

Nos. 19-6477/19A-482

In The
Supreme Court of the United States

OCTOBER TERM 2019

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**

RESPONDENT'S APPENDIX

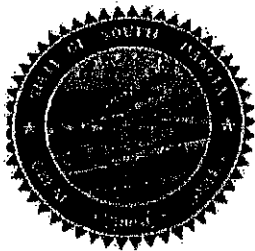
JASON R. RAVNSBORG, South Dakota Attorney General
SHERRI M. WALD, Deputy Attorney General
PAUL S. SWEDLUND, Assistant Attorney General
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: 605-773-3215
Facsimile: 605-773-4106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

Attorneys for Respondent Young

APPENDIX

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STATE OF SOUTH DAKOTA
BOARD OF PARDONS AND PAROLES

ORDER DENYING / CONTINUING COMMUTATION OF SENTENCE

In Re: **RHINES, CHARLES** 0000015036 Transaction 28414

The above-entitled matter came before the South Dakota Board of Pardons and Paroles. The Board, after considering the application for Commutation of Sentence, attests it is hereby ORDERED that the application is:

KJK DENIED

CONTINUED TO PAPER REVIEW - Requesting additional information:

CONTINUED FOR PERSONAL APPEARANCE

Comments: _____

Dated: December 12, 2018

Kevin J. Kull
Board Member,
SD Board of Pardons and Paroles

Rev. Patricia White Horse-Cards
Board Member,
SD Board of Pardons and Paroles

*If the application is denied, this offender will not be eligible to apply again for one (1) year (SDCL 24-15-10).
If the application is continued for a personal appearance, further instructions/requirements will be given to the offender.*

STATE OF SOUTH DAKOTA
OFFICE OF THE GOVERNOR
EXECUTIVE ORDER 2019-10

Whereas, Article IV, Section 3 of the South Dakota Constitution grants to the Governor the power to "grant pardons, commutations, and reprieves, and may suspend and remit fines and forfeitures"; and

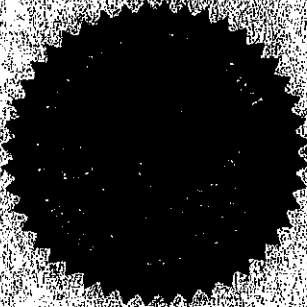
Whereas, SDCL 24-14-1 grants to the Governor the discretion to "by executive order, delegate to the Board of Pardons and Paroles the authority to hear applications for pardon, commutation, reprieve, or remission of fines and forfeitures, and to make its recommendations to the Governor"; and


Whereas, The Board of Pardons and Paroles meets monthly to make conditional release decisions for penitentiary inmates and has set forth a procedure to hear such clemency applications and make such determinations

It is, Therefore, By Executive Order, Ordered that all applications for executive clemency, whether it be designated a "pardon," a "commutation," a "reprieve," or a "remission of a fine or forfeiture" shall be addressed to and initially reviewed and heard by the Board of Pardons and Paroles. Recommendations for "executive clemency" shall be forwarded to the Office of the Governor for independent review; and

Be It Further Ordered, That whenever it becomes apparent the purposes or objects of a conditional order of clemency is not being accomplished, the Board of Pardons and Paroles may issue an order to show cause why such conditional order of clemency should not be revoked, hold a due process hearing on the order to show cause, and make its recommendations to me concerning the alleged violations of said conditional order of clemency.

Dated in Pierre, South Dakota this 3rd day of June 2019.




Kristi Noem
Governor of South Dakota

ATTEST:

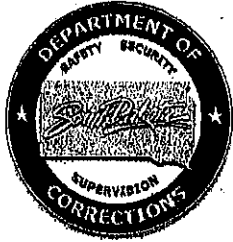

Steve Barnett
Secretary of State

Policy
Distribution: Public

1.4.E.2
Inmate Medically Necessary Health Care

1.4.E.2 Inmate Medically Necessary Health Care

I Policy Index:



Date Signed: 03/22/2016
Distribution: Public
Replaces Policy: 4E.4
Supersedes Policy Dated: 11/06/2015
Affected Units: All Institutions
Effective Date: 03/23/2016
Scheduled Revision Date: September 2016
Revision Number: 13
Office of Primary Responsibility: DOC Administration

II Policy:

Health care services deemed medically necessary by a health care provider will be provided to inmates under the jurisdiction of the Department of Corrections (DOC).

III Definitions:

Medically Necessary:

Care which is determined by the health care provider to be all of the following:

- Consistent with community standards.
- Ordered by an authorized DOC Health Care provider.
- Required to prevent significant deterioration of the inmate's health or permanent functional impairment if not rendered during the time of incarceration.
- Not considered experimental or to be lacking in medically recognized professional documentation of efficacy.
- Not administered solely for the convenience of the inmate or the health care provider.

Health Care Provider:

All DOC staff, individuals under contract assigned to the DOC (including Department of Health and Department of Social Services staff) or student interns, providing medical, mental, dental, or optometric care in a DOC institution. This also includes outside specialists/referrals providing services to an inmate.

Inmate:

For the purposes of this policy, an inmate is any person who has been sentenced or placed in a facility under the control of the Department of Corrections (DOC).

IV Procedures:

1. Determination of Medical Necessity:

- Health care providers will assess inmates as they deem necessary to identify those who may require medically necessary care, treatment and/or supervision. Examples include the chronically ill, inmates with communicable diseases, the physically disabled, pregnant inmates, terminally ill, inmates with behavioral health needs and the developmentally disabled.

Revised: 03/22/2016



- B. Inmates who are determined to have a medical necessity beyond the resources available at their assigned facility, as determined by the responsible health care practitioner, will be reviewed for possible transfer to a facility where such care/services are available and can be provided (ACA #1 HC-1A-05).
- C. Inmates may utilize the administrative remedy process to address complaints/grievances involving health care services (See DOC policies 1.3.E.2 *Administrative Remedy for Inmates* and DOH policies P-A-11 *Grievance Mechanism for Health Complaints*).

2. Coordination of Medical Orders with DOC Policy:

- A. Medical orders deemed medically necessary will be carried out in all circumstances.
- B. If a DOC policy or an institutional operational memorandum conflicts with a medical order for medically necessary health care, the Clinical Director or his/her designee will contact the Warden of the facility where the inmate is housed.
- C. In all other situations where requested medical services are not deemed medically necessary by the health care provider/clinician, DOC policies and/or institutional operational memorandums will take precedence.
- D. In all cases of conflicting policy and orders, the situation and any applicable policies, operational memorandums and/or orders will be reviewed by the Clinical Director, health care provider and the Warden or his/her designee to reach a resolution and identify any possible changes that may be considered to policies, procedures or OMs.
- E. The health authority will arrange for the availability of the health care services. The responsible clinician will determine medically necessary health care services. The DOC is responsible for providing administrative support to make identified services accessible to the inmate (ACA #1-HC-2A-02).

V Related Directives:

- DOC policy 1.3.E.2 – *Administrative Remedy for Inmates*
- DOC policy 1.3.E.3 – *Juvenile Administrative Remedy Procedure*
- DOH policy P-A-02 – *Responsible Health Authority*
- DOH policy P-A-11 – *Grievance Mechanism for Health Complaints*

VI Revision Log:

September 2004: Added references to administrative remedy/grievance policies. Added references to DOH policies PA 02 and Y 02. Changed institutional policy to institutional operational memorandum.

September 2005: Updated DOH policy references. Changed CEO to Warden, Superintendent.

October 2006: Edited the policy to include the term "medically necessary" where appropriate. Minor style/format changes made throughout the document.

October 2007: Minor style/format change.

September 2008: Revised formatting of policy in accordance with DOC policy 1.1.A.2. Added reference to DOC policy in section V.

September 2009: Added hyperlinks.

September 2010: Revised formatting of Section I.

August 2012: Deleted "Non-Public" and Replaced with "Public" Deleted "Human Services" and Replaced with "Social Services" in definition of Health Care Provider" Added "medical, mental and dental health" to Section 1 A. Deleted "medical order will take precedence in situations of medical necessity" and Replaced with "Clinical Director or his/her designee will contact the Warden or Superintendent of the

Policy

Distribution: Public

1.4.E.2

Inmate Medically Necessary Health Care

facility where the offender is housed" in Section 2 B. **Added** "Clinical Director" and **Deleted** "of the institution in order" and **Added** "and identify any possible changes that may be considered to the cited policy and/or operational memorandum(s) in Section 2 D.

September 2013: Reviewed with no changes.

September 2014: **Deleted** "determining medically necessary health services (e.g. medical, dental and mental health)" and **Replaced** with "identifying offenders who may require medically necessary care, treatment and/or supervision. Examples include the chronically ill, offenders with communicable diseases, the physically disabled, pregnant offenders, the terminally ill, offenders with serious mental health needs and the developmentally disabled" in Section 1 A. **Added** B. to Section 1. **Deleted** "if they do not agree with the decision of the health care provider" in Section 1 C. **Deleted** and identify any possible changes that may be considered to the cited policy and/or operational memorandum(s)" and **Added** "The health authority will arrange for the availability of the health care services, the responsible clinician will determine the services that are needed/required, the DOC will be responsible for providing administrative support to make the services accessible to the offender (ACA #1-HC-2A-02)" in Section 2 D.

September 2015: Reviewed with no changes.

March 2016: **Deleted** "offender" and **Replaced** with "inmate" and **Deleted** "Superintendent" throughout the policy.

Denny Kaemingk (original signature on file)

Denny Kaemingk, Secretary of Corrections

03/22/2016

Date

OFFICE OF THE PUBLIC DEFENDER

Pennington County Courthouse
Rapid City, South Dakota 57701

(605) 394-2181

November 4, 1992

Dr. Daniel Kennelly
517 W. 20th St.
Sioux Falls, SD 57105

RE: Evaluation of Charles R. Rhines

Dear Dr. Kennelly:

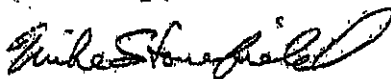
Enclosed are copies of a report of a police officer at the scene of the killing in this case, the autopsy report, and a statement made by Mr. Rhines to police in June of this year. Hopefully this will provide some basic information on the facts of this case; if you need additional materials, let me know.

Also enclosed is a certified copy of the Order for Psychiatric Examination. The Judge has informed defense counsel that we will be given the money needed for your examination; however, he would like a preliminary estimate as to your anticipated bill. If you could provide this to me, I would appreciate it. As we discussed earlier, because the death penalty is involved in this case, please do whatever testing or evaluations you feel are appropriate for your determinations in the areas of competency for trial, mental illness and sanity.

Mr. Rhines will be transported to the Minnehaha County Jail on November 12, 1992, and will be there until your examination is completed.

If you need additional information, let me know.

Sincerely,



Michael Stonefield
Assistant Director

MS\lmb
Enclosures



0595

Appendix 006



OFFICE OF THE PUBLIC DEFENDER

Pennington County Courthouse
Rapid City, South Dakota 57701

(605) 394-2181

February 2, 1993

Dr. Daniel Kennelly
517 West 20th Street
Sioux Falls, SD 57105

RE: Charles R. Rhines

Dear Dr. Kennelly:

I appreciate the time and work you put into the evaluation of Mr. Rhines, and your continued interest in the case. Once we received your report, it did not appear that his mental condition or history figured into the case to a degree where we needed your testimony,

Unfortunately, the result we most feared was what occurred, a sentence of death. Again, however, the attorneys who worked with Mr. Rhines very much appreciate your work on the case.

Sincerely,

Michael Stonefield

MS/cc

STATE OF SOUTH DAKOTA)
COUNTY OF PENNINGTON) ss
STATE OF SOUTH DAKOTA)
Plaintiff,)
vs.)
CHARLES RUSSELL RHINES,)
Defendant.)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
FILE NO. 93-81

ORDER FOR PSYCHIATRIC EXAMINATION

The defendant, Charles Russell Rhines, being indigent, and having moved the Court by and through his attorneys, for an Order for a Psychiatric Examination to determine: (1) whether the defendant is suffering from a mental disease, developmental disability, or psychological, physiological or etiological condition, which renders him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, (2) whether the defendant was suffering from a substantial psychiatric disorder of thought, mood or behavior which affected him at the time of the commission of the alleged offense and which impaired his judgment, but not to the extent that he was incapable of knowing the wrongfulness of his alleged act, and (3) whether the defendant was temporarily or partially deprived of reason at the time of the commission of the alleged offense, in that at the time of the alleged offense, he was incapable of knowing the wrongfulness of the alleged offense; the Court being familiar with the file and all prior proceedings herein, and being familiar with the basis of such motion, and it appearing to be in the best interests of justice to do so, now, therefore, it is hereby

ORDERED That the defendant, Charles Russell Rhines, be

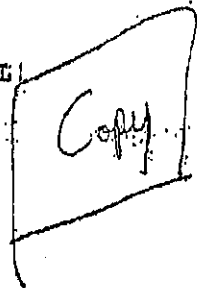


D. J. KENNELLY, M.D. / 517 West Twentieth / Sioux Falls, S.D. 57105 / Phone [605] 336-1928
Diplomate, American Board of Psychiatry and Neurology / American Board of Forensic Psychiatry / Fellow, American Psychiatric Association

November 24, 1992
Mr. Michael Stonefield
Assistant Director
Office of the Public Defender
Pennington County Courthouse
Rapid City, South Dakota 57701



CONFIDENTIAL



Re: Rhines, Charles R.

Dear Mr. Stonefield:

Mr. Rhines was seen at the Minnehaha County Public Safety Building on November 13, 15, 17, 18, and 19, 1992 for a total of four and three-fourths hours. He understands the seriousness of his legal situation and that the death penalty is being pursued. The purpose of the examination and necessity of a report to his attorney was explained. He also understood that if my report is used that I have to answer questions about everything I know about him. He understood that it was his right to not tell me anything or to stop the interview in time and to consult with his attorney.

Screening for neurological evaluation is negative.

Prior to his final interview, he reported that he does not remember anything unusual. He reports that he does not remember anything unusual on the day of the alleged crime until about 2 am when he was called from the jail to bring some clothes for his roommate. He states it was a snowy day and he did little. He ate some pork chops and gravy, and nothing unusual happened. He denies intoxication or feeling ill.

Four days later he left for Seattle. He was unaware that he was about to be offered a job in Rapid City. He felt he could get a job in Seattle and his roommate's father asked him to return home. With the loss of the roommate he would not be able to afford his apartment. Later the roommate came to Seattle.

It is significant that he reports that his roommate was his homosexual lover and that the young man had earlier given evidence of adulthood but was really seventeen years old. The roommate was also involved with a female. However, Mr. Rhines did not realize that until later in Seattle. Mr. Rhines is convinced that a substantial reward is behind any information the former roommate has given.

While homosexuality is a major factor in Mr. Rhines' life, it had nothing to do with the alleged victim whom he had seen only a few times during his employment at the donut shop. He feels that he has had a sexual identity problem until some counseling in 1978 to get him "to come out of the closet." He denies promiscuity or



any forced sexual relationships. He reports that he dresses in leather and when doing that he is more assertive. This assertiveness is verbal such as ordering people to move out of his way. He states he is not looking for fights and has not been challenged to fight. He also reports that when sexuality is sadistic it is only with willing partners.

This aspect of his life is not involved with the alleged victim, but it is important to understanding the relationship with the roommate whom he states is interested in the reward.

He denies much misbehavior as a child. He served in the Army from 1974 to 1976 where he was using drugs and he did receive non-judicial punishment of reduction in rank, fine, restriction and a general discharge.

Upon return home to South Dakota he continued to use marijuana and speed which he relates as "the mid-seventies stuff." He feels this was to escape and to avoid interaction with other people. In 1977 he served seven months for third degree burglary. He did see a counselor at the penitentiary but did not follow-up with counseling until he was ordered to do so in 1978. At that time there was a parole violation due to a fight with his brother-in-law. During that time he was working as an engraver in a gold factory.

In February 1980 he was sentenced to ten years after pleading guilty to armed robbery. He states he was threatened in the penitentiary so he requested a transfer. He was sent to Washington state where there were some fights in the penitentiary. He was allowed work release and did well at this and continued to work as a baker after discharge. He was able to earn thirty thousand dollars and become an assistant manager.

He reports that he altered some checks. His lover attempted the same thing, but was arrested. At that time he left town and later sent for this man. He feels that the police were following his partner to try to arrest him.

He went to Rapid City where he was hired by a donut shop which is the same establishment where Mr. Schaeffer was killed.

After about a year he was fired. However, he states that didn't upset him much because he had been fired and rehired several times. He feels justified because he was allowed unemployment benefits. He was looking for work. As stated above he left about four days after the death. There he did obtain employment and a place to live. The young man and the young lady joined him in Seattle. He states that this made him depressed. — why? shared affection?

He was arrested on a burglary charge but states that that charge was dropped.

While in the King County Jail he was interviewed. He states he doesn't remember making much of this and when I show him some of

the quotations he is surprised.

He does remember going to the jail in Seattle and being in the holding area. He does remember talking to the police but this is vague. He states there was another policeman involved. He feels that he was in shock, upset and confused because he had been arrested. He states that before his roommate return he was bored and lonely. He relates he enjoys monogamous relationships.

In Seattle he lived with a friend who accepted that he was gay. He worked for the friend and also had a job in the salmon research.

At the King County Jail he was put on suicide watch because he had asked for a gun and a bullet. He states that if he had had that he would have shot himself. When asked why "I just spent five hours confessing, that ends your life." He denies suicide intent at the present time.

If he is not convicted he would like to return to Seattle, Oregon, or work on fish research in the Gulf of Mexico. He tells me at least twice that he can do electronic work.

