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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA,)
)
Plaintiff,)
)
vs.) No. CR95000271
)
KYLE DAVID SHARP,)
)
Defendant.)

July 30, 2008
Bisbee, Arizona

BEFORE: The Honorable WALLACE R. HOGGATT, Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS
EVIDENTIARY HEARING CONTINUING

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A P P E A R A N C E S

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1 I N D E X

2	WITNESS:	EXAMINATION BY:	ON PAGE:
3	JAMES WHITE CONTINUING	Mr. Gorman	10
		Ms. Lam	12
4		The Court	15
		Mr. Gorman	19
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6 EXHIBITS:

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8	5a	Teala Ellis declaration	29
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14	108a	Macartney interview transcript	30
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21	186	David Barry Phelps DVD 2-12-08, 1 of 2	7
22	187	David Barry Phelps DVD 2-12-08, 2 of 2	8
23	188	Dr. Edward Shipley DVD 2-13-08, 2 of 2	8
24	189	Stephen Tharp, M.D. DVD 2-13-08, 2 of 2	8

25

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

2 THE COURT: We're continuing with the evidentiary
3 hearing in State of Arizona against Kyle David Sharp,
4 CR95-271. All counsel are present at this time. Mr. Rohman
5 is also present. Mr. Sharp continues to waive his personal
6 presence. Now Mr. White was on the witness stand. He does
7 not appear to be in the courtroom.

8 MS. LAM: He is outside, your Honor.

9 THE COURT: Oh, he's outside. Do we have
10 something to take up in his absence?

11 MR. GORMAN: We could. We have a few housekeeping
12 things, if you want to do that and bring him in. And we can
13 do it now if you'd like.

14 THE COURT: Well, why not? Let's go ahead and do
15 that.

16 MR. GORMAN: The first thing, Judge, is, just so
17 the record is clear, I gave the state copies of the DVDs
18 from the --

19 THE COURT: That we discussed yesterday? The one
20 we discussed yesterday?

21 MR. GORMAN: These are different ones. If you
22 recall July 14th of that week, Shawn Brannum, Dale Sharp,
23 Clifton Phelps, Kevin Brannum, Teala Ellis, Shannon Cassons,
24 and Lynn Collins. And there should be -- I don't have them
25 in this bunch -- but Judge Thomas Lett.

1 MS. RYAN: He testified --

2 THE COURT: He testified in February.

3 MR. GORMAN: Okay. My mistake.

4 MS. RYAN: -- in February.

5 MR. GORMAN: So we've tendered those to the state
6 so they have copies of them. And what we intend to do with
7 these DVDs is review them, because we just received these
8 the other day. And once we proof them, then we will submit
9 them to the court for admission.

10 THE COURT: All right.

11 MR. GORMAN: If that's permissible.

12 THE COURT: Ms. Lam or Ms. Gard, any objection?

13 MS. LAM: No, your Honor.

14 THE COURT: All right. We'll handle it that way
15 then.

16 MR. GORMAN: Judge, I'm going to hand you what's
17 marked as Defendant's Exhibit 180. And what this is, the --
18 we compared the DVD testimony to the transcripts that were
19 prepared, and we just noted errors in the transcripts and
20 the page numbers and the witness. And so we were just going
21 to provide that exhibit to the court reporter so she can
22 decide if we're correct in our opinion that some words were
23 missing or different words were said.

24 THE COURT: All right. This does say,
25 "Memorandum, Privileged and Confidential."

1 MR. GORMAN: We waive the privacy point, your
2 Honor.

3 THE COURT: Okay.

4 MR. GORMAN: Both implicitly and expressly.

5 THE COURT: I'm not sure it would be confidential
6 in any event. But a claim of such has been waived.

7 So has the state gotten a copy of this?

8 MR. GORMAN: Yes. I gave the state a copy.

9 MS. LAM: Yes.

10 THE COURT: Very well. Thank you.

11 MR. GORMAN: And then, Judge, I don't know if they
12 want me to call Mr. Rohman, which I'm happy to do, but go
13 through the DVDs which are going to be marked as exhibits,
14 that were reviewed and compared to the transcript. And
15 we're going to move them into evidence.

16 THE COURT: All right. And when you say you don't
17 know if, "if they", I assume that means the state.

18 Would you want to call Mr. Rohman to establish
19 that?

20 (Discussion off the record between counsel.)

