IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

Charles Russell Rhines Plaintiff,	)	CIV No. 14 - 979
v.	)	REPLY TO "LAST WORD"
State of South Dakota, Defendant.	)	

COMES NOW THE PLAINTIFF IN THE ABOVE ENUMERATED ACTION, TO again provide some illumination to the otherwise darkly shrouded process made so by the, shall we be charitable and say less-than-accurate, statements made by the Defendant's Representative. Perhaps we now have a more accurate way of expressing these less-than-accurate statememts: "alternative facts."

In the Defendant's previous filing the method described by Defendant's Representative of how the filing was delivered to the Plaintiff employs such alternative facts.

1. Defendant's WAIVER OF HEARING dated November 21, 2014 states that the method by which these alternative fact statements were delivered to the Plaintiff was through the United States mails. This attested to and certified by the signing of the Certificate Of Service attached to the aforesaid document. SEE: Exhibit 1.
2. The Court will kindly take note there is no hint of United States First Class or other class, postage of any kind attachedto the manilla envelope in which the Defendant's Waiver Of Hearing and Sur Reply were delivered to the Plaintiff. SEE: Exhibit 2(a) and Exhibit 2(b). These are, respectively,

the front and back of the manilla envelope in which the Waiver of Hearing and Sur Reply were delivered to the Plaintiff. There are no United States postage stamps, postal meter tapes or computer generated postage stickers affixed to the envelope as is attested to by the Certificate Of Service, or is supposed to be attested to by the Certificate of Service. This is simply another example of the Defendant's representative playing fast and loose with the Rules of Procedure and the law. These documents were apparently hand delivered to the State Penitentiary rather than mailed.

3. In Defendant's Sur Reply, Defendant's Counsel attempts his usual tactics of smear and defame by stating the Plaintiff would rather purchase a new television set than pay for legal case law authority printouts from the South Dakota State penitentiary's Inmate Legal Assistance Office. This is another example of one of those "alternative facts." Case law authority printouts from the Inmate Legal Assistance Office (ILAO) do not cost the inmates of the South Dakota State Penitentiary any funds at all. Only **LEGAL COPIES OF SUBMITTED DOCUMENTS** are charged at the rate of $0.15 (15¢)/page. That is, the copies of this document which the Plaintiff will submit to the ILAO for photo-copies will cost the Plaintiff 15¢ per page, but the case law authorities which the Plaintiff requested from the ILAO do not cost the Plaintiff any amount at all.

This errouneous conclusion by Defendant's Counsel is the result of Defendant's Counsel illegally and unethically obtaining information from the ILAO. The information Assistant Attorney General Swedlund obtained about legal copy costs was accurate but then he translated that information into anotrher to which it did not apply and **ASSUMED** he was correct. ie, the Inmate legal Assistance Office informed AAG Swedlund that copies are charged at the rate of 15¢/page and AAG Swedlund **ASSUMED** that included case law authorities as well. He is incorrect, and has done what all assumptions do. (And by the way, the "L" in solder is silent. Another assumption gone wrong.)

4. It was not the cost of the copies which is or was in contention in this matter but the time to reply restrictions which were the constraining and driving principle. Plaintiff believed, perhaps incorrectly, that he had a maximum of fifteen (15) days to reply to Defendant's Anser, as is stated in the Rules of Procedure, to the Original Complaint andsince Defendant had cited thirteen (13) Case Law Authorities the Plaintiff was not going to have sufficient time to obtain and review all thirteen (13) case law authorities cited by the Defendant due to the fact that the Inmate Legal Assistance Office will only provide a maximum of two (2) case law authority printouts per week and a total of eight printouts per calen-

dar month.

This restriction on the numerical amount of case law authority printouts was the constraining factor and had nothing to do with how much or how little in the way of monetary expenditures the Plaintiff was willing to incur in pursuit of the repeal of this unconstitutional statute.

It is likely the Inmate Legal Assistance Officer, Mark Bidne, informed AAG Swedlund about these facts but facts generally get in the way of smear and defame tactics. "alternative Facts" are so much more appealing, apparently.

5. As to the matter of the Plaintiff requesting his Federal Public Defenders to furnish the Plaintiff with case law authorities, how would they justify do so to their employer? Should they lie to their employer about the use of said printout's? To what account would such printout's be charged?

It may be common for South Dakota Assistant Attorney's generals to mislead their employer and to commit perjury and fraud as well as telling lesser lies anywhere and anytime it is convenient to do so, rather than following the law and correct procedure, legally and above board. However, other attorney's seem to have stronger ethical constraints to which they adhere to with rigidity. The Plaintiff's Assistant Federal Public Defenders seem to be such attorney's.

6. The Defendant's Counsel likes to refer to the Plaintiff's on-

going Federal habeas Corpus proceedings as though they have some relevancy to these proceedings. So, let us delve into that as well for more illumination.

In the Defendant's **STATEMENT OF UNDISPUTED MATERIAL FACTS** the Defendant's Counsel distorts an Official United States Government document so that a pertinent, cited portion, reads EXACTLY OPPOSITE what is printed on the document. Perhaps the deciphering of typewritten English eludes Defendant's Representative after all?

The Plaintiff cites his DD-214 "Report Of Separation From Active Duty from the United States Army dated October 13, 1976. In box 9e the CHARACTER OF SERVICE is stated as being UNDER HONORABLE CONDITIONS. Apparently this was not to the liking of Defendant's Counsel so he altered the CHARACTER OF SERVICE description to reflect the Plaintiff had been discharged from the United States Army under LESS Than Honorable Conditions. This was outright perjury, as the statement, altered from the official document was proferred to the Court (both SD State & Federal) as a Material Fact and material facts offered to the Court which are known to be untrue, and are in fact outright alterations from official documents are called perjurous statements and are felonies in the State of South Dakota. (SEE: SDCL's §§22-29-1; 22-29-2; 22-29-4; 22-29-5(2) and 22-29-18.)

We have gotten far, far afield from the issues presented in

in the original Complaint. Lots of baffling BS and of course an Assistant Attorney General showing us his disdain for correct procedure and adherence to the law and legallities, the niceties which are supposed to make civilized society operate correctly and smoothly.

7. In Defendant's previous filings Defendant alleged that the Plaintiff had no standing by which he could be asking for relief as the Plaintiff had not been harmed by the statute. This contention is absolutely not true as has been recently demonstrated in federal court and the discovery of evidence which could conceivably alter the Plaintiff's current sentence from death to life. Could readily do so.

During the Plaintiff's 24 year appeals process he has repeatedly attempted to urge his appointed councels to interview the Plaintiff's criminal trial jurors about a nine (9) question note they sent to the trial court judge during penalty phase deliberations. These questions ranged from the Plaintiff's potential future dangerousness if he were ever placed in a minimum security prison or be allowed Work Release to what conditions of confinement the Plaintiff could expect to incur if the had been sentenced to life in prison rather than death, to whether or not the Plaintiff would be allowed to have a cell-mate or associate with other inmates.

During voir dire the jurors were informed that the Plaintiff

is a homosexual and each potential juror indicated this would play no part in their deliberations.

However, the list of questions sent to the trial court judge during penalty phase deliberations seems to counterindicate those statements by these jurors and, subsequently the Plaintiff urged each of his appointed counsels to interview these jurors about what they had meant with the 9 questions. During the nearly 23 ensuing years after trial and through 16 or so appointed counsels, none would interview the jury, until 2015 when counsel from outside the area was appointed by the Honorable Karen E. Schreier as Learned Counsel for the Plaintiff's federal habeas petition. In September 2015 Learned Counsel Carol R. Camp and investigator Mary K. Poirer began interviewing former jurors and discovered that apparently most of them had viewed the oaths they took in voir dire as merely a suggestion and the promise not to use the Plaintiff's homosexuallity against him ~~was~~ as being null and void.

8. In the meantime the Plaintiff has been appointed new counsel yet again, obtaining the services of the Federal Community Defenders Office for the Eastern District of Pennsylvania's Capital habeas unit. These attorney's have now interviewed all twelve of the Plaintiff's former jurors and have discovered serious juror misconduct which, had it been introduced at any point short of 2011 would have been usable in federal Court.

As is, with the holding in Cullen V Pinholster and the newly enacted habeas corpus statute in South Dakota the Plaintiff cannot now introduce this newly discovered, powerful evidence of juror misconduct into the the courts. Therefore, this new statute has very much caused the Plaintiff harm and therefore provides the "standing" Defendant's Representative so vehemently denies exists.

These instances of misconduct existed long before the SD habeas corpus statute was changed. However, the unwillingness of SOUTH DAKOTA appointed counsel to investigate made for this problem. Hence, the Plaintiff seeks to have this newly enacted statute repealed through the finding that it has provisions which are clearly Unconstitutional.

For the foregoing reason the Plaintiff strongly resists the Defendant's Motion To Dismiss based upon the idea that Plaintiff has no standing to bring this action.

Submitted this 5th day of September, 2017.

Charles R. Rhines, pro se
P.O. Box 5911
Sioux Falls, SD 57117-5911

served 6/20/2014 BK

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

****

Charles R. Rhines, Plaintiff,

v.

State of South Dakota, Respondent.

Civ. 14-979

S U M M O N S

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TO THE RESPONDENT:

Pursuant to SDCL 15-6-4(a) you are hereby SUMMONED and required to answer the enclosed Complaint Challenging The Constitutionallity of South Dakota Codified Law 21-27 by serving a copy of your ANSWER upon the Plaintiff at P.O. Box 5911, Sioux Falls, South Dakota, 57117-5911, within thirty (30) days of receipt of this Complaint, exclusive of the day of service.

Failure to answer the Complaint within the thirty (30) days mandated by SDCL 15-6-4(a) shall be grounds for the Plaintiff to seek Default Judgment against you as demanded in the Complaint.

Charles R. Rhines, pro se
P.O. Box 5911
Sioux Falls, SD 57117-5911

S E A L

FILED
APR 29 2014
Minnehaha County, S.D.
Clerk Circuit Court

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

Charles R. Rhines. Plaintiff. v. State of South Dakota. Respondent.	Civ. 14-979 COMPLAINT CHALLENGING THE CONSTITUTIONALLITY OF SOUTH DAKOTA CODIFIED LAW 21-27

COMES NOW THE PLAINTIFF, Charles R. Rhines, IN THE Above enumerated action, requesting the Second Judicial Circuit Court for the State of South Dakota to Grant the Plaintiff the Relief demanded herein: That South Dakota Codified Law 21-27 which was amended by the Eighty-Seventh Legislative Assembly in the year 2012 with Senate Bill 42, known as South Dakota habeas corpus, be held to be unconstitutional and therefore unenforcable in the State of South Dakota for the reasons stated herein.

The Plaintiff challenges SDCL 21-27 in five (5) parts, enumerated herein with Roman Numerals I through V, inclusive.

ISSUE I:

SDCL 21-27-3 (1-4) encompasses a new statute of limitations for filing an application for a writ of habeas corpus which is greviously inadequate for an incarcerated citizen who is not already a qualified attorney to learn enough about the law to un-

derstand that his rights under the South Dakota and United States constitutions may have been violated, and how to go about rectifying any such violations.

The change from a five (5) year statute of limitations to a two (2) year statute of limitations makes little sense except to further disadvantadge the incarcerated citizen as it often requires three (3) to four (4) years for an incarcerated citizen to acquire enough knowledge of the law to understand that his rights under the United States and/or South Dakota Constitutions may very well have been violated and that, under the law, he did not receive a fair trial or hearing, for which he is entitled to recourse.

Indeed, the shortest para-legal corresspondence course available is more than two years in length, if the incarcerated citizen is able to scrape together the funds with which to persue such an endeavor.

Further, formal law school is three (3) years of an extensive, intensive cirriculum in a setting of higher education with the participants already having matriculated from a four (4) year baccalaureate program from an accredited university, with at least some of the baccalaureate course work having been pre-law.

Noted legal scholar and influential commentator on the subject of law, Christopher Columbus Langdell, who was appointed Dean of the Harvard Law School in 1870 wrote that Law is a science, like biology or physics and the data on which this science is based are judicial decisions. Dean Langdell continued the anology far

enough to argue that the (law) library is to a lawyer what the laboratory is to the chemist or physicist. As he explained in an 1887 commencement address at Harvard:

> "[It] is indispensible to establish at least two things: First, that law is a science; Secondly, that all the available materials of that science are contained in printed books...If it be a science, it will scarcely be disputed that it is one of the greatest and most difficult of the sciences...
>
> We have also constantly inculcated the idea that the (law) library is the proper workshop of professors and students alike; that it is to us all that laboratories of the University are to the chemists and physicists; all that the museum of natural history is to the zoologists; all that the botanical gardens are to the botanists." 1

Yet here we are, expecting ordinary, untrained, generally uneducated prisoners who lack the fundamental resources common to law schools (ie, extensive law libraries, legal textbooks, and trained instructors/professors to assist in the legal education of the students) to somehow winkle out on their own that their legal, constitutional rights may have been violated, and to do so within a period of two (2) years or less.