He states that occasionally when alone he hears his name called. I do not get any history of any symptoms that lead to a psychotic diagnosis. The depression at the time of arrest in Seattle is situational. He does not show depressive symptoms at the present time.

His interactions with others are limited but he can interact. He does tend to alternate between passiveness and assertiveness, and there is some suspiciousness. Of course at this time guardedness would not be considered unreasonable.

He has had some experiences where he sees things as happening before they happen. He relates an incident when women came to the donut shop and he knew one of their names.

On mental status examination one finds that he is alert and oriented. His memory and intellectual functions are all good. He can recall seven digits forward and reverse. However, when given three words he could only recall two after eight minutes on two occasions. However, his general memory is good. There is no evidence of a thought disorder. He shows some humor and some interests.

There are some areas of incomplete information about the legal system. He clearly has the intelligence to learn if he is instructed. I would see him as having the ability to understand in both irrational and rational manner the charges, the proceedings, and the relationship with an attorney.

Since he is not distressed by his homosexuality it does not constitute a mental illness.

Until the final interview he insisted he was not there. Obviously, one can not make any comments about his mental status at the time. There is no evidence that he has experienced any major mental disorders that would significantly restrict his ability to use judgement or to comprehend his behavior. It is exceedingly unlikely that an illness would appear suddenly and then leave suddenly.

On the last interview he insisted on giving more detail. He questions why "a sane man would confess to murder." He states that he did this to keep his roommate out of it and at the time, no one made any statements about the death penalty.

He spontaneously reports that he and his roommate went to the donut shop to rob the place. "Things went sour."

During his description there is one episode of unusual word usage. This could also be a misunderstanding on my part. He states that "I stabbed Donovan twice to stop him from assault with a deadly weapon." When I asked him to explain he reports that he knew Donovan would recognize his roommate. "I stabbed him once in front of the office door. He was fighting and screaming. I stabbed him again. He quieted down, I got him up and walked him down to the store room and tied his hands." At that point the roommate came in and Donovan made a comment to him.

Mr. Rhines told his roommate that Donovan was not going to go anywhere because he was tied and stabbed; and he left to go get the money. He reports the roommate came in and told him that Donovan wasn't going to tell anybody and was not going to live. At that point, he thought he would have time to gather his belongings, clothing, car and leave town. He recognized that would look suspicious although it didn't prove anything. When they got home he reports that the roommate told him that he had stabbed Donovan again.

At that point he returned the roommate to work and went out to the country to dispose of clothing, weapon and some checks. He decided to take the blame himself because he sees no reason for a second person to go to jail as it would not bring Donovan back to life. "There is no point in ruining two lives."

He also reports that in Seattle he confessed because the police told him that they could find another friend of Mr. Rhines in violation of parole and the gentleman would lose visitation rights. He reports he would probably be beaten by the other man if that was to happen. His functioning and intelligence would indicate that he is capable of comprehending the consequences of revealing this information and he could understand advice from his attorney.

He tells me that he related this information after he had a telephone conversation with his attorney.

The conclusions of this evaluation would include that no major

mental illness can be diagnosed. There are a number of social interactions which could point to mixed personality traits. I have not yet seen the results of the psychological testing. Perhaps this can shed some light on that subject. Personality disorders or traits are patterns of interaction with others and influence behavior. However, psychiatrists believe that these individuals have final executive power over behavior.

One does not see his judgement to be an illness. Obviously he does not always use good judgement.

He has the ability to rationally and factually understand his legal situation and charges.

After I see a final report from Doctor Arbes I will review my information again. If any other information becomes available, I will be happy to review it or discuss it with you.

Sincerely,



D.J. Kennelly, M.D.

DJK/tk

D. J. KENNELLY, M.D. / 517 West Twentieth / Sioux Falls, S. D. 57105 / Phone (605) 336-1928
Diplomate, American Board of Psychiatry and Neurology / American Board of Forensic Psychiatry / Fellow, American Psychiatric Association

BRIEF PSYCHOSOCIAL HISTORY

CONFIDENTIAL!

Name: Rhines, Charles
Date: November 17, 1992

Mr. Charles Rhines is seen on this occasion at the Minnehaha County Public Safety Building to develop a social history. I explained to Mr. Rhines that this information would be made available to Doctor Kennelly for his use in doing his psychiatric evaluation. Additionally, I advised that this information may also be shared along with Doctor Kennelly's report to whomever the court order requires a report be sent. He indicated an understanding of that and stated that he did not feel the need for further legal consultation prior to our visiting.

FAMILY HISTORY: Mr. Rhines was born on July 11, 1956 at McLaughlin, South Dakota. He was raised in that community where his father managed the local Farmer's Co-Op Elevator. Mother was occasionally employed as a bookkeeper. Charles is the youngest of four children, having a brother currently forty-four years of age and two sisters ages forty-one and thirty-nine. His brother left home to join the Marine Corps when Charles was eight years old so it feels as though they were raised completely separately. He characterizes his relationship with his sisters as one of fighting and having little in common. He tells me that after the age of twelve he was pretty much left to take care of himself. His mother was employed outside of the home and his next older sister was fifteen and not interested in his twelve year old activities. She was off with her friends doing social things and he spent most of his time watching TV and eating at home after school. He describes himself as being grossly over weight as a child and being quite non-athletic. He felt these factors contributed to his limited peer acceptance.

Mr. Rhines has never married and had no serious relationships with females. As an adult, he became aware of his homosexual orientation and has had a few extended relationships with gay partners. Mr. Rhines sees himself as openly practicing his gay life style and feels good about that choice.

EDUCATIONAL HISTORY: Mr. Rhines says he did poorly in school and was socially promoted between grades three and six. He believes that occurred because his mother was on the school board. In the seventh grade, he was failed. That was quite a shock to him. He generally disliked school because he was forced to learn at the rate of the slowest child in the class and found that slow pace rather boring. Therefore, he didn't apply himself and his academic grades reflected that fact. He dropped out of school in ^{where?}

EXHIBIT

5

0604

the tenth grade and went to work. ^{where? no?} At age seventeen he went to live with his brother-in-law and sister in Wood, South Dakota and began high school again in the ninth grade. ^{name?} His brother-in-law was a teacher in that system and he thought perhaps he would do better under his tutelage. This lasted four months before he dropped out. He talked of the frustration he had with socializing with teachers who were friends of his brother-in-law on the weekends and observing their social habits. Then, going back to school and having to fit into the role of student and being expected to view them in an idealistic way was not comfortable for him. However, he did eventually receive a high school diploma from St. Louis High School in Hawaii while serving with the second division in Korea.

MILITARY EXPERIENCE: Mr. Rhines service sixteen months at Ft. Carson, Colorado and nine months in South Korea. He was discharged a few months early for disciplinary reasons. His discharge was a general discharge under honorable circumstances.

EMPLOYMENT HISTORY: He has had brief periods of employment in construction industry and one time worked as a manager of a donut shop. While in prison in the state of Washington he worked at various electronic jobs.

COLLEGE EXPERIENCE: Mr. Rhines attended the University of South Dakota at Springfield for a few months following his military service. He studied electronics but had difficulty accomplishing in that field. He was somewhat older than the average college student and did not fit into the peer groups. On occasion he was the object of other people's teasing. They enjoyed calling him "zero." In retaliation for this type of treatment, Mr. Rhines burglarized a dorm room occupied by two of the people who most enjoyed teasing him. This ended in his expulsion from school and also his first incarceration for the burglary.

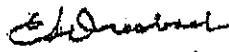
LEGAL HISTORY: Mr. Rhines was convicted of third degree burglary in November 1977 and sentenced to three years in the state penitentiary. He served about one year or less of that time and in 1979 was convicted of first degree robbery and served seven and one-half years of a ten year sentence. This sentence was served primarily in the state of Washington per his request because there were people in the South Dakota State Penitentiary who had animosities towards him and he needed distance from that threat. He presently is charged with first degree murder and third degree burglary. The incident reportedly occurred on March 8, 1992 in Rapid City, South Dakota. He is pending trial on that charge.

PSYCHIATRIC HISTORY: He had one brief period of counseling in 1979. This occurred at the West River Mental Health Center in Rapid City. The focus of therapy was to facilitate his working through sexual identity problems. He feels that was very helpful and enabled him to "come out of the closet" with his homosexuality. When I asked about any feeling of needing psychiatric care at other times, he said "ya I suppose so" over

the past five or six years. When I asked what his reason for thinking he would need care was he replied "I play with S & M." At that point he went on to talk about participating in sadomasochistic homosexual behaviors. As he discusses this further, he does not see it as a psychiatric abnormality, but assumes such behavior would not be seen as "normal" here in the Midwest.

GENERAL OBSERVATIONS: Mr. Rhines was cooperative and spontaneous. He responded relevantly to all direct inquiries. He was somewhat inclined to be perhaps a little dramatic and offered detail that seemed to support his dramatically making his points.

Signed.....


Steve Dresbach, MSW
Clinical Social Worker

SD/tk

PSYCHOLOGICAL EVALUATION

RHINES, Charles

DOB: July 11, 1956

DATE OF EVALUATION: November 17 and 21, 1992

DATE OF REPORT: December 1, 1992

EVALUATOR: Bill H. Arbes, Ph.D.

REFERRAL:

Mr. Rhines is being referred at this time by Daniel J. Kennelly, M.D., for psychological evaluation. Dr. Kennelly has evaluated Mr. Rhines at the request of Joseph Butler, attorney at law, for a legal charge pending in Pennington County, South Dakota.

To complete this evaluation, Mr. Rhines completed the Minnesota Multiphasic Personality Inventory (MMPI), the Millon Clinical Multiaxial Inventory (MCMI), the House, Traas, Person Test, the Rorschach Personality Diagnosis Method, and selected stimulus cards from the Thematic Apperception Test (TAT).

MENTAL STATUS:

Mr. Rhines is a 36-year-old white male who appeared for the session dressed in an orange jumpsuit, the standard wear for inmates at the Minnehaha County Jail. He appeared neatly groomed, and seemed to be quite receptive and open to the evaluation. He exhibited minimal signs of anxiety, nor did he exhibit any signs of disorder of mood. His thought processes were coherent, although episodically throughout the evaluation would offer tangential side comments which although had the intent of being humorous, frequently appeared to be relevant to the task at hand. His thought content showed no signs of psychotic affiliation or thinking. He is clearly oriented, shows no aberrations of recent or remote memory, and appears to be of above average intellectual ability as manifested by his handling of abstract material in responses to proverb testing. He exhibits minimal insight into the nature of his current personal social situation as it is contributing to mental status, and his judgment is questionable.

TEST RESULTS INTERPRETATION:

In his responses to the MMPI, he tended to respond in an extremely exaggerated manner, endorsing a wide variety of inconsistent symptoms and attitudes. Typically, this type of response is a result of a number of factors, including random responding, which this writer does not believe is the case here, falsely claiming psychological problems, low reading level, a "plea for help", or an acute disturbance that may dissipate over time or it may be indicative of a markedly confused psychotic state. Of the possible factors listed, it is this writer's opinion that this client is falsifying his responses to appear in a more negative light than in fact is the case. He certainly



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doesn't exhibit a low reading level, and he denied responding in a random manner, and he denies a seeking of help for his problems. Likewise, there are no signs of any confusion or psychotic ideation in this writer's visits with this person, and therefore the assumption is made that he tended to falsify his responses to the test data. As a result, the MMPI is an invalid profile, based upon the responses that he adopted.

Likewise, his responses to the MCMI, he tended to respond in a manner in which he was overly self-critical and self-depreciating in terms of his responses. However, the following profile is probably valid although mostly likely exaggerated based upon his responses. The clinical scales suggest that there is a moderate level of pathology in the overall personality structure of this person. He is likely to have a checkered history of disappointments in his personal and family relationships, deficits in his social attainments are notable, as is a tendency in his part to precipitate self-defeating vicious circles. Earlier hopes for himself have met with frustrating setbacks and efforts to achieve a consistent niche in life have failed. Although he is able to frequently function on a satisfactory ambulatory basis he is likely to evidence a persistent emotional dyscontrol and periodic episodes of acting out behavior.

The behavior of this man is typified by his quiet, inexpressive yet dependent way of relating to others. A marked deficit in social interest is notable as are frequent eccentricities, ideas of reference, occasional magical thinking and depersonalization anxieties. His intensely introversive pattern coexists with a lack of energy, deficient social initiative, and stimulus-seeking behavior. Also notable is his impoverished affect and his confused thoughts about interpersonal matters. Although he prefers a peripheral role in social family relationships, there is also a strong, conflicting need for dependency. Both of these stem from his low self-esteem and his deficiencies in assuming autonomous behaviors.

For the most part, this patient is a detached observer of life. He is strongly self-belittling, possesses an image of himself as a weak and ineffectual person. Rather than face the world, he defensively retreats, thereby becoming even more remote from sources of potential gratification. Life is uneventful for him, with extended periods of solitude that are characterized by feelings of being empty and depersonalized. Displaying a pervasive inadequacy in most areas, he tends to follow a meaningless, ineffectual, and idle life pattern, generally remaining only on the periphery of social activities.

This man is beginning to exhibit some signs of cognitive disturbance, particularly with regard to emotional and interpersonal matters. His periodic estrangement from others may lead him to lose touch with reality on occasion. Social communications are often odd, strained, and self-conscious, thereby further alienating him from others. His hesitation to express affect may stem from an intrinsic inability to experience pleasure.

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Frequently, this patient is depressed and morose. At other times, he may be erratically moody and complaining. Beneath his apathetic exterior are intense feelings of discontent and anger that may be displayed periodically in passive-aggressive, petulant, and fault-finding behavior. More often, however, he is self-deprecating and self-punitive and disposed to constant worrying.

The preference of this man is to follow a simple, repetitive and dependent life pattern in which he can avoid self-assertion and maintain his distance from normal social aspirations. Disengaged from and disinterested in most of the rewards of active human relationships, he often appears to others as an unobtrusively strange, disconnected, and lifeless person. Restricting his social and emotional involvements only perpetuates his life pattern of isolation and dependency with every increasing circles of anger.

Mr. Rhines' drawings on the House, Tree, Person Test suggest a number of concerns and issues related to his sexual identity. He is plagued by marked feelings of insecurity and does not experience himself as being connected or grounded in any aspects of his life. He tends to hold many struggles and problems within himself, and tends to disguise and hide his internal turmoil with a somewhat flippant and pseudo-arrogant demeanor. He does project a distinct dislike for women, and has minimal respect or regard for women. He makes many efforts to establish as much control in his life as he can, but frequently finds himself being unable to do this, which results in a high degree of anxiety and frustration, with episodic acting out behaviors. He tends to be a very rigid individual, and clearly is fearful of expressing his own thoughts and feelings, and attempts to maintain a mask of control and self-discipline. There are no signs of disturbance of thought process or thought content in his drawings, but there are clear signs of a marked underlying personality disorder, with passive-aggressive, avoidant and schizoid features being prominent. There are also signs of significant anxiety present.

Mr. Rhines' responses to the Thematic Apperception Test indicate a person who feels markedly apprehensive and restless at this time and struggles with a current indecisiveness over minor matters. He is also likely to struggle with some marked physical discomforts including gastrointestinal, sleep disturbance, headache, and muscular tightness. He is currently expressing a high level of dejection and discouragement about his current life situation and tends to maintain a pessimistic view of the future. There is a loss of efficiency and self-confidence, diminished pleasure in previously rewarding activities, preoccupation with matters of personal inadequacy, and feelings of worthlessness and guilt. Overall, he feels that he is struggling with oppressive social demands and responsibilities, and experiences a high degree of anger and resentment because of this. His sense of personal inadequacy underlies his fear that the expectation of others will overwhelm him and result in their disapproval and rejection. He tends to be markedly self-deprecating, but again continually tries to cover this with a demeanor of self-assurance.

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Mr. Rhines had a total of 27 responses to the 10 stimulus cards of the Rorschach suggesting an individual with perhaps average intelligence. There were no signs of any psychotic leation or significant pathology emerging on his responses to the Rorschach. Interestingly, this man appeared to be somewhat avoidant of responding to the stimulus cards, and many times had to be probed to look at the cards in different ways in order to see if he was perceiving some other items. His responses were quite common and standard, and in a number of his responses were related to geographical formations. This in itself has minimal significance, except to suggest that he is fearful of disclosing some of his inner thoughts and feelings. He does appear to be fairly knowledgeable about a number of different things, and describes himself as a "voracious reader". Although he attempts to give the impression of being bright and well-read, and knowledgeable in a variety of different areas, his response content clearly suggest a man of average intelligence.

DIAGNOSTIC IMPRESSIONS:

As a result of this evaluation, the following diagnoses are suggested:

Axis I: 300.02, Generalized Anxiety Disorder.
Axis II: 301.22, Schizotypal Personality with prominent schizoid or avoidant traits.

My appreciation to Dr. Kennelly for the opportunity to evaluate this interesting patient.


BILL H. RHINES, PH.D./ajo
Licensed Psychologist
Associate Clinical Professor
Department of Psychiatry
USD School of Medicine

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF PENNINGTON)

SEVENTH JUDICIAL CIRCUIT

IN THE MATTER OF THE STATE OF SOUTH DAKOTA Vs. CHARLES R. RHINES

AFFIDAVIT OF DEWEY J. ERTZ, Ed.D.

State of South Dakota)
) ss.
County of Pennington)



I, Dewey J. Ertz, Ed.D., being an adult of competent and sound mind, and being first duly sworn on oath, state as follows:

1. I am a psychologist at Chrysalis Association, 403 National Street, Suite 1, Rapid City, South Dakota. I am licensed to practice psychology in the State of South Dakota and my license number is 123.