21 MR. GORMAN: They'll stipulate to it.

22 MS. LAM: I stipulate to that.

23 MR. GORMAN: So let me just say I'm moving for
24 Defense Exhibit 181, which is the DVD of Linda Dixon's
25 testimony.

1 THE COURT: Any objection?

2 MS. GARD: No, your Honor.

3 THE COURT: It shall be marked and received.

4 MR. GORMAN: 182, which is the DVD of the
5 Honorable Thomas Lett's testimony.

6 MS. GARD: No objection, your Honor.

7 THE COURT: It shall be marked and received.

8 MR. GORMAN: Exhibit 183, which is the DVD
9 testimony of Terry Miller.

10 MS. GARD: No objection.

11 THE COURT: It shall be marked and received.

12 MR. GORMAN: Exhibit 184, which is the DVD
13 testimony of Kathy Ferguson.

14 MS. GARD: No objection.

15 THE COURT: It shall be marked and received.

16 MR. GORMAN: Exhibit 185, which is the DVD
17 testimony of Raymond -- Dr. Raymond Kincaid.

18 THE COURT: Any objection?

19 MS. GARD: No, your Honor.

20 THE COURT: It shall be marked and received.

21 MR. GORMAN: Exhibit 186, which is the DVD
22 testimony of David Barry Phelps.

23 THE COURT: Any objection?

24 MS. GARD: No, sir.

25 THE COURT: It shall be marked and received.

1 MR. GORMAN: And disk 2 of 2, Exhibit 187, of the
2 DVD testimony of David Barry Phelps.

3 THE COURT: Any objection?

4 MS. GARD: No objection.

5 THE COURT: It shall be marked and received.

6 MR. GORMAN: Disk 2 of 2, except I only have one
7 DVD, of Dr. Edward Shipley.

8 Is there more than one?

9 And this is Exhibit 188.

10 THE COURT: Any objection to 188?

11 MS. GARD: No, your Honor.

12 THE COURT: It shall be marked and received.

13 MR. GORMAN: And the same with Dr. Stephen Tharp,
14 it's disk 2 of 2, Exhibit 189, but I only have one.

15 THE COURT: Any objection to 189?

16 MS. GARD: No, your Honor.

17 THE COURT: It shall be marked and received.

18 Well, when you locate DVDs 1 of 1 for each of the
19 two doctors, we can get those marked and deal with them at
20 that time.

21 MR. GORMAN: And then the other thing, your Honor,
22 these affidavits have already been admitted, copies of them.
23 But when these witnesses testified in Indiana they were
24 presented under oath, copies, and they signed them. And so
25 we're going to move for those in.

1 MS. LAM: State will stipulate to that, your
2 Honor.

3 THE COURT: Have they been marked?

4 MR. GORMAN: Yes, your Honor.

5 (Discussion off the record between the court and
6 clerk.)

7 THE COURT: All right. The clerk has informed
8 me -- and I'm pretty sure that was off the record. Let's
9 put it on the record, that the signed copies of the
10 affidavits of the witnesses will be marked in such a fashion
11 as to go along with the other affidavits. In other words,
12 if one is 5, then the signed one will be 5a, and so forth.
13 So I don't have all the designations at this time.

14 Madam Clerk, at a convenient opportunity, during a
15 break or otherwise, please match these up with the already
16 admitted exhibits, give them the appropriate designations,
17 and then bring them to my attention. And then on the record
18 I will by the appropriate designation order them admitted
19 into evidence.

20 Mr. Gorman, any other housekeeping matters before
21 we get Mr. White back in?

22 MS. RYAN: No, your Honor.

23 MR. GORMAN: No your Honor.

24 THE COURT: Does the state have anything to raise
25 before we get the witness back in?

1 MS. LAM: No, your Honor.

2 THE COURT: All right. Mr. Szymeczek, if you
3 would ask Mr. White to come back in.

4 (Witness summoned.)

5 THE COURT: Mr. White, good morning. Please take
6 the witness stand again. You are still under oath.

7 And let me place this on the record. The clerk
8 advised me that yesterday, although the affidavit of
9 Mr. White had been received into evidence, it had not been
10 marked, and therefore did not have a designation. It has
11 now been given a exhibit number, Exhibit 176. And it is
12 marked as received in evidence.

13 And Mr. Gorman, you may proceed with
14 cross-examination.

15

16 JAMES WHITE

17 called as a witness herein, being previously duly sworn, is
18 further examined and testifies as follows:

19

20

21 EXAMINATION CONTINUES

22 BY MR. GORMAN:

23 Q Mr. White, I'm going to ask you to take a look at
24 what's Exhibit 179.

25 A Yes, sir.

1 Q Now the Arizona Supreme Court published State
2 versus Gallegos, G-A-L-L-E-G-O-S, 185 Ariz. 340 on May 3rd
3 of 1996. Correct?

4 A Yes.

5 Q I'm going to ask you to turn to page 4 of that
6 Arizona Supreme Court decision. And do you see the
7 underlined language?

8 A Yes.

9 Q I'm going to read that. Please read along
10 silently.

11 "We recently have discounted an expert's report of
12 intoxication based on defendant's self-reporting where the
13 evidence did not corroborate defendant's story. See State
14 versus Stokley, 182 Ariz., 505, 520; 898 P.2d 454, 469
15 (1995)."

16 Did I read that correctly?

17 A Yes.

18 Q Is that the case that they refer to in this
19 decision, the Stokley case, that you were aware of from
20 practicing in Cochise County?

21 A Yes.

22 MR. GORMAN: No further questions.

23 THE COURT: Thank you, Mr. Gorman.

24 And I believe, Ms. Lam, you had conducted the
25 direct, so if you have any redirect, you may proceed.

1 MS. LAM: Thank you, your Honor.

2

3

EXAMINATION

4 BY MS. LAM:

5 Q Good morning, Mr. White.

6 A Good morning, Ms. Lam.

7 Q Mr. White, would you agree or disagree with me
8 that funding or lack of funding did not have any influence
9 on your decision not to hire mitigation expert?

