No. 18-8030

In The

Supreme Court of the United States

OCTOBER TERM 2018

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 8th Circuit

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

JASON R. RAVNSBORG, South Dakota Attorney General
PAUL S. SWEDLUND, Assistant Attorney General
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: 605-773-3215
Facsimile: 605-773-4106
paul.swedlund@state.sd.us

Attorneys for Respondent Young

CAPITAL CASE – NO DATE OF EXECUTION SET

QUESTIONS PRESENTED

Did the district court err in finding that *Martinez* did not provide cause for Rhines to amend his petition for a writ of *habeas corpus* because Rhines was proffering not new claims but new evidence in support of old claims?

Did the district court err in finding that the *Martinez* exception applies narrowly to claims of the alleged ineffectiveness of initial collateral review counsel and not to counsel in Rhines' second or successive collateral review proceedings?

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STATEMENT OF THE CASE

Charles Russell Rhines was convicted of the March 8, 1992, murder of 22-year-old Donnivan Schaeffer. *State v. Rhines,* 1996 SD 55, ¶¶ 1-3, 548 N.W.2d 415, 424 (*Rhines I*). That night, Donnivan entered the donut shop where he worked after hours to retrieve supplies and caught Rhines burglarizing and robbing the store. *Rhines I,* 1996 SD 55 at ¶ 158, 548 N.W.2d at 451. Rhines incapacitated Donnivan by stabbing him in the abdomen and back. Donnivan dropped to the floor, screaming and writhing in pain. *Rhines I,* 1996 SD 55 at ¶ 158, 548 N.W.2d at 451. Donnivan begged Rhines not to kill him. *Rhines I,* 1996 SD 55 at ¶ 158, 548 N.W.2d at 451. Rhines walked Donnivan to a dingy storeroom in the strip-mall donut shop and set him down on a wooden pallet. *Rhines I,* 1996 SD 55 at ¶ 158, 548 N.W.2d at 451. Rhines locked Donnivan's head between his knees and pounded a hunting knife into the base of Donnivan's skull, partially severing his brain stem. *Rhines I,* 1996 SD 55 at ¶ 158, 548 N.W.2d at 451.

Unaffected by the screams and blood and death, Rhines left the store with his loot to get something to eat at "Perkins. Up on LaCrosse [Street]. Had an order of french fries." Donnivan's body was found later that evening slumped forward on the pallet in a widening pool of his own blood, his hands tied behind his back. *Rhines I,* 1996 SD 55 at ¶ 158, 548 N.W.2d at 451. Donnivan Schaeffer lost his life so Rhines could make off with approximately $1,700 in cash and coins. *Rhines I,* 1996 SD 55 at ¶ 2, 548 N.W.2d at 424.

At his criminal trial, Rhines' defense counsel – Joe Butler, Wayne Gilbert and Michael Stonefield – faced an impossible mitigation dilemma. Rhines' "very damning" confession made mitigation a tricky proposition. STATE HABEAS CORPUS TRIAL TRANSCRIPT (HCT) at 70/5, Young Appendix at 00001. Wanting to "maintain credibility" with the jury, trial counsel felt that overplaying their mitigation hand might "appear to be shifting blame when it was really pretty obvious where the blame lied." HCT at 69/3, Young Appendix at 00001.

Nevertheless, Rhines' counsel investigated all customary sources of mitigating evidence – friends and family, military service records, schooling, employment history, psychiatric and psychological examinations, prosecution discovery – and found (as detailed in the record below) that their client had led a life dedicated to criminality and disregard for the rights and dignity of others. Each item of evidence that "painted a more complete picture of [Rhines'] life" came with the risk of "open[ing] up the area[s] of his record" that his trial counsel were fighting "to keep out." HCT at 85/12, Young Appendix at 00001.

Rhines' counsel looked first to their own client for mitigation assistance. Rhines was asked to write an autobiography from which his counsel hoped to glean mitigating facts. GILBERT AFFIDAVIT at ¶ 3, Young Appendix at 00099, 00103. Far from being helpful, Rhines' life story was an alarming litany of aggravators coupled with passages of disturbing psychopathic rantings. RHINES AUTOBIOGRAPHY, Young Appendix at 00014, 00045; HERNANDEZ

AFFIDAVIT, Rhines Appendix at 00334-00336, 00338-00339, 00341. Rhines' autobiography did not attribute his poor academic performance to any attention or cognitive processing deficit. Instead, Rhines informed his counsel that his poor scholastic performance was due to his boredom with studies and his predilection for rebellion. RHINES AUTOBIOGRAPHY, Young Appendix at 00034. Rhines considered himself smarter than everyone else around him and found it beneath his intelligence to "learn at the rate of the slowest child in the class." PSYCHOSOCIAL REPORT, Young Appendix at 00090. According to Rhines he was not "stupid or developmentally disabled," he "simply refused to do any of it." RHINES AUTOBIOGRAPHY, Young Appendix at 00034. Rhines did not report having experienced any trauma from his military experience. Rather, Rhines described the Korean DMZ of the 1970s as "PARTY CENTRAL!" RHINES AUTOBIOGRAPHY, Young Appendix at 00040. Rhines' autobiography was a mitigation dead end.

Trial counsel secured Rhines' military record but determined "that the army records as a whole would not be helpful" due to Rhines' drug use, apathy, frequent insubordination, assaultive behavior and theft of military property. HCT at 156/11, Young Appendix at 00001; MILITARY RECORDS, Young Appendix at 00491. Likewise, school records could open the door to Rhines' pervasive juvenile delinquency.

The available list of Rhines' "friends" was thin given that most were more like partners in crime or victims than friends in any conventional sense.

RHINES AUTOBIOGRAPHY, Young Appendix at 00068, 00070; HARTER AFFIDAVIT at ¶ 3, Young Appendix at 00184; ALLENDER AFFIDAVIT at ¶ 16, Young Appendix at 00219. What non-criminal "friends" Rhines had could not supply favorable testimony given Rhines' habit of stealing from, beating, preying upon, abusing, threatening and generally wrecking the lives of anyone who tried to befriend him. HERNANDEZ AFFIDAVIT at ¶¶ 2-9, Young Appendix at 00331-00333; HARTER AFFIDAVIT at ¶¶ 2-7, Young Appendix at 00184-85; TARANGO AFFIDAVIT at ¶¶ 2-7, Young Appendix at 00343-00344.

Even childhood and adolescent acquaintances from Rhines' hometown of McLaughlin, South Dakota, who might have strained to say something sympathetic about Rhines, could not testify without opening themselves up to cross-examination about Rhines' well-known misdeeds, like arson fires, burglarizing buildings, wiring buildings to explode, cruelty to animals, and generally menacing the population of that small town. LARSON AFFIDAVIT at ¶ 7, Young Appendix at 00363; MILLER AFFIDAVIT at ¶¶ 4-7, Young Appendix at 00365-00366; JUNDT AFFIDAVIT at ¶ 3, Young Appendix at 00367; ALLENDER AFFIDAVIT at ¶ 12, Young Appendix at 00218. The same was true of Rhines' past employers, whom he invariably robbed and cheated. RHINES AUTOBIOGRAPHY, Young Appendix at 00024, 00042; HERNANDEZ AFFIDAVIT at ¶ 5, Young Appendix at 00332; HARTER AFFIDAVIT at ¶¶ 3, 4, Young Appendix at 00184-85.

