence of Mr. Dunlap's mental health status. However, the balance of the evidence is not nearly close enough for a finding that Mr. Lewis' failure to cross-examine, while ill-advised, amounts to constitutional ineffective assistance.

Mr. Dunlap incorporates his claims as set forth in Case No. 95CR605, the "Burger King" case in this proceeding. When the Court ruled in that matter, it found that the United States' Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). was retroactively applicable to his conviction. As noted elsewhere herein, in *People v. Bradbury*, 68 P.3d 494 (Colo. App. 2002), the Colorado Court of Appeals held that *Apprendi* does not apply retroactively to convictions that were already final when the Supreme Court issued its order. The recent United States Supreme Court case of *Schriro*

v. Summerlin, *supra*, has a similar holding. Therefore, the Court's ruling in the Burger King case cannot stand.

Photographs of Tattoos and Handwriting Exemplars

Defendant next asserts that photographs of his tattoos were the result of an illegal search and that the Court improperly ordered the People to file a motion for new photographs (which motion was granted at that time). In their response, the People refer to *People v. Reynolds*, 38 Colo. App. 258, 559 P.2d 714 (1976). That case states that Crim. P. 41.1 "authorizes a court to order a person to submit to nontestimonial identification upon a showing that reasonable grounds exist to suspect that an offense was committed by that person." *People v. Reynolds*, 559 P.2d 714, 715 (Colo. App. 1976).[115]

The ruling in *Reynolds* is supported by *People v. Salaz*, 953 P.2d 1275 (Colo. 1998). Although the Court stated that the District Attorney should have complied with Crim. P. 16 (*Tr.* 12/4/95: 161), the Court also noted, "there's almost a form over substance issue since all I have to do is hear the District Attorney today request that the defendant submit to a photograph under (Crim. P.) 16, Part II (a) and I'll do that. So why don't you - - ." Mr. Peters then indicated "We'll do that." *Id*.

Mr. Peters then stated, "What we'll do, Judge, is file an actual written motion so that we've got documentation on that." Mr. Dunlap presumes more than is in the record. In any event, as the People note, the Court proceeded as it did in an abundance of caution in this capital case. Defendant's claim of error is not supported by the record or the law.

As a result of this finding, the Court does not make any determination concerning alleged constitutional error.

A similar situation arose with respect to the production of Defendant's handwriting exemplars. An oral motion was made in open court. The Court granted the motion after a hearing.

Defendant was given an opportunity to object. Apparently, defense counsel realized that Crim. P. 16 (as it incorporates Crim. P. 41.1) maintains a liberal standard

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[115] In their papers, the People state that the Court relied on *Reynolds*. The Court has quickly reviewed the transcript and does not find that reference. Nevertheless, the People's position is appropriate.

with respect to non-testimonial evidence. *See Richardson v. District* Court, 632 P.2d 595 (Colo. 1981). They chose not to object.

Defendant has not demonstrated any prejudice as a result of this decision. The Court finds that counsel's performance did not implicate *Strickland v. Washington*'s performance prong.

Defendant's Statements at CMHIP

One of the major pretrial issues in this case was the extent to which, if at all, Defendant's statements at the Colorado Mental Health Institute in Pueblo could be used by the prosecution. The Court heard the testimony of several doctors and staff members. Ultimately, the Court ruled that the prosecution could not use those statements in either its guilt/innocence phase or its sentencing phase cases in chief. However, the Court found that the statements were constitutionally voluntary (as set forth in *People v. Dracon*, 884 P.2d 712 (Colo. 1994)) and authorized the prosecution to use the statements as rebuttal or impeachment in either portions of the trial.

Post-conviction counsel argue that this ruling violates *Estelle v. Smith*, 451 U.S. 454 (1981). This position is not tenable.

Prior to his being transported to CMHIP, Judge Bieda gave Defendant an advisement concerning incompetency. The advisement was truncated because of Defendant's behavior.

While he was at CMHIP, doctors and staff repeatedly advised Defendant not to talk about the facts of the case. His attorneys also told Defendant that he should not talk about the case with anyone at CMHIP.

In spite of these admonitions, Defendant made his statements.

The Court has reviewed these facts and the law. In *Estelle v. Smith*, the Supreme Court held that, where a defendant does not introduce psychiatric evidence, the State could not introduce information from a court-ordered competency evaluation as affirmative evidence to persuade the jury to return a death sentence. 451 U.S. 454, 466.

Similarly, in *French v. District Court*, 153 Colo. 10, 384 Colo. 268 (1963), the Colorado Supreme Court held that a defendant who enters a plea of not guilty by reason of insanity cannot be compelled to give statements against his will. The requirements of

§16-8-106 (2) CRS have been repeatedly found to be constitutional. *See People v. Herrera*, 87 P.3d 240 (Colo. App. 2003): "Section 16-8-106 (2) . . . only precludes expert testimony in support of such a defense and allows evidence of noncooperation to be used to rebut the defense . . . . A contrary result would permit a defendant to raise and support an insanity defense while unfairly depriving the prosecution of any method of testing the validity of that defense." 87 P.3d 240, 247. *See also Johnson v. People*, 172 Colo. 72, 470 P.2d 37 (1970).

The Court recognized that its ruling concerning *Saathoff* issues required careful attention to both phases of the trial. By entering its limited purposes order, the Court narrowed the scope of the prosecution's potential use of the statements but permitted Defendant to present his mitigation evidence under circumstances that gave him a fair opportunity to develop both statutory and *Eddings* mitigators.

During pretrial hearings, the parties discussed and the Court considered the Colorado Court of Appeals' ruling in *People v. Galimanis*, 765 P.2d 644 (Colo. App. 1988). Subsequent law, including *People v. Herrera*, *supra*, does not change that basic law.

The Court's 1995 and 1996 rulings were based in other case law. *People v. Branch*, 805 P.2d 1075 (Colo. 1991) set forth the right of the prosecution to use Defendant's statements for rebuttal and impeachment. Once again, case law that has been announced during the past eight years does not require a change. *See People v. Trujillo*, 49 P.3d 316 (Colo. 2002).

In addition, the Court considered *Buchanan v. Kentucky*, 483 U.S. 402 (1987). No interpretation of that case, announced since the Court's rulings, requires a different result than that entered eight years ago.

In his motion, Defendant states that the Court's ruling caused "chilling effects" so that he could not introduce Dr. Barkhorn's testimony about "mental health issues." *M*: 284. At the hearing, however, Mr. Lewis indicated that he had no intention of presenting mental health testimony. Although Defendant considers it improper, Mr. Lewis stated that he intended to limit Dr. Barkhorn's testimony to issues relating to dysfunctional

families.[116] In addition, Defendant seems to protest too much. If the Court had not entered its limiting order, Mr. Dunlap surely would have complained that all of his statements would have been used as invalid aggravation.

In short, nothing that Defendant has presented causes the Court to find that its order was in anyway improper.

Prosecutors' Speaking to Dr. Barkhorn

Defendant contends that trial counsel's failure to obtain his consent before permitting the prosecutors to speak to Dr. Barkhorn. Defendant's cited case, *People v. Mozee*, 723 P.2d 117 (Colo. 1986) is inapposite to this argument. *Mozee* discusses the ramifications of *People v. Curtis*, 681 P.2d 504 (Colo. 1984) when, shortly after *Curtis* was first announced by the Court of Appeals, Mr. Mozee testified without having received an advisement. The Supreme Court found that a court's failure to give a defendant a *Curtis* advisement did not, in and of itself, resolve the issue of whether that defendant had voluntarily waived his Fifth Amendment privilege.

The general thrust of Defendant's argument has been addressed in Colorado. In *Gray v. District Court*, 884 P.2d 286 (Colo. 1994), the Supreme Court held that, if a defendant proposed to present expert testimony, notice was appropriately afforded to the prosecution.[117]

The People cite *Moore v. People*, 174 Colo. 570, 485 P.2d 114 (1971) and argue that its "captain of the ship" doctrine is dispositive. This concept was expanded in *People v. Anderson*, 649 P.2d 720 (Colo. App. 1982). There, the Court of Appeals held that a defense attorney could create a waiver of a defendant's speedy trial right, at least under the Uniform Disposition of Detainers Act, without first obtaining his or her client's approval.

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[116] During Defendant's rebuttal case, Dr. Barkhorn testified that she did not possess expertise with respect to "dysfunctional families" and that she was never asked to prepare for such an examination. Although this information was damaging to Mr. Lewis' testimony, it does not affect Defendant's claim that the Court's ruling denied him the right to present Dr. Barkhorn during the penalty phase.

[117] The issue in *Gray* was related to a mental status defense. In the instant case, Defendant has raised the issue of ineffective assistance of counsel due to trial counsel's alleged failure to adequately investigate Defendant's mental status and present an appropriate mitigation case. The Court concludes that *Gray* is at least tangentially relevant to the issue of failure to obtain Defendant's consent prior to permitting the prosecution to speak to Dr. Barkhorn.

These cases, together with *Lanari v. People*, 827 P.2d 495 (Colo. 1992) represent the only authority offered by the parties. Defendant does not contend that the interview violated the rubric of *Hutchinson v. People*, 742 P.2d 875 (Colo. 1987). If the prosecution had used Defendant's statements to impeach him, or perhaps his witnesses in the penalty phase, Defendant's argument might have greater force. *People v. Lanari*, 827 P.2d 495, 500. The prosecution did not do so. Thus, *Lanari*'s rule of limited admissibility is not implicated.[118] The Court concludes that Defendant's assertion is groundless.

Prosecutors' Questions During Penalty Phase

Defendant objects to certain aspects of the prosecution's questions during the penalty phase and argues that trial counsel's failure to object to them constitutes ineffective assistance of counsel. During Adenia Ashlock's testimony, the prosecution asked if she continued to believe that Defendant did not kill anyone at Chuck E Cheese and that she believed that the guilt/innocence phase verdict was "racist." Defendant now argues that this was inadmissible impeachment and irrelevant pursuant to CRE 701.

The People's cited case of *People v. Taylor*, 190 Colo. 210, 545 P.2d 703 (1976) is dispositive with respect to the allegation concerning "racism." With respect to Ms. Ashlock's testimony concerning her beliefs about Defendant's non-involvement in the crime, the question was not appreciably different than if the prosecutor had simply asked, "You're Mr. Dunlap's sister, is that correct?" The statement was not one of opinion that was designed to provide assistance to the jury. It was strictly impeachment. This testimony fits within the ambit of the Court of Appeals' ruling in *People v. Freeman*, 47 P.3d 700 (Colo. App. 2001).

The Court finds that, if defense counsel had objected to the disputed testimony, the jury would not have concluded that the mitigating factors outweighed the aggravators, thereby resulting in a life sentence. *Le v. Mullin*, 311 F.3d 1002 (10th Cir. 2002).

Prosecutor's Reference to Right to Trial

Mr. Dunlap also contends that the People's reference to his having exercised his right to a jury trial in the Burger King case was irrelevant. He apparently argues that, since he chose to proceed to a jury trial, this fact cannot be used against him. The first case he cites, *People v. Rodgers*, 734 P.2d 145 (Colo. App. 1986), deals with a prosecutor

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[118] *See also Knecht v. Weber*, 640 N.W. 2d 491 (S.D. 2001).

who suggested that an innocent person never would seek a jury trial. The Court of Appeals viewed this comment as akin to a comment on a defendant's deciding not to testify. *Griffin v. California*, 381 U.S. 957, 85 S. Ct. 1229 (1965) also addresses Defendant's Fifth Amendment right to remain silent.

Here, the People's evidence merely indicated that a jury had reached a verdict in the Burger King case. This information was not at all prejudicial. Defendant's claim is totally groundless.

Failure to Anticipate Colorado Supreme Court's Ruling

Defendant also asserts that trial counsel were constitutionally ineffective because they failed to anticipate the Colorado Supreme Court's ruling in *People v. Dunlap*, 975 P.2d 723 (Colo. 1999). Other defendants' claims in this regard have been found to be lacking in any merit. *See Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982); *Fullenwider v. State*, 674 N.W. 2d 73 (Iowa 2004);[119] *State v. Savage*, 849 P.2d 1073 (N.M. App. 1992); *Sullivan v. Wainwright*, 695 F.2d 1306 (11th Cir. 1983); *U.S. v. Gonzalez-Lerma*, 71 F.3d 1537 (10th Cir. 1995); *Walker v. State*, 863 So. 2d 1 (Miss. 2003).[120] The Court finds that Mr. Dunlap's position is without merit.

Inability to Present Proportionality Evidence

Defendant argues that the Court erred when it did not permit him to present proportionality evidence. He also asserts that the Court permitted the State to present similar evidence.

First, the Court agrees with the People that there are few cases to which Defendant's crimes can be compared. The People also correctly refer to settled law. "The type of proportionality review which the defendant argues is required by the state constitution, and which the Court in (*Pulley v.) Harris* (465 U.S. 37, 104 S. Ct. 871 (1984)) held was not required by the federal constitution, inquires into whether the punishment imposed is "disproportionate to the punishment imposed on others convicted of the same crime." *People v. Davis* 794 P.2d 159, 174 (Colo. 1990). *See also U.S. v.*

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[119] "(Trial) counsel was not bound to anticipate future rulings by this court when those rulings are not reasonably predictable." 674 N.W.2d 73, 76 .

[120] "Clairvoyance is not a required attribute of effective representation." 71 F.3d 1537, 1542.

Higgs, 353 F.3d 281 (4th Cir. 2003); *McCleskey v. Kemp*, 482 U.S. 920, 107 S. Ct. 1756 (1987). This Court will not establish new law that contradicts precedent.

Further, the Court will not enter any order that contradicts the Colorado Supreme Court's holdings. The Court recognizes that Defendant must make this assertion to preserve his argument for subsequent appeals.

Defendant's brief contains lengthy arguments about Colorado's pre- and post-*Dunlap* capital sentencing laws. Again, the Court acknowledges that Defendant must set forth his contentions to preserve the record for future appeals. The Court will not enter any orders concerning existing or pre-*Dunlap* Colorado law.

Defense Counsel's Failure to Subpoena Carol Dunlap's Medical Records; Failure to Research and Apply Tennessee Law to Obtain those Records; and Failure to Present Adequate Evidence about Carol Dunlap's Mental Health Condition

Mr. Dunlap contends that trial counsel was insufficiently aggressive and constitutionally ineffective because he failed to subpoena Carol Dunlap's medical records, including her psychiatric records. In this regard, he alleges that counsel should have served a subpoena and that Ms. Dunlap waived her privilege by discussing her bipolar condition with third parties. He states that a Crim. P. 16 motion "was obviously an incorrect method for obtaining those records since the state and its agents did not have them." *M*: 197-198. Mr. Dunlap also argues that trial counsel's refusal to accept Carol Dunlap's offer to release a portion of her records dealing with her bipolar condition "was inexcusable." *Id*.

The testimony indicates that Carol Dunlap was one of the most difficult people with whom either counsel or the investigative team had ever dealt. The Court received statements and testimony from Ms. Dunlap during the pretrial and trial phases and also during the post-conviction hearing. Her testimony (on October 16 and 17, 2002) provided details about her (then) current attitude.

After a tumultuous childhood and adolescence, Ms. Dunlap married Rufus Rochelle, the father of Adenia Dunlap. After Adenia Dunlap's birth, Mr. Rochelle became abusive. Ms. Dunlap and Adenia Dunlap left the family home. Sometime after

that, Ms. Dunlap tried to commit suicide and was hospitalized. She stated that she was diagnosed with depression or depressive neurosis.

About six months after Defendant was born, Ms. Dunlap married Jerry Dunlap. She described him as “an outstanding father.”

She testified that Defendant suffered a head injury after falling off of Jerry Dunlap’s shoulders. He also was injured after riding a bicycle in a dangerous manner.

Ms. Dunlap admitted to subjecting Defendant to corporal punishment. She also said that Defendant’s siblings informed her that Defendant was “knocked out” by a baseball bat.

Ms. Dunlap stated that she was first hospitalized for bipolar disorder in 1980 in Memphis, Tennessee. She had been “quite paranoid, and very irrational, hallucinating. I tried to hurt my son (Garland).” *Tr.* 10/16/02: 171. She said she also tried to kill Defendant.

When Ms. Dunlap suffered from “manic episodes,” she trusted only her husband. She does not know if the Memphis hospital physicians prepared a diagnosis or if she took any medication. She did say that she was in a “catatonic state.” *Tr.* 10/16/02: 176.

She also was hospitalized twice in Michigan and twice in Colorado. One hospitalization in Grand Rapids, Michigan lasted several weeks.

Thus, the record indicates that Carol Dunlap was treated for mental health issues in at least three and perhaps four states.

Post-conviction counsel’s position concerning Tennessee law is accurate. *See Quarles v. Sutherland*, 389 S.W. 2d 249 (Tenn. 1965); *Givens v. Mullikin ex. rel. Estate of McElwaney*, 75 S.W. 3d 383 (Tenn. 2002). However, the Court cannot determine what value, if any, Carol Dunlap’s Tennessee hospital records would have been because they were not admitted in evidence in the post-conviction hearing.

As a practical matter, there may have been very good reasons for counsel not to pursue those records.

The trial team portrayed Carol Dunlap as an extremely difficult, if not hostile person. They tried a variety of means to secure her cooperation. On her best days, she

would sign a release and then revoke it, or, in open court, offer to make some of her records available and, moments later, and with no explanation, change her position.

Perhaps, at some point, the trial team should have pursued the Tennessee records. However, they were trying to work with Carol Dunlap for many months, hoping that she would recognize her son's plight and that she would become an ally instead of an impediment. If the trial team had sought the records in Tennessee at a useful time, they might have further aggravated Ms. Dunlap.

Defendant's only basis for claiming that trial counsel's approach "was obviously . . . incorrect is counsel's failure to obtain the records. The remainder of his argument is speculative. The Court therefore declines to find that trial counsel's failure to obtain the Tennessee records implicates *Strickland v. Washington*'s performance prong.

Defendant also claims that Ms. Dunlap's comments about her bipolar condition to third parties constitute a waiver of the doctor-patient privilege. The Court disagrees.

A person can comment about his or her medical condition to any other person. This does not implicate the doctor-patient privilege. *See People v. Covington*, 19 P.3d 15 (Colo. 2001). In the context of the attorney-client privilege, the Supreme Court has held that, "the privilege applies only to statements made in circumstances giving rise to a reasonable expectation that the statements will be treated as confidential." *Lanari v. People,* 827 P.2d 495, 499 (Colo. 1992). *See also Gordon v. Boyles*, 9 P.3d 1106, 1123 (Colo. 2000).

Further, the burden of establishing a waiver is upon the person seeking to overcome a claim of privilege. *Clark v. District Court*, 668 P.2d 3 (Colo. 1983). Defendant has not satisfied this burden.

During the pretrial and trial periods, Carol Dunlap was repeatedly maintained her privilege. There was no evidence to indicate that she waived her privilege with respect to any information she disclosed to medical professionals. *People v. Deadmond*, 683 P.2d 763 (Colo. 1984). Defendant has not cited any authority indicating that the mere description of a mental illness to third persons constitutes a waiver of the doctor-patient privilege.

The only way the Court could find waiver would be to enact a new provision to §13-90-107 (1) (d) CRS. That task is left to the general assembly, which has the sole authority to create the law of privilege and has shown a repeated capacity to modify the statute.

Defendant's Allegations Concerning Ineffective Assistance of Counsel: Mr. Lewis in Guilt/Innocence Phase; Both Attorneys in Penalty Phase

The most substantial and complex facet of Defendant's motion concerns his allegation that trial counsel failed to adequately investigate, prepare and present a mitigation case. During the hearing, the Court heard testimony from a number of mental health professionals, highly trained technical and other support staff, members of Mr. Dunlap's family and attorneys.

During the sentencing trial, the defense team presented evidence directed at Defendant's upbringing, his attempt to "cooperate" with the District Attorney; and his age. Witnesses included Ellis Armistead, lead defense investigator; Ira Williams, with whom Defendant was placed in a form of foster care early in his life; Sabrina Walker, Ira Williams' daughter; Adenia Ashlock, Defendant's sister; Christine Clapper, a neighbor during Defendant's youth; Thomas Moore, a case worker with the Arapahoe County Department of Social Services; Regina Hairston, one of Ms. Dunlap's co-workers; Barry Levene, Ms. Dunlap's supervisor at the Environmental Protection Agency; and Carol Dunlap.

Post-conviction counsel assert that the trial team never actually considered a mental health defense. During his testimony, Mr. Lewis acknowledged that this contention was substantially accurate. When Mr. Dunlap's behavior in the jail began to appear to be irrational, Mr. Lewis filed an ex parte motion for a psychiatric examination. Judge Michael Bieda, then assigned to this case, denied the motion.

Mr. Lewis was extremely concerned about the prospect of Defendant's being sent to the Colorado Mental Health Institute in Pueblo. "The last thing I wanted, the very last thing, was for Nathan to go to the state hospital . . . . I was fighting to keep him in the jail, medical ward or otherwise . . . . (W)hat I feared greatly is what came to pass when he went to the state hospital and so I was fighting to get the judge to first let me conduct my independent evaluation in the hopes that Mr. Dunlap would come around. This would be

a confidential evaluation . . . . I felt reasonably sure that the opinion would be one of malingering versus any mental disease or defect and I felt that . . . any independent evaluation of Mr. Dunlap which might be helpful to us would be seriously undermined by a lengthy stay at the state hospital which would generate a lot of negative material." *Tr.* 12/16/03: 192. [121]

During cross-examination, Mr. Lewis acknowledged that, in capital cases, competent defense counsel must "leave no stone unturned." She or he must raise every meritorious defense, marshall a team of experts, typically including a mitigation expert and psychiatrists or other mental health professionals. Mr. Lewis was aware of the network of individuals and organizations to whom counsel could look. He also acknowledged that his concern about the state hospital began early in his representation of Defendant. His decision became inflexible. Thus, the defense's approach did not truly evolve with the substantial factual investigation that followed.

The law with respect to these areas is at once well settled and murky. While *Strickland v. Washington*, 466 U.S. 668 (1984) is the seminal case, two more recent Supreme Court opinions have refined the rubric. In *Williams v. Taylor*, 529 U.S. 362 (2000), the defendant had been committed for mental health treatment when he was 11 years old. He had been subjected to substantial abuse and neglect. He was deemed to be "borderline retarded" and might have had mental impairments organic in origin. His formal education ended after the sixth grade.

Williams' trial counsel did not seek to obtain his social services and juvenile records because they mistakenly thought that Virginia law and procedure would bar such a release. Most significantly, trial counsel did not begin to prepare a mitigation defense until one week before the beginning of trial.

If Williams' trial team had engaged in the exhaustive preparation required in death penalty cases, they could have presented evidence that Williams' parents had been imprisoned for neglecting him and his siblings. Williams' father severely and repeatedly

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[121] The Court discusses the impact of Judge Bieda's and the State Public Defender's Offices' approaches to the trial defense team elsewhere in this order.

beat him. He was placed outside of his home and spent some time in an abusive foster home.

While in prison, Williams was instrumental in breaking up a drug ring, returned a guard's wallet and was considered to be "among the inmates "least likely to act in a violent, dangerous or provocative way." *Id.,* at 569, 588. Counsel failed even to return the phone call of a certified public accountant who had offered to testify that he had visited Williams frequently when Williams was incarcerated as part of a prison ministry program, that Williams 'seemed to thrive in a more regimented and structured environment,' and that Williams was proud of the carpentry degree he earned while in prison." *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

Last year, the Court announced its decision in *Wiggins v. Smith*, 539 U.S. 510 (2003). Defendant Wiggins' guilt/innocence phase was tried to the court. His sentencing trial was to a jury. Trial counsel told the jurors that they would hear that someone other than Wiggins actually killed the victim. She then said that she would present evidence of Wiggins' "difficult life." He had no prior serious crimes of violence and no convictions at all before age 27.

The trial court had denied bifurcation. Before closing argument, trial counsel stated that, had the motion been granted, she would have presented evidence of Wiggins' limited intellectual functioning and "childlike emotional state on the one hand, and the absence of aggressive patterns in his behavior, his capacity for empathy, and his desire to function in the world on the other." 123 S. Ct. 2527, 2532 (2003). In any event, the jury heard no evidence of Wiggins' life history or family background.

Wiggins' trial counsel did not retain a forensic social worker, even though that person's services were available to them.

The Supreme Court's factual review also indicated that Wiggins' mother was a chronic alcoholic. Wiggins had been placed in several foster homes. In at least one instance, Wiggins and his siblings had been left home alone for days without food. Wiggins had been repeatedly sexually abused as a youngster. The Court found:

> He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care. His mother had had sex with men while her children slept in the same bed. On one occasion, she put Wiggins' hand against a hot stove burner. As a

result, Wiggins was hospitalized. The time Wiggins spent homeless, along with his diminished mental capacities, further augment his [potential] mitigation case. 123 S. Ct. 2527, 2542 (2003).

The Court criticized trial counsel's effort as being a "halfhearted . . . shotgun approach." The jury learned that Wiggins had no prior convictions and that his contacts with law enforcement, prior to the murder at issue, were no more than minimal.

The Supreme Court found that Wiggins' lack of violence would have limited the State's ability to rebut a proper mitigation case.

The *Wiggins* Court reviewed the *Strickland v. Washington* standards and found that the Court had not made new law in *Williams v. Taylor*. The performance prong requires a defendant to show that trial counsel's representation fell below an objective standard of reasonableness. The Supreme Court has not set forth specific guidelines but has held that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). However, a defendant must demonstrate that, "counsel made errors so serious that he or she was not acting as the 'counsel' guaranteed by the Sixth Amendment." 466 U.S. 668, 687.

In *Strickland v. Washington*, *Williams v. Taylor* and *Wiggins v. Smith*, trial counsel all chose to limit the scope of the investigation into possible mitigation evidence. Once again, the Supreme Court held that there is no specific formula which a reviewing court should utilize. The Court held that,

> counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. *Strickland v. Washington*, 466 U.S. 668, 690-691.

The second *Strickland v. Washington* prong is that of prejudice. Thus a "defendant 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." 466 U.S. 668, 694. In *Wiggins*, the Supreme Court stated, "In assessing prejudice, we reweigh the evidence in aggravation against the totality of available

mitigating evidence." *Wiggins v. Smith*, 123 S. Ct. 2527, 2542 (2003).[122] Since Wiggins did not have any record of violent conduct, the Supreme Court found that, "there is a reasonable probability that at least one juror would have struck a different balance." 123 S. Ct. 2527, 2543. *See also Neill v. Gibson*, 263 F.3d 1184 (10th Cir. 2001).

Strickland v. Washington held that the two pronged analysis can be truncated by the reviewing court's first focusing on the prejudice prong.

> [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed." 466 U.S. 668, 697. *See Kinnard v. U.S.* 313 F.3d 933, 935 (6th Cir. 2002).

The Court declines to proceed in this fashion for two reasons. Although Defendant has failed to establish prejudice (as set forth *infra*), it is not "easier" to resolve the issues in that manner. Second, the Court is trying to provide all courts that review this order with complete findings of fact and conclusions of law. Therefore, both prongs will be evaluated.

Evidence about Conditions at Colorado State Penitentiary and Public Defender's Videotape

Defendant's claim has several sub-parts. He asserts that the trial team failed to present available evidence regarding prison conditions and that they failed to object to evidence about jail conditions.

The first issue concerns Defendant's potential placement in the Department of Corrections under a life sentence. During pre-trial motions and at trial, counsel asked

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[122] Although this Court heard conducted the trial and does not sit as an appellate court, it concludes that it must perform the same analysis. Since the Court determines that certain aspects of trial counsel's performance fell beneath the acceptable standards, the Court will weigh all of the aggravation against the total available mitigation. In other words, the Court "must keep in mind the strength of the government's case and the aggravating [circumstances] the jury found as well as the mitigating factors that might have been presented." *Battenfield v. Gibson* 236 F.3d 1215, 1234 (10th Cir. 2001). In doing so, the Court must consider that which was available to counsel at the time of the trial and must avoid any "20/20 hindsight." At the same time, the Court must "evaluate the totality of the evidence--"both that adduced at trial, *and the evidence adduced in the habeas proceeding[s].*" *Wiggins v.* Smith, 123 S. Ct. 2527, 2543, *citing Williams v. Taylor*, 529 U.S. 362, 397-398 (2000). (emphasis in text).

permission to create a videotape of conditions at the Colorado State Penitentiary ("CSP"). The Court initially denied the request but revisited the issue. Later, the Court learned that a videotape did exist. Defense counsel chose not to present the tape to the jury.

During the post-conviction hearing, David Wymore testified that Steve Gayle had asked him about a tape that had been created for the Colorado State Public Defender's Office. "It was created particularly for capital litigation." *Tr.* 10/23/02: 183.

Mr. Wymore stated that, in *People v. Rodriguez*, the Supreme Court countenanced arguments about the lack of future dangerousness mitigator to the effect that defendants could assault guards in prison. *People v. Rodriguez*, 794 P.2d 965, 976(Colo. 1990). Mr. Wymore viewed this evidence as consistent with the holding in *Skipper v. South Carolina*, 476 U.S. 1 (1986). As a result, Defendant's Exhibit PC-W was created.

Mr. Wymore opined that the videotape was strong evidence concerning the "full, absolute security and deprivation that exists in New Max." *Tr.* 10/23/02: 190. He reasoned that this evidence would blunt the prosecution's argument about Defendant's attempted escape and other evidence about future dangerousness. He also testified that competent defense counsel should have asked to show the tape in a penalty phase.

Mr. Lewis testified that part of his reason for not showing the tape was the prosecution's stated intent to play a videotape from the Limon Correctional Facility. That tape demonstrated a less severe environment and at least implied that a defendant would have substantial opportunities to wreak havoc in such a setting. Mr. Wymore said that competent defense counsel could argue that either Defendant would not have been sent there, or, if the Department of Corrections chose to place him in a less restrictive setting, it would have determined that Defendant did not create a risk of harm to other inmates, guards or other persons in prison. He also opined that trial counsel was constitutionally ineffective because they did not seek to admit the CSP tape.

Michael Root testified as a rebuttal witness for Mr. Dunlap. He was admitted as an expert criminal defense attorney. Although he did not have Mr. Wymore's extensive death penalty trial experience, he did demonstrate an understanding of the critical issues

concerning the preparation and presentation of a mitigation case.[123] He believed that the CSP videotape should have been shown at trial. He could not opine as to whether trial counsel's failure to do so implicated *Strickland v. Washington*'s performance prong.

Dennis Burbank, administrative office for the Colorado State Penitentiary, testified concerning that maximum security facility. He reviewed some of the facility's features about which Mr. Wymore testified. Whenever a prisoner is outside of his cell, he is placed in full restraints and is accompanied by two guards.

CSP has five security levels. When an inmate is on levels 1, 2 and 3, he is locked down 22 hours and 45 minutes per day. Inmates are never together. Each inmate is permitted to exercise for one hour. He then takes a shower for up to 15 minutes. When they use the telephone, they are restrained by one hand to the adjoining wall.

Inmates have television in their cells on level 2 and higher. Television is used for educational programs and provides network programming. Food is delivered through a tray slot in the cell door. Before they are permitted to exit a cell for any reason, inmates must place their hands through that slot to be handcuffed. When they return to the cell, the door closes. The inmate places his hands back through the slot to have the manacles removed.

Mr. Burbank testified that the mission of CSP is "to take incorrigible, violent, dangerous, predatory inmates out of general population and place them in a more secure environment to create a safer environment at the general population facilities." *Tr.* 10/31/02: 242.

Testimony of Colorado State Penitentiary Inmates

The defense presented the testimony of three witnesses that was almost completely unbelievable. Kevin Fears is an inmate at the Colorado State Penitentiary ("CSP"), having been incarcerated there since October, 1993. He first stated that he had made efforts to be transferred from CSP (categorized by defense counsel as "more severe") to the Florence Federal Penitentiary (a "nicer" facility). He explained that CSP did not have satisfactory educational programs and that it did not have limits on

[123] Unlike Mr. Wymore, Mr. Root presented not only as knowledgeable but also as more balanced and less of a "crusader" than did Mr. Wymore.

administrative segregation. Neither Mr. Fears nor the defense suggested any mechanism whereby a state prisoner could be transferred to a federal prison.

In 1997, Mr. Fears and Mr. Dunlap were in the same pod at CSP. Mr. Fears heard a "crashing sound" which he later learned was Defendant's smashing of his television set. Guards responded to Defendant's cell. Mr. Fears could not hear what was being said, but he knew that the guards were raising their voices "because Mr. Dunlap was acting irrational. (*sic*)" Mr. Fears was not able to explain how he was able to determine the nature of Defendant's actions.

Later, Mr. Dunlap was moved to a cell that was approximately 30 feet away from Mr. Fears'. Mr. Dunlap was in this cell for no more than a month. Mr. Fears heard interchanges between Defendant and CSP guards whereby the guards were trying to get him to calm down. He referred to this as a form of "semi-vegetative conscious state . . . where he could sit up but he couldn't stand up. He could crawl but he could not walk. He could speak but he could not make sense. He could hear you, but not understand what he was hearing. He could see, but not understand what he was hearing."

During cross-examination, Mr. Fears stated that his cell was underneath Mr. Dunlap's.

Mr. Fears offered no explanation as to how he could reach these conclusions. Testimony from staff at CSP, as well as the Public Defender videotape, demonstrated a stern existence where contact between inmates is, at best, rare.

Mr. Fears also offered testimony that he was able to see into Defendant's cell on one occasion when Mr. Fears was returning from a shower.[124] This testimony is incredible because of CSP personnel testimony that inmates are taken from their cell or the exercise room by two guards. It is inconceivable that the guards would have permitted Mr. Fears to stop by Mr. Dunlap's cell for even a brief observation.[125] (Mr. Fears said this observation lasted five seconds.) In addition, the window area of the cell is quite small (four inches by eight inches). Even if Mr. Fears had been able to look into the cell while walking back to his cell (The Court recognizes that the pace of an inmate being escorted

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[124] Mr. Fears claimed that he saw Defendant, in the nude, "sitting in a puddle of urine and feces."
[125] *See Tr.* 10/24/02: 167-168.

by two guards would be slow.), the opportunity for observation would be minimal. As noted, Mr. Fears testified that his cell was below Mr. Dunlap's. There was no explanation as to how or why Mr. Fears would have been on the upper level of his pod.

He claimed that he heard Defendant mumbling and yelling both day and night on an irregular but continuing basis. He believed that Defendant was not faking because Mr. Dunlap had not followed an unwritten inmate code, whereby an inmate who was intent on faking a condition would confide this information with another inmate.

Mr. Fears has suffered a number of felony convictions, including two counts of first degree murder and one count of attempted first degree murder. The Court finds that Mr. Fears offered testimony that was without any credibility.

In addition, he described events that occurred after the trial in this case. The experts who testified during this post-conviction proceeding could have considered his information. However, it would not have been available at trial. Mr. Fears offered no reliable testimony that supports the contention that, as of the first quarter of 1996, Mr. Dunlap was suffering from bipolar disorder or some other major mental illness. To the extent the Defendant offered his testimony solely to bolster Defendant's contention that he suffers from an inherited major mental illness, the effort failed.

A former inmate, Lawrence Goshen, also testified. At the time of his testimony, he was on parole for aggravated robbery. He served a portion of his sentence at CSP as a result of a transfer from the Arkansas Valley facility for gang related activity.
At one time, Mr. Goshen's cell was directly across from Defendant's. Later, they had adjacent cells. Mr. Goshen stated that, during this latter time, he and Mr. Dunlap were able to talk on a daily basis.

He testified that Defendant's behavior changed in 1997. On the night that Gary Davis was executed, the "COs" were "antagonizing" Defendant, telling him that he would be the next inmate to be executed.[126] Defendant then began to "talk real weird, smashing stuff, giving away his pictures and food and all his personal belongings (to Mr.

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[126] During cross-examination, Mr. Goshen said that this type of activity by the guards would result in their having to "pay for that." *Tr*. 4/17/03: 137. No further explanation of this comment was provided.

Goshen)." *Tr.* 4/17/03: 117. Although Defendant was talking, Mr. Goshen could not understand what he was saying.

Later, when Mr. Goshen tried to talk to him, Defendant was not responsive. Mr. Goshen was not able to determine if Defendant was sleeping. Mr. Goshen also testified that he was required to clean Defendant's cell because he had "scattered" feces on himself and his cell. Mr. Goshen also testified that he had cleaned feces in several cells in addition to Mr. Dunlap's.

Other inmates used feces and urine as a weapon or a tool of frustration. Mr. Goshen said that Mr. Dunlap did not do so. He felt that Mr. Dunlap was "crazy."

His testimony about his ability to see into Mr. Dunlap's cell (*Tr.* 4/17/03: 140) was not credible, except for a time when he might have had a vantage when Defendant was taken to the shower and when he was in the cell on the clean-up crew. The former presumes that Mr. Goshen would be looking at Defendant's cell and that, more than five years after the event, he could recall what he observing. The Court finds that neither proposition is tenable.

Mr. Goshen's testimony about returning Defendant's property via Steve Harrington also lacks credibility. He said he would use string to slide items down to Mr. Harrington. Although Mr. Goshen claimed that he was being creative in this regard, the Court finds that it was Mr. Goshen's testimony that was creative.

Once again, the experts who testified in this hearing had access to Mr. Goshen. The information about which he spoke would not have been available to trial counsel. Mr. Goshen's credibility is substantially suspect. It does not support the contentions about Defendant's mental health at times relevant to the 1996 trial.

Steven Harrington, a current CSP inmate, convicted of first degree murder, criminal attempt to commit first degree murder, second degree kidnapping, aggravated robbery, aggravated motor vehicle theft, second degree assault on a peace officer (all felonies) testified on April 30, 2003. He has been at CSP for 10 years.

Mr. Harrington "met" Mr. Dunlap after Defendant arrived at CSP. They communicated by yelling through their doors. He testified about Mr. Dunlap's "crazy" talk at the time of Gary Davis' execution. Defendant also began to "send [him] all his personal papers . . . address book . . . letters from his mother and his family . . . and the next thing I knew he slammed his TV on the floor." *Tr.* 4/30/03: 10.

He said that inmates exchanged things from time to time, "misdemeanor things" such as cake, Kool-Aid or postage stamps. Inmates never gave others their personal belongings.

Later, he heard Defendant making infantile sounds in his cell. He also observed Defendant, having been removed from his cell, covered with feces all over his upper body and all around his mouth. He then was brought back to his cell. Mr. Harrington stated that Defendant still had feces smeared on his body. He testified that Defendant was removed from his cell again and that he had smeared feces on himself.

Mr. Harrington has been a management problem for DOC. He has had numerous disciplinary proceedings for verbal abuse of guards and damage to DOC property.

On cross-examination, Mr. Harrington testified that he told Defendant that he (Mr. Dunlap) had a "split personality." He claimed to learn about "split personalities" from watching the Oprah Winfrey television program. He also stated that Mr. Dunlap had confided that his mother had bipolar disorder. Later, he stated that inmates could pass relatively thin books between their cells.

The Court finds Mr. Harrington to be incredible. The videotape and testimony about CSP indicate that inmates would not be able to pass books between cells. There was no explanation as to how one inmate's property would be delivered to another inmate.

If Mr. Dunlap had been removed from his cell when he was covered with feces, it is inconceivable that he would be returned to his cell without having been cleaned.

The three inmates may have been presented to bolster Defendant's claim that the CSP videotape should have been used by trial counsel. Their testimony added nothing to the tape and the testimony of Mr. Burbank.

The testimony about Mr. Dunlap's circumstances at the time of Gary Davis' execution is not helpful because the jury would have known nothing about these events. To the extent that Defendant offers this information to support the testimony of Drs. Opsahl, Lewis, Poch and Barkhorn, the Court notes it but finds that post-trial evidence is not of value in its analysis.

In any event, the Court finds that the three inmates offered nothing that was either credible or useful.

Mr. Fears, who was convicted of murder in a notorious case, has been at CSP since 1993. One of the factors in his placement has been concern for his safety. Lucas Salmon, another person convicted of first degree murder, also is housed at CSP. Mr. Burbank testified that he would be "victim prone" if he were placed in general population.

However, Mr. Burbank testified that there are only three ways by which an inmate is placed at CSP: "The majority . . . are there because they've displayed inappropriate behavior in a general population facility and their behavior poses a threat to the security and safety of staff, inmates and the facility.

"The second type of inmate . . . would be death penalty inmates . . . . The third group, which are an extreme minority, would be the group that Mr. Salmon and Mr. Fears would fall into where, due to custodial issues or protective custody issues, it's been decided that for their own safety they need to be managed at the Colorado State Penitentiary." *Tr.* 10/31/02: 126-127. These classifications can be overridden upwards when increased security is required and downwards when security and safety concerns about an inmate abate.

Cell inspections occur each day. Once every 30 days, a more intense "shakedown" occurs. This involves a detailed inspection to assure the presence of all utensils and to be certain that no escape attempts are occurring.

On cross-examination, Mr. Burbank testified that some individuals who were convicted of first degree murder, and against whom the death penalty had been sought, were housed at the Limon prison. At least one other was housed at Arkansas Valley. The Limon facility manages medium and close security inmates. Limon prisoners can use a gym,

weight lifting equipment, a running track and can participate in team sports. Job assignments permit inmates to be outside of their cells during many daylight hours.
The totality of the evidence available for the March, 1996 penalty phase included the two videotapes and the testimony of Mr. Burbank and of two of the CSP inmates. The inmates' information would have been limited to the conditions at CSP. The Court is confident that competent counsel would not call convicted murderers to testify before a sentencing jury. The Court concludes that the available evidence would have shown both extremely stark (CSP) and less severe settings.

However, if the defense had presented the tape and Mr. Burbank, the jury could have been left to speculate whether Mr. Dunlap would have remained in CSP or would have been placed elsewhere.

Defendant's argument, that a placement outside of CSP would have indicated a finding of a lack of dangerousness, is novel but not persuasive. First, Defendant displayed an escalating and continuing pattern of dangerousness before the Chuck E Cheese murders. Second, CSP has a finite number of cells. The jury could not know the number of inmates which the Department of Corrections might have sought to place in CSP at any given time. Finally, Defendant's tattoo and his note to Mr. Kirkpatrick (in which he sought false or perjured statements) would have militated against any appreciable mitigation from the CSP videotape.

Defendant's cited cases are inapposite. In *Gardner v. Florida*, 430 U.S. 349 (1977), a death sentence was reversed because certain confidential information contained in a presentence report ordered by the trial judge, and used by that judge to override a jury's recommendation of a life sentence, was not disclosed to the defendant or his attorneys. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." 430 U.S. 349, 358.
In *Simmons v. South Carolina*, 512 U.S. 154 (1994), the prosecution argued that the defendant's future dangerousness was a critical reason to impose a death sentence. However, the jury was not informed that a life sentence would be one without the

possibility of parole. Seven members of the United States Supreme Court voted to reverse the capital sentence.

The facts in this case do not comport with the holdings of those cases.

Defendant's second argument in this regard is that evidence that "he would have had an easy life in prison if allowed to live" and conditions in "the local jail", including playing ping pong was irrelevant. *M*: 133. Defendant now contends that trial counsel should have objected and that his failure to do so constituted ineffective assistance of counsel.

Defendant's citations are not on point. For example, *Smith v. State*, 511 N.E. 2d 1042 (Ind. 1987) dealt with trial counsel's failure to impeach a police sergeant's testimony with statements of another sergeant (where the first sergeant introduced the defendant's damaging statements), and counsel's failure to produce evidence that the only eyewitness to the murder had himself stabbed the victim less than six weeks before the fatal stabbing. The Indiana Supreme Court found that these actions constituted ineffective assistance of counsel.

