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IN THE UTAH COURT OF APPEALS

State of Utah,)

Plaintiff and Appellee)

vs.)

Leonard Preston Gall,)
Defendant and Appellant)

Case No. 20040540

BRIEF OF APPELLANT

Appeal from a judgment of:

1. Guilty and Mentally Ill of Manslaughter, U.C.A., §76-5-205, a second degree felony, with dangerous weapons enhancement, U.C.A. §76-3-203;
2. Guilty and Mentally Ill of Theft of Automobile, U.C.A. §76-6-404, a second degree felony; and
3. Not Guilty By Reason of Insanity on a charge of aggravated burglary, U.C.A., §76-6-203, a first degree felony,

entered pursuant to pleas thereto, in the Third Judicial District, Salt Lake County, State of Utah, the Honorable Judith S. Atherton, presiding.

Laura B. Dupaix
J. Frederic Voros, Jr.
Assistants Attorney General
160 E 300 S 6th FL
PO Box 140854
Salt Lake City, Utah 84114-0854

Attorneys for Appellee

James B. Gottstein (7811100)
Law Project for Psychiatric Rights, Inc.
406 G Street, Suite 206
Anchorage, Alaska
(907) 274-7686

Nathan N. Jardine, Esq.
Nathan N. Jardine & Associates
39 Exchange Place, Suite 100
Salt Lake City, Utah 84111
(801) 994-9985 Tel.

Attorneys for Appellant



TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES.....	iii
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUES PRESENTED, STANDARDS OF REVIEW AND PRESERVATION.....	1
CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS.....	4
STATEMENT OF THE CASE.....	5
I. Nature of the Case, Course of Proceedings and Disposition.	5
II. Statement of Facts	7
SUMMARY OF ARGUMENTS	12
ARGUMENT	13
I. The Judgments Are Invalid Due to Attorney Disloyalty.	13
II. The Judgment Of Not Guilty By Reason Of Insanity Is Invalid As the Result of Ineffective Assistance of Counsel/Disloyalty and For Lack Of Any Factual Basis	16
A. There is No Factual Basis for the Aggravated Burglary Disposition..	16
B. The NGRI Judgment and the GMI Convictions Were the Product of Disloyalty/Ineffective Assistance of Counsel.....	20
III. Mr. McCaughey Was Disloyal/Rendered Ineffective Assistance During Sentencing.....	27
IV. The Trial Court Erred By Ignoring The Evidence of The Iatrogenic Nature Of His Psychosis.	29
V. The Trial Court Erred By Conducting The Sentencing Hearing With Counsel Purporting To Represent LPG After His Employment Had Been Terminated; He Had Withdrawn From The Representation and LPG Had Moved for a Continuance.	34
VI. The Incarceration Regime Imposed in This Case is Unconstitutional As Applied To LPG Because It Deprives Him Of The Benefit Of The Term Setting Process By The Board Of Pardons.	36
VII. The Incarceration Regime Imposed in This Case is a Violation Of The Americans With Disabilities Act.	38
CONCLUSION	39
ADDENDUM	A
• Text of Constitutional Provisions, Statutes, Ordinances, Rules and Regulations	A
• Information (December 17, 2001)	00001
• Amended Information (September 10, 2003)	00003
• Transcript of Change of Plea Hearing (September 10, 2003)	00006
• Plea Agreement (September 10, 2003)	00039

- Minutes: Change of Plea Law and Motion Notice (September 10, 2003) 00046
- Order of Commitment to Department of Human Services, Pursuant to "Not Guilty By Reason of Insanity" Judgment, and Notice of Proposed Commitment Under "Guilty and Mentally" Ill Pleas (September 15, 2003) 00048
- Motion (*Pro Se*) for 603 (sic 402) Offense Reduction (April 23, 2004) 00052
- Letter from Leonard Preston Gall to Judge Atherton (April 17, 2004) 00053
- Letter from Leonard Silvius Gall to Judge Atherton (filed April 26, 2004) 00056
- Letter from Leonard P. Gall to Steve McCaughey (filed April 26, 2004) 00059
- Withdrawal of Counsel (April 27, 2004) 00060
- Declaration of Ann Blake Tracy, PhD (filed April 26, 2004) 00061
- Report of Grace E. Jackson, MD (April 30, 2004) 00096
- Transcript of Sentencing Hearing (May 3, 2004) 00116
- Minutes Sentence, Judgment, Commitment 00125

APPENDIX

- Form 1 - General Matrix, Utah Board of Pardons and Parole
- 2004 Adult Sentencing and Release Guidelines, Utah Sentencing Commission

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES

<i>Fisher v. Gibson</i> , 282 F.3d 1283 (CA10, 2002).....	15
<i>Gallivan v. Walker</i> , 2002 UT 89, 54 P.3d 1069.....	37
<i>Glasser v. United States</i> , 315 U.S. 60, 62 S.Ct. 457 (1942)	14
<i>In the Interest of: L.G.W.</i> 638 P.2d 527 (Utah 1981).....	33
<i>Olmstead v. L.C.</i> , 527 US 581, 119 S.Ct. 2176 (1999).....	39
<i>Osborn v. Shillinger</i> , 861 F.2d 612 (CA 10 1988).....	14, 15, 16
<i>State v. Albiston</i> , 2005 UT App 425	2, 33
<i>State v. Corwell</i> , 2003 UT App 261, 74 P.3d 1171, <i>rev'd on other grounds</i> , 2005 UT 28, 114 P.3d 569.....	1
<i>State v. Hansen</i> , 2002 UT 114, 61 P.3d 1062	2, 3, 4
<i>State v. Herrera</i> , 895 P.2d 359 (Utah 1995)	8, 19, 20
<i>State v. Herrera</i> , 993 P.2d 854 (Utah 1999)	8, 19, 20
<i>State v. Holland</i> , 876 P.2d, 357 (Utah 1994)	14
<i>State v. Holland</i> , 921 P.2d 430 (Utah 1996)	14
<i>State v. Litherland</i> , 2000 UT 76, 12 P.3d 92.....	1, 2
<i>State v. Lopez</i> , 2005 UT App. 496	4
<i>State v. Lovell</i> , 1999 UT 40, 984 P.2d 382	34
<i>State v. Martinez</i> , 2001 UT 12, 26 P.3d 203	20, 22
<i>State v. Merrill</i> , 2005 UT 34, 114 P.3d 585	20, 21
<i>State v. Robinson</i> , 23 Utah 2d 78, 457 P.2d 969 (Utah 1969)	21
<i>State v. Rudolph</i> , 970 P.2d 1221 (Utah 1998).....	18
<i>State v. Shepler</i> , 869 P.2d 968 (Utah App. 1994)	3
<i>State v. Taylor</i> , 2005 UT 40, 116 P.3d 360.....	3, 35
<i>State v. Willis</i> , 2004 UT 93, 100 P.3d 1218	3
<i>United States v. Cronin</i> , 466 US 648, 104 S.Ct. 2039 (1984).....	15
<i>United States v. Morrissey</i> , 461 F.2d 666 (2nd Cir. 1972)	35
<i>Washington v. Harper</i> , 494 U.S. 201, 110 S.Ct. 1028 (1990)	32
<i>Williams v. Illinois</i> , 399 US 235, 242, 90 S.Ct. 2018, 2023 (1970).....	37

STATUTES

42 USC §12132	38
Americans with Disabilities Act, 42 USC §12131 <i>et seq</i>	38
U.C.A. §76-3-402.....	10, 29, 33
U.C.A. §76-5-203.....	24
U.C.A. §76-6-202.....	18
U.C.A. §76-6-203.....	18
U.C.A. §76-6-404.....	24
U.C.A. §77-13-6.....	21
U.C.A. §77-16a-304	25

U.C.A. §77-16a-305 25
U.C.A. §77-16a-306 25
U.C.A. §78-2a-3(2)(j)..... 1

RULES

Appellate Rule 23B 15, 27, 28

REGULATIONS

U.A.C. §R671-201 24

CONSTITUTIONAL PROVISIONS

Amend. XIV U.S. Const..... 32, 37
Article 1, § 7 Utah Const..... 32
Article 1, §24, Utah Const..... 37

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to U.C.A. §78-2a-3(2)(j).

STATEMENT OF THE ISSUES PRESENTED, STANDARDS OF REVIEW AND PRESERVATION

A. Whether the judgment(s) is(are) invalid because of attorney disloyalty/ineffective assistance of counsel.

Standard of Review. Attorney disloyalty/ineffective assistance of counsel is raised for the first time on appeal and therefore, there is no "standard of review" *per se*. However, "appellants bear the burden of proof." *See, e.g. State v. Litherland*, 2000 UT 76, , ¶17, 12 P.3d 92, 98.

Preservation of Argument. Attorney disloyalty is a special type of ineffective assistance of counsel claim and may be raised for the first time on appeal so long as appellant is represented by different counsel than at trial. *See, e.g., Litherland*.

B. Whether the judgment of Not Guilty By Reason of Insanity should be set aside for lack of any factual basis.

Standard of Review. Whether the trial court complied with the requirements of entering a plea is a question of law which is reviewed for correctness. *See, e.g., State v. Corwell*, 2003 UT App 261, ¶10, 74 P.3d 1171, *rev'd on other grounds*, 2005 UT 28, 114 P.3d 569.

Preservation of Argument. This issue arises out of attorney disloyalty/ineffective assistance of counsel and this Court will review an issue not properly preserved if the appealing party can demonstrate plain error or exceptional circumstances. The party

may also assert ineffective assistance of counsel in failing to preserve the issue. *State v. Hansen*, 2002 UT 114, ¶21, fn2, 61 P.3d 1062.

C. Whether the sentences are the product of attorney disloyalty/ineffective assistance of counsel.

Standard of Review. Attorney disloyalty/ineffective assistance of counsel is raised for the first time on appeal and therefore, there is no "standard of review" *per se*. However, "appellants bear the burden of proof." *See, e.g. Litherland*.

Preservation of Argument. Attorney disloyalty is a special type of ineffective assistance of counsel claim and may be raised for the first time on appeal so long as appellant is represented by different counsel than at trial. *See, e.g. Litherland*.

D. Whether the trial court erred in setting Defendant's sentence and degree reduction motion by failing to consider the evidence presented by Defendant regarding the iatrogenic (treatment caused) nature of his psychosis.

Standard of Review. Review of sentencing decisions and conviction of a lesser degree are reviewed for abuse of discretion. *State v. Albiston*, 2005 UT App 425.

Preservation of Argument. This issue arises out of attorney disloyalty/ineffective assistance of counsel and this Court will review an issue not properly preserved if the appealing party can demonstrate plain error or exceptional circumstances. The party may also assert ineffective assistance of counsel in failing to preserve the issue. *Hansen*, fn.2.

E. Whether the trial court committed reversible error by failing to continue the sentencing hearing.

Standard of Review. Denial of a request for continuance is reviewed for abuse of discretion. *State v. Taylor*, 2005 UT 40, ¶8, 116 P.3d 360.

Preservation of Argument. This issue arises out of attorney disloyalty/ineffective assistance of counsel and this Court will review an issue not properly preserved if the appealing party can demonstrate plain error or exceptional circumstances. The party may also assert ineffective assistance of counsel in failing to preserve the issue. *Hansen*, fn2.

F. Whether the trial court committed reversible error in refusing to enter conviction for a lower degree of offense.

Standard of Review. Interpretation of the statute itself presents a question of law. *State v. Shepler*, 869 P.2d 968, 969 (Utah App. 1994).

Preservation of Argument. This issue arises out of attorney disloyalty/ineffective assistance of counsel and this Court will review an issue not properly preserved if the appealing party can demonstrate plain error or exceptional circumstances. The party may also assert ineffective assistance of counsel in failing to preserve the issue. *Hansen*, fn2.

G. Whether the confinement regime imposed here is unconstitutional as applied to him.

Standard of Review. The constitutionality of the confinement regime as applied to LPG is a matter of law reviewed for correctness. *State v. Willis*, 2004 UT 93, ¶4, 100 P.3d 1218.

Preservation of Argument. This issue arises out of attorney disloyalty/ineffective assistance of counsel and this Court will review an issue not properly preserved if the appealing party can demonstrate plain error or exceptional circumstances. The party may also assert ineffective assistance of counsel in failing to preserve the issue. *Hansen*, fn2.

H. Whether the confinement regime imposed here is a violation of the Americans with Disabilities Act.

Standard of Review. The interpretation of a statute presents a question of law, which is reviewed for correctness. *State v. Lopez*, 2005 UT App. 496, ¶9.

Preservation of Argument. This issue arises out of attorney disloyalty/ineffective assistance of counsel and this Court will review an issue not properly preserved if the appealing party can demonstrate plain error or exceptional circumstances. The party may also assert ineffective assistance of counsel in failing to preserve the issue. *Hansen*, ¶21.

**CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, RULES, AND REGULATIONS**

The text of relevant constitutional provisions, statutes and regulations is contained in the Addendum.

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STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings and Disposition.

On December 17, 2001, Defendant/Appellant, Leonard P. Gall (LPG) was charged with (1) Criminal Homicide, a First Degree Felony and (2) Theft, a Second Degree Felony. R6, Add1. LPG was initially represented by the Salt Lake Legal Defenders, but there were a couple of representation changes, ending up with Mr. Steven R. McCaughey entering an appearance for LPG on March 4, 2003.¹ R295.² On September 10, 2003, LPG entered pleas of (1) Guilty and Mentally Ill (GMI) to Criminal Homicide, Manslaughter, a Second Degree Felony, with dangerous weapons enhancement, (2) Guilty and Mentally Ill to Theft, a Second Degree Felony, and (3) Not Guilty by Reason of Insanity (NGRI) to Aggravated Burglary, a First Degree Felony.³ R503-508, Add39-45. The court accepted the pleas and immediately thereafter conducted a hearing to determine whether LPG was currently mentally ill, found him to be, and committed him to the Utah State hospital for what "may be the rest of defendant's life." R608, 509-512, Add6-38, 46-51.

¹ Suzanne Gustin, later entered an appearance as co-counsel for the sentencing phase. R522.

² The designation "R" followed by a number is to the Record as numbered by the Clerk. The designation "Add" followed by a number is to the page number of the Addendum for this brief. There are numerous documents in the sealed record, all of which bear either record page "R588" (evaluations and victim impact statements), or "R589" (sentencing submissions). Where it is not otherwise obvious which document is referred to, the document will be identified in (parenthesis) and if the entire document is not referred to, specific page numbers.

³ An Amended Information conforming to this was also filed the same day. R497, Add3.

On April 23, 2004, LPG (but not his attorney) filed a motion for degree reduction, citing new information that the homicide was probably the result of the psychiatric drugs. R523, Add52. On April 26, 2004, LPG (but not his attorney) filed a letter regarding the disposition of the two GMI judgments, the ultimate aim being:

if and when, but only if and when, I am found safe for a conditional release or discharge by the hospital and authorized by the Court, that such conditional release or discharge will be possible.⁴

That same day, LPG wrote then counsel, Stephen McCaughey requesting he withdraw from representing him because he had lost confidence in him. R531, Add59.

On April 27, 2004, Mr. McCaughey filed a withdrawal of counsel.⁵ R532, Add60. Nonetheless, at the May 3, 2004, Sentencing Hearing, LPG was represented by Mr. McCaughey as if he had not been terminated and withdrawn as counsel. R 609, Add116-124. LPG was sentenced to two consecutive terms of one to fifteen years on the second degree GMI judgments, with either a one to five or one to six years weapons enhancement.⁶ R609:7, Add122. LPG was then committed to the Utah State hospital on the two GMI judgments. R538-9, Add125-6.

During this appeal, LPG filed an Appellate Rule 23B motion for a remand of the case to the trial court for entry of findings of fact necessary for the court's determination of a claim of ineffective assistance of counsel. The State opposed and filed a cross

⁴ R525-7, Add53-55.

⁵ Co-counsel, Suzanne Gustin moved to withdraw the following day, April 28, 2004. R535.

⁶ The Transcript states one to five years (R609:7, Add122), while the Sentence Minutes states 1 to six years. R539, Add126.

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motion to dismiss the claims of ineffective assistance of counsel with respect to the guilty pleas. This Court denied both motions.

II. Statement of Facts

LPG, was born December 3, 1976. R6, Add1. His parents divorced when he was six years old. R588 (Cohn 8/26/02, p3). LPG had a pretty normal childhood until age 16, when he was prescribed Paxil for anxiety. R589, Add 91. He then started experiencing worse psychiatric symptoms leading to increasingly aggressive psychiatric treatments, including hospitalization and being electroshocked nine times. R589, Add 91, R588(Cohn 8/26/02, p5, USH 2/13/04 Report). LPG made a number of suicide attempts. *Id.* Not recognized until 2004, it is highly probably the Paxil caused LPG's first psychotic symptoms, which because it was unrecognized, resulted in the escalating psychiatric treatments and resultant problems. R589 (Tracy Declaration), Add91. In spite of all this, LPG graduated from college, receiving a bachelor's degree in film studies. R589 (Tracy Declaration), Add 91, R588(Cohn 8/26/02, p5, USH 2/13/04 Report).

LPG was reported to be on and off his psychiatric medications over the years and the medications were changed from time to time. *Id.* Starting in early 2001, LPG reportedly began getting worse, which was attributed to him stopping his medication. R588(Cohn 8/26/02, p. 6). At that time, he was living with his mother, Susan Gall. R588(Cohn 8/26/02, p. 6). However, in September of 2001, Ms. Gall refused to let LPG continue living with her unless he took all his medication as prescribed and he moved in with a friend in Orem in late September of 2001. R588 (Cohn 8/26/02, p6).

Mrs. Gall continued to be very concerned and expressed this concern to mental health providers. *Id.* The mental health providers determined that LPG was not an imminent danger to self or others and was therefore not subject to involuntary commitment. *Id.*

LPG stayed with his mother, Mrs. Gall, for five days over Thanksgiving, 2001, and on December 3, 2001, Mrs. Gall again wrote to a mental health professional that she was worried about LPG, which apparently was not received until December 10, 2001, when Mrs. Gall re-faxed it. R589.

On December 14, 2001, LPG was visiting his mother at the family home and while psychotic and delusional, killed his mother with a hatchet. R6-7, Add 1-2. LPG then took his mother's car and attempted to commit suicide by ingesting a large number of pills. R588 (Cohn 8/26/02, p9). LPG vomited and being unsuccessful at committing suicide, drove to Reno Nevada, where he was apprehended by University of Nevada Reno police on the night of December 15 -- early morning December 16, 2001. *Id.*

LPG was transported to Utah and charged with Criminal Homicide, a First Degree Felony and Theft, a Second Degree Felony. R6-7, Add1-2. LPG was initially represented by the Salt Lake Legal Defenders, primarily Robert Heineman. R15. Mr. Heineman asserted diminished capacity,⁷ did not assert an NGRI defense under existing Utah law, but did challenge the constitutionality of Utah's *mens rea* limitation.⁸ R60 *et seq.*

⁷ R44.

⁸ Essentially seeking to overturn *State v. Herrera*, 895 P.2d 359 (Utah 1995)(*Herrera I*) and *State v. Herrera*, 993 P.2d 854 (Utah 1999) (*Herrera II*).

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LPG had a number of competency to stand trial determinations by psychologist Nancy Cohn and psychiatrist Mark Rindflesh, in which while not expressing any opinion regarding lack of the requisite *mens rea* due to mental illness, recited that LPG killed his mother to prevent her from being tortured to death. R588.

There were a couple of substitutions of attorney, with Mr. Steven R. McCaughey ultimately becoming counsel on March 4, 2003. R295. Mr. McCaughey did assert the possibility of an NGRI defense,⁹ filed an amended plea to NGRI,¹⁰ and arranged for a psychiatric evaluation from Susan Mirow, Ph.D., M.D., who determined that LPG did not know his mother was human at the time of the homicide. R589 (Mirow). A subsequent joint evaluation by psychologist Cohn and psychiatrist Rindflesh did not dispute this opinion. R588 (Cohn 8/2/03, Rindflesh 8/4/03).

Ultimately, LPG, upon the advice of then counsel McCaughey pled GMI to Criminal Homicide, Manslaughter, a Second Degree Felony, with dangerous weapons enhancement and Theft, a Second Degree Felony, and NGRI to Aggravated Burglary, a First Degree Felony.¹¹ R503, R608, Add 6-47. Sentencing on the GMI judgments was initially set for March 15, 2004, but postponed until May 3, 2004. R515-6.

In between, in February of 2004, it became public knowledge that certain psychiatric medications known as Selective Serotonin Re-uptake Inhibitor (SSRI) anti-depressants cause some people to become both manic (including psychotic) and

⁹ R604:4.

¹⁰ R413.

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violent.¹² R523, Add52. LPG then obtained the services of Dr. Ann Blake Tracy, an expert on SSRI's to look into his case. R589, Add 61. Dr. Tracy concluded that LPG's psychiatric symptoms were most likely caused by his being prescribed the Paxil when he was sixteen,¹³ which then precipitated an escalating series of symptoms and treatments, ultimately leading to the tragedy of December 14, 2001. R589, Add91. LPG then obtained the services of Grace Jackson, M.D., a medical expert on psychopharmacology, who concurred. R589, Add96.

Then counsel McCaughey, however, did not take any steps to utilize this information on LPG's behalf and on April 23, 2004, LPG presented it in support of a motion to reduce the conviction to a lower degree under U.C.A. §76-3-402.¹⁴ R523, Add52. LPG also asked that the sentencing hearing scheduled for May 3, 2004, be delayed to "sort out what should be done" about the information regarding the likelihood it was "really the psychiatric medications that precipitated/caused [LPG] to commit [his]crime." *Id.* In the absence of any action by then counsel Mr. McCaughey on his behalf, LPG submitted a letter on April 26, 2004, regarding sentencing, with the ultimate goal being:

(Continued footnote)-----

¹¹ An Amended Information conforming to this was also filed the same day. [R497, Add3.

¹² Paxil, the initial medication LPG was prescribed at age 16 is such an SSRI.

¹³ At that time, the Paxil was prescribed for relatively minor anxiety problems. R588 (Tracy), Add91.

¹⁴ LPG mis-cited to "Rule 4-603."

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if and when, but only if and when, I am found safe for a conditional release or discharge by the hospital and authorized by the Court, that such conditional release or discharge will be possible.¹⁵

That same day, April 26, 2004, LPG terminated Mr. McCaughey's representation and requested that he withdraw from the case. R531, Add59.

On April 27, 2004, Mr. McCaughey filed a withdrawal of counsel.¹⁶ R532, Add60. Nonetheless, at the May 3, 2004, Sentencing Hearing, LPG was represented by Mr. McCaughey as if he had not been terminated and withdrawn as counsel. R 609. During that hearing, neither Mr. McCaughey nor the judge made any mention of the termination of Mr. McCaughey as counsel and his filing a withdrawal. R609. Neither did the judge rule on LPG's request to postpone the sentencing hearing. With respect to the motion to lower the degree of offense, Mr. McCaughey stated that in his judgment "filing such a motion would really be frivolous in light of the circumstances of this case. But in deference to [LPG] and his father, I would orally make that motion." R609:5, Add120. The court thereupon denied the motion, saying only:

This was a crime of extreme violence and a 402 reduction is simply out of the question in this case.

R609-6, Add121.

¹⁵ R525, Add53.

¹⁶ Co-counsel, Suzanne Gustin moved to withdraw the following day, April 28, 2004. R535.

Without discussing the information LPG had presented regarding the iatrogenic nature of his psychiatric symptoms,¹⁷ the Court sentenced LPG to two consecutive terms of one to fifteen years on the second degree GMI judgments, with either a one to five or one to six years weapons enhancement.¹⁸ In doing so, the Court stated that it believed it was "almost everybody's" goal to ensure that Defendant/Appellant stayed at the Utah State hospital "for a long period of time," which presumably included Mr. McCaughey.¹⁹ R609-8. LPG was then committed to the Utah State hospital on the two GMI judgments. R539, R609:122, Add122, 126.

SUMMARY OF ARGUMENTS

There were two fundamental legal deficiencies below, which generated a number of improper results. The first is the disloyalty of then counsel McCaughey, which invalidates all three judgments in this case without more.

The second fundamental problem with the proceedings below revolves around the sentencing. Mr. McCaughey's objective of having LPG confined in the Utah State Hospital "for a long period of time" as phrased by the Court not only resulted in his failure to do anything on behalf of LPG, but to totally undermine LPG's *pro se* motion

¹⁷ At the beginning of the hearing the did court indicate it had "received and reviewed 15 letters as well as numerous documents concerning mental health issues with regard to the defendant." R609:4, Add119.

¹⁸ The Transcript states one to five years, R609:7, Add122, while the Sentence Minutes states one to six years. R539, Add 126.

¹⁹ The transcript can be read a couple of ways and counsel has been informed an audio recording of this hearing is not available. Counsel believes the interpretation that the Court was including Mr. McCaughey in the "almost everybody's" is the most logical and likely one.

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for a degree reduction by calling it "frivolous." The Court acted improperly by conducting the sentencing hearing with Mr. McCaughey acting as counsel after his employment had been terminated and he had withdrawn from the representation. The court also erred by refusing to consider a degree reduction due solely to the "extreme violence" involved. It was not proper to categorically deny the motion for conviction of lower degrees based solely on that factor without taking into consideration the other statutorily required factor of LPG's history and character.

In addition to the fundamental legal deficiencies in the proceedings, the incarceration regime in this case results in illegal discrimination under the Equal Protection Clause of the United States Constitution, the Uniform Application provision of the Utah Constitution and the Americans with Disabilities Act, because it appears he is being incarcerated for 30 years under the GMI sentences due to his NGRI status, rather than receiving a baseline incarceration from the Utah Board of Pardons of 4 years and 6.4 months.

ARGUMENT

I. The Judgments Are Invalid Due to Attorney Disloyalty.

The Utah Supreme Court has unequivocally held that attorney disloyalty invalidates a conviction.

Given the direct and fundamental nature of the duty of loyalty, we will not inquire into the issue of whether the breach of that duty was prejudicial. We are obliged not to do so by our own precedent, *State v. Brown*, 853 P.2d 851, 857-58 (Utah 1992), and that of the United States Supreme Court, *Glasser v. United States*, 315 U.S. 60, 75-76, 62 S.Ct. 457, 467-68, 86 L.Ed. 680 (1942). In *Glasser*, the Supreme Court reversed a conviction because an attorney represented codefendants with adverse

interests. The Court refused to inquire into the issue of prejudice because "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Id.* at 76, 62 S.Ct. at 467; see also *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981); *Cuyler v. Sullivan*, 446 U.S. 335, 348-50, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 488-90, 98 S.Ct. 1173, 1180-82, 55 L.Ed.2d 426 (1978); *Government of Virgin Islands v. Zepp*, 748 F.2d 125, 138 (3d Cir.1984); *State v. Smith*, 621 P.2d 697, 699 (Utah 1980).

State v. Holland, 876 P.2d, 357, 361 (Utah 1994).

While the court, at that point, only disqualified the attorney as to further proceedings, in the subsequent case of *State v. Holland*, 921 P.2d 430, 436 (Utah 1996), the Utah Supreme Court repeated this language in reversing the conviction.

We need not examine whether such performance resulted in prejudice to Holland. "Once the Court conclude[s] that [the defendant's] lawyer had an actual conflict of interest, it [shall] refuse to indulge in nice calculations as to the amount of prejudice attributable to the conflict. The conflict itself demonstrate[s] a denial of the 'right to have the effective assistance of counsel.' "

(citations omitted)

In *Glasser v. United States*, 315 U.S. 60, 75-76, 62 S.Ct. 457, 467-68 (1942), cited by the Utah Supreme Court in both the *Holland* cases cited above, the United States Supreme Court held the Sixth Amendment right to counsel was violated where an attorney did not have undivided loyalty to his client, and this mandated conviction reversal.

That disloyalty of counsel is unconstitutional under the Sixth Amendment of the United States Constitution mandating reversal of a conviction is confirmed in *Osborn v. Shillinger*, 861 F.2d 612, 625 (CA 10 1988):

[A]n attorney who adopts and acts upon a belief that his client should be convicted "fail[s] to function in any meaningful sense as the Government's adversary." *Cronic*, 466 U.S. at 666, 104 S.Ct. at 2051. Whether the attorney is influenced by loyalties to other defendants, third parties, or the government, "if [he] entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights."

This was recently re-confirmed by the 10th Circuit in *Fisher v. Gibson*, 282 F.3d 1283 (CA10, 2002).

In *United States v. Cronic*, 466 US 648, 656-7, 104 S.Ct. 2039, 2045-6 (1984), the United States Supreme Court phrased it this way:

[T]he adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." . . . But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

(footnotes and citations omitted)

In *Osborn*, 861 F.2d at 628, the Tenth Circuit discussed how "Counsel's actions in regard to sentencing even more clearly indicate the abandonment of his duty of loyalty" by having made public statements saying his client should not be given consideration at sentencing and stressing the brutality of the crime, rather than presenting information that would have supported a more lenient sentence.²⁰ Mr. McCaughey's performance

²⁰ As set forth in the affidavits submitted in support of LPG's Rule 23B Memorandum, there were many positive things about LPG as he struggled with the hand he was dealt. Mr. McCaughey did nothing to try and use this information for the benefit of his client. While these facts are not in the record due to the Rule 23B Motion having been denied and therefore cannot be relied upon here, what is crystal clear from the entire record is Mr. McCaughey never did a single thing to counteract the impression conveyed by the prosecution that LPG was simply a brutal killer as a result of his reckless failure to take psychiatric drugs.

here was far worse than a public statement against his client. Here he termed a very viable charge reduction motion "frivolous" in open court. This is four square with the type of counsel performance the Tenth Circuit found in *Osborn* to be a *per se* violation of the right to counsel and mandates vacation of all three judgments here.

LPG respectfully suggests Mr. McCaughey's terming the offense reduction motion "frivolous" in open court is disloyalty as a matter of law,²¹ invalidates the judgments in this matter and this Court need go no further.

As set forth above, appellate courts are not to "indulge in nice calculations as to the amount of prejudice attributable" to such disloyalty and must invalidate the entire proceeding as violative of the the Sixth Amendment to the United States Constitution.

II. The Judgment Of Not Guilty By Reason Of Insanity Is Invalid As the Result of Ineffective Assistance of Counsel/Disloyalty and For Lack Of Any Factual Basis

At the last minute, Mr. McCaughey presented LPG with a plea agreement which added a third count, Aggravated Burglary, a First Degree Felony, to which LPG was exhorted to, and did, plead NGRI. This NGRI judgment is both the result of ineffective assistance of counsel/disloyalty and is legally defective.

A. There is No Factual Basis for the Aggravated Burglary Disposition

At the change of plea hearing the factual basis of the NGRI was stated by Mr. McCaughey to be "based on the reports of Dr. Mirow and Dr. Cohn and Dr. Rindflesh

²¹ There is a tremendous amount of other evidence pointing to disloyalty, both in the record and in the affidavits of Leonard Preston Gall and Leonard Silvius Gall presented
------(footnote continued)

that have been submitted to this court over the period of this case." R 608:20. The prosecution offered the following as the basis for the NGRI on the Aggravated Burglary charge:

As an evidentiary matter, your Honor, evidence located by the defense, Mr. McCaughey has called into question the precise content of LPG's delusion at the time he committed these offenses. Based upon that, there has been some doubt interjected as to whether he might otherwise receive a not-guilty-by-reason-of-insanity verdict were the case to proceed to trial.

As a practical matter, the not-guilty-by-reason-of-insanity judgment that you are entering will provide the Court, your Honor, with lifetime jurisdiction to supervise this defendant, quite apart from the criminal sanctions, and to assure that he continues to comply with treatment and to protect himself and the public from being dangerous in the future.

Id. The Court then found that with respect to justifying the NGRI this was "sound and appropriate in this case." R608:21-22.

However, the NGRI burglary judgment is irreconcilably inconsistent with the GMI judgments and there is absolutely no factual basis for the burglary charge. That there are no facts to support a burglary charge is strongly suggested by the government not even charging LPG with burglary until the plea agreement. Analysis makes clear there is no factual basis.

(Continued footnote)-----
in the Rule 23B Motion. Perhaps this is why this Court found a Rule 23B remand unnecessary, but in any event, record items, will be discussed infra.

Burglary occurs when a person "enters or remains unlawfully in a building or any portion of a building with intent to commit" various crimes, including assault and theft²² and becomes Aggravated Burglary if

in attempting, committing, or fleeing from a burglary the actor or another participant in the crime:

- (a) causes bodily injury to any person who is not a participant in the crime;
- (b) uses or threatens the immediate use of a dangerous weapon against any person who is not a participant in the crime; or
- (c) possesses or attempts to use any explosive or dangerous weapon.²³

Thus, a necessary predicate of Aggravated Burglary is that Burglary have been committed.

Here, the evidence is uncontroverted that LPG had permission to be at his mother's²⁴ so the first element is not present. *State v. Rudolph*, 970 P.2d 1221, 1229 (Utah 1998) ("if the actor commits a crime while *lawfully* inside a building, there is no burglary") (emphasis in original). With respect to the second element, "intent to commit" certain crimes, it is impossible for LPG to not have been able to form the intent to commit the manslaughter and theft by reason of insanity for purposes of the burglary, but then be convicted as having the requisite intent for the same crimes. In other words, if he couldn't form the intent to commit the manslaughter or theft while entering or remaining in the house, he couldn't have had the intent while in the house to commit the manslaughter and theft to which he pleaded guilty and mentally ill. *See, e.g., Rudolph*,

²² U.C.A. §76-6-202, emphasis added.

²³ U.C.A. §76-6-203.

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id. ("he committed burglary if he formed the intent to commit a sexual assault either at the time he entered the victim's home or at any time thereafter while he remained there unlawfully").

This impossibility is actually starkly illustrated by Mr. McCaughey's statement at the change of plea hearing that:

LPG entered his house, his mother's house, with the intent to -- or remained in his mother's house with the intent to commit a felony. At that time he recklessly caused her death.

R 608:11. Mr. McCaughey's statement that LPG entered his mother's house with the intent to commit a felony is absolutely inconsistent with the NGRI disposition.

Getting back to Mr. McCaughey's statement that the basis for the NGRI disposition on the Aggravated Burglary charge are contained in the reports of Dr. Mirow and Dr. Cohn and Dr. Rindflesh, this Court will find no such basis. Nowhere in these reports is there any discussion of LPG's delusions or other psychiatric symptoms negating intent with respect to any burglary charge, which charge, of course, didn't even exist at the time the reports were written.

The aggravated burglary charge was instead developed out of whole cloth for the sole purpose of locking LPG up for the rest of his life. This was done by fashioning a set of judgments that mimicked the *Herrera* result of having both NGRI and guilty but mentally ill verdicts. However, *Herrera* involved the extraordinary facts of the defendant believing one victim was a robot and the others human. This sort of

(Continued footnote)-----
²⁴ *e.g.*, R589 (Cohn 8/26/02, p9).

extraordinary factual predicate justifying both GMI and NGRI verdicts in the *Herrera* case is simply not present here and neither Mr. McCaughey, the prosecution, or the judge for that matter, ever attempted to establish that it was. There simply is no factual basis for the NGRI verdict, nor for that matter, any burglary conviction. This mandates reversal.

Moreover, while locking LPG up for the rest of his life may be a proper motive for the prosecution, it was not for defense counsel, Mr. McCaughey. It was disloyalty/ineffective assistance of counsel.

B. The NGRI Judgment and the GMI Convictions Were the Product of Disloyalty/Ineffective Assistance of Counsel.

In *State v. Martinez*, 2001 UT 12, ¶16, 26 P.3d 203, 207, the Utah Supreme Court reiterated:

an individual has been denied the effective assistance of counsel if: (1) counsel's performance was deficient below an objective standard of reasonable professional judgment, and (2) counsel's performance prejudiced the defendant.