In U.S. v Twomey, 510 F2d 634, 640 (7th Cir. 1975) Senior District Court Judge Charles E. Wyzanski wrote:

> "While a trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."

Yet this revision of the statute of limitations from five (5) years to two (2) years sets up that scenario exactly: The sacrifice of untrained, uneducated, unprepared ("unarmed") prisoners with practically no legal resources or funds with which to acquire such resources to well educated, highly experienced, fully

1. Quoted in W. Twining, Karl Llewellyn and the Realist Movement (1973) 12. As quoted in "Thinking Like A Lawyer."page 242. Kenneth J. Vandevelde (2011)

prepared legal gladiators with the full resources and nearly unlimited funding of the State of South Dakota while the incarcerated citizen must somehow scrape together the meager resources the South Dakota Department of Corrections permits him to possess, utilizing what little funds/funding he may have available.

The legal library at the South Dakota State Penitentiary is quite meager, to speak generously about it, and does not afford access to even the most basic of necessary materials such as the Supreme Court Reporter series of books which cite federal case law authorities or the Northwest Reporter series which publish South Dakota case law authorities. (See attached listing)

Additionally, the legal library at the South Dakota State Penitentiary may only be accessed one hour per day by General population inmates, when they are permitted general library time. Any other inmates, such as Administrative Segregation or Capital Punishment may only access the legal library on weekends by requesting no more than three (3) legal books which are brought to the Ad. Seg./CP inmates' cell. Ad.Seg/CP inmates are not actually permitted to visit the legal library but must conduct all research from within their cells. All such materials must be returned to the legal library on Monday mornings.

These restrictions upon access works against the incarcerated citizen to limit the amount of time he has available to learn the law to five hours per week, far less time than a typical law school student would be required to attend class in a single day, let alone a week.

It requires a considerable amount of time to gain enough knowledge of the basics of law, let alone the intracacies of Constitutional law, to ascertain whether the incarcerated citizen may have a claim to persue in the courts.

This change in the statute of limitations does not serve anyone's best interests, except, perhaps, the Attorney General's apparent desire to further disadvantadge incarcerated citizens in the exercise of their legal right to challenge a criminal conviction on Constitutional grounds.

This is further exacerbated by SDCL 21-27-4 wherein an incarcerated citizen must first prove he has a colorable claim before counsel may be considered for appointment, if he is indigent and needful of appointed counsel.

Previously, an incarcerated citizen need only file an application for a writ of habeas corpus alleging that one or more rights under the United States or South Dakota Constitutions had been violated, have an attorney appointed under the law and allow the qualified attorney to review the trial record for Constitutional errors.

In his dissent in State v. Rhines, Pennington County file numeber 18268, Justice Sabers of the South Dakota Supreme Court made the uncontested assertion that every trial is filled with literally dozens of errors, some of which could result in reversal if brought to the attention of the Court by competent counsel.

SDCL 21-27-4 prevents this from occurring by requiring the incarcerated citizen to first prove he has a claim before he may even apply for counsel to assist him in reviewing his case for Constitutional errors. This provision, coupled with SDCL 21-27-3 as discussed above, creates an insurmountable blockade to the incarcerated citizen to access his right to contest his criminal conviction for no more reason than an Attoreny General who apprently wishes to amass an enviable win/loss record to tout in his political ambitions.

The change of the statute of limitations from five (5) years to two (2) years is grossly unfair to the incarcerated citizen because it places an undue and un-needed burden upon the incarcerated citizen which is not shared by the opposition. The Eighty Seventh Legislative Assembly has allowed the Attorney General of the State of South Dakota to decide what the rules are for South Dakota habeas corpus are going to be rather than the will of the voters whom they are supposed to represent.

The legislature is supposed to be part of the "referee process" rather than allowing one team or the other to decide what the rules of the game are going to be.

This change in the statute of limitations was unwarranted and un-needed as there is no record that any incarcerated citizens were abusing the process of the writ of habeas corpus as previously enacted in the State of South Dakota.

ISSUE II:

SOUTH DAKOTA CODIFIED LAW 21-27-4 IS AN EXPOST FACTO VIOLATION OF THE UNITED STATES CONSTITUTION.

The last lines of Section four (4) of SDCL 21-27 are probably the most egregious example of any ex post facto law ever considered or enacted any any State legislature, except possibly Section five (5) of SDCL 21-27.

The final lines of Section Four (4) must be the most stunningly crafted bit of legislation to come down the pike in many years.

"THE INEFFECTIVENESS OR INCOMPETENCE OF COUNSEL, WHETHER RETAINED OR APPOINTED, DURING ANY COLLATERAL POST-CONVICTION PROCEEDING IS NOT GROUNDS FOR RELIEF UNDER THIS CHAPTER."

Legislating that the ineffectiveness of counsel is not grounds for relief under the habeas corpus chapter may actually be reasonable because INEFFECTIVE assistance is such a subjective inference that different people viewing the same information and/or evidence could reasonably arrive a wholly different conclusions.

Even so, this statute could have been crafted more artfully as it grants blanket immunity to attorney's who fail to provide to their client's the benefit of their full attention, talents and expertise, and the client, under this statutory scheme is left without recourse.

If the South Dakota Legislature had stopped at INEFFECTIVE assistance not being grounds for relief under SDCL 21-27 that might have been understandable as INEFFECTIVE assistance is a subjective

determination dependent upon the circumstances of the case and the perceptions and experiences of the fact-finder.

INEFFECTIVE assistance of counsel is a highly subjective de termination which can vary from case to case. However, the 87th Legislative Assembly did not stop at simply disallowing INEFFECTIVE assistance to be grounds for relief under SDCL 21-27, negating the South Dakota Supreme Court holding in Jackson v. Weber, supra, the South Dakota legislature went beyond that and granted blanket immunity to attorney's to be INCOMPETENT, which is a completely different standard by which attorney's performances are judged.

Competence, or it's reverse, INCOMPETENCE, is a wholly objective measure of an attorney's legal skills and knowledge as determined by the Bar Associations, State and National. An attorney must demonstrate ability and knowledge to a set of examiners who use objective criteria to determine whether the Bar Applicant has shown he/she has a mastery of the priniciples of and practice of law and has demonstrated that he/she possesses the requisite legal knowledge to practice law in an ethical manner.

If an attorney is not COMPETENT in his skills or has practised law so poorly that his performance may be deemed to be INCOMPETENT, then that attorney is a menace to society and should not be given a pass to further inflict his/her INCOMPETENCE upon other, unsuspecting citizens, and the client, who has obviously not benefitted from his attorney's INCOMPETENT performance should not be

penalized because of it.

Yet here we are, penalizing the unsuspecting habeas corpus applicant simply because South Dakota has been blessed with an Attorney general who prefers an un-level playing field upon which to sacrifice unarmed prisoners to legal gladiators.

Certainly no state or federal statute should ever be enacted to permit anyone in a skilled, licensed profession to operate in an incompetent manner and have the State Legislature or Federal Congress decree that those citizens who have been wronged by the skilled and licensed professional operating incompetently should have no recourse to recover from the licensed and allegedgly skilled professionals INCOMPETENCE.

It would be unconstitutional, and need I say it, reprehensible, to enact legislation that would provide blanket immunity from litigation by medical patients/clients persuing recourse against a physician for INCOMPETENCE in his skilled and licensed profession.

It would be blatantly unconstitutional to provide immunity to electricians or HVAC professionals (installing natural gas/propane gas lines?) for their INCOMPETENCE in their skilled and licensed professions.

There is no difference between an attorney practisin law in an INCOMPETENT manner and a physician, electrician or HVAC installer practising their respective skilled and licensed professions INCOMPETENTLY, where the very lives of their clients may very well hang in the balance.

Why would it be constitutional to give immunity to an incompetent ATTORNEY but not to an incompetent PHYSICIAN, ELECTRICIAN or HVAC installer?

One idea that troubles the Plaintiff in particular is the nagging question of why any ethically practising Attorney General would desire to write an attorney incompetence immunity clause into a statute such as this. Ethically speaking, it does not seem to make much sense.

ISSUE III:

SOUTH DAKOTA CODIFIED LAW 21-27-4 IS UNCONSTITUTIONAL BECAUSE SECTION FOUR (4) VIOLATES THE RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCE CLAUSE IN THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

South Dakota Codified Law 21-27-4 abrogates theRight of citizens to Petition The Government For Redress Of grievance as is gaurenteed by the First Amendment to the United States Constitution.

SDCL 21-27-4 states, in part. THE INEFFECTIVENESS OR INCOMPETENCE OF COUNSEL, WHETHER RETAINED OR APPOINTED, DURING ANY COLLATERAL POST-CONVICTION PROCEEDING IS NOT GROUNDS FOR RELIEF UNDER THIS CHAPTER.

If either retained or appointed counsel have been either ineffective or incompetent then the South Dakota Legislature has removed the Right of a habeas corpus applicant to Petition the Government For Redress of This Grievance.

An ineffective or incompetent attorney is a wrong done to the

person whom that ineffective or incompetent attorney has been retained or appointed to represent and this statute gives such an attorney blanket immunity to avoid any consequences of his wrongful actions/inactions and therefore denies the client the ability to recover from the attorney's wrongfulactions through the Redress of Grievance Clause of the First Amendment to the United States Constitution.

This Clause in the First Amendment of the United States Constitution is part and parcel of the reason a defendant has the Right to Petition the Government For Redress of This Sort Of Grievance as well as the Right To Counsel, which the South Dakota Supreme Court has held in Jackson v Weber, that a habeas corpus applicant in the State of South Dakota has the Right to EFFECTIVE, and therefore COMPETENT, assistance of counsel, if he has the Right to Counsel at all. The holding in Jackson v Weber reversed the previous holding in Krebs v Leapley a year earlier wherein the South Dakota Supreme Court had held that counsel need not be effective, merely present.

This holding, of course, made no sense because if an habeas corpus applicant is entitled to an attorney then he is entitled to have counsel that is more than merely present in the courtroom, but COMPETENT and EFFECTIVE as well.

This statute abrogates that holding and implicates, nay, violates blatantly, the Redress Of Grievance clause ofthe First Amendment to the United States Constitution.

If appointed or retained counsel have been ineffective, or

worse, INCOMPETENT, then that should be testable in a court of law. To hold that a Petitioner may not seek such Redress against an attorney who has practised law so poorly as to be deemed to be INCOMPETENT must be held to be blatantly unconstitutional as it abrogates nearly everything citizens of the United States hold dear as their legal system.

This provision of SDCL 21-27 abrogates the ability of wronged citizens to sue an attorney for his wrongful actions or simple inability to practise law in an effective or competent manner.

ISSUE IV:

SOUTH DAKOTA CODIFIED LAW 21-27 IS AN EX POST FACTO LAW PROHIBITED BY ARTICLE 1, SECTION 10 OF THE UNITED STATES CONSTITUTION.

The testimony given by South Dakota Attorney General Marty Jackley and South Dakota citizen Peggy Schaeffer was very specific in stating the change in the South Dakota habeas corpus statute was aimed at Donald Moeller and Charles Rhines, respectively. These two names are repeatedly cited by these two witnesses during their testimony before the South Dakota Legislature, and these were the only advocates requesting the habeas corpus statute be changed. There was no other testimony given, for or against, the passage of this statute revision, only some objections from certain groups of the terms of the proposed statute changes. This was was the most notably from the Trial Lawyers Association which objected to the statute of limitations for applying for a writ being reduced from five (5) years to one (1) year. Said objections were taken into consideration and the proposal was altered to the current two (2) year statute of limitations as previously addressed in this brief.

In James v. United States 366 U.S. 312, 247 n.3, 81 S.Ct. 1052, 1070,6 L Ed 2d 246

Justice Harlan wrote that he understood the ex post facto clause as serving a purpose beyond ensuring that fair notice be given of the legal consequences of an individual's actions. He stated "Aside from problems of warning and specific intent, the policy of the prohibition against ex post facto legislation would seem to rest on the apprehension of the legislature,.in imposing penalties on past conduct...may be acting with a purpose not to prevent dangerous conduct generally, but to impose by legislation a penalty against specific person(s) or class of persons." (Emphasis added)

This statute revision was plainly crafted and ADVOCATED by the South Dakota Attorney General to address two persons specifically and a specific class of persons: That of capital sentenced citizens. This makes these statute revisions an ex post facto law enacted unconstitutionally.

Unlike procedural gaurentees in the Bill of Rights which were originally applicable only to the federal government, the Ex Post Facto clause has always applied to the States. (See: United States Constitution: Article 1, Section 10).