In *State v. Higgins*, 572 N.E. 2d 834 (Ohio App. 1990), trial counsel was ineffective for failing to object to the admission of certain hospital records. The State's case was largely circumstantial. The Ohio Court of Appeals found that counsel's failure to contest the admission of these records, which contained numerous hearsay references, was ineffective assistance of counsel, implicating both prongs of *Strickland v. Washington*. Once again, this case does nothing to support Defendant's claim.[127]

Mr. Dunlap also argues that trial counsel were ineffective because they failed to present evidence that CSP "is both escape proof and the facility and procedures ensure that no prisoner can realistically harm another person." *M*: 135. He contends that this evidence was "compelling and persuasive . . . that would have effectively negated" the

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[127] These cases are cited in Defendant's Memorandum at page 202. The Memorandum's heading is, "Failure to object to various improper items of evidence. *See e.g.*, Failure to object to evidence on jail conditions." Although there may be other arguments to which these cases may be applicable, for example, Investigator Meskis' testimony that contained hearsay statements of the victims in the Burger King case, the Court cannot conclude that these cases are at all on point with respect to jail conditions.

State's materials "about escape attempts, future multiple murders, revenge, grudge and lust killings . . . [that were] completely unchallenged." *Id*. Although the videotape and evidence about CSP are noteworthy, and would have been admissible at the penalty phase, the Court is left with conflicting opinions, as presented by the defense experts, with respect to whether *Strickland v. Washington*'s performance prong was implicated. Even if the Court were to conclude that Defendant had presented a persuasive argument in this regard, it cannot conclude that *Strickland*'s prejudice prong has been met. The State was prepared to present evidence that other defendants who had been convicted of first degree murder were housed in facilities other than CSP. As noted, Defendant's contention that his placement there would be indicative of a determination that DOC would have determined that he no longer was dangerous is not persuasive. The presence of murderers in other DOC facilities militates strongly against this argument.

Defendant cites *Parker v. Bowersox*, 188 F.3d 923 (8th Cir. 1999). There, the prosecution offered two aggravating factors. The jury found the existence of one but not the other. Counsel's failure to call a witness who could have provided key information about a plea agreement was found to be constitutionally ineffective. It "undermine[d] [the appellate court's] confidence in the outcome of the sentencing proceeding." 188 F.3d 923, 931. The circumstances in Defendant's case do not resemble those in *Parker v. Bowersox*.[128]

Defendant acknowledges that, in his cited case of *Summit v. Blackburn*, 795 F.2d 1237 (5th Cir. 1986), the State alleged only one aggravating factor. The Court also notes that, in that case, a predicate crime of attempted aggravated robbery was supported only by the defendant's confession. The 5th Circuit found constitutional ineffectiveness because counsel failed to delve into "corpus delecti."

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[128] The 8th Circuit has held, "Rebuttal of aggravating evidence, where rebuttal evidence is available **and efficacious**, is one of the duties of trial counsel. One of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence. *See Bell v. Cone,* 535 U.S. 685 (2002); *see also Starr,* 23 F.3d at 1285. Accordingly, defense counsel's failure to investigate and to call available and useful rebuttal witnesses to aggravating evidence constitutes ineffective assistance of defense counsel. *Ervin v. State* 80 S.W.3d 817, 827 (Mo. 2002). (emphasis added) Defendant's argument about prison conditions does not persuade the Court that the available evidence was "efficacious."

In *Moore v. Jackson*, 194 F.3d 586 (5th Cir. 1999), trial counsel's cross-examination of the arresting officer, which "went far beyond the scope of direct," 194 F.3d 586, 611, elicited "very damaging evidence . . . from the State's first witness." *Id.* This evidence was not provided by any other prosecution witness.

Moore also has findings about a defendant whose "childhood was marked by physical and emotional deprivation and abuse." 194 F.3d 586, 613. Moore's post-conviction counsel presented evidence of substantial and continuing physical abuse, abandonment to the point that Moore was living on the street and stealing food to survive.

> Moore's school records corroborate the neglect, deprivation, and physical abuse that characterized Moore's early childhood. School records describe a morose and withdrawn child who rarely participated in classroom activities. School records likewise describe Moore as suffering from severe developmental delays, perhaps resulting from poor nutrition and inadequate parenting. Moore never passed any year and was granted only social promotions until he dropped out altogether shortly after he was kicked out of the house at age fourteen. *Id.*

Mr. Dunlap's upbringing does not approach the abusive circumstances described in *Moore*.[129] In any event, the Court cannot conclude that trial counsel's failure to present evidence of prison conditions causes the Court to lose confidence in the outcome of the penalty phase herein.

Mr. Lewis' Absences during Guilt/Innocence Phase

Mr. Dunlap also alleges that Mr. Lewis was constitutionally ineffective because he was not present for three days during the guilt/innocence phase. During the hearing, Mr. Lewis testified that, on one of these days, he and Mr. Armistead had traveled to Texas to interview a prospective expert. This trip had been scheduled before trial. However, Mr. Lewis' (earlier) flight was cancelled.

Mr. Lewis also testified that he deliberately absented himself during Miguel Kirkpatrick's testimony. As noted elsewhere herein, Mr. Lewis's attempt to develop

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[129] Here, and in many other instances, Mr. Dunlap's post-conviction counsel cite cases that superficially support his claim. Although the Court cannot compare cases based on specific factual differences, the Court must consider the nature of the facts available to trial counsel in this case and those available to the attorneys who represented the defendants in the cited cases. In addition, the Court notes that there is no evidence to support Defendant's contention that Jerry Dunlap's beatings of him left scars on his buttocks. The testimony from CMHIP staff indicated that there were no such scars.

positive information from Mr. Kirkpatrick (from the defense's perspective) was unsuccessful. Mr. Lewis felt that it was essential that he not be present when Mr. Kirkpatrick testified during the guilt/innocence phase.

Post-conviction counsel's papers state that these absences demonstrate that Mr. Lewis did not prepare a mitigation case until the trial was underway. The evidence at the hearing does not support this contention. Mr. Lewis' testimony that the trial team's investigation into mitigation began at the earliest stages of their representation was uncontradicted. He stated that the first mitigation interview, with Benton Jordan, occurred on January 11, 1994. *Tr.* 12/16/03: 133.

Defendant's reliance on *Williams v. Taylor*, 529 U.S. 362 (2000) in this regard is inappropriate. Contrary to the circumstances in *Williams*, defense counsel did not "begin to prepare for the sentencing phase until a week before trial." *Memo*: 178. Similarly, his reference to *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995) is inapposite. Unlike the attorneys in that case, trial counsel did substantial investigation in the two years before the beginning of trial.[130]

The circumstances in *Bean v. Calderon*, 163 F.3d 1073 (9th Cir. 1998) are not relevant for the Court's consideration. There, a late appointment of counsel for the penalty phase led to a "defense [that] was disorganized and cursory." 163 F.3d 1073, 1078.

The Court has found very little case law that discusses Defendant's claim about the absence of one of two co-counsel for a portion of a trial. There is a passing reference in *Roche v. State*, 690 N.E. 2d 1115 (Ind. 1997). Defendant Roche claimed that one of his attorneys failed to attend certain pretrial hearings. The Indiana Supreme Court found that this did not constitute ineffective assistance.

The Court finds that Defendant has not presented any authority to support his claim as to Mr. Lewis' absence. The Court also concludes that Defendant has not established that Mr. Lewis' non-appearance constituted constitutionally ineffective assistance.

Mr. Lewis' Failure to Take Notes

During the hearing, Mr. Cherner proposed that Mr. Lewis' failure to take notes during trial, particularly to prepare for cross-examination, during direct examination of Defendant's penalty phase witnesses, and during closing argument. Mr. Cherner also suggested, through his questions, that Mr. Lewis failed to make complete notes of various interviews and conversations with prospective witnesses.

In *United States v. Cronic*, 466 U.S. 648 (1984), the opposite occurred. The defendant asserted that his attorney, who had not previously tried a criminal case, was ineffective because he used notes during his opening statement. The United States Supreme Court found that note-taking was not "inherently inconsistent with a reasonably effective defense as to justify that respondent's trial was unfair." 466 U.S. 648, 666, n40.

The Court has found no other case law. In the absence of authority, the Court concludes that a defense attorney's general stylistic approaches to trial practice, absent egregious behavior such as appearing in court under the influence of alcohol or drugs, falling asleep during trial and lack of adequate preparation, are not grounds for a finding of constitutional ineffectiveness.

Defendant's Offer to Plead Guilty

Defendant's papers contain lengthy discussions about Ellis Armistead's penalty phase testimony. That testimony dealt with Defendant's offer to plead guilty if the State agreed not to seek the death penalty. He argues that this evidence, which "was the only mitigating factor intelligibly presented by the defense," *M*: 139, should have been supplemented by evidence that, if Defendant had pled guilty without such a concession, he would waive his right to have a jury determine the sentence.

This argument is unpersuasive. Trial counsel sought to establish a specific mitigator: "The extent of the defendant's cooperation with law enforcement agencies and with the office of the prosecuting district attorney." C.R.S. §16-11-103 (4) (h). The testimony was not directed to any legal consequences of a defendant's pleading guilty to

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[130] Other material in *Glenn v. Tate*, with respect to John Glenn's "history, character, background and organic brain damage", is appropriate for consideration with respect to Defendant's assertion that trial counsel was ineffective because he did not present mental health information during the penalty phase.

First Degree Murder.

Prosecutor's Closing Argument: Comments about Defendant's Offer to Plead Guilty

A separate issue relates to Mr. Peters' closing argument, "And you know, when asked, why didn't he plead guilty, we never got an answer, did we? Huh-uh." *M*: 140. Other portions of Mr. Peters' arguments referred to Defendant's purported motivation to help Tracie Lechman.

Defendant contends that counsel's failure to object to these and related references constitutes ineffective assistance of counsel. He cites several cases in his memorandum. *Memo*: 180-182. The State points out in its second reply brief, *RBII*: 85, that the Court specifically instructed the jury that it could not consider Defendant's assertion of his right to trial by jury. While this reference is accurate, it does not address the portion of Mr. Peters' argument, *supra*, which the Court finds to be improper.

The Court's review of the case law reveals the following. In *Nave v. Delo*, 62 F.3d 1024 (8th Cir. 1995), the court held that isolated improper comments did not affect the jury's sentencing determination. As a result, no prejudice occurred (from counsel's failure to object). Similar findings were made in *Moore v. State*, 820 So. 2d 199 (Fla. 2002); *Woods v. State*, 573 S.E. 2d 394 (Ga. 2002)[131]; *Monegan v. State*, 721 N.E. 2d 243 (Ind. 1999).

Since the prosecutor improperly delved into one of Defendant's asserted statutory mitigator, trial counsel should have objected¸ even though he had adopted a minimal objection strategy. The Court concludes that this failure to object was beneath the standard of care for competent capital defense counsel. The Court also finds that this error was not of the nature to undermine the Court's confidence in the reliability of the sentencing hearing or the jury's verdict.

Mr. Lewis' Penalty Phase Opening Statement

Defendant argues that Mr. Lewis' penalty phase opening statement, "combined with his failure to present the evidence which he promised in that statement would form

[131] During his testimony, Mr. Lewis stated, on several occasions, that he sought to minimize his objections for strategic reasons. The Court finds that this testimony is similar to that in *Woods*.

the core of the 'mitigation' case, constituted ineffective assistance of counsel." *M*: 148. The Court first finds that Mr. Lewis did not make specific promises that implicated the case law Defendant cites. The Court has made these findings with respect to Mr. Gayle's
opening statement during the guilt/innocence phase and incorporates those findings with respect to Mr. Lewis' opening statement.[132]

Defendant's argument about Mr. Lewis' "promises" requires a review of a specific body of law.
The question has been framed as follows: "whether counsel was constitutionally deficient in promising in opening statement to present certain evidence and then failing to present the witnesses who would have supplied that evidence." *Dobson v. U.S.* 815 A.2d 748, 755 (D.C. 2003). As previously noted, the Court must consider a number of factors.

The Court's determination must be fact driven.

> Only by examining the circumstances can a determination be made of whether counsel made reasonable tactical choices in light of the situation as it appeared at the time and whether the change of tactics prejudiced the defense. "No particular set of rules can be established to define effective assistance, as hard-and-fast rules would inevitably restrict the independence and latitude counsel must have in making tactical and strategic decisions." *Edwards v. U.S.* 767 A.2d 241, 248 (D.C. 2001) (citing *United States v. McGill*, 11 F.3d 223 (1st Cir. 1993).

The Court must determine whether trial counsel actually promised to produce certain evidence, the lack of which forms the basis of Defendant's post-conviction claim. The text of the opening statement controls the Court's determination. *McAleese v. Mazurkiewicz*, 1 F.3d 159 (C.A. 3 (Pa.) 1993.

Defendant quotes a substantial portion of trial counsel's penalty phase opening statement (*M*: 149 et. seq.) and states that trial counsel "went on at length . . . about the extensive expert and scientific proof of all of those things which Mr. Dunlap would present . . . . It was, with the exception of anecdotes and the ultimately 'plea offer'

evidence, the entirety of the opening statement. It was the core of the mitigation case he promised to present." *Id*.

The text that follows demonstrates that Mr. Lewis never promised to present expert testimony. "But there are some answers, and I will deal with as much as I can and present as much as I'm able to.

"The answers may come from a variety of sources and from a variety of kinds of witnesses . . . . It may come from people in academic fields, such as criminology and psychology and psychiatry . . . .The single most common denominator, the single most common factor and the most common thread is exactly the kind of house that I will try to show, through whatever windows I can get us in, the Dunlap house was."[133] ***Tr.*** 2/28/96: 4273, 4282.

Trial counsel did call several witnesses in the penalty phase. He did not call any expert witnesses, including Drs. Rebecca Barkhorn, Frederick Miller and Robert Fairbairn, all of whom had reviewed Defendant's mental status.[134] At the Crim. P. 35(c) hearing, the testimony of Jennifer Gedde, one of the trial team's investigators, indicated that counsel and the investigators had heated discussions about the value of presenting Dr. Barkhorn's testimony.

The problem they faced was patent. The Court had granted trial counsel's motion concerning Defendant's statements at CMHIP. The State was not permitted to present this evidence in its guilt/innocence or penalty phase cases in chief. However, the statements were available to the State for rebuttal or impeachment.

Mr. Lewis did not provide an explanation as to why he did not call experts. He told the jury that they did not need expert testimony to understand his point. The Court cannot second guess his strategic decision with respect to his opening statement.

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[132] Defendant cites *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988). There, defense counsel referred to doctors' reports that were in his possession. Although counsel promised the jury to call the doctors, he did not do so.

[133] Carol Dunlap's complete lack of cooperation with the trial team, together with her attempts to prevent other family members from talking to them, makes this comment factually based. Mr. Lewis effectively tied this together during his closing argument.

[134] During the Crim. P. 35(c) hearing, Dr. Barkhorn testified in the defense's case in chief. She stated that trial counsel did not provide her with the nurse's notes and other chart entries made during Defendant's stay at the Colorado Mental Health Institute at Pueblo (CMHIP). This matter will be discussed, *infra*.

This presents a different scenario than those presented in the case law. In *Harris v. Reed*, 894 F.2d 871 (7th Cir. 1990), counsel was ineffective, and the defendant satisfied both *Strickland v. Washington* requirements, because counsel did not interview two "unbiased" witnesses who positively identified a different person who fled the scene of a robbery and shooting. In his opening statement, defense counsel "showed an understanding" of the alternate suspect theory. Defense counsel did not adequately investigate this evidence and failed to produce witnesses to support his opening statement claim. The witnesses were available and would clearly support a viable defense. Thus, the Seventh Circuit found that counsel was constitutionally ineffective. 894 F.2d 871, 878-879 (7th Cir. 1990).

During the hearing, Mr. Lewis testified that he had hoped to be successful in the penalty phase and could have been on his "best day." *See, e.g. Tr.* 12/19/03:35; 116; 1/14/04: 149. The penalty phase verdict was adverse to Mr. Dunlap. Nevertheless, the Court cannot find that Mr. Lewis' performance during his opening statement denied Mr. Dunlap his right to counsel as envisioned in the Sixth Amendment.

Mr. Lewis' Failure to Object during Cross-Examination of Ellis Armistead

Mr. Dunlap also argues that Mr. Lewis was constitutionally ineffective because he did not object to several aspects of the prosecution's cross-examination of Mr. Armistead. First, the record demonstrates that Mr. Lewis did interpose several objections and was not "near[ly]-total passiv[e]." *M*: 141. Second, as the State observes, the Court engaged in a lengthy hearing and advisement of Defendant with respect to this evidence. *RBII*: 88-89. Contrary to Mr. Dunlap's position, the cross-examination did not constitute a "transform[ation of] Mr. Dunlap's exercise of his right to trial by jury into both rebuttal of a mitigating factor and aggravation." *M*: 141. Instead, the State properly asked questions about Defendant's actual motivation for offering to plead guilty. The Court concludes that no juror would be surprised if a defendant attempted to avoid a death sentence by seeking a negotiated settlement of the case.

The discussion of Mr. Armistead's other clients who pled guilty was irrelevant. However, its inclusion in the cross-examination was of minimal consequence. Trial counsel's failure to object was not constitutionally ineffective. *See Davis v. People*, 722 P.2d 998 (Colo. 1996).

Defendant sets forth other aspects of the prosecutor's cross-examination of Mr. Armistead. The transcript indicates that defense counsel objected to the objected to questions and that the Court sustained those objections.

Post-conviction counsel notes that Mr. Armistead was asked questions about his opinions about certain aspects of the case. Mr. Lewis objected. The Court overruled his objection.

None of these areas support Defendant's claim for ineffective assistance of counsel.

Mr. Dunlap's memorandum cites several cases that address a prosecutor's improper comments on a defendant's right to silence. They are inapposite here.

Mr. Lewis' Penalty Phase Closing Argument

Defendant also argues that Mr. Lewis' penalty phase closing argument was substandard. This is an issue to which he devotes considerable attention.

He alleges that "the adversary process completely broke down during the critical closing arguments." *M*: 159.[135] He states that, "defense counsel failed to even suggest that a life sentence was appropriate, justified **or even wanted by Mr. Dunlap** until, as a virtual afterthought, immediately after assuring the jurors that a death verdict would be justified and completely acceptable to the defense, and in conjunction with another of counsel's expressions of 'disgust' with his client, he said that the jurors should choose a life sentence." *M*: 160. (emphasis in motion)

Mr. Dunlap contends that Mr. Lewis "dehumanized" him by starting his closing argument, "How can anyone be so cold? How can anyone be so cruel, I said? What road can anyone go down that could take them to the point where they made the choices that were made at Chuck E Cheese?" *Id.*

Mr. Dunlap complains that Mr. Lewis was far too concerned about the true victims and not enough about him, the defendant. He castigates Mr. Lewis for referring to Mr. Peters as "my old friend."

> And he states that "dehumanizing one's client . . . repeated condemnations of one's client . . .repeated expressions of disgust for one's client . . . repeated

[135] The motion also states, "Also relevant is the abundant mitigation that was available to trial counsel that he either failed to present or failed to adequately investigate." *M*: 160. The Court finds that Defendant cannot credibly argue that the closing argument did not discuss evidence that was not presented.

emphasis on the ‘disgusting reasons for the client’s actions, and on the total responsibility that should be imposed on the client . . . declaring to the jury in closing argument that he **personally**, and the rest of the defense, *i.e.*, the accused, has no objection to or complaint about a death sentence . . . declaring that the

defense had not presented adequate mitigation to justify a life sentence is ineffective assistance of counsel.” *M*: 165-166. (emphasis in motion)

On its face, Defendant’s arguments are powerful. There are two additional factors that the Court must consider. First, the entire argument was made in a professionally emotional and sincere tone. Second, Mr. Lewis’ theme was not one of abandonment. Mr. Lewis was faced with an overwhelming case in both the guilt/innocence and penalty phases. Mr. Dunlap had led a life of crime for several years. His violence had unceasingly escalated. During his best days as an adolescent, while at Savio House, he performed adequately so that he could leave the facility. The jurors could reasonably have concluded that he did so consciously, and with determination, so that he could return to his criminal exploits.

In his opening statement, Mr. Lewis portrayed the Dunlap household as secretive. He told the jury that Mr. Dunlap would never tell others about the family secrets. He described his effort as trying to get into small windows in the Dunlap home.

Furthermore, there was actual abandonment that was displayed. It focused on Mr. Dunlap’s family. Mr. Lewis did not abandon Mr. Dunlap: Mr. Dunlap’s family physically and emotionally abandoned him. Perhaps the most stirring moment in closing was Mr. Lewis’ call: “Mrs. Dunlap, will you please stand up.” *Tr.* 3/7/96: 5766.

Throughout his argument, Mr. Lewis discussed the Dunlap family’s complete abandonment of Defendant. He also attempted to convince the jury that it was difficult to fully understand how Defendant became a quadruple murder, how he got to where he was (thus referring back to counsel’s general voir dire and the rabbit on the fence).

At the hearing, Mr. Lewis testified that Defendant’s lack of remorse “was a real problem for us.” *Tr.* 1/12/04: 32. He thus wanted to convey to the jury, “from our side of the room, from the defense table, from me, from some of us, from us as a group, a sense

of remorse and responsibility and an appropriate realization of the devastation . . . and I tried to do it sincerely myself." *Tr.* 1/12/04: 32-33.

He noted that "this was a very unusual case . . . . It was desperate times . . . . In this case, we had to be careful how we conveyed the message or it would, indeed, fall on deaf ears . . . . A sympathy session . . . empathy with the client . . . [was not] going to work." *Tr.* 1/12/04: 33-34.

He stated that he would not criticize the jury if it returned a death verdict. At the end of his arguments, Mr. Lewis asked the jury to return a life sentence.

The thrust of Mr. Lewis' testimony was that desperate times required extraordinary and unusual approaches to the penalty phase closing argument. Given the horror of this case, Mr. Dunlap's continuing braggadocio, his application of the smoking gun, "by any means necessary" tattoo, his escape attempt and letter to Mr. Kirkpatrick, his willingness to engage in sexual intercourse immediately after committing the murders, his methodical decision to have another person wash the White Sox jacket, the placing of a different gun to which he led the police, and all of the other post-murder actions, as well as Carol Dunlap's constant negative intermeddling, Mr. Lewis' hands were substantially tied.

Mr. Wymore testified that he had "great concerns" about Mr. Lewis' closing argument. He opined that Mr. Lewis' statements would have been more appropriate for a prosecutor than a capital defense attorney. Among the comments Mr. Wymore found objectionable were:

> What a total lack of respect for themselves or anybody's rights they had . . . . They do get pleasure out of other people's pain. It's disgusting . . . . I don't know what any of this means or if it means anything to you in this case and that's for you to decide . . . . Do you really think Nathan would have become a cold-blooded killer . . . . This tattoo which is disgusting to me . . . . If you choose to kill my client under the facts of this case, I will respect your decision and you will not hear one word of criticism from me. I think you're entitled to that and you've got it from my side." *Tr.* 10/23/02: 238-246.

Mr. Wymore stated that the latter comment constituted Mr. Lewis' abandonment of Mr. Dunlap. "That is so far below the standard of practice, that is abandonment." *Tr.*

10/23/02: 246.[136] He stated that Mr. Lewis' final plea to "choose life" was not offered on behalf of Mr. Dunlap or anyone else.

On cross-examination, Mr. Wymore stated that he based his opinions on *Williams v. Taylor*, 529 U.S. 262 (2000). Although the cross-examination became divergent, *Williams v. Taylor* did not address deficiencies in defense counsel's closing argument. Furthermore, Mr. Wymore was not familiar with Mr. Truman's closing argument in *Davis v. People*, 871 P.2d 769 (Colo. 1994).[137]

John Blume, whose principal area of expert testimony dealt with voir dire, also offered opinions about Mr. Lewis' closing argument. He noted that Mr. Oberosler's stated views about capital punishment were reinforced by Mr. Lewis' initial comments ("How could anybody be so cold? How could anybody be so cruel?"). Mr. Blume also took issue with Mr. Lewis' statement that he had not provided much information about Defendant's background. *Tr.* 11/4/02: 168.

He opined that the prosecution's arguments were "a very forceful case for the death penalty", *Tr.* 11/4/02: 171. On the other hand, "the defense closing argument . . . virtually gave the jury permission and license to impose the death penalty . . . . He raised the question of whether or not it makes any difference to Mr. Dunlap at all whether he gets life or death. [It is] a disturbing question." *Tr.* 11/4/02: 171-172. He opined that Mr. Lewis' closing argument admitted that the mitigation case "isn't enough to warrant or justify a life sentence." *Tr.* 11/4/02: 173. He stated that Mr. Lewis' overall approach was "tepid . . . distancing himself from the client." *Id.*

Mr. Blume acknowledged that a capital defense attorney must maintain credibility with the jury. However, he testified that the closing argument was beneath the standard of care and was prejudicial. "If the defense lawyer can't even really vigorously advocate for a life sentence and indicate that a life sentence is appropriate, what else can the jury draw from that other than the person's own lawyer thinks they should get the death penalty and I can't think of anything more disastrous." *Tr.* 11/4/02: 174-175.

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[136] Not all efforts by capital defense attorneys to distance themselves from their clients constitute ineffective assistance of counsel. *See State v. Ball*, 824 So. 2d 1089 (La. 2002).

[137] Mr. Wymore presented as a knowledgeable and highly partisan witness. For example, on one occasion, Mr. Wymore interposed an objection to an evidentiary ruling by the Court. *Tr.* 10/23/02: 197.

He also stated that, had the defense offered testimony about a bipolar condition, that evidence would have been powerful support for a life sentence. In addition, that evidence could have been used in closing argument to make a more credible plea for a life sentence. *Tr.* 11/4/02: 177.

Mr. Blume shared Mr. Wymore's lack of knowledge about the Colorado Supreme Court's opinion in *Davis v. People*.

The parties' authorities present differing views of the requisite legal analysis. Defendant cites *Clark v. State*, 690 So. 2d 1280 (Fla. 1997). There, defense counsel referred to his client as a "bad person" and "one of those people from the underbelly of society who, for whatever reason of background and upbringing, is unable to fully abide

by the laws that the rest of us abide by." 690 So. 2d 1280, 1282. Counsel also referred to himself as a "ghoul." *Id*. He added, "I agree that people like Mr. Clark should be stopped." He added, "Don't ask me, because I have no answer. What possesses anyone to go into a place of business with a firearm to steal one hundred dollars, and apparently to be prepared to use the firearms to steal one hundred dollars. I don't know the answer.... The problem is that it happens all the time with these type of people." 680 So. 2d 1280, 1283.

The Florida Supreme Court found that the performance of Clark's attorney constituted ineffective assistance and that both prongs of *Strickland v. Washington* were satisfied. There are valid comparisons between Mr. Lewis' argument and that of Clark's attorney.[138] A similar theme is found in *Harris by and through Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995)[139]

Defendant refers to *Wade v. Calderon*, 29 F.3d 1312 (9th Cir. 1994). There, trial counsel conceded the result:

> I believe the die has already been cast. I think that you as individuals without consulting each other collectively based upon your past verdicts in this case have decided what to do . . . . (I)f in your wisdom you think the appropriate punishment is death, you may be also giving an escape once again by analogy the gift of life

[138] *But see Gaskin v. State*, 822 So. 2d 1243 (Fla. 2002).
[139] It should be noted that, in *Harris*, trial counsel met with his client for less than two hours.

> to Melvin Meffery Wade to be free from this horror that he and only he knows so well. 29 F.3d 1312, 1324.

Defendant's arguments are countered by the Supreme Court's findings in *Davis v. People*, 871 P.2d 769 (Colo. 1994). In that case, Craig Truman stated that there were times when he "hated" his client; that he hated what Davis had done and that there was no excuse for it. He added, "You can't change what's happened and I am not going to twist or fudge anything for you. Now's the time for me to be heard.... [E]ach one of you has it in your hand to spare Gary Davis or to kill him, for if one of you says no, stop the killing, there's been too much, that's the way it will be." 871 P.2d 769, 777. Mr. Truman ended his remarks by begging the jury to spare his client's life.

In *Davis*, the Supreme Court found that a request for mercy in the face of overwhelming aggravation was not constitutionally substandard. *See also Crawford v. State*, 867 So. 2d 196 (Miss. 2003), (Counsel's reference to his client as a "monster" was an acceptable final effort to convince the jury that the defendant was insane); *Washington v. U.S.*, 291 F. Supp. 418 (W. D. Va. 2003) (The choice of themes in closing argument is a strategic consideration entitled to wide deference.); *Le v. Mullin*, 311 F.3d 1002 (10th Cir. 2002) (In guilt phase, attempt by counsel to ingratiate himself, and by extension, defendant, with the jury not ineffective assistance of counsel.)[140]

In *People v. McDermott*, 51 P.3d 874 (Cal. 2002), the defendant contended that his attorney's minimizing his defense[141], together with counsel's thanking the jury for their attentiveness "regardless of how they voted" and his comparison of the defendant's decision not to testify was comparable to a coach's decision in a football game, constituted ineffective assistance. The California Supreme Court held that where there was a legitimate reason for the argument, counsel was not constitutionally ineffective in his guilt phase summation.

In *Commonwealth v. Carpenter*, 725 A.2d 154 (Pa. 1999), the defendant complained of trial counsel's "weak, sparse closing argument." 725 A.2d 154, 161. A portion of that argument was, "I think you should find he lived in a different kind of

[140] The 10th Circuit found that Mr. Truman did not abandon Mr. Davis during closing argument. *Davis v. Executive Director of Department of Corrections*, 100 F.3d 750 (10th Cir. 1996).

[141] In fact, counsel was rebutting the prosecution's argument that the defense was "purported" or "attempted."

community than we do. I don't think he should be penalized because what he does for entertainment is go out on Friday night and drink a little and have a little marijuana. I think you will find eighty percent of his community does that." 725 A.2d 154, 162. The defendant claimed that this was racially disparaging. The Pennsylvania Supreme Court found that these comments did not meet either of *Strickland v. Washington*'s prongs.

The Court has set forth these authorities, representing holdings that find both ineffective assistance of counsel and the lack thereof, to indicate the difficulty in entering its ruling. Mr. Lewis' words, as reflected on the printed page, could lead a reviewing court to conclude that Defendant's allegation is well taken. However, the printed word does not always reflect the actual circumstances of the argument.

Based on our Supreme Court's decision in *Davis*, and recognizing the actual atmosphere that existed in the courtroom in March, 1996, the Court finds that Mr. Lewis' closing argument, while less than a stirring plea for life, did not violate *Strickland v. Washington*'s prejudice prong. Perhaps Mr. Lewis should have focused more on an appeal for life and less on his assurance that the jury's decision would be respected. The Court cannot and will not engage in "20/20 hindsight" and will not ignore precedent with respect to closing argument. *See People v. Lewis*, 22 P.3d 392 (Cal. 2001).

This is a close question. As noted elsewhere herein, even if Mr. Lewis' performance during closing argument was constitutionally sub-standard, it did not cause constitutional prejudice.

Mental Health Evidence (Expert and Law Opinions) Presented at the Post-Conviction Hearing

The most significant portion of Defendant's ineffective assistance of counsel argument relates to the failure of Mr. Lewis to present a mental health defense. The Court finds that an appropriate analysis requires a review of the testimony presented at both the pretrial hearings and, more significantly, at the Crim. P. 35(c) hearing.

Dr. Charles Opsahl

Dr. Charles Opsahl testified on October 28 and 29, 2002. Dr. Opsahl is a licensed psychologist and serves as the chief psychologist at Yale University Health Services. His career has spanned more than 25 years, during which he has periodically published in

peer review journals. He has experience as a neuropsychologist and was admitted as an expert in neuropsychology.

Dr. Opsahl stated that neuropsychology is a sub-branch of psychology “that deals with . . . the relationship between the brain and behavior; that is, looking at behavior and making correlations to brain function, looking at brain function, making correlations to behavior.” (*Tr*. 10/28/02: 24)
He spent three days with Mr. Dunlap in May, 2000 to obtain an oral history of any head injuries, medical problems, and substance abuse. In this regard, Defendant advised him about head injuries at ages 6, 8, 10 and 14. Dr. Opsahl feels that any history of insults to the brain is of interest to neuropsychologists. He concluded that Defendant was being “forthright” during their encounters. *Tr*. 10/28.02: 27.[142]

He also administered a variety of standardized tests to Mr. Dunlap. His data is contained in Defendant’s Exhibit PCX-10.[143] It appears that Dr. Opsahl utilized 22 tests. He believed that Defendant was trying to be cooperative.

Dr. Opsahl opined that Defendant “was clearly psychotic, was delusional, was very high energy, had a thought disorder and was either bipolar or schizophrenic, or perhaps both, schizoaffective diagnosis. And secondly, that he showed some brain damage in the frontal lobes, especially the left frontal lobe.” *Tr.*10/28/02: 36. He stated that this damage was “mild.” *Tr.* 10/29/02: 39.

Dr. Opsahl put great weight on the differential between Defendant’s verbal IQ (104) and performance IQ (122). He stated that the former, which is associated with the left side of the brain, was in the “average” range; the latter, associated with the right side of the brain, is in the “superior” range. He testified that both should be “up to 122.” *Tr.* 10/28/02: 38. This variation was an important factor in his opinion.

Dr. Opsahl’s testing also included measures concerning “motor tasks that measure motor functioning . . . (that indicate) how the hands work, how the fingers work, how

[142] During re-cross examination, Dr. Opsahl acknowledged that he had not seen any radiological confirmation of Defendant’s reports. *Tr*. 10/29/02: 74.

he's able to manipulate hands back and forth." *Tr.* 10/28/02: 41. He noted that the right side of the brain controls the left side of the body and vice-versa.

Mr. Dunlap is right handed. His dominant hand should perform ten percent better than his left hand. On the Finger Oscillation Test, Mr. Dunlap did not demonstrate such a ten percent differential. A similar result was obtained on the Grip Strength Test. "Both hands, left and right, were below normative levels for someone his age, his level of education." *Tr.*10/28/02: 42. The results of the Luria Alternating Hand Movements test also were not as Dr. Opsahl would expect in a person without left frontal lobe damage. The Speech Sounds Perception Test, which measures left brain function, contained errors.[144] The Seashore Rhythm Test, which measures right brain function, contained no errors.

The results of the Boston Naming Test revealed a below average score by one standard deviation. A similar result was attained in the Sentence Repetition Test. On other language tests, "he did fine." *Tr.* 10/28/02: 44.

Dr. Opsahl opined that the test results showed "patterns of strengths and weaknesses . . . with the left side of the brain being much more compromised than the right side of the brain, which gives, you know, rise to the final diagnostic conclusion about frontal lobe deficits, in particular left hemisphere." *Id.*

Dr. Opsahl was asked about the possible etiology for these deficits. He stated that there could be a variety of causes, including brain injuries and, perhaps, an umbilical cord

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[143] During the hearing, there was considerable discussion about errors in Dr. Opsahl's original report. He stated that there had been some transcription errors that gave "a couple of wrong values for Mr. Dunlap's IQ." *Tr.* 10/28/02: 31. His report was revised on August 15, 2000.

[144] When Ms. Wilson asked Dr. Opsahl if the normative data indicates that four errors, which Defendant had, is "fully normal, *Tr.*: 10/28/02: 216, he agreed. He then stated that no test score can be viewed in isolation and that Defendant's "disadvantage" is not revealed in that test. *Tr.* 10/29/02: 31. The disadvantage also is not demonstrated in any of the Tokens Test, the Controlled Oral Word Association Test, or the Sentence Repetition Test. Apparently, even if no single test reveals any deficit, a neuropsychologist can consider the tests together and determine that a person, such as Defendant, has executive functioning disabilities and, therefore, left frontal lobe damage.

being wrapped around Mr. Dunlap's head causing hypoxia.[145]

Dr. Opsahl's review of tests, including the Rorschach Ink Blot Test, the Thematic Apperception Test and the MMPI-2, led him to conclude that Mr. Dunlap suffered from "a psychotic process, delusional thinking, fragmented psychological responses, merging of percepts, fusing of percepts, certainly high energy, high productivity that might be consistent either with a bipolar disorder or schizophrenic disorder." *Tr.* 10/28/02: 46.[146] Dr. Opsahl considered an MMPI that was administered to Mr. Dunlap in 1989 at Overland High School. He stated that Scales 0 and 9 were elevated and that the remaining scales were within normal limits. Scale 9 is the "mania scale." Scale 0 is the "social interaction scale." The elevations of these scales for Defendant "are indicative that there was some manic pathology as far back as 1989." *Tr.* 10/28/02: 56-57.

Dr. Opsahl reviewed Defendant's MMPI scores in a test that Defendant took at the Colorado Mental Health Institute at Pueblo ("CMHIP") on April 15, 1994. He testified that, based on Dr. Frank Lee's notes, Defendant appeared to be "frankly psychotic . . . very grandiose . . . threatening." *Tr.* 10/28/02: 59. He viewed Defendant's statements (E.g.: "I'm going to play crazy as long as I can . . . . I'm a legend. People will look up to me. I want to be able to go out in public and people will respect me. I used to pack a pistol but I won't have to now because I'm a legend. They will be forced to respect me." *Tr.* 10/28/02: 59-60) as signs of grandiosity and not of malingering.

Dr. Opsahl rescored the CMHIP MMPI, found a valid profile, and determined that the mania scale was 88. Anything over a 70 indicates "clinically significant elevation." *Tr.* 10/28/02: 62. He disagreed with Dr. Lee's assessment of the 1994 MMPI-2 because

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[145] During cross-examination, Dr. Opsahl stated that he did not consider any medical records because he is not a physician and is not qualified to testify about them. Although he considered the history of potential insults to the brain suffered by Defendant, he did not attempt to have those reports independently verified. He stated that this a common practice for neuropsychologists, at least in Connecticut. "If medical records are available, that's fine." *Tr.* 10/28/02: 161. As a trier of the fact, the Court would question this lack of investigation because Dr. Opsahl was offering an opinion about a medical condition: left frontal lobe brain damage. Furthermore, Dr. Poch testified about a report concerning Mr. Dunlap's birth. The attending physician saw no complications at birth. *Tr.* 11/7/02: 65. Given the totality of the evidence, the Court concludes that reasonable jurors would have discounted this suggestion about purported loss of oxygen at the time Mr. Dunlap was born.

[146] Dr. Opsahl expanded on these views at *Tr.* 10/28/02: 55.

Dr. Lee only gave Mr. Dunlap 370 of the 567 questions on the MMPI-2.[147] Thus, Dr. Opsahl did not agree that Mr. Dunlap presented with an antisocial personality disorder. He opined that the failure to have a complete MMPI-2 would not permit any valid conclusions from any subscales; only the "main scales" would provide valid data. *Tr.* 10/28/02: 63.[148]

Dr. Opsahl reviewed the computer scoring of Defendant's MMPI-2, administered by Dr. Lee. The scoring indicated consideration of a hypomanic episode, manic episode, bipolar disorder and cyclothymia, together with considerations of alcohol abuse. After reviewing these materials, Dr. Opsahl disagreed with Dr. Lee's conclusion that Defendant suffers from an antisocial personality disorder. He based this opinion on the aforementioned computer score and his own evaluation of Mr. Dunlap. *Tr.* 10/28/02: 70.

The computer also suggested that Defendant should be considered for psychotropic medication and for an evaluation for organic brain impairment.

Dr. Opsahl gave an opinion that Defendant "either has a bipolar disorder or is in the process, in the middle of a manic episode, a hypermanic episode or a cyclothymic disorder." *Tr.* 10/28/02: 75.

Dr. Opsahl also reviewed testing performed by Dr. Jon Stoner in 2000.[149] These tests included the SCL-90.[150] Dr. Stoner's testing resulted in his writing, "it is reasonable to conclude that Mr. Dunlap is claiming to suffer virtually all symptoms of all mental disorders known to contemporary man. If valid, one would expect Mr. Dunlap to display profound psychotic symptoms which have not been observed to date." DEF-PC CC: *Tr.* 10/28/02: 80-81. Dr. Opsahl stated that Mr. Dunlap had clearly been psychotic prior to Dr. Stoner's evaluation and report.[151] Dr. Opsahl disagreed with Dr. Stoner's conclusions.

Dr. Stoner reported that Mr. Dunlap was trying to "fake a bad profile."

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[147] Later, Dr. Opsahl referred to Dr. Lee's examination as a "short form" MMPI. He stated that Dr. Stoner used a "long form." *Tr.* 10/28/02 : 114.

[148] Dr. Opsahl relied on John R. Graham: "MMPI-2 Assessing Personality and Psychopathology", 3rd Edition (Oxford University Press: 2000) in this regard. He did not state a specific reference. It should be noted, however, that Graham states: "Extreme elevations (T > 80) on scale 9 may be suggestive of a manic episode. Patients with such scores are likely to show excessive, purposeless activity and accelerated speech; they may have hallucinations and/or delusions of grandeur; and they are emotionally labile. Some confusion may be present, and flight of ideas is common." Graham: 82.

[149] As with other post-trial testing, the State objected to any consideration of these tests.

[150] The SCL-90 is a self-report inventory which is used to screen for psychological problems and for symptoms of psychopathology.

Tr. 10/28/02: 88. Dr. Opsahl believes that Mr. Dunlap's symptoms were indicative of "a severe psychosis, either paranoid schizophrenia or some kind of paranoid delusional thought disorder and/or bipolar manic condition." *Tr.* 10/28/02: 89.

Dr. Opsahl also testified about Dr. Stoner's administration of the MCMI-III, also known as the Millon Clinical Battery. He stated that this test is appropriate for Axis II considerations of personality disorders, not for Axis I problems that fit into "major psychopathology." *Tr.* 10/28/02: 117.

Dr. Opsahl's disagreement with Dr. Stoner's and Dr. Lee's assessments is derived, in part, from the hospital notes of Mr. Dunlap's stay at CMHIP.[152] He did not know whether Dr. Stoner had reviewed those notes. However, Dr. Opsahl believes that the notes "strongly suggest that (Defendant) was psychotic[153] and delusional." *Tr.* 10/28/02: 121.

On cross-examination, Dr. Opsahl testified that he and Dr. Dorothy Otnow Lewis have worked together on six to eight cases.

Dr. Opsahl acknowledged that he could not, based on any single test score, state that Mr. Dunlap was bipolar in 1989.

Dr. Opsahl was asked to review a psychological assessment of Defendant performed by Dr. Switzer in 1989. That assessment revealed an elevated mania scale[154] with the balance of the profile being well within normal limits.

Dr. Switzer's report contained a reference to a clinically significant elevation on Scale 4, the Psychopathic Deviate Scale. The cross-examination of Dr. Opsahl concerning his review of Dr. Switzer's report leads the Court to conclude that, while Dr. Opsahl read it, he gave little credence to Dr. Switzer's opinions. When pressed about his views about Defendant's status in 1989, Dr. Opsahl candidly acknowledged that he could

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[151] Dr. Opsahl also disagreed with Dr. Stoner's selection of a scoring category for the SCL-90.

[152] These notes are the subject of considerable controversy in this case. Dr. Rebecca Barkhorn was retained by trial counsel to evaluate Mr. Dunlap. She testified that she did not see these records before forming her opinion that Mr. Dunlap has a narcissistic personality disorder. Upon reviewing these records, she changed her opinion and testified that Mr. Dunlap suffers from a bipolar disorder.