2. My date of birth is 10/13/1950. I reside at 14768 Flying Eagle Dr., Box Elder, South Dakota, 57719.

3. I have been contracted through the Federal Public Defender Districts of South Dakota and North Dakota to review client documents and records, evaluate competency, and testify at hearings, if necessary, on behalf of Charles R. Rhines. Several hours have been spent reviewing records that include trial and grand jury transcripts, depositions, law enforcement investigation information, psychiatric and psychological assessments, educational and military service information, recent interviews completed on various individuals, and various correspondence between attorneys and other individuals representing Charles. This also includes listening to and reading transcripts of taped statements Charles provided to law enforcement personnel on 6/19 and 6/21/2012.

4. The information in this affidavit represents a summary of my conclusions from the work I have completed. Considerable information is not presented to support these conclusions but this information is available on request. A complete forensic psychological evaluation may be drafted at a later date.

5. Charles was charged with the killing of 22-year-old Donnivan Schaeffer in Rapid City, South Dakota, on 3/08/1992. Three attorneys were appointed to defend him; Joseph Butler, Wayne Gilbert, and Michael Stonefield. Arrangements were made for Charles to be evaluated by a psychiatrist, D. J. Kennelly, MD; and by a psychologist, Bill H. Arbes, Ph.D. Dr. Kennelly completed his evaluation on 11/13, 15, 17, 18 and 19/1992. He noted that Charles presented a negative neurological screen and that he had been seen to address sexual identity issues during 1978. He also presented a history of substance use. Dr. Kennelly concluded that Charles was displaying

situational depression but he did not present a psychotic diagnosis or a thought disorder. He also gave an opinion that Charles was not mentally ill at the time of the crime. Dr. Arbes saw Charles on 11/17 and 21/1992. He administered several personality measures to Charles but he did not complete cognitive testing. Dr. Arbes identified several findings from his assessment that included Charles making tangential comments, above average cognitive skills based on his response to proverbs, minimal insight, and questionable judgment. The results from the Minnesota Multiphasic Personality Inventory were read as invalid. Charles was felt to display moderate psychopathology on the Millon Clinical Multiaxial Inventory with dependent personality traits, frequent worry, and other mood symptoms. Projective testing indicated that he was insecure, disliked females; and that he was likely to present somatic issues, feel inadequate, and display self-blame. He was avoidant of the cards from Rorschach's test. Dr. Arbes concluded that Charles was displaying a Generalized Anxiety Disorder, Schizotypal Personality Disorder with prominent schizoid or avoidant traits. A letter was written to Dr. Kennelly dated 2/02/1993 by Michael Stonefield stating that his testimony at trial was not determined necessary because Charles' mental condition or history did not reach the degree where his testimony was needed. This letter and the comments indicate that a legal decision was made not to present psychiatric or psychological testimony in the litigation phase of Charles' trial and that there was no consideration of using this type of information to identify mitigation factors. Further, the purpose of the psychiatric and psychological evaluations was for the purpose of determining insanity and competency and not for the purpose of mitigation. In fact, no consideration of utilizing psychiatric or psychological data for mitigation was given even after these initial findings were available based on the information reviewed.

6. Charles' social and educational histories evidence significant attention-deficit and learning disabled symptoms. The information available to me indicates that he coped with these symptom patterns and related impairments by overeating and gaining weight, substance use and acting out. He had difficulties integrating socially with others because of his sexual orientation. The social difficulties included poor judgment and reasoning, impulsivity, and personality dysfunction as an adult. Several examples of these patterns are included in his school records, information regarding his military service, and by the testimony of his sister, Elizabeth Young, during his sentencing.

7. An updated intelligence test was completed with Charles when he was seen by me at the South Dakota State Penitentiary in Sioux Falls, South Dakota, on 5/26/2012. He was individually administered the Wechsler Adult Intelligence Scale-Fourth Edition. Charles' results are felt to be a valid estimate of his current cognitive functioning.

Charles obtained a Full Scale IQ of 105 which is at an average level falling at the 63rd percentile. Four composite scores were gained by administering several different subtests. These composite scores have an average range from 85 to 115 with a mean at 100, and the subtests have an average range from 7 and 13 with a mean at 10. Charles' composite and subtest scores were as follows.

<u>Composite/Subtests</u>	<u>Scores</u>	<u>%ile</u>
Verbal Comprehension	132	98 th
Similarities	10	
Vocabulary	19	
Information	17	

Perceptual Reasoning	100	50 th
Block Design	11	
Matrix Reasoning	07	
Visual Puzzles	12	
Working Memory	100	50 th
Digit Span	07	
Arithmetic	13	
Processing Speed	79	08 th
Symbol Search	04	
Coding	08	

The Verbal Comprehension composite is a measure of verbal concept formation, verbal reasoning, and knowledge acquired from the person's environment. Charles' results indicate superior skills in these areas. Subtest results indicated that Charles has strengths in his general word knowledge and fund of general verbal knowledge. Weaknesses were displayed in his verbal reasoning skills but this weakness is only in regard to his superior skills on the other two subtest areas and his scaled score and verbal reasoning was at an average level.

Perceptual Reasoning is a measure of perceptual and fluid reasoning, spatial processing, and visual-motor integration. His score in this area indicates average functioning. Subtest results indicated that Charles has average skills in the ability to construct abstract wholes from parts and in non-verbal reasoning and visual perception. He displayed weaknesses in his visual information processing and abstract reasoning skills.

The Working Memory composite provides a measure of the individual's ability to temporarily retain information in memory, perform some operation or manipulation with it, and produce a result. Additional skills involve attention, concentration, mental control, and reasoning. Charles obtained a score at an average level. Subtest results indicated strengths in the ability to focus attention and concentration while solving verbally presented math problems and weaknesses in his immediate verbal memory.

Processing Speed provides a measure of the ability to quickly and correctly scan, sequence, or discriminate simple visual information. This composite also measures short-term visual memory, attention, and visual-motor coordination. Charles' score indicates high borderline skills in this area. Both of his scaled scores were lower. He scored at a below average range on a task measuring visual recognition and processing speed and in the low average range on a subtest that reflects psychomotor speed on a task requiring new learning.

Additional strengths and weaknesses can be identified by comparing each composite score with the other composite results. Charles appears to have strengths in his Verbal Comprehension, and weaknesses in Processing Speed using this method. He also presented a highly significant 15 point difference between his highest and lowest scaled score results. These test results are consistent with individuals who have Attention-Deficit/Hyperactivity Disorder and a history of academic learning impairments.

8. Charles' demeanor on tape interviews reviewed and in various references to the statement indicated a pattern of social interaction impairments frequently identified among individuals with attention deficit and learning impairments. Both Attention-Deficit Disorder and learning impairments often reflect neurobehavioral problems. Individuals with attention-deficit problems do not display abnormal behavior. Rather they display a significantly elevated frequency of normal behavior. They have difficulty in various areas including sustaining their attention to tasks, are unable to attend to significant stimuli in their environment and ignore non-significant stimuli, present impulsivity, low frustration tolerance, have difficulties with feeling bored, and they display paradoxical responses to stimulant medication as such medication allows them to remain calm and focus while individuals taking stimulants without these impairments become hyperactive and off-task. These patterns are also highly problematic in the school environment as children and adolescents with these problems present fluctuations in their learning between classes and are susceptible to school failure. Another concern is that they frequently have difficulties understanding social cues and they feel different from their peers resulting in withdrawal and isolation.

9. Charles was described as "callous" during these interviews in the records reviewed. His behavior and verbal responses during these interviews need to be understood in the context of how Charles processes information and in the time frame when these interviews took place. My assessment of Charles indicates that he generally processes information orally by listening to his own voice. This is a common characteristic of individuals who have learning disorders and difficulties focusing and concentrating. Records reviewed indicated that Charles processed the murder to a limited extent by talking to others during the time between when the murder was committed and when the interviews were conducted. He was reprocessing these events orally to help him understand what happened during the interviews in my opinion. This also accounts for his desires to take breaks and have the tape recorder shut off so he could process without having the information taped. Specific examples of his reprocessing is included on pages 16 and 17 stating if he had money for the right attorney he would be acquitted, laughter at various points in the interviews, and a cynical attitude that reflects his intelligence and ability to reason effectively but also within the context of poor social skills. These interviews triggered memories of the events that took place when Charles killed Donovan Schaeffer producing an additional unusual demeanor during the interviews. Charles also responded defensively as he did during his life when feeling pressured because he was being questioned about outcomes resulting from his poor judgment or impairments in reasoning. This includes the reference to butchering chickens on page 8. Defensiveness was displayed and this defensiveness is reflected in request to avoid certain topics and to terminate the second interview.

10. The jury in the murder trial deliberated for 24 hours before reaching a verdict. They also requested feedback from the judge regarding various sentences they could impose. This indicates that the jury was struggling with understanding the events that had taken place resulting in the death of Donovan Schaeffer. Unfortunately, they did not have adequate mitigation information to understand Charles' mental state and motivation to burglarize the establishment where the murder took place nor was information presented about antecedents to these events.

11. My opinions from reviewing the records and other information available, interviewing Charles, and the psychological testing completed, are reported below. These opinions are stated within a reasonable degree of psychological certainty. The right is reserved to change these opinions should significant additional information become available. My specific opinions are as follows:

- The jury in the murder trial was not presented sufficient mitigation evidence to assist them in understanding Charles' psychological impairments.
- Limited comments were provided regarding Charles' mental state during the sentencing phase of his trial but no expert opinions were offered to explain to the jury the extent and the impact of his mental state and functioning on his crimes. No expert witnesses were presented during the guilt phase of his trial to address these issues. Charles' attorneys only explored insanity and competency issues through completion of psychiatric and psychological assessments. They did not consider the option of utilizing the information they gain from these assessments for mitigation purposes, or the option of gaining additional psychiatric and psychological data for mitigation.
- A complete psychological picture of Charles was not presented to the jury at his trial as sufficient assessment information was not completed to document his attention-deficit and learning impairments. This information would have allowed the jury to have a better understanding of Charles as a person and given them an explanation regarding his impulsivity and other characteristics which were factors in the death of Donovan Schaeffer.
- Significant collateral information was available to address these areas and some of this information was presented to the jury. However, the jury was not provided sufficient professional information to assist them in understanding the antecedents of Charles' life and how this information impacted his commission of his crimes.
- The characterization of Charles as being "callous" due to the content and his demeanor when interviewed by law enforcement personnel is inaccurate in my opinion. The jury in his trial needed to understand how his pattern of orally reprocessing, laughter during this process, poor social skills, defensiveness, and other response patterns reflected the history of impairments Charles had suffered throughout his life.

Dated this 11th day of June, 2012.


Dewey J. Ertz, Ed.D.

Thomas E. Schacht, Psy.D, ABPP
Clinical and Forensic Psychology
P.O. Box 70308 - ETSU
Johnson City, Tennessee 37614

August 28, 2012

Mr. Paul Swedlund
Office of the Attorney General
State of South Dakota
Pierre, South Dakota

RE: Rhines v Weber, Civ. 02-924

Dear Mr. Swedlund,

Please accept this letter as a report of opinions to which I am prepared to testify in the habeas corpus proceedings involving Mr. Rhines. Numerals in brackets refer to numbered pages of my file and are for ease of reference during testimony. A list of records reviewed is appended.

Sincerely,

Thomas E. Schacht, PsyD, ABPP

BACKGROUND

Mr. Rhines has been on South Dakota's death row since 1993, following his conviction of first-degree murder committed in the course of his burglary of the establishment of a former employer, Dig'Em Donuts. Three mental health experts were retained by Mr. Rhines' counsel; all submitted written reports, but none were called to testify in either the guilt or the penalty phase of the trial.

The current habeas proceeding is understood to include claims of ineffective assistance of counsel with respect to management of the mitigation component of the penalty phase of Mr. Rhines' trial.

In support of the habeas petition, Mr. Rhines has submitted the expert affidavit of psychologist Dewey Ertz, Ed.D., dated June 11, 2012. As indicated by the foundation for opinion recited in his affidavit, Dr. Ertz' opinions appear based substantially on a retrospective re-interpretation of the same body of information available at trial. Primary sources of additional information appear to include Dr. Ertz' own interview of Mr. Rhines and a WAIS-IV intelligence test, both of which were reportedly conducted on May 26, 2012.



Dr. Ertz' opinions are set forth in his affidavit, which is not accompanied by a detailed report, and which presents an admittedly truncated foundation and reasoning for the stated opinions. In Dr. Ertz' words: "Considerable information is not presented to support these conclusions but this information is available on request." [emphasis added]

Dr. Ertz' opinions may be summarized as follows:

[1] Dr. Ertz admits that "significant collateral" information was presented to the jury in mitigation, but he complains that "sufficient professional information" was not provided (i.e. the information was not presented via expert testimony).¹

In particular, Dr. Ertz argues that the jury should have heard expert testimony about two mental conditions that were not identified by the trial experts (ADHD and Learning Disability), but that Dr. Ertz has retrospectively identified in his May 26, 2012 evaluation of Mr. Rhines. Dr. Ertz also disagrees with any characterization of Mr. Rhines at trial as psychopathically "callous" and argues that the jury should have heard his theory that a false appearance of callousness arose in Mr. Rhines' police interrogation as an epiphenomenon of "oral reprocessing" that Mr. Rhines allegedly must engage in to compensate for his alleged ADHD and Learning Disability.

Per Dr. Ertz, as a result of not hearing about ADHD, Learning Disability, and "oral reprocessing" the jury did not hear a "complete psychological picture" and "was not presented sufficient mitigation evidence to assist them in understanding Charles' psychological impairments." As a consequence of Dr. Ertz' hypotheses, Mr. Rhines' trial was ostensibly defective.

Over the course of his affidavit, Dr. Ertz outlines a mitigation case constructed around his retrospective diagnoses and his rejection of Mr. Rhines as "callous." Dr. Ertz hypothesizes that such a mitigation case, presented via the foregone expert testimony, would have allowed a jury to understand and sympathize with Mr. Rhines' motivation for engaging in the burglary, Mr. Rhines' actions in slaying the victim, and Mr. Rhines' apparently "callous" statements and otherwise inappropriate demeanor during subsequent police interrogation.

[2] Dr. Ertz attributes the allegedly defective handling of the mitigation phase at trial to a presumably flawed "legal decision" to eschew expert testimony. Dr. Ertz offers his own factual assumptions regarding the thinking of trial counsel and trial experts and about the jury's deliberations and what topics the jury was allegedly "struggling" with understanding. For example, he asserts that the legal decision to eschew expert testimony involved "no consideration" of using the experts to identify and present mitigation factors. Dr. Ertz asserts as a factual

¹ It is my understanding that the "collateral" information presented at trial included testimony from Mr. Rhines' two sisters.

conclusion that trial counsel's only use of their mental health experts was to address issues of competency to stand trial and an insanity defense.²

OPINIONS

[1] Attention Deficit Disorder and Learning Disability Are Not Demonstrated

The retrospective diagnostic impressions set forth in Dr. Ertz' affidavit (ADHD and Learning Disability) are presented in conclusory fashion. Information available from records and Dr. Ertz' testing is insufficient to support retrospective diagnoses of ADHD and Learning Disability to a reasonable degree of clinical certainty.

Dr. Ertz' stated basis for diagnosing attention deficit disorder and learning disability has two elements:

- First, Dr. Ertz asserts that Mr. Rhines' "social and educational histories evidence significant attention-deficit and learning disabled symptoms." His affidavit identifies these histories as including Mr. Rhines' school records, his military record, and the testimony of his sister at sentencing. (Ertz affidavit, ¶ 6).
- Second, Dr. Ertz relies on Mr. Rhines' pattern of performance on a WAIS-IV intelligence test administered on May 26, 2012.

Independent review of the school and military records fails to support the conclusions Dr. Ertz reaches.

The accuracy of Dr. Ertz' current IQ testing is uncertain for a number of reasons described below. Even if the accuracy of the testing were demonstrated, Dr. Ertz fails to show that Mr. Rhines' condition measured 20 years after the trial is representative of his condition in the past.

Additional records, including correctional records, Mr. Rhines' own autobiographic writings made around the time of trial, a video deposition given by Mr. Rhines in 1994, and prison mental health records not only fail to support Dr. Ertz' diagnostic conclusions, they offer plainly contradictory behavioral evidence and raise significant circumstantial concerns about the potential for systematic malingering in anticipation of appellate proceedings.

² Dr. Ertz does not disclose a basis for any of his factual assertions as to what the trial attorneys, the original trial experts, and the jury did or did not consider or deliberate, nor does he explain the factual basis for his claim that the work of the retained experts related only to assessment of sanity and competency.

School Record

The school record available for review covers only the 9th grade (1971-1972 school year). The transcript does not refer to special education placement, learning disability, or ADHD. The record shows that Mr. Rhines failed the 9th grade, despite generally above average and at best superior performance on standardized academic achievement testing.³ A notable exception was a good grade of 89 in driver's education.⁴

The most parsimonious explanation for the school failure is Mr. Rhines' poor attendance at school, as indicated by a combined total of 77 days absent or tardy out of a total of 162 days for which attendance status was recorded.