Rhines' counsel also sought out possible psychiatric or psychological mitigators. Defense counsel retained Dr. D.J. Kennelly and a team of consulting mental health professionals who prepared a complete psychiatric, psychosocial and psychological workup on Rhines. As reflected in Stonefield's retainer letter, Dr. Kennelly was asked to examine Rhines not simply for competency and sanity, but also to perform "whatever testing or evaluations" he felt were appropriate to determine whether Rhines was afflicted with any "mental illness." STONEFIELD LETTER, Young Appendix at 00368. Likewise, the trial court had ordered Dr. Kennelly to examine Rhines for whether he "was suffering from a substantial psychiatric disorder of thought, mood, or behavior" that impaired his judgment. ORDER APPOINTING PSYCHIATRIC EXPERTS, Young Appendix at 00370.

Dr. Kennelly was thus tasked to perform a comprehensive evaluation, which he did in consultation with a psychologist and a clinical social worker. It proved to be another mitigation dead end. Dr. Kennelly found that Rhines had no psychotic symptoms, no chronic depression, no thought disorder, no distress related to his homosexuality, no major mental disorder, no inability to use judgment or comprehend his behavior, no impairment of executive power over his behavior, no impairment of judgment, and no inability to rationally and factually understand his legal situation and charges. KENNELLY REPORT, Young Appendix at 00081. Most importantly, Dr. Kennelly's "[s]creening for neurological evaluation [wa]s negative." KENNELLY REPORT, Young

Appendix at 00081. Dr. Kennelly's neurological screening revealed no indicators of a "cognitive processing deficit" or an "organic brain injury." KENNELLY REPORT, Young Appendix at 00081.

Dr. Kennelly's clinical social worker prepared a psychosocial background report on Rhines. The report imparts much the same information as Rhines wrote in his autobiography. Rhines reported that he did poorly in school because he "didn't apply himself," though he did not report any difficulties focusing his attention or thinking things through. Rhines dropped out of high school but eventually obtained a high school diploma while serving in the military. Rhines bombed out of the military in 1976. He underwent a brief period of counseling in 1979 "to facilitate his working through sexual identity problems." PSYCHOSOCIAL REPORT, Young Appendix at 00091. He was convicted of his first felony in 1977 (burglary), his second in 1979 (armed robbery). Rhines spent most of his years between 1977 and 1987 in prison. He shuffled between different employers between 1987 and 1992 until he was arrested for Schaeffer's murder. The psychosocial history that Rhines reported, like the autobiography he prepared for defense counsel, did not suggest viable mitigating mental health issues.

Dr. Kennelly also consulted with Dr. Bill H. Arbes for purposes of psychological examination and testing on Rhines. Rhines did not fully cooperate with Dr. Arbes. First, Dr. Arbes found Rhines to be an individual of average intellectual ability, not mentally disabled in any way. Second, Dr. Arbes found

"no signs of psychotic affiliation or thinking." Though Dr. Arbes felt that Rhines' life was veering toward "cognitive disturbance . . . with regard to emotional and interpersonal matters," he determined that Rhines did not exhibit "signs of disturbance of thought process or thought content." Instead, Dr. Arbes detected "clear signs of a marked underlying personality disorder." Third, Rhines "tended to falsify his responses to the [MMPI] test data," invalidating the test. Based on Rhines' pattern of "random responding" to test questions, Dr. Arbes concluded that Rhines was "falsifying his responses to appear in a more negative light than in fact is the case." Rhines also threw his MCMI testing, but not quite enough to invalidate the test; it revealed moderate psychopathology. Finally, Dr. Arbes diagnosed Rhines' principle problems as apathy, insecurity and introversion. Rhines compensated for his "pervasive inadequacy in most areas" by following "a meaningless, ineffectual, and idle life pattern." ARBES REPORT, Young Appendix at 00086, 00087; ERTZ AFFIDAVIT at ¶ 5, Young Appendix at 00093.

Dr. Kennelly's multi-disciplinary workup led co-counsel Stonefield and the defense team to conclude that Rhines' "mental condition or history [did not] figure into the case to a degree where [the defense] needed [Dr. Kennelly's] testimony." STONEFIELD LETTER, Young Appendix at 00369; GILBERT AFFIDAVIT at ¶ 4, Young Appendix at 00100.

Handicapped by Rhines' chilling confession, sordid backstory and no significant mental condition to explain or excuse Rhines' vicious murder of Donnivan Schaeffer, his trial counsel predicated their mitigation strategy on

exploiting and preserving 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 government from presenting evidence concerning non-statutory aggravating factors. HCT at 40/9, 42/13-21, 44/8, 70/12, 83/12, 85/12, Young Appendix at 00001; *Rhines I,* 1996 SD 55 at ¶ 100, 548 N.W.2d at 441. Excluding Rhines' sprawling sociopathic and criminal history was a "big factor" in trial counsels' strategy to secure a life sentence for their client. HCT at 40/9, 70/12, 83/12, Young Appendix at 00001.

Rhines' counsel faced a straightforward strategic choice at trial: (1) exploit the court's rulings that shut the door on Rhines' jaw-dropping past and put on the best possible mitigation case through available family, or (2) risk reopening the door on the state's extremely damaging counter-mitigation evidence by overplaying their mitigation hand with equivocal character evidence and flimsy psychological speculations. His trial counsel judiciously chose the former over the latter. GILBERT AFFIDAVIT at ¶ 6, Young Appendix at 00100; HCT at 40/9, 42/13-21, 44/8, 70/12, 83/12, 85/12, 131/14, Young Appendix at 00001.

With the successful exclusion of a mountain of collateral aggravating evidence came careful limitations on the scope of the mitigation case Rhines could present. Rhines' counsel crafted a carefully-tailored positive mitigation narrative from selected family testimony. Rhines' older sister Elizabeth testified on her brother's behalf. Her long career as an elementary school teacher

positioned her to offer her expertise on alleged developmental difficulties that shaped her brother's life. CRIMINAL TRIAL XIII, Young Appendix at 00374. Rhines' sister Jennifer also testified in mitigation of a death sentence. Like Elizabeth, Jennifer described Rhines' difficulties with school work. CRIMINAL TRIAL XIII, Young Appendix at 00387. Jennifer also testified to Rhines' early sexual identity confusion and adjustment to his homosexuality as an adult. CRIMINAL TRIAL XIII, Young Appendix at 00387.

Through Elizabeth and Jennifer, the jury heard a sympathetic account of Rhines' troubled existence. His "learning disabilities" triggered emotional problems and crippling insecurities. Sexual identity confusion exacerbated his already problematic life. Had programs existed in the 1960s and 1970s that exist now, Rhines might have been steered away from a life of violent crime while still young.

Instead, Rhines slipped through the cracks. He found himself at a young age in the macho, homophobic army of the 1970s. In hindsight, the army certainly did the maladjusted young Rhines no favors by indoctrinating him in dehumanizing the perceived "enemy" as soldiers must and training him in "doing people" with an entrenching tool, the butt of an M16, or a bayonet. CONFESSION 19JUN92, Young Appendix at 00414.