[153] During cross examination, Dr. Opsahl acknowledged that there was "no evidence that he was acting psychotic in 1989, based on assessments… (Ms. Wilson's question) other than those (elevated mania and social introversion scales)." *Tr.* 10/28/02: 144.

[154] There were clinically significant elevations on Scale 4 and Validity Scale F. Dr. Switzer did not indicate the specific degree of elevation. *Tr.* 10/28/02: 142.

not definitively state that Defendant was suffering from Bipolar I in 1989. Indeed, the only indication of such a condition was one elevated score on Dr. Switzer's report.[155]

Cross-examination elicited a noteworthy response. Ms. Wilson asked Dr. Opsahl for the objective evidence supporting his determination that Defendant was bipolar in 1989. Dr. Opsahl testified that Defendant's energy level, as set forth in an MMPI, combined with "one score" (a Scale 9 of 65), *Tr.* 10/28/02: 147, formed the basis of his opinion. Yet, only moments earlier, Ms. Wilson asked him, "You're saying solely on elevation of Scale 9 being around 65, you can state that the defendant in 1969 had Bipolar Disorder?" He responded, "No, all by itself, of course, I could not have diagnosed that, but it certainly is extra evidence that his energy level was quite high on the MMPI administered by Dr. Switzer." *Tr.* 10/28/02: 147. The Court is troubled by this internal inconsistency in Dr. Opsahl's testimony and concludes that reasonable jurors would have had similar misgivings.

Curiously, during his face-to-face meetings with Defendant, Dr. Opsahl asked Defendant, "Is it possible that you were in a manic episode during the alleged incident (the Chuck E. Cheese murders)?" Defendant responded, "It's possible, but I don't think it happened. For the most part, I recalled everything I did." *Tr.* 10/28/02: 155-156. The Court has two concerns about this approach. First, it seems dubious that a professional would ask a person who had been convicted and sentenced to death about whether he was experiencing a manic episode during the homicides. This type of questions assumed Defendant was fully aware of manic episodes and set the stage for Defendant to offer responses to questions that were helpful to him.[156]

Second, there was considerable discussion about "confirmatory bias" during the hearing. The question to which the Court has referred reasonably raises the specter of confirmatory bias on Dr. Opsahl's part.

Cross-examination also disclosed that Mr. Dunlap's performance on the Booklet Categories Test did not reveal any problem with his executive functioning. Dr. Opsahl

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[155] The Court finds that, at least with respect to Dr. Switzer, Dr. Opsahl chose to consider test results that support his opinion and gave no credence to any data that would contradict it.
[156] It must be noted that Defendant's answer cannot be construed as trying to set up a favorable result. The Court simply believes that Dr. Opsahl's approach compromises the reliability of his evaluation.

did not score the Wisconsin Card Sorting Test. However, he stated that neither the Wisconsin Card Sorting test, in isolation, or when considered together with the Booklet Categories Test, showed any difficulty in executive functioning. Further, the Rey Complex Figure Test indicated that Defendant scored better than 82 percent of the normative sample.[157]

The prosecution pursued the issue of brain damage. Dr. Opsahl was not aware that, at some unspecified time, Defendant had been given an Electroencephalogram. He stated that such "testing that's already been done . . . would not change my results one way or the other." *Tr.* 10/28/02: 213.

Dr. Opsahl acknowledged that he did not administer the entire Halsted-Reitan battery of tests. He stated that the entire battery was not always given, especially when other tests were part of an evaluation.

When asked to specify the basis for his opinion that Mr. Dunlap suffers from mild left frontal (brain) hemisphere disadvantage, Dr. Opsahl presented the following catalogue: (1) differentiation between verbal and performance IQ; Speech Sound Perceptions Test (This test contained four errors. The Court previously has reviewed his testimony that acknowledges that four errors are "fully normal" and that Defendant's disadvantage cannot be observed through this test, at least in isolation.); Luria Alternating Hand Movement Test (right hand functioning "much worse than his left hand functioning"- *Tr.* 10/29/02: 41); the grip strength test (showing lower scores than would be anticipated for both hands); and the Finger Oscillation Test (the anticipated 10 percent advantage for Defendant's dominant – right – hand was not demonstrated). Thus, when considered with the Booklet Categories and Wisconsin Card Sorting Tests, Defendant's disadvantage is "mild." *Tr.* 10/29/02: 43.

Dr. Opsahl relied on Defendant's statements that he had had "two psychotic episodes (and) that he had tried to commit suicide several times." *Tr.* 10/29/02: 51. He thus determined that "this was a severely psychiatrically impaired man. There were

documented hospitalizations for psychotic episodes, two suicide attempts." *Id*. When asked if he had read that reviewing hospital personnel had determined that Mr. Dunlap had not experienced a psychotic episode, Dr. Opsahl responded, "I read those speculations in the records, yes." *Tr*. 10/29/02: 52. He also stated that he relied on Defendant's self-reports concerning "depressive mood swings up and down for a number of years, perhaps as early as age 10 or 11." *Tr*. 10/29/02: 84.

Dr. Opsahl presented as a careful witness. He listened patiently and did not hesitate to ask for questions to be repeated when they were not clear to him. He never became frustrated when pressed during cross-examination.

His credibility suffered when he testified that he was unaware that his opinions would be analyzed by other experts. *Tr*. 10/28/02: 179. His statement that he did not know whether the Court would consider whether Defendant was bipolar also strains credulity. *Id*.[158] Dr. Opsahl testified in other cases where the death penalty was at issue. He is an experienced neuropsychologist and an experienced expert witness. He occasionally was evasive about matters about which he claimed to require documentation. For example, Dr. Opsahl was asked, "And would you also agree that you should examine the issue at hand from all reasonable perspectives and actively seek information which will differentially test plausible rival hypotheses?" *Tr*. 10/28/02: 201. His response was: "Again, I don't know what you're referring to." *Id*. Although the prosecutor had not been very artful in some of her previous questions, the cited question requires nothing more than a basic understanding of the scientific method.

Further, Dr. Opsahl's equivocation about whether Mr. Dunlap was psychotic undermined a critical portion of his testimony. To his credit, he corrected himself without prompting by the proponent of his testimony.

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[157] For the Rey Complex Figure Test, the normative sample is "basically made up of people who do not have neurological deficits." (*Tr*. 10/28/02: 189 – Ms. Wilson's question, the terms of which Dr. Opsahl accepted as valid.)

[158] Although the Court is not going to determine whether Defendant suffers from bipolar condition or some other major mental illness, it must consider whether there was sufficient evidence, available to trial counsel, to make a credible presentation to the jury.

Dr. Opsahl's demeanor and the manner in which he answered questions indicate that he opposes capital punishment and that this view colors his testimony. His opinion concerning left frontal lobe damage was not persuasive and, in the Court's view, would not have brought about a different outcome had they been presented at trial. The jury probably would have viewed it with skepticism.

Since Dr. Opsahl was not aware of the 1997 incidents, his testimony is not skewed by that information. He presented as a competent professional, but also as a person who periodically considered evidence favorable to his opinion while ignoring materials that would not support it. Furthermore, Dr. William Hansen's testimony (discussed *infra*) discussed several problems with Dr. Opsahl's approach to forensic psychological testing. Dr. Rose Marie Manguso's testimony also causes the Court to find that Dr. Opsahl's testimony had minimal value and would not have been persuasive at the sentencing trial.

Dr. Opsahl's work as a defense witness in the Donta Page case in Denver and his lack of appreciable service to the prosecution in other cases suggest that he has a propensity to support defendants facing capital punishment. This does not, in and of itself, cast a pall on Dr. Opsahl's credibility. It does cause the Court to have concerns about his testimony in light of the findings made in the immediate paragraph, *supra*. Of course, had Dr. Opsahl testified in 1996, the Donta Page case would not yet have occurred.

Dr. Todd Poch

Dr. Todd Poch testified on November 6 and 7, 2002. He was admitted as an expert in forensic psychology. He has extensive impressive credentials, including board certification in forensic medicine, having testified as an expert twenty to thirty times and being in a firm with a national practice in forensic cross-cultural assessments. He has written about the death penalty and is a frequent lecturer. One of his presentations was to the 1999 annual Colorado Public Defender Conference.

Dr. Poch performed a forensic examination of Defendant[159] in August and September, 2002. He administered a battery of tests, including the MMPI-2, the Childhood Trauma Questionnaire ("CQT"), the Structured Clinical Interview for Dissociative Disorders ("SCID-D"); the Millon Clinical Multiaxial Inventory ("MCMI-III"), the Suicide Behavioral History Form, and the Brief Psychiatric Rating Scale ("BPRS"). Dr. Poch testified that no component was more significant than any other. The examination also is designed to consider malingering.

Dr. Poch gave an opinion within a reasonable degree of psychological probability (or, as he said, within a reasonable degree of psychological certainty): "Mr. Dunlap . . . suffer(s) from Bipolar I Disorder, most recent episode depressed, severe with psychotic features," DSM-IV Code 296.54. *Tr.* 11/6/02: 25. He believed that bipolar symptoms began in late adolescence. He added a "rule-out" diagnosis of Posttraumatic Stress Disorder, DSM 309.81.[160] *Id.*

He also diagnosed Defendant as suffering from Personality Disorder, Not Otherwise Specified, DSM 309.9. *Tr.* 11/6/02: 26.

Dr. Poch testified that mental illnesses and disorders have environmental and genetic (or hereditary) components. As a result, a detailed family history is essential to the examiner.

Dr. Poch learned that there was "a history in multiple relatives (of Mr. Dunlap) of mental illness." *Tr.* 11/6/02: 29. He noted that what was "most important" was "the fact that it's referenced in so many of the records related to this case was the long-diagnosed and treated mental illnesses of his mother who was treated for a mood disorder – treated pharmacologically for a mood disorder over an extended period of

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[159] Dr. Poch testified that, "in forensic psychology, the real client of the evaluator is the judicial system." *Tr.* 11/6/02: 14. When Ms. Scissors asked Dr. Poch about his opinions concerning a patient, Mr. Hower objected. Defense counsel slightly modified her questions and the hearing continued. The Court never learned the significance Dr. Poch attached to the notion of the judicial system as client. (The only other reference to this topic was with respect to Defendant's contention that the People had engaged in theft of medical records.) However, during cross-examination, Dr. Poch testified that he and Mr. Dunlap did not have "the traditionally understood patient-doctor relationship and that confidentiality . . . does not apply." *Tr.*: 11/6/02: 212.

[160] Dr. Poch testified that a rule-out diagnosis means that there is sufficient clinical evidence to suggest that the disorder may be present, but at that particular moment the data is insufficient to meet all of the criteria of the DSM. Thus, there is a high possibility that the diagnosis exists. However, it is ethically inappropriate for a clinician to present such a diagnosis. *Tr.* 11/6/02: 25-26.

time.”[161] *Id*. The “anecdotal information” of mental illness of uncles and grandfathers and “suggestive implications that some of his siblings demonstrated abnormal behaviors”, were important data. *Id.*

Dr. Poch was aware that Carol Dunlap was hospitalized and treated for a mood disorder. He also referred to her “under oath” information in which “she details her long mental health history.” 11/6/02: 30.[162] He thus relied on “multiple references” concerning Carol Dunlap’s mental illness and its challenges to the Dunlap family. *Id*.

He also felt that Defendant’s string of robberies, committed at age 15, was significant because they represent serious antisocial behavior and because he did not appear to have any substantial history of antisocial behavior when he was younger. There was no indication of truancy or major discipline at school.

Dr. Poch reviewed Defendant’s mental health records at length. He noted that Defendant attempted suicide on two occasions.[163]

Defendant’s time at Third Way Center was marked by fragmentation. He was unable to focus on relevant issues and became disorganized. When Defendant then was hospitalized at Presbyterian St. Luke’s Medical Center, the staff noted, “The extent of his oppositional behavior raises questions of beginning thought disorder.” (Cited at *Tr*. 11/6/02: 67.) Dr. Poch noted that this was the (then) most recent of several mental health professionals’ references to an emerging thought disorder.

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[161] Carol Dunlap’s refusal to provide her mental health records to trial counsel thus becomes a significant issue for the Court’s determination of the instant motion.
[162] Since Carol Dunlap did not give “under oath” information before or at trial, Dr. Poch must have relied on testimony at the Crim. P. 35(c) hearing. This information would not have been available to potential trial defense experts or the jury.
[163] Dr. Poch’s testimony appears to relate to two attempts in the Colorado State Penitentiary in 2000. The prosecution objected to the Court’s considering any information about events that occurred after March, 1996. There also were references to Defendant’s attempting to overdose on Carol Dunlap’s psychotropic medication. If this were the information upon which Dr. Poch had relied, the Court would view his testimony in a substantially different light than it now does. Since the CSP suicide attempts occurred in 2000 (at a time after the execution of Gary Davis, and the associated behaviors exhibited by Mr. Dunlap), the Court cannot give these suicide attempts any weight. The jury would not have been aware of incidents that occurred four years after the trial. This information could not have changed the jury’s sentencing verdict (or, for that matter, its verdict on the charged offenses).

Dr. Poch elaborated on the data that supports the conclusion that Bipolar I disorders are heritable. He cited DSM-IV to note that "first degree biological relatives of individuals with Bipolar I Disorder have elevated rates of Bipolar I Disorder, 4 to 24 percent." *Tr.* 11/6/02: 32-33.

Many of Dr. Poch's references to the standardized tests he administered produced results similar to those about which Dr. Opsahl testified. The Court has read the transcript and finds it to be complete and accurate. Some of Dr. Poch's instruments were not utilized by Dr. Opsahl.

The Childhood Trauma Questionnaire is designed to elicit information concerning physical, sexual and emotional abuse and emotional neglect. Defendant's scores were "high moderate" to "low severe" with respect to emotional and physical abuse and minimal with respect to sexual abuse and physical abuse.[164] Anecdotal information supported the findings of physical abuse. Dr. Poch's review of records did not reveal specifics concerning emotional abuse. However, Ms. Swetnam's report contains references to Carol Dunlap's verbal and physical abuse of Defendant during her manic phases.

Dr. Poch testified that abused children may, but may not, develop disorders in later life. He also reviewed Dr. Switzer's report and noted that she believed that Defendant, at the time of her report, might be developing Bipolar Disorder. Dr. Switzer noted that Scales 0 and 9 were elevated with a "T score" of 65. Scale 9 measures Hypomania. The 65 score is clinically significant. Scale 0, measuring social introversion, also was elevated. The balance of the profile was "well within normal limits." *Tr.* 11/6/02: 88.

Dr. Poch reviewed a variety of test results, including those of Drs. Opsahl and Lee. He opined that, with few exceptions, the psychometric tests showed a pattern. "(T)here were indices of a severe mental disorder, generally involving hypomania or thought disorder. And sometimes, but not in every case, elevated measures of paranoia and/or depression." *Tr.* 11/6/02: 81-82.

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[164] Dr. Poch's testimony contained this internal inconsistency. One scale measuring physical abuse produced scores in the high moderate to low severe range. Another scale, addressing physical abuse and neglect, measured in the minimal range. This testimony was not satisfactorily clarified. *See Tr.* 11/6/02: 36.

Dr. Poch discussed Dr. Switzer's findings and her belief that, at the time she administered an MMPI-2, Mr. Dunlap was "endorsing . . . so many symptoms that they would be reflective of so many disorders that they could not possibly apply to a single person." *Tr.* 11/6/02: 93.

Dr. Switzer posited a rule-out diagnosis for malingering. Based on Graham's text concerning the MMPI-2 and his own evaluations, Dr. Poch opined that Defendant suffers from a severe thought disorder. He also testified that Defendant's behavior at CMHIP, including unusual sleeping patterns and CMHIP's decision to chain Defendant for half of the time, which indicated that he was a danger to himself or others, supports the proposition of the thought disorder. The sleeping patterns "could be indicative of a manic episode." *Tr.* 11/6/02: 113.

The scoring of the MMPI-2 administered by Dr. Lee indicated that Defendant was a candidate for psychotropic medication, potential impulsiveness, flight of ideas, lability of mood, and delusions of grandeur. *Tr.* 11/6/02: 114.[165] The computerized score also suggested that Defendant suffered from hypomanic episode, manic episode, bipolar disorder and cyclothymia. After reviewing the CMHIP hospital records, Dr. Poch found that Mr. Dunlap's behaviors were consistent with severe mania.[166]

Dr. Poch opined that Dr. Lee's MMPI did not yield results that are consistent with malingering. Dr. Lee also administered the Structural Interview of Reported Symptoms ("SIRS"). Dr. Poch stated that Dr. Lee's MMPI and SIRS "produced a profile indicative of a manic episode with psychotic features." *Tr.* 11/6/02: 119. Since Mr. Dunlap was spending a considerable period of time in shackles, he believed that Dr. Lee should have made recommendations to a psychiatrist for psychotropic medication and an attempt to find "a less restrictive intervention than shackling." *Id.*

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[165] Dr. Poch expressed concern about Dr. Lee's failure to give Mr. Dunlap all 567 questions in the MMPI-2 and Dr. Lee's opinion that Defendant's elevated hypomania scale was consistent with a "personality disorder, not otherwise specified, with narcissistic and antisocial features" (*Tr.* 11/6/02: 105) are not supported by the relevant literature. Dr. Poch also opines that Dr. Lee did not present adequate data from his testing that appropriately supports his conclusions.

[166] Dr. Poch stated that Dr. Lee's failure to present findings consistent with the available data and his lack of "full disclosure" (His suggestion was: "My diagnosis is inconsistent with that that would be found by other people interpreting the same data") placed Dr. Lee's report "on the edge" of the requirements of the Code of Ethics for Forensic Psychiatrists. *Tr.* 11/6/02: 115.

Dr. Poch reviewed the battery of tests administered by Dr. Stoner in 2000. He felt that two of the tests were properly administered but that the SCL-90-R "had some anomalies" that could have resulted from "poor instructions, misunderstanding on the part of the patient, or scoring the results against an improper norm." *Tr.* 11/6/02: 131.

Dr. Poch also disagreed with Dr. Stoner's interpretation of the SCL-90- R was inaccurate because it was scored "against the wrong normative group." *Tr.* 11/6/02: 132. Dr. Stoner had used the norms for non-patients. Dr. Poch stated that either the inpatient or outpatient norms could have been appropriate, and would have preferred the outpatient norms. The use of the non-patient norms produced "elevated results." *Tr.* 11/6/02: 141. The other norms would have produced results that were much lower in elevation. If Dr. Stoner had used one of the other norms, he would not have been able to conclude that Mr. Dunlap was "endors(ing) every symptom known to man." *Tr.* 11/6/02: 144.

Dr. Poch's review of the MMPI administered by Dr. Stoner revealed elevations at Scales 8 and 9. Drs. Graham and Greene state that this type of elevation "is generally indicative of a severe thought disorder." [167]*Tr.* 11/6/02: 145. The L ("lie") and K ("defensiveness") Scales were within normal ranges.

Dr. Stoner did not find that Defendant suffered from bipolar disorder. Dr. Poch cannot explain this result absent confirmatory bias.[168]

Dr. Poch also testified that the MMPI he administered revealed that Defendant was "extremely depressed, (and) he was suicidal." *Tr.* 11/6/02: 162.[169]

Dr. Poch administered the MCMI-III and found that Defendant evinced "a profile

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[167] Dr. Poch provided a detailed review of the symptomatology of thought disorders. The transcript is accurate. The Court will not make what would have to be lengthy findings. *See Tr.* 11/6/02: 150-151. He also quoted Graham: "The 8/9-9/8, so that's Schizophrenia Hypomania, code type is suggestive of serious psychological disturbance, particularly if Scales 8 and 9 are grossly elevated." *Tr.* 11/6/02: 109. Dr. Roger L. Greene, *The MMPI-2, an Interpretive Manual*, Second Edition, makes a similar finding.

[168] The issue of Dr. Stoner's alleged confirmatory bias also was raised when Dr. Poch discussed Dr. Stoner's directive that, since CSP had adequate evidence of Defendant's bizarre behavior, staff should document more normal behavior.

[169] Dr. Poch also testified about several new MMPI scales that were developed over the last two years. Since these scales clearly were not available to any clinician in 1994-1996, the Court cannot consider them except as they support the other post-conviction hearing experts. The Court made that finding during the hearing. Dr. Poch also speculated about such things as whether "Nathan Dunlap had experienced horror or remorse over his actions (at Chuck E. Cheese)." *Tr.* 11/6/02: 171. The defense argued that Jamie Snook reported such regret.

which is reflective of both depression and moroseness coupled with periods of manic behaviors." *Tr.* 11/6/02" 174. A Structured Clinical Interview for DSM-IV Dissociative Disorders produced no dissociative disorder. This does not affect Dr. Poch's view that Defendant suffers from Bipolar Disorder.

Dr. Poch testified that Mr. Dunlap represents "an extraordinary case" because of the lengthy history of available psychological testing. *Tr.* 11/6/02: 178. He found the tests produced consistent results with no indicia of malingering. Carol Dunlap's history of bipolar disorder supports such a finding for Defendant. Dr. Poch opined that Defendant began to manifest his symptoms in his late teenage years and that Jerry and Carol Dunlap's observations are consistent with a "developing mental illness." *Tr.* 11/6/02: 192.

Bipolar disorder is recurrent and chronic. "The symptomatology sometimes is more severe than at other times." *Tr.* 11/6/02: 194. Dr. Poch could not state, within a reasonable degree of psychological probability, that Defendant met all of the diagnostic criteria for bipolar disorder in 1994. Dr. Poch had the benefit of many post-trial evaluations. However, in 1994, Dr. Poch would not have found that Defendant "was malingering with no evidence of a psychiatric illness." *Tr.* 11/6/02: 197.

On cross-examination, Dr. Poch first admitted that he had never served as a mental health professional in a penal or other correctional institution. As of November, 2002, he had provided treatment for only one person in a correctional facility (or a person in a mental institution for criminal conduct). He has performed forensic examinations for such individuals.[170] In the criminal arena, including capital cases, Dr. Poch has testified almost exclusively for the defense.

He also acknowledged that a psychologist's clinical judgment would come, in large part, from the "actual observation and treatment of mental disease in patients." *Tr.* 11/6/02: 201. "Sound clinical judgment would draw from a wide database. . . . Good clinical judgment would never be based on sending the data scores (from an MMPI-2 or an MCMI-III or other instrument that can be scored by a computer) and someone who

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[170] In response to a question from the Court, Dr. Poch likened his relationship with those individuals and persons upon whom he performed a civil independent medical examination pursuant to CRCP 35(a).

used solely a psychometric instrument to make a diagnosis would not be . . . using good clinical judgment." *Tr.* 11/6/02: 203.

Dr. Poch has testified as a defense witness in death penalty cases in a number of jurisdictions throughout the United States. In each instance, he testified that the defendant was suffering from some form of mental health problem. This testimony was used to support the defendant's mitigation presentation.

Dr. Poch was asked to discuss confirmatory bias. He gave one example in which Dr. Stoner asked for tapes of Defendant's normal behavior. He also generally agreed that a professional who was looking for evidence to support a previously-established conclusion would be another example and would be "a poor approach to science." *Tr.* 11/7/02: 11.

His presentation at the Public Defender became the grist for Mr. Hower's cross-examination. And although counsel did quote from Dr. Poch's paper about the need to convey to a capital sentencing jury the nature of the fear and terror being experienced by a defendant, he stated that professionals must act with "truth and integrity." *Tr.* 11/7/02: 23.

When Mr. Hower asked him about the opinions of several observers that Mr. Dunlap had been malingering, Dr. Poch acknowledged that he had not included several of these references in his report. He stated that he felt that he had "addressed the malingering fully, but I did not enumerate the many allegations of malingering specifically in my report." *Tr.* 11/7/02: 48.

Although Dr. Poch believes that Mr. Dunlap suffers from bipolar disorder and Personality Disorder, N.O.S., he noted no objective evidence of brain dysfunction or head injury. Additionally, the staff at Presbyterian St. Luke's Hospital did not specifically mention the possibility of a thought disorder. This report also indicates that Defendant denied any history of homicidal or suicidal ideation. The report indicates that there also was no history of alcohol or drug abuse. This calls into questions the testimony about Mr. Dunlap's alleged suicide attempts (based on consuming an overdose of his mother' psychotropic drugs). Indeed, Dr. Edgar Moser diagnosed Defendant as having an Oppositional Disorder (which is similar to a Conduct Disorder).

Mr. Hower reviewed the DSM criteria for Antisocial Personality Disorder, §301.7, with Dr. Poch. The witness agreed that Defendant exhibited a sufficient number of traits to fit within that diagnosis. However, Dr. Poch sought to distinguish these criteria for Defendant if the listed behaviors occurred during a manic episode.

Generally, Dr. Poch presented as a forthright witness. He clearly has an attitude that favors the defense in capital cases. He seemed to make a substantial effort to be persuasive about his views and periodically went beyond the thrust of the questions (both by Ms. Scissors and Mr. Hower) to embellish his point and to elucidate upon it.

The Court's notes concerning Dr. Poch's demeanor indicate a very professional affect and approach to testimony. He was not shaken by the prosecutor's probing and detailed cross-examination. However, that examination revealed his continuous relationship with Dr. Lewis and others on the defense team of witnesses. Also, Dr. Poch was very guarded about the subject of the death penalty itself.

Post-conviction counsel have argued that defense counsel who work on capital cases have access to a core group of professional witnesses who travel the country in support of defendants who either are charged with first degree murder and are facing the potential of a death sentence or who have already been sentenced and are before the court on post-conviction review. The evidence presented at this hearing supports that proposition. A reasonable inference can be drawn that Drs. Opsahl, Poch and Lewis have worked together on a variety of cases and that they share a common disdain for the death penalty. They are entitled to this view. Although Dr. Poch stressed the need for a professional to maintain "truth and integrity," the Court must determine how he and the other witnesses would be perceived by the Colorado Springs jury and whether their testimony would have persuaded at least one juror to vote for a life sentence. *See, e.g. Carter v. Bowersox*, 265 F.3d 705 (8th Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001).

Dr. Dorothy Otnow Lewis

Dr. Dorothy Otnow Lewis testified over the course of four days (October 29-31, 2002; April 7, 2003). She was admitted as an expert in psychiatry.[171]

Dr. Lewis reviewed a substantial quantity of documents in Defendant's Exhibits PC-X (1), (2), (3), (5), (6), (7), (8) and (10).[172] She did not recall seeing a document concerning the observations of Defendant by CMHIP personnel.

Dr. Lewis interviewed Defendant on March 15 and 16 and July 14, 15, 16, 2002. She spent approximately 20 hours with him. She opined that Mr. Dunlap "suffers from an episodic, recurring psychosis, probably best described as a bipolar or manic depressive disorder, with severe psychotic features, including catatonic features." *Tr.* 10/29/02: 149-150.

"He also meets the DSM-IV criteria for a schizophrenic diagnosis or a schizoaffective diagnosis, but because moods are such a prominent or states of excitability versus depression are a prominent picture, I have made the diagnosis of bipolar disorder with severe psychotic features, but I would not disagree with someone who made the diagnosis of schizophrenia or schizoaffective disorder which would simply emphasize the schizophrenic qualities and take note of the mood fluctuation." *Id.*
Dr. Lewis believes that Defendant was psychotic "without question in the year prior to the Chuck E. Cheese offenses and that he manifested flamboyant psychotic symptoms after his arrest in 1994 and then subsequently in 1997 and more recently in the summer of 2002." *Tr.* 10/29/02: 151.

Her description of individual with bipolar mood disorders is interesting: They "go through periods in which – there are different ways in which they manifest their symptoms, but they can go through periods in which they are just hyperactive, outgoing, gregarious, industrious, and/or it can reach psychotic proportions in which they are rageful, angry, dangerous, psychotic. There can be periods in between of normality,

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[171] The defense also offered Dr. Lewis as an expert in "neuropsychiatry as it affects violent offenders." *Tr.* 10/29/02: 115. The Court felt that Dr. Lewis could be admitted as an expert in psychiatry and could give opinions pursuant to CRE 702 and 703. The defense did not ask the Court to modify its ruling.

[172] Dr. Lewis also reviewed Defendant's Exhibit PC-GG, a videotape from the Department of Corrections from October 31, 1997. Since Defendant's actions on this date clearly could not have been presented to the jury, the Court will not consider those actions themselves in entering its conclusions of law.

although there are some cases that cycle very rapidly, and then there are other times in which the individual becomes extremely depressed, may not even want to get out of bed, may become suicidal, may just withdraw and not communicate well." *Tr.* 10/29/02: 151-152.

Dr. Lewis discussed two types of catatonia. In the context of this case, her example was a person who would keep on going and going, requiring little sleep for two or three days. People without this problem could not act in this way.

She joined the other professionals called by the defense in noting that bipolar disorder has a significant hereditability factor.[173] Dr. Lewis found this to be noteworthy because she learned that Carol Dunlap had been in a hospital's psychiatric ward between 1972 and 1994. Dr. Lewis had the benefit of the records of each of those hospitalizations.

Carol Dunlap had received several diagnoses. These included depression; acute psychosis; "bipolar recurrent mania with psychosis"; "chronic undifferentiated schizophrenia"; paranoid schizophrenia and manic depressive disorder. Carol Dunlap had been sexually inappropriate with Defendant.

Defendant's maternal grandfather had been psychiatrically hospitalized and had received a 30 percent disability from a Veterans Administration hospital for paranoid schizophrenia. Charles Garnett Jones, III, Carol Dunlap's brother, had been treated for bipolar mood disorder.

Dr. Lewis described Defendant's family as "amazing." "You don't usually see that many relatives in one family with that extreme disorder. . . . What is unusual in my experience in this family is the intensity and severity of the symptoms and signs in all of these family members." *Tr.* 10/29/02: 204.

She testified that she could not determine whether Defendant had suffered trauma at birth. Her review of the hospital records indicated that Defendant had stopped breathing and required resuscitation. Defendant self-reported that he had fallen off his stepfather's shoulders and had lost consciousness and that, in a separate incident, he had attempted to jump a flight of stairs on a bicycle and lost consciousness. Family members

[173] DSM-IV states that individuals with first degree relatives who suffer from Bipolar I Disorder have elevated rates of between 4 and 24 percent.

indicated that he had been knocked unconscious with a baseball bat. Dr. Lewis also testified that, "according to a variety of sources, (Carol Dunlap) when she was in her manic phases particularly, was violently aggressive toward him (and) beat him mercilessly." *Tr.* 10/29/02: 208.

Dr. Lewis' final report contains less detail in this regard. On page 4 (Defendant's Exhibit PC-X(10)), she refers to Carol Dunlap's fantasizing about killing her children and a "brutal" beating after Defendant suffered a "severe injury while fooling around with his bike." There is considerably greater anecdotal information about Jerry Dunlap's assaultive behavior toward Defendant. (Dr. Lewis' final report: 7) She gave graphic testimony about an incident when the Dunlap family was at a motel and the Dunlap children took doughnuts that were provided for the motel's guests. She also discussed an incident at a Burger King.

Dr. Lewis was not able to specify the sources for this information. "There have been so many sources that my recollection is that his mother described this and it was alluded to in other subsequent records so -- and I can't cite the records, I would have to look them up, but it was -- I don't recall, I would have to look at my notes, I don't recall --I think Nathan may have told me about them as well." *Tr.* 10/29/02: 214.[174]

Dr. Lewis believed that Defendant had been sexually abused by Carol Dunlap and by Jerry Dunlap.[175] Jerry Dunlap became concerned that Defendant was displaying symptoms of "bipolarity." *Tr.* 10/29/02: 219. As a result, Dr. Switzer evaluated Defendant. Dr. Lewis testified that no diagnosis was made. However, Defendant was referred to Dr. Lazarus. Dr. Lewis reviewed a report written by Kathy Kunce, MSW, and countersigned by Dr. Lazarus. Dr. Lazarus concluded there was no clinical evidence that Defendant had a bipolar disorder as of January 17, 1999. Dr. Lewis disagreed with his assessment.

She believes that Dr. Lazarus did not have all of the facts she had had at her disposal. During her testimony, she referred to Defendant's "severe depression and his

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[174] Dr. Lewis' notes, contained in Defendant's Exhibit PC-X(10), contain a brief reference to assaultive behavior. The Court cannot determine any other source for this information.

[175] There is no support for this opinion. As noted, other experts' testing indicated a minimal probability for sexual assault.

being suicidal . . . and, of course, the very strong family history of a mother with a disorder, an uncle with a disorder, and a grandfather with a disorder that was so that there -- I just think Dr. Lazarus probably was not furnished with or didn't ask for enough material to make that assessment." *Tr.* 10/29/02: 226.

Dr. Lewis stated that, in the time leading up to the Chuck E Cheese murders, Defendant's bipolar disorder was escalating. She opined that the indicators were, "He was . . . robbing places. He was . . . apparently mouthing off not only to his brother Garland, but to others. His preoccupation was killing. He was, according to one girl who I believe was Tina Blan who worked at Chuck E. Cheese . . . it might have been Burger King, he was bouncing off the walls at times and then at other times he was withdrawn and uncommunicative." *Tr.* 10/30/02: 23. Dr. Lewis also believed that, immediately before the murders, Jerry Dunlap "was or had been extremely brutal to (Defendant)." *Tr.* 10/30/02: 24.[176]

Dr. Lewis also reviewed Defendant's behavior at the Arapahoe County Jail and at CMHIP. She stated that Defendant's conduct was consistent with manic behavior and a bipolar disorder. At CMHIP, his conduct was symptomatic of a manic, psychotic or schizophrenic episode.

She believes that Defendant was not malingering. "A malingerer would want to be sympathized with and would want to make a good and nonthreatening presentation." *Tr.* 10/30/02: 31. On cross-examination, Dr. Lewis stated that "it's commonly known that malingerers want to be found crazy, but not dangerous, and they want to be considered someone that feels terrible or couldn't possibly have done this and that by and large do not try to antagonize an evaluator. . . . Malingerers do not try to be threatening with staff that is going to be evaluating them." *Tr.* 10/31/02: 37-38.

Dr. Lewis found CMHIP's determination that Defendant did not demonstrate a need for medication to be "an outrageous statement." *Tr.* 10/30/02: 37. She noted that

[176] Carol Dunlap did not support Dr. Lewis' belief. She testified that, immediately before the Chuck E. Cheese murders, Jerry Dunlap was in Memphis, Tennessee. *Tr.* 10/16/02: 202.

Defendant had been in restraints, that his behavior had continued for ten days and that his mother had been medicated.[177]

Dr. Lewis discussed other incidents and observations of other professionals which she stated were supportive of her diagnosis. At the same time, she disagreed with Dr. Lee's opinion that Defendant was malingering. She stated that certain statements of Defendant were grandiose and delusional. Thus, his statement, "I used to have to pack a pistol but I won't have to now because I'm a legend. They will be forced to respect me. They can give me probation, then maybe I'll just get out of town. The crime was so perfect they will never find out who did it," was "absolutely contrary to malingering." *Tr.* 10/30/02: 48-49.

Dr. Johnson stated that Defendant's presentation was "variable" and that this supported his opinion that Defendant was malingering. Dr. Lewis disagreed and stated that variability was not inconsistent with psychotic episodes. *Tr.* 10/30/02: 50.

Dr. Lewis believes that Defendant suffers from a severe bipolar disorder with psychosis that dates back to at least adolescence. She testified that his presentation in CMHIP could not be malingered. Although a portion of her testimony relates to her review of activity that occurred after the trial, she was able to give her opinion based on material that was available to the parties as of January, 1996.[178]

Dr. Lewis was the first of two witnesses whose presentation was undermined by effective cross-examination. She was quickly portrayed as a person who spends a

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[177] Ms. Scissors asked Dr. Lewis about the possibility that Carol Dunlap disclosed her bipolar condition to Dr. Johnson of CMHIP. Ms. Scissors followed up by asking, "If in interviewing the mother of a patient who suffered from bipolar disorder she disclosed to you that her symptoms during the course of a bipolar episode were very similar to the symptoms your patient was suffering from, would that help you rule out a possible diagnosis of malingering?" Dr. Lewis responded, "Surely would." *Tr.* 10/30/02: 41.

[178] The Court notes that Dr. Lewis was "appalled" that Dr. Stoner noted Defendant's bizarre behavior and that he sought to document "normal" behavior. *Tr.* 10/30/02: 65. The Court has noted this and other actions by Dr. Stoner in viewing his testimony with an adverse inference. The Court also notes that Dr. Lewis came to this case with a predisposition, as will be set forth, *infra*. Dr. Lewis testified about elevated creatine phosphokinase (CPK) as an indicator of various psychoses. Dr. Lewis stated that she had done some research on the internet to further investigate this proposition. She was not clear about the time when this connection was first proposed. However, she did note that Carol Dunlap had an elevated level of CPK during one of her hospitalizations. Based on the record before it, the Court cannot conclude that this testimony would have been admissible and/or persuasive in a mitigation case. Later in the hearing, Dr. David Johnson disputed Dr. Lewis' views about the relationship between elevated CPK levels and the likelihood that a person would suffer from a bipolar condition.

substantial period of her time in support of defendants who face potential (or actual) death sentences. Dr. Lewis also gave several non-responsive and rambling answers to Ms. Wilson's questions. Her responses to Ms. Scissors were more concise.

Although Dr. Lewis relied on Mr. Dunlap's statements about his abusive history for a significant portion of her opinions, she has written that "anyone who has committed a violent crime is always suspect in terms of lying." *Tr.* 10/30/02: 93.

Ms. Wilson asked Dr. Lewis about the extent to which she believed that a brain injury gave rise to Defendant's major mental illness. Dr. Lewis replied that it was "extremely hard to tease out what the distribution of brain dysfunction secondary to trauma may have been. . . . I can't make a conclusion that brain injury was a major factor." *Tr.* 10/30/02: 94.

Even though she could not completely reconcile Dr. Opsahl's opinion with her findings, she felt that she had received enough evidence for her diagnosis without psychological input.

Dr. Lewis believes that implementation of the death penalty deprives society of information about what makes people become violent. When Ms. Wilson asked her about her views about the death penalty, Dr. Lewis equivocated. She allowed as how she "can't fault Israel for executing (Adolf) Eichmann." *Tr.* 10/30/02: 116. However, because "we are learning that so many individuals who have been condemned to death turn out not to have even done (*sic*), I think it should be abolished on that principle alone. It's catastrophic to kill innocent people." *Tr.* 10/30/02: 116-117.

Ms. Wilson pressed Dr. Lewis about the number of times Carol Dunlap had sexually assaulted Defendant. Dr. Lewis "presume(d) from (a) report of Jerry Dunlap that Nathan Dunlap was sexually abused throughout his life." *Tr.* 10/30/02: 143. Further examination demonstrated Dr. Lewis' lack of clarity on this issue.[179]

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[179] A fair interpretation of this point is that any single incestuous event could cause great damage to any person. In this sense, the Court does not question Dr. Lewis' views about potential precipitators for a major mental illness, exclusive of heredity. However, the Court questions Dr. Lewis' reliance on Jerry Dunlap's assertions about repeated sexual abuse. Carol Dunlap did not permit trial counsel to obtain her psychiatric records. Dr. Lewis had full access to them. Jerry Dunlap was of no value to the trial team. He did not testify at the Crim. P. 35(c) hearing. The Court has no way to assess his credibility. Dr. Lewis' reliance on the statements of a person alleged to be a perpetrator of physical and sexual child abuse is dubious.

During her testimony, Carol Dunlap acknowledged walking in her house naked in the presence of her children. She stated that Jerry Dunlap has physically abused Defendant by throwing him down a flight of stairs, by throwing him into a locker and by "knock(ing) him out at Burger King." *Tr.* 10/16/02: 193.

Ms. Dunlap testified that, on the night of the Chuck E Cheese murders, Defendant "crawled into bed with me. That's not unusual. My adult children do it right now and we just held each other. He talked to me. I talked to him. It was a mother-son thing. It was nothing intimate about it. There was nothing sexual about it. It was just a way of comfort to one another." *Tr.* 10/16/02: 205. And during cross-examination, Ms. Dunlap was asked "Do you recall anything of any sexual nature with any of your children?" She responded, "Not at all." *Tr.* 10/17/02: 35. She also stated that, although Defendant would walk naked in the family home, he was not acting in a sexual manner. *Tr.* 10/17/02: 85. Finally, Carol Dunlap was firm in her testimony that there was no inappropriate sexual conduct between her and Defendant at any time. *Tr.* 10/17/02: 110.

Ms. Dunlap testified that, when she was having a manic episode, she becomes "hypersensitive, hypersexual." *Tr.* 10/17/02: 120. However, she stated that this conduct was and always is directed at her husband.

Thus, the portion of Dr. Lewis' testimony about Defendant's having been sexually assaulted by his mother would have been troubling to the jury. To the extent that Dr. Lewis relied on statements of Jerry Dunlap, the jury would have had to consider the credibility of a physical and sexual child abuser. There does not appear to be other evidence to support this contention.

Defendant told Dr. Lewis that he would prefer to receive the death penalty rather than to be considered "crazy." *Tr.* 10/20/02: 152. Dr. Lewis acknowledged that this view was common among most of the violent criminals with whom she has dealt: "It certainly is true that most of them, that they would rather be considered bad than mad." *Id*. The cross-examination, which led to a series of interrupted questions and answers, left the Court uncertain about Dr. Lewis' opinion. On the one hand, Defendant was concerned about having a bipolar condition similar to his mother's. At the same time, "he wanted to appear okay and that's common." *Tr.* 10/30/02: 155. The Court cannot square this

testimony with Defendant's reported statements, at CMHIP, that he would feign being crazy.

Apparently, Dr. Lewis had not been able to read Dr. Edgar Moser's notes of July, 1990. She also believed that Defendant had, at one time, been diagnosed with a reading disability. She was unable to make a specific reference.[180]

Apparently, Dr. Lewis had not received or reviewed any documents that recorded information from CMHIP personnel about Defendant's behavior during his hospitalization in 1994. She thus was not able to comment about Defendant's apparently being actively psychotic at one moment and, almost immediately thereafter, being able to play basketball. When asked about this, Dr. Lewis stated that a person could participate in sports after such an episode. She could not put a specific time frame between one's being in a psychotic state and becoming sufficiently organized to play basketball.

Dr. Lewis did not recall reviewing reports of Ms. Jamie Snook.

Dr. Lewis discussed the cyclical nature of manic episodes. "You can have (more commonly) . . . a period of . . . weeks or months even of hypomania and then maybe be interspersed by periods of normality and episodes of depression and you can also have a rapid cycling disorder so that it varies and I can't say that we understand it that well." *Tr.* 10/30/02: 198.

Dr. Lewis stated that the CMHIP records that she did review were "full of evidence of psychosis." *Tr.* 10/30/02: 202. She also stated that her review of the record was replete with "episodes of (Defendant's) laughing inappropriately at different times." *Tr.* 10/31/02: 20. The witness was not asked to put these two opinions into context. When asked about Defendant's threatening behaviors toward CMHIP staff, Dr. Lewis expressed a preference for finding this to be consistent with psychotic, inappropriate behavior rather than a personality disorder. *Tr.* 10/31/02: 26.

During her cross-examination, Dr. Lewis was asked several questions about Defendant's lack of remorse for the victims. As part of this discussion, she noted that Defendant was "constantly revved up and talking to many, many people over 1993 about

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[180] Dr. Lewis' inability to make some specific references does not reflect on her credibility. The massive amount of documentation would be daunting for any witness, professional or lay.

I'm going to kill this person and that person about killing and killing and killing and that people just thought he was wacky." *Tr.* 10/31/02: 30.

