CASE NO. _____ (CAPITAL CASE) (18A654)

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES RUSSELL RHINES,
Petitioner,

v.

DARIN YOUNG, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Eighth Circuit

APPENDIX
PART 2, APP. 187-284

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Dated: February 15, 2019

APPENDIX CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-3360

Charles Russell Rhines

Appellant

v.

Darin Young, Warden, South Dakota State Penitentiary

Appellee

Appeal from U.S. District Court for the District of South Dakota - Rapid City
(5:00-cv-05020-KES)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 01, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

October 8, 1998

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Craig Eichstadt
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96-1070

Re: Rhines v. Weber, CIV~~97~~-1070

Gentlemen:

Pursuant to the Habeas Corpus relief sought by the Plaintiff in this action, the following is my decision thereon.

On January 23, 1993, Petitioner Charles Russell Rhines (Rhines) was found guilty of premeditated First Degree Murder and Third Degree Burglary pursuant to jury trial. On January 26, 1993, the same jury returned a sentence of death by lethal injection finding statutory aggravating circumstances to have existed in connection with the death of Donnivan Schaeffer.

Rhines appealed his conviction to the South Dakota Supreme Court which subsequently affirmed that conviction in State v. Rhines, 1996 SD 55, 548 NW2d 415. Thereafter, Rhines initiated an application for a Writ of Habeas Corpus. An evidentiary hearing was held on this Petition on April 6, 1998, with the subsequent testimony of Michael Butler being produced by way of deposition on June 5, 1998. Counsel thereafter submitted their briefs and arguments to the Court upon which this decision is based.

The scope of review by this Court is limited to fundamental questions of jurisdiction and basic constitutional rights. Goodroad v. Solem, 406 N.W.2d 141, 142-43 (S.D. 1994); Jenner v. Leapley, 521 N.W.2d 422, 425 (S.D. 1987). It is not for this Court to provide the Defendant with a further forum to raise issues that have been presented appropriately to the South Dakota Supreme Court. Those matters which have been presented to the South Dakota Supreme Court are considered res judicata and not subject to review in a Habeas Corpus proceedings. A Habeas Corpus proceedings is intended only to address very narrow, limited issues of substantive constitutional rights, the primary of which is the right of a Defendant in a criminal case to be represented by competent counsel. This right is guaranteed by the Sixth Amendment of the United States Constitution, as well as the South Dakota Constitution. The nature of the review by this Court is established by the standards set forth in Strickland v. Washington, 466 U.S. 668

(1984). Under Strickland, there are two fundamental requirements that must be established to support the allegation of ineffective assistance of counsel. The Petitioner must establish first that counsel's performance, taken as whole, was deficient and so serious that counsel was not functioning as a legal counsel for the Petitioner. The second prong of Strickand is that had counsel not been so unprofessional, there is a reasonable probability that the result of the proceeding would have been different. See also, Kimmelman v. Morrison, 477 U.S. 365, 375 (1986) and Luna v. Solem, 411 N.W.2d 656, 658 (S.D. 1987). There exists a strong presumption that counsel is competent, which presumption the Petitioner must overcome. Michael v. State of Louisiana, 350 U.S.91, 101 (1955); Loop v. Class, 1996 SD 107, ¶14, 554 NW2d 189, 191-92. It is further stated that "the reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances and the standard of review is highly differential." Phyle v. Leapley, 491 N.W.2d 429, 433 (S.D. 1992). The standard that this Court is to use in judging whether or not counsel has been ineffective is set forth further in Strickland. Therein the Court states, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686.

The process of this review will follow the controlling document, the "Second Amended Application Writ of Habeas Corpus". In that document, under the allegations of ineffective assistance of counsel, Rhines asserts that:

(1) He never met with two of his three counsel prior to the start of trial. Therefore, he asserts, there was a lack of pretrial preparation.

The evidence presented to the Court establishes that all of his counsel met with him prior to trial on a number of occasions. His counsel, having developed a division of labor, left the primary contact with the Defendant in the hands of Wayne Gilbert while Mike Stonefield and Joseph Butler proceeded to address legal matters and investigation. The evidence is also clear that each of these three counsels were skilled, experienced, and conscientious in their representation of Rhines. There is no evidence to support a lack of preparation or reason to believe that they made any legal or tactical errors based upon the asserted lack of contact.

(2) One of his counsel was depressed and engaged in theft during the course of time that he was representing Rhines.

There is no evidence to support any belief that that this counsel failed, in any way, to fully and adequately represent Mr. Rhines. There is absolutely no evidence that would indicate that this situation in anyway detracted from the legal services provided by this attorney. The problems of this attorney in no way manifested themselves in the trial of this case.

(3) There was a failure to cross examine some of the prosecution witnesses.

The record reveals that there were witnesses whom the State called that were not crossed examined by Rhine's attorneys. To cross examine or not cross examine a witness is both a

tactical and a judgment call by a lawyer. It is well within the scope of competence for a lawyer not to cross examine a witness if either the cross examination would produce nothing productive, or if, indeed, to cross examine would open areas of testimony which would be unfavorable to the Defendant. There exists no evidentiary support to indicate that cross examination of these witnesses would have been, in any way, helpful to the defense. The evidence presented to this Court establishes that it was a tactical decision and that cross examining some of the witnesses would be of no benefit. There is no reason to believe that any further examination of these witnesses would have produced a benefit to the defense.

(4) Failure of the lawyers to call witnesses who lived in Rapid City to provide mitigation evidence.

This was clearly a tactical decision on the part of counsel. Testimony presented to the Court indicates that it was necessary to be very careful in presenting any mitigation as to Rhines personal history in that doing so could open up the opportunity to the State to present evidence of Rhines' prior criminal record. Indeed, there was evidence presented to this Court that efforts were made to obtain testimony from relatives, but some of those relatives were unwilling or unable to come forward. Mr. Stonefield went so far as to fly to Seattle, Washington to locate a friend of Rhines. While evidence has been presented by Michael Butler that he felt more effort could have been made to locate mitigating witnesses, there is no evidence to support the belief that there were any other witnesses available who would have been able to provide additional positive evidence to present to the jury.

(5) **His counsel, Joseph Butler, advised the jury that he supported the death penalty.**

Mr. Butler testified that his comment was made to the jury to develop an identification with them, to "get on common ground" with the jury and for tactical purposes with which this Court can find no fault. This is especially significant where all jurors must be "Death Qualified" and therefore willing to consider applying the death penalty.

(6) **Defense counsel failed to raise, in the appeal of this case, the failure of the trial Court to specifically answer a juror's question on prison life.**

During deliberations, the Jury asked:

> "In order to award the proper punishment we need a clear prospective [sic] of what 'Life In Prison Without Parole' really means. We know what the Death Penalty Means, but we have no clue as to the reality of Life Without Parole.
> The questions we have are as follows:
>
> 1) will Mr. Rhines <u>ever</u> be placed in a minimum security prison or be given work release.
>
> 2) will Mr. Rhines be allowed to mix with the general inmate population

3) allowed to create a group of followers or admirers.

4) will Mr [sic]Rhines be allowed to discuss, discribe [sic] or brag about his crime to other inmates, especially new and or young men jailed for lesser crimes (ex: Drugs, DWI, assalt [sic] etc.)

5) Will Mr [sic] Rhines be allowed to Marry or have congigal [sic] visits.

6) Will he be allowed to attend college

7) will Mr [sic] Rhines be allowed to have or attain any of the common joys of life (ex TV, Radio, Music Telephone or hobbies and other activities allowing him distraction from his punishment).

8) will Mr [sic] Rhines be jailed alone or will he have a cellmate.

9) what sort of free time will Mr [sic] Rhines have. (what would his daily routine be).

We are sorry, Your Honor, if any of these questions are inappropriate but there seems to be a huge gulf between our two alternitives [sic]. On one hand there is Death and on the other hand what is Life in prison w/out parole."

(Court's exhibit 5; Trial Tr. 2697-2701.) The Court properly responded to the jury: "Dear Jurors: I acknowledge your note asking questions about life imprisonment. All the information I can give you is set forth in the jury instructions." (Trial Tr., at 2698.) The instructions as a whole set out the law the jury was to use in reaching their decisions. There was no need to provide more detailed information to them than they already had. Prison conditions are not an issue for the jury to concern themselves with and to attempt to elaborate on them would open the possibility of error in any attempted explanation of them. There was no evidence available during the trial or to the judge that could be used to explain these questions to the jury. They must rely upon the instructions they had received. To do otherwise would open up an entirely new area of evidence which would be unrelated to the jury's duties under the law. The South Dakota Supreme Court also addressed this in the Rhines decision. There was no error by the Court in not providing detailed answers to very detailed questions.

(7) **The South Dakota Supreme Court was not presented with the case of Simmons v. South Carolina, 512 U.S. 154 (1994), which Rhines asserts would have justified a reversal of the case.**

In Simmons, the United States Supreme Court reversed a death sentence on the basis that, "An instruction directing juries that life imprisonment should be understood in its 'plain and ordinary meaning' does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular State defines 'life imprisonment'". 512 U.S. at 170. In that case, however, the statutory basis for imposing a death sentence was available on the basis that

the Defendant will be dangerous in the future. Dangerousness is not a criterion within South Dakota's statutory scheme. While there may be some misunderstandings concerning the full significance of eligibility for parole, when one is considering the dangerousness of a particular defendant, that is not of such significance where that is not a criteria for imposition of the death penalty. In Simmons, the Court held that, "Because Petitioner's future dangerousness was at issue, he was entitled to inform the jury of his parole ineligibility." Id. at 171. Such, of course, is not the situation in the case at hand. In addition, Simmons was decided after the brief s were submitted, but before oral arguments. The case was as available to the South Dakota Supreme Court as it was to counsel. "Life with out parole" was referred to in the jury instructions a number of times and there was no issue raised as to future dangerousness under South Dakota law.[1] Therefore, there is no prejudice to the Defendant in not presenting this issue to the South Dakota Supreme Court. It was also the opinion of Mr. Stonefield that this case was not on point in Rhines. He considered its import to Rhines and correctly deemed it to be inapplicable.

(8) **The attorneys failed to effectively argue that death was a sentence which was disproportionate to the facts in this case compared to other similar situations.**

This was an issue that the South Dakota Supreme Court extensively discussed. The Supreme Court reviewed a number of cases that involved the death of a person. They closely weighed the factors in the "similar" cases and did not find any that carried the significance that existed in Rhines. I will not further address this issue, as it was thoroughly addressed in Rhines.

(9) **The firm, to which Wayne Gilbert belonged at the time of trial, hired a secretary who was the wife of the lead investigator of the case for the State.**

She was hired without Mr. Gilbert's awareness, had no access to any confidential information concerning the case, and served as a receptionist without access to that information. No evidence was submitted to suggest any improprieties concerning her conduct.

(10) **There was a lack of communication and input available for him.**

The evidence supports that there were numerous opportunities for input and complete discussion available with counsel. There is no evidence of any communication problem whatsoever during the course of the trial or prior to it. Rhines at no time offered an objection or discomfort with the quality of contact with his counsel prior to, or during trial.

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[1] The aggravating circumstances the jury was instructed upon, and that they found, were:

1. The offense of First Degree Murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind;
2. The offense of First Degree Murder was committed for the purpose of avoiding, interfering with, or preventing lawful arrest;
3. The Defendant committed the offense of First Degree Murder for himself for the purpose of receiving money.

SDCL 23A-27A-1.

(11) and (12) **The attorneys were unprepared for *voir dire* and trial and thus were ineffective.**

The trial encompassed 2,706 pages of transcript, with v*oir dire* taking 2,067 pages. The attorneys engaged in extensive questioning of the jurors, in an individual fashion. The trial transcript also sustains the expertise, effort and diligence of counsel. No evidence has been submitted to support this assertion nor does the record suggest any lack of preparation or skill on the part of counsel.

(13) **A Motion for Change of Venue should have been made.**

Counsels did consider the possibility of a Motion for Change of Venue, but they believed it was tactically not in the Defendant's best interests to do so. In addition, the course of voir dire, as it occurred, displayed clear evidence that the jury panel had not been tainted by pretrial publicity. Indeed, this issue was reviewed by the Supreme Court. Therein, they stated, "Our review of *voir dire* shows an impartial jury was impaneled." Rhines, 1996 SD 55 ¶107, 548 NW2d at 442. It was counsels' opinion that pretrial publicity can best be examined through the individual *voir dire* they obtained. After reviewing a pretrial survey done in the community they felt that a change of venue in this case would not benefit their client. Counsel was faced with the strong presumption under the law that a defendant can receive a fair trial in the community where the crime was committed. State v. Weatherford, 416 N.W.2d 47, 50 (S.D. 1987). Beyond that, they reserved the option to raise this issue should the *voir dire* reveal a basis for such a request. The record of *voir dire* does not reveal any basis for this motion to be made. This was a tactical decision that they are entitled to make which this Court can find no fault with. There is great doubt that such a motion would have prevailed; should it have succeeded, there is absolutely no reason to believe that the result of the trial would have been different.

(14) and (15) **Defense counsel should not have brought up the issue of the Defendant's homosexuality during *voir dire* and that they should have made a Motion in Limine to prevent reference to it.**

It was the belief of trial counsel that the issue of homosexuality would inevitably come up through witnesses and they felt that it could not be precluded. Therefore, they felt that the best approach was to deal with it head-on, in order to sensitize the jury and get a better understanding as to their feelings of this. All three of the counsel felt that this was the best approach. While there was limited introduction of this information at trial, it was a tactical decision well within the parameters of counsels' judgment. While it is easy to second-guess trial counsel when a conviction results from the trial, such Monday morning quarterbacking is not the province of this court. See, Jones v. Class, 1998 SD 55 ¶23, 578 NW2d 154,162.[2] These decisions must be viewed in light of the information available at the time. See, High Elk, 344 N.W.2d at 500

[2] Quoting High Elk v. State, 344 N.W.2d 497, 501 (S.D.1984), the Supreme Court stated:
"It is not our function to second guess the decisions of experienced trial attorneys regarding matters of trial tactics." (citation omitted) "It is always easy to use hindsight to cast doubt on a lawyer's trial tactics, but a wrong or poorly advised exercise of judgment is not alone enough to support a subsequent claim of ineffective counsel."

(explaining that the question of effective assistance is based upon determining whether counsel used "customary skill and diligence that a reasonably competent attorney would perform *under similar circumstances*." (emphasis added) (quoting United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976))).

(16) **Objection should have been made to questioning of the medical examiner by the prosecutor suggesting that the victim's hands were tied before he died.**

The victim was found with his hands tied securely behind his back, face down on the floor. The victim had 3 knife wounds, the last of which was to the back of his neck, which the Rhines referred to as a "coup de grace", the fatal wound. He also stated that the reason he tied the victim's hands was that he didn't want the victim to call for help. While the States Attorney unsuccessfully sought to elicit from the medical examiner that the victim's hands were tied before the fatal blow was struck, he could not answer to a reasonable degree of medical certainty that that was the case. However, there was evidence from which a jury could draw conclusions concerning the sequence in which the rope was tied in relationship to the death of the victim. In addition, there was an appropriate objection made by counsel. While one might feel that there was overreaching by the States Attorney, appropriate steps were taken by defense counsel to preclude an improper response by the medical examiner, and there is no reason to believe that the outcome of the case was in any way improperly influenced.

(17) and (18) **Counsel was ineffective by not objecting to the introduction of the Victim Impact Statement which was read by the mother of the victim.**

The mother of the victim read a victim impact statement in court, during the penalty phase of the trial. Counsel, for some time, was fully aware that the impact statement was going to be addressed and that there was a written statement which the mother may be anticipating reading. While the Court ruled on its admissibility immediately before its presentation, there was nothing more counsel for the Defendant could do than they had done nor was there any apparent basis to believe that they could have forestalled its introduction. The request for a continuance would not have produced any further benefit for the Defendant.

(19) **Counsel should have made a motion to provide him with the opportunity to make an unsworn allocution to the jury at the penalty phase of trial.**

Michael Butler testified that during the trial of State v. Moeller, 1996 SD 60, 548 NW2d 465 the Circuit court granted a motion by the Defendant to allow him to make an unsworn allocution to the jury. However, the decision was made by him not to have this done by Moeller after all. While there may be some marginal support for a legal argument that such an allocution could be made, counsel here chose not to propose it for a number of reasons. There was concern that the allocution may not ring with sufficient remorse, that it would not work to the Defendant's benefit. There was the possibility that the Defendant, in his allocution, could open up the door to allowing in evidence of his prior criminal history which, to that point, had been excluded from the trial. Again, this was a tactical decision which I do not fault, and it is certainly not a basis for second guessing counsels' decision at the time of the trial.

(20) **Defense counsel did not raise the argument, for the purposes of suppressing the statements of the Defendant, that the police officer advised him prior to his statement no execution had occurred in South Dakota since 1947, as a means to entice a statement from him.**

This issue was considered by defense counsel. In weighing the benefits of bringing that argument, it was decided not to present it in that there were more salient areas that they wished the Court to fasten upon. Further, there is nothing in the record that suggests that this was, in any fashion, an ingredient in the decision of the Defendant to make his statement. Further, this statement, while undoubtedly intended to encourage the Defendant to cooperate with law enforcement, was accurate and not of such a nature to overbear the will of the defendant. See, State v. Smith, 1998 SD 6 ¶8, 573 NW2d 515, 517. ("The question is not whether the interrogators' statements were the cause of the confession but whether those statements were so manipulative or coercive that they deprived [the defendant] of his ability to make an unrestrained, autonomous decision to confess." (citation omitted)). This is not of the quality that a judge would, in any event, find a basis to suppress the confession of the Defendant. Indeed, the South Dakota Supreme Court reviewed this confession of the Defendant and found it to meet constitutional standards. The tactical decision on the method to approach the confession was sound and I find neither fault on the part of counsel nor prejudice to the Defendant in this choice.

(21) **An effort should have been made to solicit a plea agreement eliminating the death penalty should he implicate Sam Harter in this matter.**

Counsel, through much deliberation and discussions with Rhines, were very satisfied that there would be no plea agreement available in this case. The States Attorney was clearly unwilling to compromise in his pursuit of a death penalty. There was no reason to believe that he would relent under any circumstances. A futile effort at plea agreement is not necessary.

(22) and (23) **Not submitting jury instructions directing the jury to not consider the number of possible aggravating circumstances.**

In South Dakota, for a jury to consider a death penalty, they must find at least one of a number of different circumstances existent in the particular case. Only after finding such a circumstance may they then impose the death penalty. In South Dakota there is no weighing of the various circumstances, but only the finding of one's existence. Here they found three (deparvity of mind element of SDCL 23A27A-1(6) was later rejected by the Supreme Court). However the Supreme Court nonetheless upheld the jury's death decision. The Supreme Court found, as I do, that the instructions adequately set forth the nature and manner in which the jury is to reach a decision concerning the death penalty. Finding more than one does not undermine their decision. They certainly can consider all the evidence presented without the process being tainted by a suggestion that they weighed the fact that they found more than one circumstance. There were no significant arguments raised in closing by the State, which suggested a stacking of the circumstances in order to arrive at a death penalty. To not propose such instructions is not error.

(24) **Failure to investigate defendant's background to provide effective mitigation.**

As discussed earlier, there were substantial efforts made to develop mitigation evidence. Trial counsel used reasonable efforts to do so. There is no evidence to support a belief that any further efforts would have been fruitful.

(25) **Heather Shephard was not adequately cross examined on inconsistencies in her testimony.**

She was indeed examined appropriately with the primary purpose, however, of seeking to establish an emotional state of mind of the Defendant which would suggest a lesser offense than First Degree Murder. The inconsistencies that existed did not relate to any issue of significance to the defense as they would only address in a very limited way the commission of the crime itself, which was not a matter of significant dispute. There is no prejudice to the Defendant, under these circumstances. This was a tactical decision which is well within the range of appropriate representation.

(26) **The assertion that counsel should have introduced evidence to prove that the victim was unfaithful to his fiancee to diminish the Victim Impact Statement presented in Court.**

This is obviously not a matter that would reasonably be considered for mitigation. It would only suffice to inflame the jury and would serve no functional purpose. There was no prejudice to the Defendant in not bringing this issue out.

Additional issues raised

In addition to these allegations of inadequacy of counsel, the Writ contains additional references to assert Constitutional law violations which Petitioner asserts merits consideration by this Court. Nearly all these matters have been reviewed and considered by the South Dakota Supreme Court and are generally not within the purview of this Court in a Habeas Corpus review. I will, however, address them very briefly and where appropriate note the where they are discussed in Rhines.

B--**Failure to suppress Mr. Rhine's statements** (at 425-429).
The Supreme Court found full Miranda rights were provided appropriately to the Defendant.

C--**Failure to excuse juror Dawn Stoeffler** (at 430-33).
She ultimately testified she could not set aside her attitudes toward the death penalty. Thus, she was reasonably excused.

D--**State's selective use of peremptories** (at 433-35).
These are discretionary for the State and were not used inappropriately.

E--**Failure to respond to jury question on "the reality of life without parole"** (at 442).

Life without parole was mentioned a number of times and its meaning was reasonably clear under the circumstances of this case on the instructions.

F--**Capital punishment violates due process and equal protection.**

South Dakota statutes have been previously upheld. See, State v. Moeller, 1996 SD 60 ¶102-09, 548 NW2d 465, 487-89.

G--**Allowing of Victim Impact Statement denied due process** (at 446-47).

Impact statements had been provided by law some time prior to the murder in this case. SDCL 24-5A-43.

H--**Insufficient evidence of torture** (at 452).

It is supported by the evidence of the second nonfatal stab wound and the condition of the victim prior to the final blow.

I--**The trial Court erred in instructing on depravity of mind** (at 453).

Inappropriate use of this did not undermine the other findings of a basis for the death penalty.

J--**Error in aggravating circumstances which denied due process**.

This was generally discussed throughout the body of the case.

K--**The jury's consideration of one or more invalid circumstances violated due process and equal protections** (at 450).

The jury can consider as many circumstances as it wished, but it must find at least one statutory circumstance to exist.

L--**Allowing statements by Rhines concerning the judicial system** (at 440-42).

Statements were made during the course of admissions by the Defendant that were critical of the judicial process. The Court weighed prejudice versus probative value of the statements and exercised its sound discretion in allowing the statements into evidence.

M--**Denied appointment of forensic communication expert** (at 442).

This is within the sound discretion of the Court. That discretion was not abused.

N--**Refusal of Defendant's proposed instructions** (at 443-44).

The Court has broad discretion in determining instructions and they should be considered as a whole, Rhines, 1996 SD 55, ¶111, 548 NW2d at 443, and, as such, instructions 8, 9 and 11 were not necessary.