Martinez, at ¶17, goes on to state:

in the context of a guilty plea, the "defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."

In its November 25, 2005, Order denying both LPG's Rule 23B Motion and the State's motion for partial dismissal of the ineffective assistance of counsel claims (Rule 23B Order), this Court stated:

Failure to file a timely motion to withdraw a guilty plea is a jurisdictional bar that extinguishes the right to challenge the guilty plea on direct appeal. See *State v. Merrill*, 2005 UT 34, ¶48, 114 P.3d 585. Given the holding of

Merrill, we would lack jurisdiction to consider a challenge to the validity of the guilty plea under the guise of an ineffectiveness of counsel claim. However, we do not determine what effect, if any, Merrill would have on the stipulation for entry of a not guilty by reason of insanity judgment on the aggravated burglary count, which was contained in the plea agreement. Accordingly, we defer a ruling on the issues raised in the cross-motion for partial dismissal pending plenary presentation and consideration of this appeal.

As set forth herein, disloyalty, at any stage of the proceedings invalidates all of the judgments in this case. This means this Court does not have to reach the narrow jurisdictional issue identified in its November 25, 2005, Order.

It seems prudent, however, to address this question. Clearly, a not guilty by reason of insanity judgment entered upon a plea agreement is not a guilty plea to which either U.C.A. §77-13-6 or *Merrill* apply. The harder question is whether once having jurisdiction over the NGRI judgment, does this Court obtain jurisdiction over ineffective assistance of counsel regarding the GMI convictions? LPG submits once this Court has jurisdiction on one basis, jurisdiction is no longer an issue and it can hear the entirety of the ineffective assistance of counsel claim, including the validity of the guilty plea. *See, e.g.*, footnote 6 of Chief Justice Crockett's dissent in *State v. Robinson*, 23 Utah 2d 78, 457 P.2d 969 (Utah 1969). Since the GMI convictions and the NGRI judgment were part of a "package deal" it does not seem possible nor desirable to separate them out. *Merrill* does not address this situation.

Thus, if this Court finds the NGRI judgment the product of ineffective assistance of counsel, LPG respectfully suggests the GMI judgments must also fall. LPG does not perceive this Court's Rule 23B Order as precluding this result because it very

specifically denied the State's motion to dismiss "defendant's challenge to the validity of his guilty plea for lack of jurisdiction."²⁵

From the totality of the situation, particularly the events surrounding the sentencing,²⁶ it is clear Mr. McCaughey's objective was to have LPG locked up for the rest of his life and the plea agreement was constructed to do so.²⁷ LPG believes Mr. McCaughey's actions at sentencing establishes disloyalty as a matter of law and invalidates the judgments in this matter. However, as a precautionary measure, through his Rule 23B motion, LPG attempted to augment the current record as to both disloyalty and ineffective assistance of counsel that might not constitute disloyalty to, among other things,²⁸ include the following facts:

- Mr. McCaughey had not obtained LPG's agreement to the disposition of the case when he told the court at the September 8, 2003 hearing that there was a disposition (plea agreement).²⁹ ¶21 of Affidavit of Leonard Preston

²⁵ Cross-Motion for Partial Dismissal and Response in Opposition to Defendant's 23B Motion to Remand, dated September 12, 2005, page 1.

²⁶ To wit: Mr. McCaughey's failure to take any actions on behalf of his client with respect to sentencing and his terming LPG's *pro se* motion to be convicted of a lower degree, "frivolous." R609:5.

²⁷ Since the plea agreement was only entered into as a result of this improper objective (deficiency), absent the deficiency the plea agreement would not have been agreed to and prejudice is established under *Martinez*.

²⁸ The affidavits of LPG and LSG also included a fair amount of material regarding LPG's life and background to show Mr. McCaughey was also ineffective because he failed to take the actions he could have to counter the overwhelmingly negative portrayal and perception of LPG.

²⁹ R607:2.

Gall submitted in support of the Appellate Rule 23B Motion (LPG Affidavit).

- Mr. McCaughey did not tell LPG the real purpose of the September 10, 2003, change of plea hearing. ¶12 of LPG Affidavit.
- If LPG had been informed that his GMI terms would normally not be set while he was in the hospital for up to the entire 30 year maximum incarceration thereunder he would not have agreed to the plea agreement. ¶s 31 & 32 of LPG Affidavit.
- Mr. McCaughey told LPG's father, Leonard Silvius Gall (LSG) that Mr. McCaughey had negotiated the disposition that he had because he did not feel LPG deserved just two second degree felonies that the prosecution had offered. ¶18, 41 of the Affidavit of Leonard Silvius Gall (LSG Affidavit); ¶16 LPG Affidavit.
- Mr. McCaughey would tell LSG one thing and LPG something completely different. ¶43 of LSG Affidavit.

These allegations were, however, held by this Court to be insufficient

"nonspeculative allegations of facts, not fully appearing in the record on appeal" that could support an allegation that counsel was ineffective with regard to the stipulation for entry of a judgment of not guilty by reason of insanity.

(Rule 23B Order, page 2). Thus, for purposes of this appeal, LPG must rely upon the facts already contained in the record.

These facts are mainly that the combination of the GMI and NGRI judgments had the effect of increasing LPG's incarceration far beyond what was likely under the original charges.³⁰ Under the "Matrix" which establishes a baseline from which the Utah Board of Pardons and Parole (Board of Pardons) set sentences, the sentence for Criminal Homicide, Murder, a First Degree Felony under U.C.A. §76-5-203, would be 16 years and the sentence for Theft, a Second Degree Felony, U.C.A. §76-6-404, would be 16 months regular probation.³¹ Under the Board of Pardon Guidelines,³² even a consecutive sentence for the theft would only add 40% of 16 months, or 6.4 months of probation to this. Thus, the baseline incarceration if LPG had been convicted of the crimes originally charged would be 16 years of imprisonment and 6.4 months of probation.

Under the two second degree felonies to which LPG pled GMI, the Matrix provides a baseline of 4 years of imprisonment for the manslaughter and the same 6.4 months of probation for the theft.

In stark contrast, the result of the interplay between the NGRI and GMI judgments is leading to LPG being incarcerated at Utah State hospital without his term ever being set in the way that everyone else's is.³³ Under this scenario, he will be

³⁰ The prejudice to LPG is apparent.

³¹ See, the first page of the Appendix where this Matrix has been reproduced for the Court's convenience.

³² Balance of the Appendix.

³³ U.A.C. §R671-201 provides that:

"within six months of an offender's commitment to prison the Board will give notice of the month and year in which the inmate's original hearing will be conducted . . . All felonies, where a life has been taken, will be

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serving his GMI prison terms at Utah State Hospital for the full 30 years maximum of the combined consecutive sentences without his terms for the GMIs ever having been set by the Board of Pardons. At that point, he will then still be serving his "up to life" term under the NGRI.

If LPG had been sent to the Utah State Hospital solely on one or more NGRIs, it is possible for him to be discharged when it is determined it is safe to do so, which may include a conditional discharge. U.C.A. §77-16a-304, 305, 306. However, so long as LPG is at the Utah State Hospital on the GMIs these provisions are not applicable. Similarly, the Board of Pardons is not setting his term because he is at the hospital on the NGRI disposition.

To summarize then, because LPG is at the hospital his term will likely not ever be set and he will be there for the entire 30 years before it is even possible for him to have any kind of discharge on his "up to life" NGRI commitment. When the results of the combination GMI and NGRI dispositions are analyzed, it becomes obvious they were carefully constructed to allow no possibility for release for the longest period of time possible. This is certainly consistent with the judge's statement at the Sentencing

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routed to the Board as soon as practicable for the determination of the month and year for their original hearing date."

However, because LPG has not been committed to prison, it appears this will not occur while LPG is incarcerated at Utah State Hospital under the NGRI judgment. It certainly has yet to occur. One of the factual elements LPG asked to establish through his Rule 23B motion was "when the Board of Pardons is likely to set the Defendant/Appellant's term on the Guilty and Mentally Ill judgments." (§3(h), of LPG's proposed Rule 23B Remand Order). Perhaps this Court denied the Rule 23B Remand Motion with respect

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hearing ("Mr. Gall, you will be at the Utah State Hospital . . . for a long period of time. And that's frankly my goal I think for almost everybody in this case from the very beginning."³⁴

There are only two inferences that can be drawn from this. The first is that this was the goal of Mr. McCaughey,³⁵ which constitutes disloyalty. Other facts pointing to disloyalty have already been discussed, but it seems worthwhile to reiterate at this point that there is absolutely no basis for the burglary disposition. The other inference is that Mr. McCaughey didn't understand the effect of this combination of judgments,³⁶ which is, of course, ineffective assistance of counsel as a matter of law.

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to this factual issue because the Court already understands this is the effect of the combination GMI and NGRI dispositions.

³⁴ R609:8, Add123. It is troubling for the trial court to say it was the court's goal from the very beginning to put LPG at the hospital for a long time. The court's decisions, of course, should be made based upon the evidence presented to it at the various phases of the proceedings, not based on its goal "from the very beginning." That the court had this goal from the very beginning, at a minimum, reinforces the point discussed in the next section that the trial court improperly failed to properly consider the evidence before it at sentencing. It also, of course, conclusively shows impermissible bias.

³⁵ The statement of the judge that this was the "goal I think for almost everybody" at least implies that it was Mr. McCaughey's goal as well. The transcript is unclear about this because it says "my goal I think for almost everybody," which doesn't make a lot of sense unless it was really more like "my goal -- I think for almost everybody." Counsel attempted to obtain a recording of this hearing to ascertain this, but was told there was none available.

³⁶ This is suggested by Mr. McCaughey's statement at the Change of Plea hearing that "this plea agreement . . . gives us the same benefit . . . had he been found not guilty by reason of insanity at trial." R608:21. As the foregoing analysis makes clear the plea agreement most assuredly did not give LPG the same benefit as an NGRI on the charges at trial.

III. Mr. McCaughey Was Disloyal/Rendered Ineffective Assistance During Sentencing.

This Court's Rule 23B Order states, "Gall concedes that the record is adequate to allow assertion of the ineffectiveness claims [regarding the sentencing proceedings]." It is hard to know what to make of this because LPG's Rule 23B Memorandum states:

As mentioned above, notwithstanding this withdrawal, then counsel attended the sentencing hearing on May 3, 2004, as if he were still representing Defendant/Appellant. However, he made no efforts on behalf of Defendant/Appellant and in fact, as mentioned above, termed the offense reduction motion "frivolous." These facts appear in the record so no remand is necessary with respect to them.

What is not in the record, however, is then counsel had informed Defendant/Appellant and his father the prosecution had agreed to not seek consecutive terms. This agreement was violated during the sentencing hearing, yet then counsel did not object. Thus, one of the facts Defendant/Appellant needs to establish on remand is that the prosecution agreed to not seek consecutive sentences or, alternatively, that then counsel told Defendant/Appellant and his father that this was the case.

(footnotes omitted).

While as set forth above, LPG believes the fact that Mr. McCaughey:

- (1) purported to represent LPG at the sentencing hearing after he had been discharged and withdrawn as counsel,
- (2) failed to make any efforts at all on behalf of LPG with respect to the sentencing, and
- (3) termed the offense reduction motion frivolous,

establishes both ineffective assistance of counsel and disloyalty as a matter of law; it is not a concession that the record is adequate. It was precisely because of the possibility this Court might not agree this established ineffective assistance of counsel and

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disloyalty as a matter of law, that the Rule 23B remand was sought to establish, among other things, that "the prosecution agreed to not seek consecutive sentences or, alternatively, that then counsel told Defendant/Appellant and his father that this was the case."

Logically then, it appears only if this Court

- (a) agrees the existing record establishes ineffective assistance of counsel or disloyalty with respect to the sentencing proceedings, or
- (b) concludes that neither
 - (i) the State agreeing to not seek consecutive sentences and Mr. McCaughey's failure to raise it when this agreement was breached, or
 - (ii) Mr. McCaughey lying to LPG and his father that the State had agreed not to seek consecutive sentences,constitute ineffective assistance of counsel or disloyalty,

can the Court's conclusion about the "concession" regarding the state of the record be reconciled with the language of the Rule 23B Memorandum. Clearly, lying to his client about such an agreement constitutes disloyalty. This thus only leaves the conclusion that the existing record establishes ineffective assistance of counsel or disloyalty as a matter of law, a conclusion with which LPG certainly agrees.

However, it is not at all clear that is what this Court meant in its Rule 23B Order. Nevertheless it seems incomprehensible that Mr. McCaughey's statement that the offense reduction motion was "frivolous" can be held to be anything other than

disloyalty and his complete failure to do anything whatsoever in the sentencing phase on behalf of his client can be held to be anything but ineffective assistance of counsel.

IV. The Trial Court Erred By Ignoring The Evidence of The Iatrogenic Nature Of His Psychosis.

Well in advance of the sentencing hearing set for May 3, 2004, LPG informed Mr. McCaughey that information had been coming out that many people become psychotic and delusional as a result of the psychiatric medications they are prescribed and this should be followed up for potential presentation to the trial court on his behalf in connection with the sentencing. LPG and LSG then arranged for Dr. Ann Blake Tracy, an expert in these medications, to review his history and address this issue. Dr. Tracy's analysis confirmed that LPG's serious psychiatric history was almost certainly caused by the treatment he had received, primarily psychiatric drugs. However, Mr. McCaughey made no efforts to utilize this information on LPG's behalf and when it became clear to LPG that Mr. McCaughey was not going to do anything on his behalf with regard thereto, he, among other things, moved for conviction of lower degree of offense under U.C.A. § 76-3-402 (402 Reduction)³⁷ when he wrote the court as follows:

³⁷ Mis-cited as Rule 4-603.

April 23, 2004

Honorable Judge Atherton
Third Judicial District Court

Re: Rule 4-603 Motion:
State of Utah v. Leonard Preston Gall, Case No. 011919226;

Dear Judge Atherton

There is some new information on my case, which was conveyed to my attorney some time ago, but he is out of town and unavailable and I wanted to make sure I met the deadline for filing a motion for reduction of offense at sentencing in time. I don't know why my attorney has not mentioned this option before, particularly in light of the new information. My father found Rule 4-603 by himself, just today, the last day to file the motion.

The crux of the matter is that it is looking very likely it was really the psychiatric medications that precipitated/caused me to commit my crime. I am enclosing the not quite finished report of Dr. Ann Blake Tracy about this.

What I would really like the court to do is allow us some time to sort out what should be done about this. However, because of the deadline for the Rule 4-603 motion, I am also formally asking that my offenses be reduced.

It is my preference, however, that the sentencing hearing set for May 3rd be delayed and we use the time instead to decide what to do about this new information.

Thank you for your consideration.

Sincerely,
/s/
Leonard Preston Gall

R523, Add52, emphasis added.

On April 26, 2004, the final version of the Declaration of Ann Blake Tracy Declaration, PhD (Tracy Declaration) was filed. R589, Add61. The Tracy Declaration

runs some 35 pages and is a very comprehensive analysis of the situation. Included are the following conclusions:

I believe that Lenny Gall was a normal child with a family history of hypoglycemia, a metabolic disorder, who inadvertently got started on these serotonergic medications. They were given to him at a younger age than the FDA had approved as safe or effective and at an age that they have recently warned can be very dangerous leading to suicide and/or violence toward others.

What stands out in Lenny's medical records is the drastic changes for the worse after he was first introduced to Paxil at the age of 16 in 1993. Shortly after the introduction of Paxil, he went from simple anxiety problems to all the signs of a manic reaction to Paxil - including, as Dr. Cohn stated in her August 26, 2002, report, "with documentation of paranoia, grandiosity, loose associations, and suicidal ideation" (suicidal ideation is continuous obsessive thoughts of ways to kill oneself). This in spite of the fact that this was child who had a consistent even keel disposition before his introduction to Paxil.

From there it was downhill because no one noticed that the manic reactions were drug-induced. Had these manic, paranoid, and suicidal reactions been recognized as adverse drug reactions, he could have been withdrawn safely from the offending medications at that time. (Paxil had just recently been introduced and most adverse reactions had not even been determined at that point.) In my experience and in my opinion that would have prevented the years of medical treatment for his additional drug-induced reactions of depression, suicide attempts, bipolar disorder, schizophrenia, etc. as well as preventing the drug-induced psychotic reaction that led to the death of his mother and his subsequent confinement.³⁸

* * *

My professional opinion is that in considering the information in the product package inserts alone there is such overwhelming evidence that this entire situation was chemically/physically-induced that I do not

³⁸ R589 (Tracy), Add91, emphasis added.

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understand why anyone did not consider the potential of an extremely altered mental state for Lenny in this tragedy.³⁹

The conclusions of the Tracy Declaration were confirmed by a report from Grace E. Jackson, MD (Jackson Report), a psychiatrist who is an expert in psychopharmacology, which was filed on April 30, 2004.⁴⁰ Included in the Jackson Report is the following conclusion:

The development of manic and psychotic symptoms appears to have been iatrogenically induced at age 16; iatrogenically perpetuated through several years of continuing drug treatment and intermittent drug withdrawal; and iatrogenically aggravated by ECT [electroshock] and quite possibly an unrecognized closed head injury (frontal lobe syndrome) occurring in the immediate aftermath of a serious motor vehicle accident.

The trial court, however, did not consider any of this evidence, denying the motion instead solely on the basis that it was a crime of extreme violence"

I am denying the motion for a 402 reduction. This was crime of extreme violence and a 402 reduction is simply out of the question in this case.

R609:6, Add 121.

The failure of the trial court to substantively address the charge reduction motion is a violation of Article 1, § 7 of the Utah Constitution as well as the Due Process Clause of the United States Constitution as applied to the states under the 14th Amendment. The United States Supreme Court has held that if state law gives a person a right, federal due process requires the state to use proper procedures to effectuate the right. *See, e.g., Washington v. Harper*, 494 U.S. 201, 110 S.Ct. 1028 (1990). The same is true under

³⁹ R589 (Tracy), Add93.

⁴⁰ R589(Jackson), Add96.

Article 1, §7, of the Utah Constitution. Under *In the Interest of: L. G. W.*, 638 P.2d 527 (Utah 1981), once having raised the issue, an essential element of due process is an "inquiry into the merits of the question presented."

In fact, this Court's recent decision of *Albiston, supra*, makes clear that the trial court must "consider all legally relevant factors" in considering a 402 Reduction motion. U.C.A. § 76-3-402. mandates consideration of both the "nature and circumstances of the offense" and "the history and character of the defendant." The best that can be said of the trial court's consideration of the motion is that it considered the "nature and circumstances of the offense." This is an abuse of discretion as a matter of law. *Id.*

Here, the evidence presented by LPG with respect to the motion for conviction of a lower offense, set forth above, was directly related to the "history and character of the defendant", presenting a compelling case for leniency based upon the iatrogenic (treatment caused) nature of the offense.⁴¹ It is clear that LPG is a victim of the treatment caused psychosis resulting in his mother's death in addition to his mother being a victim. Inordinate attribution of blame resulting in the virtual impossibility of LPG getting beyond the walls of the hospital for at least 30 years and possibly for life compounds the tragedy. LPG was legally entitled to consideration of these factors and

⁴¹ A pretty large percentage of the facts set forth in the affidavits submitted in support of LPG's Rule 23B Motion related to other aspects of the history and character of LPG as evidence that Mr. McCaughey was ineffective as counsel in failing to do anything to counter the overwhelmingly negative impression that had been given of LPG -- an impression that was not accurate.

more than that, deserved consideration of them as well as a matter of common decency and morality. The failure of the trial court do so is reversible error.

V. The Trial Court Erred By Conducting The Sentencing Hearing With Counsel Purporting To Represent LPG After His Employment Had Been Terminated; He Had Withdrawn From The Representation and LPG Had Moved for a Continuance.

As set forth above, when LPG realized Mr. McCaughey was not going to present the very important information that his psychosis was almost certainly caused by the prescribed medications and Mr. McCaughey was not doing anything to try and achieve the minimum sentences possible, he terminated his employment and requested the sentencing hearing be delayed to "sort out what should be done" about the information. Also as set forth above, Mr. McCaughey filed a withdrawal from the case. In spite of this, and without acting on the request for continuance, the sentencing hearing proceeded as if neither of these events had occurred.

The withdrawal was not put in the form of a motion, but instead was an unequivocal departure from the case.⁴² Regardless, there is no doubt it was error for the trial court to fail to address this.

As the Utah Court of Appeals has properly held, when a defendant expresses dissatisfaction with counsel, a trial court "must make some reasonable, non-suggestive efforts to determine the nature of the defendant's complaints."

State v. Lovell, 1999 UT 40, ¶27, 984 P.2d 382, 388. In *Lovell*, however, the court went on to hold the failure to do so was harmless "given the circumstances" of that case. *Id.*

⁴² R532, Add60.

However, the Utah Supreme Court there also cited with approval *United States v. Morrissey*, 461 F.2d 666, 669 (2nd Cir. 1972) where it stated "[n]ormally, failure to conduct such an inquiry constitutes reversible error."

The harm here is apparent. In addition to the disloyalty as manifested by sabotaging the Motion for Conviction of a Lower Offense by terming it "frivolous," and failing to do anything at all to minimize LPG's length of incarceration, the trial court's failure to explore the situation prevented LPG from making a motion to withdraw his guilty and mentally ill pleas, which has had the extremely prejudicial consequence of limiting his ability to challenge the validity of the pleas in this appeal.

It was also reversible error for the trial court to fail to grant LPG's request for a continuance.

An abuse of discretion occurs when a trial court denies a continuance and the resulting prejudice affects the substantial rights of the defendant, such that a "review of the record persuades the court that without the error there was 'a reasonable likelihood of a more favorable result for the defendant.' "

State v. Taylor, 2005 UT 40, ¶8, 116 P.3d 360.

Here, LPG was effectively without the assistance of counsel and the prejudice is apparent. He needed someone to make an effort on his behalf with respect to the sentencing, including arguing the import of the likelihood of the iatrogenic (treatment caused) nature of the crime. Perhaps even more prejudicial is by going forward with the sentencing in the absence of the assistance of counsel, LPG did not have a chance to move to withdraw his guilty and mentally ill pleas. There were at least two grounds for such a motion. One is the ineffective assistance of counsel claim with respect to the

entry of those pleas and the second is that the homicide was almost certainly the result of his psychiatric treatment (ie., the drugs he was prescribed).

VI. The Incarceration Regime Imposed in This Case is Unconstitutional As Applied To LPG Because It Deprives Him Of The Benefit Of The Term Setting Process By The Board Of Pardons.

As demonstrated above, because LPG has been committed to the Utah State Hospital under his NGRI for from 5 years to life and at the same time serving his sentences of 2 to 30 years under the GMI judgments, he is not getting the benefit of the term setting process by the Board of Pardons that everyone else receives. If this were not so, the baseline sentence the Board of Pardons would be looking at would be four years and 6.4 months. Then after serving this term (or whatever term the Board of Pardons determined), LPG would be eligible for release under the NGRI disposition when the pre-requisites for such release might be satisfied. However, it appears the Board of Pardons will not even set his term while he is at the hospital on the NGRI disposition. At the same time, the hospital can not even consider LPG for release under the NGRI disposition until he serves his sentence, which not having been set, is 30 years. Thus, solely by virtue of his NGRI status his prison sentence is, in effect, increased from a baseline of 4 years and 6.4 months to 30 years. This is a violation of both the federal Equal Protection Clause and Utah's Uniform Application provision.

The Equal Protection Clause of the United States Constitution, is contained in §1 of the 14th Amendment, which provides in pertinent part:

Section 1. . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

Under the federal Equal Protection Clause "a law nondiscriminatory on its face may be grossly discriminatory in its operation." *Williams v. Illinois*, 399 US 235, 242, 90 S.Ct. 2018, 2023 (1970)

Article 1, §24 of the Utah Constitution requires that "All laws of a general nature shall have uniform operation." The Utah Supreme Court has recently summarized the relationship between the federal Equal Protection Clause and Utah's "uniform operation" requirement as follows:

Even though there is a similitude in the "fundamental principles" embodied in the federal Equal Protection Clause and the Utah uniform operation of laws provision, "our construction and application of Article I, § 24 are not controlled by the federal courts' construction and application of the Equal Protection Clause," and "[w]e have recognized that article I, section 24 ... establishes different requirements from the federal Equal Protection Clause." In light of and because of these differences, we also have reiterated that Utah's uniform operation of laws provision is "at least as exacting and, in some circumstances, more rigorous than the standard applied under the federal constitution."

Gallivan v. Walker, 2002 UT 89, ¶33, 54 P.3d 1069, citations omitted.

Just as the United States Supreme Court, in *Williams*, held a facially neutral statute may be a violation of the Equal Protection Clause as applied in particular circumstances, the Utah Supreme Court has held similarly:

"What is critical is that the operation of the law be uniform." "A law does not operate uniformly if 'persons similarly situated' are not 'treated similarly'"

Gallivan, supra., at ¶37, citations omitted.

In *Williams*, the United States Supreme Court found an incarceration regime that had the effect of discriminating against poor people a violation of due process.

It is clear, of course, that the sentence was not imposed upon appellant because of his indigency but because he had committed a crime. And the Illinois statutory scheme does not distinguish between defendants on the basis of ability to pay fines. But, as we said in *Griffin v. Illinois*, supra, 'a law nondiscriminatory on its face may be grossly discriminatory in its operation. Here the Illinois statutes as applied to Williams works an invidious discrimination solely because he is unable to pay the fine.

399 US at 242, 2018 S.Ct. at 2022-3, citations omitted.

The current situation is very similar to that in *Williams*. The only difference is that the disparate treatment on incarceration here is based on LPG's finding of mental illness, rather than ability to pay fines. This is violative of both the federal Equal Protection Clause and Utah's Uniform Application provision.

VII. The Incarceration Regime Imposed in This Case is a Violation Of The Americans With Disabilities Act.

The same disparate treatment discussed in the previous section regarding how the interplay of the GMI sentences and the NGRI disposition is a violation of the Equal Protection Clause of the United States Constitution and the Uniform Treatment provision of the Utah Constitution constitutes a violation of the federal Americans with Disabilities Act, 42 USC §12131 *et seq* (ADA). 42 USC §12132 provides:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

The United States Supreme Court has held both that the ADA prohibits undue institutionalization as a result of mental illness ("undue institutionalization qualifies as

discrimination 'by reason of ... disability.'"),⁴³ and inures to the benefit of people in prison ("the plain text of Title II of the ADA unambiguously extends to state prison inmates").⁴⁴

Thus, even if this Court finds that incarcerating LPG to 30 years of a prison sentence (at the hospital) because he is classified as mentally ill instead of a baseline incarceration of 4 years and 6.4 months is not a violation of Equal Protection or Uniform Application, it is a violation of the ADA.

CONCLUSION

For the foregoing reasons, Defendant/Appellant Leonard Preston Gall respectfully requests this Court to:

- A. Vacate the Judgments in this matter because of attorney disloyalty and remand for further proceedings;
- B. Vacate the Not Guilty By Reason of Insanity Judgment for lack of any factual basis;
- C. Vacate the Not Guilty By Reason of Insanity Judgment due to attorney disloyalty/ineffective assistance of counsel;
- D. Vacate the sentences in this matter and remand for sentencing proceedings consistent with the decision of this Court;

⁴³ *Olmstead v. L.C.*, 527 US 581, 597-602, 119 S.Ct. 2176, 2185-2188 (1999).

⁴⁴ *Pennsylvania Dep't. of Corrections v. Yeskey*, 524 US 206, 213, 118 S.Ct. 1952, 1956 (1998).

E. Declare the incarceration regime under the judgments in this case unconstitutional as a violation(s) of the Equal Protection Clause of the United States Constitution and/or the Uniform Application provision of the Utah Constitution as applied to Defendant; and

F. Declare the incarceration regime under the judgments in this case a violation of the Americans with Disabilities Act.

RESPECTFULLY SUBMITTED this 19th day of January 2006.

LAW PROJECT FOR PSYCHIATRIC RIGHTS, INC.

By: 
James B. Gottstein, Esq.
Alaska Bar No. 7811100

ADDENDUM

Amend. XIV U.S. Const.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, §7, Utah Const.

No person shall be deprived of life, liberty or property, without due process of law.

Article 1, §24, Utah Const.

All laws of a general nature shall have uniform operation.

Americans with Disabilities Act, of 1990, 42 U.S.C. §§12132

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

U.C.A. §76-3-402

§ 76-3-402. Conviction of lower degree of offense

(1) If the court, having regard to the nature and circumstances of the offense of which the defendant was found guilty and to the history and character of the defendant, concludes it would be unduly harsh to record the conviction as being for that degree of offense established by statute and to sentence the defendant to an alternative normally applicable to that offense, the court may unless otherwise specifically provided by law enter a judgment of conviction for the next lower degree of offense and impose sentence accordingly.

(2) If a conviction is for a third degree felony the conviction is considered to be for a class A misdemeanor if:

(a) the judge designates the sentence to be for a class A misdemeanor and the sentence imposed is within the limits provided by law for a class A misdemeanor; or

(b)(i) the imposition of the sentence is stayed and the defendant is placed on probation, whether committed to jail as a condition of probation or not;

(ii) the defendant is subsequently discharged without violating his probation; and

(iii) the judge upon motion and notice to the prosecuting attorney, and a hearing if requested by either party or the court, finds it is in the interest of justice that the conviction be considered to be for a class A misdemeanor.

(3) An offense may be reduced only one degree under this section unless the prosecutor specifically agrees in writing or on the court record that the offense may be reduced two degrees. In no case may an offense be reduced under this section by more than two degrees.

(4) This section may not be construed to preclude any person from obtaining or being granted an expungement of his record as provided by law.

U.C.A. §76-5-203

§ 76-5-203. Murder

(1) As used in this section, "predicate offense" means:

(a) a violation of Section 58-37d-4 or 58-37d-5, Clandestine Drug Lab Act;

(b) child abuse, under Subsection 76-5-109(2)(a), when the victim is younger than 18 years of age;

(c) kidnapping under Section 76-5-301;

(d) child kidnapping under Section 76-5-301.1;

(e) aggravated kidnapping under Section 76-5-302;

(f) rape of a child under Section 76-5-402.1;

(g) object rape of a child under Section 76-5-402.3;

(h) sodomy upon a child under Section 76-5-403.1;

- (i) forcible sexual abuse under Section 76-5-404;
- (j) sexual abuse of a child or aggravated sexual abuse of a child under Section 76-5-404.1;
- (k) rape under Section 76-5-402;
- (l) object rape under Section 76-5-402.2;
- (m) forcible sodomy under Section 76-5-403;
- (n) aggravated sexual assault under Section 76-5-405;
- (o) arson under Section 76-6-102;
- (p) aggravated arson under Section 76-6-103;
- (q) burglary under Section 76-6-202;
- (r) aggravated burglary under Section 76-6-203;
- (s) robbery under Section 76-6-301;
- (t) aggravated robbery under Section 76-6-302; or
- (u) escape or aggravated escape under Section 76-8-309.

(2) Criminal homicide constitutes murder if:

- (a) the actor intentionally or knowingly causes the death of another;
- (b) intending to cause serious bodily injury to another, the actor commits an act clearly dangerous to human life that causes the death of another;
- (c) acting under circumstances evidencing a depraved indifference to human life, the actor engages in conduct which creates a grave risk of death to another and thereby causes the death of another;
- (d)(i) the actor is engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or is a party to the predicate offense;
- (ii) a person other than a party as defined in Section 76-2-202 is killed in the course of the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense; and

(iii) the actor acted with the intent required as an element of the predicate offense;

(e) the actor recklessly causes the death of a peace officer while in the commission or attempted commission of:

(i) an assault against a peace officer under Section 76-5-102.4; or

(ii) interference with a peace officer while making a lawful arrest under Section 76-8-305 if the actor uses force against a peace officer;

(f) commits a homicide which would be aggravated murder, but the offense is reduced pursuant to Subsection 76-5-202(3); or

(g) the actor commits aggravated murder, but special mitigation is established under Section 76-5-205.5.

(3) Murder is a first degree felony.

(4)(a) It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another:

(i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse; or

(ii) under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

(b) Under Subsection (4)(a)(i) emotional distress does not include:

(i) a condition resulting from mental illness as defined in Section 76-2-305; or

(ii) distress that is substantially caused by the defendant's own conduct.

(c) The reasonableness of an explanation or excuse under Subsection (4)(a)(i) or the reasonable belief of the actor under Subsection (4)(a)(ii) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

(d) This affirmative defense reduces charges only as follows:

(i) murder to manslaughter; and

(ii) attempted murder to attempted manslaughter.

U.C.A. §76-6-202

§ 76-6-202. Burglary

(1) An actor is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit:

(a) a felony;

(b) theft;

(c) an assault on any person;

(d) lewdness, a violation of Subsection 76-9-702(1);

(e) sexual battery, a violation of Subsection 76-9-702(3);

(f) lewdness involving a child, in violation of Section 76-9-702.5; or

(g) voyeurism against a child under Subsection 76-9-702.7(2) or (5).

(2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

(3) A violation of this section is a separate offense from any of the offenses listed in Subsections (1)(a) through (g), and which may be committed by the actor while he is in the building.

U.C.A. §76-6-203

§ 76-6-203. Aggravated burglary

(1) A person is guilty of aggravated burglary if in attempting, committing, or fleeing from a burglary the actor or another participant in the crime:

(a) causes bodily injury to any person who is not a participant in the crime;

(b) uses or threatens the immediate use of a dangerous weapon against any person who is not a participant in the crime; or

(c) possesses or attempts to use any explosive or dangerous weapon.

(2) Aggravated burglary is a first degree felony.

(3) As used in this section, "dangerous weapon" has the same definition as under Section 76-1-601.

U.C.A. §76-6-404

§ 76-6-404. Theft--Elements

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

U.C.A. 77-13-6

§ 77-13-6. Withdrawal of plea

- (1) A plea of not guilty may be withdrawn at any time prior to conviction.
- (2)(a) A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made.
- (b) A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest.
- (c) Any challenge to a guilty plea not made within the time period specified in Subsection (2)(b) shall be pursued under Title 78, Chapter 35a, Post-Conviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.

U.C.A. 77-16a-304

77-16a-304 Review after commitment.

- (1) The executive director, or his designee, shall establish a review team of at least three qualified staff members to review the defendant's mental condition at least every six months. That team shall include at least one psychiatrist and, if the defendant is mentally retarded, at least one staff member who is a designated mental retardation professional, as defined in Section 62A-5-301.
- (2) If the review team described in Subsection (1) finds that the defendant has recovered from his mental illness, or, that the defendant is still mentally ill but does not present a substantial danger to himself or others, the executive director, or his designee, shall notify the court that committed the defendant that the defendant is a candidate for discharge and shall provide

the court with a report stating the facts that form the basis for the recommendation.

(3) The court shall conduct a hearing within ten business days after receipt of the executive director's, or his designee's, notification. The court clerk shall notify the prosecuting attorney, the defendant's attorney, and any victim of the crime for which the defendant was found not guilty by reason of insanity, of the date and time of hearing.

(4) (a) If the court finds that the person is no longer mentally ill, or if mentally ill, no longer presents a substantial danger to himself or others, it shall order the defendant to be discharged from commitment.

(b) If the court finds that the person is still mentally ill and is a substantial danger to himself or others, but can be controlled adequately if conditionally released with treatment as a condition of release, it shall order the person conditionally released in accordance with Section 77-16a-305.

(c) If the court finds that the defendant has not recovered from his mental illness and is a substantial danger to himself or others and cannot adequately be controlled if conditionally released on supervision, the court shall order that the commitment be continued.

(d) The court may not discharge an individual whose mental illness is in remission as a result of medication or hospitalization if it can be determined within reasonable medical probability that without continued medication or hospitalization the defendant's mental illness will reoccur, making him a substantial danger to himself or others. That person may, however, be a candidate for conditional release, in accordance with Section 77-16a-305.