Mr Justice Chase, writing a few years after the adoption of the Constitution, stated that the Clause was probably a result of the Ex Post Facto laws and Bills of Attainder passed in England. "With very few exception, the ADVOCATES of such laws were stimulated by ambition, or personal resentment, and vindictive malice. (EMPHASIS added).

To prevent such, and similar, acts of violence and injustices

the federal (congress) and state legislatures were prohibited from passing any Bill of Attainder or Ex Post Facto law. Calder v. Bull, 3 Dall. 386, 389 1 L.Ed 648

It is an important indication of the thought at the time that Mr. Justice Harlan believed the Clause (Ex Post Facto) did no more than state an inherent rule of government.

That the advocates of these statute revisions were/are motivated or stimulated by vindictive malice, personal resentment and ambition is beyond doubt from the tenor of their testimony before the South Dakota State Senates' Judicial Committee. Their very own words indict them on these points.

Mrs. Peggy Schaeffer is the mother of a murder victim for which the Petitioner, Charles Rhines was convicted. That she bears ill will toward the Petitioner as well as personal resentment and vindictive malice there is no doubt and the Plaintiff is sure Mrs. Schaeffer believes she is justified in her desire to take away the Constitutional Rights of capital sentenced inmates to appeal their criminal convictions.

However much any of the South Dakota legislature may or may not have sympathized with Peggy Schaeffer in her grief and desire to seek revenge for the slaying of her son, it is not sufficient justification for the legislature to enact an unconstitutional statute stripping citizens of their rights to challenge their criminal convictions on constitutional grounds.

That the South Dakota Attorney General is driven or motivated by ambition there is no doubt at all. He practically radi-

ates political ambition. And this is understandable as it is a very unwise career decision to become the Attorney General for South Dakota unless one has higher political aspirations. The Office of Attorney General in South Dakota is Constitutionally term-limited to two (2) consecutive four (4) year terms, making the assumption of the Office on grounds of altruism a very unwise career move indeed. There have been few Attorney's General in the State of South Dakota who did not aspire to much higher political office and viewed the AG's Office as a mere stepping stone to that end.

Even so, the political ambitions of even the most dedicated Attorney general are not grounds for the enactment of unconstitutional Bills such as Senate Bill 42 of the Eighty-Seventh Legislative Assembly.

And there was certainly no "dangerous conduct" to be addressed at all. There was certainly no need for the advocates of this statute revision to declare that an emergency existed that threatened the public peace, health or safety, requiring immediate passage, enactment and implementation of Senate Bill 42 without the usual period of time for publication, public notice of a new statute and comment thereupon. The only discerible danger was to the United States and South Dakota Constitutions from the hyperbole of the advocates of this statute stating this was an emergency in order to ram through an unconstitutional piece of legislation.

These changes to the South Dakota habeas corpus statute erodes the continually advancing and evolving standards of professionalism of the legal community, nearly doing away with it altogether in the State of South Dakota. These Statute revisions do nothing to advance the legal profession and in fact relaxes the standards of conduct, disclosure and review.

These newly enacted revisions in the South Dakota habeas corpus statute provide an "out" for attorney's to practice unprofessionally, leading to the loss of that case for their client, with the client facing all the negative consequences and repercussions of that loss with no legal recourse to addressthe incompetence or deliberate ineffectiveness of an attorney who has decided not to provide his client with the utmost representation according to the attorney'sabilities. This statute sets up the possibilities of an attorney practising deliberately ineffective assistance of counsel of an unpopular client.

What kind of representation could any of the 9/11 conspirators expect to receive in a South Dakota courtroom today? A strong, spirited, zealous defense because the, likely appointed attorney, would know he was subject to a rigorous review of his performance in a habeas corpus petition or a weak, ineffectual defense because the attorney now protected from any recourse contemplated by the client whom he has so poorly defended, intentionally.

These statute revisions take the legal profession fifty years in reverse as far as standards of conduct are concerned.

An Attorney may once again appear in a courtroom thouroughly intoxicated, pass-out on the habeas corpus Petitioner's table, sleep through the entire evidentiary hearing, doing nothing what-so-ever to represent his client and the petitioner, under Section Four (4) of the current version of SDCL §21-27, will have no recourse to address the incompetence and ineffectiveness of the attorney.

The foregoing, as the court may well be aware, is an actual example of why the defense of Ineffective Assistance of Counsel came about. We, in South Dakota at least, are now headed back in that direction, courtesy of the South Dakota Attorney General and the Eighty-Seventh Legislative Assembly who would rather have the Attorney General write the laws they pass than to do the hard work themselves of formulating, writing, debating and enacting legal, constitutional legislation.

ISSUE V:

SECTION FIVE (5) OF SOUTH DAKOTA CODIFIED LAW §21-27 IS UNCONSTITUTIONAL BECAUSE IT IS AN EXPOST FACTO LAW, PROHIBITED BY ARTICLE 1, SECTION 10 OF THE UNITED STATES CONSTITUTION.

South Dakota Codified Law §21-27-5 states: " A CLAIM PRESENTED IN A SECOND OR SUBSEQUENT HABEAS CORPUS APPLICATION UNDER THIS CHAPTER OR OTHERWISE TO THE COURTS OF THIS STATE BY THE SAME APPLICANT SHALL BE DISMISSED."

There is no time limitation written into the South Dakota habeas corpus statute to limit the reach of a court back in time to dismiss a second or subsequently filed habeas corpus application.

Under this statutory scheme a court may reach back as far as desired into the past to dismiss ANY second or subsequently filed habeas corpus application, regardless what the present disposition may be from that previously filed second or subsequent habeas corpus proceeding.

Conceivably, a court could reach back twenty-five (25) years or more and dismiss a fourth habeas corpus application wherein the applicant was successful in convincing a court that he was not actually guilty of the murder for which he had been duly convicted and sentenced to the South Dakota State Penitentiary under a sentence of life in prison. See: State of South Dakota v Roger Flittie.

Under the current statutory scheme Roger Flittie would still be an innocent man wrongly convicted of his own Mother's murder, sitting in a South Dakota State Penitentiary prison cell because he would never have been able to finally elicit the truth from witnesses in his fourth (4th) habeas corpus Petition, he would not have gotten past the first one under this law of the Attorney Generals creation.

Under the wording of the present incarnation of the South Dakota habeas corpus statute there is nothing to prevent a court from reaching back as far as necessary and dismissing previously adjudicated habeas corpus petitions simply by negating the second or subsequently filed application because it did not fit the current qualifications for filing a second or subsequent application for a writ of habeas corpus.

The wording of SDCL §21-27-5 is a gross violation of the prohibition in the United States Constitution against enactment of Ex PostFacto laws or Bills of Attainder, which this provision of the South Dakota habeas corpus statute could easily be called.

Under the current manifestation of the South Dakota habeas corpus statute the First Circuit Court could reach back and dismiss Roger Flittie's second habeas corpus application, thereby negating the additional filings, find where he is and bring him back to the South Dakota State Penitentiary to continue serving his life sentence.

One absolute truth this petitioner has learned about the law, which astounds most people when they confront it for the first time is that in the law, if something CAN occur, it will, eventually occur. This provision in the South Dakota habeas corpus statute seems far-fetched to be used in the way contemplated but given enough time this scenario will occur. It should not be possible and the framers of the Constitution understood that people would always try to slip bad law into legislative assemblies and this provision of SDCL §21-27 is no exception to that.

Petitioner prays the Court grant his demand for relief and find the current incarnation of the South Dakota habeas corpus statute: SDCL §21-27, unconstitutional under both the United States and South Dakota Constitutions.

(20)

Petitioner prays the Court grant him the stated relief and any additional relief as the Court may deem as just and fair in the interests of justice.

Charles R. Rhines, pro se
P.O. Box 5911
Sioux Falls, South Dakota
57117-5911

FILED
APR 29 2014
Minnehaha County, S.D.
Clerk Circuit Court

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CHARLES RUSSELL RHINES, Plaintiff, vs. DARIN YOUNG, Warden, South Dakota State Penitentiary; Defendant.	5:00-CV-05020-KES ORDER DENYING MOTION TO AMEND THE JUDGMENT AND DENYING MOTION TO STRIKE

Petitioner, Charles Rhines, moves the court to alter or amend its judgment. Respondent, Darin Young, resists the motion. Respondent also moves to strike certain exhibits from the record. Rhines resists the motion. For the following reasons, the court denies the motion to alter or amend the judgment and denies the motion to strike.

BACKGROUND

The procedural history of this case is set forth more fully in the court's February 16, 2016 order granting summary judgment in favor of respondent and denying Rhines's federal habeas petition. *See* Docket 305. The following facts are relevant to the pending motions:

Rhines is a capital inmate at the South Dakota State Penitentiary in Sioux Falls, South Dakota. He was convicted of premeditated first-degree murder for the death of Donnivan Schaeffer and of third-degree burglary of a Dig'Em Donuts Shop in Rapid City, South Dakota. A jury found that Rhines

should be subject to death by lethal injection, and a state circuit court judge imposed the sentence. On February 16, 2016, this court granted respondent's motion for summary judgment and denied Rhines's federal petition for habeas corpus. Docket 305. The court entered judgment in favor of respondent on the same day. Docket 306.

I. Rhines's Rule 59(e) Motion

LEGAL STANDARD

Federal Rule of Civil Procedure 59(e) was adopted to clarify a district court's power to correct its own mistakes within the time period immediately following entry of judgment. *Norman v. Ark. Dep't of Educ.*, 79 F.3d 748, 750 (8th Cir. 1996) (citing *White v. N.H. Dep't of Empl. Sec.*, 455 U.S. 445, 450 (1982)). "Rule 59(e) motions serve the limited function of correcting 'manifest errors of law or fact or to present newly discovered evidence.' " *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006). "Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment." *Id.* The habeas context is no exception to the prohibition on using a Rule 59(e) motion to raise new arguments that could have and should have been made before the court entered judgment. *Bannister v. Armontrout*, 4 F.3d 1434, 1440 (8th Cir. 1993). The Rule "is not intended to routinely give litigants a second bite at the apple, but to afford an opportunity for relief in extraordinary circumstances." *Dale & Selby Superette & Deli v. United States Dep't of Agric.*, 838 F. Supp. 1346, 1348 (D. Minn. 1993); *see also* 11 Charles Alan Wright &

Arthur R. Miller, *Federal Practice & Procedure, Federal Rules of Civil Procedure* § 2810.1 (3d ed.) ("However, reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly"). "A district court has broad discretion in determining whether to grant or deny a motion to alter or amend [a] judgment pursuant to Rule 59(e)[.]" *Metro. St. Louis*, 440 F.3d at 933.

DISCUSSION

A. Conflict of Interest

Rhines's conflict of interest argument is based on his interpretations of the Supreme Court's *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) opinion. On June 5, 2015, Rhines moved to hold his federal habeas proceeding in abeyance.[1] He argued that the stay was necessary so that he could investigate potential ineffective assistance of trial counsel claims premised on the *Martinez* decision. On August 5, 2015, the court concluded that *Martinez* did not apply to him and denied Rhines's motion for several reasons. Docket 272. As one reason for denying Rhines's motion, the court found that Rhines received independent counsel between his initial-review collateral proceeding and his federal habeas proceedings.[2] Thus, there was no conflict of interest that interfered with Rhines's federal habeas counsel.

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[1] The court lifted the earlier stay on Rhines's federal habeas proceeding on February 4, 2014. Docket 224. Respondent's summary judgment motion became ripe for review on November 26, 2014.

[2] The court's August 5, 2015 order traces the lineage of attorneys who have represented Rhines throughout his state and federal proceedings. Docket 272 at 10-12. The court learned during oral argument on respondent's summary judgment motion that two other attorneys–Judith Roberts and Mark Marshall–also represented Rhines during his second state habeas proceeding.

Then on October 21, 2015, and two days prior to the oral argument hearing on respondent's summary judgment motion, Rhines moved for reconsideration of the court's order denying his request for a stay as well as for permission to amend his federal habeas petition.[3] According to Rhines, the court "fail[ed] to consider the unusual factual scenario that exists in Mr. Rhines' case. Mr. Rhines has not simultaneously had the benefit of effective, independent counsel for the entire time that his case has been pending in either state or federal court." Docket 279 at 1. Rhines argued that the court's interpretation of *Martinez* and its analysis concerning the independence of his counsel was wrong. The court concluded, among other things, however, that *Martinez* did not apply and that Rhines was not entitled to relief. Docket 304 at 19-20.

Here, and like Rhines's first motion for reconsideration, Rhines contends that "this Court has failed to recognize the impact of [*Martinez*] and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013)" because several attorneys from the Federal Public Defenders' Office (FPDO) represented Rhines during part of his second state habeas proceeding and in his federal habeas proceeding. Docket 323 at 2; Docket 340 at 1. Rhines contends that this partial overlap creates an impermissible conflict of interest.

The names of those attorneys did not appear on the federal docket.