O--**Jury was influenced by passion and prejudice and other factors** (at 455).

The evidence is more than adequate to support the jury's verdict.

P--**Disproportionate sentence in this case when compared to other homicides** (at 455-58).

The Supreme Court went through a detailed comparison of other homicides and found this case to be entirely justified and proportionate.

Q--**The use of State vs. Moeller, 1996 SD 60, 548 NW2d 465 was not appropriate in the proportionality's review**.

This was not addressed specifically by the Supreme Court, although the case was used. The Defendant asserts that, since Moeller was reversed, it should not have been considered as one of the sentences to evaluate for proportionality purposes. The Defendant asserts that since Moeller was decided just a week after Rhines was decided and Moeller was reversed, the Supreme Court should not have used Moeller for comparative purposes. The sentencing in South Dakota is imposed by the jury. The fact that the Supreme Court later reversed that case does not affect the efficacy of the sentencing itself. The jury decision on the death penalty was not seen to be defective. Thus, it was reasonable to consider it.

R--**Prejudicial misconduct by the State seeking a statement from the medical examiner that the victims hands were tied before his death.**

This has been previously addressed.

S--**Prosecution misconduct by not stating until the day of the penalty phase they would use the Victim Impact Statement.**

This was a possibility for some time, of which the defense was aware. There was no prejudice therefrom.

T--**Prosecutor referring to "gutting" the victim**.

This was not an unreasonable reference to the nature of the initial wound received by the victim. Although the word may be graphic, it is nonetheless reasonably relevant to the wound, thus appropriate.

U--**Enlarged photographs offered by the prosecution were inappropriate in showing the injury sustained by the victim.**

This is within the reasonable discretion of the trial Court and is not, on its face, misconduct by the prosecution.

One other issue that has been addressed in the brief by the Defendant was the assertion that trial counsel was incompetent by not obtaining and **submitting a letter to the State for the purposes of offering a plea agreement in which the Defendant would accept a life sentence.** The purpose would be, thereafter, to offer that plea letter to the jury to help establish remorse in the sentencing phase of the trial. While there may be some arguments as to its validity, it is generally not appropriate to introduce plea negotiations to the jury in any phase of the jury process. Had there been a letter so prepared, it is very doubtful it would have been allowed to be introduced before the jury. It is further very dubious that it would have had any positive benefit for the Defendant. Indeed, it could not, under any stretch of the imagination, be considered a significant issue which could have changed the course of the jury's decision.

Based upon all of the foregoing discussion, I find there to be neither error by the defense counsel nor any circumstance which would suggest any other decision by the jury should actions have been otherwise by the defense counsel. I further find that there are no Constitutional defects that would justify the relief requested by the Defendant. I am therefor dismissing this action.

I would ask that the State prepare the appropriate papers confirming this decision.

Sincerely,

MERTON B. TICE, JR.
Circuit Court Judge

MBT/lcc

Pennington County, SD
FILED
IN CIRCUIT COURT
OCT 08 1998
Ranae Truman, Clerk of Courts
By _____ Deputy

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

File No. Civ. 02-924

CHARLES RUSSELL RHINES

Petitioner,

DOUGLAS WEBER, Warden, South Dakota State Penitentiary,

Respondent.

MEMORANDUM DECISION ON MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AND ORDER

I. PROCEDURAL AND FACTUAL BACKGROUND

Petitioner, Charles Rhines, was convicted of premeditated first-degree murder and third-degree burglary. On January 26, 1993, a jury sentenced him to death by lethal injection. Petitioner appealed his conviction and sentence to the South Dakota Supreme Court. Fourteen issues were raised on direct appeal, including the excuse of prospective juror Diane Staeffler, the state's use of its peremptory challenges, the use of victim impact testimony, and the proportionality review. The South Dakota Supreme Court affirmed petitioner's conviction and sentence and the United States Supreme Court denied further review on December 2, 1996.

Petitioner then applied for a writ of habeas corpus in state court on December 5, 1996. **See Exhibit 1.** On April 29, 1997, he filed his First Amended Application for Writ of Habeas Corpus. **See Exhibit 2.** A Second Amended Application for Writ of Habeas Corpus was filed on September 17, 1997. **See Exhibit 3.** In his Second Amended Application for Writ of Habeas Corpus raised forty-six issues, including ineffective assistance of counsel of trial and appellate counsel, the excuse for cause of prospective juror Diane Staeffler, and the constitutionality of the South Dakota capital punishment statutes. Rhines' state habeas was denied by the trial court on October 8, 1998. **See Judge Tice's decision, Exhibit 4; See Transcript of Habeas Hearing, Exhibit 5; and Deposition of Michael Butler, Exhibit 6.** He appealed the denial of the state habeas. **See Docketing Statement, Exhibit 7.** The South Dakota Supreme Court affirmed the denial on February 9, 2000. **See decision of South Dakota Supreme Court, 2000 S.D. 19, 608 N.W.2d 303, Exhibit 8.**

On February 22, 2000, Rhines filed a federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. An amended petition for writ of habeas corpus was filed on November 20, 2000, that alleged thirteen grounds for relief. **Exhibit 9.** Respondent, Douglas Weber, alleged that several of the grounds had not been exhausted and were, therefore, procedurally defaulted. On July 3, 2002, the Federal District Court found that petitioner's grounds for relief Two(B), Six(E), Nine(B), (H), (I), and (J), Twelve, and Thirteen were unexhausted. The district court stayed the petition pending exhaustion of Rhines' state court remedies on the condition that

Rhines file a petition for habeas review in state court within 60 days and return to federal court within 60 days of completing the state proceedings. The state appealed.

On direct appeal, the Eighth Circuit Court of Appeals vacated the stay and remanded the case so this court could determine whether Rhines could proceed by dismissing the unexhausted claims from his petition. *Rhines v. Weber*, 346 F.3d 799 (8th Cir.2003). The United States Supreme Court granted certiorari to determine whether a district court may issue an order of stay and abeyance in a mixed petition for habeas corpus, that is, a petition containing exhausted and unexhausted claims. *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 1532, 161 L.Ed.2d 440 (2005). The Court held that stay and abeyance is permissible under some circumstances. *Rhines*, 125 S.Ct. at 1535. The Court remanded the case to the Eighth Circuit Court of Appeals so it could determine whether the Federal District Court abused its discretion in granting the stay. *Id.* at 1535-36.

At the time the Federal District Court made its decision regarding the stay, it did not have the benefit of the controlling Supreme Court authority when it issued the order of stay and abeyance in 2002. The Eighth Circuit Court of Appeals remanded the case to this court to analyze the petition for writ of habeas corpus under the new test enunciated in *Rhines*. *Rhines v. Weber*, 409 F.3d 982, 983 (8th Cir.2005). The Federal District Court was directed to analyze each unexhausted claim to: (1) determine whether Rhines had good cause for his failure to exhaust the claims in state court, (2) determine whether the claims were plainly meritless, and (3) consider whether Rhines had engaged in abusive litigation tactics or intentional delay. *Id.* (citing *Rhines*, 125 S.Ct. at 1535). On December 19, 2005, the Federal District Court found that Rhines had good cause for failing to exhaust the claims, the claims were not plainly meritless, and Rhines had not engaged in abusive litigation tactics. Rhine's petition for habeas corpus was stayed pending exhaustion in state court. More specifically, the Federal District Court remanded the case for the State Court to exhaust Grounds Two(B), Six (E), Nine(B), (H), (I), (J), and Twelve. The Federal District Court also conditioned the remand to state court on Petitioner's dismissal of Count 13, otherwise, his petition would be dismissed in Federal District Court as being a "mixed petition."

On September 26, 2005, Rhines requested leave from the state court to amend his petition. State did not object and leave was granted. Thereafter, three days after the District Court's decision handed down on December 19, 2005, on December 21, 2005, an Amended Application for Writ of Habeas Corpus was filed. **See Exhibit 10.** This Amended Petition still contained the count which dealt with the failure to have Rhines present while a jury note and response was discussed during the jury's deliberation. **Exhibit 10, Amended Application for Writ of Habeas Corpus, ¶ 11. (This is the count which the District Court referenced as "Count 13").**

On February 21, 2008, Petitioner filed his First Amended Petition for Writ and Declaratory and Injunctive Relief. **See Exhibit 11.** This Petition raised thirteen counts but excluded the issue dealing with the jury note.[1] Petitioner, in the alternative, asked for declaratory

[1] The numbering of Petitioner's claims also changed in many respects. In order to comply with the Federal District Court's remand, references will be made to both the Amended Application for Writ and the District Court's numbering mentioned in the decision remanding to state court to exhaust claims.

and injunctive relief which challenged the two drug protocol for executions which was passed by the 2007 Legislature. Petitioner further requested that the State Court declare that SDCL 23A-27A-32 constitutes an unconstitutional bill of attainder and an unconstitutional ex post facto law.

Thereafter, on April 18, 2009, the attorneys for Petitioner and State, asked the State Court to delay a hearing on the Writ in light of the pending United States Supreme Court case *Baze v. Rees* which challenged the constitutionality of lethal injection. After the *Baze* case was handed down, the parties requested that the hearing continue to be continued while they met with experts on lethal injection. On June 20, 2011, Attorney General Marty J. Jackley, filed a Notice of Adoption of Execution Protocol which complied with the decision of *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520 (2008) and was adopted by the State of South Dakota on May 18, 2011. On October 24, 2011, a Notice of Adoption of Revised Execution Policy and Protocol was filed. This policy and protocol was adopted by the State of South Dakota effective October 19 and 13, 2011, respectively.

On March 1, 2012, the State filed its Motion to Dismiss or for Summary Judgment and Statement of Undisputed Material Facts. A status hearing was held on April 9, 2012, and a Scheduling Order was entered setting the hearing on the Motion for Summary Judgment for July 3, 2012. The parties agreed to amend the scheduling order and the hearing on the Summary Judgment motion was held July 23, 2012. The hearing on the Writ is now scheduled for November 26-29, 2012.

Before the Court at this time is Respondent's Motion to Dismiss or for Summary Judgment on Petitioner's First Amended Petition for Writ and Declaratory and Injunctive Relief. Petitioner's claims are as follows:

Ground One:

¶ 21 The rights of Charles R. Rhines to due process, an impartial jury, and equal protection of the law were violated by exclusion for cause of the prospective juror Jack Meyer. **(See Exhibit 9, Ground Two(B) of the Federal Petition.)**

Ground Two:

¶ 22 Charles R. Rhines' rights to due process, equal protection and to be free from cruel and unusual punishment were violated on account of the unconstitutionality of the South Dakota Capital Punishment Statutes in that the South Dakota Death Penalty Statutes in SDCL 23A-27-A-1, mandate that the court "shall consider, or shall include in instructions to the jury" death penalty provisions "in all cases in for which the death penalty may be authorized," which is all Class A felonies under SDCL 22-6-1. **(See Exhibit 9, Ground Six(E) of the Federal Petition.)**

Ground Three:

¶23 Charles R. Rhines' Fifth Amendment rights under the United States Constitution, and his corresponding rights under the South Dakota Constitution, including, but not limited to Article XI, Sections 7, 9, and 10, to due process of law, and the Sixth Amendment rights under

the United States Constitution, and his corresponding rights under the South Dakota Constitution, including but not limited to Article VI, Section 6 and 7, to assistance of counsel were violated through the ineffective assistance of his trial counsel. The ineffective assistance of trial counsel prejudiced Charles R. Rhines, and manifested itself in multiple ways including:

a. The tepid presentation of evidence during the penalty phase by the attorneys for Mr. Rhines, including failure to contact or call available witnesses—including, but not limited to John Fouske, James Mighell and Connie Royer—who would have provided helpful testimony for Mr. Rhines in the penalty phase. **(See Exhibit 9, Ground Nine(B) of the Federal Petition.)**

b. The failure to catch and correct erroneous and false, highly prejudicial testimony of Glen Wishard. **(See Exhibit 9, Ground Nine(H) of the Federal Petition.)**

c. The failure to request the hiring of, consult with, or hire a mitigation consultant or expert. **(See Exhibit 9, Ground Nine(I) of the Federal Petition.)**

d. The failure of trial counsel to register objections to keep out irrelevant prejudicial testimony such as Rhines having access to a gun, a statement by Rhines at the victim's funeral. **(See Exhibit 9, Ground Nine(J) of the Federal Petition.)**

Ground Four:

¶ 24 The due process and equal protection rights of Charles R. Rhines under both the United States Constitution and the South Dakota Constitution were violated by various acts of prosecutorial misconduct. The prosecutor committed prosecutorial misconduct in, among other things, maintaining that the victim's hands were tied prior to the fatal wound, when the evidence was to the effect that they were tied afterwards; in referring to the victim being "gutted" in the assault when there was no such evidence; using and arguing from false and erroneous testimony from witness Glen Wishard; and using the improper tactic of eliminating all jurors with any misgivings about imposition of the death penalty. **(See Exhibit 9, Ground Twelve of the Federal Petition.)**

Ground Five:

¶25 Charles R. Rhines was deprived his rights to due process of law, equal protection of the laws and the doctrine of separation of powers as provided by the state and federal constitutions in that the judgment and sentence of death resulted from a failure to follow the procedure outlined in SDCL 23A-27A. These violations are based on the following reasons:

a. Charles R. Rhines contends that the State's Attorney has only the discretion to charge a Class A Felony, but that once such decision is made the punishment for any such offense lies solely within the province of the judicial branch.

b. SDCL Chapter 23A-27A has been applied unconstitutionally throughout the state in a manner so as to allow a state's attorney to charge under Ch. 23A-27A, but also to allow

the state's attorney the unfettered discretion, with no guidelines, whether to seek the death penalty.

c. Other persons who have been charged with Class A felonies have been allowed to enter into plea bargains in which the state's attorneys have made promises of life imprisonment in return for a guilty plea to the Class A felony.

d. Under SDCL Ch. 23A-27A, as interpreted, the jury may choose not to impose a death penalty even if aggravating circumstances are found for any reason or without any reason. Because of the discretion given to the jury under South Dakota's statutory scheme, selecting a jury that is "death qualified" skews the composition of the jury pool and eliminates from it those persons who are able to follow the circuit court's instructions but would nonetheless choose not to impose the death penalty.

e. Because the punishment that may be imposed for a Class A felony lies solely within the province of the judicial branch, the proper pool for proportionality analysis consists of all person who entered guilty pleas or who were convicted of Class A felonies, regardless of whether the death penalty was imposed.

Ground Six:

¶ 26 The South Dakota Supreme Court conducted its statutorily mandated proportionality review based only upon those cases in which a death penalty was imposed instead of all cases in which a death penalty might be imposed in violation of the terms of SDCL 23A-27A, and deprived Charles R. Rhines of his rights of due process of law as provided by the state and federal constitutions.

Ground Seven:

¶ 27 The process by which Charles R. Rhines was charged, convicted and sentenced to death deprived him of his right to due process under the federal and state constitutions in that:

a. The death penalty under Chapter 23A-27A is a sentencing enhancement in all cases for which the death penalty may be authorized.

b. The due process clause of the Fifth Amendment and the notice and jury guarantee of the Sixth Amendment of the United States Constitution and the corresponding sections of the South Dakota Constitution require that any fact that increases the maximum penalty for a crime must be charged in an indictment, or, in the case of state actions, in an indictment or information.

c. The federal constitutional rights apply to Charles R. Rhines under the Fourteenth Amendment.

d. The aggravating circumstances under which Charles R. Rhines' sentence of death was based were not alleged in the indictment or in any information.

Ground Eight:

¶28 The manner of execution as provided by SDCL 23A-27A-32 as in effect at the time Charles R. Rhines' conviction violated his rights to due process of law and constitutes cruel and unusual punishment under the Eighth Amendment of the United States Constitution and the corresponding Article under the South Dakota Constitution:

a. Executions are unconstitutional if they involve unnecessary and wanton infliction of pain or torture or lingering death.

b. Where pain is inflicted in an execution results from something more than the mere extinguishment of life, the United States Constitution Eighth Amendment and the corresponding South Dakota articles' prohibition against cruel and unusual punishment are implicated.

c. Given the two chemicals specified in SDCL 23A-27A-32 in effect at the time of Charles R. Rhines' conviction and the absence of a person trained to administer and monitor anesthesia, it is reasonably foreseeable that Charles R. Rhines may experience suffocation and excruciating pain during his execution in violation of the Eighth Amendment and the corresponding South Dakota Amendment.

d. An execution pursuant to SDCL 23A-27A-23 as codified on the date of Charles R. Rhines' conviction violates the United States Constitution and the South Dakota Constitution prohibition against cruel and unusual punishment and is therefore unconstitutional.

Ground Nine:

¶29 That Charles R. Rhines' rights to due process of law and his rights to assistance of counsel under the United States Constitution and the South Dakota Constitution were further violated through the ineffective assistance of trial counsel in that they failed to allege and argue as part of the direct appeal to the South Dakota Supreme Court the issues raised in grounds 1-8, inclusive, of this Petition, thereby prejudicing the Petitioner.

Ground Ten:

¶30 Charles R. Rhines' right to due process of law and his right to assistance of counsel guaranteed under the United States Constitution and the South Dakota Constitution were violated through the ineffective assistance of his habeas counsel, in that counsel failed to raise the issues set forth in grounds 1 through 9, inclusive, of this Petition, in the Petition for Writ of Habeas Corpus initially filed, and the subsequent appeal to the South Dakota Supreme Court.

Ground Eleven:

¶31 The execution of Charles R. Rhines by lethal injection as set forth in the present SDCL 23A-27A-32 violates Rhines' rights to due process under law and his rights against cruel and unusual punishment guaranteed under the United States Constitution and the South Dakota Constitution.

a. SDCL 23A-27A-32 was amended by the South Dakota Legislature during the 2007 legislative session.

b. On information and belief, the South Dakota Legislature rejected proposed amendments requiring executions be carried out in the most humane manner possible.

c. SDCL 23A-27A-32 removes the requirement of a physician participation in the execution process.

d. Executions are unconstitutional if they involve unnecessary and wanton infliction of pain or torture or lingering death.

e. Where pain inflicted in an execution results from something more than the mere extinguishment of life, the constitutions of the United States and South Dakota, South Dakota Articles prohibition against cruel and unusual punishment are implicated.

¶32 Upon information and belief, the protocol presently in effect for lethal injection execution uses a three drug cocktail.

¶33 With the three drug cocktail presently believed to be used in executions, in the absence of a person trained to administer and monitor an anesthesia, it is reasonably foreseeable that Charles R. Rhines may experience suffocation and excruciating pain during his execution in violation of the Constitutions of the United States and South Dakota.

¶34 An execution pursuant to the present SDCL 23A-27A-32 violates the United States Constitution and the South Dakota Constitution's prohibition against cruel and unusual punishment and it is therefore unconstitutional.

Ground Twelve:

¶35 Charles R. Rhines' right to due process of law against cruel and unusual punishment is guaranteed under the United States Constitution and the South Dakota Constitution is violated by the statutory procedure set forth in 23A-27A-32.

a. SDCL 23A-27A-32 was passed by the South Dakota legislature during the 2007 legislative session.

b. SDCL 23A-27A-32 was amended in two specific areas: it removed the specifications of the two drug cocktail to be used in the lethal injection by the prior statute, and substituted in its place the requirement that the warden should determine the substances and the quantity of substances used for the punishment of death. The statute provided no other detail recording the warden's decision. The second change was that a physician was no longer required to participate in the execution process.

¶36 Executions are unconstitutional if they involve unnecessary and wanton infliction of pain or torture or lingering death.

a. Pain inflicted in an execution results from something more than the mere extinguishment of life, the United States Constitution and the South Dakota Constitution is prohibition against cruel and unusual punishment is implicated.

b. On information and belief, the South Dakota legislature rejected proposed amendments requiring executions to be carried out in the most humane manner possible.

¶37 Given the fact that the warden is given no guidance as to the type of substances used or the quality of substances used for the punishment of death, and there is no requirement by law that the execution be carried out in a humane manner, and the absence of a person trained to administer and monitor an anesthesia, it is reasonably foreseeable that Charles R. Rhines may experience suffocation and excruciating pain during his execution, as allowed under the present statute.

¶38 An execution pursuant to the present SDCL 23A-27A-32 violates the United States Constitution and the South Dakota Constitution prohibition against cruel and unusual punishment and therefore is unconstitutional.

Ground Thirteen:

¶39 The present SDCL 23A-27A-32 constitutes an unconstitutional bill of attainder, and an unconstitutional ex post facto law as applied to Charles R. Rhines.

a. SDCL 23A-237A-32, as codified on the date of Charles R. Rhines' convictions is unconstitutional, for reasons previously stated.

b. SDCL 23A-27A-14 requires a condemned inmate to be sentenced to life in prison if the death penalty is declared unconstitutional.

c. Because Charles R. Rhines must be sentenced to life in prison as a result to the unconstitutionality of SDCL 23A-27A-32 as codified at the time of his conviction, and as a result of the application of SDCL 23A-27A-14, SDCL 23A-27A-32, as presently codified, constitutes an unconstitutional bill of attainder and an unconstitutional ex post facto law, as applied to Charles R. Rhines.

The Petitioner's claims will be addressed separately below.

II. ANALYSIS

1. Burden of Proof, Summary Judgment and Review Standards

A. Burden of Proof

In habeas corpus cases, the applicant has the initial burden of proof by a preponderance of the evidence to demonstrate that he or she is entitled to the relief requested. *Hays v. Weber*, 2002 S.D. 59, ¶11, 645 N.W.2d 591, 595; *New v. Weber*, 1999 SD 125, ¶ 5, 600 N.W.2d 568, 572 (citing *Lien v. Class*, 1998 SD 7, ¶ 11, 574 N.W.2d 601, 607). The State has no burden of proof, only the burden of meeting the evidence of the petitioner. *Davi v. Class*, 2000 S.D. 30 ¶ 26, 609 N.W.2d 107, 114.

B. Summary Judgment

The South Dakota Supreme Court has held that the Rules of Civil Procedure, SDCL ch. 15-6, apply to habeas corpus cases. *Reutter v. Meierhenry*, 405 N.W.2d 627, 630 (S.D. 1987). Furthermore, habeas corpus is a civil proceeding and summary judgment is a method of disposing civil proceedings within the guidelines of *Wilson v. Great Northern Railway Co.*, 83 S.D. 207, 157 N.W.2d 19 (1968). *Id.*

> A movant is entitled to summary judgment if the movant can: "**show that there is no genuine issue as to any material fact and that [the movant] is entitled to judgment as a matter of law.**" In determining whether summary judgment should issue, the facts and inferences from those facts are viewed in the light most favorable to the nonmoving party, **and the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that such party is entitled to judgment as a matter of law**. Fed.R.Civ.P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356–57, 89 L.Ed.2d 538 (1986). Once the moving party has met this burden, **the nonmoving party may not rest on the allegations in the pleadings, but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists.**

(emphasis added.) *Hanic v. Weber*, 2009 WL 700197 (D.S.D.). Thus, under *Wilson* and its progeny, Respondent has the burden to establish the absence of a genuine issue of material fact and upon meeting that burden, the burden switches to the Respondent to set forth specific facts showing a genuine issue of material fact does exist.