Through Rhines' sisters, his trial counsel effectively portrayed Rhines' life leading up to the murder as a series of systemic oversights and missteps, and of understandable confusion and frustration on Rhines' part. Their strategic

decision to tailor Rhines' mitigation case to the narrow seams of his life where sympathy might lie held the line on opening the record to the wide swaths of Rhines' criminality and sociopathy. Indeed, the prosecutor at Rhines' trial commended Rhines' counsel for doing "a heroic job of tying the prosecution's hands on sentencing evidence" by obtaining the orders excluding Rhines' criminal history and restricting aggravating evidence to statutory factors. "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 given the hidden reality of Rhines' sordid life." GROFF AFFIDAVIT at ¶ 8, Young Appendix at 00121; *State v. Moeller,* 2000 SD 122, ¶ 142, 616 N.W.2d 424, 459 ("[t]he possibility of damaging rebuttal is a necessary consideration in counsel's decision whether to present mitigating evidence about the defendant's character and background").

Nevertheless, the jury sentenced Rhines to death. *Rhines I,* 1996 SD 55 at ¶ 3, 548 N.W.2d at 424. The jurors have stated they were moved to a death sentence by the calloused and gruesome nature of the murder and, most of all, by Rhines' bloodcurdling confession, in which he cackles while comparing young Donnivan's death spasms to a beheaded chicken running around a barnyard. RHINES CONFESSION, Young Appendix at 00424, 00426. The South Dakota Supreme Court affirmed the conviction and sentence. *Rhines I,* 1996 SD 55 at ¶ 3, 548 N.W.2d at 424.

Rhines petitioned for *habeas corpus* relief in state court. Given the useless results of the pretrial psychiatric/psychological screening and the strategic imperative of not putting Rhines' mental status in issue during the criminal trial, Rhines' first state *habeas corpus* counsel, Michael Hanson, did not raise a claim attacking the effectiveness of trial counsels' investigation into mental status mitigators. The South Dakota Supreme Court affirmed the denial of Rhines first state *habeas corpus* petition. *Rhines v. Weber,* 2000 SD 19, 608 N.W.2d 303.

Rhines filed a federal petition for *habeas corpus* relief in the district court. In these proceedings, Rhines was represented by Roberto Lange (now a U.S. District Court Judge), John Schlimgen (now a state Magistrate Judge) and Neil Fulton (former Chief of Staff to the Governor of the State of South Dakota). Rhines' new *habeas corpus* counsel reviewed the work of his old counsel and then moved to amend his federal petition to include four claims not exhausted in his first state *habeas corpus* proceedings. The district court granted leave to amend and granted a stay of the federal proceedings to allow Rhines to exhaust his new claims in state court.

- When granting leave to amend, the district court instructed Rhines' new lawyers "to include every known constitutional error or deprivation entitling [Rhines] to habeas relief" and advised Rhines' counsel "that he may be presumed to have deliberately waived his right to complain of any constitutional error not raised in the amended

petition." AMENDED PROCEDURAL ORDER, Docket 72 at 1, *Rhines v. Weber,* CIV 00-5020 (D.Ct.S.D.), Young Appendix at 0043. The court further cautioned that, due to strict limitations on the filing of successive petitions, it was "incumbent upon [Rhines] to raise all known claims in the amended petition." AMENDED PROCEDURAL ORDER, Docket 72 at 1, *Rhines v. Weber,* CIV 00-5020 (D.Ct.S.D.), Young Appendix at 00430.

- When granting the stay, the district court excused Rhines' failure to exhaust his amended claims on the grounds that Rhines' ineffective mitigation claim was not then procedurally defaulted due to possible ineffective assistance of first state *habeas corpus* counsel (anticipating *Martinez*[1] by 7 years). ORDER GRANTING STAY AND ABEYANCE, Docket 150 at 6, 8, *Rhines v. Weber,* CIV 00-5020 (D.Ct.S.D.), Rhines Appendix at 00438, 00440. Thus, Rhines was afforded *Martinez* review of first *habeas corpus* counsel's performance before *Martinez* review even existed.

Rhines filed a second state *habeas corpus* petition challenging his conviction, sentence and method of execution. Specifically, Rhines' second state (and amended federal) petition alleged that his trial counsel had performed an ineffective mitigation investigation. The centerpiece of Rhines' new mitigation

[1] *Martinez v. Ryan,* 132 S.Ct. 1309 (2012).

claim was the affidavit and report of educational psychologist Dr. Dewey Ertz. Dr. Ertz reported that Rhines exhibited ADHD "symptoms" (without rendering a formal diagnosis). ERTZ AFFIDAVIT at ¶ 6, Young Appendix at 00094. Dr. Ertz administered an IQ test which resulted in Rhines scoring a 132 (superior) on the verbal subtest, 100 (average) on perceptual reasoning, 100 on working memory, and 79 (below average) on processing speed. ERTZ AFFIDAVIT, Young Appendix at 00094. Because of the discrepancy between Rhines' superior score of 132 on the verbal component and below average score of 79 on the non-verbal component, Dr. Ertz hypothesized that Rhines labored under a "cognitive processing deficit" but, again, rendered no formal diagnosis.

Dr. Ertz's finding of ADHD "symptoms" in Rhines' childhood is unremarkable considering that virtually every child exhibits ADHD "symptoms," like not completing school work or not listening to adults. DSM IV ADHD ENTRY, Young Appendix at 00470. Second, evidence of ADHD in Rhines' childhood and life is contradictory at best given testimony from classmates and teachers, who described Rhines' behavior as "normal," and evidence that Rhines was capable of planning, concentration, focus, and abstract thinking when it came to managing a donut shop; conceiving, carrying out, and covering up crimes; learning about electronics; or mastering the use of an M60 machine gun and other complex military weaponry. LARSON AFFIDAVIT at ¶ 1, Young Appendix at 00362; BROOKS AFFIDAVIT at ¶ 2, Young Appendix at 00364; FRANKS REPORT, Young Appendix at 00508; MILITARY RECORDS, Young

Appendix at 00491. Finally, putting aside the speculative and conclusory nature of Dr. Ertz's ADHD (or "cognitive processing deficit") "diagnosis," even the famously death penalty adverse 9th Circuit Court of Appeals has observed that ADHD is "somewhat common" and is not "quality" mitigation evidence. *Brown v. Ornoski,* 503 F.3d 1006, 1016 (9th Cir. 2007)(even if defense psychiatrist had formally diagnosed defendant with ADD as alluded to in his report, it would have added little in comparison to the evidence in aggravation).

Dr. Ertz's hypothesis of a "cognitive processing deficit" was similarly not quality mitigation evidence. Pre-incarceration testing on Rhines did not document any significant discrepancy between Rhines' verbal and non-verbal capabilities. A Lorge-Thorndike IQ test administered in 1971, before Rhines had incentives to malinger, revealed only a four-point discrepancy between his verbal (92) and non-verbal (88) scores. SCHACHT REPORT, Young Appendix at 00518. Given Rhines' history of malingering in testing administered by Dr. Arbes, the disparity between Rhines' verbal and non-verbal score likely is explained by malingering.