[3] Rhines also moved for permission to file a supplemental summary judgment brief to include the arguments that Rhines sought to add to his federal habeas petition. The court denied the request.

Capital petitioners such as Rhines have a statutory right to counsel, and the court may upon motion appoint substitute counsel if the "interests of justice" so require. *Martel v. Clair*, 132 S. Ct. 1276, 1286-87 (2012). The FPDO was appointed as co-counsel for Rhines in 2009. Docket 184. Rhines never moved for the FPDO's substitution.[4] Thus, the issue of whether Rhines was entitled to substitute counsel was not raised before this court. While Rhines argued that the partial overlap between the attorneys who represented him during part of his second state habeas proceeding and the conclusion of his federal habeas proceeding created an impermissible conflict of interest, at no time did Rhines move for substitute federal habeas counsel, and the court does not believe an impermissible conflict of interest exists. Docket 272 at 12. The court is satisfied that it did not base its decision on a manifest error of law or fact. And the court has twice analyzed and rejected Rhines's contention that *Martinez* otherwise applies to him. Because Rule 59(e) is not intended to give litigants "a second bite at the apple," it, likewise, is not intended to give them a third. *See Dale & Selby Superette*, 838 F. Supp. at 1348. Thus, Rhines's conflict of interest argument fails.

B. Juror Bias and Impropriety

1. Actual and implied bias of jurors

Rhines contends that two jurors at his trial harbored anti-homosexual biases against him. He argues that those biases infected his sentencing process and caused the denial of his constitutional rights to an impartial jury, to due

[4] Rhines returned to state court for his second state habeas proceeding in 2005.

process, to be free from the arbitrary imposition of the death penalty, and to equal protection of the law.

Rhines did not raise previously his juror bias claim in any state or federal proceeding.[5] According to Rhines, the reason that this issue was not presented earlier is because none of Rhines's previous attorneys interviewed the jurors from his trial. Some of the former jurors were interviewed recently, and Rhines has secured their signed affidavits. Rhines argues that the affidavits are "newly discovered evidence" under Rule 59(e) and asserts that the court should amend its judgment accordingly in light of this new evidence.

Rhines's argument fails, however, for several reasons. First, a motion under Rule 59(e) cannot be used to "tender new legal theories, or raise arguments which should have been offered or raised prior to entry of judgment." *Metro. St. Louis*, 440 F.3d at 933; *see also Bannister*, 4 F.3d at 1440 ("Bannister first raised the claim in the district court in a Rule 59(e) motion. The district court correctly found that the presentation of the claim in a 59(e) motion was the functional equivalent of a second [habeas] petition, and as such was subject to dismissal as abusive"). Thus, Rhines's juror bias claim should have been raised at the outset of his habeas proceeding. *See* Docket 72 (directing Rhines "to include every known constitutional error or deprivation entitling [him] to relief"). Second, a principal purpose of Rule 59(e) is to afford courts the opportunity to correct their mistakes in the period immediately

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[5] Rhines's federal habeas petition asserted that his right to an impartial jury was violated because certain jurors were excluded based on their views of the death penalty. *See* Docket 73.

following the entry of the judgment. *Norman*, 79 F.3d at 750. But Rhines does not explain how the court made a mistake regarding an issue that was never before the court. Third, because Rhines did not raise his juror bias claim during any of his state proceedings, this court cannot consider it. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) ("Before seeking a federal writ of habeas corpus, a state prisoner . . . must 'fairly present' his claim in each appropriate state court"); *Rucker v. Norris*, 563 F.3d 766, 769 (8th Cir. 2009) (agreeing with the district court that an "issue is procedurally barred because it was not 'fairly present[ed]' to the appropriate state court") (alteration in original). And while Rhines argues that each of his prior attorneys–including his initial-review collateral proceeding attorney–failed to develop his juror bias claim, Rhines cannot avail himself of the rule from *Martinez* because Rhines's defaulted claim is not a claim for ineffective assistance of trial counsel. *Martinez*, 132 S. Ct. at 1320.

As to Rhines's newly discovered evidence argument, the court finds that Rule 59(e) is applicable in this context.[6] The Eighth Circuit applies the same standard for Rule 59(e) motions based on newly discovered evidence as it does

[6] In *Holland v. Jackson*, 542 U.S. 649, 652-53 (2004) the Supreme Court held that a habeas petitioner must satisfy § 2254(e)(2) "when a prisoner seeks relief based on new evidence without an evidentiary hearing." But unlike this case, the *Holland* case involved an exhausted claim rather than a new claim. *Id.* at 650. Regardless, relief under § 2254(e)(2) also requires as a prerequisite that the new evidence "could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A)(ii); *Holland*, 542 U.S. at 653.

for Rule 60(b)(2) motions.[7] *Miller v. Baker Implement Co.*, 439 F.3d 407, 414 (8th Cir. 2006). "To prevail on this motion, [the movant is] required to show—among other things—that the evidence proffered with the motion was discovered after the court's order and that he exercised diligence to obtain the evidence before entry of the order." *Anderson v. United States*, 762 F.3d 787, 794 (8th Cir. 2014). The evidence must also be admissible. *Murdock v. United States*, 160 F.2d 358, 362 (8th Cir. 1947).

Here, and regardless of whether the juror affidavits are admissible, Rhines has had roughly twenty years to develop the evidence he now offers. In fact, Rhines faults each of his attorneys for not developing this evidence sooner. *See, e.g.*, Docket 323 at 2 ("Beginning with trial counsel, counsel at every stage of the prior proceedings have failed to interview the jurors"). But Rhines's allegations undermine the foundation of his motion. For Rhines to prevail, he must show that this evidence *could not have* been discovered earlier *despite* having exercised reasonable diligence to obtain it. Rhines, however, asserts that the evidence *should have* been discovered earlier *if* his attorneys were diligent. Rhines's contention is the inverse of what Rule 60(b)(2) is designed to address. He makes no showing that "he had been unable to uncover the newly discovered evidence prior to the court's summary judgment ruling." *Miller*, 439 F.3d at 414. Likewise, the decades-long period of delay

[7] Rule 60(b)(2) provides that litigants may seek relief from a final judgment or order based on "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2).

while the evidence was obtainable indicates a lack of diligence. *Holland v. Jackson*, 542 U.S. 649, 653 (2004) (rejecting an argument to present new evidence because "[i]t is difficult to see, moreover, how respondent could claim due diligence given the 7-year delay"). "Because this evidence was available to [Rhines], it should have been presented prior to the entry of judgment." *Metro. St. Louis*, 440 F.3d at 935.

Finally, to the extent that Rhines's motion could be construed as a motion to present new evidence related to issue IX.D of his federal habeas petition,[8] the court's conclusion is the same. Issue IX.D was adjudicated on the merits in state court. Section 2254(d) and the rule in *Pinholster* limit this court's review of a claim that was adjudicated on the merits in state court to the record that was before the state court. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Rhines's juror affidavit evidence was not presented to or considered by the state court that adjudicated the claim. Rhines cannot use Rule 59(e) to circumvent § 2254(d) and *Pinholster*. *Pitchess v. Davis*, 421 U.S. 482, 489 (1975) (holding that the Federal Rules of Civil Procedure apply in § 2254 proceedings to the extent that they are not inconsistent with any statutory provisions). Consequently, this court cannot consider the evidence. Thus, Rhines's newly discovered evidence argument fails.

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[8] Issue IX.D alleged that Rhines's trial attorneys were ineffective because they failed to exclude evidence of Rhines's homosexuality. *See* Docket 73.

2. Juror consideration of extrinsic evidence and *ex parte* contacts with the trial judge

Rhines argues that the jurors considered extrinsic evidence during the course of his trial. According to Rhines, the jurors at some point discussed a newspaper article that speculated about which of the jurors would serve as alternates. Rhines also argues that the jurors had improper *ex parte* contact with the trial judge when the judge allegedly told the jurors "that he would not refer to them by name and that the defense could ask them to affirm that the verdict as read was true." Docket 323 at 7. Rhines contends that these incidents violated his Sixth and Fourteenth Amendment rights.

This claim, like Rhines's juror bias claim, was not raised previously in any state or federal proceeding. For the reasons stated more fully in section I.B.1, *supra*, the court denies Rhines's motion to raise the claim for the first time now and denies Rhines's motion to present new evidence in support of the claim.

3. Whether one of the jurors did not live in Pennington County

Rhines's trial took place in Pennington County, South Dakota. Rhines argues that one of the jurors actually lived in Meade County, rather than Pennington County, and that the juror was thus ineligible to serve at Rhines's trial. Rhines argues that this error violated his Sixth and Fourteenth Amendment rights.

This claim, like Rhines's preceding arguments, was not raised previously in any state or federal proceeding. For the reasons stated more fully in section

I.B.1, *supra*, the court denies Rhines's motion to raise the claim for the first time now and denies Rhines's motion to present new evidence in support of the claim.

C. Ineffective Assistance of Trial Counsel Claims

Rhines moves for reconsideration of the court's adjudication of issues IX.A, IX.B, and IX.I of his federal habeas petition. Those three issues all concerned whether Rhines's trial counsel's investigation and presentation of mitigating evidence constituted ineffective assistance of counsel. Each claim was considered and rejected in state court. This court concluded that Rhines was not entitled to relief on any of his claims. *See* Docket 305 at 82-101.

1. Appropriate standard of review

Rhines challenges the legal standards used to adjudicate his ineffective assistance of trial counsel claims. Ineffective assistance claims are governed generally by *Strickland v. Washington*, 466 U.S. 668 (1984). The state court cited and analyzed the *Strickland* test. Docket 204-1 at 21 (explaining the so-called "deficient performance" and "prejudice" prongs). The court applied that test using the facts of the *Strickland* opinion and several other Supreme Court decisions involving attorneys' mitigation efforts for comparative purposes. *See id.* at 19 (citing *Burger v. Kemp*, 483 U.S. 776 (1987) and *Darden v. Wainwright*, 477 U.S. 168 (1986)). The state court determined that Rhines failed to show that his attorneys' performance was deficient and, therefore, it concluded that Rhines was not entitled to relief.

This court set out in its order granting summary judgment in favor of respondent the applicable standard of review in Rhines's case. *See* Docket 305 at 8-11. That standard is established by § 2254. The court cannot grant relief unless a state court's adjudication of a claim is "contrary to, or involved an unreasonable application of, clearly established Federal law" or unless the decision is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). Also, "a determination of a factual issue made by a State court shall be presumed to be correct," and the habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). The Supreme Court has elaborated on the application of those provisions in numerous opinions, and this court's order set forth those principles. Docket 305 at 8-11.

The court also set forth the more specific standards that apply when a state court adjudicates an ineffective assistance claim. *Id.* at 82. The court held:

> In the context of § 2254, however, Rhines must overcome an additional hurdle. This court's task is to determine if the state court's decision involved an objectively unreasonable application of the *Strickland* standard. *See Knowles* [*v. Mirzayance*,] 556 U.S. [111,] 122 [(2009)]. Because the *Strickland* standard itself is deferential to counsel's performance, and because this court's review of the state court's decision under § 2254 is also deferential, the standard of review applied to Rhines's ineffective assistance claims is 'doubly deferential.' *Id.* at 123. Consequently, 'the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.' *Harrington v. Richter*, 562 U.S. 86, 105 (2011); *see also Pinholster*, 131 S. Ct. at 1403

> (noting the petitioner must demonstrate that the state court's determination regarding both prongs was unreasonable to be entitled to relief).

Id. This court concluded that the state court's resolution of Rhines's ineffective assistance claims was reasonable and that Rhines was not entitled to relief.

Here, Rhines argues that the state court's interpretation of the *Strickland* test was wrong. He argues that the state court's appraisal of the "deficient performance" prong was not exacting enough of counsel's performance. Rhines also argues that the state court's description of the "prejudice" prong was incomplete. And Rhines argues that this court's review of the state court's decision was based on an improper standard.

Rhines, however, already received an opportunity to challenge–and he did challenge–the state court's analysis. *See* Docket 232 at 80-96 (Rhines's summary judgment brief). Rule 59 is not a vehicle for re-litigating old matters or advancing arguments that should have been made before. *Metro. St. Louis*, 440 F.3d at 933. Rhines cites in support of his "deficient performance" argument the Supreme Court's decisions in *Strickland*, *Wiggins v. Smith*, 539 U.S. 510 (2003), *Williams v. Taylor*, 529 U.S. 362 (2000), and *Rompilla v. Beard*, 545 U.S. 374 (2005). This court previously considered and rejected the same argument Rhines raises now. The court stated:

> While Rhines argues that *Williams* and *Wiggens* were controlling and dispositive, the Supreme Court has explained that *Strickland* is the appropriate standard that courts should apply to resolve ineffective assistance claims. *Pinholster*, 131 S. Ct. at 1406-07 (rejecting argument that *Williams*, *Wiggins*, and *Rompilla v. Beard*, 545 U.S. 374 (2005) impose a duty to investigate in every case). Likewise, the Court cautioned against 'attributing strict rules to

this Court's recent case law.' *Id.* at 1408.