Furthermore, it is important to note that this is a successive habeas petition. The transcript of the first habeas hearing before Judge Tice is attached as **Exhibit 5**. Relevant portions of the transcript will be noted as **(HCT ____.)**

C. Successive Habeas Petitions and Res Judicata

Because this Application was filed before July 1, 2012, it is governed by SDCL 21-27-16.1 which has now been repealed. That statute provides:

> All grounds for relief available to a petitioner under this chapter shall be raised in his original, supplemental or amended application. Any ground not raised, finally adjudicated or knowingly and understandingly waived in the proceedings resulting in his

> conviction or sentence or in any other proceeding that the applicant has taken to secure relief from his conviction, or sentence, may not be the basis for a subsequent application, unless the court finds grounds for relief asserted which for reasonable cause were omitted or inadequately raised in the original, supplemental or amended application.

In the *Matter of the Application of Novaock*, the Supreme Court held that to avoid dismissal of a successive petition for habeas corpus relief, a Petitioner must show:

> 1. Cause for his omission or failure to previously raise the grounds for habeas relief; and
> 2. Actual prejudice resulting from the alleged constitutional violation.

1998 S.D. 3, 572 N.W.2d 840. See also, *Ashker v. Class*, 534 N.W.2d 66, 67 (S.D.1995) (*Ashker III*) (quoting *Gregory v. Solem*, 449 N.W.2d 827, 830 (S.D.1989)).

As to the issues already addressed by the Supreme Court and the habeas court, the doctrine of res judicata disallows reconsidering an issue that was actually litigated or that could have been raised and decided in a prior action. *Ramos v. Weber*, 2000 S.D. 111, 616 N.W.2d 88; *SDDS, Inc. v. State*, 1997 S.D. 114, ¶ 16, 569 N.W.2d 289, 295 (quoting *Hogg v. Siebrecht*, 464 N.W.2d 209, 211 (S.D.1990)).

> "The purpose behind the doctrine is to protect parties 'from being subjected twice to the same cause of action, since public policy is best served when litigation has a finality.' " Id. (quoting *Moe v. Moe*, 496 N.W.2d 593, 595 (S.D.1993)). This due process challenge could have been raised in the direct appeal along with the Eighth Amendment challenge. Under the doctrine of res judicata, we will not review successive attacks on a sentence, especially when all the grounds could have been raised in the earlier proceeding. *Davi v. Class*, 2000 SD 30, ¶ 50, 609 N.W.2d 107, 118; *Lodermeier*, 1996 SD 134, ¶ 24, 555 N.W.2d at 626; *Miller v. Leapley*, 472 N.W.2d 517, 519 (S.D.1991).

Therefore, references to the habeas corpus record (Civ. File 96-1070) will be included to indicate where testimony and evidence has already been submitted for the circuit court and the South Dakota Supreme Court. (HCT___). With these standards in mind, each of Petitioner's claims will be addressed.

Ground One
Juror Jack Meyer

Rhines claims that the for cause exclusion of prospective juror Jack Meyer impermissibly "stacked" the jury in favor of a death sentence. In a death penalty case, a prosecutor may not strike a juror who simply expresses conscientious or religious scruples against capital punishment or who opposes it in principle. *State v. Rhines*, 1996 S.D. 55, ¶41, 548 N.W.2d 415, 430. Instead, a prospective juror may be properly excused if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." *Id.* at ¶41, 548 N.W.2d at 430, quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 851-852 (1985). A reviewing court will not overturn a trial court's

exclusion for cause "in the absence of any evidence to support it." *Rhines*, 1996 S.D. 55, ¶52, 548 N.W.2d at 432. The trial transcript in this case reveals the following *voir dire* questioning of Juror Meyer:

Examination by Mr. Groff: (State's Exhibit 3, at 340-344)

Q: Do you have any personal convictions about imposing the death penalty, that is, against imposing the death penalty?
A: No, sir.
Q: As you sit here today, do you have the ability to envision yourself being a part of that jury that would be seated over there, coming back with a verdict that would put this Defendant to death? Can you envision yourself doing that?
A: Not actually, no.
Q: Why couldn't you actually envision yourself doing that?
A: I don't know. I just couldn't envision myself doing it.
Q: No matter your view generally about whether the death penalty is right or wrong for society, do you have some personal feelings that would stop you from doing it?
A: No, I guess not.
Q: When you say you guess not, you were just telling me over here that you couldn't envision yourself as being parts of the jury; what do you mean?
A: Well, I'm not sure about making a decision about that.
Q: Let me make it real. Would it be fair to say as us [sic] look at me right now and as we talk about this, under no circumstance could you ever envision yourself being part of a jury that would impose the death penalty on this Defendant?
A: I guess not.
Q: That means, no, you don't think you could ever be a part of that?
A: I don't think I could ever be a part of that.
Q: No matter what the evidence was, you feel that if you did find him guilty of first degree murder you would automatically vote for a life sentence because you couldn't personally sit in judgment of somebody?
A: I probably would, yeah.
Q: You'd be leaning towards doing that, right?
A: Yes. I'm not saying that I couldn't be persuaded to go the other way, depending on the evidence.
Q: But you just told me you couldn't envision yourself being part of a jury and doing that, didn't you just…
A: Yes.
Q: Apparently you have a strong belief that you couldn't impose the death penalty no matter what the circumstances:
A: I would say…
Q: Is that right?
A: Yes.
Q: At least as you sit up here right now, wouldn't it be fair to say that you are leaning at this point in time, because of these personal concerns and convictions you have towards giving life imprisonment, automatically without any consideration of the case, isn't that a fair statement?

A: I guess you could say that.

Mr. Groff: Challenge for cause, you Honor.

Mr. Gilbert: May I ask a couple of questions, your Honor?

Q: Mr. Meier [sic], you have told us and we have talked about following the Court's instructions?
A: Yes.
Q: And as a general manner you don't have any problem following the Court's instructions?
A: No.
Q: You'd be able to follow the Court's instructions even if you maybe weren't sure or had a disagreement with them, would that be a fair statement?
A: Could you repeat that?
Q: You know that the Court is the entity that the instructions about the law come from, the Court, and that it's not for us to question those instructions, it's for us to follow the law as given by the Court and do you understand that?
A: Yes.
Q: Do you agree with that?
A: Yes.
Q: So, if the Court were to instruct you that you, as a juror, should consider whether there were aggravating circumstances that would justify the imposition of the penalty of death, would you follow those instructions?
A: yes.
Q: So, in other words, if the Court's instructions lead you that conclusion that you should consider the penalty of death and actually consider imposing it and being a member of the jury that comes in and says, yes, we think the penalty of death ought to be imposed here, you would be able to follow those instructions?
A: I'm not sure.
Q: Why is it you are not sure?
A: Well, you are bringing up the same thing that Mr. Groff has said and it's a contradictory statement.
Q: What do you mean? How is it contradictory?
A: In the way he asked me the question before, you know, one way or the other I have to answer one way or the other. I don't think I could be a part of that jury, I really don't.
Q: Regardless of the Court's instructions, in other words, if the Court instructed you to consider it?
A: Yes.

Mr. Gilbert: Okay, nothing further.

The Court: All right, sir, I am going to excuse you on this case. Thank you.

Meyer's *voir dire* reveals that he was unable to perform his duties as a juror in accordance with the Court's instructions and his oath. *Rhines*, 1996 S.D. 55 at ¶41, 548 N.W.2d at 430. Because Juror Meyer's views on capital punishment would "prevent or substantially

impair the performance of his duties as a juror", it was appropriate for him to be excused as a juror. Where evidence supports the trial court's dismissal of a juror for cause, no constitutional error occurred. *Rhines*, 1996 S.D. 55, ¶52, 548 N.W.2d at 432. Furthermore, Rhines brought an identical claim with regard to Juror Diane Staeffler in his direct appeal. The South Dakota Supreme Court's rejection of Rhine's challenge to striking Staeffler for cause demonstrates that a challenge to striking Meyer would not have resulted in a favorable ruling for Rhines. *Rhines*, 1996 S.D. 55, ¶¶ 51-54, 548 N.W.2d at 432-433.

At the hearing for summary judgment, Rhine's counsel admitted that he did not anticipate any further testimony of this issue other than that perhaps Rhine's trial counsel may testify. The nonmoving party has an obligation to produce to the court some evidence of specific facts showing that a genuine issue of material fact exists. A review of the *voir dire* record reveals that Rhines is unable to do that. For these reasons, summary judgment is granted as to Ground One of the Petitioner's First Amended Petition for Writ.

Ground Two
SDCL 23A-27A-1 Unconstitutional

Rhines second allegation in his petition states that South Dakota's capital punishment statutes violate due process, equal protection and the right to be free from cruel and unusual punishment. In Rhines' response to the Summary Judgment motion he further clarifies his argument stating: "Jurors must be allowed to consider not only why a death sentence should be imposed, but why it should not be based on all available evidence. By directing consideration of the death penalty in 'all cases' in which it is authorized, a large class of felonies, South Dakota's death penalty provisions do not impose adequate safeguards against irrational or unequal imposition of the death penalty."

SDCL 23A-27A-1 provides:

> Pursuant to §§ 23A-27A-2 to 23A-27A-6, inclusive, **in all cases for which the death penalty may be authorized, the judge shall consider, or shall include in instructions to the jury for it to consider**, any **mitigating circumstances** and **any of the following aggravating circumstances** which may be supported by the evidence:
>
> (1) The offense was committed by a person with a prior record of conviction for a Class A or Class B felony, or the offense of murder was committed by a person who has a felony conviction for a crime of violence as defined in subdivision 22-1-2(9);
> (2) The defendant by the defendant's act knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
> (3) The defendant committed the offense for the benefit of the defendant or another, for the purpose of receiving money or any other thing of monetary value;
> (4) The defendant committed the offense on a judicial officer, former judicial officer, prosecutor, or former prosecutor while such prosecutor, former prosecutor, judicial officer, or former judicial officer was engaged in the performance of such person's official duties or where a major part of the motivation for the offense came from the

official actions of such judicial officer, former judicial officer, prosecutor, or former prosecutor;
(5) The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person;
(6) The offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Any murder is wantonly vile, horrible, and inhuman if the victim is less than thirteen years of age;
(7) The offense was committed against a law enforcement officer, employee of a corrections institution, or firefighter while engaged in the performance of such person's official duties;
(8) The offense was committed by a person in, or who has escaped from, the lawful custody of a law enforcement officer or place of lawful confinement;
(9) The offense was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of the defendant or another; or
(10) The offense was committed in the course of manufacturing, distributing, or dispensing substances listed in Schedules I and II in violation of § 22-42-2.

When one reads SDCL 23A-27A-1 through 23A-27A-6 in whole, it is apparent that the statutes provide both mitigating and aggravating circumstances which must be considered by either the judge or the jury when contemplating a death sentence. Petitioner's argument that the death penalty is mandated is contrary to the law in South Dakota. South Dakota has delineated a statutory scheme which designates the types of crimes in which the death penalty may be applied; however, it is up to the jury or the judge to consider the aggravating and mitigating circumstances of the crime.

Furthermore, this question has been previously determined by the South Dakota Supreme Court:

> We have previously held that the aggravating factors under SDCL 23A-27A-1 are constitutional. *Rhines I*, 1996 SD 55, ¶¶ 74-76, 548 N.W.2d at 437 (noting that the Supreme Court upheld a virtually identical statutory scheme in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). In *Moeller II*, 2000 SD 122, ¶ 176 n. 18, 616 N.W.2d at 465 n. 18, we held this issue to be sufficiently resolved by our previous opinions and declined to address the issue. In this case, the circuit court found that the aggravating factors listed in SDCL 23A-27A-1(3), (6), and (9) applied to Page's convictions. We have previously upheld impositions of the death penalty based upon these specific aggravating factors in *Rhines I*, 1996 SD 55, ¶ 181, 548 N.W.2d at 455 (affirming sentence of death where SDCL 23A-27A-1(3) and (9) were found beyond a reasonable doubt), and *Moeller II*, 2000 SD 122, ¶¶ 98-120, 616 N.W.2d at 450-55 (upholding imposition of the death penalty where SDCL 23A-27A-1(6) was proved beyond a reasonable doubt). Today, we once again uphold the constitutionality of SDCL 23A-27A-1.

State v. Page, 2006 SD 2, ¶22, 709 N.W.2d 739, 751. Finally, the South Dakota Supreme Court held in *Rhines I*, 1996 S.D. 55, ¶65, 548 N.W.2d at 434:

> Rhines contends that South Dakota's capital punishment statutes violate the state and federal constitutions on a number of grounds. In considering his claims, we reiterate that there is a strong presumption in favor of the constitutionality of a statute. *State v. Floody*, 481 N.W.2d 242, 255 (S.D.1992) (citing *Simpson v. Tobin*, 367 N.W.2d 757, 765 (S.D.1985)). This presumption is rebutted only when it appears clearly, palpably, and plainly that the statute violates a constitutional provision. *Id.*

At the summary judgment hearing, both parties conceded that this is an issue for the court and is appropriate for summary judgment. There is no evidence that SDCL 23A-27A-1, et seq. are unconstitutional and therefore, summary judgment is granted as to Ground Two of the Petitioner's First Amended Petition for Writ.

Ground Three
Ineffective Assistance of Trial Counsel

Rhines claims that his trial counsel were ineffective for the following reasons:

a. The tepid presentation of evidence during the penalty phase by the attorneys for Mr. Rhines, including failure to contact or call available witnesses—including, but not limited to John Fouske, James Mighell and Connie Royer—who would have provided helpful testimony for Mr. Rhines in the penalty phase. **(See Exhibit 9, Ground Nine(B) of the Federal Petition.)**

b. The failure to catch and correct erroneous and false, highly prejudicial testimony of Glen Wishard. **(See Exhibit 9, Ground Nine(H) of the Federal Petition.)**

c. The failure to request the hiring of, consult with, or hire a mitigation consultant or expert. **(See Exhibit 9, Ground Nine(I) of the Federal Petition.)**

An additional issue was raised in his First Amended Petitioner related to his counsel's failure to object to prejudicial testimony such as Rhines having access to a gun and failure to object to a statement made by Rhines at the victim's funeral. This issue was not briefed or argued at the summary judgment hearing and for this reason, summary judgment will be granted regarding Petitioner's Ground 3(d).

a. Tepid Presentation of Evidence during Penalty Phase

Rhines contends that his trial counsel failed to properly investigate possible mitigation evidence. He further contends that "when the failure to conduct a proper investigation results from the excessive time burdens or work load of counsel, there is an effective absence of counsel."

Rhines' trial counsels' mitigation strategy was predicated on two monumental defense victories: 1) a pretrial order in limine excluding Rhines' two prior felony convictions for burglary and armed robbery with a sawed off shotgun; and 2) a pretrial order in limine prohibiting the state from presenting evidence concerning non-statutory aggravating factors. **HCT, 40, 42, 44, 70, 83 and 85.**

A review of the record reveals that Rhines' 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, psychiatric and psychological examinations and found that there was very little mitigating evidence to be found or presented. **Gilbert Affidavit, State's Exhibit 23 at ¶6.** Counsel also looked to Rhines for information. Gilbert asked him to write an autobiography from which he hoped to obtain mitigating information. **Gilbert Affidavit, State Exhibit 23, at ¶3.** The information revealed in this autobiography was at best disturbing. **Rhines Autobiography, See Attached Exhibit 12.** Rhines autobiography described his poor performance in school. The attached affidavits from his teachers reveal that he was disruptive, defiant and rebellious. **See, Larson affidavit, State's Exhibit 14, Jundt Affidavit, State's Exhibit 15; Brooks Affidavit, State's Exhibit 16.** The affidavit from Rhines' childhood friend, Kerry Larson, indicates that Larson's testimony would not be favorable to Rhines. He describes Rhines as "intimidating and scary" and knew of Rhines' attempt to blow up the grain elevator. He also said Rhines had a reputation for being a fire starter, and for abusing small animals. He also stated that he witnessed Rhines pouring gasoline on an anthill and setting it on fire in the 6th grade. **Larson affidavit, State's Exhibit 14, at ¶7.** Furthermore, the other friends that Rhines named in his answers to interrogatories as being helpful to the mitigation case, were interviewed and they did not provide any favorable testimony to support Rhines' allegations. **State's Exhibit 32.**

His military records show that he was jailed and disciplined and Article 15'd on numerous occasions for insubordination, drug use, theft of plastic explosives, and assault with a deadly weapon on a fellow service member. **Exhibit 12 at p. 29; Military Records, State's Exhibit 18 at p. 9-13, 25, 28.** In 1976, Rhines was discharged on less than honorable conditions 4 months before the completion of his enlistment. **State's Exhibit 18 at p. 17, 24.**

After leaving the military, Rhines briefly attended college until he burgled a dorm room in 1977. **Rhines Autobiography, Exhibit 12 at p. 2.** He then obtained employment with an excavating contractor where he was taught to use dynamite. His employment ended when he stole his employer's dynamite and wired a grain elevator to explode. **Exhibit 12 at 2, 5.** One of his employers became aware of his plan and rushed to the elevator and unwired the dynamite before Rhines could explode it. **Miller Affidavit, State's Exhibit 17 at ¶¶ 4-5.**

Between his release from the penitentiary in 1987 and the 1992 murder, Rhines worked various jobs. He worked at a doughnut shop in Seattle, Washington, until he embezzled approximately $40,000 from the company by forging payroll checks made payable to himself. **Exhibit 12 at p. 11.**

The centerpiece of Rhines' new mitigation case is Dr. Ertz who stated that Rhines displayed signs of ADHD and was the victim of a cognitive processing disorder. In fact, Dr. Ertz

stated in his report that the reason the tape recorder had to be turned off during Rhines' confession was due to his processing disorder. **State's Exhibit 28, ¶4.** This court finds that Dr. Ertz' testimony does little to support Rhines' argument that this testimony would have assisted his defense team during the mitigation phase. **State's Exhibit 28.**

His attorneys revealed they had a tough task at presenting a mitigation case. Gilbert testified at the first habeas hearing:

Q: [By Michael Hanson] What did you or your team do with regard to putting together something to perhaps combat the victim impact statement or soften its blow?
A: [By Wayne Gilbert] You mean factually?
Q: Yes.
A. Well, um, ultimately we called Charlie's two sisters as witnesses. Um, we spoke to Charlie himself to try to see if there were others we could call, high school teachers, friends, people like that; really didn't come up with much. We talked about calling Charlie's mother but were told that her state of health was such that it would be disastrous for her.
Q: Who told you that?
A: Charlie's sisters.
Q: Did you ever personally speak with his mother?
A: I did not, no.

HCT at p. 126.

. . . .

Q: Did you ever consider the possibility of moving the Court to allow Charles Rhines to make an unsworn allocution to the jury before they decided on the penalty?
A: Yes.
Q: What developed as a result of those thoughts? Well, did you bring such a motion or request?
A: No.
Q: Why didn't you?
A: To the best of my recollection, ah, Charlie decided that he did not want to do that.

. . . .

Q: Did—we discussed this a little bit earlier before I got—realized my notes got a little mixed up here, Mr. Gilbert, but if you'll bear with me. Did your team ever discuss what type of mitigation defense should be put on in the event this case went to the penalty phase?
A: Yes.
Q: What did your group discuss or think of?
A: Well, we discussed Charlie himself testifying or making some sort of allocution statement, his family, members of his immediate family; and as I said earlier, if we could come up with someone from Charlie's past such as teachers or friends, something along that line, talking to them.
A: Did you ever consider putting in Charles' army records?

Q: From what I can recall of those army records, I can't believe that we seriously considered putting them in.

A: How about the fact that he had spent time in the army on the DMZ in Korea?

Q: Ah, putting in records of that, I don't think so. I don't think we discussed that really.

HCT at p. 131.

Mike Stonefield, another of Rhines' trial attorneys also testified at the habeas hearing.

Q: [By Michael Hanson] Did you and the other attorneys ever discuss or talk about what type of mitigation evidence you wanted to or intended to put on at the penalty phase?

A: [By Mike Stonefield] Yeah, it was discussed.

Q: Will you share for us what was discussed?

A: Well, you know, as we worked thorough the thing, I can remember, um, thinking about—and again I guess I have to say this was—you know, this was a learning experience for everybody, certainly learning for me what a mitigation case even involves, what you're hoping to present if you have to come to it, um and from what I learned about it in discussions, I remember I think we talked about attempting to show what we could from his—from his life. Um, but again as we went through this and thought about what it was that we could present, we were confronted again with this problem of the –of the prior criminal record and the fact that we had kept it out. And I know that when we – when the time came for the mitigation case that we did present which involved Charles's sisters, we were walking a pretty fine line on the questions that we asked them to not open the door to where he spent a good part of his adult life—that he had been in prison.

So we ended up presenting or who we ended up presenting as mitigation witnesses were his two sisters who were both adults, and they talked about him, what they remembered from his childhood and the contacts they have or they had with him more recently. But, um, I—I know I saw it this way. I saw us as being really boxed in in a sense to how much about his life we could present without opening up the fact that –that he had spent a good part of the—his adult life in prison.

HCT at p. 41-42.

Q: Was there any thought put into the idea of having Mr. Rhines' mother testify at the penalty phase?

A: Well, there was discussion among—the attorneys I know about his different family members. Um, what I remember about that is that his sister who lived in Nebraska was probably closest to his mother or lived in the same town with her, and I remember that it was her opinion, the sister's opinion, that her mother couldn't bear this, that she wouldn't be able to hold up under it, that she didn't –not only didn't want to testify, that she didn't want to attend the trial or made the decision that she couldn't physically or emotionally.

Q: As the investigative attorney, did you ever speak with Charles Rhines' mother?

A: No, I didn't.

Q: Did you consider putting some testimony on at the penalty phase concerning the fact that Charles Rhines had enlisted in the army when he was 17 years old?

A: Well, um, there was another—there was another door that we might have opened up, you know, that he had been gone—gone into the service at a young age, but we had also obtained service records and I don't think that he had—that his time in the service was a particularly good time or particularly productive time. And had we mentioned that, I think we probably—as with some other things in the mitigation case, we were concerned with the fact that we might be opening a door to information that we didn't want to come in.