10 A That was -- funding was not an issue.

11 Q Now Mr. Gorman asked you if you reviewed capital
12 cases in the course of your practice and representation.
13 Generally, are you aware of the weight that the Arizona
14 Supreme Court gives to a dysfunctional family, such as in
15 State versus Pendeli(phonetic).

16 And I'm sorry, your Honor, I don't have the
17 citation for that.

18 But generally speaking, are you aware of how much
19 weight is given to dysfunctional family circumstances to a
20 defendant in mitigation?

21 A No.

22 Q Okay. Now Mr. Gorman asked if you had read the
23 opinion of State versus Sharp which was published in 1999.
24 Would that have benefited you in any way in your
25 representation of Mr. Sharp in 1995, '96 and '97?

1 A No.

2 Q And Mr. Gorman asked you if you subpoenaed lay
3 witnesses. And correct me if I'm wrong, your answer was no?

4 A No.

5 Q Correct?

6 Did you have a lay witness at sentencing that you
7 believed would testify?

8 A Yes.

9 Q And which witness was that?

10 A Toni Phelps.

11 Q Now had you filed a subpoena, would that have done
12 more -- anything other than getting her to that sentencing
13 hearing?

14 A It would not. I don't believe that would compel
15 her to testify if she was unwilling to.

16 Q So, right; is there really any difference, in her
17 case, that you did not file a subpoena? She did come, is
18 that correct?

19 A Well, again, she was present. So --.

20 Q But she did refuse, is that correct? She refused
21 to testify?

22 A Yes, she did not wish to testify.

23 Q Now I believe, correct me if I'm wrong, would you
24 agree or disagree that you did not apply for funds through
25 the court?

1 A Did not.

2 Q But you -- did you apply for funds from the Board
3 of Supervisors?

4 A As I recall, yes.

5 Q I'd like to talk to you a little bit about your
6 police negligence theory in mitigation. You described it, I
7 believe, as a novel approach?

8 A Yes.

9 Q Did you have any evidence that she was not alive
10 when the police arrived on the scene?

11 A No.

12 Q Does a defense attorney make a reasoned decision
13 to advance tactical motions and theories routinely without
14 promise of success?

15 A Yes.

16 MS. LAM: I believe that's all I have. Thank you,
17 your Honor.

18 THE COURT: Thank you, Ms. Lam.

19 MS. LAM: Thank you, Mr. White. Oh.

20 THE COURT: Yes?

21 MS. LAM: The state would like to admit the
22 aggravation/mitigation transcript. It's part of the record.
23 But just for ease of reference.

24 THE COURT: All right. I don't think it's been
25 separately marked. We have the transcript here, do we not?

1 MS. LAM: Yes.

2 THE COURT: Well, maybe it has been marked.
3 State's Exhibit G. Any objection?

4 MR. GORMAN: To admitting the transcript?

5 THE COURT: Correct.

6 MR. GORMAN: No.

7 THE COURT: Okay. Exhibit G shall be marked and
8 received.

9 Mr. White, before you step down, let me ask you
10 just a few things.

11

12 EXAMINATION

13 BY THE COURT:

14 Q You mentioned, as I recall, you did apply to the
15 Board of Supervisors for funding?

16 A Yes.

17 Q First question, when did you do this? When within
18 the context of representing Mr. Sharp?

19 A Your Honor, I don't exactly recall when. It seems
20 that it would have been -- I really can't tell you. I can't
21 recall whether it was prior to the guilt phase or prior to
22 the sentencing phase. I don't recall.

23 Q What form did your request take? Was it a call to
24 the County Administrator? Was it a formal request for an
25 action item, or what was it?

1 A As I recall it, your Honor, it was a written
2 document requesting funds and to, to get onto the Board of
3 Supervisors agenda.

4 Q Did you in fact get on, or did the item get on the
5 Board of Supervisors agenda?

6 A Yes.

7 Q And was it taken up at an open meeting of the
8 Board of Supervisors?

9 A Yes.

10 Q And what was the request for?

11 A Additional funding for this particular case.

12 Q Was it a request for more funding for the case in
13 general, or was it a request for more funding for a
14 particular expert or a particular task that you thought had
15 to be done?

16 A I, I believe, your Honor, that it was in general,
17 looking prospectively at the case.

18 Q Do you recall whether you asked for a particular
19 amount of money in addition to the currently existing
20 budget?

21 A Yes.

22 Q How much more did you ask for?

23 A I want to say, your Honor, \$5,000. But that's the
24 figure that sticks in my head.

25 Q But just to make sure I understand, you don't

1 recall what that might have been for?

2 A Only the Sharp case in general. But not
3 specifically, your Honor.

4 Q Did you appear before the Board of Supervisors in
5 connection with that request?

6 A Yes.

7 Q Did anyone else in support of the request for
8 funding?

9 A I don't believe so.

10 Q And did you present anything to the board in
11 connection with your request?

12 A As I recall, your Honor, only to elaborate on, on
13 the request for additional funds, the reason behind it.

14 Q Do you -- I realize your answers a moment or two
15 ago, that you don't recall specifically what the funds were
16 for, but do you recall whether there was a discussion at the
17 Board of Supervisors meeting about what the funds were to be
18 used for?