Docket 305 at 97. The court is satisfied that it did not make a manifest error concerning this issue.

As to Rhines's prejudice argument, the state court described the prejudice prong as requiring a showing of "actual prejudice." Docket 204-1 at 21. Rhines argues that the state court should have included the Supreme Court's further explanation that prejudice requires "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694. A defendant must satisfy both *Strickland* prongs, however, and a court can adjudicate them in either order if the defendant fails to establish one. *Id.* at 697. The state court never reached the prejudice inquiry because it concluded that Rhines's attorneys rendered reasonably competent assistance. This court agreed with the state court. Thus, even assuming the state court's description of the prejudice prong was objectively unreasonable–which it was not–the error would not affect the outcome of Rhines's case. The court is satisfied that it did not make a manifest error concerning this issue.

Regarding Rhines's argument that this court applied the incorrect standard of review to the state court's decision, Rhines does not identify the standard the court should have applied. Rhines cites primarily to various cases involving the review of ineffective assistance claims in the first instance. The Supreme Court has explained, however, that the "doubly deferential" standard

under § 2254(d) applies when a federal court reviews a state court's adjudication of an ineffective assistance claim on the merits. The court finds no manifest error with its decision. Thus, Rhines is not entitled to relief.

2. Mitigation investigation

The bulk of Rhines's motion contends that his trial attorneys failed to properly investigate and present mitigating evidence. His arguments can be grouped broadly into five areas where, according to Rhines, his attorneys should have investigated further: (1) Rhines's family; (2) Rhines's military history; (3) Rhines's jail and criminal records; (4) Rhines's mental health; and (5) Rhines's family history of exposure to neurotoxins.

Each area highlighted by Rhines, with the exception of the neurotoxins issue, was investigated by his trial attorneys. *See* Docket 204-1 at 16-19 (noting "Rhines'[s] counsel did investigate possible mitigation evidence. They investigated by talking to Rhines, his family and friends, reviewing his military service records, his schooling, employment history, [and] psychiatric and psychological examinations and found that there was very little mitigating evidence to be found or presented."). Like Rhines's standard of review argument, Rhines had the opportunity to contest–and did contest–the state court's determinations concerning his attorneys' efforts and their strategy. Docket 232 at 80-93. This court rejected those arguments and concluded that Rhines was not entitled to habeas relief. Here, Rhines devotes many pages of his reconsideration brief to re-litigating his mitigation claims. But Rhines cannot use Rule 59(e) to re-litigate old matters or advance new arguments that

should have been made before. *Metro. St. Louis*, 440 F.3d at 933. And bookending those arguments with conclusory language that this court's decision was unreasonable is an insufficient basis to justify relief. The court finds no manifest error with its decision. Thus, Rhines's claims will not be revisited.

The court will, however, address several specific issues raised in Rhines's motion. For example, Rhines cites a number of affidavits signed by individuals who, like the jurors, were also recently interviewed. *See, e.g.*, Docket 323-8 (signed March 15, 2016); Docket 323-9 (signed March 11, 2016); Docket 323-10 (signed March 15, 2016). Rhines references these affidavits in support of his arguments that the court's decision was erroneous. Rhines's ineffective assistance of counsel claims were each adjudicated on the merits in state court. Rhines has not shown that these contemporary affidavits, or similar evidence containing the same substance, were ever presented to or considered by the state court. Thus, this court cannot consider the affidavits. *Pinholster*, 563 U.S. at 181.

As for Rhines's neurotoxins argument, it is a theory that Rhines advanced in his October 21, 2015 motion to amend his federal habeas petition. *See* Docket 281 at 3-5. Rhines asserted that his trial attorneys as part of their mitigation efforts should have investigated whether Rhines was exposed to pesticides and other toxins while he was growing up in McLaughlin, South Dakota. Rhines argued that that exposure could have caused him to develop various neurological disorders. He claimed that the failure of his trial attorneys

to pursue this area of inquiry suggested that their mitigation efforts were deficient. And Rhines moved to buttress his argument with affidavits from three experts who reviewed Rhines's case file and records. *See* Docket 281-1, -2, and -3. Those experts made their own findings and conclusions concerning Rhines, his background, his mental health, and the effectiveness of Rhines's trial counsel's mitigation efforts.

This court denied Rhines's motion to amend his federal habeas petition to include his new theory and evidence. Rhines's ineffective assistance claims were each adjudicated on the merits in state court. This court held that the rule in *Pinholster* prevented Rhines from "bolster[ing] his exhausted ineffective assistance claims with new evidence that was not presented to or considered by the state court." Docket 304 at 18. The court, for similar reasons, denies Rhines's motion to present these arguments and this evidence as part of his reconsideration motion.

In sum, Rhines has not identified any manifest error with the court's judgment concerning his ineffective assistance claims. Thus, Rhines is not entitled to relief.

D. Jury Note and Juror Confusion

Rhines moves for reconsideration of the court's adjudication of Issue IX.E of his federal habeas petition. Issue IX.E alleged that Rhines's trial attorneys were ineffective due to the way they handled a note from the jurors. The state court denied Rhines's claim, and this court concluded that Rhines was not entitled to relief. Docket 305 at 106-08.

Here, Rhines attempts to re-litigate Issue IX.E. He invokes arguments that either were made or should have been made before and also cites evidence that was not presented to the state court that adjudicated his claim. Rhines's argument suffers the same infirmities as those discussed in sections I.A-C, *supra*. The court is satisfied that its decision did not involve any manifest error. Thus, Rhines's ineffective assistance claim will not be revisited.

Rhines has failed to justify altering or amending the court's judgment. Thus, Rhines's Rule 59(e) motion is denied.

II. Respondent's Motion to Strike

Respondent moves the court to strike various exhibits from the court's docket. These exhibits consist of affidavits and other documents that the court determined that it cannot consider because, for example, Rhines did not present the evidence to any state court for consideration. *Cf. Pinholster*, 563 U.S. at 181. Rhines, nonetheless, cited to some of those same exhibits in his Rule 59(e) motion, and respondent asserts that Rhines may continue to do so on appeal. Thus, respondent asks the court to excise the exhibits from the docket.

The court will not strike the exhibits. Respondent has not shown that he will be prejudiced by the continued presence of the exhibits on the court's docket. Thus, the motion is denied.

CONCLUSION

Rhines has not shown any manifest error with the court's decision. Thus, he is not entitled to relief. Respondent has not shown that the various exhibits

should be struck from the court's docket. Therefore, the exhibits will remain. Thus, it is

ORDERED that Rhines's motion to alter or amend the judgment (Docket 323) is denied.

IT IS FURTHER ORDERED that respondent's motion to strike (Docket 324) is denied.

Dated July 5, 2016.

BY THE COURT:

/s/Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

KEITH THARPE, Petitioner, vs. WARDEN, Georgia Diagnostic and Classification Prison, Respondent.	CIVIL ACTION NO. 5:10-CV-433 (CAR)

ORDER

Petitioner Keith Tharpe moves this Court to reopen his 28 U.S.C. § 2254 action pursuant to Fed. R. Civ. P. 60(b)(6). ECF No. 77. For reasons discussed below, the Court denies his motion.[1]

I. BACKGROUND AND PROCEDURAL HISTORY

Tharpe's wife left him and moved in with her parents. *Tharpe v. State*, 262 Ga. 110, 110-11, 416 S.E.2d 78, 79 (1992). Following various threats of violence, Tharpe was ordered not to have any contact with her or her family. *Id.* Instead of obeying the order, he intercepted his wife and sister-in-law on the morning of September 25, 1990 when they were on their way to work. *Id.* He forced the women to stop their car and, armed with a shotgun, escorted his sister-in-law to the rear of the car where he shot her. *Id.* After rolling her into a ditch, he reloaded the shotgun, and shot her again. *Id.*

[1] Also pending is Tharpe's motion for leave to file excess pages. ECF No. 94. This motion is **GRANTED**.

Tharpe then drove away with his wife and raped her. *Id.* When he took his wife to a credit union to make her obtain money, she called the police. *Id.* Tharpe was arrested and charged with malice murder and two counts of kidnapping with bodily injury. *Id.* Following a nine-day trial, he was convicted on all counts and sentenced to death for the murder of his sister-in-law. *Id.*

After his motion for new trial was denied, the Georgia Supreme Court affirmed Tharpe's conviction and sentence on March 17, 1992. *Id.* at 110, 416 S.E.2d at 79. Tharpe did not raise any issue of juror bias in his motion for new trial or on direct appeal. The United States Supreme Court denied certiorari on October 19, 1992. ECF No. 13-1.

Tharpe filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia on March 17, 1993, amended the Petition on December 31, 1997, and amended it again on January 21, 1998. ECF Nos. 13-2; 13-8; 13-10. In claim ten of his December 31, 1997 amended Petition, Tharpe argued that "improper racial animus . . . infected the deliberations of the jury." ECF No. 13-8 at 16.

The state habeas court conducted evidentiary hearings on May 28, 1998, August 24, 1998, December 11, 1998, December 23, 1998, and July 30, 2007. ECF Nos. 14-1 to 14-7; 15-1 to 15-2; 15-13 to 15-17; 16-1 to 16-2; 17-1 to 18-11. At the May 28, 1998 hearing, Tharpe tendered affidavits from jurors Margaret Bonner, ECF No. 14-3 at 4; Barney Gattie, ECF No. 14-3 at 7; and James Stinson, ECF No. 14-3 at 36. Over two days in

October 1998, the state habeas court presided while the parties deposed eleven of the jurors who still resided in Georgia:[2] Barney Gattie, Lucille Long, Charles Morrison, Sr., James Stinson, Jr., Joe Woodard, Jack Simmons, Margaret Bonner, Mary Graham, Ernest Ammons, Martha Sandefur, and Polly Herndon. ECF Nos. 15-6; 15-7; 15-8. At the December 11, 1998 hearing, Tharpe tendered a juror affidavit from the twelfth juror, Tracy Simmons, as well as affidavits from Georgia Resource Center employees regarding their interactions with juror Barney Gattie. ECF No. 15-16 at 7, 10, 17. On that same date, Respondent tendered an affidavit from Barney Gattie. ECF No. 15-17 at 13.

The state habeas denied habeas relief in an order filed December 4, 2008. ECF No. 19-10. The court found that the jurors' testimony, including their affidavits and depositions, were inadmissible. ECF No. 19-10 at 99. "Further, even if [Tharpe] had admissible evidence to support his claim of juror misconduct," the juror misconduct claim was procedurally defaulted because Tharpe failed to raise it during his motion for new trial or direct appeal. ECF No. 19-10 at 5, 102. Tharpe alleged ineffective assistance of counsel as cause to overcome the default. ECF No. 13-8 at 17 n.10. The state habeas court determined that Tharpe "failed to establish the requisite deficiency or prejudice." ECF No. 19-10 at 102.

Tharpe filed an Application for Certificate of Probable Cause to Appeal ("CPC

[2] One juror, Tracy Simmons, no longer lived in Georgia, and he was not deposed. ECF No. 15-8 at 7.

Application") in the Georgia Supreme Court, which was summarily denied. ECF Nos. 19-12; 19-15.

On November 8, 2010, Tharpe filed in this Court his Petition for Writ of Habeas Corpus by a Person in State Custody, which he later amended. ECF Nos. 1; 25. In claim three of his amended habeas petition, Tharpe alleged that improper racial attitudes infected the jury deliberations. ECF No. 25 at 19-20. In his answer to the amended petition, Respondent alleged this portion of claim three was procedurally defaulted.[3] ECF No. 27 at 13. After the parties briefed exhaustion and procedural default, ECF Nos. 29; 30; 34, the Court found that Tharpe's various claims of juror misconduct were procedurally defaulted, and that Tharpe failed to show cause and prejudice or a fundamental miscarriage of justice to overcome default. ECF No. 37 at 8-9.