U.C.A. 77-16a-305

77-16a-305 Conditional release.

(1) If the review team finds that a defendant is not eligible for discharge, in accordance with Section 77-16a-304, but that his mental illness and dangerousness can be controlled with proper care, medication, supervision, and treatment if he is conditionally released, the review team shall prepare a report and notify the executive director, or his designee, that the defendant is a candidate for conditional release.

(2) The executive director, or his designee, shall prepare a conditional release plan, listing the type of care and treatment that the individual needs and recommending a treatment provider.

(3) The executive director, or his designee, shall provide the court, the defendant's attorney, and the prosecuting attorney with a copy of the report issued by the review team under Subsection (1), and the conditional release plan. The court shall conduct a hearing on the issue of conditional release within 30 days after receipt of those documents.

(4) The court may order that a defendant be conditionally released if it finds that, even though the defendant presents a substantial danger to himself or others, he can be adequately controlled with supervision and treatment that is available and provided for in the conditional release plan.

(5) The department may provide treatment or contract with a local mental health authority or other public or private provider to provide treatment for a defendant who is conditionally released under this section.

U.C.A. 77-16a-306

77-16a-306 Continuing review --Discharge.

(1) Each entity that provides treatment for a defendant committed to the department as not guilty by reason of insanity under this part shall review the status of each defendant at least once every six months. If the treatment provider finds that a defendant has recovered from his mental illness, or if still mentally ill, no longer presents a substantial danger to himself or others, it shall notify the executive director of its findings.

(2) Upon receipt of notification under Subsection (1), the executive director shall designate a review team, in accordance with Section 77-16a-304, to evaluate the defendant. If that review team concurs with the treatment provider's assessment, the executive director shall notify the court, the defendant's attorney, and the prosecuting attorney that the defendant is a candidate for discharge. The court shall conduct a hearing, in accordance with Section 77-16a-302, within ten business days after receipt of that notice.

(3) The court may not discharge an individual whose mental illness is in remission as a result of medication or hospitalization if it can be determined within reasonable medical probability that without continued medication or hospitalization the defendant's mental illness will reoccur, making the defendant a substantial danger to himself or others.

UAC R671-201. Original Parole Grant Hearing Schedule and Notice.

R671-201-1. Schedule and Notice.

Within six months of an offender's commitment to prison the Board will give notice of the month and year in which the inmate's original hearing will be conducted. A minimum of one week (7 calendar days) prior notice should be given regarding the specific day and approximate time of such hearing.

All felonies, where a life has been taken, will be routed to the Board as soon as practicable for the determination of the month and year for their original hearing date. The Board will only consider information available to the court at the time of sentencing. All first degree felonies, where death is not involved, will be eligible for a hearing after the service of three years. All second degree felonies, where death is not involved, will be eligible for a hearing after the service of six months unless the second degree is a sex offense and in those cases will be eligible for a hearing after the service of eighteen months.

All third degree felonies, where a death is not involved, and all class A misdemeanors, will be eligible for a hearing after the service of three months unless the third degree felony is a sex offense and in those cases will be eligible for a hearing after the service of twelve months.

Excluded from the above provisions are inmates who are sentenced to death or life without parole.

An inmate may petition the Board to calendar him/her at a time other than the usual times designated above or the Board may do so on its own motion. A petition by the inmate shall set out the special reasons which give rise to the request. The Board will notify the petitioner of its decision in writing as soon as possible.



DAVID E. YOCOM
District Attorney for Salt Lake County
ROBERT L. STOTT, 3131
Deputy District Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

FILED DISTRICT COURT
Third Judicial District
DEC 17 2001
By _____
SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

-vs-

LEONARD PRESTON GALL

DOB 12/03/76,

AKA NONE

218 East 2000 North

529-39-6960

OTN

SO#

Defendant.

Screened by: R. Stott

Assigned to: TBAM

DAO # 01025094

BAIL: \$1,000,000.00

Warrant/Release: Def in Jail/Reno, Nevada

RANDALL N. STOTT

INFORMATION

Case No.

0119 19226 FS

The undersigned Detective T. Park - Salt Lake County Sheriff's Office, Agency Case No. 01-146802, under oath states on information and belief that the defendant committed the crimes of:

COUNT I

CRIMINAL HOMICIDE, MURDER, a First Degree Felony, at 2925 East 2965 South, in Salt Lake County, State of Utah, on or about December 14, 2001, in violation of Title 76, Chapter 5, Section 203, Utah Code Annotated 1953, as amended, in that the defendant; **LEONARD PRESTON GALL**, a party to the offense, intentionally or knowingly caused the death of Susan Gall and/or intending to cause serious bodily injury to another, committed an act clearly dangerous to human life that caused the death of Susan Gall and/or acting under circumstances evidencing depraved indifference to human life, engaged in conduct which created a grave risk of death to another, and thereby caused the death of Susan Gall.

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INFORMATION
DAO No. 01025094
Page 2

COUNT IV

THEFT, a Second Degree Felony, at 2925 East 2965 South, in Salt Lake County, State of Utah, on or about December 14, 2001, in violation of Title 76, Chapter 6, Section 404, Utah Code Annotated 1953, as amended, in that the defendant, **LEONARD PRESTON GALL**, a party to the offense, obtained or exercised unauthorized control over the operable motor vehicle of Susan Gall with the purpose to deprive the owner thereof.

THIS INFORMATION IS BASED ON EVIDENCE OBTAINED FROM THE FOLLOWING WITNESSES:

M. Gall, Dr. T. Grey, T. Park C. Nelson, V. Delahunty, E. Imotan, D. Steffens, T. Screiber, D. Jenkins, M. Cupello, C. Sofe and T. Jenkins.

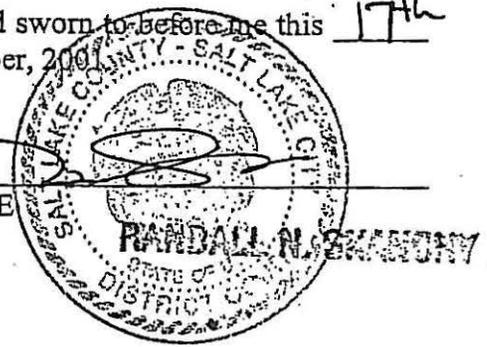
PROBABLE CAUSE STATEMENT:

Affiant has been informed by Deputy Imotan that on the above place and date he found the body of Susan Gall. Affiant has been informed by Dr. Todd Grey, the Medical Examiner for Salt Lake County, that on December 15, 2001 he performed an autopsy upon the body of Susan Gall and determined that the cause of death was multiple chopping blows to her head and neck. The cause of death was homicide. Affiant has also been informed by Office Duke Steffens of the University of Reno Nevada Police Department that on December 16, 2001 in Reno Nevada, he saw the defendant, Leonard Gall, in possession of Susan Galls' car; a 1989 Buick Skylark. Defendant told officers that he had killed Susan Gall, his mother, by using an axe. He also told the officers that he took his mother's car after he killed her.


DETECTIVE T. PARK
Affiant

Subscribed and sworn to before me this 17th
day of December, 2001


MAGISTRATE



Authorized for presentment and filing:

DAVID E. YOCOM, District Attorney


Deputy District Attorney
December 17, 2001/cw/01025094

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DAVID E. YOCOM
District Attorney for Salt Lake County
J. KEVIN MURPHY, 5768
Deputy District Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

ORIGINAL DISTRICT COURT
Third Judicial District

SEP 18 2003

SALT LAKE COUNTY

By _____ Deputy Clerk

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

-vs-

LEONARD PRESTON GALL

DOB 12/03/76,

AKA NONE

218 East 200 North

529-39-6960

OTN

SO#

Defendant.

Screened by: R. Stott
Assigned to: J.K. Murphy
DAO # 01025094

**AMENDED
INFORMATION**

Case No. 011919226

The undersigned under oath states on information and belief that the defendant committed the crimes of:

COUNT I

CRIMINAL HOMICIDE, MANSLAUGHTER, a Second Degree Felony, at 2925 East 2965 South, in Salt Lake County, State of Utah, on or about December 14, 2001, in violation of Title 76, Chapter 5, Section 205(a), Utah Code Annotated 1953, as amended, in that the defendant, **LEONARD PRESTON GALL**, a party to the offense, did recklessly cause the death of Susan Gall. Further, that a dangerous weapon or a facsimile of a dangerous weapon or the representation of a dangerous weapon was used in the commission or furtherance of the Criminal Homicide, Manslaughter, giving rise to enhanced penalties as provided by §76-3-203, Utah Code Annotated, 1953 as amended.

COUNT II

THEFT, a Second Degree Felony, at 2925 East 2965 South, in Salt Lake County, State of Utah, on or about December 14, 2001, in violation of Title 76, Chapter 6, Section 404, Utah Code Annotated 1953, as amended, in that the defendant, **LEONARD PRESTON GALL**, a party to the offense, obtained or exercised unauthorized control over the operable motor vehicle of Susan Gall with the purpose to deprive the owner thereof.

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AMENDED INFORMATION

DAO No. 01025094

Page 2

COUNT III

AGGRAVATED BURGLARY, a First Degree Felony, at 2925 East 2965 South, in Salt Lake County, State of Utah, on or about December 14, 2001, in violation of Title 76, Chapter 6, Section 203, Utah Code Annotated 1953, as amended, in that the defendant, **LEONARD PRESTON GALL**, a party to the offense, entered or remained unlawfully in the dwelling of Susan Gall with the intent to commit an assault, and was armed with a dangerous weapon, to-wit: a knife and a hatchet.

THIS INFORMATION IS BASED ON EVIDENCE OBTAINED FROM THE FOLLOWING WITNESSES:

M. Gall, Dr. T. Grey, T. Park C. Nelson, V. Delahunty, E. Imotan, D. Steffens, T. Screiber, D. Jenkins, M. Cupello, C. Sofe and T. Jenkins.

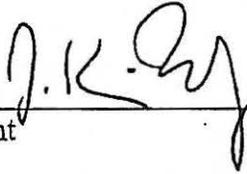
PROBABLE CAUSE STATEMENT:

Affiant has been informed by Deputy Imotan that on the above place and date he found the body of Susan Gall. Affiant has been informed by Dr. Todd Grey, the Medical Examiner for Salt Lake County, that on December 15, 2001 he performed an autopsy upon the body of Susan Gall and determined that the cause of death was multiple chopping blows to her head and neck. The cause of death was homicide. Affiant has also been informed by Office Duke Steffens of the University of Reno Nevada Police Department that on December 16, 2001 in Reno Nevada, he saw the defendant, Leonard Gall, in possession of Susan Galls' car; a 1989 Buick Skylark.

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AMENDED INFORMATION
DAO No. 01025094
Page 3

Defendant told officers that he had killed Susan Gall, his mother, by using an axe. He also told the officers that he took his mother's car after he killed her.



Affiant

Subscribed and sworn to before me this 10
day of September, 2003.

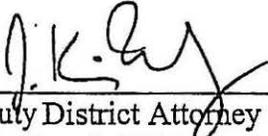


MAGISTR



Authorized for presentment and filing:

DAVID E. YOCOM, District Attorney



Deputy District Attorney
September 9, 2003
cw/01025094

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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

vs.

LEONARD PRESTON GALL,

Defendant.

) Case No. 011919226

) Transcript of:

) CHANGE OF PLEA PROCEEDINGS

BEFORE THE HONORABLE JUDITH S. ATHERTON

SCOTT M. MATHESON COURTHOUSE
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84114-1860

SEPTEMBER 10, 2003

FILED
UTAH APPELLATE COURTS

JAN 04 2005

REPORTED BY: SUZANNE WARNICK, RDR, CSR
238-7529

20040540-CA 608

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A P P E A R A N C E S

For the Plaintiff:

J. KEVIN MURPHY
ANNE A. CAMERON
Deputy District Attorneys
SALT LAKE COUNTY DISTRICT ATTORNEY'S OFFICE
311 East Broadway, Suite 400
Salt Lake City, UT 84111

For the Defendant:

STEPHEN R. MCCAUGHEY
Attorney at Law
10 West Broadway, Suite 650
Salt Lake City, Utah 84101

* * *

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1 WEDNESDAY, SEPTEMBER 10; 2003; 10:10 A.M.

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

3
4 *THE COURT:* All right. Let's take the matter of
5 State of Utah versus Leonard Preston Gall, Case No. 011919226.

6 Will counsel state their appearances.

7 *MR. McCAUGHEY:* Steve McCaughey for the defendant.

8 *MR. MURPHY:* Kevin Murphy and Anne Cameron for the
9 State.

10 (The defendant comes into the courtroom.)

11 *THE COURT:* Mr. McCaughey, this is Mr. Gall with you
12 at the podium?

13 *MR. McCAUGHEY:* It is, your Honor. Can we have his
14 hand uncuffed, please?

15 *THE COURT:* Which hand does he write with?

16 *THE DEFENDANT:* My right hand.

17 *THE COURT:* All right. Mr. McCaughey, have you
18 received a copy of the Amended Information that has been filed
19 by the State in this case?

20 *MR. McCAUGHEY:* I have. That's the one Mr. Gall and
21 I have discussed this morning, and we talked about earlier,
22 that includes Count III, an Aggravated Burglary. And it also
23 includes Count I, which was the Criminal Homicide and now is a
24 reduction down to Manslaughter, a Second, which was a First
25 Degree Homicide. And it includes a Theft. I have received it

1 and we have gone over it.

2 *THE COURT:* All right. And the proposed disposition
3 in this case?

4 *MR. McCAUGHEY:* Your Honor, it is that -- the
5 proposed disposition is that Mr. Gall will enter a plea of
6 guilty but mentally ill to Count II and to Count I; and that
7 the Court, based on certain reports and factual statements,
8 will enter and find him not guilty by reason of insanity on
9 the Count III, which is Aggravated Burglary.

10 *THE COURT:* Mr. Murphy, is that your understanding of
11 the disposition in this case?

12 *MR. MURPHY:* It is, your Honor.

13 *THE COURT:* Have you spoken with the family of the
14 victim, Mrs. Gall, about the disposition?

15 *MR. MURPHY:* I have, your Honor. Two of the family
16 members are here. And this disposition has also been reviewed
17 very carefully by the administration of the District
18 Attorney's Office.

19 *THE COURT:* Is this disposition, with regard to all
20 three counts, acceptable to the victim's family?

21 *MR. MURPHY:* My understanding from them over the past
22 several weeks is that it is.

23 *THE COURT:* All right.

24 And Mr. McCaughey, you have spoken with Mr. Gall at
25 some length, I understand, with regard to entering the pleas

1 of guilty and mentally ill.

2 MR. McCAUGHEY: Mr. Gall and I have discussed the
3 case in general ever since I have been retained by him, which
4 was several months ago. But, particularly in the last month
5 since we've had negotiations, serious negotiations, plea
6 negotiations with the District Attorney's Office, he and I
7 have spoke on several occasions and at length regarding this
8 possible plea and its benefits. So, yes. *The plea you*

9 THE COURT: You believe Mr. Gall is prepared to go
10 forward this morning with this?

11 MR. McCAUGHEY: I think he is.

12 THE COURT: All right.

13 All right. Mr. Gall, you are now charged by an
14 Amended Information with Criminal Homicide Manslaughter, a
15 Second Degree Felony, at 2925 East 2965 South, in Salt Lake
16 County, State of Utah, on or about December 14th of 2001. The
17 allegation is that you, a party to the offense, did recklessly
18 cause the death of Susan Gall. Further, that a dangerous
19 weapon, or a facsimile of a dangerous weapon, or the
20 representation of a dangerous weapon, was used in the
21 commission or furtherance of the Criminal Homicide
22 Manslaughter, giving rise to enhanced penalties as provided by
23 76-3-203, Utah Code Annotated.

24 You're also charged with Theft, a Second Degree
25 Felony, at 2925 East 2965 South, in Salt Lake County, State of

1 Utah, on or about December 14th of 2001. The allegation is
2 that you, a party to the offense, obtained or exercised
3 unauthorized control over the operable motor vehicle of Susan
4 Gall with the purpose to deprive the owner thereof.

5 Mr. Gall, is it your intention to plead guilty and
6 mentally ill to these two charges today?

7 *THE DEFENDANT:* Yes, it is.

8 *THE COURT:* All right. Mr. Gall, are you under the
9 influence of alcohol or drugs today?

10 *THE DEFENDANT:* No.

11 *THE COURT:* Do you take prescription medication?

12 *THE DEFENDANT:* Yes.

13 *THE COURT:* Okay. What is your medication, Mr. Gall;
14 what do you take?

15 *THE DEFENDANT:* I'm taking Wellbutrin, trazodone,
16 lithium, propranolol and Risperdal.

17 *THE COURT:* And this is medication that has been
18 prescribed to you because of your diagnosis of schizophrenia;
19 is that correct?

20 *THE DEFENDANT:* It was prescribed for manic-
21 depression.

22 *THE COURT:* Okay. And there was a diagnosis both of
23 bipolar disorder then and schizophrenia; is that correct?

24 *THE DEFENDANT:* Yes. Schizo-affective disorder, from
25 the psychiatrist that came to the jail.

1 THE COURT: Okay. And you have been in custody now,
2 Mr. Gall, since January 16th of last year; is that correct?

3 THE DEFENDANT: Uh...

4 THE COURT: That's what my records show. It's an
5 extended period of time, about 18 months; is that right?

6 THE DEFENDANT: Yes, that's correct. I was in
7 custody in Reno starting December 16th.

8 THE COURT: Right. Then you were transferred here to
9 Salt Lake on the 16th of January, right?

10 THE DEFENDANT: Yeah.

11 THE COURT: During that period of time, have you been
12 maintaining these medications in the jail? Have you been
13 taking all of these medications in the jail that have been
14 prescribed to you?

15 THE DEFENDANT: Yes.

16 THE COURT: And you have taken them in recent days as
17 well, continuously?

18 THE DEFENDANT: Yes.

19 THE COURT: Okay. And you have taken your most
20 recent dosage of those medications?

21 THE DEFENDANT: Yes.

22 THE COURT: Is there anything about those many
23 medications that you take that would interfere with your
24 ability to understand the proceedings in court today?

25 THE DEFENDANT: No, your Honor.

1 *THE COURT:* Do you have either a mental or a physical
2 condition that would interfere with your ability to understand
3 these proceedings?

4 *THE DEFENDANT:* Uh, while I'm on the medication, I'm
5 able to proceed with it. But I suppose with my mental
6 illness, I maybe would not.

7 *THE COURT:* All right. One of my jobs today,
8 Mr. Gall, is to make sure you understand everything that's
9 happening. And the very significant factors involved in this
10 case relate to your severe mental illness.

11 And these medications have been prescribed to you so
12 that you can become competent to understand things and to
13 carry on. And you have indicated to me already that you have
14 taken all these medications and you have taken them regularly
15 for a very long period of time.

16 Notwithstanding the recognized mental illness that
17 you suffer from, do you believe you understand what's going on
18 in court today?

19 *THE DEFENDANT:* Uh, yes.

20 *THE COURT:* Mr. McCaughey, I'll ask you these same
21 questions essentially. You have been counsel for Mr. Gall for
22 a rather extended period of time, some six months or so, at
23 this point. And you have had an opportunity to visit Mr. Gall
24 many times, including in recent days. Do you believe that he
25 is competent and understands the proceedings and can knowingly

1 and intelligently go forward with these pleas today?

2 MR. McCAUGHEY: I do, your Honor. I have observed
3 Mr. Gall over a period of six months now. And I have observed
4 an improvement in his cognitive ability, his ability to
5 understand what's going on, in his relationship with me. It's
6 been a positive improvement all along.

7 And he and I have talked at length about what we're
8 doing here. And I believe he has a good grasp of what's going
9 on and I believe he understands everything.

10 THE COURT: Is there any reason that you believe we
11 should not go forward today with the acceptance of these
12 pleas?

13 MR. McCAUGHEY: No, there's not.

14 THE COURT: All right. Mr. Gall, are you able to
15 read the English language?

16 THE DEFENDANT: Yes.

17 THE COURT: How much schooling have you had?

18 THE DEFENDANT: Yeah. I graduated from college with
19 a bachelors.

20 THE COURT: Okay. So you have got a bachelors
21 degree?

22 THE DEFENDANT: Yeah.

23 THE COURT: Have you had an opportunity to read a
24 statement of the constitutional rights you give up by entering
25 a plea?

1 *THE DEFENDANT:* What was that again?

2 *THE COURT:* Did you read that document --

3 Mr. McCaughey there has a rather lengthy document --

4 *THE DEFENDANT:* Okay.

5 *THE COURT:* -- that explains in written form all the
6 constitutional rights you give up by entering a plea of
7 guilty. Have you had an opportunity to read that document?

8 *THE DEFENDANT:* Yes, your Honor.

9 *THE COURT:* Did you also have an opportunity to speak
10 with Mr. McCaughey about the constitutional rights you give up
11 by entering a plea?

12 *THE DEFENDANT:* Yes, your Honor.

13 *THE COURT:* Did you also speak with him about the
14 basis of these charges, the possible penalty, and the nature
15 of these allegations against you?

16 *THE DEFENDANT:* Yes.

17 *THE COURT:* Do you feel like you need any more time
18 to speak with Mr. McCaughey?

19 *THE DEFENDANT:* No.

20 *THE COURT:* And, Mr. Gall, are you satisfied with the
21 representation he's given you in this case?

22 *THE DEFENDANT:* Yes, your Honor.

23 *THE COURT:* All right. Thank you.

24 Mr. McCaughey, you have previously stated that you
25 believed that Mr. Gall is capable of going forward this

1 morning. And he's indicated he has reviewed his rights with
2 you; is that correct?

3 MR. McCAUGHEY: He has.

4 THE COURT: Do you believe he understands the
5 constitutional rights that he gives up?

6 MR. McCAUGHEY: I believe he does.

7 THE COURT: Do you believe also that he understands
8 the possibilities with regard to sentencing in this case?

9 MR. McCAUGHEY: I do. We've gone over the sentencing
10 possibilities: Consecutive versus concurrent, credit for time
11 served, where he is going to be housed, et cetera. We have
12 gone over that extensively and I believe he understands.

13 THE COURT: All right. Will you then give me the
14 factual basis supporting each of these charges.

15 MR. McCAUGHEY: Your Honor, on December 14th of 2001,
16 at the address stated in the Information, Mr. Gall entered his
17 house, his mother's house, with the intent to -- or remained
18 in his mother's house with the intent to commit a felony. At
19 that time he recklessly caused her death. And, after that, he
20 took the car and then went to Reno.

21 Those are the factual bases that led to the charges
22 and to the two guilty pleas. I think that there is a
23 different factual basis that leads to not guilty by reason of
24 insanity, but those are the facts for the first two. *Guilty Plea*

25 THE COURT: I'll speak about that a little later. *There*

1 MR. McCAUGHEY: Okay.

2 THE COURT: The allegation also -- that is, with
3 regard to the Manslaughter charge -- is that he used a
4 dangerous weapon when he caused the death of his mother, Susan
5 Gall.

6 MR. McCAUGHEY: I believe the evidence will show that
7 that involved an axe, possibly a knife, but at least an axe.

8 THE COURT: And that was what caused her death; is
9 that correct?

10 MR. McCAUGHEY: Right.

11 THE COURT: Mr. Gall, is that what you did?

12 THE DEFENDANT: Uh, yes.

13 THE COURT: Do you understand that that is the
14 conduct you are admitting to by entering a plea of guilty
15 today?

16 THE DEFENDANT: Okay.

17 THE COURT: Do you understand that you're admitting
18 to having killed your mother in this manner, and also you're
19 admitting to stealing this car and, in fact, taking the car
20 for several days, ultimately being picked up in Reno, Nevada?

21 THE DEFENDANT: Yes.

22 THE COURT: Okay. Do you understand that the
23 disposition in this case anticipates that you will enter a
24 plea of guilty and mentally ill to this charge?

25 I want to make sure you understand that a plea of

1 guilty and mentally ill is a plea of guilty to the charge.
2 It's not contingent upon anything that might happen in the
3 future.

4 As part of this type of a plea, I will ask for some
5 mental health evaluations. I will consider them. But,
6 regardless of the outcome, what I will look at is what your
7 mental state is currently, your mental health issues
8 currently.

9 If I find that you're not mentally ill at the
10 present time, that doesn't make any difference with regard to
11 the entry of this plea. You're entering a plea of guilty, and
12 you will be sentenced in some manner reflecting your guilt in
13 this matter.

14 Do you understand that this is not going to be
15 removed in any way, this plea?

16 *THE DEFENDANT:* Yes.

17 *THE COURT:* No one told you anything other than that?

18 *THE DEFENDANT:* Yes.

19 *THE COURT:* No one did? You understand that this is
20 an absolute plea and it's not going to change?

21 *THE DEFENDANT:* Yes.

22 *THE COURT:* Okay. What I am really going to be
23 looking at is more toward where you will be living, where you
24 will be placed. I will not be looking at a modification of
25 the guilty plea itself.

1 *THE DEFENDANT:* Yes.

2 *THE COURT:* Okay. Any questions about that,
3 Mr. Gall?

4 *THE DEFENDANT:* No.

5 *THE COURT:* All right. I want to make sure that you
6 also understand that you are giving up your right to go to
7 trial. We had a trial set in this case, set for, in fact, all
8 of next week. You're giving up your right to bring your own
9 witnesses, the right to confront witnesses against you.

10 If you go to trial, you are presumed innocent. You
11 don't have to testify against yourself nor prove your
12 innocence. The burden is upon the State of Utah to prove each
13 element of each of these charges beyond a reasonable doubt.

14 You have a right to a speedy trial; that is, you
15 have a constitutional right to have this case move with due
16 speed through the court system. You have a right to an
17 attorney throughout the proceedings.

18 You have a right to a jury trial. The jury must be
19 composed of a panel of impartial jurors. It must be a
20 unanimous verdict before you can be convicted.

21 And you have a right to appeal the conviction. Your
22 right to appeal a plea of guilty is much more limited.

23 Mr. Gall, do you understand that that is the case?

24 *THE DEFENDANT:* Yes, your Honor.

25 *THE COURT:* Do you understand also that those are

1 constitutional rights you give up by entering a plea?

2 *THE DEFENDANT:* Yes.

3 *THE COURT:* Let's talk a little bit about sentencing.
4 I want to explain to you the maximum sentences for these
5 offenses.

6 The Second Degree Felony Manslaughter can carry with
7 it an indeterminate term at the Utah State Prison of one to 15
8 years, a fine of \$10,000 plus an 85 percent surcharge. That
9 changes when there is the addition of a dangerous weapon
10 enhancement. And that means that I can order that you serve
11 up to two years to 15 years at the Utah State Prison or even
12 two years to 20 years at the Utah State Prison for the
13 manslaughter conviction.

14 With regard to the Theft, a Second Degree Felony, I
15 can order that you serve an indeterminate term at the Utah
16 State Prison of one to 15 years, pay a fine of \$10,000 plus an
17 85 percent surcharge.

18 Mr. Gall, I want you to understand also that, with
19 regard to sentencing, all sentencing decisions are my
20 decisions. I have spoken extensively with the attorneys in
21 this case and will continue to do so. I have reviewed mental
22 health records and will continue to do so. I want you to
23 understand that they are very much a part of the sentencing
24 and the disposition in this case.

25 But, ultimately, the person who makes all decisions

1 with regard to sentencing is me. I am the one who will be
2 doing that. I am not bound to accept recommendations. I will
3 be the one that will make all decisions with regard to
4 sentencing, including whether any commitments I may order will
5 run concurrently -- that is, at the same time as each other --
6 or consecutively -- one after another.

7 I will make a determination, in large part, about
8 where you are going to be housed. I anticipate that, for an
9 extended period of time, you will be housed at the Utah State
10 Hospital. But, again, I am the one who makes that
11 determination and I will do so when I receive the necessary
12 information from the State Hospital, itself, as well as other
13 mental health evaluations.

14 Do you understand that I am the one who is making
15 those decisions?

16 *THE DEFENDANT:* Yes.

17 *THE COURT:* Did anyone tell you anything other than
18 that?

19 *THE DEFENDANT:* No.

20 *THE COURT:* Did anyone promise you any kind of
21 treatment from the Court, anything, so that you would enter
22 this plea?

23 *THE DEFENDANT:* Would you say that again?

24 *THE COURT:* Did anyone make any promises to you,
25 particularly about what I might do by way of sentencing?

1 MR. McCAUGHEY: Your Honor, I did indicate to
2 Mr. Gall that we had spoken with you and it was your
3 indication that you did not intend to impose a fine in this
4 case. The decision had not been made, but that was your
5 initial impression based on where he was going to be.

6 THE COURT: That's correct.

7 MR. McCAUGHEY: Other than that, has there been any
8 promises made?

9 THE DEFENDANT: Uh, no.

10 THE COURT: And you understand I will make a decision
11 with regard to the fine. But, at this point, it's frankly
12 unlikely that I will impose a fine in this case. But, then
13 again, I will make that decision at the time of sentencing,
14 make that determination at the time of sentencing. Do you
15 understand that?

16 THE DEFENDANT: Yes.

17 THE COURT: Okay. Mr. Gall, has anyone threatened
18 you so that you would enter a plea today?

19 THE DEFENDANT: No.

20 THE COURT: Has anyone forced you in any way?

21 THE DEFENDANT: No.

22 THE COURT: Has anyone compelled you in any way to
23 enter this plea today, these two pleas today?

24 THE DEFENDANT: No.

25 THE COURT: Are you doing this of your own free will?

1 *THE DEFENDANT:* Yes.

2 *THE COURT:* And are you doing it because you
3 committed these two offenses?

4 *THE DEFENDANT:* Yes.

5 *THE COURT:* Do you have any questions that I can
6 answer for you now, Mr. Gall?

7 *THE DEFENDANT:* No, your Honor.

8 *THE COURT:* I'll ask that you sign that statement
9 now.

10 (The defendant signs his Statement of Defendant.)

11 *MR. MCCAUGHEY:* Did you want to go into the not
12 guilty by reason of insanity?

13 *THE COURT:* No. I will do that later.

14 I have before me now a statement that has been
15 signed by the defendant and by counsel.

16 Mr. Gall, how then do you plead to the charge of
17 Criminal Homicide Manslaughter, a Second Degree Felony, at
18 2925 East 2965 South, in Salt Lake County, State of Utah, on
19 or about December 14th of 2001, the allegation being that you
20 recklessly caused the death of Susan Gall; further, that you
21 used a dangerous weapon, or a facsimile of a dangerous weapon,
22 or the representation of a dangerous weapon, in the commission
23 of this criminal homicide?

24 *THE DEFENDANT:* Guilty and mentally ill.

25 *THE COURT:* And how do you plead to the charge of

1 Theft, a Second Degree Felony, at 2925 East 2965 South, Salt
2 Lake County, State of Utah, on or about December 14th of 2001,
3 the allegation being that you exercised unauthorized control
4 over the operable motor vehicle of Susan Gall with the purpose
5 to deprive the owner thereof?

6 *THE DEFENDANT:* Guilty and mentally ill.

7 *THE COURT:* I'll accept both pleas of guilty and
8 mentally ill. You have a right to file a motion to withdraw
9 these pleas before sentence is announced. I am also now
10 signing the Statement of Defendant and I incorporate it into
11 the court record. I find the pleas to be knowing, intelligent
12 and voluntary this morning.

13 Let's move on now to Count III. Count III reads as
14 follows: Aggravated Burglary, a First Degree Felony, at 2925
15 East 2965 South, in Salt Lake County, State of Utah, on or
16 about December 14th of 2001, the allegation being that
17 Mr. Gall, a party to the offense, entered or remained
18 unlawfully in the dwelling of Susan Gall, with the intent to
19 commit an assault, and was armed with a dangerous weapon, to
20 wit: a knife and a hatchet.

21 *MR. McCAUGHEY:* That's fine.

22 *THE COURT:* I believe, by stipulation of the parties,
23 you have agreed that I will enter a verdict with regard to
24 Count III of not guilty by reason of insanity.

25 Mr. McCaughey, is that true?

1 MR. McCAUGHEY: That is, your Honor. And that's
2 based on the reports of Dr. Mirow and Dr. Cohn and
3 Dr. Rindflesh that have been submitted to this Court over the
4 period of this case.

5 THE COURT: Mr. Murphy, is the State stipulating to
6 this verdict?

7 MR. MURPHY: Yes, the State is, your Honor.

8 THE COURT: Will you give me a basis for this
9 particular disposition?

10 MR. MURPHY: As an evidentiary matter, your Honor,
11 evidence located by the defense, Mr. McCaughey has called into
12 question the precise content of Mr. Gall's delusion at the
13 time that he committed these offenses. Based upon that, there
14 has been some doubt interjected as to whether he might
15 otherwise receive a not-guilty-by-reason-of-insanity verdict
16 were the case to proceed to trial.

17 As a practical matter, the not-guilty-by-reason-of-
18 insanity judgment that you are entering will provide the
19 Court, your Honor, with lifetime jurisdiction to supervise
20 this defendant, quite apart from the criminal sanctions, and
21 to assure that he continues to comply with treatment and to
22 protect himself and the public from being dangerous in the
23 future.

24 THE COURT: And, Mr. Murphy, you stated earlier, in
25 general, that the family of Susan Gall have reviewed this

1 entire disposition and were in agreement with it as well.

2 MR. MURPHY: That's correct, your Honor.

3 THE COURT: And that includes this not-guilty-by-
4 reason-of-insanity finding by this Court and the entry of that
5 verdict?

6 MR. MURPHY: That's correct, your Honor.

7 MR. McCAUGHEY: Your Honor, if I may.

8 Also, part of the reason for entering into this plea
9 agreement is that, had this matter gone to trial, we could
10 have ended up with the same not-guilty-by-reason-of-insanity
11 verdict in reference to the homicide charge that we have on
12 the aggravated burglary. But we would have been taking a risk
13 that Mr. Gall could have been convicted on the First Degree
14 Murder charge, which would have resulted in a guilty but
15 mentally ill but then would have resulted in a commitment to
16 the Utah State Prison for five to life.

17 That is something we were, most assuredly, trying to
18 avoid. And this plea agreement has allowed us to do that and
19 gives us the same benefit that we would have had, had he been
20 found not guilty by reason of insanity at trial.

21 THE COURT: All right. And I am in agreement with
22 the assessment. I have spent a great deal of time on this
23 case. And I believe that both the pleas of guilty and
24 mentally ill to Counts I and Count II and the verdict of not
25 guilty by reason of insanity to Count III are sound and

1 appropriate in this case.

2 And I believe it is a disposition that is in the
3 best interests of all parties involved, and that includes
4 Susan Gall's family, and also Mr. Gall, Leonard Gall. I
5 believe that it is, in fact, the most appropriate disposition
6 in this case.

7 Mr. Gall, I'm prepared to accept and issue a verdict
8 of not guilty by reason of insanity to the charge of
9 Aggravated Burglary, a First Degree Felony. I want you to
10 understand, Mr. Gall, that the maximum penalty for this
11 offense is a commitment of five years to life at the Utah
12 State Prison. And by entering this verdict -- had you been
13 convicted of a first degree felony --

14 And by entering this verdict, this Court will
15 maintain -- will have the ability to maintain jurisdiction
16 over this case, over that count -- and that means specifically
17 over you -- for as long as the prison could have. That means
18 up to your entire lifetime. And that's part of what's going
19 on with the acceptance of this disposition of not guilty by
20 reason of insanity.

21 Do you understand that will afford this Court
22 lifetime jurisdiction over where you are; do you understand
23 that that's true?

24 *THE DEFENDANT:* Did you say that I can be at the Utah
25 State Prison during this whole time?

1 *THE COURT:* Not on this charge.

2 *THE DEFENDANT:* Okay.