Ms. Wilson asked her whether she recalled Defendant's call to Benton Jordan "about 24 hours before he stated acting out and said something positive is going to happen in my case and I can't tell you what." *Tr.* 10/31/02: 41. Dr. Lewis did not recall this event.

Dr. Lewis was asked about the tattoo which appeared on Mr. Dunlap's arm while he was in custody awaiting trial. The tattoo contains a smoking gun and the words, "By any means necessary." *Tr.* 10/31/02: 50. She was asked if she thought Defendant believed in that statement. Dr. Lewis' answer was not responsive: "I think it's something that he -- that no malingerer who is faced with a trial for his life would -- he only has that, he has a gun there on his --I forget what -- one arm. I think that no malingerer would wanted to be found not dangerous and who is going on trial for his life in his right mind would ever have a gun and by no -- what is it . . . 'By any means necessary.' I think that it's a -- it's a psychotic and a grandiose piece of behavior that I, when I asked about it, Mr. Dunlap kind of laughed and couldn't quite explain it, but it has-- he had his own reasons for having to put it on." *Tr.* 10/31/02: 50-51.

Ms. Wilson asked Dr. Lewis about Defendant's purported statements by Arapahoe County Jail inmate Ronald Flemming. Flemming testified that he had spoken to Defendant and then informed Deputy Rainey about that conversation. Flemming attributed statements to Defendant: "Watch, watch what I'm going to do, it's an act, check this out." *Tr.* 10/31/02: 70. Dr. Lewis had no explanation for this statement.

A brief review of Mr. Flemming's testimony of August 1, 1995, is necessary to provide context for this facet of Dr. Lewis' testimony.[181] He alleged that Arapahoe County Sheriff's Deputy Terry Rainey gave another inmate, one Eddie Johnson, special treatment by bringing him from protective custody to the behavioral control unit for a breakfast of croissants and "all kinds of stuff." *Tr.* 8/1/95: 44. He also alleged that Deputy

Rainey asked him to write a statement regarding Defendant when he was in the behavioral control unit.

Mr. Flemming then testified that he had talked to Defendant on February 15 (probably in 1994) and "he let me know he was just putting on an act. He said, Watch what I'm going to do, check this out, I know what I'm doing, you know where I am." *Tr.* 8/1/95: 47. Mr. Fleming then attempted to equivocate about his statement: "I remember the statement, writing the statement, but -- how could I -- I don't understand how I could have talked to Nathan Dunlap if he's behind a wall." *Tr.* 8/1/95: 47.

Dr. Lewis was asked about Defendant's deliberate actions after the Chuck E. Cheese murders. He directed Tracie Lechman to hide some of the robbery money and a bag that contained the murder weapon. He retrieved that bag and disposed of the gun in a dumpster. The Aurora Police Department never located the gun. On the morning after the murders, he met with Charles Isaac and asked him to "keep the money for safekeeping." (Ms. Wilson's words) *Tr.* 10/31/02: 109. Defendant also organized a bag that contained a gun and gloves that had nothing to do with the murders. That bag was placed in a different location. Defendant ultimately led police to that bag.

Dr. Lewis felt that this demonstrated Defendant's "grandiose state . . . (and that) he was still suffering from a manic depressive illness during this period of time. He subsequently became much more disorganized and much sicker." *Tr.* 10/31/02: 110-111. She believes that Ms. Wilson's review of the facts of the case was taken out of context. In this regard, she stated that Defendant became increasingly "sicker." *Id.* Although Defendant stated that he had committed the perfect crime, he had not done so because he was apprehended. The evidence against him was strong and Mr. Dunlap made a series of incriminating statements. The Court finds that this portion of Dr. Lewis' opinion is not in any way persuasive.

In April, 2003, Dr. Lewis was asked about her understanding of Garland Dunlap's

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[181] The motion practice at issue involved Defendant's contention that certain witnesses should not be permitted to testify because they were governmental agents as set forth in *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199 (1964) and *Maine v. Moulton*, 474 U.S. 159, 106 S. Ct. 477 (1985).

statement. According to Dr. Lewis, Garland Dunlap had stated that Defendant had been "revved up" about killing. This was inconsistent with Garland Dunlap's testimony. *Cf. Tr.* 10/31/02: 30 and 10/21/02: 219.

She did not think she had been provided statements of Fatima Maynard or Shawna Armstrong. Dr. Lewis was aware of a string of robberies but not of any other juvenile record. Her report did not include any information about Defendant's sale of cocaine or of any alleged burglaries. She discounted Defendant's theft from his employer.

Dr. Lewis was aware of Defendant's shooting a handgun into Isaiah Thomas' house. She believed that this and the aggravated robberies were done while Defendant was in a psychotic state. She also suggested that, since Defendant had a fever approximately 5 days before the Chuck E. Cheese murders, that he was "still not well" and that the fever exacerbated his psychosis. She stated that this was "common clinical knowledge."

Dr. Lewis offered little insight into Defendant's refusal or inability to express remorse about the murder victims.

Dr. Lewis is an experienced psychiatrist who spent a considerable period of time meeting with Defendant, reviewing records and writing her report. The Court notes that she was provided with Carol Dunlap's psychiatric records for this case. Ms. Dunlap was unwilling to surrender those records to trial counsel.

The Court finds that Dr. Lewis did not employ an appropriate scientific method. She impressed the Court as strongly opposed to the death penalty and as a person who is determined to find a mental illness in virtually any person charged with or convicted of a capital crime so as to facilitate the abolitionist cause. Several witnesses testified that her use of terms such as "tragedy" was inappropriate for a professional evaluation. Dr. Barkhorn, also a defense witness, testified that Dr. Lewis "approached it (her analysis) . . .with an agenda and there are just comments that I found unnecessary and unprofessional . . . and actually according to Philip Resnick's course on report writing would not belong in a report." *Tr.* 4/9/03: 94.

Although the defense never suggested that Defendant was insane at the time of the murders or unable to form a culpable mental state, Dr. Lewis volunteered her opinion

that Defendant "was incapable of reflection and rational judgment; his actions were driven, rather, by his manic psychosis and delusional beliefs." *Dr. Lewis' Report, Exhibit PCX-10*. Her officious introduction of an irrelevant opinion served only to undermine her credibility.[182]

Although the presentations of other witnesses can be questioned, there was no other testimony that struck the Court as being so completely biased and of little value in this case as that of Dr. Lewis. There certainly are issues concerning Defendant's mental status that much be carefully reviewed. Dr. Lewis was of very little assistance to the Court's efforts to complete its tasks.

Dr. Rebecca Barkhorn

Dr. Rebecca Barkhorn testified as a defense witness on April 9, 10, 15 and 21, 2003. She was admitted as an expert in psychiatry and forensic psychiatry for this hearing. Post-conviction counsel also asked that the Court find that, had the trial team made such an offer during the 1996 penalty phase, she would have been granted a similar admission. The State stipulated to this request; and the Court so found.

Dr. Barkhorn testified that Forrest Lewis, lead trial counsel, provided certain materials to her and that she "received envelopes with additional interviews or whatever as we proceeded." *Tr*. 4/9/03: 60. She maintained her file after the trial was completed in 1996.

Dr. Barkhorn reviewed reports by Drs. Johnson and Lee from CMHIP. She did not receive the CMHIP hospital chart. She had asked Mr. Lewis "for all past psychiatric reports, medical records if they were obtainable . . . (and) school records. I wanted to be able to talk to family members. And I don't recall if there was more that I asked for." *Tr.* 4/9/03: 62. She noted that it was important for her to review all available information lest she "come to the wrong conclusions." *Tr*. 4/9/03: 64. "Every attorney I've worked with

[182] During cross-examination, Dr. Lewis was asked about her visit with Theodore Bundy on the night before his execution. She testified that *The New Yorker* magazine "teased" her about this event. This vignette serves to reinforce the Court's determination that Dr. Lewis is a witness on a mission, if not a crusade, to defeat the capital sentence of every defendant whose attorneys hire her. In Dr. Lewis' mind, there is no justification for the death penalty (except, perhaps, for war criminals such as Adolf Eichmann). She will spare no effort to rescue each and every person sentenced to death.
Further, Dr. Barkhorn, who also was not asked to perform a sanity examination, concluded that Defendant "knew what he was doing" when he was committing the murders. *Tr*. 4/9/03: 191.

has understood that I need those kinds of records [full documentation] to do my job." *Tr.* 4/9/03: 65.

She met with Defendant on many occasions in 1995. She also met with Carol and Adenia Dunlap. During the first portion of her testimony, Dr. Barkhorn gave an overview of her understanding of Defendant's situation as she understood it in the winter of 1996. She expected to be a defense witness in the penalty phase.[183]

Her last meeting with Defendant was in December, 1995. Dr. Barkhorn then diagnosed Defendant as having a narcissistic personality disorder with antisocial traits (on the DSM-IV Axis II). She did not enter any other diagnosis (*I.e.*, she did not determine that any Axis I diagnosis was appropriate. She thus determined that Defendant was not suffering from a major mental illness.). She was prepared to testify about this diagnosis at the penalty phase.

Dr. Barkhorn's diagnosis would have led to a description of Defendant as being, "very grandiose, thinks highly of himself, he's smarter than other people, more attractive than other people, can do things everybody else cannot do . . . . Sometimes is filled with thoughts and fantasies of envy for those people that are admired by, according to his or her value standards, a lot of envy involved. That person is interpersonally exploitative, who generally takes what he or she needs without really considering thoughts of others. Can often be someone who does not feel empathy and that's part of this --it's connected to this interpersonal exploitation." *Tr.* 4/9/03: 80-81.

Dr. Barkhorn also had considered a diagnosis of bipolar disorder because Carol Dunlap had that heritable condition (according to Mr. Lewis and Carol Dunlap), "but also because Mr. Dunlap's grandiosity was extreme . . . . I told (Mr. Lewis) that it was of almost psychotic proportions or it was quasi-psychotic." *Tr.* 4/9/03: 81.

Dr. Barkhorn was presented with challenges as she performed her tasks. "I asked Carol Dunlap. Although she once said she thought he had bipolar disorder, she denied all the symptoms when I said, well, do you remember if your son ever did this or that and

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[183] As of March, 1996, Dr. Barkhorn had primarily been an expert who supported defendants. Since that time, she has consulted for the prosecution on one occasion.

she -- I asked her if I could have access to her medical records and she denied me access to that or permission." *Tr.* 4/9/03: 82.

In addition, Dr. Barkhorn did not have the hospital chart (from CMHIP), including the seclusion and restrain records and nursing notes,[184] school records, Third Way Center and Savio House records. She testified that she made an initial request and some follow-up inquiries but that, as of the trial date, she had not received these items.

She believed that Mr. Dunlap's abuse as a child was "severe." *Tr.* 4/9/03: 86. He had stated that he and his siblings had received "spankings" which were, in fact, beatings on the back or rear with a belt, often between 50 and 100 times. *Id.* He told Dr. Barkhorn that Carol Dunlap said they would be beaten until one of the children bled. Defendant was the first to bleed; the beatings then stopped.

Defendant did not help his own cause with Dr. Barkhorn. He referred to his family life as being "ideal, perfect, very wonderful. He did not complain about his family." *Tr.* 4/9/03: 87-88.

As a result of this information, Dr. Barkhorn's proposed testimony at the penalty phase would have included a "negative" diagnosis. She could have included some information that she deemed "positive", including the physical abuse, the circumstances of living with a mother with a mental illness and the fact that Jerry Dunlap sexually abused Adenia Dunlap.

Sometime after September 6, 2002, Dr. Barkhorn read Dr. Lewis' report. Post-conviction counsel then asked Dr. Barkhorn to consider "the underlying documentation" (given to Dr. Lewis). *Tr.* 4/9/03: 97. Counsel also provided Dr. Barkhorn with six loose-leaf binders and, thereafter, another quantity of documents. Some of these materials relate to events that occurred after March, 1996. Others, such as the CMHIP chart, were in existence as of Defendant's 1994 hospitalization for a competency evaluation.

[184] Dr. Barkhorn testified that she specifically requested these materials from trial counsel. The Court finds that it is unlikely that she would have requested any seclusion and restraint materials if she did not know that Defendant had been placed in seclusion and restraint. However, her stated request for nursing notes is completely understandable and quite likely to be accurate.

As previously noted, Dr. Barkhorn took issue with the composition of Dr. Lewis' report.[185] However, "it was replete with very important psychiatric facts." *Tr.* 4/9/03: 102. Dr. Barkhorn then stated that, had she been aware of the complete CMHIP records and other materials referred to in Dr. Lewis' report in 1996[186], she would have testified that "Nathan Dunlap did have bipolar disorder and had a manic episode for which he had been hospitalized at the state hospital." *Tr.* 4/9/03: 103. She opined that Defendant "has had bipolar disorder since he was born and, yes, he did have bipolar disorder in 1993." *Tr.* 4/9/03: 127.[187]

Dr. Barkhorn listed the "major" factors (of many) that trigger bipolar symptoms: stress, lack of sleep, physical illness. She stated that bipolar disorder can be treated with medication. She also stated that, especially when a person is in the midst of a manic episode, "especially if they're also psychotic," she or he will not sleep. *Tr.* 4/9/03: 130. "That is not volitional. They are not staying awake because they want to, their body cannot sleep." *Id.* She also testified that Defendant suffered a bipolar episode that lasted throughout virtually his entire stay at CMHIP.
Dr. Barkhorn reviewed the seclusion and restraint records and stated that the notes were contemporaneously made at 15 minute intervals.[188] She stated that a patient could exhibit more than one presentation at once. For example, a person could be observed to be both agitated and angry; quiet/withdrawn and mute/immobile. There were considerable periods of time when Defendant had minimal sleep.

She opined that the records revealed that Defendant experienced a manic episode in the Arapahoe County Jail, starting in February, 1994,[189] and others at CMHIP. She

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[185] Dr. Barkhorn did not evaluate Mr. Dunlap for competency. She did not have any concern about Defendant's competency. When asked if she had been dealing with a person she perceived to be incompetent, she stated that she would have "dealt with it." *Tr.* 4/10/03: 154. Once again, Dr. Barkhorn demonstrated a considerably greater level of objectivity than did Dr. Lewis. If she had had a concern about competency, her perception would have carried much greater weight because she examined Defendant at a time much more proximate to the murders than did Dr. Lewis. On cross-examination, she was asked about this issue. She disagreed with Dr. Lewis. "I just didn't find any evidence for that." *Tr.* 4/10/03: 256.
[186] Counsel made an exhaustive record of the items to which Dr. Barkhorn had access during the late morning and early afternoon sessions of April 9, 2003.
[187] During redirect examination, Dr. Barkhorn testified that "You are born with the genetic predisposition to develop (bipolar disorder). *Tr.* 4/21/03: 20.
[188] Dr. Barkhorn testified that Colorado State regulations require a facility to make chart entries every 15 minutes for people placed in seclusion and/or restraint. These observations occurred through a small window in the seclusion and restraint room door.

further testified that a person cannot malinger the length of sleep deprivation that Defendant displayed while at CMHIP. *Tr*. 4/9/03: 134. Such agitation and sleeplessness are difficult to maintain. Additionally, when Defendant was not in seclusion and/or restraint, "his comportment (was) very different." *Tr*. 4/9/03: 152. Dr. Barkhorn reported similar findings during other times when she believed Defendant was experiencing a manic episode at CMHIP.[190]

Dr. Barkhorn indicated that Defendant's behaviors need not to have been in the context of a bipolar disorder, "but it had to be mania or it can't be malingered. It was just pivotal in changing some of the thoughts that I had, but my diagnosis is based on many other facts about Mr. Dunlap…that I read, you know, all sorts of things that I was told." *Tr*. 4/9/03: 162.[191]

Dr. Barkhorn concurred with many other witnesses that, "when people are out of the affective episodes, whether it's the mania or the depression, they return to more or less normal function . . . . I say more or less -- because again bipolar disorder really refers to probably many illnesses that take the same pattern, just like schizophrenia does. So not everybody goes back to full, normal function, but when the affective episode ends, they sleep normally, they eat normally . . . their judgment is better . . . . If they were psychotic, their psychotic symptoms are gone, so they're back to being more or less their normal selves." *Tr*. 4/9/03: 173-174.

Dr. Barkhorn testified that most people who are afflicted with bipolar are diagnosed in late adolescence or early adulthood. Some children have been found to have a bipolar condition. Although she found some evidence of Defendant's acting as a "class clown", he never did anything more than be disruptive in class. *Tr*. 4/9/03: 177.

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[189] Dr. Barkhorn also testified about another manic episode that occurred in 1997. Although this event may be viewed as confirming her opinion, the trial jurors clearly would not have been able to hear this testimony and would not have been able to use it as supportive of her opinion.

[190] Dr. Barkhorn's testimony concerning Defendant's manic episode(s) was not completely clear. At one point, she appeared to discuss multiple manic episodes. On another occasion, she indicated that his stay at CMHIP constituted one episode. *Tr*. 4/9/03: 142.

[191] Dr. Barkhorn gave opinions about other approaches that a clinician should use before seclusion and restraint, particularly psychotropic medications. However, Defendant's Crim. P. 35(c) motion does not address the propriety of the services Defendant received at CMHIP. Therefore, the Court will not address this proposition.

She joined Dr. Lewis in believing that Defendant was born with a bipolar disorder. Yet, she could not offer an opinion that he would have been diagnosed before his late adolescence/early adulthood.

Interestingly, Dr. Barkhorn testified that, "if he's out of an episode entirely, he could go back to his baseline of normal function. I'm not sure that I know what that is with Mr. Dunlap. I just don't know him well enough and I don't know that." *Tr.* 4/9/03: 183.

Dr. Barkhorn also stated that Defendant's conduct with Deputy Gallo (who referred to his actions as "bizarre") was symptomatic of a thought disorder. His actions included running up and down stairs; becoming hyper-religious; displaying an inappropriate affect; grating speech; inability to express thoughts clearly; and sleep disturbance. *Tr.* 4/9/03: 183-184. She felt that these characteristics were indicative of Defendant's being psychotic. She also stated that his conduct was not malingering because it was not intentional or done for a secondary gain. However, she also testified about one of Mr. Dunlap's statements during her fifth interview. He stated he "will manipulate to get what I need." *Tr.* 4/10/03: 191. Although this testimony was given in the context of his disposing of the murder weapon and the robbery money, the Court cannot find that the jury would have limited its consideration of this statement to its context.

During redirect examination, Dr. Barkhorn testified that Defendant's statements (at CMHIP) that he "was not crazy" were "uncharacteristic in general of a malingerer, especially when surrounded by mental health personnel, to try to appear like he was not crazy, to deny that he was having symptoms. It's just usually the opposite." *Tr.* 4/21/03: 17.

On cross-examination, Dr. Barkhorn related Defendant's views about his sleep at CMHIP. Mr. Dunlap informed her that he "slept too much" during his hospitalization. *Tr.* 4/10/03: 157.

Dr. Barkhorn testified about malingering in more detail. She stated that malingerers can be ingratiating, very controlling and angry. "But the thing that's most important is the consistency with the diagnosis, how voluble they are about their symptoms . . . . Generally, someone who is malingering isn't going to threaten the evaluator with

violence . . . . (T)hey may be controlling and angry, but they're probably not going to try to be too off-putting and really scare you." *Tr*. 4/9/03: 198.

Defendant also bragged about the murders and "went out of his way to deny a lot of symptoms." *Tr*. 4/9/03: 199. His repeated incontinence of feces and urine was "pretty distasteful and not seen in malingerers day after day after day." *Tr*. 4/9/03: 200.

She felt that the MMPI-2 results she reviewed demonstrated that Defendant was "psychiatrically ill." *Tr*. 4/9/03: 202. His repeated admission and description of the crimes were portrayed as grandiosity and showing a lack of "great judgment." *Tr*. 4/9/03: 203. She felt that his history was "all of a sudden (going) from being a pretty straight-laced kid who had not gotten into any trouble before to a kid who is getting in lots of trouble." *Tr*. 4/10/03: 51.

Dr. Barkhorn acknowledged that Defendant once stated that he had heard voices for a period of time and then changed to indicate that "the walls were thin." *Tr*. 4/10/03: 76. Ms. Wilson also asked her about Defendant's incontinence. In an interview with the prosecution, she had said that the incontinence, in and of itself, did not mean anything. Further, she felt that Defendant might have been sufficiently frightened that he smeared feces on himself to prevent others from touching him.

Dr. Barkhorn stated that, during her meeting with prosecutors, she felt "some amount of pressure and tension in that meeting . . . . It was not comfortable for me." *Tr*. 4/10/03: 78.

In 1996 (prior to her reviewing the CMHIP chart), Dr. Barkhorn described Defendant as "the most pathological narcissistic person (she had) ever met." *Tr*. 4/10/03: 85. At that time, she did not believe that Defendant had an Axis I Bipolar Disorder. She conveyed this information to Mr. Lewis.

She testified that it was her common practice to ask for all records relating to a hospitalization. However, if she received reports and no hospital charts, she would have either requested the charts or asked why she had not been provided with them. Further, if she had received them at a later time, she would have repeated her request. *Tr*. 4/10/03: 103.

At an unspecified time, Defendant told Dr. Barkhorn that, if he received a life sentence, he would commit suicide. Dr. Barkhorn discounted this statement: "(T)here was no point at which I believed that Mr. Dunlap was suicidal based on when I saw him." *Tr.* 4/10/03: 90.

Although Carol Dunlap was not concerned about people being aware of her bipolar condition, she was unwilling to release her medical records to Dr. Barkhorn, thus treating her in the same way as she dealt with the trial defense team.

Defendant informed Dr. Barkhorn that his maternal uncle was bipolar. This corroborated information she had received from Adenia and Carol Dunlap. However, Carol Dunlap also was uncooperative in other ways. When Dr. Barkhorn asked her about potential signs of hypomania in Defendant, including decreased need for sleep (staying up and not being tired), increased activity, increased dare taking, grandiose self-esteem, and impulsivity, "she (Carol Dunlap) did not indicate to (Dr. Barkhorn) affirmatively that she had noticed those." *Tr.* 4/10/03: 145.

Dr. Barkhorn discussed Defendant's presentation with Carol and Adenia Dunlap. When she "tried to elicit specific symptoms that -- I don't remember exactly, but that I didn't ever get enough from Adenia or Carol to feel like there was a diagnosis there of that." *Tr.* 4/10/03: 148-149. If Dr. Barkhorn had been informed of Defendant's exhibiting rapid speech, jumping from subject to subject or other similar symptoms, she would have noted these in her report.

Defendant informed Dr. Barkhorn that the aggravated robberies he committed went "fast" and that this was thrilling to him. *Tr.* 4/10/03: 162-163. When discussing the Chuck E. Cheese murders, he was "quite put out" because the public perceived him to be a disgruntled employee. *Tr.* 4/10/03: 165. He repeatedly told Dr. Barkhorn that he committed the murders to "gain status with his friends . . . and get money." *Id.*

Since Dr. Barkhorn was aware of Carol Dunlap's reported bipolar disorder, she looked for mood changes in Defendant during her interviews. However, she noted that shifting moods do not happen on a momentary basis. "You may not see shifting moods for weeks or months . . . . There's not an on/off switch." *Tr.* 4/10/03: 170.

At the time Dr. Barkhorn interviewed him, Defendant remained infatuated with Tracie Lechman. He attributed his early actions in the Arapahoe County Jail to his

concern that Ms. Lechman not suffer any untoward consequences because of his conduct. "He felt so strongly that Tracie not testify, Tracie needed to get off and he'd do anything." *Tr.* 4/10/03: 172. He also stated that he "needed to prove to Tracie how far he'd go." *Tr.* 4/10/03: 204.

During his discussions with Dr. Barkhorn, Defendant expressed some sympathy for the victims' families, but very little for the victims themselves. He felt that, after the first murder, the others should have reacted differently. "They should have run. Only the strongest survive and they were stupid, all victims are stupid." *Tr.* 4/10/03: 178 (Ms. Wilson's question, quoting from Dr. Barkhorn's notes) On one occasion, he stated that, after the murders, he was at Tony's (Schalk) "tripping on it, couldn't believe he did it, felt very bad, felt remorse, couldn't give those people lives back. Get over it possible because couldn't stand feeling so bad. If I feel sorry, I shouldn't have done it . . . . Not proud of what I did, was bad, but can't dwell on it." Tr. 4/10/03: 222.

During Dr. Barkhorn's redirect examination, she stated that Defendant had "cried about (the murders) for a long time." *Tr.* 4/15/03: 242.

He also reported that he would kill Chuck E. Cheese manager Will Mickelson and offered no justification for this thought. *Tr.* 4/10/03: 180-181. He was angry about Mr. Mickelson's attitude toward him and that his thought about killing Mr. Mickelson was "his fantasy." *Tr.* 4/10/03: 182.
He stated that he came out of the Chuck E. Cheese bathroom with adrenaline. He had no feelings during the first two shots. The last three shots occurred while he was angry. By the third shot, he was "totally enraged." *Tr.* 4/10/03: 216.

Mr. Dunlap discussed his planning of the murders. Dr. Barkhorn's notes contain this passage: "Next cold rage as Chuck E. Cheese conjured up, not so much angry at manager, robbery resulted in murder, not murder alone." *Tr.* 4/10/03: 195. But, "it was still murder as far as those people go." Defendant evinced no emotion as he made these statements. *Id.*

Dr. Barkhorn's cross-examination also explored the nature of bipolar disorder. Most who suffer from this malady do so because of a genetic link. Many people with bipolar disorder can function well in society. Others function, but not as well.

It is possible for a person with a major mental illness to have an antisocial trait. These people can do antisocial things even when they are not in a manic episode and are not flagrantly psychotic. *Tr.* 4/10/03: 231.

This discussion was deemed important because, during his many criminal activities, Defendant did not demonstrate a decreased need for sleep. He did not display religiosity, unusually increased interest in sex, pressured speech, or indications that he was suffering from delusions. The State therefore established the implication that Defendant was not in a manic, hypomanic or psychotic state when he was committing his juvenile and adult crimes. *Tr.* 4/10/03: 232-234.

When Dr. Barkhorn was asked about not being given the CMHIP chart, she stated that, without it, she made the best diagnosis she could with the available materials. In a formal report, she would have reserved the right to amend or change her diagnosis if she received any additional information. She also noted that the various juvenile records, including those from Savio House and from Dr. Lazarus, did not provide sufficient information to support a diagnosis of bipolar disorder. *Tr.* 4/10/03: 240.

Although pressed during cross-examination, Dr. Barkhorn did not change her views about malingering, especially with respect to lack of sleep. “That is something that is nonmalingerable.” *Tr.* 4/15/03: 163. She added that a person can have mania without being psychotic. Thus, the presence or absence of hallucinations was not significant to her post-1996 review. She placed great weight on CMHIP chart entries of 17 (“quiet and withdrawn”) and 32 (“agitated”). At the same time, Dr. Barkhorn acknowledged that she could not draw any conclusions about what the observer could actually see. Every two hours, personnel had a face-to-face encounter with Mr. Dunlap.

Ms. Wilson asked Dr. Barkhorn about Dr. Johnson’s notes. He wrote that “just about if not every one (of Defendant’s actions) was volitional.” *Tr.* 4/15/03: 171. A nursing note by Connie Thomas created additional uncertainty about Defendant’s sleep. *See Tr.* 4/15/03: 173. Dr. Barkhorn acknowledged that she could not explain the discrepancies.

Dr. Barkhorn did not write to Mr. Lewis requesting the hospital charts. She stated that they spoke by telephone. When post-conviction counsel asked Dr. Barkhorn to do more work on this case, she was “not actually thrilled about getting involved in this

again." *Tr*. 4/15/03: 178. Post-conviction counsel has stated that Dr. Barkhorn "had no experience with capital cases or mitigation issues. She lacked the necessary experience and expertise to recognize and formulate the issues which would have been important to Mr. Dunlap's case. Due to defense counsel's failure to provide her with necessary information and documents, and due to defense counsel's failure to conduct additional necessary investigation, and through her own inexperience and failure to recognize the symptoms and signs involved, Dr. Barkhorn failed to recognize Mr. Dunlap's actual mental health issues." *M*: 115.[192] Dr. Barkhorn rightfully disagreed with this assessment. In 1996, she had had some forensic experience and certainly had a great deal of experience in recognizing and diagnosing major mental illnesses.[193]

The redirect examination reinforced the notion of Dr. Barkhorn's experience. Counsel asked her about Mr. Dunlap's early behavior in the Arapahoe County Jail. His hyper-religiosity, pacing, kneeling, running up and down the stairs were, in her view, symptoms of a manic episode. This testimony buttressed that of other defense mental health experts.

Dr. Barkhorn stated that it is very difficult to diagnose bipolar condition in an adolescent. She was asked about Laurie Swetnam-Woods' memorandum. Defendant's behaviors in the Cherry Creek School system could be indicative of either an attention deficit disorder or of bipolar disorder.

Toward the end of her testimony, Dr. Barkhorn was asked about her prior opinion that Defendant suffered from a narcissistic personality disorder. Although she agreed that he met the essential criteria for that diagnosis, Dr. Barkhorn stated that, "you cannot have in a narcissistic personality disorder the kind of decreased need for sleep where an individual could be awake hour after hour after hour like that." *Tr*. 4/21/03: 51. Ms. Wilson also asked Dr. Barkhorn about her conversations with Mr. Lewis about the trial

[192] Post-conviction counsel also argues that trial counsel did not provide Dr. Barkhorn with Carol Dunlap's psychiatric records. The record clearly demonstrates that Carol Dunlap would not release her records.
[193] Dr. Barkhorn also was receiving frequent telephone calls and other requests from the parties concerning her review of records and opinions in this case. Since the ostensible proponent of her testimony in this post-conviction motion practice (Defendant) had maligned her in writing and since Mr. Bevis, a prosecution investigator, was making frequent requests for information, and since she was required to perform in excess of 24 hours' work in the post-conviction phase (*Tr*. 4/15/03: 185-186), the Court fully understands Dr. Barkhorn's displeasure with the demands that were visited upon her.

defense team's decision not to call her at the penalty phase. "I remember him saying that Adenia had finally agreed that she would talk about the abuse . . . and that it was a decision made that he felt was strategically the best for his position." *Tr.* 4/21/03: 56.

Pursuant to CRE 614, the Court asked Dr. Barkhorn about circumstances that would cause a person with bipolar disorder to enter into a manic phase. She responded that there are a number of "precipitants" that include lack of sleep, stress, someone's death, the loss of a romantic relationship, and a serious illness. *Tr.* 4/21/03: 60.

In the follow-up to the Court's questions, Mr. Cherner asked about the amount of preparation that the trial defense team had with Dr. Barkhorn. In other criminal cases, she had had either face-to-face or a combination of telephone conversations and in-person meetings with defense counsel. "There's a thorough discussion of what might happen on direct and actually oftentimes I hear the attorney's views of what I should prepare for the cross-examination." *Tr.* 4/21/03: 62. Dr. Barkhorn testified that the trial defense team did not engage in that level of preparation with her.

Dr. Barkhorn was required to testify over a period of four different hearing days. She was asked exhaustive questions about her notes, her initial and subsequent opinion about Defendant's diagnosis and her views about other experts, especially Dr. Lewis. She presented as a very thoughtful, careful and capable expert.
The parties found themselves in the peculiar position of being her supporter when it suited their purpose and her detractor when it did not. As noted, post-conviction counsel attacked her qualifications in their papers. The state strongly endorsed Dr.
Barkhorn's initial views and cast her as a pro-defense witness when she stood firm in her views.

Dr. Barkhorn is an honorable, straightforward and thoroughly professional witness. Although she had not had the opportunity to testify in a capital case in 1996, and although she clearly has grown professionally in the seven years since the trial, the Court concludes that she could have been a valuable asset for the defense if she had had all of the CMHIP materials.

Dr. Barkhorn's testimony raises serious questions about Defendant's mental health status at the time of the trial. The Court concludes that she would have provided

testimony that would have supported a mitigation case, including the following mitigators: "His capacity to appreciate wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution", §16-11-103 (5) (b) CRS (1988); "The emotional state of the defendant at the time the crime was committed", §16-11-103 (5) (f) CRS (1988); and, "Any other evidence which in the court's opinion bears on the question of mitigation." §16-11-103 (5) (l) CRS (1988), the so-called "*Eddings*" mitigator.

Of course, Dr. Barkhorn's value would have been limited in 1996 because Mr. Lewis did not give her all of the CMHIP reports, most notably the seclusion and restraint records. If she had been permitted to view these records, she could have given Mr. Lewis and the trial team valuable information with which they could have considered the viability of including professional mental health data in the mitigation case.

Dr. William Hansen

Dr. William Hansen testified as a People's witness on April 24, 2003. He was admitted as an expert in clinical and forensic psychology. He has presented before both prosecution and defense organizations, including the Colorado District Attorneys' Council, the Colorado Criminal Defense Bar and the Colorado Defense Lawyers Association.

Dr. Hansen reviewed the reports of Drs. Opsahl and Poch and the raw data that each used in writing his respective report.[194] Dr. Opsahl formed an opinion that Defendant suffered from a left hemisphere deficit based on the difference between his verbal and performance IQ scores. Dr. Hansen testified that professional literature "suggests that there's a large proportion of the people who have great differences between the verbal and performance IQs. It doesn't necessarily mean something about their day-to-day functioning. Other testing would be necessary to conclude that. *Tr.* 4/24/03: 35-36.

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[194] Dr. Hansen actually had reviewed only Dr. Opsahl's original report. However, he was present for all of Dr. Opsahl's testimony and was aware of the change in Dr. Opsahl's scoring. In addition to reviewing materials, he rescored as many tests as he could. Dr. Hansen also noted that, although Dr. Opsahl's initial report listed inaccurate test scores, the actual tests were accurately scored.

Dr. Hansen disagreed with Dr. Opsahl's opinion. He stated that he was "aware of nothing in the literature that says you take one of the IQ scores and determine what should be a premorbid IQ for the other." *Tr*. 4/24/03: 38. This testimony indicates that Dr. Hansen does not believe that an 18 point difference between Defendant's verbal and performance IQ scores would, in and of itself, be indicative of the brain damage about which Dr. Opsahl testified.

Dr. Hansen also noted that both of Defendant's IQ scores were above the mean IQ scores for the population as a whole. The Court finds that, had this specific testimony been presented before the trial jury, it would have significantly compromised that portion of a defense that was based on brain damage. When this opinion is combined with Carol Dunlap's statement that Defendant suffered from a wrapped umbilical cord at birth, a defense team that would have presented these two pieces of evidence would have created serious credibility issues for itself and for Mr. Dunlap.

Dr. Hansen criticized Dr. Opsahl's opinion concerning the Rorschach test that Dr. Opsahl had administered to Defendant. While he agreed that the Rorschach had been shown to be reliable and valid in a forensic setting, he stated that Dr. Opsahl did not use any recognized formal scoring system for this test.

The Rorschach has several "formalized" scoring systems. Dr. Hansen stated that one of these systems should be used because, "we have a scientific basis . . . in the literature for understanding what different responses and response sets might mean. If one does not use that, if one does not use something that can be compared to other data known to be reliable, valid and scientifically researched, there's several errors (*sic*) that can occur." *Tr*. 4/24/03: 41. He listed problems such as the "Ouija Board approach" – one that is not scientific or capable or being compared to other scoring systems in the professional literature. *Id.*[195] This "approach" was discussed by former Colorado State University Professor Irv Weiner. Dr. Opsahl stated that "I frankly don't believe that any scoring system in a qualitative basis is all that useful. I use it (the Rorschach) as a qualitative tool. In this case it provided very good information about issues such as how psychotic he was, if the percepts were clean and distinct and separable or whether they

[195] Dr. Hansen explained the Rorschach test and its administration in detail. This testimony is found at *Tr*. 4/24/03: 42.

merged and fused into one another, providing information about his productivity, that sort of thing. Whether Exner[196] had his own particular scoring system or not is not of concern to me." *Tr.* 10/28/02: 193.

Dr. Hansen was asked about the American Psychological Association's Ethical Standards. He provided the following: "Psychologists who develop, administer, score, interpret, or use psychological assessment techniques, interviews, tests, or assessments, do so in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques." *Tr.* 4/24/03: 47. Dr. Hansen opined that Dr. Opsahl did not comply with this ethical requirement. Based on all of the testimony presented during the Crim. P. 35(c) hearing, the Court finds that this assessment is accurate.

The Court finds that Dr. Opsahl's approach to an important instrument such as the Rorschach, which has been subjected to numerous standardized scoring systems, is cavalier. It most likely would have been off-putting to the jury.

Dr. Opsahl also did not use a standardized scoring system for the Thematic Apperception Test ("TAT"). Dr. Hansen could not, and did not, fault Dr. Opsahl in this regard. Instead, he stated that no reliable scoring system has been developed and that the TAT is not of appreciable value in forensic evaluations "because of its lack of validity and reliability." *Tr.* 4/24/03: 49.

Dr. Hansen also stated that the Sentence Completion Test, also administered to Defendant by Dr. Opsahl, lacks reliability. As with the TAT, Dr. Hansen testified that the Sentence Completion Test lacks formal guidelines for comparison. He stopped using the test "because I became convinced it was contributing at that time to confirmatory bias for me in my early clinical years." *Tr.* 4/24/03: 58.

Dr. Hansen also commented with respect to Dr. Opsahl's opinion that the results of the Rorschach, TAT and Sentence Completion Test was consistent with the MMPI-2 results. Dr. Hansen stated that he was not aware of any method for arriving at such an opinion. *Tr.* 4/24/03: 59.

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[196] Dr. Hansen testified that John Exner and his colleagues engaged in extensive studies of the Rorschach over the past 30 years.

He criticized Dr. Opsahl's use of the Beck Depression Inventory because it is designed to be used for a person who has been diagnosed with depression and is being treated with medication. He stated that it is most appropriately used to determine whether the medication regimen is appropriate or should be changed. Although Dr. Opsahl's usage is authorized, its use as a diagnostic tool (as set forth in the instrument's instruction manual) should be used "very cautiously." *Tr*. 4/24/03: 51 And Dr. Hansen stated that Dr. Opsahl was not cautious in his evaluation. He testified that Dr. Opsahl made assumptions that are not approved by the manual.

Dr. Hansen said that two of Defendant's several MMPI-2 evaluations, those administered by Drs. Opsahl and Lee, do not reveal an elevated Scale 2, and that the tests do not demonstrate that Defendant suffers from depression. He also testified that Dr. Opsahl's use of the MMPI-2 did not provide any useful information with respect to Mr. Dunlap.

Dr. Hansen also disagreed with Dr. Opsahl's opinion that Mr. Dunlap's MMPI-2 responses demonstrated psychosis. He said, "The statement that his thinking on these matters was fragmented, tangential, and no evidence of merging and fusing of percepts is nonsensical as it applies to the MMPI-2 . . . . There was nothing psychotic about his responding." *Tr*. 4/24/03: 72.

Dr. Hansen stated that Dr. Opsahl had received an NCS Interpreter Profile for the MMPI-2.[197] He testified that there were no indications that Dr. Opsahl had used this material or that there was any indication of how Dr. Opsahl arrived at his analysis of the MMPI-2.

Dr. Hansen stated that the NCS profile "supports the conclusion that there might be some paranoid ideation," or some other thought disorder, but that it does not suggest the pressured or high-energy profile about which Dr. Opsahl testified. *Tr*. 4/24/03: 76. Dr. Hansen viewed this as another indicator of confirmatory bias.

Dr. Hansen also reviewed Dr. Poch's testimony and had opinions about it. He was less critical about some of Dr. Poch's approaches than he was of those of Dr. Opsahl. However, he felt that Dr. Poch's use of a (separately administered) MMPI-2 as a

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[197] He explained that this is a scoring and interpretive service, provided by the University of Minnesota, to assist with a clinician's consideration of the MMPI-2.

diagnostic tool was inappropriate. He cited Greene's treatise to support this proposition. Nevertheless, he talked about Dr. Poch's assignment of code types for Defendant.

Dr. Poch has assigned code types of 8 (schizophrenia) /2 (depression) /0 (social introversion). As a result, Dr. Poch believed that Defendant was cycling between hypomania and depression. *Tr*. 4/24/03: 87.

Dr. Hansen believed that a more accurate code typing for Defendant is 8/2/4, or "psychopathic deviat(e)". *Tr*. 4/24/03: 89. He acknowledged that people with an 8/2/4 code type "tend to be . . . impulsive, angry, act in antisocial ways, and often their depression results out of being called to be accountable for (their) actions." *Tr*. 4/24/03: 90.

He also stated that Defendant's "Scale 9 T score" was 62. Although Dr. Poch believes that this score means that a person has a high mania quotient, Dr. Hansen stated that scores below 65 are not "clinically significant" and "are within the normal range." *Id*. Thus, there was no clinical indication of elevated mania.

Dr. Graham has written that people with codes 8/2 are appropriately considered to have a schizoaffective disorder. Dr. Hansen stated that he is not aware of Dr. Graham's source for this information. He thus discounted Dr. Poch's reliance on this portion of Dr. Graham's writings. The Court concludes that, while Dr. Hansen was a credible and persuasive witness, he engaged in some selective reliance on treatises. This was part of a pattern in the hearing. Trial jurors probably would have found this testimony troubling and could well have given less weight to his testimony as a whole.

On cross-examination, Dr. Hansen acknowledged that he did not make a diagnosis of Defendant. Therefore, if (as is the case here) other mental health professionals diagnosed Mr. Dunlap as suffering from a bipolar disorder, he did not "have a basis for saying that they are incorrect." *Tr*. 4/24/03: 111.

The defense also developed evidence that related to a significant part of his motion. Dr. Hansen agreed with the statement that, "a competent evaluation requires a review of the records, independent of the patient, and interview of the patient." *Tr*. 4/24/03: 107-108. He also testified that the three tests that provide worthwhile data are

the WAIS-III, the MMPI-2 and the Rorschach "if properly administered using the Exner scoring system." *Tr.* 4/24/03: 108.

Since Dr. Hansen did not develop a diagnosis of Defendant, he was not in a position to state that another clinician's diagnosis was incorrect. However, Dr. Hansen is able to treat people without obtaining a formal diagnosis. He frequently does this but apparently does so after administering the WAIS-III, the MMPI-2 and the Rorschach (after appropriate sentencing).

While Dr. Hansen was not impressed with Dr. Opsahl's MMPI-2 test results, he also was not "overly admiring" of Dr. Lee's work. *Tr.* 4/24/03: 119. "I thought his conclusions . . . reached beyond what is in the literature as a whole." *Id.*

As with other mental health professionals, defense counsel asked Dr. Hansen about echolalia and his opinions as to whether Defendant demonstrated its characteristics. Defense counsel and Dr. Hansen discussed Dr. Poch's finding of code types of 8/2/0 in Defendant, preferring instead code types of 8/2/4. There was a dispute as to Dr. Poch's reliance on Dr. Graham's view (with which Dr. Hansen also disagreed) that a 2/8 code type is an indicator of both bipolar disorder and schizoaffective disorder. Dr. Hansen accepted Dr. Graham's views concerning schizoaffective disorder but not that concerning bipolar disorder. He further objected to Dr. Poch's analysis because Dr. Poch did not provide at least some of the computer-assisted scoring with respect to some of his testing.

Dr. Hansen disagreed with portions of Graham's treatise. Although he acknowledged that a 2/8 code type should be considered for a diagnosis of schizoaffective disorder (which Graham describes as "serious and chronic psychopathology", *Tr.* 4/24/03: 115, the language used by Mr. Cherner), he stated that a diagnosis of bipolar disorder was not appropriate.[198]

Later in cross-examination, Dr. Hansen acknowledged that his citing of Dr. Opsahl's report did not include Dr. Opsahl's reference to a "most likely diagnosis" of schizophrenia, possibly paranoid type, or paranoid disorders. *Tr.* 4/24/03: 130.