Mr. Rhines' autobiographic descriptions of his school experiences, penned for his trial attorneys as part of their mitigation investigation, fail to support attention-deficit or Learning Disability as primary causes of Mr. Rhines' poor school performance, instead pointing to his choices about how to deploy his effort. Thus, Mr. Rhines wrote:

- "It's not that I was stupid or developmentally disabled. I could not keep my mind on anything not intensely interesting. [*However, this was not a generalized primary ADHD, but was a choice, as*] I would sit in study hall / home room for hours reading an old (circa 1929) physics book but would not do math or English. [p. vi] (italic comment added)
- "I was still wrapped up in trying to figure myself out ... so I didn't apply myself." [p. vii]
- "In seventh grade I also found another love – !SCIENCE FICTION! I discovered Robert Heinlein, Robert C. Clarke, Paul Anderson. I have been an avid reader ever since - not just sci fi but nearly anything. At the time though, I stuck with S.F. and read every S.F. book in the school library. I could burn through 5 or 6 a day and often did. I did not read, I consumed them. This gave me something other than entertainment though - it gave me a vocabulary unmatched by my peers. As a sophomore I tested out to a 15th grade vocab." [p. vii].

³ The only exception was a weak score on a "language usage" subtest that measures things like proper use of punctuation, grammar, and writing forms.

⁴ Good driving performance is not expected in significant attention-deficit disorder. Indeed, impaired driving is the norm in ADHD. See, e.g. Barkley, R. et al. (2002) Driving in young adults with attention deficit hyperactivity disorder: Knowledge, performance, adverse outcomes, and the role of executive functioning. J. Int. Neuropsychol. Soc., 8(5), 655-672.

Military Record

Contrary to Dr. Ertz' assertion, Mr. Rhines' military record does not prove the presence of functionally significant ADHD or learning impairment. Indeed, based on the military record and his own descriptions of his military experience set forth in his autobiography, Mr. Rhines, when sober, performed well as a soldier. The record demonstrates that the ultimate failure of Mr. Rhines' military career is most reasonably attributable to effects of massive substance abuse in combination with antisocial personality rather than incapacity associated with ADHD or Learning Disability. Thus:

- On March 5, 1974, Mr. Rhines underwent standard military aptitude testing. His standard scores in ten areas ranged from 103 to 134. By statistical convention, military standard scores have a population mean of 100 and a standard deviation of 20. This is different from the statistical convention used for civilian IQ tests, which also have a mean of 100, but a standard deviation of 15 rather than 20.

Mr. Rhines' aptitude scores may be understood as ranging from average to high average.

Mr. Rhines' "GT" or "General Technical" score was 123, which is a bit more than one standard deviation above the mean. The GT score has been used as a general predictor of overall learning potential. A GT score of 120 was at one time required for a soldier to participate in full-time study at a civilian college and statistically, corresponds roughly to the ability level demonstrated by college graduates on standard IQ tests.

- An "Enlisted Evaluation Data Report" sets forth Mr. Rhines' November 1974 MOS test ratings. As would have been expected based on his GT score, Mr. Rhines' MOS test scores rated him as "average" or "high" in six of seven tested areas, including: individual weapons, crew-served weapons, special purpose weapons, combat techniques and patrolling, rifle squad and platoon tactics, and field activities. Mr. Rhines scored "low" (but not "very low") in only one area: "map reading and field fortifications."
- An "Enlisted Evaluation Report" narrative by Platoon Sergeant Henry Kowalik dated April 10, 1975 described Mr. Rhines' strengths and capacity to learn: "PV2 Rhines' performance has improved dramatically in the past few months. He probably knows more about an M60 machine gun than anyone in my platoon. PV2 Rhines has room for improvement, but he has shown me lately that he has the capability to be a fine soldier."

The same Enlisted Evaluation Report contains a list of ten "duty performance traits" rated on a four point scale from "ranks with the very best" to "needs improvement." The ratings were based on a reported "daily contact" with Mr. Rhines. Mr. Rhines received zero marks of "needs improvement" and was awarded the following ratings:

- "ranks with the very best" in the area of "ability to work in harmony with others"

- “superior to most” or “exceeds or meets duty requirement” in all remaining areas including: scope of knowledge about duties, ability to initiate action without direction / dependability in performing without supervision, attitudes of interest and enthusiasm for duties, seeking opportunities for self-improvement, personal behavior sets a good example for others, demonstrates qualities of leadership, takes pride in dress, appearance and military bearing, and physical fitness.

Mr. Rhines' autobiographic description of his military training matches Sgt Kowalik's assessment. In Mr Rhines' words: "I totally ate up weapons training - we learned to fire and maintain just about every weapon most people can think of (M-16/M203, .45 cal, M-60, .50 cal., 90mm, 81 mm mortar, .45 cal MG, LAW, 106 mm RR, tactics of fire and maneuver, house to house fighting, insurgency suppression, chemical / biological / nuclear combat. In short, I could perform efficiently the functions required of the modern combat soldier." [p. x]

Mr. Rhines autobiography describes the drug use he subsequently commenced in the military as massive. Thus:

- "(In Ft. Carson my preferred drug was LSD - I have no idea of how much I did while there. I do recall one extended period of 3 tabs/day for 90 or so days.) (Speed was another favorite along with lots of weed.)" [p. xv]
- Mr. Rhines described his station in South Korea as a "doper's paradise" and as "PARTY CENTRAL!"... "The civilian drug stores did not require a prescription and though they were off limits to U.S. personnel, they did have back doors and people who would sell out the back door. Codeine became a favorite drug for me. Marijuana was plentiful and cheap." [p. xii] Mr. Rhines alleged that his codeine use escalated to the point that he could consume 10-12 bottles of codeine-containing cough syrup at a time. By his account, each bottle contained 500 mg of codeine. If this account is accepted, then his total ingestion would have equated to an incredible five to six grams of codeine – well in excess of a lethal dose for a person who had not developed a high tolerance from chronic opiate abuse.

Mr. Rhines was discharged from the military under less than honorable conditions, following a long series of disciplinary infractions. Commanding officer Col. John M. Brown stated the official grounds for discharge as "apathy" in Mr. Rhines' September 14, 1976 discharge documents.

In light of Mr. Rhines' early very positive military performance, including superior learning of multiple complex skills, his ultimate military failure is not explained by a hypothesis of ADHD or Learning Disability, since these impairments, if they exist, would have originated early in life and would have been present from the beginning of his enlistment and should have interfered with his acquisition of those skills. Substance abuse is a more parsimonious explanation for Mr. Rhines'

military failure, since sedation and/or adverse effects on energy and motivation, resulting in "apathy" are common and well recognized sequelae of opiate abuse and marijuana abuse.

Autobiography and Deposition

An autobiography penned by Mr. Rhines for his trial attorneys in connection with the original investigation into potential mitigating factors does not show difficulty with language usage or disorganization as may be expected in the presence of significant ADHD or Learning Disability. Rather, his writings demonstrate that Mr. Rhines was capable of articulating and organizing an extended and reasonably sequenced narrative. Pages are consecutively numbered with Roman numerals. The handwritten text is neat and legible, and the language use includes complex sentence structures without significant deficits in spelling, grammar, or syntax.

In 1994 Mr. Rhines was deposed in a connection with a civil case brought by the family of the murder victim against Mr. Rhines' former employer, who was accused of negligence in hiring Mr. Rhines. The deposition was videotaped, which provides an excellent audiovisual foundation for observing Mr. Rhines' functioning as he listened, processed questions, and formulated his responses. The video shows that Mr. Rhines was a precise and thoughtful listener. He understood questions easily and did not demonstrate a significant need for repetition, clarification, or explanation. Mr. Rhines produced concise, organized, and relevant narrative responses. The video shows that Mr. Rhines listened to questions and waited appropriately for his turn to speak. His behavior was not characterized by tendencies to interrupt or to answer prematurely and in general he conducted himself in a reflective manner inconsistent with the pervasive impulsivity hypothesized by Dr. Ertz. At various times, Mr. Rhines appropriately consulted with his criminal defense attorney and invoked his 5th Amendment rights against self-incrimination. The deposition demonstrates Mr. Rhines' ability to produce reasoned calculations of anticipated cash receipts expected to be on-hand from the business he robbed, and it affirms his own characterization of himself as a "reasonably astute" person.

Mr. Rhines' autobiographical descriptions of his pre-homicide vocational and prison history tend to argue against major functional impairment from ADHD or Learning Disability. .

- *Institutional leadership role in prison.* In Mr. Rhines' words, describing his strategic plan to avoid anti-gay victimization:

"I revived the SMPC (Sexual Minority Prisoners Caucus). This was an organization not only recognized by the administration but also chartered and incorporated under the laws of Washington [State]. I became another Bigfish - Small pond - very small pond. But, the baiting and the attacks ceased." [p. APP10].

- *Technical education.* During his incarceration prior to the present offense, Mr. Rhines also reportedly was "rather busy" - "taking electronics all day and studying

late nights.” [p. APP10] He reported that he eventually became a “NASA-certified solderer.” [p. APP11] He reported various prison jobs related to maintenance of electronic musical and audiovisual equipment. Mr. Rhines’ self-reported success in prison education programs, his certification in a precise technical skill, and successful performance in technical job assignments all argue against significant functional impairment from ADHD or Learning Disability.

- *History of promotion into managerial roles.* Per the vocational history set forth in his autobiography and re-iterated in his 1994 deposition, Mr. Rhines worked at Winchell’s Donut House from February 1987 to September 1990 when he resigned. He started as a baker and was promoted twice, to assistant manager and then to manager.

Prior to the murder, Mr. Rhines worked at Dig-Em Donuts from February 1991 to February 1992. He was promoted to manager in that job as well. In his autobiography, he criticizes the management practices of the owner, who he denigrates as dishonest and inefficient.

Repeated promotion to management positions would be extraordinary for an individual with significant impairment from ADHD or a Learning Disability.

Limited Probative Value of Current IQ Testing for Retrospective Diagnosis

The only psychological testing reported in Dr. Ertz’ affidavit is the Wechsler Adult Intelligence Scale - 4th Ed. administered on May 26, 2012 [Ertz Affidavit ¶ 7].

If the scores reported by Dr. Ertz are accepted at face value, then Mr. Rhines presently shows a significant unevenness in his pattern of cognitive abilities. Wechsler IQ scores have a population mean of 100 and a standard deviation of 15. When the subtests of the Wechsler test are clustered:

- Mr. Rhines’ verbal comprehension index (similar to “verbal IQ” in previous Wechsler test editions) is in the superior (gifted) range at 132.
- In contrast, Mr. Rhines’ nonverbal (perceptual reasoning) abilities are two standard deviations lower, at 100. This is a relative deficit, not an absolute impairment, as 100 is the population mean. (Similar nonverbal abilities are referred to in the 4th edition as “perceptual reasoning” and in previous Wechsler editions as “performance IQ.”)
- A “Processing Speed” index is in the borderline range at 79.

Dr. Ertz opines that Mr. Rhines’ pattern of IQ test scores is “consistent with individuals who have attention-deficit disorder and a history of academic learning impairments.” This statement is true,

but it is also misleading because it is incomplete due to failure to reflect consideration of other explanations for the obtained scores including but not limited to the potential for malingering.

First, it is possible to have an uneven pattern of Wechsler subtest scores such as that produced by Mr. Rhines and to have neither ADHD nor a Learning Disability. Individuals who function adequately and who are without criminal history may show similar patterns.

Second, it is possible to have relatively lower nonverbal and processing-speed scores for reasons that are transient or that occurred subsequent to the time of the alleged offense. In addition to the possibility of malingering, discussed further below, examples of factors to consider along these lines:

- The only available IQ testing from Mr. Rhines' school years fails to show a discrepancy between verbal and non-verbal abilities. A Lorge-Thorndike intelligence test was administered on 11-15-71 and produced a verbal IQ score of 92 and a non-verbal IQ score of 88. The four point difference is non-significant. These data would support a hypothesis that the verbal-perceptual discrepancy measured by Dr. Ertz, even if it is real now, was not present in 1971, as would be expected if the discrepancy was due to ADHD or Learning Disability (both conditions originating in childhood).
- The WAIS-IV subtests on which Mr. Rhines earned relatively lower scores in Dr. Ertz' testing require intact vision and unimpaired use of a dominant upper extremity for manipulating test materials and using a pencil. In this regard:

[a] Mr. Rhines' has worn eyeglasses since childhood. Prison medical records show that he last had an eye examination in 2007 and that he requested a new exam on September 11, 2011. The record does not show that he received the updated exam or that his optical prescription had been updated as of the date of Dr. Ertz' testing.

[b] Prison medical records show that in February of 2012, Mr. Rhines injured his right shoulder while exercising. [299] Symptoms were severe and persisted for months, markedly impairing his ability to use his right upper extremity. For example, on April 2, 2012, Mr. Rhines requested medical assistance, writing that he was unable to hold or lift anything with his right hand, even something so insubstantial as a paper napkin. He protested: "I am having to become LEFT-HANDED!" [267] The prison medical file continues to document Mr. Rhines' complaints of shoulder pain in early May, 2012, within weeks of Dr. Ertz' testing. [270, 298]

- Dr. Ertz assumes a childhood cause to explain test results obtained in 2012, when Mr. Rhines was within six weeks of his 56th birthday. Per the prison medical record, Mr. Rhines has a family history of dementia (paternal); he had also

undergone major voluntary weight loss (~70 pounds) which should raise circumstantial concern about potential for adverse effects on cognition of nutritional deficiency. Mr. Rhines' homosexual lifestyle and substance abuse history put him at risk for sexually transmitted diseases that can adversely affect neurocognitive function, including HIV and Hepatitis C. Mr. Rhines tested negative for HIV when initially incarcerated in 1993, but the medical record does not show any re-assessment of his status with respect to these disease risks.

Even if Dr. Ertz' May 26, 2012 IQ scores were accepted as accurate, and even if it were assumed that the 2012 scores were similar to scores Mr. Rhines would have obtained twenty years ago, Dr. Ertz does not explain the relevance to capital mitigation of any relative weaknesses in perceptual reasoning and processing speed (a/k/a "performance IQ"). At least one state Supreme Court has affirmed the principle that verbal IQ rather than performance IQ captures the mental capacities most pertinent to determination of moral culpability. In *People v Vidal*, 155 P. 3d 259 (2007), the defendant had a Performance IQ measured as high as 126 and a Verbal IQ measured as low as 59. The California Supreme Court affirmed the trial court's finding of mental retardation for *Atkins* purposes, supporting the court's reliance on verbal IQ as most probative of the mental capacities relevant to culpability. The trial court had observed that Verbal IQ was most relevant to its analysis of whether the defendant was mentally retarded for *Atkins* purposes because "[w]e are talking about issues of premeditation, deliberation, appreciation of concepts of wrongful conduct, ability to think and weigh reasons for and not for doing things and logic, foresight, and all of those are related to verbal I.Q." Mr. Rhines' verbal IQ, as measured by Dr. Ertz, was superior at 132.

Malingering

The validity of IQ testing depends heavily on whether the examinee consistently exerts sufficient effort to produce an accurate result. For this reason, specialized psychological tests exist for the specific purposes of measuring level of effort and detecting potential malingering. Examples of such instruments include the Test of Memory Malingering and the Validity Indicator Profile. Notwithstanding Mr. Rhines' history of malingering on psychological testing administered by Dr. Arbes, a psychologist retained by trial counsel in 1992, Dr. Ertz did not administer any validity tests when he examined Mr. Rhines on May 26, 2012.

Dr. Ertz'05-26-2012 interview notes indicate that Mr. Rhines reported ADHD to Dr. Ertz as a factual matter of diagnostic history. Since no information about ADHD is reported as having been given to the mental health experts employed by trial counsel, there is a reasonable question as to when, how, and why Mr. Rhines subsequently added ADHD to his self-reported clinical history. In particular, there is circumstantial reason for the court to consider whether Mr. Rhines manufactured this clinical history in furtherance of the post-conviction appeals process.

As discussed below, prison medical records indicate that Mr. Rhines retrospectively identified himself in 2005 as having suffered from ADHD in childhood, and he then used this claim as a basis for requests that prison mental health staff educate him about the condition. Specifically:

- Mr. Rhines was seen by a prison psychologist in February, 1993 for a diagnostic evaluation with particular focus on suicide risk and some counseling. Mr. Rhines offered a history of not feeling remorse and of failing to complete unspecified things that he had begun. The only offered diagnosis was antisocial personality with the added qualification of "very psychopathic." [237] Difficulty with attention and learning were not reported or described. Indeed, the prison psychologist recommended that Mr. Rhines read a book - "Inside the Criminal Mind" by Stanton Samenow, PhD - which he did and which they subsequently discussed. Fifteen years later, prison mental health staff descriptions do not indicate change in these initial diagnostic impressions. Thus, mental health notes from late July 2008 describe Mr. Rhines as:

"[Q]uite cynical and exhibits little emotion for others or consequences. His behavior is quite antisocial and goal-oriented..."[200]

"Polite but cold and seemingly devoid of emotion during interactions... seems to be calculating and surveying the writer at times, predatory." [201]

- While on death row, Mr. Rhines has had access to mental health professionals who, per the record, regularly monitored his condition. For the most part, records show that Mr. Rhines has had little interest in interacting with these mental health personnel and showed no objective signs of significant mental problems. One notable exception to his general indifference to mental health staff involves Mr. Rhines' requests for information about attention deficit disorder. There is no reference to attention deficit until October 4, 2005, when Don Brown, PhD, wrote that Mr. Rhines was "reportedly doing well but has some questions regarding ADD and ADHD." [226] No follow-up to Mr. Rhines' inquiry was documented. Potentially inconsistent with significant current symptoms of ADD, Mr. Rhines reportedly spent a lot of time engaged in the manufacture of intricate beadwork.
- The mental health record is then silent with respect to alleged attention deficit until January and February 2007, when Mr. Rhines again asked mental health staff to talk with him about attention deficit disorder. [217-222] He was offered, but did not accept, a referral for treatment evaluation. Per the clinician's note, Mr. Rhines stated that his attention deficit symptoms "have somewhat stabilized but that he still has interest in the subject."⁵ [220]

⁵ Given Mr. Rhines' general disinterest in the prison mental health staff, and given his denial of any current symptoms or request for treatment, there is sufficient threshold to consider alternative reasons for his inquiries about ADHD. Juxtaposition of the timing of his inquiries about ADHD with events in his ongoing post-conviction appeals could shed light on this question.