19 A I'm sure there probably was, your Honor.

20 Q And what was the outcome of the consideration by
21 the board?

22 A I believe that we were granted the funds that were
23 requested.

24 Q You were?

25 A I believe so.

1 Q Okay. Did you utilize those funds for whatever
2 purpose you had in mind?

3 A I assume so, but I couldn't really tell you
4 exactly, your Honor.

5 Q I want to ask you something, and you may or may
6 not know about this. Are you aware that Rule 6.8 of the
7 Arizona Rules of Criminal Procedure currently sets the
8 standards for the appointment and experience levels of
9 counsel in criminal cases, both first chair and, and other
10 counsel? Are you aware of that?

11 A I'm sure there's a rule, your Honor. I have not
12 looked at that rule for quite some time.

13 Q Regardless of the particular designations of the
14 rule, and I've stated it to be Rule 6.8, are you aware that
15 a version of the rule setting qualifications for counsel in
16 capital cases went into effect on an emergency basis
17 November 1, 1996? Do you know whether that's the case or
18 not?

19 A I don't recall, your Honor.

20 Q Do you recall whether there was a rule dealing
21 with qualifications of trial counsel? It also deals with
22 appellate and post-conviction relief counsel, but I'm asking
23 about trial counsel here. Are you aware that there was a, a
24 rule which went into effect concerning qualifications for
25 trial counsel in capital cases during the period of time

1 that you represented Mr. Sharp?

2 A I don't recall that there was a rule change.

3 Q Okay. Or the implementation of a rule that had
4 not existed previously?

5 A Or the implementation, yes.

6 Q So I think that probably answers the next
7 question, but I'll ask it anyway just to be certain. At any
8 time did you present anything to the trial judge, Judge
9 Borowiec, to indicate that there had been a new rule that
10 had gone into effect setting qualifications for trial
11 counsel in capital cases and either informing him that you
12 did or did not meet the standards or inquiring of him
13 whether the court believed that you met those standards?

14 A I don't recall that, your Honor.

15 THE COURT: Thank you.

16 Do counsel have any questions based on my
17 questions?

18 Ms. Lam, he's your witness. I'll start with you.

19 MS. LAM: No, your Honor.

20 THE COURT: Thank you.

21 Mr. Gorman.

22 MR. GORMAN: Yes, your Honor.

23

24

EXAMINATION

25 BY MR. GORMAN:

1 Q The Legal Defenders was originally appointed by a
2 Justice of the Peace in Cochise County by a single-page
3 minute entry where he checked a box, and no one from your
4 office appeared, correct?

5 A Oh, I don't recall that, Mr. Gorman.

6 Q And after the notice of death was issued -- strike
7 that.

8 After the state filed their formal notice that
9 they were seeking the death penalty, no judge on, on the
10 Superior Court bench inquired of you if you met
11 qualifications set forth in Rule 6.8 as adopted on October
12 22nd, 1996; on an emergency basis effective November 1,
13 1996. Correct?

14 A That's correct.

15 Q And you never reviewed that rule of criminal
16 procedure prior to going forward with your opening statement
17 on the day of Mr. Sharp's trial?

18 A I don't recall. I don't recall that, Mr. Gorman.

19 Q Do you agree if, by express definition of a rule
20 adopted by the Arizona Supreme Court, that you were
21 expressly by rule not qualified to defend a capital
22 defendant, that you had an ethical obligation to move to
23 withdraw?

24 A I assume if I was aware of that rule and I did not
25 feel that I qualified under the rule as lead counsel in a

1 capital case, that I should have brought that to the court's
2 attention.

3 Q And do you agree or disagree that Mr. Sharp was
4 entitled to a capital defense attorney who would review the
5 rule on the qualifications for a capital defense attorney in
6 Arizona prior to going forward with the representation?

7 A Yes.

8 Q And you did not review this rule, nor were you
9 aware of it; correct?

10 A Well, I don't recall, Mr. Gorman, one way or the
11 other. But --

12 Q You did not move to withdraw at any time, did you?

13 A I did not move to withdraw, yes.

14 MR. GORMAN: No further questions.

15 THE COURT: Thank you, Mr. Gorman.

16 Ms. Lam, final redirect?

17 MS. LAM: Very briefly.

18

19

EXAMINATION

20 BY MS. LAM:

21 Q Mr. White, should co-counsel also have been aware
22 of this rule?

23 A Yes, either through myself or independently.

24 Q And had she been aware of this rule, should she
25 also have refused to represent Mr. Sharp?

1 A I would say I would think the same obligation
2 would apply to her that would apply to me. And if she felt
3 that she was not qualified under the rule, she would bring
4 that to my attention or the court's attention.

5 Q And is it fair to say, would you agree or
6 disagree, that your co-counsel was less qualified than you
7 were at the time?