After the parties briefed the merits of remaining claims, the Court denied

[3] In a footnote in his brief, Respondent for the first time argues that Tharpe "did not raise this issue in his CPC [A]pplication before the Georgia Supreme Court" and the claim is, therefore, unexhausted. ECF No. 89 at 7 n.2. In prior proceedings before this Court, Respondent never argued the claim was unexhausted. Instead, he argued that it was "properly found by the state habeas corpus court to be procedurally defaulted." ECF No. 27 at 13. Even now, beyond the mere mention of exhaustion in a footnote, Respondent does not argue that Tharpe's juror bias claim is unexhausted. Instead, he still clearly argues that the "claim remains procedurally defaulted." ECF No. 89 at 16. This Court has already ruled the claim is procedurally defaulted. ECF No. 37 at 8-9. Consistent with the previous litigation in this case and with the arguments Respondent makes in his current brief, ECF No. 89 at 16-29, this Court treats Tharpe's juror bias claim as procedurally defaulted. *See Hills v. Washington*, 441 F.3d 1374, 1376-77 (11th Cir. 2006)

Tharpe's habeas corpus petition and granted a certificate of appealability ("COA") on one claim—"Whether the state habeas court's determination that Tharpe's trial counsel was not ineffective in the investigation and presentation of mitigation evidence was based on an unreasonable determination of the facts, or was contrary to, or involved an unreasonable application of, clearly established federal law." ECF No. 65 at 57. Tharpe moved to have the COA expanded, but he did not request a COA regarding any of his juror misconduct claims. *Tharpe v. Warden*, No. 14-12464 (11th Cir. June 20, 2014). The Eleventh Circuit denied relief on August 25, 2016. ECF No. 75. Tharpe filed a petition for writ of certiorari in the United Stated Supreme Court, which was denied on June 26, 2017. ECF No. 82.

II. ANALYSIS

Tharpe argues the Court should exercise its discretion to reopen his federal habeas proceedings under Fed. R. Civ. P. 60(b)(6) to permit him to prove that his death sentence was fatally tainted by the racist views of juror Barney Gattie, a claim the state court and this Court previously found to be procedurally defaulted. ECF No. 77 at 15. Rule 60(b)(6) permits reopening a case for "any . . . reason justifying relief from the operation of the judgment." But, "relief under Rule 60(b)(6) is available only in 'extraordinary circumstances.'" *Buck v. Davis*, 137 S. Ct. 759, 777 (2017) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)). "Such circumstances . . . rarely occur in the habeas context." *Gonzalez*, 545 U.S. at 535.

Tharpe contends his case should be reopened "due to extraordinary circumstances triggered by recent Supreme Court decisions, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), and *Buck v. Davis*, 137 S. Ct. 759 (2017)." ECF No. 77 at 1. But, "'[s]omething more than a 'mere' change in the law is necessary . . . to provide the grounds for Rule 60(b)(6) relief.'" *Booker v. Singletary*, 90 F.3d 440, 442 (11th Cir. 1996) (quoting *Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir. 1987)); *Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014) (citing *Gonzalez*, 545 U.S. at 535-38) (finding that "a change in decisional law is insufficient to create the 'extraordinary circumstance' necessary to invoke Rule 60(b)(6)"); *Howell v. Sec'y Fla. Dep't of Corr.*, 730 F.3d 1257, 1260-61 (11th Cir. 2013) (same). The movant bears the burden of showing not only a change in the law, but also "'that the circumstances are sufficiently extraordinary to warrant relief.'" *Booker*, 90 F.3d at 442 (quoting *Ritter*, 811 F.2d at 1401).

Tharpe fails for two reasons to establish the extraordinary circumstances necessary to reopen his case. First, Tharpe's request for the Court to review his juror bias claim in light of *Pena-Rodriguez* is barred by *Teague v. Lane*, 489 U.S. 288 (1989). Second, this claim is procedurally defaulted and the state habeas court already reviewed Gattie's statement when it concluded Tharpe failed to establish cause and prejudice to overcome the default.

A. The new rule announced in *Pena-Rodriguez* does not apply to cases on collateral review.

On March 6, 2017, the Supreme Court held:

> [W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Pena-Rodriguez, 137 S. Ct. at 869. The issue is whether this recently-decided rule applies to cases on collateral review.

"Federal habeas corpus serves to ensure that state convictions comport with the federal law that was established at the time [a] petitioner's conviction became final." *Sawyer v. Smith*, 497 U.S. 227, 239 (1990) (emphasis omitted). In *Teague*, the Court held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310-11.

"To apply *Teague*, a federal court engages in a three-step process." *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997). The first step is to determine when the defendant's conviction became final. *Id.* Tharpe's conviction was final on October 19, 1992, the date on which the Supreme Court denied certiorari review. ECF No. 13-1; *Bond v. Moore*, 309 F.3d 770, 773 (11th Cir. 2002) (stating that a conviction is final on the date the Supreme Court denies certiorari).

Second, the Court "must surve[y] the legal landscape as it then existed and determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." *Lambrix*, 520 U.S. at 527

(internal quotation marks and citations omitted). In other words, was the rule announced in *Pena-Rodriguez* "*dictated* by then-existing precedent"? *Id.* (emphasis in original).

Tharpe argues it was. ECF No. 93 at 5. Although Tharpe cites two Supreme Court cases that existed at the time his conviction became final, neither addressed whether the Sixth Amendment allows impeachment of a jury verdict. *See Turner v. Murray*, 476 U.S. 28, 36-37 (1986) (holding that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issues of racial bias"); *Rose v. Mitchell*, 443 U.S. 545, 559 (1979) (reaffirming that "discrimination in the selection of the grand jury remains a valid ground for setting aside a criminal conviction," but holding that the defendant failed to "make out a prima facie case of discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment with regard to the selection of the grand jury foreman").

Tharpe also argues that "numerous lower courts have already considered claims under *Pena-Rodriguez* in habeas proceedings." ECF No. 93 at 6. But, none of these courts found *Pena-Rodriguez* applicable; none addressed retroactivity; and in only one case[4] did the respondent raise *Teague*. *See Berardi v. Paramo*, No. 15-55881, 2017 U.S. App. LEXIS 13638, at *2 (9th Cir. July 27, 2017) (no mention of retroactivity but

[4] This one case is *Sears v. Chatman*, No. 1:10-cv-1983-WSD, 2017 WL 2644478 (N.D. Ga. June 20, 2017), which is discussed below.

upholding the state court's denial of relief for Petitioner's juror bias claim); *Young v. Davis*, 860 F.3d 318, 333-34 (5th Cir. 2017) (no mention of retroactively but declining to extend *Pena-Rodriguez* and consider juror affidavits not presented to the state courts); *Sanders v. Davis*, No. 1:92-cv-05471-LJO-SAB, 2017 U.S. Dist. LEXIS 92501, at *215 (E.D. Cal. June 15, 2017) (no mention of retroactivity but finding that juror statements on the prejudicial effects of jury instructions were not admissible); *Montes v. Macomber*, No. 15-cv-2377-H-BGS, 2017 U.S. Dist. LEXIS 54713, at *25 n.3 (S.D. Cal. Apr. 10, 2017) (no mention of retroactivity but explaining that "intrinsic jury processes will not be examined on appeal and cannot support reversal"); *Anderson v. Kelley*, No. 5:12-cv-279 (DPM), 2017 U.S. Dist. LEXIS 48268, at *77 (E.D. Ark. Mar. 28, 2017) (no mention of retroactivity but finding that evidence of the jurors' thought processes could not be considered); *Cutro v. Stirling*, No. 1:16-cv-2048-JFA, 2017 U.S. Dist. LEXIS 42903, at *56 n.26 (D.S.C. Mar. 23, 2017) (no mention of retroactivity but finding that juror affidavits should not be considered); *Richardson v. Kornegay*, No. 5:16-hc-02115-FL, 2017 U.S. Dist. LEXIS 43080, at *25-29 (E.D.N.C. Mar. 24, 2017) (no mention of retroactivity but finding juror statements inadmissible).[5] Thus, these cases do not support Tharpe's argument

[5] In *Richardson*, a review of the docket located on the Federal Judiciary's Public Access to Court Electronic Records ("PACER") shows that neither the petitioner nor the respondent cited *Pena-Rodriguez* prior to the court's March 24, 2017 order. *Richardson v. Kornegay*, 5:16-hc-02115-FL, ECF Nos. 7, 12, 20, 21, 22, 23, 24, 28, 29, 31 (E.D.N.C.). In its order, the court distinguished *Pena-Rodriguez*, finding that the juror statements offered in *Richardson* did not indicate any juror relied on racial animus to convict the defendant and, therefore, the statements could not be used to impeach the verdict. *Richardson v.*

that *Pena-Rodriguez* applies to cases on collateral review. These courts simply did not address the issue of retroactivity.

Tharpe argues that "[n]otably, in a capital case in the Northern District of Georgia, the district court declined to accept the state's retroactivity argument and denied the claim on the merits." ECF No. 93 at 7 (citing *Sears v. Chatman*, No. 1:10-cv-1983-WSD, 2017 U.S. Dist. LEXIS 94475, at *10 (N.D. Ga. June 20, 2017)).[6] A review of the docket in that case, however, reveals that the district court specifically declined to reach the respondent's *Teague* argument. *Sears v. Chatman*, 1:10-cv-1983, ECF No. 49 at 15 n.8 (N.D. Ga. May 9, 2016). The court ultimately determined that the petitioner did not show the Georgia Supreme Court's denial of his juror coercion claim was based on unreasonable facts or "was contrary to, or involved an unreasonable application of **clearly established Federal law.**" *Sears v. Chatman*, No. 1:10-cv-1983-WSD, 2017 WL 2644478, at *17 (N.D. Ga. June 20, 2017) (emphasis added).

Kornegay, No. 5:16-hc-02115-FL, 2017 U.S. Dist. LEXIS 43080, at *29 (E.D.N.C. Mar. 24, 2017). Relying on *Pena-Rodriguez*, the petitioner recently filed a motion to alter or amend judgment. *Richardson v. Kornegay*, 5:16-hc-02115-FL, ECF No. 35 (E.D.N.C. Apr. 4, 2017). In response, the respondent argued that "*Pena-Rodriguez* prescribed a new constitutional rule of criminal procedure" and, therefore, cannot "apply retroactively to [p]etitioner's case under *Teague* . . . ." *Richardson v. Kornegay*, 5:16-hc-02115-FL, ECF No. 36 (E.D.N.C. Apr. 4, 2017). The court has not yet ruled on the petitioner's motion to alter or amend judgment.

[6] Tharpe provided the LEXIS citation for this order. For reasons unknown, LEXIS shows "[t]he requested document is not available at this time . . . ." Therefore, the Court has located the order on Westlaw and uses the following citation: *Sears v. Chatman*, No. 1:10-cv-1983-WSD, 2017 WL 2644478 (N.D. Ga. June 20, 2017). For background, the Court has reviewed the docket located on PACER and cites to that when necessary.

"'[C]learly established Federal law'" means only the holdings of the Supreme Court's cases in existence at the time the Georgia Supreme Court decided the claim. *Id.* at *8 (quoting 28 U.S.C. § 2254(d)(1)). *Pena-Rodriguez* was not in existence at the time the Georgia Supreme Court denied Sears's juror coercion claim and the district court did not apply *Pena-Rodriguez* to the claim. Therefore, neither *Sears*, nor any of the other cases cited by Tharpe, supports his argument that the rule announced in *Pena-Rodriguez* was dictated by existing precedent and, therefore, applies retroactively.

Contrary to Tharpe's arguments, this Court finds that the rule announced in *Pena-Rodriguez* was not dictated by clearly established Supreme Court law. Instead, *Pena-Rodriguez* was a clear break with long-standing precedent. See *Tanner v. United States*, 483 U.S. 107, 117 (1987) (citations omitted) (stating that "[b]y the beginning of this century, if not earlier, the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict"). As the Court pointed out in *Pena-Rodriguez*, "[a]t common law jurors were forbidden to impeach their verdict, either by affidavit or live testimony." 137 S. Ct. at 863 (citing *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785)). This broad no-impeachment rule was endorsed by the Supreme Court in *McDonald v. Pless*, 238 U.S. 264, 268 (1915) and by Congress in 1975 when it adopted the Federal Rules of Evidence, specifically Rule 606(b). *Pena-Rodriguez*, 137 S. Ct. at 864. Also, "[i]n the great majority of jurisdictions, strong no-impeachment rules continue to be viewed as both promoting

the finality of verdicts and insulating the jury from outside influences.'" *Id.* at 878 (Alito, J., dissenting) (citations omitted).

Prior to *Pena-Rodriguez*, the Supreme Court addressed whether the Constitution mandates an exception to the no-impeachment rule only twice. *Id.* at 866. In both cases, the Court endorsed the rule and refused to find exceptions. *Id.* at 866-67 (citing *Tanner*, 483 U.S. at 125; *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014)). Thus, *Pena-Rodriguez* was a "startling development" in that "for the first time, the Court create[d] a constitutional exception to no-impeachment rules." *Id.* at 875 (Alito, J., dissenting).