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[198] He also stated that Dr. Graham provided no basis for his assertion that this code type properly could be considered as a candidate for a bipolar diagnosis.

Dr. Hansen also was confronted with testimony he gave in two federal cases. Although he criticized the testing procedures of certain defense experts, in the federal case, he also administered two psychological tests, the MMPI-2 and the Rorschach, "to contribute to my understanding of the individual" (as opposed to a diagnosis). *Tr.* 4/24/03: 149.

All of this boils down to the question of whether the MMPI-2 should not be the only instrument used to develop a diagnosis. Indeed, both of the MMPI profiles developed by Drs. Opsahl and Poch established valid profiles. Dr. Hansen disagrees with their interpretations of the profiles and their views that Mr. Dunlap suffers from a major mental illness.

The cross-examination also clarified Dr. Hansen's concerns about Dr. Lee's evaluation. Although Dr. Lee's testing established one criterion that could lead to a finding of narcissism, Dr. Hansen stated that Dr. Lee's conclusion "would not be supported by the literature in general." *Tr.* 4/24/03: 181.

The cross-examination became somewhat conflicted when defense counsel attempted to determine the extent to which Dr. Hansen's income was derived from forensic work. The Court initially entered an improvident ruling with respect to Dr. Hansen's total annual income. That ruling, which shielded that information, was inconsistent with the ruling entered concerning Dr. Poch. This inconsistency is inappropriate and cannot be the basis of any finding that either supports Dr. Hansen's credibility or undermines that of Dr. Poch. In its discretion, the Court will not consider either of the witness' total income or the percentage of that income derived from forensic work in assessing their respective testimony.

Having made that determination, the Court notes that Dr. Hansen has been employed by both prosecutors and defense counsel in Colorado in a number of very serious cases. He is not a partisan. Indeed, he was careful not to offer a diagnosis of Mr. Dunlap, in large part because he never met with Defendant.

The Court finds that Dr. Hansen was a thoughtful, careful witness who was not interested in telling the Court more than he knew. He has no agenda and offered a critique of matters he deems important, matters that he stated Drs. Opsahl and Poch omitted from their evaluations and testimony. The cross-examination revealed some

flaws and some biases in his testimony, but did not cause him to retreat from his basic premises.

Dr. James Grigsby

The Court has found that Dr. Lewis was not a credible witness because of her predisposition in capital cases. Dr. James Grigsby, admitted as an expert in neuropsychology, initially appeared to be a confident, well prepared witness. By the time cross-examination had been completed, his testimony was not persuasive and of minimal value.

As of April 14, 2003, Dr. James Grigsby had performed between 1,300 and 1,500 neuropsychological examinations. He has minimal forensic experience and maintains other professional interests.

He analyzes the brain concerning memory and perception, but does not do so in isolation. He considers how the brain is affected by body chemistry and other factors.

Dr. Grigsby testified that he uses standardized measures for an actuarial judgment, as opposed to a less reliable clinical judgment. He opined that Dr. Opsahl's report is "seriously flawed." For example, he stated that Rey Complex Figure test concerning malingering produces bad results from only very impaired people. Thus, he believes that Dr. Opsahl's reliance on this test is unjustified.

Dr. Grigsby stated that Dr. Opsahl's intellectual evaluations were based on incorrect scores and incorrect interpretations. Although Dr. Opsahl was correct in his scoring of Defendant's performance IQ, his finding about a verbal IQ of 104 (at least initially) was inaccurate. However, when presented with People's Exhibit 25, and compared with Defendant's Exhibit PCX-10 (Dr. Opsahl's revised report), he noted differences that he had not anticipated. He did not know if the errors he had observed were the result of inattention or mistakes.

Dr. Grigsby testified that a significant portion of the population (approximately 10.7 percent) have the same difference in verbal and performance IQ scores as does Defendant. And he stated that Dr. Opsahl's opinions do not comport with Dr. Lezak's findings in her treatise. He said that Dr. Opsahl was using "spin" in his report.

Dr. Grigsby believes that Defendant's IQ scores are in the superior range. He has a good working memory and an ability to keep things in mind. His executive cognitive functioning demonstrate a set of high level abilities, an ability to plan, an awareness of consequences and an ability to monitor himself critically. He found that other testing supported this proposition.

He further criticized Dr. Opsahl for using "idiosyncratic methods at times", for example in scoring the Wisconsin Card and Boston Naming tests. As with other witnesses, Dr. Grigsby criticized Dr. Opsahl for not following standardized scoring procedures. He also stated that, if Dr. Opsahl had used proper cuing on the Boston Naming Test, Defendant might have been able to respond properly in some instances where he had provided erroneous responses. As a result, he questioned the reliability of Dr. Opsahl's data.

Dr. Grigsby disagreed with Dr. Opsahl's view that clumsiness in sensory motor functioning is an indication of pathology. He testified that Dr. Opsahl was "attempting to make the case" for brain damage. Since Defendant scored in the 80th percentile of the Finger Oscillation Test, the brain damage finding was not justified.

He supported other testimony that Dr. Opsahl demonstrated confirmatory bias. And he testified that Dr. Opsahl's failure to administer test in a standardized manner led to over interpretation and misinterpretation.

Cross-examination revealed that Dr. Grigsby had never met, let alone diagnosed Defendant. And Dr. Grigsby based his opinions on Dr. Opsahl's first report, not the corrected document that the Court must consider. Indeed, Dr. Grigsby's report, People's Exhibit 23, relies on the incorrect data that Dr. Opsahl later corrected.

When Dr. Grigsby testified on direct examination, he appeared to be almost scripted. He was confident, and, by facing the Court for his answers, virtually directed his answers accordingly. When Mr. Cherner conducted his cross-examination, Dr. Grigsby became uncertain and somewhat nervous. Although he personally opposes the death penalty, he was forced to explain his own level of confirmatory bias. Dr. Grigsby acknowledged that some of the opinions about which he testified were not in his report. He equivocated about his office conference with Mr. Cherner, specifically with respect to the questions counsel asked him at that time.

A review of Dr. Grigsby's report reveals that it is not very insightful with respect to the specific tests about which he is critical. He also believes that the type of testing that Dr. Opsahl performed is more useful in the civil arena than in criminal cases. There was no testimony that either supported or contradicted Dr. Grigsby's views in this regard.

While the Court acknowledges that other witnesses subscribed to some of Dr. Grigsby's views, and irrespective of the problem discussed in the immediately preceding paragraph, the Court finds that Dr. Grigsby was not a persuasive witness.

Dr. Jeremy Lazarus

Dr. Jeremy Lazarus testified as an expert in psychiatry. Unlike many of the other professional witnesses, Dr. Lazarus indirectly provided services to Defendant at a time somewhat proximate to the Chuck E. Cheese murders. However, his personal contact with Mr. Dunlap was limited. One of his employees, Kathy Kunce, a licensed clinical social worker, was affiliated with his practice, Psychiatric Services, Inc., which received patient referrals from Comprecare (an early entity in the world of managed care). Ms. Kunce saw Defendant eight times during the period of October 11, 1989 through January 8, 1990.

Carol Dunlap took Defendant to Dr. Lazarus' office because he had committed a string of aggravated robberies as a juvenile. She was concerned that he might have been "manic depressive" (Bipolar Disorder). However, Ms. Kunce wrote a letter to Dr. Lee Thompson stating that "there is no clinical evidence of this at this time." Exhibit PCX-1.

Interestingly, when the trial team's investigators sought information from Dr. Lazarus (in March, 1994), his office provided a diagnosis of Conduct Disorder, undifferentiated type. Dr. Lazarus stated that this diagnosis would have been that of Ms. Kunce, who was qualified to make such determinations, and that he "would have concurred with that diagnosis." *Tr.* 4/17/03: 69.

He stated that, had Defendant exhibited any manic or hypomanic behavior or severe depression, Ms. Kunce was trained to recognize it. He also testified that his office's records did not denote the presence of any indicia of a major mental illness.

Dr. Lazarus indicated that Defendant did not present with any symptoms of bipolar disorder. Dr. Kunce's work with Defendant, and her reports to Dr. Lazarus, do not stand for the proposition that Defendant was suffering from bipolar disorder. He

testified that Dr. Kunce did not find any indications that, in late 1989 through early 1990, Defendant was displaying active manic-depressive symptoms.[199]

Dr. Lazarus had no recollection of Defendant's reported physical abuse (nor, inferentially, the sexual abuse of Adenia Dunlap that Defendant had observed).

During his cross-examination, Dr. Lazarus stated that the MMPI is not "a critical part of making a diagnosis of bipolar disorder." *Tr*. 4/17/03: 79. At the same time, Dr. Lazarus was not aware of whether Ms. Kunce did any investigation of services provided to Defendant by personnel in the Cherry Creek School District.

He also acknowledged that a child's explosive, antisocial behaviors could be indicative of either a conduct disorder or a mood disorder. Dr. Lazarus also testified that the cyclical nature of Bipolar Disorder is such that Ms. Kunce could have seen Defendant during a time when Defendant was neither in a manic or depressed phase. At the same time, he noted that, in 1989-1990, mental health experts were not focused on bipolar disorder in children and teenagers. "We've become more concerned about this during the last couple five (*sic*) years." *Tr*. 4/17/03: 88. He also acknowledged that, had Defendant demonstrated any signs of depression, "That would have been interesting information to have." *Tr*. 4/17/03: 90.[200]

Dr. Lazarus had no information as to whether Ms. Kunce had done any research concerning Defendant's alleged suicide attempts or any data concerning Carol Dunlap's symptoms during one of her episodes.

On redirect examination, Dr. Lazarus testified that Ms. Kunce was very skilled in working with adolescents.

On re-cross, Ms. Scissors asked an interesting question: "And would you agree as you sit here today as a psychiatrist, that there is a considerable fund of knowledge about how to diagnose bipolar disease in adolescents that just wasn't available in 1990 when

[199] During cross-examination, defense counsel and Dr. Lazarus skirmished over the use of the term "manic depressive." *Tr*. 4/17/03: 75. That label has not been used for a considerable period of time, including the time when Defendant obtained services from Dr. Lazarus' office. The Court finds that this testimony was not harmful to Dr. Lazarus' testimony and did not detract from his credibility.

[200] The prosecution's objection, although overruled, was, in hindsight, well taken. The Court's reference to these statements is made to reinforce its view that Dr. Lazarus' testimony offers little insight into Defendant's status in 1996, except as to the fact that, during the time his office provided services to Defendant, the mental health field was not considering a bipolar diagnosis during the relevant timeframe.

Ms. Kunce saw Nathan Dunlap?" Dr. Lazarus responded, "Yes." *Tr*. 4/17/03: 98. This represents the only significant facet of his testimony and is damaging to Defendant's claims. A reliable and persuasive opinion that Defendant had a bipolar disorder probably would not have been available to present to the jury at the sentencing phase.

This also undercuts Dr. Barkhorn's testimony that, had she been presented with the CMHIP seclusion and restraint observation reports, she would have been able to testify that Defendant suffered from a bipolar disorder. The defense has not been able to present a clear explanation of this discrepancy. As a result, if the trial team had proceeded as post-conviction counsel proposes, the prosecution would have had a strong argument that a diagnosis of bipolarity was unreliable. The defense then would have been confronted with the prospect of having to rely on the alternative diagnoses (such as schizophrenia, schizoaffective disorder and psychosis). The evidence concerning these proposed major mental illnesses is not as compelling, from a defense perspective, as is the evidence suggesting bipolar condition.

Dr. Lazarus was not the most persuasive witness called during the hearing. In making this finding, the Court does not question his general credibility. Instead, the Court notes that Dr. Lazarus was asked to consider the notes of one of his colleagues, Ms. Kunce. He had no specific recollection of Mr. Dunlap or of any of the issues which brought him to his practice. As noted, he provided the single significant piece of information about bipolar condition in the period 1990-1996.

Dr. Rose Marie Manguso

Dr. Rose Marie Manguso was one of the most impressive expert witnesses in this case. She was admitted as an expert in psychology, clinical neuropsychology and forensic neuropsychology. At the time of her testimony (April 30 – May 1, 2003), she was one of four or five board certified neuropsychologists in Colorado. She has performed assessments at CMHIP and in private practice. Her work has included 22-23 forensic neuropsychological examinations, including 10-12 for civil litigation.

Dr. Manguso must be regarded as an independent expert. She has testified for the prosecution and, on two occasions, for the defense. She was a defense expert in an

Arapahoe County District Court case involving allegations of capital murder. In that case, she offered testimony in support of a defendant's claim that he was mentally retarded.

In this matter, Dr. Manguso performed a neuropsychological consultation. She reviewed materials generated by Drs. Lewis, Opsahl and Poch. She was not asked to render a diagnosis and did not offer one in her testimony.

Dr. Manguso stated that Dr. Opsahl's test results[201] do not support his diagnosis. She was critical of his use of the Rey-15 item Memory Test. She stated that this test provides a very incomplete measure of Defendant's effort and motivation. If an individual does not give a sufficient effort or is not appropriately motivated, the results will not be valid. As a result, she concluded that the Rey results cannot be found to have been "non-malingered." *Tr.* 4/30/03: 83.

Dr. Manguso stated that Dr. Opsahl's opinion about left (brain) hemisphere damage is not supported by the WAIS-3 test. The difference between the verbal and performance IQs does not lead to such a conclusion. She testified that approximately 10 percent of the population has this split. She also noted that there has been no definitive research on this issue. Older versions had a 20 point cut-off. (Defendant had an 18 point differential.) Dr. Muriel Lezak, author of "Neuropsychological Assessment", has written that the IQ test differentials do not support Dr. Opsahl's finding. *See Lezak: Neuropsychological Assessment* (1995): 690.

She agreed with Dr. Opsahl that Defendant's Wechsler Memory Scale test demonstrated that Defendant had no memory deficits. However, she opined that both his finger-tapping and oscillation test results were normal. This was contrary to Dr. Opsahl's opinion.

She had similar views about the speech sounds and seashore rhythm tests. Although Dr. Opsahl testified that the results of these tests demonstrated left hemisphere damage, Dr. Manguso did not agree.

Dr. Manguso said that the grip strength test, wherein Defendant's dominant (right) hand was not 10 percent greater than his left hand, is not indicative of left

[201] Dr. Manguso limited her work to a review of the testing done by other experts.

hemisphere damage. She noted that, if someone does not want to utilize a strong grip, he may not do so.

Her review of the Tokens test indicated that Defendant scored in the 70th percentile. He also scored in the normal range in the Controlled Oral Word Association test. Dr. Manguso also stated that this test is a good indicator for left frontal hemisphere deficits. Mr. Dunlap's score does not show any impaired performance. As a result, she believes that there is no left frontal hemisphere damage.

Although Dr. Opsahl stated that Defendant's score on the Boston Naming test was one deviation "off", Dr. Manguso found his score to be normal. During redirect examination, she testified that Dr. Opsahl did not administer this test properly because he did not provide Defendants with cues when Defendant was unable to answer certain questions. She testified that cuing was appropriate and the lack to give cues potentially would lead to a lower score.

Dr. Opsahl also testified that Defendant's result in the Sentence Repetition test was one deviation "off" for his age norm group. However, Defendant was able to repeat a sentence up to 13 words in length. Once again, she believed that this was inconsistent with left frontal hemisphere damage.

When all of the test results were considered as a whole, Dr. Manguso believes that Defendant does not have any left frontal hemisphere damage.

She also reviewed as much of the executive functioning test and scores thereof as possible.[202] The Booklet Category test produced a normal result. (This test measures full brain function.) When these tests are considered together, there is no indication of left frontal hemisphere damage.

Dr. Manguso also criticized Dr. Opsahl's willingness to interpret tests without regard to a patient's history. Dr Opsahl testified that, although self-reports or other information about loss of consciousness from a variety of alleged incidents in Defendant's youth could confirm his opinion about brain damage, the lack of confirmation "would not change my

[202] Dr. Opsahl did not provide a summary of his scoring of the Wisconsin Card Sorting test. However, she scored the test herself and found the results to be normal.

neuropsychological test results. The results are what they are. They don't depend on past history." *Tr*. 10/28/02: 155.

In her report, People's Exhibit 52, Dr. Manguso wrote that Dr. Opsahl's neuropsychological evaluation methods had "numerous problems." She found that he used an inadequate validity assessment measure. She felt that he also did not thoroughly score his test results and "misrepresented findings on multiple measures." She also disputed his interpretation of test data. His conclusion that Defendant had "difficulty on one measure of rapid alternating hand movement indicated 'neuropsychological difficulty in the prefrontal cortex especially in the left hemisphere' . . . is an over-interpretation of an isolated test finding in an individual whose effort and motivation were not adequately documented."

Dr. Manguso also took issue with Dr. Lewis' opinions. She described the consideration of malingering as one that requires a search for a consistent or inconsistent presentation. Defendant presented a number of inconsistent behaviors. This would suggest that Defendant was malingering.

Her examples include Defendant's actions at CMHIP. On February 22, 1994, Defendant had to be helped to the shower. He had "refused" to walk. However, once he was in the shower, he cleansed himself while standing.

On February 25, 1994, Defendant was, at one point, completely unintelligible. However, a conversation later on that day was completely logical.

On March 16, 1994, he had to be spoon fed. However, he could distinguish what he wanted to eat. His motions and gestures were very controlled.

On March 21, 1994, Defendant was incontinent. Nevertheless, he fed himself with "good organization."

On March 25, 1994, Defendant acted bizarrely and made strange noises. However, his behavior improved when he thought no one was watching him.

On April 1, 1994, Defendant admitted to "playing games."
On April 8, 1994, he said he was able to cooperate with his attorneys if they would cooperate with him and represent him in a manner consistent with his wishes. Mr. Dunlap was quoted as saying that he wanted to stop playing games and "get it over with."

Dr. Manguso stated that all of these actions were consistent with, and examples of, malingering.

She joined Dr. Barkhorn in criticizing Dr. Lewis for her use of unprofessional terminology. For example, Dr. Lewis' statement that Defendant's supposed telltale signs of mental illness had "tragically" not been explored was inappropriate for a forensic examination.

Dr. Lewis found that Defendant was clinically depressed with a "high T scale 2." Dr. Manguso felt that this was an inappropriate diagnosis in the absence of more data.

In her report, Dr. Manguso writes that Dr. Lewis "left out important information documenting Mr. Dunlap's behavioral inconsistencies. She incorrectly stated that there was nothing in the record suggestive of malingering."

She also questioned Dr. Lewis' ability to find that Defendant was suffering from bipolar condition in 1993-1996 based on her evaluation "years after the event she is attempting to interpret." And she stated that, "Years later, to attempt to construct a new diagnosis in this manner is a process that is fraught with a significant potential for misinterpretation, speculation, and error."[203]

On cross-examination, Dr. Manguso acknowledged that her work was limited to a records review. If she had interviewed Defendant, he report could have been more complete. As a result, she admitted that her "results are interpreted cautiously." *Tr.* 5/1/03: 7. She did not speak with Dr. Johnson or review any Cherry Creek High School records.

She did not consider several tests that were administered to Mr. Dunlap because they do not relate to neuropsychology. And she did not opine that Defendant actually was malingering.

Dr. Manguso stated that, as of the date of her testimony, there has been an increased prevalence of children with bipolar condition when their parents are similarly afflicted. She also said that four episodes (referred to as a "rollercoaster") could be consistent with bipolar disorder. She did not form an impression that Defendant had suffered manic episodes, notwithstanding the loss of sleep issues that were the subject of

considerable discussion in this hearing. At the same time, she indicated that the loss of sleep, combined with Defendant's other behaviors, made mania a reasonable question to consider.

Dr. Manguso had reviewed Dr. Lee's administration of a SIRS test, which is an instrument to determine if the subject is malingering. At least with respect to the SIRS test given by Dr. Lee, Defendant was shown to have "answer[ed] the questions in a straightforward manner." *Tr.* 5/1/03: 13.

Dr. Manguso discussed the MMPI-2 administered to Defendant by Dr. Lee. She testified that the test revealed a valid profile and that Defendant "wasn't trying to say he was too sick or trying to say he wasn't sick at all." *Tr.* 5/1/03: 17. (This quote is a portion of a question by Ms. Scissors with which Dr. Manguso agreed.)

Dr. Lee determined that Mr. Dunlap had a personality disorder, not otherwise specified, with narcissistic and antisocial features, an Axis II diagnosis. Dr. Manguso stated that a person can have both an Axis I and an Axis II disorder, for example, bipolar disorder or schizophrenia and an antisocial personality disorder. Apparently, Dr. Lee had considered an Axis I diagnosis because he reported that he found no indication of a thought disorder and little to support the presence of psychosis.

Dr. Manguso acknowledged that Dr. Lewis had "done an excellent job of documenting symptoms [of psychosis and perhaps bipolar condition]." *Tr.* 5/1/03: 23. However, when counsel pursued the merits of computer scoring of the MMPI-2, Dr. Manguso was unequivocal. Although these scores are valuable, they "raise many treatment considerations and diagnostic considerations that must be used by the evaluator in the totality of the information about the individual to see if they are appropriate." *Tr.* 5/1/03: 27. At the same time, she agreed with counsel that neither Dr. Lee nor Dr. Johnson pursued the impact of computer scoring of assessment instruments in the context of all of the other information developed about Defendant.

She testified that Dr. Lee had noted some remarkably elevated clinical scores. Mr.

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[203] This statement was made in the context of the fact that, "None of the multiple mental health professionals who saw Mr. Dunlap during the months and years preceding 12/14/93 or in the months following apparently ever diagnosed him with (bipolar disorder)."

Dunlap's score on the mania scale was the highest Dr. Lee had noted to date. On the schizophrenia scale, Mr. Dunlap's result was the second highest Dr. Lee had observed. However, the examination did not produce information of specific value of these tests. The discussion of the amorality and ego inflation arguably support both Mr. Dunlap's claims concerning his suffering from a major mental illness and the State's contention that his issues relate to a personality disorder.

The subsequent discussion about code types within the MMPI (Defendant was found to have an "8-9/9-8" code type) brought forth information of greater value. Defendant's code type suggested a "modal diagnosis"[204] of schizophrenia and severe disturbance in thinking. *Tr.* 5/1/03: 38. This type of individual will likely be "confused, perplexed and disoriented and they may report feelings of unreality. They have difficulty concentrating and thinking and they may be unable to focus on issues. Thinking also may appear to be odd, unusual, autistic, and circumstantial. Speech may be bizarre and may involve clang associations, neologisms, and echolalia. Delusions and hallucinations may be present." *Id.* [205].

Dr. Manguso referred to Graham's text and indicated that the modal diagnosis for persons who are code type 8-9/9-8 is "schizophrenia and severe disturbance in thinking may be evident." *Tr.* 5/1/03: 48. Dr. Manguso stated that the 8-9/9-8 code type person who conforms to the modal diagnosis would display non-volitional behaviors.

At the same time, Dr. Manguso continued to opine that Defendant did not demonstrate non-volitional behaviors at CMHIP. Instead, his actions were inconsistent, his statements (E.g.: "I'm tired of these bullshit games. I'm not gonna play your game any more. I'm gonna play crazy as long as I can. They don't have anything on me. Police have no case against me. They're stupid.") were more consistent with malingering than any major mental illness. At the same time, Dr. Manguso stated that "knowledge of the facts (the actual evidence against Mr. Dunlap) would assist me in knowing whether his perception of that situation was delusional or factual would be helpful." *Tr.* 5/1/03: 56.

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[204] During redirect examination, Dr. Manguso testified that "modal diagnosis" is "the most frequently occurring score in a distribution, so the most frequently occurring diagnosis." *Tr.* 5/1/03: 48.
[205] Dr. Manguso was quoting from Dr. Graham's book, "MMPI-2: Assessing Personality and Psychopathology," 3rd Edition.

During re-cross examination, she stated that the chart entries that she reviewed could be consistent with either malingering or non-malingering.

Dr. Manguso stated that depression is important for a clinician to consider when determining if a person suffers from bipolar disorder. She also indicated that the nature of the depression, whether situational or long-standing in nature, is a significant consideration. She noted that any number of circumstances in life could cause depression in a person who is not prone to it. The Court concludes that each person's circumstances, at any relevant time, must be taken into account at the time of an evaluation lest experts formulate diagnoses when they are not justified.

Dr. Manguso presented as a careful, thoughtful and unbiased witness. She has testified for both the prosecution and defense in cases where the death penalty was at issue. She was responsive to both the prosecutor and defense counsel. She joined the substantial number of witnesses who criticized Dr. Lewis' for an unprofessional approach to portions of her report, while giving Dr. Lewis credit for a good deal of thoroughness in gathering data.

Her criticism of Dr. Opsahl was insightful and telling. She did not attempt to provide a diagnosis of Defendant. At the same time, her testimony about Dr. Opsahl's failure to completely score certain test items and his apparent unwillingness to follow standardized, objective measures for dealing with other instruments was impressive (for her depth of knowledge) and cast a serious cloud over Dr. Opsahl's work.

Dr. Manguso joined Dr. Hansen in criticizing Dr. Opsahl's methodology and report. Although Dr. Opsahl is a credentialed expert who obviously put a great deal of effort into his work, his testimony in this hearing was substantially undermined, both by effective cross-examination and by more credible prosecution witnesses.

Dr. Edgar Moser

Dr. Edgar Moser was admitted as an expert in psychiatry. He has been the staff psychiatrist for Presbyterian St. Luke's Hospital for many years. He performed Defendant's evaluation as requested by Third Way Center in conjunction with Joan Farley, a Licensed Clinical Social Worker.

Dr. Moser felt that there was no reason for Defendant to be at Presbyterian St. Luke's. Defendant had been verbally abusive to a female Third Way staff member. Mr. Dunlap stated that he was getting back at Third Way staff for being "rude."

At the time of Defendant's hospitalization, Dr. Moser was aware that Carol Dunlap had been diagnosed with bipolar condition. He is aware that bipolar condition can be heritable, although much more is known about this now than was the case in 1990. He was not informed that Defendant had ever attempted suicide. However, on cross-examination, he contradicted this statement. He received no references to physical abuse or head injuries. On a physical examination, there were no scars on Defendant's abdomen. Indeed, there was no reference in Presbyterian St. Luke's records to scars on any part of Defendant's body.

He acknowledged that Defendant's oppositional behavior gave rise to the possibility of a beginning thought disorder such as paranoia. After talking to Defendant, Dr. Moser considered the possibility that Defendant suffered from bipolar condition. He reviewed Defendant's "partially sleep deprived electroencephalograph and found it to be 'normal.'" Dr. Moser's provisional diagnosis was depression and conduct disorder.

At one point, Defendant told Dr. Moser that he would change because he had to get along with the Third Way staff, whether he wanted to or not.[206] Dr. Moser found that Defendant was immature, and motivated to find a way to leave Third Way and not to improve his behavior.

Upon Defendant's discharge from Presbyterian St. Luke's, Dr. Moser's diagnosis was Oppositional Disorder.[207] He had considered bipolar condition and did not find that Defendant suffered from it. He started that it is very difficult to diagnose bipolar condition in adolescents. The symptoms of bipolar condition can appear to be common teenage rebellion or similar behavior.

On cross-examination, Dr. Moser testified that bipolar condition formerly was not a popular diagnosis for adolescents. Indeed, adolescents who were diagnosed with

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[206] This type of insight supports those experts who opined that Defendant had no major mental illness. It contravenes those who believed that Defendant was suffering from some form of thought disorder, bipolar condition, damage to the brain or the other mental problems they ascribed to Defendant.
[207] Dr. Moser testified that this refers to the defiance of authority and basic social rules.

depression frequently had a history of bipolarity in their parents. He stated that adolescents who suffer from depression do not hide their symptoms from others.

In 1990, the MMPI was not used to diagnose bipolar condition. More recently, the test has been utilized in this regard. Dr. Moser also said that heritable bipolar condition often will skip a generation. Mr. Dunlap's family history includes bipolarity in Carol Dunlap's brother and mental health issues for Defendant's natural father (perhaps schizophrenia). This information, which was not available to Dr. Moser, would have been helpful in 1990.

When asked about other witnesses' views that Defendant suffered from a narcissistic personality disorder, Dr. Moser acknowledged that narcissism can be a part of a number of mental health problems, including bipolar condition. Further, a variety of stressors can cause the manifestation of bipolar symptoms. Contemporary research has indicated that manic episodes have more organic than environmental causes.

Dr. Moser had one or more meetings with Carol Dunlap. She minimized Defendant's robberies. And Dr. Moser felt that "it was not worthwhile going into the story" about robberies with a BB gun or a golf club. *Tr.* 4/23/03: 151. However, since Defendant was "fairly well in denial" about his behavioral issues, Dr. Moser did not pursue this issue with him. *Id.*

Dr. Moser impressed the Court as very professional and not invested in the outcome of this litigation. He had difficulty in understanding the reason for Defendant's hospitalization. As a result, his opinions could have been influenced by this skepticism.

However, his testimony was particularly helpful for the Court's analysis of the potential value of trial counsel's pursuing bipolar condition in 1994-1996. As other witnesses have noted, contemporary research and testing have enabled mental health professionals to diagnose bipolar condition in younger people. This was not the case during the period 1994-1996.

One particularly thorny issue is that Defendant had just emerged from adolescence when he committed the Chuck E. Cheese murders. Post conviction counsel could have fairly argued that all diagnoses of Defendant, leading up to trial, should have been based on adult standards. Counsel did not set forth this assertion. Instead, counsel

have argued that trial counsel should have pursued Defendant's purported bipolar condition and/or other major mental illness further. When the Court considers Dr. Moser's testimony and that of Mr. Armistead (reflecting on the unprecedented difficulty the attorneys and investigators encountered when attempting to unearth much of Defendant's mental health history), it cannot find that counsel failed to turn over many of the stones that were capable of being dislodged.

Dr. David Johnson

Dr. David Johnson testified during the People's case in chief on four different days, June 25 and 26, and September 8 and 9, 2003. He also testified as a surrebuttal witness on February 11, 2004 and during a pretrial motions hearing on December 12, 1995.

Dr. Johnson is (and at all relevant times was) the staff psychiatrist in the maximum security forensic unit at the Colorado Mental Health Institute in Pueblo. He was assigned as Mr. Dunlap's evaluating physician during his stay at CMHIP. His task was to perform a competency evaluation.

Dr. Johnson met with Defendant frequently each week. During Defendant's times in seclusion and restraints, he met with him at least once daily to determine whether that placement should continue. If Dr. Johnson was off or on vacation, another staff physician met with Mr. Dunlap.

Dr. Johnson specifically directed CMHIP staff not to discuss the (then) allegations against Mr. Dunlap with him. If Defendant started to speak spontaneously, he told staff to advise him not to talk about the charges and to talk to his attorneys instead.

Dr. Johnson, and other physicians and staff, described Defendant as being intermittently angry and rageful. When he arrived at CMHIP, and periodically thereafter, he was incontinent of urine and feces. Shortly after his arrival, he was "very angry, also defecating, throwing food, struck out at staff, threatening staff, (and) flashing gang

signs." *Tr.* 6/25/03: 34.[208] Initially, Dr. Johnson could not determine if his conduct was volitional or the product of a major mental illness. Since Defendant had eaten a full evening meal the night before these observations were made, Dr. Johnson admitted that he suspected that Defendant was acting volitionally.

On the morning of February 23, 1994, Defendant was able to eat his breakfast in a completely organized manner. However, his behavior changed rapidly and deteriorated to the point where he was placed in seclusion and restraints. He was placed in this status frequently and for lengthy periods of time. The seclusion and restraints was used to protect staff and other patients.

By February 28, 1994, Dr. Johnson had concluded that Defendant was displaying "histrionic posturing." He was flamboyant, displayed excessive emotions, and engaged in behaviors that reflected these behaviors. *Tr.* 6/25/03: 47.

Throughout his stay at CMHIP, Defendant's behaviors varied greatly. Dr. Johnson felt that this inconsistency was not indicative of a major mental illness.

By March 2, 1994, Defendant's behavior had improved. He was eating well, maintaining hygiene without difficulty and was appropriately responsive. On March 3, 1994, Dr. Fairbairn visited Defendant. He observed that he had not seen a person as catatonic in 20 to 30 years. Dr. Johnson "blew (this statement) off" because Dr. Fairbairn had not actually evaluated Mr. Dunlap. *Tr.* 6/25/03: 51.[209]

During his time in Pueblo, Defendant was observed by "many of the doctors at the state hospital during this review of seclusion and restraint, multiple doctors from various divisions, including forensic. At no time did any one of these doctors . . . ever make a suggestion . . . that Mr. Dunlap had a mental illness and needed to be treated." *Tr.* 6/25/03: 53.

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[208] Dr. Johnson acknowledged that he did not believe that any staff member slanted his or her views about Defendant because of this conduct. He took their views at face value. *Tr.* 6/26/03: 98. He also discounted any possibility that any Arapahoe County Sheriff's Department deputy would be biased in his or her reporting of Defendant's behaviors, even though they all recognized that Defendant had been charged in a notorious case.

[209] On May 2, 1994, Dr. Fairbairn met with Defendant at CMHIP for approximately one and one-half hours. Defendant ultimately threatened him. Dr. Fairbairn took some time away from Defendant but ultimately met with Defendant again without any additional problems.

Dr. Johnson referred to this case as “huge . . . and it needed a very careful assessment.” *Tr*. 6/25/03: 57. The defense attempted, with no more than limited success, to utilize this statement as an indication of confirmatory bias.

He spoke with Carol Dunlap who told him that she had bipolar condition and was taking drugs such as BuSpar and Lithium. She described manic symptoms, including being terrified of other persons, of disrobing (inappropriately) and of insomnia.[210]

Dr. Johnson indicated that he was open to a diagnosis of mania. He then testified, “the sine qua non for a diagnosis of mania . . . (is) a persistent mood disturbance and that consists of a period of elevated, expansive, or irritable mood that lasts for at least, I believe, one week in the absence of hospitalization or treatment.” *Tr*. 6/25/03: 59. Any one of these criteria is sufficient for the diagnosis. He felt that none of the things Carol Dunlap described qualified for any of those criteria. Dr. Johnson also reported that Ms. Dunlap refused to release any of her records to the state hospital, just as she had with the defense team.

Ms. Dunlap reported that her father and one of her brothers had suffered from bipolar disorder. She could not provide any information about symptoms either person had displayed. Dr. Johnson discounted this report.

He received a report from Marilyn Kay Salas about a telephone conversation between Defendant and Carol Dunlap. During that time, Defendant was “quite open and almost jovial.” *Tr*. 6/25/03: 65. He had spoken clearly and strongly and had engaged in banter. As soon as the telephone call was finished, Defendant became “more guarded and more, you know, resistive in talking to the ward staff.” *Id*. This was another example of the inconsistency in Defendant’s behavior that led Dr. Johnson to conclude that Defendant did not suffer from a major mental illness.

On another occasion, Defendant removed his pants and began dancing in the unit. Dr. Johnson opined that this was not an indication of a major mental illness. Instead, it

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[210] Dr. Johnson testified that one of 9 criteria of borderline personality disorder is the feeling of helplessness and abandonment. Since Jerry and Carol Dunlap had expressed concern about Ms. Dunlap’s illness to Laurie Swetnam-Wood, the defense posited that Ms. Dunlap’s condition had a direct impact on Defendant’s adolescence, thus leading to borderline personality disorder. The defense also contended that there was a co-morbidity of that Axis II disorder with an Axis I illness such as bipolar condition. The experts agreed that the two conditions could co-exist. They differed as to whether Defendant presented with those two problems.

was an escalation of attention-getting. *Tr.* 6/25/03: 122.

Early in his hospitalization, Defendant was placed in seclusion and restraints for a second time. During this episode, Defendant asked to have a telephone call with his mother. Dr. Johnson told Defendant that a telephone was available for his use. Defendant responded that he did not know his mother's telephone number. Dr. Johnson stated, "People that can't remember their mother's phone number and they're talking to their mother all the time, that just hard to believe, and even if it's true, it would be an indication of severe organic brain syndrome or severe mental retardation and not an indication of psychosis." *Tr.* 6/25/03: 69-70.[211]

When asked about a legitimate mental illness as distinguished from an effort to fake such an illness or the engaging in malingering, Dr. Johnson looks for "consistency in his demeanor from minute-to-minute, from hour-to-hour, from day-to-day . . . . the quality of his demeanor, is he very angry, does he look very frightened, does he look very anxious." *Tr.* 6/25/03: 70.

Defendant had been interviewed by Dr. Frank Lee on the same day and was "coherent and logical, but uncooperative." *Id.* Although he could not provide his mother's telephone number to Dr. Johnson, he had been able to tell Dr. Lee the name of the president of the United States, his parents' names, mental status and locations. Given this inconsistency, Dr. Johnson concluded that Defendant did not suffer from a severe organic brain syndrome or mental retardation.

Another seclusion and restraints event occurred in March, 1994. In the morning, Defendant had been communicating well and talking about family issues with a pastor. Later, Defendant played basketball in the recreation yard. He then did not want to return inside. Upon returning to the day hall, he became combative, resistive to staff direction and became progressively more uncooperative. *Tr.* 6/25/03: 84-85. Dr. Robert Goos, another psychiatrist, met with Defendant. He was aggressive, kicking and hitting and would not discuss his behavior, stating only that he missed his girlfriend.

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[211] The Court does not find this statement to be supportive of Dr. Opsahl's opinions.

Once in seclusion and restraints, Defendant "screamed, acted like a chicken, wet on himself . . . basically (tore) or (chewed) the foam rubber out of the mattress, (had) destroyed his mattress." *Tr.* 6/25/03: 87. By the next morning, Defendant was not demonstrating these behaviors. When Dr. Johnson asked Mr. Dunlap if he understood whether he had acted as he had the day before, he said, "I just don't like to follow the rules." *Id.* Dr. Johnson then stated that, since these actions were not accompanied by delusions or hallucinations, Defendant was not suffering from psychosis. Instead, Dr. Johnson felt that Defendant was displaying passive-aggressive behavior.

There were other incidents that caused Defendant to be placed in seclusion and restraints. On one occasion, he was "howling and cackling like a chicken and he wasn't responding to verbal interaction by the staff." *Tr.* 6/23/03: 93. At another time, he expressed violence, but not in a disorganized way. "He was very goal oriented about what he wanted to do." *Tr.* 6/25/03: 96. He was at once incontinent and able to feed himself.[212]

This level of inconsistent behavior was a hallmark of Defendant's behavior during his stay at the state hospital. The defense posited that Defendant was displaying rapid cycling within a bipolar disorder. Dr. Johnson defined rapid cycling as "a type of bipolar disorder in which the moods change rapidly by bipolar criteria and there has to be four distinct mood episodes in a twelve month period, but they are separated by two months of normal behavior or normal affect." *Tr.*: 6/25/03: 111. "Rapid cycling does not refer to minute-to-minute, hour-to-hour changing like Mr. Dunlap demonstrated." *Id.* In fact, DSM-IV defines rapid cycling as a type of manic-depressive illness in which the patient experiences four or more episodes of mania and/or major depression in a year.[213]

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[212] Dr. Johnson also viewed videotapes of Defendant in Colorado State Penitentiary in 1997. Post-conviction counsel posit that his behaviors at that time, which was proximate to the execution of Gary Davis, are another indication that Defendant suffers from a major mental illness and that that illness was present in 1994. The Court has determined that it will not consider any post-trial evidence, except as to examinations by mental health professionals that were received as evidence in this case. For the benefit of reviewing courts, this testimony of Dr. Johnson can be found at *Tr.* 6/26/03: 81.

[213] During other witnesses' direct and cross-examinations, post-conviction counsel posited that Defendant might have been suffering from ultra-ultra rapid cycling. This term is applied to those whose cycles occur within a month or less. If a person demonstrates a pattern that occurs within a 24 hour period, the person may be described as suffering from ultra-ultra rapid or ultradian cycling. This phenomenon can be described as a "Dr. Jekyll and Mr. Hyde" presentation, where a person can rapidly alternate from belligerent and nasty to giddy and silly. The descriptions in the seclusion and restraints notes arguably support a finding of ultra rapid cycling but not ultra-ultra rapid cycling, which requires the presence of several mood switches in a 24 hour period.

When Bipolar I Condition was explored further, Dr. Johnson testified that untreated manic episodes can last from several months to as long as six months. Untreated depressive episodes tend to last longer, often up to nine months or a year.

Dr. Johnson believed that Defendant was passive-aggressive and not demonstrating manic behavior. Dr. Johnson defined passive-aggressive behavior as, "simply refusal (*sic*) to act in a responsible way and to meet expectations of normal behavior", *Tr.* 6/25/03: 89; and "when people are defiant they open themselves up to being punished or dealt with in a severe way . . . openly defiant [so that] you can be dealt with in a more overt, aggressive way . . . a way of defying normal expectations, but reducing the chances of retaliation, raising the chances of an active intervention by the caregiver, by the partner, or by the boss or whatever." *Tr.* 6/25/03: 89-90.

Since Defendant was at the state hospital for a competency evaluation, the staff did not give him medication. "We very seldom medicate defendants that are at the hospital for a competency . . . evaluation unless they have a well-documented unequivocal history of major mental illness." *Tr.* 6/25/03: 117. And since the staff did not have such a history for Defendant, they did not attempt to restrain him by the use of chemical or other medical agents.

Defendant was placed in seclusion and restraints on a number of occasions because of a number of actions as previously described herein, including threatening staff and other patients; being incontinent of urine and feces; and destroying his mattress. Dr. Johnson stated that aggressive behavior, or passive-aggressive behavior, not manic behavior, caused virtually all of those placements. *See, e.g. Tr.* 6/25/03: 165-166. He also opined that individuals purposefully act out in order to be placed in seclusion and restraints to obtain some form of secondary gain (here, to delay the criminal proceedings). Dr. Johnson gave an opinion that, "malingering is more likely in people that have anti-social traits or antisocial personality disorder." *Tr.* 6/26/03: 233. He based this opinion on his experience at the state hospital and not on any treatise or professional

article.[214]

Dr. Johnson stated that Defendant had a personality disorder, "a lifelong, enduring pattern of maladaptive personality traits which lead to very significant detriment to the individual in terms of his social, occupational, interpersonal functioning . . . as opposed to discrete episodes of a definite mental illness." *Tr.* 6/25/03: 148-149.

Defendant also engaged in chanting. The defense posited that this was an example of echolalia. Dr. Johnson did not agree with this assessment: "His chanting behavior would not be echolalia because he wasn't constantly repeating something that someone else had said to him." *Tr.* 6/25/03: 152.