8 A Well, I had had more trial experience than she had
9 had and practiced longer.

10 MS. LAM: Nothing further, your Honor.

11 THE COURT: All right. Thank you.

12 Thank you, Mr. White. You may step down. You are
13 excused. You are free to go.

14 THE WITNESS: Thank you.

15 THE COURT: Does the state have any additional
16 witnesses at this time?

17 MS. LAM: No, your Honor.

18 THE COURT: So the state rests in this proceeding?

19 MS. LAM: The state does rest.

20 THE COURT: Thank you. Mr. Gorman, I believe you
21 mentioned something about a rebuttal witness. Whom would
22 you like to call?

23 MR. GORMAN: Could I have one moment to confer
24 with Ms. Ryan, your Honor?

25 THE COURT: You may.

1 MR. GORMAN: Your Honor, we elected not to call
2 any rebuttal witnesses, so we'll rest if that's the
3 appropriate term at this point.

4 THE COURT: I don't know if it is or not, but it
5 might be. So all right.

6 MR. GORMAN: I'll probably rest anyways.

7 THE COURT: In any event, all the evidence is in
8 in connection with this proceeding other than the DVDs that
9 we already talked about which will be forthcoming.

10 A question. How would you like to deal with
11 argument? And also, Counsel, I don't know if you've thought
12 about submitting proposed findings of fact and conclusions
13 of law. But that would be of great assistance to me, as I'm
14 sure counsel know I am required to make findings of fact and
15 conclusions of law in a matter such as this.

16 MR. GORMAN: Judge, I have a suggestion.

17 THE COURT: Go ahead.

18 MR. GORMAN: And Ms. Lam can correct me if I'm
19 wrong, but obviously if the court rules against the
20 petitioners, we would appeal that. And I'm assuming, having
21 had cases with the AG before, that if the court rules for
22 the petitioner, then the state's going to appeal that.

23 With that in mind, that, that's going to be the
24 eventual path we're going to be on is an appeal no matter
25 how the court rules. What I'd like to do, because I'd like

1 to make this first pleading as detailed and accurate as
2 possible, is once the court reporter is finished with all of
3 the transcripts, that we have a date at least 60 days off to
4 file our opening brief, you could say, where we're going to
5 argue for the relief on the issue that the court restricted
6 us to in its minute entry, I believe of August 12th of --
7 I'm not sure which year.

8 THE COURT: 2004, I believe.

9 MR. GORMAN: Right. And then we would restrict
10 that brief and have an extensive narrative on everything
11 that was introduced in the record at the PCR, and a very
12 large statement of facts that would, which cites to the
13 record, et cetera. And then we would argue for our relief
14 based on what we set forth and what occurred in the record.
15 And then the state would need to respond. And then we'd
16 want time for a reply.

17 And then after the briefing is done, I'd suggest
18 we just have a teleconference and pick a date for argument,
19 if the court chooses for argument. And I would request
20 argument. And then also argue the remaining three motions
21 that are pending. And I don't think I need to list those.
22 But all of them relate to issues that are going to be
23 incorporated into the court's ruling. And then once we have
24 a date we can all come on one more occasion and argue all of
25 the motions and then leave, and the court can rule. And

1 then we're done, at least, you know, at this court's level.

2 THE COURT: Let me make sure I understand what
3 you're suggesting is the schedule here. When the court
4 reporter finishes the transcripts, gets those distributed,
5 from that point you'd have 60 days thereafter within which
6 to file your first brief. You didn't specifically mention
7 findings of fact and conclusions of law, but I would like
8 that.

9 MR. GORMAN: Well, I meant to, Judge. I'm sorry.

10 THE COURT: Okay.

11 MR. GORMAN: Because that was my point on why I
12 wanted to be so detailed in our narrative of our statement
13 of facts. And we will definitely provide findings of fact
14 and conclusions of law for the court that will accompany the
15 brief.

16 THE COURT: All right. Then state would respond.
17 And of course I'll ask them how much time they think they
18 would need. But whatever that amount of time is. State
19 would file a response as well as the state's proposed
20 findings of fact and conclusions of law. Then the defense
21 would submit a reply, 30 days after --

22 MR. GORMAN: Thirty days.

23 THE COURT: -- after the state's response.

24 MR. GORMAN: Yes.

25 THE COURT: And then we'd have -- and here I'm

1 somewhat less sure of what you're suggesting. You mentioned
2 a teleconference argument. But that would not be on the
3 pending motions. That would be on the issues that my minute
4 entry of 2004 said were before the court in this proceeding.
5 Is that --

6 MR. GORMAN: No. I misspoke, Judge.

7 THE COURT: Okay.

8 MR. GORMAN: I meant to say that the
9 teleconference would be to set a date for oral argument on
10 all pending motions, including the brief based on this
11 hearing.

12 THE COURT: Phone conference to set argument then,
13 setting the argument on, first, what I believe to be the
14 issues before me here, and then on the, the pending motions.

15 MR. GORMAN: Right. There's a motion we filed
16 arguing that the court should apply the Cropper standard.

17 THE COURT: Right.

18 MR. GORMAN: Okay. You recall those.

19 THE COURT: I remember. I can't give you --

20 MR. GORMAN: Generally, right.

21 THE COURT: I can't give you point by point, but I
22 remember there are a set of motions pending. All right.
23 And then argument. And then I would proceed with the, with
24 the ruling on that. I think I understand what you're
25 saying.