Because *Pena-Rodriguez* announced a new rule, the Court must take the third step and determine "whether that new rule nonetheless falls within one of the two exceptions to [the] nonretroactivity doctrine." *Lambrix*, 520 U.S. at 539. Under the first exception, the inquiry is whether the new rule is substantive or procedural. *Schiro v. Summerlin*, 542 U.S. 348, 352 (2004). Substantive rules apply retroactively, while procedural rules do not. *Id.* at 351. Tharpe argues that the rule announced in *Pena-Rodriguez* is a substantive rule of law. ECF No. 93 at 4-5. To support this position, Tharpe cites cases that hold some state evidentiary rules are substantive versus procedural and, therefore, apply in diversity actions. *Bradford v. Bruno, Inc.*, 94 F.3d 621, 622 (11th Cir. 1996) (only state law of substantive, as opposed to procedural, nature is applicable in diversity cases); *Ungerleider v. Gordon*, 214 F.3d 1279, 1282 (11th Cir. 2000) (finding that the parole

evidence "rule is one of substantive law, not evidence, so it is applied by federal courts sitting in diversity"). But, for retroactivity purposes, a rule is considered substantive only if it "narrow[s] the scope of a criminal statute by interpreting its terms" or "place[s] particular conduct or persons covered by the statute beyond the State's power to punish." *Summerlin*, 542 U.S. at 351-52; *Lambrix*, 520 U.S. at 539 (internal quotation marks and citations omitted). "In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural." *Summerlin*, 542 U.S. at 353 (emphasis in original). *Pena-Rodriguez* "'neither decriminalize[d] a class of conduct nor prohibit[ed] the imposition of capital punishment on a particular class of persons.'" *Lambrix*, 520 U.S. at 539 (citations omitted). Instead, it altered the application of no-impeachment rules. The ruling in *Pena-Rodriguez*, therefore, is properly classified as procedural because it dictates when courts must consider juror testimony to impeach a verdict.

"The second exception is for watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Lambrix*, 520 U.S. at 539 (internal quotation marks and citations omitted). "That a new procedural rule is fundamental in some abstract sense is not enough; the rule must be one without which the likelihood of an accurate conviction is *seriously* diminished. This class of rules is extremely narrow, and it is unlikely that any . . . ha[s] yet to emerge." *Summerlin*, 542 U.S. at 352 (emphasis in original) (internal quotation marks and citations omitted). The

Supreme Court has "observed . . . that the paradigmatic example of a watershed rule of criminal procedure is the requirement that counsel be provided in all criminal trials for serious offenses." *Gray v. Netherlands*, 518 U.S. 152, 170 (1996) (citations omitted). Tharpe does not argue, and the Court cannot find, that the rule announced in *Pena-Rodriguez* is a watershed rule akin to *Gideon's* rule establishing the right to counsel in all felony cases.

Consequently, the Court finds that *Pena-Rodriguez* "announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Summerlin*, 542 U.S. at 358. Because consideration of *Pena Rodriguez* in Tharpe's habeas action is precluded under *Teague*, the Court must decline to grant his Rule 60(b)(6) motion to reopen. *See Buck*, 137 S. Ct. at 780 (noting that 60(b)(6) relief is inappropriate if movant is not entitled to benefit of the new rule he seeks to invoke).[7]

B. Pretermitting *Teague*, Tharpe's juror misconduct claim is procedurally barred.

As explained above, in *Pena-Rodriguez* the Court held that the Sixth Amendment requires the no-impeachment rule to "give way" if a juror makes a clear statement that he relied on racial bias to convict a defendant. 137 S. Ct. at 869. Tharpe states that

[7] While Tharpe relies on *Buck* in his Rule 60(b)(6) motion, nothing in *Buck* alters the application of *Teague* in this case. The Court agrees with Tharpe that in *Buck*, the Supreme Court did not decide whether *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013) apply retroactively. *Buck*, 137 S. Ct. at 780. This is because the Respondent waived the argument by failing to raise it in a timely manner. *Id.* In this case, Respondent has raised *Teague* in a timely manner and the Court finds that *Teague* bars application of *Pena-Rodriguez*.

"*Pena-Rodriguez* . . . establishes that this Court erred in failing to reach the merits of Mr. Tharpe's claim." ECF No. 77 at 15. It does not. This Court did not fail to reach the merits of Tharpe's juror misconduct claim because Georgia's no-impeachment rule prohibits the admission of juror testimony to impeach a verdict. Instead, the Court did not address the merits of the claim because Tharpe failed to raise the claim on direct appeal and, therefore, the claim was procedurally defaulted. *See Black v. Hardin*, 255 Ga. 239, 239, 336 S.E.2d 754, 755 (1985).

In *Pena-Rodriguez*, trial counsel, during the motion for new trial and on direct appeal, presented two juror affidavits that showed a third juror expressed numerous racist comments during jury deliberations. 137 S. Ct. at 862. The trial court, Colorado Court of Appeals, and Colorado Supreme Court all held that the courts could not consider the affidavits because deliberations that occur among the jurors are protected from inquiry under Colorado's no-impeachment rule. *Id.* Here, Tharpe failed to raise the juror bias claim during his motion for new trial or on direct appeal. Tharpe did not raise the issue until his state habeas proceedings.

At the May 28, 1998 state habeas evidentiary hearing, Tharpe tendered affidavits from several jurors, including Barney Gattie. ECF No. 14-3 at 4-6, 7-8, and 36-38. In his affidavit, Gattie stated:

> I . . . knew the girl who was killed, Mrs. Freeman. Her husband and his family have lived in Jones [C]ounty a long time. The Freemans are what I would call a nice Black family. In my experience I have observed that there are two types of black people. 1. Black folks and 2. Niggers. For

> example, some of them who hang around our little store act up and carry on. I tell them, "nigger, you better straighten up or get out of here fast." My wife tells me I am going to be shot by one of them one day if I don't quit saying that. I am an upfront, plainspoken man, though. Like I said, the Freemans were nice black folks. If they had been the type Tharpe is, then picking between life or death for Tharpe wouldn't have mattered so much. My feeling is, what would be the difference. As it was, because I knew the victim and her husband's family and knew them all to be good black folks, I felt Tharpe, who wasn't in the "good" black folks category in my book, should get the electric chair for what he did. Some of the jurors voted for death because they felt that Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason. The others wanted blacks to know they weren't going to get away with killing each other. After studying the Bible, I have wondered if black people even have souls. Integration started in Genesis. I think they were wrong. For example, look at O.J. Simpson. That white woman wouldn't have been killed if she hadn't have married that black man.

ECF No. 14-3 at 7.

Subsequently, the state habeas court allowed the parties to depose eleven of the juror who stilled lived in Georgia. (ECF Nos. 15-6 at 30). The depositions were taken over a two-day period (October 1 and 2, 1998) in the presence of the court. ECF Nos. 15-6; 15-7; 15-8. At his deposition, Gattie testified that he consumed alcohol every weekend. ECF No. 15-8 at 84. He stated that he had been drinking alcohol on the Saturday he first spoke with representatives from the Georgia Resource Center. ECF No. 15-8 at 84-85. When they returned on Memorial Day with the affidavit for him to sign, he had again been drinking. ECF No. 15-6 at 41-42. He testified that he had consumed a twelve-pack of beer and a few drinks of whiskey before signing the affidavit. ECF No. 15-8 at 80. Gattie stated he was not told what the affidavit was

going to be used for, he did not read the affidavit, and when the affidavit was read to him, he did not pay attention.[8] ECF Nos. 15-6 at 42-43; 15-8 at 83. He complained that the affidavit was "taken all out of proportion," or taken "[o]ut of context" and "was misconstrued." ECF No. 15-6 at 56, 118.

Gattie testified that he is not "against integration" or "against blacks." ECF No. 15-6 at 66. He claimed to think African Americans "are hardworking people" and no more violent than other groups of individuals. ECF No. 15-6 at 99-100. Gattie stated that he used the term "nigger," but not as a racial slur. ECF No. 15-6 at 113-14. Instead, he used it describe both white and black people who are "no good," who do not work, or who commit crimes. ECF Nos. 15-6 at 113-14; 15-8 at 92, 94. Gattie also testified that race was not an issue at deliberations and he never used the term "nigger" during deliberations. ECF Nos. 15-6 at 118; 15-17 at 14.

In addition to Gattie, the other ten jurors who were deposed testified that Tharpe's race was not discussed during deliberations, race played no part in their deliberations, no one used racial slurs during deliberations, and racial animus or bias was not a part of the deliberations. ECF Nos. 15-7 at 5, 31, 53-54, 60, 85-86, 94, 117-19; 15-8 at 26, 46, 59, 74-75, 117, 125. Tharpe tendered an affidavit from Tracy Simmons, the only juror who was not deposed, and he did not allege that race played any part in their

[8] According to the Georgia Resource Center representatives who interviewed him, they informed Gattie who they were and the reason for their visit, and Gattie did not appear alcohol-impaired. ECF No. 15-16 at 10-26.

deliberations or that anyone expressed racial animus or bias during deliberations. ECF No. 15-16 at 7-8.

Respondent also submitted an affidavit from Gattie in which he stated he did not vote to impose the death penalty because of Tharpe's race. ECF No. 15-17 at 14. Instead, he stated he voted for a death sentence because of "the evidence presented" and Tharpe's lack of "remorse." *Id.* In this affidavit, Gattie again distanced himself from the statements shown in the affidavit he signed for Tharpe's state habeas counsel. He claimed "parts of what he said [were] left out of the statement and other parts were written out of context." ECF No. 15-17 at 16.

In its December 4, 2008 Order, the state habeas court found that the jurors' affidavit and deposition testimony was not admissible to impeach the verdict. ECF No. 19-10 at 98-101. But, "**even if [Tharpe] had admissible evidence to support his claim of juror misconduct, this Court finds that the claims are procedurally defaulted as [Tharpe] failed to raise them at the motion for new trial or on appeal.**" ECF No. 19-10 at 102 (emphasis added).

To determine if Tharpe could establish cause and prejudice to overcome procedural default, the state habeas court considered the jurors' depositions and affidavits. ECF No. 19-10 at 102-04. Regarding the allegation of juror racism and bias, the state habeas court found:

> Petitioner has tendered the affidavit of juror Barn[ey] Gattie to attempt to establish that a member of his jury was allegedly racially biased and

> prejudiced against Petitioner and thus, impeach the jury's verdict. However, this Court concludes that Petitioner has failed to show that any alleged racial bias of Mr. Gattie[] was the basis for sentencing the Petitioner, as required by the ruling in *McClesky*. In fact, Mr. Gattie testified in his affidavit that he "did not vote to impose the death penalty because [the Petitioner] was a black man" and that "at no time was there any discussion about imposing the death sentence because [Petitioner] was a black man." This Court finds that Petitioner has failed to establish any prejudice with regard to this claim.

ECF No. 19-10 at 103-04 (citations omitted). The court ultimately concluded:

> as to each of these juror misconduct claims, this Court finds that Petitioner has failed to carry his burden of establishing deficiency of counsel or prejudice resulting from counsel's representation. Thus, Petitioner has failed to establish cause or prejudice to overcome his default of these claims, and habeas relief is denied.

ECF No. 19-10 at 104.

When, as in Tharpe's case, "[a] state court finds insufficient evidence to establish cause and prejudice to overcome a procedural bar, 'we must presume the state court's factual findings to be correct unless the petitioner rebuts that presumption with clear and convincing evidence.'" *Greene v. Upton*, 644 F.3d 1145, 1154 (11th Cir. 2011) (citations omitted). During his federal proceedings, Tharpe presented no evidence to overcome the procedural bar and, therefore, this Court found his juror misconduct claims, including his claim improper racial animus, were procedurally defaulted. ECF No. 25 at 19-20.

Because the state habeas court's procedural default analysis comports with the analysis required by *Pena-Rodriguez*, the Court fails to see how *Pena-Rodriguez* changes

the outcome. In *Pena-Rodriguez*, the Court held that "where a juror makes a clear statement that indicates he . . . relied on racial stereotypes or animus to convict a criminal defendant," the trial court should "consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." 137 S. Ct. at 869. To determine if Tharpe could overcome procedural default of his juror misconduct claim, the state habeas court specifically found that Gattie had not relied on racial stereotypes or animus to sentence Tharpe. ECF No. 19-10 at 103-04.