HCT at p. 43-44.

Gilbert further explained in his affidavit that Rhines' sisters were emphatic that their elderly mother could not take the stand or assist in his defense. **Gilbert Affidavit, State's Exhibit 23 at ¶3.** Gilbert stated that the defense team met with Dr. D.J. Kennelly, a psychiatrist and that he did not recognize anything in his report as being useful as mitigation evidence. **Gilbert Affidavit, State's Exhibit 23 at ¶4.** Dr. Kennelly consulted with Dr. Bill H. Arbes, a psychologist, and no useful evidence was gleaned from his report, either. *Id.* Gilbert stated that he discussed having Rhines giving his own allocution but it was determined that Rhines' allocution would not be convincing. **Gilbert Affidavit, State's Exhibit 23 at ¶5.** He further stated that Rhines agreed that his allocution would not be effective. **Gilbert Affidavit, Exhibit 23 at ¶5.**

Additionally, due to strategic reasons such as the fear of opening the door to allow evidence of Rhines' past criminal history and other aggravating evidence which counsel has successfully moved *in limine* to exclude, a delicate line had to be walked in the presentation of any evidence at this phase of the trial. **See Gilbert Affidavit, Exhibit 23 at ¶6; HCT at 42/13-21, 44/8, 85/12.** A review of the affidavit of prosecutor Dennis Groff reveals:

> First, Rhines counsel did a heroic job of tying the prosecution's hands on sentencing evidence. For one thing, Rhines' counsel secured an order excluding Rhines' two felony convictions. For another, Rhines' counsel secured an order in limine restricting the prosecution's aggravating evidence to only statutory factors. These were monumental victories for the defense. These rulings allowed Rhines' sisters to paint a sympathetic, and largely unchallenged, portrait of Rhines for the jury. Rhines' sisters' pleas for sympathy carried far greater weight than they deserved give the hidden reality of Rhines' sordid life.

Groff Affidavit, State's Exhibit 31 at ¶8.

The question then becomes whether Rhines' counsels' strategy satisfied the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114 (1987) and *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464 (1986). These three cases are all death penalty cases which address the mitigation phase of a death penalty case.

In *Strickland*, the United States Supreme Court held that defense counsel was not ineffective for failing to investigate or present mitigation evidence when he had succeeded in excluding Strickland's criminal history from sentencing and when further mitigation evidence

risked undermining the favorable light in which he had been able to place Strickland at his plea hearing. After receiving the death penalty, Strickland complained that his counsel should have placed numerous character witnesses on the stand and introduced psychiatric testimony; however, the Strickland court determined that the omission of this potential evidence from Strickland's mitigation case resulted from sound strategy.

In *Burger v. Kemp*, the Court determined that counsel was not ineffective when he "offered no mitigating evidence at all" at the sentencing hearing. Counsel explored several potential avenues of mitigation but ultimately came to the conclusion that presenting the evidence "would have revealed matters of historical fact that would have harmed his client's chances for a life sentence" more than they would have helped. *Burger*, 483 U.S. at 792, 107 S.Ct. at 3124.

Finally, in *Darden v. Wainwright*, the Supreme Court held that counsel was not ineffective when available mitigating evidence "would have opened the door for the state to rebut with evidence of [Darden's] prior convictions. Darden, 477 U.S. 186, 106 S.Ct. 2474. Thus, the jury would have learned that Darden "had been in and out of jails and prisons for most of his adult life." *Id.*

These three cases exemplify the challenges facing Rhines' counsel during the death penalty phase of the trial. In *State v. Page*, the South Dakota Supreme Court held:

> We have recognized, however, that South Dakota law imposes no specific standard of proof in regard to mitigation. *Rhines v. Weber,* 2000 SD 19, ¶ 39 n. 9, 608 N.W.2d 303, 312 n. 9 (*Rhines II*) (citing SDCL 23A-27A-1 and 2). In *Rhines I,* we acknowledged:
>
> > We have rejected the notion that "a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." *Franklin v. Lynaugh,* 487 U.S. 164, 179, 108 S.Ct. 2320, 2330, 101 L.Ed.2d 155, 169 (1988). Equally settled is the corollary that the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer.
>
> 1996 SD 55, ¶ 82, 548 N.W.2d at 438 (quoting *Harris v. Alabama,* 513 U.S. 504, 512, 115 S.Ct. 1031, 1035, 130 L.Ed.2d 1004 (1995)). **In addition, we have also held that "South Dakota law does not require the weighing of aggravating circumstances against mitigating factors. Although the jury is free to consider all mitigating circumstances, they need only find one statutory aggravating factor beyond a reasonable doubt to impose the death penalty."** *Rhines II,* 2000 SD 19, ¶ 53, 608 N.W.2d at 314 (citing *Rhines I,* 1996 SD 55, ¶¶ 78-82, 169, 548 N.W.2d at 437-38, 453).

(emphasis added.) *State v. Page*, 2006 S.D. 2, ¶ 50, 709 N.W.2d 739, 758-759.

The record is replete with evidence supporting the theory that the presentation of the evidence at the penalty phase was due to strategic planning and an effort to minimize the potential "bad" evidence that the State could have introduced to rebut Rhines' efforts to put in mitigating evidence. Finally, a review of Mike Butler's deposition in the first Habeas Corpus Hearing reveals that in his opinion, he did not know whether Rhines had received ineffective assistance of counsel during the mitigation phase and he did not have any idea what mitigation evidence may have been discovered that would have been helpful to the mitigation case. **See Exhibit 6 at p. 41-44.**

A petitioner shoulders a heavy burden of proof in an ineffective assistance of counsel claim. *Coon v. Weber*, 2002 S.D. 48, 11 N.W.2d 638, 642. "A claim of ineffective assistance of counsel presents a mixed question of law and fact and must be reviewed under the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)." *Dillon v. Weber*, 2007 S.D. 81, 737 N.W.2d 420, 424.

> To establish the first prong of ineffective performance, the defendant must rebut the strong presumption that the counsel's performance was competent. *Boyles v. Weber*, 2004 S.D. 31, ¶ 27, 677 N.W.2d 531, 540 (citations omitted). The appropriate standard for judging a lawyer's performance under the first prong is that of "reasonably competent assistance." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064 (citation omitted). " 'There is a strong presumption that counsel's performance falls within the wide range of professional assistance and the reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all circumstances.' " *Denoyer v. Weber*, 2005 S.D. 43, ¶ 19, 694 N.W.2d 848, 855 (quoting *Brakeall v. Weber*, 2003 S.D. 90, ¶ 15, 668 N.W.2d 79, 84 (quoting *Bradley*, 1999 S.D. 68, ¶ 19, 595 N.W.2d at 621)). The second prong of the Strickland test requires a defendant to show that counsel's deficient performance caused actual prejudice to the defendant. Strickland, 466 U.S. at 693, 104 S.Ct. at 2067.

Steichen v. Weber, 2009 S.D. 4, ¶ 25, 760 N.W.2d 381, 393.

The inquiry into counsel's performance must be whether habeas counsel's assistance was reasonable considering all of the circumstances. *Engesser v. Dooley*, 2008 S.D. 124, 759 N.W.2d 309, other citations omitted. The Court recognizes that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* Furthermore, habeas claims based on the failure to call a witness are viewed with caution as "[t]he decision to call a witness is normally a judgment by counsel which the courts do not second-guess." *Williams v. Carter*, 76 F.3d 199, 200 (8th Cir. 1996).

> In habeas cases challenging an attorney's investigation, "the reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. The petitioner must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Brakeall v. Weber*, 2003 S.D. 90, ¶ 15, 668 N.W.2d 79, 84 (emphasis added) (quoting *Bradley v. Weber*, 1999 S.D. 68, ¶ 19, 595 N.W.2d 615, 621).

> It is well settled that in reviewing trial counsel's performance, it is not this Court's function to second guess the decisions of experienced trial attorneys regarding matters of trial tactics unless the record shows that counsel failed to investigate and consider possible defenses and to exercise their good faith judgment thereon. The determination does not rest on whether this Court finds the tactics or strategy employed to be the most advantageous but, instead, whether counsel satisfied the *Strickland* standard of competence. In reviewing whether counsel acted reasonably we analyze counsel's performance in light of the circumstances then existing. Neither the result reached nor second guessing with the benefit of hindsight determine the reasonableness of counsel's performance.

Hirning v. Dooley, 2004 S.D. 52, ¶ 17, 679 N.W.2d 771, 777; *Bradley v. Weber*, 1999 S.D. 68, ¶ 19, 595 N.W.2d 615, 621; *Randall v. Weber*, 2002 S.D. 149, ¶ 7, 655 N.W.2d 92, 96.

Finally, it is important to note that presenting mitigation evidence in this case came with the risks outlined above.

> Even if we somehow assume additional mitigating evidence existed, counsel did not necessarily have to present it. As always, counsel had to consider the possible detriment as well as the benefit. Presenting mitigating evidence risks opening the door to rebuttal evidence. The prosecution may rebut mitigating penalty evidence with unfavorable revelations about the defendant. In rebuttal, the prosecution is bound neither by its statutory pretrial notice of aggravating evidence nor by the aggravating factors set forth in the statute. The possibility of damaging rebuttal is a necessary consideration in counsel's decision whether to present mitigating evidence about the defendant's character and background.

State v. Moeller, 2000 S.D. 122, ¶142, 616 N.W.2d 424, p. 459, quoting, *People v. Freeman*, 8 Cal.4th 450, 34 Cal.Rptr.2d 558, 882 P.2d 249, 286 (1994) (citations omitted).

The nonmoving party has an obligation to produce to the court some evidence of specific facts showing that a genuine issue of material fact exists. After thoroughly reviewing the record, I see no evidence that Rhines is able to do that. Additionally, this issue was raised in the first habeas proceedings and decided by Judge Tice. **See Exhibit 4, ¶¶ 4, 19, and 24**. Thus, this issue is precluded by res judicata. For these reasons, summary judgment is granted as to Ground Three (a) of the Petitioner's First Amended Petition for Writ.

b. The failure to catch and correct erroneous, false and highly prejudicial testimony of Glen Wishard.

Rhines claims his attorneys were ineffective because they failed to contest, exclude or rebut the testimony of Glen Wishard, an employee at the doughnut shop who described Rhines' behavior shortly after the murder. Wishard was a baker at a second Dig'Em Donut location in Box Elder. Wishard's testimony revealed that Rhines and Sam Harter arrived at the Box Elder store sometime after 2:00 a.m. on the night of the murder. He testified that Rhines seemed

"cheerful." **State's Exhibit 3 at 2409.** He stated that Rhines stated that he just been questioned by the police because he was a former employee. *Id.* He went on to say that Rhines did not express any concerns about being questioned by the police. *Id.*

One of Rhines' attorneys, Michael Stonefield, cross-examined Wishard and asked how it came to be that he told the police about his observations of Rhines. He testified that he had contacted the police. Stonefield then asked about the date that he talked to police which he agreed was in September, several months after the murder. **Id. at 2410.** Wishard testified that he didn't think much about Rhines' demeanor until he had been arrested. Rhines argues that he told his attorneys that Wishard's testimony was false and that Wishard had the wrong date. **HCT 52:19 to 53:25.**

During the habeas corpus hearing, Stonefield testified in regards to cross-examining the State's witness:

Q: [By Mr. Hanson]: Okay. There were a number of state witnesses that were not cross-examined by the defense team. Can you tell me why?

A: [By Mr. Stonefield]: Well, a number of them, as I recall, for example, were people who had found property or things like that that simply helped tie Charles into the killing more closely. There were a number of people who—who simply—I think we agreed on this. I don't – I've never thought that you need to ask questions when you're not making a point. I think the objective is to try to make points with your questions and if you're not going to make any, then why ask any.

Q: Okay. So if a witness wasn't cross-examined, there is a likely possibility there wasn't anything to cross-examine them about; would that be a fair statement?

A: Sure.

HCT at p. 84.

Attorney Joe Butler gave similar testimony:

Q: [By Mr. Gormley]: There is also an allegation in this particular case that the Petitioner's attorneys failed to cross-examine some of the prosecution's witnesses. What is your response to that allegation?

A: [By Mr. Butler]: I think that's true. We did not examine some.

Q: And why did you not cross-examine some of the witnesses?

A: Because—I've always –it's my philosophy you don't cross-examine unless you got something to cross-examine about.

HCT 173-174.

The South Dakota Supreme Court has reiterated the standard applied to ineffective assistance of counsel claims numerous times:

> To be entitled to relief on a claim of ineffective assistance of counsel, a defendant must show that his counsel provided ineffective assistance and that he was prejudiced as a

result. *Steichen,* 2009 S.D. 4, ¶ 24, 760 N.W.2d at 392. To establish ineffective assistance, a defendant must show that counsel's representation fell below an objective standard of reasonableness. *Dillon v. Weber (Dillon II)*, 2007 S.D. 81, ¶ 7, 737 N.W.2d 420, 424. The question is whether counsel's representation "amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, —— U.S. ——, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984)). "There is a strong presumption that counsel's performance falls within the wide range of professional assistance and the reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all circumstances." *Steichen*, 2009 S.D. 4, ¶ 25, 760 N.W.2d at 392–93.

State v. Thomas, 2011 S.D. 15, ¶21, 796 N.W.2d 706, 713.

Regarding Wishard's testimony, it appears from the testimony quoted above that the short questioning by Rhines' defense attorneys was strategic rather than ineffective.

Furthermore, the second prong of *Strickland* requires the Petitioner to show prejudice:

A defendant alleging ineffective assistance of counsel also has the burden of proving prejudice. *Dillon II*, 2007 S.D. 81, ¶ 6, 737 N.W.2d at 424. Prejudice "exists only when 'there is a reasonable probability that, but for counsels unprofessional errors, the result of the proceeding would have been different.' " Id. ¶ 8 (quoting *Owens v. Russell*, 2007 S.D. 3, ¶ 9, 726 N.W.2d 610, 615 (quoting Strickland, 466 U.S. at 694, 104 S.Ct. at 2068)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Ultimately, "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2068–69.

Id. at ¶28, 726 N.W.2d at 715. Wishard was called in the State's case in chief. There was overwhelming evidence presented at trial as to his guilt. Rhines has failed to show that he was prejudiced by the questioning of Wishard and there is no reasonable probability that absent the alleged errors by counsel, that the jury would have found him not guilty. For these reasons, summary judgment is granted as to Ground 3(b).

c. The failure to request the hiring of, consult with, or hire a mitigation consultant or expert.

Rhines next claims that his attorneys were ineffective because they failed to hire or consult with a mitigation expert. This issue was not briefed separately in Petitioner's Summary Judgment response; however, for reasons of exhaustion, it will be addressed herein.

The law is clear that although defense teams do "not have a specific obligation to employ a mitigation specialist, they d[o] have an obligation to fully investigate the possible mitigation

evidence available." *Foust v. Houk*, 655 F.3d 524 C.A.6 (Ohio) 2011; *Jells v. Mitchell*, 538 F.3d 478, 495, C.A.6 (Ohio) 2008. (While Jells's counsel did not have a specific obligation to employ a mitigation specialist, they did have an obligation to fully investigate the possible mitigation evidence available.) See, e.g., *Williams v. Taylor*, 529 U.S. 362, 397, 120 S.Ct. 1495 (2000). The purpose of a mitigation specialist is to gather a thorough and comprehensive development of family history and collection of records." *Foust* at 537.

This task was done by Rhines' lawyers and was fully described in Issue 3(a). A mitigation expert would have interviewed the same friends, family, teachers, employers and reviewed the same records including the autobiography of Rhines, as his attorneys did. For these reasons, summary judgment is granted on this issue.

Ground Four
Prosecutorial Misconduct

Rhines makes 4 separate arguments regarding prosecutorial misconduct. They are:

a. The prosecutor's argument that Donnivan Schaeffer's hands had been bound prior to Rhines inflicting the fatal wound was misconduct;
b. The prosecutor's argument that Rhines gutted Schaeffer was misconduct;
c. The prosecutor committed prosecutorial misconduct by introducing and arguing Wishard's testimony; and,
d. The prosecutor committed misconduct in jury selection.

Issues a and b were addressed by Judge Tice in the first habeas case. See Exhibit 4, ¶¶ 16, R and T. However, in order to fully exhaust these issues, they will again be addressed briefly herein.

A. Hands Tied Before Fatal Wound

Rhines claims that the prosecutor improperly argued that the victim's hands were tied prior to the fatal wound was inflicted. More specifically, Rhines argues that Groff improperly argued that Schaeffer's hands were tied prior to the fatal blow.

The test for prosecutorial misconduct was stated in *Rhines v. Weber*, 408 F.Supp.2d 844, 852 (2005):

> The test for reversible prosecutorial misconduct has two parts: (1) the prosecutor's remarks or conduct must in fact have been improper, and (2) such remarks or conduct must have prejudicially affected the defendant's substantial rights so as to deprive the defendant of a fair trial. *United States v. Conroy*, 424 F.3d 833, 840 (8th Cir.2005) (quoting *United States v. Hernandez*, 779 F.2d 456, 458 (8th Cir.1985)). "There are numerous cases in which courts have censured prosecutors for improper statements or conduct but nevertheless have affirmed the conviction because the misconduct was found, in the context of the whole trial, not to be prejudicial." *Hernandez*, 779 F.2d 456 at 458-59.

The Federal District Court more narrowly described Rhines' allegations by stating that "[t]he alleged misconduct is related to the 'outrageously or wantonly vile, horrible, or inhuman' aggravating factor found in SDCL 23A-27A-1." *Id.* The District Court further stated that the state court should have the opportunity to hear the claim." *Id.* Judge Tice's decision on this point is found in his decision issued on October 8, 1998:

> The victim was found with his hands tied securely behind his back, face down on the floor. The victim had 3 knife wounds, the last of which was to the back of his neck, which Rhines referred to as a "coup de grace', the fatal wound. He also stated that the reason he tied the victim's hands was that he didn't want the victim to call for help. While the States Attorney unsuccessfully sought to elicit from the medical examiner that the victim's hands were tied before the fatal blow was struck, he could not answer to a reasonable degree of medical certainty that that was the case. However, there was evidence from which a jury could draw conclusions concerning the sequence in which the rope was tied in relationship to the death of the victim. In addition, there was an appropriate objection made by counsel. While one might feel that there was overreaching by the States Attorney, appropriate steps were taken by defense counsel to preclude an improper response by the medical examiner, and there is no reason to believe that the outcome of the case was in any way improperly influenced.

See Exhibit 4, ¶16. While paragraph 16 of the habeas court's decision was more focused on ineffective assistance of counsel in failing to object to this testimony, the issue was discussed in the context of prosecutorial misconduct in ¶ R.

This Court has examined the trial transcript specifically examining the issue of prosecutorial misconduct and makes the same conclusion. First, the medical testimony was inconclusive as to whether Mr. Schaeffer's hands were tied before or after the fatal wound. **State's Exhibit 3, at 2231-2236**. Secondly, Groff's argument acknowledged the inconclusive nature of the medical examiner's testimony and told the jury it was to make its own conclusion. **State's Exhibit 3 at 2108; 2662**. Thirdly, the South Dakota Supreme Court ruled that a person could reasonably infer that Rhines tied Schaeffer's hands before inflicting the fatal wound. *State v. Rhines*, 1996 S.D. 55 at ¶163, 548 N.W.2d 415, 452.

> Furthermore, **one can reasonably infer from the evidence that Rhines bound Schaeffer's hands before he inflicted the third fatal stab wound.** Rhines told interrogating officers that he tied Schaeffer's wrists because his breath was whistling out of the wound in his back. However, when the interrogating officers questioned Rhines about the possibility that Rhines bound Schaeffer before the fatal wound to his neck, Rhines' responses were evasive and nonsensical. Furthermore, Dr. Habbe testified that the whistling sound of Schaeffer's breath was consistent with Schaeffer's back wound, but that death after the third wound to the neck would have been "near instantaneous." Further, Dr. Habbe noted abrasions on Rhines' wrists, and the jury could reasonably infer that these marks were caused or exacerbated by Schaeffer's agonized struggle before his death.

It appears to this Court that this issue has been addressed by both the habeas court and the South Dakota Supreme Court on direct appeal. The record has been fully developed on this issue and therefore, summary judgment is appropriate. There are no disputed issues of fact regarding the impropriety of Groff's argument as to when the victim's hands were tied and how that argument was made to the jury.

B. Improper Argument that Victim was "gutted"

The Federal District court additionally held that this issue was not exhausted. *Rhines v. Weber*, 408 F.Supp.2d 844 (2005). This issue was addressed in the habeas court's decision in ¶T. Judge Tice held: "T—Prosecutor referring to "gutting" the victim. This was not an unreasonable inference to the nature of the initial wound received by the victim. Although the word may be graphic, it is nonetheless reasonably relevant to the wound, thus appropriate." **See Exhibit 4, ¶T.** While Rhines did not appeal this issue to the South Dakota Supreme Court, it nonetheless, was brought before the habeas court. See, Rhines' Statement of Issues on appeal, Exhibit 7.

Dr. Habbe testified regarding the wounds the victim received. **State's Exhibit 3, 2218-2227.**

Q: [By Groff]: What did you observe about that particular wound?
A: [By Dr. Habbe]: This wound measured, width-wise, from a point down here to a point up here measured a little under one and a half inches. The interior part of the wound here has a blunt margin to it and the superior part of the wound has a sharp, pointed appearance to it. Coming from the tip of this wound is a superficial, and I think you can see part of it right here, what would be called an incised wound coming extending all the way up to right here. From here to here this wound is very superficial and barely breaks through the skin.
Q: With respect to that would you said the blunt portion was on the bottom?
A: Right there.
Q: And the sharp portion was on the top?
A: Right. And that's —to get that what you do is you reapproximate the wound and you can see the blunt margin right here and if you put this back together this margin up at the top I pointed.
Q: And then the area above that wound, the lighter area is that consistent with being caused by the sharp portion of that instrument?
A: Yes.
Q: Tell the jury what you found in the internal examination, please.
A: This wound, the margin of your ribs run along in here, so this wound goes in between two ribs. Can I refer to this report?
Q: Yes.
A: This wound goes in between two ribs on the right side of the chest. It goes into the plural space, which is the space where the right lung would be. The right lung is not involved by the stab wound. The wound then hits the diaphragm which bulges up in here and goes in to the abdominal cavity right where the liver would be. The liver is also not involved.

State's Exhibit 3 at 2218-2220.

Q: [By Groff]: What did you notice about that wound in terms of the regularity of the wound?

A: [By Dr. Habbe]: Well, if you look at this wound, the margins are not, when it's reapproximated, the margins are not even. There is a little irregularity to the wound. In other words, it goes in and then comes back out and so there is—there is irregularities to the sides of the wound indicating that there is movement during this stab wound. Now the movement could be by the knife or by the person who is getting the wound.