- On August 13, 2008, Mr. Rhines saw a prison psychiatrist who prescribed medication for complaints of recent-onset insomnia. History provided by Mr. Rhines was documented as follows: " He says he believes he had ADHD as a child but has grown out of those symptoms as he has matured." [198]

[2] "Oral-reprocessing" impairment is undefined and not demonstrated

Dr. Ertz' exculpatory hypotheses regarding Mr. Rhines' laughter and other negative aspects of his demeanor during police interrogation focus on a concept that Dr. Ertz calls "oral reprocessing." As described by Dr. Ertz, during interrogation Mr. Rhines engaged in "reprocessing these events orally" to gain a better understanding of his own words "by listening to himself." Mr. Rhines' requests to have the police tape recorder turned off are explained by Dr. Ertz as "so he could process without having the information taped." Dr. Ertz argues that the mental and behavioral activity of "oral reprocessing" gives rise to a false appearance of callousness. [Ertz affidavit at ¶ 9].

Oral reprocessing, if understood in the sense of facilitating thinking by self-directed inner speech, is a normal and positively adaptive psychological process. The concept of "oral reprocessing" as a presumptively pathological process, as applied by Dr. Ertz to Mr. Rhines' case, does not conform to any generally accepted psychological technical knowledge, scientific data or theories of which I am aware.

Mr. Rhines' 1994 video deposition does not show the delays or dysfluencies that would presumably accompany expenditure of mental effort on pathological "oral reprocessing." There was no need to interrupt the deposition or to turn off the tape to accommodate Mr. Rhines' alleged need for oral reprocessing.

Prison counseling notes dated February 25, 1993, set forth Mr. Rhines' perspective on his interrogation at a time much closer to the actual events and invite an alternative to Dr. Ertz' hypothesis - namely, that any interruptions in Mr. Rhines' interrogation were strategic and not the product of any cognitive impairment. [234] The counseling notes indicate that Mr. Rhines expressed anger at prosecutors for pursuing capital punishment despite his confession of guilt and cooperation with authorities. In other words, Mr. Rhines' was frustrated that his confession strategy failed - that his performance during interrogation did not have the intended effect of blunting the prosecution of his crimes. From the perspective of defense mitigation planning, Mr. Rhines' interrogation performance should have alerted counsel and experts to the fact that Mr. Rhines was so lacking in capacity for empathy that he failed to appreciate the aggravating heinousness of his interrogation performance, and he instead unrealistically expected that his statements would earn him favorable treatment. Consideration of such apparently massive incapacity for empathy and related deficits in regulating the impression he makes on others would reasonably contribute to a defense decision to avoid having Mr. Rhines testify or allocute.

[3] Dr. Ertz' implicitly proposed standard of providing the jury with a "complete psychological picture" is undefined and, regardless of definition, is subject to strategic risk-benefit analysis.

The "complete psychological picture" to which Dr. Ertz refers is not a standard psychological term of art and is undefined by Dr. Ertz. However, since every criminal case has at least two sides, any definition of a "complete picture" necessarily includes not only what the defense could choose to present, but also what the defense choices would likely make available to the state for use in cross-examination or rebuttal.

Cross-examination or rebuttal expert testimony in Mr. Rhines' case could have drawn on extremely negative features of Mr. Rhines' history, character, and performance in the defense mental exams - facts that were either known to the state or that would have become known through required pre-trial disclosure of the defense experts' work. In response to the mitigation scheme envisioned by Dr. Ertz, the state could have become able to present information with a high potential to have a very damaging impact on the defense. For example:

- If Dr. Ertz' proposed mitigation scheme opened the door to state rebuttal on the issue of factors contributing to psychiatric diagnosis, such as Mr. Rhines' self-image, then the jury may have been exposed to Mr. Rhines' graphic self-descriptions as a dangerous monster. For example, in a letter to "Arnie" dated August 16, 1991, nearly seven months prior to the murder, Mr. Rhines described himself as a "sexual predator" who "should be locked up and never be allowed to roam free and wild."
- Litigating the issue of psychiatric diagnosis would also have opened the door to detailed presentation of Mr. Rhines' sexual sadism. Mr. Rhines' sexual sadism is relevant not only as an element of differential diagnosis, but also because it is thematically linkable to the homicide in at least three ways. First, the same knife used to kill the victim is identified in Det Steve Allender's affidavit as a dual-purpose "sex toy." Second, Mr. Rhines' autobiography includes his own characterization of the homicide as a perverse gratification demanded by a periodically unleashed inner "primal animal" to which he attributes both his need to engage in sexual sadism and his murder of Donnivan Schaeffer on March 8, 1992. Thus, Mr. Rhines wrote:

"There is, in every human being, an animal. A viscious (sic) primal animal capable of ANYTHING necessary for survival. The deeper an individual buries that animal, the more URBANE / civilized he/she is. For some people (the majority) he is very deep and never gets out. For others (myself included) that creature is only an inch or so down and must get out once in a while. If he is kept suppressed for too long he takes over.

Before living in Rapid City, I had a couple of "Buddies" - bottoms - to let him spend his rage on in a controlled environment - in a controlled manner.

After about 18 months of no release he was more than ready to act out. He got his chance March 8, 1992. In a moment of lost self-control the animal took over and my own identity - the person, the tender lover, the father figure was subjugated to the will of rage." [p. xvi-xvii]

Finally, if the homicide is viewed through the psychological lens of sadistic gratification, then it becomes reasonable to consider whether any laughter or other apparent lack of remorse on Mr. Rhines' part also reflects a poorly concealed positive sense of satisfaction with his conduct.

- If Dr. Ertz' proposed mitigation scheme would have opened the door to state rebuttal on the issue of psychiatric differential diagnosis, then the jury may have been exposed to evidence of Mr. Rhines' antisocial character with psychopathic tendencies and related history of criminal versatility and persistent recidivism, and to Mr. Rhines' strong determination to avoid another incarceration as expressed in his statements to parole officials at the time of his prior release. The latter would potentially augment the state's argument for the statutory aggravator of murdering a witness whose testimony could have caused Mr. Rhines to be again imprisoned.
- If Dr. Ertz' proposed mitigation scheme opened the door to disclosure of the defense expert reports, then the jury could have been exposed to objective psychometric evidence of Mr. Rhines' malingering during Dr. Arbes' psychological examination.
- If Dr. Ertz' proposed mitigation scheme opened the door to disclosure of the defense expert reports, then the jury could have been exposed to Mr. Rhines' statements that demonstrate blame-shifting and prevarication about the murder during the defense psychiatric exam. In this regard, Mr. Rhines claimed to Dr. Kennelly that he had given a false confession for the purpose of keeping his under-age roommate (Sam Harter) out of the case. Mr. Rhines further claimed to Dr. Kennelly that it was Mr. Harter, rather than himself, who had initiated and made the decision to kill and that it was Mr. Harter and not himself, who had subsequently delivered the final fatal wound to the victim's brain stem against Mr. Rhines' advice and out of Mr. Rhines' presence. Mr. Rhines' statements to Dr. Kennelly - if presented in mitigation to a jury that had already convicted Mr. Rhines - could have opened the door to potentially devastating demonstration by the state of the remorseless depravity and evil inherent in Mr. Rhines' portraying himself falsely as an altruistic protector of Mr. Harter while simultaneously attempting to finger Mr. Harter as the allegedly true killer.

In sum, Dr. Ertz' affidavit speaks only to retrospectively perceived foregone opportunities for expert testimony, and does not identify any risks of such testimony. As a basis for evaluating the

judgment of trial counsel, Dr. Ertz' affidavit addresses only the imagined benefits of counsel having chosen a different mitigation path, unbalanced by consideration of the potential for harm.⁶

[4] Expert testimony has significant downside risk

Experienced capital-case attorneys, both prosecution and defense, with whom I have worked over the past quarter century have been highly sensitive to the strategic implications of weighing both risks and benefits of potential mitigation testimony. Accordingly, my expert services commonly include consultation regarding both the strengths and weaknesses of potential expert testimony, both my own and that of other experts involved on both sides of the case

There are empirical data supporting the importance of considering the downside risk of expert testimony in capital cases. As described below, a large study from the California segment of the Capital Jury Project found that expert testimony accounted for two-thirds of all capital juror references to witnesses "backfiring" on the defense. Such data underscore the importance of strategic decision-making with respect to presentation of expert testimony.

Funded by the National Science Foundation, the Capital Jury Project began in 1991 and created a national consortium of university-based studies of how actual jurors in capital cases made their decisions. Immediately following trials, jurors were individually interviewed according to extensive standard protocols. The study focused on states that offered a significant number of both death sentences and life sentences, so that comparisons of factors giving rise to one or the other outcome could be studied. These states included Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia.

Sundby⁷ reported on interviews with 152 jurors in 36 capital cases in the California segment of the research project. The sentencing outcomes of the cases were evenly split, with 18 death sentences, 17 sentences of life without parole, and one case in which the jury deadlocked over the penalty. Among other inquiries:

⁶ Ironically, given the present claim that his attorneys' strategic decisions constituted ineffective assistance, the autobiography prepared by Mr. Rhines for his trial defense team explicitly references Mr. Rhines' own attempt at strategic information management. Thus, he wrote in an appendix at the conclusion of the autobiography: "What have I left out of this bio? Most of what I went through during my years at W.S.R. (WA State Reformatory). It could be important for my defense but also detrimental if the prosecution obtains my central file from WSR."

⁷Sundby, S. (1997) The jury as critic: An empirical look at how capital juries perceive expert and lay testimony. *83 Virginia Law Review* 1109 (1997).

"the jurors were asked whether, for prosecution or defense, any guilt-phase witnesses were particularly hard to believe, what evidence or testimony was most influential at the penalty phase, and whether any penalty-phase evidence "backfired." These questions, therefore, tended to elicit recollections of the most memorable witnesses from the trial those witnesses who left either a very positive or negative impression on the jurors such that they immediately responded to the interview questions with a response of, "You should have heard" (Sundby at 1122-1123).

In responding to this question, jurors had ample opportunity to report their perceptions of expert witnesses, as experts of some type were called by the defense in 30/36 (83%) trials and by the prosecution in 27/36 (75%).

In general, Sundby's study found that experts presented by the prosecution were viewed more positively by jurors than were those presented by the defense. On the other hand, when defense experts were viewed positively, that fact correlated positively with imposition of a life sentence. Unfortunately for the defense, however, its experts were often viewed negatively. In particular, the study's results showed that:

[P]rofessional experts accounted for two-thirds of all juror references to defense witnesses as backfiring or being hard to believe, but for only about one-fifth of juror references to defense witnesses as positively influential. Roughly speaking, jurors' impressions of defense expert witnesses were more than twice as likely to be negative rather than positive. Nor was it simply a few experts generating the negative impressions, as jurors negatively cited 27 different defense experts in 18 cases at either the guilt or penalty stages. By contrast, only 9 defense experts in a total of 8 cases were identified as positive influences at either the guilt or penalty phases. Further perspective on the difficulties juries have with defense experts can be gained by comparing the negative to positive ratio for the defense's professional experts to the other two categories of witnesses. The professional experts come out far worse. "Family and friends" witnesses, for instance, were named as a positive influence for the defense case 39 times and as backfiring witnesses only 15 times, a ratio that is almost the mirror opposite of the ratio for experts (15 positive references, 38 negative references). And although not used as witnesses as often as were professional experts or family and friends, lay experts enjoyed an even more favorable positive to negative impression ratio, as jurors named them as among the most influential witnesses 15 times and saw them as backfiring on only occasions. Thus, the good news for defense experts is that their testimony tends to be remembered (jurors mentioned a defense expert witness as memorable in 20 of the 30 cases in which experts testified); the bad news is that they tend to be remembered for not being credible. (Sundby 1123-1124, internal footnotes omitted).

With respect to prosecution witnesses, the picture is different. As Sundby reports:

Of the 12 prosecution witnesses cited negatively, only 3 were professional experts, while 14 of the 50 witnesses who were viewed as most influential were experts. The professional experts called by the prosecution, therefore, enjoyed a far better positive to negative ratio than did the defense experts. (Sundby at 1125).

These empirical observations demonstrate that a capital defense team cannot assume that expert testimony is at worst merely futile. Mitigation strategy cannot follow a simple "more is better" principle. Careful analysis and consideration of the demonstrable risk that expert testimony will backfire and harm the defendant's case is clearly warranted.

The standard of practice for a consulting defense expert in a capital trial requires that the expert inform counsel of all sides of the story - not only what is potentially beneficial, but also what the state is likely to be able to offer in rebuttal. Harm-avoidance is a routine consideration for defense teams, which must sometimes decide close questions - when does an ounce of benefit outweigh an ounce of harm, or a pound of harm, and when does it not? Strategic decision-making about what information to present to a particular jury in a particular community and what to hold back is taken very seriously because, literally, a life hangs in the balance.

APPENDIX: RECORDS REVIEWED

Schaeffer v Digges	Transcript and DVD of Charles Rhines' video deposition (08-30-1994) Excerpts from deposition of Sam Harter (01-14-1994)
Charles Rhines	Autobiographic writings, variously handwritten and typed, 76 pp.
McLaughlin S.D. Schools	Charles Rhines' high school scholastic record (9 th grade transcript, 1971-1972)
Dewy Ertz, Ed.D.	Affidavit (06-11-2012); WAIS-IV record form and interview record form (05-26-2012); miscellaneous file notes (mostly undated).
D.J. Kennelly, M.D.	Report of forensic psychiatric investigation (11-24-1992)
Steve Dresbach, MSW	Report of psychosocial history (11-17-1992)
Bill Arbes, PhD	Report of psychological testing (12-01-1992)

Rhines v Weber

Affidavits of Steve Allender, Arnold Hernandez, Joe Johnson, Roy Jundt, Gus Miller, Kerry Larson, Sam Harter, Heather Tarango and selected related exhibits

State's Motion to Dismiss (02-28-2012), Reply Brief (07-17-2012), and Supplemental Exhibits Supporting Motion to Dismiss (07-23-2012)

S.D. Department of
Corrections

Charles' Rhines mental health and medical records from the beginning of his incarceration in 1993 through April 2012 (1091 pp.)

U.S. Army

Charles Rhines' military records

UNIVERSITY OF SOUTH ALABAMA

OFFICE OF THE VICE PRESIDENT
FOR HEALTH SCIENCES



TELEPHONE: (251) 460-7189
5795 USA DRIVE, N. CSAB ROOM 170
MOBILE, ALABAMA 36688-0002
FAX: (251) 460-4369

July 13, 2012

Mr. Paul Swedlund
Assistant Attorney General
Appellate Division
Office of Attorney General
1302 E. Hwy 14, Suite 1
Pierre, SD 57501-8501

RE: Charles Rhines

Dear Mr. Swedlund:

At your request, I have reviewed a series of records relative to the murder of Donnivan Schaeffer on March 8, 1992 by Charles Rhines, who has been sentenced to the death penalty. A question was raised by psychologist, Dr. Dewey J. Ertz, who indicated that there was no testimony at the time of Mr. Rhines' sentencing relative to his psychiatric history and diagnosis, nor his psychological state at the time of the commission of the offense. He further suggested that his psychological problems had a bearing on his demeanor during Mr. Rhines' confession of the murder to police investigators on June 19, 1992 and June 21, 1992. Accordingly, you have asked me to review those same records to determine whether there were sufficient psychiatric problems faced by Mr. Rhines to serve as mitigating factors in his sentencing.

In preparation for this report, I have reviewed the audiotape and transcript of Mr. Rhines' confession from June 19, 1992 and June 21, 1992, his military file, school records, autobiography (Part I and Part II), statements regarding his conduct while awaiting IME, the psychiatric assessment dated November 24, 1992, by D. J. Kennelly, M.D., the report of Dr. Bill H. Arbes, Ph.D., psychologist of December 1, 1992, and the summary of the social history by Mr. Steve Dresbach, MSW, clinical social worker at that same time. In addition, I reviewed multiple police investigative reports from both South Dakota and Washington, an excerpt of the deposition of Mr. Harter, Mr. Hernandez's deposition, a letter from Mr. Rhines to Mr. Hernandez, Mr. Rhines' penitentiary security file (excerpt), Mr. Rhines' plan to "take out" and rob Mr. Hernandez's friends, and the mental health records of Mr. Rhines since his incarceration for the murder of Mr. Schaeffer. I have reviewed the report outlining the interpretation of the testing performed by Dr. Ertz, who rendered an opinion on the results of these tests. I have also reviewed affidavits by Kenny Larson, Gus Miller, and Roy Jundt. My report below will outline



background material on Mr. Rhines and end with my conclusion relative to his diagnosis and mental state.

Childhood history: As detailed in Mr. Dresbach's report, Mr. Rhines was born on July 11, 1956 in McLaughlin, South Dakota. He was the youngest of four children. His father managed a local co-op elevator, and his mother was occasionally employed outside the home as a bookkeeper. He describes his relationship with his sisters as one of fighting with them. At the age of 12, he reported that he was pretty much left to take care of himself. As a result, he spent most of his time watching TV and eating at home leading to problems of obesity and inactivity. He did not feel that he was accepted by his peers as a result of being overweight and non-athletic. There is no history of abuse.