3 *THE COURT:* You can be in the Utah State Prison on
4 your pleas of guilty and mentally ill, on those two second
5 degree felonies. You cannot be at the Utah State Prison under
6 a not guilty verdict.

7 But you can and will be under the jurisdiction of
8 this Court until this Court relinquishes jurisdiction. And
9 this Court has the ability to have jurisdiction -- that is, to
10 basically control where you are -- for your entire life. Do
11 you understand that that's true?

12 *THE DEFENDANT:* I thought after my two -- after my
13 two one to 15s were done, that I would automatically go to the
14 State Hospital.

15 *THE COURT:* That may be the case. Mr. Gall, it's
16 hard to predict at this point what's going to happen in what
17 could be a 30-year period.

18 You cannot spend more than 30 years at the Utah
19 State Prison because that's the maximum that I can order a
20 prison commitment for on two second degree felonies. Your
21 placement after that really is something that's up to me or
22 the judge who succeeds me in this position.

23 Do you understand that?

24 *MR. McCAUGHEY:* But she can't send you back to the
25 prison. You can be in the State Hospital or in some sort of

1 form of conditional release or something like that, but it
2 would not be at the prison.

3 *THE DEFENDANT:* Okay.

4 *THE COURT:* Do you understand that that's the case?

5 *THE DEFENDANT:* Yes, your Honor.

6 *THE COURT:* Also, the law does require that I make
7 specific findings with regard to the entry of this kind of a
8 disposition, whether there is a victim of the crime for which
9 I am accepting the verdict of not guilty by reason of
10 insanity, and if the victim wishes to be notified of any
11 conditional release, discharge or escape.

12 And with regard to the burglary charge, Mr. Murphy,
13 I understand the victim is Leonard Gall's brother, Michael.

14 *MR. MURPHY:* That's correct.

15 *THE COURT:* And is it his desire to be notified,
16 consistent with the statutory requirements?

17 *MR. MURPHY:* It is, your Honor. And also a close
18 family member -- in fact, Susan Gall's brother -- Ted Jenkins
19 is also here today. He would also like to receive that
20 notification.

21 *THE COURT:* Any objection to that, Mr. McCaughey?

22 *MR. McCAUGHEY:* No.

23 *THE COURT:* I believe that is appropriate. And I
24 will indicate also that Ted Jenkins wishes to be informed with
25 regard to any conditional release, discharge or escape.

1 Upon the acceptance of a verdict of not guilty by
2 reason of insanity, the Court must conduct a hearing within
3 ten days of today to make a determination of whether Mr. Gall
4 is currently mentally ill. I believe that this Court can go
5 forward with that hearing today, based on a number of factors.
6 The most important and most compelling in my mind is that,
7 within the last month, the Court received updates from
8 Dr. Nancy Cohn and Dr. Mark Rindflesh, who were the original
9 mental health examiners in this case -- both of whom did an
10 update in August of this year -- as well as a brief but
11 current report by Susan Mirow.

12 Mr. McCaughey, do you feel like, based on that
13 current information, I can go forward this morning with that
14 hearing?

15 MR. McCAUGHEY: I do.

16 THE COURT: Mr. Murphy?

17 MR. MURPHY: The State feels that way as well, your
18 Honor.

19 THE COURT: All right.

20 Mr. McCaughey, your proffer with regard to
21 Mr. Gall's mental illness, current mental illness?

22 MR. McCAUGHEY: I believe, after reading Dr. Mirow's
23 report, and Dr. Rindflesh and Dr. Cohn, I think he still has
24 an on-going mental illness. I understand it's being treated
25 with medication but it is still present. And I think that

1 meets the statutory criteria that the Court needs to find.

2 *THE COURT:* Mr. Murphy, are you in agreement with
3 that?

4 *MR. MURPHY:* Yes, your Honor. We think he still
5 suffers from mental illness. We think that he still poses a
6 substantial, if not immediate, threat to himself or others,
7 particularly given his history of noncompliance with
8 medication when he's not compelled to comply.

9 *THE COURT:* All right. And I am in agreement with
10 that, having reviewed all of that documentation.

11 With regard to Mr. Gall's mental illness, I will
12 make the following findings: I find then that, by clear and
13 convincing evidence, that the defendant, Leonard Gall, is
14 still mentally ill; and also find by clear and convincing
15 evidence that, because of that mental illness, the defendant
16 presents a substantial danger to himself or others.

17 On that basis, Mr. Gall, I am ordering your
18 commitment under the verdict of not guilty and mentally ill to
19 the Utah State Hospital.

20 With regard to Counts I and Count II, the guilty and
21 mentally ill sentences, the statute requires that, prior to
22 sentencing under those provisions, I notify the Director of
23 the Department of Human Services about this verdict, or the
24 acceptance of these pleas, and permit her -- to give her
25 notice, and permit her and her department at the Utah State

1 Hospital to examine Mr. Gall prior to sentencing on this case.
2 I believe that can be done at the State Hospital.

3 I will request the Director of Human Services to
4 permit that evaluation to be done at the Utah State Hospital.
5 I don't anticipate any difficulties with that, based on the
6 fact that I have ordered Mr. Gall to be housed at the Utah
7 State Hospital under the other provision.

8 Mr. McCaughey, Mr. Murphy, we talked a few moments
9 ago in chambers and talked about setting the sentencing out
10 approximately six months so that Mr. Gall can have a
11 sufficient time at the Utah State Hospital to be thoroughly
12 evaluated by the psychiatrists at the Utah State Hospital.

13 Is that your request then, Mr. Murphy?

14 MR. MURPHY: Yes, your Honor.

15 THE COURT: And Mr. McCaughey, as you know, Mr. Gall
16 has a right to be sentenced on these cases between two days
17 from now and 45 days from now. I can set the sentencing out
18 longer if you agree to that.

19 MR. McCAUGHEY: We will waive the time for
20 sentencing, your Honor, as long as it's clear that we will be
21 arguing for credit for time served from today, the date that
22 he entered his plea at least, and also from the time he
23 started to serve his time in the jail when he was booked into
24 jail. But, at least, I want that clear, that that's the basis
25 that we're waiving it is that we have the right to ask for

1 credit for time served.

2 *THE COURT:* And, certainly, as I indicated earlier, I
3 will listen to arguments and recommendations with regard to
4 sentencing. But, again, I am the one who is going to make the
5 decision in that regard.

6 Mr. McCaughey, you certainly are aware of that.

7 *MR. McCAUGHEY:* I understand that, your Honor. But,
8 just for the record, we do desire that he be evaluated at the
9 Utah State Hospital.

10 *THE COURT:* That then will be my order. Let's get a
11 sentencing date in early March.

12 How about the 15th of March?

13 *MR. McCAUGHEY:* The Ides of March.

14 *THE COURT:* The Ides of March. You can remember it
15 that way.

16 *MR. McCAUGHEY:* What time?

17 *THE COURT:* 2 o'clock.

18 *MR. McCAUGHEY:* That's all right.

19 *THE COURT:* Anything further, Mr. Murphy?

20 *MR. MURPHY:* Yes. Michael Gall, the defendant's
21 brother, is here. He has asked leave to be heard by the Court
22 now that the plea has been entered. And I will tell you also
23 that he is going to be asking that a no-contact order be
24 entered between the defendant and himself.

25 *THE COURT:* I certainly think that's appropriate.

1 That's something I can order at the present time.

2 Any objection to Mr. Gall speaking now,
3 Mr. McCaughey?

4 MR. McCAUGHEY: No. May we be excused while that
5 happens?

6 THE COURT: I'll actually ask that you go over by the
7 jury box so that Mr. Gall can speak. And Leonard Gall, if you
8 will go over with your attorney.

9 Are you Michael Gall?

10 GENTLEMAN SPEAKING: Yes.

11 THE COURT: Okay. And you wish to say something
12 then?

13 GENTLEMAN SPEAKING: Yes.

14 THE COURT: Okay.

15 GENTLEMAN SPEAKING: Here?

16 THE COURT: Yeah. You can just stand right there.
17 No, you don't have to go on the witness stand.

18 GENTLEMAN SPEAKING: Right here. Okay.

19 Umm, I know that I will speak again at the
20 sentencing hearing. But I just wanted to say, umm, first off,
21 I still love my brother, umm, but I don't understand why he
22 took our mom's life. She was always good to him.

23 Umm, I also want to say that he has given a lot of
24 pain to me and to my family. But I forgive him. I don't have
25 any anger towards him.

1 But the only person I really have any anger against
2 is my father. And I know my father. If he wasn't like the
3 way he was, maybe none of this would have happened.

4 I don't blame my brother, I don't. The most person
5 I blame is my father. And I would -- I love my brother. But
6 I never want to see my father again. That's all.

7 *THE COURT:* Thank you. Thank you, Mr. Gall.

8 Mr. McCaughey, if you and Mr. Gall will come back
9 for a moment to the podium.

10 I intend to recess court in a few moments. But
11 also, before doing that, I will say a few words about this
12 case.

13 This case, from beginning to end, is a tremendous
14 tragedy for everybody involved -- for the Gall family, for the
15 community. I never met Susan Gall. But I have read some of
16 her words and I have heard about her from people. Her loss
17 and the circumstances of her death are as tragic as any that
18 we can see in a court.

19 Mr. Gall, with regard to your life now and the past
20 year and a half and in the future, it's hard to imagine the
21 horror you must live in on a daily basis, having taken the
22 life of your mother and the pain that your family members feel
23 as a result of this. It has caused larger pain, though, also
24 through this entire community.

25 The community in Utah has responded to this. The

1 legislature has passed legislation that hopefully will prevent
2 this type of a situation from ever happening again.

3 Mr. Gall, you suffer from an extreme mental illness,
4 a mental illness that you cannot control, and that one of the
5 symptoms is not taking medications. It goes along with the
6 mental illness, and that's typical.

7 And what that has left us with is a community with
8 the obligation of caring for people in your situation -- or
9 not the "obligation." It leaves the question up of that.

10 And our community has not, in the past, taken steps
11 to be actively involved in the lives of people such as you.
12 In retrospect, we would all like to look back and say, maybe
13 if Leonard Gall had stayed on his medications, maybe if we had
14 resources for him, maybe if the family was able to somehow get
15 him some help, all of this wouldn't have happened.

16 And maybe all of that's true. But that didn't
17 happen. And we are left here today having to recognize the
18 horror and the tragedy that your conduct and your life and the
19 circumstances have resulted in.

20 I have no answers with regard to those issues,
21 Mr. Gall. But I can tell you that they're of a daily concern
22 to me and to many people in this community.

23 With that, Mr. McCaughey, I appreciate your work on
24 this case.

25 Mr. Murphy, Ms. Cameron.

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We'll be in recess.

MR. McCAUGHEY: Thank you, your Honor.

(These proceedings concluded at 10:53 a.m.)

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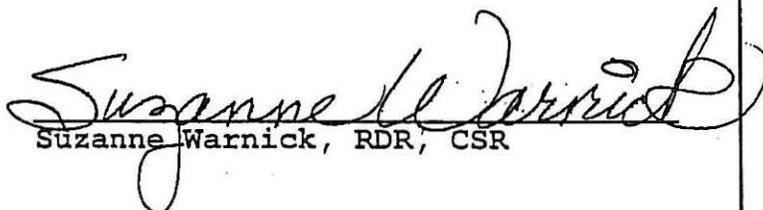
C E R T I F I C A T E

STATE OF UTAH)
:
COUNTY OF SALT LAKE)

I, SUZANNE WARNICK, RDR, CSR, do certify that I am a nationally certified Registered Diplomate Reporter with the Certificate of Merit, and also a Certified Shorthand Reporter in and for the State of Utah.

That at the time and place of the proceedings in the foregoing matter, I appeared as the official court reporter in the Third Judicial District Court for the Honorable Judith S. Atherton, and thereat reported in stenotype all of the proceedings had therein. That, thereafter, my said shorthand notes of the Change of Plea Proceedings were transcribed by computer into the foregoing pages; and, after editing, this constitutes a full, true and correct transcript of the same.

WITNESS MY HAND AND SEAL in Salt Lake City, Utah, on this, the 4th day of March, 2004.


Suzanne Warnick, RDR, CSR

SEP 10 2003

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE COUNTY *CP*

Deputy Clerk

STATE OF UTAH,

Plaintiff,

vs.

LEONARD PRESTON GALL,

Defendant.

: STATEMENT OF DEFENDANT IN
: SUPPORT OF GUILTY AND MENTALLY
: ILL PLEA, PURSUANT TO §77-16a-103,
: UTAH CODE ANN., AND STATEMENT OF
: COUNSEL

: Case No: 011919226 FS

: JUDGE JUDITH S. ATHERTON

I, Leonard Preston Gall, hereby acknowledge and certify that I have been advised of and that I understand the following facts and rights:

Notification of Charges

I am pleading guilty and mentally ill to the following crimes:

Crime and Statutory Provision	Degree	Punishment Min/Max and/or Minimum Mandatory
Manslaughter, U.C.A. § 76-5-205, with dangerous weapon enhancement, U.C.A. § 76-3-203	2 nd degree felony	2 years to 15 years prison, may be 2 years to 20 years; \$10,000 fine plus 85% surcharge
Theft of automobile, U.C.A. § 76-6-404	2 nd degree felony	1 to 15 years prison; \$10,000 fine plus 85% surcharge

In addition, I am stipulating that the Court will enter judgment of "not guilty by reason of insanity," on a charge of aggravated burglary, a first degree felony under U.C.A. § 76-6-203. I acknowledge and certify my understanding that under this "not guilty by reason of insanity" judgment, I am subject, in addition to the criminal penalties for my above-described "guilty and mentally ill" pleas, to commitment to the Utah Department of Human Services for involuntary mental health treatment; further, that the period of such commitment may, under U.C.A. 77-16a-

302, extend for a period of five years to life, subject to periodic review by the trial court.

I have received a copy of the Amended Information against me. I have read it, or had it read to me, and I understand the nature and elements of the crimes to which I am pleading guilty and mentally ill.

Factual Basis for Pleas

The elements of the crimes to which I am pleading guilty and mentally ill are:

Manslaughter: that on or about December 14, 2001, at 2925 East 2965 South, in Salt Lake County, State of Utah, I did recklessly cause the death of my mother, Susan Gall, and that I used a dangerous weapon to do so.

Theft of Automobile: that on or about December 14, 2001, at 2925 East 2965 South, in Salt Lake County, State of Utah, I did obtain or exercise unauthorized control over the operable motor vehicle of my mother, Susan Gall, with the purpose to deprive her of that automobile.

I understand that by pleading guilty and mentally ill I will be admitting that I committed the crimes listed above. I stipulate that the following facts describe the conduct for which I am criminally liable. These facts provide a basis for the trial court to accept my guilty and mentally ill pleas and prove the elements of the crimes to which I am pleading guilty and mentally ill:

At the above-described place and time, I was suffering from a serious mental illness, and for several months I had not been taking the medication prescribed to control the symptoms of my illness. By refusing to take my prescribed medications, I acted recklessly. As a result, I was experiencing delusions caused by my mental illness, and acting upon those delusions, I attacked my mother in her bedroom with a knife and a hatchet, killing her. I then took her automobile, eventually driving it to Reno, Nevada, where I was arrested about two days later.

These facts also create a substantial risk, were this case to proceed to trial, that I would be found guilty of criminal homicide, murder, a first degree felony as charged in the originally-filed Information in this Court, as well as theft of an automobile. I am entering into this plea agreement, in part, to avoid this risk.

Factual Basis for Not Guilty by Reason of Insanity Judgment

I understand that aggravated burglary, a first degree felony, occurs when a person enters or remains unlawfully in the dwelling of another, with the intent to commit an assault on any person, and uses or threatens the immediate use of a dangerous weapon against any person who is not a participant in the crime. Based upon the report of an expert witness, retained by the defense in this case, a question has been raised about the content of my delusional thinking at the

time that I killed my mother; in particular, the question is whether I had the intent to assault or kill another human being. I understand that based upon the existence of this question, the prosecution has agreed to the "not guilty by reason of insanity" judgment on this charge.

Waiver of Constitutional Rights

I am entering these pleas, and consenting to the "not guilty by reason of insanity" judgment, voluntarily. I understand that I have the following rights under the constitutions of Utah and of the United States. I also understand that if I plead guilty and mentally ill I will give up all the following rights:

Counsel. I know that I have the right to be represented by an attorney and that if I cannot afford one, an attorney will be appointed by the court at no cost to me. I understand that I might later, if the judge determined that I was able, be required to pay for the appointed lawyer's service to me.

I have not waived my right to counsel. My attorney is Stephen R. McCaughey. My attorney and I have fully discussed this statement, my rights, and the consequences of my guilty and mentally ill pleas, along with the consequences of the "not guilty by reason of insanity" judgment.

Jury Trial. I know that I have a right to a speedy and public trial by an impartial (unbiased) jury, and that I will be giving up that right by pleading guilty and mentally ill.

Confrontation and cross-examination of witnesses. I know that if I were to have a trial, a) I would have the right to see and observe the witnesses who testified against me, and; b) my attorney would have the opportunity to cross-examine all of the witnesses who testified against me.

Right to compel witnesses. I know that if I were to have a trial, I could call witnesses if I chose to, and I would be able to obtain subpoenas requiring the attendance and testimony of those witnesses. If I could not afford to pay for the witnesses to appear, the State would pay those costs.

Right to testify and privilege against self-incrimination. I know that if I were to have a trial, I would have the right to testify on my own behalf. I also know that if I chose not to testify, no one could make me testify or make me give evidence against myself. I also know that if I chose not to testify, the jury would be told that they could not hold that choice against me.

Presumption of innocence and burden of proof. I know that if I do not plead guilty, I am presumed innocent until the State proves that I am guilty of the charged crimes. If I choose to fight the charges against me, I need only plead "not guilty," and my case will be set for a trial. At a trial, the State would have the burden of proving each element of the charges beyond a

reasonable doubt. If the trial is before a jury, the verdict must be unanimous, meaning that each juror would have to find me guilty.

I understand that if I plead guilty and mentally ill, I give up the presumption of innocence and will be admitting that I committed the crimes stated above.

Appeal. I know that under the Utah Constitution, if I were convicted by a jury or judge, I would have the right to appeal my conviction and sentence. If I could not afford the costs of an appeal, the State would pay those costs for me. I understand that I am giving up my right to appeal my conviction if I plead guilty and mentally ill. I understand that if I wish to appeal my sentence I must file a notice of appeal within thirty (30) days after my sentence is entered.

I know and understand that by pleading guilty and mentally ill, I am waiving and giving up all the statutory and constitutional rights as explained above.

Consequences of Entering a Guilty And Mentally Ill Plea

Potential penalties. I know the maximum sentence that may be imposed for each crime to which I am pleading guilty and mentally ill. I know that my sentence may include a prison term, fine, or both:

I know that in addition to a fine, an eighty-five percent (85%) surcharge will be imposed. I also know that I may be ordered to make restitution to any victim(s) of my crime(s), which include my mother's immediate family.

Consecutive/concurrent prison terms. I know that if there is more than one crime involved, the sentences may be imposed one after another (consecutively), or they may run at the same time (concurrently).

Plea Agreement. My guilty and mentally ill pleas, and the entry of the "not guilty by reason of insanity" judgment, are the result of a plea agreement between my attorney, in full consultation with me, and the prosecuting attorney. All the promises, duties, and provisions of the plea agreement, if any, are fully contained in this statement, including those explained below:

Upon the entry of my guilty and mentally ill pleas as stated above, the State will recommend that I be committed to the Utah State Hospital for evaluation and treatment, with periodic review by the trial court, until commitment to the State Hospital is no longer clinically necessary. At the end of that time, the trial court will sentence me, on the "guilty and mentally ill" pleas to counts I and II of the Amended Information, within the maximum terms elsewhere set forth in this Statement.

I also reiterate my understanding and agreement that regardless of the terms and duration of my ultimate criminal sentence under my guilty and mentally ill pleas, I will remain

legally committed for involuntary mental health treatment, under the trial court's ongoing jurisdiction, for a period extending beyond my criminal sentence, and which could continue for the rest of my life, with regular review by the trial court.

Trial judge not bound. I know that any charge or sentencing concession, or any sentencing recommendation, made or sought by either defense counsel or the prosecuting attorney, or jointly recommended by the defense and the prosecution, are not binding on the judge. I also know that any opinions counsel express to me as to what they believe the judge may do are not binding on the judge.

Defendant's Certification of Voluntariness

I am entering these pleas of my own free will and choice. No force, threats, or unlawful influence of any kind have been made to get me to plead guilty and mentally ill. No promises except those contained in this statement have been made to me.

I have read this statement, or I have had it read to me by my attorney, and I understand its contents and adopt each statement in it as my own. I know that I am free to change or delete anything contained in this statement, but I do not wish to make any changes because all of the statements are correct.

I am satisfied with the advice and assistance of my attorney.

I am 26 years of age. I have attended school through bachelor's degree, University of Utah. I can read and understand the English language. I was not under the influence of any drugs, medication, or intoxicants which would impair my judgment when I decided to plead guilty and mentally ill. I am not presently under the influence of any drug, medication, or intoxicants which impair my judgment. Instead, I have been taking the medication prescribed for my mental illness, enabling me to freely, rationally, and voluntarily enter into this plea agreement.

Based upon my current compliance with my prescribed treatment, I believe myself to be of sound and discerning mind and to be mentally capable of understanding these proceedings and the consequences of my guilty and mentally ill pleas, as well as the consequences of the "not guilty by reason of insanity" judgment. I am not currently suffering from an impairment that would prevent me from understanding what I am doing or from knowingly, intelligently, and voluntarily entering my pleas.

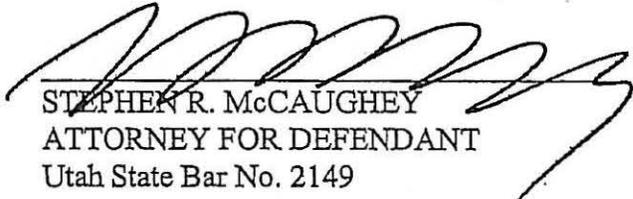
I understand that if I want to withdraw my guilty and mentally ill pleas, I must file a written motion to withdraw my pleas before sentence is announced. I will only be allowed to withdraw my guilty and mentally ill pleas if I prove that they were not knowingly and voluntarily made. I understand that any challenge to my pleas made after sentencing must be pursued under the Post Conviction Remedies Act in Title 78, Chapter 35a, and Rule 65C of the Utah Rules of Civil Procedure.

DATED this 10 day of Sept, 2003.


DEFENDANT

Certificate of Defense Attorney

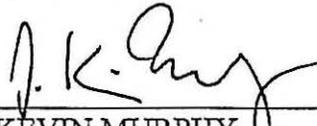
I certify that I am the attorney for Leonard Preston Gall, the defendant above, and that I know he has read the statement or that I have read it to him; I have discussed it with him and believe that he fully understands the meaning of its contents and is mentally and physically competent to proceed with the plea agreement described herein. To the best of my knowledge and belief, after an appropriate investigation, the elements of the crime and the factual synopsis of the defendant's criminal conduct are correctly stated; and these, along with the other representations and declarations made by the defendant in the foregoing Statement, are accurate and true.


STEPHEN R. McCAUGHEY
ATTORNEY FOR DEFENDANT
Utah State Bar No. 2149

Certificate of Prosecuting Attorney

I certify that I am the attorney for the State of Utah in the case against Leonard Preston Gall, defendant. I have reviewed this Statement of Defendant and find that the factual bases for the defendant's criminal conduct constituting the offenses are true and correct. No improper inducements, threats, or coercion to encourage a plea have been directed toward defendant. The plea negotiations are fully contained in the Statement and in the Plea Agreement, or as

supplemented on the record before the Court. There is reasonable cause to believe that the prosecution evidence would support the conviction of defendant for the offenses for which the pleas are entered, or for the greater offense of criminal homicide, murder, a first degree felony, as well as motor vehicle theft. Finally, in light of this defendant's well-documented prior history of serious mental illness, and upon consultation with and the consent of the victim's family, I believe that the acceptance of the pleas would serve the public interest.



J. KEVIN MURPHY
DEPUTY DISTRICT ATTORNEY
Bar No. 5768

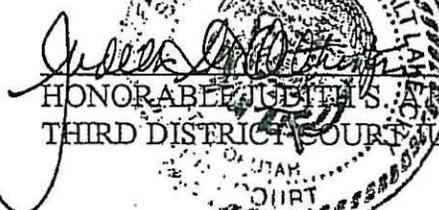
Order

Based on the facts set forth in the foregoing Statement and the certification of the defendant and counsel, and based on any oral representations in court, the Court witnesses the signatures and finds that defendant's guilty and mentally ill pleas are freely, knowingly, and voluntarily made. The Court further finds that the defendant has freely, knowingly, and voluntarily agreed that a judgment of "not guilty by reason of insanity" will be entered on a charge of aggravated burglary, a first degree felony.

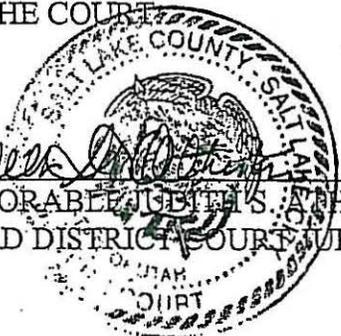
IT IS HEREBY ORDERED that the defendant's guilty and mentally ill pleas to the crimes set forth in the Statement be accepted and entered, and that judgment of "not guilty by reason of insanity" on aggravated burglary, a first degree felony, is also entered.

DATED this 16 day of September, 2003.

BY THE COURT



HONORABLE JUSTICE S. ATHERTON
THIRD DISTRICT COURT JUDGE



3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES
Plaintiff, : CHANGE OF PLEA
: LAW AND MOTION
: NOTICE
:
:
vs. : Case No: 011919226 FS
:
LEONARD PRESTON GALL, : Judge: JUDITH S ATHERTON
Defendant. : Date: September 10, 2003

PRESENT

Clerk: lorip
Reporter: WARNICK, SUZANNE
Prosecutor: ANNE A CAMERON
J KEVIN MURPHY

Defendant

Defendant's Attorney(s): STEPHEN R. MCCAUGHEY

DEFENDANT INFORMATION

Date of birth: December 3, 1976

Video

CHARGES

1. MANSLAUGHTER - 2nd Degree Felony
Plea: Guilty-Mentally Ill - Disposition: 09/10/2003 Guilty -
Mental Ill
2. THEFT - 2nd Degree Felony
Plea: Guilty-Mentally Ill - Disposition: 09/10/2003 Guilty -
Mental Ill
3. AGGRAVATED BURGLARY - 1st Degree Felony
Plea: Not Guilty-Insanity - Disposition: 09/10/2003 Not
Guilty -Insanity

Case No: 011919226
Date: Sep 10, 2003

The Information is read.
Court advises defendant of rights and penalties.

HEARING

COURT FINDS BY CLEAR AND CONVINCING EVIDENCE THAT DEFENDANT IS STILL MENTALLY ILL AND POSES SUBSTANTIAL DANGER TO HIMSELF AND OTHERS. ORDER TO COMMIT TO STATE MENTAL HOSPITAL TO BE SUBMITTED BY COUNSEL.

SENTENCING is scheduled.

Date: 03/15/2004

Time: 02:00 p.m.

Location: Fourth Floor - S44
Third District Court
450 South State
SLC, UT 84114-1860

Before Judge: JUDITH S ATHERTON

Dated this 10 day of Sept, 20 03



JUDITH S ATHERTON
District Court Judge

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this proceeding should call Third District Court-Salt Lake at 238-7058 at least three working days prior to the proceeding. The general information phone number is (801)238-7300.

Defendant Gall, on advice of counsel and with the prosecution's consent, then waived the maximum time for sentencing on counts I and II. Sentencing on those counts is hereby set for March 15, 2004, at 2:00 PM.

The Court then proceeded to disposition on the "not guilty by reason of insanity" judgment on count III, aggravated burglary, under Utah Code § 77-16a-302 (2002). Based upon the several mental health evaluations previously submitted to the Court, and based upon the attorneys' review of the facts of this case and of the defendant's extensive mental health records, this Court FINDS, by clear and convincing evidence, that defendant Gall is still mentally ill, and that because of his mental illness, he presents a substantial danger to himself or others. *See* Utah Code § 77-16a-302(2). Of particular concern in this regard is the defendant's well-documented history of major mental illness, his noncompliance with his prescribed psychotropic medication, and his history of threatening and violent behavior when such noncompliance causes his mental condition to decompensate.

Accordingly, the Court ORDERS that defendant Gall be committed to the Utah Department of Human Services for confinement, evaluation, and treatment of his mental illness at the Utah State Hospital. Count III, aggravated burglary, is a first degree felony. Therefore, the period of defendant's commitment, for the "not guilty by reason of insanity" judgment on this count, may be for the rest of defendant's life, Utah Code §§ 77-16a-302(3) (2002) and -303(1) (1992), but is subject to review by the Department of Human Services at least every six months, under the provisions of Utah Code § 77-16a-304 (1992).

As required by Utah Code § 77-16a-303(2), the Court FINDS that there is a victim of the aggravated burglary. This victim is Michael Gall, defendant's brother. Victim Michael Gall

wishes to be notified of any conditional release, discharge, or escape of defendant Gall from the confinement provided by the Department of Human Services. Another victim is Ted Jenkins, brother of the deceased victim, who also requests notification.

Sentencing on the "guilty and mentally ill" verdicts is scheduled for March 15, 2004, at 2:00 PM. At that time, the Court may commit defendant to the Department of Human Services pursuant to Utah Code § 77-16a-202 (2002). Per Utah Code § 77-16a-104(4) (2003), the Court hereby NOTIFIES the executive director of the Department of Human Services of this proposed placement, and invites the Department of Human Services to evaluate defendant and make a recommendation to the Court regarding defendant's sentence and placement on the "guilty and mentally ill" judgments.

Regarding Human Services and State Hospital evaluation both on the "not guilty by reason of insanity" judgment and on the "guilty and mentally ill" pleas, attorneys for the prosecution and for the defense are hereby authorized, within thirty days of entry of this Order, to submit letters to the Department and the State Hospital, with copies to the Court, outlining their specific areas of concern regarding defendant. In order to make a more fully-informed decision regarding sentencing, the Court hereby requests that the Department and the State Hospital address those concerns as part of their evaluation of defendant Gall.

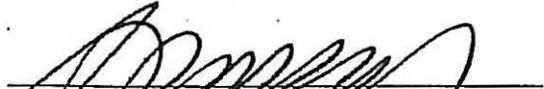
SO ORDERED this 15 day of Sept., 2003.





JUDITH S. H. ATHERTON
District Court Judge

Stipulated and Approved as to Form:



Stephen R. McCaughey
Attorney for Defendant



J. Kevin Murphy
Deputy District Attorney
Attorney for Plaintiff

April 23, 2004

FILED
DISTRICT COURT

04 APR 23 PM 3:49

Honorable Judge Atherton
Third Judicial District Court

THIRD JUDICIAL DISTRICT
LAKE COUNTY
DEPUTY CLERK

Re: Rule 4-603 Motion:
] State of Utah v. Leonard Preston Gall, Case No. 011919226;

Dear Judge Atherton

There is some new information on my case, which was conveyed to my attorney some time ago, but he is out of town and unavailable and I wanted to make sure I met the deadline for filing a motion for reduction of offense at sentencing in time. I don't know why my attorney has not mentioned this option before, particularly in light of the new information. My father found Rule 4-603 by himself, just today, the last day to file the motion.

The crux of the matter is that it is looking very likely it was really the psychiatric medications that precipitated/caused me to commit my crime. I am enclosing the not quite finished report of Dr. Ann Blake Tracy about this.

What I would really like the court to do is allow us some time to sort out what should be done about this. However, because of the deadline for the Rule 4-603 motion, I am also formally asking that my offenses be reduced.

It is my preference, however, that the sentencing hearing set for May 3rd be delayed and we use the time instead to decide what to do about this new information.

Thank you for your consideration.

Sincerely,

Leonard Preston Gall
Leonard Preston Gall

I hereby certify that a copy of this motion was mailed to Anne A. Cameron
on April 23, 2004.

Leonard Silvius Gall
Leonard Silvius Gall

00052

April 17, 2004

Honorable Judge Atherton

FILED
DISTRICT COURT

Re: State of Utah vs. Leonard Preston Gall

04 APR 26 PM 2:27

Dear Honorable Atherton:

I am the defendant, Leonard Preston Gall, the son of Susan Jenkins Gall and Leonard Silvius Gall and the brother of Michael Raymond Gall. I'm sad because of this tragedy – sad for my mom, Susan, myself, for my dad, Leonard, Michael, my mother, her brothers and sisters, all their relatives, friends and our whole community. I recognize my responsibility for my mom's death in December 2001. I have felt deep sorrow and grief. I thought a lot about my mother and how good she was and I feel sorry for her and everyone else who has been hurt because of this. She was a great mother. I really loved her a lot.

I am asking you to consider the new facts that have come forth since my September 10, 2003 hearing, with the overriding consideration that your upcoming sentencing be just. These facts include that I was prescribed Paxil eleven years ago at the age of 16 and that later my parents abruptly took me off the Paxil. The Paxil was improperly prescribed for simple anxiety problems without my parents being made aware of any serious reactions or withdrawal risks, including the high risk of adverse reactions to me due to my family's low blood sugar history. My parents were also not made aware that Paxil was not approved for use in anyone under the age of 18. Paxil was recently banned in the United Kingdom for use in anyone under the age of 18 and doctors in the United States have warned against it. Dr. Nancy B. Cohn's August 28, 2002 report and Dr. Ann Blake Tracy's March 29, 2004 declarations further confirm the adverse effects for me of Paxil shortly after my taking it, including "with documentation of paranoia, grandiosity, loose associations and suicidal ideation" and the adverse effects of the various other serotonergic medications prescribed for me including Prozac, Trazadone, Wellbutrin, and Zyprexa, from 1993 to 2001.

Zyprexa was prescribed and taken shortly before the violent incident on 12/14/01. Zyprexa's present package insert reports that and Dr. Ann Blake Tracy's March 29, 2004 declaration states that "Akathisia levels while on Zyprexa jumped FIVE times as opposed to not being on the drug. Akathisia is believed to be the reaction that produces suicide or violence while taking one of these serotonergic medications. So according to this package insert, the six pills of Zyprexa Mr. Gall ('Lenny') took in the days before the killing could have potentiated a violent episode by FIVE times." The package insert also states that delusions are a frequent adverse effect and I was clearly suffering from such delusions when the tragedy occurred. There is evidence before the court that had Paxil not been prescribed for me when I was 16, and/or had Zyprexa not been prescribed shortly before the incident, this tragedy probably never would have happened; I loved my mom. Also had the manufacturers of Paxil, Zyprexa, and the other drugs warned of the risks of suicide and homicide for certain people like myself, this tragedy may never have happened. The suicide and homicide risks of anti-depressants are presently being investigated by our U.S. Senate.

I am asking you to weigh these above mentioned new facts within the plea bargain I signed on September 10, 2003: Also, I'm asking you to consider the facts that I have always loved my mom and always wanted to protect her; that my mom invited me over to her house on December 14, 2001; that my brother let me in our house; that my

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525

mom and I always used ea other's car; that any of these offenses from a single episode; that I have shown I am amenable to supervision; that I was exceptionally cooperative with law enforcement; that the offense represents a single incident with my not having any prior history of violence; that I'm doing well in the hospital including having been elected president of the forensic patients and am effectively carrying out these responsibilities. With these in mind, I am asking that you adjust/reduce the offenses or consider sentencing as follows:

A. Offense adjustments/reductions

1. Adjust the second-degree manslaughter with weapons enhancement to "Not Guilty by Reason of Insanity".
2. Adjust the second-degree vehicle theft to "Not Guilty by Reason of Insanity".
3. Such other different adjustment/reductions that the Court may find just.