1 Let me ask the state, any other suggestion as to
2 how to proceed, Ms. Lam?

3 MS. LAM: Your Honor, it would be helpful if we
4 could have a ruling on defense motions, on the standard of
5 review, because that affects how we approach our brief. And
6 the defense also requested that the court consider the guilt
7 phase. That too would be helpful, if the court would make a
8 ruling on that before we actually write briefs on the
9 matter. I frankly can't remember the third pending motion.

10 THE COURT: I'd have to take a look.

11 MR. GORMAN: Oh, Judge, I can tell you.

12 THE COURT: Go ahead.

13 MR. GORMAN: We filed the two pleadings she's
14 referred to, and the third one I believe. I know that the
15 first issue we wanted the court to rule on is whether it is
16 ineffective assistance of counsel per se to fail to secure
17 the services of a mitigation specialist, which is like a
18 summary judgment motion because there's no issues of fact.
19 It's a pure issue of law. Everybody concedes he didn't get
20 one. So those are the three.

21 And, and in hindsight, I, I think Ms. Lam might be
22 right, it might be better to have the rulings on those --
23 well, especially the Cropper motion and especially the
24 inconsistent theories the state's been espousing. Those
25 first. Rather than what I suggested. She's probably right.

1 THE COURT: Well, and what are your thoughts then?
2 I read them when they came in. I doubt that counsel are
3 ready to argue them now. I know I'm not ready to hear
4 argument now without going through those motions --

5 MR. GORMAN: Right.

6 THE COURT: -- again and the responses. So what
7 do you have in mind?

8 MR. GORMAN: Well, if the court wants to pick a
9 date now, I'm fine picking a date. And we can come back and
10 argue it.

11 THE COURT: We are all here. And this was set for
12 finishing the hearing through tomorrow. I don't know if you
13 all made other plans now that we know that the evidence is
14 all in. But I mean, if you were prepared to go ahead, say
15 tomorrow morning, we could do that. But if you need more
16 time, we can pick another date.

17 MS. LAM: Your Honor, could we do this
18 telephonically?

19 THE COURT: Yes.

20 MS. LAM: The state is actually of the opinion
21 that these motions are so clear cut, I am failing to see why
22 argument is even necessary on the motions. But that's up to
23 the court of course.

24 THE COURT: Well, argument may be helpful if, if
25 it's not -- no harm done. If it is, then it is helpful and

1 useful. So we'll have argument on the motions.

2 Let me ask Glen to step in with the book, and
3 we'll see if we can come up with something.

4 All right. And while we're waiting for that, let
5 me address the signed affidavits, copies; that is, those
6 that were signed during the witness's testimony. The signed
7 affidavit of Teala Ellis which was signed by her at the
8 conclusion of her testimony, July 15, 2008, that has been
9 marked as Defendant's Exhibit 5b. And I believe the state
10 has no objection.

11 I believe you indicated no objection to any of
12 these, correct?

13 MS. LAM: That's correct, your Honor.

14 THE COURT: So 5b shall be marked and received.

15 The, the affidavit -- or the copy of the affidavit
16 of Dale Sharp signed July 17, 2008 is marked as Defendant's
17 Exhibit 6a. That shall be marked and received into
18 evidence.

19 The copy of the affidavit of Shawn Brannum signed
20 by him July 14, 2008 has been marked as Defendant's Exhibit
21 7b -- Bravo that is -- and that shall be received into
22 evidence.

23 Signed copy of the affidavit of Shannon Cassons
24 signed by her July 15, 2008 has been marked as Defendant's
25 Exhibit 8a and shall be received into evidence.

1 The copy of the affidavit of Lynn Collins signed
2 by her 7/16/08 has been marked as Defendant's 11a and shall
3 be received into evidence.

4 And the copy of the affidavit of Clifton Phelps
5 signed by him 7/14/2008 has been marked as Defendant's
6 Exhibit 36a and shall be received into evidence.

7 MR. GORMAN: And then, Judge, I have Defendant's
8 Exhibit 108a which is an interview of Margo Macartney. The
9 audiotape is already admitted. This is a transcription.
10 Move for its admission.

11 THE COURT: Any objection?

12 MS. LAM: No objection.

13 THE COURT: 108a shall be marked and received.

14 THE COURT: All right. Ms. Cobb, you have the
15 calendar. What we are looking for is a date for telephonic
16 argument on pending motions in this matter; not on the
17 post-conviction relief issues as a whole. That's being
18 dealt with separately. But there are certain pending
19 motions. I don't know what we have.

20 Best estimate, Counsel, as to the -- a time that
21 you need? An hour? Do you need more?

22 MS. LAM: It shouldn't take more than an hour.

23 THE COURT: I'm sure it shouldn't take more than
24 an hour.

25 THE COURT: Mr. Gorman?

1 MR. GORMAN: Well, they're our motions. So then,
2 procedurally, I assume the court is going to let us go first
3 and then have the last word?