School history (taken from Mr. Dresbach's report), and from school records: Mr. Rhines reports to Mr. Dresbach that he did poorly in school, being promoted between grades three and six "socially" rather than on academic performance because his mother was on the school board. He failed seventh grade, and reports that he did not apply himself in school. He dropped out in tenth grade and went to work. At age 17 he moved in with his brother-in-law and sister and began high school again, which lasted only four months. He reports that he became disillusioned with the teachers when he observed their unprofessional social behavior outside of school, and yet was expected to respect them while he was in school as their student. He later received his high school diploma while in the military service.

Military service (drawn from his military record): Mr. Rhines served in the military from March 1974 through September 1976. He was given a general discharge and separated from the military early because, "This soldier's poor performance is a result of his decidedly apathetic attitude. Private Rhines' presence in the unit is a detrimental factor, to an extreme degree. There is no other grounds for an adequate disposition of this case." While in the service, he "received two field grade Article 15's, and had been punished non-judicially five times. He has demonstrated an unwillingness to adapt to military life. He continually flaunts authority and he is a disruptive influence in his unit." In the military he was found to have illegal possession and use of drugs, unauthorized possession of explosives and a firing device, and an assault with a deadly weapon on another service member.

Employment history: Mr. Rhines has had brief periods of employment in construction; several times in various donut shops; and electronics jobs. While in the state of Washington, he learned to become a baker.

College experience (drawn from Mr. Dresbach's report): Mr. Rhines attended the University of South Dakota for a few months studying electronics. He performed poorly academically and had difficulty socially, not fitting in with the peer group, occasionally becoming the object of their teasing. In retaliation, he burglarized a dorm room which resulted in his expulsion from the school and his first incarceration.

Legal history: Legal problems faced by Mr. Rhines during adolescence are documented in his autobiography where he details a breaking and entry and shop lifting. He is also described in an affidavit by Mr. Gus Miller to have taken dynamite from his place of employment in 1973. Mr.

Miller later found the dynamite set to explode at a grain elevator. There were suspicions that he was involved in arson fires when he was 14-15, as mentioned in his autobiography and the Larson affidavit. He was convicted of third degree burglary in November, 1977, receiving a sentence of three years, but served less than a year. In 1979 he was convicted of first degree robbery, serving seven and one-half years of a ten year sentence.

Relationships: Mr. Rhines "came out" in 1979, declaring his homosexuality. He apparently has not had any serious heterosexual relationships. He does acknowledge a few extended relationships with gay partners, including Mr. Hernandez and Mr. Harter. He does acknowledge S & M activity as part of his homosexual behavior.

Past psychiatric history: Prior to his incarceration for the murder of Mr. Schaeffer, he sought counseling briefly in 1979 in relation to the recognition that he was homosexual, although he does not feel that his homosexuality is a psychiatric problem (drawn from Mr. Dresbach's report). Subsequent to his incarceration in 1992, he was evaluated and determined to be suffering from no major mental illness (D.J. Kennely, M.D.). Generalized Anxiety Disorder and Schizotypal Personality disorder were diagnosed by Dr. Arbes at that same time. After his conviction, he was diagnosed by Alan R. Knutson, Ph.D. as Antisocial Personality Disorder. In 2008, and 2009 he was considered to possibly have a mood disorder, but that was never confirmed by Dr. Davidson. Otherwise, he has not had psychiatric problems identified throughout his incarceration. Dewey Ertz, Ed.D., suggested Mr. Rhines may have ADHD based primarily on his IQ testing, offering no other explanation of his performance on the testing, nor other diagnoses.

Alcohol and drug history: Apparently, Mr. Rhines had significant use of illicit drugs in the past, although there is no evidence he was intoxicated with either drugs or alcohol at the time he committed the murder of Mr. Schaeffer.

Medical history: There are no records of any significant medical problems faced by Mr. Rhines prior to, or during the time of the murder of Mr. Schaeffer.

Events surrounding the murder of Mr. Schaeffer: Well documented in multiple records, including the confession of Mr. Rhines, were the events surrounding the murder of Mr. Schaeffer which occurred in March, 1992. In the months prior to the murder, Mr. Rhines had worked in a donut shop in which Mr. Schaeffer was also employed. Mr. Rhines was apparently involved, along with others who worked at the shop, in stealing money from the cash register. Mr. Rhines work in the donut shop also resulted in him knowing about the cash kept on hand. He planned to burglarize the shop and solicited the aid of Sam Harter, who also worked in the shop, and who was the homosexual lover of Mr. Rhines. On the night of the murder, Mr. Rhines was dropped off at the donut shop by Mr. Harter, who then apparently went home. Mr. Rhines, during the course of the burglary, was interrupted by Mr. Schaeffer who showed up for work. Mr. Rhines stabbed Mr. Schaeffer in the abdomen then in the back. Mr. Rhines then dragged him to the back of the store and plunged the knife into the base of his skull. After the stabbings, he completed his burglary of the donut shop. He later called Mr. Harter who drove back to the donut shop and picked him up. Mr. Rhines later fled to Washington State. While there he was arrested under

suspicion of stealing copper wire, along with a person with whom he was living. He was joined prior to that by Mr. Harter and Mr. Harter's girlfriend who was apparently pregnant at the time.

Mr. Rhines was transported back to South Dakota in June, 1992, after he had confessed to the murder of Mr. Schaeffer as recorded on the 19th and 21st of that month. He later reported on February 25, 1993 (as recorded in the notes of the prison health services), that his confession of killing Mr. Schaeffer and his cooperation with authorities was aimed at avoiding the death penalty. He expressed his anger at the prosecutor for pursuing the death penalty despite his confession. On other occasions he indicated that his confession was an effort to protect his roommate from prosecution. In the deposition of Mr. Hernandez on January 20, 1994 on page 29, Mr. Hernandez indicates that he visited with Mr. Rhines in May, 1992:

...after he was brought back and had been arrested and he was in jail, and he kept telling me that "they're going to have to prove I did it." He just kind of laughed it off like it was no real biggee about it, and I said "take" - something to the effect of, "take life", I said, "if you did it," I said, "you should be dealt with to the full extent of the law," and he goes, "Well, Donnivan was a nice kid. It's just that he got in the way, the timing was off.

Mr. Hernandez goes on to say that there appeared to be no evidence of remorse by Mr. Rhines.

Summary:

The following represent my conclusions with reasonable medical certainty:

Diagnosis: Since I did not interview Mr. Rhines directly, my diagnostic impressions rely upon the records outlined above including his own personal biography. Suffice it to say, there is no evidence that Mr. Rhines suffers from a major mental illness, and by that I mean a psychotic disorder where he is unable to perceive reality, such as is seen frequently with schizophrenia. There are times when he appeared to have some symptoms of depression, but none of the symptoms were severe enough to warrant the diagnosis of major depression. Nor was there the presence of anxiety to the degree necessary to confirm the initial impression of generalized anxiety disorder. Dr. Ertz suggested that the psychological tests he performed on Mr. Rhines are consistent with ADHD, although he does not formally make that diagnosis nor offer other explanations for his performance on those tests. Dr. Ertz also suggests that Mr. Rhines may suffer from slowed cognitive processing.

My diagnosis of Mr. Rhines, which is most consistent with his history, is Antisocial Personality Disorder, a diagnosis also given to him by Dr. Knutson. This diagnosis is reserved for those showing a "pervasive pattern of disregard for the violation of the rights of others occurring since age 15 years" (DSM IV). Mr. Rhines' frequent unlawful behaviors, deceitfulness, aggressiveness, failure to sustain consistent work, and apparent lack of remorse more than meet the major criteria for this disorder, as does evidence of a conduct disorder beginning before age 15. In his autobiography Mr. Rhines indicates breaking and entering and shoplifting as an early adolescent, combined with probable arson and theft of dynamite as a late adolescent. His behavioral problems continued in the military, leading to a premature discharge.

Insanity and competency: All recorded history and the confession by Mr. Rhines indicate clearly that he knew right from wrong at the time of the killing of Mr. Schaeffer. Indeed, his attempts at covering his crime and his escape from South Dakota after the crime, strongly attest to his full awareness that his actions were wrong. Likewise, all evidence supports his competency to stand trial.

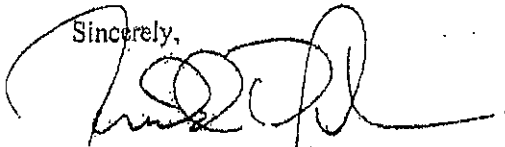
ADHD: A question was raised by Dr. Ertz as to whether Mr. Rhines' behavior during his confession was evidence of ADHD and/or slow cognitive processing. Dr. Ertz also implied that either or both may have contributed to the murder of Mr. Schaeffer. While there has been a question in the past in the scientific literature of whether ADHD is a precursor of Antisocial Personality Disorder or violent behavior, more recent comprehensive studies suggest that there is no greater risk of Antisocial Personality Disorder or violence with ADHD (Mordre, et al, "Impact of ADHD and conduct disorder in childhood and adult delinquency" BMC Psychiatry, 2011;11). In that article, the authors conclude, "Our finding strengthens the assumption that there is no direct association between ADHD and criminality." This comports with my clinical experience. Indeed, the suggestion by Dr. Ertz that Mr. Rhines may suffer from ADHD is based on testing performed nearly 20 years after the murder. No abnormalities in cognitive processing were noted by psychologists and psychiatrists in 1992 and 1993. Indeed, the ability of Mr. Rhines to concentrate and complete complicated tasks in a logical, rational manner speaks against ADHD. Rather than an inability to concentrate, he demonstrates that he can focus his attention when motivated to do so. For instance, his early military career is characterized by successfully completing complicated assignments. His ability to serve as a manager for a donut shop is another example. Likewise, he was very thorough in his planning and execution of the burglary of the donut shop on March 8, 1992.

Behavior during the confession: In the course of his confession in 1992, Mr. Rhines laughed on several occasions, and on several occasions stopped the taped interview for several minutes and then allowed it to resume. There is no indication that during the course of the confession that Mr. Rhines had difficulty understanding the questions asked of him or in answering them coherently using logical thought processes. The times of laughter occurred when he seemed to realize that the police were not more thorough in their investigation than anticipated. The starting and stopping of the tape is consistent with Mr. Rhines' trying to decide whether he is going to continue with his confession, knowing the risk involved. As he noted later, he was hoping his confession would demonstrate his cooperation, and thus remove the death penalty from consideration. He also was attempting to protect his roommate from being implicated. In my opinion, there was not evidence of slow cognitive processing during his confession.

Remorse: The presence of remorse is not evident in the records that I reviewed. Indeed, the murder of Mr. Schaeffer had apparently a minor impact on Mr. Rhines who had the presence of mind to continue methodically with the burglary of the donut shop after killing Mr. Schaeffer, and to later indicate that the murder was because Mr. Schaeffer "just got in the way."

This concludes my evaluation of the records forwarded to me to date relative to the state of mind of Mr. Rhines at the time of the murder of Donovan Schaeffer. It is subject to revision depending on further submission of documents.

Sincerely,

A handwritten signature in black ink, appearing to read 'RDF', written over the word 'Sincerely,'.

Ronald D. Franks, M.D.
Vice President for Health Sciences
Interim Chair, Department of Psychiatry
Professor of Psychiatry

RDF/cwc

Contact Information

Stuart B Lev

Organization: Community Defender Organization Eastern
District of Pennsylvania

Phone: (215) 928-1100

Fax: (215) 928-1112

Lafayette Bldg.
437 Chestnut St., Suite 800
Philadelphia, Pennsylvania 19106
Philadelphia County
U.S.A.

Admitted:

Michigan, 1978

Pennsylvania, 1986

Total Firm Size:

11-25

Office Size:

11-25

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Appendix 052

Contact Information

Michael Wiseman

Organization: Community Defender Organization Eastern
District of Pennsylvania

Phone: (215) 928-1100

Fax: (215) 928-1112

Lafayette Bldg.
437 Chestnut St., Suite 800
Philadelphia, Pennsylvania 19106
Philadelphia County
U.S.A.

Admitted:

New York, 1982

Pennsylvania, 1995

Total Firm Size:

11-25

Office Size:

11-25

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Contact Information
Community Defender Organization Eastern District of
Pennsylvania

Lafayette Bldg.
437 Chestnut St., Suite 800
Philadelphia, Pennsylvania 19106
Philadelphia County.
U.S.A.

Phone: (215) 928-1100

Fax: (215) 928-1112

Affiliates:

Anderson, James M Jr., Staff Attorney

Bostic, Edson A

Bradley, Yvonne R

Demasse, Elaine G

Epstein, Robert

Kelly, Michael J

Kozlow, David M, Staff Attorney

Lawry, Matthew C

Lev, Stuart B

Marley, Stephen L III

McColgin, David L

Meehan, Maranna

Miller, Joseph M, First Assistant Federal Defender

Patchen, Stuart M

Rowley, Maureen K, Chief Federal Defender

Russianoff, Sylvia A

Sarner, Felicia

Skipper, Leigh M

Swarns, Christina

Swedlow, Kathryn R

Thompson, Rossman D Jr.

Whitelaw, John

Wilson, Mark T

Wiseman, Michael

Wycoff, David W

Total Firm Size:

11-25

Office Size:

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810 A.2d 33

KeyCite Yellow Flag - Negative Treatment
Called into Doubt by Com. v. Ligons, Pa., May 27, 2009
572 Pa. 588
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee,

v.

Jesse BOND, Appellant.

Submitted July 15, 1999.

Decided Aug. 23, 2002.

Reargument Denied Oct. 17, 2002.

Following affirmance on direct appeal of his convictions for first degree murder, robbery, possessing an instrument of crime and conspiracy, and his death sentence, 539 Pa. 299, 652 A.2d 308, inmate filed petition for post-conviction relief. The Court of Common Pleas, Philadelphia County, Nos. 1778, 1783, 1785, 1787, 1789, David N. Savitt, J., denied petition, and inmate appealed. The Supreme Court, No. 212 Capital Appeal Docket, Castille, J., held that: (1) petitioner's claim of subsequent counsel ineffectiveness did not undo the waiver of the underlying claims; (2) counsel was not ineffective for failing to introduce evidence that petitioner was abused and neglected as a child, in support of catch-all mitigating circumstance; (3) counsel was not ineffective in its preparation for penalty phase; (4) petitioner failed to establish that counsel were ineffective for failing to discover and produce evidence of his alleged mental and emotional deficiencies; (5) petitioner's "after-discovered evidence" claim did not warrant relief; (6) counsel was not ineffective for failing to life-qualify jury; and (7) additional instruction on mercy and leniency was not warranted.

Affirmed.

Nigro, J., concurred in the result

Saylor, J., filed a concurring opinion.

West Headnotes (23)

[1] Criminal Law

➤ Affirmance of conviction

Post-conviction relief petitioner's claims that admission of his statement to police violated his state and federal constitutional rights to counsel and that prosecutor's guilt phase closing argument was improper were procedurally barred; where claims were resolved on direct appeal and petitioner attempted to bring claims a second time by recasting his theory of error and by tacking on a boilerplate allegation of ineffectiveness of all prior counsel. U.S.C.A. Const.Amend. 6; Const. Art. 1, § 9; 42 Pa.C.S.A. § 9544(a)(2).

1 Cases that cite this headnote

[2] Criminal Law

➤ Matters Already Adjudicated

A post-conviction relief petitioner cannot obtain review of claims that were previously litigated by presenting new theories of relief, including allegations of ineffectiveness, to relitigate previously litigated claims.

9 Cases that cite this headnote

[3] Criminal Law

➤ Validity

The unconstitutionality of the Post Conviction Relief Act (PCRA) provision respecting previous litigation and the Supreme Court's settled interpretation of it was not self-evident and, thus, petitioner's bald assertion that provision violated state and federal constitutional rights to equal protection and was fundamentally unfair provided no basis for relief from preclusion of previously litigated claims. Const. Art. 1, §§ 1, 26; U.S.C.A. Const.Amend. 14; 42 Pa.C.S.A. § 9544(a)(2).

3 Cases that cite this headnote

[4] Criminal Law

➤ Waiver

Even if post-conviction relief petitioner's claims that admission of his statement to police violated his state and federal

819 A.2d 33

[23] Criminal Law

⇐ Presentation of Issue in Prior Proceedings

Post-conviction relief petitioner's attempt to incorporate argument made in another pleading by mere reference was ineffective means of raising a new claim, not raised in post-conviction proceeding below; permitting petitioner to append new claims to appeal on review would have wrongly subverted the time limitation and serial petition restrictions for post-conviction proceedings.

7 Cases that cite this headnote

Attorneys and Law Firms

**36 *594 Robert Brett Dunham, Michael Wiseman, Philadelphia, for Jesse Bond.

Catherine Marshall, Philadelphia, Robert A. Graci, Harrisburg, for Commonwealth of PA.

Before ZAPPALA, C.J., and CAPPY, CASTILLE, NIGRO, NEWMAN, SAYLOR and EAKIN, JJ.

OPINION OF THE COURT

Justice CASTILLE.

This is an appeal from the denial of appellant's petition for relief under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 *et seq.* For the reasons set forth herein, we affirm the order of the PCRA court.