B. In the event the Court does not adjust/reduce the offenses to "Not Guilty by Reason of Insanity" as above, that the Court sentence as follows:

1. Continue my treatment in the Utah State Hospital.
2. Credit me for time served in the Jail and Hospital.
3. Regarding each of the Guilty and Mentally Ill pleas, that you choose to have them run at the same time (concurrently).
4. That under 76-3-203 and 76-3-203.8 you sentence me to indeterminate terms of 2-5 years for the plea - manslaughter with dangerous weapon enhancement and 1 to 5 years for the plea - theft of an automobile and that the sentences run concurrently - or whichever reduction the court chooses for each of these two pleas.
5. Also, that under 77-18-1 (2)a, that the court after imposing sentences, suspend the execution of each of the above sentences or of any sentences and place me on bench probation under the jurisdiction of this Court - for each of the Guilty and Mentally Ill pleas.
6. Also, that under 76-16a-301 to 76-16a-306, and under the other Utah Code of Criminal Procedures, that you adjust the "Not Guilty by Reason of Insanity" on a charge of Aggravated Burglary, a first degree felony, to "Not Guilty by Reason of Insanity" on a charge of burglary (in a dwelling), a second degree felony, and that the commitment is clarified to extend for a period of up to 15 years, subject to review by the trial court. That any time in the hospital be credited to time served of the Guilty and Mentally Ill sentences.
7. Please have the entire case under the Court's jurisdiction rather than under the Board of Pardons. That way the Court can be assured I can be discharged only when and if the Court finds it's safe to do so.

Some of my mother's friends and relatives have written letters to you. I think they may have extreme fears from a statement in some letters written when I was delusional. They may think I have plans, intents, or desires to kill or harm them.

I do not have any plans, intentions, desires or even thoughts about killing or harming any friends or family of my mothers. In fact, I hope the absolute best for them. Also, I have no plans, intents, desires or thoughts of harming or killing anybody.

The essential idea of my request is that the sentencing be structured so that if and when, but only if and when, I am found safe for a conditional release or discharge by the hospital and authorized by the Court, that such conditional release or discharge will be possible.

Thank you for your consideration.

Leonard Preston Gall
Leonard Preston Gall

cc: Leonard Silvius Gall

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527

FILED
DISTRICT COURT 2004

04 APR 26 PM 2:27

JUDICIAL DISTRICT
SALT LAKE COUNTY

DEPUTY CLERK

Judge Judith Atherton
Third Judicial Court
450 State Street
Salt Lake City, UT 84111

Dear Judge Atherton,

I am Leonard (Len) Silvius Gall – I am Leonard (Lenny) Preston and Michael Gall's father. I was the husband of Susan Gall for over ten years (1972-1983). I am writing because while, I, like everyone else have been horror struck by this tragedy, I also would like to prevent a second tragedy of locking up my son for the rest of his life if that proves unnecessary.

I am a Christian who believes in continuously protecting the health and welfare of my family, my sons, Lenny Preston and Michael and myself. I also believe in making every effort to get to the truth of important things. I am 61 years old. I have had 38 years of business experience and a Master's Degree in Business Administration from Stanford University.

Susan and I were separated in 1981 and eventually divorced. She moved back to Utah with Michael and Lenny and I stayed living in Santa Barbara, California until moving to Utah two years ago to respond to this tragedy. During the separation and after the divorce, my sons each visited me about four weeks a year every year and I faithfully paid child support to their mother. The visits were always positive for each of us. I think I have always been a positive influence in each of my son's lives and plan to always be so.

Lenny certainly never had any intent to harm or had any knowledge of harming his mother. Throughout his whole life, he has always loved and been protective of his mother. He always was an even-keeled, normal boy throughout the first 16 years of his life. He had a lot of friends and was well liked. He always treated people with great love and respect. He received A's and B's in school. He was involved in numerous extracurricular activities, including playing soccer, basketball, and volleyball. He was often elected the captain of those teams. He played trumpet in the band. He was a solid leader.

I believe my son, Lenny, is now either not mentally ill or mentally ill for a different reason – the not mentally ill or different reason being the initial effect that Paxil, 11 years ago at age 16, and the subsequent other medications in 11 years, have had on him – particularly the effect of the Zyprexa which was prescribed and taken shortly before the incident on 12/14/01. Zyprexa's present package insert reports and Dr. Ann Blake Tracy's March 29, 2004 declaration states that

“Akathisia levels while on Zyprexa jumped FIVE times as opposed to not being on the drug. Akathisia is believed to be the reaction that produces suicide or violence while taking one of these serotonergic medications. So according to this package insert, the six pills of Zyprexa Mr. Gall ('Lenny') took in the days before the killing could have potentiated a violent episode by FIVE times.”

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The package insert also states that delusions are a frequent adverse effect and Lenny was clearly suffering from such delusions when the tragedy occurred. Up until the FDA on 2/3/04 first confirmed the suicide and violence risks of these drugs, I believed Lenny was mentally ill the last 11 years. Now I'm not so sure. He's certainly had significant psychological and/or psychotic reactions to these drugs.

At 16 years old, in 1993, he was prescribed Paxil for simple anxiety – without me being aware of this being prescribed – my being unaware because his mother and I had been separated when Lenny was five and Michael was two – she living in Utah with Lenny and Michael, I in Santa Barbara.

I also found out recently from Dr. Kohn's August 26, 2002 report and Dr. Anne Blake Tracy's March 29, 2004 report, that my son, Lenny, had significant psychological or psychotic reactions to Paxil shortly after he began taking it in 1993. I knew nothing about those reactions previously until reading these reports. I'm shocked that Lenny was prescribed this drug when it's known that there is greater adverse reaction risks to someone taking these drugs when low blood sugar is common in a person's family history – and I was diagnosed over 30 years ago with acute low blood sugar.

Had I known in 1993 about Lenny's significant reactions to Paxil, I would have reviewed this with whomever prescribed the Paxil. However, even if I had known in 1993 and then reviewed it with whomever prescribed it, I, and any parent, still could have made serious mistakes about what to do about it. At that time, Paxil had recently come out and there were very few, if any, published adverse reactions to Paxil – even the tests of the drugs were not made public. However, Paxil, as you probably know, was not and has never been approved for use by anyone under the age of 18. In fact, Paxil was banned from use by the United Kingdom in people under the age of 18 and warnings against such use issued in the United States by the F.D.A.

As it was, then in 1994, Lenny decided to go to college in the city I lived in – Santa Barbara. He brought his Paxil pills with him – the first time I became aware that he was taking them. So, me being an athlete playing different sports – volleyball, running, weightlifting, yoga, skiing, etc. – I suggested to Lenny to tone up and start exercising again like he did when he played on sports teams and quit the Paxil. Little did I, or his mom know he should have quit the Paxil over time – even possibly taking a year to get off completely. Instead, I suggested he stop taking all of it and just begin exercising and playing sports.

A few months later in 1995, Lenny then had his second significant reaction – abrupt withdrawal – to the Paxil (the first reaction being shortly after he began taking it), – including he was driving around the freeways of Los Angeles calling his mother and I, telling us that something was trying to torture him or us. So in retrospect, with the benefit of new knowledge about these drugs, it now appears all of the serious psychiatric symptoms were prescription drug caused culminating with the psychotic reaction to the just prescribed Zyprexa.

I believe Lenny is now beginning to understand how and why that this happened and is effectively focused on living his life safely for himself and everyone. It seems to me that in light of all these circumstances, the most just sentencing would be structured so that Lenny can be

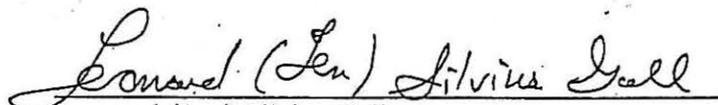
released when and if, but only when, he is considered safe for a conditional release or discharge by the hospital and authorized by the Court.

What I'm asking you to do, your Honor, is to consider how much Lenny loves and has always loved his mom, how he treats people well, and help give him the possibility of living a normal life again. It seems to me that the best option at this point is for Lenny just to be committed to the Utah State Hospital for "Not Guilty by Reason of Insanity" for all three offenses. However, if you decide otherwise I'm requesting you suspend, reduce, or suspend the execution of each part of his possible sentences/commitments – the guilty and mentally ill parts, the weapons enhancement part and the not guilty by reason of insanity part.

It's highly probable that the medications were the root-cause of what happened. As we all are now beginning to more learn, these medications are not safe for a certain people, like Lenny, who has a family history of low blood sugar and who has a tendency to significantly and adversely react to them.

I would therefore fervently request that your sentencing decisions take these circumstances into account and allow for the possibility for Lenny to be released, if and when, but only if and when it is considered safe to do so by the hospital and the Court.

Thank you for your consideration of this request and may God grant you the wisdom to issue a just decision.


Leonard (Len) Silvius Gall

FILED
DISTRICT COURT

04 APR 26 PM 2:35

JUDICIAL DISTRICT
SALT LAKE COUNTY
April 26, 2004
DEPUTY CLERK

Steve McCaughey
Attorney
10 West Broadway
Suite 650
Salt Lake City, UT 84101

Dear Mr. McCaughey,

I've lost confidence in your representation of me. I, therefore, am requesting that you withdraw as my counsel.

Leonard F. Gall

cc: Judge Judith Atherton
Ann A. Cameron
Susanne Gustin

00059

531

FILED
DISTRICT COURT

04 APR 26 PM 2: 27

JUDICIAL DISTRICT
SALT LAKE COUNTY

DEPUTY CLERK

Ann Blake Tracy, PhD

Health Sciences with emphasis on Psychology

3851 Saddler Drive
West Jordan, UT 84088
USA

Phone: 801-209-1800 Fax: 801-282-5282 E-mail:
atracyphd1@aol.com

March 29, 2004

Declaration of Ann Blake Tracy, PhD

RE: Leonard Preston Gall - DOB 12/6/76

Introduction

I have been asked to give my expert opinion on the adverse effects of serotonergic chemicals which potentially trigger violence in the user and any possible role they may have played in this case. Lenny Gall's first experience with serotonergic medications was in 1993 at the age of 16. He was prescribed Paxil for simple anxiety without his parents being made aware of any serious adverse reactions or withdrawal risks. His parents were also not made aware that Paxil was not approved for use in anyone under the age of 18. After serious adverse psychiatric reactions to Paxil Lenny was

00061

continued on various serotonergic medications including, Prozac, trazadone, Wellbutrin, and Zyprexa, from 1993 to 2001.

Zyprexa was prescribed for Lenny shortly before the violent incident on 12/14/01. Akathisia levels while on Zyprexa jumped by FIVE times as opposed to not being on the drug! Akathisia is believed to be the reaction that produces suicide or violence while taking one of these serotonergic medications. So according to Zyprexa's package insert the six pills of Zyprexa Mr. Gall took in the days before the killing could have potentiated a violent episode by FIVE times.

I have reviewed the police reports and evidence, doctor and hospital reports, news reports, autopsy reports, victim statements, medical records, etc. in the case of Leonard Preston Gall in order to give my expert opinion on the adverse effects of the serotonergic chemicals which potentially trigger violence in the user.

In forming my opinion I have also interviewed Mr. Gall and his father in gathering information on this case and met with the staff at Utah State Hospital including Don Rosenbaum, Director of Forensic Administration, Dr. Paul Whitehead, Lenny's psychiatrist, and Greg Porter, Lenny's social worker.

For a decade and a half I have researched, written, lectured, done radio, television, newspaper and magazine interviews on the subject of the SSRI and SNRI antidepressants. I have also written several books on this group of drugs, the most current being an approximately 500 page book on the Prozac family of antidepressants entitled Prozac: Panacea or Pandora? - Our Serotonin Nightmare. I have also produced an hour and a half long audio tape on the safest methods of withdrawal along with modalities that rebuild the body/brain after the damage caused by these drugs.

Over the past 12 years I have testified as an expert witness in court cases involving out of character behavior including extreme violence triggered by these medications, as well as acting as a consultant for attorneys in a large number of these cases - many of which have since been settled by the drug manufacturers. Of course these were secret settlements with gag orders - which I believe strongly should be made illegal because buying silence in these cases is an extreme hazard to public safety. If we are prevented from learning via the sad experience of others it will be our misfortune to learn by

our own sad experience due to that lack of warning.

Serotonin, Suicide & Aggression - The Causal Connections

Paxil is in a new class of antidepressant drugs known as Selective Serotonin Reuptake Inhibitors (SSRIs). Other popular drugs in this class of antidepressants are Prozac, Serafem, Zoloft, Luvox, Celexa, Lexapro; the Serotonin Norepinephrine Reuptake Inhibitors (SNRI) antidepressants: Effexor, Serzone and Remeron; another that was introduced before this which is very similar in action upon serotonin is trazadone, with the brand name Deseryl (As you will notice the similarity in spelling of the names, Serzone (nefazodone) & Deseryl (trazadone) are similar drugs.) One last antidepressant to add to this list which has a strong secondary impact upon serotonin is Wellbutrin. We also have the new serotonergic antipsychotics: Zyprexa, Geodon, and Risperdol. This new group of atypical antipsychotics would be best described as a combination of the older antipsychotics and these new SSRI antidepressants. These newer serotonergic medications have been introduced to the market over the past decade and a half now.

Of these drugs Lenny Gall was prescribed from 1993, at the age of 16, until 2001: Paxil, Prozac, Trazadone, Wellbutrin, and Zyprexa.

On February 2, 2004, the FDA held a special hearing to discuss the dangers of SSRI & SNRI antidepressants in those under age 18. The drugs in question were Prozac, Zoloft, Paxil, Luvox, Celexa, Lexapro, Effexor, Serzone, Remeron and Wellbutrin. These drugs (excluding Prozac) were banned this past year in the UK by their medical regulatory board, the MHRA. This action was based on studies, clinical trials, conducted in the under 18 age group by the drug manufacturers. The studies had not been revealed to officials before this time even though some had been conducted 12 years previously. They were released only after much public and government pressure.

The studies, conducted by the manufacturers, demonstrated the most serious adverse effects of suicide, violence, self-mutilation and medical damage at a rate over three times greater than placebo in children. (This should be of particular interest to those in Utah as we have led the way in the use of these drugs since they were introduced a decade and a half ago. We now use double the national average of these antidepressants in Utah and as of five

months ago we learned that suicide is currently the leading cause of death in males 15-44! Simple math would lead to the conclusion that either these drugs are causing an increase in suicide, or at the very least, they are doing nothing to stop or slow down suicides.)

The UK moved quickly to warn of these most serious adverse effects while our own FDA has followed suit at a much slower pace. But after hearing testimony on Feb. 2, 2004 the FDA Advisory Committee, who was not scheduled to arrive at a decision until June, 2004, ruled that this was much too serious a situation and warnings must be put into place immediately. This came as a great surprise to those of us presenting testimony due to the fact that 9 out of 10 of the FDA reviewers personally had financial ties to the drug companies and because they were not expected to reach a decision before June, 2004 on this issue. Yet they went on to recommend warnings being put into place on Prozac, Zoloft, Paxil, Luvox, Celexa, Lexapro, Effexor, Serzone, Remeron and Wellbutrin. The warnings they recommended were suicide, violence toward others to the point of homicide, aggression, agitation and confusion associated with the use of these drugs in those under 18 especially when first starting to use the drugs or whenever the dose is adjusted.

On March 22, 2004, the FDA followed the advice of their advisory committee and issued these warnings. They surprised most everyone by including the same warnings for adults as well as those under 18 - a move the FDA in the UK is expected to make sometime this Spring.

Several years ago these drug companies were offered an extension on their patent period if they would conduct clinical trials on children to determine the safety and effectiveness of the drugs in children. The FDA felt it necessary in light of so many physicians prescribing these unproved drugs "off label" to children and teens. Of great interest to the court should be the fact that these companies have continued to refuse to disclose this clinical trial information to the FDA. They are claiming that these safety studies are "trade secrets" and cannot be released! There is apparently no law that requires these studies to be released. Their refusal to disclose this data has prompted government authorities to come forward to suggest that Congress may have to step in to investigate.

This past Wednesday, March 24, 2004, Congress did step in demanding answers. The Subcommittee on Oversight and Investigations, led by Joe

Barton of TX and James Greenwood of PA, demanded to know from the FDA:

#1 What did the FDA know about these drugs?

#2 When did they know it?

#3 Why did the FDA not issue these warnings about serious damage sooner?

They want all records of any kind, including even memos exchanged between a long list of drug manufacturers and the FDA, be turned over this Congressional committee by April 5, 2004 in order to investigate this matter even further.

Some manufacturers admitted that the drugs appear to have no more benefit than a placebo for children but they are holding back the data that would clearly have insured the warnings the FDA Advisory Committee felt should be implemented immediately. So, although the evidence of suicide and violence is overwhelming, we have had to wait while many American children have suffered great harm and caused harm to those around them as a result of this lack of warning.

An article (2/27/04) from the John's Hopkins Newsletter entitled "Companies hide pills' dirty secrets" reports: "According to The Washington Post, doctors writing prescriptions do not have approved labeling to guide them and must rely on their own judgment and the available scientific knowledge," even though some pertinent information is not being disclosed. And being 18 years old is pretty close to 19, 20, 21 or 22. . . . Antidepressant medication is also chemically addictive: When the reports in the U.K were released, British regulators warned people who were currently taking the medication not to stop because of the harmful side effects and sudden withdrawal symptoms."

<http://www.jhunewsletter.com/vnews/display.v/ART/2004/02/27/403ea69331cda>

Dr. David Healy has been a strong voice in the UK warning about these serotonergic antidepressants. In a recent letter to the head of the USFDA about America's problems with these drugs, he posed several questions. Among them was this question:

"What will the FDA do to remedy the incredible fact that Americans track the fate of parcels through the post 100 times more accurately than they track the death of children and adults on these drugs?"

America's Third Leading Cause of Death - Properly Prescribed Prescription Drugs

The large majority of the public remain unaware that the third leading cause of death (200,000 annually) in America is the taking of prescription drugs as prescribed according to a recent study done by pharmacists. It is not a problem in abusing these drugs but in taking them as one has been counseled by their physician to take them that kills so many. In other words the death toll from prescription drugs each week is as great as suffering another 9/11 tragedy each week.

But with this new information coming out from health regulatory boards we begin to see that these are not the only victims. There are also behavioral effects of some medications that are causing many additional deaths. After conducting studies on his own colleagues that produced suicidal and homicidal ideation (constant persisting thoughts and planning of suicide or homicide) and actions, Dr. David Healy, one of the leading experts on SSRI antidepressants in the UK, estimates a death toll from Prozac-induced suicides alone to be 50,000 worldwide.

Serotonin Reuptake Inhibitors and Atypical Antipsychotics

The new serotonergic antidepressants and antipsychotics, are designed to increase levels of serotonin and they do so by inhibiting serotonin reuptake. In other words, they do this by decreasing one's ability to metabolize serotonin. What research has always shown since the discovery of serotonin in the mid fifties is that the impairment of serotonin metabolism produces impulsive murder or suicide.

Although the public and even treating physicians have been led to believe that increasing serotonin is what is needed to cure depression, suicidal tendencies, anxiety, etc., research shows the exact opposite - hardly what the marketing claims would have us think. But, since when has marketing and

reality had anything in common?

P450 2D6 Liver Enzyme Problems With Serotonergic Medications

We know that 7% - 10% of the population genetically lack the liver enzyme system necessary to metabolize SSRI antidepressants. We also know that in longer term the use of the drug itself causes this same liver enzyme to become impaired in breaking down the medication which leads to toxic reactions as do high dosages or overdose. Additionally this ability to metabolize varies from race to race.

Of course the lack of this enzyme means a patient cannot break down these medications which lead to toxic reactions. I think we often forget that, in mind altering drugs or psycho active drugs as these antidepressants are, the toxic reactions can generally be expected to manifest in behavioral changes before the physical toxic effects become obvious.

Although there should be a requirement that patients be tested to see if they have a functioning P450 2D6 liver enzyme system before ever taking one of these antidepressants, the test is not required and rarely done before prescribing.

Records indicate that Lenny was not given this test, as so many other patients were not given the test before ever taking an SSRI antidepressant. His serious adverse reactions to Paxil upon initiation of use indicated that Lenny may be in the 7 - 10% of the population that lack the P450 liver enzyme necessary to metabolize SSRI antidepressants. But rather than consider that possibility and test for it, he was continued on the medication with reactions building to even higher levels after that.

Serotonin Syndrome

The fatal toxic reaction known as Serotonin Syndrome includes many mental/behavioral changes before death is produced. It is a condition in which the level of serotonin level itself reaches a toxic level. It is caused by using two substances in combination that both inhibit serotonin reuptake.

This reaction is so dangerous that it can produce death in a 24 hour period.

This toxic effect also produces many mental changes which can include euphoria and intoxication, sustained rapid eye movement and muscle twitching, overreaction of the reflexes, with rapid mental changes ranging from confusion to hypomania (a happy drunken state).

Suicidal tendencies and especially impulsive suicidal tendencies indicate a toxic reaction to a serotonergic medication. And Lenny, while taking serotonergic medications, attempted suicide at least three times that the records indicate. Understanding that impulsive suicidal actions are a toxic reaction to medication would help one see the potential for impulsive violent action on Lenny's part as the toxicity increased. But rather than realize this was a toxic effect of his medication it was allowed to reach the point where it led to the violent act we witnessed on Dec. 14, 2001.

Serotonin Toxicity

**Decrease in serotonin metabolism = increase in serotonin levels =
violence**

Dr. Felix Sulman from Israel who did the initial research on serotonin found that those who could not metabolize serotonin, thus causing the levels of serotonin to rise were in effect being poisoned by the higher levels of serotonin. [Now keep in mind that this is the same so called "therapeutic" effect produced chemically by this new Prozac family of SSRI antidepressants.]

These patients suffered from out of character aggression, hot flashes, irritability, irrational tension and anxiety, sleeping difficulties of all types, horrifying nightmares, spontaneous abortion or miscarriage, etc. He also found that when rabbits, the most docile of creatures, were given injections of serotonin they became aggressive and would attack. Even the first trials for Prozac, the mother of this family of antidepressants, demonstrated that cats and dogs given the drug would growl or hiss. This adverse aggressive effect subsided when they were withdrawn from the drug.

Over the past 50 years scientific research has continued to demonstrate that a decrease in one's ability to metabolize serotonin (which in turn leads to an increase in serotonin levels) is found in: schizophrenia or psychosis, mania, mood disorders (including depression and anxiety), organic brain disease,

autism, mental retardation, Alzheimer's disease, anorexia, old age, suicide, (especially violent suicide), repeat suicide attempts, arson, violent crime, hostility, insomnia, alcohol abuse and cravings for alcohol and other drugs, reckless driving, impulsive acts with no concern for punishment, bulimia, more contact with police, arguments with spouses, friends or relatives, impaired employment due to arguments, exhibitionism, obsessive compulsive behavior, a lessening of conscious control over behavior, etc.

Mutant Mice Study: An article about a study published in 1996 by researchers at the University of Southern California and headed by Dr. Jean Chen Shih was entitled "*Mutant Mice May Hold Key To Human Violence - An Excess Of Serotonin.*" The study explained that a type of genetically engineered mouse was the most violent known to man. These mice would rip one another to shreds when placed in a cage together.

In this study researchers also mentioned a group of Dutch men in the same family who had been incarcerated for violent crime including rape, arson and assault. They found that both the mutant mice and the men in this Dutch family lacked the enzyme necessary to break down serotonin - producing the same end result as the SSRI antidepressants when they impair one's ability to metabolize serotonin. This impaired serotonin metabolism produces increased levels of serotonin leading to the long list of problems above including violence and hostility.

Dr. J. J. Mann from Australia has published extensive research over many years demonstrating that an inability to metabolize serotonin leads to impulsive murder and suicide. Although he was an expert for the Paxil manufacturer as a defendant in a recent Paxil-induced mass murder/suicide case, Dr. Mann was compelled to testify that Paxil and other SSRIs, cause a decrease in serotonin metabolism and that the decrease in metabolism of serotonin produces impulsive murder and suicide. This was a 2001 WY case where a man on Paxil shot his wife, daughter, baby granddaughter and himself after only two pills. The jury ruled that the evidence was clear that Paxil was the major cause of the out of character impulsive murder/suicide and awarded the survivors \$6.4 Million in damages. (*Tobin vs GlaxoSmithKline* - www.justiceseekers.com)

Dr. Sherwin Nuland in the 6/9/94 issue of New York Review of Books criticized the publication of the book *Listening to Prozac* for its encouragement in using a drug like Prozac that works via increasing

serotonin. After discussing the similarity of serotonin to psychedelic drugs like LSD and PCP he pointed that research shows the dangers of serotonin increases as: constriction of lungs and intestines, diarrhea, wheezing, flushing, tightening of the bronchioles, mental confusion and lessening of conscious control over behavior.

Serotonin in Anxiety and Panic Response

Australian researcher Murray Essler and his colleagues at Melbourne's Baker Medical Research Institute once again confirmed earlier research indicating high serotonin in anxiety. They were shocked to find that, even on a good day, the average serotonin levels in panic disorder patients were EIGHT times higher than the normal population. Of course their research indicates the increasing of serotonin levels will make one's anxiety and panic response far greater.

In light of his discovery, Dr. Essler, sounding a strong alarm to his colleagues, questioned why it had become common practice to prescribe serotonergic medications, which increase serotonin levels even higher, to patients suffering from anxiety or panic disorders.

Lenny was initially given the serotonergic medication, Paxil, outside FDA safety guidelines for someone his age (16), for a problem of simple anxiety in 1993. From Dr. Essler's research and the research of many others before him, this anxiety would indicate that Lenny had problems metabolizing serotonin leading him to have higher serotonin levels than normal. It, therefore, should have been expected that any medication that would increase serotonin levels would only make his condition worsen.

With this information it is most interesting to note Dr. Cohn's August 26, 2002 report about Lenny's condition over his initial period of use of the serotonergic medication, Paxil. Dr. Cohn noted:

"He became more clearly symptomatic over the following year, with documentation of paranoia, grandiosity, loose associations, and suicidal ideation. By December of 1994 he was demonstrating more floridly manic symptoms, including rapid speech, restlessness, and mood instability. He was apparently treated with antidepressant medications during that time period . . ."

He had gone from simple anxiety into many serious symptoms of a manic reaction to Paxil. Dr. Cohn makes it quite clear that the concern here would be that Lenny's symptoms of manic reaction were becoming very obvious. His physicians should have noted and appropriately withdrawn him from the medication in order to prevent the worsening of this adverse reaction.

Earlier Medications That Affected Serotonin

Serotonergic agents are not new to us. Society has had previous tragic experiences with other chemicals that increase serotonin levels. We now know those drugs as LSD, PCP, and Ecstasy. When LSD was introduced to us, by its manufacturers, Eli Lilly [also the makers of Prozac] in 1956 we were led to believe that this new medication would be the "miracle cure" for mental illness and alcoholism, as well as serve as an aid in psychoanalysis. As a society we learned via very sad experience that the initial information we were given on LSD was far from true. Society continues half a century later to suffer as a result of this pharmaceutical mistake costing society billions of dollars and many more lives every year.

Psychiatrists prescribed Ecstasy for depression, etc. until about five years before Prozac was introduced in America when Ecstasy also was pulled from the legal market.

Similarly when PCP was introduced as a pain killer and anesthetic the initial researcher told us that this drug had a "large margin of safety in humans." The researcher who made that statement apologized 20 years later and is now publishing warnings about the potential of SSRI antidepressants to produce LSD flashbacks, etc. Thanks to the protests of police, other emergency personnel, as well as judges, PCP was removed from the market seven years after its introduction and long before the researcher who promoted it apologized for ever being involved in the development of this most dangerous drug. After stating that they would never have continued the research on this drug had they known and lamented, "What have we wrought?!"

Generally these types of regrets are sounded AFTER a drug is pulled from the market, similar to what we heard from the developer of Fen-Phen after its removal. But the warning for these new antidepressants has already been

sounded by their creator, Dr. Candace Pert, while they are yet on the market.

Tragically it appears that few listened six years ago to the strong warnings that came from Dr. Candace Pert, one of the two discoverers of the serotonin binding process which made the SSRI antidepressants possible. Dr. Pert stated in the Oct. 20, 1997 issue of *TIME* Magazine, speaking about these SSRI antidepressants, "I am alarmed at the monsters I created." She went on to express how little we know about these drugs and their dangers, especially the dangers in longer-term use.

Although such bold statements by one involved in the birth and development of a new class of medications have never been made before, little stir was made over her statement and the drugs continue to thrive in our society.

When you understand the implications of the widespread use of these serotonergic chemicals, the ignoring of such critical input from such a renowned researcher about her own discovery along with its far reaching and potentially devastating impact upon society it is indeed alarming.

Research demonstrates that we are experiencing a chemical/medical de ja vu with this new group of drugs - a rebirth of the LSD/PCP era. Tragically we are learning that history is repeating itself at the expense of many innocent lives - those unaware of their powerful adverse effects who take the drugs and those who live and associate with those who do take them.

LSD Effects of SSRI Antidepressants

In *Clinical Psychiatry News* 27(6):34, 1999 researchers from Yale, Malcolm Bowers, MD, et. al., reported that over a 14 month period they found that psychosis induced by this new group of SSRI antidepressants represented 8% - 11% of psychiatric admissions in a general hospital. When extended out nationwide that should represent a figure of 160,000 to 250,000 hospital admissions for psychotic breaks every year in this country.

The researchers were shocked at such a high number of cases being reported since they pointed out that most of these would go unrecognized as drug-induced leading physicians to continue to drug the patient rather than discontinue treatment with the offending medications. Clearly Lenny was one of those whose drug-induced psychotic break went unrecognized as

such. Due to this rather than being withdrawn properly from the offending medication at that time via an extremely slow tapering, he was treated with more and more medication for what should have been recognized as a drug-induced psychotic break.

Another set of researchers reported in *Int J Psychopharmacol* 1999;2: 165-172 on the implications for SSRI-induced mania and psychosis. They found that Prozac and other SSRI antidepressants can simulate the effects of LSD and phenethylamine hallucinogens.

Again in the *New York Times* Dr. Howard Markel reported 10/24/00 on his previous research on SSRI antidepressants and adolescents. He found that SSRIs induced LSD flashbacks in his patients. As he searched to learn why he found that they increase serotonin as does LSD and have an affinity for many of the same neuroreceptors in the brain further stressing the similarity in action between LSD and SSRI antidepressants.

Then once again in the *Journal of Clinical Psychiatry* 62;1, Jan. 2001, 30-33 the same researchers from Yale released new research showing the similar action of SSRIs and LSD. Entitled "*Antidepressant-Associated Mania and Psychosis Resulting in Psychiatric Admissions*" the paper reports that SSRIs like LSD also affect serotonin-2 receptors in the brain. The study ended with this conclusion: "To the extent that LSD and phenethylamine hallucinogens are seen as psychogenic in humans, then SSRIs may facilitate the emergence of some forms of psychosis."

Compelling Anecdotal Evidence

The first in this class of SSRI antidepressants, Zimelidine, was introduced in 1983 in Europe. (It has since been removed from the market due to adverse reactions.) Since the introduction of this first SSRI we have witnessed as a world a sharp increase in violence within the walls of people's own homes. The anecdotal evidence (the same type of evidence we use to pull drugs from the market - numbers of adverse reaction reports) is compelling.

To clarify the great importance of antidotal evidence I refer to a document filed in the US District Court of Kansas in a case involving a Zoloft induced suicide of a 13 year old boy, Matthew Miller. This is a declaration by Dr. Jonathan Cole, MD, who is known as the father of psychopharmacology in

America. Dr. Cole states, "The real world is not perfect. Drugs can and do cause adverse effects which can resemble the manifestations of the illness and arguments about the causes and nature of these adverse events, including suicides, must rest on case reports [antidotal evidence] and data collected in small studies for other purposes. . . If some cases stand out strikingly, there are logically others where the adverse effect is more subtle."

One Microcosm: In the early 1990's Dr. James Goodwin of Winatchee, WA earned the title "Pied Piper of Prozac" by recommending an SSRI antidepressant to everyone of his patients. Dr. Goodwin, himself on Prozac, lost his license to practice for some time because of this. He told me personally face to face in June of 1994 that everyone of his approximately 800 patients were on either Prozac or Paxil.

The first year after Dr. Goodwin's excessive prescribing of the SSRIs the impact appeared in police reports for that small town. This indicates an alarming possible link between the use of these drugs and a drastic increase in violence. In 1988, the year before Goodwin's prescribing binge began, the town reported 19 attempted suicides, 9 rapes and 208 assaults. By the time the 1990 figures were reflected in the 1991 report those figures jumped from the previous 19 attempted suicides to 43, from 9 rapes to 20 and from 208 assaults to 508. While the town experienced almost no increase in population during this period, each category of violent crime had more than doubled in that short amount of time. No other potential contributing factors stood out to explain this jump in violent crime for the small city of Winatchee.

Hypoglycemia and Mental Changes

Lenny has a history of hypoglycemia in his family line which would indicate that Lenny had a strong possibility of blood sugar problems as well. His father, among others in Lenny's family line, was diagnosed with acute hypoglycemia over thirty years ago. Those who have a genetic weakness will of course be at a higher risk of adverse reactions affecting blood sugar.

These serotonergic medications have such a strong negative impact upon the pancreas that they can cause hypoglycemia (reduced blood sugar), as well as diabetes (increased blood sugar). Even slight imbalances in blood sugar will immediately begin to produce loss of brain cells or brain damage. The brain

cannot function without proper blood sugar levels and any imbalance in either direction can produce seizure activity in the brain leading to violent or other out of character behavior.

In fact one of Lenny's hospital reports had flagged blood sugar as a possible concern. Yet Lenny was not tested for this metabolic disorder - something that should have been ruled out -before he was ever medicated with a psychiatric medication.

Every SSRI antidepressant has hypoglycemia listed as a side effect and over the past 12 years of working with those having adverse reactions to the SSRIs, I have found hypoglycemia to be the most common reaction in patients. This is, in my opinion, the most obvious reason why so many patients report a craving for alcohol and sweets while on these antidepressants.

In a hypoglycemic state the body works to raise the blood sugar level as rapidly as possible to avoid going into insulin shock. The problem of course is that alcohol and sugar can lead to additional rebound effects of dropping the blood sugar level even lower. So a chemically induced craving for the substances that will worsen this condition will compound the effects of this disorder.

The hypoglycemic reactions produce a strong adverse effect on the pancreas weakening it even further to the point of producing diabetic reactions to the drug. Zyprexa has such a high rate of patient reports of producing intense diabetic reactions resulting in deaths that the drug is facing not only many wrongful death lawsuits as a result, but also lawsuits for chemically inducing a high rate of diabetes.

Adverse mental effects of hypoglycemia strongly impact mental status:

Gabriel Cousens, MD and psychiatrist states: "Hypersensitivity to alterations in blood glucose, with associated erratic behavior, may be linked with the increasing number of people suffering from unexplained anxiety and panic attacks." He also explains that "When blood sugar drops below a certain point, the glucose receptor center cannot properly control the anxiety center in the locus coeruleus. This results in anxiety symptoms typified by mental and physical agitation, fear [paranoia], increased heart rate, and irritability."

p. 141, "*Spiritual Nutrition and the Rainbow Diet*"

Dr. James W. Long has for many years published a yearly issue of "*The Essential Guide to Prescription Drugs.*" In his 1995 issue he addresses the potential of medications to produce hypoglycemia. He states that, "Since normal brain function is dependent upon an adequate supply of glucose, reducing the level of glucose in the blood below a critical point will cause serious impairment of brain activity." He states that the symptoms range from drunkenness to convulsions and death. Then states, "Hypoglycemia at any stage requires prompt recognition and treatment. Because of the potential for injury to the brain, the mechanisms and management of hypoglycemia should be understood by all who use drugs capable of producing it."