Q: Now, when you look at that particular knife, State's Exhibit Number 71, is that knife, the width of that knife greater or lesser than the wound?

A: It's less.

Q: With a wound that is greater than the width of the knife what might that indicate?

A: Well, possibly the same thing. Either movement by the knife as it's going in or movement by the decedent in this case.

State's Exhibit 3 at p.2223.

Q: Approximately how far did those wounds go?

A: The first one was probably not as deep as the second one. This one goes somewhere in the neighborhood of four to six inches, and understand that that's a guess, basically. And the first one over the abdomen goes from three to five inches in that neighborhood.

State's Exhibit 3 at p. 2226.

During closing arguments in the guilt phase of the trial, Groff argued as follows:

> What he does with that knife, he's got it by his side and the blade is up, and with that blade being up when that male figure comes through the door and says, what's going on, what does he do with the knife. The answer is in State's Exhibit Number 57. Sure, you can see the wound there, but you see something else. The doctor told you the blunt end is on the bottom, the sharp end was on the top. And then you see this line going up. That knife was held with that blade up for this ripping kind of motion **to gut** that person, and it shows on State's Exhibit Number 57.

State's Exhibit 3 at p. 2512 (emphasis added). Groff was prepared to substantiate the "gutting" theory with Rhines' former friend who told police that Rhines had often spoken of how he would kill someone by "gutting" them. **Groff Affidavit, at ¶3; Hernandez Affidavit at ¶4.**

A review of prosecutorial misconduct cases in South Dakota reveals that while a prosecutor's conduct may be improper, prejudice must also be shown. In *State v. Smith* 1999 S.D. 83, 599 N.W.2d 344, Smith claimed that in closing arguments the prosecutor deliberately inflamed the passions of the jurors:

During closing arguments, the prosecutor called Smith a "monster ... something scarier than anybody dressed up on Halloween." The prosecutor repeatedly stated Smith was a "sexual predator," a "tyrant in his own home," that Smith "was not human," a "pervert" and a "child molester." He also claimed that Smith, "took away N.F.'s dignity," "[h]e betrayed her trust," "[h]e dominated N.F.," "[he] did not treat N.F. like a human being, let alone a child or let alone a daughter." He stated Smith "got his kicks forcing sex on a child." He said Smith had "impregnated his stepdaughter when she was 13 years old and gave her his disease." The prosecutor argued N.F. was a "prisoner of war," Smith had "held her captive," and she had been "turned into a robot." Counsel for the defendant repeatedly objected to the prosecutor's inflammatory statements. The trial court sustained the objections and instructed the jury to disregard the prosecutor's comments.

The South Dakota Supreme Court reviewed a Minnesota case and stated:

In order to determine whether misconduct occurred we can look to persuasive authority from other jurisdictions. In *Porter*, the Minnesota Supreme Court found that misconduct permeated the prosecutor's entire closing argument. 526 N.W.2d at 365. In closing arguments, the prosecutor stated that if the jury acquitted the defendant they would be "suckers" and if they believed the defendant's wife's testimony then he had "time share in Santa Claus's condo at the north pole, and [would] sell you some." Id. at 363. He also repeatedly referred to the "James Porter School of Sex Education" several times during the closing arguments.FN8 *Id.* The Court labeled the prosecutor's statements as misconduct that "struck at the heart of the jury system, juror independence." Id. at 365.

FN8. Porter had been charged with sexually molesting S.M.D. However, there existed a number of allegations he sexually molested children when he was a priest.

In the *Smith* case, the Court found that the prosecutor had committed prosecutorial misconduct; however, it did not rise to the level required for a reversal. Prosecutorial misconduct reaches the level of a federal constitutional violation only if the argument "so infect[s] the trial with unfairness as to make the resulting convictions a denial of due process." *Id*. quoting, *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

Turning to the facts of the Rhines' case, the evidence in the case suggested that the wound was created by an upward movement of the blade with its sharp end facing upwards. In addition, the word "gut" is used only once in the closing argument of the guilt phase of the trial and not at all in the closing argument in the death penalty portion of the trial. The single use of the word "gut" certainly doesn't reach the level required under the case law cited above. Finally, like the previous issue, this issue was raised before in the habeas hearing before Judge Tice and, therefore, it is res judicata. For all of these reasons, summary judgment is appropriate on this issue.

c. Wishard Testimony

Rhines next contends that the prosecutor improperly introduced testimony that Rhines was cheerful based on the testimony of Glen Wishard, a doughnut shop employee who testified that he saw Rhines the night of the murder. This issue was discussed above in relation to the ineffective assistance of counsel claim. At trial, Wishard testified that Rhines appeared cheerful the night of the murder. **State's Exhibit 3 at p. 2409**. Defense counsel tried to discredit his testimony. **State's Exhibit 3 at p. 2410**. It certainly cannot be said that Groff committed prosecutorial misconduct when using testimony from a state witness during his argument. The supporting evidence for that comment is found in Wishard's testimony.

> It is well established ... that the prosecutor and the defense have considerable latitude in closing arguments, for neither is required to make a colorless argument." *State v. Smith*, 541 N.W.2d 584, 589 (Minn.1996). Counsel has a right to discuss the evidence and inferences and deductions generated from the evidence presented. *State v. Reynolds*, 120 Idaho 445, 816 P.2d 1002, 1006 (Idaho App.1991). However, our cases have held fast to the idea that "[t]he prosecutor has an overriding obligation, which is shared with the court, to see that the defendant receives a fair trial." *State v. Blaine*, 427 N.W.2d 113, 115 (S.D.1988) (citing State v. Brandenburg, 344 N.W.2d 702 (S.D.1984).

There are no facts in dispute regarding whether Groff committed prosecutorial misconduct on this issue. The statement was in evidence and whether or not Rhines can now prove somehow that he told his attorneys that Wishard was mixed up on the dates, does not go to the issue of prosecutorial misconduct. Summary judgment is granted on the issue of Wishard's testimony and prosecutorial misconduct.

d. Jury Selection

Rhines' claims that Groff improperly eliminated all jurors with misgivings about imposing the death penalty. This issue has been before the South Dakota Supreme Court. See, *State v. Rhines*, 1996 S.D. 55, 548 N.W.2d 415. As stated above, a juror may be removed for cause if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." *Id.* at ¶41, 548 N.W.2d at 430, quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 851-852 (1985). In respect to peremptory strikes, no such standard exists.

The South Dakota Supreme Court found no constitutional violation on this issue:

> We therefore hold there is no state or federal constitutional prohibition against the State's use of peremptory challenges to exclude all prospective jurors who expressed reservations about the death penalty but were not excludable for cause on that basis.

Id. at ¶63. Likewise, there is no issue of fact precluding summary judgment.

Ground Five:
Prosecutors possess unfettered discretion in seeking the death penalty

Rhines' Petition lays out a more detailed claim than what was argued in the Summary Judgment brief. The petition states:

> Charles R. Rhines was deprived his rights to due process of law, equal protection of the laws and the doctrine of separation of powers as provided by the state and federal constitutions in that the judgment and sentence of death resulted from a failure to follow the procedure outlined in SDCL 23A-27A. These violations are based on the following reasons:
>
> a. Charles R. Rhines contends that the State's Attorney has only the discretion to charge a Class A Felony, but that once such decision is made the punishment for any such offense lies solely within the province of the judicial branch.
>
> b. SDCL Chapter 23A-27A has been applied unconstitutionally throughout the state in a manner so as to allow a state's attorney to charge under Ch. 23A-27A, but also to allow the state's attorney the unfettered discretion, with no guidelines, whether to seek the death penalty.
>
> c. Other persons who have been charged with Class A felonies have been allowed to enter into plea bargains in which the state's attorneys have made promises of life imprisonment in return for a guilty plea to the Class A felony.
>
> d. Under SDCL Ch. 23A-27A, as interpreted, the jury may choose not to impose a death penalty even if aggravating circumstances are found for any reason or without any reason. Because of the discretion given to the jury under South Dakota's statutory scheme, selecting a jury that is "death qualified" skews the composition of the jury pool and eliminates from it those persons who are able to follow the circuit court's instructions but would nonetheless choose not to impose the death penalty.
>
> e. Because the punishment that may be imposed for a Class A felony lies solely within the province of the judicial branch, the proper pool for proportionality analysis consists of all person who entered guilty pleas or who were convicted of Class A felonies, regardless of whether the death penalty was imposed.

In his Summary Judgment Response he simply argues that South Dakota prosecutors possess unfettered discretion in seeking the death penalty. This argument most closely resembles part 5(b) of his petition. For purposes of exhaustion, all of the issues will be reviewed.

a. Death Penalty in Prosecutor's Sole Discretion

This issue was addressed in *Moeller III*, 2004 S.D. 110 at ¶¶ 42-50, 689 N.W.2d 1 at p. 14-18.

SDCL 23A-27A-2 provides:

In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted to hear additional evidence in mitigation and aggravation of punishment. At such hearing the jury shall receive all relevant evidence, including:

(1) Evidence supporting any of the aggravating circumstances listed under § 23A-27A-1;
(2) Testimony regarding the impact of the crime on the victim's family;
(3) Any prior criminal or juvenile record of the defendant and such information about the defendant's characteristics, the defendant's financial condition, and the circumstances of the defendant's behavior as may be helpful in imposing sentence;
(4) All evidence concerning any mitigating circumstances.

As stated in *Moeller III*:

SDCL 23A-27A-2 takes effect only after the jury has returned a verdict of guilty. At that point, the jury hears "additional evidence in mitigation and aggravation of punishment. In such a hearing, the jury shall receive all relevant evidence, including ... [e]vidence supporting any of the aggravating circumstances listed under § 23A-27A-1" as well as " [a]ll evidence concerning any mitigating circumstances." Id. (emphasis added). At this point, the discretion of the parties and the trial court is limited to the latter's determination of the relevance of proffered evidence: the court is obliged to allow (for "the jury shall hear") both the State and the defense to present "all relevant evidence." That is, the court shall allow the prosecution to present all relevant evidence supporting any of the aggravating factors, and the defense to present all relevant evidence concerning any mitigating factors. Relevant evidence includes "[e]vidence supporting any of the aggravating" factors and " all evidence concerning any mitigating circumstances."

We assume that statutes mean what they say. *South Dakota Subsequent Injury Fund v. Casualty Reciprocal Exch.*, 1999 SD 2, ¶ 17, 589 N.W.2d 206, 209. Quite clearly, § 23A-27A-2 means that the jury is to hear all relevant evidence that either side wishes to present. **Accordingly, when "the prosecution intends to seek the death penalty," nothing more-or less-can be meant than that the prosecution believes that, if the case goes to trial, it has sufficient evidence to support a jury finding that one or more of the aggravating factors exist in the case and that any mitigating evidence will be found an insufficient counterweight to preclude a death sentence.FN6 On the other hand, when "the prosecution does not intend to seek the death penalty," the meaning can be either (1) that the prosecution believes it has insufficient evidence to support a jury finding that aggravating factors exist in the case or (2) that it has proposed-and the court has agreed-that (a) at the conclusion of the culpability phase, the jury will be given no instructions on aggravating factors-without which a death sentence cannot be imposed-and, therefore (b) the jury need not be death-qualified.** To underscore the point, neither the defense nor the prosecution may be

> prevented from presenting relevant evidence to the jury in the penalty phase of the trial. **The notion that prosecutorial discretion exists in the penalty phase is a distraction. The only discretion in the penalty phase is that of the trial court to determine relevance in accordance with standard canons of evidence.**

(emphasis added.) *Moeller III* at ¶¶48-49, 689 N.W.2d at p. 17. The Court's held that Moeller could present no evidence that the prosecution exercised an unlawful discretion in seeking the death penalty:

> As for Moeller's constitutional challenge to the prosecution's discretion in seeking the death penalty, we adhere to our holding in Moeller II that "[s]elective enforcement of SDCL 23A-27A-1 and 22-16-4 is insufficient to show that the statutes have been unconstitutionally applied to a specific defendant, absent a showing that the particular selection was deliberately based on an unjustifiable standard such as race, religion or other arbitrary classification." 2000 S.D. 122, ¶ 165, 616 N.W.2d at 463. Moeller insists that, because the State assumed a prerogative to pursue the death penalty in his case, he has been denied due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment. The State took this decision, however, even before the trial began, in order to obtain a death-qualified jury. Moeller has presented no evidence that the prosecution exercised unlawful discretion.

Id. at ¶51, 689 N.W.2d at p. 18. Based on the South Dakota Supreme Court's precedent on this issue, Rhines' claim must fail and summary judgment is granted.

b. SDCL 23A-27A is applied unconstitutionally by limiting death penalty to egregious crimes.

Rhines argues that SCL 23A-27A et seq. is unconstitutional because it allows the state's attorney unfettered discretion, with no guidelines, whether to see the death penalty. This argument plainly reads the statutes incorrectly. SDCL 23A-27A-4 provides:

> If, upon a trial by jury, a person is convicted of a Class A felony, a sentence of death shall **not be imposed unless the jury verdict at the presentence hearing includes a finding of at least one aggravating circumstance and a recommendation that such sentence be imposed.** If an aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. If a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. The provisions of this section shall not affect a sentence when the case is tried without a jury or when a court accepts a plea of guilty.

Thus a plain reading of this statute limits the prosecutor to seeking the death penalty upon evidence of an aggravating circumstance. Those aggravating circumstances are found in SDCL 23A-27A-1:

> Pursuant to §§ 23A-27A-2 to 23A-27A-6, inclusive, in all cases for which the death penalty may be authorized, the judge shall consider, or shall include in instructions to the

jury for it to consider, any mitigating circumstances and **any of the following aggravating circumstances which may be supported by the evidence**:

(1) The offense was committed by a person with a prior record of conviction for a Class A or Class B felony, or the offense of murder was committed by a person who has a felony conviction for a crime of violence as defined in subdivision 22-1-2(9);

(2) The defendant by the defendant's act knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(3) The defendant committed the offense for the benefit of the defendant or another, for the purpose of receiving money or any other thing of monetary value;

(4) The defendant committed the offense on a judicial officer, former judicial officer, prosecutor, or former prosecutor while such prosecutor, former prosecutor, judicial officer, or former judicial officer was engaged in the performance of such person's official duties or where a major part of the motivation for the offense came from the official actions of such judicial officer, former judicial officer, prosecutor, or former prosecutor;

(5) The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person;

(6) The offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Any murder is wantonly vile, horrible, and inhuman if the victim is less than thirteen years of age;

(7) The offense was committed against a law enforcement officer, employee of a corrections institution, or firefighter while engaged in the performance of such person's official duties;

(8) The offense was committed by a person in, or who has escaped from, the lawful custody of a law enforcement officer or place of lawful confinement;

(9) The offense was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of the defendant or another; or

(10) The offense was committed in the course of manufacturing, distributing, or dispensing substances listed in Schedules I and II in violation of § 22-42-2.

(emphasis added.) South Dakota's statutory scheme is not unconstitutional and provides limitations on prosecutorial discretion and provides specific guidelines for when a prosecutor may seek the death penalty. Furthermore, this issue was fully explored by the South Dakota Supreme Court which found the statutory scheme constitutional in both *Moeller II*, 2000 S.D.

122, ¶ 165, 616 N.W.2d 424, 463 and *Moeller III,* 2004 S.D. 110, ¶43; 689 N.W.2d 1,15. Summary judgment is granted on this issue.

c. Constitutional Right to Plead Guilty

Next Rhines argues that SDCL 23A-27A et seq.is arbitrary because it allows the prosecutor to reject a plea of guilty in exchange for life imprisonment. Rhines' argument must fail as there is no constitutional right to plead guilty in exchange for life imprisonment. As was stated in *Florida v. Nixon*, 543 U.S. 175, 191, 125 S.Ct. 551, 562 (2004):

> Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous.

A review of the facts in this case, reveal that the prosecution rejected Rhines' offers to plead guilty in exchange for a life sentence which it was constitutionally allowed to do. **See HCT 169.**

Q: [by Mr. Hanson]: During the course of your representation of Charles Rhines, were you asked to talk with Mr. Groff about the possibility of a plea agreement whereby Mr. Rhines would plead to the charge in return for a life imprisonment sentence?
A: [by Mr. Joe Butler]: Yes, I was.
Q: Did you have that conversation with Mr. Groff?
A: yes.
Q: What was Mr. Groff's response?
A: He said no way.

HCT 169-170.

The prosecutor's decision to seek the death penalty was based on its evidence showing the objective and non-arbitrary aggravating circumstance of the murder. Again, the statutes contain limitations which are placed upon the prosecution and the evidence in this case supported the charge of a capital offense rather than entering into plea bargain. Summary judgment is granted as to this issue.

d. Death Qualified Jury

Rhines argues that "death qualifying" a jury eliminates those persons who might choose not to impose the death penalty. This issue was already discussed infra in Ground 4(d) in relation to prosecutorial misconduct. In *State v. McDowell*, 391 N.W.2d 661 (S.D. 1986), the South Dakota Supreme Court addressed this issue:

> First, although the systematic exclusion of distinct groups of citizens from jury panels violates a defendant's constitutional rights, *State v. Hall*, 272 N.W.2d 308, 310-11 (S.D.1978), citizens who express a complete inability to impose the death penalty do not constitute a distinct group. *Lockhart v. McCree*, 476 U.S. 162, ----, 106 S.Ct. 1758, 1766, 90 L.Ed.2d 137, 150 (1986). To constitute a distinct group, the group must be cognizable.

United States v. Test, 550 F.2d 577, 591 (10th Cir.1976). It must have some internal cohesion and it must be such "an identifiable group which, in some objectively discernible and significant way, is distinct from the rest of society, and whose interests cannot be adequately represented by other members of the ... panel." *United States v. Potter*, 552 F.2d 901, 904 (9th Cir.1977). Those who cannot impose the death penalty have numerous and countless reasons and rationales for that inability. See *People v. Fields*, 35 Cal.3d 329, 349, 197 Cal.Rptr. 803, 815, 673 P.2d 680, 692 (1983), cert. denied, 469 U.S. 892, 105 S.Ct. 267, 83 L.Ed.2d 204 (1984). Thus, there is no internal cohesion, no cognizability, and no objectively identifiable group distinct from the rest of society. Groups, which are solely defined in terms of their shared attitudes which would prevent or substantially impair members thereof from performing one of their duties as jurors, are not distinctive groups. *Lockhart*, 476 U.S. at ----, 106 S.Ct. at 1766, 90 L.Ed.2d at 150.

Second, assuming such individuals do constitute a distinct group, their exclusion is prohibited only from jury wheels, pools of names, panels or venires from which juries are drawn. The jury actually chosen does not have to "mirror the community and reflect the various distinctive groups in the population." *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 702, 42 L.Ed.2d 690, 703 (1975). See also, *Duren v. Missouri*, 439 U.S. 357, 363-64, 99 S.Ct. 664, 668-69, 58 L.Ed.2d 579, 586-87 (1979). In the present case, those expressing an inability to impose the death penalty were not systematically excluded from the jury pool, and thus defendant has no grounds for complaint. *Lockhart*, 476 U.S. at ----, 106 S.Ct. at 1764-65, 90 L.Ed.2d at 147-48.

Third, defendant has failed to show that his jury, or death-qualified juries in general, are conviction prone and not impartial. Defendant has not presented any empirical evidence, studies, etc. Thus, any impartiality claim is unsupported. Compare, e.g., *Sullivan v. Wainwright*, 464 U.S. 109, 111, 104 S.Ct. 450, 451, 78 L.Ed.2d 210, 212-13 (1983); Keeten v. Garrison, 742 F.2d 129, 131-33 (4th Cir.1984); and *Spinkellink v. Wainwright*, 578 F.2d 582, 593-94 (5th Cir.1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979). See also, *State v. Kingston*, 84 S.D. 578, 586, 174 N.W.2d 636, 640 (1970), wherein we disagreed with the argument that removal of potential jurors because of their conscientious objections to the death penalty, resulted in a jury organized to convict.

Finally, we reject defendant's invitation to follow *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir.1985), which held a death-qualified jury to be a denial of the right to a representative cross-sectional jury. Grigsby goes against the great weight of federal and state authority and was recently overruled in Lockhart. Although this Court is the final authority on the interpretation and enforcement of our state constitution, *State v. Opperman*, 247 N.W.2d 673, 674 (S.D.1976), and we have the power to provide individuals with greater protection under our state constitution than does the United States Supreme Court under the federal constitution, id., we find the decision and reasoning in *Lockhart* to be persuasive and we expressly subscribe thereto in regard to our state constitution. Therefore, defendant's constitutional rights, under either constitution, were not violated.

(emphasis added.)

The reasons set forth in the *McDowell* case are equally applicable here and there is no constitutional violation. Therefore, summary judgment is appropriate.

e. Proper Pool for Proportionality Review

Rhines argues that the pool from which to conduct a proportionality review should have been comprised of a larger class of Class A felonies where the death penalty was not imposed. SDCL 23A-27A-12(3) provides:

> With regard to the sentence, the Supreme Court shall determine:
>
> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 23A-27A-1; and
>
> **(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.**

(emphasis added.) In *Moeller v. Weber*, 635 F.Supp.2d 1036, (D.S.D. 2009) the court addressed South Dakota's proportionality review in capital felony cases:

> S.D.C.L. § 23A-27A-8 provides that the South Dakota Supreme Court "accumulate the records of all capital felony cases that the court deems appropriate." The South Dakota Supreme Court has determined that similar cases for purposes of proportionality review are those cases in which capital sentencing proceeding was actually conducted. See *State v. Rhines*, 548 N.W.2d 415 (S.D.1996). The South Dakota Supreme Court rejected Moeller's contention that by restricting proportionality review to the decisions of other capital sentencing authorities, it was abridging all of Moeller's rights to due process and equal protection of the laws as protected under the Fourteenth Amendment. *Moeller v. Weber*, 689 N.W.2d at 18. Although Moeller maintains that the South Dakota Supreme Court erred in construing its proportionality review statute, federal habeas relief may not be based on a mere perceived error of state law. See *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984).
>
> The Supreme Court has consistently held that the Eighth Amendment does not require proportionality review by an appellate court in every case in which such review is requested by the defendant. See *Pulley v. Harris*, 465 U.S. at 50-51, 104 S.Ct. 871; see also *Walker v. Georgia*, --- U.S. ----, 129 S.Ct. 481, --- L.Ed.2d ---- (2008)(denial of petition of certiorari in which petitioner claimed Georgia Supreme Court erred in applying its statutorily required proportionality review). Although proportionality review is not mandated by the Constitution, once it is required by statute it must be conducted consistently with the Due Process Clause. See *Tokar v. Bowersox*, 198 F.3d 1039, 1052

(8th Cir.1999). In Moeller's direct review the South Dakota Supreme Court, after analyzing the facts of Moeller's case and comparing those facts to the other cases in the proportionality pool, concluded that the sentence of death was neither excessive nor disproportionate to the penalty imposed in similar cases, after considering both the crime and the defendant. *State v. Moeller*, 616 N.W.2d at 463-465. Having conducted this review and having made this determination, the South Dakota Supreme Court satisfied the due process requirement. The Federal courts do not look behind this determination to consider the manner in which the state Supreme Court conducted its proportionality review or whether the state Supreme Court misinterpreted its state statute in conducting its review. *Tokar v. Bowersox*, 198 F.3d at 1052.