Dr. Johnson believed that Defendant was malingering a number of symptoms. Unlike a person who malingers psychosis or hallucination, Defendant (according to Dr. Johnson) was engaged in behavioral outbreaks and outbursts. As a result, Dr. Johnson was unable to establish malingering on the SIRS test. Dr. Johnson believed that Defendant deliberately engaged in these behaviors so that he could avoid returning to court to address the charges filed against him.[215] Dr. Johnson acknowledged that it was difficult for him to make a diagnosis "in a complicated case like this", *Tr.* 6/25/03: 183. Nevertheless, he finally concluded that Defendant suffered from a "very severe personality disorder." *Id*. Dr. Johnson referred to DSM-IV TR and set forth a diagnosis of "personality disorder NOS . . . with significant antisocial, narcissistic and passive-aggressive traits." *Tr.* 6/25/03: 184.[216]

Thus, Dr. Johnson opined Mr. Dunlap's condition as having, "a lifelong or long-enduring pattern of maladaptive personality traits which result in significant distress to

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[214] Mr. Cherner presented quotations from "Clinical Assessment of Malingering and Deception", *infra*, that presents views contrary to Dr. Johnson's views. Specifically, he disagreed with the treatise's position that those with an antisocial personality disorder are not likely to malinger. *Tr.* 6/26/03: 234-235. At the same time, Dr. Johnson agreed that, with respect to malingering, "no other syndrome is so easy to define, but so difficult to diagnose." *Id.*

[215] Dr. Johnson also opined that, "Malingerers often try to threaten (examiners)." *Tr.* 6/25/03: 250. This view is contrary to that of Dr. Lewis, who stated that malingerers try not to antagonize examiners in the hope that they will be found insane but not dangerous.

[216] Dr. Johnson settled on a diagnosis of borderline personality disorder, DSM-IV TR 301.83. This is a long-standing behavioral pattern which is characterized by "considerable instability in a wide variety of . . . functioning, including interpersonal relationships, moods, ways of thinking." *Tr.* 6/26/03: 56.

the individual and/or significant impairment in functioning." *Tr*. 6/25/03: 191. The antisocial features related to Defendant's long-standing involvement in violent crime; the narcissistic portion related to his grandiosity, "his belief in unlimited success, power and prestige, his braggadocio about different things he had done;" *Tr*. 6/25/03: 192; the passive-aggressive portion of his behavior related to non-compliance with rules and not working within the milieu.[217]

Dr. Johnson acknowledged that there were "overlaps" between a borderline personality disorder and various mood disorders, including bipolar disorder. *Tr*. 6/25/03: 196. One example of this is Defendant's display of unstable moods. However, Dr. Johnson believed that Defendant's mood swings were much more rapid than would typically be found in Bipolar I disorder. As previously noted, Dr. Johnson did not believe that Defendant was displaying symptoms of rapid cycling. He also disagreed with the opinions of Drs. Lewis, Poch, Fairbairn and the recent opinion of Dr. Barkhorn.

Dr. Johnson had worked at the Centennial Correctional Facility's "special needs unit" (maximum security) and was familiar with various ways in which those inmates would "act out." Mentally ill inmates would "cut on themselves." However, those inmates with borderline personality disorders and antisocial personality disorders represented the group which were the most difficult to manage.[218] Defendant did not engage in self-mutilation but did demonstrate other facets of the antisocial personality disorder. *Tr*. 6/25/03: 201.

As previously noted, Defendant's sleep patterns are an integral part of post-conviction counsel's assertion that Defendant suffers from a mood disorder, probably a bipolar disorder. In 1994, Defendant was at the state hospital for 131 days, 71 of which were in seclusion and restraints. He had 34 days where he had less than four hours of sleep. *Tr*. 6/25/03: 207. There was one evening where Defendant had no sleep at all.[219]

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[217] Dr. Johnson also agreed with a reference from "Clinical Assessment of Malingering and Deception", edited by Richard Rogers, "Feigned mania is difficult to successfully maintain for an extended time because it is onerous to feign symptoms of a true disorder: Flight of ideas, incoherent speech, motor excitement, and insomnia." *Tr*. 6/26/03: 161.

[218] For example, they would spit and throw feces at each other and at guards.

[219] In addition, there were seven days where Defendant for less than three hours. *Tr*. 6/26/03: 136. Similar situations arose in April and May, 1994. Dr. Johnson acknowledged this, but stated that he did not believe that these events were related to mania. Instead, he opined that Defendant was "hyper aroused." *Tr*.

Dr. Johnson stated that, "Mr. Dunlap at times was suffering from a lot of, say, sympathetic nervous system arousal. He was very adrenalized, had a lot of adrenalin, a lot of cortisol in him. These are all different chemicals that arise when a person is aroused and agitated . . . .It almost gets to a point where it has a life of its own . . .[and] becomes a biologically oriented phenomenon of decreased sleep . . . . It's not diagnostic of mania by any means." *Tr.* 6/25/03: 209-210. Dr. Johnson considered Defendant's lack of sleep to be a "hyper-arousal situation." *Id.* And since Defendant did not display hallucinations or delusions, Dr. Johnson felt he could not be found to be psychotic.

He acknowledged that Defendant's placement in seclusion and restraints was anything but comfortable. The tenor of Mr. Cherner's questions was that Defendant would not have deliberately acted out so that he would return to such an unpleasant environment.

During rebuttal, Dr. Barkhorn opined that Dr. Johnson focused on Bipolar I (a classic manic-depressive condition) and that he did not recognize adolescent bipolar condition. Since Dr. Johnson decided, relatively early in Defendant's stay at CMHIP, that Defendant had a personality disorder, Dr. Barkhorn believed that he had pre-set views about Defendant's behavior. This suggested confirmatory bias.

Dr. Barkhorn also disputed Dr. Johnson's views about rapid cycling and stated that the factors upon which Dr. Johnson relied to find histrionic posturing are consistent with mania. She also testified that Defendant's episodic behavior was not consistent with a personality disorder but related to mood cycling.

Dr. Barkhorn also stated that sleep does not take on a life of its own. She testified that Defendant's sleep patterns were characteristic of mania.

The critical issue here relates to the development of scientific literature concerning adolescent bipolar disorder. Dr. Johnson suggested that bipolar disorder was (at least in contemporary times) over-diagnosed. Dr. Barkhorn believes that the literature supports her view that Defendant suffered from bipolar disorder. She cited Kaplan & Sadok's Psychiatric Treatise. [220]

6/26/03:137. Another possibility was that Defendant showed extended periods of agitation. *Tr.* 6/26/03: 144.

[220] There was considerable dispute about the state of understanding concerning bipolar disorder in adolescents in the mid-1990s. Dr. Johnson's reliance on an Audubon Society article diminished his

Dr. Johnson spoke at length about Carol Dunlap's mental health history.[221] In this regard, he felt that, irrespective of Carol Dunlap's condition, "a lot of Nathan's behavior is learned behavior by growing up with his mother and observing her in different situations, observing how she reacts and learning her types and styles of reacting and incorporating them into his own personality to me that's a more likely personality (*sic*) than assuming that they both have a hereditary, genetically-determined bipolar disorder." *Tr.* 6/25/03: 220.[222]

The Court concludes that the psychiatric community had not arrived at the specific determinations that exist in 2002-2004. Therefore, the defense has not established, by a preponderance of the evidence, that competent capital defense counsel would have been able to present a credible expert who would have convincingly opined that Mr. Dunlap suffered from bipolar disorder in 1996. And as noted elsewhere herein, the trial team's options were significantly limited by Carol Dunlap's steadfast refusal to help them help her son.

Dr. Johnson also felt that post-conviction counsel's efforts to relate various other relatives' mental health problems to Defendant were "a stretch . . . [because] there's no justification or verification or objective criteria to make the diagnosis accurate." (*sic*) *Tr.* 6/25/03: 224. In this regard, he felt that Dr. Lewis insinuated her personal views into her diagnoses to reach a pre-determined conclusion (in other words, confirmatory bias). He also opined that Charles Garnett Jones' records did not demonstrate a psychiatric record. Those records also revealed that Mr. Jones has abused marijuana and cocaine for a period

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credibility. However, the Court concludes that the circumstances as they existed during 1994-1996 were not the same as it is at this time.

[221] The prosecution asked Dr. Johnson a number of questions about Carol Dunlap's mental health history. The Court will make only minimal findings about this. The Court is satisfied that, at all relevant times, Carol Dunlap suffered from a mental illness, probably bipolar disorder, which is hereditable. No other findings are necessary for this order.

[222] Dr. Johnson gave this testimony when asked about Dr. Lewis' opinions. The Court has found that Dr. Lewis would not have been a persuasive witness in 1996. On the other hand, Dr. Johnson's strongly stated beliefs, together with his somewhat stubborn unwillingness to consider various aspects of Defendant's behavioral history, would have permitted trial counsel to argue, with some persuasiveness that, like Dr. Lewis, Dr. Johnson's opinions are at least partially driven by confirmatory bias. At the same time, his view that Dr. Lewis "played loose with the facts", *Tr.* 6/25/03: 230, is supported by her own testimony and that of other witnesses, some of whom, such as Dr. Barkhorn, believe that Defendant suffers from a bipolar disorder. The Court agrees with his statement that, "Dr. Lewis exaggerates and she's just not objective." *Tr.* 6/25/03: 248.

of time. Unlike Dr. Lewis, Dr. Johnson did not believe that episodic drug use was consistent with a bipolar disorder. [223]

Dr. Johnson reviewed Defendant's Third Way records and felt that there was no evidence of thought fragmentation. Defendant had been discharged because he was too difficult to manage. "He was considered oppositional. He had a poor response to individual or family therapies . . . . He projected blame on everybody else. He wouldn't take responsibility. He was abusive." *Tr.* 6/25/03: 237. These findings are supportive of Dr. Johnson's opinions.

Dr. Johnson also noted that, while Defendant was in Presbyterian St. Luke's Hospital, Dr. Moser diagnosed an oppositional disorder. Dr. Johnson opined that Defendant's juvenile records indicated that Mr. Dunlap was an "oppositional adolescent who is developing a severe personality disorder." *Tr.* 6/25/03: 239.

There also was discussion about the effect of elevated CPK and its relationship to psychosis and schizophrenia. The Court feels that Dr. Lewis' views on this subject, while worthy of consideration, would not have been persuasive to a jury. As previously noted, it appears that Dr. Lewis was willing to ascribe a substantial number of mental illnesses to Mr. Dunlap. While Dr. Johnson exhibited some level of confirmatory bias, his tendencies in this regard pale in comparison to Dr. Lewis'.

Dr. Johnson also opined that none of Drs. Moser, Lazarus or Thompson, or Ms. Swetnam-Wood or Ms. Switzer recorded any indicia of hypomania when they had contact with Mr. Dunlap. He stated that the symptoms described by Dr. Lewis "are far removed from hypomanic disorder." *Tr.* 6/26/03: 31. Further, when Dr. Johnson was asked to consider a diagnosis of Bipolar Disorder II (which was first recognized in 1994), he responded that Defendant did not fit into that category.

Dr. Johnson never diagnosed Defendant as suffering from an antisocial personality disorder. However, when asked on cross-examination, Dr. Johnson acknowledged that

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[223] Dr. Johnson admitted that the Dunlap family had a history of mental illness. *Tr.* 6/26/03: 73.

Defendant suffered from an Axis I adjustment disorder.[224] He also agreed that Defendant's legal stressors in 1994 were appropriate for a finding of adjustment disorder at that time. Further, he agreed that he could have, and perhaps should have been able to offer this diagnosis if called as a witness in 1996. In addition, Dr. Johnson admitted that, in 1994, he should have added borderline personality traits to his 1994 diagnosis.[225]

Mr. Cherner pressed Dr. Johnson about diagnosing Defendant's sleep disorder. Dr. Johnson did not believe that he could diagnose Defendant as having an Axis III sleep disorder. However, Dr. Johnson did acknowledge that mood disorders are common for individuals with borderline personality disorder. In addition, this diagnosis may occur when a person is in his or her late teens or early twenties.

Dr. Johnson also acknowledged that borderline personality disorder "tends to abate with age." *Tr.* 6/26/03: 78. (Mr. Cherner's words) As a result, if trial counsel had been forced to confront Dr. Johnson at trial, they could have argued that Mr. Dunlap's future dangerousness would have lessened because, in his 30s or 40s, Defendant could have outgrown the condition or could have been healed.

Dr. Johnson hypothesized that an unspecified event occurred on February 14, 1994 that caused Defendant's behavior to deteriorate. He could not identify any specific trigger. Thus, he admitted that this was no more than a "strong assumption." *Tr.* 6/26/03: 108.

Mr. Dunlap was given a form of physical examination while he was at the state hospital. There were no scars noted on his buttocks. *Tr.* 6/25/03: 83. This testimony was significant because post-conviction counsel have alleged that Mr. Dunlap was severely

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[224] An adjustment disorder occurs when a person has affective or behavioral symptoms in response to an identifiable stressor. Relevant stressors can be natural events or crises or interpersonal problems. By definition, they last less than six months after the stressful event. If symptoms exceed six months, the person probably has a different disorder. However, such disorders lasting more than six months are viewed as chronic. Adjustment disorders are defined in DSM-IV 309.

[225] Dr. Johnson's testimony became somewhat confusing at this point (June 26, 2003). He continued to admit that he should have listed the borderline personality traits in 1994. However, he then said that the finding of adjustment disorder required information he learned after 1997. The Court has determined that data obtained after 1996 should not, and cannot be used in its determination of the issues before it. If counsel could not have obtained the information in 1994-1996, they could not have failed to satisfy the *Strickland v. Washington* performance prong.

beaten as an adolescent and these beatings produced injuries that would have led to scarring.

When Dr. Johnson returned to the stand on September 8, 2003, he and Mr. Cherner discussed the diagnosis of bipolar condition in adolescents. Dr. Johnson believes that it is over-diagnosed. The majority of experts who testified in this hearing hold contrary views. In fact, Kaplan and Sadock's *Comprehensive Textbook of Psychiatry, II*, 2742, states, "the most frequent age of onset of Bipolar I disorder, i.e., an episode of mania, is between 20 and 30 years, followed by 15 to 19 hears." *Tr.* 9/8/03: 67.[226]

The Court also has reviewed Dr. Johnson's testimony of December 12, 1995, together with the testimony of Dr. Frank Lee, given on the same date. With respect to Dr. Johnson, the substance and the tenor of his statements are substantially similar to those in the Crim. P. 35(c) hearing. However, the greater focus of that testimony was on voluntariness issues.[227]

To be sure, Dr. Johnson's credibility was undermined by some of his research and by effective cross-examination and Dr. Barkhorn's rebuttal testimony. However, even if Dr. Johnson was not as impressive as Drs. Hansen, Manguso and Poch, his testimony in 1996 would have carried considerable weight. His background at CMHIP is substantial. No other witness presented with the experience in a close forensic evaluation facility. Although trial defense counsel could have parlayed this background into a basis for confirmatory bias or other weakness in credibility, their task with Dr. Johnson would have been formidable.

Post-conviction counsel inquired about the significance of changes in the state hospital's rules concerning seclusion and restraint, particularly in light of a number of suicides that occurred in the facility. The Court observed Dr. Johnson during this testimony. He responded calmly and without any appreciable defensiveness.

The Court finds that nothing in Dr. Johnson's transcribed testimony (1995) changes its assessment of his post-conviction testimony or of his credibility. With respect to the latter, the Court finds that Dr. Johnson made diligent efforts to complete his court-

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[226] As noted elsewhere herein, this view is of relatively recent origin.

ordered evaluation of Defendant without substantial preconceived notions. He did demonstrate a degree of confirmatory bias.

If he had testified at trial, Dr. Johnson would have been a persuasive witness. He and his colleagues at the Colorado Mental Health Institute took a considerable period of time to complete the evaluation. They were not satisfied to merely observe Defendant's behaviors from the beginning of his admission. The overall testimony of Dr. Johnson, Ms. Salas, Ms. Lopez, Ms. Snook and Mr. Smith demonstrate that the state hospital staff, both physician and technician, was careful and professionally engaged with Mr. Dunlap and his unusual presentation. Their individual and collective testimony leads the Court to conclude that they would have been highly credible witnesses at trial. Although this finding does not directly bear on Mr. Lewis' decisional process (and *Strickland v. Washington*'s performance prong), it does have great significance with respect to the issue of prejudice (as set forth in Defendant's ineffective assistance of counsel allegation)

Testimony of Lay Witnesses (Employees of Colorado Mental Health Institute at Pueblo; Arapahoe County Sheriff's Department; Third Way Center; Arapahoe County Department of Social Services)

Marilyn Kay Salas

Marilyn Kay Salas, a registered nurse, employed by the Colorado Mental Health Institute – Pueblo between 1984 and 2002, worked at that facility while Mr. Dunlap was there for his competency evaluation. Before becoming a registered nurse, she was a psychiatric technician. She was permitted to give lay opinions pursuant to CRE 701.[228]

Ms. Salas worked on the ward in which Mr. Dunlap was housed during a "swing" shift (3:00 PM to 11:00 PM), for five days each week. Her duties included observing behaviors on the ward and making chart notes, thereby reporting to the assigned doctors.

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[227] In 1995, Dr. Lee testified about a battery of tests he administered to Mr. Dunlap during his time at the state hospital. Some of Dr. Lee's testimony related to the question of voluntariness.

[228] This rule was amended, effective July 1, 2002. The Court utilized the new terms of the rule in entering orders in this case. The Court found that the testimony of Ms. Salas, and others from CMHIP and the Arapahoe County Jail, was rationally based on her perceptions and was helpful to the Court in determining facts in issue. Witnesses also were permitted to give opinions pursuant to §16-8-109 CRS.

She testified that individuals sent to CMHIP for competency evaluations engage in recreational therapy and community meetings but would not be receiving "active treatment."

She stated that Defendant exhibited unusual behaviors, such as "gibberish, unable to understand what he was saying, laughing inappropriately, incontinent of urine and feces, smearing the walls, flushing his clothes and bedding down the toilet, or attempting to . . . jumping on . . . his bed, just generally overactive, pacing, not spending too much time sitting still." *Tr.* 4/22/03: 182. He would periodically refuse to eat; staff attempted to feed him.

The decision to place Defendant in seclusion and restraints could be made either by a doctor or a nurse. This decision was not based on whether staff felt his conduct was volitional or involuntary. Nevertheless, Ms. Salas stated that the number of times Defendant was placed in seclusion and restraints was "very high."[229] The seclusions and restraint were ordered because Defendant's behavior was "frequently more disruptive than anything else." *Tr.* 4/22/03: 188.

Ms. Salas initially thought that Mr. Dunlap's behaviors were not volitional. Later, she changed her view.

When Mr. Dunlap first arrived at CMHIP, he was "extremely agitated . . . he seemed real scared, just kind of wide-eyed and wild." *Tr.* 4/22/03: 198. "He looked psychotic but he looked scared to death, too." *Tr.* 4/28/03: 88. Thus, Ms. Salas felt that Defendant's actions were not of his own free will. Her assessment changed when she noticed Defendant's changing behaviors with respect to incontinence, communication with staff and extreme physical activity were not consistent during his stay at CMHIP.

Ms. Salas essentially agreed with a portion of the defense's contentions that certain behaviors cannot easily be maintained for a lengthy period of time. "Some of

[229] The standards for placing an individual in seclusion and restraints were different, and less restrictive, than are the current standards. Previously, a person could be placed in seclusion and restraints if he or she were dangerous to himself or herself or to others as well as being disruptive in the milieu. The latter criterion has been removed from the current standards. "He has to actually do something before he can be put in seclusion or restraint, whereas back in '94, if the potential was there, then that was grounds for seclusion or restraint." *Tr.* 4/22/03: 187.
The Court concludes that, as with post-trial behaviors, contemporary regulations cannot be considered. Neither would have been available to the jury. Although post-trial behaviors could be seen as confirmatory, they are not evidence that would have been available to trial counsel.

them are pretty good at it, but that's really pretty hard to do . . . . It's really hard, difficult to behave in a way 24 hours a day, seven days a week for months that is not the way you are." *Tr*. 4/22/03: 202.

Defendant would feed himself and then suddenly stop doing so. He would occasionally answer questions appropriately and then would ramble and stare at the ceiling or the floor. Within one conversation with his mother, Defendant was, at one point, slow, hesitant and mumbling, then clearer and stronger. Later, he returned to the slow, hesitant, mumbling speech.

During his time at CMHIP, Defendant could respond to staff appropriately, and shortly thereafter engage in inappropriate behavior. On occasion, he could use the bathroom functionally and then become completely inappropriate. Within a short period of time, Mr. Dunlap was observed jumping on his bed springs and yelling obscenities at staff and then eating 90% of his supper, including liquids. Ms. Salas stated that this behavior was inconsistent because he was, at one moment, cooperative and able to follow directions and, at the next moment, agitated and oppositional. On another occasion, Defendant was incontinent, but was able to feed himself "with good organization." *Tr*. 4/22/03: 216.

Ms. Salas offered opinions about bipolar condition and her view that Defendant's behaviors were not consistent with that illness. She stated that, based on her experience, Defendant's occasional incontinence was not consistent with psychosis. She also testified that most people who are involuntarily incontinent will remain that way unless staff takes them to the bathroom. Defendant had demonstrated an ability and willingness to use a toilet on at least some occasions.

Defendant's inconsistent behavior also included episodes of being responsive to staff on some occasions and not responding to simple questions that required a "yes" or "no" response on others. He also was placed in seclusion and restraints on one occasion for attempting to hit a staff member.

On another occasion, Mr. Dunlap was placed in seclusion (but not restraints) for being aggressive toward a peer. He also told staff that he was a "Crip" and would "[scare] the hell out of us." *Tr*. 4/28/03: 10. He also flashed gang signs, backed into a corner,

acted as if he would fight and yelled that he had a pencil and would hurt staff with it. During a meal time proximate to this conduct, Defendant had eaten 90 percent of his supper. This led to a four point restraint. He also was using the toilet "at will." *Tr.* 4/28/03: 10.

After being placed in restraints, Mr. Dunlap became calmer. A short time thereafter, he began to be "very agitated and thrashing about, talking gibberish." *Tr.* 4/28/03: 13.

Shortly after this incident, Mr. Dunlap became calmer. CMHIP staff permitted him to enter the day hall, watch television and shower. Defendant was able to shower without assistance. While watching television, he was "still kind of loose, smiling and laughing inappropriately, but . . .during that time, he had displayed mostly acceptable behavior." *Tr.* 4/28/03: 16.

Ms. Salas observed that Defendant could eat enough food to keep himself nourished and then smear the rest of it. He could use the toilet on some occasions and become incontinent shortly thereafter.

She testified about other actions by Defendant that she characterized as volitional, even though those acts caused staff to place him in seclusion or seclusion and restraint. Mr. Dunlap and another peer had been involved in "picking at each other." The two were placed in a quiet hour. As soon as the quiet hour was over, "they made a beeline for each other and started fighting." *Tr.* 4/28/03: 19. This led to Defendant's being placed in seclusion and restraint. Ms. Salas believed that this was volitional behavior because he was able to follow staff directions to stay quiet for an hour and then immediately pursue a fight with another patient.

By the time Mr. Dunlap was discharged from CMHIP, Ms. Salas believed that Mr. Dunlap had been malingering and was not psychotic. She also testified that Dr. Johnson had placed his opinion that Defendant was malingering in Defendant's CMHIP chart. As a result, it was possible that she was watching for malingering behavior.

On cross-examination, Ms. Salas acknowledged that, when individuals were in seclusion and restraints, and incontinent of feces and urine, staff experienced additional work. Staff therefore would do everything it could do to get the individuals out of

seclusion and restraints. She also admitted that a person would be placed in seclusion and restraints because he "was either unable or unwilling to conduct himself in a manner that would permit him to be released from restraints." *Tr.* 4/28/03: 34.

Although defense counsel tried to portray Defendant's habits as indicative of manic behavior, Ms. Salas did not concur with this assessment: "The incontinent of urine and feces, the unwillingness or inability to walk, refusal to feed himself, those are what we call regressive behaviors and they're like indicative of a much earlier stage of development, and I've never seen before that in a person in a manic phase, which is what his -- that high level of agitation indicates a manic phase . . . . But the two, the two are almost at the opposite ends of the pole." *Tr.* 4/28/03: 37. Ms. Salas testified that, based on her experience, the behaviors also could be consistent with bipolar disorder and mania. Other behaviors, such as incontinence, an inability to walk and speaking "gibberish" (or pressured speech) are not consistent with bipolar disorder but are consistent with Schizophrenia and other psychotic disorders. *Tr.* 4/28/03: 38.[230] The behaviors in question, if demonstrative of a form of psychosis, are not commonly seen at CMHIP, generally because people with this type of mental illness are medicated.

The issue of non-medication was explored with several witnesses. CMHIP personnel stated that they did not use medication for two interrelated reasons. First, Defendant was at CMHIP for an evaluation and not for treatment. Second, medication would mask any real symptoms that Defendant might have manifested. As a result, an evaluation could not have been successfully completed.

Dr. Martin Schaffer was the physician who first saw Defendant when he was admitted to CMHIP. After his initial contact, Dr. Schaffer wrote a portion of the admission summary in which he entered an Axis I diagnosis of Panic Disorder. This was

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[230] The cross-examination of Ms. Salas could be seen as helping Defendant. It also supports the testimony of Dr. Stoner, a witness toward whom the Court drew an adverse inference. Dr. Stoner believed that Defendant's presentation, if found to be the product of a major mental illness, would require a clinician to determine that Defendant suffered from virtually every mental illness known to man. Herein lies a problem for the Court as it analyzes Defendant's assertion that trial counsel should have presented substantial mental health evidence. What would Defendant's diagnosis have been in March, 1996? Would one expert posit that Defendant was suffering from bipolar disorder (assuming it could have been accurately diagnosed in a 22 year old person at that time)? Would a more accurate diagnosis be schizophrenia or perhaps schizoaffective disorder? Or were the Axis II diagnoses correct? As difficult as this is for the Court, the jury would have found this challenge to be extraordinary.

based, at least in part, on his observation that Defendant was "untidy, erect, tense, overactive, excited, rambling, shouting and screaming." He also had defecated in his pants. *Tr*. 4/28/03: 45.

When Ms. Salas first saw Defendant, he appeared to be "thin [and] emaciated looking." *Tr*. 4/28/03: 46. Obviously, this was a serious issue. CMHIP staff continued to be concerned about this condition because Defendant did not maintain a consistently appropriate level of fluid and food intake.

Ms. Salas described seclusion and restraints as including the use of four leather cuffs and substantial limitation in one's freedom of movement. Generally, and with some exceptions, a person would "behave better as a means of getting out of seclusion and restraints." *Tr*. 4/28/03: 48.

Mr. Dunlap was told that the criteria for his being released from seclusion and restraints were ceasing fecal and urinary incontinence, disrobing inappropriately and yelling incoherently. At least on April 23, 1994, Defendant was able to eat and drink appropriately. Therefore, the restraints were terminated. However, upon his return to seclusion, he again became incontinent of feces and urine, resumed his agitated behavior and became combative when staff attempted to place him back in restraints.

On one occasion (March 2, 1994), Defendant had been in seclusion and restraints for 12 consecutive days. He was able to receive a telephone call from Carol Dunlap and engage in an appropriate, if guarded and mumbling, conversation.

By March 17, 1994, Defendant had been returned to seclusion and restraints because his behavior had again become agitated. He remained in seclusion and restraints until March 30, 1994. Defendant's behavior, including constant repetition of phrases, often laced with profanity, had been noted at the Arapahoe County Detention Center and at CMHIP.

During her cross-examination of Ms. Salas, defense counsel posited that Defendant experienced echolalia and the hearing of voices. Ms. Salas could not comment on this because she was not Defendant's therapist. Further, she had no way of knowing whether Defendant was hearing voices. However, Defendant never did complain to her about hearing voices.

On March 26, 1994, Defendant was in restraints because of his disruptive and potentially self-injurious behavior. This conduct included the aforementioned incontinence and various forms of agitation. At the same time, Ms. Salas noted that, during periods of seclusion and restraint, Defendant would be permitted to have some time on the ward. Although he had been incontinent and would disrobe in his room, he generally would not act in such a manner while on the ward. On one occasion, when Defendant was in a day hall, he took off all of his clothing and "streaked to the ward next door." *Tr.* 4/28/03: 71.

Defendant had another period of seclusion and restraints between April 18 and May 4, 1994. During this time, while in the day hall, he began to remove his clothing, and run wildly around the day hall. Once again, during this 16 day period of seclusion and restraint, staff would occasionally remove the restraints. Defendant would become agitated, incontinent of urine, refuse food and exhibit other behaviors that required staff to resume the restraints.

On May 24, Defendant exhibited aggression. He was "cornered" in his room. *Tr.* 4/28/03: 76. Staff was concerned that Defendant would use a pencil to cause harm to one or more of them. He had stated that he had a pencil. Later, staff found out that he did not have a pencil during this incident. Counsel suggested that either Defendant was saying he had a pencil to alarm staff or he thought he had a pencil when, in fact, he did not. Counsel asked if this possibly was indicative of a thought disorder. The witness was not qualified to testify about this issue.

Defendant was released from seclusion and restraints only to be returned for another six day period starting May 20, 1994. He was either unable or unwilling to discuss release criteria. Nevertheless, he was released. On one occasion, he ate 90 percent of his food but smeared the remainder. He also talked to his reflection in a mirror.

In spite of all of this inconsistent behavior, Ms. Salas did not believe that Defendant was psychotic. He switched from "infantile" behaviors to suitable interaction with peers, watching television, making telephone calls and other appropriate actions within a matter of days, without medication or other intervention. Ms. Salas thus believed that Defendant's actions were volitional. "Psychotic features just don't ordinarily come and go like that." *Tr.* 4/28/03: 86.

Ms. Salas stated that it is difficult for any person to continuously exhibit behaviors that suggest psychosis over a period of months. "It's difficult to act a part for months." *Tr.* 4/28/03: 91. Agitation can occur both volitionally and non-volitionally.

Ms. Salas also testified that it is not likely that Defendant malingered his sleeplessness. Fatigue would overcome a person whose mental status did not cause him to reject sleep.

Ms. Salas was a very calm, thoughtful and professional witness. Although she held firm views that Defendant was malingering, she did not appear to the Court as a person who would make such statements because of any bias. She had a vast level of experience as a psychiatric nurse. If she had testified in the penalty phase, she would have been very credible and persuasive.

Debra Lopez

Debra Lopez, a psychiatric nurse at CMHIP, also testified during the People's case. At the time of this hearing, she had more than 20 years' experience. Therefore, in 1994, she had been a nurse for 11 years.

At the relevant time for this case, Ms. Lopez was assigned to a secure forensic unit, working a day shift. She worked in the forensic unit during Defendant's stay at CMHIP, observed him and took care of his daily needs. She never asked Defendant questions about the (then) allegations of the case or about the competency examination.

She is familiar with approximately 40 to 50 patients who have been diagnosed with bipolar disorder. She described a typical patient's symptoms of a manic stage as "extremely irritable, agitated a lot, get rambling speech . . . hyper-sexual and grandiose in their thinking." *Tr.* 4/28/03: 119. She also is familiar with patients who are hallucinating. "They appear to be responding to internal voices and . . . they can talk to themselves or they think . . . possibly that the TV was actually talking to them." *Tr.* 4/28/03: 121.

Ms. Lopez opined that Defendant did not suffer from a mental illness and that he was a malingerer. Periodically, he was "unruly and threatening." *Tr.* 4/28/03: 122. The prosecutor called her attention to an incident of April 28, 1994, when Defendant attempted to punch a staff member. This event occurred when Defendant was in seclusion and restraints. When staff attempted to give him a break from that situation, he would not "tolerate" it. *Tr.* 4/28/03: 124. He was "uncooperative and resistive." *Tr.* 4/28/03: 126.

On May 20, 1994, Defendant, together with patient Robert Lytle, stalked another patient. Although Defendant was offered counseling about this matter, "he continued to escalate and threatening (*sic*) to strike patients or staff and that I'm a gang member (*sic*)." *Tr.* 4/28/03: 128.

Staff told Defendant about the requirements for his release from seclusion and restraints, including appropriate behavior in the day hall while on breaks and to remain in control. His response was to minimize his behavior and to refuse to accept responsibility for it.

During breaks for showers and meals, Defendant would initiate conversations about his being a gang member. Staff did not attempt to stop this behavior because their duty was to complete a competency evaluation and to chart his actions.

As Ms. Salas had done, Ms. Lopez observed that, on February 25, 1994, Defendant had been uncooperative and chanting. Shortly thereafter, he went to lunch and would not feed himself. However, when a green bean fell from a spoon, Defendant "automatically had caught the bean and ate it." *Tr.* 4/28/03: 131. Ms. Salas testified that, "as a rule, a psychotic patient or -- is probably is -- is not going to notice if something fell, but that he did and managed to catch it." *Id*. She also stated that (psychotic patients are) "responding to internal stimuli and if they're that ill that you have to spoon feed them, they, as a rule, are not going to notice that action." *Id*. In addition, psychotic patients generally find seclusion and restraints to be isolating. Their time in the milieu of the day room is "more pleasant." *Id*..

Ms. Lopez' responsibilities included cleaning Defendant after incontinent episodes. She did not observe any scars on his buttocks.

A significant entry occurred on May 3, 1994. Ms. Lopez had a conversation with Defendant. She testified, "He admitted that I'm totally in control of my behavior and went on to say that he is angry at times and that he handles it by playing games and that he is passive aggressive." *Tr.* 4/28/03: 139. Later, he blamed his incontinence on the staff and stated that, "if you want to clean my ass, I'll let you." *Tr.* 4/28/03: 140. As a result of these statements and her other observations, Ms. Lopez opined that Defendant was able to control his behavior.

Ms. Lopez gave some testimony that was inconsistent with other testimony. She testified that, when some truly psychotic patients become incontinent of feces, they "even eat stool or they smear it all over on the walls, on themselves." *Tr.* 4/28/03: 142. She admitted that CMHIP records did indicate that Defendant had smeared his feces on the floor and on his mattress. *Tr.* 4/28/03: 178.

Ms. Lopez observed a visit with Defendant and his mother and sister. The group laughed and joked. At one point, the family "put a whole bunch of pony tails in his hair . . . . I did overhear his mother comment, 'Now you really look like a crazy person.'" *Tr.* 4/28/03: 143. She opined that Defendant was able "to turn his behavior off and on at will." *Id.*

Ms. Lopez joined other witnesses in observing that Defendant was more "organized" in his behavior when he believed that he was not being watched by staff. *Tr.* 4/28/03: 143. For example, he generally was able to shower himself well without assistance. Some patients who have a major mental illness have problems in the shower. She also said that (at least) certain symptoms of mental illness can be mimicked.

On cross examination, Ms. Lopez acknowledged (after a considerable amount of dialogue) that she was aware of the crimes with which Defendant was charged before the time he arrived for his competency evaluation. As of his date of arrival, she was able to connect Mr. Dunlap with the charges. However, she was persistent in her statements that her role was to observe and not make any diagnosis or reach any conclusions.

Although she was pressed about the potential unpleasant duties of cleaning Defendant and his living area as a result of his incontinence, Ms. Lopez never was perturbed. She described this work as part of her duties. "I've had a lot of practice in bathing patients or in cleaning incontinent patients." *Tr.* 4/28/03: 161.

She also concurred with other witnesses who testified that Defendant was not offered medications (to the best of her knowledge) because he was there for a competency assessment.[231] *Tr.* 4/28/03: 157.

Defense counsel asked Ms. Lopez about her opinion that Defendant was malingering. She acknowledged that malingering typically occurs when a patient believes

he or she has something to gain. Counsel had obtained testimony that, when a patient is in restraints, she or he will be very uncomfortable. Thus, counsel inferred that the discomfort level would run contrary to the notion of malingering. However, Ms. Lopez stated that a patient does have something to gain because his or her stay at CMHIP will be lengthened. The patient will be able to at least postpone any prison sentence. She believed that a sojourn in CMHIP would be preferable to a sentence in the Department of Corrections. She further said that a person who was acting bipolar or psychotic would require additional testing and evaluation, thereby prolonging his stay at CMHIP.

She allowed that Defendant was not informed that his behavior was extending his stay. However, she also testified that she had experience with other patients who "if they act out would act insane, it guarantees a longer stay or if they act suicidal it will guarantee a longer stay, so it does happen." *Tr*. 4/28/03: 166.

After further questioning, she conceded that she assumed that Defendant would have found CMHIP more comfortable than incarceration. She also stated that most malingerers do not admit to that behavior. Nevertheless, Defendant did admit that he was "totally in control of his behavior." *Tr*. 4/28/03: 167. Although counsel presented these chart notes to Ms. Lopez, as well as notes about Defendant's lack of sleep, (Mr. Lopez said that she had not been familiar with these entries before counsel presented them to her during the hearing) and information that Defendant had eaten his mattress[232], she did not change her opinion that Defendant was a malingerer.

She also maintained her view when presented with a note by Ron Purvine, a registered nurse at CMHIP. He had noted that Defendant was "crazy at times." Ms. Lopez felt that this could be another indication of mental illness or feigned mental illness.

Ms. Lopez was an assured witness who was not shaken by professionally vigorous cross-examination. She had some gaps in her knowledge of the observations and views of other CMHIP personnel. Nevertheless, she presented as a witness with substantial

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[231] She acknowledged that patients who are profoundly psychotic have been offered psychotropic medications. The Court infers from this testimony that no doctor who worked with Defendant felt that he suffered from that degree of psychosis.

credibility and would have been a strong witness for the People at the penalty phase in March, 1996.

Jamie Snook

Jamie Snook is a registered nurse at CMHIP. At the time of Mr. Dunlap's hospitalization at CMHIP, she had been working for three years and had worked at CMHIP for about five months. She had no previous experience in a psychiatric hospital. She supervised psychiatric techs, administered medicine, and provided therapeutic counseling to all patients.

Ms. Snook is familiar with Axis I major mental illnesses and Axis II personality disorders. She has observed people in the manic phase of bipolar disorder. She stated that Mr. Dunlap was able to "turn it on and off . . . . (There were) times . . . in which I saw him being quiet, calm and still, and then he would observe me looking at him, once he noticed me looking at him, immediately start doing something bizarre." *Tr.* 6/23/03: 191.

She approached all patients, including those in a bipolar manic phase in a calm, non-threatening manner to try to avoid their escalating.

Ms. Snook talked to Mr. Dunlap about his background. He denied having suffered any sexual abuse. However, on cross-examination, Ms. Snook acknowledged that patients often do not accurately report a history of sexual abuse. When she asked him about his occupation, he braggingly replied "something like drug dealer." *Tr.* 6/23/03: 194.

Mr. Dunlap's seclusion and restraints episodes occurred because he threatened other people and because he was disruptive in the milieu. Ms. Snook stated that each of these precipitants occurred about half of the total times he was placed in seclusion and restraints.

Ms. Snook testified that none of Mr. Dunlap's inconsistent behaviors fit a person who was suffering from a bipolar condition, a psychotic state or a combination of both of

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[232] When counsel asked Ms. Lopez about Defendant's eating his mattress, she indicated that this could be a sign of either a psychotic or an angry patient.

those major mental illnesses. In addition, she felt that his changes from normal to bizarre behaviors were indicative of a person who was malingering.

On March 20, 1994, a seclusion and restraint note indicated that when staff observed Mr. Dunlap through a window, he was awake and quiet. However, when staff entered the room, “he would rant and mumble using vulgarities at times. Would bob his head and make gestures and movements with his arms.” *Tr.* 6/23/03: 201. Ms. Snook stated that this was indicative of malingering. On cross-examination, she acknowledged that, during some seclusion and restraint periods, Mr. Dunlap would be agitated and screaming. However, when he saw Ms. Snook, he occasionally calmed down and smiled at her.

As of 1994, Ms. Snook’s training in malingering was minimal. At the same time, Ms. Snook managed to develop a rapport with Mr. Dunlap. Other CMHIP staff did not have that type of relationship with him.

Another example of Defendant’s inconsistent behavior dealt with his food. On occasion, he would pick it up, look at it and play with it. At other times, he would eat normally. He never seemed to fail to recognize food for what it was. Thus, Ms. Snook felt he was not psychotic.

The seclusion and restraint records reflect that Defendant experienced a number of days when he had minimal sleep. However, Ms. Snook noted that, on some occasions, Defendant’s sleep patterns were reversed. He would be sleeping more during the daytime and less at night. Staff decided that it would wake him at 15 minutes intervals during the day. By doing so, they hoped to improve his sleep at night. (Ms. Snook noted that Defendant had been disruptive during the evenings. Staff hoped to address this issue by having him sleep less during daytime.)

On April 8, 1994, Ms. Snook talked to Defendant about any reason he might have for his incontinence episodes. Mr. Dunlap stated that he “was just angry about the whole situation.” When she asked specifically about fecal incontinence, “why he had been soiling his pants . . . he just shook his head and smiled.” *Tr.* 6/23/03: 207.

On one occasion, Mr. Dunlap talked about the Chuck E. Cheese murders. He told Ms. Snook that "it didn't matter, those people meant nothing to him and he would kill again." *Tr.* 6/23/03: 214. He appeared to be logical and coherent.

At the time Mr. Dunlap was at CMHIP, Ms. Snook had had very little psychiatric experience. She had not treated patients who suffered from schizophrenia, bipolar disorder or psychotic disorder. Although she gained in experience and sophistication after Mr. Dunlap left CMHIP, when she started working there, she did not necessarily know "what to look for" (with respect to specific mental illnesses). *Tr.* 6/23/03: 220. (Ms. Scissors' words)

Ms. Snook discussed Mr. Dunlap's statement to Dr. Lee that he had committed the perfect crime and that he was a legend. She acknowledged to Ms. Scissors that this statement could be indicative of grandiosity. Similarly, his statement, in a pastoral care group, that he wanted to be a firefighter, a police officer or a rock star also could be signs of grandiosity. Post-conviction counsel posit that such grandiosity is symptomatic of a major mental illness. Ms. Snook admitted that this was possible. She also stated that these statements could be part of a personality disorder.

Ms. Scissors asked Ms. Snook whether CMHIP staff had recorded any indicia of hallucination by Mr. Dunlap. In Exhibit PCX-3, page 5049, Defendant was quoted as saying, "I can't wear these clothes because when I want to, they change colors." *See Tr.* 6/24/03: 14. Ms. Snook agreed that a person who believes that his clothes change colors could be hallucinating. In turn, hallucinations are consistent with schizophrenia and psychosis. However, shortly after this discussion, Mr. Dunlap was able to go into the day hall and watch television without any discernible problems.

Additionally, no CMHIP staff member believed that Defendant was hallucinating. Ms. Snook testified that, "In the whole context of his stay at the hospital, there were (*sic*) so much evidence of what seemed to be volitional attempts at faking or malingering psychotic symptoms." *Tr.* 6/24/03: 37.

Ms. Snook agreed that psychotic patients can need help and redirection. This can be accomplished by staff's being supportive and focusing. *Tr.* 6/24/03: 16. In PCX-3, page 5062, staff reported that Defendant had defecated on the floor, had removed his

diaper and had bitten off several large chunks of his mattress. When staff redirected him, Mr. Dunlap cooperated.

Cross-examination touched on other ostensibly bizarre and irrational behavior including Defendant's claiming that gang signs were actually other languages, such as Japanese and Spanish and that Defendant would hypnotize Ms. Snook. She felt intimidated on one occasion "because of his demeanor, his glaring and -- yes, the whole situation I did feel like it was an intimidating situation." *Tr.* 6/24/03: 59.

Ms. Snook also testified that truly psychotic people talk about strange or unbelievable things but do so throughout the course of their conversation. Those with a psychotic illness do not "go in and out of what -- of normal conversation to something that appears to be psychotic. It's a constant thought process that's evident in their behavior and their conversation at every interaction that you have with them." *Tr.* 6/24/03: 34. She had never seen patients who manifest (appearing to be) complete psychotic and then "complete clearing." *Id.*

Periodically, Defendant was able to express himself clearly. For example, he could ask for extra portions at meals and for clean laundry so that he could shower daily. He asked for laundry soap and for a mop and broom to clean his room. Exhibit PCX3: 5100. On April 1, 1994, Ms. Snook asked him why he had had difficulty communicating in the past. Defendant shook his head and smiled. When she asked him if he "had been playing games with us . . . he said yes, in quotes." *Tr.* 6/24/03: 50.