[NOTE: Before the full body convulsions become the reaction to hypoglycemia it should be expected that milder seizure activity will occur that produces many mental changes and out of character behavior.]

A case in point is a school incident in 1998 in Pocatello, ID where a young man on Zoloft held students hostage for several hours. Luckily his father was a doctor who knew enough to rush him in to have brain wave patterns taken. It was found that he was in seizure activity from the Zoloft. Medication that can produce drastic drops in blood sugar can produce this seizure activity in the brain leading to mental changes that produce bizarre out of character behavior.

Another example would be the case of Officer Stephen Christian. Officer Christian was one of Dallas' finest officers with a 23 year career and 19 commendations. He was also a minister.

After being started on Prozac Officer Christian continued to report that he was having delusions. Doctors told him that Prozac does not cause delusions - apparently they had not read the package insert listing "delusion" or "psychosis" as a side effect. So Officer Christian was admitted to a psychiatric hospital for treatment.

In his initial physical, as he was admitted to the hospital, they found that his blood sugar was so adversely affected the level was a mere 46. At 40 a patient is generally comatose. Rather than notice the relationship of his extreme low blood sugar to his medication and reduce the dose, the doctors

00076

TRIPLED the Prozac dose for Officer Christian in the hospital and released him.

If his blood sugar levels were so adversely affected by a 20mg dose, anyone can imagine what a tripling of the medication dosage could have done. Two weeks later Officer Christian ran into a police substation at 3:00 AM wearing plain clothes and shooting. He was pronounced dead after taking 27 bullets himself and wounding a fellow officer. [Officer Christian's wrongful death case as well as the injury to his fellow officer was settled out of court by the makers of Prozac several years ago.]

Akathisia is a side effect of SSRIs that produces suicide and violence

The definition of akathisia is: motor restlessness and specifically, a feeling of muscular quivering . . . Often, the symptoms is of such intensity that it becomes impossible for the patients to sit still day or night, and which is described by them as more difficult to endure than any of the symptoms for which they had been originally treated. Because akathisia produces such a strong stimulant effect the word akathisia is a Greek term meaning "can't sit still." It is a very severe over stimulation or agitation leading patients to report they would do anything to stop it, including suicide, as a solution to put an end to such utterly intolerable restlessness.

Acquaintance with this symptom of akathisia, which often persists for a considerable time after the drug has been withdrawn, is important because it is sometimes mistaken for an agitated depression and wrongly treated. (Psychiatric Dictionary, Fifth Edition, Oxford University Press, 1981)

Akathisia is often indicated in medical reports by the word "tremor." In the Paxil package insert, during the withdrawal from Paxil, tremor is listed as being over three times higher than in the withdrawal from placebo. This would indicate that akathisia is likely three times greater in withdrawal from Paxil as in withdrawal from placebo. And as indicated in the Zyprexa package insert, those on Zyprexa have a FIVE times greater rate of suffering akathisia than those on placebo.

Listed below are a few medical studies relating to Akathisia:

Publication: Comprehensive Psychiatry, January/February 1975
Research Paper: The Many Faces of Akathisia
Author: Theodore Van Putten

Publication: Australian Journal of Hospital Pharmacy, Volume 24, No. 6,
1994

Research Paper: Akathisia: Current Status of a Perplexing Clinical
Syndrome

Authors: John A. Gattera, Bruce G. Charles, Barry A. Smithurst

Publication: Psychopharmacology Bulletin, Volume 26, No. 1, 1990

Research Paper: Akathisia and Violence

Authors: Martha L. Crowner, MD, Richard Douyon, MD, Antonio Convit,
MD, Pedro Gaztanaga, MD, Jan Volavka, MD, PhD, and Robert Bakall, MD

Publication: The Journal of the American Medical Association (JAMA),
Nov 10 1978; Vol 240, No. 20

Research Paper: Neuroleptics. Violence as a Manifestation of Akathisia

Author: Walter A. Kackich, MD

Publication: The Journal of Nervous and Mental Disease, Vol. 176, No. 9,
1988

Research Paper: High Potency Neuroleptics and Violence in Schizophrenia

Authors: John N. Herrera, PhD, John J. Sramek, Pharm.D., Jerome F. Costa,
MD, Swati Roy, PhD, Chris W. Heh, MD, and Bich N. Nguyen, RN

Publication: American Journal of Psychiatry, 142:4, April 1985

Research Paper: Suicide Attempts Associated with Akathisia

Authors: Robert E. Drake, MD, PhD, and Joshua Ehrlich

**The following are medical studies relating to SSRIs, Akathisia and
Violence:**

Publication: Journal of the American Academy of Child and Adolescent
Psychiatry, 30:2, March 1991

Research Paper: Emergence of Self-Destructive Phenomena in Children and
Adolescents during Fluoxetine Treatment

Authors: Robert A. King, MD, Mark A. Riddle, MD, Phillip B. Chappell,
MD, Maureen T. Hardin, MSN, George M. Anderson, PhD, Paul Lombroso,

MD, and Larry Scahill, MSN, MPH

Publication: Australian and New Zealand Journal of Psychiatry, Volume 29,
Number 1

Correspondence: Antidepressants and Side Effects
Editor: Sidney Bloch

Publication: Primary Care Psychiatry 2000, Vol 6, No 1

Research Paper: Emergence of antidepressant induced suicidality

Author: David Healy, North Wales Department of Psychological Medicine

Publication: CNS Drugs 1 (3): 223-231, 1994

Research Paper: The Fluoxetine and Suicide Controversy: A Review of the
Evidence

Author: David Healy, North Wales Department of Psychological Medicine

Publication: Psychiatry Drug Alerts, Volume III/November 1989/Number
11

Research Paper: Fluoxetine-induced Akathisia

Author: Lipinski J. et al

Publication: The American Journal of Psychiatry, 147:2, February 1990

Research Paper: Emergence of Intense Suicidal Preoccupation During
Fluoxetine Treatment

Author: Martin H. Teicher, MD, PhD, Carol Glod, RN, MSCS, and
Jonathan O. Cole, MD

Publication: The Journal of Clinical Psychiatry, 50:9, September 1989

Research Paper: Fluoxetine-Induced Akathisia: Clinical and Theoretical
Implications

Authors: Joseph F. Lipinski, Jr, MD, Gopinath Mallya, MD, Paula
Zimmerman, RN, and Harrison G. Pope, Jr, MD

Publication: The Journal of Clinical Psychiatry, Volume 52, Number 12,
December 1991

Research Paper: Re-exposure to Fluoxetine after Serious Suicide Attempts
by Three Patients: The Role of Akathisia

Authors: Anthony J. Rothschild, MD, and Carol A. Locke, MD

Publication: Archives of General Psychiatry, July 1992

00079

Research Paper: Fluoxetine, Akathisia and Suicidality: Is there a causal connection?

Author: William C. Wirshing, MD

Publication: Journal of Clinical Psychiatry, 53:11, November 1992

Research Paper: Akathisia, Suicidality and Fluoxetine

Author: Margaret S. Hamilton, MD, and Lewis A. Opler, MD, PhD

REM Sleep Behavior Disorder (RBD)

Initial studies with the SSRI antidepressants showed that REM sleep was being repressed by the drugs. REM is critical to brain function and one's level of consciousness. Without proper REM sleep one will experience breaks of REM sleep during periods of wakefulness and begin acting out in a dream state - basically this is what we would refer to as a psychotic break. This is how sleep deprivation can produce psychotic breaks.

In sleep research this is known as a REM Sleep Behavior Disorder (RBD). In RBD there is no paralysis during sleep allowing one to act out dreams or nightmares. Generally in RBD it is a nightmare that is experienced causing 80% of patients experiencing RBD to hurt themselves or someone else - even to the point of homicide.

In the past RBD was known basically as a "drug withdrawal state" or something expected to occur mainly in withdrawal from psycho active drugs. But early on in my research on serotonergic drugs I began to see all the signs of RBD in patients taking SSRI antidepressants. Most shocking to me was to view brain wave patterns of a patient on the SSRI Prozac for six months. The brain waves indicated that this patient, who appeared alert and functioning to those interacting with him, was in a total anesthetic sleep state and dreaming! The statements, "I have acted out my worst nightmare on this drug," and "I don't know what is real and what is a dream" became so common from patients that it made me determined to learn what was happening to produce this effect.

I contacted Dr. Carlos Schenk and Dr. Mark Mahwold, the leading researchers on RBD in the United States, to alert them of the feedback coming in from patients. At the time I contacted these researchers they informed me that there was no research on a connection between the SSRIs

and RBD. But, after my call, they began to research this issue. They were surprised to learn, when they looked back through their records over several years, that 48% of the patients they had diagnosed with RBD were taking Prozac (the only SSRI antidepressant on the market at that time). They then alerted their researchers to take note of this as they worked with RBD patients. With this approach they found a shocking 80% of the cases they were diagnosing with RBD were on an SSRI antidepressant. Another 6% were on the older tricyclic antidepressants.

So from their research we now know that the very large majority (86%) of cases being diagnosed with this horrible sleep disorder, where one acts out their worst nightmare, is being found in patients taking antidepressants with the largest majority on SSRI antidepressants. Researchers believe that it is likely the high serotonin levels that over stimulate the brain stem which removes one's ability to have paralysis when they sleep. This then allows the patient to move around and literally act out the dreams or nightmares they are having - exactly word for word what patients had been repeating over and over again.

Now the most obvious and most frightening question, if RBD was initially known as a drug withdrawal state, how much greater must be the possibility of RBD in the withdrawal from these SSRI antidepressants and new atypical antipsychotics with SSRI features? If 86% of the cases being diagnosed are currently on these drugs, how many more instances of RBD are likely in the withdrawal from these drugs? Clearly we can expect that figure to be extremely high. With the recent FDA warnings being issued many patients may be frightened into abrupt withdrawal from these medications. Because of this potentially very high rate of RBD in withdrawal from these medications this must be investigated immediately to insure public safety.

The high rate of RBD in patients on SSRI antidepressants should be enough to demonstrate the extreme danger posed by these drugs. This is why the brain wave patterns I mentioned above is what I presented to the FDA in September of 1991 as my greatest concern with these drugs. And this new RBD research showing such a high rate of patients with RBD on an SSRI was the main issue I presented to the FDA in my testimony on Feb. 2, 2004.

I believe there is little question that Lenny also acted out his worst nightmare on December 14, 2001. It was well documented that his sleep was very much impaired by the many various serotonergic medications he had taken

over the years before his mother's death. His sleep deprivation, coupled with the high potential for RBD (produced by a continuous barrage of serotonergic drugs) greatly impaired his ability to have much, if any, contact with reality. I see no possible way for Lenny to have possessed a level of consciousness necessary to form intent to harm at the time of his mother's death.

Critical Information on SSRI Accumulation in Brain Tissue

In America Prozac was the first in this new group of SSRI antidepressants and atypical antipsychotics to be introduced to the market. Its introduction was the end of December in 1987.

Lenny was given a fairly high dose of Prozac (40 mg).

Like the other drugs in this group Prozac is highly protein binding - 94.5% as opposed to cocaine which is only 8%. (Paxil is 98%.) This means that it binds to brain tissue at a much higher rate and takes FAR LONGER to flush out of the system.

Dr. Craig Karson investigated this binding aspect and found an extremely high accumulation rate of this drug after the first six months of use. He is highly concerned that we are testing blood instead of brain tissue to determine the toxicity of an SSRI in a patient. Yet, while in the brain, where the drug has its strongest impact, the level of the drug is approximately up to 100 times greater than what is found in the blood. For more accuracy he wishes we would test brain tissue instead of blood to determine drug levels of SSRIs. Similar studies have been done on Paxil and Luvox also showing a very high accumulation rate in brain tissue as opposed to blood.

Dr. Karson believes that this high accumulation rate with a much longer washout period is the reason why it takes so long for the side effects of these highly protein bound drugs to subside once they begin. Dr. Karson followed one of his patients who took Prozac for one year and then tapered off the drug. Two years later when the patient died he tested brain tissue and even he with all of his experience in brain accumulation levels was shocked to see how high a level of Prozac there was in the brain tissue so long after use.

This high protein binding aspect of these drugs poses another very serious

problem - the mixing of these drugs within the brain itself when used one after another. Prescribing information on all of the drugs warns of using these drugs in combination. Yet with Dr. Karson's research we learn that these drugs are being combined within the patient's system when used one after another. The main concern in combining these drugs which target serotonin is the inducing of the potentially fatal and strongly behavior altering Serotonin Syndrome. (Refer to previous information on Serotonin Syndrome)

Paxil Package Insert - Listed Side Effects Pertinent To This Case:

Lenny's initial SSRI prescription in 1993 was for Paxil. At the time he was only 16 years old. The drug was not approved for use in youth of his age. And now Congress is asking why warnings were not issued on children and the adverse reactions of these drugs before now. Paxil is the first drug he stopped taking "cold turkey," in 1994, after 18 months on Paxil. Both taking the Paxil initially and its subsequent inappropriate cold turkey withdrawal, threw him into a manic state leading to his first psychiatric hospitalization. But studies indicate that these "withdrawal-induced manias," as they are called, can be so severe that mood stabilizing medications generally used for mania cannot stop the antidepressant-induced manic psychosis.

To give an idea of the side effects that come from these medications which would be pertinent to this case, especially in light of the warning out of the UK and our own FDA, I list for you the side effects for adults taking Paxil, Prozac, Zyprexa, Wellbutrin, Neurontin and Trazadone that would apply in this case to help us understand what happened to cause this delusional aggressive violent action by Lenny in Dec. 2001:

METABOLIC---"hypoglycemia and diabetes"

PSYCHIATRIC---"emotional lability, confusion, abnormal thinking, hysteria, drug dependence, extrapyramidal reaction, hostility, hallucination, increased reflexes, manic-depressive reaction, euphoria, paranoid reaction, delirium, delusions, psychosis, psychotic depression, withdrawal syndrome."

Paxil-Ten Times Greater Rate of Hostility

00083

In June, 2003 the FDA in the UK banned the use of Paxil, and two months later banned the use of Effexor in those under the age of 18. The ban was due to drug company documents kept hidden from the public for 12 years indicating a three times greater rate of suicide, violence, psychosis, self-mutilation and medical damage in tests done on those under 18. Other countries have since joined in banning these drugs.

With those reports being made public seven out of the ten USFDA panel members who voted on the safety of these drugs for adults publicly stated that they would change their vote in light of this new information. Other experts warned that if this is being found in those under 18 it is happening with adults as well. (Front page, New York Times, August 7, 2003)

Beyond that, Dr. David Healy who has personally viewed the internal company documents on Paxil, made an absolutely shocking statement on October 12, 2003, at a debate on these drugs which took place in Australia. Dr. Healy reviewed these documents in a case in Wyoming in which an elderly man, Donald Schell, shot and killed his wife, daughter, infant granddaughter and himself after taking only two Paxil pills. (The jury ruled in that case that the evidence was clear that the two Paxil were the cause of this tragedy awarding \$6.4 Million to the few remaining family members.)

Dr. Healy stated that he had found the documents indicated a ten times greater rate of hostility in those under 18 who were taking Paxil. He went on to explain what the company meant by the word "hostility":

"From the unpublished data that the company has put into the public domain, children appear on Aropax [Paxil] to be 10 times more likely to be hostile than children taking placebo."

"I wouldn't have guessed what this word might have meant any more than any of you will have guessed, but in actual fact hostile doesn't mean children saying "Hey Mum, get lost". It means children who may have engaged in homicide, may have engaged in a homicidal act, may have been suffering from homicidal ideation, or may have engaged in aggressive behaviour of one sort or the other."

<http://www.abc.net.au/rn/science/mind/s961298.htm>

Zyprexa Package Insert - Listed Side Effects Pertinent To This Case:

Monoaminergic Antagonist: "Olanzapine is a selective monoaminergic antagonist with high affinity binding to the following receptors: Serotonin 5HT 2A/2C . . ." [The 5HT 2 binding is the same receptor that Dr. Malcolm Bowers from Yale proposed that the binding to the 5HT 2 receptor is likely the reason for the SSRI antidepressants to be causing such a high rate of psychosis. This is the same receptor LSD is known to bind to in producing psychosis. Zyprexa is an atypical antipsychotic in that it is more like a combination of an SSRI antidepressant combined with an old antipsychotic.]

Hypoglycemia and Diabetes Mellitus: ". . . epidemiological studies suggest an increased risk of treatment-emergent hyperglycemia-related adverse events in patients treated with the atypical antipsychotics. . . In some cases, hyperglycemia has resolved when the atypical antipsychotic was discontinued; however, some patients required continuation of anti-diabetic discontinuation of the suspect drug."

Akathisia: Akathisia levels while on Zyprexa jumped by FIVE times as opposed to not being on the drug! Akathisia is believed to be the reaction that produces suicide or violence while taking one of these serotonergic medications. So according to this package insert the six pills of Zyprexa Mr. Gall took in the days before the killing could have potentiated a violent episode by FIVE times.

Nervous System: "FREQUENT: abnormal dreams, amnesia, delusions, emotional lability [mood swings], euphoria, manic reaction, schizophrenic reaction INFREQUENT: alcohol misuse, antisocial reaction, CNS stimulation, delirium, depersonalization, obsessive compulsive symptoms, phobias, stuttering, withdrawal syndrome" [This certainly describes absolutely everything we witnessed Lenny do in the months leading up to and including the day of the violent incident on Dec. 14, 2001. He was also demonstrating the physical adverse effects - note that one of the initial interviewers mentioned an odd stuttering aspect to his speech.]

Lenny was prescribed Zyprexa and began taking the drug shortly before the December 14, 2001 incident. Clearly he suffered very serious adverse reactions to Zyprexa as we witnessed and as was mentioned in many reports

in the form of abnormal dreams, amnesia, delusions, emotional lability, euphoria, manic reaction, schizophrenic reaction, CNS stimulation, delirium, depersonalization, obsessive compulsive symptoms, phobias, stuttering, and withdrawal syndrome.

Prozac Package Insert - Listed Side Effects Pertinent To This Case:

Because Prozac was the first SSRI introduced to the market we know more about adverse reactions from it than the newer drugs. What we find as an adverse effect from Prozac should be expected with all of the clones of Prozac that followed it - Zoloft, Paxil, Luvox, Celexa, Lexapro and the newer serotonergic ant psychotics - Zyprexa, Geodon, and Risperidol. According to the Prozac package insert "the most common adverse event associated with discontinuation in 3 pediatric placebo-controlled trials was mania/hypomania."

Nervous System: Frequent adverse reactions were agitation, amnesia, confusion, emotional lability, and sleep disorder. Also listed as "infrequent", not even "rare," are akathisia, CNS depression, CNS stimulation, depersonalization, euphoria, hallucinations, hostility, paranoid reaction, personality disorder and psychosis.

Other reactions, for which Lenny sought treatment, were the toxic physical effects of asthma, hemorrhage, vomiting, and ear pain.

Trazadone Package Insert - Listed Side Effects Pertinent To This Case

Trazadone selectively inhibits serotonin uptake. Of utmost concern with Trazadone would be the clinical reports indicating almost a three times greater incidence of "tremor" - something that often indicates the very serious reaction of akathisia.

Other reports on Trazadone are: abnormal dreams, agitation, anxiety, apnea, extrapyramidal symptoms, grand mal seizures, hallucinations, insomnia, liver enzyme alterations, paranoid reaction, psychosis, rash, stupor, tardive dyskinesia, etc.

Wellbutrin Package Insert - Listed Side Effects Pertinent To This Case:

Wellbutrin works via the reuptake of norepinephrine, serotonin, and dopamine.

History of Seizure or Cranial Trauma: Wellbutrin XL should be administered with extreme caution to patients with a history of seizure, cranial trauma, or other predispositions(s) toward seizure, or patients treated with other agents (e.g., antipsychotics, other antidepressants, theophylline, systemic steroids, etc.) that lower seizure threshold.

[In 2001, a few months before the tragedy, Lenny had a very serious car accident where his car flipped over ten times and was totaled. In this type of accident, the brain hits against the inside of the skull causing much bruising and injury to the brain. In 1995 Lenny had also been given 9 ECT treatments or electronically induced seizures. Both of these actions would have set him up for a serious reaction to Wellbutrin including seizure activity which can trigger delusions, violence, and out of character behavior. The Wellbutrin package insert warns strongly about seizure potential with the use of Wellbutrin in those with previous seizure activity or cranial trauma. These two actions and the side effects of Wellbutrin should have been more seriously considered as a contraindication before ever prescribing Wellbutrin to Lenny.]

General: Agitation and Insomnia: Increased restlessness, agitation, anxiety, and insomnia, especially shortly after initiation of treatment with bupropion.

Psychosis, Confusion, and Other Neuropsychiatric Phenomena: Depressed patients treated with bupropion have been reported to show a variety of neuropsychiatric signs and symptoms, including delusions, hallucinations, psychosis, concentration disturbance, paranoia, and confusion. In some cases, these symptoms abated upon dose reductions and/or withdrawal of treatment.

Activation of Psychosis and/or Mania: Antidepressants can precipitate manic episodes in bipolar disorder patients during the depressed phase of their illness and may activate latent psychosis in other susceptible patients.

Drug Interactions: . . . studies suggest that paroxetine, sertraline, norfluoxetine, and fluvoxamine as well as nelfinavir, ritonavir and effavirenz inhibit the hydroxylation of bupropion.

Many drugs, including most antidepressants (SSRIs, many tricyclics), beta blockers, antiarrhythmics, and antipsychotics are metabolized by the CYP4502D6 isoenzyme. Although bupropion is not metabolized by this isoenzyme, bupropion and hydroxybupropion are inhibitors of CYP4502D6 isoenzyme in vitro.

Concomitant use of bupropion with other drugs metabolized by CYP4502D6 has not been formally studied.

Drugs That Lower Seizure Threshold: Concurrent administration of WELLBUTINXL Tablets and agents (e.g., antipsychotics, other antidepressants, theophylline, systemic steroids, etc.) that lower seizure threshold should be undertaken only with extreme caution. (see WARNINGS). Low initial dosing and gradual dose increases should be employed.

Alcohol: In postmarketing experience, there have been rare reports of adverse neuropsychiatric events or reduced alcohol tolerance in patients who were drinking alcohol during treatment with bupropion. The consumption of alcohol during treatment with WELLBUTRIN XL should be minimized or avoided.

Agitation: 1.8% Wellbutrin 0.3% in placebo [a rate of 6 to 7 times greater incidence of agitation with Wellbutrin]

Nervous System: depersonalization, emotional lability, hostility, suicidal ideation, vertigo, derealization, hypomania delirium, euphoria, hallucinations, manic reaction, and paranoid reaction.

Neurontin Package Insert - Listed Side Effects Pertinent To This Case

With Neurontin it is important to know that the manufacturer is facing multiple litigations due to a whistle blower from within the company admitting that salesmen were being told to introduce themselves as "Dr." so and so to gain the confidence of doctors and then suggest the drug be used

for unapproved uses to increase sales.

From the website of one such law firm, Parker & Waichman out of NY, we find the following: "Neurontin, the controversial epilepsy drug that was heavily marketed for off-label use may be linked to suicidal behavior. . . It is believed that Parke-Davis which was acquired by Pfizer in 2000 had a systematic strategy to market and promote Neurontin for untested uses, such as chronic pain, bipolar disorder and migraine."

(<http://yourlawyer.com/practice/printpage.htm?topic=Neurontin>)

Nervous System: FREQUENT: hyperkinesia, increased reflexes, anxiety and hostility INFREQUENT: dreaming abnormal, dystonia, stupor, apathy, hallucination, agitation, paranoia; depersonalization, euphoria, feeling high, doped up sensation, suicidal, psychosis RARE: personality disorder, mania, neurosis, hysteria, antisocial reaction, suicide gesture

Warning: Antiepileptic drugs should not be abruptly discontinued because of the possibility of increasing seizure activity. [Keep in mind that mania is continuous mild seizure activity and Lenny experienced mania in the abrupt withdrawal from this drug when he converted to another religion.]

Conclusion

In conclusion I believe years of research speaks for itself. It is clear that the evidence linking SSRI antidepressants, tricyclic antidepressants, atypical antipsychotics [serotonergic antipsychotics] and other serotonergic agents, to aggressive or violent actions, including self harm and harm to others, is overwhelming. This is a public safety issue that should no longer be ignored. At this point far too many have suffered and/or died as a result of society's ignorance of this research. Hopefully Congress moving to demand studies kept hidden for years will begin to shed more light on this travesty.

The Washington Post reported the very latest on this issue on Friday, April 23, 2004:

http://www.washingtonpost.com/wp-dyn/articles/A34792-2004Apr22_2.html

Antidepressants Called Unsafe For Children

4 Medications Singled Out In Analysis of Many Studies.

By Shankar Vedantam

Washington Post Staff Writer

Friday, April 23, 2004; Page A03

Four popular antidepressants being used to treat thousands of depressed American children are unsafe, ineffective or both, according to the first comprehensive scientific review to include all available studies, including negative data that have long been withheld from public scrutiny by the pharmaceutical industry.

It is especially dangerous to prescribe Paxil, Zoloft, Effexor and Celexa for children who are suicidal, said British researchers who conducted the analysis published yesterday in the journal the Lancet, because the data show a clear increase in the risk of suicidal behavior among children taking the drugs -- and no benefit. . . .

Wayne D. Blackmon, a Washington psychiatrist who has long said clinicians cannot rely on the integrity of the data they are being given, said Congress should force the FDA to take unpublished negative trials into account and force the companies to make all data -- positive and negative -- available for public scrutiny.

In the meantime, he said, clinicians should go back to the Hippocratic oath -- "First, do no harm" -- and "recognize that you are flying by the seat of your pants."

This Washington Post article shows how "especially dangerous" Paxil was for young Lenny Gall.

Also, the most critical period of use when the majority of adverse effects could be expected is when the SSRI is started, stopped or a change in medication occurs. Lenny experienced all of those repeatedly from 1993-2001.

I believe that Lenny Gall was a normal child with a family history of hypoglycemia, a metabolic disorder, who inadvertently got started on these serotonergic medications. They were given to him at a younger age than the

FDA had approved as safe or effective and at an age that they have recently warned can be very dangerous leading to suicide and/or violence toward others.

What stands out in Lenny's medical records is the drastic changes for the worse after he was first introduced to Paxil at the age of 16 in 1993. Shortly after the introduction of Paxil, he went from simple anxiety problems to all the signs of a manic reaction to Paxil - including, as Dr. Cohn stated in her August 26, 2002 report, "with documentation of paranoia, grandiosity, loose associations, and suicidal ideation" (suicidal ideation is continuous obsessive thoughts of ways to kill oneself). This in spite of the fact that this was a child who had a consistent even keel disposition before his introduction to Paxil.

From there it was downhill because no one noticed that the manic reactions were drug-induced. Had these manic, paranoid, and suicidal reactions been recognized as adverse drug reactions, he could have been withdrawn safely from the offending medication at that time. (Paxil had just recently been introduced and most adverse reactions had not even been determined at that point.) In my experience and in my opinion that would have prevented the years of medical treatment for his additional drug-induced reactions of depression, suicide attempts, bipolar disorder, schizophrenia, etc. as well as preventing the drug-induced psychotic reaction that led to the death of his mother and his subsequent confinement.

Also in 1995, Lenny's first abrupt withdrawal (from Paxil) threw him into full blown mania. This is extremely dangerous due to the potential of withdrawal-induced mania. This action in effect pushed Lenny out of the Paxil-induced frying pan right into the fire. This is mania referred to as "withdrawal mania" because it is brought on by the abrupt withdrawal from this group of antidepressants. It is this failure to warn of the serious dangers associated with withdrawal that has triggered multi district lawsuits against GlaxoSmithKline, the makers of Paxil.

The worst way to take these serotonergic drugs is intermittently with changes in dose and switching of medications. This is one of the warnings the FDA just put into place on these drugs. Taking them intermittently produces what is called a kindling effect. What this means is that each time the drug is introduced again the patient has a much stronger effect when taking small amounts.

This is the way Lenny was taking these drugs after his abrupt withdrawal from Paxil threw him into a manic reaction. Lenny took Zyprexa this way because it was the way his physician had prescribed it for him. Then when it should have become obvious that he was having a manic reaction from the abrupt withdrawal he was placed on yet more serotonergic antidepressants and serotonergic antipsychotics. This continuous drugging with serotonergic agents impaired his metabolism of serotonin even further, thus increasing the possibility of serotonin-induced psychosis, RBD, impulsive suicide or homicide.

The continuous drugging with one serotonergic medication after another kept him from experiencing a washout period from the Paxil which would have shown that the real cause of the initial manic psychosis was Paxil - a drug-induced manic psychosis which is known to be transient or which is known to be eliminated by the appropriate withdrawal of the offending medication instead of abrupt withdrawal as Lenny inadvertently did.

My tape on withdrawal suggests taking months to years (depending upon the length of time on the drugs) to wean off these drugs in order to avoid manic or psychotic reactions. After 14 years of working with patients withdrawing from these drugs I have found the safest length of time for withdrawal is about half the amount of time a patient has taken them (except for longer term use where it seems that just about a year and a quarter for withdrawal in a patient on the drugs is a safe withdrawal period). Interestingly Eli Lilly, the makers of Prozac, just changed the withdrawal period in their clinical trials after a young healthy volunteer hung herself in their laboratory in withdrawal from their newest SSRI antidepressant.

In my opinion the two abrupt withdrawals, the first from Paxil in 1995, and the second from the Zyprexa shortly before the 12/14/01 tragedy caused serious behavioral changes due to the withdrawal effects. Adding to that was the shock to his system due to the drastic change in medication the beginning of 2001 when he abruptly dropped off Wellbutrin and Neurontin. At that time he continued to use Trazadone sporadically and St. John's Wort (an herb used as a natural alternative that increases serotonin levels) three times a day when he converted to another religion and was told his faith was stronger than his "mental illness."

Little did anyone know that what Lenny was dealing with were drug reactions that would become far worse with any abrupt changes in

medication. That warning only came March 22, 2004 from the FDA. How would anyone know with this blatant lack of warning by both the drug manufacturers and the FDA? This in turn produced the violent behavior by Lenny in December of 2001 - violent behavior which the drug companies knew for years and did not warn - drug-induced violence known to be FAR GREATER than normal.

I believe it was shock from these abrupt withdrawals of Paxil and Zyprexa that produced the kindling effect leading to the impulsive as well as compulsive suicidal and homicidal thoughts. And also led to the more intense ~~toxic mental and behavioral~~ changes and continuous prescribing of more and more serotonergic medications.

Although there are those while unaware of this information on these medications have alleged that Lenny acted recklessly by refusing to take his prescribed medications, we can see from this information that he was instead acting responsibly by wanting to come off medications that we now know were actually harming him.

My professional opinion is that in considering the information in the product package inserts alone there is such overwhelming evidence that this entire situation was chemically/physically-induced that I do not understand why anyone did not consider the potential of an extremely altered mental state for Lenny in this tragedy. And when looking at the severity of the first manic psychosis triggered by the abrupt withdrawal of the Paxil, I am shocked that no one considered that it was an effect of this abrupt withdrawal or a Paxil-induced manic psychosis. Yet Dr. Malcomb Bowers from Yale noted that he was shocked when he found so many reports of SSRI-induced psychosis reported by hospitals when MOST PHYSICIANS do not recognize that these psychosis are drug induced psychotic breaks. Although he found 8% - 11% of those were hospitalized due to an SSRI-induced psychosis, he stressed that there must be a much higher number going psychotic on these medications that were not being noticed, reported, or treated, but ending up in continuous treatment for what was actually a drug-induced psychosis. Obviously Lenny should have been weaned gradually off the Paxil shortly after the introduction to the drug when the first signs of paranoia, rapid speech, delusions, suicidal ideation, etc. - all signs of serious reactions to Paxil.

Clearly the sum total of this scientific evidence indicates that the expected

result of the combination of many various serotonergic medications Lenny was using over the years, combined with the recent abrupt withdrawal from Zyprexa would be expected to produce a range from very diminished capacity to no mental capacity at all to act on one's own. I agree with other experts that he was not conscious enough to form any intent to do much of anything due to the toxic effects of these drugs in his system.

I firmly believe that as he is weaned appropriately off these drugs that have caused these reactions we will see a normal human being with no tendency toward violence as he was before ever being given these serotonergic drugs. This is something I have seen in case after case after case.

I do believe it to be clear in reviewing the data we now have on Paxil that this drug was the initial catalyst that consequently led to the tragic events of 12/14/01. This greatly impaired Lenny's thought processes initially leading to more and more drugs of a similar nature that in turn led to such out of character behavior on his part for several months during 2001. Then the initiation of use of the serotonergic agent Zyprexa once again by Lenny produced a kindling effect making his reactions to the drug much greater. All of that led to the delusions resulting in the death of his mother and his own suicide attempt and suicidal ideation afterwards.

Respectfully,

A handwritten signature in black ink that reads "Ann Blake Tracy, PhD". The signature is written in a cursive, flowing style.

Ann Blake Tracy, PhD
Executive Director,
International Coalition For Drug Awareness
Author of Prozac: Panacea or Pandora?
- Our Serotonin Nightmare

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Office: 801-282-5282

Cell: 801-209-1800

E-Mail Address: atracyphd1@aol.com

Website: www.drugawareness.org

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BOARD JUDICIAL DISTRICT
SALT LAKE COUNTY

DEPUTY CLERK

I. Introduction

Educational and Professional Background

I am a Board Certified psychiatrist residing in North Carolina. The scope of my current practice includes clinical duties as a contract psychiatrist, independent research in the areas of neuropharmacology and epidemiology, and educational lectures for medical professionals and the public.

Academically, my background includes baccalaureate degrees from California Lutheran University (BA in political science, BS in Biology - completing both programs summa cum laude), as well as a Master's in Public Administration. My professional education in medicine was completed at the University of Colorado School of Medicine in May 1996. Following medical school, I was commissioned in the US Navy with orders for post-graduate training in psychiatry: internship at San Diego Naval Medical Center (Balboa Hospital - graduating in 1997); residency in Washington, D.C. in the National Capital consortium (a tri-service training program performed at Walter Reed Army Hospital, Bethesda Naval Hospital, and Malcolm Grow Hospital at Andrews Air Force Base).

Subsequent to the successful completion of my residency in June 2000, I was assigned as a staff psychiatrist at Bethesda Naval Hospital where I supervised the work of trainees and provided care to active duty personnel, their dependents, and retirees. Since transitioning out of the military in spring 2002, I have pursued work as a Locum Tenens provider and independent consultant.

II. Forensic Experience

In spring of 2003, I participated as an expert witness in the case of Myers vs. Alaska Psychiatric Institute (API). The case was important because of its consideration of my testimony about the efficacy and safety of neuroleptics. Special emphasis was placed upon the FDA's analysis and approval of olanzapine (Zyprexa) as a primary example of the "newer" antipsychotic therapies. Interestingly, on March 1, 2004, the FDA announced its requirement for new warnings about health risks associated with olanzapine [1] and other atypical neuroleptics. This FDA alert was consistent with many of the concerns which I had expressed in my affidavit [2] and more recent writings [3].

In considering my testimony in the Myers case, the Alaska Superior Court, and the former Director of Schizophrenia Research at NIMH (National Institutes of Mental Health) both qualified me as an expert in the area of psychopharmacology. This expertise continues to expand, particularly through my personal research which has been preparatory for the publication of a book explaining the mechanisms through which psychiatric medications often prevent or delay recovery.