But, even assuming that Dr. Ertz's illusory "diagnoses" are correct, they would not have assisted the defense of the criminal case. First, ADHD does not cause uncontrollable, violent behavior or impair one's ability to comprehend and choose between right and wrong. FRANKS REPORT, Young Appendix at 00508; *Jones v. Schriro,* 450 F.Supp.2d 1023, 1044 (D.Ariz. 2006)(defendant's alleged ADHD had "little or no mitigating value because . . . it bears no causal

relationship to violent conduct"). One assumes that Rhines' vague "cognitive processing disorder" similarly does not fit the category of a major mental illness or Dr. Ertz certainly would have made a point of it. Thus, Dr. Ertz's "diagnoses" had "minimal significance" because he drew no connection between the murder and Rhines' alleged attention and cognitive processing deficits. *Jones,* 450 F.Supp.2d at 1045; *Morris v. Secretary DOC,* 2009 WL 3170497 (M.D.Fla.)(alleged ADHD not mitigating where psychiatric expert established no correlation between the alleged affliction and the murder).

Second, had Rhines' criminal defense counsel tried to sell this trifling psychological mumbo-jumbo to the jury, as Rhines now claims they should have, the prosecution would have seized on the opportunity to proffer a significant differential diagnosis of antisocial personality disorder. GROFF AFFIDAVIT at ¶ 8, Young Appendix at 00121; FRANKS REPORT, Young Appendix at 00507; *Norris,* 579 F.3d at 856 (any mitigating evidence presented through an expert could open the door to damaging cross-examination). Rhines' entire life history – his fixation with explosives, his firestarting, his cruelty to animals, his sexual predation on underage boys, his drug use, his military insubordination, his felonies, his incarcerations, his threats and plots to kill people, his objectification of people, his assaults, his rampant thievery – would have been relevant to the differential diagnosis. GROFF AFFIDAVIT at ¶ 8, Young Appendix at 00121; FRANKS REPORT, Young Appendix at 00507.

An IME diagnosis of sociopathy was virtually assured given Rhines' history and a prior diagnosis of antisocial personality disorder rendered during penitentiary intake evaluations performed immediately after Rhines' conviction, which concluded that Rhines was "very psychopathic." GROFF AFFIDAVIT at ¶ 8, Young Appendix at 00121; FRANKS REPORT, Young Appendix at 00507. Thus, putting Rhines' mental status in issue carried two unacceptable risks: first, that the jury would hear the full history of Rhines' dissolute existence, and, second, that the jury would learn that Rhines is an archetypal psychopath.

The state court found that Rhines' counsel had made a reasoned strategic decision to avoid placing Rhines' mental status in issue and denied Rhines' second petition. DECISION IN SECOND STATE *HABEAS CORPUS* PETITION, Rhines Appendix at 200. The South Dakota Supreme Court declined to issue a certificate of appealability.

The district court then lifted the stay on Rhines' pending petition and reviewed the state court's determination that Rhines' trial counsel had not been ineffective for not further investigating Rhines' mental status. While the federal petition was pending, Rhines' latest lawyer, Carol Camp, moved for a second stay and for leave to amend Rhines' federal petition to assert claims that he suffered from PTSD from his military service and an "organic brain injury" precipitated by childhood exposure to neurotoxins in the air and water supply of his hometown of McLaughlin, South Dakota.

The district court denied the motion to stay and to amend. The district court noted that *Martinez* applies only to new substantial claims of ineffective assistance of criminal trial counsel that were not exhausted in first state *habeas corpus* proceedings due to the ineffective assistance of first state *habeas corpus* counsel. The district court ruled that *Martinez* did not require or permit a second stay under the circumstances because Rhines' second state *habeas corpus* counsel had adjudicated his ineffective mental status investigation claim in state court and, accordingly, Rhines could not meet the threshold *Martinez* criterion of an unexhausted claim. ORDER DENYING MOTION FOR ABEYANCE, Docket 272 at 14, *Rhines v. Weber,* CIV 00-5020 (D.Ct.S.D.), Young Appendix at 00465. The court also found Rhines' new claims beyond the scope of *Martinez* because (1) the allegation of ineffectiveness raised by Rhines' new "claims" pertained to Rhines' second state *habeas corpus* counsel and (2) Rhines' proffered claims were not new *claims* but rather new *evidence* supportive of his exhausted claim of ineffective failure to investigate his mental status. ORDER DENYING MOTION FOR ABEYANCE, Docket 272 at 7, 12, 14, *Rhines v. Weber,* CIV 00-5020 (D.Ct.S.D.), Young Appendix at 00458, 00463, 00465. The district court concluded that Rhines' motion did not implicate the policy concerns behind the *Martinez* decision because "this is not a case where a petitioner's claims of ineffective assistance of counsel ha[d] gone unheard." ORDER DENYING MOTION FOR ABEYANCE, Docket 272 at 14, *Rhines v. Weber,* CIV 00-5020 (D.Ct.S.D.), Young Appendix at 00465. Rather, Rhines' motion for a second stay

was an untimely, "late attempt to further delay" disposition of his *habeas corpus* proceedings. ORDER DENYING MOTION FOR ABEYANCE, Docket 272 at 15, *Rhines v. Weber,* CIV 00-5020 (D.Ct.S.D.), Young Appendix at 00466.

The district court entered judgment denying Rhines' *habeas corpus* petition in February of 2016. Rhines attempted to revive the *Martinez* issue in a Fed.R.Civ.P. 59(e) motion. The district court denied the motion. Rhines appealed the *Martinez* issue and was again denied relief by the United States Court of Appeals for the 8th Circuit. *Rhines v. Young,* 899 F.3d 482 (8th Cir. 2018). Rhines could not have seriously expected the state or district courts to accept that parading the nauseating spectacle of his sociopathic, dysfunctional life before the jury in furtherance of Dr. Ertz's flimsy psychological diagnoses or farfetched theories of neurological injury due to groundwater contamination was preferable to the woeful, homespun tale of miseducation and sexual identity confusion that Rhines' defense counsel expertly wove from his sisters' testimony at sentencing. Rhines now seeks a petition for a writ of *certiorari* for review of the 8th Circuit's decision.

SUMMARY OF ARGUMENT

Rhines' petition for writ of certiorari is an unsuitable vehicle for addressing the "question presented" for three reasons:

1. There is no genuine circuit split or unsettled question requiring this court's attention.

2. A ruling definitively distinguishing a new *claim* from new *evidence* supporting an old claim for purposes of *Martinez* would be merely advisory in this case because Rhines' claims, even if new, would not meet the *Martinez* criterion of a claim of ineffective assistance of initial collateral review counsel or other necessary *Martinez* criteria.
3. A ruling determining that Rhines' claims are new would be merely advisory in this case because Rhines cannot meet the prejudice component of the cause and prejudice test.