Tharpe complains that the state habeas court's procedural default analysis was "superficial" and failed to comply with the that required by *Pena-Rodriguez*. ECF No. 93 at 14. But, in *Pena-Rodriguez*, the Court specifically left discretion to the state trial court to determine if a juror's statement indicted he relied on racial animus to convict or sentence a defendant:

> Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether the threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

137 S. Ct. at 869.

The "circumstances" presented in Tharpe's case are dissimilar from those in

Pena-Rodriguez. *Id.* In *Pena-Rodriguez*, two jurors came forward immediately following the trial to report another juror's overtly racist remarks made during deliberations. *Id.* at 861. The Court stated that "not only did [the] juror . . . deploy a dangerous racial stereotype to conclude petitioner was guilty . . . he also encouraged other jurors to join him in convicting on that basis." *Id.* at 870. No juror came forward following Tharpe's trial to complain about the deliberations. There is absolutely no indication that Gattie, or anyone else, brought up race during the jury deliberations. It was more than seven years later, and possibly when he was intoxicated, that Gattie made his racist statement. Appearing before the state habeas court for his deposition, Gattie testified that the statement had been misconstrued and he provided a second statement in which he stated his vote to impose the death penalty had nothing to do with race. ECF No. 15-17 at 14. After attending the depositions of eleven jurors, including Gattie, the state habeas court apparently credited this statement when it found Gattie had not relied on racial stereotypes or animus to sentence Tharpe. *See Consalvo v. Sec'y for the Dep't of Corr.*, 664 F.3d 842, 845 (11th Cir. 2011) ("Determining the credibility of witnesses is the province and function of the state courts, not a federal court engaging in habeas review."). Given this analysis, the Court finds that Tharpe has not shown a reasonable probability of a different outcome under *Pena-Rodriguez*.[9]

[9] Again, nothing in *Buck* alters this outcome. Tharpe states that *Buck* stands for the proposition that "the possibility that racial bias impacted a death sentence constituted an extraordinary circumstance for the purposes of filing a 60(b)(6) motion." ECF No. 93 at

III. CONCLUSION

For these reasons, Tharpe's motion to reopen his 28 U.S.C. § 2254 action pursuant to Fed. R. Civ. P. 60(b)(6) is **DENIED.**

CERTIFICATE OF APPEALABILITY

"[A] COA is required before a habeas petitioner may appeal the denial of a Rule 60(b) motion." *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1265 (11th Cir. 2015). The Court can issue a COA only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To merit a COA, the Court must determine "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citations omitted). If a procedural ruling is involved,

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9. In *Buck*, there were several "extraordinary circumstances." 137 S. Ct. at 767, 776-79. A defense psychologist, who was "a medical expert bearing the court's imprimatur," 137 S. Ct. at 777, testified that "Buck was statistically more likely to act violently because he is black" *Id.* at 767. In five other cases in which this same expert provided similar testimony, the State had already consented to the defendants being resentenced. *Id.* at 778-79. It refused to do so in Buck's case because the defense, not the State, presented the expert at trial. *Id.* at 779. The Court stated that "[r]egardless of which party first broached the subject, race was in all these cases put to the jury 'as a factor . . . to weigh in making its determination.'" *Id.* (citations omitted). The Court granted Buck's 60(b)(6) motion to reopen and found ineffective assistance of counsel. *Id.* at 780. As the dissent explained, *Buck* "has few ramifications, if any, beyond the highly unusual facts presented. . . . The majority leave entirely undisturbed the black-letter principles of collateral review . . . and Rule 60(b)(6) law that govern day-to-day operations in federal court." *Id.* at 781 (Thomas, J., dissenting). The extraordinary circumstances present in *Buck* are not present here. Moreover, *Buck* did not alter the application of *Teague*, which ultimately bars the application of *Pena-Rodriguez* in Tharpe's case.

the petitioner must "demonstrate that a procedural ruling barring relief is itself debatable among jurists of reason; otherwise, the appeal would not 'deserve encouragement to proceed further.'" *Buck*, 137 S. Ct. at 777 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Under this standard, the Court cannot find that "a reasonable jurist could conclude that the District Court abused its discretion in declining to reopen judgment." *Id.* The Court, therefore, declines to issue a COA.

SO ORDERED, this 5th day of September, 2017.

S/ C. Ashley Royal
C. ASHLEY ROYAL, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Declaration of Frances Cersosimo

Pursuant to 28 U.S.C. § 1746

1. I was a juror in the trial of Charles Rhines in 1993. While I was a juror, I kept a journal of my thoughts and impressions of the trial. That journal is a true and accurate reflection of my thoughts and impressions during the trial.

2. On March 7, 2016, two attorneys working with the defense for Mr. Rhines came to speak with me about my jury service. I spoke with them and shared with them my journal from the trial. In 2015, an investigator for Mr. Rhines called me on my home phone and I chose not to speak with him about this case at that time. In the years between the 1993 trial and that visit in 2015, no one attempted to talk with me about my jury service.

3. Attached to this declaration is a copy of my 81-page journal that the two attorneys made. These pages are a true, correct, and complete copy of my journal that I kept during my jury service in Mr. Rhines's trial.

I declare under the penalty of perjury that the forgoing is true and correct.

Frances Cersosimo — 3-8-16

Frances Cersosimo — Date

Exhibit N

Frances Cerasuolo Jan. 7, 1993

My Journal on the murder trial of Donovan Schaffer. Charles Rhine is being charged w/ 1st degree murder. On Dec. the 5th 1992 I received a jury summons for this case. I filled out the questionaire and it was in the mail Dec. 7th. From that time on I have not thought of much else. My first reaction was that I could not be on the jury because it scared me. Since that time I have come to belive I could not only do a good job, realizing it would be emotionally hard on me, but that I wanted to do this.

On Mon. Jan. 4th I went to the Court house at 9:00 A.M. and was shown a video & taken into the court room for instructions from the Judge Korenkamp. There were 40 some people in my group. As I sat in the room waiting for the video to begin I remember thinking the atmosphere was like a group waiting for a funeral. We were a very

somber group. Before we left we were given a time to come back to be questioned by the attorneys. Today at 11:00 A.M. I was scheduled. I went in at 11:25 and was through at 11:50. I was very nervous and my heart was pounding as I entered the courtroom. Judge Konenkamp reminded me I was still under oath. Defense attorney Joe Butler smiled at me and inquired of the correct pronunciation of Cassesmo. He said I understand you are a painter. Yes I said and a farmer & I said yes. He explained that he had received my answers on my questionaire I filled out & wanted to let me know he might ask some probing questions but not to take it personal. I said I understand. The first question he asked was about the question of: could I state any reason why I would not want to be a juror

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on this case. I wrote that I would rather answer that question in person. I started saying that when I was young I was interested in the court system, enjoyed Perry Mason show and the court room scenes were interesting. At that time I thought I hope I can be on a jury someday. In 1976 I was in a courtroom and can now back it was on the jury & thought; I hope I never have to do that - be on a jury. My name was shaking for the minute I opened my mouth and at this point I said give me a second, I can't believe how nervous I am. Betty said I know this isn't easy, you're in a strange room and this is a serious case however you have nothing to fear. I said I understand. Going on I said well, since that time I put thoughts of being on a jury out of my head and never thought I would

be asked to serve. I've thought about this a great deal + feel I can do this. Butler then asked about my children and what they do. I said Nancy is 23 and in her 4th year at Dakota as an assistant in the learning disability center. My 21 year old son is about to begin attending JC-tech and my 17 yr. old son attends Central. Butler then asked if I believed in the death penalty since the State was asking for the death penalty. I said yes I do. He said in my 1st degree murder trial + I said no not always. He asked what a person would have to do to be given a death sentence in my mind. I said well if it was pre meditated and the victim was killed in a painful violent way + the accused had no remorse. ~~Butler then asked if I could think~~

Butler then asked if there were any other situations I could think of and I said that in my experience in life what I thought I would do in a given situation wasn't what I actually did when it was a reality. So what I would consider to warrant the death penalty in a case could only be determined by the evidence of the case + how I felt at that time. Butler said Charles Rhines is a homosexual as are the men he lives with. Did you know he was homosexual? I said no I did not. He said when I said he was homosexual did that bother you. I said no. He said do you think homosexuals are sinfull + something else that I can't remember. I said from what I have learned I believe it's genetic + I feel

they have a right to a life. He then asked if I knew anyone who was homo sexual and I said no but then I said I should mention that my daughter was recently married and her husband has a cousin who I was sure was homosexual & my husband also had him in class & we had discussed the fact that we believed he was & recently it came out that he was. Then Butler said if you are on this jury and everyone was against you would you be able to stick to your opinion. I said yes I could if I truly thought I was right. My husband has said in his personality that he is black & white meaning something is right or it is wrong & he says for me it's alot of gray area in that I want to know

all the details + why someone did or said something. But, if I strongly felt something was right ~~[illegible]~~ I am very stubborn. Butler then said that in this case if the jury finds the accused guilty + decides on the death penalty it may be required of each individual to say to the accused I find you guilty + sentance you to death, could you do that? I said yes I could. At this time I want to write my feelings about this matter. Some people will think maybe I'm heartless because when I said yes there was no hesitation for me. Years ago I never could have been able to even begin to think about saying someone should be put to death. Over the years I have become somewhat hardened.

I have always believed life was precious and no one had the right to take someone's life. I am only speaking in a situation where someone chooses to take a life; not self defense, but in a selfish act. I have always thought if you take someone's life you forfeit your right to life. In that respect for me an eye for an eye does apply. I do hope my idea of this trial is not minimalized & hope & pray it doesn't become a nightmare for me. I tend to think I can handle things more than maybe I should. I guess only time will tell. Anyway back to the questioning. I can't remember what else Mr. Butler asked at go he earlier said where are you from? I said Rapid City. There was a sheet of paper in front of me with two columns of typed names.

I was asked to look at the names and tell him if I knew any of the people. I said no not personally. Butler then said so you do recognize some of the names. I said a few I believe are names of law enforcement officers. He asked how I knew these names. I said having lived here all my life I'd seen the names in the news ect. At the end of questioning Mr. Butler said you seem like a nice caring woman & this juror is accepted. Now it was Mr. Griffis turn. He got out of his chair & smiled at me and walked within a few feet of me. He said I too have read your statements in the questionaire & only recently was given the backside where you wrote your situation with Mr. Konenkamp in 1996 & your like & respect for

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him after the trial in 1976. I do hope you won't judge me too harshly if I don't present myself as well as he did + at this he smiled. I smiled back + said no I won't. He then said I'll also try not to use too much theatrics. I smiled again + I said you do what you think best as I realize these are 2 totally different cases. Groff then said this trial will probably be the most difficult trial to ever be on the jury for. I said I agree. It is very serious. Groff said can you see yourself sitting in those chairs over there in the jurors box. I said yes I could. He asked if I could sentence a man to life in prison with no hope for parole or give a death sentence. I said yes I could but

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the death sentence would be based solely on the evidence of the case. Graff asked if in doing his job of presenting the case would I expect him to convince me of guilt beyond a reasonable doubt or ~~else~~ would I expect him to present a perfect case. I was puzzled & said I didn't know what he meant by a perfect case. All I knew was if he convinced me that the accused committed the crime then I would find him guilty. He seemed pleased by my response & said this juror is acceptable. Then judge Konenkamp asked me if I could hear how the law read before deliberations and then carry out that law. I said yes. He said I remind you that you

One other thing Groff asked me was if I was on the jury and we gave the death sentence if people got upset with me and said things like how could you? Would you be able to handle that? I said I don't see that as a problem, they have their opinion and I have mine.

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are under oath + that you cannot discuss this case with anyone, read newspaper accounts of this case or TV news pertaining to this case. He said Can you promise me this. I said yes I will do as you ask. He then said if for some reason ~~you~~ we are unable to get in touch with you; if you don't hear from us by noon Tues. I was to call them. After I left the court house I had mixed feelings. My heart finally started slowing down after 10 minutes or so. I have a strong feeling I will be chosen for the final 12 voting jurors. Four will be alternates who will hear all the evidence but will not vote unless one of the 12 cannot continue w/ the trial.

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Today is Jan. 14, 1993. I was told yesterday at 2:30 that I would be called either later in the day or 1st thing Thursday morning. By 11:00 today I felt I needed to know one way or the other. I was told to talk to Frank as he was the one to call the jurors. After I spelled my name for him he said is that Frances A. & I said yes. He said well I have good news you are excused and your service will no longer be needed. They have already chosen the jury. I got off the phone really stunned as I was so sure since all this time had passed that I was going to be on this jury. Then I was somewhat angry that I had been in limbo all this time so I called the court house back

and a woman named ~~Judy~~ Amy answered. I said this is Fran Cerasino, could you tell me when I was ~~[illegible]~~ excused. She said we just recieved the list of jurors let me check she then said Fran you are one of the jurors. I said but Frank just told me I was not a juror. Amy said well he was wrong because we just got the list and you are on it. OK I said that's fine. She said you are to report tomorrow morning at 9:00 on the 3rd. floor to the same room where you saw the video. She did not know if we would be there all day or what. Anyway it's been a roller coaster of emotions but overall I'm glad I'm on the jury but I'm not sure why. At this time it is after 11:00 & I hope to get a good nights sleep. We'll see!

Day 1 Jan. 15, 1993 The Trial

Today is Jan. 18th, a Monday. Tomorrow will be day 2 of the trial. Going back to Friday, the 1st day of Court. We were delayed until 9:30 as 2 jurors were caught in a traffic accident. That delay gave us a little time to visit and relax a little. I did not sleep well the night before and I learned I wasn't the only one. One man told me he was very nervous. We went into the court room and the judge gave us instruction and after telling us not to discuss the case with anyone & not to each other, read the newspapers or listen to the news. The judge gave us an example of what happened to one juror. She discussed the case w/ someone. During deliberations she brought up a