4 THE COURT: Indeed, yes.

5 MR. GORMAN: So, well, with three motions, I'm
6 going to ask -- it's just that -- I think I'm going to ask
7 for two hours with three motions.

8 THE COURT: Okay. Well, let's set it for that.
9 If we don't need it, we don't need it. But if we do, it
10 would be available.

11 MR. GORMAN: Because I consider these all
12 well-taken and very crucial issues to the case.

13 THE COURT: And, of course, as we've discussed,
14 Mr. Sharp has waived his presence personally throughout this
15 week and the previous week. Would he wish to, to be
16 available by phone for this, or would he waive his presence
17 also?

18 MR. GORMAN: We have to ask him. But if the court
19 would like, we can have him sign a waiver if he chooses not
20 to attend.

21 THE COURT: All right.

22 MR. GORMAN: Or we could just represent that he
23 told us. Whatever the court would prefer.

24 THE COURT: I would accept the representation if
25 that's the case. Let us know. I mean if we --

1 MR. GORMAN: Oh, no.

2 THE COURT: -- if we have to --

3 MR. GORMAN: Yeah.

4 THE COURT: -- go through DOC to get him on the
5 line, we will do that.

6 MR. GORMAN: Yeah, we can simply -- we don't have
7 to go out there in person to make the inquiry. We can
8 schedule a legal call with him.

9 THE COURT: When do we have two hours? Glen, can
10 we set this for Thursday, August 28th, at 1:30?

11 Any problem with that date?

12 MS. LAM: I didn't hear the time, your Honor.

13 THE COURT: 1:30.

14 MS. LAM: Okay.

15 MR. GORMAN: It's all right with petitioner, your
16 Honor.

17 MS. LAM: It's all right with the state, your
18 Honor.

19 THE COURT: All right. So Thursday, August 28,
20 2008, beginning at 1:30 p.m. shall be the time for argument.
21 Counsel may appear by telephone if they wish. That will be
22 argument on pending motions regarding standard of review,
23 regarding claim of ineffective assistance of counsel per se,
24 and the other ones. I don't have a list in front of me, but
25 the pending motions.

1 And at that time, at the conclusion of that
2 hearing -- well, I suppose you need my ruling first before
3 we set a schedule of further matters.

4 But put it down in the minute entry that at that
5 time, following the argument on the motions, the court will
6 address the matter of scheduling of filing of written
7 arguments and proposed findings of fact and conclusions of
8 law.

9 And for purposes of my making sure I comply with
10 Rule 32.8(d), which states that the court shall rule within
11 ten days after the hearing ends except in extraordinary
12 circumstances where the volume of the evidence or the
13 complexity of the issues require additional time -- Counsel,
14 you can state your position on whether you agree or disagree
15 with this -- but I will take the position that the
16 post-conviction relief hearing has not in fact ended until
17 the time that I have received from counsel all proposed
18 findings of fact and written arguments that by further order
19 I will permit.

20 Would counsel agree or disagree with that?

21 MR. GORMAN: Petitioner agrees, your Honor.

22 THE COURT: Thank you.

23 MS. LAM: State agrees, your Honor.

24 THE COURT: All right. Very well.

25 (Discussion off the record between the court and

1 court reporter.)

2 MR. GORMAN: What is FTR?

3 THE COURT: "For The Record." It's the digital
4 recording system. It's --

5 MR. GORMAN: Oh, I see. That's why we all have
6 microphones.

7 THE COURT: I'm sorry?

8 MR. GORMAN: That's why we all have these
9 microphones?

10 THE COURT: Well, primarily to enable us to hear
11 ourselves. But that, that is one of those. It's usually
12 for the clerk. Although I suppose they're available for the
13 reporter, although the reporter indicates she never checks
14 it. And I don't think she's required to.

15 Well, that's a good question. Mr. Gorman, what,
16 what are you asking me to direct the court reporter to do
17 with regard to what you believe to be discrepancies?

18 MR. GORMAN: Just to bring up the videos and
19 listen to the portion that we say was inaccurately
20 transcribed and correct it if she agrees. If she doesn't
21 agree, she can note it on the memorandum I provided to her,
22 and we can make it part of the record.

23 And then the appellate court that reviews it will
24 be on notice that they have to make their own determination
25 by reviewing the DVDs and the transcript. If it's

1 reconciled and she agrees with what Mr. Rohman's staff
2 determined, then all the corrections will be made, and this
3 won't be an issue.

4 THE COURT: All right. Here's what I'm going --
5 I don't know if the state has any position on
6 this?

7 MS. LAM: Not really, your Honor.

8 THE COURT: All right. Here's what I'm going to
9 order. I'm going to order that Ms. Heins check her own
10 notes and determine whether based on what has been presented
11 she wishes to make a correction or not, and report to me.
12 And I will -- report in writing.

13 And, frankly, you can, you can make your notes on
14 a copy of this memorandum. And I will provide that to
15 counsel.