Mr. Dunlap never expressed remorse for the Chuck E. Cheese murders. When he discussed them, he did so "in a boastful manner." *Tr.* 6/24/03: 49. He also told Ms. Snook that he could cooperate with his lawyers but wanted them to cooperate with him and represent him in the manner of his choosing. He also discussed the murders and did so in a calm manner, without pressured speech or flight of ideas. "He was logical and goal-directed in his responses." *Tr.* 6/24/03: 52.

Ms. Snook was a calm and thoughtful witness. The Court finds that she was substantially credible. If she had testified in March, 1996, she would not have been able to provide as much detail about psychiatric patients because she had very little experience at that time. Nevertheless, she appeared to be an accurate historian and could have

provided contextual information that would have aided the prosecution in its attempt to rebut a defense mental health mitigation case.

David Lucero

Two other witnesses, E. Douglas Smith and David Lucero, both of whom had worked at CMHIP during Defendant's stay there, offered similar testimony. Mr. Lucero is a licensed practical nurse. As of the time he testified, he had 25 years of experience in the mental health arena.

Mr. Lucero felt that Defendant did not exhibit and of the symptoms of a major mental illness with which he had become familiar. He was the staff member who was feeding Defendant, ostensibly because Defendant was incapable of doing so, when Defendant was able to catch a green bean that had fallen off a spoon.

With respect to incontinence, Mr. Lucero testified that, on one occasion, in his room, Defendant had a bowel movement "over the bed." Mr. Lucero told Mr. Dunlap, "Nathan, for being as psychotic as you are, you sure are worried about where you have a bowel movement." *Tr.* 6/23/03: 32. Shortly thereafter, Defendant began to play with his feces and have bowel movements in his pants.

Mr. Lucero believed that Defendant never had any psychotic episodes while he was at CMHIP.

E. Douglas Smith

Mr. Smith is a registered nurse. He addressed a variety of the behaviors that Defendant displayed. He believed that "his behavior was goal directed", *Tr.* 6/23/03: 93. He also quoted Mr. Dunlap as saying, "I'm doing this on purpose . . . . I'll get you, you think you can fuck with me, but you'll learn, I'm doing this on purpose, oh, yeah, I'll sue -- I'll show you shit you've never seen." *Tr.* 6/23/03: 95.

Mr. Smith also observed that, despite Defendant's incontinence of urine and feces, he was "very neat and clean about it." Mr. Smith had not seen a psychotic person who was so orderly in his incontinence. *Tr.* 6/23/03: 96.

The issue of Defendant's sleep deprivation was discussed. Mr. Smith did not relate this to psychosis. He also recalled Mr. Dunlap's statement, "I've killed before, I can do it again." *Tr.* 6/23/03: 98.

Another patient at CMHIP "was crazy [and] actually made the statement of somebody needs to tell him that being crazy is a full-time job." *Tr.* 6/23/03: 107. Mr. Smith felt that this was a logical statement given Defendant's "on and off and on again and off again psychosis." *Id.*

Mr. Smith admitted that a person who suffered from a combination of bipolar disorder, psychotic and schizophrenic features and an Axis II personality disorder would be "both seriously mentally ill and also very difficult to deal with." *Tr.* 6/23/03: 159. (Ms. Scissors' words) Defendant also told Mr. Smith about the murders even after being told not to do so.

All of this information would have been available for the mitigation case. The Court concludes that this approach would have had a chance at success only if trial counsel could have persuaded the jury that Defendant truly suffered from this wide variety of problems. As noted elsewhere herein, the defense experts who opined that Defendant suffered from a major mental illness, except for Drs. Poch and Barkhorn, were not persuasive. Further, Drs. Poch and Barkhorn did not believe that Defendant had the substantial cluster of maladies that were discussed by witnesses such as Drs. Opsahl and Lewis.

Sherry Stuart

In 1993, Sherry Stuart was a classifications specialist for the Arapahoe County Sheriff's Department. She was doing the same work when she testified on April 21, 2003. Her work includes initial and ongoing assessments for adjustments and mental health services. Ms. Stuart has a master's degree in counseling. She and her colleagues ask the inmates and obtain any other information about psychiatric and medical history. The classification specialists therefore try to look for "precursor(s), if you will, how they might interact with other people. We observe whether they are in fact acting orderly, if they're not in touch with reality or oriented to where they're at or overly afraid." *Tr.* 4/21/03: 74.

On December 15, 1993, Ms. Stuart had a personal interaction with Mr. Dunlap. He was cooperative with Ms. Stuart and was not nervous or upset. He was responsive to a variety of questions about personal information, such as physical condition, "victimization potential", denial of suicidal ideation, and whether he was under the

influence of alcohol or drugs (which Defendant denied). *Tr.* 4/12/03: 89. He stated that he was a member of a Raymond Avenue Crips gang.

Since there had been threats against Defendant's life before he arrived at the jail; and because the case was "very high profile", Ms. Stuart wanted to place him in protective custody. *Tr.* 4/21/03: 90. He was placed in the Special Intervention Unit ("SIU"). Based on her training and (as of 1993) relatively limited experience, Ms. Stuart offered lay testimony that Defendant was not demonstrating any psychological problems. He also denied experiencing any mental health problems.

Ms. Stuart also testified that Defendant was not tearful. He did not appear to be depressed[233] and expressed no remorse. (These opinions were based on Ms. Stuart's observations of Defendant and not on anything Defendant said to her.) Ultimately, he was placed in general population.

On February 14, 1994, Deputy Jackie Gallo brought Defendant to SIU. He "had been running around the dayroom saying that he was free and that he had been saved . . . . (H)e was telling her that he was guilty of what he was accused of and that he had told people in the dayroom that he was guilty of what he was accused of and he'd been going from cell to cell talking to different inmates . . . . He had a Bible with him and he would alternately read very loudly from the Bible and then come up to the window . . . . He was saying, I'm going to fuck you up, I'm going to get you, I'll get you back some day. And then he would go back to the middle of the cell and start reading out of the Bible again." *Tr.* 4/21/03: 105-106.

His behavior changed rapidly. "[He] was cycling so rapidly within a course of minutes . . . an up manner to a very angry manner, it was not congruent with my previous observations of people that were having . . . manic or depressive episodes . . . . So it was my opinion that he was faking it." *Tr.* 4/21/03: 108.

At the same time, Ms. Stuart acknowledged that a bipolar disorder diagnosis could not be ruled out. *Tr.* 4/21/03: 195.

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[233] The Court accepted this as lay testimony and considered the term "depressed" or "depression" in their common, non-professional context.

Ms. Stuart presented professionally and was knowledgeable in her area of experience. At the time of her observations, she had minimal time on the job. The value of her testimony was limited to those observations. The State attempted to offer CRE 701 opinions. The Court received those opinions on a limited basis, and now finds them to be of no appreciable value as it enters this ruling. However, her factual observations are of value.

Robert James

Robert James worked in the Arapahoe County jail. He assisted the nursing staff and dealt with the special needs of "inmates on the psychological side." *Tr*. 4/21/03: 113.

Mr. James told Mr. Lewis that he intended to observe Mr. Dunlap in the behavioral control unit. He provided some of the same services to inmates as did Ms. Stuart.

On February 15, 1994, Mr. James observed Mr. Dunlap in the Behavioral Control Unit ("BCU"). He worked a swing shift from 2:30 PM to 12:30 AM. Individuals who are in Unit BC-4 (a suicide watch unit) can see into the control room. He testified that when Defendant was aware that Mr. James was watching him, "he would get low and flop his arms and act like a chicken or whatever . . . and he would just kind of hop around the room and flap his arms." *Tr*. 4/21/03: 119. If Defendant could not see a person observing him, he would not exhibit this type of behavior.

On that same day, trial counsel Forrest Lewis and Dr. Miller (a psychiatrist) came to visit Defendant. Mr. James instructed Defendant to put on a gown for the visit. Defendant complied without further direction.

Defendant went into a room to meet with Mr. Lewis and Dr. Miller. Shortly after the conversation began, Mr. Dunlap began to leave that room. Mr. James instructed him to return. Defendant complied. This sequence of events was repeated approximately three times.

Apparently, he left the meeting room and went to another room, BC-7. Mr. James "caught up with him" there. "He was just walking around and I told him, put your hands up against the wall, get up against the wall, put the hands behind you, which he did, he complied, and I put the handcuffs on him and right after that he proceeded to become

violent, which like he wanted to fight, but he couldn't do anything. (He was) pulling, pushing, anything he could do." *Tr*. 4/21/03: 136.

Mr. Lewis and Dr. Miller decided to terminate their visit. After this, Defendant again calmed down. However, at 7:00 PM, a trustee delivered food to Mr. Dunlap. After the trustee set the food down, Defendant "rushed" the door. Mr. James stopped his progress. Defendant then said, "Come on, come on, let's get down." Mr. James interpreted this as a desire to fight. *Tr*. 4/21/03: 139. Mr. James hit his elbow on a doorjamb, apparently was able to get Mr. Dunlap back into his room and left that area.

Mr. James wrote a report wherein he described Defendant's actions as including "talking, crying, appears to be an act." *Tr*. 4/21/03: 141. He testified that the crying appeared to be "pretending to be crying." *Id.*

The initial portion of cross-examination was interesting. Mr. James could not remember where he was when he first learned about the September 11, 2001 terrorist attacks. He also described the Chuck E. Cheese murders as "a regular occurrence during my career." *Tr*. 4/21/03: 152. He also said that he did not initially link Mr. Dunlap to the murders and that he did not talk to his co-workers about them.

Mr. James acknowledged that Mr. Dunlap was in BCU because "someone figured he showed suicidal tendencies." *Tr*. 4/21/03:156. Since Defendant was placed on suicide watch in a rubberized room, it was reasonable to conclude that he might have a mental health problem.

Mr. James had multiple tasks to perform during his shift. He was responsible for observing several BCU cells by television monitor. Arapahoe County Sheriff's Department policies directed that each inmate be observed at the entrance of his or her cell every half hour to 45 minutes.

Defendant was placed in handcuffs and leg shackles. He was able to remove a handcuff (Mr. James said he had observed this but did nothing about it) and was able to pace around his cell. Mr. James also testified that, while he was in his BCU cell, Mr. Dunlap was able to remove an apron (attached by Velcro) and was observed in the nude for a considerable period of time.

Mr. James' ability to recount the events of February, 1994 was challenged indirectly by the defense. During direct examination, he was very straightforward and responded succinctly to the prosecutor's questions. During cross-examination, he occasionally appeared to be flustered and resistant to counsel's questions. The Court finds that his observations of the events of February 14 and 15, 1994, are helpful to a determination of the issues but that his credibility was weakened by the cross-examination.

In addition, Mr. James' comments about the homicides (a regular occurrence during his career) were not credible. Although the Court accepts his observations about Defendant's behaviors while in BCU, he appeared to have a bias in favor of the prosecution. Therefore, the Court disregards his opinions.

Joseph Ferro

Joseph Ferro was a shift sergeant at the Arapahoe County Jail when Defendant arrived there shortly after the Chuck E. Cheese murders. Prior to Defendant's being placed in BCU, he was placed in a general population cell. Mr. Ferro inspected the cells periodically. He generally wrote that Defendant (and any other inmate with whom he was housed) maintained his cell in very good condition. He found that the cell had no dust; it was "very clean and immaculate"; the sink and toilet unit was clean; the beds were kept according to regulations; the clothing was hanging neatly; the walls were free of graffiti.

To the extent that Mr. Ferro and any other personnel were able to complete inspection reports, they were consistently good for Mr. Dunlap's cell. As late as February 13, 1994, when Mr. Dunlap was housed alone in his cell, he maintained it appropriately. On those occasions when his cell received excellent ratings, he would receive candy bars as rewards.

Cross-examination revealed that Mr. Dunlap was every bit the well-known inmate he was portrayed to be by post-conviction counsel. Mr. Ferro quoted Lieutenant Tennyson as asking him, "You know who that was that you were just talking to? And I said no. And he mentioned Nathan Dunlap." *Tr.* 4/21/03: 222-223.

The Court presumes that this testimony was offered to demonstrate that Defendant, at least on some occasions, was able to comport himself according to standard

jail expectations, even though he periodically would act in an entirely contrary manner. The State seeks to portray all aspects of his bizarre behavior as volitional, as a product of a personality disorder (DSM-IV Axis II). The defense posits that all of this behavior is part of the cyclical features of a bipolar disorder or some other major mental illness (DSM-IV Axis I).

The defense also implies that Defendant received "special" observations and, perhaps, was viewed by the Arapahoe County Sheriff's Department and CMHIP personnel in a manner most likely to support a conviction and a death sentence. With the exception of Dr. Stoner (whose observations are not relevant to anything the jury would have heard), the testimony in the post-conviction hearing does not support this proposition.

Terry Rainey

Terry Rainey was (and continues to be) a deputy sheriff in the Arapahoe County Jail's Special Intervention Unit. Although she could not recall the specifics of her first contact with Defendant, she "assumed" that it occurred shortly after he arrived in the jail. Defendant was a high profile inmate. Such prisoners routinely were initially placed in protective custody.

Deputy Rainey had direct contact and supervision of Defendant and others in the SIU. Prior to February 14, 1994, Defendant was well groomed, polite, got along with others and kept a clean cell. In fact, "when he first came in, I…was amazed at how quickly he did adjust to being in jail." *Tr.* 4/21/03: 228. He manifested no indicia of mental health problems.

Shortly before February 14, 1994, Defendant was present when some other inmates were discussing a newspaper article about various cases in which young people were killed with guns. The article contained references to Defendant's case.

Deputy Rainey reported that, on February 14, 1994, Defendant's attorneys visited

him.[234] Defendant was on suicide watch. Thereafter, periodic entries concerning Defendant's behaviors were made. On February 16, 1994, Deputy Rainey noted that Defendant was yelling, walking around and declined to eat his breakfast. He ate only part of his lunch. During his time in SIU, he ate some meals and refused others.

Deputy Rainey did not observe Defendant walking around the dayroom with a Bible as had other witnesses. However, she testified that this activity was recorded in the SIU logs. She was not aware of any appetite changes Defendant may have experienced during his time in the Arapahoe County Jail.

The log reflects an incident, while he was in a "rubber room" (a place where an individual who is on suicide watch cannot harm himself), during which Defendant removed his gown and paced, knelt and crawled.

Gil Gonzales

Deputy Gil Gonzales was, and continues to be, a deputy with the Arapahoe County Sheriff's Department. On February 18, 1994, Judge Michael Bieda went to the Arapahoe County Jail to advise Defendant about his competency evaluation.[235] Deputy Gonzales observed these proceedings.

When Judge Bieda arrived, Defendant had feces on himself and on the walls of his cell. Since it would take a considerable time to clean the cell, the advisement went forward as scheduled. Defendant was screaming or yelling throughout the advisement. He yelled, "1, 2, 3, 4, 5, 6, 7, 8, 9, 10 motherfucker." The advisement lasted approximately 10 minutes.

The advisement consists of Judge Bieda's providing Defendant with an appropriate, if expedited explanation concerning counsel's allegation of incompetency and the procedures that would follow.

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[234] The details of this visit were not discussed during Deputy Rainey's testimony. Defendant's Exhibit PCX-5 contains two references to visits during this time. On February 15, 1994, during the 0500-1500 shift, a defense attorney and an investigator visited Mr. Dunlap. Defendant refused to talk to them. The attorney asked that a "phys. doctor" visit Mr. Dunlap. During the 1430-0030 shift, Mr. Lewis and Dr. Miller attempted their visit. (Bates number 3261)

[235] Since the defense moved to admit the entire record of this case, the Court has consulted the ICON entries. On February 17, 1994, the defense moved for a competency evaluation. Post-conviction counsel does not claim that this motion was one of the aspects of ineffective assistance of counsel. The Court finds that trial counsel's decision was within the standards of professional, competent assistance in this community at the time it was made.

After this occurred, the attorneys and Judge Bieda returned to the courtroom. Mr. Gayle then noted that the Sheriff's Department did not have appropriate facilities to address Mr. Dunlap's "mental illness" and asked that he be transported to CMHIP without delay. Thus, the record is clear that the defense was aware of the possibility that Defendant had a mental illness and proceeded appropriately.

Deputy Gonzales was one of the deputies who transported Defendant to CMHIP in a Suburban (vehicle). Defendant repeated his mantra while en route. He continued to be loud, was not responsive, but remained awake during the trip to Pueblo.

Upon their arrival at CMHIP, Defendant "[bore] down" as if to defecate in his trousers. He was initially uncooperative with CMHIP staff. However, a staff member ultimately asked Defendant if he would cooperate. Defendant responded, "Yes."

The Court considers the observations as part of its overall task of determining whether trial counsel was constitutionally ineffective in the presentation of their penalty phase case.

Laurie Swetnam

Laurie Swetnam was a school social worker at Overland High School in 1989. At that time, her name was Laurie Swetnam-Wood. She worked with Vicki Switzer, a clinical psychologist and Dr. Ray Willett as a mental health team. The team assessed students for strengths and weaknesses and determined if they needed a special education program.

Mr. Dunlap's "Dad"[236] contacted her in January, 1989. As a result, Ms. Swetnam prepared a written social family assessment. The "Dad" expressed concerns to whether Defendant's behavior "was something neurological . . . something different about him, just born into him, he felt that he was not dangerous, but that he was very provocative . . . (and) that he would what he said was push people." *Tr.* 4/15/03: 77.

After other calls from the "Dad", Ms. Swetnam decided that Defendant should be screened by "the impact team." *Tr.* 4/15/03: 79. Defendant did not have problems with

[236] The context of Ms. Swetnam's complete testimony indicates that "Dad" was Jerry Dunlap.

truancy but was referred to the principal's office for "silly, disruptive behavior." *Tr.* 4/15/03: 80. His academic work was punctuated by a lack of organization and difficulty in completing assignments. When school officials asked Defendant about this, he responded that other children behaved in a similar manner. Apparently, he had no insight into the need to correct his own problems and not worry about those of other students. In fact, Defendant was failing all of his classes. Mr. and Ms. Dunlap were "open" to discussions with personnel from the school and other agencies. *Tr.* 4/21/03: 82. They signed releases.[237]

In their analysis, Overland High School staff found that Defendant had very good "adaptive behavior." *Tr.* 4/21/03: 85. He was able to hold a job for a year and was able to solve problems on the job better than he peers. He was respected by his supervisor at a Burger King.

Ms. Swetnam felt that Defendant was a good candidate for psychotherapy. Dr. Switzer felt that Defendant was depressed. If Defendant had been suffering from depression, it could explain some of his inappropriate actions and lack of follow through in school. However, there was no diagnosis of depression. Instead, the report noted,

> Overall personality style may tend to be characterized by impulsive hostility, an apprehensive mistrust of others, and an edgy defensiveness against expected criticism . . . . Nathan may need to gain power in order to vindicate past grievances. Losing his temper, getting into fights, and acting in a daring fashion may be attempts to provoke fear in others in an attempt to work through past humiliations . . . . In order to protect himself, he needs to blame others. PCX-1: 3951-3952.

In 1989, Ms. Swetnam spoke to one of Carol Dunlap's mental health professionals. He had diagnosed Carol Dunlap as suffering from bipolar condition. She was responding well to medication. She had been verbally abusive toward her children, "but he didn't think it was . . . over the edge, that it wasn't out of the norm of a number of

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[237] This willingness to sign releases in 1989 is in sharp contrast to Carol Dunlap's refusal to cooperate with trial counsel when they sought releases for her mental health record. She also permitted Ms. Swetnam to speak with her physician about her mental illness. Furthermore, Ms. Swetnam indicated that Carol Dunlap was "fairly open[]" in her discussion of her bipolar condition. *Tr.* 4/15/03: 116.

families." *Tr*. 4/15/03: 100. Ms. Swetnam became aware that Carol Dunlap had had two psychiatric hospitalizations before 1989.

Dr. Switzer wrote that Defendant was demonstrating either "a cry for help, or an acute disturbance, or malingering." *Tr*. 4/15/03: 114.

Ms. Swetnam had not been informed about Carol Dunlap's fondling of Defendant. When defense counsel asked her about this, she stated that she "would need a lot more information . . . . .(T)here's always issues of parents crossing boundaries with kids and it's the consistency of that and the intensity that determines whether it's an issue that would influence someone's behavior." *Tr*. 4/15/03: 120. She stated she was aware of unspecified abuse of Mr. Dunlap by his mother and/or stepfather. However, Ms. Swetnam also acknowledged Defendant's comment that Carol Dunlap had been physically abusive toward him during one of her manic periods.

During cross examination, Ms. Scissors and Ms. Swetnam engaged in a discussion about the onset of bipolar disorder. Counsel attempted to determine whether Defendant was exhibiting symptoms of that major mental illness. This dialogue turned out to be of minimal value because Defendant was 14 years old at the time Ms. Swetnam met with him. Counsel's question suggested that bipolar disorder's onset occurs most frequently between ages 20 and 30 and second most frequently between ages 15 and 18.[238] *Tr*. 4/15/03: 129. However, she stated that she would have noted "precursors" of the disorder had she observed them. This interchange suggests that it is very difficult to determine whether an adolescent is suffering from bipolar disorder.

Defendant told Ms. Swetnam that he had no marks from physical abuse on his body. *Tr*. 4/15/03: 145. She also did not know of any alleged suicide attempt by Defendant during his time at Overland High School.

Ms. Swetnam presented in a forthright manner and did not appear to be supportive of either party. She was asked questions about her dealings with Defendant when he was 14 years old. The Court concludes that, if she had testified during the penalty phase, she would have offered little of value to either side. The Court makes this finding in the

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[238] The changes in mental health professionals' views about the availability of a diagnosis of Bipolar I in adolescents, from 1996 to the present, are discussed elsewhere herein.

context of Carol Dunlap's refusal to permit the trial defense team to have access to her psychiatric records.

In the context of the Court's task in this post-conviction proceeding, Ms. Swetnam's only significant material addressed the problems with diagnosing adolescents with bipolar disorder. She offered little material that would have assisted the defense had she been called at the trial's penalty phase.

David Eisner

David Eisner is the Executive Director of the Third Way Center and held that position when Defendant was placed in Third Way in 1990. He has a Master's of Education degree with a focus on rehabilitation counseling. Mr. Dunlap was referred to the program by the Arapahoe County Department of Social Services after he was adjudicated as a delinquent for aggravated robbery and violent juvenile offender.

Defendant "struggled with his placement . . . with the rules, with any authority figure whatsoever, with any time anyone said or did something he didn't like, he felt he could serve retribution on them. The parents supported that . . . and . . . brought in that we didn't understand them because of their religious beliefs." *Tr.* 4/10/03: 11. The parents minimized Defendant's behavior and were very erratic in their responses. Mr. Eisner opined that the family was dysfunctional.

Defendant first learned that Jerry Dunlap is not his biological father during a treatment session at Third Way. Also during those sessions, Defendant denied any abuse by either Carol or Jerry Dunlap. However, Defendant's anger caused Third Way personnel to suspect abuse.

Although the defense attempted to portray Carol Dunlap as psychotic, Mr. Eisner could not state that there any indications of psychosis. He never saw her in a psychotic state. He acknowledged that Carol Dunlap had told the facility that she had been diagnosed with bipolar disorder and that she had had "breakdowns" in the past. *Tr.* 4/10/03: 38.

Ultimately, Defendant became substantially out of control. Third Way requested psychological testing. Defendant was sent to Presbyterian St. Luke's Hospital. Mr. Eisner did not recall that Defendant was diagnosed as being depressed and having a conduct

disorder. He also did not remember that Presbyterian St. Luke's "question(ed) . . . (the) beginning (of a) thought disorder." *Tr*. 4/10/03: 37.

When he was asked about the possibility of a thought disorder, Mr. Eisner disagreed with this concept. Instead, he felt that Mr. Dunlap's behavior changed very quickly "from being very polite and nice and congenial to being very abusive, mean, and cruel." *Tr.* 4/10/03: 42.

Mr. Eisner portrayed Third Way as a very patient program that does not "kick many kids out." *Tr.* 4/10/03: 18. Mr. Eisner was not prepared to state that Defendant's problems were primarily caused by his parents.

Defendant's bad behavior included slapping a girl "which was totally justified by his parents." *Tr.* 4/10/03:23. A heated exchange ensued. Mr. Eisner believed that Carol and Jerry Dunlap's enabling and minimizing behavior was one cause of Defendant's escalating behavior. After this episode, Defendant was expelled from Third Way.

Mr. Eisner was familiar with individuals who had been diagnosed as psychotic or suffering from bipolar disorder. He stated that Defendant did not exhibit traits associated with either condition. He also believes that "bipolar diagnosis . . . (is) a very frequent(ly) over-used diagnosis." *Tr.* 4/10/03: 38. Mr. Eisner stated that, had he testified in 1996, his views would have been the same as those he offered during this post-conviction proceeding.

Mr. Eisner did not recall whether he was willing to cooperate with the trial defense team. However, he testified that he was "horrified" by the Chuck E. Cheese murders. *Tr.* 4/10/03: 35.

Mr. Eisner's opinions concerning mental health diagnoses would have required substantial explanation in 1996. He refers to conduct disorder as a DSM-IV Axis I diagnosis. While this is accurate, such a diagnosis is limited to adolescents. In a sense, testimony of this type could well have caused jurors more difficulty in 1996, when bipolar disorder was not as frequently diagnosed in adolescents as it now.

Mr. Eisner tried to answer questions in a straightforward manner and was equally responsive to both attorneys. His disdain for Mr. Dunlap would not have made him a favorable witness for the defense. The Court rejects any allegation by post-conviction

counsel that trial counsel were ineffective because they failed to call him in the penalty phase.

Trial counsel were not ineffective with respect to any aspect of the Third Way records. They worked to shield those records from the People by motion practice and preserved the record for appeal. The evidence adduced at this post-conviction hearing suggests that any testimony by Mr. Eisner would have been damaging to Defendant at trial.

Kellie Mann

Kellie Mann succeeded Linda Metsger as Mr. Dunlap's caseworker. She worked with him during his time at Third Way Center. Defendant had been making inappropriate and derogatory comments toward females at Overland High School. When Ms. Mann met with Defendant, he stated that he had been suspended from school because he had thrown trash on the floor. He felt that he needed more structure, and that his problem with females and other behavioral issues were due, in part, to problems in his family. His time in Presbyterian St. Luke's Hospital has been discussed previously.

Ms. Mann testified that Defendant was terminated from Third Way Center shortly after he slapped a female peer. He also had been agitating other youth at Third Way and had been extremely abusive to Third Way staff. Ms. Mann helped facilitate Defendant's transfer to Savio House.

Ms. Mann acknowledged that Defendant's problems could well have been triggered by dysfunction in his family. His bad behavior escalated immediately after he was informed, for the first time, that Jerry Dunlap was not his natural father.

ACDSS faced a problem as a result of the failed Third Way placement. Defendant had not taken any responsibility for his actions at Third Way. The Department determined that Defendant should be placed at Savio House, a residential child care facility for adolescent males. However, due to a lack of bed space, Defendant was first sent back to his family home.

Ms. Mann was involved with Defendant for only three months. She testified that Defendant's bad behavior began shortly after he learned that Jerry Dunlap was not his

biological father. Jerry and Carol Dunlap expressed dissatisfaction with Third Way Center's approach to therapy. Apparently, all of this was considered when ACDSS, in conjunction with probation officer Don Dickson, decided to place Defendant in Savio House, a facility from which he ultimately was discharged satisfactorily.

Linda Metsger

During Mr. Dunlap's involvement in the juvenile delinquency system, Linda Metsger was a supervisor with the Arapahoe County Department of Social Services ("ACDSS"). This Court had sentenced Defendant to mandatory out-of-home placement. She facilitated Defendant's placement at Third Way Center.

Ms. Metsger testified that Carol Dunlap's "dirty laundry", which was aired during pre-placement activities, included her statement that she had hated Adenia Dunlap from the date of conception. *Tr.* 10/24/02: 197-198. In addition, "everything [Jerry Dunlap] said about Nathan Dunlap was extremely negative, very angry." *Tr.* 10/24/02: 198. Neither Carol Dunlap nor Jerry Dunlap was supportive of the placement, even though they knew that out-of-home placement was mandatory. Carol Dunlap told Defendant that he did not need therapy; that he did not have any problems; and that "you need to put in your time and you need to get out of there." *Tr.* 10/24/02: 202. ACDSS notes also indicated that Jerry Dunlap had, at least on one occasion, assaulted Defendant at school and that he "admitted out-of-control to the point where he could kill someone." *Tr.* 10/24/02: 210.

When Defendant was sent from Third Way to Presbyterian St. Luke's Hospital, Kellie Mann wrote a report indicating that Defendant was "dissociate" and that he had two different persons in him. *Tr.* 10//24/02: 205. When Ms. Mann testified, she clarified her position. "At different times you will hear kids say that there is a good person inside me or an evil person and . . . it depends what they've done, what they say." *Tr.* 4/15/03: 25.

Upon his return to Third Way from Presbyterian St. Luke's, Defendant had "taken absolutely no responsibility for what has happened. He returned to Third Way but hadn't changed and needed to be moved." *Tr.* 4/15/03: 28.

Issues Concerning Financial Burdens, Judge Bieda's Failure to Appoint an Independent Expert and the Office of the State Public Defender's Initial Refusal to Promptly Compensate Defendant's Investigators

Defendant asserts that his trial attorneys "suffered considerable financial burdens" during the pendency of this matter. His brief contains a reference to Mr. Gayle's concern, expressed during the pretrial proceedings, that he could "go broke" because of the amount of work required by the case.

Mr. Gayle testified, albeit reluctantly and uncomfortably, on October 21, 2002. There was no discussion of this matter.

Mr. Lewis was asked about financial issues. He testified about the problems he encountered associated with Judge Bieda's refusal to authorize a confidential psychiatric examination of Defendant. In addition, the defense investigative team was, for a time, denied payment by the Public Defender's Office.

Mr. Lewis testified that neither he nor his team stopped any work or failed to turn any stones because payment was not guaranteed. "We felt that if we stopped working, that would be to the detriment of Mr. Dunlap, and felt that at the end of the day, one form or other, we'd eventually prevail on the fee issue." *Tr.* 12/16/03: 213.

During cross-examination, Mr. Lewis admitted that, even before he was appointed, he thought the prosecution probably would seek the death penalty. After his appointment, he immediately began to consider issues related to mitigation.

He began to assemble the team necessary to represent Mr. Dunlap capably. He added Steven Gayle as co-counsel and David Lane as an expert advisor. He was familiar with the work of H. Ellis Armistead as an investigator (and, before he began his private investigative work, as a member of the Lakewood, Colorado Police Department) and selected him as lead investigator.

Mr. Lewis also immediately sought to obtain adequate funding for his work. As previously noted, this soon became remarkably difficult. He and his team encountered resistance from Judge Bieda and the Public Defender's Office and, even after fees and costs were approved, payments often were substantially delayed. At one point, both

Messrs. Lewis and Armistead contemplated seeking leave to terminate their services. Mr. Lewis acknowledged that this problem became a distraction. *Tr.* 1/12/04: 166.

Mr. Lewis also testified that the funding problem became prejudicial. Judge Bieda denied certain payment requests unless the defense team provided extraordinary detail. Judge Bieda also denied some payment requests that contained an unusual level of detail. Mr. Lewis asked to meet with Judge Bieda to explain his need for payment. Judge Bieda refused to speak with Mr. Lewis.

Mr. Lewis and Mr. Peters ultimately did meet with Judge Bieda concerning the defense's request for funding for a confidential psychiatrist. After that meeting, Judge Bieda granted this request, with limitations. However, Judge Bieda denied Mr. Lewis' request for additional independent psychological testing before Mr. Dunlap was sent to the Colorado Mental Institute in Pueblo. He also denied Mr. Lewis' request for additional fees for the evaluation that he finally had approved. It was with this backdrop that Mr. Lewis felt he had no choice but to question Mr. Dunlap's competency.

When this Court assumed responsibility for this case (in January, 1995), it contacted the Colorado State Public Defender's Office in an effort to end this problem. It ceased to be an issue from that time forward.

Mr. Lewis stated that, "the length of time that it took to take this case to trial obviously gave under the circumstances more time to work on it and so it was beneficial in that regard." *Tr.* 1/14/04: 82. Aside from the concerns about which Mr. Lewis spoke, as reflected, *supra*, there were no other financial issues that affected any aspect of the defense team's investigation, preparation or performance.

The Court finds that the obstacles visited upon the defense team by Judge Bieda and the Colorado State Public Defender's Office were inappropriate, ill-informed and not in the interest of justice. The Court also finds that Messrs. Lewis and Gayle and Mr. Armistead and his employees continued to work diligently throughout the entire time they served on Mr. Dunlap's behalf.

The law does not support post-conviction counsel's claim for relief. In *Conklin v. Schofield*, 366 F.3d 1911 (11th Cir. 2004), the court, citing *Barnard v. Henderson*, 514

F.2d 744 (5th Cir. 1975), held, "Fundamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert of his choosing, bound by appropriate safeguards imposed by the Court, examine a piece of critical evidence whose nature is subject to varying expert opinion." 366 F.3d 1911, 1208-1209.

In *Ake v. Oklahoma*, the United States Supreme Court set forth three factors for the determination of whether a defendant is entitled to court-appointed expert assistance. There is no doubt that Mr. Lewis' request for the appointment satisfied the *Ake* standards.

Judge Bieda's failure to appoint the requested expert was error. However, it is subject to harmless error analysis. *Powell v. Collins*, 332 F.3d 376 (6th Cir. 2003).

Judge Bieda's error occurred very early in the proceedings. The uncontroverted evidence shows that Mr. Dunlap did receive expert assistance shortly after the denial. Further, trial counsel had ample time to obtain additional expert assistance to prepare for trial.

The Court concludes that this error did not have a substantial and injurious effect on the jury's verdict. The Court is not in grave doubt as to the harmlessness of the error. *California v. Roy*, 519 U.S. 2 (1996). The error did not relate to a structural defect in the constitution of the trial mechanism.

Mr. Lewis' testimony about his desire for a private, independent psychiatric examination is important. The Court does not ignore it. However, Drs. Fairbairn and Miller did have opportunities to observe Mr. Dunlap. Shortly before Defendant was taken to CMHIP, Mr. Lewis and Dr. Miller visited Defendant. If Mr. Dunlap had been more cooperative, and had not acted as he did, trial counsel's reluctant decision to question his competency, and the concomitant trip to CMHIP, might have been averted.[239]

The Court makes the same findings and conclusion with respect to the State Public Defender's refusal to make all payments as requested. Again, the record reveals that this issue was resolved early in 1995. The trial team continued to work for him throughout the relevant time frame.

Mr. Lewis testified that he chose not to pursue a mitigation case based on Defendant's mental health because of Mr. Dunlap's stay at CMHIP and the reports from the State Hospital. He did not testify that, if he could have had an independent, confidential psychiatric evaluation before Defendant went to CMHIP, he would have, or even might have, utilized Defendant's mental status in the mitigation case.

As noted elsewhere in this order, in 1994-1996, mental health professionals had not reached a consensus about bipolar condition in adolescents. The testimony in this case was retrospective. Among the defense experts, only Dr. Barkhorn had seen Defendant at the relevant time. She testified that, if she had been given the seclusion and restraints reports, she would have diagnosed bipolar disorder. Other witnesses stated that this diagnosis was, at best, difficult during the pretrial and trial periods.

Voluntariness of Defendant's Statements at CMHIP

Defendant also contends that the Court erred in finding Defendant's statements at the state hospital voluntary, albeit not admissible in the prosecution's cases in chief. The Court has reviewed the testimony and arguments of December, 1995, and its ruling of December 13, 1995. The Court concludes that its findings and conclusions remain valid.

Many of Defendant's statements were volunteered. As the Court noted, there was one problematic area when Dr. Johnson showed Defendant certain discovery materials. Nevertheless, the Court's findings of fact and conclusions of law were entered in accordance with *People v. Branch*, 805 P.2d 1075 (Colo. 1991). Subsequent case law does not mandate any change. *People v. Trujillo*, 49 P.3d 316 (Colo. 2002) is not directly on point here. However, the Court concludes that its reasoning is at least supporting by analogy.

In his motion, Defendant states that he was threatened because he chose to exercise his right to remain silent. In 1995, the Court relied on *People v. Galimanis*, 765 P.2d 644 (Colo. App. 1988). Subsequent appellate rulings have maintained that case's rubric. *See People v. Herrera*, 87 P.3d 240 (Colo. App. 2003); *People v. Tally*, 7 P.3d 172 (Colo. App. 1999).

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[239] Although the Court has concerns about Mr. James' credibility, his view that Defendant was acting out was supported by other testimony, including that of Arapahoe County Sheriff's deputies and staff at CMHIP.

His argument that §16-8-106(2) is unconstitutional has been addressed by appellate courts. *People v. Tally*, *Id.*; *People v. Herrera*, *Id.*

Mr. Dunlap also argues that he was denied his procedural due process right to be competent. This contention appears to be based on his assertion that his statements were coerced and obtained illegally.

The Court has addressed these issues, *supra*. However, Defendant also appears to be arguing that he was not competent. The Court cannot find any specific opinion from any of his experts to suggest that, at any time between February 14, 1994 and March, 1996, he was incompetent as defined in §16-8-102(3) CRS (effective during the relevant time frame of this case). Although Dr. Lewis has opined that Defendant suffered from bipolar condition, schizophrenia and catatonia, the latter opinion having been voiced also by Dr. Fairbairn, no expert testified that Mr. Dunlap was unable to understand the nature and course of the proceedings or of participating or assisting in his defense or cooperating with his attorneys.

The Court notes that Defendant was actively engaged with his attorneys during the pretrial hearings, at trial and throughout the post-conviction proceedings. This contention is without merit.

In this post-conviction proceeding, Defendant contends that Mr. Lewis was completely uninformed with respect to a major mental illness from which he suffered at least during the period 1994 forward. After the battle that defense counsel waged with respect to obtaining a private psychiatric evaluation, and after Mr. Dunlap was at the State Hospital, the defense was authorized to send Dr. Robert Fairbairn to Pueblo to interview Mr. Dunlap. Mr. Lewis found that Dr. Fairbairn's opinions were not helpful. Dr. Fairbairn felt that Mr. Dunlap was "50 percent . . . okay, 40 percent there's malingering, 10 percent there's a psychosis." *Tr.* 1/12/04:177.

Defendant's principal assertion that the trial team should have explored his mental status more completely is, in part, meritorious. After listening to days of testimony, from both defense and prosecution experts, the Court concludes that trial counsel could not have made an informed decision as to whether an expert should have been called without the benefit of a complete battery of recognized, standardized, and properly scored tests.

Mr. Lewis did receive the views of Drs. Fairbairn, Lee and Johnson. He should not have relied on these to the exclusion of experts retained by the defense.

As of January, 1995, Messrs. Lewis and Gayle were not refused anything they sought. Nevertheless, they chose not to have any mental health professional, other than Dr. Barkhorn, appointed to assist them. Mr. Lewis deliberately elected not to provide Dr. Barkhorn with the seclusion and restraint records from Defendant's stay at CMHIP. Although she now has provided an opinion that Mr. Dunlap suffers from a major mental illness (bipolar condition) more than 8 years after the trial, she has stated that her opinion would have been the same in 1995 through early 1996.

Neither Mr. Lewis nor any other member of the trial defense team spoke to Dr. Johnson about the prospect of his becoming a defense witness during the penalty phase. No member of the trial team spoke to Dr. Johnson to learn what he might have testified about had he been called by the prosecution during the penalty phase. No trial defense team member ever talked to Dr. Johnson about any individuals with whom he might have spoken to learn more about Defendant's or his family's mental health history. Dr. Johnson stated that the trial team did not contribute any information that he did not already know.

The Court's determination of the critical issue concerning the failure to present mental health evidence, allegedly constituting ineffective assistance of counsel, is difficult. The Court has found that Mr. Lewis and his colleagues began an mitigation investigation immediately after appointment. During the hearing, Mr. Cherner contended that the mere number of hours of work is not a relevant factor in resolving Mr. Dunlap's claim.

The Court finds that the trial defense team's failure to even investigate a mental health defense implicates *Strickland v. Washington*'s performance prong. Mr. Lewis has acknowledged that he is not a psychiatrist, psychologist or other mental health professional. Although he correctly prophesied that Mr. Dunlap's stay at CMHIP would

produce substantial unfavorable evidence, he made his decision without having the benefit of available professional guidance.[240]

The Court finds that the majority of the case law, including the progeny of *Strickland v. Washington*, *Williams v. Taylor* and *Wiggins v. Smith*, supports Defendant's proposition with respect to *Strickland v. Washington*'s performance prong. Each case must be judged on its own merits. Each case has its own unique facts.
Those facts control a court's decision concerning prejudice. The Court's decision with respect to prejudice also is difficult. A review of some recent cases will help put the Court's determination in context and may assist courts that review this order.

In *Allen v. Woodford*, 366 F.3d 823 (9th Cir. 2004), trial counsel did not start preparing a penalty phase case until one week before trial. Counsel was unable to obtain any family information or to "contextualize" the defendant in any appreciable way. Counsel was given a list of several witnesses by the defendant and a probation report and interviewed only four of them.

At the habeas hearing, the defendant presented several family members and friends who could have testified as mitigation witnesses. The 9th Circuit reviewed all of these circumstances and determined that counsel did not satisfy the *Strickland v. Washington* prejudice prong. However, the court also found that the potential mitigation would not have outweighed "the overwhelming evidence in aggravation." 366 F.3d 823, 846. Evidence that the defendant had been a hard worker; the impact of the defendant's execution on his children; the defendant's reputation as a good, friendly and generous person; and his overall pleasant nature would not have been sufficient to outweigh the aggravation.

The State had presented evidence that the defendant had a lengthy record of violent crime; he had "masterminded" eight aggravated robberies; had shot and seriously injured another person in a previous crime; he had a conviction for conspiracy to commit murder; and this case was motivated by his hatred of those who had "'ratted' him out and

an ability to reach beyond prison walls in seeking his revenge." 366 F.3d 823, 852. Mr. Allen also had killed witnesses against him.

Allen v. Woodford addresses a case where the only available mitigation was "humanization." More substantial mitigation was deemed not to outweigh aggravation in *Campbell v. Kincheloe,* 829 F.2d 1453 (9th Cir. 1987).

Marshall v. Hendricks, 313 F. Supp. 2d 423 (D. N.J. 2004) presents facts that, in a narrow way, parallel some of the circumstances in the instant case. The defendant and trial counsel had had a difficult working relationship. Counsel conducted no "targeted investigation into potentially mitigating factors and neglect[ed] to consult with his client." 313 F. Supp. 2d 423, 452.
Trial counsel could have presented evidence about the defendant's background, education, family life and community activities. Counsel also did not include a plea for mercy in the penalty phase closing argument:

> All I can say is this, that I hope when you individually consider the death penalty, that you're each able to reach whatever opinion you find in your own heart, and that whatever you feel is the just thing to do, we can live with it.' We cannot characterize this 'verbal shrug of the shoulders' as advocacy, much less find it reasonable representation in the context of a capital murder trial."
> 313 F. Supp. 2d 423, 454-455.[241]

The New Jersey court found that these circumstances established constitutional prejudice and vacated the death sentence.