My most recent work with patients involved a Locum Tenens assignment in the North Carolina Department of Corrections. In that position, which I held between August 2003 and March 2004, I was directly responsible for the medication management, multidisciplinary treatment plans, and initial psychiatric assessments of patients at three different facilities, ranging from in-processing and minimum custody camps to a close-custody facility housing inmates with chronic medical and mental illnesses. Most recently, I have testified on behalf of an Alaska state prisoner (Bavilla vs. State of Alaska, Department of Corrections) who was challenged with involuntary treatment (neuroleptics), despite the fact that she posed no imminent danger to herself or others.

III. Impact of Former Testimony and Relevance to Present Case

In the 2003 case of Myers vs. API, my testimony addressed many of the flaws associated with the development and approval of psychiatric drugs, and with the dissemination of information explaining the risks associated with chemical therapies. As many physicians and legal professionals seem unaware of the scope of these problems, a brief review may be helpful in the current deliberations:

- 1) ghost writing: this refers to the process by which payments are given by pharmaceutical companies to physicians who lend their names to drug-company generated research reports. This perpetuates the illusion of independent research and objective findings, when in fact the listed authors have never participated in, nor reviewed results, of the data for which they assume authorship [4]
- 2) file drawer effect & publication bias: this refers to the process by which journals, professional organizations, and the media "file" negative studies in the waste can or other "file" drawer, delaying or refusing to publish them. Negative studies are far less likely to be reported in medical journals, due to pressures upon editors from advertisers and other sources [5]

3) non-disclosure agreements: this refers to the process by which drug companies and other funders of research force their employees to sign contracts prohibiting uncensored release of investigations and findings. These agreements can prevent or delay public access to vital information for many years, often with tragic results [6, 7]; such agreements also preclude expert witnesses from disclosing proprietary information which becomes available to them through the process of litigation and discovery, again compromising the quality of information which is released to the public and to professionals at large

4) biased trial designs: this refers to the numerous methods used by drug companies and other agencies to produce and interpret data favorable to new products, relative to placebo or older therapies. Specific examples of the biases employed include the use of non-comparative dosing strategies; placebo washout; penetration of blinding procedures; the use of concomitant medications; rater-scored rather than patient-scored assessment scales; post-hoc determinations of efficacy; and the manipulation of intention to treat data to favor LOCF vs. OC results [8,9]

IV. Purpose of This Report

I have been asked to review the matter of the *State of Utah vs. Leonard Preston Gall*, in order to provide an independent, psychiatric opinion about factors which may have influenced the defendant's capacity to either understand his behaviors at the time of the crime(s); or to conform his behaviors to the expectations of society and the law at the time of the crime(s). While my evaluation will incorporate a *biopsychosocial* review of the case, I will be emphasizing the contributions of medical conditions and treatments which may have been missed or minimized in previous deliberations and sentencing.

V. Materials Reviewed

In preparing this report, I have reviewed the following materials:

- 1) Declaration of Ann Blake Tracy, PhD
dated March 29, 2003
- 2) Letter from Mr. Leonard Silvius Gall to Judge Judith Atherton
dated April 17, 2004
- 3) Letter from defendant to Judge Judith Atherton
dated April 17, 2004
- 4) Telephone conversations with Mr. Leonard Silvius Gall
04/27/04, 04/28/04, 4/29/04, 4/30/04

VI. Limitations of Current Report

Due to a variety of restrictions (temporal, geographic, and procedural), this report has been prepared in the context of the following limitations:

- 1) lack of access to complete medical records and evaluations (past and present)
- 2) lack of opportunity to perform direct face-to-face interview with the patient for the purpose of assessing mental state, neurocognitive functions, and judgment; and for the purpose of performing a thorough review of social and development background (including any possible history of physical, emotional, and/or sexual abuse), past symptoms, and subjective response to treatments
- 3) lack of opportunity to perform interviews with collateral sources of information [additional family members, friends, former employers, teachers]
- 4) lack of opportunity to perform an independent, comprehensive medical evaluation with referrals to pertinent specialists and completion of the following assessments:
 - a) lab tests – such as CBC, liver function tests, comprehensive metabolic panel, heavy metal screen, hepatitis screen, RPR and FTA-ABs (to rule out latent syphilis or neurosyphilis), prolactin and cortisol levels, ESR and ANA (to rule out lupus), HIV, urine drug screen, thyroid function tests (to include TSH and free T4), B12 and folate levels, urinalysis
 - b) thorough neurological exam – to include review and assessment of all cranial nerves, sensory, and motor abilities, coordination, verbal fluency, gross cognitive limitations
 - c) neuroimaging – as current standard of care for psychosis includes CT, MRI, or both to rule out intracranial lesions or other anatomic pathology
 - d) EEG assessment: (preferably with patient off of all psychoactive medications) to rule out epilepsy or other electrophysiological abnormalities

These limitations are duly acknowledged, not as a disclaimer for the remarks which follow; but as a reminder of the essential need for comprehensive and up-to-date assessments in the care of all mental health patients regardless of their disposition.

VII. Pertinent Social & Developmental History

Leonard Preston Gall is a 27 year old single Caucasian male born on 12/03/76. The oldest of two boys, "Lenny" was born in California, where he was raised by both parents until their separation in 1982 (defendant age 6) and divorce two years thereafter.

Following the parental separation, the defendant and his sibling (brother Michael, born in 1980) were reared by their mother in Utah. During this time period, the boys enjoyed four weeks per year with their father in Southern California. Mr. Gall describes his eldest son as an "even keeled" young man who succeeded academically (As, Bs), athletically (captain of high school volleyball team in grade nine), and socially (caring deeply about his family, and earning the respect of his peers).

From a developmental standpoint, there is no reported history of learning difficulties, speech or motor delays, oppositional or delinquent behaviors, or substance abuse problems. There was no record of violence or psychosis until after the defendant received his first psychiatric drug at the age of sixteen. From an academic standpoint, the defendant completed high school on time. He graduated from college with good grades, even though academic progress was interrupted by events described below.

Psychosocial stressors which may have influenced the defendant include the following:

- 1) his mother's early concerns about the health of the family into which she married (father of defendant notes that his own mother suffered a nervous breakdown around age 55, possibly leading his new wife to become worried about "tainted genes" that might eventually be passed along to their progeny);
- 2) his mother's familial background (history of violence, difficult relations with her own father);
- 3) his frequent displacements and relocations due to his parents' separation (age 6 through 14 with mother in Utah; age 14-15 with father in California; age 15-18 with mother in Utah; age 18 in California, then back to Utah following recurrence of symptoms during freshman year of college);
- 4) his younger brother's psychological struggles (cannabis abuse, suicide attempts during his adolescence);
- 5) his mother's own health problems (she stopped practicing Christian Science at age 20; possible anxieties about her own health led to treatment with several medications - details not known).

Family Psychiatric and Medical History

There is a positive history of psychiatric illness in the defendant's maternal grandmother, whom Mr. Gall describes as "experiencing a nervous breakdown at age 55." The defendant's younger brother is reported to have experienced some delays with language for which a speech therapist was consulted early in the second year of his life (Note: Michael's delivery was difficult, and he experienced respiratory difficulties necessitating ICU treatment for several days after birth). The defendant's younger brother was placed in Special Education classes for a limited period of time. This brother later experienced problems with cannabis abuse (high school) and suicide attempts. The defendant's mother is described by Mr. Gall as "occasionally violent." He recalls specifically the notes of the speech therapist who attended to his youngest son, and whose records conveyed concerns about the emotional stability of the defendant's mother.

As noted in Dr. Ann Tracy's declaration and in the letter of Mr. Leonard S. Gall, there is a history of hypoglycemia in the defendant's father. No other details of the family's medical history have been available or shared with me for my review.

Defendant's Psychiatric & Medical History

The preparation of a comprehensive chronology of symptoms, interventions, and treatment response has not been feasible (short notice to prepare this report, lack of access to pertinent records). However, the available sources of information permit the following outline of critical events:

- 1993: "anxiety" diagnosed at age 16, treated with Paxil >>>> leading to new onset of psychotic and hypomanic or manic symptoms:
paranoia, grandiosity, loosening of associations, suicidal thoughts
- 1995: abrupt discontinuation of Paxil at age 18 (during college in California) leading to recurrence of paranoid delusions several weeks into the withdrawal period
- 1996: eventual resolution of delusions with stability over a period of six months (closely monitored by father in Santa Barbara)
- 1997: return of suicidal thoughts/suicide attempt (pill overdose) in aftermath of psychotic experience, and in context of return to Utah

- 1997: electroshock treatment (9 treatments, according to Dr. Ann Blake Tracy)
- 1997 – 2001: treatment with series of antidepressant medications/herbs including:
 - Prozac (fluoxetine): unclear dates
 - Wellbutrin (bupropion) and Neurontin (gabapentin) : abruptly stopped in early 2001
 - Desyrel (trazodone): taken “sporadically”
 - St. John’s wort: taken “sporadically”
- January 2001: first treatment with Zyprexa (olanzapine) given for “sleep”
- fall 2001: motor vehicle accident with possible loss of consciousness, closed head injury / traumatic brain injury [details not available]
- August – December 14, 2001: resumption of treatment with olanzapine; six tablets consumed [doses, frequency, precise dates not clear]

VIII. Understanding Violence - Neuroscientific Techniques

Many theories have been proposed to explain the neurological underpinnings of human violence [10]. The research in this area begins with the consideration of the phylogenetic architecture of the human brain; which refers to the evolutionary development of discrete brain regions thought to underlie aggression in many species.

Violence in humans and other primates is presumed to arise from abnormal or heightened activity in the limbic system; and/or the disinhibition (weakening of control) from the neocortex (the higher centers of the brain, through which impulses and instincts can be consciously restrained). These developments can develop through structural or physiological changes in the brain.

Structural lesions in the limbic system or neocortex of the human brain represent anatomic substrates (foci) of potential violence. For this reason, neuroimaging studies are employed in order to establish the presence of discrete physical abnormalities: e.g., tumors, infectious granulomas or abscesses, demyelinating disease processes, A-V malformations, or traumatic injuries.

Most violence appears to be based in transient changes in cellular activity or neurophysiology, rather than the more permanent structural abnormalities mentioned above. In order to understand the possible physiological causes of violence, researchers explore the activity of specific neurotransmitters (serotonin, dopamine, norepinephrine) or hormones (testosterone, cholesterol) as they affect behavior in different neural locations.

In the case of Leonard Preston Gall, it is essential for the State to consider what, if any, structural abnormalities might have existed in the defendant's brain at the time of the offense(s). *[None have been identified, according to the information provided to me.]* Next, it becomes essential for the State to consider the existence of physiological (electrochemical) disruptions in the limbic system and/or neocortex of the defendant, which may have precluded his ability to control his impulses and aggression.

Given the fact that there are no reliable or non-invasive methods for sampling or detecting chemical levels in the human brain; and given the fact that the brain is delicately protected from the rest of the body by an exquisite shield known as the "blood brain barrier" – scientists cannot accurately evaluate brain function by measuring chemical substances in non-brain fluids (such as blood or urine).

Therefore, most theories about human behavior have been developed in lab tests, by integrating data from three sources: 1) animal investigations (performing experiments on live specimens, then sacrificing the animal in order to analyze chemical or cellular changes in brain tissue; 2) lumbar punctures in human subjects (sampling the cerebrospinal fluid before and after a particular treatment or activity); and 3) direct observation of human behavior, in response to medications or other experimental manipulations. Ultimately, theories of human behavior are advanced by correlating the natural or medication-induced chemical changes in the human brain (most reliably assessed by sampling the fluid which bathes the brain) with animal models.

Understanding Violence -- Research Findings

The most consistently replicated associations between violence and physiochemical changes in the brain include:

- low levels of cerebrospinal HIAA (hydroxyindoleacetic acid, the major metabolite or breakdown product of serotonin) [11, 12, 13]
- high levels of serum testosterone [14]
- low levels of serum cholesterol [15, 16, 17]

In the absence of comorbid substance abuse or dependence, mental illness per se is not a reliable predictor of violence towards others. Most violent crimes in the U.S. are committed by sociopaths or individuals acting under the influence of mind-altering substances (such as alcohol, cocaine, PCP, crystal methamphetamine, LSD) [18].

While risk factors for violence *do* include psychosis, research suggests that most individuals who suffer from hallucinations or delusions do not harm others unless they are also under the influence of mind-altering drugs [19, 20]. Another significant risk factor for suicide and homicide among the mentally ill is akathisia, which is a common side effect of antipsychotic drugs [21]. Ironically, while it is widely acknowledged that street drugs and alcohol play leading roles in the commission of violent crimes in America each year, it is generally *not* acknowledged that *prescribed* drugs contribute significantly to many of these same behaviors.

Serotonin and the Adverse Effects of Antidepressant Drugs

Evidence for the adverse psychiatric effects of serotonergic antidepressants has existed for more than 50 years, but this information has generally been concealed or minimized. Although there were case reports of agitation, violent thoughts, and self-harm occurring in the development of many antidepressants throughout history, it was not until the arrival of Prozac-like drugs that these events began to occur in sufficient numbers to draw serious regard. A series of papers documenting Prozac-related agitation and violence began to appear in the medical journals around 1990. In response to these reports, the FDA convened a special hearing in 1991 to consider the issue of possible drug-induced violence.

Despite the existence of clear evidence suggesting similar connections between violence and other SSRIs at that time (Paxil, Zoloft), the FDA refused to review evidence on any medication besides Prozac. Although the FDA agreed that more research in the area of product safety was indicated, it failed to pursue the kinds of studies needed to establish a clearer picture of the connection between serotonergic drugs and aggression. The FDA also refused to issue any warnings about the new drugs, fearing that more people with depression would be "scared away" from seeking pharmacotherapy if harsh warnings were issued about products which the regulatory agency wished to depict as necessary, effective, and only rarely harmful.

The long-term repercussions of this decision have been disastrous. In a series of position statements, letters to governmental authorities, and peer-reviewed publications explaining the history of antidepressant induced violence and withdrawal syndromes [22, 23, 24], Dr. David Healy has performed a meticulous review of missing and/or misinterpreted data from healthy volunteer (Phase I) studies; pre-marketing (Phase III) clinical investigations; and epidemiological surveys. His comprehensive analysis of data (largely concealed by drug companies, but accessed by Healy on several occasions as an expert witness in several key legal contests) has produced the following findings:

- 1) a 2-3 fold higher risk of suicide in adults and children taking the newer serotonin antidepressants, relative to placebo
- 2) an approximate 180 suicides among SRI (serotonin reuptake inhibitor) consumers per 100,000 depressed patients compared to 67 suicides per 100,000 patients treated with older drugs or no drugs

and, based on the estimated 50 million SRI consumers in the US since 1988:

- 3) 21,900 – 70,000 excess adult suicides

1500 excess child suicides

all arising directly from the consumption of serotonergic antidepressants in the US since the introduction of Prozac-type drugs between 1989 and 1992

Among the most serious risks of antidepressant therapies are psychiatric side effects, which include worsening depression, hypomanic or manic states, and/or psychosis. Pertinent studies include the work of Yale researchers who recently reviewed the records of patients admitted to their hospital for inpatient-stabilization. Their data suggest that as many as 8% of all patients admitted were experiencing mania or psychosis arising directly from antidepressant therapy [25]. Many case reports lend support to these findings.

Most recently, researchers at the University of California San Diego have proposed the creation of a new diagnostic category, recognizing the high frequency of antidepressant-associated mood swings (11% of patients diagnosed with a bipolar II condition in their research). These investigators have proposed the label "bipolar III" for the phenomenon of antidepressant-induced hypomania, due to the fact that the phenomenon has become such a common and clinically significant event [26].

Mechanisms Accounting for Serotonergic Antidepressant Violence

Many possible mechanisms have been proposed to explain the physiological processes through which serotonin reuptake inhibitors may induce suicide and homicide. First, observers have identified the emergence of a "frontal lobe" or "amotivational syndrome" through which many patients on serotonin drugs become apathetic and indifferent about their behaviors. Concerned investigators have suggested that patients on serotonergic drugs may become incapable of contemplating the consequences of their actions, due to a loss of motivation or cognitive energy. This SRI apathy syndrome is so important that the textbook of the American Psychiatric Association now devotes specific attention to it [27], and a number of child and adolescent psychiatrists have observed the same phenomenon in their patients [28].

A second mechanism contributing to antidepressant-related violence is the induction of akathisia – a severe state of inner restlessness and agitation, commonly produced by antipsychotic medications. Studies in animals and humans suggest a complex interaction between serotonergic cells in the midbrain, and dopamine neurons in the striatum. It has been proposed that serotonin exerts an inhibitory effect upon dopamine transmission, in a manner that echoes the effects of dopamine antagonists (neuroleptics). In addition to akathisia, a large number of subjects treated with serotonergic drugs have experienced movement disorders, prompting one leading American psychiatrist to pen an article entitled "Must we now consider SRIs to be neuroleptics?" [29, 30, 31]. The link between akathisia and violence has been the subject of many epidemiological and experimental investigations [32] and is explicitly acknowledged in the DSM-IV as one of the most serious side effects of neuroleptic therapy.

A third mechanism for antidepressant-induced violence involves acute or chronic disruptions in serotonin levels of the brain. In this regard, serotonin reuptake inhibition appears to cause acute elevations in serotonin; chronic serotonin reuptake inhibition appears to cause adaptations in the brain which lead to significant reductions in serotonin levels. Either extreme appears to have serious consequences in the limbic system and the neocortical regions of the brain which modulate impulsivity, aggression, and mood. [Note: While the declaration of Dr. Ann Blake Tracy discusses serotonin syndrome as a possible cause of violence, it is this writer's opinion that the serotonin syndrome is more appropriately characterized by symptoms of delirium, autonomic instability, myoclonus, diarrhea, diaphoresis, coma, and possible death.]

A fourth mechanism for serotonergic-drug violence relates to the impact of serotonin upon the levels or activity of other neurotransmitters in key regions of the brain. It is significant that the most current research of the drug companies themselves (such as Eli Lilly, maker of Prozac) has discovered that the "selective" serotonin reuptake inhibitors do not appear to be selective at all, due to the fact that they produce significant increases in norepinephrine and dopamine levels in many areas of the brain. These secondary effects may account for the delusions, hallucinations, mood states, or panic attacks that are frequently caused by the serotonin reuptake inhibitors and other antidepressants which affect any of the fourteen subtypes of serotonin receptors that have been identified to date.

A fifth mechanism of serotonergic-drug violence, mentioned by Dr. Tracy, is the relatively new phenomenon of a parasomnia (sleep disturbance) entitled "REM sleep behavioral disorder." While I was never exposed to this phenomenon in my psychiatric training, I am grateful for the education which Dr. Tracy's declaration has provided me. While the prevalence of REM sleep disturbances that have actually involved homicides has presumably never been researched, my own clinical experience suggests that many of my former patients exposed to serotonergic agents were suffering from alterations in consciousness which made it difficult for them to distinguish the point at which their nighttime dreams had ended, and their daytime "reality" had begun. Retrospectively, I suppose it is possible that many of these individuals may have experienced the kinds of altered EEG states that Dr. Tracy has suggested. However, this is such a new and startling phenomenon that I suspect very few physicians recognize its existence and intervene appropriately in the face of its practical effects.

Time Course for Emergence of SRI (serotonin reuptake inhibitor) Violence and Psychosis

It is essential to appreciate the possibility that antidepressants (like many other psychiatric drugs) can precipitate any of the aforementioned changes during the active phase of treatment (e.g., while the drug is still being consumed); during the immediate period of drug discontinuation (days to weeks); or most suprisingly, during the months that follow the cessation or interruption of drug consumption.

Not only do the fluorinated antidepressants (Prozac, Luvox, Paxil) accumulate in the brain at levels that are 2 to 20 times higher than blood levels; but these same chemicals now appear to remain in the body for far longer periods of time than most physicians have ever been trained to anticipate [33, 34, 35]. All of this information is particularly relevant to the case at hand, because it is possible that the defendant's behaviors at the time of his offenses represented the long term effects of previous drug treatments which continued to alter the neurotransmitter levels and activity of his limbic system and/or frontal lobes.

Dopamine and the Adverse Effects of Antipsychotic Drugs

Evidence for the role of antipsychotic medications in the development of suicidal or homicidal thoughts, mania, and/or psychosis is also robust [36, 37, 38]. Similar to the theories identified above, the mechanisms which account for neuroleptic-associated violence include drug induced disruptions in neurotransmitter turnover (metabolism); the induction of a specific reduction in mood or motivation, identified as "neuroleptic induced deficit syndrome" (or NIDS); cognitive disruptions, including the delayed onset of difficulties described by some investigators as the condition of "tardive dysmentia"; and the frequent induction of akathisia, which appears to occur in as many as 40-50% of patients treated with older neuroleptics. However, it is important to recognize that the

newer antipsychotic medications – such as olanzapine (Zyprexa) – have been found to induce akathisia in many patients [39]. Actual post-marketing reports suggest that there is very little difference between the rates of akathisia experienced by many patients given these new drugs compared to the older neuroleptics, despite the claims of the drug manufacturers to the contrary [40].

One final point which is particularly pertinent to the present case involves the neuronal adaptations which occur as medications are chronically administered, or when previously administered neuroleptic therapies are abruptly withdrawn. The Montreal researcher, Guy Chouinard, has proposed several models of “supersensitivity” or “tardive” psychosis, to explain the exacerbations of delusions or hallucinations which commonly emerge the longer a patient remains on dopamine antagonists, such as olanzapine; or alternatively, when dopamine blockade is suddenly reduced. Many other clinicians and researchers have expressed similar concerns about the existence of neuroleptic withdrawal syndromes, which have been noted to continue in some cases for as long as six to eight months [41].

Adverse Effects of ECT

Reference is made by Dr. Ann Blake Tracy to a series of nine treatments of ECT, administered to the defendant in 1995. (Further discussion with the defendant’s father On 4/30/04 reveals that these treatments actually occurred in 1997.) It is worth emphasizing here that ECT remains a controversial procedure because of the long term risks, in the face of unclear or only temporary benefits. ECT has been illegalized in Italy, and is seldom practiced in a number of other European countries (e.g., the Netherlands, Germany). Studies of even the most ardent supporters of ECT have acknowledged that the procedure is ineffective in about 40% of the patients who receive it; and only temporarily effective in those who do show signs of response (80-100% relapse rates within six months of therapy).

The acute side effects of ECT include mania and/or rapid cycling (2-6% of patients in some studies); post-ECT seizures; and cognitive disturbances which are potentially longlasting in many subjects. Equally disturbing are research reports suggesting brain atrophy in some ECT recipients; and the epidemiological data which imply that ECT accelerates the frequency of depressive relapses, and retards the improvement of underlying psychopathology. For all of these reasons, one must wonder to what extent the defendant’s past behaviors were possibly influenced by the long-term effects of nine separate electroshock treatments, administered while he was just out of his teens.

IX. Case Formulation

From a biopsychosocial perspective, the present case suggests an overwhelming record of organic (biological) contributions to violence. While a variety of psychosocial stressors may have contributed to anxiety for which the defendant sought assistance at age 16, it is unlikely that those stressors precipitated the intense psychological problems which developed only after the defendant was exposed to psychoactive medications and ECT.

The events of December 14, 2001 unfolded in the context of escalating assaults on the defendant's brain. The history reveals a crescendo of neurophysiological disruptions, arising from the active effects or withdrawal effects of psychiatric medications known to cause violence; from repeated episodes of electroshock therapy (outlawed in Utah for minors under the age of 14; and now banned by many countries because of the unacceptable risks of irreversible brain damage); from the sporadic use of an herbal remedy that has also been linked to mania and psychosis (St John's Wort) [42, 43]; and possibly from closed head injury suffered in a car accident that occurred just months before the crime.

Unlike most perpetrators of violent crimes, Leonard Preston Gall had no previous history of aggression or homicide; no previous history of delinquency; and no previous history of substance abuse or drug dependence. The development of manic and psychotic symptoms appears to have been iatrogenically induced at age 16; iatrogenically perpetuated through several years of continuing drug treatment and intermittent drug withdrawal; and iatrogenically aggravated by ECT and quite possibly an unrecognized closed head injury (frontal lobe syndrome) occurring in the immediate aftermath of a serious motor vehicle accident.

X. Diagnoses

While the historical diagnoses have not been revealed to me, my understanding of the case to date suggests the following progression of events:

Axis I

- a) age 16: anxiety disorder NOS
unclear symptoms but presumably occurring in context of parental difficulties and divorce, relocation from California to Utah after successful freshman year spent in company of father, mother's intrapsychic/interpersonal difficulties, family's financial stressors, negotiation of puberty, etc.
- b) age 16-18: paxil induced mood vs. paxil induced psychotic disorder
hypomania or mania with psychotic features
grandiosity, loose associations, and delusions, initially triggered by active treatment with medication; later, triggered by serotonin withdrawal syndrome

c) age 18-present:

r/o PTSD

characterized by anxiety, mood, and/or dissociative reactions to each of the aforementioned psychotic episodes, as well as possible violence witnessed or experienced in childhood; reaction to homicide in 2001; and ongoing stressors associated with protracted sentence and incarceration

r/o mood disorder NOS vs. psychotic disorder NOS (resolving or resolved) occurring in the context of active treatment with, or withdrawal from, brain-altering medications and St. John's Wort; ECT; and possible closed head injury suffered in fall 2001

r/o neuroleptic induced akathisia (by history)

r/o SSRI-induced akathisia (by history)

Axis II deferred

Axis III r/o closed head injury (motor vehicle accident in fall 2001)

r/o endocrine disturbance (hyperglycemia, hyperlipidemia secondary to olanzapine administered in past ; r/o hypoglycemia due to paternal history of same)

XI. Recommendations

It is remarkable that Lenny Gall has survived the series of traumas which have transpired since his first exposure to psychoactive medication eleven years ago.

From my telephone conversations with the defendant's father on April 26, 2004, it is my understanding that the defendant currently displays no active signs of psychosis, mood disturbance, or cognitive deficits. He has not engaged in any acts of self-injury, and has not threatened or harmed other individuals or property since December 14, 2001. He is not currently regarded as an imminent threat to others or himself. He has engendered the respect of staff members, clinicians, and fellow patients alike.

Given the facts of the case as they have been reported to me, it would be my recommendation that the State of Utah attach an absolute priority to the defendant's petition for offense adjustments and/or reductions, in recognition of the fact that the crime for which he has been charged was most likely the product of neurological disorder. The facts of the case argue strongly that the defendant, in all likelihood, suffered from a transient but severe disruption in brain function which prevented him from comprehending the wrongfulness of his behaviors; precluded his anticipation of the consequences of his actions; and restricted or eliminated his capacity to control aggressive impulses arising from an overactive or disinhibited limbic system.

Finally, it would be prudent for the State to review the long-term indications for continued pharmacotherapy, inasmuch as the defendant has now exhibited stability for over two years; inasmuch as the protracted administration of unnecessary pharmacological agents can actually contribute to further chronicity of symptoms (via neuronal adaptation, desensitization, and tolerance); and inasmuch as the continued use of medications is presumably aimed at the stabilization of disorders that have largely been caused by psychiatric interventions all along.

Signed:



Grace E. Jackson, MD

Date:

April 30, 2004

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A P P E A R A N C E S

FOR THE PLAINTIFF:

ANNE A. CAMERON
DEPUTY DISTRICT ATTORNEY
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: 363-7900

FOR THE DEFENDANT:

STEVEN R. McCAUGHEY
SUZANNE GUSTIN
Attorneys at Law
10 West Broadway, #650
Salt Lake City, Utah 84101
Telephone: 364-6474

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May 3, 2004

2:14

P R O C E E D I N G S

* * * * *

THE COURT: All right, let's take the matter of State of Utah versus Leonard Preston Gall, case number 011919226. Will Counsel state their appearances.

MS. GUSTIN: Suzanne Gustin -- sorry, Steve.

MR. McCAUGHEY: Go ahead.

MS. GUSTIN: Suzanne Gustin for Mr. Gall.

MR. McCAUGHEY: Steven McCaughey for Mr. Gall.

MS. CAMERON: Anne Cameron for the State.

THE COURT: The record should reflect that Mr. Gall is present also in the courtroom. This is the time set for sentencing. Mr. Gall entered pleas of guilty to second degree -- guilty and mentally ill to a second degree manslaughter charge and a second degree theft charge. I committed Mr. Gall to the Utah State Hospital sometime ago, last September I believe it was, with regard to the third first degree felony count. I set this matter for sentencing at that point for Mr. Gall to have some time to be at the Utah State Hospital and also to receive an update from the State Hospital.

1 And I have received one dated the 18th of February.

2 Are you prepared to go forward with sentencing on the
3 other two cases now, Mr. McCaughey?

4 MR. McCAUGHEY: I am.

5 THE COURT: Ms. Cameron?

6 MS. CAMERON: Your Honor, it would be -- we've had
7 quite a bit of testimony. I don't think that any -- the
8 victims are present. Do you have any desire to speak?

9 Okay. The victims have spoke at the time that the
10 pleas were entered, therefore the State doesn't have much more
11 to say other than the fact that the State would definitely
12 recommend, due to the nature of these crimes, that the two
13 second degree felonies that the defendant is to be sentenced on
14 today are to run consecutive to each other.

15 THE COURT: I also have received and reviewed 15
16 letters, as well as numerous documents concerning mental health
17 issues with regard to the defendant.

18 The February 18th report from the Utah State
19 Hospital concludes that Mr. Gall has not retained any sort of
20 stability and is still mentally ill and request continued
21 treatment of him under the first degree felony. By way of
22 sentencing then, Mr. McCaughey?

23 MR. McCAUGHEY: Your Honor, prior to sentencing, it
24 was -- a letter I received from Mr. -- from the defendant,
25 Leonard Gall, which I am convinced was probably written by his

1 father, he did indicate that there had been no motion for a 402
2 reduction filed in this case. And that was a conscious
3 decision on my part because I don't -- in my judgement of the
4 case, I believe filing such a motion would really be frivolous
5 in light of the circumstances of this case. But in deference
6 to my client and his father, I would orally make that motion at
7 this time that had the Court -- pursuant to 76-3-402, that the
8 Court reduce each one of those second degree felonies to third
9 degree felonies and at the same time sentence Mr. Gall to a
10 concurrent sentence of zero to five on -- with any weapon
11 enhancement on those particular charges.

12 And I think with that, the argument can be made that
13 the circumstances of this case, being guilty but mentally ill,
14 that Mr. Gall deserves the benefit of that statute. Other than
15 that, I would submit it.

16 THE COURT: Ms. Cameron, do you want to respond to
17 Mr. McCaughey's motion?

18 MS. CAMERON: Your Honor, the State would object to
19 any 402 motion given the circumstances of this case. And there
20 seems to be no mitigating circumstances at all involved with
21 this. The defendant is mentally ill, that does not, however,
22 lessen his culpability for his behavior, therefore the State
23 vehemently objects to any 402 reduction and encourages the
24 Court to sentence him consecutively on the sentences, one of
25 which does carry a weapons enhancement.

1 THE COURT: All right. I am denying the motion for a
2 402 reduction. This was a crime of extreme violence and a 402
3 reduction is simply out of the question in this case.

4 Mr. Gall, do you want to say anything to me before I
5 sentence you on these two charges?

6 THE DEFENDANT: I just want to say to the Court
7 that -- and everyone -- that I recognize my responsibility for
8 my mother's death and I'm sorry to everyone for everything
9 that's happened, especially to the Jenkins. I feel terrible
10 about what's happened. I love my mom very much and I miss her.

11 And also I have some concerns about the letters I
12 wrote on the date of the incident, in it I wrote I killed my
13 family for the same reason. My family may think I have some
14 plans, intents, or desires to kill or harm them. I do not have
15 any plans or intents or desires to kill any of them or harm any
16 of them or anyone else. And that's all.

17 THE COURT: All right. All right, Mr. Gall, thank
18 you for those statements.

19 A few words before sentencing. This case has been a
20 tragedy, Mr. Gall, to you, to your family, and you recognize
21 that, and your mother. It's also been, in a real sense, a
22 tragedy for this entire community because of the inability to
23 keep you safe and to keep your mother safe. If there's
24 anything positive, I'm reluctant to even use that word with
25 regard to this, is that perhaps legislation that was passed

1 subsequent to your mother's death may help in preventing this
2 happening to somebody else.

3 Your mother spent a great deal of time working with
4 you and working with the community to help people suffering
5 from mental illnesses such as yours. I hope in the future we,
6 as a community, are able to be of greater assistance.

7 All right, I make the following findings: I find
8 first that by clear and convincing evidence that you, Mr. Gall,
9 are currently mentally ill, continue to be mentally ill. I'm
10 also finding that because of your mental illness you pose an
11 immediate physical danger to yourself and to others.

12 Further, that the Department of Human Services is
13 able to provide treatment, care, custody, and security that is
14 adequate to meet your conditions and needs, therefore my
15 sentence is as follows: I am committing -- I'm ordering that
16 you serve as indeterminate term, on Count I, of 1 to 15 years;
17 Count II, 1 to 15 years; in addition, an enhancement of 1 year
18 to 5 years concerning the firearm. They are to run
19 consecutively with each other.

20 I am committing you to the Department of Human
21 Services. You will remain at the Utah State Hospital. And I'm
22 committing you under the code section 77-16a-202 (1),
23 subsection (a). And that leaves that the decision with regard
24 to your transfer ultimately to the Department of Corrections
25 and prison, as well as your decision -- any future decision of

1 readmission to the Utah State Hospital to the Department of
2 Human Services and to the Department of Corrections.

3 My order further is that these commitments commence
4 forthwith.

5 Mr. Gall, you will be at the Utah State Hospital
6 where you will get treatment and be safe for a long period of
7 time. And that's frankly my goal I think for almost everybody
8 in this case from the very beginning. You -- today you look
9 better than I've ever seen you, much clearer thinking. And I
10 hope that the time at the Utah State Hospital has helped you
11 and that you will be able to be safe and get treatment at the
12 hospital. Okay.

13 MR. McCAUGHEY: Thank you, your Honor.

14 THE COURT: Mr. McCaughey, thank you. Ms. Cameron,
15 thank you.

16 MS. CAMERON: Thank you.

17 (Proceedings concluded at 2:24 p.m.)
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REPORTER'S CERTIFICATE

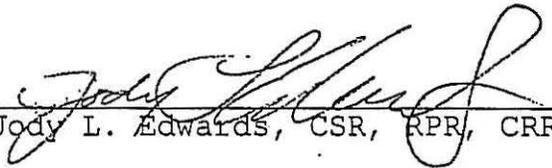
STATE OF UTAH)
: SS.
County of Salt Lake)

I, Jody L. Edwards, do certify that I am a Registered Professional Reporter and Official Court Reporter in and for the State of Utah; that I reported the proceedings of the above-entitled matter at the aforesaid time and place. That the foregoing proceedings were reported by me in stenotype using computer-aided transcription real-time technology consisting of pages 3 through 8 inclusive.

That the same constitutes a true and correct transcription of the said proceedings.

That I am not of kin or otherwise associated with any of the parties herein or their counsel, and that I am not interested in the events thereof.

WITNESS my hand at Salt Lake City, Utah, this 12th day of May, 2004.



Jody L. Edwards, CSR, RPR, CRR

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES
Plaintiff, : SENTENCE, JUDGMENT, COMMITMENT
: :
vs. : Case No: 011919226 FS
: :
LEONARD PRESTON GALL, : Judge: JUDITH S ATHERTON
Defendant. : Date: May 3, 2004

PRESENT

Clerk: lorip
Reporter: EDWARDS, JODY
Prosecutor: ANNE A CAMERON
Defendant
Defendant's Attorney(s): STEPHEN R. MCCAUGHEY
SUSANNE GUSTIN-FURGIS

DEFENDANT INFORMATION

Date of birth: December 3, 1976
Video

CHARGES

1. MANSLAUGHTER - 2nd Degree Felony
Plea: Guilty-Mentally Ill - Disposition: 09/10/2003 Guilty -
Mental Ill
2. THEFT - 2nd Degree Felony
Plea: Guilty-Mentally Ill - Disposition: 09/10/2003 Guilty -
Mental Ill
3. AGGRAVATED BURGLARY - 1st Degree Felony
Plea: Not Guilty-Insanity - Disposition: 09/10/2003 Not
Guilty -Insanity

00125

Case No: 011919226
Date: May 03, 2004

SENTENCE PRISON

Based on the defendant's conviction of MANSLAUGHTER a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of THEFT a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

TO RUN CONSECUTIVELY.