In February of 1993, a jury found appellant guilty of first degree murder, robbery, possessing an instrument of crime and conspiracy, and sentenced him to death. On direct appeal, this Court summarized the underlying facts as follows:

At approximately 6:39 p.m., on the evening of October 31, 1991 appellant and his codefendant, Aaron Wheeler, entered the Stop and Go Deli at 2200 North Broad Street in Philadelphia. While the

codefendant acted as a look-out, appellant pointed a gun at a store employee, Yang-Jin Kim, and ordered him to open the cash register and give appellant the money. Mr. Kim called to the store manager, Jai *595 Ho Lee, who was behind the counter. Mr. Kim went to the register and hit the "no-sale" button in order **37 to open the drawer. Mr. Lee closed the drawer and locked the register and then threw the key on the floor. [Appellant], who was standing about four feet in front of Mr. Lee when Mr. Lee threw the key on the floor, responded by shooting Mr. Lee in the upper left side of his chest. The bullet entered the left lung and perforated the aorta, the main blood vessel to the heart, and then exited the body. Mr. Lee was pronounced dead fifteen minutes later having bled to death as a result of the gunshot. Appellant and his codefendant fled from the store after the shot was fired.

Commonwealth v. Bond, 539 Pa. 299, 652 A.2d 308, 310 (1995) (footnote omitted). Appellant was represented at trial by appointed counsel, James S. Bruno, Esquire, and co-counsel, Dean Owens, Esquire, of the Defender Association of Philadelphia. On direct appeal to this Court, Attorney Bruno represented appellant. On January 12, 1995, this Court affirmed appellant's conviction and sentence of death. *Id.*

On June 6, 1995, appellant filed the instant PCRA petition. The PCRA court, per the Honorable David N. Savitt, appointed new counsel, Ramy Djerassi, Esquire, to represent appellant, and new counsel then filed an amended petition and supplemental petitions. The court held an extensive evidentiary hearing over the course of several days where appellant was represented by both Attorney Djerassi and present PCRA appeal lead counsel, Michael Wiseman, Esquire, who at the time of the hearings was apparently affiliated with the Defender Association of Philadelphia and is now affiliated with the Capital Habeas Corpus Unit of that organization. Judge Savitt ultimately denied PCRA relief on December 10, 1997, and appellant appealed to this Court.

819 A.2d 33

- 6 The modification in *Strickland* posed by an application of *Lockhart* would "require a separate inquiry into fundamental fairness even when [the defendant] is able to show that his lawyer was ineffective and that his ineffectiveness probably affected the outcome of the proceeding." 529 U.S. at 393, 120 S.Ct. 1496. For our purposes, of course, the modification *Lockhart* would have worked in the *Strickland* prejudice test is academic. *Williams* reaffirms that it is *Strickland* that governs the type of claim we face here, so it is *Strickland* that we must apply.
- 7 See N.T. 4/14/97 for testimony of Barry M. Crown, Ph.D. (neuropsychologist), and N.T. 4/21/97 for testimony of Richard G. Dudley, Jr., M.D. (psychiatrist).
- 8 On direct appeal, this Court held that the prosecutor had articulated race-neutral reasons for the use of peremptory challenges. *Commonwealth v. Bond*, 652 A.2d at 313.
- 9 Appellant never explains why he failed to raise this after-discovered evidence claim on direct appeal.
- 10 The term "life-qualification" refers to the process by which counsel or the court identifies and excludes those prospective jurors who have a fixed opinion that a sentence of death should always be imposed for a conviction of first-degree murder. *Commonwealth v. Keaton*, 556 Pa. 442, 729 A.2d 529, 542 n. 9 (1999).
- 11 We note that the *Lark* opinion cited above involved the subsequent appeal filed from the denial of the serial PCRA petition and, thus, the *Lark* Court addressed the merits of the Baldus-Woodworth study claim. The Court rejected the very same argument that appellant now makes. Specifically, we held that the claim involving the Baldus-Woodworth study was untimely under the PCRA since "the statistics which comprise the study were of public record and cannot be said to have been 'unknown' to Appellant" and, thus, the information "does not fall within the purview of 42 Pa.C.S. § 9546(b)(1)(ii)." 746 A.2d at 588 n. 4.
- 12 The Prothonotary of the Supreme Court is directed to transmit the complete record in this case to the Governor in accordance with 42 Pa.C.S. § 9711(f).
- 1 *Williams* explained this approach in terms of its recognition of the difficulty facing post-conviction counsel, since claims of appellate counsel's ineffectiveness are generally derivative claims, see *id.* at 567 n. 5, 782 A.2d at 526 n. 6, as well as in terms of maintaining balance and fairness in the capital review process in light of other changes that have been implemented restricting review. See *id.* at 569, 782 A.2d at 527.
- 2 Compare Majority Opinion, *op.* 572 Pa. at ---, 819 A.2d at 40 ("Such boilerplate allegations tacked on to waived claims of trial court error do not discharge appellant's burden of proving ineffectiveness." (citations omitted)), with *Lambert*, 568 Pa. at 365, 797 A.2d at 243 ("[I]n this merits analysis, it is clear that appellant's failure to forward relevant argumentation as to each necessary 'individual facet' of the *Strickland* standard dooms his boilerplate claims to failure").
- 3 As the majority notes, in the present case, the same attorney represented Appellant at trial and on direct appeal, and, accordingly, it is not necessary to independently consider the stewardship of direct appeal counsel with regard to issue presentation and preservation on the same terms as presented in *Williams*.

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17 A.3d 873

609 Pa. 605
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee

v.

James Melvin SMITH, Appellant.

Submitted July 1, 2010.

Decided March 29, 2011.

Synopsis

Background: After his conviction for first-degree murder and death sentence were affirmed on direct appeal, 518 Pa. 15, 540 A.2d 246, defendant petitioned for postconviction relief. The Court of Common Pleas, Criminal Division, Philadelphia County, at No. CP-51-CR-0717891-1983, Carolyn Engel Temin, Senior Judge, ratified stipulation of parties, granting defendant a new penalty phase hearing based on ineffectiveness of trial counsel. However, the Common Pleas Court denied guilt phase claims without an evidentiary hearing. Defendant appealed.

Holdings: The Supreme Court, No. 591 CAP, Baer, J., held that:

- [1] claim that notes of a conversation between trial counsel and defendant's sister constituted after-discovered evidence of defendant's actual innocence had already been litigated on direct appeal and thus was not reviewable;
- [2] defendant waived review of claim challenging trial court's denial of trial counsel's motion to withdraw from case in order to testify at hearing on new trial motion;
- [3] witness's post-trial affidavit stating that she saw someone other than defendant shoot victim did not constitute after-discovered evidence of actual innocence;
- [4] Commonwealth did not withhold witness's statement that she saw someone other than defendant shoot victim;
- [5] counsel's failure to interview Commonwealth witness on the eve of trial was not ineffective assistance;
- [6] defendant's prior acquittal on gun possession charges was not after-discovered evidence of actual innocence; and

[7] Commonwealth did not violate *Brady* by failing to disclose to defense evidence of defendant's prior acquittal on gun possession charges.

Affirmed.

Saylor, J., dissented.

West Headnotes (55)

[1] **Criminal Law**
↔ Interlocutory, Collateral, and Supplementary Proceedings and Questions

Criminal Law
↔ Post-conviction relief

Standard of review of order ruling on petition for postconviction relief is whether the findings of the postconviction court are supported by the record and are free of legal error. 42 Pa.C.S.A. § 9541 et seq.

1 Cases that cite this headnote

[2] **Criminal Law**
↔ Effectiveness of Counsel

Generally, with respect to ineffective assistance claims asserted in postconviction proceedings, counsel's performance is presumed to be constitutionally adequate, and counsel will only be deemed ineffective upon a sufficient showing by the petitioner. U.S.C.A. Const. Amend. 6.

3 Cases that cite this headnote

[3] **Criminal Law**
↔ Prejudicial effect

A postconviction petitioner establishes prejudice, for purposes of asserting claim of ineffective assistance, when he demonstrates that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S.C.A. Const. Amend. 6.

17 A.3d 873

of affidavit at trial, he did not challenge admission of evidence on direct appeal.

Cases that cite this headnote

[53] Criminal Law

⇨ Presentation of Issue in Prior Proceedings

Postconviction petitioner waived challenge to trial court's failure to administer limiting instruction about how jury could consider witness's affidavit, in murder prosecution, where he never requested a limiting instruction at trial.

Cases that cite this headnote

[54] Criminal Law

⇨ Post-conviction proceeding not a substitute for appeal

Postconviction petitioner waived challenge to Commonwealth's alleged improper closing argument referencing challenged evidence, in murder prosecution, where, although he objected to the argument at trial, he did not raise the issue on direct appeal.

Cases that cite this headnote

[55] Criminal Law

⇨ Grounds in general

Alleged instances of ineffective assistance of counsel, which were resolved on appeal upon finding that any ineffectiveness did not prejudice defendant's cause, did not amount to cumulative error of the sort that warranted relief from murder conviction; the claims regarding the accomplice witness charge, trial counsel's stipulations regarding expert testimony, and trial counsel's cross-examination of Commonwealth witnesses, considered together, did not provide cause to question outcome of proceedings. U.S.C.A. Const. Amend. 6.

Cases that cite this headnote

Attorneys and Law Firms

**879 Cristi A. Charpentier, Billy Martin Neles, Defender Association of Philadelphia, **880 Michael Wiseman, Philadelphia, for James Melvin Smith.

Hugh J. Burns, Philadelphia District Attorney's Office, Philadelphia, Amy Zapp, PA Office of the Attorney General, Harrisburg, for the Commonwealth of Pennsylvania.

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

*617 OPINION

Justice BAER.

James Melvin Smith (Appellant) appeals from an order denying his petition for relief pursuant to the Post Conviction *618 Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. For the reasons stated herein, we affirm the order of the PCRA court denying the petition for PCRA relief.

As we explained on direct appeal, *Commonwealth v. Smith*, 518 Pa. 15, 540 A.2d 246 (1988), on June 22, 1979, Appellant, Levi Rucker (Rucker), and Kimberleigh Green (Green) met at Green's residence to plan the murder of Davis Kelly (Kelly). Kelly was suspected by these conspirators of having killed Michael Green, Green's brother, several months earlier. *Id.* at 248. In accordance with their plan, on the evening of June 22, 1979, Green, who was underage, asked Kelly to buy her some beer at the corner bar. Kelly agreed and entered the bar to purchase the beer. As he exited the bar to return to Green, Rucker closed the door so the patrons inside could not see what was about to transpire. Appellant then emerged from an adjacent alley and shot Kelly from behind. As Kelly attempted to stand, Appellant shot him three more times from approximately three feet away. The incident was witnessed by Betty Harris (Harris), a bystander who was sitting nearby on her front porch.

Two days later, Appellant was arrested for illegally carrying a .32 caliber pistol. A ballistics examination established that the bullets that killed Kelly were fired from this gun. Appellant denied involvement in the shooting, and was not charged with murder at that time.

17 A.3d 873

"academic potential is at an elementary level," and he is easily influenced by others; school records, which reveal that Appellant had serious cognitive and intellectual **899 deficits from an early age and was functioning in the mentally retarded range; 1973 Danville State Hospital records, revealing that Appellant was committed to a mental hospital because he was "hallucinated, paranoid, and acutely disturbed," was diagnosed as schizophrenic, paranoid, borderline retarded, and prescribed a variety of psychotropic medications; 1973-75 Fairview State Hospital Records, which show that Appellant's mental illness caused him to be involuntarily psychiatrically institutionalized from June 1, 1973 through August 29, 1975, demonstrate the existence of brain damage, and describe Appellant's hallucinations and drug use; a 1979 court mental health evaluation performed following Appellant's arrest on gun charges, which further documents Appellant's history of mental illness and dysfunction; a 1984 court presentence report and mental health evaluation performed following Appellant's conviction on unrelated charges of reckless endangerment, aggravated assault, and possessing an instrument of a crime, stating that Appellant maintained strong, loving family relationships, was an obedient child, but suffered from paranoid schizophrenia and his rehabilitation plan should include a psychiatric basis; a 1985 court mental health evaluation prepared post-trial for this capital case, which further documents Appellant's mental health maladies; family members, who Appellant asserts were available at the time of trial to offer testimony about Appellant's unstable and *650 traumatic childhood; and other expert mental health evidence based on reviews of this evidence.

Additionally, according to Appellant, trial counsel failed to do the following: obtain records documenting Appellant's long history of mental problems; interview family members about Appellant's history; and obtain a mental health evaluation for use at trial. Appellant argues that counsel's deficiency in failing to investigate his client's mental health is particularly striking because the 1979 and 1984 reports were created for the court in connection with two prior cases relevant to the capital trial: the 1979 report was prepared during Appellant's trial for possessing the murder weapon, and the 1984 report was prepared in connection with a conviction that the Commonwealth used as an aggravating circumstance in the capital penalty phase. If counsel had obtained these two reports, Appellant argues they would have

provided vital information that would have propelled further investigation and led to the discovery of the wealth of mental health evidence listed above.

We now turn to Appellant's claims premised on this mental health evidence.

A. Incompetency

[29] Appellant argues that under the Sixth Amendment, counsel had a duty to investigate thoroughly his background and mental health for purposes of developing evidence of incompetency, and, if counsel had done so and requested a pre-trial competency hearing, there is a reasonable probability that the trial court would have found Appellant incompetent to stand trial. The Commonwealth argues that Appellant has failed to provide any evidence to support his claim that he was actually incompetent at the time of trial.

[30] A defendant is presumed to be competent to stand trial. *Commonwealth v. Rainey*, 593 Pa. 67, 928 A.2d 215, 236 (2007); *Commonwealth v. duPont*, 545 Pa. 564, 681 A.2d 1328, 1330-31 (1996). The burden, therefore, is on Appellant to prove, by a preponderance of the evidence, that he was incompetent to stand trial. *Rainey*, 928 A.2d at 236; *Commonwealth v. Brown*, 582 Pa. 461, 872 A.2d 1139, 1156 (2005). *651 To prove that he was incompetent, **900 Appellant must establish that he was either unable to understand the nature of the proceedings against him or to participate in his own defense. 50 P.S. § 7402(a); *Rainey*, 928 A.2d at 236; *Brown*, 872 A.2d at 1139; *Hughes*, 555 A.2d at 1270. To obtain a hearing on this claim, Appellant would have to proffer evidence sufficient to meet this burden.

Appellant proffered to the PCRA court extensive evidence of mental impairments that he asserts demonstrates that he was incompetent to stand trial. Specifically, Appellant presented evidence that he has a lifelong history of significant cognitive dysfunction and major mental illness; suffered from schizophrenia at the time of the offense and trial; suffered childhood trauma; and has a history of drug and alcohol dependence. Appellant also offered an affidavit from Richard G. Dudley, Jr., M.D., a medical doctor and psychiatrist, who reviewed Appellant's records and performed a psychiatric examination of him. Dr. Dudley concluded that based upon Appellant's history,

2016 WL 8761773

Only the Westlaw citation is currently available.
United States District Court,
E.D. Pennsylvania.

James Melvin SMITH, Petitioner,

v.

John E. WETZEL, et al., Respondents.

CIVIL ACTION No. 13-2410

Filed 06/30/2016

Attorneys and Law Firms

Billy H. Nolas, Defender Association of Philadelphia,
Christi A. Charpentier, Kerry Gerace Levy, Federal
Community Defender Office, Philadelphia, PA, for
Petitioner.

Joshua Scott Goldwert, Thomas W. Dolgenos,
Philadelphia District Attorney's Office, Philadelphia, PA,
for Respondents.

REPORT AND RECOMMENDATION

LINDA K. CARACAPPA, UNITED STATES CHIEF
MAGISTRATE JUDGE

*1 Now pending before this court is a petition for Writ of Habeas Corpus (Doc. 5) filed pursuant to 28 U.S.C. § 2254 and a Memorandum of Law in Support of Petition for Writ of Habeas Corpus (Doc. 22), filed by a petitioner currently incarcerated in the State Correctional Institution Graterford in Collegeville, Pennsylvania. For the following reasons, it is recommended the petition for writ of habeas corpus be DENIED.

I. PROCEDURAL HISTORY

On February 6, 1985, following a jury trial in the Court of Common Pleas of Philadelphia County before the Honorable Eugene Galfand, petitioner was convicted of murder in the first degree, criminal conspiracy, and possession of an instrument of crime. The Supreme Court of Pennsylvania summarized the relevant facts as follows:

On the evening of June 22, 1979, [petitioner] and Levi Rucker met at Kimberleigh Green's residence in the

6400 block of North Twenty-first Street to plan the killing of Davis Kelly. Davis Kelly was suspected by these conspirators of having killed Michael Green, Ms. Green's brother, several months earlier. The plan was for Ms. Green to lure the victim from 6410 North Twenty-first Street, where he was visiting his young daughter, on the pretext of purchasing a quart of beer for Ms. Green. (Ms. Green was not of legal age to purchase alcoholic beverages at this time.) The victim would purchase the beer at the Tropical Lounge which was just down the street. When the victim left the lounge, Levi Rucker was to lock the door of the lounge behind him, and [petitioner] was to emerge from an adjacent alley and shoot the victim with his gun.

The plan, and the victim, were successfully executed later that night, shortly before midnight. Ms. Green gave the victim two dollars to purchase the beer. He walked to the nearby Tropical Lounge and purchased a quart of beer. He then left the lounge and walked back toward 6410 North Twenty-first Street where Ms. Green waited outside. As the victim approached Ms. Green, [petitioner] emerged from the adjacent alley and shot the victim from behind. The victim fell to the ground and, as he attempted to get to his feet, [petitioner] came closer to him and, from about three feet away, pumped three more rounds into him. The three conspirators then fled.