Likewise, in the present case, a thorough review of the sentence was done in Rhines' direct appeal. See, *State v. Rhines*, 548 N.W.2d 415 (S.D.1996).

In *State v. Piper*, the South Dakota Supreme Court rejected this same argument:

> This Court's previous decisions have acknowledged that our analysis of similar cases under SDCL 23A-27A-12(3) compares cases involving a capital sentencing proceeding, whether life imprisonment or a death sentence was imposed. "Because the aim of proportionality review is to ascertain what other capital sentencing authorities have done with similar capital murder offenses, the only cases that could be deemed similar are those in which imposition of the death penalty was properly before the sentencing authority for determination." *Rhines I*, 1996 SD 55, ¶ 185, 548 N.W.2d at 455 (quoting *Tichnell v. State*, 297 Md. 432, 468 A.2d 1, 15-16 (1983), cert. denied, 466 U.S. 993, 104 S.Ct. 2374, 80 L.Ed.2d 846 (1984) (citing *Flamer v. State*, 490 A.2d 104, 139 (Del.1983), cert. denied, 474 U.S. 865, 106 S.Ct. 185, 88 L.Ed.2d 154 (1985))). With this holding, we rejected the defendant's argument that "the pool of similar cases for proportionality review should encompass all homicide cases that were prosecuted or could have been prosecuted under the State's current capital punishment scheme." Id. ¶ 184, 548 N.W.2d at 455. Our opinion in *Moeller II* rejected a similar argument. 2000 SD 122, ¶ 167, 616 N.W.2d at 463. Accordingly, we reject Piper's contention that the proper universe of similar cases is all convictions for Class A felonies in South Dakota.

(emphasis added.)

The proper pool from which to conduct a proportionality review in a capital case are those cases in which imposition of the death penalty was properly before the sentencing authority for determination. There was no constitutional error and summary judgment is granted.

Ground Six:
Proportionality Review

This issue was addressed *infra* in Ground 5(e). Summary judgment is granted.

Ground Seven:
Aggravating Factors must be alleged in Indictment

Rhines argues that the aggravating circumstances must be alleged in the indictment or in any information. This issue was decided in *Moeller III*, 2004 S.D. 110, ¶¶ 54-58, 689 N.W.2d 1, 19-20:

> Moeller argues that the habeas court erred when it concluded that the process by which Moeller was charged, convicted, and sentenced to death was not defective in some substantial form required by law. Moeller relies on the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), for his argument that his constitutional rights were violated when the State failed to list in the indictment the statutory aggravators that it intended to use to support his death sentence. However, in *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), the United States Supreme Court made clear the limited application of its ruling in Ring. Writing for the majority of the Court, Justice Scalia unequivocally explained, "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." Id. at 2526. Moeller's direct review was final August 30, 2000. *Moeller II*, 2000 SD 122, 616 N.W.2d 424. Ring did not announce its new procedural rule until 2002. 536 U.S. at 584, 122 S.Ct. at 2428. As such, the rule does not apply to Moeller.

Likewise, the rule does not apply to Rhines whose direct review was final May 15, 1996. Thus, no issue of fact remains and summary judgment is granted.

Ground Eight:

The manner of execution as provided by SDCL 23A-27A-32 as in effect at the time Charles R. Rhines' conviction violated his rights to due process of law and constitutes cruel and unusual punishment under the Eighth Amendment of the United States Constitution and the corresponding Article under the South Dakota Constitution.

In Rhines' Summary Judgment brief, he now contends that he has not exhausted his administrative remedies with the South Dakota Department of Corrections regarding his method of execution claims. **See Exhibit 11, First Amended Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief-Grounds 8, 11 and 12.** He now requests that this court dismiss Grounds 8, 11 and 12 without prejudice.

State argues that any 1983 action filed by Rhines is procedurally defaulted because he failed to exhaust his administrative remedies. The Prisoner Litigation Reform Act (PLRA) requires inmates to exhaust available administrative remedies before filing suit to challenge the conditions of their confinement. Furthermore, 42 U.S.C. 1997e(a) states:

> **§ 1997e. Suits by prisoners**
>
> (a) Applicability of administrative remedies

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

State's argument is that Rhines has procedurally defaulted on any administrative remedy by failing to initiate a complaint within 30 days of notice of the change of execution protocol. South Dakota's state penitentiary offers an administrative remedy for the "application of any administrative directive, policy, or unit rule or procedure." ERM A.12.B-State's Exhibit 7. The Department of Correction's policy gives the inmate 30 days to start the process.

Notice was given to Rhines of the change of execution protocol on or about July 1, 2007. On October 21, 2011, State filed notice of the adoption of the latest version of the execution protocol. Thus, State's argument is that Rhines' claim accrued as early as July 1, 2007 or no later than October 21, 2011. Rhines concedes in his brief, he has failed to exhaust his administrative remedies.

This court does not need to address the exhaustion question because the challenge to the execution protocol has been properly brought in this habeas corpus action as a challenge to the Eighth Amendment Right against cruel and unusual punishment. Habeas corpus can be used only to review (1) whether the Court has jurisdiction of the crime and of the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases, whether an incarcerated defendant has been deprived of basic constitutional rights. *Erickson v. Weber*, 2008 S.D. 30 ¶7, 748 N.W.2d 739, 744 ; SDCL §21-27-16.

The case of *Hill v. McDonough*, 547 U.S. 573, 126 S.Ct. 2096 (2006), addressed a case wherein a prisoner's 1983 action was deemed a habeas petitioner and dismissed by the court for failure to comply with the mandates of a successive habeas petition:

> Federal law opens two main avenues to relief on complaints related to imprisonment: a **petition for habeas corpus**, 28 U.S.C. § 2254, and **a complaint under the Civil Rights Act of 1871**, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983. Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus. *Muhammad v. Close*, 540 U.S. 749, 750, 124 S.Ct. 1303, 158 L.Ed.2d 32 (2004) (per curiam) (citing *Preiser*, 411 U.S., at 500, 93 S.Ct. 1827). An inmate's challenge to the circumstances of his confinement, however, **may be** brought under § 1983. 540 U.S., at 750, 124 S.Ct. 1303.

(emphasis added.) Thus, the Supreme Court recognized both avenues for addressing challenges related to one's imprisonment. Thereafter, in *Adams v. Bradshaw*, the Sixth Circuit Court of Appeals recognized that a method of execution challenge was cognizable on habeas petition:

> The Warden's contention that Hill "holds that a challenge to the particular means by which a lethal injection is to be carried out is non-cognizable in habeas" is too broad. Nowhere in *Hill* or *Nelson* does the Supreme Court state that a method-of-execution challenge is not cognizable in habeas or that a federal court "lacks jurisdiction" to adjudicate such a claim in a habeas action. Whereas it is true that certain claims that can

> be raised in a federal habeas petition cannot be raised in a § 1983 action, see *Preiser*, 411 U.S. at 500, 93 S.Ct. 1827, it does not necessarily follow that any claim that can be raised in a § 1983 action cannot be raised in a habeas petition, see *Terrell v. United States*, 564 F.3d 442, 446 n. 8 (6th Cir.2009). Moreover, *Hill* can be distinguished from this case on the basis that Adams has not conceded the existence of an acceptable alternative procedure. See 547 U.S. at 580, 126 S.Ct. 2096. Thus, Adams's lethal-injection claim, if successful, could render his death sentence effectively invalid. Further, Nelson's statement that "method-of-execution challenges [ ] fall at the margins of habeas," 541 U.S. at 646, 124 S.Ct. 2117, strongly suggests that claims such as Adams's can be brought in habeas.

Adams v. Bradshaw, 644 F.3d 481, 483 (6th Cir. 2011).

No South Dakota court has addressed whether the execution protocol adopted in 2007 and 2011 following the United States Supreme Court's decision in *Baze v. Rees* is constitutional. *Baze* found Kentucky's three-drug lethal injection method of capital punishment did not constitute cruel and unusual punishment under the 8th Amendment.[2] The *Baze* decision detailed the safeguards the Court deemed constitutionally sufficient to protect condemned inmates from anesthetic maladministration.

Because questions of fact exist regarding South Dakota's execution protocol, summary judgment shall not be granted on this issue.

Ground Nine:
Ineffective assistance of appellate counsel

Rhines was convicted and sentenced in 1993 for the murder of Donavan Schaeffer. He filed a direct appeal with the South Dakota Supreme Court which conviction was affirmed on May 15, 1996. Rhines claims that he was denied effective assistance of counsel when his appellate attorneys failed to raise Grounds 1-7 and his Ground 8 on direct appeal.

Questions regarding appellate counsel were raised in the first habeas hearing. **See Exhibit 2 and 3, and Exhibit 4, ¶¶ 6-7.** While some of the issues have been reframed in Rhines' succession of habeas petitions, many of the issues were actually addressed in Justice Miller's 64 page decision. See, *State v. Rhines*, 1996 S.D. 55, 548 N.W.2d 415. Furthermore, some of the issues identified by the Federal District Court as having been unexhausted, were actually addressed by the Supreme Court and by the habeas court. (South Dakota's death penalty statutes are unconstitutional, tepid presentation of mitigation case, erroneous testimony of Glen Wishard, mitigation consultant, and prosecutorial misconduct) This court has thoroughly reviewed and discussed Grounds 1-8 and found no errors of trial counsel, appellate counsel or habeas counsel. To agree with Rhines' argument that his appellate attorneys were ineffective would be imposing an impermissible standard which would hold them to being super-lawyers.

[2] Apparently, this challenge is currently before the Honorable Lawrence Piersol, United States District Court, District of South Dakota, Southern District. It is possible that a decision in that case would be determinative of the issue before this court.

> We have previously acknowledged that "this [C]ourt will not compare counsel's performance to that of some idealized 'super-lawyer' and will respect the integrity of counsel's decision in choosing a particular strategy, [but] these considerations must be balanced with the need to insure that counsel's performance was within the realm of competence required of members of the profession." *Hofman v. Weber*, 2002 S.D. 11, 639 N.W.2d 523 citing, *Sprik v. Class*, 1997 SD 134, ¶ 24, 572 N.W.2d 824, 829 (citations omitted).

The same standard which applies to trial counsel claims applies to claims of ineffective appellate counsel:

> To establish ineffective assistance of counsel, a defendant must prove (1) that counsel's representation fell below an objective standard of reasonableness and (2) that such deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Hopfinger v. Leapley*, 511 N.W.2d 845 (S.D.1994). Relying on *Strickland, Woods v. Solem*, 405 N.W.2d 59, 61 (S.D.1987), held that prejudice exists when there is a reasonable probability that, but for counsel's unprofessional errors, the proceeding would have been different. It is not enough for the petitioner to show that the verdict would have been different, he must show 'that the counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064; *Hopfinger*, 511 N.W.2d at 847; *Fast Horse v. Leapley*, 521 N.W.2d 102, 104 (S.D.1994). See also *Freeman v. Leapley*, 519 N.W.2d 615, 616 (S.D.1994). Other courts have held trial counsel and appellate counsel to the same standard when determining an ineffectiveness of counsel claim. See *Kirby v. State*, 550 N.E.2d 1343, 1345 (Ind.App.1990).

Lykken v. Class, 1997 S.D. 29, 561 N.W.2d 302. There has been no evidence that counsels' representation fell below an objective standard of reasonableness or that there has been any prejudice to Petitioner. Summary judgment is granted as to this claim.

Ground Ten:
Ineffectiveness of Habeas Counsel

Charles R. Rhines' argues next that his habeas counsel failed to raise the issues set forth in grounds 1 through 9, inclusive, in the Petition for Writ of Habeas Corpus initially filed, and the subsequent appeal to the South Dakota Supreme Court.

Rhines' first habeas trial was held before Judge Tice on April 6, 1998. Judge Tice issued a decision addressing 46 issues. **See Exhibit 4.** Furthermore, this court has addressed each of the alleged errors herein and it cannot be said that habeas counsel's performance fell below an objective standard of reasonableness and that Rhines was prejudiced. *Strickland.* It can hardly be said that counsel was ineffective. Effective counsel is not always equated with successful counsel. *Fast Horse v. Leapley*, 521 N.W.2d 102 (S.D.1994); *State v. McBride*, 296 N.W.2d 551, 554 (S.D.1980). Applying the standard set forth above, I find that Petitioner has not met his burden and summary judgment shall issue.

Ground Eleven:

Lethal injection execution protocol violates Eighth Amendment

Rhines' contention regarding the execution protocol was addressed in Ground Eight. Rhines is entitled to present evidence at the evidentiary hearing on this issue.

Ground Twelve:

Charles R. Rhines' right to due process of law against cruel and unusual punishment is guaranteed under the United States Constitution and the South Dakota Constitution is violated by the statutory procedure set forth in 23A-27A-32.

Rhines' contention regarding the execution protocol was addressed in Ground Eight. Rhines is entitled to present evidence at the evidentiary hearing on this issue.

Ground Thirteen:

The present SDCL 23A-27A-32 constitutes an unconstitutional bill of attainder, and an unconstitutional *ex post facto* law as applied to Charles R. Rhines.

A. *Ex Post Facto* Law

Rhines claims that SDCL 23A-27A-32 constitutes an unconstitutional *ex post facto* law because it adopted a different method of execution by lethal injection than existed at the time of Rhines' conviction. Article I, Section 10 of the United States Constitution and Article VI, Section 12 of the South Dakota Constitution prohibit the adoption of *ex post facto* laws. See, *State v. Arguello*, 2002 S.D. 157, 655 N.W.2d 451.

> [I]it is settled that criminal or penal legislation amending existing law may not change the legal consequences of acts completed before its effective date, a statute, however, is not rendered unconstitutional as an *ex post facto* law merely because it might operate on a fact or status preexisting the effective date of the legislation, as long as its punitive features apply only to acts committed after the statutory proscription becomes effective. *Lewis v. Class*, 1997 SD 67, ¶ 23, 565 N.W.2d 61, 65.

State v. Arguello, 2002 S.D. 157, ¶14, 655 N.W.2d 451, 454. Two elements are required for a finding that a statute is *ex post facto*: "[I]t must be retrospective, that is it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17, 23 (1981) (footnotes omitted). See also *Delano v. Petteys*, 520 N.W.2d 606, 608 (S.D.1994); *Stumes v. Delano*, 508 N.W.2d 366, 371 (S.D.1993); *Matter of Williams*, 488 N.W.2d 667, 669-70 (S.D.1992) (*Williams I*).

Rhines' claim fails to meet the requirements set forth to establish a valid *ex post facto* claim. Summary Judgment is granted.

B. Bill of Attainder

Finally, Rhines claims that SDCL 23A-27A-32 is an unconstitutional bill of attainder because it subjects him to a different method of execution by lethal injection than existed at the time of his sentencing. South Dakota has very little case law dealing with bills of attainder.

> An understanding of the prohibition against bills of attainder begins with an examination of the evils that the framers of the Constitution sought to prevent by adopting the clause. During the three centuries preceding the American Revolution, the British Parliament used the "bill of attainder" as a device to impose a sentence of death against named persons or identifiable members of a group without benefit of trial. *United States v. Brown*, 381 U.S. 437, 85 S.Ct. 1707, 1711, 14 L.Ed.2d 484 (1965). An almost identical legislative device known as the "Bill of Pains and Penalties" inflicted less onerous punishments such as imprisonment, banishment, and confiscation of property of specified persons or groups, also without benefit of a judicial trial. *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S.Ct. 2777, 2806, 53 L.Ed.2d 867 (1977). During the Revolutionary War, all thirteen state legislatures adopted laws directed against those loyal to the Crown; among these statutes were a significant number of bills of attainder and bills of pains and punishment. *U.S. v. Brown*, 85 S.Ct. at 1711. No doubt exists that the framers of the United States Constitution were familiar with the infamous history of bills of attainder when the prohibition against such statutes by states was adopted unanimously and without debate by the Constitutional Convention.
>
> The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature. *U.S. v. Brown*, 85 S.Ct. at 1711–12.

(emphasis added.) *State ex rel. Bunker Resource Recycling and Reclamation, Inc. v. Mehan*, 782 S.W.2d 381 (Mo.1990). With that historical perspective, it serves to examine an example of a death row inmate attack on a change of execution protocol from hanging to lethal injection. In *Langford v. Day*, 134 F.3d 1381 (9th Cir. 1998), the court held:

> The characteristics of a bill of attainder are **specificity of the affected persons, imposition of punishment, and lack of a judicial trial.** See *Atonio v. Wards Cove Packing Co.*, 10 F.3d 1485, 1495 (9th Cir.1993). None of the three characteristics is present here. The Montana legislature's action affected all persons under sentence of death, now and in the future. The elimination of hanging imposed no punishment on Langford. Langford was convicted and sentenced to death by a court. There accordingly has been no attainder.

(emphasis added.)

Likewise, none of these three characteristics are present in this case and Rhines' claim must fail. Summary judgment is granted.

III. CONCLUSION

An evidentiary hearing shall be held on Petitioner's First Amended Petition for Writ of Habeas Corpus on Grounds 8, 11 and 12. The declaratory relief requested is denied.

ORDER

ACCORDINGLY, it is hereby ORDERED that State's Motion for Summary Judgment is granted as to Grounds 1-7, 9 and 10 and is denied as to Grounds 8, 11 and 12. Evidence shall be heard on Grounds 8, 11 and 12 on November 26-29, 2012, commencing at 8:30 a.m. each day.

Dated this 17 day of September, 2012 at Rapid City, Pennington County, South Dakota.

BY THE COURT

Honorable Thomas L. Trimble
Circuit Judge, Seventh Judicial Circuit

ATTEST:
Ranae Truman, Clerk of Courts
By: _____
Deputy Clerk

(SEAL)

State of South Dakota } Seventh Judicial
County of Pennington } Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this
SEP 17 2012
RANAE L. TRUMAN
Clerk of Courts, Pennington County
By _____ Deputy

Pennington County, SD
FILED
IN CIRCUIT COURT
SEP 17 2012
Ranae Truman, Clerk of Courts
By _____ Deputy

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

CHARLES RUSSELL RHINES, Petitioner, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	ORDER DENYING MOTION FOR CERTIFICATE OF PROBABLE CAUSE #26673

Petitioner having served and filed a motion for a certificate of probable cause to appeal from a final order entered by the trial court in the above-entitled habeas corpus proceeding on April 29, 2013, and respondent having served and filed a response thereto, and the Court having considered the motion and response and having determined that probable cause that an appealable issue exists has not been demonstrated, now, therefore, it is

ORDERED that the motion for a certificate of probable cause be and it is hereby denied.

DATED at Pierre, South Dakota, this 17th day of July, 2013.

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

(Justices John K. Konenkamp and Lori S. Wilbur disqualified.)

PARTICIPATING: Chief Justice David Gilbertson and Justices Steven L. Zinter, Glen A. Severson, Circuit Court Judge Scott P. Myren and Retired Justice Robert A. Miller.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2376

Charles Russell Rhines

Appellant

v.

Darin Young, Warden, South Dakota State Penitentiary

Appellee

American Civil Liberties Union, et al.

Amici on Behalf of Appellant(s)

Appeal from U.S. District Court for the District of South Dakota - Rapid City
(5:00-cv-05020-KES)

ORDER

The petition for rehearing by the panel is denied.

September 18, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CHARLES RUSSELL RHINES, Plaintiff, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Defendant.	*	CIV. 00-5020-KES **FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND STATEMENT OF EXHAUSTION**

Charles Russell Rhines, for his First Amended Petition For Writ of Habeas Corpus and Statement of Exhaustion, and consistent with the Court's Procedural Order dated May 17, 2000, and the Rules Governing Section 2254 Cases in the United States District Court and Appendix thereto, states as follows:

1. Petitioner Charles Russell Rhines is imprisoned in the South Dakota State Penitentiary under a Judgment of Conviction entered in Circuit Court, Seventh Judicial Circuit, County of Pennington, State of South Dakota.

2. The date of the Judgment of Conviction was January 29, 1993.

3. The sentence imposed on Charles Russell Rhines is death by lethal injection.

4. The offenses on which Petitioner was convicted are first degree murder and third degree burglary.

5. Petitioner Charles Russell Rhines entered a plea of not guilty to the offenses charged at his preliminary hearing. Before his trial, Petitioner Rhines, through counsel, offered to plead

guilty to first degree murder in exchange for a life sentence, which offer was spurned by the prosecuting attorney.

6. The conviction and sentence was obtained through jury trial.

7. Petitioner Charles Russell Rhines did not testify at trial.

8. Petitioner Charles Russell Rhines did appeal from the Judgment of Conviction.

9. The appeal from the Judgment of Conviction was to the Supreme Court of the State of South Dakota.

10. The decision of the Supreme Court of South Dakota on direct appeal is reported at State v. Rhines, 548 N.W.2d 415 (S.D. 1996).

11. The Judgment of Conviction and the death sentence were upheld by the South Dakota Supreme Court, notwithstanding the finding of the South Dakota Supreme Court that one of the aggravating factors relied upon by the jury to impose the death sentence was unconstitutional.

12. Petitioner Charles Russell Rhines filed an Application For Writ of Habeas Corpus in state court. Prior to this case, Petitioner Charles Russell Rhines has never filed a federal habeas corpus action to challenge his conviction.

13. Petitioner Charles Russell Rhines filed his state court Application for Writ of Habeas Corpus in Circuit Court, Seventh Judicial Circuit, State of South Dakota, Pennington County as Rhines v. Weber, civil file number 96-1070. The Court held an evidentiary hearing on the Petition, and issued Findings of Fact, Conclusions of Law and an Order on November 16, 1998, denying relief on the Petition. Petitioner Charles Russell Rhines appealed to the Supreme Court of South Dakota, which affirmed the lower court in a decision reported at Rhines v. Weber, 608 N.W.2d 303 (S.D. 2000).