SENTENCE RECOMMENDATION NOTE

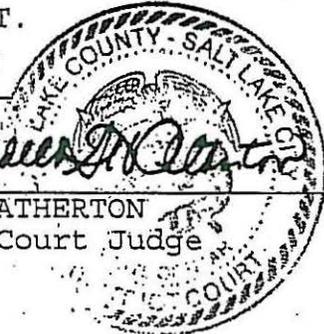
DEFENDANT TO BE IN CUSTODY OF DEPARTMENT OF HUMAN SERVICES TO PROVIDE SERVICES. DEFENDANT TO REMAIN AT THE UTAH STATE HOSPITAL.

SENTENCE ENHANCEMENT NOTE

COURT ORDER 1-6 YEARS FOR WEAPONS ENHANCEMENT.

Dated this 3 day of May, 20 04


JUDITH S ATHERTON
District Court Judge



Appendix

FORM 1 - GENERAL MATRIX CRIMINAL HISTORY ASSESSMENT

These are guidelines only. They do not create any right or expectation on behalf of the offender.

- | PRIOR FELONY CONVICTIONS
(SEPARATE CRIMINAL CONVICTIONS) | 0 NONE
2 ONE
4 TWO
6 THREE
8 MORE THAN THREE | VIOLENCE HISTORY
(PRIOR JUVENILE OR ADULT CONVICTION FOR AN OFFENSE WHICH INCLUDES USE OF A WEAPON, PHYSICAL FORCE, THREAT OF FORCE, OR SEXUAL ABUSE) | 0 NONE
1 MISDEMEANOR
2 3rd DEGREE FELONY
3 2nd DEGREE FELONY
4 1st DEGREE FELONY | | | | | | | | | | | | |
|---|--|--|--|----------------------|--|---|------|----|---------|-----|--------|----|-------|---|-------|
| PRIOR MISDEMEANOR CONVICTIONS
(SEPARATE CRIMINAL CONVICTIONS) (INCLUDES DUI & RECKLESS) (EXCLUDES OTHER TRAFFIC) | 0 NONE
1 ONE
2 TWO TO FOUR
3 FIVE TO SEVEN
4 MORE THAN SEVEN | WEAPONS USE IN CURRENT OFFENSE
(ONLY WHEN CURRENT CONVICTION DOES NOT REFLECT WEAPON USE OR WHEN STATUTORY ENHANCEMENT IS NOT INVOLVED) | 1 CONSTRUCTIVE POSSESSION
2 ACTUAL POSSESSION
3 DISPLAYED OR BRANDISHED
4 ACTUAL USE
6 INJURY CAUSED | | | | | | | | | | | | |
| PRIOR JUVENILE ADJUDICATIONS
(ADJUDICATIONS FOR OFFENSES THAT WOULD HAVE BEEN FELONIES IF COMMITTED BY AN ADULT)(THREE MISDEMEANOR ADJUDICATIONS EQUAL ONE FELONY ADJUDICATION) | 0 NONE
1 ONE
2 TWO TO FOUR
3 MORE THAN FOUR
4 SECURE PLACEMENT | TOTAL SCORE: _____ | | | | | | | | | | | | | |
| SUPERVISION HISTORY
(ADULT OR JUVENILE) | 0 NO PRIOR SUPERVISION
1 PRIOR SUPERVISION
2 PRIOR RESIDENTIAL PLACEMENT
3 PRIOR REVOCATION
4 ACT OCCURRED WHILE UNDER CURRENT SUPERVISION OR PRE-TRIAL RELEASE | <table border="1" style="width: 100%; text-align: center;"> <tr> <th colspan="2">CRIMINAL HISTORY ROW</th> </tr> <tr> <td>V</td> <td>16 +</td> </tr> <tr> <td>IV</td> <td>12 - 15</td> </tr> <tr> <td>III</td> <td>8 - 11</td> </tr> <tr> <td>II</td> <td>4 - 7</td> </tr> <tr> <td>I</td> <td>0 - 3</td> </tr> </table> | | CRIMINAL HISTORY ROW | | V | 16 + | IV | 12 - 15 | III | 8 - 11 | II | 4 - 7 | I | 0 - 3 |
| CRIMINAL HISTORY ROW | | | | | | | | | | | | | | | |
| V | 16 + | | | | | | | | | | | | | | |
| IV | 12 - 15 | | | | | | | | | | | | | | |
| III | 8 - 11 | | | | | | | | | | | | | | |
| II | 4 - 7 | | | | | | | | | | | | | | |
| I | 0 - 3 | | | | | | | | | | | | | | |
| SUPERVISION RISK
(ADULT OR JUVENILE) | 0 NO ESCAPES OR ABSCONDINGS
1 FAILURE TO REPORT (ACTIVE OFFENSE) OR OUTSTANDING WARRANT
2 ABSCONDED FROM SUPERVISION
3 ABSCONDED FROM RESIDENTIAL PROGRAM
4 ESCAPED FROM CONFINEMENT | | | | | | | | | | | | | | |

CRIME CATEGORY

CRIMINAL HISTORY									
	A	B	C	D	E	F	G	H	I
	1st Degree Murder	2nd Degree Death	1st Degree Person	3rd Degree Death	1st Degree Other	2nd Degree Person	3rd Degree Person	2nd Degree Other	3rd Degree Other
V	24 YRS	8 YRS	10 YRS	48 MOS	84 MOS	60 MOS	36 MOS	30 MOS	20 MOS
IV	22 YRS	7 YRS	9 YRS	42 MOS	78 MOS	48 MOS	30 MOS	24 MOS	18 MOS
III	20 YRS	6 YRS	8 YRS	36 MOS	72 MOS	36 MOS	24 MOS	20 MOS	12 MOS
II	18 YRS	5 YRS	7 YRS	24 MOS	66 MOS	30 MOS	20 MOS	18 MOS	10 MOS
I	16 YRS	4 YRS	6 YRS	20 MOS	60 MOS	24 MOS	18 MOS	16 MOS	9 MOS

Imprisonment
Intermediate Sanctions
Regular Probation
Mandatory Imprisonment
Misdemeanors

CONSECUTIVE ENHANCEMENTS: 40% of the shorter sentence is to be added to the full length of the longer sentence.

CONCURRENT ENHANCEMENTS: 10% of the shorter sentence is to be added to the full length of the longer sentence.

Matrix timeframes refer to imprisonment only. Refer to the categorization of offenses.
Capital offenses are not considered within the context of the sentencing guidelines.

	ACTIVE CONVICTIONS	CRIME CATEGORY	TIME
MOST SERIOUS	_____	_____	_____
NEXT MOST SERIOUS	_____	_____	_____
OTHER	_____	_____	_____
OTHER	_____	_____	_____
		TOTAL	_____

OFFENDER NAME: _____ DATE SCORED: _____ SCORER'S NAME: _____

INTRODUCTION

The Utah Sentencing Commission, pursuant to its statutory authority and responsibility under Utah Code Ann. § 63-25a-304, promulgates the following 2004 Adult Sentencing and Release Guidelines for adult criminal offenders.

The Utah Sentencing Commission is charged to recommend and coordinate sentencing and release policy for both juvenile and adult offenders within the state of Utah. It consists of twenty-seven members who represent all facets of the justice systems: judges, prosecutors, defense attorneys, legislators, victims, law enforcement, treatment specialists, ethnic minorities, corrections, parole authorities, and others.

Changes from the 1998 Guidelines

The 2004 Adult Sentencing and Release Guidelines include no changes to Form 1 (General Matrix), Form 2 (Sex Offender Matrix), or Form 3 (Aggravating and Mitigating Circumstances Associated With Mandatory Imprisonment Sentences). Form 4 (Aggravating and Mitigating Circumstances) now includes an additional aggravating circumstance for financial or theft crimes. Consistent with prior practice, the lists of aggravating and mitigating circumstances are not exhaustive.

Addendum B, which categorizes felony offenses, has been updated to include offenses previously omitted and offenses enacted by the legislature since the implementation of the 1998 Guidelines.

Finally, the text of the manual has been updated and revised, although it remains essentially the same as the 1998 Guidelines.

Philosophy Statement

The goal of the guidelines is to bring more objectivity to the sentencing and release process yet also allow the court or the Board of Pardons and Parole discretion in considering aggravating and mitigating circumstances. The guidelines provide for consideration of the following factors:

- Severity of the offense;
- Utah penal statutes;
- Crime history and risk to society;
- Prosecutorial, judicial, and parole board discretion; and
- Continuum of sanctions

Sanctions should be proportionate to the severity of the current offense. Guidelines should reflect the culpability of the offender based on the nature of the current offense and the offender's role coupled with the offender's supervision history and overall likelihood to recidivate as inferred by the offender's "Criminal History Assessment." The Adult Sentencing and Release Guidelines reflect these basic concepts of justice.

Criminal punishment should focus on the particular circumstances of each crime, offender, and victim involved. Guidelines should promote uniformity while, at the same time, afford the sentencing judge and Board of Pardons and Parole the flexibility to fashion a specific sentence to an individual offender. The guidelines facilitate individualized sentences by establishing matrices that include a variety of sentencing options to accommodate a continuum of sanctions such as regular probation, intermediate sanctions, and imprisonment. Aggravating and mitigating circumstances also enhance discretion and encourage individualized sentencing and release decisions.

While decision makers are strongly encouraged to abide by the guidelines,

departures from the guidelines will sometimes be necessary. These departures should be based upon aggravating or mitigating factors, and the Sentencing Commission strongly encourages decision makers to articulate these factors on the record.

Statement of Purpose

The sentencing of criminal offenders is a complex process with many related decision points. For sentencing purposes, the process starts with the prosecutor's decision regarding the specific charges to be filed and what, if any, plea to negotiate. If the defendant is convicted, the judge typically refers the offender to the Department of Corrections for a presentence investigation. The presentence investigator reviews the background of the offender, documents the nature of the offense and its impact on the victim, and then makes recommendations to the judge concerning the sentence to be imposed and any conditions associated with that sentence. See Utah Code Ann. § 64-13-20. The judge then imposes sentence.

A variety of options are available to the judge including an increasing number of intermediate sanctions. The most severe of all sentencing options involve the Utah Department of Corrections. Correctional resources are severely overtaxed and there has been concern about policy to help allocate those resources. The guidelines assist decision makers in the appropriate allocation of these limited resources. If the judge sentences the offender to prison, custody of the offender transfers to the Utah Department of Corrections, and jurisdiction and the decision of how long the offender remains under prison custody transfers to the Board of Pardons and Parole.

Guidelines as a Tool

Utah law provides the basis for the sentencing and release of criminal

offenders. By sound design these statutes allow significant latitude in decision-making. The guidelines are an attempt to further structure decision making relative to sentencing and release, yet still retain the flexibility to deal with individual cases. The guidelines also provide a means of identifying and allocating required resources. Utah's guidelines are intended to maintain judicial and parole board discretion, and at the same time incorporate a rational criminal justice philosophy, eliminate unwarranted disparity, and provide a tool to match resources with needs.

The guidelines, as structured, provide a forum for discussion regarding sentencing and a common frame of reference on which to base discussion. Equally important, they provide a means to look into the future and assess the demand for resources based on policy changes.

Action Research Approach

Although the foundation of the guidelines is sound, they need to be revisited, monitored, and evaluated on a regular basis. One of the primary directions of the Utah Sentencing Commission is to provide this review. The guidelines are not intended to set policy in concrete. Because the philosophy, functioning, and problems of the criminal justice system fluctuate constantly, the guidelines should be adaptable to change, and should even encourage such change. Through general monitoring of how the guidelines are used, they can be modified to accommodate changes in policy or practice.

POLICY IMPLICIT IN THE GUIDELINES

These guidelines are a cooperative venture. No additional legislation is being proposed to coerce agencies to conform. The effort is to provide a mechanism for communication and improvement of key policy rather than to dictate practice by statute or rule. For the guidelines to function well, several policies are important. The policies need not be implemented exactly as stated, but their intent is critical.

Prosecution

Prosecutors may use the guidelines to determine the implications of charging and plea negotiations. The guidelines are intended to make the system predictable by making explicit the sentence an offender with a given background is likely to receive. Prosecutors should make it a policy to explain the effect of charging and plea negotiations in each individual case to the victim.

Presentence Investigators

Presentence investigations should be conducted on all felony convictions and class A misdemeanor sex offense convictions. Presentence investigations are beneficial to the Board of Pardons and Parole as well as to the court and should be completed even when the court may not deem it necessary in a particular case. Presentence investigations should have the guidelines forms attached when they are sent to the sentencing judge, the prosecutor, and the offender in accordance with Utah Code Ann. § 77-18-1 and Utah Code Jud. Admin. Rule 4-203. The recommendations made to the judge should conform to the guidelines unless aggravating or mitigating circumstances are documented.

Sentencing Judges

Sentencing judges may require that the guidelines forms be attached to all district court presentence investigations. Judges are encouraged to sentence within the guidelines unless they find aggravating or mitigating circumstances justifying departure. These circumstances should be stated in open court and included on the judgment and commitment order.

In order to assist judges in sentencing, Utah law provides for a possible diagnostic evaluation. "In felony cases where the court is of the opinion imprisonment may be appropriate but desires more detailed information as a basis for determining the sentence to be imposed than has been provided by the presentence report, the court may in its discretion commit a convicted defendant to the custody of the Department of Corrections for a diagnostic evaluation for a period not exceeding 90 days." Utah code Ann. § 76-3-404. Such a referral involves the use of scarce resources and should be reserved for an in-depth review and assessment to provide the sentencing judge with the necessary information to make the appropriate sentence. This statutory authority and accompanying resources are intended to enhance the assessment capabilities in sentencing and are not intended to provide shock incarceration for the offender. When seeking to supplement a presentence report with a psychological evaluation, the court may also consider community resources other than the diagnostic unit at the Department of Corrections.

Board of Pardons and Parole

The Board of Pardons and Parole requires an updated guidelines form to be completed on each offender appearing for an original parole grant hearing. In many cases, additional events have occurred between the time of the court's first sentencing decision and the first

appearance before the Board (e.g., new convictions, program successes or failures, escapes, etc.). Except where there are aggravating or mitigating factors, the Board is encouraged to make decisions compatible with the guidelines. A statement of general rationale for Board decisions is provided to the offender and made available to the public.

Utah Sentencing and Release Guidelines Instructions

Under the direction of the Utah Sentencing Commission, these 2004 Adult Sentencing and Release Guidelines represent a cooperative effort by all the components of the Utah criminal justice system to make a unified statement of policy regarding the sentencing and release of adult criminal offenders. The dominant underlying philosophy of the guidelines is that criminal sentences should be proportionate to the seriousness of the offense for which the offender was convicted. Other major policies are inherent in the guidelines. These are the offender's overall culpability based on the nature of the current offense and the offender's role coupled with the supervision history and likelihood to recidivate, as inferred from the offender's criminal history. The guidelines provide predictability by communicating a standard in sentencing and releasing and thereby allow all parts of the system to have a good idea of the disposition and penalty associated with the conviction.

Except for consecutive and concurrent enhancements, all statutory sentencing enhancements are not included in the context of these guidelines. For example, Utah law concerning repeat and habitual sex offenders, Utah Code Ann. § 76-3-407, or gang enhancements, Utah Code Ann. § 76-3-203.1, are to be considered outside and in addition to these guidelines.

Form 1 – General Matrix

Criminal History Assessment

The purpose of the Criminal History Assessment is to provide a standard frame of reference to reduce or enhance the severity of the sentence based on the prior criminal and supervision history of the offender. Only score the single highest

point option within a given category. Do not check multiple scores in a single category and then add them.

Prior Adult Felony Convictions

Do not count the current offense or offenses. Prior felony convictions are limited to adult convictions. Only convictions should be counted. Other instances such as dismissed cases, intelligence information, numerous prior arrests, etc. may be considered in the aggravating and mitigating circumstances section but are not quantified in the guidelines. Where military records are available, court martial information should be included if the charges are criminal in nature.

Utah law defines "single criminal episode" as "all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective." Utah Code Ann. § 76-1-401. If multiple convictions arise from a single criminal episode, as statutorily defined, only one conviction should be counted.

Prior Adult Misdemeanor Convictions

This item is scored similarly to the one above. Traffic crimes should be excluded with the exception of DUI and reckless driving convictions.

Prior Juvenile Adjudications

This item specifically scores the juvenile record. Only adjudications that would be criminal convictions if committed by an adult should be counted; do not count status offenses. Such adjudications should be calculated in the same manner as generally explained in the Prior Adult Felony Convictions and Prior Adult Misdemeanor Convictions categories. Only those cases that resulted in a finding of delinquency should count. In other words, some adjudication of guilt in the juvenile system

must be found before points are allotted here. Care must be exercised since not every entry on a juvenile record represents an adjudication.

For purposes of calculating in this category, three misdemeanor offenses equal one felony. Do not "round up" in these cases, i.e., less than 3 misdemeanors = 0 felonies; 3 – 5 misdemeanors = 1 felony; 6 – 8 misdemeanors = 2 felonies, etc. Status offenses are offenses that would not be illegal if committed by an adult, e.g., truancy or smoking.

The final option in the prior juvenile adjudications category indicates that four points are awarded if the offender experienced a secure placement in the juvenile system. Only a commitment to secure care qualifies for this option.

Supervision History

This item encompasses both juvenile and adult history. Only post-adjudication or post-conviction supervision should be counted. Pre-trial detention or jail, for example, would not constitute supervision history for these purposes. The term "revocation" includes situations where findings of fact hearings have demonstrated that the conditions of supervision had been violated, but the judge or Board of Pardons and Parole chose to continue supervision without revocation. The item entitled "act occurred while under current supervision or pretrial release" refers to the situation at the time the offense occurred. For points to be assigned in this Supervision History category, both the prior and present offenses should be criminal in nature. Traffic violations and status offenses for juveniles certified to the adult system should not be counted.

Supervision Risk

This item penalizes those who have absconded or escaped from court ordered

supervision in the past, as either a juvenile or an adult. The more restrictive the supervision, the greater the penalty. Those who "fail to report" for court, presentence investigation, or supervision, receive one point. "Absconding" is when an offender leaves the facility without permission; or fails to return at a prescribed time. If an offender is under supervision, absconding occurs when he changes his residence . . . without notifying his parole officer or obtaining permission or when the offender, for the purpose of avoiding supervision: hides at a different location from his reported residence; or leaves his reported residence. Absconding receives two points if the placement is non-residential and three points if the supervision is residential in nature. Scoring points for absconding does not require a conviction because absconding is not a crime.

"A prisoner is guilty of escape if he leaves official custody without authorization." Utah Code § 76-8-309(1). If the offender "escapes" from a secure (locked door or secure perimeter) confinement setting, four points are allotted. Only convictions for escape should be counted unless the offender could have been charged with escape or absconding but was, instead, charged or convicted of another crime while on escape status.

Violence History

This category is intended to document any violence that may have accompanied any prior criminal offense(s). Only count prior convictions. The guidelines contain a graduated scale of points to be allotted depending upon the past violent offense. One point is allotted for a misdemeanor, two points for a third degree felony, three points for a second degree felony, and four points for a first degree felony as indicated on Forms 1 and 2. Other incidents of documented violence that are not convictions in and of themselves

may be considered under Form 4 - Aggravating and Mitigating Circumstances.

Weapons Use in Current Offense

In addition to the violence history category of the criminal history assessment, the guidelines emphasize the use of a *weapon in the current offense(s)* as a factor that may increase the criminal history score. Do not consider this category for any prior convictions as is the case in all other criminal history categories. This category is also to be considered only when the current conviction does not reflect the use of the weapon or when there is no statutory weapons enhancement involved. For example, if it is apparent that the offender was convicted of first degree felony aggravated robbery instead of second degree robbery because of the use of a weapon; do not additionally consider this category. Likewise, if an offender receives the dangerous weapons enhancement, do not additionally consider this category.

The point allocation in this category depends upon the use of the weapon: *Constructive Possession*, for purposes of the guidelines, occurs when the offender has access to the weapon but it is not on his or her person. For example, there was a firearm in the glove compartment or a knife in a gym bag in the vicinity. One point is allotted for constructive possession. *Actual Possession*, for purposes of the guidelines, occurs when the offender has the weapon on his or her person. For example, a handgun in a pocket. Two points are allotted for actual possession. *Weapon displayed or brandished* results in three points being allotted. *Weapon actually used* results in four points being allotted. This occurs, for example, when an offender points or fires a gun, uses a knife in close proximity to the victim, or swings a baseball bat. *Weapon used and injury caused* results in six points being allotted, regardless of the seriousness of the injury.

(Again, consider this entire category only if the conviction, itself, does not reflect the weapons use or when no dangerous weapons enhancement is being considered.)

As mentioned, this category is the only occasion when the current conviction is considered in the criminal history portion of Form 1. Otherwise, current convictions are considered only in determining the appropriate column of the matrix or in aggravating and mitigating factors. Admittedly, considering the current conviction in the criminal history assessment creates an anomaly in the guidelines. However, the Sentencing Commission considers the use of a weapon to be such a significant factor in determining both placement and release decisions in sentencing, it is addressed in the guidelines in this manner.

Total Score

To arrive at this score, add up the points associated with each category in the Criminal History Assessment.

Criminal History Row

Using the Total Score, identify the appropriate criminal history row: I, II, III, IV, or V using the chart labeled "Criminal History Row."

General Matrix

The rows of this matrix represent differing levels of criminal history and correspond with the total score from the criminal history assessment. The columns represent crime categories and correspond with the most serious current offense. The columns list both a felony level and a crime category (murder, death, person, or other). The various levels of shading in the matrix represent suggested dispositions (disregarding aggravating and mitigating circumstances).

The crime category columns generally flow from left to right indicating the most severe sanction to the least severe sanction. However, this does not necessarily indicate which crimes are more severe than others. Some cells recommend a more severe placement than the cell immediately to its right (e.g. prison vs. intermediate sanction), but the length of stay may actually be shorter than in the cell immediately to the right.

To determine the guidelines' recommended disposition, locate the cell where the appropriate crime category column and criminal history row intersect. The proper crime category column is based on: (1) the felony level of the most serious presenting offense; and (2) the crime category. Addendum B identifies the specific category for every felony offense (murder, death, person, or other).

If there are multiple current offenses, refer to Addendum A, *Crime Column Listing*, to determine which offense is the most severe and which column should be used. This listing will also indicate which matrix should be used when current offenses include both sex offenses and non-sex offenses.

As indicated earlier, to determine the proper criminal history row, calculate the total criminal history assessment score and use the chart labeled "Criminal History Score" to identify the row that corresponds with that score.

After having identified the proper crime category column and criminal history row, locate the cell where the column and row intersect. That cell includes the guidelines' recommendation regarding sentencing disposition and the typical length of stay if the offender is sentenced to prison. The level of shading in that box identifies the suggested or mandatory sentencing disposition (probation, intermediate sanctions, imprisonment, or mandatory

imprisonment). Split cells containing dual shading indicate that the guidelines recommend either placement.

Mandatory Imprisonment

Utah law mandates imprisonment for all offenders convicted of murder. Utah Code Ann. § 76-3-406. Thus, the guidelines indicate a mandatory imprisonment sentence for murder, regardless of the criminal history row. Murder, Utah Code Ann. § 76-5-203, is the only offense considered in crime category A. Aggravated murder is not considered at all on the Adult Sentencing and Release Guidelines.

Utah law mandates imprisonment for other offenses and mandatory jail for some offenses if the prison sentence is stayed. However, Form 1 – General Matrix does not indicate all mandatory incarceration sentences. Doing so would unnecessarily complicate the matrix when a review of the applicable statute will suffice.

Time Enumerated within Individual Cells

The length of time enumerated within each cell is the typical length of stay if the offender is imprisoned. These times apply only if the offender is sentenced to prison and do not apply if the offender is sentenced to an intermediate sanction or to regular probation. If there is only one active sentence, the typical guideline term is determined by simply identifying the cell where the appropriate crime category column intersects with the criminal history row. The times located within cells found in the mandatory imprisonment shaded area are not mandatory minimums.

In rare cases, the statutory minimum length of stay in prison may be higher than the typical length of stay provided in an individual cell. This will happen only when the statutory minimum for a crime is longer than the usual statutory minimum for that

felony level. For example, a drive-by shooting is a third degree felony punishable by three to five years in prison. It is possible that the typical prison term indicated in the matrix will be less than three years since most third degree felonies are punishable by zero to five years in prison. In cases where the statutory minimum exceeds the typical length of stay provided in the matrix, the typical length of stay should be ignored.

Consecutive or concurrent

When multiple offenses are before the court, "[t]he court shall state on the record and shall indicate in the order of judgment and commitment: (a) if the sentences imposed are to run concurrently or consecutively to each other; and (b) if the sentences before the court are to run concurrently or consecutively with any other sentences the defendant is currently serving." Utah Code Ann. § 76-3-401(1). State statute requires the court to consider the following factors in determining whether sentences shall run concurrently or consecutively:

- Gravity and circumstances of the offenses
- Number of victims
- History, character, and rehabilitative needs of the defendant.

Utah Code Ann. § 76-3-401(2).

"The court shall order that sentences for state offenses run consecutively if the later offense is committed while the defendant is imprisoned or on parole, unless the court finds and states on the record that consecutive sentencing would be inappropriate." Utah Code Ann. § 76-3-401(3).

If multiple convictions are ordered to run concurrently, the guidelines add 10% of the recommended length of stay of the shorter sentence to the full recommended

length of the longer sentence. For example, consider an offender convicted of aggravated robbery with a recommended length of stay of 7 years (84 months) and also convicted of aggravated assault with a recommendation of 20 months. If the court orders the sentences to run concurrently, the guidelines recommend a length of stay of 86 months (10% of 20 mos = 2 mos + 84 mos = 86 mos).

If multiple convictions are ordered to run consecutively, the guidelines add 40% of the recommended length of stay of the shorter sentence to the full recommended length of the longer sentence. Using the same example above, if the sentences were consecutive, the guidelines would recommend a length of stay of 92 months (40% of 20 mos = 8 mos + 84 mos = 92 mos). This same approach applies even if there are three or more sentences being considered.

For another example, consider an offender convicted of robbery and sentenced to prison with a guidelines recommendation of 48 months. The offender is paroled after 36 months and, while on parole, commits aggravated burglary and is sentenced to prison with a guidelines recommendation of nine years. If the judge orders the sentences to run consecutively, the new guidelines recommended sentence is 9 years, 5 months (40% of 12 mos (which is the time remaining on the original sentence) = 4.8 mos + nine years = approximately 9 years, 5 months).

If there are a string of multiple offenses that are running consecutively or concurrently, add the applicable percentage of all of the shorter sentences to the longest sentence. For example, consider an offender convicted of 1) aggravated assault with a recommendation of 24 months, 2) a drug offense with a recommendation of 20 months, and 3) forgery with a recommendation of 10 months. If the judge

orders the sentences to run concurrently, add 10% of both the drug offense and the forgery to the 24 months for the aggravated assault. The guideline recommendation would total 27 months (10% of 20 mos = 2 mos; 10% of 10 mos = 1 mos; 2 mos + 1 mos = 3 mos; 3 mos + 24 mos = 27 mos).

Occasionally, the "longer" sentence may not be from the most "severe" offense as indicated by the *Crime Column Listing (by severity)* as explained above. In these exceptional cases, consider the sentence for the most severe offense to be the "longest" sentence for purposes of calculating concurrent and consecutive sentences. This is done to preserve consistency in guidelines application.

All guidelines considerations of concurrent and consecutive sentencing should be consistent with the limitations in Utah Code Ann. § 76-3-401.

Conditions of Intermediate Sanctions and Regular Probation

Intermediate sanctions include any sanction between regular probation and prison. In Utah, courts sometimes attach *special* conditions to a probationary sentence which makes the sentence more than regular probation. For the purpose of the guidelines, typical conditions of probation often include payment of restitution, attendance in counseling, drug testing, search and seizure clauses, community service, etc. These conditions ordinarily do not rise to the level of being *special*, and therefore do not transform regular probation into an intermediate sanction.

The concept of intermediate sanctions is that the higher the risk an offender poses in the community, the more controls are placed on the offender. These controls are intermediate sanctions. They include such things as electronic monitoring, referral to the day reporting centers,

participation in residential treatment programming, intensive supervision, etc. These are the *special* conditions referred to above. These programs always have increased levels of supervision. In addition, because of the increased supervision, these sanctions are more costly than regular probation. As such, these intermediate sanctions should be viewed from the perspective that because they are limited, the court should carefully select those offenders who need them in conjunction with the Department of Corrections.

It is important to note that the higher the risk an offender presents in the community, the more intermediate sanctions an offender may access. For instance, an offender may be on intensive supervision and electronic monitoring and also be attending the day reporting center. Obviously, because of the cost of these programs, it is important that all the services accessed are necessary. Therefore, the separation of regular probation and intermediate sanctions has to do with cost and level of supervision as indicated by the *special* conditions attached. There is no bright line between regular probation and intermediate sanctions and this fact ought to be considered in sentencing.

Form 2 – Sex Offender Matrix

These are the sentencing and release guidelines to be used for all sex offenders. Specifically, offenses to be considered under this portion of the guidelines include:

- offenses that require registration under Utah Code Ann. § 77-27-21.5(1)(e);
- aggravated kidnapping, § 76-5-302;
- custodial sexual relations or misconduct, § 76-5-412;
- custodial sexual relations or misconduct with a youth receiving state services, § 76-5-413; and
- sexual battery, § 76-9-702(3).

Aggravated kidnapping may be scored on Form 1 if the offense does not involve a sexual component.

Criminal History Assessment

The Criminal History Assessment is only slightly different than that used under Form 1 for all other offenders. Two additional categories exist on the Criminal History Assessment for sex offenders: Number of Prior Victims and Time Range. The factors related to the likelihood of sex offenders to commit additional sex offenses are specific to a history of sexual deviancy and situations resulting in sexual arousal. The added categories of Number of Prior Victims and Time Range are designed to address these factors. Other than these two additional categories, the Criminal History Assessment for sex offenders should be scored identically to Form 1.

In an extensive study on mandatory minimum sentences for sex offenders, the Sentencing Commission found, among other things, that sex offenders were quite different than other offenders. See *Utah Sentencing Commission Annual Report 1995-1996*; Utah Statistical Analysis Center, *Analysis of Utah's Child Kidnaping and Sexual Abuse Act of 1983*. Mandatory imprisonment, lifetime parole, treatment resources, and the separate guidelines matrix resulted from this study. Form 2 reflects the amended laws mandating imprisonment for certain sex offenders in conjunction with differing indeterminate lengths of stay ranges. In addition, there are only three criminal history rows on the sex offender matrix compared to five on the general matrix. This provides the Board of Pardons and Parole with more discretion concerning sex offenders.

Number of Prior Victims

This category documents whether the offender had prior victims in any sex offense convictions not including the

present offense. Zero points are allotted for no prior victims, three points allotted for one prior victim, and four points for more than one prior victim in any of these prior sex offense convictions. This victimization does not have to arise out of a single criminal episode. However, before any points are allotted under this section, there must be a specific conviction involving the victim or victims counted.

Time Range

This category quantifies the length of time the offender has been offending sexually and is based on sex offense convictions. If the offender has any sex offense conviction over two years old, four points are allotted. Three points are allotted if the offender has any sex offense conviction more than one year old and less than two years old. Two points are allotted for any conviction within the last year excluding the present offense, and one point for the present offense. The date of conviction is determinative for purposes of this section.

Sex Offense Disposition Matrix

The sex offender matrix on Form 2 is obviously different than the Form 1 matrix. However, they both function similarly. Simply identify the appropriate crime category column and intersect it with the appropriate criminal history row to determine the suggested or mandatory disposition. Addendum B lists the crime categories for all sex offenses. Addendum A identifies the appropriate column if more than one sex offense is currently before the court. As with Form 1, the criminal history row is located by calculating the total criminal history score and using the chart labeled "Criminal History Row."

Utah law mandates imprisonment for certain sex offenses regardless of the criminal history score. This is reflected in the crime category columns and the

disposition shading. In rare cases, Utah law does allow for an alternative sentence to prison for otherwise mandatory imprisonment sex offenses. However, an arduous list of circumstances must be met before such a deviation is allowed. These circumstances are enumerated under Utah Code Ann. § 76-5-406.5.

As on Form 1, split cells with dual shading indicate the guidelines recommend either placement.

Form 3 - Aggravating and Mitigating Circumstances Associated with Offenses with Three Alternative Minimum Lengths of Stay

As mentioned, certain sex offenses mandate imprisonment. Utah Code Ann. § 76-3-406. For all but one of these offenses, three alternative minimum terms may be imposed. "[T]he court shall order imposition of the term of middle severity unless there are circumstances in aggravation or mitigation of the crime." Utah Code Ann. § 76-3-201(7)(a). "In determining a just sentence, the court shall consider guidelines regarding aggravating and mitigating circumstances promulgated by the Sentencing Commission." Utah Code Ann. § 76-3-201(7)(e). In accordance with the above statutory directive, the Sentencing Commission has, in Form 3, promulgated aggravating and mitigating circumstances for sex offenses with three alternative minimum terms and Form 3 should be used in determining which of those three terms will be imposed by the court. Form 3 is not an exclusive list.

Form 4 - Aggravating and Mitigating Circumstances

There are occasionally circumstances that compel deviation from the guidelines. Some of the more common reasons are listed for convenience on Form 4. Other reasons, as they occur, can be specified. Reasons should always be

specified when the guideline sentence is not recommended. These aggravating and mitigating circumstances should be considered for both Form 1 – General Matrix and Form 2 – Sex Offender Matrix.

In considering all aggravating and mitigating factors in a particular case, the number of each should not merely be added up or otherwise mechanically applied in the balancing process. Rather, the totality of the mitigating factors should be compared against the totality of the aggravating factors. Any one mitigating factor, standing alone, could outweigh some or all of the aggravating circumstances in the case. On the other hand, one aggravating factor, standing alone, could outweigh some or all of the mitigating factors in the case. The guidelines are concerned with the respective substance and persuasiveness of the competing factors, not their relative numbers. Also, do not list an aggravating factor in either form if it is already an element of the offense.

Aggravating factor #2 on Form 4 states "Multiple documented incidents of violence not resulting in conviction." In order for these "documented incidents of violence" to be counted, there must exist a court approved stipulation that such incidents will be considered. The intent of this requirement, along with having a certain standard of verification, is to assure that all are aware at the time of conviction that such documented incidents will be counted on the guidelines and considered in both the sentencing and release decisions.

Days of Credit

Time incarcerated under the following circumstances should be counted as time served against the maximum sentence: (1) a conviction is set aside and there is a subsequent commitment for the same criminal conduct; (2) a commitment is made to the Utah State Hospital pursuant to a guilty and mentally ill conviction; (3) time

is spent in custody outside the State of Utah based solely on the Utah warrant; (4) the Board of Pardons and Parole deems such credit just under the circumstances; (5) credit is otherwise required by law. Utah Admin. R671-205-1. No credit is given for time spent in custody at the Utah State Hospital or comparable non-prison psychiatric facility while the offender is judicially declared incompetent.

Guideline Matrix Recommendation

The guideline sentence without regard to aggravating or mitigating circumstances should be documented here.

AP&P Recommendation

The recommendation of Adult Probation and Parole should be documented here.

Reason for Departure

Any reasons for departure should be documented by the presentence investigator in every case in which the guideline recommendation is not followed.