ARGUMENT

1. There Is No Genuine Circuit Split Or Unsettled Question Requiring This Court's Attention

According to Rhines, there is an unresolved tension between this court's decisions in *Cullen v. Pinholster,* 131 S.Ct. 1388 (2011), and *Martinez v. Ryan,* 132 S.Ct. 1309 (2012), that has created "disarray" in the circuits due to the inability of courts to discern the boundary between a new *claim* and new *evidence* that supports an old claim. According to Rhines, the analytical split between the 9th Circuit Court of Appeals' decision in *Dickens v. Ryan,* 740 F.3d 1302, 1318 (9th Cir. 2014), and decisions from the 4th, 5th and 6th Circuit Courts of Appeals urgently demands this court's attention

No genuine tension exists. First, courts may consider and weigh new evidence in performing the *Martinez* analysis. Second, so long as a party meets the *Martinez* criteria, new evidence may be heard in regard to the merits of the claim. *Gallow v. Cooper,* 133 S.Ct. 2730, 2731 (2013)(Breyer dissenting from

denial of *certiorari*). Third, there is no split; published authorities reveal that the circuit courts essentially uniformly follow the *Vasquez v. Hillery,* 474 U.S. 254, 260 (1986), "fundamentally altered" test.

In *Escamilla v. Stephens,* 749 F.3d 380 (5th Cir. 2014), a defendant's state *habeas corpus* counsel developed evidence of alleged childhood abuse that his trial counsel had supposedly overlooked. The state *habeas corpus* court nevertheless found that trial counsel had adequately investigated Escamilla's history by meeting with him and his family (who did not report an abusive upbringing), investigating his background, and relying on the findings of two medical experts that Escamilla did not suffer from organic brain injury or other "'excuse or explanation' for [his] behavior to support mitigation." *Escamilla,* 749 F.3d at 386.

On federal review, Escamilla, per *Martinez,* sought to supplement the record of his state *habeas corpus* proceedings with additional evidence of his father's alleged abuse and additional mitigating circumstances supposedly overlooked by his state *habeas corpus* counsel. The district court denied the motion to supplement the record and the circuit court affirmed. The court found that *Martinez* was not applicable to Escamilla's case because "once a claim is considered and denied on the merits by the state habeas court, *Martinez* is inapplicable, and may not function as an exception to *Pinholster's* rule that bars a federal habeas court from considering evidence not presented to the state habeas court." *Escamilla,* 749 F.3d at 394.

Escamilla observed that "[i]n *Martinez,* the Court held that an otherwise procedurally defaulted *claim* of ineffective assistance of counsel may be heard by a federal habeas court where it was not properly raised in the state habeas court on initial review due to state habeas counsel's ineffective representation." *Escamilla,* 749 F.3d at 394 (italics in original). Since Escamilla's "new" evidence "merely provided additional evidentiary support for his claim [of ineffective failure to discover mitigating evidence of childhood abuse] that was already presented and adjudicated in the state court proceedings," the *Escamilla* court – citing *Dickens* – found that "[t]he new evidence presented to the district court [ha]d not 'fundamentally alter[ed]'" Escamilla's claim. *Escamilla,* 749 F.3d at 395. Consequently "*Pinholster* bar[red Escamilla] from presenting new evidence to the federal habeas court with regard to this already-adjudicated claim." *Escamilla,* 749 F.3d at 394.

In addition to *Dickens,* the *Escamilla* court cited the pre-*Dickens* decision in *Moore v. Mitchell,* 708 F.3d 760 (6th Cir. 2013). In *Moore,* a capital defendant complained that his trial counsel had ineffectively failed to prepare and prevent the defense's psychologist from giving damaging testimony on cross-examination. Moore raised the claim in an appellate review of allegations of ineffective trial counsel and again in state *habeas corpus* review. Both state courts denied the claim.

On federal *habeas corpus* review, Moore, invoking *Martinez,* sought to present new evidence that his state *habeas corpus* counsel had been

"insufficiently diligent in developing the record" of the claim in state court. The district court accepted the additional evidence on a stipulation of the parties and granted *habeas corpus* on the claim.

The circuit court reversed. The circuit court ruled that *Martinez* was inapplicable because Moore's claim had been "rejected . . . on the merits," rather than procedurally defaulted, in the state court proceedings. *Moore,* 708 F.3d at 785. Moore had wanted to use *Martinez* to obtain a "remand to allow *factual development* of his allegation that *collateral* counsel was ineffective" for failing to fully develop the claim of trial counsel's ineffectiveness. *Moore,* 708 F.3d at 785 (italics in original). But the *Moore* court concluded that *"Pinholster* plainly bans such an attempt to obtain review of the merits of claims presented in state court in light of facts that were not presented in state court." *Moore,* 708 F.3d at 785. Thus, the court flatly declined Moore's invitation to "turn *Martinez* into a route to circumvent *Pinholster."* *Moore,* 708 F.3d at 785.

In *Gray v. Zook,* 806 F.3d 783 (4th Cir. 2015), a capital defendant's original state *habeas corpus* petition alleged that his trial counsel had been ineffective for failing to "present any expert testimony to explain [his] drug use and the impact it had on [his] 'moral culpability and behavior.'" *Gray v. Warden of Sussex I State Prison,* 707 S.E.2d 275, 289 (Va. 2011). The district court denied relief on this claim but appointed Gray new counsel and new experts. Gray's new counsel sought to amend his petition to add a claim that his trial counsel "were

ineffective in failing to present evidence of Gray's voluntary intoxication at the time of the crimes." *Gray,* 806 F.3d at 789.

In support of this claim, Gray's new lawyers offered affidavits from a clinical psychologist and a neuropharmacologist regarding the effects of Gray's drug use. *Gray,* 806 F.3d at 799. The district court denied leave to amend and the circuit court affirmed. Without citing specifically to *Dickens,* the circuit court ruled that, while Gray's new evidence "perhaps strengthened" his original claim that his drug use diminished his moral culpability, it had not "fundamentally altered" the form of the claim Gray had previously exhausted in his first state *habeas corpus* proceeding. "The heart of [Gray's] claim remain[ed] the same: his trial attorneys should have done more to show how Gray's intoxication at the time of the crimes lessened his moral culpability." *Gray,* 806 F.3d 799; *Waddy v. Robinson,* 2013 WL 3087294, *2 (S.D.Ohio)(defendant's "new" evidence in support of *Atkins* defense raised "unexhausted facts" not an "unexhausted claim").

Like Escamilla, Moore and Gray, Rhines is muddling concepts of procedural default and exhaustion in an effort to "turn *Martinez* into a route to circumvent *Pinholster." Moore,* 708 F.3d at 785. Rhines' first state *habeas corpus* counsel's performance was reviewed by his second state/federal counsel who added a new claim of ineffective mitigation investigation that allegedly had been overlooked. Like Escamilla, Moore and Gray, Rhines adjudicated his claim of ineffective mitigation investigation of alleged mental defects in his second

state *habeas corpus* proceedings. *Escamilla,* 749 F.3d at 394; *Moore,* 708 F.3d at 785; *Waddy,* 2013 WL 3087294 at *3. Like Escamilla, Moore and Gray, Rhines' second federal motion to amend sought to enhance the factual record of an already-exhausted claim, not to revive a procedurally-defaulted claim. *Escamilla,* 749 F.3d at 394; *Moore,* 708 F.3d at 785; *Waddy,* 2013 WL 3087294 at *3. Consequently, as in *Escamilla, Moore* and *Gray,* the 8th Circuit Court correctly determined that *Martinez* did not trump *Pinholster's* ban on introducing extra-record evidence into the record of this case. *Rhines,* 899 F.3d at 496.