In *Rompilla v. Horn*, 355 F.3d 233 (3rd Cir. 2004), the defendant had stated that his life was "normal." Rompilla's attorneys met with numerous family members and found nothing unusual. They determined that, "additional investigation would not have represented a wise allocation of limited resources." 355 F.3d 233, 257. Trial counsel pursued the defendant's background but did not find mitigating information. A doctor recommended that counsel consider whether the defendant, "while under the influence of

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[240] Mr. Lewis' admitted failure to have developed a "Plan B" (*Tr.* 1/12/04: 209), while not constitutionally ineffective in and of itself, is further evidence of his failure to satisfy *Strickland v. Washington*'s performance prong.

alcohol, can become prone to violent behavior although he himself strongly denies this." The doctor urged that the defendant be subjected to further evaluations before any definite conclusions were made. The court found that counsel's investigation was reasonable. The Circuit Court also found that this case was "critically different" than *Wiggins v. Smith*. The Court also found that the *Strickland* standard does not require counsel "to take all the steps that might have been pursued by the most resourceful defense attorneys with bountiful investigative support . . . . That is more than the Sixth Amendment demands." 355 F.3d 233, 258.

In *Lovitt v. Warden*, 585 S.E. 2d 801 (Va. 2003), mitigation evidence included the testimony of four sheriff's deputies. They testified that the defendant had behaved well in the jail and had participated in Bible study, Alcoholics Anonymous and voluntary work programs. Lovitt's stepsister told the jury that he had helped raise his younger siblings. The stepfather was alcoholic and denied significant access to the children. He had beaten the defendant with a telephone cord and had molested all of the children on a regular basis.

Lovitt had an antisocial personality disorder, was a polysubstance abuser. His stepfather had supplied marijuana to him.

However, Lovitt had prior felony convictions. His motive for the subject murder was to eliminate any witness to a robbery. He had several prior convictions, including attempted robbery, burglary, theft and drug offenses. Some of his mitigation evidence was deemed to be "double edge" (The Virginia Supreme Court adopted this term from *Wiggins v. Smith*.) There was no evidence of a psychiatrist or psychologist providing a mental health evaluation. Unlike Wiggins, Lovitt was not borderline retarded or otherwise then victim of diminished mental capacity. As a result, the Virginia Supreme Court found no constitutional prejudice.

In the instant case, Defendant had numerous prior delinquent acts, the facts of which (but not the convictions) were introduced at the penalty phase. There was available

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[241] Trial counsel also was deemed deficient because he had agreed to proceed to the penalty phase a mere two hours after the jury had convicted his client. The New Jersey federal court found that he should have sought a continuance to make more meaningful penalty phase preparations.

psychiatric evidence. As with *Lovitt* and *Wiggins*, a substantial amount of the total mental health evidence was "double edge."

In *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003), the Tenth Circuit found that Bryan had been advised about the potential use of mental health evidence in the penalty phase and rejected that proposal. Trial counsel ultimately made a strategic decision not present evidence of the defendant's organic brain syndrome and mental illness.

This decision was made, in part, because of a concern that the mental health evidence might support the prosecution's claim that the defendant was a continuing threat to society. In a vein similar to that of Mr. Lewis, trial counsel felt that the evidence would do more harm than good. Counsel chose to seek mercy. The Tenth Circuit found this to be a reasonable strategic decision.[242]

In *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003), neither of the defendant's two trial attorneys had prior capital litigation experience. They began their mitigation preparation after the guilty verdict had been received, leaving six days before the penalty phase began. There was no expert consultation.

If counsel had performed a suitable investigation, they would have learned that the defendant grew up in abject poverty, with family violence and instability, a poor education, and probable mental disorders. His father had criminal convictions; his mother abandoned the children on several occasions.

The defendant first displayed signs of his mental disorder as a teenager. Ultimately, mental health testing revealed psychological problems. Available school records and IQ tests were not reviewed. Trial counsel did not consult with a mental health professional. The actual mitigation case lasted about 45 minutes. The 6th Circuit found constitutional prejudice.

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[242] The *Bryan v. Mullin* court was closely divided. The dissent began, "Robert Leroy Bryan is a delusional, severely diabetic victim of organic brain damage. He had been charged with solicitation to commit murder several years prior to this crime, but was found incompetent and institutionalized . . . . Despite the compelling evidence in the record regarding Mr. Bryan's history of mental illness, and despite the fact that the sentencing jury never heard that evidence, the majority concludes that Mr. Bryan did not receive ineffective assistance of counsel at sentencing . . . . Mr. Bryan's counsel provided some of the most ineffective defense I have ever seen, amounting to a concession of guilt and relating none of the reams of compelling mitigating evidence." 335 F.3d 1207, 1225. As previously noted, decisions concerning ineffective assistance of counsel are not subject to bright line rules.

The instant case contains some of the factors in *Hamblin*. Mental health testing arguable revealed psychological problems. Not all records were carefully reviewed. However, preparation of the mitigation case began shortly after trial counsel were appointed. The mitigation case was far more extensive than was Hamblin's.

The Florida Supreme Court found no constitutional prejudice in *Reed v. State*, ___ So.2d ___, 2004 WL 792837 (Fla. 2004). The prosecution had a strong aggravation case within the guilt/innocence phase. Neither side presented any penalty phase evidence.

Defendant Reed "had rejected the use of testimony about his mental condition because he did not want his counsel to argue any circumstances that would imply guilt. . . [and had] rejected the use of testimony by family and friends because he did not want them involved in his trial." 2004 WL 792837, *16 (Fla. 2004). Counsel also [had] "explained to Reed prior to trial the risk of not preparing mitigation given the high likelihood he would be convicted and again discussed the matter with him immediately after the conviction." *Id*. The Florida Supreme Court found that the defendant had waived his right to present mitigation. It also concluded that the jury probably would not have been persuaded by this evidence and that the rebuttal evidence available to the State would have revealed the defendant's level of substance abuse, propensity of violence and otherwise undesirable personality.

That court also noted that counsel had either investigated "or was aware of Reed's background and mental health to an extent, as evidenced by the presentence investigation report, psychiatric report, and medical records presented to the trial court for penalty-phase consideration . . . . [E]ven if Reed's counsel had gone against his client's wishes and investigated further, the testimony that could have been presented was just as likely to have resulted in aggravation against rather than mitigation for Reed." 2004 WL 792837, *17 (Fla. 2004)

This is an important consideration in the instant case. Mr. Lewis clearly was aware of the nature of the CMHIP report. He had predicted the result well before it was delivered in the State Hospital report. Unlike *Reed*, a further psychiatric evaluation and the presentation of evidence by credible witnesses would have produced mitigation. However, the State was armed with substantial additional aggravation rebuttal evidence that would have brought damaging material to the jury's attention.

A different result occurred in *Soffar v. Dretke*, 368 F. 3d 441 (5th Cir. 2004). There, trial counsel failed to interview a surviving murder victim. His statement, made available through discovery, "contained significant exculpatory materials." 2004 WL 792837 *30. Counsel also was deemed substandard when he did not retain a ballistics expert. Expert testimony could have produced information that would have corroborated the surviving victim and demonstrate inconsistencies in the defendant's own statements.

At the habeas hearing, trial counsel did not advance any rational reason for failing to take these steps.

Since the State did not present "clear objective evidence" of the defendant's guilt, trial counsel was found to be substandard with respect to preparation of his guilt/innocence phase case.

Most recently, the Florida Supreme Court decided *Henyard v. State*, ___ So. 2d ___, 2004 WL 1171354 (Fla. 2004). A tactical decision not to call the defendant's stepmother because the defendant had stolen from her was found to be reasonable. The trial attorneys had some evidence that the stepmother had spanked or otherwise physically abused Henyard. Although post-conviction counsel claimed that the evidence should have been introduced, irrespective of "trial counsel's fears about negative repercussions", the court found that this did not constitute ineffective assistance.

Henyard also allegedly had attempted suicide on two occasions. The jail supervisor opined that the "attempts" were not genuine.

The Circuit Court found that this conduct could be construed as being manipulative. Trial counsel's decision not to introduce the evidence was deemed to be a reasonable tactical decision.

Henyard's trial counsel did present mental health evidence. During the post-conviction hearing, the evidence suggested that Henyard's mental health weaknesses were relatively mild. Once again, the court found no ineffective assistance of counsel.

In *Bishop v. State*, ___ So. 2d ___, 2004 WL 1471062 (Miss. 2004), the Mississippi Supreme Court noted the substantial distinction between Bishop's background and that of Wiggins. Although Wiggins had been starved, beaten and raped for most of his youth, he had no prior criminal history. "From the affidavits submitted by Bishop, his childhood was difficult and he had emotional problems, however, his

background does not rise to the same level as Wiggins's." *Id*.

As previously noted, no single factual scenario helps the Court resolve this issue. Having considered all of the pleadings, testimony, exhibits and post-trial submissions of the parties, the Court makes the follow findings with respect to Mr. Dunlap's mental health assertions.

The following witnesses presented substantially credible evidence: Drs. Poch, Barkhorn, Manguso, Johnson, Moser and Hansen. The Court finds that Dr. Opsahl's methodology renders his opinions to be of no more than minimal value. Dr Lewis is a partisan who conducted exhaustive and detailed examinations. However, she used those examinations to posit that Mr. Dunlap suffered from a substantial number of mental health problems. In the Court's view, the trial jury would have discounted virtually all of her opinions.

Dr. Grigsby's credibility in this case was eviscerated by cross-examination. Dr. Lazarus had minimal contact with Defendant. He relied on Ms. Kunce's notes. His testimony would have done little to damage the mitigation case proposed by post-conviction counsel.

Dr. Lee testified at the pre-trial hearing. Although he presented well, the evidence adduced at the Crim. P. 35(c) hearing would have damaged his effectiveness.

The CMHIP clinicians were credible and posed great risks to the proposed mental health defense. Ms. Salas initially believed Defendant's actions were not volitional. After she had an opportunity to observe him for a greater period of time, she changed her opinion. As previously noted, she appeared to be a forthright and believable witness.

Ms. Lopez was another believable witness. As a part of her work on the ward at CMHIP, she cleaned Defendant after episodes of incontinence. Her testimony that Defendant did not have scars on his buttocks would have been very damaging to post-conviction counsel's theory that Defendant suffered far worse physical abuse than that about which the jury heard. She freely supported the defense's contention that psychotic patients smear feces when they are incontinent. However, Defendant's statement, "If you want to clean my ass, I'll let you" and his blaming staff for his incontinence would have

been very damaging. As noted, she was a poised witness. Ms. Salaz would have presented very favorably to the jury.

Ms. Snook was a thoughtful witness. The Court cannot know whether her experience since the trial assisted her appearance and demeanor. She would not have had the psychiatric nurse experience to offer much of the testimony that she offered at the post-conviction hearing. Her factual information would have been substantially the same in 1996. The Court concludes that her eyewitness observations, including Defendant's admissions that he was "playing games" would have significantly assisted the prosecution in its presentation of rebuttal testimony.

Most of the Arapahoe County Sheriff's deputies all testified in a competent and non-partisan manner. Ms. Stuart presented as a good observer of people in a very difficult environment. Once again, she would have helped the prosecution in rebutting any mental health mitigation.

Although Carol Dunlap testified during the post-conviction hearing, the Court finds that she would not have testified in the same manner at the penalty phase. (In fact, she did not.) During the period 1993-1996, she was uncooperative with the defense team. She was far more interested in any notoriety she could glean from her son's arrest than in helping him and his defense team prepare a mitigation case. Her refusal to execute releases and her retraction of the one release she signed indicate that she had no desire to help Defendant.

Adenia Ashlock was a good witness for the defense. Although she was more expansive in the post-conviction hearing than she was at trial, she provided as much help to the trial team as could have been expected in 1996. As with other trial witnesses, six years had passed between her trial testimony and her testimony in this hearing. The Court infers that she has matured and become increasingly more confident and mature.

Defendant's claims concerning the Dunlap nuclear family are without merit.[243]

The Court also notes that the professionals held different views with respect to clinicians' ability to diagnose bipolar disorder in adolescents in the early to mid 1990s. If Mr. Dunlap were to have presented a persuasive mental health mitigation case, he would have had to focus on a single major mental illness. Thus, the type of testimony that Dr. Lewis offered probably would not have led to a different sentencing result.

Post-conviction counsel have presented evidence that bipolar condition is heritable and that his family has a number of individuals who have suffered from a major mental illness. The Court finds that trial counsel would have had great difficulty in calling those people. The evidence adduced between 2002 and 2004 indicates that Carol Dunlap was contacting family members and urging them not to assist the defense team. The Court cannot be confident that witnesses such as Garnett Jones would have appeared if subpoenaed.

In addition, at least some of the experts stated that bipolar condition can skip generations. The Court also notes that, with the exception of the period February through June, 1994, Defendant presented rationally in a lengthy, complicated and stressful proceeding.[244] In fact, with the exception of his angry outburst at the May, 1996 sentencing hearing, Mr. Dunlap always appeared to be attentive and engaged with his attorneys. Each time the Court inquired of him (primarily to obtain waivers of his appearance for activities as set forth in the record), he responded coherently and respectfully.

[243] Garnett Jones testified at the post-conviction hearing. He stated that he suffers from bipolar disorder. He and Carol Dunlap have the same father. He stated that some his symptoms are sleeplessness and an inability to eat, experiencing extreme sexual desires, violence and explosiveness. He also testified that his change in mood occurs suddenly: "Before I know it I've gone from being fine to totally not fine . . . . It's something that runs rampantly through the family that none of us have any control over and it's not a positive thing, so it's more of a curse than it is a blessing." *Tr.* 10/22/02: 12-13. He also stated that a substantial number of other family members have similar experiences. While Mr. Jones may or may not actually suffer from bipolar disorder or any other problem, he was an interesting but not persuasive witness. Similarly, Marion Winfrey was a pleasant witness. She discussed some of Carol Dunlap's mental health issues. But she offered nothing that would have cause the jury to believe that Defendant actually had a similar condition in 1996.

[244] There was evidence that Defendant suffered another incident, similar to that which occurred in 1994, in 1997 (at the time of Gary Davis' execution). Although the defense contends that this is corroborative evidence, it would not have been available to the 1996 jury.

Trial counsel was not successful in obtaining any meaningful assistance from Carol Dunlap. Post-conviction counsel suggest that, if the trial team had used a different approach with her, Carol Dunlap could have been a useful witness.

The testimony proves otherwise. For example, she stated that Jerry Dunlap, the man who sexually assaulted Adenia Dunlap/Ashlock and who allegedly was physically abusive to Defendant, was "an outstanding father" (to Nathan Dunlap). Other evidence revealed that Ms. Dunlap found a bizarre form of pleasure in the notoriety of this case.

During the post-conviction hearing, Carol Dunlap testified that Defendant had been born with his umbilical cord wrapped around his neck and that he was "blue." She described events where Defendant suffered various forms of head trauma and attendant loss of consciousness.

Dr. Lee Thompson, admitted as an expert in pediatrics, testified on April 16, 2003. He saw Defendant in the 1980s and performed a record review for this hearing. Although he does not specialize in psychiatric issues, he has experience in dealing with patients who manifest what might be a serious mental illness.

Dr. Thompson found no indication that Defendant had suffered any serious head injury, trauma or loss of consciousness. And although Carol Dunlap testified that Defendant had suffered serious beatings at the hands of Jerry Dunlap (the "outstanding father"), to the extent that scars remained. Dr. Thompson performed a standard physical examination and found no scarring consistent with child abuse or anything else. In fact, he found no scars at all. On cross-examination, he acknowledged that he did not closely examine Defendant's buttocks.[245]

He also noted no signs of depression, hypomania or depression. However, when Dr. Thompson was advised about Carol Dunlap's bipolar condition, he made a referral to Dr. Jeremy Lazarus. Dr. Thompson testified that he was not aware about any follow-up.

He also was unaware of an open case with the Arapahoe County Department of Social Services. If he had been aware of this, he would have tried to obtain the Department's records. He also was unaware of the Presbyterian St. Luke's hospitalization. He did not know of the alleged suicide attempts.

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[245] Since Defendant bears the burden of proof in this hearing, the Court notes that Defendant did not present any photographs to support his contention of scars on his buttocks.

Although Carol Dunlap talked about her mental health issues to such people as Barry Levene, she never appeared to suffer mood swings. He also described incidents of her being able to manipulate people, especially at work. *Tr.* 10/22/03: 220.

Trial counsel did everything rationally possible to work with Carol Dunlap. For whatever reason, she would not cooperate with them. She attempted to negatively influence Garland and Adenia Dunlap and other extended family members. *Tr.* 4/23/03: 47, 186. Mr. Armistead stated that "as far as a family member, she was about the worst . . . Ms. Dunlap is Number 1 as far as being the worst to deal with . . . . She was just very difficult to deal with." *Tr.* 4/17/03: 186.

If trial counsel had called the best witnesses presented by Defendant in the post-conviction hearing (Dr. Poch; Dr. Barkhorn, if fully informed), they would have been limited in their ability to establish that Defendant suffered from a bipolar condition. Much has been learned about bipolar in adolescents since 1996.

If the trial team had limited its presentation to bipolar condition, the jury would not have faced the large number of diagnoses that were posited during the hearing. As previously noted, the experts would have had less information about adolescent bipolar condition was available in 1996.

The case law does not discuss the specific scenario of this case.[246] *Williams v. Taylor* and *Wiggins v. Smith* hold that capital defense counsel have a duty to thoroughly investigate all available mitigation evidence and then make an informed strategic decision. The Court has found that Mr. Lewis did not make an informed strategic decision because he did not obtain an independent, private mental health evaluation before deciding that he would never consider advancing mitigation evidence based on Defendant's mental status.

Allegations Concerning the Direct Appeal and Mr. Dunlap's Appellate Counsel

Defendant has asserted several issues concerning his direct appeal and the performance of appellate counsel. He alleges that counsel was deficient because she failed to raise issues concerning the voir dire and "the court's excusal of death scrupled

[246] Defense counsel has persuasively argued that the Court cannot make a decision by looking to the specific facts of the case law. The Court accepts that proposition but finds that, with respect to the overall application of *Strickland v. Washington* and Defendant's claim of the effect of cumulative error, the Court must consider the specific facts of this case and apply them to the case law. A level of comparison of facts is unavoidable and inevitable.

jurors." *M*: 220. He asserts that appellate counsel was ineffective for failing to raise issues concerning challenges to jurors who were selected, especially Mr. Craddock. He also argues that guilt/innocence phase issues should have been part of the direct appeal. Finally, he contends that "Argument I" "is incomprehensible . . . is over 100 pages long, most of which does not appear to have anything to do with the issue supposedly raised." *M*: 221. Mr. Dunlap also argues that appellate counsel attempted to enter into "a *sub silentio* deal with the Colorado Supreme Court, by providing the court with a means of interpreting C.R.S. §16-11-103 in a manner entirely unfavorable to defendant, in exchange for reversing Mr. Dunlap's death sentence . . . (and) hop[ing] that a particular justice of the U.S. Supreme Court, Justice Scalia, would notice the issue . . . and adopt it as consistent with a position adopted by that justice", *Id.* was constitutionally ineffective.

Barbara Blackman was Defendant's lead appellate counsel for his direct appeal. The Court had originally appointed her to perfect an appeal in the Burger King case. After the conviction in the instant case, the Court appointed her to pursue appellate issues therein.

Prior to her appointment, Ms. Blackman had had extensive appellate experience. She had worked in the Colorado State Public Defender's Office from 1980 through 1989, serving as Chief Appellate Deputy from December, 1983 through December, 1989. She also had extensive experience in private practice, including a period of more than five years as Mr. Cherner's partner.

After she finished the bulk of her work in this case, she has worked in the Indianapolis, Indiana and Durham, North Carolina Public Defender's offices since 1998. In those offices, she has worked on capital appeals.

Ms. Blackman was admitted as an expert in appellate practice, death penalty appeals and ineffective assistance of counsel.

When Ms. Blackman began to work on this case, she contacted several experienced criminal appellate attorneys seeking co-counsel. All of them declined to join her. Finally, Seth Benezra agreed to work with her. She asked him to review the record from the penalty phase and to write the argument concerning its closing argument. Mr. Benezra's law partners served as informal "law clerks."

She reviewed the brief in the direct appeal of *People v. Robert Harlan*[247] and found it to be "of limited utility."[248] That brief contained a paragraph on one issue that did not cite authority.

Ms. Blackman worked on this case for 1,600 hours. She chose to pursue those issues with the greatest chance of success, citing *Jones v. Barnes*, 463 U.S. 745 (1983). There, the Supreme Court cited R. Stern, Appellate Practice in the United States 266 (1981): "Most cases present only one, two, or three significant questions . . . . Usually, . . . if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones." 463 U.S. 745, 752.[249]

Ms. Blackman also was aware of the Colorado Supreme Court's ruling in *People v. Rodriguez*, 914 P.2d 303 (Colo. 1996). In that case, Justice Erickson expressed disdain for an appeal that re-addressed previously resolved issues. In addition, the Court was distressed about a defendant who "exploits this statutory right (of appeal) through his exceedingly long and disjointed presentation of his case to both this court and the district court." 914 P.2d 230, 253. Nevertheless, she filed a 249 page brief.[250]

Her brief's Argument No. 1, which Ms. Blackman described as containing a myriad of claims, attacked the death sentences as being in violation of the cruel and unusual punishment and due process of law provisions of the 8th and 14th Amendments to the United States Constitutions as well as Article II, §§16, 20, 23 and 25 of the Colorado Constitution. Ms. Blackman appropriately attacked this Court's rulings concerning *People v. Saathoff*, 790 P.2d 804 (Colo. 1990). She argued that *Saathoff* did not authorize

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[247] In fact, the Colorado State Public Defender's Office visited another problem on Mr. Dunlap's defense team. Mr. Benezra testified that it was very difficult to obtain the *Harlan* brief. The Public Defender's office felt it would constitute a conflict of interest to assist the Dunlap appellate team. And the Colorado Supreme Court did not permit copying because the *Harlan* case involved sexual assault.

[248] The Court has not received a transcript of the hearing of April 29, 2003. Therefore, no page citations are provided. Any materials in quotations are Ms. Blackman's statements as contained in the Court's notes.

[249] Ms. Blackman met with Defendant at CSP on more than ten occasions. Mr. Dunlap had wanted Ms. Blackman to raise guilt/innocence phase issues in the direct appeal. She felt that issues of constitutional dimension that were not raised on direct appeal were not waived, citing *People v. Hubbard*, 184 Colo. 243, 519 P.2d 945 (1974). *People v. Rodriguez*, *Id*., did not eviscerate this concept. In fact, the *Rodriguez* Court recognized that death is qualitatively different than any other punishment and that there must be reliability in its implementation. Thus, the Supreme Court granted defendant Rodriguez greater latitude than it would to other defendants. This Court followed that procedure in its handling of this Crim. P. 35(c) proceeding.

the Court to permit the form of rebuttal to mitigators that it had authorized.[251]

Ms. Blackman opined that the Court's *Saathoff* rulings constituted Defendant's strongest appellate issue. Shortly after sentencing, she met with Messrs. Lewis and Gayle. They shared her view.

She recognized that Colorado precedent was "somewhat unique." Post-conviction counsel can raise issues which were not raised on direct appeal. She studied the composition of the Colorado Supreme Court, noted its newer members and crafted issues that might appeal to them. At the same time, Ms. Blackman wrote her brief for "multiple audiences." She made certain "strict construction" arguments, especially with respect to the weighing/non-weighing statute, in an effort to approach a United States Supreme Court that had a strong penchant for strict construction.[252]

She acknowledged being "extremely disturbed" that trial counsel failed to exhaust all peremptory challenges, especially since the mitigation case was "limited." She did not pursue issues concerning polygraph evidence because she had done so in the Burger King appeal.

Seth Benezra testified that his role was limited to work on issues of alleged prosecutorial misconduct in closing argument and serving "more as a sounding board" for Ms. Blackman. *Tr*. 4/22/03: 73. He assisted her with her preparation of Argument No. 1. However, Mr. Benezra stated that the "lead issue" was almost exclusively Ms. Blackman's work.[253]

Ms. Blackman and Mr. Benezra jointly chose not to raise guilt/innocence phase issues. Although Mr. Cherner suggested that this constituted waiver, Ms. Blackman's

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[250] The entire Colorado Supreme Court record is contained in Defendant's Exhibit PC-H.

[251] John Blume, one of Defendant's experts, testified that he had read the brief and "truthfully I'm not sure that I really understand it." *Tr*. 11/4/02: 184. He felt that there should have been a "fact specific" approach to the issue of non-statutory aggravation. *Tr*. 11/4/02: 187. In fact, Ms. Blackman was "fact specific." The Supreme Court chose to refine its position as initially set out in *Saathoff*. Ms. Blackman's reference to the United States Supreme Court's ruling in *Ring v. Arizona*, 536 U.S. 584 (2002) that overruled *Walton v. Arizona*, 497 U.S. 649 (1990), demonstrated her appreciation of the possibility of change. She thus appropriately sought a finding of an 8th Amendment violation.

[252] Ms. Blackman acknowledged that her brief addressed a non-weighing statute and that her oral argument addressed non-weighing and weighing issues. Once again, she attempted to keep as many options open for Defendant as possible without violating her *Jones v. Barnes* principles.

[253] Mr. Benezra recognized that Issue No. 1 was "very complicated" and "a hard issue to write." *Tr*. 4/22/03: 94.

testimony, and the breadth of this hearing, render this allegation, in the context of guilt/innocence phase issues, unpersuasive.

Defendant cites *Evitts v. Lucey*, 469 U.S. 387 (1985) and *Anders v. California*, 386 U.S. 738 (1967) in support of the general proposition that Mr. Dunlap has the right to effective appellate counsel on direct appeal. However, *Strickland v. Washington*, 466 U.S. 668 (1984) provides the basic law with respect to claims of ineffective assistance of appellate counsel, even as it does with respect to trial counsel.

These principles do not mean "that a convicted defendant can obtain an easy reversal of his or her conviction based upon the allegedly deficient performance of counsel." *U.S. ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1015 (7th Cir. 1988). A defendant claiming ineffective assistance of appellate counsel must "identifying acts or omissions of counsel that could not be the result of professional judgment." *Id*.
As in any consideration of ineffective assistance of counsel claims, the Court must accord appellate counsel great deference and presume that her performance was constitutionally effective. *Scoggin v. Kaiser*, 186 F.3d 1203 (10th Cir. 1999). The Court cannot insert its own views, or the hindsight views of others, into the *Strickland v. Washington* equation. The review is a mixed question of law and fact.

In addition, when considering appellate counsel's performance, the Court must focus on not what is prudent and appropriate but only what is constitutionally compelled. With respect to the prejudice prong, Defendant must show that, but for counsel's alleged professional errors, but only what is constitutionally compelled. *Smallwood v. Gibson*, 191 F.3d 1257 (10th Cir. 1999). However, since death is a qualitatively different punishment than others, the effort which is constitutionally compelled is more substantial than that required in other cases.

The Court first finds that Ms. Blackman correctly seized on one of the most significant and controversial pretrial rulings in this case. The Court's interpretation of *Saathoff* and its granting of the People's request to use evidence to rebut statutory mitigators certainly was the fodder of effective appellate advocacy. The Colorado

Supreme Court's detailed review of this topic and its application of *Stringer v. Black*, 502 U.S. 222 (1992) to its decisions in *People v. Tenneson*, 788 P.2d 786 (Colo. 1990) and *Saathoff*, satisfies the Court that the direct appeal's Argument No. 1 was properly raised and prioritized.

Defendant's first two arguments are almost circular when considered in the context of his claim that trial counsel were ineffective because they failed to exhaust all peremptory challenges. Nevertheless, the Court finds that the current proceedings have given Defendant all the process to which he is due with respect to jury selection and voir dire issues.[254] Further, post-conviction counsel have not shown that Defendant has lost any opportunity to obtain review by the Colorado Supreme Court. He also has failed to establish that, as a result of Ms. Blackman's decisions, he cannot obtain a Certificate of Appealability in any prospective federal habeas corpus.

Defendant also complains about Ms. Blackman's failure to appeal any guilt/innocence phase issues. He states that "several non-frivolous issues were presented by the record." *M*: 221.

If effective appellate advocacy calls for raising every "non-frivolous" issue, Defendant's claim could be deemed to be meritorious. Defendant arguably could have asked the Supreme Court to review some of the jury instructions, the State's opening statement and closing argument and certain search and seizure issues.

The Court finds that these claims do not satisfy *Strickland v. Washington*'s performance prong for the reasons stated *supra*. Even if Ms. Blackman's decision not to pursue these issues fell beneath the standard of care, Defendant cannot establish the *Strickland* prejudice prong. *See R. Stein*, *Appellate Practice in the United States*, *supra*.

During the hearing, numerous witnesses were asked about the strength of the People's guilt/innocence phase evidence. The tenor of those questions demonstrates post-conviction counsel's appreciation of the case on the merits. The Colorado Supreme Court has found that, "The evidence overwhelmingly supports Dunlap's guilt. This is neither a

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[254] The People's brief provides no assistance to the Court. "Dunlap's appellate counsel did not raise any issues regarding the excusal of certain jurors because there were no errors committed by the trial court as explained previously. Thus, there is no ineffective assistance of appellate counsel claim." *RBI*: 189. The People make a similar comment with respect to Defendant's claim about jurors who were not excused.

case in which there was a close issue concerning the identity of the murderer, nor a case where new evidence could someday reveal that the wrong person had been charged and convicted." *People v.* Dunlap, 975 P.2d 723, 765 (Colo. 1999).[255]

The Supreme Court had the benefit of the complete transcript of the trial. The parties accurately set forth the evidence in their briefs. Defendant would have gained nothing by attempting to obtain review of any aspect of the trial on the merits.

The final part of Defendant's claim relates to "Argument I." Here, the People's responsive brief is on point. "It is clear that appellate defense counsel was primarily interested in trying to overturn the death penalty verdict . . . . Appellate counsel's argument number one dealt with challenging Colorado's death penalty statute. However, it not only attacks the statute but also raises a number of sub-issues related to the way this case was tried at the penalty phase." *RBI*: 190.

The Court has reviewed Defendant's opening brief in the Supreme Court and finds it to be well written. Ms. Blackman begins with a review of the proceedings that gave rise to the Court's *Saathoff*-based ruling. She noted that the State announced its intention to prove that "Defendant constituted a future danger to society." *Brief*: 37.

The brief then reviewed the later history of proceedings leading up to the trial and discussed the testimony of the State's penalty phase witnesses in appropriate detail. The penalty phase closing arguments were discussed and put into context.

Ms. Blackman then wrote about the legislative history of Colorado's capital sentencing statute. "The sponsor/supporters of the bill repeatedly told the House and Senate Committees that, with the exception of binding jury verdicts, the proposal was identical to Florida's capital statute." *Brief*: 63. A scholarly discussion about post-*Furman v. Georgia*, 408 U.S. 238 (1972) death eligibility and death selection statutes ensued. This led to Ms. Blackman's analysis of the weighing and non-weighing statutes that were enacted in the post-*Furman* years. "Whether a statute is weighing or non-weighing is thus not a question of 'semantics,' but a question of 'critical importance,' because it dictates how error can occur in a capital trial and what remedies can be utilized

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[255] The opening brief concedes Defendant's guilt at page 29. The Court cannot fault this approach, even though the Supreme Court is required to perform an independent review of all death sentences.

when error does occur." *Appellate Opening Brief*: 76. "Whether a state opts for a weighing or non-weighing system, it is free, within only the broadest of federal constitutional limitations, to choose whatever selection or eligibility factors it wishes." *Brief*: 78, *citing California v. Ramos*, 463 U.S. 992 (1983).

Ms. Blackman followed with a cogent discussion about a weighing state, one that "maximizes the possibility of mercy and accords maximum value to the choices made by a defendant and his counsel by prohibiting the state from introducing 'objectively relevant' evidence about the character of the defendant or the circumstances of the offense which fall outside of statutory aggravation . . . . A weighing state recognizes that mitigating factors should exist solely for the defendant's benefit, and thus accords to only the defendant the right to inject the concept of mitigation." *Brief*: 83-84.

Ms. Blackman then describes Florida's statute as "a classic weighing scheme", *Brief*: 86, and forcefully argued that this Court's interpretation of *Saathoff* led to improper introduction of irrelevant and inflammatory evidence such as Defendant's "By Any Means Necessary" smoking gun tattoo. She presented "the very real risk" that the use of such "irrelevant" evidence would effectively become ersatz statutory aggravation. *Brief*: 92. She cited *Castro v. State*, 547 So. 2d 111 (Fla. 1989) to argue that a prosecutor could not introduce evidence of prior criminal activity "in such a way as to inflame the passions of the jury." *Brief*: 98.

This led to Ms. Blackman's core argument: "A weighing state permits a defendant to waive mitigation precisely because he has determined that mitigation cannot be proven . . . . (*Brief*: 106) [and] the Florida Supreme Court [has] interpreted its statute and weighing scheme as prohibiting nonstatutory aggravation, i.e. evidence presented by the state in an effort to influence the verdict, which is neither probative of statutory aggravation nor responsive to mitigation advanced by the defendant. *Brief*: 109. Thus, when the drafters of the Colorado death penalty statute sought to permit the admission of all possible relevant information about a capital defendant, the result was an unconstitutional weighing statute, both on its face and as applied. *Brief*: 112.

The Court's review of Defendant's brief leads it to conclude that Argument I was comprehensive and clear. While it is detailed and comprehensive, it is understandable by

appellate judges or justices as well as their law clerks. Defendant has not established that Ms. Blackman's performance was constitutionally ineffective.

Defendant did not develop his theory that Ms. Blackman attempted to impress Justice Scalia with her argument and that this effort worked to his detriment. Ms. Blackman did write her brief for at least two audiences: the Colorado Supreme Court and the United States Supreme Court. The Court finds that this is appropriate and effective appellate advocacy in death penalty litigation.

The Court finds that Defendant's arguments concerning the direct appeal and his appellate counsel are baseless.

Prejudice Analysis

The Court now turns to the question of whether Mr. Lewis' decision caused constitutional prejudice. "[T]o establish prejudice, a 'defendant 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.'" *Wiggins v.* Smith, 123 S. Ct. 2527, 2542 (U.S. 2003). In this regard, "if there is a reasonable probability that at least one juror would have struck a different balance", 123 S. Ct. 2527, 2542, Defendant will have established prejudice.

The Court concludes that trial counsel's substandard performance, with respect to failing to investigate and failing to object have not caused constitutional prejudice. Even if the Court were to find that the penalty phase closing argument met the *Strickland v. Washington* performance prong, its determination would be the same.

The Court makes these determinations because the State's aggravating evidence, was substantial and overwhelming. Specifically, the Court notes:

1. The nature of the crime itself was extraordinary. "[T]he horror of the crime itself that looms large . . . . Dunlap killed four people and seriously wounded a fifth. He did it without provocation or cause, but rather with a brutal contempt for human life." *People v. Dunlap*, 975 P.2d 723, 765 (Colo. 1999).

2. The State presented evidence of 28 statutory aggravating factors. Even if the Supreme Court ultimately determines that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) applies retroactively, such that the Burger King conviction for a Class 2 felony should not have been admitted in the penalty phase, the 27 remaining aggravating factors are more than sufficient to support the jury's sentencing verdict. The 5(a) aggravator was significant. However, Defendant's continuing and increasingly violent criminal activities provided evidence of future dangerousness and were relevant to his character, background and history.

3. Mr. Dunlap's preparation for, execution of and actions after the killings were well thought-out:

   (a) Defendant played basketball with some friends several hours before he went to Chuck E Cheese. He told the other players that he was intent on murder;

   (b) Immediately after the murders, he heard an early media account and told a friend that he was the perpetrator;

   (c) He effectively disposed of the murder weapon; it never was recovered.

   (d) He arranged for another person to wash the White Sox jacket which he had worn during the murders;

   (e) He took the money to Ms. Lechman's. After engaging in sexual intercourse, he persuaded her to help him hide the money;

   (f) He had placed a different gun in a gym bag and had placed it either before the murders or shortly thereafter. He led the Aurora Police Department to the duffel bag and engaged in game-playing with them.

4. While at CMHIP, he admitted that he was in control of himself. He told Ms. Snook he had been "playing games" with staff and was "doing this on purpose. He told staff that he had killed and could kill again;

5. Defendant had no remorse for his crimes or for his victims. He repeatedly admitted his culpability and was boastful about the murders. His application of the smoking gun tattoo encapsulated his true feelings and attitude;

6. There prospects that Defendant manipulated all of his actions at CMHIP are at least equal to the chances that he was suffering from a bipolar episode;[256]

7. Carol Dunlap's failure to assist her son redounded to Defendant's detriment. Mr. Armistead's opinions about her have record support;

8. Mr. Dunlap's adolescence was punctuated by ever-escalating crime. If the defense had presented the CSP video (and if the prosecution had presented the Limon video), a juror who would be inclined to vote for a life sentence would have been left with the hope that DOC would have confined Defendant at CSP for the balance of his life. Mr. Burbank's testimony provided no such assurances to the Court. He presented as a credible person with great integrity. The Court finds he would have given the same testimony at trial. The jury almost certainly would have had a similar impression of his credibility.

9. Mr. Dunlap attempted to escape from the Arapahoe County Jail. He also asked Mr. Kirkpatrick to perjure himself with respect to their relationship.

Post-conviction counsel have presented the printed reports, exhibits, treatises and expert witnesses. All of the defense experts, save Dr. Barkhorn, interviewed Defendant for the first time many years after the trial. Counsel's approach was completely appropriate and was in keeping with the many other post-conviction cases which the Court has read in preparation for the hearing and its writing of this order.

Post-conviction counsel raise credible claims about trial counsel's strategy and decisions. The Court has carefully reviewed each of those claims and has found that two meet the requirements of *Strickland v. Washington*'s performance prong.

The Court finds that, even if Mr. Lewis had presented Dr. Barkhorn and Dr. Poch, or witnesses with similar qualifications and credibility, there is no reasonably probability that the result of the penalty phase would have been different. Similarly, Mr. Lewis'

[256] Although Defendant suffered a similar incident at CSP at the time of Gary Davis' execution, the jury never would have heard this information. The jury would have had to weigh the available mental health evidence (which would have been weaker than that presented at the hearing because of the recent research into adolescent bipolar condition) against the substantial materials available to the prosecution.

failure to object to Mr. Peters' inappropriate comment would not have brought about a different sentence.

Even if the Court had concluded that Mr. Lewis' closing argument was beneath the standard of care, and if the Court had added this consideration to the mix, the result would not have been different. Mr. Lewis could have implored the jury to show mercy; he could have focused on matters other than the nature of juveniles with whom the jurors probably were not acquainted; and he could have used the proposed mental health evidence to argue that Mr. Dunlap suffered from one or more major mental illnesses. Under the totality of the circumstances, there is no reasonable probability that even one juror would have been swayed from his or her decision.

None of Mr. Lewis' decisions were so ill-chosen that they permeated the entire trial (both guilt/innocence and penalty phases) with obvious unfairness. *Neill v. Gibson*, 278 F.3d 1044 (10th Cir. 2001).

***Blakely v. Washington* Issues**

As the Court was engaged in its final proofreading of this order, defense counsel filed their Supplemental Authority and Claims (DEF-PC131). The People filed their response (DA-PC81).

The Court is aware that defense counsel have sought a limited remand from the Court of Appeals in the Burger King matter with respect to *Blakely v. Washington*, ___ U.S. ___, 2004 WL1402697.

The Court has reviewed *Blakely* carefully because of its administrative responsibilities. Given the posture of the Burger King case's appeal, the Court will not enter any specific findings at this time. However, any future argument also would require a consideration of *Schriro v. Summerlin*, ___ U.S. ___, 2004 WL 1402732.

Cumulative Error

Defendant also contends that the cumulative effect of trial counsel's error constitutes ineffective assistance of counsel. The case law explains this concept.

> In some cases, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant. *See United States v. Green,* 648 F.2d F. 2d 587 (9thCir. 1981). Where, as here, there are a number of errors at trial, "a balkanized, issue-

> by-issue harmless error review" is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. *United States v. Wallace,* 848 F.2d 1464, 1476 (9th Cir.1988). In those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors. *U.S. v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996).[257]

Errors that are separately harmless may, when considered together constitute cumulative error. *State v. Madrigal*, 721 N.E. 2d 252 (Ohio 2000). "The test is whether the totality of the circumstances substantially prejudiced the defendant and denied the defendant a fair trial." *State v. Parker*, 89 P.3d 622.

"A new trial may be ordered when the aggregate effect of numerous formal irregularities denied the defendant a fair trial. However . . . when the individual errors do not show an absence of a fair trial, reversal for cumulative error is not justified." *People v. Phillips*, ___ P.3d ___, 2004 WL 743704 *9 (Colo. App. 2004).

The Court finds that the two areas ineffective assistance of counsel identified herein, when considered cumulatively, did not substantially prejudice Mr. Dunlap and did not deny him a fair trial.

Although the Court persists in its finding that Mr. Lewis' closing argument did not fall beneath the standard of care, the Court concludes that, if the argument were deemed to be substandard, its addition to the other performance prong deficiencies still would not cause constitutional prejudice or produce an unfair trial.

Mr. Dunlap may consider the Court's ruling as indicating that nothing could have brought about a different sentence. Although the circumstances facing the trial team created this situation, it did not have to be so.

Mr. Dunlap could have listened to his attorneys and followed their advice. He could have stayed silent and not have admitted his crimes to so many people.

He had the capacity to cooperate at CMHIP. If he had done so, he could have been released much sooner than four months after his admission, most probably with the same finding of competency.

The trial team then could have proceeded with an evaluation for mental health issues. If there had been some seclusion and restraint records, Dr. Barkhorn might

have been able to her diagnosis of bipolar condition. Her testimony, presented without the backdrop of all of Mr. Dunlap's distorted behavior, could have been valuable at the penalty phase.

Mr. Lewis testified that Mr. Dunlap's behavior resulted in "one step forward, two steps back that just killed us every day, every report, every interview, every struggle with a decision . . . . Maybe we should have run through the mine field (use a mental health defense and face the bad evidence from CMHIP) . . . . I don't know." *Tr.* 1/14/04: 146.

The Court concludes that Mr. Dunlap sealed his own fate and that, in all probability, he did so as part of his desire to be a legend in his own time. He may well suffer from bipolar condition. Even if he does (and did in 1994-1996), this evidence, which could sway one or more jurors in some cases, probably would have been unpersuasive here.

As Mr. Lewis stated of Mr. Dunlap's conduct on the night of the offense,

> It sends a message to the jury that the client knew what he was doing, that there was (*sic*) some calculated actions here, and that there was some analytical response on his part as to not get caught, not commit the crime. It certainly takes away any argument that the client didn't know what he was doing or had some sort of mitigator like that. It also, again, engenders strong emotions on the part of the jury . . . . It engenders fear. It's -- it's very difficult to overcome."

The jury found that his conduct was truly evil and worthy of the ultimate penalty. Mr. Dunlap did nothing to help himself and his attorneys and a great deal to help the prosecution. The Court is compelled to find that Mr. Dunlap was not deprived of counsel, as contemplated by the Sixth Amendment, and that he is not entitled to post-conviction relief.

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[257] In *Frederick*, there was only one "direct witness" whose testimony was inconsistent and contained contradictions. In the instant case, the People's evidence was a polar opposite thereof.

Accordingly, Defendant's motion is denied. The Court has prepared a new mittimus with a new execution date. The Court stays execution pending further proceedings.

SO ORDERED.

DONE this ____ day of ________________, 2004.

BY THE COURT:

____
John P. Leopold
District Judge