16 I believe that the next step -- if, if suggested
17 changes are made, fine. If, if they're not, then I think
18 the next step is for the proponent of the changes to make a
19 request of the court. I think I can order myself, in
20 effect, to compare the transcript against the DVD; and if I
21 agree that the change should be made, I can order that.
22 But, but I don't believe that I can order the court reporter
23 to make that kind of change. I think -- in other words, I
24 don't think I can or should order her to review the DVDs to
25 make changes. I think that, if that's required, would have

1 to be done by the court.

2 MR. GORMAN: All right. Thank you, your Honor.

3 THE COURT: Okay. All right. Does -- Madam Court
4 Reporter, does that answer your question?

5 (Discussion off the record between the court and
6 court reporter.)

7 THE COURT: I'm just directing you to check your
8 notes. If somebody has to, to go through DVDs, well, that's
9 me. So I'll do that.

10 Any other matters to come before the court at this
11 time?

12 MR. GORMAN: No, your Honor.

13 MS. LAM: Your Honor, the state would just like to
14 add its two cents. We agree on the written findings of fact
15 and conclusions of law and the time schedule that the court
16 has set out. Perhaps the only direction would be oral
17 argument. Given the vast amount of evidence that has come
18 in at this hearing, that would be a pretty extensive
19 argument. That's my objection.

20 THE COURT: Well, I'm sorry. Let me make sure I
21 understand. Your objection is to oral argument in addition
22 to the written argument?

23 MS. LAM: That's correct, your Honor.

24 THE COURT: Well, I would say that part of
25 Mr. Gorman's suggestion is after all of the written

1 arguments and proposed findings and conclusions are in that
2 there be a phone conference to set argument. I would say to
3 set argument if the court believes it would be appropriate
4 or necessary. It may be that the materials are sufficient
5 to enable me to, to make a ruling without oral argument; and
6 in which case I can say so, and I can take it under
7 advisement as of that, that time.

8 MS. LAM: That's fine, your Honor. Thank you.

9 One last thing, Madam Clerk.

10 THE COURT: Yes.

11 MS. LAM: Defense said that they believed they had
12 marked and admitted James White's interview, the paper copy.
13 Is that so? If not, I would like to make sure that's
14 admitted.

15 THE COURT: Well, the interview, I don't recall
16 that specifically. There was reference to the affidavit,
17 which did come into evidence. I don't know about the
18 interview.

19 MR. GORMAN: Oh, the, the January of '08?

20 MS. LAM: Right.

21 MR. GORMAN: That's already been admitted. That
22 was part of Exhibit 178 which was what -- your file that you
23 sent to him. You stipulated to its admission.

24 MS. LAM: I did. Okay. Thank you.

25 THE COURT: So that is in.

1 MS. LAM: Thank you.

2 THE COURT: Let me ask a question. The request to
3 hold in abeyance the lethal injection issue, I've forgotten
4 my timetable. I don't believe that that really is one of
5 those that -- or maybe counsel disagree -- that that's
6 something that is to be argued on August 28th. Is that
7 before me now that I need to make a ruling on it?

8 MS. RYAN: Yes, your Honor.

9 THE COURT: I see that there was a supplement to
10 the second request to hold in abeyance the lethal injection
11 issue. That was -- I don't know when it was actually filed
12 downstairs. But my copy was received July 22. Is
13 everything now in that I should review before making a
14 ruling on that? Or is there, is there more coming?

15 Ms. Lam?

16 MS. LAM: As far as I know, your Honor, you have
17 everything from the state. The only recommendation is that
18 State versus Landrigan, L-A-N-D-R-I-G-A-N, the same issue is
19 being litigated now; and it probably is in the interest of
20 economy and time-saving to wait until we have a ruling on
21 that case.

22 MS. GARD: It's pending in Maricopa County.

23 MS. RYAN: And that's what was included in the
24 supplement.

25 MS. LAM: Right.

1 THE COURT: Okay. So does that mean you're in
2 agreement with the defendant's request to hold the lethal
3 injection issue in abeyance?

4 MS. LAM: Absolutely.

5 THE COURT: You are? Well, that means that's an
6 easy resolution. The second request, to hold in abeyance
7 lethal injection issue, is granted. Consideration of that
8 issue is stayed and pending further order of the court. I
9 will rely on counsel -- who have been very diligent in these
10 matters, so I don't have any qualms about relying on
11 counsel. But I will rely on you to inform me of any ruling
12 or other event that in your view suggests that the lethal
13 injection issue should come back before this court.

14 In other words, inform me of any event or time
15 that you believe indicates that the stay that I've just
16 granted should be lifted. And that can either be by
17 stipulation, if you both agree, or by motion if you don't.

18 Anything else on this case at this time?

19 MR. GORMAN: Not from petitioner, your Honor.

20 THE COURT: Thank you.

21 MS. LAM: Not from the state, your Honor.

22 THE COURT: All right. Well, thank you all very
23 much. And we'll be talking again at some later time. At
24 recess.

25 (Proceeding adjourns.)

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I, Penny Heins, Arizona Certified Reporter No. 50219, do hereby certify that the foregoing pages constitute a full, accurate typewritten record of my stenographic notes taken at said time and place, all done to the best of my skill and ability.

DATED this 17th day of April, 2009.

Penny Heins
Certified Court Reporter
Arizona CCR No. 50219

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