Dickens, Escamilla, Moore, Gray and the 8th Circuit Court's opinion in this case do not evidence any "disarray" in circuit court jurisprudence over the distinction between a new *claim* and new *evidence* in support of an old claim. *Dickens, Escamilla, Gray* and the 8th Circuit's decision below all employed the "fundamentally altered" standard. *Escamilla* cited and followed *Dickens* (marking perhaps the first time the 5th and 9th Circuits have agreed on a matter of capital case jurisprudence). The 8th Circuit's decision below cites and follows *Escamilla.* Though courts characterize or define "fundamentally altered" variously, this is more a matter of form than substance. *Gray,* 806 F.3d at 799 ("new" claim did not fundamentally alter old claim when "nature" of the claim was the same); *Jones v. Ryan,* 2018 WL 2365714, *7 (D.Ct.Ariz.)("new" claim that did not raise "new legal theory" did not fundamentally alter old claim); *Lopez v. Schriro,* 491 F.3d 1029, 1040 (9th Cir. 2007)("new" claim exhausted if it

is "substantial equivalent" of old claim); *Witter v. Baker,* 2015 WL 2082894, *8 (D.Ct.Nev.)("new" claim that "bears little resemblance" to old claim a fundamental alteration).

Clearly, the portion of the *Vasquez* rule permitting a petitioner to introduce new facts to support federal review of a state claim – so long as those new facts did not "fundamentally alter" the nature of the state claim – did not survive the enactment of the AEDPA and *Pinholster*. *Vasquez,* 474 U.S. at 260. But *Dickens, Escamilla, Moore, Gray* and the 8th Circuit Court's decision below all recognize that *Vasquez's* test for distinguishing new, unexhausted claims from old, exhausted ones has continuing relevance in the post-AEDPA and post-*Pinholster* legal landscape. Thus, the district and circuit courts below correctly ruled that Rhines' "new claims" of PTSD and "organic brain injury" due to alleged neurotoxic exposure did not fundamentally alter the version of the claim exhausted in Rhines' second state *habeas corpus* proceeding. The "heart" of both claims was his trial counsels' alleged ineffective investigation into potentially mitigating mental conditions. Rhines' "new" claim, being the "substantial equivalent" of his old, exhausted claim, was outside the scope of *Martinez* and its supporting "new evidence" was barred by *Pinholster*. *Gray,* 806 F.3d at 799; *Lopez,* 491 F.3d at 1040.

2. A Ruling Definitively Distinguishing Old From New Claims Would Be Merely Advisory Here Because Rhines' Claims, Even If New, Do Not Meet The Other Criteria Of The *Martinez* Exception

Even if this court promulgated a rule definitively distinguishing new *claims* from new *evidence* for *Martinez* purposes, it would be merely advisory as applied to Rhines because he cannot meet the ineffective assistance of initial collateral review counsel criterion of the *Martinez* exception. Nor can Rhines meet the criterion of a substantial claim.[2]

a. Rhines' "New" Claims Implicate The Effectiveness Of Counsel In His Second Collateral Review Proceeding, Not Initial Collateral Review Counsel

By its express terms, the *Martinez* exception encompasses only the error of counsel in "initial-review collateral proceedings" and "does not extend to attorney errors" in "second or successive collateral proceedings." *Martinez,* 566 U.S. at 16; *Arnold v. Dormire,* 675 F.3d 1082, 1087 (8th Cir. 2012)(declining to extend *Martinez* to alleged ineffectiveness of state appellate counsel's failure to preserve issues litigated in *habeas corpus* hearing on appeal); *Banks v. Workman,* 692 F.3d 1113 (10th Cir. 2012)(declining to expand *Martinez* to alleged ineffectiveness of appellate counsel); ORDER DENYING MOTION FOR

[2] To the extent *dicta* in *Pinholster* hypothesized an exception for new evidence in certain circumstances, the hypothetical posited was "new evidence of withheld exculpatory witness statements." *Pinholster,* 131 S.Ct. at 1417. Rhines is not complaining about withheld exculpatory evidence. The alleged failure to develop evidence of alleged additional mental defects in this case does not lie with the state as might override *Pinholster*. *Gonzalez v. Wong,* 667 F.3d 965, 979 (9th Cir. 2011). Rhines and his counsel had free rein to develop the evidence with several experts supplied at the state's expense and came up empty-handed each time.

ABEYANCE, Docket 272 at 13, *Rhines v. Weber,* CIV 00-5020 (D.Ct.S.D.), Young Appendix at 00464 ("*Martinez* does not apply to any proceeding beyond Rhines' initial review collateral proceeding"). Here, rather than his initial-review *habeas corpus* counsel, Rhines is claiming that his second-review *habeas corpus* counsel – Schlimgen, Lange, Fulton – failed to effectively develop the record of his mitigation claim during the *second* state *habeas corpus* proceeding.[3] Thus, Rhines' petition here requests not merely the application of *Martinez* but an expansion of its holding beyond initial collateral review counsel.

The district and circuit courts correctly recognized that the alleged ineffectiveness of *second* collateral review counsel was beyond the scope of *Martinez. Rhines,* 899 F.3d at 494 (Rhines' "new" claim alleged "ineffectiveness of prior federal habeas counsel," not initial state habeas counsel); ORDER DENYING MOTION FOR ABEYANCE, Docket 272 at 13, *Rhines v. Weber,* CIV 00-5020 (D.Ct.S.D.), Young Appendix at 00464 ("Rhines's return to state habeas court in 2005 was not his 'first designated proceeding for a prisoner to raise a

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[3] Rhines' reliance on Justice Breyer's dissent from the denial of a petition for a writ of *certiorari* in *Gallow v. Cooper,* 113 S.Ct. 2730, 2731 (2013), for the proposition that *Pinholster* does not preclude additional evidence of unexhausted facts on previously exhausted claims is unavailing. Gallow's counsel, unlike Rhines', failed to present "ANY evidence regarding [Gallow's] ineffective-assistance claim, despite the opportunity to do so at seven evidentiary hearings." *Gallow v. Cooper,* 505 Fed.Appx. 285, 295 (5th Cir. 2012)(capitalization and emphasis in original). Rhines' ineffective investigation claim benefits from no similar infirmity. Fulton did present further evidence regarding Rhines' mental status through Dr. Ertz.

claim of ineffective assistance of trial counsel' and was therefore not his initial-review collateral proceeding"). Consequently, any ruling from this court definitively distinguishing new *claims* from new *evidence* in support of old claims, and finding that Rhines' PTSD/neurotoxin allegations are the former and not the latter, would have no practical effect unless this court expands *Martinez* to the alleged ineffectiveness of Rhines' second state/federal *habeas corpus* counsel.

b. Rhines' "New" Claims Are Not Substantial

Even if "new," Rhines' proffered claims do not meet the *Martinez's* substantiality criterion. *Martinez,* 132 S.Ct. at 1318-19, 1320-21; ORDER DENYING MOTION FOR ABEYANCE, Docket 272 at 15, *Rhines v. Weber,* CIV 00-5020 (D.Ct.S.D.), Young Appendix at 00466 ("Rhine has presented no potentially meritorious claims at all"). Rather, Rhines' alleged new claims are wildly speculative.

Rhines "new" evidence did not identify any new, specific condition that afflicted Rhines but, rather, simply hypothesized on the etiology of the alleged "cognitive processing deficit" hypothesized by Dr. Ertz during the second state *habeas corpus* proceeding – recast here as "organic brain injury" – as due to lead or pesticide poisoning. RHINES *MARTINEZ* BRIEF, Docket 289, Young Appendix at 00469 (citing no specific condition, only "possible brain damage"). The speculation that Rhines was exposed to air- or waterborne neurotoxins was devoid of any specific evidence of to what degree Rhines was ever exposed and, if

so, the impact of such exposure, if any, on Rhines' neurological development as a child or mental status as an adult. *Gray,* 806 F.3d at 799 (newly proffered neuropharmacological evidence was speculative when experts were uncertain of how intoxicated defendant was at the time of the crimes).

The speculation that exposure to neurotoxins as a child left Rhines afflicted with some unspecified neurological deficit was belied by Dr. Kennelly's neurological screening, which revealed no manifestations of organic brain injury. KENNELLY REPORT, Young Appendix at 00081. In other words, even if Rhines had been exposed to environmental toxins as a child (for which there is virtually no evidence), it did not manifest itself as any form of brain disorder or deficit in any adult testing.

In this respect, Rhines' "new" claim is similar to the circumstances of *Gonzalez v. Wong,* 667 F.3d 965 (9th Cir. 2011). In *Gonzalez,* the court rejected an inmate's claim that his trial counsel had been ineffective for failing to identify an alleged mental defect that impaired his ability to process cues that informed him that the person he was shooting was a cop. Noting that federal law contains "no blanket obligation to investigate possible 'mental' defenses, even in capital cases," the *Gonzalez* court denied relief because "an attorney only needs to investigate mental health defenses if there are 'facts *known to counsel* from which he reasonably should have suspected that a meritorious defense was available.'" *Gonzalez,* 667 F.3d at 991 (italics in original). As in *Gonzalez,* the

testing on Rhines did not reveal any deficits or bases for further testing. KENNELLY REPORT, Young Appendix at 00081.

Not only has Rhines failed to demonstrate the existence of any mental defect, he hypothesizes a possible etiology that inherently entails highly speculative retrospective analysis and diagnosis. How does one accurately measure the air or groundwater contamination, if any, in McLaughlin or the Rhines household more than 40 years after the fact? Even if the presence of these pollutants could be quantified generally, how does one reliably extrapolate Rhines' individual exposure to them, and its effect on his neurological development, from the data?

And if these environmental factors account for some as-yet-unidentified mental defect, where is the corroborating empirical evidence? Why do Rhines' siblings – his straight-A student sisters and his law-abiding brother – not suffer from the same defect? Why have no other homicidal psychopaths emerged from McLaughlin if these pollutants contaminated the entire town's air and water? Given these empirical shortcomings, it is not surprising that Rhines' counsel could not unqualifiedly vouch for the substantiality of the claim; his *Martinez* brief in the district court conceded that these theories of "possible brain damage" were merely "potentially meritorious," which is far short of demonstrating substantial, meritorious claims. RHINES *MARTINEZ* BRIEF, Docket 289 at 16, *Rhines v. Weber,* CIV 00-5020 (D.Ct.S.D.), Young Appendix at 00469. Hypotheses of air or groundwater contamination in McLaughlin in the 1960s or

1970s as a potential etiology for a mental condition for which no evidence exists is hardly a substantial claim of ineffective assistance of counsel, particularly when any correlation between his alleged exposure to these contaminants and the murder would simply entail rank speculation on top of rank speculation. *Gonzalez,* 667 F.3d at 991; *Jones,* 450 F.Supp.2d at 1045; *Morris,* 2009 WL 3170497.

3. Any Ruling That *Martinez* Provides Cause To Excuse Rhines' Default Of His "New" Ineffectiveness Claim Would Be Merely Advisory Because He Cannot Demonstrate Prejudice

If Rhines' claim was indeed entirely new as he asserts, it was procedurally defaulted at the time he filed his motion to amend.[4] To overcome a procedural default, a petitioner must demonstrate both cause and prejudice. *Coleman v. Young,* 501 U.S. 722, 750 (1991). A ruling that Rhines' "new" claims fell within the scope of *Martinez* would have no practical effect in this case because Rhines cannot meet the additional criterion of prejudice.

The "prejudice" component of "cause and prejudice" is analytically distinct from *Strickland* prejudice. *Strickland v. Washington,* 466 U.S. 688 (1984); *Zinzer v. Iowa,* 60 F.3d 1296, 1299 n. 7 (8th Cir. 1995). The "actual prejudice" required to overcome the procedural default bar is significantly higher than the *Strickland* prejudice required to establish the underlying claim of ineffective

[4] Rhines' "new" PTSD/neurotoxin/organic brain injury claim was subject to South Dakota's two-year statute of limitations. Per *Hughbanks v. Dooley,* 2016 SD 76, 887 N.W.2d 319, the statute on the claim commenced to run July 1, 2012, and barred the claim as of July 1, 2014. Rhines did not file his motion to amend until October 21, 2015.

assistance of counsel. *United States v. Frady,* 456 U.S. 152, 165-68 (1982). This higher hurdle requires more than the "possibility of prejudice," it requires "actual and substantial disadvantage infecting [the entire proceeding] with error of constitutional dimension" to a degree that, but for the alleged error, there is a "substantial likelihood" of a different outcome. *Frady,* 456 U.S. at 172. Rhines can no more demonstrate prejudice in regard to his "new" claim than he could his old because his trial counsel could no more have risked opening the door on the state's differential diagnosis of sociopathy for the sake of the "new" evidence than they could for the mitigation evidence they had on hand.

This court's precedent affirming tactical decisions of this sort is well established. In *Strickland,* this court found that defense counsel had not been ineffective for failing to further investigate or present mitigation evidence given that he had succeeded in excluding Strickland's criminal history from sentencing and further mitigation evidence risked undermining the favorable light in which he had been able to place Strickland at his plea hearing. *Strickland,* 466 U.S. at 677. In *Burger v. Kemp,* 483 U.S. 776, 792 (1987), this court found that counsel had not been ineffective even though he had "offered no mitigating evidence at all" at the sentencing hearing when presenting a mitigation case would have opened the door to unfavorable "historical fact[s]" that "would have harmed his client's chances for a life sentence" more than they would have helped. And in *Darden v. Wainwright,* 477 U.S. 168, 186 (1986), 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."

Worthington v. Roper, 631 F.3d 487 (8th Cir. 2011), demonstrates the force that the *Strickland/Burger/Darden* line of cases exerts on the analysis of prejudice here. As here, Worthington complained in federal *habeas corpus* proceedings that his trial counsel had failed to adequately investigate mental health mitigators. As here, Worthington's criminal trial experts found no significant mental disease or defect and rendered a diagnosis of antisocial personality disorder. *Worthington,* 631 F.3d at 493. And, as here, Worthington's counsel determined that the "very damaging" diagnoses of antisocial personality disorder and malingering outweighed any benefit to attempting to introduce evidence of lesser diagnoses of substance dependency, ADHD, PTSD, or depression. *Worthington,* 631 F.3d at 493. The *Worthington* court ruled that, even if defense counsel's mitigation case "preparation for the penalty phase was not ideal," it was reasonable in view of the fact that they had obtained opinions from qualified mental health experts that ultimately proved unavailing when balanced against the strategic imperative of keeping damaging counter-mitigation evidence out of the sentencing record. *Worthington,* 631 F.3d at 501-503. As in *Worthington,* Rhines' trial counsel obtained psychiatric and psychological evaluation of their client prior to trial. *Worthington,* 631 F.3d at 501 (counsel not ineffective when they "obtained the assistance of a qualified

expert on the issue of the defendant's sanity"), see also *Gentry v. Sinclair,* 705 F.3d 884, 899 (9th Cir. 2013).

Thus, as in *Gentry,* the evaluations performed at Rhines' counsels' behest "provided no evidence useful to the defense [and] . . . counsel were concerned about opening the door to damaging rebuttal." *Gentry,* 705 F.3d at 900; *Worthington,* 631 F.3d at 503 (no ineffectiveness when counsel strategically determined that "[t]he beneficial 'nuggets' in [one expert's] diagnosis were far outweighed by the 'substantial negative impact'" of opening the door to admission of a diagnosis of antisocial personality disorder); *DeYoung v. Schofield,* 609 F.3d 1260 (11th Cir. 2010).

The logic of the *Strickland/Burger/Darden* line of cases applies with equal force in the *Pinholster/Martinez* context. In *Carter v. Mitchell,* 2013 WL 1828950, *4 (S.D.Ohio), the court adopted the magistrate's recommendation to not admit "a vastly expanded body of evidence purportedly related to trial counsels' ineffectiveness in presenting mitigation evidence, but far beyond the theory of ineffectiveness" Carter had exhausted in the state courts. As here, Carter's basic ineffectiveness claims "were fairly presented to the state courts and are not based on new or distinct theories insofar as they related to the preparation of Carter's mitigation" case. *Carter,* 2013 WL 1828950 at *3. Like Rhines, Carter sought a stay, which the court denied because it was improper to "expand [the] scope [of a *Rhines* stay and abeyance] from unexhausted claims to unexhausted evidence." *Carter,* 2013 WL 1828950 at *3. "To extend *Rhines* [*v.*

Weber, 125 S.Ct. 1528 (2005),] to encompass 'unexhausted evidence' would provide virtually limitless opportunities to delay finality in habeas litigation." *Carter,* 2013 WL 1828950 at *3.

In a related supplemental order, the *Carter* court observed that "the variety of relevant mitigating evidence in a capital case is, under the ABA guidelines and the case law, enormous. It is easy to imagine repeated post-conviction discoveries of 'new' mitigating evidence and the construction of arguments about why it was ineffective assistance of trial counsel to fail to discover it before. To permit stays, perhaps on a repeated basis, pending exhaustion of new evidence would turn the exhaustion doctrine into a mechanism for indefinite delay of finality." *Carter v. Mitchell,* 2013 WL 3147948 (S.D.Ohio).

In short, Rhines has failed to demonstrate a "substantial likelihood" of a different outcome in his criminal trial or *habeas corpus* proceedings sufficient to meet the prejudice component of the cause and prejudice test. *Frady,* 456 U.S. at 172. Given Rhines' documented average to superior intellectual functioning, his endstage hypotheses of minor diagnoses (ADHD, CPD or PTSD) in his motion to amend fell miles short of the necessary threshold of proffering a substantial claim or prejudice for purposes of the *Martinez* exception. Adding to the analysis the facts that Rhines' late hypotheses sharply contradict both his own earlier medical experts and his self-penned autobiography, his trial counsels' strategy of avoiding trifling mental status defenses to preserve the

rulings excluding the state's devastating counter-mitigation evidence appears more reasonable still. *Worthington,* 631 F.3d at 503. Indeed, Rhines' endstage descent into tinfoil hat theories of airborne toxins and contaminated water supplies are precisely the sort of lame excuses and feeble blame-shifting that his defense team prudently avoided in order to "maintain [the] credibility" of their pleas to the jury to spare Rhines' life. HCT at 69/13, Young Appendix at 00001 at 69/13.

CONCLUSION

A letter Rhines wrote in 2015 is revealing of the depths of Rhines' sociopathy. In the letter to the incumbent Mayor of Rapid City, Sam Kooiker, who was being challenged for mayor by Steve Allender, the detective who investigated Rhines' case and arrested him, Rhines purported to have information that Kooiker would find "helpful." Rhines had this to say about his victims on Page 3 of the letter:

> I hope this [letter] helps you discredit Allender to the point he withdraws from contention. He would be the worst Mayor ever in Rapid City. Allender is a psychopath. No, not a criminal one but a psychopath none-the-less. He will do or say whatever it takes to obtain what he wants, regardless of what laws he has to violate.
>
> Oh, and one more thing. Allender will likely have Edwin and Peggy Schaeffer on his side as they are the Father and Mother of the deceased victim and Allender . . . yada, yada, yada and they have $$$ courtesy of their deceased son . . . or the insurance company for the business where he was slain. It's complicated.

KOOIKER LETTER, Young Appendix at 00530.

22 years after the murder, Rhines expresses the same remorseless condescension toward his victim and his victim's parents (who did not recover

"$$$" from Dig'Em Donuts or its insurer "courtesy of their deceased son") that he exhibited in his confession. Rhines sounds no less chilling characterizing Donnivan's parents' enduring grief over the loss of their son as so much "yada, yada, yada" than he did during his confession. No amount of psychobabble about air- or waterborne contaminants could mitigate away Rhines' palpable contempt for the lives and dignity of other humans exhibited by this letter, his confession and the mountain of aggravating evidence he would have faced had his criminal trial counsel committed the malpractice of opening the door to it.

There is no circuit split or unsettled question regarding the operation of the *Martinez* exception warranting this court's attention. Nor is Rhines' petition a suitable vehicle for addressing any of the "questions" its presents because any ruling would be merely advisory under the circumstances of this case. Accordingly, Rhines' petition for writ of certiorari should be DENIED.

Dated this 13th day of March 2019.

Respectfully submitted,

JASON R. RAVNSBORG
ATTORNEY GENERAL

_Paul_S._Swedlund_____

Paul S. Swedlund
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: 605-773-3215
Facsimile: 605-773-4106
paul.swedlund@state.sd.us

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of March 2019 a copy of the foregoing response to petition for writ of certiorari was served on Claudia Van Wyk, 601 Walnut Street, Suite 545 West, Philadelphia, PA 19106 and Timothy J. Langley, Assistant Federal Public Defender, 200 West 10th Street, Suite 200, Sioux Falls, SD 57104 via U.S. Mail first class prepaid.

_Paul_S._Swedlund_____
Paul S. Swedlund