Davis Kelly died shortly thereafter as a result of his wounds which severely damaged most of his internal organs. He had been shot four times, one of the bullets exiting his body (the spent bullet was never recovered) and the other three lodging in and recovered from his body. One of the bullets had been severely distorted by an impact with a hard object which, the Commonwealth's firearms expert testified, demonstrated that the bullet had ricocheted, probably off of the sidewalk. The forensic medical evidence corroborated that one of the victim's wounds was caused by a ricochet. The remaining two bullets were identified as .32 caliber ammunition.

Betty Harris was present at her mother's house at 6410 North Twenty-first Street when Kimberleigh Green asked the victim to purchase some beer on the night of the shooting. Betty Harris and two friends were on the porch when he returned, and she witnessed the shooting which took place on the sidewalk in front of the house. Ms. Harris had known [petitioner] from the

in Support of Habeas Pet. at 89-90. Petitioner further states trial counsel did nothing when, at the start of the penalty phase, trial counsel encountered red flags that should have alerted trial counsel to investigate petitioner's competency, such as a 1973 report stating petitioner was committed to Farview State Hospital because of "psychotic decompensation." *Id.* at 93. Had counsel conducted an adequate investigation, petitioner states counsel could have shown that petitioner's mental health problems and cognitive impairments rendered petitioner incompetent to stand trial and could have presented viable guilt phase defenses of insanity and/or diminished capacity. *See id.* at 88. Petitioner states counsel could not have made a reasonable decision not to present an insanity or diminished capacity defense, because counsel failed to conduct a thorough investigation. *See id.* at 107. Petitioner argues he was prejudiced, because the overwhelming evidence about petitioner's severe mental impairments established a reasonable probability that petitioner would have been found incompetent to stand trial or a mental state defense would have been successful if petitioner's background was effectively investigated, developed, and presented. *See id.* at 95. Moreover, petitioner notes the state courts did not hold an evidentiary hearing on the instant claim, and, even if relief is deemed inappropriate on the current record, the court should hold a hearing to allow petitioner to present his evidence. *See id.* at 87, 98. Finally, petitioner states the Pennsylvania Supreme Court did not adjudicate petitioner's claim on the merits, because the Pennsylvania Supreme Court did not address either the performance or prejudice prong of *Strickland*, which is a less demanding standard than the "preponderance standard" the court held petitioner to, and as such, this court's review of petitioner's claim is *de novo*. *See id.* at 101-02.

a. Counsel's Failure to Investigate and Present Evidence of Petitioner's Incompetence

*23 The Pennsylvania Supreme Court reviewed petitioner's claim that trial counsel was ineffective for failing to investigate and present evidence of petitioner's incompetence, and it denied petitioner's claim on the merits, stating, in relevant part:

A defendant is presumed to be competent to stand trial. *Commonwealth v. Rainey*, 593 Pa. 67, 928 A.2d 215, 236 (2007); *Commonwealth v. duPont*, 545 Pa. 564,

681 A.2d 1328, 1330-31 (1996). The burden, therefore, is on [petitioner] to prove, by a preponderance of the evidence, that he was incompetent to stand trial. *Rainey*, 928 A.2d at 236; *Commonwealth v. Brown*, 582 Pa. 461, 872 A.2d 1139, 1156 (2005). To prove that he was incompetent, [petitioner] must establish that he was either unable to understand the nature of the proceedings against him or to participate in his own defense. 50 P.S. § 7402(a); *Rainey*, 928 A.2d at 236; *Brown*, 872 A.2d at 1139; *Hughes*, 555 A.2d at 1270. To obtain a hearing on this claim, [petitioner] would have to proffer evidence sufficient to meet this burden.

[Petitioner] proffered to the PCRA court extensive evidence of mental impairments that he asserts demonstrates that he was incompetent to stand trial. Specifically, [petitioner] presented evidence that he has a lifelong history of significant cognitive dysfunction and major mental illness; suffered from schizophrenia at the time of the offense and trial; suffered childhood trauma; and has a history of drug and alcohol dependence. [Petitioner] also offered an affidavit from Richard G. Dudley, Jr., M.D., a medical doctor and psychiatrist who reviewed [petitioner's] records and performed a psychiatric examination of him. Dr. Dudley concluded that based upon [petitioner's] history, 'there clearly are substantial questions about whether [petitioner] was competent to proceed at the time of his capital trial.' Affidavit of Dr. Dudley, PCRA Exhibit R, at 12.

[Petitioner's] assertions, and the mental health evidence on which they are based, are insufficient to meet the high burden to which he is held to demonstrate that he was prepared to prove that he was actually incompetent to stand trial. In fact, [petitioner] does not assert that he was actually incompetent; mirroring Dr. Dudley's analysis, he states that he 'has raised substantial questions about whether he was incompetent at the time of the original trial court proceedings.' [Petitioner's] Brief at 50. Dr. Dudley's and [petitioner's] assertions that there are substantial questions about [petitioner's] competency, even if believed, do not satisfy [petitioner's] burden to prove that he was incompetent to stand trial. *See Rainey*, 928 A.2d at 236 (doctor's assertion that a competency evaluation would have been appropriate did not satisfy the appellant's burden to prove that he was actually incompetent at the time of trial); *Commonwealth v. Romero*, 595 Pa. 275, 938 A.2d 362, 374-75 (2007) (finding appellant's claim of incompetency meritless where he presented

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Declined to Extend by Com. v. Bracey, Pa., December 29, 2009
596 Pa. 297
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellant

v.

George E. BANKS, Appellee

In re George E. Banks,

Appeal of Mary Yelland, as Next Friend.

Commonwealth of Pennsylvania, Appellant

v.

George E. Banks, Appellee (Two Cases).

Submitted Feb. 13, 2007.

|

Decided Dec. 28, 2007.

Synopsis

Background: After defendant's convictions on 12 counts of first-degree murder and death sentence was affirmed, 513 Pa. 318, 521 A.2d 1, petition for postconviction relief was denied, 540 Pa. 143, 656 A.2d 467, and petition for federal habeas corpus relief was denied, 542 U.S. 406, 124 S.Ct. 2504, 159 L.Ed.2d 494, defendant's mother filed a "next friend" petition on his behalf, seeking a stay of execution and alleging that defendant was incompetent to be executed. The trial court denied the petition for want of jurisdiction. Mother appealed. The Supreme Court assumed plenary jurisdiction and directed trial court to conduct competency hearing. The Court of Common Pleas, Luzerne County, Nos. 1290, 1506, 1507, 1508, 1519A-1519H, 1520, 1524 of 1982, Michael T. Conahan, Senior Judge, found that defendant was incompetent. Commonwealth sought review.

Holdings: The Supreme Court, Nos. 2, 5 EAP 2006, and 461, 505 CAP, held that:

[1] defense counsel did not have the right to be present during Commonwealth's psychiatric expert's examination of defendant;

[2] Commonwealth did not commit a constitutional violation by failing to notify defense counsel before

Commonwealth's psychiatric expert examined defendant; and

[3] trial court's error in precluding Commonwealth's psychiatric expert from testifying at competency hearing warranted a new competency hearing.

So ordered.

Cappy, C.J., dissented and filed opinion in which Baldwin, J., joined.

West Headnotes (3)

[1] Sentencing and Punishment

☞ Mental Illness or Disorder

Defense counsel did not have the right to be present during Commonwealth's psychiatric expert's examination of death row inmate who was allegedly incompetent to be executed; although the parties allegedly understood that any contact with inmate by the Commonwealth would be inence of defense counsel or other representatives of the defense, there was no evidence that trial court ever ordered, either verbally or in writing, that defense counsel be present during examinations of inmate, Supreme Court, the court exercising original jurisdiction, did not impose any such restriction when it ordered trial court to hold competency hearing, and there was no support, in case law or in a statute, for such "right."

3 Cases that cite this headnote

[2] Sentencing and Punishment

☞ Mental Illness or Disorder

Commonwealth did not commit a constitutional violation by failing to notify defense counsel before Commonwealth's psychiatric expert examined death row inmate and interviewed Department of Corrections personnel to determine whether inmate was incompetent to be executed, as defense counsel claimed, where defense counsel was

943 A.2d 230

well aware of exactly who would be examining inmate and questioning the personnel, exactly for what limited purpose, and, with respect to the personnel, exactly which questions would be asked.

1 Cases that cite this headnote

[3] Sentencing and Punishment

⊖ Harmless and Reversible Error

Sentencing and Punishment

⊖ Evidence

Trial court's error in precluding Commonwealth's psychiatric expert from testifying at hearing on death row inmate's competency to be executed due to expert's examination of inmate outside the presence of defense counsel warranted a new competency hearing at which Commonwealth could present opinion testimony from a qualified expert of its choosing.

3 Cases that cite this headnote

Attorneys and Law Firms

**231 Scott Charles Gartley, David W. Lupas, Luzerne County Dist. Attorney's Office, Wilkes-Barre, PA, Jennifer Ann Buck, Amy Zapp, Jonelle Harter Eshbach, Office of Atty. Gen., Harrisburg, PA, for the Com. of PA.

Billy Horatio Nolas, Matthew C. Lawry, Defender Ass'n of Philadelphia, Albert Joseph Flora, Luzerne County Public Defender's Office, Wilkes-Barre, for George E. Banks.

Stuart Brian Lev, Billy Horatio Nolas, Matthew C. Lawry, Maureen Kearney Rowley, Defender Ass'n of Philadelphia, William Ruzzo, Albert Joseph Flora, Jr., Luzerne County Public Defender's Office, Wilkes-Barre, for Mary Yelland.

*299 OPINION

PER CURIAM.

Before us is a challenge by the Commonwealth to the findings and conclusions of law of the Court of Common Pleas *300 of Luzerne County ("trial court"), which this Court, after assuming plenary jurisdiction over this matter, directed to determine whether appellee¹ George E. Banks is competent to be executed. For the reasons that follow, the trial court is directed to conduct a new and expeditious competency hearing at which the Commonwealth can present opinion testimony from a qualified expert of its choosing.

In June 1983, a jury convicted appellee of twelve counts of first-degree murder, one count of third-degree murder, and related offenses in connection with his September 25, 1982 early morning killing spree in and near Wilkes-Barre, Luzerne County.² After rejecting his insanity defense, **232 the jury imposed the death sentence for each of appellee's twelve first-degree murder convictions. This Court affirmed appellee's convictions and sentences on direct appeal, *Commonwealth v. Banks*, 513 Pa. 318, 521 A.2d 1 (1987), and unanimously denied post-conviction relief, *Commonwealth v. Banks*, 540 Pa. 143, 656 A.2d 467 (1995). Appellee's federal *habeas corpus* petition was ultimately denied in the second of two decisions of the U.S. Supreme Court. *Beard v. Banks*, 542 U.S. 406, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004). On October 5, 2004, Governor Edward G. Rendell signed a warrant for appellee's execution, scheduling it for December 2, 2004.

On November 19, 2004, appellee's mother, Mary Yelland, filed a "next friend" petition on his behalf, seeking a stay of execution and alleging, *inter alia*, that appellee was incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) (holding that Eighth Amendment prohibits States from executing defendants determined to be insane). The trial court denied the petition for want of jurisdiction, finding that it was time-barred under the PCRA. Yelland appealed to this Court. In an order issued *301 on December 1, 2004, we assumed plenary jurisdiction under 42 Pa.C.S. § 726,³ stayed the warrant of execution, and directed the trial court to "hold a competency hearing expeditiously in accordance with *Ford v. Wainwright*." Reproduced Record ("R.R.") at 20a. Because competency can be contested factually, and because there could be questions of credibility, this Court, while retaining jurisdiction, essentially drafted the trial judge to act as a master. On December 3, 2004, we further directed the trial court to



Sam Kooiker
Mayor: Rapid City, South Dakota
300 6th Street
Rapid City, South Dakota
57701

Charles R. Rhines
SDDOC #15036
P.O. Box 5911
Sioux Falls, SD
57117-5911

May 22, 2015
RECEIVED

Re: Steve Allender

JUN 1 2015

Dear Sir:

MAYOR'S OFFICE

There is an old adage that says "politics makes strange bed-fellows." Well, it doesn't always have to but the possibility exists that it has the potential to do so, depending upon what one's goals may be.

I am an inmate in the South Dakota State Penitentiary under sentence of death for the murder of Donnivan Schaeffer in March 1992 in Rapid City. The lead investigator on the case was Steve Allender. I assume he made a lot of headway by "breaking" that case and so I have a vested interest in writing this letter, as you will come to understand after reading this letter and reviewing the enclosed documents.

I was watching the local news a few days ago and saw that Steve Allender had decided to run for Mayor of Rapid City and that you are strongly opposed to his doing so on the basis that he is a racist, mainly against Native Americans, and that you have some evidence of that.

I have some information which may be helpful to you in that vein but I do not know if it still exists as Allender was Chief of Police for a few years and would have had access to the evidence rooms of the Police Department.

On April 4, 1992 then Sargeant Steve Allender of the RCPD and Sargeant Donald Bahr of the Pennington County Sheriff's Office were interviewing me in connection with the Donnivan Schaeffer murder investigation. We were sitting in a Seattle, Washington Holiday Inn Hotel room and they were intimating that the murder of Donnivan Schaeffer had been something way out of the ordinary in Rapid City, you know, that killings just don't occur in Rapid City.

I replied that there had been nearly a dozen murders committed in Rapid City in the previous 12 months. They were both dumbfounded and shocked and denied any such thing had occurred, to which I replied that they were all Native Americans and had had Native perpetrators.

Allender said "That's just scumbag killing scumbag." As though Native American deaths don't count.

You can imagine my consternation a few years later when I read in the Argus Leader that Steve Allender had been promoted to Lieutenant and had been appointed Native American liason with the police department!

That comment may still exist as it was recorded on a micro-cassette recorder Allender had running in contravention of Washing-



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ton State wiretapping statutes. Washington is a 2-party consent state and Allender had not obtained my consent to record the interview. I discovered he was recording when I caught him changing tapes during a bathroom break. I made him stop recording but I believe the "scumbag" comment made it onto the first tape before that point and, since it should have become part of the investigative file, perhaps it still exists.

It's the old O.J. Simpson MARK FURHMAN "I NEVER USED THE N WORD" gotcha moment. Furhman had forgotten the interview where he'd used the "N" word over and over and over. Perhaps Allender has forgotten about that tape. Is it possible for you to have someone look for it? It'd be a great little "gotch" moment. "Have you ever referred to Native Americans as "scumbags?"

However this letter is not about a tenuous possibility of discrediting Steve Allender but a real one, one that can be proven on the record. I have documentary evidence that Steve Allender lied under oath about materials facts of a case while he was Chief of Police and has committed perjury in a capital case. Mine.

I have included in this manilla envelope several documents:

- 1) A rejection letter from Judge Davis informing me that I could not use the criminal statutes to sue the then Chief of Police Steve Allender. He did not elaborate that I must use the civil statutes and sue him for libel and slander. My documents were returned to me and, I have little doubt, Judge Davis gave ol' Stevie a "heads up" that informatin existed that he had committed perjury in an affidavit he had signed on July 11, 2012. And there was proof that it was indeed perjury.
- 2) Another rejection letter but this one from Judge Larry Long refusing my application for In Forma Pauperis status so that I could file the libel and slander suit against then private citizen Steve Allender.
- 3) the Affidavit of Steve Allender against myself showing on paragraph 8 where he has made up quite a fanciful story about how he was a hero while arresting me.
- 4) Copies of the cover page and pages 6 - 36 of a legal document entitled SUPPRESSION HEARING, civ 93-81 wherein the true details of my arrest are attested to by the ACTUAL arresting officer.
- 5) The Complaint For Libel and Slander which did not get subsequently filed due to lack of funds to pay the filing fee. It's why I had requested IFP status.

This last details all the places where Steve Allender lied under oath in the Affidavit.

You will probably read the entire affidavit and have an opinion about that. You have to take a lot of what Allender says with a large dose of salt. He did, after all, completely fabricate paragraph 8...I'm no angel, that I freely admit but Allender has no business lying about anything while under oath, especially as Rapid City's Chief of Police. Isn't he supposed to be setting the standards for the rest of the Policeforce? What kind of standards was he setting?

Page 3

I wish I had known of your disapproval of Steve Allender a year or so ago. I would simply have made copies of all this and mailed them to you and the city council. I imagine that would have been the end of ol Steve and his racist, lying ways.

Water under the bridge..

I personally wanted to sue Allender to discredit him legally so that when my federal habeas corpus petition is heard I will be able to impeach his testimony. And, perhaps I could go back to the rest of his testimony in that document entitled SUPPRESSION HEARING where he told a lot of other lies which went against me in court.

I note in the Complaint that I assume Allender used that paragraph, or some form of it, in his promotion boards, showing what a hero he was during a felony arrest in a murder case.. It's just a load self-aggrandizing BS. I imagine Allender was pretty good at that hiswhole career.

Didn't anyone wonder why after apparently chasing the Chief's position his whole career and attaining it he suddenly decided to retire after holding that position for only a few years? He was what, 53 years old? Pretty young to be retiring, don't you think?

I think it was a case of retire quick before Rhines sues you and you get fired for cause.

I think Steve should have remained retired lest he open a can of worms he will wish he had not opened. The statute of limitations for libel and slander may have expired but I don't think there is a statute of limitations on perjury, especially in Capital cases.

I hope this 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 some \$\$\$ courtesy of their deceased son...or the insurance company for the business where he was slain. It's complicated.

The information here could be highly problematic to use but a skillfull politician or his election staff should be able to come up with a way to use this...to "leak" it to the media without your direct involvement or having any aspersions cast upon you for using it.

Do the people of Rapid City really want a perjurer for a mayor? No matter what his "good intentions" may have been, it's still wrong to bear false witness against anyone.

Sincerely,

Charles R. Rhines