14. A concise statement, as contemplated in the model form for use in Applications for Habeas Corpus under 28 U.S.C. § 2254, of each ground on which claim for relief is made, including a Statement of Exhaustion as required in the Court's Procedural Order dated May 17, 2000, follows:

GROUND ONE:

The Fifth and Fourteenth Amendment rights of Mr. Rhines were infringed through admission and use at trial of Mr. Rhines' statements to law enforcement officers on June 19 and 21, 1992.

Supporting Facts:

Following the arrest of Mr. Rhines in Seattle on June 19, 1992, Mr. Rhines was questioned over the course of several hours on June 19 and June 21, 1992, by two law enforcement officers from the State of South Dakota. During the course of the interrogation, Mr. Rhines made incriminating statements that were used prominently by the State in the guilt and penalty phases of the trial. The law enforcement officers failed to give adequate warnings as required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), and its progeny, in that:

A. At no time was Mr. Rhines told that he could terminate the questioning at any time he wished;

B. At no time was Mr. Rhines told that he had the right not only to have an attorney present with him during the questioning, but also to request an attorney to be present at any point during questioning;

C. At no time was Mr. Rhines told that if he could not afford an attorney, one would or must be appointed for him;

D. At no time was Mr. Rhines told that by agreeing to answer questions, he would be waiving Miranda rights;

E. The statements of Mr. Rhines were involuntary in that they were procured following a statement by a South Dakota law enforcement officer implying that Mr. Rhines would not receive the death penalty.

Statement of Exhaustion:

The admission of the statements taken from Mr. Rhines on June 19 and 21, 1992, were challenged at the trial court level through Defendant's first Motion To Suppress, (Settled Record "SR" at 68-72) Supplement to First Motion to Suppress (SR at 88-95), Suppression Hearing of December 1, 1992, and an objection at trial before admission of the statements (Trial Transcript "TT" at 2415-16). These issues were raised on direct appeal (Appellant's Brief dated June 23 1994 at pp. 15-27). These issues further were raised in the First Amended Application For Writ of Habeas Corpus (First Amended Application at p. 4, B.), and on appeal in the state habeas corpus action (Appellant's Brief dated January 20, 1999, at p. 48).

GROUND TWO:

The rights of Mr. Rhines to due process, an impartial jury, and to equal protection of the law were violated by exclusion for cause of two prospective jurors: A) Diane Staeffler and B) Jack Meyer.

Supporting Facts:

During jury selection, the State used its peremptory challenges to exclude those prospective jurors who had expressed scruples, reservations or concerns about implementation of the death penalty (TT at 430, 514, 607, 810, 1109, 1298, 1349). Running short on peremptory challenges, the State sought and the trial court allowed removal for cause of prospective juror Diane Staeffler (TT at 1618-1639). Diane Staeffler, while indicating hesitation with implementing the death penalty, indicated a willingness to follow the instructions of the Court in that regard. The Court twice denied challenges for cause by the State, yet continued to allow the State to interrogate Staeffler in an increasingly hostile fashion. The Court then granted the State's motion to excuse Ms. Staeffler for cause. The handling of prospective juror Jack Meyer was substantially similar. (TT at 332).

Statement of Exhaustion:

During the questioning of Diane Staeffler, counsel for Rhines repeatedly objected to the handling of the questioning and the motions to excuse Ms. Staeffler for cause (TT at 1631-1639). Rhines raised a challenge to the exclusion of Diane Staeffler for cause on his direct appeal (Appellant's Brief dated June 23, 1994, at pp. 28-41). On direct appeal, this issue was raised with reference to due process rights and to the rights secured under the cases of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed. 2d 339 (1976); and Gray v. Mississippi, 41 U.S. 648, 107 S.Ct. 2045, 95 L.Ed. 2d 622 (1987). Mr. Rhines again raised this issue in his First Amended Application For Writ of Habeas Corpus (First Amended Application at p. 4.C.) and on appeal to the South Dakota Supreme Court from the denial of the Writ of Habeas Corpus in state court. (Appellant's Brief dated January 20, 1999 at p. 49.) The handling of juror Jack Meyer has not been separately exhausted in state court.

GROUND THREE:

The rights of Mr. Rhines to due process, an impartial jury, and equal protection of the law were violated by the State's calculated and selective use of peremptory challenges to exclude jurors with scruples or reservations about imposition of the death penalty.

Supporting Facts:

The State openly pursued a strategy to use peremptory challenges to remove jurors who demonstrated scruples, concerns or reservations about the death penalty, but who were not unequivocally opposed to imposing the death penalty in all cases. (TT at 430, 514, 607, 810, 1109, 129, 1349, 1701-02). With respect to its strategy regarding peremptory challenges, the prosecuting attorney acknowledged:

> . . . the State has worked out a strategy to specifically avoid the next juror, that is juror Larson, the next person you'll see. Our whole strategy in waiving was to avoid the possibility of having her come on without any pre-emts [sic] left when she stated on her questionnaire that it would be very difficult to impose the death penalty, that was our greatest fear and that is the reason we waived.

TT at 1701-02. The State's strategy and "greatest fear" of jurors who may have reservations about imposition of the death penalty violated the Fifth, Sixth, Eighth and Fourteenth Amendment rights and protections secured to Mr. Rhines by decisions like Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

Statement of Exhaustion:

Counsel for Mr. Rhines objected during jury selection as to the tactics of the State. Counsel for Mr. Rhines also moved to have a new jury impaneled for purposes of the penalty phase. (TT at 2567-2570). Mr. Rhines raised on the direct appeal the challenge to the State's calculated and selective use of peremptory challenges, including citation to the cornerstone Witherspoon case. (Appellant's Brief dated June 23, 1994, at 41-45). That challenge was renewed in the First Amended Application For Writ of Habeas Corpus (First Amended Application at p. 4.D.) The issue was also raised again on appeal in the state habeas corpus action. (Appellant's Brief dated January 20, 1999, at p. 49).

GROUND FOUR:

Mr. Rhines' constitutional protection against ex post facto laws, the Eighth Amendment right against cruel and unusual punishment, and rights to due process and equal protection of the law were violated by use of victim impact testimony during the penalty phase.

Supporting Facts:

The murder on which the conviction is based occurred on March 8, 1992. On July 1, 1992, an amendment to the South Dakota death penalty statutes became effective to permit victim impact testimony during the penalty phase. Citing the protection against ex post facto

laws and other authority, Mr. Rhines filed a motion to exclude any such evidence or testimony, and a supplement to that motion (SR at 115-116, 141-142). The trial court reserved ruling until the day of the penalty phase proceeding, January 25, 1993, when it chose to admit such evidence. (SR at 427, TT at 2563-2567). The victim impact testimony, which was read by the victim's mother and was the last testimony to the jury during the penalty phase, was not rebuttal to any presentation by the witnesses for Mr. Rhines and was not otherwise admissible evidence in the penalty phase.

Statement of Exhaustion:

Rhines challenged the admission of the victim impact testimony at trial, both by motion and during trial. (SR at 115-16, 141-142, Motion Hearing Transcript at 12-31, 54-57, TT at 2563-2567). Rhines raised a challenge to the allowance of the victim impact statement on direct appeal. (Appellant's Brief dated June 23, 1994, at 53-70.) In the course of that appeal, Rhines referred to the ex post facto prohibition and cited to cases involving constitutional challenges including Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); Booth v. Maryland, 42 U.S.496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987); South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989). In his First Amended Petition for Writ of Habeas Corpus, Rhines again raised the challenge to the admission of the victim impact evidence. (First Amended Application at p. 4.G.). That challenge was likewise stated to the South Dakota Supreme Court on appeal in the state habeas corpus action. (Appellant's Brief dated January 20, 1999, at p. 50).

GROUND FIVE:

The due process, equal protection and Eighth Amendment rights of Mr. Rhines to be free from cruel and unusual punishment were infringed through imposition of the death penalty by a jury that considered an unconstitutional "depravity of mind" aggravating factor.

During the penalty phase, the Court instructed the jury under SDCL 23A-27A-1(6) on "depravity of mind" as an aggravating factor on which the jury could base imposition of a death sentence. The trial court gave the jury instructions on "depravity of mind." (SR 456-57). The State argued for imposition of the death penalty based on Mr. Rhines' alleged "depravity of mind." The jury specifically found as an aggravating factor underlying imposition of the death penalty that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved "depravity of mind" by Mr. Rhines. (SR at 481). The Supreme Court of South Dakota appropriately found that the "depravity of mind" element was unconstitutionally vague. State v. Rhines, 548 N.W.2d 415, 447-449 (S.D. 1996). Nevertheless, the South Dakota Supreme Court upheld the imposition of the death sentence, despite the unconstitutional factor (and jury instructions regarding that factor) being considered by the jury. The South Dakota Supreme Court failed to undertake an appropriate harmless error analysis.

Statement of Exhaustion:

Mr. Rhines objected at trial to the giving of the instructions on "depravity of mind." (TT at 2639-2640). Mr. Rhines raised challenges to the giving of instructions on "depravity of mind" on direct appeal (Appellant's Brief dated June 23, 1994, at 77-86). Mr. Rhines raised this issue again, including the issue of the lack of harmless review analysis by the South Dakota Supreme Court, in his First Amended Petition, and on appeal of the State Habeas case to the South Dakota Supreme Court. (Appellant's Brief at pp. 37-48). During the presentation on direct appeal, Mr. Rhines cited cases involving constitutional issues, such as Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); and Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). On the appeal from the State Habeas Corpus ruling, Mr. Rhines cited federal constitutional law cases including Zant v. Stephens, 462 U.S. 862, 77 L.Ed.2d 235, 103

S.Ct. 2733 (1983); Clemons v. Mississippi, 494 U.S. 738, 108 L.Ed.2d 725, 110 S.Ct. 1441 (1990). Sochor v. Florida, 504 U.S. 527, 119 L.Ed.2d 326, 112 S.Ct. 2114 (1992); Stringer v. Black, 503 U.S. 222, 117 L.Ed.2d 367, 112 S.Ct. 1130 (1992); and Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 765, 875 S.Ct. 824 (1967).

GROUND SIX:

Mr. Rhines' rights to due process, equal protection and to be free from cruel and unusual punishment were violated on account of the unconstitutionality of the South Dakota capital punishment statutes in several respects.

Supporting Facts:

Mr. Rhines was given a sentence of death under the South Dakota capital punishment scheme that existed under SDCL 23A-27A as of January of 1993. The South Dakota death penalty statutes were unconstitutional in the following respects.

A. The listing of aggravating circumstances under SDCL 23A-27A-1 does not adequately limit "death eligible" defendants or offenses;

B. The South Dakota capital punishment statutes contain insufficient standards to guide the sentencer's discretion in determining whether a particular defendant will or will not receive a death sentence;

C. The South Dakota death penalty statutes mandate a sentence of death upon a jury recommendation, unconstitutionally foreclosing discretion of a trial judge in sentencing;

D. The South Dakota death penalty statutes require judicial proportionality review, without providing adequate guidance or a means of collecting information on death penalty cases;

E. The South Dakota death penalty statutes in SDCL 23A-27A-1, mandate that the court "shall consider, or shall include in instructions to the jury" death penalty provisions "in all cases for which the death penalty may be authorized," which is all Class A felonies under SDCL 22-6-1.

Statement of Exhaustion.

Such challenges to the constitutionality of the South Dakota Capital punishment statutes were raised in Pre-Trial Motions. (SR at 96-103). Such matters were argued by Mr. Rhines at the trial court level (Motion Hearing at 12-31). On direct appeal from the conviction, Mr. Rhines raised such challenges. (Appellant's Brief dated June 23, 1994 at pp. 45-53). Such issues were raised again in the state habeas corpus petition and to the South Dakota Supreme Court on appeal therefrom. (Appellant's Brief dated January 20, 1999, at pp. 49-50). Issue Six E. was not directly raised previously by Rhines, but is futile to pursue in state court in light of the South Dakota Supreme Court ruling in State v. Moeller, 616 N.W.2d 424, 463 (S.D. 2000).

GROUND SEVEN:

The Fifth Amendment right to due process, the Eighth Amendment rights to be free from cruel and unusual punishment and the equal protection rights of Mr. Rhines were violated by improper jury instructions during the penalty phase.

Supporting Facts.

The following errors occurred in the jury instructions during the penalty phase of Mr. Rhines' trial:

A. The trial court instructed on "depravity of mind" as a circumstance for imposing the death penalty, which was later held to be unconstitutional.

B. The trial court erred in its instruction on the meaning of SDCL 23A-27A-1(3);

C. The trial court erred in refusing the giving of a proposed instruction by Charles Rhines regarding the procedure for the jury to follow in arriving at their sentence (SR at 445, Proposed Instruction 8);

D. The trial court refused to give Rhines' proposed instruction 9 regarding the presumption of innocence of aggravating circumstances (SR at 446);

E. The trial court refused to give proposed instruction 11 regarding the meaning of the death sentence and life imprisonment (SR at 448).

F. The trial court failed to comprehend the reasons for the jury note and failed to deal properly with instructing the jury in light of its jury note.

In the midst of deliberation on the penalty phase, the jury sent a note to the Court indicating confusion over the meaning of life without parole, what petitioner's living conditions and privileges might be if he received life in prison, and other such things. The jury thus indicated an uncertainty over the instructions from the Court, which could have and should have been resolved through Rhines' proposed instructions.

Statement of Exhaustion:

The above-listed challenges to the jury instructions were presented to the trial court and presented on direct appeal (Appellant's Brief dated June 23, 1994 at 86-92, 109-116). In that discussion, Rhines referred to constitutional rights and cited constitutional authority such as Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2809, 49 L.Ed.2d 859 (1976), and other such authority. In the state habeas corpus case, Mr. Rhines again presented such arguments in the First Amended Petition and to the South Dakota Supreme Court on appeal. (Appellant's Brief dated January 20, 1999, at 57).

GROUND EIGHT:

There was constitutionally insufficient evidence to support a finding of certain aggravating circumstances.

Supporting Facts:

Based on the instructions of the trial court, the jury found that the offense involved "torture" and was perpetrated to obtain money. Given the way those terms should apply in the context of the death penalty and in the context of sufficiency of the evidence under the Fifth Amendment, Eighth Amendment, and Equal Protection Clause, there was insufficient evidence to find either of those aggravating circumstances beyond a reasonable doubt.

Statement of Exhaustion.

Rhines raised the above-stated grounds on his direct appeal (Appellant Brief dated June 23 1994 at 86-93, 70-77). These grounds were again stated in the First Amended Petition and on appeal to the South Dakota Supreme Court in the state habeas action. (Appellant's Brief dated January 20, 1999 at 50-51).

GROUND NINE:

Mr. Rhines' Fifth Amendment right to due process of law and the Sixth Amendment right to assistance of counsel were violated through the ineffective assistance of his trial counsel.

Supporting Facts:

Mr. Rhines was represented at trial level by Wayne Gilbert and Joseph Butler. The Court also appointed public defender Michael Stonefield as the investigator. The ineffective assistance of trial counsel manifested itself in multiple ways including:

A. The absence of any true mitigation investigation on behalf of Rhines;

B. The tepid presentation of evidence during the penalty phase by the attorneys for Mr. Rhines, including failure to contact or call available witnesses—including, but not limited to, John Fousek, James Mighell and Connie Royer—who would have provided helpful testimony for Mr. Rhines in the penalty phase;

C. The failure to present to the jury during the penalty phase any information about Rhines' willingness to accept culpability, whether through information on Rhines' effort to plead guilty to first degree murder or through Rhines' right to give an allocution to the jury at the penalty phase;

D. The failure of the defense team to make a motion in limine and objections to prevent presentation of information on the homosexuality of Charles Rhines, and instead publicizing to the jury Rhines' homosexuality during voir dire;

E. The inappropriate and ineffective handling of the jury note raising questions during penalty phase deliberations about Mr. Rhines personally and the meaning of life imprisonment;

F. The need for the appointed investigator, Michael Stonefield, to take over much of the defense work in the case due to problems with the defense team;

G. The ineffective representation of Mr. Rhines by one attorney who was suffering from depression and later disbarred for theft, a second attorney who openly and repeated told the jury that he supported the death penalty, and a third attorney who was supposed to be the "investigator" and ended up doing the majority of the work.

H. The failure to catch and correct erroneous and false, yet highly prejudicial, testimony from Glen Wishard.

I. The failure to request the hiring of, consult with, or hire a mitigation consultant or expert.

J. The failure of trial counsel to register objections to keep out irrelevant yet prejudicial testimony such as Rhines having access to a gun, a statement by Rhines at the victim's funeral.

Statement of Exhaustion:

Petitioner believes that the issues listed as A through G were raised in the First Amended Application For Writ of Habeas Corpus and in turn on the appeal to the South Dakota Supreme Court in the state habeas corpus action. (Appellant's Brief dated January 20, 1999 at 9, 17-37.) In his presentation of these claims, Rhines relied upon the seminal constitutional case in this realm of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

GROUND TEN:

The rights of Mr. Rhines to due process, equal protection under law, and to be free from cruel and unusual punishment were violated by the Court's errors in its proportionality review and review of whether imposition of the death penalty was under passion, prejudice or other arbitrary factors.

Supporting Facts:

Under SDCL 23A-27A-12 and consistent with constitutional protections under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, the Supreme Court of South Dakota was obliged to and undertook an analysis of: 1) Whether the death sentence was imposed under the influence of passion, prejudice or any other arbitrary factor; 2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; and 3)

Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. In conducting its review, the Supreme Court of South Dakota neglected information indicative of imposition of the death sentence based on passion, prejudice or arbitrary factors. The Supreme Court of South Dakota also took an unconstitutionally narrow view of "similar cases" in conducting its proportionality analysis.

Statement of Exhaustion:

Mr. Rhines presented these issues on direct appeal to the Supreme Court of South Dakota. (Appellant's Brief dated June 23, 1994 at 113-122). These issues also were addressed in Appellant's Proportionality Review Brief dated January 18, 1995, and Appellant's Proportionality Review Reply Brief dated March 3, 1995. The Supreme Court of South Dakota was aware of the constitutional implications of such a review in citing Gregg v. Georgia, 428 US 153, 96 S.Ct. 2809, 47 L.Ed.2d 859 (1976) in its discussion on the topic. See State v. Rhines, 548 N.W.2d 415, 455 (S.D. 1996).

GROUND ELEVEN:

The due process rights and right to adequate assistance of counsel of Rhines were violated by the refusal of the trial court to appoint a forensic communication expert.

Supporting Facts:

Before trial, Rhines, who is indigent, moved for appointment of a forensic communication expert for the purpose of designing, pre-testing, conducting and analyzing a community attitude survey and preparation of a jury questionnaire. The motion was made both for venue considerations and trial preparation. SR at 38-58. The cost of such work likely would have ranged between $4,000 and $7,000. SR at 38-58. Part of the purposes of such a survey would be to instruct counsel on dealing with the homosexuality of Mr. Rhines. (Appellant's

Brief dated June 23, 1994 at 107 (quoting 11/3/92 letter from counsel to Judge Konnenkamp)). The trial court denied the request.

Statement of Exhaustion:

Rhines, in his appeal to the Supreme Court of South Dakota, raised this issue. (Appellant's Brief dated June 23, 1994 at 106-109). The Supreme Court of South Dakota granted no relief in this regard.

GROUND TWELVE:

The due process and equal protection rights of Mr. Rhines were violated by various acts of prosecutorial misconduct.

Supporting Grounds:

The prosecutor committed prosecutorial misconduct in maintaining that the victim's hands were tied prior to the fatal wound, when the evidence was to the effect that they were tied afterwards; in referring to the victim being "gutted" in the assault when there was no such evidence; using and arguing from false and erroneous testimony from witness Glen Wishard; and using the improper tactic of eliminating all jurors with any misgivings about imposition of the death penalty.

Statement of Exhaustion:

The illicit tactic of the prosecution in eliminating the claim all jurors with scruples or misgivings about the death penalty overlaps Ground Two above and the claim was exhausted for the reasons set forth above in Ground Two. The other instances of prosecutorial misconduct have not been raised previously but fall within Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963), and its progeny.

GROUND THIRTEEN:

The Fifth, Sixth and Fourteenth Amendment rights of Mr. Rhines were violated as a result of the failure to have Mr. Rhines present or allow him to participate in the handling of the jury note and response to the jury note.

Supporting Grounds:

In the midst of jury deliberations, the jury delivered to the Court a note setting forth myriad questions regarding the meaning and nature of life imprisonment, among other things. Mr. Rhines was not made aware of the note at the time, nor included in the hearing to resolve how to respond to the note.

Statement of Exhaustion:

While issues surrounding the handling of the jury note have been raised on direct appeal and in the habeas corpus case, this precise claim has not been raised previously.

15. Petitioner Charles Russell Rhines believes that each of the above-stated grounds have been exhausted either on direct appeal or through the state habeas corpus action, or both, as set forth in the separate statement of exhaustion sections after each ground.

16. Petitioner Rhines has no petition or appeal now pending in any court, either state or federal, as to the judgment under attack, other than this action.

17. The names and addresses of each attorney who represented Charles Russell Rhines at various stages are the following:

a. At the preliminary hearing, arraignment and plea, trial, sentencing, and on direct appeal:

Lead Attorney: Wayne Gilbert, (not practicing), 1529 Forest Hill Drive, Rapid City, South Dakota, 57701

Second Attorney: Joseph M. Butler, Bangs, McCullen, Butler Foye & Simmons, P. O. Box 2670, Rapid City, South Dakota, 57709

Investigator/ Attorney:	Michael Stonefield, Pennington County Public Defender's Office, 315 St. Joseph Street, # 44, Rapid City, South Dakota, 57701

b. On the State Habeas Corpus proceeding and appeal therefrom:

Michael W. Hanson, 505 West 9th Street, #202, Sioux Falls, South Dakota, 57104.

18. Petitioner Rhines was sentenced on January 29, 1993, on all charges in the case, with the sentence imposed for the first degree murder conviction being death by lethal injection.

PRAYER

Wherefore, Petitioner Charles Russell Rhines prays that the Court grant Petitioner all relief to which he may be entitled in this proceeding.

Dated at Sioux Falls, South Dakota, this 16th day of November, 2000.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

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Attorneys for Defendant
Charles Russell Rhines

I declare under penalty of perjury that the foregoing is true and correct to my best knowledge.

Exercised on this 16 day of November, 2000.

Charles Russell Rhines

CERTIFICATE OF SERVICE

Roberto A. Lange, one of the attorneys for Plaintiff, hereby certifies that a true and correct copy of the foregoing "First Amended Petition For Writ of Habeas Corpus and Statement of Exhaustion" was served by mail upon:

Craig M. Eichstadt
Deputy Attorney General
500 E. Capitol Avenue
Pierre, SD 57501-5070

Gary R. Campbell
Assistant Attorney General
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Grant Gormley
Assistant Attorney General
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Assistant Attorney General
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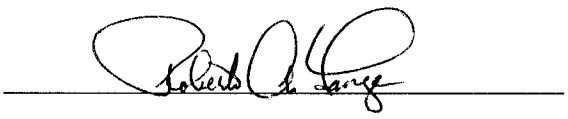
on this 16th day of November, 2000.



UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CHARLES RUSSELL RHINES, Petitioner, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary Respondent.	CIV. 00-5020-KES ORDER GRANTING MOTION FOR STAY AND ABEYANCE

PROCEDURAL HISTORY

Petitioner, Charles Rhines, was convicted of premeditated first-degree murder and third-degree burglary. On January 26, 1993, a jury sentenced him to death by lethal injection. Petitioner appealed his conviction and sentence to the South Dakota Supreme Court. Fourteen issues were raised on direct appeal, including the excuse of prospective juror Diane Staeffler, the state's use of its peremptory challenges, the use of victim impact testimony, and the proportionality review. The South Dakota Supreme Court affirmed petitioner's conviction and sentence and the United States Supreme Court denied further review on December 2, 1996.

Petitioner then applied for a writ of habeas corpus in state court on December 5, 1996. In his state habeas, petitioner raised numerous issues, including ineffective assistance of counsel, the excuse for cause of prospective

juror Diane Staeffler, and the constitutionality of the South Dakota capital punishment statutes. Rhines's state habeas was denied by the trial court on October 8, 1998. The South Dakota Supreme Court affirmed the denial on February 9, 2000.

On February 22, 2000, Rhines filed a federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. An amended petition for writ of habeas corpus was filed on November 20, 2000, that alleged thirteen grounds for relief. Respondent, Douglas Weber, alleged that several of the grounds had not been exhausted and were, therefore, procedurally defaulted. On July 3, 2002, this court found that petitioner's grounds for relief Two(B), Six(E), Nine(B), (H), (I), and (J), Twelve, and Thirteen were unexhausted. This court stayed the petition pending exhaustion of Rhines's state court remedies on the condition that Rhines file a petition for habeas review in state court within 60 days and return to federal court within 60 days of completing the state proceedings. The state appealed.

On direct appeal, the Eighth Circuit Court of Appeals vacated the stay and remanded the case so this court could determine whether Rhines could proceed by dismissing the unexhausted claims from his petition. Rhines v. Weber, 346 F.3d 799 (8th Cir. 2003). The United States Supreme Court granted certiorari to determine whether a district court may issue an order of stay and abeyance in a mixed petition for habeas corpus, that is, a petition containing exhausted and unexhausted claims. Rhines v. Weber, 125 S. Ct.

1528, 1532, 161 L. Ed. 2d 440 (2005). The Court held that stay and abeyance is permissible under some circumstances. Rhines, 125 S. Ct. at 1535. The Court remanded the case to the Eighth Circuit Court of Appeals so it could determine whether this court abused its discretion in granting the stay. Id. at 1535-36.

Because this court did not have the benefit of the controlling Supreme Court authority when it issued the order of stay and abeyance in 2002, the Eighth Circuit Court of Appeals remanded the case to this court to analyze the petition for writ of habeas corpus under the new test enunciated in Rhines. Rhines v. Weber, 409 F.3d 982, 983 (8th Cir. 2005). This court was directed to analyze each unexhausted claim to: (1) determine whether Rhines had good cause for his failure to exhaust the claims in state court, (2) determine whether the claims were plainly meritless, and (3) consider whether Rhines had engaged in abusive litigation tactics or intentional delay. Id. (citing Rhines, 125 S. Ct. at 1535). The court finds that Rhines had good cause for failing to exhaust the claims, the claims are not plainly meritless, and Rhines has not engaged in abusive litigation tactics. Accordingly, his petition for habeas corpus is stayed pending exhaustion in state court.

DISCUSSION

1. Good Cause

Rhines contends that he has good cause for his failure to exhaust his claims in state court because his post-conviction counsel was ineffective. Respondent argues that alleged ineffective assistance of counsel cannot serve as good cause for failure to exhaust his claims in state court, just as ineffective assistance of counsel is not good cause to excuse a procedural default. The Supreme Court did not define "good cause" in Rhines.

The only other Supreme Court decision to reference the term "good cause" in the stay and abeyance context is Pace v. DiGuglielmo, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005). In Pace, the Court held that a state postconviction filing rejected by the state court as untimely was not properly filed within the meaning of § 2244(d)(2). Id. at 1814. The petitioner argued that the court's timeliness interpretation was unfair because a petitioner trying in good faith to exhaust his state court claims might litigate for several years only to find out that his claim had never been properly filed. Id. at 1813. Thus, his federal petition for habeas relief would be time barred. Id. In response, the court noted that "[a] prisoner seeking state postconviction relief might avoid this predicament . . . by filing a 'protective' petition in federal court to stay and abey the federal habeas proceedings until state remedies are exhausted." Id. The Supreme Court recognized that "petitioner's reasonable

confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court." Id.

In the present case, Rhines initially filed a pro se federal habeas corpus petition leaving "more than eleven months left before the expiration of the limitations period." Rhines, 125 S.Ct. at 1532. He also filed a pro se "Motion to Toll Time" because he was concerned about the one-year statute of limitations contained in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). In response to the Motion to Toll Time, respondent advised the court that Rhines "has had a maximum of fourteen days (more likely eight days) that have run against the statute of limitations in Section 2244. Since petitioner is in no danger of losing his right to file for federal habeas corpus relief, there is no reason to toll the time of the statute of limitations." State's Response to Petitioner's Motion to Toll Time (filed June 2, 2000) at p. 4. Relying on respondent's representations, the court denied Rhines's motion to toll time.

Rhines followed the procedure that was subsequently articulated in Pace, namely he filed a protective petition in federal court and asked the federal court to stay and abey the federal habeas proceeding, stating that he was concerned about complying with the one-year statute of limitations in the AEDPA. The court finds that Rhines was reasonably confused about whether his claims had been properly exhausted in state court and thus he has shown "good cause" for his failure to exhaust his unexhausted claims.

In the alternative, the court finds that under the circumstances of this case, Rhines meets the "good cause" requirement due to the ineffective assistance of his post-conviction counsel. The Eighth Circuit Court of Appeals has not addressed the issue of "good cause" in the stay and abeyance context. District courts faced with the stay and abeyance question since the Rhines decision have split on whether alleged ineffective assistance of post-conviction counsel constitutes good cause for failure to exhaust claims in state proceedings.[1] Without much discussion, at least four district courts found that alleged ineffective assistance of counsel during post-conviction proceedings did constitute good cause for failure to exhaust claims in state proceedings. See e.g., Ramchair v. Conway, 2005 WL 2786975 at *16 (E.D.N.Y. 2005); Boyd v. Jones, 2005 WL 2656639 at *4 (E.D. Mich.); Fradiue v. Pliler, 2005 WL 2204862 (E.D. Cal. 2005); and Martin v. Warren, 2005 WL 2173365 (E.D. Mich. 2005). Similarly, and again with limited discussion, at least two district courts found that alleged ineffective assistance of counsel during post-conviction proceedings did not constitute good cause. See, e.g., Vasquez v. Parrott, 2005 WL 2864703 at *10 (S.D.N.Y. 2005); Hubbert v. Renico, 2005 WL 2173612 at *3 (E.D. Mich. 2005).

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[1]District courts have also found good cause where the petitioner may have been mentally incompetent, Shotwell v. Lamarque, 2005 WL 1556296 (E.D. Cal. 2005), or was unrepresented by counsel, Coulter v. Mullins, 2005 WL 2487980 (W.D. Okla. 2005), Rogers v. Carey, 2005 WL 1366451 (E.D. Cal. 2005).

Respondent, relying on Coleman v. Thompson, 501 U.S. 722, 730, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) and Murray v. Carrier, 477 U.S. 478, 490-492, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986), contends that the court should apply the same principles to "good cause" in the stay and abey context as has been applied to show "cause" under the "cause and prejudice" standard in the procedural default arena; namely, that ineffective assistance of post-conviction counsel is not grounds for relief from a procedural default unless it violates the Federal Constitution. The Supreme Court recognized that "[t]he procedural default doctrine and its attendant 'cause and prejudice' standard are 'grounded in concerns of comity and federalism[.]'" Edwards v. Carpenter, 529 U.S. 446, 451, 120 S. Ct. 1587, 1591, 146 L. Ed. 2d 518 (2000) (quoting Coleman, 501 U.S. at 730). The failure of a habeas petitioner to meet the State's procedural requirements deprives the state courts of an opportunity to reach the issues in the first instance. Id. But unlike the procedural default situation where a petitioner is barred from presenting his claim to state courts, Rhines is not barred from presenting his claim to the state court. Thus, the principles of comity and federalism would be given full recognition if the court allowed Rhines to exhaust his unexhausted claims in state court. As a result, the underlying concern of applying the principles of comity and federalism that result in requiring a petitioner to show that the assistance of counsel was so ineffective as to

violate the Federal Constitution does not exist, because petitioner can present his claims to state court.

Moreover, this court believes that the Supreme Court suggested a more expansive definition of "good cause" in Pace and Rhines than the showing needed for "cause" to excuse a procedural default. See Pace 125 S. Ct. at 1814. In Pace, the Supreme Court acknowledged that "reasonable confusion" about timeliness was sufficient to meet the cause requirement. Reasonable confusion on the part of a petitioner is less stringent than acts that have been found sufficient to establish cause for procedural default. See Carrier, 477 U.S. at 488 (a showing that the factual or legal basis for a claim was not available to counsel or that "some interference by officials" made compliance impracticable would constitute cause).

In this case, there is nothing in the record to indicate that Rhines's allegations of ineffective assistance of counsel are frivolous or that Rhines should have been aware that his post-conviction counsel should have raised the issues on appeal. See Ramchair, 2005 WL 2786975 at *16. Permitting Rhines to return to state court to exhaust his remedies and present his ineffective assistance of counsel argument complies with the principles of comity and federalism that underlie the exhaustion doctrine. See Edwards, 529 U.S. at 451. Furthermore, the exhaustion doctrine was not intended to unreasonably impair the petitioner's right to relief. Rhines, 125 S. Ct. at 1536.

Respondent contends that if ineffective assistance on state habeas is sufficient grounds for good cause, then every petitioner who merely alleges ineffective assistance of his prior attorney will get stay and abeyance. Respt.'s Br. 7. The Rhines test, however, requires the court to dismiss a motion for stay and abeyance where the petitioner engages in abusive litigation tactics or intentional delay, even if he has good cause and potentially meritorious claims. Rhines, 125 S. Ct. at 1535. Because the court believes that Rhines's allegations of ineffective assistance of counsel are analogous to the "reasonable confusion" about timeliness cited in Pace, the court finds good cause exists to excuse Rhines's failure to exhaust his claims in state court.

2. Potential Merit Analysis

Even if Rhines has good cause to excuse failure to exhaust his claims in state court, "the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless." Rhines, 125 S. Ct. at 1535 (citing, with the cf. signal, 28 U.S.C. § 2254(b)(2), which provides that "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.") If the claims are "potentially meritorious" the court should grant the stay. Id. Pursuant to § 2254(b)(2), a court may decide an unexhausted issue on the merits because the "exhaustion rule is not a rule of jurisdiction, and sometimes 'the interests of

comity and federalism [are] better served by addressing the merits.'" Padavich v. Thalacker, 162 F.3d 521, 522 (8th Cir. 1998) (quoting Granberry v. Greer, 481 U.S. 129, 134, 107 S. Ct. 1671, 95 L. Ed. 2d 119 (1987)).

a. Ground Two(B)—Allegedly Improper Exclusion of Prospective Juror Jack Meyer

Rhines's amended petition alleged that his rights to due process, an impartial jury, and equal protection were violated by the trial court's exclusion of prospective juror Jack Meyer. The trial court excluded him for cause because he indicated that he was opposed to the death penalty.

Prospective jurors may be excluded for cause because of their views on capital punishment if their views would prevent or substantially impair the performance of their duties as a juror in accordance with the jury instructions. Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841, (1985). "[A] sentence of death[, however,] cannot be carried out if the jury that imposed or recommended it was chosen by excluding venire men for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Davis v. Georgia, 429 U.S. 122, 123, 97 S. Ct. 399, 50 L. Ed. 2d 339 (1976). Having reviewed the transcript of Meyer's voir dire, the court finds that this claim is not plainly meritless.

b. Ground Six (E)—Alleged Unconstitutionality of the South Dakota Death Penalty Statute

Rhines contends that South Dakota's application of its death penalty statutes violates his right to due process, equal protection, and constitutes cruel and unusual punishment. Under South Dakota law, a sentence of death or life imprisonment are the only sentences permitted for Class A felonies. SDCL 22-6-1. SDCL 23A-27A-1 provides that "in all cases for which the death penalty may be authorized, the judge shall consider, or shall include in instructions to the jury for it to consider, any mitigating circumstances and any of the following aggravating circumstances which may be supported by the evidence." The statute enumerates ten aggravating factors, including a finding that the defendant committed the crime for money or that the crime was outrageously vile or inhuman. Id. Rhines contends that the statute is unconstitutional as applied because South Dakota does not treat all Class A felonies as death penalty cases.

Respondent contends that Rhines's claim is plainly meritless because SDCL 23A-27A-1 is identical to the statute upheld in Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). Whether the statutes are identical is not the issue, however, because Rhines is challenging the application of the statute. In Gregg, the Court held that "the death penalty is not a form of punishment that may never be imposed." Id. at 187. The death

penalty is acceptable as long as it is not imposed in an arbitrary and capricious manner. Id. at 195. Because Rhines has alleged that the death penalty was applied arbitrarily, the court finds that he has made a colorable federal claim. Thus, the court finds that his claim is not plainly meritless. See Rhines, 125 S. Ct. at 1535.

c. Grounds Nine(B), (H), (I), and (J)—Alleged Ineffective Assistance of Trial Counsel

In Ground Nine (B), Rhines alleges that his trial counsel were ineffective for their "tepid" presentation of evidence during the penalty phase, including their failure to call John Fousek, James Mighell, and Connie Royer as witnesses who would have provided helpful testimony. In Ground Nine (H), Rhines contends that his counsel missed erroneous and highly prejudicial testimony from Glen Wishard. Rhines alleges in Ground (I) that his attorney failed to consult with a mitigation expert. In Ground (J), Rhines alleges that his counsel failed to object to irrelevant and prejudicial testimony that Rhines had access to a gun, and testimony about Rhines's statements at the victim's funeral.

Rhines must show that his attorneys' performance fell below an objective standard of reasonableness and that he suffered prejudice as a result of their substandard performance. Strickland v. Washington, 466 U.S. 668, 688-692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A counsel's errors

must be so serious that the conviction or sentence is unreliable. Id. at 687. Judicial scrutiny of attorney performance is highly deferential, with a strong presumption that counsel's conduct falls within the range of reasonable professional conduct. Id. at 689.

Respondent argues that Rhines's ineffective assistance of counsel claims are plainly meritless because Rhines did not allege that he was prejudiced by his attorneys' alleged errors. Rhines contends that by citing to Strickland he has alleged prejudice and that the alleged prejudice is obvious. The court understands Rhines's habeas petition to allege prejudice because he relied on Strickland and because the court can infer from the context of his habeas petition that Rhines is alleging that he would not have been sentenced to death but for the ineffective assistance of his trial counsel.

While Rhines faces an uphill battle in a state habeas proceeding under the deferential Strickland standard, the court finds that these claims are not plainly meritless. If Rhines can prove his allegations, a court could find that his counsel's performance fell below the objective standard for reasonableness and that he was prejudiced as a result. For example, in Austin v. Bell, 126 F.3d 843, 849 (6th Cir. 1997), the court found that failure to call available witnesses to testify at sentencing was ineffective assistance of counsel, as Rhines alleged in Ground Nine(B). In Harries v. Bell, 417 F.3d 631, 638 (6th Cir. 2005), the court found that petitioner's counsel was

ineffective for failing to properly investigate mitigating evidence and rebut aggravating evidence, as Rhines alleged in Ground Nine(I). Depending on the nature of the prejudicial evidence or testimony in Ground Nine(H) and (J), failure to object could qualify as an error so serious that the conviction or sentence is unreliable. See Strickland, 466 U.S. at 687. Accordingly, Rhines' ineffective assistance of counsel claims are not plainly meritless.

d. Ground Twelve—Alleged Prosecutorial Misconduct

Rhines alleges that the prosecution violated his right to due process and equal protection by (1) claiming that the victim's hands were tied before the fatal stabbing, when they were actually tied after Rhines killed the victim; (2) claiming that the victim was "gutted" when there was no such evidence; (3) using false testimony from witness Glen Wishard; and (4) excluding all jurors with misgivings about the death penalty.

"The test for reversible prosecutorial misconduct has two parts: (1) the prosecutor's remarks or conduct must in fact have been improper, and (2) such remarks or conduct must have prejudicially affected the defendant's substantial rights so as to deprive the defendant of a fair trial." United States v. Conroy, 424 F.3d 833, 840 (8th Cir. 2005) (quoting United States v. Hernandez, 779 F.2d 456, 458 (8th Cir. 1985)). "There are numerous cases in which courts have censured prosecutors for improper statements or conduct but nevertheless have affirmed the conviction because the misconduct was

found, in the context of the whole trial, not to be prejudicial." Hernandez, 779 F.2d 456 at 458-59.

Respondent contends that the claims related to the first three issues are plainly meritless because Rhines did not allege that he was prejudiced by the prosecution's alleged misconduct. Respondent contends that even if Rhines did allege prejudice, the errors are minor compared to his explicit confession to the killing.

As in the court's analysis of the ineffective assistance of counsel claim, it is apparent from the context that Rhines is claiming that the alleged misconduct led the jury to sentence him to death, thereby prejudicing him. The alleged misconduct is related to the "outrageously or wantonly vile, horrible, or inhuman" aggravating factor found in SDCL 23A-27A-1. If proven true, prosecutorial misconduct regarding evidence or testimony may be grounds to overturn a sentence, and the state court should have the opportunity to hear the claim. This claim is not plainly meritless.

e. Ground Thirteen—Rhines's Absence During Jury Note Consideration

Rhines alleges that he was absent during the court's consideration of a juror question in violation of the Fifth, Sixth and Fourteenth Amendments. The constitutional right to presence is rooted in the Confrontation Clause of the Sixth Amendment, but the Supreme Court has also recognized a due

process right in some situations where the defendant is not confronting witnesses or evidence against him. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). A defendant has a due process right to be present "whenever his presence has a relation, reasonably substantial, to the fulness [sic] of his opportunity to defend against the charge . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Id. (citation omitted). The propriety of the exclusion of the defendant must be considered in light of the whole record. Id.

In Gagnon, the Court held that the trial judge's in camera questioning of a juror did not violate the defendants' due process rights because they could not have done anything or gained anything by being present. 470 U.S. at 526-27. Nor was their presence necessary to ensure fundamental fairness or a reasonably substantial opportunity to defend against the charge. Id. at 527.

In the case at bar, the jury wrote a nine-part question seeking clarification of the definition of a sentence of life in prison without parole. Ct. Ex. 5. The jury asked what Rhines's daily routine in prison would be like. Id. For example, the jury wanted to know whether Rhines would ever be given work release or conjugal visits, allowed to mix with the general prison population, or allowed to watch TV and listen to music. Id. Judge John K.

Konenkamp considered the matter in chambers and offered counsel for both sides the opportunity to comment on his proposed answer. Jury Trial Tr. Vol. XIII at 2697. The jury was not present. Id. His proposed response was "Dear Jurors: I acknowledge your note asking questions about life imprisonment. All the information I can give you is set forth in the jury instructions. Dated this 26th day of January, 1993, signed by the Court." Joseph Butler, counsel for Rhines, objected on the basis of completeness and suggested that Judge Konenkamp instruct the jury that they could not base their decision on speculation or guesswork. Id. at 2699.

Judge Konenkamp overruled the defendant's objections, and answered the jury note with his own note written as he had originally proposed. Jury Trial Tr. Vol. XIII at 2700-01. The court noted that each juror acknowledged during voir dire that he or she understood that a sentence of life without parole meant life without parole, and that the jury instructions said the same thing. Id. at 2700. Thus, no further instructions were necessary. Id. at 2700.

Like in Gagnon, Rhines's presence could not have made any difference. His attorneys were present at the time and argued on his behalf. The jury was not present during the hearing and Rhines's absence could not have made any difference in the jury's decision to sentence him to death. The note dealt with a purely legal matter and the judge had already given the jury the

definition of life without parole. Thus, Rhines's presence did not have a reasonably substantial relation to his ability to defend against the charge and was not necessary to ensure fundamental fairness. Even if Rhines's allegations that he was absent during the hearing are true, this could not have violated his constitutional rights. Accordingly, the court finds the claim plainly meritless.

3. Intentionally Dilatory Litigation Tactics

The South Dakota Supreme Court denied Rhines's state habeas appeal on February 9, 2000. Rhines petitioned this court for habeas relief on February 22, 2000. After this court issued its order dated July 3, 2002, granting Rhines a stay pending exhaustion of the unexhausted claims in state court contingent upon Rhines commencing state court exhaustion proceedings within 60 days, Rhines did so. His petition was filed in state court on August 22, 2002. Because Rhines filed the habeas petition less than a month after the state habeas proceedings were complete, and he filed his state court petition to exhaust the unexhausted claims in 50 days, the court finds that Rhines has not engaged in intentionally dilatory litigation tactics.

After considering the three factors articulated by the Supreme Court in Rhines, the court finds that Rhines has good cause for his failure to exhaust, his unexhausted claims are not plainly meritless, and there is no indication

that he engaged in intentionally dilatory litigation tactics. Thus, Rhines is entitled to have his petition stayed pending exhaustion of the potentially meritorious claims. Because the petition has already been filed in state court, the only question remaining for this court to decide is the amount of time within which Rhines will have to return to this court following completion of state court exhaustion. In Rhines, the Supreme Court referenced approvingly a 30-day time period. As a result, this court will adopt that 30-day time period.

Based on the foregoing discussion, it is hereby

ORDERED that Rhines shall have 15 days to notify this court whether he intends to dismiss Ground Thirteen. If Ground Thirteen is not dismissed, the court will dismiss this petition as a mixed petition.

IT IS FURTHER ORDERED that the petition for habeas corpus is stayed pending exhaustion of Grounds Two(B), Six (E), Nine(B), (H), (I), (J), and Twelve in state court, conditioned upon petitioner returning to this court within 30 days of completing such exhaustion.

Dated December 19, 2005.

BY THE COURT:

Karen E. Schreier

KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE