MARK TORVINEN
District Attorney

KRISTIN A. McQUEARY
Chief Civil Deputy

OFFICE OF THE DISTRICT ATTORNEY OF ELKO COUNTY, NEVADA

540 Court Street, Second Floor
Elko, Nevada 89801-3515
775-738-3101 ▪ 775-738-0160 fax

ROBERT J. LOWE
CHAD B. THOMPSON
DAVID A. BUCHLER
MARK S. MILLS
TYLER J. INGRAM
JONATHAN L. SCHULMAN
TANNER SHARP
Deputy District Attorneys

Thursday The 12th Day Of December, 2013

Mr. Benjamin Jones
533 Canyon Road
Green River, Wyoming 82935

Re: **Notice Of The Probable Settlement Of State Vs. Patrick McCormick, And The Reasons Therefor.**

Ms. Jones;

I write to advise you, so that you will know in advance of any Newspaper Coverage of it, that Mr. McCormick's Case is likely to settle by a Plea of No Contest by him to Involuntary Manslaughter.

The reality of that means that he will not go back to prison.

This was not a decision lightly undertaken and what has happened in this:

As you are aware in November of 2012, the Nevada Supreme Court reversed Mr. McComick's conviction.

Specifically what the Court found is that:

> Appellant argues that counsel was ineffective for failing to investigate whether the victim died from anaphylactic shock due to an allergic reaction to penicillin. The record before this court indicates that counsel was deficient and that appellant was prejudiced by that deficiency. Counsel testified that he knew the emergency room physician could not rule out a penicillin allergy as a cause of death; that he could not recall discussing it with Dr. S. Dunton, the medical expert with whom he briefly consulted; and that he would have presented expert testimony that the victim died of anaphylactic shock had he had such an expert opinion. Counsel provided no reason for why he did not investigate this possible defense. It was thus objectively unreasonable for trial counsel to have abandoned the potential defense without first investigating it. Strickland, 466 U.S. at 690-91.

Moreover, appellant has demonstrated a reasonable probability of a different outcome had counsel presented expert testimony regarding a penicillin allergy.

After that I hired one of the preeminent Experts in the United States, Dr. Bennet Omalu – **whose name I obtained from Dr. Ellen Clark** - the Pathologist who testified in Mr. McCormick's trial to review the Case.

Dr. Omalu is a Clinical, Anatomic, and Forensic Pathologist, who is also a Neuropathologist, and Epidemiologist – and again he is one of the most recognized experts in this field in the United States and probably the World.

After thoroughly reviewing all of the medical records, the investigative materials, and reviewing the some 33 slides that were kept from the Autopsy of Jacob's June 1995 Autopsy, some of which he had tested by an outside laboratory as well, Dr. Omalu concluded that:

1. First:

> Review of the submitted hospital and medical records confirms that **NO** definitive clinical laboratory test was performed on Jacob Jones. Anaphylaxis was neither confirmed nor excluded; however anaphylaxis remained a potent differential diagnosis especially given the temporal relationship and association between the exposure and administration of Penicillin, and onset of the symptoms of acute cardiopulmonary arrest, pulmonary edema and loss of consciousness. The following clinical laboratory tests are typically performed on blood samples [plasma] to confirm the diagnosis of anaphylaxis, viz:
>
> 1. Total Immunoglobulin E [IgE]
> 2. Allergen specific IgE [in this instance penicillin specific IgE]
> 3. Histamine

4. Tryptase
5. Chymase
6. Carboxypeptidase A3

None of these tests was performed before Jacob Jones died. Although they were not performed pre-mortem, these tests should have also been performed post-mortem either on a hospital admission blood sample or an autopsy blood sample, yet none of these tests was performed after the autopsy. These tests should have been performed in light of the prevailing forensic scenario with Penicillin Anaphylaxis as a potent and highly plausible underlying cause of death or contributory factor to death.

b. Second:

... **In summary therefore, a fatal anaphylactic reaction to Penicillin remains a likely underlying cause of death of Jacob Jones, especially in light of the negative tissue immunohistochemistry for APP, which will be described below**
...

... Review of the autopsy pictures did not reveal any extensive and/or confluent subcutaneous and/or subgaleal hemorrhages of the scalp. There were no skull fractures. The next medico-legal question that arises, therefore, would be: What is the forensic significance of the intracranial hemorrhages described on Jacob Jones in relation to causation of death? The prevailing technological tool we may adopt to address this question would be Amyloid Precursor Protein [APP] tissue immunohistochemistry to determine the degree of diffuse traumatic axonal injury, if present. APP is a large transmembrane protein that exists in the neurons and axons [nerve fibers] in the brain and spinal cord. In a brain without injury, APP immunohistochemistry is negative. In a brain with traumatic axonal injury APP immunohistochemistry becomes progressively positive as the post-injury time increases. APP immunohistochemistry becomes positive after about one to three hours following injury

sustenance and is a marker of severe traumatic brain injury.

The APP immunopositive pattern for traumatic brain injury comprises multifocal APP-immunopositive axonal bulbs, axonal spheroids and swollen, distorted axonal forms. This specified pattern was absent in the archival histologic sections of Jacob Jones' brain and spinal cord except only in the nerve fiber layer of the neuroretina in the right and left eyeballs, adjacent to the optic papilla, and accentuated in the right eyeball. APP immunohistochemistry was therefore negative in the brain, spinal cord and optic nerves in this case. This additional finding further suggests that severe traumatic brain injury may not be the underlying cause or mechanism of death. The focal immunopositive pattern observed in the nerve fiber layer of the neuroretina, adjacent to the optic papilla, would be consistent with secondary focal axonal injury of the neuroretina due to congestive brain swelling and raised intracranial pressure, which can follow any type of brain injury including hypoxic-ischemic cerebral injury of any etiology.

In my practice I have encountered cases whereby APP immunohistochemistry was negative in the brain of infants in spite of traumatic brain injury given the cellular immaturity of the infantile brain. However within the context of the prevailing forensic scenario in this case, negative APP immunohistochemistry is yet another feature that may further undermine the validity of the cause of death as has been determined by the coroner.

APP immunohistochemistry was performed on the tissue histology slides of the brain, which were taken and archived by Dr. Laubscher, the pathologist, who performed the autopsy. Unfortunately, the brain sections, which were taken are not the standard sections, which are recommended for the evaluation of the human brain for traumatic brain injury. These sections were grossly inadequate and did not include vital topographically targeted regions of the brain that are selectively vulnerable to traumatic axonal injury. The absence of these topographically selective regions

of the brain for APP immunohistochemistry even further undermines the validity of the autopsy brain analysis and evaluation for the presence or absence of traumatic brain injury, and the assessment of the severity of the traumatic brain injury.

There is a mismatch between the CT scan of the head upon hospital admission and the autopsy findings after death. The CT scan of the head was negative and did not show any intracranial hemorrhages. Autopsy showed bilateral subdural hemorrhages. Could the intracranial hemorrhages have occurred between the hospital admission and death, and/or autopsy? Could all or some of the intracranial hemorrhages have been artifactual aberrations of medical/surgical therapy or an artifactual aberration of the autopsy prosection? Furthermore the histomorphologic and topographic pattern of selective cerebral neuronal excitotoxic injury in this case, is inconsistent with severe traumatic brain injury, severe traumatic axonal or vascular injury. Rather it is consistent with cerebral hypoxic-ischemic neuronal injury, which is seen in acute cardiopulmonary arrest, which Jacob Jones was diagnosed with. His acute cardiopulmonary arrest was thought to be caused by acute anaphylactic reaction to penicillin.

Hypothetically, if the suspected perpetrator in this case instigated the terminal chain of events by inflicting adult-induced non-accidental trauma on Jacob Jones on or before June 9, 1995, there are prevailing repeated breaches of the contiguity of this alleged chain of events by novel factors, which would have successfully impeached or nullified such an alleged child-abusive event as the underlying cause of death. These novel factors, which may have successfully breached the contiguity of the alleged child abusive chain of events include sepsis, DIC, penicillin anaphylaxis and shaking by the mother. These novel factors synergistically initiated novel and terminal chains of events, which precipitated death. **The clinical management, death investigation and autopsy in this case did not successfully identify, recognize, inculpate or exculpate these novel factors as probable underlying causes**

of, and contributory factors to death within a reasonable degree of medical certainty.

In short Dr. Omalu concluded that the most likely cause of Jacob's death was from anaphylactic shock from his allergy to penicillin which had been diagnosed by Dr. Robert Leigh at the Elko General Hospital on the 1st of January, 1995.

This issue is further reinforced by Dr. Robert Stefanko's diagnoses at the ER at the Elko General Hospital on the 9th day of June, 1995, the day Jacob died.

In his discharge summary concerning his treatment of Jacob on the 9th of June, 1995, in the Elko General Hospital Dr. Stefanko recited the following:

1. On Page 3 under the Heading "Medical Decision Making" Dr.

   Stefanko observed that:

   > The patient sustained an acute cardiopulmonary arrest, **probably secondary to an acute respiratory arrest and acute allergic etiology from penicillin would be suspected**...

b. On Page 4 of the Summary under the Heading "Diagnosis" Dr.

   Stefanko recited:

   1. Acute respiratory and cardiopulmonary arrest with successful resuscitation, however, cannot rule out permanent central nervous system/cerebral sequela.

   2. **Rule out acute allergic reaction to penicillin causing number one.**

   3. Rule out child abuse.

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4. Multiple contusions to the face and right forearm.

What Dr. Stefanko meant when he said "Rule out acute allergic reaction to penicillin causing umber one" is that the possibility that Jacob suffered an acute, fatal anaphylactic reaction to penicillin and **that that potential needed to be further forensically investigated – which did not occur**.

In August of this year, once Dr. Omalu had made his Report, I spoke at length to Dr. Clark the Pathologist who testified at Mr. McCormick's original Trial.

She advised that:

1. It was still her opinion that the autopsy photographs disclosed evidence of blunt force trauma.

2. **However she also agreed that**:

   a. The tests which would have identified or excluded anaphylactic reaction to penicillin **could have been done at the time**;

   b. They cannot be done now because the bodily fluids which was be necessary **were not preserved**; and

   c. That she recognizes that under those circumstances it is going to be nearly impossible at this point to prove – beyond a reasonable doubt - that Jacob did not die of anaphylactic shock because there are potential alternative explanations for all of the symptoms she originally identified which cannot now be eliminated ***because the bodily fluids necessary to run such tests simply no longer exist***.

I have consulted with a number of my colleagues and all in agreement that if we proceeded to trial at this point on the Murder charges it is a near certainty that Mr. McCormick would be acquitted.

I am willing to talk to you about this, and answer any questions you may have but I am settled upon resolving the matter if it can be done because I do not believe we can under these circumstances that we can prevail at trial.

Mr. Benjamin Jones
Re: Notice Of The Probable Settlement Of State Vs. Patrick McCormick, And The Reasons Therefor

December 12th, 2013

I have been doing this for over thirty (30) years; I have litigated many, many murder cases; and the unfortunate reality of this case is that it has been fatally compromised by the failure to conduct some testing that was available at the time of Jacob's death; this testing should have been done; it was not done; and it cannot be done now.

I simply have no choice.

There will be an evidentiary hearing conducted in connection with the settlement of this matter at which Dr. Omalu is going to testify before the Court.

You will be able to attend and hear his live testimony about these issues.

Sincerely,

MARK TORVINEN
Elko County District Attorney